

1 summary judgment, the district court should not consider the new evidence without giving the
2 non-movant an opportunity to respond.” *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996)
3 (citation omitted). The Ninth Circuit has applied this principle to preliminary injunction
4 motions, holding that “a district court may consider new evidence presented in a reply brief *if* the
5 district court gives the adverse party an opportunity to respond.” *El Pollo Loco, Inc. v. Hashim*,
6 316 F.3d 1032, 1040-41 (9th Cir. 2003) (emphasis supplied).

7 In the present case, by reply and declaration, Plaintiff presents new arguments and well
8 over 100 pages of new evidence. Plaintiff fabricates a “tacit admission” of KFI, and then seeks
9 to impart significance to this fiction by presenting, as Exhibit A to Mr. Guite’s declaration,
10 Plaintiff’s counsel’s correspondence to KFI’s counsel of July 22, 2010, in which Plaintiff
11 conveyed its “alternate request for relief.” *See* Reply Br. at 2. Apart from the fact that this offer
12 was less genuine than Plaintiff would lead the Court to believe,¹ Plaintiff presents this new
13 evidence and makes arguments based thereon, and yet KFI has no opportunity to respond.

14 Plaintiff’s reply brief also seeks to strike the declarations of Messrs. Elalouf and Slavitt,
15 and in support of this request Plaintiff submits correspondence between counsel. *See* Exhibits D
16 and E to the Guite Declaration. Despite the fact that KFI’s counsel had indicated in its letter of
17 July 29, 2010, that a substitute declaration of Mr. Elalouf would be filed, Plaintiff nonetheless
18 asserted, the very next day, that “Defense counsel refused to ... resubmit proper declarations
19 leaving Cascade with no option other than to request to strike their improper testimony.” Reply
20 Br. at 4, fn. 4. Such issues as to form are now moot as KFI has filed substitute declarations, not
21 only for Mr. Elalouf (as stated in Mr. Slavitt’s letter dated July 28, 2010), but also for Mr. Slavitt

21 ¹ Plaintiff’s offer actually came late on Thursday, July 22 – two weeks after the motion was filed – and was sent
22 only to local counsel, Warren Rheaume. KFI’s response to the preliminary injunction motion, however, was due the
23 following Monday, July 26. Moreover, and as stated in KFI’s posting to www.ravelry.com (which Plaintiff attaches
as part of Exhibit A to the Guite Declaration), KFI has already provided, and will continue to provide, continuing
guarantees to any of its customers in good standing who request one.

1 as well, in which such alleged formal deficiencies were addressed.²

2 Plaintiff has made allegations in this case regarding over a dozen different yarns, and yet
3 criticizes KFI for not having secured its own fiber analysis reports in a little over two weeks.³

4 KFI has ably challenged the sufficiency of the evidence Plaintiff has offered, and such a conflict
5 is all that is required to discredit Plaintiff's likelihood of success on the merits.

6 For the foregoing reasons, Plaintiff's new arguments and evidence as set forth in its reply
7 brief and in Mr. Guite's declaration should be stricken. Alternatively, if the Court is not inclined
8 to strike Plaintiff's new arguments and evidence, the Court should permit KFI to respond in
9 greater detail so that the Court may benefit from a more complete presentation of the issues.

10 Dated: August 4, 2010

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23 ² Contrary to Plaintiff's assertions, Mr. Elalouf's declaration contains statements of facts known to those involved
in the yarn trade, and Mr. Elalouf's years of experience in the yarn trade provide the basis for his statements.
Moreover, even if this Court were to regard any of Mr. Elalouf's statements as lacking foundation, it is well-
established that courts may consider otherwise inadmissible evidence in preliminary injunction proceedings. *See,*
e.g., Flynt Distributing Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). KFI has offered Mr. Elalouf's
statements and various industry articles that discuss the limitations of fiber analysis to demonstrate that not all fiber
analysis reports are of equal credibility, in addition to citing exhibits submitted by Plaintiff itself that contradict the
test results offered by the Plaintiff. *See e.g.* Ex. 10 to Ex. A of Guite Decl. to Opening Brief.

³ Plaintiff further implies that the existence of the Eastern District of Pennsylvania action means that KFI should
already have all the proofs necessary to address this motion. Such an implication is entirely unwarranted.
Discovery has been stayed in the Pennsylvania action pending the disposition of KFI's motion for summary
judgment, and expert discovery has not yet been completed. Indeed, most of the yarns at issue in the present action
are not even at issue in the Pennsylvania action. Plaintiff's criticisms, therefore, are misplaced.

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, I electronically filed the foregoing document 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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DATED this 4th day of August, 2010.

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