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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
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CASCADE YARNS, INC., a Washington Corporation, Plaintiff, vs. KNITTING FEVER, INC., a New York Corporation, DESIGNER YARNS, LTD., a corporation of England, FILATURA PETTINATA V.V.G. DI STEFANO VACCARI & C. (S.A.S.), and entity organized or existing under the laws of Italy, SION ELALOUF, an individual, DIANE ELALOUF, an individual, JAY OPPERMAN, an individual, DEBBIE BLISS, an individual, DAVID WATT, an individual and DOES 1-50, Defendant.	Case No. 2:10-cv-00861 RSM **CASCADE YARNS, INC.'S OPPOSITION TO DEFENDANT KNITTING FEVER, INC.'S MOTION FOR RELIEF FROM A DEADLINE IN ORDER TO SUBMIT A SUPPLEMENTAL DECLARATION IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION** **Note on Motion Calendar: September 24, 2010**

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20 **I. <u>INTRODUCTION</u>**

21 Cascade's motion for preliminary injunction asks the Court to order Knitting Fever, Inc.
22 ("KFI") to correctly label its mislabeled yarns or at least provide a continuing guarantee pursuant
23 to the Wool Products Labeling Act ("WPLA"), 15 U.S.C. § 68(g). In support of its motion,
24 Cascade submitted evidence of KFI's mislabeling in the form of detailed testing reports and
25 sworn declarations. In response, KFI elected not to submit test reports for its own yarns or any
26 admissible evidence supporting the accuracy of its labels. Rather, it presented the inadmissible

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hearsay of its president and its counsel -- that purported evidence has now been stricken by this Court.[1] Now, on the last possible date that it could file any motion to be noted for consideration prior to the September 29 oral argument on the motion for preliminary injunction, KFI asks the Court for permission to file another irrelevant and insufficient "supplemental declaration" from its president, Sion Elalouf. (Dkt. No. 67.) This declaration will purportedly support KFI's newly raised "unclean hands" defense to Cascade's motion for preliminary injunction. KFI, in conjunction with the other defendants, has apparently squandered the nearly four months since Cascade filed this action by testing Cascade's products instead of its own and would like to put that "evidence" before the Court to avoid being enjoined from continuing to sell its mislabeled products or be required to provide a continuing guarantee. As explained below, Cascade does not have unclean hands, and, even if it does, injunctive relief should still be awarded as against KFI to address the continuing irreparable harm of its wrongdoing.

II. ARGUMENT

A. Cascade Does Not Have Unclean Hands.

Defendants have not demonstrated a likelihood of success on their affirmative defense of unclean hands. Upon learning of KFI's purported testing results, Cascade immediately took action to notify its customers of the reports and how it is addressing the matter. *See* Declaration of Robert Dunbabin ("Dunbabin Decl.") ¶¶ 8-10, Ex. B. Those efforts -- which evince prompt, reasonable remedial actions, the opposite of unclean hands -- include detailing the discrepancies in each yarn tested and Cascade's ongoing efforts to contact the mills where the yarns were produced to investigate, make replacement labels for the yarn, and/or perform further testing. *Id.*. Cascade further advised all of its customers of the test results provided by KFI. *Id.*

The defendants cannot establish that Cascade has "unclean hands" based solely on the fact of their testing reports. They must also show that to the extent Cascade had mislabeled yarn in

[1] This Court recently granted Cascade Yarns' motion to strike those declarations. (Dkt. No. 71.)

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the marketplace, it has harmed KFI and that it would be inequitable to allow Cascade to pursue its claims against KFI for KFI's mislabeled yarn:

> To establish unclean hands, a defendant must demonstrate (1) inequitable conduct by the plaintiff; (2) that the plaintiff's conduct directly relates to the claim which it has asserted against the defendant; and (3) plaintiff's conduct injured the defendant. In applying the doctrine, '[w]hat is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendants.' (citations omitted.)

Demarest v. Quick Loan Funding, Inc., Case No. CV09-01687 MMM (SSx), 2009 U.S. Dist. LEXIS 120251 at *30 (C.D. Cal. April 6, 2009). KFI has not alleged any harm caused by Cascade's purportedly mislabeled products. More importantly, Cascade's conduct is not inequitable such that denying injunctive relief is appropriate. Cascade only learned of the allegedly mislabeled products on September 15, 2010 -- just seven days ago. Dunbabin Decl., ¶ 6. Since then, it has taken numerous steps to remedy any harm to consumers, including initiating a re-labeling process and offering its customers the opportunity to return any of the yarns that have fiber contents that vary from the present labels. Cascade's assertion of its right to ask the Court to require KFI to do what Cascade is doing -- guarantee that its product labels are correct and re-label or stop selling the products when the labels are inaccurate -- is equitable.[2] Accordingly, Cascade's conduct in addressing KFI's concerns only supports granting injunctive relief against KFI for the reasons set forth in Cascade's motion for preliminary injunction; it is not a basis for an unclean hands defense.

B. <u>There is No Admissible Evidence to Support KFI's Unclean Hands Defense.</u>

Cascade moves to strike the proposed Supplemental Declaration of Sion Elalouf in Opposition to Cascade's Motion for a Preliminary Injunction and its accompanying exhibits as

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[2] To the extent the Court has questions regarding Cascade's knowledge of any mislabeled products or its efforts to address the issues raised by KFI on September 15, a Cascade representative with appropriate personal knowledge of those topics will be present in Court and available to provide live testimony at the September 29 hearing on Cascade's motion for preliminary injunction.

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1 inadmissible hearsay. His statements regarding testing requested by co-defendant Designer
2 Yarns, Inc. and the results provided by SGS Cashmere Labs are beyond his personal knowledge
3 and lack foundation. Fed. R. Evid. 602; *United States v. Lake*, 150 F.3d 269, 273 (3d Cir. 1998).
4 To the extent he submits the information and documents as an expert, he has not been properly
5 qualified as an expert and his testimony should be stricken. Lay opinions cannot be based on
6 scientific, technical, or other specialized knowledge, and a party cannot offer an expert opinion
7 "in lay witness clothing" to evade Fed. R. Evid. 702. Mr. Elalouf was not personally involved in
8 the submission of samples or the testing and was not a recipient of the reports from SGS
9 Cashmere Labs. His proposed supplemental declaration should be stricken.

10 As a result of KFI's failure to present admissible evidence in support of their unclean
11 hands defense, the defense should not preclude issuance of the preliminary injunction requested
12 by Cascade. *See Beijing Tong Ren Tang (USA) Corp. v. TRT USA Corp. et al.*, 676 F. Supp. 2d
13 857, 861 (N.D. Cal. 2009) (granting preliminary injunction after striking inadmissible hearsay
14 evidence of alleged unclean hands).

15 **C. <u>KFI's Assertion of Its Unclean Hands Defense is Improper "Sandbagging" on</u>**
16 **<u>the Eve of Oral Argument On Cascade's Motion for Preliminary Injunction.</u>**

17 Cascade's prompt, effective remedial efforts to address the possibility of labeling
18 inaccuracies are markedly different than the actions KFI has taken since the receiving notice of its
19 mislabeled yarns and being served with this action. Instead of taking *any* steps to correct its
20 labeling errors, defendants, through Mr. Elalouf and Mr. Slavitt, have resorted to further
21 misrepresentations to this Court as well as intimidation and threats of filing a countersuit against
22 Cascade. Dunbabin Decl., ¶¶ 6-7, 12-14, Ex. A.

23 According to the test reports sponsored by Mr. Elalouf, the defendants had knowledge of
24 alleged labeling inaccuracies of Cascade's yarns at least as early as July 13, 2010 and well before
25 KFI filed its Opposition and Sur-Reply to the Motion for Preliminary Injunction on July 26, 2010
26 and August 4, 2010 respectively. (*See* Dkt. Nos. 38 and 42.) Defendants attached two testing

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reports allegedly for Cascade's "DOLCE" and "KID SETA" yarns to Mr. Elalouf's "proposed declaration" dated July 13, 2010. (Dkt. No. 69 at 8 and 21.) KFI asserts that these two yarns and others are mislabeled based on Mr. Elalouf's comparisons of the labels and the testing reports. (Dkt. No. 68, ¶7 and Dkt. No. 69, Exh. 3.) Despite having had notice of this information on July 13 or shortly thereafter, KFI's motion alleges:

> the complete analysis of Cascade's yarns were not available until after KFI submitted its briefing on the motion for a preliminary injunction. As a result, this is KFI's first opportunity to present this evidence to the Court.
>
> Dkt. No. 67 at 3:12-15.

This is not the first time KFI and its counsel have played "fast and loose" with facts regarding the timing of certain events. In Cascade's earlier Motion to Disqualify, Cascade raised the issue of KFI's counsel's seemingly misleading statements regarding when it had actual notice of the lawsuit such that it had not had sufficient time to prepare a response and needed an extension of time. (Dkt. No. 51 at 4-5.) Here, KFI again appears to attempt to mislead the Court by requesting permission to file a supplemental declaration because of they only received the "new facts" after the close of briefing. (Dkt. No. 67 at 3:12-18.) KFI's failure to raise the fact of the testing reports in their July 26 and/or August 4 submissions is fatal to their motion and it should be denied.

Moreover, KFI has further misrepresented to the Court their intentions in obtaining the testing of Cascade's yarns. In KFI's motion, it asserts the reports were conducted for KFI's unclean hands defense and to rebut Cascade's allegations of injury. (Dkt. No. 67 at 3.) The testing, however, appears to have been initiated to coerce Cascade into dismissing the action so that both KFI and Cascade could continue to sell mislabeled products. Mr. Slavitt stated as much in his letter to counsel for Cascade on September 15, 2010. Declaration of Robert J. Guite, Ex. A. Mr. Slavitt wrote:

> KFI wanted to share its current findings with you now in the hope that this information might influence your client's interest in pursuing this lawsuit. Should Cascade prefer that KFI refrain from filing its motion for relief from a deadline

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> presenting the accompanying materials, Cascade must withdraw its motion for preliminary injunction by no later than 3:00 p.m. (PDT) tomorrow. And in the broader frame, should Cascade wish to avoid a lawsuit that would now include KFI's counterclaims for false advertising and unfair competition based on allegations that Cascade is offering a substantial number of falsely labeled goods, it must agree to dismiss with prejudice all of its claims against all parties in the above-referenced action, and reimburse our clients for their attorney's fees incurred in this matter to date. *Id.*

Not surprisingly, Mr. Slavitt did not include this letter with a declaration in support of the pending motion. The letter further evidences the underhanded nature of Mr. Elalouf's dealings with those who dare to challenge his practices. Indeed, Mr. Elalouf could not allow Mr. Slavitt to do the speaking for him on this issue. On the evening of September 15, he wrote an e-mail to Cascade directly to threaten it with legal action unless Cascade stayed quiet about the labeling issues raised in this lawsuit. Mr. Elalouf wrote:

> I am copying you on my own a letter my attorneys have sent yours.
>
> I want to make sure that you have personally checked where you stand and what can come from KFI taking this matter to the next level.
>
> Think hard about the mess you have created in regards to labeling and testing. Think hard about the fight you have started that you cannot win!
>
> Regardless of the outcome, our industry will be the biggest loser as a result of your actions and the escalation that is about to follow in response.
>
> In truth, it is only because of this concern for the industry that I write to you as it is no secret that there is not much love lost between us.
>
> Basically, I am giving you a chance to put an end to the madness you have started before it is too late!
>
> Sion

Dunbabin Decl., Ex. A. Mr. Elalouf's "concern for the industry" can only be his concern for his own improperly gained profits made by duping consumers into buying cheap acrylic yarn at cashmere prices. Cascade did not respond to Mr. Elalouf's email and has no intention of sweeping this issue under the rug for the benefit of Mr. Elalouf. To the contrary, Cascade believes in pursuing this case and obtaining injunctive relief for its benefit, the benefit of the hand

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knitting yarn industry and to increase consumer confidence in its products that accurate labels provide. KFI's misleading and improper motion is untimely and should be denied.

C. Even if Cascade Has Unclean Hands, Injunctive Relief Should Be Granted As Against KFI.

If this Court finds that Cascade has unclean hands -- which it does not -- on the basis that fiber test reports appear to indicate that Cascade has sold mislabeled yarn, that finding would not preclude the Court from granting Cascade's request for injunctive relief.[3] Courts may grant injunctive relief to a plaintiff even if the plaintiff has unclean hands, particularly where the public interest is implicated by the action. *EEOC v. Recruit, U.S.A., Inc. et al.*, 939 F.2d 746, 753-55 (9th Cir. 1991). More recently, in a Lanham Act case involving competing websites for traffic school courses, the district court issued a preliminary injunction despite having found that the plaintiffs' domain names confused consumers in "precisely the same manner" that defendants' did and that plaintiffs were therefore guilty of unclean hands. *Trafficschool.com, Inc. et al., v. Edriver, Inc., et al.*, 633 F. Supp. 2d 1063, 1083-84 (C.D. Cal. 2008). According to that court,

[3] Comparing the photocopies of labels that KFI submitted (using the control number from the testing lab beginning with WTS) with the actual reports furnished, it is evident that KFI deliberately omitted a number of test results. It is impossible to tell how many, as there may be additional photocopies of labels that were not provided. 13 of the 31 labels included in Exhibit 1 to the draft Elalouf declaration are for yarns that were not listed on Exhibit 3 to the draft Elalouf declaration. Dunbabin Decl., Ex. D (chart summarizing KFI tests). Cascade can only assume that the test results for those yarns --and any others they may have tested such as those yarns including cashmere that compete directly with KFI's yarns at issue in this action -- have accurate labels. It is calculated that KFI did not include test results for Cacade's two cashmere blend yarns on the market. Cashmere is usually the fiber tested for, as it costs upwards of $150 a kilogram at the manufacturing level: this is nearly four times greater than the cost of the mohair fiber that KFI's test reports suggest is deficient from certain yarns. It is also noteworthy that pursuant to federal regulations, there is a 3% tolerance for fiber blends, 16 C.F.R. § 303.43, and that a number of the results are at the threshold of this tolerance. Products within this tolerance are not deemed to be misbranded for purposes of the WPLA. This is especially noteworthy as the reports provided with Mr. Elalouf's declaration do not furnish the testing margin of error, as do the reports produced by Cascade's expert, Dr. Langley. KFI's reports reference statistical sampling by counting 1,000 or so fibers, as such there is obviously a margin of error. Lastly, a number of the yarns listed were marginal products, which either were discontinued or in the process of being closed out. Dunbabin Decl., ¶ 9. This is in stark contrast to the primary yarns at issue with KFI, which are essentially their flagship brands. Dunbabin Decl., ¶¶ 12-14.

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> Plaintiffs need not prove actual injury in order to be entitled to injunctive relief under the Lanham Act. "[R]elief is available under Lanham Act §43(a) if it can be shown that the advertisement has misled, confused, or deceived the consuming public." (Citations omitted.)
>
> While Plaintiffs may come with unclean hands, this does not necessarily preclude injunctive relief. Professor McCarthy remarked:
>
> > [W]here the law invoked by the plaintiff is really for the protection of the public, unclean hands is not a defense. That is, if the evidence shows that plaintiff is engaging in inequitable practices, but defendant is also guilty of the unfair competition charged, an injunction should be granted notwithstanding the unclean hands maxim. It is better to remedy one wrong than to leave two wrongs at large. If defendant thinks that plaintiff is guilty of inequitable conduct, he should raise it in a counterclaim or in a separate suit against plaintiff.
>
> 6 McCarthy on Trademarks & Unfair Competition §31:53 (citations omitted).

Trafficschool.com, Inc., 633 F. Supp. at 1085. The public interest here is that consumers will continue to be harmed unless KFI is stopped from continuing to represent to the public that its yarns contain cashmere when they contain no cashmere or just trace amounts. The lack of evidence that KFI's yarns identified by Cascade actually contain cashmere in the amounts reflected on the labels, along with KFI's president's threatening message to Cascade to dismiss the lawsuit out of "concern for the industry" only bolsters the need for court intervention to protect the public from KFI's improper practices. Ordering KFI to re-label the yarn or issue a guarantee is necessary and appropriate given that consumers have been and are likely to continue be misled regarding KFI's yarns absent court action. Cascade's motion for preliminary injunction should be granted regardless of Cascade's alleged labeling issues and unclean hands, as it is better to remedy one wrong by enjoining KFI than to leave two wrongs at large.[4]

[4] As a showing of Cascade's good faith in pursuing this Action and motion for preliminary injunction, and to the extent the Court would prefer to require KFI to issue a continuing guarantee but is concerned that it would be inequitable based on KFI's alleged but unsubstantiated unclean hands defense, Cascade is willing to agree to offer a continuing guarantee under the WPLA as to those yarns identified as having inaccurate labels in the proposed Supplemental Sion Elalouf Declaration.

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1
III. CONCLUSION

2 For the foregoing reasons, Cascade respectfully requests that the Court deny Defendant
3 KFI's Motion for Relief from a Deadline and proceed with the hearing on Cascade's Motion for
4 Preliminary Injunction.
5
6 Dated: September 22, 2010 SQUIRE, SANDERS & DEMPSEY L.L.P.
7
8 By: *_/s/ Robert J. Guite_*
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