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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NIKE USA, INC., an Oregon corporation,

Plaintiff,

v.

BORIS BERIAN, an individual California resident,

Defendant.

Case No. 3:16-cv-00743-SB

PLAINTIFF NIKE USA, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR EXPEDITED PRELIMINARY INJUNCTION HEARING AND RELATED DISCOVERY

Nike USA, Inc. ("Nike") submits this reply memorandum in further support of its Motion for Expedited Preliminary Injunction Hearing and Related Discovery (Nike's "Discovery Motion"), which is set for hearing on June 7, 2016 at 2:00 p.m. In that motion, Nike seeks an order permitting it to conduct expedited discovery in advance of the preliminary injunction hearing and setting that hearing on a date prior to June 28, 2016.

I. INTRODUCTION

This is a simple case in which Nike clearly exercised its right of first refusal by matching the New Balance Offer[1] to Defendant, but Defendant has refused to acknowledge as much or abide by his contractual obligations. The critical facts are as follows:

- Section 5 of Defendant's 2015 Contract plainly provides that "Nike shall have a right of first refusal with regard to any bona fide third-party offer received by ATHLETE which ATHLETE desire to accept." The section goes on to provide that "ATHLETE shall submit in writing (on the third-party's letterhead), the specific terms of any such offer," after which Nike has 10 business days to notify the athlete if it will enter into an agreement "on terms no less favorable" than those of the third-party offer.

- Pursuant to this provision, on January 20, 2016, Defendant's agent provided a term sheet from New Balance that Defendant found to be agreeable. The term sheet itself was silent on reductions.

- Two days later, on January 22, 2016, Nike wrote Defendant's agent, stating "Nike matches the New Balance Offer" as set forth in the term sheet provided on January 20. The letter also included a copy of the term sheet with "Nike" inserted in lieu of "New Balance" to confirm the match. And while the letter noted that the New Balance offer was silent on reductions and sought clarification of whether any material terms were omitted from the offer, *it in no way indicated that Nike was not matching any such terms.*

- Despite these facts, Defendant has refused either to acknowledge that Nike had matched the New Balance Offer or to provide any clarification on whether the term sheet his agent had provided was complete.

[1] Capitalized terms not defined herein with have the same meaning as that ascribed in the Discovery Motion.

In his Opposition, Defendant spends much of the time arguing the merits, claiming that Nike failed to match the New Balance offer because Nike somehow included reductions in its response even though the matching term sheet it provided to Defendant on January 22, 2016 *did not contain any reductions.* But what is more astonishing is that while raising this defense, Defendant argues that Nike should not be permitted *any* document discovery whatsoever to explore its merits. In this regard, Defendant agrees that it "may make sense" to hold not only a preliminary injunction hearing, but *a trial on the merits* by June 28, but nonetheless insists that Nike should only be allowed to serve limited interrogatories and "very limited" depositions in preparation for such a *trial*.

To justify this unorthodox approach, Defendant claims that Nike's lawsuit is nothing more than a baseless attempt to prevent Defendant from competing. But nothing could be further from the truth. As it does with all of its athletes, Nike hopes Defendant will compete and succeed. Indeed, Nike was Defendant's first sponsor and supported him before he achieved his current notoriety. Nevertheless, like any other paying endorser, Nike expects Defendant to compete in its own apparel and/or footwear.

Defendant also mistakenly suggests that the proposed discovery is unnecessary or unduly burdensome. But as Nike has demonstrated, the proposed discovery is narrowly focused on the defense that Defendant has brought into play, namely whether Nike somehow failed to match the New Balance Offer. Defendant should not be permitted to simultaneously raise this issue as a defense and prevent Nike from exploring it through document discovery.

For all of these reasons, the Court should set a hearing before June 28, 2016, which Defendant does not seriously oppose. But the hearing should be limited to the proposed

preliminary injunction, and Nike should be permitted to obtain the limited discovery it has proposed.

II. ARGUMENT

A. The Limited Discovery Sought By Nike Is Essential.

As Defendant's Opposition makes clear, his principal defense to Nike's claim is that Nike failed to match the New Balance Offer. According to Defendant, this question can be resolved strictly based on the correspondence between the parties. Yet it is precisely because Defendant has argued that Nike did not match the New Balance Offer that Nike's requested discovery is necessary.

Defendant's theory of the case is that Nike failed to match the alleged "lack of reductions" in the New Balance Offer. Nike disagrees with this assertion based on the fact that it unequivocally stated that it "matche[d] the New Balance Offer" and provided Defendant with a term sheet explicitly matching each of the offer's seven terms. Cesar Decl. Ex. 4 [Dkt. No. 8-4]. But there is also a factual issue of what exactly New Balance offered. As communicated to Nike, the New Balance Offer was only a term sheet that was silent as to reductions. And while Defendant relies on an email from his agent to Nike claiming that the "lack of reductions" was a material element of the offer, he never provided any documentation on *New Balance letterhead*, as required under the 2015 Contract, to substantiate that claim. Opp'n [Dkt. No. 14] at 4. Nike is therefore entitled to limited discovery to determine what exactly New Balance offered.[2]

[2] The June 7, 2016 Declaration of John Evans ("Evans Declaration") (Dkt. No. 17) indicates that the New Balance term sheet did not include a provision allowing New Balance to reduce Mr. Berian's compensation in the event he did not meet a specified level of performance. Putting aside the fact that this is the first time Defendant has provided *any* information on this issue, the declaration is nonetheless factually vague in that it does not address whether New Balance intended to apply reductions based on other factors (*e.g.*, frequency of performance). As a result, discovery on the issue is still warranted to address the issue and determine the scope of

As Nike has made clear, it matched the New Balance Offer regardless of whether that offer contained reductions. But Defendant should not be permitted to avoid his contractual obligations under the right of first refusal clause merely by sending an incomplete term sheet as an "offer" and then claiming that Nike has failed to match such terms simply because it asks for clarification on details of the offer that appear to have been omitted. Under such circumstances, Nike should be permitted to obtain limited discovery of communications or documents regarding the precise nature of the New Balance Offer.

B. The Requested Discovery Is Reasonable and Narrowly Tailored.

Contrary to Defendant's assertions, the discovery proposed by Nike is both reasonable and narrowly tailored to the issues in dispute. Defendant's position that Nike should be deprived of *all* document discovery, on the other hand, is completely unreasonable. Although Defendant appears willing to allow Nike to conduct "very limited" depositions, to do so without *any* document discovery would totally undermine Nike's ability to obtain a complete view of the narrow set of facts at issue in this case.

Moreover, the proposed document requests are not overly broad as Defendant suggests. Indeed, while Defendant complains about the breadth of the relatively standard definitions in Nike's document requests, such definitions are largely irrelevant given that Nike is merely seeking communications or documents relating to the New Balance Offer. Moreover, the requests (and the events at issue) cover a relatively short period of time. As a result, the volume of material will necessarily be limited and will almost certainly be confined to the paper and

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the offer that Nike unequivocally matched in its initial response to Defendant's agent on January 22, 2016.

electronic files of two people – Defendant and his agent. Collection of such materials would be relatively simple and does not, as Defendant suggests require an "army of attorneys" to work for "a month." Opp'n at 7. Nor will it disrupt Defendant's training, as the limited burden, as he concedes, will fall on his counsel.

C. Defendant Is In Breach of the 2016 Contract and Expedited Relief Is Necessary to Prevent Further Harm to Nike.

Defendant also seeks to avoid the proposed expedited relief and discovery on grounds that even if Nike matched the New Balance Offer, the affiliation clause in the 2016 Contract[3] permits him to "run[] in the New Balance gear of his club team." This is argument is essentially an improper attempt to argue the merits of the case on a discovery motion, and, in any event, it is wrong for three reasons.

First, while Nike agrees that it matched the affiliation clause, that clause cannot be read to allow Defendant to wear New Balance footwear and apparel. The affiliation clause merely provided that Defendant would be permitted to "wear the official uniform and footwear of the Big Bear Track Club in all domestic competitions." And at the time the New Balance Offer was made, the only official element of the Big Bear Track Club uniform was a Big Bear Track Club badge. Nike was not provided any information suggesting that New Balance was an official sponsor of Big Bear Track Club at that time. *See* Cesar Decl. [Dkt. No. 8] ¶ 13. In fact, Big Bear Track Club's videos and social media posts early January feature Defendant and other team

[3] Nike does not contend, as Defendant suggests, that Defendant is bound by the long-form agreement Nike sent to him on February 15, 2016. That agreement was a memorialization, subject to Defendant's review, of the 2016 Contract, which was formed on January 22, 2016, when Nike unequivocally matched the New Balance Offer Defendant submitted to Nike on January 20, 2016. *See* TRO Motion at 9-10; Cesar Decl. Ex. 3 [Dkt. No. 8-3]; Cesar Decl. Ex. 4 [Dkt. 8-4]. However, Nike's match of the New Balance Offer included a match of the affiliation clause, therefore Nike concedes that it is part of the 2016 Contract. *See* Cesar Decl. Ex. 4 [Dtk. No. 8-4] at 7.

members in *Nike* apparel. Therefore, Defendant's claim that he is free, under the 2016 Contract, to compete in New Balance apparel and footwear is unfounded.

Second, to the extent Defendant is arguing that, in order to match the New Balance Offer, Nike had to allow Defendant to compete in New Balance apparel and footwear at the Olympics and Olympic Trials, Defendant's argument is wrong as a matter of law. Interpreted in this way, the affiliation provision of the New Balance Offer would have clearly been inserted to undermine the very purpose of Nike's endorsement relationship with Defendant, and thus would have been an unenforceable "poison pill." *See Davis v. Iofredo*, 713 N.E.2d 26, 28 (Ohio Ct. App. 1998) (right of first refusal may not be defeated by special or peculiar terms not made in good faith); *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249, 252 (Ky. App. 1967) (same).[4]

Finally, even if the 2016 Contract did permit Defendant to compete in New Balance in the Olympic Trials, it does not permit him to compete in New Balance at the Olympic Games or endorse New Balance on his social media accounts. The express language of the New Balance term sheet, which was matched in identical language by Nike (substituting "Nike" for "New Balance") manifestly provides otherwise. *See* Cesar Decl. Ex. 4 [Dtk. 8-4] at 7 ("ATHLETE shall compete for Team NIKE and wear the Team NIKE official uniform in all international events.") Moreover, there is no question that Nike would be harmed if it lost the unique opportunity of having Defendant endorse Nike products during the Olympics season, which would plainly be the case if Defendant is absent from Nike's Olympics-related marketing

[4] In this regard, the Evans Declaration makes clear that New Balance "plans to enter" an endorsement agreement with Defendant, which supports the implication that it attempted to structure its offer in a manner that would preclude Nike from matching it so that Defendant would be free to enter an agreement with New Balance.

campaign, competes in New Balance footwear, and promotes New Balance on social media and elsewhere. It is this harm that Nike seeks to avoid by seeking expedited temporary relief.

D. Nike Did Not "Delay" In Serving Its TRO Motion.

Finally, Defendant mistakenly argues that Nike should be deprived of the proposed discovery because it purportedly delayed filing this action or the TRO Motion. But the reality is that Defendant has been on notice that Nike was considering seeking preliminary injunctive relief since at least February 19, 2016. *See* Cesar Decl. Ex 6 [Dkt. 8-6] at 1. Moreover, any doubts Defendant might have had about Nike's intentions to do so were resolved on May 20, when Nike finally served him – in person, because his counsel reneged on his agreement to accept service – with the Complaint. *See* Ramfjord Decl. [Dkt. No. 7] ¶¶ 3-6. Finally, Nike filed its TRO Motion just six business days after serving Defendant with the Complaint. Therefore, Defendant is not prejudiced by preparing and responding to narrowly tailored expedited discovery, particularly given that Defendant himself proposes that a preliminary injunction hearing *and trial on the merits* be held in less than a month. Opp'n at 8.

E. The Court Should Not Consolidate the Preliminary Injunction Hearing with the Trial on the Merits.

Despite claiming that limited discovery would be overly burdensome, Defendant also suggests that the Court could consolidate the preliminary injunction hearing with the trial on the merits. As the Supreme Court stated in *University of Texas v. Camenisch,* a party "is not required to prove [its] case in full at a preliminary-injunction hearing." 451 U.S. 390, 395 (1981). Therefore, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Id.* This is particularly true where, as here, the parties agree that the hearing should be held on an expedited schedule. *See Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) ("[I]t is unlikely that the merits of a claim will be fully ventilated

at the early stage of a litigation at which a preliminary injunction is normally addressed.") Under such circumstances, it is unfair to expect Nike to fully develop its claims, which seek more than just injunctive relief.

DATED: June 7, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the following named persons on the date indicated below by

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery
- ☐ email
- ☒ notice of electronic filing using the CM/ECF system

to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at his or her last-known addresses indicated below.

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DATED: June 7, 2016.

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