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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 MOTION AND MEMORANDUM FOR PARTIAL SUMMARY JUDGMENT RE UNFAIR COMPETITION AND FALSE ADVERTISING UNDER THE LANHAM ACT, 15 U.S.C. § 1051 AND UNFAIR COMPETITION UNDER THE WASHINGTON CONSUMER PROTECTION ACT

Note On Motion Calendar: January 14, 2011

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Cascade Yarns, Inc. (“Cascade”) moves this Court for partial summary judgment as to liability on its claims for unfair competition brought under the Lanham Act and the Washington Consumer Protection Act. As shown in Cascade’s Motion for Preliminary Injunction against Knitting Fever, Inc. (“KFI”), KFI’s cashmere-blend yarns, and other yarns, are not properly labeled. KFI admitted that test results of its yarns have “been at variance” with the

1 labels. The continued sale of the subject yarns violates the Wool Products Labeling Act, 15
2 U.S.C. § 68 (“WPLA”), the Lanham Act and the Consumer Protection Act as the subject yarns do
3 not contain the constituent fibers identified on their product labels. As a result, KFI’s labels are
4 literally false, have a tendency to deceive the public and customers, are meant to influence buying
5 decisions and cause the diversion of customers from Cascade to KFI. KFI by all impressions has
6 no admissible evidence to the contrary; thus, there can be no genuine issue of material fact that
7 numerous KFI yarns are mislabeled. Selling of mislabeled products constitutes unfair
8 competition in violation of state and federal law.

9 **II. FACTUAL BACKGROUND**

10 This is a civil action arising under: (a) the United States Trademark Act of 1946, as
11 amended, 15 U.S.C. § 1051, *et seq.* (“Lanham Act”); (b) the Racketeer Influenced And Corrupt
12 Organization Act, 28 U.S.C. § 1964 *et seq.* (“RICO”); and (c) the Washington Consumer
13 Protection Act (“CPA”), RCW 19.86, for unfair competition and false advertising. Cascade is
14 one of the nation’s finest purveyors of yarns and sells its products through specialty retailers and
15 boutiques throughout the United States. Dkt. No. 11, ¶ 2. Cascade’s products include many
16 yarns containing wool and natural fibers including kid mohair, silk and cashmere. *Id.* ¶ 3.
17 Cascade extensively promotes its trade name and products throughout the United States. *Id.*

18 KFI imports and distributes a variety of hand knitting yarns generally identified as its
19 *Cashmerino* lines. The labels and marketing materials for KFI’s *Cashmerino* yarns, marketed
20 under various trade names including Sirdar, Debbie Bliss and Louisa Harding, provide that the
21 products contain 12% cashmere, 55% merino wool and 33% acrylic. Dkt. No. 12, Ex. B.
22 Contrary to the labels, and contrary to the WPLA, independent testing completed in 2006
23 confirmed that these yarns did not contain the fibers listed on their labels. Dkt. Nos. 4-2, 4-3, 4-4.
24 The testing revealed that the yarns contained no cashmere or considerably less cashmere than as
25 represented on the labels. *Id.*; Declaration of Kenneth D. Langley (“Langley Decl.”) ¶ 37, Exs. B,
26 C.

1 Following this testing, KFI lulled customer concerns with written statements that its
 2 products were then accurately labeled, but also admitted that it had earlier imported and sold yarn
 3 that did not contain cashmere -- contrary to the product labels. Dkt. No. 12-3, Ex. A-2 at Ex. 15
 4 (“It doesn’t surprise us that your test showed no cashmere. After all the yarn in question was
 5 manufactured and sold some time ago....”). Indeed, KFI and its supplier corresponded regarding
 6 the lack of cashmere in the yarns and KFI’s supplier (defendant Filatura Pettinata V.V.G. Di
 7 Stefano Vaccari & C. (“VVG”)) wrote to KFI to suggest “alternative” approaches. *Id.*, Ex. A at
 8 Ex. 11. VVG recognized that the absence of cashmere could be “quite dangerous” and suggested
 9 that KFI “try stopping the rumors.” *Id.* VVG further wrote:

- 10 a) we continue so as done so far if we think that the risks are not too big;
 11 b) we stop using this kind of blend;
 12 c) we change the blend and use the best possible cashmere quality, which will
 13 be easier to find in case of lab checks. Of course, the price would change.

14 *Id.*

15 Also included with VVG’s correspondence were test reports from a laboratory in Italy
 16 confirming that no more than 6.4% cashmere was found in any of the samples tested.¹ *Id.* On
 17 July 20, 2006, KFI issued a three-page letter addressing the lack of cashmere in its *Cashmerino*
 18 yarns. Dkt. No. 12, Ex. A at Ex. 2. In that letter, KFI asserted that the yarns contained cashmere;
 19 KFI did not provide a separate guaranty or a continuing guaranty pursuant to section 68g of the
 20 WPLA. *Id.* Tellingly, KFI issued letters to its customers purportedly affirming the accuracy of
 21 its labels but did not issue any continuing guaranty under section 68g of the Act. *Id.*, Ex. A at

22 ¹ This 6.4% cashmere result was at odds with the no-cashmere acrylic-heavy variety of the yarn
 23 that KFI appeared to be selling at the time. Declaration of Robert J. Guite (“Guite Decl.”), Ex. A.
 24 KFI’s customer testified that the cashmerino yarns purchased contained no cashmere and that he
 25 addressed this issue with KFI principals Jay Opperman or Sion Elalouf. *Id.* at 59:3-15. Further,
 26 he was assured by them that the KFI cashmerino yarns sold after July 2006 had cashmere and that
 these new dye lots were designated with a “b” or a “c.” *Id.* at 182:9-14; 186:4-8. These results
 are, however, consistent with the wool-surplusage, but acrylic-consistent, variety that KFI sells to
 this day. By all impressions, this test appears to have been of the prototype that VVG was
 developing to be consistent with the intent and strategy set forth in the letter sent by VVG.

1 Exs. 2, 17, 19, 20. Contrary to these assertions, test results of the *Cashmerino* yarns obtained
2 during this time, and confirmed by a second independent laboratory, show that the *Cashmerino*
3 yarns contained 57% wool and 43% acrylic. Dkt. No. 12, Ex. A at Exs. 13-14; Dkt Nos. 4-2, 4-3,
4 4-4; Langley Decl., Ex. C.

5 KFI's prices for its *Cashmerino* yarns are commensurate with the prices of competing
6 yarns, including Cascade's yarns, that actually contain the fibers identified on their labels. Dkt.
7 No. 11, ¶ 5. Thus, KFI's profit margin on its *Cashmerino* is many times greater than it would be
8 if it had included the more expensive cashmere fibers in its products. *Id.* ¶ 6. KFI's sale and
9 marketing of its products as labeled is misleading and causes customer confusion and damage to
10 Cascade. Such harm includes, but is not limited to: (i) unfair competition and violation of the
11 WPLA; (ii) damages to Cascade's reputation and goodwill; (iii) diminution in the market value
12 and acceptance of Cascade's wool and cashmere yarns; and (iv) damage to Cascade's reputation
13 in that KFI's inferior product may be confused with Cascade's product that actually contains a
14 similar percentage of cashmere to the content represented on KFI's labels.

15 KFI is attempting to hide the fact that its yarns do not contain the labeled quantities of
16 cashmere and wool in order to unfairly compete with hand knitting yarns that are accurately
17 labeled, including Cascade's products. *Id.* ¶¶ 5, 6, 7. Of course, if the subject yarns were
18 accurately labeled they would also sell for a much lower price; KFI charges a higher price for the
19 *Cashmerino* yarns because they purport to contain cashmere. KFI's marketing, sale and
20 promotion of its products including those marketed under its Sirdar, Debbie Bliss and Elsebeth
21 Lavold brands is inconsistent with the labeling requirements of the WPLA and with the
22 reasonable expectations of retailers and consumers purchasing wool yarns. KFI sells yarn
23 products in interstate commerce, ships yarn products across state lines and markets its yarn
24 products on its website located at www.knittingfever.com. Dkt. No. 12, Ex. B.

25 In reliance upon the Defendants' representations made in the Fall of 2006 regarding the
26 accuracy of KFI's labels, Cascade took no further immediate actions in 2006. Nevertheless,

1 Cascade's lingering concerns remained. In 2010, it commissioned fiber tests of certain KFI
2 yarns. Independent testing of the subject yarns -- and other KFI yarns -- was conducted in 2010
3 and again confirmed that the KFI yarns did not contain the fiber content identified on their labels.
4 For example, the *Cashmerino* yarns contained no cashmere at all -- or if they did, they contained
5 10% to 50% of the amounts listed on the labels. Dkt. No. 4-5; Langley Decl., Exs. D-T.

6 On September 29, 2010, this Court heard oral argument on Cascade's Motion for
7 Preliminary Injunction. At that hearing, counsel for the parties agreed that Cascade's motion
8 would be deemed withdrawn if KFI submitted a Continuing Guaranty on the form approved by
9 the FTC and agreed to a stipulation containing additional terms regarding the Continuing
10 Guaranty. Since that time, KFI asserts that it submitted a Continuing Guaranty but no stipulation
11 has been entered as KFI insisted on precluding Cascade from using the guaranty that it filed for
12 filing a criminal complaint regarding KFI's fraudulent issuance of the same. Dkt. No. 129. At
13 this Court's request, a Motion for Protective Order regarding the entry of the Stipulation and
14 Order Re Continuing Guaranty is presently pending. *Id.* Also since that time, Cascade has
15 learned that despite the submission of the Continuing Guaranty by KFI on or before November 8,
16 2010, it continues to sell yarns that are not properly labeled and continue to contain no cashmere
17 or quantities of cashmere substantially less than identified on the product labels. Langley Decl., ¶
18 37, Exs. T; Dkt. No. 133 at Exs. C-E; Dkt. No. 135 at Ex. A.

19 In response to Cascade's Motion for Preliminary Injunction, KFI declined to produce any
20 evidence that its yarns are properly labeled. To the contrary, its counsel admitted that the fiber
21 content of its yarns were "at variance" from the contents listed on their labels, essentially
22 confirming that KFI willfully sells mislabeled yarns. Dkt. No. 95, Ex. C at 23:25-24:2 (Mr.
23 Slavitt admitted: "frankly, your Honor, while some tests have shown that the yarns are properly
24 labeled, *others are at variance.*") (emphasis added).

25 Not persuaded by defense counsel's "fiber testing is meaningless" argument, this Court
26 struck the declaration testimony of KFI's president and its counsel purporting to challenge the

1 reliability of fiber analysis in general and Cascade's test reports in particular. Dkt. No. 71. Forty-
2 four days later, Cascade sought a Writ of Attachment. Dkt. No. 93. True to form, KFI, again,
3 elected to present absolutely no evidence regarding the accuracy of its product labels. Dkt. No.
4 105. More telling is the fact that KFI never presented evidence of accurate labeling during the
5 more than two years of litigation of the matter proceeding in the Eastern District of
6 Pennsylvania,² even in response to a motion for summary judgment filed in that matter.³ KFI
7 continues to knowingly sell falsely labeled products, even following its submittal of a Continuing
8 Guaranty to the FTC. *See* Langley Decl., ¶ 37, Ex. T; Dkt. No. 133, Exs. C-E.

9 In light of this uncontroverted evidence, Cascade now moves for summary judgment
10 pursuant to Fed. R. Civ. P. 56(a) on its Lanham Act and CPA claims. Simply put, Defendants
11 have no admissible facts evidencing that their yarns are accurately labeled. Granting this motion
12 will streamline litigation and reduce the time needed to bring this matter to trial.

13 **III. DISCUSSION**

14 **A. Summary Judgment Is Proper Where, As Here, Cascade Has Established The** 15 **Elements Of Its Claims.**

16 Under Federal Rule of Civil Procedure 56(a), the moving party is entitled to summary
17 judgment on each claim -- or part of each claim -- when the moving party establishes that there is
18 no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter
19 of law. Fed. R. Civ. P. 56 (a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the
20 moving party meets this burden, then the nonmoving party must come forward with affirmative
21 evidence to show a genuine issue of material fact. *Anderson*, 477 U.S. at 256. The "mere
22 existence of a scintilla of evidence in support of the [nonmoving party's] position will be
23 insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving
24 party]." *Id.* at 252.

25 ² *The Knit With v. Knitting Fever, Inc. et al.* now pending in the United States District Court for
the Eastern District of Pennsylvania under Case No. 02: 08 - CV- 04221 (consolidated).

26 ³ The motion was subsequently withdrawn.

1 As to Cascade’s claim for unfair competition under the Lanham Act, it is entitled to
2 judgment as a matter of law. Section 43(a) provides:

3 Any person who, on or in connection with any goods or services, or any
4 container for goods, uses in commerce any word, term, name, symbol, or device,
5 or any combination thereof, or any false designation of origin, false or misleading
6 description of fact, or false or misleading representation of fact, which—

7 (A) is likely to cause confusion, or to cause mistake, or to deceive as to the
8 affiliation, connection, or association of such person with another person, or as to
9 the origin, sponsorship, or approval of his or her goods, services, or commercial
10 activities by another person, or

11 (B) in commercial advertising or promotion, misrepresents the nature,
12 characteristics, qualities, or geographic origin of his or her or another person’s
13 goods, services, or commercial activities,

14 shall be liable in a civil action by any person who believes that he or she is
15 or is likely to be damaged by such act. (15 U.S.C. § 1125(a)(1)).

16 The intent of the Lanham Act “is to regulate commerce within control of Congress by
17 making actionable the deceptive and misleading [practices] [and] to protect persons engaged in
18 such commerce against unfair competition.” *Frisch’s Restaurants, Inc. v. Elby’s Big Boy of
19 Steubenville, Inc.*, 670 F.2d 642, 646 (6th Cir. 1982) (quoting 15 U.S.C. § 1127). As a remedial
20 statute, it “should be interpreted and applied broadly so as to effectuate its remedial purpose.”
21 *Frisch’s Restaurants, Inc.*, 670 F.2d at 651. As the court recognized in *Gucci Am., Inc. v. Duty
22 Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287-88 (S.D.N.Y. 2003), summary judgment as to
23 liability in a Lanham Act unfair competition is appropriate and properly granted when the
24 plaintiff establishes the *prima facie* elements of a claim for unfair competition.

25 **B. Cascade Satisfies The Elements of Its Lanham Act Claim.**

26 The elements of a Lanham Act § 43(a) false advertising claim are: (1) a false statement of
fact by the defendant in a commercial advertisement about its own or another’s product; (2) the
statement actually deceived or has the tendency to deceive a substantial segment of its audience;
(3) the deception is material, in that it is likely to influence the purchasing decision; (4) the
defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or

1 is likely to be injured as a result of the false statement, either by direct diversion of sales from
2 itself to defendant or by a lessening of the goodwill associated with its products. *Southland Sod*
3 *Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *see also Cook, Perkiss and Liehe,*
4 *Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir. 1990). To establish
5 falsity within the meaning of the Lanham Act, a plaintiff need only show that the statement was
6 literally false, either on its face or by necessary implication, or that the statement was literally true
7 but likely to mislead or confuse consumers. 15 U.S.C. § 1125(a); *Castrol, Inc. v. Pennzoil Co.*,
8 987 F.2d 939, 943, 946 (3d Cir. 1993). To show that an advertisement or representation is
9 literally false the statement must be viewed in its entirety. *Southland*, 108 F.3d at 1139; *McNeil-*
10 *P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1549 (2d Cir. 1991); *American Home*
11 *Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982).

12 When the statements made are literally false, *actual deception of consumers is presumed.*
13 *See, e.g., U-Haul, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir. 1986); *Johnson & Johnson,*
14 *v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988); *PPX Enters., v. Audiofidelity Enters., Inc.*,
15 818 F.2d 266, 272 (2d Cir. 1987). Even if an advertisement is not literally false, relief is available
16 under Lanham Act § 43(a) if it can be shown that the advertisement has misled, confused, or
17 deceived the consuming public. *Southland*, 108 F.3d at 1140; *Sandoz Pharmaceuticals Corp. v.*
18 *Richardson-Vicks, Inc.*, 902 F.2d 222, 228-29 (3d Cir. 1990); *American Home Prods. Corp. v.*
19 *Johnson & Johnson*, 577 F.2d 160, 165-66 (2d Cir. 1978); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 522
20 F. Supp. 1238, 1248-49 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982).

21 However, as is the case at bar, where a plaintiff proves that a statement is “literally false,”
22 there is no requirement to prove consumer deception. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*,
23 227 F.3d 489, 497 (5th Cir. 2000); *Balance Dynamics Corp. v. Schmitt Indus.*, 204 F.3d 683, 693
24 (6th Cir. 2000); *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967, 971 (7th Cir. 1999).
25 A statement that is explicit or implied, is unambiguous, and is false, is literally false. *Novartis*
26 *Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d

1 578 at 587 (3d Cir. 2002). For example, an advertisement for orange juice that stated: the product
2 is “pasteurized juice as it comes from the orange” is literally false because pasteurized juice has
3 undergone a process which makes it different from freshly-squeezed juice, and is not “juice as it
4 comes from the orange.” *The Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d
5 Cir. 1982) (lower court erred by holding the advertisement was not literally false).

6 “Pasteurization entails heating the juice to approximately 200 degrees Fahrenheit to kill certain
7 natural enzymes and microorganisms which cause spoilage[;]” thus, the statement was literally
8 false for purposes of Lanham Act. *Id.*

9 Here, KFI’s product labels provide that its yarns contain, for example, 12% cashmere
10 when, in fact testing confirms that those yarns contain 0% cashmere, trace amounts of cashmere,
11 or substantially less than is labeled. Dkt. No. 12, Ex. A at Exs. 13, 15, 21, 27, 28; Dkt. Nos. 4-2,
12 4-3, 4-4, 4-5; Langley Decl., ¶ 37, Exs. B-T. Others, such as Louisa Harding “Kashmir” are
13 deceptive *per se*, before even considering their evidenced lack of Cashmere. 16 C.F.R § 300.24
14 (“Any word or coined word which is phonetically similar to the name or designation of a fiber or
15 which is only a slight variation in spelling from the name or designation of a fiber shall not be
16 used in such a manner as to represent or imply that such fiber is present in the product when the
17 fiber is not present as represented.”)

18 The second element of a false advertising claim under the Lanham Act is materiality. A
19 deception is material if it is likely to influence a customer’s purchasing decision. The plaintiff
20 must establish materiality even when defendant’s statement is literally false. However, plaintiffs
21 are not required to present evidence that customers purchasing decisions were actually influenced,
22 but that they are likely to be influenced. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts,*
23 *Inc.*, 299 F.3d 1242 (11th Cir. 2002). Materiality is established by proving that the deception
24 relates to an “inherent quality or characteristic” of the product being misrepresented. *Johnson &*
25 *Johnson Vision Care, Inc.*, 299 F. 3d at 1250.

1 In *Cashmere & Camel Hair Manufacturers Institute v. Saks 5th Avenue*, 284 F.3d 302,
2 306, 312 (1st Cir. 2002), the First Circuit considered the claims of manufacturer of cashmere
3 garments and of CCMI, “a trade association of cashmere manufacturers dedicated to preserving
4 the name and reputation of cashmere as a specialty fiber,” that garments that purportedly
5 contained 10% cashmere contained no cashmere. Testing of random samples of the garments
6 conducted by Professor Langley⁴ on behalf of plaintiffs confirmed that the garments contained no
7 cashmere. *Id.* The First Circuit recognized that “overstating the cashmere content” of the
8 garments is material because the misrepresentation “relates to an inherent characteristic of the
9 product sold.” *Id.* The court continued: “[i]ndeed, it seems obvious that cashmere is a basic
10 ingredient of a cashmere-blend garment; without it, the product could not be deemed a cashmere-
11 blend garment or compete in the cashmere-blend market.” *Id.* The court further recognized that
12 the defendants’ “aggressive marketing” of the garments as “cashmere blends” further highlighted
13 the defendants’ own belief that the presence of cashmere was an inherent and important
14 characteristic of the product. *Id.* Thus, materiality is presumed when a product misstates the
15 cashmere content it contains. *Id.* Here, materiality exists as KFI’s product labels and its
16 description of the subject yarns -- *Kashmirs* and *Cashmerinos* -- are literally false.

17 Where an alleged falsehood or misrepresentation relates to a primary ingredient in a
18 product, the materiality requirement is met. *Id.* For example, in *The Coca-Cola Co.* the court
19 found that “[t]he claim that Tropicana’s Premium pack contains only fresh-squeezed, unprocessed
20 juice is clearly a misrepresentation as to that product’s inherent quality or characteristic [and
21 therefore is likely to influence customers’ purchases].” *The Coca-Cola Co.*, 690 F.2d at 318.

22 Here, KFI’s products do not contain the fibers identified on its product labels -- many of
23 the subject yarns contain no cashmere at all. Instead, the yarns contain excess wool and/or

24
25 ⁴ Professor Langley is Cascade’s expert witness in this matter and is a recognized expert in the
26 field of cashmere identification and textile analysis. *Cashmere & Camel Hair Manufacturers
Institute*, 284 F.3d at 207.

1 cheaper acrylic fibers. Langley Decl., Exs. B-T. Customers would not pay as much for KFI's
2 *Cashmerino* yarns if they knew the yarns did not contain cashmere. KFI's misrepresentation is
3 central to the product's inherent quality or characteristic -- that *Cashmerino* yarns contain the
4 quantities of cashmere disclosed on the labels. Simply put, advertising a hand knitting yarn as
5 containing 12% cashmere when it contains 0% cashmere (or substantially less than the quantity
6 identified) is a material misrepresentation. *See Cashmere & Camel Hair Manufacturers Institute*,
7 284 F.3d at 207.

8 **C. Cascade Met Its Burden Of Showing That The Subject Yarns Are Not**
9 **Properly Labeled.**

10 KFI's labeling of its *Cashmerino* yarns as containing 12% cashmere⁵ (1) is literally false;
11 (2) has a tendency to deceive a substantial segment of potential customers; (3) is meant to
12 influence the purchasing decisions of potential customers; (4) was made in interstate commerce
13 by (at least) being posted on KFI's website and offered for sale nationwide; and (5) is likely to
14 injure Cascade by diverting sales from it, since Cascade and KFI are direct competitors.

15 **1. KFI's Statements are Literally False, Have a Tendency to Deceive**
16 **Potential Customers and Were Meant to Divert Sales from Cascade**

17 There can be no legitimate dispute that identifying its *Kashmir* and *Cashmerino* yarns as
18 containing cashmere when they do not is deceptive and misleading. Its conduct can only be
19 intended to divert sales from Cascade (and/or other purveyors of fine wool and cashmere yarns)
20 to KFI. KFI is seeking to build its business based on the misperception it has created that its
21 product is a cashmere fiber yarn. *See, e.g., International Sports Mgmt. v. Stirling Bridge Group,*
22 *Inc.*, 2004 U.S. Dist. LEXIS 8716, *9-10 (N.D. Ill. 2004) (defendant's false and misleading

23 ⁵ The Louisa Harding *Kashmir* yarns and Debbie Bliss *Cashmerino* yarns appear to be identical
24 in testing result as to contents. Langley Decl., ¶ 37, Exs. D-T. However, the *Kashmir* variety is
25 labeled as 10% cashmere while most *Cashmerino* varieties are labeled as 12%. KFI also
26 marketed another identical product "*Cashmir Luxury*" which was labeled as 6% cashmere and
contained zero cashmere or trace amounts of cashmere. Thus, it appears that KFI targeted
different market segments with different labels on the same product. Dkt. No. 132; Dkt. No. 135,
¶¶ 2-5, Ex. A.

1 statements and advertising were made knowingly, willfully and with malicious intent to divert
2 customers from plaintiff to defendant). Since these representations and statements by KFI are
3 literally false, actual deception of consumers is presumed. *See, e.g., Cashmere & Camel Hair*
4 *Manufacturers Institute*, 284 F.3d at 314-16; *Johnson & Johnson*, 862 F.2d at 977; *PPX Enters.*,
5 818 F.2d at 272; *U-Haul*, 793 F.2d at 1040.

6 2. **KFI's Misleading Statements Were Made in Interstate Commerce**

7 It likewise cannot be disputed that KFI's statements, which were made on its labels and
8 shipped across the United States, and made on its website, entered interstate commerce. *See*
9 *Trade Media Holdings Ltd. v. Huang Assocs.*, 123 F. Supp. 2d 233, 242 (D. N.J. 2000) ("Using a
10 domain name to operate a website is a 'use in commerce' because it affects a plaintiff's ability to
11 offer services.").

12 Furthermore, Cascade also sells its products and uses its marks in interstate commerce.
13 Dkt. No. 11, ¶ 2. Plaintiff's use alone is sufficient to satisfy the "interstate commerce" prong of
14 the Lanham Act. *See, e.g., Jewel Cos, Inc. v. Jewel Merchandising Co., Inc.*, 1978 U.S. Dist.
15 LEXIS 14272, *2 (N.D. Ill. 1978) (it is sufficient that the plaintiff is engaged in interstate
16 commerce and that defendant's actions have had a substantial effect on its business); *Ranch*
17 *House of Am., Inc. v. Kramer*, 1974 U.S. Dist. LEXIS 7632, *3 (M.D. Fla. 1974) (plaintiff's
18 allegations of its own interstate use and goodwill is sufficient for defendants' use to have an
19 effect upon interstate commerce).

20 3. **KFI's Statements are Likely to Injure Cascade, Its Competitor**

21 KFI is a competitor of Cascade in the specialty yarn industry selling similar products to
22 the same customer base. Dkt. No. 11, ¶¶ 2-4. KFI's unfair competing and windfall profits from
23 its mislabeled yarn damage Cascade. Cascade is required to compete against KFI, while it earns
24 windfall profits from its mislabeled yarns and uses those profits to prop up its marketing efforts,
25 such as publishing the expensive full color *Debbie Bliss Magazine* (a publication that has almost
26 no advertisers) or paying to fly Ms. Bliss to Seattle to throw out the opening pitch at a recent

1 Seattle Mariners baseball game at Safeco Field. Dkt. No. 11, ¶ 7. In *Cashmere & Camel Hair*
2 *Manufacturers Institute*, the First Circuit recognized that “a precise showing [of harm] is not
3 required, and diversion of sales, for example, would suffice.” 284 F.3d at 318. The court
4 recognized that “using inexpensive materials that are represented as something more valuable
5 would generally create a substantial competitive advantage by undercutting competitors who
6 correctly represent their products.” *Id.* at 319. The fact that defendants are paying less for yarn
7 that contains no (or substantially less) cashmere than buyers who are purchasing legitimate
8 cashmere fabric is sufficient evidence of harm. *Id.*

9 Similarly, the characteristics of a purportedly cashmere yarn (that actually contains no
10 cashmere, or only a trace amount of cashmere) are likely going to be perceived by consumers as
11 inferior to their expectations. Thus, other products actually containing cashmere (including those
12 sold by Cascade) are likely to suffer decreased sales as a result of being compared to KFI’s
13 mislabeled products. *Id.* ¶ 8. Such a comparison injures competitors like Cascade whose
14 products may be rejected out of hand by consumers who were dissatisfied by KFI’s seemingly-
15 comparable products and by increasing sales. *Id.*

16 Under Section 35(a) of the Lanham Act, when a violation of the unfair competition
17 provisions of Section 43(a) of the Act occurs, “the plaintiff shall be entitled . . . , subject to the
18 principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff,
19 and (3) the costs of the action.” 15 U.S.C. § 1117(a). Such profits and damages shall be assessed
20 either by the court or shall be “caused to be assessed under [the Court’s] direction.” *Id.* In
21 assessing damages, the court may enter judgment for any sum above the amount found as actual
22 damages, not exceeding three times such amount. 15 U.S.C. § 1117(a); *Go Med. Indus. Pty., Ltd.*
23 *v. Inmed Corp.*, 471 F.3d 1264 (Fed. Cir. 2006). Alternatively, when the plaintiff is unable to
24 prove actual damages based on any measure, courts in the Ninth Circuit have generally allowed a
25 monetary award based on equitable theories of unjust enrichment and deterrence. *See*

26

1 *CollegeNET, Inc. v. XAP Corp.*, 483 F. Supp. 2d 1058 (D. Or. 2007) (citing *Lindy Pen Co. v. Bic*
2 *Pen Corp.*, 982 F.2d 1400, 1406-07 (9th Cir. 1993)).

3 A plaintiff may prove actual damages based either on its lost sales or on the defendant's
4 profits as a measure of lost sales. *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 988 (9th Cir. 1995).
5 Where a defendant willfully violates § 43(a) of the Lanham Act, a plaintiff may be entitled to
6 recover the defendant's profits under § 35(a) of the Act "subject to the principles of equity." 15
7 U.S.C. § 1117(a); *see also U-Haul Intern., Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1042 (9th Cir.
8 1986) (the remedies available under § 35(a) of the Lanham Act apply to unfair-competition
9 claims as well as trademark-infringement claims brought pursuant to § 43(a) of the Lanham Act).
10 The purpose of § 35(a) is to "take all the economic incentive out of [unfair competition]." *Polo*
11 *Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir. 1986). Accordingly,
12 disgorgement of profits in direct-competition cases may be necessary "to secure the return of all
13 profits" to the plaintiff. *Playboy Enters., Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272, 1274
14 (9th Cir. 1982).

15 Here, discovery is necessary as to the extent of the defendants' profits but that need for
16 discovery does not preclude the instant motion. Partial summary judgment as to liability is
17 appropriate even if there is a genuine issue as to the amount of damages. Fed. R. Civ. P. 56(a);
18 *Pacific Fruit Express Co. v. Akron, C. & Y. R. Co.*, 524 F.2d 1025, 1029-30 (9th Cir. 1975) (a
19 court may grant summary judgment on a claim and reserve the issue of damages for a separate
20 trial); *Conversive, Inc. v. Conversagent, Inc.*, 433 F. Supp. 2d 1079, 1094 (C.D. Cal. 2006)
21 (granting summary judgment on unfair competition and other Lanham Act claims while reserving
22 ruling on damages); *Gucci Am., Inc.*, 286 F. Supp. 2d at 287-88 (same). Here, Defendants lack
23 any admissible evidence to support the accuracy of their labeling; thus, there is no question to put
24 before a jury on this point.

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1 **D. Cascade Has Also Satisfied The Elements Of Its Washington Consumer**
2 **Protection Act Claim Such That Summary Judgment On That Claim Is Also**
3 **Proper.**

4 Washington's Consumer Protection Act provides that "[u]nfair methods of competition
5 and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby
6 declared unlawful." RCW 19.86.020. The purpose of the CPA is to "complement the body of
7 federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent
8 acts and practices in order to protect the public and foster fair and honest competition." RCW
9 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032, 750
10 P.2d 254 (1987). To establish a CPA violation, the plaintiff must prove five elements: (1) an
11 unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public
12 interest, (4) and causes injury to the plaintiff in her business or property, and (5) the injury is
13 causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200
14 P.3d 695, 699 (2009) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
15 Wn.2d 778, 780, 719 P.2d 531 (1986)).

16 As Washington courts recognize in interpreting unfair competition claims under the CPA,
17 the CPA is analogous to the Lanham Act. *Sleep Country USA, Inc. v. Northwest Pac., Inc.*, 2003
18 U.S. Dist. LEXIS 26055 (W.D. Wash., Oct. 10, 2003) (citing *Nordstrom, Inc. v. Tampourlos*, 107
19 Wn.2d 735, 739, 733 P.2d 208 (1987). Thus, where a defendant is liable under the Lanham Act,
20 it "is also liable under RCW 19.86.020." *Sleep Country*, 2003 U.S. Dist. LEXIS 26055 at *20.
21 Here, Cascade has established that it has satisfied the elements of its Lanham Act claim and,
22 simultaneously, its CPA claim. *Id.*; see also *Cashmere & Camel Hair Manufacturers Institute*,
23 284 F.3d at 320 (reversing the dismissal of plaintiff's state law unfair competition claims as the
24 conduct supporting the Lanham Act claim also supported the state law claim). Summary
25 judgment is, therefore, proper on Cascade's CPA claim as well.

1 **IV. CONCLUSION**

2 Cascade has established that KFI's cashmere blend yarns are not properly labeled and that
3 its sale of those yarns constitutes unfair competition in violation of the Lanham Act and the CPA.
4 Defendants lack any admissible evidence to refute the factual showing that their labels are
5 materially false. Accordingly, Cascade's Motion for Summary Judgment as to those claims
6 should be granted.

7
8 Dated: December 23, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

9
10 By: /s/ Robert J. Guite
Robert J. Guite, WSBA No. 25753

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12 Cascade Yarns, Inc.