

ELEVENTH CIRCUIT TRANSCRIPT ORDER FORM
Provide all required information and check the appropriate box(es)

PART I. Transcript Information

Within 14 days of the filing of the notice of appeal, the appellant must complete Part I and file this form with the District Court Clerk and the Court of Appeals Clerk for all cases. 11th Cir. R. 10-1.

Case Information:

Short Case Style: Securities and Exchange Commission vs Complete Business Solutions Group, Inc. et. al.

District Court No.: 9:20-cv-81205-RAR Date Notice of Appeal Filed: November 09, 2022

Court of Appeals No. (if available): 22-13811

Transcript Order Information:

No hearing No transcript is required for appeal purposes All necessary transcript(s) already on file

I am ordering a transcript of the following proceedings:

_____ HEARING DATE(S) / JUDGE/MAGISTRATE / COURT REPORTER NAME(S)

Pre-Trial Proceedings _____

Trial _____

Sentence _____

Plea _____

Other September 14, 2022, April 21, 2022, Aug 15, 2022 Judge Rudolfo A. Ruiz Ilona Lupowitz

Criminal Appeals:

In a criminal appeal, if the appellant pleaded guilty and intends to raise an issue regarding the guilty plea, the record must include a transcript of the guilty plea colloquy, and if the appellant intends to raise an issue regarding the sentence, the record must include a transcript of the sentencing hearing. ***If such transcripts are not ordered or are not already on file, you must check the appropriate box(es) below:***

A transcript of a guilty plea colloquy is not being ordered and is not already on file, and I certify that no issue regarding a guilty plea will be raised in a merits brief in this appeal.

A transcript of the sentencing hearing is not being ordered and is not already on file, and I certify that no issue regarding sentencing will be raised in a merits brief in this appeal.

Note: Counsel who seek leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), must ensure the record contains transcripts of all relevant proceedings. See 11th Cir. R. 27-1(a)(8).

Financial Arrangements:

I certify that I have made satisfactory arrangements with the Court Reporter(s) for paying the cost of the transcript(s).

Criminal Justice Act: My completed AUTH-24 for government payment of transcripts has been uploaded in eVoucher and is ready for submission to the magistrate judge or district judge [if appointed by the district court] or to the circuit judge [if ordered by or appointed by the circuit court]. [A transcript of the following proceedings will be provided *only if specifically authorized* in Item 13 on the AUTH-24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions.]

Ordering Counsel/Party: Andre G. Raikhelson, Esq., representing Joseph Cole Barleta

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I certify that I have completed and filed Part I with the District Court Clerk and the Court of Appeals Clerk, served all parties, AND sent a copy to the appropriate Court Reporter(s) if ordering a transcript. 11th Cir. R. 10-1.

Date: Dec. 19, 2022 Signature: /s/ Andre G. Raikhelson, Esq. Attorney for: Joseph Cole Barleta

PART II. Court Reporter Acknowledgment

Within 14 days of receipt, the Court Reporter must complete this section, file this form with the District Court Clerk, and send a copy to the Court of Appeals Clerk and all parties. The transcript must be filed within 30 days of the date satisfactory arrangements for paying the cost of the transcript were made unless the Court Reporter obtains an extension of time to file the transcript.

Date Transcript Order received: _____

Satisfactory arrangements for paying the cost of the transcript were made on: _____

Satisfactory arrangements for paying the cost of the transcript have not been made.

No. of hearing days: _____

Estimated no. of transcript pages: _____

Estimated filing date: _____

Date: _____ Signature: _____ Phone No.: _____

PART III. Notification That Transcript Has Been Filed In District Court

On the date the transcript is filed in the district court, the Court Reporter must complete this section, file this form with the District Court Clerk, and send a copy to the Court of Appeals Clerk.

I certify that the transcript has been completed and filed with the district court on (date): December 19, 2022

Date: Dec. 19, 2022 Signature: /s/ Andre G. Raikhelson, Esq

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION
4 CASE NO. 20-CV-81205-RAR

5 SECURITIES & EXCHANGE COMMISSION, Fort Lauderdale, Florida

6 Plaintiff, May 19, 2022

7 vs. 3:00 p.m. - 5:10 p.m.

8 COMPLETE BUSINESS SOLUTIONS GROUP,
9 INC., d/b/a PAR FUNDING, et al.,

10 Defendants. Pages 1 to 100

11 MOTION HEARING - VIA VIDEOCONFERENCE
12 BEFORE THE HONORABLE RODOLFO A. RUIZ, II
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES VIA VIDEOCONFERENCE:

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1 (Appearances continued.)

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1 (Call to the Order of the Court.)

2 THE COURT: We're going to go ahead and get started.
3 We're here this afternoon in the case of 20-81205, the matter
4 of Securities Exchange Commission v. Complete Business
5 Solutions Group, doing business as Par Funding, et al.

6 Let's get some appearances. For purposes of arguing
7 the motion and hearing a little bit of argument, there's some
8 folks that I expect will be taking the lead today.

9 So starting with the SEC, who do I have handling
10 argument on behalf of the SEC?

11 MS. BERLIN: Good afternoon, Your Honor. This is Amy
12 Riggle Berlin on behalf of the SEC.

13 THE COURT: Okay. And on behalf -- I have my names
14 here, but I think on behalf of the defendants, we're going to
15 be hearing arguments certainly from Mr. Futerfas, I believe.

16 Is he here today?

17 MR. FUTERFAS: Yes, I am, Your Honor. I think
18 Mr. Ferguson is going to take the lead, but I'll probably have
19 a few words to say as well. Thank you.

20 THE COURT: Thank you. And I know Ms. Schein, I saw
21 her as well. There she is. I know that she's on there as
22 well.

23 MS. SCHEIN: Yes. Good afternoon, Your Honor. Bettina
24 Schein for Joseph Cole Barleta. Thank you.

25 THE COURT: You're welcome. And I do know that James

1 Kaplan also was on the motion [audio distortion]. I'm looking
2 for him as well, to see if he's with us.

3 MR. FERGUSON: Your Honor, Mr. Kaplan has had -- hello.
4 David Ferguson. Good to see you. Mr. Kaplan, unfortunately,
5 has had a family emergency --

6 THE COURT: I do see Mr. Snyder. Mr. Snyder's on as
7 well, right?

8 MR. SNYDER: Yes, Your Honor. I am.

9 THE COURT: And thank you, Mr. Ferguson. I know you're
10 going to take the lead on the defense side here.

11 So that covers, pretty much, the main folks. I know
12 that Mr. Soto, who was originally on the motion, has since
13 withdrawn, so I don't believe he's going to be participating
14 any longer. But I have kind of the team, if you will, on the
15 defense end here with us.

16 I know also I have counsel -- Mr. Hyman, you're also
17 appearing. I know you're technically not a signatory on the
18 motion, but obviously it impacts your client as well, on behalf
19 of Mr. Furman. And if you have anything you want to add, we'll
20 turn to you as well. Okay?

21 MR. HYMAN: Thank you, Your Honor. [Audio distortion].

22 THE COURT: Okay. And do I have anybody else really
23 that's -- I don't think chiming in on the motion. I know we
24 have a lot of other folks that are probably watching along,
25 probably some investors and whatnot, but let's see if we can

1 jump right into it.

2 I do know -- Mr. Alfano, thank you for joining us. I
3 don't know how many folks on the receiver's team are here, but
4 if I need to hear from you all today, I'll certainly turn to
5 you as well.

6 MR. ALFANO: Thank you, Your Honor. And it's just me
7 this afternoon.

8 THE COURT: Okay, great.

9 So to maybe make it easier for the Court, if I have
10 investors who are watching, you can turn off your cameras for
11 me. I need to just have counsel on the Zoom. It's hard
12 because I have many windows, and I'd like to make sure that I
13 am directing my comments to lawyers who are arguing. So I've
14 identified, I think, everybody that is going to be presenting
15 any sort of argument or was a signatory to the motion.

16 So we can go ahead and turn off cameras for those who
17 are either watching along or simply listening in. That would
18 be fine. And I will kind of jump in if we could here.

19 So we're really here on the motion to strike. And the
20 reason why the Court went ahead and set it as expeditiously as
21 possible was in large part due to the request for an expedited
22 ruling that was Docket Entry 1226. The subject motion is
23 Docket Entry 1224.

24 I'm sorry. If you could mute -- whoever else is on,
25 make sure you keep your audio on mute. Thank you.

1 So as I was saying, the motion is the motion to strike.
2 To boil it down, essentially, it is a request by the defense
3 team that the Court either, A, exclude or strike any mention of
4 Par Funding being a Ponzi scheme from their motion, from the
5 SEC's motion, for disgorgement and remedies, or alternatively
6 that the Court entertain reopening consent judgements under
7 Rule 60.

8 I will tell you, you guys have all briefed this pretty
9 thoroughly, and I think I can cut to the chase here to give you
10 kind of my sense of where this is going to go. Perhaps I'll
11 start in reverse.

12 The Court is in no way, shape, or form, persuaded that
13 any of the parameters of Rule 60 are remotely satisfied, and
14 I'm not intending to let anyone out of any consent judgment
15 today. So I can tell you, that certainly is not going to
16 happen. I understand that it's alternative relief you're
17 asking for and that you believe that under the several sub
18 provisions under Rule 60, you may trigger what's necessary for
19 such relief. I respectfully disagree that this is in the realm
20 of Rule 60 and hits the extraordinary and compelling
21 requirements we need for relief from judgements, let alone
22 consent judgements. Okay? So let's talk really more about the
23 thrust of it, which is the Ponzi scheme.

24 You know, I think that my goal here today is to perhaps
25 give the defense team some peace of mind because I think this

1 whole motion has really been generated by concern that the
2 Court is being either misled, or the Court is going to be
3 unduly influenced by what I at least envision to be argument.
4 Not evidence, argument, argument in a motion that has been made
5 by the SEC in characterization, argument that needs to be
6 supported by evidence.

7 And so now that the SEC decided to use the words,
8 "Ponzi scheme" -- and I will just make sure -- everyone I think
9 knows, the Court was probably the first one to use the words
10 "Ponzi scheme" a year ago. I believe at that time everyone
11 told me, you know, that was premature, and I held off on that
12 and going beyond that until we started getting more of an
13 evidentiary analysis probably first from the receiver, then the
14 counterpoint from the expert that defense and their research
15 had done on how the merchant cash advance business operated.

16 So we had this Ponzi scheme allegation lurking in the
17 ether since the case began. I don't doubt the defense team is
18 right. It's certainly not part of your consent judgment. You
19 certainly have not admitted to it. But I think we're losing
20 sight of what we're litigating now. Now we are in a different
21 phase. We are in a phase of remedies, and we are in a phase of
22 disgorgement. And these are positions the SEC has taken in
23 characterizing the nature of the business in an effort to
24 justify, I think is -- the way I think the defense has pointed
25 out correctly -- certain level of penalties that they're asking

1 me to engage in, and analyze, and take a look at to see if
2 they're warranted.

3 Now, simply because it makes its way into the pleadings
4 now, in this secondary phase of the case, in the motion, does
5 in no way mean that the Court is finding that you all on the
6 defense team, in your consent, stipulated to or agreed to this
7 characterization. It's not in the judgement. No one is being
8 -- at the liability phase, being forced to acknowledge or in
9 any way, shape or form concede that this is a Ponzi scheme. I
10 certainly don't hold you guys to that. And to me, I just look
11 at this as the SEC's posture and argument that they believe the
12 evidence can support.

13 And by the same token, like we did before trial, if you
14 all recall, when we did the motions in limine, we talked about
15 this back then, and we had a lot of discussion about are we
16 going to be allowed to use this word or not; can we describe
17 the business this way. And in my view, I had really left that
18 up to my jurors, feeling that the evidence had to support
19 certain characterizations, but certainly not isolating or
20 shutting down a line of argument that this model was taking
21 from the new investor to pay the old. I mean, that has been
22 discussed by different folks in different pleadings, and
23 investigated and developed in discovery, pretrial, in different
24 ways.

25 And so I don't want anybody on the defense team to

1 think that they've been locked into this Ponzi scheme
2 allegation by way of their consent, certainly not to the level
3 of needing to reopen a consent. I don't know why we would not
4 allow the defense to simply go forward and present their
5 argument, as they would have done had we gone to trial and this
6 had somehow come up, to point out that this does not warrant
7 the description of a Ponzi scheme, that this is a misstatement
8 of the factoring business and the model, that we have record
9 evidence that shows this penalty is not justified based on the
10 way in which the books looked, and have looked, and your
11 analysis from your experts. Seems to me that all that is still
12 fair game and very well-developed in discovery up through
13 today.

14 To go now and strike -- and that's without even into
15 the proprietary of the procedural ability to do this. Because
16 I will confess, this is -- under 12(f), which is my
17 understanding of how this proceeded, this isn't exactly -- this
18 is not a striking of pleadings; it's a motion. So arguably,
19 you could just deny this as an improper use of judicial
20 discretion to strike a portion of the motion.

21 But let's put that away for a second. I saw the case
22 cited. And you may argue that there's some inherent authority
23 of the Court to eliminate scandalous matter from pleadings and
24 motions alike. So I'm not going to get too caught up in that.
25 But I guess what I want the defense team to understand is I

1 don't see you guys sandbagged in the way that you're being
2 boxed into your consent judgment reflecting that you've
3 acknowledged this. And I don't think we need to elevate the
4 disgorgement penalty phase to the level of almost an implied
5 acceptance of liability for operating a Ponzi scheme. I don't
6 see that in the way this has been framed. And I don't think
7 anybody here on the defense side should be, I guess, shocked
8 that it emerged in the pleading. I certainly would be
9 concerned if you guys had not been aware that this has been out
10 there so that you never conducted discovery. And truthfully,
11 we allowed for discovery in the disgorgement phase too. So if
12 you needed it, you had the time for it. I think I granted an
13 extension for it.

14 But I think this whole motion, truthfully, is motivated
15 by the defense team's concern that now that they put "Ponzi" in
16 their pleadings, that I'm going to launch your guy with
17 sanctions through the roof, and I'm going to hit them with
18 everything and not write off any losses, and give you guys the
19 biggest penalties. I mean, have a little faith that the Court
20 is not going to sit here and say "Ponzi scheme" and ignore the
21 evidence. They have to show me in the pleadings why
22 disgorgement is relevant to the level that they're advocating
23 for, and you guys are going to give me enough to show me why I
24 should not be persuaded in any way, shape or form that this
25 rises to the extreme level of penalties that they're advocating

1 for.

2 And so that's just my opening feeling on this. And I
3 know the defense wants to carve it out, but I -- you guys gotta
4 remember, the only person here you have to persuade -- I know
5 that Mr. Futerfas pointed this out, the court of public
6 opinion. I get that. I understand that. The only guy you
7 have to worry about here is me at this stage of the game.
8 There's no jury left. This is down to Ruiz and what he sees as
9 appropriate for disgorgement. If I'm telling you that I'm
10 going to read this like any other allegation, and I'm going to
11 let you guys battle it, and I'm going to see if there's
12 anything remotely justifying these penalties, and giving you
13 guys the peace of mind, I guess, that I'm not going to sit here
14 and say, oh, my gosh, Ms. Berlin finally called it a Ponzi
15 scheme and is now injecting, at the eleventh hour, a way to
16 taint the Court's view of the business. I mean, that would be
17 a misstatement of the procedural history because this Ponzi
18 scheme thing has been floating for, at least for a year, and at
19 no point in time, in my view -- at least I have seen from the
20 financials what I thought were concerns about the economic
21 model, and I never at any point had felt like you guys would
22 walk into a consent judgment with something you didn't know
23 about. And certainly you wouldn't have adopted any of the
24 language in there if you thought they were making you guys
25 admit to a Ponzi scheme.

1 So I guess, Mr. Ferguson, I'll turn to you. Again, I'm
2 inclined to simply deny this motion because I don't see any
3 basis, legally or factually, to start striking out what I think
4 is really argument. It is argument of counsel in a motion.
5 It's not evidence to term it something unless evidence supports
6 otherwise.

7 What would you say --

8 MR. FERGUSON: May I -- okay. You're right about our
9 concern. And I hear you, that -- and I don't doubt that you
10 mean what you say. But the position we've been put in is not
11 proper.

12 First off, you know, Your Honor, you say that this
13 Ponzi's been out there in different pleadings. It hasn't been
14 out there in any pleadings.

15 THE COURT: Maybe not in the pleadings. Maybe not in
16 the pleadings. I would agree -- it's come up in status
17 conferences in questions with the receiver. I'll give you
18 that. Okay.

19 MR. FERGUSON: Yeah. And when it has come up, the SEC
20 says we haven't alleged a Ponzi.

21 The issue here is, I'm telling you, as an officer of
22 the court, that if the amended complaint alleged a Ponzi, you
23 know, you were the one sort of pointing at the door saying we
24 could go this way, read the room, and bifurcate, and we'll get
25 there, and you'll have a fair shot at -- and maybe things will

1 go your way. But in doing so, it has the complaint -- the
2 admitted complaint that this was a Ponzi.

3 I can tell you right now, it wasn't bifurcated. We
4 would have gone to the jury. I believe I could show the jury
5 -- and this came up in Furman's case. The only evidence -- and
6 Furman went to trial, and then they're dropping this on him.
7 They never uttered the word "Ponzi." You know I watched that
8 -- seven days, the entire trial. They never uttered the word
9 "Ponzi." The only evidence that came in was \$500 million in
10 investor money and 1.5 billion in revenues. And I would have
11 wanted to prove that to the jury. And I think I can absolutely
12 have done that, with my colleague, and we might have even won
13 the registration and disclosures case, which is really what
14 this is all about.

15 But we decided, a tactical decision, that we would go
16 forward and get here to disgorgement, and now -- and we put
17 this in our original motion. It's like, you know, they pled
18 guilty to one crime, and they're dropping a murder charge on
19 us. Ponzi means something. And my client and the other
20 defendants have the right, when the dust settles, to make a
21 decision of what they're going to bifurcate -- if they're going
22 to bifurcate, what they're going to bifurcate to. Because now
23 we're put in a position -- you're saying what you are allowed
24 to do -- you're allowed to do discovery. You can counter this
25 with evidence.

1 So I guess what I'm hearing is, we're going to have a
2 bench trial on this. We didn't want a bench trial. If that's
3 what we're stuck with, I have to be careful because I don't
4 want to upset you. But we didn't want a bench trial on this.
5 We never knew we were going to have a trial on this. And we
6 wouldn't have bifurcated. We would have gone to the jury.

7 And one thing -- I just want to let you know -- and I
8 wish I didn't have to spend a minute doing this. An hour or so
9 before this hearing I get an email from the counsel from the
10 SEC saying I made a misrepresentation to the Court when we said
11 that the SEC intentionally waived and decided not to bring a
12 Ponzi allegation, and the point being because the commission
13 never -- the five commissioners never voted on this.

14 And I want to be clear. We're not suggesting that the
15 commissioners did anything. I don't know what the commissioner
16 did in or about this case. And when our papers say that the
17 SEC waived this Ponzi scheme theory of liability, I'm talking
18 about, so we're clear, Your Honor, through -- by and through
19 counsel, by and through trial counsel.

20 And what happens here is, we had the SEC say this isn't
21 -- we haven't alleged it's a Ponzi. Then the receiver, through
22 Sharp, who is not an expert, said it's a Ponzi. We pushed
23 back, and the receiver equivocates and says, well, Sharp's not
24 an expert. We'll just talk about what it looks like right now.

25 We get our expert report out, and we -- and he analyzed

1 4 million plus transactions involving over 16,000 merchants.
2 And, yeah, we can't prove that it's not a Ponzi, but we
3 shouldn't have to do that at a bench trial, at this phase, when
4 it wasn't part of the complaint.

5 And understand, after the receiver, through Sharp,
6 started talking about this -- it's, again, not a pleading. At
7 one point, trial counsel for the SEC said -- communicated an
8 intent by the SEC to amend to allege a Ponzi, which, if you
9 stop right there, amend to allege, in a second amended
10 complaint, a Ponzi scheme. So that's a concession that's not
11 in the complaint -- first amended complaint because it's not.
12 It's a concession that they would need to do so and were
13 considering doing so.

14 And my colleague, Mr. Futerfas, sent a long
15 well-thought-out letter to counsel for the SEC and explained,
16 you need to wait. Don't get ahead of your -- wait for this.
17 What for what's going to come out. Wait for Glick's report.
18 We're going to show you it's not a Ponzi scheme because it's
19 not a Ponzi scheme. And after that, the SEC never amended to
20 assert a Ponzi scheme.

21 Again, we're not saying that the commissioners met and
22 said, no, we're not doing it. Counsel knew this needed to be
23 done, if that's the road they wanted to go down, read the
24 letter from Futerfas, didn't do it. And we're saying that
25 that's a waiver. And I don't lightly say that we would want to

1 be released from the consent.

2 But I understand you've gone through a lot here to get
3 this case postured, to stay on the track you want, to end by
4 the end of summer, but I don't want -- I don't want to have to
5 brief Ponzi and put in evidence that it's not a Ponzi when it's
6 not a part of the second amended complaint that we consented
7 to. And quite frankly, Your Honor, we shouldn't have to. And
8 if we have to, we should have a jury hear that because that was
9 my client's right. It's not me talking. It's not David
10 Ferguson, the lawyer.

11 And no disrespect to you, the Court. These are real
12 individuals, who have a real due-process right, and if they're
13 going to be accused of a Ponzi, they needed to be directly
14 accused, not in the ether, not maybe, not we don't understand
15 or we don't have all the financials. It should have been in
16 the amended complaint, or a subsequent amended complaint, and
17 we never would have signed those consents. We never, ever
18 would have done it, and we would have had a trial, for better
19 or worse.

20 And now, here we are. We're going to basically -- what
21 I'm hearing is we're going to have a bench trial in front of
22 you where I and my colleagues get to try to convince you it's
23 not a Ponzi, and if we're successful, then the analysis that
24 the SEC put in the omnibus motion that we'd get hit with, tier
25 three, we don't get hit with one dime of expenditure. We

1 basically get a -- we get a judgment as if they were sued for
2 being a Ponzi when they never were. And that's the problem.

3 And the simple -- Your Honor, you do have inherent
4 authority. This isn't a rule under anything but your inherent
5 authority. That's what we've invoked. And you could very
6 easily resolve this by striking the references to Ponzi or
7 letting them file an amended paper quickly that says it doesn't
8 rely on something that they've never sued us for. And that's
9 the way this should go forward.

10 We did read the room. We took you up at your
11 suggestion. We did the right thing to have a disgorgement
12 hearing, and now the wrong thing is being done. I'm
13 disappointed that we had to right it.

14 I understand you're thinking, well, you guys are
15 concerned, but you don't really need to be. But we really do
16 have to be because you and a bench trial is not the same as a
17 jury, and that's something Mr. LaForte has a right to.

18 And you hear -- what's the SEC say? They say in their
19 papers, oh -- and they had some discovery. They can put in
20 some discovery. But they shouldn't be allowed to put in any
21 evidence, but they can put in some evidence. And they
22 shouldn't even be allowed to have a hearing on it. They should
23 be stuck with what they put in the filings.

24 Your Honor, this is back, like, with the Rule 41 we got
25 in front of you. I think you heard very troubling,

1 questionable things about how this case got started in our
2 representations to the Court. And, frankly, Your Honor, you
3 said, well, I don't think I've enough evidence, you know, an
4 email saying I'm going to burn these people with lies and hit
5 them with sanctions. You can take it to the jury; maybe the
6 jury would like to hear this.

7 But, frankly, at that moment I'm thinking, well, the
8 SEC is now saying this is just a registration and disclosure
9 case. So that stuff, the lies they told that caused us to
10 bring the first Rule 41 motion, was never going to make it to
11 the jury.

12 And I understand you weren't impressed that it was time
13 to stop what they'd done to start this, and get the
14 receivership that never should have been, unfortunately. But
15 here we are again. They're basically -- they're jumping out
16 with allegations they didn't make. They're saying, let the
17 defendants brief it. Don't let them put in any evidence. Let
18 them put in evidence, but don't let them have any argument.
19 They don't get their day in trial. Don't let them -- don't let
20 them off of their -- out of their consent. Oh, and don't even
21 consider the declarations that they filed to support are the
22 motion to strike because they took the Fifth.

23 So I guess it's okay with the SEC if my client and the
24 other defendants took the Fifth to sign a consent, but then
25 can't tell you, hey, as far as a collateral issue, if I'd have

1 known I was consenting to go to a Ponzi scheme bench trial, I
2 wouldn't have done it. [Audio distortion]. They don't waive
3 the Fifth Amendment. And I hate to see argument in this. I
4 hate to be in this position. But they are entitled to a jury
5 trial on this Ponzi allegation, not a bench trial. And I would
6 rather be dedicating my time right now and leading up to this
7 motion, the preparation for this, to the disgorgement looking
8 at *Liu*, looking at what expenses should be deducted, and making
9 the presentation to you that this is what the disgorgement
10 should be. If they're going to -- if there's going to be
11 disgorgement, if there are going to be penalties, it should be
12 no more than this. That's what I should be focused on. Now I
13 have to spend the rest of my time getting ready to defend a
14 Ponzi scheme case, in a bench trial, which should never be, and
15 it should be in front of a jury. And that's a problem. And it
16 could be fixed with a wave of your pen striking those
17 allegations as we've requested. And it would be of no
18 prejudice to the SEC, and it would be the right thing to do,
19 Your Honor.

20 THE COURT: You would agree with me, Mr. Ferguson, that
21 from the beginning I think we had seen -- maybe my recollection
22 on every pleading is not crystal clear.

23 But let's take away the words, "Ponzi scheme." My
24 recollection, at least, and the evidence, especially some of it
25 pretrial, some of the expert reports, am I correct that there

1 at least has been a discussion? When the economics of this
2 business has been analyzed, a position I believe was raised,
3 whether through receiver or SEC, that it did not appear that
4 investors could be paid out through factoring it through their
5 investments and through the notes without the influx of new
6 capital from new investors. Not the words, "Ponzi scheme."
7 But am I mistaken that it is not something that has come up in
8 -- not only in filings, but has been discussed about whether
9 this truly could be a standalone model that was economically
10 viable versus it kind of lived and died off new investment?
11 But not -- like I said, not making that, kind of, next step of
12 calling it a Ponzi scheme. But is it not true that that has
13 been discussed and debated, really, for a while now in the
14 case?

15 MR. FERGUSON: Your Honor, absolutely it came -- it
16 originally started -- first of all, at the preliminary
17 injunction hearing you said over and over, I don't want to hear
18 about Ponzi. Ponzi has nothing to do with scienter of the
19 violations alleged in the complaint. You were very clear. We
20 cited some of that in a motion, and you basically shut down --
21 this isn't about Ponzi, it's about registration and disclosure.
22 And then the receiver -- and, you know, I've had my differences
23 with the receiver and what the receiver's done. I won't go
24 back through it again. But the receiver is the one who came
25 out with -- the receiver, who's not even a party, an officer of

1 the court, came out with the Ponzi smear, and did so through
2 Sharp, who's not an expert. And the SEC has never put it in a
3 pleading. The SEC -- you asked at one status conference about
4 that. SEC said that, well, SEC never alleged it was a Ponzi.
5 And candidly, said the SEC, through counsel, the SEC never
6 listed it wasn't a Ponzi. But the fact that it was out there
7 doesn't mean, at this critical phase, after bifurcating and
8 consenting to get to the finish line, we should have to face
9 such a terrible allegation. It would be the same as what if
10 they said, well, oh, yeah, they stole the money.

11 Remember in the complaint, the motion where they said
12 they stole all the money from the account? They put that in
13 there and wanted to get disgorgement and sanctions because they
14 stole the money out of the bank account. That's not true.
15 They should be confined to the four corners of the amended
16 complaint and the theories that were put forth in there. And
17 it was out there in the wind. People would say it. There was
18 some concern. Yes, it was out there but it was not in the
19 amended complaint. We never would have consented or
20 stipulated.

21 And, yeah, we have -- we can prove -- I'm sorry. We've
22 got good support. We can prove that it's not a Ponzi, but we
23 should be allowed to do that to a jury. We're not supposed to
24 be -- we're not supposed to be now at an evidentiary hearing on
25 liability, and that's what this is. That's exactly what --

1 THE COURT: But that's the problem. I think that what
2 unfortunately is happening here is the defense camp believes we
3 are litigating securities violations and that we are dealing
4 still with sections or rules of securities laws were violated
5 when indeed the liability phase of the case is over.

6 So I understand that hearing this is a back-door
7 method, in the view of the defense, to label, or, in your view,
8 mislabel the business in an effort to seek higher-tiered
9 penalties. That's really the only issue here. And we know
10 that, per your consent -- because the one thing I want to
11 clarify: I'm not having a bench trial, so I don't know where
12 that came from. I'm not doing any bench trials. Heck, I don't
13 even know if I'm going to have oral argument because I'm not
14 required to. I am allowed, pursuant to the consent that you
15 all have signed -- with the advice of some of the best counsel
16 in town you all agreed that I can rule on the motions and the
17 papers and the evidentiary submissions that have already been
18 turned in.

19 So as far as I'm concerned, the next phase is, once
20 this becomes ripe in July, I'm going to sit down, I'm going to
21 pour through every piece of paper that has been filed in
22 support of the penalties and in opposition to the penalties.
23 If I am stuck or I need oral argument, I will certainly set it.
24 But I don't see a universe where I am now going to conduct a
25 full-blown evidentiary bench trial. There has been discovery

1 permitted, as foreseen by the parties, toward the disgorgement
2 phase, and that is part of what I'm going to review. But I'm
3 certainly not in a position, as a trier of fact in an
4 evidentiary hearing, to have a mini trial over a Ponzi scheme.

5 The way I see this, I don't know -- perhaps I'm
6 oversimplifying it, but I see this as argument that the SEC's
7 attempting to advance to characterize what they believe the
8 evidence shows. And I am able to now look at competing
9 evidence that you guys have already been developing for quite
10 some time in support of the idea that this cannot be
11 characterized as a Ponzi scheme, and that the labeling is wrong
12 by the SEC, and that it doesn't justify the kind of death
13 penalty that they're advertising or advocating for in terms of
14 the tier of fines, penalties, et cetera, for disgorgement.

15 So all of this stuff that I'm hearing, I want to be
16 clear, I think it misstates where we are in the case. I know
17 that your view is we would have never agreed to this if we
18 thought down the line, in disgorgement, we would face this
19 battle, but at the end of the day, we're not going to
20 relitigate anything that you guys have consented to. We're
21 certainly not going to make anyone admit or even acknowledge,
22 based on the language of the consent, that this is a Ponzi
23 scheme. That's not in there, and you guys are not going to be
24 tethered to that. It's being injected now, I understand, for
25 justification as to the penalties, but, again, it's got to

1 match the evidence.

2 So let's just assume for a moment that we never
3 mentioned the words, "Ponzi scheme." I don't know that
4 anything necessarily changes. All that happens is -- I still
5 have to look at all the evidence and determine whether or not
6 it justifies a level of disgorgement under *Liu*. It requires
7 there to be a certain level of penalties. That's what I've
8 expected, and that's, as you said, what defense is expected to
9 do in this next something.

10 MR. FERGUSON: There --

11 THE COURT: One second. But my point is, yes, we throw
12 an allegation in there. But I have to again tell you: We all
13 went into this knowing that I was going to look at the
14 evidence, and I was going to have to make a judgment call on
15 the proper level of disgorgement. I continue to not understand
16 why we're allowing the use of this word to upend what evidence
17 is in the disgorgement phase. It is not evidence to allege a
18 Ponzi scheme; it is not. It has never been. It is simply an
19 argument to justify penalties. If I do not think it is
20 supported by the evidence, or I think there is a debatable
21 issue based upon your evidentiary submissions on behalf of the
22 defense, they will not get from the Court the level of tiered
23 damages that they're asking for. I just won't entertain it.

24 MR. FERGUSON: And Your Honor --

25 THE COURT: Yeah. And that's why I think we differ.

1 But go ahead.

2 MR. FERGUSON: If I could press the button and put that
3 in a jar, I'm okay, I'm happy. Okay? But there's an
4 implication there. Because you're going to be making a
5 determination. And I don't want to, for a second, act -- what
6 I'm saying to sound like I have any doubt that there was a
7 Ponzi. But what if you decide, oh, they tipped it in. Maybe
8 it was. So then what?

9 I hear you saying, you know, you're going to put in
10 evidence it's not a Ponzi, you're not going to get to tier
11 three. That's what I want. That's great. But it's in play.
12 The cannon is kind of rolling around. And what if you decide,
13 you know, I'm not -- I'm still confused by the transactions and
14 the complexity of the business. I hear what Glick is saying.
15 But maybe -- you know what? I'm going to -- you're not telling
16 me that you're -- I'm not trying to put you in a box, but I'm
17 saying, you're not saying I'm not going to believe it's a
18 Ponzi; I'm not going to find this is a Ponzi. You're talking
19 to me as if that's a likely result, and I should be comforted
20 by that.

21 But what if you do decide it is? Then I -- what have I
22 done here? How do I -- where is my client's due process? It's
23 in play. That's the problem. And it should be taken off the
24 table. It shouldn't be in play.

25 THE COURT: Your argument is you would prefer -- you

1 would prefer to roll your dice with a jury on that issue. You
2 would prefer not to have a situation where now you find
3 yourself unable to, perhaps, litigate more aggressively the
4 Ponzi issue by putting on either new evidence or at least
5 putting it in the hands of jurors. And I understand that. I
6 understand that. And I can't give you assurances beyond the
7 fact that I won't let its use, or of the use of the words,
8 "Ponzi scheme," inappropriately influence me so that I
9 immediately jump to a third tier. It's got to be supported.

10 And you think -- I will say this: From the beginning,
11 I have always felt like we were all, on both sides, very
12 measured in using that word. People have steered clear of it.
13 It's been a bit of a third rail. No one's really wanted to
14 take that next step. And I recognize that the SEC decided to
15 do that now. And I'm going to have Ms. Berlin respond here in
16 a moment.

17 But I do tell you -- I can tell you, obviously, what I
18 have in front of me, knowing that even before we went to trial
19 this was going to be disputed. We had competing experts on
20 this. It came up in the trial. We were going to fight over
21 it, and I recognized that from the beginning. Now we're not
22 there anymore.

23 You know, I think the whole issue here is -- it's hard
24 for me to say put your faith in the Court to be able to try to
25 figure out if they have any evidence or any support for such a

1 strong allegation to justify the third tier.

2 But, look, I can tell you this as well: Again, I
3 haven't gone through every nuance, and I'm still waiting for
4 all the briefing, but simply because I may agree or may see,
5 economically, that new funds were being -- or facilitated the
6 paying of old investors, I don't think there's anything
7 automatic, as far as I understand, when it comes to
8 disgorgement. At the end of the day, I have to decide what I
9 think is appropriate, you know? And as Mr. Futerfas -- he was
10 the first who pointed out in your motion, the award -- and it
11 should be penalties on excess of \$100 million. That's
12 significant. I think it's a big-ticket item. I still have to
13 take a look at that and see, am I persuaded that that's
14 appropriate regardless of what you want to label it. I mean,
15 there's still a lot of discretion, I think, that goes into the
16 disgorgement process.

17 Let me do this. Let me -- Ms. Berlin, I'm going to
18 turn to you. One of the questions I have really for the SEC
19 is, perhaps, why now. You know, this was a bit of kind of
20 lobbying a grenade into the disgorgement phase. I certainly am
21 not thrilled by it if only because, to Mr. Ferguson's point, I
22 was looking forward to having this done on evidentiary
23 submissions that we already have without anything disrupting
24 the process like this has.

25 I tend to agree with your position that this is

1 argument, and that you haven't necessarily done anything
2 inappropriate in terming it this because you still have to come
3 forward with your burden here on your argument for
4 disgorgement. But, certainly, I do wonder if there was a need,
5 at this stage of proceedings, to go this route from the SEC's
6 perspective, understanding that this has nothing to do with
7 liability. We're not going to talk about liability. We've
8 already -- had gotten the consent judgements. That phase of
9 the case is done.

10 But, look, you can understand the defense team is very
11 concerned that injecting this at this phase might be unduly
12 prejudicial. And I can give him all the assurances in the
13 world, but, Mr. Ferguson's right. I don't know. If I look at
14 this, and I agree that the numbers support a characterization
15 of Ponzi scheme, then perhaps there are two or three penalties
16 on the table, but I don't know until I take a deep dive into
17 the defense response.

18 But what's your take on some of the arguments
19 Mr. Ferguson has raised?

20 MR. HYMAN: Your Honor --

21 THE COURT: Give me one second, Mr. Hyman. I just need
22 to hear -- I want to take this in turns.

23 MR. HYMAN: I just wanted to make sure you knew I was
24 out there.

25 THE COURT: Yeah. No, no. We're going to hear from

1 you. I just want to make sure we cover all of Mr. Ferguson's
2 points, and then --

3 MR. HYMAN: Thank you, Your Honor. By all means.

4 THE COURT: Go ahead, Ms. Berlin.

5 MS. BERLIN: Thank you, Your Honor.

6 First, I'd like to address the question that Your Honor
7 posed to Mr. Ferguson. The Court is exactly right. The SEC is
8 actually the party that raised the issue that without the
9 inflow of additional investor funds, they would not have been
10 able to pay the investors. The receiver raised it, and the SEC
11 also filed an expert report opining on that.

12 In addition to filing that expert report, it was
13 litigated on a motion in limine, filed by the defendants, to
14 keep that evidence out of the trial, and that motion in limine
15 was denied.

16 I worry, Your Honor, that -- and I would say I've
17 conferred with this, a little bit more about this -- that maybe
18 my use of the phrase, "Ponzi scheme," has raised some --
19 triggered something in the defendants that was not intended.
20 It's shorthand for what we've argued, which is that they were
21 using investor money to pay other investors, that without the
22 influx of more investor money, they would not be able to pay
23 investors.

24 We're not seeking -- I'm not even sure what claim they
25 were talking about, that would be added to this, but we're past

1 liability. We're just talking about that one thing, of how the
2 money flows, and that while they were representing the business
3 was a super successful company, which is the claim, they were,
4 in fact, breaking even and unable to pay the other investors.

5 THE COURT: Let me ask you this, Ms. Berlin. With your
6 statement just now -- because I -- you know, this case has been
7 a heavy lift for the Court for a couple of years. And I agree.
8 Mr. Ferguson knows that I'm trying to get it to some finish
9 line.

10 Your last comment right there, I think, encapsulates
11 exactly what my concern is. If your argument is simply, Judge,
12 this business, when you look at the financials, this business
13 was not thriving; this business was at a standstill; this
14 business was issuing MCA loans to entities that certainly were
15 not financially capable of repaying them; that loans that went
16 out ultimately resulted in defaults; or loans were then
17 modified with additional funds, but on the books were not
18 reflected as such. And that if you look at the market and how
19 this played out, it's not a COVID concern. It's not an
20 economic downturn concern. It's the fundamentals of the
21 business that, at its core, just didn't add up.

22 And the reality is, Your Honor, we have you look at
23 this and recognize that the economics just didn't make sense.
24 Our experts have said that this was not a factory business that
25 was successful, and, indeed, the money that we paid out to note

1 holders was not generated by an income stream generated by the
2 loans. It was coming, instead, from new funds.

3 What I just said there, I would like to think, would
4 not have generated a single motion from Mr. Ferguson and his
5 team because everything I just said has probably been argued in
6 one way or another by my receiver, by the SEC, and in
7 opposition by the defense, which has come forward with the
8 Glick report since day one to say this is a misunderstanding of
9 the factory business, or a function of COVID and business
10 shutdowns, because prior to COVID this was working great.
11 Everything I have said is fair game. At no point did I talk
12 about it being a Ponzi scheme. At no point did I try to say
13 you take from Peter to pay Paul.

14 You know, this can be done in a way that doesn't take
15 off the table the penalties you seek and, at the same time,
16 make me focus on the analytics and gets away from labels. And
17 I think, truthfully -- maybe I'm being a bit naive, but I think
18 that if it would have been framed that way, and you would have
19 stayed away from a term that understandably has been avoided
20 because it's inflammatory, you don't lose anything. You can
21 still seek the same third -- you know, tier-three penalty. You
22 can seek the same disgorgement because you would focus on the
23 numbers and say it's misleading to the investors; this is never
24 the way this paid out; they only made money because of new
25 money, because the factory didn't work out the way they said it

1 was working out because look at the loans themselves. They
2 weren't generating anything.

3 I don't know why we can't look at this today and simply
4 make that acknowledgment I just said, take this out, take out
5 this argument, and focus on the financial wherewithal of the
6 business, and we may get away from the labels. And perhaps
7 that is a happy medium where you can still make your pitch for
8 the penalties, but we don't go down this rabbit hole of now
9 we're trying to elevate this description to a more nefarious
10 one.

11 What would you say in that -- because if you're telling
12 me now, Judge, you know what? Listen, what I care about is the
13 money didn't make sense, and if you look at the numbers, this
14 doesn't look like it was a going business. It was literally on
15 life support through new investor money. If that's what you
16 want, we can do that without getting into a Ponzi scheme
17 argument.

18 And I don't know that you necessarily lose anything by
19 saying to me today, Your Honor, I would ask that you -- and
20 I'll -- have it on the record -- I would ask that you disregard
21 any characterization of this business as a Ponzi scheme and
22 focus instead only on arguments related to the business and the
23 way it was paying its investors. What would happen if we asked
24 you to do that? Would that really change anything for you in
25 your relief?

1 MS. BERLIN: Thank you, Your Honor. Just two points to
2 make in response.

3 So, one, just to start with the, I guess, Ponzi scheme,
4 wherein the defendant has raised all of these alarms with, but
5 it's not -- and there's not any federal statute that references
6 Ponzi scheme. I am honestly confused. I know they just don't
7 like the phrase.

8 But what that phrase means in sort of, like, parlance,
9 like, commonly known as, in lay persons' terms, because there's
10 not a federal statute that references the words, "Ponzi
11 scheme." It's just something that is shorthand to refer to a
12 situation where an entity is needing -- you know, when they pay
13 investors, that it's not really all coming from what they said
14 it was going to come from, but they're having to resort paying
15 with the other investor money in order to make the payments.

16 THE COURT: Let me ask you this, Ms. Berlin: Your
17 complaint alleged fraud. As far as I understand it, the SEC's
18 justification for third-tier monetary penalty under -- I
19 believe 15 USC, Section 78u (d) (3) (B), means that you can seek
20 a third-tier monetary civil penalty because the violation
21 involved fraud and deceit and created a significant risk of
22 substantial loss to other persons.

23 Why, if fraud is found in the complaint, and they've
24 never admitted or denied it, by their consent, and that's the
25 definition of the third-tier monetary civil penalty, why do I

1 need any of this debate today? Why can I not just say, you
2 know what? Your allegations of Ponzi scheme are stricken. The
3 Court will simply focus on allegations in your complaint that
4 form the basis for third-tier penalties in the form of fraud
5 and deceit, and that -- which created a significant risk of
6 substantial loss to other persons. Why can I not just do that
7 today and put this to bed?

8 MS. BERLIN: There's several reasons.

9 THE COURT: Tell me.

10 MS. BERLIN: First of all, I don't believe there's any
11 legal basis for censoring the SEC's argument. In fact, we
12 entered into a settlement with the defendants that we also rely
13 on, as a party, that explicitly not only says they can't -- the
14 only thing it does to them is they can't deny the claim
15 allegations. They're deemed as true.

16 But our settlement also enables both parties to conduct
17 discovery and to file additional evidence. We're entitled to
18 do this on your -- the very settlement agreement that we
19 entered.

20 THE COURT: But that's not answering my question.

21 Listen, you're entitled to do whatever you want.
22 There's entitlement, and then there's best practices. And my
23 concern here is, I just don't see the need. I don't see the
24 need. I don't care that you know you could be -- you're
25 entitled to try to term it this way. I'm trying to find the

1 practical need.

2 If you want third-tier monetary civil penalties, and
3 the SEC wants to look like the steward of the investing public
4 that it says it is, it would seem to me that they should come
5 forward with a certain set of allegations, stick to them
6 through the consent, and you could still get exactly what you
7 want without putting in some new characterization. And I know
8 I could throw it in there, but I know I could also look to it
9 and say to myself, this is scandalous, impertinent, improper,
10 or unnecessary.

11 I'm asking the SEC now, today, if the whole purpose of
12 this is to seek third-tier penalties, which can be sought if
13 there's fraud or deceit, and you have fraud in your complaint,
14 why do I need any of this ancillary characterization in your
15 arguments? It just seems to be an unnecessary injection of the
16 Ponzi scheme term when you already have what you need here
17 because, truthfully, this fraud issue and the way you framed
18 it, that was in the pleadings then. No one can look at me now
19 and say you've never alleged deceit or you've never alleged a
20 risk of substantial loss. That has always been in the
21 beginning of the case.

22 So if that's there, and it lets you open the door to
23 third tier, I'm not saying that you -- it's not about could;
24 it's about should. Should you do this? Does it really make
25 sense to delay my disgorgement phase, and yours, by now having

1 us here argue something that is not really going to advance the
2 SEC's goals of seeking the monetary civil penalties? That's
3 really the question.

4 I'm just trying to figure out -- if you tell me, Judge,
5 we wanted to throw it in there because we like the way it
6 looks, and we like the way it sounds, okay. All right. That's
7 fine. But I want to know, legally, does it really impact what
8 you're seeking in relief? I don't think, based on the way I
9 read the statute, that it does.

10 Do you agree with me there, that you don't need to
11 allege Ponzi scheme to get a third-tier penalty?

12 MS. BERLIN: Correct, because --

13 THE COURT: Okay. So I got you there. So you don't
14 need it. All right.

15 So then why is it in there other than let's stick it to
16 these guys on the back end? I mean, why is it in there? Why
17 do I need this? Let's --

18 MS. BERLIN: We are --

19 THE COURT: You know, I'm trying to figure out, at some
20 point, some cooler heads have to prevail. We've got the
21 consent done. You can seek third tier. But if I don't think
22 you need it, and the defense feels like, you know what, we are
23 ambushed -- and really, whether they want to say it's public
24 perception, whether they want to say it's taking their focus
25 off things, I think there's some hyperbole in the way they're

1 describing this problem. I'm not disagreeing with you, but I'm
2 also a pragmatic kind of guy. And to me it is, am I making the
3 SEC litigate with a hand tied behind their back when they can't
4 get the relief they want in disgorgement. You're telling me,
5 no. You're telling me that Ponzi scheme allegations don't
6 change the relief you're seeking, and you already have fraud
7 framed throughout your pleadings.

8 So if that's the case, and the defense is really only
9 looking for us to strike the characterization of "Ponzi scheme"
10 out, why don't we just do that by agreement and let us litigate
11 this on merit for the issue of penalty? Why are judicial
12 resources being spent -- I have to sit here again, ready to
13 handle the disgorgement.

14 I don't think we need to be sidetracked on this. We
15 managed to get to the consent liability phase. This is
16 upending the work that's been done. I can't get my mind around
17 why you legally need it.

18 I'm not saying you can't do it. I'm not saying that
19 you don't need to show me the chart of every single thing that
20 the SEC is permitted to do, of which I agree with you. No
21 bench trial. No evidentiary hearing. I can rule on the
22 papers. And I certainly hope I can. And I don't need oral
23 argument. I don't know. I have to read everything.

24 But I could tell you, everything you frame, you're
25 going to be able to argue for. This adds nothing. All this

1 does is inflame passions on both sides over something that does
2 not advance the litigation. And, you know, many people would
3 say that's a textbook 12(f); when you're adding something that
4 doesn't do anything, just cut it out.

5 And I'm asking you, just as an officer with the SEC, if
6 you don't need it, what is so tough about saying to me, you
7 know what, Judge? They're making a big deal out of it. So be
8 it. We've already alleged fraud. We can go third tier. We'll
9 just acknowledge by stipulation, or I'll enter an order,
10 paperless, for you that says, as agreed to on the record, the
11 Court will strike or disregard any characterization of this
12 entity as a Ponzi scheme. And I'm done. And I don't have to
13 worry about the rest of these arguments.

14 What about that result troubles the SEC? I know that
15 you don't like it, but what about it really messes with your
16 theory of disgorgement? That's what I want to know.

17 MS. BERLIN: So we're talking about disgorgement and
18 penalty, and I'd like to address each one. And, first, let me
19 address the statement that, you know, let's -- about cooler
20 heads prevailing or that the SEC --

21 THE COURT: Let me have you answer my question: What
22 does in taking out Ponzi scheme and granting this motion do to
23 any of the legal relief you seek? Does it do anything to the
24 legal relief you seek?

25 MS. BERLIN: Yes, multiple things. First of all --

1 THE COURT: Tell me what it does.

2 MS. BERLIN: First -- I'd like to provide all of the
3 reasons.

4 Number one: The five commissioners of the SEC
5 determine penalty. I am here to represent them. If the Court
6 is striking and censoring the SEC from arguing certain facts by
7 -- that I find are relevant to penalty, then I will need to go
8 back to the commissioners and --

9 THE COURT: I'm going to take you one at a time. I
10 just told you, you're seeking third-tier monetary civil
11 penalties, and you have alleged fraud and deceit and the risk
12 to the public. You can seek what you want. You don't have to
13 go back to the commission.

14 The fact that I don't want it characterized as a Ponzi
15 scheme, for whatever reason, whether I believe it's a due
16 process concern, whether I believe it's impertinent material in
17 the pleadings, and a characterization that's unnecessary to
18 advance the SEC's case, whatever the reason is, I don't know
19 why you need to go back to the five commissioners because Judge
20 Ruiz didn't let you use a word in your pleadings. I assume you
21 can seek the same relief.

22 Why do you have to go back to them? I'm not censoring
23 the SEC. I'm just making sure that they get the relief they're
24 seeking without unnecessary allegations. Why does that require
25 the commission's involvement again?

1 MS. BERLIN: It would. So there are two points, Your
2 Honor, if I can just --

3 THE COURT: Well, listen, if you can hit them on the
4 head right away, but I'm going to keep hitting you if you can't
5 give me the answer, so...

6 MS. BERLIN: I --

7 THE COURT: Give me the argument, legally, why you have
8 to go back and get Ponzi scheme -- and has to be in your
9 pleadings. Let's just focus on that one.

10 MS. BERLIN: And I will try to do this without
11 violating the rules that state that my communications with the
12 five commissioners are not public, and they are attorney-client
13 --

14 THE COURT: Sure. All right.

15 MS. BERLIN: But, Your Honor, the five commissioners of
16 the SEC authorized the specific amounts that we seek.

17 So as the Court knows, as a matter of law, in
18 determining -- let's talk about penalty. We'll talk about
19 disgorgement in a minute. That's a separate reason why these
20 facts are relevant. But on penalty, the Court must look at a
21 certain list of factors and we briefed them. One of them is
22 scienter; one of them is egregiousness. And on both of those
23 things, the complaint allegations are deemed as true.

24 And, also, under the settlement that we reached with
25 the defendant, the SEC is entitled to file a motion with

1 additional facts. We don't have to prove anything that's in a
2 complaint.

3 So then we come forward, and we say, here, this is a
4 list of what the Court looks at for penalties. Under these
5 facts, this is why there's more -- the answer that you've
6 already found, that's in the complaint, plus additional facts.

7 So a third-tier penalty is not where we get the 50
8 million or the 100 million. I just want to break it down
9 because I'm not sure Mr. Ferguson stated that correctly.

10 A third-tier penalty is in the federal statute, and
11 that term applies -- third-tier penalty applies when there is
12 fraud and there are either investor losses -- the risk of
13 investor losses or there is gain -- pecuniary gain by the
14 defendant.

15 There are two ways, if I may explain, to calculate
16 penalties. One of them is traveling under the third-tier
17 number, where you look at the statutory figure and you multiply
18 it by every single time they violated it. So there's a
19 statutory figure for third-tier penalty. For this time period
20 -- it changes, year by year, with inflation, but it's probably
21 an average around, like -- let's say it's around 190,000.
22 Multiply that by every investor they defrauded and then by
23 every [audio distortion] to every investor. That is one way to
24 calculate the penalty under that third-tier statutory figure
25 that Mr. Ferguson keeps throwing out there.

1 We're not doing that. That would result in a much
2 higher number than what we are seeking. The SEC has stated in
3 its brief, look, this is a third-tier penalty, and this is the
4 way that can be determined. If we traveled under that
5 third-tier-penalty analysis, we could also state to the Court
6 that the statute states that their penalty can be equal to the
7 disgorgement, which is 200, you know, plus million dollars.
8 We're not seeking that much either. We're seeking less.

9 So we explained the third-tier penalty by telling the
10 Court, this is the third-tier penalty. This is what a
11 third-tier penalty would look like if we sought it under the
12 calculation or based on the equal to the pecuniary gain.
13 Instead, we're asking for something lower. And we're going to
14 the case law. So we're pivoting. We're not saying take the
15 statutory figure for third tier. We're saying instead, Your
16 Honor, let's actually look at -- and look at a penalty based on
17 the factors in the common law. Okay?

18 And under the factors in the common law, which we
19 briefly tell the Court what those factors are, that courts
20 consider when they look at the penalties or the common law,
21 they're very similar to what we seek for an injunction. And we
22 ask for what they say is very high, but it's based on the
23 conduct in this case, and it's lower than what the calculation
24 would be if we did third tier.

25 So if, now, we're being told we need to go, and you

1 take the statutory figure for third-tier penalty, and multiply
2 it, and not look at the fact -- not look at the fact of the
3 scienter would be egregious as under the common law, I would
4 need to go back to the commission.

5 So without commission authorization for a specific
6 number, the only thing I am allowed to do, Your Honor, is seek
7 the maximum number, which is not, I don't think, helpful to the
8 defendants or the Court because it's -- you know, it would --
9 we would have to only -- we are only permitted to argue the
10 maximum.

11 So the issue that while they were making the claim on,
12 you know, misreps of the success of the company and how
13 profitable it was, they, in fact, had to resort to taking
14 investor money to pay other investors, is a fact that goes to
15 the scienter and the egregiousness. It's one of many, many,
16 many facts -- I apologize. My dog is barking. I'm sorry.

17 It's not the sole basis for why we're seeking the 100
18 million. It's just one of many facts. But it is a fact that
19 was considered in the approach that we presented to the Court.

20 So if that fact cannot be argued, I would need to go
21 speak with my clients and inquire, and get authorization, and
22 it could be that we come back to the Court just looking at the
23 third-tier statute. The third-tier statute, the number is
24 going to be a lot higher, and that is because this involved a
25 lot of investors. We alleged numerous claims. I think there's

1 seven charges against each defendant. And if you look even --
2 at the complaint, I think -- going through memory -- it's been
3 a couple of years since I looked at that, but I think there was
4 11 misrepresentations and omissions, plus the fraudulent
5 schemes, plus the fraudulent course of conduct. I think there
6 were seven counts.

7 So when you start multiplying, and you do it under that
8 third-tier penalty that Mr. Ferguson keeps bringing up, it's
9 going to be a higher number. I would need authorization to go
10 and do that. And instead, the SEC is not seeking liability for
11 a second fraudulent scheme claim. We have a fraudulent scheme
12 claim that's being admitted for purposes of this motion.
13 Instead -- we routinely do this, I think, on every motion for a
14 bifurcated consent. We come in and say, we've got the
15 complaint information. Here are additional facts that the
16 courts are supposed to consider.

17 The Court might say, you know what? I see you on
18 scienter, that you're claiming, hey, they're claiming using
19 investor money to pay other investors when they were saying it
20 was profitable. Yeah, I think that boosts their scienter, or
21 not. And the Court would say, yeah, I find it does, but I'm
22 going to assess a penalty at X number anyway. It's just a
23 factor for consideration that we are presenting, and what we
24 did is, we came in at a lower number.

25 Now I cannot tell you, sitting here, whether our number

1 -- if we approached the Court on the common list of factors,
2 will the number be less if we take out the fact that they used
3 some investor money to pay other investors? Will the
4 commission decide to go the third-tier statutory route, and
5 we're coming before this Court seeking a much higher penalty?
6 I can't speak to that, Your Honor, because I would need to go
7 back to my client. But this is merely one pass (phonetic_.
8 We're not asking the Court to make a finding. The Court
9 doesn't have to use the phrase, "Ponzi scheme." It is
10 shorthand and simply refers to the factual situation where they
11 are using investor money to pay other investors.

12 THE COURT: But here's the issue I have. I think maybe
13 at the end, you kind of addressed my question, which is, at no
14 point has the Court ever suggested that you're going to alter
15 your fraud allegations, which are framed in your complaint. At
16 no point has the Court said that you cannot illustrate scienter
17 and that I cannot consider the economic model of paying new
18 investors -- paying old investors with new investor money.

19 None of the opening argument you've made do I disagree
20 with. The only thing I'm mentioning, the factors you're
21 relating to the conduct in this case are fraud are fair game,
22 and everybody knows that has been an argument for the third
23 tier and the penalty, et cetera. That shorthand use of the
24 words, "Ponzi scheme," is what is creating the problem. It's
25 what is in page 2 of Docket Entry 1224. That is the motion.

1 If you had not used that term, which is inflammatory in the
2 view of the defense, whatever, you know, you make of that, they
3 are concerned. They feel like that fraud allegation was not
4 framed that way up through the consent judgment.

5 But if everything else you've told me with the fraud is
6 framed -- and I think it is -- and it all goes to the same
7 argument as scienter, I have no idea why the short form, as you
8 say, of terming this a Ponzi scheme is necessary. It is a
9 characterization of what happened here that is troubling the
10 defense, that the SEC gains nothing from including in their
11 disgorgement motion, nothing. Because everything else, which
12 is the technical term -- the fraud allegations, the way it was
13 -- folks were being paid with some of the new funds, that's
14 what matters to scienter. That's what matters for calculating
15 disgorgement. And that's what matters in determining the
16 appropriate civil penalties. That, to me, is the core of your
17 motion.

18 So going back to my earlier question: I think the
19 answer that you're giving me at the end is, your analysis is we
20 decided to inject Ponzi scheme as a short-form
21 characterization, but it does not have any impact on any of our
22 requests in terms of what relief we're seeking or how we're
23 describing the business.

24 Am I not correct in that, that the term itself could be
25 excised and change nothing from your request?

1 MS. BERLIN: Your Honor, the term is a --

2 THE COURT: Term of art. It's a term of art.

3 MS. BERLIN: It's a single statute that references
4 Ponzi scheme. I don't know where the defendants are so
5 offended that we used the phrase. But it is -- the behavior of
6 using investor money to pay other investors, that is called a
7 Ponzi scheme. And --

8 THE COURT: I'm asking you. I'm asking you --

9 MS. BERLIN: That's all we're referring to.

10 THE COURT: I'm asking you, if paying new investors --
11 or paying old investors with new investor money is alleged, and
12 that's in there, and that's the way you believe the evidence is
13 shown the course of conduct of this business, why, again, do I
14 lose anything by the SEC saying, you know what? It is such an
15 inflammatory term, we don't need it. Because we get to the
16 same place with everything we have alleged there. There's
17 simply no practical need for that description.

18 And whether it is formally stricken, or the Court
19 disregards the terminology or the phrase, and focuses on the
20 descriptors of how the money was being paid, it doesn't change
21 anything to me. What it does is, it does seem to take an issue
22 off the table.

23 And maybe I'll just pause for a second and ask you,
24 Mr. Ferguson: Would you agree with me that if it's a matter of
25 just excising like you would in an impertinent allegation, in a

1 12(f) traditional pleading motion, am I correct that you guys
2 would be fine, and we can basically take that phrase, or
3 disregard it, but that everything else that's been argued you
4 knew was coming, and you're ready to argue it again based on
5 your papers. Am I correct in that?

6 MR. FERGUSON: Your Honor, that's what I'm asking for.
7 That's it. That's it.

8 MS. BERLIN: Well --

9 THE COURT: Ms. Berlin, listen: This is foolish, you
10 guys. I mean, if everything here has already been framed, and
11 my defense team only wants to take out one reference to this,
12 that they find to be over the top, that changes nothing for the
13 SEC; doesn't require five commissioners to reconvene; doesn't
14 change the relief on the tier; none of the things are
15 disrupted. It's a short form used that they take issue with
16 from a characterization standpoint. I have no reason to -- I
17 can't even understand why we would not just come out of this
18 hearing and briefly say, as agreed to by the parties, given
19 that it does not materially impact the relief being sought by
20 the SEC in disgorgement, the Court will disregard allegations
21 or characterizations of this being a Ponzi scheme. And with
22 that, I will grant the motion in part, and I would moot this
23 whole thing, and we can let them finish briefing on
24 disgorgement.

25 Why? Why would I not just do that today? And this

1 could continue to be litigated without any impact on anybody,
2 really, about the merits of the disgorgement.

3 MS. BERLIN: Well, I can tell you why. So their
4 argument has changed. This is not what they wrote in their
5 motion.

6 THE COURT: Ms. Berlin -- Ms. Berlin, you've got to
7 read the room.

8 MS. BERLIN: I'm reading it.

9 THE COURT: This is -- listen, listen: Do not argue
10 for the sake of arguing. I am trying to be productive and save
11 everybody time and money. And the way to do that is, don't get
12 hung up on a term in your pleadings.

13 If they don't care about everything else you stated
14 because they've been ready for it, and it's been framed, and
15 all they want is to take out a term, and the term makes no
16 legal difference to the relief you're seeking, why are you
17 arguing for its inclusion when all this does is distract us
18 from the merits?

19 Let's just get it excised. You're telling me it
20 doesn't impact anything because all of the formal definition of
21 Ponzi is spelled out. And, in fact, we've all said it, without
22 saying it, for two years. We always said, it appears, based on
23 some of the evidence and the expert reports, that the money
24 that's being paid out is directly attributable to new investors
25 and not the MCA business. And the defense has said that's not

1 true. We don't know how to factor. We're doing it wrong.

2 Stay the course. If that's the argument, then let's
3 just let the Ponzi scheme part of it go; keep the rest. And
4 just ignoring that one term -- I'm hearing from Mr. Ferguson
5 that is what troubles them. So I don't know why we wouldn't
6 just do that and move on.

7 MS. SCHEIN: Your Honor, may I be heard?

8 THE COURT: Let me just hear real quick from Ms.
9 Berlin. I need the SEC to tell me why -- if this seems to be a
10 very easy fix, so that we can focus on merit, I just don't see
11 a reason why we need to leave the characterization. It goes --
12 it does nothing for the merits of the case. It is argument.
13 And I could simply just excise it without impacting anything in
14 the disgorgement phase, Ms. Berlin.

15 What can you -- I mean, this is the argument that
16 Mr. Ferguson has made now. Forget whatever you thought it was.
17 His concern is, I don't want it saying Ponzi scheme. You're
18 telling me it doesn't matter for what I want for relief. That
19 means to me, just take out Ponzi scheme, and we can all fight
20 another day what it means to be disgorgement under *Liu*.

21 What do you think about that for the SEC?

22 MS. BERLIN: Here's my concern, Your Honor: And let me
23 start by making another recommendation, since we are now sort
24 of having a hearing on relief that was not sought. But I would
25 like to resolve this.

1 Rather than having the Court enter an order that,
2 essentially, it could be used as a precedent that would stymie
3 the SEC and the agency's ability to use a phrase that is
4 commonly used in our bases.

5 I am reading *Liu*, Your Honor, and what I suggest is
6 that I simply file an amended motion; I remove that phrase; I
7 insert that description; the Court deny their motion as moot,
8 rather than grant it, because it will become nationwide
9 precedence that we are now -- trust me, that this is an order
10 barring the SEC from using what is a shorthand phrase that we
11 routinely use. And I have never had anybody have to litigate
12 the use of that phrase. I am happy to amend that motion, file
13 it today with the same deadline and nothing -- put in the
14 description, delete the word Ponzi, and I'll never mention it
15 again. I'll just use the description of what that means, and I
16 think that will just be fine, and then this motion could be
17 denied as moot.

18 THE COURT: I see that to be the best way to fix the
19 problem without precedent setting, without having to impact any
20 sort of ruling or having to put something in writing that later
21 could be misinterpreted.

22 Look, every case is different. This is not about being
23 precedent setting. It's about the unique facts of this case
24 and the avoidance of that term, and the fact that that would
25 jeopardize unnecessarily the work done to this point on

1 consent. And it would give the peace of mind to everybody that
2 we can still seek -- in the SEC's view, we can still seek the
3 third tier based upon framed leading allegations of fraud, but
4 now the defense team does not have to worry about that floating
5 out there, that term that they have sought to avoid, and it
6 gives them the peace of mind that they can focus on why this is
7 not fraud. But they will not feel as cabined by the Ponzi
8 scheme allegation or argument.

9 Mr. Ferguson, if that is done, and Ms. Berlin can tell
10 me how long it will take, would that cure the concern? I would
11 let her file the amended first. Then all the deadlines remain.
12 She, you know, control Fs her document, removes the Ponzi
13 scheme part. Everything else is fair game. We've already
14 talked about these things being framed. You can oppose them in
15 your papers with evidence and with supporting documents. And
16 that would allow me to simply deny the motion as moot.

17 If we go that route, would that not cure your primary
18 concern?

19 MR. FERGUSON: Your Honor, I'm going to answer your
20 question. I know my colleague, Mr. Futerfas, wants to chime in
21 for a second.

22 But the answer is, yes, but with an asterisk. I'm
23 sorry, but my trust for my opponent in this case has
24 evaporated. There's none. And I don't trust that it will be
25 that simple. But if the SEC is going to eradicate the Ponzi

1 scheme references from the motions -- I'm trying to get them
2 stricken. So, yeah, that's it.

3 But I do want to address one thing. My opponent keeps
4 saying I'm throwing around tier three. No, they are.

5 And then counsel says, I don't even know what claim --
6 they're talking about a Ponzi scheme. Well, counsel was going
7 to amend to allege a Ponzi scheme, so she has to know what she
8 was going to amend to the [audio distortion] if she never did.
9 We shouldn't have to fight the concept that we were a Ponzi
10 scheme because it was never alleged.

11 And in fact, we didn't pay investors with other
12 investors' money. We vehemently disagree with that, and
13 Glick's report proves that. But, again, we shouldn't have to
14 litigate that, even without the moniker of Ponzi scheme in
15 front of you now, because we should be past that. It was never
16 preserved. It was never alleged. It was kicked around. It
17 was shot down. It was talked about.

18 But the problem here is that it -- the SEC, trying to
19 avoid -- if we don't strike it, we're just going to pull it
20 back. I can't, without seeing what they actually do, say that
21 fixed it. But in theory, it's a heck of a lot better than
22 where I sit right now, yes.

23 THE COURT: Well, I would say this: I have reviewed
24 the pleadings and, as far as I can tell, the only thing here
25 that has supported the request for some sort of relief in terms

1 of striking is the defense's view that Ponzi scheme is an
2 improper characterization or allegation. And if I'm hearing
3 from the SEC that they can seek everything that they want so
4 that the Court is not limiting their relief under the consent,
5 or under the case law, or under the common law, or applicable
6 statutes, if they can seek everything that they want to seek,
7 including third-tier penalties and the disgorgement award, and
8 they can accomplish that without having to use this term, then
9 I think the best way they can do it is they can simply amend.
10 Because they have fraud framed from the beginning. They can
11 still utilize that, and the investors, and investors being at
12 risk as justification for the penalties and all of the
13 different concerns they have on disgorgement can be addressed
14 that way, I don't see a reason --

15 MR. FERGUSON: I agree with that. I agree.

16 THE COURT: Yeah. So to me it just seems -- I mean,
17 let Ms. Berlin file the amended pleading. It doesn't change
18 the relief. You guys don't have to feel like now we're trying
19 to defend against a new type of characterization. You get to
20 focus on what you've always focused on, which is your position
21 from day one, that this wasn't routed in fraud, that this is a
22 valid business model, which is what your opposition to
23 disgorgement is going to say when you guys propose your number,
24 if anything. You're going to say, this mischaracterizes the
25 nature of the business. And the Court's going to look at all

1 the documents, all the expert testimony, deposition
2 transcripts, et cetera, et cetera, and that'll take care of it.

3 And so, to me, that's what we can do. And we can stay
4 on task. But I don't see why we don't do this, and just get
5 this term off the table, and now we can focus on the purported
6 fraud and the purported way in which investors were paid with
7 new money. I think that's all fair game, but we don't have
8 anything about Ponzi in there.

9 MR. FUTERFAS: Your Honor, can I be heard?

10 THE COURT: Yes. Go ahead, Mr. Futerfas.

11 MR. FUTERFAS: Thank you.

12 I agree with Your Honor, and I certainly agree with
13 everything Mr. Ferguson said, and will certainly support
14 redacting a term or excising a term that's -- in our view, is
15 improper. But I am concerned -- I want to raise this with the
16 Court because I'm really concerned here.

17 At the end of the day, what I hear Ms. Berlin really
18 saying is, effectively, a bait and switch. Because what I
19 think she's saying -- and I'm kind of reading between -- I'm
20 reading what she's saying, but I'm also listening to what she's
21 not saying, is this: This case was originally charged as a
22 misrepresentation case, a misrepresentation about insurance or
23 a misrepresentation about whether they had underwriting, or
24 whether someone showed up and took a photograph of the merchant
25 or didn't take a photograph of the merchant. That is the first

1 complaint and that's the amended complaint.

2 And what I think we are looking at, and what Ms. Berlin
3 is clearly telegraphing to me -- and I think everyone is -- you
4 know what? If you look at cases around the country,
5 misrepresentation cases, in no way do they get near
6 \$100 million penalty. It's never done. Forget it.

7 And what I think is going to happen here -- and what
8 she's preparing to do -- is basically a bait and switch where
9 they come in and say, okay, they take away the moniker, Ponzi,
10 but they still say, you know, that effectively all these other
11 things were in place, that they needed new investor money to
12 pay old investors, and then that becomes the fight that they
13 want to engage in, and that becomes the principal fight and the
14 principal argument they make for a ridiculous claim of penalty.

15 And what I'm hearing -- what I'm concerned about is,
16 first, Mr. Ferguson said we don't get a jury because they
17 didn't charge it. Okay? They didn't charge it. We will argue
18 that.

19 Now I hear Your Honor say we may not even get a bench
20 trial. But that is going to be the tail wagging this dog. And
21 I can tell you that what's so upsetting about it is -- and they
22 had the opportunity -- and that's what I wrote that letter on
23 February 25th. They had the opportunity to amend the
24 complaints, and we can specifically take discovery about those
25 issues.

1 Now, we got an expert, and we did that stuff to respond
2 to the receiver's allegations. But look at what you have. You
3 have -- and this is what the evidence is going to show. That's
4 why you're going to have a tail wagging the dog at the penalty
5 phase. The evidence is going to show this company had outside
6 CPAs; this company had inside CPAs; this company had James
7 Klenk, who was still working for the receiver, as a CPA,
8 in-house. This company sought their own audits for years.

9 What Ponzi scheme -- what company that's using good
10 money -- new money versus bad money goes out and hires audits.
11 This company paid millions of taxes. In 2019, I think the
12 number is 179 million in reported revenue in which it paid
13 taxes. It paid taxes on millions of dollars in revenue in '18,
14 '17 and '16.

15 So you've got reams of accountants, reams of
16 professionals looking at this. You've got professionals from
17 the outside, major investors, who came in to invest in this
18 company either by their own accountant, their own professionals
19 who reviewed the books and records of this company.

20 All those people are wrong? All those people are
21 incorrect? That's ridiculous.

22 Second of all --

23 THE COURT: Mr. Futerfas, I'll say this: Save this.
24 This is your response to disgorgement.

25 MR. FUTERFAS: But --

1 THE COURT: This is disgorgement. We have already -- I
2 don't understand why everybody's having so much difficulty with
3 where we are in this case. I'm not -- you guys all walked into
4 consent. The game is over on liability. We're not playing
5 this anymore. I'm done.

6 You didn't like it? The Eleventh Circuit will be
7 involved next, after I get through disgorgement. They can
8 review it. Because at this point, I'm not paying for the same
9 real estate twice.

10 MR. FUTERFAS: Your Honor --

11 THE COURT: You guys walked into consent.

12 MR. FUTERFAS: Your Honor --

13 THE COURT: The ink is dry. They spell out the next
14 phase. Everything you just said is exactly what I expect to
15 see in the disgorgement argument. You are going to get your
16 day before me by putting forth evidence that you just said, the
17 accountants, all of the outside analysis of the numbers, the
18 merchant cash advance problems, all of that. I have to look at
19 all of that. And that is your evidence in support of why there
20 should not be a penalty like the one Ms. Berlin is advocating
21 for. But we have already done this discovery. We were
22 preparing -- we were on the eve of trial. We had motions in
23 limine that were litigated. This has to end.

24 Gentlemen, this is over. We are not going to keep
25 fighting liability. We now must focus on disgorgement. It

1 will be on the papers. If I need a hearing, I will have one.

2 Paragraph 5-B of our consents make very clear that the
3 Court, in my discretion, can look at all the evidence that has
4 been submitted, and it could be affidavits, declarations,
5 excerpts of sworn deposition, or investigated testimony, and
6 documentary evidence. There's no bench trial. Everything you
7 guys have in evidence you will put forth to rebut the SEC's
8 argument for fees -- not fees, but penalties.

9 MR. FUTERFAS: Penalty. Your Honor --

10 THE COURT: And everything else that comes with it.

11 So all the things you're telling me, I'm not
12 disagreeing with you. I'm just not really clear why I'm
13 hearing argument on something that you're going to be briefing
14 for me and that I'm going to revisit.

15 MR. FUTERFAS: Your Honor, I'll answer that. I can do
16 it quickly.

17 The reason is this: We did consent to liability. The
18 liability was on the amended complaint as drafted. And my
19 point is, when you get -- when you look at the SEC's
20 submissions and everything else, what you're going to hear from
21 the SEC is going to be this uncharged allegation, which wasn't
22 in the first complaint, wasn't in the second complaint. The
23 SEC never amended it or added it. That's liability. They're
24 going to try to influence Your Honor on penalty in disgorgement
25 based on something they never charged.

1 So I agree with Your Honor. Liability phase is over,
2 but liability phase was on a typical misrepresentation case.
3 They didn't give us full information about the insurance, or
4 this, or that. And what the SEC's going to come in here, is
5 have the tail wag the dog about something we did not
6 acknowledge in the liability phase, i.e., this whole economic
7 claim that they have, that's been blown away by the Glick
8 reports, but they're going to come in with it anyway.

9 And that was my concern. Why should they be allowed to
10 do that? They had the opportunity to amend, make that part of
11 the liability phase. They didn't. They didn't. And --

12 THE COURT: Well, in your response in opposition to
13 disgorgement, put all this in writing --

14 MR. FUTERFAS: Okay.

15 THE COURT: -- and point out the fact that the scope of
16 disgorgement is inappropriate because the scope exceeds the
17 framing of the pleadings.

18 MR. FUTERFAS: Okay.

19 THE COURT: You're going to hear from Ms. Berlin that
20 you can't challenge -- by way of your own consent, you're not
21 going to be able to go back and relitigate anything you've
22 admitted to.

23 MR. FUTERFAS: Right.

24 THE COURT: You are very much, I think, well within
25 your right to argue that the scope of disgorgement is excessive

1 based upon what was consented to in terms of liability.

2 MR. FUTERFAS: That's -- yes, Your Honor.

3 THE COURT: We went ahead and said we were liable for
4 unregistered offerings, payroll disclosure. That does not link
5 up to 100 million. That links up to a different number.
6 Because what you're telling me today is the argument from the
7 defense -- and it makes sense, obviously -- is that this is a
8 penalty that is not commensurate to the conduct that you went
9 ahead and admitted to.

10 So she may be coming out and asking for a high number,
11 and you guys can rebut that and say, that number's not tethered
12 to the reality of the case. And Ms. Berlin's going to have to
13 show in her pleadings why the Court is able to go above and
14 beyond perhaps just what can be linked to the particulars of
15 the admissions of liability to justify such a large amount in
16 terms of penalties and all the other relief that she's seeking.

17 But I will point out to you, you know, that this idea
18 of the bait and switch -- I mean, we know that the consents
19 provide, and the remedies provide that you can -- you know --
20 and we've allowed it. Right? You can't have new discovery,
21 that you're able to kind of open up the door and look into some
22 of these things perhaps in a little more of a fulsome way.

23 So to the extent that anybody here is, in my view,
24 being sandbagged or surprised, you know, I think allowing the
25 amendment to eliminate Ponzi scheme is fair. But certainly, we

1 can't sit here and say we're surprised because a lot of these
2 things we knew, pretrial, were going to be discussed or at
3 least were being considered in motions in limine. So we knew
4 that some of these fraud arguments were lurking and had been
5 pretty well fleshed out in the economic model that they were
6 attacking when the SEC appeared before the Court multiple
7 times.

8 So, you know, I agree with you. Determining
9 disgorgement and penalties, it has to be tethered to reality.
10 And so there has to be some evidentiary support.

11 But I would -- I would ask you -- in fact, I would
12 welcome that the defense, in their opposition, show me case
13 law, not argument without a single cite. Show me case law that
14 says specifically that the SEC is capped on disgorgement to the
15 framing of their allegations or the admission of liability and
16 consent. Because certainly, if you tell me that the case law
17 supports that disgorgement cannot be essentially detached from
18 the underlying allegations to justify a higher number, then I'm
19 not going to give the SEC a higher number. I'm not. It's got
20 to be tethered to the allegations. It's got to be tethered to
21 the evidence in the case.

22 But my understanding, from what I've seen so far, is
23 that the SEC does not believe that in determining disgorgement
24 and penalty amounts, that they are confined by the complaint's
25 allegations, that there is some sort of preclusion from that.

1 And I think that Ms. Berlin has stated, pretty unequivocally,
2 that she believes that there is room under the statute to go
3 beyond that, based on the evidence, and that there isn't case
4 law or statutes that would prevent the SEC from going higher
5 simply because, you know, there's nothing that's tethered to
6 the complaint.

7 And I don't think that that -- and, Ms. Berlin,
8 briefly: Am I correct that your position and that your view of
9 the case law is you're not, at the disgorgement and penalty
10 phase, limited in the sense that your disgorgement has to be
11 either directly related to or linked to what was admitted to in
12 the consent? Am I correct in that?

13 MS. BERLIN: Yes, I -- if I may, quickly. Yes, Your
14 Honor, that is correct. If we were, then the number for
15 disgorgement would be inequitable because it would be higher
16 than what we're seeking. The complaint alleges 458 million
17 because that's what we knew at that time. We're now thinking,
18 like, half that because we have to be able to determine how
19 much was paid to investors, and we do not think disgorgement
20 doubled. Like, we do not seek more if it paid it to investors
21 than that.

22 So if we were limited to the complaint allegation, the
23 Court would have to enter an order for 458 million, double what
24 we're seeking, and that's inequitable. That's not fair because
25 they've paid some of that down.

1 So when you get to disgorgement, you have to look at
2 the reality of how much did they get in, how much went to
3 investors, and what's the balance, because that balance is how
4 they make investors whole. Right? But we don't seek more than
5 that because that's not fair, that's not right, and that's why
6 we seek less than what's in the complaint, to be very clear.

7 THE COURT: But my point is, in addition to that, the
8 argument is, you know, if you have to look at it in the way of
9 a criminal analogy, that you were, you know, charged with, you
10 know, grand theft you get the death penalty. I mean, that's
11 what the defense is characterizing this as, that the penalties
12 are unconnected or disconnected from the allegations of, you
13 know, failure to do due diligence and all the things we talked
14 about from the beginning of the case. Right? Failure to
15 register. All the different violations of the Securities Act.
16 They believe that there needs to be, I guess, in a way, some
17 connection between disgorgement and the actual admissions in
18 the consent. And what you're pointing out is, there has to be
19 evidentiary support for the number you're seeking, but you are
20 not cabined in the sense of the number because of the way in
21 which the complaint is framed, because there is fraud alleged
22 throughout the complaint.

23 So in my view, you seeking a certain sum is not somehow
24 restricted by the nature of the case. I mean, this is in
25 direct response to the idea of a tail wagging the dog.

1 So that's why I'm asking you: There is not a situation
2 here where you have pled so little and such a thread bare
3 theory in your complaint that you are seeking numbers that are
4 untethered to the SEC's theory of the case. There is fraud
5 permeating many of these counts under the different securities
6 laws.

7 So my understanding is, with evidentiary support, that
8 you can seek these sums, that you don't have to pledge
9 something else to open the door to this level of relief
10 provided, of course, as you said -- and that's why you're not
11 tethering yourself to the number in the complaint -- provided
12 that you can show, with the evidence you have in the record,
13 that this number is supported by, you know, whether it's
14 deposition testimony or financial records, correct?

15 MS. BERLIN: That's absolutely correct. I think that
16 this is not a situation where we're seeking a penalty based on
17 violations of the security funds that were not pled. The
18 penalty is being sought based on the counts in the complaint,
19 but then the case law makes very clear that when you look at
20 the penalty, it's not only what -- like, the specific complaint
21 allegation. It's the reality. It's any other evidence.

22 And for that reason, our settlement -- this is our
23 template consent and judgment, so it should look like same.
24 Like, at that time in the world, the day they find it, every
25 complaint and judgment will be the same because it's a template

1 for everyone, if you do a bifurcated consent, that we can then
2 file a motion with evidence. And they can take discovery
3 because they might -- sometimes -- they might be -- Your Honor,
4 sometimes I file a case, and they want to right away bifurcated
5 it.

6 And when they see my motion, it has facts that I've
7 developed since we filed the case, but they haven't done
8 discovery, and they get to take discovery before they respond.
9 So there's nothing that limits it. Our penalty is based on the
10 counts in the complaint, the conduct in the complaint.

11 And in addition to all of those facts that show the --
12 why the higher penalty is necessary, we added a few more. Not
13 the end of the world. I think the penalty would probably be
14 the same whether those were there. But that's what the law
15 requires, so that's what we're doing.

16 We're telling the Court here all the facts, everything
17 in the complaint and more. The Court can use any of them the
18 Court would like. But the Ponzi scheme is not the thing that
19 makes it a \$100 million penalty. It's the conduct in the
20 complaint. And this is just another piece of scienter that's
21 in support of the charge that we pled about them lying about
22 the success of the -- at how successful they were.

23 So it's not like we're now coming in and saying, oh, we
24 want \$100 million penalty for insider trading, that they were
25 also doing that, or something that's unrelated. But that's not

1 the case at all. And the complaint explicitly allows us to do
2 this, and they get to take discovery. But they've already
3 done -- I mean, we've already done the discovery. It's --

4 THE COURT: Well -- and to your point, I mean, we
5 talked about this from the beginning, that the fraud and the
6 misrepresentations that underlie the complaint are the very
7 basis for the relief you're seeking in disgorgement. I mean,
8 there is a very natural connection, in my view, to that.

9 Now, as I stated earlier, does that require us to have
10 a characterization of a Ponzi scheme? It doesn't, and we're
11 going to put that issue to bed through amendment.

12 But, certainly, I want to be clear: Excising that term
13 is all I expect from the SEC. The rest of what I've seen is
14 absolutely tethered to what the complaint has said.

15 Now, whether the number makes any sense, and when you
16 look at the equities in the situation, and the evidence, which
17 I have to study, does it justify the penalty and its size,
18 that's what's going to be argued. And that's what I think the
19 defense camp needs to focus on, which is, instead now of
20 worrying too much about the framing of the case, recognize that
21 we have a consent judgment on liability and start to use the
22 resources that you have available to defend a new front in the
23 litigation, which is explaining to the Court why the number
24 proposed by the SEC is not realistic, is not appropriate, and
25 it is not supported by the evidence. And the Court is going to

1 have to decide, because we've had it from the beginning, two
2 very different versions of this business and how it's been
3 described to the Court by different experts.

4 So I'm going to have to look at that and determine what
5 I think is the proper characterization, evidence-based
6 characterization of the business, that would then justify a
7 penalty, and is that penalty the one the SEC thinks is
8 warranted or is it less. And I have to look at that carefully.
9 But that's all that we're doing now. This is not -- in my
10 view, respectfully -- a bait and switch. It's not a surprise.

11 I'll give you that the Ponzi scheme was, kind of, a new
12 little curve ball at the eleventh hour, and we're going to get
13 rid of that. But the rest of this case, it is what we said it
14 is from the beginning.

15 So I don't see a reason why this new amended motion,
16 which won't disrupt anything, gets filed, that at least this
17 characterization can be mooted, but we can then focus on this
18 issue of disgorgement.

19 And certainly, if the defense camp said, Judge, we have
20 only stipulated to these three or four violations of securities
21 laws; sure, we should have, maybe, done better on disclosure;
22 or maybe we should have registered these notes, et cetera;
23 they're securities instruments; but that in no way, Your Honor,
24 makes any sense why they should get 100 million.

25 Why? Because look at our business model. It didn't

1 become rooted in fraud. It actually was impacted by an
2 economic downturn. It had good loans. The factory rates were
3 high. And this is a mischaracterization of the underlying
4 numbers of the business. It's not old investor money getting
5 -- old investments getting paid with new investor money. That
6 is not correct.

7 That is exactly what I had expected the disgorgement
8 would look like. It would be the defense presenting to me that
9 this number is not tethered to the reality of the business, and
10 that has been a future of this case, before the consent, when
11 we thought we were going to go to trial. All of that was in
12 play. There's no surprise on any of this.

13 My hope is, once you get the amendment, we can allow
14 this to get briefed and I can see, by July, what the defense
15 brings. We'll get our replies in. It'll all be set up. And I
16 can start pouring through the evidence and figuring out,
17 truthfully, if what the SEC wants is warranted based upon the
18 business model and what you guys had admitted to in conduct.
19 That's it. That's all it's down to. If we --

20 MR. FERGUSON: Your Honor?

21 THE COURT: Yeah. Go ahead.

22 MR. FERGUSON: From the defense, let's get this behind
23 us. Let's get that amendment filed, get the Ponzi out of
24 there, and we will focus and continue to do so.

25 I took notes. I appreciate what you've said, and

1 that's along the lines of what I have and we have been working
2 on in addition to this motion.

3 THE COURT: Of course. Mr. Ferguson, I know that what
4 you guys want to show me is this did not have a permeation --
5 like Mr. Futerfas just said, Judge, we can live with the fact
6 that we should have registered these things; or, you know, we
7 admitted that our due diligence was just a little bit shy, or
8 we didn't disclose someone's criminal record.

9 But certainly, Your Honor, we do not have a pervasive
10 fraud that would justify a penalty of this large amount because
11 what is being shown to you in their report is shown to be false
12 in our report. Look at what Glick said. Look at the factory
13 business. This is not taking from Peter to pay Paul. And,
14 therefore, there's no reason why, even though they're alleging
15 this fraud, that you should ever buy into a penalty that high.
16 That is -- to me, from the beginning, has been what the case
17 will come down to in disgorgement.

18 And like I said, this does not necessitate an
19 evidentiary hearing. We have a lot of discovery. In fact,
20 some of this was pretrial motion practice. And I will go back
21 and look back at the different reports.

22 I said it in the beginning. I'll say it again: If I
23 do see the need for oral argument, like I've done with almost
24 every other motion in this case, I will certainly set one. But
25 I don't want anyone to brief, and get ready, thinking there's a

1 mini trial. Focus on the record evidence and show me why it
2 rebuts SEC's claim. That's what the defense team has to do.

3 So --

4 MR. FERGUSON: Your Honor?

5 THE COURT: Yeah. Go ahead.

6 MR. FERGUSON: We've been through a lot. It's a long
7 case. We know what we have to focus on. We're going to.

8 We will be asking you for oral argument. And we
9 understand your position about whether you need it or not, and
10 just -- with that, if you could keep an open mind given all
11 we've been through the fact of what we've all been through, and
12 the fact that we did it, you know, with consent. And we'd like
13 to be heard from.

14 And I see counsel shaking her head, no. Luckily, I'm
15 not asking her for oral argument because I wouldn't get it.
16 But just keep an open mind on that, please.

17 THE COURT: I've set almost every single thing in this
18 case for argument. I would strongly suspect that this would be
19 any different, when the Court rules on disgorgement as well.
20 But I just think it's good that we all know that it was just be
21 OA in support of the pleadings, nothing more, nothing less.
22 And I will wait, when I see that everything is ripe, and how it
23 looks.

24 And Ms. Berlin, so I can clear, I'm not even going to
25 put an order on the record for this. I'm going to term this a

1 status conference. I trust that you will file this amendment
2 in the next few days, or by Monday; is that a fair assumption?

3 MS. BERLIN: It'll be by tomorrow morning. I've
4 already -- the word Ponzi appears in 13 places. So I am going
5 to replace every reference to Ponzi scheme with what -- with
6 the definition of a Ponzi scheme, that, you know, they were
7 using investor to pay new investors, and they were [dog
8 barking] [distorted audio]. I'll do a control F. So it's
9 still going to have that same point, but we're just not going
10 to call it a -- use the shorthand, a Ponzi scheme.

11 THE COURT: Correct.

12 MS. BERLIN: I'll place that in the 13 places it's
13 located. And if I can get to that tonight, after my kids go to
14 bed, that's probably when you'll see it. It'll probably come
15 through tonight, but --

16 THE COURT: When it comes through, the Court will then
17 deny the motion that has been filed, docketed -- the one that
18 is pending, 1224, as moot, given that correction, for the
19 reasons discussed on the record, and that will take care of
20 this motion.

21 And, again, as we stated, that edit, to me, is not
22 problematic because it [audio distortion] anyway. It is
23 directly linked to the SEC's argument and really what we dealt
24 back in the preliminary injunction hearings about whether or
25 not the financial picture painted, right, about this business

1 and its return was truly accurate or really a genesis of fraud
2 in the way in which the money was being utilized. I don't have
3 a problem with it.

4 And I trust that from what I'm hearing from
5 Mr. Ferguson, the defense team won't either. They can live
6 with it, haven't taken away at least this terminology, which I
7 know you took issue with, and now we can focus on just briefing
8 over the coming, you know, six weeks, getting our response done
9 and getting everything lined up.

10 Ms. Schein, anything you wanted to add as -- I haven't
11 had you speak yet.

12 MR. FERGUSON: Your Honor, one more -- may I?

13 THE COURT: Mr. Ferguson, just for my court reporter's
14 sake, one at a time. Go ahead.

15 MR. FERGUSON: I'm asking that we please -- we've done
16 this on about every proceeding, but get an amended order now
17 denying this motion is moot, and saying that the SEC is going
18 to be filing an amended --

19 MS. BERLIN: Your Honor, again --

20 MR. FERGUSON: Let me finish, please.

21 THE COURT: One at a time, guys, for my court reporter.
22 Go ahead.

23 MR. FERGUSON: We think that would be important. We
24 did put a lot in this motion. There are a lot of other
25 factors. And we would like -- I don't think there would be any

1 harm. I think it would be appropriate to get the appropriate
2 -- even just a paperless order documenting what's happened here
3 today.

4 THE COURT: Listen, I don't have a big problem with
5 this.

6 Ms. Berlin, I will simply put paperless order denying
7 the motion as moot given that the SEC will be filing a revised
8 motion removing the references to Ponzi scheme as discussed at
9 the hearing held on this date. Something like that would take
10 care of it. And then you can just get it in by some point
11 tomorrow and we're done. Okay? That's not a problem. I can
12 put it in as a placeholder.

13 MS. BERLIN: Your Honor, that order will be used by the
14 defendant in other matters to indicate -- and in other cases.
15 They didn't --

16 THE COURT: Well, then how about we -- listen --

17 MS. BERLIN: There can't be an order on relief that
18 wasn't sought in a motion. I've offered to just change that
19 wording, when it was raised today, to resolve this.

20 MS. SCHEIN: Your Honor, may I be heard?

21 THE COURT: One at a time, please. One at a time.

22 MS. BERLIN: Now they want relief in an order, that
23 they didn't seek in a motion, that I heard for the first time
24 during this hearing when the Court asked me if we would be
25 willing do it. It's not sought for them to have us censor what

1 words I use to describe behavior. This order -- there's no
2 reason they would ask the Court for this order unless it's
3 intended to be used in other proceedings, which is a problem
4 throughout this case.

5 MS. SCHEIN: Your Honor, may I be heard?

6 (Simultaneous speaking.)

7 THE COURT: All right. Listen. Guys, guys. Listen.
8 One at a time. One at a time. My court reporter cannot take
9 down everyone speaking over each other.

10 Ms. Schein, what did you want to add?

11 MS. SCHEIN: Yes, Your Honor. I just want to thank
12 Your Honor for hearing us today, for hearing the motion to
13 excise the word "Ponzi." We appreciate Your Honor hearing us,
14 and hearing the issue at hand, and we'll await direction from
15 Your Honor after filing our -- our opposition as to whether
16 Your Honor would want to hear argument from us. And I think --
17 that's all I wanted to say, Your Honor. Thank you.

18 THE COURT: Thank you. And let me ask counsel for
19 Mr. Furman: Mr. Hyman, do you want to add anything else that
20 we haven't touched on already?

21 MR. HYMAN: Yes. I'd like to just state for the
22 record, for about 45 seconds, to preserve the rights, which is
23 to say, number one: Mr. Furman obviously did not consent to
24 the entry of the judgment. The judgements were entered as to
25 him after a full-on jury trial. He otherwise reserves all of

1 his rights with respect to whatever relief that may apply to
2 him.

3 And secondly, Your Honor, during the course of the jury
4 trial in this matter, we did attempt to bring in evidence to
5 show the financial viability of Par Funding, and those issues
6 were consistently not included as a portion of the trial
7 because at least during the liability phases, it was the SEC's
8 general position that investor damages was not a particular
9 consideration as part of the fraud claims. So we were
10 otherwise precluded during the course of trial from proving
11 kind of the -- or disproving the taking Paul's money to pay
12 Peter. But other than that, we understand Your Honor's orders
13 and are prepared to live with them.

14 THE COURT: Thank you. And, yeah, I recognize that I
15 can't remember all the rulings. Obviously, it's been a little
16 while. My recollection too is we -- because we were focused on
17 the issue of liability only, and there was a concern about
18 perhaps injecting the financial of Par Funding into the limited
19 allegations against Mr. Furman regarding the securities
20 violations, I think that was the thrust of -- perhaps it was
21 under 401, but a relevancy concern I had, and why I didn't let
22 that become kind of a separate part of the trial. But I think
23 that's important because obviously your client's not part and
24 parcel of the consents. So we have that on the record, which
25 is important for him.

1 I do recognize also, obviously, Mr. Hyman, that we have
2 the new trial motions still pending, and we are trying to get
3 that ready to go for you because, for the record, I want to
4 make sure that you have all of those arguments preserved. So
5 that's in progress.

6 All right. So one thing I will just add -- because I
7 think that to Mr. Ferguson's point, this issue of how to go
8 about doing this paperlessly.

9 Page 13 of ECF 1224 says, in no uncertain terms,
10 defendants, Lisa McElhone, Joseph LaForte and Joseph Cole
11 Barleta, respectfully request that this Court enter an order
12 striking all allegations or mentions of Par Funding being a
13 Ponzi scheme in the Plaintiff Securities and Exchange
14 Commission omnibus motion for final judgements against
15 Defendants Furman, Barleta, LaForte and McElhone. I read that
16 because I'm being told that this was not the framing of the
17 motion, that this was not the relief requested. I'm reading
18 it. This is exactly what was framed. This is --

19 MR. FERGUSON: Your Honor, if I may, respectfully --

20 THE COURT: No, no, no. Mr. Ferguson, I'm saying --
21 what I'm trying to tell you is the SEC just added that they
22 felt, in terms of ruling, that this was not the relief
23 requested. I'm reading the motion that you filed back to you.

24 This is the relief that has been sought. One of the
25 grounds you sought was striking the allegations, which is going

1 to be, in their view, mooted in large part because they are
2 going to file an amended complaint. It's all on the record.
3 So to me, I don't see any issue with entering a paperless order
4 that simply acknowledges that given that an amended complaint
5 shall be filed as agreed to --

6 MR. FERGUSON: Motion. Motion, Your Honor.

7 THE COURT: I'm sorry?

8 MR. FERGUSON: Motion, amended motion.

9 THE COURT: An amended motion. My apologies.

10 An amended motion shall be filed no later than
11 tomorrow. Okay? This is essentially going to be mooted. And
12 I will structure that order. But everything I've put on the
13 record I think is more than enough in terms of the procedural
14 history and how this motion was addressed. I will wordsmith
15 it, but to the extent that you want a placeholder, I will go
16 ahead and put something on the docket, and I think it will
17 satisfy everyone, to a certain extent, that we don't lose track
18 of what we're going to do here with this particular issue that
19 we put to bed.

20 MR. FERGUSON: I appreciate that. Thank you for your
21 time, Your Honor.

22 THE COURT: So with that being said, I don't believe I
23 have anybody else that needed to be heard from today. We've
24 gone ahead and handled this motion. We know that we're going
25 to go ahead and have some amendments done, and we'll go from

1 there and look towards the next phase. Obviously the Court
2 will wait and see how that looks.

3 Yes, Ms. Berlin. Before we finish up, what do we got?

4 MS. BERLIN: Thank you so much. And I apologize. I
5 understood they were seeking to strike our arguments, not just
6 the phrase.

7 THE COURT: Yes, they say the phrase. I just wanted to
8 make sure we had that on the record. Yeah.

9 MS. BERLIN: All right. I just wanted to ensure that
10 also the defendant's responses -- that they're not going to be
11 responding that this is not a Ponzi scheme. This phrase, I
12 understand, they will not be using either, because then I would
13 need to reply to it. I don't want to be sitting here again in
14 a month because if they use the phrase, then we have to reply.
15 So my understanding --

16 THE COURT: I can guarantee you, Ferguson will tell me
17 that this is a term that you do not plan on inserting in any of
18 your own pleadings, correct?

19 MS. BERLIN: But he's still going to argue --

20 MR. FERGUSON: Your Honor, we'll rebut what she says,
21 what the SEC says through counsel, that we believe is
22 incorrect, and we'll avoid that as well. That's been our
23 intention.

24 MS. BERLIN: Okay, great.

25 THE COURT: Let's just avoid the term, and that way we

1 don't have to worry about the characterization that's been
2 disputed.

3 So with that being said --

4 MS. BERLIN: One more thing --

5 THE COURT: Yeah.

6 MS. BERLIN: -- if I may. I'm so sorry.

7 I just must do this because it would be -- Mr. Ferguson
8 represented to the Court earlier that I told him that the
9 commissioners did not vote on something, and that -- if I had
10 done that, by the way, would be a major violation of the law.
11 Whether or not the commissioners vote on something is not
12 public and would be illegal for me to disclose. And in truth,
13 I emailed Mr. Ferguson that I could -- that he could not know
14 whether or not they voted, and what they decided, because that
15 is all non public, and that he, therefore, could not know that
16 information.

17 So I just wanted to correct that on the record, that he
18 was not told that any nonpublic information whether the SEC did
19 or did not make a decision.

20 MR. FERGUSON: Your Honor, I confirm that. I can
21 confirm that. And I just want to be clear.

22 MS. BERLIN: Thank you.

23 MR. FERGUSON: I think I was pretty clear when I told
24 you I don't know what the commissioners had done or not done.
25 And counsel hasn't told me that they've done or haven't done

1 anything. I was trying to address her concern that I was --
2 that we were making it appear like the five commissioners
3 intentionally waived something. Well, that wasn't our
4 intention. Counsel's never told me anything of the sort.

5 And I hope you understand, I'm not here to be an
6 expert. I don't know anything about what the five
7 commissioners have done or have not done in this case.

8 MS. BERLIN: So we're going to -- all parties, they can
9 argue whether it is or is not a Ponzi scheme. But nobody is
10 going to use that phrase. And that's my --

11 THE COURT: No one is going to use -- that phrase is
12 not going to be inserted in any pleadings going forward. The
13 Court does not intend on giving that phrase any credence. The
14 Court will focus on whether or not the economics of this
15 business indicate that old investors, or prior investments,
16 were truly paid by way of profits made from Merchant Cash
17 Advance loans that were generating revenue, or is it true that
18 their income stream was nonexistent and/or flat, and,
19 therefore, really the money that was making its way to
20 investors was being generated by new investments in Par
21 Funding. That has been, to me, the theme of this case from the
22 get-go, along with all the accompanying securities concerns.
23 And truthfully, I think that is one of the core debated issues
24 of the case that I will have to make a determination about when
25 I ultimately rule on disgorgement and figure out what is the

1 appropriate penalty and what those numbers are. That is going
2 to be probably the most significant dispute because it goes to
3 the theme of this case, which is, this has been, in the
4 defense's view, a misinterpretation from the beginning of the
5 business model. And in the government's view, the SEC's view,
6 it has been a misrepresentation of the success rate of these
7 loans. And that really is the core of the case. And everybody
8 should be able to brief that.

9 And we've had a lot of discovery and a lot of
10 affidavits and expert reports that have been filed that
11 truthfully give the Court a flavor of where each camp is at.
12 And I'm going to go through all that. And as I stated, if oral
13 arguments are requested, I will always take those requests
14 seriously. I look forward to get this fully briefed so I can
15 roll up my sleeves and get to this kind of next phase of the
16 case. And then my hope is, once that phase has been ruled
17 upon, then we will get to kind of the final phase, if you will,
18 which is the receiver looking at what the Court has ruled on in
19 disgorgement and being able to come up with a plan going
20 forward of how much investigators will receive, one way or the
21 other. That's how I see the case traveling or moving for the
22 next, let's say, six months. So that's going to be the focus.

23 So with that being said, I think we've covered it all.
24 I look forward to the amended motion. We'll go ahead and get
25 this motion handled paperlessly. And I look forward to the

1 response from the defense camp here in the start of July.

2 MS. BERLIN: And I just want to make sure that nothing
3 I've said has indicated to the defendants that we are agreeing
4 that they can argue anything that goes against the complaint
5 allegations. So the Court was just saying the issue as to the
6 success of the company, those are the complaint allegations.

7 So I just want to make sure everyone understands, that
8 the defendants understands that the SEC is not agreeing to any
9 modification of the consent or judgement by hearing their
10 arguments and not consenting. I just sat here quiet and let
11 them talk. But a lot of what they said, I agreed with, in what
12 they're allowed to argue, and I just want to make sure everyone
13 is clear on that so I don't get another -- it's all very
14 surprising if they get my reply and I take issue with things
15 they've said here today.

16 THE COURT: I'll say this: I think, at this point,
17 that the best way to do this, honestly, is let the defense do
18 what they need to do for their clients.

19 And to me, I don't disagree with your analysis, Ms.
20 Berlin. We know what the consents let you do and what they
21 don't let you do. And, unfortunately, there are limitations in
22 those consents as to how much of the admission of liability
23 could be revisited. And it's zero, right? That's locked in.
24 Those allegations cannot be contested. There is a limitation.

25 The difference here, I think, now becomes is the amount

1 for disgorgement appropriate given those allegations that have
2 been admitted to. That's where the argument comes in.

3 And if you feel that the defense goes and questions
4 something, then I think the easiest thing to do is just use it
5 in your reply, and bring it up in your reply and say, Your
6 Honor, arguments A through G are legit, but these other
7 arguments have already been eliminated by way of consent. And
8 I'll have to make that call. If they're foreclosed by the
9 consent, I certainly am not re-litigating the consent.

10 So I'm going to hold everybody to the burden they
11 signed off on on liability. So don't waste pages on fighting
12 stuff that's already been admitted to. Focus on why that
13 doesn't justify, why those violations admitted to are -- and,
14 again, it's really not admit or deny. Let me take that back.
15 It's not necessarily an admission, but essentially the
16 limitations on challenging allegations that kind of set the
17 fact pattern for the Court. Once we have that in place, like
18 we do now, it should be what do those facts generate in terms
19 of monetary relief with disgorgement. And there's a lot of
20 battle ground there, I think, for everybody to debate about
21 what that number should look like, and we'll let that play out.

22 But to your point, Ms. Berlin, obviously if something
23 goes outside what you think is allowed, just raise it in your
24 reply and I'll address it. Okay?

25 MS. BERLIN: Thank you. I just wanted to make sure

1 because there were things today -- I was only addressing what
2 was raised today, and I wanted the defendants to know that, so
3 when they get my reply they don't think I'm throwing something
4 at them out of the blue and I should have argued that today. A
5 lot of things were talked about today that went outside of the
6 motion.

7 So I just wanted everyone to know that I'll file a
8 reply that is relating to the response and that silence today
9 during certain arguments has no meaning other than --

10 THE COURT: No, there won't be a waiver. There's no
11 waiver here. This is the Court attempting to do what a meet
12 and confer could not, which is excise the term so that
13 everybody can go fight over the merits another day.

14 But I think your chart on the first two pages of 1239,
15 ECF 1239, spell out pretty clearly what are the limitations of
16 challenging the disgorgement process, and what has been
17 admitted to and what has been accepted.

18 As it says in paragraph 5-C, for the purposes of the
19 motion, that the allegations of the complaint shall be accepted
20 as and being true by the Court.

21 I think we can all agree that that limits some of the
22 arguments, but certainly -- certainly the scope of disgorgement
23 is what will be litigated now. And even with these types of
24 allegations being admitted to are not being able to phase a
25 challenge, it doesn't mean the defense can't attempt to state

1 that doesn't make sense as the basis for a high disgorgement
2 amount. So just address it in your reply.

3 But certainly, I just want everyone to understand the
4 Court may feel compelled that certain arguments can't be
5 addressed; it's, therefore, closed by the consent. So let's
6 focus on the things that you can argue about and not try to
7 relitigate things that have already been shut down in the
8 liability phase. That much, I think everyone understands.

9 MS. BERLIN: Thank you, Your Honor.

10 THE COURT: All right. Thank you very much, everyone.
11 Have a great rest of your day. And I look forward to getting
12 the remaining filings on the disgorgement. Okay?

13 We are in recess.

14 MS. BERLIN: Thank you, Your Honor. Good night.

15 MR. FERGUSON: Thank you.

16 (Court recessed at 5:10 p.m.)

C E R T I F I C A T E

17
18 I hereby certify that the foregoing is an
19 accurate transcription of the proceedings in the
20 above-entitled matter.

21 This hearing is subject to the technological
22 limitations of reporting remotely.

23 DATE: June 16, 2022 /s/Ilona Lupowitz
24 ILONA LUPOWITZ, CRR, RPR, RMR
25 Official Court Reporter
United States District Court
400 North Miami Avenue, 8th Floor
Miami, Florida 33128
(305) 523-5634

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 WEST PALM BEACH DIVISION
4 CASE NO. 20-CV-81205-RAR

5 SECURITIES & EXCHANGE COMMISSION, Fort Lauderdale, Florida

6 Plaintiff, September 14, 2022

7 vs. 10:18 a.m. - 1:58 p.m.

8 COMPLETE BUSINESS SOLUTIONS,
9 d/b/a PAR FUNDING, et al.,

10 Defendants. Pages 1 to 151

11 EVIDENTIARY HEARING
12 BEFORE THE HONORABLE RODOLFO A. RUIZ, II
13 UNITED STATES DISTRICT JUDGE

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1 (Call to the Order of the Court.)

2 THE COURT: All right, everyone. We're going to go
3 ahead and get started. We were getting our Zoom set up here
4 because I understand that we needed to make it available for a
5 few of our lawyers. So we're going to begin in Case
6 No. 20-8125, Securities and Exchange Commission v. Complete
7 Business Solutions Group, Inc., doing business as Par Funding,
8 et al.

9 Who do I have here in court on behalf of the SEC?

10 MS. JOHNSON: Good morning, Your Honor. Alise Johnson
11 for the SEC. As you know, Ms. Berlin got into a fender-bender
12 on the way here, so she's Ubering home to appear by Zoom.

13 I will do my best to proceed until she gets here. She
14 has all the evidence and our PowerPoint, but I can handle the
15 Furman issues, any legal issues, and issues with the receiver.

16 THE COURT: Thank you, Ms. Johnson.

17 MS. JOHNSON: Thank you for allowing her to appear by
18 Zoom.

19 THE COURT: Absolutely. When she connects, we'll try
20 to make a note of it so that I can unmute her and allow her to
21 contribute and answer some of the Court's questions.

22 To the extent that you're unable to cover some of the
23 things I will begin asking, let me know, and I can attempt to
24 cover other points until she is able to join us today.

25 Certainly, there are some issues here upfront that are for the

1 SEC to answer, but even so the receiver can probably chime in
2 early on in the process while we wait for her to join.

3 So on behalf of the defendants, who do we have here
4 today? We can begin with McElhone, LaForte, go to Cole, go to
5 Furman, in that order.

6 Go ahead, gentlemen.

7 MR. KAPLAN: Good morning, Your Honor. Jim Kaplan and
8 Noah Snyder for the defendant, Lisa McElhone. I'd note for the
9 record that Ms. McElhone is likewise with us here in court.

10 THE COURT: Yes. Nice to see you for the first time, I
11 think in two years, in person.

12 MR. FUTERFAS: I was just saying, it's a pleasure to be
13 here, Your Honor. Alan Futerfas for Ms. McElhone.

14 THE COURT: Thank you, guys. Good to see you all live.
15 All right. Who else do I have? Go ahead.

16 MR. HYMAN: Good morning, Your Honor. Zachary Hyman on
17 behalf of the defendant, Michael Furman.

18 MR. FERGUSON: Good morning, Your Honor, David Ferguson
19 on behalf of Joseph LaForte. And I'll note that Joseph Cole is
20 also present behind me.

21 THE COURT: Oh, very good. Good morning.

22 MR. FERGUSON: I understand his counsel spoke to
23 Mr. Kaplan, and is stuck in Turkey. I don't know how he got
24 there, but he --

25 MR. KAPLAN: I understand there was a funeral. He had

1 to leave on short notice, and is unable to get back. I
2 understand that he and Mr. Cole are going to rest on their
3 brief.

4 THE COURT: Okay.

5 MR. KAPLAN: To the extent that there are particular
6 questions, we'll do the best we can to assist --

7 THE COURT: Yes. I have a couple that are unique to
8 Mr. Cole, so --

9 MR. FERGUSON: We might be able to field those, Your
10 Honor.

11 THE COURT: Okay, great. I think you guys will be able
12 to do it. But if not, I'll go back to the briefing. But thank
13 you, guys. I'd appreciate that. Okay.

14 MR. SNYDER: Also, I apologize, Your Honor. I forgot
15 to introduce Mr. Furman who's here in the courtroom, as well.
16 We originally anticipated at least a degree of him being able
17 to testify. He is able to provide additional clarification to
18 questions regarding the specific numbers in his analysis, if my
19 proffer is not satisfactory to Your Honor.

20 THE COURT: Very good. Thank you for that.

21 All right. And then on behalf of the receiver, I do
22 note that Mr. Alfano is appearing on Zoom. And I see you
23 there, Mr. Alfano. I don't know if we need to formally unmute
24 you, because we're gonna get a cacophony of sound here. But I
25 note you're appearing over Zoom. But in court, who do I have?

1 MR. KOLAYA: Yes. Good morning, Your Honor. Timothy
2 Kolaya on behalf of the court-appointed receiver, Ryan
3 Stumphauzer. And Mr. Stumphauzer is present, as well.

4 THE COURT: Very good. Thank you, guys.

5 Okay. So we had talked about this yesterday. Really,
6 the purpose of today's hearing, an evidentiary hearing, is to
7 address disgorgement and civil penalties.

8 After a status conference yesterday at which the
9 parties informed me that they had begun potential conversations
10 and discussions regarding settlement when it comes to
11 disgorgement and penalties, I indicated that I wanted to
12 proceed with today's hearing anyway. First, because we still,
13 I think, have a bit of a ways to go before the parties can
14 reach an agreement. And second, because I continue to have a
15 number of questions that I would like to get some answers to
16 today that would assist me in completing the order that I'm in
17 the process of rendering regarding disgorgement and civil
18 penalties.

19 As I stated yesterday, I have no issue, and we'll talk
20 about this at the end of today's hearing, with holding off on
21 issuing the order that I'm working on to facilitate an
22 environment where the parties can try to reach an agreement
23 amongst themselves. And so that's not going to be an issue.
24 But I do think it's incumbent upon the Court to at least
25 finalize some of my analysis in the order and have it, for lack

1 of a better way to put it, ready to go, so in the event we
2 can't get this case resolved, we can have an order promptly
3 issued because we all know that we're, I guess, maybe on the
4 five yard line. I don't know what exactly will be, whether
5 that, or on the eve of going into the end zone in this case, in
6 that once we get this part of the case resolved -- we did our
7 injunction, which was kind of the first phase. We did
8 everything that led up to the consent judgments, and the trial
9 with Mr. Furman, and then now we're at the disgorgement and
10 penalty phase. And after that, I believe that the receiver
11 will have the most clarity they've had to date on how they can
12 attempt to begin a claims process.

13 I mean, you guys will have numbers that you can put
14 your hands around, in addition to everything you collected.
15 But you need this number so that you guys can actually figure
16 out how to prioritize disbursement to investors.

17 So I have a couple of major arenas here I wanted to
18 cover. And I definitely encourage the parties on all sides, if
19 at any point something I'm stating is mistaken -- I mean,
20 because there is a lot of documentation I've gone through. It
21 is very possible that I'm misinterpreting something, or
22 misreading something. Please, I want to get it right. There's
23 no ego here in fixing what I've reached thus far. So do not
24 hesitate to let me know or point me to something you think I'm
25 overlooking in my questions, because it is possible that I have

1 missed something.

2 So the best way I can begin, I think, is to focus on
3 McElhone and LaForte, because I think that they're the thrust
4 of the analysis and truthfully the bulk of the briefing.

5 So, Ms. Johnson, I know that you may not necessarily
6 have all the information on this point, but we'll do our best.
7 Let me know.

8 MR. KOLAYA: Your Honor, I'm sorry to interrupt. I've
9 been told that Your Honor's audio is on mute for Zoom.

10 THE COURT: Oh. Thank you for letting me know. I'm
11 going to leave that muted until we can figure out that reverb.
12 Let's see if we can get our tech folks in here to see if we can
13 -- we've done this once before, and it's a little challenging.

14 But thank you for letting me know, Mr. Kolaya. Let's
15 see if I can get it to work. I think Ms. Berlin actually is
16 about to join us.

17 (Discussion was held off the record.)

18 THE COURT: Ms. Berlin, just so you know, we have not
19 begun yet. We're waiting for you to join, question wise. All
20 I have are appearances for the record. I'll go ahead, and if
21 you want, I can unmute you. And if you just want to state your
22 appearance. And I'm going to do the same, Mr. Alfano, with
23 you, just so we can make sure that the clearing is okay. Okay.

24 So I'm going to go ahead and unmute you, Ms. Berlin,
25 and then let's see if it works. Okay? Hold on.

1 Go ahead, Ms. Berlin.

2 MS. BERLIN: I'm unmuted?

3 THE COURT: Yes, I can hear you.

4 MS. BERLIN: This is Amy Riggle Berlin on behalf of the
5 SEC.

6 THE COURT: Excellent. Okay. Mr. Alfano, if you can
7 try, as well, just to state your appearance on behalf of the
8 receiver.

9 MR. ALFANO: Good morning, Your Honor. Gaetan Alfano
10 on behalf of the receiver.

11 THE COURT: Thank you. All right.

12 So I think it's working now, and I have everyone's
13 appearances, some on Zoom and some live.

14 So what I had started by saying, Ms. Berlin and
15 Mr. Alfano, who I don't think you heard me either, was I'm
16 going to begin with some questions that will get to my concerns
17 with the disgorgement analysis. And so we're going to walk
18 through some of these today, and I'm going to start with
19 questions that are directed more towards McElhone and LaForte.
20 So let's kind of dive in, if we could.

21 So the SEC, I think from the beginning, has disputed
22 the overall numbers that I should use as a starting point to
23 determine the disgorgement amount for McElhone and LaForte.
24 The SEC would like that I use the numbers in the receiver's
25 declaration, and that's, for the record, ECF No. 1214-1, in

1 order to calculate the number of unpaid promissory notes due to
2 Par Funding investors. I think we can all agree that's how the
3 SEC has framed the disgorgement sum for me, for McElhone and
4 LaForte.

5 Now, what does that entail? Well, the receiver's
6 declaration states that Par Funding raised \$550,325,596, and
7 that it disbursed \$300,108,117 to investors, including all
8 agent funds. And that has left an unpaid balance of notes in
9 the amount of \$250,217,479. And that is kind of the starting
10 point for the SEC's disgorgement when it comes to McElhone and
11 LaForte. I mean, that's how the receiver declaration reads.

12 Now, the May quarterly status report -- and I mentioned
13 this on Monday -- which is ECF 1223-3, has this
14 pre-receivership cash summary in it. Now, I'm not looking at
15 prospective and what collected. It's the one document that
16 snapshots this business, I believe, from 2012 through 2020. In
17 that document, it has a summary of cash sources and uses for
18 that period. In that summary provided by the receiver in their
19 diligence with DSI, it shows that Par Funding raised
20 \$548,800,000 and disbursed \$302,400,000 to investors. By that,
21 the Delta on that, that unpaid balance of notes, is
22 \$246,500,000.

23 There was a hearing I went back and read the transcript
24 of held on July 8, 2022. I believe in that hearing before
25 Magistrate Judge Reinhart, Mr. Kolaya and others stated that

1 the figures in the pre-receivership cash summary, which I'm
2 going to call today the PF cash summary, were based on, quote,
3 more in-depth analysis that also included a reconciliation from
4 bank account statements the receiver reviewed. And that, if
5 you look, was included in the defendants' response, Exhibit 2,
6 ECF No. 1330-2, at 11-A through 13.

7 So my first question is what is the SEC's objection to
8 the use of more accurate records to determine disgorgement?
9 Because I have, on its face, a little over or just under \$4
10 million out of the gate between the receivership's number -- or
11 the receiver's done number, in their diligence, and the Delta
12 in the declaration that's provided in support of the starting
13 point for McElhone and LaForte. So that's the first question I
14 had.

15 So I guess, maybe, Ms. Berlin, I'll unmute you, and you
16 can maybe tell me why you think that difference is there. I'll
17 go ahead and turn to you.

18 MS. BERLIN: Thank you, Your Honor.

19 As we explained in the reply brief, what you're looking
20 at in 1223-3 and what is stated in the receivership, in the
21 receiver's declaration, concern a different type of analysis
22 and a different time period. And we explained what that
23 distinction is.

24 I think that Mr. -- I don't know if the Court is still
25 having -- if our explanations are not sufficient, because

1 that's what I would basically just repeat. I don't know if
2 you'd like the receiver himself to explain it to you. But it's
3 nothing more than what we've stated in our reply, where we
4 explained that these aren't two, like, dramatically different
5 numbers, there's not an error, and precisely what the issue is.

6 And one other thing is, just to be clear, the number
7 that's in the receiver's declaration, I wouldn't necessarily
8 call it the balance on the note because it doesn't -- I just
9 wanted to make sure we were clear. It does not include the
10 interest that's owed on the note. It's exclusively how much
11 investor money was received through the offer and sale of notes
12 and how much investor principal has not been returned, and that
13 CBSG maintains, which is a little different from the balance,
14 which would include what the investors were supposed to get
15 under the notes.

16 But, yeah, the difference between these two numbers, I
17 mean, it's really, it's apples -- sort of apples and oranges.
18 And I don't know if the Judge stated that you were going to
19 have Mr. Stumphauzer explain it, or if we can provide anything
20 further than that we wrote in our reply.

21 THE COURT: Well, let's start with a couple of things.
22 We're here for oral argument. I've read everything. Restating
23 it and telling me to look at your reply is not going to help
24 me. My concern is, what I saw in the reply essentially was you
25 didn't feel like any of these statements or that statement

1 didn't matter. I never got an actual explanation for what I
2 think is almost \$4 million. I mean, this is a legitimate
3 difference. This isn't, like, chump change. I have to get the
4 right number. So I'm trying to understand why you would, I
5 guess, have an issue with going over a more accurate snapshot.
6 And if there's something in the financials you want to point
7 out that's not captured in that, certainly, I need to
8 understand it. And maybe I had missed it.

9 Now, it's better to check with the receiver on that.
10 I'm happy to do it. I have him and his counsel here. But I
11 just was trying to understand, if we have the receivership data
12 -- and I want to take a step back for a second.

13 You are relying on the receiver's declaration for your
14 numbers. The receiver's declaration is rooted in the books and
15 records reviewed by the receiver. So it just stands to reason
16 that I should similarly be able to look at the receiver's work
17 and figure out the right number, not take the SEC's declaration
18 from the receiver and not look at the data that supports it.
19 And so that's why I felt compelled to go and look at this
20 different number, because there has been this representation
21 that it is the most accurate snapshot of that business
22 activity.

23 So is there -- can you explain to me maybe the
24 financial difference there, and that number -- I don't know if
25 your argument is it's more that interest calculation that is

1 not being captured, perhaps, and that's why the over statement
2 is different. But can you explain maybe in a little more
3 granular level what exactly is the reason why we have that 4
4 million difference?

5 MS. BERLIN: Certainly. Well, first we would seek
6 issue with -- I think Mr. Kolaya would tell you he's not an
7 accountant, and I don't think that he's done an analysis of
8 these two things from an accounting perspective to stage, or
9 for this Court to rely on, which is more reliable. And it
10 wasn't Mr. Stumphauzer who said it, it wasn't testimony at the
11 hearing, it was a response by the receiver's counsel.

12 But the numbers are based on two different things. So
13 the numbers in the receiver's declaration that we rely on,
14 those cite to and rely upon the defendants' own numbers that
15 are in the CBSG QuickBooks. So those are the numbers in the
16 QuickBooks. The SEC's expert witness and the defendant expert
17 witness relied on those same QuickBooks. We've had testimony
18 about the QuickBooks. We actually reconciled the QuickBooks to
19 the bank account records. That took about two years. And we
20 issued an expert report on that.

21 So the receiver's declaration is about the numbers that
22 are in the defendants' QuickBooks records that our expert
23 witness and theirs have both reviewed, reconciled, and relied
24 on completely for their expert reports. So those QuickBooks
25 records have been the evidence throughout this entire case and

1 throughout all of discovery.

2 After the close of discovery, Brad Sharpe, he was with
3 CSI, I'm not sure whether he's an accountant, but he issued
4 this report that we see at 1223-3. The numbers that he
5 identified have not been -- those are not consistent -- I mean,
6 if you look at both parties' expert reports, we all agree that
7 these QuickBooks records were the accurate numbers, and
8 reconciled them to the bank records with the promissory notes,
9 with the documents. Brad Sharpe came up with his own number, a
10 little bit different.

11 The defendant sought discovery concerning that. It was
12 denied. And we do not know -- we don't have his work product,
13 we don't know the basis, that came after the discovery period.
14 It has not been verified by any accountant or expert in this
15 case, by the defense or the SEC. It's from the individual at
16 CSI whose work has not even been checked by anyone.

17 Of course, the defendants point to it because he came
18 up with a different number. But the defendant, from the very
19 beginning of this case, even through their response, they're
20 attaching the expert report of Joe Glick, who relied on the
21 QuickBooks records which have been reconciled.

22 So that is our reason for relying on the QuickBooks
23 records, is because we have verified those. Defendants have.
24 We've taken testimony, depositions of experts, experts have
25 issued reports, they've been reconciled, we've produced all of

1 that work product versus something in a status report filed by
2 Mr. Sharpe. We have no idea where he got the numbers, whether
3 he reconciled them, whether he hired an accountant. But
4 they're different from the QuickBooks numbers.

5 THE COURT: Okay. Let me, just to kind of summarize, I
6 think the big question here is, we all know there's a
7 difference between the figures shown in the financial records
8 and stated in the receiver's report, and the date of this
9 expert witness report, and those in the Sharpe analysis, and
10 it's about 3.8 million.

11 I understand there's this risk of uncertainty as to
12 whether Sharpe is right or the defendants' financial records,
13 which have been summarized in the receiver's declaration and
14 Davis' report are right. That's been the argument you've
15 advanced. And I understand that.

16 But, I mean, when we talk about settling the question
17 with Sharpe, the SEC put Sharpe on this witness stand in the
18 Furman trial and utilized Sharpe. Sharpe has been advanced as
19 a reliable analysis for a while. And so I'm a little troubled
20 that suddenly now we can use the receiver number that, in your
21 view, has been reconciled and is better and just so happens to
22 generate a bigger disgorgement amount. And I can't look at or
23 I shouldn't trust the underlying data from Sharpe that has been
24 relied upon, in my view, in other context because suddenly now
25 he's being called into question or at least the diligence is

1 being called into question.

2 The challenge I'm having is, I have receiver's counsel
3 in a hearing acknowledging that it's the best snapshot of the
4 financial situation of Par during those operative years of 2012
5 through 2020.

6 So I guess, Mr. Kolaya, I'll turn to you. Maybe you
7 can tell me why -- and it is certainly the declaration of
8 Mr. Stumphauzer that is the basis for the SEC's number. But
9 how do I reconcile that with what you guys have advanced as the
10 best or the most updated snapshot of what's going on in the
11 company? I think we can all agree it's a difference of 3.8
12 million or thereabouts. I have to feel comfortable that I'm
13 not overstating disgorgement, right? I mean, that's what this
14 is about.

15 So how do I square those up, or does the receiver have
16 a point of view as to one being more accurate than the other?
17 What do you think about that?

18 MR. KOLAYA: Your Honor, Timothy Kolaya on behalf of
19 the receiver, Ryan Stumphauzer.

20 The receiver doesn't take a position about which is the
21 best number or which number the Court should use. From our
22 perspective, the differences are that the declaration attached
23 to the SEC's motion referred to the QuickBooks accounts.
24 Beyond that, what the receiver has done is looked at -- and we
25 looked specifically -- we looked at some bank statements and a

1 cash account. And looking at those numbers, there were some
2 variances of numbers that did not appear in the QuickBooks.

3 THE COURT: Okay. And that's --

4 MR. KOLAYA: So we simply looked at additional
5 transactions which we did not see as being recorded inside the
6 QuickBooks.

7 THE COURT: Right.

8 MR. KOLAYA: And these are numbers that were on bank
9 statements and cash accounts that we thought appeared to be
10 investor activity that should be recorded in the QuickBooks,
11 but had not been done so by prior management.

12 THE COURT: Again, I know you guys are here to assist
13 me and you're doing collections, and the SEC has made it very
14 clear they do not believe that the receiver has a role to play
15 in terms of presenting argument. And I agree, it's more to
16 assist the Court. But you would then state that the number
17 that I'm looking at is one that captures other financial
18 activity that you all observed in your review of books and
19 records not otherwise captured in the QuickBooks records.

20 MR. KOLAYA: Correct. These are other transactions,
21 other statements we looked at, and other accounts within the
22 records that were not necessarily reflected on the investor
23 activity portion of the QuickBooks accounts.

24 THE COURT: Right.

25 MR. KOLAYA: And for DSI's review and analysis of the

1 bank records and these other accounts, they made the decision
2 that these are transactions that appear to be attributable to
3 investor activity.

4 THE COURT: Right.

5 MR. KOLAYA: Which ultimately resulted in a lower net
6 investor activity number.

7 THE COURT: Right.

8 MR. KOLAYA: And also to clarify from our perspective,
9 from DSI's perspective, we did not look at, like Ms. Berlin has
10 indicated, any interest. This is a pure cash in, cash out,
11 without determining the cash out, whether it was principal or
12 interest. So this is purely a net investor activity number
13 looking from, again, QuickBooks, with additional data and
14 additional reconciliation of information that we saw that we
15 believed appeared to be attributable to that investor activity.

16 THE COURT: But to your point, that interest issue is
17 the same for both numbers. It's just one number captures more
18 financial activity attributable to investor activity than the
19 other. I mean, that's all it really is, right?

20 MR. KOLAYA: That's correct. Yes, Your Honor.

21 THE COURT: All right. Thank you for that, Mr. Kolaya.

22 So I guess I'll ask the defense team, unless I'm
23 missing something, what I'm hearing is the number that they
24 have from DSI is more accurate and captures more business
25 activity than the number that the SEC's giving me. And I

1 guess, Mr. Kaplan, and I don't want to simplify it, but I think
2 that's -- and again, the receiver's right. They're not saying
3 which one I should pick. But certainly, one captures a more
4 accurate depiction of what was going on in those years than a
5 larger, more broad sweeping sum of money in, money out, in the
6 declaration, right?

7 MR. KAPLAN: Yes, Your Honor. And we can maybe drill
8 down just a little bit further.

9 THE COURT: Please, yeah.

10 MR. KAPLAN: The difference between Mr. Sharpe's
11 figures and the unaltered QuickBooks figures is that Mr. Sharpe
12 observed at least one account that for whatever reason wasn't
13 included in the QuickBooks. Mr. Sharpe was able to identify
14 certain returned wires that did not make it into the QuickBooks
15 analysis. And as you go through this ridiculous painstaking
16 process of finding 50, 70 transactions over the course of
17 3.8 million transactions over eight years, it adds up. And
18 that's the basis.

19 THE COURT: That's what I thought. But I just want to
20 make sure that I'm not missing anything. And I understand the
21 SEC's position, but it was important for me to make sure that I
22 wasn't misreading, for lack of a better word, the
23 pre-receivership cast summary so that I could have a better
24 understanding.

25 I think that at a very baseline level, the reason why

1 I'm raising this as my first question goes back to the
2 analytical framework under *Liu*. And I think at this point it
3 would be important for the Court to note that I am very much
4 aware that *Liu* has been, for lack of a better word, codified
5 when we had the National Defense Authorization Act of 2021. I
6 do know that after *Liu*, it made very clear that this securities
7 remedy is now part and parcel of what the SEC can do.

8 But I have to repeat that I don't believe that
9 codifying it or putting it in the statute changes the equitable
10 requirements and analysis that *Liu* set forth pretty clearly.
11 And by that, I mean that I have to believe that it would be
12 inherently punitive to use less accurate records that would
13 disgorge more than the ill-gotten gains of McElhone and
14 LaForte. I mean, that is exactly what *Liu* says we cannot do.
15 So the reason why this matters to me is because painting with a
16 broad brush and possibly requiring disgorgement of sums that
17 are overstated would really not capture the financial picture
18 of Par Funding as best as we have it, and could lead the Court
19 to issue an order that is just inherently punitive instead of
20 focusing on the status quo requirement to put the investors
21 where they were before this whole thing started, which is what
22 *Liu* says and what the case law says. And I think the fact that
23 the SEC has the blessing statutorily to engage in disgorgement
24 changes the -- you know, I would almost call them the roadmap,
25 or maybe even kind of the guardrails, really, is what it is.

1 The guardrails that the case law said we need to look at.
2 That's why I asked this question, just so my thinking is clear
3 to everyone.

4 Now, let me move on to some questions I have regarding
5 the interplay with McElhone, LaForte, and Vagnozzi.

6 So the SEC has represented that all disbursements made
7 to agent funds and, therefore, Vagnozzi, were included in the
8 \$300,108,117 of disbursements that the SEC initially deducted
9 from the disgorgement requested from McElhone and LaForte. And
10 I saw that in the SEC's motion. I think it's at page 30.
11 That's ECF 1252, specifically, Footnote 3.

12 First question, really, Mr. Kolaya, is probably where
13 the receiver can help me: Do you know, are the disbursements
14 to agent funds included in the disbursement figure on the PF
15 cash summary? Do you know that?

16 So the PF cash summary that I'm looking at -- now that
17 I've gone through that first part where I'm living in the world
18 of the pre-receivership cash summary that you had imbedded in
19 your May quarterly status report, I'm just wondering if you
20 have any knowledge in that document about whether disbursements
21 to agent funds were included in the disbursement figure. You
22 may know, you may not know. And I know that some of these
23 questions we may not have the answers to.

24 MR. KOLAYA: Your Honor, I've been fairly confident the
25 answer is yes. But we can verify that precise question for

1 you.

2 THE COURT: Okay.

3 MR. KOLAYA: And I expect to get back to you before the
4 end of the hearing.

5 THE COURT: Okay. And that's fine. That's what I
6 thought, but I needed to frame that first.

7 MS. JOHNSON: Your Honor?

8 THE COURT: Yes.

9 MS. JOHNSON: I just want to reiterate our standing
10 objection to having the receiver testify as to --

11 THE COURT: Sure. All right. And that's noted. I
12 understand.

13 MR. SNYDER: Your Honor, Furman also takes the same
14 position in terms of us having requested discovery from the
15 receiver and having been denied the opportunity to take it as
16 it relates to the pending request to supplement the record.

17 THE COURT: Okay. And that's understood, as well. I
18 think we all need to recognize -- given in my view, at least,
19 the equitable nature of these proceedings, and the fact that
20 the Court is being tasked with divining and figuring out what
21 is the proper amount of ill-gotten gains, it stands to reason
22 that I can rely on all of the discovery and diligence and work
23 that has been done by the receiver, and that I'm not asking for
24 new evidence today; I'm not admitting new evidence today; I'm
25 conducting an evidentiary hearing, certainly with the existing

1 submissions from both sides. I don't believe there's a
2 problem. And certainly, I would be really surprised if case
3 law would look down, given the nature of the equity of this
4 proceeding, look down upon a District Court's effort to make
5 sure that they're not overly penalizing an individual in a
6 civil proceeding. And that's really why I'm doing this today.
7 I just think it's necessary, or else I will be flying blind on
8 some of these numbers.

9 So understanding that objection and overruling it, let
10 me move to the next part of this question regarding the agent
11 funds: What did the SEC deduct that is specifically related to
12 Vagnozzi's agent funds? And what I mean by that is, did the
13 SEC deduct moneys paid to Vagnozzi for consulting expenses?

14 Even more a finer point on that, specifically payments
15 made to A Better Financial Plan for consulting. I note that
16 there are \$1.9 million in payments made to A Better Financial
17 Plan for consulting.

18 So I don't know if maybe the SEC can let me know --
19 getting down to the point here is, I want to make sure that
20 McElhone and LaForte are not being held responsible for
21 payments made to Vagnozzi when Vagnozzi is subject to
22 disgorgement. This is the double counting problem I've been
23 struggling with for the last several weeks.

24 Do you know, Ms. Berlin? Has that been adjusted, or
25 can you give me some guidance on that?

1 Let me unmute you. I think I have to click the button.

2 Go ahead.

3 MS. BERLIN: Thank you, Your Honor.

4 Yes, I have answers for you on that and the question

5 you asked Mr. Kolaya. I just wanted to -- if I could just

6 briefly just state for the record, so we can preserve this.

7 Under *Liu*, the standard is that we present evidence.

8 We provided a sworn declaration that reflects the QuickBooks

9 records that were reviewed and approved and accepted and

10 utilized by the defendants' expert and the SEC's expert. Those

11 analogies took two years to do by CPAs at the top firms in

12 Miami. Instead of relying on that sworn testimony and all of

13 that expert work, the Court is suited to rely on a proffer from

14 a non accountant lawyer for the receiver, unsworn testimony, or

15 proffer, by a non accountant, that he, in his personal opinion,

16 he thinks that Brad Sharpe, a non CPA, that his work is better

17 than the accountants for both parties.

18 We've never seen Mr. Sharpe's work. Mr. Kolaya is not

19 an accountant. He wasn't sworn. He's not an expert. And we

20 object to all of that.

21 And the standard under *Liu* is that the defendants have

22 the burden of presenting clear evidence, which there is none,

23 and that the Court should err on the side against the

24 defendant. Because what the issue here is, what do the

25 investors get back. So by finding for the defendants, which is

1 contrary to the way it's supposed to go with the presumption,
2 the Court is actually finding against the investors.

3 Now, on the issue --

4 THE COURT: Let me pause there real quick because I
5 wanted to ask you a question on that.

6 I understand that the SEC's burden under *Liu* and to put
7 forth evidence doesn't have to obviously be exact. Certainly,
8 when it comes to ill-gotten gains, the case law from *Calvo* and
9 some other opinions tells us that it needs to be a reasonable
10 approximation of a defendant's ill-gotten gains. I guess we
11 continuously refer to all of the auditing and all of the work
12 done.

13 Am I correct that the only main document that you have
14 provided for me to find the initial amount for McElhone and
15 LaForte is the declaration? Meaning, it is just the two-page
16 declaration that says, in two lines: One, we raised 550 odd
17 million. And then another one, we repaid 300 million. And
18 that's it. I mean, I know that you are continuously pointing
19 to the fact that this is a product of diligence and auditing
20 and records. And I have gone back, and I have to confess, I've
21 looked at district courts all over the country, and opinions,
22 and what I have seen from the SEC in many of them is a lot more
23 detailed than what I got here. Many of them have a much more
24 fulsome breakdown, so that if there's an affidavit or
25 declaration, it is accompanied by financial backup. And we

1 have breakdowns, or at least some numbers are pointed to
2 specifically in the record.

3 I want to make sure that I'm not misstating anything.
4 Because I went back again the other day, and I looked to see if
5 Docket Entry 1214 came with any other exhibits or any other
6 documents.

7 Am I correct that the only thing that I have is one
8 two-page declaration with two numbers, and no other
9 attachments, and no other exhibits? I want to make sure. You
10 may tell me that's enough, and we may disagree. But I just
11 want to make sure that you're not pointing me to something else
12 in your papers that you wanted me to go look at for backup.

13 Am I right, that that's not there?

14 I think you're muted again. I'm sorry. I hope you
15 heard my question. Go ahead.

16 MS. BERLIN: I apologize. I'm so sorry, Your Honor.

17 Yes, I heard the question. Mr. Stumphauzer, the expert
18 reports summarized and reconciled the QuickBooks.

19 So for the SEC, we have filed that. It's 77 -- it's
20 ECF No. 774-1. So those numbers from the SEC's expert report,
21 Melissa Davis, from Kapila Mukamal, the defendant, unlike
22 Mr. Sharpe, in his recent analysis, or Mr. Kolaya, there was
23 discovery concerning this and concerning the QuickBooks
24 records, which were created by the defendants.

25 So to answer your first question that you asked

1 Mr. Kolaya, I was going to direct you to this document, which
2 we cited in our reply. And I can show you in this document
3 where it breaks down who those agent funds are through
4 Ms. Davis' exhibit.

5 We utilized Mr. Stumphauzer's summary declaration,
6 because up until Mr. Sharpe filed that report, the numbers were
7 not in dispute about how much was raised and how much was
8 returned. So rather than provide to the Court a 533-page
9 expert report -- and I apologize. We provided the summary from
10 the receiver who summarized the QuickBooks. Then you have the
11 SEC's expert report, which is 774-1, which is a 553-page expert
12 report that explains how Kapila Mukamal reconciled the
13 defendants' QuickBooks records to all of the bank accounts.

14 And also, in these exhibits, which I'll show you, Your
15 Honor, because it will answer, I think, your questions about
16 those agent funds. In the exhibits to 774-1, you can see the
17 breakdown of the expenditures. So when we talk about, you
18 know, investors and agent funds, who are we really talking
19 about, you can see exactly who those are in this document,
20 774-1.

21 THE COURT: Can I ask you, unless I'm -- and maybe the
22 defense team and the receiver could tell me. I don't remember
23 your motion citing 774-1 anywhere. It may be in your reply,
24 but I don't recall -- I know you did a summary declaration, but
25 I have to confess, I think it would have been wiser, or at

1 least supporting the SEC's position, if the motion had directed
2 me to actual underlying expert report analysis. I have just
3 this blanket declaration. I'm not doubting those numbers are
4 derived from expert analysis. But unless I'm missing
5 something, I don't recall the motion directing me or, quite
6 frankly, giving me any guidance to go into the depths of the
7 expert report 774 to support the declaration. It simply says
8 this is the declaration, and this is where we start. It's
9 difficult, as you can imagine, for the Court to take just that
10 and not feel like I need to make a deeper dive.

11 So am I correct? And maybe the reply -- I know there's
12 a mention in the reply, it appears, where you talk about
13 Ms. Davis, and that's where you say that they could not have
14 paid investors without the inflow of more investor money. I
15 think that was at paragraph 85. But again, that's in the
16 reply. I guess the reply is when the SEC became aware that
17 they should be advancing actual numbers and figures in an
18 expert report, when they saw all of the arguments from the
19 defense camp. But, again, the reply is not the operative
20 filing.

21 So I was somewhat thrown off when the motion kept
22 telling me, go straight to the delta of 250 million by looking
23 at two lines in a declaration. And I have to tell you, it's a
24 buried reference to Ms. Davis' report in the reply, it's not in
25 the main part of the argument, which is partly why I had to set

1 this today, because I didn't understand that you guys were
2 really going into a deeper position on 774-1.

3 So I take it today, from what you're telling me, is
4 that you're basing these numbers -- it's less about just a
5 declaration from the receiver, but you're really actually
6 putting these numbers forward from the expert report of
7 Ms. Davis. Is that really where it comes from?

8 MS. BERLIN: Yes. And I apologize, Your Honor, because
9 I will tell you, I -- when the Brad Sharpe -- I guess he did
10 his own accounting analysis. Again, I'm not sure if he did
11 [audio distortion] or how those numbers were derived.

12 But I did not at that time pick up on that line in his
13 report that it was 3 million less than what the parties had
14 been saying for a couple of years. So when we utilized
15 Mr. Stumphauzer's declaration, summarizing the defendants' own
16 QuickBooks records that they themselves have relied on for two
17 years, I did not realize -- I thought this was a -- I didn't
18 realize this was an issue in dispute until I saw the response
19 from the defendants where they're basically saying, forget
20 about our own QuickBooks records, and Joe Glick and Melissa
21 Davis, let's look at this line item on Brad Sharpe.

22 So I just had not picked up on Mr. Sharpe's line items
23 in that particular report until I saw it. And I did not
24 realize that the number was in dispute. Because if you look
25 back, we've all been relying on these QuickBooks records for

1 two years. And Mr. Sharpe's prior reconciliation was the same
2 as Ms. Davis's. They both, you know, had early on reconciled.

3 So I apologize --

4 THE COURT: Let me just say this: Is it safe to say
5 then that you -- and again, I understand you didn't think it
6 was in dispute. You advanced a conclusory assertion by way of
7 declaration on the Delta because the SEC at no point thought
8 that we were operating under the same universe. So you did not
9 feel there would be a need in your motion to explain why 774-1,
10 which is not cited in your motion, was the linchpin for this
11 Delta number that would be a starting point for McElhone and
12 LaForte. Because up until the filing, or up until the response
13 to that motion, you believed everyone was on the same page
14 until the Court inherited then the defense response with a new
15 number to use as a comparison. And you can imagine my
16 position, which I will urge you to do, is realize that I'm
17 being given your argument without that much support, because
18 you didn't think you needed it -- which I understand. But then
19 I'm confronted with a number that the receiver at a proceeding
20 acknowledges is a great snapshot of the business from 2012 to
21 2020. And since we're all working off receiver data, it just
22 seemed natural for the Court to ask this question, because I'm
23 being given two receiver based numbers.

24 I understand your QuickBooks number you believe is
25 reconciled better through accounting expertise. I completely

1 understand that now. But you can understand why I had this
2 initial concern, I hope, because there's just nothing really
3 there to draw out that there was a conflict on this.

4 So you're telling me that up until the response, the
5 SEC assumed that this was pretty much a perfunctory opening
6 number, right?

7 MS. BERLIN: I mean, this is a simple issue. How much
8 was raised from investors through the promissory notes and how
9 much did they pay back in principal. We have the QuickBooks
10 records of the defendant. All parties have had them for two
11 years. We've done extended discovery. And Mr. Stumphauzer's
12 declaration is a summary of tens of thousands of pages of
13 QuickBooks records.

14 But these are not like new numbers. In fact, I haven't
15 even looked at the defendants' own expert, Mr. Glick, to see
16 how far off his numbers were. But it never occurred to us that
17 the -- to me, at least. I mean, had I known that the Court was
18 going to see a 553-page reconciliation of the bank records, I
19 would have provided it. I would have cited to it. But I
20 really thought that this was a summary from the receiver under
21 oath summarizing the business records figure would be
22 sufficient. And I recognize, sitting here now, that I should
23 have cited to the full expert report, and the Court could have
24 chosen not to read it and decided that the conclusion was
25 enough. But I should have at least cited it for the Court.

1 And I apologize that I didn't.

2 THE COURT: Yeah. I think if this -- the last years of
3 litigation and this case have shown us anything, I think it's
4 better to err on the side of caution and give us backup
5 whenever possible. This case, I think, is not the type of
6 matter where we want to go with a conclusory assertion on
7 anything. Everything needs backup. It at least puts me in a
8 better spot so that I can come up with a good opening number.
9 Because you know, as well as I, that that kind of sets the
10 stage for McElhone and LaForte. I have to work backwards with
11 a number I can trust.

12 So, certainly, I understand your position now, but I
13 was unclear on, when I had this split of opinion, which way to
14 go.

15 So, again, when we come out of today's hearing, the
16 Court will take all of this under advisement. But it is
17 important, I think -- certainly, I have spent a lot of time
18 going through the defendants' over 1,000 pages of supplemental
19 documentation. And so, certainly, I do not imagine that a
20 disgorgement order would really permit a court to try to do a
21 reasonable approximation without spending the time necessary to
22 hang your hat on numbers that they can feel comfortable with.
23 That's why I have these questions.

24 But I understand your position on this.

25 And I think, going back to where I left off, you have

1 assured me, I think, today that the SEC has disgorged, I
2 believe, from Vagnozzi, the consulting payments made to A
3 Better Financial Plan. I think you said that that's correct.

4 And again, the reason why I mention this is because if
5 the SEC has considered the consulting payments to A Better
6 Financial Plan in Vagnozzi's disgorgement calculation, then
7 that amount should be deducted from McElhone and LaForte's
8 total amount of disgorgement due. That's why I'm asking.
9 Maybe it's captured in your number. Am I right that that's not
10 being double counted?

11 MS. BERLIN: Yes, Your Honor. If I could share my
12 screen, I have a demonstrative aid. I just -- attached to the
13 defendants' response are, like, four different expert analyses
14 with, like, various numbers.

15 So we actually have, like, more than just two sets of
16 numbers going on. But I can get into that a little bit more,
17 if the Court wants. But if I could share my screen, I made a
18 demonstrative aid so I could sort of walk through the double
19 counting question.

20 THE COURT: Yeah, go ahead. I'll allow you to share
21 the screen.

22 Can you guys see the screen?

23 MR. KAPLAN: Yes, Your Honor.

24 THE COURT: Let's share the screen. Let me see if I
25 have to give you permission. I may have to allow you. I think

1 you do have the ability to do it. Let me know if something's
2 not letting you do it.

3 MS. BERLIN: Okay. Thank you.

4 THE COURT: Is it working for you?

5 MS. BERLIN: It's not. It's just not showing the --
6 usually, you would be able to see sort of the, you know, what's
7 going to open.

8 THE COURT: We're checking on our end to see if there's
9 something we can do to let you share the screen.

10 MS. BERLIN: Thank you so much.

11 Another option is, if the defendants have a computer
12 hooked up to your visual, I could just email them the document,
13 if that's faster and easier.

14 THE COURT: Yeah. I think you are -- I mean, you could
15 also send it to the Court, and the Court is able to share the
16 screen. So perhaps the easiest thing to do is email it to the
17 Ruiz email, and then I can attempt to just open it, and I can
18 share it -- because I can see that I can share my screen
19 without a problem.

20 MS. BERLIN: Just remind me of the email address.

21 THE COURT: Yes. It's ruiz@flsd.uscourts.gov.

22 I don't know what's happening because I do have it here
23 that you are able to share. So that's odd, but I can do it
24 this way, that's fine.

25 MS. BERLIN: Okay. Thank you, Your Honor. So when the

1 Court receives it, it's the very first slide. And we can walk
2 through the double counting, and I can explain sort of the
3 evidence as well as, you know, where these were seen from.

4 (Discussion was held off the record.)

5 THE COURT: Can everybody see that?

6 MR. KAPLAN: Yes.

7 THE COURT: Thank you. So I'm going to go ahead now
8 and open this up, and we can all follow along. Obviously, I'm
9 controlling it, Ms. Berlin, so just tell me, I mean, if you
10 want me to scroll down, let me know.

11 But I'll turn it over to you now that everyone can see
12 the screen. It states there is no double counting. Go ahead.

13 MS. BERLIN: Thank you so much.

14 At the top, I just showed you the email from McElhone
15 and LaForte, at this starting point was the amount that was
16 raised from investors. And then down the left side, you see
17 the minuses.

18 So the first one is the amount paid to investors and
19 agent funds, which that is exactly what Mr. Stumphauzer's
20 declaration states. So you can also see, like, where we're
21 getting those numbers from. Remember, there are 40 or so
22 agents. And we also have individual investors in Par Funding,
23 a handful of those. And so that figure is both the agent
24 funds, because they are investors, right? They're the ones
25 purchasing these promissory notes from Par Funding, as well as

1 individual investors.

2 And so if you look at any of the numbers, like, whether
3 you look at the receiver's numbers, or you look at the SEC's
4 expert, you will see that the amounts transferred from Par
5 Funding to Mr. Vagnozzi's entities -- remember, he has a whole
6 series of them -- it's far more than the amount of his
7 settlement. Because he settled to a figure, and it's a non
8 public basis. But it's, you know, I think it was around 6
9 million for his disgorgement. And if you look at the agent
10 funds, every single distribution made to an agent fund, whether
11 it was any one of, I think there were, like, seven or eight for
12 Mr. Vagnozzi that received money, as well as Mr. Furman and his
13 agent funds. The Judge had mentioned A.G. Morgan, who the SEC
14 recently filed a case against; they're included. Every single
15 agent fund.

16 So the amount deducted for Mr. Vagnozzi's agent funds
17 is way in excess of his disgorgement. His disgorgement is 6
18 million. And if you take a look at any of the expert reports
19 to see the number that went to ABFP -- so Mr. Glick's expert
20 reports are at 1330, ECF-1330. The SEC's is 774.

21 So just to give you a sense, so everyone sees this
22 number, if we go to 774 and we want to see how much the ABFP
23 income funds, meaning Mr. Vagnozzi, received, that's on page 8.
24 And that's PDF page 8, Your Honor.

25 THE COURT: Okay. I'm going to -- I'll scroll down

1 here. Let me know which one.

2 MS. BERLIN: It's not going to be -- if you go back up
3 to the first page, I was just going to cite to -- tell the
4 Court and tell everyone, and the defendants, where this is
5 because it's not a figure that they can see that.

6 Mr. Vagnozzi, in 774-1, we list the amount that his
7 agent funds all received. And it's laid out there in a nice
8 little chart. It's in excess of, you know -- I don't know --
9 probably more than -- definitely more than 40 million. I'm
10 looking at it right now. All of that was deducted. So it's
11 not only the amount Mr. Vagnozzi disgorged, which is a smaller
12 subset. That's not what we look at. We look at how much did
13 Par Funding distribute to any of the agent funds, including
14 Mr. Vagnozzi. All of that was deducted. Every single agent
15 fund payment was deducted.

16 So if we look at the document that the Court has up, if
17 the defendants or the Court want to confirm this, number one,
18 it's in the receiver's sworn declaration. Number two, it's in
19 the QuickBooks that all parties have. Number three, it is in
20 ECF 774-1. The defendant took our expert's testimony. Our
21 numbers are not different on this. They don't want just
22 Mr. Vagnozzi's disgorgement number deducted, Your Honor. It
23 should be the full amount that McElhone and LaForte no longer
24 hold and that they turned over to him. So all of that was
25 taken out.

1 In addition, the number that's in Mr. Stumphauzer's
2 report, in the expert's report, also deducts the amount that
3 was paid to Mr. Cole through his entities. And it also deducts
4 the amount -- this one does deduct the amount that is in
5 Mr. Abbonizio's disgorgement order. These other payments are
6 through the agent funds, so they're all included.

7 But the defendants have not been able to identify --
8 and we explain this in our motion, upfront, that our number
9 includes not only payments to the investors and agent funds,
10 but the disgorgement for Vagnozzi, Abbonizio, for Cole. Those
11 are all out. And our motion lays that out clearly, we cite to
12 the evidence. They argued it. We pointed them back to our
13 motion and the evidence there.

14 But I was hoping that this sort of demonstrative aid
15 could help the defendants and the Court understand everything
16 that's been deducted.

17 THE COURT: I want the defense to weigh in on this.
18 You know, I'd like to think that I'm somewhat of an intelligent
19 person, but I've got to believe that the defense camp and
20 myself are looking at this and all of these references to 774-1
21 wondering where is any of this in your pleadings. I literally
22 am looking at this and saying I have been grasping at straws
23 for a month because the pleadings are so light on evidentiary
24 support.

25 You're come in here today and pointing me to all of

1 these records. You have one passing reference to Exhibit 19.
2 I haven't seen an SEC motion or order around the country on
3 disgorgement that doesn't go into the very nitty-gritty detail.
4 These numbers cannot be painted with a broad brush. I would
5 have loved to have had this demonstrative attached or imbedded
6 in your motion. I would have loved to have had 774-1 broken
7 down specifically. But respectfully for you to say that your
8 motion lays this out and it's obvious, other than just
9 conclusory telling me what numbers I should take to the bank,
10 there is no pointing or connecting to underlying evidence.
11 It's in the record, but I needed the SEC to show me where it
12 is. I cannot go through this like a pig searching through
13 truffles and try to figure out where in this record can I get
14 this support. Certainly, you have it there. But I think, most
15 respectfully -- and I'm going to hear from the defense in
16 response -- the motion does not go into 774 enough for me to
17 make an intelligent decision about some of these
18 determinations.

19 I have to tell you, this whole breakdown, other than
20 generically saying we backed out agent funds, I can't just
21 simply hang my hat on that. I got defense telling me we're not
22 sure either. So whoever, Mr. Ferguson or Mr. Kaplan --

23 MR. FERGUSON: Let me just make --

24 THE COURT: I want to make sure I'm not in a parallel
25 universe, guys. I'm looking at this now as if I've sat on this

1 motion for two months, and this was plain as day. It was not
2 until the first time today am I seeing something that would
3 give me that level of confidence in their positions. What's --

4 MR. FERGUSON: Your Honor, you're clearly trying to get
5 this right. I'm listening to an opponent who is saying things
6 like if you rule for the defense, you're ruling against the
7 investors, and talking about interest, and these are red
8 herrings, when the interest wasn't even in the numbers we're
9 talking about. I'm looking at this visual aid.

10 I can understand you want more detail. But I don't
11 even think this visual aid would have helped you. It probably
12 would have just confused you further. This 330,000 number,
13 that has to be million. We just heard from counsel that
14 Vagnozzi got 40 million, and you're looking at 330,000 here.
15 That can't be right. And it's not supported by anything. I
16 just --

17 THE COURT: Mr. Kaplan, your response. And that may
18 also be a typo. I assumed it was also millions.

19 MR. KAPLAN: I assumed it was, as well.

20 THE COURT: Right.

21 MR. KAPLAN: Let's assume it is.

22 So the starting point, the commission would ask you to
23 accept, is the \$550 million number that's the top line in blue.
24 And then we get -- I'm bad with colors -- an orange line, 330
25 million.

1 Wait a minute. You spent 15 minutes earlier today
2 looking to establish the basis of a discrepancy between 300
3 million, the SEC's number, and 296 million, I think, the
4 defense's number. Where is 330 million coming from?

5 So it's not the typo that's the problem. It's the
6 concept and it's the analysis.

7 THE COURT: Well, I guess my challenge is, I'm being
8 told by the SEC that there is expert testimony in support for
9 these numbers. And I'm not doubting that Ms. Berlin has a
10 good-faith basis to request them. What I'm saying is, from
11 just a matter of practice and procedure, for the Court to look
12 at this motion and feel that there's enough in there of backup,
13 of evidentiary backup for me to feel comfortable, this is not
14 like I'm asking to disgorge a trivial sum. I cannot -- it
15 would be -- really, it would just be a complete abdication of
16 my responsibility under the case law to just look at what the
17 SEC's given to me in a declaration and rubber stamp it. I
18 cannot do that. No matter how good the data is, if it's not
19 cited in support of these numbers, I am finding myself at dead
20 ends on where these things are coming from.

21 And I understand the SEC is saying there are expert
22 report sections in 774-1 that would support each and every one
23 of these.

24 I guess, Mr. Kaplan, my question back to you is you're
25 hearing here today, going back to my original question, right?

1 MR. KAPLAN: Right.

2 THE COURT: That I'm being told that all of the ABFP
3 and Vagnozzi disgorgement is getting pulled out of McElhone and
4 LaForte's -- again, I'd have to look at what the backup is for
5 this. But according to this graphic, assuming it's -- this
6 number is not a typo, it is saying there that all agent funds,
7 including Vagnozzi, it's all coming out. Again, the consulting
8 payments are not the same thing. That's another problem.

9 MR. KAPLAN: Right.

10 THE COURT: But what's your sense of that argument that
11 it has been taken out of McElhone and LaForte's number?

12 MR. KAPLAN: So I don't even think -- I don't even
13 think that's the issue. We've now drilled down is how much
14 came in from investors, how much got paid back.

15 So in our brief, Document 1329, on page 15,
16 coincidentally at Footnote 15, we cite you to this Court's
17 judgment that came about as a result of a settlement where
18 Mr. Vagnozzi agreed to disgorge a little more than
19 \$4.5 million. That was earlier this year. That hasn't been
20 counted anywhere. If that money is coming in, I assume it
21 will, it ought to be used to pay investors and should be backed
22 off the amount of our disgorgement. And that's for
23 Mr. Vagnozzi personally, in his individual capacity. Exhibit 6
24 to our brief is a schedule of all the third party consulting
25 fees.

1 So there was an entity called A Better Financial Plan.
2 And separately, apart from this disgorgement, there's a little
3 more than \$1.9 million paid to that company, which we feel
4 we're entitled to deduct from the amount we could disgorge.

5 THE COURT: Let me ask this, Ms. Berlin. Looking at
6 this chart again, maybe you want to direct me. Is there any
7 evidence in the expert report, 774-1, or maybe some other
8 evidence in the record, that would clearly show that the SEC
9 has attributed consulting payments to Mr. Vagnozzi in his
10 disgorgement as opposed to lumping them into the disgorgement
11 amount for McElhone and LaForte?

12 Is there -- not the chart, but is there something you
13 would say, Your Honor, you can look at this piece of evidence
14 and clearly see that when we negotiated and agreed to
15 Vagnozzi's disgorgement, his consulting fees were included in
16 that. ABFP fees were in that. And, therefore, we are not
17 imbedding those in the amount of disgorgement for McElhone and
18 LaForte.

19 Do we have somewhere in the record where that's
20 exemplified or clear? Maybe one of the pages in the expert
21 report? And I think it could be in one of the sections of the
22 report. Maybe it is. I just want to make sure.

23 MS. BERLIN: So there's a fundamental problem. Just to
24 back up for a second. Hopefully, this will answer the
25 question.

1 So, first of all, what we're showing you is not a deep
2 complicated analysis. What took two years was that we actually
3 checked the bank records to the QuickBooks to make sure the
4 QuickBooks were correct. That's called a reconciliation.

5 After those are confirmed as accurate, it's literally
6 going to the QuickBooks and printing a report, which is what
7 Mr. Stumphauzer did. This is not an accounting analysis. It
8 takes two years to reconcile, but all the parties did.

9 So for this kind of number, we're not, you know, filing
10 2,000 pages of QuickBooks. We used the receiver to say the
11 QuickBooks records, which have been reconciled and are correct,
12 they state the figure. So that's why -- you know, I realize
13 now that Your Honor would like to actually do a deep dive and
14 check the accounting yourself. And in the future, we will -- I
15 will pass it along.

16 THE COURT: Listen, I have to interrupt you. Pass it?
17 What did you expect me to do? I'm not going to be a potted
18 plant. I have to do my job. I cannot imagine the SEC just
19 trots out generic conclusory statements and judges take them as
20 gospel. I have an independent obligation. This is an
21 equitable proceeding. It's not unique to me. It's not
22 unorthodox. It's my job, correct? I mean, you would agree
23 with me that a motion, typically, would have record citation
24 and support for propositions of law. I'm wondering why I don't
25 have a pincite to an expert report after every number being

1 requested, especially in a case like this where you know, as
2 well as I, for the last two years, that every number the SEC
3 has advanced has been challenged by the defense. We had a
4 trial with one defendant. This is not a bunch of defendants
5 going quietly along with every SEC number.

6 So if there's ever a case where I expected there to be
7 a fulsome deep dive to help me get the right numbers, it would
8 be this one. I mean, I think all of them -- I think there
9 shouldn't be a single case that the SEC prosecutes nationally
10 where they don't look at expert evidence to support their
11 numbers. That's my take on it. You asked me to take money
12 away from people and give it to the right folks, I have to have
13 evidentiary support for that.

14 But I take somewhat of an offense to the fact that you
15 believe that this is asking more of the SEC's burden than what
16 they must carry. Reasonable --

17 MS. BERLIN: No, I --

18 THE COURT: Hold on a minute. Hold on a minute.

19 Reasonable approximations and estimates, which is your
20 burden, does not mean taking shortcuts. It does not mean
21 giving me a motion that is substandard. It requires you to
22 point me to evidence in the record to support your
23 calculations.

24 Today, for the first time, I am hearing where you are
25 drawing these numbers from. And, yes, I would agree that there

1 is support for them. But, no, if I don't have it attached or
2 cited, you cannot expect me to simply look at those numbers,
3 especially in the face of strong opposition from the defense,
4 and just ignore their countervailing points and accept the
5 SEC's version without backup.

6 I mean, you had it in the record. This wasn't like it
7 required more. But it had to be cited in the motion. And
8 that's why I have all these gaps and these questions.

9 So go back -- you were saying -- to the point where you
10 said that you can show me record evidence regarding, for
11 example, the way in which you attributed consulting fees and
12 disgorgement from Vagnozzi to make sure it doesn't get
13 attributed to McElhone and LaForte. I want to know, because
14 I'm writing these things down, and I can go back now and take a
15 look at where in the 533 pages I can find what I need. And I
16 think -- I'm looking at it here. Maybe page 8 is one of them
17 that I could have looked at, but I wasn't directed to it.

18 Where would you have me look to avoid some of the
19 double counting, for example, with Vagnozzi? What do you think
20 about that? Because that would help me understand why you guys
21 are on good footing.

22 MS. BERLIN: Yes. So thank you, Your Honor. Something
23 to consider is the defendants have not made any point as to why
24 Mr. Vagnozzi's disgorgement number would be -- Mr. Vagnozzi's
25 personal disgorgement number would be deducted from McElhone

1 and LaForte's number. So disgorgement is each defendant's
2 ill-gotten gains.

3 So in order for them to claim that Mr. Vagnozzi's
4 disgorgement figure should be deducted from what McElhone and
5 LaForte and Par Funding received, they would have to indicate a
6 payment from them to Mr. Vagnozzi personally. That could be at
7 issue.

8 So Mr. Vagnozzi's settlement -- what I'm telling Your
9 Honor is Mr. Vagnozzi, the basis of his settlement is not
10 public. His disgorgement figure is about \$4 million. To give
11 you a hypothetical. If Mr. Vagnozzi received his \$4 million --
12 remember, he had his own offering. ABFP, seven of them. And
13 he got paid separately from investors. His disgorgement for
14 those companies has nothing to do with Par Funding. That's
15 his, that's what he raised and he kept, not what he sent on to
16 Par Funding, not what he gave back to investors. It's just
17 like Mr. Furman. He's in that world. He's not -- so what his
18 companies get, what he gives back, what he gives away, what he
19 spends. And then Mr. Vagnozzi personally gets some money.

20 So what the defendants are saying is, hey, Mr. Vagnozzi
21 got some money. We can't point to any payment we ever made to
22 Mr. Vagnozzi personally. We want the SEC to prove what, that
23 they did and -- what I'm telling you is they can't point to a
24 single payment to Mr. Vagnozzi that is more than this amount to
25 him, personally, and claim that it's not included in his agent

1 funds numbers.

2 Mr. Vagnozzi was paid by Par Funding first through a
3 finder's fee agreement, and then as a finder, and then through
4 the agents fund payments. The agent fund payment to every
5 agent fund, including Vagnozzi, are included.

6 And, Your Honor, with your permission, what I will do
7 today is -- I do have it annotated for Mr. Cole's payment. I
8 can do that for all 40 plus funds and however many investors
9 there are. We can cite to it in the 500-page report and just
10 file that so that you do not have to dig around, and tell you
11 exactly what page each investor is on, and each agent fund is
12 on that's reflected in the QuickBooks.

13 But for the -- Mr. Vagnozzi, if you're talking about
14 his personally, surely they're not asking to deduct a finder's
15 fee, which would be not a legitimate business expense under any
16 -- I hope we can all agree on that basic piece of law -- that a
17 finder's fee in violation of the law is not something that
18 McElhone and LaForte are capable of -- or able to deduct as a
19 matter of law.

20 Mr. Vagnozzi, the basis for his disgorgement payment is
21 not public. But we can tell you that the money that he
22 received did not come from Par Funding directly. And they will
23 not be able to point you to a single payment from Par Funding
24 to Mr. Vagnozzi, personally -- not his company, but personally
25 -- that was not one of the finder's fees that would not be

1 subject to a disclosure or subject to a deduction.

2 So what you're asking me to do is, like, impossible.
3 You'd have to show me a payment to Mr. Vagnozzi personally, not
4 his agent fund. The agent funds are all deducted. Every one
5 of Mr. Vagnozzi's agent funds is deducted.

6 THE COURT: Yes, Mr. Kaplan. Go ahead. You wanted to
7 respond.

8 MR. KAPLAN: Yeah. So if we were to look at the
9 commission's opening brief for this motion -- it's
10 Document 1252, page 8 of 45, bottom paragraph on the page, the
11 commission goes through a description of exactly what Par
12 Funding, through Abbonizio and Vagnozzi trained the agents and
13 Par Funding provided the agents with marketing materials,
14 Abbonizio together with Vagnozzi oversaw the agent funds. So
15 they treat them together. Abbonizio has all of \$10.5 million
16 in disgorgement that the commission concedes is properly
17 deductible. But for some reason, respectfully, that I still
18 don't understand, having treated them as two sides of the same
19 coin, working together, \$11 million is properly deducted
20 according to the commission -- 10.5, sorry -- but the other 4.5
21 attributable to Vagnozzi for some reason is not. It makes no
22 sense.

23 And to take it to the very last step, the only reason
24 disgorgement exists is to make the investors whole.

25 So all of this is to create, for lack of a better word,

1 a giant pot that's going to be assembled so Mr. Stumphauzer can
2 write 1,200 checks, or however many. It needs to be deducted.
3 That's why we're here.

4 THE COURT: Ms. Berlin, your response to that?

5 MS. BERLIN: Thank you so much. That's a great point
6 that Mr. Kaplan just made, and I can address -- explain that to
7 him.

8 So Mr. Abbonizio is paid directly from Par Funding and
9 through his various entities. So the money that goes -- the
10 money that goes from Par Funding to Mr. Abbonizio is no longer
11 being held by Par Funding. And accordingly, it is his
12 disgorgement that he is paying is deducted, because it would
13 not be fair to double count it.

14 Mr. Vagnozzi, on the other hand, he has agent funds.
15 The money goes from Par Funding to an agent fund, to
16 Mr. Vagnozzi personally. So the money that Mr. Vagnozzi gets
17 is coming to him through his company, AG -- what is it called?
18 A Better Financial Plan, ABFP Management, ABFP, Inc., and the
19 ABFP Income Fund [audio distortion].

20 So you are seeing that Mr. Vagnozzi -- and we do not
21 tell you that that disgorgement figure is the amount he got
22 directly, personally, from Par Funding. He gets that money
23 always. He gets paid through his entity, other than the
24 finder's fee he was sanctioned for years ago.

25 And so the full amount, there's 4 million to

1 Mr. Vagnozzi down here. He gets that from a pot of more than
2 \$50 million that goes from Par Funding to Mr. Vagnozzi's agent
3 fund. All of those agent funds, including the 4 million that
4 went to Mr. Vagnozzi, have been deducted from the figure for
5 Ms. McElhone and Mr. LaForte. What they're saying is the
6 equivalent of we want to go to every agent fund that you're
7 deducting money from, our disgorgement figure. And then
8 whatever the agent fund paid their agent fund manager, we want
9 to deduct it twice so that we get double deductions. That's
10 what they're asking for. And that's not appropriate.

11 Mr. Vagnozzi was paid through his agent funds. He
12 cannot identify a single payment that they're asking about.
13 Like, go into QuickBooks, find me a payment from Par Funding to
14 Mr. Vagnozzi personally that wasn't one of these finder fees
15 agreements, you can't. The disgorgement is based on money he
16 got through the agent funds, the full amount of which has
17 already been deducted for him and every other agent fund
18 manager, every one of them, including Mr. Furman. All of them.
19 So they are completely different. Mr. Abbonizio gets paid from
20 Par Funding directly. It's not going to an agent fund and then
21 to him.

22 So you're seeing that, the disgorgement figure deducted
23 for him. So, basically, again, as we stated in our motion,
24 every agent fund, including Mr. Vagnozzi, all deducted.

25 THE COURT: All right. And I think one takeaway today

1 -- and we'll talk about it at the end of today's hearing --
2 certainly, there are representations made about deductions.
3 The question is, where is the backup? I mean, that to me is
4 looking like the narrative here. And we're going to have to
5 figure out what I'm going to do with that. Because, certainly,
6 if there is backup, none of which was cited in the motion, then
7 we're in a bit of a difficult spot because the Court, honestly,
8 should have been given the opportunity to go through that, and
9 the defendants should have known where these numbers were being
10 drawn from, because they cannot respond in a vacuum, nor can I
11 write in a vacuum.

12 Now, let me keep it moving, because I have the chart
13 up. Let me talk about Cole for a minute, Ms. Berlin.

14 You guys are seeking an award of disgorgement in the
15 amount of \$13,247,011 in your motion.

16 Can you tell me how you arrived at that amount? How
17 did you come up with that amount for Cole? Again, it may be
18 that you point me back to the expert report and show me
19 something now. But when I read the motion, I -- I see here, as
20 I'm moving through the chart -- maybe you want me to focus on
21 page 2.

22 MS. BERLIN: Yes, Your Honor.

23 THE COURT: Which, again, something that I don't know
24 that this was broken down in this fashion in the motion, but,
25 certainly, now it's being shown to me to explain a little bit

1 -- for example, this might be the first time I think that I'm
2 getting a picture of how we are going to incorporate New Field
3 Ventures for the first time because that was one of my concerns
4 the other day. I didn't have enough information on this.

5 So tell me, if you could -- do you want to walk me
6 through this disgorgement calculation so I know how you got to
7 the 13 million?

8 MS. BERLIN: Yes, Your Honor.

9 THE COURT: Okay.

10 MS. BERLIN: And, yes, we relied on the receiver's
11 sworn summary of all the QuickBooks. And I believe -- and we
12 will file that annotation for you, but I think the defendants
13 have this number.

14 So Cole's disgorgement on the left, you see what
15 Mr. Cole has consented to for purposes of this motion, which is
16 a total of 16.2 million in disgorgement.

17 So, I mean, that's the amount that he cannot reject or
18 argue against today. We are seeking less than that because the
19 records, that once we got a more fulsome view of the records,
20 they changed a little bit. And some increased, and some
21 decreased, and some we determined weren't appropriate to seek
22 in disgorgement.

23 So the left-hand side is sort of laying out what the
24 complaint is saying for Mr. Cole. The right-hand side goes an
25 extra year, to 2020, and it's the amount that goes to him

1 through ALB, the amount that goes through to New Field
2 Ventures, the amount to Beta Abigail. And in the complaint,
3 like, it's deemed true, for purposes of this motion, is that he
4 has an ownership interest in these, that he's paid through
5 these consulting agreements, and then, of course, the annotated
6 complaint has those undercover FBI recordings where he's
7 admitting to these things and other evidence cited to support
8 the allegations.

9 And then we have in his own response brief, he states
10 and he admits that he got \$751,000.

11 Our number for the amount that he received directly,
12 Your Honor, was lower than that. I don't have it in front of
13 me, but just to fully disclose, the number that we were able to
14 find in the record that Mr. Cole received was a lower number
15 than the 751. So I inserted the 751 here because Mr. Cole
16 admits that that's how much he got directly within his
17 response.

18 So the way we got to the \$13,247,011 is we had the
19 \$3,186,297; we had the \$40,877,007 for Beta Abigail; the 9.5
20 for -- hold on a second. I'm so sorry. It was the ALB, the
21 Beta Abigail, the -- directly, but it was a lower number. And
22 then some of the payment that Mr. Abbonizio disgorged in some
23 of that ownership interest, we deducted from the New Field
24 Ventures amount because they have a shared interest in that.
25 And so that amount was deducted. If you add up all these

1 numbers, it's something more like 20 million. The SEC could
2 seek that. That's what the evidence shows. The complaint
3 alleges 16 million. And we were seeking a lesser amount by,
4 basically, you know, looking at the New Field Ventures figure,
5 the fact that a portion of that is shared with Mr. Abbonizio,
6 and, basically, adding a percentage of it instead of the whole
7 thing because it didn't feel -- it didn't seem equitable,
8 obviously, to ask for the full amount. And so that is how the
9 \$13 million figure was reached.

10 THE COURT: So let me ask -- again, I don't want to
11 interrupt your flight of thought, Mr. Kaplan, but I have one,
12 too. Let me go real quick, and then turn it back to you.

13 So let me ask you on the last point as to the
14 beneficial ownership. So the amended complaint states that ALB
15 Management solely owned by Cole -- and you have this in your
16 chart, so at least what I saw in the amended complaint seems to
17 sync up here -- received 1.8 million from Par Funding. And
18 that Beta Abigail, solely owned by Cole and New Field Ventures,
19 received 14.4 million. And this is in the amended complaint,
20 paragraphs 19 and 20. That total is 16.2 million. We
21 obviously know that you're seeking less than that. That's one
22 of the things I noticed, it's 13 million.

23 So the first thing I thought of was, well, there must
24 be some deduction made to the New Field Ventures from Cole's
25 disgorgement amount, and that must be because of the ownership

1 interest that we had with Abbonizio versus Cole in New Field
2 Ventures.

3 And so I was trying to figure out, without the benefit
4 of this chart today, just from the pleadings, how we got to
5 that number. And then, of course, I also wanted to make sure
6 that we weren't disgorging the wrong number with Abbonizio
7 because that could be an issue, too, because of New Field
8 Ventures. Because, again, I don't know if Abbonizio received
9 any funds from Par Funding through any entities other than New
10 Field Ventures. So that's why it was unclear to me.

11 So taking a step back, I guess maybe I don't have all
12 the details, but what made up Abbonizio's disgorgement? I
13 think that's the issue, maybe. I can't figure out how that
14 interplays with Cole. This chart has given me a bit of a sense
15 of attributing to Cole what his ownership interest is in New
16 Field Ventures. Am I right in that?

17 MS. BERLIN: Well, that's the full amount that went to
18 -- I was just showing you the full amount that went to New
19 Field Ventures. But to answer your question about
20 Mr. Abbonizio, if you're curious about how he got paid, just
21 for some examples -- we're not taking all of them. But if you
22 just look at defendants' own Exhibit 6, right, to their
23 response, they have a list of all of these consultants that
24 were paid. And you'll see several there -- it's actually in
25 this PowerPoint, if you scroll down. You would see all of the

1 amounts -- oh, yeah, keep scrolling. I just took a [audio
2 distortion] that you were just looking at [audio distortion].

3 But if you keep scrolling, it's -- I believe it's one
4 of the last pages. And you'll see -- I'll tell you when to
5 stop.

6 THE COURT: This is all prejudgments. Okay.

7 MS. BERLIN: If you keep going, it's at the --

8 THE COURT: Okay, yeah.

9 MS. BERLIN: Right there.

10 So if you see, I have in yellow here. This is their
11 Exhibit 6. What I did for their consultant is I kind of color
12 coded. But you can see the second batch. And I'm sorry it's a
13 little fuzzy.

14 New Field Ventures, Abbonizio -- Perry Abbonizio, and
15 ES Equity, those are all in their Exhibit 6. They actually
16 list all of the amounts, and they admit that they paid these
17 amounts to Mr. Abbonizio. So he got money through Newfield, he
18 got money personally, and he got money through another company
19 that he owned called ES Equity.

20 So, you know, the details of, you know, the settlement
21 with the defendants, with Vagnozzi and LaForte, are nonpublic,
22 but what we, you know, have explained -- because you see it in
23 our motion. It was laid out. Here's the number. We subtract
24 -- the receiver is telling you under oath that the 300 million
25 is all investors and all agent funds. We're subtracting that.

1 You see it in our motion. We then say minus the 10 million --
2 it's about 10 million and change that Abbonizio disgorges. So
3 it is deducted already from the McElhone and LaForte figure
4 because that's where Abbonizio got that \$10 million money. So
5 it's no longer in McElhone and LaForte's hands. They've given
6 it to Abbonizio. It's in his hands. He disgorges it. And,
7 you know, the details of that, of which of these three it came
8 from, that is non-public, Your Honor. But if you just look at
9 their Exhibit 6, you'll see that it involves a lot of numbers,
10 and the money is fungible.

11 So what we did with our figure for Mr. Cole is rather
12 than -- you know, basically, the amount he consented to is
13 16.2. It's not equitable, it's not a fair number for the
14 reasons that we've laid out. A portion of that, that 9.9 is,
15 you know, some of that was held with Mr. Abbonizio. And also,
16 you know, some of the numbers are higher because it includes an
17 additional year since we filed the complaint. And then we
18 deducted it because we don't know the full detail of his
19 arrangement with Mr. Abbonizio.

20 When we issued discovery, again, about, like, the
21 disgorgement, about your ill-gotten gains, these people refused
22 to fight it. None of them. I mean, I love it they come here
23 today and all these arguments are made, but they were required
24 to provide their sworn accounting by this Court, by an order in
25 July of 2020. Those sworn accountings are utilized by the SEC

1 and all parties to determine the disgorgement figures. The
2 defendants refused. Mr. Cole's not asserting the Fifth. He
3 refused, as well. He didn't produce any discovery. He then
4 denied that he had an ownership. But if you look at, number
5 one, he's consented to the complaint allegation. And number
6 two, I cited there's evidence, you know, we filed an annotated
7 complaint, you might remember some undercover recordings and
8 the CBSG documents that prove those points.

9 So he denied it. He denied he had an ownership in New
10 Field Ventures. He refused to provide documents. He refused
11 to provide this sworn accounting, despite the court order. And
12 so for us, we are unable to get the full picture because Mr.
13 Cole is concealing it and violating court orders.

14 And so what we did was we took some money off,
15 basically trying to give every possible, like, fair benefit of
16 the doubt, if that makes sense.

17 THE COURT: Let me hear Mr. Kaplan on this point. Go
18 ahead, Counsel.

19 MR. KAPLAN: So it's a lot to unpack. I'll keep it
20 simple and specific.

21 Mr. Cole didn't consent to this number or any other
22 number, and it wasn't in the complaint to begin with.

23 As it turns out, Newfield is a receivership entity. So
24 if someone wants to know what Newfield paid to Abbonizio or
25 what Newfield paid to Cole, I could think of a really good

1 place to go to get it.

2 I would posit to you that the Newfield records reflect
3 that Mr. Cole received a grand total of zero. So ownership
4 interest, admitted ownership interest. How much money did he
5 put in his pocket from Newfield? If the answer is zero, then
6 the disgorgement number as to that component is zero.

7 THE COURT: Zero. Right. And that's really where my
8 concern was, is that I understand that we may not have a
9 complete picture, but certainly the challenge I was having is I
10 know that Abbonizio enters into the settlement with the SEC for
11 disgorgement of \$10,498,581. I was trying to figure out how
12 much of that disgorgement amount represents his, Abbonizio's,
13 proceeds from disbursements to New Field Ventures. And it
14 looked like at one point that the SEC was holding Cole
15 responsible for all funds disbursed to New Field Ventures when
16 we don't really have an evidentiary support for that or
17 clarity.

18 And so my concern was, did we capture Abbonizio's
19 interests properly or were we putting a disgorgement number on
20 Cole, given an entity that never served as a pass-through or
21 received funds from Par Funding that would be ill-gotten and
22 would have to be disgorged. That's really why my concern was
23 there.

24 Now, I'm getting, I think, for the first time in this
25 demonstrative, the SEC's giving me more detail about how they

1 reached that number. Certainly, it sounds like the Cole number
2 -- and I know it doesn't have to be an exact science. But
3 given the lack of information, the SEC's somewhat ballparking
4 that 13 million because we don't necessarily have all the
5 details of what exactly Cole's involvement was.

6 Is that fair to say, Ms. Berlin? Did I get that right?
7 Maybe you want to respond to Mr. Kaplan's view.

8 MS. BERLIN: Thank you so much, Your Honor.

9 I wonder if I could ask the Court -- and I'm so
10 embarrassed that I'm asking the Court to do this. But if we
11 could go back up to that demonstrative with the Cole numbers.

12 THE COURT: Yes.

13 MS. BERLIN: Perhaps I can explain this to the Court
14 and Mr. Kaplan more clearly. Thank you so much.

15 THE COURT: Is it here? Are you talking about this or
16 all the way up?

17 MS. BERLIN: No, the one that you were just on, Cole's
18 disgorgement. Thank you so much.

19 THE COURT: Yes.

20 MS. BERLIN: So on the pages that follow it, I don't
21 think we need to go through it, but the complaint does
22 actually, Mr. Kaplan, allege that Mr. Cole had an ownership
23 interest in New Field Ventures, and there are very specific
24 paragraphs, it's paragraph 19, and then 240 to 242 that
25 specifically lay out the amounts that he got.

1 So those facts can't be disputed because there are
2 allegations in the complaint that he got the money -- that Cole
3 got money from New Field Ventures. And so new evidence can be
4 presented on that. We're not having a trial on things that
5 Mr. Cole has agreed to.

6 But what you see on the right-hand side of that chart
7 is -- if you take a look -- so ALB and Beta Abigail, those are
8 not entities where we have this situation with Mr. Abbonizio.
9 And if you take a look at those two numbers, I mean, again, it
10 turns out to be, like, right around 8 million, plus the 751
11 that he admits he got directly. It's a little more than nine.
12 Then we have this \$12 million figure. Adding the full 12 takes
13 him above 20.

14 So essentially what we did is we kind of said it's
15 between nine, which is ALB, Beta Abigail, and then we had a
16 slightly number -- smaller number for the directly. It's
17 between that and then to around eight, nine, on one hand, and
18 20 something on the other.

19 And so because Mr. Cole refused to provide a sworn
20 accounting, didn't provide the discovery, we literally -- we
21 know from the recording, he states it, that he gets paid with
22 his consulting funds, and we have the CBSG document showing it,
23 but we don't know how they exchanged cash. So I kind of -- we
24 sort of split it, and then went to the lower end of what that
25 split could be. So that we were giving him, like, every

1 possible doubt.

2 And, you know, those are things that we're not required
3 to do, but we tried to get this right. But that is a part that
4 we truly had to make our very best estimate. And then we gave
5 the benefit of the way it shifted to Mr. Abbonizio -- I mean,
6 I'm sorry, to Mr. Cole. I apologize. To Mr. Cole. We gave
7 that benefit to Mr. Cole. So that's how that number generated.

8 THE COURT: Okay.

9 MS. BERLIN: If we had an accounting. We'd probably
10 know the exact -- maybe we'd have more clarity.

11 THE COURT: Okay. Yes, Mr. Kaplan. Your response.

12 MR. KAPLAN: Yes. The last point I care to make on
13 this: If I could direct the Court again to our brief document,
14 1329, page 27. We go through the Cole disgorgement analysis.

15 Footnote 42 speaks specifically to what the complaint
16 does or does not say, what was or was not admitted. And the
17 moneys received from ALB and from Beta Abigail, 8.1 million,
18 are traced to a receiver report that's in the record at 1223-3,
19 at page 2. That's where we got our numbers. That's where
20 they're from. The receiver's here. If Newfield paid money to
21 Cole, they'll be able to tell you how much. And if they
22 didn't, we have to move on.

23 MS. BERLIN: Your Honor, if I could just speak to that
24 real quickly. It might be helpful, if the Judge scrolls down
25 one page, because there is a part of the complaint that I think

1 the defendants missed.

2 So there is a paragraph here where we talk about Mr.
3 Cole -- because one of the allegations against Mr. Cole is that
4 he received this money, and then he went to the SEC and filed a
5 statement saying he didn't receive any proceeds. So we
6 identified these as funds that he received, and then lied to
7 the SEC about having received.

8 So what we have in these paragraphs that I've laid out
9 and tried to make it very clear, we have that Cole received
10 1.8 million from Par Funding, which included investor funds
11 through payments to ALB, that Par Funding transferred
12 14.4 million to Beta Abigail and New Field Ventures, in which
13 Cole has an ownership interest. But if you scroll down one
14 more paragraph to 240 -- I think it's 240, it's on the next
15 page -- we have that as for Cole -- this is where we're talking
16 about Mr. Cole received gross proceeds and then claims that he
17 didn't.

18 So in paragraphs 239 through 242, we lay out why it's a
19 lie when Cole says he didn't get investor proceeds. And what
20 we allege there is that he lied to the SEC because he received
21 at least \$11.3 million from the offering through these four
22 years alone. And then we lay out for Cole that he -- Par
23 Funding transferred funds to companies in which Cole has an
24 ownership interest or received financial benefits. And then we
25 lay out exactly what those are. And the last one is New Field

1 Ventures.

2 So, like, that sentence right there is saying it.

3 Like, that's his ownership interest. And the receiver is not
4 going to be able to testify about what cash Abbonizio and Cole
5 exchanged. And furthermore, there can be no evidence on this.
6 It is admitted to in the consent. The receiver is not a
7 witness, and will have no personal knowledge anyway of what
8 money Mr. Abbonizio gave Mr. Cole. And if that was going to be
9 litigated, and his consent was going to disappear that the
10 defendant signed, then we would want Mr. Abbonizio to testify.
11 But we're not having a trial.

12 THE COURT: I think the problem is those paragraphs
13 don't discuss his full ownership interest. There's nothing --
14 I mean, I'm looking at 241 and 242. My question started with
15 the connection between those admissions and the correct
16 disgorgement amounts. So we're all reading the same thing.

17 I don't know that we're really addressing the concern I
18 initially had, which is trying to figure out apportionment on
19 Newfield. I'm not doubting there is a consent to these
20 allegations. But to say that these allegations would give me
21 the clarity I needed to figure out if we were putting Cole on
22 Newfield numbers or that we actually understood that Newfield
23 obtained Par Funding funds that would allow us to then
24 disgorge, that's where I found there to be a lack of clarity.

25 And so I agree that this is trying to explain the

1 relationship. But the challenge I'm having is it still falls
2 short of giving me at least what I need to make sure that we
3 don't double count. That was my problem with it.

4 One thing I wanted to add, too, unless I'm reading it
5 wrong. Your slides, when they point to 774, for example,
6 Cole's disgorgement slide, which I think I'm sharing, page 65
7 of the report is a definitional section. Page 65 that you
8 cited does not have any analysis that would support that money.
9 So to the extent at the end of the day today when we get into
10 what my next steps will be, we want to check that. Because I
11 don't know if we're talking about the same cite.

12 Do you see what I'm talking about, Ms. Berlin, how you
13 have a cite there?

14 MS. BERLIN: Yeah. I see that. And the -- I'm not
15 sure if you looked at -- to be clear, there's -- I'm looking at
16 paragraph -- it's not paragraph 60, but I see what you're
17 saying, to make sure that I give you the correct page number
18 would be helpful.

19 THE COURT: Well, I'll give you an example. I'm going
20 to try to share another screen. Let's see if it works. I
21 believe -- I don't know if I'm sharing this, but does that look
22 like the report? I think it's showing up on the screen, 774.
23 This is page 65. So page 65, which you're citing, is a
24 definitional section. It's not pointing to the Cole numbers.
25 I'm just saying, generally -- right?

1 MS. BERLIN: You're in 774-1. The document you're
2 showing is 774-1.

3 THE COURT: Yeah.

4 MS. BERLIN: Oh, I see. Okay.

5 THE COURT: Yeah, 774-1. And then if you look here in
6 the other one in ECF, you're citing 774 -- I think, 774-1,
7 page 65, to show me, just by way of an example, the ALB moneys
8 that's attributed to Cole. It's just something to note that
9 when we go back and we look at this -- and I'm going to share,
10 again, your report here. I think it should come up. And your
11 slides. There we are.

12 See, I'm talking about this number here. See, I'm
13 talking about this data here. I just think we need to be
14 careful, because going back to my other point about needing
15 that expert report to actually pinpoint where you're getting
16 the numbers, it would be helpful to double check because some
17 of them may be a little off.

18 So let me move on -- I think I've heard enough on this
19 point -- to the deductions, if I could, and talk a little bit
20 about that.

21 So I know that we're taking issue with utilizing what
22 I've termed the PF cash summary that defendants have pointed to
23 from the receiver, from Mr. Sharpe. But I just wanted to note
24 that that summary contained a number for operating business
25 expenses of Par Funding from 2012 to 2020 in the amount of 42.6

1 -- excuse me -- \$42,600,000.

2 One thing -- and I don't know, Mr. Kolaya, if you can
3 shed some light on this. But I was trying to confirm the types
4 of business expenses that that would encompass, such as banking
5 fees, computer and internet expenses, insurance costs,
6 janitorial services, legal fees, other professional fees,
7 payroll to non insiders and utilities costs. I want to get a
8 sense -- that number, is that what at least your review of that
9 summary would encompass?

10 MR. KOLAYA: Your Honor, if it would please the Court,
11 I believe Mr. Stumphauzer would be prepared to speak to that
12 particular issue.

13 THE COURT: Yeah. However you want to walk me -- I
14 think you know what I mean, Mr. Stumphauzer. I'm just trying
15 to figure out what those operating business expenses entailed.

16 MR. STUMPHAUZER: I think the general categories you
17 just set forth are exactly correct. It's other types of
18 operating expenses. I guess you can look through the line
19 items to see the varieties within. But, yes, it's non
20 consulting fees, from what we've seen. So it could be
21 everything from computer expenses, internet expenses,
22 professional fees, search engine optimization. You name it.
23 Things along those lines. As well as janitorial, and some of
24 the other categories you named.

25 THE COURT: All right. I needed to check that,

1 obviously, because that's one of the arguments when we talk
2 about deductions, if the Court is ultimately adopting the
3 defendants' view that this was at one point a business that was
4 generating some income and making valid loans, then the
5 analysis changes slightly. It would arguably open the door for
6 the Court to consider deductions. Because I am well aware of
7 the line of cases, post *Liu*, that look at businesses and look
8 at entities and determine whether or not they are completely
9 generated ill-gotten gains.

10 You know, we have some situations where the Supreme
11 Court seems to suggest that you could have a case where there
12 really is no valid basis for the business, or a situation where
13 the entire profit of the business are undertaking results from
14 wrongdoing. And there -- even there, quite frankly, they talk
15 about not deducting inequitable deductions, such as for
16 personal expenses, and some cases post *Liu* have analyzed that.
17 But that also requires me to decide whether expenses are
18 legitimate or whether they're merely wrongful gains under
19 another name. And one of the things I've been balancing here
20 is if, indeed, the Court determines that there was at some
21 point a business here that was not purely generated to profit
22 off ill-gotten gains, or wrongdoing, then it would arguably
23 open the door to deduct legitimate business expenses.

24 So that's why I asked that question, because it
25 facilitates the Court's review of one of the line items that

1 seems to suggest this would not fall under wrongdoing inasmuch
2 as its overhead, banking fees, search optimization, et cetera.

3 And so let me flow from that point. So the PF cash
4 activity also contains a line item for other related activity.

5 And one of the items there is Full Spectrum processing. And
6 there's 10.7 million that goes to full spectrum processing.

7 And I'm wondering and, again, this goes to what I think is just
8 an overall lack of evidentiary support for some of these issues
9 that makes it difficult for the Court to divine if they should
10 be deducted or if they should be disgorged.

11 But do we know, Mr. Stumphauzer, are there any records
12 regarding the nature of the disbursements to Full Spectrum
13 processing? I think we all have the books and records for Full
14 Spectrum. And I'm trying to figure out if there's any other
15 purpose for Full Spectrum, other than operate Par Funding.
16 Because there are some disbursements. Defendants have pointed
17 them out as a deduction item. But it's difficult for me to
18 ascertain what they're paying Full Spectrum for. And I'm kind
19 of having to guess that. And I thought it was possible that it
20 was similar to what you just told me in terms of operating
21 expenses, but I don't want to make that leap without checking
22 with you.

23 So what's your sense on that? Do you know?

24 MR. STUMPHAUZER: I do, Your Honor. Could I have one
25 minute?

1 THE COURT: Yes, of course. Take a minute just to make
2 sure that I don't misstate it.

3 MR. STUMPHAUZER: Your Honor, I think the best way to
4 describe it is, you know, obviously, FSP is a related party.
5 All collectors, all the employees we're dealing with now were,
6 in fact, employees of FSP. FSP, basically, acted as a service
7 provider, not just to Par Funding, but even other MCA
8 companies. They listed emails, they processed collections,
9 they updated records.

10 So, you know, I guess the best way to put it is that's
11 an intercompany transaction. But it does reflect essentially
12 the expenses of operating the business.

13 Now, you know, can I go through line item by line item
14 and say that there's not other things that were in there or
15 inappropriately spent? I can't. But certainly, the general
16 purpose of FSP was it was a service provider to CBSG, and it
17 was people that sat in the same building.

18 THE COURT: Thank you for that. Yes, Mr. Kaplan, or
19 anybody who wanted to try to add some --

20 MR. KAPLAN: I want to try to help with this.

21 THE COURT: Yes.

22 MR. KAPLAN: Par Funding began in 2012. FSP was born
23 January 1, 2017. The bulk of the \$42 million that you
24 addressed five minutes ago with the receiver is money through
25 the end of 2016.

1 On January 1, 2017, FSP was incorporated. And all the
2 work that was formally done at Par, the expenses that occurred
3 at Par, got moved over. If FSP didn't exist, the \$12 million
4 would have been owned by Par.

5 And lastly, on this point, throughout this case, you've
6 heard things like Par had 75 employees, Par employed 15
7 accountants. Those are all FSP people. And when the FBI
8 showed up in the summer of 2020, and the company closed, and
9 then the receiver took over and operations resumed, at least
10 with regard to collections, they rehired the former or some of
11 the former FSP employees.

12 On Monday, we were here and looking at emails from
13 Mr. Wheeler. He's an FSP employee, or he was. Now he works
14 for BSI or the receiver.

15 But this is a completely business-focused operation
16 that has nothing to do with the sale of notes or the servicing
17 of investors. This is where the money comes from.

18 THE COURT: Thank you, Mr. Kaplan. Let me do this,
19 just so I can give everyone a brief break.

20 MR. FERGUSON: Your Honor?

21 THE COURT: Yes.

22 MR. FERGUSON: Just to follow up on that, after FSP was
23 created, there was only a single employee at Par.

24 MR. KAPLAN: At Par.

25 MR. FERGUSON: And that was Ms. McElhone.

1 THE COURT: Okay.

2 MR. FERGUSON: So it's basically operating as the
3 operational entity that's doing the business of the company.

4 THE COURT: That's what I thought, truthfully, while I
5 was drafting the order. But I needed to just double check with
6 my receiver and make sure that I wasn't missing something.

7 What I'd like to do is -- yes, Ms. Berlin, on this
8 point, if you want to add any points on the FSP question, go
9 ahead. Because I'm going to take a break in a little bit.

10 MS. BERLIN: But probably better for the break -- after
11 the break, if I could just address the deductions, generally.

12 But something to help the Court: If the Court
13 determines that some of those deductions are appropriate for
14 FSP, I would, like, argue after the break, because it's a
15 lengthier one, but a lot of those things that defense counsel
16 just said, and the receiver, they're in the complaint. They're
17 already deemed as true. So you might not have the evidence
18 from them, but it's in the complaint, and it's deemed as true
19 for everyone, right?

20 So it has a narrative. It has the 2017, that
21 Ms. McElhone was the sole employee, and what Full Spectrum did
22 during that time. So I think that would be helpful. That's in
23 the defendants' section.

24 THE COURT: Sure. We can address that here after a few
25 minutes break. I do not believe, in my review of the amended

1 complaint, that there is an allegation accepted as true that
2 eliminates Full Spectrum Processing as a business operator --
3 in fact, I don't know that the complaint is anywhere near that
4 specific -- that would, for example, prevent the Court from
5 addressing its applicability as a deduction. And certainly,
6 that would require, I think, going back to my other point, if
7 the SEC believes that that's established in the complaint, it
8 would require the Court to essentially adopt the position that
9 the entire business was existing only for the generation of
10 ill-gotten gains. If that was the argument, then perhaps the
11 Court could understand the SEC's view that the amended
12 complaint has foreclosed deductions. But even then we know
13 that even in that context, *Liu* and case law has indicated that
14 you have to take a close look and make sure. Because you can
15 actually have certain sums deducted even if the business is
16 rife with improper ill-gotten gains and doesn't have a true
17 function.

18 And I think that the important thing here is this is
19 partly why a couple of months ago we had so much litigation
20 over the SEC's recharacterization of Par Funding as a Ponzi
21 scheme at this stage of the proceedings. Because what that
22 did, in the defendants' view, was back-dooring an allegation
23 that was not pled in the amended complaint, and could have
24 potentially -- and would certainly open up defendants to a
25 different spectrum, if you will, of civil penalties.

1 So one of the things that we've had to balance here is,
2 certainly, on their best day, one could say Par Funding broke
3 even. I mean, on their best day. That's been how I look at
4 it. The big question, of course, is did this entire MCA model
5 really seek to give out money to small businesses in a way that
6 wasn't essentially only loaning to insiders and not necessarily
7 benefiting these businesses, but instead making money off note
8 holders for the benefit of the principals of the company.
9 We've debated this throughout the litigation.

10 I just want the record to be clear that I went back to
11 the amended complaint's allegations, and I don't know that the
12 amended complaint, absent me making a bit of an inferential
13 leap, forecloses any consideration of deductions. I think
14 there are certain deductions that, as a matter of law, I do not
15 think are warranted. But conversely, there are some that have
16 good-faith basis if I can get a sense of whether or not it is a
17 true, legitimate, business expense.

18 And for example, I don't know -- for example, amended
19 complaint paragraph 42 talks about full spectrum processing.
20 It says there's 12 million in business expenses or moneys that
21 I think were -- excuse me. Let me take that back, actually.
22 That's what the defense are asking for. The amended complaint
23 simply talks about, since 2017, Par Funding being operated by
24 FSP. But I don't know that it goes to that next step and tries
25 to characterize moneys paid to FSP as pure ill-gotten gains. I

1 think there's nothing in the amended complaint that would make
2 a connection so that I can't have defendants come forward today
3 and say look at these 10.7 million, Judge, and determine if
4 they are actually business expenses or should be disgorged.
5 That's my point on that.

6 I understand we are cabined by the allegations they've
7 admitted. But I don't know that the allegations in the amended
8 complaint are such that some of these things are completely off
9 the table. That's my concern.

10 MS. BERLIN: I was just trying to help them because
11 they were sort of proffering, and I was just trying to point
12 out, like, yeah, a lot of what they said you don't have to just
13 accept as a proffer. Like, you could, they could rely on the
14 complaint. I was just trying to help the defense, actually.

15 THE COURT: Okay.

16 MS. BERLIN: But our position, you know, the complaint
17 alleges a scheme. So if we had also said it was a Ponzi
18 scheme, that count is already in there because we alleged that
19 they were engaged in a fraudulent scheme. There's -- actually
20 two separate counts of the complaint are just scheme liability.

21 But I think after the break, I wonder if, perhaps, I
22 could address sort of, I think, the perspective of the
23 deductions. Because, you know, one of the words that gets lost
24 in *Liu* is the undertaking or business. So the SEC case and/or
25 disgorgement are not about the CBSG business. We haven't

1 thought CBSG profited. And you didn't see that in our
2 analysis. I said from the beginning our case is not about
3 CBSG. Our case is about the undertaking, the offering.

4 So we have only sought disgorgement based on the
5 offering. We have not sought the profit that CBSG generated.
6 But the defendants want to deduct expenses for CBSG, I guess,
7 to keep the profits and deduct the expenses. But the SEC is
8 not seeking disgorgement against -- based on the business
9 profit. So disgorgement could be based on the undertaking,
10 which is what we are doing here with the offering; or, because
11 it's an unregistered offering, it's like an owned enterprise.
12 If we allege that that offering is a massive fraudulent scheme,
13 unregistered, rotten from beginning to end, basically, under
14 the law, under seven count. We do not talk about the business,
15 it's all about the offering. That's the only thing our
16 disgorgement is about.

17 So we do not go into the business and the expenses.
18 And when we come back, I'd like to address why shifting the --
19 if the Court agrees, or will listen to us try to explain it,
20 cite the cases and distinguish cases where the SEC brings the
21 case because of the fraudulent business versus a fraudulent
22 offering. So you might see cases about a broker-dealer or
23 trader or even an offering fraud where there are issues with
24 the use of investor money that's different from the way they
25 represented. And it gets into disgorgement about the business.

1 This is not that case. Like, our case is only about the
2 offering. And our view is that that whole offering was a Ponzi
3 scheme. We don't look at Par Funding.

4 MR. KAPLAN: Wait a second.

5 MS. BERLIN: We never generated the assets, but also
6 that their representation to investors, as they admit in their
7 own report, that I'll point to, is that they told investors
8 that their money would only be used to loan out, and for no
9 purpose.

10 And their own documents state that they use no investor
11 funds, no offering proceeds to pay a single expense of Par
12 Funding. Their own experts. That's their evidence attached to
13 their response. I don't know if they forget about this, but
14 they have conceded that point. No investor dollar was ever
15 used for any business expense. They had other money that came
16 in that they used for that.

17 And so when we come back from the break, I just wonder
18 if I can, perhaps, walk you through that. And it's the
19 defendants' own evidence that they filed with their response
20 that shows you.

21 THE COURT: Sure. Let me give my defense counsels an
22 ability to simply address that last comment before we take a
23 break.

24 MR. FERGUSON: Your Honor, I appreciate the
25 opportunity.

1 What I wanted to address if we had a long hearing on a
2 motion to strike the Ponzi allegations. I think that the SEC
3 is attempting to distract you and confuse you. And the
4 suggestion that a Ponzi scheme is framed within the complaint
5 or their amended complaint, which merely corrected the
6 technical name for the trust, is false.

7 MS. BERLIN: I'm not saying that.

8 MR. FERGUSON: And saying fraudulent scheme means
9 Ponzi. Then according to the SEC, I think here they can say we
10 were a counterfeit operation, as well. It's just -- I trust
11 you will reject that. I know we've had a little time together
12 yesterday, and you basically were specific that you have
13 rejected that. But I have to make the record clear for many
14 purposes.

15 And we object to that characterization is in the
16 complaint, it's not true, and ask you not to be distracted in
17 any way.

18 THE COURT: Yes. Just to make everyone feel
19 comfortable. In court, we had a long hearing on a motion to
20 strike for that reason.

21 So we're going to go ahead and take about a ten-minute
22 break. I do recognize that we are in the lunch hour. I would
23 ask -- I do not have a lot left. And I would rather just try
24 to finish this hearing and let everyone go home. And
25 truthfully, I need to ultimately address what I'm going to do.

1 Because we need to talk and go back to our point yesterday
2 where the parties advised me of the potential of a resolution.

3 Over these next 10, 15 minutes, I'll take a break on,
4 you guys obviously feel free to use the restroom. Anyone needs
5 to stretch out.

6 I will just say -- and I'll repeat it at the end of my
7 hearing today. But if there was ever a moment where I think
8 the SEC should sit down and engage fulsomely all defendants and
9 find resolution, it's now.

10 I have to say, this motion, I think, had some glaring,
11 glaring deficiencies in it, deficiencies that I have had a
12 problem overcoming, and I'm getting a lot of gap filling today,
13 some of which I think is well taken, some of which I really
14 would have appreciated had it be formally or properly framed
15 for me in the initial pleading. But we are at a position now
16 where we are so close to getting to trying to begin to make
17 investors whole, that it would be very frustrating for the
18 Court to further delay analysis on this point and have to take
19 things under advisement because I am now being presented with a
20 bunch of new points and evidentiary support that was never -- I
21 mean, I'm sorry -- it was never in the SEC's motion.

22 I don't think objectively anyone can look at this SEC
23 motion and think that it gave the Court what it needed to make
24 a proper ruling. So now, I'm getting all this additional
25 information, much of which I think defense is hearing for the

1 first time. They were not able to also respond to the use of
2 the expert report and how it supplemented some of these
3 arguments.

4 So, you know, I have to decide what's the best way to
5 move forward on disgorgement right now. I'm going to take a
6 break so everyone stretch out, but I really do encourage the
7 parties at the end of today's hearing to let me know how much
8 we're going to push on trying to get this to the finish line
9 with a frank discussion about what is fair and equitable in
10 terms of disgorgement and penalties. Because I do think it's
11 in everyone's best interest to get this case to its ultimate
12 conclusion for the benefit of investors. And stalling out on
13 fighting over disgorgement, if we can get a number we can all
14 live with, is a mistake. It's a mistake. People need to sit
15 down and work this out. Respectfully, it should have been
16 worked out a month ago. We shouldn't be here.

17 So let me go ahead and take a break. And we'll be back
18 in about 10 to 15 minutes.

19 THE COURT SECURITY OFFICER: All rise.

20 (Court recessed at 12:30 p.m.)

21 (Back on the record at 12:50 p.m.)

22 THE COURT: All right. We can go ahead and get started
23 again. I think everyone is back.

24 MR. FERGUSON: Yes, Your Honor.

25 THE COURT: Yes? Okay, great. Let's make sure,

1 Ms. Berlin, that you can hear me. There you are. Okay. And I
2 see Mr. Alfano back.

3 Okay. So when we had our break, Ms. Berlin, you had
4 mentioned something that I think we'll follow up on. Just so
5 that we have a sense of timing here, the Court really only has
6 a few more areas of inquiry. We've done a lot today. And I
7 think a lot of, quite frankly, new information has been
8 presented today and support for some propositions advanced in
9 the SEC's motion that the Court was not advised of, briefed on,
10 or aware of.

11 But with that being said, I was going back in chambers
12 on a break and looking at your point, Ms. Berlin, on
13 deductions. And I believe in your motion you talk a little bit
14 -- this is Docket Entry 1252, page 33. It says: Par Funding
15 was in the business of loaning small business investor money
16 that was raised in the defendants' fraudulent scheme, and thus
17 the business resulted from wrongful activity. It is well
18 established, under these circumstances, business expenditures
19 are not deducted from the disgorgement figure.

20 And then you cite what I had mentioned in the beginning
21 of today's hearing, that Supreme Court precedent had carved out
22 that exception. Further, because of the nature of the
23 business, commingled accounts and the fraudulent scheme, it is
24 not possible to determine the amount Par Funding -- the amount
25 Par Funding that [sic] has value independent of fueling a

1 fraudulent scheme.

2 So I'm reading that because that was my understanding
3 of the theory of the SEC. The theory has been, it falls into
4 the *Liu* exception of a business that only fuels ill-gotten
5 gains, and, therefore, no deductions. What I think I heard
6 before the break was a different theory. The SEC now is
7 telling me, we're not seeking anything against the proceeds --
8 and I want to make sure I understand how thinly this is being
9 sliced -- but we're not seeking any funds that were generated
10 by Par Funding, only that which is attributed to the note or
11 the issuance of the notes.

12 And I'm having some difficulty understanding -- I mean,
13 I read your own motion about commingling. It seems to be
14 somewhat one in the same. The notes generate loans. The loans
15 fuel the business. It is all intertwined. I don't know how
16 the SEC wants me to decide. We're only seeking disgorgement on
17 the notes. So all deductions are attributed to the business
18 over here and cannot be attributed to the note offerings or the
19 very nature of the business, which is the issuance of the
20 notes.

21 So that's a little -- again, that, to me, is -- I
22 didn't glean that from the pleadings. I don't know if the --
23 the defendant saw it that way. I have always seen that the
24 objection to deductions is, you can't deduct because everything
25 is ill-gotten. That's how I read it. Not that it's split, not

1 that I'm only touching the notes, so since I'm only touching
2 the notes, give me the Delta, give me the 250 million and
3 forget the rest because I'm not going after that.

4 You understand, Ms. Berlin, why that's really difficult
5 to do? Because everything is so commingled. And if that is
6 the theory, respectfully, I don't know that your pleadings have
7 explained that. I mean, I didn't see that, and I've
8 scrutinized them. And what I read, I think, just now in your
9 initial motion didn't advance that theory. I don't think the
10 SEC has said: Deductions are inappropriate because we are only
11 pursuing the notes and not the underlying business proceeds or
12 profits from the business.

13 Can you explain that to me? And if I'm stating your
14 position correctly, maybe I'm not, but I think that's what you
15 wanted to tell me before the break.

16 And let me click the button. Go ahead.

17 MS. BERLIN: Thank you so much, Your Honor.

18 Yes. So if you look at our motion, the SEC did not
19 seek the profits of Par Funding. So, you know, throughout this
20 case, as the Court's aware, the defendants have argued that Par
21 Funding was extremely profitable because of its merchant cash
22 advance business. And, you know, they filed an expert report
23 about how they, you know, invest, I guess, take investor money,
24 and give it to merchants. And then as they get paid from the
25 merchants, they loan that same money out again and again and

1 again, and they develop these massive profits, according to
2 them.

3 So if you look at our motion, the SEC does not seek any
4 -- it's just not there. I guess I should have written it. We
5 are seeking -- the basis of our disgorgement is related to the
6 notes only. We are not seeking -- we did not ask for the
7 profits of Par Funding.

8 So to give you an example of what I'm referring to --
9 so this is when the burden then shifts to the defendants and
10 they're asking for the expenses not of the offering, right? So
11 what I thought they were going to do is give us expenses for
12 the offering, like, the money that's utilized, the percentage
13 of the overhead or something like the meetings with the agent
14 fund, the marketing materials, the email. We would have
15 addressed those and why they're not appropriate.

16 But instead what they did is they gave their deductions
17 for the business. So if the Court would bear with me, if the
18 Court scrolls down on the PowerPoint that's on the screen, I
19 have the explanation of this, and why -- okay. We can keep
20 going because I think we've covered all of this with Cole.

21 And it's just a little bit further. Okay, perfect.

22 If we go to the McElhone and LaForte. So the SEC has
23 argued that there are no legitimate business expenses, that the
24 defendants paid investors using the commingled investor money.

25 By the way, before the break, Alise told me -- because

1 I was, like, did I say the P word? And she's, like, you said
2 the P word. I did not mean to say the P word. I meant to say
3 a fraudulent scheme, because we have two counts for a
4 fraudulent scheme. I didn't mean to use -- I didn't mean to --
5 I didn't even realize I said it until I asked Ms. Johnson, did
6 I really say that? It was an accident. So I apologize.

7 I was just referring to the fraudulent scheme counts,
8 which would be the same counts if it was a P scheme.

9 So McElhone and LaForte, the SEC -- this is what our
10 argument is: That the full use of the investor money in the
11 offering was that CBSG would loan the money out to merchants,
12 and we argue that the MCAs broke even and that they didn't
13 generate sufficient cash to pay the investors returns from the
14 MCAs. The defendants' argument is that the investor money was
15 spent exclusively to fund the MCA loans, that no investor money
16 was ever used to pay any CBSG expense, ever, not a third party,
17 not a consultant, not all these things that [indiscernible] in
18 their response. They literally have -- and I'm going to show
19 you in a second, no investor money was ever used for any of
20 that, that the investor money was raised in the offering fraud,
21 that, basically, like, the [indiscernible] of the loan was
22 that.

23 So if we go to this next screen that you're on, this is
24 their money flow, and this is their ECF 1330-16, which is their
25 report.

1 So their flow of funds is that -- and this is their
2 expert report. This is Joe Glick. He says the money goes from
3 the investors directly to the MCA. It's not used for any other
4 purpose. Then the MCA paid back that investor money with the
5 interest, and that Par Funding then takes that money and sends
6 it three places. One, sends the investors their portion. Two,
7 uses the MCA money to pay the CBSG expenses and the CBSG
8 profits.

9 So if we scroll to the next page -- so legitimate
10 business expenses. This is why it's a legal issue.

11 So -- and these are issues they raised in their
12 response. So they -- the law is -- you know, *Liu* was just
13 decided by the Ninth Circuit a few weeks ago and they were,
14 like, no, no, you can't deduct costs and expenses for things
15 that you didn't tell the investors you were going to use their
16 money for. If you tell the investors you're using their money
17 for one thing, to fund a loan, as the loan -- this is the loan
18 money, you can't later come back and try to collect all of your
19 other expenses for things the investors did not invest in.

20 So *Liu* says that, (indiscernible) says that. These are
21 just basic principles of the law. These are legal issues.

22 So as we scroll down to the next slide, the defendant
23 -- this is just two recent cases that's on this basic point.
24 You know, the defendants' position -- and I'm going to show you
25 in a moment, it's in their own exhibit, and always has been --

1 that the investor money was not used to pay a single expense,
2 not an operating expense, not a consultant, nothing, that it
3 only went to the MCAs, and that was all it was ever used for.

4 So if we scroll to the next page -- because this is
5 totally contrary to what they're saying now. This is their own
6 expert report. This is attached to their response. It has
7 always been a part of their case. Again, it's just like -- I
8 mean, we'll file it, and we'll show you the numbers that we're
9 asking for that are different from, I guess, the receivers on
10 that one point, are the same in Mr. Glick's -- their own
11 expert's report. But we've all had those numbers.

12 But their own expert had stated from the beginning that
13 investors were provided an explanation of the business and that
14 their funds were to be used to meet merchant advances. As
15 such, it would be improper to treat investor funds as the first
16 dollars out. It would be proper to treat their funds as the
17 first dollars to the merchants. And if we scroll to the next
18 page, they literally have an expert opinion on this. This is
19 their only expert opinion in the case, is that investor funds
20 were used entirely to fund merchants' advances. As a result,
21 consulting fees were not paid with investor funds. Then their
22 own expert goes on to say -- he gives a full, long analysis
23 that they attach to their response brief. And it's always been
24 a part of this case, saying the investor money was subsumed.
25 Like, in other words, the investor money was only ever given to

1 merchants as a loan. No investor funds were available to pay
2 any operating expenses, consulting fees, payments to parties,
3 or anyone else. This is not us saying it. This is -- their
4 expert has said this from the get-go.

5 So when we saw the response, and they're asking for all
6 these expenses that they've already -- that they're -- they've
7 already admitted when the investor money was never, ever, ever
8 used for these things and, in fact, according to their own
9 expert opinion attached to their response, and has always been
10 the case, all of the evidence, undisputed, every investor, they
11 were told their money was going to be loaned to Par Funding.
12 If they had known it was for anything else, they never would
13 have invested. That evidence is in every TRO declaration from
14 an investor.

15 And the investors, if we scroll down, consistent with
16 what the defendant told this Court in their expert report, with
17 their response, every investor deck said that. It's part of
18 this record. It says, I was told my money would be used to
19 make a merchant loan. Had anyone told me it would be used for
20 anything else, I never, ever would have invested.

21 If you scroll down to the next page, even the marketing
22 videos state it. And this has never been disputed in this
23 case, Your Honor. Their position has always been, in an expert
24 report -- I mean, they have an expert opine on this. In all of
25 the evidence, it has never come up until this hearing that

1 investor money did not pay for anything at Par Funding.
2 Instead -- this is from their own video -- they would loan out
3 the money. This is, like, TRO Exhibit 138. It's a video --

4 MR. FERGUSON: Your Honor, I have to object. This is
5 argument.

6 THE COURT: Yes. I think the important thing is I have
7 some questions here today that I want answered. I understand
8 your argument today. I don't want to get too far afield with a
9 full-blown breakdown of what we're doing here. I know that
10 you're going through your argument on deductions. I think that
11 you would agree with me that the only place where I see some of
12 the argument you are raising today, in a much more thorough
13 way, would be found in about a page and a half of the reply, 12
14 and 13. And beyond that, I don't know that I was provided with
15 any additional information that would elucidate this theory.

16 I'm looking at the Cole testimony you cited at page 13,
17 and then it ends on page, I think, 14. But I want to make sure
18 that since we're not really here today, necessarily, to get
19 into a lot of additional argument, I just want to be clear that
20 I don't know that some of what you're breaking down today has
21 made its way into the four corners of the pleadings.
22 Certainly, I don't think it was expressly explained in the
23 motion. But the reply itself, I definitely don't -- I mean, a
24 lot of it, in fact, pages 11, 12, and 13 go back to the nature
25 of the business. They go back to it's a purported Ponzi

1 scheme. It references a quote talking about a Ponzi scheme.
2 It cites some of the recent case law. But I don't know that it
3 makes a differentiation between the notes and the expert
4 reports that you are relying on, defense's expert reports. I
5 don't think that that has been expressly explained in these
6 pleadings so that I would even be able to discern that was the
7 theory that you're explaining today.

8 I mean, this is obviously a lot more nuance and
9 explanation about why we would be able to use -- for example,
10 the first thing I looked for -- and maybe I'm missing it --
11 would be your reliance. There's, I think, one or two cites
12 about commingled funding. But, again, I don't have an
13 explanation here besides a couple of cites to LaForte's
14 testimony that would get me to the place you're explaining
15 today. I think that's one of the challenges I'm having.

16 MS. BERLIN: I can explain.

17 So what I'm showing you is their own exhibit. These
18 are their own exhibits attached to the response they filed to
19 our motion. So I'm simply pointing out to the Court the legal
20 problem that they have with the deductions they're requesting.

21 THE COURT: No, I understand. I completely understand
22 what you're showing me. You're showing me why deductions, in
23 whole, are, in your view, inappropriate, because you are
24 relying on their expert reports in support of a proposition
25 that all of these moneys went right back into the loans.

1 So the way you want me to look at it is the notes can
2 be essentially divorced from the business in a way to ignore or
3 at least disregard any sort of deduction because you are no
4 longer seeking what you believe to be profits from Par Funding,
5 only loan or note-related moneys. And your point is that the
6 defendants have made clear that all of those moneys were
7 reinvested or multiplied or back into the loans and the notes,
8 and, therefore, to deduct from that would be inappropriate.

9 I mean, I'm simplifying it. But that is now at least
10 crystallized with what your presentation is today. Am I right,
11 that that is kind of the core part of your argument?

12 MS. BERLIN: That's sort of it. So, like, the slide
13 that we're on now, it shows you what they're asking for is that
14 the Court give them deductions for CBSG expenses and --

15 THE COURT: I know what they're asking for. I
16 understand.

17 MS. BERLIN: So if they ask for the expenses to come
18 out, your starting place would be CBSG profits. We would need
19 to do a profit analysis of the business. That's not the type
20 of disgorgement request we made.

21 So if you deduct expenses, and you let them keep all
22 the profits, then obviously that's -- nowhere is that the
23 correct disgorgement analysis.

24 THE COURT: All right. Let me do this. Let me do
25 this. I think I've heard your position, but I wanted to give

1 defense counsel a chance to address this point. Because I
2 agree, we don't need to spend additional time on this analysis.
3 I needed to just get as an answer to my question what the SEC's
4 theory of deductions or against deductions was.

5 MS. BERLIN: I had -- I'm sorry.

6 THE COURT: Yes. Go ahead, Mr. Kaplan. You wanted to
7 respond.

8 MR. KAPLAN: Document 1252 is the SEC's opening brief.

9 THE COURT: Correct.

10 MR. KAPLAN: At page 30 of 45. The Court should order
11 disgorgement of 226 some odd million dollars. And it says
12 right there, here's how we get to it. 550 million in, 300
13 million out. We're going to give you credit for Cole. We're
14 going to give you credit for Abbonizio. The rest is on you.
15 That's what you pay.

16 MR. FERGUSON: And, Your Honor --

17 MR. KAPLAN: In the reply brief, which is
18 Document 1341, at page 11 of 34, they doubled down. Because at
19 the bottom of that page, they go right to where we all were the
20 whole time.

21 *Liu* recognizes an exception. If you're operating a
22 business as a complete fraud, everything is the object of
23 wrongdoing, you don't get any deductions because it's all
24 wrongdoing.

25 THE COURT: Right.

1 MR. KAPLAN: I think we all know that's not what
2 happened here.

3 THE COURT: Well, and look. I think one of the
4 discrepancies -- we have a lot of commingling here,
5 commissions. There's lack of consistency here that I'm
6 troubled. You know, she's deducting -- there are some
7 deductions for commissions, there are some deductions for
8 payments. But then she wants me -- the SEC wants me to get
9 away from the business. So it doesn't make sense. I can't
10 pick and choose what a deduction that I -- you know, that's
11 what I'm trying to say when I'm saying I can't imagine that I
12 had missed the boat that bad for the last two years. Because
13 I'm looking at it, and I'm thinking, how can I work in
14 deductions, commissions, and all of that, and she's taking them
15 out. And Ms. Berlin's saying let's pull those out. But then
16 now she's telling me, only look at the notes. There is some
17 internal inconsistencies there I can't seem to square up. And
18 so the methodology is where I'm struggling a little bit.
19 That's where -- again, it's a little bit of apples and oranges.
20 It truly is a note issue. Then it has to be explained in a way
21 that I can understand without commingling some of these
22 commission issues.

23 And as you pointed out, I mean, page 30 pretty much
24 sets forth the model. And that's the model that I was guided
25 by. What I'm hearing today is a lot more nuanced when it comes

1 to the notes than what I have seen up until this point. And
2 that's where I'm having -- that's why I'm having so many
3 struggles with some of the numbers and methods here.

4 Yes, Mr. Ferguson.

5 MR. FERGUSON: I think the problem here is it's not
6 you, you're not missing anything. I think we heard it when
7 counsel started to answer your question about this. I wrote it
8 down. She said, I guess I should have written -- and then
9 stopped. And I'll end the quote there. And I'll add what
10 she's saying. I guess I should have written what I am arguing
11 now. That's the problem.

12 THE COURT: And, look, if it was the theory, okay, it
13 was the theory. But from a due process standpoint and judicial
14 economy, I cannot inherit pleadings without this being
15 crystallized, and certainly cannot expect the defendants to
16 defend themselves appropriately and explain their position if
17 the target is moving. I have to have a good sense, at this
18 stage of the game, how we are getting to these numbers.

19 And I'm getting a lot more information today. I'm very
20 thankful that I set the matter for hearing. You know, I think
21 back to some of the initial arguments, that the SEC felt
22 strongly I should not set this matter for hearing. And I'm
23 very thankful that I didn't walk into reversible error because,
24 truthfully, I'm very concerned, looking at a 42-page draft that
25 I spent the last month on, some of this is not the theory I'm

1 seeing today. I was trying to be guided by these pleadings,
2 and I'm concerned that I had missed some of what the SEC was
3 going for. And I don't know that it's been described,
4 certainly not as clearly or with some of the support I've seen
5 today, with record citations, because today I'm seeing support
6 from the defendants' exhibits, I'm seeing support from some of
7 the expert reports of Ms. Davis. There's just a lot more here
8 that fills in a lot of blanks that I was struggling with. And
9 I understand why now, because I was not perceiving some of the
10 SEC's theory as it would apply to deductions.

11 So this has been very helpful. But I have to agree
12 that I don't really know that we're talking the same language
13 from the pleadings to what I'm hearing today. So certainly,
14 this is clarifying a lot of the theory. And it makes sense
15 that the defense response focused on deductions in that way.
16 Because if you do read page 30, you are led to believe that it
17 is a business analysis. The whole Par Funding model, not just
18 slicing the note part of it, and focusing on only the note so
19 as to block out any ability to deduct any expenses. So, I
20 mean, I understand why things got framed this way, because it
21 starts with Docket Entry 1252.

22 Let me do this: I don't want to spend too much time on
23 my final question regarding outside consultants because I
24 think, at this point, you know, I know it's an \$8,620,102.26
25 amount, and I wanted more insight into those payments because

1 they were nonparties. It reminds me a little bit of the relief
2 defendant argument we had some time ago with the receiver where
3 we ultimately allowed some of that loan to stay outside the
4 receivership because the Court didn't feel persuaded that these
5 were third parties that were connected to Par Funding and these
6 were legitimate outside consultants.

7 I had been working on how to accommodate or at least
8 account for that. I don't think we need to spend time arguing
9 that because, obviously, we've shifted a bit on the overall
10 position. But I do want to end with civil penalties, because
11 that's, obviously, something we haven't talked about at all.

12 And so when it comes to civil penalties, defendants,
13 this really is more for you all. You guys went ahead and gave
14 me or you mentioned an investor log. There's an investor log
15 that's Exhibit 28 to ECF No. 1330-28. It shows the number of
16 unpaid promissory notes as 115 as of the commencement of this
17 action. And you guys, I think, had put in your -- or I think
18 that you contend that the total number of unpaid promissory
19 notes was 115. I was wondering how we got to that number.

20 Does the defense camp know? Can you tell me,
21 Mr. Kaplan?

22 MR. KAPLAN: Would you give me a moment?

23 THE COURT: Yes, sir. Confer with your team. I need
24 to find out where that number comes from in the response.

25 MR. KAPLAN: And the citation again?

1 THE COURT: I think it was page 49, maybe, I think I
2 saw 115 in there. Let me see if I'm right on that.

3 MS. BERLIN: Can I help?

4 THE COURT: Response at 49. Yes, Ms. Berlin. I'm
5 sorry. Go ahead.

6 MS. BERLIN: I was trying to help them. It might be in
7 your expert reports. I'm just searching.

8 THE COURT: I think it's in the response at 49. That's
9 where my notes are. There's a mention of 115. And again,
10 you're right. It may come from an underlying report. But
11 that's where I plucked the number out of. It's Exhibit 28,
12 that it should come in. That's the investor log.

13 MR. KAPLAN: Okay. Here's what we're talking about.

14 THE COURT: Yeah.

15 MR. KAPLAN: And thank you for the cite to page 49.
16 That's where I am.

17 MR. FERGUSON: It's actually 48 of the brief, but 49 of
18 the filing.

19 MR. KAPLAN: 49 of Document 1329.

20 So we are talking there about an investor log prepared
21 by the commission.

22 THE COURT: Okay. By the commission.

23 MR. KAPLAN: And that investor log, which we attach as
24 Exhibit 28, shows that at the commencement of the action there
25 were only 115 separate notes.

1 THE COURT: Okay.

2 MR. KAPLAN: That were outstanding.

3 Now -- so we've talked a lot about agent funds, right?

4 An agent fund might be tens of millions of dollars, but it
5 might only be one note, and that might -- if I understand the
6 question correctly, I think that might help clearing up where
7 these numbers are coming from and the concepts behind them.

8 Because 115 notes is a pretty shocking number. How we get to
9 200 million outstanding, if there's only 115 notes. That's
10 why. We're not talking about individual investors who might
11 have made a \$50,000 investment.

12 THE COURT: And that's important, right? Because when
13 the Court looks at civil penalties, there are different ways to
14 get there. So those numbers can matter, depending on how
15 you're calculating. That's why I wanted to make sure that I
16 had a good understanding of where you're getting that from.
17 And I think that helps. So, thank you for that.

18 MR. KAPLAN: You're welcome.

19 THE COURT: The last big question I have for purposes
20 of today's hearing is really directed to the SEC.

21 The SEC had cited to *Woodbridge*, where the defendant,
22 Shapiro -- I think that was also a consent, also. It wasn't
23 litigated.

24 But in any event, you cited the *Woodbridge* to support
25 the request for a \$100 million penalty award. I just wanted to

1 hear, Ms. Berlin, does the SEC or can the SEC point me to any
2 additional cases that would support third-tier penalties at
3 such a high amount?

4 MS. BERLIN: Well, I mean, we've identified *Woodbridge*.
5 But as we stated in our -- and I can search the cases that have
6 come out in the last week. But as we stated in our motion, you
7 know, the commissioners of the SEC are the ones who determine
8 what penalty we seek.

9 This case is second to none. I mean, the types of
10 violations, the length of time, the number of
11 misrepresentations and omissions, the types of deception, the
12 fact that there's a scheme, an unregistered offering, that
13 they're lying to multiple state agencies and the SEC and
14 investors. We could not find, like, a comparable case because
15 this case is incomparable.

16 *Woodbridge* was the closest. But even *Woodbridge* is not
17 -- the conduct alleged is not this severe. But I can search.
18 We do keep, you know, like, have a database of updated cases.
19 There's been a flurry of activity in the last two weeks. I've
20 been tracking on the deduction issue because of the new *Liu*
21 decision coming down and other things. So I can look for that,
22 Your Honor, with your permission, when we file sort of our
23 notations, we can send those to you and, of course, to the
24 defense counsel.

25 MR. FERGUSON: Your Honor, we object to supplemental

1 findings and notations.

2 THE COURT: Don't worry. I'm going to handle that in a
3 second. Okay. I just want to point out -- hold on one second.

4 I just want to point out, real quick, *Woodbridge* was a
5 1.2 billion, with a B, Ponzi scheme.

6 So I just want to hear clearly on the record that the
7 SEC considers this case and its regulatory violations to be
8 tantamount to a \$1.2 billion Ponzi scheme. That may be your
9 position. But I'm looking at -- and I understand there's a
10 number of regulatory violations. They've consented to
11 everything, so that's no surprise. We have a litany of them.
12 They're listed in the pleadings. They're listed in my draft
13 order. But I just -- I struggle to understand how we can
14 compare this case, even if you just looked at the scope, to a
15 \$1.2 billion Ponzi scheme to justify a \$100 million penalty
16 award.

17 You may say that you believe this does have enough
18 misrepresentations to get us there. But I just wanted to make
19 sure I understood the SEC's position correctly. Because,
20 again, from an equitable perspective, I'm balancing penalty to
21 disgorgement, and I'm looking at comparable cases of my
22 colleagues throughout the country. And certainly, there's
23 nothing right on point with this case, but there is a way to at
24 least to get the universe of appropriate penalties established.
25 And *Woodbridge* seemed to be a little more of an outlier than a

1 good comparable.

2 But you would say, in your view, that this is along the
3 lines of that level of a scheme; is that right?

4 MS. BERLIN: It's not my view. It's the SEC's view.

5 THE COURT: Or on behalf of the SEC, okay. Sure.

6 MS. BERLIN: Yeah. Everything is -- I am here
7 representing what they have determined. And this case is
8 deemed on par with *Woodbridge*. That case involved a Ponzi
9 scheme. And, again, I didn't mean to use the P word earlier.
10 But this case involved two scheme violations, two charges for
11 scheme liability. It is not a P scheme, it is a different kind
12 of scheme that is alleged in the complaint. But if you look at
13 the counts, these are two of the counts.

14 So this is a case with a scheme that goes on for a long
15 period of time, and all of the reasons that are apparent in the
16 complaint. But, yes, when the commission looks at this case,
17 *Woodbridge* is the case that is comparable, and that I was
18 authorized to compare this case to in the view of the SEC
19 because of the type of conduct involved as alleged in the
20 complaint and the -- you know, all of the reasons that we
21 argued in our motion.

22 THE COURT: Okay.

23 MS. BERLIN: Your Honor, have --

24 THE COURT: Okay.

25 MS. BERLIN: I did want to --

1 THE COURT: Go ahead. Yeah, you wanted to say
2 something else? Go ahead.

3 MS. BERLIN: If it helps the defendants on this issue,
4 the -- in the PowerPoint that I had on page 20, we laid out for
5 them, so they can see, every person on their consulting [audio
6 distortion], but although we are -- we dispute that these
7 should be deducted as consultants, but all of these have,
8 except for one, have -- are included in the deductions the SEC
9 indicated in its motion.

10 So I'm going to email this to the defendants so that
11 they can see that, and they understand that all the people they
12 listed there are agent funds. And those are included in the
13 numbers. And we will -- you know, we'll email this chart to
14 them so that they have, you know, a sense of these things,
15 really, having already been deducted.

16 So I just wanted to point that out on the record for
17 them. And also tell them I'll email them the chart, as well.

18 THE COURT: Okay. Yes, Mr. Kaplan. You wanted to add
19 something. Go ahead.

20 MR. KAPLAN: Just one point, to the extent it helps.
21 We filed as Exhibit 27 a list of every single penalty case the
22 Eleventh Circuit has had in the last 20 years.

23 THE COURT: I looked at it.

24 MR. KAPLAN: Whatever use you make of it or don't make
25 of it --

1 THE COURT: That's partly why this question was asked.
2 Because I took a look at it to try to figure out where this
3 case fit in alongside others just so that we don't have an
4 outlier.

5 All right. So let me summarize here where we're at.
6 So the Court has gone through all of my questions, certainly
7 has been provided with a lot of what I would deem to be new
8 information, albeit information that existed in the record, but
9 was not found, cited to, or clearly explained in the SEC's
10 motion. And that had led the Court to a few different points
11 in my drafting where I found myself necessitating additional
12 information. And a lot of the questions today have facilitated
13 that.

14 But I think what we've seen today is a marked
15 difference in some of the theories being pursued. Certainly, I
16 think the deduction analysis from the SEC has taken a little
17 bit of a different form today and been crystallized in a way
18 that I do not believe the pleadings ever accomplished.

19 I also think it's very important, when we go back to
20 the initial argument of today, the McElhone and LaForte
21 numbers, and the underlying data from the receiver declaration
22 has not been identified, absent in a stray footnote here or
23 there, adequately enough for the Court to sit down and conduct
24 a true, thorough disgorgement analysis because it's difficult
25 when we are not citing to the underlying Davis report in

1 support of some of these positions.

2 So there's different ways to go about doing this. The
3 first way would be to try to engage in supplemental briefing.
4 But I'll be frank. Some of the positions today are so
5 different from the initial motion that supplemental briefing
6 would make the Court's life even more difficult than it's
7 already been over the last month in trying to figure out
8 exactly how we're going to get to a number that makes sense
9 under the law.

10 So we have talked a lot about the potential for trying
11 to see if a settlement can be had on the issue of disgorgement
12 and civil penalties. Let me check in with my defense counsels
13 and find out if we continue to have an open line of
14 communication on this point. Because we discussed yesterday
15 the possibility of the Court withholding any sort of ruling so
16 as not to disturb the possibility of a settlement negotiation
17 and stipulation as to disgorgement and as to civil penalties.

18 Mr. Kaplan, Mr. Ferguson, Mr. Futerfas, how do we feel
19 about that ongoing conversation, and would it be beneficial, in
20 your view, to hold off on any other analysis until you guys
21 have explored that option? Where are we at there, I guess, is
22 my question?

23 MR. FUTERFAS: May I respond, Your Honor?

24 THE COURT: Yes, absolutely.

25 MR. FUTERFAS: I appreciate being here in person,

1 finally, to meet Your Honor.

2 As you know, we -- the defense has long been engaged or
3 tried to engage in settling just the matter that's before the
4 Court today, now. We tried in November of 2020. We tried a
5 year later with Magistrate Reinhart. Dave Ferguson and I
6 literally was in his chambers for a day doing exactly that.
7 Only today, for the first time, do we see the SEC's position
8 with numbers, for the first time in two years, numbers that
9 have been available to all of us. Okay?

10 So from our side, of course, this case should be
11 resolved. These are numbers. There are principles that apply,
12 that we understand, and we think the SEC might understand. So,
13 of course, we would value and utilize productively an
14 opportunity to do that.

15 MR. FERGUSON: And if I may. I'm not -- I don't have a
16 real hopeful outlook on the prospects of settling because I
17 think that we are dealing with a moving target. We have
18 fundamental disagreements over *Liu*. There's a lot of
19 impediments. But hopefully, what's happened here today might
20 guide all of the litigants, including and particularly the SEC.
21 And I would request that you defer your ruling for a week and
22 allow us -- and if after that week, we're getting somewhere, we
23 will let you know. I don't want this to drag on too long.
24 I've got many reasons to wrap this up. I think a week will be
25 sufficient. I think we'll know within that time whether it

1 isn't going to happen or it is going to happen. And as we get
2 to the end of the week, and we need a little more time, maybe
3 we'll come back and ask you. But I think that should be
4 sufficient. I want to take you up on your suggestion.

5 THE COURT: Yes. And I'm glad you mentioned one point
6 about that. Mr. Kaplan, I want you to chime in, too. The idea
7 that I think, you know, we have a lot of investors who have
8 been waiting for this day. We've all worked very diligently to
9 get here. The Court is not interested in prolonging this case.
10 We need to get to the last phase of this case, which is putting
11 the receiver in a position to begin the claims handling process
12 so that we can make people whole. The purpose of this
13 disgorgement is not punitive. The purpose of the disgorgement
14 is to get back to square one and get money to investors, and
15 everybody moves on, deals with their penalties, and we're done.
16 I mean, that is what we are at now. We are at the finish line.

17 I don't want to find myself rebooting and necessarily
18 going all the way back to the beginning here after all this
19 work.

20 But at the same time, I have to say, I have a pleading
21 in front of me right now that I honestly find deficient. I
22 don't know any other way to put it. I do not believe that
23 having a pleading like this, that is lacking record cites, that
24 does not make use of an expert report fulsomely, and does not
25 give me the opportunity to make sure that these numbers are

1 supported is very, very challenging for the Court. Because
2 without that, without someone framing it, not only can I cannot
3 get the defense position clarified, but I can't really feel
4 comfortable with numbers that I believe are falling within the
5 parameters of existing case law.

6 So that's why today was important, so we have a better
7 sense of that.

8 Mr. Kaplan, your take on Mr. Ferguson's and
9 Mr. Futerfas' suggestion that, certainly, you want to avail
10 yourselves of some time to see if, for the benefit of all
11 parties, we can come up with numbers we can all live with.

12 MR. KAPLAN: So I have a little bit of an advantage
13 here in terms of not being bogged down by what took place. I
14 wasn't here. There's a lot of good lawyers on this case. If
15 we can't get to spitting distance in a week, then we can't.
16 And I know Your Honor's in the midst of trial, as well. It's
17 not the only case you have. We'll get you an answer in a week.
18 If we can get it done, that's great. If not, do what you need
19 to do.

20 THE COURT: And let me tell you what I think I need to
21 do. I don't know if it needs to wait a week. I don't know why
22 the Court doesn't deny the motion for disgorgement today
23 without prejudice, find it completely insufficient, and make
24 the SEC go back to work. And that would be -- that's what I'm
25 thinking of doing, not waiting. Because truthfully, I cannot

1 even -- what's going to happen here is I can't write an order
2 on these pleadings. What I got today is so different, and
3 without record support, the next best thing would be
4 supplemental briefing. None of us want -- that's going to make
5 such a bad record, if then I get a whole new pleading, then I'm
6 tempted to say today that this pleading does not pass muster
7 not because it doesn't satisfy, arguably, their initial burden
8 of production, but because it puts the Court in an impossible
9 position because there is simply no record evidence pointed to
10 to allow me to really analyze deductions, if they're
11 applicable, business expenses. Certainly, we didn't even
12 really get into any of this discussion about how the SEC looks
13 at deductions. And I would have to think that the SEC, after
14 hearing the Court's view of things, and the defense camp, is in
15 a much, much better position to rebrief this disgorgement
16 argument the right way. And let me get an order that is the
17 right thing.

18 But again, I'm telling you, I don't think there's a way
19 -- I mean, I'm looking at my draft almost at the 50-page mark,
20 and the amount of new theories advanced today and new cites
21 that I didn't get, it would almost be impossible for me to
22 write an order that will withstand appellate review if I didn't
23 make the SEC go back and write it over again the right way.

24 You heard what she said in the beginning. Ms. Berlin
25 did not think this court needed evidentiary record support to

1 make a ruling. I can tell you that I do, if it comes down to
2 disgorgement. I don't award a government agency millions of
3 dollars and penalize people at a requested \$100 million amount
4 unless I feel certain that I got record evidence to back it up.
5 And these pleadings did not give me what I needed.

6 What do you think about that? I don't want to up end
7 anything so I'm asking you because that's where I'm at.

8 MR. KAPLAN: I'm going to give you a straight and
9 honest answer. We would not want that.

10 THE COURT: Okay. That's fair. That's why I'm asking.

11 MR. KAPLAN: You've made very clear why we're here, to
12 get to the finish line, to figure out the disgorgement, figure
13 out the penal date, to give it to Mr. Stumphauzer and let him
14 start distributing it. You can't do that if you deny it
15 without prejudice.

16 THE COURT: That's fair. That's why I'm asking.

17 MR. KAPLAN: We'll be back here right between
18 Thanksgiving and Christmas. I don't want to do that. Nobody
19 wants to do that.

20 THE COURT: I asked because I don't know that I'm in a
21 position to render -- let me ask it this way, Mr. Kaplan.

22 If, indeed, no resolution is reached, I don't want
23 anyone to be shocked that in seven days I do exactly what I
24 just suggested. I don't know that I can write this order -- I
25 mean, what I'm hearing today is so different. It was not

1 explained clearly. It was not cited by record support. We are
2 looking at different theories today. This was not framed.

3 MR. KAPLAN: So I would separate that out.

4 The SEC gave you its theory. This business was not a
5 business. This was a front. This was all for wrongdoing. So
6 they don't get the benefit of any deductions except what we get
7 back from Mr. Cole and Mr. Vagnozzi, and maybe the government
8 themselves. It wasn't confusing. It wasn't vague. It was
9 crystal clear. And they doubled down on it in the reply. We
10 took this very seriously. We said, yeah, they have the burden
11 of proof. Yeah, this, they have the burden of production.
12 Forget all of that. We're going to show you, chapter and
13 verse, if you don't want to talk about profits, if all you want
14 to talk about is what's the hole in the investor's pocket and
15 how do we fill it, then here's how you do it, and here's the
16 disgorgement amounts you're entitled to.

17 We gave you I don't know how many different buckets of
18 deductions. You may choose some, reject others. That's your
19 job. But as a Court of equity, you have what you need in front
20 of you to decide what an equitable disgorgement is, and we'd
21 ask you to do it.

22 MR. FERGUSON: And, Your Honor, I double down on what
23 he's saying. They came in here with some deductions are okay
24 and this is our theory. And now, it's changed at this hearing.
25 And we have responded with evidence and citations to the record

1 that we believe are sufficient to guide you. You may accept
2 our numbers, you may come up with your own numbers that -- I
3 don't think it'll be shocking. I'm not going to say I don't
4 know that you're going to come in under the numbers we
5 suggested. But I just think it would be -- I think in a way it
6 would be rewarding the SEC for what -- you know, I'll save the
7 adjectives. I'll keep them off the record. But just rewarding
8 the SEC for changing its course, you know, when we're here at
9 the final hearing, just to give you some guidance.

10 But I believe that there is evidence there that should
11 be able to guide you and allow you to finish this out like
12 we've all been working so hard to do.

13 THE COURT: Okay. I mean, I guess the only reason I
14 say it is -- and I don't know what life gets injected into the
15 case past the Court's ruling, but I just feel very strongly
16 that I need to be able to write an order that is well rooted in
17 the record. I have, as you guys know, have done the best I can
18 with what I have received. And I did have, and I have drafted
19 a number of paragraphs on these points that explain my logic
20 and how I approach these different deductions. It should come
21 as no surprise. The court is persuaded by some, and disagrees
22 with others. And I've gotten a lot of information from the
23 receiver that, quite frankly, backs up my suspicions on some of
24 the deduction items.

25 But really, the only thing that I'm still retooling is

1 the civil penalties. It should come as no surprise that I
2 respectfully disagree with the SEC. This is not *Woodbridge*.
3 This is not 100 million civil penalty. It just, it's not. It
4 doesn't make any sense. When you look at other cases and you
5 look at the equitable obligations of the court, that civil
6 penalty to me just would not correspond with the conduct. It
7 doesn't mean the conduct is not serious. It doesn't mean that
8 I'm not considering serious penalties. It certainly doesn't
9 mean that I'm going to give a huge reduction on disgorgement.
10 But, again, we have to stay in the realm of what is appropriate
11 with these facts.

12 And so I have made adjustments. And like I said
13 yesterday, I certainly believe that the numbers I'm coming up
14 with are within reason. They are not as low as defendants want
15 me to go, and certainly not as high as the SEC wants me to go.
16 And that should come as no surprise, that I'm somewhere in the
17 middle. I've looked at this record.

18 Now, I have a lot to digest from today's hearing, and
19 I'll have to go back and take a look at what the SEC has added
20 today that I may not have been privy to. But I guess,
21 Mr. Ferguson, you would then also argue that you would not want
22 the Court to entertain supplemental briefing either.

23 MR. FERGUSON: Please do not. Yes, that's our
24 position.

25 THE COURT: Listen, nobody wants to see the end of this

1 litigation more than me. We've carried this for two years. I
2 want to get to the end because the investors deserve it. I've
3 done everything I can to marshal assets. My receiver has been
4 consumed with going after everything he can. We have, I think,
5 amassed a really solid amount of funds to pay back investors.
6 This is the last piece of that. Okay? So I don't like the
7 idea of rebooting it. I don't like the idea of supplemental
8 briefing. I can't make any promises. I'm going to get the
9 rough of this transcript from my court reporter, I'm going to
10 sit in my chambers, and I'm going to attempt to go back and
11 bolster this order wherever possible. But what I plan on doing
12 now, based upon at least what the defense wants me to do, is
13 sitting on my hands for about seven days and seeing if what
14 I've said today is enough to give the parties clarity to try to
15 get to a place that we can all live with so the investors can
16 start getting their money back.

17 And I will add, this is not unlike what happened when
18 we did the preliminary injunctions. And I heard four hours of
19 evidence and gave everybody enough guidance, and cooler heads
20 prevailed, and everybody walked out with injunctions they could
21 live with. It's not unlike what happened on the eve of the
22 consent judgments when we were going to trial with the majority
23 of defendants. So this pattern has repeated itself.

24 And as I stated yesterday, I'm just disappointed
25 because, truthfully, Mr. Futerfas mentioned it, I don't know

1 why right after the consent judgments were entered we really
2 didn't get into a serious conversation about the disgorgement.
3 Because one thing I have learned, and I'm certainly not as
4 experienced as all of you at this, but when you divorce the
5 disgorgement this much from the consent judgment, this is what
6 happens. If we had gotten into it all at once, we probably
7 wouldn't have had this problem. And actually, when you're
8 serving case law, this doesn't happen that often. Most of the
9 time, you stipulate to the whole kit and caboodle. Everything
10 is done together. In fact, sometimes magistrate judges are
11 going through the last nuts and bolts with the recommendation
12 on the disgorgement because it's mechanical. But you know what
13 I did see? Every order I read has a lot of financial data and
14 backup from the SEC every time down to the line item, every
15 single penny is accounted for when those disgorgement orders
16 come out. That's not what I had here. It might be in that
17 record, but it didn't make its way into the motion. And that
18 has been difficult for the Court.

19 Yes, Ms. Johnson.

20 MS. JOHNSON: We would like to withdraw the motion.

21 MR. KAPLAN: Sorry?

22 THE COURT: You'd like to withdraw the SEC's motion?

23 MS. JOHNSON: We would like to withdraw the motion,
24 work on the settlement. And if we're not able to settle, we
25 will then refile it.

1 THE COURT: Okay. All right.

2 MR. KAPLAN: We oppose that.

3 THE COURT: Okay.

4 MR. KAPLAN: I have no idea how much it cost us to get
5 here.

6 THE COURT: I can imagine it cost a lot.

7 MR. KAPLAN: Yes. So --

8 THE COURT: Here's what we're going to do. Here's what
9 we're going to do. I have in front of me an ore tenus motion
10 to withdraw the motion. I'm going to reserve ruling for seven
11 days. I don't know what I'm going to do yet.

12 I'm going to pull the rough, I'm going to see if I can
13 do something with it and get to an order. If I find myself
14 stuck, I will then seriously consider allowing the SEC to
15 withdraw. And at that point, we'll have to discuss a briefing
16 schedule for a new motion. But I'm not going to rule it today.
17 I will sit on the motion to withdraw. And if you guys after
18 seven days, I'm going to ask for a status report, I'll even
19 say, by next Friday, I'll do ten days. If you need more time
20 by next Friday, and you're moving in the right direction, ask
21 for it, and you're going to get it. I want conversations to
22 continue. If you tell me by next Friday or soon thereafter
23 we're at an impasse, the court will then go ahead and address
24 it. But I will enter a paperless order today on here in
25 saying: Pending before the Court is an ore tenus motion to

1 withdraw this motion for disgorgement and civil penalties. The
2 Court reserves ruling in order to give the parties an
3 opportunity to reach an agreement as to disgorgement and civil
4 penalties. The parties shall provide the Court with a joint
5 status update on those negotiations on or before whatever next
6 Friday is. And after the parties have advised the Court,
7 should they not reach a resolution, then the Court will
8 entertain and rule on the pending motion to withdraw.

9 All right, Ms. Johnson? We'll do it that way. I'm
10 going to sit on it until we see what happens. I don't want to
11 disrupt the apple cart. But I think it's the safest way to
12 just lit everything with a pause button and let's give everyone
13 a chance to walk out of this today, digest this record, and see
14 if there's a deal. Does that work for you?

15 MS. JOHNSON: Yes, Your Honor. And just so you know,
16 the parties have been trying to settle this all along. It's
17 not one side or the other. It's a humongous number.

18 THE COURT: It is. It's a big number.

19 MS. JOHNSON: So that's part of the issue.

20 THE COURT: Yes.

21 MS. JOHNSON: It's not for lack of trying. There's
22 probably been more talks about settlement in this case than
23 almost any other case I've been involved in.

24 THE COURT: That's good to hear.

25 MS. JOHNSON: I've been involved in some very big

1 cases. And it's not for the lack of trying.

2 THE COURT: That's good to hear. And, look, and I'll
3 say this: Who knows what appellate remedies could be pursued.
4 But I think the investors need to hear this, too. The reality
5 is, both sides could disagree with me on so many different
6 issues, that this could be easily tied up in appeals. And it's
7 a huge sum. And the receiver will be stuck. My receiver
8 cannot move without these numbers. You can't just run the
9 numbers. So it's in everyone's best interest that we all can
10 live by the number. It will expedite resolution for the
11 investor's benefit. This could be taken up. There could be
12 appellate issues clouding it. It would make for a messier
13 process for the receiver when it comes to figuring out and
14 sorting claims.

15 So I agree, this is the type of case that it doesn't
16 benefit anybody. And I don't think, quite honestly, it
17 benefits the parties. I don't think it benefits the SEC.
18 Certainly, if an order comes out one way or the other that is
19 adverse to the SEC's analysis, that's not good for the SEC.
20 And for the defendants, if it's a number that they're not ready
21 to stomach, and one that they negotiate is better, they should
22 break down that number and go for it. Because I don't think my
23 number's also going to be one close enough to their proposal
24 that they will be happy with it.

25 Again, everyone has a lot to lose. But most of all,

1 the investors do. And I don't want them to wait anymore. So I
2 appreciate you guys making it happen, and I hope this
3 facilitates more than hurts this conversation. I really do.

4 So, thank you, Ms. Johnson. I know you guys are
5 working on it. All right.

6 Mr. Kaplan, you wanted to add something?

7 MR. KAPLAN: I do not. We appreciate the Court's time.
8 We'll be mindful of your comments.

9 THE COURT: Yes, Mr. Hyman. Go ahead. Sorry. I want
10 to turn to you next.

11 MR. HYMAN: There was two very brief, I guess,
12 questions or concern.

13 The first would be, obviously, Your Honor did not ask
14 any questions of Mr. Furman. Otherwise, I don't wish to
15 belabor any of the Court's time. But I wanted to make sure
16 that we didn't slip through the cracks in case there's
17 questions Your Honor may have had for us with respect to the
18 position beyond the facts. As you know, we dispute that any --
19 well, it's our position the SEC didn't conduct any analysis
20 with respect to the amounts in or out, as were verified by
21 Mr. Sharpe during trial.

22 And second, Your Honor, regardless of whether you have
23 additional questions of us as counsel, I wanted to point, for
24 purposes of your consideration with respect to the civil
25 remedies, ECF No. 1300, and 1307, which were Mr. Furman's

1 motion for leave to file an appeal in forma pauperis, as well
2 as the declaration that was filed in support of that motion,
3 which does detail and provide additional support for our
4 contention that Mr. Furman is otherwise insolvent.

5 THE COURT: Right. I remember that. I think I denied
6 the IFP appeal. But you're saying for purposes of
7 understanding his financial position vis-a-vis any penalties,
8 right?

9 MR. HYMAN: Yes, Your Honor.

10 THE COURT: Yes. I have noted that. And, in fact, I
11 can tell you, having worked on Mr. Furman's arguments as well
12 on the ones you advanced, I did not forget about him.
13 Certainly, did not. You obviously are in a little bit of a
14 different position because there was a trial that took place,
15 which I know is on appeal.

16 But one of the things that I did was go through the
17 bank records. I will tell you that I found it somewhat
18 challenging at times. And I'm looking at my draft as we speak.
19 Your declaration, Exhibit A, I looked at pages 38, 61, 63,
20 trying to sort out whether or not I thought there were any bank
21 records that I could hang my hat on for purposes of a
22 deduction.

23 And I will point out, because the SEC probably will
24 recall, that the SEC did not want me to even look at those. I
25 have elected to still take a look at some of those documents in

1 an abundance of caution. I know that the SEC has pointed out,
2 given the Fifth Amendment invocation, that these would
3 constitute new evidence. And, in fact, it's worth just noting
4 right now, in case anyone's under this misguided assumption,
5 there are initial arguments relied upon by the SEC regarding a
6 sword and a shield of the Fifth Amendment.

7 But as McElhone and LaForte pointed out, all the
8 evidence that they're relying on is in record, in receiver
9 records, not new. So to the extent anyone is wondering what
10 I've done with that, I've all but sidestepped it. I do not
11 find that the evidence I'm using is inappropriately back-doored
12 in, in violation of invocation of the Fifth.

13 So I've looked at that evidence. I know the SEC may
14 disagree, but I just felt it was important for everyone to
15 understand.

16 Now, the same thing with Mr. Furman. Although I do
17 believe that there's some problems with the new submissions of
18 bank records. But I have looked at them. I will note, many of
19 them look to be business travel, things like dental expenses,
20 and certain payroll and healthcare makes it a little more
21 difficult, pursuant to the declaration and the documents, to
22 find that it would be possible to deduct. And I'm still going
23 through all that. But I have carefully looked at all that.

24 Now, as to the penalties, Mr. Hyman, you are right. I
25 want everyone to understand that the penalties have to be

1 related to the disgorgement. And so I'm balancing that.
2 Because you can't go ahead and separate the two completely.

3 And one of the things that I'm looking at is
4 everyone's, for lack of using a criminal term, you know,
5 relative culpability. You know, you have to. I know where
6 Furman is on the chain of command and the pipeline. I know
7 where he is, and he's down here. I understand. And so I've
8 tried to find any civil penalty that I believe is appropriate,
9 understanding his economic circumstances and where he's out on
10 disgorgement versus other people.

11 So I don't know how much comfort, but you can tell I
12 have spent time looking at your client's situation because,
13 again, you will note, just like I said in the beginning, the
14 number for disgorgement with Mr. Furman is a different method
15 than what they used on Cole, and different method than what
16 they used on McElhone and LaForte. So I have three different
17 styles of finding disgorgement. So I've looked at them
18 independently. So I have looked at that. But I haven't
19 forgotten about you guys. I've been looking at all your
20 submissions.

21 MR. HYMAN: We weren't assuming so, but --

22 THE COURT: No, no, you were right to raise it.

23 MR. HYMAN: -- I thought it incumbent on me to at least
24 double check.

25 THE COURT: No, no, no, you were right to raise it.

1 Yes, Ms. Johnson.

2 MS. JOHNSON: Sorry, one more thing. At the end of the
3 week if we aren't able to resolve it, can we file just a
4 two-page supplement with just citations to the record, nothing
5 new, nothing that they need to rebut?

6 THE COURT: No. I will do the following. I don't want
7 you to file anything else other than a joint status report on
8 settlement discussions. And I'm going to take your withdrawal
9 motion under advisement. I'm going to wait. I want to see
10 what happens.

11 But no supplemental filing will be permitted until I
12 rule on your pending motion to withdraw. And if I deny your
13 motion to withdraw, in that motion I would enter language
14 allowing or disallowing supplemental filings. I'll address it
15 at that time. It would just be premature right now.

16 All right. Anything else before we conclude today?

17 Receiver, anything else we need to cover, guys? Maybe
18 it would just be more about how things are going, but I haven't
19 given you a chance to add on that. Go ahead.

20 MR. STUMPHAUZER: Yes, Your Honor. I hesitate to even
21 stand up. I know it's been a long day. Presumably, you
22 haven't eaten. And you've already heard a lot of technical
23 argument.

24 I did, however, want to respond to your questions you
25 asked at the very beginning, whether the \$302.4 million figure

1 for disbursements to note holders, whether that included
2 disbursements to A Better Financial Plan funds, as well as the
3 other side agent funds, we told that it does, but we wanted to
4 confirm --

5 THE COURT: It does.

6 MR. STUMPHAUZER: -- and it does, in fact.

7 The other thing is, in hearing Your Honor articulate
8 how much detail you've gone into, and how carefully you've
9 studied this, I did want to mention one other thing. I
10 understand there are a lot of moving parts, so it might not
11 matter anymore.

12 But when you rattled off a few examples of what you
13 thought were likely included in operating expenses, you were
14 absolutely right. So everything from janitorial supplies to
15 computer stuff.

16 But to the extent Your Honor is getting to that level
17 of detail, we also wanted to let you know, just as one example,
18 that number includes the \$499,000 penalty that was paid to
19 Pennsylvania for the securities violations. And I only bring
20 that up because I don't want to inject myself in this process
21 at all. I don't think it's my role. But if you were going to
22 rely on a figure from us for purposes of coming up with
23 deductions, and you want us to do further work, just please let
24 us know. I was just trying to agree with your general
25 characterizations, and I think most of what you see in there is

1 fairly routine expenses.

2 THE COURT: That's helpful. If we get to that point, I
3 might have to reach out. So I appreciate that.

4 MR. KAPLAN: I have nothing -- one issue. I will say
5 that when you go through our papers, you'll see that we
6 accounted for that 499. We understand that's not deductible.

7 THE COURT: No, but that's good, just so I have some
8 clarity on the numbers.

9 Okay. With that being said, anything else, briefly? I
10 think I've heard from all folks in the courtroom.

11 Anything else? Mr. Alfano, anything you want to add?
12 I'll prompt you first. Let me unmute you. I know I had you on
13 standby. Go ahead.

14 MR. ALFANO: Nothing at this time, Your Honor. Thank
15 you.

16 THE COURT: Thank you. And finally, Ms. Berlin,
17 anything else you want to add beyond what your co-counsel,
18 Ms. Johnson, has added? I will put that paperless order in the
19 record and put a deadline of next Friday. And my hope is,
20 obviously, that we can find a number that works for the
21 commission and works for all defendants, and, most importantly,
22 works for the investors, so the investors take away from this
23 that we continue to advance the ball.

24 Anything else you want to add? I think I unmuted. Go
25 ahead.

1 MS. BERLIN: No, nothing more to add. We're happy to
2 have another round of settlement discussions with the
3 defendants, as we have. The deductions of MCA expenditures
4 would have to require the inclusion of MCA profits. And I
5 think that's going to be difficult. But we are willing to have
6 every discussion with them and make ourselves available over
7 the next seven days to see what we can do. We'll notify the
8 Court, just as the Court advised.

9 THE COURT: Thank you for that.

10 Real quick, Ms. Johnson, I meant to ask you: We had
11 additional lawyers get involved before the consent judgments
12 from the SEC, is that correct, that assisted in trying to get
13 us over the finish line? I thought we had some other counsels
14 also just to get even more resources in from both sides.

15 Do we have -- again, I don't know if this falls on only
16 a few of you, and there's a lot of work to be done, but I
17 really wanted to see if we could get as many eyeballs on this
18 as possible. Is that something that can be advanced? I don't
19 know, depending on people's availability, I know you kind of
20 came in to assist for the trial. So what's your sense of that?

21 MS. JOHNSON: Yes. We have some other lawyers
22 available that can do it. One of the lawyers is no longer with
23 the SEC, but we'll put the resources necessary to get help.

24 THE COURT: I appreciate that. Because one of the
25 challenges, though, as Ms. Berlin says that the commission

1 approval portion of this can be difficult. So I can see a
2 situation where numbers are at least in principle, and it still
3 needs another, whatever it might be, another week, two weeks,
4 to get the commission approval. You'll get it from me. It's
5 just where we were from what you guys advised me yesterday to
6 where we can be, we're not in a place where we can even get
7 submitted to the commission. So we have to get there first.
8 And then, hopefully, we can get approval and get this thing
9 moving.

10 MS. JOHNSON: That's exactly how it works.

11 THE COURT: Okay.

12 MS. JOHNSON: Once the staff comes to an agreement of
13 something that we can recommend to the commission, then it goes
14 through the lengthy memo process and talking to commissioner
15 counsel, commissioners, and then it's heard before the
16 commission. That can take a long time, even if we rush it.
17 But we would like -- we're working towards having something
18 that we can recommend, but we're not quite there yet.

19 THE COURT: Okay. Very good. All right.

20 So with that being said, we'll conclude today's
21 hearing. Again, the Court will enter a paperless order after
22 today memorializing the SEC's pending motion to withdraw their
23 -- 1252, I believe, is the docket entry. The Court will
24 reserve ruling on that motion.

25 The Court will spend the next week looking at the

1 transcript while I allow the parties a chance to look at some
2 of my analysis today in the hopes that they can find a number
3 that will benefit all parties and, most importantly, the
4 investors. Obviously, I'm sure there are many investors
5 watching today's proceeding that thought we would walk out
6 today with a disgorgement number. I can only share with the
7 investors who are waiting patiently that all parties here are
8 doing everything they can to find a number that is equitable
9 and fair and puts us at, as the law says, the status quo, not
10 in a punitive way, but in a way that complies with case law and
11 makes investors whole. I will continue to endeavor to do that,
12 as I know the receiver will, as well. I thank all investors
13 and the parties for their patience. I do hope that everyone
14 walks out of court today understanding that it's better to have
15 a judge who scrutinizes than rubber stamps. That's how it
16 works.

17 All right. With that being said, we are in recess.

18 MR. KAPLAN: Thank you, Your Honor.

19 MS. JOHNSON: Thank you, Your Honor.

20 THE COURT SECURITY OFFICER: All rise.

21 (Court recessed at 1:58 p.m.)

22

C E R T I F I C A T E

23

24 I hereby certify that the foregoing is an

25 accurate transcription of the proceedings in the

1 above-entitled matter.

2 This hearing was conducted both live and via
3 videoconference and is therefore subject to the technological
4 limitations of reporting remotely.

5

6 DATE: September 24, 2022 /s/Ilona Lupowitz
7 ILONA LUPOWITZ, CRR, RPR, RMR
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH
CASE NO. 20-CV-81205-RAR

**SECURITIES AND EXCHANGE
COMMISSION,**
Plaintiff **August 25, 2021**
vs.
**COMPLETE BUSINESS SOLUTIONS
GROUP, INC, et al,**
Defendants.

MOTIONS HEARING
BEFORE THE HONORABLE **RODOLFO A. RUIZ, II,**
UNITED STATES DISTRICT COURT JUDGE

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10 **P R O C E E D I N G S**

11 *(The following proceedings were held in open court*
12 *and via Zoom teleconference.)*

13 **THE COURT:** Good morning, everyone. Please be seated.
14 Okay. We're here this morning, everyone, in case number
10:11 15 20-81205. This is the matter of Securities and Exchange
16 Commission versus Complete Business Solutions Group, Inc., et
17 al.

18 We have a number of folks that are appearing live here
19 this morning, but I do know that we're also joined by
10:11 20 individuals over the Zoom application.

21 So if at any point anyone that is watching on Zoom or
22 anyone that is participating on Zoom is having any issues with
23 the technology, please let us know. Our IT folks are trying to
24 make this as seamless as possible for a hybrid proceeding for
10:11 25 those that cannot make it in person.

1 So I'm going to attempt to have everyone state their
2 appearances for the record here, those that are live first, and
3 then we'll go to anyone that is on the Zoom application.

4 So I believe she is on Zoom, so I'll start actually
10:11 5 with the Securities and Exchange Commission. Ms. Berlin, can
6 you hear me? Are you there?

7 **MS. RIGGLE-BERLIN:** Thank you. This is Amie
8 Riggle-Berlin, and I'm here -- and getting feedback.

9 **THE COURT:** Let's start off by muting anything else
10:12 10 you have on because I'm hearing the feedback, and I don't think
11 our court reporter is going to be able to take down a
12 transcript with that.

13 So I don't know if there's anything else around you,
14 Mr. Berlin, but we need to try to mute it. We're piping this
10:12 15 in through our audio in the courtroom. Let's try this again.
16 Do you still have that feedback?

17 **MS. RIGGLE-BERLIN:** I believe I still do. We're back.

18 **THE COURT:** All right. So that's not working very
19 well. Let's go ahead and give you a second here while we try
20 to figure out what's going on with your echo.

21 And let me get appearances for the record of those
22 folks that are actually here. I do believe I have the receiver
23 and receiver's counsel --

24 **MR. ALFANO:** Good morning, Your Honor. Gaetan Alfano.

10:13 25 **MR. KOLAYA:** Tim Kolaya, for the receiver. Along with

1 us is Ryan Stumphauzer. (Audio distortion)

2 **THE COURT:** So let's see if we can figure this out.
3 Okay? I'm going to do this -- please call IT. We spent way
4 too much time working on this yesterday for this not to be
10:13 5 working this morning. All right. So at least we got our
6 appearances for our receiver and company.

7 Let me go ahead, gentlemen, and go through on behalf
8 of the defendants that are in court. Let's start appearances,
9 if we can.

10:13 10 **MR. LEVINE:** Good morning, Your Honor. Your Honor,
11 Joshua Levine on behalf of defendant, Joseph LaForte.

12 **MR. FERGUSON:** Good morning, Your Honor. David
13 Ferguson on behalf of Joseph LaForte.

14 **MR. SOTO:** Good morning, Your Honor. Alejandro Soto
10:13 15 on behalf of defendant, Joseph LaForte.

16 **MR. MILLER:** Good morning, Your Honor. Brian Miller
17 from Akerman on behalf of defendant, Dean Vagnozzi.

18 **MR. MARCUS:** Good morning, Your Honor. Jeff Marcus on
19 behalf of Perry Abbonizio.

10:13 20 **THE COURT:** All right. Okay. Now, we're going to go
21 ahead and attempt to keep stating appearances for those that
22 are on Zoom.

23 So I'll start off, if we could, I do believe we have a
24 number of lawyers appearing on Zoom. Let's go ahead. Those
10:14 25 counsels that are on Zoom, if you could go ahead and please and

1 state your appearance. We're going to see if we can hear you.
2 We're having a little bit of a technical problem, but go ahead,
3 if you could, please.

4 (Audio distortion)

5 **MS. SCHEIN:** Bettina Schein for Jo Cole. (Audio
6 distortion)

7 **THE COURT:** Those folks that can hear me, whoever is
8 appearing on Zoom has to be muting -- has to moot their audio.
9 So everyone that is trying to do this on Zoom (audio

10:15 10 distortion).

11 For the record this is why the judge wanted to do this
12 in person.

13 All right. Let's try -- I saw Ms. Schein. I heard
14 her appearance for the record. Someone else? Who doesn't have
10:15 15 it on mute? I will take that no one is able to hear anything
16 that is on? Yeah, I don't think anyone can hear us.

17 **MR. ALFANO:** To the extent that helps, this was giving
18 us feedback.

19 **THE COURT:** I still hear audio from people that are, I
10:16 20 think, appearing on Zoom. So let me try, Ms. Berlin, can you
21 go ahead and attempt to state your appearance again for the
22 record and let me see how that goes. (Audio distortion)

23 **MS. RIGGLE-BERLIN:** Yes. Can you hear me, Your Honor?

24 **THE COURT:** I can. And I don't area any feedback
10:16 25 either, so we have at least fixed your feed. Can you hear me

1 clearly?

2 **MS. RIGGLE-BERLIN:** Yes, Your Honor, I can. There's
3 no feedback.

4 **THE COURT:** So that looks like we may have fixed it,
10:16 5 whatever that is that we did. Let's try to keep it that way.

6 I'm going to try this also again and let Mr. Futerfas
7 and Ms. Schein appear again. Let me try this one more time.
8 Go ahead, Mr. Futerfas, and let's try and have you appear for
9 the record and see how good the feedback is.

10:17 10 **MR. FUTERFAS:** Good morning. Thank you. Good
11 morning, Your Honor. Alan Futerfas for Lisa McElhone.

12 **THE COURT:** All right. That was very clear.

13 And Ms. Schein, go ahead again and state your
14 appearance.

10:17 15 **MS. SCHEIN:** Yes, Bettina Schein for Joseph Cole.

16 **MR. RAIKHELSON:** I'm also here for Joseph Cole. Can
17 you hear me?

18 **THE COURT:** Yes, I can hear you, Mr. Raikhelson.

19 **MR. RAIKHELSON:** I'm local counsel.

10:17 20 **THE COURT:** Correct. All right. So I was able to
21 hear all of you guys without any feedback, so I think we've
22 figured this out.

23 And I'm going to try again, let's see, for my team on
24 the defense side, I know you guys stated your appearance, but I
10:17 25 kind of want to see what the echo, if anything, is still going

1 on.

2 Let's state our appearances one more time and let's
3 see if we can speak. I think everyone can hear us, so we
4 probably don't need those mics, but let's try. Go ahead, guys.

10:17 5 Who do I have here in court on behalf of which defendant and
6 which counsel. Let's try this one more time so we make sure
7 everyone hears.

8 **MR. LEVINE:** Josh Levine on behalf of defendant,
9 Joseph LaForte.

10:18 10 **MR. FERGUSON:** David Ferguson on behalf of Mr. LaForte
11 as well.

12 **MR. SOTO:** Alejandro Soto on behalf of Mr. LaForte as
13 well.

14 **MR. MILLER:** Brian Miller on behalf of Dean Vagnozzi.

10:18 15 **MR. MARCUS:** Jeff Marcus on behalf of Perry Abonizzio.

16 **THE COURT:** And I would ask Ms. -- let me try.

17 Ms. Berlin, did you get a chance to hear everyone's
18 appearances? Could you hear everybody that just appeared?

19 **MS. RIGGLE-BERLIN:** Yes, I could. Thank you, Your
10:18 20 Honor.

21 **THE COURT:** Okay. Very good. I think we have
22 overcome any technical challenges and don't worry. I know the
23 time has been allocated. The Court will run over time to make
24 up for what we lost trying to get technical glitches resolved.

10:18 25 So with that being said, anybody else that has not

1 appeared on the Zoom? I don't know if I've gotten everybody
2 already, but if you haven't stated an appearance, any counsel
3 of record on the Zoom that have not appeared, if you would go
4 ahead and do so at this time.

10:18 5 **MR. GACHE:** Hi, Judge. This is Ron Gache from LOGS
6 Legal Group, and we represent Lead Funding, and we're just
7 observing today, Your Honor.

8 **THE COURT:** All right. That works for me. Anybody
9 else? Okay. I think we've got everybody that's already been
10:19 10 appearing or that is going to appear today on for the record
11 and everybody can hear each other.

12 Obviously, just as a reminder, those investors that
13 are watching or that are participating and want to see what's
14 going on, my hope is that you will continue to keep everything
10:19 15 on mute because the feedback makes it very difficult for us to
16 hear what's going on in court and for everybody else who is
17 participating over Zoom to get a clear feed.

18 So just a reminder again that everyone please keep it
19 on mute. I will do my best for those folks that are on Zoom
10:19 20 that are going to be arguing today to turn to you and let you
21 unmute it so that you guys can speak. I think the best thing
22 though is keep it on mute until it's your turn to chime in so
23 that we don't get too much feedback.

24 So let's talk a little bit about what we're going to
10:19 25 do today. The Court has set aside some time to address two

1 pending motions. The first one -- and not necessarily in this
2 order -- although we can discuss how we want to address them.

3 The first one is the Motion to Discharge the Receiver,
4 and that is at docket entry 649. And the other one is our Rule
10:20 5 41 Motion to Dismiss the Amended Complaint Due to Misconduct By
6 the Securities and Exchange Commission and Related
7 Constitutional Violations, and that is docket entry 663.

8 So those are the two we're going to address today.
9 The way the Court, I think, sees this being most effective and
10:20 10 efficient is to really ask a few questions and set the stage.

11 The briefing has been extensive, so I don't want
12 anyone to reargue what you've already put on the papers. I've
13 read it all. I've gone through a number of exhibits that guys
14 have referenced, so I'm pretty familiar with all the key
10:20 15 arguments.

16 I just have maybe some more pointed questions to ask,
17 and then what we can do is you guys can have a little bit of
18 time to add or supplement to your pleadings anything else you
19 want to the Court to consider.

10:21 20 I think probably, to me at least, the easiest way to
21 go about doing this is to hear argument under Rule 41. I want
22 to take a step back. I don't believe that everybody signed off
23 on the Rule 41. I think the 41 is really Mr. Futerfas,
24 Ms. Schein, and Mr. Ferguson; am I correct in that? I think
10:21 25 that's really your motion.

1 **MR. FERGUSON:** That's correct, Your Honor. And I
2 intended to argue that with perhaps some assistance from my
3 partner who helped me -- who did most of the drafting but the
4 other lawyers that you mentioned also signed off on it.

10:21 5 **THE COURT:** Perfect. So I think the plan is I'll hear
6 from you guys here in court so that Ms. Schein and Mr. Futerfas
7 can chime in or echo. I'll turn to you twice on the Zoom after
8 a little bit so that you can also add anything else that may be
9 Mr. Ferguson and his partner have missed or haven't been able
10:21 10 to touch on as much as you would like.

11 So guys, look, let me start with this. I mean, you
12 know as well as I what the Rule 41 standard is. You know, the
13 motion has a lot of information in it, but when it boils down
14 to the legal standard, I need to essentially find, as the case
10:22 15 law states, really almost a willful level of intent.

16 And some of the case law I pulled, independent of the
17 pleadings, indicate that mere negligence is not going to be
18 sufficient to justify a finding of willful misconduct in order
19 for me to dismiss this complaint by the SEC under my power
10:22 20 under Rule 41(b).

21 And so the way I look at the motion, you've pointed
22 out a lot of what you have -- I think you would term sloppy
23 investigation. Let me put it like that. I think that if I was
24 going to give it the defense's best characterization, one of
10:22 25 the things would be that it was somewhat negligent; that there

1 was not enough investigation done with investigators outside of
2 Heskin; that this is a situation where, in your view -- and
3 we'll talk a little bit more about it -- we've deputized a
4 private attorney; he's gone ahead and done the SEC's work for
10:23 5 them; there has just not been kind of the fulsome review of
6 underwriting documentation and default rates and those types of
7 issues that would ordinarily, in the view of these particular
8 defendants, form the basis for a valid and well-thought-out SEC
9 action.

10:23 10 And so my question to you guys is knowing that
11 standard, knowing how high it is -- I think we can all agree
12 it's a high burden -- can I, on this record, truly entertain a
13 motion to dismiss?

14 This if, at best, I were to say, "maybe it's sloppy;
10:23 15 maybe they could have done better," and, of course, Ms. Berlin,
16 you'll get a chance to respond. I know in your view you guys
17 have done a thorough investigation, and it was only .06 of your
18 documentation that relied on Mr. Heskin, and so you guys have
19 more than enough of a good-faith basis to pursue this action,
10:24 20 and there was no direct action or direct commandeering of this
21 individual as part of your investigation, and therefore this
22 should be denied.

23 But I want to start with the defense and give them an
24 opportunity to tell me why this rises to the level of Rule 41.

10:24 25 So maybe -- and I'm sure you have other things you want to

1 cover first, but that's kind of my first concern, and then
2 we'll touch on other things.

3 But how am I really going to really do that with the
4 existing case law? Let me turn it over to you. Go ahead.

10:24 5 **MR. FERGUSON:** And I appreciate that you read
6 everything, and that you're asking this pointed question.

7 And I will tell you if we just have the sloppy
8 investigation, I don't believe we would have brought this
9 motion.

10:24 10 And it starts with a sloppy investigation from an
11 obviously-biased source, and then you get some obviously-biased
12 declarant, all from the same lawyer.

13 And they don't inquire or even -- it doesn't appear
14 that the SEC even recognizes the bias they have, but what
10:25 15 happens is the SEC, for whatever reason, motivated to go after
16 my client and the business, they take it further.

17 For example, you've got the Fleetwood declaration and
18 their endeavor to say that there was sloppy underwriting.
19 Fleetwood says that "I got approved before I got funded."

10:25 20 Counsel signs the pleading and says that -- I'm sorry.
21 "I got approved before the onsite inspection." The SEC changes
22 that to funded. That's not even what the declarant said.

23 And then in the reply -- in the response, pulls out
24 some CRM document and says, "Look at this," which they didn't
10:25 25 even have at the time. That's a major problem.

1 And the beginning of the pleading is that this is a
2 mob-like predatory loan operation charging 400 percent interest
3 sometimes, and as high as 95 percent (sic). And that did come
4 from Mr. Heskin. But the SEC did nothing, nothing at all to
10:26 5 look into the MCA industry, apparently, to know that those
6 allegations weren't true.

7 And then, you know, I'll skip over a lot of the other
8 falsities, and we can talk about them, but if you bookend that
9 opening with the defendants pilfered millions of dollars out of
10:26 10 the bank account, the investors' bank accounts, and that's
11 dropped on your desk, I couldn't imagine a scenario where you
12 wouldn't enter the most drastic pretrial relief, TRO, asset
13 freeze, and receivership. I get it.

14 And frankly, the allegations -- look, Your Honor, I've
10:26 15 had to go head to head with Mr. Stumphauzer and his crew often
16 to say we have got a job to do.

17 But in candor, I kind of understand now, as I've
18 delved down into this, like, you know, they're stopping the
19 processing and basically vapor locking this machine that
10:27 20 advances and collects cash, in the face of the allegations that
21 the SEC threw into this pleading.

22 And I imagine it's just a sign to understand, "wait a
23 minute; this isn't an illegal loan sharking predatory loan
24 operation." Without that, that wouldn't have happened. The
10:27 25 investors would be in such a better spot.

1 And then "you stole the money." Well, of course
2 you're going to take the bait, if you will, but it was just
3 that, it was bait, because as you see in our papers, we point
4 out it's quite clear now these aren't loans. That's not true.
10:27 5 It's not usury. It's not 400 percent interest. The money
6 wasn't stolen.

7 And what do we get from the SEC? The misconduct, I'm
8 sorry, but in my mind continues on because they don't say, "oh,
9 they weren't loans; we were wrong." They say, "what does it
10:28 10 matter if they were loans? They still call them loans." And
11 that's after they basically use the panko (inaud.) to blow the
12 door off the company and take it over.

13 And now they say, "well, it's irrelevant if they're
14 loans, if they were selling hamburgers or hot dogs. I don't
10:28 15 care." Well, of course they don't care. They baited you to do
16 what you did and they got what they wanted. What did they say
17 about when they stole the money? Not a peep. They just
18 ignored it. And they made it up.

19 Melissa Davis, their expert, who you relied on a lot,
10:28 20 she said, "yeah, they took tens of millions of dollars out of
21 the -- left \$83,000 behind." But when Mr. Stumphauzer gets
22 there and everyone now knows, there's 26 million dollars in the
23 account. It didn't happen.

24 And what's even more unfortunate is the money that
10:28 25 went to Georgia, that's a platform that disburses the cash

1 millions of hundreds of dollars dispensed that way, and they
2 did nothing at all to check that.

3 And so now in the reply -- I'm sorry, in the response,
4 the SEC says we already said at the preliminary injunction
10:29 5 hearing that that was all irrelevant. They still don't talk
6 about the theft accusation.

7 Why are they complaining? They just don't get it.
8 They don't get it. The defense doesn't get it because this is
9 just a simple securities registration disclosure case. That's
10:29 10 what they say now after they got the most drastic relief
11 possible.

12 They -- all of this, I still would like to believe and
13 my client would like to believe and the other defendants would
14 like to believe that the company can still be salvaged and the
10:29 15 note holders can still be made whole.

16 But none of that -- I can't imagine that if the SEC
17 had done a more proper investigation, not made up allegations
18 like -- so the Dean Vagnozzi concealed Joseph LaForte's
19 identify from a 300-investor dinner.

10:29 20 And they attach the transcript -- the commission
21 attaches the transcript to their TRO motion. When you look at
22 it, Dean Vagnozzi grabs the PA system mic and says, "May I have
23 your attention, ladies and gentlemen, meet Joe LaForte."

24 And it all adds up. Look, I've been practicing 30
10:30 25 years, I've seen a lot of people make mistakes, but I've

1 started to notice over the years it's rarely do they make a
2 mistake that doesn't advance their case.

3 And, here, if these are just mistakes, every single
4 one of them advances their case. I can't imagine if they'd
10:30 5 have pled a registration that should be registered and here are
6 some disclosures, default, whatever it is, I can't imagine,
7 Your Honor, that you would have entered a TR0 asset freeze and
8 receivership. And you're saying no, you wouldn't, right?

9 **THE COURT:** There's absolutely -- listen, there's
10:30 10 absolutely no reason why the Court, number one, let alone an ex
11 parte one, which is to be granted only in the most extreme
12 circumstances under case law, only to try to preserve status
13 quo, only to prevent investors from losing money.

14 The narrative and the evidence presented to this
10:31 15 Court, before the defendants were able to get really involved
16 in the cases and start to get their hands on discovery, painted
17 a stark picture that I believe -- and still believe to this day
18 -- left me with no option but to do what was done.

19 I mean, if not, I ran the risk, based upon what was
10:31 20 presented to me -- and I distinctly remember it because it was
21 right around July 4th of last summer. And I was in my home
22 looking at the documents and thinking if I don't move on this
23 I'm going to leave a lot of investors out in the cold. And
24 that was really what drove it.

10:31 25 Now, the challenge I'm having is as more and more

1 information gets before the Court and I look at what you're
2 asking me to do here, you know -- and we'll hear from the SEC
3 in a little bit -- they continue to maintain, again, that
4 they -- and as I said -- and you put it clearly -- you know,
10:31 5 that even if it's some negligence or, you know, not the type of
6 investigation you would expect from a government agency like
7 the SEC, that it wouldn't rise to the level of Rule 41.

8 I wanted to ask you, is there not perhaps a way --
9 because we are really on the eve of trial. I mean, we have
10:32 10 this trial set in December, three months from now. Summary
11 judgment deadline, I think, is September 24th.

12 You know, is this really the relief you think is
13 appropriate? Why would I not allow this to go forward to
14 trial, let this really get aired out in front of a jury? And I
10:32 15 think you would be in good stead if this plays out in front of
16 a jury, and a lot of your allegations and aversions, everything
17 you've said here, your word aberrance in this, some of these
18 breakdowns in the investigative process, get a little bit of
19 sunlight.

10:32 20 I would imagine that you would feel strongly about
21 some sort of a sanction motion coming at that point, and I'm
22 just curious, am I in the best position now, before trial, with
23 the evidence I have, to take the extraordinary step of throwing
24 this case out under 41-B, as opposed to perhaps waiting to see
10:32 25 how things play out at trial, getting a little more of a both

1 sides of the story with the ability of a cross-examination to
2 really get into this? And then perhaps we can decide, you
3 know, and if -- maybe it would be a directed verdict issue, I
4 don't know, or even arguably maybe a Rule 11 issue, I'm not
5 certain.

6 But I'm just trying to figure out, is this the vehicle
7 to vindicate your client's rights? And if the argument's going
8 to be, "well, Judge, it has to be this way because we can't
9 stand this receivership another minute", which is really what I
10:33 10 garner from all these pleadings, is "we're choking off this
11 business, we can't do this anymore, you've just got to at least
12 let this company get back on its feet, shut down the
13 receivership portion of it, and let's litigate this like a
14 straight-up regulatory case for nondisclosure and let that be
15 it."

16 I mean, is that really why you're telling me, "Judge,
17 I can't wait for trial. I've got to do this now"?

18 **MR. FERGUSON:** Let me put it into my perspective, and
19 I understand your position, and I can tell you candidly I would
10:33 20 have entered those same orders if I had been presented this as
21 what you were putting in --

22 **THE COURT:** I think most of us would have, okay, based
23 on those facts.

24 **MR. FERGUSON:** -- and that's a fact.

10:34 25 But -- so the question is, yes, I'm asking for the

1 complete relief. You could craft something intermediate, but
2 this concept that "we're on the eve of trial, so let's just go
3 ahead and air it out at trial," it's problematic for a couple
4 of reasons.

10:34 5 First of all --

6 **THE COURT:** Yeah, tell me why, that's important.

7 **MR. FERGUSON:** -- we've got note holders out there.

8 That's who -- they -- that -- if we win and get the company
9 back, we want them made whole. If we lose, we want them made
10:34 10 whole as best as possible.

11 And three months, four months between now and trial, I
12 think that -- and, again, I'm not taking a shot at
13 Mr. Stumphauzer -- but I don't think they've really been
14 focusing on or are capable of the collections that the defense
10:34 15 and the team that they've assembled could do. And I believe we
16 can cover significant ground between now and trial and bring in
17 money back in for investors, and that's -- that should be the
18 most important goal.

19 And to say -- and it's a pragmatic question. "Well,
10:34 20 we're almost at trial; can we just get there?" I don't think
21 so in this case for a couple of reasons.

22 The investor issue that I just told you about,
23 fairness, but also the SEC, the commission, needs to -- there
24 needs to be ramifications for baiting you into signing these
10:35 25 orders, this most drastic preliminary ex parte remedies

1 imaginable.

2 And if you allow that to happen, and you think it's a
3 reasonable thing, the problem is you're rewarding that very
4 conduct. And they're going to come back and try it again, and
10:35 5 other folks that I might not represent or know right now and
6 maybe represent in the future are going to get burned in the
7 same way.

8 And, you know, the funny thing is this is supposed to
9 be about protecting the investors who invested in an
10:35 10 opportunity that the SEC says should be registered and they
11 didn't get the right disclosures.

12 But the SEC doesn't seem to care about those investors
13 at all. They won't even admit. They come here and say, "We
14 got this wrong, Your Honor, and here's how we can fix it." Or
10:36 15 maybe they could go collect something.

16 No. They just -- I'm sorry, but they just doubled
17 down. They recklessly accuse us of fabricating evidence, which
18 is completely false. We take a snapshot of QuickBooks, and we
19 put on top who the declarants were so that you can tether that
10:36 20 document to what we're talking about.

21 They couldn't possibly believe that we were trying to
22 sneak by you a QuickBooks entry that has declarants' names on
23 it because the declarations would have -- were filed by the SEC
24 came later, it's clearly for the purpose of this litigation.

10:36 25 But they're misbehaving -- their misbehavior

1 continues. And I believe, Your Honor, if you are not inclined
2 to grant the entire relief, I -- at a minimum, I believe you
3 should take a look at letting us, under perhaps the monitorship
4 of the receiver, let us try to collect some money in these
10:36 5 months. Let us do something.

6 The SEC has to pay some price here, and letting them
7 going to trial and defending themselves is not enough of a
8 price.

9 THE COURT: Let me ask you, What would be the court
10:37 10 order -- I don't think it's really a court order. But what is
11 the federal rule of the court order that you claim the SEC
12 violated for purposes of Rule 41?

13 Because I, as you would expect, I'm tethered to what
14 the standard is for Rule 41. That's what you're seeking relief
10:37 15 under. I go back to my point earlier that it's a high bar, and
16 the mere negligence is not going to satisfy.

17 What -- I mean, unless you're saying that they're --
18 assuming -- I got to assume and correct me if I'm wrong -- but
19 you're not seeking to enforce Rule 41 under a court order
10:37 20 federal rule, but, instead, you are essentially asking me to
21 use my inherent authority based upon what you believe is a
22 finding that can be made that this was brought frivolously or
23 in bad faith.

24 So I want to make sure I get exactly our theory. So
10:38 25 the argument, am I right, Mr. Ferguson, that you say, "Judge,

1 we want you" -- it's not a court order issue. It's "we want
2 you to invoke your power under Rule 41-B because we have shown
3 you that this has been brought frivolously or in bad faith."

4 Is that -- am I right in that?

10:38 5 **MR. FERGUSON:** One hundred percent, Your Honor --

6 **THE COURT:** Okay, okay.

7 **MR. FERGUSON:** -- because the case was -- there was no
8 order.

9 **THE COURT:** Right.

10:38 10 **MR. FERGUSON:** The case was, in its inception, was
11 borne of this, and we believe that it's well beyond willful.
12 It -- I'm sorry, well beyond negligence. It's willful and
13 their response, it continues, the willful misconduct.

14 **THE COURT:** And what do you make of going back to the
10:38 15 more nuts and bolts, you know, the motion -- and you've pointed
16 out -- talks a lot about your belief that they have exclusively
17 relied on the Heskin and DiPrieto information to kind of build
18 the case?

19 **MR. FERGUSON:** Let me address that.

10:38 20 **THE COURT:** Yeah, let's go through this because one
21 thing that you saw, there is a response, and I want you to
22 respond.

23 The SEC has asserted that it contacted them, not the
24 other way around, right? They didn't say, you know, I know one
10:38 25 of the arguments was that, you know, Heskin went to them, kind

1 of handed them a case and they ran with it.

2 They're saying they contacted them, which I think
3 everyone agrees they're allowed to do, and that, more
4 importantly, the SEC continues to say that the investigation
10:39 5 was well under way, right? That they have said, "Judge, this
6 is but one piece of already very developed investigation. And
7 so even if we took information from Heskin, it doesn't show
8 that we were doing this in bad faith."

9 What do you make of that?

10:39 10 **MR. FERGUSON:** Let me address that.

11 **THE COURT:** Yeah.

12 **MR. FERGUSON:** Again, if it was just this Heskin, the
13 declarant, just that, this motion wouldn't be before you.

14 **THE COURT:** Okay.

10:39 15 **MR. FERGUSON:** But that's the platform for the rest of
16 the misconduct that occurs after that.

17 And this suggestion that they contacted Mr. Heskin, I
18 have no reason to -- I can't dispute that with the thousands
19 and thousands of documents I've looked at. I hear it now. I
10:39 20 understand it.

21 The contention that, oh, counsel -- trial counsel for
22 the commission typed up the declarations, okay, but that would
23 mean counsel should know that funded is an important switcheroo
24 there when you go from approval.

10:40 25 And I actually believe the SEC has made up this

1 approval if they're typing up these declarations to show you
2 how the approval part doesn't work.

3 But, again, if that was just it, but they're not being
4 candid about that, either, because they say, well, we've -- I'd
10:40 5 say "dump." They'd say we've got hundreds of thousands of
6 documents, and this is just .06 or whatever it is of the
7 documents. And, look, Your Honor, look how robust our
8 investigation was because of all of these documents.

9 Well, let's look at -- I think the telescope is sort
10:40 10 of turned around backwards there. Let's look at the material
11 facts here. If you look at the allegations in the complaint, I
12 would wager -- and, again, this is fun with statistics -- but I
13 would wager that Mr. Heskin's information and the declarants'
14 information, which they didn't go bother to get anyone else's
10:41 15 declarations, accounts for probably 90, 95 percent, if not
16 more, of the allegations in the complaint.

17 So what that tells me is whatever they got, however
18 long they were working on this, whatever they got wasn't
19 material -- wasn't material enough to really show through in
10:41 20 the complaint, the amended complaint, and the emergency TRO
21 motion.

22 So that's not even candid when they're saying that.
23 And, again, if it was just that, I wouldn't be sitting here
24 right now. I'd be working on something else probably in this
10:41 25 case, but that -- the fact is that's the platform, and from

1 there, it's not that the SEC just made a few more mistakes or
2 got a little sloppy; they went all out, made up a big lie about
3 the theft of money, absolutely said things happened in
4 transcripts that they filed that didn't. Joe Cole met at a
10:41 5 dinner to talk about acquiring a bank to avoid usury loans,
6 Your Honor, that don't even apply, first of all.

7 But when I read that transcript over and over, it's
8 not in there, that Mr. Vagnozzi concealed Joe LaForte's
9 identity. "Ladies and gentlemen, meet Joe LaForte." It just
10:42 10 -- this isn't accidental, this is willful, and they wanted --
11 and I think what I believe, probably they know because the
12 commission does this, that if they can bait you into that
13 relief and you freeze everybody's assets and you take over the
14 business, the defendants eventually cannot defend themselves,
10:42 15 and they end up for giving you -- giving the SEC -- they're out
16 of money, they're dried out, they've got nothing, and they
17 signed financial affidavits confirming that, and they sign a
18 consent judgment for the whole kit and caboodle.

19 And the settlement says "as long as you didn't lie on
10:42 20 your financial affidavits, we're never going to collect from
21 you", and they don't have to worry about a motion like this.
22 And now they do. And here we are. And they should pay the
23 price.

24 **THE COURT:** What do you make -- what do you make, for
10:43 25 example, taking one example of some -- and I know that your

1 view is that you've produced kind of a mosaic, if you will, of
2 shortfalls in the investigation. You know, we could spend a
3 lot of time talking about the investor dinner and whether or
4 not someone was trying to hide their identity. We can talk
10:43 5 about how much was really completed before Heskin came into the
6 picture.

7 And the SEC's response indicates -- and we don't know,
8 quite honestly, whether they needed Heskin, in your view, to
9 make the case or not. But at least the timeline indicates that
10:43 10 it didn't get started with him; that there was some ongoing
11 investigation, and the commission had gone ahead and
12 essentially blessed and authorized the investigation back on an
13 August 2019 e-mail to the investor merchant client. There was
14 some indication already of what was ongoing, and they had
10:44 15 provided that form 1662.

16 What do I make, for example -- like in underwriting,
17 just to give you an example. When we talk about underwriting,
18 we know that they did get a declaration of the former CBSG
19 assistant, they had looked at some of the representations on
10:44 20 the website, there were some documents that indicated onsite
21 inspections were not occurring before a deal was approved.
22 There were some other declarations. That's just, you know, I'm
23 just trying to give you an example. There may be flaws.

24 **MR. FERGUSON:** May I -- yeah, and I want you -- but my
10:44 25 point is --

1 THE COURT: I'm sure you're going to tell me there's
2 some flaws in that, but, again, I go back to my other point:
3 There may be flaws in it, and some of that is to be played in
4 my view before the jury, but I have to find, essentially, I
10:44 5 don't want to say it's almost a black-and-white situation, but
6 I'm so hesitant because the case law on 41 requires such a high
7 bad-faith finding, I would essentially have to find that they
8 had made up things out of whole cloth.

9 MR. FERGUSON: Let me address that.

10:44 10 THE COURT: Yeah. Go ahead.

11 MR. FERGUSON: So, Ms. Jones, let's talk about her.

12 THE COURT: Sure, yeah.

13 MR. FERGUSON: She -- she commit -- she --

14 THE COURT: Yeah, Jones.

10:45 15 MR. FERGUSON: -- she's a -- she's, as we set forth,
16 she's a disgruntled employee who was terminated and brought a
17 case against the outfit. But this concept of approved before
18 the onsite inspection, Your Honor, as we try to break out and
19 isolate it in our reply, that's made up by the SEC.

10:45 20 THE COURT: What is made up by the SEC?

21 MR. FERGUSON: That there's an approval process.

22 THE COURT: Oh, oh.

23 MR. FERGUSON: That it's approved. There is no such
24 approval because in this arrangement here, the company has no
10:45 25 obligation to fund until and only if it chooses to do so, and

1 it does so after underwriting.

2 And so this approval makes it sound like you get a
3 letter you're pre-approved for a million-dollar loan, Your
4 Honor, you know what happens next. You send in your stuff, and
10:45 5 if you really want the loan and you clear underwriting, you get
6 the money, but if you don't, you don't get it or you get it at
7 a higher rate.

8 That approval thing is another problem made up by the
9 SEC. And, here, if there's this ongoing investigation because
10:46 10 what I see is a hasty investigation, and it was rushed. But if
11 there's an ongoing investigation, well, then they could have
12 used their subpoena power to discern that the money wasn't
13 stolen from that company in Georgia. Where are other merchant
14 declarations?

10:46 15 Frankly, when I first read the complaint -- I've done
16 some FTC work -- when I first read the complaint, Your Honor,
17 there's a complete disconnect with this complaint because you
18 take these 14 merchants who are all in litigation, and most of
19 them owed money to Par, and you start this case and you read
10:46 20 the factual allegations.

21 And about halfway through the factual allegations, I
22 put it down and go this reads like an FTC case because then you
23 get to the claims and it's about securities. But why are they
24 so concerned with these 14 merchants that Mr. Heskin brought
10:46 25 that they'd been investigating for so long? Why don't they

1 have any other merchant declarations? Why is it just this
2 source?

3 You know what else? Where are the investor
4 declarations? Where are the investor witnesses? They're not
10:47 5 there because this isn't some long, well-thought-out
6 investigation that at the very end comes across Mr. Heskin and
7 they use .06 of it for his information. They -- I'll give it
8 to them, they reached out and called him, but from that point,
9 they rushed this. You see Mr. Heskin's e-mail, the blast to
10:47 10 all the clients: "I need this rush, give me this back," yes,
11 no, yes, no, yes, no.

12 And, again, this approval thing is a ruse because
13 they're trying to make it look like they didn't do any
14 background checks, they didn't do any due diligence, and they
10:47 15 approved it, meaning they're obligated to give them money, and
16 then do this sham of an underwriting process.

17 And, Your Honor, rather than walk you through three
18 notebooks and all the competing charts, I think you've got it
19 there, you see we've provided evidence that there were
10:47 20 background checks, there were onsite inspections, and the SEC
21 says, well, who's Metro Inspections? We don't know if they're
22 real. How do we know who they did? Well, it's got our logo
23 and Metro's, that they did it for us and we paid for it. And
24 all of -- but all of that is just a misdirection now.

10:48 25 But the point being I reject that this record supports

1 some long, well-thought-out, well-conducted investigation and
2 Mr. Heskin comes in late. The indicia is the opposite, and if
3 you look at what we filed, they found him, they wanted to do my
4 client, they wanted to take him down, and they wanted to -- and
10:48 5 the way they knew to do it was to put the false allegations in
6 front of you, get you to take the bait, get you to enter these
7 drastic orders and here we are.

8 **THE COURT:** I guess, one of my concerns is the way you
9 stated that just now, I think, shows why I'm so hesitant. The
10:48 10 indicia, you know, the way things look, our view of
11 underwriting versus their view of underwriting.

12 Boy, do all these things sound like that's why we have
13 a jury system. They do not sound like the type of reasons why
14 a Court should step in to a regulatory investigation and toss
10:49 15 it, essentially, an extension for bad faith or willfulness.

16 I mean, you've got to -- and I know in your view
17 you've gotten there already, but my view, at least in the case
18 law, is, I mean, you have to catch them red-handed in the sense
19 that if I had communications that knew full well that these
10:49 20 guys are the subject of a SEC vendetta, they didn't do anything
21 wrong, I mean, I don't have that with this record.

22 What I have, again, I think in your best day is a very
23 swift and maybe not thorough investigation, perhaps too much
24 reliance on certain individuals who had an axe to grind,
10:49 25 perhaps it could have been more beneficial to seek other

1 merchants that were not in active litigation.

2 All of these things, though, go to credibility. All
3 of these things go to weight. You know, even these simple
4 things like whether or not the underwriting really is being
10:49 5 mischaracterized by the SEC. If it is being
6 mischaracterized -- and this has been an argument from the
7 beginning -- that the SEC has not fully understood the
8 factoring business and how this works. That may be true, and
9 so one would say, well, the way they have painted this business
10:50 10 makes it look like there's something nefarious, and the reality
11 is there's not. That, again, could be a negligent type of
12 pleading. It might be sloppy. It might depend too much on
13 limited testimony from individuals who have very mixed motives.

14 But when I think of bad faith -- and I -- this is not
10:50 15 me speaking, it's the Eleventh Circuit. I mean, what we need,
16 really, is that kind of willful misconduct for me to exercise
17 my inherent authority to dismiss a claim. I mean, you guys
18 know this. It's a drastic, very serious sanction, and I just
19 keep pointing to some of what I've seen here on both sides
10:50 20 indicating that the best I can concede to you is that this was
21 not done in a way that we would expect the government to
22 conduct a thorough investigation.

23 And if I give you that, that is something that I'm
24 sure will be displayed for jurors to see. It will be litigated
10:51 25 at summary judgment. But, boy, does it concern me that it

1 falls just short of what I would need to be able to grant 41
2 relief.

3 That's just really where you have me. And I'm not
4 saying that I can't get there. I'm just saying I think you
10:51 5 recognize it's a tough lift because you'd be asking me to
6 essentially go through all of these pieces of evidence.

7 And let me tell you this: Let's say, that I believe
8 you 100 percent on, for example, the Joe Cole and disclosure
9 issue, where you said clearly, look, they introduced him for
10:51 10 who he was, no one's hiding the ball here, this is completely a
11 misstatement.

12 Even if I gave you that or I were to give you, you
13 know, that they relied too much on the 14 litigation, that's
14 not still getting me to bad faith. That might be getting me to
10:51 15 a kind of a poor investigation, but it's not getting me to bad
16 faith. You know? That's where I'm a little bit stuck, I
17 guess.

18 **MR. FERGUSON:** Well, Your Honor, our position is when
19 you stack all this up, it's --

10:52 20 **THE COURT:** Right. All of it together is enough,
21 right?

22 **MR. FERGUSON:** -- if you pull one thing out, but at
23 some point you got the person wearing dark sunglasses at night,
24 they're -- it's raining, they don't have windshield wipers,
10:52 25 they're speeding, they're on their Blackberry, at some point an

1 accident is so willful that it crosses the line and it becomes
2 willful disregard for the truth, falsity, rights and the law.
3 And I think we're there, Your Honor.

4 **THE COURT:** Okay. Okay.

10:52 5 **MR. FERGUSON:** And this underwriting concept, that's
6 another sort of willful misdirection. They wanted to take this
7 business down on a securities claim, so they just -- they throw
8 this underwriting, but we don't have any investors saying I
9 didn't get paid because the underwriting is so bad or that none
10:52 10 of these -- we're talking a lot about underwriting and,
11 frankly, I don't even see this.

12 At trial, I'm going have to talk about it if we have
13 to go to trial, but what I'm -- I'll go ahead and preview my
14 opening, this is not an underwriting case. That's a
10:53 15 misdirection by the SEC, it's a misdirection of you, and if I
16 had to go to the jury, it'd be a misdirection of the jury.

17 But if this is an SEC case, they want to say, oh, you
18 should have registered, you should have disclosed. That's the
19 case they should have brought, and if they were doing a
10:53 20 long-term investigation like that -- and I am not -- I do not
21 have a let's go do Joe LaForte, ha-ha, let's make up some
22 stuff. (Nodding). If I did, you know, this hearing, yeah, I
23 don't even know -- (voices overlap)

24 **THE COURT:** I don't know if we'd need a hearing.

10:53 25 **MR. FERGUSON:** Yeah, but on that, I'm going to -- I'm

1 going rest on you stack it all up and it crosses the willful
2 line.

3 **THE COURT:** Let me ask you this.

4 **MR. FERGUSON:** May I just say one last --

10:53 5 **THE COURT:** Yeah, I'm sorry, go ahead. Yeah, finish
6 your point.

7 **MR. FERGUSON:** -- yeah. And you said that, you know,
8 dismissing a claim is a drastic sanction. I'm saying it's the
9 right solution to a drastic remedy that was procured
10:53 10 improperly, but, again, I'm telling you, Your Honor, we would
11 cooperate. If you came up with something less than that, if
12 you didn't think that was the appropriate sanction, we would
13 work with you, and if that needed further discussions, status
14 conference to work it through quickly, we would do that.

10:54 15 But I do believe that given the drastic relief that
16 they procured wrongfully, that the commission procured
17 wrongfully, that the sanction is less drastic than what they
18 did here.

19 **THE COURT:** And let me put it this way. I think --
10:54 20 and I know all of you guys and defense councils on the line
21 would agree with me -- that, really, the Rule 41, I believe is
22 driven by your good-faith belief that this was done willfully
23 and not a thorough investigation, but at its very core, and
24 I've gone over this really from your rely, as I read it again
10:54 25 yesterday evening, and really from most of the pleadings in

1 this case for the last six months, I think you would agree with
2 me that you would be just as satisfied if the Court were to
3 essentially order the receiver to extricate itself from the
4 business.

10:54 5 I mean, at the end of the day, what I gleaned from all
6 of the defense counsels' positions is really an overarching
7 concern with the receivership. It's been the hallmark, I
8 think, even pleadings like this, although they do spend a lot
9 of time pointing out what you believe are flaws in the SEC's
10:55 10 investigation.

11 I think and you've stated it just now in that you
12 recognize that there may be an intermediate level of relief
13 that doesn't rise to the level of dismissal because I think
14 even all defense counsels continuously emphasize that this is a
10:55 15 registration and disclosure matter, and if this was litigated
16 as such, there wouldn't be so much of a battle.

17 That would really go back to the nature of the case or
18 the truth of this claim, and it can be litigated and done in
19 your view a lot more swiftly and cleanly if we found a way to
10:55 20 get Par Funding essentially back in business without the
21 receivership in play.

22 And so I don't want to misstate your position, but my
23 sense is, from even this Rule 41, just like it's being echoed
24 in the companion motion we're going to talk about later, that
10:56 25 your biggest concern, even at this case, continues to just be,

1 Judge, let us litigate it with the individual defendants and
2 the registration issues and the disclosure issues.

3 But we have pulled in -- and I think in the defense
4 view, without reason -- we've pulled in the entire business
10:56 5 model and this is now a collateral casualty to what should have
6 been a much more streamlined regulatory investigation.

7 I mean, isn't that really what it boils down to? I
8 mean, if you guys walked out of here today with some adoption
9 or understanding of a plan to have the receiver wind down his
10:56 10 involvement and see what this big operation could get up and
11 running again, that probably is the number-one relief that all
12 the defense are -- not only the ones in this motion, but
13 everybody else that's on this defending a player, in this case,
14 is seeking; is that right?

10:56 15 **MR. FERGUSON:** Your Honor, what you're saying makes
16 sense and, yes. But you started with, Would be more satisfied
17 if Mr. Stumphauzer was shown the door versus the relief I'm
18 asking?

19 **THE COURT:** I think you want the relief you're asking
10:57 20 for, sure. Yes. Yes.

21 **MR. FERGUSON:** That's what we're entitled to, and no
22 offense to Mr. Stumphauzer, but as everyone knows, my partner
23 and I have butted heads with him for months about things that
24 have happened, but, frankly, we blame the SEC for what they did
10:57 25 for all of that.

1 And it's ironic because this Rule 41 motion came -- I
2 filed it late at night, right after we got the response to the
3 other motion we're going to argue, and the SEC jumped in to
4 defend the receivership and says, "Why are they fighting with
10:57 5 the receiver? They should be fighting with me."

6 You know, I'm reading that as my secretary's uploading
7 this Rule 41 motion. The point of that is we would have fought
8 them sooner had we got our documents sooner, and, you know, the
9 SEC says, "Oh, why are they bringing it now?" Well, they've
10:57 10 been dumping -- you know, they dumped like seven terabytes of
11 documents on us. We got as many as 150,000 documents, you
12 know, a month ago or so ago.

13 So it took me this long for Josh and I to do this, but
14 the SEC has basically -- they threw the grenade, blew up the
10:58 15 place, and are just sitting back, and Mr. Stumphauzer is taking
16 the lead and basically spent a lot of time, I think, trying to
17 figure out if the SEC's allegations were right, looking for
18 theft and improper conduct and trying to decide if this
19 business was crooked, as the SEC alleged.

10:58 20 So a long-winded answer to your question: We would
21 certainly be satisfied with relief that got us back in to try
22 to recover money and make money for the investors. That is
23 absolutely the most important thing that we could do other
24 than, if the case is going to continue, defend ourselves.

10:58 25 **THE COURT:** Okay. And I agree. I mean, I understand,

1 and your view is you filed it, seeking the dismissal, and, in
2 your view, the inherent power of the Court would justify that,
3 given this record.

4 You've heard kind of my concerns about what that takes
10:59 5 in terms of funds necessary under Rule 41, but you've also
6 conceded that if the Court doesn't feel we've gotten there,
7 that there would perhaps be alternative measures the Court
8 could take, and one of those, as you pointed out, would be to
9 at least step back from the receivership issue, and I
10:59 10 understand that.

11 Let me -- obviously, I've allowed you to go on, and I
12 don't want to lose my train of thought because I don't --
13 Mr. Futerfas and Ms. Schein, I do know that you're all on this
14 motion, too.

10:59 15 But I -- if you would indulge me, I'd like to let the
16 SEC respond before I hear a little more from the other defense
17 counsels that are signed off on this motion because I will
18 forget some of the things we've touched on, and I'm sure the
19 SEC wants to respond some.

10:59 20 So, Ms. Berlin, you can still hear me; is that
21 correct? I hope so. Oh, let me see. I can see you speaking,
22 so I think you can hear me. I just don't hear you. There we
23 are. Okay. Can you hear me now?

24 **MS. BERLIN:** I can. Can you hear me as well?

11:00 25 **THE COURT:** Okay. I can hear you. Make sure you

1 project a little bit. I think everyone else's microphones are
2 off. I'm going to turn to you.

3 So my issue here -- and you've heard me say it, it's
4 not a big surprise given the case law -- that we have arguments
11:00 5 made by the SEC about the timing of the investigation. We have
6 arguments made that it wasn't fully relying on Heskin and
7 DiPrieto, that, as you pointed out, .6 percent of the
8 investigative file comes from him.

9 You have arguments that you have independent sources
11:00 10 on underwriting shortfalls that the SEC, when you look at the
11 timeline, did complete an investigation and justified the
12 relief they sought.

13 And you've pointed to a number of e-mails and exhibits
14 that I've reviewed that would indicate if not directly opposed
11:00 15 to the representation that defendants made in this motion, at
16 least would call into question those representations, thereby
17 making it more difficult for a willfulness finding to be made.
18 And at best, as I stated, perhaps it would be some sort of a
19 negligent or rushed investigation.

11:01 20 Now, I know you take issue with that. I'll turn to
21 you. Again, I don't know if this rises to the level of Rule 41
22 because of how high that burden is. But the idea of willful
23 contempt and finding or exercising my power in this regard, I
24 think, is -- I'm very wary of it, let's put this that way,
11:01 25 given this record.

1 But go ahead and some response if you would to the
2 reply and some of the arguments made by counsel. Go ahead.

3 **MS. BERLIN:** Thank you, Your Honor.

4 So first and foremost, the defendants cannot present
11:01 5 any case where a Court has ever reviewed an SEC or any other
6 government agency investigation to opine on whether a thorough
7 (audio distortion) the Court's opinion of an SEC investigation
8 could give rise to a Rule 41 violation.

9 In order for the -- this is a -- for this Court to
11:02 10 have jurisdiction over an SEC investigation, we did not address
11 that in our response brief because they didn't frame it that
12 way. They framed it as a state actor issue, and we addressed
13 that.

14 So I'd like to back up, Your Honor, and address, first
11:02 15 and foremost, the defendant -- if the Court is going to opine
16 on an SEC investigation, there would have to be some base or
17 showing that the Court has jurisdiction to do so, and it does
18 not. And the defendants cannot and will not be able to cite
19 case law on that.

11:02 20 SEC investigations are under the full discretion of
21 the agency. There's no case where a court opines on what they
22 think about the investigations, nor could that ever be (audio
23 distortion).

24 **THE COURT:** Sorry, Ms. Berlin, it's cutting in and out
11:02 25 a little bit, so I don't know if you want to get a little

1 closer to the computer or we're going to turn it up a little
2 bit here, but I wasn't able to hear exactly what you said in
3 that last comment. Go ahead.

4 **MS. BERLIN:** Yes, I could hear another person
11:03 5 speaking, so can you hear me okay now? Is there any --

6 **THE COURT:** Yeah, I can hear you now. Let's --
7 hopefully, that the audio picks up. Go ahead.

8 **MS. BERLIN:** Certainly. I'll back up.

9 We addressed the issues they raised in their motion.
11:03 10 Today they're painting and framing it a bit differently,
11 whereas I'm hearing discussion about the SEC investigation,
12 where it might have been negligent, whether there were issues
13 there, and whether the defendants' view of an SEC investigation
14 or that they could even ask the Court to review it. And all of
11:03 15 that is improper. That wasn't the way I (audio distortion)
16 framed.

17 I'm hearing feedback, Your Honor. Are you as well?

18 **THE COURT:** Yeah, I mean, it's not even feedback.
19 You're just cutting in and out.

11:04 20 (Thereupon, an off-the-record discussion was had.)

21 **MS. BERLIN:** Is this better, Your Honor?

22 **THE COURT:** Yes. Go ahead.

23 **MR. FERGUSON:** If you mute the Court audio, then we
24 can't hear anything.

25 **THE COURT:** Ms. -- okay. Let's try again. Let's see

1 if she can keep going. Maybe unmute me for a second, so I can
2 tell her to just keep talking.

3 **MS. BERLIN:** Your Honor, can you hear me okay?

4 (Thereupon, an off-the-record discussion was had.)

11:04 5 **THE COURT:** Mr. Raikhelson, go ahead and -- go ahead
6 and -- if you can hear me, go ahead and mute yourself.

7 Ms. Berlin, I'm going to just mute our court audio so
8 that so you can speak uninterrupted without that breakdown. So
9 I'm turning it over to you. Okay? So go ahead and speak. At
11:04 10 this time, I'm going to mute our court audio so (voices
11 overlap) can hear you.

12 **MS. BERLIN:** Your Honor, I'm not sure if you can hear
13 me.

14 **THE COURT:** Can you hear me, Ms. Berlin? Ms. Berlin
11:04 15 can you hear the Court? Can you hear me, Ms. Berlin?

16 **MS. BERLIN:** I can.

17 **THE COURT:** Okay. What I'm going to try to do is mute
18 the microphone. That way, no audio comes from our courtroom
19 and it should prevent you from being chopped up. So you're
11:05 20 going to get a little bit of uninterrupted air time here.

21 One thing I will say before you start speaking just so
22 I can kind of get ahead of it, my understanding is we're not
23 arguing over the nature of the investigation, okay? That's not
24 what we've discussed. Mr. Ferguson and I are on this
11:05 25 conversation at least for the last 30 minutes or so, and my

1 view was he was pointing out what he believes are flaws in the
2 investigation that his evidence, at least in the way he's
3 portrayed it and he's framed it and pointed to the record, he
4 believes that it shows that representations made in the initial
11:05 5 pleadings in this case were not supported by the record,
6 indicate an investigation that was not fulsome, and rise to the
7 level of a bad-faith case that would trigger inherent power
8 under Rule 41.

9 I haven't really spent a lot of time talking about
11:06 10 state actor. I'll talk about that in a little bit, but,
11 really, at its core, it's a Rule 41 inherent power due to bad
12 faith. And I don't think it's about how your investigation was
13 conducted because that's not what matters to me.

14 I agree I don't have jurisdiction over how the SEC
11:06 15 does what they do, but once you file a pleading, now I do.
16 When you're in my house, now I do have jurisdiction over it and
17 I'm looking at your pleadings.

18 And the way the pleadings are framed, Mr. Ferguson is
19 pointing out, along with Ms. Schein and Mr. Futerfas in their
11:06 20 motion, they believe that the pleading has a lot of it glaring
21 deficiencies that rise to the level of more than mere
22 negligence. They rise to the level of willfulness and bad
23 faith because there's gaps not only in the investigation, but
24 it exclusively relies on a subsection of merchants with an axe
11:07 25 to grind, it relies on Heskin too much, and it misstates the

1 nature of the business, the underwriting, little things like
2 Mr. Cole trying to hide his identity is somewhat rebutted by
3 representations made at the dinner.

4 All of that stuff, as I understand Mr. Ferguson's
11:07 5 argument, builds essentially a narrative or a picture of an
6 investigation that, in the view of the defense, was motivated
7 by the SEC just wanting to stick it to these defendants and
8 take down the company in progress.

9 That is the argument that's being made. So I agree
11:07 10 with you, this isn't about the investigation. It's about when
11 you put pen to paper, did you have a good-faith basis to make
12 the allegations you did? That-- that's really what it is and
13 you stated you did.

14 So I'll turn it to you. I'm going to mute my
11:07 15 microphone. Let's go ahead and have you respond to that.

16 **MS. BERLIN:** Thank you, Your Honor.

17 And I'll -- since you're going to be muted, perhaps
18 I'll just take a pause every so often just to make sure that
19 there's something that you wanted to say since I won't be able
11:08 20 to hear you. Does that sound acceptable? I just don't want to
21 keep speaking if the Court has something it wanted to add or
22 ask.

23 (Thereupon, an off-the-record discussion was had.)

24 **THE COURT:** That's fine. Can you hear me? You can go
11:08 25 ahead. I'll try not to stop you. Go ahead.

1 MS. BERLIN: Thank you so much, Your Honor. So, you
2 know, to begin with -- and I'll just restate it because I know
3 I was breaking up before, and I think the Court did hear me
4 based on the comment just made.

11:08 5 But, obviously, the defendant has not presented
6 anything to provide this Court with jurisdiction to opine about
7 the investigation or could it. And instead what they have done
8 is they have examined the initial pleadings a year after they
9 were filed, and comes to the Court with pure hyperbole and
11:08 10 speculation about what the investigation entailed.

11 The investigation is not public. They do not know
12 what the investigation entailed. However, they do have the
13 investigative record that we produced to them a year ago and
14 that they did have at the time of the preliminary injunction
11:09 15 hearing, which demonstrates quite clearly that their arguments
16 are just patently false and without basis.

17 I heard the Court state that the amount received from
18 Shane Heskin was 0.6 percent. It's actually point -- it's 0.06
19 percent. And the defendants presented to the Court it ends up
11:09 20 being -- it's more than 50 bases that they claim are false in
21 the preliminary injunction motion that was filed, or the TRO
22 motion that was filed a year ago.

23 And we went through every single one of those and
24 spent more than 130 hours going back and basically reexamining
11:09 25 the matters that were set for a hearing a year ago. And in the

1 reply, they identified three things that they claim that we
2 missed or ignored out of what they asserted, and I will address
3 those three matters.

4 First, they claim that the -- Mr. LaForte, that the
11:10 5 November 2019 dinner shows that they identified him using his
6 real name. And what is happening here, Your Honor, is they're
7 going back through the evidence and sort of trying to find
8 something that's helpful to them without looking at what we
9 actually asserted or the transcript itself.

11:10 10 In our motion for temporary restraining order and in
11 that particular paragraph, we argue that the misrepresentation
12 in this case is that Mr. LaForte's criminal record was not
13 disclosed to potential investors and that he used an alias to
14 conceal his true identity from investors.

11:10 15 We present a lot of evidence. We present e-mail
16 messages where he's using his alias, Joe Mack. We present
17 recordings with their covers, where that's not disclosing his
18 criminal record. We present a lot of evidence with the TRO
19 motion about the fact that he did not disclose and no one
11:11 20 disclosed Mr. LaForte's criminal record to the investors.

21 That is the misrepresentation at issue. The fact that
22 he uses an alias goes to show how he did it and also his
23 scienter and the efforts to which he went to conceal who he
24 really was. They attach the transcript of the November 19
11:11 25 dinner and explain and argue that the hearing in this case that

1 they spoke to 300 investors. At no time was his criminal
2 record disclosed. They identified a section of the transcript
3 where they used his real name. That's great if they used his
4 real name at a dinner.

11:11 5 They didn't disclose his criminal record to any of
6 these potential investors, which is what we argue. The full
7 transcript was filed. The argument, the misrep [sic] that
8 we're alleging is fraud is that the company is being run by a
9 convicted felon and that investors are not being told about
11:11 10 that.

11 Now, they have pointed out to an argument, Your Honor,
12 on this one occasion, they used his real name. Great. They
13 could have argued that a year ago, that's wonderful they used
14 his real name once. It's undisputed that they didn't disclose
11:12 15 his criminal order or anything about Mr. LaForte. Here's how
16 you spell his name, everybody can Google it, not that that
17 would even be a defense because it's not.

18 They didn't disclose his criminal record. That's what
19 this case is about. We have presented a lot of evidence from
11:12 20 investor declarations saying I spoke with him, I always thought
21 his name was Joe Mack, to e-mails from him using his fake name,
22 to his e-mail address, which is his fake name, his business
23 card, which is his alias.

24 These are issues for a jury. They can present this to
11:12 25 a jury and say, hey, look, here's one time that they used his

1 real name, they didn't disclose his criminal record, and we
2 will argue they won't be able to show you any instance where
3 they disclosed his criminal record. That's the claim.

4 For scienter, he actually made efforts to conceal his
11:13 5 identify. Here are 50, 100, whatever it is, examples of him
6 using an alias. And the jury will make a decision about this.

7 But for them -- for the defendants to come to this
8 Court and argue that the SEC intentionally misled or we
9 concealed or this dinner is all we have, it's absurd.

11:13 10 The entire transcript is attached. The TR0 motion in
11 that paragraph discusses two things: It talks about how he --
12 they never disclosed his criminal record and also that he uses
13 an alias.

14 We attached the transcript in full. At the hearing,
11:13 15 they could have come back, they could have said, hey, here's
16 one place where they used his real name.

17 Your Honor, that doesn't change our charge. They
18 didn't disclose his criminal record. A transcript doesn't have
19 it. And we presented not that transcript to say he used an
11:13 20 alias there, but e-mails, investor (inaud.) docs and a lot of
21 evidence showing the use of his alias.

22 So what they're doing is (inaud.) one time where
23 someone referenced his real name. They still didn't disclose
24 his criminal background, and they're trying to turn this into
11:14 25 something that it is not. Nothing was concealed. The full

1 transcript, as in all transcripts, were attached. And if that
2 transcript, and if it's clear on the audio that they used his
3 real name at some point in the transcript, that wasn't
4 concealed from the Court on purpose. They haven't identified
11:14 5 any argument for that. We presented the transcript in full for
6 the Court's review. The defendants had it, they could have
7 pointed it out to us or to the Court and made that argument a
8 year ago and the Court could have considered it.

9 But even pointing it out now, if they used his name at
11:14 10 some point in the dinner, it doesn't change a thing. It
11 doesn't make any difference and it doesn't have anything to do
12 with the massive amount of evidence that was provided. They're
13 simply speculating that the SEC knew about it, that we could
14 have concealed it. They haven't argued that we filed a false
11:15 15 transcript, that we intentionally -- that it doesn't say his
16 name and it should. So I'm just a little mystified about that
17 particular issue.

18 The second thing that they argue is that the SEC
19 claimed that Mr. Cole told some undercover agents about their
11:15 20 desire that they were starting a bank and that one of the
21 benefits could be to avoid usury laws.

22 They argue that we don't address that in our reply
23 brief, and I apologize, I missed that, as you know, Your Honor,
24 because we had to file a very lengthy chart and a lot of
11:15 25 evidence to show what was really going on in this case in a

1 very short period of time.

2 I didn't, but it's very simple. The transcript
3 attached to -- the transcript we cite in our TR0 papers
4 specifically includes Mr. Cole discussing that. And what he
11:15 5 says, and it's on page 420 of the transcript, is he says
6 from -- I'm starting on page 24 during the same undercover
7 discussion on the transcript that we filed.

8 There is a discussion. Mr. Cole is the male speaker.
9 And it is discussed, while we're talking about the bank,
11:16 10 Mr. Chessler, one of the people who was there, says, "Well,
11 there's no usury under federal." And Mr. Cole starts speaking
12 and he says, "That's right, no usury." And one of the
13 undercover says, "Isn't that the key?" And Joe Cole says, "The
14 key."

11:16 15 So I apologize that I missed that argument in their
16 papers. It's in the transcript that we filed very clearly,
17 page 420, line 24 through page 421, line 9. They're talking
18 about starting the bank and that a key is that there's a lack
19 of usury.

11:17 20 The third thing that they mention is, oh, that they
21 transferred money out. They argued, well, Your Honor, you
22 would never have entered a TR0 if you had known that the money
23 that the CBSG, quote, transferred to the Georgia bank account
24 back in June, that they later put that money back into the
11:17 25 account.

1 Your Honor, we filed our motion. It was very clear
2 that, in Melissa Davis's declaration, that we had our bank
3 records through June. The declaration states and we have the
4 documents that they transferred all this money out. And the
11:17 5 defendant, if they wanted to make the argument, well, after you
6 got that bank record and before the injunction was entered, we
7 put some of that money back into the company, that's something
8 that they could have argued.

9 But even then, Your Honor, so there's nothing false
11:17 10 about Melissa Davis's declaration, nor can they claim there is.
11 What they're arguing is that they subsequently put some of that
12 money back into the company.

13 Even if that's true --

14 **MR. FERGUSON:** Your Honor, I've got to object.

11:18 15 **MS. BERLIN:** -- okay, and even if we looked at that
16 and we found the same thing, it doesn't matter.

17 That wasn't the sole basis for a seeking a TRO. We
18 provided this Court with evidence and argument that was
19 unrebutted, and they still haven't even presented it to this
11:18 20 Court in their motion, that they transferred investor funds to
21 themselves, that Lisa McElhone had gotten more than \$14 million
22 of the investor money that was -- that commingled investor
23 money, what was referred to as investor funds for (inaud.)
24 because it included investor funds, which is the key. That she
11:18 25 took 14 million, that Joe Cole and Perry Abbonizio took money.

1 We presented evidence that they used some of that
2 money to purchase real estate property. We presented evidence
3 that they channeled this investor fund -- these investor funds
4 through companies owned by the defendants under consulting
11:19 5 agreements, when these companies did no work. We presented
6 evidence they sent it to Heritage and Eagle 6 and several other
7 companies that the defendants own.

8 We presented all of that evidence to the Court for our
9 TR0 motion, showing they were misappropriating investor funds.
11:19 10 We also presented the evidence and the transcripts showing they
11 were planning to start a bank and that they would then have --
12 and our concern was -- the means for having a bank and
13 controlling the flow of their own funds.

14 All of these things were presented with evidence.
11:19 15 Their one issue today is, well, the one thing of 22 million
16 that Melissa Davis put in her declaration was taken out in
17 June, and I'm not sure when they're claiming it happened, but
18 at some point we put that money back into the company.

19 They should have presented that a year ago, but even
11:19 20 if not, even if the Court was reopening day three of a
21 preliminary injunction hearing today, it's a distinction
22 without a difference because that wasn't the sole basis for the
23 TR0 nature of this case. The issue was that the investor funds
24 were being dissipated and sent to the defendants themselves to
11:20 25 the tune of millions and millions and tens of millions of

1 dollars, and that the defendants were creating a bank.

2 THE COURT: Ms. Berlin, can you -- (voices overlap)

3 MS. BERLIN: (Audio indiscernible) one of many things
4 that formed the basis for the emergency relief. And saying on
5 this particular one, we could put this money back into the
6 company. Well, if that's true?

7 THE COURT: Ms. Berlin, can you hear me?

8 (Voices overlapping)

9 THE COURT: There we go. Ms. Berlin, Ms. Berlin, can
10 you hear me? I'm sorry. Okay.

11 MS. BERLIN: Yes.

12 THE COURT: Just I wanted to just point out something
13 you had mentioned. There had been an objection here by
14 Mr. Ferguson, but I assume I know what it is.

11:20 15 You had mentioned something about Ms. Davis's theory
16 of really coming from the -- her declaration on the funds
17 moving around.

18 Just for clarity's sake, I know that there's been some
19 issue with Ms. Davis and her breakdown of the funds really in
11:21 20 the form of the defendants' use of the Glick report.

21 But I just wanted to double-check my recollection of
22 the TRO phase of the case. I mean, I know a lot more now from
23 what the receiver has uncovered in terms of money flowing into
24 different consulting vehicles and real estate ventures.

11:21 25 But I just want to make sure I understood. Your

1 position was that Ms. Davis's declaration showed at least or
2 indicated in the good-faith belief by the SEC that some of the
3 funds or significant portions of funds were being directed to
4 the individual defendants and away from the investors.

11:21 5 Did I -- I want to make sure I understand that
6 argument. You -- you had stated that earlier; am I right on
7 that?

8 MS. BERLIN: That's right. Ms. Davis presented two
9 declarations, one with our TRO motion we presented, the second
11:21 10 one in advance of the preliminary injunction hearing. During
11 the preliminary injunction hearing, we discussed those.

12 Those declarations showed that -- I think it was more
13 than 13 or 14 million went to Ms. McElhone or to the relief
14 defendant, which is her trust, which is why that trust is a
11:22 15 relief defendant. That monies went to entities that were owned
16 by Mr. Cole and Mr. Abbonizio, and we went through those
17 amounts.

18 At the preliminary injunction hearing, we also showed
19 their own financial statements showing the forwarded funds to
11:22 20 these companies. We discussed with the Court how they call it
21 consulting fees, but, in reality, that money is flowing to the
22 defendants' corporations and to Ms. McElhone's trusts, and that
23 these amounts of investor funds went to those locations, went
24 to the defendants to the tune of -- you know, I don't remember
11:22 25 the number off the top of my head because this was a year ago

1 of what our numbers were at that time. Of course, now we know
2 it's a lot more than we said then, but it was a quite a bit,
3 they were funneled.

4 We also filed with the declaration or the chart made
11:23 5 by the SEC showing the flow of money to and the purchase of
6 properties which the receiver subsequently used to seek those
7 properties to bring those properties into the receivership.
8 But we did not bring this case and the TRO was not based on the
9 transfer of -- that one transfer was, you know, we talked in
11:23 10 our papers and we present evidence about how they're funneling
11 money to themselves, their companies, the trust that's owned by
12 Ms. McElhone.

13 We amended their complaint for one reason, which
14 would -- because we learned that the trust, one, we forgot, I
11:23 15 think, the word "God" beginning trust, but we also had learned
16 after filing that the trust was owned -- the grand tour and the
17 beneficiaries are LaForte and McElhone.

18 So we presented evidence about the flow of money to
19 that trust, the flow of money to (inaud.) Abigail, (inaud.)
11:24 20 Heritage, Eagle 6, that those -- and presented evidence that
21 those are all the defendants' companies. And that they were
22 starting a bank, and that they were concerned about the usury
23 laws and that we were concerned about the monies not only going
24 off to the defendants' personal accounts and business bank
11:24 25 accounts, but to that as well. And in our papers and in the

1 presentation of evidence in support of the TR0. So even
2 then --

3 **THE COURT:** Well, and just to be clear -- and just to
4 be clear, Ms. Berlin, because I reviewed the charts prepared.
11:24 5 I would assume you would also rely -- I believe it's Docket
6 Entry 692, Document 692, which was the spreadsheet that you
7 guys have prepared that maintains the evidence that you believe
8 you had at the time. The TR0 was sought. That would disprove
9 some of the defendants' arguments, or at least -- let me say
11:24 10 this way -- maybe not disprove, but at least contest the
11 arguments made by the defendants that the declarations you've
12 made have been false.

13 You know, for example, the Fleetwood one which you
14 talked about earlier, you have maintained that the SEC's theory
11:25 15 is that the QuickBooks exhibit that is being utilized for that
16 dealing with underwriting is not one that is in its native form
17 and somehow manipulated, right?

18 So my point is that going back to why I'm concerned
19 about the standard, your argument is -- and I know it's -- you
11:25 20 believe it's stronger than this -- but at a minimum, the SEC
21 has provided in the evidence heading into today's hearing, that
22 the 34 pages of charts, for example, that you guys have
23 provided, that there has at least been a colorable showing that
24 everything that was included in the TR0 was based in some sort
11:25 25 of independent investigation.

1 And, therefore, even if the Court were to credit a
2 defendant's argument that this is rushed or not verified to the
3 level it should have been by the SEC, it would not legally rise
4 to the level of the relief under Rule 41 because it would be
11:26 5 almost impossible. Even with all of the evidence that's been
6 advanced by the defense, there's enough in the SEC's breakdown
7 of what they have looked at to state, or at least disprove,
8 that it was willful or done in bad faith; is that correct?

9 MS. BERLIN: That's part of it, Your Honor. We
11:26 10 absolutely agree that they cannot show, they cannot use a legal
11 standard, but if I could just clarify two -- a couple of
12 things --

13 THE COURT: Sure.

14 MS. BERLIN: -- that you just stated?

11:26 15 THE COURT: Yeah, go ahead.

16 MS. BERLIN: Thank you so much.

17 So our -- the TR0 papers are based on the, I mean, on
18 the evidence presented with the TR0. (Audio distortion) I
19 cannot discuss, talk about or tell the Court about the
11:26 20 investigation and what it showed and what we did. I am
21 prohibited by law, and the defendants will know they're
22 speculating.

23 That chart is in response -- that is something that we
24 prepared to respond to Docket Entry 663-22, which was the
11:27 25 defendants presented a chart where they purport to show why the

1 merchant declaration is false, and so we're simply responding
2 to it and showing that their chart is completely false,
3 borderline frivolous, and showing what the evidence really does
4 show about those merchants --

11:27 5 **THE COURT:** Well, and my point is this: My point is
6 again -- and I don't know why we keep arguing about the
7 investigation because I made it clear that that's not -- that's
8 neither here nor there.

9 The argument here is it's Rule 41 for evidence in the
11:27 10 record of a bad-faith or willfully negligent, really,
11 investigation. And what I'm trying to lay a record on and be
12 clear on is even if I credit the defendants with their
13 arguments of negligence, it has to rise to the level of bad
14 faith to use the Court's inherent power.

11:27 15 And forget about what the investigation had. But as
16 the record sustains here today, there's enough declarations,
17 and one could argue about them. I mean, that's what will
18 happen at trial. One can argue about the veracity of some
19 declarations, but this is not a situation where the SEC filed
11:28 20 the case that was essentially a figment. I mean, there is
21 evidence, one could argue that if it's strong enough evidence
22 to justify some of the relief requested, but from a bad-faith
23 perspective, there was evidence independent of Heskin. There
24 was evidence, as far as I've reviewed binders coming into
11:28 25 today, of different declarations. I agree the defendants are

1 right, it's a subsection of merchants, it's not the whole pool.

2 But, again, nothing requires it to be for purposes of
3 overcoming a bad-faith allegation. You have 14, you have 14.

4 And even if some information is procured from Heskin, that's
11:28 5 not fatal, either. And even if one were to maybe dispute the
6 characterization of Mr. LaForte's disclosures and his criminal
7 record as you've stated, that's not really the angle the SEC's
8 pursued.

9 All of these things that the defendants are arguing
11:29 10 makes up enough of a bigger picture to show bad faith. You
11 would say to me, and based upon your representations in your
12 papers and the charts you've prepared pointing to the evidence
13 you guys have relied on to date, you would say that, at best,
14 there may be a dispute about the strength of the evidence, but
11:29 15 this is not the bad faith you would need to find that the SEC
16 has essentially just made this up and targeted these defendants
17 in a way that would trigger the Court's inherent authority to
18 dismiss the case, an extreme sanction under Eleventh Circuit
19 precedent.

11:29 20 Am I correct in that?

21 **MS. BERLIN:** Yes, Your Honor, you are absolutely
22 correct in that.

23 **THE COURT:** Okay. Let me ask you something else
24 before I get to state actor, and I'm bleeding together this
11:29 25 relief with the other relief, but it's just something that I

1 want to ask the SEC. And maybe there isn't a way to do this
2 and maybe there is, I don't know.

3 I have Stumphauzer and Kolaya and Alfano in here with
4 DSI doing all this work, spending countless hours chasing
11:30 5 money, trying to get investor returns, trying to recoup money
6 that you have stated now, again, and we have seen some evidence
7 of, moved out of perhaps CBSG and Par Funding coffers into
8 those of consultants or property-holding companies that were
9 controlled by certain defendants.

11:30 10 We've talked a lot throughout this case about the end
11 game here. What was of the purpose of the receivership? Why
12 did it get implemented? You've seen and I'm sure the receiver
13 has seen and the defendants have seen the Court issued an order
14 not that long ago that stopped liquidation of some personal
11:30 15 property because I felt it was premature to do so prior to
16 trial, and continued to be of that belief that this is supposed
17 to be a status quo operation.

18 You've also seen a lot of argument about this business
19 being purportedly thriving. I don't know because we all know
11:31 20 that there was a note exchange right about when the SEC got
21 involved that seems to suggest the returns were not going to
22 continue on the pace they were at. One could sit here and say
23 that it's economic conditions, one could sit here and say it's
24 COVID. We're never going to really know because we got
11:31 25 involved right around then.

1 But my question to the SEC is: If this case is
2 genuinely about a certain number of defendants who've already
3 (inaud.) to preliminary injunctions and about their failure to
4 disclose their criminal history, their, quote/unquote, fees,
11:31 5 whatever they were billing because investors didn't know how
6 much of the monies they were gaining was going to them as part
7 of their own, you know, draw or take from the returns.

8 If that's really what the case is about, does the SEC
9 foresee a situation, any permutation of what's currently going
11:31 10 on here, where this business with, again, oversight monitoring,
11 however you want to call it, we could explore what's going to
12 happen to this business model, but extricate from it all the
13 individuals defendants that, up until this point, are dealing
14 with the allegations regarding registration or failure to
11:32 15 disclose and register, failure to abide by registration
16 requirements?

17 Do you see any way in which Par Funding and this
18 model, at some point, could pivot to trying to continue in the
19 MCA business, or is the SEC's view, Judge, at this point, we
11:32 20 have to wait until the whole trial goes down. Then at that
21 point, we have to see if the jury returns a verdict in favor of
22 the SEC against some of these individuals so that we can at
23 that point, as the receiver has said multiple times, start
24 figuring out how these investors can get some of their
11:32 25 principle back?

1 But that's what I've been told, and I'm just curious.
2 I've been presented with a plan here, I've looked at it, I
3 don't know how viable it is. We're going to talk a little bit
4 about an ongoing CLA audit that was never completed, that was
11:33 5 in its final stages.

6 What is, for lack of a better word, the end game?
7 Because at the end of the day, I'm not going to have the
8 receiver on this company -- and then forget the individuals
9 defendants. I'm talking about just the business itself.

11:33 10 Does the SEC foresee a way in which the receiver could
11 begin to wind down his involvement or position or transfer it
12 to more of a monitorship and put people in place in Par Funding
13 that would restart the business? Or is that something that is
14 just not -- and I'll hear from the receiver on this as well
11:33 15 later -- but is that something that's just not foreseeable
16 until the trial is concluded?

17 I'm just curious what the SEC's view is on that.

18 **MS. BERLIN:** Thank you, Your Honor.

19 It's that there's -- there's several pieces that I
11:33 20 need to discuss to answer that. I wish I could just say yes or
21 no, I would like to just provide the Court with the information
22 that we have available --

23 **THE COURT:** Yeah.

24 **MS. BERLIN:** -- and how -- what form would the
11:34 25 conclusion of it provide.

1 So, first of all, the receiver, it's important to note
2 that the receiver is -- did not simply discard all of the CBSG
3 employees, but, in fact, put someone in, which is Brad Sharp
4 with DSI, to oversee its operations. And so there are still
11:34 5 CBSG employees, CBSG accountants who are there helping to
6 operate, collect, and continue the CBSG work. It's just that
7 it's currently being done without the defendants, and it's done
8 with DSI there.

9 So what the Court was just discussing, I think is sort
11:34 10 of happening with DSI and with the former CBSG employees. Some
11 of the former CBSG employees, I think it's maybe six of the
12 CBSG accountants who were there are still there, and then some
13 others who have been retained.

14 But now we have the assurance of knowing that it's
11:35 15 being properly run and money is not being misappropriated or
16 diverted.

17 We did not file -- the SEC did not file its expert
18 report in response to the Glick report, and that's because
19 it's -- I don't believe it's something for the Court to
11:35 20 examine, but if the Court wants to see it now, of course, we
21 would file it.

22 The Glick report is the defendants' expert witness.
23 They hired an expert; he gave an opinion. The SEC also hired
24 an expert, and our expert and Mr. Glick will, you know, go
11:35 25 through it at trial if this isn't resolved on summary judgment.

1 Our expert looked at everything independently of DSI
2 and the receiver and did its own, Melissa Davis and Tomit
3 Tapira (inaud.) and did their own independent analysis and
4 reached the same independent leap conclusions as DSI. And --

11:35 5 THE COURT: By the way, is that conclusion
6 GAAP-supported?

7 MS. BERLIN: Well, I mean, yes, and she's an
8 accountant and she did --

9 THE COURT: Okay, no, I'm just making sure because
11:36 10 that's -- as you know, that's been one of the big things, is
11 that the argument has been the Glick report is under GAAP
12 principles, DSI is not, so it matters that the Court would be
13 receiving, perhaps, whenever the expert reports are due -- I
14 think it's two days from today -- and maybe it's best that the
11:36 15 Court hold off on the receiver discharge motion until I can see
16 it.

17 But I think that's one of the concerns that has been
18 repeatedly shared with the Court that, you know, there's a
19 dispute about principles and methods used, and the
11:36 20 GAAP-approved methods of Glick should be looked at as a much
21 stronger financial picture than what DSI was able to do.

22 But just so that I understand, you know, your view is
23 that we now -- or you are aware -- that there is an SEC expert
24 that is kind of the countervailing and computer expert to rebut
11:36 25 the Glick expert, also using all understood GAAP principles in

1 his analysis; is that right?

2 MS. BERLIN: The issue is the methods that are used.

3 So Mr. Glick utilizes --

4 THE COURT: He used accrual, right? And DSI used
11:37 5 cash. And the argument has been that the accrual basis is a
6 better, healthier financial picture and that DSI looked at cash
7 and that cash did not show exactly what was going on in the
8 company as it really existed.

9 Now, we all know just the way it works that the
11:37 10 accrual can also be very misleading because the accrual can
11 paint a picture, but it also depends on the future and how some
12 of these loans are going to be repaid and how things are going.

13 So if you don't have good reconciliation between your
14 cash and your accrual methods, you could really be floating up
11:37 15 a company that doesn't really have much in its coffers or
16 anything at all, and that's been one of the disputes, I think,
17 between DSI and Glick.

18 Now, Glick's view is the MCA model -- if I understand
19 it correctly -- really drives under an accrual analysis that
11:37 20 cash is a worthless analysis.

21 Am I going to get from the SEC an expert report that
22 has the same method used by Glick, or is it also looked at in
23 the cash analysis as DSI, and then we're going to get into an
24 accounting expert battle at trial as to what more appropriately
11:38 25 paints a picture of this business as a growing concern?

1 What's the SEC's take on -- and you know the expert
2 report, I haven't got a chance to review it and I don't think
3 it's due yet, but what's your view? Do we have a much more
4 straightforward accrual analysis by the SEC that rebuts the
11:38 5 Glick accrual analysis or is it more the DSI cash analysis?

6 **MS. BERLIN:** So the SEC's -- I'm going to answer that
7 also in two pieces.

8 So the SEC provided -- it has an expert report, and we
9 have a completely different approach than Mr. Glick, but -- and
11:38 10 so there could foreseeably be a battle of experts, and our
11 expert finds that, you know, without the inflow of investor
12 funds, this could never continue. This operation could not
13 continue, and that investor funds were used to pay prior
14 investors, and the analysis and the methodologies that are
11:39 15 utilized are similar to those of DSI and (inaud.) explains why.

16 However, Your Honor, and then I will just state that
17 as a practical person who tends not to utilize expert witnesses
18 at trial because a battle of two accountants, you know, is what
19 it is. It's a battle of two accountants for the Court or a
11:39 20 jury to discern.

21 But I can tell you what is (audio distortion), and I
22 think that will -- to me, this is the most compelling thing.
23 Whether it's accrual-based, cash basis, however they want to
24 look at it, at the end of the day, okay, I think we can all
11:39 25 agree that we would look at how much money was going out and

1 how much money was coming in. How much was there? Was this
2 really profitable? Is it only profitable based on like the
3 money that they hope to one day get back, meaning accounts
4 receivable? Did they have enough money to keep themselves
11:39 5 afloat without some investor money coming in? The answer to
6 that is no.

7 Unless CBSG started raising money from investors
8 again, okay, they cannot -- they do not have the ability to
9 make more loans or more MCA. And, again, if there are
11:40 10 complaints, as we call it, MCA loans, it's -- an MCA loan
11 doesn't matter. They don't have money to give out to whatever
12 you want to call it without investor money coming in.

13 And that's the point that I don't think anyone can or
14 would dispute. I've never heard it disputed. Mr. Cole, in his
11:40 15 own deposition testimony -- and you'll see this on summary
16 judgment -- did a expert report. We'll present it to you with
17 the cold hard facts of what was going on there.

18 And Mr. Cole, the CFO, admitted in his deposition
19 testimony that he agrees with our numbers, which is that the
11:40 20 CBSG gave out about \$1.2 billion-with-a-B to merchants over the
21 course of its business. It got back from those merchants about
22 1 point -- that same amount, plus some people say 7 million,
23 some say 14 million. Either way, you're looking at (audio
24 distortion) percent back, more comes back, so \$1.2 billion
11:41 25 dollars goes back over this whole time period.

1 And the amount that it brings back into its coffers
2 from its business is only 7 to 14 million dollars more than it
3 ever gives out. Well, they owe investors hundreds of millions.
4 They've paid themselves more than the amount that's come back
11:41 5 from CBSG. So (audio distortion) uses the biggest number, \$14
6 million was the big -- not even profit, before expenditures --
7 is the big number that they get back, and that's what I think
8 the number Cole used in his testimony.

9 So maybe that would cover the amount -- not even --
11:41 10 that went to Lisa McElhone and her companies? The business,
11 however you want to look at it under whoever's accounting
12 method, nobody disputes the numbers of how much went out
13 through the business, how much came out through the business.
14 And that number that comes back, it's like, you know, 1
11:42 15 percent, 1 and a half percent of what's going out? That's Not
16 even enough --

17 **THE COURT:** Let me ask you something, though,
18 Ms. Berlin. You would agree with me that, just so I
19 understand, the relevancy of the model, the relevancy of the
11:42 20 business itself, the MCA business, the Par Funding business
21 itself here, is really only relevant as it pertains to
22 disclosures made or not made by individuals involved in the
23 corporation.

24 So meaning that whether it be default rates, whether
11:42 25 it be, you know, underwriting, whatever it may be, all of the

1 facts pertaining to the business model because the business
2 model is not being sued, right? The MCA business is not being
3 sued. No one here really is -- and we said this earlier in the
4 case -- is contesting whether it's a loan, a cash advance.

11:43 5 It's individuals who, in your view and the SEC's view, have
6 lined their pockets with money that should have gone to the
7 investors, which has been from the beginning the reason why the
8 Court has authorized the receiver to chase down any and all
9 funds to get them for the benefit of investors, if they should
11:43 10 have found their way to them as opposed to some of the
11 individuals in a company.

12 You know, and so since that's not really what this is
13 about, the business model, I guess all of these representations
14 about its profitability or, in your view, its lack thereof, are
11:43 15 less of a concern for me than the representations that were, in
16 your view, in violation of SEC regulations and federal
17 regulations made to hapless investors who did not know
18 necessarily what they were getting into, which is really what
19 the SEC has maintained this case is about.

11:43 20 So the way I see it, is we should be having a trial in
21 the coming months about, were there representations made in
22 violation of securities laws? Were these notes that did not
23 receive the regulatory oversight they should have under law?
24 And then at some point -- at some point, there will be a
11:44 25 coffer, there already is, of money that has been recovered by

1 the receiver.

2 Investors will have to make a decision. They will
3 have to, through some form of recordkeeping, make claims from
4 that amount of money, that pot that's been recovered, and they
11:44 5 will at that point have to decide, you know, do I want to take
6 my money out of this concern? Do I want to go ahead and take
7 my ball and go home because I was misled?

8 Some investors made decide that they want to
9 double-down and continue in the MCA business. I don't know.
11:44 10 Par Funding obviously is not going to be what it was, and
11 there's some folks still in there from the company. But I
12 don't think there's a universe if the SEC proves their case
13 where McElhone or LaForte are going to play any role in this
14 business.

11:44 15 And so the reason why I'm asking this question --
16 where is the end? -- is at some point I'd like to know when the
17 receiver's role will finish and whether or not this company
18 will be reevaluated under new leadership perhaps and maybe
19 monitoring, or as is the defendant's concern, fully liquidated.

11:45 20 There are defendants who maintain that this model was
21 somehow profitable and successful, and investors that I think
22 maintained that if given the opportunity, they would have stuck
23 with Par Funding. At some point, I think we will give them
24 that decision. We will let that be the investor decision. But
11:45 25 the hope is if they make that decision, they will have full

1 information, that the market requires for them to be able to
2 make it an educated way.

3 So the roundabout thing I'm getting at here is just
4 trying to get a sense at trial, when we get all this out there,
11:45 5 what's going to be the exit?

6 And I think the receiver said multiple times that it's
7 not something they can do until the trial, which I agree with,
8 but we have another motion here to let the receiver out, put
9 him in a monitoring role. You've heard that it's even relief
11:46 10 requested as a subset of what is being sought under the 41
11 motion, and that this could be done by perhaps keeping all the
12 individual defendants out of the game and let this money be
13 hunted down by people that defendants believe know the business
14 model better. And I don't know if that's accurate.

11:46 15 The receiver will be asked today to maybe opine as to
16 the proposal that's been forwarded to me, and whether that's
17 even realistic given the current circumstances of this
18 business, this Docket Entry 663-34.

19 But I guess, Ms. Berlin, I'm trying to get a sense of,
11:46 20 do you agree -- does the SEC agree with me that this is really
21 not about attacking the business as much as those folks that
22 use that business and didn't disclose the way it was being used
23 to investors.

24 I just don't -- it's a big-picture question, but it
11:47 25 continues to be a problem throughout this case because this is

1 getting too far away -- and I'm going to be very blunt -- it's
2 getting too far away from the regulatory oversight and more
3 into day-to-day management of this company, which is not what
4 the court signed up for and it's not really what I want this
11:47 5 litigation to be about. We're spending more time fighting over
6 that and the business model than we are about what these people
7 did when they made representation to adopt the business.

8 And I just hope as we get to the last phase of the
9 case, summary judgment, and trial, that we keep our eye on what
11:47 10 the case is about.

11 Do you understand what my concern is?

12 **MS. BERLIN:** (No answer).

13 (Thereupon, there was a brief pause due to technical issues.)

14 **MR. FERGUSON:** Your Honor, before we switch this
15 talking portion --

16 **THE COURT:** Yeah.

17 **MR. FERGUSON:** May I just --

18 **THE COURT:** Yeah, I'm going to go back because I got
19 to let you get a little air time on the state actor doctrine,
11:48 20 so I'm going to go back to that. I just needed to get this
21 question out and then I'm going to pivot back.

22 **MR. FERGUSON:** And I'll keep it brief and then --

23 (Voices overlapping)

24 **THE COURT:** And I got to let Mr. Futerfas, he wants to
11:48 25 add a little, and then I'll switch to the other motion, and

1 we'll have -- we will -- and it's okay. We're going to go over
2 time, but it's fine.

3 Ms. Berlin, can you hear me at all right now? Can you
4 hear me, Ms. Berlin? (Audio distortion) For those that have
11:54 5 been following along, sorry. Something happened here.

6 For those that can hear me, those folks who are
7 appearing on Zoom, please keep it on mute. Other than me
8 having a conversation with counsel, I'll prompt you, but if
9 someone chimes in or, more importantly, if someone connects by
11:54 10 phone, which is what apparently happened, it snapped the
11 communication here and we were unable to keep talking.

12 So just try your best if you could, we're going to try
13 to have you guys piped in to the court system now in just a
14 moment, but let's just -- come on in, guys. We're trying to
11:55 15 get this figured out.

16 I think at this point everyone should be able to hear
17 me. We're going to try to pick up where we left off. I don't
18 know when I got cut off, so my hope is that, Ms. Berlin, enough
19 of what I was expressing was covered.

11:56 20 But, again, just so everyone knows, if you are
21 watching or following along, please just make sure not to call
22 in because it could cut off our audio, or to chime in on Zoom
23 until I prompt you.

24 So I'm going to try to hear from Ms. Berlin here, and
11:56 25 then my plan is to move to Mr. Futerfas and then back to and

1 then to check in with Ms. Schein and then move back to
2 Mr. Ferguson, and then I have one or two little final questions
3 on the 41 issue, although we touched on the discharge a little
4 bit here of the receiver, which is the other motion.

5 So, Ms. Berlin, again, I'm not sure how much you heard
6 about my concern, but what I was trying to figure out here is a
7 little bit about the end game and how the SEC envisions this
8 playing out. I think you've maintained that it needs to be
9 tried, and only then and once tried, we can then figure out if
11:56 10 principles can be returned or if there is any way to save the
11 company.

12 I think one of the overarching problems has become the
13 purpose of the receiver is to recover funds, but not liquidate
14 and not let the company essentially, you know, be defunct. And
11:57 15 so I don't know how realistic it is, but I think what's
16 happening here and what I was sharing earlier before we got cut
17 off is that I want to get a, I guess, assurance that this case
18 continues to be focused on individual defendants and the lack
19 of disclosure or regulatory compliance by those defendants as
11:57 20 opposed to getting caught up in the business itself.

21 Now, some of that is intertwined because
22 representations about the business's profitability are part and
23 parcel of the SEC's case as to misrepresentation. So I
24 understand that. And that's what the case will be about.

11:57 25 But once we have gotten through that, there will be a

1 discussion about how the receiver's going to extricate
2 themselves and what's going to happen to this company and its
3 employees. And I don't know that there's a future of this
4 company with the current or former leadership involved, but I
11:58 5 wonder if there's a view by the SEC that this MCA endeavor
6 should continue altogether.

7 Do you have any thoughts on that, on what the SEC's
8 kind of long-term plan is once they get through just what the
9 case is really about, the regulatory issues?

11:58 10 **MS. BERLIN:** First of all --

11 **THE COURT:** One second, Ms. Berlin.

12 (Thereupon, there was a brief pause due to technical problems.)

13 **THE COURT:** All right, for everybody that's there, I'm
14 going to give you guys a phone number to call and we're going
12:02 15 to open a conference line. I'm going to be off the Zoom. I'm
16 going to mute it. You should be able to still see some video,
17 but I don't want to waste everybody's time, and this is
18 unacceptable. So we're going to go ahead and get everyone to
19 appear over the phone.

12:02 20 Ms. Berlin, I would recommend you want to keep the
21 audio off, but I would call in on the separate line, same with
22 Ms. Schein and Mr. Futerfas. Please feel free to call in,
23 we're going to give you guys -- I'm going to open up a line
24 right now and we're going to give everybody that number, and
12:02 25 any investors that wish to call in as well, feel free to call

1 in because I do not believe the audio is something you're going
2 to be able to hear. (Audio distortion).

3 All right. Can everybody hear me? Because what we're
4 doing here is we're going to switch to telephonic. Apparently,
12:03 5 the Zoom systems are not working right now and we're having
6 some issues. So what we're going to do is we're going to do
7 this telephonically. So those that are not appearing in court
8 right now are going to get an opportunity to call in.

9 Can everybody hear me right now?

12:03 10 **MS. BERLIN:** Yes.

11 **THE COURT:** Okay. Here's what we're going to do:
12 We're having some issues with the Zoom. We're going to have
13 everybody just call in telephonically because for some reason
14 the system is not working. And it's happening to multiple
12:04 15 courtrooms right now up here, so it's not just ours. I don't
16 know what's going on with Zoom.

17 I'm going to give the phone number and a code to dial
18 in, and I would ask, let's get anybody that wants to call in is
19 free to call in. I think what I can do is I'm going to leave
12:04 20 my computer audio on because if my computer audio is on you can
21 hear me talk. And at least you can hear what I'm saying for
22 those that want to stay on the Zoom.

23 But if you want to call in, if you're counsel, I need
24 you to just call in to the line, so that we can go ahead and
12:04 25 have you guys be heard on the record. It's not working here to

1 speak over the Zoom.

2 So, Ms. Berlin, Mr. Futerfas, Ms. Schein, I'm going to
3 give you guys a number now. If you guys have a pen handy to
4 write it down so that you can call in, and then we'll pick up
12:04 5 where we left off, okay? All right, and Mr. Raikhelson as
6 well. All right, what's the phone number?

7 All right, it's 1-877 -- and this applies to anyone
8 that is on the call that can hear me. If you want to call in
9 we're going to switch to telephonic. 1 (877) 402-9753. The
12:05 10 access code is 9372453. The security code is 0918.

11 So one more time. Those that need to appear, counsel
12 needs to call in now: 1 (877) 402-9753; code 9372453; security
13 code 0918.

14 I'm going to leave the Zoom active. I'm not going to
12:05 15 shut it down, but, again, I don't know how well the audio will
16 be heard, so give it a chance, guys, if you want to stick
17 around and watch on it, but I need at least the lawyers to
18 please call in.

19 So I'm going to wait one moment and then we'll
12:06 20 continue where we left off.

21 (Thereupon, a brief recess was taken.)

22 **THE COURT:** Do I have Ms. Berlin on the line? Okay.
23 I hear beeps. I need to just know if I have counsel on the
24 line, so I'm looking for Ms. Schein, Mr. Futerfas, and
12:06 25 Mr. Raikhelson, I think, are the only three.

1 **MS. BERLIN:** Your Honor, this is Amie Riggle Berlin on
2 the line.

3 **THE COURT:** Okay. I can hear you, Ms. Berlin. Can
4 you hear me clearly?

12:06 5 **MS. BERLIN:** Yes, Your Honor, I can. Thank you.

6 **THE COURT:** Okay, very good. Okay. All right.

7 Do I have any other counsel on the line on behalf of
8 the defendants?

9 **MS. SCHEIN:** Your Honor, it's Bettina Schein on the
12:07 10 line. Thank you.

11 **THE COURT:** If you are dialing in, you need to mute.
12 Please mute. If you're on Zoom, please mute it. I hear
13 Ms. Schein. I know that Ms. Berlin's on the line. Someone has
14 obviously got me on speaker or mute. Needs to be muted. So
12:07 15 you need to mute your computer or your phone, please.

16 **UNIDENTIFIED INVESTOR:** Sorry, how do we do that?

17 **THE COURT:** I'm not IT, whoever asked how to do that.
18 You've got to figure it out, okay?

19 **MR. RAIKHELSON:** Your Honor, this is Andre Raikhelson.
12:07 20 I can -- I'm local counsel for Joe Cole Barleta. Can you hear
21 me?

22 **THE COURT:** Yep, I can hear you just fine. So I got
23 you, I got Ms. Schein, and I'm looking for Mr. Futerfas to call
24 in. I don't know if he's there.

12:08 25 **MR. FUTERFAS:** I am on, Your Honor.

1 THE COURT: Okay. Thank you.

2 MR. FUTERFAS: I am on, Your Honor.

3 (Voices overlapping)

4 THE COURT: Just go ahead and mute yourself. We'll
12:08 5 deal with it in a little bit. I just need to get Ms. Berlin on
6 there so that I can finish discussing, then I want to have
7 Mr. Futerfas and Ms Schein on there so I can touch base with
8 them.

9 Anybody else that's beeping in is probably an investor
12:08 10 or the public. You're free to follow along. I'm going to
11 leave the Zoom going, again, so if you want to put a face with
12 the voice. But please mute. You have to mute. Whoever is
13 listening, you have to mute. You cannot have your line open.
14 You have to mute your phone or your Zoom. Okay.

12:08 15 So, Ms. Berlin, we're going to try this. Can you hear
16 me? We're going to try this one more time. And let me let
17 you -- let me set up. Let me tell everybody what we're going
18 to do.

19 The Court's going to do the following. It's 12:10.
12:09 20 The Court has one status conference at 1:00 o'clock. We're
21 going to go until about 12:30. I'm going to let everybody take
22 a break for lunch, and then we're going to keep going. I'm
23 going to move some stuff around that I have this afternoon that
24 can be moved. I've already consulted with my CRD, and this
12:09 25 hearing has been, to me, has been interrupted by technology.

1 And so my view is I want to continue the hearing.
2 I'll give everybody that's personally here a lunch break, and
3 we'll pick it up again at 2:00 o'clock so that we can have
4 about another hour of argument because I feel that we've barely
12:09 5 been able to get through everything I want to get through
6 because of the interruptions.

7 So I want everyone to feel comfortable that we'll come
8 back on at 2:00 o'clock, and I will go ahead and do some
9 technological rigging in the interim.

12:09 10 But let's at least get the next 30 minutes hopefully
11 uninterrupted, and then we'll try to kind of do a little bit of
12 a reboot so I can touch base and clean up some points for this
13 record when I come back in the afternoon.

14 So I want everyone to know that, so plan your
12:09 15 schedules accordingly. And I know that -- I think the
16 defendants asked for more than the time I had allotted, so I
17 think this should work for everybody.

18 Now, Ms. Berlin, I didn't get a chance to hear your
19 response. I don't know -- again, we've been interrupted a lot,
12:10 20 but I'm going to turn it back to you to kind of give me a
21 long-range picture and plan of the receivership issue and the
22 focus of this case in its last phase of summary judgement and
23 trial.

24 Go ahead if you could, please. I know that you heard
12:10 25 some of what my concerns were, and maybe give me the SEC's view

1 about Par Funding and whether Par Funding will be once again a
2 going concern, not liquidated, and possibly with new leadership
3 at the end of this case, which is something that has been
4 referred to multiple times by defendants and their papers, as
12:10 5 they seek to at least advance a plan for the Court to try to
6 let Par Funding get back into the MCA game.

7 So can you address that for me?

8 **MS. BERLIN:** Yes, Your Honor, thank you so much. And
9 I just want to check and make sure you can hear me okay.

12:10 10 **THE COURT:** I can hear you perfect, thank you.

11 **MS. BERLIN:** Okay, great.

12 So the SEC's position is that the receivership should
13 continue and that it needs to be done in a way that maximizes
14 the return for the investors. So that includes what the
12:11 15 receiver is doing to go after funds to try to collect where
16 they can.

17 The collections efforts do look different from the way
18 the defendants did it. We presented some evidence from people
19 who claimed that there were some threats of violence and other
12:11 20 things in trying to collect, and I attached to our response
21 brief a response brief filed by the U.S. Attorney's Office in a
22 pending criminal case against Mr. LaForte that discusses an
23 ongoing investigation. And also there are discussions with
24 witnesses about the collections efforts of the defendants.

12:11 25 So the receiver is collecting differently than the

1 defendants might have, but I don't think that we can say that
2 they're doing it -- that they should be doing it the way the
3 defendants did.

4 There are claims that I think could be considered by
12:12 5 the receiver that we've discussed with them to try to get funds
6 from other sources, and I think all of that needs to continue.

7 The critical thing here, Your Honor, is that I don't
8 think it's disputed that the company only had 14 million at the
9 most ever coming back in from this business over the course of
12:12 10 its lifetime, and that that wasn't enough to pay expenses.

11 This company requires investor funds coming in, in order to
12 continue operations and do more deals.

13 So I don't think there's a question that if they're
14 not going to continue raising money from investors for
12:12 15 securities offerings, and so as a practical matter then, how
16 can it proceed or engage in more deals if the investor money
17 that they rely upon to operate is -- has been ended, okay?

18 And that ended before the SEC came into this case, as
19 they say. That's what their claim was in their exchange
12:13 20 offering.

21 I would also add that, you know, our evidence shows
22 that this was operating as, you know, what's commonly referred
23 as a "Ponzi scheme" in the sense that they were paying
24 investors with new investor money.

12:13 25 So how does it look at the end of the day? I think

1 that's something that the receiver has to contemplate, and the
2 SEC will be supporting whatever maximizes the return. That
3 could mean trying to collect money from third parties that were
4 involved or perhaps negligent. It could involve the
12:13 5 liquidation of some of the properties and assets that have been
6 collected.

7 But as far as CBSG operating, the receiver, you know,
8 can speak more to this, but if there's no investor money coming
9 in, I mean, there's no dispute. If you don't have money coming
12:13 10 in, you don't have money to give away or to loan out or to do
11 an MCA with. And there is no investor money coming in, and
12 that was their only source, right, of money to get out to these
13 merchants.

14 So, in reality then, Your Honor, you know, how does a
12:14 15 company whose business is, you know, lending money from -- that
16 it collects from investors and getting, you know, supposedly
17 getting more back, how can it continue or go back into business
18 unless it has a different stream of funds that it would be
19 collecting to give out to investors?

12:14 20 So I just don't see it as anything that could be
21 practical. I think the evidence is going to show that this was
22 running as a Ponzi scheme, which is relevant to our allegations
23 about the representations made to investors about its success
24 and that it was a meritorious company.

12:14 25 And I think at the end of the day, the goal is going

1 to be to look everywhere, look under every rock, trace down
2 every dollar of investor money, wherever it went, and collect
3 it so that it can be given back to the investors.

4 But unless they were going to do another securities
12:15 5 offering, right, that's how they were making the money to give
6 out to merchants according to their business model. And that's
7 -- so that's what they did, but according to what their
8 business model supposedly was, it was giving -- it's dependent
9 on that initial inflow from the promissory note sale.

12:15 10 So I don't see how that --

11 **THE COURT:** Okay. No, and I just wanted to get a
12 sense of that, and when we get back from the lunch, I'll hear
13 more from the receiver on the secondary motion, which is to
14 discharge the receiver, and I know that the SEC has taken a
12:15 15 position on that. The receiver, really at the Court's
16 instruction, has not addressed that, in large part because
17 their job used to be to collect funds, not respond to pleadings
18 as much as possible so we can try to keep the costs down.

19 One thing I want to do is turn back to Mr. Ferguson
12:15 20 and then hear from Mr. Futerfas and Ms. Schein, again, they
21 need to add a little bit more, but I'd like to try to finish
22 that argument that is focused on the Rule 41, and then we'll
23 just take our break and then deal with about an hour of
24 argument -- 2:00 to 3:00 o'clock, we'll deal with a little bit
12:16 25 of a argument on the receiver, which I know there's other

1 counsels that have advocated for that, Mr. Soto and others who
2 are not under the Rule 41.

3 One thing I didn't get a chance to talk about -- and,
4 Ms. Berlin, I want to hear your point and then I'll turn it
12:16 5 back to Mr. Ferguson -- there's really two arguments.

6 The main one is the bad faith and willfulness.
7 There's a -- kind of a secondary state actor argument. I'll
8 hear from counsel in a minute. I assume it's some sort of a
9 due-process claim, but there is this kind of amorphous
12:16 10 constitutional violation being asserted, and it would be
11 natural under the Fifth Amendment, under the state actor
12 doctrine case law.

13 But I just wanted to get the SEC's formal position on
14 the record that I believe the way you've pled it and the way
12:16 15 the evidence at least has indicated that there is no true
16 direction by the SEC to Heskin so that it would satisfy the
17 standard required for state actor doctrine to trigger
18 constitutional and due process protections.

19 And by that, I mean that all that has been advanced to
12:17 20 the Court, based on my review, is temporal proximity. No one
21 can deny that when the SEC was building their case, Heskin was
22 in communication. But it doesn't appear to me that there's
23 enough record evidence to support a finding that the SEC
24 directed Heskin to act as an agent and therefore circumvented
12:17 25 the constitutional rights of the defendants.

1 And one of the arguments behind that, number one,
2 you've pointed out there is no due process violation anyway.
3 They were advised by counsel. Defendants actually, on some of
4 the private suits with the MCAs, went ahead and dictated the
12:17 5 scope of the deposition.

6 And so that's been kind of an initial argument. But
7 you've pointed out that even if we ignore that for a bit, the
8 reality is that there is just not enough evidence for the Court
9 to find that the state has exercised coercive power over the
12:18 10 private decisions of Heskin so as to, quote/unquote, deputize
11 him as an agent of the SEC.

12 And I want to make sure that I've stated that position
13 correctly because it is a large part of the Rule 41 motion,
14 and, therefore, the Court is not persuaded that there's enough
12:18 15 of a showing for bad faith to justify this sanction under the
16 Court's inherent power.

17 I think I would also have to explicitly acknowledge
18 that the Court is not satisfied the state actor doctrine has
19 been satisfied or met under the case law.

12:18 20 What does the SEC want to chime in because we haven't
21 talked about that at all, but it is a feature of the pleadings.

22 Anything else the SEC wants to add on that point?

23 **MS. BERLIN:** Thank you, Your Honor.

24 I think that the Court, as always, did a great job
12:18 25 summarizing that very concisely, but the only thing that I

1 would add is the SEC also argued in our response -- and I think
2 this is sort of the critical feature here -- is that the state
3 actor doctrine would not have any applicability here anyway,
4 like regardless of what the facts were because the issue is
12:19 5 that if we're dealing with the private lawsuit and a private
6 SEC lawsuit, there is no place.

7 You know, this arises in the situation, the state
8 actor doctrine, was that it was a criminal case or a state
9 regulatory actor organization case where parties cannot assert
12:19 10 a Fifth Amendment right.

11 Here, the defendant testified and provided evidence in
12 federal private lawsuits in the Eastern District of
13 Pennsylvania. They chose not to assert their Fifth Amendment
14 rights. They had that right there.

12:19 15 So even if the Court were to find Mr. Heskin was a
16 state actor, which it cannot, there's no evidence (audio
17 distortion) that he was not. But even if he was, which he
18 wasn't and they can't provide anything other than speculation,
19 state actor doctrine has no applicability. There can't be a
12:20 20 Fifth Amendment right or a Fifth Amendment violation or a
21 due-process violation when you're looking at two civil cases,
22 in both of which the defendants could have asserted their Fifth
23 Amendment right.

24 So there -- where would the due process violation lie?
12:20 25 Are they claiming that in the Eastern District of Pennsylvania

1 where they were deposed that the Fifth Amendment doesn't apply,
2 that they couldn't have asserted those rights? No.

3 So it's just a red herring argument, Your Honor.

4 There's no reason to even proceed, and this case is very much
12:20 5 like the Eleventh Circuit case that we cited at some point in
6 the McKinn (ph.) case, both of which are directly on point for
7 these issues.

8 And if I may, I just, very briefly because I know
9 we've taken way more time than was anticipated, so if I could
12:20 10 just briefly discuss one thing that I inadvertently failed to
11 state on the court's prior question?

12 **THE COURT:** Yeah. Go ahead and then I'll turn it back
13 to Mr. Ferguson and then touch base with Mr. Futerfas and
14 Ms. Schein before we break for lunch.

12:21 15 Go ahead.

16 **MS. BERLIN:** Thank you so much, Your Honor.

17 I just wanted to point out, as the Court knows,
18 questions have been made about the 14 merchant declarations,
19 that was not the sole basis in any way for our claims about the
12:21 20 underwriting issue. We had the undercover recorded transcripts
21 where Mr. LaForte is explaining how you do underwriting for the
22 vast majority of the deals. And these anchor clients who can
23 (audio distortion) calls now and ask them for money. And then
24 Ms. Jones, who also stated the same thing.

12:21 25 But we have an (inaud.) for Mr. LaForte, and that's

1 what we presented to the Court with our TRO motion. And we
2 used these merchant declarations as examples of (audio
3 distortion) just the Court wasn't sure LaForte admitted and
4 what Ms. Jones, the underwriting assistant director, both
12:21 5 stated.

6 So this isn't a case where we're coming forward and
7 saying you didn't do underwriting and we're only relying on 14
8 merchants' acts, which, by the way, which are (audio
9 distortion).

12:22 10 But it goes beyond that. We provided defendants'
11 (audio distortion) limitations as well. And as far as the
12 funding distinction the defendants made, the issue in this
13 case, and we allege that they lied to investors, and we pointed
14 the Court in our TRO papers to page 9 of their brochure, which
12:22 15 states that they make a decision within 48 to 72 hours, that
16 they don't rush the decision.

17 The issue and what our allegation is, it's not even
18 about when the money left the bank account. It's when they
19 made the decision. How long they took to do the underwriting.
12:22 20 How long that process took. That's the misrepresentation
21 that's in this case. That's what we allege they lied about and
22 that's what the evidence will show at trial and that's what
23 showed up on the TRO.

24 And then finally I just ask to strike in the reply,
12:23 25 the defendants make an allegation to this Court about me

1 claiming that this isn't the first time that Ms. Berlin has
2 presented (audio distortion). They cite to the Cramer (ph.)
3 decision and tell this Court that in that case, Judge Merryday
4 (audio distortion) in the Middle District found that, when I
12:23 5 presented him with untrustworthy evidence. They cite to the
6 case, so there's no question there where or what it says.

7 And, yet, they've made this false and public
8 defamatory statement, and it's sort of indicative of all (audio
9 distortion) under the same way. That decision, Your Honor, and
12:23 10 I would ask that you please look at it. Because they wrote
11 (audio distortion), where the issue was whether the Court would
12 admit the investigative testimony of an unavailable witness.

13 And the Court sets the standard under Rule 807 and
14 Rule 412 is whether or not it has the (audio indiscernible).
12:24 15 And the Court found that because the defendant, who at that
16 point was a fugitive, had not been cross-examined, and had, you
17 know, an interest that was posed to the remaining defendants,
18 that it didn't have the indicia of trustworthiness to be
19 admitted into evidence at trial.

20 So (audio indiscernible) SEC or that me, in
21 particular, as she had claimed, was found to be untrustworthy
22 or present false evidence to a court, it was a motion in
23 limine, where the legal issue is, does this transcript bear the
24 indicia of trustworthiness so that the Court should admit?

12:24 25 And it was a legal issue that was litigated, and the

1 Court ultimately decided that the defendants would win on that
2 motion in limine point. But that is not how they (audio
3 indiscernible) the Court. They filed something on the public
4 record (audio indiscernible).

12:25 5 **THE COURT:** Okay. Ms. Berlin, that's all right. I'll
6 take a look at the case, all right? No one here is going to
7 make that a feature of the Court's ruling.

8 And, again, if anybody is on the phone call that is
9 speaking that is not Ms. Berlin, then you need to mute your
12:25 10 phone, please. I'm getting a lot of feedback and I don't want
11 to get to the point where I make this a closed hearing this
12 afternoon, and no one can listen in, which is where we're
13 headed if I don't stop having interruptions and people dialing
14 in without muting.

12:25 15 So, Mr. Ferguson, let me turn back to you so that I
16 can allow you to make some final points and, perhaps, address,
17 if you would like, the applicability of the state actor
18 doctrine.

19 And then I will ask if Ms. Schein or Mr. Futerfas
12:25 20 wishes to add anything else to the Rule 41. I think just to
21 briefly summarize, there has been a presentation made by each
22 side that indicates, again, this is an investigation that was
23 in flux. Some of it, in the view of the SEC, was done prior to
24 Heskin. Enough of it was done with evidence to support a lack
12:26 25 of bad faith.

1 And then, conversely, the defendants have positioned
2 their argument to show that if you look at all of the
3 investigative shortfalls, in the view of the defendant, that it
4 should, as a whole, rise to the level of bad faith.

12:26 5 And the Court will ultimately have to decide whether
6 Rule 41 case law would permit the Court to exercise its
7 discretion this way based upon this record and a thorough
8 review of all competing affidavits and declarations.

9 So, Mr. Ferguson, what did you want to add (voices
12:26 10 overlap) this?

11 **MR. FERGUSON:** I'll keep it brief.

12 **THE COURT:** Yeah, it's okay, I don't want to cut you
13 off. I just want to make sure that I don't miss anything on
14 Rule 41 and from your co-counsel either before we break.

12:26 15 **MR. FERGUSON:** Thank you.

16 **THE COURT:** Go ahead. Yeah.

17 **MR. FERGUSON:** I really appreciate it.

18 Before I -- and I'm going to keep this brief, but I do
19 want to address a couple of things because counsel is speaking
12:26 20 as if we agree to some things that we do not agree, and I do
21 not want --

22 **THE COURT:** I don't think anybody agrees to anything
23 in this case, so (voices overlap)

24 **MR. FERGUSON:** And I just want to check them off real
12:27 25 fast.

1 First of all, Ms. Davis is using the cash basis. We
2 do not agree it is GAAP-compliant. Counsel said -- I think
3 everybody will agree -- it doesn't matter if you use accrual or
4 cash, the result is still that they needed investor money and
12:27 5 were basically a Ponzi scheme.

6 We do not agree with that at all.

7 **THE COURT:** What would you say as to the comment,
8 which got lost in all of our technical issues, which was a
9 surprise to me. And I don't -- and we'll hear from Ms. Berlin
12:27 10 this afternoon, but I don't expect to have that happen at
11 trial. I think I literally heard her say -- this is the first
12 time I've heard this and I have gone on record a couple of
13 times explicitly stating this is a battle of the experts -- and
14 for the first time today, I think I was just told that the SEC
12:27 15 was not planning on calling an expert.

16 **MR. FERGUSON:** May I address that?

17 **THE COURT:** Yeah, I mean, unless I misheard that, I
18 absolutely --

19 **MR. FERGUSON:** Yeah.

12:27 20 **THE COURT:** -- absolutely assumed it was going to be
21 Glick versus the SEC's person, and now maybe that's not what
22 the SEC plans on doing, and I got to tell you some of the risks
23 of representations or alleged misrepresentations by the
24 principles of this company, I think really depend on an expert
12:28 25 coming in and saying you can't represent that default rate

1 because the economics behind the business do not stand for it.

2 I don't know how you would --

3 **MR. FERGUSON:** Let me respond.

4 **THE COURT:** -- yeah. What would you say? I mean,

5 I --

6 (Voices overlapping)

7 **MR. FERGUSON:** I can shed light on it.

8 **THE COURT:** What did you -- what do you say because I
9 did not expect that?

10 **MR. FERGUSON:** If, Your Honor, we have to go to
11 trial --

12 **THE COURT:** Right.

13 **MR. FERGUSON:** -- I will be there. I can assure you
14 Mr. Glick will be there unless something happens that he can't
15 make it. We're bringing an expert. The SEC is saying we're a
16 Ponzi scheme, and we're going to defend ourselves and we're
17 going to defend any representations that were made by the
18 defendants. And the SEC, if they don't want to bring an
19 expert, I don't think it'll go so well for them.

20 **But I'll tell you this:** I don't believe that I
21 suggest that Ms. Davis will not survive a Daubert challenge.
22 She will not pass it and we want that opportunity. Mr. Glick
23 does not agree with her. We do not agree that we were a Ponzi.
24 We do not agree that we needed new investor money to continue
25 to operate. We do not agree with that at all.

1 There was a reference to a representation made when
2 there was a restructure. I contend that that was not made by
3 my client or Par, and we can parse through that later. But be
4 very clear, our position is that Mr. Glick and Ms. Davis will
12:29 5 have a showdown if and only if Ms. Davis can get around our
6 Daubert challenge, and don't take any of those -- and I don't
7 want the people listening to, for a second, believe that the
8 defense agrees that this was a Ponzi scheme. That is not
9 appropriate to make that argument in this case.

12:29 10 And I want you to also understand, shifting back for a
11 second, to the substance of the Rule 41, I've got a few notes.
12 There was a lot going on.

13 But please understand, Your Honor, we're not -- this
14 isn't summary judgment. We're not here attacking the filing of
12:30 15 what the SEC now is locked in on what this case is about, a
16 securities registration and disclosure case. This isn't a
17 summary judgment motion.

18 So for the purposes of this motion, that's not what
19 we're talking about. We're here looking for a remedy for the
12:30 20 preliminary relief that was wrongfully obtained that caused
21 drastic, catastrophic injury to Par, the note holders, the
22 defendants, and that's what this is about. So it's a little
23 bit of a misdirection to try to start arguing summary judgment.

24 And some other points.

12:30 25 If you go back into the motion and the TRO motion, the

1 Vagnozzi investor dinner -- which wasn't just about Par, it was
2 about other opportunities, too -- the SEC says that that's
3 tethered to hiding Mr. LaForte's identity, and then the
4 transcript reveals otherwise.

12:30 5 The other thing. The dinner with Mr. Cole about the
6 bank. And I don't know if they're doubling down or it sounded
7 like on the LaForte introduction like that doesn't matter
8 again. And I'm not sure, it's a little convoluted, but the
9 record is there and what they said in their TRO and what the
12:31 10 transcript says, it doesn't support that. I'd like you to key
11 in on that when you're thinking about this.

12 The dinner with Mr. Cole, they double down and they
13 say Mr. Cole said we're going to get a bank to avoid usury
14 laws. Again, Your Honor, this is more of the same conduct that
12:31 15 we're complaining about pre-TRO and when the motion was filed.
16 The transcript, he doesn't say that. So check that out and
17 that should impact the veracity of counsel's argument because
18 it's not there.

19 And you, Your Honor, you're all over the issues.
12:31 20 You're a smart man. Why on earth would Defendant Cole think he
21 needs to get a bank to avoid usury laws for MCA advances that
22 are not governed by usury laws? It's nonsense, Your Honor.

23 The most troubling thing I heard here today -- well,
24 in addition to we agree that this is a Ponzi -- is now the SEC,
12:32 25 rather than saying we got it wrong about the theft of all the

1 money out of the coffers which caused you to, in part, hit the
2 nuke button here, now counsel's arguing we're making it up,
3 that we did take -- and this is what I heard -- that we did
4 take the money, but we sent some of it back to the company.

12:32 5 That's not our position. That's not what happened.
6 That money was moved from the business to the funding platform
7 in the ordinary course of business. No money was taken.

8 THE COURT: Is your belief on that point -- I mean, I
9 know that some of it has been in Georgia with the funding
12:32 10 platform.

11 MR. FERGUSON: Yeah.

12 THE COURT: What do you make of assertions early on in
13 the case -- and, again, it's hard because I know you're
14 pointing to the Court to what was represented at the TR0 phase.
12:32 15 Some of this stuff has come out through the receiver's work.

16 But is it your dispute upfront that any of the money
17 found its way to individual defendants inappropriately,
18 meaning --

19 MR. FERGUSON: Yes.

12:33 20 THE COURT: -- do you believe that that funding or
21 that money came got from investor funds to those individual
22 defendants was open and obvious, everybody knew those -- that
23 is the fees that they charge and that was properly disclosed,
24 that this is not -- that they were fleecing investors, but that
12:33 25 this was the profit of their hard-earned work, you know, or

1 hard-earned gains for their hard work because of the MCA
2 factoring? What's your view on that?

3 **MR. FERGUSON:** I do dispute the concept that a penny
4 was wrongfully taken. Now, the Georgia money, you got my
12:33 5 position, so now we're moving, too.

6 **THE COURT:** Right, we're talking about separate,
7 right.

8 **MR. FERGUSON:** Not another -- not one penny was
9 wrongfully taken or stolen by any of the defendants. And what
12:33 10 you just said is our position that this was compensation
11 consulting fees for work they did, and that's our position.
12 And then we believe that the -- they just blew out the account
13 and stole the money was just a easy way to bait you into doing
14 the obvious.

12:34 15 **THE COURT:** And let me ask you, something like that,
16 which goes back to my issue when I see a chart, and the SEC and
17 I are having this discussion earlier, and I'm pointing and
18 Ms. Berlin asked me or shown me where your underwriting
19 statements are. And now I have at least her version of the
12:34 20 declarations that formed the basis for the underwriting.

21 Something like this compensation argument, so we have
22 a side telling me this is clearly consulting fees, we can prove
23 it's consulting fees, we'll get people up here from the
24 business to show you that this is not money being taken out
12:34 25 inappropriately from the investors and they being unaware of

1 it.

2 And then I have some of the testimony or some of the
3 documentation that seems to evidence that this wasn't
4 necessarily disclosed in that fashion to investors.

12:34 5 How can I look at something like that, which is
6 traditionally would be a jury issue or disclosure debate over
7 the compensation for regulatory concerns and what they should
8 have told investors, how can I look at that and say, well, you
9 know, what that's clearly bad faith by the SEC, they don't have
12:34 10 a leg to stand on that that is a hundred percent, you know, a
11 fleecing investors, it's clear it's compensation?

12 Because, I mean, there's a lot of grays there to me in
13 this record. And then to ask --

14 **MR. FERGUSON:** Let me address it.

12:35 15 **THE COURT:** -- (voices overlap) when I see grays, I
16 can't get you to 41. That's my problem.

17 **MR. FERGUSON:** Your Honor, as a lawyer, we all have to
18 be careful what we ask for because if we get it and we weren't
19 entitled to it, we're going to lose it later. Okay?

12:35 20 I'm not here to tell you that they -- that it's
21 willful misconduct for them to throw that out there and
22 challenge -- because -- but I think the theme of their paper is
23 that apparently the operators of the businesses were not
24 entitled to a dime in compensation, and if they got any
12:35 25 compensation, they stole.

1 I believe that some of that can be pared out at
2 summary judgment, and if the case continues, some of that might
3 be a jury issue and we'd stand there to defend it. I would be
4 misleading you if I just told you, don't look there, that's --
12:35 5 you're wrong.

6 THE COURT: And that's -- and that's, look, and I
7 appreciate that because, as an officer of the Court, that's
8 important to me, and that's why, when I look at this motion, I
9 said I get the argument, but I can't square up this record with
12:36 10 the relief requested.

11 And let me tell you something: I think you're
12 absolutely right. I think I would be swiftly reversed by the
13 Eleventh Circuit on this record if I granted your motion. And
14 I say that respectfully --

15 MR. FERGUSON: Well, Your Honor --

16 THE COURT: -- and I think it's a well -- I think it's
17 a well-pled motion, but it's the standard that worries me. I
18 feel like I have to get a level of hand caught in the cookie
19 jar to exercise such broad and sweeping power, which is why in
12:36 20 the beginning I said if you're right on this, we got another
21 way. I mean, I get what you're saying. We really don't judge
22 at this point. We decimated Par Funding, we've taken all this
23 money out of the stream of the MCA loans, we can't get back to
24 where we were, we can't put the genie in the bottle.

12:36 25 I would say I don't know that granting Rule 41 fixes

1 any of that other than you, I think rightly, are saying to the
2 Court, exercise your discretion to prevent abuse by the
3 government by the SEC in this fashion. And that is a
4 good-faith argument to make to the Court that they should pay a
12:37 5 price if indeed they went ahead and ran roughshod over
6 defendants with no investigation, with no leads, no
7 declarations or anything of that nature.

8 You know, but when I got a bunch of disgruntled people
9 that they spoke with, yeah, I'm with you, their credibility is
12:37 10 going to a little bit suspect. Your theory isn't a bad one:
11 If we can get this thing to be shut down, then we don't owe our
12 outstanding loans. I mean, that makes a lot of sense, right,
13 everything gets frozen and now a bunch of disgruntled MCA
14 borrowers, who are probably looking at confessions of judgment,
12:37 15 are now going to walk.

16 So, again, I'm not disagreeing with any of this. I
17 think all of this stuff might make a group of six or eight look
18 at the SEC and go, well, wait a minute. Your case is built on
19 no expert and 14 disgruntled portfolios. I mean, and maybe
12:37 20 there are witnesses from the defense that say, listen,
21 everybody knew that we had to take some of these monies for our
22 work. This was not a non-disclosure issue.

23 But all of these things I'm pointing out to you, which
24 I will contend are arguable flaws in the SEC's case, it's all
12:38 25 about whether I can make a real finding here today that it

1 rises to the level of a Rule 41.

2 **MR. FERGUSON:** May I, Your Honor?

3 **THE COURT:** Yeah, yeah, you go ahead.

4 **MR. FERGUSON:** Okay. I might have misspoken. I want
12:38 5 you to understand what my point was about review and reversal.

6 When we were talking about the compensation, what I'm
7 saying is if our Rule 41 was based on the false allegations
8 that they got paid and they were entitled to get paid and you
9 should find that here, if that went up, I believe that would be
12:38 10 subject to reversal. That's what I was conceding.

11 As far as the Rule 41 motion as it stands, the one we
12 brought, I believe stacking the willful disregard, stacking it
13 like the guy I gave the example driving down the street and
14 crashing into somebody, at some point I believe in any of these
12:38 15 numerous points, they crossed the line into willful.

16 I believe you could dismiss the case, whether -- it's
17 your discretion at this point whether you decide to do so,
18 think that's the right result, or something less, some other,
19 that's all on your desk.

12:39 20 **THE COURT:** And you don't think the stacking -- you
21 think it's not a stacking of inferences?

22 **MR. FERGUSON:** It's not inferences, no.

23 **THE COURT:** That's the key, right? Is it a situation
24 where I'm taking, for example, the Heskin temporal proximity
12:39 25 argument, and I'm going to make the leap.

1 MR. FERGUSON: That, I'm going to address that for a
2 second.

3 THE COURT: Yes, address that for a second.

4 MR. FERGUSON: The state actor concept, it's real
12:39 5 simple what we're pointing to, and it's more than just a
6 temporal proximity. Mr. Heskin is a private actor, as you
7 know. And the manual of the --

8 THE COURT: Of the SEC.

9 MR. FERGUSON: -- of the SEC, 3.1.4 states that they
12:39 10 cannot utilize a private entity and utilize them in the
11 furtherance of their investigation, and Mr. Heskin, a private
12 adversary, a private litigant, he, after a protective order has
13 been entered on certain subjects of what he can ask at Cole's
14 deposition, he's communicating with the SEC, he's asking the
12:40 15 questions the Judge (audio indiscernible) are not relevant and
16 that you shouldn't ask. He's getting testimony, and then he
17 immediately orders the transcript and sends it to the SEC.

18 So that's not just co-concurrence; it's working
19 together. And Mr. Heskin is e-mailing the SEC and law
12:40 20 enforcement. I believe that we've got -- we put e-mails in the
21 record, where there's e-mails from Heskin to counsel, not --
22 two different counsels at the SEC and FBI agents.

23 Now, what I don't see coming back are e-mails between
24 them talking, and I don't know what they did, but I would
12:40 25 suggest people in that position, when confronted with an e-mail

1 like that, if they wanted to communicate further would probably
2 do so by phone. I could never find that.

3 But we've got Heskin as the -- he's the hub of the
4 FBI, the SEC. He's asking questions for the SEC. And, sir, it
12:40 5 reads -- that Cole deposition transcript reads like a blueprint
6 of the complaint that was filed, you know, weeks later.

7 And that's our position. That's it in a nutshell.
8 It's no more exotic than that.

9 But I do not believe I'm stacking inferences because
12:41 10 if that was all it was, it wouldn't be enough, but that, we've
11 shown you the interaction there and what happened. And the
12 things we're stacking are not inferences. I'm not asking you
13 to believe that, through inferences, that the SEC said that the
14 money was stolen when it was being funded to merchants in the
12:41 15 ordinary course of business.

16 I'm not asking you to swallow an inference when I'm
17 saying the SEC tells you that they concealed Mr. LaForte and
18 introduced him by name, when they tell that this transcript --
19 and they tell you here in this hearing -- that this transcript
12:41 20 supports Mr. Cole saying we're going to buy a bank to --
21 acquire a bank to avoid laws that don't even apply. Those are
22 not inferences. It's misconduct. And the arguments continuing
23 here, I believe, are enough.

24 And I believe you should grant our motion. I
12:42 25 understand you were asked to fire a gun. You shot the gun.

1 And I'm asking you now to realize that was -- you shouldn't
2 have done that, the preliminary relief, but I understand why
3 you did it. And you're like, well, what do I do now? This is
4 something you have to deal with, or what are the ramifications?

12:42 5 If I wanted to grant that relief, what are the ramifications?
6 How do I make it better? How do I make it as right as I can?

7 And that's on your table. We're here to give you
8 information, respond to questions. But I just wanted to make
9 those points and I want to leave with one final point.

12:42 10 Just the ongoing misconduct. We heard counsel talking
11 about the merchant declarations. Counsel referred to
12 Fleetwood.

13 **THE COURT:** Right.

14 **MR. FERGUSON:** Counsel -- we've shown you -- the
12:42 15 counsel's own London report that she got from Mr. Heskin,
16 bought and paid for by Mr. Heskin, which shown you in the
17 papers, that he confirms that Fleetwood was funded on
18 January 9, 2017.

19 Now remember there's a site, the deal starts on the
12:43 20 4th. There's a site inspection ordered that occurs on the 5th,
21 and then it's funded on the 9th. We've shown you the wire, the
22 money out of Par's account, but counsel keeps saying it was the
23 4th and doubled down here, and that's false. And London, her
24 own expert, shows that that's false.

12:43 25 Chief, the counsel gets a printout. This is Exhibit

1 B-8 to the papers, and it's a CRM printout that talks about
2 Fleetwood. It says data funding, 01-04-17, okay? Deal value,
3 zero dollars; expected close, 8-17-2021.

4 This is obviously not -- this is a CRM. This is
12:43 5 garbage in, garbage out. This is the data control at the
6 company. This does not trump the actual bank records
7 Mr. London's finding.

8 And what's really interesting to me, it's just last
9 night, I think I was on the phone with Mr. Levine, he called me
12:44 10 and he found this. And if you look at the declaration of
11 Melissa Davis that's Exhibit B-5 that the SEC filed to
12 basically show that the QuickBooks image that we gave you with
13 the declarants names on the top is not how it is in QuickBooks.
14 We weren't ever asking you to believe that.

12:44 15 But if you read Ms. Davis's materials that she
16 attaches, she says I accessed the QuickBooks and here's some
17 printouts from QuickBooks that show the last page of it is the
18 Fleetwood services account, and it shows that the -- that it
19 was funded on the 9th. The money went out on the 9th. It's
12:44 20 in -- counsel's own declarant, Ms. Davis herself, confirms that
21 counsel's argument to you based on this CRM printout, this
22 continued argument that Fleetwood funded before the site
23 inspection.

24 This is false, Your Honor. This can't be tolerated.
12:45 25 See, what's going to happen here is if you let this slide,

1 they're going to do this again. The commission's going to do
2 this again, counsel's going to do this again. And there has to
3 be ramifications for this.

4 **THE COURT:** Okay. And let me ask this.

12:45 5 Just I know that Mr. Futerfas and Ms. Schein -- and
6 whoever's on the line needs to please mute. I have investors
7 that are not muting their calls.

8 So let me finish this first portion, which is simply
9 we've heard argument on the Rule 41, although we've touched on
12:45 10 some other issues.

11 Before we break for about an hour and 15 and then I'll
12 return just after 2:00 o'clock, then hopefully we'll see if we
13 can get a clean line set up again at that time, and I may issue
14 some information if we need to change the numbers, but we
12:45 15 should be able to all call in again and hear the remainder of
16 the argument on the other side, and then we're going to touch
17 base with the receiver as well.

18 Mr. Futerfas or Ms. Schein, I don't know if you want
19 to add anything. I mean, Mr. Ferguson has kind of taken the
12:45 20 lead already in your motion. Quite a bit has been said on top
21 of the papers is what I wanted to give you guys an opportunity
22 to be heard on this Rule 41 motion before the Court rules.

23 And, you know, again, I think I've said it many times
24 in this case. The difficult challenge in this case is because
12:46 25 we have a lot of evidence and a lot of different statements

1 made and deposition transcripts and moving parts, it is the
2 case that begs for a fact-finder in the form of a jury to kind
3 of make an ultimate determination of what are the underlying
4 key issues in the case. And we'll see how much can be resolved
5 at summary judgment.

6 But I will say that at this point I've made my
7 concerns clear as to whether or not it would be a proper
8 exercise in my discretion to dismiss the case. Given what I've
9 seen, I find there to be some merit in the cutting of corners
12:46 10 on some of the investigatory issues done by the SEC, but we
11 know that that kind of at-most negligent type of behavior --
12 although there may be a strong public policy argument for the
13 Court getting involved and reminding the SEC of its
14 obligations -- it's a much different ball game to get to the
12:47 15 world of bad faith to trigger Rule 41.

16 And I will note that a lot of the state-actor
17 arguments that have been made, we know they're not actionable
18 to kind of look and use the SEC's manual as a standard that can
19 be enforced, per se, and there's some case law on that,
12:47 20 although, again, I think it's part and parcel of the
21 defendants' presentation that this was not the world's best
22 investigation before they asked for a very big remedy.

23 And one would wonder what would have happened if we
24 kind of pumped the brakes a little bit upfront before asking
12:47 25 for a TRO, but we all know that presented with the evidence

1 that I have in front of me, I continue to believe it was the
2 right call to protect investors, and we've let that operation
3 try to drum up and get as much as we can in investor proceeds.

4 But, Mr. Futerfas, is there anything you want to add
12:47 5 that hasn't been already argued on top of what you heard from
6 your co-counsel?

7 **MR. FUTERFAS:** Yes, Your Honor, thank you. I
8 appreciate your patience today. And I'm going to be brief,
9 given that Your Honor's heard a lot already.

10 I want to start, and I would be very quick, but --
11 because I know we're going to talk about this after lunch --
12 but Ms. Berlin was asked by Your Honor, it's her report
13 according to GAAP. Is it GAAP supported? And they took about
14 five minutes to answer the question and never answered it. No,
12:48 15 it's not GAAP-supported.

16 Then Your Honor asked, "Am I getting a report from
17 your expert, Ms. Berlin, that analyzed this company under a
18 (audio indiscernible) analysis?" And, again, she hesitated and
19 waffled. The answer is no. The report that the SEC got and
12:48 20 produced to us on August 13th is a rehash of a cash-basis
21 analysis done by DSI. We could eviscerate that report. We
22 will eviscerate that report at a Daubert hearing. It is easily
23 and demonstrably destroyed, and I could do it after lunch with
24 Your Honor in about five minutes.

12:49 25 Further, she made claims that this company was a Ponzi

1 scheme. How can she say that? James Klenk, who is the CFO of
2 this company, or the chief financial officer of this company,
3 or the controller and a CPA and continued to work for the
4 receiver since the receivership was deposed by me for eight
12:49 5 hours. He said this was not a Ponzi scheme. He said that
6 this -- the numbers for this company were all made according to
7 GAAP by him in 2018.

8 In addition, Your Honor, you've got three reports by
9 Joe Brick. Three: An April 15th report; a July 13th report;
12:50 10 and now an August 13th report. Those reports make clear that
11 this company was absolutely profitable, that the information
12 provided in the KPI reports is accurate. And more recently, in
13 the August 13th report, which Ms. Berlin either didn't read or
14 doesn't want to read, that shows clearly on an extraordinary
12:50 15 analysis, okay, that credited funds from the -- came from
16 investors, came from people that, okay, they were providing
17 money under loan was solely used, solely used for MCA activity.

18 And none of those funds were used to pay consulting
19 fees. None. And Ms. Berlin, who is not a CPA, who has no
12:50 20 understanding of the financials in this case at all, has the
21 temerity to say in front of three reports offered by one of the
22 leading CPA firms in the country, much less South Miami, okay,
23 in the country, who have examined this information in minute
24 detail. Okay? And it can still repeat what she said before.

12:51 25 And I think that goes to the Rule 41 motion because

1 I'm going to take you back very quickly in one minute and say
2 the following: The only thing I would add to Mr. Ferguson's
3 excellent argument is this: When you read this complaint, this
4 complaint, the first one and the amended complaint, it talks
12:51 5 about bad underwriting, ROAM, 400 percent interest rate. It
6 makes all kinds of claims.

7 Now we know underwriting? Your Honor, there was a
8 750-gigabyte storage of underwriting called ConvergeHub. The
9 SEC never bothered to look at it. The SEC brought this case
12:51 10 without ever calling the company, without ever serving a Wells
11 Notice, without calling counsel. This company has excellent
12 counsel in Fox Rothschild and other lawyers who are
13 representing this company. No one got a phone call. No one
14 got a letter. Nothing.

12:52 15 How do you take the guy -- how do you take Shane
16 Heskin -- how do you take Shane Heskin with his 14 merchants
17 out of 7,600, all of whom who want to avoid their obligations,
18 and run with that and never place a phone call to a company
19 that has 17 accountants, has outside counsel, has 70 employees,
12:52 20 and has an outside accounting firm reporting millions of
21 dollars of revenue every year and just shut it down?

22 How do you possibly do that at the SEC and not make
23 the slightest inquiry of this company and just rely on Heskin
24 and bring this case? That's crazy, Your Honor. That's just
12:53 25 nuts.

1 So I don't know if Your Honor is going to find that it
2 rises to the level of willful negligence or what it is, but as
3 we go through this case -- and I asked Mr. Klenk at his
4 deposition: You're a financial officer, you're a CPA, did the
12:53 5 SEC ever contact you about the financial wherewithal of this
6 company, the underwriting of this company, any of the
7 operations of this company before they brought the case? No.
8 Not a phone call before they brought this case.

9 And, Your Honor, everything else I'll add and I
12:53 10 will -- I'm certainly available after lunch to talk about the
11 motion that we made. Thank you.

12 **THE COURT:** Yeah, thank you.

13 And we're going to talk about the receiver because,
14 look, a lot of the receiver concerns are echoed in the Rule 41.
12:53 15 I just want to make sure we all recognize, as I've done
16 repeatedly this morning into the afternoon, the standard that
17 is required for Rule 41, and the Court understands the
18 defendants' position.

19 Ms. Schein, do you want to add anything else to the
12:54 20 presentation on the Rule 41?

21 **MS. SCHEIN:** Your Honor, I appreciate the Court's
22 patience and attention to these important issues as the defense
23 has brought at this time. Since the lunch hour is approaching,
24 I will reserve for after -- the afternoon to reserve my
12:54 25 comments, and I will rely upon the excellent presentation of

1 Mr. Ferguson to put forth these important issues, and also the
2 additional comments by Mr. Futerfas.

3 Thank you, Your Honor.

4 **THE COURT:** Thank you.

12:54 5 So what we're going to do is it's just before 1:00
6 o'clock. Let me give everybody about like an hour and 15. If
7 everybody will come back around 2:15 or so, or dial in by 2:15,
8 give everybody a chance to kind of stretch out their legs, take
9 a break.

12:54 10 I expect to go about one hour until about 3:15, no
11 later than 3:30. I cannot push some of my hearings back beyond
12 that. And, in fact, I have one in ten minutes, so I'm going to
13 run to that next.

14 But I just want everyone to understand that what we'll
12:55 15 do this afternoon is we'll hear some argument on the other
16 motion, which was just the motion to discharge a receiver. I
17 do recognize that is joined by, I think, all defense counsels
18 in the case, so I'll try to give everybody at least a little
19 bit of time.

12:55 20 I don't know how, but what we did this morning was
21 very effective that Mr. Ferguson kind of led the argument on
22 the Rule 41. I don't know if one counsel plans on leading the
23 receiver discharge argument.

24 **MR. FERGUSON:** If I may, Your Honor?

25 **THE COURT:** Yeah.

1 **MR. FERGUSON:** This was our plan, so I wasn't just
2 hogging the mic, and Mr. Futerfas is going to take lead on that
3 motion.

4 **THE COURT:** On the one?

5 **MR. FERGUSON:** Yes, sir.

6 **THE COURT:** Okay, so, Mr. Futerfas, when I get back,
7 we'll start with you on the phone at around 2:15 so that I can
8 hear your argument on the receivership portion of this. And I
9 know that we have other counsels that haven't chimed in on the
12:55 10 receivership, who are signed off on that block at the end.
11 I'll just prompt them here in court to see if anybody wants to
12 add to Mr. Futerfas's presentation.

13 So, with that -- and then, of course, I will at that
14 time, Ms. Berlin, also hear from the SEC. And the receiver
12:56 15 motion, I will also hear an update since I have the receiver
16 here and his counsel, Mr. Alfano, I want to touch base with
17 them, but that's better reserved for the secondary motion.

18 Ms. Berlin, there's not much else I'm going to have
19 you add to the reply. This is a defense motion. I just want
12:56 20 to be clear. I'm taking it under advisement here. But I want
21 you to know that, obviously, I've heard your side of the
22 argument, but I wanted to give the defendants a chance to
23 finish off their points, okay?

24 So I don't any if there was more you wanted to add,
12:56 25 but at this point, the Court is satisfied that it's got enough

1 evidence in the record to make a determination based upon the
2 spreadsheets and evidence everyone's provided, okay?

3 **MS. BERLIN:** Thank you, Your Honor. I didn't plan to
4 say anything further unless the Court has questions.

12:56 5 **THE COURT:** No, I don't. I just wanted to make sure.
6 I don't have any other questions for the SEC. I just wanted to
7 make sure, okay?

8 And, by the way --

9 **MS. BERLIN:** Thank you, Your Honor.

12:56 10 **THE COURT:** -- while we're on break also, when I come
11 back, I do want to talk a little bit because I think it would
12 be foolish not to.

13 I keep referencing the end game here. We were able,
14 early on in this case when we had the preliminary injunction
12:57 15 proceedings, to keep a meet-and-confer relationship. That was
16 very successful. And if you remember, when we dealt even with
17 Mr. Vagnozzi, we were able to work out agreements on a lot of
18 things.

19 You know, I know this case went to mediation early,
12:57 20 but I'm going to check in also this afternoon when I get back
21 about where this case really should go. Do we have a case here
22 that everybody thinks they need to dig in on as summary
23 judgment approaches? Because we all know once we get to
24 summary judgment and we start approaching trial, and you all
12:57 25 heard that the Court is 110 percent invested in seeing an end

1 to this case in the current calendar year of 2021.

2 I am fully putting my foot on the gas, and nothing
3 will be ahead of this case on the current trial calendar. I
4 need all parties to understand that this is -- we're getting
12:57 5 into that kind of fishing and cutting bait time because once we
6 get into summary judgment, the Court starts writing on those,
7 possibly set this for OA.

8 Once I rule on these pending motions, we're going to
9 get to a position where no one can really move the needle. And
12:58 10 I don't know, Ms. Berlin, how much you've had a conversation
11 with your opposing counsels. You always advise the Court every
12 time that your phone lines are open. But, you know, there's a
13 lot going on in this case, and it just seems like an inflection
14 influx point today.

12:58 15 After we get out of court, I urge the parties -- I
16 urge the parties to see if there's an exit strategy. I'm not
17 trying to say this is like getting out of Afghanistan, but the
18 way it's going right now, I mean, we're getting to the point
19 where I'm going to end up consuming my receiver for another
12:58 20 four months. I've got defendants that I think are willing to
21 come to the table, and, quite honestly, some of the individual
22 defendants have bigger fish to fry in their lives right now
23 with other investigations than this one. And I have a bunch of
24 claims here that, quite honestly, I think the FCC, if they're
12:58 25 worried about this business and these investors going out and

1 misrepresenting anything to the public, I mean, it doesn't seem
2 that it would be that tough to craft a resolution, and then all
3 that we would really be arguing about is the monies that have
4 been seized, what we have in the coffers, what goes to
12:59 5 investors.

6 I mean, again, I see no upside to letting this thing
7 play all the way through a trial if all it's going to do is
8 then bring us to back to square one, which is we've got some
9 problems with this firm collecting money. Now where does it
12:59 10 go? Who does it go to? We line up the claims. That's going
11 to be here now, that's going to be here later. These
12 defendants, if they're willing to come to the table and try to
13 figure out something that will keep them out of this business
14 and keep the SEC calm, that they're not going to make
12:59 15 representations in this space. They already have TROs, or
16 preliminary injunctions, rather, that they agreed to.

17 I just want to mention that, Ms. Berlin, because this
18 is the kind of case that, at this point, I don't want everyone
19 to just throw up their hands and think the only way out is a
01:00 20 jury trial. Do you understand what I mean on behalf of the
21 SEC?

22 MS. BERLIN: Your Honor, I absolutely understand, and
23 I -- the defendants are well aware what a potential settlement
24 would look like. I speak with them regularly and they know
01:00 25 that they can -- I speak with them a lot. They can -- we can

1 have a settlement discussion anytime, and I've already laid out
2 for them what potential settlements would look like.

3 And so I say it again and all defense counsel can hear
4 me, and they know because I speak often that they can speak
01:00 5 with us. And, you know, unfortunately, this particular hearing
6 is example A of the lack of -- there was no conferral about
7 this. I think that conferral is important. It needs to be
8 maintained so that we don't waste time with matters including
9 what occurred today.

01:00 10 And in the motions that were filed, there was no
11 conferral, and anytime any defendant wants to speak settlement,
12 our phones lines are open. They all have all of these -- both
13 of my phones and my personal cell, and I remain willing to
14 speak with them again anytime they would like.

01:01 15 **THE COURT:** Here is one thing I will probably do, so
16 that you know.

17 I think the Court is -- intends on once I rule on
18 these motions, the Court -- and, again, it's not the most
19 artful solution, but in the hopes of restarting the
01:01 20 conversation with literally about just under a month to go
21 until the summary-judgment motions are due and about three
22 months to trial, I practice using what I'd term an informal
23 settlement conference, which mandates that all parties and
24 their clients be accessible on the line, meet and confer for a
01:01 25 minimum of a certain amount of time, we'll say two or three

1 hours, with the receiver present. And it's not something that
2 requires judicial intervention. It's not an informal
3 settlement conference presided over by a magistrate judge.

4 But it's almost like a forced meet-and-confer, where
01:01 5 I'm requiring the parties to provide me with joint status
6 report on the discussions that are being had.

7 Even if it doesn't generate some sort of resolution or
8 at least limit the issues, I think it's important that everyone
9 take stock of where we're at in the litigation because this
01:02 10 next phase then becomes another round of briefing and battles.

11 And, again, there's not a lot left in the case, and there's not
12 a lot of runway left, and we're hearing about possible Daubert
13 challenges and other things that are coming in the future.

14 The Court stands at the ready to go through all of
01:02 15 them and get it to trial and try it, but I'm just -- I'm
16 looking at the upside, if you will, of the SEC and their
17 purpose as a regulatory body and what these defendants are
18 looking to do with their lives post this litigation.

19 And it just seems to me that there should be an exit
01:02 20 strategy here, something in the middle, where all parties may
21 not be thrilled, but they'd rather walk away with a certainty
22 that is not available to everybody if we put this in the hands
23 of a jury.

24 Let's be -- let's put it this way: If the Court is
01:02 25 having challenges getting its hands around exactly what

1 happened and all the moving parts, putting this in front of a
2 jury will probably fare no better. And there's a lot of
3 uncertainty there, and I think all parties should at least take
4 a hard look again.

01:03 5 And now that we know so much more and the discovery
6 deadline is fast approaching, in fact, I think it's in the next
7 ten days, it's very close. So the discovery's going to close
8 pretty soon, absent an agreement that it doesn't want to file
9 on an existing deadline.

01:03 10 And I just want everyone to hear this admonition from
11 the Court, and let's take the temperature down to close today's
12 hearing and see if maybe we can try to, with everybody's as
13 talented as they are on both sides of the ball here, we should
14 be able to figure something out here that let's us walk away
01:03 15 with a resolution we can live with.

16 But with that being said, I'm five minutes late for my
17 next hearing. I will be back here at 2:15 and we will all hear
18 the second motion for about an hour and then I'll let you guys
19 know where we're at.

01:03 20 Okay? All right, see you in a brief recess.

21 **MS. BERLIN:** And, Your Honor, we call back in?

22 **THE COURT:** Yes. I'm sorry? Someone else -- what was
23 that? What was that?

24 **MS. BERLIN:** I just want to confirm that we call back
01:03 25 in. This is Amie Riggle Berlin. We call back in?

1 THE COURT: Yes, I think the easiest thing to do is to
2 have everyone disconnect and we'll open the line at 2:00
3 o'clock, everybody can call back in, okay?

4 MS. BERLIN: Thank you. And when we resume, I'd just
01:04 5 like to clarify something about the expert report that I think
6 will be helpful. (Audio distortion).

7 THE COURT: Yes, that would be helpful.

8 MS. BERLIN: I think maybe you all just
9 misunderstood --

01:04 10 THE COURT: That will be helpful for me, too. Why
11 don't I hear from you and you can touch base on the expert
12 thing before I move on in the next motion?

13 For those that are on the Zoom, it will just continue
14 on. If you wish to have a view of the courtroom, I will leave
01:04 15 that open. I'm just going to go ahead and mute it, as I've
16 done, but we'll leave that open so that you guys can continue
17 to watch the proceedings. Okay?

18 MR. FERGUSON: Your Honor, thank you for all the time
19 you've given us.

01:04 20 THE COURT: Yeah.

21 MS. BERLIN: Thank you.

22 THE COURT: Sorry that it was interrupted by the --

23 MR. FERGUSON: No, thank you very much.

24 THE COURT: -- wonders of technology. All right. So
01:04 25 I'll see you guys in about an hour and 15. All right? Thank

1 you.

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(Thereupon, a luncheon recess was taken.)

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A F T E R N O O N S E S S I O N

9

THE COURT: Please be seated, everyone.

02:29 10

Okay. Let's go back on the record if we could and, please, if you are listening in on the phone or you have rejoined the feed on the Zoom -- because we do have the Zoom feed if you want to see what is happening as well as (audio indiscernible) -- you need to mute. I'm already hearing my voice, so please mute any phones if you are dialing in.

02:29 15

All right. We're testing one more time here to make sure I don't hear anybody. Any echo? Okay.

So let's go back on the record. Case No. 2081205, *Securities & Exchange Commission v. Complete Business Solutions Group, doing business as Par Funding, et al.*

02:30 20

We have everyone again present in court and some folks joining us on the phone. And we had left off with the Rule 41 motion, which the Court has now put under advisement, and we're going to turn now to the accompanying motion which is the plaintiff's motion to discharge the receiver.

02:30 25

1 So on this one, I understand that Mr. Futerfas wanted
2 to lead some of the argument and start off with him. I don't
3 know, Mr. Futerfas, if you are online. Are you there?

4 **DEFENSE ATTORNEY:** Yes, I am, Your Honor, thank you.

02:30 5 **THE COURT:** Okay, great.

6 So similar to what I did with Mr. Ferguson, I'll talk
7 to you a little bit about the receivership issue, and then I
8 want to hear arguments you have in addition to what has already
9 been extensively briefed.

02:31 10 You know, the one thing that I think jumped out at me
11 the most, Mr. Futerfas, that I will say and I think you had
12 hinted at this before we broke, is the argument we made in the
13 past and that you noted and you've pointed to the record where
14 the Court has repeatedly indicated that it will be beneficial
02:31 15 to get a sense of the financials through the defendant's view,
16 and that is really come to pass in the Glick report, as you
17 stated.

18 Now, we have heard some argument about the Glick
19 report and its underlying numbers, and the Court has always
02:31 20 been very invested in seeing maybe a competing report, and I
21 know you have pointed out that the DSI report should not be
22 substituted as a competing report because it falls short of
23 GAAP principles.

24 But you mentioned the CLA audit, and I'm going to talk
02:32 25 about that a little bit and we'll talk to the receiver about

1 that, I wasn't aware that the CLA audit was ongoing and that it
2 was, according to your pleadings, pretty close to being wrapped
3 up before the receiver came in. You know, one of the things,
4 thinking out loud, that you put in your motion, even if the
02:32 5 Court is not, for example, fully persuaded that we could
6 discharge the receiver at this point, you had suggested that at
7 a minimum -- and this is also in your proposed plan -- that the
8 CLA audit be completed, that it be allowed to at least finish
9 its last phase. And we could talk about what that would cost.
02:32 10 Obviously, I'm always very cautious that some of these funds
11 would come out of the investor pockets if the receiver
12 ultimately allowed that or I ask asked for that to be
13 completed.

14 But be that as it may, I don't know your position on
02:33 15 whether you think that is extremely valuable for the Court to
16 have in front of it. The CLA audit materials are in progress.
17 Maybe it wouldn't be a big lift to complete it. And I think it
18 would give, I think in your view, some backup perhaps from an
19 accrual basis to what was done in the Glick report. That --
02:33 20 I'm not sure if the CLA will ultimately agree with the Glick
21 report.

22 But I guess my -- the bottom line in all of this is
23 even if I did that, and I'm going to ask the receiver later
24 this afternoon to just kind of tell me what is even feasible,
02:33 25 if anything, in terms of your suggestion. I surmise that not

1 very much of it can be accomplished or implemented, given the
2 collection efforts, but I do want to hear their take on what
3 they've seen and kind of use some of the time for an update on
4 their end.

02:33 5 But I want you to talk a little bit in your remarks
6 here if we start on this how valuable you think and why you
7 think it would be important to get the CLA audit, what you
8 think we could realistically do at this phase to even excuse
9 the receiver at such a late juncture in the case, given their
02:34 10 collection efforts because my understanding is, really, your
11 entire plan thrives on this business being put back in
12 operation.

13 And without that, we really aren't going to be in any
14 better position than we are now with the receiver doing all
02:34 15 that they can to get money, to pull money, to get those funds
16 from wherever they find them so that we can put those monies in
17 the coffers here, waiting to find out what happens at trial
18 before we can determine if people can be made whole, if we can
19 get some of these investors their principal back.

02:34 20 And that's always been the guiding principle for the
21 Court. And I will note, and I would ask that you maybe address
22 it briefly, you guys have been very concerned, rightly so, with
23 liquidation. The Court, as I stated earlier this morning, has
24 already asked the receiver to kind of hold off on liquidation
02:34 25 efforts, and really that's to personal property because the

1 order had already made the limitation as it pertains to real
2 estate.

3 But I did want to just bring that up again because I
4 am of the opinion that we need to just hold on and try to keep
02:35 5 this money, this pot of money growing, protected until we
6 figure out the merits of what's going to happen at trial.

7 So that's just my initial thoughts to give you some
8 guidepost, but I'm sure you have some things you want to flag
9 for me. Remember, of course, I have read everything, so I
02:35 10 don't want you to belabor anything, but if you want to hit some
11 high notes on your pleadings and tell me some things you want
12 me to focus on more than others, I'll turn it over to you.

13 So go ahead, Mr. Futerfas.

14 (Thereupon, there was an interruption by the AT&T
02:35 15 operator.)

16 **THE COURT:** Whoever this is, you can go ahead and
17 share any passcodes to join the call provided everybody can
18 please mute their phone calls. Okay? Thank you.

19 All right, Mr. Futerfas, go ahead. The floor is
02:36 20 yours.

21 **MR. FUTERFAS:** Okay, thank you, Your Honor.

22 So I'll start, Your Honor, with your question about
23 the CLA audit. We know a fair amount about that audit, and
24 that's because it was engaged in September 6, 2019. It's an
02:36 25 audit of the tax year 2018. The company paid \$200,000 for that

1 audit in, you know, in 2019 or 2020. We know that the
2 CliftonLarson firm was paid 200,000 to date.

3 And, importantly, Mr. Klenk, who I had mentioned
4 previously who still works at the company, he led the audit
02:36 5 team from the perspective of the company. So he was the
6 principal point of contact for CLA. He testified about that
7 during his deposition a few weeks ago.

8 He also testified that by about July of 2020, around
9 the time the receiver came in, that the audit was toward the
02:37 10 ending stages or was in quality control. It was almost
11 complete.

12 And he also testified that the only amount of money
13 due CLA to complete the audit was \$25,000. So he testified
14 about that. Mr. Klenk, who is still at the company
02:37 15 conducting -- he's a CPA for a long time, he conducted audits
16 himself, and he spoke a lot about that process and his
17 involvement in the CLA part of the process.

18 So the bottom line, Your Honor, is that CLA is
19 basically awaiting instruction. They sent a letter to the
02:38 20 company after the appointment of the receiver, basically saying
21 that they were going to suspend the audit pending additional
22 direction.

23 So I think with a nominal payment of \$25,000, you've
24 got one of the top ten accounting firms in the country who can
02:38 25 take a look, and there are -- this was about 2018 tax year --

1 and finish the audit of that year.

2 And I would suggest that that's very important to do.
3 You have -- Your Honor now has not one, but three reports from
4 the Berkowitz Pollack Brandt accounting firm, forensic
02:38 5 accounting firm. And these reports, they are complicated. You
6 know, they're written by accountants for accountants. They're
7 written by experts in the language that experts use.

8 But the bottom line in those three reports is the
9 following: Number one, the overall factor rate that Par made
02:39 10 on its money, so when Par provided funding of \$100,000 to a
11 merchant, the overall factor rate it received backed was 1.339.
12 So it received about 40 percent on its money. And that's how
13 it made money. It gave out money like a company builds cars
14 and sells cars. It basically sold money for a profit, and so
02:39 15 he analyzed that he found that, number one.

16 Number two -- and I'm just summarizing all three
17 reports. They are dense. We have a lot of charts. Certainly,
18 Mr. Klenk is well equipped to answer any questions at any kind
19 of hearing or a proceeding, but the bottom -- okay, we got a
02:40 20 (audio indiscernible) -- the merchant receipts dwarfed money
21 that came in from creditors. Dwarfed it. He found that CBSG
22 or Par was profitable and it earned literally hundreds of
23 millions in revenue.

24 Now, that's very important. That's not money --
02:40 25 that's not a dollar being returned. It's not like a \$100,000

1 went to a merchant, and the merchant paid \$100,000 back.
2 Revenue is a term used in accounting, used in IRS, used in tax
3 returns, revenue means, basically, profit. It means money on
4 top of -- it's basically if you sold a car, you had a -- you
02:40 5 would get revenue from the sale of that car, and that's what
6 revenue is.

7 And he found that CBSG was profitable and it earned
8 hundreds of millions in revenue. And he also found that
9 reload, something that the receiver had mentioned a long time
02:41 10 ago, made money. He explained why those were profitable, how
11 reloads made money. He also found that the MCA profits, the
12 profits derived from the merchant-funding business covered the
13 operation's expenses, it covered all the interest payments to
14 creditors, it covered commissions, and it covered all that,
02:41 15 including whatever factoring losses did occur, and that the
16 revenue, after all that, after all that, the revenue was
17 \$64 million. And you can find that analysis at paragraph 88 of
18 his April 15th report.

19 He found other things. These are dense reports, all
02:41 20 three of them. He found that the underwriting was very strict
21 with its company. Your Honor has heard about ConvergeHub,
22 something that we believe the SEC didn't even know about or
23 explored prior to filing the case because their job is an
24 enormous database of 750 gigabytes of data, almost a terabyte
02:42 25 of data, in which all of the underwriting data that came in

1 from all the merchants was collected and processed and
2 analyzed.

3 And only -- Mr. Klenk found that only 17 percent of
4 the merchants who sought funding deals actually received
02:42 5 funding. Seventeen percent.

6 That tells you if a company wanted to simply throw
7 money out to merchants without an analysis or a consideration
8 of whether they can abide by their contracts, their funding
9 contracts, the number would be far higher than 17 percent.
02:43 10 That's a lower number, and what that tells you is that there
11 was strict underwriting that was in place, and, of course, we
12 can prove that, and if this case goes to trial, we will prove
13 that.

14 But, finally, the August 13th report by Mr. Glick,
02:43 15 which was submitted as Exhibit -- I think Exhibit 2 to
16 Mr. Ferguson's reply brief of just the other night, that was
17 about this question of where did -- the very important
18 question, Where did creditor or note holder monies go? Did
19 they go to operations? Did they go to consulting fees? Where
02:43 20 would they go? Where did they go?

21 And his analysis, which is very -- extremely granular,
22 granular in terms of money flows, the dates of money flows in
23 and out of Par's accounts, when money came in from creditors,
24 when money came in from merchants, when those monies were
02:44 25 disbursed for various purposes. This is a very detailed

1 analysis.

2 And he concludes that creditor funds were used only,
3 only to fund MCA deals. They were not used to pay consulting
4 fees. He's absolutely rock solid on that, that money that came
02:44 5 in from creditors did not go to consulting fees.

6 So what -- what's -- we also want to, just as we're
7 filling out this picture, is when we deposed Mr. Klenk just a
8 few weeks ago -- and Mr. Glick notes this in his reports -- you
9 know, for a company to file tax returns, it has to file under
02:44 10 accrual basis. The IRS requires filing the tax return on an
11 accrual basis.

12 And, by the way, I'm advised that every public
13 company -- we're talking General Motors, Dell Computer, Delta
14 Air Lines, Tesla, every public company has to file on accrual
02:45 15 basis. It's required as a public company.

16 And Mr. Klenk testified that when he came into the
17 company, one of its principal responsibilities was to make sure
18 that all the finances were GAAP-compliant. And he testifies
19 that he accomplished that goal. He put all of these finances
02:45 20 of this company GAAP-compliant.

21 And when you start putting the picture together, well,
22 look at 2017, the company reported 75 million in revenue; 2018,
23 123 million in revenue; 2019, 179 million in revenue.

24 Mr. Klenk testified that the outside accounts, this
02:46 25 company not only had 17 accountants in-house, including

1 Mr. Klenk as a CPA and another one that he identified who was
2 just about to become a CPA or gotten her CPA certification, but
3 in addition to that, there was a whole outside accounting firm.

4 That accounting firm had a direct portal into the
02:46 5 QuickBooks and the financials of Par. Without having to go
6 through any individual, they have an automatic direct portal
7 where they can see the monies coming and going in and out of
8 the various accounts. Okay?

9 And he worked with his -- with that CPA firm, and so
02:46 10 I'm trying to put a picture together for Your Honor because it
11 relates to this receiver motion that we made. And, you know,
12 our concern was and is that, you know, when a receiver comes
13 in, the receiver's job is, according to the Court's order and
14 according to legal structure around receivership, is to secure
02:47 15 the assets and protect the assets. Protect them.

16 And who are they protecting the assets for? They're
17 protecting the assets for investors if there were for
18 investors. They're protecting the assets for creditors of the
19 company. Most of the individuals are not investors, actually.
02:47 20 They're really creditors and note holders. The receivers
21 protect them.

22 But it's also, under the case law, to protect the
23 defendants because if at the end of the day, the SEC does not
24 prevail on its case, and a lot of that that's there at the
02:47 25 beginning and the defendants prevail, and at the end of the

1 day, there are no assets or very few assets, well, that's not
2 fair to the defendants either, and the case law says that.

3 **THE COURT:** Can I ask you something about that,
4 Mr. Futerfas? Ms. Berlin asked me about that last point and I
5 hate to interrupt you.

6 **MR. FUTERFAS:** Yes, Your Honor.

7 **THE COURT:** I understand on the investor side and, you
8 know, we've all seen the investor concern on the investments,
9 the nature of the factoring, how they relied upon it. Some
02:48 10 folks put a lot of money into Par Funding, et cetera, and they
11 had gotten accustomed to a certain rate of return.

12 But when we talk about the defendants themselves, you
13 know, you guys sought that I stop any liquidation of personal
14 property, which I have done.

02:48 15 Do you really feel that we're in a position where the
16 defendants have been put at risk as it stands now? And by
17 that, I mean all we have done is seized and controlled
18 properties, some personal properties, some real estate, bank
19 accounts of the company, that belonged to or affiliated with
02:48 20 certain defendants.

21 But I agree that the purpose of that was to determine
22 what would happen at trial or some substantive motion stage.
23 And then, of course, if the SEC doesn't carry their burden as
24 they must, then we can go about unwinding that and returning
02:49 25 those assets to the defendants, including allowing the

1 corporation to, in some form perhaps, continue its extension.

2 Do you believe right now that what we've done with the
3 receiver is a lot? And I say this because a lot of the
4 arguments, anti-receiver arguments, are had we put in a team
02:49 5 that knew the MCA business, we would have continued with our
6 profitability, note holders would have gotten paid, none of
7 these loans would have dried up.

8 My understanding is that theory is really hinging upon
9 the idea, kind of combined with the Rule 41 motion, that once
02:49 10 the SEC came in and some of these loans or folks that you had
11 loaned money out to saw -- especially some of the ones that
12 were in default, were not doing so well -- saw that the SEC was
13 coming in, there was a quick willingness not to make good and
14 to just basically default, and that had people with experience
02:50 15 been running it, they would have continued to successfully
16 pursued confessions of judgment, either through Fox Rothschild
17 or anybody else, they would have continued to make loans, and
18 ultimately we would not have had a dry-up of the income stream
19 that, again, I wonder how accurate that is. We don't know
02:50 20 because of COVID and other things. But we do know there was
21 that note exchange before the pandemic, and that didn't seem to
22 indicate that the financials were as strong as maybe in prior
23 years.

24 But am I correct that the receiver has done exactly
02:50 25 what the Court has asked, which is freeze everything as much as

1 you can, recoup as much as you can, no one ever told the
2 receiver, nor could the receiver keep this business operating
3 and continue loaning money, given that the first thing they
4 have to do is determine the viability of the loans, whether
02:50 5 there was sufficient underwriting, the legality of the loans
6 and their rates in state courts?

7 They have continued to seek the unfreezing of state
8 court litigation, which I have promptly done every time. Most
9 of it is in the Court of Common Pleas in Philadelphia. I'm
02:51 10 just -- I'm troubled because I think a lot of the assertions
11 about the receiver not doing what he needs to do really hinged
12 on you guys wanted them to keep this business model going, and
13 there was just no universe where I could have allowed that,
14 what I mean with the time, nor could the receiver have allowed
02:51 15 that without doing due diligence on all the outstanding loans.

16 Am I correct that now is when you said enough of a
17 picture has been painted that you have proposed this plan, that
18 was Docket Entry 663-34, where you believe this business could
19 restart again in some way, shape, or form?

02:51 20 Am I correct in that?

21 (Thereupon, an off-the-record discussion was had.)

22 **MR. FUTERFAS:** Your Honor, I can answer --

23 **THE COURT:** Yeah, go ahead.

24 **MR. FUTERFAS:** -- (voices overlap) that. There's
25 enough of a question.

1 **THE COURT:** Because -- and I'm sorry. We got
2 interrupted there.

3 But my point was you said that the defendants needed
4 to be protected. And I, you know, that -- it's the defendants
02:51 5 until we have actually seen the SEC prove their case and the
6 investors, it's both.

7 And I just want to make sure that we have some
8 understanding that the receiver has done what I've charged him
9 to do, and that that has not dissipated defendants' assets. It
02:52 10 may not have done the income stream investors became accustomed
11 to, but I can't say that we have not tried to freeze things and
12 keep them status quo, especially since the Court stopped any
13 liquidation of personal property.

14 Can you address that?

02:52 15 **DEFENSE ATTORNEY:** Yes, I would. I can. I think
16 there -- I have a few answers to it.

17 The first answer is contained in Exhibit A to our
18 initial motion, the motion we filed on July 13th. And you may
19 not recall it today, but Exhibit A to that motion is a chart, a
02:52 20 very detailed chart of what would have happened had the company
21 continued to run as it was running on July 26, 2020.

22 And what we did in that chart is we showed how the --
23 what has happened since the receivership took over with respect
24 to the finances of the company and what would have happened had
02:53 25 the company simply continued to run as it was historically

1 running.

2 And the short form here, the short form is this: Had
3 the company continued to run, interest would have been paid to
4 note holders, an additional 27 million would have been paid to
02:53 5 note holders that has not been paid since July of 2020. There
6 are a diminishment of assets of about \$58 million, and that
7 number is arrived at all spelled out in exhibit A, where that
8 number 58 comes from.

9 And then finally, the losses on current MCA contracts,
02:53 10 right to return on current MCA contracts, was about 102 million
11 since July 2020. So we have a total loss based on -- this is
12 not based on guesswork; this is based on how was the company
13 running, a company that was -- that was in the middle of
14 audits, that had CPAs on staff, that was providing ongoing
02:54 15 financial statements to potential investors, to -- there was
16 even -- there's testimony in the deposition about a significant
17 investment bank wanting to come in and buy the company or take
18 a large piece of the company.

19 And Mr. Klenk was in the middle of those
02:54 20 conversations. So this would -- this would be -- the numbers
21 that I'm giving you are net earnings, Exhibit A. It's based on
22 actual historical activity that's now been verified in a number
23 of reports by Joel Glick.

24 **THE COURT:** And what do you make -- I'm sorry,
02:54 25 Mr. Futerfas. What do you make of the argument we've heard

1 multiple times -- and I don't know how the Glick report ever
2 addressed it, that the bulk -- I don't know if my numbers
3 are -- off memory, I think it was something like 70 percent.
4 But that the massive portion of the portfolio, which was
02:55 5 consolidated among -- I don't want to say maybe it was less
6 than ten counts.

7 And we have talked a lot about those key accounts that
8 formed a large portion of the portfolio. Many of those
9 accounts are in dire straits, right? Some are either facing
02:55 10 bankruptcy, others I think were dealing with criminal
11 prosecution. That was such a large bulk of the portfolio that
12 Par Funding was relying on.

13 How can we sit here and prognosticate that we would
14 have had that kind of return, knowing that so much of the
02:55 15 portfolio is just simply incapable of generating or paying back
16 these loans? Has there ever been any countervailing report
17 that has shown that the financial position of this large chunk
18 majority of the portfolio could recover or would have
19 recovered? Or is the argument, well, Judge, that was a
02:56 20 byproduct of the receiver coming in. And to that, I would say
21 it doesn't look like that because the receiver came in, but
22 these folks were already having massive financial issues and
23 problems and had clearly gotten out over their skis in terms of
24 how much they had borrowed. And then that kept getting
02:56 25 renegotiated and reloaded with the principal players in Par

1 Funding.

2 That corner of the portfolio makes it so difficult for
3 me to sit here and think I put in a receiver, and that that
4 receiver had not been in there, we would have had a better
02:56 5 return. It's just it's -- I don't understand how
6 mathematically we could make such a leap.

7 Can you tell me about that? How do we answer for all
8 of those problematic merchants that we've identified that are
9 clearly not in a position to repay or reload or do anything?

02:56 10 **MR. FUTERFAS:** There -- absolutely. There are a
11 number of good answers to that.

12 First of all, Mr. Glick did address that very topic at
13 pages -- paragraph 60 through -- it goes on and on. It goes
14 from paragraph 60 to, I don't know, maybe -- I'm still looking
02:57 15 at the report. He devotes pages and pages to that very
16 question, and finds that, first of all, the -- some of the
17 larger -- the larger merchants who received funds, it's part of
18 a portfolio.

19 So there's a whole portfolio here that -- of merchants
02:57 20 that were providing money and paying back money under
21 contracts. Mr. Glick analyzes those merchants, that very
22 merchant, analyzed the entire portfolio across the board and
23 says that, overall, the rate of return was 1.339 percent. But
24 that's just one answer.

02:57 25 The second answer is those merchants were paying. In

1 other words, when the receiver comes in and says -- the
2 receiver said a lot of things when they came in. You know,
3 when they came in and they addressed -- and then they
4 commissioned a DSI report, which is a completely -- it's simply
02:58 5 not worth whatever they spent on it. But in any event, when,
6 you know, those merchants were paid. So you've got a
7 historical record of all of these merchants, the larger
8 merchants who got -- who received significant funding.

9 And all of them, you could look at the payment
02:58 10 history. That's number 2. Those merchants were paying. Those
11 payments are logged on the books and records of the company,
12 and are observed by everyone analyzing the books and records of
13 the company.

14 Number 3, neither DSI nor the receiver nor anyone has
02:58 15 addressed the collateral. And Fox Rothschild collateralized
16 these merchants ten ways to Sunday. There are, you know, Fox
17 Rothschild was a very good law firm. There are all kinds of
18 collateral documents. In some cases, there were personal
19 guarantees. In other cases, there are first-edition wings and
02:59 20 first-edition, you know, documents that Fox Rothschild did so
21 that if there was -- let's say, you have 15 merchants and one
22 or two does go bad, well, you've got huge collateral portions
23 on those merchants. You've got some personal guarantees on
24 some of those merchants. Fox Rothschild was not stupid and,
02:59 25 quite frankly, some of the people running this company were not

1 stupid. They knew there was money going out there, and if
2 there was a chance that someone would have a problem or a
3 company would have a problem, they wanted to make sure they had
4 collateral.

02:59 5 But if you go to back to the first question is, Was
6 the money coming in? Were these merchants paying? And they
7 were. So all this Exhibit A does, now that we've put together,
8 has said if merchants were paying across the board as they had
9 been paying as of July 2020, and you just brought that forward
03:00 10 eight months, six or eight months, to whenever this chart was
11 prepared, maybe a year, whatever -- let's see, it would have
12 been July, so almost a year -- and you simply bring that period
13 forward, using the activity that occurred up until that date,
14 this is what you have.

03:00 15 And one of the questions Your Honor asked me that what
16 you have is 187 million loss -- one of the questions Your Honor
17 asked me, "Well, how are the defendants harmed?" And I'd love
18 to tell you the defendants are -- have been concerned about
19 themselves, of course, but they're equally concerned with the
03:00 20 note holders. From day one, when we were filing papers with
21 Your Honor back in August and we were providing this
22 seven-point plan -- I think we provided that on August 13th a
23 year ago -- this was all about the defendant saying we can't
24 let this company fall apart. We can't let it get liquidated.
03:01 25 We can't shut down this thriving business. All these people

1 are going to get hurt, people that relied on us, people that
2 thought we had a good company, we do have a good company, let's
3 keep this active. And the defendants were hurt because they
4 don't have that \$187 million that's there. You don't have the
03:01 5 revenue coming in. You don't have an ongoing business.

6 And what the receiver has done is say, okay, we shut
7 down the business, that money isn't available there. Now we're
8 going to come to you, defendants, take any of the property that
9 belongs to you or belongs to a trust, and we're going to
03:01 10 substitute money that would have been created from the
11 operation of the business with money that the defendants
12 received in consulting fees, et cetera.

13 And I want to segue for one second, Your Honor -- I
14 appreciate your giving me this opportunity -- to this question
03:02 15 because all along, there's this question, and it's individuals
16 who build a business, who work 18 hours a day for eight years
17 and build a business that pays millions of dollars of interest,
18 and significant rates of interest in some years, to note
19 holders are not entitled to receive any compensation.

03:02 20 And what the receiver has done is created this
21 paradigm, and the SEC as well, that, uh-oh, (shaking head)
22 people got consulting fees.

23 Well, excuse me. If you tell me that an investment
24 bank where the people who run that bank don't make money, you
03:02 25 show me a hedge fund where the people, where they get two plus

1 20 on the money on a hedge fund. I don't understand. These
2 people are supposed to work 18 hours a day to build a company
3 with 70 employees and not entitled to any compensation?

03:03 4 And now, Joel Glick's report of August 13, 2021, says,
5 guess what? If you do a really deep dive, we can prove that
6 none of the note-holder money actually went to pay the
7 consulting fees. So the consulting fees came out of revenues
8 from the business. That's in -- that's right -- that's
9 straight as can be in the (audio distortion) August 13, 2021.

03:03 10 So, yes, the defendants have been harmed. The note
11 holders have been harmed. There was money that could have been
12 brought in that wasn't brought in. There's assets have been
13 diminished. And I agree with Your Honor, we did make that
14 point, and as a footnote, that, of course, the receiver comes
03:03 15 in, and you're going to have a savvy merchant saying, "Oh,
16 well, it looks like I can get out of this obligation."

17 Which is one of the reasons, quite frankly, that early
18 on we suggested that a receiver -- we suggested directly to the
19 receiver, keep Fox Rothschild on board. They know the
03:04 20 business. They've been collecting these receivables for a year
21 and a half, and they've been doing a darn good job. Don't let
22 them go. Keep them on. They know the contracts, they know the
23 playing field. They've litigated all these issues. And the
24 receiver didn't do that.

03:04 25 So our complaint with the receivership is they

1 basically came in and they thought -- they basically thought
2 this was a bad company, and we're going to prove it's a bad
3 company. And I almost liken it to this idea that the people
4 who believe the earth is flat. You know? I don't -- it's kind
03:04 5 of like we believe the earth is flat. Now Mr. Klenk, who is
6 our employee, might tell us, "This isn't a Ponzi scheme, this
7 is a pretty thriving company." We don't care.

8 CLA was in the midst of an audit, a detailed audit,
9 that only took \$25,000 to finish in July of 2020. This
03:05 10 receiver spent \$25,000 inspecting jet skis. You know? I mean,
11 receiving cars from the defendants that were worth \$15,000.
12 \$25,000, you could have an audit of 2018, which would have
13 shown this Court and everybody else, hold on, here's an audit,
14 deep-dive audit of '18. Did this company make money or not?
03:05 15 Would this company run properly or not? Did this company,
16 according to GAAP, et cetera, et cetera.

17 They couldn't -- they didn't want to spend \$25,000 to
18 do that. Instead, they hired DSI. So it's almost like -- and
19 then we tried to provide evidence. We tried to show
03:05 20 information. Mr. Glick authors his April 15, 2021, report,
21 which, it just knocks the DSI report out of the water, and the
22 receiver doubles down. It's kind of like I don't care what
23 telescope you show me. I don't care what image you show me,
24 the earth is flat.

03:06 25 And it's just that's not, I think, what the receiver

1 should have been doing. And I think the receiver should have
2 been impartially not taking a predetermined view of this
3 company, but coming in and providing just down-the-middle,
4 accurate information from accurate sources.

03:06 5 I do -- I know there are other things you want to talk
6 about, Your Honor, but I do -- one of the pieces of your
7 question was, What do we do now?

8 THE COURT: Yeah.

9 MR. FUTERFAS: And that was part --

03:06 10 THE COURT: And I was going to ask you to pivot to
11 that because I think -- I mean, a lot of what you're covering,
12 I think is notable, and I understand it puts a little more of a
13 gloss on the pleadings, where you and your fellow codefendants
14 believe we are at and why you believe that this was, in the
03:06 15 long view, not the right move for Par Funding.

16 And I know that a lot of that turns on the Glick
17 report and some of the other items that we've been discussing
18 in the Klenk deposition.

19 But I would because I do want to also -- of course,
03:07 20 the receiver has not been able to chime in today, and I'm going
21 to turn to them in just a moment.

22 But I wanted to know your proposal going forward
23 because, I mean, a lot of what we've talked about, we could sit
24 here, similar to what happened when we talked to Mr. Ferguson,
03:07 25 and he readily acknowledged that the picture that was portrayed

1 of the current situation was one that had to be, by any jurist,
2 I think, acted on immediately and led to the implementation of
3 the path that we're on right now.

4 And I will say whatever anybody thinks of the receiver
03:07 5 and how they've approached it, I think the collection efforts
6 have been laudable and undeniable in that we at least have
7 obtained quite a large number in terms of funds that are
8 investor-related that can ultimately be used to, and if the SEC
9 proves their case, make investors whole.

03:07 10 But going forward, let's talk pragmatically and
11 practically. We have arguably three more months in the case.
12 We have a summary judgment deadline coming up, and we are
13 really at the tail end. Discovery is almost done.

14 And I'm going to have, by virtue of summary judgment
03:08 15 or through a jury verdict, a much cleaner picture of where the
16 SEC is at and whether or not they've been able to see through
17 each one of these securities claims. And it just seems to me,
18 practically speaking, I know that Mr. Ferguson said earlier
19 that not even a minute more should be spent in allowing the
03:08 20 receiver to continue to manage Par Funding and everything that
21 has been done so far.

22 But just the sea change, you know, to try now at the
23 end of the case, really at the end of the case's lifecycle, in
24 my view, to try to somehow implement -- I'm looking at your
03:08 25 proposal and say, okay, the receiver is going to turn into more

1 of a monitor or a local, and we're going to bring in -- I'm
2 sorry.

3 Whoever's there -- someone needs to mute, please. If
4 I can get a mute, please, for whoever has got their phone on,
03:09 5 thank you.

6 So as I was saying, for me to now turn this ship
7 around and say, okay, we're going to make the receiver kind of
8 alter strategy, move into a monitor role, and then we're going
9 to go ahead and essentially restart the engine and entertain
03:09 10 loans, I mean, I'm looking at the report right now. It
11 proposes that the Court not only have the receiver cease their
12 collection efforts, but really to have Par Funding resume
13 funding, quote, in a conservative manner to ensure
14 sustainability and growth with company cash flows, to go ahead
03:09 15 and rehire folks for collections.

16 They obviously -- there's obviously some compliance
17 concerns here that I think make sense, but, again, it would
18 essential reopen and restart the business. And, again, that is
19 such a sea change in how a court would imagine managing this
03:10 20 with what is left. I mean, if we were in a different phase of
21 the case, I might say, all right, well, let's talk about this.

22 But with what is left, it just seems difficult for me
23 to understand how would we even go about doing this if it's
24 even possible, quite honestly, because as Ms. Berlin said
03:10 25 earlier, these are through offerings of notes, so they're not

1 going to be able to offer anything right now, not in the
2 current position they're in, not with the regulatory concerns
3 we have.

4 And I don't think there's a way -- let me put this
03:10 5 way. I don't think there's a way to separate these two things
6 because as I stated this morning, the big fight here has become
7 a fight almost against the receiver, an arm of the Court, as
8 opposed to fighting against the SEC as a true adversary on both
9 sides of the V in this case.

03:10 10 The receiver has continued to follow court orders and
11 has done its investigation as I have asked it to do. And
12 what's happened is we find ourselves with almost a dual-track
13 case. One is the defendants against the SEC which we argued
14 under Rule 41 this morning, but there's this second part of the
03:11 15 case, which is just -- and Mr. Ferguson alluded to it -- it's a
16 fight between the defendants and how the receiver is doing his
17 job.

18 And I would love to get my receiver out of this
19 business. I would love to say, you know what? We're going to
03:11 20 kind down collections. What we got is what we got. And that's
21 really what the receiver said from the beginning: We'll
22 evaluate claims when this thing is done being tried. And they
23 said that to the investors who asked, and I've been seeing the
24 reports.

03:11 25 But for me to say, okay, receiver, you're out, I'm

1 going to bring in and reopen the company and, by the way, your
2 proposal also actually envisions a role for McElhone and Cole
3 which I would never permit. There's not a universe where I
4 would ever let any of the individual defendants who have their
03:11 5 injunctions in place now that are borderline
6 don't-break-the-law injunctions.

7 But the reality is it would have to be a different
8 crew that you guys believe has MCA knowledge to start refunding
9 with notes, all of which, again, is subject to regulation and
03:11 10 oversight.

11 I just don't see a way where I could actually do any
12 of this implementation and remove the receiver. I think it
13 would be doing more harm than good. To me, it just seems let
14 the receiver finish through trial, and let's -- it's kind of
03:12 15 like I said when I entered the order on the -- and some of you
16 saw it -- there was an order on a foreclosure of a mortgage.
17 And we had a third party that was arguing the mortgage issue.

18 And I put it very clearly in my order, I said I
19 understand right now it's too premature. I want to allow a
03:12 20 global settlement possibility that the receiver is pursuing to
21 see if it comes to fruition. But I told them -- the bank, I
22 told these folks renew the motion. Come back. If I can't have
23 you guys sit on your rights as, you know, first in line, on
24 this foreclosure, of this property, indefinitely.

03:12 25 I would feel the same if the receiver was on this

1 indefinitely. If you look at the receivership cases, some of
2 them are spanning decades and years. We've come up on just one
3 year since the case was filed and we're just finishing
4 discovery now. It's just I don't know why -- I mean, look, if
03:13 5 I had maybe a continuance or something happened, which I can
6 almost all but assure you is not going to happen in this case
7 because I'd want to see it through by the end of the year,
8 maybe we could talk about something.

9 But right now with three months left, tell me,
03:13 10 Mr. Futerfas, how would you expect me to literally implement a
11 whole new plan when I could actually figure out once and for
12 all if the SEC even has a case, right? Because if the SEC
13 doesn't have a case -- we talked about this this morning -- and
14 falls apart, let me tell you, it's pretty easy for
03:13 15 Mr. Stumphauzer and his firm to turn around, start figuring out
16 where this money's got to go back to, and they're done. And
17 the investors will figure out what we're going to with this
18 company, but the SEC lost and we move on, or maybe they lost in
19 part.

03:13 20 It's a lot cleaner to exit that way than in the middle
21 of trial prep, having the receiver pull out and implement and
22 put in a whole new team, not to mention that's going to cost a
23 lot of money, money that has been really secured for the
24 benefit of the investors, just hire more staff, add more people
03:14 25 reemploy a firm to go chase collections.

1 How do you expect me to do any of that realistically,
2 pragmatically, with the three months I have until the end of
3 the case? That's my question. You've alluded to the future.
4 How do you expect me to do that with three months left in this
03:14 5 case?

6 MR. FUTERFAS: Your Honor, I will give you my view,
7 and I know Mr. Ferguson or Mr. (audio indiscernible) give his
8 view as well since he was part of that proposal. But what I
9 would say to you is the very first piece of this, there are
03:14 10 various piece.

11 The first piece is there's about 419 million out there
12 in receivables, 419 million. And if Your Honor was to shift
13 the paradigm, the first thing I would do is rehire Fox
14 Rothschild immediately. They know every one of those deals.
03:14 15 They collateralized those deals. They litigated where they
16 needed to litigate. They know this better than anyone.

17 And what you've been seeing since they were discharged
18 a year ago, is kind of a haphazard approach to collections by
19 the receiver. And on this point, I have criticized the
03:15 20 receiver about a lot of things, including the discharge of Fox
21 Rothschild, but on this point, the receiver kind of put
22 themselves in a difficult situation because you're jumping in
23 to do the job that this law firm knew everything about and had
24 been doing it for a year and a half, and doing it very
03:15 25 effectively.

1 So first thing I would do is say let's bring in Fox
2 Rothschild, tell them there's \$419 million in receivables out
3 there, go get it. You got contracts, you got (audio
4 indiscernible) of judgment. You go get it. This would --
03:16 5 you've done it for the years before. That's number one.

6 Number two, Ms. Berlin made a misstatement. She said
7 that this company could only provide money to merchants based
8 on money coming from creditors or note holders. That's just
9 not true. It's just not true, period. She's not a CPA. She
03:16 10 clearly hasn't read Joel Glick's August 13, 2021, report, which
11 unquestionably makes clear that not a dime of note-holder money
12 went anywhere else, but the fund -- didn't go anywhere else.

13 Okay? It doesn't rely on that. The amount of inflows
14 Mr. Glick's report shows, the amount of inflows from merchant
03:16 15 activity far exceeded -- far exceeded the inflows from
16 creditors.

17 So once you start collecting this 419 million that's
18 owed, you start bringing in money, that money can be put to
19 work. One of the issues that has kind of been on the table in
03:17 20 this whole litigation is, is the MCA business a lawful
21 business? And there were various times, the SEC, the receiver,
22 various times during this year they suggested this is the
23 unlawful business.

24 Well, one of our exhibits to our motion is a slough of
03:17 25 cases, a page of cases by poor courts around the country

1 upholding MCA contracts. Texas, California, Pennsylvania, New
2 York, all over the place.

3 So these are valid, enforceable contracts. They've
4 been enforced numerous times, okay, much to the consternation
03:17 5 of Mr. Heskin and his clients, but they've been enforced
6 numerous times. So you got 420-odd million out there that
7 should be brought in. That money, when it comes in, could be
8 put to work without raising a single new dollar from a
9 creditor, not a single new dollar.

03:18 10 And I think --

11 **THE COURT:** Let me ask you this, Mr. Futerfas let me
12 ask you this.

13 I understand the Fox Rothschild point, and I, look,
14 I've watched them seek litigation injunctions or lifting of the
03:18 15 litigation injunction to recover on settlements. I know that
16 there was a big argument made that there was a settlement on
17 the verge of being consummated that was ultimately lost when
18 the receiver was put in play.

19 But I know -- and, look, I can't sit here and say that
03:18 20 I know how much Fox Rothschild would have recouped versus the
21 receiver. But I think we do have to recognize that, to the
22 extent possible, they couldn't enter into this market and the
23 collection of these outstanding loans without first
24 ascertaining the legality of the underlying loans.

03:18 25 Now, I know your view is if Fox Rothschild had done

1 that sufficiently already, and so we lost time by them having
2 to go through and do that. But I have seen a number of consent
3 judgments pursued, settlement negotiations pursued. It's
4 tough, other than to say I guess if you had Fox Rothschild on
03:19 5 top of what has already been done by the receiver, maybe we
6 would have been able to recoup more, although, again, it's --
7 there's some costs coming with that of having Fox Rothschild go
8 out there and doing that.

9 Well, one thing that we keep talking about -- and I
03:19 10 don't know if I've ever heard your position on it -- we really
11 have relied a lot on the Glick report.

12 You know, there's some issues with that report, too.
13 I can sit here and say that DSI is not GAAP-compliant. I can
14 give you that when we talk about cash services accrual, but
03:19 15 I've never really heard an explanation from the defendants
16 because you really want me to hang my hat a lot on Glick and
17 make that essentially one of the key pieces of evidence to show
18 profitability.

19 But have you ever been able, or is there any evidence
03:19 20 I can look at that has identified or at least explained a
21 little bit about the credit losses and their allowance for
22 credit losses by -- or the lack thereof that Glick did not
23 include in his report? Because my recollection was that
24 there's a problem, even though he is following some GAAP
03:20 25 accounting methods, it seemed to me, from my recollection in

1 reviewing not only the report itself, but some of the analysis
2 regarding the report, that that credit loss under GAAP was not
3 appropriately incorporated.

03:20 4 And then probably bigger news to me was -- and this is
5 not Mr. Glick's fault -- but the data that Mr. Glick is using
6 had never really, at least to me, been solidified. He
7 acknowledged in his report -- I think it was at page 31, number
8 40 -- he never actually audited or otherwise independently
9 verified the accuracy of Par Funding's internally prepared
03:20 10 income statements.

11 That's a major problem because that's the whole
12 foundation. I mean, I can design a profitability report that
13 shows great numbers if the numbers are baked in with flaws when
14 you give them to me. I don't know that what Glick has been
03:21 15 using from the beginning are solid figures.

16 Now, that's why when I saw your CLA proposal, I said
17 maybe CLA had better numbers, but, again, if they're depending
18 on what's being brought to them, and we know there was a whole
19 thing with adverse opinion with Freedman in the past.

03:21 20 I'm just -- I'm worried because if that has been a
21 problem throughout the case of being able to really sink my
22 teeth into one audit report that can be really used as gospel,
23 I don't know that we have one. I don't know if the CLA one
24 would be one, right?

03:21 25 What do you make of -- I mean, there are some issues.

1 I can't -- you guys really want me to hold on to Glick for dear
2 live and find that that's a way I can put this thing back into
3 play. But I don't know that I've really heard -- and, again, I
4 thought it was a battle for the experts, but Ms. Berlin has
03:21 5 showed me that maybe that comes up in a summary judgment, and I
6 never really get someone to directly address these purported
7 issues with Glick's reports. I hope I do. I hope some expert
8 from somewhere can tell me that these are either over loan or
9 they independently checked these numbers.

03:22 10 But what should I do about those holes in the Glick
11 report that were flagged for me that I saw independently when I
12 reviewed it that gave me a little cause for concern?

13 Do you have an answer for me on that?

14 **MR. FUTERFAS:** Yes, I do, Your Honor. The -- both
03:22 15 Joel Glick and Melissa Davis at the FCC have been working off
16 the exact same information. There are QuickBooks reports. The
17 QuickBooks reports from the company were taken over and grabbed,
18 you know, taken over by the receiver when the receiver came in.
19 Those are the same QuickBooks reports that have been provided to
03:22 20 outside auditors that have been relied on by their outside
21 accountants.

22 And no one is suggesting that those QuickBooks are in
23 any way inaccurate. Melissa Davis is not suggesting they're
24 inaccurate. She's relying on them. Joel Glick is relying on
03:22 25 them. They're also relying on deposit logs. The logs of

1 deposits that came in from the HCH processors, Mr. Glick is
2 relying on those deposit logs. Again, those are like the
3 essential foundational financial documents of the company.
4 Melissa Davis is relying on those documents.

03:23 5 I think when you see Mr. Glick's August 13, 2021,
6 report, the most recent one, I think he makes it pretty clear
7 in there that he and Melissa Davis are relying on the same
8 information. And, by the way, so is CLA, the top ten, you
9 know, the big ten accounting firms.

03:23 10 So there's not really an issue where someone says
11 we're looking at data that's funky data. The bottom line is
12 when Mr. Glick went ahead and he corroborated or endeavored to
13 corroborate the KPI reports, he went back to the foundational
14 data to see if the KPI reports were accurate.

03:23 15 When he did his other analysis of -- the analysis of
16 the income flows to see whether note-holder funds went to pay
17 consulting fees, okay, when they went to consulting fees, he
18 was relying on the foundational data, the same data Melissa
19 Davis is relying on.

03:24 20 I want to address the other piece quickly, the piece
21 about the -- that credit loss. That is an issue that we
22 explored at some length at Mr. Klenk's deposition. It's a very
23 well-known issue, and it does not affect -- it only affects
24 profitability on the margins. You know, we're talking about
03:24 25 150 million in revenue in some years. Or what were the numbers

1 here? 187 million in some years. And you're talking about
2 whether a, you know, 5 million should be allocated to an
3 additional -- on one side, it should be a loss or not a loss.
4 Or \$10 million.

03:24 5 So you're not talking about an amount that's going to
6 make a material difference in the profitability of the company.
7 But, effectively, I think I can articulate it simply because I
8 only understand it simply.

9 The IRS actually -- the IRS in 2016 said to Par --
03:25 10 said to Par in 2016, hold on a second, you're writing off bad
11 debt too early. You're letting -- you're saying that, let's
12 say, a merchant hadn't paid and let's say their RTR is \$130, so
13 \$100 was funded, \$130 was supposed to be repaid, so the RTR is
14 130. I'd like to return 130. And the merchant paid, let's
03:25 15 say, \$15 of that \$30 of profit. Let's call it that way.

16 And the IRS came in and said, hold on a second.
17 That's \$15 that that merchant didn't pay you. You're writing
18 that off, okay? You're writing that off in, you know, in 90
19 days or 120 days or whatever period of time it was. We, the
03:26 20 IRS, think you should be waiting a lot longer to write that off
21 because, you know, you might collect that down the road, and,
22 by the way, if you take it as a write-off, your tax bill goes
23 down.

24 So the IRS in 2016 took the position that Par was too
03:26 25 kind of aggressive in their write-offs. Then Par was dealing

1 with that, and they said, okay, we're going to adjust when we
2 decide a merchant really isn't going to pay the balance that
3 they owe us and really take it as a write-off.

4 So over the years, from 2016 to 2020, there's been
03:26 5 this push and hold between when something's going to be put in
6 the write-off bucket, which will decrease, obviously, at the
7 end of the day, will increase revenue or whatever. It will be
8 a write-off that will lower the tax bill by a hair.

9 And by the way, that was an issue that Mr. Klenk was
03:26 10 working with the CLA very closely on. He provided a lot of
11 information to CLA, and they were actually trying to figure out
12 what is the right -- where do we draw the line?

13 So that's an issue well known to the accountants, well
14 known to Par, but it's not -- the big picture is not material
03:27 15 to the profitability of the company.

16 **THE COURT:** And let me ask you this. What about going
17 back to the -- what we've been calling that large exception
18 portfolio.

19 What would you say, given that the numbers seem to
03:27 20 indicate that there -- to that portion of a portfolio, and I
21 understated, I think, its percentage. I think it was closer to
22 82.4 -- or, well, excuse me, 82.4 percent received reloads.

23 But the main part of the exception portfolio, there
24 seems to be some record evidence that more was extended to
03:27 25 these particular merchants than was ever received. And so from

1 an exposure perspective, you know, we make a dig deal out of
2 accrual versus cash method, but from an exposure perspective,
3 it seemed that this is something that DSI concluded in their
4 cash analysis, but I don't know that Mr. Glick ever was really
03:28 5 able to address this, although I guess the only argument is he
6 believed collectability was a lot higher and that there was a
7 better chance of recovery.

8 We know now that the exception portfolio is in a bad
9 shape. It's going to be hard to collect anything from some of
03:28 10 those entities. How do I look at this Glick report and, again,
11 say to myself that this exception part of the portfolio, as you
12 were mentioning earlier, is truly a viable collection that we
13 can go get, whether it's Fox Rothschild or the receiver or
14 anybody else. Because I think it's pretty unrebutted that they
03:28 15 never took in what they extended in terms of lines of credit,
16 in terms of reloads, and that's such a big portion of the
17 portfolio.

18 And I say this because a lot of the arguments for
19 restarting the business would be, I think, completely dependent
03:29 20 on a portfolio portion of this size. The exception line of
21 accounts is such a big part. I mean, it just seems that unless
22 those really were strong businesses with the ability to repay,
23 and, historically, I don't think they ever worried they were
24 going to repay more than they borrowed.

03:29 25 It just is hard for me to understand why putting in a

1 team now would necessarily change anything to the benefit of
2 the investors.

3 And if you could just address that briefly, and then I
4 do want to give the receiver an opportunity to chime in because
03:29 5 we've covered a lot, and to give me a little update, and then
6 turn back to you and then hear from the SEC.

7 But can you address that issue of the exception
8 portfolio? Because -- and, again, I know the key arguments
9 you're making and I've given you an opportunity here to really
03:29 10 address them. I just am trying to get a better sense of the
11 realistic possibility of disrupting the current receivership
12 system.

13 And if you want to tell me, Judge, okay, kind of like
14 Mr. Ferguson said, I can live with the fact that maybe you
03:29 15 can't grant Rule 41, although I think it's warranted, but there
16 are intermediate measures.

17 You seem to suggest, at a minimum, let them finish a
18 CliftonLarson audit. And you've said that a couple times, and
19 I don't know that I'm adverse about it, I want to hear what --
03:30 20 if it's even worth it, if it's kind of about having too many
21 cooks in the kitchen. I'm going have a Larson Allen one, I'm
22 going to have the DSI one, I'm going to have the SEC, and I'm
23 going to have Glick. I'm going to have four different reports,
24 different analysis.

03:30 25 I don't know if that's going to really help anybody to

1 spend investor money to get another set of numbers. So I don't
2 know if that helps, unless you think it's like someone checking
3 Glick's homework, and then now I have two similar audits with
4 similar methods that could bolster the underlying conclusions
03:30 5 from Glick.

6 Maybe that's why you think that's a good step in the
7 right direction, but I'm trying to figure out if I'm not going
8 to be willing at this stage of the litigation to get the
9 receiver out of what they're doing and let them keep doing
03:30 10 their job, then what other steps would you ask the Court
11 entertain that could advance us to a place where maybe we look
12 at Par Funding post-litigation to see if we can do something
13 with it.

14 What would you suggest and how do you address that
03:31 15 Glick shortfall?

16 And after you cover those, I'll pivot to the receiver.
17 Go ahead.

18 **MR. FUTERFAS:** Yes, Your Honor, very quickly.

19 Paragraph 61 of Mr. Glick's April 15 report, paragraph
03:31 20 61 states that the exception portfolio represents approximately
21 46 percent of the outstanding accounts-receivable balance, and
22 it's comprised of 16 merchants divided into five groups. And
23 then he goes on for pages to analyze that.

24 What I could say is some of these merchants, I know,
03:31 25 at least from the work we've done, I know pretty well. B&T

1 Supply, it's a huge company. B&T is probably the largest.
2 They're liable for 78 million, I think \$78 million.

3 Then there's a giant company, its (audio
4 indiscernible) backers, the people behind that company are
03:32 5 very, very wealthy people. There are surety agreements
6 blanketing B&T Supply. B&T Supply was paying.

7 And, you know, a lot of problems with the -- this cash
8 method is this: You know, anyone who has a mortgage, a bank
9 sends a extends a mortgage of \$300,000. The person, the
03:32 10 borrower pays the first six months. So the borrower pays,
11 let's say, \$10,000 or \$15,000 over the first six months. Well,
12 under a cash basis, anyone could say, hold on a second, you've
13 only got cash on hand of 15,000. You've got a \$300,000
14 mortgage out there. Well, under that analysis, every bank in
03:32 15 the world is underwater and is basically ready for default.

16 That's not how the world works. That's not how
17 financial institutions are analyzed. That's why they're not
18 analyzed as cash. So -- and some of these merchants are very
19 large. B&T Supply supplies Las Vegas with hotels. It's a very
03:33 20 big company. They funded a professional stadium. There's a
21 lot of information on them. And they also are heavily
22 collateralized.

23 And what I would suggest, Your Honor, is at least if
24 Your Honor's concerned with the exception portfolio, then
03:33 25 there's a lot of money in that exception portfolio. It is

1 worth it to bring back the firm that made these deals that
2 actually created this collateral.

3 Fox Rothschild created this collateral with some of
4 these entities, if not all of them. They wrote it. They
03:33 5 drafted it. They let them pursue it because if a law firm gets
6 paid a quarter of a million dollars to pursue and leaves \$200
7 million or \$150 million, that's a pretty darn good return on
8 the investment.

9 So at a minimum, I would say to do that, Your Honor.

03:34 10 **THE COURT:** Okay. And that -- and, look, I think
11 that's, to me, a proactive proposition because you're saying to
12 me, Judge, let's at least involve another firm to help
13 collection efforts. That's inline with what I had wanted to do
14 and what the receiver's been doing, but it would give them some
03:34 15 inside knowledge, perhaps from an outside firm that has been
16 doing this a little longer, and maybe -- maybe the move here --
17 and I'll hear and see what they say -- maybe the move is to, at
18 least in this last stage of the litigation, bring in some
19 reinforcements and try to see if we can recover even more than
03:34 20 we recovered already.

21 I'm going to hear from them. I am curious to see what
22 they think about it and what they think about any of the
23 proposals. So I do need to turn to the receiver.

24 Yes? Did you want to add one more thing? Because I
03:34 25 don't want to cover too much without them responding.

1 Go ahead.

2 **MR. FUTERFAS:** Just the CLA.

3 (Voices overlapping)

4 **THE COURT:** Yes, the CLA.

5 (Voices overlapping)

6 **THE COURT:** Tell me what you think because I just
7 don't know that it's worth it.

8 (Voices overlapping)

9 **MR. FUTERFAS:** Yeah, the CLA, that is, in colloquial
03:35 10 language, a no-brainer. The receiver has spent about \$9
11 million to date. That's what I think that the rate has been.
12 \$25,000 to finish an audit that's almost done, that at least
13 tells everybody in 2018 -- it's just for 2018, but at least it
14 says, in 2018, this is -- this company was profitable or not
03:35 15 profitable, how profitable it was, how well it maintained its
16 position, what its business was like.

17 That would be very valuable because if you get
18 corroboration on 2018, then what you're really saying is, you
19 know what? This was a real company. This was a good company.
03:35 20 This was a thriving company. And now we've got all these
21 people proving it in addition to all the accountants who looked
22 at it over the years.

23 So I think that's a no-brainer investment, Your Honor.

24 **THE COURT:** Okay. All right. So let me do this.

03:35 25 I have not heard from the receiver since their last

1 report, and I've not had a status with them. Obviously, I'm
2 sure there's more they want to cover to give us an update on
3 collection efforts and maybe run through some of the more
4 recent numbers.

03:36 5 So I don't know how the receiver would prefer to cover
6 it, if you would want, Mr. Alfano, we can kind of start from
7 the beginning. At some point, though, obviously, I think it
8 would be beneficial to hear the receiver's position on any of
9 these proposals and the most recent kind of modified one, which
03:36 10 would be, Judge, let's get the CLA audit done and let's bring
11 back Fox Rothschild, which are two recommendations.

12 I will tell you that I can entertain modifications to
13 assist the receiver pulling the receiver up and somehow putting
14 in a plan to resume the business is almost dead on arrival,
03:36 15 given where we are in the litigation and what that would entail
16 for what you guys have ongoing.

17 So, I mean, but I'm open to seeing if there's
18 something else that can be done to help recovery efforts.

19 So I'll turn it to you, and if you want to step back
03:36 20 and tell us anything else about where you're at, please, the
21 floor is yours.

22 Go ahead.

23 **MR. ALFANO:** Thank you, Your Honor.

24 And, again, I just want to make it clear to -- for
03:37 25 everyone involved that the receiver serves at the pleasure of

1 the Court, and we abide by the directives that Your Honor
2 provides us.

3 So as far as where we are now, we are at \$86 million
4 in cash, \$53 million in real property, which excludes the
03:37 5 disputed Texas property and \$3 million in personal property.
6 We have no objection to adding to our forces, if necessary.
7 We've retained Texas counsel to help us with several matters
8 down there as well.

9 But let me say this about Fox Rothschild, and I say
03:37 10 this guardedly. I have the utmost respect for Fox Rothschild,
11 my colleagues at Fox Rothschild in Philadelphia. I think that
12 their -- the statements attributed them in terms of their
13 intimate knowledge and the work that they did to collateralize
14 is way overstated and way overblown.

03:37 15 Fox got involved in early '20, essentially in a
16 material way, recording confession to judgment after confession
17 to judgment and filling up the Court of Common Pleas, which
18 invariably resulted in litigation, both in the Eastern District
19 and in the State Court in Pennsylvania.

03:38 20 One of the issues with Fox Rothschild is that they
21 have historically represented Anthony Zingarelli, who is a
22 counter party on several of the transactions that are at issue.
23 He's also been described as the right-hand man of Mr. LaForte.

24 So we have serious concerns about utilizing Fox
03:38 25 Rothschild, and it's not because we have any question about

1 their competency, but we don't want to create what could be an
2 actual or a potential conflict-of-interest situation with Fox
3 Rothschild, so we think we've acted prudently there.

4 We have retained Fox for purposes of transition, so
03:38 5 that if they do work, some pleading is directed to them, we
6 need records from them, they're paid for their time. But
7 they're not within the receiver's confidences and vice versa,
8 so that's our perspective on Fox Rothschild.

9 Let me just talk about briefly this -- the lack of
03:39 10 practicality of the proposal. I mean, I can't imagine any
11 scenario in which the receiver would be comfortable with
12 Ms. McElhone or Mr. Cole back in the company in any way.

13 And, you know, with all due respect to Ms. McElhone,
14 although she was very involved in the real estate transactions
03:39 15 that have resulted in the various assets that are now part of
16 the real estate portion of receivership, she's basically a
17 figurehead when it came to the actual MCA business. That
18 business, and we've seen enough e-mails, you know, until we're
19 bleary-eyed from reading them.

03:39 20 That business was run by Mr. LaForte. You know, this
21 fiction that somehow he was a ISO and he was simply providing
22 leads, he was involved in every critical decision with respect
23 to Par Funding, CBSG. There's no question about it. So
24 there's no way that one could comfortably say, well, we'll take
03:40 25 Ms. McElhone back into the business without getting

1 Mr. LaForte. And that's, again, completely unacceptable.

2 There's also no way that the receiver would be
3 comfortable, given the allegations in the SEC complaint
4 proceeding to either pay interest on existing notes right now,
03:40 5 renegotiating notes, which is part of their proposal -- let's
6 go out and continue the, you know, the note exchange that was
7 underway.

8 I mean, given the allegations that the SEC has made,
9 we would be, I think, uncomfortable, and it would be imprudent
03:40 10 for us to step into that activity.

11 And with respect to collections, we're doing it
12 ethically, we're doing it, as we view it, by the law. We're
13 trying to be resourceful in terms of when we decide that it's
14 necessary to pull the trigger on something as opposed to
03:41 15 resolving it.

16 I mean, we have spent this first phase reconciling
17 accounts, gathering information, trying to claw back assets.
18 This next phase will be very collection-intensive, and there's
19 the possibility that there may be additional claims,
03:41 20 third-party claims that may come out of this if there's still a
21 deficiency to be addressed.

22 But that's kind of the phase and structured approach
23 that we've utilized. But, again, but even with collections, I
24 mean, I don't think it's any secret that there was an ongoing
03:41 25 criminal investigation in the Eastern District of Pennsylvania

1 that deals, at least in part as we understand it, with the
2 collection activity of Par.

3 So, again, for us to get back into this business would
4 be not just impractical; it would be imprudent.

03:41 5 And would I in good faith stand before you and say,
6 well, you know, we don't have to raise any more money, or we
7 don't have to, you know, go out and, you know, potentially
8 devolve into some of the collection activities of the former
9 owners.

03:42 10 But could we take the 86, 87 million dollars we have
11 now and plug them back into MCA deals? And, again, I think
12 that would be completely irresponsible. You have Mr. Glick
13 that says highly profitable, lucrative business, terrific
14 business, and then you have the FCC's expert -- and I
03:42 15 understand that report may not have been filed or submitted
16 yet, but it's been distributed, and the SEC's expert concludes
17 that, essentially, Par couldn't continue to fund operations and
18 make the necessary investor payments without raising additional
19 investor funds.

03:42 20 So -- and I'm not here to break a tie, but given those
21 circumstances, Your Honor, for us to risk the cash that we
22 currently have to fund new MCA deals, again, I think it would
23 be completely irresponsible under receiver.

24 **THE COURT:** Can I ask you a question, Mr. Alfano?

03:43 25 **MR. ALFANO:** Yes, sir.

1 **THE COURT:** And, again, I may not be able to be privy
2 to it, and I don't know how much we know about it.

3 There has been that swirling criminal investigation
4 since this case started last July, and I keep waiting and
03:43 5 waiting and waiting to find out -- I don't know if it's going
6 to impact my case or not, but do we have any sense of what's
7 happening on that side of the coin?

8 And I don't know how much any party can divulge on
9 that, but when I saw this case come on my docket originally, I
03:43 10 did not think that it would be almost over a year before that
11 side of what's going on here manifested itself one way or the
12 other.

13 I'm just curious because that seems to kind of hang
14 over my head a little bit, and I never really know if that's
03:43 15 heading in the direction with regard to Par. And I don't mean
16 unrelated criminal charges that I know one of the defendants
17 has. That's -- I'm not talking about felon and possession
18 counts. I'm talking about a true criminal investigation. Is
19 that something that the parties are monitoring? Can I get at
03:44 20 least, to the extent there is an update, some sense of what's
21 going on with that or we don't really know?

22 **MR. ALFANO:** I can only really tell you what I know,
23 Your Honor.

24 **THE COURT:** Sure.

03:44 25 **MR. ALFANO:** You know, what's within the confines of a

1 grand jury investigation. And what I know is we have been
2 asked to produce massive amounts of data and documents, which I
3 have done, pursuant to subpoenas.

4 We have also been asked to make certain employees
03:44 5 available for interview, including interviews discussing the
6 very same reports that the defendants are now touting to you as
7 proof positive that this company was, you know, a profitable
8 company. And we have provided the access to those employees.

9 That's all that I can say at this point.

03:44 10 **THE COURT:** And is it fair to say -- I mean, I'm
11 probably overstating that you have the 86 cash on hand, but
12 we've talked a little bit about in some of the reports, that
13 the 53 million, or thereabouts, in property, hopefully, if we
14 got to the point where that had to be actually liquidated,
03:45 15 could generate more than what's there. But just trying to get
16 my finger on the pulse of exactly -- if I had to add it all up,
17 ballpark, it's probably what -- 140 million, let's say?

18 **MR. ALFANO:** At least, if not more. We're told by the
19 property manager in Philadelphia, who also is a developer and
03:45 20 is very familiar with the Philadelphia real estate market, that
21 he believes, conservatively, those properties would be worth 5
22 to 10 percent more and would also be attractive as a potential
23 portfolio sale if they were sold in bulk.

24 **THE COURT:** Do you recall -- and I don't know the
03:45 25 number, the magic number when we started this litigation that

1 we were -- I don't want to say the number specifically was how
2 much was outstanding, how much was tied up in loans, but how
3 much investor -- in terms of investor proceeds, what was
4 floating out there to recover?

03:45 5 I don't remember. I don't know why I think 289
6 million, but I keep -- that number popped in my head, so maybe
7 that's something that I committed to memory.

8 But there was a number. I just want to know how -- I
9 mean, again, we always have said we're hoping to knock down the
03:46 10 cents-on-the-dollar situation. We are incrementally getting
11 closer and closer to whatever kind of magic, outstanding number
12 there was. And we may very well be halfway there, based on
13 what I'm seeing. But I want to make sure that I'm right on
14 that.

03:46 15 **MR. ALFANO:** Sure, Your Honor. It's \$364 million of
16 principal, but if one were to treat -- and, again, I know I'm
17 getting way, way ahead of myself.

18 **THE COURT:** Yeah, we're extrapolating quite a bit, I
19 know, yeah.

03:46 20 **MR. ALFANO:** But if one were to treat the interest
21 payments received by certain investors as a return on
22 principal, we believe that that would reduce the number down to
23 somewhere in the 280 -- \$280 million range.

24 **THE COURT:** So, you know, in a way, I mean, we have
03:46 25 made great strides over the past year, I would say, in terms of

1 collection efforts.

2 And how are the collection efforts generally going
3 forward? I mean, you've kind of indicated that we're going to
4 maybe ramp up a little bit because we have probably have enough
03:46 5 time to really digest the nature of some of these loans and
6 their ability to go after some of these outstanding balances in
7 account receivable. We expect to be maybe a little uptick here
8 in the last -- in the next couple months? Or what's your
9 sense?

03:47 10 **MR. ALFANO:** So, Your Honor, let me say this, and,
11 again, I said it guardedly.

12 There's basically two businesses here. There's what
13 would be considered the traditional MCA business, which has
14 performed to a degree, and we believe that we're probably at
03:47 15 the end of our ability to capitalize on that aspect of the
16 business. I mean, there's some merchants that are paying
17 routinely, there's others that we enter into modification
18 agreements with, there's others that we try to achieve global
19 onetime settlements with in order to settle their obligation.

03:47 20 Then there's the exception portfolio, which we believe
21 is roughly 54 percent of the accounts receivable. Now, it's --
22 and I know Your Honor mentioned this and I'm not sure that the
23 answers that you were given about it were necessarily accurate.

24 Those merchants were, quote/unquote, paying. That's
03:48 25 what you were told. Well, they were paying because they were

1 continuing to receive funds, and so to the extent that anybody
2 is counting, you know, that portfolio as performing or not
3 subject to some sort of an allowance for a (inaud.) loss, the
4 reality is once they stopped receiving funding, they basically
03:48 5 stopped paying. And we've only had one merchant that was ever
6 net cash-flow positive in that group, and that was National
7 Brokers to the tune of 1.7 million.

8 Now, that's over \$200 million of accounts receivable
9 in a very troubled group of merchants. And I know Mr. Futerfas
03:48 10 talks about B&T Supply. Well, B&T Supply is not Home Depot.
11 All right? Let's be clear, all right? There's not a lot of
12 transparency with their financial information. When we've
13 spoken to their lawyers about the status of things and trying
14 to resolve things, what we're told is that the principals of
03:48 15 B&T Supply pay Mr. LaForte somewhere between 6 and 7 million
16 dollars of cash on the side.

17 So they dispute how much they owe. We claim -- we
18 believe on a cash basis, just the cash that we advanced versus
19 the cash that we got back, that B&T owes at least \$20 million.
03:49 20 And, again, they dispute that.

21 They also dispute whether they can legitimately be
22 charged for the additional \$70 million in fees that's part of
23 that account receivable.

24 Part of the challenge, Your Honor, is that if you look
03:49 25 at the actual cash exposure here, how much cash did we advance

1 versus how much cash are we likely to receive back, actual
2 cash, forget the fees, it's -- we believe that's going to be an
3 amount that's less than \$100 million, that the bulk of this
4 accounts receivable is made up of fees, and fees on fees, and
03:50 5 at times, fees on fees on fees with no additional cash advances
6 or funding ever having been provided.

7 So we think that this portfolio has its challenges.
8 We're working very hard and trying to be very resourceful in
9 terms of how we approach it. We do think that we are going to
03:50 10 ramp up collections, but 53, 54 percent of this book is -- it's
11 very troubled. And I could, if you'll permit me to just go,
12 Your Honor, to the motion to discharge for a moment.

13 **THE COURT:** Yeah, sure.

14 **MR. ALFANO:** So the motion to discharge, the
03:50 15 defendants who have moved with respect to that motion, they
16 refer you to -- in that document, it's 649, and it's 649-1,
17 which is the table that they've put together. They call it
18 "CBSG Performance Comparison." Then they have the receiver's
19 model and then they have their model. Irrespective of whose
03:51 20 model you use, they conclude that there's \$88 million of excess
21 cash. Excess assets.

22 **THE COURT:** Sorry, one second. Whoever is on the line
23 needs to mute, please. If you have called in, you must put
24 your phone on mute. I can still hear someone's phone. If
03:51 25 you've called in, you must put your phone on mute, please.

1 Okay. Go ahead.

2 **MR. ALFANO:** So they basically are telling the Court
3 that there's \$88 million of what they call "net equity" --
4 excess cash, assets, however it's characterized, okay?

03:51 5 But there's not. And whether it's our model or their
6 model, it's immaterial. There's simply not.

7 You start with \$88 million. We've determined that
8 there's \$15 million that they've counted as AR. It was never
9 funded; therefore, there's no AR. That reduces it down to 73
03:52 10 million. There's \$39 million in bankruptcies -- National
11 Brokers and Health Acquisition Corp. That's \$39 million of
12 receivables in bankrupt companies.

13 Now, we know National Brokers is riddled -- I mean, if
14 they were continuing to pay, the company that had the same EIN
03:52 15 number filed for bankruptcy. We believe it's bankruptcy fraud.
16 We've asked for permission to lift the litigation injunction to
17 pursue them. We've notified the U.S. Attorney's Office of our
18 concerns about what happened with this company. But
19 irrespective, between National Brokers and Health Acquisition
03:52 20 Corp., that's \$39 million in bankrupt companies.

21 So that brings me down to \$34 million, okay? There
22 was another \$14 million of bankrupt merchants that we
23 discovered very quickly, that they haven't even been accounted
24 for yet.

03:53 25 Brings me down to 20. Now, you've heard all this kind

1 of great and powerful testimony about collateral and COJs, and,
2 you know, we're going to do this and we're going to pursue them
3 here.

4 Well, one of these exception portfolio merchants, they
03:53 5 actually did. It was a company called Big Red. And in January
6 of 2020, they went to Philadelphia and they got a COJ against
7 Big Red for 19.6, and represented by Fox Rothschild, a very,
8 you know, capable firm. Haven't collected on it. I mean, that
9 was there for months. All right? Just sitting there as a COJ
03:53 10 for months. And it -- not to fault Fox Rothschild, it's just
11 the reality is that sometimes if you get to that stage, you've
12 already lost the case, okay?

13 So that's 19.6. So that brings me down, effectively,
14 to zero. And what that means is that for the balance of this
03:54 15 analysis, we have to collect a hundred percent of the accounts
16 receivable. And the bulk of those accounts receivable are fees
17 on fees, or fees on fees on fees.

18 And it's just not realistic. You've heard about, you
19 know, security, you know, with Mr. Futerfas. Oh, it's we have
03:54 20 all this security, we have this security. CDH's (ph.) security
21 was a hospital, an abandoned hospital in Williston where the
22 tax liens alone pretty much eliminate any possible value.

23 A lot of the security that we have, Your Honor, are
24 second and third and fourth mortgages on properties. Many
03:54 25 times, the value of that property, assuming it was just to be

1 sold at an arm's length transaction, doesn't even reach our
2 position.

3 So we're completely out of the money. There are times
4 where, theoretically, it could reach our position depending
03:55 5 upon the circumstances of the sale. But because in so many
6 instances, they didn't get a first-mortgage lien because,
7 again, they were dealing with merchants and individuals who
8 typically were not among the most creditworthy in either the
9 credit markets or in the mortgage markets.

03:55 10 We're at a second or third or fourth position. But,
11 again, if we were to foreclose, more often than not, there are
12 substantial liens ahead of us, that I would have to take
13 investor funds to cover that mortgage in the hope that if we
14 could force the sale, there would be enough value in that sale
03:55 15 in order to recoup what we had to pay to the first mortgage
16 holder, and then achieve a recovery for us as a second, third,
17 or fourth mortgage holder. And, again, in many instances,
18 that's not a risk that we would take.

19 You know, and I had a circumstance in California last
03:56 20 week, where there was a merchant that wanted to refinance and
21 refinance in the kind of standard credit markets. It was a
22 multimillion-dollar, you know, first lien possession. We held
23 a second and a third mortgage position with that merchant.
24 When they went to, you know, a reputable bank to get, you know,
03:56 25 commercially reasonable financing, that lender said, well,

1 obviously, we're going to take out the first mortgage holder.
2 As far as you -- and this was Eagle 6. As far as Eagle 6 was
3 concerned, we can cover the second mortgage. There's enough,
4 you know, loan-to-value ratio there to do that, but we can't do
03:56 5 anything with your third mortgage.

6 So we had to do a subordination agreement and, you
7 know, we're now sitting in a second lien position, which at
8 this point, isn't helpful because even if we were to declare it
9 in default and foreclose, we would again have to transact, you
03:57 10 know, several millions of dollars of first-lien positions ahead
11 of us in order to try to get a few hundred thousand dollars of
12 a recovery there.

13 So those are, again, some of the challenges. You
14 know, I don't want to wade into the dispute between Glick and
03:57 15 Davis as far as the various reports on who's right and who's
16 not. At this point, I assume that'll be a matter to be
17 resolved.

18 But I do want to talk about for a moment these KPI
19 reports, which a lot of Mr. Glick's analysis depends upon and
03:57 20 the defendants cite. And we know -- I mean, and Mr. Klenk --
21 and, you know, they love to cite Mr. Klenk's testimony when
22 they think it's helpful. They ignore it when it's not. And
23 when Mr. Klenk testified at his deposition, and is, I think
24 unquestionably clear, is that those reports are misleading.

03:58 25 And the reason that they're misleading is because they

1 overstate the AR and they understate a subjective reserve for
2 losses. And we know at least two ways in which they overstate
3 the AR.

4 They, first of all, in consolidation deals, where they
03:58 5 didn't fund a hundred percent of the contracted amount, they
6 funded a portion of it, they still claim that that full
7 contracted amount is actually AR. We know that's overstated
8 but by at least \$135 million in this KPI reports that they
9 cite.

03:58 10 In syndication deals, what we've learned is that they
11 claim 100 percent of the AR in a syndication deal, even though
12 they have agreed to sell a portion and have sold a portion of
13 that deal to some other company.

14 We're looking at the reloads. We think that the
03:58 15 reloads also are overstated. But even with what we know now,
16 what -- and Mr. Klenk testified to this as well -- what we know
17 now is that by virtue of having an overstated AR in the KPI
18 report and a subjective, understated loss realization or a
19 treatment of losses, they can then manipulate what it appears
03:59 20 to be the default rate, is what they call the RTR, to make it a
21 very low number.

22 So we're continuing to work, you know, through that.
23 But I just wanted to make sure that the Court had, you know,
24 the benefit of that information.

03:59 25 And I'm happy to answer -- as far as CLA, I mean, we

1 can talk about CLA. We're not sure at this point in 2021 the
2 utility of having, basically, 2018 numbers and what, if
3 anything, that would show. Again, I think that their sense of
4 where this audit was and how complete it was is, you know, is
04:00 5 highly misstated.

6 You know, CLA wasn't retained to undertake a forensic
7 audit, which is what they say in their pleadings. They were
8 engaged to perform a standard audit. It was not a,
9 quote/unquote, full-blown, top-notch deep dive. It was one
04:00 10 partner, one manager, one staff.

11 We believe that the engagement partner, based upon
12 public information about discipline, that that audit partner
13 may have been involved in a discipline and perhaps a one-year
14 suspension at the time that he was the audit partner in that
04:00 15 engagement. It wasn't nearly complete. There were a list of
16 open items, most critically of which was the GAAP analysis of
17 the provision for an allowance for doubtful accounts.

18 The deferred revenue wasn't finalized. There was
19 trial balance amount that CLA acknowledged was overstated
04:01 20 because, Your Honor, as said previously, the work she included
21 factoring revenue for syndication deals which needed to be
22 excluded, although it wasn't excluded in their KPI report.

23 So we're not convinced of the utility of completing
24 the CLA audit at this time. We think that our time and
04:01 25 resources would be better spent trying to understand what the

1 actual financial condition of the company currently is.

2 **THE COURT:** Yeah. I mean it sounds to me that any
3 additional efforts really wouldn't move the needle any more
4 than all the work that's been done thus far. I mean, it makes
04:01 5 it sound as if it's a inability to aggressively collect was
6 what I'm hearing and what I've seen over the last three or four
7 months is it's a bit of blood from the stone.

8 I mean, there's just nothing there to collect. Some
9 of these entities are essentially almost judgment-proof. You
04:02 10 can't do much with it. You're in subordinate positions.
11 You're just not in a situation where, especially the exception
12 of a portfolio, where they were essentially repaying with fresh
13 reloads, fresh money loaned to them.

14 It's just this is not a situation where a huge portion
04:02 15 of the portfolio is truly recoverable and that whether it be
16 Fox Rothschild or anybody else could go out and do any better
17 than what's been done so far.

18 And like you said, I mean, a lot of the problems here
19 is, even with confessions, I mean, what good is it? It's the
04:02 20 paper it's printed on. I mean, there's not -- the ability to
21 really recover off that is minimal at best.

22 So it sounds like the best-case scenario, from what
23 you're telling me, is we have the last few month here as we
24 head to trial, trying to recover from the only portions of the
04:02 25 portfolio that seemed to be functioning, that there is some

1 recovery to be had there. And then, of course, to continue to
2 follow any money that has been diverted away from investors and
3 into other endeavors, which is what we've done already, the
4 seizures of property, personal, real estate, bank accounts, et
5 cetera.

6 I'm curious, has there been any movement on that
7 front, or have we pretty much found all the fountains we can
8 find in terms of any funds that you believe really could have
9 gone to note holders but ultimately went, whether you want to
04:03 10 call them consulting fees or something else.

11 Do we have a sense of whether we found all of those
12 pots of money? I mean --

13 **MR. ALFANO:** I do, Your Honor. And before, I just
14 want to make sure that I was clear when I was talking about
04:03 15 deposition testimony, so that was Mr. Klenk. And I hope I
16 didn't get confused that with Mr. Glick, right.

17 **THE COURT:** Yeah I understood it to be Mr. Klenk.

18 Look, I think that you stated it accurately,
19 Mr. Alfano, that most of what has been brought to the Court's
04:03 20 attention is a mix between the literal court and client
21 testimony.

22 I mean, those are the two things that have been
23 advanced to the Court as grounds to do a serious, you know,
24 look at receivership activity and entertain possibly changing
04:03 25 course. And as you stated, I think that those two pieces of

1 evidence do not paint a picture that would somehow be improved
2 by removing the receiver from the picture or trying to get back
3 in this business or bringing an outside third party.

4 I think it overstates any type of success that we
04:04 5 would have by changing the course we're on. I don't know that
6 it would -- if anything, I think it could hurt us in trying to
7 transition out of our current paths, but you were going to say
8 something about (voices overlap) --

9 MR. ALFANO: I was going to answer Your Honor's
04:04 10 question. And the short answer is that we think that we're
11 close to the end as far as exhausting McElhone, LaForte.

12 We haven't really started with Cole, Abbonizio, and
13 Vagnozzi. We know where we believe where those assets are, and
14 it's just a question of getting the necessary bank accounts in
04:04 15 order to tie that down.

16 THE COURT: Okay.

17 MR. ALFANO: So there is still, we believe -- and,
18 again, I'm sure the defendants would oppose this -- but we
19 believe that there's still additional assets that were acquired
04:04 20 with investor funds.

21 And if I could just conclude with this one statement
22 that, you know, you continue to hear, "well, no investor funds
23 were used to pay consulting fees."

24 THE COURT: Yeah. I'm glad you mentioned that. We've
04:05 25 got to talk about that; I wanted to finish with that.

1 **MR. ALFANO:** It's a complete misnomer. They never
2 capitalized this company. I mean, any money that flowed
3 through this company came from investor funds. And when you
4 look at the cash in and out, it's 7 million according to DSI,
04:05 5 14 million according to the SEC's expert. And that's the net
6 cash return.

7 So when they say, you know, we never pay -- we never
8 took consulting fees with investor funds, it was all investor
9 funds. The MCA money was just recycled and recirculated with
04:05 10 virtually no cash return, certainly not the sort of cash return
11 you would expect from a company that purportedly did
12 \$1.2 billion in transactions. So, ultimately, it's all
13 investor funds at this point.

14 **THE COURT:** And I meant to also ask, you talked about
04:05 15 it a little bit, in terms of where we go from here and how we
16 see the -- I don't know if I want to call it an exit strategy.
17 I want to confirm that the receiver continues, as we discussed
18 before, to believe that the best course of action is to
19 continue current collection efforts and amass as much as we can
04:06 20 in term of funds and then let the trial play out. Let's see
21 what happens.

22 And then and only then can the receiver, as an arm of
23 the Court, begin to identify how we're going to go about the
24 orderly payout or claim of investor funds that have been
04:06 25 accrued. Right?

1 I mean, that is the only course of action, and at that
2 point, we can maybe make a determination as to what happens
3 with the few employees that we brought back. What do we do
4 with the business model?

04:06 5 But that is, again, continues to be our game plan, if
6 you will, is to wait to see the outcome of trial, and at that
7 point, we can more effectively evaluate which way funds should
8 be directed, whether to investors, to defendants, et cetera,
9 right?

04:06 10 **MR. ALFANO:** Absolutely. That is certainly our
11 approach.

12 **THE COURT:** And do you guys understand -- at least I
13 wanted to touch base briefly. I don't think that the overhead
14 was very high, but I assume that the receiver and the team
04:07 15 understood why the Court ultimately felt compelled to stop any
16 liquidation of personal property?

17 **MR. ALFANO:** Absolutely, Your Honor.

18 **THE COURT:** Yeah, I just felt -- it just made more
19 sense that we wouldn't go into that until we knew the outcome
04:07 20 of any trial or any dispositive motion?

21 **MR. ALFANO:** Yeah, and, frankly, we were simply trying
22 to take advantage of what we understand to be a very hard
23 market for used vehicles. I mean, that was -- and avoid the
24 storage costs.

04:07 25 **THE COURT:** Yeah. I mean, I agree. I think it's kind

1 of the same logic as to why I don't necessarily feel compelled
2 to alter or change our proposed path and what we've done with
3 the receiver, and not put anything else in play. It's kind of
4 the same idea with that because we only have a couple months
04:07 5 left and, I think, the trial and I would hope to do that.

6 And I wondered -- and I know this is kind of a minor
7 issue but we talked a little bit, you talked about having some
8 more lienholder positions and all of that.

9 Do we have any sense of how conversations are going on
04:08 10 that one piece of property where we've had that third party
11 that's come in and (voices overlap) --

12 **MR. ALFANO:** We've been unable to resolve it.

13 **THE COURT:** Okay. We still have some time. I haven't
14 seen any renewed motion. But you guys understand also that
04:08 15 position, it's kind of what you just alluded to, that how much
16 is that money really going to flow to you guys? Probably none
17 of it. And so how much longer can I hold off the first
18 lienholder at bay without them really having an opportunity to
19 kind of close and foreclose on that?

04:08 20 I just wanted to give it a shot, and if I can't do it,
21 I may end up having to lift it for that one party, so don't be
22 stunned by that. I just think that really I'm not forfeiting
23 anything that could come to the investors because I just don't
24 think (audio beep) there's anything left based on that piece of
25 property.

1 **MR. ALFANO:** I can tell you Mr. Kolaya was on with
2 that merchant yesterday afternoon, still trying to resolve
3 things.

4 **THE COURT:** Okay. Well, we'll make an effort on that.

04:08 5 Was there anything that either you or Mr. Kolaya
6 wanted to add regarding any other arguments or evidence that we
7 have heard today? Really, it's not for you guys to worry about
8 the Rule 41. That's the SEC.

9 But is there anything you guys wanted to chime in on
04:09 10 that I may not have covered on either an update on current
11 operations, or anything we've heard from the defendants as to
12 the argument to discharge or remove the receiver?

13 **MR. ALFANO:** Yeah, may I defer to my colleagues?

14 **THE COURT:** Yes. Of course. Yeah, I don't know if
04:09 15 anybody wanted to add anything. That was the point. I just
16 wanted to make sure that we make a clear record and if there's
17 something else that should be brought to my attention, now is
18 the time.

19 **MR. ALFANO:** Your Honor, we have nothing else to add
04:09 20 at this time. Thank you.

21 **THE COURT:** Okay. So, Mr. Futerfas, I don't want to
22 belabor it too much. I think we've kind of heard the
23 receiver's take on some of your proposal, specifically the Fox
24 Rothschild one, the value they're trying to bring in or
04:09 25 complete the CliftonLarsonAllen audit.

1 I think that really what this comes down is differing
2 opinions of the financial strength of some of these outstanding
3 loans and their collectability. I think that logistically
4 getting back into the game, the MCA game, has got a whole host
04:10 5 of problems.

6 I was never truly considering that option, just not
7 only because of the procedural posture of the case and where
8 we're at, but just the complications that come with allowing
9 Par Funding folks to come back in at this stage of the game to
04:10 10 try to start loaning funds again, I think would be playing fast
11 and loose with investor money, which I don't feel comfortable
12 with, and the receiver's indicated they had obviously don't,
13 either.

14 But I'm in a position here where, given the financial
04:10 15 stability or, really, instability of some of the exception
16 portfolio, not of all of it, and the fact that they have done
17 what they can with the functioning portion of the portfolio
18 that was paying, and the acknowledgment that, really, I don't
19 know that inserting another firm, other than it maybe costing
04:11 20 us more would move the ball any further, especially since they
21 are in touch with Fox Rothschild when it comes to transition
22 files and things of that nature, and they're obviously paid for
23 their time.

24 It doesn't seem, at this stage of the game, that it
04:11 25 would make much sense and improve the investors' financial

1 position by discharging or altering the receiver. It's just
2 based upon the record I have before me and what the receiver
3 has done and the way they have found the condition of some of
4 these loans, and the fact that, really, we were just getting
04:11 5 repaid with our own money, I mean, it doesn't sound -- and we
6 can fight over the consulting fees and that's not really an
7 issue here for the receiver, so much as it just shows a little
8 bit of the financial picture.

9 And I understand that you guys want me to hold on to
04:11 10 Glick and Klenk enough to disturb this. But when I look at,
11 again, just the hard numbers of the outstanding loans, I am
12 just not persuaded that changing up the course right now,
13 inserting a third party, getting in the MCA business, none of
14 that really would change or improve the investor's position.

04:12 15 I can't sit here and look at this record. I can't sit
16 here and look at 142 million when you combine cash on hand,
17 real estate, and personal property collected, and say there has
18 not been a fiduciary duty adhered to by the receiver to the
19 investors where they have not acted in the best interest of the
04:12 20 investors and also at the direction of the Court.

21 At this point, it's (inaud.) that they have done
22 everything possible to get us closer and closer to the
23 outstanding loan amount, the money that was out there. We all
24 know getting to 364 million, or 280 if we deal with interest
04:12 25 payments, is going to be a very, very difficult endeavor.

1 We're somewhat halfway there and may, with some conservative
2 real estate estimates, be a little more than halfway there.

3 I know that's not what the investors want to hear. I
4 know the investors want to get it all back, and we're going to
04:13 5 keep trying to do that, and we have three more months of
6 collection efforts to go. And I know that if there is another
7 dollar to be added to the recovery, it will be added.

8 But I can't, on this record, sit here and say that it
9 would make any sense to take the receiver out of play with the
04:13 10 recovery they've done just over a year into the game, and not,
11 if anything, put investors more at risk than they are today.

12 And I think this is just a financial reality. We can
13 argue until we're blue in the face about MCAs and knowledge of
14 MCAs and the types of loans and this type of market, but we
04:13 15 really can't argue with the financial position of the
16 borrowers, the folks that were extended these loans and their
17 ability to pay us back and our ability to collect on those
18 through judgments or just simple straightforward settlement
19 negotiations, which have really been undertaken at every step
04:13 20 of the way. That's why I keep lifting litigation injunctions
21 in hopes we can negotiate and get some of this money back.

22 But we've heard it here today. The exception
23 portfolio is not in great shape. Some of it is bankruptcy
24 stays are in place, it's going to be difficult, and we're just
04:14 25 very far down the line. Par Funding, so everyone understands,

1 was, you know, second and third holders. They're not frontline
2 to be able to capitalize on some of these outstanding loans and
3 get these monies back.

4 And so I have to say that this it is not a situation
04:14 5 where if I saw, you know, if I saw wastefulness, if I saw
6 dilatory behavior, if I saw ineffective collections, but
7 anything that's been termed "ineffective" is not a reflection
8 of receiver efforts; it's a reflection of the financial markets
9 that they're in and the borrowers that we're dealing with and
04:14 10 the portfolio that was structured way before the receiver came
11 into play.

12 So, you know, this lack of capitalization, I think,
13 has come to the forefront. I don't think it was something
14 created by the receiver. I don't think it was something that
04:14 15 was created by market forces or conditions. I think it's just
16 the reality of these loans, unfortunately, not being
17 collateralized as they were represented to be or at least not
18 having the diligence behind them that we hoped for.

19 And maybe we were loaning money on a wing and a prayer
04:15 20 and hoping these things were going to get repaid. But with
21 this kind of reloading, and instead of paying back Par with
22 another loan or another extension, you heard, everyone just
23 heard the numbers.

24 This is not a situation here where I look at the Glick
04:15 25 report and I look at Klenk and I say to myself, well, the

1 receiver is at fault. It's the economic model here, and it's
2 not that I'm maligning the MCA business. That's not what the
3 case is about.

4 It's just the financial realities of what's
04:15 5 outstanding. I can't create a better picture. Unfortunately,
6 it is what it is, and if I were to pull up the receiver at this
7 point, I think it would damage ongoing efforts, ongoing
8 negotiations. And with only three month left in this case
9 until we get to trial, I don't think that's in the investors'
04:16 10 best interest.

11 So I don't know, Mr. Futerfas, if you can understand
12 my concern as to why I don't want to disrupt the apple cart
13 here with what we have. I'll just give if you want a minute or
14 two, if you want to just maybe make a comment on some of what
04:16 15 Mr. Alfano shared regarding his findings. And I don't think
16 he's really getting into the reports. He's just painting a
17 financial picture of what these loans were like, and I don't
18 think this is about having the wherewithal of factoring and how
19 that works.

04:16 20 I think this is just, unfortunately, these individuals
21 are not going to be able to pay back what they borrowed. And I
22 don't think I would have changed that Fox Rothschild do it or
23 Par Funding trying to collect on it. I don't know that any of
24 that would have improved this financial picture.

04:16 25 So what, if anything, do you want to add,

1 Mr. Futerfas, on this point or in response to anything you
2 heard from receiver's counsel? I'll turn back to you briefly.

3 **MR. FUTERFAS:** Your Honor, I'll talk for a few
4 seconds, but I know that Mr. Soto wants to address a few things
04:16 5 that Mr. Alfano said.

6 **THE COURT:** Yeah, I'll turn it to him.

7 I wanted to finish with your comments and let me turn
8 to Mr. Soto. So go ahead and -- any final points before I turn
9 to (voices overlap) --

10 **MR. FUTERFAS:** Well, I would say very briefly, Your
11 Honor is this: The reason we want CLA done and the reason it
12 should be done is because it just seems to be a very unusual
13 circumstance that for eight years dozens of CPAs have been all
14 over this business that -- including expert CPAs outside the
04:17 15 business, inside the business, audits being done, tax returns
16 being filed showing hundreds of millions of dollars of revenue.
17 And (audio indiscernible), the receiver started this
18 receivership with 26 million in the bank, and now has about \$55
19 million, okay? They have collected 30-something, \$30 million.

04:17 20 That \$30 million used to be collected basically every
21 month by this company, okay? Every month. And not just by --
22 not just from the exception portfolio, but across the board.

23 So we've gone from a company that no one had any
24 problem with, that had audits, that on and on and on, to all of
04:18 25 a sudden, this money's not collectible and the company's no

1 good.

2 And it's just impossible. It's just impossible. And
3 the reason we suggested that CLA be done is because, at least
4 in 2018, there will be yet another confirmation that this
04:18 5 company was real and profitable.

6 And with that, I'll turn it over to Mr. Soto. Thank
7 you.

8 **THE COURT:** Okay. Go ahead, Mr. Soto. Let me turn it
9 over to you. Go ahead on the issue of the receiver of this
04:18 10 charge.

11 **MR. SOTO:** Yes, Your Honor, thank you so much.

12 So what we've heard from the inception of this case
13 from the receiver is we just can't collect as much as they used
14 to collect. But the reason isn't because of anything that
04:18 15 we're doing. It's just there are problems with this portfolio
16 that are insurmountable, that no one could overcome.

17 There is collateral out there, but it can't be
18 collected, really, and even if you have a judgment, it just
19 sits there. We know that Fox Rothschild was collecting money,
04:19 20 but we're telling you, Judge, we the receiver were telling you
21 it just -- that just can't happen anymore. It stopped
22 happening.

23 And so one thing I've heard the Court say is this
24 portfolio, the exception portfolio, is in trouble,
04:19 25 specifically, and I don't think it's because of market

1 activity, even though COVID, an unprecedented financial turmoil
2 that followed it, happened at the very inception of the -- just
3 before this case was filed in March of 2020.

04:19 4 And the SEC comes in, sues this company, imposes a
5 receivership, and what we're trying to do is untie those
6 things, right? We're trying to untie, what effect did the
7 receivership have on the recovery efforts here? What effect
8 did COVID have on this business? Those are unanswerable
9 questions.

04:19 10 But what I can tell you, Your Honor, is that if you
11 look at the numbers in this case, the financials, and you ask
12 about the Glick report, what the Glick report says is look at
13 this company, it had 77 merchants to date. Of those merchants,
14 4,000 roughly closed over the eight, nine, ten years of its
04:20 15 existence. And this company was collecting, essentially, \$1.40
16 for every merchant dollar that it put out. That's its history.
17 That's not six months of history. That's years and years of
18 history that's been ignored by the DSI report, by the receiver,
19 by the Melissa Davis report.

04:20 20 And I don't know that you assess any company in this
21 land and ignore eight, nine, ten years of profitable
22 collections activity.

23 I'd like to put the CLA report into some sort of
24 context and then I'll address this question of the exception
04:20 25 portfolio.

1 **THE COURT:** And can I ask you before you turn to that,
2 when you say "collection," is it your estimation -- you heard
3 Mr. Alfano's comment about capitalization -- is it your
4 estimation that this was truly money that was being generated
04:21 5 and paid back and not, again, Par Funding being paid back with
6 its own reloads or its own money?

7 **MR. SOTO:** I'll answer that question, and it's in the
8 Glick report. And I know we're relying heavily on it, but he
9 is a forensic accountant and I'm just a lawyer.

04:21 10 **THE COURT:** By the way, as you address the Glick
11 report, maybe you could do the same as the -- do you have the
12 same confidence in the Glick report despite perhaps some
13 concerns regarding the underlying numbers that were provided to
14 him in his evaluation and some of the concerns on the credit
04:21 15 side?

16 Do you share any of those concerns as you kind of tell
17 me that that's a report I can bank on? Because I keep going
18 back to those. I don't know -- I know that Mr. Futerfas
19 pointed out that that's not necessarily a fatal thing, but I'm
04:21 20 just curious, do you share any of the concerns that were raised
21 about the Glick report perhaps having some underlying
22 methodology that didn't account for all of the different ins
23 and outs of the MCA model? Or maybe not, I don't know.

24 **MR. SOTO:** I'll answer those two questions.

04:21 25 So the first question had to do with, was this company

1 really getting money back or was it a result of reloads? And
2 if you look at the Glick report -- and I'll answer your
3 questions about, concerns about it.

4 The Glick report says quite clearly reloads are not an
04:22 5 indication of a merchant's inability to pay, in and of
6 themselves. What you have to look at are other factors that
7 the DSI report just doesn't undergo. It doesn't undergo the
8 analysis. What it does is it demonizes a reload, which is
9 essentially a refile. It demonizes a reload and says reloads
04:22 10 are bad, and then it says 86 percent of reloads, that's too
11 high.

12 There is no rule, no principle, no market average that
13 they look at. They just say too much, too high, we're not
14 comfortable.

04:22 15 That's not something the Court should rely on.

16 **THE COURT:** Well, I'm really not.

17 **MR. SOTO:** Okay.

18 **THE COURT:** I'm not so worried about DSI. I'm
19 probably not being -- looking at Glick, did Glick look at
04:22 20 whose -- what -- whose monies are they paying them back with?
21 Are they paying them back with more loans on top of loans, or
22 are they paying it because they're truly capitalized? They
23 went out and actually generated a profit and paid back the
24 loan. I never understood a Glick -- and I don't think it's
04:23 25 Glick's fault. I just don't know that Glick was the answer to

1 that.

2 MR. SOTO: I'll tell you the answer, and this is why
3 you should rely on Mr. Glick.

4 THE COURT: Okay.

04:23 5 MR. SOTO: Actually, now I want to correct something
6 that Mr. Futerfas said. Mr. Glick does not opine with respect
7 to the collectability of the exception portfolio. In fact,
8 he's very careful. I worked very closely with him. He's very
9 careful not to opine with respect to that.

04:23 10 But I'll tell you and I'll say -- and I'll repeat
11 something that a number of people in this room have already
12 said. You said -- your words, I believe, were, how could we
13 prognosticate the collectability or the profitability of this
14 exception portfolio based on what we've seen? Others have said
04:23 15 the same thing. We can't.

16 But what I'd like the Court to sort of recognize is
17 that we have a company that started with three people who put
18 on an advance, and from that, built it time after time after
19 time over the course of 4,000 closed deals that we can
04:23 20 objectively at that no one can dispute, where they collected
21 \$1.40 for every dollar they advanced. That's indisputable,
22 inarguable.

23 So what happens is in March of 2020, COVID hits. It
24 affects everybody. This is a company that advances money to
04:24 25 small businesses and they start having trouble. What do they

1 do to answer one question that was asked here, which is, can
2 this company advance money without new investor dollars coming
3 in?

4 Well, our expert says that they can, but I have a
04:24 5 better answer for you. They actually did do that. They did
6 that in March, they did that in April, and they did it in May
7 of 2020 when they stopped taking in investor money because the
8 future was unpredictable, and they were sending out advances of
9 merchant money and making money on that during that period.
10 It's inarguable; it happened.

11 So can they do it now? They've done it before. They
12 did it under COVID conditions. The economy is back up and
13 running. They can do it again. That's not something we even
14 need to worry about. We know they can do that.

04:24 15 **THE COURT:** But how did they do that? Did they not do
16 that by issuing and thriving off investor notes and money that
17 then gets sent out and never actually making anything back on
18 the loans themselves?

19 **MR. SOTO:** Well, here's -- see, the thing is --

04:25 20 **THE COURT:** And, again, you mentioned the exception
21 portfolio's collectability. I think Glick is pretty much
22 agreeing with all of us that these are dead-on-arrival loans.
23 I mean, these guys, he doesn't know, but I think he knows
24 better than to say I think we can get money out of these guys
04:25 25 because we know that they're in financial straights.

1 But the whole idea, as you pointed out, not
2 necessarily that it's to capitalize, but that they've been able
3 to be successful. Sure. They continue to generate funds from
4 the investing public. They got the investing public to expect
04:25 5 that they could generate a certain return, and they did that
6 very successfully for many, many years. I don't doubt that.

7 The problem I'm always having is I can't necessarily
8 figure out, even if I look at the financial years prior to the
9 one at issue with kind of that, what you claim to be a kind of
04:25 10 a good run of profitability, it just seems, from everything
11 I've looked at, that it never really came from loans that were
12 fruitful necessarily. Maybe some portion of it did, but it
13 seemed that most of the time they really thrived off influxes
14 through promissory notes, and that that money kept being loaned
04:26 15 out and that ultimately whatever they got back in really never
16 exceeded what was being borrowed. I mean, there was always
17 that deficit.

18 And that maybe is the most recent financial picture,
19 I'll give you that. Maybe they did better years prior, and
04:26 20 that's one of your points is that we should look at this more
21 as an economic condition thing and not as a purported
22 mismanagement thing. I agree, we're never going to really
23 truly understand exactly what market forces could have impacted
24 this, but I have to say that I'm just a little concerned that
04:26 25 we would attribute this to these loans being extremely well

1 capitalized and secured. I just -- I looked for that in the
2 record and I haven't been able to really see that. Maybe I'm
3 missing something.

04:26 4 **MR. SOTO:** Judge, that's why the CLA audit is so
5 important.

6 **THE COURT:** Okay.

7 **MR. SOTO:** That's why we're saying, Judge, remember,
8 we are representing the defendants here accused of the things
9 that you're suggesting, right, and look at what we're doing.

04:27 10 **THE COURT:** (Voices overlap) the SEC.

11 **MR. SOTO:** The SEC, not you. And look at what we're
12 doing. We're saying, hey, there's a CLA audit that was done by
13 a reputable auditor, and we're asking that it be finished.
14 We're asking that someone take a look at that. We're not
04:27 15 asking that it be hidden or be thrown under the rug.

16 If a defendant accused of nefarious activities with
17 respect to a business is asking for the judge and the jury and
18 everyone to look at the audit that was done, please complete
19 it. At this point if it's completed, will we be involved in
04:27 20 it? No, it will be the receiver. We will have no oversight.
21 It was in quality control. What little I know of accounting
22 and auditing needs, it was walking into the end zone. It
23 was --

24 **THE COURT:** Let me ask you a question: Do you think
04:27 25 it's that valid to do something that would snapshot a company

1 that long ago? I mean, given that we're in 2021. It's a 2018
2 -- (voices overlap.)

3 MR. SOTO: Judge, my whole point here is that the
4 moment that the SEC filed this suit -- and I want to make
04:28 5 clear. When you say what damage has been done, you said
6 there's no universe, and I will answer your question.

7 There's no universe where I would have allowed
8 merchant advances to continue. Imagine any business. If you
9 walk in, you shut them down -- an airline, stop flying your
04:28 10 planes; a law firm, stop sending out invoices -- how quickly
11 will that company die?

12 And what we're saying here and what you're asking is,
13 Could the SEC's imposition of this suit and the receivership
14 plus COVID have impacted this? My goodness, of course. Of
04:28 15 course, it did. And, of, course that's what's happening here.

16 And so what I say is, if you want to look at this
17 company, stop asking Glick or Davis or whomever to say, What do
18 you think is the crime? That's the cause. You know what a
19 better way to look at this is? Eight, nine, ten years of real
04:28 20 activity, where these people who are accused of wrongdoing were
21 running this business with no one looking at it, with no
22 receiver oversight, making a dollar, forty every dollar they
23 advanced. The CLA audit that's independent of us, this is a
24 reputable auditing company.

04:29 25 (Voices overlapping)

1 THE COURT: Whoever's on needs to mute, please. If
2 you are on the call, you need to mute.

3 MR. SOTO: What we're suggesting is that we're so
4 confident that it's going to corroborate what I'm telling you
04:29 5 today and what Mr. Glick has said and what Mr. Klenk said
6 during his deposition and I will address that one little
7 thing --

8 THE COURT: I'm sorry, Mr. Soto, someone is still on.
9 Whoever is on the line and is listening to this hearing, I will
04:29 10 have to close the line if you keep speaking. You need to mute
11 your phone, please.

12 MR. SOTO: We are so confident that --

13 (Voices overlapping)

14 MR. SOTO: I don't think he knows that he's --

04:29 15 THE COURT: I don't think he knows he's not on mute.

16 MR. SOTO: (Inaud.)

17 THE COURT: Yeah, just give me one second, let's see
18 if he's going to finish his conversation. If you can hear me,
19 anybody that's on the line, I need you to please mute or
04:30 20 disconnect. Thank you.

21 All right, let's see what we get.

22 So you were saying, I'm sorry, you're saying that the
23 CLA audit could corroborate how things were going. Should I be
24 worried?

04:30 25 Let me ask you a practical question: Do you guys want

1 to pay for it?

2 MR. SOTO: I'll have to speak to my client. I don't
3 have this \$25,000 in my back pocket right now.

4 THE COURT: Oh, I know. I'm just asking, and this is
04:30 5 a practical question.

6 The defendants all tell me they want it because I
7 don't know how excited I am about spending more investor money
8 on an independent audit. I mean, every dollar matters, but, I
9 mean, I would imagine the receiver -- I don't know. It's a
04:30 10 fair question.

11 If the defendants teamed up and said pay the last
12 amount, we will pay the remainder of the CLA audit, we just
13 want the Court to permit it, we front the cost, and the
14 receiver has to go in and provide access so the CLA audit can
04:30 15 be finished, would the receiver take issue if they funded the
16 cost on the CLA audit?

17 I'm asking. It's a fair question. I don't know if
18 anybody -- you can meet and confer. And I don't want to put you
19 guys in a position, but I really see no reason why I would say
04:31 20 no. If the defendants say it's in the last quality control
21 stage, we'll talk to our clients, we'll front it, I have no
22 problem telling the receiver make the rest of that year
23 available and bring them in and let them look at it.

24 I mean, that, to me, seems like a very fair thing if
04:31 25 the defense thinks it's going to really help give me a better

1 financial picture, and we're at the last phase of it, all we
2 need to do is make sure the receiver makes it accessible.

3 And I would be willing to go ahead and entertain a
4 proposal order from the defense team that they will front the
5 cost and CLA can go on and finish the audit. Does the receiver
6 have any major concerns about CLA ever finishing the audit.

7 **MR. STUMPHAUZER:** Your Honor, the first thing I'd want
8 to do -- conceptually, I have no problem with it at all. And I
9 think once the process starts, you're going to see the kicking
04:31 10 and screaming on the other side of the aisle.

11 Initially, though, I have a couple of concerns. So
12 one is there's the extremely strange scenario where the partner
13 that they hired, we believe, based on public records, was
14 actually barred from auditing for some period of time, at least
04:32 15 for public accountings, provide the public accounting oversight
16 board.

17 **THE COURT:** Okay.

18 **MR. STUMPHAUZER:** Really unclear what the backstory is
19 there, so we'd have to look into that a bit.

04:32 20 My other huge concern is that I think, operationally,
21 the only people that would be able to really help complete
22 their tasks is Mr. Klenk, who right now is one of the
23 accountants at the company and we're short-staffed. I think
24 we'd also have to peel someone off from collections
04:32 25 realistically, and that would be my big concern.

1 But I can also tell you that -- I mean, I just don't
2 know how else to say this, but what do you think a top ten
3 accounting firm is going to do when the controller of the
4 company is saying our KPI figures are overstated? What is the
04:32 5 audit firm going to say when the -- you know, and I encourage
6 you to read the Klenk deposition. There's a transcript, and it
7 doesn't say a lot of what was said today.

8 And we also have papers that show all their
9 outstanding requests. The notion that they were approaching
04:33 10 the end zone is nonsense. In fact, the only real accounting
11 issues in the case, I think you nailed it. The only accounts
12 that matter: Accounts receivable, which is offset by -- they
13 hadn't calculated allowance, they hadn't gotten the information
14 for an allowance. Not even their own company's own controller
04:33 15 would tell you the allowance is correct. How's that audit
16 going to go?

17 So, you know, I'm not conceptually opposed to it. I
18 think it actually will very much show the shortcomings of the
19 Glick report, but what I don't want to do is directly interfere
04:33 20 with collection staff. That would be an issue.

21 So what I would like to do, if it's okay with Your
22 Honor, is consult with DSI, try to figure out if we think, even
23 though there's an accountant that could be brought back such
24 that someone would be able to attend to the auditors and get
04:34 25 them the information they need without diverting it from my

1 main task, which is trying to collect money.

2 And what we've seen is, you know, there are a limited
3 number of people that have real historical, institutional
4 knowledge, and we're trying to be very defensive with them to
04:34 5 keep them from working on tasks that are not directly related
6 to collecting funds.

7 So -- but, look, conceptually, I think it's a good
8 idea. And one of the many reasons why -- I don't want to even
9 get into the expert reports -- but you were just told that
04:34 10 Glick said -- or you were told a couple things.

11 There were tax returns that claimed hundreds of
12 millions of dollars of profit. The reason that you haven't
13 been shown those -- it would obviously be a good exhibit to
14 show you -- is they don't exist. That's just not true.

04:34 15 Also, you were told that Glick opined that the money
16 coming from investors was, excuse me, the money coming from
17 merchants was sufficient to pay investors. And now we read the
18 Glick report. Because what he says is the gross cash coming in
19 from merchants was enough to pay investors. So in other words,
04:35 20 if I advance you an MCA of \$10 and you pay me back 8, and I
21 advance you \$10 and they pay me 8, defense says we got \$20 to
22 pay back the investors. I'd say, no, that's -- that's just not
23 how the world works, right? When we pass money back and forth,
24 that's not profit. He's looking at the gross number coming
04:35 25 back.

1 So I think it would be helpful to get a truthful
2 account of what's happening. I have no fears about how that
3 audit would come out. I know how it's going to come out.
4 They're going to -- (voices overlap)

04:35 5 **THE COURT:** Well, let me ask you this.

6 I mean, one thing that we could say -- and, I mean,
7 and, again, I don't know if CLA's issues with the partner and
8 what was going on. I mean, part of the -- I don't want to say
9 the attractiveness of re-employing them is that they had
04:35 10 already done some of the work. But I have always said from the
11 beginning that the difficulty here is -- especially now that I
12 understand that the SEC expert, I don't think is doing an
13 accrual basis, they're doing cash. It doesn't really
14 necessarily -- it doesn't hurt me, but it doesn't help me to
04:36 15 the extent that it would be a counter way to understanding
16 where the link, if any, they had to shortfall.

17 I have been very concerned about saying, you know
18 what? The parties should be required -- SEC and the defense
19 and the receiver -- to come to an agreement on one single
04:36 20 independent audit with both accrual and cash bases of the
21 company that would be the agreed-upon financial picture of the
22 company.

23 The problem with that is the amount of time that would
24 take, the amount of resources that would take. You know, at
04:36 25 this stage of the game, really? I mean, for what -- at what

1 cost? I mean, we're trying to finish the case. I mean, I
2 don't see why -- that's not going to help anybody. I mean, it
3 would maybe help me if I was in trial and I was trying to
4 figure out, you know, what is the real financial picture? Do I
04:36 5 have an independent expert that we can rely on?

6 And that's not going to happen here. We each have two
7 experts, as many times happens with experts that are going to
8 have very different views on the economics behind the business
9 and what's happening.

04:37 10 But it's just I want to do something that is
11 worthwhile, and I don't know. Doesn't sound like the CLA audit
12 being completed -- especially if it was 2018 and it was that
13 far along to begin with -- I don't know how valuable it will
14 be.

04:37 15 But maybe the best thing to do is not pull the trigger
16 on that day and give you guys an opportunity to even discuss
17 what that would look like and see if the parties could come to
18 an agreement, CLA or otherwise, about the need for some sort of
19 independent audit. But I don't know.

04:37 20 My fear is, again, it would have to come within reason
21 for the receiver to not be pulled away from collection efforts
22 because that hurts the investors' bottom line, too. So I don't
23 know what you think about this, but --

24 **MR. STUMPHAUZER:** I apologize. I just realized

04:37 25 there's probably one more thing I should add, and it may be

1 well be the case that the one of the attorneys in the courtroom
2 can.

3 I should also add that I, personally, have not had, I
4 don't think, any contact with CLA. My law partners have. I
04:37 5 don't know that we've ever asked them if they would be willing
6 to complete the audit. As you can imagine, these accounting
7 firms are quite protective of their reputation because it is
8 currently the subject of a federal securities litigation that
9 you haven't even decided on yet.

04:38 10 So I just want to give one more caveat I got from
11 resources: I have to make sure they're willing to do it.

12 **THE COURT:** Sure. Okay.

13 Well, let me turn back to you, Mr. Soto. Obviously,
14 I'm considering it. I think that we're in a position now where
04:38 15 at least the receiver had some concerns, I think justified
16 ones. And perhaps the parties could at least discuss this a
17 little further to see if they think it can be accomplished if
18 CLA is even willing to undertake the engagement if you think
19 it's worthwhile.

04:38 20 And, ultimately, I'd like to know if the defendants
21 were to propose something to the Court, whether it be CLA or
22 somebody else, after conferring with the receiver that could
23 look at really an accrual basis methodology with numbers that
24 we all can kind of agree with a little bit because, you know,
04:38 25 the KPIs are a concern and from the Klenk testimony, I'm a

1 little concerned about the baseline of information being used
2 by CLA and by really anybody, we got to make sure it's the
3 right numbers.

4 But I'm not adverse to it. So, I guess, the best
04:39 5 thing I can tell you is I'm not necessarily entertaining a
6 discharge or a change in receiver operations, but I am willing,
7 if the parties want to bring me the proposal on some sort of
8 independent audit in this last window of time, that we go ahead
9 and explore that. I think it should be explored. I know the
04:39 10 Court would like it and I think it would be beneficial,
11 especially if it was someone that specifically looked at the
12 Glick report in doing their evaluation and also, quite
13 honestly, looked at whatever the SEC has already provided in
14 their expert report. I don't see why not.

04:39 15 I mean, I think we should have all the experts on the
16 table. We have three reports, I believe -- the SEC's, DSI's
17 and Glick's. And I hate to keep adding more analysis to this.
18 One would think that of the three, I should be able to discern
19 which one is the one I can trust. But each one has either a
04:39 20 different accounting method or a different underlying set of
21 numbers that gives me cause for concern.

22 So maybe, maybe this is something you guys can think
23 about, but I can at least assure you that if you guys come up
24 with a proposal and run it by the receiver, even if it has some
04:40 25 objections to it, I can at least take a look at it and give it

1 an earnest review and see if maybe I can give the defendants
2 someone to finish off either 2018 or conduct a fresh look at
3 the most recent year before COVID, however we want to really
4 look at it. I'm open-minded to that -- to that suggestion.

04:40 5 So I'm sorry to interrupt. But go ahead, you were
6 saying about the CLA, I think, generally and where we were at
7 on the loans. Go ahead.

8 MR. SOTO: Yes, Your Honor, just to address the one
9 question you had of those three reports, only one is signed by
04:40 10 a forensic accountant who actually followed GAAP, so that might
11 give you some guidance with respect to the one that you ought
12 to be paying attention to.

13 With respect to the KPI report, I want to make
14 something clear because it's hard to follow all of the things
04:40 15 that you're hearing, and I want to make sure that you
16 understand the discrepancy that the receiver's now raising or
17 suggesting that Mr. Klenk referenced during his deposition.

18 So the picture is this: There is a fraction based
19 upon two numbers that the company has collected from its own
04:41 20 bank statements that make up this KPI report. And those two
21 numbers, one divided over the other, create this percentage
22 that we've been talking about, the default percentage. One of
23 those numbers is the total money wired out by the company,
24 okay? And the other number is the amount of factoring loss
04:41 25 that this company sustained.

1 Now, the issue that they're raising is that the total
2 money wired out, which would make the numerators here, is
3 overstated because that number includes not just cash that went
4 out, but cash that the company promised to send out in
04:41 5 contracts.

6 And so what they're saying, essentially, is it's an
7 accrual-based number, and it is including those numbers that
8 were promised to be wired out, but, in fact, may not have been
9 wired out. And I think Mr. Alfano said his estimation is that
04:41 10 the difference is somewhere in the neighborhood of \$100
11 million, \$150 million -- I forget exactly the number.

12 I'll tell you what we did in order to avoid their
13 problem. And by "we," I mean Mr. Glick. Mr. Glick underwent a
14 cash analysis of the money that went out for that total
04:42 15 wired-out number, so he looked at bank statements. He didn't
16 review contracts. He didn't do that particular analysis on an
17 accrual basis. That was his second report, which was verifying
18 the KPI report. He looked at cash, he looked at bank
19 statements, actual money that went out.

04:42 20 And when he did that analysis, the number that he got,
21 instead of the number being 1.19 -- I think, in the KPI report,
22 Your Honor, if you look at it through June of 2020, it says
23 1.20 because it's -- instead of 119 [sic], they used 120
24 [sic] -- he got 1.16. In other words, the number -- the
04:42 25 difference is immaterial. It's absolutely immaterial.

1 And I challenge anyone to look at the cash and defy
2 the number that he got. He looked at every bank statement. It
3 took him months to do this work, and what he did was, just you
4 had a question about, Can we rely on his numbers?

04:43 5 Mr. Futerfas is right. Ms. Davis and Mr. Glick are
6 really looking at the same data. In fact, DSI looked at the
7 same data. We used -- Glick used some of the ACH information
8 that they provided because that's one sort of bank account. We
9 know that from the mistake they made, thinking that money had
04:43 10 been wired out, and it, in fact, went to ACH account, which is
11 a bank account. He looked at bank statements and he looked at
12 QuickBooks.

13 And he reconciled all of that, and his second report
14 said the KPI report is accurate. And he looked at cash. He
04:43 15 didn't look at that on an accrual basis. So this mistake that
16 you're hearing, this misleading thing that Mr. Klenk testified
17 about, I also encourage. I don't want to waste the Court's
18 time. I encourage you to read the transcript. This is what he
19 was complaining about and we verified that in the second
04:43 20 report.

21 So I'll just say this: You asked a question earlier.
22 And you said: Have the defendants been harmed here? And this
23 goes back to the motion to dismiss. This is the harm that
24 happened here. The harm that happened here is that the SEC
04:44 25 rushed in, shut this company down. And now, as a result, it

1 hasn't been able to lend a dollar in over a year, and that's no
2 fault of the receiver. It's just what you said. You could not
3 imagine a universe where money could be loaned out.

4 You also had this receiver come in and try to figure
04:44 5 this company out, the legality, whether to fire Fox Rothschild,
6 to do all of these things, and it's caused significant damage
7 to this company, to these investors who own this company, and,
8 obviously, to the defendants.

9 And what we're asking and what we're suggesting, Your
04:44 10 Honor, is that any business that you shut down in this way is
11 going to suffer irreparable damage. And that's why we felt so
12 strongly about the motion to dismiss and the damage that's been
13 caused.

14 And that's why we feel that, just as you said, whether
04:45 15 we resolve this case tomorrow, whether we go to trial, and have
16 an answer, at the end of the day, we're going to have this
17 company, and a profitable Par is the best thing for investors.

18 And what we're suggesting is that a profitable Par is
19 a Par that is advancing money. If someone comes into my office
04:45 20 tomorrow and says you can't issue another invoice to any other
21 company, you go to an airline and say you can't fly any planes,
22 it's going to shut down and they're going to be dead in a week,
23 they're going to be dead in a month.

24 And that's what's happening to this company that these
04:45 25 investors are relying on, that everybody on the phone

1 listening, too, is relying on. And it can't survive under
2 those circumstances.

3 So, yeah, three months matter, three days matter.
4 This company was collecting a \$2 million a day, 28 million, \$30
04:45 5 million a month, on average, before this happened.

6 It's not the receiver's fault that he can't advance
7 loans and collect money on new business, but it is a fact that
8 we have to deal with, and the proposal that Mr. Futerfas has
9 put forward is one that would address that, and it would help
04:46 10 investors, it would help the defendants who believe that
11 they're going to be vindicated at the end of this, and that
12 this company is going to of more value to everyone if we do it
13 that way.

14 And there is a path forward, we're happy to sit and
04:46 15 talk and figure that out. But it shouldn't be I'm going to
16 throw up my hands and say it can't be done because that's a lot
17 of guesswork.

18 **THE COURT:** I guess, my only -- and I totally
19 understand the position of the defense on this -- and I guess
04:46 20 my one concern, to kind of see it through the Court's eyes, you
21 know, if I came into a company -- and you use the example of
22 the airlines.

23 If I have some evidence that indicate that those
24 airlines are flying with engines that don't work and that the
04:46 25 wings could fall off, I'm not letting anybody get on the plane.

1 If it's your firm and they're coming to work and I had
2 wind that you were disbarred, no one should be using you as
3 their attorney. If I have investors that are investing in a
4 company and they are not being told that the money that they're
04:46 5 putting in that they're thinking is being factored is actually
6 being used to buy real estate in Colorado, or being used to buy
7 someone else's Patek Philippe watch, then I think I have a
8 responsibility to make sure that those investors know what
9 they're getting into.

04:47 10 So I understand the examples. The concern I have in
11 this case is I do want to protect of the investors. I
12 understand that the defendant's model is, well, the best way we
13 can do it is maximize the return on investment. And I agree,
14 in a perfect world, I wish I could have every investor get
04:47 15 exactly what their promissory note promised them at the rate
16 promised.

17 The challenge I'm having is I'm balancing that with a
18 case -- a case that has yet -- absolutely, I want to make this
19 clear -- has yet to be made by the SEC. And it will be their
04:47 20 burden to do so. But a case that purportedly, allegedly, these
21 are representations that have been made to these investors that
22 are either inaccurate or, more importantly, are not being fully
23 explained, or the disclosure is not as fulsome as it should be
24 so the investors that made this decision made it with eyes wide
04:48 25 open.

1 And we're going to hopefully get to the bottom of this
2 in the near future, but I absolutely understand your concern
3 that what I did here, because it is a business that thrives off
4 continuous loans, it's very hard once you shut it down, and all
04:48 5 you're going to be doing is trying to scrap back what's out
6 there. And I agree, and it has been -- I make no illusions
7 about it. And the many investors that have been with us all
8 day, and they know, and I know many of them are frustrated, and
9 some of them just want to see the case come to an end; some of
04:48 10 them just want to see some of their principal come back, and
11 that's why I urge the parties again -- and I was directly
12 speaking to Ms. Berlin about trying to find a way that we can
13 put this behind us so that Par can try to find a way forward if
14 there is a resolution to be had, and I hope we can find it.

04:48 15 But I do understand the balance. The balance really
16 is, you know, I have to protect the investors due to the
17 investments they made, that they made blindly without, perhaps,
18 the regulatory disclosure required by law versus the fact that
19 now their money's locked up in there, and I have essentially
04:49 20 stopped it from being factored and multiplied and generating
21 more proceeds. And I know that.

22 Now, the big challenge is we're all operating on
23 half-truths and information, mostly because we don't understand
24 the market well enough to really predict, especially with an
04:49 25 exception portfolio, would they truly have made what they were

1 promised they would make, even if they had been completely
2 advised of people's criminal records or default rates, whatever
3 it may be, underwriting? Would they really have generated that
4 number? I agree with you, it's hard to tell. COVID makes it
04:49 5 difficult. Small businesses were hit hard. I think the
6 exception portfolio and its financial condition can't be really
7 recast any other way. It's a very tough group of loans to
8 recover.

9 But I will say this. I don't know that we're in a
04:49 10 situation now where I will be comfortable, with the record I
11 have before me, tossing out the full receiver operation. But
12 as I've stated, I am comfortable if you think and you can come
13 up with a proposal on some sort of an audit, whether it's
14 CliftonLarson going forward or somebody else, I was speaking
04:50 15 with the receiver -- any proposal forward is something I will
16 take seriously.

17 But I think that that would be an incremental step to
18 trying to continue to develop clarity, instead of, with three
19 months to go in the case and discovery almost complete and some
04:50 20 relief on the horizon, deciding that it would be best for
21 investors to pull the receiver out because I'm just not in a
22 position, quite honestly, to put that money to work, you know,
23 the way you would want me to.

24 I just can't take, you know, the number Mr. Alfano
04:50 25 gave me, I can't take 86 million and put it back in the MCA

1 game because it would be just, quite honestly, way above and
2 beyond what I'm responsible for doing, which is trying to at
3 least collect for investors and protect.

4 And, obviously, that decision should be left to
04:50 5 investors; it shouldn't be mine. If an investor wants to roll
6 the dice and get back in this game after this case is over, be
7 the -- have the gumption, go for it, talk to Par or Par's
8 successor, and we can see if people are able to recover what
9 they were initially promised.

04:51 10 I just don't think I'm in a position now, and I think
11 it would be really a mistake to pull out the receiver at this
12 stage of the game. But like I said, that doesn't mean that I'm
13 not open to intermediate steps, and if you guys can come up
14 with something and you think that that audit would really help
04:51 15 shed light on financial conditions going forward, then I think
16 we should meet and confer with the receiver, and maybe we can
17 come up with some sort of proposal.

18 **MR. SOTO:** Thank you, Your Honor.

19 **THE COURT:** Okay, thank you.

04:51 20 Now, I know we have gone on very long and it's almost
21 5:00 o'clock. I think I allotted two hours for this hearing
22 and have used probably four or more. And I thank the investors
23 who stuck with me. And I do know that some of that was eaten
24 up by technological difficulties.

04:51 25 Ms. Berlin, I don't know that there's much that you

1 need to add. Most of this, really, you've put in your papers.
2 I know you object to the receiver being discharged.

3 Obviously, what was important to me was to hear the
4 defendants' arguments for discharge and hear the latest from
04:51 5 the receiver as to whether they thought any of these proposals
6 were possible. And I've left an open door for the parties to
7 meet and confer to try to figure out if there's an independent
8 audit they want to explore that might be more along the lines
9 of what Glick did.

04:52 10 But anything else you want to add -- briefly,
11 please -- in response to this motion?

12 MS. BERLIN: Yes, Your Honor. Your Honor, may I add
13 something?

14 THE COURT: Is that Ms. Schein? I'm sorry.

04:52 15 (Voices overlapping)

16 THE COURT: Okay. Is that you, Ms. Schein? I'm
17 sorry, is that -- Ms. Schein, is that you? I'm sorry. I
18 didn't mean to speak over you.

19 MS. SCHEIN: Yes, I'm sorry, Your Honor. (Audio
04:52 20 indiscernible) that I would like to --

21 THE COURT: Go ahead. What did you want to add? What
22 did you want to add? Go ahead, let me give you the floor.
23 What did you want to add on this?

24 (Voices overlapping)

04:52 25 MS. SCHEIN: Yeah, very briefly. And I appreciate my

1 co-counsels having set forth all this on the record.

2 Your Honor, I'd just like to make it crystal clear, I
3 know investors are listening and Your Honor has considered the
4 idea of removing the receiver. I just want to say, just up
04:52 5 front, that one of the investors has contacted me and indicated
6 that he would be willing to come to Philadelphia -- he does
7 live in Pennsylvania -- and assist in getting the company back
8 up on its feet.

9 So I put that out there, Your Honor, just to say there
04:53 10 are people and investors who are willing to come in who know
11 the business inside out because they are investors, in part.
12 So that's one issue I wanted to raise with the Court for your
13 consideration.

14 In addition, I also think that there is some confusion
04:53 15 with regard to the financials. And I know the receiver kept
16 bringing up the exception portfolio, but the defense undertook
17 it, based upon what Your Honor has said, to get the report from
18 an expert forensic accountant. And the defendants went ahead
19 and did that.

04:53 20 And as to the underlying information that the
21 accountant used, we have to be clear on it. The accountant
22 used bank statements, QuickBooks, and ACH, which is the type of
23 bank account, as my co-counsel has said. That was the
24 information used to form the extensive reports that Mr. Glick
04:54 25 prepared.

1 And those are reports that I think we all can rely on
2 and that have come to conclusions that wholeheartedly and
3 completely dispel the SEC's claims about the consultant fees,
4 about the default rates, and about all of these other misreps
04:54 5 [sic] that the SEC has put forward.

6 So -- and that is our expert report. It's -- your
7 report that deals with our report by Bradley Sharp is really,
8 most respectfully, Your Honor, not worth the paper it's written
9 on. He's not an accountant. He's not a CPA, and that report
04:54 10 is not an analysis that you can go to the bank with.

11 The report by Glick is the expert report. So I just
12 wanted to be clear on that, Your Honor, to clarify a few
13 points. And, also, the fact that the issue with reloads I know
14 the receiver brought up, but that issue is in the Glick report,
04:55 15 and that -- the issue was covered by the careful, thoughtful,
16 thorough analysis done by Mr. Glick, which came to the
17 conclusion that a very small percentage of the full 100 percent
18 of merchants -- I think less than 14 percent of merchants
19 received reloads.

04:55 20 So as Mr. Soto brought to your attention, every dollar
21 went out, 40 cents came back on that dollar. We're talking
22 about lots of dollars that went out.

23 So, Your Honor, I just wanted to emphasize those
24 points. I appreciate Your Honor taking the day to hear us on
04:55 25 these very important motions, and I just wanted to suggest to

1 you that there is a way forward in removing the receiver and
2 putting in place, for the next three months until trial,
3 people, including investors, who are willing to come to
4 Philadelphia and to resurrect the company.

04:55 5 Thank you, Your Honor.

6 **THE COURT:** Well, I will say -- thank you, Ms. Schein.

7 I will say this: As I indicated earlier, I was going
8 to require, and I'm still going to require what I term an
9 "informal settlement conference." What I may do in there, and
04:56 10 I can put it on the record here today, it's really more than
11 just an informal settlement conference. Obviously, if the
12 parties were to find common ground in a long-term resolution,
13 that would be ideal.

14 But it should also be used to discussed these
04:56 15 proposals, the proposal that Ms. Schein has come up with, the
16 one Mr. Soto and Mr. Futerfas have suggested, and Mr. Ferguson
17 has brought up, to talk about the potential of an audit, to get
18 a better financial picture, cross-referenced with Mr. Glick.

19 All of these things I think are worth a very
04:56 20 legitimately dedicated meet-and-confer conference with all
21 parties and their clients, at least clients that are an
22 arm's-length away or a phone call away. They don't have to be
23 in person. We can do it over a video conference, you can do it
24 over the phone. But I think it requires an inflection point
04:56 25 now, with discovery closing and summary judgment fast

1 approaching and trial on the horizon, that we at least sit down
2 and try to take a look at this big picture before we find
3 ourselves in another round of motion practice, which is quickly
4 approaching.

04:57 5 And so I just put that on the record, and I think
6 that's one of the times we should also use to discuss your
7 proposal, Ms. Schein. And I urge the parties to look in to
8 that and explore that, and maybe the defendants can also
9 propose to the receiver any sort of a follow-up audit on the
04:57 10 CLA numbers.

11 Do I have any other defendants on either one of these
12 motions? I've heard, I think, from most of the individuals who
13 have argued them or drafted them, and I know people have been
14 kind enough to concede their time to their colleagues so we
04:57 15 don't have too many people arguing.

16 Anybody else here in court on the defendants' side
17 need to be heard on any of these motions? Okay. I think we're
18 okay, and I think I heard from Mr. Futerfas and Ms. Schein,
19 anyone on the line.

04:57 20 So then I meant to go back, just to put a final point
21 on it.

22 Ms. Berlin, do you have anything you want to add,
23 really only on the receiver discharge issue? And let me just
24 say this, Ms. Berlin, before you chime in, I haven't looked at
04:58 25 the -- at your expert report yet, the one that I understand is

1 a cash -- I think it is GAAP-compliant, I hope.

2 And the next question is: I hope that it looks at
3 some of the numbers that Mr. Glick has proposed so we can at
4 least get a better sense, even though it may be cash basis
04:58 5 versus accrual.

6 But I urge the SEC also to be heavily involved in
7 discussions in the informal conference -- settlement conference
8 in the hopes of not only finding common ground, but maybe
9 having some give and take on what the SEC thinks is the right
04:58 10 way to go here with the trial approaching.

11 But I just, you know, I want you to understand that
12 after today's hearing, you know, the Court is eagerly
13 anticipating the summary judgment that you plan on filing.

14 And I want to see and I hope to see that the SEC has
04:58 15 been able to put together at least some financial data that
16 would clarify some of the concerns raised by the Glick report
17 and that would fit perhaps a little closer to the narrative
18 that was advanced by the SEC when this case began.

19 I think there's a lot more nuance here than meets the
04:59 20 eye, and I know there's a lot of different episodes that led to
21 the SEC's ultimate decision to press forward on this case.

22 But I think it's also important that the SEC figure
23 out what is the goal here. I understand the goal to be
24 obviously to help investors, but really if these defendants are
04:59 25 cause for concern by the federal government in their actions in

1 the financial marketplace, that steps be taken to correct that,
2 and then we can move on trying to resolve things with
3 investors.

4 But spending more time and money prosecuting this
04:59 5 case, if there is a resolution to be had early, I think would
6 be foolhardy. And so I hope that the SEC sits down and does
7 make a concerted effort to try to find common ground with the
8 defendants here so that we can, if it's possible, we can at
9 least explore the possibility of something global resolving the
05:00 10 SEC's concerns, while also keeping in mind that investors are
11 standing by, waiting to see the outcome of this case, and our
12 hope is to protect them and try to return to them what money
13 we've already been able to obtain.

14 Is there anything else, Ms. Berlin, though, that you
05:00 15 wanted to add before we conclude today, briefly? Go ahead.

16 **MS. BERLIN:** Yes, thank you.

17 The defendants and receiver just spoke for about three
18 hours, and I just need about five minutes to address what they
19 were saying.

05:00 20 First of all, I just wanted to state that the
21 defendants' motion to discharge the receiver, which the SEC
22 filed a response to. You know, the defendants' argument today
23 is focused on the profitability of the company, and that is not
24 the standard for not only their motion, but was also not the
05:00 25 argument that was presented to this Court in appointing

1 receiver.

2 Instead, you know, first, they would need to show
3 under their motion that there was some improper misconduct by
4 the receiver, which they failed to do. They didn't present a
05:01 5 single piece, not a shred of authenticated evidence in support
6 of either motion. So I'm not even clear how the Court could
7 make any findings of fact about anything on that motion. That
8 I was anticipating they might do it today, it didn't occur.

9 Next, on the receiver motion, the SEC filed a motion
05:01 10 asking for a receiver and telling the Court that the basis for
11 the receivership was that the defendants were diverting money
12 to themselves. And that is undisputed to this day. There has
13 been no issue with that, no argument that it didn't occur. And
14 that is the basis for the appointment of the receiver.

05:01 15 The Court made a ruling on the TR0 on a very complete
16 record, including more than, I think, all told, close to 200
17 pieces of authenticated evidence, and at a two-day evidentiary
18 hearing, that this is not the first time the defendants have
19 challenged the receiver.

05:01 20 The Court is well apprised of what the receiver has
21 been doing. He has filed repeated status reports, and the
22 defendants take it upon themselves to always file a response
23 with Mr. Glick's position.

24 Nothing in the last year has altered the fact that
05:02 25 they took investor money and sent it to themselves. And there

1 has not been a single argument about that. The point for the
2 receiver, Your Honor, was because there was an ongoing,
3 unregistered securities offering, which was the basis for
4 appointing a receiver. There's been no argument that that
05:02 5 didn't occur, that there wasn't an unregistered securities
6 offering, and that they didn't divert money to themselves.

7 On top of that, this case has the added feature of
8 myriad misrepresentations and omissions to the defendants,
9 which also served as the basis for the appointment of a
05:02 10 receiver, and that the misreps were ongoing. The defendants
11 haven't attacked that, either.

12 Instead, what they did through their Rule 41 motion is
13 present the juries unauthenticated pieces of evidence, which
14 the commission responded to, basically saying we are not
05:03 15 claiming or agreeing that any of this is accurate evidence.
16 But even if it was, they know that this doesn't pass muster.
17 An even at that, they took aim at just a few pieces of the
18 myriad pieces of evidence that this Court heard.

19 In essence, on the motion to terminate the receiver
05:03 20 and the Rule 41 motion, it's a motion for reconsideration of
21 the Court orders that it entered a year ago. They can't meet
22 that standard, either, in addition to the ones in their motion.

23 Everything they argued today is something that they
24 have known that they had access to, even their point about the
05:03 25 merchants having litigation against CBSG, the Court -- the SEC

1 presented that. It's attached to the (inaud.) declaration, a
2 chart of all the cases. The defendants knew that when we had
3 the preliminary injunction hearing. They could have argued it
4 at that time, but they chose not to. They were all heavily
05:03 5 involved in that litigation. And as we argued in our TRO, most
6 merchants were involved in litigation with them.

7 The defendants have basically made a full day out of
8 making arguments based on, I guess, proffer because there's no
9 authenticated evidence before the Court on anything. And I
05:04 10 think that the goal here is to try to get some ruling from the
11 Court that they can use in other matters unrelated to the SEC
12 case.

13 The profitability of the company and audit of the
14 company is not relevant to the SEC's claim. At all. We did
05:04 15 not claim that their audit was improper. They heard it from
16 Mr. Futerfas himself. He told you he wants the CLA audit to be
17 completed and Mr. Soto said the same thing because according to
18 them, it would prove that the Glick report is accurate.

19 The Glick report is their own expert report they paid
05:04 20 for. I hope Mr. Soto agrees with it. You asked him if he did.
21 He paid for it. That's their expert report. That's their
22 defense to the case.

23 Whether there's an audit and what it says from 2018 is
24 relevant to not a thing in this case, other than perhaps what
05:05 25 that they want to use in another court. And the fact that they

1 want the investors to pay for it, meaning the receivership, is
2 offensive.

3 If they wanted an audit, Your Honor, they've had a
4 year to take discovery. They could have gotten it themselves.

05:05 5 I urge the Court not to allow that to proceed. There is no way
6 we could conduct summary judgment and a trial if an audit were
7 to begin right now. The audit that was in process, which I
8 understand is actually very far from completion, took a very
9 long time. So are we delaying this case for a year to get an
05:05 10 audit report that shows what? Nothing relevant to any
11 misrepresentation, omission charged in this case and nothing
12 relevant to the unregistered securities offering at issue.

13 I would like to discuss -- the Court has made some
14 references to he hopes that the expert report is on a GAAP
05:05 15 basis, he hopes it's on an accrual basis. There has been no
16 finding that that's the proper basis to examine this company
17 on. The defendants have provided their expert reports to the
18 Court.

19 The SEC will address those issues at the proper time,
05:06 20 which is summary judgment or trial. And those are not the
21 proper bases for it, and I hope that no judgment has already
22 been made that it is. And I would ask that the Court wait to
23 see the expert reports and then make a determination.

24 As far as the -- everything on the Rule 41, it
05:06 25 basically ends with the related receiver motion is nitpicking

1 and speculating being various pieces of evidence that were
2 presented a year ago that the defendants chose not to raise at
3 that time, failed to raise, and now they're trying to create a
4 vehicle where they don't have to meet the preliminary
05:06 5 injunction standard, they don't have to present authenticated
6 evidence to this Court. They're hoping to get findings based
7 on what they presented with their motions that they can use in
8 this case and in other matters. And there has been no
9 authenticated evidence presented upon which any fact could be
05:06 10 found. Instead, even if everything they presented were
11 accurate and were true, both motions utterly failed.

12 I would like to address briefly Fox Rothschild. As
13 the defendants know, Fox Rothschild's lawyers and Fox
14 Rothschild are witnesses in this case. The SEC deposed them in
05:07 15 this case. As you heard from the receiver, the collections
16 efforts of CBSG are -- they are currently being investigated by
17 other agencies, and Mr. Berman, the Fox Rothschild partner,
18 will be a witness that the SEC calls at trial. You will see
19 his deposition transcript attached to our summary judgment
05:07 20 motion. The defendants want you to make the receiver rehire
21 him, apparently so he either has greater credibility with
22 witnesses and the jury, or he has a conflict and can't be a
23 witness. They're part of it. They're witnesses. They cannot
24 be rehired. And the defendants know that.

05:07 25 **THE COURT:** Anything else?

1 MS. BERLIN: Yes. As far as some of the comments
2 today that the Court made about wishing that the Court had
3 known certain things at the time of the TRO, that was the point
4 of the preliminary injunction hearing. There's been nothing
05:08 5 raised that wasn't raised at the preliminary injunction hearing
6 or that the defendants couldn't have. They presented no
7 evidence, other than wild speculation that these merchants
8 would benefit financially from this case being filed, or that
9 they even still owe money to CBSG.

05:08 10 And if the Court wanted to consider that, we would
11 have presented evidence to counter it. But they presented no
12 evidence whatsoever because they can't. Instead, they have
13 nothing but empty hollow legal arguments by the defense
14 counsel, trying to avoid meeting the preliminary injunction
05:08 15 standards of authenticated evidence, trying to avoid a summary
16 judgment standard, and trying to avoid a trial standard.

17 They can meet none of those three, so they have
18 created a separate vehicle, where we have a seven-hour hearing
19 with no evidence where they can just argue a lot of what-ifs.

05:09 20 And we take issue with that.

21 And finally, Your Honor, the defendants have
22 complained today about the cost of the receiver. The
23 defendants, if the Court looks at the bills of the receiver, a
24 lot of the cost of this receivership has been responding to the
05:09 25 defendants' argument, the defendants' motions against the

1 receiver, the defendants' taking evidence. The biggest --
2 what -- I am currently going through their records, and I
3 believe it's going to show that their biggest cost has been the
4 defendants, and today is no exception.

05:09 5 The receiver has multiple attorneys here today, had to
6 prepare for the defendants to raise yet another attack. So if
7 we want to talk about where investor money is being spent right
8 now, it is being spent and has been spent for a year, in large
9 part, responding to the defendants' arguments, which have all
05:09 10 shown so far to be unavailing.

11 And the motions before the Court are no exception. We
12 would ask that if the Court is inclined to make any factual
13 findings based on the unauthenticated evidence presented by the
14 defendants, that it reserve ruling until summary judgment when
05:10 15 authenticated evidence is presented to the Court under the
16 proper standard.

17 I have nothing further.

18 **THE COURT:** Okay.

19 **MR. FERGUSON:** Real quick, Your Honor, if I --

20 **THE COURT:** Please. Briefly.

21 **MR. FERGUSON:** In reverse order.

22 Fox Rothschild, they're going to be a witness in this
23 case, irrelevant if they -- if they were allowed to collect
24 against B&T or someone else. They give greater credibility as
05:10 25 a witness. Well, that could be resolved with an in limine

1 order, Your Honor.

2 Conflict? We would waive that. Responding -- the
3 motions we've had to file with the receiver, I think if you
4 thought they were not well founded, you probably would have
05:10 5 stricken them fast, and we had to have -- bang heads a couple
6 of -- few times, and I suggest to you that every one of those
7 filings was in good faith by us, and I doubt highly that the
8 receiver's lion's share of the 9 million paid to him and any
9 expenses was responding to motions that Josh and I filed.

05:10 10 That's just ludicrous, Your Honor.

11 And here they go again, the SEC, counsel, "Don't let
12 them have an audit." Keep our hands tied behind our back. I
13 assure you with my hands tied behind my back, I'm a much easier
14 foe. I promise you that.

05:11 15 And if we want the proposed, we'll pay for the audit,
16 and we want to work with the proposal with the receiver to get
17 that done, it's -- I don't see how it could involve one minute
18 of counsel's time and stop her from filing summary judgment.

19 And to closing, at the beginning of her last comments,
05:11 20 she basically said that we agree that money was -- investor
21 money was diverted. We do not agree that we diverted money.
22 We do not agree that the defendants wrongfully paid themselves
23 anything. We do not -- we wholly dispute commingling and we'll
24 address that at the right time.

05:11 25 This -- it seems like she thinks we're at a summary

1 judgment here. She said, basically, that we don't dispute --
2 last point, we don't dispute the sale of unregistered
3 securities. I want everyone listening, and you particularly,
4 Your Honor, we certainly do. That was not at issue at today's
05:12 5 hearing. We've asserted answers, affirmative defenses and
6 denials, and we will address it at summary judgment, and if we
7 have to, we'll do it at trial.

8 **THE COURT:** All right. Thank you for that,
9 Mr. Ferguson. Let me just kind of --

05:12 10 **MS. BERLIN:** Your Honor, if I -- may I just -- this
11 has nothing to do with the arguments, but just going forward,
12 the defendants have made constant sort of attacks on me, being
13 referred to the SEC as Amie Riggle Berlin, and I think the
14 Court might be aware that it stirred up quite a bit of personal
05:12 15 animosity, not only by the defendants and others, but I would
16 just ask to be referred to during this case as the SEC counsel
17 or Ms. Berlin, and that any sort of personal attacks about Amie
18 or her be ceased because it is causing issues and they have
19 manifested outside of this case.

05:12 20 **THE COURT:** Okay.

21 **MS. BERLIN:** And so I would just ask that we keep it
22 professional and address the SEC as the SEC. Or address me as
23 counsel for the SEC. This is not a personal issue with the
24 defendant, but it's something that should occur in every single
05:13 25 case before any federal court. It is not personal. I don't

1 address arguments about the defendants as the attorneys making
2 them, but it is stirring up a frenzy.

3 And I think that, you know, that combined with the
4 attacks on the witnesses, is having a chilling effect on the
05:13 5 SEC's ability to make sure that we can procure witnesses who is
6 are still willing and available to appear before the Court.

7 And so I would just ask that that instruction be
8 provided.

9 **THE COURT:** Okay. Well, I think we're all adults
05:13 10 here, I don't need to instruct anybody to do anything. We're
11 all officers of the Court.

12 I think what we need to do is treat each other
13 professionally. I think that is what our local rules require,
14 our bar rules require, and this is a perfect example of why,
05:13 15 you know, I -- I've been trying to tell the parties that we
16 need to take down the temperature a notch. If the informal
17 settlement conference is going to move the needle at all in any
18 part or facet of the case, it's important that we go into it
19 treating each other with respect and understand, even though we
05:14 20 are all doing our best to advocate for our clients here, we
21 want to make sure that everybody understands that we need to be
22 professional.

23 So...

24 **MR. FERGUSON:** Your Honor, if I may?

25 **THE COURT:** Yes.

1 that the SEC has had ample opportunity to make their case up
2 through today. And this is probably the first time in a long
3 time that all defense counsels were given a worthwhile
4 opportunity to make arguments, regardless of the underlying
05:15 5 motions being granted or denied, giving them the air time to
6 let me know their feelings and express their opinions of the
7 evidence as it has developed, I think is part and parcel of a
8 good adversarial system.

9 And we can not allow the proceedings to essentially
05:15 10 devolve in the SEC on a runaway train going forward without
11 allowing the defendants to at least have court time to make
12 their arguments, to be able to show me evidence they believe
13 will vindicate their clients. It's what the whole system is
14 about, and I don't think that simply because we're very
05:16 15 dedicated to fighting over some of these points, that anyone is
16 trying to be disrespectful.

17 But going forward, I just want to remind everybody,
18 let's make sure that we respect one another and we understand
19 that we're all officers of the Court in our representations to
05:16 20 one another and to me, and, really, for the investing public
21 and those that are watching the case, who are eagerly hoping
22 that justice is done one way or the other and that everyone
23 gets a chance to prove their case or defend their case.

24 I will say this: I have reviewed both motions. It is
05:16 25 not my nature to belabor a ruling on either one of them and, in

1 fact, I'm going to rule from the bench on both of them.

2 I'm going to be denying both motions. I will begin by
3 denying the Docket Entry 649, which is the discharge of the
4 receiver. The reality is, I fully respect the defendants
05:17 5 coming up with outside-the-box ideas on how to save this
6 company. They're doing it because I, in the beginning, said I
7 wanted to save the company. I did not want it liquidated, so
8 the Court has had a vested interest in trying to maintain jobs,
9 keep it going, find a way to let this company continue.

05:17 10 There may be such a way, but I don't think it's today,
11 and it certainly isn't a procedure of mine to put in a receiver
12 with three months to go and pull the receiver out and implement
13 a new plan so close to trial, when we can hopefully get a final
14 decision from jurors on some of these contested claims if we
05:17 15 don't resolve some of them in part beforehand on summary
16 judgment.

17 The reality is there has not been a sufficient
18 evidentiary showing in my mind that would indicate that the
19 receiver has played a role in hurting or -- the company,
05:17 20 hurting investors, or in any way, shape, or form, advocating a
21 fiduciary duties to the investors, to the company with
22 obligations to the Court.

23 The difficulties that the receiver has encountered are
24 difficulties that I think anyone trying to manage these MCA
05:18 25 loans would encounter. I don't think it's necessarily a lack

1 of specialization, and I can definitely say, having reviewed
2 all of their bills and looked at all of their motions, that
3 this is absolutely work that has to be done. They're chasing
4 money for the benefit of the investors. It's what I charged
05:18 5 them to do. It's what I think they should do.

6 Is Mr. Soto right that putting the receiver in has
7 hurt the business? Yes, because the nature of the business was
8 loans and the Court had to stop that business.

9 Why did I do it? As we've discussed, representation
05:18 10 that I have seen, evidence that I saw at the temporary
11 restraining order and preliminary injunction phase led the
12 Court to believe that the investing public was not advised of
13 certain material issues regarding these promissory notes, and
14 because of that, I did not feel that these loans could
05:18 15 continue.

16 But the receiver and the job they have done, I
17 believe, has been exceptional. I do not believe it has somehow
18 been dilatory or purposefully hurt the company. They're simply
19 trying to evaluate what can be recovered, and that's all that
05:19 20 they've been charged with doing.

21 I understand that there have been some issues with
22 bringing in DSI, that we would prefer to have someone that is
23 producing reports that are more GAAP-compliant. But I think
24 some of the forensic work, I have to give the receiver the
05:19 25 bandwidth to try to figure out the best folks to bring in while

1 keeping costs reasonably low and in check to try to recover
2 money.

3 But when we get down to the brass tacks of what's been
4 recovered to date, as we heard from Mr. Alfano today, 86
05:19 5 million in cash, 53 million in real estate, 3 million in
6 personal property, we're getting to around -- if we appraise
7 that real estate a little higher -- probably 150 million out of
8 280 million, which is that reduced amount from 364 due to
9 interest payments. I don't think that anyone can look at that
05:20 10 number and say that the receiver has not done what it needs to
11 do.

12 Now, after we get to the trial phase, a couple more
13 months away, is there going to be an exit plan? I'm looking
14 for one. I want there to be one. This is not going to be what
05:20 15 Mr. Stumphauzer's firm is going to be doing and Mr. Alfano's
16 firm is going to be doing after this case is over. We need to
17 hand this off and figure out what can be done, not only to get
18 investors their money back and figure out how to unwind
19 everything. Or, conversely, if the SEC does not prove their
05:20 20 case, I have no doubt in my mind that the receiver can swiftly
21 return assets that are not being dissipated, that are not being
22 liquidated, pursuant to my orders, so that we can make sure
23 that the defendants, if they ultimately did not commit
24 securities violations, they must be made whole.

05:20 25 And I think right now all we're doing is trying to

1 maintain status quo. Does state quo hurt? It does. Is it
2 better than us flying blind on MCA loans, when I wasn't sure
3 and still am not sure about the underlying financials and
4 underwriting of some of these loans? I think it is.

05:21 5 That's a decision that I have to make. And I
6 understand that some investors are on board with it and others
7 are not. I can only tell the investors that I continue to have
8 their best interests in mind, and I know that the receiver
9 does, too.

05:21 10 But there's just not enough in this motion. And I
11 will agree with Mr. Ferguson and all the lawyers that have
12 argued -- Mr. Soto, Ms. Schein, Mr. Futerfas -- it is well
13 taken.

14 I do take some issue with the SEC believing that this
05:21 15 is somehow a bad-motion practice or that this is somehow
16 frivolous or not supported by law. These are well-taken
17 motions that have questioned my reasoning for implementing a
18 receivership. And I think it was absolutely fine to not only
19 file, but to ask for oral argument, and a whole day has been
05:21 20 given to address them because this is significant. It's
21 important.

22 I know that some folks disagree with the course that
23 the Court has undertaken, but I still continue to believe from
24 what I've seen and what the receiver has done and what I've
05:21 25 seen with these MCA loans that are outstanding, this it is the

1 best choice in the cupboard. It is the best tool we have to
2 continue to try to recover these assets.

3 So that motion is going to be denied for the reasons
4 stated on the record.

05:22 5 When it comes to the Rule 41 motion, I will also have
6 to deny that. It is Docket Entry 663, the motion to dismiss
7 due to misconduct and related constitutional violations.

8 I will be somewhat brief, but the record compels that
9 I make some findings. And the bottom line is what I started
05:22 10 with, is just a very challenging standard, and I think defense
11 counsel understands it.

12 Rule 41(b) really triggers my inherent ability to
13 dismiss a claim and provide for the efficient disposition of
14 litigation if I note, as the Eleventh Circuit has said, more
05:22 15 than mere negligence or confusion, but I need to find willful
16 misconduct.

17 I readily agree with the defendants on a certain point
18 that there are some temporal proximities that trouble me.
19 There is some investigative work that I think could have been
05:23 20 done better. I do believe that the SEC was well within its
21 right to work with Heskin, and I understand that they can draw
22 from private attorneys and other resources, but it doesn't rise
23 to the level that we would need for me to swiftly dismiss a
24 case of this nature.

05:23 25 There is enough record evidence presented by the SEC

1 in this case for me to determine that, at best, on defendants'
2 best day, it was somewhat negligent and wasn't as thorough as
3 it should have been. But does it rise to the level of
4 willfulness or bad faith that would mandate? And that's a
05:23 5 factual and evidentiary finding I would have to make on the
6 record to justify dismissal under 41(b). It just doesn't rise
7 to that level.

8 We can argue about differences in opinion regarding
9 what the SEC had in their investigative file at the time that
05:23 10 they proceeded with this case, but there's enough independent
11 sources of information for the SEC to proceed with this case.
12 And although there was somewhat of a mosaic of problems, as
13 counsels has argued and Mr. Ferguson has made that point, I
14 can't string together these pieces of evidence to get me past a
05:24 15 level of mere negligence. It would only be willful misconduct
16 that would permit such a drastic remedy, and I just don't see
17 it in this record.

18 I will also add that I don't believe that the state
19 actor doctrine is even implicated here, given the parallel
05:24 20 proceedings. And if even if it were somehow triggered, I don't
21 believe we have the nexus established where the state, in the
22 form of the SEC, has exercised coercive power over private
23 counsel in such a way so as to trigger the state actor --
24 action -- excuse me, the state actor doctrine.

05:24 25 And I will point out again, it seems like everyone has

1 been able to be afforded the due process that they're entitled
2 to under constitutional principles under the Fifth Amendment,
3 so I don't think it plays a role and I don't see anything, even
4 if it did, that would rise to that kind of deputization that
05:24 5 has been alleged of Heskin and others to make the SEC's case
6 for them.

7 So based upon that finding, I don't have a situation
8 here where I can grant the Rule 41. There's just not -- I'm
9 unwilling and unable, quite honestly, to dismiss based upon my
05:25 10 inherent authority, based upon the fact that I have reviewed
11 and the lack of evidence and bad faith to warrant an
12 extraordinary sanction of dismissal.

13 And, again, when we look at how much of the
14 investigative file relied on materials to build the case from
05:25 15 the private lawyer and his client, it is not at such a level
16 that the Court will find the state actor happened, transpired,
17 or somehow made the SEC's case essentially willful or bad-faith
18 prosecution.

19 So what will come out from both motions will be brief
05:25 20 orders, relatively short and to the point. They will simply
21 state for the reasons stated on the record. They may or may
22 not add a couple of case cites, but given that we have a
23 summary judgement fast approaching -- I think September 24th --
24 given that our discovery deadline is fast approaching, and that
05:25 25 I have digested this over the past two and a half weeks and

1 wanted to wait to hear from everybody to confirm my instincts
2 on some of these motions.

3 I thought it best to rule today so there's no
4 confusion and leave a blank slate because what we're going to
05:26 5 do after today is the parties are going to be ordered to meet
6 and confer in the next few weeks so see if there's anything
7 that can be worked out, either to streamline issues for trial,
8 streamline issues for summary judgment, settle, if possible,
9 any claims, and, of course, as suggested by Mr. Soto and
05:26 10 Ms. Schein, to talk to the receiver about the possibility, if
11 anything, to bringing in someone else from a forensic
12 accounting perspective, whether CLA or otherwise, to take a
13 look at the financials and ultimately prepare perhaps another
14 independent report that can give us more guidance as to some of
05:26 15 the flaws that are purportedly in the Glick report.

16 So with that being said, I do not believe there's much
17 left for the Court to address, but I'll turn just to the SEC on
18 the line. Anything else for the Court to address before I let
19 the parties go? SEC, anything else on the line?

05:27 20 **MS. BERLIN:** Thank you, Your Honor. I just wanted to
21 clarify one thing. Is the Court making a finding that the
22 SEC's investigation was negligent?

23 **THE COURT:** No. I said that on defendants' best day,
24 they would be able to argue that --

25 **MS. BERLIN:** Thank you.

1 **THE COURT:** -- there was some negligence and
2 corner-cutting on the investigation.

3 But I don't need to make such a finding. All I've got
4 to do and all I've been asked to do is find under 41(b) if it's
05:27 5 willful or not.

6 I understand the argument to be that it was willful.
7 What I'm saying is even characterizing it with all inferences
8 that they would ask for on a temporal proximity, at best, you
9 get negligence. I'm not finding it, but, at best,
05:27 10 academically, you would, and it would not rise to the level
11 necessary for 41(b).

12 Does it that make it clear?

13 **MS. BERLIN:** Yes. Thank you so much, Your Honor. I
14 have nothing to add. Thank you.

05:27 15 **THE COURT:** Okay. Very good.

16 How about on the part of the receiver? Anything,
17 guys, you need to let me know about before we would let you get
18 back to collections?

19 **MR. ALFANO:** Nothing at this time, Your Honor.

05:27 20 **THE COURT:** All right. Thank you.

21 Anything else from of the defense counsels present in
22 court that you guys wanted to add?

23 **MR. FERGUSON:** No, Your Honor. I'm just speaking for
24 all of us here, and I assume all the other defendants and
05:28 25 counsel. We thank you for your time and attention and we

1 be a middle ground here for us to try to let Par Funding do
2 what it does in the future and get these individual defendants
3 out of this game and figure out what the SEC is seeking in
4 terms of relief, and hopefully narrow things down so you can
05:29 5 start getting investor money prioritized and back once we
6 finish our collection efforts.

7 So with that being said, the hearing is concluded.
8 Thank you, guys, again for the briefing. We are in recess.

9

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11 (Thereupon, the above hearing was concluded.)

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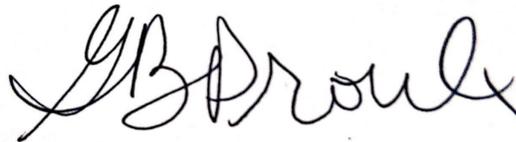
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C E R T I F I C A T E

This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.



09/02/2021

DATE COMPLETED

GIZELLA BAAN-PROULX, RPR, FCRR

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