1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

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, vs. COACH, INC., a Maryland corporation, and COACH SERVICES, INC., a Maryland corporation, Defendants.	Cause No. 2:11-CV-00214 RSM **PLAINTIFF'S OPPOSITION TO COACH'S MOTION FOR PROTECTIVE ORDER AND REQUEST TO STAY MOTION PENDING RULE 26(F) INITIAL CONFERENCE** **[ORAL ARGUMENT REQUESTED]** **NOTE ON MOTION CALENDAR: March 18, 2011**

16
17
18
19
20
21
22
23
24
25
26
27

SUMMARY

The contours of Coach's early litigation strategy have now become clear. Coach's opening salvo came in the form of an ultimatum to Plaintiff's counsel: dismiss the present case or face a defamation lawsuit and a motion for Rule 11 sanctions. When Plaintiff's counsel failed to dismiss the case, Coach sued Plaintiff's counsel for defamation. This defamation lawsuit is clearly a SLAPP ("Strategic Lawsuits Against Public Participation") lawsuit under Washington law, RCW 4.24.525. The defamation suit against counsel is the subject of our currently pending "special motion to strike" Coach's counterclaims.

Having run afoul of Washington's anti-SLAPP policy by suing opposing counsel, Coach now seeks to unilaterally control the discovery process. Despite repeated written and oral requests over several weeks, Coach's counsel has refused to conduct a Rule 26(f) initial discovery conference, or to even schedule such a conference. Coach's counsel asserts that he has

28

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WA 98119
(206) 291-7419

Dockets.Justia.com

not had time to prepare. See, e.g., Eagan Decl., Docket No. 12, Exhibit A at 1. Yet during this same period Coach has found time to answer the complaint, sue opposing counsel, draft lengthy and threatening letters to opposing counsel, draft multiple confidentiality proposals, and submit a motion seeking a protective order (and discussing merits issues). See, e.g., Carlson Decl., Docket No. 9, Ex. A. Therefore, Coach has had ample time to prepare for a Rule 26(f) conference. It refuses to go forward for one reason: because until the conference takes place, the plaintiff may not conduct discovery. FRCP 26(f). Meanwhile, as Coach is well aware, the clock is ticking on the Plaintiff's 180-day deadline to move for class certification. LR 23.

While otherwise refusing to allow discovery, in the present motion Coach makes clear that it intends to cherry-pick evidence from its own files, and use that unilateral evidence to seek dismissal or limitation of this case. Coach admits that it intends to use its self-selected evidence to seek Rule 11 sanctions, to oppose class certification, and to support its defamation claims against opposing counsel. Motion, Docket No. 10 at 3-4. Coach further claims that it needs to bring forth this evidence *now* (while plaintiff cannot test Coach's evidence through discovery), and that this hand-selected evidence must remain hidden from the public within sealed Court files.

The Court should not sanction Coach's effort to unilaterally control discovery and to draw a grossly overbroad veil of secrecy over its proposal to submit unilateral evidence. While Coach certainly has a legitimate interest in protecting documents that derive economic value from remaining confidential, their current protection proposal goes well beyond that. Coach's request to sequester as secret any document "relating to" and "revealing" the central issue in this case – the illegalities in Coach's "counterfeiting program" -- violates Washington's public policy favoring public access to the courts.

Because Coach has refused to confer regarding a discovery plan, this Court should stay the present request for a protective order until the parties have conducted an initial discovery conference and are able to submit a Joint Status Report and Discovery Plan. A discussion of

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

protective order issues should take place as part of a broader discussion of the overall discovery process, a discussion that must fairly address the needs of both parties. Until that time, Coach should be directed to adhere to the local rules, particularly LR 5(g), in seeking to seal documents in the Court file.

ARGUMENT

As to the merits of Coach's protective order, there are several reasons why the request should be denied.

A. COACH HAS FAILED TO SATISFY ITS MEET AND CONFER OBLIGATIONS

Coach failed to satisfy its meet and confer obligation before filing this motion. Coach's counsel never spoke with Plaintiff's counsel regarding the proposed protective order they forwarded on March 7, 2011, just days before filing this motion. Coach's own exhibits demonstrate that the only communication between counsel regarding this proposed protective order was a series of e-mails. Eagan Decl., Exs. C-E.[1] Coach therefore filed this motion without satisfying its Rule 26 and Rule 37 obligation to meet and confer in person on the subject of the Motion.

B. COACH'S PROPOSED PROTECTION ORDER IS OVERBROAD

Coach's proposed protective order is grossly overbroad under Washington law, particularly as to the scope of secrecy it would impose on sealed documents in the Court file. The Washington State Constitution provides that "justice in all cases shall be administered openly." CONST. Article I, § 10. In ruling on protection order issues and issues of sealed court files, the Washington State Supreme has elaborated: "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861

[1] Coach had previously forwarded an entirely different proposed protective order, which was grossly overbroad and which was never agreed to. Coach's current, and very different, proposal was forwarded to Plaintiff's counsel on March 7. It is undisputed that the parties have never discussed in person the protective order proposal that Coach has now forwarded to this Court for decision.

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

(Wash. 2004). Public access is guaranteed in judicial proceedings, both civil and criminal, and this includes access to court documents. *Cohen v. Everett City Council*, 85 Wash.2d 385, 388, 535 P.2d 801 (1975). Washington's GR 15 reflects this policy, requiring that civil court documents may only be sealed after the "the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." Washington GR 15(c)(2). This Court's own local rules also reflect this policy, providing a comprehensive procedure for seeking to seal court documents, LR 5(g), and requiring that the Court not sign any stipulated protective order agreed to by the parties that calls for the sealing of as-yet unidentified documents. LR 26(c)(2).

Coach's proposed protective order would treat as "ATTORNEYS EYES ONLY" -- and require a sealed court file for -- any document: "relating to the online counterfeiting detecting program by Gibney Anthony & Flaherty or Coach that describe or reveal the counterfeit detection program."[2] As Coach knows, this entire case centers on the illegalities inherent in what Coach calls its "counterfeiting program." Coach's grossly overbroad designation would attempt to cloak in secrecy substantially every document in this case, including many documents that are already public and many other documents that are benign. This is a direct affront to Washington's public policy favoring public access to the Courts, as well as the Western District of Washington's local rules on sealing documents.

C. COACH PROACTIVELY SOUGHT NATIONWIDE PUBLICITY REGARDING THE "COUNTERFEITING PROGRAM" THAT IT NOW SEEKS TO CLOAK IN SECRECY

Coach has, for years, actively sought nationwide publicity regarding the very

[2] We note that in its submission to this Court, Coach modified this definition slightly, limiting it to documents "that describe or reveal the counterfeit detection program." We are unclear what documents Coach believes would or would not "reveal" its counterfeit detection program. Even with this modified definition, Coach's proposal is grossly overbroad, potentially encompassing any document deriving out of, or referring or relating to, its counterfeiting efforts, no matter how benign.

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

"counterfeiting program" it now seeks to shroud in secrecy. See Carlson Decl., Ex. A. Coach has even designated a "code name" for the public relations warfare it wages against trademark counterfeiting: "Operation Turnlock." This operation, on which Coach has spent millions of dollars, involves an aggressive nationwide campaign of litigation and public relations. As part of this campaign, Coach has filed hundreds of lawsuits alleging trademark infringement.[3] Coach's general counsel admitted that Coach uses Operation Turnlock as a public relations tool, to achieve "general deterrence" against counterfeiters. Coach employees have conducted multiple media interviews and have talked openly about Operation Turnlock. *Id*.

Coach employs the media and courts to publically threaten consumers with trademark lawsuits if they "mess with" Coach. Coach also sends highly threatening letters to consumers, falsely informing them that they violated trademark law and are subject to millions of dollars in liability. This includes consumers like plaintiff Gina Kim, who did absolutely nothing wrong or illegal. Yet now that Coach has been called to account for these abuses, it apparently sees the value in keeping its anti-counterfeiting efforts secret. It demands that details of its program be kept private and locked away in sealed Court files. Coach should not be allowed to blare publicly at consumers using "Operation Turnlock" while, at the same time, shielding the more unsavory aspects of that program from public view.

Coach is certainly entitled to seek protection for any document that it can demonstrate derives independent economic value from remaining confidential. *See* Washington's Uniform Trade Secrets Act, RCW 19.108.010 *et seq*.; Washington GR 15. In doing so, Coach should be required to comply with Washington law and with the local rules of the Western District of Washington regarding sealing documents in this Court's file. LR 5(g). Instead, Coach requests a protective order that would shroud in secrecy substantially any document that Coach *wants*

[3] Numerous Coach documents have been made public through these lawsuits, yet Coach's current protective order would treat as confidential even documents that have been previously made public.

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

shrouded in secrecy. This would usurp this Court's local procedures for sealing documents. It is also noteworthy that Coach has submitted no declaration or evidence from any Coach employee justifying its request for ATTORNEYS ONLY confidentiality and sealed court files in this case. Given Washington's strong public policy favoring public access to the courts, this failure of evidence alone is fatal to Coach's motion.[4]

D. THE LOCAL COURT RULES ADEQUATELY PROTECT COACH'S CONFIDENTIALITY INTERESTS

Coach's proposed sealing procedures would usurp this Court's local rules concerning the sealing of documents. This Court's local rules make clear that "There is a strong presumption of public access to the court's files." "With regard to dispositive motions, this presumption may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting the court's files from public review." LR 5(g)(2). The local rules define a procedure to make such a showing, which requires evidentiary support from the party seeking to designate a document as a secret. In contrast, Coach's proposed protective order would reverse this process, requiring *the Plaintiff herself*, if she were to file a document that Coach had deemed ATTORNEYS EYES ONLY, to somehow submit evidence to support *Coach's* demand that the document be filed under seal. *See* [Proposed] Protective Order, Docket No. 11, ¶ 2. This is not how the process can or should work, and Coach's sealing proposal is untenable for that reason.

E. COACH'S PROPOSED CONFIDENTIALITY AGREEMENT IS UNILATERAL AND WOULD UNFAIRLY BIND ONLY THE PLAINTIFF

Coach's proposed confidentiality agreement would only apply to and bind the Plaintiff

[4] Coach should not be allowed to bring forward such evidence solely on reply, where plaintiff will be given no opportunity to test or respond to that evidence. It was Coach's burden to support its motion with competent evidence, and Coach has failed to do that. Moreover, the declaration from Mr. Eagan, an associate attorney at DLA Piper, is insufficient to substantiate Coach's request for secrecy. Mr. Eagan's bare statements that "the details of Coach's online anti-counterfeiting efforts are highly confidential," and that this "information would be enormously valuable to counterfeiters and potential counterfeiters, who would use such information as a blueprint for evading detection," etc., are wholly without foundation and should not be considered. *See* Eagan Declaration, ¶¶ 7-8.

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

1 and her counsel. Coach itself, and its counsel, would be exempt from the very burdensome
2 procedures imposed in Coach's proposal. The Plaintiff exclusively would be restricted in the
3 handling of documents and Coach solely would yield the power to designate documents as
4 confidential. Coach's proposal would impose extreme burdens on the Plaintiff, and only the
5 Plaintiff, complicating every aspect of this case, including: (1) document management and
6 dissemination, (2) working with experts, (3) filing documents with the Court, and (4) conducting
7 depositions. Coach itself would apparently be exempt from all of these burdens.

8 As one example, in an almost humorous attempt to usurp the attorney-work product
9 protection and gain an unfair litigation advantage, Coach's proposal would require Plaintiff's
10 counsel to give Coach's counsel ten days advance notice of its plans to use documents and
11 information at every deposition. Proposed Protective Order, Docket No. 11, ¶ 1(d). Coach
12 would then be empowered, prior to every deposition, to move for an order limiting that
13 deposition. Of course, Coach itself would not be subject to any such requirement. Furthermore,
14 Coach's proposal would require the Plaintiff, and only the Plaintiff, to (in certain circumstances)
15 provide to Coach's counsel a copy of court filings ten days in advance of filing. Id., ¶ 2(a)-(b).
16 It would impose many other unilateral, and highly burdensome, obligations on the Plaintiff, and
17 only the Plaintiff, in relation to all Court filings. The imposition of such one-sided logistical
18 burdens, on only one party, is grossly unfair. Coach's attempt to achieve such a massive, one-
19 sided advantage is perhaps the most telling aspect of its current request.

20 As noted above, Coach has refused to meet and confer or to conduct an initial discovery
21 conference, despite repeated written and oral requests from Plaintiff's counsel. Given the
22 importance of these issues, and Washington's strong public policy favoring open courts, the
23 Court should defer any consideration of Coach's protective order request at least until the parties
24 complete the initial discovery conference and submit a Discovery Plan. Only then can the
25 Plaintiff and the Court fairly judge the scope of protection requested by Coach, and the
26 appropriate logistics for effectuating that protection. At this early stage in the case, Coach

27
28

CARLSON LEGAL
100 W. HARRISON ST.
SUITE N440
SEATTLE, WASHINGTON 98119
(206) 291-7419

should not be allowed to avoid discovery, cherry-pick evidence, and shroud its unilateral evidence in an overbroad veil of secrecy. Coach should simply follow the local rules.

CONCLUSION

Plaintiff respectfully requests that the Court deny Coach's current request for the aforementioned reasons. During this early phase of the litigation, the local rules provide ample protection to a party seeking to seal court documents.

DATED this 16th day of March, 2010.

/s/
Jay S. Carlson, WSBA No. 30411
Carlson Legal
Christopher Carney, WSBA No. 30325
Carney Gillespie & Isitt PLLC
Jason Moore
Van Eyk & Moore, PLLC
100 W. Harrison St., Suite N440
Seattle, WA 98119