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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’S SECOND MOTION AND MEMORANDUM FOR LIMITED EXPEDITED DISCOVERY

Note On Motion Calendar: December 24, 2010

I. INTRODUCTION AND RELIEF REQUESTED

Cascade Yarns, Inc. (“Cascade”) brings this motion to acquire discovery on evidence that is both exigent in nature and highly susceptible to spoliation. Defendants have undertaken two inculpatory acts since Mr. Elalouf signed a Continuing Guaranty pursuant to 15 U.S.C. § 68(g) of the Wool Products Labeling Act (“WPLA”): (1) they have continued to ship mislabeled cashmere-blend products with surplus wool; and (2) they have refused to sell to their customers

1 mislabeled cashmere-blend products with surplus acrylic. Cascade seeks discovery to draw
2 samples from Defendants' warehouses (and offers to pay Knitting Fever, Inc.'s ("KFI") list
3 wholesale prices for merchandise drawn) so that it may collect evidence that is likely to disappear
4 before formal discovery begins.

5 **II. FACTUAL BACKGROUND**

6 Prior to Cascade's discovery of Defendants' mislabeling scheme, Defendants'
7 cashmerino-type¹ yarns contained no cashmere and a substantial surplus of acrylic fibers. *See*
8 Dkt. No. 4 at ¶ 56. Notably, all of the cashmerino yarns that another plaintiff (also pursuing claims
9 against KFI based on its mislabeled products) tested in its inventory were consistent with this
10 fraud: those yarns had no cashmere and a surplus of acrylic. Dkt. Nos. 4-2, 4-3, 4-4. Deposition
11 testimony of Defendants' largest customer in the United States, Webs of Northampton MA,
12 confirmed that Debbie Bliss Cashmerino yarn contained no cashmere prior to the introduction of
13 dye-lots labeled with a "b" or a "c." Declaration of Robert J. Guite ("Guite Decl."), Ex. A. Tests
14 of the "b" and "c" versions shows a surprising accuracy with respect to the acrylic content, some
15 cashmere but a surplus of merino wool, which varies widely.² *See, e.g.*, Dkt. Nos. 4-5 (test
16 reports showing varying fiber content of dye lots identified with no letter and those identified
17 with letters "b" and "c").

18 Cascade recently discovered that since Mr. Elalouf executed a Continuing Guaranty under
19 the WPLA (on or before November 9), Defendants have continued to ship mislabeled
20 cashmerino-type yarns. Guite Decl., Ex. C; Declaration of Linda L. Lucente ("Lucente Decl.");
21 Guite Decl., Exs. B, C (product label purporting 10% cashmere content and analysis confirmed
22 1.1% cashmere fiber content and 2.7% cashmere fiber content, respectively). On November 10,

23 ¹ Cashmerino-type refers to blends of wool, typically merino with or without cashmere, and
24 acrylic. The nature of these blends foils the easily undertaken burn test to discover off-label
amounts of acrylic in the yarn.

25 ² Cascade believes that these dye lots were engineered to mirror the argument of defense counsel:
26 cashmere and merino are difficult to discern, and the variability of results between dye lots
evidences the unreliability of fiber testing.

1 2010, JenningsStreet Yarns, a yarn shop located in Fort Worth, Texas, ordered a bag of Louisa
2 Harding Kashmir Aran, and forwarded the package onto Kenneth Langley for fiber testing.
3 Lucente Decl., ¶ 2. Fiber testing of that sample revealed that it contained about 1/10 the stated
4 amount of cashmere but had the exact amount of acrylic. Guite Decl., Ex. B.

5 While defendants appear to be willing to ship yarns with the correct percentage of animal
6 hair, but a shortage of cashmere, they are unwilling to ship the difficult to explain acrylic-heavy
7 variety that they used exclusively prior to the summer of 2006. When Ms. Lucente attempted to
8 order Louisa Harding Kashmir DK, she was told that this yarn was “discontinued” and would not
9 be shipped. Lucente Decl., ¶ 3. She was told that this was because “they were simply trying to
10 empty the warehouse.” *Id.*, ¶ 4. The story that she was given was strange, self-contradictory, and
11 inconsistent with the listing of “new” colors identified as available for sale on KFI’s interactive
12 website. *Id.*; Guite Decl., Ex. E. Cascade believes that these products were only available in the
13 acrylic-heavy versions and that defendants precipitously stopped shipping them after Mr. Elalouf
14 executed the Continuing Guaranty. Prior to signing the Continuing Guaranty, defendants
15 apparently had no concerns about selling the acrylic-heavy no cashmere versions of its
16 cashmerino-type products and, in fact, discouraged customers from returning the mislabeled
17 goods.³

18 Allowing Cascade to inspect Defendants’ two New York warehouses, and any other
19 location where they store yarns, will allow it to discover evidence that is likely to disappear.
20 Again, Defendants’ agent Suzie stated that “they were simply trying to empty the warehouse.”
21 Lucente Decl., ¶ 4. Presumably, KFI continues to sell and ship yarns such that yarns presently in
22 stock may not be available for testing by the time Cascade would otherwise be able to proceed
23 with discovery . As Cascade offers to pay the rate that KFI is currently charging its customers for

24 ³ Defendants had apparently shipped a consignment order of the cashmere-less yarn that it
25 received as a return from customer A.C. Moore of its house-label product for sale at a retail
26 tradeshow in the Chicago area last summer.³ Declaration of Robert A. Dunbabin (“Dunbabin
Decl.”), Ex. A and Guite Decl., Ex. G.

1 any samples it obtains, there should be minimal to no burden imposed on KFI to obtain these
2 samples. Given that this matter has been pending for nearly seven months, this discovery request
3 is not premature and is necessary at this time.

4 **III. DISCUSSION**

5 **A. As This Court Has Done Before, Discovery May Be Accelerated Pursuant to 6 Fed. R. Civ. P. 26(d)(1)**

7 The Court has previously exercised its discretion to excuse the parties from the meet and
8 confer requirements of Federal Rules of Civil Procedure 26(d) and 26(f) and ordered expedited
9 discovery. *See* Dkt. No. 108. Fed. R. Civ. P. 26(d)(1) permits such discovery. The rule provides
10 that “[a] party may not seek discovery from any source before the parties have conferred as
11 required by Rule 26(f), except . . . by court order.” As the court recognized in *Yokohama Tire
12 Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613 (D. Ariz. 2001), federal district courts
13 have “the discretion to order the expedited production of documents if the appropriate
14 circumstances exist.” “Rule 26(d) therefore permits the district court to order expedited
15 discovery.” *Arista Records, LLC v. Doe*, 2007 U.S. Dist. LEXIS 97283, *5 (S.D. Ohio Nov. 5,
16 2007).

17 The Court may order accelerated discovery procedures, including permitting discovery to
18 begin prior to the Rule 26(f) conference, upon a finding of good cause. *Yokohama Tire Corp*, 202
19 F.R.D. at 614 (“the Court adopts a good cause standard to warrant the granting of any expedited
20 discovery prior to the Rule 26(f) scheduling conference.”); *see also Best Western Int’l, Inc. v.
21 John Doe*, 2006 U.S. Dist. LEXIS 56014, *3 (D. Ariz. 2006) (“An order permitting discovery
22 before a Rule 26(f) conference may be issued for good cause.”); *Allcare Dental Mgmt., LLC v.
23 Zrinyi*, 2008 U.S. Dist. LEXIS 84015, *1 (D. Idaho Oct. 20, 2008); *Invitrogen Corp. v. President
24 and Fellows of Harvard*, 2007 U.S. Dist. LEXIS 74282, *2 (S.D. Cal., 2007); *Semitool, Inc. v.
25 Tokyo Electron Am.*, 208 F.R.D. 273 (N.D. Cal. 2002)). “Good cause may be found where the
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1 need for expedited discovery, in consideration of the administration of justice, outweighs the
2 prejudice to the responding party.” *Invitrogen Corp.*, 2007 U.S. Dist. LEXIS 74282 at *2.

3 In deciding whether to order expedited discovery under the “flexible ‘good cause’ test”
4 courts “examine the discovery request . . . on the entirety of the record to date and the
5 reasonableness of the request in light of all the surrounding circumstances.” *Adnan Abou Ayyash*
6 *v. Bank al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (quoting *Merrill Lynch, Pierce, Fenner*
7 *& Smith, Inc. v. O’Connor*, 194 F.R.D. 618, 623-24 (N.D. Ill. 2000)). Here, Cascade has
8 describe the immediate need to sample yarns in KFI’s current inventory before that stock is
9 depleted and bases that request on the well-founded belief that KFI continues to ship mislabeled
10 yarns even after submitting the Continuing Guaranty.

11 **B. Cascade Should Be Permitted To Enter KFI’s Premises To Obtain Samples**
12 **Of The Subject Yarns For Fiber Analysis**

13 A request for entry and inspection is allowed under Fed. R. Civ. P. 34(a)(2) if it is within
14 the scope of Rule 26(b). Fed. R. Civ. P. 34(a)(2); *Cuno Inc. v. Pall Corp.*, 116 F.R.D. 279, 281
15 (E.D.N.Y. 1987) (“Inspection is permitted, and indeed anticipated, by Rule 34(a), to be governed
16 by the scope of Rule 26(b).”) Rule 26(b) provides that “parties may obtain discovery regarding
17 any nonprivileged matter that is relevant to any party’s claim or defense” and that, to be
18 discoverable, “the information sought need not be admissible at the trial if the information sought
19 appears reasonably calculated to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

20 An inspection under Rule 34(a)(2) may include the sampling and testing of a product.
21 *See, e.g., Martin v. Reynolds Metal Corp.*, 297 F.2d 49, 57 (9th Cir. 1961) (permitting
22 examination, confinement, photographing and taking of urine samples from cattle located on the
23 appellants’ property); *Minnesota Mining & Mfg. v. Nippon Carbide Indus. Co., Inc.*, 171 F.R.D.
24 246, 248-49 (D. Minn. 1997) (granting request to inspect, observe, videotape, and photograph
25 production facilities and giving permission to take samples of certain of the materials employed
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1 in the production process). Cascade will agree to pay KFI's list wholesale price for each of the
2 subject yarns it selects and removes from KFI's stock.

3 Pursuant to Rule 34(a)(2), Cascade requests that this Court order that KFI make its
4 facilities available to Cascade's representatives to select and obtain samples of the subject yarns
5 for fiber analysis. As set forth herein, the fiber content of the subject yarns is central to Cascade's
6 claims and will be used by Cascade at trial in this matter. Given that sales of the subject yarns are
7 ongoing, Cascade believes that existing stock may be shipped before it is able to obtain samples
8 in the ordinary course of discovery such that expedited discovery is appropriate and necessary.

9 **IV. CONCLUSION**

10 Cascade respectfully requests that this Court exercise its discretion to enter an Order
11 permitting limited expedited and sampling of the subject yarns as described herein. Cascade
12 believes that Defendants have at least two warehouse facilities and requests that the order permit
13 entry and sampling of yarns at any facilities that the Defendants may have for the storage of yarn.

14 SQUIRE, SANDERS & DEMPSEY L.L.P.
15 Dated: December 9, 2010

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

18 Attorneys for Plaintiff
19 Cascade Yarns, Inc.

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