

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS**
Dallas Division

M3Girl Designs, LLC
Plaintiff,

vs.

Blue Brownies, LLC
Charlotte Liles,
Krista Dudte, and
Robert Dudte
Defendants.

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CIVIL ACTION NO. 3-09cv2390-F

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR RECONSIDERATION OF THE
COURT'S SUMMARY JUDGMENT ORDER**

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COMES NOW Plaintiff, M3Girl Designs, LLC, and files this Response to the Defendants' Motion for Reconsideration as follows:

I. INTRODUCTION

The Defendant Blue Brownies Motion for Reconsideration should be denied because it does not satisfy the Rule 59 or Rule 60 standards for showing “surprise,” “manifest error,” or newly discovered evidence that could not have been presented earlier to the Court. For instance, Defendant Blue Brownies claims “surprise” that this Court considered the “total image” of the Plaintiff’s trade dress. The Defendants, however, were warned that their “isolated” analysis of “single prongs” of the Plaintiff’s trade dress was insufficient to address the complete nature of the Plaintiff’s trade dress. There is no “surprise” in the Court’s denial of the Defendants’ summary judgment motion, especially where the Defendants’ summary judgment briefing was incomplete by only partially addressing single elements of the identified trade dress in this matter.

Moreover, there was no “manifest error” in the Court’s trade dress functionality analysis. Examining only a partial list of the Defendant Blue Brownies vitriolic complaints, the Defendants accuse this Court of committing the following errors:

- The Court allegedly used, identified and analyzed “a new Court-authored trade dress articulation surprisingly presented after the Defendants had briefed and orally argued their summary judgment motion,” *Mtn. Recons., DE 121, p. 4-5*,
- “The Court’s Summary Judgment Order Inappropriately Construes and Analyzes a New, Broader, and Vague Trade Dress Definition,” *Mtn. Recons., DE 121, p. 5*,
- “The Court leaves Defendants in a quandary to understand the specific product features that comprise Plaintiff’s alleged trade dress...,” *Mtn. Recons., DE 121, p. 5*,

- The Court allegedly used a trade dress definition that was a “new, strikingly broad, and vague trade dress definition...” *Mtn. Recons., DE 121, p. 5,*
- The Court uses a “newly created articulation of Plaintiff’s alleged trade dress,” *Mtn. Recons., DE 121, p. 6,*
- “In stark contrast, the Court’s summary judgment order in this case effectively amends the Plaintiff’s complaint sua sponte, without affording Defendants any notice of a new and broader trade dress definition after Defendants briefed and argued their motion for partial summary judgment on an entirely different trade dress articulation.” *Mtn. Recons., DE 121, p. 7,*
- The Court “evaluates the functionality of this entirely new and broader trade dress definition without due disregard of those features that cannot logically, or legally, be distinctive trade dress elements.” *Mtn. Recons., DE 121, p. 9.*

All of the above complaints leveled by the Defendants against this Court simply miss the mark. This Court’s December 6, 2011 Order did not err in denying the Defendants’ Motion for Summary Judgment. The Defendants’ never addressed the “total image” of the Plaintiff’s trade dress claim in its briefing – instead addressing individual elements from the Plaintiff’s trade dress definition in “isolation.” *See Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 543 (S.D.N.Y. 2003)* (must evaluate features “taken together, not in isolation.”)

The Defendants’ incomplete briefing evaluated the elements of the Plaintiff’s trade dress “in isolation,” not “taken together.” As the Defendants readily admit in their Motion for Reconsideration, this was error on their part – the Court had nothing to do with the Defendants failure to conduct the appropriate legal analysis. *Defendants’ Mtn. for Reconsideration, p. 9 (Defendants’ cited Maharishi favorably for the proposition that trade dress should be considered collectively, not in isolation).* Based on the Defendants’ erroneous trade dress analysis presented in the original motion, the Defendants’ Motion for Summary Judgment should have been denied, and there is absolutely nothing

presented in the Defendants' Motion for Reconsideration that would have, or should, change that result.

Moreover, all the alleged "new" evidence attached to the Defendants' Motion for Reconsideration could have been included in earlier briefing and arguments. The Defendants do not support the introduction of this new evidence or arguments with a reasonable explanation as to why these arguments were not presented earlier or why it failed to find, and cite, to its "new" Appendix evidence earlier. In fact, the alleged "new" evidence cited in the Defendants Motion for Reconsideration (e.g. Exhibits A and B) are website pages and marketing brochures that were publicly available and accessible during the briefing on the Defendants' Summary Judgment Motion. Defendants' alleged "new" evidence and legal arguments should have been presented earlier, and for that reason, the Defendants' Motion for Reconsideration should be denied.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. *Sheperd v. International Paper Co.*, 372 F.3d 326, 328 (5th Cir. 2004); *see also St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). Reconsideration motions are generally analyzed under the standards for a motion to alter or amend judgment under Rule 59(e) or a motion for relief from a judgment or order under Rule 60(b). *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 *n.* 10 (5th Cir.1998).

A Rule 59(e) motion "calls into question the correctness of a judgment." *Templeton v. Hydrochem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (*citing In re TransTexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). "A motion to alter or amend the judgment

under Rule 59(e) ‘must clearly establish either a manifest error of law or fact or must present newly discovered evidence’ and ‘cannot be used to raise arguments which could, and should, have been made before the judgment issued.’” *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990)).

A motion for reconsideration is appropriate in the following circumstances: (1) to address an intervening change in controlling law; (2) to consider new evidence not previously available; (3) to correct a clear or manifest error of law or fact; or (4) to prevent manifest injustice. *Fisherman’s Harvest, Inc. v. Post, Buckley, Schuh & Jernigan, Inc., et al.*, No. G-05-0151, 2008 WL 4277001, at *2 (S.D. Tex. Sept. 10, 2008). Reconsideration is only allowed on specific grounds and a party may not simply rehash arguments made during the original consideration of the motion nor assert new arguments that could have been made at the time of the original filings on the point. *Id.* In other words, these motions cannot be used to raise arguments which could, and should, have been made before the judgment issued, and moreover, they cannot be used to argue a case under a new legal theory. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)(quoting *Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)).

“Rule 59(e) permits a court to alter or amend a judgment, but it “‘may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.’” *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2617 n. 5 (2008) (quoting 11 Charles A.Wright, Arthur R.Miller, Mary Kay Kane, *Federal Practice & Procedure* §2810.1, at 127-128 (2d ed.1995) (footnotes omitted)). “A motion to reconsider based on an alleged discovery of new evidence should be granted

only if ‘(1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching.’” *Johnson v. Diversicare Afton Oaks, LLC*, 2010 WL537756, at *4 (5th Cir. Feb. 17, 2010) (quoting *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir.2003)).

The Fifth Circuit warns that altering, amending, or reconsidering a judgment under Rule 59(e) is an extraordinary remedy that courts should use sparingly. *Templet*, 367 F.3d at 479; *see also* 11 Wright, Miller, & Kane §2810.1, at 124. The Rule 59(e) standard “favors denial of motions to alter or amend a judgment.” *S. Constructors Group, Inc. v. Dynaletric Co.*, 2 F.3d 606, 611 (5th Cir. 1993).

III. ARGUMENT

“Motions for reconsideration have a narrow purpose and are only appropriate to allow a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Arrieta v. Yellow Transp., Inc.*, 2009 WL 129731, at *1 (N.D. Tex. Jan. 20, 2009) (Fitzwater, C.J.) “Such motions are not the proper vehicle for rehashing old arguments or advancing theories of the case that could have been presented earlier.” *Id.* Because the Defendants’ Motion for Reconsideration fails to satisfy the Rule 59 or Rule 60 standards for showing “surprise,” “manifest error,” or newly discovered evidence that could not have been presented earlier to the Court, the Defendant Blue Brownies’ Motion for Reconsideration should be denied.

A. Defendant Blue Brownies Cannot Legitimately Claim “Surprise” At the Court’s Denial of its Motion for Summary Judgment

In its initial summary judgment submission, the Defendant Blue Brownies claimed that the Plaintiff M3Girl Design’s trade dress was “functional,” and therefore unprotectible under trade dress law. The Defendants now claim “surprise” when this Court considered the “total” visual image of the Plaintiff’s trade dress in denying the Defendants’ Motion for Summary Judgment.

Contrary to the Defendants’ arguments, there is simply nothing surprising about this Court’s analysis or its denial of the Motion for Summary Judgment. The multiple visual aspects that make up the “total image” in the Plaintiff’s trade dress were identified repeatedly by the Plaintiff M3 Girl Design, and the Plaintiff M3 Girl Designs warned the Defendant Blue Brownies that its “single prong” analysis of individual trade dress elements was insufficient to address the “total image” of the Plaintiff’s trade dress claim. While the Defendant could have addressed, and should have addressed, the Plaintiff M3 Girl Design’s combination of trade dress elements in its functionality analysis, it failed to do so.

In support of its original “functionality” analysis, the Defendant Blue Brownies only addressed the trade dress elements in the Plaintiff’s trade dress definition in “isolation” as “individual” elements claiming that each individual trade dress element was, by itself, functional. The Plaintiff repeatedly pointed out in its Response in Opposition to the Motion for Summary Judgment and at oral argument at the Motion Hearing that the Defendants’ “single prong” trade dress analysis failed to address the “total image” of the trade dress.

Despite these warnings, the Defendants' original summary judgment briefing and arguments relied only upon an analysis of single elements of the Plaintiff's trade dress considered in "isolation." See *Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co.*, 292 F. Supp. 2d 535, 543 (S.D.N.Y. 2003) (must evaluate features "taken together, not in isolation.") The Defendants admit and acknowledge that such an "isolationist" approach is legally flawed, as shown on page 9 of their Motion for Reconsideration. On page 9 of their Motion for Reconsideration, the Defendants cite to the *Maharishi* case for the proposition that the Court must evaluate features of trade dress "taken together, not in isolation."

As the Defendants readily admit, their incomplete original briefing this was an erroneous approach to the functionality analysis. Based on the Defendants' erroneous trade dress analysis as initially provided in their Motion for Summary Judgment briefing, the Defendants' Motion for Summary Judgment should have been denied. There is absolutely nothing presented in the Defendants' Motion for Reconsideration that would, or should, change that result. This Court's December 6, 2011 Order did not err in denying the Defendants' Motion for Summary Judgment.

B. Defendant Blue Brownies Supports Its Motion for Reconsideration By Misconstruing the Court's December 6, 2011 Order

The Defendant Blue Brownies also attempt to misinterpret a portion of the Court's Order in order to support its Motion for Reconsideration. The Defendants' misinterpretation of findings in the Court Order takes various Court statements out of context. Namely, the Court's Order denied the Defendants' Summary Judgment Motion after construing "M3Girl's Second Amended Complaint as seeking trade dress protection for the overall design of its bottlecap jewelry..." According to Blue Brownies, defining

the Plaintiff's trade dress in this manner inherently relies on copyrightable subject matter being found in the interior of the bottlecap jewelry.

The Court made no such finding, and the Defendants' arguments are fatally flawed. As a cursory examination of the Court's Order reveals, the December 6, 2011 Order never incorporated copyrightable subject matter into the Plaintiff's definition of its trade dress. Even if the word "decorated" is used in the Court's December 6, 2011 Order, it does not require copyrighted images to be displayed in the interior of the bottlecap as argued by the Defendant Blue Brownies.

In support of their argument, the Defendants also mistakenly attribute a statement regarding "decorated interior surfaces" of the bottlecap jewelry as an explicit finding of the Court. As shown in the December 6, 2011 Order, this quoted statement was not a finding of the Court. Instead, the December 6, 2011 Order attributed this statement to that of M3Girl's counsel at the oral argument. *Dec. 6, 2011 Order, p. 5* ("it is clear from M3Girl's statements during oral argument of this Motion that the essence of M3Girl's complaint is that its trade dress consists of jewelry made from bottlecaps with decorated interior surfaces."). Accordingly, the Defendants' arguments in the Motion for Reconsideration rely upon misconstrued findings and mistaken attributions in order to support their arguments. For these reasons, the Defendants' Motion for Reconsideration should be denied.

C. Defendant Blue Brownies Presents Arguments and Evidence That Should Have Been Presented Earlier, Without Any Explanation As To Why These Arguments and Evidence Were Not Raised Earlier

Defendant Blue Brownies raise new evidence and arguments in its Motion for Reconsideration, but it does not support the introduction of these new arguments with a

reasonable explanation as to why it did not make these new arguments earlier or why it failed to find, and cite, to its new Appendix evidence earlier. The alleged new evidence cited in the Defendants Motion for Reconsideration (e.g. Exhibits A and B) are website pages and marketing brochures that were publicly available and accessible during the briefing on the Defendants' Summary Judgment Motion.

Namely, Exhibit A is a copy of archival websites allegedly dating back to the year 2001, and these documents were available and accessible to Defendant Blue Brownies since the filing of this lawsuit. Moreover, Exhibit B are website pages that allegedly show various "refrigerator magnets," which were webpages available and accessible to the Defendants during the briefing on their Motion for Summary Judgment.

Even if considered, Exhibits A and B fail to show anything relevant with respect to the Plaintiff's "jewelry" design trade dress. Exhibit B shows website pages having "refrigerator magnets" on it, and Exhibit A shows bottlecaps having "miniature saint's pictures embedded in plastic." *See Exhibit A, p. 2.* These exhibits do not show any information regarding jewelry design trade dress. Further, in a "re-hash" argument, the Defendants Blue Brownies appear to argue that there is a "novelty" requirement for trade dress claims, which is not the legally correct. This "novelty" argument (which is not a prerequisite for trade dress protection¹) did not succeed in the Defendants' initial summary judgment briefing, and it should not succeed now.²

¹ The Defendants also incorrectly argue that the Court misapplied the "competitive necessity" test in the present case. Contrary to the Defendants' arguments, the Court correctly addressed the "competitive necessity" test after finding that the Plaintiff's trade dress was "not functional under the traditional *Inwood Labs* test." The Defendants "red-herring" arguments are meant to confuse the Court, and these arguments should be disregarded in the context of this Motion for Reconsideration. If applicable at

Bottomline, there is no reason this alleged new evidence and legal arguments should be presented in a Motion for Reconsideration. *Arrieta v. Yellow Transp., Inc.*, 2009 WL 129731, at *1 (N.D. Tex. Jan. 20, 2009) (Fitzwater, C.J.) (“Such motions are not the proper vehicle for rehashing old arguments or advancing theories of the case that could have been presented earlier.”). The Defendants’ arguments fail because all the facts and arguments presented by Blue Brownies in their Motion for Reconsideration could have, and should have, been discovered and presented to this court in the original summary judgment motion.

Even considering this newly submitted evidence, however, the denial of the original motion would not be changed such new evidence is considered. For that reasons,

all, these arguments should have been presented earlier with respect to the original motion – not in a Motion for Reconsideration.

² The Defendants continue to rely on the existence of a patent application filed by Plaintiff as a basis for rejecting the Plaintiff’s asserted trade dress. The Defendants, however, refuse to address the explicit findings of the United States Patent & Trademark Office that actually proves non-functionality for several reasons. First, the Plaintiff’s patent application has not been issued as a U.S. Patent by the U.S. Patent & Trademark Office, so there is no functionality defined anywhere in an issued claim. And, second, the United States Patent & Trademark Office has taken the official position that the Plaintiff’s type of jewelry design, including the use of “e.g. bottlecaps”, “does not functionally relate [to] the system claim and does not impart a structural difference in the claimed invention.” *See Exhibit 6 to Plaintiff’s MSJ Response, Office Action, p. 5, Cl. 12, p. 9, Cl. 19, Jan. 11, 2011; Exhibit Y to Defendants’ Appendix in Support of Mtn. for Summary Judgment, Jan. 13, 2011 Office Action, M3G 03871, p. 5 (Cl. 12 rejection, ditto, Cls. 13), M3G 03875, p. 9 (Cl. 19, ditto Cl. 20)*. The United States Patent & Trademark Office has been very blunt about this particular point. The Plaintiff’s claimed trade dress elements, to the extent also shown in the Plaintiff’s patent application, has been classified by the U.S. Patent & Trademark Office as “non-functional descriptive material.” *Id. (emphasis added)*. The Defendants’ original Motion for Summary Judgment briefing concealed this official position taken by the U.S. Patent & Trademark Office that the Plaintiff’s trade dress was “non-functional descriptive material,” and the Defendants’ Motion for Reconsideration compounds this error by continuing to raise these arguments.

the court should decline to consider such a claim for the first time in a motion to alter or amend. Accordingly, because none of the evidence offered by Blue Brownies “would probably change the outcome” of the original motion, the Defendants’ Motion for Reconsideration should be denied.

D. Defendant Blue Brownies Curious Claim That This Court Granted Partial Summary Judgment to the Plaintiff by the December 6, 2011 Order

Lastly, Defendant Blue Brownies also presents an argument that the Court’s Order Denying the Blue Brownies Summary Judgment Motion (D.E. No. 120, Dec. 6, 2011 Order) somehow also granted, *sua sponte*, the Plaintiff a partial “summary judgment on the functionality issue and, as a result, [the Plaintiff will] be absolved of Plaintiff’s burden to prove non-functionality of its alleged trade dress.” *Mtn. Reconsideration*, p. 10-11 (D.E. No. 121). It is entirely unclear how the Defendant Blue Brownies can interpret a simple denial of its summary judgment motion as the grant of a partial summary judgment in favor of the Plaintiff on the functionality issue.

The Court did not resolve evidence in favor of the movant, Blue Brownies, but complied with the normal summary judgment standards of resolving all disputed factual issues in favor of the non-movant. That is what the law requires. But, even the resolution of such disputed factual issues in favor of the Plaintiff cannot transform the Court’s denial of the Defendants’ summary judgment motion into the grant of an un-requested summary judgment motion in favor of the Plaintiff. Frankly, the Defendants’ arguments on this point are not fully understood, but a Motion for Reconsideration is not the place for advancing such new ambiguous legal arguments. For that reason, the Defendants’ Motion for Reconsideration should be denied.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion for Reconsideration should be denied.

Respectfully submitted,

Date: January 6, 2012

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on Defendants' counsel by Electronic Mail (ECF-Pacer) this day January 6, 2012..

/s/ D. Scott Hemingway