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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

**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

NOTE ON MOTION CALENDAR:
August 20, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Unable to point to specific factual allegations against each Defendant, Plaintiff, Cascade Yarns, Inc. (“Cascade”), is content to lob baseless accusations (*i.e.*, that the instant motion is brought to delay) and seek safe harbor behind the length of its Amended Complaint without regard for the sufficiency of the allegations contained therein. Like many RICO plaintiffs, Cascade confuses prolixity with particularity. *See, e.g.*, Opp’n Br.at 2 (stating that the Amended

1 Complaint contains 80 paragraphs of “factual” allegations); *id.* at 14 (noting that Cascade’s
2 Amended Complaint is 35 pages in length). As has been noted before: “[a] complaint can be
3 long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is
4 not an uncommon mask for absence of detail.” *Williams v. WMX Technologies, Inc.*, 112 F.3d
5 175, 178 (5th Cir. 1997). Because the Amended Complaint does not provide details from which
6 a jury could infer an agreement to participate in a RICO conspiracy, Count VI must be
7 dismissed.
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9 II. LEGAL ARGUMENT

10 A. Cascade Does Not Allege Sufficient Facts as to the 11 Individual Defendants to Permit an Inference of Agreement

12 In response to Defendants’ argument that the Amended Complaint does not differentiate
13 the conspiracy allegations as against each of the Defendants, Cascade proceeds to prove
14 Defendants’ point. Rather than identify specific allegations to support an inference of agreement
15 against any individual Defendant, Cascade merely copies and pastes large swaths of its Amended
16 Complaint. Parsing through Plaintiff’s allegations, however, reveals that the specific allegations
17 against each Defendant are insufficient to support an inference of agreement. The conspiracy
18 allegations pertaining to specific Defendants follow.
19

20 1. KFI

21 “KFI arranged for an industry publication to print a retraction and apology on Cascade’s
22 behalf.” Am. Compl. at ¶ 52. “KFI, despite its repeated criticism of results from CCMI-
23 approved fiber testing laboratories, advised A.C. Moore to engage a testing facility
24 recommended by CCMI.” *Id.* at ¶ 54. “Upon information and belief, for a short period of time
25 KFI placed the ‘no letter in dyelot’ product on closeout for liquidation but stopped that course of
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1 action because of inquiries it received from the customers as to why the product was on
2 closeout.” *Id.* at ¶ 56. “On information and belief, when KFI received complaints from its
3 customers, it actively discouraged the customers from having independent testing of the yarns’
4 fiber content conducted” and offered “letters of guarantee” which “on information and belief . . .
5 would not have effectively insulated KFI’s customers from liability from selling mislabeled
6 products.” *Id.* at ¶ 57.

8 **2. Designer Yarns**

9 “On information and belief, Mr. Elalouf and Designer Yarns entered into an agreement to
10 substitute the 0% cashmere version of the product for the Cashmerino spun of 12% cashmere.
11 Complaint at ¶ 31. No information is provided as to the date, time, or manner of assent, except
12 that it is “believed to be before June 9, 2001.” *Id.* An attorney on behalf of Designer Yarns
13 wrote a letter denying that the product was mislabeled and that, upon and information, Defendant
14 Elalouf directed the attorney to submit the letter. *Id.* at ¶ 45.

16 **3. Diane Elalouf**

17 “On information and belief, Mrs. Elalouf has access to and responsibility for reviewing,
18 approving and paying invoices from KFI’s foreign suppliers.” *Id.* at ¶ 9.

19 **4. Jay Opperman**

20 “On information and belief, since 2001, Mr. Opperman is a director of, and one of the
21 registered owners of, the shares” of Designer Yarn. *Id.* at ¶ 10. “On information and belief . . .
22 Mr. Opperman actively participated in the wrongful conduct that is the subject of this Complaint,
23 including but not limited to making false representations of the fiber content of KFI’s yarn
24 products.” *Id.* “On information and belief, even prior to its formal introduction, Mr. Opperman .
25 . . . represented that a new KFI product, called Cashmerino DK, contained 55% merino wool, 33%
26 microfiber and 12% cashmere.” *Id.* at ¶ 36. The Amended Complaint does not provide the date,
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1 time, method of communication, or recipient of any of these alleged misrepresentations.

2 **5. Debbie Bliss**

3 “On information and belief, Ms. Bliss has participated and facilitated the wrongful
4 conduct described in this Complaint.” *Id.* at ¶ 11. On September 26, 2006, Ms. Bliss sent a
5 letter, which upon information and belief was sent via U.S. mail, representing “that the Debbie
6 Bliss branded yarns contain cashmere.” *Id.* at ¶ 53.

7 **6. David Watt**

8 “Mr. Watt . . . on information and belief, at all time material to this Complaint, was an
9 active participant in the scheme alleged herein.” *Id.* at ¶ 12. Mr. Watt wrote an email to Mr.
10 Elalouf suggesting that KFI note that Cascade’s statements were based on a single fiber analysis
11 instead of questioning the expertise of the examiner. *Id.* at ¶ 50. Mr. Watt received a letter from
12 VVG which suggested, *inter alia*, that “we change the blend and use the best possible cashmere
13 quality, which will be easier to find in the case of lab check.” *Id.* at ¶ 55.

14 **B. Cascade’s Allegations Are Insufficient to Infer Conspiracy**

15 The remainder of the conspiracy allegations identified in Cascade’s opposition do not
16 pertain to the alleged conspiracy agreement at all. *See, e.g.*, Opposition at 6-7 (citing Amended
17 Complaint at ¶¶ 40-43) (discussing Cascade’s actions with respect to the Cashmerino product).
18 Assuming, *arguendo* that Plaintiff alleged sufficient facts to support a plausible claim that Mr.
19 Elalouf committed the underlying RICO infractions, it has failed to allege any facts from which
20 to infer that any of the other Defendants knew about the scheme and knowingly agreed to
21 participate therein. *See Chapman v. Ontra, Inc.*, 1997 U.S. Dist. LEXIS 8331, *27 (N.D. Ill.
22 June 6, 1997) (stating that “the plaintiff must allege facts from which each defendant’s
23 agreement to violate RICO can be inferred”). At best, Cascade alleges that the other Defendants,
24 in response to commonplace quibbles among competitors, defended the integrity of their product.
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1 Assuming the yarns were not properly labeled, Cascade does not provide any facts from which a
2 jury could infer that any of the other Defendants were aware of this shortcoming. Quite to the
3 contrary, Cascade's allegations admit that "it is impossible to determine the true fiber content of
4 spun yarn without expert fiber test results." Amended Complaint at ¶ 42.

5
6 Though Cascade does take the time to allude to an "agreement" between some
7 Defendants, it alleges only that "on information and belief," Mr. Elalouf and Designer Yarns and
8 VVG agreed at some unknown place, on some unknown date, at some unknown time, "to
9 substitute the 0% cashmere version of the product for the Cashmerino spun of 12% cashmere."
10 *Id.* at ¶¶ 31-32. Such conclusory allegations of conspiracy are plainly inadequate. *See, e.g.,*
11 *Allen v. New World Coffee, Inc.*, 2001 U.S. Dist. LEXIS 3269, at *33 (S.D.N.Y. Mar. 27, 2001)
12 (holding that "plaintiffs' allegations, devoid of factual assertions concerning the nature of the
13 agreement and unspecific as to the time period during which the conspiracy took place, are
14 insufficient to state a claim under Section 1962(d)").

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16 As the above allegations make clear, there is not a single allegation, other than a
17 conclusory statement that at some unknown date, time, and place, Mr. Elalouf and Design Yarns
18 "entered into an agreement," that the Defendants agreed or conspired to do anything. Instead,
19 Cascade attempts to bootstrap commonplace statements and actions by businesspeople who
20 believed, and continue to believe, that their products are properly labeled into some far-reaching
21 international mail and wire fraud syndicate. Cascade provides no factual allegations but only
22 boilerplate accusations as to Defendants' respective intent. *See Beauregard v. Hillock*, 2009
23 U.S. Dist. LEXIS 119237, at *13 (W.D. Wash. Dec. 2, 2009) (classifying RICO claims as
24 "frivolous and without merit" where "plaintiffs have made numerous conclusory statements, but
25 have not alleged facts supporting those conclusory statements; and they have speculated on the
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1 motives of defendants, without factual basis”).

2 Cascade cannot merely point to sporadic and isolated actions of the individual defendants
3 nor can it plausibly spin these threadbare recitals into an inference of agreement. Vague
4 allegations that Defendants took individual actions, separated by years and continents, does not
5 permit an inference that the Defendants knowingly agreed and conspired to commit RICO
6 violations. *Carter v. MGA, Inc.*, 189 F. App’x 893, 895 (11th Cir. 2007) (affirming dismissal of
7 §1962(d) claim where “[p]laintiffs alleged no facts to show or to create a reasonable inference
8 that Defendants made an agreement”). Instead, the only plausible conclusion is that the
9 individual Defendants were not aware, let alone agreed to be a party to, any alleged conspiracy to
10 mislabel the products.
11

12 **C. Cascade’s Plea for a Lesser Pleading Standard Is Unavailing**

13 Recognizing its inability to meet the Rule 9(b) pleading standard, Cascade instead
14 attempts to dismiss the clear holdings in *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir.
15 2007) and *Jameson Kealii Kauhi v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS
16 90916 (W.D. Wash. Sept. 29, 2009) by stating that “[n]either case addressed a RICO conspiracy
17 claim.” Cascade does not explain why the Ninth Circuit’s statement that a Rule 9(b) “does not
18 allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to
19 differentiate their allegations . . . and inform each defendant separately of the allegations
20 surrounding his alleged participation in the fraud,” is inapplicable to a complaint alleging that
21 several defendants conspired to commit mail and wire fraud. *Swartz*, 476 F.3d at 764-65.
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24 Plaintiff’s attempt to distinguish *Kauhi* is similarly unavailing. The *Kauhi* court ruled
25 that “[f]irst, legal conclusions are not entitled to an assumption of trust” and “[s]econd,
26 conclusory allegations of fraud against multiple defendants without specificity are insufficient as
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1 a matter of law.” 2009 U.S. Dist. LEXIS 90916, at *13-14 (internal citation omitted). Cascade
2 does not, because it obviously cannot, cite a single case that permits reliance on conclusory
3 allegations or discards the requirement that allegations of fraud in claims arising under § 1962(d)
4 must be pled with particularity.

5 **D. A Court May Dismiss a § 1962(d) Claim Where**
6 **a § 1962(c) Claim Is Not Subject to Dismissal**

7 Finally, Cascade asserts that since Mr. Elalouf has not moved to dismiss the § 1962(c)
8 claim, “there is no basis to dismiss Cascade’s broader conspiracy count under section 1962(d).”
9 Opp’n Br. at 10. This argument is not only legally incorrect but frankly bizarre. Though
10 Cascade cites to *In re Nat’l W. Life Ins. Co. Deferred Annuities Litig.*, 467 F. Supp.2d 1071,
11 1086 (S.D. Cal. 2006) for the proposition that “where a Section 1962(c) claim is not subject to
12 dismissal, a motion to dismiss a claim under section 1962(d) should be denied,” the Court said
13 no such thing. Rather, in *National*, the defendant had argued that the Section 1962(c) claim
14 failed and, therefore, so too must the Section 1962(d) claim. *See, e.g., Howard v. America*
15 *Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (“Plaintiffs cannot claim that a conspiracy to
16 violate RICO existed if they do not adequately plead a substantive violation of RICO”). In other
17 words, the challenge to the Section 1962(d) claim was predicated on the court dismissing the
18 Section 1962(c) claim. As the Court found that the plaintiff had adequately alleged a Section
19 1962(c) violation, there was no longer any basis to challenge the conspiracy claim. *See National*,
20 467 F. Supp.2d at 1086 (“However, since the court finds that the [complaint] adequately states a
21 §1962(c) claim, Defendant’s argument is rejected”); *see also In re Am. Honda Motor Co. Inc.*
22 *Dealership Relations Litig.*, 941 F. Supp. 528, 550-51 (D. Md. 1996) (“Because I have already
23 determined that plaintiffs have properly pled the underlying claims, I find that plaintiffs have
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1 stated a claim under section 1962(d)”).¹

2 **III. CONCLUSION**

3 For the foregoing reasons and those contained in Defendants’ previous submissions,
4 Defendants respectfully request that the Court dismiss Count VI of the Amended Complaint with
5 prejudice.

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7 DATED this 20th day of August, 2010.

8
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24 ¹ There is no basis for Cascade’s request for leave to re-plead. Cascade’s allegations are
25 identical to those currently pending in the United States District Court for the Eastern District of
26 Pennsylvania, where substantial discovery has already occurred. As Cascade’s current counsel is
27 also counsel of record for Plaintiff there, Cascade has already had the benefit of discovery in
crafting its current Complaint. There are no additional facts to add and leave to amend would,
respectfully, result only in a protracted exercise in futility.

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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 Failure to State a Claim 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 20th day of August, 2010.

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