IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ADIDAS AMERICA, INC., **08-CV-91-BR**

Plaintiff, **ORDER**

v.

MICHAEL CALMESE,

Defendant.

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BROWN, Judge.

This matter comes before the Court on Defendant Michael Calmese's Motion (#217) for Leave to File a Third Motion for Reconsideration of February 22, 2010, Order.

For the reasons that follow, the Court **DENIES** Defendant's Motion (#217) for Leave to File a Third Motion for Reconsideration, **DENIES as moot** Defendant's Voluntary Motion (#227) to Strike Third Motion for Reconsideration, and **GRANTS** Plaintiff's Motion (#221) for Sanctions as set out below.

BACKGROUND

Defendant again seeks leave to file a third motion for reconsideration of the Court's Order issued February 22, 2010, in which the Court denied Defendant's Second Opposed Motion (#160) for Reconsideration of this Court's Order (#155) issued November 16, 2009, and affirmed Magistrate Judge Janice M. Stewart's October 7, 2009, nondispositive Opinion and Order (#134). The procedural history of Defendant's repeated attempt to challenge the Court's conclusions on Summary Judgment with respect to the "relatedness of goods" between Defendant and Plaintiff's sportswear products is as follows:

On October 28, 2009, Defendant filed his original Motion for Reconsideration in which he requested this Court to reconsider

its Order of October 8, 2009. Defendant maintained a decision by the District Court for the District of Arizona in an unrelated litigation between Nike, Inc., and Calmese was binding on Magistrate Judge Stewart's determination of the *Sleekcraft* factor of "relatedness of goods":

> Defendant Calmese believes this Oregon should have come to the same legal conclusion as did the Honorable Judge Roslyn O. Silver in the Arizona District because just as wine complements cheese and salami, a commonsensical complementary relationship exists between adidas' sports garments and Calmese's sports garments. In fact Plaintiff and Defendant both use sports garments with identical "PROVE IT" marks in all capital letters on clothing and also on hang tags and receipts with out the world famous adidas logo or trademark. How much more related can these goods get given both adidas and calmese admittedly are using sports garments with the mark "PROVE IT"?

On November 16, 2009, the Court denied Defendant's Motion for Reconsideration. The Court held in relevant part:

> Defendant contends this Court did not conduct a *de novo* review of the record with respect to his Objections as required by 28 U.S.C. § 636(b)(1) on the ground that the United States District Court for the District of Arizona in its October 16, 2008, Opinion and Order in *Calmese v. Nike, Inc.*, No. 06-CV-1959, decided on the same record that the "relatedness of the goods" *Sleekcraft* factor weighed in Defendant's favor. The Court notes Plaintiff was not a party to the Arizona proceedings, and, therefore, the likelihood of confusion between the products of Plaintiff and Defendant was not at issue in that matter. The Court has reviewed the record *de novo* and adheres to its October 8, 2009, Order with respect to this *Sleekcraft*

factor.

The Court also noted:

> Defendant states the Arizona Opinion and Order was attached as Exhibit E to his Response to Opposition to Defendant's Motion for Leave to File Federal Taxes (#133). Exhibit E to that document, however, is a September 8, 2009, Order in the *Calmese v. Nike* matter in which the Arizona District Court denied Defendant's Motion for Reconsideration (Defendant was the plaintiff in the Arizona case). In that Motion, Defendant requested the Arizona court to reconsider its ruling to dismiss his Complaint against Nike for trademark infringement.

On November 25, 2009, Defendant filed his Second Motion for Reconsideration in which he repeated his request that the Court reconsider its decision to affirm Magistrate Judge Stewart's Findings and Recommendation:

> Just as wine complements cheese and salami, a commonsensical complementary relationship exist between adidas's sports garments and Calmese's sports garments. Vendors often sell sports clothing and sports garments in the same stores and customers consume the products simultaneously, *i.e.* while playing sports. This factor should have never had to be reconsidered and should have weighed in favor of Defendant long ago as confirmed by the Honorable Judge Roslyn O. Silver, United States District Judge, on October 16, 2008. Judge Anna Brown commits a plain error were she erroneously states that because Plaintiff adidas was not a party to the Arizona proceedings, therefore, the likelihood of confusion between the products of Plaintiff adidas and Defendant Calmese was not at issue in that matter. Because the Plaintiff adidas and Defendant Calmese's dispute did not surface until well after the Arizona

> proceedings started, gives rise to the fact that there could be not issue given that there was no dispute yet. This Courts review fails here because in the Arizona proceedings the likelihood of confusion was between Calmese's t-shirts vs. Nike's shoes and Calmese still won this factor. Here the likelihood of confusion is even greater because the likelihood of confusion is between adidas's t-shirt vs. Calmese's t-shirts, a perfect t-shirt match. Therefore, how can Defendant Calmese lose this factor in the Oregon District Court when Calmese won this very same *Sleekcraft* Factor in the Arizona District Court based on the very same "law" that should be applied in this matter? Defendant Calmese should rightfully and legally be awarded the *Sleekcraft* Factor for Relatedness of Goods as a matter of law simply because the same laws apply to all of the District Courts throughout the entire United States of America.

On February 22, 2010, the Court issued an Order denying Defendant's Second Motion for Reconsideration and instructed Defendant to seek leave of Court before filing any additional motions for reconsideration. The Court also denied Plaintiff's request that the Court sanction Defendant for a frivolous filing.

On March 3, 2010, Defendant filed a Motion for Leave to File a Third Motion for Reconsideration. In his Motion, Defendant repeated his argument that the decision by the District Court of Arizona controls this Court's determination of the "relatedness of goods" factor:

> By repeatedly not considering the fact that Calmese has presented evidence that proves Calmese has already won a *Sleekcraft* factor test for Relatedness of Goods test in the

> matter Michael D. Calmese v. Nike Inc. Case No. 06-cv-1959, a previously litigated matter in the Arizona District Court, deprives Calmese of the justice that he is entitled to by law. It was and should be the same law that awarded Calmese a favorable ruling on this one point of Relatedness of Goods in Honorable Judge Rosyln O. Silver's October 16, 2008 ORDER. This Court should note that Calmese won the Relatedness of Goods factor and he did not even file an answer to Nike's "second" motion for summary judgment which subsequently allowed them to prevail on their motion but not before awarding Calmese several *Sleekcraft* factors, specifically Relatedness of Goods.

On March 9, 2010, the Court issued the following Order denying Defendant's first Motion for Leave to File a Third Motion for Reconsideration:

> In its Order issued February 22, 2010, the Court prohibited Defendant from filing any additional motions for reconsideration without leave of Court. On March 3, 2010, Defendant Michael D. Calmese filed a Motion (#170) for Leave to File Motion for Reconsideration of February 22, 2010, Order. In his pending Motion, Defendant reiterates the arguments he made in his previous Second Opposed Motion for Reconsideration and asserts a decision by the United States District Court for the District of Arizona in a matter involving Defendant and a company unrelated to Plaintiff binds the Court's determination of the facts and law as to the "relatedness of goods" between Defendant and Plaintiff adidas America, Inc. In its February 22, 2010, Order, the Court concluded the issues and facts before this Court were not in dispute in the District Court of Arizona and that Defendant did not show any error of fact or change in controlling law that compelled further consideration. The Court, therefore, adheres to its previous ruling. Accordingly the Court DENIES

> Defendant's Motion (#170) for Leave to File Motion for Reconsideration and, for the same reasons set out it is Order issued February 22, 2010, DENIES Plaintiff's request for the Court to sanction Defendant.

On March 29, 2010, Defendant filed a Second Motion (#175) for Leave to File a Third Motion for Reconsideration of March 9, 2010, Order, in which he once again argued the "relatedness of goods" *Sleekcraft* factor should weigh in his favor on the basis of the Arizona District Court's decision. On April 20, 2010, the Court issued an Order denying Defendant's Motion for Leave. With respect to the "relatedness of goods" issue, the Court emphasized:

> In the long line of Defendant's argument on this factor, he misses the thrust of the Magistrate Judge's reasoning with respect to the "relatedness of goods" factor that is at the heart of her ultimate conclusion on Summary Judgment: Plaintiff's use of multiple adidas logos in combination with the "Prove It" mark make the likelihood of confusion with Defendant's mark minimal. In addition, Defendant stubbornly continues to maintain the decision of the Arizona District Court is binding on this Court. The Court, however, has already pointed out that the Arizona decision is not binding on this Court as a matter of law nor is it determinative of the facts in this case. Ultimately Defendant has not cited any change in controlling law nor shown clear errors of fact that would provide adequate grounds for the Court to modify or to overturn the its Order adopting the Magistrate Judge's Amended Findings and Recommendation. Although Defendant spends the bulk of his Motion lamenting a perceived double standard by which the Court has allowed Plaintiff but has prevented Defendant from relying on the decision by the Arizona District Court,

> Defendant's argument fails. The Court has not made any ruling with respect to a party's ability to cite or to argue analogous aspects of that decision. In fact, the Court has merely concluded Defendant's reliance on that decision is misplaced and is not grounds for altering the Court's rulings in this matter.

In its Response to the Motion, Plaintiff again sought sanctions against Defendant:

> Here we go again. Calmese has added yet another frivolous filing to his already impressive collection and, in the process, he has once again forced adidas to waste its time and resources preparing a response (and, just as unfairly, Calmese has once again forced the Court to waste its time and resources considering a frivolous motion). The title of Calmese's latest motion speaks volumes: a Second Motion for Leave to File a Third Motion for Reconsideration. While it would be bad enough if Calmese's latest motion was accurately titled, the fact of the matter is that the present motion is at least the seventh attempt by Calmese to object to and/or seek reconsideration of this Court's entry of summary judgment in adidas's favor on the issues of trademark infringement and unfair competition. The time has come to put a stop to Calmese's incessant filing of frivolous motions. adidas has previously explained that, in its view, the only way to effectively put a stop to Calmese's incessant filing of frivolous motions is to impose a monetary sanction against him.

The Court again declined to sanction Defendant, but issued the following Order to Defendant:

> Accordingly, in the exercise of its discretion and pursuant to the Court's inherent authority, the Court further ORDERS Defendant not to make, file, or seek leave to file any additional motions with respect to any of the rulings, opinions, or orders addressed in this

> Order or related to the Court's adoption of Magistrate Judge Stewart's Amended Findings and Recommendation (#101) in this matter and ORDERS Defendant not to file any motion to reconsider this Opinion and Order.
>
> If Defendant violates this Order by making, filing, or seeking leave to file prohibited motions, the Court will impose sanctions, potentially including the striking of his pleadings and an entry of an order of default against Defendant thereby permitting Plaintiff to conclude this matter in its favor without any opportunity for Defendant to oppose the relief Plaintiff seeks.

As noted, on August 19, 2010, Defendant again sought leave to file a third motion for reconsideration. In its Response (#221), Plaintiff once again sought sanctions against Defendant for his disregard of the Court's Order. On August 24, 2010, the Court issued an Order construing Plaintiff's Response a Motion for Sanctions in part and permitted Defendant to have the opportunity to respond. On August 24, Defendant filed his Voluntary Motion (#227) to Strike Third Motion for Reconsideration, which the Court construes, in part, as Defendant's Response to Plaintiff's Motion for Sanctions. On August 26, 2010, Plaintiff filed its Response to Defendant's Voluntary Motion to Strike Third Motion for Reconsideration.

STANDARDS

The Court has "broad discretion in fashioning sanctions." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1065 n.8

(citing *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006), and *Ritchie v. United States*, 451 F.3d 1019, 1026 (9th Cir. 2006)). There is "strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989). Moreover,

> "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long*, 912 F.2d at 1148; *see O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir.1990). Thus, in *De Long*, we outlined four factors for district courts to examine before entering pre-filing orders. First, the litigant must be given notice and a chance to be heard before the order is entered. *De Long*, 912 F.2d at 1147. Second, the district court must compile "an adequate record for review." *Id.* at 1148. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Id.* Finally, the vexatious litigant order "must be narrowly tailored to closely fit the specific vice encountered." *Id.*

Molski, 500 F.3d at 1057. When encountering vexatious litigants, the Ninth Circuit has held appropriate sanctions

> may include not only a pre-filing order, but also monetary sanctions or even the ultimate sanction of dismissal of claims. We do not here hold that, if a court encounters vexatious litigation, a pre-filing order is the only permissible form of sanction. Rather, the district court may exercise its

> sound discretion under the facts presented to choose any appropriate sanction that will punish the past misconduct and prevent the future misconduct of the lawyer or party at issue.

Molski, 500 F.3d at 1065 n.8. In addition, "[c]ourts have inherent equitable powers to dismiss actions or enter default judgments for failure to prosecute, contempt of court, or abusive litigation practices." *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987)(citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962); and *United States v. Moss-American, Inc.*, 78 F.R.D. 214, 216 (E.D. Wis. 1978)).

DISCUSSION

Plaintiff's Motion for Leave to File Third Motion for Reconsideration violates a clear Order of the Court issued on April 20, 2010. As summarized, the history of Defendant's filings with respect to the Court's rulings on summary judgment in this matter clearly demonstrates that Defendant has continued to repeat the same arguments despite the Court's repeated rulings that Defendant's bases for reconsideration are without legal merit. Although Plaintiff styles his latest Motion as providing new arguments for reconsidering the Court's February 22, 2010, Order, Plaintiff again offers nonbinding authority for the proposition that he "should have won the *Sleekcraft* factor test

for 'Likelihood of Confusion' long time ago."

Nevertheless, in his Voluntary Motion to Strike, Defendant asserts he made an "honest mistake" by filing his latest Motion for Leave and seeks the Court's permission to withdraw the Motion. Plaintiff contends Defendant's Motion cannot be considered a mistake and certainly should not be considered an honest one under the circumstances. Plaintiff points out the Court denied Defendant's Second Motion for Reconsideration on February 22, 2010, and ordered Defendant not to file any additional motions for reconsideration without leave of Court; after the Court denied Defendant's Second Motion for Leave to File a Third Motion for Reconsideration on April 20, 2010, the Court ordered Defendant not to "make, file, or seek leave to file any additional motions with respect to any of the rulings, opinions, or orders addressed in this Order or related to the Court's adoption of Magistrate Judge Stewart's Amended Findings and Recommendation (#101) in this matter and ORDERS Defendant not to file any motion to reconsider this Opinion and Order" on penalty of sanctions; and the Court reminded the parties on July 20, 2010, that the Court "has previously directed the parties not to file any more motions so that the parties focus their efforts on preparing for trial." Thus, Plaintiff contends the Court's Orders have been numerous, measured, and clear, and Defendant's latest Motion for Leave violated not one, but two standing orders

not to file any additional motions generally or any motions related to the summary-judgment rulings in this matter specifically.

Plaintiff also notes Defendant's Voluntary Motion to Strike violated the Court's rules because he failed to confer with Plaintiff's counsel before filing his Motion. On July 20, 2010, roughly a month before Defendant filed his Voluntary Motion to Strike, the Court reminded Defendant of Local Rule 7-1:

> The procedure to request the Court to take formal action in the case is to file a motion. Before filing any motion, a party must confer with the opponent about the subject of the proposed motion and make a good faith effort to resolve the issue without court intervention. *See* Local Rule 7-1. Indeed, a party filing a motion is required to certify in the first paragraph of any motion that the party has made the good faith effort required by Local Rule 7-1.

Ultimately, Defendant has blatantly ignored the Court's warnings and clear orders and has flaunted the lenience the Court has shown in declining to sanction Defendant for abuse of the legal process.

As a consequence of Defendant's frivolous and repeated filings, the Court finds Defendant has wasted the resources of Plaintiff and the Court and has shown a blatant disregard for the judicial process. The parties and the Court have been dealing with some form of Plaintiff's challenge to the Court's orders with respect to the rulings made on summary judgment since

October 2009. Specifically, Defendant made objections to the Findings and Recommendation, filed two motions to reconsider, and filed three motions for leave to file a third motion for reconsideration of the same rulings. In light of the history of these motions, the Court finds Defendant's statement that he made an honest mistake by filing this latest request for leave is not credible.

For these reasons, the Court concludes sanctions are warranted but declines at this stage to strike Defendant's pleadings outright. The Court will not be so forgiving of future violations of Court orders.

Instead, in the exercise of its discretion, the Court ORDERS Defendant to pay the reasonable attorneys' fees and any costs Plaintiff has incurred to respond to Defendant's latest Motion for Leave and his Voluntary Motion to Strike. To this end, the Court directs Plaintiff to file **no later than September 7, 2010,** an appropriate pleading setting forth the amount of reasonable attorneys' fees and any costs Plaintiff has incurred to respond to these two Motions and the bases for those fees; *i.e.*, to include Plaintiff's billing rates, hours incurred, etc. The Court then will review the pleading and issue an order determining the amount of fees and any costs that Plaintiff reasonably expended as a result of Defendant's sanctionable conduct. After it makes its determination, the Court will set a

14-day deadline for Defendant to pay that amount in full to Plaintiff's counsel. If, however, Defendant fails to timely pay that amount in full, the Court will reconsider whether to impose the ultimate sanction of striking Defendant's pleadings and allowing Plaintiff to pursue a default judgment in this matter.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#217) for Leave to File a Third Motion for Reconsideration, **DENIES as moot** Defendant's Voluntary Motion (#227) to Strike Third Motion for Reconsideration, and **GRANTS** Plaintiff's Motion (#221) for Sanctions as set out in this Order.

IT IS SO ORDERED.

DATED this 27th day of August, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge