

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

FUTURE PROOF BRANDS, LLC	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-cv-00144
	§	JURY TRIAL DEMANDED
MOLSON COORS BEVERAGE	§	
COMPANY F/K/A MOLSON COORS	§	
BREWING COMPANY and	§	
MILLERCOORS, LLC,	§	
	§	
Defendants.	§	

PLAINTIFF’S MOTION FOR EXPEDITED DISCOVERY

Pursuant to Federal Rule of Civil Procedure 26(d)(1), Plaintiff Future Proof Brands, LLC (“Future Proof”) respectfully requests that the Court enter an Order authorizing expedited discovery (the “Motion”) from Defendants Molson Coors Beverage Company f/k/a/ Molson Coors Brewing Company and MillerCoors LLC (together, “Molson Coors” or “Defendants”).

I. INTRODUCTION

Future Proof is the owner of exclusive rights in the BRIZZY mark, which it uses in connection with the advertisement and sale of its hard seltzer product, Brizzy®. Future Proof initiated this lawsuit to stop Molson Coors from infringing the BRIZZY mark by promoting, launching, and selling a competing hard seltzer product confusingly named, Vizzy.

Future Proof filed a Motion for Preliminary Injunction (the “PI Motion”) contemporaneous to the filing of the instant Motion. (Doc. #8). The PI Motion details the significant irreparable harm

that Future Proof will suffer — without an adequate remedy at law — if Molson Coors is allowed to continue infringing the BRIZZY mark.

Future Proof requests limited expedited discovery in connection with the pending PI Motion, which seeks immediate injunctive relief to prohibit Molson Coors from the imminent national launch of the competing hard seltzer product, “Vizzy.” Future Proof respectfully asks this Court to issue an Order allowing it to propound the limited expedited discovery attached as Exhibit A to this Motion, to aid in preparations for the hearing on the pending PI Motion, at which Future Proof must establish a likelihood of success on the merits of its claims.

II. ARGUMENT & AUTHORITIES

A. Standard.

“Federal Rules of Civil Procedure 34(b) and 26(d) allow a party to seek expedited discovery, and the Fifth Circuit has permitted such discovery in certain circumstances.” *Accruent, LLC v. Short*, No. 1:17-CV-858-RP, 2017 WL 8811606, at *1 (W.D. Tex. Nov. 8, 2017); *United Biologics, LLC v. Am. Acad. of Allergy*, No. SA-14-CV-35-OLG, 2014 WL 12637937, at *2 (W.D. Tex. Mar. 20, 2014) (“Federal Rule of Civil Procedure 26 gives a trial court wide discretion to manage the discovery process.”) (internal citations omitted); *see also FMC Corp. v. Varco Int’l, Inc.*, 677 F.2d 500, 501 (5th Cir. 1982) (“following a week of expedited discovery, the district court held a hearing on FMC’s application for a preliminary injunction”).

While Federal Rule of Civil Procedure 26(d) generally requires a conference of parties before discovery may commence, a court may order pre-conference discovery upon a showing of good cause. *Accruent*, 2017 WL 8811606, at *1 (“The Fifth Circuit has not expressly adopted either standard, but several district courts within the Fifth Circuit have used the good cause standard.”); *see also Combat Zone Corp. v. John/Jane Does 1-2*, Civil Action No. 2:12-cv-00509, 2012 WL 6684711, at *1 (E.D. Tex. Dec. 21, 2012) (“An increasing majority of district courts,

including several in the Fifth Circuit, have adopted a ‘good cause’ standard to determine whether to permit such expedited discovery.”). This District has concurred “with those courts that have adopted a good cause/reasonableness standard for motions for expedited discovery when the movant anticipates a later preliminary injunction determination.” *Legacy of Life, Inc. v. Am. Donor Servs., Inc.*, No. SA-06-CA-0802-XR, 2006 WL 8435983, at *1 (W.D. Tex. Oct. 10, 2006). “The burden of showing good cause is on the party seeking the expedited discovery, and the subject matter related to requests for expedited discovery should be narrowly tailored in scope.” *Accruent*, 2017 WL 8811606, at *1.

“Factors commonly considered in determining the reasonableness of expedited discovery include, but are not limited to: ‘(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.’” *Legacy of Life, Inc.*, 2006 WL 8435983, at *1. (citations omitted). As demonstrated below, Future Proof has good cause for the expedited discovery requested in this Motion under these factors.

B. Future Proof’s Preliminary Injunction Motion is Pending.

As an initial matter, the first factor — “whether a preliminary injunction is pending”—is satisfied because Future Proof’s PI Motion is currently pending. *Id.* Thus, an order for expedited discovery is appropriate. *Id.* (“Expedited discovery may be appropriate in cases involving applications for a preliminary injunction.”); *see also Rodale, Inc. v. U.S. Preventive Medicine, Inc.*, No. 8-cv-120, 2008 WL 4682043, at *1 (E.D. Tex. Oct. 21, 2008) (“An order for expedited discovery would be appropriate in a case seeking a preliminary injunction.”); *SEC v. Stafford Int’l Bank, Ltd.*, No. 9-cv-298, 2009 WL 9123278, at *1 (N.D. Tex. Feb. 17, 2009) (holding that

“[e]xpedited discovery is appropriate to permit a prompt and fair hearing on the Commission’s Motion for Preliminary Injunction.”).

C. The Breadth of the Proposed Discovery Directly Relates to the Preliminary Injunction Motion.

Molson Coors’s use of the VIZZY mark in connection with its competing hard seltzer products causes a likelihood of confusion. In advance of the hearing on the PI Motion, Future Proof seeks expedited discovery limited in scope to concern the eight digits of confusion typically analyzed by the Fifth Circuit when determining the likelihood of confusion of an infringing mark. *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 329 (5th Cir. 2008) (internal citations and quotation marks omitted). Accordingly, the breadth of the requested discovery concerns: “(1) strength of the plaintiff’s mark; (2) similarity of design between the marks; (3) similarity of the products; (4) identity of retail outlets and purchasers; (5) similarity of advertising media used; (6) the defendant’s intent; (7) actual confusion; and (8) degree of care exercised by potential purchasers.” *Id.*

D. The Purpose of the Proposed Discovery is to Prepare for the Preliminary Injunction Hearing.

The purpose of the requested discovery is to gather evidence in support of Future Proof’s PI Motion. Specifically, Future Proof intends to use the expedited discovery obtained at the preliminary injunction hearing to underscore the irreparable harm that Future Proof will continue to suffer should Molson Coors’s trademark infringement continue.

E. Responding to the Proposed Discovery Will Impose Minimal Burden on Molson Coors.

Future Proof seeks narrow discovery that Molson Coors should be able to easily collect and produce. For example, the discovery requests ask Molson Coors to produce its own press and promotional materials related to the BRIZZY mark, among other discovery related to the likelihood of confusion factors. Molson Coors publicized a March 2020 launch date for its

infringing hard seltzer product Vizzy®. (Doc. #8, p. 1, 4-5). The close proximity of Molson Coors's anticipated launch date minimizes the burden, if any, of Molson Coors obtaining the requested discovery. The discovery is narrowly tailored to documents and information that Molson Coors likely created or reviewed in connection with the imminent launch of Molson Coors's infringing product Vizzy®, a direct competitor to Future Proof's product, Brizzy®.

F. Early Discovery Will Allow for an Informed Preliminary Injunction Hearing.

Finally, the expedited discovery that Future Proof seeks is timely and reasonable within the context of this lawsuit. Molson Coors has publicly stated that it plans to release the infringing product next month. (Doc. #8, p. 1, 4-5). Discovery is appropriate at this phase of the lawsuit to enable Future Proof to determine the full extent of Molson Coors's trademark infringement and unfair competition prior to the launch date of the infringing product. *See Tracfone Wireless, Inc. v. King Trading, Inc.*, No. 3-08-CV-0398-B, 2008 WL 918243, at *1 (N.D. Tex. Mar. 13, 2008) (mem. op.) (“[T]he court finds that expedited discovery, before a Rule 26(f) conference, is necessary to enable plaintiff to determine the nature and extent of defendants’ alleged counterfeiting activities so it can decide whether to seek preliminary injunctive relief.”). The limited discovery requested will also facilitate a streamlined presentation of evidence at the hearing on the PI Motion.

In sum, all five good cause/reasonableness factors weigh in favor of allowing Future Proof to engage in the limited expedited discovery requested in this Motion.

III. CONCLUSION AND PRAYER

For the foregoing reasons and good cause shown, Future Proof respectfully requests that this Court grant its Motion for Expedited Discovery, and enter an Order allowing Future Proof to

propound the five (5) requests for production and five (5) interrogatories attached hereto as Exhibit A, which require a response from the Molson Coors Defendants within five days of service.

DATE: February 27, 2020

Respectfully submitted,

/s/ Christopher J. Schwegmann

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CERTIFICATE OF CONFERENCE

Counsel for Plaintiff and counsel for Defendants have personally conducted a conference at which there was a substantive discussion of the items presented to the Court in this Motion, and Defendants are opposed to this Motion.

/s/ Christopher J. Schwegmann
Christopher J. Schwegmann

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of February, 2020, a true and correct copy of the above and foregoing document was served *via electronic mail and certified mail* on Defendants' counsel as follows:

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