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HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington Corporation,

Plaintiff,

vs.

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.), and entity organized or existing under the laws of Italy, SION ELALOUF, an individual, DIANE ELALOUF, an individual, JAY OPPERMAN, an individual, DEBBIE BLISS, an individual, DAVID WATT, an individual and DOES 1-50,

Defendant.

Case No. 2:10-cv-00861 RSM

CASCADE YARNS, INC.’S MOTION FOR PROTECTIVE ORDER AND ENTRY OF STIPULATION AND ORDER RE CONTINUING GUARANTY

Note On Motion Calendar: December 17, 2010

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to this Court’s request of November 30, 2010, Cascade Yarns, Inc. (“Cascade”) moves for a protective order entering the Stipulation and Order agreed to by counsel at the September 29, 2010 hearing. Defendant Knitting Fever, Inc. (“KFI”) represents that it has now submitted its Continuing Guaranty under the Wool Products Labeling Act, 15 U.S.C. § 68g (“WPLA”) to the Federal Trade Commission (“FTC”), following the intervention of this Court.

1 Cascade has filed its Continuing Guaranty with the FTC. In addition to the submission of the
2 Continuing Guarantees, the parties agreed that a Stipulation and Order would be filed with this
3 Court reflecting the filing of the Continuing Guarantees and certain other provisions. To date,
4 that Stipulation and Order has not been filed.

5 Although Cascade acceded to the majority of the revisions to the Stipulation and Order
6 requested by KFI's counsel, it cannot agree to the demand that Cascade not use the signed
7 continuing guaranty to seek redress for Defendants' unlawful and criminal acts. Other than this
8 provision, counsel have agreed to the remaining terms of the Stipulation and Order.

9 **II. FACTUAL AND PROCEDURAL BACKGROUND**

10 Following the September 29 hearing, KFI's counsel circulated a proposed Stipulation and
11 Order as directed by this Court. As this Court is aware from the several follow-up telephonic
12 conferences, the continuing guaranty was not forthcoming. Following the most recent call with
13 the Court, KFI's counsel represented that the Stipulation and Order had been submitted to the
14 FTC; however, the Stipulation and Order has not been submitted to this Court. KFI's counsel
15 submitted his further proposed revisions to the Stipulation and Order on November 4 and Cascade
16 agreed to all but one of the additional revisions inserted for the first time with that proposal. *See*
17 Declaration of Robert J. Guite ("Guite Decl."), Ex. A. After review of that proposal, Cascade
18 determined that the additional language proposed by KFI¹ may preclude it from cooperating with
19 investigations of KFI by state and/or federal authorities and that the only purpose of this addition
20 is an attempt to evade liability under the WPLA.

21 Cascade believes that such a provision would not be enforceable and, further, that it may
22 not be properly entered by this Court as an Order. KFI's counsel insists that Cascade stipulate to
23 an Order prohibiting it from using KFI's continuing guaranty to seek redress from a governmental

24 ¹ The language proposed by Mr. Slavitt and at-issue is as follows: "Neither Cascade nor KFI,
25 either directly or through a proxy, shall use the continuing guaranty provided by the other party
26 for any purpose other than in connection with the execution of this Stipulation, except upon
further order of the Court." Guite Decl., Ex. B.

1 agency for either civil or criminal prosecution for filing a false guaranty. The prohibition
2 requested by KFI could prevent Cascade from using evidence related to providing a false
3 guaranty in this case, either as a RICO predicate act or otherwise. Cascade respectfully submits
4 that neither goal that KFI seeks to advance by requiring the language at-issue is proper and that
5 the language has no place in an Order of this Court.

6 At the September 29 hearing, Cascade agreed that it would not seek to publicize that the
7 parties filed continuing guarantees with the FTC. To that end, Cascade agreed to the following
8 provision proposed by KFI: “Neither Cascade nor KFI, either directly or through a proxy, will
9 publicly comment on the continuing guaranty provided by the other party except that either party
10 may respond to individual inquiries and state that both of the companies filed continuing
11 guarantees with the FTC.”² Mr. Slavitt’s additional language proposed on November 4 goes
12 impermissibly further than this agreement or the instructions of the Court during the subsequent
13 conference calls. Specifically, Mr. Slavitt proposed the following new provision: “Neither
14 Cascade nor KFI, either directly or through a proxy, shall use the continuing guaranty provided
15 by the other party for any purpose other than in connection with the execution of this Stipulation,
16 except upon further order of the Court.” Guite Decl., Ex. B.

17 In response to Mr. Slavitt’s proposal, Cascade suggested the following revision: “Neither
18 Cascade nor KFI, either directly or through a proxy, shall use the continuing guaranty provided
19 by the other party for any purpose other than in connection this litigation or in connection with
20 any investigation by or report to any governmental agency or trade group, except upon further
21 order of the Court.” Mr. Slavitt replied on November 22 (a week after Cascade provided its
22 proposed revision) and advised: “Your proposed change to paragraph 4C has no basis in our

23 _____
24 ² Cascade has learned that yarns shipped by KFI even after it executed its continuing guaranty are
25 not properly labeled. *See* Cascade’s Second Motion for Limited Expedited Discovery filed
26 concurrently with the instant motion. As such, Cascade respectfully requests that this provision
be excised from the Stipulation and Order given that KFI’s ongoing sales of improperly labeled
yarns evidences that KFI submitted a false guaranty in violation of 15 U.S.C. § 68g(b). The
Stipulation and Order should not be used to shield disclosure of this information.

1 agreement or in Judge Martinez's remarks. In fact, it is entirely contrary to both. As a result, we
2 cannot accept this change. Please let us know if you are prepared to execute the last version of
3 the stipulation we provided." Given the delay in Mr. Slavitt's response and his request that
4 Cascade execute the "last version" of the stipulation" he provided, Cascade sought this Court's
5 further intervention. Guite Decl., Ex. C. In response, this Court requested that Cascade bring the
6 instant motion pursuant to LR 7(d)(2). *Id.*, Ex. D.

7 Since that time, Cascade has discovered that Defendant KFI continues to ship mislabeled
8 products, such as a yarn labeled as containing 10% cashmere but actually containing a little over
9 1%. *See* Cascade's Second Motion for Limited Expedited Discovery filed herewith. Defendants
10 have built their criminal enterprise upon the foundation of mislabeled products, and it is
11 understandable that defense counsels would seek to limit exposure to criminal liability.

12 **III. DISCUSSION**

13 Fed. R. Civ. P. 26(c) governs the issuance of protective orders. It provides, in relevant
14 part: "Upon motion by a party . . . the court in which the action is pending may make any order
15 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or
16 undue burden or expense, including . . . that a trade secret or other confidential research,
17 development, or commercial information not be revealed or be revealed only in a designated
18 way..." Fed. R. Civ. P. 26(c); *Braack v. Home Depot U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 52967
19 *5-7 (W.D. Wash., July 23, 2007). Any order that limits public access to court records or that
20 purports to preclude a party from sharing or disclosing information should be as narrowly drawn
21 as possible such that public access to the courts is maintained. *See Dreiling v. Jain*, 93 P.3d 861,
22 871 n.7 (Wash. 2004) (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)); *see*
23 *also San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir.
24 1999). Only legitimately-confidential information may be kept secret from the public. *Citizens*
25 *First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943 at 946 (7th Cir. 1999).

1 KFI cannot dispute that its Continuing Guaranty was filed with the FTC (at least it
2 represents that it has been so filed) and is unquestionably a public document. Indeed, the purpose
3 of the Continuing Guaranty is to provide a defense to third parties who may rely on it. It is not a
4 confidential or proprietary document and was made on a form promulgated by the FTC.
5 Nonetheless, Cascade agreed that it would not comment on the fact of the filing of the Continuing
6 Guaranty but it should not be prohibited from using the Continuing Guaranty in connection with
7 this litigation or in any report to a state or federal regulatory or law enforcement agency.

8 Simply put, KFI's proposed paragraph 4C is inconsistent with Washington law, federal
9 law and this Court's strong interest in affording transparent and open justice. *See, e.g., Walcker*
10 *v. SN Commer., LLC*, 2006 U.S. Dist. LEXIS 63781, *3 (E.D. Wash. 2006) (citing *San Jose*
11 *Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999)). Cascade
12 should not be precluded from disclosing the fact that KFI executed a Continuing Guaranty to any
13 governmental agency. That document is a public document and could never qualify as
14 confidential such that it could be protected from disclosure. In addition, KFI's proposed
15 paragraph 4C may preclude Cascade from using the fact of the execution of the Continuing
16 Guaranty in pursuing its claims for unfair competition or its RICO claims "except upon further
17 order of the Court." Such a provision hampers Cascade's ability to pursue its claims both in
18 discovery and at the time of trial unless it first seeks leave from this Court for permission to use
19 the Continuing Guaranty. This is burdensome, unworkable and unnecessary. Cascade already
20 agreed that it would not publicly comment on the fact of the filing of the Continuing Guaranty; it
21 should not be hamstrung from preparing its case. Further, it should not be muzzled from
22 disclosing the fact that KFI submitted a Continuing Guaranty to state and/or federal law
23 enforcement agencies. Indeed, to so require would be improper. *Humboldt Baykeeper v. Union*
24 *Pac. R.R. Co.* 244 F.R.D. 560, 566-67 (N.D. Cal. 2007) (citing *Seattle Times v. Rhinehart*, 467
25 U.S. 20, 37 (1984) (denying protective order forbidding plaintiffs from disclosing results of
26 testing of contaminated site in light of plaintiffs' First Amendment rights and potential that

1 dissemination would improve government agencies' ability to ensure compliance with
2 environmental laws)).

3 As the court recognized in *Humboldt Baykeeper*, this Court should play no part in
4 shielding KFI's filing of a Continuing Guaranty from government agencies. 244 F.R.D. at 566-
5 67. In light of these considerations, Cascade proposes that the following paragraph 4C be
6 included in the Stipulation and Order:

7 Neither Cascade nor KFI, either directly or through a proxy, shall use the
8 continuing guaranty provided by the other party for any purpose other than in
9 connection this litigation or in connection with any investigation by or report to
any governmental agency, except upon further order of the Court.³

10 Cascade submits that this proposed language is consistent with the instructions of this
11 Court and is sufficient to satisfy any legitimate concerns raised by KFI without improperly
12 burdening Cascade from pursuing its claims in this action or impairing its ability to make
13 disclosures or to cooperate with governmental investigations. Cascade's proposed form of
14 Stipulation and Order is submitted herewith as Exhibit E to the Guite Decl. Cascade's proposed
15 form of Stipulation and Order also includes a requirement that the parties exchange conformed
16 copies of the Continuing Guaranty that are returned to them by the FTC. Cascade submits its
17 conformed copy as Exhibit F to the Guite Decl.

18 **IV. CONCLUSION**

19 Cascade requests that the Court enter its proposed Stipulation and Order so that it will not
20 be hindered in the prosecution of this case or precluded from participating in any investigations
21 by government agencies.

22 Dated: December 9, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

23 By: /s/ Robert J. Guite
Robert J. Guite, WSBA No. 25753

24 Attorneys for Plaintiff
Cascade Yarns, Inc.

25 ³ Cascade's November 22 proposal also permitted disclosure to trade groups. To avoid any
26 ambiguity or potential for dispute, Cascade has deleted reference to trade groups.