

EXHIBIT 2005

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY (NEWARK)**

HAPPY PRODUCTS, INC.,

Plaintiff,

v.

ONTEL PRODUCTS CORPORATION;
BOSCOV'S DEPARTMENT STORE,
LLC; BJ'S WHOLESALE CLUB, INC.;
AND UNBEATABLESALE.COM, INC.,

Defendants.

Civil Action No. 2:24-cv-09819-EP-JRA

Hon. José R. Almonte

JOINT PROPOSED DISCOVERY PLAN

**Initial Scheduling Conference: May 2,
2025 3:30 p.m.**

Document Filed Electronically

- 1. Set forth the name of each attorney appearing, the firm name, address and telephone number and facsimile number of each, designating the party represented.**

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Attorneys for Defendants Ontel Prods. Corp., Boscov's Department Store, LLC, BJ's Wholesale Club, Inc., and Unbeatable.com, Inc.

2. Set forth a brief description of the case, including the causes of action and defenses asserted.

Plaintiff's Description of the Case

Plaintiff claims that Defendants infringed its patent (covering certain functionality) and trade dress (as defined in the Amended Complaint) relating to its innovative Flippy multi-angle tablet pad through sales and offers for sale of Ontel's inferior-quality knock-off Pillow Pad product, which Ontel offered for sale through both direct and retail channels (including but not

limited to those of the Retailer Defendants) after ordering multiple copies of the Flippy so that it could develop its knock-off-version. Plaintiff has also alleged numerous instances of Ontel's false advertising of Ontel's knock-off Pillow Pad product, including (on information and belief), the use of the Flippy to advertise the knock-off Pillow Pad product and advertisements of certain generations of Pillow Pad to sell different generations of Pillow Pad. Based on Ontel's direct and retail-partner sales of its knock-off Pillow Pad product, Plaintiff alleges that it was blocked out of numerous retail channels and its overall sales suffered greatly. Plaintiff also alleges unfair competition against Ontel and the other Defendants and tortious interference against Ontel under New Jersey state law.

Defendants have not yet filed an Answer, and thus have not asserted any defenses, although their Partial Motion to dismiss certain claims is presently pending.

As such, and because Defendants were free at any time (and remain so) to file an Answer and Counterclaims on any or all counts of the Amended Complaint but declined to do so, Plaintiff submits that it is inappropriate to use this filing to discuss hypothetical counterclaims and related discovery issues that Defendants may (or may not) bring into this case at some unspecified point in the future.

In addition, Plaintiff objects to Defendants' repeated and extensive use of this Joint Filing to argue the substance of its Partial Motion to Dismiss. Mindful of the purpose of this joint submission, Plaintiff will not respond to Defendant's Description of the Case beyond noting its disagreement with the framing and numerous statements therein.

Defendants' Description of the Case

Plaintiff's Amended Complaint names four Defendants: Ontel Products Corporation ("Ontel"), Boscov's Department Store, LLC, BJ's Wholesale Club, Inc., and Unbeatable.com, Inc. The Amended Complaint asserts the following claims against Ontel: Direct Patent Infringement, Induced Patent Infringement, Trade Dress Infringement under the U.S. Lanham Act, False Advertising under the U.S. Lanham Act, Unfair Competition under New Jersey statutory and common law, and Tortious Interference with Prospective Economic Advantage under New Jersey common law – all regarding Ontel's alleged manufacture, offering, and sale of a multi-angle tablet pad. Plaintiff alleges that Ontel's offering of the Accused Product infringes U.S. Patent No. RE48,479, and also Plaintiff's alleged and unregistered, product-design trade dress rights in its "Flippy" product.

Plaintiff alleges that Defendants Boscov's Department Store, LLC, BJ's Wholesale Club, Inc., and Unbeatable.com, Inc. (collectively, the "Retailer Defendants") purchased the Accused Products from Ontel and sold them to consumers. Against the Retailer Defendants, Plaintiff alleges: Direct Patent Infringement, Trade Dress Infringement, and Unfair Competition under New Jersey statutory and common law.

Defendants have not yet filed an Answer or counterclaims, but dispute Plaintiff's factual and legal claims, and will present a robust defense to all of Plaintiff's claims. Defendants' Partial

Motion to Dismiss and to Strike sections of the Amended Complaint (ECF No. 40) is pending before Hon. Judge Padin, and will be fully briefed on April 28, 2025. The pending motion seeks dismissal of Plaintiff's claims: for (1) Trade Dress Infringement; (2) Tortious Interference with Prospective Economic Advantage under New Jersey common law; (3) Unfair Competition under New Jersey statutory law and (4) and Unfair Competition under New Jersey common law. Moreover, the pending motion seeks the striking of numerous Amended Complaint paragraphs which mention former-Defendant Telebrands Corporation ("Telebrands"). Telebrands had been voluntarily dismissed by the Plaintiff from this lawsuit, and the Court had ordered Plaintiff not to mention Telebrands in its Amended Complaint, but Plaintiff nevertheless included more than sixty (60) references to Telebrands in its Amended Complaint. Additionally, Defendants' have moved to strike other Amended Complaint paragraphs that describe unrelated third-parties' lawsuits.

After Defendants' Motion to Dismiss and to Strike is fully adjudicated (and, potentially, after Plaintiff files its second amended complaint), Defendant Ontel anticipates filing multiple counterclaims against Plaintiff. Factually, the counterclaims will include *inter alia* Plaintiff's recent filing of frivolous complaints of patent infringement with Amazon, Inc., demanding the removal of Ontel's products from the Amazon ecommerce platform when, allegedly, Plaintiff lacked a good faith belief that there existed any infringement of Plaintiff's patent. Ontel may also file counterclaims for trade libel and defamation.

3. Have settlement discussions taken place? Yes ___ No X

(a) What was plaintiff's last demand? N/A

(b) What was defendant's last offer? N/A

4. The parties [have X have not _____] met pursuant to Fed. R. Civ. P. 26(f):

5. The parties [have _____ have not X] exchanged the information required by Fed. R. Civ. P. 26(a)(1). If not, state the reason therefor.

The parties have agreed to exchange the information required by Fed. R. Civ. P. 26(a)(1) by May 23, 2025, subject to the modifications below:

6. Explain any problems in connection with completing the disclosures required by Fed. R. Civ. P. 26(a)(1)

Plaintiff submits that a *computation* of damages as set forth in Fed. R. Civ. P. 26(a)(1)(A)(iii) is premature prior to the completion of fact discovery because it requires, at the very least, substantial factual information regarding the timing and volumes of Defendants' various sales of the Ontel Pillow Pad product that is currently in the possession of Ontel, the Retailer Defendants, and other third parties. That computation is properly the subject of expert testimony.

In the exchange of information set forth above, Plaintiff can *describe* the framework for how it presently believes that each category of damages should be calculated, but it will not have the ability or information necessary to perform that calculation at that time.

7. The parties [have _____ have not X] filed disclosures of third-party litigation funding. See Local Civil Rule 7.1.1.

The Parties represent that they do not have third-party litigation funding to disclose in this lawsuit.

8. The parties [have _____ have not X] conducted discovery other than the above disclosures. If so, describe.

9. Proposed joint discovery plan:

- (a) Discovery is needed on the following subjects:

Subjects identified by Plaintiff:

- The circumstances and reasons for Ontel's decision to proceed with making a knock-off version of the Flippy
- The design designs made by Ontel in producing its knock-off Pillow Pad product
- The timing and financials of Ontel's wholesale and retail sales
- Ontel's development and importation of its knock-off Pillow Pad product
- The provenance of multi-angle tablet pad products depicted in Ontel's initial Pillow Pad advertisements
- Ontel's relationships with retailers, including but not limited to the Retailer Defendants
- The development and deployment of Ontel's advertisements depicting and/or selling its later-generation Pillow Pad products
- Each Defendant's sales figures and revenues relating to Ontel's knock-off Pillow Pad product
- Ontel's awareness of actual consumer confusion between its Pillow Pad product and Flippy
- Ontel's discussions with retail partners, including but not limited to the Retailer Defendants, regarding Flippy and/or Plaintiff's allegations of infringement

Plaintiff submits that no discovery is needed for issues that do not relate to the claims and defenses presently at issue in this case, and Defendants' inclusion of such subjects below is improper. These include at least the following subjects identified by Defendants below:

- "Plaintiff's communications with Ontel's direct response television and retail customers."
- "Plaintiff's communications with third-parties regarding Ontel."
- "Plaintiff's advertising, public relations, and marketing campaigns regarding Ontel and the

Flippy.”¹

Furthermore, Plaintiff disagrees with Defendants’ characterization that it made any false statements about Ontel at any point, let alone “distribut[ed]” them, and notes that Defendants expressly refused to revise their phrasing to state “*allegedly* false and injurious statements”.

Subjects identified by Defendants Ontel regarding Plaintiff’s claims:

- Plaintiff’s abandoned trademark application to the United States Patent and Trademark Office (“PTO”) to register its purported unregistered trade dress in the Flippy product design.
- Whether Plaintiff’s Flippy product design achieved acquired distinctiveness amongst consumers pursuant to the Trademark Act Section 2 and, if so, when did the Flippy design achieve acquired distinctiveness.
- Plaintiff’s advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies linking the name to a source for its Flippy product design.
- Plaintiff’s relationships with particular retailers, including but not limited to those mentioned in Plaintiff’s Amended Complaint.
- Plaintiff’s communications with Ontel’s direct response television and retail customers.
- Plaintiff’s communications with third-parties regarding Ontel.
- Plaintiff’s alleged lost sales owing to the alleged conduct of the Defendants.
- Third-party tablet pad designs and products, including patented designs and unpatented designs offered to consumers and relevant Prior Art.
- Plaintiff’s prosecution of its patent applications before the PTO, including its identification of Prior Art.
- Plaintiff’s evidence of objective indicia of non-obviousness, if any.
- Plaintiff’s manufacturing capabilities and funding.
- Plaintiff’s advertising, public relations, and marketing campaigns regarding Ontel and the Flippy.

Subjects identified by Defendant Ontel regarding Ontel’s forthcoming counterclaims:

- Plaintiff’s distribution of false and injurious statements about Ontel.
- Plaintiff’s communications to Amazon, Inc., regarding Ontel’s products.

Please note that Defendants do not herein respond to Plaintiff’s premature objections to discovery that has not yet been served.

¹ Plaintiff is unable to understand how the subject of “Plaintiff’s ... public relations, and marketing campaigns regarding Ontel and the Flippy” has anything to do with any issues presently in this case, and Defendants did not substantively respond to Plaintiff’s request for an explanation.

(b) Discovery [should _____ should not X] be conducted in phases or be limited to particular issues. Explain.

Plaintiff submits that there are no gating issues that would require discovery to be conducted in phases, nor are there any limits on discovery necessary beyond those set forth in the Local Rules, Federal Rules of Evidence, and the Federal Rules of Civil Procedure.²

Defendants' Statement

Defendants do not propose that discovery be conducted in phases; however, Defendants submit that all discovery should be stayed until the pending Partial Motion to Dismiss and to Strike is fully adjudicated, and Defendants file their Answers and Counterclaims.

First, Defendants note that the pending Partial Motion to Dismiss and to Strike will be fully briefed next week, and the Defendants' Motion seeks dismissal of four (4) of Plaintiff's claims, including Plaintiff's claim that its "Trade Dress" has been infringed by the Defendants, and Plaintiff's claim for Tortious Interference with a Prospective Economic Advantage. As pleaded, the Plaintiff's claims for (a) Trade Dress Infringement and (b) Tortious Interference with a Prospective Economic Advantage are very closely tied to Plaintiff's patent infringement claims. For example, Plaintiff alleges that *each and every sale* of the Accused Products amounts to (1) patent infringement, (2) trade dress infringement, and (3) a tortious interference with a prospective economic relationship between the Plaintiff and a retailer or consumer. *See* D.I. 34, at ¶ 394. Thus, Defendants submit that it would be more efficient for discovery to proceed only after the Parties know whether the Plaintiff's trade dress infringement and tortious interference claims survive the pending Motion to Dismiss and to Strike, since they are factually intertwined with Plaintiff's other legal claims.

Second, Defendant Ontel will be filing counterclaims against Plaintiff after the pending Partial Motion to Dismiss and to Strike is adjudicated. The counterclaims will include Plaintiff's "bad-faith" submission of patent-infringement complaints to Amazon, Inc., regarding the sale of certain Ontel products on Amazon. Plaintiff's "bad-faith"

² Plaintiff also offers the following statement in response to Defendants' position seeking a stay of all discovery: Defendants' effort to informally request a stay of ***all discovery*** via the CMC ***without even having filed a motion for such*** is completely improper. *See Humana Inc. v. Celgene Corp.*, Civil Action No. 19-7532 (ES) (MAH), 2025 U.S. Dist. LEXIS 63586, at *6 (D.N.J. Mar. 19, 2025). Substantively, "[I]t is well settled that the mere filing of a dispositive motion does not constitute 'good cause' for the issuance of a discovery stay." *Galarza v. Whittle-Kinard*, Civil Action No. 16-cv-00764 (ES)(SCM), 2017 U.S. Dist. LEXIS 75981, at *3 (D.N.J. May 18, 2017). That is even more so here, where even if Defendants' Motion to Dismiss were granted in total—which seems unlikely based on Judge Padin's pre-motion conference—it would hardly dispose of the case because 6 Counts of the Amended Complaint would remain; Defendants ***have not*** moved to dismiss Counts I–III for patent infringement and Counts V–VII for Lanham Act False Advertising, which are indisputably ready to proceed to discovery.

complaints to Amazon, Inc., involve the Patent-in-Suit, however, as asserted against Ontel products that are not the subject of Plaintiff's patent infringement claims in this lawsuit. Thus, discovery on Plaintiff's and Ontel's claims should proceed at the same time because they both involve the scope of Plaintiff's alleged patent rights.

Consequently, Defendants submit that discovery should be stayed until Defendants' Answers and Counterclaims are filed. Defendants' do not respond herein to Plaintiff's lengthy prebuttal, which Plaintiff inserted shortly before end-of-day.

(c) Proposed schedule:

(1) Fed. R. Civ. P. 26 Disclosures May 23, 2025

(2) E-Discovery conference pursuant to L. Civ. R. 26.1(d):

on or before May 9, 2025.

(3) Service of initial written discovery

Plaintiff proposes May 2, 2025.

Defendants propose 7 days after the Defendants' Answers and Counterclaims are filed with the Court.

(4) Plaintiff proposes a maximum of 30 Interrogatories by each party to each other party.

Defendant proposes a maximum of 25 Interrogatories by each party to each other party, as is set forth in F.R.C.P. 33(a)(1).

(5) Maximum of 10 depositions to be taken by each party (any depositions conducted pursuant to L. Pat. R. 4.4 and/or L. Pat. R. 4.5 shall not count against this limit). Any deposition noticed pursuant to Fed. R. Civ. P. 30(b)(6) shall count as a single deposition per notice regardless of the number of witnesses designated to provide testimony or the number of topics involved.

(6) Motions to amend or to add parties to be filed by 60 days after service of the last pleading to which no response is due (i.e., Answer to Counterclaims).

(7) Fact discovery to be completed by 3 months after Markman order.

(8) Burden of Proof expert reports due on 90 days after completion of fact discovery; any supplementation thereof will be automatically permitted and due 30 days after production of any supplemental discovery response relating thereto or production ordered pursuant to a motion to compel after the close of fact

discovery.

(9) Rebuttal expert reports due on 60 days after Burden of Proof expert reports; any supplementation thereof due 14 days after permitted supplementation of a Burden of Proof Expert Report.

(10) Expert depositions to be completed by 60 days after Rebuttal Expert Reports.

(11) Dispositive motions to be served within 90 days of completion of expert discovery.

(d) Set forth any special discovery mechanism or procedure requested.

As set forth above in 9(b), the Defendants request that discovery not commence until the Defendants' Partial Motion to Dismiss and to Strike is ruled upon by Judge Padin, and the Defendants file their Answers and Counterclaims.

In response, Plaintiff notes that well-settled rules that "the mere filing of a motion to dismiss does not stay discovery." *Udeen v. Subaru of Am., Inc.*, 378 F. Supp. 3d 330, 332 (D.N.J. 2019); *see also* footnote 4 above (identifying exemplary procedural and substantive issues with Defendants' improper informal stay request).

Patent-specific discovery as follows (all dates calculated pursuant to L. Pat. R.):

Exhibit 1

<u>Plaintiff's Proposed Deadline</u>	<u>Defendants' Proposed Deadline</u>	<u>Description</u>
To be discussed at CMC		Mediation. The parties expect to agree upon a mediator and notify the Court by the date identified in the schedule.
(14 days after CMC)	14 days after Defendants' Answers and Counterclaims are filed ("DAC")	L. Pat. R. 2.2 Presentation of a consent confidentiality order.
(14 days after CMC)	14 days after DAC	L. Pat. R. 3.1 Disclosure of Asserted Claims and Infringement Contentions (and associated L. Pat. R. 3.2 document production) to be served.

<u>Plaintiff's Proposed Deadline</u>	<u>Defendants' Proposed Deadline</u>	<u>Description</u>
(59 days after CMC)	35 days after Prior Deadline	L. Pat. R. 3.2A Non-Infringement Contentions and Responses
(59 days after CMC)	Same as above.	L. Pat. R. 3.3 Invalidity Contentions (and associated P.R. 3.4 document production)
(73 days after CMC)	14 days after Prior Deadline	L. Pat. R. 3.4A Responses to Invalidity Contentions
(87 days after CMC)	14 days after Prior Deadline	L. Pat. R. 4.1 Exchange of Proposed Terms for Construction
108 days after CMC	21 days after Prior Deadline	L. Pat. R. 4.2(a) Exchange of Preliminary Claim Constructions and L. Pat. R. 4.2(b) Identification of Supporting Evidence
122 days after CMC	14 days after Prior Deadline	L. Pat. R. 4.2(c) Identification of Evidence relied upon to oppose any other party's proposed claim construction (including L. Pat. R. 4.2(b) referenced evidence)
138 days after CMC	16 days after Prior Deadline	L. Pat. R. 4.3 Joint Claim Construction and Prehearing Statement to be filed
168 days after CMC	30 days after Prior Deadline	L. Pat. R. 4.4 Completion of Claim Construction Discovery (other than Expert Witnesses identified in L. Pat. R. 4.2 or L. Pat. R. 4.3 statements)
213 days after CMC	45 days after Prior Deadline	L. Pat. R. 4.5(a) Opening Markman Submissions due
243 days after CMC	30 days after Prior Deadline	L. Pat. R. 4.5(b) Completion of Expert Discovery from an expert who submitted a certification of declaration under L. Pat. R. 4.5(a)
273 days after CMC	30 days after Prior Deadline	L. Pat. R. 4.5(c) Responsive Markman Submissions and supporting evidence

<u>Plaintiff's Proposed Deadline</u>	<u>Defendants' Proposed Deadline</u>	<u>Description</u>
287 days after CMC	14 days after Prior Deadline	L. Pat. R. 4.6 Parties to meet-and-confer regarding need for and timing of hearing for claim construction and propose to the Court a schedule for a Claim Construction Hearing

Additional patent-specific topics pursuant to L. Pat. R. 2.1(a)

The parties have conferred, pursuant to Local Patent Rule 2.1(a), and report the following:

(1) Proposed modification of the obligations or deadlines set forth in these Local Patent Rules to ensure that they are suitable for the circumstances of the particular case (see L. Pat. R. 1.3);

Joint Response: The parties have addressed this issue in the proposed schedule, “Exhibit 1” chart above.

(2) The scope and timing of any claim construction discovery including disclosure of and discovery from any expert witness permitted by the Court;

Joint Response: The parties have addressed this issue in the proposed “Exhibit 1” chart.

(3) The format of the Claim Construction Hearing, including whether the Court will hear live testimony, the order of presentation, and the estimated length of the hearing;

Joint Response: The parties will submit this information in the Joint Claim Construction and Prehearing Statement on the date set forth in Exhibit 1.

(4) How the parties intend to educate the Court on the patent at issue;

Joint Response: The parties intend to educate the Court on the patent at issue through at least submissions to the Court, which may include *Markman* or other tutorials.

(5) The need for any discovery confidentiality order and a schedule for presenting certification(s) required by L. Civ. R. 5.3(b)(2).

Joint Response: The parties will submit a proposed discovery confidentiality order by the date set forth in Exhibit 1.

(6) **Joint Response:** This is not an ANDA case – N/A

(e) A pretrial conference may take place on TBD.

(f) Trial date: TBD (X Jury Trial; Non-Jury Trial).

10. **Do you anticipate any special discovery needs (i.e., videotape/telephone depositions, problems with out-of-state witnesses or documents, etc)?**

Yes No X.

11. **Do you anticipate any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced?**

Yes No X.

If so, how will electronic discovery or data be disclosed or produced? Describe any agreements reached by the parties regarding same, including costs of discovery, production, related software, licensing agreements, etc.

The parties will discuss negotiating an Electronically Stored Information (“ESI”) protocol.

Furthermore, the parties agree that, to the extent that spreadsheets are produced in discovery, native copies will be produced as well.

12. **Do you anticipate entry of a Discovery Confidentiality Order (See L.Civ.R. 5.3(b) and Appendix S)?**

Yes X No .

13. **Do you anticipate any discovery problem(s) not listed above? Describe.**

Yes No X.

14. **State whether this case is appropriate for voluntary arbitration (pursuant to Local Civil Rule 201.1 or otherwise) or mediation (pursuant to Local Civil Rule 301.1 or otherwise). If not, explain why and state whether any such procedure may be appropriate at a later time (i.e., after exchange of pretrial disclosures, after completion of depositions, after disposition or dispositive motions, etc.).**

Plaintiff may move that the action be removed from arbitration as the amount in controversy exceeds \$150,000 and the case involves complex legal issues regarding damages.

Plaintiff submits that voluntary mediation is not appropriate at the present time, but may be appropriate at a later time, once discovery related to damages (e.g.,

Defendants' sales, profits, and other financial information concerning the conduct in the complaint) has been completed.

Defendants agree that this matter is not suited for arbitration and, presently, agree that this matter is not ripe for settlement discussions.

15. Is this case appropriate for bifurcation? Yes _____ No X
16. An interim status/settlement conference (with clients in attendance), should be held in TBD .
17. We [do _____ do not X] consent to the trial being conducted by a Magistrate Judge.
18. Identify any other issues to address at the Rule 16 Scheduling Conference.

Defendants' Position:

Defendant Ontel is preparing a motion to restrain egregious conduct by Plaintiff's CEO, Juliette Fassett. Ms. Fassett communicated with the wife on one of Ontel's attorneys via Instagram. The nature of the communication to the attorney's wife was a comment on a photograph of the attorney and wife's daughter.

Ontel's and Plaintiff's counsel met-and-conferred on this issue but were unable to reach an agreement on a Consent Order to restrain Ms. Fassett's future conduct. Ontel does not herein respond to Plaintiff's attempt to now oppose a motion that has not yet been filed, including Plaintiff's misrepresentation and omission of relevant facts. Likewise, Ontel notes Plaintiff's misleading statement that Ontel "acknowledges above" that it seeks to restrain Fassett's "speech" rather than Fassett's conduct, which is actually the statement above by Ontel.

Plaintiff's Position:

Plaintiff disagrees with Ontel's misleading narrative, which ignores several crucial points, including that: (1) the attorney in question was at one time outside counsel for Ontel (among many other clients) **and has no apparent involvement with this case** but previously communicated extensively with Ms. Fassett (who is also not a party); (2) HPI's counsel responded immediately to this concern when Ontel raised it and spoke with Ms. Fassett, who agreed that she would not follow or comment on the social media accounts of anyone affiliated with Defendants, which was promptly communicated to Ontel's counsel; (3) Notwithstanding that **Ms. Fassett agreed to everything that Ontel's counsel requested** on two different rounds of phone calls, Ontel's counsel stated that they intended to file their motion anyway because "these assurances from your client are not to be trusted"; (4) Ontel's proposed "joint protective order" (which was not a "Consent Order") included numerous unconstitutional prior restraints and was grossly overbroad, proposing (among other overreaches) a bar on HPI taking legal action against the retailers of Ontel's knock-off products for their patent and trade dress infringement. Especially in view of Ms. Fassett's assurances in response and the gross overreach of the proposal, Plaintiff could not consent to the filing of an order that, as Defendants acknowledge above, sought to "restrain Ms. Fassett's future" speech, which is the only "conduct" to which Defendants have referred above.

Dated: April 25, 2025

/s/ Jordan B. Kaplan

Attorney(s) for Plaintiff(s) / Date

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