The Honorable Ricardo S. Martinez

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.

Civil Action No. 2:10-cv-00861 RSM

KNITTING FEVER, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO CASCADE'S MOTION FOR A PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
JULY 30, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

This action arises out of the commercial sale of allegedly mislabeled knitting yarn by Defendant Knitting Fever, Inc. ("KFI"), a knitting yarn importer and distributor.

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Plaintiff, Cascade Yarns. Inc. ("Cascade"), a competing yarn distributor taking its cue (and many of its allegations) from a lawsuit filed against most of the same defendants in the Eastern District of Pennsylvania in 2008, seeks damages and injunctive relief for sales it claims it will lose or has lost as a result of the KFI's conduct. While Cascade tries to spin an intricate tale of deception and conspiracy, the dispute in the present case boils down to whether the labels affixed to KFI's yarns accurately identify their composition. Cascade claims that they do not, KFI claims that they do. The present motion for injunctive relief asks the Court to resolve the ultimate question prematurely and order KFI to re-label its yarns. For the reasons stated below, Cascade has failed to demonstrate both a likelihood of success on the merits and irreparable harm. Accordingly, Cascade's request for preliminary relief must be denied.

II. FACTUAL BACKGROUND

KFI ,based in Amityville, New York, is an importer and distributor of knitting yarn products to retailers throughout the United States. These yarn products include brands such as Noro Silk Garden, Debbie Bliss Cashmerino, Elsebeth Lavold Silky Wool, and Louisa Harding Cashmere (collectively the "Yarns-in-suit"). *See* Amended Complaint at ¶ 1.[1] The Yarns-in-suit comprise various blended yarns that each contain different types of fibers including wool, acrylic, and cashmere.

[1] Cascade's brief lists the following as the yarns at issue; Debbie Bliss Baby Cashmerino, KFI Cashmerino, Debbie Bliss Cashmerino Aran, Debbie Bliss Cashmerino Astrakan, Louisa Harding Kashmir Aran, Noro Cash Iroha, Noro Silk Garden, Debbie Bliss Cashmerino Superchunky, Queensland Collection Big Wave, Queensland Collection Katmandu Aran Tweed, Queensland Collection Katmandu DK Tweed, Elsebeth Lavold Silky Cashmere, Debbie Bliss Cashmerino Chunky, Elsebeth Lavold Calm Wool, Louisa Harding Kashmir Aran, Louisa Harding Kashmir DK, and Louisa Harding Aimee. *See* Plaintiff's Brief at 2, n. 1.

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1 Cascade is a competing importer and distributor of yarns including blended yarns
2 that include cashmere. Cascade has alleged that, as early as May 2006, it received reports
3 that the yarns-in-suit did not contain any cashmere despite their labeling to the contrary.
4 *See* Amended Complaint at ¶ 41. Cascade brought these results to the KFI's attention. In
5 response, KFI assured Cascade that the yarns did, in fact, contain cashmere. Admittedly,
6 Cascade took no further action in 2006 or, indeed, for the next four years. *Id.* ¶ 68.
7 While Cascade was mulling over its "lingering concerns," The Knit With, a retail
8 yarn shop in Chestnut Hill, Pennsylvania, filed a lawsuit in the United States District Court
9 for the Eastern District of Pennsylvania (the "Pennsylvania action") in September of 2008.
10 The Knit With asserted claims against KFI, various individuals associated with KFI, and
11 foreign entities involved in the production or distribution of certain yarns sold by KFI.
12 The same defendants are named in this suit. The Knit With alleged claims for violations of
13 the Lanham Act and RICO, as well as claims for common law unfair competition, breach
14 of warranty, and perfidious trade practices.[2] The basis for all of The Knit With's claims is
15 KFI's alleged mislabeling of two types of its yarns. Moreover, The Knit With has not
16 sought preliminary injunctive relief.
17 Cascade's counsel here is intimately familiar with the Pennsylvania action.
18 Plaintiff served Cascade was a discovery subpoena in the Pennsylvania action, and in
19 March of 2010, Cascade's counsel entered his appearance on behalf of The Knit With.
20 More than three months later, Cascade's counsel filed the present action which parrots, in
21 large part, the Pennsylvania action's allegations and claims. Now, four years since
22 Cascade alleges it received the first yarn report, almost two years since the Pennsylvania
23

[2] All claims except the breach of warranty and RICO claims have been dismissed, and motions for summary judgment filed by both the defendants and the plaintiff are pending in the Pennsylvania action. KFI believes that The Knit With's motion for summary judgment is without any merit, and that Cascade's reliance on it is unwarranted.

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action was filed, and two months since filing the complaint in this action, Cascade seeks injunctive relief. Specifically, Cascade asks this Court to enjoin KFI from; (1) marketing and labeling the Yarns-in-suit as containing certain quantities of cashmere when they do not, and (2) falsely stating that the Yarns-in-suit contain quantities of cashmere. Cascade also asks that KFI provide a guaranty of its yarns pursuant to the Wool Products Labeling Act [3] Cascade can demonstrate neither likelihood of success on the merits nor irreparable harm. Cascade's motion must be denied.

I. LEGAL ARGUMENT

A. Standard for Granting Injunctive Relief

Injunctive relief is a drastic remedy that should only be utilized in extreme cases. *See Sampson v. Murray*, 415 U.S. 61, 88 (1974); *RasterOps v. Radius. Inc.*, 861 F. Supp. 1479, 1482 (N.D. Cal. 1994). Courts must be circumspect in granting a preliminary injunction as it invokes the exercise of "a very far reaching power never to be indulged in except in a case clearly warranting it." *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d

[3] KFI notes that Cascade's motion only seeks to enjoin conduct by KFI, it does not implicate the other defendants. This opposition is submitted on KFI's behalf only. To the extent Cascade claims that the other defendants are to be enjoined, the Court cannot reach the merits of that claim because this court cannot exercise personal jurisdiction over the other defendants. *See Paccar Int'l v. Commercial Bank of Kuwait S.A.K.*, 757 F.2d 1058 (9th Cir. 1985) (vacating grant of a preliminary injunction because the district court lacked jurisdiction over the enjoined defendant); *Harbor Cold Storage, LLC v. Strawberry Hill, LLC*, No. 09-1252, 2009 U.S. Dist. Lexis 103995 (W.D. Wash. Nov. 9, 2009) (court could not reach merits of preliminary injunction because it lacked personal jurisdiction). None of the defendants is a resident of Washington and, other than KFI, none conducts business in Washington or have any minimum contacts with Washington. Cascade's RICO claims are not sufficient to overcome this jurisdictional hurdle. The defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) to address this argument in depth. As a result, this response to the preliminary injunction on behalf of KFI does not waive such arguments as to the other defendants.

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1 141, 143 (9th Cir. 1964). In cases like this, the burden on the party seeking preliminary
2 injunctive relief is heavier where granting such relief would effectively grant the moving
3 party a substantial part of the relief it would obtain only after a full trial on the merits. 5 J.
4 Thomas McCarthy, *Trademarks and Unfair Competition* § 30.30, at 30-76 (4th ed. 2010)
5 (citing *Consumers Union of U.S., Inc. v. Theodore Hamm Brewing Co.*, 314 F. Supp. 697
6 (D. Conn. 1970)).

7 The Ninth Circuit has adopted an "alternative standard" under which a moving
8 party can meet its burden for preliminary injunctive relief if it proves either: (1) a
9 combination of probable success on the merits and the possibility of irreparable injury; or
10 (2) that serious questions are raised and the balance of hardships tips sharply in its favor.
11 *Preminger v. Principi*, 422 F.3d 815, 823 (9th Cir. 2005). These are not separate tests but
12 rather represent the "outer reaches of a single continuum in which the requisite showing of
13 harm increases as the probability of success on the merits decreases." *Microsoft Corp. v.
14 Lindows.com, Inc.*, 2002 U.S. Dist. Lexis 24616, *21 (W.D. Wash. March 15, 2002); *see
15 also Preminger*, 422 F.2d at 826 ("The smaller the probability of a plaintiff's success, the
16 greater must be the showing of irreparable harm."). No matter which test is used, the
17 moving party must demonstrate a significant threat of irreparable injury, irrespective of the
18 magnitude of the injury. *Microsoft Corp.*, 2002 U.S. Dist. Lexis 24616 at *21.

19 A plaintiff's burden is subject to heightened scrutiny when the relief requested is
20 mandatory in nature. The Ninth Circuit draws a clear distinction between a "mandatory
21 injunction" and a "prohibitory injunction." A mandatory injunction seeks to compel the
22 defendant to perform an affirmative act while a prohibitory injunction seeks only to
23 preserve the status quo pending trial. *See Desert Sun Net LLC v. Kepler*, 2006 U.S. Dist.
Lexis 78586, *19 (W.D. Wash. Oct. 27, 2006). The Ninth Circuit disfavors the grant of
mandatory injunctions and any request which requires affirmative conduct by a defendant
is "subject to heightened scrutiny and should not be issued unless the facts and the law

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clearly favor the moving party." *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). The mandatory injunction sought here "'goes well beyond simply maintaining the status quo pendente lite…'" *Stanley v. Univ. of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

Cascade admits that the relief it seeks is mandatory. The requested order would force KFI to take the affirmative step of re-labeling its yarn and revising its advertising, even though it is unclear what the new labels or advertisements would say differently given KFI's position that its labels it currently uses are accurate. As discussed *infra*, the facts and law do not clearly favor Cascade, and its demand for mandatory injunctive relief should be denied.

B. Cascade Cannot Demonstrate Likelihood to Succeed on the Merits

Cascade seeks a preliminary injunction against KFI on the basis of its false advertising claim under the Lanham Act. The parties do not dispute the elements of such a claim. To prevail, Cascade must prove: (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 is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

KFI disputes whether Cascade can demonstrate a likelihood of success on the merits. When there is conflicting evidence regarding the merits of a plaintiff's claim, a plaintiff cannot demonstrate likelihood of success on the merits and the request for a preliminary injunction must be denied. *Pom Wonderful LLC v. Purely Juice, Inc.*, 277

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1 Fed. Appx. 744, 745 (9th Cir. 2008); *see also Hansen Beverage Co. v. Vital Pharm. Inc.*,
2 2010 U.S. Dist. Lexis 40990, at *2 (S.D. Cal. April 27, 2010) (noting that court denied
3 preliminary injunction because there were several disputed issues of fact regarding the
4 claims made by an energy drink producer regarding its product); *Nietech Corp. v. CBS*
5 *Data Servs.*, 2004 U.S. Dist. Lexis 30318 (N.D. Cal. March 1, 2004) (plaintiffs did not
6 establish a likelihood of success on the merits because the parties submitted conflicting
7 evidence on an element of the claim); *Chem-Tainer Indus. v. Wilkin*, 1997 U.S. Dist. Lexis
8 17241 (C.D. Cal. Feb. 21, 1997) (plaintiff failed to show likelihood of success on the
9 merits because there was conflicting evidence regarding the validity of the patent at issue).

10 Here, Cascade cannot satisfy the threshold element of its Lanham Act claim – a
11 false statement by KFI. Cascade alleges that the labels affixed to yarns distributed by KFI
12 are false because the labels indicate that the yarns contain 12% cashmere when, according
13 to Cascade, they contain no cashmere. To support this allegation, Cascade relies upon tests
14 conducted in 2006 and in 2010 performed at its request. Cascade accepts the results of
15 these reports without question or indeed any scrutiny. Such blind acceptance of such test
16 reports is improper.

17 Cascade's pleadings and its motion fail to note various realities of fiber analysis
18 that would serve to constrain the import of the reports on which it relies. First, any fiber
19 analysis is subject to human judgment and human error. Fiber analysis requires a visual
20 examination of a small sample of yarn under a microscope. Apart from the fact that some
21 evaluators are more skilled than others, it is not uncommon for two evaluators to draw
22 varying conclusions about the same sample. *See, e.g.,* F.J. Wortmann and W. Arns,
23 *Quantitative Fiber Mixture Analysis by Scanning Electron Microscopy: Part I: Blends of* *Mohair and Cashmere with Sheep's Wool*, 56 Textile Research Journal 442 (1986), attached as Exhibit 1 to the Declaration of Joshua R. Slavitt ("Slavitt Decl.") filed herewith (noting that "the accuracy that can be achieved [in identifying yarn] depends largely on the

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1 ability of the operator to identify the different fibers."). In fact, trials of fiber analysis
2 laboratories conducted by the Cashmere and Camel Hair Manufacturers Institute
3 ("CCHMI"), the international trade association that is an authority on labeling issues, have
4 shown that fewer than half of the participating laboratories were able to correctly identify
5 the percentage of cashmere and wool in an 80/20 blend within ± 3%. *See* Exhibit 2 to
6 Slavitt Decl.; *see also* Declaration of Sion Elalouf ("Elalouf Decl.") at ¶ 9 filed herewith.
7 The inability of a majority of the fiber analysis laboratories tested to distinguish the types
8 of fiber within ± 3% can be a result of a number of factors, some of which relate to the
9 yarn and others of which relate to the analysis.

10 It is understood in the yarn industry that there are variations in appearance among
11 fibers of the same type, that wool/cashmere blends can have populations of fibers with
12 similar mean diameters, and that the overlap in size distributions of the diameters of the
13 respective fiber populations increases as the differences in the mean diameters of such
14 fibers decreases. *See* Elalouf Decl. at ¶ 6. The potential for inaccurate identification of
15 fibers is also arises when the yarn being tested has been dyed or treated. Environmental
16 conditions such as humidity can also play a role in the evaluation of a yarn sample. *See*
17 Ex. 10 to Ex. A of Guite Decl.; Ex.11 to Ex. A of Guite Decl. The "peculiarities" of wool
18 and cashmere fibers are very similar, and therefore, are hard to distinguish. Ex. 10 to Ex.
19 A of Guite Decl.

20 Apart from potential human error, the procedures used to evaluate yarn may also
21 affect the results. K.D. Langley Fiber Services, the source of the reports relied upon by
22 Cascade, uses light microscopy to test and identify yarn fibers. Other labs, however, use
23 scanning electron microscopy ("SEM"). While both methods are used in fiber analysis,
light microscopy is known to provide a lower resolution of the fiber shape and details, and
fiber analysis based on light microscopy is considered more subjective in the application of
relevant criteria. As a result, light microscopy analysis is more prone to operator bias. *See*

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Elalouf Decl. ¶ 5. SEM, on the other hand, is considered more objective because it is provides greater resolution and allows an evaluator to more easily identify objective distinguishing factors such as, for example, cuticle height. Experts have acknowledged that for "wool/cashmere mixtures, extensive round trials have shown that analyzing these blends by light microscopy is unreliable, if not impossible." F.J. Wortmann and W. Arns, *Quantitative Fiber Mixture Analysis by Scanning Electron Microscopy: Part I: Blends of Mohair and Cashmere with Sheep's Wool*, 56 Textile Research Journal 442 (1986), attached as Ex. 1 to Slavitt Decl.; *see also* W.D. Ainsworth and Liqin Zhang, *Microscope Analysis of Animal Fibre Blends* at 2-14 (November 2005), attached as Ex. 3 to Slavitt Decl.

The reports offered by Cascade are also subject to scrutiny because they fail to include the error limits of the results that are reported. Without a satatement of the error limits, these reports are of limited value. *See* Elalouf Decl.¶ 7. "The measurements must be made such that the limits of uncertainty can be assigned with a stated probability. Without such an assignment, no logical use can be made of the data." F.J. Wortmann et al., *Quantitative Fiber Mixture Analysis by Scanning Electron Microscopy: Part VI: Possibilities and Limitations of the Analysis of Binary Specialty Fiber/Wool Blends in View of Test Method IWTO-58*, 73 Textile Research Journal 782 (2003), attached as Ex. 4 to Slavitt Decl. The numbers of fibers identified and the blend ratio of the yarn also affect the error limit. The fewer the number of fibers identified, the higher the error limit associated with such an analysis. The Langely reports from 2006 are based on identifications of only 500 fibers, while the 2010 reports are based on between 500 and 1000 fibers. As a result, there are substantial, but unstated, error limits associated with these reports which cast doubt on the relevance of the reports. *See, e.g.,* Ex. 24 to Ex. A of Guite Decl.

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At this stage, the reports offered by Cascade cannot be reconciled with the manufacturer, Filatura Pettinata's, confirmation that cashmere sufficient to yield a 12% cashmere blend was used to produce the yarns-in-suit. Additionally, the manufacturer has acknowledged that it conducts control tests to ensure the composition of the yarns and to enable it to adjust the blends lot by lot if percentages need to be adjusted.[4] Ex. 10 to Ex. A of Guite Decl.

Even assuming that the reports referenced by Cascade are accurate, the application of their results is limited in scope and does not demonstrate a likelihood of success on the merits. Each individual report only reflects the composition of a single sample taken from a single ball of yarn drawn from a single lot. Cascade presents no evidence to demonstrate that the yarn samples tested are representative of the entire run or brand of yarn. To this point, fiber analysis laboratories routinely include disclaimers in their reports to the effect that their reports ***only*** apply to the specific samples tested, and are not necessarily indicative of the qualities of apparently identical or similar product. *See* Elalouf Decl. ¶ 8. Such a disclaimer is evident on the report from STR attached to the Amended Complaint as Exhibit C.[5] Additionally, Cascade does not offer any proof about the chain of custody of the yarn samples that were tested. The only assurance offered that the yarns tested are those of KFI is the names listed on the report. Such uncertainty and conflicting evidence

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[4] Pursuant to CCHMI standards, a deviation of plus or minus three percent between the percentage of a fiber listed on a label and the percentage of a fiber contained in a yarn is acceptable

[5] The STR Report warns "[l]etters and reports apply only to the specific materials, products or processes tested, examined or surveyed and are not necessarily indicative of the qualities of apparently identical of similar materials, products or processes . . . STR has not performed a complete analysis of the product. The test results contained in this report indicate that the product has passed or failed the specific tests only. These test results, even if rated as 'Passed' do not indicate or certify that the product is safe for commercial or consumer use." STR Report, attached to Amended Complaint as Ex. C.

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1 does not justify the grant of injunctive relief, relief that would provide Cascade with the
2 same relief it would receive after a full trial on the merits.
3 The *Pom* case in the Ninth Circuit is analogous to the present situation. *Pom*, 277
4 Fed. Appx. at 745. In *Pom*, the plaintiff claimed that the advertisements of its competitor
5 in the pomegranate juice market were false. The advertisements claimed that the
6 competitor's juice was 100% pomegranate juice. The plaintiff alleged that the competitor
7 added sugars and other ingredients to its juice, and thus its product was not 100% juice.
8 Informing the inquiry were regulations promulgated by the Food and Drug Administration
9 regarding juice labeling, similar to the wool labeling act at issue here. The Ninth Circuit
10 affirmed the district court's denial of plaintiff's motion for a preliminary injunction.
11 Agreeing with the district court, the Ninth Circuit noted that the parties had submitted
12 conflicting information about the defendant's product, including what ingredients were
13 added and whether the varietal of pomegranate, farming practices, and processing methods
14 affected the laboratory results used to identify the percentage of juice. The conflicting
15 evidence called into question plaintiff's likelihood of success on the merits and injunctive
16 relief was improper. *Id.* Here, like in *Pom*, there is conflicting evidence about the
17 composition of KFI's yarn and the tests used to determine that composition. Such
18 conflicting evidence does not establish likelihood of success on the merits.

19 **C. Cascade Cannot Demonstrate Irreparable Harm**

20 Cascade cannot demonstrate a likelihood of success on the merits, therefore, its
21 burden to demonstrate irreparable harm is heightened. Cascade cannot satisfy its burden
22 for at least two reasons; Cascade unreasonably delayed in seeking injunctive relief, and
23 Cascade presents no evidence to support its claim of injury to itself, or injury to
consumers, the parties intended to be protected by the Lanham Act.

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A "[p]laintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377(9th Cir. 1985) (affirming denial of injunction related to exclusivity provision that had been in effect for a number of years); *see also Miller v. California Pacific Medical Ctr.*, 991 F.2d 536 (9th Cir. 1993) (vacated on other grounds). The requirement of speedy action is more stringent for preliminary injunctive relief than for permanent relief:

> A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy relief and cannot complain of the delay involved pending any final relief to which it may be entitled after a trial on all the issues.

McCarthy, *supra*, § 30:53, at 30-127 (quoting *Helena Rubenstein, Inc. v. Frances Denney, Inc.*, 286 F. Supp. 132 (S.D.N.Y. 1968)). "Where no new harm is imminent, and where no compelling reason is apparent, the district court [is] not required to issue a preliminary injunction against a practice which has continued unchallenged for several years." *Id.*; *see also Whittier College v. ABA*, No. 07-1817, 2007 U.S. Dist. LEXIS 43707 (C.D. Cal. May 7, 2007) (denying preliminary injunction and noting that at a minimum the college was on notice of the challenged practice eighteen months before bringing suit and seeking injunctive relief).

In the present case, Cascade cannot demonstrate irreparable harm where it has delayed moving for injunctive relief for a period of at least four years. Such a lengthy delay undercuts any presumption of irreparable harm it may have otherwise enjoyed. *See, e.g., eAcceleration Corp. v. Trend Micro, Inc.*, 408 F. Supp.2d 1110, 1122 (W.D. Wash. 2006) (holding that the plaintiff's delay of approximately one year before moving for a preliminary injunction contradicted its assertion that it was suffering from "urgent,

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continuing, and irreparable harm"). Cascade admits that it was on notice of the allegedly false labeling as of May 26, 2006 when it claims it received the first report on the composition of the Yarns-in-suit. *See* Amended Complaint at ¶ 41. It further admits that, other than inquiring of KFI, it took no further action in 2006 based upon KFI's representations in the Fall of 2006 that its labels were accurate.

In 2008, Mr. Dunbabin, in-house counsel for Cascade, made another inquiry regarding a KFI yarn but, again, Cascade took no formal action. *See* Dunbabin Decl. ¶ 9. Even after the Knit With filed the Pennsylvania action in September 2008, asserting essentially the same claims that Cascade has asserted here, Cascade did nothing to seek relief. Cascade was subpoenaed in the Pennsylvania action pursuant to a court order entered on December 14, 2009. In March of 2010, Cascade's counsel in this matter entered an appearance in the Pennsylvania matter on behalf of the Knit With, yet he still waited until May 2010 to file the present complaint despite the fact that the allegations closely track the Pennsylvania action filed almost two years earlier. Cascade's counsel then waited still another two months to seek injunctive relief. A delay of over 4 years from the initial discovery of allegedly false labeling, and at a minimum a delay of four months from the date Cascade's counsel became directly involved in the Pennsylvania action is wholly inconsistent with Cascade's assertion of irreparable harm and the need for injunctive relief. It has not alleged a new or imminent harm that has arisen in the last month or even the last four months and, for this reason alone, Cascade's motion must be denied.

Cascade's motion also fails to offer any evidence of the actual irreparable injury it would suffer should the relief requested be denied. To establish irreparable harm, a plaintiff "must do more than merely allege it, it must '*demonstrate* immediate threatened injury as a prerequisite to injunctive relief.'" *Valeo Intellectual Property, Inc. v. Data*

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1 *Depth Corp.*, 368 F. Supp.2d 1121, 1128 (W.D. Wash. 2005) (quoting *Caribbean Marine*
2 *Servs. Co. v. Baldridge*, 844 F.2d 668, 675 (9th Cir. 1988)). Evidence that only suggests a
3 possibility of harm does not satisfy plaintiff's burden to provide "clear evidence" of
4 irreparable harm. *Id.* A speculative injury is not sufficient. *Caribbean Marine*, 844 F.2d
5 at 675.

6 In the present case, Cascade presents no evidence that demonstrates that it has or
7 will experience irreparable harm. Cascade merely asserts that, without an injunction, it
8 will lose prospective customers and goodwill. *See* Plaintiff's Brief at 4, 6, 11. It simply
9 assumes irreparable harm without actually providing any support for such assertions.
10 Cascade offers Mr. Dunbabin's speculations that Cascade will lose customers and revenue
11 will suffer. *See* Dunbabin Decl. at ¶ 8. It does not offer any documentary support such as
12 surveys, emails, financial statements, customer complaints, or concrete examples of lost
13 customers.

14 Cascade (incorrectly) presumes that any loss of customers or good will is a result of
15 KFI's labeling, not effective competition, or consumer preference for the Debbie Bliss
16 brand regardless of the yarns' composition. *See, e.g., CKE Restaurant v. Jack in the Box*,
17 494 F.Supp.2d 1139, 1146 (C.D. Cal. 2007) (denying preliminary injunction because
18 evidence presented was not sufficient to demonstrate that plaintiffs were harmed by false
19 representations, as opposed to the mere advertisement of a competing product that used
20 effective marketing techniques). This failure of proof, coupled with Cascade's extensive
21 delay, leaves little room for the assertion that the harm suffered by Cascade is urgent,
22 continuing and irreparable and, therefore utterly "belies [their] claims of irreparable harm."
23 *Valeo Intellectual Property*, 368 F. Supp.2d at 1128.

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D. The Harm to KFI From Imposition of an Injunction Outweighs Any Harm to the Cascade

Cascade's vague allegations of harm to its goodwill and potential loss of customers do not outweigh the harm KFI would experience if the Court granted Cascade's request for injunctive relief. As discussed *supra*, Cascade's claims of harm are speculative and unsupported by any evidence. In fact, Cascade has freely discussed its concerns about KFI on its website and has made it known that its yarns are distinguishable from those offered by KFI. In doing so, it would appear that Cascade is attempting to benefit from the publicity associated with the lawsuits against KFI. Further, it is difficult to envision any harm to Cascade when, by its own actions, or inaction in this case, it has demonstrated a casual indifference to protecting its alleged interests.

On the other hand, the harm KFI would experience is concrete and immediate. Cascade seeks an order enjoining KFI from marketing and labeling yarns as containing certain fibers where the yarn does not contain such fibers. Cascade assumes that because KFI has re-labeled its yarns in the past, that such an endeavor has no associated costs. First, such an order begs the question: What should the labels say? KFI believes its yarns are accurately labeled and that no re-labeling is warranted. What Cascade really wants is to force KFI to re-label its yarns to indicate that the yarns contain no cashmere, simply because Cascade's reports say so.

In order to re-label its yarn, KFI would have to remove current yarn stock from the market, create new labels, affix new labels and re-distribute the yarn. The harm to KFI in performing this exercise is two-fold. First, the absence of KFI yarns from the market, even if only for a temporary period of time, would reduce KFI's sales, revenue, and visibility to consumers. Second, the creation, printing, and application of new labels would require the substantial expenditures. Moreover, assuming the lawsuit is resolved in KFI's favor, KFI would re-incur this cost to re-label it yarns to reflect their cashmere content as it was stated

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1 before the imposition of any injunctive relief. As the balance of hardships tips clearly
2 against the issuance of the requested preliminary injunction, Cascade's motion should be
3 denied.[6]

4 ## II. CONCLUSION

5 For all the foregoing reasons, Defendant Knitting Fever, Inc. respectfully requests
6 that this Honorable Court deny Cascade's Motion for a Preliminary Injunction.

7

8 DATED this 26th day of July, 2010.

9 Pepper Hamilton LLP
Attorneys for Defendants

10

11 By <u>*/s/Joshua R. Slavitt*</u>
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22 [6] In view of the costs associated with re-labeling, if the Court is inclined to award Cascade injunctive relief, it should order Cascade to post a substantial bond to protect
23 KFI's from the costs and damages incurred as the result of a wrongful injunction.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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The Honorable Ricardo S. Martinez

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.	Civil Action No. 2:10-cv-00861 RSM **[PROPOSED] ORDER** NOTE ON MOTION CALENDAR: July 30, 2010 **ORAL ARGUMENT REQUESTED**

ORDER

AND NOW, this ____ day of ________________, 2010, upon consideration of Plaintiff, Cascade Yarns, Inc.'s Motion for a Preliminary Injunction, the opposition filed in response thereto, and for good and sufficient cause shown, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

____
Ricardo S. Martinez, U.S.D.J.

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