

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington
corporation,

Plaintiffs,

v.

KNITTING FEVER, INC., a New York
corporation, DESIGNER YARNS, LTD., a
corporation of England, FILATURA
PETTINATA V.V.G. DI STEFANO
VACCARI & C. (S.A.S.), an entity organized
under the laws of Italy; SION ELALOUF, a
natural person, DIANE ELALOUF, a natural
person, JAY OPPERMAN, a natural person,
DEBBIE BLISS, a natural person, DAVID
WATT, a natural person, and DOES 1-50,

Defendants.

Case No. C:10-00861 RSM

**MEMORANDUM OF LAW IN
OPPOSITION TO CASCADE’S
MOTION FOR WRIT OF
ATTACHMENT**

**NOTE ON MOTION CALENDAR:
November 19, 2010**

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff, Cascade Yarns. Inc. (“Cascade”), seeks the issuance of a pre-judgment writ of attachment against Defendant Knitting Fever, Inc. (“KFI”) as well as individual Defendants Sion Elalouf, Diane Elalouf, and Jay Opperman (the “Individual Defendants”).

1 Cascade's motion is flawed on several counts. As an initial matter, Cascade ignores the
2 fact that personal jurisdiction has yet to be established over the Individual Defendants. On
3 this basis alone, the motion should be denied as to them. Moreover, Cascade's assertion
4 that the Individual Defendants have been attempting to dispose of their assets is based on
5 incompetent evidence and, more importantly, is entirely fictive. Finally, Cascade has
6 failed to demonstrate the probable validity of its claims.

7 In its motion, Cascade recounts that it has commissioned various light microscopy
8 analyses of KFI's yarns. In doing so, Cascade repeatedly describes the results of those
9 tests as "confirming" that KFI's yarns do not contain the stated fiber content. Cascade,
10 however, has yet to offer anything to establish that these tests actually confirm anything.
11 Rather, Cascade simply assumes – and asks the Court to assume – that the results of these
12 tests are sufficiently accurate and reliable to be accepted. Cascade, however, is not entitled
13 to this assumption. Indeed, as suggested by the conflicting test results as to Cascade's own
14 yarns, light microscopy analysis of blended yarn samples yields inconsistent results.

15 Cascade also mischaracterizes both the Court's statements and those of KFI's
16 counsel from the September 29, 2010 hearing. Although the Court indicated only that
17 Cascade "*might* have success on the merits" (*See* Guite Declaration, Exhibit D at 36:2-3)
18 Cascade has reworded the Court's statement into "Cascade *is* likely to prevail on the
19 merits." Cascade Brief at 2:1-2 and 8:3-4. Further, the statements of KFI's counsel
20 regarding the variance of certain test results for KFI's own yarns do not constitute an
21 admission that KFI's yarns are mislabeled. Rather, and as explained in the balance of the
22 KFI's counsel's remarks:

23 And that is not surprising to us, given the fact of the limitations of these tests. The
fact that they are at variance doesn't establish necessarily that they are in variance,
but the test numbers kind of come out all over the place, or at least within too broad
of a range to rely on for purposes of a lawsuit.

Guite Declaration, Exhibit D at 24:2-7.

1 Even more troubling is Cascade's complete departure from truth in asserting that
 2 the Individual Defendants have been attempting to dispose of their assets. Cascade offers
 3 only the declaration of Robert A. Dunbabin, Jr., Esquire as support for these assertions, yet
 4 all of his statements regarding the alleged disposal of assets are *not* made upon his
 5 personal knowledge, but rather only "upon information and belief." Specifically, Mr.
 6 Dunbabin makes the following statements:

7 -Exhibit A is a true and correct copy of a sales listing for a 60-foot yacht
 8 that *upon my information and belief* is owned by Mr. Elalouf.

9 -Mr. Elalouf *appears* to have listed his yacht for sale on or about the time
 10 this suit was filed.

11 -Based *on information and belief*, Mr. Elalouf has a collection of exotic
 12 automobiles and Mr. Elalouf sold a Ferrari from his collection for a fraction
 13 of its value on or about the time of the filing of this suits. [sic]

14 Dunbabin Decl. at ¶¶ 9, 11 (emphasis added). More importantly, however, Mr.
 15 Dunbabin's statements are contradicted by the truth. While Mr. Elalouf does own a 60-
 16 foot yacht which is presently listed for sale, it has been listed for sale *since well before*
 17 *2005*. Declaration of Sion Elalouf at ¶ 2. Moreover, Mr. Elalouf has never owned a
 18 Ferrari, nor has he ever sold a Ferrari. Id. at ¶ 3.

19 III. LEGAL ARGUMENT

20 A. Legal Standards Applicable To Writs of Attachment

21 Under Washington law, pre-judgment attachment is governed by RCW 6.25 *et seq.*
 22 This statute expressly provides that a claimant is entitled to a pre-judgment writ of
 23 attachment in order to obtain security for satisfaction of any judgment the claimant may
 recover. In order to prevail on a motion for issuance of a prejudgment writ of attachment,

1 a claimant must establish two elements: (1) that there is probable cause to believe that the
2 alleged statutory ground for attachment exists; and (2) the probable validity of the claim
3 sued on. RCW 6.25.070(1).

4 Apart from the statutory requirements of RCW 6.25, the “minimum contacts”
5 doctrine under the U.S. Constitution applies to every exercise of judicial power. *Shaffer v.*
6 *Heitner*, 433 U.S. 186, 212, 97 S. Ct. 2569 (1977). As stated succinctly by the Supreme
7 Court, “use of judicial equity powers to coerce a party over whom the court has no
8 jurisdiction or likelihood of obtaining jurisdiction is unheard of.” *United States v. First*
9 *Nat'l City Bank*, 379 U.S. 378, 389 (1965). Consistent with that view, the Ninth Circuit
10 has held that the nationwide service of process provision in the Securities and Exchange
11 Act, 15 U.S.C. § 78aa, did not confer upon the district court the ability to reach property
12 and debts beyond its territorial limits through a writ of attachment. *Aschkar & Co. v.*
13 *Curtis*, 327 F.2d 306 (9th Cir. 1963). As stated by the Ninth Circuit:

14 [T]he granting of district court jurisdiction over property and debtors foreign to the
15 district is a serious and debatable matter upon which the courts should not lightly
16 proceed to judge what Congress would have done had it considered the question.
17 This is particularly so, we feel, with respect to attachment -- a remedy subject to
18 abuse and any extension of which is controversial. Even more particularly is this so
19 where, as here, the extension sought would permit the law of the forum state to be
20 imposed abroad with respect to matters upon which state laws are greatly divergent.

21 *Aschkar & Co.*, 327 F.2d at 310. It has long been recognized that “attachment is a harsh
22 remedy at best in that an alleged debtor loses control of his property before the claim
23 against him has been adjudicated. This being so, the provisions relating thereto should be
24 strictly construed.” *Barceloux v. Dow*, 174 Cal. App. 2d 170, 174 (Cal. App. 1st Dist.
25 1959); see also *Willshire v. Frees*, 184 Tenn. 523, 529 (1947) (attachment statutes are
26 strictly construed because the remedy is in derogation of the common law, harsh and

1 summary in its operation, and very liable to be abused as an instrument of injustice and
2 oppression).

3 In the present case, Cascade has failed to establish that any of the Individual
4 Defendants have sufficient minimum contacts with Washington to support the Court's
5 jurisdiction over them. As set forth more fully in their motion to dismiss, neither the
6 Elaloufs nor Mr. Opperman have the substantial, continuous, and systemic contacts with
7 Washington that are required to subject them to this Court's general jurisdiction, nor have
8 any of them either purposefully availed themselves of the privilege of conducting activities
9 in Washington or purposefully directed any activities toward Washington. In view of the
10 Court's lack of personal jurisdiction over the Individual Defendants, RCW 6.25 does not
11 confer upon the Court the ability to issue of a writ of attachment against them. On this
12 basis alone, Cascade's motion as against the Individual Defendants should be denied.

13 **B. Cascade Simply Assumes The Reliability Of Its Fiber Tests**

14 The Supreme Court has articulated the trial court's gate-keeping function under
15 Rule 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786
16 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999). If the trial
17 court determines that the expert is qualified in the relevant field, the court must exercise its
18 gate-keeper function to "ensure that any and all scientific testimony ... is not only relevant
19 but reliable." *Daubert*, 509 U.S. at 589-90. Moreover, the burden of proof on a *Daubert*
20 issue rests on the proponent of the testimony. "The proponent need not prove that the
21 expert's testimony is correct, but she must prove by a preponderance of the evidence that
22 the testimony is reliable." *Whisnant v. United States*, 2006 U.S. Dist. LEXIS 76321 at *7
23 (W.D. Wash. Oct. 5, 2006) (quoting *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th

1 Cir. 1998)). As noted by the Ninth Circuit, “something doesn’t become scientific
2 knowledge just because it’s uttered by a scientist; nor can an expert’s self-serving assertion
3 that his conclusions were derived by the scientific method be deemed conclusive. *Daubert*
4 *v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315-16 (9th Cir. 1995). Rather, the party
5 presenting the expert “must show that the expert’s findings are based on sound science,
6 and this will require some objective, independent validation of the expert’s methodology.”
7 *Id.* at 1316.

8 In the present case, Cascade has failed to present *anything* that would constitute
9 objective, independent validation of Dr. Langley’s methodology in analyzing fiber
10 samples. Rather, Cascade simply submits a series of test reports assuming – and asking the
11 Court to assume – that the methodology upon which the reports are based is sufficiently
12 reliable for use in this proceeding. In the absence of any demonstration by Cascade that
13 the test methodology employed by Dr. Langley meets the requirements of *Daubert*,
14 Cascade’s test reports cannot be accepted as evidence of anything. As a result, Cascade’s
15 test reports do not establish the probable validity of its claims.

16 C. Cascade Mischaracterizes The Court And KFI’s Counsel

17 At the hearing on September 29, 2010, the Court made the following statement:
18 “Frankly, in looking at the four factors the court looks at for preliminary injunction, I am
19 pretty convinced that they *might* have success on the merits here.” *See* Guite Declaration,
20 Exhibit D at 36:2-3 (emphasis added). From this, Cascade boldly asserts that the Court has
21 already recognized that “Cascade *is* likely to prevail on the merits.” Cascade Brief at 2:1-2
22 and 8:3-4 (emphasis added). While Defendants will not presume to tell the Court what it
23 may have meant, the phrase “might have success” has quite a different meaning from the

1 phrase “is likely to prevail.” Further, the statements of KFI’s counsel regarding the
2 variance of certain test results for KFI’s own yarns do not constitute an admission that
3 KFI’s yarns are mislabeled. Rather, and as explained in the balance of the KFI’s counsel’s
4 remarks, the variance in certain results appear to be a result of the limitations of these tests
5 and that, as a result, a *reported* variance does not necessarily mean an *actual* variance. See
6 Guite Declaration, Exhibit D at 24:2-7. Thus, when viewed accurately and in their proper
7 context, neither the statements of the Court nor those of KFI’s counsel establish the
8 probable validity of Cascade’s claims.

9 **D. Cascade Offers Incompetent Evidence In Support Of Its Motion**

10 A declaration not based on personal knowledge, but only on information and belief,
11 is entitled to no weight because the declarant does not have personal knowledge. *Bank*
12 *Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412-1413 (9th Cir. 1995); *see also United States v.*
13 *James*, 1995 U.S. App. LEXIS 20601 (9th Cir. July 20, 1995) (affidavit made on
14 information and belief was of no evidentiary value); *Columbia Pictures Industries, Inc. v.*
15 *Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991) aff’d, ___
16 U.S. ___, 113 S. Ct. 1920 (1993) (declarant stating “I believe” insufficient when
17 speculating as to motivations behind industry decisions insufficient to show antitrust
18 injury); *Taylor v. List*, 880 F.2d 1040, 1045 n. 3 (9th Cir. 1989).

19 In the present motion, Cascade expresses its “fear” that the Elaloufs and Mr.
20 Opperman “have used the six weeks that have elapsed since the hearing to attempt to
21 dispose of assets” Cascade Brief at 5:18-19. As a result, Cascade asserts that writs of
22 attachment should be issued “to prohibit Defendants from further disposing of,
23 encumbering and/or secreting their assets.” *Id.* at 5:26-6:2. In support of this assertion,

1 Cascade offers Mr. Dunbabin's declaration. Yet even a cursory review of this declaration
 2 reveals that Mr. Dunbabin's statements regarding Mr. Elalouf's property are based on
 3 nothing more than information and belief, *not* his own personal knowledge. More
 4 particularly, Mr. Dunbabin asserts that "Mr. Elalouf *appears* to have listed his yacht for
 5 sale on or about the time this suit was filed" and that "*on information and belief*, Mr.
 6 Elalouf has a collection of exotic automobiles and Mr. Elalouf sold a Ferrari from his
 7 collection for a fraction of its value on or about the time of the filing of this suits. [sic]
 8 Dunbabin Decl. at ¶¶ 9, 11. Compared against the requirement of personal knowledge, Mr.
 9 Dunbabin's declaration falls far short.

10 But more important than their lack of proper foundation, Mr. Dunbabin's assertions
 11 regarding Mr. Elalouf's property are simply false. While Mr. Elalouf owns a 60-foot boat
 12 which is presently listed for sale, he has had it listed for sale *since well before 2005*.
 13 Declaration of Sion Elalouf at ¶ 2. Moreover, Mr. Elalouf has never owned a Ferrari, nor
 14 has he ever sold a Ferrari. Id. at ¶ 3.¹ Lacking any evidence that any of the Defendants are
 15 disposing of, encumbering and/or secreting their assets, Cascade's fears are entirely
 16 unfounded.

17 **E. Cascade's Claim Would Be Offset**

18 In assessing the probable validity of a claim, due process and RCW 7.12.020
 19 require a plaintiff to prove the probable validity of the claim "over and above all just
 20 credits and offsets." *Rogoski v. Hammond*, 9 Wn. App. 500, 507 (Wash. Ct. App. 1973)

21 ¹ In view of the glaring absence of any factual support for Mr. Dunbabin's sworn
 22 statements to this Court, it is unclear how Mr. Dunbabin, an attorney admitted to practice
 23 before this Court, has discharged his obligations under Washington RPC 8.4.

1 (citing RCW 7.12.020). The apparent purpose of this phrase is to “deny the remedy of
2 attachment if, upon a balancing of claims, there remains no net claim ... available for
3 attachment.” *Id.* In view of that purpose, “counterclaims and setoffs are embraced within
4 the phrase ‘just credits and offsets’ to the extent of determining whether plaintiff has any
5 net claim left.” *Id.* at 507-08.

6 In the present case, while KFI has yet to assert any counterclaims against Cascade,
7 it has nonetheless presented the very same type of evidence against Cascade that Cascade
8 has used as the basis for its claims against KFI, namely, fiber analysis test reports. If
9 Cascade’s test reports are to be accepted, so should KFI’s. As a consequence, there would
10 be a resulting setoff to the amount of any judgment secured by Cascade. Accordingly,
11 Cascade has failed to prove the probable validity of its claim “over and above all just
12 credits and offsets.”

13 **F. If A Writ Is Issued, Cascade Must First Post A \$20 Million Bond**

14 Prior to issuance of a prejudgment writ of attachment, a claimant must post a bond.
15 *L.C. v. Gilbert*, 2010 U.S. Dist. LEXIS 80825 (W.D. Wash. June 30, 2010) (citing RCW
16 6.25.080). According to the statute, the amount of the bond is set at double the amount for
17 which a plaintiff demands judgment as shown by the complaint and the affidavit in support
18 of the application for the writ of attachment. *See* RCW 6.25.80; *see also Greive v. Warren*,
19 54 Wn.2d 365, 368 (Wash. 1959).

20 In the event a writ of attachment were issued, RCW 6.25.80 requires Cascade to
21 first post an attachment bond for double the amount for which it seeks judgment. In the
22 present case, Cascade has requested that writs of attachment “securing at least \$10 million
23 of assets should be entered.” Cascade Brief at 12:2-3. By application of RCW 6.25.80, the

1 issuance of any such writs should be predicated upon Cascade's posting of an attachment
2 bond in the amount of at least \$20 million.

3 **III. CONCLUSION**

4 Cascade has failed to establish that the issuance of a writ of attachment is
5 warranted. KFI respectfully requests that the Court deny Cascade's Motion for Writ of
6 Attachment.

7 DATED this 15th day of November, 2010.

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