

The Honorable Ricardo S. Martinez

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
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Note on Motion Calendar:
January 14, 2011

I. INTRODUCTION

Plaintiff, Cascade Yarns, Inc. (“Cascade”), seeks summary judgment on its false advertising and unfair competition claims despite the fact that almost every element of those very factually intensive claims is disputed vigorously by Defendant Knitting Fever,

OPPOSITION TO MOTION FOR
PARTIAL SUMMARY JUDGMENT
(Case No. C10-00861 RSM) — 1

1 Inc. (“KFI”). Cascade brings this Motion notwithstanding that a Rule 26(f) conference has
2 not yet taken place, no scheduling order yet exists, and no defendant has taken any fact or
3 expert discovery or, indeed, even filed an answer. Because the Motion is so premature,
4 KFI moved pursuant to Rule 56(d) for a continuance of Cascade’s motion pending the
5 conclusion of discovery. KFI files this response separately to address Cascade’s motion on
6 the merits – to the extent it can without the benefit of discovery – setting forth reasons why
7 Cascade has not met its burden under Rule 56.

8 Cascade’s Motion suffers from several fatal flaws. Not only has Cascade failed to
9 establish undisputed evidence as to the central elements of its claims (*i.e.*, falsity,
10 consumer deception, materiality of deception, and harm), it has failed to put forth *any*
11 plausibly admissible evidence to support these elements, other than self-serving
12 statements, erroneous interpretations of documents as to which no testimony has been
13 taken, and fiber analysis tests performed by a purported expert whose qualifications and
14 conclusions have not, at this early juncture, been committed to an expert report or been
subject to deposition or evaluation by an expert retained by KFI.

15 Without allowing those Defendants who remain in the case even the opportunity to
16 answer the Complaint, Cascade is asking this Court to find in its favor based on nothing
17 more than its unproven allegations and proffered scientific test reports that it claims
18 support its position. Summary judgment is not simply proper.

19 **II. LEGAL ARGUMENT**

20 **A. Summary Judgment Standard**

21 Summary judgment should only be rendered when the pleadings and discovery
22 demonstrate there is no genuine issue as to any material fact and that the movant is entitled
23 to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). An issue is "genuine" if "a

1 reasonable jury could return a verdict for the nonmoving party" and a fact is material if it
 2 "might affect the outcome of the suit under the governing law." *Woods v. Washington*, No.
 3 10-117, 2011 U.S. Dist. LEXIS 278 , *3-4 (W.D. Wash. January 4, 2011) (Martinez, J.)
 4 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986)). Where a plaintiff is
 5 unable to make a sufficient showing as to some essential element of his case upon which
 6 he will bear the ultimate burden of proof at trial, all other facts are necessarily immaterial.
 7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All reasonable inferences
 8 supported by the evidence are to be drawn in favor of the nonmoving party. *See Villiarimo*
 9 *v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact
 10 might resolve the issues in favor of the nonmoving party, summary judgment must be
 11 denied." *Goodman v. New Hampshire Ins. Co.*, No. 09-1493, 2010 U.S. Dist. LEXIS
 12 125329, *7-8 (W.D. Wash. Nov. 29, 2010)(Martinez, J.) (citing *T.W. Elec. Serv., Inc. v.*
Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987)).

13
 14 **B. Genuine Issues of Material Fact Preclude the Entry of Summary Judgment**

15 In the present case, there are genuine issues of material fact which preclude the
 16 entry of summary judgment in Cascade's favor.

17 Since 2001, KFI has imported cashmere-containing yarns, initially under its own
 18 house brand, and then through Designer Yarns, Ltd. ("Designer Yarns") under the Debbie
 19 Bliss brand, all of which are produced by Defendant Filatura Pettinata V.V.G. Di Stefano
 20 Vaccari & C. (S.A.S.) ("Filatura"), a yarn manufacturer well-regarded in the industry and
 21 with whom KFI has had a long-term relationship. *See* Declaration of Sion Elalouf
 ("Elalouf Decl.") at ¶ 3.

22 In 2006, after Cascade had circulated a test report of Dr. Kenneth Langley
 23 concerning one of KFI's Cashmerino yarns, Mr. Elalouf sought to confirm the fiber

1 content of the Cashmerino yarns. *Id.* at ¶ 4. In confirming that the fiber content of the
2 Cashmerino yarns, Designer Yarns provided both quantitative test reports from SGS Wool
3 Testing Services International showing the cashmere content of the tested Cashmerino
4 yarns in compliance with their labeling, and qualitative DNA test reports from Shirley
5 Technology, Ltd. showing the presence of goat fibers. *Id.* at ¶ 5 and Exhibits A and B
6 thereto.

7 In addition to the test reports provided by Designer Yarns, Mr. Elalouf also secured
8 a signed and notarized statement from Filatura which confirmed that “the correct amount
9 of cashmere fibre has gone into every batch of Cashmerino yarn ever produced by Filatura
10 V.V.G.” *Id.* at ¶ 6 and Exhibit C thereto. Filatura also provided Mr. Elalouf with a copy
11 of a test report that it had secured on its Cashmerino yarns showing the cashmere content
12 of the samples tested in compliance with their labeling. *Id.* at ¶ 7 and Exhibit D thereto. In
13 view of the foregoing, it was Mr. Elalouf’s understanding that the Cashmerino yarns were
14 spun with the correct quantities of constituent fibers. *Id.* at ¶ 8.

15 Since the commencement of the present lawsuit, KFI has secured test reports on
16 different Louisa Harding and Kathmandu yarns at issue in this case which report fiber
17 content in compliance with their labeling. *Id.* at ¶ 9 and Exhibit E thereto. These tests
18 reports, as well as the test reports of Cashmerino yarns referenced above, are directly at
19 odds with the test reports submitted by Cascade. Moreover, they cast doubt on the
20 reliability of other reports offered by Cascade. If nothing else, this conflicting evidence
21 demonstrates that there are genuine issues of fact as to whether KFI’s yarns are properly
22 labeled. When judging the evidence at the summary judgment stage, however, the Court
23 does not make credibility determinations or weigh conflicting evidence. *T.W. Electric
Service, Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987)
(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348,

1 1356 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). Applying these
2 principles to the present case, it is clear that summary judgment is not proper.

3
4 **C. Cascade Has Not Established the Elements of a
False Advertising Claim Under The Lanham Act**

5 In order to win summary judgment on its Lanham Act claim, Cascade must
6 establish: (1) “a false statement of fact by the defendant in a commercial advertisement
7 about its own or another's product; (2) the statement actually deceived or has the tendency
8 to deceive a substantial segment of its audience; (3) the deception is material, in that it is
9 likely to influence the purchasing decision; (4) the defendant caused its false statement to
10 enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result
11 of the false statement, either by direct diversion of sales from itself to defendant or by a
12 lessening of the goodwill associated with its products.” *Southland Sod Farms v. Stover
13 Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). Failure to establish just one of these
14 elements would be fatal to Cascade’s motion, and here Cascade has failed to establish at
15 least four of the five.¹ Because Cascade fails to carry its burden under Rule 56, its
16 summary judgment motion must be denied.

17 **1. Cascade Has Not Established The Requisite False Statement**

18 Cascade’s motion is based on the remarkable premise that the Court must accept
19 whatever Cascade says as true, without even allowing KFI the opportunity to respond to its
20 allegations or challenge them through discovery and/or a *Daubert* motion. For example,
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22 _____
23 ¹ For purposes of this Opposition only, KFI does not dispute that the allegedly false statements entered interstate commerce.

1 Cascade summarily asserts that the false statement prong is met because it has proffered
 2 “scientific” testing from its hired consultant that allegedly “confirms that [the yarns at
 3 issue] contain 0% cashmere, trace amounts of cashmere, or substantially less than is
 4 labeled.” Plaintiff’s Br. at 9. As discussed *infra*, KFI very much disputes the reliability of
 5 such tests and the accuracy of those results especially in light of contrary results in other
 6 testing. Cascade cannot win summary judgment where this dispositive issue, which
 7 according to Cascade hinges on scientific evidence, has not been addressed through expert
 8 disclosures and discovery by both sides, consistent with the Rules of Evidence and Rules
 9 of Civil Procedure.²

10 Another example of Cascade’s quixotic quest to simply allege itself through Rule
 11 56 is Cascade’s argument construing a letter from Filatura as an admission that the yarns at
 12 issue did not contain the labeled amount of cashmere. Of course, Filatura’s statements are
 13 susceptible of equally rational and wholly innocuous alternative interpretations. For
 14 example, Filatura’s statement that “we change the blend and use the best possible cashmere
 15 quality, which will be easier to find in case of lab checks” can readily be construed as
 16 implying that the current blend includes cashmere but that it is not the “best possible
 17 cashmere quality” and is, therefore, difficult to identify during laboratory analysis. Thus,
 18 Cascade’s supposed “admission” not only provides evidence that the products contain
 19

20 ² Cascade also ignores that prior to the 2007 Amendment to the Wool Products Labeling Act, the statute did
 21 not include a definition of “cashmere.” For example, cashmere is defined as both a “fine, downy wool
 22 growing beneath the outer hair of the Cashmere goat” or “a soft fabric made of this wool or of similar fibers.”
 23 See <http://www.thefreedictionary.com/Cashmere> (last visited January 10, 2011) (emphasis added).
 Therefore, to the extent Cascade asserts that the labeling prior to 2007 was literally false (or even only
 misleadingly false) it must present evidence that a significant portion of consumers identified “cashmere” by
 a uniform definition and that the products at issue did not contain 12% of a material that satisfied this
 definition.

1 cashmere but also casts doubt on the accuracy of Cascade’s alleged tests. Ultimately,
2 however, the Court need not choose between competing interpretations at this time.
3 Instead, it must draw all reasonable inferences in KFI’s favor. *Villiarimo*, 281 F.3d at
4 1061.

5 Cascade’s only other alleged evidence of literal falsity is the statement of KFI’s
6 counsel that “while some tests have shown that the years are properly labeled, *others are at*
7 *variance.*” Plaintiff’s Br. at 5 (emphasis supplied by Cascade). As discussed in further
8 detail *infra*, counsel’s statement only further demonstrates that fiber analysis, including
9 tests of Cascade’s yarns, routinely results in divergent outcomes. Thus, the credibility,
10 reliability, and admissibility of these tests is a proper subject of discovery and an issue for
11 trial.

12 **2. Cascade Has Not Established Actually Deception or a**
13 **Tendency to Deceive a Substantial Segment of Its Audience**

14 Cascade offers no evidence that any consumer, let alone a substantial segment of
15 the audience, was actually deceived or was likely to be deceived by the alleged false
16 statement regarding the cashmere content of the products. Instead, Cascade incorrectly
17 asserts that “where a plaintiff proves that a statement is ‘literally false,’ there is no
18 requirement to prove consumer deception.” Plaintiff’s Br. at 8. As an initial matter, and as
19 stated *supra*, Cascade has not established a false statement, let alone a literally false one.

20 Moreover, Cascade does not cite to a single Ninth Circuit case obviating a
21 plaintiff’s obligation to prove consumer deception. The Ninth Circuit has held that the trial
22

1 court correctly applied Circuit precedent where it instructed the jury that “in order for this
2 presumption to apply, the jury must find that defendants engaged in *intentional*
3 deception.” *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 209 (9th Cir. 1989)
4 (emphasis added). Here, Cascade has not proven that any Defendant has intentionally
5 misrepresented the contents of the KFI’s yarns. To the contrary, the evidence of record
6 shows that KFI responded to Cascade’s initial allegations in 2006 by making inquiries of
7 both Designer Yarns and Filatura, that in response to those inquiries KFI received test
8 reports from three different labs and written assurances from Filatura, and that based on
9 those inquiries KFI believed that the Cashmerino yarns were spun with the correct
10 quantities of cashmere. *See* Elalouf Decl. at ¶¶ 5-8. Thus, even if Cascade could establish
11 literal falsehood, it is not entitled to any presumption regarding consumer deception.

12 Finally, even if Cascade were able to establish an (1) intentional; (2) literal; (3)
13 falsehood, summary judgment would still be improper. Cascade appears to conflate
14 “presumption” with “irrefutable proof.” Even the case on which Cascade predominantly
15 relies establishes that any presumption of deception is subject to rebuttal evidence. As the
16 First Circuit explained in *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Avenue*, 284
17 F.3d 302, 319 (1st Cir. 2002), “[n]othing in this opinion, however, is meant to preclude
18 defendants from rebutting the presumption of consumer deception at trial by showing that
19 the labeling did not actually deceive consumers.” Here, even if the presumption of
20 deception were appropriate, KFI, as discussed more fully in its Rule 56(d) motion, should
21 be entitled to conduct discovery regarding any actual confusion in order to overcome the
22 presumption.

1 **3. Cascade Has Not Established That Any Alleged Falsehood**
 2 **Was Material to a Consumer’s Purchasing Decision**

3 In support of its argument that the alleged falsehood was material to a consumer’s
 4 purchasing decision, Cascade cites predominantly to the First Circuit’s decision in *Saks*
 5 *Fifth Avenue*.⁴ Cascade’s lengthy discussion of the decision does not disclose that in *Saks*
 6 *Fifth Avenue*, the court decided an appeal of a summary judgment granted to the
 7 *defendants*. See 284 F.3d at 306. Therefore, in considering the evidence before it, the
 8 First Circuit was required to “construe the record evidence in the light most favorable to,
 9 and drawing all reasonable inferences in favor of, the nonmoving party.” *Id.* at 308 (partial
 10 quotation omitted). In other words, the First Circuit’s decision used the exact opposite
 11 standard of review than what this Court must apply to the instant motion.⁵

12 The divergent standards of review do not amount to a distinction without a
 13 difference. With respect to the materiality of the falsehood, the *Saks Fifth Avenue* court
 14 concluded, in light of the applicable standard of review, that “it seems *reasonable to*
 15 *conclude* that defendants’ misrepresentation of the blazers’ cashmere content is material
 16 because it relates to a characteristic that defines the product at issue” *Id.* at 312
 17 (emphasis added). Cascade also states that the “court further recognized that the
 18 defendants’ ‘aggressive marketing’ of the garments as ‘cashmere blends’ further
 19

20 ⁴ The only other case to which Cascade cites, *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312 (2d
 21 Cir. 1982), involved an equally inapplicable standard of review arising from the appeal of a denial of a
 22 preliminary injunction.

23 ⁵ In addition, in *Saks Fifth Avenue*, “[f]or purposes of this appeal, defendants concede[d] that the issue of
 whether the garments were mislabeled is both material and genuinely in dispute.” *Id.* Moreover, again “[f]or
 purposes of [that] appeal, defendants concede[d] that they have made a false or misleading statement of fact
 in describing their blazers.” *Id.* at 311. Here, KFI does not make, nor does the evidence warrant, any such
 concessions.

1 highlighted the defendants’ own belief that the presence of cashmere was an inherent and
 2 important characteristic of the product.” Plaintiff’s Br. at 10. What the court actually
 3 stated, however, was that – again in light of the standard of review – it was “reasonable to
 4 infer” that defendants’ marketing efforts (of which there is no evidence in the instant case)
 5 suggested that “defendants themselves believed cashmere to be an inherent and important
 6 characteristic” *Id.*⁶

7 Though Cascade incorrectly asserts that “materiality is presumed when a product
 8 misstates the cashmere content it contains,” Plaintiff’s Br. at 10,⁷ it nevertheless proceeds
 9 to offer unsupported conjecture as to the alleged materiality of cashmere content. For
 10 example, Cascade offers the conclusory assertion that “Customers would not pay as much
 11 for KFI’s *Cashmerino* yarns if they knew the yarns did not contain cashmere.” Plaintiff’s
 12 Br. at 11.⁸ Similarly offered without any citation is Cascade’s assertion that the alleged
 13 misrepresentation “is central to the product’s inherent quality or characteristic – that
 14 *Cashmerino* yarns contain the quantities of cashmere disclosed on the labels.” *Id.*;
 15 *compare id.* (offering unfounded speculation regarding materiality) *with Campagnolo*
 16 *S.R.L. v. Full Speed Ahead, Inc.*, 2010 U.S. Dist. LEXIS 46176 (W.D. Wash. May 11,
 17 2010) (Martinez, J.) (evaluating materiality based upon expert report identifying material
 18 purchasing factors among relevant consumers). Simply because Cascade says the
 19 cashmere content is material does not make it so.

20 _____
 21 ⁶ Similarly, with respect to the second alleged falsehood regarding the provenance of the cashmere, the court
 22 rejected defendants’ rebuttal argument because “it ignores what a rational juror could find after drawing all
 23 reasonable inferences in plaintiffs’ favor.” *Id.* at 313.

⁷ Though Defendants cite to *Saks Fifth Avenue* in support of this statement, the case states no such thing.

⁸ Even if this were true, Cascade does not cite to any case finding that a mere increase in price unequivocally
 requires a finding of materiality.

1 Instead, a reasonable fact-finder could – and in this case, should – conclude that the
 2 precise cashmere content is immaterial to the relevant consumer. A myriad of other
 3 factors, such as brand name, packaging, trade press commentary, or store sales person
 4 recommendations, could be the driving force behind a customer’s decision to purchase a
 5 particular yarn.⁹ Moreover, Cascade purports, without support, to treat any alleged
 6 deficiency in cashmere content as equally impactful in the eyes of the consumer. In other
 7 words, under Cascade’s analysis whether the products at issue contain 0% cashmere, trace
 8 amounts of cashmere, or a single thread at variance with the labeled amount is *immaterial*
 9 while any scintilla below the labeled amount is presumptively, conclusively, and
 10 irrefutably *material*. Cascade has no evidence in support of such an argument, let alone
 11 undisputed evidence.

12 **4. Cascade Has Not Established Evidence of Harm**
 13 **Resulting From The Alleged False Advertising**

14 While Cascade discusses at length the remedies allegedly available to a Lanham
 15 Act plaintiff, and speculates in detail regarding potential injuries to a competitor arising
 16 from a Lanham Act violation, it does not offer any evidence of actual injury that it suffered
 17 as a result of KFI’s alleged false advertising.¹⁰ Instead, Cascade, citing again to *Saks Fifth*
 18 *Avenue*, states that a “precise showing [of harm] is not required, and diversion of sales, for
 19 example, would suffice.” 284 F.3d at 318. Of course, Cascade does not present any

20 _____
 21 ⁹ In fact, according to Cascade’s in-house counsel, consumers “would not be able to detect the absence of
 22 cashmere fibers without expert testing.” *See* Declaration of Robert A. Dunbabin, Jr., Dkt. Entry No. 11 at ¶
 23 8. Cascade does not cite a single case where something that was imperceptible to a consumer was found to
 be material.

¹⁰ Ironically, Cascade does assert that “discovery is necessary as to the extent of the defendants’ profits” in
 the same very same motion where it implicitly argues that KFI is not entitled to any discovery to defend
 claims against it. Motion at 14.

1 evidence of diversion of sales. The plaintiffs in *Saks Fifth Avenue*, by contrast, offered
2 “uncontradicted evidence that [plaintiff]’s customers actually reduced their purchases of
3 [plaintiff]’s cashmere blend fabric because they could not compete with [defendant]’s
4 lower-priced garments.” *Id.* As a result, “[b]ased on the evidence presented, a rational
5 factfinder could reasonably infer that the substantial cost savings [defendant] enjoyed from
6 using non-cashmere or recycled cashmere allowed [defendant] to lower the price of its
7 blazers, thereby preventing [plaintiff]’s customers from competing in the market.” *Id.* at
8 319.

9 By only offering examples of theoretical harm while delaying determination of the
10 amount and proper measure of any damages, Cascade confuses the amount of damages
11 with proof that it suffered harm as a result of the alleged false advertising – a critical and
12 required element of a Lanham Act violation. Thus, in *Saks Fifth Avenue*, the court
13 concluded that the aforementioned evidence permitted a “reasonable inference, to which
14 plaintiffs are entitled at summary judgment, [which] enables plaintiffs to demonstrate the
15 *causal* link between the harm they suffered and defendants’ misrepresentations.” *Id.*
16 (emphasis added). Here, Cascade attempts to replace the *Saks Fifth Avenue* plaintiff’s
17 evidence of actual harm (and inference of a causal connection to which Cascade is not
18 entitled) with unsubstantiated allegations that it is “likely” to suffer decreased sales or that
19 consumers “may” reject Cascade’s products. *See, e.g.*, Plaintiff’s Br. at 12 (“KFI’s
20 Statements are Likely to Injure Cascade”); *id.* at 13 (“Thus, other products actually
21 containing cashmere (including those sold by Cascade) are likely to suffer decreased
22 sales”).

1 Cascade asks this Court to grant it summary judgment based on the mere belief that
 2 someday, somehow it may suffer some sort of harm a result of the alleged false
 3 advertising. Even in the preliminary injunction context, “something more than a plaintiff’s
 4 mere subjective belief that he is injured or likely to be damaged is required” *Johnson*
 5 *& Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189 (2d Cir. 1980). Moreover, as the
 6 Ninth Circuit has held, “in a suit for damages under section 43(a) . . . actual evidence of
 7 some injury *resulting from the deception* is an essential element of the plaintiff’s case.”
 8 *Harper House, Inc.*, 889 F.2d at 210.¹¹ As Cascade cannot cite to any specific examples of
 9 harm it allegedly suffered, it indisputably cannot carry its burden to show injury *resulting*
 10 *from the deception*.¹²

11 **D. Cascade’s Consumer Protection Act Claim is Legally Deficient**

12 Cascade’s claim under RCW 19.86.020 fails for the same reasons its Lanham Act
 13 claim fails, as well as for the additional reason that Cascade has not presented any evidence
 14 that the alleged acts negatively impacted the public interest. Moreover, the Supreme Court
 15 of Washington has held that “whether the public has an interest in any given action is to be
 16 determined by the trier of fact from several factors, depending upon the context in which
 17 the alleged acts were committed.” *Hangman Ridge Training Stables, Inc v. Safeco Title*
 18

19
 20 ¹¹ Furthermore, case law from across the federal circuits is clear that “literal falsity, without more, is
 21 insufficient to support an award of money damages to compensate for marketplace injury such as harm to
 22 goodwill” as a “contrary rule would risk conferring an undue windfall on” Lanham Act plaintiffs. *Balance*
 23 *Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 693-94 (6th Cir. 2000) (cited by Cascade).

¹² Even *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1411 (9th Cir. 1993) *superseded in part on other*
 grounds as stated in *R&R P’ners, Inc. v. Tovar*, 2007 U.S. Dist. LEXIS 29819 (D. Nev. Apr. 23, 2007),
 which endorsed a more flexible approach to damages, required “evidence that at least one wholesale
 distributor engaged in switching its product [as] credible proof of the fact of damage.”

1 *Insurance Company*, 105 Wn.2d 778, 790, 719 P.2d 53 1 (1986).¹³ Accordingly, summary
2 judgment on the Washington Consumer Protection Act Claim would be improper.

3 **E. Evidence of Cascade’s Unclean Hands Precludes Summary Judgment**

4 The Ninth Circuit has long established that “unclean hands is a defense to a
5 Lanham Act infringement suit.” *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d
6 837, 847 (9th Cir. 1987); *see also Japan Telecom, Inc. v. Japan Telecom America Inc.*, 287
7 F.3d 866, 870 (9th Cir. 2002) (“it is essential that the plaintiff should not in his trade mark,
8 or in his advertisements and business, be himself guilty of any false or misleading
9 representation.”). In order to prevail, “the defendant must demonstrate that the plaintiff’s
10 conduct is inequitable and that the conduct relates to the subject matter of its claims.”
11 *Fuddruckers*, 826 F.2d at 847. As a consequence, “equity requires that those seeking its
12 protection shall have acted fairly and without fraud or deceit as to the controversy in
13 issue.” *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985) (emphasis
14 added).

15
16 In the present case, even though KFI has yet to even answer the Complaint, KFI
17 has already presented evidence of Cascade’s unclean hands in the form of over twenty test
18 reports on Cascade’s yarns showing their fiber contents at variance with their labels as well
19 as product labels which fail to contain country of origin information as required by law.

20 *See* Supplemental Declaration of Sion Elalouf and Exhibits A and B attached thereto (Dkt.

21 ¹³ The *Hangman* Court went on to identify several “factors . . . relevant to establish public interest: (1) Were
22 the alleged acts committed in the course of defendant’s business? (2) Are the acts part of a pattern or
23 generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is
there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5)
If the act complained of involved a single transaction, were many consumers affected or likely to be affected
by it?” *Id.* Cascade has failed to address any of these factors in its Memorandum in support of its Motion.

1 Nos. 78-79). Insofar as Cascade's central claim in the present case is that KFI is making
2 false representations as to the fiber content of its yarns, evidence that Cascade is engaging
3 in precisely the same conduct should serve to defeat Cascade's summary judgment motion.
4 At the very least, and as set forth more fully in KFI's Rule 56(d) motion, such evidence is
5 sufficiently suggestive of Cascade's unclean hands that KFI should be entitled to engage in
6 discovery on the issue.

7 **III. CONCLUSION**

8 For the reasons stated above, Defendants respectfully request that the Court deny
9 Cascade's Motion for Partial Summary Judgment.

10 DATED this 10th day of January, 2011

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