

The Honorable Ricardo S. Martinez

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington corporation,

Plaintiffs,

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 under the laws of Italy; SION ELALOUF, a natural person, DIANE ELALOUF, a natural person, JAY OPPERMAN, a natural person, DEBBIE BLISS, a natural person, DAVID WATT, a natural person, and DOES 1-50,

Defendants.

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

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

NOTE ON MOTION CALENDAR:
August 13, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendants Knitting Fever, Inc., Designer Yarns, Ltd., Sion Elalouf, Diane Elalouf, Jay Opperman, Debbie Bliss, and David Watt (collectively, "Defendants"), move to dismiss Count Six of the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.¹

¹ Defendant Filatura Pettinata V.V.G. Di Stefano Vaccari & C. (S.A.S.) does not join in the present motion as it has not yet been served with process in this matter. It is noted, however, that the arguments set forth herein as to Defendants would appear to apply with equal force to Filatura as well.

1 Plaintiff, Cascade Yarns, Inc. (“Cascade”), has asserted six causes of action, five of
 2 which are directed to all of the named Defendants. *See* Amended Complaint at ¶¶ 97-113, 126-
 3 131. The last of these five counts – Count Six – is a conspiracy claim under the Racketeer
 4 Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, *et seq.* *Id.* at ¶¶ 126-
 5 131. Moreover, the Rule 9(b) pleading standard applies to this claim because the predicate acts
 6 upon which the claim is based sound in fraud. *Id.* at ¶ 118. Cascade’s allegations in support of
 7 this claim, however, attribute all actionable conduct collectively to “Defendants” without any
 8 specificity as to the respective roles of each. *Id.* In so doing, Cascade has failed to differentiate
 9 its allegations of a RICO conspiracy as against each of the Defendants, or inform the Defendants
 10 separately of the allegations surrounding the participation of each in the alleged fraud. Such
 11 allegations do not satisfy the Rule 9(b) pleading standard. Accordingly, Cascade’s cause of
 12 action under 18 U.S.C. § 1962(d) against “Defendants” fails to state a claim upon which relief
 13 may be granted. Defendants respectfully submit that Count Six of the Amended Complaint
 14 should be dismissed.

15 16 II. FACTS

17 In connection with Cascade’s RICO conspiracy claim, Cascade’s allegations are as
 18 follows:

19 127. On a date more certainly known to Defendants, Defendants came to a mutual
 20 understanding to accomplish the unlawful plan to sell yarn products with false
 21 representations as to the products’ fiber content as described in this Complaint
 22 (“Defendants’ mutual understanding”).

23 128. At the time of Defendants’ mutual understanding, Defendants were employed by
 24 or associated with the enterprise described by this Complaint.²

25
 26 ² The “enterprise” to which this allegation refers is recited earlier in the Amended
 27 Complaint as follows: “Cascade is informed and believes that Defendants, individually and/or
 collectively, constitute an enterprise as that term is defined in 18 U.S.C. § 1961.” *See* Amended
 (continued...)

1 129. At the time of Defendants’ mutual understanding, Defendants were engaged in
2 activities that affected interstate commerce.

3 130. Defendants knowingly and willfully entered into Defendants’ mutual
4 understanding by indicating, through their words and/or actions, their agreement
5 to conduct or participate, directly or indirectly, in the conduct of affairs of the
6 enterprise described in this Complaint through a pattern of racketeering activity.

7 131. As described in this Complaint, Defendants committed overt acts to accomplish
8 the goal of Defendants’ mutual understanding.

9 Amended Complaint at ¶¶ 127-131.

10
11 **III. LAW AND ARGUMENT**

12 **1. Cascade Has Failed To State A Claim Under 18 U.S.C. § 1962(d)**

13 Dismissal under Fed. R. Civ. P. 12(b)(6) may be based upon the lack of a cognizable
14 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
15 *v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Vague and mere “[c]onclusionary
16 allegations, unsupported by facts, are not sufficient to state a claim under 42 U.S.C. § 1983.”
17 *Jones v. Community Development Agency*, 733 F.2d 646, 649 (9th Cir. 1984); *Pena v. Gardner*,
18 976 F.2d 469, 471 (9th Cir. 1992). “While a complaint attacked by a Rule 12(b)(6) motion to
19 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds
20 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation
21 of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
22 555-56, 127 S. Ct. 1955, 1965 (2007) (internal citations omitted). “Factual allegations must be
23 enough to raise a right to relief above the speculative level, on the assumption that all the

24
25 _____
(continued...)

26 Complaint at ¶ 117.

1 allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555, 127 S. Ct. at 1965.
2 Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
3 570, 127 S. Ct. at 1974.

4 Two working principles underlie the Supreme Court's decision in *Twombly*; first, the
5 tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare
6 recitals of a cause of action’s elements supported by mere conclusory statements. *Ashcroft v.*
7 *Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (citing *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965).
8 Second, determining whether a complaint states a plausible claim is context-specific, requiring
9 the court to draw on its own experience and common sense. *Id.* (citing *Twombly*, 550 U.S. at
10 556, 127 S. Ct. at 1971).

11 A court considering a motion to dismiss may begin “by identifying allegations that,
12 because they are mere conclusions, are not entitled to the assumption of truth.” *Calhoun v.*
13 *Hook*, 2009 U.S. Dist. LEXIS 116404, 14 (W.D. Wash. Nov. 10, 2009). While legal conclusions
14 can provide the complaint’s framework, they must nonetheless be supported by factual
15 allegations. *Id.* But where the well-pleaded facts do not permit the court to infer more than the
16 mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the
17 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). *Iqbal*, 129 S. Ct. at 1950 When there are
18 well-pleaded factual allegations, a court should assume their veracity and then determine
19 whether they plausibly give rise to an entitlement to relief. *Id.* at 1948-51.

20 Federal Rule of Civil Procedure 9(b) requires a pleader of fraud to detail with
21 particularity the time, place, and manner of each act of fraud, plus the role of each defendant in
22 each scheme. Fed. R. Civ. P. 9(b). The Ninth Circuit has repeatedly insisted that this rule be
23 followed in RICO actions alleging the predicate act of mail fraud. *See Odom v. Microsoft Corp.*,
24 486 F.3d 541, 553-54 (9th Cir. 2007); *Lancaster Community Hosp. v. Antelope Valley Hosp.*
25 *Dist.*, 940 F.2d 397 (9th Cir. 1991); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541
26 (9th Cir. 1989); *Schreiber Dist. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.

1 1986). To comply with Rule 9(b), a plaintiff must plead with specificity, to include the “time,
2 place, and specific content of the false representations as well as the identities of the parties to
3 the misrepresentations.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)
4 (citation omitted). A plaintiff must “set forth what is false or misleading about a statement, and
5 why it is false.” *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-48 (9th Cir. 1994).
6 Moreover, “mere conclusory allegations of fraud are insufficient.” Moore, 885 F.2d at 540.

7 Rule 9(b) “does not allow a complaint to merely lump multiple defendants together but
8 require[s] plaintiffs to *differentiate their allegations . . . and inform each defendant separately*
9 *of the allegations surrounding his alleged participation in the fraud.*” *Swartz v. KPMG LLP*,
10 476 F.3d 756, 764-765 (9th Cir. 2007) (internal quotation and citation omitted, emphasis
11 supplied). In *Swartz*, the Court held the complaint patently failed to comply with Rule 9(b) and,
12 therefore, insufficient as a matter of law because it failed to allege any factual basis for the
13 claims, but rather was comprised of a set of generalized and undifferentiated allegations against
14 the defendants as a group. *Id.* As explained by the Court, each RICO defendant was entitled to
15 know what acts he or she was charged with committing. *Id.* In the context of a fraud suit
16 involving multiple defendants, “a plaintiff must, at a minimum, ‘identif[y] the role of [each]
17 defendant[] in the alleged fraudulent scheme.’ ” *Id.* (quoting *Moore*, 885 F.2d at 541); *see also*
18 *Jameson Kealii Kauhi v. Countrywide Home Loans Inc.*, 2009 U.S. Dist. LEXIS 90916, *13-14
19 (W.D. Wash. Sept. 29, 2009) (“conclusory allegations of fraud against multiple defendants
20 without specificity are insufficient as a matter of law.”).

21 In *Jameson*, the Court dismissed RICO claims because the plaintiffs had failed to
22 “separate and distinguish their allegations against the [d]efendants,” asserting nothing more than
23 “conclusory allegations and legal conclusions, that [d]efendants were conspiring in some
24 fraudulent scheme.” *Id.* at *13. The Court also noted that the plaintiffs hadn’t made allegations
25 as to promises made by any particular agent of the defendants. *Id.* As a result, the Court ruled as
26 follows:

1 Plaintiffs' RICO allegations are facially insufficient for at least two
 2 reasons. First, legal conclusions are not entitled to an assumption of
 3 truth. *Iqbal*, 129 S. Ct. at 1950. Second, conclusory allegations of
 4 fraud against multiple defendants without specificity are insufficient
 5 as a matter of law.

6 *Id.* at *13-14 (citing *Swartz*, 476 F.3d at 765).

7 In the present case, Cascade has alleged only that "Defendants" have engaged in a RICO
 8 conspiracy. *See* Amended Complaint at ¶¶ 127-131. Yet Cascade has failed to provide anything
 9 close to the specificity required by Rule 9(b). Notably, Cascade has failed to specify or
 10 differentiate the participation of each of the Defendants in the alleged RICO conspiracy. Rather,
 11 Cascade makes only the most generalized, collective allegation that "*Defendants* came to a
 12 mutual understanding to accomplish the unlawful plan to sell yarn products with false
 13 representations as to the products' fiber content." *Id.* (emphasis supplied). Moreover, in
 14 describing the details of the alleged RICO conspiracy, Cascade offers only the following:

15 -At the time of Defendants' mutual understanding, *Defendants* were
 16 employed by or associated with the enterprise;³

17 -At the time of Defendants' mutual understanding, *Defendants* were
 18 engaged in activities that affected interstate and/or foreign commerce;

19 -*Defendants* knowingly and willfully entered into Defendants' mutual
 20 understanding by indicating, through their words and/or actions, their
 21 agreement to conduct or participate, directly or indirectly, in the
 22 conduct of the affairs of the enterprise described in this Complaint
 23 through a pattern of racketeering activity; and

24 -As described in this Complaint, *Defendants* committed overt acts to
 25 accomplish the goal of Defendants' mutual understanding.

26 *Id.* at ¶¶ 127-131 (emphasis supplied).

27 As in *Jameson*, Cascade's allegations of a fraud-based RICO conspiracy claim in this
 case against "Defendants" are wholly conclusory and utterly lacking in any specificity or
 differentiation as to the respective roles of each of the Defendants in the alleged RICO

³ As noted in footnote 1, Cascade defines the RICO "enterprise" as "Defendants, individually and/or collectively." *See* Amended Complaint at ¶ 117.

1 conspiracy. In the absence of such specificity, Cascade's RICO conspiracy claim is facially
2 insufficient. *See Jameson*, 2009 U.S. Dist. LEXIS at *13-14. Defendants respectfully request
3 that Count Six of the Amended Complaint be dismissed.

4
5 **IV. CONCLUSION**

6 For the foregoing reasons, this Court should dismiss Count Six of the Amended
7 Complaint for failure to state a claim.

8
9 DATED this 26th day of July, 2010.

10 Pepper Hamilton LLP
11 Attorneys for Defendants

12 By /s/Joshua R. Slavitt

13 Joshua R. Slavitt (Admitted *Pro Hac Vice*)
14 Deirdre E. McInerney (Admitted *Pro Hac Vice*)
15 3000 Two Logan Square
16 Philadelphia, PA 19102
17 Tel.: (215) 981-4000
18 Fax: (215) 981-4750
19 E-mail: slavittj@pepperlaw.com
20 mcinerneyd@pepperlaw.com

21 Davis Wright Tremaine LLP
22 Attorneys for Defendants

23 Warren J. Rheaume, WSBA #13627
24 Sarah K. Duran, WSBA #38954
25 1201 Third Avenue, Suite 2200
26 Seattle, Washington 98101-3045
27 Tel.: (206) 757-8035
E-mail: warrenrheaume@dwt.com
sarahduran@dwt.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing Motion to Dismiss for Failure to State a Claim 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.
One Maritime Plaza, Suite 300
San Francisco, CA 94111-3492
rguite@ssd.com

DATED this 26th day of July, 2010.

Pepper Hamilton LLP
Attorneys for Defendants

By /s/Joshua R. Slavitt
Joshua R. Slavitt (Admitted *Pro Hac Vice*)
Deirdre E. McInerney (Admitted *Pro Hac Vice*)
3000 Two Logan Square
Philadelphia, PA 19102
Tel: (215) 981-4000
Fax: (215) 981-4750
E-mail: slavittj@pepperlaw.com
mcinerneyd@pepperlaw.com

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington
corporation,

Plaintiffs,

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
under the laws of Italy; SION ELALOUF, a
natural person, DIANE ELALOUF, a natural
person, JAY OPPERMAN, a natural person,
DEBBIE BLISS, a natural person, DAVID
WATT, a natural person, and DOES 1-50,

Defendants.

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

**[PROPOSED] ORDER TO DISMISS
FOR FAILURE TO STATE A
CLAIM**

NOTE ON MOTION CALENDAR:
August 13, 2010

ORAL ARGUMENT REQUESTED

ORDER

AND NOW, this ____ day of _____, 2010, upon consideration of
Defendants Knitting Fever, Inc., Designer Yarns, Ltd., Sion Elalouf, Diane Elalouf, Jay
Opperman, Debbie Bliss, and David Watt's Motion to Dismiss for Failure to State a Claim, any
opposition filed in response thereto, and for good and sufficient cause shown, it is hereby

ORDERED that the Motion is GRANTED; and it is further

