UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-61515-CIV-COOKE/BANDSTRA

ASPEX EYEWEAR, INC. AND CONTOUR OPTIK, INC.

Plaintiffs,

v.

HARDY LIFE, LLC., MARCHON EYEWEAR, INC., NIKE, INC., REVOLUTION EYEWEAR, INC., AND GARY MARTIN ZELMAN, AN INDIVIDUAL,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS', MARCHON EYEWEAR, INC. AND NIKE, INC., MOTION FOR JUDICIAL NOTICE OF PRIOR FEDERAL COURT PROCEEDING AND SUPPORTING MEMORANDUM OF LAW

Plaintiffs, Aspex Eyewear, Inc. ("Aspex") and Contour Optik, Inc. ("Contour") (collectively, "Plaintiffs"), hereby oppose Defendants' Marchon Eyewear, Inc. ("Marchon") and Nike, Inc.'s ("Nike") (collectively, "Defendants"), Motion for Judicial Notice of Prior Federal Court Proceeding ("Motion"). In support thereof, Plaintiffs' state as follows:

1. As an initial matter, Plaintiffs dispute the Defendants' position that the previous litigation between the parties, *Aspex Eyewear, Inc. et al. v. Marchon Eyewear, Inc.,* Case No. 06-08000 (C.D. Cal.) ("California Case"), bars the instant action. These arguments, among others, will be addressed in Plaintiffs' Opposition to Defendants' Motions to Dismiss which is to be filed on or before December 24, 2009.

2. Defendants' Motion requests that the Court take judicial notice of the public record and that such consideration should not convert their Motion as one for summary judgment. (*See* DE #25 at ¶2.) Although that general principle is correct, the Defendants'

Motion appears to request that this Court take judicial notice of the entire record from the California Case. (*See* DE # 25 at ¶ 3.) This request is not proper as the entire record from the California Case has not been introduced into evidence by Defendants in this case.

3. "As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, ***unless the prior proceedings are introduced into evidence***." *Concordia v. Bendekovic*, 693 F. 2d 1073, 1076 (11th Cir. 1982) (emphasis added); *see also Schlafer v. Indian Spring Maint. Ass'n*, 139 Fed. Appx. 147, 149 (11th Cir. 2005) ("The defendants attached copies of [plaintiff's] previous lawsuits to their motions to dismiss."); *Thomas v. Evans*, 880 F. 2d 1235, 1241 (11th Cir. 1989) ("The absence of this information in the record makes it very difficult for this court to review the district court's finding of res judicata."). In short, although this Court may take judicial notice of the public record without converting a motion to dismiss into summary judgment, Defendants cannot simply request that every docket entry in that case be considered in this matter without inclusion of that record in their Motion.

WHEREFORE, Plaintiffs, Aspex Eyewear, Inc. and Contour Optik, Inc., respectfully request that the Court deny Defendants', Marchon Eyewear, Inc. and Nike, Inc., Motion for Judicial Notice of Prior Federal Court Proceeding, and for such other relief the Court deems necessary and proper.

DATED: December 17, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jacqueline Becerra
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