

**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,)	Judge Virginia M. Kendall
)	
Defendants.)	

NOTICE OF SUPPLEMENTAL AUTHORITY

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

I. Cases Relevant to Defendants' Motion to Dismiss

1. Attached as **Exhibit A** is a recent decision from Judge Norgle of this district in *Zojo Solutions, Inc. v. Cooper Tools, Inc.* No. 10-cv-1504 (N.D. Ill. Feb. 16, 2011), dismissing Zojo's complaint pursuant to Rule 12(b)(6) for failing to plead sufficiently under Fed. R. Civ. P. 9(b). Citing "[t]he clear majority of courts," Judge Norgle ruled that Rule 9(b) is correctly applied to false marking claims. *Id.* at 4-5. In analyzing a complaint very similar to that brought by Simonian in the present case, Judge Norgle held that it did not meet the requirements of Rule 9(b). "Zojo has failed to allege who was responsible for marking the products, whether Cooper Tools had any procedures in place for checking on the continued pendency of patents, when or where the tape measure products were manufactured, when the offending products were marketed or sold, and has not described any particular advertising or other marketing activity." *Id.* at 7. Statements made by Judge Norgle in the case are directly relevant to arguments made by Defendant in its motion to dismiss, particularly regarding Simonian's failure to meet the requirements of Fed. R. Civ. P. 9(b).

II. Cases Relevant to Defendants' Motion to Transfer

2. Continuing a near universal trend in courts across the country, Defendants attach as **Exhibit B** and **Exhibit C** two recent decisions out of the Eastern District of Texas granting transfer to false marking defendants under factual situations highly similar to the facts of the present case. In *Promote Innovation LLC v. Little Kids, Inc.*, No. 2:10-cv-135-TJW-CE (E.D. Tex. Feb. 23, 2011) (Exhibit B), the Magistrate Judge granted Defendants' motion to transfer to the District of Rhode Island. In *Tex Pat, LLC v. Becton, Dickinson and Co.*, No. 5:10-cv-123 (E.D. Tex. Feb. 22, 2011) (Exhibit C), Magistrate Judge Craven recommended granting Defendant's motion to transfer to the District of New Jersey. In addition to continuing the overwhelming trend of courts in granting such motions, these opinions contain reasoning that is relevant to Defendant's motion to transfer to the Southern District of New York.

Dated: February 28, 2011

Respectfully submitted,

/s/Jeffrey M. Drake

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CERTIFICATE OF SERVICE

I, Jeffrey M. Drake, hereby certify that on the February 28, 2011 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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