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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 MOTION AND MEMORANDUM FOR LIMITED EXPEDITED DISCOVERY AND LETTER ROGATORY**

**Note On Motion Calendar: November 12, 2010**

**I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiff Cascade Yarns, Inc. (“Cascade”) moves this Court for an order allowing limited expedited discovery and international judicial assistance for obtaining documents from a third-party, located in the United Kingdom, to obtain original and complete copies of unsigned reports of fiber analysis submitted by Defendant Knitting Fever, Inc. (“KFI”) in opposition to Cascade’s previously-filed Motion for Preliminary Injunction. The production of those documents is

1 necessary in the interests of justice, as KFI and its counsel have refused to respond to Cascade's  
2 concerns, supported by conflicting tests and testimony, that Defendants' proffered evidence may  
3 have been altered. SGS Cashmere Testing Labs ("SGS") is located in the United Kingdom and  
4 neither of Defendants' law firms will otherwise cooperate to dispel legitimate concerns that  
5 Cascade has regarding the provenance of the evidence KFI offered to this Court.

6 Obtaining documents on an expedited basis and from sources outside the United States is  
7 permitted under treaty and the Federal Rules of Civil Procedure. This Court expressly has the  
8 authority to allow expedited discovery pursuant to Fed. R. Civ. P. 26(d)(1): "A party may not  
9 seek discovery from any source before the parties have conferred as required by Rule 26(f),  
10 *except ... by court order.*" (emphasis added.) The request for Judicial Assistance is appropriate  
11 pursuant to the Hague Convention on the Taking of Evidence in Civil or Commercial Matters  
12 T.I.A.S. 7444, 23 U.S.T. 2555, 23 U.S.C. § 1783. Lastly, none of the defendants should be  
13 burdened by this, as the discovery will not be directed at them and defense counsel has already  
14 foisted that material sought (or portions of it) before this Court.

## 15 **II. FACTUAL BACKGROUND**

16 The central theme of the case is commercial and consumer fraud, and misrepresentation.  
17 KFI operates an ongoing scheme to mislead and defraud customers, and injure KFI's competitors,  
18 through the importation and sale of hand knitting yarns falsely claiming to contain expensive  
19 fibers. Cascade moved for a preliminary injunction to require KFI to properly label its yarns, or  
20 alternatively, to submit a form of continuing guaranty approved by the Federal Trade  
21 Commission under the Wool Products Labeling Act, 15 U.S.C. § 69(g). (Dkt. No. 10.) Rather  
22 than address the mislabeling of its products, KFI deflected scrutiny with unsigned and  
23 unprovenanced test reports, allegedly conducted for Designer Yarns by SGS in the United  
24 Kingdom. (Dkt. No. 67.) These reports purportedly show that certain of Cascade's products  
25 were mislabeled. Neither UK-based Designer Yarns nor the UK-based SGS offered a declaration  
26 in support of these unsigned test reports. (Dkt. No. 68.) Instead, defense counsel offered a

1 declaration from Sion Elalouf, the managing agent of U.S.-based Knitting Fever, to authenticate  
2 the unsigned reports. *Id.*<sup>1</sup>

3 Cascade takes accurate labeling seriously and quickly began its own investigation: it  
4 promptly notified its customers of the allegations and commissioned its own tests. (Dkt. No. 74.)  
5 At the same time, KFI publicized Cascade's purportedly incorrect labels to its customers on a  
6 popular website. Declaration of Robert J. Guite ("Guite Decl."), Ex. F. Other postings in this  
7 forum indicate that this material was mailed to Cascade Yarns' customers. *Id.* Investigation of  
8 the fiber content of the yarns purportedly tested by SGS was difficult as a number of these  
9 "recent" tests were of yarns that were discontinued many years ago and are not readily available  
10 on the market. Declaration of Robert A. Dunbabin ("Dunbabin Decl."). The ongoing testing of  
11 the samples, which could be found, has revealed results directly at odds with KFI's unsigned  
12 tests. *Id.* As soon as Cascade obtained these additional test results and confirmation from its  
13 suppliers that Cascade's products were, in fact, properly labeled, Cascade requested that KFI  
14 produce certified copies of the test reports that had been submitted to this Court. Guite Decl.,  
15 Exs. C, D. No one who has appeared as counsel for Defendants, including any attorneys from  
16 Davis Wright Tremaine, would so much as take or return a telephone call on this issue. *Id.* Mr.  
17 Slavitt's sole response was his glib rebuff of Cascade's concerns by letter of October 1. Guite  
18 Decl., Ex. H.

19 Cascade's suspicions regarding the authenticity of the unsigned tests is based upon a host  
20 of circumstantial evidence. The circumstantial evidence includes the following: (1) many of the  
21 samples appear to have been acquired years ago, the dye lots are old and a number of products  
22 have been long since discontinued; (2) the tests that Mr. Langley performed on the same dye lots

23  
24 <sup>1</sup> Mr. Slavitt's correspondence of September 15 enclosed the SGS test reports at issue and  
25 demanded that Cascade withdraw its Motion for Preliminary Injunction or KFI would publish the  
26 test reports that purported to demonstrate that Cascade's products were not properly labeled.  
Guite Decl., Ex. G. Cascade did not capitulate and proceeded to hearing on its Motion for  
Preliminary Injunction.

1 listed in the unsigned reports confirmed the accuracy of Cascade's labels; (3) the tests Mr.  
2 Langley performed on other dye lots that we were able to locate on the same product, when the  
3 listed dye lots were not locatable; (4) the Declaration of Elisabeth Loyola confirming that a  
4 counter-sample of the same yarn purportedly tested by SGS was accurately labeled; (5) the  
5 Declaration of Emanuele Scribanti describing the mill's production of Mohair Kiss yarn and that  
6 both samples purportedly tested were from the exact same mill production run and, as such, the  
7 fiber content should have been identical (but was not) as the only difference between the samples  
8 was the color the fibers were dyed;<sup>2</sup> and (6) defense counsel's curious response to these concerns.  
9 *Id.*

10 Cascade explained that given its own test reports, Mr. Elalouf's submission of deficient  
11 and unsworn declarations, and allegations of his alteration of evidence in a matter in the Eastern  
12 District of New York (and a court order requiring Mr. Elalouf and KFI's counsel in that matter to  
13 submit their computers and electronic devices for forensic testing) that KFI should direct the  
14 laboratory to make the originals of the test reports available to Cascade. Mr. Elalouf has  
15 demonstrated (in another matter also arising out of KFI's products and anti-competitive behavior)  
16 to be willing and able to modify documents to improve his position in litigation. Guite Decl., Ex.  
17 B. As noted, Mr. Elalouf and his counsel in that matter, Mr. Klein, were ordered to present their  
18 computers for forensic testing and analysis to discover the extent of this discovery abuse and  
19 misconduct. *Id.*

20 Given that KFI's publication of, and reference to, these test reports are causing harm to  
21 Cascade's reputation and sales, Cascade seeks immediate discovery to determine whether the  
22 originals of the test reports are as purported to be by Mr. Elalouf. In light of Mr. Slavitt's refusal  
23 to produce certified copies of the SGS test reports, Cascade believes that there is no suitable  
24 option other than obtaining the original report from the source. The burden associated with this

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26 <sup>2</sup> This anomaly is fully described in paragraph 5 of Mr. Scribanti's declaration. The color the  
fibers were dyed in production would not change in fiber content.

1 should be non-existent to the defendants and minimal to the testing lab that allegedly authored the  
2 unsigned report.

3 **III. DISCUSSION**

4 **A. This Court May Order Accelerated and Expedited Discovery Pursuant to  
5 Fed. R. Civ. P. 26(d)(1)**

6 The Court has the discretion to excuse the parties from the meet and confer requirements  
7 of Federal Rules of Civil Procedure 26(d) and 26(f) and order expedited discovery. *See* Fed. R.  
8 Civ. P. 26 (d)(1) (“A party may not seek discovery from any source before the parties have  
9 conferred as required by Rule 26(f), except . . . by court order”); Fed. R. Civ. P. 26 (f) (“Except .  
10 . . . when the court orders otherwise, the parties must confer as soon as practicable—and in any  
11 event at least 21 days before a scheduling conference is held or a scheduling order is due under  
12 Rule 16(b)); *see also* *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 613 (D.  
13 Ariz. 2001) (“the Court opines that it has the discretion to order the expedited production of  
14 documents if the appropriate circumstances exist.”). “Rule 26(d) therefore permits the district  
15 court to order expedited discovery.” *Arista Records, LLC v. Doe*, 2007 U.S. Dist. LEXIS 97283,  
16 \*5 (S.D. Ohio Nov. 5, 2007).

17 The Court may order accelerated discovery procedures, including permitting discovery to  
18 begin prior to the Rule 26(f) conference, upon a finding of good cause. *Yokohama Tire Corp.*, 202  
19 F.R.D. at 614 (“the Court adopts a good cause standard to warrant the granting of any expedited  
20 discovery prior to the Rule 26(f) scheduling conference.”); *see also* *Best Western Int’l, Inc. v.*  
21 *John Doe*, 2006 U.S. Dist. LEXIS 56014, \*3 (D. Ariz. 2006) (“An order permitting discovery  
22 before a Rule 26(f) conference may be issued for good cause.”); *Allcare Dental Mgmt., LLC v.*  
23 *Zrinyi*, 2008 U.S. Dist. LEXIS 84015, \*1 (D. Idaho Oct. 20, 2008); *Invitrogen Corp. v. President*  
24 *and Fellows of Harvard*, 2007 U.S. Dist. LEXIS 74282, \*2 (S.D. Cal., 2007); *Semitool, Inc. v.*  
25 *Tokyo Electron Am.*, 208 F.R.D. 273 (N.D. Cal. 2002)). “Good cause may be found where the  
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1 need for expedited discovery, in consideration of the administration of justice, outweighs the  
2 prejudice to the responding party.” *Invitrogen Corp.*, 2007 U.S. Dist. LEXIS 74282 at \*2.

3 In deciding whether to order expedited discovery under the “flexible ‘good cause’ test”  
4 courts “examine the discovery request . . . on the entirety of the record to date and the  
5 reasonableness of the request in light of all the surrounding circumstances.” *Adnan Abou Ayyash*  
6 *v. Bank al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (quoting *Merrill Lynch, Pierce, Fenner*  
7 *& Smith, Inc. v. O’Connor*, 194 F.R.D. 618, 623-24 (N.D. Ill. 2000)).

8 Here, Cascade has good cause to seek accelerated and expedited discovery of complete  
9 and verified copies of the test reports submitted to this Court with Mr. Elalouf’s Declaration.  
10 First, KFI’s counsel does not dispute the relevance of the documents; he merely asserts that the  
11 documents should not be required to be produced in advance of discovery and the Rule 26(f)  
12 conference. Guite Decl. ¶ 11. There is no reason for Cascade to suffer further injury as a result  
13 of KFI’s ongoing delay tactics. The documents at issue are relevant to KFI’s “unclean hands”  
14 defense to Cascade’s claims and to Cascade’s potential claims for disparagement and trade libel.  
15 Cascade may seek leave to file a Second Amended Complaint to allege those claims, among  
16 others and will pursue such claims at trial. Second, production of the original test reports by a  
17 non-party would pose no burden or prejudice on KFI. Indeed, such information should be readily  
18 available and inexpensive to produce. Immediate production would help reduce the harm that  
19 Cascade has already suffered as a result of KFI’s filing and publication of the test reports.

20 **B. A Letter Rogatory Should Issue To Permit Cascade To Obtain The Requested**  
21 **Discovery In The United Kingdom.**

22 Discovery from persons outside the United States is governed by Fed. R. Civ. P. 28, and,  
23 where applicable, the Hague Convention on the Taking of Evidence Abroad in Civil or  
24 Commercial Matters (“Hague Evidence Convention”), 23 U.S.T. 2555; T.I.A.S. No. 7444; 28  
25 U.S.C. § 1782; 28 U.S.C. § 1781; 8 I.L.M. 37 (1969). Both the United States and the United  
26 Kingdom are signatories to the Hague Evidence Convention. *See* Hague Convention on Taking

1 of Evidence Abroad in Civil or Commercial Matters, with signatory nations, available at  
2 [http://www.travel.state.gov/law/info/judicial/judicial\\_689.html](http://www.travel.state.gov/law/info/judicial/judicial_689.html).

3 Pursuant to Fed. R. Civ. P. 28(b), Cascade requests that this Court issue a Letter Rogatory  
4 directed to the appropriate judicial authority in the United Kingdom requesting the production of  
5 certified copies of all test reports and data in the possession, custody and control of SGS for any  
6 of Cascade's yarns submitted to SGS for testing by Designer Yarns, Ltd., Knitting Fever, Inc.,  
7 Sion Elalouf, or David Watt. As set forth herein, the test reports and data in the possession of  
8 SGS are relevant to Defendants' defenses and to Cascade's potential claims in this litigation and  
9 will be used by Cascade at trial in this matter.

10 **IV. CONCLUSION**

11 Cascade respectfully requests that this Court exercise its discretion to enter an Order  
12 permitting limited expedited discovery in this matter as described herein and the issuance of the  
13 proposed Letter Rogatory submitted herewith.

14 Dated: October 28, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

15  
16 By: /s/ Robert J. Guite  
Robert J. Guite, WSBA No. 25753

17  
18 Attorneys for Plaintiff  
Cascade Yarns, Inc.