

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

The Knit With,

Plaintiff,

vs.

Civil Action

Knitting Fever, Inc.,

Designer Yarns, Ltd.,

Filatura Pettinata V.V.G.

Di Stefano Vaccari & C. (S.A.S.),

Sion Elalouf,

Diane Elalouf,

Jeffrey J. Denecke, Jr.

Jay Opperman,

Debbie Bliss,

Defendants.

No. 02: 08 - CV - 4221

PLAINTIFF’S RESPONSE TO THE MOTION TO DISMISS
FILED BY THE U.S. DEFENDANTS

Plaintiff, The Knit With – by and through its attorney, James F. Casale, Esquire – hereby responds to the motion to dismiss filed by Defendants Knitting Fever, Inc., Sion Elalouf, Diane Elalouf, Jeffrey Denecke, Jr. and Jay Opperman (*hereinafter*, the US Defendants). ¹

Plaintiff opposes the motion filed by the US Defendants and, for the reasons articulated in the supporting brief, respectfully requests this Honorable Court to deny the motion as substantively without merit.

1

The Defendants’ single paragraph motion relies upon its supporting brief to state the substance of the Defendants’ contentions.

The US Defendants claim Plaintiff’s Complaint fails to state a claim for which legal relief may be granted with respect to the federal questions raised in Counts Three through Five and therefore seeks dismissal of the Complaint pursuant to RULE 12(b)(6). The motion also requests the Court to decline, pursuant to 28 U.S.C. § 1367, to exercise jurisdiction over Plaintiff’s remaining claims asserted under state law for the breach of express and implied warranties of merchantability, perfidious dealing in unfair competition and to pierce the corporate veil.

With respect to Count Three, the US Defendants claim Plaintiff does not have standing so as to be entitled to seek the protections afforded by the LANHAM ACT. Defendants claim the Court should dismiss Counts Four and Five, asserted pursuant to the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, as untimely under the applicable statute of limitations and for failure to state a ‘causal nexus’ between the alleged predicate acts of racketeering and Plaintiff’s injury.

With respect to the LANHAM claim, the cases relied upon by the US Defendants in support of argument for dismissal are not only factually distinguishable but the Third Circuit has never ruled that a retailer lacks a competitive . . .² The Defendants' claim that expiration of the judicially created limitations period bars Plaintiff § 1962(c) cause of action is an improper and mechanistic application of the statute of limitations devoid of all reference to the accrual rule and therefore the motion to dismiss should be denied as failing to accord with law and therefore the Defendants motion to dismiss the RICO conspiracy claim alleged at Count Five should be denied as well.

Plaintiff requests the opportunity to provide a sur-reply brief if necessary, the opportunity of oral argument if the Court determines such is required and leave to file an amended complaint, *nunc pro tunc*, in the event that Plaintiff's Complaint, in its entirety or count thereto is adjudged by the Court to require dismissal.

Respectfully submitted,

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Dated: 8 October, 2008

002 .108-01 (Response to Motion to Dismiss)

2

When discussing Plaintiff's LANHAM claim, the US Defendants conflate the provisions of 15 U.S.C. § 1125(a)(1)(A) with § 1125(a)(1)(B); Plaintiff claims the literally false advertising of " the nature, characteristics, qualities, or geographic origin of . . . goods " pursuant to § 1125(a)(1)(B) and not the associational injury actionable pursuant to § 1125(a)(1)(A).

Finally, the US Defendants misrepresent the prevalent Third Circuit rule concerning calculation of the expiration of the statute of limitations, as announced by that Court. See, *Forbes v. Eagleson*, 228 F.3d 471, 2000 U.S. App. LEXIS 25918 (CA 3, 2000)(HELD: Injury discovery rule adopted.).

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

<hr/>		:
The Knit With,		:
	<i>Plaintiff,</i>	:
vs.		:
		:
Knitting Fever, Inc.,		:
Designer Yarns, Ltd.,		:
Filatura Pettinata V.V.G.		:
Di Stefano Vaccari & C. (S.A.S.),		:
Sion Elalouf,		:
Diane Elalouf,		:
Jeffrey J. Denecke, Jr.		:
Jay Opperman,		:
Debbie Bliss,		:
	<i>Defendants.</i>	:
<hr/>		:

Civil Action

No. 02: 08 - CV - 4221

LEGAL MEMORANDUM
IN SUPPORT OF PLAINTIFF’S RESPONSE TO THE MOTION TO DISMISS
FILED BY THE U.S. DEFENDANTS

Introduction

This litigation originates from the improper labeling of three handknitting yarns sold in interstate commerce to the Plaintiff, a retailer of specialty yarns for handknitting sourced from its wholesale supplier, Knitting Fever, Inc.

Defendants Knitting Fever, Inc., Sion Elalouf, Diane Elalouf, Jay Opperman and Jeffrey Denecke have motioned the court to dismiss the three Federal Question claims raised: Counts Three through Five. Count Three brings a false advertising claim, pursuant to 15 U.S.C. § 1125(a)(1)(B) against Knitting Fever, Inc., for misrepresenting the fiber content of three Cashmerino yarns at issue. Count Four seeks damages for Sion Elalouf having operated or managed Knitting Fever, Inc. as a racketeering enterprise and Count Five alleges the remaining motioning defendants, among other parties which have not joined this motion, joined

or participated in a conspiracy to further the Elalouf scheme to foist fraudulently labeled handknitting wool products upon the market. Under different legal theories, the present motion attacks the legal sufficiency of Counts Three and Four¹ and recognizes that Count Five remains contingent upon the viability of Count Four.²

FACTS

Knitting Fever, Inc., *hereinafter* “KFI”, is an aggressive wholesaler of handknitting yarns which bills itself as the leading supplier to independent specialty retailers such as Plaintiff. *See*, Complaint, ¶ 25. In its drive to achieve that status, KFI engages in a number of trade practices established by Mr. Elalouf which, perhaps entirely legal, are unethical or commercially unreasonable. *See, id. at* ¶ 9, 18, 20, 22, 25. When faced with the success of another distributor’s line of yarns labeled under a ‘designer’ name, KFI was compelled to create a rival brand which debuted in 2001 as the Debbie Bliss Collection. Beginning in 2003 and extending through 2005, the Debbie Bliss Cashmerinos was single best selling type of handknitting yarn on the US market. *See, id. at* ¶¶ 26 through 43.

Before May, 2006, Mr. Elalouf’s success with the Cashmerino yarn began to unravel as yet a third yarn distributor sought to trade on the successful marketing concept of the first and ‘knock off’ the Cashmerino yarn type; by reverse engineering this third yarn distributor discovered the Cashmerino range wholesaled by KFI was spun without any cashmere at all. A successive expert fiber analysis performed for the Cashmere and Camel Hair Manufacturers’ Institute on Debbie Cashmerino Chunky confirmed the absence

1

Knitting Fever, Inc. is a closely held corporation the chief executive officer of which is Sion Elalouf. See, Complaint ¶ 4. Count Three of the Complaint is specifically directed only to Knitting Fever, Inc. Count Four alleges that Mr. Elalouf manages Knitting Fever, Inc. as a racketeering enterprise. The motion before the court can properly be characterized as advancing the corporate and individual interests of Mr. Elalouf alone.

2

As a matter of law, a RICO conspiracy claim is contingent upon the existence of a viable violation of a substantive provision of 18 U.S.C. §1962. In the event that Plaintiff’s Count Four is dismissed, Count Five lapses. The remaining US Defendants, among others, therefore do not advance any direct interest in the present motion.

Plaintiff elects to reference the present motion in accord with the factual reality of its presentation and hereinafter refers to the present motion as the Elalouf motion.

of cashmere in that Cashmerino product.

Within 7 weeks of Cashmere Institute testing Cashmerino Chunky, a rumor reached Plaintiff that a yarn, identified only as supposedly spun of 55% merino wool, 33% microfiber and 12% acrylic had been tested with a finding the yarn contained a zero cashmere content. Upon hearing this rumor, Plaintiff's representatives immediately identified this exact proportionate fiber content to be that of two yarns inventoried and offered for sale: Debbie Bliss Cashmerino Aran and Cashmerino Baby. Later that day, KFI Cashmerenos DK was also identified as spun of the exact same proportionate fiber content and all three yarns were immediately removed from sale; the next day, Plaintiff adopted the business decision that these three yarns would remain off-sale until the fiber content of each could be verified and the salability of each could be vouched for.

Initial qualitative fiber analysis of the three yarns indicated "no cashmere fibers were observed". *See*, Exhibit " 9 " at page 1. Quickly following Plaintiff's receipt of this unfortunate news, KFI caused a general letter, addressed by Mr. Elalouf, to be issued to the entire yarn trade in which Mr. Elalouf requested retailers to "rest assured that Debbie Bliss's Cashmerino yarn contains cashmere." *See*, Exhibit " 14 ".

Successive testing by a second independent fiber analyst confirmed the initial qualitative results obtained by Plaintiff's initial test. *See*, Exhibit " 15 ". Further Langley quantitative testing indicates the cashmerino yarns are spun of 57% wool and 43% acrylic. *See*, Exhibit " 9 " at page 2.

APPLICABLE JUDICIAL STANDARD

A motion to dismiss pursuant to RULE 12(b)(6) tests the legal sufficiency of a complaint. *See*, FED. R. CIV. PRO. 12(b)(6). Courts have an obligation to determine the presence of a factual situation which is or is not justiciable and, in doing so, to view the complaint as a whole. *See, City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (CA 3, 1998).

When determining whether a complaint states a cause of action with legal sufficiency, a court "must accept as true " all factual allegations made in the complaint as well as the reasonable inferences which can

be drawn from those facts. *See, Doe v. Delie*, 257 F.3d 309 (CA 3, 2001). Only when a court is satisfied that the complaint entirely fails to state a claim for which relief can be granted may a court dismiss the complaint. *See, Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229 (1984).

The Elalouf motion claims the legal insufficiency of The Knit With claim under Count Three which alleges KFI has falsely advertised the fiber content of the Cashmerino yarns. Mr. Elalouf posits the Plaintiff, under controlling Third Circuit law, lacks standing to bring a false advertising claim merely because The Knit With and KFI are in a wholesaler-retailer relationship.

The Elalouf motion also claims the RICO claim alleged at Count Four is legally insufficient – for two reasons:

1.) the applicable four year limitations period bars bringing this claim because, according to Mr. Elalouf’s interpretation of limitations law, the judicially created limitations period began to run in 2001 when The Knit With first inventoried the Cashmerino yarns; and

2.) Plaintiff was not injured by certain of the predicate racketeering acts, as alleged in ¶ 113 of the Complaint, which occurred in connection with the lawsuit brought by KFI against Coats Holdings, Ltd. in the Eastern District of New York.³

For the reasons which follow, the court should deny the Elalouf motion as devoid of all merit.

LEGAL ARGUMENT

A. The False Advertising Claim Pursuant to the Lanham Act

I. Plaintiff Possesses Standing to Assert a False Advertising Claim

Plaintiff fully recognizes a false advertising claim pursuant to the LANHAM ACT has a limited reach. *See, John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292 (E.D. PA, 1976)(HELD: A §43(a) cause of action

3

The Elalouf motion alternatively seeks dismissal of Count Four under a claim that certain alleged predicate racketeering acts have “nothing to whatsoever with either” with Plaintiff’s claim for relief or the conduct which caused those injuries and thereby lack a causal nexus between Mr. Elalouf and the Plaintiff.

belongs to members of the commercial class.), *aff'd*, 587 F.2d 602, 1978 U.S. App. LEXIS 8080 (CA 3, 1978); *accord*, *Monkelis, v. Scientific Sys. Srvcs.*, 653 F. Supp. 680, 1987 U.S. Dist. LEXIS 885 (W.D. PA, 1987)(OBSERVING: Traditional plaintiff in § 43(a) cases is a competitor injured by defendant's false advertisement of its own products.).

Under Third Circuit law, the general question of who may bring a false advertising claim under the LANHAM ACT is well expressed in *Brunson Commun., Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550 (E.D. PA, 2002)(HELD: Generally, the LANHAM ACT provides a private remedy to a *commercial plaintiff* who meets the burden of proving that *its commercial interests* are harmed by a competitor's false advertising.)(*emphasis supplied*); *accord*, *Granite State Ins. Co. v. AAMCO Transmissions, Inc.*, 57 F.3d 316, 321 (CA 3, 1995) (HELD: Focus of LANHAM ACT is on commercial interests harmed by a competitor's false advertising.); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 1998 U.S. App. LEXIS 32595 (CA 3, 1998)(HELD: the LANHAM ACT limits the class of persons entitled to sue to those who can trace their injury to the anti-competitive conduct proscribed by the ACT; parties not in direct competition (because they are " doing business on different economic levels ") may have standing to sue if they have a " *reasonable interest to be protected* " *against injury to their ability to compete or a harm, direct or indirect, to the good will or reputation of a commercial plaintiff.*)(*emphasis supplied*). *See also*, *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F.2d 649 (CA 3, 1954)(HELD: Retailer's use, in the advertising for sale of its \$ 6.95 dress, a photograph of plaintiff's \$ 17.95 dress is as plain a use of false advertising in the sale of goods as could be imagined and violates a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties and provides for their vindication in the federal courts.)(marking the revolution in interpretation of § 1125(a) claims).

Plaintiff is possessed with standing to maintain this false advertising claim.

Plaintiff is a commercial entity, *see*, ¶ 5, with an openly discernible reasonable interest in the false advertising of the products at issue. *See*, the Complaint as a whole. Plaintiff seeks the judicial administration of the LANHAM ACT, specifically the false advertising provision of 15 U.S.C. § 1125(a)(1)(B). The Complaint

facially discloses a commercial plaintiff has suffered harm to its commercial interests by another having falsely advertised (and explicitly so) its own products through the false claim of a significant presence of cashmere in the fiber content of the three Cashmerino products at issue. The Complaint facially discloses the proximate commercial relationship of the parties. *See*, Complaint ¶¶ 17 and 18.

KFI is the exclusive importer and wholesaler of the Cashmerino products at issue. *See*, Complaint, ¶¶ 5 and 37. KFI explicitly falsely advertised these same products to The Knit With when first introducing the products for sale, *id.*, ¶¶ 37 and 38, and continuously thereafter, *id.*, ¶ 39, through July, 2006. *See*, Exhibit “ 14 ”. The Plaintiff, The Knit With, engages in the retail sale of handknitting yarns and is therefore a commercial entity. *See, id.*, at ¶ 3. Plaintiff’s commercial interests have been harmed by KFI’s false advertising of the fiber content of the yarns at issue because, by the independent operation of the WOOL PRODUCTS LABELING ACT, 15 U.S.C. § 68a, Plaintiff is prohibited from selling to consumers the Cashmerino products purchased from KFI and remaining in Plaintiff’s inventory. *Id.*, at ¶¶ 52 and 106.

II. The *Conte Bros.* Standing Analysis Does Not Apply to *This* Plaintiff

Where a court can not readily discern from the allegations of a complaint the existence of a proximate relationship between the parties or that the plaintiff is possessed with a facially discernible commercial interest in the goods claimed to be falsely advertised, a court is required to undertake a prudential standing analysis. *See, Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225, 1998 U.S. App. LEXIS 32595 (CA 3, 1998)(The question ... is whether, in enacting the LANHAM ACT, ... Congress intended to confer standing to plaintiffs in Appellant’s *position.*)(*emphasis supplied*); *see also, The Joint Stock Society v. UDV North Am.*, 266 F. 3d 164, 2001 U.S. App. LEXIS 20426 (CA 3, 2001)(HELD: Plaintiff exporter-importer of Russian-made vodka to be labeled under Smirnov name, but which sells no products in the US market, lacks prudential standing to assert § 43(a) claims for false designation of origin and false advertising against US-registered trademark holder of Smirnoff vodka.); *Cook Drilling Corp. v. Halco Am., Inc.*, 2002 U.S. Dist. LEXIS 903 (E.D. PA 2002)(HELD: Motion to dismiss § 43(a) LANHAM ACT claim

granted for lack of prudential standing; LANHAM Act is intended as an instrument for remedying concrete, competitive injuries suffered directly by parties who are proximate to a commercial misrepresentation; for a plaintiff asserting prudential standing it is insufficient merely to have been concretely and directly injured, without more.).

The Elalouf motion inappropriately relies on extraneous *dicta* in both the *Conte* trial opinion and the appellate decision for the absurd proposition that a retailer *always* lacks standing to bring a false advertising claim against its wholesale supplier. Such reliance is misplaced as the Third Circuit's *Conte* holding is directly contrary to the Elalouf position. Moreover, even a most cursory review of the facts of the *Conte* case discloses that case is entirely inapposite to the motion before this court.

Conte arose from a representative retailer, seeking to establish a class action claim on behalf of similarly situated retailers nationwide and wholesalers of competitive motor oil products, concerning the false advertising of Slick 50, a Teflon-based automobile engine lubricant. *See, Conte Bros. v. Quaker State-Slick 50*, 165 F. 3d 221, 223-4 (CA 3, 1998). The Federal Trade Commission, pursuant to the FEDERAL TRADE COMMISSION ACT *codified at* 15 U.S.C. §45(a), brought an enforcement action against Quaker State challenging the veracity of that manufacturer's claims for that product; the enforcement action resulted in a settlement agreement which enjoined Quaker State from disseminating false or unsubstantiated claims regarding the Slick 50 product. *Id.*, at 224. Following the FTC settlement, Conte Bros., a New Jersey retailer, initiated suit claiming its sales of competitive motor oils were harmed by the Quaker State's false advertising. *Id.* Conte Bros. did not sell Slick 50. *Id.* The defendants motioned dismiss the complaint in the absence of the representative plaintiff having standing. *Id.* The trial court granted the motion to dismiss opining "that only 'direct commercial competitor' or 'surrogates' for direct commercial competitors having standing to pursue claims under § 43(s)", *codified at* 15 U.S.C. § 1125(a). *Id.*

The Third Circuit, on entirely different grounds, affirmed – but expressly disapproved of the trial court's formulation that "only 'direct commercial competitors' or 'surrogates' " are possessed with standing. *Id.*, at 231-2. Rather, the Third Circuit ruled the standing question which is dispositive of whether a plaintiff

asserting a § 1125(a) claim which has not sold and does not sell the falsely advertised products has a reasonable interest to be protected should be conducted by an analysis of the five factors enunciated by the Supreme Court in *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 537 n.33, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)(deciding standing of anti-trust plaintiff in absence of a proximate relationship between the parties).

Similarly, Elalouf's citation to *The Joint Stock Society v. UDV North Am.*, 266 F. 3d 164, 2001 U.S. App. LEXIS 20426 (CA 3, 2001) is wholly unavailing. In *The Joint Stock Society*, the Third Circuit ruled on the narrow question of whether a planned start-up importer-distributor has a commercial interest in the false designation or origin and the false advertising of a domestically produced liquor which would be in competition with the vodka to be imported by the planned start-up. Importantly, the planned start-up had no commercial quantities of the Russian-made vodka available for sale and therefore did not present an actual case or controversy ripe for judicial determination.

The citation in the Elalouf motion to *Cook Drilling Corp. v. Halco Am., Inc.*, 2002 U.S. Dist. LEXIS 903 (E.D. PA 2002) is equally inapposite. There, Judge Yohn decided that a falsely advertised industrial drilling hammer did not create a commercial injury because the buyer did not purchase the drilling hammer for resale. Instead, the drill hammer was purchased for use in the plaintiff's own drilling business.

As the facts of these cases indicate, all three which are exclusively relied by the Elalouf motion are entirely distinguishable on the facts from the present Complaint. The cases cited in the Elalouf motion, therefore, are not dispositive of the present claim.

Presently, The Knit With and KFI are in a direct proximate relationship with each other – unlike *Cook Drilling* and *Conte Bros.* The falsely advertised goods were actually purchased by the Plaintiff from KFI for the actual commercial purpose of resale to consumers – unlike *Conte Bros.* and *Cook Drilling.* Finally, the claim concerns inventoried products offered for sale to consumers which have been falsely advertised by the importer-distributor – unlike *The Joint Stock Society* case where the plaintiff had yet to inventory any commercial quantity of goods. Because the cases relied upon by the Elalouf motion are wholly

distinguishable on their facts, the rule of law established by those cases – determinative of whether a plaintiff who is not in a proximate relationship with the defendant, who has no commercial quantity of product available for resale or whose purchase of a falsely advertised product was not made for commercial purposes – is wholly inapposite to the present facts.

III. This Plaintiff Satisfies All Five *Conte* Factors Determinative of Prudential Standing

A. The *Conte Bros.* Test for Prudential Standing

As adopted by the Third Circuit, the prudential standing test for LANHAM actions claiming the false designation of origin or the false advertising of goods where the complaint does not readily indicate a discernible reasonable commercial interest to be protected or a proximate relationship between the parties is a test of five parts. *See, Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221(CA 3, 1998)(HELD: Prudential standing determined by five factors employed by Supreme Court in *Associated General Contractors.*).

The five *Conte Bros.* factors determinative of whether a plaintiff whose complaint does not disclose a readily discernible reasonable commercial interest in protection from false advertising are :

- 1.) The nature of the plaintiff's injury: Is the injury of a type Congress sought to redress in providing a private remedy for violations of the LANHAM ACT?
- 2.) The directness or indirectness of the asserted injury.
- 3.) The proximity or remoteness of the party to the alleged injurious conduct.
- 4.) The speculativeness of the damages claim.
- 5.) The risk of duplicative damages or complexity in apportioning damages.

Id., at 233. *See also, Brunson Communs., Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550 (E.D. PA, 2002) (HELD: Same.); *accord, Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 2001 U.S. App. LEXIS 2157 (CA 5, 2001)(HELD: Same.); *Phoenix of Broward, Inc. v. Mc Donald's Corp.*, 489 F.3d 1156, 2007

U.S. App. LEXIS 14814 (CA 11, 2007)(HELD: Same.); *American Assoc. of Orthodontists v. Yellow Book USA, Inc.*, 434 F.3d 1100, 2006 U.S. App. LEXIS 1626 (CA 8, 2006)(applying, without adopting, less categorical multi-factor test of *Conte Bros.* which focuses judicial enforcement of the LANHAM ACT on the protection of commercial interests and the prevention of competitive harm)(noting without resolving circuit split on standing test to be applied).

B. Application of the *Conte Bros.* Test to The Knit With's Complaint

1. *Is Plaintiff's Injury of the Type Covered by the Lanham Act?*

The purpose of the twin unfair competition causes of action legislated at § 1125(a) serves “to ferret out unfair competitive methods and protect businesses from the unjust erosion of their good will and reputation.” *See, Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 236 (CA 3, 1998). The present Complaint alleges a commercial injury suffered by a commercial plaintiff resulting from KFI having falsely advertised the cashmere content of the Cashmerino yarns at issue. Mr. Elalouf's motion admits the Plaintiff's injury is commercial in nature (*see*, Elalouf Brief at p. 12) but posits that the injury is not competitive in nature.

The Knit With's injury is competitive in nature.

a. Vertical Competitive Harm

The parties have been since the early 1980's, and at all times material to this cause of action, in a direct vertical competitive relationship. A vertical competitive relationship exists when the parties are doing business “ on different economic levels” in the market for the same goods – more specifically when a supply and fulfillment relationship exists in the sale of the same goods. *See, Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1175 (CA 3, 1993)(Injured party and rogue enterprise doing business on different economic levels are in competition sufficient for a false advertising claim when the defendant's false advertising of the description of goods is or is likely to harm the plaintiff.). *See also*, 4 MC CARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:33 (1996)(Observing the passe notion that there cannot be ‘unfair competition’

without direct 'competition' between the parties is often rejected.).

b. Plaintiff Suffered Multiple Vertical Competitive Harms

The Knit With has suffered a vertical competitive harm in at least six ways.

First, Plaintiff purchased for resale goods which were not received but for which Plaintiff expended time, effort and money in creating consumer demand. *See*, Complaint ¶ 18(e). *See also*, *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (CA 3, 1954)(HELD: The LANHAM ACT, at § 43(a) clearly and without ambiguity establishes a cause of action for the use of a false representation in the description of goods sold in commerce.)(vertical action by supplier against retailer).

Second, Plaintiff holds in inventory a considerable quantity of paid-for goods which are prohibited from resale because KFI or the Elalouf-related international distributor and/or the Elalouf-related manufacturing agent mis-labeled or mis-manufactured the products. *See*, Complaint at ¶ 52. The Knit With has suffered a competitive injury because its inventory of these products is prohibited from being offered for sale as labeled by independent operation of the WOOL PRODUCTS LABELING ACT, *codified at* 15 U.S.C. § 68a. Whenever a merchant such as the Plaintiff can not offer for resale inventoried products, the merchant suffers a competitive injury.

Third, The Knit With has suffered a second competitive injury because it has been required to test the Cashmerino yarns at issue for the fiber content of each merely to ascertain the salesworthiness of the products. As discussed more fully below, the WOOL PRODUCTS LABELING ACT imposes an affirmative duty upon manufacturers and importers of wool products – sensibly, the persons who *introduce* wool products into the commerce – to label such products in compliance with the statutory and regulatory requirements and implicitly to perform fiber analysis functions. Whenever a retailer, compelled by forces beyond its control, is required to perform a function which is legally mandated to be performed by an entity higher up in the chain of distribution (such as here, where KFI is the importer), the retailer suffers a competitive injury. Moreover, funds used by the Plaintiff to test the products so as to ascertain the fibre content of each were not

used to lay in inventory of other goods, to engage in marketing activities or to expand customer services.

Fourth, when a retailer creates consumer demand for a product exclusively available from a single importer and for reasons beyond the retailer's control – but caused by the importer's actions – the retailer can no longer meet that consumer demand, the retailer has suffered a competitive injury (and the importer has enjoyed an undeserved free-riding competitive benefit) by the consumer going elsewhere to fulfill its demand for the unique or exclusive product. *Cf., Baldwin Piano, Inc. v. Piano Expo, Inc., d/b/a Steinway Piano Galleries*, 2005 U.S. Dist. LEXIS 35490 (M.D. FL, 2005)(action by piano manufacturer to enjoin piano retailer from advertising the sale of goods pursuant to § 1125(a) of the LANHAM ACT.)(vertical action by supplier against retailer).⁴

Fifth, the Plaintiff has suffered a competitive injury from its supplier because The Knit With is deprived of the profit anticipated to be realized upon its investment in the goods at issue – all the while KFI, under Mr. Elalouf's management has enjoyed the profits derived from its sale of these same goods to Plaintiff. *See, Thorn v. Reliance Van Co., Inc.*, 736 F.2d 929 (CA 3, 1984)(loss of investment injury caused by false advertising recoverable under LANHAM ACT.).

Finally, as illustrated by these facts, a retailer's horizontal competitive injuries can be imputed to a vertically related defendant when the defendant succeeds in lulling other retailers into believing that falsely advertised goods are not falsely advertised. *See*, Complaint Exhibits “ 14 ”, “ 16 ” and “ 18 ” and text associated therewith.

By acting in compliance with the legal prohibition against mis-labeled wool products, The Knit With turned away consumer sales for the products at issue – which consumer demand could reasonably be inferred to have been satisfied by other, less scrupulous, merchants who in turn met such consumer demand by wholesale purchases from the Defendant.

4

Presently, The Knit With's claim is a reverse vertical competitor claim where a retailer is claiming against its supplier for the supplier having falsely advertised goods offered for resale. Both L'Aiglon Apparel and Baldwin Piano are vertical competitor claims.

For all the foregoing reasons, the Plaintiff's injury can fairly be classified as competitive in nature as well as commercial in character and it is the type of injury which the LANHAM ACT is designed to provide redress.

2. *The Directness or Indirectness of the Asserted Injury*

As defined by the Third Circuit in *Joint Stock Society*, this factor addresses the issue "whether the defendants' conduct has had a direct effect on either the plaintiff or the market in which they participate." *See, Joint Stock Soc'y.*, 266 F.3d at 181. When assessing the impact of a defendant's false advertising of goods, a court looks to whether the plaintiff's goodwill and commercial reputation have been or are likely to be harmed by the false advertising and not some intervening factor. *See, Conte Bros.*, at 234. This factor protects against 'the loss of a crown for the want of a nail' type of argument where the plaintiff's injury is only determined to have been caused by a long chain of multiple successive causative links.⁵

In *Cook Drilling*, Judge Yohn acknowledged the plaintiff's harm "stems fairly directly from defendants' misrepresentation, but the connection between this false representation and the asserted injury to Cook's reputation and goodwill (breach of contract for failing to timely drill for another's construction of footings in erecting a bridge) is not direct enough to weigh in favor of prudential standing." *See, Cook Drilling* at 22. As illustrated by Judge Yohn, the causative link in *Cook Drilling* is a chain of many links: because of defendants' false representation, the plaintiff bought a hammer of inferior quality, this tool broke repeatedly (whereas a hammer supplied as advertised would not have broken), these breakages resulted in financial losses. *Id.*

The court concluded that while not perfectly direct, the driller presented a fairly direct injury, which weighs moderately in favor of standing but requires balancing against any injury to Cook's reputation or

5

In Cook Drilling, Judge Yohn cited Proctor & Gamble Co. v. Amway Corp. as exemplifying a perfectly direct injury. See, Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 563 (CA 5, 2001)(one competitor's . . . making false statements about his own goods and thus inducing customer to switch from a competitor." In Proctor & Gamble, there are no intervening causative steps between the representation and the harm; the statement is made, and the reaction (customers switching their allegiance) harms the plaintiff.

goodwill – which injury is more attenuated. As defined by the court, the chain of causal injury to reputation is more elongated with the directness of any injury more tenuous: “defendants falsely represented the make of the drilling hammer; the plaintiff consequently bought an inferior product; that tool broke where the product Cook intended to purchase would not have; as a result, Cook performed inadequately during the bridge project; its customers and/or competitors learned of its deficient performance; and its good will and reputation consequently suffered.” *Id.*, at 23. Because this causal chain requires so many links between the alleged false advertising and the harm to the plaintiff’s goodwill counsels against finding prudential standing.

The Knit With presents a sufficiently direct claim to establish prudential standing.

The Defendant falsely advertised the cashmere content of its own products which were purchased by the Plaintiff for resale to consumer and which can not be offered for sale, as labeled, because all sellers, including the plaintiff and the defendant are prohibited from selling mis-labeled wool products.

The Knit With’s injury is even more direct injury than the injury claimed in *Proctor & Gamble*. There a defendant’s misstatements about its own products to consumers required the consumer to not just fail to buy the plaintiff’s products but also buy the defendant’s products from a seller which did not participate (actually or imputedly) in the false advertising.

3. *The Closeness of the Plaintiff to the Misconduct*

The third factor evaluated in *Conte Bros.* is the proximity or remoteness of the plaintiff to the alleged injurious conduct. *See, Conte Bros.* at 234.

In *The Joint Stock Soc’y*, this factor was explained as follows:

the “ court’s task here is to determine whether there is ‘an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest’ by bringing an enforcement action. The existence of such a class ‘diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.’

See, The Joint Stock Society, at 182.

In *Conte Bros.*, the Third Circuit held manufacturers of competing engine additives constituted such

a class, at 234. In *Cook Drilling*, the court identified at least two groups more directly harmed by the alleged false advertising were in a better position to address the false advertising than the plaintiff: 1.) vendors of drilling hammers which compete with the falsely advertised product and 2.) manufacturers of the specific type of hammer producing competitive products to the falsely described drill hammer. *See, Cook Drilling*, at 26.⁶

Presently, only KFI and the Elalouf-related entities are closer to the alleged misconduct than The Knit With. The falsely advertised products at issue are branded goods exclusively imported by the Defendant. The Knit With purchased the falsely advertised goods for resale purposes from the Defendant because of the anticipated market demand for this specific branded product.

While Cascade Yarns, Inc., which discovered the falsely advertised fiber content of one of the six yarns comprising the Debbie Bliss Cashmerino line of products, would, as a competing manufacturer also have an interest in serving as a private attorney-general, Cascade Yarns has demonstrated no interest in doing so – and for good reason: any litigation brought by a horizontally competing merchant, which has purchased none of the falsely advertised products, presents a less direct claim than that of a vertically related merchant which actually suffered the harms resulting from the actually falsely advertised goods. The damages of such a horizontally competing private attorney-general, which purchased none of the falsely advertised goods, would be subject to claims of speculativeness; while the damages could be calculable, judicial relief would most likely primarily consist of the defendant being enjoined against future false advertising.

Where as here a justiciable claim is present, application of the court's equity powers demands that the claim proceed. A bird in hand is better than any two who have yet to emerge from the bush.

6

As The Joint Stock Soc'y. decision recognized, the implicit premise of both Associated Gen. Contractors and Conte Bros. is that a direct horizontal "competitor will usually have a stronger commercial interest than a non-competitor" in fulfilling the role of a private attorney-general. See, The Joint Stock Soc'y. at fn. 10.

All other factors being equal, a prohibition against a retailer serving as a private attorney-general would violate a retailer's equal protection of the laws and violate the due process clause of the FIFTH AMENDMENT of THE CONSTITUTION.

4. The Speculativeness of the Damages Claim

The fourth *Conte Bros.* factor is the speculativeness of the damages claim which, as applied, includes consideration of the avoidability of the damages allegedly suffered. *See, Conte Bros.*, at 235.

As illustrated by *Cook Drilling*, damages which are not speculative but are concrete and quantifiable pecuniary losses stemming in a sufficiently direct manner from the alleged misrepresentation satisfy this factor and favors the grant of prudential standing. *See, Cook Drilling*, at 27.

The present complaint precisely quantifies The Knit With's injuries. *See, Complaint* at ¶ 106.⁷

Plaintiff's damages were not avoidable – and for two reasons.

First, the Cashmerino yarns at issue were unique, branded products for which no alternative source of supply was available. Not until 2006, and months after Plaintiff discovered these yarns were falsely advertised was Plaintiff able to pick up that new and possibly competitive product.

Second, falsely advertising the fiber content of a wool product is an especially insidious wrong to identify and confirm. As Mr. Elalouf himself stated in writing, without expert fiber analysis, it is especially hard to detect the presence (or absence) of cashmere in a product blended of cashmere, other wool fibers states and fibers generally. *See, Complaint* at ¶ 34.

As more fully explained below, the claim posited in the Elalouf motion that The Knit With neglected an affirmative legal duty to have tested all wool products for the fiber composition of the same is drawn from thin air. The statute imposes no such duty upon a commercial buyer of wool products. More importantly, the statute expressly mandates the manufacturer or *importer* of a wool product label the product in compliance with the provisions of the WOOL PRODUCTS LABELING ACT and by regulation, the labeler is required to label accurately. *See, 15. U.S.C. § 68a.* Furthermore, as more fully discussed below, the assertion of such a claim is legally irresponsible, flies in the face of commercial reasonableness and fails for practical impossibility.

7

Compliance with LOCAL RULE 5.1.1 prevents Plaintiff from ascribing a specific dollar value to its measure of damages.

For all these reasons, The Knit With's Complaint satisfies the fourth factor of the *Conte Bros.* test.

5. ***Risk of Duplicative Damages or Complexity In Apportioning Damages***

The fifth and final *Conte Bros.* factor focuses on the risk of duplicative damages or complexity in apportioning damages. *See, Conte Bros.*, at 235.

This factor requires a court to weigh whether multiple claims, possibly to be brought by parties who have been injured more directly by the alleged misrepresentation and have the right to sue for the harm(s) suffered counsels against a conferring standing upon a plaintiff whose complaint does not disclose a proximate relationship between the parties and a readily discernible commercial interest to be protected.

Courts are not blind to the fact that judicial recognition of the legal sufficiency of any complaint heightens the defendant's exposure to the award of duplicative damages. ” *See, Cook Drilling*, at 29. For this reason, the *Conte Bros.* test favors the more directly injured over the less directly injured. *See, Conte Bros.*, 165 F.3d at 235 (Recognizing the right of every potentially injured party in the distribution chain to bring a private damages action would subject defendant firms to multiple liability for the same conduct and would result in administratively complex damages proceedings.).⁸

Assessing the present Complaint against the Third Circuit's criteria, The Knit With is possessed with standing because the Plaintiff is more directly injured than other putative parties – none of whom have initiated proceedings.

For all the foregoing reasons, the Court should find The Knit With is possessed with prudential standing and deny the Elalouf Motion as without merit.

8

The impact on the defendant, by way of exposure to damages as a result of the defendant's own false advertising of goods, arguable should not be a factor in assessing whether a plaintiff has standing. Such an analysis requires a court to declare, at the outset of a claim to be litigated, that the legal validity of the claiming party's position is dependant upon the defending party's ability to willingness to pay in monetary damages for the entirety of the harms caused by the defendant.

Stated more simply, an assessment of the plaintiff's standing to bring a Lanham claim should be analyzed wholly independently of any impact upon the defendant of the court's conferral of standing. The only party to be looked at when assessing a plaintiff's qualification of standing should be the plaintiff. To assess the plaintiff's standing through the prism of the impact upon the defendant is unjust. Just as a defendant's view of the plaintiff's claim can not confer standing upon a plaintiff, so too a defendant's view that a plaintiff does not have standing should not act to deny standing.

B. The 1962(c) RICO Claim

On two different grounds, the Elalouf motion claims Count Four of the Complaint is subject to dismissal for legal insufficiency: that it has been untimely filed after expiration of the limitations period requiring the filing of claims and because of a claimed lack of a causal nexus between some (but not all) of the numerous predicate racketeering acts alleged.

For the reasons which follow, the court should deny the Elalouf motion as without merit.

A. Lack of Causal Nexus Between Predicate Racketeering and Plaintiff's Injury

Plaintiff alleges its injuries result by reason of Defendant Sion Elalouf operating or managing KFI as a racketeering enterprise. *See*, Complaint Count Four, ¶¶ 109 through 120. The Complaint alleges Mr. Elalouf is responsible for establishing KFI's trade policies. *See, id.* at ¶ 7. Among the apparent trade policies employed by KFI is the explicit false advertising of goods imported by KFI and introduced into the commerce of the United States. *See, id.* at ¶¶ 16 through 82. Plaintiff alleges it has suffered an injury proximately caused by KFI's false advertising. *See*, Count Three. Injuries suffered as a consequence of the false advertising of goods represents the kind of harm for which the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT provides a cause of action. *See, West Indian Sea Island Cotton Assoc., Inc., v. Threadtex, Inc. and Bernard Richman*, 761 F. Supp. 1041, 1991 U.S. Dist. LEXIS 4650 (S.D. NY, 1991) (HELD: False advertising and false designation of origin injuries, actionable under § 43(a) of the LANHAM ACT, sufficient as injury for which redress may be sought pursuant to the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.).

Mr. Elalouf's motion claims certain – but not all of the numerous instances of his racketeering activities – have “nothing to do *whatsoever* with either The Knit With's claim for relief or the conduct of the Defendants that it (*sic*) allege[s] caused such injuries.” *See*, Elalouf Brief at p. 12 (*emphasis in original*). Specifically, the Elalouf motion posits that Mr. Elalouf's apparent violations of 18 U.S.C. § 1512(c) (relating to witness tampering), § 1503(a) (relating to obstruction of justice) and § 1951 (relating to interference with

commerce by threats – extortion and blackmail – or violence)⁹ which occurred before or during the course of the litigation brought by Mr. Elalouf and known as *Knitting Fever, Inc. v. Coats Holdings, Ltd.* (E.D. NY 05-CV-01065) are without consequence.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275 (1985), the Supreme Court ruled that where a plaintiff is injured by a defendant’s violation of any of the crimes enumerated at 18 U.S.C. § 1961 (exhaustively listing violations of state and federal law which for RICO purposes are known as predicate acts), the plaintiff’s cause of action is exclusively via a § 1962© claim. The Supreme Court has *never* ruled that a RICO plaintiff may only claim those predicate acts causing the plaintiff’s injury when seeking to satisfy the numerosity requirement of a § 1962 claim.

Moreover, the Supreme Court has consistently ruled that a plaintiff bringing a § 1962© RICO claim need only show the injury for which redress is sought was caused by reason of a business being managed or operated as a racketeering enterprise. *See, Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275 (1985) and *American National Bank & Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 105 S. Ct. 3291 (1985), which collectively held that neither a ‘racketeering injury’ nor an injury which flows from the *performance of racketeering acts* in the conduct of an enterprise is required in claims brought under § 1962©.

The allegations of witness tampering, obstruction of justice and interference with commerce by threats (extortion and/or blackmail) or violence – together with allegations of mail fraud, wire, fraud, money laundering, interstate in aid of a racketeering enterprise and use of facilities of interstate commerce in aid of a racketeering enterprise – establish that KFI is operated or managed by Mr. Elalouf as a racketeering enterprise. The causal nexus between these predicate acts and the injury suffered by Plaintiff is Mr. Elalouf’s conduct of KFI as a racketeering enterprise. As the Supreme Court recently observed, the essence of § 1962(c) is that it “provides a private right of action for treble damages to any

9

It should be noted that all of the predicate acts of racketeering activity alleged by Plaintiff involve violations of criminal statutes – for which no private cause of action is available to a party injured by such acts.

person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of" indictable acts. *See, Bridge v. Phoenix Bond & Indemnity Co. et al.*, ___ U.S. ___, 128 S. Ct. 2131, 170 L. Ed. 2d 1012, 2008 U.S. LEXIS 4703 (2008).

Moreover, the causal nexus requirement posited by Mr. Elalouf is nothing more than a restatement of the "racketeering injury" requirement rejected by the Supreme Court more than 20 years ago. *See, Sedima, supra.*

Mr. Elalouf's motion may more properly be characterized as a motion to strike the allegations of ¶¶ 113(c), (d) and (e). Were the court to so conclude, it is respectfully submitted that the instances of predicate racketeering activity as alleged are so numerous, and continuous, that Plaintiff's § 1962(c) claim continues.

B. The Knit With's Complaint is Timely Filed

The Elalouf motion to dismiss is a double-pronged attack on the legal sufficiency of The Knit With's allegation of Mr. Elalouf's conduct of Knitting Fever, Inc. as a racketeering enterprise. The heart of this attack is the Elalouf motion's mis-reading of the WOOL PRODUCTS LABELING ACT first as requiring The Knit With to have tested the Cashmerino products when they were first added to its inventory in 2001 which – had that been done – would have alerted the Plaintiff to the absence of cashmere in the Cashmerino products as early as 2001. In the absence of so doing – or so goes the Elalouf motion – The Knit With's complaint is untimely filed and therefore barred by application of the judicially created statute of limitations.

1. The WOOL PRODUCTS LABELING ACT

a. Definition of an Affirmative Legal Duty

An affirmative legal duty is an action required to be performed as specifically prescribed by statute or regulation. *See, United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814, 1957 U.S. Dist. LEXIS 3938 (D. C. MD, 1957)(HELD: Where statute or regulation imposes an affirmative duty to do something, it must

be performed.).

b. The Wool Law Imposes No Affirmative Duty on Plaintiff

The Elalouf motion seeks to evade responsibility both for the mis-labeling of the Cashmerino products at issue and for operating KFI as a racketeering enterprise by entirely misapprehending the WOOL PRODUCTS LABELING ACT and the liability and responsibility of a retailer of wool products under the Wool Law. As an overview, under the terms of the Wool Law, retailers fulfill the role of an Alsatian – to watchfully and protectively shepherd the wool market and remain alert to violations – rather than a Terrier – to actively chase down a rat.

Moreover, the Elalouf motion’s reading of the Wool Law is simultaneously legally irresponsible, commercially unreasonable, and practically unworkable.

Legally Irresponsible

The most cursory perusal – and even the most close scrutiny – of the Wool Law fails to identify any statutory or regulatory language imposing *upon a commercial buyer*, such as the Plaintiff, any duty to substantiate the *representations made by a commercial supplier* appearing on the labeling of wool products. The Elalouf motion cites no provision of the WOOL PRODUCTS LABELING ACT, or the regulations promulgated thereunder, to substantiate the astounding affirmative duty postulated and by which Mr. Elalouf seeks to evade liability for the improper labeling of the Cashmerino yarns at issue. This is so for the simple reason that no such affirmative duty is mandated by the Wool Law as generally applicable to a retailer. ¹⁰

Retailers can avoid the liability imposed by the Wool Law for improper labeling through any number of measures short of actively testing the fibre content of wool products purchased for resale to consumers.

10

The Plaintiff does not assert it is not liable to the appropriate authorities for its inadvertent sale of improperly labeled wool products.

Plaintiff’s position is that in the absence of any reason to believe a wool product is improperly labeled, a retailer has no duty to inquire into the fiber content of a wool product or any of the other specific informational items required by the Wool Law to appear on the labeling of wool products. As is explained in more detail infra, the liability which is imposed upon a retailer for the inadvertent sale of improperly labeled wool products acts as a consumer protection measure and to ensure the retailer is aware of and alert to the possible presence of improperly labeled wool products introduced in the chain of distribution by unscrupulous manufacturers or importers.

Such measures include:

- choosing suppliers carefully between known and unknown firms;
- establishing supplier relationships primarily with long-term entities who have a strong and continuing stake in the wool market;
- sourcing wool products from large suppliers with a dedicated presence in the wool market;
- verifying the suppliers' representations do indeed conform to the labeled statements;
- developing close relationships with suppliers of wool products;
- remaining aware of trade information about sourcing, availability and the pricing of wool products to be alert to inconsistencies so as to be able to identify possibly improperly labeled wool products.

When these actions, alone, are insufficient, the Wool Law provides a commercial buyer with yet another possible tool to avoid liability: assurances (in the form of a Guaranty of Compliance to *be provided by the supplier* wherein the supplier guarantees the wool product conforms with the labeling requirements established by law) which, when not furnished by the supplier places the commercial buyer on notice of some likely violation of the law. ¹¹

Moreover, and not mentioned by the Elalouf motion at all, are the affirmative duties imposed upon those who *introduce* wool products into the stream of commerce. The statutory and regulatory language of the Wool Law clearly imposes affirmative duties upon the *entity introducing wool products* into the stream of commerce – whether by domestic manufacture or *importation* of foreign-made wool products.

By statute, persons who introduce wool products into the stream of commerce are expressly required to label their wares in conformance with the statutory labeling disclosures. *See*, 15 U.S.C. § 68c (Any person

11

It is noted the Wool Law does not mandate a supplier's compliance with a request for assurances. However, the law of sales so does and when assurances is not provided within the manner and time requested by a buyer, the seller is deemed to be in breach of the agreement for the sale of that goods. See, UNIFORM COMMERCIAL CODE, Article Two § 609 and cases decided thereunder; the UCC is in force in almost every state.

In the instant matter, Plaintiff requested assurances from Knitting Fever, Inc. concerning the labeling of wool products supplied to Plaintiff. See, Complaint, ¶¶ 54 and 69(d).

manufacturing for introduction, or first introducing into commerce a wool product shall affix thereto the stamp, tag, label, or other means of identification required by this Act.). By regulation, those responsible for labeling wool products are required to label truthfully. *See*, 16 C.F.R. § 300.30 (Products subject to the act shall not bear, nor have used in connection therewith, any . . . label, mark or representation which is false, misleading or deceptive in any respect.). The statutory and regulatory language clearly imposes the duty to label solely upon the manufacturer or importer; as a predicate responsibility to fulfilling that duty, the manufacturer or importer has the duty to ascertain the fibre content of wool product.

Commercially Unreasonable

It is commercially unreasonable to misapprehend the Wool Law so as to require retailers and other commercial buyers of wool products to actively verify the labeled representations required to be made by manufacturers and importers.

The essence of commercial transactions between merchants of goods of a like kind is the good faith and fair dealing of the parties. This the law of sales so presumes. Retailers reasonably rely upon their wholesale suppliers (who reasonably rely upon their distributors who reasonably rely upon manufacturers and importers who in turn reasonably rely upon the manufacturer who reasonably relies upon a commodity broker who reasonably relies upon a producer) that the qualities and characteristics of goods offered for sale are what the seller represents them to be. In simpler times, perhaps, a commercial buyer could know the actual manufacturer of the goods and thereby inspect or supervise the manufacturer's processes. Where in an advanced and sophisticated economy transcending local markets and reaching worldwide, commercial functions have become highly articulated and differentiated. It is simply commercially unreasonable to expect a retailer to perform such a testing function which the law presumes the function is to be performed by the manufacturer or importer.

Moreover, were commercial buyers in the chain of distribution required to actively verify all representations made by commercial sellers about the qualities and characteristics of goods intended to reach

consumers, commerce would screechingly and quickly grind to a halt. Prices to be paid by consumers would astonishingly and exponentially escalate into exorbitant sums for goods of every kind. The consumer would be deprived of the advantages of a sophisticated, international trade in goods. The entire economy would revert to the local, insular economies of the Dark Ages and the sale of goods would be consigned to occur in the dark recesses of the souk.

The Wool Law, in obvious deference to commercially reasonable practices and customs, places the duty to accurately label where it properly belongs: on those who introduce into the stream of commerce any products subject to the WOOL PRODUCTS LABELING ACT – in the present matter, the US Defendants. This is the only affirmative duty established by the Wool Law.¹²

Practically Unworkable

The retailer's affirmative duty postulated by the Elalouf motion is practically unworkable.

Trained materials analysts are not so great in number as to allow for reliable testing at each transaction point in the chain of distribution for wool products specifically or all products generally. As the instant case illustrates, the number of trained materials analysts worldwide with the training, knowledge and skill to identify a component fiber, such as cashmere, in a finished manufactured yarn is relatively small. *See*, Exhibit 13 to the Complaint. Were even one retailer required to test every wool product which the retailer could reasonably expect to offer for resale to the consumer, such a regimen would overwhelm available

12

At first glance, the absolute liability imposed upon all sellers of improperly labeled wool products – even those not involved with the labeling, manufacture or specification of the fiber content of such products – may appear unreasonable. This liability derives from the express statutory prohibition against the sale of improperly labeled wool products and applies when a commercial seller has any reason to believe a wool product is improperly labeled.

The sweeping scope of liability evinces Congress' purpose to eradicate deceptive practices in the sale of wool products where buyers, both commercial and consumer, may not be able to readily or reliably ascertain or determine the true fiber content of such products.

The liability imposed upon a retailer, such as the instant Plaintiff, serves to protect the consumer who is the ultimate victim of an attempted or perpetrated fraud. While the Wool Law itself does not provide a cause of action to an inadvertently liable retailer, remedies are available to the retailer such as those, under state statutory and common law, as asserted in the instant litigation.

resources for fiber analysis.

Furthermore, such an affirmative duty would require *every* retailer to duplicate the verification efforts of *all* other retailers. Such a regimen of duplicated effort would result in a horrible waste of manufactured goods and also deprive the consumer of the benefits of a sophisticated economy directed to the production and provision of quality goods at relatively low prices. For this reason, the affirmative duty expressly mandated by the Wool Law for an importer or manufacturer to label wool products, and any predicate verification which may be necessary for compliance with the regulatory duty to label accurately, is placed on the person who introduces a wool product into the stream of commerce. Verification is done by the source, it is done once and for all those who in the ordinary course of business succeed in that chain of distribution.

The effort by the US Defendants, led by Sion Elalouf, to misrepresent the provisions of the WOOL PRODUCTS LABELING ACT, and to postulate a duty where such does not exist is entirely consistent with the claimed presence of cashmere in the yarns at issue. *See*, Exhibit 14, p. two ¶ 3.

In the absence of notice that a wool product is improperly labeled, the function of successive merchants in the chain of transactions ultimately resulting in a consumer's purchase of wool products is to act as a protective watchdog: to be alert to and responsive to any reason to believe the wool product is improperly labeled. The statutory role of a retailer is not, as the US Defendants assert, that of a terrier to chase vermin through burrows.

For all the foregoing reasons, the Court should deny the Elalouf motion seeking the court to legislate an affirmative duty on the part of commercial buyers of wool products and to amend the Wool Law to relieve an importer of its duty to label wool products with a statement of the fiber content of the same and to promulgate a revised regulation relieving an importer from the duty to label truthfully.

2. The Accrual of The Knit With's RICO Claim

Analysis whether a statute of limitations has expired can not be performed in a vacuum of the absence of consideration of when the cause of action presented to the court accrued. *See, Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 1996 U.S. App. LEXIS 10866 (CA 7, 1996)(HELD: The law concerning statutes of limitations

fairly bristles with subtle, intricate and often misunderstood issues.); *see also*, *Pearl v. the City of Long Beach*, 296 F.3d 76, 2002 U.S. App. LEXIS 14168 (CA 2, 2002)(HELD: Application of the concept of accrual, sometimes referred to as the ‘discovery rule’, is often confused.)(*cert. den’d.*, 2003 U.S. LEXIS 2206 (2003).

For as long as ‘the memory of any man now alive runneth’, accrual of a federal cause of action is determined by application of the ‘discovery rule’. *See*, *Clark v. Iowa City*, 87 U.S. 583, 20 Wall. 583, 22 L. Ed. 427 (1875)(HELD: The term ‘legal injury’ describes whether an injured party has a right – under common law or statutory law or in equity – to initiate suit to recover relief resulting from suffering an actual injury.); *accord*, *TRW Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441 (2001)(Scalia, concurring)(Unquestionably the traditional rule is that absent other indications, a statute of limitations *begins* to run at the time the plaintiff has the right to apply to a court for relief.)(emphasis supplied).

The ‘discovery rule’ establishes the beginning point of when a plaintiff can initiate a lawsuit to redress injuries suffered. *See*, *In re Swift*, 129 F.3d 792 (CA 5, 1997)(The accrual of a cause of action is a concept closely tied to the fundamental purpose of a cause of action – to make an injured party whole; the accrual of a cause of action means the right to institute and maintain a suit – a cause of action has accrued whenever one person may sue another.); *see also*, *Caruolo v. AC & S, et al.*, 2001 U.S. Dist. LEXIS 1332 (S.D. NY, 2001)(Discovery rule is a fair and simple rule which permits a person to discover his or her injury *before* the statutory period for suit *begins* to run; discovery rule intended to correct the widespread injustice of the common law rules used to determine time of accrual of an action.).

As a consequence of the discovery rule for accrual, “ all statutes of limitation begin to run when the ‘legal injury’ has been discovered.). *See*, *Clark v. Iowa City, supra*; *see also*, *Rotella v. Wood*, 528 U.S. 594, 120 S. Ct. 1075 (2000)(HELD: When applying a discovery accrual rule, discovery of the injury . . . is what starts the clock on the running of the statute of limitations.); *see also*, *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (CA 3, 1994)(HELD: Pursuant to the discovery rule, the accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that

an injury has been inflicted.); *accord*, *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 1996 U.S. App. LEXIS 10866 (CA 7, 1996)(HELD: The discovery rule as applied by federal courts, keys the accrual of the claim to the discovery of injury rather than to the discovery of the wrongful act that caused the injury.).

The difficulties in applying both the accrual rule and the pertinent statute of limitations is magnified when the substantive statutory cause of action is a statute as complex as the RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT. *See*, *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 2001 U.S. App. LEXIS 16999 (CA 3, 2001)(HELD: Statute of limitations issues attendant to civil RICO claims, historically, have been tricky for two reasons: first, Congress failed to provide a statutory limitations period in the RICO statute and second, the Supreme Court has consistently refused to determine when a RICO action accrues – *i.e.*, when the applicable limitations period begins to run.). The latter half of the accrual-limitations equation has been settled by the Supreme Court. *See*, *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987)(HELD: Borrowing analogous four-year period established by the CLAYTON ACT, 15 U.S.C. § 15b, limitations period for civil claims pursuant to RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS Act is a period of four years.). Nonetheless, statute of limitations controversies continue in the absence of the Supreme Court clearly enunciating a RICO accrual rule. *See*, *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 2001 U.S. App. LEXIS 16999 (CA 3, 2001)(HELD: Accrual of a RICO claim remains a source of controversy.).

In the aftermath of *Rotella*, the Third Circuit adopted the injury discovery rule for determination of the accrual of RICO claim. *See*, *Forbes v. Eagleson*, 228 F.3d 471 (CA 3, 2000)(HELD: Injury discovery rule adopted to determine accrual of the statute of limitations for RICO actions.); *accord*, *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 2001 U.S. App. LEXIS 16999 (CA 3, 2001)(HELD: Civil RICO claims are governed by a more lenient ‘injury discovery’ rule.);¹³ *Oshiver v. Levin, Fishbein, Sedran & Berman*,

13

As noted by the Mathews court “the important question whether a civil RICO claim must be complete before it accrues” remains; the Third Circuit has “little doubt that the question eventually will have to be addressed” on another day. See, Kidder, Peabody & Co., Inc., 260 F.3d 239, 2001 U.S. App. LEXIS 16999 (CA 3, 2001).

38 F.3d 1380, 1994 U.S. App. LEXIS 31575 (CA 3, 1994)(HELD: As a general rule, the statute of limitations begins to run when the plaintiff's cause of action accrues; the accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured.)(*citing, Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (CA 7, 1990).).

Moreover, for RICO claims the 'injury discovery' rule now prevails in all Circuits with the exception of the Tenth, Eleventh and DC Circuits. *See, The Lares Group, II v. Tobin*, 221 F.3d 41, 2000 U.S. App. LEXIS 19078 (CA 1, 2000)(HELD: In First ¹⁴, Second ¹⁵, Fourth ¹⁶, Fifth ¹⁷, Seventh ¹⁸, and Ninth ¹⁹ Circuits, statute of limitations for claims pursuant to RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT subject to 'injury discovery' accrual rule whereby statute of limitations is triggered when a plaintiff knew or should have known of his injury.); *Trollinger v. Tyson Foods, Inc.*, 2006 U.S. Dist. LEXIS 17448 (E.D. TN, 2006)(HELD: In wake of *Rotella*, Sixth Circuit applies an 'injury discovery' rule to determine accrual of statute of limitations for civil RICO claims.); *Hope v. Klabal*, 457 F.3d 784, 2006 U.S. App. LEXIS 20122 (CA 8, 2006)(HELD: RICO claims are subject to the 'discovery rule' which dictates that the limitations period begins to run when the facts constituting fraud were discovered or, by reasonable diligence, should have been discovered.). The Tenth ²⁰ and Eleventh and DC ²¹ Circuits remain undecided.

14

See, *Rodriguez v. Banco Central*, 917 F.2d 664 (CA 1, 1990).

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See, *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (CA 2, 1988).

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See, *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (CA 4, 1987).

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See, *Rotella v. Wood*, 147 F.3d 438 (CA 5, 1998).

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See, *McCool v. Strata Oil Co.*, 972 F.2d 1452 (CA 7, 1992).

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See, *Grimmett v. Brown*, 75 F.3d 506 (CA 9, 1996), cert. dismiss'd as improvidently granted, 519 U.S. , 117 S. Ct. 759, 136 L. Ed. 2d 674 (1997).

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***Cory v. Aztec Steel Bldg. Inc.*, 468 F.3d 1226, 2006 U.S. App. LEXIS 27570 (CA 10, 2006)(HELD: Without adopting either the 'injury occurrence' or 'injury discovery' rule and analyzing claim for building materials purchased in 1993 and 1995 found to be defective in 1996 and June, 1999 under both standards, suit filed in August 2003 is untimely.)(observing**

The ‘discovery rule’ bases accrual of a cause of action when the plaintiff knows, or by application of diligence, should have known of the date when an injury was suffered. *See, Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1994 U.S. App. LEXIS 31575 (CA 3, 1994)(HELD: The ‘polestar’ of the discovery rule is not the plaintiff’s actual knowledge of injury, but rather whether the knowledge was known, or through the exercise of reasonable diligence, knowable.). Reasonable diligence is triggered by ‘storm warnings’ of culpable activity as the cause of injury. *See, Gruber v. Price Waterhouse*, 697 F. Supp. 859 (E.D. PA, 1988)(HELD: Whether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis for their claims depends on whether they had sufficient information of possible wrongdoing to place them on ‘inquiry notice’ or to excite ‘storm warnings’ of culpable activity.).

Presently, the Elalouf motion claims The Knit With’s injury was knowable in 2001. Specifically, the Elalouf motion contends The Knit With :

- had it performed an independent analysis of the fibre content of these yarns in 2001 as required by an affirmative duty said to be imposed by the Wool Law, The Knit With would have been discovered the zero cashmere content in the Cashmerinos then;
- need not have waited for any ‘storm warnings’ concerning the fibre content of these yarns before independently ascertaining whether the labeled fibre content is correct.

Therefore, Mr. Elalouf contends the statute of limitations for Plaintiff’s RICO claim expired in 2005 – almost three years before the date of the filing of The Knit With’s Complaint and a full year before any participant in the yarn trade other than the persons presently named as defendants had any reason to believe the Cashmerino yarns at issue were spun with a zero content of cashmere.

Were the major premise of the Elalouf motion correct – *i.e.*, that the WOOL LAW imposes a duty

injury was complete upon purchase of the allegedly defective buildings materials)(cert. den’d., U.S. , 2007 U.S. LEXIS 4564 (2007).

21

See, Riddell v. Riddell Washington Corp., 866 F.2d 1480 (CA DC, 1989)(assuming, but not deciding, that injury discovery rule applies).

upon commercial buyers of wool products to investigate the fibre content of those wool products prior to committing to offer such products for sale to consumers – the analysis employed by Mr. Elalouf would be logical and could possibly have legal merit. As discussed, *see*, pgs. 21-25 *supra*, the major premise not only utterly fails but is nothing more than a schoolboy attempt whereby Mr. Elalouf attempts to evade legal responsibility for the consequences of his own actions by trying to set the rule of law which establishes that responsibility.

Moreover, as Mr. Elalouf admits, between 2001 and 2006 there was an absence of any storm warnings concerning the fiber content of the Cashmerino yarns so as to place The Knit With on ‘inquiry notice’ concerning the composition of these products and their labeling. *See, Cetel v. Commonwealth Life Ins. Co.*, 460 F.3d 494, 2006 U.S. App. LEXIS 21938 (CA 3, 2006)(HELD: Storm warnings have not been exhaustively catalogued, but they are essentially any information or accumulation of data that would alert a reasonable person to the probability that misleading statements or significant omissions have been made which lead to injury.); *see also, Warren Freedensfeld Assoc., Inc. v. Mc Tigie*, 531 F.3d 38, 2008 U.S. App. LEXIS 13065 (CA 1, 2008)(HELD: Inquiry notice requires a reasonable suspicion that skulduggery was afoot.).

In the absence of ‘storm warnings’, an injured plaintiff is not required to behave like a terrier and chase a weasel through its hole. Similarly, it is entirely unreasonable for a commercial buyer to presume that a commercial seller may or has misrepresented the labeled qualities and characteristics of a commercial product. *See, Mc Tigie, supra* (HELD: In commercial relationships, there is no reason to believe that a defendant might thumb his nose at this adhering to legal requirements so as to impose inquiry notice upon a plaintiff.).

Finally, Mr. Elalouf’s motion is based upon information known to Mr. Elalouf and certainly not known to the Plaintiff. Since Mr. Elalouf knew in 2001 that the Cashmerino yarns at issue were spun a zero cashmere content, and were therefore improperly labeled, he could have avoided all liability for the ensuing cashmere debacle by taking the appropriate corrective measures. In the absence of his having done so, and in the absence of any ‘storm warnings’ between 2001 and 2006 concerning the fiber content of the yarns at

issue, it is wholly unreasonable to conclude that a commercial buyer's cause of action accrued in accordance with the defendant's knowledge of the true state of affairs.

Under the facts presented to the court, The Knit With had no duty to affirmatively inquire whether the fiber content of the Cashmerino products were mis-labeled and no reason to believe these products were mis-labeled as to establish inquiry notice. In the absence of notice, actual or constructive, of the absence of cashmere in the Cashmerinos, the Plaintiff's cause of action could not have accrued prior to when it did. Therefore, The Knit With's cause of action did not accrue before July 6, 2006 when it received the first 'storm warning' of the impending cyclone known as the cashmere debacle.

3. Plaintiff Has Two Years Remaining Within Which to File Suit

Plaintiff's cause of action against Mr. Elalouf for managing or operating KFI as a racketeering enterprise accrued on July 6, 2006 upon receipt of a 'storm warning' concerning the fiber content of the Cashmerino yarns stocked by The Knit With since Autumn, 2001.

Contrary to the position advocated by Mr. Elalouf, expiration of the statute of limitations can not be determined without first ascertaining when a cause of action accrued. *See, Warren Freedensfeld Assoc., Inc., v. Mc Tigue*, 531 F.3d 38, 2008 U.S. App. LEXIS 13065 (CA 1, 2008)(HELD: The date of accrual of a cause of action is not always determined mechanically; in certain circumstances, accrual contemplates application of the so-called discovery rule.).

The limitations period applicable to a RICO cause of action is four years. *See, Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987); *see also, In re Swift*, 129 F.3d 792 (CA 5, 1997)(The purpose of statutes of limitation is different from the accrual rule: statutes of limitations bar the litigation of stale claims at a time removed from when the pertinent events occurred.). Since the four year limitations period has yet to expire, Plaintiff has almost another two full years within which it may have elected to initiate suit.

Finally, because Plaintiff states a legally sufficient claim for Mr. Elalouf's violation of § 1962©, the dependent conspiracy claim brought pursuant to § 1964 (d) is legally sufficient as well.

CONCLUSION

For all the foregoing reasons, Plaintiff, The Knit With, requests this honorable court to determine:

1. Plaintiff is possessed with prudential standing to maintain the false advertising claim asserted at Count Three of the Complaint; and
2. Plaintiff's two RICO claims – Count Four brought against Mr. Elalouf individually for his having operated or managed Knitting Fever, Inc. as a racketeering enterprise, and Count Five for the remaining individual US defendants, among other named parties, having conspired with or facilitated Mr. Elalouf's cashmere caper – are not barred by application of the statute of limitations.

Finally, Plaintiff requests this honorable court to deny the motion to dismiss Plaintiff's Complaint brought by Sion Elalouf on behalf of himself and the remaining US Defendants as devoid of merit.

Respectfully submitted,

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Dated: 8 October, 2008.

Counsel for Plaintiff, The Knit With

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

The Knit With,

Plaintiff,

vs.

Knitting Fever, Inc.,
Designer Yarns, Ltd.,
Filatura Pettinata V.V.G.
Di Stefano Vaccari & C. (S.A.S.),
Sion Elalouf,
Diane Elalouf,
Jeffrey J. Denecke, Jr.
Jay Opperman,
Debbie Bliss,

Defendants.

Civil Action

No. 02: 08 - CV - 4221

ORDER

AND NOW, this _____ day of _____, 2008, upon consideration of the Motion to Dismiss Plaintiff’s Complaint as filed by the US Defendants and Plaintiff’s Response thereto, and for sufficient and good cause shown and in the interests of justice, it is hereby:

ORDERED that the Motion to Dismiss is **DENIED** as devoid of merit. The Parties are hereby directed to proceed with this case consistent with the Federal Rules of Civil Procedure.

BY THE COURT:

Hon. Ronald L. Buckwalter, J.

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

The Knit With,

Plaintiff,

vs.

Knitting Fever, Inc.,

Designer Yarns, Ltd.,

Filatura Pettinata V.V.G.

Di Stefano Vaccari & C. (S.A.S.),

Sion Elalouf,

Diane Elalouf,

Jeffrey J. Denecke, Jr.

Jay Opperman,

Debbie Bliss,

Defendants.

Civil Action

No. 02: 08 - CV - 4221

CERTIFICATE OF SERVICE

I, James F. Casale, Esquire, attorney for Plaintiff, hereby certify that, on the date set forth below, I caused to be served Plaintiff's Response to the Motion to Dismiss of the US Defendants, and Brief in support thereof, to counsel for Defendants Knitting Fever, Inc., Sion Elalouf, Diane Elalouf, Jeffrey Denecke, Jr., and Jay Opperman by electronic filing with the U.S. District Court for the Eastern District of Pennsylvania and by First Class Mail upon Designer Yarns, Ltd., Filatura Pettinata V.V.G. di Stephano Vaccari (S.A.S.) and Debbie Jane Bliss.

BY: _____
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Dated 8 October, 2008