THE HONORABLE RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

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| GINA KIM, on behalf of a class consisting of herself and all other persons similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>COACH, INC., a Maryland corporation, and COACH SERVICES, INC., a Maryland corporation,<br><br>Defendants. | Cause No. 2:11-CV-00214 RSM<br><br>**REPLY IN SUPPORT OF MOTION TO STRIKE AND FOR SANCTIONS PURSUANT TO WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525**<br><br>**NOTED FOR CONSIDERATION APRIL 1, 2011**<br><br>**[ORAL ARGUMENT REQUESTED]** |

## SUMMARY

After counsel filed the present anti-SLAPP motion against Coach's defamation lawsuit, Coach attempted to eliminate the offending SLAPP claims through amendment. Thus, Coach has essentially admitted that its defamation lawsuit against opposing counsel constituted a SLAPP. Coach now seeks to avoid the consequences for its violation of Washington's public policy and abuse of the judicial process.[1]

In arguing that this amendment immunizes them from anti-SLAPP sanctions, ***Coach relies upon authority that was recently overturned by the Ninth Circuit***. Coach failed to inform

[1] Coach waited until the last moment to attempt to "amend away" its conduct. The amendment was filed after business hours on the last day on which Coach could so amend.



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the Court of this directly on point and adverse authority, *Northon v. Rule,* Ninth Circuit Docket No. 07-35319, Order, January 18, 2011.[2] This case directly contradicts and overturns the basis of Coach's legal argument.

Coach also ignore directly on point California case law making clear that their amendment does *not* immunize them from SLAPP sanctions. See, *e.g.*, *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*, 122 Cal. App. 4th 1049 (2004). In short, Coach's legal arguments are plain wrong, and the applicable authorities -- ignored by Coach in their submission -- unanimously support the SLAPP Defendants' present request for sanctions.

It should also be noted that Coach seeks to "have its cake and eat it too." In its eleventh-hour Amended Answer, Coach continues to speciously and repeatedly accuse Plaintiff's counsel of defamation. Answer, Docket No. 6 at 13-16. Coach also spends over 60% of its Opposition Brief arguing that this Court should rule, in Coach's favor, on the SLAPP issues. Opposition, pages 7-19. Presumably, Coach will promptly re-file the defamation claims against opposing counsel if the Court so rules. Coach therefore asks this Court to rule *in its favor* on SLAPP, while at the same time claiming that it legally immune from an *adverse* ruling on SLAPP.

Coach tried to make the SLAPP issue "go away" only after we undertook the burden and expense of preparing our anti-SLAPP motion. In explaining this conduct, Coach now admits that the defamation counterclaims against opposing counsel have become a "huge distraction[.]" Opposition at 7, n. 1. Indeed they have. Avoiding such "huge distractions" is the very purpose of Washington's anti-SLAPP statute. Washington's legislature said, unanimously: "SLAPPs are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities." RCW 4.24.525, Findings – Purpose. The anti-SLAPP motion to strike is therefore intended "to avoid the potential for abuse in these cases." *Id*. By its own admission, Coach has already caused exactly the harm that the anti-SLAPP statute is meant to prevent. It should be held to account this.

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[2] *Northon v. Rule*, Ninth Circuit Docket No. 07-35319, Order, January 18, 2011, for publication (9th Cir. 2011). The *Northon* decision is attached as Appendix 1 to this Reply Brief.



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In the absence of valid authority, Coach relies upon self-congratulatory sports analogies. Opposition at 7. But to the undersigned counsel, who were sued for defamation for exercising first amendment rights, this defamation lawsuit was not viewed a game. Suing opposing counsel in the middle of ongoing litigation, in violation of Washington's anti-SLAPP statute, is a serious matter.

## ARGUMENT

### A. The Anti-SLAPP Motion is not Moot.

Coach's primary legal argument is that they have an unfettered right to amend their counterclaims to immunize them from Washington's anti-SLAPP statute. In support of this argument, Coach relies on *Verizon Del., Inc. v. Covad Comm. Co.,* 377 F.3d 1081 (9th Cir. 2004) for the proposition that an anti-SLAPP motion is mooted by an amendment removing the offending claims. See *Coach, Inc.'s Opposition to Special Motion to Strike and for Sanctions* ("Opposition"), at 4-7.[3] Unfortunately for Coach, *Verizon* is no longer good law. Recently, the 9th Circuit overruled *sub silentio* the entire reasoning of *Verizon.*[4]

Federal courts have long adhered to the *Erie*[5] doctrine. Under *Erie,* "federal courts sitting in diversity apply state substantive law and federal procedural law." *Freund v. Nycomed Amersham,* 347 F.3d 752, 761 (9th Cir. 2003)(quoting *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 427 (1996)). In essence, the *Erie* doctrine "guarantees a litigant that, if he takes his state law cause of action to federal court… the result in his case will be the same as if he had brought it in state court." *Chambers v. Nasco,* 501 U.S. 32, 53 (1991). To summarize, when a state law is deemed "substantive" for the purposes of *Erie* analysis, it is controlling in federal court. If procedural, then federal procedural rules take precedence over any directly conflicting state procedural rules.

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[3] Coach also relies upon *Arata v. City of Seattle*, 2011 WL 248200 (W.D. Wash.), decided by Judge Lasnik in January, 2011. In *Arata*, Judge Lasnik simply applied *Verizon*. Based on the timing of *Arata*, however, it is clear that Judge Lasnik was never made aware of *Northon v. Rule,* and that this Ninth Circuit ruling was never presented to him for consideration.

[4] It is unclear to counsel why Coach did not bring to the Court's attention the fact that *Verizon* has been overruled in relevant part.

[5] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).



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The *Verizon* case involved an application of *Erie* based on a now-overruled characterization of anti-SLAPP statutes as "procedural." Evaluating California's anti-SLAPP statute, the court wrote "[w]e have also cautioned that '[p]rocedural state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure[.]'" *Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). Based on its characterization of anti-SLAPP statutes as merely "procedural," the *Verizon* court declined to entertain an anti-SLAPP motion to strike following the amendment of an offending complaint. That panel found that to do so would create a direct collision with Fed. R. Civ. P. 15(a), and that under *Erie*, federal procedure would control over conflicting state procedure. *Id.* This is the portion of the *Verizon* decision upon which Coach mistakenly relies. Opposition at 4-7.

However, the Ninth Circuit has recently re-examined the *Erie* doctrine as it relates to state law anti-SLAPP remedies. *See Northon v. Rule*, Appendix 1. In *Northon*, the Ninth Circuit observed that "[s]tate laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply in federal district court[.]" *Northon* at 3 (emphasis added). The court held: "a special motion to strike and the attorneys' fee provision in California's anti-SLAPP statute, which allows a prevailing defendant on a motion to strike to recover attorneys' fees and costs, protect ***substantive*** rights and apply in federal court." *Id*. (emphasis added). The court acknowledged that, like Washington, Oregon's anti-SLAPP statute "was modeled after California's." *Id*. Evaluating whether under *Erie*, a SLAPP sanction award was governed "by state or federal law," the court found that Oregon's anti-SLAPP statute constituted ***substantive*** law for the purposes of *Erie* analysis. "The entitlement to fees and costs enhances the anti-SLAPP law's protection of the State's 'important, substantive' interests.'" *Id*. Therefore, the SLAPP statute applied in federal court despite a claimed conflict with federal law.

Because the Ninth Circuit has held that anti-SLAPP remedies are substantive rather than procedural, an anti-SLAPP motion can not be preempted by an alleged conflict with Fed. R. Civ. P. 15(a), as Coach mistakenly contends. Coach's legal rationale – that under *Erie* it could



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"moot" the anti-SLAPP sanctions simply by amending – is faulty.

**B. Coach's Eleventh-hour Amendment Does Not Negate Washington's Anti-SLAPP Statute.**

With the *Erie* question conclusively resolved, the real question before this Court is clear: applying state law, does an amendment removing SLAPP claims, made after the filing of an anti-SLAPP motion for sanctions, protect the SLAPP plaintiff from those sanctions?

No Washington court has addressed this issue. But Washington's federal courts have recognized that because Washington's anti-SLAPP provision is similar to California's, the federal courts look to California precedent as persuasive legal authority regarding the application of Washington's anti-SLAPP statute. *Aronson v. Dog Eat Dog Films*, 738 F. Supp. 2d 1104, 1109-10 (W.D. Wash. 2010); *Castello v. City of Seattle,* Western District of Washington Docket No. 10-1457 MJP, Order, November 22, 2010.[6] Indeed, Coach embraces this point in its own Opposition brief. Opposition, 7-8.

California case law is entirely clear that a party who dismisses or amends claims out of a case after an anti-SLAPP motion has been filed remains subject to sanctions under the anti-SLAPP statute. Coach's tactic of last minute amendment, seeking to undo its SLAPP conduct, does not protect it from anti-SLAPP sanctions.

The California case most directly on point is *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc*., 122 Cal. App. 4th 1049 (2004). The fact pattern there is identical to this case. In *Sylmar*, a cross-complaint defendant filed a SLAPP motion to strike, seeking sanctions against the cross-complaint plaintiff. After the SLAPP motion was pending, the SLAPP plaintiff attempted to amend its complaint, alleging that because the amendment was "as of right," it could not be sanctioned for its SLAPP allegations. *Sylmar*, 122 Cal. App. 4th at 1054. Relying upon a long line of California cases, the appellate court roundly rejected that argument. Pointing out that under established authority, neither voluntarily nor involuntarily

[6] The *Castello* decision is attached as Appendix 2 to this Reply Brief.



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dismissal could moot SLAPP sanctions, the Court held that an amendment removing offending claims was not "qualitatively different" than dismissal. *Id*. at 1055. "[T]here is no express or implied right in section 425.16 [California's anti-SLAPP statute] to amend a pleading to avoid a SLAPP motion." *Id*.

As to the argument that an amendment *as of right* should moot sanctions even where amendment with leave would not, the court held: "[t]his would totally frustrate the Legislature's objective of providing a quick and inexpensive method for unmasking and dismissing such suits." *Id*. at 1056. "By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent." "Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources." *Id*. at 1055 (citing *Simmons v. Allstate Ins*., 92 Cal. App. 4th 1068, 1073-74 (2001)).

The *Sylmar* rule is well-settled: other California courts have similarly held that "a plaintiff cannot use an 11th-hour amendment to plead around a motion to strike under the anti-SLAPP statute." *Navellier v. Sletten*, 131 Cal. App. 4th 763, 772 (2003).

The above California authority is directly on point and highly persuasive in interpreting Washington's anti-SLAPP statute. The result -- imposing sanctions on a SLAPP offender despite an eleventh-hour attempt to amend -- is particularly appropriate in applying Washington's anti-SLAPP statute. In unanimously amending RCW 4.24.525, the Washington legislature declared that it was "concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525 – Findings – Purpose. The legislature acknowledged that "such lawsuits are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities."

Coach's behavior speaks for itself: their lawsuit against counsel was specious, and they abandoned it in an obvious effort to escape the consequences. In order to effectively deter the type of conduct that Coach engaged in here, the Washington legislature unanimously declared:



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"[t]his act shall be applied and construed liberally to effectuate its general purposes of protecting participants in public controversies from an abusive use of the courts." Moreover, the statute provides for a $10,000 liquidated sanction for each SLAPP defendant. Potential punitive damages are also made available at the discretion of the court to "deter repetition of the conduct and comparable conduct by others similarly situated." RCW 4.24.525(6)(a)(iii).

In this case, one of the largest law firms in the world, acting at the behest of a multi-billion dollar corporation, threatened to sue their opposing counsel for defamation if the claims against Coach were not immediately dismissed. Carlson Decl., Docket No. 9 ¶ 11, Ex. A. When that dismissal was not forthcoming, these parties filed suit. This forced the undersigned counsel to undertake the very significant time commitment involved in researching, preparing and filing an anti-SLAPP motion to strike. More time and burden has been expended bringing this reply. This work severely disrupted plaintiff counsel's ability to work on the underlying legal claims against Coach. It has been hugely time consuming and expensive. Now, Coach and their counsel request immunity. This flies in the face of the letter, and the spirit, of Washington's public policy as expressed in RCW 4.24.525.

**C. Former Cross-Defendants' Declaratory Judgment Action Does Not Preclude Anti-SLAPP Remedies.**

Coach asserts, wrongly, that cross-claim Defendants are not entitled to seek the protections of Washington's anti-SLAPP statute, because Coach claims that cross-defendants "themselves first injected their defamation claim into this lawsuit by filing a claim for declaratory relief." Opposition, at 10. Coach cites no authority for this statement, and ignores its own role in precipitating the filing of the declaratory judgment action.

Prior to filing declaratory judgment action, Coach on multiple occasions threatened counsel with a defamation lawsuit, in an obvious attempt to intimidate counsel into dismissing Ms. Kim's lawsuit. Coach on multiple occasions *admitted* to making these statements, and continues to accuse counsel of defamation. In Coach, Inc.'s Amended Answer, Docket No. 21, Coach states as follows: "…counsel for Coach indicated to counsel for Ms. Kim that counsel had



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committed actionable defamation that *would be* the subject of a claim." Amended Answer, at 2 (emphasis added). "Coach admits that, in a February 17, 2011 letter, Mr. Keehnel informed counsel for Ms. Kim that they committed defamation." Amended Answer, at 7. "Coach admits that Mr. Keehnel informed counsel for Ms. Kim that counsel for Ms. Kim committed defamation and that a claim *would be filed*." Amended Answer, at 7 (emphasis added). Coach "specifically denies that there has been no defamation against Coach." Amended Answer, at 8 (internal quotation marks omitted).

Under the circumstances here, it is clear that an "actual controversy" existed between the parties entitling cross-Defendants to request declaratory relief under 28 U.S.C. § 2201. Having been repeatedly threatened with the filing of a defamation action in an unspecified forum at an unspecified time, counsel felt compelled to seek declaratory relief[7] in order to prevent greater harm and harassment should Coach decide to file its SLAPP action in an out-of-state forum.

After counsel filed the declaratory judgment action, Coach was faced with a choice. Coach could have acceded to counsel's request for a declaratory judgment, or otherwise abandoned their oft-stated intention to pursue a defamation lawsuit against counsel. If Coach had followed that course, there would be no anti-SLAPP issue here. Instead, Coach chose to carry out its threat to file a SLAPP lawsuit against counsel. Moreover, even after amending away its defamation claim, Coach continues to assert that counsel committed defamation.

Irrespective of any declaratory judgment action, Coach *chose to file a SLAPP defamation claim* against counsel. Washington's unanimous legislative mandate is clear that the Washington statute is to be construed broadly, and reaches any "claim, *however characterized*," that implicates a chilling effect on public discourse. RCW 4.24.525(2)(emphasis added). Nowhere is there any suggestion that parties are denied remedies because they seek the protection of a declaratory judgment action.

[7] If the Court grants counsel's special motion to strike, the resulting dismissal with prejudice of Coach's defamation claims will, of course, moot the declaratory judgment action.



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**D. Counsel's Television Interview Easily Fits Within the Definition of "Public Participation and Petition."**

Without a single citation to legal authority, Coach argues that counsel's interview on a network television newscast regarding Coach's anti-counterfeiting program and the claims in this lawsuit do not constitute "public participation and petition" under Washington's anti-SLAPP statute. This is specious.

Coach takes an absurdly narrow view of the "public participation" standard. Again, the unanimous Washington legislature directed that our anti-SLAPP statute should be construed and applied liberally to effectuate its purposes. RCW 4.24.525, Application -- Construction. Because the television interview was given regarding a class-action matter pending in this Court, the interview was regarding "an oral statement made … that is reasonably likely to encourage or enlist public participation in an effort to effect consideration or review of an issue … in a judicial proceeding." RCW 4.24.525(2)(c). As the SLAPP defendants have declared, one purpose of the interview was to solicit additional class participation in this lawsuit.[8] Carlson Decl., Docket No. 9 ¶ 4; Carney Decl., Docket No. 9, ¶ 4. Indeed, publicizing a class action filing is a common event and is one way that the public participation and consumer protection goals of the class action device are routinely met.

The interview is also clearly an "oral statement made … in connection with an issue under consideration or review by a … judicial proceeding [.]" RCW 4.24.525(2)(b). While Coach attempts to argue that this lawsuit is somehow not actually a "judicial proceeding" in which issues are "under consideration," again, there is no authority whatsoever for that rather remarkable argument. Applying and construing the statutory language liberally (indeed, applying and construing it conservatively), proceedings before this Court are "judicial proceedings" in which issues are "under consideration."

[8] Coach spends a significant amount of its briefing arguing merits issues related to the underlying claims against Coach. These arguments are irrelevant to the present motion.



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In a previous ruling applying Washington's revised anti-SLAPP statute, Judge Pechman recognized that a "major television network's local news broadcast constitutes a 'public forum' within the meaning of 4.24.525(2)(d)." *Castello*, Appendix 2 at 10. So, the interview in question concerned an "oral statement made … in a … *public forum* in connection with an issue of public concern." 4.24.525(2)(d)(emphasis added). Coach's counter-argument that this lawsuit, and its own nationwide anti-counterfeiting program, are not matters of "public concern" is difficult to reconcile, particularly because: (1) Coach admits that it is a famous brand for purposes of defamation analysis, subjecting it to the "actual malice" defamation standard, and (2) Coach has spent millions of dollars and has actively publicized its nationwide anti-counterfeiting campaign (dubbed "Operation Turnlock") in an effort to achieve "general deterrence" against consumers. *See* Carlson Decl., Docket No. 9, Ex. E; Carlson Decl., Docket No. 14, Ex. A. Coach's anti-counterfeiting efforts are a broad and well publicized crusade, and Coach executives have been interviewed multiple times about Coach's efforts. For Coach to now claim that these are not issues of "public concern" is contradictory.

Coach complains to this Court that the public has responded to the television interview by communicating its displeasure directly to Coach. Opposition, at 19. Coach nowhere explains why the public would respond in this fashion over an issue that is not a matter of public concern. Coach's attempt to conflate the class action numerosity requirement with the definition of "public concern" under the anti-SLAPP statute is likewise unavailing. Opposition at 3, 9-10.

There seems to be little legitimate dispute that Coach's defamation claims fall within Washington's anti-SLAPP statute. Indeed, Coach likely reached this same conclusion when they decided to attempt to run from its claims by amending them out of the case.

**E. Coach's Could not Possibly Establish, by Clear and Convincing Evidence, the Probability of Prevailing in Proving "Actual Malice."**

First, Coach misstates the legal standard it must satisfy to avoid anti-SLAPP sanctions. Coach cites to California's anti-SLAPP statute for the proposition that it merely needs to show "minimal merit." But California's statute is, by its plain terms, different than Washington's,



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requiring proof only of a "probability" that plaintiff will prevail on the SLAPP claim. California Code of Civil Procedure 425.16(b)(1). Under Washington's statute, however, the legislature has required "*clear and convincing evidence* of a probability of prevailing on the claim." RCW 4.24.525(4)(b) (emphasis added). Washington's is a different standard entirely, which is why the Court's of this District have ignored California's "minimal merit" standard in favor of Washington's "clear and convincing evidence" standard. *Aronson*, 738 F. Supp. 2d at 1109; *Castello*, Appendix 2 at 6. Coach's attempt to avoid the legal standard applied in this District is telling.

It is well known that the "actual malice" legal standard for public figure defamation is "almost impossible" to meet. *See, e.g.*, Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 Va. L. Rev. 477, 477, 500 n.182 (1998) (discussing that the higher standard of actual malice for public figures is almost impossible to meet). To avoid sanctions, Coach is therefore required to show, by clear and convincing evidence, that it can meet this "almost impossible" standard. Coach has utterly failed to do this.

Coach makes no substantial defense of one of the three statements for which it sued opposing counsel for defamation. Coach claimed as false an accusation that "Coach uses accusations of trademark infringement to stifle second-hand sales of authentic products." Answer and Counterclaims, docket No. 6, ¶ 23. This accusation ignored the actual words quoted in the subject interview, which were: "***we think*** they want to force consumers to only buy new Coach products, and only buy them in coach stores." Coach ignored the words "we think," which indicates a statement of opinion, not fact. Carlson Decl., Docket No. 9, ¶ 9. Coach is no longer appears willing to defend this defamation allegation.

Otherwise, Coach spends a great deal of time discussing its anti-counterfeiting efforts and the underlying merits of Ms. Kim's allegations in this case. None of that is relevant to whether Coach can prove, by clear and convincing evidence, that the SLAPP defendants acted with "actual malice" and made false statements that harmed Coach. What *Coach* knew, and when *Coach* knew it, is not material. As demonstrated convincingly in our last submission, there was



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no actual malice by opposing counsel, and the proffered statements were literally and substantially true. Certain of the complained of statements were statements of opinion. Coach certainly cannot show by clear and convincing evidence, on this record, that it can prove "actual malice." In this regard, the anti-SLAPP defendants will otherwise rest on their prior submission.[9]

## CONCLUSION

Suing opposing counsel during active litigation in federal court is an extraordinary and overly aggressive move, designed to produce an unfair advantage in the underlying case. This conduct clearly comes within Washington's anti-SLAPP statute, which was adopted unanimously to deter this very type of conduct. Coach's attempt to find a loophole and avoid the consequences for its behavior has no support in the law or in equity. The defamation defendants respectfully request that this Court impose sanctions under Washington's anti-SLAPP statute, including the mandatory sanctions of attorney fees and $10,000 for each defendant, and a punitive damage award sufficient "necessary to deter repetition of the conduct and comparable conduct by others similarly situated." RCW 4.24.525(6)(a)(iii).

DATED this 1st day of April, 2010.

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[9] Coach's brief has several misleading arguments. For example, Coach refers to the Declaration of Chris Carney, Docket No. 9, asserting that his statement "no one working on behalf of Coach had ever contacted Ms. Kim" is false, because Ms. Kim received the letter from Coach's counsel that is the subject of this lawsuit. In context, obviously Mr. Carney was talking about contact from Coach ***before*** Ms. Kim received this letter. Coach's counsel understands this full well, and their argument that this fabricated discrepancy "establishes that Coach has stated a legally sufficient claim" is absurd. Opposition at 15-16.



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