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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 FLYCATCHER CORP. LTD., et al.,

4 Plaintiffs,

5 v.

24 Civ. 9429 (KPF)

6 AFFABLE AVENUE LLC, et al.,

Conference

7 Defendants.

8 -----x

9 New York, N.Y.
10 August 22, 2025
10:15 a.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 KOFFSKY SCHWALB LLC
Attorneys for Plaintiffs
16 BY: EFREM TOBIAS SCHWALB

17 STEVEN ANDREW FELDMAN
Attorney for Defendant Affable Avenue LLC

18 MANDELBAUM BARRETT PC
Attorneys for Defendant Top Experience Company, LLC d/b/a
19 We Pay Cost LLC
20 BY: BRIAN BLOCK
JOEL GEOFFREY MacMULL

21 SCARINCI HOLLENBECK
Attorneys for Defendant Joshua Chavez d/b/a
22 Onestopfastshop
23 BY: DAN BRECHER (via Teams)

24 LOZA & LOZA, LLP
Attorneys for Defendant Valley Bodega Wholesale Inc.
25 BY: ERYN YEE KWAI TRUONG (via Teams)

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(Case called)

MR. SCHWALB: Good morning, your Honor. Efrem Schwalb from the law firm of Koffsky Schwalb on behalf of plaintiffs, Flycatcher Corp. Ltd. and Flycatcher Toys, Inc.

THE COURT: Sir, thank you, and good morning.

My friends, may I start please with you, sir? Thank you.

MR. FELDMAN: Steven Andrew Feldman appearing on behalf of Affable Avenue.

THE COURT: Thank you, sir, and good morning to you.

And you, sir?

MR. SCHWALB: Good morning, your Honor Brian M. Block from the law firm of Mandelbaum Barrett for Top Experience LLC.

THE COURT: Thank you so much.

And sir?

MR. MacMULL: Good morning, your Honor. Joel MacMull on behalf of Top Experience as well. It's nice to see you again.

THE COURT: Good to see you both. Is one of you taking the lead this morning?

Mr. MacMull, your colleague, Mr. Block just pointed to you, so I think it's you.

MR. MacMULL: I think he's right.

THE COURT: Thank you so much.

I understand I have as well some folks on the line.

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1 Do I have — is it — Eryn Truong on Teams?

2 MS. TRUONG: Yes. Good morning, your Honor. This is
3 Eryn Truong of the law firm of Loza & Loza representing
4 Defendant Valley Bodega Wholesale Inc.

5 THE COURT: Thank you so much.

6 And I believe as well, do I have also — I believe
7 it's Brecher — Dan Brecher?

8 MR. BRECHER: Yes, your Honor. It's Dan Brecher
9 representing the Defendant Joshua Chavez.

10 THE COURT: Thank you very much. So good morning to
11 all of you, and thank you for coming in this morning. We're
12 here because of an order to show that I previously issued
13 concerning certain submissions filed on behalf of Affable
14 Avenue by Mr. Feldman. From my perspective, what I would like
15 to do this morning is to speak at length with Mr. Feldman about
16 what happened with some of the submissions.

17 So I think the best way for me to do that is I am
18 going to ask you, Mr. Feldman, I'm going to ask you a lot of
19 questions. I don't know that I'm going to permit the other
20 attorneys to speak. I hope I'll be comprehensive, but you'll
21 tell me if there's something that I missed. Mr. Feldman,
22 because I'm asking all of these and because I see you have a
23 lot of notes in front of you, I'll let you, please, remain
24 seated as you are answering the questions. But in the interest
25 of good order, I'll ask my deputy to place you under oath.

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(Steven Andrew Feldman affirmed)

Sir, thank you so much. Please be seated.

Mr. Feldman, I understand that you represent Affable Avenue in this case. In that capacity, are you working with any other attorneys on this matter for Affable Avenue?

MR. FELDMAN: No. I am not working with any other attorneys.

THE COURT: Thank you, sir.

MR. FELDMAN: Let me ask you a clarifying question. When you say "any other attorneys," what does that mean?

THE COURT: You're right. I'll ask a better question. Let's do it this way: Your firm was retained to represent the defendant Affable Avenue in this case, is that correct?

MR. FELDMAN: That is correct.

THE COURT: Do you have associates who work with you in your firm, or is it just you at the firm?

MR. FELDMAN: I have associates who do work with me on particular cases. In this particular matter, there is no associate involved in this case.

THE COURT: Thank you. And is any other lawyer from any other law firm assisting you with this representation in this case?

MR. FELDMAN: I have sought counsel from other attorneys in this matter. I've conferred with other counsel throughout, but in terms of representing Affable directly, I am

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1 the only person who represents Affable in this matter.

2 THE COURT: And I should be clear — I'm sure you know
3 this — I'm not interested in seeking your privileged
4 communications about the case. I just want to make sure I'm
5 getting a complete picture of what is going on.

6 When you say you've consulted other attorneys, is that
7 sort of discussions of the legal issues in the case, or are
8 they providing legal research or writing for you in any of
9 these matters?

10 MR. FELDMAN: So actually the answer is yes, actually.
11 So in this particular case, I have had several -- again, I'm
12 not going to go into the substance of the discussions because
13 those would be confidential, as your Honor said.

14 THE COURT: Of course.

15 MR. FELDMAN: But on multiple occasions, I have
16 reached out to counsel to -- well, it's two components. One
17 component is the substance of the case in terms of the actual
18 litigation theory, some of the underlying substantive matters
19 of the case, as well as the procedural aspects of the case at
20 the beginning of the case when the case was first brought to my
21 attention. So there are different layers, and in terms of the
22 ethical aspects of the case, obviously there are other counsel
23 that were addressed.

24 When Mr., for example, MacMull and I had several
25 discussions in terms of strategy and how to handle the case,

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1 obviously privileged or at least he said it was privileged,
2 those privileged discussions were somewhat substantive. And at
3 that point in time, it became clear that Mr. MacMull and I had
4 a clear conflict in terms of our positions on the case, and as
5 such, I was -- as such, I was unable to rely on him for
6 anything substantively, although we could still have
7 conversations on the case. So I had to stop consulting with
8 him on the case.

9 THE COURT: I'm a little puzzled by the term
10 "consulting with him." Obviously he represents another
11 defendant in the case, and to the extent that there are common
12 legal issues that each of you is facing, I could understand
13 that you might discuss and you might say, does this make sense
14 as a defense in the case or things of that nature. Obviously,
15 he cannot assist you — unless you think he can — with the
16 drafting of legal submissions in this matter.

17 MR. FELDMAN: So yes. So I would definitely agree
18 with that part. However, I would parse that into two different
19 things.

20 THE COURT: OK.

21 MR. FELDMAN: So there's about four different levels
22 of cooperations in terms of actual legal writing that attorneys
23 can do. The first level of cooperation is just talking about
24 the overall strategy in terms of whether we're going to align
25 our submissions. So for example, opposing counsel can

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1 potentially agree with non-opposing counsel that we're going to
2 go with a certain line of the case because it works for us to
3 get a favorable judgment, you know, success, right?

4 THE COURT: Of course.

5 MR. FELDMAN: And that happens all the time and there
6 are ethical issues with that. I'm not dealing with that in
7 this case personally.

8 Then there's, in terms of coordinating, we can also
9 talk frankly about our agreed positions. And then when it
10 comes to agreed positions, we could say, hey, I'm just going to
11 go and like me too your submission or I'm not going to me too
12 your submission. And each counsel is responsible for their own
13 submissions, but if I am me-too-ing it, then obviously I have a
14 responsibility. And to that end, Mr. MacMull and I had an
15 initial discussion about the matter.

16 In the beginning, we were actually, you know,
17 cooperating almost on a more minute level in terms of
18 discussing how we would address particular letters to the
19 Court. For example, there was a situation where there was a
20 very large submission submitted to the Court by plaintiff's
21 counsel, and Mr. MacMull, you know, in correspondence said,
22 hey, why don't you win on the merits, kind of thing; like, why
23 do you have to do this?

24 Those kinds of correspondence that we had together, I
25 agreed with him in terms of obviously this should be won on the

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1 merits. But in terms of the actual focus of the legal
2 arguments that, again, did not cross the line into preparing
3 documents, it was, hey, I agree with you, and I submit -- and
4 in my letter to the Court, I wrote my response. I said like I
5 concur with his position.

6 THE COURT: OK. I'm going to ask you to speak a
7 little slower for the court reporter and Judge just so I can
8 take better notes. Thank you.

9 MR. FELDMAN: Yes, your Honor.

10 THE COURT: Now, was that the third level of
11 cooperation that you were talking about?

12 MR. FELDMAN: No. That's still the first level.

13 THE COURT: We're still on level one.

14 MR. FELDMAN: Level one, which is, I would say, the
15 strategic coordination.

16 THE COURT: OK. Have we exhausted level one? I just
17 want to know what two, three, and four are.

18 MR. FELDMAN: All right. I can anticipate questions,
19 so I apologize. So I'm trying to focus on what I think is the
20 best view, in my belief, since I am trying to be as accurate as
21 possible.

22 THE COURT: Of course.

23 MR. FELDMAN: And since this is a theory that I have,
24 I'm presenting it as best as I can on the fly.

25 THE COURT: Of course.

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1 My point, sir, is you said to me at some point that
2 there were four levels of cooperation that attorneys can do.
3 And then you talked about discussions of overall strategy
4 positions and the possibility of me-tooing arguments. I did
5 not know whether those were three things or one thing. You've
6 now told me they are one thing. For my own completeness, may I
7 know if, I'm allowed to, what levels two, three, and four are
8 in your four levels of cooperation?

9 MR. FELDMAN: So if I can explain, so the last one we
10 talked about, which is the me too part --

11 THE COURT: Yes, sir.

12 MR. FELDMAN: That crosses the line into number two.

13 THE COURT: I see. OK. And then three and four?

14 MR. FELDMAN: Three and four would be substantive
15 arguments in terms of — let's say — drafting a certain part
16 of the complaint and someone, you know, basically either
17 dittoing it essentially, which is me-tooing it, and me copying
18 it, actually copying it. And then there's the other part,
19 which is conferring with counsel, and requesting whether it's
20 courtesy copies of a case that seem to make no sense or seem to
21 have an issue, or vice versa telling other counsel, hey, you
22 made a mistake over year; it's going against our strategy;
23 maybe you want to fix it.

24 So that's a coordination that does go to the substance
25 of the work and does go to the underlying case. That's where

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1 the, sort of, conflict of interest starts coming up, which is
2 if interests of the two parties don't align, there are subtle
3 arguments that each one may be making that don't align and
4 therefore the coordination at that point starts becoming much
5 more fraught with consideration, and you have to sort of, I
6 guess, tread more lightly in terms of how you cooperate and how
7 you work together.

8 So in this particular case, in terms of the second
9 level, we did coordinate in terms of discussing the strategy in
10 terms of our positioning. I can't disclose those things
11 because again I don't --

12 THE COURT: Of course, and I'm not asking you to.

13 MR. FELDMAN: But I will say a significant point of
14 contention without substance was a significant part of my line
15 of -- my lining of reasoning in the case. And that particular
16 part of the case took a turn into the more substantive part,
17 which is where I'll get into the next level, which is in that
18 point. So --

19 THE COURT: Sir, let me ask you to pause for a moment,
20 and let me ask more bite-sized questions.

21 MR. FELDMAN: Sure.

22 THE COURT: There came a point in time where you
23 decided to file a motion to dismiss the third amended
24 complaint, yes?

25 MR. FELDMAN: Yes. That's right.

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1 THE COURT: How did you go about preparing that
2 memorandum?

3 MR. FELDMAN: So I had two memorandums.

4 THE COURT: OK.

5 MR. FELDMAN: I did a first memorandum which focused
6 on the standard outline that we outlined in the initial -- in
7 my letter briefing as well as in response to plaintiff's
8 submissions in their opposing letter.

9 THE COURT: I see. So your initial motion to dismiss
10 was both the explication of your affirmative arguments and an
11 attempt to anticipate, based on the plaintiff's pre-motion
12 submissions, what their arguments were going to be?

13 MR. FELDMAN: Correct. And to that end, those
14 involved, I think it was -- I don't remember exactly how many
15 cases, but I would say that it was somewhere -- if it was about
16 60 cases, I wouldn't be an exaggeration. And that was my
17 initial corpus of case law that I was originally utilizing for
18 preparing my outline.

19 THE COURT: Right. You said 60 cases. Now, in one of
20 your emails to Mr. MacMull, you suggested that you had a
21 repository of cases.

22 MR. FELDMAN: Correct.

23 THE COURT: And is that repository from which you drew
24 when you were thinking about how to prepare the memorandum in
25 this case or something else?

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1 MR. FELDMAN: So there's two different repositories.
2 And when I say -- so that repository is not the same repository
3 that I used for the initial part of the case.

4 THE COURT: But you said that you did.

5 MR. FELDMAN: There's two different. I have two
6 different -- when I said "repository," I meant I had a folder
7 of cases that were downloaded or collected that were based on
8 the -- all the cases that were cited in the premotion briefing.
9 So that means every single --

10 THE COURT: Is it your view, sir, that there were 60
11 cases cited in the premotion submissions?

12 MR. FELDMAN: No. I'm saying I don't remember how
13 many there were. I couldn't say one way or another. There
14 were many cases that were cited. I was actually going through
15 both the cases that were cited by plaintiff's counsel in their
16 letters as well as the cases cited by other counsel for
17 defendants as well as the unique areas of case law that I felt
18 were important to distinguish. For example, the case that I
19 cited involved -- I don't remember it offhand but the NFL case
20 that I cited involving -- I believe the word was controlled
21 carnage, which involved an arbitration agreement where your
22 Honor ruled upon. So, for example, that was a case that I had
23 in my corpus, but that was not a case that was cited by
24 opposing counsel or by cocounsel or by anybody else for that
25 matter.

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1 THE COURT: OK. Go ahead.

2 MR. FELDMAN: So in terms of the corpus of cases, so
3 the way I do my analysis is that I gather all the cases that
4 were cited prior in the cases so I know where all the parties
5 are in terms of their positioning. And then what I do is I do
6 a critical analysis of those cases following the line history.
7 So, for example, just to use as an example, when an argument is
8 being made about trademark infringement concerning warranty,
9 OK. I'm just using this as an example because I did not get
10 into that, but I think it's important to make the point.

11 So one of the things that I looked at was what the
12 standard of party expectation was for warranty. So, for
13 example, I followed all the case law going back to 1930 where
14 some of this was developed in terms of the expectations of
15 consumers when they are purchasing a warranty. Because in
16 those line of cases, at that time, prior to the age of the
17 internet and prior to, it's cheaper to buy a new one than it is
18 to fix, you know, that was the -- that was where the case law
19 really came from. So I focused, for example, on a lot of those
20 cases that were foundational to the way the court today views
21 consumer-related concerns in the law.

22 THE COURT: And what legal research databases are you
23 using to do this? For example, do you have the books at home
24 and you are going through those or are there computer-aided
25 legal research databases you are using or something else?

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1 MR. FELDMAN: So there's a few different levels. So
2 at the time when I first started this case, I had something
3 called Casetext.

4 THE COURT: Yes.

5 MR. FELDMAN: Now Casetext was purchased by Thomson
6 Reuters, OK. Originally Casetext had access to the largest
7 non -- basically the largest available data set. I believe --
8 and, again, I can't verify now because it's too late -- they
9 had access also to Westlaw private citators, which is the one
10 thing that I needed, especially with regard to federal practice
11 and being able to cite to cases outside of the tristate area,
12 because, again, case law, especially when it comes to
13 arbitration arguments and especially when it comes to cases
14 with arbitration with technology companies --

15 THE COURT: Please slow down, sir. Thank you.

16 MR. FELDMAN: Sure. Cases involving both technology
17 and non-technology cases involving non-Second Circuit case law
18 because oftentimes the decisions that relate to interpreting
19 arbitration agreements, interpreting warranty, interpreting the
20 expectations of online commerce since the dot-com boom has
21 become the territory of the Ninth Circuit.

22 So to the extent that -- if you would like to look for
23 cases in the second department, there are cases, but many are
24 unpublished. And when it comes to threshold cases such as
25 preliminary orders on motions to dismiss or preliminary orders

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1 on -- those are often not reported. And, again, I don't know
2 who makes the decision when to report them, but if you want to
3 get those cases, you can either go to PACER and download them
4 yourself; you can go to something called the free -- I forget
5 the term. You can also go to something called the Free Law
6 Project, FLP, and they've been sued by Westlaw, I believe. And
7 what they did is they have a project called Recap where if
8 somebody downloads a PACER case, a PACER decision, they can
9 share it with others so that others have access to it without
10 having to pay the PACER fee.

11 THE COURT: OK. Sir, as I understand it, Casetext was
12 purchased by Thomson Reuters in August of 2023.

13 MR. FELDMAN: Correct.

14 THE COURT: And this case was filed in December 2024.

15 MR. FELDMAN: That's correct.

16 THE COURT: So one of the things you said to
17 Mr. MacMull, for example, is that some of these citations were
18 originally gathered during my initial research in
19 December 2024, when I had broader access to legal databases,
20 including Casetext with CoCounsel.

21 MR. FELDMAN: Right.

22 THE COURT: However, when did your access to Casetext
23 expire?

24 MR. FELDMAN: At the end of 2023 --

25 THE COURT: Yes.

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1 MR. FELDMAN: -- there was -- so I actually had
2 correspondence with Casetext to discuss with them. I actually
3 spoke with the CEO of the company at the time to talk to him
4 about some of the issues that I had with the -- with Casetext
5 as product, and I also used to -- when I was in law school, I
6 worked -- I was trained to work for Westlaw in their student,
7 you know, research unit. I never ended up doing it, but at the
8 time, I learned about how Westlaw does a lot of their --

9 THE COURT: Sir, you are not answering my question.

10 MR. FELDMAN: I'll get to that.

11 THE COURT: No. I want you to actually answer my
12 question. I don't want the scenic route, sir.

13 So when did you stop using Casetext?

14 MR. FELDMAN: So Casetext then called me after
15 whenever it happened in 2023. I don't know the date.

16 THE COURT: August of 2023.

17 MR. FELDMAN: When it was announced. Casetext, at
18 that point in time, went into a sort of, you have a choice.
19 You could continue using us and then it would be done, or you
20 can jump on board with Westlaw and pay a cut rate for access to
21 Casetext and CoCounsel, which was their -- which was one of
22 their tools that they had which involved, you know, cite
23 checking, but it used an AI format which now belongs to
24 Westlaw.

25 That -- so I jumped onto the Westlaw bandwagon but

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1 under the Casetext framework, which meant that when I logged
2 in, I had a Westlaw login for Thomson Reuters but extremely
3 limited access. I had access to Casetext but also extremely
4 limited access, because when Casetext was transferring over to
5 Westlaw, whatever they did messed things up.

6 So in addition -- yes. So in that period of time,
7 between the time that I stopped paying for Westlaw, I had
8 access to Westlaw in a limited fashion. I had access to
9 Casetext in a limited fashion because the two were not
10 completely merged.

11 THE COURT: For how long did that persist?

12 MR. FELDMAN: Until around December of 2024. And then
13 I assume in January things were over, but at that point in
14 time, I told them I'm no longer going to subscribe to Westlaw
15 because essentially I felt that it was a bait and switch.

16 THE COURT: All right. And so by December of 2024,
17 you no longer had access --

18 MR. FELDMAN: At the end of December 2024. By
19 January, essentially I had no longer had access or limited
20 access. I did have some access because I would check it to
21 say, hey, did you fix your problems with the transition from
22 Casetext to Thomson, but there was no way I could use it in an
23 effective manner. In fact, I told them I wanted to cancel my
24 thing. They then had correspondence with me. Again, I don't
25 remember the exact timeline, but I had correspondence with

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1 various customer satisfaction associates, and I had multiple
2 emails with them saying, hey, you guys, the services don't work
3 as intended. The warranty -- the intended purpose of purchase
4 was not good, and to this day, I still have a dispute with
5 Westlaw.

6 THE COURT: All right. Fine. But the complaint in
7 this case was filed on December 11 of 2024. When was it served
8 on your client and when you were retained?

9 MR. FELDMAN: I was retained on December 11 -- I
10 believe December 11 or December 10, my client received a cease
11 and desist order. I was retained to respond to the cease and
12 desist order. I sent a response to the cease and desist order
13 on December 11 -- on December 12, I think. I don't remember
14 exactly the date.

15 When I was doing that cease and desist order prep, I
16 did most of the research involving what I used to prepare my
17 response. Part of that research involved in -- part of that
18 research involved some of the underlying things in this case.

19 THE COURT: One moment, sir. You say most of the
20 research did you to prepare a response. What do you mean by
21 that? Do you mean the answer or do you mean your affirmative
22 motion to dismiss?

23 MR. FELDMAN: No, my response to the cease and desist
24 letter.

25 THE COURT: I see. Thank you.

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1 MR. FELDMAN: The cease and desist letter contained
2 various accusations which are somewhat in the complaint. I was
3 not aware that the date after the cease and desist order was
4 dated a lawsuit had been filed, but at that time I wasn't
5 aware.

6 THE COURT: All right. So I see that there appears to
7 have been a waiver sent on or about December 17.

8 MR. FELDMAN: Correct. I mean, I can't say correct,
9 but I can --

10 THE COURT: OK. I have on the docket on January 15, a
11 waiver of service returned, executed as to Affable Avenue. The
12 waiver was sent December 17, 2024, so I see that.

13 Now, I don't think we have a conference until February
14 or March. There's an amended complaint in April of 2025. The
15 initial pretrial conference was held on April 11 of 2025. So
16 by then, sir, you no longer had access to CoCounsel or Casetext
17 or Westlaw for that matter.

18 MR. FELDMAN: That is correct.

19 THE COURT: You had some materials that you had
20 gathered in connection with the response to the cease and
21 desist order. Of course, that was based on whatever the
22 arguments were with the cease and desist order, which may or
23 may not have made their way into subsequent iterations of the
24 complaint.

25 When you spoke about the repository of cases that

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1 you've compiled, was that in connection with your response to
2 the cease and desist order or is this repository to which you
3 refer something else?

4 MR. FELDMAN: The repository, again, I think -- you
5 are using the term repository.

6 THE COURT: Sir, I'm repeating your term.

7 MR. FELDMAN: Right. The term that I used in my email
8 with cocounsel, right?

9 THE COURT: Yes.

10 MR. FELDMAN: So when I was referring to that, I would
11 have to see the actual context. If you could read the context
12 back to me.

13 THE COURT: I did, sir. Thank you.

14 MR. FELDMAN: I don't have that in front of me right
15 now.

16 THE COURT: It's an exhibit in this case, sir, but go
17 ahead.

18 MR. FELDMAN: Right. So it is on the record.
19 However, I'm right now speaking under oath, and I --

20 THE COURT: Yes, about a document that you wrote, an
21 email you wrote. What is the repository?

22 MR. FELDMAN: I don't recall what it says. I can't
23 say for sure. So I know that you used the term repository --

24 THE COURT: Ms. Noriega, can I ask you, please, to
25 show Mr. Feldman the bottom paragraph of this page? I'm asking

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1 him what he means by the term repository. This is the term
2 that he used.

3 MR. MacMULL: Could you tell us the page you are
4 looking at?

5 MR. FELDMAN: Well, it's not paginated the same way.
6 So, Mr. MacMull, thank you for your message
7 regarding --

8 THE COURT: Don't read it into the record, sir.

9 MR. FELDMAN: So I wrote: Many of the citations were
10 drawn from a repository of many cases I compiled in connection
11 with Amazon cases. Right?

12 THE COURT: Yes.

13 MR. FELDMAN: Since I was first retained in this and
14 similar matters.

15 THE COURT: OK. So what is the repository?

16 MR. FELDMAN: Including older decisions that have
17 shaped the legal framework relevant to the claims at issue.
18 Some of those --

19 THE COURT: Sir, I specifically told you not to read
20 this into the record. I'm asking you a very simple question.
21 What is the repository to which you refer?

22 MR. FELDMAN: It's a repository of, I would say,
23 numerous cases that I have collected over the last few years
24 involving cases where I was involved with Amazon-related
25 disputes, Amazon-related issues.

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1 THE COURT: How is it collected, sir? Is it a folder?
2 Is it an electronic document? How does this repository exist?

3 MR. FELDMAN: I have electronic -- I have folders. I
4 have folders where I have actual like copies of cases or I have
5 snippets of cases that I copied from in my -- you know, that
6 I've copied from in order to develop the line of reasoning that
7 I use when I'm making arguments.

8 THE COURT: And so by the time you were preparing your
9 brief in support of your motion to dismiss, we had had the
10 premotion conference. There was an exchange of letters in that
11 regard. There was also a letter in or about May from
12 plaintiff's counsel that is referring to certain things. I see
13 your response is May 16.

14 I suppose I should go back one step. At the time you
15 were preparing the response to the premotion letter --

16 MR. FELDMAN: Yes.

17 THE COURT: -- you were using this repository, or
18 where were you getting your cases and your arguments?

19 MR. FELDMAN: So, for example, the case that I found
20 about your Honor's decision regarding controlled -- I think the
21 word was controlled carnage. I don't remember because I was
22 looking specifically for your Honor's arbitration decisions.

23 THE COURT: If it's the NFL case, I had one NFL case
24 involving Ezekiel Elliott.

25 MR. FELDMAN: That was, yes.

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1 THE COURT: That may be it, although I would not think
2 that that was necessarily relevant to what was going on here
3 but OK. Where did you find it?

4 MR. FELDMAN: I actually researched -- I don't
5 remember exactly how I researched, but I researched for your
6 Honor's name as well as decisions regarding arbitration.

7 THE COURT: I'm just going to note something that may
8 have relevance later on. Your letter to me of May 16 cites the
9 Himmelstein decision that causes us so much consternation later
10 on. There you got it right. You got the case name right. You
11 got the court right. You got the citation right. I will never
12 understand — but you will eventually tell me — how it is it
13 came to be so wrong later on.

14 So you prepared your premotion letter. I scheduled
15 briefing on the motion to dismiss. Go ahead.

16 MR. FELDMAN: Because you are making a point which is
17 a valid point. There was a disconnect between the line of
18 reasoning that I used in my drafted letter that I wrote at that
19 time, which was based on my own research and my own collection
20 of documents and snippets of cases that I refer to in the past,
21 whether those were -- and, again, those were from, sometimes,
22 Goggle Scholar.

23 Google Scholar has a -- their citations are not full
24 citations in the sense that you would only have, for example,
25 the name of the case and --

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1 THE COURT: What is the name, Legal Scholar?

2 MR. FELDMAN: Google Scholar at Google.com, which is a
3 free database which used to be quite robust, which involved the
4 ability, for example, to check case cites, so you can see where
5 the case is cited in other cases. However, they will not use
6 Westlaw reporters. And so, for example, in New York cases,
7 they'll only use, for example, slip opinion numbers.

8 THE COURT: We are getting ahead of ourselves. I'll
9 simply note that Google Scholar does not help you here because,
10 of course, the Himmelstein decision is a reported decision.

11 MR. FELDMAN: It's a reported decision, and that's the
12 way I reported it.

13 THE COURT: Yes, except when you didn't.

14 MR. FELDMAN: And when I didn't, which I addressed in
15 my letter, and that does not -- again, I wasn't citing it for
16 my purposes. I was quoting -- it was not -- it was not --

17 THE COURT: Sir, we will get into that at some later
18 point.

19 MR. FELDMAN: Sure.

20 THE COURT: You're suggesting to me that for this
21 May 16 premotion submission, you're using your existing legal
22 research and Google Scholar?

23 MR. FELDMAN: Google Scholar.

24 THE COURT: And what else?

25 MR. FELDMAN: At that time, I believe I was starting

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1 using vLex.

2 THE COURT: Yes. VLex has AI components to it, but
3 let me understand how you are using it.

4 MR. FELDMAN: So in terms of the AI components, there
5 are -- it has multiple -- I just need a drink.

6 THE COURT: We can take a break. We don't have water.

7 MR. FELDMAN: I have a drink. May I?

8 THE COURT: All right.

9 MR. FELDMAN: Thank you. Can you repeat?

10 THE COURT: Yes. I'm trying to understand, please,
11 how you are incorporating vLex into the preparation of the
12 premotion letters. But please make sure your throat is clear.
13 I don't want you to have any problems.

14 MR. FELDMAN: It's not.

15 THE COURT: Take a moment, sir.

16 Off the record, please.

17 (Off-the-record discussion occurred)

18 THE COURT: The question, as I recall, sir, is I
19 wanted to understand how you were using vLex in the preparation
20 of your premotion submissions.

21 MR. FELDMAN: So I don't recall exactly how I used it,
22 but I can tell you how I generally approach vLex. So vLex is
23 a -- is an old product, which went under -- I forgot the name
24 of the term of what it used to use. Maybe Veritas or some
25 other term. I used to use it in the past. Oh, it was called

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1 Fastcase, F-a-s-t-c-a-s-e.

2 It was offered with, I believe, Loislaw, one of the
3 older citation databases. They were -- I believe in my view,
4 they were substandard in terms of their ability to do anything.
5 However, once I could no longer use CoCounsel and Casetext and
6 Thomson Reuters, which originally -- which was part of the
7 initial subscription that I had, I had to stop using that, and
8 I had to use other sources. So I experimented with several
9 different options. The one option that was available that was
10 affordable was vLex. VLex was offered through the New York
11 State Bar Association.

12 So I used -- I got onto vLex, and for the most part,
13 it has some limited research capabilities. Unfortunately, it
14 does not have good citation capabilities, or at least then at
15 that point it did not have. One of the issues with citation at
16 that point in time was that when you reported a case, they only
17 provided you with a certain part of the actual citation, not
18 the full citation. So, for example, they wouldn't provide you
19 with -- I think they didn't provide you with the full name and
20 string. They only provide you with the reported citation or
21 not unreported citation format, but it wasn't in legal form or
22 it wasn't in the proper form.

23 Whenever I would do a vLex search, where I am
24 reporting a case from vLex, I would then have to go to another
25 step, which is check citation or cite check. If it was a

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1 larger case where I had more time or I had whatever, I would go
2 to the law library, and I would do -- I would spend a few hours
3 on Westlaw or Lexis researching those issues. I don't remember
4 if these cases specifically I did research in -- using the
5 court's available free research through Westlaw at the library.

6 THE COURT: You would go to a law library and use
7 Westlaw and Lexis for free using whose password?

8 MR. FELDMAN: Using the public -- the available public
9 resources that they have over there.

10 THE COURT: I see.

11 MR. FELDMAN: Under the New York State reporting
12 system library resources.

13 THE COURT: All right. But you're saying that as you
14 were using vLex, you knew that there were problems with
15 citations.

16 MR. FELDMAN: Absolutely.

17 THE COURT: You knew that because you never got a full
18 citation.

19 MR. FELDMAN: It wasn't -- no. The citations were
20 sometimes full because. They sometimes were embedded in cases.

21 THE COURT: Yes.

22 MR. FELDMAN: So I trusted the cases that they cited
23 in full were correct. But in terms of doing full citations in
24 an actual brief, I had to do my own second check, which the way
25 I do that often is I would take the citations that are in the

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1 case or that I'm citing, and then if I'm going to use them, I
2 would then go to what is called Google Scholar as a cite
3 button, which is what I included in my thing. And I would
4 enter the -- either the case name. Sometimes the case names
5 would not be the same because not all reporters report cases
6 the same way.

7 Also, if you don't have an official reporter, you have
8 to decide how to name a case with multiple parties. Like, for
9 example in this case, the short case is Flycatcher vs. Affable,
10 right, but if you wanted to do -- I don't know how Westlaw
11 would cite it, but Westlaw would cite it potentially
12 differently than the way I would cite it.

13 THE COURT: OK.

14 MR. FELDMAN: So I have to make a judgment call
15 sometimes with how to cite cases that are not reported or cite
16 cases that are reported in vLex or in other cases.

17 THE COURT: But that would seem to extend only to how
18 you would name the case, not how you would cite it. For
19 example, you might have a Westlaw site or Lexis cite or a
20 miscellaneous cite, but I'm not sure -- my real concern, as
21 we'll get to, is that there are just cases in your brief for
22 which those cites don't exist, that case name doesn't exist, or
23 that case name has a different cite. Again, we'll get to that.

24 You went to the library only to cite check and not to
25 do research?

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1 MR. FELDMAN: No. I went to do research as well.

2 THE COURT: On Westlaw?

3 MR. FELDMAN: On Westlaw and Lexis.

4 THE COURT: OK. And you said a few moments ago that
5 sometimes when you had a larger submission, that might
6 determine whether you went to the library. I want to make sure
7 I understand that correctly.

8 MR. FELDMAN: Correct.

9 THE COURT: So perhaps if you had a one-paragraph
10 letter you were writing to the Court, you might not make your
11 way to the law library. But for an actual brief, you would go
12 to the library and do a brief search and cite checking at the
13 library?

14 MR. FELDMAN: Correct.

15 THE COURT: All right.

16 MR. FELDMAN: I mean, if I felt that it was necessary
17 to do a cite check.

18 THE COURT: All right.

19 MR. FELDMAN: Now when I do -- again, to the extent
20 possible, I try -- I will -- I check every single one, double
21 check every one, because I want to make sure that they are
22 correct. But at the time if I felt that the citation was
23 sufficiently correct based on the way that it was cited in
24 other cases that I found that were similar, I would use them.
25 However, I also found out subsequently that oftentimes cases

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1 are cited, for example, Westlaw cases are cited in reporters
2 that are not reported. And sometimes I will find them and I
3 would say, OK, I would rather not use the Westlaw reported
4 citation or the non-official citation that Google uses, and
5 I'll try to find another case that will cite to that case in --
6 that will cite to that case.

7 THE COURT: I don't understand why you would do that.
8 What you're saying is if there is a decision that exists, it's
9 an unreported decision. It exists only with a Lexis cite or
10 Westlaw cite because there's no reporter that cites it. Are
11 you suggesting that what you wanted to do is find some other
12 case citing that case?

13 MR. FELDMAN: Which I would do.

14 THE COURT: Why would you do that? It doesn't tell
15 you what the case says. That tells you what some other court
16 thought the case said, but that's not a legitimate way of cite
17 checking or doing research.

18 MR. FELDMAN: Absolutely. It's definitely not. I
19 would parse that out.

20 THE COURT: You keep saying "parse that out." I find
21 that interesting, sir. Go ahead and parse that, but then you
22 are going to explain to me how you put together the actual
23 brief in support of your motion to dismiss in this case.

24 MR. FELDMAN: OK so -- OK. Your Honor, I don't
25 remember what I was saying before. Is it possible to read back

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1 the record?

2 THE COURT: No. You were parsing something out for
3 me, and what I was suggesting to you was that it was
4 ill-advised for you to cite cases by finding something other
5 case mentioning that case and then seeing the citation
6 contained in it.

7 MR. FELDMAN: Well, actually -- well, let me clarify
8 that. What happens is that you have cases that are cited in
9 many decisions. The same cases cited in decisions, those cases
10 are cited sometimes in subsequent decisions for the actual
11 principal that that case is for. However, sometimes those
12 citations only refer to a Westlaw citation, or at times,
13 especially if it's a new case, it would show a reporter, F.2d,
14 whatever, and it will have a blank space.

15 THE COURT: Yes.

16 MR. FELDMAN: If I'm citing to or referring to the
17 legal argument in that case but I would like to have a full
18 citation, I would try to find another case that cites to that
19 case for that proposition.

20 THE COURT: Yes. Although another thing you could do
21 is simply use, at the law library, Westlaw, if it has not yet
22 been assigned an F.4th cite or something like that, you could
23 indicate it hasn't been. And if it hasn't been, you would see
24 that.

25 MR. FELDMAN: That's now.

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1 THE COURT: I don't care about now. Now doesn't help
2 me. I need to know what you did here. I need to understand
3 because we're doing a postmortem to figure out how one-quarter
4 of your cases were nonexistent hallucinations.

5 MR. FELDMAN: Fourteen out of 60 cited cases.

6 THE COURT: Just under one-quarter of the cases. I
7 cannot understand how you did that, sir. Tell me how you did
8 that, how you put together this brief to be so bad.

9 MR. FELDMAN: So after I prepared my -- after I
10 prepared my outline for my brief or essentially most of the
11 arguments that I was doing in my brief which followed my prior
12 research, again, it wasn't complete because at the time I
13 wasn't done yet. I was going to spend my -- the last week
14 basically finalizing my arguments. That's when I indicated I
15 received a call from my client advising about what was going on
16 in the -- about what was going on on the Amazon -- in the
17 Amazon side of things with regard to his account, which was
18 involved in this -- which was to some part, not all of it. But
19 some part of it was involved in this case.

20 And at that point in time, I reached out to counsel
21 that was in communication with Amazon to verify what the status
22 was. I also went to verify the status of the appeals that were
23 going on in Amazon, which at the time was going nowhere
24 partially because we had this lawsuit and partially because
25 Amazon -- I think as Flycatcher has said, Amazon did not

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1 respond to their initial complaints to them about theft, and it
2 was only after they complained about it -- so it was reported
3 in the news. It was only after they complained about it that
4 Amazon did something about it, which included shutting down my
5 client's account.

6 So that changed the case itself because that now meant
7 that my client is being prejudiced by a decision that has now
8 escalated into -- escalated into Amazon procedures dealing with
9 accounts, which is governed primarily by the BSA, by the Amazon
10 Business services Agreement, which was mentioned in this case.

11 THE COURT: Yes, and which I said to you was not a
12 very successful or thoughtful way of getting arbitration with
13 respect to Flycatcher. Sir, once again, I'm really just asking
14 you to answer my questions, and I'm trying to make them as bite
15 size as possible. I ordered the submission. There was a third
16 amended complaint. I don't believe I allowed a fourth amended
17 complaint. I scheduled the opening briefs to be filed on or
18 before June 20 of 2025. That is in May.

19 So I want to be sure we're both focusing on the same
20 time period. The outline of which you speak, the efforts you
21 were going to make in the final week to fill in necessary
22 information, that is in June. You're saying then that you were
23 derailed because of issues within Amazon?

24 MR. FELDMAN: Within the Amazon part of it.

25 THE COURT: You were filing a motion to dismiss, and

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1 I'm not sure any of these Amazon issues made its way into the
2 motion to dismiss that you filed with me. Let us focus on the
3 brief that you filed with me.

4 MR. FELDMAN: At that time in point, I was trying to
5 get -- I was trying to substantiate the information because --
6 OK. I think this is an important point, but if your Honor
7 doesn't want me to mention it --

8 THE COURT: I'll let you make the point, but once
9 again I don't see -- you are asking me to compel arbitration
10 based on terms of service that did not in any way include
11 Flycatcher. You were trying to bind them to your terms of
12 service with Amazon. I don't understand how they get bound
13 into it, but I also don't see that any of that discussion is in
14 our opening brief.

15 MR. FELDMAN: It isn't in my brief.

16 THE COURT: Right. So then why do I care about? I
17 care about what you filed with me.

18 MR. FELDMAN: Because when I -- because the -- there
19 was a nuanced argument that I was trying to change and make,
20 which I was not ultimately able to make. However, originally
21 the focus was on -- the focus was, for my arguments, was
22 originally on the standard -- whatever was in the prior
23 submissions because of this change, I felt because of something
24 called, which I believe -- and again, there isn't much case law
25 about it. But it is the concept of estoppel, and it is used in

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1 the context of unions and pension funds where if you are a
2 party to a collective bargaining agreement that has an
3 arbitration clause, or you have a -- or you are a party to or
4 you -- either receive benefits from that agreement, and even if
5 you are not on the agreement, you are really just a me too.

6 THE COURT: I really appreciate, Mr. Feldman, you
7 trying to teach me the law of --

8 MR. FELDMAN: I'm just --

9 THE COURT: No. But even as you describe it, you are
10 trying to use it offensively against an entity that according
11 to the complaint your client harmed by taking their products.
12 I'm not there, sir.

13 I keep asking you, and I'm not sure why you are
14 refusing to answer me. I am asking you how you put together
15 the actual memorandum you filed by me, which has none of this
16 discussion of the arbitration issues with Amazon.

17 MR. FELDMAN: So I redrafted my memo that week. And I
18 redraft -- I reorganized my entire memo that week. I then did
19 subsequent research, which focused primarily on case law, which
20 I was not able to find case law in our circuit involving cases
21 on point. And I didn't have access at that time to Westlaw or
22 Lexis because I didn't have the time to get to it at that time,
23 not because I didn't want to but because I had other things
24 going on.

25 THE COURT: Sir, that doesn't matter to me at all.

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1 Your professional obligation requires you to cite legitimate
2 cases to me.

3 MR. FELDMAN: Absolutely, your Honor.

4 THE COURT: Sir, you are not answering my question.
5 I'm not sure how many ways I can ask it.

6 MR. FELDMAN: So what I did I was -- what I did was go
7 to the active -- Amazon is now based in Washington state. I
8 looked for cases involving Amazon, cases that interpreted the
9 BSA at that time in active litigation involving Amazon. At
10 that point in time, I was not using -- there was no -- I did
11 not find any cases on vLex or on -- you know, I was able to get
12 theories of case law, but I was not able to find any -- any
13 reported cases or any cases that involved that.

14 At that point in time, I used both Google Scholar and
15 Google search to search for multiple -- for cases or any cases
16 that involved Amazon and the arbitration submission.

17 THE COURT: And this is all the week before your
18 arbitration?

19 MR. FELDMAN: Correct.

20 THE COURT: I want to make sure I understand this
21 correctly. You had budgeted your time such that although you
22 had an outline for your submission to me, you were planning on
23 filling in that outline. You did a lot of work on that outline
24 in the week prior to its submission to the Court. In that time
25 period, you suddenly pivoted to a different set of arguments

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1 regarding arbitration, and you spent that time looking for
2 support for arguments and you found no such support.

3 MR. FELDMAN: No, it's not that I found no such
4 support. I had legal theories I was looking for that I
5 found -- that I had seen in other case, and I was looking
6 specifically for Amazon-related cases and primarily in the
7 Ninth Circuit or other circuits where the -- where
8 non-parties -- "non" meaning parties that are not on the same
9 exact agreement but parties that were on separate agreements,
10 meaning similarly signed agreements. Parties in the same -- in
11 the same -- parties that agreed to the same agreement that were
12 part of the same system, which means that parties at -- for
13 example, in order to get into -- in order to play baseball, all
14 parties, sort of, agreed to the rules that MLB puts forward in
15 terms of how to play. The National League and American League
16 may have different rules, but ultimately when they play each
17 other, they're each bound to the agreement to play by the rules
18 that are in the marketplace.

19 So in this case, my argument, which was similar to the
20 argument that I had before, but that was not the main thrust of
21 the argument. But my argument became much more prescient
22 because my client was at the mercy of Amazon at that very
23 moment because Amazon was refusing to release funds from my
24 client's account. But at that time, that issue became primary.
25 Again, I got a call from my client on Wednesday. I spoke to my

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1 client on Thursday, the Thursday before. Friday the 20th was
2 the deadline, so the Thursday or Wednesday before, I was
3 informed by my client that -- of this new part of the new thing
4 that was going on. And instead of it being just a two-line
5 point about being involved in case -- in those cases, I did not
6 have the case law that addressed the specific thing, and I was
7 also on notice because your Honor did not, I believe -- seeing
8 that your Honor did not want to pursue the arbitration angle at
9 that time.

10 THE COURT: Sir, I didn't, but you did. My point is
11 you're telling me that you changed gears because of things that
12 were happening at Amazon.

13 MR. FELDMAN: Correct.

14 THE COURT: And there is a section at page 12 of your
15 submission. It's entitled: All claims are subject to
16 mandatory arbitration. You are citing *Doctor's Associates* and
17 *Schnabel*, S-c-h-n-a-b-e-l, and my NFL decision. Those cases
18 are not the ones that were found to be false. It's all these
19 other cases.

20 So I'm going to ask the question, sir. At some point,
21 did you use any generative artificial intelligence program or
22 system to assist you with the preparation of this memorandum?

23 MR. FELDMAN: Yes, your Honor.

24 THE COURT: Was it vLex or something else?

25 MR. FELDMAN: It was a combination of --

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1 THE COURT: VLex and what?

2 MR. FELDMAN: VLex and Paxton AI.

3 THE COURT: Sorry. The other one, please?

4 MR. FELDMAN: Paxton, P-a-x-t-o-n.

5 THE COURT: And?

6 MR. FELDMAN: And I also -- I don't remember if there
7 was another one, but I also used Google search, which
8 involves -- this is a Google search itself because I was
9 searching for -- Googling searches to show where the case
10 was -- where Amazon and the BSA, where Amazon and the
11 arbitration agreement, and Amazon -- were to show up. In those
12 searches, I found several cases in fact. One of the cases, I
13 think, was Kapes — that I cited incorrectly — Kapes v.
14 Amazon.

15 THE COURT: That's K-a-p-e-s.

16 MR. FELDMAN: Versus Amazon.

17 THE COURT: Yes.

18 MR. FELDMAN: Right. And that was not a non-existent
19 case.

20 THE COURT: Yes. So when you clicked on Kapes, what
21 did you see?

22 MR. FELDMAN: When I saw the search results, which is
23 similar to KWIC, K-W-I-C, which they have their own thing in
24 Lexis, I saw the Kapes case, and I copied and pasted it and
25 said, I'm going to try to use this. That Kapes case was not an

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1 actual case because in the result it was a -- it was actually a
2 case called *CDM v. Amazon*. And the *CDM v. Amazon* case cited
3 *Kapes*, I thought, incorrectly, that the citation was *Kapes v.*
4 *Amazon*.

5 THE COURT: Sir, there are multiple cases in your
6 submission that do not exist.

7 MR. FELDMAN: So each one of them has a -- I did not
8 address them in my brief, each one, although I would have
9 addressed it if the Court wanted me to, and I put that in my --

10 THE COURT: You're here now. I wanted to understand.
11 Are you acknowledging, sir, that you never read any of these
12 cases, that these were embedded cites in other things that you
13 picked up? Did you ever click on Poly-America —
14 P-o-l-y-America v. API Industries, Inc., a supposed Eastern
15 District from 2020, did you click on that Westlaw cite, and
16 what did you find?

17 MR. FELDMAN: So I couldn't access that Westlaw cite.

18 THE COURT: Then why did you cite it, sir?

19 MR. FELDMAN: Because there was a similar case that
20 was relevant that I thought was -- when I was looking for the
21 citation, I thought that that was the right case.

22 THE COURT: So this mystifies me, sir. You're
23 suggesting that when you couldn't access a case, which, by the
24 way, you could because you could have gone to the law library
25 and used Westlaw to figure out that these cases existed.

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1 MR. FELDMAN: You can only go during the hours that
2 the court is open.

3 THE COURT: Yes.

4 MR. FELDMAN: Right. And at that point in time, I was
5 working on actually getting the facts straight from what was
6 going on at Amazon. So I couldn't do two things at once. I
7 could work at my computer, or I could go to the court. And at
8 that time, I had no more budgeted time because Friday, which
9 was the Friday before, I was not able to find out any more
10 information. So I was basically left on Sunday, Monday,
11 Tuesday, Wednesday, Thursday, Friday. That week I had my
12 children's graduations so --

13 THE COURT: Stop. Stop. Do not suggest, sir, that
14 you get to put aside your professional responsibilities to the
15 Court because of your children's graduation.

16 MR. FELDMAN: Absolutely not.

17 THE COURT: But you are still not answering my
18 questions, which is getting to the point of being frustrating.
19 Look, if you don't want to be straight with me, if you don't
20 want to answer questions with candor, that's fine. I'll just
21 make my own decisions about what I think you did in this case.
22 I'm giving you an opportunity to try and explain something that
23 I think cannot be explained.

24 But just looking, for example, at page 3 of your
25 brief, you say as follows: The Second Circuit has made that

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1 reselling of genuine goods, even without authorization, does
2 not violate the Lanham Act unless the goods are materially
3 different or consumers are misled about the product's source.
4 You cite two cases, neither of which exists.

5 MR. FELDMAN: If your Honor can tell me which cases
6 were the ones I cited?

7 THE COURT: Poly-America LP v. API Industries and
8 Storm Manufacturing Group, Inc. v. Weather Tec Corp.

9 MR. FELDMAN: So those two cases, Storm Manufacturing
10 and Poly-America, there are multiple cases that -- when I
11 searched on the case law that have similar issues. In fact,
12 many of those cases were -- Storm has 25, 30 cases and so does
13 Poly-America have multiple cases. I believe plaintiff's
14 counsel was on one of them, if I'm not mistaken. And those
15 cases are -- they are spelled -- some of them are spelled API,
16 some of them are Poly-America. Many of them are different. I
17 was using initially when I was researching -- when I was
18 researching these cases, I was using the -- I was using the
19 combination of Google and -- and I already -- and I have cited
20 the -- I have cited -- not cited but I have the Poly-America
21 case that I intended to cite, and I think I submitted --

22 THE COURT: Sir, you cited two cases that didn't
23 exist, and the fact that there may be many cases that do exist
24 doesn't absolve you of citing cases that don't exist.

25 The second thing, to tell me that there was a

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1 litigation captioned Storm Manufacturing Group v. Weather Tec
2 but this just wasn't part of it, once again, does not make me
3 feel any better. I want to understand how you felt compelled
4 to cite cases that did not exist. You clearly didn't read the
5 cases. You didn't read either of those cases, correct?

6 MR. FELDMAN: I don't -- no. I --

7 THE COURT: You couldn't have. They don't exist.

8 MR. FELDMAN: It wasn't the -- the citation that I
9 used, I would not rely on the citations when I was first
10 searching the cases. So if I cited to a case that cited to
11 another case, I may have cited to a case that was not -- I may
12 have referred to, not cited, but I referred to that case. When
13 I went to check to see the case and find the case, I mistakenly
14 used the citation that did -- that, one, the citation did not
15 exist, and two, the citation that I used was not the same
16 citation.

17 Subsequently, and this is where I --

18 THE COURT: You're suggesting to me that somewhere in
19 the docket of Poly-America LP v. API Industries is a decision
20 that supports your point, but you simply cited to the wrong
21 case in the docket?

22 MR. FELDMAN: No. It was a different case with a very
23 similar name.

24 THE COURT: But that's not the same case. The actual
25 cite, sir, that you have here is to a case called McCoy v.

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1 Burress. It is from the District of Kansas, and it talks about
2 the timeliness of motions and relation back, which has nothing
3 to do with any of the issues in that case.

4 MR. FELDMAN: The reporter that I cited to was
5 incorrect.

6 THE COURT: Sir, it's not a reporter. It's an
7 unreported decision on Westlaw.

8 MR. FELDMAN: Westlaw is a reporter, if I'm not
9 mistaken.

10 THE COURT: Well, OK, but --

11 MR. FELDMAN: So I could not check. So I saw -- I got
12 the case that had only a -- that had an unofficial citation,
13 whether it was a citation to the civil case docket, which I
14 prefer not to use. I use the --

15 THE COURT: But that might have been accurate, which
16 this was not.

17 MR. FELDMAN: Correct, and that's -- and I, in favor
18 of using the official citation if one was available and Westlaw
19 in this district, which is preferred, I continued looking if
20 there was a Westlaw case, and I found, in searching, a case
21 that cited the Westlaw case. I thought it was the same case.

22 THE COURT: If I did a search of the entire Westlaw
23 database and put in the Poly-America name and this 2020 Westlaw
24 cite, I'm not going to find another court in the land who
25 actually cited this case because it doesn't exist, right?

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1 MR. FELDMAN: Correct, your Honor.

2 THE COURT: So what possessed you to think that you
3 could?

4 MR. FELDMAN: Again, what I've done in the past is I
5 would search for the same case name, OK, but again doesn't have
6 the citation, and I would try to find where that case was cited
7 in other cases for the same proposition. Now, when I found --
8 in this particular situation, I found a case that had -- that
9 is Poly-America that is not in this district. But when I tried
10 to cite to that case, at some point, again, I did not realize
11 that it was not the same case. The name was different, but
12 there is a cite called Poly-America in this district.

13 I don't remember the API Industries or Poly-America,
14 but one of them was correct. At that time, I thought it was
15 correct. At that time, I was already -- I was drafting the --
16 I was, at that point, I was -- I had a bunch of cases that I
17 thought were correct and that I thought represented the
18 position that I was saying now. Some of them, the names were
19 correct, and some of them the citations were not correct but
20 the names were correct. For example, I think there was a case
21 called S'well, where I was trying to find that case, but in the
22 case, it was not referred to as S'well. It was actually
23 referred to as --

24 THE COURT: The S'well is S-'-w-e-l-l.

25 MR. FELDMAN: Correct.

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1 THE COURT: Sir, I don't know how many times I can ask
2 you this.

3 MR. FELDMAN: Yes.

4 THE COURT: What you're suggesting to me is that you
5 found cases that maybe supported your position, but then
6 somehow you managed to either miscite the case or miscite the
7 case and provide a citation to a case that does not exist. I
8 will never understand why you are doing that. But I do think
9 that also runs headlong into another argument you were making
10 because you were saying to me, or you were saying to
11 Mr. MacMull, that some of these cases are the product of
12 hallucinations. Did you not say that?

13 MR. FELDMAN: I don't remember if I said that. But I
14 may have said they were likely to be or may have been the
15 product of hallucinations. At that point, I was not sure
16 because I didn't investigate to see where any of them were.

17 THE COURT: If what you are saying is true, which is
18 that your problem, your mistake, is that you're finding case
19 citations that prove your point, but you are having difficulty
20 translating the cites as you find them into a cite that you can
21 use in your decision.

22 By the way, to be clear, I don't actually believe
23 that, but go ahead, go with that as your argument, and that's
24 the problem. Then I don't understand how these are so wrong.

25 MR. FELDMAN: So I ran -- so then I subsequently, when

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1 I put them together in terms of my final brief, I think, on
2 Friday at some point in time, I ran those -- I ran some of the
3 arguments through vLex. The ones that were Westlaw citations
4 were not picked up because they do not check any Westlaw
5 citations.

6 THE COURT: Correct.

7 MR. FELDMAN: And then subsequently, I went through a
8 cite checker either -- it may have been Paxton AI first, and
9 again, did not pick up on any of the citations as being wrong.
10 And then subsequently, I ran it through AI to check again, and
11 they either -- either the AI corrected it, meaning, came back
12 with a different citation that was the proper citation or came
13 back with a citation that was not the proper citation, but at
14 that point in time, I did not know that those citations that
15 were final, which were the ones that I was supposed to check
16 and make sure that they were correct, those were the ones that
17 ultimately ended up in the brief.

18 THE COURT: You didn't cite check the brief before you
19 submitted it to me.

20 MR. FELDMAN: Sorry.

21 THE COURT: You didn't fully cite check the brief,
22 before you submitted it to me.

23 MR. FELDMAN: Correct, I did not.

24 THE COURT: You cited cases that, again, do not exist.

25 I want to understand the use of AI in the drafting of

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1 the brief. Are you telling me now that your use of AI was
2 limited to checking citations of cases? Give me all of the
3 ways in which you used AI in the preparation of this brief.

4 MR. FELDMAN: I would -- I put together multiple
5 arguments, and I drafted and redrafted parts of the -- parts of
6 the arguments that I made.

7 THE COURT: You used AI to assist you in drafting the
8 brief?

9 MR. FELDMAN: I used AI to assist in organizing my
10 arguments in the brief, yes.

11 THE COURT: That was unwise.

12 You also used AI for research?

13 MR. FELDMAN: To search for where it -- to search
14 those cases -- to search that those cases were, in fact, there
15 or that there were other cases that were reported.

16 THE COURT: I want to make sure I understand that.
17 You used AI. How did you use AI to research the issues that
18 were discussed in your brief?

19 MR. FELDMAN: If there was an issue that was framed
20 as -- if there was an issue framed as -- I don't recall, but if
21 there was an issue framed as -- I don't recall, but whatever
22 the issue is, I would draft whatever I would draft and then I
23 would check it and say, is this a good restatement; is it
24 proper -- is the citation proper, or something like that.

25 THE COURT: When you did legal research in the first

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1 instance, were you doing the research all by yourself or were
2 you using AI? Were you asking either vLex or Paxton AI to find
3 for you cases for a particular proposition?

4 MR. FELDMAN: I used Paxton AI. No, I used Vincent --
5 vLex to find the general areas of case law. What is the case
6 law when it comes to, for example, cases in which parties to
7 the same contract are also bound -- parties to a similar
8 agreement -- to the same agreement but not on the same page of
9 the agreement, are there cases that address that issue?

10 And that's -- and that came back with multiple
11 secondary sources and other sources that refer to courts
12 viewing Amazon as what is called a gate keeper or a platform
13 manager, which is a concept that is not frequently found in
14 cases.

15 THE COURT: Yes, but sir, the portion of your brief
16 that actually addresses Amazon and the arbitration agreement is
17 quite small. A lot of your brief speaks about the trademark
18 infringement and GBL Section 349 claims. So I would think that
19 the Amazon cases to which you refer actually have not nothing
20 to do with the arguments in your brief.

21 MR. FELDMAN: The GBL 349 cases, I was focused not on
22 the number 349 but on the concept of consumer protection.
23 Because 349, the statute, 349 is a consumer protection statute.

24 THE COURT: Thank you for telling me. I did know
25 that. Thank you.

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1 MR. FELDMAN: No, no. I was looking to see broadly in
2 other jurisdictions to see how the courts interpret consumer
3 protection statutes in general in connection with the way that
4 consumers would be confused potentially in a trademark case.
5 So I wanted to see if there was cases that had similar a line
6 of argument, which wouldn't necessarily imply 349, but they
7 would imply other -- they would apply the same kind of public
8 policy reasoning that exists in Section 349.

9 THE COURT: Sir, we're going to take a break in a few
10 minutes because I've been tormenting our court reporter, and I
11 don't want to unnecessarily. I want to understand this before
12 we break. We keep talking about this list of cases that you
13 acknowledge do not exist, and there are also cases that do
14 exist but do not contain the quotes that you ascribe to them.

15 I want to understand whether your position today is
16 that each and every one of these errors was the product of you
17 finding a case that you then were unable to translate from the
18 mode in which you found it to a Westlaw cite or were the
19 product of hallucinations or both.

20 MR. FELDMAN: I would say both because it would be the
21 product of -- it would be the product of finding a case --

22 THE COURT: Let me be more pointed about it. You are
23 telling me that some of these things, I should just squarely
24 place the blame on you as a researcher and as a drafter,
25 because what you did is you found a case, but in your efforts

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1 to translate night a citation form that I might recognize, you
2 attributed to it the wrong citation.

3 You are saying this case really does exist, Failla, if
4 you look for it. It's just got the wrong cite. But you are
5 also telling me that there are some things that are not really
6 your fault as much as they are AI hallucinations.

7 MR. FELDMAN: No, I'm saying they are my fault
8 regardless.

9 THE COURT: Good. I appreciate that. But are they
10 the product of those two things?

11 MR. FELDMAN: Yes.

12 THE COURT: So things came together, and you did not
13 bother to check them. They are hallucinations from AI, and you
14 did not check them.

15 A. When I went back to check them -- I didn't know that they
16 would be hallucinations because they did not appear --
17 especially when I saw the full -- when I did my searches and I
18 didn't see any -- I didn't see any regular flags or anything --
19 red flags or anything that would indicate that it wasn't
20 correct, then I still went and ran it through -- I ran all of
21 it through AI to make sure that there was no -- that there was
22 no incorrect citations. And then I ran it through -- I believe
23 I ran it through Vincent AI and other things, and, again, they
24 did not come up as either these are wrong or they didn't exist.

25 THE COURT: But, sir, you couldn't run them through

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1 Vincent AI because Vincent AI, it wouldn't recognize Westlaw
2 citations.

3 MR. FELDMAN: I didn't know that. I didn't --

4 THE COURT: That is no -- OK. Go ahead.

5 MR. FELDMAN: No, no. I didn't realize that it would
6 not recognize the Westlaw citations. I thought it would
7 provide me an alternative citation that would be correct, not
8 that it would be only a Westlaw citation. I thought it would
9 provide me, for example, with a non-reported version of the --
10 now, in looking in hindsight, I know that they don't, but at
11 the time I did not know that it would not provide me with an
12 alternative citation or if it has in its database knowledge
13 of -- it has a vector that would make sure that any Westlaw
14 citation, especially if it's been reported in other cases that
15 are reported, that those Westlaw citations are correct, not
16 that it had access to -- that it would provide you with a
17 Westlaw citation.

18 THE COURT: All right. Let's take a break here. I'll
19 see you all in ten minutes. Thank you very much.

20 (Recess)

21 THE COURT: Thank you, everyone. Please be seated.
22 As always, I appreciate your patience.

23 Mr. Feldman, let me please return to the timeline of
24 the submissions in this case. At the time that you submitted
25 your motion to dismiss, were you aware of the false citations

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1 contained in it?

2 MR. FELDMAN: I was not aware.

3 THE COURT: In your response to my order to show
4 cause, you say — and perhaps I should get the exact words —
5 "A substantially corrected draft prepared within 24 hours." Is
6 that 24 hours from the day of the filing, sir, or 24 hours from
7 the day you understood that there were false citations in it?

8 MR. FELDMAN: Twenty-four hours from the time that
9 Mr. MacMull sent me a letter on Sunday.

10 THE COURT: Right. OK. So that's it. So on Sunday,
11 you receive an email from Mr. MacMull. Is that the first time,
12 sir, that you're aware that there are citations to cases that
13 do not exist and quotations that do not exist in the cases
14 cited? Is that the first time you are aware, sir?

15 MR. FELDMAN: Yes.

16 THE COURT: Yes. And so what you're saying is within
17 24 hours of the receipt of that email, you had prepared a
18 corrected brief?

19 MR. FELDMAN: I prepared a brief that I thought was
20 correct, but I was not yet -- at the time, I spent all day in
21 front of my computer. I did not have time to go to the court
22 to cite check to make sure that the cases I was citing was
23 correct.

24 THE COURT: If you weren't in a place that you could
25 check the cites, how could you know that the citations were

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1 correct?

2 MR. FELDMAN: I went -- what I would do is go to -- I
3 went back to each one of the citations that were identified by
4 Mr. MacMull, and I went to see exactly how -- I did my own
5 post-mortem to find out what and how those mistakes happened.
6 And, for example, and again I realized that, for example, the
7 case that involved the Poly --

8 THE COURT: Poly-America, sir.

9 MR. FELDMAN: Yes, Poly-America. Yeah, it was
10 *Poly-America LP v. Stego Industries*, which was a Northern
11 District of Texas case, and *Polymer Tech. Corp. v. Mimran*,
12 which was a Second Circuit decision.

13 THE COURT: Neither of which is the citation here,
14 sir.

15 MR. FELDMAN: Correct.

16 THE COURT: So within 24 hours, you had, as you tell
17 me, a substantially corrected draft prepared. You're learning
18 on the 22nd -- let me make sure I have this correct. 5:53 p.m.
19 on Sunday, June 22, that's the date and time I'm reading from
20 Mr. MacMull's email. Do you have any reason to dispute the
21 time of that email?

22 MR. FELDMAN: He sent it -- I believe he was on
23 vacation when he sent it.

24 THE COURT: OK. So by 5:53 on Sunday, June 22, 2025,
25 you were aware that you had submitted to the Court citations to

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1 cases that did not exist, correct?

2 MR. FELDMAN: At that time, I was aware that the
3 citations -- that was a problem of the citations, and I was
4 going to get to the bottom of it and inform the Court and file
5 an amendment.

6 THE COURT: Yes, except you didn't tell me. So by
7 Sunday night after you got that email, had you confirmed that
8 certain of the citations were to cases that did not exist, or
9 was that confirmation process done on Monday?

10 MR. FELDMAN: The confirmation process was done Sunday
11 through Sunday night. And then on Monday, I contacted
12 counsel -- other counsel to confer as to how to proceed with
13 this -- with the -- how to proceed with addressing it to the
14 Court, what the appropriate way to do it was and how to do it.
15 That's what I did.

16 THE COURT: On the 23rd of June, that Monday, you did
17 not advise me that you had filed a submission on Friday that
18 included cases of cases that did not exist, is that not
19 correct?

20 MR. FELDMAN: I was given until 5:00 p.m. to make that
21 that, and I spoke to counsel and I was advised by counsel --

22 THE COURT: "Advised by counsel," by what counsel?
23 Your counsel?

24 MR. FELDMAN: I consulted with other attorneys, with
25 colleagues.

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1 THE COURT: I see. On this case or elsewhere?

2 MR. FELDMAN: This case.

3 THE COURT: With counsel sitting next to you?

4 MR. FELDMAN: I mean, I sent -- I asked Mr --

5 THE COURT: You asked Mr. MacMull to give you his
6 cases and cite check your brief.

7 MR. FELDMAN: No. I asked Mr. MacMull to -- in that
8 case, I asked him to check my brief to run it through the same
9 citation reporter he used.

10 THE COURT: Right, which was certainly not his
11 obligation. My point remains, sir, on the 23rd of June, you
12 did not tell me that you had filed a brief that contained
13 citations to cases that did not exist.

14 MR. FELDMAN: I drafted my own letter to the Court
15 that I was going to send to the Court. However, when I was
16 going to send a letter to the Court saying that I'm going to
17 correct it and send the corrected brief, I wasn't sure if it
18 was correct yet. I was in the middle of drafting a letter. I
19 spoke to counsel and asked whether -- at that point in time, I
20 was not aware yet to the extent what the -- I looked to see the
21 substance of what I was arguing and I looked at the case
22 citations, and at that point in time I felt that the errors
23 were in the case citations not in the substance -- not in the
24 substance of the arguments, that the cases that were -- the
25 cases I was citing to was incorrect, however the substance of

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1 the arguments that I was making at that time was correct, and
2 that the errors in citation should be addressed that way and
3 should be informed to the Court, which is what I wanted to do
4 on Monday.

5 THE COURT: Which you didn't do on Monday, sir.

6 MR. FELDMAN: Because Monday was -- because then, at
7 that point in time, I knew that Mr. MacMull would not run his
8 check cite in Westlaw.

9 THE COURT: He had no obligation to --

10 MR. FELDMAN: Absolutely.

11 THE COURT: No, but you chastised him in your emails
12 for declining to give his cases to you and for declining to run
13 a cite check on your submission. He had no obligation to do
14 that. I want you to answer my question. You did not tell me
15 on Monday, June 23, that you had submitted a brief that
16 contained citations that did not exist.

17 MR. FELDMAN: That is correct.

18 THE COURT: On Tuesday, you still did not tell me. On
19 Tuesday, you did not send me a letter telling me that you had
20 filed a brief that contained citations to cases that did not
21 exist, true?

22 MR. FELDMAN: True. On Tuesday, I was revising
23 my papers, true.

24 THE COURT: On Wednesday, June 25, you did not tell me
25 that you had filed a brief that contained citations to cases

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1 that did not exist?

2 MR. FELDMAN: On Wednesday, I -- was Wednesday the
3 date that Mr. MacMull contacted the Court?

4 THE COURT: No, sir. I believe that is Thursday,
5 June 26. Let me just confirm.

6 MR. MacMULL: I'll so stipulate, your Honor.

7 THE COURT: I just wanted to make sure it was a
8 Thursday, and it was. Yes. It was a Thursday. Monday is the
9 23rd. You keep me in the dark. Tuesday you keep me in the
10 dark. Wednesday you keep me in the dark. Thursday you keep me
11 in the dark, and it is not until Mr. MacMull advises me -- will
12 you acknowledge, sir, that the first time I'm made aware that
13 you have cited cases that do not exist is when Mr. MacMull
14 tells me on the 26th June? You never told me before then?

15 MR. FELDMAN: I did not tell you.

16 THE COURT: You made a conscious decision not to tell
17 me. Yes, yes. I don't know why you did that, but you
18 refrained from telling me.

19 MR. FELDMAN: I made a conscious decision to tell you.

20 THE COURT: You never told me, sir.

21 MR. FELDMAN: I had a letter --

22 THE COURT: You never submitted a letter, sir. That's
23 like a tree falling in the forest. You did not submit a
24 letter. You did not let me know. He threatened -- not
25 threatened. That's an overstatement. He let you know that he

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1 was going to tell me. You didn't even bother then to tell me.

2 He sends you an email on the 26th of June at
3 2:58 p.m. "Mr. Feldman, clearly continuing to engage with you
4 in connection with this matter is not productive. Accordingly,
5 we'll proceed as we deem appropriate." You didn't tell me, and
6 I don't know why. Well, you've given me an explanation, but
7 there's no real reason why you should have kept this from me.

8 MR. FELDMAN: I drafted and redrafted my letter to the
9 Court.

10 THE COURT: That you never gave to me.

11 MR. FELDMAN: Because at that time, it was too late
12 because the Court already wrote its order to show cause.

13 THE COURT: Sir, you had four days to tell me before
14 Mr. MacMull did, and you chose not to. You didn't have to give
15 me a corrected brief then. You simply could have said, Failla,
16 there's a problem with my brief. I need to submit a corrected
17 one. You didn't even bother to do that. You knew, as of the
18 night of the 22nd, that there were problems with your
19 submission, and you never told me. That's correct. I had to
20 learn from Mr. MacMull that you had filed a brief with improper
21 citations, yes?

22 MR. FELDMAN: I wasn't sure what to do.

23 THE COURT: How could you not be sure what to do? You
24 wanted me to persist -- you let me live for actually six days
25 thinking that you had filed a proper brief when you hadn't. I

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1 don't know why you think that you needed to wait. I don't want
2 to know your conversations with counsel. I don't understand
3 how you thought it was appropriate to keep me in the dark, but
4 you did.

5 MR. FELDMAN: I did not think -- I thought it was
6 appropriate to give you a full accounting of what happened, and
7 I thought that I should clarify exactly what was right and what
8 was wrong and then let you know that.

9 THE COURT: Yes, but then you didn't. Because you did
10 submit a response to the order to show cause on July 11, which
11 is when I get your accounting of what happened.

12 Now, to be clear, in your emails with Mr. MacMull, you
13 made citations to your repository of cases, which is why I
14 asked you earlier about the repository of cases. But I don't
15 actually see how any of the citation errors could have been the
16 product of your reliance on your repository of cases because
17 presumably that repository is of real cases with real
18 citations. So how does the repository enter into the fact that
19 you submitted briefing to me that contained citations to cases
20 that did not exist?

21 MR. FELDMAN: I had 60 citations in the brief.

22 THE COURT: Yes.

23 MR. FELDMAN: And 14 of those citations were citations
24 that Mr. MacMull brought attention to.

25 THE COURT: Yes.

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1 MR. FELDMAN: So of those 44 citations, those were in
2 my repository.

3 THE COURT: I see. OK. So the repository isn't to
4 blame for anything. You're saying the repository is the source
5 of your good citations.

6 MR. FELDMAN: I'm saying that the repository is the
7 source of the work that I was working on and that I was
8 referring back to. For example, there was a Poly case, which
9 later on was deemed something else. There was the S'well case,
10 which has another name to it. The Storm Tech [sic] case also
11 had another name to it. These cases are cases that I have and
12 those cases — and I said this before — a significant portion
13 of those cases was based on a repository of cases that I had
14 already researched in the past over the years that I've been
15 dealing with Amazon-related matters. Not having actually dealt
16 with it in court but having investigated cases that clients
17 come to me and asking what are my rights, what aren't my
18 rights. And at the time, I did the research on each of those
19 cases. It was way before AI even existed or at least I was
20 aware of it.

21 THE COURT: All right. Sir, with respect to your
22 response to the order to show cause — again, it's filed with
23 me on July 11 — to what degree did you use AI in the
24 preparation of this response?

25 MR. FELDMAN: To a -- in terms of the -- I compiled

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1 all of -- I went to the law library, and I went to research the
2 New York State Bar Association reports. I also pulled
3 Mr. MacMull's articles that he wrote specifically. I also went
4 through the various cases, the *Mata* case and some of the other
5 cases. I also went through some of the other cases that were
6 involved. And in that instance, I put together all the cases
7 that I was going -- that I was going to use, and I began to
8 prepare a formal response including a basically line-by-line
9 correction of the citations explaining or telling what they
10 were.

11 At that point in time, I felt that: (1) every time you
12 put a citation online that is incorrect, there's a potential
13 that someone else is going to be citing to it, so what I
14 decided to do was remove any -- to change it to be more of a
15 personal letter where I was focused on that my conduct and also
16 the error that I made, which -- and at that point in time, I
17 proceeded to change the -- to change it from being a fully
18 cited motion to being more of a letter to the Court.

19 And at that point in time, the -- what I then did was
20 I went to check to see -- I put together all the information in
21 what's called a NotebookLM, which is a closed repository -- I
22 guess, repository. Basically, I put in the original documents
23 and confirmed that if there's anything in there that is correct
24 or if it was correct, it would give me the exact citation of
25 the source. And if it was incorrect, it would not -- it would

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1 tell me that it's not correct. So that's what I did to fix it.

2 It was basically I drafted my letter. I did my
3 research. I didn't cite to Irving Finkel, but I definitely did
4 my own research. I read Ray Bradbury many years ago,
5 *Fahrenheit 451*, I felt that that was for me, the importance
6 of -- that's where I wanted to -- and I also felt that it was
7 important to include my personal things. None of those -- none
8 of that information was in the repository, but in terms of my
9 reference to the information that was in the CLE materials that
10 I reviewed in terms of the cautioning of using AI, in terms of
11 the proper or improper usage of it, I also referred to to try
12 to understand, you know, better how Westlaw citations, again, I
13 had -- much of that was in the repository, so I kept it there.

14 For example, I had to refer back to it and say is this
15 quote, the exact quote that I have that is there, and if it's
16 not, I ran it against that to make sure that it was correct.
17 But ultimately I did not -- I chose to make it a personal
18 letter where there's no -- where I was not going to be citing
19 to anything. Unfortunately, I had a quotation there that was
20 in fact not -- it was -- when I removed it -- when I thought I
21 removed it, I thought I removed the quotation. I thought it
22 was going to be more personal.

23 THE COURT: That's even more confusing because the
24 quotation -- you told me a moment ago that you read the *Mata*
25 case and other cases, but you ended up quoting to an article

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1 about them and not the case itself.

2 MR. FELDMAN: I did not -- I wanted to cite to the
3 literature that was out there.

4 THE COURT: But you didn't identify it as literature.
5 You didn't identify it as an article about the case. You
6 identified it as the case.

7 MR. FELDMAN: So I originally, in my draft, I actually
8 have the citations to the article, and I went through and I
9 changed it. I actually removed all citations. I thought I
10 removed all citations except for the citations that I was
11 referring to with Ray Bradbury and with the biblical citations
12 and also from the article to -- the British Museum, I think it
13 was. I don't remember if I actually kept it into the final
14 version. Originally I was going to cite to it, but I couldn't
15 find the initial --

16 THE COURT: But sir, what would have been problematic
17 about citing to *Mata*, which is an actual case? You are saying
18 now you wanted to remove cites to it. I don't quite understand
19 why what you cited to is not *Mata* but an article about *Mata*. I
20 agree with you that there's no utility in perpetuating false
21 citations, but *Mata* and *Park*, they're real cases.

22 MR. FELDMAN: When you referred to it, I didn't
23 make -- I mentioned *Mata*. Originally I mentioned *Mata* as a
24 separate -- meaning, I was citing to it separately. And then I
25 was going to cite to the secondary material that took lessons

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1 from *Mata*, but instead I decided to refer to *Mata* just in
2 general as the case that is existing that is an important case,
3 and I was going to just make the point, which I mistakenly did
4 not -- when I was making my edits, I missed the -- I missed
5 the --

6 I think it was I left in a quotation. There's a comma
7 over there. That comma there before the quotation was supposed
8 to be was supposed to be removed. It was supposed to be
9 removed and whatever. It was supposed to be put in. It's a
10 run-on sentence, and I missed it. I didn't realize.

11 THE COURT: Sir, repeatedly, you suggest to me that I
12 should be mindful of the fact that "immediate corrective action
13 was taken upon discovery with a substantially corrected draft
14 prepared within 24 hours." That draft was not submitted to me
15 with your response to the order to show cause, is that not
16 correct?

17 MR. FELDMAN: I wrote that I would submit it if the
18 Judge wanted me to.

19 THE COURT: You did not offer it to me between the
20 23rd of June and the 11th of July.

21 MR. FELDMAN: At that point in time, I was responding
22 to the order to show -- I felt that I was supposed to respond
23 to the order to show cause and not do anything further until
24 the -- I felt that the Court was notified by Mr. -- not the --

25 THE COURT: Sir, you are repeatedly telling me that

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1 you had a corrected draft, but you never showed me the
2 corrected draft. At some point, I told you I did not see it,
3 but until that moment, you kept repeating it but never showed
4 it to me. I actually have no knowledge as to whether this
5 corrected draft exists.

6 MR. FELDMAN: So it was not included when Mr. MacMull
7 forwarded it to the Court. It is in the email he forwarded,
8 but he did not actually forward the draft I sent to him,
9 which --

10 THE COURT: I imagine he felt it was not his place to
11 send your work product to me.

12 MR. FELDMAN: Selective. I guess he -- that's fine.
13 But I didn't think any of the conduct --

14 THE COURT: Wait. Did you think it was Mr. MacMull's
15 obligation to forward your corrected brief to me?

16 MR. FELDMAN: No. I thought it was inappropriate to
17 forward our personal correspondence to the Court.

18 THE COURT: Well, no, actually I think it's quite
19 illuminative. You had given him the draft, but you had not
20 given it to me.

21 MR. FELDMAN: I did mean to give it to you. But at
22 that point in time as things were in flux originally, what I
23 wanted to do was I was going to ask the Court to amend it, but
24 amend it substantively as opposed to --

25 THE COURT: Yes. That was impermissible because you

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1 were going to be submitting a completely different thing. You
2 were trying to capitalize on your submission that contained
3 false citations. You wanted the opportunity to submit an
4 amended brief that included new arguments. That was
5 impermissible.

6 MR. FELDMAN: Your Honor, I specifically -- that's why
7 I requested relief for that -- not for that because but for the
8 purpose of recognizing that the information that I -- the
9 arguments that I had were moot -- were moot. And so submitting
10 a brief with corrected citations that were not going to be --
11 that were no longer relevant at that point in time, especially
12 after -- I don't remember when, but at some point in time, I
13 realized just sending a corrected brief was not what I needed.
14 I really needed to do what I did on Friday which was actually
15 amend -- fully amend the brief and correct it, and ask the
16 Court for more time, which is what I needed.

17 THE COURT: Which is not what you did.

18 MR. FELDMAN: Which is not what I did.

19 THE COURT: So going back to my earlier question: To
20 what degree did you use AI in the drafting of your response to
21 the order to show cause?

22 MR. FELDMAN: I used NotebookLM to review the content
23 of my -- to review the content that was referring to whatever
24 I -- it was consistent with my interpretation of the cases and
25 the material that I reviewed from the bar association and from

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1 the ethical -- from the ethical decision -- from the secondary
2 related to the ethical use of AI.

3 THE COURT: Other than the quotes that are contained
4 in this document, is every word in this document written by
5 you?

6 MR. FELDMAN: I believe so. And again, yes, other
7 than the quotes that I was paraphrasing -- if I was
8 paraphrasing something, it's not a quote. It was not written
9 by me but written by someone else. But it was an actual line
10 that I put in myself.

11 THE COURT: And your foray or your discussion on the
12 ancient libraries of Ashurbanipal, A-s-h-u-r-b-a-n-i-p-a-l,
13 that came from you?

14 MR. FELDMAN: It came from me. It came from me from
15 research that I reviewed from the London Museum from Irving
16 Finkel's review of the Assyrian script.

17 THE COURT: Now, there's no reference to the London
18 Museum in this document, is that not correct?

19 MR. FELDMAN: I did not cite to it.

20 THE COURT: There's no reference to Mr. Finkel in this
21 document.

22 MR. FELDMAN: I did not cite to him. I did not intend
23 to. There was a phrase I was going to cite to him, which was
24 the pen is mightier than the sword.

25 THE COURT: Yes.

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1 MR. FELDMAN: But actually when I went back to listen
2 to his recording, he did not say the pen is mightier than the
3 sword, so I did not cite to it, and I didn't believe there was
4 any reason for me to cite to it at the time. It was not based
5 on his information only. It was based on multiple sources.
6 It's an area of interest that I have always looked into, and
7 given lectures about it, but most of it is my own unscientific
8 thoughts about various things.

9 THE COURT: You told me that you transmitted a
10 substantially corrected draft memorandum to cocounsel for
11 collaborative review. What did you expect him to do?

12 MR. FELDMAN: I thought he would run it through -- the
13 same way he took my original motion and used it to me-too it
14 and say, here we go. He then told me he could not me-too it.
15 You are tell --

16 THE COURT: Yes, but you are telling me on July 11
17 that you sent it to him for that purpose, not telling me that
18 he declined to do it.

19 MR. FELDMAN: I didn't -- I felt that it would be
20 unnecessary for me to call attention to his refusal to help me.

21 THE COURT: OK. But instead what you did, you
22 attempted to leave me with the misimpression that somehow this
23 is being reviewed by cocounsel. That's what you did. By
24 telling you sent it to them for their collaborative review and
25 not telling me that they declined your request for

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1 collaborative review, I'm left with the misimpression that you
2 were getting assistance from your cocounsel on the corrected
3 brief.

4 MR. FELDMAN: That was not intended.

5 THE COURT: I'm not sure how I could have come to any
6 other conclusion, sir.

7 All right. So did you get any collaboration on your
8 substantially corrected draft memorandum that you submitted to
9 cocounsel? Did you submit it to anyone other than Mr. MacMull?

10 MR. FELDMAN: I was going to submit it to plaintiff
11 before I submitted it to the Court.

12 THE COURT: That wasn't my question. My question was:
13 Did you submit it to anyone other than Mr. MacMull?

14 MR. FELDMAN: I did not submit it to anyone because it
15 ended up it needed more. It needed to be corrected, and I
16 needed to go to Westlaw to make sure it was correct.

17 THE COURT: Which you said you did within 24 hours.

18 MR. FELDMAN: I couldn't go to --

19 THE COURT: You said "substantially corrected draft
20 memorandum." It wasn't really substantially corrected, sir, it
21 seems, or at least not within 24 hours. OK. But understand
22 that this very much leaves the misimpression that somehow you
23 were having someone check your work to make sure it was not
24 problematic when, in fact, he declined to do so.

25 MR. FELDMAN: That was not the impression that I meant

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1 to give.

2 THE COURT: And yet, it is the impression that you
3 left me with.

4 All right. So this is the point where you are telling
5 me you want to amend. There's some fighting about whether to
6 amend. My recollection is that plaintiff's counsel was opposed
7 to the request, so they wrote something the same day saying,
8 don't let them do it. You wrote back a few days later, and
9 then I set the conference. So again, I'm hearing you say under
10 oath that every word of this other than the quotes is yours.

11 MR. FELDMAN: As far as I recall, yes.

12 THE COURT: And that in no way did you use generative
13 AI to draft any portion of this brief.

14 MR. FELDMAN: I used generative AI to confirm that the
15 information that I wrote was correctly referencing the
16 information that I had.

17 THE COURT: In August you sought leave to file a reply
18 brief, which again was interesting, given that I had not yet
19 approved your original brief. And you filed a brief that
20 contained, again, a case that was wrong. Your proposed reply
21 brief cited to the case *Himmelstein*, H-i-m-m-e-l-s-t-e-i-n. It
22 was a case, as we noted a little while ago, that you actually
23 cited correctly in your premotion letter. I do not understand
24 how -- let's be clear. There are three errors with this
25 citation. Error one is that the defendant is incorrect.

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1 Actually, there are four errors. The plaintiff is incorrect.
2 The defendant is incorrect. The case citation is incorrect,
3 and it purports to affirm a District of Columbia case that is
4 incorrect.

5 I'm just going to pull up your memorandum of law so
6 that I can see it again. Candidly, it's ridiculous on its face
7 because it does seem strange to me that it is affirming --
8 well, wait a minute. Let me take that back. It is affirming a
9 decision the District of Columbia issued some six years
10 earlier. I find that interesting. But if you pull up the
11 cite, the 908 F.3d 49 cite is to a criminal case, *United States*
12 *v. Camara*, C-a-m-a-r-a, and then the DDC case that you cite, 44
13 F. Supp. 3d. 1, is a case involving Humane Society. So every
14 part of that citation is wrong, and I don't quite understand
15 how it came to be so wrong.

16 You cited it correctly once previously. You were
17 citing to a decision that had been cited by your adversaries
18 and your colleagues. It was a reported decision. So your
19 statements to me, what you say to me, is the challenge that
20 you've been struggling with is concerning the verification of
21 unreported citations. This was a reported case that you
22 somehow correctly cited months earlier, but couldn't correctly
23 cite this time. What happened?

24 Let's also acknowledge that you're responding to the
25 citation to *Himmelstein* in the briefs of plaintiff and the

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1 briefs of your codefendant. It is cited correctly at pages 16
2 and 17 of the plaintiff's opposition. It is cited correctly at
3 pages 26 and 27 of Top Experience's brief. How possibly could
4 you have gotten it wrong?

5 MR. FELDMAN: When I was doing my reply, there were
6 two things that I was trying to do, which was -- one, was to
7 make my arguments but also to tailor my arguments to limit them
8 to what was covered by the other parties. So the purpose of my
9 citation to -- my -- what I intended to do was quote directly
10 from the citation that was in plaintiff's -- that was in
11 plaintiff's opposition that cited to defendant MacMull's
12 citation. It was not intended to -- I was -- essentially I
13 copied and pasted that information from the MacMull -- sorry --
14 from the Flycatcher opposition to show the context, and I was
15 not arguing the case itself. I was arguing that they
16 themselves said that the parties -- that plaintiffs -- that
17 plaintiffs made that case.

18 So when I subsequently went through the -- when I went
19 back to then do my table of authorities and to correct it, what
20 I did was I then took out all the cases that I cited to and put
21 them into an Excel spreadsheet. In the -- at some point in
22 time between when I was -- I went through each one. I went
23 through each case. I downloaded -- I went to PACER to download
24 every single case.

25 I also went to PACER to try to download -- I don't

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1 remember the name of the case — one of the cases that were
2 cited that were decided on March 27 of 2007. I was not able to
3 find -- I was not able to find a -- I was not able to get the
4 original PACER decision for that case because it was -- that
5 dated range was sealed, so I wasn't able to confirm that. So I
6 basically was going through every single case, making sure that
7 they were cited correctly.

8 THE COURT: So the case to which you speak is the
9 *Klein-Becker* case. I'm not concerned about that, sir. I'm
10 asking you why when the plaintiff correctly, at page 16 of
11 their brief, cites to *Himmelstein* case and your codefendant
12 correctly cites it, and you're saying you are just cutting and
13 pasting the citation, how did you get it wrong?

14 MR. FELDMAN: What I did was I had each citation
15 separately in the document. What I was doing is I was -- I had
16 the -- when I looked up the citation, I had -- I was looking
17 at -- again, I was looking at the -- I looked for *Himmelstein*
18 to look up the *Himmelstein* case, and what I did, I was I just
19 went to -- again, I wasn't looking at it in -- it must have
20 been like 5:00 in the morning or something like that.

21 I was looking at just the citation itself. I wasn't
22 thinking about it for purposes of the substance of what was
23 there. So I was going through each citation making sure the
24 citation was correct. I was not looking at it for purposes of
25 the -- so I already had the original case. I downloaded it.

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1 The *Himmelstein* case, I had from the past. I actually
2 downloaded it the night before at 7:00 -- 11:00, sometime in
3 the evening, amongst the other cases to make sure I had every
4 other case, the original case that was there, and to make sure
5 that I was citing to the right non-Westlaw reporter where
6 possible.

7 THE COURT: Mr. MacMull, excuse me. I can hear you,
8 and I don't think you mean me to. Thank you.

9 Mr. Feldman, please continue.

10 MR. FELDMAN: So the *Klein-Becker* --

11 THE COURT: No, no. I'm not thinking about the
12 *Klein-Becker* case. That one matters less to me.

13 It's the *Himmelstein* case, sir. You say that the way
14 you checked it is by running a check with Google, but there are
15 three citations in the screenshot you gave to me. The first
16 one is correct. The second one is correct. You picked the
17 third. Why?

18 MR. FELDMAN: So that was not -- when I got the third
19 one, it wasn't -- my point was that when I searched for
20 consumer and -- I don't remember what it was that I was
21 searching for when I was looking to confirm that I had the
22 right citation.

23 THE COURT: You put *Himmelstein Consumer*, sir.

24 MR. FELDMAN: Yes. So *Himmelstein Consumer*, the case
25 that is involved was *Himmelstein v.* — I believe — Comcast.

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1 THE COURT: That's the case that it isn't. That's the
2 wrong citation. That's the one you chose.

3 MR. FELDMAN: So the reporter -- and the reason is the
4 reporter of the citation of Himmelstein in my excerpt, when I
5 jotted it down, I jotted it down as the, you know, 49 F. Supp.
6 or F.2d, whatever the original citation for the Himmelstein
7 case was, I wasn't sure of the full citation, so I had comma
8 44. I think I was trying to just confirm. And then what
9 happened was that I took that citation, and I couldn't find --
10 again, I was looking only at the citation itself. It wasn't
11 looking at the case for its substance, and I was trying to find
12 how I could -- I lost track between the section, the citation
13 part and the reporter part and the -- which I thought was a --

14 THE COURT: That makes no sense to me at all, sir.

15 *Himmelstein* is a decision of the New York Court of
16 Appeals on General Business Law, Section 349. The Himmelstein
17 case you cited is a Fair Credit Reporting Act case. They are
18 not in any way -- they may in the broadest sense both involve
19 consumer statutes, but I cannot fathom how you could have
20 gotten that so wrong.

21 MR. FELDMAN: I was trying to -- when I was going
22 through it, I was looking at it for the purposes of
23 understanding what -- I had the wrong citation there when I was
24 using that excerpt. And in looking up that excerpt, I found
25 the Himmelstein case, not remembering the Himmelstein case that

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1 I had, the night before, already downloaded.

2 THE COURT: That makes no sense to me. Also, if the
3 point is you told me in your response to your order to show
4 cause that basically you've learned from this awful experience
5 and that "comprehensive verification protocols have been
6 implemented to prevent recurrence." And here you write "to
7 ensure such errors do not recur, I have implemented systemic
8 procedural safeguards."

9 They are clearly not working. I cannot believe you
10 when you say you've implemented verification procedures because
11 there aren't that many citations in your brief. You're citing
12 to something that was a key issue in your adversary's briefing,
13 and I don't know how you couldn't figure out to cite enough of
14 the case so that you could get the proper citation,
15 particularly when you cited it yourself.

16 MR. FELDMAN: I had the exact quote from the original
17 PDF, which I originally took, and then what I did was I took
18 that quote from the PDF. I did OCR on it, and copied and
19 pasted into the text document. When I had it in that text
20 document, at that point in time, I stopped. And then when I
21 went back to go through the -- to put it in there, I did not --
22 I was not thinking about the case itself. I was just looking
23 to make sure that it was the correct citation because it was
24 copied from --

25 THE COURT: But, sir, it wasn't the correct citation.

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1 MR. FELDMAN: I went to check to see the case.

2 THE COURT: You didn't. You put in Himmelstein
3 Consumer. It gave you the right answer, and you took the wrong
4 answer. You skipped the two correct answers and took the wrong
5 one. There's no justification for that. I don't understand
6 how you suddenly thought that in a case discussing New York
7 law, you should be quoting to the District of Columbia.

8 MR. FELDMAN: It was -- I was thinking about consumer
9 protection and that case involved a consumer who did not return
10 a VCR or something, and he was being sued by Comcast for -- he
11 was reported by Comcast for \$400 in non-payments. And I
12 thought, I was like, OK, maybe that's why it was cited. I did
13 not remember.

14 THE COURT: It was the third cite. How did you not
15 look at cites one and two, which were the correct cites?

16 MR. FELDMAN: That isn't the way I searched for it.

17 THE COURT: That was the way that you told me you
18 searched for it.

19 MR. FELDMAN: That was --

20 THE COURT: Stop interrupting me, Mr. Feldman. It
21 really is getting annoying.

22 Mr. Feldman, you tried to explain it by giving me
23 Exhibit A, which is the opinion you downloaded, and by giving
24 me a screenshot of what you did. Now you're telling me this
25 isn't what you did. Now you're telling me there's more than

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1 what you told me you did. But this is what you told me that
2 you did, and this is illogical.

3 For you to say that based on a search that returned
4 three cases, two of which were correct and the third which was
5 incorrect, that I should accept that you somehow in good faith
6 decided to pick the third one that was incorrect. Now you are
7 telling me, oh, Failla, no, I did more. That's not what you
8 are saying here. This is what you told you that you did.

9 MR. FELDMAN: The screenshot is not contemporaneous
10 with the actual drafting of my letter, which I did not notice
11 that it was not correct. When I was alerted to it, I then went
12 back to see what possibly could have happened over here because
13 I was quoting directly from another -- I was quoting directly
14 from the brief, so I went back to check. And I looked and I
15 saw that when I was going through the -- to do the check
16 citations manually, I did not -- I searched to see, OK -- you
17 know, I searched the case.

18 It was -- and I found, when I did the search for
19 Himmelstein, the case that came up was a DDC case, which I saw
20 before. I was like, oh, I've made errors with DDC cases
21 before. What is wrong? What is going on here? So I went to
22 double check, and that's when I went and found the Himmelstein
23 Consumer case. I got confused, and I thought that that was the
24 case that was cited by opposing counsel rather than the case
25 that was foundational, which was cited multiple times and I

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1 cited by myself.

2 But I was not focusing on the case itself. I was just
3 trying to make sure that the case was the correct citation.
4 And I had more trouble because when I had the comma when I was
5 putting together that thing, the comma, I thought that I was
6 supposed to be citing to an appellate case, and I checked to
7 see how, what is the right way to write a subsequent --
8 subsequent things that are -- when you are referring to if a
9 case is appealed or something. So I went to make sure that the
10 citation was correct. I did not find it, and I checked to see
11 how to properly refer to it, and I put that in there.

12 THE COURT: All right. But sir, even if *Himmelstein*
13 *v. Comcast* was the correct site, and it, of course, was not,
14 the screenshot that you give me cites a citation of 931 F.
15 Supp. 2d. 48, which is not the citation that you gave, so
16 everything is wrong about that. You cited to the *Camara* case
17 instead.

18 MR. FELDMAN: The reporter from F. Supp. 3d became
19 F.3d or it became F.3d from F. Supp. 3d which I did not realize
20 and I did not realize I changed the entire citation check this.

21 THE COURT: One moment, please. No. That can't be
22 because it is 931 F. Supp. 2d. 48. That is the cite in the
23 screenshot that you gave me. You then cited it as 909 F.3d 49,
24 and suddenly it becomes a D.C. Circuit decision rather than a
25 D.C. court decision. And the other citation to it, which of

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1 course is not correct, is 44 F.3d 1, which is a District of
2 Columbia case from 2012. So it can't be that you
3 mistranscribed something because the numbers are so off. 908
4 is not 931 and the F.3d is not the F. Supp. 2d.

5 MR. FELDMAN: It was completely incorrect.

6 THE COURT: Yes, it was. You are showing me this
7 screenshot as some justification as how it became so incorrect,
8 and it itself is wrong. You cannot explain to me from this
9 screenshot how you came to the citation that you got because
10 it's not there.

11 MR. FELDMAN: I'm saying that I -- I'm saying that
12 that is an example of where you -- where the two cases come up,
13 the correct case and an incorrect case, and that when I was
14 searching just for the case with *Himmelstein*, which again is
15 not a very common name, I reflexively thought that it was
16 correct, not realizing I did it incorrectly. When I copied and
17 pasted, I had it incorrectly, and when I --

18 THE COURT: You are so incorrect as to have me
19 question what you actually did. Because if you had, in fact,
20 put in *Himmelstein Consumer* into Google and gotten your case
21 that's from Google, which is problematic to begin with, had you
22 looked at these, I told you the first one was correct. The
23 second one was correct. The third was not the correct case.
24 But had you put in the cite 931 F. Supp. 2d. 48, you would have
25 gotten *Himmelstein v. Comcast* in the District of Columbia. You

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1 would have actually gotten a *Himmelstein* case.

2 So I cannot understand, from the postmortem that you
3 gave me as an explanation for why this was wrong, how you came
4 instead to cite something completely different. You cited 908
5 F.3d 49. There's nothing that tells me where that came from.
6 That is the *Camara* case that you mentioned to you earlier, so I
7 don't know where that came from. I have to assume that this is
8 another issue of you using AI to get cites.

9 MR. FELDMAN: I used -- so for that to get to the --
10 understanding how to properly cite the two -- the string
11 citation, which was *Himmelstein v.*, in this case, *Comcast*, and
12 properly put in what I had, which was the comma 42, which was
13 because I had -- I didn't have the full, proper citation for
14 that case initially. And, again, it was not a Google search.
15 It was Google Scholar. If you put it Google Scholar and you
16 typed the words *Himmelstein Consumer*, because I was looking to
17 see the -- to make sure that the different DDC case that came
18 up, I couldn't find how I had this 42 F. Supp., but I couldn't
19 find the original citation but I thought that it was correct.

20 So I felt that I had to make sure that it was correct
21 in terms of the citation. So I checked the case that with --
22 the string that I had, and the case search, cite case search
23 that I used, which is called citation -- citation checker,
24 which is an AI system, came back with a corrected string
25 citation that had AF, FDE with it, again, not correct.

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1 THE COURT: OK. It is correct that it was not
2 correct. But I cannot understand how you could use so many
3 sources and come up with so many wrong answers when, in fact,
4 your adversaries gave you the proper citation. That's all you
5 needed to work with.

6 But you tried to pivot to what you think is a broader
7 issue, and I just want to understand what you think I should do
8 about this. You make a point of saying that while requiring
9 neutral case citations has not been adopted by either the blue
10 book or the circuit, it should not be assumed that everyone has
11 access to the walled garden of Westlaw and Lexis. It seems to
12 me that you actually have access to the walled garden of
13 Westlaw or Lexis if only you would go to the law library to do
14 it. I suppose another way of doing that is simply not to cite
15 Westlaw citations and deal with reported decisions.

16 But why does any of that matter here when the missed
17 citation was a reported decision? What do you want me to do
18 with the fact that you don't have Westlaw? It sounds like you
19 want me to say that you should be absolved of all of these
20 terrible citation errors, these missed citations, because you
21 don't have Westlaw. But now I know you have access to Westlaw.
22 So what do you want?

23 MR. FELDMAN: The access to Westlaw that I have is
24 limited to what was publicly available in the law library. I
25 do not have full access. When you wrote my reply, at that

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1 point, I did not have access to the law library. And, again, I
2 was doing it manual -- I was manually checking, going through
3 each and every case. That one, I thought that I made an error,
4 and I was trying to find the correct one and I could not find
5 the correct one. I miscited it not realizing that I was not
6 doing it the right way. But every single case I cited in
7 there, I took the -- I made the effort to make sure that they
8 were correct.

9 I'm not saying it's because of Westlaw. I'm just
10 saying had I been able to do a check cite, it would have
11 immediately flagged it as incorrect because there is no such --
12 the way that I reported it --

13 THE COURT: Even checking it on Google, sir, showed
14 you what the correct citation was.

15 MR. FELDMAN: In hindsight, when I saw it then and
16 when I checked it, I saw it there. When I had it in a text
17 unconnected to anything other than just simply the quote from
18 the other document, that I mistakenly put in there, I did not
19 realize that I had it incorrect. I thought that that was my
20 corrected -- the corrected citation when, in fact, it was an
21 incorrect citation.

22 THE COURT: Sir, I'm in Google Scholar right now. How
23 do I get cases from Google Scholar?

24 MR. FELDMAN: If you go to the left side, there's a
25 triple a hamburger to get case law.

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1 THE COURT: And there it is. So have you done that
2 again? Each of the cases cited here, there are several
3 Himmelstein cases. The first one is the case actually cited by
4 the parties, and it is properly cited here. The second one is
5 as well. The third one is the District of Columbia case
6 *Himmelstein v. Comcast* with the correct cite. The fourth one
7 is another *Himmelstein v. Comcast* with the correct cite to the
8 District of Columbia.

9 MR. FELDMAN: I thought that that was the -- the third
10 cite, the District of Columbia appeal, which was an appeal, I
11 thought that that was what I had originally and I miscited it.
12 When I ran that string citation, which I thought would be to
13 the Google Scholar version of the underlying case as well as
14 the appeals case, to see that it was correct, that was the way
15 that the check cite came back saying that's how it should be.

16 THE COURT: That cannot be. I hear you saying it, and
17 I don't understand how that can be but all right.

18 MR. FELDMAN: I generally don't cite to -- again, I
19 was not citing to my own case. I was citing to a quote, and I
20 missed -- when I was going through the quotes, I had an error.
21 I erroneously checked it, not thinking about the substance of
22 the case, just checking it. I made a mistake. I went to check
23 it. I saw the --

24 THE COURT: Sir, you are in the middle of a sanctions
25 proceeding for filing cases that don't exist. I would have

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1 thought that you would have been extra especially careful with
2 citations to me, and you weren't in your response to the order
3 to show cause and you weren't in the reply brief. That's where
4 we are. I think that is where we are.

5 I should note that I do want you to note you should
6 obtain a transcript of this conference with whatever speed you
7 think is appropriate.

8 From my perspective, I've asked the questions I wanted
9 to ask, and I have gotten the answers that I got. I'm not
10 saying they are the answers that I wanted, but they are the
11 answers that I got.

12 Mr. Schwalb, I'm not going to let you question your
13 adversary, but if there's a subject matter area that you think
14 I overlooked, tell me now.

15 MR. SCHWALB: No, your Honor. I think you covered
16 whatever there is to be covered.

17 THE COURT: Thank you. Mr. MacMull, the same offer.

18 MR. MacMULL: Thank you, your Honor. The only
19 observation I'll make --

20 THE COURT: I'll pause you there. I'll let you make
21 observations in a moment. If there was a subject matter I
22 didn't question him on, tell me. Otherwise I'm going to
23 proceed to oral argument.

24 MR. MacMULL: I'm sorry. Oral argument on the motion?

25 THE COURT: I'll offer the parties two things. If you

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1 want to look at the transcript of this and write to me what you
2 think is an appropriate way of resolving my order to show
3 cause, I'll give you that opportunity. Otherwise I'll hear you
4 from you orally now.

5 MR. MacMULL: Oh, I see. I misunderstood what your
6 Honor meant when you said oral argument. In answering your
7 Honor's question, I don't believe substantively that your Honor
8 has omitted any line of examination.

9 THE COURT: Thank you.

10 Mr. Feldman, how do you believe I should resolve this?

11 MR. FELDMAN: I'm sorry.

12 THE COURT: How do you believe I should resolve this
13 order to show cause.

14 MR. FELDMAN: I would ask that the Court -- I would
15 ask that the Court consider the errors that I made; that the
16 errors I made were gatekeeping were, in fact, done; and that to
17 the extent that there were any errors that I have made, I will
18 endeavor to continue to correct them, and I will endeavor to
19 put in other -- to improve the way I am doing it. I have also
20 solicited other counsel to assist me with either being able to
21 join them in access to citation reporters, but also to help me
22 with my general writing issues that I've had in terms of just
23 the kind of things that I should have done and also to avoid
24 any use whatsoever of any, you know, artificial intelligence or
25 LLM type of methods, including Vincent AI or Paxton AI or

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1 CoCounsel, but to only use the original cases themselves that
2 I'm citing. And to the extent that I cite to any other cases,
3 that I put into effect I have learned that I cannot rely on
4 certain things.

5 I also have recognized that although I know that
6 I'm -- I do make mistakes, but that first and foremost, when I
7 do make a representation to the Court, that I make a
8 representation accurately. And to the extent that I do not or
9 don't, I would -- generally would want to make sure that those
10 are done appropriately, and that I have also looked into
11 getting additional help to ensure that before I am submitting
12 anything, I have other counsel who will assist me as a -- in an
13 associate capacity to make sure that any of my submissions are
14 done correctly, appropriately, and ethically.

15 THE COURT: Sir, I should have asked you earlier. I
16 don't think I asked this question fully. To what degree, if at
17 all, did you use artificial intelligence in the preparation of
18 your reply brief?

19 MR. FELDMAN: In the preparation of my reply brief?

20 THE COURT: Yes, sir.

21 MR. FELDMAN: The only artificial intelligence I used
22 in connection with preparing the reply brief was the formatting
23 of the citation that I had incorrect, checking -- in connecting
24 the lower decision F. 3d. -- Supp. 3d. to F -- whatever the
25 citation to the appeal is. When it comes to the actual brief

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1 itself, I used, you know, the standard spell checking and other
2 tools that I used when I -- that are available within Office to
3 make sure, whether it's grammatical or any other, errors that
4 would come through would be correct.

5 THE COURT: In your opening brief, did you use it as
6 well to assist in organizing your thoughts and in drafting?
7 Did you use it in any way to assist or organize your thoughts
8 in terms of drafting the reply?

9 MR. FELDMAN: No. I focused on narrowing things down
10 to purely the -- What it wrote is to narrow it down to the
11 issues addressed in the appeal. What I did was I organized it
12 to point to -- I tried as much as possible to follow the
13 framework that I thought made sense.

14 THE COURT: Again, just so that I'm clear, what you
15 wanted to do with the reply was to narrow it to the issues
16 addressed in the opposition. Am I --

17 MR. FELDMAN: Yes.

18 THE COURT: OK. Because of that, you did not use
19 artificial intelligence in the organizing of your thoughts or
20 the drafting of any portion of the reply?

21 MR. FELDMAN: In the opposition report, I focused only
22 on the -- I focused on -- I did not use AI to form or draft my
23 brief. I used AI to review my prior submissions, but I did not
24 use AI in order to draft the reply. I used AI only to check
25 the citation that I improperly formatted to the citation that I

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1 used in the -- that I quoted.

2 THE COURT: Did you use AI to summarize or in any way
3 organize the briefing that you had received from your adversary
4 or from your defendant cocounsel?

5 MR. FELDMAN: Did I use AI to summarize the briefing?
6 No, I did not. I actually got the -- I read through the
7 documents and I went through to see what the documents were. I
8 think I may have uploaded to it -- I maybe uploaded it to
9 Westlaw to do -- check citations on them to make sure that the
10 citations were correct that I found.

11 THE COURT: Wait. I'm sorry. You used Westlaw to
12 check citations for your adversary's briefing but not your own?

13 MR. FELDMAN: No. I used it to -- I couldn't do it on
14 mine because I ran out of time, but I did have the ability to
15 pull the citations to make sure that the case citations that
16 were relevant to the case, that I addressed them.

17 THE COURT: You used Westlaw to check the citations in
18 your adversary's brief?

19 MR. FELDMAN: In my own -- in everyone's brief.

20 THE COURT: OK. Except when you ran out of time.

21 MR. FELDMAN: No. When I drafted my own brief, my own
22 reply, I was relying only on my own on Thursday when I was
23 writing it and then on Friday when I finished it.

24 THE COURT: Nothing prevented you from going to check
25 your citations with Westlaw after you had completed the

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1 drafting of your reply brief?

2 MR. FELDMAN: I could not do it at that time. The one
3 citation which I had incorrect, at that time, it was Thursday
4 night. Friday morning at 5:00 in the morning, I was not able
5 to go to get Westlaw.

6 THE COURT: Thank you.

7 Mr. Schwalb, I'll hear from you now.

8 MR. SCHWALB: Your Honor, we submitted a letter on the
9 order to show cause --

10 THE COURT: Yes.

11 MR. SCHWALB: -- that Mr. Feldman's client shouldn't
12 be allowed to file the motion to dismiss and should answer the
13 complaint. That's the position that we take. I'm not -- I
14 haven't spoken to my client about what happened here this
15 morning, so I don't know if my client's position has changed.
16 But at the time, we were not asking for sanctions against
17 Mr. Feldman other than that. Your Honor mentioned in papers
18 recently that your Honor is considering defaulting
19 Mr. Feldman's client. I'm the plaintiff. I take defaults if
20 the Court wants to give it.

21 THE COURT: I can't do it just because you want it,
22 sir.

23 MR. SCHWALB: OK. That's where we are.

24 THE COURT: All right. Do you want the opportunity to
25 submit anything in writing? You are not obligated to do so.

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1 MR. SCHWALB: The only opportunity I want is to
2 discuss with my client and then to advise the Court whether --
3 if the Court would allow, whether we want to submit anything
4 else. But for now, I don't think so.

5 THE COURT: Let me do this. I'll hear from you all
6 orally today. By next Friday if you want to submit something,
7 you'll let me know. It would be a rather short schedule for
8 the submission, and I would not be expecting opposition. I
9 would expect simultaneous briefing on it.

10 MR. SCHWALB: Thank you, your Honor.

11 THE COURT: All right. Mr. MacMull?

12 MR. MacMULL: Thank you, your Honor. I may have
13 misunderstood our prior colloquy, so hopefully I haven't waived
14 anything. I only wanted to say that Mr. Feldman, of course,
15 made reference to certain conversations and interactions we
16 had. In as much as the Court has questions about that, I'm
17 availing myself to your Honor's examination insofar as you have
18 any questions.

19 THE COURT: There's some discussion, sir, that the
20 communications that you sent to me were subject to the common
21 interest privilege. Do you wish to respond to that, sir? I
22 could basically get a volume discount here on ethical issues.
23 But I presume that you would not transmit to me privileged
24 information you received in the course of a communication
25 protected by common interest.

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1 Please let me back up a moment. I have to think
2 through this. Does common interest actually apply in this
3 setting under New York's law? New York has rather specific --
4 I guess it might because you are actual parties to the
5 litigation.

6 MR. MacMULL: I didn't mean to cut off.

7 THE COURT: No, go ahead.

8 MR. MacMULL: It exists when, in fact, there's an
9 agreement between the parties.

10 THE COURT: Yes.

11 MR. MacMULL: The mere juxtaposition of the defendants
12 does not by itself create a common interest privilege here.
13 And my only comment is, your Honor, nothing that I have set
14 forth in Exhibit A, which is at docket entry 158-1, pertains to
15 anything involving any common interest privilege and the
16 substantive discussions that Mr. Feldman and I had regarding a
17 certain tact that he wanted to take that I disagreed with.

18 THE COURT: All right. I don't know, sir, that you
19 have a horse in the race on the issue of sanctions.

20 MR. MacMULL: I do --

21 THE COURT: All right. I'll hear from you. Whether I
22 ultimately agree with you as you speak to the issue will be for
23 another day, but go ahead.

24 MR. MacMULL: I trust your Honor is aware of this, but
25 I recently read that there something approaching 300 decisions

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1 in this country wherein the issue of lawyers using AI has been
2 the subject of decisions, and in those decisions, there's a
3 range of sanctions but among them include fees. And I
4 certainly will wait for your Honor's ultimate determination,
5 but I would ask that I be permitted to make a fee application
6 pursuant to either a violation of Rule 11(b) and/or 28 U.S.C.
7 1927. I believe there has been a multiplication of proceedings
8 here that would have been entirely unnecessary if Mr. Feldman
9 had done what I asked him to do that Sunday night in June.

10 THE COURT: All right. Anything else, sir?

11 MR. MacMULL: The one observation I will make, your
12 Honor, would this the time for me to make that observation?

13 THE COURT: Now you can make the one observation, yes,
14 sir.

15 MR. MacMULL: Very good. And your Honor did notice
16 this previously in your Honor's order, but I just wanted to
17 call it your Honor's attention for purposes of the record. You
18 asked Mr. Feldman at great length whether or not he had been
19 the only scribe in connection with his response to the order to
20 show cause. I believe he testified that, in fact, he was in
21 the absence of quotations that are set forth in that order.
22 The only observation I wish to make with respect to that is
23 that the style of prose is significantly different than
24 anything else that he has submitted, not the least of which is
25 the letter to the Court in docket 166 in which the entire first

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1 paragraph of his letter is a single sentence and is laden with
2 a series of grammatical errors, which is entirely unlike the
3 style of writing and certainly the quality of the writing that
4 appears at docket 164.

5 THE COURT: So noted.

6 Anybody want to say anything else? Otherwise, I will
7 let you go.

8 MR. MacMULL: I do have a question with respect to the
9 underlying motions, your Honor.

10 THE COURT: Yes, sir.

11 MR. MacMULL: Your Honor indicated in her last order
12 that you are not going to -- again, this is in connection with
13 plaintiff's surreply, just to be clear. And that's docket
14 entry -- I can find in it a second. The one observation I
15 would like to make, your Honor, is that could we please be
16 permitted to file by next Friday, nothing more than the single
17 page or two, with respect to the problems that we perceived
18 with the surreply, which is in essence that it addresses issues
19 that are not within the four corners of the third amended
20 complaint; namely, a warranty that apparently was included with
21 all the products but again is not the subject of anything
22 within the third amended complaint.

23 THE COURT: I feel like you have just now done that,
24 sir, but let me say no for now because otherwise this briefing
25 will never end.

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1 MR. SCHWALB: Can I respond to that or --

2 THE COURT: No. I can look at these things myself.

3 All right. We're adjourned. Thank you.

4 (Adjourned)

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