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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  
  
**REPLY DECLARATION OF ROBERT J. GUTE IN SUPPORT OF CASCADE YARNS, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

I, Robert J. Gute, declare as follows:

1. I am an attorney, admitted to practice before all of the courts of the State of Washington and this court, and am Of Counsel at Squire, Sanders & Dempsey (US) LLP, counsel of record for Plaintiff Cascade Yarns, Inc. ("Cascade") in this action. This declaration is based on my personal knowledge and, if called on to do so, I would and could testify competently as to the matters set forth herein.



**EXHIBIT A**



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January 13, 2011

**VIA EMAIL AND U.S. MAIL**

Warren J. Rheume, Esq.  
Rebecca J. Francis, Esq.  
Sarah K. Duran, Esq.  
Davis Wright Tremaine LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101-3045

**Re: *Cascade Yarns, Inc. v. Knitting Fever, Inc. et al.*  
United States District Court, Western District of Washington  
Case No. 2:10-cv-00861-RSM**

Dear Counsel:

We write regarding Defendants pending "RULE 56(b) [sic] MOTION TO CONTINUE CASCADE'S PARTIAL SUMMARY JUDGMENT MOTION." In our letters of December 31 and January 3, we offered to make Professor Langley for deposition on several dates, offered to stipulate to allow you to obtain Professor Langley's files and to provide an expert of Defendants' choice with the yarns that Professor Langley tested so that Defendants could obtain their own fiber analysis of those samples. No one from Davis Wright Tremaine responded to our correspondence. Mr. Slavitt of the Pepper Hamilton firm responded by letter refusing to take Professor Langley's deposition. No response was made to our offer to allow Professor Langley's file to be produced or to our offer to make the same yarns tested by Professor Langley available for testing.

With respect to the remaining discovery referenced in the motion, KFI wholly failed to meet its burden to identify with reasonable particularity what information was sought or how that information would raise a genuine issue of fact sufficient to defeat the pending Motion for Summary Judgment. As you know, vague and/or conclusory assertions about allegedly-necessary discovery are not sufficient to satisfy the requirements of Rule 56(d). In light of these circumstances, we fail to see any good faith basis to proceed with your motion. Accordingly, we ask that you withdraw your RULE 56(b) [sic] MOTION TO CONTINUE CASCADE'S PARTIAL SUMMARY JUDGMENT MOTION by 2:00 p.m. tomorrow.

Very truly yours,

A handwritten signature in black ink that reads 'Robert J. Guite'.

Robert J. Guite

RJG/tmd

cc: Joshua R. Slavitt, Esq.

**EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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THE KNIT WITH,		:
	Plaintiff,	:
v.		: Civil Action No. 08-cv-04221
		:
KNITTING FEVER, INC.,		:
DESIGNER YARNS, INC.,		:
FILATURA PETTINATA V.V.G.		:
DI STEFANO VACCARI & C.,		:
SION ELALOUF,		:
DIANE ELALOUF,		:
JEFFREY J. DENECKE, JR.,		:
JAY OPPERMAN, and		:
DEBBIE BLISS,		:
	Defendants.	:
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THE KNIT WITH,		:
	Plaintiff,	:
v.		: Civil Action No. 08-cv-04775
		:
EISAKU NORO & CO., LTD.,		:
KNITTING FEVER, INC.,		:
SION ELALOUF,		:
DIANE ELALOUF, and		:
JAY OPPERMAN,		:
	Defendants.	:
<hr/>		:

**SURREPLY BRIEF OF KNITTING FEVER, INC. AND SION ELALOUF  
IN OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Defendants Knitting Fever, Inc. (“KFI”) and Sion Elalouf submit this surreply brief in order to address certain arguments in Plaintiff’s reply brief that mischaracterize the law and misstate the record in this case.

Notwithstanding Plaintiff’s aspirations to the contrary, “[a] summary judgment is neither a method of avoiding the necessity for proving one’s case nor a clever procedural gambit

whereby a claimant can shift to his adversary his burden of proof on one or more issues.”

*Weinstock v. MDTV Med. News, Inc.*, 2007 U.S. Dist. LEXIS 5339, at \*3 (S.D. Cal. Jan. 25, 2007) (quoting *Watts v. United States*, 703 F.2d 346, 347 (9th Cir. 1983)). Rather, in order for Plaintiff to prevail on summary judgment, it must, of course, prove both the absence of genuine issues of material fact and its entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c). Moreover, the burden on the non-moving party to present evidence in opposition does not even arise until the moving party – here, Plaintiff – first meets the Rule 56 standard.

In the present case, Plaintiff has failed to satisfy this standard. As noted in KFI’s brief in opposition, Courts rarely find that a plaintiff has met the Rule 56 standard on claims that depend heavily on questions of intent, such as those alleged by Plaintiff. *See* KFI Opposition (Dkt. Entry No. 175) at 13-14; *see also Frantz v. Ferguson Enters., Inc.*, 2009 U.S. Dist. LEXIS 6241, at \*19 (E.D. Pa. Jan. 28, 2009) (“Both parties’ arguments revolve around questions of credibility and intent. Such questions are for the finders of fact at trial, not the Court when deciding a motion for summary judgment.”); *Pittsburgh Home & Garden Show, Inc. v. Scripps Networks, Inc.*, 2008 U.S. Dist. LEXIS 21020, at \*8-\*9 (W.D. Pa. Mar. 17, 2008) (explaining that “issues involving state of mind, including fraudulent intent and actual knowledge, both applicable here, are factually intensive, require credibility determinations within the province of a jury and are generally not determined at the summary judgment stage”); *id.* at \*9 (quoting *Copelands’ Enters., Inc. v. CNV, Inc.*, 945 F.2d 1563, 1567 (Fed. Cir. 1991) (“As a general rule, the factual question of intent is particularly unsuited to disposition on summary judgment”). Plaintiff fails utterly to address this proposition. Instead, Plaintiff asserts that “[i]mplicitly, Mr. Elalouf argues only direct evidence can prove an intent to defraud.” Reply at 6, n. 6. Not only does Plaintiff

grossly mischaracterize Mr. Elalouf's argument regarding intent, the cases upon which Plaintiff relies fail to defeat its own straw man.<sup>1</sup>

Plaintiff cannot satisfy Rule 56 as to the elements of injury or proximate cause merely by resting on unsubstantiated allegations of harm and conclusory arguments as to causation. Plaintiff summarily states that, as a "purchaser of the mis-labeled Cashmerinos, TKW is 'immediately injured.'" Reply at 7, n. 6.<sup>2</sup> Though Plaintiff supports this proposition by citing to *Bridge v. Phoenix Bond Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008), the Supreme Court's decision addressed only whether a RICO plaintiff must allege, and subsequently prove, first-party reliance. *Phoenix Bond* cannot be read to do away with the need to show injury and proximate causation. *See id.* at 2144-45 (referring to the injury and proximate cause requirements).

Similarly, Plaintiff cannot meet its Rule 56 burden with regard to falsity merely by appending the unauthenticated, unsworn hearsay statements of its yet-to-be qualified expert, or

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<sup>1</sup> The first case cited by Plaintiff, *Camell's [sic] Hair Belting Case*, appears to be referring to the English House of Lords 1896 decision in *Reddaway v. Banham*, which involved the tort of passing off. The case merely observes that fraud is found in many forms but does not address the required evidence sufficient to prove intent. Indeed, this case seems to corroborate the notion that questions of intent are factually intensive. *United States v. Hannigan*, 27 F.3d 890 (3d Cir. 1994) did not address the requisite proof of intent but instead examined whether the government presented sufficient evidence of use of the mails to support a jury's conviction. The other cases involve the Third Circuit's review of jury instructions in criminal RICO actions, which, of course, only underscores that the question of intent lies squarely within the province of the finder of fact.

<sup>2</sup> This, of course, completely disregards Plaintiff's recent assertion that "there exists a genuine issue of material fact whether the 2007 partnership is the proper party to pursue the claims alleged." *See Opposition to Defendants' Motion for Summary Judgment* (Dkt. Entry No. 143) at 16.

by attaching an email as to which it has not established admissibility.<sup>3</sup> In fact, Plaintiff's summary judgment motion does not contain an expert affidavit, expert report, or expert deposition testimony. Instead, Plaintiff simply attaches unsworn hearsay letters as to which no foundation has been laid.

Even if Plaintiff had met its initial burden under Rule 56, thereby shifting the burden to KFI and Mr. Elalouf to demonstrate a genuine issue of fact, they have met that burden. Plaintiff's manufactured objections to Elalouf's affidavit, *see, e.g.*, Dkt. Entry. No. 179, are frivolous.<sup>4</sup> Mr. Elalouf's Substitute Declaration, made upon personal knowledge, properly and sufficiently calls into question Plaintiff's unsupported allegations as to his "intent," in addition to raising significant material issues as to the reliability, credibility, and indeed admissibility of Plaintiff's "evidence" regarding the fiber content of the yarns at issue. Summary judgment on any of Plaintiff's claims would, therefore, be improper. *See Frantz*, 2009 U.S. Dist. LEXIS 6241, at \*19 ("Both parties' arguments revolve around questions of credibility and intent. Such

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<sup>3</sup> Plaintiff provides no support for its novel proposition that a movant's proposed evidence is presumptively admissible. Rule 56 does not require a party opposing summary judgment to prove that the movant's proposed evidence is inadmissible. The movant has the burden to meet the Rule 56 standard with evidence as to which it has established admissibility.

<sup>4</sup> To the extent any issues existed with the technical format of Mr. Elalouf's declaration, such issues have been mooted by Mr. Elalouf's submission of a substitute declaration. *See* Dkt. Entry No. 182 ("Substitute Declaration"). To the extent Plaintiff finds fault with Mr. Elalouf for not appending an expert declaration regarding fiber content, Plaintiff casts stones from its glass house. *See Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 96 (3d Cir. 1985) (stating that if the moving party's "aim was to force [the non-moving party] to present an expert's affidavit or sworn testimony, then the burden initially was on them to file their own expert's affidavit as part of their motion for summary judgment").

questions are for the finders of fact at trial, not the Court when deciding a motion for summary judgment.”).

Respectfully submitted,

Dated: August 17, 2010

/s/ Joshua R. Slavitt  
Joshua R. Slavitt  
Pepper Hamilton LLP  
3000 Two Logan Square  
Philadelphia, PA 19103  
(215) 981-4000  
(215) 981-4750 (fax)

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I, Joshua R. Slavitt, hereby certify that on the date set forth below I caused to be served Defendants' Sur-reply Brief of Knitting Fever, Inc. and Sion Elalouf In Opposition to Plaintiff's Motion for summary Judgment to Plaintiff's Motion for Summary Judgment upon counsel for the Plaintiff, The Knit With, via CM/ECF notification.

Date: August 17, 2010

s/Joshua R. Slavitt/  
Joshua R. Slavitt