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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 REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT RE UNFAIR COMPETITION AND FALSE ADVERTISING UNDER THE LANHAM ACT, 15 U.S.C. § 1051 AND UNFAIR COMPETITION UNDER THE WASHINGTON CONSUMER PROTECTION ACT**

**Note On Motion Calendar:  
January 14, 2011**

**I. INTRODUCTION**

There is nothing hasty or unordinary about this motion. This case was filed nearly eight months ago. A similar case in Pennsylvania was filed nearly 28 months ago. Defendants refuse to depose Professor Langley, examine and analyze his testing samples, or retain an expert.

Cascade offered properly-authenticated and un rebutted expert testimony on the testing of KFI samples *obtained from the marketplace* and detailed the chain of custody and testing methodology. KFI ignores the evidence, rebuffs offers of discovery and depositions, with its

1 trademark tactics for delay. Cornered by Cascade's offer to facilitate discovery, KFI switches to  
 2 "plan B" and offers an inadmissible 11th-hour declaration, replete with hearsay and  
 3 unauthenticated documents. None of this "evidence" purports to relate to Knitting Fever, Inc. or  
 4 *yarns actually sold in the United States*.

5 There is no issue of fact with respect to liability on these claims: Cascade presented un-  
 6 rebutted expert testimony demonstrating that KFI continues to sell improperly labeled yarns in  
 7 interstate commerce. KFI failed to offer an expert or to present admissible evidence on the yarn it  
 8 sold, or show what discovery it needs. The Court should grant the motion.

## 9 **II. DISCUSSION**

### 10 **A. Counsel's Rule 56(d) Declaration Is a Naked Request for Delay Divested of** 11 **Any Legitimate Need for Discovery**

12 It is important to note that KFI makes no claim that it needs additional time to acquire a  
 13 declaration from its own expert, let alone retain one. As its defense lacks merit, KFI intends to  
 14 proceed to trial without an expert. Vague claims regarding the need for discovery cannot justify a  
 15 Rule 56(d) continuance. *Natural Resources Def. Council v. Patterson*, 146 F.3d 1118, 1133 (9th  
 16 Cir. 1998) (defendant must state what evidence will be discovered and how it will defeat motion);  
 17 *Nidds v. Schindler Elevator*, 113 F.3d 912, 921 (9th Cir. 1996) (party seeking continuance must  
 18 proffer sufficient facts to defeat motion). KFI offers speculation and demands lengthy delay.

19 KFI could have requested a Rule 56(d) continuance to secure testimony of its own expert,  
 20 but KFI brings the motion because "KFI has not yet had the opportunity to propound any  
 21 discovery on Dr. Kenneth Langley." When Cascade volunteered to provide this in an expeditious  
 22 manner,<sup>1</sup> Philadelphia counsel summarily rejected the offer.<sup>2</sup> Defense Counsel's actions show the  
 23 Rule 56(d) motion to be frivolous. KFI knows the facts; therefore, it does not want the discovery.

24 <sup>1</sup> "We are agreeable to stipulate to allow you to conduct early discovery, including issuance of a  
 25 Notice of Deposition and a *Subpoena Duces Tecum* to Professor Langley." Dkt. No. 167, Ex. A.  
 26 This letter offered a number of available dates. *Id.* Shortly thereafter, another letter was sent  
 offering KFI access to Professor Langley's samples for examination and testing: "if you would  
 like to have an expert conduct analysis of those samples, please let me know[.]" *Id.*, Ex. B.

1 At issue is the labeling and contents of KFI's yarn. If KFI's defense had merit no  
 2 discovery would be needed. "There is no reason to grant a continuance to a litigant who has  
 3 personal and intimate knowledge of the underlying facts for the purported purpose of conducting  
 4 discovery to ascertain those identical facts." *FTC v. JK Publications*, 99 F. Supp. 2d 1176, 1200  
 5 (C.D. Cal. 2000) (quoting *United States v. Private Sanitation*, 899 F. Supp. 974, 984 (E.D.N.Y.  
 6 1994)). If KFI's yarns were correctly labeled, an expert could purchase samples from the  
 7 marketplace and do tests: KFI chose not to offer any expert testimony regarding the fiber content  
 8 of its products and does not need a Rule 56(d) continuance to do so. As the court recognized in  
 9 *Private Sanitation*, such a position "is disingenuous." 899 F. Supp. at 984 ("Ferrante's request is  
 10 disingenuous. Ferrante seeks to defend this action by obtaining testimony of others, while  
 11 continuing to assert the Fifth Amendment privilege with respect to the underlying facts.")

12 Local counsel realized that KFI had no basis to request a Rule 56(d) continuance,<sup>3</sup> and  
 13 declined to sign Philadelphia counsel's motion as required by GR 2(d). Philadelphia counsel is  
 14 aware of the procedural defect and stated that a signature would be forthcoming.<sup>4</sup> The Court  
 15 should follow local counsel's lead and refuse to endorse this naked ploy for delay.

#### 16 **B. Cascade's Motion To Strike**

17 Pursuant to LR 7(g), Cascade requests that the Court strike portions of the Declaration of  
 18 Sion Elalouf in Opposition to Cascade's Motion ("Elalouf Declaration") because it contains  
 19 inadmissible evidence that should not be considered in opposition to Cascade's Motion.

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20 <sup>2</sup> "With regard to discovery of Dr. Langley, the *dates you offer are entirely unrealistic* for a  
 21 number of reasons. To begin with, *the pleadings have yet to close and formal discovery has yet*  
 22 *to begin.*" Dkt. No. 167, Ex. D. Mr. Slavitt's refusal appeared to relate solely on the procedural  
 23 posture of the case: "Once a scheduling order is in place, *the parties can then proceed with*  
*discovery in the manner in which they each see fit.*" *Id.* (emphasis added). Mr. Slavitt failed to  
 address the offer of a subpoena or access to the samples actually tested. *Id.*

24 <sup>3</sup> By letter of January 13, 2011 Cascade requested that the Motion to Continue be withdrawn as it  
 was not properly supported. Reply Declaration of Robert J. Guite ("Reply Guite Decl."), Ex. A.

25 <sup>4</sup> "[W]e will file corrected papers that include a signature line for local counsel." Dkt. No. 167,  
 26 Ex. D. It is unlikely local counsel reviewed these papers, which have routinely been incorrectly  
 calendared and filed just before midnight.

1 Specifically, the witness lacks sufficient personal knowledge to be competent to testify as to the  
2 purported facts set forth in the Elalouf Declaration or to authenticate the attached exhibits.  
3 Furthermore, much of the information in the Elalouf Declaration and its attached exhibits  
4 constitutes inadmissible hearsay for which no exception exists. Accordingly, the Court should  
5 strike Paragraphs 5-7 and 9 and Exhibits A-E of the Elalouf Declaration (Dkt. No. 170).

6 **1. Mr. Elalouf Lacks Personal Knowledge To Support His Statements**  
7 **And To Authenticate The Exhibits Attached To His Declaration**

8 “An affidavit or declaration used to support or oppose a motion [for summary judgment]  
9 must be made on personal knowledge, set out facts that would be admissible in evidence, and  
10 show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P.  
11 56(c)(4). “A trial court *can only consider admissible evidence* in ruling on a motion for summary  
12 judgment.” *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P. 56(e);  
13 *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988)). “Authentication is a  
14 ‘condition precedent to admissibility,’ and this condition is satisfied by ‘evidence sufficient to  
15 support a finding that the matter in question is what its proponent claims.’” *Orr*, 284 F.3d at 773  
16 (quoting Fed. R. Evid. 901(a)). Courts in the Ninth Circuit “have repeatedly held that  
17 *unauthenticated documents cannot be considered* in a motion for summary judgment.” *Id.*,  
18 citations omitted, emphasis added. “In a summary judgment motion, documents authenticated  
19 through personal knowledge must be attached to an affidavit that meets the requirements of [Fed.  
20 R. Civ. P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted  
21 into evidence.” *Id.* at 773-74, brackets in original; internal quotations omitted.

22 Mr. Elalouf, the President of KFI, testifies that “Designer Yarns provided both  
23 quantitative test reports from SGS Wool Testing Services International showing the cashmere  
24 content of the tested Cashmerino yarns in compliance with their labeling, and qualitative DNA  
25 test reports from Shirley Technology, Ltd. showing the presence of goat fibers,” which he  
26 attaches as Exhibits A and B. Dkt. No. 170, ¶¶ 2, 5, Exs. A, B. Mr. Elalouf does not provide any

1 information about how these purported tests were undertaken, the methodologies utilized,  
2 whether the purported yarn testers adhered to appropriate scientific standards, or what the  
3 appropriate scientific standards may be.<sup>5</sup> He is silent as to whether the samples were from the  
4 market place or manufactured solely for testing purposes.

5 KFI attempts to introduce evidence, through Mr. Elalouf, when he lacks any personal  
6 knowledge, other than he was given these documents. There is no indication for whom the  
7 documents in Exhibit A were prepared. *Id.*, Ex. A. The documents in Exhibit B state that they  
8 were sent to David Watt of Designer Yarns. Mr. Elalouf states that “Designer Yarns provided”  
9 these test reports, though he does not state whether Designer Yarns provided them to KFI or to  
10 some other entity that subsequently provided them to KFI, let alone if the yarn tested bears any  
11 resemblance to the yarn KFI sold in the United States. Mr. Elalouf lacks personal knowledge to  
12 be able to testify to the results of these purported tests. *See Id.*, ¶ 5. He also does not lay a  
13 foundation to authenticate the documents in Exhibits A or B. This is insufficient for his  
14 testimony in Paragraph 5 or Exhibits A and B to be admissible in opposition to Cascade’s Motion  
15 for Summary Judgment. *See In Re Homestore.com, Inc. Securities Litig.*, 347 F. Supp. 2d 769,  
16 780 (C.D. Cal. 2004) (ruling that an expert report attached to a declaration on a summary  
17 judgment motion was inadmissible on authentication grounds despite the fact that the proffering  
18 parties “assert[ed] that this document is an expert report compiled by Ms. Nettesheim [the expert]

19  
20 <sup>5</sup> The *Daubert* standard provides an additional basis for the Court to exclude Exhibits A and B  
21 (as well as Exhibits D and E, discussed *infra*). *See Daubert v. Merrell Dow Pharm.*, 509 U.S.  
22 579, 589 (1993) (“[U]nder the Rules the trial judge must ensure that any and all scientific  
23 testimony or evidence admitted is not only relevant, but reliable.”). “Ordinarily, a key question to  
24 be answered in determining whether a theory or technique is scientific knowledge that will assist  
25 the trier of fact will be whether it can be (and has been) tested.” *Id.* at 593. “Another pertinent  
26 consideration is whether the theory or technique has been subjected to peer review and  
publication.” *Id.* “Additionally, in the case of a particular scientific technique, the court  
ordinarily should consider the known or potential rate of error . . . and the existence and  
maintenance of standards controlling the techniques operation.” *Id.* at 594 (internal citations  
omitted). “Finally, ‘general acceptance’ can yet have a bearing on the inquiry.” *Id.* The Elalouf  
Declaration is devoid of information that would all the Court to determine whether the proffered  
test results should be admissible under *Daubert* and should be stricken on that basis.

1 and cite[d] her background and the source of this data”).

2           Moreover, the fact that the purported test results attached as Exhibits A and B are not  
3 supported by sworn testimony from any of the individuals who purportedly conducted these tests  
4 provides sufficient grounds to strike these exhibits. *See Scott v. Edinburg*, 346 F.3d 752, 759 (7th  
5 Cir. 2003) (“Marsh’s report was introduced into the record without any supporting affidavit  
6 verifying its authenticity and is therefore inadmissible and cannot be considered for purposes of  
7 summary judgment.”); *Lock Realty Corp. IX v. U.S. Health, LP*, 2009 U.S. Dist. LEXIS 84069, at  
8 \*8 n.1 (N.D. Ind., Sept. 14, 2009) (“In response to Lock’s motion for summary judgment, the  
9 defendants attached the expert report of Louis Jackson. As noted by Lock, Mr. Jackson’s report  
10 isn’t verified or sworn, and as such, isn’t properly before this court.”); *Howmedica Osteonics*  
11 *Corp. v. Tranquil Prospects*, 482 F. Supp. 2d 1045, 1057 (N.D. Ind. 2007) (“[A]n unsworn and  
12 unverified expert report is not Rule 56 evidence that may be relied upon to overcome a motion for  
13 summary judgment.”). Indeed, the Elalouf Declaration is devoid of any information regarding  
14 what was actually “tested,” the chain of custody for what was “tested” or the chain of custody for  
15 the alleged test results.

16           The fatal authentication problems that compel the Court to strike Exhibits A and B and the  
17 related testimony are also inherent in Exhibit D and Mr. Elalouf’s related testimony in Paragraph  
18 7. Mr. Elalouf states that “Filatura also provided KFI with a copy of a test report that it had  
19 secured on its Cashmerino yarns showing the cashmere content of the samples tested in  
20 compliance with their labeling.” Elalouf Decl., ¶ 7. This purported test result was not addressed  
21 to KFI and is not supported by sworn testimony from any of the individuals who purportedly  
22 conducted (or received) the tests. In addition, Exhibit D appears to be written in Italian without  
23 an English translation. Mr. Elalouf provides no basis or explanation for his understanding of this  
24 foreign language document. Likewise, Mr. Elalouf provides no information regarding what was  
25 actually “tested” or the chain of custody for the product “tested.” It is doubtful that the yarn  
26 tested was ever sold by KFI. As this Court recognized in striking Mr. Slavitt’s declaration in

1 opposition to the motion for preliminary injunction, a witness may testify that attachments are  
2 true and correct copies but “cannot testify to the truthfulness or accuracy of the opinions  
3 expressed” in documents or reports purportedly sponsored by that testimony. Dkt. No. 71.

4 Paragraph 9 and Exhibit E should also be stricken for the reasons set forth above. Mr.  
5 Elalouf testifies “[s]ince the commencement of the present lawsuit, KFI has secured test reports  
6 on different Louisa Harding and Kathmandu yarns at issue in this case which report fiber content  
7 in compliance with their labeling.” *Id.*, ¶ 9. Mr. Elalouf specifically does not identify who  
8 provided KFI with these purported test results. This further establishes that he lacks sufficient  
9 personal knowledge to form a foundation for his statement in Paragraph 9, to authenticate Exhibit  
10 E, explain what products were tested or the chain of custody for either the “test” results of for the  
11 product allegedly tested. The fact that these purported tests appear to be addressed to Designer  
12 Yarns contradicts Mr. Elalouf’s assertions.

13 In stark contrast to the lack of information provided in Elalouf Declaration Exhibits A, B,  
14 D, and E (and related declaration paragraphs), Cascade’s expert, Professor Kenneth D. Langley,  
15 described in exacting detail the scientific methodologies utilized in his analysis of the KFI yarns  
16 submitted in support of Cascade’s Motion for Summary Judgment. *See* Declaration of Kenneth  
17 D. Langley in Support of Plaintiff Cascade Yarns, Inc.’s Motion for Summary Judgment, ¶¶ 13-  
18 17, 37; Exs. B-T.<sup>6</sup> (Dkt. No. 152).

19 The Court should also strike Paragraph 6 and Exhibit C to the Elalouf Declaration. Mr.  
20 Elalouf testifies that “I also secured a signed and notarized statement from Filatura which  
21 confirmed that ‘the correct amount of cashmere fiber has gone into every batch of Cashmerino  
22 yarn ever produced by Filatura V.V.G.’” Elalouf Decl., ¶ 6. There is no indication whether he

23  
24 <sup>6</sup> KFI did not move to strike or object to the Langley Declaration. KFI declined Cascade’s  
25 invitation to take Mr. Langley’s deposition and to examine the yarn samples that Mr. Langley  
26 tested. It is also telling that KFI’s Rule 56(d) motion does not seek a continuance to afford KFI  
additional time to fix the glaring evidentiary defects in its Opposition to Cascade’s Motion for  
Summary Judgment. Dkt. No. 169.

1 actually obtained the document attached as Exhibit C from VVG or from some other source. The  
2 document is dated August 28, 2006, but it appears to have been printed from an unidentified  
3 Gmail account on December 3, 2009 in which it was identified as “VVGSwornStatement.gif.”  
4 Elalouf Decl., Ex. C. Mr. Elalouf does not state who e-mailed this document or whose e-mail  
5 address received it. Neither Mr. Elalouf’s testimony nor Exhibit C is sufficiently authenticated to  
6 be admissible in opposition to Cascade’s Motion for Summary Judgment.

7 **2. The Elalouf Declaration And The Attached Exhibits Constitute**  
8 **Inadmissible Hearsay**

9 Although Cascade maintains that the Court should strike Paragraphs 5-7 and 9 and  
10 Exhibits A-E based on inadequate foundation and authentication grounds, these same Paragraphs  
11 and Exhibits are also inadmissible on hearsay grounds. Even if the Court were to determine that  
12 any of these Paragraphs or Exhibits is somehow properly authenticated, each such Paragraph or  
13 Exhibit should still be stricken because it contains hearsay without an exception.

14 “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial  
15 or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c).  
16 The test results presented in Exhibits A, B, D and E are out-of-court statements offered to prove  
17 the truth of the matters asserted (*i.e.*, the alleged amounts of cashmere that KFI contends is  
18 contained in each of the yarns tested), and should be stricken. Exhibit C also includes  
19 inadmissible hearsay. Elalouf Decl., Ex. C (“We can confirm that the correct amount of cashmere  
20 fiber has gone into every batch of Cashmerino yarn ever produced by Filatura V.V.G.,” and  
21 “Filatura V.V.G. has employed a number of sophisticated techniques to ensure the integrity of the  
22 blend at all stages of production”). Likewise, certain of Mr. Elalouf’s statements in his  
23 declaration constitute inadmissible hearsay. *See* Elalouf Decl., ¶ 5 (stating that the test results in  
24 Exhibits A and B “show[] the cashmere content of the tested Cashmerino yarns in compliance  
25 with their labeling . . . [and] show[] the presence of goat fibers”); ¶ 6 (quoting a hearsay statement  
26 from Exhibit C); ¶ 7 (representing that the test results in Exhibit D “show[] the cashmere content

1 of the samples tested in compliance with their labeling”); ¶ 9 (discussing the test results in Exhibit  
2 E purportedly on “yarns at issue in this case which report fiber content in compliance with their  
3 labeling”). Given that “[a] trial court can only consider admissible evidence in ruling on a motion  
4 for summary judgment,” the Court should strike Exhibits A-E and the paragraphs in the Elalouf  
5 Declaration that reference statements in the information in these Exhibits on hearsay grounds.  
6 *See Orr*, 285 F.3d at 773; *Hot Wax, Inc. v. Warsaw Chem. Co., Inc.*, 45 F. Supp. 2d 635, 638  
7 (N.D. Ill. 1999).

8 Lastly, Cascade notes that in *Hot Wax, Inc. v. Warsaw Chem. Co., Inc.*, a case presenting  
9 factual and procedural circumstances strikingly similar to those presently before this Court, the  
10 court struck a witness’ affidavit in opposition to a motion for summary judgment for the same  
11 reasons that the Elalouf Declaration should be stricken. There, the plaintiff alleged that the  
12 defendant engaged in false advertising in violation of Section 43(a) of the Lanham Act by  
13 labeling and distributing commercial carwash products as “wax,” which the plaintiff contended  
14 did not contain wax. *Hot Wax*, 45 F. Supp. 2d at 636-37. In his affidavit, the defendant’s witness  
15 stated that seven of the defendant’s specific products contained wax. *Id.* at 637.

16 The “Plaintiff [] moved to strike this statement on two grounds: that [the witness] does not  
17 have personal knowledge of the chemical composition of the products at issue in this case and  
18 that [the witness’] information regarding the alleged presence of wax in these particular products  
19 is based on the hearsay statements of [an expert] and of [the manufacturer of the products].” *Id.*  
20 The court found the “affidavit, in essence, is a repetition of [the manufacturer’s] and [an expert’s]  
21 out-of-court statements regarding the alleged presence of wax in the products at issue. [The  
22 witness] repeats these out-of-court statements as though they were facts, and Defendant attempts  
23 to use [the witness’] repetition for the truth of the matter asserted, i.e., that the products at issue  
24 do, in fact, contain wax.” *Id.* at 638. The court struck the affidavit because “[the witness] has no  
25 personal knowledge of the chemical composition of the products at issue in this case,” and “[the  
26

1 witness'] statements rely on inadmissible hearsay." *Id.* at 637-38. As discussed above -- and as  
 2 occurred in *Hot Wax* -- the Court should grant Cascade's motion to strike.<sup>7</sup>

3 In the Pennsylvania action KFI argued that hearsay such as this should not be considered  
 4 by the Court. Using Mr. Slavitt's own words, KFI "cannot meet its Rule 56 burden with regard to  
 5 falsity merely by appending the unauthenticated, unsworn hearsay statements of its yet-to-be  
 6 qualified expert, or by attaching an email as to which it has not established admissibility." Reply  
 7 Guite Decl., Ex. B. As KFI argued, "simply attach[ing] unsworn hearsay letters as to which *no*  
 8 *foundation has been laid*" is not proper on summary judgment. *Id.*

9 **C. The Only Reliable, Admissible And Proper Evidence Before This Court**  
 10 **Establishes That KFI's Labels Are Literally False**

11 The only competent evidence before this Court -- the expert declaration of Professor  
 12 Langley (to which KFI offers no objection) -- establishes that, as a matter of fact, KFI's  
 13 statements regarding the fiber content of its yarns are literally false. Thus, Cascade has met its  
 14 burden, not only to show that KFI has made a false statement, but also that the statement deceived  
 15 consumers; when statements made are literally false, actual deception of consumers is presumed.  
 16 *See, e.g., U-Haul, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir. 1986); *Johnson & Johnson,*  
 17 *v. GAC Int'l, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988); *PPX Enters., v. Audiofidelity Enters., Inc.*,  
 18 818 F.2d 266, 272 (2d Cir. 1987). Cascade need not present evidence of consumer deception.

19 **D. Cascade Has Established That KFI's Literally False Misrepresentation of Its**  
 20 **Yarns' Fiber Content Are Material**

21 As Cascade has already explained (*see* Dkt. Nos. 10, 42 and 151), where, as here, the  
 22 materiality of a false statement is established by proving that the deception relates to an "inherent  
 23 quality or characteristic" of the product being misrepresented. *Johnson & Johnson Vision Care,*

24 <sup>7</sup> Although KFI presents no competent evidence, to the extent that the Court may be inclined to  
 25 consider any of it, there is ***absolutely no evidence*** proffered regarding the purported fiber content  
 26 of, at least, the following yarns: (1) Noro Cash Iroha; (2) Noro Silk Garden; (3) Noro Silk  
 Mountain; (4) Queensland Collection Big Wave; (5) Queensland Collection Katmandu DK  
 Tweed; (6) Elsebeth Lavold Silky Cashmere; (7) Elsebeth Lavold Calm Wool; (8) Debbie Bliss  
 Cashmerino Chunky; and (9) Cashmerino Super Chunky. *See and compare* Langley Decl. (Dkt.  
 No. 152), Exs. B-T *with* Elalouf Decl. (Dkt. No. 170), Exs. A-E.

1 *Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002). As Cascade has shown in  
 2 prior briefs, courts have held that labeling a sweater as containing “cashmere” when it in fact  
 3 contains “recycled cashmere” (as opposed to “virgin cashmere”) is a material misrepresentation  
 4 when recycled cashmere adversely impacts the characteristics of cashmere. *Cashmere & Camel*  
 5 *Hair Manufacturers Institute v. Saks 5th Avenue*, 284 F.3d 302, 338 (1st Cir. 2002); *see also The*  
 6 *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d Cir. 1982) (finding that “[t]he  
 7 claim that Tropicana’s Premium pack contains only fresh-squeezed, unprocessed juice is clearly a  
 8 misrepresentation as to that product’s inherent quality or characteristic [and therefore is likely to  
 9 influence customers’ purchases].”) It is hard to imagine how one could honestly argue that fiber  
 10 content is not an “inherent” quality of a yarn product.<sup>8</sup> Indeed, because yarn is nothing more than  
 11 a collection of fibers spun together, its fiber content is necessarily the product’s inherent  
 12 characteristic. Accordingly, because the fiber content of yarns relates to -- and is the heart of -- a  
 13 yarn product’s “inherent quality or characteristic,” a misrepresentation of that fiber content is  
 14 material as a matter of law. *E.g., Saks 5th Avenue*, 284 F.3d at 338.

15 **E. Cascade Offered Sufficient Evidence That It is Likely To Suffer Harm, Which**  
 16 **Is All It Is Required To Show**

17 KFI confusingly asserts that Cascade’s motion should be denied because “it does not offer  
 18 any evidence of actual injury.” Opposition at 11:16-17. However, as KFI concedes, Cascade is  
 19 not required to show actual harm, but, rather, Cascade is required to establish that “[it] has been  
 20 or *is likely to be injured* as a result of the false statement . . . .” Opposition at 5:5-13 (quoting  
 21 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (emphasis added)).  
 22 As Cascade established in its moving papers and in its motion for preliminary injunction (*see* Dkt.  
 23 Nos. 10, 42 and 151), Cascade has met this burden. *See also* Dkt. No. 11 at ¶¶ 4-8 and Dkt. No.  
 24 43, Ex. G. In fact, here, where Cascade has already demonstrated that it has otherwise satisfied

25 <sup>8</sup> Indeed, many of the products at issue play on their alleged, but incorrect, cashmere content by  
 26 calling themselves “Cashmerino” yarns.

1 the elements of its Lanham Act claim, the likelihood of harm is presumed.<sup>9</sup> *See, e.g., Visioneer,*  
 2 *Inc. v. Umax Techs., Inc.*, 1998 U.S. Dist. LEXIS 23431 \*12-13 (N.D. Cal., Dec. 7, 1998)  
 3 (“When a plaintiff demonstrates a likelihood of confusion, it is generally presumed that the  
 4 plaintiff will suffer irreparable injury if injunctive”). Indeed, “where the parties are direct  
 5 competitors, proof that consumers are likely to be misled into believing that defendant’s product  
 6 is superior to plaintiff’s, then it follows that plaintiff will lose some portion of the market ‘and  
 7 thus suffer irreparable injury.’” McCarthy, J. Thomas, *McCarthy on Trademarks and Unfair*  
 8 *Competition*, § 27:37 (4th Ed. 2009) (quoting *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d  
 9 312, 317 (2d Cir. 1982)). Here, the evidence before Court demonstrates that KFI has made  
 10 literally false statements that are material to the products at issue and deceive the consuming  
 11 public. Moreover, Cascade has offered a specific, fact-based explanation as to how it is being  
 12 harmed in an irreparable way. *See, e.g.*, Dkt. No. 11 at ¶¶ 4-8. Accordingly, Cascade has  
 13 adequately demonstrated that it “is likely to be injured as a result of the false statement” and  
 14 therefore has met its burden. *Southland Sod Farms*, 108 F.3d at 1139.

### 15 III. CONCLUSION

16 KFI offers unsupported requests for further delay, subterfuge and inadmissible evidence in  
 17 response to Cascade’s motion and falls far short of meeting its burden. Cascade’s Motion for  
 18 Partial Summary Judgment should be granted.

19 Dated: January 14, 2011

SQUIRE, SANDERS & DEMPSEY (US) LLP

20 By: /s/ Robert J. Guite

21 Robert J. Guite, WSBA No. 25753  
 22 Attorneys for Plaintiff  
 Cascade Yarns, Inc.

23 <sup>9</sup> Again, Cascade limited this motion for partial summary judgment to the issue of KFI’s liability  
 24 for its violations of the Lanham Act and RCW 19.86.020 and has reserved the issue of the amount  
 25 of damages until after Cascade has taken discovery. Such a limitation is expressly contemplated  
 26 by the language of the new Fed. R. Civ. P. 56(a). (“A party may move for summary judgment,  
 identifying each claim or defense -- **or the part of each claim or defense** -- on which summary  
 judgment is sought”) (emphasis added). Cascade has satisfied its burden for the relief it seeks --  
 partial summary judgment as to liability.