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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13

14 KAWHI LEONARD,
15 Plaintiff,
16 v.
17 NIKE, INC.,
18 Defendant.

CASE NO. 19-cv-01035-BAS-BGS

**DEFENDANT NIKE, INC.'S
NOTICE OF MOTION AND
MOTION TO TRANSFER VENUE**

Date: August 19, 2019
**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**
Courtroom: 4B
Judge: The Hon. Cynthia A. Bashant

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD

2 PLEASE TAKE NOTICE that on August 19, 2019, Defendant NIKE, Inc.
3 will and hereby does move this Court, located at 221 W. Broadway, San Diego,
4 California 92101, for an order transferring this action to the District of Oregon
5 pursuant to 28 U.S.C. 1404(a). This Motion is made following the conference of
6 counsel that took place on July 9, 2019.

7 The Motion should be granted because the parties knowingly and willingly
8 entered into a valid and enforceable forum selection agreement, which governs all
9 asserted claims, defenses, and counterclaims in this action, and which establishes a
10 court of competent jurisdiction in the State of Oregon as the exclusive venue to
11 adjudicate this dispute.

12 This Motion is made pursuant to Civil Local Rule 7.1, and is based on this
13 Notice of Motion and Motion, the accompanying Memorandum of Points and
14 Authorities, the supporting Declaration of Dinusha Welliver and Exhibits 1-3
15 thereto, all of which are served and filed herewith, Plaintiff's Complaint and NIKE,
16 Inc.'s Answer and Counterclaims, and any argument of additional evidence that is
17 permitted by this Court.

18 Dated: July 17, 2019

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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
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14 KAWHI LEONARD,
15 Plaintiff,
16 v.
17 NIKE, INC.,
18 Defendant.

CASE NO. 19-cv-01035-BAS-BGS

**DEFENDANT NIKE, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO TRANSFER VENUE**

Date: August 19, 2019
**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**
Courtroom: 4B
Judge: The Hon. Cynthia A. Bashant

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STATUTES

28 U.S.C. § 1404(a)	passim
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I. INTRODUCTION

In 2011, NIKE and NBA athlete Kawhi Leonard entered into a “Men’s Pro Basketball Contract,” which ran with extension from October 2011 through September 2018 (the “Contract”). The Contract sets forth in clear and unambiguous terms Leonard’s acknowledgement of NIKE’s ownership of all intellectual property created in connection with the Contract, regardless as to whether that intellectual property is created by Leonard or by NIKE. In connection with that Contract, NIKE’s designers created the “Claw Design” that NIKE subsequently registered with the United States Copyright Office, referred to (but not imaged) in the complaint (Compl., Dkt. 1 ¶¶ 20-29):



Leonard personally signed the Contract containing the IP ownership provision, and in a 2014 article even gave “all the credit” to NIKE’s team for the finished product seen above.

While Leonard did not create the Claw Design, he did share with NIKE during the design process his own work that incorporated a hand, the initials “KL”, and the number “2,” again referenced in but omitted from the Complaint, and replicated below:

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Although the complaint conflates these two very distinct works and refers to both of them as the “Leonard Logo,” NIKE does not assert ownership of Leonard’s design above. As far as Nike is concerned, Leonard is free to use it. The Claw Design, on the other hand, belongs to NIKE pursuant to the clear terms of the Contract and because it was created by NIKE’s design team.

Despite the Contract IP provision to which Leonard agreed, and despite his prior accolades of NIKE’s work in the Claw Design, Leonard has now decided that he, and not NIKE, is the rightful owner of the design, and has even accused NIKE of committing fraud by registering its design with the Copyright Office. NIKE vigorously disputes Leonard’s claims of copyright ownership and has asserted in its contemporaneously filed Answer and Counterclaims that NIKE is the rightful owner of the Claw Design, and that Leonard is in breach of the parties’ Contract. NIKE looks forward to its day in court to adjudicate its claims.

But the Contract’s intellectual property ownership provision is not the only language that Leonard ignores in the parties’ agreement. The Contract also contains a forum selection clause conclusively establishing Oregon as the exclusive venue to hear all disputes arising under the Contract. Accordingly, NIKE brings this motion under 28 U.S.C. § 1404(a) to enforce the Contract’s forum selection clause, and to seek transfer of this action to the District of Oregon.

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Under controlling Ninth Circuit law, this dispute “arises under” the Contract and thus falls within the Contract’s Oregon forum selection provision. Each of the parties’ claims, defenses, and counterclaims relates to their rights and obligations set forth in the Contract, and interpreting the Contract’s intellectual property ownership provision is necessary to resolve the parties’ dispute. The Contract plainly states that NIKE exclusively owns any logos or copyrights that were created, *by either* NIKE or Leonard, “in connection with this Contract.” Thus, Leonard’s declaratory judgment claims for ownership of the Claw Design, non-infringement of any of NIKE’s rights thereto, and for fraud on the Copyright Office can only be resolved by interpreting and applying the Contract’s provisions. Likewise, NIKE’s copyright ownership claim, and its claims for copyright infringement, fraud, and breach of contract, all clearly arise under the Contract.

Because the forum selection clause is valid and enforceable, because the parties’ claims arise under the Contract, and because public policy supports enforcement of the forum selection clause, this action should be transferred to the District of Oregon.

II. FACTUAL BACKGROUND

A. The NIKE-Leonard Men’s Pro Basketball Contract

On October 26, 2011 NIKE entered into the Contract with Kawhi Leonard, LLC, as “CONSULTANT,” and Kawhi Leonard, as “ATHLETE,” who, “for purposes of [the] Contract, [was] under an exclusive employment agreement with CONSULTANT.” (*See* Declaration of Dinusha Welliver in Support of NIKE, Inc.’s Motion to Transfer Venue (“Welliver Decl.”) at ¶ 2, Ex. 1¹; Dkt. 1 ¶ 20.) The Contract generally related to, among other things, NIKE’s “use of ATHLETE’s

¹ The Welliver Declaration attaches the Contract as Exhibit 1 in redacted form. Redacted portions of the Contract include highly confidential and sensitive financial and commercial terms irrelevant to the instant Motion. The publicly-filed, redacted version discloses the portions of the Contract relevant to the instant Motion and discussed therein. However, NIKE has filed an unopposed motion for leave to file under seal an unredacted version of the Contract, should the Court wish to review the entire Contract in considering this Motion.

1 personal services and expertise in the sport of professional basketball and
 2 ATHLETE's endorsement of the NIKE brand and use of NIKE products.”
 3 (Welliver Decl., Ex. 1; *see* Dkt. 1 ¶ 22.) The “Contract Period” originally ran from
 4 October 1, 2011 to September 30, 2014. (Welliver Decl., Ex. 1 § A; Dkt. 1 ¶ 21.)
 5 The Contract was subsequently extended, and it ultimately expired without further
 6 extension on September 30, 2018. (Dkt. 1 ¶ 21.)

7 The Contract attached and incorporated NIKE's Standard Terms and
 8 Conditions (the “Standard Terms”). (*See* Welliver Decl., Ex. 1.) Paragraph 8 of the
 9 Standard Terms, “Ownership of NIKE Marks, Designs, and Creatives,” provided,
 10 in relevant part: “CONSULTANT (a) acknowledges that...NIKE shall exclusively
 11 own all rights, title and interest in and to any logos, trademarks, service marks,
 12 characters, personas, copyrights, shoe or other product designs, patents, trade
 13 secrets or other forms of intellectual property created by NIKE (and/or its agents),
 14 CONSULTANT or ATHLETE in connection with this Contract; [and] (b) shall
 15 completely cooperate with NIKE in its efforts to obtain and maintain protection for
 16 such right, title and interest,...” (Welliver Decl., Ex. 1 ¶ 8.)

17 Through the Standard Terms, Leonard also “represent[ed], warrant[ed] and
 18 covenant[ed],” among other things, that “[n]either CONSULTANT nor ATHLETE
 19 shall permit, or authorize, any third-party licensee of theirs to use any NIKE Marks
 20 or condone any licensee's unauthorized use thereof.” (Welliver Decl., Ex. 1 ¶
 21 13(b).) “NIKE Marks,” in turn, are defined as “the NIKE name, the Swoosh
 22 Design, the NIKE AIR Design, the Basketball Player Silhouette (‘Jumpman’)
 23 Design or any other trademarks or brands...now or hereafter owned and/or
 24 controlled by NIKE.” (*Id.* ¶ 1(d).) In light of the clear language contained in
 25 Paragraph 8 (reproduced above) that NIKE owns all marks created by it or by
 26 Leonard in connection with the Contract, the Claw Design, which by Plaintiff's
 27 own allegations was created in connection with the Contract (*see* Dkt. 1 ¶¶ 23-29),
 28 is a trademark “owned and/or controlled by NIKE.” The Claw Design therefore is a

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1 NIKE Mark subject to Paragraph 13(b)'s restrictions on third-party unauthorized
2 usage.

3 The Contract also includes the following choice-of-law and forum-selection
4 provision, which establishes an Oregon court of competent jurisdiction as the only
5 proper venue to hear a suit or action "arising under" the Contract:

6 **21. GOVERNING LAW & JURISDICTION.** This
7 Contract shall be governed by and construed in
8 accordance with the laws of the State of Oregon and
9 except as provided in Paragraph 14, any suit or action
10 arising hereunder shall be filed in a Court of competent
11 jurisdiction within the State of Oregon. CONSULTANT
and ATHLETE hereby consent to personal jurisdiction
within the State of Oregon and to service of process by
registered or certified mail addressed to the respective
party as set forth above.

12 (Welliver Decl., Ex. 1 ¶ 21.) Finally, the Standard Terms' "Entire Contract" clause
13 provides: "This Contract shall constitute the entire understanding between
14 CONSULTANT and NIKE and may not be altered or modified except by a written
15 agreement, signed by both parties." (*Id.*, Ex. 1 ¶ 22.) NIKE and Leonard never
16 entered into a separate written agreement relating to the Claw Design that would
17 deviate from the Contract or any Standard Terms. (Welliver Decl. ¶ 6.)

18 **B. Nike's Development of the Claw Design in Connection with the**
19 **Contract**

20 Leonard vaguely claims that he "contemplated and conceived of ideas for a
21 personal logo," and that he "refined" such logo "[i]n late December 2011 or
22 January 2012," during the Contract Period. (Dkt. 1 ¶¶ 17-18; *see* Welliver Decl.,
23 Ex. 1 at § A.) Leonard omits from his Complaint, however, the image of the logo
24 he "conceived" or "refined." Nor does the Complaint include an image of the Claw
25 Design that NIKE registered with the Copyright Office (Reg. No. VA0002097900).



26 Instead, the Complaint conflates the rough, hand-drawn design sketch that
27 Leonard "forwarded to NIKE" (Dkt. 1 ¶ 25) and the Claw Design that NIKE
28 developed in connection with the Contract (and subsequently registered for

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copyright), referring to both as the same so-called “Leonard Logo.” (*Id.* ¶¶ 18, 39-41, 56.) These designs are not, in fact, one and the same, and Plaintiff’s sweeping use of the term “Leonard Logo” is thus factually inaccurate. It is also at odds with Leonard’s own allegations that NIKE “modified” the design that he forwarded, that NIKE produced multiple rounds of design proposals reflecting such modifications, and that Leonard ultimately “accepted” one such design proposal in June 2014 “based upon the Leonard Logo” (but *not* the so-called “Leonard Logo” itself). (*Id.* ¶¶ 24-29 (emphasis added).)

In reality, the “rough draft” sketch Leonard shared with NIKE for NIKE to create a design in connection with the Contract is markedly different from the Claw Design that NIKE ultimately created and later registered with the Copyright Office. *See* Kiel, George, “The Oral History of Kawhi Leonard’s ‘Klaw’ Logo,” Jun. 5, 2019,² NiceKicks.com (attributing the following statements to Plaintiff from an October 2014 interview: “I drew up the rough draft, sent it over and they (Jordan Brand) made it perfect...I give the Jordan Brand team all the credit because I’m no artist at all...They refined it and made it look better than I thought it would ever be, and I’m extremely happy with the final version.”) (*available at*: <https://www.nicekicks.com/kawhi-leonard-says-claw-logo-idea/>) (last visited Jul. 17, 2019). (*See* Answer and Counterclaims, Ex. C.) The below side-by-side comparison plainly demonstrates the marked differences between the “rough draft” that Plaintiff *actually* created, and the Claw Design created by NIKE and which is owned by NIKE pursuant to the clear terms of the Contract:

² This story originally published on October 29, 2014, under the title: “Kawhi Leonard Says ‘The Claw’ Logo Was His Idea.” The story republished, under its new title, on June 5, 2019, two days after Plaintiff filed the Complaint. The republished story is otherwise the same as it appeared in the original publication. A copy of the original article as retrieved from the Internet Archive’s “Way Back Machine” is attached as Exhibit D to NIKE’s Answer and Counterclaims and is available at: <https://web.archive.org/web/20190604095321/https://www.nicekicks.com/kawhi-leonard-says-claw-logo-idea/> (last visited July 17, 2019).

Leonard's "Rough Draft"	NIKE's Copyrighted Claw Design
	

(Welliver Decl. ¶¶ 3-4, Ex. 2.)

C. The Parties' Dispute

Consistent with the Contract's intellectual property ownership provisions (*see* Welliver Decl., Ex. 1 ¶ 8), NIKE applied for and obtained a U.S. copyright registration for the Claw Design that was created in connection with, and in furtherance of, the Contract. (*Id.* ¶ 5, Ex. 3.) Despite his express agreement that NIKE owned the Claw Design, Leonard filed the complaint seeking the following judicial declarations with respect to the ill-defined "Leonard Logo:" "(i) Leonard is the sole author of the Leonard Logo; (ii) Leonard's use of the Leonard Logo does not infringe any rights of Nike, including without limitation any rights Nike may claim to possess with respect to the Leonard Logo; and (iii) Defendant committed fraud on the Copyright Office in registering the Leonard Logo." (Dkt. 1 ¶56.) Leonard also alleges that he "intends in the near future to use the [Claw Design] on apparel and footwear that he is actively developing and intends to bring to market and to affix on items he intends to distribute in connection with sports camps and charity events, and to affix on other products to be determined." (Dkt. 1 ¶¶ 44, 4.)

In its Answer and Counterclaims filed contemporaneously herewith, NIKE seeks a declaration that NIKE, not Leonard, is the exclusive owner of the registered Claw Design created in connection with the Contract, that Leonard has infringed

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1 NIKE's exclusive rights to reproduce and distribute the copyrighted Claw Design,
 2 and that Leonard breached the Contract, for example, by manifesting his intent to
 3 commercially exploit the Claw Design through third-party manufactured
 4 merchandise without Nike's authorization. Nike also asserts a claim for fraud on
 5 the Copyright Office in light of the fact that Leonard applied for and recently
 6 obtained a copyright registration for NIKE's Claw Design, falsely naming Leonard
 7 as author. (*See Answer and Counterclaims*, ¶¶ 48-92.)

8 **III. LEGAL STANDARDS ON A MOTION TO TRANSFER BASED ON A** 9 **FORUM SELECTION CLAUSE**

10 "A party may move to transfer under 28 U.S.C. § 1404(a) when the venue
 11 chosen by the plaintiff is proper but a valid forum selection clause exists."
 12 *Goldman v. U.S. Transport & Logistics, LLC*, Case No. 17-cv-00691-BAS-NLS,
 13 2017 WL 6541250, *2 (S.D. Cal. Dec. 20, 2017) (citing *Atl. Marine Constr. Co. v.*
 14 *U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013)). "[I]nterpretation and
 15 enforcement of contractual forum selection clauses are procedural issues to be
 16 decided under federal law." *Color Switch LLC v. Fortafy Games DMCC*, 377 F.
 17 Supp. 3d 1075, 1082 (E.D. Cal. 2019) (quoting *Graham Tech. Solutions, Inc. v.*
 18 *Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1431 (N.D. Cal. 1997)). "Section
 19 1404(a) is merely a codification of the doctrine of forum non conveniens." *Atl.*
 20 *Marine*, 571 U.S. at 60. "[B]ecause both § 1404(a) and the forum non conveniens
 21 doctrine from which it derives entail the same balancing-of-interests standard,
 22 courts should evaluate a forum-selection clause pointing to a nonfederal forum in
 23 the same way that they evaluate a forum-selection clause pointing to a federal
 24 forum [through 28 U.S.C. § 1404(a)]." *Atl. Marine*, 571 U.S. 49 at 61.

25 Generally, "[o]n a motion to dismiss for forum non conveniens, the moving
 26 party must establish: '(1) that venue is proper in the transferor district; (2) that the
 27 transferee district is one where the action might have been brought; and (3) that
 28 transfer will serve the convenience of the parties and witnesses and will promote

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1 the interest of justice.’” *Edwards v. C4 Planning Solutions, LLC*, Case No.: 3:18-
 2 cv-02144-BEN-AGS, 2019 WL 1746573, at *2 (S.D. Cal. Apr. 17, 2019) (quoting
 3 *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506
 4 (C.D. Cal. 1992)). Under this general standard, “[o]nce venue is found proper in
 5 both districts, a court must consider public factors relating to ‘the interest of justice’
 6 and private factors relating to ‘the convenience of the parties and witnesses.’”
 7 *Edwards*, 2019 WL 1746573, at *2 (quoting *Decker Coal Co. v. Commonwealth*
 8 *Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)).

9 “When there is a valid forum selection clause, however, ‘[t]he calculus
 10 changes,’ and the court must modify its § 1404(a) analysis in three ways.”
 11 *Edwards*, 2019 WL 1746573, at *2 (quoting *Atl. Marine*, 571 U.S. at 63). “‘First,
 12 the plaintiff’s choice of forum merits no weight,’ and the plaintiff, who is defying
 13 the forum selection clause, ‘bears the burden of establishing that transfer to the
 14 forum for which the parties bargained is unwarranted.’” *Edwards*, 2019 WL
 15 1746573, at *2 (quoting *Atl. Marine*, 571 U.S. at 63). “Second, the court should
 16 only consider public interest factors, not private ones.” *Edwards*, 2019 WL
 17 1746573, at *2; *Color Switch*, 377 F. Supp. 3d at 1083 (“Once a court finds that a
 18 forum selection clause is valid, it must balance public interest factors to determine
 19 whether dismissal of the action in favor of the other forum would promote
 20 justice.”). “Finally, ‘a § 1404(a) transfer of venue will not carry with it the original
 21 venue’s choice-of-law rules—a factor that in some circumstances may affect
 22 public-interest considerations.’” *Edwards*, 2019 WL 1746573, at *2 (quoting *Atl.*
 23 *Marine*, 571 U.S. at 63).

24 “The procedural rules for a motion to dismiss under Rule 12(b)(3) for
 25 improper venue apply to a motion to dismiss based on a forum selection clause.”
 26 *Goldman*, 2017 WL 6541250, at *1 n. 1. (citing *Argueta v. Banco Mexicano, S.A.*,
 27 87 F.3d 320, 323–24 (9th Cir. 1996)).³ Thus, for the purpose of this Motion, “the

28 ³ Even though the Supreme Court in *Atl. Marine* clarified that a motion to transfer
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pleadings need not be accepted as true, and the court may consider facts outside of the pleadings.” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004) (citation omitted).

IV. ARGUMENT

A. The Contract’s Forum Selection Clause is Valid and Enforceable

“[T]he Supreme Court has established a strong policy in favor of the enforcement of forum selection clauses.” *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir. 2006) (discussing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991)). In considering the “threshold question” of “whether the forum selection clause is enforceable,” *Questrel, Inc. v. Merriam-Webster, Inc.*, No. SACV 10-1907 AG MLGX, 2011 WL 7637786, at *2 (C.D. Cal. Mar. 23, 2011), the court presumes the validity of the forum selection clause. *Murphy*, 362 F.3d at 1140 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (“forum selection clauses are presumptively valid”)). “As a result of this presumption, when parties have contracted in advance to designate a particular forum for the resolution of disputes, ‘a district court should ordinarily transfer the case to the forum specified in that clause.’” *Zako v. Hamilton Co.*, No. 5:15-CV-03162-EJD, 2016 WL 344883, at *3 (N.D. Cal. Jan. 28, 2016) (quoting *Atl. Marine*, 571 U.S. at 62).

“The party seeking to avoid the forum selection clause bears a ‘heavy burden of proof.’” *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (en banc) (quoting *M/S Bremen*, 407 U.S. at 17); *Doe I v. AOL LLC*, 552 F.3d 1077,

under § 1404(a) is the proper vehicle for enforcing a contractual forum-selection clause, some district courts in the Ninth Circuit have continued to treat motions seeking enforcement of a forum selection clause as motions to dismiss governed by Rule 12(b)(3). *See, e.g., Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp. 3d 1075, 1082 (E.D. Cal. 2019). NIKE submits that this action should be transferred to the District of Oregon pursuant to the Contract’s forum selection clause regardless of whether this Motion is analyzed under § 1404(a) or Rule 12(b)(3), although it notes that this Court has previously followed *Atl. Marine’s* procedural mandates in similar circumstances. *See Goldman*, 2017 WL 6541250, at *2.

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1 1083 (9th Cir. 2009) (“[T]he party seeking to avoid a forum selection clause bears a
 2 heavy burden to establish a ground upon which [the court] will conclude the clause
 3 is unenforceable.”) (internal quotations and citation omitted). Accordingly, forum
 4 selection clauses “should be honored ‘absent some compelling and countervailing
 5 reason.’” *Murphy*, 362 F.3d at 1140 (quoting *M/S Bremen*, 407 U.S. at 12.)
 6 Avoiding a forum selection clause thus requires “a strong showing ‘that
 7 enforcement would be unreasonable and unjust, or that the clause [is] invalid for
 8 such reasons as fraud or overreaching.’” *Edwards*, 2019 WL 1746573 at *2
 9 (quoting *M/S Bremen*, 407 U.S. at 15).

10 “Federal courts have recognized only three grounds for declining to enforce a
 11 forum selection clause: (1) where the inclusion of the clause in the contract was the
 12 result of ‘fraud or overreaching,’ (2) if the party seeking to avoid the clause would
 13 be effectively deprived of its day in court in the forum specified in the clause, or (3)
 14 if enforcement would contravene a strong public policy of the forum where the suit
 15 was filed.” *Edwards*, 2019 WL 1746573 at *2 (quoting *Murphy*, 362 F.3d at 1140
 16 (9th Cir. 2003)).

17 Here, Leonard cannot meet his heavy burden to overcome the forum
 18 selection clause’s presumptive validity or the strong policy favoring its
 19 enforcement. None of the extraordinary circumstances that would permit a forum
 20 selection clause to be set aside are present here. There is no factual basis for
 21 Leonard to assert that the Oregon forum selection clause was entered as the result
 22 of fraud or overreaching. Nor would Leonard be deprived of his day in court if this
 23 case proceeds in an Oregon forum.

24 Moreover, none of the relevant public interest factors favor setting aside the
 25 Contract’s forum selection clause. *See Edwards*, 2019 WL 1746573, at *2
 26 (recognizing that when evaluating venue transfer in the face of a valid forum
 27 selection clause, the “court should only consider public interest factors, not private
 28 ones.”). In circumstances involving a valid forum selection clause, “a court should

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only consider public interest factors such as: the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum that is at home with the law.” *Color Switch*, 377 F. Supp. 3d at 1083 (internal quotations and citations omitted). There is no compelling public policy reason for this action to be heard in this District rather than the agreed-upon Oregon forum. To the contrary, the parties’ dispute does not bear any greater connection to California than Oregon. Moreover, the parties agreed that the Contract would be “governed by and construed in accordance with” Oregon law (Welliver Decl., Ex. 1 ¶ 21), and their interrelated copyright claims will be governed by the same Ninth Circuit precedent in either District.

The Contract’s Oregon forum selection clause is accordingly valid and enforceable, and the only question remaining is whether this action falls within the scope of that provision.

B. The Parties’ Disputes Arise Under the Contract

The Contract’s forum selection clause applies to “any suit or action arising hereunder.” (Welliver Decl., Ex. 1 ¶21.) Ninth Circuit courts have interpreted the phrase “arising hereunder” to cover claims “relating to the interpretation and performance of the contract.” *Edwards*, 2019 WL 1746573, at *4-5 (citation omitted). Moreover, there is “ample Ninth Circuit authority for the proposition that, for purposes of a forum selection clause, a claim arises out of a contract when it is necessary to interpret the contract to resolve the dispute.”⁴ *Bagdasarian Prods., LLC v. Twentieth Century Fox Film Corp.*, No. 2:10-CV-02991-JHN, 2010 WL 5154136, at *3 (C.D. Cal. Aug. 12, 2010).

////

⁴ Courts generally treat “arising out of” and “arising under” as synonymous and have cautioned against interpreting either phrase to require “but-for causation.” *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 602 (7th Cir. 1994) (“‘Arising out of’ and ‘arising under’ are familiar phrases, and courts have resisted the siren call of collapsing them to but-for causation.”)

1 The Ninth Circuit has also held that “forum selection clauses can be equally
 2 applicable to contractual and tort causes of action,” and that “[w]hether a forum
 3 selection clause applies to tort claims depends on whether resolution of the claims
 4 relates to interpretation of the contract.” *Manetti-Farrow, Inc. v. Gucci America,*
 5 *Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). District courts in this Circuit “have applied
 6 the *Manetti-Farrow* test to a variety of forum section clauses,” including forum
 7 selection clauses applying to “disputes under” the contract. *Bagdasarian*, 2010 WL
 8 5154136 at *3 (collecting cases); *see Molloy v. RK Netmedia, Inc.*, No.
 9 CV0902614MMMAGRX, 2009 WL 10669608, at *12 (C.D. Cal. Oct. 8, 2009) (“If
 10 the applicability of a forum selection clause [to non-contractual claims] is unclear,
 11 Ninth Circuit courts consider whether ‘the claims alleged in the complaint relate to
 12 the interpretation of the contract.’”) (quoting *Hebe v. Seagrave Fire Apparatus,*
 13 *LLC*, CV 07-155 AS, 2007 WL 1541741, *3 (D. Or. May 18, 2007)).

14 Of particular relevance, Ninth Circuit courts have regularly applied the
 15 *Manetti-Farrow* test to find that copyright-based claims fall within the scope of
 16 forum selection clauses similar to the one set forth in the parties’ Contract. *See*
 17 *Graham Technology Solutions, Inc.*, 949 F. Supp. at 1433-34 (applying *Manetti-*
 18 *Farrow* to find that contract’s forum selection clause applicable to “all disputes
 19 hereunder” governed the action because resolution of plaintiff’s copyright claims
 20 required interpretation of that contract); *Bagdasarian*, 2010 WL 5154136, at *3
 21 (concluding under *Manetti-Farrow* that forum selection clause directed to “any
 22 claim or dispute arising out of this Agreement” covered plaintiff’s copyright co-
 23 ownership and unjust enrichment claims, because “resolution of each of Plaintiff’s
 24 claims require[d] interpretation of the Agreement”); *see also Color Switch LLC*,
 25 377 F. Supp. 3d at 1085 (“apply[ing] the *Manetti-Farrow* framework to determine
 26 whether resolution of [plaintiff’s] copyright and declaratory relief claims require
 27 interpretation of the publishing agreement and are thereby within the scope of the
 28 publishing agreement’s forum selection clause”); *Questrel*, 2011 WL 7637786, at
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1 *3 (C.D. Cal. Mar. 23, 2011) (concluding under *Maenetti-Farrow* that copyright
 2 claim is subject to license agreement’s forum selection clause, where “the Court
 3 need[ed] to look at the License Agreement to adjudicate the [claim]”).

4 *Graham Technologies* is particularly instructive. *Graham* involved a
 5 personal services contract (“PSA”) containing a forum selection clause providing
 6 that “[t]he parties agree to submit to the exclusive jurisdiction over all disputes
 7 hereunder to the federal and state courts in the State of New York.” *Graham*, 949
 8 F. Supp. at 1429. After the parties’ relationship deteriorated, plaintiff filed
 9 copyright infringement, unfair competition, and false advertising claims against
 10 defendant in federal court in the Northern District of California. *Id.* at 1430–31.
 11 The defendant filed a motion to dismiss or to transfer venue, arguing the
 12 appropriate venue for the action was the Southern District of New York pursuant to
 13 the PSA’s forum selection clause. *Id.* at 1428. The plaintiff opposed enforcement
 14 of the forum selection clause, contending that plaintiff “has not raised contractual
 15 issues related to the PSA, in its complaint, and that what [was] truly at stake in th[e]
 16 cases [was] the vindication its rights under the Copyright Act.” *Id.* at 1431–32.

17 The district court in *Graham* rejected this argument and held that the scope
 18 of the forum selection clause covered the plaintiff’s copyright claims. *Id.* at 1433.
 19 The court reasoned that the resolution of the copyright claims “ultimately require[d]
 20 interpretation of the PSA,” and that such claims “relate[d] to the rights and duties
 21 enumerated in the [contract].” *Id.* Similar to the parties’ Contract here that
 22 addresses ownership of intellectual property created in connection with the
 23 Contract, the PSA at issue in *Graham* addressed “ownership of all copyrights to
 24 software developed *in connection with* the [PSA] project.” *Id.* Thus, the court
 25 found that resolution of the case depended on whether any of the computer
 26 programs at issue were “developed under...the terms of the PSA.” *Id.*
 27 Accordingly, the district court transferred the case to the Southern District of New
 28 York pursuant to the forum-selection clause. *Id.* at 1434–35.

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1 The district court in *Color Switch* recently reached the same conclusion
 2 based on similar facts. *See Color Switch*, 377 F. Supp. 3d at 1083-87. There, the
 3 court applied the *Manetti-Farrow* framework to conclude that resolution of
 4 plaintiff's copyright and declaratory relief claims required interpretation of the
 5 parties' publishing agreement and were therefore within the scope of the publishing
 6 agreement's Dubai, UAE forum selection clause. *Id.* Seeking to avoid the
 7 agreement's forum selection clause, the *Color Switch* plaintiff "argue[d] that
 8 resolution of its copyright and declaratory relief claims d[id] not require analyzing
 9 the publishing agreement because: (1) its copyright in the [work] predates the
 10 publishing agreement...; and (2) its copyright claim is based on its creation and
 11 authorship of the [work]." *Id.* at 1085. The district court rejected these arguments,
 12 reasoning that plaintiff's copyright and declaratory judgment claims turned on
 13 ownership issues that "necessarily require[d] analyzing the publishing agreement to
 14 determine whether [an employee] was, in fact, hired on a 'work-for-hire' basis" to
 15 author the work at issue. *Id.* at 1085; *see also Bagdasarian* 2010 WL 5154136, at
 16 *3 (forum selection clause applying to "any claim or dispute arising out of this
 17 Agreement" covered copyright co-ownership and unjust enrichment claims,
 18 because "resolution of [those] claims require[d] interpretation of the Agreement").

19 This motion warrants the same outcome as those described above. Applying
 20 the governing *Manetti-Farrow* framework, each of Leonard's copyright ownership,
 21 non-infringement, and fraud on the Copyright Office claims "arise under" the
 22 Contract.⁵ Because the Contract clearly and unambiguously establishes that NIKE
 23 is the exclusive owner of any design or logo created "in connection with this
 24 Contract," either by NIKE *or* Leonard (*see* Welliver Decl., Ex. 1 ¶ 8), resolution of

25
 26 ⁵ That Leonard's copyright-based claims are styled as declaratory judgment claims
 27 in the Complaint does not alter the analysis. *See Color Switch*, 377 F. Supp. 3d at
 28 1084 ("[C]laims for declaratory relief 'do not fall outside of the forum-selection
 clause simply because they sound in equity.'" (quoting *Glob. Quality Foods, Inc.*
v. Van Hoekelen Greenhouses, Inc., No. 16-CV-00920-LB, 2016 WL 4259126, at
 *7 (N.D. Cal. Aug. 12, 2016)).
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1 the parties' copyright dispute over the Claw Design requires interpretation of the
 2 Contract, and relates to the parties' respective rights and duties thereunder. And
 3 even though Leonard cannot credibly dispute that NIKE's registered Claw Design
 4 was developed "in connection with [the] Contract," should he do so, resolution of
 5 the parties' competing intellectual property ownership claims will still require
 6 interpretation and application of this provision to the facts. *See Questrel, Inc.*, 2011
 7 WL 7637786, at *3 ("This claim about whether a certain action was taken within
 8 the scope of the License Agreement is 'in connection with' the terms of that
 9 Agreement. If the Court were unable to consider the terms and scope of the
 10 License Agreement, the claim would be rendered incomprehensible.") Thus, under
 11 governing Ninth Circuit authority, all of Leonard's claims are covered by the
 12 Contract's Oregon forum selection clause.

13 However, it is not just Leonard's claims that arise under the Contract.
 14 NIKE's affirmative defenses and counterclaims reinforce that this entire action
 15 "arises under" the Contract. *See, e.g., Dvorak v. Moody's Analytics Inc.*, No. C 10-
 16 03657 JSW, 2010 WL 11636243, at *2 (N.D. Cal. Oct. 5, 2010) ("[T]he fact that
 17 Moody's cross-claims require adjudication of the Release Agreement necessarily
 18 implicates the forum selection clause of that contract.") NIKE's copyright
 19 ownership and infringement counts relate to the parties' rights and obligations
 20 under the Contract, and require interpretation of the Contract's intellectual property
 21 ownership provisions, for the same reasons discussed above with respect to
 22 Leonard's copyright claims. Moreover, NIKE asserts breach of contract against
 23 Leonard for violating his representations and warranties set forth in Paragraph
 24 13(b), for example, in view of his manifest intention to commercially exploit the
 25 Claw Design on non-NIKE merchandise. (Dkt. 1 ¶¶ 4, 44.)⁶ Thus, this entire

26 ⁶ By filing its answer and counterclaims before this Court, NIKE has *not* waived its
 27 defense of improper venue. *Hillis v. Heineman*, 626 F.3d 1014, 1016-18 (9th Cir.
 28 2010) ("We hold that the filing of a counterclaim, permissive or otherwise, does not
 constitute a waiver of a defense of improper venue asserted in an answer.");
Ponomarenko v. Shapiro, 287 F. Supp. 3d 816, 836 (N.D. Cal. 2018) ("[I]t actually
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1 action “arises under” the Contract under Ninth Circuit precedent and falls squarely
2 within the Contract’s Oregon forum-selection clause.

3 **V. CONCLUSION**

4 For the foregoing reasons, each of the parties’ claims in this action “arise
5 under” the Contract and thus fall within the scope of the Contract’s valid and
6 enforceable forum selection clause. Accordingly, NIKE’s motion to transfer this
7 action to the District of Oregon should be granted.

8
9 Dated: July 17, 2019

DLA PIPER LLP (US)

/s/ Tamar Y. Duvdevani

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San Diego, CA 92101
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Fax: 212.335.4501

Attorneys for Defendant NIKE, Inc.

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27 would have been *inappropriate* under Supreme Court precedent for Shapiro to file a
28 motion to dismiss or otherwise challenge venue as improper, and he has not waived
his right to enforce the forum selection clause through a § 1404(a) motion [because
he filed an answer and counterclaims].”) (emphasis in original).
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10 *Attorneys for Defendant NIKE, Inc.*

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13
14 KAWHI LEONARD,

15 Plaintiff,

16 v.

17 NIKE, INC.,

18 Defendant.

CASE NO. 19-cv-01035-BAS-BGS

**DECLARATION OF DINUSHA
WELLIVER IN SUPPORT OF NIKE,
INC.'S MOTION TO TRANSFER
VENUE**

19
20 I, Dinusha Welliver, hereby declare and state as follows:

21 1. I am currently employed by NIKE, Inc. as Studio Manager, Jordan
22 Brand Design. I submit this Declaration in Support of NIKE's Motion to Transfer
23 Venue in the above-captioned case, and I am personally familiar with the facts
24 stated below.

25 2. Based on NIKE's corporate business records, and my familiarity with
26 NIKE's design and development of trademarks, logos, and other artwork for the
27 Jordan Brand, I understand that NIKE entered into a Men's Pro Basketball Contract
28 with Kawhi Leonard, effective from October 1, 2011 to September 30, 2014 (the

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1 “Contract”). I understand that the Contract was extended and ultimately expired on
 2 September 30, 2018. Attached hereto as Exhibit 1 is a true and correct copy of the
 3 Contract in redacted form.

4 3. Pursuant to the Contract, NIKE undertook efforts to design and
 5 develop a logo to be used in connection with Mr. Leonard’s endorsement of NIKE
 6 and Jordan Brand merchandise. In connection with that effort, Mr. Leonard sent to
 7 NIKE an image of a sketch on or around April 14, 2014. Attached hereto as
 8 Exhibit 2 and reproduced below is a true and correct copy of that image.



16 4. NIKE hired designers to create design proposals for a logo to be used
 17 in connection with Mr. Leonard’s endorsement of NIKE and Jordan Brand
 18 merchandise under the Contract. One of the designs created by NIKE’s design
 19 team in 2014 is reproduced below.



27 5. I understand that NIKE filed a copyright application with the United
 28 States Copyright Office to register the above design, and that application was

1 granted registration as Reg. No. VA0002097900), effective May 11, 2017 (the
2 "Registration"). Attached hereto as Exhibit 3 is a true and correct copy of the
3 Registration certificate issued to NIKE by the .

4 6. To the best my knowledge, NIKE and Mr. Leonard have not entered
5 into any other written agreement separate from the Contract that addresses the
6 creation or ownership of any trademarks, logos, designs, or other artwork by NIKE
7 or by Mr. Leonard.

8
9
10 I declare under penalty of perjury under the laws of the United States of
11 America that the foregoing is true and correct, and that I executed this declaration
12 in Beaverton, Oregon on the date below.

13
14 Dated: July 17, 2019



15 Dinusha Welliver
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TABLE OF CONTENTS
EXHIBITS

Exhibit	Description	Pages
1	Men's Pro Basketball Contract (Redacted)	4-16
2	Image of a sketch	17
3	Registration certificate issued to NIKE	18

EXHIBIT 1

MEN'S PRO BASKETBALL CONTRACT

THIS IS A CONTRACT made and entered into by and between **NIKE USA, INC.** ("NIKE") and **KAWHI LEONARD, LLC** ("CONSULTANT"). **KAWHI LEONARD** ("ATHLETE"), for purposes of this Contract, is under an exclusive employment agreement with CONSULTANT. NIKE desires the use of ATHLETE's personal services and expertise in the sport of professional basketball and ATHLETE's endorsement of the NIKE brand and use of NIKE products. CONSULTANT has agreed to authorize the use of ATHLETE's name and provide ATHLETE's services upon the terms and conditions contained below. In consideration of the mutual promises, terms and conditions set forth on this "Contract Terms Sheet" and in the attached NIKE Standard Terms and Conditions (the "Standard Terms") the parties agree as follows:

A. CONTRACT PERIOD: The Contract term shall be October 1, 2011 to September 30, 2014 (the "Contract Period").

B. GRANT OF ENDORSEMENT RIGHTS:

[REDACTED]

C. USE OF NIKE PRODUCT & PERSONAL SERVICES:

[REDACTED]

D.

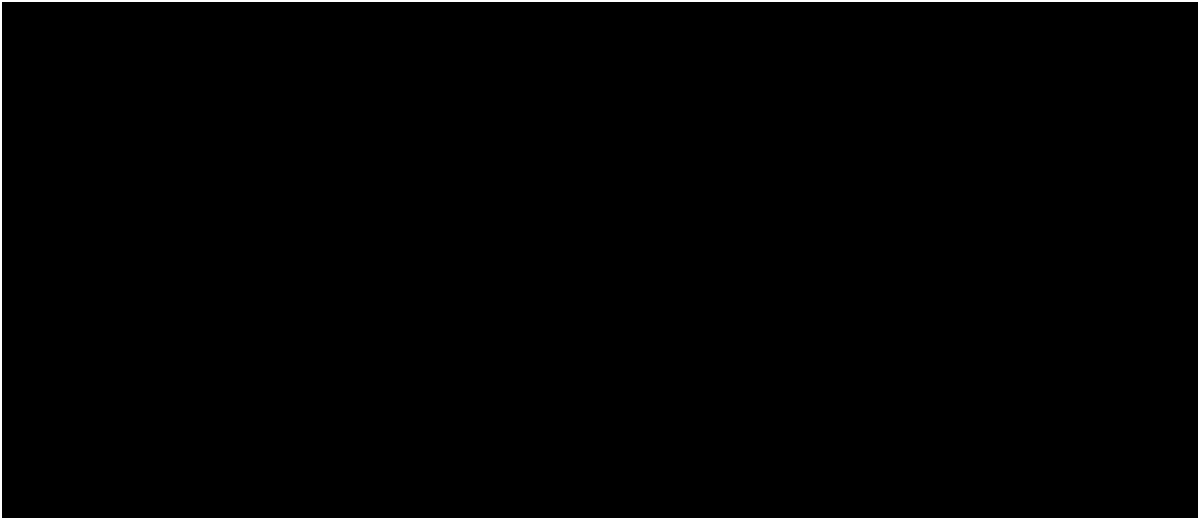
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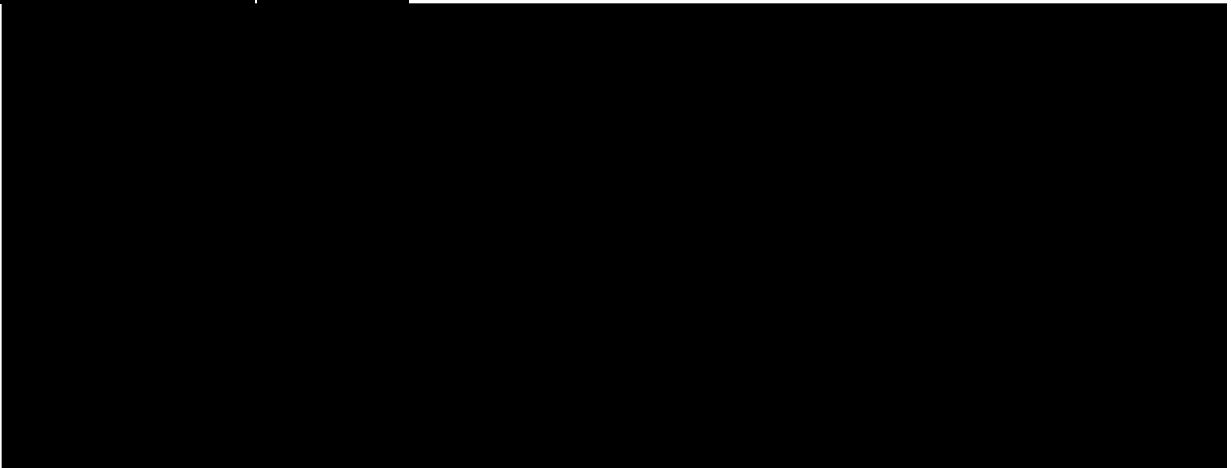
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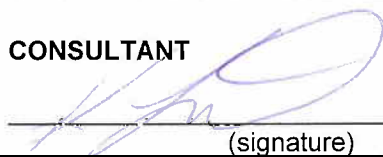
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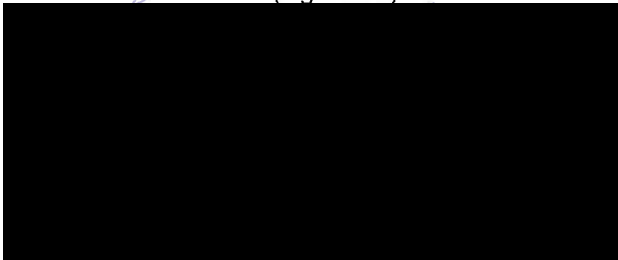
I.

IN WITNESS WHEREOF, this Contract has been fully-executed as of the date indicated below.

CONSULTANT



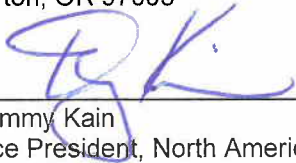
(signature)



ATHLETE's Team: San Antonio Spurs

NIKE USA, INC.

One Bowerman Drive
Beaverton, OR 97005

By: 

Tommy Kain
Vice President, North America Sports Marketing

Dated: 10/26/11

NIKE STANDARD TERMS & CONDITIONS

1. **ADDITIONAL DEFINITIONS.** The terms set forth below in this Paragraph shall be defined for all purposes under this Contract as follows:

(a) "NIKE Group" shall mean NIKE USA, Inc., NIKE Retail Services, Inc. (d/b/a NikeTown), their parent company NIKE, Inc., their licensees, distributors, subsidiaries, affiliates and any successor companies thereto.

(b)

(c)

(d) "NIKE Products" shall mean all "Products" in connection with which, or upon which, the NIKE name, the Swoosh Design, the NIKE AIR Design, the Basketball Player Silhouette ("Jumpman") Design or any other trademarks or brands (e.g., Sports Specialties, Brand Jordan, SPL.28) now or hereafter owned and/or controlled by NIKE appear (collectively, the "NIKE Marks"), singly or in any combination.

(e) "Contract Year" shall mean a 12-month period from October 1 until September 30.

(f)

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2. **USE OF NIKE PRODUCTS.**

- [REDACTED]
3. **CONSULTATION.** Throughout the Contract Period, CONSULTANT promises and agrees to make ATHLETE available to render, and shall upon NIKE's request render, independent consulting and other personal services for the purposes of assisting NIKE in the design, development, advertisement, marketing and/or sale of NIKE Products and the promotion of basketball or NIKE brands. CONSULTANT agrees ATHLETE shall also, as requested, report to NIKE, either orally or in writing if so requested, on the NIKE Products supplied to ATHLETE through NIKE's product development testing program. Such written or oral reports shall address the fit, design, wear characteristics, function, materials and construction techniques of NIKE Products ATHLETE wears or uses.

4. **PRODUCTION COOPERATION.** [REDACTED]

5. [REDACTED]

6. [REDACTED]

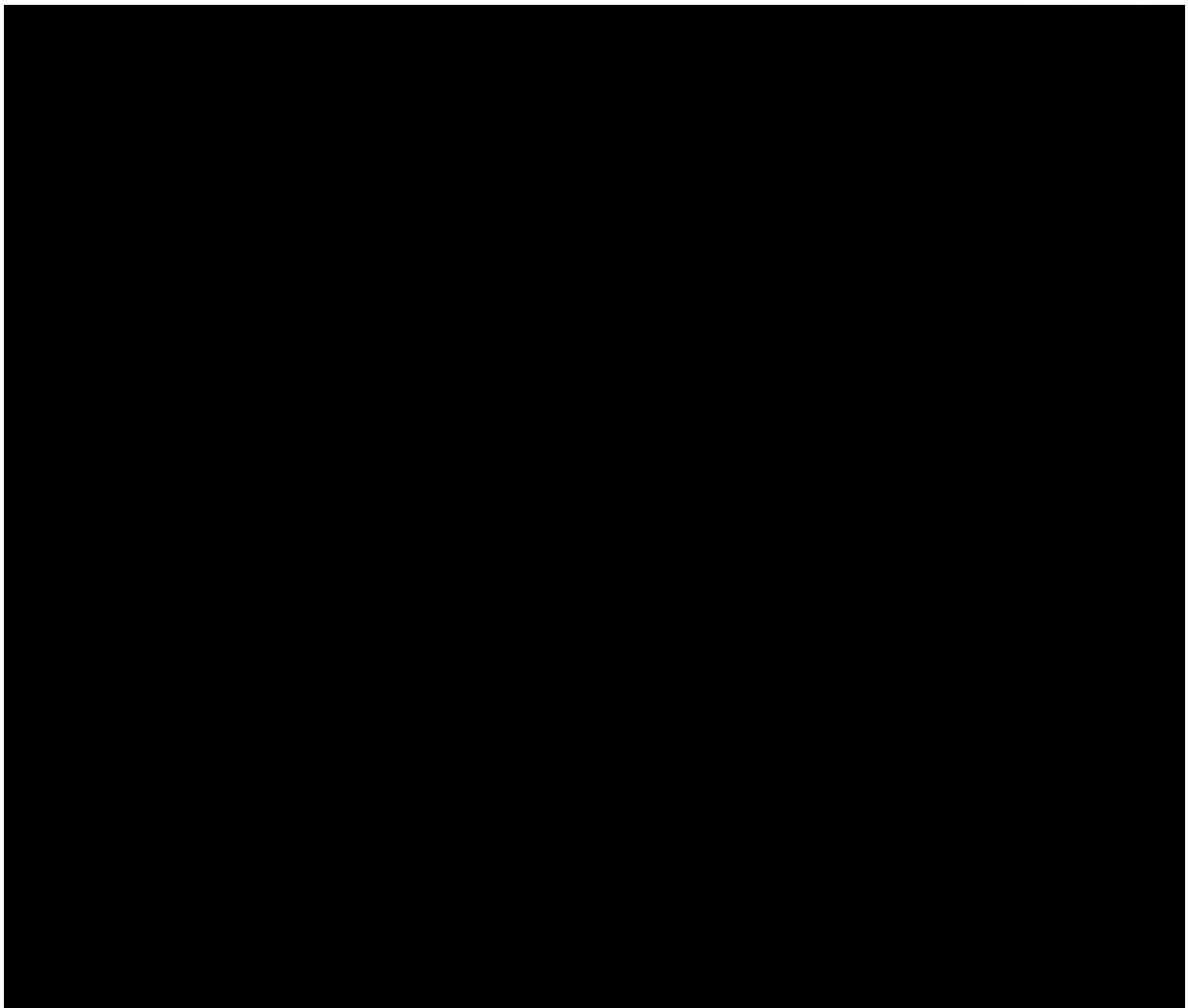
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7. **USE OF ATHLETE ENDORSEMENT.** [REDACTED]

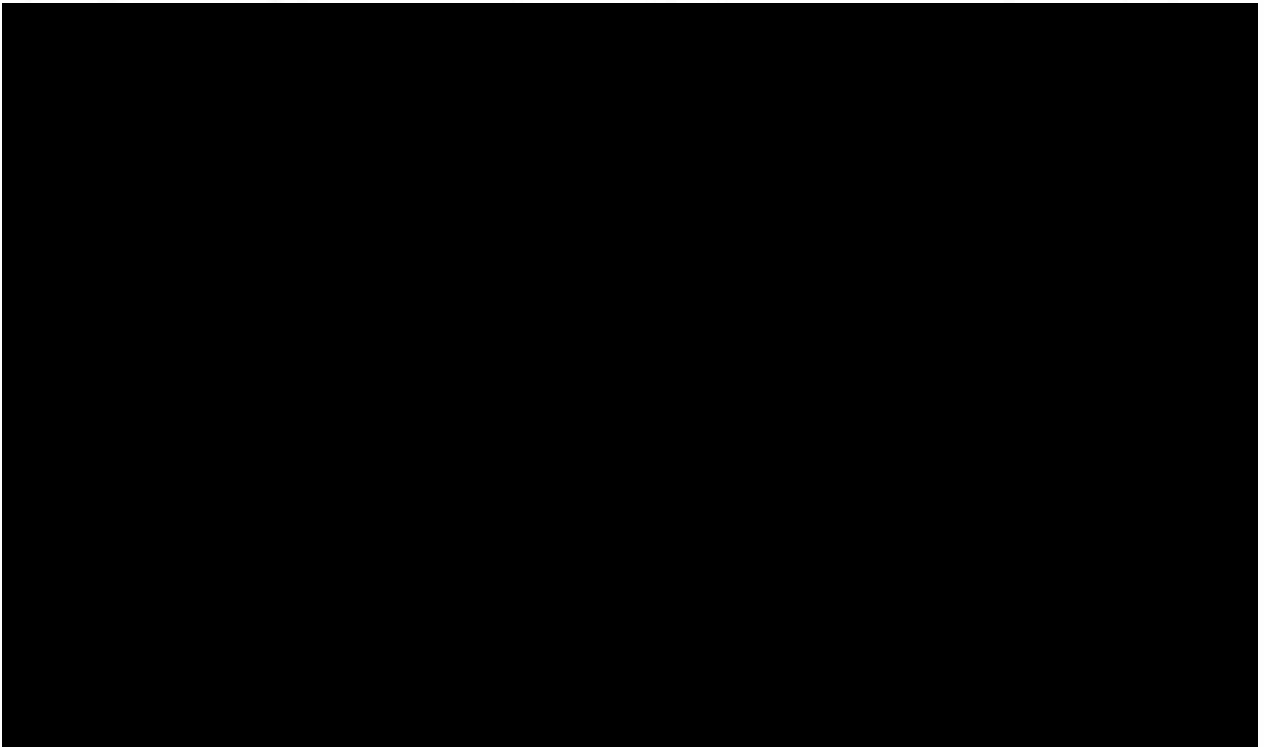
8. **OWNERSHIP OF NIKE MARKS, DESIGNS & CREATIVES.** CONSULTANT (a) acknowledges that NIKE exclusively owns all rights, title and interest in and to the NIKE Marks and that NIKE shall exclusively own all rights, title and interest in and to any logos, trademarks, service marks, characters, personas, copyrights, shoe or other product designs, patents, trade secrets or other forms of intellectual property created by NIKE (and/or its agents), CONSULTANT or ATHLETE in connection with this Contract; (b) shall completely cooperate with NIKE in its efforts to obtain and maintain protection for such right, title and interest, including by promptly executing any documents as may be required by NIKE in connection therewith; and (c) further acknowledges that after expiration or termination of this Contract, NIKE shall continue to have the unrestricted right to use (and without any CONSULTANT or ATHLETE approval) such intellectual property, including without limitation the right to re-issue a "signature" product previously associated with ATHLETE, provided that such post-contractual use shall not then-include the ATHLETE Endorsement.

9. [REDACTED]

10. [REDACTED]



11. **RIGHTS OF TERMINATION.**



12.



13. **REPRESENTATIONS, WARRANTIES AND COVENANTS.** CONSULTANT represents, warrants and covenants that:

(a) Neither CONSULTANT nor ATHLETE shall approve any use by their licensees of any photographs or footage of ATHLETE in which NIKE Marks that appear on Products worn and/or used by ATHLETE have been airbrushed, digitally altered or otherwise obscured;

(b) Neither CONSULTANT nor ATHLETE shall permit, or authorize (except as permitted under the foregoing clause (a)), any third-party licensee of theirs to use any NIKE Marks or condone any licensee's unauthorized use thereof.

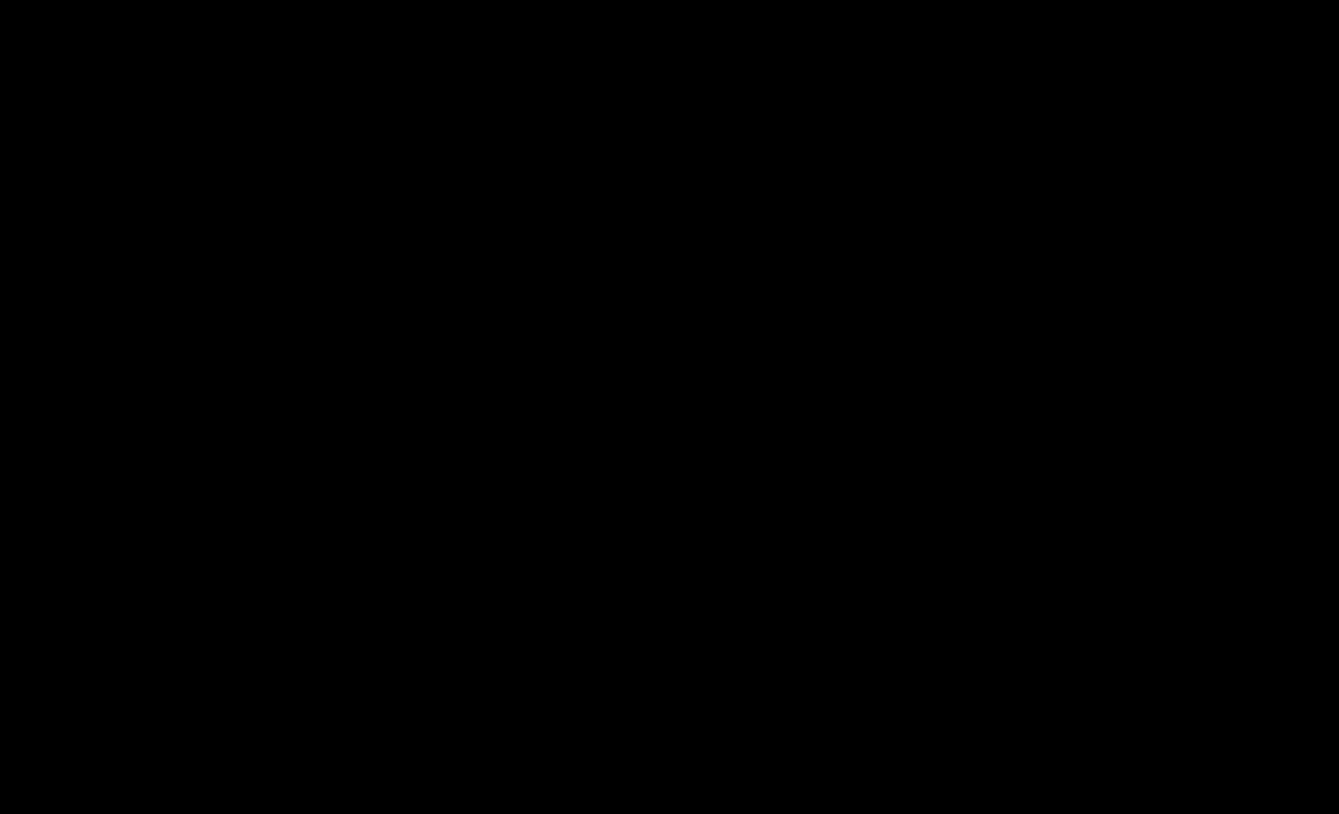
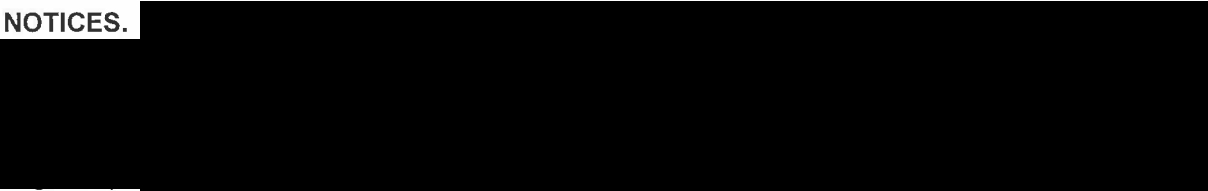
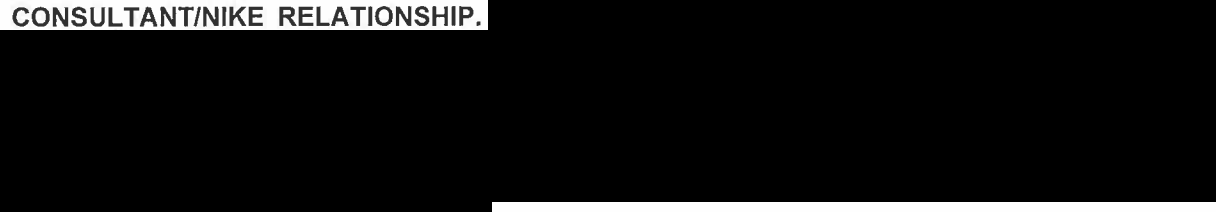


(c)

(d)

(e)

(f)



- 
14. **EQUITABLE REMEDIES.** In the event CONSULTANT or ATHLETE breaches any material term of this Contract, in addition to any and all other remedies available at law or in equity, NIKE shall be entitled to injunctive relief from further violation of this Contract, during any litigation as well as on final determination thereof, without prejudice to any other right of NIKE hereunder or otherwise.
15. **NOTICES.** 
16. **CONSULTANT/NIKE RELATIONSHIP.** 
17. **ASSIGNMENT/DELEGATION.** 
18. **WAIVER.** The failure at any time of either party to demand strict performance by the other party of any of the terms or conditions of this Contract shall not be construed as a continuing waiver or relinquishment thereof, and either party may, at any time, demand strict and complete performance by the other party.
19. 

20. **SEVERABILITY.** Every provision of this Contract is severable.
21. **GOVERNING LAW & JURISDICTION.** This Contract shall be governed by and construed in accordance with the laws of the State of Oregon and except as provided in Paragraph 14, any suit or action arising hereunder shall be filed in a Court of competent jurisdiction within the State of Oregon. CONSULTANT and ATHLETE hereby consent to personal jurisdiction within the State of Oregon and to service of process by registered or certified mail addressed to the respective party as set forth above.
22. **CONFIDENTIALITY.** CONSULTANT and ATHLETE shall not (nor shall they permit or cause their agents, attorneys, accountants, representatives or employees to) disclose the financial or other material terms of this Contract, the marketing plans of NIKE, or material or information disclosed to CONSULTANT or ATHLETE (or by CONSULTANT or ATHLETE to NIKE) pursuant to Paragraph 3 above, to any third party, with the exception only of CONSULTANT's or ATHLETE's agents, attorneys, accountants, representatives or employees, except as may be required by law. This Paragraph shall survive the termination or expiration of this Contract.
23. **ENTIRE CONTRACT.** This Contract shall constitute the entire understanding between CONSULTANT and NIKE and may not be altered or modified except by a written agreement, signed by both parties. Any previous agreements between the parties shall have no further force or effect.

--- END ---

SCHEDULE A

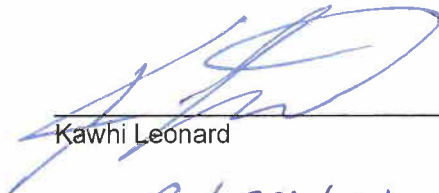
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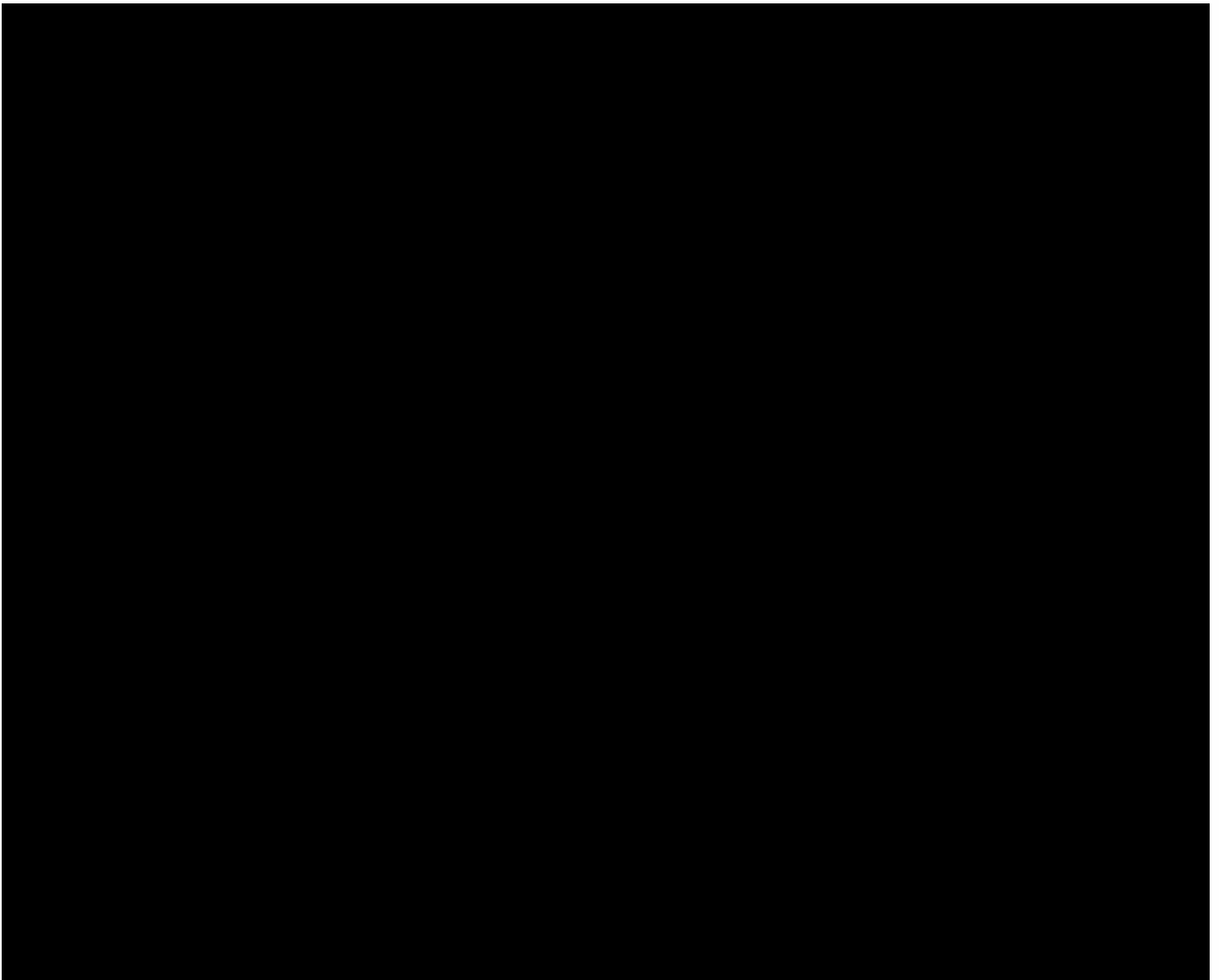
GUARANTY

By a certain Contract, entitled Men's Pro Basketball Contract and dated effective October 1, 2011, NIKE USA, Inc. ("NIKE") and KAWHI LEONARD, LLC., ("CONSULTANT") contracted for the grant to NIKE of certain rights and the provision to NIKE of certain services. In order to induce NIKE to enter into said Contract, I, KAWHI LEONARD ("ATHLETE"), hereby guarantee the performance by CONSULTANT of all its obligations under said Contract and agree personally to render all services and fulfill all undertakings called for therein. I acknowledge and agree that a breach of this Guaranty shall be grounds for termination of the Contract by NIKE under Paragraph 11 thereof. This guaranty incorporates by this reference and is governed by the same "Contract Terms Sheet" and "NIKE Standard Terms & Conditions" that are attached to and form a part of the Contract.


Kawhi Leonard
DATE: 9/30/11



Dear Nike Athlete,



NikeTown Locations:

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EXHIBIT 2



EXHIBIT 3

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Karen Leigh Clayett

Acting United States Register of Copyrights and Director

Registration Number

VA 2-097-900

Effective Date of Registration:

May 11, 2017

Title

Title of Work: Kawhi Leonard Logo

Completion/Publication

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Date of 1st Publication: October 28, 2014

Nation of 1st Publication: United States

Author

- Author: Nike, Inc.
- Author Created: 2-D artwork
- Work made for hire: Yes
- Domiciled in: United States

Copyright Claimant

Copyright Claimant: Nike, Inc.
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Date: May 11, 2017