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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, an
individual, JAY OPPERMAN, an individual,
DEBBIE BLISS, an individual, EMMEPIEFFE
SRL, an entity organized or existing under the
laws of Italy, and DOES 1-50.

Defendants,

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
THIRD MOTION FOR A
PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:
June 17, 2011**

I. INTRODUCTION

Plaintiff, Cascade Yarns. Inc. (“Cascade”), alleges that yarns distributed by Defendant

1 Knitting Fever, Inc. (“KFI”), labeled as containing milk protein fiber, do not actually contain any
2 milk protein fiber. On the basis of those allegations, Cascade seeks to enjoin KFI from selling the
3 yarns labeled as containing milk fiber.

4 Cascade’s allegations are incorrect and its request for injunctive relief is improper. Expert
5 testing, appropriate for the types of yarns and fibers at issue, confirms that all yarns labeled as
6 containing milk protein fiber *do* contain milk protein fiber. The test reports and analysis offered
7 by Cascade’s expert are unreliable, incomplete, and incorrect. Moreover, Cascade has not shown
8 that consumers have been deceived or that it has suffered any actual injury.

9 Not only does Cascade’s motion fail because it cannot show that it is likely to succeed on
10 the merits, Cascade cannot demonstrate a likelihood of irreparable harm. Rather, in an attempt to
11 capitalize on the milk yarn controversy that Cascade itself has created, Cascade repeats the
12 unfounded allegations in its motion on its website, disparaging KFI and propping up its own
13 yarns. In any event, Cascade lacks standing because it does not compete with KFI for the sale of
14 milk yarns. For all these reasons, the award of a preliminary injunction would be improper. The
15 Court should deny Cascade’s 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 the present
19 motion are blended yarns containing different types of wool and milk protein fibers. Specifically,
20 Cascade identifies four yarns in its motion: (1) Ella Rae Milky Soft; (2) KFI Baby Milk; (3) Ella
21 Rae Latte, and (4) Viking Milk and Honey (the “Milk Yarns”). Mot. at 7.¹

22 Cascade imports and distributes yarns but, unlike KFI, Cascade does *not* sell any yarns
23 containing milk protein fibers. Cascade claims that, beginning in January 2011, it received

24 ¹ The Third Amended Complaint also refers to Queensland Leche. Even though Cascade does not
25 specifically mention Queensland Leche in the present motion, KFI arranged for its testing and has included the
26 results of this testing in this opposition. Accordingly, the term “Milk Yarns” as used in this opposition to refers to all
five yarns.

1 reports that the Milk Yarns did not contain any milk protein fiber despite their labeling to the
 2 contrary. *See id.* at 7-8. With its motion, Cascade submits three reports from K.D. Langley Fiber
 3 Testing Services as “proof” that the Milk Yarns do not contain milk protein fiber. It now asks
 4 this Court to enjoin KFI from marketing and labeling the Milk Yarns as containing certain
 5 quantities of milk protein fiber, and using the term “milk protein” on any yarn labels.²

6 **III. LEGAL ARGUMENT**

7 **A. Cascade Lacks Standing to Assert Lanham Act Claims on Milk Yarns**

8 Procedurally, Cascade’s motion fails for lack of standing. In the Ninth Circuit, in order to
 9 have standing a plaintiff must demonstrate: (1) a commercial injury due to a misrepresentation
 10 about a product; and (2) that the injury is competitive, i.e., harmful to the plaintiff’s ability to
 11 compete with the defendant. *Jack Russell Terrier Network v. Am. Kennel Club Inc.*, 407 F.3d
 12 1027, 1039 (9th Cir. 2005). Cascade here fails to demonstrate either.

13 Cascade simply suggests, without any support, that it has lost customers and goodwill as a
 14 result of KFI’s sale of Milk Yarns. Specifically, it claims that the characteristics of a “purported”
 15 Milk Yarn that actually contains no milk protein “are likely going to be perceived by consumers
 16 as inferior to their expectations. . . Such a comparison injures [Plaintiff] whose products may be
 17 rejected out of hand by consumers who were dissatisfied by KFI’s seemingly comparable
 18 products.” Mot. at 3-4. This argument is based on nothing but speculation that proceeds from a
 19 false premise.

20 “For a plaintiff to have standing, the parties must be competitors in the sense that they ‘vie
 21 for the same dollars from the same consumer group,’ and the alleged misrepresentation must at
 22 least theoretically effect a diversion of business from the plaintiff to the defendant.” *Peviani v.*
 23 *Hostess Brands, Inc.*, No. 10-2303, 2010 U.S. Dist. LEXIS 122478 *20 (C.D. Cal. Nov. 3, 2010)
 24 (quoting *Trafficschool.com, Inc. v. Edriver, Inc.*, 633 F. Supp.2d 1063, 1070 (C.D. Cal. 2008));

25 _____
 26 ² KFI notes that Cascade’s motion seeks only to enjoin conduct by KFI – it does not implicate any other
 defendant and, therefore, KFI is the only defendant that need respond to the motion.

1 *see also New.Net, Inc. v. Lavasoft*, 356 F. Supp.2d 1090 ,1116 (C.D. Cal. 2004) (plaintiff lacked
2 standing to bring a Lanham Act claim because it and defendant were involved in different
3 products in different segments of the internet market even though they were both downloadable
4 software providers).

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

17 **B. Standards for Granting Injunctive Relief**

18 Injunctive relief is a drastic remedy that Courts should utilize only in extreme cases. *See*
19 *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *RasterOps v. Radius, Inc.*, 861 F. Supp. 1479, 1482
20 (N.D. Cal. 1994). Courts must be circumspect in granting a preliminary injunction as it invokes
21 the exercise of “a very far reaching power never to be indulged in except in a case clearly
22 warranting it.” *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). In
23 cases like this, the burden on the party seeking preliminary injunctive relief is even heavier where
24 granting such relief would effectively give the moving party a substantial part of the relief it
25 would obtain only after a full trial on the merits. 5 J. Thomas McCarthy, *Trademarks & Unfair*
26

1 *Competition* § 30.30, at 30-76 (4th ed. 2010) (citing *Consumers Union of U.S., Inc. v. Theodore*
2 *Hamm Brewing Co.*, 314 F. Supp. 697 (D. Conn. 1970)).

3 A party seeking a preliminary injunction must prove: (1) that it is likely to succeed on the
4 merits; (2) that it is likely to suffer irreparable harm; (3) the balance of equities tip in its favor;
5 and (4) the injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*,
6 555 U.S. 7, 25 (2008). A court cannot issue a preliminary injunction when there is a mere
7 possibility of irreparable harm. – such harm must be **likely**. *Id.*; see also *Am. Trucking Ass’ns v.*
8 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

9 A plaintiff’s burden is subject to heightened scrutiny when the relief requested is
10 mandatory in nature. Courts in the Ninth Circuit draw a clear distinction between a “mandatory
11 injunction” and a “prohibitory injunction.” A mandatory injunction seeks to compel the
12 defendant to perform an affirmative act while a prohibitory injunction seeks only to preserve the
13 status quo pending trial. See *Desert Sun Net LLC v. Kepler*, No. C06-1041P 2006 U.S. Dist.
14 Lexis 78586, *19 (W.D. Wash. Oct. 27, 2006). The Ninth Circuit disfavors granting mandatory
15 injunctions, and any request requiring affirmative conduct by a defendant is “subject to
16 heightened scrutiny and should not be issued unless the facts and the law clearly favor the moving
17 party.” *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). The mandatory
18 injunction sought here ““goes well beyond simply maintaining the status quo pendente lite ...””
19 *Stanley v. Univ. of S. Ca.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*,
20 612 F.2d 1112, 1114 (9th Cir. 1979)).

21 The relief Cascade seeks in the present motion is mandatory. See Mot. at 3. The
22 requested order would require KFI to take the affirmative steps of ceasing the sales of the Milk
23 Yarns, re-labeling those yarns, and revising its advertising. As discussed below, the facts and
24 law do not favor Cascade, and the Court should deny its demand for mandatory injunctive relief.

1 **C. Cascade Cannot Demonstrate a Likelihood of Success on the Merits**

2 To prevail on its new claim that the Milk Yarns are mislabeled, Cascade must prove: (1)
3 “a false statement of fact by the defendant in a commercial advertisement about its own or
4 another's product; (2) the statement actually deceived or has the tendency to deceive a substantial
5 segment of its audience; (3) the deception is material, in that it is likely to influence the
6 purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and
7 (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct
8 diversion of sales from itself to defendant or by a lessening of the goodwill associated with its
9 products.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997).

10 The parties vigorously dispute whether Cascade can demonstrate likely success on the
11 merits. When there is conflicting evidence regarding the merits of a claim, a plaintiff cannot
12 demonstrate likely success on the merits and the Court must deny the request for a preliminary
13 injunction. *Pom Wonderful LLC v. Purely Juice, Inc.*, 277 Fed. Appx. 744, 745 (9th Cir. 2008);
14 *see also Hansen Beverage Co. v. Vital Pharm. Inc.*, No. 08-1545, 2010 U.S. Dist. Lexis 40990, at
15 *2 (S.D. Cal. April 27, 2010) (preliminary injunction denied because of several disputed issues of
16 fact regarding the claims made by an energy drink producer regarding its product); *Nietech Corp.*
17 *v. CBS Data Servs.*, No. 03-3419, 2004 U.S. Dist. Lexis 30318 (N.D. Cal. Mar. 1, 2004)
18 (plaintiffs did not establish a likelihood of success on the merits because parties submitted
19 conflicting evidence on an element of the claim); *Chem-Tainer Indus. v. Wilkin*, No. 97-0829,
20 1997 U.S. Dist. Lexis 17241 (C.D. Cal. Feb. 21, 1997) (plaintiff failed to show likelihood of
21 success on the merits because of conflicting evidence regarding validity of patent at issue). Here,
22 while failure to satisfy even one element is sufficient to destroy Cascade's likelihood of success
23 on the merits, Cascade cannot satisfy at least three of the elements of a Lanham Act claim – a
24 false statement by KFI, consumer deception, and injury.³

25 ³ For the same reasons discussed, *infra*, Cascade also cannot demonstrate a likelihood of success on its
26 unfair competition claim brought pursuant to Washington state law and any alleged violation cannot form the basis of
 a preliminary injunction.

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

2 Cascade alleges that the labels affixed to the Milk Yarns are literally false because: (1) the
3 labels indicate that the yarns contain milk protein, when they do not; and (2) milk protein is not
4 the proper name for the fiber at issue. To support the allegation that the Milk Yarns do not
5 contain any milk protein fiber, Cascade relies upon tests conducted by K.D. Langley Fiber
6 Testing Services. Cascade accepts these reports as absolute “proof” of mislabeling without any
7 question or scrutiny.

8 Contrary to Mr. Langley’s opinion, KFI’s expert, Dr. Maureen Reitman, determined that
9 the Milk Yarns contain milk protein fiber. Dr. Reitman holds a doctorate degree from the
10 Massachusetts Institute of Technology in materials science and engineering and has over twenty
11 years experience with visual, microscopic, and chemical analyses to determine composition and
12 structure of natural and synthetic fibers. Declaration of Maureen Reitman attached to Opposition
13 to Second Motion for Preliminary Injunction (hereinafter “First Reitman Declaration”), dkt. no.
14 203 at p 22. KFI sent Dr. Reitman samples of the Milk Yarns, and she analyzed them in her
15 laboratory with an optical microscope and with micro-Fourier transform infrared (FTIR)
16 spectroscopy. Declaration of Maureen Reitman attached to Opposition to Third Motion for
17 Preliminary Injunction (hereinafter “Second Reitman Declaration”) at ¶3. Dr. Reitman’s micro-
18 FTIR analysis reveals that there is chemical evidence of the presence of milk protein fiber in the
19 Milk Yarns. *Id.* at ¶9. Dr. Reitman concluded that Mr. Langley has not provided a sufficient
20 scientific basis to conclude that the Milk Yarns do not contain milk protein fiber. *Id.* at ¶10.

21 Mr. Langley examined the fibers under a microscope and performed a form of chemical
22 analysis on the fibers. “Microscopic examination of synthetic fibers, such as those based on milk
23 protein or acrylic,” however, “is not sufficient to determine the chemical nature of the fibers. It is
24 sufficient to discriminate between different fiber sizes and textures.” *Id.* at ¶7.

25 Mr. Langley states that he observed negative birefringence in some of the fibers in three
26 yarns he analyzed and, as result, he concluded that the fibers were acrylic. *Id.* Birefringence is

1 an optical property linked to refractive indices, which is related to the polarity and orientation of a
2 material. *Id.* “The methodology is not a direct measure of the specific composition, and is not a
3 sufficient method for determining that milk protein is absent from the fibers of the three yarns”
4 Mr. Langley evaluated. *Id.* Additionally, Mr. Langley did not employ a chemical analysis
5 technique that would reasonably be expected to identify the presence of milk or milk protein if
6 such were present, and Mr. Langley’s conclusion that milk protein fibers are absent from the Milk
7 Yarns is consistent with the shortcoming of the test methodology he employed. *Id.* at ¶8.

8 Dr. Reitman’s test results are consistent with confirmation received from KFI’s suppliers
9 of the Milk Yarns, Emmepieffe s.r.l. and Jiangyin Jinda Textile Co. Ltd., that quality control
10 procedures ensure that the Milk Yarns contain the stated percentages of milk protein fiber
11 appearing on their labels. *See* Declaration of Piero Ferraro, dkt no. 203, Exhibit 2; *see also*
12 Declaration of Edgar Yu, dkt. no. 203, Exhibit 3.

13 Here, the only reliable scientific evidence is that offered by Dr. Reitman. Even without
14 considering Dr. Reitman’s conclusions and the declarations of the Milk Yarn suppliers, blind
15 acceptance of Mr. Langley’s reports is improper for several reasons. As an initial matter, it is
16 uncertain that Mr. Langley could survive a *Daubert* challenge. Mr. Langley’s declaration details
17 his experience in evaluation of cashmere and other “specialty animal fibers.” Absent from Mr.
18 Langley’s declaration and its accompanying exhibits, however, is a description of any prior
19 experience testing milk protein fibers or other non-animal fibers, or a description why the
20 techniques applied to animal fiber analysis can also be applied to non-animal fibers. In fact, these
21 techniques can and do vary.

22 As evident from his reports, Mr. Langley primarily used light microscopy to test and
23 identify yarn fibers. Essentially, the subject yarns are sectioned, mounted on slides, and viewed
24 under a microscope. The proper identification of the fibers requires the viewer to be able to
25 distinguish the various fibers based on the physical characteristics of the fiber, such as cuticle
26 height and diameter. Mr. Langley asserts that he examined the fibers for birefringence, an

1 optical characteristic. Langley Decl. at ¶4, dkt. no. 209. However, “[m]icroscopic examination
2 of synthetic fibers, such as those based on milk protein or acrylic, is not sufficient to determine
3 the chemical nature of the fibers.” See First Reitman Declaration at ¶6. As a result, “microscopic
4 analysis is not a suitable scientific basis for determining that milk protein fibers are absent in the
5 subject yarns.” *Id.*

6 Even if light microscopy enabled an observer to detect milk protein fiber, Cascade fails to
7 appreciate and consider the numerous reasons why test reports based on light microscopy cannot
8 be accepted at face value. Light microscopy is subject to human error, and the validity of
9 interpretation is dependent on the skill and experience of the observer. See *id.* Light microscopy
10 can also be prone to operator bias based upon expectations as to the presumed composition of the
11 yarn, and confounded by similarity of fiber structures. *Id.* As a result, variations in reported
12 percentages across observers and laboratories are to be expected. Moreover, an analysis is
13 necessarily limited by the representativeness of the samples that are analyzed. Additionally, the
14 potential for inaccurate identification of fibers is a well-recognized concern, especially when the
15 yarn being tested has been dyed or treated such as the Milk Yarns at issue in the present motion.
16 Environmental conditions such as humidity may also play a role in the evaluation of a yarn
17 sample.

18 Milk protein fibers are best identified by chemical properties rather than their physical
19 shape. *Id.* at ¶6. (citing Protocol 20). In his supplemental declaration, Mr. Langley asserts that
20 for certain fibers that appeared to be coated, he immersed these fibers in bleach for an hour and
21 then examined them after they were washed and dried. Langley Decl., at ¶7, dkt no. 209. Mr.
22 Langley merely states that the birefringence of the remaining sample was characteristic of a
23 synthetic fiber. *Id.* Absent from Mr. Langley’s reports are any specific results about the
24 chemical analysis (e.g., solubility). Rather, he merely cites a chemical analysis protocol.

25 Mr. Langley’s failure to observe milk protein fiber is unremarkable. In fact, it is to be
26 expected. Protein-based materials, such as milk protein fiber, dissolve in bleach, leaving behind

1 any non-protein, synthetic components. The Langley reports are subject to further scrutiny
2 because they do not identify the error limits of the methods he employed. Without error limits,
3 the reports are of limited value. For example, a report that states that a yarn sample contains
4 5.7% of a particular fiber is unavailing if the report is accurate within plus or minus 10%. The
5 numbers of fibers tested and the blend of yarn also affect the error limit. The fewer the number of
6 fibers used, the higher the error limit. The Langley reports are based on over 500 fibers or
7 between 500 and 1000 fibers. Such few fibers likely means that the reports are subject to a high
8 error limit, casting further doubt on the relevance of the reports.⁴ See e.g. Exs. D-F to Langley
9 Decl., dkt no. 193.

10 Even if the Court were to ignore both Mr. Langley's apparent lack of experience and
11 qualifications to analyze milk protein fibers and that the test methodologies employed are not
12 capable of identifying milk protein fiber, the application of Mr. Langley's reports is limited in
13 scope and does not demonstrate either falsity or a probable success on the merits. Each individual
14 report only reflects the composition of a single sample of a single ball of yarn from a single lot.
15 Cascade presents no evidence to demonstrate the yarn samples tested are in any way
16 representative of the entire production run of such yarn. Such uncertainty and conflicting
17 evidence far from justifies the grant of injunctive relief.

18 Cascade has failed to demonstrate that KFI's labels are literally false. Even if Mr.
19 Langley's opinions were admissible, the fact that Dr. Reitman's testimony directly contradicts
20 Mr. Langley precludes the entry of a preliminary injunction. The Ninth Circuit has determined
21 that conflicting evidence calls into question a plaintiff's likelihood of success on the merits and
22 renders injunctive relief improper. *Pom Wonderful LLC v. Purely Juice, Inc.*, 277 Fed. Appx.
23 744, 745 (9th Cir. 2008) (affirming denial of plaintiff's motion for a preliminary injunction and
24

25 ⁴ KFI also notes an error on the report of the content of Ella Rae Milky Soft, attached as Exhibit D to Mr.
26 Langley's declaration. Dkt. no. 193. 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.

1 noting that the parties had submitted conflicting information about the defendant's product,
 2 including what ingredients were added and whether the varietal of pomegranate, farming
 3 practices, and processing methods affected the laboratory results used to identify the percentage
 4 of juice). Here, as in the *Pom* case, at minimum there is conflicting evidence about the
 5 composition of KFI's Milk Yarns and the tests used to determine those compositions. Such
 6 conflicting evidence prevents Cascade from establishing its likelihood of success on the merits.

7 As noted above, Cascade also claims that the labels are literally false because, pursuant to
 8 the Textile Products Identification Act ("TPIA"), "milk fiber" is not an appropriate term.
 9 Cascade asserts that under the TPIA, milk fiber should be referred to as "Azlon" or "Polylactide."
 10 Mot. at 4. Such an assertion, however, is entirely irrelevant to Cascade's purported Lanham Act
 11 claim. Failure to use a particular term does not equate to a false statement where that term is not
 12 inaccurate.⁵ Plaintiff cannot manufacture a claim for alleged violations of the TPIA and related
 13 regulations, for which Congress provided no private cause of action, in the guise of a Lanham Act
 14 claim.⁶

15 2. Cascade Has Not Shown That Any Consumers Are Deceived

16 Cascade's failure to show a false statement alone, prevents its success on the merits. Even
 17 if it could offer a false statement, however, Cascade must also show that KFI's labels misled,
 18 confused, or deceived consumers. *See Southland Sod Farms v. Stover See Co.*, 108 F.3d 1134,
 19 1140 (9th Cir. 1997). It cannot. Cascade does not even attempt to show that the Milk Yarn labels
 20 deceived consumers. Instead, it claims only that KFI's statements were "literally false" and,
 21 therefore, consumer deception is presumed. For the reasons described *supra*, unlike the plaintiff

22 _____
 23 ⁵ Cascade appears to claim that the use of the word "milk" is misleading because it implies to the consuming
 public that milk is a natural fiber. Mot. at 2. Cascade, however, provides no support for such a statement.

24 ⁶ This Court is not the appropriate forum to debate the obligations imposed by either the TPIA or the Wool
 25 Products Labeling Act ("WPLA"). Neither provides for a private cause of action, and any attempts by Plaintiff to
 26 circumvent such a limitation are inappropriate. 15 U.S.C. §§ 68d, 70e; *see also Warren Corp. v. Goldwert Textile
 Sales, Inc.*, 581 F. Supp. 897, 899 (S.D.N.Y. 1984) (plaintiff "cannot create a private right of action under the Wool
 Act, nullifying the Act's own provisions, by asserting its standing to sue under the Lanham Act").

1 in the *Coca Cola* case, Cascade has not shown that KFI's statements are literally false. *See Coca-*
2 *Cola Co. v. Tropicana Prod. Inc.*, 690 F.2d 312 (2d Cir. 1982). When a challenged statement is
3 alleged to be implicitly false, a plaintiff must demonstrate that the statement misleads, confuses or
4 deceives the public through evidence such as the public's reaction to the statement. *Johnson &*
5 *Johnson v. GAC International, Inc.*, 862 F.2d 975, 977 (2d Cir. 1988)(citing *American Home*
6 *Products v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978)). Often consumer deception is
7 demonstrated through surveys. *Southland*, 108 F.3d at 1140.

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

17 3. Cascade Has Not Shown Any Injury

18 Like its allegations of irreparable harm and consumer deception, Cascade's allegations of
19 injury are similarly speculative and unsupported by any evidence. Cascade claims that KFI's sale
20 of allegedly mislabeled Milk Yarns allows KFI to reap windfall profits, allowing KFI to unfairly
21 compete. Cascade, however, does not offer any support for such "windfall" profits, or concrete
22 examples of even a single lost customer. Cascade claims that consumers, who admittedly cannot
23 accurately determine fiber composition without expert testing, who are dissatisfied with KFI's
24 yarns will reject comparable Cascade yarns. As noted above, however, Cascade does not offer
25 any yarns containing milk protein fibers. Accordingly, Cascade cannot lose customers when it
26 does not even sell the product the customer seeks.

1 As to profits, Cascade merely recites the prices of several of KFI's yarns and the prices of
 2 several of Cascade's yarns and assumes that, because they are different, KFI must be earning
 3 windfall profits. If there is any direct injury based on price, the injury is experienced by
 4 consumers, not Cascade. Cascade does not offer its own financial statements, let alone an
 5 explanation as how it can opine as to KFI's profit margins. As Cascade is well aware, yarns price
 6 are not merely the sum of the cost of their ingredients. Overhead, marketing, labor, import taxes,
 7 etc. all may affect price. All Cascade offers are the self-serving conclusions of Mr. Dunbabin
 8 based on his experience in the yarn industry. Without actual facts, Cascade cannot demonstrate
 9 any injury and, therefore, has failed to demonstrate a likelihood of success on the merits.

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

11 In addition to likelihood of success on the merits, Cascade must demonstrate a likelihood
 12 of irreparable harm in order to obtain injunctive relief. See *Winter v. NRDC, Inc.*, 555 U.S. at 25;
 13 *Am. Trucking Ass 'ns v. City of Los Angeles*, 559 F.3d at 1052. Cascade's failure to make this
 14 showing ends the analysis.

15 Although Cascade asserts that it will suffer irreparable harm absent an injunction, it offers
 16 nothing except the conclusory sentence that it will incur "loss of market share and loss of
 17 goodwill in the marketplace." Mot. at 19. It does not even allege what its share of the market is.
 18 It simply claims to be "one of the nation's finest purveyors of yarns." *Id.* at 5. Cascade does not
 19 cite to a single case finding irreparable harm based on an unsupported allegation of diminished
 20 market share and goodwill.⁷ Instead, courts in the Ninth Circuit require *actual* evidence of lost

21 _____
 22 ⁷ The cases Cascade cites do not support its position. In *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*,
 23 240 F.3d 832 (9th Cir. 2001), for example, the Ninth Circuit affirmed a district court's finding that the absence of an
 24 injunction "would result in the possibility of irreparable harm." *Id.* at 841. In *Winters v. N.R.D.C.*, 555 U.S. 7, 129
 25 S. Ct. 365, 375-76 (2008) however, the Supreme Court expressly rejected the Ninth Circuit's "possibility" standard
 26 and instead held that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is
 inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon
 a clear showing that the plaintiff is entitled to such relief." In *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60
 F.3d 27, 37-8 (2d Cir. 1995), the Second Circuit addressed the irreparable harm from an injunction preventing a
 company from bringing a new product to market. There, the court held that prospective goodwill can constitute
 irreparable 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

(continued...)

1 customers and goodwill in order to find irreparable harm. *See, e.g., Hansen Bev. Co. v. N2G*
 2 *Distrib.*, 2008 U.S. Dist. LEXIS 105442, at *15 (S.D. Cal. Dec. 28, 2008) (rejecting plaintiff’s
 3 “scant evidence” that alleged false advertising caused it to lose customers). For example, in
 4 *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp.2d 995, 1007 (C.D. Cal. 2007),
 5 the court denied a motion for preliminary injunction where the moving party, like Cascade here,
 6 had not provided the Court with “any evidence of irreparable harm aside from its argument that it
 7 may experience a loss of good will and customer confusion due to misleading statements on [the
 8 other party’s] packaging.” Instead, the Court held that “[t]his vague and unsupported argument is
 9 not sufficient to establish irreparable injury.” *Id.*

10 Because Cascade cannot provide any evidence of irreparable injury, it instead requests
 11 that the Court presume irreparable harm. In so doing, Cascade fails to recognize that not all
 12 Lanham Act claims are analogous and the presumption of irreparable harm will apply, if at all,⁸ in
 13 cases of infringement or misappropriation of a competitor’s trademark *only*. “While irreparable
 14 injury may be presumed once a likelihood of confusion has been shown to exist in an
 15 *infringement action* under the Lanham Act, the Ninth Circuit has not yet found this presumption
 16
 17

18 (continued...)

19 does not offer a milk protein fiber product, and has not shown that it is even planning to offer one, *Tom Doherty* has
 20 no bearing on Cascade’s burden to show irreparable harm. Finally, Cascade cites to a footnote from *Vision Sports,*
 21 *Inc. v. Melville Corp.*, 888 F.2d 609, 612, n. 3 (9th Cir. 1989), which states only that, in some cases, irreparable harm
 22 is presumed upon a showing of likelihood of confusion. As Cascade’s claims do not involve a likelihood of
 23 confusion analysis, and as discussed in more detail *infra*, this presumption does not apply.

24 ⁸ In *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2008), the Supreme Court rejected the Federal
 25 Circuit’s presumption of irreparable harm in the context of permanent injunctions arising from patent infringement.
 26 *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*
Connection, Inc. v. Pardini, 726 F. Supp.2d 1107, 1123 (E.D. Cal. 2010) (citing *eBay* and stating that “[t]his Court
 does not presume irreparable harm, even in intellectual property cases.”); *see also Skydive Ariz., Inc. v. Quattrocchi*,
 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 to be applicable to false advertising cases.” *Univision Music, LLC v. Banyan Entm’t*, 2004 U.S.
2 Dist. LEXIS 30957, at *17 (C.D. Cal. Nov. 15, 2004) (emphasis added).

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

19 Cascade misleadingly cites to *McCarthy on Trademarks and Unfair Competition* in
20 support of its proposition that irreparable harm is presumed in false advertising cases. *See* Mot. at
21 20. The quoted statement applies to cases of false advertising where the defendant’s advertising
22 makes a **direct comparison** to the plaintiff’s product. The full text that Cascade cites that in
23 cases, like this one, where the alleged “false advertising is non comparative and makes no direct
24 reference to a competitor’s product, irreparable harm is **not** presumed.” *McCarthy on*
25 *Trademarks and Unfair Competition*, § 27:37 (4th ed. 2010) (emphasis added); *see also Valu*
26

1 *Eng'g, Inc. v. Nolu Plastics, Inc.*, 732 F. Supp. 1024, 1025 (N.D. Cal. 1990) (noting that “in cases
2 of false comparative advertising, irreparable harm is presumed”) (emphasis added).

3 Thus, in *Mutual Pharmaceutical Co. v. Ivax Pharmaceuticals, Inc.*, 459 F. Supp.2d 925,
4 944 (C.D. Cal. 2006), the Court cited to *McCarthy* and rejected the plaintiff’s argument that
5 irreparable harm is presumed in false advertising cases. In so doing, the Court explained,
6 “[a]lthough such a presumption would apply if this were a trademark infringement case, such a
7 presumption of injury is applied differently in the context of false advertising claims.” *Id.*
8 Instead, “[o]utside the context of comparative advertisements (that is, those that make no direct
9 reference to a competitor’s product), a presumption of irreparable injury to a party is unwarranted
10 because the injury caused by such a false or misleading advertisement ‘accrues equally to all
11 competitors; none is more likely to suffer from the offending [advertisements] than any other.’”
12 *Id.* at 945-46 (quoting in part *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.3d 34, 38 (2d Cir.
13 1988)). Consequently, there is simply no legal basis for a presumption of irreparable harm in this
14 case.⁹

15 Finally, Cascade asserts that it should be entitled to make a less stringent irreparable harm
16 showing because of an alleged likelihood of success on the merits. Not only does Cascade fail to
17 demonstrate a likelihood of success on the merits, as discussed *supra*, the Supreme Court
18 expressly rejected any preliminary injunction standard that does not require a plaintiff to establish
19 that it will suffer irreparable injury absent an injunction. To that end, and in light of *Winter*, the
20 Ninth Circuit has clarified that “[t]o the extent our cases have suggested a lesser standard, they

21 _____
22 ⁹ Cascade cites to a single unpublished decision where the court applied a presumption of irreparable harm.
23 See *Visioneer, Inc. v. Umax Techs., Inc.*, 1998 U.S. Dist. LEXIS 23431 (N.D. Cal. Dec. 7, 1998). Respectfully, that
24 court overlooked the distinction between direct comparison and non-comparative false advertising claims. Instead,
25 the court simply stated that “[w]hen a plaintiff demonstrates a likelihood of confusion, it is generally presumed that
26 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
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 are no longer controlling, or even viable.” *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d
2 1046, 1052 (9th Cir. 2009); *see also Maxim Integrated Prods. v. Quintana*, 654 F. Supp.2d 1024,
3 1030 (N.D. Cal. 2009) (after the Supreme Court’s ruling in *Winter*, “a plaintiff is no longer
4 entitled to a presumption of irreparable harm on the ground that it has shown a likelihood of
5 success on the merits.”).

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

15 Cascade’s assertion that it will suffer a loss of market share absent an injunction also
16 defies logic. First, as noted above, Cascade does not even offer a milk protein fiber yarn of its
17 own, so KFI’s actions can have no effect on Cascade’s non-existent share of that market.
18 Moreover, even if Cascade could prove lost sales, such damages are not irreparable but entirely
19 monetary in nature. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d
20 597, 603 (9th Cir. 1991) (“economic injury alone does not support a finding of irreparable harm,
21 because such injury can be remedied by a damage award”); *Los Angeles Memorial Coliseum*
22 *Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (noting that “the
23 possibility that adequate compensatory or other corrective relief will be available at a later date
24 . . . weighs heavily against a claim of irreparable harm” and monetary injury is not considered
25 irreparable). Second, even if the Court were to conclude that lost customers can constitute
26 irreparable harm, Cascade offers no evidence – not a single survey, customer complaint, or indeed

1 any concrete example – of a customer it would lose absent an injunction. Simply stated, Cascade
2 asserts only that there is a “possibility” that it will suffer irreparable harm without an injunction.
3 That will not suffice.

4 Cascade has not experienced, and will not experience, irreparable harm in the absence of
5 an injunction. To the contrary, Cascade is taking advantage of KFI’s sale of the Milk Yarns to
6 wage a smear campaign against KFI on Cascade’s website. Based on the single test reports
7 provided by Mr. Langley as to each of the Milk Yarns, Cascade self-righteously tells consumers
8 that the milk yarns are nothing more than common acrylic blends. Cascade’s claim of irreparable
9 harm is, in fact, disingenuous.

10 **E. The Balance of the Harms Favors KFI if an Injunction is Imposed**

11 Cascade’s vague allegations of possible harm to its goodwill and potential loss of
12 customers do not outweigh the actual harm KFI would experience if the Court granted Cascade’s
13 request for injunctive relief. As discussed *supra*, Cascade’s claims of harm are purely speculative
14 and unsupported by any evidence. Moreover, Cascade has chosen to litigate this case in the
15 public forum and freely offering its beliefs about KFI on its website and making it known that its
16 yarns are distinguishable from those offered by KFI. Evidently, it wants to benefit from the
17 publicity associated with the lawsuit against KFI.

18 On the other hand, the harm KFI would experience is concrete and immediate. Cascade
19 has requested a Court order enjoining KFI from marketing and labeling yarns as containing
20 certain fibers for yarns that do not contain such fibers. First, the mere filing of the motion for an
21 injunction and the posting of Cascade’s accusations on Cascade’s own website as if they are
22 indisputable has harmed KFI. Second, Cascade assumes that re-labeling yarns is a costless
23 exercise. First, such an order would beg the question – what should the labels say? Based on Dr.
24 Reitman’s testing and the assurances KFI has received from its suppliers, KFI’s yarns are
25 accurately labeled and no re-labeling is warranted. What Cascade really wants is to force KFI to
26 re-label its yarns and omit the reference to milk protein simply because Cascade’s reports say so.

1 In order to re-label its yarns, KFI would have to create new labels, affix new labels to yarn in
2 inventory, and provide new labels to its customers to be affixed to yarns in their respective
3 inventories. The harm to KFI in performing this exercise is three-fold. First, the creation and
4 affixing of new labels to KFI inventory of Milk Yarns would require the expenditure of KFI
5 funds. Second, the provision of additional new labels to customers along with a credit to
6 compensate retailers for their costs of affixing the new labels would require an additional
7 expenditure of KFI funds. Finally, a forced re-labeling would irreparably diminish customers'
8 trust in KFI who continue to believe in KFI's integrity. Assuming the lawsuit is resolved in
9 KFI's favor, KFI would re-incur this cost to re-label its yarns to reflect their milk protein fiber
10 content as they did before any injunctive relief. As the balance of hardships tips against the
11 issuance of the requested preliminary injunction, it should be denied.¹⁰

12 **IV. CONCLUSION**

13 For all the foregoing reasons, this Court should deny Cascade's motion for a preliminary
14 injunction.

15
16 Dated: June 13, 2011

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25 ¹⁰ Given the cost of re-labeling and corrective of advertising, if the Court were inclined to grant injunctive
26 relief, it should require Cascade to post a bond in order to protect KFI from the costs and damages incurred as the
result of a wrongful injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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:

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