

The Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASCADE YARNS, INC., a Washington
corporation,

Plaintiffs,

v.

KNITTING FEVER, INC., a New York
corporation, DESIGNER YARNS, LTD., a
corporation of England, FILATURA
PETTINATA V.V.G. DI STEFANO
VACCARI & C. (S.A.S.), an entity organized
under the laws of Italy; SION ELALOUF, a
natural person, DIANE ELALOUF, a natural
person, JAY OPPERMAN, a natural person,
DEBBIE BLISS, a natural person, DAVID
WATT, a natural person, and DOES 1-50,

Defendants

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

**DECLARATION OF JOSHUA R.
SLAVITT IN OPPOSITION TO
CASCADE'S MOTION FOR
EXPEDITED DISCOVERY**

NOTE ON MOTION CALENDAR:
November 12, 2010

I, Joshua R. Slavitt, declare as follows:

1. I am an attorney, admitted to practice before this Court *pro hac vice*, and am a partner with Pepper Hamilton LLP, counsel of record for Defendant Knitting Fever, Inc. ("KFI") in this action. This declaration is based on my personal knowledge and, if

DECLARATION OF JOSHUA R. SLAVITT
IN OPPOSITION TO CASCADE'S MOTION
FOR EXPEDITED DISCOVERY
(Case No. C10-00861 RSM) — 1

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1 called upon to do so, I would and could testify competently as to the matters set forth
2 herein.

3 2. Attached hereto as Exhibit A is a true and correct copy of a webpage
4 maintained by the Cashmere and Camel Hair Manufacturers Institute that I accessed and
5 downloaded on November 7, 2010.

6 3. Attached hereto as Exhibit B is a true and correct copy of KFI's Objections
7 to the October 25, 2005 Order submitted to the United States District Court for the Eastern
8 District of New York in litigation against Coats Holdings Ltd., at Docket No. 05-cv-1065
9 (DRH)(MJO).

10 I declare under penalty of perjury under the laws of the United States of America
11 and the Commonwealth of Pennsylvania that the foregoing is true and correct.

12 Executed on November 8, 2010 at Philadelphia, Pennsylvania.

13 
14 Joshua R. Slavitt

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on December 6, 2010, I electronically filed the foregoing PRAECIPE with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Robert J. Guite
rguite@ssd.com

DATED this 6th day of December, 2010.

By s/ Warren J. Rheaume
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EXHIBIT A

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- Superfine Wool Council

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Testing Labs

The following independent laboratories are known to CCMI to have facilities and personnel capable of identifying and distinguishing fine animal hair fibers. This listing does not in any way constitute an endorsement by CCMI of the results of specific analyses performed.

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EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KNITTING FEVER, INC. and KFI, INC.,

Plaintiffs,

CV-05-1065 (DRH) (MJO)

-against-

COATS HOLDINGS LTD., COAT S PLC,
COATS GMBH, COATS OPTI NV, COATS
NORTH AMERICA CONSOLIDATED, INC.
and WESTMINSTER FIBERS, INC.,

Defendants.

X

**PLAINTIFFS’ OBJECTIONS TO COURT’S
OCTOBER 25, 2005 CONFERENCE ORDER**

In accordance with Fed. R. Civ. P. 72(a), plaintiffs respectfully object to the rulings that Chief Magistrate Judge Orenstein made during the October 25, 2005 status conference (the “Order” [54]¹) and request that the Order be stayed pending a determination on these Objections. The Order directed that:

(1) “Mr. Klein [plaintiffs’ counsel] be deposed on 11/15/05 at 2:00 p.m. re: receipt of documents in issue from client, Elalouf or others” and

(2) “Plaintiff’s principal, Mr. Elalouf, produce his desktop, laptop, PDA and

¹“[]” herein refers to documents in the Court’s docket sheet for this matter. To avoid the unnecessary proliferation of paper, I am not attaching hard copies of these documents to the instant Objections. Plaintiffs will, of course, make such copies available should the Court request them.

cell phone on 10/31/05 at 9:00 a.m. for pickup by defendant's forensic expert examination of all, e.g., memory drives and metadata material re: transmission of E-Mail or other communication re: yarns; alteration of communications between clients and attorneys."

In their current form, these extraordinary rulings would require plaintiffs – and, potentially, their counsel – to produce confidential and privileged information, as well as information regarding plaintiffs' business in general and Mr. Elalouf's personal affairs that are entirely irrelevant to any issue in this case. For this reason, among others, plaintiffs' co-counsel, Richard Kestenbaum, asked the Court in an October 27 letter [52] to reconsider its Order. To date, however, the Court has not issued any new or modified order.

Most troubling is the fact that the Court issued its Order – apparently concluding that plaintiffs' counsel somehow had violated their ethical obligations by failing to immediately turn over the materials in question to defendants and that Mr. Elalouf had obtained the materials illegally – without ever having reviewed the communications in question.

Indeed, when it issued its Order, the Court had just two documents before it – defendants' October 2, 2005 letter alleging that plaintiffs had unlawfully come into possession of numerous, unspecified privileged and confidential documents [46] and plaintiffs' October 7 response thereto [50] which, among other things, denied defendants' allegations; explained that – as plaintiffs had repeatedly told defendants – one of defendants' own employees had voluntarily given the materials to plaintiffs; denied that any of the communications was privileged but nevertheless agreed to turn over some of them; and pointed out that defendants were in violation

of their discovery obligations because they improperly withheld from production many of the undisputedly non-privileged communications that plaintiffs' source had furnished².

After describing the history and background of this discovery dispute, these Objections will explain in greater detail why the Order should be vacated.

History of Discovery Dispute

1. The Parties' Pre-Mediation Exchange of Information

This dispute arises out of the parties' informal exchange of information in advance of a settlement mediation conducted before the Hon. Kathleen Roberts on September 30, 2005³. Specifically, on September 12, 2005, plaintiffs furnished defendants hundreds of pages of materials in response to defendants' requests. Included among them were some 51 pages of internal emails among defendants, which a Coats employee voluntarily had been furnishing to Mr. Elalouf, plaintiffs' principal, from time to time since before the lawsuit had commenced. The source either printed copies of the communications and mailed them to Mr. Elalouf or forwarded them to Mr. Elalouf via email.

In the latter case, Mr. Elalouf removed the source's name from the email before printing them, because he was concerned that defendants would fire or otherwise punish the source if they learned of the source's identity. These were the hard copies that plaintiffs furnished to counsel and that counsel produced to defendants as part of the parties' informal pre-mediation

² Defendants' October 2 letter asked that the issues it raised be addressed at a conference already scheduled for October 3. Plaintiffs therefore filed a detailed response on October 3 [47]. Because Magistrate Judge Orenstein treated defendants' October 2 letter as a request for a pre-motion conference, however, he rejected plaintiffs' October 3 response as exceeding the page limits under his rules. Instead, the October 3 conference order [48] stated that defendants' issues were not ripe and scheduled another status conference for October 25.

³ There has been no formal FRCP document discovery in this case. Rather, defendants waited until the eve of the discovery cut-off to serve their document demands and interrogatories, and the Court vacated them as being untimely, instead directing the parties "to cooperate in discovery so that a meaningful presentation" could be made

disclosure⁴.

The vast majority of these communications were between representatives of Coats and involved day to day business issues relevant to Coats' relationship with KFI; they did not at all involve communications between defendants and their counsel. And some of these were proverbial "smoking guns." They went to the very heart of the merits of this case, demonstrating, for example, that – contrary to Coats' denials during the course of the lawsuit – Coats violated the parties' exclusive distributorship agreement by marketing S&G yarns directly to KFI's customers.

For their part, defendants responded to plaintiffs' discovery requests by producing 87 pieces of paper. Each was designated "confidential" for purposes of the parties' previously signed confidentiality order. Despite the confidentiality order, however, defendants objected to virtually every one of plaintiffs' requests on confidentiality grounds. Defendants also objected to virtually every request on privilege grounds, though they failed to furnish any log identifying purportedly privileged materials. And defendants failed to produce the "smoking guns" or any of the other internal communications that plaintiffs' source had given plaintiffs.

2. The Parties' Disagreement Over The Internal Coats Emails

By letter dated September 20, 2005, defendants alleged – without specifically identifying any document – that plaintiffs' document production "generally include[d]" emails containing attorney-client privileged material, attorney work-product communications and "communications involving proprietary, confidential and trade secret information concerning

(. . . continued)

to Judge Roberts at the mediation [45].

⁴ Before producing the materials, plaintiffs' counsel contacted Judge Roberts confidentially to discuss the production procedure, including the fact that some email communications would be produced in redacted form to

business decisions by Coats.” The letter also asked to know from whom the materials had been obtained and demanded the return of all “original unredacted copies.”

In response, by letter dated September 23, 2005, plaintiffs stated that they disagreed with defendants’ contention that any of the materials were privileged and noted that confidentiality was not a legitimate basis for defendants to object to plaintiffs’ possession of them. Plaintiffs also asked defendants to furnish legal authority for their demand that plaintiffs were obligated to return the materials.

The mediation was conducted on September 30 and failed to resolve the case. Two nights later, defendants filed and served their October 2 letter. This resulted in the Court’s October 3 conference order scheduling another conference for October 25.

3. Plaintiffs’ Efforts to Resolve the Dispute

Following the October 3 conference, plaintiffs tried to resolve the dispute before October 25, without success. Specifically, by letter dated October 5, plaintiffs sent defendants copies, hand-numbered 1-51, of the internal communications that had been included in plaintiffs’ pre-mediation document production. Without conceding that any of the communications were privileged, plaintiffs offered to turn over pages 31, 40, 48, 50-51⁵ thereof and to “[p]lease identify which of the other enclosed materials, if any, Coats believes to be privileged so we can review them and evaluate Coats’ contention.”

Plaintiffs did not hear back from defendants until October 17. Significantly, defendants’ letter of that date admitted that some 31 of the 51 pages in question were not privileged. As to the remaining 20 pages, however, defendants still did not explain their basis for contending that

(. . . continued)
protect the identity of plaintiffs’ source.

the communications were privileged. And defendants declined plaintiffs' offer to turn over any of the communications, insisting that they would accept only "unredacted originals."

By letter dated October 20, plaintiffs tried again to resolve the matter. In addition to the communications identified in their October 5 letter, plaintiffs offered to turn over – again without conceding that they in fact were privileged – pages 24, 36-39 and 41-42 as part of an amicable resolution of the dispute. With respect to all 15 of these pages, plaintiffs offered as follows:

[T]o properly dispose of the communications. . . .Because these were emails⁶, there may not be any "unredacted original documents" for KFI to turn over, as you demanded. Accordingly, I suggest that I direct KFI to delete the emails in question from its computer system and to destroy all hard copies thereof. I will similarly destroy the copies in my possession. And we will give you declarations so confirming this procedure.

Even as to pages 43-47, which plaintiffs did not believe to be privileged, their October 20 letter again asked defendants to "advise us of the basis for your contention that they are privileged."

During an October 24 conference call, the parties still could not reach agreement on which of the communications in question plaintiffs should turn over or how plaintiffs should turn over any agreed to communications. Plaintiffs therefore suggested that the parties meet in court at 1:00 p.m. on October 25 – one and one-half hours before the scheduled court conference – and together go page by page through the 51 pages in a last-ditch effort to resolve the matter.

(. . .continued)

⁵ Plaintiffs later realized that pages 26-27 were duplicative of 50-51, and agreed to turn those over as well.

⁶ Plaintiffs' letter did note, however, that there would be unredacted originals to turn over to the extent that KFI's source – instead of emailing the communications to KFI – printed them out and mailed them to KFI. That in fact turned out to be the case for pages 24, 26-27/50-51, 31 and 39.

Defendants agreed⁷.

Plaintiffs' counsel arrived in court on October 25 at about 1:10 p.m. Counsel had determined that seven of the 14 pages of communications that plaintiffs previously offered to turn over as part of an amicable resolution had been mailed from the source to plaintiffs, such that "unredacted original hard copies" existed. Counsel brought them to court with an eye toward turning them over if an agreement could be reached.

Defendants' counsel, however, did not arrive in court until 2:15, and the parties therefore never went through the 51 pages of communications. This was unfortunate, because the dispute now boiled down to two questions: (1) how should the eight remaining pages that plaintiffs had received by email and now were willing to surrender as part of an amicable resolution (36-38, 40-42 and 48-49) be turned over and (2) were pages 43-47 privileged?

4. The October 25 Conference

Plaintiffs reasonably expected the conference to focus, at least initially, on the Court's review of each of the 51 pages of internal communications in question to determine which of them, if any, were privileged. That never happened. Instead, in response to a statement from defendants' counsel that plaintiffs had not turned over any of the communications, the Court: (a) directed plaintiffs' counsel to divulge the name of plaintiffs' source, which counsel declined to do on privilege grounds; (b) directed plaintiffs' counsel to turn over all unredacted original hard copies in his possession, which counsel did (including the originals of eight communications that defendants admitted were not privileged -- 22-23, 25 28-30 and 32-33); and (c) issued the Order

⁷ Following this call, plaintiffs' counsel contacted the Nassau County Bar Association's "Ethics Hotline" and obtained guidelines on their ethical and professional responsibilities with respect to the materials in dispute.

that is the subject of these Objections⁸.

The Order Should Be Vacated

The facts summarized above simply do not justify the extraordinary rulings issued by the Court, especially considering that the Court never even looked at the communications to determine whether they were privileged in the first place and never conducted any inquiry into how plaintiffs had obtained the communications to begin with.

Had the Court examined the communications, it would have seen the following:

1. Many of the pages on their face have nothing whatsoever to do with attorney communications. Rather, they are emails between and among various Coats representatives that don't even mention lawyers. Coats did not produce any of them, despite their obvious relevance to the action and their clear responsiveness to KFI's specific interrogatories and document requests. Indeed, as noted above, some of the documents are classic "smoking guns" that refute some of the key contentions made by Coats throughout this litigation and support material elements of KFI's claims.

2. A handful of pages involve emails between and among several Coats representatives making references -- among various other issues -- to things that Coats' counsel told one of the correspondents. For example:

(a) In a January 23, 2005 email, a Coats employee wrote to three other

⁸ During the conference, the Court also made comments along the following lines (plaintiffs do not yet have the transcript and, therefore, cannot cite to exact quotes): (1) that the Court might refer the matter to the U.S. Attorney's office; (2) that plaintiffs' counsel think their client and money are more important than their law licenses; and (3) that the Court does not like thieves. The Court also impliedly suggested that plaintiffs had illegally "purchased" the communications in question from the source; when plaintiffs' counsel objected to such insinuation on the ground that there was nothing in the record to support it, the Court remarked that plaintiffs had no credibility with the Court.

employees, including John Laurie, regarding a “new collection.” Laurie replied on January 24 by emailing – with the same “New collection” subject line – the first employee and two additional employees. Among other issues, Laurie’s email summarized items that “we” had discussed with Loryn (31).

(b) In a February 18, 2005 email captioned “KFI” and sent to another Coats employee, John Laurie summarized a conversation he had had with “our lawyer” and asked the recipient to find out various information concerning KFI’s 2004 orders. The recipient forwarded the email to another Coats representative who, in turn, forwarded it to two other Coats representatives (40).

(c) On March 24, 2005, John Laurie reported to another Coats representative regarding the results of oral argument on KFI’s motion for a preliminary injunction, giving Loryn’s assessment that Coats had won but it wasn’t easy and it wasn’t complete (48). This was part of seven pages of internal communications from March 22 through March 28, 2005 (43-49), all of which had a “re” line entitled “Fw: Coats/KFI filing from L. Riggiola.” No such filing was attached to or referenced in any of the communications, which instead addressed a number of business issues, including the fact that a Coats representative had prematurely leaked word about Coats’ termination of KFI to the industry, contrary to Coats instructions.

Given this breakdown of the internal email communications, Coats’ reliance on two cases for the proposition that KFI acted improperly by failing to immediately return them to Coats is misplaced. If anything, these cases actually support KFI’s position.

Specifically, in *Madanes v. Madanes*, 186 F.R.D. 279 (S.D.N.Y. 1999), Magistrate Judge

Francis denied a motion seeking to preclude a party from using various materials that it had obtained from the other side outside the discovery process. The Court distinguished the situation where a party actively secured material to which it wasn't otherwise entitled from the situation "where the party receiving the evidence was not involved in any wrongful conduct in securing it." *Id.* at 292. In the former situation, the Court reasoned, the materials cannot be used because they are tainted. In the latter situation, on the other hand, there is no basis for requiring the return of the materials or for prohibiting their use.

As Judge Francis observed:

Such a sanction would have no deterrent value since the punishment would fall on the blameless party rather than on the wrongdoer who may have no interest in the litigation. Moreover, the passive recipient of non-privileged material would be deprived of information to which she would otherwise be entitled through the discovery process.

Id.

Here, since a Coats representative voluntarily furnished the email communications to KFI, KFI is in the same position as the "blameless party"/"passive recipient" in *Madanes*. Thus, consistent with that decision, KFI's retention and use of the communications in question is entirely proper.

Similarly, *Maldonado v. State of New Jersey*, 225 F.R.D. 120 (D.N.J. 2004), supports KFI's – rather than Coats' – position. That case involved a letter from defendants to their own lawyer that "inexplicably" wound up in plaintiff's possession. The Court disqualified plaintiff's counsel for failing to timely return the letter because the Court concluded that the letter was privileged and that the unexplained circumstances by which it came into plaintiff's possession did not constitute a waiver of the privilege.

In sharp contrast – using the same legal standards and analysis as the *Maldonado* court employed – the communications at issue here either are not privileged or Coats has waived any privilege that otherwise might have attached to them.

Specifically, the emails are not subject to the attorney-client privilege because none contains facts that Coats communicated to its outside counsel for the purpose of obtaining legal advice. Indeed – unlike the letter in *Maldonado* – none involves communications from Coats to its counsel at all. To the contrary, they generally involve internal Coats communications that, among other things, mention items that Coats’ counsel had discussed with one of them.

Because these were not communications from counsel to Coats, they are similarly not subject to the work product privilege. Moreover, that privilege is aimed at protecting the legal theories developed by counsel in preparing for litigation, and none of the communications falls into that category. Neither does Coats’ email simply transmitting the proposed termination letter.

This being the case, Coats’ argument must fail; there is no reason to consider the issue further. Nevertheless, it bears emphasis that – given the circumstances under which the communications reached KFI – Coats either expressly or impliedly waived any privilege that otherwise might have attached.

As summarized above, the emails in question were disseminated to a number of different individual representatives of several different Coats entities. If any of these recipients is found not to be a “client,” then the knowing and voluntary transmission to that individual would be an express waiver of the attorney-client privilege. And even if all the Coats recipients are deemed to be clients, then the client who voluntarily sent the emails to KFI expressly waived the

privilege.

Finally, even assuming *arguendo* that a privilege attached that Coats did not expressly waive, it still would not be improper for KFI to retain and use the communications. Under the factors summarized in *Maldonado*, Coats would be found to have impliedly waived the privilege. The purportedly privileged information contained in the emails was disclosed multiple times to multiple recipients. And the purportedly privileged content of the emails was insignificant. As the *Maldonado* court observed, based on such factors a court has the discretion to deem that the party holding the privilege has waived it.

U.S. v. Riga, 281 F.Supp.2d 733, 742 (S.D.N.Y. 2003), which the Court cited at the October 3 conference, does not compel a different result. To the contrary, the *Riga* court employed the same four-prong analysis that plaintiffs have used in this case to evaluate whether the communications in question are privileged. Unlike *Riga*, though, Coats' disclosures in the instant case were not the result of Coats' "isolated, inadvertent error" but, rather, constituted voluntary, purposeful disclosures by one of the intended senders or recipients of the communications.

* * *

Since the communications at issue here either are not privileged or Coats has waived any privilege that otherwise might have attached to them, there is no basis for Coats to contend that KFI's possession or use of them is illegal, unethical or in bad faith.

Conclusion

Plaintiffs are not interested in retaining or using in this lawsuit any materials that might implicate any privilege. They remain willing to review the materials with opposing counsel and

the Court to identify and discuss those that Coats believes to be privileged. Plaintiffs believe that such an exercise may well resolve the issue. In fact, they came to Court on October 25 prepared to address the issue by making the presentation summarized in these Objections. They were not given the opportunity to do so.

In the absence of the Court's examination of the communications and its consideration of plaintiffs' arguments, it was premature for the Court to direct defendants' seizure of Mr. Elalouf's computers and to schedule a deposition of plaintiffs' counsel. Plaintiffs therefore request the Court to vacate the Order. To avoid potential harm and prejudice that could result from Mr. Elalouf's turnover of computers to defendants and from Mr. Klein's deposition, plaintiffs also request the Court to stay the Order pending its consideration and determination of these Objections.

Dated: Melville, NY
October 30, 2005

Respectfully submitted,

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