

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 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. C10-00861 RSM

RULE 56(b) MOTION TO CONTINUE CASCADE’S PARTIAL SUMMARY JUDGMENT MOTION

NOTE ON MOTION CALENDAR: January 7, 2011

I. Introduction

Before any discovery has been conducted – indeed, before any defendant has even filed an answer – Plaintiff, Cascade Yarns, Inc. (“Cascade”), has filed a motion for partial summary judgment in an inherently fact-intensive false advertising case concerning the fiber content of knitting yarns. Because fact discovery is required, Defendant Knitting Fever, Inc. (“KFI”) moves this Court pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to continue Cascade’s motion for partial summary judgment pending the conclusion of discovery. Such a continuance is required in order for discovery to be conducted regarding, among other things, the essential elements of Cascade’s claims as well as KFI’s defense of unclean hands.

II. Factual and Procedural Background

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2 This action arises out of the commercial sale of allegedly mislabeled knitting yarn by
3 KFI, an importer and distributor of knitting yarn products to retailers throughout the United
4 States. The yarns at issue in this case are all blends of various types of fibers, in which wool,
5 silk, and/or synthetic fibers are combined with a smaller proportion of either cashmere, mohair,
6 or camel hair, and include brands such as Noro, Debbie Bliss, Elsebeth Lavold, Queensland
7 Collection, and Louisa Harding.

8 Cascade, a competing yarn distributor taking its cue (and many of its allegations) from a
9 lawsuit filed against most of the same defendants in the Eastern District of Pennsylvania in 2008,
10 seeks damages and injunctive relief for sales it claims it will lose or has lost as a result of KFI's
11 conduct. While Cascade tries to spin an intricate tale of deception and conspiracy, the dispute in
12 the present case boils down to whether the labels affixed to KFI's yarns accurately identify their
13 composition. The centerpiece of Cascade's case is its collection of fiber analyses purportedly
14 conducted on a number of KFI's yarns which report percentages of cashmere or other specialty
15 fibers at variance with the contents stated on the labels. Based on these test reports, Cascade has
16 alleged that KFI is falsely advertising its yarns.

17 In connection with Cascade's effort to obtain a preliminary injunction, KFI presented
18 reports of fiber analyses that had been conducted on over twenty different yarns sold by Cascade.
19 *See* Declaration of Joshua R. Slavitt ("Slavitt Decl.") at ¶ 2; *see also* Declaration of Sion Elalouf
20 (Dkt. Nos. 78-79). According to these reports, the percentages of cashmere or other specialty
21 fibers were at variance with the percentages indicated on Cascade's product labels. Slavitt Decl.
22 at ¶ 3. Cascade responded by providing fiber analyses of some of its own yarns which disagreed
23 with those presented by KFI. *Id.* at ¶ 4.

1 **III. Argument**

2 **A. Legal Standard for Continuances Pursuant to Rule 56(d)**

3 Rule 56(d) of the Federal Rules of Civil Procedure provides:

4 When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or
5 declaration that, for specified reasons, it cannot present facts essential to justify its
6 opposition, the court may:

- 6 (1) defer considering the motion or deny it;
- 7 (2) allow time to obtain affidavits or declarations or to take discovery; or
- 8 (3) issue any other appropriate order.

9 Fed. R. Civ. P. 56(d).¹ The Ninth Circuit has explained that in order to prevail under this rule,
10 “parties opposing summary judgment must make ‘(a) a timely application which (b) sufficiently
11 identifies (c) relevant information, (d) where there is some basis for believing that the
12 information sought actually exists.’” *Emplrs. Teamsters Local Nos. 175 & 505 Pension Trust*
13 *Fund v. Clorox Co.*, 353 F.3d 1125, 1129 (9th Cir. 2004) (quoting *VISA Int’l Serv. Ass’n. v.*
14 *Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986)). Courts should grant Rule 56(d)
15 motions if the nonmoving party has not had the opportunity to discover information essential to
16 its opposition. *See, e.g., Burlington Northern Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of*
17 *Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (finding that where “a summary
18 judgment motion is filed so early in the litigation, before a party has had any realistic opportunity
19 to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f)
20 motion fairly freely”).

21 Notwithstanding this liberal policy, the party seeking discovery has the burden of
22 proffering sufficient facts to show that the evidence sought exists, and that it would prevent
23

24 ¹ Effective December 1, 2009, Rule 56 was amended such that subdivision (d) carries
25 forward without substantial change the provisions of the former subdivision (f). *See* Advisory
26 Committee Note to Rule 56. As a result, the body of law developed under prior Rule 56(f)
27 applies to the current Rule 56(d) motion.

1 summary judgment. *Chance v. Pac-Tel Teletrac, Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).
2 A district court “does not abuse its discretion by denying further discovery if (1) the movant has
3 failed diligently to pursue discovery in the past . . . or (2) if the movant fails to show how the
4 information sought would preclude summary judgment.” *California Union Ins. Co. v. American*
5 *Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990) (citations omitted).

6
7 **B. KFI Meets the Requirements for Continuance Pursuant to Rule 56(d)**

8 The present case has not yet progressed beyond the pleading stage. *See* Slavitt Decl. at ¶
9 5. Other than the Court’s grant of limited expedited discovery to Cascade, discovery has not yet
10 even begun. *Id.* Needless to say, discovery is required as to the existing facts related directly to
11 the essential elements of Cascade’s claims and to KFI’s defenses. *Id.* at ¶ 6.

12 In order for Cascade to prevail on summary judgment, it must show that there are no
13 genuine issues of material fact that KFI: (1) made false statements of fact in a commercial
14 advertisement about its own or another’s product; (2) the statement actually deceived or has the
15 tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it
16 is likely to influence the purchasing decision; (4) KFI caused its false statement to enter
17 interstate commerce; and (5) that Cascade has been or is likely to be injured as a result of the
18 false statement, either by direct diversion of sales from itself to KFI, or by a lessening of the
19 goodwill associated with its products. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
20 1134, 1136 (9th Cir. 1997). To demonstrate falsity under the Lanham Act, Cascade “may show
21 that the statement was literally false, either on its face or by necessary implication, or that the
22 statement was literally true but likely to mislead or confuse consumers.” *Id.* (citing *Castrol Inc.*
23 *v. Pennzoil Co.*, 987 F.2d 939, 943, 946 (3d Cir. 1993)).

1 1. Discovery Is Required to Determine the Truth of Falsity of KFI's Statements

2 In the present case, Cascade has alleged that KFI has made literally false statements
3 concerning the fiber contents of its yarns, its motion for partial summary judgment rests almost
4 entirely upon the independent testing of Dr. Kenneth Langley (Dkt. No. 152). According to
5 Cascade, Dr. Langley's tests unequivocally reveal that KFI's yarns are mislabeled as to their
6 fiber contents. KFI, however, has not yet had the opportunity to propound any discovery on
7 Cascade or Dr. Langley. Slavitt Decl. at ¶ 7. As a result, there is no way for KFI to know with
8 any certainty whether Dr. Langley analyzed the same yarns that KFI sells and the conditions and
9 methodology of his analysis that may affect their results. *Id.* By placing Dr. Langley's test
10 reports at the center of its motion, Cascade has "made this information fair game by resting its
11 theory of the case on these results." *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 2009 U.S.
12 Dist. LEXIS 22863, at *10 (W.D. Wash. Mar. 23, 2009). As in *Campagnolo*, it would be
13 "fundamentally unfair" to prohibit KFI to question the veracity of the information provided by
14 Dr. Langley. *Id.* at *10-11.

15
16 2. Discovery Is Required to Determine the Materiality of KFI's Statements

17 Beyond the issues pertaining to Dr. Langley's reports, KFI has had no opportunity to
18 investigate whether KFI's allegedly false statements are material. As noted above, Cascade must
19 prove that KFI's allegedly deceptive product labels have influenced or are likely to influence
20 consumers' purchasing decisions. *See id.* at *11 (citing *Southland*, 108 F.3d at 1136). Cascade,
21 for example, has failed to produce any customer surveys showing that KFI's allegedly false
22 statements would affect a customer's purchasing decision. Slavitt Decl. at ¶ 8. As a
23 consequence, "adjudicating a summary judgment motion the benefit of such information would
24 ignore the well-established test of whether a plaintiff has a valid § 43(a) Lanham Act claim."
25 *Campagnolo* at *12.

1 motion for a continuance pursuant to Rule 56(d) and continue Cascade's partial summary
2 judgment motion pending the conclusion of discovery.

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4 DATED this 30th day of December, 2010.

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