

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO. (together with its affiliate MURBO MUSIC PUBLISHING, INC.), CHERRY LANE MUSIC PUBLISHING COMPANY, INC., CAL IV ENTERTAINMENT LLC, ROBERT TUR d/b/a LOS ANGELES NEWS SERVICE, NATIONAL MUSIC PUBLISHERS ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, STAGE THREE MUSIC (US), INC., EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY d/b/a BIENSTOCK PUBLISHING COMPANY, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, THE MUSIC FORCE LLC, and SINDROME RECORDS, LTD. on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE LLC, and GOOGLE INC.,

Defendants.

ECF Case/FILED UNDER SEAL

Civil Action No. 07-CV-3582 (LLS) (Related Case No. 07-CV-2103)

STIPULATION AND ORDER

WHEREAS on October 6, 2009, two articles appeared on the cnet.com website containing or purporting to contain information designated as "Highly Confidential" by Defendants ("YouTube") pursuant to the Second Amended Stipulated Pre-Trial Protective Order ("Protective Order") entered in the above-captioned matter;

WHEREAS the parties in the above-captioned matter and in Viacom International Inc. et al. v. YouTube, Inc. et al., 07 Civ. 2103, undertook an investigation to determine the source of the leak of YouTube's Highly Confidential information;

WHEREAS, as a result of that investigation, counsel for the putative Class Plaintiffs, Proskauer Rose LLP ("Proskauer"), committed to implement certain procedures designed to enhance Proskauer's protection of material designated by YouTube as "Confidential" or "Highly Confidential" under the Protective Order, as described in Louis M. Solomon's November 16, 2009 letter to the Court (attached hereto as Exhibit A);

NOW THEREFORE IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel of record, for the parties hereto, that Proskauer will take the following

additional measures to secure YouTube's Confidential and Highly Confidential information and further investigate the source of the leak of YouTube's Highly Confidential Information.

I. Steps Concerning Securing Confidential Material/Remedies Regarding Redaction Issue

1. Proskauer shall provide no later than November 20, 2009 an accounting of all of the instances in which Proskauer sent to anyone not entitled to receive same materials with Defendants' Highly Confidential information purportedly redacted, including from the Second Amended Complaint, along with a specific disclosure of all instances in which the redaction methodology described in Proskauer's November 12, 2009 letter was employed.

2. Proskauer shall recover and secure all material described in (1) above, and to certify when and how that is done.

3. Proskauer shall provide by November 20, 2009 a declaration detailing when and how it learned that the redactions of deposition transcripts sent to Tur and Hauprich (and/or of any other material) were ineffectual.

4. Proskauer shall produce by November 20, 2009 a copy of the documents sent to Tur in the binder of documents that Tur received containing Defendants' confidential information and any electronic communications transmitting the documents contained in the binder, and use its best efforts to sequester Tur's binder and provide a copy of such binder to YouTube.

5. Proskauer shall provide by November 20, 2009 an accounting of every instance in which a person not entitled to receive Highly Confidential material received unredacted copies of the Hurley and/or Karim transcripts, describing when and to whom each such transmission occurred.

6. Henceforth if Proskauer wishes to provide Confidential or Highly Confidential materials to any of its clients it will do so electronically only after complying with the First undertaking contained in Proskauer's letter to the Court of November 16, 2009 (attached hereto as Exhibit A).

II. Steps Regarding Leak Investigation

1. Proskauer shall disclose the facts pertaining to the investigation undertaken by Iris, including: (a) production of forensic copies of Tur's and Hauprich's devices that have been imaged by Iris (pursuant to an appropriate privilege non-waiver provision and other appropriate protections to be agreed upon by the parties or directed by the Court); and (b) copies of all Iris final reports pertaining to the leak investigation. Defendants reserve the right to seek to obtain (and Proskauer reserves the right to oppose) all communications between Proskauer and Iris and copies of all Iris reports (including interim and draft reports) pertaining to the leak investigation.

2. Proskauer shall provide a log of all communications between Proskauer and Tur/Hauprich regarding the transmission of the Schmidt deposition transcript, the leak and potential protective order violations, including the dates and subjects of the communications.

3. Proskauer shall produce native copies of all of the email attachments from Figueira's Sept. 8, 2009 email to Tur, and metadata associated with Tur's versions of the email.

4. Proskauer shall produce the communications transmitting deposition transcripts to Hauprich, native versions of all transcripts sent to Hauprich and metadata associated with Hauprich's versions of emails sent to him transmitting transcripts.

5. Tur shall provide consent for Defendants to obtain discovery from third-party email hosting companies of Tur's email communications with Greg Sandoval and all of Tur's email communications that contained Defendants' deposition transcripts as attachments.

6. Tur shall disclose all phone numbers assigned to his phones that he has used since the deposition of Eric Schmidt and provide consent for Defendants to obtain discovery of phone records for those phone numbers.

7. In addition, the parties agree that Defendants may take an additional four hours of testimony from Mr. Tur. The December 18th deposition cutoff should not apply to that deposition, and the parties will discuss the appropriate location for said deposition.

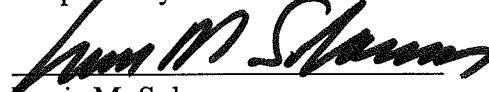
The parties agree that the above is subject to the following:

- A. The November 20, 2009, date is a best efforts undertaking, with final completion to occur on or before December 11, 2009 for everything under Proskauer's control and at the time IRIS is completed, for the work being done by IRIS.
- B. To the extent Proskauer's good faith determination that its professional duties require it to respond in a manner different from what is set forth above, Proskauer will so advise Defendants' counsel and the Court, and Proskauer may present its issues and/or findings to the Court in camera.
- C. None of the above shall constitute any waiver by Proskauer of any privilege or immunity of the putative Class or any client or the Firm and shall not constitute any admission of wrongdoing or that any of the information at issue is Confidential or Highly Confidential under the Protective Order. Insofar as Proskauer withholds all or any portions (including through redactions) of any documents on the basis of any applicable privilege or immunity or its good faith determination of its professional obligations, it shall notify Defendants and shall log the documents and have them available for in camera inspection should the Court wish to review them.
- D. The parties may seek to modify the above for good cause shown.
- E. With respect to named plaintiff Robert Tur, Proskauer will attempt to get the consent requested by November 18, 2009. Should Proskauer determine in good faith that Mr. Tur requires separate counsel in respect of any of the issues covered above, Proskauer shall so advise Defendants' counsel, in which event the agreements concerning Tur recited above shall be subject to the consent of that counsel.

F. All parties reserve their rights to seek all costs and fees associated with their investigation of the source of the leak of YouTube's designated Highly Confidential information.

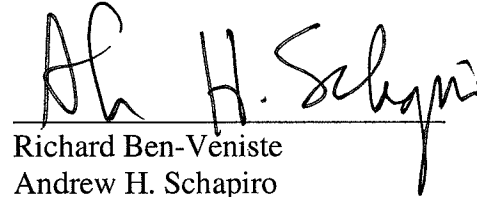
Dated: November 16, 2009

Respectfully submitted



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Attorneys for the Putative Class

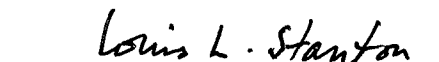


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Attorneys for Defendants

SO ORDERED:


Hon. Louis L. Stanton
United States District Judge

11/16/09

Exhibit A

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BOCA RATON
BOSTON
CHICAGO
HONG KONG
LONDON
LOS ANGELES
NEW ORLEANS
NEWARK
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November 16, 2009

Hon. Louis L. Stanton
United States District Judge
United States Court House
500 Pearl Street, Room 2250
New York, New York 10007

Re: The Football Ass'n Premier League, et al. v. YouTube, Inc., et al., 07 Civ. 3582 (LLS)

Dear Judge Stanton:

We write in advance of our 3:00 p.m. conference with Your Honor today. We here provide the most concrete answers we thus far have to the Court's question whether any confidential or highly confidential material designated by Defendants has been disclosed improperly or is at risk of unauthorized disclosure, including whether and to what extent redactions of the type involved in the September 8, 2009 transmittal of depositions to two named Class Plaintiffs were made in any other instances in this case. We also describe the methodology Proskauer is using to verify what we know. Finally, we wish to detail the additional procedures Proskauer is immediately putting in place specifically to deal with the management of confidential or highly confidential material in this case in the future. (Late on Sunday, we received from counsel for Defendants a new protocol. We have not had a chance to discuss that proposal with counsel for Defendants but will do so and will be prepared to address it at the conference with Your Honor. It appears that many of the requests in Defendants' proposal are covered by the procedures set out below.)¹

¹ Relating to the Chad Hurley and Karim deposition transcripts, which are two of the transcripts sent out on September 8, we advised Defendants' counsel over the weekend that those two transcripts were not redacted as sent to the two clients. As both of those clients had signed the Ex. A undertaking to the Protective Order, both were entitled to review deposition transcripts deemed to be designated Confidential under paragraph 6 of the Protective Order. The Karim and Hurley transcripts were not redacted when sent on September 8 because there was no designation (either during those depositions or within 30 days after delivery of the respective transcripts) that called for redaction (Protective Order paras 6(a), (b)). Nor to our knowledge was there any request for an extension of the time limits in the Protective Order to make those designations. As we advised counsel for Defendants, in our search following Friday's conference, we did find some belated HC designations, in one case nearly 3 months and in the other case nearly 4 months after the depositions in question. The initial searches made by the associate and paralegal, done before the September 8 transmittal, looked during and beyond the respective 30-day periods but did not sweep months later and thus did not reveal the late designations. As we have advised Your Honor, none of the deposition transcripts remains in the possession of either client.

Hon. Louis L. Stanton
November 16, 2009
Page 2

A. Verifying that No Improper Disclosure of Confidential or Highly Confidential Information has Occurred

As we advised Your Honor, more than a dozen IT personnel, both at Proskauer and at the independent forensic firm IRIS, and at least six lawyers (including the Firm's General Counsel, Steve Krane, our partner who heads Risk Management, Greg Mashberg, as well as several senior partners with expertise in conducting internal investigations (Dieter Snell, Bob Cleary, and Anthony Pacheco) -- in addition to the core team otherwise working on this matter -- have been conducting a thorough investigation of the circumstances of the September 8 redactions and related issues. Based on our investigation to date, Proskauer has detected no other transmittal of confidentiality redactions outside of the Firm made in the manner of the September 8 transmittals or that otherwise permits unmasking. The analysis so far shows that, except for the September 8 transmittals, the Firm previously and consistently redacted materials by means that do not allow unmasking and that, except for the September 8 transmittals, no other potential disclosure of information designated by Defendants as highly confidential has been found.

We describe here in general the steps we have taken to support our conclusion that the format of redactions in the depositions sent to two of our clients, each a named Class representative (in one case in-house counsel) on September 8, 2009, was an isolated event and has not occurred before and will not occur in the future. Although Proskauer's work is not yet complete, in the respects identified below, we feel that we have identified the cause of the lapse in our standard procedures that occurred on September 8. In addition, everything we have looked at thus far confirms our belief that this was a singular event, which will not occur again.

First, like the Court, we want to rely on comprehensive steps to confirm that the September 8 redactions were an isolated incident and that no other documents or information designated by Defendants as Confidential or Highly Confidential under the Protective Order is at any risk. To accomplish that, the Firm has:

1. Already started analyzing the thousands emails and documents involved in any email or other written communications in the case, along with all attachments. If any attachment or other document, whether or not an attachment, contains any confidential information that has been redacted, we are analyzing the integrity and manner of redaction. Among the communications is the Second Amended Complaint filed in redacted form as well as under seal. No improper disclosure or errant redactions occurred;
2. Been meeting with and interviewing each lawyer, paralegal, and every other time keeper whose time on the case involved the communications with clients or others outside the Firm on the case, (in the case of former employees, we are working to locate and interview them) to assist in identifying any confidential or redacted material that passed through that person at any time, as well as their particular use of any redaction tools. This is in addition to the interviews already

Hon. Louis L. Stanton

November 16, 2009

Page 3

conducted with the core case team below and in combination with the electronic and physical searches described above;

3. Identified the precise circumstances involved in the September 8 redactions and confirmed, subject to the exhaustive verification process described above, that no other copies of those attachments had been transmitted to any person outside the Firm, other than Msrs. Tur and Hauprich.
4. Examined all Firm departments and facilities with any involvement or responsibility for document management or redactions to verify the standards, policy, procedures, training, and practices used by each of those Departments, including Practice Support, IT Help Assistance, the Paralegal Department, and Document Support on a Firm-wide basis.

Second, we have confirmed that the redactions done for the September 8 transmittal of depositions were not done by the paralegal who, in the past, has been responsible for redactions on other items we have redacted in this case (see discussion below). The paralegal who performed the September 8 redactions was relatively new. She had, however, been trained in the proper manner of redactions on July 1, 2009 at an intensive document management presentation at which attendance is mandatory. The training session not only went over the proper procedure orally; the written presentation materials similarly include a requirement that, using Adobe to electronically redact, one must print an image of the redacted version and create a *new* pdf image of it (thus making it clear that a single pdf version, as was done here, was not enough). Proskauer has held Adobe training for new hires every year for the past three years at least. We are prepared to explain other teaching and instructional activities to learn redaction procedures if the Court wishes. These apply to paralegals, associates, and the Firm's IT department.

In the past, redactions have typically been done by our principal paralegal, with her work being reviewed by one or more associates. We spoke to that paralegal, who described the method she used as either manually redacting or electronically redacting pursuant to the appropriate method (creating a second, secure pdf image). These are correct methods.

Third, we have spoken to each of the other paralegals and lawyers now at Proskauer actively involved in representing the putative class (we will try to speak to other time keepers, past and present, involved in outward communications as well). On that basis, and apart from redacted copies of the Second Amended Complaint, which as noted were all redacted properly, we have not identified any other redacted documents sent to any clients, apart from those contained in the September 8 transmittals to Tur and Hauprich, but we are, as described above, still completing our verification process.

Fourth, in the past, we have electronically filed redacted documents with the Court. The best example of that is a redacted version of the operative complaint. We also filed redacted copies of our responsive brief in the appeal that Defendants took to the Ninth Circuit last year. We have

Hon. Louis L. Stanton
November 16, 2009
Page 4

double checked the filed copies of both those documents. We can confirm that the redactions were done in the appropriate manner.²

Fifth, moving more broadly to our efforts to protect the vast number and type of materials that Defendants have designated Confidential or Highly Confidential, we store those documents in secure, password-protected databases for the electronic documents, and in locked cabinets for the hard copy documents. We have confirmed that the people working on the case understand their obligations under the Protective Order. We note that, when the parties (including Defendants and Viacom) were exchanging information on our respective processes as part of the protocol to try to determine the sources of the leaks to Sandoval, we concluded that our procedures in that investigation were as strict as or stricter than those of Defendants and Viacom. Nonetheless, we are adding several additional protections, as discussed below.

Although we have thus far reviewed the materials that the lawyers and paralegals actively involved in the litigation believe could possibly be a source of error, we are committed to an exhaustive process to verify this. As described above, we are continuing to examine each of the thousands of email attachments among personnel with any involvement in the case, and are focusing on transmittals of discovery materials sent to clients. We hope to complete this broader analysis within two-to-three weeks.

B. Implementation of additional controls and protections

Effective immediately, the Firm has put in place several additional controls and protections for the specific purpose of making sure there are no even arguable issues going forward in this case. We summarize them below:

First, the senior lawyers on this case have met and spoken with the firm's general counsel, his designee for this matter, and two other senior litigation partners, both former prosecutors. Together we have devised an entirely separate and additional layer of protection for Defendants' materials. The system will include designating a senior litigation partner who is trained in computer technology and has extensive experience in e-discovery matters. His name is Colin Underwood, and his biographic entry on the Proskauer website is attached hereto.

² The Ninth Circuit Tur appeal, which the Court referred to at Friday's hearing, involved a submission – after Defendants were given prior notice and did not object – under seal of documents designated Confidential and Highly Confidential by Defendants (later voluntarily downgraded to Confidential). While the Court found that the question of Class Plaintiffs' non-compliance with the Protective Order was not "plain or simple" (7/15/08 Tr. at 27), the record is clear that the submission did not put at risk any Highly Confidential material. Further, the Court found that Class Plaintiffs' application to remove even the down-graded Confidential status of the documents was "not countered by any similar analysis on the part of the defendants." (8/1/08 Tr. at 28) We remain extremely sensitive to the views expressed by the Court in relation to this matter and do not believe the current issue should be seen as related.

Hon. Louis L. Stanton

November 16, 2009

Page 5

The firm has advised Mr. Underwood of the seriousness of this matter, and we have given him the operative Protective Order and will supply him with the various relevant letters, papers, and court transcripts – both on this issue and on the episode last year. Effective immediately, all personnel working on the case are being instructed that before any of Defendants' information or material is sent out of Proskauer (whether or not designated as confidential or highly confidential) in any fashion (whether via email or hard copy methods), Mr. Underwood will personally inspect the materials to ensure strict compliance with the operative Protective Orders. He will also personally inspect any of Defendants' confidential materials that we intend to show any of our clients as part of the deposition preparation process or in any meetings we have with our clients that involve any of Defendants' confidential information. Mr. Underwood was involved in the YouTube case at the outset, including ESI discovery and communicating with potential experts in this case.

Second, at this point, we do not intend to send whole transcripts of Defendants' witnesses to our clients and will not do so absent specific notice and consent by Defendants (which we request be forthcoming within 72 hours of our request) or an order of this Court. Additionally, going forward, upon receipt, all of Defendants' deposition transcripts will be immediately marked Entire Transcript Highly Confidential -- Outside Counsel's Eyes Only upon receipt, and that designation will not be removed until after a designation letter has been received, and the transcript has been properly redacted and reviewed in accordance with the above procedure, or the Court determines that we may treat the material as Confidential.

Third, we are asking Defendants' counsel to reconsider and moderate their excessive over-designation of confidential and highly confidential materials. We have not yet worked out where we want them to begin that reconsideration process. We will undertake to take the initiative on this project. Of course, until it is in place, we will continue to comply with the Protective Order. We do note that we could not disagree more with Defendants' counsel assertion that we have not been forthcoming during this process. Consistent with our attorney-client obligations, we have disclosed far more than Defendants have.

Fourth, more generally, the Firm intends to bring to the specific attention of the lawyers, paralegals and IT staff at the firm the error that occurred on September 8 and confirm again the proper method of redacting information.

We are willing to consider any other methodology that Your Honor or Defendants' counsel wishes to propose.

We do not here address the status of forensic work on Mr. Tur's computers (or those of Mr. Hauprich), since that process is presently underway and the Court directed that the parties focus now on the above issues. We would still ask Your Honor to consider the integrity and effectiveness with which we have so far represented the putative Class in this large, complex, and challenging case, or just as importantly, that it was Proskauer that was insistent, from the outset, that any investigation of the leak to CNET include clients; that Proskauer provided

Hon. Louis L. Stanton
November 16, 2009
Page 6

defendants with Mr. Tur's September 14 communications with Sandoval; and that Proskauer engaged an independent forensic firm to examine and image the computers and emails of the two clients who received the September 8 email and attachments in the absence of any agreement that this would be done as part of the original protocol.

We raise these points only to emphasize that Proskauer has neither dragged its feet nor hid the ball. We will not do so in the future either. We are here now because Proskauer has been forthcoming while trying to protect the confidences of its clients. We regret the lapse that led to the September 8 transmittal.

We look forward to the conference this afternoon.

Respectfully,



Louis M. Solomon
Attachments

cc: Counsel for all parties in both the Class and Viacom Actions, with attachments

PROSKAUER ROSE

Public Site

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Practice Areas:

Antitrust
Commercial Litigation
Intellectual Property
Litigation
Patent Law
Hatch - Waxman Act
Life Sciences

Education:

- YALE LAW SCHOOL, J.D., 1990
- PRODUCTION EDITOR, YALE LAW JOURNAL, 1989-1990
- UNIVERSITY OF MICHIGAN, M.S., 1985
- UNIVERSITY OF MICHIGAN, B.S., 1984
- WITH HIGHEST DISTINCTION
- PHI BETA KAPPA

Bar Admission:

- 12/05/1990 NEW YORK

Court Admissions:

- 1991 U.S. DISTRICT COURT, NEW YORK, EASTERN DISTRICT
- 1991 U.S. DISTRICT COURT, NEW YORK, SOUTHERN DISTRICT
- 1998 U.S. DISTRICT COURT, MICHIGAN, EASTERN DISTRICT
- 1998 U.S. DISTRICT COURT, WISCONSIN, EASTERN DISTRICT
- 2000 U.S. COURT OF APPEALS, FIRST CIRCUIT
- 2000 U.S. COURT OF APPEALS, FIFTH CIRCUIT
- 2001 U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIR.
- 2001 U.S. COURT OF APPEALS, FEDERAL CIRCUIT
- 2003 U.S. COURT OF APPEALS, SECOND CIRCUIT
- 2008 U.S. COURT OF APPEALS, THIRD CIRCUIT

Bar Affiliations:

- NEW YORK STATE BAR ASSOCIATION, MEMBER, ANTITRUST AND INTELLECTUAL PROPERTY LAW SECTIONS
- AMERICAN BAR ASSOCIATION, MEMBER, ANTITRUST, INTELLECTUAL PROPERTY AND LITIGATION SECTIONS; COMMITTEES ON COMPUTER LITIGATION AND ANTITRUST LITIGATION

Clerkship:

- LAW CLERK, HON. ROBERT W. SWEET, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, 1990-1991

Biography:

Colin Underwood is a partner in the Litigation and Dispute Resolution Department and serves as Co-Chair of the Proskauer's Antitrust Practice

Group. He is resident in the New York office.

Colin's practice focuses on complex commercial litigation, with an emphasis on antitrust and intellectual property. He has extensive experience in representing clients in the pharmaceutical industry in all types of disputes, from patent infringement litigation to contract disputes. In 2006, he obtained a major litigation victory for a small biotechnology client asserting breach of contract claims against a major pharmaceutical manufacturer. He also successfully represented another biotechnology client in an international arbitration to resolve a licensing dispute. Colin has also litigated on behalf of a generic pharmaceutical company asserting antitrust claims against another generic manufacturer for having delayed its competitor's entry into the market.

In 2007, Colin represented a major French cellular telephone company in litigation against the provider of network equipment that had failed, taking the telephone system out of service.

More recently, Colin represented the men's professional tennis tour, ATP Tour, Inc., against antitrust claims brought by the owners of Hamburg tennis tournament. After a two-week jury trial, the ATP prevailed on all counts.

Colin has also advised clients on antitrust compliance issues and in connection with merger analysis, and has represented clients before the Antitrust Division and the FTC.

Prior to entering private practice, Colin served as a law clerk for the Honorable Robert W. Sweet in the United States District Court, Southern District of New York.

Colin received his J.D. from Yale Law School in 1990, where he served as Production Editor of the *Yale Law Journal*. He earned his B.Sc. in mathematics and computer science from the University of Michigan in 1984 and his M.S. in computer science from the University of Michigan in 1985.

Colin is a member of the Executive Committee of the Antitrust Section of the New York State Bar Association and he also belongs to the Intellectual Property and International Law and Practice Sections. He is also a member of the American Bar Association, where he belongs to the Antitrust, Intellectual Property and Litigation Sections, and to the Committee on Antitrust Litigation. Colin also serves on the Advisory Board of the *BNA Pharmaceutical Law and Industry Report*.

Reported cases:

Eli Lilly & Co. v. Emisphere Technologies, Inc., 408 F. Supp. 668 (S.D. Ind. 2006)

Geneva Pharmaceuticals Tech. Corp. v. Barr Labs., Inc., 386 F.2d 485 (2d Cir. 2004)

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