



1 The inchoate nature of the motion is further evidenced by the title “Rule 56(b) motion.”  
 2 While the language and cases in the body of the memorandum refer to Fed. R. Civ. P. 56(d) and  
 3 the postponement of an opposition when material facts are not available, Defendants appear to  
 4 actually be seeking relief under Rule 56(b) -- a temporal prohibition to the filing of any motion  
 5 for summary judgment, regardless of the progress of discovery or any facts sought.<sup>2</sup> Defendant  
 6 avoided stating its argument and intentions directly, as the impropriety would be evident.<sup>3</sup>

7 Further complicating matters is defense counsel’s obdurate refusal to comply with local  
 8 rules. Philadelphia counsel has filed each of its dispositive motions on a third-Friday calendar,  
 9 rather than the LR 7(d)(3) mandated fourth Friday. Local counsel also refuses to sign motions  
 10 and responsive papers, absent a demand to do from Cascade; the present motion is no exception.  
 11 *See* GR 2(d). Lastly, Philadelphia counsel has since indicated that this motion is intended to  
 12 supplement an opposition to Cascade’s motion, instead of stating the factual basis as to why one  
 13 cannot be filed. In short, Defendant fabricated a second-bite at the apple.

14  
 15 Bliss, as this would have clearly established the scienter element for prosecution. *See* Dkt. No. 47  
 16 at p. 26 (Mr. Slavitt wrote to Ms. Bliss on June 24, 2010 to accept her request for representation  
 in this matter.)

17 <sup>2</sup> The delay sought is unrelated to the discovery of any particular evidence. This is demonstrated  
 18 by defense counsel’s statements and by the relief requested: “Defendant Knitting Fever, Inc.  
 19 (“KFI”) moves this Court pursuant to Rule 56(d) ... to continue Cascade’s motion for partial  
 20 summary judgment pending the conclusion of discovery” (Dkt. No. 157 at 1:22-24) and, further,  
 21 by the request to “continue Cascade’s partial summary judgment motion pending the conclusion  
 22 of discovery.” *Id.* at 7:1-2. Defendants’ proposed order provides: “Cascade’s Motion for Partial  
 Summary Judgment (Dkt. No. 151) is hereby STRICKEN AS MOOT without prejudice to refile  
 upon completion of discovery.” Dkt. No. 157-1, p. 2. Of course, none of this relief is proper  
 under Fed. R. Civ. P. 56(d); ruling on dispositive motions cannot be delayed indefinitely. A  
 particularized showing of exactly what discovery is necessary and how the requested discovery  
 will raise a genuine issue of material fact must be made. *See Natural Resources Defense Counsel*  
*v. Houston*, 146 F.3d 1118, 1133 (9th Cir. 1998).

23 <sup>3</sup> KFI’s inherent claim that Cascade’s motion is premature merely due to the posture of the case  
 24 lacks legal merit. *See Liberty Leasing Co. v. Hillsum Sales Corp.* 380 F.2d 1013 (5th Cir. 1967)  
 25 (upholding grant of summary judgment regardless of the fact that the motion was filed before the  
 26 answer). Rule 56(b) confirms that a party may file a motion for summary judgment *at any time*  
 until 30 days after the close of all discovery. Indeed, the Advisory Committee notes to the 2009  
 revisions to Rule 56 provide “[t]he new rule allows a party to move for summary judgment at any  
 time, *even as early as the commencement of the action.*” (emphasis added).

1 Here, Cascade will limit its response to the procedural history and impropriety of defense  
2 counsel's present actions. Cascade will respond to the substantive aspects of KFI's opposition, if  
3 any, including its Rule 56(d) analysis in the Reply to be filed on Friday, on January 14<sup>th</sup>.

4 **II. FACTUAL BACKGROUND AND DISCUSSION**

5 Philadelphia and local counsel refused to respond and correct the improper noting of this  
6 motion. On December 31, Cascade wrote to all counsel of record for the Defendants regarding  
7 the improper calendaring of this motion. Declaration of Robert J. Guite ("Guite Decl."), Ex A.  
8 Not one of KFI's numerous attorneys provided a response. In fact, some were so eager to ignore  
9 it that they deleted it, from their inbox, without reading. *Id.* While Philadelphia counsel actually  
10 read the letter, he nevertheless ignored it completely. *Id.* As promised in the letter, Cascade  
11 telephoned Philadelphia counsel at 10:00 a.m. PST/ 1:00 p.m. EST on Wednesday, January 5 but  
12 the call was screened by his secretary and never returned as promised.<sup>4</sup> *Id.*

13 In an effort to accommodate KFI's vaguely stated discovery needs, Cascade wrote again  
14 on January 3, 2011 offering to make the samples tested by Professor Kenneth Langley available  
15 for inspection and testing; again this elicited no response. *Id.*, Ex. B. Frustrated by the lack of  
16 cooperation, on January 7, 2011, Cascade wrote to local counsel and the ethics partner at Davis  
17 Wright Tremaine. *Id.*, Ex. C. Only after involving the ethics partner at Davis Wright Tremaine  
18 was Cascade able to get a response from Mr. Slavitt. *Id.*, Ex. D.

19 Mr. Slavitt's January 7 response raised more questions than it purported to answer: (1)  
20 Mr. Slavitt denied that the motion was improperly calendared and asserted that the Court's re-  
21 noting of it was in error; (2) he denied that the December 30 motion constituted KFI's response to  
22 Cascade's motion for partial summary judgment; and (3) he brazenly rebuffed Cascade's offers to

23 <sup>4</sup> Ironically, Cascade was placed in the position of badgering KFI to conduct the investigation,  
24 which KFI has alleged that Cascade is depriving it of the opportunity to conduct. KFI's  
25 intransigent refusal to pursue that allegedly-necessary discovery belies the improper intent of this  
26 motion. *See* Guite Decl., Ex. D. In that letter, Mr. Slavitt fails to mention or respond to  
Cascade's offer to stipulate to a subpoena to Professor Langley and to make samples of the yarns  
he tested available for KFI's own testing and inspection.

1 cooperate in providing the discovery that Cascade had assumed formed that factual basis for  
2 KFI's motion. Only after receiving Philadelphia counsel's January 7 letter was it apparent that  
3 KFI was not objecting on the basis that KFI lacked any particular discovery; instead, KFI  
4 objected on the procedural basis that a motion for summary judgment should not be heard before  
5 the close of discovery.<sup>5</sup>

6 As KFI's present motion appears to be a naked effort to create two separate opportunities  
7 for it to respond to one motion for partial summary judgment, Cascade objects to the present  
8 motion's consideration by the Court and respectfully requests that it be stricken.

9 **III. CONCLUSION**

10 KFI's request for a continuance is frivolous and should be denied. The motion for partial  
11 summary judgment is limited solely to the propriety of KFI's product labeling and Cascade  
12 presents evidence (thus far unrebutted) that KFI's product labels are inaccurate. KFI fails to meet  
13 its burden to establish with specificity what additional evidence it would obtain in discovery that  
14 would be sufficient to defeat Cascade's motion. More damning is KFI's refusal to cooperate in  
15 obtaining the discovery that Philadelphia counsel testified that he needs.

16  
17 Dated: January 10, 2011

SQUIRE, SANDERS & DEMPSEY (US) LLP

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19

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

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Attorneys for Plaintiff  
Cascade Yarns, Inc.

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23 <sup>5</sup> It is apparent that KFI does not actually require any discovery to know that its products are  
24 intentionally mislabeled. For instance, in the two years of litigating the case in the Eastern  
25 District of Pennsylvania, KFI has yet to take a single deposition, request a sample for inspection,  
26 or issue a subpoena to Professor Langley. Despite this posture, KFI brought its own motion for  
summary judgment, which was denied, and opposed two from the plaintiff, without alleging the  
lack of discovery as a basis to deny the motion based upon Fed. R. Civ. P. 56(d) (or predecessor  
Rule 56(f)).