



1 their ability to vigorously represent all clients due to the facts and circumstances of this dispute  
2 such that no reasonable attorney would conclude that he or she would be able to provide  
3 competent and diligent representation to each affected client. And, even if he or she could so  
4 conclude, there is no proof (i.e. other than from counsel himself), that *each of the eight*  
5 clients actually gave informed consent. Cascade's motion should be granted.

6 **A. Pepper Hamilton's Representation Of The Defendants Violates Rule Of**  
7 **Professional Conduct 1.7**

8 Both parties seem to agree that Washington Rule of Professional Conduct 1.7 restricts  
9 counsel from representing defendants in two situations, where one client will be directly adverse  
10 to another client (RPC 1.7(a)(1)) or where "there is a significant risk that the representation of one  
11 or more clients will be *materially limited* by the lawyer's responsibilities to another client." RPC  
12 1.7(a)(2) (emphasis added). It appears, however, that Pepper Hamilton failed to consider section  
13 (a)(2) of Rule of Professional Conduct 1.7 when attempting to assess its ability to jointly  
14 represent the defendants in this matter. Defendants' counsel, Joshua Slavitt, asserts he  
15 independently evaluated the claims alleged and "concluded there is no current conflict of interest  
16 between or among any of the named Defendants." Dkt. No. 47, Ex. D, ¶17:4-5. Absent from Mr.  
17 Slavitt's declaration is any mention of his consideration of whether there was a significant risk  
18 that his representation would be materially limited due to responsibilities to another client. He  
19 apparently only looked at "current" conflicts and overlooked any subsequent positions he would  
20 or might take in the litigation that may jeopardize other clients' interests. Failure to properly  
21 consider all potential as well as current conflicts supports disqualification.

22 Even if Mr. Slavitt had considered both any current conflicts and the risk of his  
23 representation of one client materially limiting his ability to represent another client at some point  
24 in the litigation, he could only move forward with the engagement if he "reasonably" believed he  
25 could provide competent and diligent representation to "each affected client," the representation  
26 would not involve the assertion of one claim by one client against another client in that litigation

1 “and *each affected client gives informed consent, confirmed in writing.*” RPC 1.7(b)(1), (b)(3)and  
 2 (b)(4) (emphasis added). Mr. Slavitt’s conclusion is not reasonable in a case where the core issue  
 3 is whether the yarn was properly labeled and 1) the manufacturer, 2) importer, 3) distributor and  
 4 4) individual employees are co-defendants.

5 Disregarding the obvious difference between the client that controls the actual contents of  
 6 the yarn and its labeling and the ones that do not, defense counsel asserts that his clients “intend  
 7 to present a unified defense that will demonstrate there is no factual or legal basis for Plaintiff’s  
 8 claims.” Dkt. No. 47 at 10. Although Mr. Slavitt admits that one theory of defense in a  
 9 mislabeling case would be that defendant KFI was a “victim” of its suppliers (suppliers being one  
 10 or more of KFI’s co-defendants). Dkt. No. 47, Ex. D, ¶11:7-8. He disputes having said that “KFI  
 11 is a victim too of others’ improper labeling” to counsel in another case, but he admittedly did not  
 12 deny it or attempt to correct that counsel’s understanding of KFI’s litigation strategy and, or  
 13 defenses to the mislabeling claims in that case until now -- a year and a half later. Dkt. No. 47,  
 14 Ex. D, ¶11. His statement as KFI’s agent is binding upon KFI under Fed. R. Evid. 801(d)(2).  
 15 *See, United States v. Gregory*, 871 F.2d 1239, 1242-43 (4th Cir. 1989). As KFI (and possibly  
 16 other defendants) has not tested the yarn at issue<sup>2</sup> to verify if the other clients supplied what was  
 17 labeled, counsel’s “reasonable belief” that his “unified defense” theory “provide[s] competent and  
 18 diligent representation” with loyalty and independent judgment lacks a factual basis.

19 There are myriad ways that the defendants’ interests might diverge and counsels’ joint  
 20 representation is materially limited in that they cannot consider claims for indemnity and  
 21 contribution, or propose testing of what one client supplied to another. If Designer Yarns or  
 22 Debbie Bliss discovers that *KFI* re-labeled the yarn, it would want to look to KFI for contribution.  
 23 KFI may have a claim against the clients who supplied the yarn. In 2008, for example, KFI  
 24 blamed its “Italian spinner” (likely co-defendant Filatura Pettinata V.V.G. Di Stefano Vaccari &

25 \_\_\_\_\_  
 26 <sup>2</sup> In its Surreply to Cascade’s Motion for Preliminary Injunction, KFI admits that it has not “secured its own fiber  
 analysis reports” regarding the “over a dozen different yarns” at issue in this case. Dkt. No. 50 at 3:2-4.

1 C. (S.A.S.) (“V.V.G.”)) of “changing the composition of its wool” such that was mislabeled.  
 2 Guite Reply Decl., Ex. 1. In the context of the international sale of goods, where at least one  
 3 party admits that it has not independently tested the products against the representations on the  
 4 labels, it would be unusual to not expect contribution and/or indemnity. The individuals may be  
 5 subject to personal civil, and potentially criminal, liability for their actions on the behalf of the  
 6 other client(s), who are their employers and, as to Mr. and Mrs. Elalouf, the spouse of a partner.<sup>3</sup>

7 Finally, even if these clients could consent to the joint representation, there is no objective  
 8 proof that “each affected client g[ave] informed consent, confirming in writing.”<sup>4</sup> Defense  
 9 counsel submitted no declarations from their clients to confirm that they were adequately and  
 10 properly informed of the risks of joint representation as to each client’s interests in the matter.  
 11 Worse yet, Pepper Hamilton admits that it does not have a signed representation letter from Mr.  
 12 Watt.<sup>5</sup> More appallingly, only Ms. Bliss and Mr. Opperman’s representation letters cover this  
 13 matter, while the others’ are *expressly limited* to a different lawsuit. Dkt. No. 47, Exs. C & G.  
 14 KFI, Sion Elalouf, Diane Elalouf, Designer Yarns Ltd. and V.V.G. lack any written informed  
 15 consent to joint representation, or letter of engagement, with each of the defendants in this case.

16 **A. Pepper Hamilton Violated RPC 5.5 and Offered Misleading Testimony.**

17 Apart from the complete failure of evidence of an informed waiver of the material  
 18 limitations inherent in the “unified defense” to this intentional tort case, Pepper Hamilton has also  
 19 committed serious ethical violations in this case. Mr. Slavitt 1) executed an engagement  
 20 agreement, 2) negotiated with opposing counsel, 3) appeared in this action prior to motioning for  
 21 *pro hac vice* admission, and 4) Ms. McInerney misleadingly testified regarding notice of the suit.

22 <sup>3</sup> It appears that defense counsel is only interested in postponing resolution of this matter, so that more misbranded  
 23 goods may be shipped. Indeed, defense counsel even attempts to assist in the collection of these debts by promising a  
 continuing guarantee to any KFI client that is in good standing with their account. Dkt. No. 50 at 2, fn 1.

24 <sup>4</sup> RPC 1.0(e) defines “Informed consent” as the agreement by a person to a proposed course of conduct after the  
 lawyer has communicated adequate information and explanation about the material risks of and reasonably available  
 alternatives to the proposed course of conduct.

25 <sup>5</sup> Mr. Watt’s engagement letter with Pepper Hamilton is dated August 2, the day defendants responded to this motion  
 26 to disqualify and well after late June 2010, the time Mr. Slavitt says Mr. Watt decided to engage him as counsel in  
 this action. Dkt. No. 47, Ex. E and Ex. D, ¶16.

1 Mr. Slavitt's actions violate RPC 5.5(b)(2) as he is not admitted to practice law in Washington.  
2 His reliance on Comment 10 to RPC 5.5 to excuse his conduct is unavailing as it relates to non-  
3 representational investigatory work: "[e]xamples of such conduct include meetings with the  
4 client, interviews of potential witnesses, and the review of documents." RPC 5.5 comment 10.

5 Mr. Slavitt's co-counsel Ms. McInerney presented a materially false and/or misleading  
6 declaration in violation of 18 U.S.C. § 1623 when she testified that they received the complaint  
7 the week after the firm agreed to represent Ms. Bliss. She stated "Pepper Hamilton did not  
8 receive a copy of either the original or amended complaint until the week of June 28, 2010." Dkt.  
9 No. 8, ¶2. They must have at least had knowledge of the contents of the complaint before June 28  
10 because its engagement letter to Debbie Bliss is dated June 24, 2010 -- four days earlier. Dkt. No.  
11 47, Ex. C. Mr. Slavitt stated that prior to accepting the representation of his clients he "made an  
12 independent evaluation of the claims that Plaintiff is alleging in this action...[and] concluded that  
13 there is no current conflict of interest..." Dkt. No. 47, ¶17. In this complex case *he must have at*  
14 *least reviewed the complaint prior to sending out an engagement letter* or he would be violating  
15 RPC 1.7 and likely his firm's client intake practices as well. RPC 1.7 comment 3, and Dkt. No.  
16 46, ¶¶2-4 and Dkt. No. 45, ¶3. Therefore, Mr. Slavitt, Ms. McInerney and their firm are also  
17 subject to disqualification, if not discipline, for their unethical and apparently perjured statements.

18 **B. Davis Wright Should Be Disqualified As Formerly Representing Cascade and**  
19 **Because It Has Divulged Embarrassing or Detrimental Information About**  
20 **Cascade's Ability to Sustain Litigation In Violation of RPC 1.9(c)(1)**

21 In its opposition, Davis Wright acknowledges it had discussions with Cascade regarding  
22 representing Cascade in an employment lawsuit. It disputes, however, that any attorney-client  
23 relationship between it and Cascade was formed or that confidences were disclosed. Cascade  
24 disagrees for the reasons stated in its moving papers. Moreover, Davis Wright should also be  
25 disqualified from this action is because it has now used information from its confidential  
26 conversations against Cascade in opposition to this motion. Counsel Michael Kileen improperly  
divulged the knowledge it gleaned from its protected communications with Cascade back in 2009

1 that Cascade is a small company lacking the finances to “absorb the cost” of an employee lawsuit  
 2 that they considered “frivolous.” Dkt. No. 45, ¶12. Mr. Kileen’s assertions, made on behalf of  
 3 the opposing party in a RICO and Lanham act case, constitute the use of information relating to  
 4 the representation of Cascade to Cascade’s disadvantage in violation of RPC 1.9(c). Courts have  
 5 recognized that the information protected by RPC 1.9(c) is not limited to attorney-client  
 6 privileged information. It covers “other information gained in the professional relationship that . .  
 7 . the disclosure of which would be embarrassing or would be likely to be detrimental to the  
 8 client.” *FMC Technologies, Inc. et al. v. Edwards*, 420 F. Supp. 2d 1153, 1161 (W.D. Wash.  
 9 2006) (analyzing former RPC 1.9(b) which is now RPC 1.9(c)). The improper disclosure of  
 10 Cascade’s information relating to its representation, and the finances available for litigation, is  
 11 another basis upon which this Court should disqualify Davis Wright from this action.

12 **C. Cascade Has Standing To Seek Defense Counsels’ Disqualification Due To**  
 13 **Their Open And Obvious Conflicts Of Interest**

14 Cascade has standing to move to disqualify defense counsel, due to their apparent  
 15 violations of ethical rules. This court has the “power to control the conduct of the attorneys  
 16 practicing before it.” *FMC Technologies, Inc.*, 420 F. Supp. 2d at 1156. Where the ethical  
 17 violations by counsel are “open and notorious,” non-clients may bring the motion to disqualify.  
 18 *Id.* Moreover, Cascade has separate standing as a former client of Davis Wright - or at least as a  
 19 potential client who shared its confidences and secrets with the expectation of becoming a client -  
 20 to challenge the firm’s involvement where it is manifestly unable to meet its ethical obligations.

21 Dated: August 6, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

22 By: /s/ Robert J. Guite  
 23 Robert J. Guite, WSBA No. 25753

24 Attorneys for Plaintiff  
 25 CASCADE YARNS, INC.