

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

THOMAS A. SIMONIAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: 1:10-cv-01615
	)	
MAYBELLINE LLC,	)	Judge Virginia M. Kendall
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF MAYBELLINE LLC’S MOTION TO DISMISS**

**I. Introduction and Summary of Argument**

Plaintiff Thomas A. Simonian (“Simonian”) has sued defendant Maybelline LLC (“Maybelline”) for false patent marking under 35 U.S.C. § 292. Simonian’s complaint lacks a number of legal prerequisites and required factual allegations, and is substantially duplicative of an earlier-filed action, thus it should be dismissed. Specifically:

*Simonian lacks Article III standing.* The mere fact that Simonian is bringing suit as a *qui tam* plaintiff does not allow him to circumvent the constitutional requirement of standing. Simonian has failed to plead any cognizable injury in fact stemming from Maybelline’s alleged false marking. As such, Simonian has failed to set forth an adequate basis for standing that would afford this Court subject matter jurisdiction, and dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is compelled.

*Simonian has failed to sufficiently plead fraud with specificity.* As Simonian’s allegations under 35 U.S.C. § 292 include a requirement to prove “intent to deceive the public,” they sound in fraud, and are thus subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). Simonian’s allegations fall short of alleging the factual basis required by Rule 9(b), thus the complaint against Maybelline should be dismissed.

*Simonian alleges only that that expired patents were marked.* Simonian’s entire basis for his false marking claim is that expired patents were marked on the Maybelline products. The marking of expired patents on a product cannot be the basis of a false marking claim.

*Simonian’s allegations duplicate those made in an earlier-filed lawsuit.* Most of the patent markings alleged in Simonian’s complaint against Maybelline are identical to allegations contained in a complaint filed in the Northern District of California prior to the filing of Simonian’s complaint. Those allegations should be dismissed under the “first to file” rule.

## **II. Statement of Facts**

On March 5, 2010, San Francisco Technology Inc. (“SFTI”) filed suit against twenty-one different Defendants, including Maybelline LLC (“Maybelline”) for alleged false marking under 35 U.S.C. § 292. (Ex. A.) SFTI’s complaint alleged false marking of U.S. Patents No. 4,871,536 (“the ‘536 patent”); 4,887,622 (“the ‘622 patent”); 4,898,193 (“the ‘193 patent”); and 4,993,440 (“the ‘440 patent”) on various mascara products. On March 11, 2010, Simonian filed the present lawsuit against Maybelline for false marking of patents in violation of 35 U.S.C. § 292. (Dkt. No. 1.) The complaint alleges that Maybelline sold mascara products bearing at least one of four separate patents that had expired. *Id.* Both complaints alleged that Maybelline’s Volume Express®, Full ‘N Soft®, and Lash Discovery® products were marked with at least one of the ‘622, ‘536, ‘193, or ‘440 patents, which are alleged to have expired. *Id.* at ¶¶15, 17, 18, and 19; Ex. A at ¶ 100.

Simonian’s complaint in this case fails to set forth a cognizable injury in fact, to either the public or to Simonian himself. The closest the complaint comes is speculation that the alleged marking “is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.” *Id.* at ¶26. The complaint further

alleges without factual support that “Defendant . . . has benefitted [sic] commercially and financially by maintaining false statements of patent rights.” *Id.* at ¶ 27. Nowhere is an actual injury to either to the public, the industry, or Simonian himself alleged beyond speculation.

Simonian, in his complaint, further generally (and vaguely) alleges an intent to deceive the public. He never alleges specific facts showing this fraudulent intent, and instead only pleads “upon information and belief”:

- “Upon information and belief, Defendant has in the past manufactured and marketed, or caused to be manufactured and marketed, and presently manufactures and markets, or causes to be manufactured or marketed, products for sale to the general consuming public.” ¶ 15.
- “Upon information and belief, Defendant knows, or should know (by itself or by its representatives), that the Expired Patents marked on its products have expired and/or do not cover the products to which the markings are affixed.” ¶ 24.
- “Upon information and belief, Defendant intentionally marked its products with the Expired Patents in an attempt to prevent competitors from entering the market and for the purpose of deceiving the public into believing that something contained in or embodied in the products is covered by or protected by one or more of the Expired Patents.” ¶ 25.
- “Upon information and belief, Defendant knows, or reasonably should know, that marking its products with false patent statements was and is illegal under Title 35 United States Code.” ¶ 28.

No other facts are set forth in the complaint to demonstrate intent of Maybelline.

### **III. Argument**

#### **A. The Court Should Dismiss Simonian’s Complaint Under 12(b)(1) Due to the Absence of Subject Matter Jurisdiction**

All plaintiffs, including *qui tam* relators, must have Article III standing in order for a court to exercise subject matter jurisdiction. *Vermont Agency of Nat’l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000). If a court lacks subject matter jurisdiction, it must dismiss the action. Fed. R. Civ. P. 12(h)(3). Article III standing is “the most basic doctrinal principle,” as the Constitution restricts federal judicial power to those cases exhibiting a real case or

controversy. *Spring Commc'ns Co. v. APCC Servs., Inc.*, --- U.S. ---, 128 S. Ct. 2531, 2535 (2008). “[T]here must be alleged (and ultimately proved) an ‘injury in fact’—a harm suffered by plaintiff that is ‘concrete and particularized’ and actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998). An injury in fact is the “hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1152 (2009). Causation must also exist, that is, “a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant,” as must redressability. *Steel Co.*, 523 U.S. at 103. The injury in fact must be “concrete and actual or imminent” and cannot be “conjectural or hypothetical.” *Vermont Agency*, 529 U.S. at 771. “These requirements together constitute the ‘irreducible constitutional minimum’ of standing, which is an ‘essential and unchanging part’ of Article III’s case-or-controversy requirement, and a key factor in dividing the power of government between the courts and the two political branches.” *Vermont Agency*, 529 U.S. at 771. Where a plaintiff fails to present sufficient facts to show an injury in fact, the complaint must be dismissed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A *qui tam* plaintiff has standing to sue “only insofar as the ‘claim’ deemed to be assigned meets constitutional standing requirements.” *Stauffer v. Brooks Bros., Inc.*, 615 F. Supp.2d 248, 255 (S.D.N.Y. 2009) (citing *Vermont Agency of Nat’l Res.*, 529 U.S. at 771). “By its terms, the statute seeks to protect the public not simply from false marking of unpatented articles but instead from false marking that is fraudulent, deceptive, and intentional.” *Id.* at 254 (citations omitted). Therefore, the actionable injury necessary for standing has to be “an injury to [the government] or to the public stemming from fraudulent or deceptive false marking.” *Id.*

For false marking actions under § 292, a plaintiff must plead an actual or imminent injury to himself, the federal government, or the public as a result of marking “with an intent to deceive the public.” *Id.* at 255. In *Stauffer*, the plaintiff brought suit pursuant to 35 U.S.C. § 292 against Brooks Brothers, Inc., based on the marking of expired patents on bow ties. Stauffer’s sole allegations of injury were that the marking “wrongfully quelled competition with respect to such bow tie products thereby causing harm to the economy of the United States” and that the defendants “likely benefited in at least maintaining their considerable market share.” *Id.* at 252 (citing Dkt. 1 ¶¶ 129-130). The court in *Stauffer* held that the statements set forth in the complaint were “insufficient to establish anything more than the sort of ‘conjectural or hypothetical’ harm that the Supreme Court instructs is insufficient.” *Stauffer*, 615 F. Supp. 2d at 255. The court further stated: “That some competitor might somehow be injured at some point, or that some component of the United States economy might suffer some harm through defendants’ conduct, is purely speculative and plainly insufficient to support standing.” *Id.* The court ultimately concluded that Stauffer’s complaint “fails to allege with any specificity an actual injury to any individual competitor, to the market for bow ties, or to any aspect of the United States economy.” *Id.* Accordingly, the court dismissed the complaint. *Id.*

The facts in the instant case are virtually identical to those in the *Stauffer* case, and the same result should follow. Both cases involve individuals bringing suit pursuant to 35 U.S.C. § 292 for alleged marking of expired patents. The allegations made by the plaintiff in *Stauffer* were indeed *more extensive* than those made by Simonian in the instant case regarding injury in fact. Stauffer had alleged that the marking “wrongfully quelled competition . . . thereby causing harm to the . . . United States.” *Stauffer*, 615 F. Supp. 2d at 252 (citing Dkt. 1 at ¶ 129). Stauffer had further alleged that the Defendants have “likely benefitted [sic] in at least maintaining [their]

considerable market share.” *Stauffer*, 615 F. Supp.2d at 252 (citing Dkt. 1 at ¶ 129-30). Simonian’s complaint alleges only that “Defendant . . . has benefitted commercially and financially.” (Dkt. No. 1 at ¶27.) Both complaints include an allegation that the marking “is likely to, or at least has the potential to, discourage or deter persons and companies from commercializing competing products.” *Id.* at ¶ 26; *Stauffer*, 615 F. Supp. 2d at 252 (citing Dkt. 1 at ¶¶ 128, 130). As such, Simonian has not even alleged facts equal to what Stauffer alleged in his complaint. These assertions “are insufficient to establish anything more than the sort of ‘conjectural or hypothetical’ harm that the Supreme Court instructs is insufficient.” *Stauffer*, 615 F. Supp.2d at 255. Accordingly, the present case should be dismissed, as Simonian does not have standing to bring suit under Article III of the United States Constitution.

**B. The Court Should Dismiss Simonian’s Complaint Under Fed. R. Civ. P. 12(b)(6) for Failing to Sufficiently Plead Pursuant to Fed. R. Civ. P. 9(b)**

In all claims based on fraud, “the circumstances constituting fraud . . . shall be stated with particularity.” Fed. R. Civ. P. 9(b). A plaintiff alleging fraud “must plead the ‘who, what, when, where, and how: the first paragraph of any newspaper story.’” *S.E.C. v. Bengier*, 2010 WL 918065, \*3 (N.D. Ill. March 10, 2010) (Ex. B) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7<sup>th</sup> Cir. 1990))<sup>1</sup>. “The circumstances of fraud include the “identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.” *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7<sup>th</sup> Cir. 1997).

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<sup>1</sup>The Federal Circuit has followed the lead of the Seventh Circuit regarding the pleading of fraud-based claims stating: “As the Seventh Circuit has held, the ‘circumstances’ in Rule 9(b) must be set forth with ‘particularity,’ i.e., they ‘must be pleaded in detail’-[t]his means the who, what, when, where, and how’ of the alleged fraud.” *Exergen v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326-27 (Fed. Cir. 2009) (quoting *DiLeo*, 901 F.2d at 627).

It is generally insufficient to plead the circumstances constituting fraud with particularity by pleading those circumstances on “information and belief.” *Harrison Wells Partners, LLC v. Chieftain Const. Holdings, Ltd.*, 2009 WL 3010847, \*3 (N.D. Ill. September 16, 2009) (Ex. C) (citing *Bankers Trust*, 959 F.2d 677, 684 (7<sup>th</sup> Cir. 1994)). Where “the facts [were] inaccessible to plaintiff, ...he [has] to plead the grounds for his suspicions.” *Bankers Trust*, 959 F.2d at 684. See also *Uni\*Quality*, 974 F.2d 918, 924 (7<sup>th</sup> Cir. 1992) (“[A]llegations made upon information and belief are insufficient, even if the facts are inaccessible to the plaintiff, unless the plaintiff states the grounds for his suspicions.”). “[C]laims that are based on ‘a course of fraudulent conduct,’ are subject to the heightened pleading standard of Rule 9(b).” *In re Yasmin and Yaz Marketing, Sales Practices and Products Liability*, 2010 WL 747497, \*8 (S.D. Ill. Feb. 26, 2010) (Ex. D) (quoting *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7<sup>th</sup> Cir. 2007)). Where a case “sounds in fraud,” it is subject to the heightened pleading requirements of Rule 9(b). *Pirelli Armstrong Tire Corp. v. Walgreen Co.*, 2010 WL 624709, \*7 (N.D. Ill. February 18, 2010) (Ex. E).

“The false marking statute is a fraud-based claim, which is subject to the pleading requirements of 9(b).” *Juniper Networks v. Shipley*, 2009 WL 1381873, \*4 (N.D. Cal. May 14, 2009) (Ex. F). “A claim for false marking fails absent evidence of an actual intent to deceive.” *FMC*, 369 F.Supp. 2d 539, 584 (E.D. Pa. 2005). A dismissal for failure to comply with the heightened pleading requirements of Rule 9(b) is properly a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). See *Melicio v. Kia Motors Corp.*, 2005 WL 3005609 (N.D. Ill. 2005) (Ex. G) (granting a motion to dismiss under Rule 12(b)(6) for failing the heightened pleading requirements of Rule 9(b)).

Simonian clearly failed to meet his burden under the heightened pleading requirements of 9(b), and thus the complaint should be dismissed for failure to state a claim under Rule 12(b)(6). A violation of the false marking statute only occurs where the marking is made “with intent to deceive the public.” 35 U.S.C. § 292. Simonian’s entire pleading regarding the requisite fraudulent intent are plead “upon information and belief.” Nowhere does Simonian plead the “who, what, when, where, and how” required by Fed. R. Civ. P. 9(b). *DiLeo*, 901 F.2d at 627. Specifically, Simonian alleges that “[u]pon information and belief, Defendant is a sophisticated company and has many decades of experience applying for, obtaining, and/or litigating patents.” (Dkt. No. 1 at ¶ 22.) Simonian further alleges that “Defendant knows, or reasonably should know, that marking its products with false patent statements was and is illegal under Title 35 United States Code.” *Id.* at ¶ 28. Simonian never alleges beyond these statements the necessary knowledge within an individual at Maybelline to form the requisite intent required by 35 U.S.C. § 292. All allegations pertaining to the knowledge and intent of Maybelline are plead “upon information and belief,” or are based on an assertion that Maybelline “should have known” the status of the patents alleged to be expired. As such, the complaint does not meet the requirements set forth in Rule 9(b), and it should be dismissed under Rule 12(b)(6).

In a factually similar situation, a district court recently dismissed similar pleadings as insufficient to meet Federal Rule of Civil Procedure 8(a). *Brinkmeier v. Graco Children’s Prods. Inc.*, 2010 WL 545896 (D. Del. Feb. 16, 2010) (Ex. H). The plaintiff in *Brinkmeier* had alleged that the defendant “knows, or should know” that products have been falsely marked, basing her allegations on the fact that defendant had an intellectual property manager who “cannot have any reasonable belief that such products are protected by such patents.” *Id.* The plaintiff stated, in conclusory fashion, that the marking was “for the purpose of deceiving the



public.” *Id.* The court rejected the claims for failing to state a claim under the default pleading standards of Rule 8(a). “These allegations alone do not supply enough factual matter to suggest an intent to deceive, and amount to nothing more than the ‘mere labels and conclusions’ prohibited by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). *Id.*”

The allegations set forth in Simonian’s complaint are even more threadbare than those in *Brinkmeier*. They do not even allege that an individual within Maybelline holds a position similar to the “intellectual property manager” referenced in the *Brinkmeier* complaint. Both complaints rest upon the same generalized statements of intent based solely on “information and belief.” As such, as in *Brinkmeier*, Simonian’s complaint against Maybelline should be dismissed.

**C. Simonian Fails to Allege Any Activity that Constitutes “False Marking”**

The sole basis for Simonian’s false marking claim is that *expired patents* were marked on the Maybelline products. The marking of expired patents on a product cannot be the basis of a false marking claim, thus Simonian’s complaint should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).<sup>2</sup> A complaint should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) when it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations in the pleading. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). There are four substantive requirements to a claim for false marking under 35 U.S.C. § 292: a marking importing than an article is patented; that the marking is on, affixed to, or used in advertising for the article; that the article is “unpatented”; and an intent to deceive the public. *Clontech Labs., Inc. v. Invitrogen*

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<sup>2</sup>The issue of whether an expired patent is properly within the scope of § 292 is currently on appeal in front of the Federal Circuit in *Pequignot v. Solo Cup Co.*, 09-1547, as more fully addressed in Maybelline’s motion to stay, filed concurrently herewith.

*Corp.*, 406 F.3d 1347, 1351 (Fed. Cir. 2005). As expired patents fall outside the scope of “unpatented” articles as required in § 292, it is clear that no relief can be granted consistent with Simonian’s allegations, and the case should be dismissed under Rule 12(b)(6).

Section 292 provides a penalty against “[w]hoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article the word ‘patent’ or any word or number importing the same is patented, for the purpose of deceiving the public.” 25 U.S.C. § 292(a). The only Federal Circuit decision that addresses this issue upheld a decision that marking with an expired patent was *not* false marking. *Arcadia Machine & Tool, Inc. v. Sturm, Ruger & Co.*, 786 F.2d 1124, 1125 (Fed. Cir. 1986). In *Arcadia*, the Central District of California held that where a patentee “included expired patents on labels used on firearm boxes,” the label was “not...violative of § 292 as a matter of law.” *Arcadia Mach. & Tool, Inc. v. Sturm, Ruger & Co.*, 227 U.S.P.Q. 655, 655-56 (C.D. Cal. 1985). The Federal Circuit affirmed. *Arcadia*, 786 F.2d at 1125. District Court cases echo the sentiment of *Arcadia*, and also found that the marking of an expired patent number was not a false marking. *See Wilson v. Singer Mfg. Co.*, 30 Fed. Cas. 223, 224 (N.D. Ill. 1879), *aff’d*, 12 Fed. 57 (C.C.N.D. Ill. 1882) (stating that marking with expired patent “may be valuable information to the public.”); *FMC Corp. v. Control Solutions Inc.*, 369 F.Supp.2d 539, 584 (E.D. Pa. 2005) (“[T]here is no stated corresponding duty to remove the patent number on a product whose patent has expired.”)

The legislative history of the false marking statute makes clear that Congress did not intend Section 292 to cover marking of expired patent numbers. Congress was aware that its false marking statute had not been interpreted by the Federal courts as applying to expired patents, and yet rejected proposed amendments which, arguably, would have caused the statute to apply to expired patents. A bill introduced in 1860 sought to change the language in the

statute from “unpatented” to “not at the time secured by a patent.” S. 424, 36<sup>th</sup> Congress, 2<sup>nd</sup> Session, April 26, 1860. This added language would arguably have covered expired patent numbers. That bill was rejected, and as such the scope of “unpatented” was not expanded.

It is indisputable that marking an unexpired patent does not have the same harm as knowingly and intentionally marking a patent number on an article that the patent does not protect and never protected. In *Clontech*, the Federal Circuit recognized “the cost of determining whether the involved patents are valid and enforceable” and costs “necessary to interpret each patent, investigation into prior art and other information bearing on the quality of the patents, and analysis thereof” as potential harms brought about by marking an article with a patent that does not read on the article. *Clontech* 406 F.3d at 1357, n.6. None of these costs are at issue where, as here, the sole marking is that of an expired patent. The status of a patent is readily ascertainable from the patent number and a simple search on the PTO’s website, and thus brings about no potential to deceive or to confer benefit on its owner.

**D. As Most of Simonian’s Allegations Are Duplications of Those Raised by SFTI, Those Allegations Should Be Dismissed Under the “First-to-File Rule”**

The “first-to-file rule” states that “[w]hen two similar actions are filed, the general rule favors the forum of the first-filed suit.” *Schwarz v. National Van Lines, Inc.*, 317 F.Supp.2d 829, 832-33 (N.D. Ill. 2004) (citation omitted). Where a federal suit is duplicative of a parallel federal suit pending in another court, dismissal is proper “for reasons of wise judicial administration.” *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7<sup>th</sup> Cir. 1993). “[A] suit is duplicative if the ‘claims, parties, and available relief do not significantly differ between the two actions.’” *Id.* (quoting *Ridge Gold Standard Liquors v. Joseph E. Seagram*, 572 F. Supp. 1210, 1213 (N.D. Ill. 1983)). While “[t]he Federal Circuit has not expressly stated a view as to whether, in patent cases, the first-to-file rule applies only where the concurrent actions at issue

involve identical parties, . . . courts . . . have found no requirement that the parties in the concurrent actions be the same in order for the first-to-file rule to apply.” *Shire U.S., Inc. v. Johnson Matthey, Inc.*, 543 F. Supp. 2d 404, 408-09 (E.D. Pa. 2008).

It is indisputable that the SFTI’s complaint against Maybelline in the Northern District of California was filed prior to Simonian’s filing against Maybelline in the present suit. As set forth above, both complaints allege that Maybelline’s Volume Express®, Full ‘N Soft®, and Lash Discovery® products were marked with at least one of the ‘622, ‘536, ‘193, or ‘440 patents, which are alleged to have expired. Therefore, most of Simonian’s allegations are identical to those previously brought by SFTI. As a result, the claims presented by both complaints “do not significantly differ between the two actions.” *Ridge Gold*, 572 F.Supp. at 1213.

In addition, because both the instant case and the SFTI case are *qui tam* cases, the beneficiary plaintiffs are identical—the *United States*. Simonian brought suit against Maybelline pursuant to 35 U.S.C. § 292(b), which states that “[a]ny person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.” 35 U.S.C. § 292. “[*Q*]ui tam actions reward private parties for successfully bringing suit on behalf of the government.” *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1356 (Fed. Cir. 2009). Simonian has brought suit as a *qui tam* plaintiff under 35 U.S.C. § 292. SFTI’s earlier-filed suit was also filed as a 35 U.S.C. § 292 *qui tam* action. Therefore, both suits were brought against Maybelline by plaintiffs acting on behalf of the U.S. government. As a result, the parties “do not significantly differ between the two actions.” *Ridge Gold*, 572 F.Supp. at 1213.

Finally, as both Simonian and SFTI bring suit pursuant to 35 U.S.C. § 292, they are also both seeking the same monetary relief, namely a fine of “not more than \$500 for each offense.” 35 U.S.C. § 292(a). As a result, the “claims, parties, and available relief do not significantly differ between the two actions,” thus the two cases are duplicative. *Ridge Gold*, 572 F. Supp. at 1213.

“Wise judicial administration” favors dismissal of Simonian’s complaint against Maybelline. Maybelline should not have to defend itself against identical complaints in parallel proceedings in both California and Illinois, particularly as both complaints are brought by *qui tam* plaintiffs on behalf of the government, plaintiffs who have alleged no injury in fact to themselves or to any particular industry or company. Other *qui tam* statutes have recognized the problem of potential for duplicative suits and have included language that prevents a second plaintiff from bringing suit. *See U.S. ex rel. Batty v. Amerigroup Illinois, Inc.*, 528 F. Supp. 2d 861, 872 (N.D. Ill. 2007) (“Because of the danger of abuse of the *qui tam* device by opportunistic individuals seeking a windfall, Congress has enacted certain provisions that limit the Court’s jurisdiction over *qui tam* actions. Applicable to this case are the first-to-file bar, 31 U.S.C. § 3730(b)(5), and the government-action bar, 31 U.S.C. § 3730(e)(3).”) The same potential issues are present in this case. Therefore, “wise judicial administration” favors granting dismissal of Simonian’s duplicative claims against Maybelline.

**E. Dismissal Should Be Entered Without Leave to Amend**

Because it is not possible for Simonian to amend his complaint in such a way that it would comport with the requirements of Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), dismissal of his complaint should be without leave to file an amended complaint. “Even though Rule 15(a) provides that ‘leave shall be freely given when justice so requires,’ Fed. R. Civ. P. 15(a), a district court may deny leave to amend for undue delay, bad faith, dilatory motive, prejudice, or futility.” *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7<sup>th</sup> Cir. 1997) (citations omitted). “Futility” is established where “the complaint, as amended, would fail to state a claim upon which relief could be granted.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). “This standard is the same standard of legal sufficiency that applies under Rule 12(b)(6).” *General Electric*, 128 F.3d at 1085.

Dismissal without leave in this case is proper because any amendment of the complaint would be futile. Simonian cannot plead an injury in fact, as there is no indication that he has personally suffered an injury due to Maybelline’s alleged marking. Further, Simonian’s pleadings do not hint that there is or could even potentially be a quantifiable injury to the public or the economy of the United States as a result of Maybelline’s alleged marking. Simonian also did not allege any competitive harm as a result of Maybelline’s alleged marking. As such, it is impossible for Simonian to amend his complaint in such a way that there is a cognizable injury in fact as required by Article III standing requirements.

It is further impossible for Simonian to amend his complaint in such a way to evade the basic injury in fact requirement. Abstract harms such as “injury to the interest in seeing that the law is obeyed” are not sufficient to bring a case within the requirements of Article III standing. *Federal Electrion Comm’n v. Akins*, 524 U.S. 11, 24 (1998); *see also Lance v. Coffman*, 549

U.S. 437, 442 (2007) (that the law “has not been followed” is “precisely the kind of undifferentiated, generalized grievance . . . that we have refused to countenance in the past”); *Lujan*, 504 U.S. at 573-74 (“[H]arm to . . . every citizen’s interest in proper application of the Constitution and laws...does not state an Article III case or controversy.”). Similarly, the government’s interest in seeing its laws upheld is not an assignable concrete injury. *Stauffer*, 615 F. Supp. 2d at 254 n.5. Therefore, it would be futile to allow Simonian to amend his complaint in an attempt to give the Court subject matter jurisdiction under Rule 12(b)(1).

Finally, it would be futile to allow Simonian to amend his complaint in an attempt to adequately state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) in light of the heightened pleading requirements of Rule 9(b). Nothing from Simonian’s complaint gives any indication that he is in a position to be able to plead those factors.

#### **IV. Conclusion**

For the reasons stated above, Simonian’s complaint against Maybelline should be dismissed without leave to file an amended complaint.

Dated: April 30, 2010

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jeffrey M. Drake, hereby certify that on the April 30, 2010 the attached document was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the registered attorney(s) of record that the document is available for viewing and downloading from CM/ECF:

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