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, and as to Ms. Kim, counterclaim defendant,

v.

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

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

NO. 2:11-cv-00214-RSM

COACH, INC.'S SURREPLY IN OPPOSITION TO PLAINTIFF'S COUNSEL'S MOTION TO STRIKE AND FOR SANCTIONS

NOTED FOR CONSIDERATION: APRIL 1, 2011

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Pursuant to Local Rule 7(g), defendant/counterclaimant Coach, Inc. ("Coach") submits this surreply asking the Court to strike two portions of plaintiff Kim's counsel's Reply in Support of Motion to Strike and for Sanctions Pursuant to Washington's Anti-SLAPP Statute (the "Reply") (Dkt. No. 31). In the Reply, at 1:22-2:3 and 3 n.4, plaintiff's counsel twice baldly and baselessly accuse Coach of violating its duty of candor to the Court by allegedly failing to disclose that the Ninth Circuit, in *Northon v. Rule*, No. 07-35319, 2011 WL 135720, – F.3d – (9th Cir. Jan. 18, 2011), supposedly overruled *Verizon Delaware, Inc. v. Covad Communications Co*., 377 F.3d 1081 (9th Cir. 2004). As discussed below, nothing in *Northon* purports to overrule *Verizon, sub silentio* or otherwise. Counsel for Coach take very seriously these baseless accusations of professional misconduct. *See* RPC 3.3(a). Plaintiff's counsel's accusations are unsupported, inappropriate, and immaterial, and must be stricken.

1. Plaintiff's counsel fail to acknowledge that *Northon* ***cannot*** overrule *Verizon,* because ***a Ninth Circuit panel cannot overrule precedent established by a prior Ninth Circuit panel*** — an *en banc* decision would be necessary. *See Murray v. Cable Nat'l Broadcasting Co.*, 86 F.3d 858, 860 (9th Cir. 1996) ("Murray asks us to do what we cannot: overrule a prior decision of this court. '***[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent.***'") (quoting *U.S. v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995)) (emphasis added). Thus, even if *Northon* purported to overrule *Verizon, Verizon* remains the law in the Ninth Circuit unless and until an *en banc* panel overrules it. Plaintiff's counsel conspicuously omit this dispositive fact while brazenly accusing Coach's counsel of unethical conduct.

2. It is facially apparent from *Northon* that the Ninth Circuit panel did not intend or attempt to overrule *Verizon*. **In *Northon*, the Ninth Circuit cites *Verizon* with approval.** *Northon*, 2011 WL 135720 at *1 (citing *Verizon*, 377 F.3d at 1090). The balance of the opinion is silent on *Verizon*, saying not a word about supposedly overruling it. Plaintiff's counsel argue that the Ninth Circuit panel in *Northon* overruled a precedent that it cites favorably, and without saying that it was overruling that precedent, without explaining why it

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was supposedly overruling the precedent, and *without even mentioning the precedent again after citing it favorably*. Plaintiff's counsel inexplicably ignore this incongruity in accusing counsel for Coach of professional misconduct.

Indeed, after *Northon*, courts in this circuit continue to cite *Verizon* with approval for the identical proposition for which Coach cited *Verizon*. *See, e.g., Z.F. v. Ripon Unified School. Dist.*, No. 2:10-cv-00523-GEB-JFM, 2011 WL 356072 at *9-*11 (E.D. Cal. Feb. 2, 2011) ("[Counterclaim-defendants] seek to strike the malicious prosecution claim under California's anti-SLAPP statute. However, reaching the ***merits*** of [Counterclaim-defendants'] anti-SLAPP motion ***before Counterclaimants could amend*** their malicious prosecution claim would 'directly collide with Fed.R.Civ.P. 15(a)'s policy favoring liberal amendment.'"; denying counterclaim-defendants' anti-SLAPP motion to strike) (quoting *Verizon*, 377 F. 3d. at 1091) (emphasis added). Plainly, *Northon* is not the sea change that plaintiff's counsel urge.[1]

3. *Northon* does not even address the dispositive issue in our case and in *Verizon, i.e.*, the issue *Verizon* decided in Coach's favor -- amendment of a complaint or counterclaim to remove the challenged claims defeats an anti-SLAPP motion to strike. In *Northon*, the plaintiffs failed to amend their complaint to remove the claims that were the subject of the anti-SLAPP special motion to strike. *Northon*, 2011 WL 135720, at *1. Rather, a motion to strike ***still-pending*** claims was presented to the trial court, which granted the motion to strike. *Id*. at *1 ("The district court ***granted*** the Defendants' special motion to strike the Plaintiffs' claims and dismissed the case….") (emphasis added). Under such circumstances, the court awarded fees to the defendants because they ***prevailed*** on the special motion to strike ***extant*** claims, thereby creating an entitlement to fees under Oregon law. *Id.*

4. Where plaintiff's counsel go wrong is in fundamentally misapprehending the *Erie* analysis in both *Verizon* and *Northon.* In *Verizon*, the Ninth Circuit squarely holds that the

[1] Plaintiff's counsel state that "it is clear" Judge Lasnik decided *Arata v. City of Seattle*, No. C10-1551-RSL, 2011 WL 248200 (W.D. Wash. Jan. 25, 2011) without being "aware of *Northon,"* even though *Arata* was decided a week **after** *Northon.* Reply at 3 n.3. Plaintiff's counsel are apparently suggesting that Judge Lasnik and his clerks do not bother to Shepardize or otherwise check their citations or look at recent cases before issuing decisions.

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federal rule permitting amendment to remove a claim challenged under an anti-SLAPP statute controls; a state cannot dictate the *procedure* to be followed by a federal court. In *Northon*, the Ninth Circuit reaffirmed that a party may seek fees, as a substantive right, in federal court if the purportedly offending claim is still in the case when the strike motion comes on for hearing. Thus, if Coach had not exercised its right under Rule 15 to amend its counterclaim (and if plaintiff's counsel could satisfy the standards of Washington's anti-SLAPP statute), plaintiff's counsel could have sought fees. But ***Coach did exercise its right to amend under Rule 15***, and so there was no purportedly offending counterclaim remaining to be attacked. Thus, in our case, the *Erie* analysis of *Verizon* governs; the claims that are the subject of the special motion to strike are no longer pending; and plaintiff's counsel's pursuit of the motion is frivolous:

> We have previously confirmed that defendants sued in federal courts can bring anti-SLAPP motions to strike state law claims and are entitled to attorneys' fees and costs ***when they prevail***. ***But we have also cautioned that procedural state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure*** and have accordingly refused to apply certain … provisions of the anti-SLAPP statute because they would conflict with Fed.R.Civ.P. 56. …***[G]ranting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed.R.Civ.P. 15(a)'s policy favoring liberal amendment.*** [Defendant] argues that to accept the approach of *Vess* promotes forum shopping, encouraging plaintiffs to sue in federal courts rather than state courts because they would get "one free shot at a SLAPP suit before amending the complaint." ***But a direct collision with a federal procedural rule exists***.… ***If*** the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants.

377 F.3d at 1091-92 (citations omitted; emphasis added). The limited holding in *Northon* is logical: an anti-SLAPP defendant who prevails on the merits of an anti-SLAPP claim is entitled to an award of fees. This is completely consistent with *Verizon*. In our case, however, it is a legal impossibility for plaintiff's counsel to prevail on the special motion to strike because the challenged counterclaims literally are no longer available to strike. Thus, *Verizon* is good law; *Verizon* controls; and *Verizon* disposes of all of plaintiff's counsel's spurious bases for contending that counsel for Coach violated any professional responsibility. The Court should strike the groundless allegations of professional misconduct at 1:22-2:3 and 3 n.4 of the Reply.

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Respectfully submitted this 6th day of April, 2011.

s/ Stellman Keehnel

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Attorneys for defendant and counterclaimant Coach, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all counsel of record.

Dated this 6th day of April, 2011.

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