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A Haystack in a Hurricane: Right of Publicity Doctrine Continues to Clash with New Media

By Matthew Savare and John Wintermute

In 1956, a court likened the state of publicity law (*i.e.*, the right to control the commercial use of one's identity) in the United States to a "haystack in a hurricane."¹ Since then, courts have brought little clarity to the doctrine. Indeed, recent case law in the videogame space has not resolved the seemingly incongruous opinions among various courts and has highlighted the inherent conflict between the doctrine and the First Amendment.

In January, the US Court of Appeals for the Ninth Circuit addressed this issue in *Davis v. Electronic Arts Inc.*² The besieged videogame company already had lost dual landmark cases in 2013, with the Third and Ninth Circuits deciding, in *Hart v. Electronic Arts Inc.*³ and *Keller v. Electronic Arts Inc.*,⁴ respectively, that Electronic Arts (EA) was not entitled to First Amendment protection for its use of college football players'

virtual likenesses in its popular *NCAA Football* line of games. *Davis* extended the ruling in those previous cases to the professional football context and held that the "historic teams" featured in EA's *Madden NFL* games, which allows gamers to control avatars resembling retired players, violates those players' right of publicity because those likenesses are "central to the creation of an accurate virtual simulation of an NFL game."⁵

The implications of *Davis*, *Hart*, and *Keller* for videogame manufacturers are materially adverse. Yet the broader takeaway is the difficulty in reconciling an ever-evolving right of publicity doctrine with emerging technologies and new media. Judicial acclimation to new technology is never painless, but innovative businesses and marketers face unique uncertainty and risk in navigating these unpredictable waters. As content providers, brands, advertisers, news organizations, and the public continue to blur the lines of art, commerce, entertainment, and information—particularly with new technologies and methods of distribution—an unclear and ever-expanding right of publicity doctrine has the capacity to chill innovation.

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Publicity

The present flood of right of publicity litigation, particularly with respect to entertainment properties, tracks the doctrine's swift growth since its inception in 1953. In that year, the Second Circuit coined the term "right of publicity" to support the idea that a "prominent person" possessed "the right to grant exclusive privilege in publishing his picture" in advertisements.⁶ Since that holding, this limited formulation of the right has been expanded to include protections for non-celebrities, post-mortem rights, and broad categories of identification.

Today, 31 states recognize a right of publicity (19 by statute, 21 by common law, and nine by a combination of the two).⁷ Among the states that recognize the right, it generally is composed of three components: (1) use of the plaintiff's identity, (2) without the plaintiff's consent, and (3) for commercial purposes.⁸ "Commercial purposes" in California, as in many other states, includes both uses "in products, merchandise, or goods" and "for purposes of advertising or selling."⁹

However, there are wide variations in the right across the different states. For example, some states have extended publicity rights past the subject's death while others have not.¹⁰ The duration of this post-mortem protection varies widely among the different jurisdictions, and some, though not all states accord the right to celebrities and non-celebrities alike.¹¹ Moreover, as the doctrine has evolved over the years, the "identity" prong has morphed from its humble beginnings of protecting only a person's name and picture to virtually any indicia of a person's identity. Statutes and courts from various states have extended protections to, among other things, name, voice, signature, photograph, likeness, "look-alikes,"¹² "sound-alikes,"¹³ catchphrases,¹⁴ nicknames,¹⁵ screen persona,¹⁶ performance characteristics,¹⁷ and biographical data.¹⁸

Since its inception, the right of publicity has been a controversial doctrine, engendering criticism from academics, judges, and the public at large,¹⁹ particularly with respect to its interplay with the First Amendment. In one of the most well-known opinions regarding the conflict between the right of publicity and the First Amendment,²⁰ Ninth Circuit Judge Alex Kozinski lamented in his dissent:

I can't see how giving [Vanna] White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an

idea, one way of referring to an object or a person. But not allowing any means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law.²¹

The dangers identified by Judge Kozinski stem from the perceived inconsistent and haphazard balancing of publicity rights and free speech. Indeed, no fewer than five First Amendment tests have been recognized in evaluating right of publicity claims.²² The US Supreme Court, in its only case involving the right of publicity, held that free speech protections "do not immunize the media" from right of publicity violations, but declined to impose any standard or test to resolve the tension between these competing principles.²³ The result has been chaotic, as lower courts have created their own ad hoc balancing tests borrowed from copyright, trademark, and other areas of the law. Such a process has engendered seemingly conflicting rulings, doctrinal inconsistencies, and uncertainties for plaintiffs and defendants alike.

In *Keller*, EA proffered First Amendment defenses based on four tests: (1) the "transformative use" test; (2) the *Rogers* test; (3) the "public interest" test; and (4) the "public affairs" exemption.²⁴ The Ninth Circuit dismissed the latter three defenses as inapt and rejected EA's contention that its use was transformative.²⁵ The Court held that the "realistic" nature of the players' depictions in the game rendered EA's use of their likenesses non-transformative, and hence subject to the players' publicity rights.²⁶

Keller's "realistic use" holding, along with *Hart's* nearly identical analysis, is troubling for content creators and a potential boon for athletes and celebrities. Realism, many critics of these decisions argue, is an entirely acceptable creative aim and one that judges do not have the authority or the artistic wherewithal to condemn.²⁷ Given the Supreme Court's recognition that videogames are entitled to the same degree of First Amendment protection as other forms of creative works, such as books and movies,²⁸ the Ninth Circuit's holding seems inconsistent with controlling case law and begs several important questions. Why are docudramas such as *The Social Network*, which are based on real people and a certain degree of verisimilitude, shielded from right of publicity claims by the First Amendment while realistic videogames are not? How is a videogame, which has been held by numerous courts to be expressive speech, considered a commercial use? To what degree does someone's persona need to be "transformed" to receive First Amendment protection? Can such transformation result in a different cause of action, such as a defamation claim?²⁹ At a time when technology is enabling photorealistic renderings of individuals

(both living and deceased) for entertainment content, First Amendment advocates argue that the vagaries and uncertainties of the transformative use test make it ill-equipped to balance the right of publicity doctrine with the right to free speech.

In *Davis*, EA also argued that the First Amendment protected the use of former NFL players' likenesses because they appeared in only a single feature of the game, amounting to an "incidental use" of their images.³⁰ The Ninth Circuit rejected this defense, citing a number of factors, including "the unique value" of the use "and [its] contribution to the commercial value of *Madden NFL*," EA's advertising of the "historic teams" feature, the prominence of the former players' likeness, and their relation "to the main purpose and subject" of creating "an accurate virtual simulation of an NFL game."³¹ In essence, the court held there to be a misappropriation of the players' publicity rights because "[a]ccurate depictions of the players" was "central" to an accurate virtual experience.³²

But *Davis*, too, arguably fails to accord traditional First Amendment protections to new media. This seeming incongruity is illustrated when *Davis* is read in conjunction with *Dryer v. National Football League (NFL)*,³³ which was decided by a district court in Minnesota only three months earlier. In that case, former NFL players sued the league itself, claiming that its use of the players' likenesses and historical video footage in various NFL Films productions was unauthorized and a violation of their publicity rights.³⁴ The *Dryer* court rejected the suit's merits, finding for the NFL on all of its various arguments, including that the films qualified for full First Amendment protection as non-commercial speech and were protected under the "newsworthiness" doctrine.³⁵ Given the similar fact patterns of the two cases, the contradictory dispositions of *Davis* and *Dryer* are striking.

In fact, the *Dryer* court addressed and accepted the same incidental use argument that the Ninth Circuit rejected in *Davis*:

The NFL is capitalizing not on the likenesses of individual players but on the drama of the game itself, something that the NFL is certainly entitled to do. Plaintiffs do not explain how the NFL could create a visual recounting of a significant football game or the season of a particular football team without the use of footage of NFL players playing in those games. While the NFL certainly reaps monetary benefits from the sale and broadcast of these productions, the use of any individual player's likeness—the productions' display of footage of plays involving an individual player—is not for

commercial advantage but because the game cannot be described visually any other way.³⁶

Davis, conversely, viewed the necessity of the players' likenesses for achieving a realistic virtual simulation as inculpatory, not exculpatory, evidence.³⁷ That begs the question as to why EA is not entitled to exploit its license with the NFL to create accurate virtual simulations of games (including the reenactment of historical games), just as the NFL is entitled to create traditional, visual accounts of historical games? Why is EA's pursuit of realism any less valid than the NFL's? One can reconcile the *Davis* and *Dryer* holdings by pointing out that the courts are different and the Minnesota district court is not bound by the holdings of the Ninth Circuit. Such a response ignores the fundamental problem, namely, that the state of right of publicity jurisprudence is convoluted and contradictory, particularly with respect to emerging media and technologies.³⁸

The state of the law has led to more, not fewer, lawsuits. In addition to the *Hart*, *Keller*, and *Davis* cases against EA, right of publicity lawsuits emanating from videogames have been filed recently by Manuel Noriega,³⁹ Lindsay Lohan,⁴⁰ *No Doubt*,⁴¹ and the estate of General George Patton.⁴² *Hart* and *Keller*, in fact, relied on *No Doubt v. Activision Publishing, Inc.* in finding that celebrity depictions in a videogame were not protected unless they somehow "transformed" the subject.⁴³ This trend shows no signs of slowing. The mutable doctrine and ad hoc application of various First Amendment tests creates an unhealthy environment for all parties involved. Content creators are faced with uncertainty as to what rights need to be cleared, undue threats of litigation, and a potential chilling of arguably protectable speech. The persons depicted in the content have to invest the time, money, and risks associated with formal legal action. If the law were clearer on this subject, the likelihood that there would be a meeting of the minds between the parties would presumably increase and the chances of litigation would almost certainly diminish.

These problems are compounded as innovative companies and emerging technologies blend artistic, commercial, and informational messages in hybrid speech. Existing right of publicity and First Amendment jurisprudence, which compel content to be judged as either commercial or non-commercial, fails to appreciate that speech is not always binary and often cannot be placed in these neat, notional buckets. The emergence of hybrid speech, such as advertorials and native advertising, and the advent of social media and its functionalities, such as "likes" and "retweets," have further complicated matters for brands and content creators and increased their opportunities to run afoul of right of publicity laws.

Take, for instance, the dispute between Katherine Heigl and Duane Reade in the summer of 2014 over a tweet sent out by the drugstore chain. The disputed post captioned a paparazzi photo of Heigl exiting a Duane Reade store with the message “Don’t you just love a quick #DuaneReade run? Even Katherine Heigl can’t resist shopping at #NYC’s most convenient drugstore!” Alleging that those 19 words had violated her right of publicity, Heigl sued the company for \$6 million.⁴⁴ The parties quickly settled for an undisclosed sum, but questions abound. To what extent does the First Amendment protect a company’s truthful social media statements discussing a celebrity’s use of its product or service? Does it matter that Duane Reade included its hashtag in the tweet and would it have been safer to simply retweet the photograph without any additional messaging?

On this set of facts, existing case law seems to lean in Heigl’s favor. But would more indirect messaging be acceptable? For example, companies often provide free swag at celebrity functions, such as the Oscars. Can these companies, which pay to get their products freely distributed to celebrities, post pictures of these celebrities (with no captions or other verbiage) with these products without their permission? Here, the answer appears less clear than in the Heigl case, and likely depends, among other things such as the choice of law, on which definition of “commercial speech” the applicable court employs.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁴⁵ the US Supreme Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” However, just three years later in *Bolger v. Youngs Drug Products Corp.*,⁴⁶ the high court defined commercial speech as “speech which does ‘no more than propose a commercial transaction.’” More recently in *Kasky, v. Nike, Inc.*,⁴⁷ the California Supreme Court concluded that certain speech was “commercial” because “the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products....”

Retweeting a picture of a celebrity carrying a company’s products, without including any messaging, still seems to be commercial speech and problematic from a right of publicity perspective under *Central Hudson* and *Kasky*, but possibly not under *Bolger*. What if the facts are changed and the company posting the message is truthfully reporting on a celebrity’s philanthropic involvement with a charity that the company sponsors? Although there is no definitive answer, what is clear is that a 140-character message can expose

companies—even ones that are doing more than simply proposing a commercial transaction—to a Page Six headline and a multimillion dollar lawsuit.

In light of our culture’s fascination with celebrities and sports figures, incorporating some elements of their personas into our messaging—be it a tweet, a Facebook post, a virtual reality simulation, a videogame, or a 60-second spot—will continue unabated. Likewise, because stars often earn more money licensing their name, image, voice, or likeness and go to great lengths to cultivate their image, their professional representatives will continue to enforce their publicity rights vigorously.

With all of the aforementioned doctrinal uncertainties and with the likes of Lindsay Lohan invoking her right of publicity against everyone from E-Trade,⁴⁸ to the makers of *Grand Theft Auto*,⁴⁹ to Pitbull,⁵⁰ businesses and their advertising agencies must assume that simply evoking someone’s persona, even in the most tangential way, will result in a demand letter and ultimately litigation. Despite Supreme Court precedent to the contrary, lower courts are simply not affording certain types of entertainment speech, especially videogames, the same robust First Amendment protections it gives other expressive content. In light of this environment, any commercial venture should carefully evaluate whether using—or simply evoking—the persona of an individual (celebrity or non-celebrity) without permission in any messaging (unless unequivocally non-commercial) is worth the risk. Until Congress or the Supreme Court acts to clarify and reconcile the various discrepancies concerning the scope of publicity rights, the definition of “commercial speech,” and the bounds of First Amendment protection, the haystack will keep blowing.

Notes

1. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir. 1956).
2. *Davis v. Electronic Arts Inc.*, Case No. 12-15737 (9th Cir. Jan. 6, 2015), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/06/12-15737.pdf>.
3. *Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3d Cir. 2013).
4. *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013).
5. *Davis*, at 16.
6. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).
7. The states with statutory sources of publicity rights are: California (Cal. Civ. Code 3344-3344.1); Florida (Fla. Stat. Ann. 540.08); Illinois (765 Ill. Comp. Stat. 1075/1); Indiana (Ind. Code Ann. 32-36-1-1); Kentucky (Ky. Rev. Stat. ann. 391.170); Massachusetts (Mass. Gen. Laws. Ann. ch. 214, 3A); Nebraska (Neb. Rev. Stat. 20-201); Nevada (Nev. Rev. Stat. Ann. 597.7700); New York (N.Y. Civ. Rights Law 50, 51);

- Ohio (Ohio Rev. Code Ann. 2741.01); Oklahoma (Okla. Stat. Ann. tit. 21, 839.1); Pennsylvania (42 Pa.C.S.A. § 8316); Rhode Island (R.I. Gen. Laws § 9-1-28.1); Tennessee (Tenn. Code Ann. 47-25-1101-1108); Texas (Tex. Prop. Code Ann. 26.001-15); Utah (Utah Code Ann. 45-3-1); Virginia (Va. Code Ann. 8.01-40); Washington (Wash. Rev. Code Ann. 63.60.010); and Wisconsin (Wis. Stat. Ann. 895.50). The states that recognize a common law right of publicity are: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin. The states that recognize both a statutory and common law right of publicity are: California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas, Utah, and Wisconsin.
8. J. McCarthy, *The Rights of Publicity and Privacy* § 6.1 (2014). Courts have struggled mightily to differentiate between commercial and entertainment speech. A survey of this struggle is beyond the scope of this article, but for further information, see Matthew Savare, "Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements," 11 *UCLA Ent. L. Rev.* 331 (2004).
 9. California Civil Code § 3344.
 10. See, e.g., *id.* at § 3344.1.
 11. See, e.g., *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011).
 12. See, e.g., *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978); *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512 (9th Cir. 1993).
 13. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).
 14. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).
 15. See, e.g., *Lombardo v. Doyle, Dane, & Bernbach, Inc.*, 396 N.Y.S.2d 661 (App. Div. 1977); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979).
 16. See, e.g., *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994).
 17. See, e.g., *Apple Corps Ltd. v. Leber*, 229 U.S.P.Q. 1015 (Cal. Sup. Ct. 1986).
 18. See, e.g., *Prima v. Darden Restaurants, Inc.*, 78 F. Supp. 2d 337 (D.N.J. 2000).
 19. See, e.g., Joshua Waller, "The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting The Exploitation of the First Amendment?," 9 *UCLA Ent. L. Rev.* 59 (2001); Diane Leenheer Zimmerman, "Who Put the Right in the Right of Publicity?," 9 *DePaul-LCA J. Art & Ent. L. & Pol'y* 35, 52 (1998) (stating that "the expanding right of publicity is a piece of a larger trend that has elicited negative comment from a wide range of scholars alarmed at seeing intellectual property rights gradually colonizing more and more of the informational commons."); Mark A. Lemley & Eugene Volokh, "Freedom of Speech and Injunctions in Intellectual Property Cases," 48 *Duke L.J.* 147, 227 (1998) ("The speech-restrictive potential of the right of publicity goes much further than that of trademark law, or even libel law, and it may mean that the doctrine as a whole is substantively unconstitutional . . ."); Michael Madow, "Private Ownership of Public Image: Popular Culture and Publicity Rights," 81 *Cal. L. Rev.* 127, 191 (1993).
 20. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, J., dissenting). The case involved a Samsung advertisement for its consumer electronics equipment, which depicted various Samsung products with various, humorous predictions. The commercial was to illustrate that Samsung's products would still be used 20 years in the future. The image in question in this case involved a robot, dressed to look like Vanna White, beside a game board reminiscent of the Wheel-of-Fortune, with the caption "Longest running game show. 2012 A.D." The US Court of Appeals for the Ninth Circuit reversed the district court's rejection of White's summary judgment motion for a common law right of publicity claim, stating that it "declines Samsung and Deutch's invitation to permit the evisceration of the common law right of publicity through means as facile as those in this case."
 21. *Id.* at 1519.
 22. These tests include: (1) the "transformative use test" employed by the California Supreme Court in *Comedy III Productions, Inc. v. Saderup, Inc.*, 25 Cal. 4th 387 (2001); (2) the *Rogers* test, from *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); (3) the standard from the Restatement (Third) of Unfair Competition, which was used by the Sixth Circuit in *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003); (4) the "pre-dominant use" test utilized by the Missouri Supreme Court in *Doe v. TCI Cablevision, Inc.*, 110 S.W.3d 363 (Mo. 2003); and (5) the "knowingly false" standard, a concept from libel law adopted in some right of publicity cases, including *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001).
 23. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The *Zacchini* case demonstrates that the doctrine is not confined to commercial speech. In *Zacchini*, the Supreme Court concluded that a television station had to compensate a performer when it aired his entire act without his consent during its eleven o'clock news program. Thus, although the unauthorized use concerned a seemingly newsworthy event, the First Amendment did not immunize the station. Although commentators have construed the decision narrowly to apply only to misappropriations of a plaintiff's entire act, its holding illustrates that even newsworthy speech is not beyond the doctrine's reach.
 24. *Keller*, 724 F.3d at 1273.
 25. *Id.* at 1274-1284.
 26. *Id.* at 1283-1284.
 27. See, e.g., Tyler Ochoa, "Rationalizing (?) the Hart and Keller v. EA Sports Publicity Rights Rulings (Guest Blog Post)," *Technology & Marketing Law Blog* (August 5, 2013), http://blog.ericgoldman.org/archives/2013/08/a_futile_attempt.htm.
 28. *Brown v. Ent't Merchants Assn.*, 131 S.Ct. 2729 (2011).
 29. Matthew Savare, "Falsity, Fault, and Fiction: A New Standard for Defamation in Fiction," 12 *UCLA Ent. L. Rev.* 129 (2004).

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30. *Davis*, at 12.
31. *Davis*, at 14–16.
32. *Davis*, at 16.
33. *Dryer v. Nat'l Football League*, Civil Case No. 09-2182 (D. Minn. Oct. 10, 2014), available at <http://www.loeb.com/~media/Files/Publications/2014/10/Dryer%20v%20NFL.pdf>.
34. *Id.* at 1.
35. *Id.* at 39.
36. *Id.* at 15.
37. *Davis*, at 16.
38. The authors of this article have focused exclusively on the interplay between the First Amendment and the right of publicity. However, other challenges exist with respect to the right of publicity, including choice of law and forum shopping due to the wide variations in the law, the variations with respect to post mortem protection, and the different definitions and tests employed to determine whether the speech at issue is commercial. Based on these and other factors, numerous commentators have called for the Supreme Court to clarify the doctrine or for the passage of a federal right of publicity law.
39. *Noriega v. Activision/Blizzard, Inc.*, No. BC 551747 (Cal. Sup. Ct. Oct. 27, 2014).
40. *Lohan v. Take-Two*, Case No. 156443/2014.
41. *No Doubt v. Activision Publ'g, Inc.* 192 Cal. App. 4th 1018 (2011).
42. *CMG Worldwide Inc. v. Maximum Family Games, LLC*, filed in the US District Court for the Northern District of California.
43. See *Keller*, 724 F.3d at 1278–1279 (“Like the majority in *Hart*, we rely substantially on *No Doubt*, and believe we are correct to do so.”).
44. *Heigl v. Duane Reade*, filed in the US District Court for the Southern District of New York.
45. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).
46. *Bolger v. Youngs*, 463 U.S. 60, 66 (1983) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).
47. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 946 (2002).
48. *Lohan v. E*Trade Securities LLC*, Case No. 10-004579, filed in the Supreme Court of the State of New York, County of Nassau.
49. *Lohan v. Take-Two*, Case No. 156443/2014, filed in the Supreme Court of the State of New York, County of New York.
50. *Lohan v. Perez*, Case No. 2:11-cv-05413 (S.D.N.Y. Feb. 21, 2013).

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