

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, an individual, DIANE ELALOUF, an individual, JAY OPPERMAN, an individual, DEBBIE BLISS, an individual, DAVID WATT, an individual and DOES 1-50,

Defendants,

v.

ROBERT A. DUNBABIN, SR., an individual, JEAN A. DUNBABIN, an individual, ROBERT A. DUNBABIN, JR., an individual, and SHANNON M. DUNBABIN, an individual,

Third Party Defendants.

No. C10-00861 RSM

**KNITTING FEVER, INC.’S
OPPOSITION TO CASCADE’S
SECOND MOTION FOR A
PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:
MARCH 18, 2011**

1 **I. INTRODUCTION**

2 Plaintiff, Cascade Yarns, Inc. (“Cascade”), and Defendant Knitting Fever, Inc. (“KFI”)
3 distribute knitting yarns made of cashmere and other specialty animal fibers in competition with
4 one another. All of Cascade’s claims – as set forth in the pleadings including the Second
5 Amended Complaint – are based on allegations that the labels of these yarns sold by KFI
6 misrepresent the content of cashmere and/or other specialty animal fibers in those yarns.

7 Cascade’s present motion for a preliminary injunction has nothing to do with the yarns
8 alleged to be mislabeled as set forth in Cascade’s pleadings. Instead, Cascade now takes issue
9 with the labels on an entirely different type of yarn sold by KFI – yarns containing milk protein
10 fiber – and by the present motion seeks to enjoin KFI’s sale of these yarns. Cascade requests this
11 relief even though (1) its complaint contains *no* allegations regarding any milk yarns; (2) Cascade
12 does *not* compete with KFI for the sale of milk yarns and therefore lacks standing; (3) Cascade
13 has not established a likelihood of irreparable harm; and (4) even if this claim were procedurally
14 proper, Cascade has still not shown that it would likely succeed on the merits of its claim. The
15 Court should deny the motion.

16 **II. FACTUAL BACKGROUND**

17 KFI, based in Amityville, New York, imports and distributes a wide variety of knitting
18 yarns to retailers throughout the United States. The yarns that are the subject of this motion –
19 yarns which are mentioned nowhere in the Second Amended Complaint (“SAC”) or in any prior
20 iteration of the complaint – are blended yarns containing different types of wool and milk protein
21 fibers. Specifically, Cascade identifies three yarns: (1) Ella Rae Milky Soft; (2) KFI Baby Milk;
22 and (3) Ella Rae Latte (the “Milk Yarns”). Mot. at 1 n.1.

23 Cascade imports and distributes yarns but, unlike KFI, Cascade does *not* sell any yarns
24 containing milk protein fibers. Cascade claims that, beginning in January 2011, it received
25 reports that the Milk Yarns did not contain any milk protein fiber despite their labeling to the
26 contrary. *See id.* at 7-8. Cascade submits three reports from K.D. Langley Fiber Testing Services

1 as “proof” that the Milk Yarns do not contain milk protein fiber. It now asks this Court to enjoin
 2 KFI from marketing and labeling the Milk Yarns as containing certain quantities of milk protein
 3 fiber, and using the term “milk protein” on any yarn labels.¹

4 **III. LEGAL ARGUMENT**

5 **A. Plaintiff’s Motion Is Beyond the Scope of the SAC**

6 None of the three versions of the complaint filed in this action presents claims based on,
 7 or even mentions, the Milk Yarns that are the subject of this motion. To the contrary, each
 8 iteration of the complaint, including the SAC filed less than one month ago on February 17, 2011,
 9 makes allegations directed only to yarns blended with cashmere or other specialty animal fibers.
 10 Cascade itself acknowledges that this motion deals with “an entirely new and different set of
 11 activities,” yet proceeds as if it actually has alleged a Lanham claim against KFI based on the
 12 Milk Yarns. Mot. at 3. In other words, Cascade discusses its likelihood of success on a claim it
 13 has not even brought. *Id.*

14 Cascade has not taken the required steps to present allegations concerning the Milk Yarns
 15 to the Court and to KFI. It may not shoehorn new allegations into the SAC by way of a
 16 preliminary injunction motion.² As a result, the Court lacks jurisdiction to issue the injunction
 17 Cascade requests. *Stewart v. U.S. Immigration & Naturalization Servs.*, 762 F.2d 193, 198-99
 18 (2d Cir. 1985) (court lacked jurisdiction to enter a preliminary injunction because discrimination
 19 allegations in motion different from and were not included in complaint); *Jayne v. Bosenko*, No.
 20 08-2767, 2010 U.S. Dist. Lexis 130302 at*15-*16 (E.D. Cal. Nov. 29, 2010) (plaintiff cannot
 21 bootstrap new allegations into complaint by way of preliminary injunction).

22 ¹ KFI notes that Cascade’s motion seeks only to enjoin conduct by KFI – it does not implicate any other
 23 defendant and, therefore, KFI is the only defendant that is responding to the motion.

24 ² The motion also attempts to insulate any allegations about the Milk Yarns from the *Twombly* and *Iqbal*
 25 pleading requirements and a challenge pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Ashcroft v. Iqbal*,
 26 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (Plaintiffs must allege “enough
 facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief
 above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in
 fact).”).

1 **B. Cascade Lacks Standing to Assert Lanham Act Claims on Milk Yarns**

2 Even if it were proper for Cascade to seek relief with respect to a claim it has yet to assert,
3 Cascade’s motion fails for lack of standing.³ In the Ninth Circuit, to have standing a plaintiff
4 must demonstrate (1) a commercial injury due to a misrepresentation about a product, and (2) the
5 injury is competitive i.e. harmful to the plaintiff’s ability to compete with the defendant. *Jack*
6 *Russell Terrier Network v. Am. Kennel Club Inc.*, 407 F.3d 1027, 1039 (9th Cir. 2005). Plaintiff
7 here fails to demonstrate either.

8 Plaintiff simply suggests, without support, that it has lost customers and goodwill as a
9 result of KFI’s sale of Milk Yarns. Specifically, it claims that the characteristics of Milk Yarns
10 that contain no milk protein “are likely going to be perceived by consumers as inferior to their
11 expectations. . . Such a comparison injures [Plaintiff] whose products may be rejected out of hand
12 by consumers who were dissatisfied by KFI’s seemingly comparable products.” Mot. at 14-15.
13 This argument is nothing but speculation based on a false premise.

14 “For a plaintiff to have standing, the parties must be competitors in the sense that they ‘vie
15 for the same dollars from the same consumer group,’ and the alleged misrepresentation must at
16 least theoretically effect a diversion of business from the plaintiff to the defendant.” *Peviani v.*
17 *Hostess Brands, Inc.*, No. 10-2303, 2010 U.S. Dist. LEXIS 122478 *20 (C.D. Cal. Nov. 3, 2010)
18 (quoting *Trafficschool.com, Inc. v. Edriver, Inc.*, 633 F. Supp.2d 1063, 1070 (C.D. Cal. 2008));
19 *see also New.Net, Inc. v. Lavasoft*, 356 F. Supp.2d 1090, 1116 (C.D. Cal. 2004) (plaintiff lacked
20 standing to bring a Lanham Act claim because it and defendant were involved in different
21 products in different segments of the internet market even though they were both downloadable
22 software providers).

23 While Cascade and KFI may be competitors in the market for cashmere-blended yarns –
24 and in fact the composition of many of KFI’s and Cascade’s cashmere blends are comparable –

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26 ³ Cascade cannot cure its lack of standing, and any request by Cascade for leave to amend the complaint, yet again, to include allegations as to the Milk Yarns must be denied as futile in addition to being prejudicial.

1 they simply do not compete in the market for milk protein fiber yarns because Cascade does not
2 sell such yarns. As a result, any consumers' potential dissatisfaction with KFI's milk protein
3 fiber yarn products will not lead them to reject Cascade's milk yarn products because no such
4 products exist. Cascade has neither demonstrated nor even alleged that any of the yarns it sells
5 are comparable substitutes for KFI's milk protein fiber yarns and their unique characteristics. To
6 the contrary, Cascade argues that fiber content is an inherent and material quality of a yarn
7 product that influences a consumer's purchasing decision. Cascade puts forth no support for the
8 proposition that KFI's sale of Milk Yarns has any impact on it whatsoever. Cascade cannot
9 demonstrate commercial and competitive injury required to pursue a preliminary injunction or a
10 Lanham Act claim based thereon, and the Court should deny the motion.

11 C. Standards for Granting Injunctive Relief

12 Injunctive relief is a drastic remedy that Courts should utilize only in extreme cases. *See*
13 *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *RasterOps v. Radius, Inc.*, 861 F. Supp. 1479, 1482
14 (N.D. Cal. 1994). Courts must be circumspect in granting a preliminary injunction as it invokes
15 the exercise of "a very far reaching power never to be indulged in except in a case clearly
16 warranting it." *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). In
17 cases like this, the burden on the party seeking preliminary injunctive relief is even heavier where
18 granting such relief would effectively give the moving party a substantial part of the relief it
19 would obtain only after a full trial on the merits. 5 J. Thomas McCarthy, *Trademarks & Unfair*
20 *Competition* § 30.30, at 30-76 (4th ed. 2010) (citing *Consumers Union of U.S., Inc. v. Theodore*
21 *Hamm Brewing Co.*, 314 F. Supp. 697 (D. Conn. 1970)).

22 A party seeking a preliminary injunction must prove: (1) that it is likely to succeed on the
23 merits, (2) that it is likely to suffer irreparable harm, (3) the balance of equities tip in its favor,
24 and (4) the injunction is in the public interest. *Winter v. N.R.D.C., Inc.*, 55 U.S. 7, 25 (2008). A
25 court cannot issue a preliminary injunction when there is a mere possibility of irreparable harm –
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1 such harm must be *likely*. *Id.*; see also *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d
2 1046, 1052 (9th Cir. 2009).

3 A plaintiff's burden is subject to heightened scrutiny when the relief requested is
4 mandatory in nature. Courts in the Ninth Circuit draw a clear distinction between a "mandatory
5 injunction" and a "prohibitory injunction." A mandatory injunction seeks to compel the
6 defendant to perform an affirmative act while a prohibitory injunction seeks only to preserve the
7 status quo pending trial. See *Desert Sun Net LLC v. Kepler*, No. C06-1041P 2006 U.S. Dist.
8 Lexis 78586, *19 (W.D. Wash. Oct. 27, 2006). The Ninth Circuit disfavors granting mandatory
9 injunctions, and any request requiring affirmative conduct by a defendant is "subject to
10 heightened scrutiny and should not be issued unless the facts and the law clearly favor the moving
11 party." *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). The mandatory
12 injunction sought here "goes well beyond simply maintaining the status quo pendente lite ..."
13 *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United*
14 *States*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

15 Cascade seeks mandatory relief. See Mot. at 4. The requested order would require KFI to
16 take the affirmative steps of re-labeling its yarns in inventory and providing labels to its
17 customers. As discussed below, the facts and law do not favor Cascade, and the Court should
18 deny its demand for mandatory injunctive relief.

19 **D. Cascade Cannot Demonstrate Irreparable Harm**

20 Cascade must demonstrate a likelihood of irreparable harm to obtain injunctive relief. See
21 *Winter v. N.R.D.C., Inc.*, 55 U.S. at 25; *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d at
22 1052. Cascade's failure to make this showing ends the Court's analysis.

23 Although Cascade asserts that it will suffer irreparable harm absent an injunction, it offers
24 nothing except the conclusory sentence that it will incur "loss of market share and loss of
25 goodwill in the marketplace." Mot. at 18. Cascade does not cite to a single case finding
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1 irreparable harm based on an unsupported allegation of diminished market share and goodwill.⁴
 2 Instead, courts in the Ninth Circuit require actual evidence of lost customers and goodwill in
 3 order to find irreparable harm. *See, e.g., Hansen Bev. Co. v. N2G Distrib.*, 2008 U.S. Dist.
 4 LEXIS 105442, at *15 (S.D. Cal. Dec. 28, 2008) (rejecting plaintiff’s “scant evidence” that
 5 alleged false advertising caused it to lose customers). For example, in *Premier Nutrition, Inc. v.*
 6 *Organic Food Bar, Inc.*, 475 F. Supp.2d 995, 1007 (C.D. Cal. 2007), the Court denied a motion
 7 for preliminary injunction where the moving party, like Cascade here, had not provided the Court
 8 with “any evidence of irreparable harm aside from its argument that it may experience a loss of
 9 good will and customer confusion due to misleading statements on [the other party’s] packaging.”
 10 Instead, the Court held that “[t]his vague and unsupported argument is not sufficient to establish
 11 irreparable injury.” *Id.*

12 Because Cascade cannot provide any evidence of irreparable injury, it instead requests
 13 that the Court simply presume irreparable harm. In so doing, Cascade fails to recognize that not
 14 all Lanham Act claims are analogous and that the presumption of irreparable harm will apply, if
 15 at all,⁵ **only** in cases of infringement or misappropriation of a competitor’s trademark. “While

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 17 ⁴ The cases Cascade cites do not support its position. In *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*,
 18 240 F.3d 832 (9th Cir. 2001), for example, the Ninth Circuit affirmed a district court’s finding that the absence of an
 19 injunction “would result in the possibility of irreparable harm.” *Id.* at 841. In *Winter v. N.R.D.C.*, 555 U.S. 7, 129 S.
 20 Ct. 365, 375-76 (2008) however, the Supreme Court expressly rejected the Ninth Circuit’s “possibility” standard and
 21 instead held that “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent
 22 with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear
 23 showing that the plaintiff is entitled to such relief.” In *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27,
 24 37-8 (2d Cir. 1995), the Second Circuit addressed the irreparable harm from an injunction preventing a company
 25 from bringing a new product to market. There the court held that prospective goodwill can constitute irreparable
 26 harm only where there is a “clear showing that a product that a plaintiff has not yet marketed is truly a unique
 opportunity for a company” and expected “the ‘clear showing’ standard to be infrequently met.” As Cascade does
 not offer a milk protein fiber product, and has not shown that it even is planning to offer one, *Tom Doherty* has no
 bearing on Cascade’s burden to show irreparable harm. Finally, Cascade cites to a footnote from *Vision Sports, Inc.*
v. Melville Corp., 888 F.2d 609, 612, n. 3 (9th Cir. 1989), which states only that, in some cases, irreparable harm is
 presumed upon a showing of likelihood of confusion. As Cascade’s claims do not involve a likelihood of confusion
 analysis, and as discussed in more detail *infra*, this presumption does not apply.

⁵ In *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2008), the Supreme Court rejected the Federal
 Circuit’s presumption of irreparable harm in the context of permanent injunctions arising from patent infringement.
Id. at 392-93 (“this Court has consistently rejected invitations to replace traditional equitable considerations with a
 rule that an injunction automatically follows a determination that a copyright has been infringed.”). After *eBay*,
 many courts stopped applying a presumption of irreparable harm under any circumstances. *See, e.g., Credit Bureau*
 (continued...)

1 irreparable injury may be presumed once a likelihood of confusion has been shown to exist in an
 2 ***infringement action*** under the Lanham Act, the Ninth Circuit has not yet found this presumption
 3 to be applicable to false advertising cases.” *Univision Music, LLC v. Banyan Entm’t*, 2004 U.S.
 4 Dist. LEXIS 30957, at *17 (C.D. Cal. Nov. 15, 2004) (emphasis added).

5 The purpose of the presumption of irreparable injury in cases involving infringement or
 6 misappropriation of another’s mark is that the loss of exclusive control of one’s own mark is
 7 likely to result in irreparable injury. “In ***trademark infringement*** actions, the Ninth Circuit has
 8 held that once the plaintiff has established a likelihood of confusion, irreparable harm is
 9 presumed. This is because it is reasonable for the court to assume that continuing infringement
 10 with a loss of control of its reputation and a loss of its goodwill.” *U. S. Olympic Comm’n v.*
 11 *Xclusive Leisure & Hospitality Ltd.*, 2009 U.S. Dist. LEXIS 12698, at *23 (N.D. Cal. Feb. 19,
 12 2009) (emphasis added); *see also Paul Frank Indus., Inc. v. Sunich*, 502 F. Supp.2d 1094, 1102
 13 (C.D. Cal. 2007) (“***[i]nfringing activity*** may lead to a loss of control over [plaintiff’s] reputation
 14 and/or dilution of the goodwill that [plaintiff] has built up over the years”) (emphasis added);
 15 *Ariz. Opera Co. v. AZ Opera Co.*, 2006 U.S. Dist. LEXIS 48938, at *15 (D. Ariz. July 14, 2006)
 16 (“Irreparable harm is presumed because continuing infringement would result in the loss of
 17 control of reputation and loss of goodwill.”). Allegations of non-comparative false advertising,
 18 such as that asserted in the present motion, simply does not invoke these considerations as there is
 19 no infringement or misappropriation of a competitor’s mark. In other words, Cascade continues
 20 to enjoy the exclusive control of its marks.

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 23 (continued...)

24 *Connection, Inc. v. Pardini*, 726 F. Supp.2d 1107, 1123 (E.D. Cal. 2010) (citing *eBay* and stating that “[t]his Court
 25 does not presume irreparable harm, even in intellectual property cases.”); *see also Skydive Ariz., Inc. v. Quattrocchi*,
 26 2010 U.S. Dist. LEXIS 49972, at *3-4 (D. Ariz. Apr. 29, 2010) (refusing to apply presumption because “[i]n light of
 the Supreme Court’s decision in *eBay*, many district courts have ceased this practice, refusing to afford plaintiffs a
 presumption of irreparable harm”) (citing cases).

1 Cascade misleadingly cites to *McCarthy on Trademarks and Unfair Competition* in
 2 support of its proposition that irreparable harm is presumed in false advertising cases. *See* Mot. at
 3 18. The quoted statement applies to cases of false advertising where the defendant’s advertising
 4 makes a **direct comparison** to the plaintiff’s product. The full text that Cascade cites that in
 5 cases, like this one, where the alleged “false advertising is non comparative and makes no direct
 6 reference to a competitor’s product, irreparable harm is **not** presumed.” *McCarthy on*
 7 *Trademarks and Unfair Competition*, § 27:37 (4th ed. 2010) (emphasis added); *see also Valu*
 8 *Eng’g, Inc. v. Nolu Plastics, Inc.*, 732 F. Supp. 1024, 1025 (N.D. Cal. 1990) (noting that “in cases
 9 of false comparative advertising, irreparable harm is presumed”) (emphasis added).

10 Thus, in *Mutual Pharmaceutical Co. v. Ivax Pharmaceuticals, Inc.*, 459 F. Supp.2d 925,
 11 944 (C.D. Cal. 2006), the Court cited to *McCarthy* and rejected the plaintiff’s argument that
 12 irreparable harm is presumed in false advertising cases. In so doing, the Court explained,
 13 “[a]lthough such a presumption would apply if this were a trademark infringement case, such a
 14 presumption of injury is applied differently in the context of false advertising claims.” *Id.*
 15 Instead, “[o]utside the context of comparative advertisements (that is, those that make no direct
 16 reference to a competitor’s product), a presumption of irreparable injury to a party is unwarranted
 17 because the injury caused by such a false or misleading advertisement ‘accrues equally to all
 18 competitors; none is more likely to suffer from the offending [advertisements] than any other.’”
 19 *Id.* at 945-46 (quoting in part *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.3d 34, 38 (2d Cir.
 20 1988)). Consequently, there is simply no legal basis for a presumption of irreparable harm in this
 21 case.⁶

23 ⁶ Cascade cites to a single unpublished decision where the court applied a presumption of irreparable harm.
 24 *See Visioneer, Inc. v. Umax Techs., Inc.*, 1998 U.S. Dist. LEXIS 23431 (N.D. Cal. Dec. 7, 1998). Respectfully, that
 25 court overlooked the distinction between direct comparison and non-comparative false advertising claims. Instead,
 26 the court simply stated that “[w]hen a plaintiff demonstrates a likelihood of confusion, it is generally presumed that
 the plaintiff will suffer irreparable injury if injunctive relief is not granted.” *Id.* at *12. In non-comparative false
 advertising cases, however, where the defendant is not infringing or misappropriating the plaintiff’s mark, there is no
 likelihood of confusion analysis. *See generally id.* (conducting no likelihood of confusion analysis). Tellingly, the
 two cases to which the district court cites for the proposition, *Metro Pub. Ltd. v. San Jose Mercury News*, 987 F.2d

(continued...)

1 Finally, Cascade asserts that it should be entitled to make a less stringent irreparable harm
 2 showing because of an alleged likelihood of success on the merits. As discussed *supra* n.4, the
 3 Supreme Court expressly rejected any preliminary injunction standard that does not require a
 4 plaintiff to establish that it will suffer irreparable injury absent an injunction. To that end, and in
 5 light of *Winter*, the Ninth Circuit has clarified that “[t]o the extent our cases have suggested a
 6 lesser standard, they are no longer controlling, or even viable.” *Am. Trucking Ass’ns v. City of*
 7 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *see also Maxim Integrated Prods. v. Quintana*,
 8 654 F. Supp.2d 1024, 1030 (N.D. Cal. 2009) (after the Supreme Court’s ruling in *Winter*, “a
 9 plaintiff is no longer entitled to a presumption of irreparable harm on the ground that it has shown
 10 a likelihood of success on the merits.”).

11 More fundamentally, Cascade’s motion fails to offer any evidence of actual irreparable
 12 injury it would suffer should the Court deny the injunction. To establish irreparable harm, a
 13 plaintiff “must do more than merely allege it, it must ‘**demonstrate** immediate threatened injury
 14 as a prerequisite to injunctive relief.’” *Valeo Intellectual Property, Inc. v. Data Depth Corp.*, 368
 15 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) (quoting *Caribbean Marine Servs. Co. v. Baldrige*,
 16 844 F.2d 668, 675 (9th Cir. 1988)) (emphasis added); *see also Premier Nutrition, Inc.*, 475 F.
 17 Supp.2d at 1007. Here, Cascade presents no evidence whatsoever that demonstrates that it has or
 18 will experience irreparable harm. Cascade merely asserts that without an injunction, it will lose
 19 prospective customers and goodwill. *See Mot.* at 18.

20 Cascade’s assertion that it will suffer a loss of market share absent an injunction also
 21 defies logic. First, as noted above, Cascade does not even offer a milk protein fiber yarn of its
 22 own, so KFI’s actions can have no effect on Cascade’s non-existent share of that market.
 23 Moreover, even if Cascade could prove lost sales, such damages are not irreparable but entirely

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 25 (continued...)

26 637 (9th Cir. 1993) and *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609 (9th Cir. 1989), were **trademark infringement** cases, not false advertising cases.

1 monetary in nature. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d
2 597, 603 (9th Cir. 1991) (“economic injury alone does not support a finding of irreparable harm,
3 because such injury can be remedied by a damage award”); *Los Angeles Memorial Coliseum*
4 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (noting that “the
5 possibility that adequate compensatory or other corrective relief will be available at a later date
6 . . . weighs heavily against a claim of irreparable harm” and monetary injury is not considered
7 irreparable). Second, even if the Court were to conclude that lost customers can constitute
8 irreparable harm, Cascade offers no evidence – not a single survey, customer complaint, or indeed
9 any concrete example of a customer it would lose absent an injunction. Simply stated, Cascade
10 asserts only that there is a “possibility” that it will suffer irreparable harm without an injunction.
11 That will not suffice.

12 **E. Cascade Cannot Demonstrate a Likelihood of Success on the Merits**

13 As a threshold matter, and as set forth above, Cascade has not asserted any claim that the
14 Milk Yarns were mislabeled. There are, therefore, no merits regarding the Milk Yarns on which
15 Cascade can be likely to succeed. In any event, to prevail on this new and unpled claim, Cascade
16 must prove: (1) “a false statement of fact by the defendant in a commercial advertisement about
17 its own or another's product; (2) the statement actually deceived or has the tendency to deceive a
18 substantial segment of its audience; (3) the deception is material, in that it is likely to influence
19 the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce;
20 and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by
21 direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with
22 its products.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

23 The parties vigorously dispute whether Cascade can demonstrate likely success on the
24 merits. When there is conflicting evidence regarding the merits of a claim, a plaintiff cannot
25 demonstrate likely success on the merits and the Court must deny the request for a preliminary
26 injunction. *Pom Wonderful LLC v. Purely Juice, Inc.*, 277 Fed. Appx. 744, 745 (9th Cir. 2008);

1 *see also Hansen Beverage Co. v. Vital Pharm. Inc.*, No. 08-1545, 2010 U.S. Dist. Lexis 40990, at
2 *2 (S.D. Cal. April 27, 2010) (preliminary injunction denied because of several disputed issues of
3 fact regarding the claims made by an energy drink producer regarding its product); *Nietech Corp.*
4 *v. CBS Data Servs.*, No. 03-3419, 2004 U.S. Dist. Lexis 30318 (N.D. Cal. Mar. 1, 2004)
5 (plaintiffs did not establish a likelihood of success on the merits because parties submitted
6 conflicting evidence on an element of the claim); *Chem-Tainer Indus. v. Wilkin*, No. 97-0829,
7 1997 U.S. Dist. Lexis 17241 (C.D. Cal. Feb. 21, 1997) (plaintiff failed to show likelihood of
8 success on the merits because of conflicting evidence regarding validity of patent at issue). Here,
9 Cascade cannot satisfy at least three of the elements of a Lanham Act claim – a false statement
10 by KFI, consumer deception, and injury.

11 **1. Cascade Has Not Shown a False Statement**

12 Cascade alleges that the labels affixed to the Milk Yarns are literally false because (1) the
13 labels indicate that the yarns contain a certain percentage of milk protein, when they do not; and
14 (2) milk protein is not the proper name for the fiber at issue. To support the allegation that the
15 Milk Yarns do not contain any milk protein fiber, Cascade relies upon tests conducted by K.D.
16 Langley Fiber Testing Services. Cascade accepts these reports as “proof” of mislabeling without
17 any question or scrutiny, and even though Mr. Langley provides no data to back up his
18 conclusions. Such blind acceptance of Mr. Langley’s reports is improper for several reasons.

19 As an initial matter, the Court has not qualified Mr. Langley as an expert, and his
20 credentials and methods have not been vetted under *Daubert*. Further, Mr. Langley’s declaration
21 details his experience in evaluating cashmere and other “specialty animal fibers.” Absent from
22 Mr. Langley’s declaration and its accompanying exhibits, however, is a description of any
23 experience testing milk protein fibers or other non-animal fibers, or a description why the
24 techniques applied to animal fiber analysis can also be applied to non-animal fibers. In fact, the
25 techniques can vary.

1 As evident from his reports, Mr. Langley uses light microscopy to test and identify yarn
2 fibers. Essentially, the subject yarns are sectioned, mounted on slides, and viewed under a
3 microscope. The proper identification of the fibers requires the viewer to be able to distinguish
4 the various fibers based on the physical characteristics of the fiber, such as cuticle height and
5 diameter. However, “[m]icroscopic examination of synthetic fibers, such as those based on milk
6 protein or acrylic, is not sufficient to determine the chemical nature of the fibers.” *See*
7 Declaration of Maureen Reitman, attached as Exhibit 1 at ¶ 6. As a result, “microscopic analysis
8 is not a suitable scientific basis for determining that milk protein fibers are absent in the subject
9 yarns.” *Id.* Milk protein fibers are best identified by chemical properties rather than physical
10 shape. *Id.* (citing Protocol 20). The protocols referenced by Mr. Langley describe several
11 chemical analysis techniques that are not capable of reliably distinguishing between acrylic and
12 milk protein fibers. *Id.* at ¶ 7. Even if the techniques could reliably distinguish between acrylic
13 and milk protein fiber, Mr. Langley does not report what technique he applied and, therefore, he
14 “has provided no scientific basis for concluding that fibers in the subject yarn do not contain milk
15 protein.” *Id.* Mr. Langley’s failure to observe milk protein fiber is unremarkable. In fact, it is to
16 be expected.

17 Even if light microscopy enabled an observer to detect milk protein fiber, Cascade fails to
18 appreciate and consider the numerous reasons why test reports based on light microscopy cannot
19 be accepted at face value. Light microscopy is subject to human error and the validity of
20 interpretation is dependent on the skill and experience of the observer. *See* Reitman Declaration
21 attached as Exhibit 1 at ¶ 6. It can be prone to operator bias based upon expectations as to the
22 presumed composition of the yarn, and confounded by similarity of fiber structures. *Id.* An
23 analysis is necessarily limited by the representativeness of the sample viewed. Additionally, the
24 potential for inaccurate identification of fibers is a well-recognized concern especially when the
25 yarn being tested has been dyed or treated such as the yarns samples here. Environmental
26

1 conditions such as humidity may also play a role in the evaluation of a yarn sample. It is also
2 recognized that there will be variations in reported percentages across observers and laboratories.

3 The Langley reports are also subject to scrutiny because they do not identify the error
4 limits of the methods employed. Without an error limit the reports are of limited value. For
5 example, a report that states that a yarn sample contains 5.7% of a particular fiber is unavailing if
6 the report is accurate within plus or minus 10%. The numbers of fibers used and the blend of
7 yarn also affect the error limit. The fewer the number of fibers used, the higher the error limit.
8 The Langley reports are based on over 500 fibers or between 500 and 1000 fibers. Such few
9 fibers likely means that the reports are subject to a high error limit and casts doubt on the
10 relevance of the reports.⁷ See e.g. Exs. D-F to Langley Decl.

11 Even if the Court were to ignore Mr. Langley's apparent lack of experience and
12 qualifications to analyze milk protein fibers and that the test methods employed are not capable of
13 identifying milk protein fiber, the application of Mr. Langley's reports is limited in scope and
14 does not demonstrate falsity and a likely success on the merits. Each individual report only
15 reflects the composition of a single sample of a single ball of yarn, of a single lot. Cascade
16 presents no evidence to demonstrate the yarn samples tested are representative of the entire
17 production run of yarn. Such uncertainty and conflicting evidence far from justifies the grant of
18 injunctive relief, relief that would provide Cascade with the same relief it would receive after a
19 full trial on the merits.⁸

20 Cascade's claim that KFI's yarns lack milk protein fiber cannot be reconciled with
21 confirmation received from KFI's suppliers of the Milk Yarns, Emmepieffe s.r.l. and Jiangyin
22 Jinda Textile Co. Ltd., that quality control procedures ensure that the Milk Yarns contain the

24 ⁷ KFI also notes an error on the report of the content of Ella Rae Milky Soft, attached as Exhibit D to Mr.
25 Langley's declaration. The label of Ella Rae Milky Soft attached as Exhibit D to Mr. Langley's declaration
identifies the color as 91215, not 9125 as reported by Mr. Langley on his report.

26 ⁸ Assuming, also, that such merits actually touched on the Milk Yarns, which they do not.

1 stated percentages of milk protein fiber appearing on their labels.⁹ See Declaration of Piero
2 Ferraro attached hereto as Exhibit 2; see also Declaration of Edgar Yu attached hereto as Exhibit
3 3.

4 Cascade has failed to demonstrate that KFI's labels are literally false. At best, the parties
5 have presented conflicting evidence as to the composition of the Milk Yarns. The Ninth Circuit
6 has determined that conflicting evidence calls into question a plaintiff's likelihood of success on
7 the merits and renders injunctive relief improper. *Pom Wonderful LLC v. Purely Juice, Inc.*, 277
8 Fed. Appx. 744, 745 (9th Cir. 2008) (affirming denial of plaintiff's motion for a preliminary
9 injunction and noting that the parties had submitted conflicting information about the defendant's
10 product, including what ingredients were added and whether the varietal of pomegranate, farming
11 practices, and processing methods affected the laboratory results used to identify the percentage
12 of juice). Here, as in the *Pom* case, there is conflicting evidence about the composition of KFI's
13 Milk Yarns and the tests used to determine that composition. Such conflicting evidence prevents
14 Cascade from establishing its likelihood of success on the merits.

15 As noted above, Cascade also claims that the labels are literally false because, pursuant to
16 the Textile Products Identification Act ("TPIA"), "milk fiber" is not an appropriate term.
17 Cascade asserts that under the TPIA, milk fiber should be referred to as "Azlon" or "Polylactide."
18 Mot. at 4. Such an assertion, however, is entirely irrelevant to Cascade's purported Lanham Act
19 claim. Failure to use a particular term does not equate to a false statement where that term is not
20 inaccurate. Plaintiff cannot manufacture a claim for alleged violations of the TPIA and related
21 regulations, for which Congress provided no private cause of action, in the guise of a Lanham Act
22 claim.¹⁰

23
24 ⁹ Pursuant to CCHMI standards, a deviation of plus or minus three percent between the percentage of a fiber
listed on a label and the percentage of a fiber contained in a yarn is acceptable.

25 ¹⁰ This Court is not the appropriate forum to debate the obligations imposed by either the TPIA or the Wool
26 Products Labeling Act ("WPLA"). Neither provides for a private cause of action and any attempts by Plaintiff to
circumvent such a limitation are inappropriate. 15 U.S.C. §§ 68d, 70e; see also *Warren Corp. v. Goldwert Textile*

(continued...)

1 **2. Cascade Has Not Shown That Any Consumers Are Deceived**

2 To demonstrate a likelihood of success, Cascade must also show that KFI's labels misled,
 3 confused, or deceived consumers. *See Southland Sod Farms v. Stover See Co.*, 108 F.3d 1134,
 4 1140 (9th Cir. 1997). Cascade does not even attempt to show that the Milk Yarn labels deceived
 5 consumers. Instead, it claims only that KFI's statements were "literally false" and, therefore,
 6 consumer deception is presumed. For the reasons described *supra*, Plaintiff has not shown that
 7 KFI's statements are literally false. When a challenged statement is alleged to be implicitly false,
 8 a plaintiff must demonstrate that the statement misleads, confuses or deceives the public through
 9 evidence such as the public's reaction to the statement. *Johnson & Johnson v. GAC*
 10 *International, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988)(citing *American Home Products v. Johnson*
 11 *& Johnson*, 577 F.2d 160, 165 (2d Cir. 1978)). Often consumer deception is demonstrated
 12 through surveys. *Southland*, 108 F.3d at 1140.

13 In the present case, Cascade has not provided any such reports. Any reference Cascade
 14 makes to consumers is purely speculative and without any evidentiary foundation whatsoever.
 15 Cascade does not offer any facts, statements, comments, or even questions from any consumers to
 16 demonstrate that KFI's labels misled them. For example, there is no information as to whether
 17 the knitting public: (1) understands the Milk Yarn labels; (2) knows what milk protein fiber (or
 18 Azlon or polylactide) is; or (3) is likely to be confused or misled by use of the term milk protein
 19 fiber. And all this assumes that the knitting public reads yarn labels in the first place. Without
 20 even attempting to demonstrate that consumers were misled, Cascade cannot succeed on the
 21 merits.

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 24 _____
 (continued...)

25 *Sales, Inc.*, 581 F. Supp. 897, 899 (S.D.N.Y. 1984) (plaintiff "cannot create a private right of action under the Wool
 26 Act, nullifying the Act's own provisions, by asserting its standing to sue under the Lanham Act").

3. Cascade Has Not Shown Injury

1 Like Cascade's allegations of irreparable harm and consumer deception, its allegations of
2 injury are similarly speculative and unsupported by any evidence. Cascade claims that KFI's sale
3 of allegedly mislabeled Milk Yarns allows KFI to reap windfall profits, allowing KFI to unfairly
4 compete. Cascade, however, does not offer any documentary support of such profits, or concrete
5 examples of even a single lost customer. Cascade claims that consumers, who admittedly cannot
6 accurately determine fiber composition without expert testing, dissatisfied with KFI's yarns will
7 reject comparable Cascade yarns. As noted above, Cascade does not offer any yarns containing
8 milk protein fibers. Accordingly, Cascade cannot lose customers when it does not even sell the
9 product the customer seeks.
10

11 As to profits, Cascade merely recites the prices of several of KFI's yarns and the prices of
12 several of Cascade's yarns and assumes that, because they are different, KFI must be earning
13 windfall profits. Cascade does not offer its own financial statements, let alone an explanation as
14 how it can opine as to KFI's profit margins. As Cascade is well aware, yarns price are not merely
15 the sum of the cost of their ingredients. Overhead, marketing, labor, import taxes, etc. all may
16 affect price. All Cascade offers are the self-serving conclusions of Mr. Dunbabin based on his
17 experience in the yarn industry. Without actual facts, Cascade cannot demonstrate injury and,
18 therefore, has failed to demonstrate a likelihood of success on the merits.

F. The Balance of the Harms Favor KFI if an Injunction is Imposed

19 Cascade's vague allegations of possible harm to its goodwill and potential loss of
20 customers do not outweigh the actual harm KFI would experience if the Court granted Cascade's
21 request for injunctive relief. As discussed *supra*, Cascade's claims of harm are purely speculative
22 and unsupported by any evidence. In fact, Cascade has freely discussed its concerns about KFI
23 on its website and has made it known that its yarns are distinguishable from those offered by KFI.
24 It wants to benefit from the publicity associated with the lawsuits against KFI.
25
26

1 On the other hand, the harm KFI would experience is concrete and immediate. Cascade
2 has requested a Court order enjoining KFI from marketing and labeling yarns as containing
3 certain fibers when the yarns do not contain such fibers. Cascade assumes that re-labeling yarns
4 is a costless exercise. First, such an order would beg the question – what should the labels say?
5 Based on the assurances it has received from its suppliers, KFI believes its yarns are accurately
6 labeled and that no re-labeling is warranted. What Cascade really wants is to force KFI to re-
7 label its yarns and omit the reference to milk protein, simply because Cascade’s reports say so. In
8 order to re-label its yarn, KFI would have to create new labels, affix new labels to yarn in
9 inventory, and provide new labels to its customers to be affixed to yarns in their respective
10 inventories. The harm to KFI in performing this exercise is two-fold. First, the creation and
11 affixing of new labels to KFI inventory of Milk Yarns would require the expenditure of KFI
12 funds. Second, the provision of additional new labels to customers along with a credit to
13 compensate retailers for their costs of affixing the new labels would require an additional
14 expenditure of KFI funds. Assuming the lawsuit is resolved in KFI’s favor, KFI would re-incur
15 this cost to re-label it yarns to reflect their milk protein fiber content as they did before any
16 injunctive relief. As the balance of hardships tips against the issuance of the requested
17 preliminary injunction, it should be denied.¹¹

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25 ¹¹ Given the cost of re-labeling and corrective of advertising, if the Court is inclined to award Cascade
26 injunctive relief, it should require Cascade to post a bond to protect KFI from the costs and damages incurred as the
result of a wrongful injunction.

1 **IV. CONCLUSION**

2 For all the foregoing reasons, the Court should deny Cascade's motion for a preliminary
3 injunction.

4
5 Dated: March 14, 2010

6 Pepper Hamilton LLP

7 By: /s/ Joshua R. Slavitt

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23 rebeccafrancis@dwt.com

24 Attorneys for Defendants
25
26

EXHIBIT 1

The Honorable Ricardo S. Martinez

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,)

v.)

ROBERT A. DUNBABIN, SR., a natural person,)
JEAN A. DUNBABIN, a natural person,)
ROBERT A. DUNBABIN, JR., a natural person,)
and SHANNON M. DUNBABIN, a natural)
person,)

Third Party Defendants.)

Civil Action No. 2:10-cv-00861 RSM

**DECLARATION OF MAUREEN
REITMAN IN OPPOSITION TO
CASCADE'S MOTION FOR A
PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:
March 18, 2011**

1 I, Maureen Reitman, do hereby declare and state as follows:

2 1. I am over the age of 18, the information contained herein is based on my
3 personal knowledge and if called upon to do so, I could testify competently as to the
4 matters set forth herein.

5 2. I am a Principal and the Director of the Polymer Science and Materials
6 Chemistry practice at Exponent, Inc. (Exponent), the largest engineering firm in the United
7 States dedicated primarily to the analysis and prevention of failures of an engineering or
8 scientific nature. I hold two academic degrees: (1) a Bachelor of Science in Materials
9 Science and Engineering from the Massachusetts Institute of Technology (MIT), and (2) a
10 Doctor of Science in Materials Science and Engineering, with a thesis in the field of
11 polymers, from MIT. I have been practicing in the field of polymer science and
12 engineering for more than 20 years as a researcher at MIT, in a variety of technical roles at
13 the 3M Company, and as a consultant with Exponent. I provide consulting engineering
14 services in all aspects of the field, including, but not limited to, materials selection,
15 polymer formulation, process improvement, testing, product design and development,
16 failure analysis and intellectual property analysis. I have specific experience with visual,
17 microscopic and chemical analysis to determine composition and structure of natural and
18 synthetic fibers, as well as extensive experience developing and performing methods to
19 evaluate the physical properties and performance of fibers and fabrics made from them. A
20 true and correct copy of my *curriculum vitae* is attached hereto as Exhibit A.

21 3. I was retained by counsel for defendant Knitting Fever, Inc., (KFI) to
22 review the Declaration of Kenneth D. Langley in support of Cascade's Motion for
23

1 Preliminary Injunction dated February 22, 2011, including Exhibits (Declaration), and to
2 assess the scientific basis for his conclusions related to milk protein fibers.

3 4. In his Declaration, Mr. Langley opines that Ella Rae Milky Soft, KFI Baby
4 Milk and Ella Rae Latte “do not contain casein fiber or any fiber that was derived from
5 milk or milk protein.” His conclusions are based on testing that he reports is conducted
6 “according to AATCC (American Association of Textile Chemists and Colorists) protocols
7 20-2007 Fiber Analysis: Qualitative, and 20A-2008 Quantitative (reference: section
8 Chemical Analysis Procedures and Microscopical Analysis Procedures).”

9 5. Mr. Langley provides no detail related to which tests in the protocols he
10 applied, the observations associated with these tests, or the process he applied to determine
11 that portions of the yarns are acrylic and not based on milk protein.

12 6. Microscopic examination of synthetic fibers, such as those based on milk
13 protein or acrylic, is not sufficient to determine the chemical nature of the fibers. Protocol
14 20 states, “The man-made fibers are best identified by . . . properties which relate to
15 chemical nature rather than physical shape.” Mr. Langley’s microscopic analysis is not a
16 suitable scientific basis for determining that milk protein fibers are absent in the subject
17 yarns. Additionally, the accuracy of blend determination depends on the nature of the
18 fibers and the experience of the individual interpreting the microscopic observations.

19 7. Several chemical analysis techniques are described in the protocols, most of
20 which are not capable of reliably distinguishing between acrylic and milk protein fibers,
21 especially if the milk protein includes grafted acrylonitrile content. Mr. Langley does not
22 report what technique or techniques he has applied, or any observations associated his
23

1 testing. Therefore, Mr. Langley has provided no scientific basis for concluding that fibers
2 in the subject yarn do not contain milk protein.

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4 I declare under penalty of perjury under the laws of the United States that the
5 foregoing is true and correct.



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7 DATED this 14th day of March, 2011.

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Maureen T.F. Reitman, Sc.D.

EXHIBIT A



*Failure Analysis Associates**

Exponent
17000 Science Drive
Suite 200
Bowie, Maryland 20715

telephone 301-291-2500
facsimile 301-291-2599
www.exponent.com

Maureen T. F. Reitman, Sc.D.
Principal and Practice Director

Professional Profile

Dr. Maureen Reitman is a Principal and the Director of Exponent's Polymer Science and Material Chemistry practice. Her expertise includes polymer and composite technology, mechanics of materials, adhesion science, fiber mechanics, history and technology of plastics, and material failure analysis. She is skilled in the development and use of testing tools and methods and has applied them to plastic, rubber, metal, glass, ceramic, and composite materials and systems. She is experienced in major aspects of product development, including materials selection, end-use testing, failure analysis, certification procedures and issues related to intellectual property.

Dr. Reitman has conducted research in the areas of barrier materials; plastic pipes; transdermal drug delivery; adhesives, sealants, encapsulants, and molding compounds; nanoparticles; fibers and textiles; polymer chemical resistance; plastic insulation; connectors and splices; plastic packaging; medical devices; environmental effects on durability; and product aging. She has used her expertise to solve a broad range of problems related to coatings, fibers, films, and extruded and molded products, and their use in the telecom, electronics, electrical, transportation, construction, fire protection, medical, and consumer products markets.

Dr. Reitman is a member of the Board of Directors of the Medical Plastics Division of the Society of Plastics Engineers and an active member of two Underwriters Laboratories Standard Technical Panels, addressing Polymeric Materials (UL 94, UL 746, UL 1694) and Appliance Wiring (UL758).

Prior to joining Exponent, Dr. Reitman worked for the 3M Company in both research and management roles. Her activities included technology identification, materials selection and qualification, product development, customer support, program management, acquisition integration, intellectual property analysis, and patent litigation support.

Academic Credentials and Professional Honors

Sc.D., Materials Science and Engineering/ Program in Polymer Science and Technology,
Massachusetts Institute of Technology, 1993

B.S., Materials Science and Engineering, Massachusetts Institute of Technology, 1990

National Academy of Engineering Frontiers of Engineering, 2009; Tau Beta Pi; Sigma Xi
John Wulff Award; Carl Loeb Fellowship; NCAA Postgraduate Scholarship;
Malcolm G. Kispert Award; GTE Academic All-American

Patents

Patent 6,311,524: Accelerated Method for Increasing the Photosensitivity of a Glassy Material, issued November 6, 2001.

European Patent EP0830428: Tackified Polydiorganosiloxane Polyurea Segmented Copolymers and a Process for Making Same, published March 25, 1998.

Patent 5,371,051: Fiber Optic Fusion Splice Protector Sleeve, issued March 24, 1998.

Publications

Hoffman JM, Reitman M, Donthu S, Ledwith P. Complimentary failure analysis methods and their application to CPVC pipe. Proceedings, ANTEC 2010, Society of Plastics Engineers, Orlando, FL, May 2010.

Hoffman JM, Reitman M, Donthu S, Ledwith P, Wills D. Microscopic characterization of CPVC failure modes. Proceedings, ANTEC 2009, Society of Plastics Engineers, Chicago, IL, June 2009. Best Paper Award in Failure Analysis & Prevention.

Reitman M, Ledwith P, Hoffman M, Moalli J, Xu T. Environmentally driven changes in nylon. Proceedings, ANTEC 2008, Milwaukee, WI, Society of Plastics Engineers, May 2008.

Hoffman JM, Reitman M, Ledwith P. Characterization of manufacturing defects in medical balloons. Proceedings, ANTEC 2008, Milwaukee, WI, Society of Plastics Engineers, May 2008.

Reitman, MTF, Moalli JE. Polymeric coatings for medical device. Medical Device and Manufacturing Technology, Touch Briefings, pp. 28–30, 2006.

Moalli JE, Moore CD, Robertson C, Reitman MTF. Failure analysis of nitrile radiant heating tubing. Proceedings, ANTEC 2006, Society of Plastic Engineers, Charlotte, NC, May 2006.

Reitman M, McPeak J. Protective coatings for implantable medical devices. Proceedings, ANTEC 2005, Society of Plastic Engineers, Boston MA, May 2005.

McPeak J, Reitman M, Moalli J. Determination of in-service exposure temperature of thermoformed PVC via TMA. Proceedings, 31st Annual North American Thermal Analysis Society Conference, Williamsburg, VA, 2004.

Reitman MTF, Moalli JE. Product development and standards organizations: Listings and certifications for plastic products. 8th Annual International Conference on Industrial Engineering Theory, Applications and Practice, Las Vegas, NV, 2003.

Potdar YK, Reitman MTF. The role of engineering consultants in failure analysis and product development. 8th Annual International Conference on Industrial Engineering Theory, Applications and Practice, Las Vegas, NV, 2003.

Ezekoye OA, Lowman CD, Hulme-Lowe AG, Fahey MT. Polymer weld strength predictions using a thermal and polymer chain diffusion analysis. *Polymer Engineering and Science* 1998; 38(6):976–991, June.

Fahey MT. Nonlinear and anisotropic properties of high performance fibers. MIT Thesis, 1993.

Fahey MT. Mechanical property characterization and enhancement of rigid rod polymer fibers. MIT Thesis, 1990.

Book Contributions

Tsuji JS, Mowat FS, Donthu S, Reitman M. Application of toxicology studies in assessing the health risks of nanomaterials in consumer products. In: *Nanotoxicity: From In Vivo and In Vitro Models to Health Risks*. Sahu S, and Casciano D. (eds), Wiley, in press.

Reitman MTF. The Plastics Revolution. In: *Research and Discovery: Landmarks and Pioneers in American Science*. Lawson RM (ed), Armonk NY: Sharpe Reference 2008. ISBN 978-0-7656-8073-0.

Klein SM. Mid-century plastic jewelry. Schiffer Publishing, Atglen, PA, 2005. (Technical advisor to author).

Selected Invited Presentations

Reitman MTF. Factors for success: Plastics in injection molded medical devices. Part of *Injection Molding Works for Medical Design*, Design News Webcast, October 2008.

Reitman MTF. Plastic and composite product failures. Keynote Speaker: Third International Conference on Engineering Failure Analysis (ICEFA III), Elsevier, Sitges Spain, July 2008.

Reitman MTF. Multiphase materials for medical device applications, an overview. *Medical Device and Manufacturing (MDM)*, Canon Communications, various locations, January- June 2008.

Reitman MTF. Nanotechnology and plastics for medical devices. Capitalizing on Nanoplastics, Intertek PIRA San Antonio TX, February 2008.

Reitman MTF. Nano additives in composites and coatings for medical device applications. *Medical Device and Manufacturing Minneapolis*, Canon Communications, Minneapolis MN, October 2007.

Reitman MTF, Swanger LA. Practical tips on how to manage your technical expert in patent disputes. Ropes & Gray IP Master Class, Live Teleconference, June 2007.

Reitman MTF, Kennedy E. Root cause failure analysis and accident investigation. Lorman Educational Services, Live Teleconference, November 2007.

Reitman MTF. Plastics failure analysis: Case studies. Baltimore/ Washington Chapter of SAMPE, October 2006.

Reitman MTF. Plastics failure analysis. Baxter Global Plastics Processing Conference 2005, Schaumburg IL, 2005.

Fahey MT. Fiber mechanics, corrosion, sealants: Tales of a 3M materials scientist. Class of 1960's Scholars Program, Williams College, 1999.

Fahey MT. Adhesives and sealants for the telecommunications industry. Riverwood V Conference, St. Paul MN, 1998.

Current Professional Appointments

- Underwriter's Laboratory Standards Technical Panel STP 746 (Polymeric Materials, includes UL94, UL 746 and UL1694)
- Underwriter's Laboratory Standards Technical Panel STP 758 (Appliance Wires/ UL758)
- Medical Plastics Division Board of Directors, Society of Plastics Engineers

Professional Affiliations

- American Association for the Advancement of Science (member)
- American Chemical Society (member)
- Materials Research Society (member)
- Society for the Advancement of Material and Process Engineering (member)
- Society of Plastics Engineers (senior member)

EXHIBIT 2

Emmepieffe s.r.l.

Cap. Soc. € 99.502,00 i.v. - R.E.A. C.C.I.A.A. To: 554308
Reg. Imprese, Codice Fiscale e Part. IVA 02378820019

Via Dei Ronchi, 45/I - 10091 Alpignano (To)

Tel. 011 966 26 55 - Fax 011 966 31 74

E-mail: emmepieffesrl@virgilio.it



I, Piero Ferrero, do hereby declare and state as follows:

1. I am over the age of 18, and a citizen of Italy. This Declaration is based on my personal knowledge and reference to business records and, if called upon to do so, I could testify competently as to the matters set forth herein.

2. I am employed by the Emmepieffe SRL ("Emmepieffe"), located at V. Dei Ronchi 45/I - 10091 Alpignano (TO) Italy.

3. Emmepieffe commissions yarns to be manufactured which it sells under the Laines du Nord Baby Milk, Ella Rae Latte, and Queensland Collection Leche brands to Knitting Fever, Inc.

4. Emmepieffe's quality controls ensure that yarn which it sells under the Laines du Nord Baby Milk brand is made from 63% merino wool, 30% milk protein fiber, and 7% cashmere.

5. Emmepieffe's quality controls ensure that yarn which it sells under the Ella Rae Latte brand is made from 30% alpaca, 30% milk protein fiber, and 40% microfibre.

6. Emmepieffe's quality controls ensure that yarn which it sells under the Queensland Collection Leche brand is made from 40% wool, 30% microfiber, 20% milk protein fiber, and 10% silk.

7. As a result, Emmepieffe can certify that its Baby Milk, Ella Rae Latte, and Queensland Collection Leche yarns are accurately labeled.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 11 th day of March 2011.

Piero Ferrero

EXHIBIT 3

I, Edgar Yu, do hereby declare and state as follows:

1. I am over the age of 18, I am a resident of Jiangsu Province, and a citizen of the People's Republic of China. This Declaration is based on my personal knowledge and reference to business records and, if called upon to do so, I could testify competently as to the matters set forth herein.

2. I am employed by the Jiangyin Jinda Textile Co. Ltd. ("Jiangyin Jinda"), located at No. 88 Hua Dong Road, Jiangyin City, Jiangsu, China 21443.

3. Jiangyin Jinda manufactures yarn which it sells under the Ella Rae Milky Soft brand to Knitting Fever, Inc.

4. Jiangyin Jinda's manufacturing and quality control procedures ensure that the yarn which it sells under the Ella Rae Milky Soft brand is made from 50% cotton and 50% milk protein fiber.

5. As a result, Jiangyin Jinda can certify that its Ella Rae Milky Soft yarns are accurately labeled.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 16th day of March 2011.



Edgar Yu

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2011, I electronically filed the foregoing documents with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert J. Guite, Esquire
Squire, Sanders & Dempsey L.L.P.
275 Battery Street, Suite 2600
San Francisco, CA 94111
rguite@ssd.com

DATED this 14th day of March, 2011

/s/Joshua R. Slavitt
Pepper Hamilton LLP
Joshua R. Slavitt (Admitted *Pro Hac Vice*)
3000 Two Logan Square
Philadelphia, PA 19103
(215) 981-4000
(215) 981-4750 (fax)
E-mail: slavittj@pepperlaw.com