

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington
corporation,

Plaintiff,

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 or existing
under the laws of Italy, SION ELALOUF, a
natural person, DIANE ELALOUF, a natural
person, JAY OPPERMAN, an individual,
DEBBIE BLISS, a natural person, DAVID
WATT, a natural person and DOES 1-50.

Defendants.

Case No. C10- 00861 RSM

**DEFENDANT KNITTING
FEVER, INC.’S REPLY
MEMORANDUM OF LAW IN
SUPPORT OF ITS RULE 56(d)
MOTION**

Note on Motion Calendar:
January 14, 2011

I. INTRODUCTION

Contrary to Plaintiff Cascade Yarn Inc.’s (“Cascade”) accusations, Defendant
Knitting Fever, Inc.’s (“KFI”) Rule 56(d) motion to continue Cascade’s motion for partial
summary judgment is neither an attempt to delay, nor a scheme to create two opportunities
to respond to one motion. The necessity and basis for KFI’s motion are simple: as Cascade

REPLY MEMORANDUM OF LAW
IN SUPPORT OF RULE 56(d) MOTION
(Case No. C10-00861 RSM) — 1

1 itself has acknowledged in the course of seeking leave to file a Second Amended
 2 Complaint, none of the Defendants has answered any version of the complaint, no Rule 26
 3 conference has taken place, no scheduling order exists, and almost no discovery has been
 4 conducted in an inherently fact-sensitive case.¹ At such an early juncture, summary
 5 judgment should be refused as a matter of course.

6 II. ARGUMENT²

7 While KFI does not dispute that Rule 56 allows a party to seek summary judgment
 8 at any time, the very same rule also provides that when a non-movant cannot present facts
 9 essential to justify its opposition to summary judgment, the court may, *inter alia*, defer
 10 consideration of the motion or allow time to take discovery. Fed. R. Civ. P. 56(d). “When
 11 a summary judgment motion is filed very early in the litigation, before a realistic
 12 opportunity for discovery, courts generally grant Rule 56(d) postponements freely. Steven
 13 Baiker-McKee et al., *Federal Civil Rules Handbook* 1120-21 (2011) (relying on
 14 *Burlington Northern* for the proposition that “In such cases, summary judgment should be
 15 refused as a matter of course, with exceptions permitted in only rare cases”). Moreover,
 16 Rule 56 contemplates that if a motion for summary judgment is filed prior to the filing of a
 17 responsive pleading, opposition papers would not be due until 21 days after a responsive
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19 ¹ How Cascade sees fit to press its request for summary judgment at the same time it is seeking leave to file a
 20 Second Amended Complaint is puzzling. Indeed, while Cascade admits that it was on notice of the allegedly
 21 false labeling as of May 26, 2006, it was content to wait almost four years to file suit. Am. Compl. ¶ 41.
 22 Now that it has filed suit, it wants both an immediate resolution and permission to amend its complaint. *See*
 23 Dkt. No. 174.

² KFI acknowledges that Cascade, once again, attempts to mask the issues by disparaging Defendants’
 counsel and offering unfounded opinions as to the veracity of declarations submitted by counsel, the method
 by which counsel reviews correspondence, and how counsel handles incoming telephone calls. To the extent
 such comments become germane to a motion at issue, Defendants will respond, otherwise Defendants’
 counsel will not engage with Cascade in such mudslinging.

1 pleading is due.³

2 KFI's Rule 56(d) motion is not an attempt to secure a second opportunity to oppose
3 summary judgment. Rather, KFI's motion addresses the current procedural posture of the
4 case and explains with specificity why the lack of discovery on critical factually intensive
5 issues requires the Court to defer consideration of the motion for partial summary
6 judgment. Nothing in Rule 56, or any other rule of civil procedure, mandates that a request
7 pursuant to Rule 56(d) be raised only in opposition to a motion for summary judgment. In
8 fact, in at least two recent cases, this Court has addressed Rule 56(f) motions that were
9 filed separate from oppositions to pending motions for summary judgment, just as KFI has
10 done.⁴ *See Campagnolo v. Full Speed Ahead, Inc.*, No. 08-1372, 2009 U.S. Dist. Lexis
11 22863 (W.D. Wash. March 23, 2009) (Martinez, J.); *Ngerntongdee v. Vaughn*, No. 08-
12 1070, 2008 U.S. Dist. Lexis 97337 (W.D. Wash. Nov. 21, 2008 (Martinez, J.)). Particularly
13 noteworthy is the fact that the parties in *Vaughn*, like the parties here, submitted opposition
14 and reply briefs to both the 56(f) motion and the summary judgment motion. *See*
15 *Ngerntongdee v. Vaughn*, No. C08-1070RSM (W.D. Wash.) Dkt. Nos. 5, 10, 13, 15, 28,
16 and 30. Additionally, the relief requested by the Rule 56(f) moving parties and granted by
17 this Court, is precisely the same relief as requested by KFI in its proposed order. *See*
18 *Campagnolo*, 2009 U.S. Dist. Lexis 22863 at *13 ("the Court shall STRIKE AS MOOT
19

20 ³ Although the time periods of Rule 56(c) yield to different times set by local rule or order of the Court, the
21 evident intent of the federal rule is to defer consideration of summary judgment motions until after
22 responsive pleadings are due.

22 ⁴ As noted in the opening brief, effective December 1, 2010, Rule 56 was amended such that current
23 subdivision (d) carries forward without substantial change the provisions of the former subdivision (f). *See*
Advisory Committee Note to Rule 56. As a result, the body of law developed under prior Rule 56(f) applies
to the current Rule 56(d) motion.

1 Plaintiff's motion [for summary judgment] (Dkt. #44) without prejudice to refile"
 2 (emphasis in original)); *Vaughn*, 2008 U.S. Dist. Lexis 97337 at *9 ("Defendant Vaughn's
 3 Motion for Summary Judgment (Dkt. #5) is STRICKEN AS MOOT without prejudice to
 4 refile once discovery has concluded" (emphasis in original)).

5 Contrary to Cascade's assertion, KFI has identified the discovery that is needed and
 6 why such discovery would preclude the entry of summary judgment. The required
 7 discovery includes, but is not limited to, documents and testimony relating to: which yarns
 8 Dr. Langley analyzed, whether those yarns are the same as the yarns KFI sells, what
 9 methodology Dr. Langley used to conduct his analysis, Dr. Langley's use of this
 10 methodology in other analyses, customer surveys that evaluate whether KFI's alleged
 11 statements affect yarn purchasing decisions, consumers' understanding of the term
 12 cashmere, the fiber content of Cascade's yarns, and Cascade's labeling practices relating to
 13 yarn content and origin.⁵ Cascade presents no reason why the Court in this case should
 14 allow an exception to the general rule that summary judgment should not be considered
 15 prior to discovery.

16 III. CONCLUSION

17 For the reasons stated above and in its opening brief, KFI respectfully requests that
 18 the Court grant its motion for a continuance pursuant to Rule 56(d) and strike Cascade's
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 21 ⁵ Cascade's reference to the lack of discovery in the matter pending in the Eastern District of Pennsylvania is
 22 misleading and ignores the procedural posture of that matter. By order of the court, discovery in the matter
 23 has been stayed since May 25, 2010. Prior to the stay, the parties had only begun to pursue depositions and
 only one deposition has been taken. Moreover, KFI's opposition to plaintiff's motions for summary
 judgment in the Pennsylvania action was based on legal arguments and factual disputes already of record.

1 motion for partial summary judgment without prejudice to refile upon the conclusion of
2 discovery.

3 DATED this 14th day of January, 2011

4 Pepper Hamilton LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing Reply Memorandum of Law of Defendant Knitting Fever, Inc. in Support of its Rule 56(d) Motion 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 14th day of January, 2011.

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