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SPORTS LAW TEAM

ALERT

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IF I WERE PAID TO WALK IN YOUR SHOES: PROTECTING A COMPANY'S INTERESTS IN ENDORSEMENT DEALS WHILE STILL LOOKING OUT FOR PLAYER WELL-BEING

By Sekou Lewis and Benjamin D. Wanger

Chandler Parsons, a forward for the NBA's Dallas Mavericks, does not have to worry about buying basketball shoes. Rather, Parsons, like other NBA players, gets paid to wear certain brand name shoes. In February 2014, Chinese shoe company Anta announced that it had entered into a five-year endorsement contract with Parsons that would pay him $1 million per year (a total of $5 million). The contract presumably requires Parsons to serve as a spokesperson for Anta and to wear Anta sneakers during his games. On March 8, 2015, however, after missing the previous seven games with an ankle injury, Parsons took the court for the Mavericks without his signature Anta shoes. Instead, he wore Jordan Brand sneakers with the logos covered. When asked about his footwear after the game, Parsons told the media that he had not worn Anta shoes that night because the team trainer thought the shoes were too flexible around the ankle and Parsons was concerned that the Anta shoes may have contributed to his ankle injury.

Situations such as this, where a professional athlete no longer feels comfortable using a product that he or she has been paid to endorse, present a litany of problems for both the athlete and the apparel company. The following are a few possible courses of action for both parties when problems like this arise, as well as ways that the parties can structure an endorsement contract to avoid issues like this altogether.

To a question as to why he was not wearing his Antas, Parsons responded factually – the Antas were not providing him with enough support for his ailing ankles so he switched to his more reliable Jordans. The unfortunate implication was that the Antas were inferior. The statement slips close to disparagement of a product the player was supposed to be endorsing. The way this ordeal played out was not favorable for Anta, regardless of whether Parsons' statements were or were not disparagement or only a casual factual statement. An off-hand factual remark to the media, even with no ill intent, can unfortunately be twisted into "Player Hates His Shoes!" in the 24-hour tweeting news cycle.

As an initial matter, in order to prevent Parsons from being in a situation where he was forced to either play a game in another brand's shoe or wear his Anta shoes, and potentially risk injury, Anta's agreement with Parsons could have required Parsons to participate in the development of Anta's shoes. Given that the parties agreed to the endorsement deal in February 2014 – more than seven months before the 2014-2015 NBA regular season – the endorsement agreement could have required both parties to agree that the shoe was

acceptable well before the NBA season ever started. For example, the contract could have dictated that Anta would provide Parsons with various sneaker models well in advance of the 2014-2015 NBA season. It could then allow for a trial period during which Parsons could test out the models and make any design suggestions. So long as those suggestions were not outlandish, the contract could have built-in time for give-and-take on the design issue so that both Anta and Parsons were satisfied with the end product. This process could not go on indefinitely, given the practical limitations of product prototype lead times. Therefore the contract would ultimately have to have an end date by which Parsons chose a shoe design that Anta could implement before the start of the season. In a perfect world – and with 20/20 hindsight – Parsons and Anta could have agreed on *multiple* models with slightly different qualities to allow for some room for error.

Regardless of the steps taken to make sure that Parsons would have several models of Anta shoes available, the possibility still remains, however unlikely, that an imperfection such as a lack of ankle support might exist in all of the sneaker models that Anta provided to Parsons and, at some point during the season, Parsons might need to make a change. Sportswear manufacturers should be prepared for this possibility. Anta's endorsement agreement with Parsons could have provided a health exclusion clause whereby, in the event that Parsons had any complaints about the comfort of Anta's shoes or required any adjustments to the shoes due to an injury, he could have (and he may have) alerted Anta of the problem and allowed them a reasonable time to make any necessary adjustments to the shoes. If both parties determined that it was not possible to adjust the Anta shoes to Parsons' needs in time for the next game, the parties could come to a mutual agreement about how to proceed. It is possible that in such a circumstance the parties would agree that until Anta was able to alter its shoe to meet Parsons' needs, Parsons would wear sneakers made by another brand, with the other brand's logo covered up. But the contract needs to specify that such a decision would have to be the result of a mutual agreement, taking into consideration the health and safety of the player, and was not something that Parsons could unilaterally and arbitrarily decide.

While Anta was surely upset to see Parsons take the floor on March 8 wearing Jordan Brand sneakers, perhaps the most damaging incident to Anta occurred after the game, when Parsons spoke to the press. When asked why he had worn Jordan Brand sneakers that night, instead of his signature Anta sneaker, Parsons openly disclosed the problems he had encountered with Anta's shoes. Parsons' implicit disparagement of Anta's shoes could arguably do immeasurable damage to the company. Indeed, why would anyone buy an Anta shoe after Anta's own paid spokesperson questioned whether Anta shoes were safe?

It is vital that any endorsement contract such as this have a strict non-disparagement clause, preventing the spokesperson from taking any action or making any knowingly false public statement that negatively impacts the company and/or any of its executives or employees. Any derogatory statement to the press about the quality of company's product – especially the very product that the spokesperson is paid to endorse – must be a material breach of the endorsement agreement, entitling the company to terminate the contract and/or recover damages. Providing for liquidated damages in the endorsement agreement is desirable because where – as we saw in the case of Chandler Parsons – a company's paid spokesperson publicly disparages the company, it would be virtually impossible to calculate the company's *actual* damages with any precision. Companies in Anta's shoes must be careful in drafting such a liquidated damages clause, as there is a fine line between enforceability and liquidated damages clauses. Generally, liquidated damages clauses will only be enforced when (a) it would be difficult, at the time the contract is agreed upon, to calculate the amount of damages that would arise from a contemplated breach and (b) the amount of liquidated damages is a reasonable estimate of the actual damages that the company would suffer if

the contemplated breach were to occur. Accordingly, endorsement agreements should expressly state that: (1) in the event that the spokesperson – in this case, Parsons – breaches the non-disparagement provision, both parties acknowledge that it would be difficult to calculate actual damages; (2) based on the parties' knowledge and experience at the time the contract is executed, they agree that a certain dollar amount would be a reasonable estimate of the damages that the company would likely suffer due to the spokesperson's disparagement and (3) all parties agree that the amount of liquidated damages is fair and reasonable and would not act as a penalty to the spokesperson for his or her breach.

In connection with the non-disparagement clause, it is equally important that any endorsement contract such as this have a publicity or announcement clause addressing how and when the spokesperson will communicate with/through the media and the press in the event something like the incident with Parsons arises. A public announcement or publicity clause can be used to control the dissemination of information and prevent a spokesperson from issuing press releases, making any public announcements (including, blogs, Twitter, Facebook, etc.) or communicating with the media without the consent and input of the shoe company. Such a clause should require the spokesperson to consult with the shoe company regarding the product design or flaw prior to making a public announcement and for the parties to agree upon a strategy to address the press (for example, a joint press release, or simply advising the spokesperson to issue a "no comment"). Public announcement or publicity clauses enable a shoe company to put its foot down as to what is being said about its brand, and, thus, reduce the likelihood of a spokesperson making potentially harmful statements.

Sometimes the shoe just does not fit. But when a professional athlete is paid to wear a shoe that is uncomfortable or unsafe, then it is in the shoe company's and the athlete's best interest to resolve the issue as safely, quickly and quietly as possible. Best practices suggest every endorsement agreement contain the following provisions: (1) a "baseline model" provision that requires the athlete to select a replacement shoe he or she is comfortable wearing so the athlete always wears the company's shoe; (2) a "health exclusion" provision that in the unlikely circumstance the athlete refuses to wear any shoe due to health concerns allows the athlete to temporarily wear a competitive brand's sneakers with all logos covered until the parties finds a satisfactory shoe; (3) a "non-disparagement" provision that prohibits the athlete from saying anything potentially damaging about the company or the company's products; and (4) a "public announcement" provision that obligates the spokesperson to refrain from making any public statements about the uncomfortable or unsafe shoe without first consulting with the shoe company. The foregoing best practices protect the athlete's physical health and the health of the shoe company's brand. ◆

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