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July 11, 2008

## VIA ECF

Honorable James A. Teilborg, U.S.D.J.  
United States District Court  
Sandra Day O'Connor U.S. Courthouse, Suite 523  
401 West Washington Street, SPC 51  
Phoenix, AZ 85003-2154

**Re: Designer Skin, LLC v. S&L Vitamins**  
**05-CV-3699 (PHX) (JAT)**

Dear Judge Teilborg:

We represent defendants in the referenced matter, and write both to inform the Court that the attempt at mediation in New York City this week was not successful, and to raise a number of issues that relate to next week's trial including a serious issue as to subject matter jurisdiction. These are legal matters that are not clear from the present state of the record, and a number of evidentiary issues. Our hope is that the Court could assist in resolving some of these issues ahead of time or at least give both parties the opportunity to address them before a jury is empanelled.

Notwithstanding that there is no specific provision authorizing this correspondence, it is submitted in the spirit of L.R. Civ. 83.6 which places the interests of justice, at the Court's discretion, above strict adherence to procedural rules.<sup>1</sup> Having said that, we are obligated under the Federal Rules of Civil Procedure to make what essentially constitutes a "suggestion" under Fed. R. Civ. P. 12(h)(3), which provides, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Although it is late in the day, "A defect in the Court's subject matter jurisdiction is not waivable and can be raised at any stage of the proceeding. Fed. R. Civ. P. 12(h)(3).<sup>2</sup>

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<sup>1</sup> Presumably plaintiffs were proceeding under this rubric at the time of their filing their "Notice of Clarification" on May 6, 2008, a document not explicitly provided for under in the Rules.

<sup>2</sup> See also, *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988), *Life Teen, Inc. v. Yavapai County*, 2003 U.S. Dist. LEXIS 24363 (D. Ariz. Mar. 26, 2003) (Broomfield, J.); see also, *S.J. v. Hamilton County*, 374 F.3d 416, 418 n.1 (6th Cir. Ohio 2004) ("The district court properly construed this late-filed motion as a "suggestion" that it lacked subject-matter jurisdiction"); *Sandle v. Nicholson*, 2006 U.S. Dist. LEXIS 74725 (D. Colo. Oct. 13, 2006) (12(h)(3) motion brought on "eve of trial" must be considered on merits despite court's reservations as to timing).

**Jurisdictional defect** It appears that the Court never had jurisdiction over the copyright claims in this action. 17 USCS § 411 provides as follows:

Registration and infringement actions (a) Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.

Examination of the Pretrial Order,<sup>3</sup> including information made available to defendants for the first time today, indicates that plaintiff's copyright claims do not meet this jurisdictional requirement. We explain.

The only copyright claim remaining in this case concerns the photographs used on the Designer Skin website. "[T]he copyright-infringement claim will proceed to trial on **the issue** of whether the images on S & L Vitamins' websites are either **copies of Designer Skin's electronic renderings** or photographs of the products themselves." Order at 16 (emphasis added). These electronic renderings, of course, could only have been copied from the Designer Skin website.<sup>4</sup> Therefore none of the copyright registrations set forth in the Pretrial Order at ¶ C(1)(g), which describe registrations for product labels, is relevant to this case. Why they were included, however, may become apparent upon contemplation of what follows.

Based on the Court's ruling that the only remaining copyright infringement claim is based on "renderings" allegedly taken from the Designer Skin website, the only copyright that could be infringed is the one referred to at ¶ C(1)(g) rather obliquely, after the recitation of the specific – irrelevant – label registrations, as follows: "Designer Skin also copyrighted its web site and product menu." Besides the use of the vague term "copyrighted," plaintiffs provide no specification, in contrast to the label registrations, of a particular copyright registration for the website, which is the only registration that would include the "electronic renderings." This registration is also **not** included among the exhibits listed by plaintiff at ¶ F.<sup>5</sup>

Plaintiffs, at our request, have today<sup>6</sup> provided us, apparently for the first time, with the

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<sup>3</sup> Much in this document has become clear upon later scrutiny. The Court will hopefully be charitable in its view regarding these belated discoveries, because plaintiffs' proposed draft of the proposed Pretrial Order was provided to defendants at 9:30 PM the night before the due date. Although the Court's rules require that this document be prepared jointly, naturally defendants could not contribute meaningfully until apprised of how plaintiffs, who bear the burden of proof, proposed to put on their case.

<sup>4</sup> "Designer Skin maintains that S & L Vitamins has copied the electronic renderings that appear on Designer Skin's website and is displaying these copied images on S & L Vitamins' own websites."

<sup>5</sup> For this reason, it does not appear that the joint certification by counsel at N(3) of the Pretrial Order that "Each exhibit listed herein . . . has been disclosed and shown to opposing counsel" was inaccurate. We remain with an open question as to the certification in N(4) to the effect that all disclosures required by the Federal Rules of Civil Procedure have been made.

<sup>6</sup> This registration was **not** disclosed previously, although we were under the impression that it was. Indeed the response to our first request to see it today was a suggestion that we find it in plaintiffs' summary

unidentified copyright registration for the website and “renderings,” described in the Pretrial Order as “also copyrighted.” That document establishes the following timeline:

- **November 14, 2005** Filing of Complaint for copyright infringement
- **June 30, 2006** Registration of relevant copyrights

It appears that the Complaint was filed a full seven months prior to the registration of the copyrights. Under the clear mandate of 17 USCS § 411, this Court had no jurisdiction over plaintiff’s copyright infringement claims at the time the Complaint was filed,<sup>7</sup> and never amended the Complaint to reflect the acquisition of the registration in 2006.

Moreover, because the Copyright Act explicitly requires that a copyright holder own a registration to “institute” a claim for infringement, amendment, even if justifiable here under the equities, may not act to create retroactive jurisdiction as if it existed at the time of filing. “When Plaintiffs initiated this action the Court was without subject matter jurisdiction to hear Plaintiffs’ copyright claims. As such, 28 U.S.C. § 1653, which provides that “[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts,” does not apply to help Plaintiffs here. Section 1653 ‘addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves.’ *Wellness Publ. v. Barefoot*, 2008 U.S. Dist. LEXIS 1514 at \*32 (D.N.J. Jan. 8, 2008), citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). *Accord, Harris v. Garner*, 216 F.3d 970, 983-984 (11th Cir. 2000) (where statutory requirement for jurisdiction at time of filing not met until later, amended complaint cannot create jurisdiction retroactively). *Cf., Walton v. United States*, 80 Fed. Cl. 251, 264 (Fed. Cl. 2008) (“it appears that binding Federal Circuit case law has not departed from the established rule that jurisdiction is determined on the basis of the facts that exist at the time the complaint was filed”; permitting retention of jurisdiction only because amended / supplemented complaint actually filed). In any case, here there has been no amendment or motion to amend, and one should not be permitted now.<sup>8</sup>

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judgment submissions, but it was not there, either, nor is it conceivable that plaintiffs did not know this. Defendants submit that for this reason, they should not be held responsible for the lateness of this motion, which as set forth above must be considered on the merits in any event.

<sup>7</sup> This explains why plaintiffs have, throughout this case, “danced around” the description of this copyright. In the Complaint, the only allegation regarding any of the copyrights states (emphasis added):

13. Designer Skin **has protectible copyrights** with respect to its works, labels, drawings, images, expressions, texts, product descriptions, photographs and marketing materials associated with the Products.

47. Designer Skin **exclusively owns all of the copyrights** in its marketing materials, photographs, works, drawings, promotional materials and product labels and texts, as well as the art work, designs, sketches, expressions, color patterns and other distinctive features of same.

There is no allegation of a registration for any of the copyrights, because none existed when the Complaint was filed. Similarly, in their summary judgment motion, the Affidavit of Beth Romero (document 53-3) is silent as to any copyright registration that would cover the “renderings” by way of the website (or otherwise). This is despite the fact that the accompanying affidavit of Mike Shawl (document 54-4) discusses these “renderings” at length.

<sup>8</sup> As the 11<sup>th</sup> Circuit explained in *Harris*:

The rule provides that a supplement to the pleadings may be permitted "upon motion of a party." Fed. R. Civ. P. 15(d). There was no motion to supplement the pleadings. The rule also says that the court may permit a supplement "upon reasonable notice." *Id.* . . . The rule also charges the

For these reasons, the Court should dismiss plaintiff's claim for copyright infringement for lack of jurisdiction.

**Plaintiffs' unfair competition claim.** The Court's May 20<sup>th</sup> order ("Order") dismissed all of plaintiffs' claims besides two: Copyright infringement, as set forth above, and "unfair competition." Besides copyright, all "intellectual property claims," i.e., trademark infringement and trademark dilution, were dismissed. As to unfair competition, the Court ruled as follows:

Designer Skin's claim for unfair competition is based on the alleged infringements of its intellectual property rights. S & L Vitamins therefore argued that it would be entitled to summary judgment on this claim if the Court granted it summary judgment on all of the infringement claims in this suit. Because the copyright-infringement claim is proceeding to trial, the Court will deny S & L Vitamins' motion for summary judgment as to Designer Skin's unfair competition claim.

The Court's reasoning is internally consistent, of course, but both sides are left with a legal question in terms of preparation that could benefit from elucidation from Your Honor: If the only remaining "intellectual property" claim is copyright, what exactly is the nature of the "unfair competition" claim in the case? The parties' respective legal contentions in the pretrial order as follows. For the sake of completeness the entire contentions are reproduced, but I have emphasized the relevant "unfair competition" sections for each side:

**Plaintiff Contends:** Designer Skin has copyrights in the images copied by S & L. Furthermore, by affixing its logo to Designer Skin's images, S & L has created a false association of itself with Designer Skin which is actionable as unfair competition.

**Defendant Contends:** Designer Skin has no copyright in the "electronic renderings" or photographs of their merchandise because these photographs are not themselves creative works, merely pictures of lotion bottles. Designer Skin has not timely filed copyright registrations for all or some of the claimed copyrights. 17 USCS §§ 410, 412. Designer Skin's copyright registrations of label content do not protect the depiction of that content in photographs. In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to

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district court with conditioning permission to supplement the pleadings upon "such terms as are just." *Id.*; see also Fed. R. Civ. P. 15(d) advisory committee note ("As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms.").

216 F.3d at 981, n1. Plaintiffs have had over two years to seek to amend their pleading, and chose instead to proceed by means of subterfuge and clever wordplay. "Just" would hardly seem the appropriate description for such a situation, even if amendment could cure the jurisdictional defect retroactively. Among the factors militating against the usually liberal policy permitting amendment are "(1) undue delay [and] (2) bad faith or dilatory motives on the part of the movant." *Heaven Sent Naturals, Inc. v. Church & Dwight Co.*, 2006 U.S. Dist. LEXIS 51280, 6-7 (D. Ariz. July 25, 2006).

prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements . . . related to the distribution or display of such articles . . . 17 U.S.C. § 113(c). **“False association” is not a legally relevant issue in a copyright infringement case. There can be no claim for “unfair competition” arising out of copyright infringement. 17 U.S.C. § 301(a). The states are precluded from enforcing penalties for copyright violations if the intellectual property at issue falls within the "subject matter of copyright" as defined by federal law and if the claimed property rights are "equivalent to" the exclusive rights provided by federal copyright law. *Crow v. Wainwright*, 720 F.2d 1224, 1225 (11th Cir. 1983), cert. denied, 469 U.S. 819 (1984).**

We ask the Court to consider the two sides’ contentions above and consider providing some guidance before trial as to what exactly is the legal nature of plaintiffs’ extant unfair competition claim in light of the fact the clear legal standard.

We cannot but bring to the Court’s attention the fact that a virtually on-point case, *AJF Eng’g, Inc. v. Wade*, 2007 U.S. Dist. LEXIS 19308 (D. Ariz. Mar. 15, 2007), was decided last year in this District by Judge McNamee. There the Court considered twinned allegations of copyright infringement and unfair competition under Arizona law<sup>9</sup>. Upon finding that the unfair competition claims did in fact arise from the same facts as the copyright claim, the Court dismissed the former under controlling Ninth Circuit precedent,<sup>10</sup> writing that “under Ninth Circuit jurisprudence, to survive preemption, the state claim must protect rights that are qualitatively distinct from the rights of the Plaintiff falling under the Copyright Act . . . The state claim must have an extra element which changes the nature of the action.”

It appears that this “extra element” suggested here is the claim, **“Furthermore, by affixing its logo to Designer Skin’s images, S\_ & L has created a false association of itself with Designer Skin which is actionable as unfair competition.”** Defendants submit that “false association” is nothing but an unfair competition claim sounding in trademark, as it must be: “This Circuit has consistently held that state common law claims of unfair competition . . . are ‘substantially congruent’ to claims made under the Lanham Act.” *Cleary v. News Corp.*, 30 F.3d 1255, 1262-1263 (9th Cir. Cal. 1994), cited by *Best Western Int’l, Inc. v. Doe*, 2006 U.S. Dist. LEXIS 77942 (D. Ariz. Oct. 24, 2006) (Campbell, J.).

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<sup>9</sup> “In Count IV, Plaintiff alleges that ‘the use by Defendants . . . of AJF’s copyrighted materials to attempt to gain a competitive edge over AJF as alleged herein is actionable as an independent tort of unfair competition.’” *AJF Eng’g, Inc.*, 2007 U.S. Dist. LEXIS 19308 at 8-9.

<sup>10</sup> “Under Ninth Circuit jurisprudence, to survive preemption, the state claim must protect rights that are qualitatively distinct from the rights of the Plaintiff falling under the Copyright Act. The state claim must have an extra element which changes the nature of the action. In a case coming out of the District of Arizona, the Court found that if the essence of Plaintiff’s unfair competition claim is that Defendants used copyrighted works without authorization, then the unfair competition claim is preempted. Here, Plaintiff’s unfair competition claim is based on the allegation that Defendants . . . misappropriated and used AJF’s copyrighted materials to attempt to gain a competitive edge over AJF. Accordingly, the Court concludes that AJF’s claim for unfair competition is based on ‘rights equivalent to those protected by the federal copyright laws.’ Therefore, Defendants’ Motion for Judgment on the Pleadings filed pursuant to Fed. R. Civ. P. 12(c), for Count IV (Unfair Competition) of Plaintiff’s Second Amended Complaint is hereby GRANTED with prejudice” *AJF Eng’g, Inc.*, 2007 U.S. Dist. LEXIS 19308 at 11-12 (citations omitted).

Considering the foregoing, we request that prior to trial the Court elucidate its holding retaining the unfair competition claim here. By virtue of any clarification defendants will have some idea of what may or may not be admissible as evidence at trial based on an understanding of the actual elements of the claim being prosecuted. Alternatively, if the Court were to find that it did not have jurisdiction over the copyright claims in this matter as set out in section (1), it would be hard to understand how it could maintain supplementary jurisdiction over state law claims that in turn are based on those claims.

**Evidentiary Issues** Defendants recognize that the deadline for motions in limine has passed,<sup>11</sup> and therefore do not ask the Court here to make any specific evidentiary rulings. We nonetheless believe it will be useful for the Court to be aware of certain issues – plaintiffs will have time to respond, after all – and perhaps save jury time and reduce trial objections by discussion of them in conference with counsel prior to Tuesday.

**1. Documents not provided in discovery.** Both parties have objected in the Pretrial Order to any documents not provided by the other side in discovery. As the Court knows, no discovery was taken in this matter, although there was an exchange of documents and discovery responses in the companion case in the Eastern District of New York. We note that in *Compana, LLC v. Aetna, Inc.*, 2006 U.S. Dist. LEXIS 29028, 2-4 (W.D. Wash. May 12, 2006) a party similarly sought exclusion of all documents not produced pursuant to the mandatory disclosure provisions of Fed. R. Civ. P. 26(a). The Court rejected the request, noting a number of factors that militated against granting it including the fact that, as here, neither party conducted any discovery. “Instead, it now seeks the most severe sanction, exclusion of all evidence, without pursuing other methods for obtaining the documents.” Similar considerations would seem to apply here.

**2. Request for leave to amend the pretrial order as to objections.** We request that the Court consider, in the interest of justice, granting defendants leave to make minor amendments to the pretrial order, which we submit will not result in surprise or undue prejudice to plaintiffs. Our requested amendments are as follows, with the original wording followed by the requested change:

¶ F(3)(a) -- Defendants’ objections to plaintiffs’ proposed exhibits

1. Designer Skin’s Distributor Agreement: Irrelevant. *Requested amendment:* add Best Evidence Rule (Fed. R. Evid. 1002).

**Basis for assertion of good cause:** Defendants should be permitted to object to this evidence not only on relevance grounds, as already indicated, but under the Best Evidence Rule. As set out in the footnote on page one, the very suggestion that this document would be a proffered exhibit was a surprise; repeated

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<sup>11</sup> We also note that as to the evidentiary issue of plaintiffs’ proffer of an unsigned “exemplar” contract as proof of the content of plaintiffs’ distributorship contracts, there was no way for defendants to anticipate, prior to the deadline for motions in limine, that plaintiffs would actually attempt to either utilize this seeming irrelevant document at trial following the Court’s dismissal of plaintiff’s tortious interference claim, much less that plaintiffs would propose to utilize an unsigned copy of the document as evidence of a contract. See *infra*.

requests by the undersigned for production of a signed copy of the agreement that would comply with the Rule were rejected right through the time of the filing of the Pretrial Order. A party “cannot offer testimony describing the contents of writings, including its contracts . . . to prove the contents of those writings unless it produces the original documents, explains their absence, or otherwise complies with the evidence rules.” *See, Compana, supra*, 2006 U.S. Dist. LEXIS 29028, 4-6. Here plaintiff proposes to do just that regarding the Distributor Agreement. Considering the absence of undue prejudice to plaintiffs and the extensive opportunity given by defendants to cure by producing a compliant document, justice would seem best served by the retention by defendants to interpose their objection on this ground.

¶ F(3)(a) -- Defendants’ objections to plaintiffs’ proposed exhibits

6. S & L’s tax returns 2000-2006: Irrelevant. S&L’s income was derived from innumerable sources and these tax returns are mainly unduly [*sic*]. *Requested amendment: revise to read* “these tax returns are mainly unduly prejudicial rather than probative.”

**Basis for assertion of good cause:** Typographical error.

¶ F(3)(a) -- Defendants’ objections to plaintiffs’ proposed exhibits

9. Australian Gold discovery responses (Designer Skin [*sic*] New York lawsuit): Irrelevant. *Requested amendment: add* and, as to documents designated confidential by correspondence from S & L’s counsel dated August 23, 2005 and December 21, 2005, forbidden from disclosure “in any other proceeding” or to any person other than counsel in that action pursuant to a protective order entered on August 11, 2005, except as to documents produced to counsel for Designer Skin in the New York action by counsel for S & L without reservation of rights.

**Basis for assertion of good cause:** Self-explanatory.

We recognize this is a substantial submission at this hour. We appreciate the Court’s careful consideration of the foregoing in light of the importance of these issues to all the parties, and are of course at the Court’s disposal as may be necessary to discuss any of the foregoing prior to the trial call Tuesday morning (we will be arriving in Phoenix Sunday night).

Respectfully submitted,



Ronald D. Coleman

cc: All counsel (ECF)

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Designer Skin, LLC, an )  
Arizona limited liability )  
company; et al., )  
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Plaintiffs, )  
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vs. )  
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S & L VITAMINS, INC., )  
d/b/a BODY SOURCE d/b/a )  
THESUPPLENET.COM, a New )  
York corporation; and )  
LARRY SAGARIN, an )  
unmarried individual, )  
 )  
Defendants. )  
 )

CIV 05-3699-PHX-JAT  
Phoenix, Arizona  
July 15, 2008  
8:33 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Jury Trial - Day 1 - Pages 1 - 237)

**BEFORE:** THE HONORABLE **JAMES A. TEILBORG**, JUDGE

Official Court Reporter:

David C. German, RMR, CRR  
Official U.S. Court Reporter  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, SPC-39  
Phoenix, Arizona 85003-2151  
(602) 322-7251

PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER  
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

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**APPEARANCES:**

**FOR THE PLAINTIFFS:**

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**FOR THE DEFENDANTS:**

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New York, New York 10017  
By: Ronald D. Coleman, Esq.

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I N D E X

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VD</u>
MICHAEL SHAWL					
By Mr. Mizrahi	104				
By Mr. Coleman		148			
By Mr. Mizrahi			158		
BETH FELKER ROMERO					
By Mr. Crown	165				
By Mr. Coleman		222			

E X H I B I T S

PLAINTIFFS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
1	Certificates of copyright registrations Re Exhibits 1-1 through 1-54	191	191
2	Designer Skin's Distributor Agreement	203	207

DEFENDANTS' EXHIBIT

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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**Phoenix, Arizona  
July 15, 2008**

(Proceedings convened at 8:33 a.m.)

THE COURT: Thank you. Please be seated.

I'll ask the clerk to call the next matter, please.

08:33:00

THE DEPUTY CLERK: Civil Case 05-3699, Designer Skin versus S & L vitamins. This is the time set for jury trial. Please announce your presence for the record.

MR. MIZRAHI: Good morning, Your Honor. Elan Mizrahi and Larry Crown here for the plaintiffs, along with Beth Romero from Designer Skin.

08:33:00

THE COURT: All right. Good morning.

MR. COLEMAN: Good morning. Ronald Coleman for the defendants.

THE COURT: Good morning.

08:33:00

MR. COLEMAN: Thank you, Judge.

THE COURT: All right. I scheduled this matter for 8:30 upon receiving the defendants' document titled Notice regarding Proposed issues for a pretrial conference call and suggestion of lack of subject matter jurisdiction, end quote.

08:34:00

And that's Docket Number 91.

I scheduled it at a time where I, of course, did not have the benefit of any response, nor the benefit of any real study of the document or the issues, so -- I'm leading up to saying our time this morning will be brief. Because I have

08:34:00

1 since had the benefit of a response and perhaps more important  
2 the opportunity to study and reflect on what's raised or what  
3 has been raised.

4           The first issue I will address is the alleged  
5 jurisdictional defect, and the notice suggests that the Court 08:35:  
6 has no subject matter jurisdiction over the copyright  
7 infringement claim because the plaintiff did not register the  
8 copyright at issue, whether we're talking about the copyright  
9 in the website or the product labels, until after instituting  
10 this litigation. 08:35:

11           The plaintiff concedes that it did indeed fail to  
12 register the copyrights before filing suit but argues that the  
13 jurisdictional defect can be and has been cured by its  
14 post-filing registrations.

15           I have read what I think to be the significant cases 08:36:  
16 on this subject, and while there is much to be said for what  
17 might be described as rather clear language from Congress in  
18 Section 411, I think it is, the -- and language which I might  
19 tend to agree with but for the absence of authority in the  
20 Ninth Circuit and but for cases such as the Fifth Circuit case 08:36:  
21 of *Positive Black Talk, Inc. versus Cash Money Records*, 394  
22 F.3d 357, which basically holds that this failure can be cured,  
23 as argued for by the plaintiffs, and I am persuaded that that  
24 is the view that this Circuit would take when confronted with  
25 the issue. 08:37:

