

The Honorable Ricardo S. Martinez

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

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

**KNITTING FEVER, INC.’S  
MEMORANDUM OF LAW IN  
OPPOSITION TO CASCADE’S  
MOTION FOR EXPEDITED  
DISCOVERY**

**NOTE ON MOTION CALENDAR:  
November 12, 2010**

---

**I. INTRODUCTION**

Plaintiff, Cascade Yarns. Inc. (“Cascade”), seeks to conduct expedited discovery and deny the Knitting Fever, Inc. (“KFI”) the orderly process that the Federal Rules provide in all but the most exceptional civil cases. Cascade’s motion is premised upon its

1 unfounded “concerns” that the fiber analysis test reports on various of Cascade’s yarns  
2 proffered by KFI in connection with its opposition to Cascade’s preliminary injunction  
3 motion “may have been altered.” Cascade’s Brief at 2. Cascade asks this Court to believe  
4 that its concerns are well-founded, and that KFI’s counsel have been unresponsive and/or  
5 unreasonable. Neither is true. As shown below, “circumstantial evidence” offered in  
6 support of Cascade’s suspicions is nothing more than an amalgam of incorrect inferences  
7 and declarations of limited value. Moreover, Cascade’s counsel has simply disregarded  
8 KFI’s counsel’s prompt response to its stated concerns and, more significantly, the content  
9 of that response.

10 Ultimately, Cascade’s stated objective – to “help reduce the harm that Cascade has  
11 already suffered as a result of KFI’s filing and publication of the test reports” – is  
12 nonsensical, as formal production of the original test reports will only confirm what the  
13 copies have already shown, namely, that many of Cascade’s yarns have tested at variance  
14 from their stated fiber content. Cascade has failed to establish good cause for this Court to  
15 order discovery while motions to dismiss are still pending. Cascade’s motion, therefore,  
16 should be denied.

## 17 **II. FACTUAL BACKGROUND**

18 On September 30, 2010, one day following oral argument on Cascade’s preliminary  
19 injunction motion, counsel for Cascade wrote to KFI’s counsel and local counsel. In this  
20 letter, Cascade’s counsel advised of his receipt of additional test reports which disagreed  
21 with the test reports KFI had provided and, based on these new reports, stated that  
22 “Cascade can only conclude that the yarns and/or reports were altered in order to deceive  
23 the Court and to damage Cascade.” *See* Cascade’s Brief at Exhibit B. Based on this  
(incorrect) conclusion, Cascade’s counsel requested that KFI’s counsel “immediately  
investigate the propriety of the test reports, advise the Court of the results of your

1 investigation and withdraw Mr. Elalouf’s Supplemental Declaration and all exhibits  
2 thereto.” *Id.*

3 The following day, on October 1, 2010, KFI’s counsel responded to Cascade’s  
4 counsel. *See* Cascade’s Brief at Exhibit H. In its response, KFI’s counsel advised that  
5 neither the yarns that were tested nor the reports submitted by Mr. Elalouf were altered,  
6 and that “the only conclusion that **actually** can be drawn from the disparate results of our  
7 clients’ respective tests of Cascade’s yarns is that these testing methodologies yield  
8 inconsistent results.” *Id.* (emphasis in original).

9 Undeterred by the facts, counsel for Cascade persisted in his demands – but now  
10 his efforts were inexplicably directed solely to KFI’s local counsel, which has had no  
11 involvement in product testing. *See* Cascade’s Brief at Exhibit C. On October 5, 2010,  
12 Cascade’s counsel wrote to KFI’s local counsel to follow up on his letter of September 30  
13 (and his voicemail message to KFI’s local counsel of October 4), as if KFI’s counsel’s  
14 letter of October 1 letter had never been written. Cascade’s counsel reiterated his  
15 “compelled” conclusion of alteration, and requested that he be provided with “certified  
16 copies of all test reports of Cascade’s yarns submitted with Mr. Elalouf’s supplemental  
17 declaration directly from the testing facility that conducted the tests along with copies of  
18 the labels of the Cascade yarns tested.” *Id.*

19 On October 21, 2010, in a teleconference in which counsel for Cascade and KFI  
20 were negotiating the language of the Stipulation and Order, Cascade’s counsel again  
21 reiterated his request for certified copies of test reports but, when asked, was unable to  
22 provide any reason why this request was not premature in view of the present stage of the  
23 pending litigation.

1 And although it is entirely unrelated to the matters at issue in this case, Cascade's  
2 allegations regarding the Coats litigation require clarification. Rather than a lengthy  
3 recitation of the pertinent details of the Coats litigation in the body of this brief, KFI  
4 incorporates by reference its Objections to the October 25, 2005 Order submitted in that  
5 case. Declaration of Joshua R. Slavitt ("Slavitt Decl."), Exhibit B.

### 6 III. LEGAL ARGUMENT

#### 7 A. Legal Standards For Expedited Discovery

8 Fed. R. Civ. P. 26(d) provides that "a party may not seek discovery from any  
9 source before the parties have conferred as required by Rule 26(f)." The Rule recognizes,  
10 however, that expedited discovery may occur when authorized by court order. *Id.* Many  
11 district courts in the Ninth Circuit have followed the standard set out in *Yokohama Tire*  
12 *Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612 (D. Ariz. 2001). In *Yokohama Tire*, the  
13 court held that district courts have discretion to allow expedited discovery upon a showing  
14 of good cause by the moving party. *Id.* at 613-14; *see also Semitool, Inc. v. Tokyo Electron*  
15 *America, Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). In formulating this standard, the  
16 Court did not expound upon the definition of "good cause." but rather cited to Ninth  
17 Circuit jurisprudence. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.  
18 1992)). Utilizing the holdings of both *Yokohama* and *Johnson*, the court in *Semitool*  
19 opined that good cause existed "where the need for expedited discovery, in consideration  
20 of the administration of justice, outweighs the prejudice to the responding party." *Semitool,*  
21 *Inc.*, 208 F.R.D. at 276.

1           **B. Cascade Has Failed To Establish Good Cause For Expedited Discovery**

2                   **1. Cascade’s “Concerns” Are Unfounded**

3           Cascade admits that its allegations of KFI’s deliberate deception are based upon a  
4 “host of circumstantial evidence.” Cascade’s Brief at 3. Upon examination, however, it is  
5 apparent that Cascade’s “evidence” – an assemblage of simply incorrect and unwarranted  
6 inferences, and declarations of limited value – fails to establish good cause.

7                   **2. The Apparent Vintage Of Cascade Yarn Samples**

8           As an initial matter, Cascade has failed to explain how the apparent age of the  
9 samples of its yarn that KFI had tested should affect the fiber contents as reported.  
10 Presumably, yarns having the same fiber contents, regardless of vintage, should be  
11 interchangeable for purposes of testing. But apart from its illogic, Cascade’s conclusion  
12 that the samples KFI had tested were acquired years ago is factually incorrect. According  
13 to the Declaration of Jeffrey Denecke, all samples of Cascade’s yarns that KFI tested were  
14 acquired no earlier than August of 2010. *See* Declaration of Jeffrey Denecke, Jr. As a  
15 result, whatever inferential value the age of the tested samples was supposed to have in  
16 support of Cascade’s “concerns” of intentional deception is lost.

17                   **3. Dr. Langley’s Tests**

18           It is true that Cascade has supplemental reports of fiber analysis tests conducted by  
19 Dr. Ken Langley which differ from the reports provided by KFI. The most that can be said  
20 is that these reports show disparate results. Cascade, however, takes the unwarranted step  
21 that Dr. Langley’s supplemental tests *confirm* the accuracy of Cascade’s labels. If the  
22 labels are correct, Dr. Langley’s tests might serve as confirmation of their accuracy. If,  
23 however, the labels are incorrect, then the tests performed by SGS Cashmere Labs on

1 behalf of KFI might serve as confirmation of their *in*accuracy. In similar fashion, all that  
2 can be said of two clocks indicating different times is that at least one of them must be  
3 wrong; the accuracy of either cannot be assumed.

4 The disparate results of these two sets of tests – each performed on the same or  
5 similar dye lots by independent laboratories known to the Cashmere and Camel Hair  
6 Manufacturer’s Institute to have facilities and personnel capable of identifying and  
7 distinguishing fine animal hair fibers – suggest that these testing methodologies may well  
8 yield inconsistent results. Declaration of Joshua R. Slavitt (“Slavitt Decl.”), Exhibit A.  
9 Nonetheless, without any reason for discounting other, more likely possibilities, Cascade  
10 summarily concludes that Dr. Langley’s supplemental testing is evidence of what can only  
11 be intentional deception on KFI’s part. Cascade’s conclusion is simply unwarranted.

#### 12 **4. The Declarations of Elisabeth Loyola and Emanuele Scibanti**

13 The declarations of Elisabeth Loyola and Emanuele Scibanti are of limited value.  
14 Insofar as they relate only to Pastaza and Mohair Kiss – two of over eighteen of Cascade’s  
15 yarns tested that reported fiber contents at variance with their labels – these declarations,  
16 even if accepted, fail to compel Cascade’s conclusion of intentional deception. Notably,  
17 Ms. Loyola’s undated declaration contests the findings of an independent laboratory  
18 concerning Pastaza with those of her “in house fiber laboratory” (*see* Loyola Decl. at ¶ 7),  
19 and Mr. Scibanti’s declaration concerning details in the manufacture of Mohair Kiss  
20 offers little in the way of explanation. Shedding at most a small circle of dim light, these  
21 declarations fail to support Cascade’s “concerns” of intentional deception.  
22  
23

1                   **5.       KFI’s Counsel’s “Curious Response” To Cascade’s Concerns**

2           Cascade mischaracterizes the response it received to its stated concerns regarding  
3 the authenticity of the KFI test reports. As noted above, Cascade first questioned the  
4 authenticity of the test reports in its counsel’s letter of September 30, 2010. KFI’s counsel  
5 responded the following day, October 1, 2010, rejecting Cascade’s conclusion as reckless  
6 and pointing out that the only conclusion that *actually* can be drawn from the disparate  
7 reports is that the testing methodologies yield inconsistent results. See Cascade’s Brief at  
8 Exhibit H.

9                   **6.       Cascade Grossly Mischaracterizes The Coats Litigation**

10          Cascade offers the October 25, 2005 Order and a letter of Coats’s counsel to lend  
11 support to its insinuation that “Mr. Elalouf has demonstrated ... to be [sic] willing and able  
12 to modify documents to improve his position in litigation.” Cascade’s Brief at 4. While  
13 other “circumstantial evidence” offered by Cascade consists merely of factual or inferential  
14 errors, Cascade’s gross mischaracterization of events in the Coats litigation is simply  
15 irresponsible. As set forth in its Objections to the October 25, 2005 Order submitted in  
16 that case, the “alterations” at issue in the Coats litigation were nothing more than disputed  
17 redactions of privileged information. Declaration of Joshua R. Slavitt (“Slavitt Decl.”),  
18 Exhibit B. These disputed redactions do not involve deception of any nature. What is  
19 more, Cascade should know better.

20                   **C.       Cascade’s Stated Purpose Is Futile**

21          As set forth in its motion, expedited discovery “would help reduce the harm that  
22 Cascade has already suffered as a result of KFI’s filing and publication of the test reports.”  
23 Cascade’s Brief at 6. This stated purpose, however, is predicated on Cascade’s assumption

1 that the original test reports will show the copies to be fraudulent and confirm the accuracy  
2 of Cascade's labels. This assumption, however, is simply incorrect. As formal production  
3 in due course of originals will show, the tests performed by SGS report fiber contents of  
4 over eighteen of Cascade's yarns which are at variance with their labeled contents. As a  
5 result, the alleged harm to Cascade resulting from KFI's filing and publication of its test  
6 reports will not be abated by its immediate discovery of the originals.

7 **IV. CONCLUSION**

8 Cascade has failed to show why expedited discovery is warranted, particularly  
9 when motions to dismiss are pending. KFI respectfully requests that the Court deny  
10 Cascade's Motion for Expedited Discovery.

DATED this 8th day of November, 2010.

11 Pepper Hamilton LLP

12 By /s/ Joshua R. Slavitt

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

21 Davis Wright Tremaine LLP

22 By /s/ Warren J. Rheume

23 Warren J. Rheume, WSBA #13627  
Rebecca Francis, WSBA #41196  
1201 Third Avenue, Suite 2200  
Seattle, Washington 98101-3045  
Tel.: (206) 757-8035  
Fax: (206) 757-7035  
E-mail: warrenrheume@dwt.com  
rebeccafrancis@dwt.com

Attorneys for Defendants