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HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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

Case No. 2:10-cv-00861 RSM  
  
**CASCADE’S MOTION TO DISQUALIFY PEPPER HAMILTON AND DAVIS WRIGHT TREMAINE**  
  
**Note On Motion Calendar: August 6, 2010**

**I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiff Cascade Yarns, Inc. (“Cascade”) moves this Court to disqualify Pennsylvania attorneys Joshua Slavitt and Deirdre McInerney of the law firm of Pepper Hamilton, admitted in this matter *pro hac vice*, and the firm of Davis Wright Tremaine due to a conflict among the Defendants they represent in this matter. Mr. Slavitt and the law firm of Pepper Hamilton presently represent the Defendants that they wish to represent in this matter in an action pending

1 in the Eastern District of Pennsylvania (“Pennsylvania Action”). Cascade previously filed its  
2 response to their requests to appear *pro hac vice*; this Court declined to consider Cascade’s  
3 response and ordered that any challenge should be brought as a Motion to Disqualify.

4 The wrongful conduct of which Cascade complains subjects the Defendants to suit in the  
5 Pennsylvania Action; Pepper Hamilton (and Mr. Slavitt and Ms. McInerney, specifically) serve as  
6 counsel in that action. In addition to the conflict identified in the Motion to Disqualify in the  
7 Pennsylvania Action, Mr. Slavitt may properly be disqualified for an additional reason: Mr.  
8 Slavitt appears to have violated RCW 2.48.180(2)(a) of the Washington State Bar Act, with his  
9 July 2 correspondence wherein he asserted that “Pepper Hamilton represents the defendants in the  
10 [this] matter” — despite the fact that no attorney in that firm is admitted to practice before this  
11 Court and his application to appear *pro hac vice* was not filed until July 9.

12 Finally, Cascade moves to disqualify Mr. Rheume and the firm of Davis Wright  
13 Tremaine (“Davis Wright”) for the additional reason that Cascade consulted with that firm in  
14 2009 to act as its counsel in a suit brought against it by a management-level employee. In  
15 connection with that representation, Davis Wright obtained Cascade’s confidential information in  
16 connection with that consultation such that disqualification pursuant to RPC 1.9 (or RPC 1.18) is  
17 warranted.

## 18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 This action is a civil action arising under: (a) the United States Trademark Act of 1946, as  
20 amended, 15 U.S.C. § 1051, *et seq.* (“Lanham Act”); (b) the Racketeer Influenced And Corrupt  
21 Organization Act, 28 U.S.C. § 1964 *et seq.* (“RICO”); and (c) RCW 19.86, for unfair competition  
22 and false advertising. *See* Amended Complaint (Dkt. No. 4). Defendants are presently subject to  
23 suit in the Pennsylvania Action where, as here, their manufacture, importation, distribution and  
24 sale of misbranded hand knitting yarns is alleged. Declaration of Robert J. Guite (“Guite Decl.”),  
25 Ex. A. Pepper Hamilton represents the Defendants in the Pennsylvania Action. *See* Guite Decl.,  
26 Ex. B. The undersigned is associated as counsel for plaintiff in that action. *Id.* On July 9,

1 plaintiff in that matter filed a motion to disqualify Pepper Hamilton based on a conflict of interest  
2 among the numerous parties it purports to represent.<sup>1</sup> *Id.*, Ex. B.

3 By email of July 2, 2010, Mr. Slavitt wrote to Cascade's counsel stating that "Pepper  
4 Hamilton represents the defendants in the above-referenced matter." The matter referenced above  
5 was identified as "Cascade Yarns v. Knitting Fever, Inc. et al.; W.D. Wash. Civil Action No.  
6 2:10-cv-00861-RSM." Guite Decl., Ex. C. Mr. Slavitt did not indicate that Defendants would be  
7 retaining local counsel or that any attorneys in his firm were admitted in Washington. *Id.* Given  
8 that Mr. Slavitt is not admitted to practice in Washington or before this Court, he could not  
9 properly represent defendants in this matter. Following receipt of Mr. Slavitt's correspondence,  
10 Cascade confirmed (via review of the Pepper Hamilton website and the WSBA website) that no  
11 one with the law firm of Pepper Hamilton was admitted to practice before this Court. *Id.* Not  
12 only was no lawyer at Pepper Hamilton licensed as a member of the WSBA, none of the APR 8  
13 exceptions to the unauthorized practice of law existed. *See* RCW 2.48 *et seq.*, and APR 8.  
14 Understandably, Cascade's counsel did not want to encourage or acquiesce to the unauthorized  
15 practice of law in Washington. *Id.*; RCW 2.48.180(2)(a). Such conduct would be inconsistent  
16 with the rules of this Court.

17 After having already engaged in the unauthorized practice of law (both by sending the  
18 July 2 email and in listing themselves as counsel of record in the Motion for Extension of Time  
19 filed with this Court on July 6 (Dkt. No. 7), the applications of Mr. Slavitt and Ms. McInerney to  
20 appear *pro hac vice* were filed via the CM/ECF system on Friday, July 9. Dkt. Nos. 14 and 15.  
21 The applications were granted by the clerk on the next court day, July 12, as provided in General  
22 Rule 2(d) before Cascade had the opportunity to respond. Dkt. Nos. 16 and 17. Cascade

23  
24 <sup>1</sup> Mr. Slavitt stated during the Rule 26(f) conference in the Pennsylvania Action that KFI intended  
25 to defend itself by arguing that "it was a victim too" [of the foreign suppliers]. Guite Decl., Ex. B  
26 at Ex. 4 at ¶¶ 4, 7, 8. Only after defaults were entered against the foreign suppliers did Mr. Slavitt  
modify his appearance before the court so that it was also on the foreign suppliers' behalf. Guite  
Decl., Ex. B at Ex. 4 at ¶¶ 4, 7, 8.

1 promptly filed its response to preclude Mr. Slavitt and Ms. McInerney from appearing in this  
2 matter and noted it for consideration on the first available hearing date pursuant to LR 7(d). By  
3 Order of July 16 (Dkt. No. 26), this Court declined to consider Cascade's response and instructed  
4 that any objection to their participation be raised as a Motion to Disqualify.

5 Cascade seeks to disqualify Davis Wright for the additional reason that it recently gained  
6 confidential information from Cascade in March 2009 when Cascade engaged Michael Killeen, a  
7 partner at Davis Wright, to defend it in a discrimination suit filed against it by a former  
8 management-level employee.<sup>2</sup> Declaration of Robert A. Dunbabin, Jr. Mr. Dunbabin, Cascade's  
9 in-house counsel, previously practiced civil and employment litigation, primarily on behalf of  
10 plaintiffs. *Id.*, ¶ 6. In a prior matter handled by Mr. Dunbabin, Mr. Killeen served as counsel for  
11 defendants. In that matter, Mr. Dunbabin moved for, and was awarded, sanctions in the amount  
12 of \$5,000 against Mr. Killeen's client. *Id.*, ¶¶ 7, 8. Despite this history, Mr. Dunbabin was  
13 favorably impressed with Mr. Killeen and thought of Mr. Killeen years later when Cascade was  
14 faced with defending an employment-based claim. *Id.* At that time, Mr. Dunbabin did not  
15 believe that Mr. Killeen harbored resentment or ill-will toward him as a result of the prior  
16 sanctions order. *Id.*, ¶ 8.

17 In March 2009, Mr. Dunbabin contacted Mr. Killeen on behalf of Cascade regarding the  
18 representation. *Id.*, ¶ 2. An in-depth question and answer dialog followed via email as did a  
19 conference between Mr. Killeen, Mr. Dunbabin and Cascade's senior management. *Id.* That  
20 conference lasted between 45 minutes to an hour. *Id.*, ¶ 11. During that conference, Mr. Killeen  
21 asked pointed questions regarding Cascade's internal procedures, decision-making processes,  
22 approach toward litigation (such as aversion to risk and propensity to settle or to litigate),  
23 conflicts among management, decision-making authority, autonomy and reputation in the

24 \_\_\_\_\_  
25 <sup>2</sup> To the extent Cascade must disclose the subject matter of its protected conversations with Mr.  
26 Killeen to inform the Court of the grounds on which it brings this motion to disqualify, it does so  
without waiving the protection of those privileges, and, in fact, makes these limited disclosures  
with intent of protecting those attorney-client privileged communications.

1 industry and the community. *Id.* Understanding that these communications were for the purposes  
 2 of seeking legal advice and were subject to the attorney-client privilege, Mr. Dunbabin and  
 3 Cascade's management were self-critical, forthcoming and honest. *Id.*, ¶ 9. They shared  
 4 information candidly believing that nothing they disclosed could be used to their detriment.  
 5 During that call, Mr. Dunbabin began to feel uncomfortable because of Mr. Killeen's tone and  
 6 demeanor toward him and began to perceive that the earlier sanctions order he obtained against  
 7 Mr. Killeen remained troubling to Mr. Killeen. *Id.*, ¶ 11. Indeed, it appears that Mr. Killeen felt  
 8 similarly as he wrote a terse message to Mr. Dunbabin declining to represent Cascade. *Id.* ¶¶ 11-  
 9 13. Given this personal history and apparent animosity, Cascade is concerned that its self-critical  
 10 analysis, comments and strategy shared with Mr. Killeen may be used against it to its detriment in  
 11 this litigation given that Davis Wright gathered more information than was reasonably necessary  
 12 to determine whether to represent Cascade. *See id.* Davis Wright has not sought, nor has  
 13 Cascade offered, to waive the conflict. *Id.*, ¶ 14. On July 20, 2010, Cascade's counsel contacted  
 14 Mr. Reed of Davis Wright to request that Davis Wright voluntarily withdraw from its  
 15 representation of Defendants. Guite Decl., ¶ 10. Mr. Reed declined Cascade's request.<sup>3</sup> *Id.* This  
 16 motion follows.

### 17 **III. DISCUSSION**

#### 18 **A. Disqualifying Counsel Is Appropriate Here, Where There Is A Conflict That** 19 **Calls Into Question The Fair Or Efficient Administration of Justice**

20 The allegations raised in the motion to disqualify now pending in the Pennsylvania Action  
 21 -- which arise from Mr. Slavitt's representation of the same defendants he wishes to represent in  
 22 this matter<sup>4</sup> -- evince the potential appearance of impropriety and/or conflict of interest that  
 23 prevents simultaneous representation of the Defendants under the applicable Rules of

24 <sup>3</sup> In his letter of July 12, Mr. Reed offered to screen Mr. Killeen from the current matter;  
 however, given that the conflict is imputed to the entire firm pursuant to RPC 1.10, Cascade  
 25 concluded that this offer was insufficient. Guite Decl., Ex. F.

26 <sup>4</sup> As noted above, Pepper Hamilton purports to represent the "Defendants" in this action, without  
 limitation. *See* Guite Decl., Ex. C.

1 Professional Conduct. This appearance of impropriety taints not only Pepper Hamilton but also  
2 Davis Wright as both firms purport to simultaneously represent clients with divergent -- if not  
3 directly adverse -- interests.

4 Disqualification pursuant to Washington Rule of Professional Conduct 1.7 is warranted as  
5 described in the motion to disqualify pending in the Pennsylvania Action. Guite Decl., Ex. B.  
6 RPC “1.7(a) prohibits a lawyer from representing a client if the representation of that client will  
7 be directly adverse to another client unless the lawyer reasonably believes the representation will  
8 not adversely affect the relationship with the other client, and both clients provide written consent  
9 after consultation and full disclosure.” *Eugster v. The City of Spokane*, 110 Wn. App. 212, 229,  
10 39 P.3d 380 (2002). Similarly, subsection (b) of Rule 1.7 “prohibits joint representation if the  
11 representation will be materially limited by the lawyer’s responsibilities to another client, unless  
12 again, the lawyer reasonably believes the representation will not be adversely affected and both  
13 clients consent in writing after consultation and full disclosure.” *Id.* Moreover, where, as here,  
14 “the conflict is such as clearly to call in question the fair or efficient administration of justice,  
15 opposing counsel may properly raise the question.” *Id.* at 230 (quoting the comments to the  
16 *American Bar Association’s Annotated Model Rules of Professional Conduct 1.7* (1983).)

17 Here, Pepper Hamilton and Davis Wright simultaneously represent parties who have an  
18 inherent and direct conflict of interest, which represents the type of conflict that is properly  
19 characterized as one that “call[s] in question the fair or efficient administration of justice . . . .”  
20 *Eugster*, 110 Wn. App. at 230 (finding that the plaintiff’s motion to disqualify defense counsel on  
21 the ground that counsel’s dual representation of defendants who had direct conflict raised issue as  
22 to the fair or efficient administration of justice, but, nevertheless, concluding that the motion was  
23 properly denied because no actual conflict existed). Specifically, during the Pennsylvania  
24 Action’s Rule 26(f) conference, Pepper Hamilton announced that KFI would defend against  
25 allegations of improper labeling of certain of its yarns by claiming “KFI is a victim too of others’  
26

1 improper labeling.”<sup>5</sup> Guite Decl., Ex. B at Ex. 4 at ¶¶ 4, 7, 8. In other words, KFI suggests it will  
2 defend itself against claims that it improperly labeled its yarns by blaming its foreign suppliers,  
3 presumably Pepper Hamilton’s<sup>6</sup> other clients, Defendants Designer Yarns Ltd. and Filatura  
4 Pettinata V.V.G. Di Stefano Vaccari & C. (S.A.S.). Similarly, it is possible that KFI’s foreign  
5 suppliers could allege that the products they supplied were labeled pursuant to KFI’s explicit  
6 instructions. The simultaneous representation of parties’ with such potential conflicts of interest  
7 present “a significant risk that the representation of one or more clients will be materially limited  
8 by the lawyer’s responsibilities to another client.” RPC 1.7(a)(2).

9 Here, KFI’s statements that it was a victim of improper labeling from its suppliers would  
10 likely give rise to claims for indemnity or contribution against those suppliers (who are also  
11 Defendants in this action with the same counsel). Similarly, KFI’s suppliers could allege that KFI  
12 subsequently affixed labels misstating the fiber content of their products without their knowledge  
13 such that they were entitled to indemnity or contribution from KFI. RPC 1.7 prohibits joint  
14 representation where, as here, the representation will be materially limited by the lawyer’s  
15 responsibilities to another client unless the lawyer reasonably believes the representation will not  
16 be adversely affected and both clients consent in writing after consultation and full disclosure.  
17 *Eugster*, 110 Wn. App. at 229. Given the asserted and potential defenses, joint representation of  
18 clients with a direct conflict is not proper and calls into question the fair and efficient  
19 administration of justice. *Id.* Accordingly, the Court should disqualify Pepper Hamilton and  
20 Davis Wright from representing the Defendants. Moreover, disqualification may also be based on  
21 Pepper Hamilton’s unauthorized practice of law in Washington as such conduct evinces an  
22 inability to abide by the rules of this Court as required by General Rule 2 in order to be specially  
23 admitted.

24 <sup>5</sup> This assertion is highly doubtful given that KFI previously admitted that its *Silky Wool* was  
25 mislabeled for several years.

26 <sup>6</sup> Like Pepper Hamilton, Davis Wright purports to represent all Defendants in this action, *i.e.*, KFI  
and its foreign suppliers.

1           **B.     Disqualification Of Davis Wright Should Also Be Ordered For The**  
2                           **Additional Reason That It Had A Prior Attorney-Client Relationship With**  
3                           **Cascade**

4           The decision to disqualify counsel is within the sound discretion of this Court. *Public*  
5           *Utility Dist. No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994).  
6           Washington's Rules of Professional Conduct govern subsequent representations adverse to  
7           former clients. *Teja v. Saran*, 68 Wn.App. 793, 846 P.2d 1375 (1994). RPC 1.9 provides:

8                   A lawyer who has formerly represented a client in a matter shall not thereafter:

9                   (a) Represent another person in the same or a substantially related matter in which that  
10                   person's interests are materially adverse to the interests of the former client unless the  
11                   former client consents in writing after consultation and a full disclosure of the material  
12                   facts; or

13                   (b) Use confidences or secrets relating to the representation to the disadvantage of the  
14                   former client, except as rule 1.6 would permit.

15           Davis Wright admits that Michael Killeen consulted with Cascade for the purposes of  
16           providing legal advice in connection with the *Kohn* matter. Nonetheless, Davis Wright asserts  
17           that no attorney-client relationship was established with Cascade. Guite Decl., Ex. F. Even if this  
18           is so, it is not determinative as RPC 1.18 imposes duties in favor of prospective clients just as  
19           RPC 1.9. RPC 1.18(c). While RPC 1.18 could permit a firm that would be otherwise disqualified  
20           to continue the representation, this is not permitted where, as here, Mr. Killeen received more  
21           information from Cascade than was necessary to determine whether to accept the representation  
22           and where Davis Wright did not provide prompt notice to Cascade. RPC 1.18(d)(2). To the  
23           contrary, Cascade was forced to ask Davis Wright for its file materials and Davis Wright did not  
24           timely respond. Guite Decl., Ex. D. Only after Cascade's current counsel sent a follow up letter -  
25           - a week later -- did Davis Wright respond. *Id.*, Ex. E.

26           In order to successfully disqualify a lawyer from representing an adversary, a former  
27           client must show that the matters currently at issue are substantially related to the subject matter  
28           of the former representation. RPC 1.9; *Sanders v. Woods*, 121 Wn. App. 593, 89 P.3d 312 (2004)  
29           (citing *State v. Hunsaker*, 74 Wn. App. 38, 43, 873 P.2d 540 (1994)). To determine whether the

1 two representations are substantially related, the court must: (1) reconstruct the scope of the facts  
2 of the former representation; (2) assume the lawyer obtained confidential information from the  
3 client about all these facts; and (3) determine whether any former factual matter is sufficiently  
4 similar to a current one that the lawyer could use the confidential information to the client's  
5 detriment. *Hunsacker*, 74 Wn. App. at 44. If one individual in a law firm is precluded by RPC  
6 1.9 from representing a particular client, then all members of the firm are also prohibited from  
7 representing the client pursuant to RPC 1.10. *Id.* at 41-42.

8 It makes no difference whether actual confidences were disclosed. *Sanders*, 121 Wn.  
9 App. at 595 (citing *Teja*, 68 Wn. App. at 799). Nor does the fact that Kohn (the plaintiff in the  
10 matter where Cascade sought Davis Wright's counsel) is not a party to this action or that this  
11 action does not relate to her claims permit Davis Wright to take a position adverse to Cascade.  
12 Indeed, "'Substantially related' requires only that the representations 'are relevantly  
13 interconnected *or reveal the client's pattern of conduct.*'" *Sanders*, 121 Wn. App. at 595 (citing  
14 *Hunsacker*, 74 Wn. App. at 44, 873 P.2d 540; *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1536 (D.  
15 Kan. 1992)). As stated by another court: "[T]he underlying concern is the possibility, or the  
16 appearance of the possibility, that the attorney may have received confidential information during  
17 the prior representation that would be relevant to the subsequent matter in which disqualification  
18 is sought." *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980).

19 Here, Cascade has raised at least the appearance of the possibility that Mr. Killeen, and  
20 Davis Wright, received confidential information during the prior consultation that would be  
21 relevant to this matter. Namely, as described by Cascade, Mr. Killeen inquired broadly regarding  
22 Cascade's management, its organizational structure, management responsibilities, business and  
23 litigation approach and philosophy, decision-making process and its ability to evaluate and  
24 tolerate risk. Dunbabin Decl., ¶ 9. Any, or all, of these topics could improperly reveal Cascade's  
25 pattern of conduct thereby warranting disqualification. RPC 1.9; RPC 1.18; *Sanders*, 121 Wn.  
26 App. at 595; *Hunsacker*, 74 Wn. App. at 44. Thus, while the subject matter of the two

1 representations may be different, the broad scope of information sought and obtained by Davis  
2 Wright warrants its disqualification.

3 **IV. CONCLUSION**

4 This Court should vacate the clerk's orders granting Mr. Slavitt and Ms. McInerney  
5 permission to appear *pro hac vice* for any or all of the reasons set forth in the instant motion or in  
6 the motion pending in the Pennsylvania Action. Disqualification is also proper because of  
7 Pennsylvania counsels' improper representations that they represented Defendants in this matter  
8 (when they were not admitted to practice before this Court) in the July 2 correspondence and in  
9 the Motion for Extension of Time, which was filed three days before their applications to appear  
10 *pro hac vice*. These statements and actions evince a disregard of the rules of the admission to  
11 practice before this Court and warrant the denial of their requests to participate. Davis Wright  
12 should also be disqualified from participating as counsel for Defendants, not only because of the  
13 conflict of interest pursuant to RPC 1.7 between and among the Defendants identified in this  
14 motion, but also because of the client confidences it obtained through its prior relationship with  
15 Cascade.

16 Dated: July 22, 2010

SQUIRE, SANDERS & DEMPSEY L.L.P.

17  
18 By: /s/ Robert J. Guite  
19 Robert J. Guite, WSBA No. 25753

20 Attorneys for Plaintiff  
21 CASCADE YARNS, INC.  
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