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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

And to all our friends and families around the globe, Happy Holidays! Best wishes in the coming year.

Edited by **Robert E. Freeman**

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The Law Is Not Black and White: *The Queen's Gambit* Faces Chess Grandmaster

The Netflix miniseries [The Queens Gambit](#) exceeded all expectations when it was released on October 23, 2020. It became Netflix's "[biggest limited scripted series ever](#)," was nominated for and won two Golden Globes this past year, and [received eighteen 2021 Emmy Award nominations, walking away with more than half of them](#). However, at the same time that this happy endgame was taking place, Netflix was hit with a defamation suit by a Georgian Grandmaster who objected to certain characterizations of her in the final episode. ([Gaprindashvili v. Netflix, Inc.](#), No. 21-07408 (C.D. Cal. Amended Complaint Sept. 20, 2021)). Since then, Netflix made its countermove, seeking dismissal of the action on First Amendment and other grounds.

For those unfamiliar with the wildly popular limited series, Netflix's *The Queen's Gambit* (based on the 1983 Walter Tevis novel) is a fictional portrayal of the rise of Elizabeth Harmon, a young female chess prodigy who learned the game to escape a challenging childhood and harness her inner demons, eventually entering the male-dominated world of elite competitive chess during the Cold War era. Besides telling a captivating story that sparked a renewed interest in chess in this country, the creator of the seven-episode miniseries tried to realistically depict the various structural barriers that impeded women's advancement in the gender-segregated world of 1960s chess.

In doing so, however, the creator and Netflix met a match of their own. The first female player to be awarded the title of Grandmaster in 1978, Nona Gaprindashvili ("Gaprindashvili" or "Plaintiff"), a now 80-year-old woman living in Tbilisi, Georgia, filed a complaint for defamation against Netflix, Inc. ("Netflix" or "Defendant") in September 2021 in a California district court. The claim centers on a single line of dialogue about her in a short scene in the miniseries finale. The scene at issue takes place while Harmon [plays](#) at the fictional Moscow Invitational of 1968. There, a tournament announcer speculates that Harmon's male opponents likely would not have adequately prepared to compete against her. The announcer explains:

“As far as they knew, Harmon’s level of play wasn’t up to theirs. [...] Elizabeth Harmon’s not at all an important player by their standards. The only unusual thing about her, really, is her sex. And even that’s not unique in Russia. **There’s Nona Gaprindashvili, but she’s the female world champion and has never faced men.** My guess is Laev was expecting an easy win, and not at all the 27-move thrashing Beth Harmon just gave him.” [emphasis added]

The fictional announcer’s remark that Harmon’s male competitors might be familiar with Plaintiff, “but she...has never faced men” provided the crux of Gaprindashvili’s claims for false light invasion of privacy and defamation *per se*. Plaintiff alleges the language is false and “manifestly defamatory” – as she claims she had played matches against the world’s best male chess players by the year 1968, the year of the fictional Moscow Invitational, and thus the dialogue impugns her by claiming she did not face men or, rather, insinuates that she was inferior to men at this time. She proclaims that the offensiveness is “magnified” by her portrayal as a Russian when she has greatly “exemplified Georgian pride and independence.” Plaintiff further claims the scene had been altered from the original novel (indicating Defendant’s “actual malice” in portraying Plaintiff) and that similar intent can be inferred from Netflix’s alleged refusal to issue a suitable retraction of the statement after the series was released. As a result, Gaprindashvili asserts the final episode has caused her “great distress” and her brand “egregious harm,” causing damage to her profits and earnings and future losses of business opportunities in the chess world.

Last month, Netflix presented its defense by arguing Plaintiff’s claims are meritless and that the First Amendment protects the series creator’s artistic license to include the line in the fictional work. Netflix’s [motion to dismiss](#) asserts Plaintiff’s claims should be stricken pursuant to the anti-SLAPP statute, [Cal. Code Civ. Proc. § 425.16](#), which prohibits litigation intended to intimidate or chill protected speech, or, alternatively, should be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim. ([Gaprindashvili v. Netflix, Inc.](#), No. 21-07408 (C.D. Cal. Motion to Dismiss Nov. 1, 2021)). The anti-SLAPP defense presents an efficient way to dispense with such suits early on, a speedy, blitz chess-like way of litigating.

Anti-SLAPP (strategic lawsuits against public participation) motions succeed when two prongs of a test are met. The statute authorizes a special motion to strike if a cause of action against a person arises from any act of that person in furtherance of the person’s free speech right in connection with a public issue, unless a court determines the plaintiff has established there is a probability that he or she will prevail on the claim. [Cal. Code Civ. Proc. § 425.16 \(b\)\(1\)](#).

Netflix believes it will be able to satisfy the first prong of the test by showing the miniseries dialogue is protected speech that was “made in a place open to the public or a public forum in connection with an issue of public interest.” Netflix further alleges Plaintiff’s claims fall squarely within the anti-SLAPP statute because the “creation of a television show is an exercise of free speech” and was made available to the public on its streaming platform. Moreover, Netflix contends the dialogue was made “in connection with an issue of public interest,” as the definition of “public interest” broadly encompasses “any issue in which the public is interested.” For one, Netflix stresses Gaprindashvili is undisputedly a world-renowned public figure, which makes her an issue of public interest. Additionally, Netflix asserts the various portrayals of sexism and gender-segregation are surely public interest issues under the statute.

If the first prong is met, the clock starts ticking for Plaintiff to demonstrate there is a probability she will prevail on each element of her claims. Does this mean the endgame is in sight for Netflix? Or will Plaintiff emphatically say, “Checkmate”?

Netflix maintains Plaintiff cannot establish she will likely prevail on the merits. In order to prevail, Gaprindashvili must prove three elements: (1) that there was a publication or broadcast of a false statement; (2) that, by clear and convincing evidence, the statement was published or broadcasted with actual malice; and (3) that either the publication or broadcast made a *prima facie* showing of false light invasion of privacy or a *prima facie* showing of defamation. Netflix asserts the first element cannot be met, as “a reasonable viewer would not interpret the fictional Series as making assertions of fact.” To support its claim, Netflix points out *The Queen’s Gambit* is a fictional television series based upon a novel of the same name. Moreover, the streaming service argues that the creator did not intend nor hold out the

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series “to be a journalistic or documentarian account of real events, or even a ‘docudrama’” by drawing attention to the end credits of every episode, which expressly state the program is a fictional drama. In any event, Netflix claims the statement at issue is not defamatory because it is “substantially true”; according to the creator, Plaintiff’s participation in high-level chess tournaments against men largely occurred in the 1970s.

Similarly, Netflix asserts the second element – a demonstration of Netflix acting with “actual malice,” by clear and convincing evidence – cannot be met. To support its position, Netflix includes evidence to the contrary. Netflix’s motion reveals *The Queen’s Gambit* creator went so far as to eliminate other commentary, originally included in the novel, that he, himself, deemed to be negative towards Plaintiff (e.g., the novel states Plaintiff “was not up to the level of the fictional tournament even though she had ‘met’ the Russian Grandmasters before.”). In place of the original language, the creator actively chose to recognize Plaintiff as the first female world champion of chess and highlight the presence of sexism and related barriers that women players had to endure in the Soviet Union at the time. Furthermore, Netflix discloses the creator actually consulted with two chess experts, who reviewed the scripts on multiple occasions, and, as such, contends Plaintiff cannot show by clear and convincing evidence Netflix acted with actual malice.

To complete her *prima facie* showing of false light invasion of privacy, Gaprindashvili needs to prove the language at issue is highly offensive to a reasonable person. According to Netflix, Plaintiff will not be able to do so, as no reasonable viewer watching the seventh, and final, episode of the miniseries would interpret the statement, “There’s Nona Gaprindashvili, but she’s the female world champion and has never faced men” as defamatory. Rather, Netflix argues a reasonable viewer would understand it is yet another example of the inherent sexism and gender-segregation that existed during the 1960s. Netflix further asserts that “even if the Line implied that Plaintiff was inferior to male players (which it does not), such an implication would constitute a non-actionable statement of opinion,” rather than a statement of fact.

Lastly, to complete her showing of a *prima facie* case for defamation, Plaintiff must show injury to her reputation by pleading and proving special damages resulting from the alleged defamation, which Netflix alleges she cannot do because she cannot prove the statement in the series finale was the proximate cause of any claimed injuries to her brand and reputation. If anything, Defendant believes Plaintiff would only be able to show she has become *more* popular since the debut of *The Queen’s Gambit*.

Just this past month, however, Gaprindashvili filed her [opposition](#) to Netflix’s anti-SLAPP motion. Plaintiff does not contest that the first prong of the anti-SLAPP analysis has been met. Rather, she alleges the evidence she has submitted and the arguments she has made hold enough merit to substantiate her claims under prong two.

Without going into too much detail about her multi-pronged defense to the motion, Gaprindashvili contends that false light invasion of privacy and defamation can arise in fictional works and that both the creator of the miniseries and Netflix made a false statement when they said she “has never faced men.” Plaintiff asserts whether she faced men prior to 1968 is a factual question, which invokes either a “yes” or “no” answer. According to her motion papers, she had, in fact, faced several men by that time in notable international tournaments. To bolster her argument, Gaprindashvili further points out the *Queen’s Gambit* creator knew she had played against many men prior to 1968 because he actively removed the statement, “[Plaintiff] had met all these Russian Grandmasters many times before,” which appears in Tevis’s novel, and replaced it with the language at issue.

Plaintiff repeatedly points to the creator’s use of the word “largely” in the following statement from Netflix’s arguments, “Plaintiff’s participation in high-level chess tournaments against men *largely* occurred in the 1970s,” as one clear indication of actual malice as well. She argues the creator must have been well aware she had played against at least *some* male chess players before given his decision to qualify the statement with the word, “largely.”

Further, Plaintiff opposes Netflix’s argument that “no reasonable viewer would take the language at issue to

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impugn Plaintiff for having never played against men as a sexist imputation that she was inferior to men.” Although the miniseries does attempt to highlight gender segregation and sexism in the Cold War era by having Harmon, a woman, beat men in chess, Gaprindashvili highlights it does so by telling a story of an *American* woman beating Russian men. Not only does that diminish the real-life role Gaprindashvili, a *Georgian* woman, played in removing gender barriers in the world of 1960s chess, it purportedly exploits and disparages her historical accomplishments.

In late December, Netflix filed its [reply](#), reiterating its arguments and contending that Plaintiff failed to meaningfully address the controlling cases cited in Netflix’s papers and otherwise misstates the relevant legal standards.

A look at the court docket reveals the motion hearing is set to take place in the new year. Until then, we must wait to see how this match plays out. Will Gaprindashvili be forced to resign or will there be an evidentiary draw that moves the case forward toward trial? Make sure to follow along to see the parties’ next moves.

No High Score for Atari in IP Trial against E-Commerce Marketplace

In the dramatic conclusion to a copyright and trademark infringement multiplayer contest that went into the final round between online print-on-demand marketplace Redbubble Ltd. (“Redbubble”) and videogame studio Atari Interactive, Inc. (“Atari”), a California federal jury burst the game company’s bubble when it gave Redbubble the win. ([Atari Interactive Inc. v. Redbubble Inc.](#), No. 18-03451 (N.D. Cal. Nov. 4, 2021)). In 2018, Atari brought direct and vicarious counterfeiting and infringement claims against Redbubble stemming from the alleged presence and sale of unlicensed Atari-branded goods on Redbubble’s site. It took over three years for the case to wind its way to trial but, for now at least, it appears that Redbubble has escaped the “[Pitfall](#)” of infringement liability and statutory damages.

[Redbubble](#), an Australian company founded in 2006, is an online marketplace that utilizes a print-on-demand model. This means that, unlike traditional retailers, the company does not order or manufacture a stock of

ready-to-sell inventory. Instead, it creates individualized items, printing designs previously uploaded by independent artists/sellers onto generic goods like t-shirts and mugs when a customer places a custom order. Importantly for this suit, Redbubble also does not create the designs itself, but instead relies on files uploaded by third-party creators. Moreover, Redbubble lets the creators set the ultimate retail price for each item and, upon each sale, forwards the purchase order to a third-party manufacturer (or fulfiller), which creates the final product based on the customer’s specifications and ships it via pre-approved carriers.

[Atari](#) was born more than a generation earlier than Redbubble, in California in 1972. That year, it released [Pong](#), the world’s first massively successful videogame. Atari developed hundreds of games over the next decade, including iconic titles like Adventure, Missile Command and Centipede, before being split up and sold following the [video game industry’s 1983 crash](#). After changing corporate hands multiple times in the 1980s and 1990s, the current iteration of Atari Interactive was formed in 2001 when French publisher Infogrames Entertainment, SA (later renamed Atari, SA) acquired the brand. Today, Atari continues to develop and market new games and gaming hardware, but it is also focused on nostalgia, reselling its classic titles and licensing its IP for merchandise.

The presence of unauthorized, user-uploaded designs on print-on-demand sites has been a concern both for platforms like Redbubble and IP owners like Atari and the subject of much litigation in recent years, as courts have wrestled with who is responsible for infringing products displayed on and sold through such digital marketplaces. As with other online marketplaces that host user-uploaded content, it is a risk of Redbubble’s business that some of its independent artists will upload copyrighted images or trademarked designs for merchandise without authorization, and that consumers might complete a transaction to receive such infringing products. However, the ultimate issue of copyright and trademark liability depends on the circumstances of each case and particularly on a platform’s precise role in managing its marketplace.

Beginning in 2018, Atari launched a series of lawsuits targeting online merchandizers it claimed were

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menacing its licensing operation (like “[Space Invaders](#)” descending upon Earth) and improperly profiting off of its iconic IP, including the Atari logo and imagery from its classic games. Most of these suits were eventually resolved, but Redbubble apparently refused to play ball (or [Pong](#)) and opted for “[Combat](#)” in court.

In June 2018, Atari filed a [complaint](#) in the U.S. District Court for the Northern District of California, alleging that Redbubble is “powered by a substantial quantity of counterfeit goods.” It accused Redbubble of direct, secondary and vicarious trademark infringement, trademark counterfeiting, and copyright infringement, and even included screen grabs from Redbubble’s site showing t-shirts for sale featuring the USPTO-registered logos for Atari and Pong, among others. Upon receiving the complaint, Redbubble immediately removed the listings identified in Atari’s complaint, and also began to proactively police for Atari-related designs. Redbubble also contended that, generally speaking, it did not create the designs and was merely a “transactional intermediary” and not a seller of the merchandise on the site.

Grappling with cross-motions for summary judgment this past January, the California court acknowledged the unique position of print-on-demand businesses, noting that “Redbubble does not fit neatly into the category of either an ‘auction house’ on the one hand, that will generally be free from liability for direct infringement, or a company that itself manufactures and ships products on the other, on which liability for direct infringement can be readily imposed.” On January 28, 2021, the court [granted Redbubble’s summary judgment motion on contributory and vicarious copyright infringement and willful copyright and trademark infringement](#), noting that “Atari provides no evidence that Redbubble knew of ‘specific infringing material’ and failed to act.” The court further noted: “Redbubble’s Marketplace Integrity Team proactively screens for infringing content based on information it receives from content owners [and] searches Redbubble’s site for potentially infringing listings.” However, the marketplace was not able to “[Breakout](#)” from the suit entirely, as the court left the questions of direct copyright infringement, as well as all forms of (non-willful) trademark counterfeiting and infringement, for a jury. Notably, the court also rejected

Redbubble’s 17 U.S.C. § 512(c) (DMCA “safe harbor”) defense, noting, “Redbubble actively participates in modifying the files uploaded by users to display the designs on Redbubble-selected physical products” and thus fails the DMCA requirement that infringing images be stored “at the direction of the [third-party] user.”

At the trial in November 2021, allegations careened through the courtroom like “[Asteroids](#)” in deep space. The game studio called the website’s infringement “out of control,” but Redbubble countered by pointing out that despite offering a form through which content owners can report infringing products, Atari hadn’t flagged any merchandise as infringing on the site since 2011, leaving the Redbubble’s “Marketplace Integrity Team” in the dark.

Since Redbubble’s business model involves independent third parties marketing and selling their designs on its platform and a third party fulfilling the orders, Atari’s best chance for victory was perhaps its vicarious liability claim. Generally speaking, a defendant commits vicarious copyright infringement when it profits from direct infringement while declining to exercise its right to stop or limit it. On this point, however, the jury was apparently swayed by Redbubble’s argument that, despite its automated anti-fraud system and Marketplace Integrity Team, it cannot police its platform effectively without assistance from IP owners in the form of takedown requests. As the court stated in its prior January 2021 opinion in dismissing the vicarious copyright claims, “[F]inding infringement would be like ‘searching for a needle in a haystack’ where Redbubble lacks knowledge of [the] needles’ appearance.” In other words, by going straight to litigation without first attempting to work with Redbubble’s piracy team and inform them of specific instances of infringement, Atari attempted to use a cheat code to skip to the final level. This argument pressed the right buttons for the jury, who needed less than a day to deliberate before [exonerating Redbubble from infringement claims](#). A [judgment](#) from the court dismissing all claims soon followed.

After the verdict, it appeared to be game over. However, Atari inserted additional tokens for extended play and [filed an appeal](#) to the Ninth Circuit. Stay tuned.

Sportswear Maker Outpaces Nike in “Cool Compression” Trademark Trial

A Pennsylvania federal jury recently found that Nike, Inc. (“Nike”) infringed the “Cool Compression” branded clothing trademark of Pennsylvania-based sportswear company Lontex Corp. (“Lontex”), issuing a verdict that stated Nike had willfully infringed Lontex’s COOL COMPRESSION trademark when it used the phrase in relation to a line of its own tight-fitting performance sportswear that offers thermoregulation benefits. ([Lontex Corporation v. Nike, Inc.](#), No. 18-5623 (E.D. Pa. Judgment Oct. 29, 2021)). The jury also found that Nike was liable under a contributory infringement theory as well for its intermediaries’ (e.g., authorized retailers, distributors and resellers) sales of the infringing sportswear and further denied Nike’s affirmative defense that its use of the phrase could be considered fair use under the Lanham Act. This resulted in the court issuing a judgment in favor of Lontex in the amount of a cool half-million dollars, specifically, \$507,000.

[Lontex](#) has been providing professional teams, collegiate teams and the general public with athletic apparel products since 1989. Its “Cool Compression” line of products are compression shorts, tights or other sportswear made from Lycra meant to fit snugly and purportedly increase performance and help individuals rehabilitate from muscle injuries. Lontex claims it has sold millions of dollars in Cool Compression apparel and support gear through a variety of distribution outlets. In 2006, Lontex obtained two federal trademark registrations for COOL COMPRESSION as a word mark ([Reg. No. 3,416,053](#)) and design mark ([Reg. No. 3,416,236](#)) under Class 25 for a variety of clothing, and later in 2008 obtained protection for the word mark ([Reg. No. 3,611,406](#)) under Class 10 for compression supports (e.g., compression sleeves for use as ankle supports, arm supports, etc.) (collectively, the “marks” or “Cool Compression” marks).

In December 2015 Lontex discovered Nike’s alleged infringing sale of similar Nike sportswear that used the words “cool compression.” Later, in April 2016, counsel for Lontex attempted to make Nike sweat and sent a letter requesting Nike cease selling such infringing goods bearing the Cool Compression marks and that it forward on sales data to determine “appropriate

compensation for past unauthorized use.” After further communications in 2016 yielded no resolution, Lontex decided it was game on and filed a [complaint](#) right before the year-end on December 31, 2018. The complaint asserted federal and state trademark infringement claims and an unfair competition claim in alleging that Nike violated the Lanham Act by using the “Cool Compression” branding in the sale and marketing of similar athletic apparel and targeted to the same audience, thereby willfully causing a likelihood of consumer confusion and damage to Lontex’s business. Additionally, Lontex claimed that Nike intentionally induced its authorized distributors, resellers and retailers to infringe and use the mark, and monitored promotional advertising with respect to improper usage of the mark. Lontex’s final allegation stated that Nike had committed acts of unfair competition and passing off and, as a consequence, Lontex had been deprived of the profits and benefits of various business opportunities with third parties, among other damages. Lontex’s list of demands included a preliminary and permanent injunction barring Nike from infringing its marks, statutory damages, a disgorgement of Nike’s profits for its willful sales, and an award of attorney’s fees.

After some of the claims were whittled down during motion practice, Nike attempted to dismiss all claims on summary judgment in early 2021. Nike first argued that no reasonable jury could find Nike has committed trademark infringement because there was no likelihood of confusion between Lontex’s products and Nike’s sales of compression sportswear. According to the Pennsylvania district court hearing the Nike’s motion, trademarks are confusingly similar if “ordinary consumers would likely conclude that they share a common source, affiliation, connection or sponsorship.” Nike argued that such consumers would simply not be confused by Nike’s use of the terms “cool” and “compression” (sometimes separated by other words) to describe tight-fitting, sweat-wicking apparel. In opposition, Lontex pointed to evidence showing Nike’s apparent use of the full COOL COMPRESSION mark in several product names and introduced statements from its customers alleging actual confusion between Nike’s and Lontex’s products. Lontex further argued that the use of the words “cool compression” made Nike’s use confusingly similar to Lontex’s products and that the

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addition of any other Nike brand names or additional words around “cool compression” did not negate any infringement.

Next, Nike pleaded that its use of the term “cool compression” was protected by the affirmative defense of fair use, which protects from liability anyone who uses a descriptive term “fairly and in good faith” and “otherwise than as a mark,” merely to describe its own goods. Nike argued that Lontex cannot prevent Nike from using the term “cool compression” when Nike only uses those words in a commonly understood, descriptive sense and that there could be no likelihood of consumer confusion because “consumers that look at these know that they are buying from Nike.”

As it turned out, Lontex’s claims were not so easily swatted aside by the swoosh of a judge’s pen. In February 2021, the court [denied Nike’s motion for summary judgment](#). While the court admitted Nike presented “strong legal arguments,” it outlined several material questions of fact with respect to the likelihood of confusion factors that prevented the court from granting summary judgment. The court found both companies referring to their products as “cool compression” simply created a disputed issue of fact as to how the products are viewed by consumers in the marketplace (including by professional sports teams training staff customers), and that Lontex’s claims of actual confusion would have to be weighed at trial. The judge also punted on Nike’s fair use defense, as it could not determine as a matter of law whether Nike’s use of “cool compression” was as a trademark or purely descriptive, leaving that issue to the jury.

In mid-October, the parties suited up for a trial. In one of its [pretrial briefs](#), Lontex advanced, among other things, its theories as to why it was entitled to actual trademark damages and why disgorgement of Nike’s profits would be appropriate in this case based on Lontex’s alleged lost sales due to Nike’s infringement. During the warmup to the big event, Nike, in one of its [pretrial briefs](#), argued, among other things, that Lontex’s own marketing and product information emphasized branding terms other than COOL COMPRESSION (e.g., SWEAT IT OUT) to promote its compression garments. Nike also suggested

that this non-use of COOL COMPRESSION in certain marketing channels was an abandonment of the mark, thus undercutting Lontex’s infringement claims. Nike also again asserted its fair use defense by claiming that it did not use the term “cool compression” as a trademark (instead often using the term “cool” or “compression” separately as descriptors). Finally, Nike claimed it did not use the term “cool compression” on any Nike products or on any product labels or hangtags (instead using its own marks) and that Nike’s use of written copy in catalogs and web pages made no repeated, consistent use of the term.

After 11 days of trial, the jury must have been ready to slip on some comfortable sportswear as it sat down to discuss the case and deliberate. On October 29, 2021, the jury found that Nike’s use of the words “cool compression” on its apparel was likely to be confused with Lontex’s trademark. Moreover, the court found that Nike was also liable for contributory infringement due to the infringing sales of clothing containing the mark by Nike’s intermediaries. Lontex now awaits a decision on attorneys’ fees and profit disgorgement to go along with the \$507,000 judgment. With the trial completed, it is still not yet time to cool down as we head into overtime and the judge’s consideration of both parties’ post-trial motions.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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