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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
MOTION FOR EXPEDITED
PRELIMINARY INJUNCTION
HEARING AND RELATED
DISCOVERY**

**EXPEDITED CONSIDERATION
REQUESTED**

LR 7-1(A) CONFERRAL CERTIFICATION

Pursuant to Local Rule 7-1(a), the undersigned counsel certifies that he has attempted in good faith to confer with counsel for all parties to resolve the dispute and has been unable to do so.

REQUEST FOR EXPEDITED CONSIDERATION

Plaintiff Nike USA, Inc. (“Nike”) requests expedited consideration of this motion, which involves a pending request for preliminary injunctive relief. By its nature, the relief sought in this motion is time sensitive and good cause exists for considering this motion on an expedited basis.

MOTION FOR EXPEDITED PRELIMINARY INJUNCTION HEARING AND RELATED DISCOVERY

On June 1, 2016, Nike filed a Motion for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue (“TRO Motion”)[Dkt. No. 6], seeking to enjoin Defendant Boris Berian (“Defendant”), from competing in New Balance footwear and apparel in violation of his contractual obligations to Nike. Nike’s request for injunctive relief is time sensitive for two reasons:

- Defendant is slated to compete in the U.S. Olympic Team Trials in July and is a favorite to qualify for and compete at the 2016 Olympics in Rio de Janeiro, Brazil in August. Absent injunctive relief in advance of those events, Nike will suffer irreparable harm.
- Under Nike’s 2015 Track & Field Contract with Defendant, Nike has 180 days in which to exercise its right of first refusal. That 180 day period expires on June 28, 2016. Absent resolution of Nike’s request for injunctive relief in advance of that

date, Defendant will no doubt attempt to argue that Nike's claims are moot. While Nike disagrees with any such arguments, it will necessarily be prejudiced by having to rebut them.

Based on these considerations, Nike is now moving for an Order setting a hearing on its pending request for preliminary injunctive relief in advance of June 28, 2016 and allowing limited and targeted discovery to allow it to support its claims for injunctive relief on the following schedule:

- By 5:00 PM on June 8, 2016, the parties shall exchange any narrow and focused document requests, and any initial Fed. R. Civ. P. 30(b)(6) deposition notices, which shall be strictly limited to issues likely to be disputed at the preliminary injunction hearing. All documents referenced herein should be served by email, in addition to any other means of service. The parties' document requests shall be tailored to a sufficiently narrow universe of documents and custodians such that production can reasonably be completed in the expedited schedule requested herein. Nike's proposed document requests are attached hereto as Exhibit 1.
- By 5:00 PM on June 10, 2016, the parties shall serve any additional deposition notices relating to the preliminary injunction motion.
- By 5:00 PM on June 13, 2016, the parties shall serve written responses to document requests; shall serve written objections and designations of witnesses in response to Fed. R. Civ. P. 30(b)(6) deposition notices; and shall produce documents in response to document requests to the extent reasonably possible.
- Each party may take depositions, including one Fed. R. Civ. P. 30(b)(6) deposition, as applicable, of each other party to this action. In total, each party shall be limited to a

total of no more than two deponents and eight hours of deposition time prior to the preliminary injunction hearing. Depositions shall be conducted by telephone on or before June 17, 2016, or as otherwise agreed by the parties. Each party's document production shall be completed prior to any deposition of it or its representative pursuant to Fed. R. Civ. P. 30(b)(6).

In making this motion, Nike is mindful that it has already moved for a Temporary Restraining Order, but even assuming this Court grants such relief without a hearing, the resulting injunction cannot exceed 14 days, after which a preliminary injunction hearing would have to be held. Fed. R. Civ. P. (b)(2). Because of the time sensitive nature of its claims, Nike is merely seeking to assure that the preliminary injunction hearing itself is scheduled early enough and with adequate discovery to avoid the irreparable harm Nike is seeking to prevent.

MEMORANDUM IN SUPPORT

A. Factual and Procedural Background

In this action for declaratory and injunctive relief, Nike seeks to preclude Defendant, a highly successful runner who is a favorite to qualify for the 2016 Olympic Games, from continuing to violate his contractual obligations to Nike. Although Defendant is currently under an exclusive endorsement contract with Nike, he has chosen to compete in the footwear and apparel of one of Nike's competitors, New Balance Athletics, Inc. ("New Balance"). *See* TRO Motion at 4-6.

Nike initially agreed to endorse Defendant pursuant to a 2015 Track & Field Contract, dated June 17, 2015 (the "2015 Contract"). Declaration of Ben Cesar [Dkt. No. 8] ("Cesar Decl.") ¶ 5; *id.* Ex. 1. The 2015 Contract included a right of first refusal under which Nike had

the right to enter a new agreement with Defendant on terms no less favorable than those offered by any competitor. *Id.* ¶ 6. Specifically, Section 5 of the 2015 Contract provides that:

During the Contract Period *and for a 180-day period thereafter*, NIKE shall have a right of first refusal with regard to any bona fide third-party offer received by ATHLETE and which ATHLETE desires to accept. ATHLETE shall submit in writing to NIKE (on the third-party's letterhead) the specific terms of any such 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.

Id.; *id.* Ex. 1 at 1 (emphasis added).

Pursuant to that section of the 2015 Contract, on January 20, 2016, Defendant submitted an offer he had received from New Balance (the “New Balance Offer”) to Nike. *Id.* ¶ 7; *id.* Ex. 3. Three days later, on January 22, 2016, Nike unequivocally matched the New Balance Offer, thereby exercising its right of first refusal and creating a binding contract between Defendant and Nike (the “2016 Contract”). *Id.* ¶ 8; *id.* Ex. 4; TRO Motion at 4-5, 9-12.

Despite the fact that Nike clearly matched the New Balance Offer, which consisted only of a term sheet and was not a full written contract, Defendants has suggested that Nike did not match the New Balance Offer because it did not agree to a proposed contract without any reductions, which are standard in the industry.¹ Moreover, since January 22, Defendant has competed in New Balance footwear and/or apparel at multiple events and promoted New Balance via his social media accounts. Cesar Decl. ¶¶ 12-13; *id.* Exs. 7-8. Although Defendant claims he is currently without an apparel and footwear sponsor, these actions clearly suggest that

¹ Standard “reductions” provide for a reduction of an athlete’s compensation if the athlete fails to perform his or her obligations under the contract or perform consistent with expectations. Cesar Decl. ¶ 8.

he has been promised compensation and/or is being compensated by New Balance either directly or through his track club, Big Bear Track Club, pending expiration of the 180-day right of first refusal period in the 2015 Contract. *See id.* ¶ 13. That 180-day period ends on June 28, 2016, just days before Defendant is set to compete in the Olympic Trials, which start on July 1, 2016. *See id.* ¶ 14. Because these dates are fast approaching, Nike filed its TRO Motion on June 1, 2016, and seeks a preliminary injunction hearing prior to June 28, 2016.

B. Argument

The Federal Rules grant this Court wide discretion to expedite discovery. *See, e.g.*, FRBP 7026, FRCP 26(d)(1) (court may order discovery to occur before Rule 26(f) conference); *FTC v. NAFSO VLM, Inc.*, 2012 U.S. Dist. LEXIS 44244, at *4 (E.D. Cal. Mar. 29, 2012) (district courts may grant requests for expedited discovery when good cause is shown and especially when preliminary injunction is pending).

Here, good cause exists for an order allowing the proposed expedited discovery. Under standard discovery procedure, the discovery sought by Nike would not be available until after the proposed preliminary injunction hearing date or even after the July Olympic Trials. Moreover, the limited discovery requested is necessary to the proper resolution of Nike's request for a preliminary injunction. To secure a preliminary injunction, Nike will have to establish the likelihood that it will prevail at trial. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23, 129 S.Ct. 365, 374 (2008).

In this regard, Nike's claims turn on whether it properly exercised its right of first refusal under the 2015 Contract, forming the 2016 Contract (and precluding Defendant from endorsing or negotiating further with any of Nike's competitors). Defendant has suggested that Nike did not match the New Balance Offer because it did not agree to a proposed contract without any

standard industry reductions. Nike's position is that it unequivocally agreed to match the seven terms offered by New Balance, regardless of whether they included reductions (which were not mentioned in the term sheet provided to Nike). *See* TRO Motion at 4-5. At the same time, however, Nike firmly believes that any New Balance contract actually offered to Defendant included reductions, given that they are such a standard provision of endorsement contracts. Given that Defendant has commenced competing in New Balance footwear and apparel as well as promoting New Balance product on social media, Nike also has reason to believe that Defendant is being compensated by New Balance either directly or through his track club, Big Bear Track Club, pending expiration of the 180-day right of first refusal period in the 2015 Contract.

Under these circumstances, Nike should be permitted to take limited discovery of the communications between Defendant, his agent, and New Balance relating to the terms of the New Balance Offer and/or any form contracts actually proposed by New Balance, all of which Defendant has refused to produce on a voluntary basis. Such communications would not only reveal the true nature of the New Balance offer, but also potential admissions by Defendant regarding the fact that Nike has in fact matched the New Balance offer. In addition, Nike should be permitted to take discovery regarding any payments received by Defendant from New Balance, either directly or indirectly, which would confirm his violation of his contractual obligations with Nike. Such expedited discovery is plainly justified. *See, e.g., Ellsworth Associates, Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) (“Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings.”); *Revlon Consumer Prods. Corp. v. Jennifer Leather Broadway, Inc.*, 858 F. Supp. 1268, 1269 (S.D.N.Y. 1994) (expedited discovery granted in connection with

motion for injunctive relief); *Optic-Electronic Corp. v. U.S.*, 683 F. Supp. 269, 271 (D.D.C. 1987) (in case involving motion for injunction relief, court granted motion for expedited discovery finding that “[i]t is in the best interest of all parties to have this case resolved as soon as possible.”).

Finally, expedited discovery will not prejudice the defendant. The requested discovery is narrowly tailored to the issues that will be presented at the preliminary injunction hearing, and is not overly burdensome. (Nike’s proposed Requests for Production are attached hereto as Exhibit 1.) Moreover, the materials being sought are relevant to the core issues that will be litigated in this case regardless of the outcome of Nike’s request for preliminary injunctive relief.

For the forgoing reasons, Nike respectfully requests that this Court enter 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.

DATED: June 3, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF NIKE USA, INC.’S MOTION FOR EXPEDITED PRELIMINARY INJUNCTION HEARING AND RELATED DISCOVERY** 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 3, 2016.

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