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THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GINA KIM, on behalf of a class consisting  
of herself and all other persons similarly  
situated,

Plaintiffs,

v.

COACH, INC., a Maryland corporation,  
and COACH SERVICES, INC., a  
Maryland corporation,

Defendants, and, as to  
Coach, Inc., counterclaim  
plaintiff,

v.

JAY CARLSON, a Washington resident;  
CARLSON LEGAL, a Washington  
resident; CHRISTOPHER CARNEY, a  
Washington resident; CARNEY  
GILLESPIE & ISITT PLLC, a Washington  
PLLC,

Counterclaim defendants.

No. 2:11-cv-00214-RSM

**DEFENDANT COACH, INC.’S MOTION  
FOR PROTECTIVE ORDER**

**NOTE ON MOTION CALENDAR:  
March 18, 2011**

Defendant/counterclaim plaintiff Coach, Inc. (“Coach”) hereby moves for a narrow  
protective order so that it may use highly confidential documents and information in this lawsuit.  
Counsel for plaintiff (“Plaintiffs’ Counsel”) has refused to agree to preserve the confidentiality of

1 this information. The confidential information is at the heart of this lawsuit. If this confidential  
2 information cannot be shared with the Court and Plaintiffs' Counsel without the threat of broader  
3 disclosure, Coach cannot maintain any defense in this case – including its defense of the special  
4 motion to strike filed on March 10, 2011 by Plaintiffs' Counsel. On the other hand, if a  
5 protective order is entered so that this confidential information can be shared, the scope of this  
6 case can be greatly limited at an early stage.

7 **I. INTRODUCTION**

8 This case involves a single plaintiff who listed a bag for sale on eBay. On suspicion that  
9 the bag she listed is counterfeit, that listing was removed from eBay for a very short time.  
10 Plaintiff also received a letter, which letter is attached to Coach's Answer and Counterclaim (Dkt.  
11 No. 6), and which letter speaks for itself. Based solely on that letter and the brief removal of the  
12 bag from eBay, Plaintiffs' Counsel filed this putative class action against Coach, alleging that  
13 Coach "is engaged in an illegal, statewide and nationwide campaign to suppress 'second hand'  
14 sales of its handbags and other products." Amended Complaint (Dkt. No. 4) at 1. Also on that  
15 basis, Plaintiffs' Counsel has made sweeping allegations, such as that Coach "fails to conduct  
16 even a minimally reasonable investigation into its counterfeiting claims before threatening legal  
17 action." *Id.* at 2.

18 Plaintiffs' Counsel's allegations are false. There is no campaign to suppress second-hand  
19 sales, and the motivation for the actions taken with respect to Ms. Kim's listing was *not* the  
20 suppression of second-hand sales. Coach will demonstrate this conclusively, and defend itself  
21 successfully in this lawsuit, but can only do so if it is permitted to share information regarding the  
22 details of its online anti-counterfeiting efforts. The details of Coach's anti-counterfeiting efforts  
23 are central to Coach's defense to allegations that Coach or the law firm Gibney Anthony &  
24 Flaherty LLP ("Gibney") acted unreasonably in responding to Ms. Kim's listing. It is not a  
25 stretch to say that information regarding the investigation is one of the two or three most critical  
26 issues in this lawsuit. Coach needs to be able to rely on this information in its submissions to the

1 Court and its discussions with Plaintiffs' Counsel, yet Coach is presently unable to do so because  
2 Plaintiffs' Counsel will not agree to preserve the confidentiality of the details of Coach's online  
3 anti-counterfeiting efforts. Counsel for Coach have repeatedly attempted to obtain the  
4 cooperation of Plaintiffs' Counsel on this matter, but have been rebuffed by Plaintiffs' Counsel.  
5 See Declaration of Patrick Eagan in Support of Defendant Coach, Inc.'s Motion for Protective  
6 Order ("Eagan Dec.") at ¶¶ 10-21. Coach is left with no other choice than to seek a protective  
7 order from this Court in order to address the central issues of the case.

8 Adding to the urgency, on March 10, 2011, Plaintiffs' Counsel filed a special motion to  
9 strike Coach's defamation claims arising from Plaintiffs' Counsel stating in a televised interview  
10 that Coach conducted no investigation whatsoever before Ms. Kim received the letter. That  
11 statement is false. The falsity of that statement is obviously important to Coach's defense against  
12 the special motion to strike. In order to demonstrate the falsity of Plaintiffs' Counsel's statement,  
13 Coach must divulge the details of its online anti-counterfeiting efforts. Plaintiffs' Counsel's  
14 refusal to agree to preserve the confidentiality of Coach's highly sensitive information is  
15 unreasonably hampering Coach's ability to litigate all issues in this case. With Plaintiffs'  
16 Counsel having filed a motion to strike, with Coach's response papers due shortly, Plaintiffs'  
17 Counsel's refusal to maintain the confidentiality of information that plainly is at the core of  
18 Coach's response papers is wholly unacceptable.

19 The total maximum number of possible class members is less than 20 – for fewer than 20  
20 Washington residents received cease-and-desist letters from Gibney to combat counterfeiting of  
21 Coach products on eBay, Craigslist, and other websites. Some recipients of these letters have  
22 already admitted that they were, in fact, selling counterfeit products. But even assuming  
23 (wrongly) that every Washington recipient of such a letter was selling authentic, accurately  
24 described Coach products, a number less than 20 falls far below the standard for numerosity  
25 under Rule 23. Once a protective order is entered and Coach is able to share highly confidential  
26 information about online anti-counterfeiting efforts, it is believed that Plaintiffs' Counsel will

1 dismiss the class allegations. Failing a voluntary dismiss, Coach is preparing a motion to strike  
2 class allegations, based in part on the absence of numerosity. In order to fully brief such a  
3 motion, Coach must disclose confidential information related to the anti-counterfeiting efforts.

4 An investigation **was** conducted before Gibney sent any letters, including its letter to  
5 Ms. Kim. *See* Eagan Dec. at ¶ 5 The details of that investigation cannot be disclosed publicly,  
6 because such disclosure would reveal to counterfeiters and potential counterfeiters the precise  
7 nature of Gibney’s anti-counterfeiting efforts. The details are vital to potential early resolution of  
8 this matter. The details are further relevant to a motion for sanctions against Plaintiffs’ Counsel  
9 that Coach will be forced to serve if Plaintiffs’ Counsel decline to drop allegations improper  
10 under Rule 11 standards. The allegation that no investigation was conducted – an allegation  
11 repeated throughout the Amended Complaint and in the national newsmedia by Plaintiffs’  
12 Counsel – is demonstrably false, and was itself made without any factual basis beyond rank  
13 speculation.

14 The details of Gibney’s anti-counterfeiting program are central to the lawsuit, and to these  
15 several threshold issues. Coach respectfully requests a protective order directing the parties to  
16 preserve as “Attorneys Only,” and to file under seal, any documents or information marked as  
17 “ATTORNEYS ONLY” and falling within the two narrow categories stated below, whether  
18 shared in conjunction with Plaintiffs’ Counsel’s special motion to strike, Coach’s motion to strike  
19 class allegations, a motion for sanctions under Rule 11, or in other discussions between the  
20 parties and proceedings in this lawsuit:

- 21 (1) Descriptions of the online counterfeiting detection program by Gibney  
22 Anthony & Flaherty or Coach; and
- 23 (2) Documents relating to the online counterfeiting detecting program by Gibney  
24 Anthony & Flaherty or Coach.

25 Plaintiffs’ Counsel’s obstreperous refusal to consent to a simple confidentiality  
26 agreement is a tactic not often seen in Seattle. The harms from the delay they are creating are

1 far worse than the negatives that led to the shot-clock to put an end to stall offenses. That  
2 basketball tactic produced boredom and endless trips to the foul line. Plaintiffs' Counsel's  
3 unreasonable delay here in consenting to a narrow confidentiality agreement is (1) forcing us to  
4 consume the Court's valuable time, (2) unnecessarily driving up legal fees, and (3) obstructing  
5 Coach's efforts to put before this Court the information that is at the core of the lawsuit —  
6 information that will show precisely how the challenged anti-counterfeiting program works,  
7 and why plaintiffs' claims are baseless.

8 A protective order is needed urgently.

9 **II. FACTUAL BACKGROUND**

10 **A. Protection of Highly Confidential Information is Necessary For Coach to**  
11 **Defend This Lawsuit.**

12 Plaintiff Gina Kim alleges that her receipt of a cease-and-desist letter from Gibney was  
13 a violation of the Washington Consumer Protection Act ("CPA"), constitutes  
14 "misrepresentation of trademark infringement" under 17 U.S.C. § 512(f) (the "Digital  
15 Millennium Copyright Act"), constitutes defamation, and constitutes tortious interference with  
16 a business expectancy. First Amended Complaint (Dkt. No. 4) at 2. Under each cause of  
17 action, Plaintiffs' Counsel alleges that Gibney and Coach acted either "without conducting any  
18 reasonable investigation . . ." or "without conducting a thorough investigation . . . ." The  
19 common thread is that Plaintiffs' Counsel clearly understand that the details of the investigation  
20 into Ms. Kim's listing are central to Ms. Kim's claims and to the defense of those claims.

21 Indeed, the details of the investigation are the *sine qua non* of Coach's defense. If  
22 Coach is unable to adduce evidence detailing its highly confidential online anti-counterfeiting  
23 efforts, then Coach cannot mount a defense. Without a protective order, Coach can take no  
24 action before the Court to protect its rights and narrow the scope of the litigation. Without a  
25 protective order, Coach cannot even engage in frank discussion with Plaintiffs' Counsel  
26 regarding the nature and basis of the claims and the likelihood of success on the merits. These

1 discussions are vital to early resolution of disputed issues and narrowing the scope of litigation.  
2 Such discussions will necessarily involve disclosure of highly confidential information  
3 regarding the anti-counterfeiting program. Yet Plaintiffs' Counsel will not agree to preserve  
4 the confidentiality of that information, even when the scope of the protected information is  
5 extremely narrow. *See* Eagan Dec. at ¶¶ 10-21.

6 Plaintiffs' Counsel has also filed a motion to strike Coach's defamation claims under  
7 Washington's anti-SLAPP statute, RCW 4.24.525. One of the grounds for Coach's allegations  
8 is that Plaintiffs' Counsel stated falsely on a televised interview that Coach conducted no  
9 investigation before Ms. Kim received her letter from Gibney. As noted above, an  
10 investigation did in fact take place. *See also* Eagan Dec. at ¶ 5. In order to defend against  
11 Plaintiffs' Counsel's motion to strike, Coach must use information detailing its online anti-  
12 counterfeiting efforts. Plaintiffs' Counsel has noted the motion for hearing on April 1, 2011,  
13 giving Coach little time to obtain a protective order and mount an appropriate defense to the  
14 motion to strike.

15 Information about Coach's online anti-counterfeiting efforts would be extremely  
16 valuable to counterfeiters and potential counterfeiters. *See* Eagan Dec. at ¶ 7. Publication of  
17 that information would give counterfeiters and potential counterfeiters a blueprint for evading  
18 detection. Counterfeiters who evade detection are able to pass off lower quality goods as high  
19 quality, branded merchandise. This causes great injury to the general public, as well as to  
20 intellectual property holders. Information detailing Coach's efforts to limit online  
21 counterfeiting cannot be the subject of public filings and must be preserved as highly  
22 confidential. To require Coach to make a public disclosure of its anti-counterfeiting program  
23 would be the equivalent of handing over a team's playbook to every other team in a league. A  
24 protective order is plainly mandated here.

1           **B.     Protection of Highly Confidential Information Is Also Necessary for Coach to**  
2           **Demonstrate That Numerosity Is Impossible**

3           Ms. Kim alleges that her receipt of a cease-and-desist letter from Gibney was a violation  
4 of the CPA, constitutes “misrepresentation of trademark infringement” under the Digital  
5 Millennium Copyright Act, constitutes defamation, and constitutes tortious interference with a  
6 business expectancy. First Amended Complaint (Dkt. No. 4) at 2. Ms. Kim is seeking  
7 certification of a class consisting of the following individuals:

8                     [A]ll consumers in Washington State who have, in the last three years,  
9                     received a cease and desist letter from Coach or the agents of Coach,  
10                    accusing them of attempting to sell infringing and counterfeit Coach  
11                    products through an online outlet such as E-Bay (sic), Craigslist, and other  
12                    such services, where such allegation was made without basis and has  
13                    harmed the consumer.

14           First Amended Complaint at 8.

15           As to whether the putative class meets the numerosity requirement, Ms. Kim alleges as  
16 follows:

17                     The exact number of Class members is unknown to Plaintiff at this time, but  
18                     on information and belief, Defendant has threatened many Class members  
19                     throughout the State of Washington, making joinder of each individual  
20                     member impracticable. Ultimately, the Class and members will be easily  
21                     identified through Defendant’s records. Plaintiff believes that the members  
22                     of the Class are geographically dispersed throughout the State, and that  
23                     joinder of all Class members would therefore be impracticable.

24           *Id.* Plaintiffs’ Counsel appear to have asserted numerosity based solely on Ms. Kim’s allegations  
25 alone, as no further instances of allegedly-improper conduct are cited.

26           Coach can demonstrate that establishing numerosity is impossible in this case. In order to  
do so, however, Coach must disclose information about its anti-counterfeiting program. That  
information would include details about the efforts undertaken to identify listings of potentially-  
counterfeit items, to prevent the sale of such items, to identify the source of such items, and to  
prevent the seller and the source of the items from selling further counterfeit products. If

1 disclosed to the public, that information would be invaluable to counterfeiters and potential  
2 counterfeiters, who would use it to evade detection.

3 **III. ARGUMENT**

4 The Court should issue a protective order directing that disclosure of confidential  
5 information and documents describing or revealing online anti-counterfeiting efforts by Gibney  
6 or Coach be restricted to attorneys only. Doing so will permit Coach to engage in a full defense  
7 of the claims in this lawsuit, all of which claims depend on the assertion that Coach did not  
8 conduct a reasonable investigation into Ms. Kim's eBay listing. Without a protective order,  
9 Coach is unable to maintain a defense as to the central issue in the case. Coach also cannot  
10 engage in candid discussions with Plaintiffs' Counsel regarding the basis for the Amended  
11 Complaint, until a protective order is issued. Such communication is vital to resolving  
12 misunderstandings, eliminating ambiguities, and developing a plan and strategy for resolving the  
13 litigation.

14 A protective order will further permit Coach to demonstrate to Plaintiffs' Counsel the  
15 impossibility of numerosity in this putative class action. If Plaintiffs' Counsel still refuses to  
16 dismiss the class allegations after Coach is able to share confidential information Coach will file a  
17 motion to strike class allegations. And if Plaintiffs' Counsel refuses to file an Amended  
18 Complaint removing unsupported allegations regarding the investigation into Ms. Kim's listings,  
19 a protective order will permit Coach to serve a motion for sanctions under Federal Rule of Civil  
20 Procedure 11.

21 The propriety of a protective order here is not a debatable proposition. Federal Rule of  
22 Civil Procedure 26(c)(1) & (c)(1)(g) provide that "[t]he court may, for good cause, issue an order  
23 to protect a party or person from annoyance, embarrassment, oppression, or undue burden or  
24 expense, including . . . requiring that a trade secret or other confidential research, development, or  
25 commercial information not be revealed or be revealed only in a specified way . . . ." Coach's  
26 proposed protective order requiring Plaintiffs' Counsel to keep confidential and treat as



1 “Attorneys Only” the information and documents described above falls squarely within Rule  
2 26(c)(1)(g). “Good cause” requires the party seeking a protective order to demonstrate that  
3 “specific prejudice or harm will result if no protective order is granted.” *See Phillips ex rel.*  
4 *Estates of Byrd v. GM Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) (citing *Beckman Indus.,*  
5 *Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)). As the Ninth Circuit has explained, “[i]f  
6 a court finds particularized harm will result from disclosure of information to the public, then it  
7 balances the public and private interests to decide whether a protective order is necessary.”  
8 *Phillips*, 307 F.3d at 1211 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir.  
9 1995)).

10 Good cause exists here because particularized harm will occur if the information and  
11 documents are disclosed to the public. In particular, counterfeiters and potential counterfeiters  
12 will be better able to circumvent Coach’s anti-counterfeiting efforts. This will erode Coach’s  
13 valuable brand identity. Moreover, the public interest militates in favor of a protective order,  
14 because public disclosure of Coach’s anti-counterfeiting efforts would assist counterfeiters and  
15 potential counterfeiters in distributing low-quality knockoffs to consumers. This would harm the  
16 public and Coach. Plainly, the Court should grant Coach’s motion for a protective order.

17 It is important to note that plaintiffs will not be prejudiced in any way by the entry of the  
18 requested protective order. Even if Coach is unsuccessful in obtaining the cooperation of  
19 Plaintiffs’ Counsel, and even if Coach’s contemplated motions fail, Plaintiffs’ Counsel is  
20 nonetheless free to request in discovery the information sought to be shared at this stage. If  
21 Plaintiffs’ Counsel regards the confidentiality designation of that information to be improper,  
22 Plaintiffs’ Counsel may seek removal of the designation under the confidentiality agreement or  
23 protective order then in place.

#### 24 **IV. CONCLUSION**

25 For all of the foregoing reasons, the Court should grant Coach’s motion for a protective  
26 order.

1 Respectfully submitted this 10th day of March, 2011.

2  
3 *s/ Stelman Keehnel*

4 Stelman Keehnel, WSBA No. 9309

5 R. Omar Riojas, WSBA No. 35400

6 Patrick Eagan, WSBA No. 42679

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Attorneys for defendant and counterclaim plaintiff  
Coach, Inc.

1 **CERTIFICATE OF CONFERENCE**

2 I hereby certify under CR 26(c) of the Local Rules for the United States District Court  
3 for the Western District of Washington that I conferred and attempted to confer with all other  
4 affected parties in an effort to resolve this dispute without Court action, but the parties were  
5 unable to reach a resolution.

6 Dated this 10<sup>th</sup> day of March, 2011

7  
8 *s/Stellman Keehnel*  
9 Stellman Keehnel, WSBA No. 9309  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 10, 2011, I electronically filed the foregoing with the  
3 Clerk of the Court using the CM/ECF System which will send notification of such filing to all  
4 counsel of record.

5 Dated this 10th day of March, 2011.

6 *s/Stellman Keehnel*  
7 Stellman Keehnel, WSBA No. 9309  
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