

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THOMAS A. SIMONIAN,)	Case No.: 10-CV-05544-LHK
)	
Plaintiff,)	ORDER DEEMING FIRST AMENDED
v.)	COMPLAINT DISMISSED; FINDING
)	DEFENDANT’S MOTION TO DISMISS
MONSTER CABLE PRODUCTS, INC.,)	MOOT
)	
Defendant.)	
)	

On March 14, 2011, Defendant Monster Cable Productions, Inc. filed a motion to dismiss Plaintiff Thomas Simonian’s First Amended Complaint (“FAC”) for False Patent Marking. Defendant’s motion is set for hearing on June 2, 2011. On March 15, 2011, after Defendant filed its motion, the Federal Circuit issued a decision clarifying the pleading standard applicable to false marking claims under 35 U.S.C. § 292. *In re BP Lubricants USA Inc.*, --- F.3d ----, 2011 WL 873147, Misc. No. 960 (Fed. Cir. Mar. 15, 2011). Pursuant to the Federal Circuit’s recent decision, “Rule 9(b)’s particularity requirement applies to false marking claims and . . . a complaint alleging false marking is insufficient when it only asserts conclusory allegations that a defendant is a ‘sophisticated company’ and ‘knew or should have known’ that the patent expired.” *Id.* at *1. In his opposition to Defendant’s motion to dismiss, Plaintiff appears to concede that the FAC is deficient under this standard. *See* Opp’n to Mot. to Dismiss at 2, ECF No. 74. Therefore, instead

1 of opposing Defendant's motion by arguing that the FAC sufficiently alleges Defendant's intent to
2 deceive the public, Plaintiff has filed a motion for leave to amend.

3 In light of Plaintiff's apparent concession that the FAC is deficient under the Federal
4 Circuit's recent decision in *BP Lubricants* and Plaintiff's motion for leave to amend, the Court
5 hereby deems Plaintiff's FAC dismissed and finds that Defendant's motion to dismiss the FAC is
6 moot. Accordingly, the Court vacates the hearing on Defendant's motion previously scheduled for
7 June 2, 2011. Plaintiff's motion for leave to amend shall be heard on June 16, 2011, at 1:30 p.m.
8 If the motion can be resolved without a hearing, the Court will notify the parties and vacate the
9 motion hearing.

10 **IT IS SO ORDERED.**

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12 Dated: May 18, 2011

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14 _____
15 LUCY H. KOH
16 United States District Judge