

1 THE HONORABLE RICARDO S. MARTINEZ

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

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

12 Plaintiffs, and as to Ms.
13 Kim, counterclaim
14 defendant,

13 v.

14 COACH, INC., a Maryland corporation,
15 and COACH SERVICES, INC., a
16 Maryland corporation,

16 Defendants, and, as to
17 Coach, Inc., counterclaim
18 plaintiff.

NO. 2:11-cv-00214-RSM

**COACH, INC.'S OPPOSITION TO
SPECIAL MOTION TO STRIKE AND
FOR SANCTIONS**

FILED UNDER SEAL

**NOTED FOR CONSIDERATION:
APRIL 1, 2011**

19 Coach, Inc. ("Coach") hereby submits its opposition to the special motion to strike filed
20 by plaintiffs Jay Carlson and Christopher Carney ("Plaintiff's Counsel"). Briefing by Coach is
21 unnecessary on the motion, because **the claims that are the subject of the motion are no**
22 **longer part of this lawsuit**, having been eliminated by Coach's amended pleading. *See* Coach,
23 Inc.'s Amended Answer, Defenses, and Affirmative Defenses to First Amended Complaint,
24 and Amended Counterclaim (Dkt. No. 21). Plaintiff's Counsel were made aware of this fact,
25 yet refused to withdraw their mooted motion. Out of an abundance of caution, Coach submits
26 this opposition brief, despite the fact that Plaintiff's Counsel's motion is plainly moot.

COACH, INC.'S OPPOSITION TO SPECIAL
MOTION TO STRIKE – 1
NO. 2:11-cv-00214-RSM

DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 • Tel: 206.839.4800

1 **I. INTRODUCTION**

2 Plaintiff’s Counsel conducted a televised interview in which they falsely stated that
3 Coach “did nothing to investigate” before writing to plaintiff Gina Kim about her effort to sell
4 on eBay a handbag she described as a “NEW” Coach bag. In that same interview, Plaintiff’s
5 Counsel also falsely represented what Coach’s New York lawyer wrote in his letter to Ms.
6 Kim.

7 Plaintiff’s Counsel’s defamatory statements led loyal, long-time Coach customers to
8 write to Coach to say that they would never again buy Coach products. In short, Plaintiff’s
9 Counsel’s televised defamation of Coach caused real and substantial injury to Coach.
10 Plaintiff’s Counsel blatantly misrepresented both the content and the context of the letter
11 received by Ms. Kim. For an attorney to appear on television and make such a gross and
12 damaging misrepresentation about Coach is the very essence of defamation. Moreover,
13 Plaintiff’s Counsel’s irresponsible statements were made without Plaintiff’s Counsel bothering
14 to ask Coach what steps had been taking before its New York attorney sent a letter to Ms. Kim.
15 Plaintiff’s Counsel were indifferent to the truth. Their push to promote themselves on
16 television resulted in their recklessly disregarding the truth.

17 Coach responded logically to Plaintiff’s Counsel’s defamation and the resulting loss of
18 revenue. After Plaintiff’s Counsel filed a First Amended Complaint seeking a declaration that
19 they had not defamed Coach, Coach filed a mirror-image counterclaim, seeking a ruling from
20 this Court that Plaintiff’s Counsel had defamed Coach in the televised interview.

21 By seeking a declaration that they had not defamed Coach, Plaintiff’s Counsel gave a
22 strong signal that they desired, in this lawsuit, a full resolution of their liability to Coach.
23 Apparently, that was not Plaintiff’s Counsel’s intended signal – for when Coach filed its
24 mirror-image defamation claim, Plaintiff’s Counsel took great umbrage and filed the subject
25 motion. *See* Motion to Strike and for Sanctions Pursuant to Washington Anti-SLAPP Statute,
26 RCW 4.24.525 (Dkt. No. 9) (the “Motion”). With Plaintiff’s Counsel having clarified that they

1 do not want a complete airing in this lawsuit of their exposure based on their defamation of
2 Coach, Coach again responded logically. On March 24, Coach filed an amended counterclaim,
3 as a matter of right, under Fed.R.Civ.P. 15(a)(1)(A). (Dkt. No. 21.) In its amended
4 counterclaim, Coach does not assert any claims against Plaintiff's Counsel. Thus, the
5 counterclaims that are the entire subject of the Motion no longer exist. The Motion is moot and
6 must be dismissed.

7 Controlling, on-point Ninth Circuit precedent holds that elimination of the challenged
8 claims, through amendment of a complaint or counterclaim, *after the filing of an anti-SLAPP*
9 *special motion to strike*, defeats the special motion to strike outright. *See Verizon Del., Inc. v.*
10 *Covad Comm. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (affirming denial of anti-SLAPP
11 motion to strike when claims had been superseded by an amended complaint). Despite Coach
12 informing Plaintiff's Counsel of this controlling, dispositive authority, Plaintiff's Counsel have
13 refused to withdraw the Motion. *See* Declaration of Stelman Keehnel in Support of Defendant
14 Coach, Inc.'s Opposition to Special Motion to Strike ("Keehnel Dec.") at ¶ 4. The Court should
15 deny the Motion as moot. The Motion truly is frivolous in light of Coach having eliminated the
16 very counterclaims that are the subject of the Motion.

17 If *Verizon* had never been decided, or if Coach had not withdrawn the counterclaims
18 that are the subject of the Motion, the Motion would nonetheless fail. This putative class action
19 involves a grand total of, at most, two class members – including plaintiff Ms. Kim. Coach's
20 New York lawyers sent a total of 18 letters to Washington residents. *See* Declaration of John
21 Macaluso in Support of Defendant Coach, Inc.'s Opposition to Special Motion to Strike
22 ("Macaluso Dec.") at ¶ 16. Already, it is clear that at least 16 of those 18 recipients were
23 selling counterfeit Coach products. *See* Macaluso Dec. at ¶ 29. Considering this lack of
24 numerosity, there is no possibility of class certification, and no "public concern" is addressed
25 by slandering Coach in a televised statement. Washington's anti-SLAPP statute simply does
26 not apply here. In addition, given the patent falsity of Plaintiff's Counsel's televised

1 statements, and given Plaintiff's Counsel's reckless disregard for the truth, Coach would
2 prevail even if it had not withdrawn its challenged counterclaims and even if a "class" of one or
3 two individuals rendered this private dispute a matter of "public participation."

4 **II. THE MOTION MUST BE DENIED AS MOOT**

5 As an initial, dispositive matter, Plaintiff's Counsel's Motion must be denied as moot.
6 The counterclaims that are the only subject of the Motion are no longer part of this lawsuit, as
7 they are not included in Coach's amended counterclaim, filed March 24, 2011. (Dkt. No. 21.)
8 The relief sought by Plaintiff's Counsel – early dismissal of claims – cannot be granted,
9 because the challenged counterclaims are not part of the operative pleading. The challenged
10 counterclaims literally are no longer available to strike.

11 The Ninth Circuit Court of Appeals and the United States District Court for the Western
12 District of Washington have both addressed this issue directly, and both held that *amendment*
13 *of a complaint or counterclaim to remove the challenged claims defeats an anti-SLAPP*
14 *motion to strike*. See *Verizon Del., Inc. v. Covad Comm. Co.*, 377 F.3d 1081, 1091 (9th Cir.
15 2004) (affirming denial of special motion to strike because plaintiff amended its complaint
16 under Fed.R.Civ.P. 15(a), removing the claims that were the subject of the motion) (citing *Vess*
17 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 & 1109-10 (9th Cir. 2003)); *Arata v. City of*
18 *Seattle*, No. C10-1551-RSL, 2011 WL 248200, at *1-*2 (W.D. Wash. Jan. 25, 2011) ("The
19 Ninth Circuit has determined . . . that where a federal litigant has requested leave to amend his
20 complaint, Rule 15(a)'s policy favoring liberal amendment is not overcome simply because an
21 anti-SLAPP motion is pending. The Court is to conduct its analysis of defendant's anti-SLAPP
22 motion with respect to the amended complaint, not plaintiff's original pleading.") (internal
23 citation omitted).

24 There is no meaningful distinction between those cases and this one. Indeed, in *Verizon*
25 and *Arata*, courts were actually faced with concurrently pending motions to amend and motions
26 to strike under anti-SLAPP laws. The courts in those cases had to determine whether to grant

1 motions for leave to amend *before* turning to the narrower and easier issue before this Court.
2 In our case, Coach's amendment has already taken place, so the only "analysis" that is
3 necessary is on the mootness issue. The Ninth Circuit has made this Court's decision easy,
4 leaving this Court with no option but to deny Plaintiff's Counsel's motion as moot.

5 *Verizon* stands squarely for the proposition that an anti-SLAPP motion must be applied
6 to the **amended** pleading (*i.e.*, in our case, Dkt. No. 21, which does *not* contain the challenged
7 counterclaims). The question in *Verizon* was whether the district court had erred in granting a
8 motion to amend while a special motion to strike was pending, and then denying the special
9 motion to strike because the amended complaint did not include the claims that were subject to
10 the special motion to strike. *Verizon*, 377 F.3d at 1090-91. The appellant argued that
11 permitting an amendment would defeat the state's policy behind the anti-SLAPP statute by
12 permitting a party to avoid sanctions by amending its complaint. *Id.* The Ninth Circuit
13 emphatically rejected this argument, making it clear that the federal policy favoring liberal
14 amendment of pleadings under Fed.R.Civ.P. 15(a) is binding on federal courts and trumps a
15 state's anti-SLAPP statute as a matter of law. *Id.* For that reason, the district court was correct
16 in granting the motion for leave to amend under Fed.R.Civ.P. 15(a). *Id.* at 1091 ("As *Vess*
17 implicitly suggest, granting a defendant's anti-SLAPP motion to strike a plaintiff's initial
18 complaint without granting the plaintiff leave to amend would directly collide with
19 Fed.R.Civ.P. 15(a)'s policy favoring liberal amendment."). After leave to amend was granted
20 and the claims that were the subject of the special motion to strike removed, there was no doubt
21 that an anti-SLAPP motion to strike is mooted by an amended pleading:

22 Moreover, the purpose of the anti-SLAPP statute, the early dismissal of
23 meritless claims, would still be served if plaintiffs eliminated the
24 offending claims from their original complaint ***If the offending***
25 ***claims remain in the first amended complaint, the anti-SLAPP remedies***
26 ***remain available to defendants.***

Verizon, 377 F.3d at 1091 (emphasis added).

Similarly, in *Arata*, Judge Lasnik recently considered a plaintiff's motion for leave to

1 amend concurrently with the defendant's special motion to strike under Washington's anti-
2 SLAPP statute, RCW 4.24.525. *Arata*, No. C10-1551-RSL, 2011 WL 248200, at *1-*2.
3 Citing *Verizon*, the Court granted leave to amend and then denied anti-SLAPP remedies
4 because the challenged claims had been removed from the complaint *via* the amendment. *Id.*
5 The Court further rejected the defendant's argument that amendment would not moot the
6 special motion to strike:

7 The Ninth Circuit has determined, however, that where a federal litigant
8 has requested leave to amend his complaint, Rule 15(a)'s policy favoring
9 liberal amendment is not overcome simply because an anti-SLAPP motion
10 is pending. . . . ***The Court is to conduct its analysis of defendant's anti-***
11 ***SLAPP motion with respect to the amended complaint, not plaintiff's***
12 ***original pleading.*** Because the proposed amended complaint asserts no
13 claims against defendant McLean, her anti-SLAPP motion fails as to that
14 pleading. No fees or sanctions will be awarded.

15 *Id.* at *2 (emphasis added); *see also EchoStar Satellite, L.L.C. v. Viewtech, Inc.*, No. 07-CV-
16 1273, 2009 WL 1668712, at *6-*7 (S.D. Cal. May 27, 2009) ("*Verizon* establishes that an
17 award of attorneys' fees is not appropriate where the plaintiff eliminates the meritless state-law
18 claims from the subsequently filed *amended* complaint.") (emphasis in original).

19 *Verizon* and *Arata* stand squarely for the proposition that an anti-SLAPP motion must
20 be applied to the post-amendment pleading, even if amendment of the counterclaim took place
21 after the filing of a special motion to strike. In *Verizon* and *Arata*, the moving parties at least
22 could argue (unsuccessfully) that motions to amend should be denied and the anti-SLAPP
23 motions applied to the original claims. In our case, on the other hand, Coach amended its
24 counterclaims as a matter of right, 21 days after serving it, under Fed.R.Civ.P. 15(a)(1)(A).
25 That Rule gave Coach the unqualified right to file the amended pleading that it filed on March
26 24, 2011. (Dkt. No. 21.) That amended pleading contains none of the counterclaims to which
Plaintiff's Counsel's Motion is directed. *Verizon* permits this Court no discretion under these
circumstances. Plaintiff's Counsel's Motion must be denied as moot.¹

¹ In correspondence with counsel for Coach, Plaintiff's Counsel have inquired into Coach's motives for withdrawing its counterclaims against Plaintiff's Counsel. Coach's motives are irrelevant to the instant Motion, COACH, INC.'S OPPOSITION TO SPECIAL MOTION TO STRIKE – 6
DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044 • Tel: 206.839.4800

1 The counterclaims that are the subject of the special motion to strike are not pending,
2 and there is no procedural mechanism for resurrecting those claims. *Verizon* and *Arata* make
3 clear that the Motion must be denied as moot and that no anti-SLAPP remedies are available.²

4 **III. COACH WOULD HAVE PREVAILED ON THE MOTION TO STRIKE**

5 Because *Verizon* is dispositive and mandates rejection of the Motion as a matter of law,
6 the Court need not address the issue of whether the now-superseded counterclaims would be
7 subject to dismissal under Washington's anti-SLAPP statute. Indeed, dealing with that
8 hypothetical question is akin to having the home team go to bat in the bottom of the ninth when
9 the home team is ahead at the end of 8 1/2 innings. Nonetheless, Coach here shows why it
10 would hit a homerun in the bottom of the ninth. If the dispositive *Verizon* decision did not
11 exist, and if Coach had not amended to withdraw the counterclaims challenged by the Motion,
12 Coach would prevail on the Motion. Plaintiff's Counsel have not established by a
13 preponderance of the evidence that their statements that were the subject of the no-longer-
14 extant counterclaims were based on "public participation and petition" under the anti-SLAPP
15 statute. Thus, the statute does not apply at all. Further, even if the statute applied, Coach can
16 demonstrate by clear and convincing evidence a probability of success on the merits.

17 No Washington state court has construed Washington's anti-SLAPP statute. The
18 United States District Court for the Western District of Washington is the only court in
19 Washington to have construed the anti-SLAPP statute. *See Aronson v. Dog Eat Dog Films*, 738
20 F. Supp. 2d 1104 (W.D. Wash. 2010); *Castello v. City of Seattle*, No. C10-1457MJP, 2010 WL

21
22 because the amendment has already taken place and because Coach had an unqualified right to amend within the
23 21-day period. Nevertheless, Coach's reason for withdrawing its claims is clear from the conduct of this Motion
24 by Plaintiff's Counsel. Coach's valid defamation claims became a huge distraction from the underlying lawsuit –
25 which, it should be noted, involves only the brief removal of Ms. Kim's inaccurate listing from eBay. It is
26 difficult to imagine a theory of damages in such a case, and Plaintiff's Counsel have never stated one. Despite the
fact that Coach has been injured by Plaintiff's Counsel's defamation, Coach decided that it would prefer to amend
its answer and counterclaims, and focus on defeating the frivolous lawsuit filed by Plaintiff's Counsel.

² Counsel for Coach made Plaintiff's Counsel aware of these cases on Thursday, March 24, 2011, and requested
that Plaintiff's Counsel withdraw the Motion. Despite the existence of controlling precedent, Plaintiff's Counsel
refused to do so. *See Keehnel* Dec. at ¶ 4. Coach submits that the refusal to withdraw a motion that has been
mooted renders the motion frivolous.

1 4857022 (W.D. Wash. Nov. 22, 2010). Because Washington’s anti-SLAPP statute mirrors
2 California’s Anti-SLAPP Act, this District has looked to California precedent as persuasive
3 authority concerning Washington’s anti-SLAPP statute. *See Aronson*, 738 F. Supp. 2d at 1109-
4 10 (noting that Washington’s anti-SLAPP statute is “patterned” after California’s Anti-SLAPP
5 Act and citing California law as “persuasive authority”); *Castello*, 2010 WL 4857022 at *4
6 (“This Court . . . looks to California precedent as persuasive authority concerning the new Anti-
7 SLAPP statute.”).

8 **A. The No-Longer-Extant Counterclaims Were Not Based On An Action**
9 **Involving Public Participation And Petition**

10 Plaintiff’s Counsel have not demonstrated that the counterclaims that are the subject of
11 their Motion – which are no longer part of this lawsuit – arose out of statements “involving
12 public participation and petition” under RCW 4.24.525(2). Consequently, Coach would have
13 prevailed on the Motion, for the statute does not apply at all if the threshold requirement is not
14 satisfied. Indeed, the Washington Legislature has declared that the purpose of the statute is to
15 protect citizens who participate in matters of *public concern* and provide information to *public*
16 *entities*. RCW 4.24.525 Historical and Statutory Notes at (1)(d) (“The legislature finds and
17 declares that: It is in the public interest for citizens to participate in matters of public
18 concern and provide information to public entities and other citizens on public issues....”).

19 Washington’s anti-SLAPP statute requires a party bringing a special motion to strike to
20 demonstrate, by a preponderance of the evidence, that the claims at issue are based on an action
21 “involving public participation and petition.” RCW 4.24.525(2). In RCW 4.24.525(2), the
22 Washington Legislature defined the phrase “an action involving public participation and
23 petition” as including the following categories, in pertinent part:

- 24 (b) Any statement made, or written statement or other document submitted,
25 in connection with an issue under consideration or review by a
26 legislative, executive, or judicial proceeding or other governmental
proceeding authorized by law.
- (c) Any oral statement made, or written statement or other document
submitted, that is reasonably likely to encourage or to enlist public
participation in an effort to effect consideration or review of an issue in a

- 1 legislative, executive, or judicial proceeding or other governmental
proceeding authorized by law;
- 2 (d) Any oral statement made, or written statement or other document
submitted, in a place open to the public or a public forum in connection
3 with an issue of public concern;
- 4 (e) Any other lawful conduct in furtherance of the exercise of the
constitutional right of free speech in connection with an issue of public
concern, or in furtherance of the exercise of the constitutional right of
5 petition.

6 RCW 4.24.525(2)(b)-(e). Plaintiff's Counsel have asserted that each of the above prongs
7 applies to their defamatory statements that were the subject of the superseded counterclaims
8 and the Motion.

9 As an initial matter, Plaintiff's Counsel's showing on the issue of public participation
10 and petition is wholly insufficient. See Motion (Dkt. No. 9) at 4-5. The defamatory statements
11 by Plaintiff's Counsel involved (1) the contents of a letter sent by an attorney for Coach to one
12 private citizen (plaintiff Ms. Kim), and (2) the efforts that Coach or its attorneys undertook to
13 investigate potential counterfeiting by Ms. Kim. Without conducting any investigation, without
14 citing any facts, and without even informing the public of the full facts surrounding the single
15 instance that is at issue, Plaintiff's Counsel chose to file a frivolous class action lawsuit against
16 Coach. The mere labeling of a lawsuit as a class action does not generate an issue of public
17 concern, where that class action designation should never have been made.

18 Plaintiff asserts a "class" of Washington residents who, over the prior three years,
19 received a letter from Coach or its attorneys alleging an attempt to sell counterfeit Coach
20 products, "where such allegation was made without basis...." First Amended Complaint, ¶ V.1
21 (Dkt. No. 4). The fact is that Coach's New York lawyers sent only 18 letters to Washington
22 residents. Macaluso Dec. at ¶ 16. [REDACTED]

23 [REDACTED]
24 [REDACTED]

25 [REDACTED] A class of two people? This is far below
26 the minimum necessary to satisfy the numerosity requirement of Fed.R.Civ.P. 23(a). Plainly,

1 this matter concerns Coach's dealings with Ms. Kim alone. This is not a class action. This is
2 not a matter of public concern.

3 Similarly, the fact that the lawsuit tangentially involves Coach's anti-counterfeiting
4 efforts does not generate an issue of public concern. If Coach's actions with respect to a single
5 potential counterfeiter are a matter of public concern, then it is difficult to imagine a subject
6 that would not be a matter of public concern. Under the broad interpretation urged by
7 Plaintiff's Counsel, the only activities that would not be covered by the "public participation
8 and petition" prong would be purely private conversations. Such an interpretation cannot have
9 been intended.

10 In addition, the statute should not apply here at all because Plaintiff's Counsel
11 themselves first injected their defamation claim into this lawsuit by filing a claim for
12 declaratory relief. *See* First Amended Complaint (Dkt. No. 4) at ¶ IV.5.1-9. Plaintiff's
13 Counsel affirmatively – and first – sought judicial relief with respect to their defamation by
14 seeking a ruling that their televised statements are not defamatory. *Id.* Only *after* Plaintiff's
15 Counsel filed an amended complaint that directly seeks a ruling as to whether they defamed
16 Coach, did Coach then file mirror-image counterclaims seeking a judicial resolution that
17 Plaintiff's Counsel's televised statements are defamatory. To Coach's knowledge, no court has
18 been faced with this unique circumstance, *i.e.*, the party that filed a special motion to strike
19 under an anti-SLAPP statute also first filed a declaratory judgment action on whether the
20 subject statements are defamatory. This Court should hold that a party in Plaintiff's Counsel's
21 unique position is precluded from using Washington's anti-SLAPP statute to attack a mirror
22 image defamation claim. Permitting the application of the anti-SLAPP statute in cases initiated
23 by a declaratory judgment filing rewards declaratory plaintiffs for goading their opponents into
24 filing claims that they otherwise might not have brought and encourages, rather than
25 discourages, litigation and forum-shopping. This cannot be the intent of the Legislature.

26 As to the specific provisions cited (without evidentiary support) by Plaintiff's Counsel,

1 the first two address “[a]ny oral statement made . . . in connection with an issue under
2 consideration or review by a . . . judicial proceeding” and “[a]ny oral statement made . . . that is
3 reasonably likely to encourage or to enlist public participation in an effort to effect
4 consideration or review of an issue in a . . . judicial proceeding . . .” RCW 4.24.525(2)(b) &
5 (c). Plaintiff’s Counsel assert that, because their false statements were made in a televised
6 interview that was partially about this lawsuit, *any* statement they made is somehow protected
7 by the above provisions. In fact, when Plaintiff’s Counsel made their false statements, the
8 lawsuit was less than a day old, there had been no opportunity to test the sufficiency of the
9 pleadings, and the Court had not been asked to consider or review any of the alleged facts that
10 were the subject of the false statements made by Plaintiff’s Counsel. There was no “issue
11 under consideration or review” for purposes of RCW 4.24.525(2)(b) & (c). There was only a
12 “judicial proceeding.” Plaintiff’s Counsel’s interpretation conflates “judicial proceeding” with
13 “under consideration or review,” by immediately including at the *outset* of litigation all issues
14 that could arguably be considered by a Court in the future. By Plaintiff’s Counsel’s
15 interpretation, literally every statement about a lawsuit is protected by the anti-SLAPP statute.
16 That cannot have been the purpose of the anti-SLAPP statute.

17 The third provision cited includes “[a]ny oral statement made . . . in a place open to the
18 public or a public forum in connection with an issue of public concern.” RCW 4.24.525(2)(d).
19 As discussed, *supra*, the statements made by Plaintiff’s Counsel were *not* on an issue of public
20 concern. They were false factual statements about the contents of a letter and the efforts of
21 Coach with respect to one potential counterfeiter. Plaintiff’s Counsel had no evidence to
22 support their contention that there are others with similar stories. The “public concern” was
23 thus entirely concocted by Plaintiff’s Counsel.

24 The final provision cited includes “[a]ny other lawful conduct in furtherance of the
25 exercise of the constitutional right of free speech in connection with an issue of public concern
26 . . .” RCW 4.24.525(2)(e). Coach has already demonstrated that the issue is *not* one of public

1 concern. Moreover, this provision specifically covers only “lawful conduct in furtherance of
2 the exercise of the constitutional right of free speech.” Defamation is not “lawful conduct,”
3 and defamation is an exception to the constitutional right of free speech.

4 Because Plaintiff’s Counsel cannot demonstrate by a preponderance of the evidence that
5 the actions that were the subject of the no-longer-extant defamation counterclaims involved
6 public participation and petition, the anti-SLAPP statute does not apply and the Court must
7 deny the Motion.

8 **B. Coach Could Have Demonstrated A Probability Of Success On The Merits**

9 If *Verizon* did not exist, and if Coach had not withdrawn the challenged counterclaims,
10 and if Plaintiff’s Counsel had demonstrated that their defamatory statements bore any
11 relationship to public participation and petition, the burden would shift to Coach to establish by
12 clear and convincing evidence a probability of success on the merits. RCW 4.25.525(4).

13 Coach’s burden is minimal. The Ninth Circuit, in analyzing California’s anti-SLAPP
14 act, has held:

15 The statute requires only a minimum level of legal sufficiency and
16 triability. Indeed, the second step of the anti-SLAPP inquiry is often
17 called the “minimal merit” prong. To establish “minimal merit,” the
18 plaintiff need only state and substantiate a legally sufficient claim. Put
19 another way, the plaintiff must demonstrate that the complaint is both
20 legally sufficient and supported by a sufficient prima facie showing of
21 facts to sustain a favorable judgment if the evidence submitted by the
22 plaintiff is credited.

23 *Mindy’s Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598-99 (9th Cir. 2010) (quotations and
24 citations omitted); *see also Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002) (“[California’s
25 anti-SLAPP act] poses no obstacle to suits that possess minimal merit.”); *Mann v. Quality Old
26 Time Serv., Inc.*, 120 Cal.App.4th 90, 105, 15 Cal.Rptr.3d 215 (2004) (“A plaintiff is not
required to *prove* the specified claim to the trial court; rather, so as to not deprive the plaintiff
of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a
legally sufficient claim.”) (emphasis by court; quotation and citation omitted). Similarly,
Washington’s Legislature was explicit that the anti-SLAPP statute is intended to weed out

1 claims that are “groundless.” RCW 4.24.525 Historical and Statutory Notes at (1)(b).

2 To prevail on its (no-longer-extant) defamation counterclaims, Coach would have had
3 to establish four elements: (1) falsity, (2) an unprivileged communication; (3) fault, and (4)
4 damages. *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.3d 492 (1983). To defeat the
5 Motion, Coach would have had to demonstrate that its counterclaims possessed minimal merit
6 as to each of the elements above. Because Coach can do so, the Motion must be denied.

7 **1. Plaintiff’s Counsel made false statements.**

8 Coach’s defamation claims were predicated on one statement made by Mr. Carlson and
9 one statement made by Mr. Carney during a February 9, 2011 television newscast on KING 5
10 news in Seattle. First, in representing the contents of a letter Coach’s New York attorney sent
11 to Ms. Kim, Mr. Carlson stated: “You have committed trademark infringement and we are
12 going to sue you for two million dollars.” Dkt. No. 6 (Coach Inc.’s Answer, Defenses, and
13 Affirmative Defenses to First Amended Complaint, and Counterclaims) p. 14 at ¶ 19; *see also*
14 *Keehnel Dec. at Ex. A. Second*, in reference to Coach’s New York lawyers’ belief that Ms.
15 Kim was selling a counterfeit bag — which belief was caused by Ms. Kim having listed a
16 handbag on eBay as “NEW” and “NWT” (“New With Tags”), even though the bag was not
17 new — Mr. Carney stated: “She acquired her Coach bags directly from Coach, they are
18 unquestionably legitimate. *Clearly Coach did nothing to investigate their threats against*
19 *her.*”³ Coach Inc.’s Answer, Defenses, and Affirmative Defenses to First Amended Complaint,
20 and Counterclaims (“Superseded Counterclaim”) (Dkt. No. 6) p. 14 at ¶ 22; *see also* *Keehnel*
21 *Dec. at Ex. A.*

22 It is undisputed that Plaintiff’s Counsel made the statements that formed the basis of
23 Coach’s superseded counterclaims. Answer to Counterclaim (Dkt. No. 8) p. 3 at ¶ 22;

24 _____
25 ³ Plaintiff’s Counsel accuse Coach of “conspicuously misquoting” Mr. Carlson in ¶ 23 of the superseded
26 counterclaim. *See* Motion at 8:19-9:2. Paragraph 23 of the superseded counterclaim contained *no* quotation by
either Mr. Carlson or Mr. Carney. Paragraph 23 *alleged* that Mr. Carney “falsely asserted that Coach uses
accusations of trademark infringement to stifle second-hand sales of authentic products.” In any event, as
discussed above, Coach’s defamation counterclaim was not predicated on statements of opinion by Plaintiff’s
Counsel.

1 Declaration of Jay Carlson in Support of Motion to Strike and For Sanctions Pursuant to
2 Washington's Anti-SLAPP Statute, RCW 4.25.525 ("Carlson Dec.") (Dkt. No. 9-1) p. 2 at ¶ 5;
3 Keehnel Dec. at Ex. A. Plaintiff's Counsel argue that their statements were opinion, true or
4 substantially true, and supported by a good faith and reasonable belief in their accuracy. Not
5 so. Coach filed a legally sufficient claim.

6 First, Mr. Carlson's statement concerning Coach's New York lawyers' October 8, 2010
7 letter is defamatory in two respects.

8 (1) Mr. Carlson's statement is literally false. Mr. Carlson said: "we [Coach] are going
9 to sue you..." (emphasis added). That is not what the letter says. The letter is clear: "failure to
10 respond or to comply ... may result in Coach taking legal action..." Dkt. No. 6 (Coach Inc.'s
11 Answer, Defenses, and Affirmative Defenses to First Amended Complaint, and Counterclaims)
12 p. 22 at Ex. A (emphasis added). No lawyer would confuse "*may*" *sue* with "*are going to*
13 *sue*." Mr. Carlson deliberately misrepresented the letter. Mr. Carlson makes matters worse by
14 adding another misstatement to the end of his first misstatement: "we [Coach] are going to sue
15 you for \$2 million." That is not the letter says. The letter again is clear. It states maximum
16 penalties, but nowhere says Coach will sue or, if it does, that it will seek maximum penalties.

17 (2) Mr. Carlson's statement also created a false impression – also actionable in
18 Washington.

19 Because Mr. Carlson wholly ignored the *entire* context of Coach's dealings with Ms. Kim, he
20 created the *false impression* that as of the date of the televised interview (February 9, 2011)
21 Coach is going to sue Ms. Kim for \$2 million and that Coach is attempting to stifle second-
22 hand sales of authentic products. Ms. Kim admits that she received the October 8 letter and
23 contacted Gibney, Coach's New York lawyers (Answer to Counterclaim (Dkt. No. 8) p. 2 ¶
24 16). After further investigation by Gibney, Ms. Kim's eBay listing was *reinstated* in October
25 2010 – five months before the televised statements. Macaluso Dec. ¶¶ 23-27. Plaintiff's
26 Counsel knew this, and have not denied that Ms. Kim's listing was reinstated. But Mr.

1 Carlson’s statement put the October 8 letter in a vacuum, portraying it as Coach’s **present** and
2 obviously erroneous position on the subject. In effect, what Mr. Carlson stated was “Coach
3 today is going to sue this woman who is selling authentic Coach products.” This is false. The
4 further dealings between Ms. Kim and Gibney resulted in Ms. Kim’s eBay listing being
5 reinstated, her account being restored, and the removal of any negative consequences that may
6 have resulted from the temporary removal of her listing. Macaluso Dec. ¶¶ 23-28. Knowing
7 this, and knowing that Gibney had taken prompt action to reinstate Ms. Kim’s listing, it was
8 simply false to read, summarize, or excerpt the letter without providing details about Gibney’s
9 *later* actions. By portraying Coach as refusing to back down in the face of the “obvious falsity”
10 of its allegations against Ms. Kim, Mr. Carlson triggered numerous complaints by Coach
11 customers who were under the false impression that Coach’s aim was to intimidate its law-
12 abiding customers. See Keehnel Dec. at Ex. B. Defamation by implication is a well-
13 established claim under Washington law. See, e.g., *Mohr v. Grant*, 153 Wn.2d. 812, 823, 108
14 P.3d 768 (2005) (“Defamation by implication occurs where the defendant juxtaposes a series of
15 facts so as to imply a defamatory connection between them, or creates a defamatory implication
16 by omitting facts. ... [T]his court has recognized instances of defamation by implication.”)
17 (quotation and citations omitted). Mr. Carlson’s statement – omitting crucial facts that
18 undoubtedly would have mitigated the customer backlash, and most likely would have resulted
19 in KING 5 News not airing the non-story – was defamation by implication.

20 Second, Mr. Carney’s statement concerning Coach’s purported lack of investigation is
21 defamatory because Gibney did in fact conduct an investigation. Macaluso Dec. ¶¶ 18-27.
22 Gibney conducted an investigation before contacting eBay or communicating with Ms. Kim,
23 and Gibney conducted a follow-up investigation after Ms. Kim contacted Gibney. *Id.* The
24 result of the latter investigation was that Ms. Kim’s eBay listing was reinstated, which
25 Plaintiff’s Counsel knew. Yet, to support the truth of his statement, Mr. Carney declared: “*I*
26 *also knew that no one working on behalf of Coach had ever contacted Ms. Kim to inquire*

1 *about the handbag's authenticity and origin. ... Coach never contacted [Ms. Kim]...."*
2 Declaration of Christopher Carney in Support of Motion to Strike and for Sanctions Pursuant to
3 Washington's Anti-SLAPP Statute, RCW 4.25.525 ("Carney Dec.") (Dkt. No. 9-2) at p. 2 ¶¶ 5
4 & 6. (emphasis added). Mr. Carney's statements cannot be reconciled with the fact that Ms.
5 Kim (Mr. Carney's own client) admits that she "received the [Gibney] letter and contacted
6 Gibney." Answer to Counterclaim (Dkt. No. 8) p. 2 ¶ 16. That fact in itself establishes that
7 Coach has stated a legally sufficient claim.

8 Coach can pile-on more to establish a legally sufficient claim: it is simply and obviously
9 false that Coach conducted no investigation whatsoever. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] On October 8, 2010, Gibney sent Ms. Kim a letter. *Id.*
20 at ¶ 22. In response to the October 8 letter, Ms. Kim sent Gibney an email late on the evening
21 of October 14, 2010. *Id.* at ¶ 23. After reviewing the email on October 15, 2010, Gibney
22 immediately moved to reinstate Ms. Kim's listing, which eBay confirmed on October 18, 2010.
23 *Id.* at ¶¶ 24-25. Simply put, Gibney conducted an investigation, both before the October 8
24 letter was sent and after Ms. Kim contacted Gibney to seek reinstatement of her listing.
25 Moreover, Mr. Carney knew this because he knew that the listing had been reinstated.

26 Tellingly, the Motion does not discuss Ms. Kim's efforts to sell on eBay a handbag she

1 described as a “NEW” Coach bag. Plaintiffs Counsel’s silence speaks loudly. Rather than take
2 the ball, Mr. Carney punts and states in his declaration that “According to the American
3 Heritage Dictionary of the English Language, new is defined as: ‘Never used or worn before
4 now.’ Under this commonly accepted definition, the handbag at issue, which had never been
5 used, was ‘new.’” Carney Dec. ¶ 7. This is misleading in the extreme. In the 4th edition of the
6 *American Heritage Dictionary of the English Language*, the first-listed definition of “new” is
7 “[h]aving been made or come into being only a short time ago; recent.” *American Heritage*
8 *Dictionary of the English Language* 1183 (4th ed. 2009). That definition is consistent with
9 other dictionaries’ primary definition of “new.” For example, in the 10th edition of *Merriam-*
10 *Webster’s Collegiate Dictionary*, the first-listed definition of “new” is “having existed or
11 having been made but a short time.” *Merriam-Webster’s Collegiate Dictionary* 782 (10th ed.
12 1998). In *Webster’s Third New International Dictionary of the English Language Unabridged*,
13 the first-listed definition of “new” is “having existed or having been made but a short time.”
14 *Webster’s Third New International Dictionary of the English Language Unabridged* 1322 (3d
15 ed. 1971). In the 1st edition of the *College Edition of The Random House Dictionary of the*
16 *English Language*, the first-listed definition of “new” is “of recent origin, production, purchase,
17 etc.; having but lately come or been brought into being: *a new book.*” *College Edition of The*
18 *Random House Dictionary of the English Language* 895 (1st ed. 1968) (emphasis in original).
19 In the *Random House World Menu*, the first-listed definition of “new” is “not existing prior to
20 this moment.” *Random House World Menu* 599 (Revised ed. 1997). Thus, the definition urged
21 by Mr. Carney is, at most, a *secondary* definition.

22 Moreover, the examples given to illustrate Mr. Carney’s suggested definition are “a new
23 car” and “a new hat.” It is simply not possible that, according to Mr. Carney’s interpretation of
24 the *American Heritage Dictionary*, a four-year-old car can be advertised as a “new” car. It is
25 therefore inaccurate to contend, as Mr. Carney does, that a reasonable person interpreting Ms.
26 Kim’s listing would or should have ignored the primary – and much more commonly accepted

1 – definition of “new” in favor of a secondary definition that strains credulity.

2 The plain fact is that Ms. Kim advertised as “NEW” a bag she had purchased over four
3 years prior. This misleading description was relied on by Gibney. Macaluso Dec. at ¶ 18.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 Gibney, on behalf of Coach, conducted a thorough investigation and Mr. Carney’s irresponsible
8 statement is plainly false.

9 Thus, Coach can easily meet the “minimal merit” prong and state a legally sufficient
10 defamation claim. *See Mindy’s Cosmetics*, 611 F.3d at 598-99. The anti-SLAPP statute does
11 not immunize Plaintiff’s Counsel from making false statements. *See, e.g., Navellier*, 52 P.3d
12 710 (“[California’s anti-SLAPP act] does not bar a plaintiff from litigating an action that arises
13 out of the defendant’s free speech or petitioning; it subjects to potential dismissal only those
14 actions in which the plaintiff cannot state and substantiate a legally sufficient claim.”) (citation
15 and quotation omitted).

16 **2. Plaintiff’s Counsel’s communications were unprivileged.**

17 Plaintiff’s Counsel do not (and cannot) identify any absolute or qualified privilege
18 absolving them of liability for the defamatory statements that were the subject of the challenged
19 and no-longer-extant counterclaims. Even if Plaintiff’s Counsel could identify a qualified
20 privilege (which they cannot), Plaintiff’s Counsel, for reasons discussed above, abused that
21 privilege by their knowledge of the falsity of their statements, or by their reckless disregard as
22 to the falsity of their statements. *See Bender*, 99 Wn.2d at 504 (adopting the rule that proof of
23 knowledge or reckless disregard as to the falsity of a statement establishes abuse of a qualified
24 privilege). The statements were unprivileged.

25 **3. Plaintiff’s Counsel recklessly disregarded the truth.**

26 Plaintiff’s Counsel admit that “actual malice” may be shown by knowledge of falsity *or*

1 reckless disregard of the truth or falsity of the statement. Motion 6:4-6; *see also Bender*, 99
2 Wn.2d at 503. Had Coach decided to proceed with its defamation counterclaims, Plaintiff's
3 Counsel's actions would easily have satisfied the "reckless disregard" prong. As discussed
4 above, Mr. Carney's statement is in reckless disregard of the truth because Coach did in fact
5 contact Ms. Kim and did in fact conduct an investigation of the authenticity of Ms. Kim's
6 handbag, including follow-up investigation after its correspondence with Ms. Kim. Answer to
7 Counterclaim (Dkt. No. 8) p. 2 ¶ 16; Macaluso Dec. ¶¶ 18-27. Moreover, Mr. Carlson's
8 statement concerning the Gibney letter was in reckless disregard of the truth because it both
9 blatantly misrepresented Gibney's carefully-drafted letter and left the false impression that
10 Coach is going to sue Ms. Kim for \$2 million, omitting the critical fact that Gibney had been
11 responsible for the reinstatement of Ms. Kim's eBay listing. *Mohr*, 153 Wn.2d. at 823 (holding
12 that a defamation claim may be established through the omission of facts).

13 **4. Plaintiff's Counsel's statements injured Coach.**

14 Plaintiff's Counsel's statements injured Coach. As a result of the reckless statements
15 made by Plaintiff's Counsel in the KING 5 newscast, Coach received numerous complaints
16 from its customers indicating that they would *not* purchase Coach products in the future due to
17 the false impression, *inter alia*, that Coach was attempting to "intimidate" and "bully" Ms.
18 Kim, that Coach is "immoral," and that Coach is "Nazi's [sic]." *See Keehnel Dec Ex. B.* All
19 that is necessary to ascertain whether Coach was injured by the false statements and false
20 impression given by Plaintiff's Counsel in the KING 5 newscast is to consider what the public
21 reaction would have been if the story had included the critical fact that Ms. Kim's listing had
22 been promptly reinstated. It is doubtful that the story would have qualified as "news" at all.
23 Regardless, the reaction by customers would have been far less vitriolic. About this there can
24 be no dispute.

25 * * *

26 Even though Coach decided not to proceed with its defamation counterclaims against

1 Plaintiff's Counsel, Coach can establish a probability of prevailing on its (no-longer-extant)
2 counterclaims. Besides the fact that Plaintiff's Counsel's Motion is moot, it must be denied
3 because Coach filed legally sufficient claims.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Coach respectfully requests that this Court deny as moot the
6 special motion to strike. In light of Plaintiff's Counsel's refusal to withdraw the motion, Coach
7 further requests that the Court find that the special motion to strike is frivolous.

8 Respectfully submitted this 28th day of March, 2011.

9
10 DLA Piper LLP (US)

11 By: *s/ Stellman Keehnel*

12 Stellman Keehnel, WSBA No. 9309
13 R. Omar Riojas, WSBA No. 35400
14 Patrick Eagan, WSBA No. 42679
15 DLA Piper LLP (US)
16 701 Fifth Avenue, Suite 7000
17 Seattle, WA 98104
18 Tel: 206.839.4800
19 Fax: 206.839.4801
20 E-mail: stellman.keehnel@dlapiper.com
21 E-mail: omar.riojas@dlapiper.com
22 E-mail: patrick.eagan@dlapiper.com
23 Attorneys for defendant and counterclaim plaintiff
24 Coach, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

Copies of the foregoing document were served on counsel of record via email, by agreement, at the following email addresses:

- **Jay S Carlson**
JayCarlson.legal@gmail.com
- **Christopher Robert Carney**
christopher.carney@cgi-law.com
- **Jason Moore**
jason@vaneyk-moore.com

Dated this 28th day of March, 2011.

/s/ Stellman Keehnel
Stellman Keehnel, WSBA No. 9309

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on April 12, 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 or record:

5 Dated this 12th day of April, 2011.

6 *s/ Stelman Keehnel*
7 _____
8 Stelman Keehnel, WSBA No. 9309
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