IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TRINITY INDUSTRIES, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:11cv937-CMH-TRJ
	)	
SPIG INDUSTRY, LLC, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFF TRINITY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISQUALIFY COUNSEL FOR DEFENDANTS

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Plaintiff Trinity Industries, Inc. ("Trinity"), by undersigned counsel and pursuant to the Ohio and Virginia Rules of Professional Conduct, respectfully submits this Memorandum in Support of Plaintiff's Motion to Disqualify the law firm of Roetzel & Andress, LPA ("Roetzel") as counsel for Defendants Selco Construction Services, Inc. ("Selco"), SPIG Industries, Inc., and SPIG Industries, LLC (together "SPIG") (all collectively, "Defendants") in this action.

Counsel for Defendants have an actual conflict of interest that can no longer be waived and Roetzel has refused to withdraw. Roetzel's conduct violates numerous Rules of Professional Conduct. Roetzel's concurrent conflict of interest can only be cured by this Court granting Plaintiffs' Motion to Disqualify Roetzel from representing Defendants in this action.

I. FACTUAL BACKGROUND

A. Roetzel Seeks Waiver to Represent Defendants in this Action.

Douglas E. Spiker, a partner in the Akron, Ohio office of Roetzel, has represented Trinity Industries in regard to its Ohio workers' compensation claims for over 15 years. Decl. of Heather P. Randall ¶ 3 (**Exhibit A**). On or about September 28, 2011, Roetzel requested that Trinity waive the conflict of that law firm's concurrent representation of two entities – Roetzel's continued representation of Trinity in Ohio, and Roetzel's new representation of SPIG and Selco in Virginia, adverse to Trinity. *Id.* ¶ 4. A copy of the final waiver letter dated September 30, 2011 ("Waiver Letter") is attached hereto as **Exhibit B**.

In the Waiver Letter, Roetzel stated that the professional conduct rules of Ohio and Virginia require a waiver to allow concurrent representation of Trinity and Selco.[1] Ex. A ¶ 5. The Waiver Letter is expressly limited to "a patent litigation adverse to Trinity Industries and the

[1] In the Waiver Letter, Roetzel refers to Selco Construction Services, Inc, SPIG Industries, Inc. and SPIG Industries, LLC, collectively, as "Selco." In this Memorandum, Plaintiffs will refer to these three entities as "Defendants" or by their individual corporate names.

Texas A+M [sic] University System currently pending in the Eastern District of Virginia. The case is styled 1-11-cv-00937." Ex. A ¶ 6 (citing Ex. B at 1).

As explained below, Trinity did *not* (and never would) grant a waiver for Roetzel to concurrently represent other clients (SPIG/Selco) and participate in claiming that:

- Plaintiffs' ET-Plus products (at issue in the patent litigation) are killing people,
- the current iteration of the ET-Plus was not approved/accepted by the relevant federal agency, and
- the ET-Plus "fatal head" should be a rallying point "to connect individuals for a class action lawsuit" against Plaintiffs.

Ex. A ¶ 17. The importance of the waiver scope is addressed below.

Roetzel expressed no reservations regarding the proposed concurrent representation of Trinity and Selco, stating:

> Roetzel & Andress does not believe that our ability to provide independent, competent and diligent representation on behalf of Selco would be adversely affected by the fact that we currently represent or have represented Trinity in other Unrelated matters. *Nor do we believe that our ability to provide independent, competent and diligent representation on behalf of Trinity in other unrelated matters will be adversely affected by our representation of Selco* [in this action].

Ex. A ¶ 7 (citing Ex. B at 1).

Based upon Roetzel's representations and assurances, Trinity signed the Waiver Letter on October 5, 2011 in order to allow Roetzel to represent the Defendants in this matter, while Roetzel continued to represent Trinity in Ohio. *Id.* ¶ 8. Joshua Harman signed the Waiver Letter on behalf of Selco Construction Services, Inc, SPIG Industries, Inc. and SPIG Industries, LLC. Mr. Harman is an owner and officer of all three entities. *Id.* ¶ 9.

B. Roetzel Aids and Abets Defendants' Harmful Conduct Towards Trinity *Outside* the Scope of the Virginia Patent Litigation.

1. Mr. Harman Creates and Publishes a False and Defamatory Website

On January 24, 2012, an attorney for Roetzel (Benjamin Maskell) and Roetzel's employee and patent agent (Donald Monin) facilitated a settlement meeting between Mr. Harman (for Defendants) and representatives of Trinity. *See* Decl. of Gregory Mitchell ¶ 7 (**Exhibit C**). During this meeting, Mr. Harman stated that he had created an Internet Website located at www.failingheads.com ("the Website") that would show Trinity is "killing people" and that his claims are "supported by math." *Id.* ¶ 8. Mr. Harman also claimed to have evidence and photographs from across the U.S. to support these wild claims. *Id.* Mr. Harman stated that he intended to activate the Website. *Id.* ¶ 9. Finally, Mr. Harman also stated that he intended to provide this same information about Plaintiffs to the Federal Highway Administration ("FHWA") and certain governmental authorities. *Id.* ¶ 10. Roetzel's attorney and patent agent (Messrs. Maskell and Monin) did not appear surprised by Mr. Harman's statements on behalf of Defendants, and they did not make any efforts to dissuade Mr. Harman from acting on these threats adverse to Roetzel's *other* client, Trinity. *See id.* ¶ 11.

Subsequent to the meeting, Plaintiffs' counsel determined that the Internet domain name for Mr. Harman's Website was registered on January 16, 2012. *Id.* ¶ 12. Between January 24 through 26, 2012, the Website was protected by a user name and password, and the contents could not be viewed by the public without this information. *Id.* ¶ 13. On January 26, 2012, Plaintiffs' counsel sent a cease and desist letter to Defendants' counsel (Roetzel) notifying them that the Website did (in fact) exist but was password protected, and demanding confirmation that the Website would not be activated or operated. *See* letter attached hereto as **Exhibit D**.

On January 27, 2012, Plaintiffs discovered that the Website was now active and populated with information, photographs and specific disparaging references to both the ET-Plus product and The Texas A&M University System ("TAMUS"). Ex. C ¶ 14. Plaintiffs' counsel once again notified Roetzel that Mr. Harman's Website was now active, and demanding that Roetzel's client (Mr. Harman, the principal of SPIG and Selco) take down the site immediately. *See* letter attached hereto as **Exhibit E**. Ben Maskell of Roetzel responded by disclaiming any knowledge of or role in Mr. Harman's Website, and that Roetzel had "no control" over Mr. Harman (their client).

The Website contained the following false or misleading allegations regarding the ET-Plus product, and specifically included photographs labeled as the ET-Plus:

(a) ET-Plus heads are killing people

(b) ET-Plus heads are failing "completely"

(c) "people are perishing because of" the ET-Plus

(d) unauthorized design or manufacturing changes were made to the ET-Plus[2]

(e) design changes were made to save money at the expense of public safety

(f) the ET-Plus "chokes" and "fails"

(g) the ET-Plus frequently fails and becomes a serious safety hazard rather than a safety device, e.g., "THIS IS THE FATAL HEAD !!!!!"

(h) the ET-Plus killed a "mother of a 12 yr old son" because the guardrail impact head fail completely

(i) the ET-Plus will fail on impact "based upon physical measurements of the actual terminal."

[2] As Defendants and their counsel know, the ET-Plus has been tested, certified and accepted for use on the National Highway System. In contrast, Defendants' infringing end terminal product has never been tested, certified or authorized.

Ex. C ¶ 15. Excerpts from the Website, as published on January 27, 2012, are designated herein as **Exhibit F** (Ex. F will be made available to the Court for *in camera* inspection).

On January 30, 2012, Plaintiffs filed a Complaint in the United States District Court, Eastern District of Texas against Mr. Harman, Civil Action No. 2:12-cv-0046 ("Texas Case"). Plaintiffs have claims for defamation, business disparagement and trademark dilution by tarnishment in the Texas Case against Mr. Harman. Based upon Roetzel's repeated disclaimers of any "client" relationship with Mr. Harman (the principal of SPIG and Selco, and the same person who threatened Plaintiffs at the meeting on January 24, 2012) Plaintiffs proceeded to serve Mr. Harman, individually, with the Texas Case. A copy of the Texas Case is attached hereto as **Exhibit G**.[3]

On February 13, 2012, after confirming service of the Texas Case on Mr. Harman, Plaintiff's counsel in the Texas Case (Russell C. Brown) notified Roetzel that Messrs. Maskell and Monin are likely to possess discoverable evidence, and that these Roetzel employees may be called to testify in that action. *See* copy of letter attached hereto as **Exhibit H**.

2. Roetzel Creates a False and Misleading PowerPoint Presentation for Mr. Harman and SPIG

On or about February 2, 2012, Plaintiffs obtained direct evidence that Roetzel had an active role in Defendants' campaign of lies against Plaintiffs. *See* Ex. A ¶ 13. As explained below, Roetzel directly assisted Mr. Harman and SPIG in drafting a false and defamatory document titled, "Failure Assessment of Guardrail Extruder Terminals" (hereinafter, the

[3] Plaintiffs did not file a copy of the Website (Ex. F herein) in the Texas Case, to avoid republishing the false and defamatory content. A copy will (also) be made available to the Texas district court for *in camera* inspection.

"Presentation").[4] *See* Decl. of Brian E. Smith ¶ 17 (**Exhibit I**). Excerpts of the Presentation are designated herein as **Exhibit J** (Ex. J will be made available to the Court for *in camera* inspection).

The Presentation, which features photographs of crash sites and Trinity products, was published both on the Website[5] *and* sent by Mr. Harman to the FHWA.[6] SPIG and/or Mr. Harman sent the Presentation to the FHWA as "evidence" that certain ET-Plus end terminals on the highways do not conform to the crash tested designs approved by the FHWA. *See* Ex. A ¶ 14. The Presentation purports to be "an empirical analysis of guardrail terminal impacts throughout a number of states." Ex. J at 2. The thesis of the Presentation is that "height reduction . . . within the extruder throat coupled with reduction in the exit gap of the extruder throat . . . cause the guardrail to 'Throat Lock' in the extruder throat during an impact." *Id.* at 60. SPIG includes multiple photographs of a "young lady killed in a 2008 accident involving another current production ET-Plus with a 1.0 inch exit gap" where "the guardrail is throat locked in the extruder throat." *Id.* at 82-83. SPIG (thanks to the PowerPoint skills of Roetzel) calls this "THE FATAL ET-PLUS IMPACT HEAD." *Id.* at 84.

A review of the electronic properties (*i.e.*, metadata) of the Presentation confirms that "dmonin" is the author of the Presentation that was (a) posted on the Website by Mr. Harman

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[4] According to Mr. Monin's online biography, "Mr. Monin routinely provides research and technical assistance in patent counseling matters and in patent litigations. He has assisted in both patent infringement analysis and patent invalidity analysis. *Mr. Monin has participated in the production and scripting of technology tutorials* for the courts, and has contributed to many briefs to the courts." *See* http://www.ralaw.com/attorney.cfm?id=4979 (emphasis added). Apparently Mr. Monin's technological tutorials includes the Presentation at issue, directed not at the courts, but at government agencies that regulate Roetzel's other client, Trinity.

[5] After filing the Texas Case, Plaintiffs learned that Mr. Harman specifically obtained the Presentation (posted on the Website) from Roetzel.

[6] Plaintiffs' counsel obtained a copy of the Presentation from the FHWA after SPIG sent a copy of the Presentation to the agency via electronic mail. *See* Ex. I ¶ 19.

and (b) published to the FHWA by SPIG and/or Mr. Harman. Ex. A ¶ 15. Donald Monin is a patent agent with Roetzel. *Id.* Tellingly, at least two of the product drawings in the Presentation are identical to the diagrams in the First Amended Counterclaim. *Compare* Defs.' First Am. Countercl. ¶¶ 27, 28 (Dec. 30, 2011) (D.N. 46) *with* Ex. J at 11, 12. Roetzel included these exact same drawing in the original Counterclaim (¶¶ 27 & 28) filed on November 4, 2011 (D.N. 25). Thus, within one month of obtaining the Waiver Letter from Trinity (October 5, 2011), Roetzel had already formulated its ET-Plus product failure theories for SPIG and Selco's Counterclaim (November 4, 2011), and then finalized the lengthy Presentation for SPIG and/or Mr. Harman to send to the FHWA (emailed on or about January 24, 2012).

Any claim that the current version of Trinity's ET-Plus end terminals does *not* conform to the crash tested designs approved by the FHWA is demonstrably false. *See* Ex. I. If Roetzel – let alone Mr. Harman or SPIG – had done *any* amount of investigation before creating their Presentation, they would have learned that these changes to the ET-Plus have been crash tested by Plaintiffs and that the current version of the ET-Plus has been accepted by the FHWA for use on the nation's highways. *See* Plaintiffs' testing and FHWA acceptance documents attached hereto as **Exhibit K**; *see also* Ex. I ¶¶ 4-8. Roetzel (and Defendants) could have waited for document discovery and depositions to proceed before launching their misguided campaign to discredit Trinity. Yet Roetzel decided to shoot first and ask questions later.

C. Trinity Withdraws Its Waiver of Conflict to Roetzel.

On February 3, 2012, Trinity revoked the Waiver Letter to Roetzel. Ex. A ¶ 16. A true and correct copy of Trinity's letter is attached hereto as **Exhibit L**. Trinity cited to Roetzel's role in the Website and the Presentation as ground for revoking the conflict waiver. Ex. A ¶ 16 (citing Ex. L). Trinity concluded by stating that "these actions have created an absolute and

irreconcilable conflict of interest between Roetzel & Andress and Trinity. Trinity therefore also demands your immediate withdrawal as counsel to [SPIG/]Selco per Rule 1.7. It is clear that your representation of [SPIG/]Selco in this matter is now in direct and material conflict with the overall business of Trinity, and in fact, has caused Trinity incalculable damage." Ex. A ¶ 18 (citing Ex. L).

D. Roetzel Refuses to Withdraw From This Action.

Roetzel rejected Trinity's rescission of the waiver on February 7, 2012, in a letter from Roetzel's General Counsel Kevin J. Osterkamp. Ex. A ¶ 19. A true and correct copy of the letter is attached hereto as **Exhibit M**. In Mr. Osterkamp's letter, Roetzel denied any conflict in its concurrent representations and stated: "*Roetzel will not be withdrawing from either representation.*" Ex. A ¶ 19 (citing Ex. M). Instead, Roetzel suggested that Trinity could terminate Roetzel's representation of it in Ohio. *See id.* ("you may conclude that our services are no longer needed"). Roetzel did not deny any of the allegations in Trinity's February 3rd letter. *Id.* ¶ 20. In particular, Roetzel did not dispute the role of Mr. Monin in creating the Presentation for SPIG, and the foreknowledge of Messrs. Maskell and Monin regarding Mr. Harman's Website. *Id.* As explained below, Roetzel's actions in this case and its refusal to withdraw as counsel to Selco, place Defendants' law firm in an irreconcilable conflict that this Court must remedy through disqualification.

II. STANDARD OF REVIEW

A motion to disqualify requires the Court to weigh "the right of a party to retain counsel of his choice and the substantial hardship which might result from disqualification . . . against the public perception of and the public trust in the judicial system." *Yukon Pocahontas Coal Co. v. Consolidation Coal Co.*, 72 Va. Cir. 75, 86 (Buchanan Co. 2006) (granting disqualification) (citing *Stokes v. Firestone*, 156 B.R. 181, 185 (Bankr. E. D. Va. 1993)). Although "[t]here must

be a balance between the client's free choice of counsel and the maintenance of the highest ethical and professional standards in the legal community . . . the right of one to retain counsel of his choosing is secondary in importance to the Court's duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar." *Id.* (citing *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990)). The Court must therefore resolve all doubts in favor of disqualification. *Id.* at 86-87 (citing *Rogers v. Pittston Co.*, 800 F. Supp. 350, 353 (W.D. Va. 1992), *aff'd mem.*, 996 F.2d 1212 (4th Cir. 1993)).

Because, "[t]he guiding principle in considering motions to disqualify counsel is safeguarding the integrity of the court proceedings; [and] the purpose of granting such motions is to eliminate the threat that the litigation will be tainted," *id.* at 87 (citing *Stokes*, 156 B.R. at 185), a motion to disqualify is decided by a two-prong analysis. *Id.* (citing *Dulles Corner Props. II, L.P. v. Smith*, 38 Va. Cir. 507, 513 (1992)). First, the moving party must show a clear ethical violation by opposing counsel. *Id.* (citing *Gay v. Luihn Food Sys., Inc.*, 54 Va. Cir. 468, 470 (2001); *McDonough v. Alpha Constr. & Eng'g Corp.*, 27 Va. Cir. 50, 52 (Loudoun Co. 1991)). Second, the moving party must establish that the case at bar is tainted as a result of opposing counsel's unethical conduct. *Id.* (citing *Dulles*, 38 Va. Cir. at 513) (court must weigh competing interests).

In determining the issue of whether to disqualify counsel for a conflict of interest, "the trial court is not to weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervising power over the members of the bar and with the view of preventing 'the appearance of impropriety,' it is to *resolve all doubts in favor of disqualification.*" *U.S. v. Clarkson*, 567 F.2d 270, 273 n. 3 (4th Cir. 1977) (disqualification upheld) (citations omitted) (emphasis added). "Neither is the court to consider whether the motives of counsel in seeking to

appear despite his conflict are pure or corrupt; in either case the disqualification is plain." *Id.* *See also Sanford v. Virginia*, 687 F. Supp. 2d 591, 602 (E.D. Va. 2009) (motion to disqualify granted). The conflict "must be a real one and not a hypothetical one or a fanciful one." *Id.* at 602-03.

Federal courts typically look to relevant state rules of professional conduct for guidance. *See In re Snyder*, 472 U.S. 634, 645 n. 6 (1985). In this case, the parties agreed in the Waiver Letter that the rules in Ohio and Virginia are applicable to Trinity's relationship with Roetzel. In contrast, the Local Rules of this Court state that "[t]he ethical standards relating to the practice of law in civil cases in this Court shall be" the Virginia Rules of Professional Conduct. *See* Local Civil Rule 83.1(I). Plaintiffs will analyze Roetzel's conduct, and the ample grounds for disqualification, under both the Virginia and Ohio rules.

III. ARGUMENT

A. Roetzel Is Concurrently Representing One Client that Is Directly Adverse to Another Existing Client Without a Waiver Letter in Violation of Rule 1.7.

1. Trinity Properly Revoked Its Waiver Letter

(a) Trinity Had Good Cause to Revoke the Waiver Letter

Subsequent to executing the Waiver Letter – and as a result of Roetzel's role in the Website and the Presentation created for the sole purpose of tarnishing Trinity's business reputation and products – Trinity revoked the conflict waiver granted to Roetzel. To be sure, this decision was not taken lightly. It was made, however, in accordance with the professional conduct rules of Ohio, where Roetzel and Mr. Spiker are located, and Virginia, where the instant case is pending.

In both Ohio and Virginia, the applicable ethics rules governing conflicts related to concurrent representation are found at Rule 1.7. The rules differ in some respects, and are presented as follows:

Ohio	Virginia
RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS (a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies: (1) the representation of that client will be directly adverse to another current client; (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests. (b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply: (1) the lawyer will be able to provide competent and diligent representation to each affected client; (2) each affected client gives informed consent, confirmed in writing; (3) the representation is not precluded by division (c) of this rule. (c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies: (1) the representation is prohibited by law; (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.	Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation. (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As a threshold matter, Virginia Rule 1.7 requires that the law firm seeking a concurrent conflict of interest waiver to represent a new client adverse to an existing client must "reasonably believe" that its representation of the new client will not "adversely affect" the law firm's

relationship to the existing client. Roetzel sought and obtained the Waiver Letter to represent a new client (SPIG/Selco) adverse to an existing client (Trinity), effective October 5, 2011. As early as November 4, 2011, SPIG/Selco alleged in Defendants' Counterclaim that Trinity is making an unsafe product (the ET-Plus) that fails on impact. Soon after, Roetzel collaborated with SPIG/Selco to produce the Presentation alleging that Trinity's ET-Plus is "killing people" due to design changes. Thus, *Roetzel violated Rule 1.7 by seeking the Waiver Letter from Trinity under these circumstances*. No rational attorney at Roetzel (such as Mr. Spiker) could "reasonably believe" that such inflammatory accusations by Roetzel, SPIG and Selco against another, current client (Trinity) would not "adversely affect" Roetzel's responsibilities to, and relationship with Trinity.

Comment 32 to Ohio's Rule 1.7, provides that a client who grants a waiver nonetheless retains two important and distinct rights: (1) to rescind the waiver; or (2) to terminate counsel. Comment 32, which is based upon Comment 21 to American Bar Association Model Rule 1.7 (2004), provides:

> [32] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Courts have interpreted this comment to "equate[] the right to revoke this waiver of conflict-free counsel with any other right a client may have to terminate his lawyer's representation. This means that revoking such a waiver is subject to the same limitations as terminating counsel." *See People v. Maestas*, 199 P.3d 713, 717 (Col. 2009).

Thus, where a concurrent conflict of interest exists, and a waiver is given, the party granting that waiver may revoke it for good cause in accordance with Rule 1.7, *or* fire his counsel that previously obtained the waiver. *See id.* Trinity chose to revoke consent to the Waiver Letter in the Virginia patent litigation. Roetzel is still engaged as Trinity's state-wide counsel for Ohio workers' compensation claims. Roetzel's concurrent conflict of interest still exists here in Virginia.

(b) Roetzel is Precluded From Representing SPIG and Selco in the Virginia Patent Litigation

To determine whether Roetzel is precluded from continuing to represent SPIG and Selco in the instant case (*adverse to Roetzel's other client, Trinity*), the Court must look at "the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result." Ohio R. Prof. C. 1.7, cmt. 32.[7]

The "nature of the conflict" is *direct adversity* between two current clients of Roetzel in the Virginia patent litigation, without a conflict waiver in place. Moreover, the "nature of the conflict" has escalated out of control because of Roetzel's misguided support to SPIG, Selco and Mr. Harman in publishing false statements about Trinity – with ramifications far beyond the scope of the Virginia patent litigation. It is hard to imagine how Roetzel can maintain its duty of undivided loyalty to Trinity, while at the same time zealously attempting to foment a class action involving the ET-Plus and tarnishing Trinity's professional reputation with the FHWA.

Trinity revoked the Waiver Letter "because of a material change in circumstances." The Waiver Letter is expressly limited to the Virginia patent litigation. The scope of Trinity's waiver

[7] Virginia has not adopted comment 21 of ABA Model Rule 1.7. Nonetheless, Trinity and Roetzel agreed by the terms of the Waiver Letter that both the Ohio and Virginia Rules of Professional Conduct apply to the Waiver Letter.

did *not* extend to Roetzel creating a PowerPoint Presentation, with numerous accusations and photographs of crash scenes purportedly involving their client's product (ET-Plus), in order to attempt to convince the FHWA to withdraw acceptance of Trinity's products. In other words, Trinity did not grant a waiver for Roetzel to join Defendants' campaign to prove "by empirical analysis" (of Roetzel's Mr. Monin) that the ET-Plus product is "killing people," that Trinity supposedly concealed ET-Plus product modifications from federal regulators, and that the ET-Plus "fatal head" should be a rallying point "to connect individuals for a class action lawsuit" against Plaintiffs. At a minimum, Roetzel "changed" the circumstances when that law firm joined SPIG and Mr. Harman as crusaders for product safety. When Roetzel encouraged (or approved) of Defendants publishing these false statements on the Website and in the Presentation sent to the FHWA, Defendants' law firm passed the point of no return.

Roetzel's conduct in this case has quickly escalated *from* the engagement defined in the Waiver Letter *to* a much broader role at the forefront of a scheme by Defendants and Mr. Harman to tarnish Trinity's professional reputation and harm its entire business. Roetzel committed the sin of omission by standing by and doing nothing to stop Mr. Harman's defamatory Website campaign. Indeed, Messrs. Maskell and Monin sat mute when Mr. Harman made the verbal threats to Trinity. Even worse, Roetzel is complicit in Defendants' on-going malfeasance in publishing the Website and the Presentation to the FHWA.

The Presentation has no practical (or even tangential) role in this case. The Virginia patent litigation currently pending before this Court is not a personal injury or product liability matter. Defendants copied Plaintiffs' patented product, and then misrepresented the authenticity of Defendants' knock-off products to the Virginia Department of Transportation. Ironically, Defendants also made "improvements" to the accused product, all without any crash testing or

federal approval whatsoever. Defendants' counterclaims and affirmative defenses include theories of patent invalidity and unenforceability, tortious interference with contracts, and (if successful on their Second Amended Counterclaim) inequitable conduct and antitrust. Under no set of facts or circumstances is the performance of Plaintiffs' ET-Plus products an issue in this patent case.[8]

The "nature of the conflict" and "material change in circumstances" described above clearly outweigh "the reasonable expectations" of SPIG and Selco in retaining Roetzel, and consideration of whether any "material detriment" to SPIG and Selco would result from Roetzel's disqualification in the Virginia patent litigation. Mr. Harman (a signatory of the Waiver Letter), SPIG and Selco are the instruments of their own "material detriment," and should have known better than to "reasonably expect" that Trinity would have granted the Waiver Letter to Roetzel under the circumstances as they are now fully revealed.

The trial court may reject a party's attempt to revoke a waiver if the revocation is "untimely or filed for improper purposes." *Maestas*, 199 P.3d at 717. Trinity timely notified Roetzel of the Website and the Presentation within hours of discovering each item, on January 26th and February 2nd, respectively. Trinity timely revoked the Waiver Letter by sending a letter to Roetzel on February 3, 2012. Roetzel rejected Trinity's rescission of the Waiver Letter on

[8] Defendants will argue that the "4 inch rail feeder chute" and the "1 inch to 1 ½ inch exit gap" are relevant to their Counterclaims. Defendants allege that "third generation" ET-Plus units with these component measurements are "likely to fail," so therefore Defendants "decided in September 2009 to manufacture a competing guardrail head." First Amended Counterclaim (D.N. 46) ¶¶ 30, 35-39, 46. *See also* Defs.' 2nd Set of Req. for Prod., Nos. 101 & 102 (served Jan. 20, 2012) (seeking documents, after the fact, to support their "empirical analysis" in the Presentation). Plaintiffs dispute that Defendants had any "innocent intent" to copy Trinity's patented ET-Plus product. *See* Defs.' 10th Aff. Def. ¶ 166. Moreover, assuming for sake of argument (only) that the third generation ET-Plus is "likely to fail" for any reason, that does not justify *Roetzel's* role in drafting and disseminating a PowerPoint Presentation to the FHWA (and over the Internet) harshly critical of a current client, Trinity.

February 7, 2012. Plaintiffs continued their investigation of the conflict, and began preparing the instant Motion and Memorandum in Support, which has been filed within two weeks of rescinding the Waiver Letter.

Lacking a concurrent conflict of interest waiver (the Waiver Letter), Roetzel has no right, pursuant to Rule 1.7(b), to continue to represent SPIG and Selco in this case, unless the Court believes Trinity lacked good cause to exercise that right. As described in more detail below, Roetzel's conduct not only established good cause for Trinity to revoke the waiver, it also became apparent that Roetzel never should have sought a waiver in the first place.

2. Roetzel Has Breached its Duty of Loyalty to Trinity

Roetzel owes a duty of loyalty to Trinity per Rule 1.7. *See* Oh. R. Prof. C. 1.7, cmt. 1 ("Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client."); Va. R. Prof. C. 1.7 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). There can be no dispute that a real and actual conflict exists regarding Roetzel's concurrent representation of Trinity and SPIG/Selco. Indeed, it was Roetzel's Mr. Spiker who first disclosed the conflict to Trinity and drafted the Waiver Letter. *See* Ex. A. No dispute exists that Trinity may revoke, and has revoked, that Waiver Letter. The only question for this Court, then, is whether Trinity had good cause to do so. As explained above, the good cause standard is more than met here. Roetzel must be disqualified from this case. Roetzel's actions were (and remain) detrimental to Trinity.

"[U]nder Virginia law it is clear that a lawyer owes his or her client a fiduciary duty," *Tessier*, 731 F. Supp. at 733, and the attorneys of Roetzel have violated that bedrock principle. Certainly, Trinity expected, in the words of Roetzel's General Counsel, that this matter would be

"vigorously contested." *See* Ex. M at 1. What Trinity did *not* expect was that Roetzel's "other" clients (SPIG and Selco, as owned by Mr. Harman) would involve Roetzel in

- sanctioning the Website (soliciting a "class action" against Plaintiffs herein) and
- drafting a Presentation containing false and misleading statements about Trinity to be delivered to the FHWA.

Roetzel represented in its Waiver Letter that it would not undertake the representation of Selco if it would adversely affect Trinity. *See* Exhibit A at 1. Roetzel cannot argue that this was an "appropriate course of action" for SPIG/Selco without recognizing the negative impact on the law firm's "other responsibilities" to Trinity. *See* Va. R. Prof. C. 1.7 cmt. 8; Oh. R. Prof. C. 1.7 cmt. 14 ("material limitation conflicts"). Roetzel breached its duty of loyalty when it assisted Mr. Harman, SPIG and Selco in disseminating information that Trinity and its products kill people. These actions establish clear impropriety with regards to Roetzel's duty of loyalty to Trinity pursuant to Rule 1.7.

The Fourth Circuit has cautioned that trial courts should not "split hairs" in determining disqualification issues, and no such parsing is necessary here. *Clarkson*, 567 F.2d at 273 n. 3. The attorneys and patent agent of Roetzel were derelict in their duty of loyalty to Trinity from the very beginning when they requested the Waiver Letter, through their conduct and collaboration with Defendants in this action, and now, in refusing to withdraw. Accordingly, this Court must disqualify Roetzel as counsel to Defendants SPIG and Selco in this action.

3. Trinity Has No Obligation to Fire Roetzel to Eliminate the Concurrent Conflict of Interest

Roetzel refuses to withdraw from representing Defendants in the Virginia patent case, and has tried to escape its duty by suggesting that Trinity simply fire Roetzel as its law firm in Ohio ("you may conclude that our services are no longer needed"). It would be easy and

convenient for law firms to seek waivers among competing clients, and to then side with the "new" client (or the more profitable case – maybe even a "class action") simply by suggesting that the disfavored client should fire the law firm once that firm crosses the line of loyalty. This type of conduct is strongly disfavored under the doctrine commonly known as the "hot potato" rule. *See Picker Int'l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363 (N.D. Oh. 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989).[9] The *Picker* case involved a concurrent conflict of interest of a law firm whose clients included the opposing parties in patent litigation, subsequent to a law firm merger. The Court found that only one remedy is available to cure this scenario: the law firm subject to the concurrent conflict of interest must withdraw entirely from the case at hand. *See Picker*, 670 F. Supp. at 1366. "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." *Id.* (citations omitted). "Public confidence would be greatly shaken if a firm could simply drop one client in order to take on a more lucrative one." *Id.* at 1367.

Here, the "hot potato" is Trinity. By the tone and substance of Mr. Osterkamp's February 7, 2012 letter (Ex. M), Roetzel is attempting to convert its *current* client Trinity into a *former* client in order to solve the concurrent conflict of interest dispute in this case. Mr. Osterkamp proposed that Trinity "may conclude that our services are no longer needed." Roetzel refuses to withdraw, and the law firm has not (yet) fired Trinity as a client in Ohio. Roetzel is goading *Trinity* into firing Roetzel, under the assumption that this will "fix" the conflict problem. Roetzel's clients have asserted multi-million dollar counterclaims against Trinity. Mr. Harman's Website is fomenting a "class action" against Plaintiffs Trinity and TAMUS. There could be no

[9] *Picker*, which is frequently cited as the genesis for the "hot potato rule," was superseded on other grounds by a change to Ohio DR 5-105. *SST Castings, Inc. v. Amana Appliances, Inc.*, 250 F. Supp.2d 863, 870-71 (S.D. Oh. 2002).

clearer case of a law firm (Roetzel) seeking to cure its disqualification "in order to keep happy a far more lucrative client[s]," SPIG and Selco. What's more, Roetzel is actively engaged in ramping up the potential damages recoverable against Trinity by its "new" clients (SPIG and Selco) through the law firm's participation in, or knowledge of, the Website and the Presentation.

Trinity has been, for over 15 years, a client of Roetzel. It provided Roetzel the opportunity to represent Defendants in the Virginia patent litigation only on the basis (certified by Roetzel) that such a representation would not be to the detriment of Trinity. Roetzel has not been merely "vigorous" in its representation of Selco. Roetzel has, at turns, lacked candor, aided in the dissemination of grossly misleading information about Trinity, and, ultimately, been disloyal to its concurrent client Trinity. Roetzel was disingenuous in stating that it could continue representing Trinity in Ohio ("provid[ing] independent, competent and diligent representation of Trinity"), while at the same time in Virginia claiming that the ET-Plus products are subject to "throat lock" which is "killing people" across the U.S.

This Court will have to determine where the line of loyalty exists in this case. In Trinity's view, the line could be in one of three places, and all of these lines have been crossed: (1) Roetzel's lack of candor at the outset when seeking the Waiver Letter; (2) Roetzel's failure to stop its client from defaming Plaintiffs on the Website; and (3) Roetzel's creation of a Presentation that claims Trinity is killing people, and then advising Defendants to deliver the law firm's handiwork to the federal government.

B. Roetzel Has Committed Additional Ethical Violations in the Course of Representing SPIG and Selco

1. Rule 8.4: Roetzel Deliberately Misrepresented Knowledge of Mr. Harman's Conduct, the Creation of the Presentation, and the Status of the Website.

The Ohio and Virginia versions of Rule 8.4 are restated in the following table:

Ohio	Virginia
RULE 8.4: MISCONDUCT It is professional misconduct for a lawyer to do any of the following: (a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.	RULE 8.4 MISCONDUCT It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law ….

On January 27, 2012, Plaintiffs confronted Roetzel with the news that Mr. Harman had launched a Website highly critical of the ET-Plus. Roetzel denied any knowledge of the Website and its contents, and disclaimed any client relationship with Mr. Harman. Yet Roetzel's attorney and patent agent (Messrs. Maskell and Monin) sat in a conference room with Mr. Harman on January 24, 2012 when he threatened to activate the Website and to also contact certain, unnamed authorities. Roetzel's claimed ignorance is not credible. Further, Roetzel created the Presentation that Mr. Harman posted on the Website and also sent to the FHWA. For Roetzel to

disavow knowledge of Mr. Harman's conduct, or to deliberately misrepresent their knowledge, constitutes professional misconduct pursuant to Rule 8.4.

Further, Roetzel's explanation is undercut by the fact that its employee (Mr. Monin) prepared the Presentation. Why did Roetzel create the Presentation, other than to impugn the reputation of Trinity's ET-Plus product? As a means to convince FHWA to investigate or sanction Trinity, with ramifications that might impact the course of the Virginia patent litigation? Roetzel's knowledge of the Website and the firm's role in creating the Presentation have no legitimate connection to their narrowly-defined role as defense counsel in a Virginia patent suit. Roetzel's pretentions to the contrary are dubious at best.

The Supreme Court of Ohio has held that the various provisions of Ohio's Rule 8.4 prohibit attorneys from engaging in actions that "reflect adversely on the lawyer's honesty" or upon "the lawyer's fitness to practice law…." *Disciplinary Counsel v. Potter*, 126 Ohio St. 3d 50, 50 (2010) (citing to subsections (b) and (h) of Rule 8.4 respectively). Rule 8 (c) prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation…." *Id*. In its *Potter* decision, that Court held that an attorney's failure to disclose his personal interest in the purchase of real property over which he had a fiduciary responsibility, was a violation of Rule 8.4. *Id*. The Court found a violation and imposed sanctions even though no injury was sustained and the attorney self reported. *Id*. In contrast here, Roetzel has chosen to continue the charade of "we didn't know" despite their attendance at the January 24, 2012 meeting. Roetzel is completely ignoring the injury Roetzel's actions have caused the firm's other client, Trinity. By misrepresenting their knowledge of the Website and authorship of the Presentation highly critical of Trinity, Roetzel violated subsections (b), (c) and (h) of Ohio's Rule 8.4 and the corresponding provisions of

Virginia's Rule 8.4. Roetzel's dishonesty or misrepresentation warrant the remedy of disqualification here.

2. Rule 3.4: Roetzel took action on behalf of a client (SPIG/Selco) which is done merely to harass or maliciously injure the opponent (Trinity)

Both Ohio and Virginia have adopted versions of Rule 3.4 regarding "Fairness to Opposing Party and Counsel." The Virginia Rule provides that "[a] lawyer shall not . . . assert a position, conduct a defense, . . . or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Rule 3.4(j). Roetzel drafted the Presentation for its clients (SPIG/Selco) which is clearly interposed to "harass or maliciously injure" its other client, Trinity. As noted above, the Presentation has no practical nexus to the defense of the Virginia patent litigation. The Presentation is designed to distract the regulators, and perhaps the fact finders, from the real issues at bar – Defendants copied Trinity's ET-Plus and then submitted doctored invoices made to appear as if the accused products were genuine. Defendants put fake end terminals on the highways. The performance *of Plaintiffs' ET-Plus products* is entirely beside the point. For Roetzel to create a Presentation intending to "harass or maliciously injure" Trinity (Roetzel's other client) is a violation of Rule 3.4(j).

3. Rule 1.16(a)(1).: Roetzel's Representation of SPIG/Selco Adverse to Trinity Will Result in Violations of the Rules of Professional Conduct

The Ohio and Virginia versions of Rule 1.16 are restated in the following table:

Ohio	Virginia
RULE 1.16 DECLINING OR TERMINATING REPRESENTATION (a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies: (1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;	RULE 1.16 DECLINING OR TERMINATING REPRESENTATION (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law; . . . .

In both Virginia and Ohio, Rule 1.16(a)(1) governs the termination of client representation: "a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of the Rules of Professional Conduct or other law . . . ." For all of the reasons cited above, Roetzel's representation of Defendants in this action has already resulted in violations of the applicable Rules of Professional Conduct, in particular Rule 1.7 ("Conflict of Interest"). Because such violations have occurred and are continuing – as a result of Roetzel's continued representation of SPIG/Selco – Roetzel "shall not" continue to represent SPIG/Selco in the Virginia patent litigation.

C. The Balance of the Equities Warrants Disqualification of Roetzel

As noted in the recent case of *Yukon Pocahontas Coal Co.*, the party seeking disqualification must first show a clear ethical violation by opposing counsel. Plaintiffs (and Trinity, in particular) have demonstrated numerous violations by Roetzel of the Ohio and Virginia Rules of Professional Conduct. Next, the movant must establish that the case at bar is "tainted" as a result of opposing counsel's unethical conduct. Roetzel has continued to represent SPIG and Selco *after* Trinity revoked the Waiver Letter, in violation of Rule 1.7. No greater "taint" can exist in the judicial setting than a law firm (Roetzel) being adverse to its own client (Trinity) without a valid waiver. Moreover, Roetzel's violation of Rules 8.4 and 3.4 have actually prejudiced Plaintiffs in this action. Roetzel has misrepresented its knowledge of the Website and hidden its role in the Presentation. Roetzel created the presentation in order to "harass or maliciously injure" Trinity and its relationship with federal regulators. Plaintiffs have been defamed on the Internet and to the FHWA. There can be no dispute that Roetzel's other

clients (SPIG and Selco) have gained a potential "unfair advantage" over Trinity as a result of these actions. *See Yukon Pocahontas Coal Co.*, 72 Va. Cir. at 101.

The balance of the equities clearly favors disqualification of Roetzel. The right of SPIG and Selco to retain their chosen counsel (Roetzel) cannot outweigh the serious transgressions committed by Roetzel against their other client, Trinity, and Roetzel's refusal to withdraw per Rules 1.7 and 1.16. As endorsed by Judge Robert E. Payne of this Court, "'the right of one to retain counsel of his choosing is secondary in importance to the Court's duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.'" *Sanford*, 687 F. Supp. 2d at 602 (citing *Tessier*, 731 F. Supp. at 729). This Court has the "inherent right to supervise the conduct of attorneys practicing before [it] and to discipline an attorney who engages in misconduct, which includes the right to remove an attorney of record in a case." *Id.* at 104 (citing *Judicial Inquiry & Review Comm'n of Va. v. Peatross*, 269 Va. 428, 447, 611 S.E.2d 392 (2005)). Plaintiffs respectfully request that this Court remove Roetzel as Defendants' attorneys in this case.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court: (1) find that Roetzel has created an actual, unwaivable, and irresolvable conflict of interest in continuing to represent the Defendants in this matter; (2) disqualify Roetzel from representing Defendants in this action; and (3) provide whatever other relief the Court finds proper and just.

Dated: February 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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