

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

THOMAS A. SIMONIAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:10-cv-01615
	)	
MAYBELLINE LLC,	)	Hon. Virginia M. Kendall
	)	
Defendant.	)	

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendant Maybelline LLC (“Maybelline”), by and through its undersigned counsel, respectfully submits this Notice of Supplemental Authority.

1. Attached as **Exhibit A** is a recent decision from the Northern District of Georgia in *Accord Patents LLC v. Superfeet Worldwide, Inc.* No. 1:10-cv-862-TCB (N.D. Ga. Oct. 19, 2010). Judge Batten granted defendants’ motion to dismiss for failure to state a claim and held that plaintiff’s complaint contained only conclusory statements that were insufficient to support an intent to deceive the public under *Twombly*. Judge Batten’s opinion contains statements directly relevant to arguments made by Maybelline in support of its motion to dismiss, particularly Maybelline’s argument that Simonian’s complaint, which contains similar conclusory statements, should be dismissed under Fed. R. Civ. P. 9(b). (Dkt. 20 at 6-9.)

2. Also relevant to Maybelline’s argument that Simonian’s complaint should be dismissed under Fed. R. Civ. P. 9(b) is the currently pending mandamus petition in *Simonian v. BP Lubricants, Inc.* **Exhibit B** hereto is the petition for mandamus filed by BP Lubricants, Inc. (“BP Lubricants”). In that case, Judge Gettleman of this district had denied the motion to dismiss filed by BP Lubricants, which was premised on the same grounds as Maybelline’s motion to dismiss, namely that the complaint failed to meet the heightened pleading

requirements of Fed. R. Civ. P. 9(b). BP filed a petition for mandamus to the Federal Circuit on the issue of Rule 9(b)'s applicability to false marking claims and the requirements under that rule for such claims. If the Federal Circuit were to grant BP Lubricants' mandamus petition, confirming the role of Rule 9(b) in pleading the intent to deceive element of a false marking claim, that decision will be controlling authority. All briefing on the petition is scheduled to be completed in a matter of weeks, and the Federal Circuit's ruling on that petition is expected promptly. Several factors underscore the significance of the petition. First, it would appear the petition has already passed the threshold test for merit because the Federal Circuit ordered the claimant to respond to the petition. *See* PACER docket Sheet (**Exhibit C**). Second, both the United States and the Intellectual Property Owners Association ("IPO") have requested and been granted the right to file amicus briefs in the matter. *See id.* The recently filed amicus brief of the IPO in support of BP Lubricant's petition is attached hereto as **Exhibit D**.

3. Attached as **Exhibit E** is a recent decision from Judge St. Eve of this District in *Simonian v. Hunter Fan Co.*, No. 10-1212 (N.D. Ill. Oct. 7 2010). Judge St. Eve granted defendant Hunter Fan Co.'s ("Hunter Fan") motion to transfer to the Western District of Tennessee, relying on the fact that the transferee district was the location where the activities upon which liability hinges took place. Ex. E at 5. Judge St. Eve's opinion is directly relevant to arguments made by Maybelline in its motion to transfer (dkt. 26). Like *Hunter Fan*, the relevant actions relating to the alleged liability occurred in the transferee district.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jeffrey M. Drake, hereby certify that on the October 21, 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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