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 OPPOSITION TO SPECIAL MOTION TO STRIKE AND FOR SANCTIONS**

**FILED UNDER SEAL**

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

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



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

## I. INTRODUCTION

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

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

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

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



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

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

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

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

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

## II. THE MOTION MUST BE DENIED AS MOOT

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

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

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



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

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

*Verizon* stands squarely for the proposition that an anti-SLAPP motion must be applied to the **amended** pleading (*i.e.*, in our case, Dkt. No. 21, which does *not* contain the challenged counterclaims). The question in *Verizon* was whether the district court had erred in granting a motion to amend while a special motion to strike was pending, and then denying the special motion to strike because the amended complaint did not include the claims that were subject to the special motion to strike. *Verizon*, 377 F.3d at 1090-91. The appellant argued that permitting an amendment would defeat the state's policy behind the anti-SLAPP statute by permitting a party to avoid sanctions by amending its complaint. *Id.* The Ninth Circuit emphatically rejected this argument, making it clear that the federal policy favoring liberal amendment of pleadings under Fed.R.Civ.P. 15(a) is binding on federal courts and trumps a state's anti-SLAPP statute as a matter of law. *Id.* For that reason, the district court was correct in granting the motion for leave to amend under Fed.R.Civ.P. 15(a). *Id.* at 1091 ("As *Vess* implicitly suggest, granting 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."). After leave to amend was granted and the claims that were the subject of the special motion to strike removed, there was no doubt that an anti-SLAPP motion to strike is mooted by an amended pleading:

> Moreover, the purpose of the anti-SLAPP statute, the early dismissal of meritless claims, would still be served if plaintiffs eliminated the offending claims from their original complaint . . . . ***If the offending claims remain in the first amended complaint, the anti-SLAPP remedies 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



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

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

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

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

*Verizon* and *Arata* stand squarely for the proposition that an anti-SLAPP motion must be applied to the post-amendment pleading, even if amendment of the counterclaim took place after the filing of a special motion to strike. In *Verizon* and *Arata*, the moving parties at least could argue (unsuccessfully) that motions to amend should be denied and the anti-SLAPP motions applied to the original claims. In our case, on the other hand, Coach amended its counterclaims as a matter of right, 21 days after serving it, under Fed.R.Civ.P. 15(a)(1)(A). That Rule gave Coach the unqualified right to file the amended pleading that it filed on March 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,


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

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

## III. COACH WOULD HAVE PREVAILED ON THE MOTION TO STRIKE

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

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

---

because the amendment has already taken place and because Coach had an unqualified right to amend within the 21-day period. Nevertheless, Coach's reason for withdrawing its claims is clear from the conduct of this Motion by Plaintiff's Counsel. Coach's valid defamation claims became a huge distraction from the underlying lawsuit – which, it should be noted, involves only the brief removal of Ms. Kim's inaccurate listing from eBay. It is 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.



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

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

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

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

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

> (b) Any statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a 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

legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(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 with an issue of public concern;

(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 petition.

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

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

Plaintiff asserts a "class" of Washington residents who, over the prior three years, received a letter from Coach or its attorneys alleging an attempt to sell counterfeit Coach products, "where such allegation was made without basis...." First Amended Complaint, ¶ V.1 (Dkt. No. 4). The fact is that Coach's New York lawyers sent only 18 letters to Washington residents. Macaluso Dec. at ¶ 16. [redacted] A class of two people? This is far below the minimum necessary to satisfy the numerosity requirement of Fed.R.Civ.P. 23(a). Plainly,



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

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

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

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

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



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

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

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

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



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

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

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

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

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

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

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

*Mindy's Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598-99 (9th Cir. 2010) (quotations and citations omitted); *see also Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002) ("[California's anti-SLAPP act] poses no obstacle to suits that possess minimal merit."); *Mann v. Quality Old 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



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

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

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

**1. Plaintiff's Counsel made false statements.**

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

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

[3] Plaintiff's Counsel accuse Coach of "conspicuously misquoting" Mr. Carlson in ¶ 23 of the superseded 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.



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

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

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

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

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

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



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

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

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



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

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

Coach can pile-on more to establish a legally sufficient claim: it is simply and obviously false that Coach conducted no investigation whatsoever. [redacted] On October 8, 2010, Gibney sent Ms. Kim a letter. *Id.* at ¶ 22. In response to the October 8 letter, Ms. Kim sent Gibney an email late on the evening of October 14, 2010. *Id.* at ¶ 23. After reviewing the email on October 15, 2010, Gibney immediately moved to reinstate Ms. Kim's listing, which eBay confirmed on October 18, 2010. *Id.* at ¶¶ 24-25. Simply put, Gibney conducted an investigation, both before the October 8 letter was sent and after Ms. Kim contacted Gibney to seek reinstatement of her listing. Moreover, Mr. Carney knew this because he knew that the listing had been reinstated.

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



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

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

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



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

– definition of "new" in favor of a secondary definition that strains credulity.

The plain fact is that Ms. Kim advertised as "NEW" a bag she had purchased over four years prior. This misleading description was relied on by Gibney. Macaluso Dec. at ¶ 18. [redacted] Gibney, on behalf of Coach, conducted a thorough investigation and Mr. Carney's irresponsible statement is plainly false.

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

**2. Plaintiff's Counsel's communications were unprivileged.**

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

**3. Plaintiff's Counsel recklessly disregarded the truth.**

Plaintiff's Counsel admit that "actual malice" may be shown by knowledge of falsity ***or***



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

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

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

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

* * *

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



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

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

## IV. CONCLUSION

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

Respectfully submitted this 28th day of March, 2011.

DLA Piper LLP (US)

By: *s/ Stellman Keehnel*

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

**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

WEST\223322167.2



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

**CERTIFICATE OF SERVICE**

I hereby certify that on April 12, 2011, I 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 or record:

Dated this 12th day of April, 2011.

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



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