

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 3

3 - - - - - X

4 KRUNCHCASH, LLC, KC PCRD LLC,  
5 JEFFREY HACKMAN, SEAN MCGHIE PLC,

Plaintiffs,

6 - against -

7 PURSUIT CREDIT SPECIAL OPPORTUNITY FUND, L.P.,  
8 MITCHELL COHEN, J. SCOTT TURNER and YALE FERGANG,

9 Defendants.

10 - - - - - X

11 Index No. 656688/2021

12 September 28, 2022  
13 60 Centre Street  
14 New York, New York 10007

15 B E F O R E: THE HONORABLE JOEL M. COHEN, Justice

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

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Official Court Reporter

## Proceedings

1 THE COURT: Good afternoon.

2 Let's start with appearances beginning with the  
3 plaintiff.

4 MR. BERG: Good afternoon, your Honor.

5 Gabriel Berg of Robins Kaplan for the KrunchCash  
6 parties.

7 THE COURT: Good afternoon.

8 For the defendants.

9 MS. BEA: Good afternoon, your Honor.

10 Renee Bea representing Pursuit Credit Special  
11 Opportunity Fund LP. In one action we are the plaintiff and  
12 in the other we are the defendant.

13 THE COURT: That's right.

14 Let's remember, let's use the mics today, and the  
15 arguments are going to be at the podium.

16 MS. BEA: I apologize.

17 We also represent in the action captioned with the  
18 Index 656688/2021 Mitchell Cohen and Scott Turner.

19 THE COURT: Okay, right.

20 So we have two actions and we have one motion in  
21 each of the two. I did, in my quest to simplify today,  
22 which didn't work out, misperceived the discovery motion so  
23 I will hear that again today since I read it as covering the  
24 discovery against the banks that is being pursued in  
25 Florida, and I understand now, based on Ms. Bea's letter,

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1 that, in fact, the motion was a discovery request to the  
2 defendants in the 651070 action; yes?

3 MS. BEA: Correct.

4 THE COURT: Let's do that one first to make sure I  
5 don't forget it.

6 So cutting to it, I do see a need for, I  
7 understand the need for the information and it's within the  
8 broad scope of discovery. What my quest is for is, you  
9 know, obviously it seeks all banking information, a wide  
10 array of banking information for a number of years, and  
11 obviously a request like that will inevitably bring in lots  
12 of transactions that have nothing to do with this case and  
13 that involve uninvolved third parties, and I am, just to be  
14 open about it, looking for a way to protect those interests  
15 while at the same time providing what Pursuit legitimately  
16 needs to do the money tracing kind of activity that it has  
17 in mind.

18 So I don't know if it's Ms. Bea, why don't you  
19 start with that premise that I do see, given the nature of  
20 the allegations which, you know, obviously you are subject  
21 to a motion to dismiss which I am not hearing today, but  
22 life goes on, some need for this kind of discovery, but it  
23 seems to me very broad both as to the number of years to  
24 some extent, and redaction may be something that we have to  
25 think about.

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1 MS. BEA: Thank you, your Honor.

2 THE COURT: Turn the mic on.

3 MS. BEA: What's that?

4 THE COURT: Hit the button on the bottom of the  
5 mic.

6 MS. BEA: I see.

7 Thank you, your Honor.

8 So to respond to your question which I understand  
9 to be how can we deal with this disclosure in a way that  
10 protects the interests of potentially other parties whose  
11 transactions may not be directly relevant, it's important to  
12 I think frame the answer to that question in the context of  
13 the burden that has to be shown in order to prevent that  
14 disclosure.

15 First of all, you know, to be clear, the kind of  
16 records we are seeking are bank statements, but also wire  
17 transaction statements, manually maintained ledgers prepared  
18 by defendant Hackman, and documents sufficient to show the  
19 identity of the payees and source of funds corresponding to  
20 those transactions, and I will explain why we need all of  
21 those pieces of information.

22 Defendants come before this court presenting  
23 heavily redacted bank records, that we have everything we  
24 know of to produce to Pursuit Funds, but what they are  
25 really showing you is a summary of the amounts that Pursuit

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1 invested into the KC PCRD and KrunchCash bank accounts.  
2 That is not really disputed, but what is disputed and what  
3 is concealed by the improper redactions are transactions,  
4 for example, showing the amounts that were actually advanced  
5 to third-party recipients it advanced, whether or not  
6 KrunchCash actually invested capital alongside Pursuit as it  
7 represented it did, whether and when repayments actually  
8 occurred --

9 THE COURT: The only transactions that you need to  
10 trace would be, you know, again, you have the ones in from  
11 your client, but it would be anything out to the specific  
12 parties in the litigation that your client was supposedly  
13 helping to finance, right?

14 MS. BEA: That is a piece of it. We also need to  
15 see -- Mr. Hackman prepared ledgers that we have determined,  
16 and we have submitted an expert affidavit showing this  
17 preliminary analysis is completely irreconcilable with  
18 ledgers that were prepared for other investors and ledgers  
19 that were presented under oath to courts in Maryland and in  
20 Florida purporting to show the amounts of money that went  
21 out to the advance recipients and the amounts that were then  
22 owed based on those amounts. We see double accounting of  
23 principal, we see evidence that claims were returned. So  
24 just to get on a granular level, we can't tell for  
25 individual claim to claim whether \$800 went out, for

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1 example, to the law firm that borrowed the money or \$1,800  
2 went out to the law firm which is what is represented to the  
3 courts in Florida and Maryland, and there's no real way to  
4 tell that until we get, you know, a crack at the books.

5 Now the real issue is should we put the  
6 determination of deciding what is relevant and what is not  
7 relevant in the hands of someone that Pursuit has not only  
8 credibly alleged has been misrepresenting the nature,  
9 amount, source of those transactions and monies, but who's  
10 alleged to have defrauded our client, Pursuit, by using  
11 these misrepresented versions of the accounting for the  
12 various investments.

13 We also need to know, for example, where were  
14 these purported repayments coming from that Mr. Hackman  
15 represents were coming in when he says a million dollars of  
16 repayments came in. Was that money actually coming out of  
17 insurance proceeds on the Pharma, pharmaceutical receivables  
18 advances? Was it actually law firm revenue or was it what  
19 we think it was which was another investor called Signal  
20 Funding when they were putting their capital in, you know,  
21 that money was apparently to us being applied, based on  
22 timing, to pay out our positions and then purportedly issue  
23 new advances.

24 THE COURT: I see.

25 MS. BEA: So putting the redaction responsibility

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1 in the hands of the person alleged of fraud is frankly not  
2 the law, it's not what we are supposed to do, and the better  
3 use of sort of the mechanisms and tools that the Court has  
4 is to impose a protective order which we have been asking  
5 for, for some time, the parties have stipulated to, and it  
6 has an "attorneys' eyes only" designation. If the  
7 concern --

8 THE COURT: Has it not been signed by me yet?

9 MR. BERG: It hasn't been signed by you yet, but  
10 the parties I think, you know, have agreed on the treatment  
11 of documents, and it includes an "attorneys' eyes only"  
12 designation that can clearly be used for any records where  
13 purported third-party privacy interests are at stake. On  
14 that point, your Honor, New York does not recognize a  
15 privacy interest, by the way, in those various individuals.  
16 These are bank records, in the bank's hands, and here they  
17 are KrunchCash and KC PCRD's business records.

18 THE COURT: I think we do recognize the interests  
19 of third parties --

20 MS. BEA: We can recognize -- sorry.

21 THE COURT: -- who have nothing to do with this.

22 MS. BEA: I think we can recognize that perhaps  
23 those parties regard the information as sensitive. We have  
24 no objection to that information being designated as  
25 confidential, and where it's appropriate and third-party

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1 information is actually sensitive information, is actually  
2 being included, then an "attorneys' eyes only" designation  
3 will take care of that. That would limit disclosure to the  
4 attorneys, it would limit disclosure to the experts that  
5 need to review and analyze that data, and when it comes to  
6 trial through, you know, other disclosure, deposition,  
7 through hopefully cooperation with opposing counsel, we will  
8 be able to identify the actual transactions that are at  
9 issue.

10 THE COURT: Temporally you go back to 2017. My  
11 understanding is that there was an audit in 2019. Why do  
12 you need to go back to recover some of that time period that  
13 was already audited?

14 MS. BEA: I would like to address that audit.

15 First of all, it is false, the statement that  
16 there was an audit for the year 2018 performed in 2019. I  
17 have the affidavit of Mr. Kenneth Parzygant who the  
18 KrunchCash parties claim was the auditor stating  
19 unequivocally not only that there was no audit performed,  
20 but critically that the financial review that Pursuit was  
21 trying to perform on its investments could not be performed  
22 because KrunchCash refused to provide its bank accounts.

23 I have provided that affidavit to Mr. Berg, it was  
24 served to him on Monday in connection with the banking  
25 subpoena. I would be happy to provide the Court with a



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1 copy, as well.

2 THE COURT: I was wondering why it didn't sound  
3 familiar.

4 MR. BERG: I am sorry, I haven't seen this.  
5 When was it filed?

6 MS. BEA: It was filed on Monday.

7 MR. BERG: In which court?

8 MS. BEA: In Florida.

9 THE COURT: Not in this court?

10 MS. BEA: Not in this court because, your Honor,  
11 when your order was issued I didn't think it was proper to  
12 submit additional submissions at that time, but the parties  
13 were served with this affidavit on Monday. I had given  
14 Mr. Berg a copy before these proceedings so he could review  
15 it, and I am happy to give the Court a copy.

16 THE COURT: Just now?

17 MR. BERG: Yes, I have just seen this. Of course  
18 I object, it has not been e-filed in this court.

19 THE COURT: Let me hear Mr. Berg's response.

20 MS. BEA: May I complete my response?

21 You asked why do I need more when there was an  
22 audit in 2018?

23 THE COURT: If there wasn't an audit --

24 MS. BEA: If there wasn't an audit, there wasn't  
25 an audit, but, in addition, in 2018 -- first of all, why

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1 2017?

2 The advances, the transactions that would show how  
3 much money actually went to some of these advance  
4 recipients, would have happened in the year prior to some of  
5 the funded transactions coming in from the investors. So  
6 that is why we go back to the 2017.

7 In addition, anything done in 2018 wouldn't  
8 address Pursuit's need for information relating to the fact  
9 that the investments were collapsing in 2019, and repayments  
10 were coming in that Mr. Hackman was collecting as some kind  
11 of like use fee for himself and not paying to Pursuit. It  
12 wouldn't address additional recoveries achieved through the  
13 default actions and through other settlements in 2020 and  
14 '21 that, again, Pursuit's position is should have been paid  
15 to Pursuit. It doesn't address KrunchCash's collection of  
16 proceeds from other investments that Pursuit has invested  
17 in, but it doesn't even dispute it owes to Pursuit and it  
18 collected in 2022.

19 It's claim is that it's maintaining that in an  
20 account, it's not maintaining it in the KC PCRD account.  
21 They showed that in submissions, in other papers to the  
22 Court. So to confirm it's in the KrunchCash account we  
23 would like to look at those records.

24 THE COURT: Thank you.

25 Try to keep it brief so that we can get to the

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1 next one.

2 MR. BERG: I will be brief. I do need to respond  
3 to the premise here.

4 Your Honor, your order was actually clear because  
5 the relief they ask for is for you to make a relevancy  
6 determination that they can then take down to Florida. If  
7 you look at their brief, there isn't anywhere in it, here's  
8 the response that we find deficient, here's what we are  
9 complaining about, and so, therefore, we need these  
10 documents.

11 Your Honor's --

12 THE COURT: But this motion relates to a discovery  
13 request made to your clients, not to the banks.

14 MR. BERG: That is true, however, --

15 THE COURT: My order assumed it was the discovery  
16 request to the banks.

17 MR. BERG: All I'm saying, it wasn't the Court's  
18 fault because this is what they asked for. The relief was  
19 that we need a relevancy determination to take down to  
20 Florida. That's right on page three of their brief.

21 Let me move to the more important points.

22 First of all, they can't prove any of the  
23 allegations, and we have defeated the allegations with  
24 documentary evidence, the key ones.

25 I would submit to your Honor, the Hackman

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1 affidavit actually goes through chapter and verse. For  
2 example, they say they are owed 2.5 million which KrunchCash  
3 collected in plain view in bankruptcy court, and nobody  
4 objected. There was a trustee, everybody knew where this  
5 money was going, and they say he stole some 2.5 million.  
6 That's just false.

7 There are three other critical allegations that we  
8 disprove in this motion. Here's what we offered them  
9 because they are overstating what they know. This is the  
10 danger in a motion like this before an ounce of discovery is  
11 taken. We've said we will give you all unredacted KC PCRD  
12 bank records, we will give you redacted KrunchCash bank  
13 records, redacted because most of the transactions, a lot of  
14 them will have nothing to do with Pursuit, and the  
15 allegation that somehow money's going in the wrong  
16 direction, we will uncover where Pursuit's money went to a  
17 tee. That's how we can protect the other third parties who  
18 have, most of whom have a confidentiality provision in their  
19 contracts.

20 THE COURT: What about the money flowing back in  
21 from, I don't know whether you call them borrowers or not,  
22 but how do we trace that?

23 MR. BERG: Easily. Here is where they will  
24 unfortunately be upset to learn that money that goes into  
25 KrunchCash then goes to KC PCRD. KrunchCash runs its

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1 business with special purpose vehicles with an operating  
2 agreement at the center. Money in always ends up in KC  
3 PCR, money out goes through KrunchCash because KrunchCash  
4 had the contract with the underlying third parties against  
5 whom the defendants are searching to trace. They will see  
6 all of that.

7 And most importantly, your Honor, it is the way to  
8 protect third parties, and if I'm wrong, they come back and  
9 say we can't account for all the money, then they will know  
10 more because what they are doing now is speculating. They  
11 put in an affidavit from an expert who says I have not seen  
12 much, but here's what I can conclude.

13 THE COURT: Let me ask you this: So there's  
14 certain documents that you have agreed to produce, but have  
15 not yet produced?

16 MR. BERG: That's correct because they don't want  
17 them until this is over for some reason. We are going to  
18 give them to them. All the KC PCR are unredacted, they can  
19 have them, they can see all of that, and KrunchCash is  
20 redacted to protect investors who have nothing to do with  
21 this action.

22 THE COURT: What your plan would be is for them to  
23 get it all, get what you are willing to give them, try it,  
24 and come back to me if it turns out that the redactions make  
25 it useless.

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1 MR. BERG: Yes, that's exactly what I am  
2 suggesting because it protects the third parties, and I  
3 think they will be disappointed.

4 THE COURT: I guess that's their fear, not quite  
5 the way you mean it.

6 MR. BERG: Disappointed in the following way: To  
7 this day their principal has said to my principal privately,  
8 despite this action I know you have accounted for all of the  
9 money, you always have, he said that privately, and that's  
10 in the affidavit, as well. That's an important point  
11 because there was trust between these two friends, and there  
12 still is in some respect because my client has a background  
13 in accounting. He accounts for everything meticulously, and  
14 their principal, Mr. Cohen, knows that.

15 THE COURT: That's Mr. Hackman?

16 MR. BERG: Yes, sir.

17 The last point I would make, your Honor, is the  
18 affidavit that the defendants want to introduce is, parses  
19 too finely. They are saying is there was not an audit  
20 performed, but this Kenneth, I don't know how to pronounce  
21 his last name, Parzygnat, testified that he accounted for  
22 all new funds up to 7.8 million, I believe, as of 2019, he  
23 had accounted for all of that money. It might not be a  
24 formal audit, but it certainly was accounted for, and his  
25 declaration makes it inconsistent with what is in this

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1 record which is his writing saying I have accounted for all  
2 this money, call me if you don't understand.

3 E-mails --

4 THE COURT: Do we have a hearing date yet for the  
5 motion to dismiss this case, the Pursuit case?

6 MR. BERG: I don't believe we do, no.

7 MS. BEA: Your Honor, if I may be heard before you  
8 decide.

9 THE COURT: Okay, just briefly.

10 MS. BEA: First of all, Mr. Berg, and on behalf of  
11 his clients, has published his version of what we should  
12 accept as useful and reasonable in connection with the  
13 motion to dismiss in the other action. I have provided that  
14 to the experts who submitted an affidavit telling you it  
15 does not tell them anything.

16 THE COURT: They have looked at the actual raw  
17 material or just the description of it?

18 MS. BEA: They have looked at the redacted  
19 KrunchCash records and the KC PCR D bank records. They were  
20 filed as an exhibit to the motion that we don't have a  
21 hearing yet for.

22 THE COURT: So it has already been produced?

23 MS. BEA: It has been published. Like I said, no  
24 documents have been produced through disclosure, no Bates  
25 stamped production has been provided, and I would welcome it

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1 because we asked for it in June. However, they have  
2 published it in the way they would like it presented to  
3 support their motion to dismiss the other action.

4 What they are confusing and what they are  
5 collapsing together here is the difference between, look, if  
6 you look in this special account that we created, when we  
7 put money in there it matches up with our representation to  
8 you about how much money was put in there. That's not the  
9 question. The question is, whose money was that? Was it  
10 Signal Funding who provided an affidavit in support of our  
11 motion to compel saying our privacy interests are not a  
12 concern? We want to know where our money went.

13 THE COURT: Let me ask you, putting accounting  
14 propriety aside, if, in fact, the tracing will show that  
15 your client got back what it was entitled to, you know,  
16 other agencies might be interested to know whether money was  
17 tracing the right way, but what would the harm be to your  
18 client?

19 MS. BEA: Our clients did not receive any money  
20 back. These were paper profits, paper transactions. At the  
21 end of that paper trail is a big zero where our clients have  
22 never got their principal back. All they have are some  
23 representations about where all that principal went.

24 When you triangulate that and compare that with  
25 this other investor, again, Signal Funding submitted an



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1 affidavit in support of our motion saying we welcome Pursuit  
2 having access to transactions that might have pertained to  
3 our investments because from what we can see claims were  
4 being churned so that we were being paid back by investor  
5 number two's money, investor number two goes into that same  
6 hole, but it will not come back in terms of repayment.

7 It may look like repayment on the ledgers. Again,  
8 ledgers, I use that term very loosely here because these are  
9 Excel spreadsheets prepared by Mr. Hackman manually, and he  
10 may be meticulous about how he manually prepares the detail  
11 in this, and that is the basis for some of our fraud  
12 allegations, that the misrepresentations were so detailed  
13 down to the claim level, but when you go back and compare it  
14 to sworn statements he made in front of other judicial  
15 bodies in his deposition testimony in other actions it does  
16 not add up. When he was talking to our clients he is  
17 telling us things were repaid. Now in this other case over  
18 and over again he is saying no, no, no, they were short on  
19 all of those claims. He's always got some explanation.

20 This is disclosure, and in a New York civil  
21 litigation that involves \$10 million of investments that  
22 have gone into thin air, Pursuit, as the plaintiff, is  
23 entitled to make its own investigation of where its money  
24 went, and we shouldn't even have to be talking about  
25 evidence and affidavits on the pleadings alone.

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1           We have alleged sufficient facts to warrant  
2 disclosure of those records, but we have gone one further  
3 for the Court to give you confidence, to show you that even  
4 though we gave an expert the redacted KrunchCash bank  
5 records that really don't convey any information at all  
6 about where money was coming from or whether money was lent  
7 out to the appropriate parties or even used for the purpose  
8 our clients thought it was being used for, that's all  
9 redacted so our expert can't figure out if these things tie  
10 out.

11           THE COURT: Yeah, I think I get it.

12           Let me turn to the other motion and I will give  
13 you a response on this one at the end.

14           MS. BEA: Will your client, I am happy to e-file  
15 it, accept the affidavit of Mr. Parzygnat in support of our  
16 motion?

17           I think it's useful to the Court, but also  
18 Mr. Berg has accused me of lack of candor to the Court, and  
19 I take that accusation in his brief seriously. This is what  
20 he bases it on, he says there was an audit, so I think that  
21 the affidavit of Mr. Parzygnat is relevant for that purpose.

22           THE COURT: You can supplement.

23           Let's turn to the motion to dismiss in the other  
24 action, in the 656688 action. I guess you're back up on  
25 your feet.

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1 MS. BEA: Different papers.

2 THE COURT: We will try to -- as you have heard, I  
3 have another hearing at 3:30. Let's try to stick to ten, 15  
4 minutes a side.

5 MS. BEA: Yes.

6 The question on this motion to dismiss the  
7 KrunchCash parties' complaint is whether the KrunchCash  
8 parties' amended pleading has set forth a viable cause of  
9 action against Pursuit or its individual principals,  
10 Mitchell Cohen and Scott Turner. We submit it does not.

11 THE COURT: I know you can spend a long time on  
12 the procedural morass, usually that's the easy part of the  
13 brief to read, this part gave me a headache, but I think I  
14 understand it. Go right to the merits.

15 MS. BEA: I won't go through how we got here with  
16 all the cases, but it is important to note that this  
17 particular action was filed in an attempt to get declaratory  
18 judgments to negate claims that Pursuit brought in the  
19 Florida case and that are now before this court in this  
20 separately captioned action.

21 When I refer to the KrunchCash parties, I mean  
22 Mr. Hackman, KrunchCash and the KC PCRD fund. Sean McGhie  
23 is also a purported plaintiff in this case, however, there  
24 are no allegations pertaining to him in the entire complaint  
25 beyond the residence, his current residence being in

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1 Colorado.

2 Moving on, the declaratory judgments should be  
3 dismissed, the request for declaratory judgment should be  
4 dismissed because they're duplicative of the Pursuit action  
5 which involves the same parties and deals with the same  
6 issues.

7 THE COURT: Would you agree that, because I get  
8 these all the time, if the declaratory judgment action is,  
9 in fact, brought first, even though it's anticipatory, one  
10 might argue that's not by itself a basis to dismiss it.  
11 Here the Court gives -- as I understand it, your client  
12 brought the affirmative claims initially in a different  
13 court, it is now here having been dismissed on jurisdiction  
14 grounds, but you fired the first shot, they fired a  
15 responsive shot here, and that's the basis for the argument  
16 that there is really no reason to keep those claims  
17 outstanding. It obviously does not make sense to have all  
18 of these claims being litigated at the same time because  
19 they are essentially mirror images of each other.

20 MS. BEA: Right. Well, I can make it easier for  
21 you. It does not matter who was first filed. Courts in New  
22 York generally will not even give priority to a first filed  
23 action where the declaratory judgment action is filed  
24 defensively to preempt an action at law, and that because  
25 there are two bases upon which the declaratory judgment

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1 requests should be dismissed. One is this mirroring  
2 issue --

3 THE COURT: I get your point. The way I see it  
4 sometimes is where it's a race to the courthouse, and where  
5 it really should be in New York, and the punitive plaintiff  
6 goes to some home district, and then sometimes cases will go  
7 on at the same time.

8 MS. BEA: In our reply, page 17, we cite numerous  
9 cases in New York that recognize in that situation you give  
10 credit to the actions at law and in equity because a  
11 declaratory judgment request is an alternative remedy when  
12 those are not available.

13 THE COURT: This whole thing does not really make  
14 all that much substantive difference, right? In other  
15 words, this just determines who the plaintiff is, but the  
16 claims will be here one way or the other whether they are in  
17 your case or in this case.

18 MS. BEA: No, the declaratory judgment claims do  
19 matter because when it does come for a trial we can spend  
20 time with them now or they can assert them as affirmative  
21 defenses which is what they really are in the other action,  
22 and we can deal with them that way as they should be before  
23 the jury where we are entitled to a jury on some of these  
24 causes of action. A request for declaratory judgment is  
25 fundamentally a request that the Court decides on undisputed

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1 facts what parties should think about, for example, a  
2 contract going forward.

3 THE COURT: It's not necessarily undisputed facts.  
4 You can bring a declaratory judgment action and have a  
5 trial.

6 MS. BEA: Yes, of course, practically speaking,  
7 yes, but as a remedy it's intended to be used to declare  
8 prospective rights on a relatively static set of facts.

9 THE COURT: Your point is that the substance is  
10 that the fact finder is not a jury under that scenario.

11 MS. BEA: Correct, correct.

12 THE COURT: I got it.

13 MS. BEA: I will move on to the three claims that  
14 were added against Pursuit and against individual defendants  
15 in the amendment.

16 First, as to the fraud claim, promises to pay are  
17 not actionable as fraud, and the amended complaint makes it  
18 clear that all of the promises that are alleged to have been  
19 misrepresentations are in the context of a bona fide dispute  
20 and an adversarial negotiation between KrunchCash and  
21 Pursuit. In that context there can't be an actionable  
22 misrepresentation. There is no reliance, and KrunchCash and  
23 Hackman cannot allege an injury because they admit in the  
24 pleading that they filed those actions six months to a year  
25 before any of the alleged statements were made, and then

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1 they became defendants in those actions where they had an  
2 obligation to participate in those actions. That has  
3 nothing to do with anything Pursuit may or may not have said  
4 so, first, they couldn't induce them to participate in those  
5 cases.

6 Critically on the fraud claims there are no  
7 allegations against the individuals, Mr. Cohen and  
8 Mr. Turner. Instead the amended complaint tries to group  
9 plead them, but that doesn't, saying in general, you know,  
10 defendants did this, defendants did that, that does not  
11 satisfy CPLR 3016(e)'s requirement that requires  
12 particularized allegations tying each plaintiff's injury to  
13 actionable conduct by each defendant. Here there are no  
14 allegations against the individuals, and, in fact, the  
15 amended complaint doesn't even make clear which plaintiff  
16 was allegedly defrauded. So on these grounds alone the  
17 fraud claim should be dismissed.

18 Second, KrunchCash asserts that Pursuit breached a  
19 settlement agreement, that is, as I just explained, there  
20 can be no breach because there is no agreement, and here  
21 there was none. There was only the adversarial settlement  
22 negotiations with both sides conditioning settlement on a  
23 future writing, and that is critical. It is fatal to this  
24 claim under Amcan which is cited in our brief along with  
25 other First Department precedent, "Where the parties

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1 contemplate the final writing being a condition to  
2 settlement, there can be no settlement agreement in advance  
3 of that."

4 Turning to the -- and as to the individuals,  
5 again, there are no allegations that they were parties to  
6 any agreement much less breached one.

7 Moving on to the tortious interference cause of  
8 action, KrunchCash does not plead any actual contract or  
9 that it was breached so there can be no tortious  
10 interference with contract as a matter of law. As to their  
11 allegation that in notifying a Connecticut Advance recipient  
12 of its legal positions, that Pursuit somehow tortiously  
13 interfered with prospective business relations, KrunchCash  
14 does not and cannot plead that Pursuit acted with malice.  
15 In other words, --

16 THE COURT: They say the word.

17 MS. BEA: They say the word, but conclusory  
18 allegations are not enough because, first of all, we cite  
19 plenty of case law saying they have to specifically plead  
20 that that conduct, that malice based on factual pleading  
21 amounts to a separate crime or tort or that Pursuit acted  
22 solely to harm KrunchCash.

23 THE COURT: The word is not enough, but they  
24 allege, you know, essentially defamatory statements which  
25 can be the kind of conduct that triggers this kind of



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1 liability in some cases.

2 MS. BEA: In theory, but defamation is special.  
3 Under CPLR 3016(a)'s pleading requirement, in order to state  
4 a claim for defamation you have to specify the precise  
5 statement you're alleging is defamatory. They didn't even  
6 attach the letter that they keep referencing to the  
7 complaint. We did to our motion at Exhibit E so you can  
8 review it. You will see that under the body of law for  
9 defamation it is a letter which expresses legal positions  
10 articulated in the context of litigation, and because of  
11 that it cannot be defamatory. It's being sent under the  
12 litigation privilege, and there is no dispute that that's  
13 the context it was sent in.

14 Again, as to the individuals, no allegations to  
15 support any cause of action against them here, and certainly  
16 nothing that would give rise to individual liability for any  
17 of these alleged tortious interference activities.

18 THE COURT: Well, the company acts through some  
19 human beings, right, so who else, who were sending these  
20 letters?

21 MS. BEA: The letter states, literally the first  
22 sentence, "My firm represents Pursuit." It's unequivocal,  
23 it's not being sent on behalf of individuals, and to attach  
24 individual liability in the context where, yes, it has to  
25 act through principals, clearly if you look at the letter

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1           which we have submitted as documentary evidence or even when  
2           you look at the e-mails that KrunchCash and Mr. Hackman  
3           allege are a settlement agreement, they're acting on behalf  
4           of Pursuit at all times. That's really not disputable or  
5           disputed.

6                        In order to try to resurrect some of the claims  
7           against the individuals, in their opposition papers the  
8           defendants, the plaintiffs in this case, KrunchCash, says,  
9           oh, but there was a conspiracy, they acted in a conspiracy  
10          to commit fraud, to commit tortious interference, and to  
11          breach a contract.

12                      First of all, there can be no conspiracy, it's not  
13          a separate cause of action without the underlying cause of  
14          action. I have already explained why these causes of action  
15          fail. More importantly, to plead a conspiracy requires,  
16          again, specific elements which I am happy to walk the Court  
17          through, we spell them out in our reply papers, but it's  
18          clear as it is with the rest of the complaint, there are no  
19          specific allegations that Mr. Cohen or Mr. Turner conducted  
20          themselves in any way that could be conceivably called a  
21          conspiracy, much less in any of the underlying claims.

22                      I think, unless the Court has --

23                      THE COURT: No, that's very helpful.

24                      Let me hear from Mr. Berg, please.

25                      Thank you.

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1 MR. BERG: Your Honor, I just want to say one  
2 thing briefly about the declaratory judgment issue. The  
3 cases that they cite are when there's a race to the  
4 courthouse, as your Honor mentioned. This is different. We  
5 filed in November of 2021. This court got jurisdiction over  
6 this dispute first. They filed in, I believe, it was  
7 certainly 2022, and it was after they went to Florida.

8 THE COURT: The Florida case was before your case?

9 MR. BERG: No.

10 THE COURT: It was not?

11 MR. BERG: There was an arbitration filed in  
12 Florida. The arbitration never got jurisdiction over us.  
13 We came to your Honor in an Article 75 proceeding. Then  
14 after the Article 75 proceeding, after you ruled  
15 preliminarily, they went to Florida, and filed, and lost on  
16 jurisdictional grounds.

17 THE COURT: They brought the first lawsuit raising  
18 these claims, then you tried to amend your petition to bring  
19 the same claims here?

20 MR. BERG: First we tried to amend the petition --  
21 you're right, I'm sorry, they did file in Florida first, --

22 THE COURT: That's my point.

23 MR. BERG: -- but the jurisdiction is what  
24 matters. When the Court gets jurisdiction over the dispute,  
25 that's what matters. That turns on first filed.

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1           Let me move on.

2           The declaratory judgment statute is also  
3           incredibly broad, and we cite it in our brief.

4           As to -- let me start with tortious interference.  
5           We quote in paragraphs 80 and 81 of our complaint in detail  
6           what can only be described as malice because the letter that  
7           was referenced says, A, KrunchCash and KC PCRD are the same,  
8           that's false, B, KrunchCash improperly intercepted Pursuit's  
9           money when KrunchCash and the Connecticut confidential party  
10          were the only parties to the contract under which KrunchCash  
11          received that money. Then they go on to say don't you dare  
12          pay KrunchCash any more, we are a creditor. All of that is  
13          false.

14          THE COURT: Did the underlying party breach the  
15          contract with you?

16          MR. BERG: Not yet, but here's the point: They  
17          said don't pay a penny to KrunchCash in the future, and we  
18          don't know yet. We have to discover --

19          THE COURT: So you don't have a tort yet.

20          MR. BERG: Well, we do because they said in the  
21          future don't pay KrunchCash. We get to discover hopefully  
22          whether that turned out to be true or not, whether the  
23          Connecticut folks actually sent them money, withheld money,  
24          or did something else.

25          THE COURT: You don't get to plead a claim and

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1 then hope to find out whether it's true or not, you have to  
2 have some basis to assert that there was an actual breach,  
3 and you don't.

4 MR. BERG: I don't as I stand here, you're right,  
5 I don't.

6 THE COURT: And damages, by definition then you  
7 don't, you can't allege damages either because you don't  
8 know.

9 MR. BERG: Let me add one thing. I don't know, so  
10 if your Honor is going to dismiss the claim I would ask that  
11 it be done without prejudice because we then could find out  
12 later that the third party's paying Pursuit, and Pursuit's  
13 misrepresented, in our view, that they are a creditor, and  
14 we improperly got paid, and none of that is true.

15 THE COURT: Then you would have a different  
16 complaint.

17 MR. BERG: I would.

18 THE COURT: Okay.

19 Prospective business relationship, the same?

20 MR. BERG: The same arguments. I mean, the  
21 prospective, I would hope, would stay in the case because  
22 it's prospective, and it's not a matter of whether there's a  
23 breach currently.

24 THE COURT: You still have to show, in that  
25 situation you have to show that you have been harmed. In

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1 other words, there has to be some relationship that was  
2 going to happen that didn't happen. You're still -- this is  
3 all still happening.

4 MR. BERG: It is.

5 THE COURT: So, you know, it's like bringing a  
6 case about an operation that is still going on.

7 MR. BERG: That's fair.

8 THE COURT: Don't you have to wait until you see  
9 how it pans out?

10 MR. BERG: I would respectfully suggest that we  
11 don't because we don't know what is going on yet.

12 THE COURT: Well, if you have independently  
13 tortious behavior, those are where you bring preliminary  
14 injunction suits and the like, but here you are bringing a  
15 tort claim about something that might happen.

16 Now for a prospective business relationship tort  
17 you have to show essentially that there was resulting injury  
18 to the business relationship, that's a fundamental element  
19 of the tort, and if that still has not happened yet, then  
20 you don't have a tort yet.

21 MR. BERG: To be fair, it has not happened yet, we  
22 don't know.

23 THE COURT: Right, okay.

24 And the other, the last claim was the fraud claim?

25 MR. BERG: Yeah, the fraud claim can be simplified

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1 by reference to paragraphs 70 through 74 in the following  
2 sense: They first said that all of our allegations revolved  
3 around oral communications. That's not the case. Then they  
4 second said the settlement agreement can't be the basis of  
5 fraud because there are promises in the future.

6 We also allege that the false statements were in  
7 e-mails in paragraphs 70 through 74 in which the plaintiffs,  
8 including Mr. Cohen, I am including Mr. Turner, we allege  
9 conspired to achieve the following: They didn't want us to  
10 walk away from the plaintiffs' claims in Maryland, and they  
11 said we will pay presently, which lead to the settlement  
12 agreement, which lead to, in our view, a meeting of the  
13 minds, and so we pled in the alternative either the  
14 settlement agreement is enforceable or you have committed  
15 fraud because you never had any intention to pay us.

16 THE COURT: Statements that you're going to reach  
17 an agreement and then you don't are not -- you can't have a  
18 fraud claim based on let's try to negotiate a deal and then  
19 it doesn't work out.

20 MR. BERG: This is not an agreement to agree, this  
21 is different. This is, we will pay for the lawsuits. They  
22 started to pay for the lawsuits.

23 THE COURT: They will pay for them if there is an  
24 agreement, right?

25 MR. BERG: No, they started to pay for them before

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1 there was any agreement. They stopped paying for them. We  
2 said we are going to walk away from these claims, and they  
3 came back and said, oh, we will start paying you again, for  
4 sure we will pay you again.

5 That is in an e-mail which they don't address.  
6 That is a present promise based also on past conduct.  
7 That's not an agreement to agree. That is paragraphs 70  
8 through 74.

9 THE COURT: The thing that you say did not occur  
10 are the future payments that you're saying they promised to  
11 make, but did not.

12 MR. BERG: Yes, that's true except that the  
13 promises were reduced to writing that they would pay, not  
14 that they would pay in the future, but that they would pay.

15 THE COURT: That's either a contract or it isn't.  
16 It's not -- if somebody says, look, I promise you I will pay  
17 these claims, and let's assume it's not a contract for  
18 whatever reason, you can't make it into a fraud claim  
19 because it didn't turn into a contract.

20 MR. BERG: No, no, no, that's not what I'm saying.

21 THE COURT: So what's the false statement upon  
22 which they relied that I am going to make these payments  
23 pursuant to an agreement that we hope to ink with you?

24 MR. BERG: Let me tell you what was done in  
25 reliance: KrunchCash did not walk away from the



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1           litigations, it continued to fund the litigations not  
2           because it had an obligation, we could have gone to the  
3           other side at any point and say, everybody, walk away, and  
4           the only reason KrunchCash kept funding is because of this  
5           promise and these series of promises that lasted from when  
6           they stopped paying in 2020, they started promising almost  
7           immediately that they were going to participate, that got  
8           reduced to writing, and we said, fine, we will continue on  
9           with the litigation. That is reliance, that's justifiable  
10          reliance.

11                        In addition, Mr. Hackman day to day dedicated his  
12          time, his time to these litigations, and Pursuit said you  
13          deserve to be paid for that, reduced to writing.

14                        THE COURT: Anything further, Ms. Bea?

15                        MS. BEA: Yes, quickly.

16                        THE COURT: Five minutes.

17                        MS. BEA: First of all, if your Honor would look  
18          at those paragraphs cited by Mr. Berg, 70 through 74, in  
19          subparts what they are really talking about is a July 2021  
20          e-mail attached as Exhibit D to our motion papers which you  
21          can look at as documentary evidence because they do  
22          reference it in the complaint and incorporate it. You can  
23          read for yourself that what is expressed in there is  
24          settlement negotiations, nothing more. There's a dispute  
25          about terms, there's a dispute about what Pursuit gets in

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1 exchange for potentially committing some of this funding,  
2 and none of that was resolved.

3 CPLR 2014 requires, by the way, that out-of-court  
4 settlement agreements have to be in writing and subscribed  
5 by the parties in order to be binding, and there's also case  
6 law that we cited to you from the First Department that says  
7 when it comes to these kind of situations where the  
8 agreement lacks essential terms and where the parties  
9 anticipate a subsequent writing there can be no agreement.

10 I think that when you look at it through the lens  
11 of fraud in which the particulars are not alleged and  
12 certainly not as to the individuals, so there's other  
13 pleading issues that are already outlined for you or you  
14 look at it through the lens of breach of contract, when you  
15 look at the e-mail they rely on you will see pending review  
16 of your draft settlement agreement, your wish list does not  
17 match my understanding, we are almost on the same page, we  
18 should enter into a funding agreement, don't know how to  
19 resolve this, will have to agree to that in final  
20 documentation. These are negotiations, nothing more, they  
21 fell apart, and we are in litigation in part because of  
22 that.

23 So you know how this story unfolded so far, but  
24 when you go back and look at the e-mails and what was  
25 unfolding, again, then I think you will see there can be no

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1           justifiable reliance or agreement.

2                       THE COURT: Okay. I will take a short break. I  
3 will be right back.

4                       (A recess was taken.)

5                       (After the recess the following occurred:)

6                       THE COURT: Here are my decisions on the two  
7 motions.

8                       First, the discovery motion in the 651070/2022  
9 matter, I'm going to grant the motion to compel subject to  
10 me locating and then signing the confidentiality order which  
11 neither Ms. Klinger or I were entirely sure we knew where  
12 they were, but we will find it. I'm not sure exactly why.  
13 Normally we sign those pretty quickly so it must have  
14 slipped through somehow.

15                      I think when you are dealing with a situation like  
16 this, the tracing of funds is a very complex task. I agree  
17 with the arguments that have been made that, you know,  
18 again, I'm not certainly presupposing that the defendant,  
19 that KrunchCash did anything wrong, but the allegation is  
20 there, and if it is of the ilk that has been described,  
21 redaction would be a very easy way to gloss over it. So the  
22 only way to actually do a muscular job of trying to trace  
23 this through is to have everything. So I think the time  
24 period, and the scope, and the no redaction, all ordered,  
25 subject to there being the opportunity to mark it as

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1 "attorneys' eyes only" including expert who are hired by the  
2 attorneys.

3 So if we have trouble locating the proposed  
4 confidentiality order, we will let you know. It's hard to  
5 describe the amount of inbound communications we receive,  
6 and we don't, I'm sorry to say, sit and monitor everything  
7 that comes in, in all the cases. So it may be that I've  
8 already reminded you of this, but if you have a situation,  
9 and I am not casting the blame on any of you, but if you  
10 have a situation where the failure for to us get to and sign  
11 a confidentiality order is getting in the way, feel free to  
12 e-mail us and let us know, we won't be upset by that. We  
13 try the best we can.

14 So motion three in that action is granted.

15 Now moving on to motion three in the other action,  
16 656688/2021, that motion is also granted. I will go claim  
17 by claim.

18 The fraud claim, the first cause of action,  
19 KrunchCash alleges essentially that defendants never had an  
20 intention of honoring their oral and written commitments to  
21 compensate KrunchCash for its time in managing all of the  
22 Maryland and Florida litigation or reimbursing KrunchCash  
23 for all legal fees and expenses incurred in the LB Pharma  
24 litigations after December 2020. That's from the first  
25 amended complaint, paragraphs 73 and 74. Plaintiff relies

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1 on an oral agreement and a phone call where defendants  
2 purportedly committed to pay costs and expenses related to  
3 the litigation which they say were reiterated and confirmed  
4 in an e-mail. In April 2021 the parties entered into  
5 settlement negotiations over the litigation expenses, but  
6 based on the information that's in the record the LB Pharma  
7 settlement was never agreed upon or executed.

8 The allegations are inadequate to state a fraud  
9 claim. Putting aside the fact that it does not plead it  
10 with the requisite specificity and does not have any  
11 allegations as to the individuals, a cause of action for  
12 fraud cannot be predicated on statements which are  
13 contractual or promissory in nature and relate to future  
14 actions or conduct. There are many cases I could cite for  
15 that, but I will cite one, the Chimento case, 208 A.D.2d 385  
16 [First Department 1994]. So it's the alternative version of  
17 the claim that is casted as fraud, I think, is inadequate.  
18 It is either statements that are in anticipation of a  
19 potential contract which turns us to the next claim which is  
20 the third cause of action for breach of contract, breach of  
21 the LB Pharma settlement agreement.

22 To the extent that plaintiff alleges in the  
23 alternative that all material terms were agreed to in the LB  
24 Pharma portion of the settlement, the e-mails exchanged that  
25 are in the record about the settlement belie conclusively

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1 that claim or undermine conclusively that claim.

2 First, as alleged in the complaint, the LB Pharma  
3 settlement was rejected by Pursuit. The submission of a  
4 draft redline document in and of itself does not demonstrate  
5 there was a meeting of the minds on all essential terms, and  
6 in the June 2021 e-mail exchanges between Hackman and Cohen  
7 which plaintiffs' claim embodies the agreement make it clear  
8 that no agreement was reached.

9 As counsel pointed out, the e-mail, which is  
10 captioned "Some thoughts from our discussions" illustrates  
11 that the parties were "making progress", and were "almost on  
12 the same page," but "didn't exactly match my understanding."  
13 Further, Hackman wrote that any settlement was pending  
14 review of Pursuit's draft settlement document, and as a  
15 legal matter where the parties anticipate that a signed  
16 writing is required, there is no contract until one is  
17 delivered, at least in a situation where the allegations  
18 don't indicate a meeting of the minds on material terms. So  
19 the third causes of action is dismissed.

20 Moving to the second cause of action which relates  
21 to the tortious interference with contract and prospective  
22 business relationships, we went through that in some detail  
23 during the argument. The plaintiffs allege that defendants'  
24 January 7, 2022 letter to the Connecticut law firm  
25 constitutes tortious interference. The claim alleges

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1 tortious interference with an existing contract for Pursuit  
2 purportedly interfering with the Connecticut Advance, and  
3 with the prospective business relationship or interfering  
4 with a confidential party with whom KrunchCash has done  
5 business for many years.

6 Starting with the interference with contract, that  
7 fails because plaintiff fails to allege defendants'  
8 intentional procurement of a third-party breach of that  
9 contract without justification and damages. Nowhere does  
10 plaintiff allege that there was a breach of this third-party  
11 contract as discussed during the argument. That is not  
12 known at this point so the claim must be dismissed.

13 Although on a motion to dismiss, the allegations  
14 in the complaint should be construed liberally to avoid  
15 dismissal of a tortious interference with contract claim, a  
16 plaintiff must support his claim with more than mere  
17 speculation. That's a quote from Ferrandino case, 82 A.D.3d  
18 1035 [Second Department 2011].

19 The prospective business relationship claim fails  
20 for similar reasons. To state a claim the plaintiff must  
21 allege a specific business relationship with an identified  
22 third party with which the defendants interfered. The  
23 plaintiff must plead more culpable conduct than required for  
24 tortious interference with existing contracts, and here  
25 plaintiff alleged that defendants maliciously sent the

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1 Connecticut firm a letter entitled "Notice of Creditor Claim  
2 to Proceeds" which allegedly contained false and defamatory  
3 statements about the relationship between KrunchCash and  
4 Pursuit, but even assuming that could be sufficient to  
5 allege some of the conduct elements, and I don't think it  
6 is, plaintiff has, once again, failed to allege a resulting  
7 injury as discussed during the argument. At this point  
8 there's a potential harm, I suppose, to the relationship,  
9 but nothing has come to fruition. So, you know, if and when  
10 there are new facts that go beyond what has been pled, then  
11 plaintiffs can try again, I suppose, but the current version  
12 of the claim is clearly premature.

13 Finally, the declaratory judgment claims: I think  
14 that Pursuit has the better of the argument here. It's a  
15 tangled and circuitous route through the various court  
16 systems, but the bottom line is that Pursuit was the first  
17 entity to go to court with these claims, the affirmative  
18 version of these claims which there is a bias toward having  
19 the normal order of things where a plaintiff brings a claim  
20 seeking relief against a defendant. A declaratory judgment,  
21 which is, you know, appropriate in many, many circumstances,  
22 is oftentimes in the context that we are talking about here,  
23 one where a defendant is facing a threat of a lawsuit and is  
24 seeking to get the court to sort of quiet title, for lack of  
25 a better phrase. Here there is no reason for that because



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1 we have these same claims in their natural state in front of  
2 me.

3 Now, again, it began in Florida. The response to  
4 that was to abandon Florida where the claim by Pursuit was  
5 brought in court to bring its affirmative claims some on the  
6 topics addressed in the declaratory judgment action. The  
7 response to that was to bring the instant action here. Then  
8 the claims by Pursuit were dismissed on jurisdictional  
9 grounds and then moved here. So we are now all here in New  
10 York in front of me with the natural version of the claim,  
11 plaintiff versus defendant, and the defenses' version of the  
12 claim where KrunchCash brought it ostensibly to have the  
13 issue resolved so that it does not leave a cloud over its  
14 head, but there's no need for it any more. So even though  
15 KrunchCash was, strictly speaking, the first to file in New  
16 York court, KrunchCash's claims still mirror Pursuit's  
17 claims, and there is no need especially given consolidation  
18 to have both versions of the declaratory judgment claims  
19 move forward, both the natural version, plaintiff versus  
20 defendant, and the declaratory judgment version.

21 "As courts in New York have found, where there is  
22 another action pending which when tried will dispose of all  
23 the issues involved in the declaratory judgment action, the  
24 Court should not in the exercise of discretion entertain an  
25 action for declaratory judgment." That's a quote from the

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1 Thor Gallery case, 35 Misc.3d 1215(A) [Supreme Court New  
2 York County 2012]. Again, here these same issues will be  
3 resolved in the tandem case in front of me, that's the  
4 651070/2022 case. So KrunchCash's declaratory judgment  
5 claims are duplicative and dismissed.

6 The parties do not appear to oppose consolidation  
7 of the two competing actions so I will grant that motion.

8 I believe I've dismissed most, I think all of the  
9 substantive claims in the KrunchCash action so I'm not sure  
10 that it matters, but to the extent that -- I will grant the  
11 motion to consolidate. Judgment has not been entered yet.  
12 They may seek leave to amend, I don't know, but I think the  
13 proper course is to consolidate them into the 2022 -- I am  
14 not sure how to consolidate them now, into what, but is the  
15 idea to have a single NYSCEF number or just have the two  
16 cases independently just jointly for trial?

17 MR. BERG: I think the idea would be to  
18 consolidate them now in their action, now that you have  
19 ruled.

20 THE COURT: Right, exactly. I am not ever sure of  
21 the mechanics of what I have to order for it to happen, but  
22 they will be consolidated into the 651070/2022 number in  
23 which Pursuit is the plaintiff, which is the natural order  
24 of things, for the, you know, punitive declaratory judgment  
25 claims anyway, and obviously if KrunchCash wants to convert

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1 any claims into counterclaims, it can proceed to do that.  
2 That will simplify things.

3 Is there anything I need to deal with besides what  
4 I have done?

5 MR. BERG: No your Honor. Thank you.

6 MS. BEA: No, your Honor. Thank you.

7 THE COURT: I would ask you to order the  
8 transcript. My written order, as you probably have seen,  
9 will incorporate that by reference.

10 With that I wish you a good day.

11 Thank you.

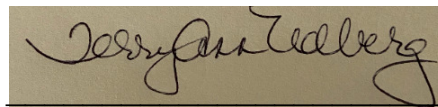
12 MS. BEA: Thank you for your time, your Honor.

13 MR. BERG: Thank you.

14 \*\*\*

## C E R T I F I C A T E

15  
16 I, Terry-Ann Volberg, C.S.R., an official court reporter of  
17 the State of New York, do hereby certify that the foregoing  
18 is a true and accurate transcript of my stenographic notes.

19 

20 Terry-Ann Volberg, CSR, CRR  
21 Official Court Reporter  
22  
23  
24  
25