

ROBERT SWAIN
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KORS (USA), INC. and
MICHAEL KORS, L.L.C.,

Plaintiffs,

v.

COSTCO WHOLESALE CORPORATION,

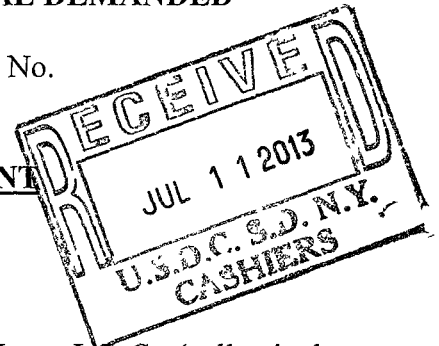
Defendant.

13 CV 4832

JURY TRIAL DEMANDED

Civil Action No.

COMPLAINT



Plaintiffs Michael Kors (USA), Inc. and Michael Kors, L.L.C. (collectively, “Michael Kors”), by their attorneys Paul, Weiss, Rifkind, Wharton & Garrison LLP, for their complaint against defendant Costco Wholesale Corporation (“Costco”), allege as follows:

Nature of the Action

1. Michael Kors brings this action for injunctive relief and damages to halt a false and deceptive bait-and-switch advertising scheme by Costco, which unjustly seeks to profit off of the enormous goodwill of the Michael Kors luxury fashion brand and its associated trademarks.

2. Costco is not an authorized retailer of Michael Kors handbags, yet nonetheless it has disseminated nationwide advertising that prominently features Michael Kors’ highly sought-after luxury handbags and claims those handbags are available from Costco “starting at \$99.” But when a consumer “takes the bait” and seeks to purchase Michael Kors handbags at a Costco store or on Costco’s retail website, no such handbags are available.

3. This bait-and-switch scheme, which intentionally exploits the popularity and appeal of Michael Kors’ luxury handbags to lure unsuspecting consumers away from bona fide Michael Kors retailers and into Costco stores, unjustly benefits Costco to the detriment of Michael Kors and its consumers and authorized retailers.

4. Michael Kors seeks an injunction halting Costco's wrongful conduct, as well as compensatory and punitive damages.

The Parties

5. Michael Kors (USA), Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 11 West 42nd Street, New York, New York, 10036.

6. Michael Kors, L.L.C. is a limited liability corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 11 West 42nd Street, New York, New York, 10036.

7. Costco is a corporation duly organized and existing under the laws of the State of Washington, with its principal place of business at 999 Lake Drive, Issaquah, Washington, 98027, and is authorized to do business in the State of New York and within this District.

Jurisdiction and Venue

8. This action arises under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and the statutory and common laws of the State of New York. This Court's jurisdiction is based upon 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over the related state and common law claims pursuant to 28 U.S.C. §§ 1338(b) and 1367(a), since these claims are joined with substantial and related claims brought under federal law.

9. This Court has personal jurisdiction over Costco pursuant to N.Y. Civ. Prac. L. & R. ("CPLR") §§ 301 and 302(a), because Costco has (i) transacted business within the state (CPLR § 302(a)(1)); (ii) committed a tortious act within the state (CPLR § 302(a)(2)); and/or (iii) committed a tortious act without the state causing injury to person or property within

the state, and (a) regularly does or solicits business, or engages in any other persistent course of conduct, in the state (CPLR § 302(a)(3)(i)) or (b) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate commerce (CPLR § 302(a)(3)(ii)). Upon information and belief, Costco and its agents prepared, disseminated, made available or broadcasted the Costco advertising at issue here, in this District and throughout the United States.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) because Costco resides in this District (as that term is defined in 28 U.S.C. § 1391(c)) and/or pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to this action have occurred and/or will occur in this District.

Facts

The Famous Michael Kors Brand and Trademarks

11. Mr. Michael Kors is widely recognized as one of America's preeminent fashion designers. His namesake company, established in 1981, currently produces a wide range of luxury products, including women's handbags. Mr. Kors has been honored with numerous prestigious awards, including The 2010 Lifetime Achievement Award from the Council of Fashion Designers of America.

12. Michael Kors has invested hundreds of millions of dollars to market and advertise the Michael Kors brand over the company's thirty year history. Michael Kors carefully controls the channels of distribution and the depiction of its products in advertisements to maintain the prestige that its customers associate with the brand.

13. Michael Kors own numerous federal trademarks, including MICHAEL KORS (Reg. No. 2520757) and MK MICHAEL KORS (Reg. No. 3438412), that are used in connection with the manufacture and sale of its luxury handbags, and those marks have achieved

widespread consumer recognition and awareness as an identifier of origin for Michael Kors' high quality products (the "Michael Kors Trademarks").

Costco's Deliberate and Unlawful Bait-and-Switch Advertising Scheme

14. Costco is the largest membership warehouse retailer in the world. According to its 2012 Annual Report, at fiscal year-end 2012 it had 622 warehouse stores in 41 states and around the world, and employed over 180,000 people. It sells to members who pay an annual fee to gain admittance to Costco's no-frills warehouse stores, or to purchase items offered on its website.

15. Costco is not, and never has been, an authorized dealer of Michael Kors handbags, and upon information and belief, Costco does not currently sell Michael Kors handbags.

16. On April 16, 2013, Costco sent an electronic mail blast advertisement (the "Bait-and-Switch Ad") to consumers featuring "Mothers' Day gift ideas." (*See Exhibit A.*) At the top of the Bait-and-Switch Ad, Costco advertised its selection of "Designer Handbags, Starting at \$99.99 Delivered." To the right of this language, Costco featured a large picture of three handbags, one of which (on the left, right next to the ad language) is unmistakably a Michael Kors handbag that prominently features the Michael Kors Trademarks. Beneath the photos of these three handbags are smaller pictures of seven more handbags, three of which are also Michael Kors handbags that prominently feature the Michael Kors Trademarks.

17. After the Bait-and-Switch Ad was disseminated to consumers, agents of Michael Kors visited Costco's retail website to view its handbag selection. No Michael Kors handbags were available on Costco's website.

18. To this date, consumers who arrive at Costco's website through the Bait-and-Switch Ad, or via Costco's main website, will not find any Michael Kors handbags available for sale.

19. After the Bait-and-Switch Ad was disseminated to consumers, agents of Michael Kors also visited nineteen different Costco retail stores in the United States to look for Michael Kors handbags. Not a single Michael Kors handbag was located at any of the Costco retail stores visited.

20. Upon information and belief, Michael Kors handbags are not generally available for purchase by consumers at Costco's retail stores or on its website and were not available for purchase by consumers at Costco's retail stores or on its website on or around Mother's Day (or any day since then), and certainly not "starting at \$99." Similarly, Michael Kors handbags were either not available for purchase by consumers at Costco's retail stores or on its website immediately after the Bait-and-Switch Ad was released, or were only available in extremely small quantities. As a result, those consumers that "took the bait" and visited Costco's retail stores or its website expecting to find Michael Kors handbags were instead presented with other handbags (as well as other products) sold by Costco, resulting in unlawfully gained sales for Costco, and lost sales for Michael Kors and its authorized retailers.

21. Costco's intent and purpose in using the well-known Michael Kors handbags in its Bait-and-Switch Ad was to convey false information, and to deceive consumers about the handbags stocked in Costco's stores and on its website, because doing so increased sales of other products sold by Costco, added to the perceived value of Costco's handbag selection, and made Costco's other handbags look more valuable by means of their association with Michael Kors' luxury handbags.

FIRST CAUSE OF ACTION
(False Advertising Under 15 U.S.C. § 1125(a))

22. Michael Kors repeats and realleges the allegations of paragraphs 1 through 21 above.

23. Costco's Bait-and-Switch Ad, which offers to sell Michael Kors handbags to consumers "starting at \$99" is literally false or likely to mislead consumers since Costco is not authorized to sell, and does not generally sell, Michael Kors handbags. And, any extremely limited quantity of Michael Kors handbags sold by Costco were certainly not offered for sale "starting at \$99."

24. Costco's false and misleading Bait-and-Switch Ad actually deceived or tended to deceive consumers.

25. Costco's false claims are and were likely to influence purchasing decisions of consumers.

26. As the owner of the famous Michael Kors brand and trademark, and a competing seller of handbags, Michael Kors was and is injured by the foregoing misrepresentations of Costco.

27. As the owner of the famous Michael Kors brand and trademark, and a competing seller of handbags, Michael Kors was and is injured by the diversion of sales to Costco from Michael Kors and authorized Michael Kors retailers.

28. Costco's conduct has caused, and unless restrained by the Court, will continue to cause irreparable injury to Michael Kors.

29. Costco's conduct has damaged Michael Kors in an amount to be determined at trial.

30. Costco's aforementioned false advertising has been willful, wanton and malicious, and done with intent to deceive. Michael Kors is therefore entitled to an award of its reasonable attorneys' fees and costs, and treble its actual damages.

31. Michael Kors has no adequate remedy at law and is entitled to a permanent injunction against Costco's false advertising.

SECOND CAUSE OF ACTION
(Unfair Competition Under 15 U.S.C. § 1125(a))

32. Michael Kors repeats and realleges the allegations of paragraphs 1 through 31 above.

33. Costco's unauthorized use of the Michael Kors Trademarks in interstate commerce in connection with a bait-and-switch advertising campaign is intended to deceive and confuse the public and lure consumers into visiting Costco's stores and its website in the search for Michael Kors handbags, thereby allowing Costco to sell other products.

34. Costco's use of the Michael Kors Trademarks in connection with the advertising and sale of Costco's own products is without Michael Kors' permission or authority and is likely to cause confusion, to cause mistake, and to deceive, to the detriment of Michael Kors and its consumers and authorized retailers.

35. Costco's conduct has caused, and unless restrained by the Court, will continue to cause irreparable injury to Michael Kors.

36. Costco's conduct has damaged Michael Kors in an amount to be determined at trial.

37. Costco's aforementioned conduct has been willful, wanton and malicious, and done with intent to deceive. Michael Kors is therefore entitled to an award of its reasonable attorneys' fees and costs, and treble its actual damages.

38. Michael Kors has no adequate remedy at law and is entitled to a permanent injunction against Costco's unlawful conduct.

THIRD CAUSE OF ACTION
(Unfair Competition in Violation of New York Common Law)

39. Michael Kors repeats and realleges the allegations of paragraphs 1 through 38 above.

40. Costco's unauthorized use of the Michael Kors Trademarks in commerce in connection with a bait-and-switch advertising campaign is intended to deceive and confuse the public and lure consumers into visiting Costco's stores and its website in the search for Michael Kors handbags, thereby allowing Costco to sell other products.

41. Costco's use of the Michael Kors Trademarks in connection with the advertising and sale of Costco's own products is without Michael Kors' permission or authority and is likely to cause confusion, to cause mistake, and to deceive, to the detriment of Michael Kors and its consumers and authorized retailers.

42. Costco's conduct has caused, and unless restrained by the Court, will continue to cause irreparable injury to Michael Kors.

43. Costco's conduct has damaged Michael Kors in an amount to be determined at trial.

44. Costco's aforementioned conduct has been willful, wanton and malicious, and done with intent to deceive. Michael Kors is therefore entitled to an award of its reasonable attorneys' fees and costs, and treble its actual damages.

45. Michael Kors has no adequate remedy at law and is entitled to a permanent injunction against Costco's unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Michael Kors demands that judgment be entered against Costco as follows:

1. Finding that Costco has (i) violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and (ii) engaged in unfair competition under the common law of New York.

2. Enjoining and restraining Costco, its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with it, or having actual notice of this Order, from:

- (a) making unauthorized use of Michael Kors' Trademarks;
- (b) advertising, marketing, promoting, displaying, supplying, distributing, offering for sale or selling any Michael Kors products;
- (c) using Michael Kors' products or the Michael Kors Trademarks in connection with Costco's promotion, advertisement, display, sale, offering for sale, or distribution of any products;
- (d) making any descriptions or representations indicating or suggesting that Michael Kors is the source or sponsor of, or in any way has endorsed or is affiliated with, Costco; and
- (e) engaging in any other activity constituting false advertising or unfair competition with Michael Kors.

3. Ordering Costco to file with the Court and serve upon Michael Kors within thirty (30) days after service of the injunction upon Costco, a report in writing and under oath setting forth in detail the manner and form in which Costco has complied with the injunction.

4. Ordering Costco to account to and pay over to Michael Kors all gains, profits, savings, and advantages obtained by Costco as a result of its wrongful conduct;

5. Awarding to Michael Kors actual and punitive damages as provided for under applicable federal and state law;

6. Awarding to Michael Kors its reasonable attorneys' fees, together with the costs and disbursements of this action, to the full extent provided for by applicable federal and state law;

7. Awarding interest, including pre-judgment interest, on all damage sums;

8. Ordering destruction of any infringing or otherwise unlawful materials, including advertising materials;

9. Granting Michael Kors such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: New York, New York
July 11, 2013

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: _____

Leslie Gordon Fagen
Darren W. Johnson

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
lfagen@paulweiss.com
djohnson@paulweiss.com

*Attorneys for Plaintiffs Michael Kors (USA), Inc.
and Michael Kors, L.L.C.*

EXHIBIT A

From: [Costco News](#)

Sent: Tuesday, April 16, 2013 2:38 AM

To: jennan@chartermi.net

Subject: Gifts for Mom - Designer handbags, flowers, jewelry and more!

[View email with images.](#) Please add <mailto:+CostcoNews@online.costco.com> to your address book. Thank you.



Mother's Day is Sunday, May 12.

Mother's Day Gift Ideas



DESIGNER HANDBAGS

Starting at
\$99⁹⁹ Delivered
While supplies last.

[CLICK HERE](#)



PINK BLOOMS MOTHER'S DAY BOUQUET

Vase included.
All orders must be placed
by 12:00 PST Tuesday
May 7, 2013 for delivery
between May 9th-11th.

\$59⁹⁹ Delivered



MOTHER'S DAY MIXED BOUQUET

Vase included.
All orders must be placed
by 12:00 PST Tuesday
May 7, 2013 for delivery
between May 9th-11th.

\$69⁹⁹ Delivered



MOTHER & CHILD JEWELRY

















These 14kt White Gold necklace
and earrings feature the classic
Mother and Child™ design.
Gorgeous pieces of jewelry that
she will enjoy for a lifetime!

















Starting at
\$189⁹⁹ Delivered














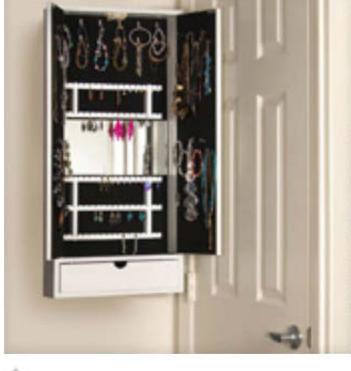



GEMSTONE JEWELRY

[CLICK HERE](#)

			
▲ GIA Certified Diamond Studs	▲ Diamond Studs Up to \$250 OFF While supplies last.	▲ One-of-a-Kind Necklaces Starting at \$5,699.99 Delivered	▲ Diamond Necklaces Up to \$150 OFF While supplies last.
			
▲ Love Knot Jewelry Starting at \$1,349.99 Delivered	▲ Diamond Heart Jewelry Starting at \$329.99 Delivered	▲ Pearl Strands Starting at \$199.99 Delivered	▲ Pearl Necklaces Starting at \$199.99 Delivered
			
▲ Avril Chaise \$469.99 Delivered	▲ Master Grade Premium Multi-Stage Electric Knife Sharpener \$89.99 Delivered After \$10 OFF Valid through 5/13/13	▲ Keurig Platinum Single Cup Coffee Brewing System Includes 60 K-cups. \$159.99 Delivered	▲ Egyptian Alabaster Citadel Lamp \$89.99 Delivered
			
▲ Spa Essentials Tote Basket \$37.99 Delivered	▲ The Fruit Company Mother's Day 8-Box Organic Tower \$74.99 Delivered After \$25 OFF Valid through 5/12/13	▲ The Fruit Company Mother's Day Deluxe Picnic Basket \$99.99 Delivered After \$30 OFF Valid through 5/12/13	▲ The Fruit Company Classic Mother's Day Watercolor Poppy and Fruit 5-Box Tower \$29.99 Delivered After \$10 OFF Valid through 5/12/13

			
Beckett Cheval Mirror with Jewelry Storage \$479.99 Delivered	Spa Sonic Skin Care System Face and Body Polisher Deluxe Kit \$39.99 Delivered After \$20 OFF Valid through 4/21/13	Brother PC210PKG Computerized Sewing Machine \$299.99 Delivered	Bella Lite Hair Removal System \$299.99 Delivered After \$100 OFF Valid through 4/21/13
			
Pinnacle 7-Piece Solid Wood Frame Set \$59.99 Delivered	Burnes of Boston 5 Opening Chandelier Collage Frame \$29.99 Delivered	SpaFinder Wellness Two \$50 Gift Cards \$79.99 Delivered	Silk'n BellaFace Anti Aging Skin Device \$199.99 Delivered After \$80 OFF Valid through 4/21/13
			
Veratex Platinum Collection 500TC Bella 6-Piece Sheet Set Available in various sizes. Price varies by size. Starting at \$119.99 Delivered	Mrs. Fields Cookies Mother's Day Spring Tower \$49.99 Delivered After \$20 OFF Valid through 5/12/13	Mrs. Fields Cookies Mother's Day Spring Tin \$29.99 Delivered After \$7 OFF Valid through 5/12/13	Best of Popcornopolis Mother's Day 7-Cone Gift Basket \$29.99 Delivered After \$10 OFF Valid through 5/12/13
			
The Original BedandBreakfast.com \$100 E-Card \$69.99 Delivered After \$5 OFF Valid through 4/26/13	Celeste Ladies' Cashmere Blend Printed Scarf \$19.99 Delivered	Carole Hochman 2-Piece Pajama Set \$18.99 Delivered	Carole Hochman French Terry Short Robe \$27.99 Delivered

			
<p>▲ Brother PE700IIPKG Computerized Embroidery Only Machine \$589.99 Delivered</p>	<p>▲ Master Home Roma LX Massage Table \$199.99 Delivered After \$30 OFF Valid through 4/29/13</p>	<p>▲ Pentax K-30 2 Lens Weatherproof DSLR Bundle Includes 18-55mm and 50-200mm WR lenses, bag and 16GB SD card. Various colors available. \$849.99 Delivered After \$300 OFF Valid through 4/21/13</p>	<p>▲ Nikon D3200 DSLR Camera 2 Lens Bundle Includes 18-55mm and 55-200mm VR lenses, WU-1a Wi-Fi mobile adapter, bag, 16GB SD card, Nikon School Instructional DVDs and photo guide. \$779.99 After \$200 OFF Free Shipping Valid through 4/27/13</p>
			
<p>▲ Samsung NX1000 Wi-Fi Compact System Camera 2 Lens Bundle Includes 16mm and 20-50mm lenses, external flash, bag and 8GB SD card. Various colors available. \$549.99 After \$250 OFF Free Shipping Valid through 4/21/13</p>	<p>▲ Panasonic LUMIX ZS25 Digital Camera Bundle Includes 16GB SD card and case. \$299.99 Free Shipping</p>	<p>▲ Canon PowerShot SX500 IS Digital Camera Bundle Includes 8GB SD card and case. \$249.99 After \$50 OFF Free Shipping Valid through 4/27/13</p>	<p>▲ JVC GZ-EX515 Wi-Fi Camcorder Bundle Includes HDMI cable, case and 16GB SD card. \$369.99 After \$30 OFF Free Shipping Valid through 4/21/13</p>
			
<p>▲ La Cote 6-Piece Stainless Steel Steak Knives with Pakka Wood Handles \$99.99 Delivered</p>	<p>▲ Saber F-16 Knife Set \$149.99 Delivered After \$100 OFF Valid through 4/28/13</p>	<p>▲ Morelle and Novato Accent Chairs \$149.99 Delivered After \$20 OFF Vaid through 5/5/13</p>	<p>▲ Brenthaven Prostyle II Sleeve 15" Genuine leather shell with high density foam protection system. \$63.99 Delivered</p>
			
<p>▲ Calibowl Non-Spill 8-Piece Bowl Set Available in red or white. \$49.99 Delivered</p>	<p>▲ Cabidor Hinge-Mounted Jewelry Door Storage \$149.99 Delivered</p>	<p>▲ Cricut Expression 2 Mother's Day Bundle Includes Cricut Expression 2 machine, cardstock, wall décor and more. \$219.99 Delivered After \$30 OFF Valid through 5/3/13</p>	

