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 **DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS** **[FILED UNDER SEAL]** **NOTE ON MOTION CALENDAR: MAY 6, 2011**

Defendants Coach, Inc. and Coach Services, Inc. (together, "Coach") hereby move this Court for an order striking the class allegations from the Second Amended Complaint ("Complaint") filed by plaintiff Gina Kim. The putative class asserted by Ms. Kim cannot meet the numerosity requirement in Fed. R. Civ. P. 23(a), because only three individuals, at most, could possibly fall within the class. ***No amount of discovery can change this fact.*** Accordingly, the Court must strike the class allegations.

I. INTRODUCTION

Plaintiff Gina Kim is a Washington resident who listed a six-year-old Coach bag on eBay as "NEW." Because her listing was misleading, Coach was led to believe that Ms. Kim

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was offering a counterfeit item for sale on eBay. Ms. Kim's eBay account was interrupted for a brief period – then completely reinstated – and she received a letter from an attorney for Coach. As a result, Ms. Kim alleges that she suffered an unspecified amount of damages, including emotional distress damages. Ms. Kim now sues on behalf of herself and the putative class of Washington residents "who have, in the last three years, received a cease and desist letter from Coach or the agents of Coach, accusing them of attempting to sell infringing and counterfeit Coach products through an online outlet such as E-Bay [*sic*], Craigslist, and other such services, where such allegation was made without basis and has harmed the consumer." *See* Second Amended Complaint (Dkt. No. 20-1), at ¶ V.1.(a).[1]

The putative class could not possibly contain more than three members. That is the number of Washington residents who received letters from Gibney and who cannot conclusively be determined to have been selling counterfeit products. The fact that at least 15 of the 18 Washington residents who received letters were selling counterfeit Coach products is not a matter of speculation or opinion. Rather, it is an objective, verified fact, not subject to dispute. The objective, documented facts are detailed (with supporting exhibits) in the two declarations submitted with this Motion.

While the pertinent number before the Court is ***three***, the maximum class size, we note that the total number of letters that Coach or its agents have sent to Washington residents, in connection with sales of Coach or counterfeit Coach products on online outlets, within the last three years, is 18. [redacted]

[1] On March 22, 2011, counsel for Ms. Kim filed a stipulated request for leave to file a second amended complaint. (Dkt. No. 20.) The second amended complaint no longer excludes former employees from the putative class, meaning that Ms. Kim is now a member of the putative class. (Dkt. No. 20-1.) Although the Court has not yet granted Ms. Kim's request to file the second amended complaint, Coach has stipulated to the filing of the second amended complaint. Moreover, the amendment of the class description does not affect the basis for this Motion. For this reason, Coach directs this motion at whichever complaint is currently extant.

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[redacted] As already explained, at least 15 of those 18 Washington residents were in fact selling counterfeit Coach products [redacted] In this way, it is conclusively established that ***the putative class comprises, at most, three individuals.*** Three individuals cannot possibly satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). The Court should strike the class allegations.

II. BACKGROUND

As noted, *supra* n.1, Ms. Kim filed suit against Coach, Inc. and Coach Services, Inc. in this Court on February 8, 2011. (Dkt. No. 1.) On March 2, 2011, counsel for Ms. Kim filed a first amended complaint that did not alter the class allegations. (Dkt. No. 4.) On March 22, 2011, counsel for Ms. Kim filed a stipulated request for leave to file the second amended complaint on March 22, 2011. (Dkt. No. 20.) The only difference between the first amended complaint and the second amended complaint is that the second amended complaint no longer excludes former employees from the putative class, meaning that Ms. Kim is now a member of the putative class. (Dkt. No. 20-1.) Although the Court has not yet granted Ms. Kim's request to file the second amended complaint, Coach has stipulated to the filing of the second amended complaint. Moreover, the amendment of the class description does not affect the basis for this Motion. For this reason, Coach directs this Motion at the second amended complaint, but this Motion is equally applicable to the first amended complaint.

During the parties' Federal Rule of Civil Procedure 26(f) conference, counsel for Ms. Kim stated to counsel for Coach that Ms. Kim is seeking damages for emotional distress in this lawsuit. *See* Declaration of R. Omar Riojas in Support of Defendants' Motion to Strike Class Allegations ("Riojas Dec.") ¶ 2. Emotional distress damages have not been requested in any of the three complaints. (Dkt. Nos. 1, 4, 20-1.)

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A. The Proposed Class

Plaintiff sues on behalf of the following class:

> (a) **The Class:** The plaintiff class alleged consists of all consumers in Washington State who have, in the last three years, received a cease and desist letter from Coach or the agents of Coach, accusing them of attempting to sell infringing and counterfeit Coach products through an online outlet such as E-Bay (sic), Craigslist, and other such services, where such allegation was made without basis and has harmed the consumer.

Complaint at ¶ V.1. Thus, the putative class includes only (1) consumers (2) in Washington state (3) who received cease-and-desist letters from Coach or its agents accusing them of attempting to sell infringing and counterfeit Coach products through an online outlet (4) ***without basis*** and (5) causing harm. Any person who received a letter but who was, in fact, selling inauthentic, infringing, or counterfeit Coach products cannot be a member of the class.[2]

With respect to numerosity, plaintiff alleges as follows:

> **2. Numerosity:** The exact number of Class members is unknown to Plaintiff at this time, but *on information and belief*, Defendant has threatened many Class members throughout the State of Washington, making joinder of each individual member impracticable. Ultimately, the Class and members will be easily identified through Defendant's records. Plaintiff believes that the members of the Class are geographically dispersed throughout the State, and that joinder of all class members would therefore be impracticable.

Complaint at ¶ V.2 (emphasis added). Plaintiff's counsel made this allegation in the original complaint, repeated it in the first amended complaint, and repeat it in the second amended complaint, despite the fact that counsel for Coach have repeatedly informed them that only 18 letters were sent to Washington recipients. Plaintiff's counsel have never had a basis for pleading numerosity, and, since no later than March 10, 2011, have been explicitly on notice that the putative class numbers fewer than 20 members. (Dkt. No. 10, at 3.)

[2] The term "without basis" is not clear. There was a basis for each of the 18 letters sent to Washington residents by Coach's attorneys. In arguing that the bases for 15 of those 18 letters are so clear and indisputable that the recipients of those letters cannot possibly be members of the putative class, Coach does not admit that the remaining letters were without basis. Coach merely assumes the uncontroversial position that the letters sent to individuals who were undoubtedly offering for sale counterfeit products were not "without basis."

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B. Facts Relating To Numerosity

[redacted] As part of the program, Gibney sent letters to individuals believed to be offering for sale counterfeit Coach products on eBay. *Id.* ¶¶ 8-9. [redacted] Declaration of John Macaluso in Support of Defendants' Motion to Strike Class Allegations ("Macaluso Dec.") ¶¶ 4-15.

Over the course of the past three years, Coach, through its Gibney attorneys, sent cease-and-desist letters to 18 individuals in the state of Washington in connection with sales of potentially infringing and counterfeit Coach products on eBay. Axilrod Dec. ¶¶ 10-11; Macaluso Dec. ¶ 14. [redacted] Axilrod Dec. ¶ 11. In short, Coach and its agents have sent a total of 18 letters to Washington residents in connection with sales of potentially counterfeit Coach products on online outlets within the last three years, [redacted] Axilrod Dec. ¶¶ 5-12; Macaluso Dec. ¶ 14.

Of the 18 potential counterfeiters identified in Washington through the Online Brand Protection Program from July 2010 to the present, ***all but three*** are conclusively established, using objective evidence, to have been selling a counterfeit Coach product (*i.e.*, because the product listed was clearly not manufactured by Coach). Macaluso Dec. ¶¶ 16-22. This

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determination can easily be made by examining the listings.

[redacted]

Of the remaining four, two were selling products with numerous telltale signs of being counterfeit. *Id.* ¶ 19. [redacted]

Even taking every inference in favor of plaintiff, ***at least 15*** of the 18 Washington recipients of letters were selling products that were not produced by Coach, yet those sellers listed the items as "Coach." Macaluso Dec. ¶ 16-19. Thus, the **maximum** number of class members – that is, individuals who could possibly have received letters accusing them without basis of offering for sale counterfeit Coach products – is three. Three people do not satisfy the numerosity requirement.

III. AUTHORITY AND ARGUMENT

A. This Court Has The Authority To Strike Deficient Class Allegations.

1. Rule 23 authorizes a motion to strike.

Under Federal Rule of Civil Procedure 23, this Court has the authority to issue an order that "require[s] that the pleadings be amended to eliminate allegations about representation of

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absent persons and that the action proceed accordingly . . . ." Fed. R. Civ. P. 23(d)(1)(D). The Ninth Circuit has held that this permits a defendant to bring a motion to strike class allegations at an early stage in the proceedings when it is clear that class allegations cannot stand. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-41 (9th Cir. 2009) (collecting cases and holding that "[a]lthough we have not previously addressed this argument directly, we conclude that Rule 23 does not preclude a defendant from bringing a 'preemptive' motion to deny certification."). In *Vinole*, the Ninth Circuit expressly rejected the argument that a defendant may not bring a preemptive motion to deny certification. *Id.* at 940 ("federal courts have repeatedly considered defendants' motions to deny class certification"). Numerous other courts and authorities are in accord. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 208 F.R.D. 625, 629-34 (W.D. Wash. 2002) (striking class allegations); *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D. Kan. 2004) (collecting cases and noting that "[t]he court should not 'blindly rely on conclusory allegations which parrot Rule 23 requirements [and] . . . may consider the legal and factual issues presented by [the] plaintiff's complaints.'") (quoting *J.B. ex. rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999)); *cf.* 1 MCLAUGHLIN ON CLASS ACTIONS § 3:4 (6th ed. 2009) (motions to strike "may properly be filed before plaintiffs have filed a motion for class certification"); *Board of Education v. Climatemp, Inc.*, Nos. 79-3144, 79-4898, 1981 WL 2033, at *2 (N.D. Ill. Feb. 20, 1981) ("motions to strike are a reflection of the court's inherent power to prune pleadings in order to expedite the administration of justice and to prevent abuse of its process").

Courts in this circuit have considered this issue and found that early dismissal of class claims is proper. *See Walls v. Wells Fargo Bank, N.A.*, 262 B.R. 519, 523 (Bankr. E.D. Cal. 2001) ("If, as a matter of law, a class cannot be certified in this adversary proceeding, it would be a waste of the parties' resources and judicial resources to conduct discovery on class certification."); *see also Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 639 (S.D. Cal. 2007) ("[A] defense-driven determination of class certification is appropriate when

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'awaiting further discovery will only cause needless delay and expense.'") (quoting *Lumpkin v. E.I. Du Pont De Nemours & Co.*, 161 F.R.D. 480, 481 (M.D. Ga. 1995)), *aff'd*, 571 F.3d 935 (9th Cir. 2009). Moreover, in determining a motion to strike class allegations, a district court may conduct "[a] preliminary inquiry into the merits . . . to decide whether the claims and defenses can be presented and resolved on a class-wide basis." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2010) (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001), cert, denied, 534 U.S. 951 (2001)). This is logical, because Federal Rule of Civil Procedure 23(d)(1)(D) expressly permits the Court to order dismissal of class claims, and Federal Rule of Civil Procedure 1 requires that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Because objective, indisputable evidence demonstrates that plaintiff Kim cannot possibly establish numerosity in this case, the Court must strike the class allegations from the second amended complaint.

2. Plaintiff is not entitled to discovery.

It is well-settled in this circuit that a plaintiff seeking to represent a class must make a showing that the requirements of Federal Rule of Civil Procedure 23 are satisfied, or will be satisfied by discovery, before she may take class discovery. *See Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985) (holding that trial court may require "a prima facie showing that the class action requirements of [Rule 23] are satisfied" prior to permitting class discovery). In order to demonstrate her entitlement to discovery, the plaintiff must either make a prima facie showing that Federal Rule of Civil Procedure 23 is satisfied or that "discovery is likely to produce substantiation of the class allegations." *Mantolete*, 767 F.2d at 1424-25 (discovery not available where putative plaintiff offered only three possible examples of class members, which did not constitute a prima facie showing or "persuasive information substantiating the class action allegations") (citation omitted).

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In our case, there is absolutely no evidence that the numerosity requirement of Federal Rule of Civil Procedure 23 has been met or can be met. The objective, verifiable (and verified), indisputable facts establish that, at most, there are three possible class members.

Plaintiff's counsel have not identified a single class member other than Ms. Kim, yet allege in conclusory fashion that the class is so numerous that joinder of all members is impracticable. Moreover, Ms. Kim's situation is plainly unique – she listed a bag, the bag was removed from eBay, she received a letter, she responded to the letter, the listing was reinstated, and she claims to have suffered emotional distress damages as a result. Riojas Dec. ¶ 2. In order to be entitled to class discovery, plaintiff's counsel must demonstrate either that there are enough other Washington residents similar to Ms. Kim, or that discovery is likely to produce substantiation of their allegation that the numerosity requirement of Federal Rule of Civil Procedure 23 has been met. Plaintiff's counsel cannot make either of these showings. Under Ninth Circuit law, established in *Mantolete*, plaintiff's counsel is not entitled to discovery on the class claims.

B. The Putative Class Cannot Possibly Meet The Numerosity Requirement

The party seeking class certification bears the burden of establishing that the requirements of Federal Rule of Civil Procedure 23(a) are met: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[3] *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Although this Motion is directed at the failure of the numerosity prong, it is worth noting that none of the elements of Rule 23(a) is met. In particular, the facts surrounding Ms. Kim's situation are incredibly specific to her. For example, other potential plaintiffs' cases (if there are any) would likely differ from Ms. Kim on issues such as the content of the listing and reason for takedown, the length of time (if any) that

[3] The party seeking certification of a class must also establish at least one of the three conditions in Federal Rule of Civil Procedure 23(b): (1) separate actions would create a risk of inconsistent outcomes or impede non-parties' ability to protect their interests; (2) injunctive relieve is appropriate because the party opposing the class has acted on grounds that apply to the entire class; or (3) common questions of law or fact predominate and a class action is a superior method of adjudication. *See Lozano*, 504 F.3d at 724.

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the eBay account was inaccessible, and especially the amount of emotional distress damages sought. Nevertheless, Coach restricts its argument herein to the demonstrable impossibility that plaintiff's counsel could ever establish numerosity.

Under Federal Rule of Civil Procedure 23(a)(1), the party seeking class certification must demonstrate that "the class is so large that joinder of all members is impracticable." *Knudsvig v. Espresso Stop, Inc.*, No. 06-1559, 2007 WL 2253371, at *1 (W.D. Wash. Aug. 1, 2007) (quoting Fed. R. Civ. P. 23(a)(1)). According to the Manual for Complex Litigation, "[d]etermining whether the proposed class is sufficiently numerous for certification is usually straightforward. Affidavits, declarations, or even reasonable estimates in briefs are often sufficient to establish the approximate size of the class and whether joinder might be a practical and manageable alternative to class action litigation." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.141 (2010).

In determining numerosity, this Court has noted that "[w]hile there is no 'magic number,' classes of up to fifteen members, and even up to forty-five members, have been found too small to merit certification." *Knudsvig*, 2007 WL 2253371, at *1 (citing *Harik v. California Teachers Association*, 326 F.3d 1042, 1051 (9th Cir. 2003); *Peterson v. Albert M. Bender Co.*, 75 F.R.D. 661, 667 (N.D. Cal. 1977)). This is consistent with the Ninth Circuit's statement that "[t]he Supreme Court has held fifteen is too small." *Harik*, 326 F.3d at 1051 (citing *General Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980)); *see also Hurley v. U.S. Healthworks Medical Group of Wash., P.S.*, No. 05-0017, 2006 WL 1788994, at *6-*7 (E.D. Wash. June 27, 2006) (finding that a putative class of no more than fifty members, residing in Washington and Idaho, was not so numerous as to make joinder impracticable).

In our case, the total number of class members cannot possibly be greater than three. *See* Axilrod Dec. ¶¶ 7-9; Macaluso Dec. ¶¶ 16, 22. These three consist of the 18 individuals in Washington who received letters from Gibney minus the 15 who are conclusively established to have been selling counterfeit "Coach" products. *Id.* Three is far below the bare minimum of

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15 established by this Court, the Ninth Circuit, and the United States Supreme Court. *Knudsvig*, 2007 WL 2253371, at *1; *Harik*, 326 F.3d at 1051; *General Tel. Co*, 446 U.S. at 330. For this reason alone, the Court must strike the class allegations.

It should also be noted that the introduction of claims for emotional distress can affect the numerosity inquiry. *See In re Aiello*, 231 B.R. 693, 711-12 (Bankr. N.D. Ill. 1999) (rejecting numerosity under Fed.R.Civ.P. 23(a)(1) in part because of the presence of emotional distress claims that would, of necessity, be unique to the class representative). The *Aiello* court noted that, "[i]n evaluating numerosity, the court may make common sense assumptions regarding class size." *Id.* at 711 (citing *Evans v. United States Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983); *Patrykus v. Gomilla*, 121 F.R.D. 357, 360-61 (N.D. Ill. 1988)) (citation omitted). The court went on to find that "the only class the Debtor could represent would be one sustaining emotional distress similar to the injury she is alleging and there are no allegations in the complaint that any other class members sustained such an injury." *Aiello*, 231 B.R. at 712. Counsel for plaintiff Kim have stated that Ms. Kim is seeking emotional distress damages. *See* Riojas Dec. ¶ 2. There are no allegations in the Complaint that would support the finding that any other class members suffered "emotional distress similar to the injury [Ms. Kim] is alleging."

There is no possibility that this Court will ever certify the class asserted by plaintiff's counsel. The "universe" of potential class members – a grand total of three at the very most – is far too low to meet the numerosity requirement. Three class members is simply insufficient under Federal Rule of Civil Procedure 23(a)(1). The Court must strike the class allegations.

IV. CONCLUSION

For the foregoing reasons, the Court should issue an order striking the class allegations from the second amended complaint and limiting discovery to issues related directly to the named plaintiff's case.

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Respectfully submitted this 14th day of April, 2011.

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By: *s/ Stellman Keehnel*

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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 of record.

Dated this 14th day of April, 2011.

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

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