IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NIKE USA, INC., Plaintiff, v. DAUNTE CULPEPPER, Defendant.	)	Civil No. 02-868-JE OPINION & ORDER

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MARSH, Judge.

Plaintiff, a designer, manufacturer and marketer of athletic footwear and accessories filed this action against Daunte Culpepper, the quarterback for the Minnesota Vikings, seeking injunctive and declaratory relief to prevent Culpepper from entering into an endorsement contract with Reebok, International, a Nike competitor. Plaintiff claims that under a contractual right of first refusal, defendant entered into an exclusive, binding 2- year contract with Nike and that defendant's entry into the Reebok contract constitutes a breach that threatens irreparable harm. Plaintiff initially moved for a temporary restraining order and this motion was resolved through a temporary stipulation. The parties proceeded with discovery and an evidentiary hearing on plaintiff's motion for preliminary injunction was conducted on July 11, 2002. During the hearing, defendant filed a motion to dismiss the action based upon his reading of the contract; defendant argues that the parties were never able to agree upon all essential terms and thus, no binding contract was ever formed. The following constitutes the written follow-up to my oral findings and conclusions granting plaintiff's prayer for preliminary injunctive relief. For the reasons which follow, plaintiff's motion for injunctive relief is GRANTED and defendant's motion to dismiss is DENIED.

STANDARDS

To obtain a preliminary injunction, plaintiff must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2)

that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. Tillamook County v. U.S. Army Corps of Engineers, 288 F.3d 1140, 1143 (9th Cir. 2002); Sardi's Restaurant Corp. v. Sardie, 755 F.2d 719, 723 (9th Cir. 1985). These are not two distinct tests, but rather are opposite ends of a single "continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987) (citations omitted).

Background

On July 1, 2000, the parties entered into a "Football Agreement" whereby defendant agreed to endorse Nike products for a one year period to expire June 30, 2001. Nike agreed to pay Culpepper $10,000 plus several cash bonuses depending upon his professional performance. The contract also gave defendant a $10,000 merchandise account. Culpepper's only obligation was to wear unaltered Nike merchandise during the regular football season and to agree to make at least one personal appearance as requested by Nike. This initial contract included a "Right of First Dealing & First Refusal." Paragraph 9 provided as follows:

> "(a) At NIKE's request, ATHLETE shall negotiate with NIKE in good faith with respect to the terms of a renewal Contract. The parties shall not be obligated to enter into an agreement if they cannot settle on mutually satisfactory terms. ATHLETE shall not (nor shall ATHLETE permit ATHLETE's agents, attorneys, accountants, representatives or employees to) engage in discussions or negotiations with any third party regarding ATHLETE's wearing, sponsoring, promoting, advertising or endorsing, or providing consulting or similar services with respect to, any Products after

> the Contract Period ("Endorsements/Services") until sixty (60) days prior to the expiration of this Contract (the "Exclusive Negotiating End Date"). (b) During the Contract Period and for a period of one hundred eighty (180) days thereafter, NIKE shall have the right of first refusal for Endorsements/Services, as follows. If ATHLETE receives any bona fide third party offer at any time on or after the Exclusive Negotiating End Date with respect to any Endorsements/Services, ATHLETE shall submit to NIKE in writing the specific terms of such bona fide third party offer. NIKE shall have ten (10) business days from the date of its receipt of such third party offer to notify ATHLETE in writing if it will enter into a new contract with ATHLETE on terms no less favorable to ATHLETE than the material, measurable and matchable terms of such third party offer. If NIKE so notifies ATHLETE within such 10-day period, ATHLETE shall enter into a contract with NIKE on the terms of NIKE's offer. If NIKE fails or declines to match or better the material, measurable and matchable terms of such third party offer within such 10-day period, ATHLETE may thereafter consummate an agreement with such third party on the terms of the offer made to ATHLETE. Prior to the Exclusive negotiating End Date, ATHLETE shall not solicit, consider or present to NIKE, and NIKE shall not be obligated to respond to, any third party offer for any Endorsements/Services.

Towards the end of the term of the initial agreement, Nike began negotiating the terms of a renewal with Culpepper's agent, Mason Ashe. There is no dispute that the parties were unable to reach an agreement. Nike was unwilling to offer more than $30,000/year, and Ashe felt that Culpepper's endorsement was worth far more than that.

Ashe then began soliciting endorsement contracts from competitors and received an offer from Reebok, International. On August 24, 2001, consistent with Paragraph 9(b) of the Nike contract, Ashe faxed Nike a copy of the Reebok offer. The Reebok offer called for cash payments of $100,000 in the first year, $125,000 in the second year, license royalties, bonuses depending upon season performance and a minimum of 8 personal

appearances per year.[1] On August 31, 2001, Bill Kellar, Director of Nike Football Sports Marketing, faxed a response to Ashe in which he indicated that Nike was willing to renew Culpepper's endorsement contract on the same terms as proposed in the written Reebok offer that Ashe had faxed to Nike on August 24, 2001. There is no dispute that the Nike acceptance letter mirrors the written terms of the Reebok offer, word for word.

On September 4, 2001, Ashe wrote to Bill Kellar and advised him that the Nike acceptance letter was ineffective because Nike had failed to include any provision for a national marketing campaign. Ashe indicated that such a promise had been made by Reebok orally. Micahel Ornstein, the NFL consultant for Reebok, submitted a declaration in which he confirms that he orally advised Ashe of Reebok's intent to create a national ad campaign around Culpepper; Ornstein explained that Reebok was unwilling to put such a commitment into writing because of trade secret and confidentiality concerns. Greg Young, the Nike sports marketing agent who had been involved in the early contract re-negotiation efforts with Culpepper, also confirms that Ashe wanted some form of marketing commitment with any contract renewal.

On September 19, 2001, Nike's in-house legal counsel Stephanie Vardavas wrote to Ashe explaining that it was Nike's position that it had met the terms of the Reebok offer and that Culpepper was bound to honor the renewal agreement.

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[1] "Appearances: 8 per year, can be used for TV, radio, print or spokesperson efforts; eight hour maximum per appearance."

Vardavas wrote: "Precisely as prescribed in their 2000-2001 agreement, Nike and Daunte Culpepper have a binding agreement for the 2001-2003 on ther terms of Nike's offer." Vardavas then directed Ashe to confirm this fact in writing. On September 21, 2002, Ashe responded in writing that it was his view that Nike had not negotiated in good faith and that "Nike's relationship with Daunte is irreconcilable and there is no contract."

On October 4, 2001, Vardavas again wrote to Ashe indicating that because Nike had matched all of the written terms of the Reebok offer, that the parties had a binding contract for 2001-2003.

Greg Young testified that he visited Culpepper in the Vikings' locker room on October 10, 2001 and that Culpepper confirmed that he would honor the Nike contract. Culpepper denies having made any such commitment. Young confirms that Culpepper was unhappy with Nike and expressed his belief that Nike had not negotiated with him in good faith. Thereafter, Nike sent Ashe a form renewal contract for the 2001-2003 season. Culpepper never signed or returned the contract.

There is no dispute that throughout the 2001 season, Culpepper continued to wear Nike shoes, consistent with the terms of his contract. Culpepper testified that he did so only because the shoes were ordered by the team. Nike presented testimony from Elizabeth Langdin, a Nike footwear developer, that she had approximately 18 custom designed shoes made for Culpepper during the 2001 season. Langdin testified that she made the shoes at the direction of Nancy Benoit, a

Nike marketing agent. Culpepper acknowledged that he had some discussions with Benoit about creating a special shoe that would be marketed under his name, but denied that he ever ordered any specialized or customized shoes for his own use.

There is also no dispute that defendant continued to order Nike merchandise under his contract account with Nike throughout the 2001-2002 season; Culpepper testified that he placed the orders for some friends, not knowing if his account was still effective. There is also no dispute that Culpepper received all of the merchandise that he ordered from Nike and that he was never billed for those items.

On March 8, 2002, Culpepper's attorneys wrote to Nike indicating that Culpepper would continue to maintain that he was no longer under contract with Nike because of Nike's failure to feature him in a national marketing campaign. The letter pointed out that Nike had not made any contract payments and that such failure was inconsistent with its position regarding the existence of a contract. On April 4, 2002, Nike dispatched a check to Culpepper for $100,000. The check stub, attached to the payment indicated that the check was for the "2001-2002 Contract Year." The check was sent to the Vikings office in Eden Prarie, Minnesota.[2]

Culpepper deposited the check into his personal bank

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[2] In his opposition to the motion, defendant intimated that the fact that Nike sent the check directly to Culpepper rather than his agent was some indication of Nike's attempt to trick Culpepper into entering into a renewal contract. Testimony at the hearing from Patrick Gillette, an Athlete Compensation Specialist for Nike, confirms that the Eden Prarie address had been used for payments during the 2000-2001 season without complaint or incident.

account on April 10, 2002. He indicated in his sworn declaration that he cashed the check not knowing what it was for and that he assumed it was for amounts due under his previous contract. At the hearing, Culpepper admitted that he had received all payments due under the prior contract and that he was unaware of any prior contractual obligation that could have explained the $100,000 payment. He denied any memory of the check stub indicating that the check was for the 2001-2002 season and confirmed that it was not his practice to notice the details of such payments; when he received checks, he promptly cashed them.

On May 1, 2002, Culpepper executed an endorsement contract with Reebok. Ashe orally notified Kellar of this fact on June 21, 2002 and advised Kellar of Culpepper's intent to film a commercial for Reebok in mid-July. Nike thereafter filed this action seeking immediate injunctive relief.

DISCUSSION

The central issue is whether Nike is likely to prevail on the merits of its claim that the parties have a valid, binding endorsement contract for the 2001-2003 seasons. There is no dispute that the parties complied with the provisions of paragraph 9(a) relative to the right of first dealing. Those negotiations were unsuccessful and Culpepper had every right to seek other offers. Once he received the Reebok offer, Culpepper properly submitted the written terms of that offer to Nike, consistent with paragraph 9(b)'s right of first refusal. Culpepper did not submit a written term relative to

a national marketing campaign; Reebok expressly refused to put any such term into writing, nor did Ashe ever specify the terms of such an offer. Exactly what Reebok intended with its oral promise of a "national advertising campaign" (i.e. print, billboard, television, radio, etc.) was never specified.

Nike presented testimony from Mark Thomishow, a Nike marketing agent, that explicit marketing terms – such as media budgets - are sometimes included within the terms of a marketing contract. For whatever reason, Reebok refused to put any marketing assurance into the terms of its offer with Culpepper. The Reebok offer Culpepper submitted to Nike failed to include any written marketing terms; all of the written terms of the Reebok offer were matched, point for point, by Nike's August 31, 2001 acceptance. Once that occurred, pursuant to paragraph 9(b), Culpepper was bound to accept Nike's offer. I expressly reject defendant's argument (made in support of its motion to dismiss for failure to state a claim) that the provisions of 9(a), regarding the parties' inability to reach an accord on terms, can be read to modify the mandatory language of 9(b) regarding the defendant's obligation to accept Nike's match of a competitor's written offer. Paragraph 9(a) governs the parties' commitment to negotiate with each other exclusively prior to seeking alternative offers; paragraph 9(b) governs the parties commitment to honor the terms of a right of first refusal. Had Nike declined to meet the written terms of the Reebok offer, Culpepper would have been free to accept the Reebok offer. However, because Nike agreed to the Reebok terms,

Culpepper bound himself to honor Nike's acceptance.

I further find that any marketing assurance defendant may have received orally from Reebok was too vague to be matched by Nike; a "national advertising campaign" could mean many things. The term is simply too uncertain to have been capable of being matched by Nike. The term further fails to constitute a "material, measurable and matchable" term as required by 9(b) of the right of first refusal agreed upon by the parties. The marketing assurance that Reebok did specify in writing, regarding 8 personal appearances, was matched word for word by Nike.

I also find significant evidence tending to demonstrate Culpepper's acceptance of the Nike renewal contract. While I accept Culpepper's testimony that it was truly never his intent to bind himself to a Nike renewal contract, his voluntary actions are clearly inconsistent with that intent. Cashing a check from Nike for $100,000 at a time when he knew that Nike was insisting upon the existence of a contract, without even glancing at the written specification on the check stub, if not knowing acceptance – constitutes such a high degree of recklessness so as to lead any reasonable person to believe that he had accepted Nike's offer. Further, Culpepper may have considered his continued use of the Nike merchandise account akin to a college prank, but again, his conduct demonstrates acceptance in the minds of reasonable people.

Based upon the foregoing, I find that Nike has demonstrated a likelihood of success on the merits of its

contract claim.

Defendant argues that even if Nike establishes a probability of success on the merits, it cannot show irreparable harm. Testimony indicated that Nike has over 8,000 athletes currently under endorsement contracts. Of those, only a small percentage receive cash in addition to merchandise. Culpepper argues that he cannot be that important to Nike given Nike's initial willingness to "only" offer him $30,000/year; however, Nike's willingess to match the Reebok offer of $100,000 for the first year (plus cash performance bonuses) indicates a great deal of importance to Nike in the football sector. Further, Thomashow's testimony supports Nike's claim that its good will would be injured by defendant's switch to Reebok and that it would be extremely costly to Nike to neutralize such a brand shift. Culpepper's own testimony indicates that he has no actual brand favorite; his only interest in signing with Reebok over Nike relates to his desire to be featured in a national ad campaign. Culpepper has had no difficulty in wearing and endorsing Nike products consistently throughout the first few years of his career. Thus, restraining Culpepper from endorsing Reebok (or any other competitor) should impose no great hardship.

Based upon the foregoing, I find that plaintiff has demonstrated a high probability of success on the merits, that plaintiff has shown some evidence of irreparable harm to its good will and that the balance of hardships favors the entry of preliminary injunctive relief pending a final resolution on the merits. Accordingly, plaintiff's motion for a preliminary

injunction (#5) is GRANTED as follows:

Defendant, and/or anyone acting in concert with the defendant, is hereby prohibited from any conduct that enters into or furthers an endorsement relationship with Reebok or any other Nike competitor pending a final resolution of the merits of this action and/or expiration of the term of the 2001-2003 contract. No bond is required.

Defendant's motion to dismiss for failure to state a claim (#29) is DENIED.

IT IS SO ORDERED.

DATED this 24 day of July, 2002.

_/s/ Malcolm F. Marsh_____

Malcolm F. Marsh
United States District Judge