

The Honorable Ricardo S. Martinez

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

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

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

NOTE ON MOTION CALENDAR:
August 20, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendants Designer Yarns, Ltd., Sion Elalouf, Diane Elalouf, Jay Opperman, Debbie Bliss, and David Watt (collectively, the “Non-KFI Defendants”) have moved to dismiss this action in its entirety pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.¹ The

¹ As noted in the opening brief, Defendant Filatura Pettinata V.V.G. Di Stefano Vaccari & C. (S.A.S.) (“Filatura”) does not join in the present motion as it has not yet been served with process in this matter. It is noted, however, that the arguments set forth herein as to the Non-KFI Defendants would appear to apply with equal force to Filatura as well.

1 Non-KFI Defendants are residents of either New York, New Jersey or the United Kingdom
2 whose contacts with Washington are nonexistent or legally irrelevant. Curiously, Plaintiff,
3 Cascade Yarns, Inc. (“Cascade”), buries these facts in a footnote to its opposition. Rather than
4 confront its conclusory jurisdictional allegations, Cascade resorts to arrogant jabs at Defendants
5 and their counsel reciting a jumble of “facts” about “the Defendants” collectively and expecting
6 the Court to infer that each individual is amenable to suit in Washington. The Court need not
7 and should not weed through such cursory and unsupported allegations. The only conclusion to
8 be drawn is that Cascade has failed to demonstrate that each Non-KFI Defendant has substantial,
9 continuous, and systemic contacts with Washington, or that any of them has purposefully availed
10 themselves of the privilege of conducting activities in Washington. The Non-KFI Defendants
11 respectfully submit that this action should, therefore, be dismissed in its entirety.²

12 II. FACTS

13 Cascade, alleges that the Non-KFI Defendants, along with Knitting Fever Inc. (“KFI”), a
14 distributor of knitting yarns based in New York, have devised and carried out a plan to sell
15 improperly labeled knitting yarn. Cascade’s allegations in its opposition brief parrots the
16 allegations of the amended complaint with one exception – Cascade attempts to bolster the
17 jurisdictional allegations regarding KFI and Debbie Bliss. These “new facts,” however, are red
18 herrings. KFI has not joined in this motion, and any additional allegations related to KFI are not
19 pertinent in assessing personal jurisdiction over the Non-KFI Defendants. As to new allegations
20 concerning Ms. Bliss, Cascade recounts appearances she made in Washington earlier this month
21 – events all occurring *after* Cascade’s initiation of this action by at least two months. These
22

23 ² Cascade’s alternate request that the Court permit limited jurisdictional discovery also
24 must be denied. “It is not acceptable for a plaintiff to hale a party into court, then ask leave to
25 conduct discovery to establish that he had a right to do so. If plaintiff had no more than the
26 overbroad, conclusory allegations with which he attempts to justify the exercise of jurisdiction
27 over these parties, they should have never been joined as defendants.” *Swartz v. KPMG, LLC*,
401 F. Supp.2d 1146, 1157 (W.D. Wash. 2004) (dismissing defendants for lack of personal
jurisdiction and denying request to conduct jurisdictional discovery).

1 recent appearances in Washington, however, are legally irrelevant to the jurisdictional analysis.
2 In short, Cascade has offered no additional facts to demonstrate that Sion Elalouf, Diane Elalouf,
3 Jay Opperman, David Watt, or Designer Yarns, Ltd. (“Designer Yarns”) sufficient contacts with
4 the State Washington necessary to establish personal jurisdiction.

5 III. LEGAL ARGUMENT

6 A. Cascade Has Not Established Either General or Specific Personal 7 Jurisdiction Over The Non-KFI Defendants

8 The importance of establishing personal jurisdiction over each defendant is paramount in
9 every case and cannot be overlooked. “Personal jurisdiction . . . is an essential element of the
10 jurisdiction of the district court, without which the court is powerless to proceed to adjudication.”
11 *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (internal quotes and cites omitted).
12 It is the burden of the plaintiff to demonstrate to the Court that it can exercise personal
13 jurisdiction over all defendants. *Schwarzenegger v. Fred Martin Motor, Co.*, 374 F.3d 797, 800
14 (9th Cir. 2004); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (2002).

15 Here, the parties agree that the Court must consider whether it can exercise either general
16 jurisdiction or specific jurisdiction over the Non-KFI Defendants. As to general jurisdiction,
17 Cascade has made no attempt to demonstrate how any of the Non-KFI Defendants have
18 substantial, continuous or systematic contacts with Washington that approximate physical
19 presence in the state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-
20 16 (1984); *see also Schwarzenegger*, 374 F.3d at 801. Neither the allegations in the amended
21 complaint, nor the declarations attached to Cascade’s opposition, provide any facts to the
22 contrary, nor indeed could they. Cascade has not alleged that any of the Non-KFI Defendants
23 are domiciled in Washington, own property in Washington, maintain bank accounts in
24 Washington, possess any licenses issued by the State of Washington, or have a place of business
25 in Washington. As a consequence, general jurisdiction over the Non-KFI Defendants in
26 Washington cannot be established.

1 As to specific jurisdiction, the parties agree that in order to exercise specific jurisdiction,
2 a plaintiff must demonstrate that: (1) the defendant has performed some act or consummated
3 some transaction within the forum or otherwise purposefully availed himself of the privileges of
4 conducting activities in the forum; (2) the claim arises out of or results from the defendant's
5 forum-related activities; and (3) the exercise of jurisdiction is reasonable. *Bancroft & Masters,*
6 *Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

7 As "evidence" of these elements as to the Non-KFI Defendants, Cascade alleges only that
8 **KFI** competes with Cascade, **KFI** operates an interactive website, and **KFI** distributes yarn to
9 Washington stores. Opp'n Br. at 12-13. Then, without any explanation or justification, Cascade
10 shifts from "KFI" to "Defendants" in concluding that "Defendants have 'expressly aimed' their
11 conduct into Washington and, accordingly, should have reasonably anticipated that they would
12 be haled into court there." *Id.* at 13. Cascade's conclusory allegations and bare legal conclusions
13 as to "Defendants" ignore Cascade's obligation to allege facts that would establish personal
14 jurisdiction over each defendant. "Each defendant's contacts with the forum State must be
15 assessed individually." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S. Ct. 1473,
16 1482 (1984); *Calder*, 465 U.S. at 790, 104 S. Ct. at 1487; *see also Rush v. Savchuk*, 444 U.S.
17 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met **as to each defendant**
18 over whom a state court exercises jurisdiction") (emphasis supplied).

19 **1. Sion Elalouf**

20 Mr. Elalouf is an individual defendant and a resident of the State of New York. *See*
21 Amended Complaint at ¶ 8. Cascade asserts that the Court may exercise jurisdiction over Mr.
22 Elalouf because he is the alter ego of KFI. *See* Opp'n Br. at 5. In support of this conclusion,
23 Cascade offers only that Mr. Elalouf is the sole or controlling shareholder of KFI as well as its
24 chief executive responsible for setting KFI's trade policies and practices. *Id.* (citing Amended
25 Complaint at ¶ 8). Mr. Elalouf's status as a shareholder and the CEO of KFI, without more, is
26 insufficient to establish that he is the alter ego of KFI or to otherwise confer jurisdiction. *Harris*
27

1 *Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (noting
2 that even 100% ownership of a subsidiary and identity of board members and officers is
3 insufficient to meet alter ego test).

4 A plaintiff cannot impute the contacts of a corporate entity onto an individual for
5 purposes of establishing jurisdiction over the individual. “A corporate officer who has contact
6 with a forum only with regard to the performance of his official duties is not subject to personal
7 jurisdiction in that forum.” *Kransco Manufacturing, Inc. v. Markwitz*, 656 F.2d 1376, 1379 (9th
8 Cir. 1981); *see also Bingham v. Blair LLC*, 2010 U.S. Dist. LEXIS 40796, *5-6 (W.D. Wash.
9 Apr. 26, 2010). Similarly, to assert personal jurisdiction pursuant to an alter ego theory, a
10 plaintiff must first prove the existence of an alter ego relationship. Contacts of the corporate
11 entity are not sufficient. “For jurisdictional purposes, the court should only pierce the corporate
12 veil in exceptional circumstances.” *Langlois v. Déjà Vu, Inc.*, 984 F. Supp. 1327, 1336 (W.D.
13 Wash. 1997) (internal quotes and emphasis omitted) (plaintiff’s allegation that defendant “has
14 long been employed in various capacities” and executed contracts for another defendant
15 insufficient to demonstrate personal jurisdiction).

16 Cascade presents no facts whatsoever to demonstrate that Mr. Elalouf, *as an individual*,
17 has sufficient contacts with the State of Washington to support the exercise of jurisdiction over
18 him. Rather, all of Cascade’s allegations concerning Mr. Elalouf concern actions taken with
19 regard to the performance of his official duties with KFI. Thus, Cascade’s reliance on Mr.
20 Elalouf’s status as CEO and a shareholder of KFI, as well as unsupported allegations of “control”
21 over Defendants Designer Yarns and Filatura, are unavailing. Otherwise, Cascade offers only
22 the conclusory allegation, applicable to Mr. Elalouf, that “[a]ll of the Non-KFI Defendants have
23 advised, consented to and participated in KFI’s wrongful conduct.” Opp’n Br. at 8. Cascade has
24 made no attempt to present any facts to establish Mr. Elalouf’s alter ego status, and Cascade’s
25 conclusory allegations and legal conclusions do not warrant the attention of the Court. *Jameson*
26 *Kealii Kauhi v. Countrywide Home Loans Inc.*, 2009 U.S. Dist. LEXIS 90916 (W.D. Wash. Sept.
27

1 29, 2009) at *13 (legal conclusions are not entitled to an assumption of truth). Cascade has not
2 alleged facts sufficient to establish personal jurisdiction over Mr. Elalouf.

3 **2. Diane Elalouf**

4 Diane Elalouf, like Mr. Elalouf, is an individual defendant and a resident of the State of
5 New York. *See* Amended Complaint at ¶ 9. Cascade argues that the Court may exercise
6 jurisdiction over Ms. Elalouf simply because, upon information and belief, Ms. Elalouf “was
7 and continues to be a KFI officer, director or shareholder” and “has access to and responsibility
8 for reviewing, approving and paying invoices from KFI’s foreign suppliers.” *Id.* Even if these
9 allegations are taken as true (which they aren’t), such facts do not make Ms. Elalouf amenable to
10 personal jurisdiction in Washington. Cascade presents no facts whatsoever to demonstrate that
11 Ms. Elalouf, *individually*, has sufficient contacts with the State of Washington to support the
12 exercise of jurisdiction over her. Rather, Cascade merely reiterates its allegations of her alleged
13 official duties with KFI, and otherwise offers only the conclusory allegation, applicable to Ms.
14 Elalouf, that “[a]ll of the Non-KFI Defendants have advised, consented to and participated in
15 KFI’s wrongful conduct.” *Opp’n Br.* at 8. Cascade has not alleged facts sufficient to establish
16 personal jurisdiction over Ms. Elalouf. *See Kauhi*, 2009 U.S. Dist. LEXIS 90916 at *13.

17 **3. Jay Opperman**

18 Cascade alleges that Mr. Opperman is an independent sales representative of KFI and a
19 director and owner of Designer Yarns. *See* Amended Complaint at ¶ 10. In similar fashion to its
20 argument concerning the Elaloufs, Cascade argues that the Court may exercise jurisdiction over
21 Mr. Opperman simply because of his roles as an independent sales representative of KFI and as a
22 director and shareholder of Designer Yarns. Like corporate officers and directors, however, an
23 independent contractor’s contacts with Washington must be judged separately from the contacts
24 of those with whom it conducts business. *Peach v. Shopshire*, 2006 U.S. Dist. LEXIS 9479
25 (W.D. Wash. Feb. 23, 2006). Cascade fails to present any facts that Mr. Opperman, *individually*,
26 has sufficient contacts with the State of Washington to support the exercise of jurisdiction over
27

1 him. Otherwise, Cascade offers only the conclusory allegation, applicable to Mr. Opperman, that
2 “[a]ll of the Non-KFI Defendants have advised, consented to and participated in KFI’s wrongful
3 conduct.” Opp’n Br. at 8. Cascade has not alleged facts sufficient to establish personal
4 jurisdiction over Mr. Opperman. *See Kauhi*, 2009 U.S. Dist. LEXIS 90916 at *13.

5 **4. Debbie Bliss**

6 Debbie Bliss is a British citizen. *See* Amended Complaint at ¶ 11. In response the Non-
7 KFI Defendants’ jurisdictional challenge, Cascade has sought to bolster its jurisdictional
8 argument by describing several appearances made by Ms. Bliss in Washington. Opp’n Br. at 6-
9 7. Cascade’s reliance on such “contacts,” however, is wholly improper as they all occurred in
10 August of 2010 – months *after* the commencement of the present action. When assessing
11 personal jurisdiction, “[o]nly contacts occurring *prior to* the event causing the litigation may be
12 considered.” *Farmers Ins. Exchange v. Portage*, 907 F.2d 911, 913 (9th Cir. 1990) (citing *Steel*
13 *v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987)) (emphasis supplied); *see also Coughenour*
14 *v. State Auto Property & Casualty Ins. Co.*, No. 94-55008, 1995 U.S. App. LEXIS 23768, *7-*8
15 (9th Cir. Aug. 9, 1995) (“Post-accident communications and investigation may not be considered
16 in determining purposeful availment”).

17 Cascade filed the initial complaint in this action on May 24, 2010, at least two months
18 *prior* to any of Ms. Bliss’s contacts with Washington that Cascade now offers in its opposition
19 brief and declarations. While Cascade makes the broad allegation that Ms. Bliss promotes her
20 products “by regularly attending trade shows and making numerous sales and marketing
21 appearances in the United States and Washington,” Cascade provides no facts to establish her
22 connection to Washington at any time prior to filing the present lawsuit. Yarns bearing the
23 Debbie Bliss brand may have be sold in Washington by KFI, but the presence of a brand cannot
24 substitute for the presence and contacts of Debbie Bliss, the individual who is named as a
25 defendant in this action. Thus, all of Cascade’s new evidence of Ms. Bliss’s contacts with
26 Washington are legally irrelevant to the jurisdiction analysis. Otherwise, Cascade offers only the
27

1 conclusory allegation, applicable to Ms. Bliss, that “[a]ll of the Non-KFI Defendants have
2 advised, consented to and participated in KFI’s wrongful conduct.” Opp’n Br. at 8. Cascade has
3 not alleged facts sufficient to establish personal jurisdiction over Ms. Bliss. *See Kauhi*, 2009
4 U.S. Dist. LEXIS 90916 at *13.

5 **5. David Watt**

6 Like Debbie Bliss, David Watt is a British citizen. *See* Amended Complaint at ¶ 12.
7 Cascade asserts that the Court may exercise jurisdiction over Mr. Watt because he is “actively
8 involved in the management of Designer Yarns.” Opp’n Br. at 7. Cascade fails to present any
9 facts that that Mr. Watt, *individually*, has sufficient contacts with the State of Washington, or
10 indeed the United States as a whole, to support the exercise of jurisdiction over him. Otherwise,
11 Cascade offers only the conclusory allegation, applicable to Mr. Watt, that “[a]ll of the Non-KFI
12 Defendants have advised, consented to and participated in KFI’s wrongful conduct.” *Id.* at 8.
13 Cascade has not alleged facts sufficient to establish personal jurisdiction over Mr. Watt. *See*
14 *Kauhi*, 2009 U.S. Dist. LEXIS 90916 at *13.

15 **6. Designer Yarns**

16 Designer Yarns is a British company. *See* Amended Complaint at ¶ 6. Cascade asserts
17 that the Court may exercise jurisdiction over Designer Yarns because it holds a license for the
18 international marketing of the Debbie Bliss brand for handknitting yarns and a distributorship
19 agreement for such goods with KFI. *Id.* Neither the alleged license nor the distributorship
20 agreement, however, qualify as actions purposefully directed or aimed at the State of
21 Washington. There is no allegation that these agreements were issued or executed in, or
22 approved by, the State of Washington, or that either of these agreements have any specific
23 connection to the State of Washington.

24 While Designer Yarns’s licensee – KFI – regularly conducts business in the State of
25 Washington, its status as licensor to KFI, without more, does not support the assertion of
26 personal jurisdiction over Designer Yarns. *See Earth Prods., Inc. v. Meynard Designs, Inc.*,
27

1 2006 U.S. Dist. LEXIS 56232 (W.D. Wash. July 31, 2006) (licensee’s activities in Washington
2 not attributable to licensor). Similarly, Designer Yarns’ receipt of any royalty income from its
3 licensees for sales made in Washington is equally irrelevant. *Red Wing Shoe Co. v. Hockerson-*
4 *Halberstadt, Inc.*, 148 F.3d 1355, 1361-1362 (Fed. Cir. 1998). “Financial benefits accruing to
5 the defendant from a collateral relation to the forum State will not support jurisdiction if they do
6 not stem from a constitutionally cognizable contact with that State.” *World-Wide Volkswagen*,
7 444 U.S. at 299. Simply put, doing business with a company that does business in Washington is
8 not the same as doing business in Washington. The Supreme Court has made clear that contacts
9 resulting from “the unilateral activity of another party or third person” are not attributable to a
10 defendant. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 & n.17, 105 S. Ct. 2174
11 (1985); *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690 (1978) (no jurisdiction
12 over a divorced husband being sued for child-support payments whose only affiliation with the
13 forum was created by his former spouse’s decision to settle there); and *Hanson v. Denckla*, 357
14 U.S. 235, 78 S. Ct. 1228 (1958) (no jurisdiction over a trustee whose only connection with the
15 forum resulted from the settlor’s decision to exercise her power of appointment there)).
16 Otherwise, Cascade offers only the conclusory allegation, applicable to Designer Yarns, that
17 “[a]ll of the Non-KFI Defendants have advised, consented to and participated in KFI’s wrongful
18 conduct.” *Id.* at 8. Cascade has not alleged facts sufficient to establish personal jurisdiction over
19 Designer Yarns.

20 **B. Defendants Are Not Subject To Rule 4(k)(2) Personal Jurisdiction**

21 Cascade asserts that its failure to demonstrate general or specific jurisdiction over the
22 Non-KFI Defendants is irrelevant because RICO, through Federal Rule of Civil Procedure
23 4(k)(2), provides a basis to assert personal jurisdiction over the Non-KFI Defendants. Indeed,
24 Cascade even accuses the Non-KFI Defendants, in italics and boldface no less, of failing to
25 address such a possibility. *See Opp’n Br.* at 4. Contrary to Cascade’s accusation, the Non-KFI
26
27

1 Defendants not only confront the possibility, but also explain why personal jurisdiction cannot be
2 based on Rule 4(k)(2). *See* Opening Br. at 9-10.

3 Under Rule 4(k)(2), personal jurisdiction requires the satisfaction of three elements:
4 (1) the claim against the defendant must arise under federal law; (2) the defendant must not be
5 subject to the personal jurisdiction of any state court of general jurisdiction, and (3) the exercise
6 of personal jurisdiction must comport with due process. *Holland Am. Line v. Wartsila N. Am.,*
7 *Inc.*, 485 F.3d 450, 461 (9th Cir. 2007); *see also Glencore Grain v. Shivnath Rai Harnarain Co.*,
8 284 F.3d 1114, 1126 (9th Cir. 2002).

9 As noted in its opening brief, Cascade cannot satisfy the second requirement, namely,
10 that Defendants are not subject to the personal jurisdiction of any state court of general
11 jurisdiction. The courts of New York can exercise general personal jurisdiction over all of the
12 Non-KFI Defendants that are amenable to suit in the United States. Mr. Watt lacks sufficient
13 contacts with the United States as a whole and, therefore, no court can exercise jurisdiction over
14 him. That Mr. Watt is beyond the jurisdiction of the United States does not affect the analysis as
15 to the remaining defendants because Rule 4(k)(2) is intended to apply only to non-resident
16 defendants “having contacts with the United States sufficient to justify application of United
17 States law and to satisfy federal standards of forum selection, but having insufficient contact
18 with any single state to support jurisdiction.” Fed. R. Civ. P. 4(k)(2) 1993 Advisory
19 Committee’s Note. Cascade’s calculated omission of any discussion regarding the exercise of
20 jurisdiction in New York is, at best, misleading. There is no basis for the exercise of Rule
21 4(k)(2) jurisdiction when all of the Non-KFI Defendants who are amenable to suit in the United
22 States are subject to the jurisdiction of New York.

1 **IV. CONCLUSION**

2 For the foregoing reasons, this Court should dismiss this entire action as against
3 Defendants Designer Yarns, Ltd., Sion Elalouf, Diane Elalouf, Jay Opperman, Debbie Bliss, and
4 David Watt for lack of personal jurisdiction.

5
6 DATED this 20th day of August, 2010.

7
8 Pepper Hamilton LLP
9 Attorneys for Defendants

10 By /s/Joshua R. Slavitt
11 Joshua R. Slavitt (Admitted *Pro Hac Vice*)
12 Deirdre E. McInerney (Admitted *Pro Hac Vice*)
13 3000 Two Logan Square
14 Philadelphia, PA 19102
15 Tel.: (215) 981-4000
16 Fax: (215) 981-4750
17 E-mail: slavittj@pepperlaw.com
18 mcinerneyd@pepperlaw.com

19
20 Davis Wright Tremaine LLP
21 Attorneys for Defendants

22
23 Warren J. Rheaume, WSBA #13627
24 Sarah K. Duran, WSBA #38954
25 1201 Third Avenue, Suite 2200
26 Seattle, Washington 98101-3045
27 Tel.: (206) 757-8035
E-mail: warrenrheaume@dwt.com
sarahduran@dwt.com

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing Reply Brief in Support of the Motion to Dismiss for Lack of Personal Jurisdiction with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert J. Guite, Esquire
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, CA 94111-3492
rguite@ssd.com

DATED this 20th day of August, 2010.

Pepper Hamilton LLP
Attorneys for Defendants

By /s/Joshua R. Slavitt
Joshua R. Slavitt (Admitted *Pro Hac Vice*)
Deirdre E. McInerney (Admitted *Pro Hac Vice*)
3000 Two Logan Square
Philadelphia, PA 19102
Tel: (215) 981-4000
Fax: (215) 981-4750
E-mail: slavittj@pepperlaw.com
mcinerneyd@pepperlaw.com