

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

Thomas A. Simonian,)	
Plaintiff,)	Civil Action No. 1:10-cv-01615
)	
v.)	Hon. Virginia M. Kendall
)	
Maybelline LLC,)	Jury Demand
)	
Defendant.)	
)	

JOINT INITIAL STATUS REPORT

NOW COME the Plaintiff, THOMAS A. SIMONIAN, and the Defendant, MAYBELLINE LLC (jointly the “Parties”), by and through their undersigned attorneys, and submit the following Initial Status Report:

- 1. Identify the attorneys of record for each party, including the attorneys expected to try the case.**

For the Plaintiff

Joseph M. Vanek – Lead Attorney
Vanek, Vickers, & Masini P.C.
111 S. Wacker, Suite 4050
Chicago, Illinois 60601
(312) 224-1502
Email: jvanek@vaneklaw.com

John Paul Bjork
Vanek Vickers & Masini
111 South Wacker Suite 4050
Chicago, IL 60606
(312) 224-1509
Email: jbjork@vaneklaw.com

For the Defendant

Francis DiGiovanni – Lead Attorney
Connolly Bove Lodge & Hutz LLP
1007 North Orange Street
Wilmington, DE 19899
(302) 658-9141
Email: fdigiovanni@cblh.com

Jeffrey Mark Drake
Wood, Phillips, Katz, Clark & Mortimer
500 West Madison Street
Suite 3800
Chicago, IL 60661-2511
(312) 876-1800
Email: jmdrake@woodphillips.com

Jessica Elyse Rissman
Law Offices of Eugene M. Cummings
One N. Wacker
Suite 4130
Chicago, IL 60606
(312) 984-0144
Email: jrissman@emcpc.com

Geoffrey A. Zelle
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange Street
Wilmington, DE 19801
(302) 658-9141
Email: gzelle@cblh.com

Martin Goering
Eugene M. Cummings, P.C.
One North Wacker Drive
Suite 4130
Chicago, IL 60606
(312) 984-0144
Email: mgoering@emcpc.com

Dean A. Monco
Wood, Phillips, Katz, Clark & Mortimer
500 W. Madison
Suite 3800
Chicago, IL 60661
(312) 876-1800
Email: damonco@woodphillips.com

Mr. Vanek, Mr. Bjork, Ms. Rissman and Mr. Goering expect to try the case for Plaintiff.

Mr. DiGiovanni, M. Drake, and Mr. Zelle expect to try the case for Defendant.

2. The basis for federal jurisdiction

Plaintiff's position:

Plaintiff's claim against Defendant arises under federal statute for the alleged violation of 35 U.S.C. § 292. As Plaintiff's claim arises under federal law, the basis for federal jurisdiction is 35 U.S.C. § 292 and 28 U.S.C. §§ 1338(a) and 1331.

Defendant's position:

Plaintiff has no standing to bring this lawsuit pursuant to 35 U.S.C. § 292, as set forth in Defendant's motion to dismiss.

3. The nature of the claims asserted in the Complaint and any Counterclaims

Plaintiff has alleged that Defendant, in violation of 35 U.S.C. § 292(a), falsely marked products with United States Patent No. 4,877,622 ("the '622 Patent"), United States Patent No. 4,871,536 ("the '536 patent"), United States Patent No. 4,898,193 ("the '193 patent") and United States Patent No. 4,993,440 ("the '440 patent"). Specifically, Plaintiff has alleged that: 1) the '622 Patent has been expired since November 30, 2007; 2) the '536 patent has been expired since July 28, 2008; 3) the '193 patent has been expired since October 20, 2007; and 4) the '440 patent has been expired since July 27, 2009. Plaintiff further alleges that Defendant falsely marks certain of its mascara

products with the expired patents with the intent to deceive the public and to gain a competitive advantage in the market.

Defendant has filed a motion to dismiss based on Plaintiff's lack of standing, plaintiff's failure to state a claim under to 35 U.S.C. § 292, failure to state its claims with the requisite specificity, and the duplicative nature of the action in view of an earlier-filed case. Defendant has also, in the alternative to its motion to dismiss, moved to: (a) stay the case pending the dispositions of two highly relevant cases that are currently on appeal to the United States Court of Appeals for the Federal Circuit; or (b) transfer the case to the United States District Court for the Southern District of New York, where this action has its "center of gravity."

Defendant has not filed any counterclaim(s) to date.

4. The name of any party not yet served and the circumstances regarding non-service

The sole Defendant, Maybelline LLC, signed a waiver of service of summons form. The executed waiver was filed with the Court on March 24, 2010.

5. The Principal legal issues

Plaintiff's position:

Whether Defendant has and continues to violate 35 U.S.C. § 292(a) by falsely marking its products with the expired '622 Patent, '536 patent, '193 patent and/or '440 patent.

Defendant's position:

Whether Plaintiff lacks standing to bring this lawsuit due to his lack of actual harm.

Whether Plaintiff has stated a claim under to 35 U.S.C. § 292 where his sole allegation is the mismarking of products with patents that have expired.

Whether Plaintiff has stated its cause of action, which sounds in fraud, with the requisite specificity.

Whether plaintiff can maintain all or part of this action, asserted as a *qui tam* plaintiff, when allegations identical to much of what has been alleged in this case were made by another purported *qui tam* plaintiff in an earlier-filed lawsuit.

Whether this case should be transferred to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404, where this action has its “center of gravity,” where litigation would be more convenient for the parties and witnesses, and where the interests of justice would best be served.

In the event that the case substantively proceeds: whether the defendant engaged in any false patent marking “for the purpose of deceiving the public” as required by 35 U.S.C. § 292.

6. The Principal factual issues

Plaintiff's position:

- (A) The date upon which the patents at issue expired;
- (B) Whether Defendant marked its products as protected by the patents at issue after the date upon which the patents expired;
- (C) After the date upon which the patents at issue expired:
 - (i) The number of units created by Defendant of each allegedly falsely marked product;
 - (ii) Whether Defendant's allegedly falsely marked products were used in advertising with reference to the patents at issue;
 - (iii) The number of copies of advertising material created by Defendant in regard to allegedly falsely marked products;
 - (iv) revenue generated from the sale of the falsely marked products;
 - (v) revenue from falsely marked products as a percentage of total company revenues; and
 - (vi) since statutory damages have a deterrent component, information sufficient to show the wealth of the Defendant.
- (D) The manufacturer and location of manufacture of the allegedly falsely marked product(s), including product packaging;
- (E) The process by which Defendant affixes patent number(s) to its products and/or product packaging.

Defendant's position:

The factual predicates underlying whether this case should be transferred to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404, including: (1) the situs of material events; (2) the relative ease of access to sources of proof; (3) the convenience of the parties; and (4) the convenience of the witnesses.

In the event that the case substantively proceeds: the factual predicates underlying whether the defendant engaged in any false patent marking “for the purpose of deceiving the public” as required by 35 U.S.C. § 292.

7. Whether a Jury Trial is expected by either party

Plaintiff's Position

A jury trial will be necessary in the event the case is not resolved prior to trial.

Defendant's Position

A trial will be necessary in the event that the case is not decided pursuant to a dispositive motion filed prior to trial.

8. Discovery

To date, no discovery has taken place. The parties anticipate that written discovery, including Interrogatories, Document Requests and Requests for Admission will be issued for this matter in the event that the case proceeds. Depositions of fact and expert witnesses will also be required for this case in the event that the case proceeds.

9. Trial Timeline and Length

Plaintiff's Position:

The earliest the parties would be ready for trial is June of 2011. The probable length of trial would be approximately five (5) days.

Defendant's Position:

The earliest the parties would be ready for trial 18 months after the disposition of Defendant's motion to dismiss or the lifting of any stay entered by the Court, whichever is later. The probable length of trial would be approximately five (5) days.

10. Magistrate Judge

The parties do not consent to proceed before a Magistrate Judge.

11. Settlement Discussion.

To date, the parties have not engaged in serious settlement discussions. Plaintiff requests a settlement conference at the Court's convenience. Defendant does not believe that a settlement conference will be useful.

Respectfully submitted:

Lead Counsel for Plaintiff:

/s/ Joseph M. Vanek
Joseph M. Vanek
Vanek, Vickers & Masini, P.C.
111 S. Wacker Drive
Suite 4050
Chicago, Illinois 60606
E-mail: jvanek@vaneklaw.com

Lead Counsel for Defendant:

/s/ Francis DiGiovanni
Francis DiGiovanni
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange Street
Wilmington, DE 19889
E-mail : fdigiovanni@cblh.com

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2010, I electronically filed the foregoing *Joint Initial Status Report* with the clerk of Court using the CM/ECF system.

/s/ Joseph M. Vanek