

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 PROTECTIVE
ORDER AND ENTRY OF
STIPULATION AND ORDER RE
CONTINUING GUARANTY**

**NOTE ON MOTION CALENDAR:
December 17, 2010**

I. INTRODUCTION

Plaintiff, Cascade Yarns. Inc. (“Cascade”), presents the Court with an incomplete
and, in places, incorrect chronology of events concerning its negotiation of the terms of the
Stipulation and Order with Defendant Knitting Fever, Inc. (“KFI”). The effect of this

1 presentation is a gross distortion of the facts. Despite its bold declaration that “it cannot
2 agree to the demand that Cascade not use the signed continuing guaranty to seek redress
3 for Defendants’ unlawful and criminal acts” (Cascade Br. at 2:6-7), Cascade and KFI have
4 already agreed to mutual restrictions on the use of the other party’s continuing guaranty –
5 use restrictions of the type litigants routinely agree to in the course of litigation. Moreover,
6 Cascade’s entire rationale for “seeking redress” is premised upon the assumed reliability of
7 the testing methodologies used in Cascade’s fiber analysis reports. As already presented to
8 the Court, the disparate results of tests performed by both Cascade and KFI – each
9 performed on the same or similar dye lots of Cascade’s yarns by independent laboratories
10 known to the Cashmere and Camel Hair Manufacturer’s Institute to have facilities and
11 personnel capable of identifying and distinguishing fine animal hair fibers – suggest that
12 these testing methodologies may well yield inconsistent, and therefore unreliable, results.

12 II. FACTUAL BACKGROUND

13 On October 6, 2010, counsel for KFI provided a draft of the Joint Stipulation and
14 Order to File Continuing Guaranties (the “Stipulation”) to Cascade’s counsel. Declaration
15 of Joshua R. Slavitt (“Slavitt Decl.”) at ¶ 2; Exhibit A to Slavitt Decl. According to this
16 draft, the parties would file executed continuing guaranties within seven (7) days of
17 execution of the Stipulation. The following day, on October 7, 2010, counsel for Cascade
18 provided its revised version of the draft Stipulation to KFI’s counsel. Slavitt Decl. at ¶ 3;
19 Exhibit B to Slavitt Decl. According to Cascade’s revised version, the continuing
20 guaranties were recited as already having been executed and attached as exhibits. *Id.* On
21 October 12, 2010, counsel for the parties again corresponded regarding the Stipulation, and
22 on October 14, 2010, KFI’s counsel provided another revised draft of the Stipulation in
23 which it restated its position regarding the exclusion of the executed guaranties as exhibits
to the Stipulation. Slavitt Decl. at ¶ 4; Exhibit C to Slavitt Decl.

1 At the October 26, 2010 telephone conference with the Court, counsel for KFI had
2 expressed its concern for the potential for mischief, and the parties agreed that, in lieu of
3 attaching executed continuing guaranties as exhibits to the Stipulation and Order, counsel
4 would exchange executed guaranties and neither party would use the guaranty of the other
5 for any other purpose except upon further order of the Court. Declaration of Joshua R.
6 Slavitt (“Slavitt Decl.”) at ¶ 5.

7 On November 2, 2010, KFI’s counsel provided another draft of the Stipulation to
8 Cascade’s counsel reflecting the agreement reached in the telephone conference with the
9 Court. Slavitt Decl. at ¶ 6; Exhibit D to Slavitt Decl. According to this draft, the parties
10 would file executed continuing guaranties with the FTC and exchange the as filed
11 continuing guaranties between counsel within seven days of execution of the Stipulation.
12 Pursuant to the agreement of counsel, this draft further recited that “[n]either Cascade nor
13 KFI, either directly or through a proxy, shall use the continuing guaranty provided by the
14 other party for any purpose other than in connection with the execution of this Stipulation,
15 except upon further order of the Court.” Exhibit D to Slavitt Decl. at § 4C.

16 Cascade’s counsel promptly responded – later that day – with detailed comments
17 on this draft of the Stipulation in which it identified a series of issues. Slavitt Decl. at ¶ 7;
18 Exhibit E to Slavitt Decl. Most prominently, Cascade’s counsel was now insisting on the
19 exchange of executed guaranties prior to the execution of the Stipulation. *Id.* Notably
20 absent from the issues identified by Cascade’s counsel was anything relating to the agreed
21 upon mutual use restrictions on the continuing guaranties of the other party that
22 conditioned the exchange of executed guaranties between counsel. *Id.* Counsel for KFI
23 responded and, despite disagreement concerning the timing of the filing and exchange of
executed guaranties, agreed to revise the Stipulation to recite that the continuing guaranties
were to be filed and exchanged *prior to* the execution of the Stipulation. Slavitt Decl. at ¶
8; Exhibit F to Slavitt Decl. Rather than indicate whether this proposed revision was

1 acceptable, counsel for Cascade simply insisted that until it was provided a copy of KFI's
2 executed guaranty, "there is nothing for us to review." Slavitt Decl. at ¶ 9; Exhibit G to
3 Slavitt Decl.

4 On November 4, 2010, KFI's counsel provided yet another draft of the Stipulation
5 to Cascade's counsel which recited that the continuing guaranties were to be filed and
6 exchanged *prior to* the execution of the Stipulation. Slavitt Decl. at ¶ 10; Exhibit H to
7 Slavitt Decl. Notably, Cascade's counsel raised no objection at that time concerning the
8 mutual use restrictions on the guaranties of the other party as a condition of the exchange
9 of executed guaranties between counsel. *Id.*

10 III. LEGAL ARGUMENT

11 A. Legal Standards Applicable To Protective Orders

12 Fed. R. Civ. P. 26(c)(1) provides that a court "may, for good cause, issue an order
13 to protect a party or person from annoyance, embarrassment, oppression, or undue burden
14 or expense." *Seiter v. Yokohama Tire Corp.*, 2009 U.S. Dist. LEXIS 76844 (W.D. Wash.
15 Aug. 10, 2009); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)
16 (rule 26(c) authorizes district courts to issue "any order which justice requires to protect a
17 party or person from annoyance, embarrassment, oppression, or undue burden."). The
18 proponent of the order must demonstrate that the order would reduce a real risk of
19 significant harm to an interest that is entitled to protection under the law and that is
20 independent of the proponent's (or the Court's) desire simply to keep the discovered
21 information out of public view or inaccessible to the authorities. *See, e.g., Foltz v. State*
22 *Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003).

23 A protective order must protect against something negative. The kinds of
"negatives" that the cases have recognized as offering potentially appropriate justifications
for protective orders can be divided into three categories: (1) abuses or misuses that are

1 internal to the litigation process or that threaten the fair adjudication of the case, (2)
2 improperly motivated harm to interests that are external to the litigation, or (3) unintended
3 but harmful collateral consequences to legitimate interests that are external to the litigation.
4 *Humboldt Baykeeper v. Union Pac. R.R.*, 244 F.R.D. 560, 563 (N.D. Cal. 2007). Examples
5 of improperly motivated external uses (in category 2) include “attempts to annoy or
6 embarrass an opponent.” *Id.*

7 **B. Proposed Section 4C Is Consistent With The Law**

8 Cascade asserts that proposed section 4C of the Stipulation is inconsistent with
9 both Washington and federal law as well as this Court’s “interest in affording transparent
10 and open justice. Cascade Br. at 5:9.¹ Contrary to Cascade’s assertion, the agreed-upon
11 mutual use restrictions as to the other party’s continuing guaranty are entirely consistent
12 with, and indeed warranted by, Rule 26 of the Federal Rules of Civil Procedure.

13 At the September 29, 2010 hearing, KFI had initially expressed its concerns that
14 Cascade would use KFI’s continuing guaranty as a weapon in its “competition by
15 litigation.” *See* Transcript of September 29, 2010 hearing at 30:22-25. These concerns
16 were reiterated in the October 26, 2010 telephone conference with the Court in which
17 counsel for Cascade agreed to mutual use restrictions on the executed continuing
18 guaranties as a condition of the exchange of executed continuing guaranties between
19 counsel. Slavitt Decl. at ¶ 5. The next draft of the Stipulation and Order provided by
20 KFI’s counsel on November 2, 2010 reflected these mutual use restrictions, and Cascade

21 ¹ Despite Cascade’s assertion that Section 4C is inconsistent with Washington law,
22 it has cited only federal court decisions which are based on interpretations of the Federal
23 Rules of Civil Procedure and the U.S. Constitution. *See Walcker v. SN Commer., LLC*,
2006 U.S. Dist. LEXIS 63781 (E.D. Wash. Sept. 7, 2006); *San Jose Mercury News, Inc. v.*
United States Dist. Court - N. Dist., 187 F.3d 1096 (9th Cir. 1999). Accordingly, KFI will
only address Cascade’s assertions with regard to federal law.

1 raised no objections to these restrictions in the comments it provided in response to this
2 draft. Slavitt Decl. at ¶ 6.

3 Moreover, KFI filed its executed continuing guaranty and provided a copy of its
4 guaranty as filed to Cascade's counsel in reliance on Cascade's agreement that neither
5 party would use the continuing guaranty of the other party for any purpose other than in
6 connection with the execution of the Stipulation, except upon further order of the Court.
7 Slavitt Decl. at ¶ 11. Allowing Cascade to repudiate its agreement and insist upon terms
8 designed purely to harass and annoy KFI would only encourage similar improper conduct
9 in the future and would discourage future civil litigants from relying on the promises made
10 by opposing counsel.

11 Even if Cascade's intentions were not merely to harass and annoy KFI, the
12 assertion of a law enforcement purpose is insufficient, without more, to justify actions in
13 derogation of a valid confidentiality agreement. *Cf. SEC v. Merrill Scott & Assocs., Ltd.*,
14 600 F.3d 1262, 1273 (10th Cir. 2010) (citing *Chem. Bank v. Affiliated FM Ins. Co.*, 154
15 F.R.D. 91, 93 (S.D.N.Y. 1994)). Notably, there are no pending state or federal regulatory
16 of law enforcement actions which have been brought against KFI and in which Cascade's
17 cooperation has been requested. Rather, Cascade is clearly shopping its complaints about
18 KFI to state and federal agencies in the hope that one might initiate an investigation of
19 KFI. Moreover, Cascade's entire effort in carving out an exception to do so is predicated
20 upon the assumed reliability of the testing methodologies used in Cascade's fiber analysis
21 reports. The disparate results of tests performed by both Cascade and KFI suggest that
22 these testing methodologies may well yield inconsistent, and therefore unreliable, results.

23 In view of the unreliability of these testing methodologies, Cascade's reliance on
Humboldt Baykeeper v. Union Pac. R.R. Co., 244 F.R.D. 560 (N.D. Cal. 2007) is
misplaced. In *Humboldt Baykeeper*, there was no dispute that the site at issue was
environmentally contaminated. As a result, there was no risk of harm to the defendant

1 resulting from the use of reports which indicated the presence of contamination. By
2 contrast, in the present case, Cascade has yet to establish the reliability of the testing
3 methodologies used in its fiber analysis reports. As a result, and in light of KFI's concerns
4 that Cascade will use KFI's continuing guaranty as a weapon in its competition by
5 litigation, there is a substantial risk of harm to KFI resulting from Cascade's unfettered use
6 of KFI's continuing guaranty.

7 **IV. CONCLUSION**

8 For the foregoing reasons, KFI respectfully requests that the Court enter its
9 proposed Stipulation and enforce the parties' agreement that neither party, either directly
10 or through a proxy, shall use the continuing guaranty provided by the other party for any
11 purpose other than in connection with the execution of the Stipulation except upon further
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1 order of the Court, and that the Court enter as an Order the Joint Stipulation as proposed by
2 KFI in the form attached as Exhibit I to the Slavitt Declaration filed herewith.

3 DATED this 13th day of December, 2010.

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