

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,

Plaintiff,

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

Defendants.

Case No. C10-00861 RSM

**KNITTING FEVER, INC.’S
MEMORANDUM OF LAW IN
OPPOSITION TO CASCADE’S
SECOND MOTION FOR
LIMITED EXPEDITED
DISCOVERY**

I. INTRODUCTION

Plaintiff, Cascade Yarns, Inc. (“Cascade”), again seeks to conduct expedited
discovery and deny Defendant Knitting Fever, Inc. (“KFI”) the orderly process that the

1 Federal Rules provide in all but the most exceptional civil cases.¹ Cascade’s motion is
2 premised upon its unfounded conclusion that evidence is likely to disappear in advance of
3 formal discovery. Cascade draws this conclusion from the assertions of Ms. Linda L.
4 Lucente, a non-party purchaser of yarn who recently sought to purchase a single type of
5 yarn in a single color, but was unable to do so because the yarn had been discontinued.
6 Cascade, however, fails to appreciate that KFI’s normal business practices of discontinuing
7 styles and types of yarn is entirely distinct from KFI’s obligations to preserve evidence that
8 may be relevant to this lawsuit. It does not logically follow that a discontinued yarn that is
9 unavailable for purchase is also at risk for being lost or destroyed for purposes of litigation.
10 The Court cannot permit Cascade to obtain such an exceptional remedy based on such
11 flawed logic. A generalized fear of the destruction of documents is not unique to this case.
12 It is an ordinary fear that every plaintiff confronts. Cascade, however, has failed to
13 establish good cause for this Court to order the requested discovery. Cascade’s motion,
14 therefore, should be denied.

16 II. LEGAL ARGUMENT

17 A. Legal Standards for Expedited Discovery

18 Fed. R. Civ. P. 26(d) provides that “a party may not seek discovery from any
19 source before the parties have conferred as required by Rule 26(f).” The Rule recognizes,
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21 ¹ Cascade filed its first motion for expedited discovery on October 28, 2010, docket
22 entry number 82. The circumstances underlying that motion were different from those
23 presented here. As a result, the fact that the Court granted that motion has no bearing on
the present motion.

1 however, that expedited discovery may occur when authorized by court order. *Id.* Many
2 district courts in the Ninth Circuit have followed the standard set out in *Yokohama Tire*
3 *Corp v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612 (D. Ariz. 2001). In *Yokohama Tire*, the
4 court held that district courts have discretion to allow expedited discovery upon a showing
5 of good cause by the moving party. *Id.* at 613-14; *see also Semitool, Inc. v. Tokyo Electron*
6 *America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). In formulating this standard, the
7 Court did not expound upon the definition of “good cause” but rather cited to Ninth Circuit
8 jurisprudence. *See Johnson v. Mammoth Recreations, inc.*, 975 F.2d 604 (9th Cir. 1992).
9 Utilizing the holdings of both *Yokohama* and *Johnson*, the court in *Semitool* opined that
10 good cause existed “where the need for expedited discovery, in consideration of the
11 administration of justice, outweighs the prejudice to the responding party.” *Semitool, Inc.*,
12 208 F.R.D. at 276.

13
14 **B. Cascade Has Failed to Establish Good Cause for Expedited Discovery**

15 The parties agree that the Court should apply the good cause standard to evaluate
16 whether expedited discovery is warranted in this instance. The parties, however, do not
17 agree that Ms. Lucente’s assertions demonstrate the requisite good cause necessary to
18 permit the requested discovery before the start of formal discovery.

19 Ms. Lucente’s assertions identify a single incident in which she tried to order one
20 particular type of yarn in one particular color. In particular, Ms. Lucente claims she was
21 told by a KFI employee named Suzie (or Susie) that the yarn was discontinued and that
22 “they [KFI] were simply trying to empty the warehouse.” Pl. Br. at 3. Not only does Ms.
23 Lucente’s reportage constitute hearsay, it would appear that her desire to purchase yarn is

1 entirely contrived and that, in fact, Ms. Lucente is acting on behalf of Cascade merely to
2 obtain yarn samples from KFI.

3 From Ms. Lucente's single attempt, Cascade illogically concludes that evidence is
4 "likely to disappear." Pl. Br. at 3:19. KFI's inventory management and sales practices,
5 however, are separate and apart from its obligations to preserve and produce documents
6 and things which may be relevant to this lawsuit. The discontinuation of styles and types
7 of yarns occurs in the normal course of KFI's business. See Declaration of Sion Elalouf
8 ("Elalouf Declaration") at ¶ 3. This does not mean, however, that a discontinued product
9 can no longer be found in KFI's possession, custody, or control. Rather, it only means that
10 the product is no longer available for commercial sale. Ms. Lucente's inability to purchase
11 a single type of yarn does not, therefore, justify Cascade's desire to invade KFI's
12 warehouses to retrieve samples of at least 17 different types of yarn. See Plaintiff's
13 Proposed Order.

14 Courts have recognized that in every civil action, from high-stakes disputes to
15 routine small claims, there is a risk that a defendant will destroy or conceal evidence. A
16 party cannot simply point out the ordinary and "obvious opportunity every defendant
17 possesses" and expect extraordinary relief. *Adobe Sys. v. South Sun Prods., Inc.*, 187
18 F.R.D. 636, 641 (S.D. Cal. 1999) (denying request to grant exceptional remedy of *ex parte*
19 injunctive relief because plaintiff presented no evidence that defendant was destroying
20 documents or would destroy documents upon notice). Cascade presents no evidence that
21 KFI, upon proper and timely discovery requests from Plaintiff will be unwilling or unable
22 to provide samples of the discontinued Louisa Harding Kashmir DK for testing. KFI is
23 well aware of its duty to preserve evidence, and in accordance with that duty, has

1 preserved several packs of Louisa Harding Kashmir DK yarn for purposes of this
2 litigation. Elalouf Declaration at ¶ 4.

3 Unlike the cases cited by Cascade, expedited discovery in this case is not necessary
4 to identify defendants, evaluate personal jurisdiction, or establish the scope of a patent
5 infringement lawsuit. *See e.g. Invitrogen Corp. v. President and Fellows of Harvard*, 2007
6 U.S. Dist. Lexis 74282 (S.D. Cal. 2007); *Best Western Int'l, Inc. v. John Doe*, 2006 U.S.
7 Dist. Lexis 56014 (D. Ariz. 2006); *Semitool, Inc.*, 208 F.R.D. 273. Additionally, the cases
8 cited by Cascade do not speak to the potential loss or destruction of documents. The
9 request for expedited discovery in the present case is simply a maneuver designed to harass
10 KFI. Cascade's "concern" about "disappearing evidence" is a façade designed to disguise
11 Cascade's intent to embark on a fishing expedition.

12 KFI's affirmation of its duty to preserve evidence, alone, should allay Cascade's
13 baseless suspicion that evidence will disappear. Yet even if it does not, Cascade is not left
14 without a remedy. Were KFI to breach its duty to preserve evidence, the appropriate
15 motion would be one for sanctions for the spoliation of evidence. *See e.g. Taylor v. Mkt.*
16 *Transp., Ltd.*, No. 05-5705, 2010 U.S. Dist. LEXIS 24939 (W.D. Wash. March 12, 2010);
17 *UMG Recordings, Inc. v. Hummer Winblad Venture Partners*, 462 F. Supp.2d 1060, 1066
18 (N.D. Cal. 2006).

19 Moreover, underlying Cascade's request is the assumed reliability of the test
20 reports it has received. Based on these reports, and Ms. Lucente's assertions, Cascade
21 concludes that KFI is willing to ship certain yarns containing animal hair, but unwilling to
22 ship yarns that are "acrylic-heavy." Pl. Br. at 3:5-7. Cascade implies, yet without
23 explanation, that this alleged selective shipment bolsters its request for expedited

1 discovery. It does not. The composition of the yarns at issue and the accuracy of the tests
2 used to determine that composition are ultimate issues in this case. To draw a conclusion
3 about the compositions of the yarns that are being shipped and, in turn, draw a further
4 conclusion about the potential destruction of evidence is both premature and entirely
5 speculative. If this matter proceeds, Plaintiff will have ample opportunity to take
6 discovery and test its hypothesis.

7 Ultimately, Cascade's motion equates the inability of a non-party to purchase one
8 of the yarns at issue in this case with the wholesale destruction and disappearance of
9 evidence for purposes of litigation. Such an illogical conclusion does not demonstrate
10 good cause necessary to justify expedited discovery.

11 12 **III. CONCLUSION**

13 With no showing of good cause, Cascade has failed to establish why the requested
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1 expedited discovery is necessary. Accordingly, KFI respectfully requests that the Court
2 deny Cascade's Second Motion for Expedited Discovery.

3 DATED this 20th day of December, 2010

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