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, vs. COACH, INC., a Maryland corporation, and COACH SERVICES, INC., a Maryland corporation, Defendants.	Cause No. 2:11-CV-00214 RSM **MOTION TO STRIKE AND FOR SANCTIONS PURSUANT TO WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525** **NOTED FOR CONSIDERATION: FRIDAY, APRIL 1, 2011** **[ORAL ARGUMENT REQUESTED]**

SUMMARY

Washington has a strong public policy protecting citizens from retaliatory lawsuits when they speak publicly about matters of public concern. Indeed, in February, 2010, the Washington Legislature ***unanimously*** adopted sweeping revisions to Washington's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, RCW 4.24.525. These revisions, which went into effect in June 2010, extended Washington's anti-SLAPP protections to "any claim, however characterized," brought in response to an act involving "public participation and petition." Under the revised definitions, this includes any lawsuit regarding "any oral statement made … in connection with an issue under consideration or review by a … judicial proceeding[.]" RCW 4.25.525(2)(b). *See also* RCW 4.25.525(2)(c)(d) and (e). In short, since June, 2010, public statements about matters under judicial review are protected by Washington's anti-SLAPP statute.

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In responding to the lawsuit against Coach, defendant Coach and its attorneys, Stellman Keehnel, Patrick Eagan, and Rogelio Omar Riojas of DLA Piper, decided that their first order of business would be to sue Plaintiff's counsel for defamation. They first attempted to leverage threats of a defamation lawsuit to compel Plaintiff's counsel to dismiss Ms. Kim's suit. Indeed, Coach's defamation allegations were first raised in a February 17, 2011 letter to Plaintiff's counsel, in which Coach's counsel specifically demanded the dismissal of all claims against Coach. See Declaration of Jay Carlson In Support Of Motion To Strike And For Sanctions Pursuant To Washington's Anti-SLAPP Statute, RCW 4.24.525 ("Carlson Decl."), at Exh. A. When Plaintiff's counsel declined to dismiss the suit, the defamation claim against Plaintiff's counsel shortly followed.

Coach's defamation suit solely concerns oral statements made by Plaintiff's counsel during a television interview about this case. Therefore, it clearly falls within the revised and expanded definitions of RCW 4.24.525.

Pursuant to RCW 4.25.525(4), counterclaim Defendants bring this "special motion to strike" Coach's defamation counterclaim.[1] Because the suit falls within the anti-SLAPP statute, "the burden shifts to [Coach and its counsel] to establish ***by clear and convincing evidence*** a probability of prevailing on the claim." RCW 4.24.525(4)(b)(emphasis added). Coach cannot meet this burden. We therefore respectfully request that the court strike the defamation counterclaims asserted by Coach and its attorneys. We further request that the Court impose the mandatory sanction of attorney's fees and costs, the mandatory $10,000 statutory sanction, and such other sanctions that would be sufficient to "deter repetition of the conduct and comparable conduct by others similarly situated." RCW 4.24.525(6)(a).

DLA Piper is one of the largest law firms in the world. It has 3,500 attorneys spread

[1] This special motion to strike is made well within the statute's 60 day filing period. RCW 4.24.525(5)(a). This filing has the effect of staying "all discovery and any pending hearings or motions" related to Coach's defamation action. RCW 4.24.525(5)(c). This stay remains in effect until the Court rules on this Motion, or until the Court, on good cause shown, orders "that specified discovery or other hearings or motions be conducted." The statute further mandates that a hearing be held on the motion to strike "not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority. *Id*.

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throughout 70 offices in 29 countries, and in 2009 had revenues well in excess of $2 Billion. Carlson Decl., at Ex. B. For its part, Coach is one of the largest luxury brands in the world. In 2010, Coach earned approximately $3.6 Billion in revenue. Carlson Decl., Ex. D. These behemoth organizations chose to file a frivolous defamation claim against opposing counsel, who are small firm or solo practitioners. This was an effort to squelch further public debate about this lawsuit and about Coach's tactics in threatening consumers across the country with massive trademark suits. Washington's anti-SLAPP statute was designed to deter this very conduct, yet Coach and DLA Piper ignored Washington's public policy favoring public participation. In order to deter repetition of this conduct by Coach, by DLA Piper, and by "others similarly situated," this Court should impose a sizeable additional sanction against these parties.

Plaintiff filed this class-action lawsuit because Coach sent her a highly threatening letter falsely accusing her of trademark infringement. Coach also arranged for the temporary interruption of Ms. Kim's eBay account, apparently publishing to eBay false claims that she had offered for sale counterfeit Coach merchandise. Coach's letter not only falsely accused Ms. Kim of trademark infringement, it threatened a lawsuit seeking damages of well over $2 Million, demanded an immediate cash payment to Coach, and demanded a false confession of counterfeiting. On information and belief, it appears that Coach has sent similar letters to many other consumers around the country. Therefore, it is perhaps unsurprising that Coach resorted to an obvious SLAPP lawsuit in an attempt to discourage further public discussion of this highly questionable, and nationwide, business practice.

ARGUMENT

A. Washington's anti-SLAPP statute protects statements on issues of public concern

RCW 4.24.525, as revised, provides special protections for defendants who are sued in response to an act of public participation. In sweeping revisions adopted ***unanimously*** in 2010, the Washington Legislature expressed 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." See Notes -- Findings -- Purpose -- 2010, RCW 4.24.525. The

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legislature found that "such lawsuits, called 'Strategic Lawsuits Against Public Participation,' or '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." *Id*. "It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and to other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process[.]" *Id*. "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the Courts." *See* Application -- Construction -- 2010, RCW 4.24.525. Carlson Decl., Ex. C.

The statute, as revised, applies broadly to any suit filed in response to oral or written public statements made about issues of public concern, which is defined as "public participation and petition." Several of the definitions of "public participation and petition" apply to Coach's defamation counterclaim. For example, the Coach lawsuit concerns:

* "Any oral statement made … in connection with an issue under consideration or review by a … judicial proceeding[.]" RCW 4.25.525(2)(b).

* "Any 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)(c).

* "Any 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).

* "Any 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's counterclaim, as described in its Answer (Docket No. 6), is based solely on oral public statements made by Plaintiff's counsel about the underlying lawsuit against Coach. Having failed to leverage its threats of a defamation case to secure dismissal, Coach now claims that certain of these oral statements were defamatory. Therefore, Coach's counterclaim is a ***quintessential*** SLAPP suit, seeking to stifle public discussion of a matter that is the subject of judicial consideration.

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Given that the lawsuit against Coach was and is subject to a judicial proceeding, public statements about that suit are clearly an act of "public participation" as defined by RCW 4.24.525(2)(b).[2] Moreover, the interview was intended to, and was reasonably likely to, elicit additional public support for the lawsuit by encouraging additional class members who had received Coach's threats to come forward. RCW 4.24.525(2)(c). The statements were also an exercise of free speech on an issue of public concern, made in the public forum of the press. Therefore, in multiple ways the oral statements made by Plaintiff's counsel easily fit within Washington's revised anti-SLAPP statute.

B. Coach cannot prove by clear and convincing evidence a probability of prevailing on the defamation claim.

Because Coach's counterclaim falls easily within the definition of RCW 4.24.525, on this motion to strike the "burden shifts to [Coach and DLA Piper] to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.25.525(4)(b). For several reasons, Coach cannot come close to meeting this high burden. First, Coach is a public figure and is therefore required to meet the "actual malice" standard to justify its defamation claim. This is an extremely difficult standard to meet and one that can never be met on these facts. Second, the statements complained of were literally true, were substantially true, and were made in a good faith belief that they were true. Other statements complained of were statements of opinion and not actionable as statements of fact under defamation law.

In short, in this anti-SLAPP motion to strike, Coach and DLA Piper must prove by clear and convincing evidence that they are likely to prevail in proving actual malice. They cannot make this extraordinary showing, and the counterclaim should be dismissed on that basis. This was the intent of Washington's legislature in revising the anti-SLAPP statute.

1. To prevail on its defamation claim, Coach and DLA Piper must prove actual malice.

In order to prevail on a defamation claim, a plaintiff must prove four elements: falsity, an

[2] State statutory anti-SLAPP claims are properly raised before federal courts ruling on state law counterclaims. *U.S. v. Newsham*, 190 F.3d 963, 971-73 (9th Cir. 1999).

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unprivileged communication, fault, and damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005); *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). The quantum of proof necessary to make out the "fault" element of defamation depends on whether the plaintiff is a public figure. A plaintiff who is a public figure must prove "actual malice" -- that is, actual knowledge of falsity or reckless disregard for truth or falsity -- and must prove this by clear and convincing evidence. *Id*. To establish falsity, a plaintiff must show that the complained of statement was "provably" false. "Expressions of opinion are protected by the First Amendment" and are not actionable. *Robel v. Roundup Corp*., 148 Wn.2d 35, 55, 59 P.3d 611 (2002).

Coach, a multi-billion dollar corporation, is one of the world's most famous luxury brands. Coach spends untold millions of dollars a year on marketing, working to ensure that it remains famous throughout the United States and the world. Coach therefore has essentially unlimited access to the media. Coach has also voluntarily thrust itself into the forefront of the issue of trademark counterfeiting in the United States. The company has established an aggressive and nationwide campaign, called "Operation Turnlock," aimed at confronting alleged infringers. Carlson Decl., Ex. E. Coach has sought, and received, significant publicity for these efforts. Indeed, in a March, 2010 interview, Coach's General Counsel Nancy Axelrod admitted that Coach had spent $1 million or more to file 160 trademark infringement cases in the previous 15 months. *Id*. She also admitted that Coach uses these lawsuits as a "general deterrent." *Id*. In other words, Coach uses lawsuits to gain publicity, and through that publicity it seeks to deter other would be trademark counterfeiters.

In its answer, Coach admits that it is a famous brand. Docket No. 6 at 8, 13. It also acknowledges that the "actual malice and reckless disregard" standard applies to its defamation claims, as it specifically asserts that the conduct complained of meets the "actual malice and reckless disregard" standard. Docket No. 6 at 15-16. In any case, given Coach's pervasive fame, and its aggressive actions to thrust itself into the forefront of an issue of public concern, Coach cannot legitimately object to its status as a public figure for the purposes of defamation law.

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2. Under the actual malice standard, Coach cannot possibly prove by clear and convincing evidence that it is likely to prevail on its defamation claims against counsel.

On the facts of this case, Coach cannot meet its burden here of showing by clear and convincing evidence that it is likely to prevail on a defamation claim against counterclaim defendants Carney and Carlson. The statements Coach complains of were neither false nor actually malicious; rather, each of the statements was either an opinion, or true or substantially true and supported by a good faith and reasonable belief in its accuracy.

With respect to Mr. Carney's statement that Coach had not investigated its false allegations against Ms. Kim, the statement certainly appears to have been at least substantially true. However, it is even more clear that Coach has no probability of proving that the statement was made with actual malice: Mr. Carney subjectively believed in the truth of the statement and had a clear and reasonable good-faith basis for his belief, having investigated the facts and determined the following:

1. The handbag in question was acquired by Ms. Kim directly from Coach and was unquestionably legitimate. Carney Decl., ¶ 5.
2. Coach did not even make an effort to contact Ms. Kim to investigate the authenticity and origin of the handbag in question. Carney Decl., ¶ 5.
3. Ms. Kim had posted in her eBay listing actual photographs of the Coach handbag she was attempting to sell, and thus Coach could have determined its authenticity by examining the photographs. Carney Decl., ¶ 6.
4. Coach could have discovered the authenticity of the handbag with even a minimal investigation, including as little as reviewing its own records to determine that Ms. Kim had previously worked for a Coach retailer and had purchased the handbag directly from Coach. Carney Decl., ¶ 5.

The evidence shows that Mr. Carney's statement was at a minimum substantially true. In

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any event, the evidence is overwhelming that Mr. Carney had an honest and reasonable subjective belief in the truth of the statements. Accordingly, Coach cannot prevail on its counterclaim, and it certainly cannot demonstrate by clear and convincing evidence a likelihood that it will prevail.

With respect to Mr. Carlson's statements paraphrasing the contents of the threatening letter received by Ms. Kim, Coach's claim is likewise untenable. Coach's strained reasoning appears to be that Mr. Carlson appeared to them to be quoting the letter, while the precise words he used to summarize the letter do not appear in the letter. As the asserted basis for a defamation claim, this is absurd. First, Mr. Carlson never stated or represented that he was quoting from the letter. Carlson Decl., ¶ 5. Moreover, he provided a copy of the letter to the reporter covering the story, and the contents of the letter speak for themselves. *Id*. There was no effort whatsoever to mislead as to the actual words used in the letter. Carlson Decl., ¶ 8. Moreover, as described in the Carlson declaration, Mr. Carlson's summary of the letter was substantially true and was entirely faithful to the letter's actual contents. Carlson Decl., ¶ 6-7. The letter asserted without equivocation that Ms. Kim had committed trademark infringement, and threatened her with legal damages totaling at least $2 Million. Docket No. 6, attachment. Coach cannot demonstrate by clear and convincing evidence that it can prove actual malice by Mr. Carlson on this strained defamation theory.

With respect to Coach's claim regarding Mr. Carlson's stated opinion about Coach's motive for sending the letter to Ms. Kim, Coach is likewise unable to demonstrate by clear and convincing evidence that it is likely to prevail. As discussed above, statements of opinion are protected by the first amendment and are not actionable as defamation. Coach appears to acknowledge this problem with the asserted claim by conspicuously misquoting (and also misattributing) the statement of opinion, omitting the critical phrase "***we think***." Carlson Decl., ¶ 9. Properly quoted, and taken in its complete context, this was plainly a statement is opinion by counsel. *Id*. Because the statement is a protected expression of opinion, and is thus not "provably false," Coach cannot meet its required showing by clear and convincing evidence that

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it will likely prevail on its defamation claim against Mr. Carlson. Moreover, given the circumstances, there is ample reason to believe that the opinion stated may very well be true.

For the reasons discussed above, with respect to each and every one of the statements alleged to constitute defamation, Coach fails to meet its burden of showing by clear and convincing evidence that it will likely prevail on proving actual malice by its opposing counsel. Washington's anti-SLAPP law clearly applies to this quintessential SLAPP lawsuit, and this court should give effect to Washington's well-considered public policy that protects those that speak out on matters of public concern. We respectfully request that the Court strike the defamation counterclaims from this case. The Court should also award to counterclaim Defendants their costs and attorney's fees, and the mandatory statutory penalty of $10,000.00. RCW 4.25.525(6)(a).

Lastly, pursuant to RCW 4.25.525(6)(a)(iii), this Court should impose an additional sanction "necessary to deter repetition of the conduct and comparable conduct by others similarly situated." This additional monetary penalty is necessary to deter future similar behavior by Coach and DLA Piper. Counsel submits that to effectively deter a multinational corporation with multi-billion dollar annual revenues, along with one of the largest law firms in the world, the mandatory assessment of $10,000 is inadequate. These behemoth parties chose to ignore Washington's clearly expressed public policy protecting public participation, and sued their opposing counsel in a gambit to squelch public debate. The Court should send a strong message that Washington's public policy may not be given such short shrift. In determing the amount of the sanction, the Court should look to the preliminary "Operation Turnlock" budget that Coach announced to achieve "general deterrence" on behalf of Coach - $1 Million. Carlson Decl., Ex. E.

CONCLUSION

The untenable and retaliatory defamation counterclaims against counsel fall squarely within the provisions of Washington's anti-SLAPP statute. They are an archetypical example of abusive litigation for the purpose of curtailing public participation in freedom of speech and free

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access to the courts. Coach cannot meet it burden to show by clear and convincing evidence that it can prove actual malice by opposing counsel. We respectfully urge the Court to apply the anti-SLAPP statute as intended, to strike the counterclaims, and to sanction Coach and its counsel accordingly.

DATED this 10th day of March, 2010.

/s/

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