

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

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.	:	

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.	:	

**DEFENDANTS’ MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF’S MOTION TO LIFT THE STAY OF DISCOVERY**

Defendants Knitting Fever, Inc., Sion Elalouf, Diane Elalouf, Jeffrey J. Denecke, Jr., Jay Opperman, Filatura Pettinata V.V.G. DiStefano Vaccari & C., and Designer Yarns, Ltd. (collectively, “Defendants”), file this memorandum of law in opposition to Plaintiff’s motion to the lift the stay of discovery.

I. INTRODUCTION

As the Court is well aware, these consolidated actions arise out of the commercial sale of allegedly mislabeled knitting yarn. Plaintiff, The Knit With, a retail yarn shop, seeks damages and injunctive relief in connection with approximately \$20,000 in purchases of certain brands of knitting yarn from Knitting Fever, Inc. (“KFI”), a knitting yarn importer and distributor, and for the alleged misrepresentations of KFI and some of the other defendants concerning the cashmere content of such knitting yarn.

Despite the relatively small dollar value of alleged purchases at issue, Plaintiff cast its net wide in pursuing its claims, originally suing 9 different defendants located in 4 different countries with 7 different claims, ranging from an unusual claim for “perfidious dealing” to claims under the Lanham Act and RICO. At the outset of the case and as discovery has progressed, Defendants have engaged in motion practice to streamline the case and dispose of the Plaintiff’s meritless allegations, in part to narrow the issues in order to lower the cost and burden of responding to Plaintiff’s broad-ranging, unremitting, and often improper discovery requests. Indeed, toward that end, Defendants moved for, and the Court granted, a stay of discovery during the pendency of Defendants’ Motion for Summary Judgment.

Because the Court has decided Defendants’ Motion for Summary Judgment, Plaintiff seeks to lift the stay of discovery. The reasons underlying the stay, however, still exist. Although the Court has dismissed certain counts (i.e., perfidious dealing, conspiracy, and Lanham Act claims) and certain defendants (Debbie Bliss) such that the scope of discovery has been narrowed somewhat, other dispositive motions remain pending before the Court (and before the federal court in Washington, where counsel for Plaintiff has filed similar claims against many

of the same defendants). Lifting the stay before the resolution of these motions would subject Defendants to costly, overbroad discovery and inevitable discovery disputes that might be avoided by the Court's first ruling on the dispositive motions.

II. ARGUMENT

A. Legal Standards For Staying Discovery

Federal courts have broad, inherent power "to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *see also New York v. United States Metals Ref. Co.*, 771 F.2d 796, 805 (3d Cir. 1985). The authority granted courts under Federal Rule of Civil Procedure 26 includes the discretion to stay discovery upon a showing of "good cause" to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. *See Fed. R. Civ. P. 26(c)*; *see also Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, No. 3:06-58, 2007 U.S. Dist. Lexis 15306, at *1 (W.D. Pa. March 5, 2007) (citing *WorldCom Techs. Inc. v. Intelnet Int'l Inc.*, No. 00-2284, 2002 U.S. Dist. Lexis 15892, at *18-*19 (E.D. Pa. Aug. 22, 2002)).

Courts in the Third Circuit have routinely granted motions for stays of discovery pending the resolution of dispositive motions. For example, this Court in *Jackson v. N. Telecom, Inc.*, No. 90-0201, 1990 U.S. Dist. Lexis 3572* 1 (E.D. Pa. March 30, 1990) granted a stay of discovery pending the resolution of a dispositive motion "in the interest of judicial economy, and with a view toward preventing possibly unnecessary and expensive discovery." *See also Babalola v. Donegal Mut. Ins. Co.*, No. 08-621, 2008 U.S. Dist. Lexis 102571 (M.D. Pa. Dec. 18, 2008) (granting stay and noting that delaying discovery may help streamline the process after

the motion to dismiss is decided resulting in less delay of the final resolution of the case);

Weisman v. Mediq, Inc., No. 95-1831, 1995 U.S. Dist. Lexis 5900 at *5 (E.D. Pa. May 3, 1995)

(a stay pending the resolution of a motion may be proper when the result would narrow discovery).

B. Good Cause Exists For A Maintaining the Stay Pending Resolution of Dispositive Motions

Here, the good cause necessitating the imposition of a stay of discovery in the first place – the need to streamline the parties and issues in the case – remains. Defendants Filatura Pettinata and Designer Yarns have filed motions to dismiss that are presently pending, and if successful on those motions, those two defendants will be dismissed from the case. Similarly, Defendants Diane Elalouf, Jay Opperman, and Jeffrey Denecke have just brought motions for judgment on the pleadings, which would result in the dismissal of Mr. Denecke and the elimination of two defendants from the alleged RICO conspiracy. The favorable resolution of these motions would streamline the lawsuit by narrowing the issues for discovery, and obviating the need for several defendants to engage in expensive and time-consuming discovery.¹ In particular, Filatura Pettinata and Designer Yarns are foreign to the United States, lifting the stay prior to the resolution of their motions to dismiss will force them to participate and impose a significant burden upon them. The individual defendants who seek dismissal of the RICO conspiracy claims against them pursuant to Rule 12(c) are based on insufficient allegations. To proceed before resolving the 12(c) motions would impose an undue burden on these defendants

¹ Defendants acknowledge that any dismissed defendants may have to participate in third-party discovery to the extent provided for by the Rules.

and enable Plaintiff to embark on a fishing expedition for facts to supplement its deficient allegations.

As the docket reflects, Plaintiff already has established a pattern of engaging in irrelevant, overbroad, and excessive discovery and related motion practice, including unfounded motions for sanctions. While Defendants expect that the appointment of a special master, as articulated in the Court's May 25 Order (Docket no. 131), may help address this pattern of behavior, maintaining a stay pending the resolution of dispositive motions – motions that may eliminate defendants or legal and factual issues – would serve the interests of judicial economy and ultimately be to the benefit of both Plaintiff and Defendants. Moreover, Defendants note that a case involving many of the same defendants and some of the same claims is pending in the Western District of Washington. *See Cascade Yarns Inc. v. Knitting Fever, Inc. et al.*, No. 10-861 (W.D. Wash.) (RSM). This case is in the pleading stage and discovery has not yet begun. Maintaining the stay in this Court would assist in any coordination of discovery as between the matters.

C. Maintaining the Stay will Not Prejudice Plaintiff

A continuation of the stay of discovery will not prejudice Plaintiff. The Defendants are not suggesting an indefinite stay of discovery, but a temporary stay only for the brief period during which the remaining dispositive motions are pending. Contrary to the allegations of Plaintiff, the pending motions are not an attempt to delay or stall the litigation. Plaintiff itself waited almost two years to properly serve Filatura Pettinata and Designer Yarns. It cannot now complain that Defendants should be precluded from challenging the sufficiency of the allegations asserted against them because of resultant delay. Once served, they timely filed their motions to

dismiss. The 12(c) motions recently filed by Defendants Diane Elalouf, Opperman, and Denecke follow closely on the heels of the Court's opinion regarding the insufficiency of the allegations of RICO conspiracy against Debbie Bliss. In that Memorandum Order, the Court provided a detailed analysis as to the deficiencies of Plaintiff's allegations against Debbie Bliss. The allegations as to Diane Elalouf, Jay Opperman, and Jeffrey Denecke are similarly deficient and the Court should apply the same reasoning to dismiss those claims from the action as well.

Plaintiff's argument that evidence or witness testimony will be lost, altered, or destroyed while a stay is in place is unfounded and inappropriate. Riding the coattails of a similarly inappropriate argument made by the plaintiff in the case pending in Washington, Plaintiff invokes as evidence of suspected future spoliation a declaration of a third-party customer who allegedly was told by a KFI representative that KFI was discontinuing a particular product for commercial sale. KFI's inventory management and sales practices, however, are separate and apart from its obligations to preserve and produce documents and things which may be relevant to this lawsuit. The discontinuation of a style or type of yarn occurs in the normal course of business, but this does not mean that the product can no longer be found in KFI's possession, custody, or control. It only means that it is no longer available for commercial sale. The alleged inability of the declarant in the Washington action to purchase a particular type of yarn does not, therefore, justify Plaintiff's desire in connection with this action to invade KFI's warehouses immediately to satisfy its overly broad and vague quest to find "evidence of the continuity of the Elalouf scheme to defraud." *See* Pl. Motion at ¶ 20, dkt. no. 225.²

² With its allegations that Defendants' motions for summary judgment and for a protective order were attempts to "forestall" inspections of its warehouses, Plaintiff continues its pattern of unfounded and unprofessional
(continued...)

Courts have recognized that in every civil action, from high-stakes disputes to routine small claims, there is a risk that a defendant will destroy or conceal evidence. A party cannot simply point out the ordinary and “obvious opportunity every defendant possesses” and expect extraordinary relief. *Adobe Sys. v. South Sun Prods., Inc.*, 187 F.R.D. 636, 641 (S.D. Cal. 1999) (denying request to grant exceptional remedy of *ex parte* injunctive relief because plaintiff presented no evidence that defendant was destroying documents or would destroy documents upon notice). Plaintiff provides no support for its argument that Defendants, upon proper and timely discovery requests from Plaintiff, would be unwilling or unable to provide relevant samples of the yarns-in-suit. Defendants are well aware of their duty to preserve evidence which they know or reasonably should know is relevant to the lawsuit. Thus, maintaining the stay will promote judicial economy without sacrificing the rights and interests of the parties.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff’s Motion to Lift the Stay of Discovery pending the resolution of Filatura Pettinata’s Motion to

(continued...)

personal attacks on Defendants and defense counsel. Defendants deny such allegations but decline to address every such irrelevant and inaccurate accusation with specificity.

Similarly inappropriate is Plaintiff’s misleading attribution of the phrase “empty the warehouse” to Defendant Sion Elalouf. *See* Casale Decl., at ¶ 7. There is no evidence that Mr. Elalouf ever uttered the phrase “empty the warehouse” or adopted it as an objective, as Plaintiff misleadingly suggests. Indeed, in the third-party declaration in which that phrase appeared, the declarant suggests only that a KFI representative told her that KFI was selling existing commercial inventory of a discontinued product; the declaration has nothing to do with spoliation of evidence relevant to this lawsuit.

Dismiss, Designer Yarns' Motion to Dismiss, as well as Diane Elalouf's, Jay Opperman's, and Jeffrey Denecke's Motions for Judgment on the Pleadings.

Respectfully submitted,

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