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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 REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION TO ENJOIN UNFAIR COMPETITION AND FALSE ADVERTISING UNDER THE LANHAM ACT, 15 U.S.C. § 1051

Note On Motion Calendar: July 30, 2010

I. Introduction

More telling than what KFI argues in its opposition is what KFI does not say. KFI offers *no evidence* to contradict the test reports from K.D. Langley Fiber Services, nor does it dispute that a multitude of KFI’s products are mislabeled. KFI offers *no testimony*, in its purported “declarations,” to claim its products are properly labeled. Put simply, KFI *does not dispute* with evidence or testimony *that its products are falsely labeled* under federal law. KFI’s silence speaks volumes: the nature of the mislabeling is clear.

1 KFI's tacit admission is even more damning as defense counsel complains that "KFI
 2 would have to remove current yarn stock from the market, create new labels, affix new labels and
 3 re-distribute the yarn." Opp. at 15:17-18. In other words, KFI not only does not dispute, but
 4 appears to admit to selling and distributing falsely labeled yarns. It asks the Court to allow it to
 5 continue mislabeling as usual. This tacit admission is all the more significant when one considers
 6 that KFI elected not to address Cascade's alternate request for relief: That KFI file a continuing
 7 guaranty of its products with the FTC. This simple form requires that KFI guarantee, under
 8 penalty of perjury, that its products are labeled in accordance with the Wool Products Labeling
 9 Act of 1939, 15 U.S.C. § 68 ("WPLA"). Cascade even offered to withdraw this motion if KFI
 10 would merely agree to file a continuing guaranty, stating that its products are truthfully labeled.
 11 Reply Declaration of Robert Guite in Support of Motion for Preliminary Injunction ("Reply Guite
 12 Decl."), Ex. A. KFI ignored this offer. *Id.*, ¶ 2.

13 In any event, KFI elected not to guaranty its labels under penalty of perjury, deciding
 14 instead to continue selling falsely labeled goods and to oppose this motion solely on procedural
 15 grounds. KFI utterly fails to rebut the showing made in Cascade's opening brief that KFI
 16 materially misrepresents the fiber content of its yarn products sold in commerce to Cascade's
 17 detriment. The only harm it will suffer by a preliminary injunction is the early demise of its
 18 scheme to mislabel and unfairly compete.

19 **II. Cascade's Request to Strike**

20 Pursuant to LR 7(g), Cascade moves to strike the Declarations of Sion Elalouf ("Elalouf
 21 Decl.") and Joshua Slavitt ("Slavitt Decl.") in their entirety.

22 **A. The Court Should Not Consider And Should Strike The Unsworn 23 "Declaration" of Sion Elalouf**

24 **1. Mr. Elalouf's "Declaration" Lacks Foundation**

25 In order for lay testimony to be admissible, a witness' personal knowledge must be
 26 established. Fed. R. Evid. 602; *United States v. Lake*, 150 F.3d 269, 273 (3d Cir. 1998). To

1 establish a proper foundation, the source of the witness' personal knowledge must be disclosed;
 2 stating that the witness is "aware" of the subject matter of his or her testimony is insufficient.
 3 *Ward v. First Fed. Sav. Bank*, 173 F.3d 611, 617-18 (7th Cir. 1999). A witness' bald assertion of
 4 his "understanding" is insufficient, without a basis or foundation. *See, e.g., Travelers Cas. & Sur.*
 5 *Co. of Am. v. Telstar Const. Co.*, 252 F. Supp. 2d 917, 924-25 (D. Ariz. 2003).

6 Mr. Elalouf's declaration is devoid of the basis of his knowledge or foundation. He states
 7 only that he is a New York resident over the age of 21 and that he "has personal knowledge of the
 8 facts stated in this Affidavit." Dkt. No. 40 at ¶¶ 1-3. More is the apparent invocations of the
 9 following phrases: "It is my understanding;" "It is also my understanding;" and "my belief." Dkt.
 10 No. 40 at ¶¶ 5-10. These qualifiers suggest hearsay not personal knowledge, and should also be
 11 rejected pursuant to Fed. R. Evid. 802. A non-expert must demonstrate personal knowledge of
 12 the facts. *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981).

13 **2. Mr. Elalouf is Not Qualified as an Expert and His Testimony Should**
 14 **Be Stricken**

15 Mr. Elalouf asserts no familiarity with or expertise in fiber analysis and lays no foundation
 16 for his statements. Lay opinions cannot be based on scientific, technical, or other specialized
 17 knowledge, and a party cannot offer an expert opinion "in lay witness clothing" to evade Fed. R.
 18 Evid. 702. *Coalition for a Sustainable Delta v. McCamman*, 2010 U.S. Dist. LEXIS 73747 *57-
 19 58 (E.D. Cal., July 21, 2010); *see* Fed. R. Evid. 701. Here, Mr. Elalouf opined on several
 20 scientific and technical topics requiring specialized knowledge of wool and cashmere
 21 manufacturing and fiber analysis.¹ However, Mr. Elalouf is no expert, and does not in any way
 22 demonstrate how he is qualified opine on the topics in his declaration. *See Stucco & Constr.*
 23 *Materials, Inc. v. Trans-Net, Inc.*, 2010 U.S. Dist. LEXIS 11926, *11-12 (W.D. Wash., Feb. 11,

24 ¹ Mr. Elalouf opined on the following topics beyond common knowledge: (1) the subjectivity of fiber analysis using
 25 a light microscopy technique; (2) distributions of the diameters for wool/cashmere blend fibers; (3) the value of
 26 reports of percentages of constituent fibers in fiber analysis reports; (4) certain practices of fiber analysis laboratories;
 and (5) findings of trials of fiber analysis laboratories conducted by the Cashmere and Camel Hair Manufacturers
 Institute. Mr. Elalouf also opines on the reliability of the fiber analysis reports submitted by Cascade.

1 2010) (Martinez, J.). Mr. Elalouf is a lay witness whose unqualified opinions amount to mere
 2 speculation that should not be considered.² *Id.*

3 **3. Even If Mr. Elalouf Were Qualified to Offer Expert Opinion His**
 4 **Declaration Should be Stricken as it is Not Properly Verified**

5 Declarations submitted to this Court must be verified as true and correct, be made under
 6 penalty of perjury, and substantially comply with 28 U.S.C. §1746.³ *See CFTC v. Topworth Int'l,*
 7 *Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999). However, Mr. Elalouf only “verified” his statement as
 8 true and correct “to the best of [his] knowledge, information, and belief” and failed to date his
 9 purported declaration or make it under penalty of perjury. Dkt. No. 40, p. 3. Declarations that
 10 are undated and not signed “under penalty of perjury” should not be considered. *See Perschau v.*
 11 *USF Ins. Co.*, 1999 U.S. Dist. LEXIS 3334 * 11 (E.D. Pa., March 22, 1999) (construing § 1746 as
 12 requiring signature “under penalty of perjury”). Equivocated verifications like Mr. Elalouf’s
 13 render the accompanying declaration inadmissible, as they do not comply with federal law and
 14 should not be considered by this Court. *See, e.g., United States v. Approximately \$ 8,024.00 in*
 15 *U.S. Currency*, 2009 U.S. Dist. LEXIS 54727 *8-9 (E.D. Cal., June 29, 2009); Fed. R. Evid. 602.⁴
 16 Declarations must be made “under penalty of perjury” in order to be valid. *See, Burgess v.*
 17 *Moore*, 39 F.3d 216 (8th Cir. 1994); *Williams v. Browman*, 981 F.2d 904, 904 (6th Cir. 1992).

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 19
 20 ² Even if Mr. Elalouf’s statements are considered lay opinions, the Court should still strike his declaration because he
 bases his opinions on “[his] understanding,” rather than any observation. *See* Fed. R. Evid. 701.

21 ³ 28 U.S.C. §1746 requires a declarant to include a verification substantially similar to the following: “I declare (or
 22 certify, verify, or state) under penalty of perjury that the foregoing is true and correct.” The Elalouf and Slavitt
 23 declarations state “I take this verification subject to the penalties of Title 28 U.S.C. § 1746 relating to unsworn
 declarations.” There is no penalty in section 1746; neither Mr. Elalouf nor Mr. Slavitt state that their testimony is
 made under penalty of perjury as required by section 1746. Like the failure to submit the continuing guaranty with
 the FTC, this language can only be tactical and made to avoid making any statements under penalty of perjury.

24 ⁴ Cascade submits that these omissions are not the result of oversight as Messrs. Slavitt and Elalouf have already
 25 been advised of these deficiencies in another action and they are, in fact, capable of submitting compliant
 26 declarations. Reply Guite Decl., ¶ 4 and Ex. C. By letter of July 28, Cascade requested that KFI strike the Elalouf
 and Slavitt declarations or submit declarations that comply with 28 U.S.C. § 1746. *Id.*, Ex. D. Defense counsel
 refused to strike the improper declarations or to resubmit proper declarations leaving Cascade with no option other
 than this request to strike their improper testimony. *Id.*, Ex. E.

1 **B. The Court Should Not Consider And Should Strike The Unsworn**
 2 **“Declaration” of Joshua Slavitt and All Exhibits Thereto**

3 Exhibits 1 through 4 to the Slavitt declaration should be stricken as they contain hearsay
 4 not within an exception. Fed. R. Evid. 801, 802. Mr. Slavitt has not authenticated Exhibits 1-4,
 5 which purport to be trade journals regarding fiber content and fiber analysis, in any manner
 6 excepting them from the hearsay rule. Mr. Slavitt did not -- and as a non-expert *cannot* --
 7 authenticate the articles as learned treatises under Fed. R. Evid. 803(18).⁵ *See Trenton v.*
 8 *Barcklay*, 2008 U.S. Dist. LEXIS 59726 *10 (D. Ariz., July 22, 2008) (holding that the learned
 9 treatise exception requires authentication by an expert); Fed. R. Evid. 803(18). Consequently,
 10 they are unreliable and, in the absence of an expert’s authentication, should be stricken. Fed. R.
 11 Evid. 801, 802, 803(6), 803(18).⁶ Finally, Mr. Slavitt’s declaration should also be stricken for
 12 failure to comply with 28 U.S.C. § 1746 as it is not made under penalty of perjury.

13 **III. Granting The Injunction Imposes No Burden on KFI**

14 Cascade seeks a narrow preliminary injunction either requiring KFI to submit a continuing
 15 guaranty as provided by the WPLA, certifying that its products are not misbranded, and/or
 16 restraining KFI from selling products whose labels do not accurately reflect the products’ actual
 17 fiber content. Cascade merely requests that KFI comply with the WPLA and FTC regulations.
 18 Should the Court grant the motion, the only burden on KFI will be to remove from commerce any
 19 mislabeled yarn products or file a continuing guaranty with the FTC.

20 KFI’s opposition asserts, without factual citation, that complying with the requested
 21 injunction would require KFI “to remove yarn stock from the market, create new labels, affix new
 22 labels and redistribute the yarn.” Opp. at 15:18-19. Of course, these steps would only be

24 ⁵ Even if they are considered, the articles are irrelevant to the instant motion. At most, they suggest that there is a
 25 potential for variation in fiber testing and a margin of error. These publications are unavailing to KFI given that none
 26 of the test results that Cascade submits are within this margin of error.

⁶ Given that KFI has responded to a motion for summary judgment in the Eastern District of Pennsylvania case, it is
 telling that it was unable to secure an expert to testify on their behalf.

1 required if the yarn products' fiber content is misstated. Thus, KFI would assertedly be
2 "burdened" by the suspension of its highly-profitable practice of mislabeling products. Proper
3 labeling is only a burden to a company intent on selling mislabeled products. Simply put, there is
4 no legitimate burden on KFI. *See, e.g., Visioneer, Inc. v. Umax Techs., Inc.*, 1998 U.S. Dist.
5 LEXIS 23431, Case No. C-98-20922-RMW (N.D. Cal., Dec. 7, 1998) (enjoining false statements
6 not a burden). Striking is KFI's contention that it would not know how to label its products. *See*
7 *Opp.* at 15:14 ("What should the labels say?"). The labels should, as required by the WPLA and
8 FTC regulations, contain *an accurate* representation of the fiber content of the product. 15
9 U.S.C. § 68; *see also* 16 C.F.R. 300.3 ("Required Label Information").

10 KFI's protestations about any burden are belied by its actions. KFI's opposition does not
11 even address the fact that it can comply with Cascade's requested injunction by doing no more
12 than filing a document with FTC that guarantees, under penalty of perjury, "that when it ships or
13 delivers any wool product, the product will not be misbranded within the meaning of the Wool
14 Products Labeling Act and the rules and regulations under that Act." Reply Guite Decl., Ex. B.
15 Prior to KFI filing its opposition to this motion, Cascade offered to strike this motion if KFI
16 would agree to file a continuing guaranty with the FTC. *Id.*, Ex. A. Rather than guaranteeing that
17 their products were truthfully labeled, KFI ignored Cascade's offer. *Id.*, ¶ 2.

18 The balance of hardships favors the granting the preliminary injunction. Cascade has
19 offered considerable evidence that KFI's distribution of mislabeled yarn products in interstate
20 commerce harms Cascade's business and deceives and confuses the general public. Notably,
21 nowhere in its opposition, nor in the purported "declarations," is there an assertion that KFI's
22 labels are anything other than false. Injunctive relief merely requires KFI to cease sale of falsely
23 labeled goods and compete fairly with Cascade; this is not a legitimate "burden." If KFI actually
24 contends its labels are truthful, it can avoid any burden by filing a continuing guaranty with the
25 FTC.

1 **IV. Cascade Has Demonstrated That It Is Likely to Succeed On the Merits**

2 **A. KFI Is Selling Mislabeled Products In Interstate Commerce**

3 Cascade demonstrated in its opening brief that fiber analysis testing confirms that KFI has
 4 distributed into interstate commerce materially mislabeled yarn products. *KFI offers no test*
 5 *result or testimony to contradict the obvious conclusion that its goods are mislabeled.* Because
 6 “the burdens at the preliminary injunction stage track the burdens at trial[,]” once Cascade
 7 showed a likelihood of success on its unfair competition claim, the burden shifted to KFI to show
 8 a likelihood that its affirmative defense will succeed or to rebut Cascade’s evidence. *Gonzales v.*
 9 *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Perfect 10, Inc. v.*
 10 *Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (“once the moving party has carried its
 11 burden of showing a likelihood of success on the merits, the burden shifts to the nonmoving party
 12 to show a likelihood that its affirmative defense will succeed”).

13 Apparently aware of its fraud, KFI elected to ignore this burden in its opposition. Indeed,
 14 despite the fact that KFI has been litigating substantially the same issues since 2008, KFI was not
 15 able to come forward with a single test report or declaration stating that its labels accurately
 16 reflect its products’ fiber content. To the contrary, KFI and Mr. Elalouf do nothing but make
 17 equivocal statements as to their belief of the labels’ accuracy. For example, Mr. Elalouf declares
 18 that “[t]he labels on the Cashmerino yarns that KFI has sold to The Knit With [the plaintiff in the
 19 Pennsylvania action] were accurate *to the best of my knowledge.*” Elalouf Decl., ¶ 3 (emphasis
 20 added). He further states, “[i]f the labels were inaccurate in any way, such inaccuracies were
 21 without my knowledge.” *Id.*, ¶ 4. Mr. Elalouf’s personal knowledge is irrelevant; federal law
 22 requires that KFI accurately label its products. Likewise, KFI states to this Court that “KFI
 23 believes its yarns are accurately labeled.” Opp. at 15:14-15. Nevertheless, KFI’s belief and
 24 understanding are irrelevant to this motion.⁷ Cascade seeks to stop the injury to Cascade’s
 25 potential business, and damage to the public’s perception of yarn and luxury fiber products.

26 ⁷ Of course, the Defendants’ intent is relevant to other causes of action raised by the First Amended Complaint.

1 KFI offers *no evidence* that rebuts Cascade's evidence. It has *no evidence* to show that its
2 labels are accurate. Deflecting from the merits, KFI offers only speculation regarding fiber
3 testing, and meritless claims that the burden imposed is onerous.

4 **B. The Test Results Upon Which Cascade Relies Demonstrate That KFI Has**
5 **Sold Mislabeled Yarn Products In Commerce**

6 Despite the fact that KFI claims that there is "conflicting evidence regarding the merit of
7 [Cascade's] claim," *KFI does not offer any evidence* that conflicts with Cascade's test results.
8 Even if Mr. Elalouf's and Mr. Slavitt's declarations contained any admissible evidence, which
9 they do not, KFI offers *no evidence* to show that its yarns are anything other than falsely labeled.
10 Looking at KFI's arguments and statements in the most favorable light, its "evidence" is nothing
11 more than a speculative critique on fiber testing. Cascade submits that the un rebutted test results
12 and the lack of any contradictory evidence from KFI warrant the issuance of the injunction.

13 Although KFI presents no evidence contradicting Cascade's test results, should this Court
14 determine that an evidentiary hearing is necessary, Cascade would present the testimony of Mr.
15 Langley (the expert who performed testing of the subject yarns). Testimony could address any
16 evidentiary concerns raised by KFI. Tellingly, KFI has not requested an evidentiary hearing.

17 **C. KFI's Reliance On The *Pom* Decision Is Misplaced**

18 KFI places great reliance on the Ninth Circuit's unpublished decision in *Pom Wonderful*
19 *LLC v. Purely Juice, Inc.*, 277 Fed. Appx. 744 (9th Cir. 2008). KFI goes as far as to declare than
20 the *Pom* case is "analogous" to the present situation. While the short, unpublished Ninth Circuit
21 decision might facially appear analogous, a review of the more factually detailed district court
22 order affirmed by the Ninth Circuit reveals that KFI's reliance is misplaced.

23 First, in *Pom* the plaintiff sought the imposition of an injunction that was different that the
24 FDA's regulations. Specifically, the plaintiff sought "an injunction based on defendants' alleged
25 failure to comply with standards which are different than those set forth by the FDA." *Pom*
26 *Wonderful LLC v. Purely Juice, Inc.*, ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY

1 INJUNCTION, at p. 7, Case No. CV 07-02633 CAS (JWJx), (C.D. Cal., July 10, 2007).⁸ As the
 2 court framed it, “[i]n essence, plaintiff is arguing that this Court *should create different criteria*
 3 *than the FDA* for which juices may be labeled ‘100% juice’” *Id.* (emphasis added.) In
 4 contrast, Cascade seeks an injunction based on KFI’s *failure to comply with FTC regulations*.
 5 KFI need not meet a different standard, than the one promulgated by the FTC.

6 Second, in *Pom* there was a factual dispute. There, the defendant submitted actual test
 7 results that contradicted the plaintiff’s false labeling claims. The *Pom* plaintiff submitted test
 8 results and, “[b]ased on the laboratory results, Pom argue[d] that Purely Juice’s statements on its
 9 bottle and on its website that it contains ‘100% pomegranate’ juice is literally false, and
 10 materially deceptive.” *Pom* District Court Order at 4. The defendant countered with *admissible*
 11 *evidence* in the form of “laboratory results authenticating the [defendant’s] pomegranate juice.”
 12 *Id.* at 9. The record here, in contrast, is devoid of any evidence supporting the accuracy of KFI’s
 13 labels. This distinction is determinative and renders the *Pom* case wholly unavailing to KFI. KFI
 14 presents no evidence to rebut Cascade’s showing that it is likely to succeed on the merits.

15 **V. Cascade Will Suffer Irreparable Harm Absent An Injunction**

16 KFI argues that Cascade cannot prove that it will suffer irreparable harm if KFI,
 17 Cascade’s direct competitor, is allowed to continue to compete unfairly by mislabeling its
 18 products, injuring consumer confidence and reaping windfall profits. As detailed below, KFI is
 19 mistaken and disregards substantial evidence.

20 **A. Cascade Did Not Unreasonably Delay in Filing This Motion**

21 KFI asserts that Cascade’s request for injunctive relief should be denied because it has not
 22 been diligent as it has known of KFI’s mislabeling of some yarns since 2006. KFI
 23 simultaneously concedes that it assured Cascade that its labels were accurate after Cascade raised
 24 concerns in 2006. *Opp.* at 3:5-6 (“KFI assured Cascade that the yarns did, in fact, contain
 25 cashmere”). Incredibly, KFI appears to fault Cascade for accepting its representations that its

26 ⁸ A true and correct copy of the order, obtained via PACER, is attached as Exhibit F to the Reply Guite Decl.

1 labels were accurate. Once this issue was rediscovered, Cascade commissioned new test reports
2 to assess the fiber content of certain of KFI's yarns. In that regard, Cascade ordered different KFI
3 yarns from multiple yarn stores located in several states.⁹

4 As described in Cascade's Amended Complaint and Exhibit D thereto, K.D. Langley
5 Fiber Services tested 31 different samples of KFI yarns in April and May 2010. Of those 31
6 samples, Langley found that 23 varied more than 3% from the fiber content stated on their labels.
7 *See and compare* Dkt. No. 4-2. Many of those samples contained 0% cashmere or trace amounts
8 of cashmere despite being labeled as containing 12% cashmere. Until it received test reports
9 confirming the absence of the labeled fiber content of KFI's products in 2010, Cascade could not
10 responsibly take any action against KFI.

11 Cascade was not previously monitoring KFI's conduct or activities as KFI told Cascade in
12 2006 (and again in 2008 in connection with another of its mislabeled yarns) that its labels were
13 correct or it had corrected its labels. In December 2009, as KFI noted in its opposition, Cascade
14 received a subpoena from plaintiff in the Pennsylvania action again raising the propriety of KFI's
15 product labels. After becoming informed of the likelihood that mislabeling of KFI's yarns
16 continued unabated, Cascade commissioned fiber testing as to certain of KFI's yarns. It received
17 reports of those tests in April and May 2010. On May 24, Cascade filed this action. Dkt. No. 2.
18 KFI's first appearance in this matter was made on July 6 and Cascade filed this motion for
19 preliminary injunction two days later, on July 8. Dkt. Nos. 7 & 10. Cascade should not be
20 faulted for relying on KFI's representations in 2006 and 2008¹⁰ that its product labels were
21 accurate or for obtaining scientifically-valid fiber analysis prior to initiating suit. As soon as
22 Cascade confirmed, with reliable scientific data, that KFI's improper product labeling (which KFI
23 alleged had been corrected in 2006 and in 2008)¹¹ persisted, it filed suit and brought this motion.

24 ⁹ Cascade has redacted the names of the yarn retailers from whom it ordered KFI's products in order to avoid having
25 these third parties unnecessarily embroiled in this litigation. In the event the Court feels that it needs to review the
names of these yarn retailers, Cascade is willing to submit unredacted copies of the test reports for *in camera* review.

¹⁰ KFI addressed the Silky Wool mislabeling with its customers, but faulted its supplier VVG for the error.

26 ¹¹ KFI's statement that "In fact, Cascade has freely discussed its concerns about KFI on its website and has made it

1 **B. Cascade Offered Sufficient Evidence of Its Harm**

2 Rather than address the specific evidence of ongoing, irreparable competitive injury and
 3 harm being suffered by Cascade, KFI instead uses pejorative terms to describe Mr. Dunbabin's
 4 testimony while ignoring its substance. As Mr. Dunbabin's testimony makes clear, KFI's unfair
 5 competition allows it to make windfall profits and damages the goodwill of the entire knitting
 6 industry thereby harming Cascade's goodwill and potential for market-share expansion.
 7 Dunbabin Decl., ¶¶ 4-8. Indeed, since this motion was filed, some 11,000 customers and/or
 8 potential customers have read at least 459 postings about the mislabeling of hand knitting yarns
 9 on one discussion forum for interested knitters, www.ravelry.com. Reply Guite Decl., Ex. G.
 10 Such widespread discussion evidencing consumer mistrust of the accuracy of fiber content
 11 labeling of hand knitting yarns can only result in a loss of goodwill and reduced consumer
 12 confidence and resulting damage to Cascade. Dunbabin Decl., ¶¶ 4-8.

13 Given Cascade's significant evidence of a likelihood of success on the merits, an
 14 injunction would be proper with even less evidence supporting irreparable injury. *Roe v.*
 15 *Anderson*, 134 F. 3d 1400, 1402 (9th Cir. 1998) (noting that the preliminary injunction factors are
 16 on a "sliding scale"); *see also Portilla v. Deutsche Bank Nat'l Trust Co.*, 2010 U.S. Dist. LEXIS
 17 53553, Case No. 10cv1164 DMS (BGS) (S.D. Cal., June 1, 2010). Application of this sliding
 18 scale compels the entry of a preliminary injunction or, at least, an order requiring KFI to execute
 19 the continuing guaranty called for by the WPLA.

20 For example, in *Visioneer*, plaintiff sought to enjoin its competitor from continuing to
 21 represent to the public that its scanner was a true 36-bit scanner. 1998 U.S. Dist. LEXIS 23431.
 22 After concluding that Visioneer was likely to succeed on the merits as to the falsity of the
 23 representations, the court easily found irreparable harm. As the Court explained:

24
 25 known that its yarns are distinguishable from those offered by KFI" is patently false. Opp. at 15:5-7. Cascade's
 26 website references fiber content testing of its own cashmere blend yarns but makes no reference to KFI or any
 dispute regarding another company's yarns. Reply Guite Decl., Ex. H.

1 When a plaintiff demonstrates a likelihood of confusion, it is generally presumed
 2 that the plaintiff will suffer irreparable injury if injunctive relief is not granted.
 3 Courts have recognized that intangible injuries, such as damage to reputation and
 4 goodwill, are inherently difficult to quantify and therefore constitute irreparable
 harm that supports the issuance of a preliminary injunction. In the present case,
 Visioneer has demonstrated a sufficient likelihood of establishing consumer
 confusion entitling it to a presumption of irreparable harm.

5 *Id.* (citations omitted). Indeed, “where the parties are direct competitors, proof that consumers
 6 are likely to be misled into believing that defendant’s product is superior to plaintiff’s, then it
 7 follows that plaintiff will lose some portion of the market ‘and thus suffer irreparable injury.’”
 8 McCarthy, J. Thomas, *McCarthy on Trademarks and Unfair Competition*, § 27:37 (4th Ed. 2009)
 9 (quoting *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982)). Here,
 10 Cascade has already shown, and KFI has offered *no evidence* to rebut that showing, KFI’s
 11 material misrepresentations as to the fiber content of its yarn products will deceive the consuming
 12 public. Cascade has offered a specific, fact-based explanation as to how it is being harmed in an
 13 irreparable way. Dunbabin Decl., ¶¶ 4-8. Cascade has adequately demonstrated that, absent
 14 injunctive relief, it will suffer irreparable harm: the alternative is to sanction the continued sale of
 15 mislabeled yarn.

16 **VI. Conclusion**

17 This Court should grant Cascade’s motion and a preliminary injunction should issue.

18 Dated: July 30, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

19

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

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Attorneys for Plaintiff
 Cascade Yarns, Inc.

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