

**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
	)	
Defendants.	)	

**NOTICE OF SUPPLEMENTAL AUTHORITY**

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

1. Briefing in *In re BP Lubricants USA, Inc.*, referenced in Maybelline’s last Notice of Supplemental Authority has now been completed. Attached as **Exhibit A** is the brief submitted by the United States, and attached as **Exhibit B** is the brief submitted by Thomas Simonian in that case. The United States, on whose behalf Simonian brings the present suit, concedes that the heightened pleading standard of Fed. R. Civ. P. 9(b) should apply to false marking cases, and agrees with Maybelline's position that intent to deceive cannot be demonstrated at the pleading stage by the type of allegations made by Simonian. The decision of the Court of Appeals for the Federal Circuit in that case will be directly relevant to issues raised by Maybelline in its motion to dismiss, namely whether Rule 9(b) should apply, and what needs to be plead under that rule for a false marking case. As briefing is now complete and the case is in front of the Federal Circuit on a mandamus petition, that decision is expected relatively soon.

2. Attached as **Exhibit C** is a recent decision out of the Eastern District of Pennsylvania in *Hollander v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, No. 2:10-cv-00836-RB (E.D. Pa. Oct. 21, 2010), in which Judge Buckwalter dismissed a similarly situated *qui tam* plaintiff’s

complaint for failure to adequately plead intent to deceive. Judge Buckwalter applied Fed. R. Civ. P. 9(b) in holding that Hollander's complaint, which contained allegations similar to those made by Simonian in the present case, did not plead sufficient facts upon which to infer an intent to deceive the public. As a result, it is relevant to Maybelline's 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).

3. Attached as **Exhibit D** is a recent decision out of the Central District of California in *Shizzle Pop, LLC v. Aviva Sports, Inc.*, No. cv 10-02574-RGK (SSx) (C.D. Cal. Nov. 3, 2010). In that case, Judge Klausner granted defendant's motion to dismiss for failure to meet the requirements of Fed. R. Civ. P. 9(b) for a second time, even after *qui tam* plaintiff Shizzle Pop attempted to remedy with an amended complaint. Judge Klausner held that the new allegations were nothing more than more detailed conclusory statements, and dismissed with prejudice. As a result, the decision is relevant to Maybelline's motion to dismiss, particularly its arguments that Simonian's complaint should be dismissed for failure to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) (dkt. 20 at 6-9).

4. Attached as **Exhibit E** is the report and recommendation of Magistrate Judge Armstrong in *Powell v. The Proctor & Gamble Co.*, No. CV-10-RRA-487-S (N.D. Ala. Nov. 3, 2010). Magistrate Judge Armstrong recommends the application of Fed. R. Civ. P. 9(b) to false marking claims, and further recommends that *qui tam* plaintiff Powell's complaint be dismissed for failing to plead any facts from which an intent to deceive can be inferred. As such, it is relevant to arguments made by Maybelline in its motion to dismiss, particularly those arguments that Simonian's complaint should be dismissed for failure to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) (dkt. 20 at 6-9).

5. Attached as **Exhibits F, G, H, I, and J** are decisions from various courts granting transfer to false marking defendants. Exhibit F is the decision of Judge Grady from this district granting transfer to defendant Leviton Mfg. Co. in *Zojo Solutions, Inc. v. Leviton Mfg. Co.*, No. 10-c-881 (N.D. Ill. Oct. 20, 2010). In transferring, Judge Grady held that the plaintiff's choice of forum is given lessened weight if the location chosen has weak connections with the operative facts of the case. *Id.* at p. 3. Exhibit G is the decision out of the Western District of Pennsylvania in *U.S. ex rel. FLFMC, LLC v. T.F.H. Publications, Inc.*, No. 2:10cv437 (W.D. Pa. Oct. 20, 2010). Exhibit H is the decision out of the Northern District of California in *Clip Ventures LLC v. U-Dig-It Enterprises, Inc.*, No. C 10-03227 CRB (N.D. Cal. Oct. 25, 2010). Exhibit I is the decision out of the Eastern District of Virginia in *Eaglewood Consulting LLC v. Graphic Packaging Int'l, Inc.*, No. 2:10cv125 (E.D. Va. Oct. 25, 2010). Exhibit J is the decision out of the Northern District of Alabama in *Dye v. Mag Instrument, Inc.*, No. 2:10-CV-00167-RDP (N.D. Ala. Oct. 28, 2010). All of these cases involve transfer motions that were granted in false marking cases under similar factual circumstances to those present in this case. As a result, they are relevant to arguments made by Maybelline in its motion to transfer (dkt. 26).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jeffrey M. Drake, hereby certify that on the November 5, 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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