

Page 1

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF OREGON
 3 PORTLAND DIVISION
 4
 5 NIKE USA, INC., an Oregon)
 corporation,)
 6 Plaintiff,)
)
 7 v.) No. 3:16-cv-
) 00743-SB
 8 BORIS BERIAN, an individual)
 California resident,)
 9)
 Defendant.)
 10 _____)
 11
 12
 13 DEPOSITION OF BORIS BERIAN
 14 BIG BEAR LAKE, CALIFORNIA
 15 Sunday, June 19, 2016
 16
 17
 18
 19
 20
 21
 22
 23
 24 REPORTED BY:
 LINDA M. KLEA
 BSBA, CSR NO. 12468, RPR
 25 JOB NO. 81212

Page 2

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 8 BORIS BERIAN, an individual)
 California resident,)
 9)
 Defendant.)
 10 _____)
 11
 12
 13 Deposition of BORIS BERIAN,
 14 taken on behalf of Plaintiff at Best
 15 Western Big Bear Chateau, 42200 Moonridge
 16 Road, Big Bear Lake, California,
 17 commencing at 3:05 P.M. on Sunday,
 18 June 19, 2016, before Linda M. Klea, BSBA,
 19 CSR No. 12468, RPR, a Certified Shorthand
 20 Reporter in and for the County of
 21 Los Angeles, State of California.
 22
 23
 24
 25

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<p style="text-align: right;">Page 9</p> <p>1 Q Friday morning. Have you talked to your 2 agent about this deposition today? 3 A Yes. 4 Q And what did -- when did you do that? 5 A It was about 2:30. 6 Q And what did your agent tell you? What did 7 you learn on that call, or what did you talk about 8 on that call? 9 A He just let me know, again, what questions 10 would be asked. 11 Q And what did he say in terms of what 12 questions would be asked? 13 A Just -- just to be honest, we have nothing 14 to hide. 15 Q Did he tell you what type of questions 16 would be asked? 17 A Not specifically, no. 18 Q Did he tell you what subjects he thought 19 the questions would cover? 20 A Yes. 21 Q And what did he say about that? 22 A It was basically stuff about the Nike stuff 23 and the contracts, reductions, and stuff like that. 24 Q Have you talked to anyone else at Big Bear 25 Track Club about your deposition in the last few</p>	<p style="text-align: right;">Page 11</p> <p>1 Q Did you have an agent at the time? 2 A I did. 3 Q Who was your agent at the time? 4 A Kimberly Holland. 5 Q And did Nike approach Kimberly Holland or 6 did she approach Nike? 7 A Nike approached her. 8 Q Okay. Did you consider any other sponsors 9 at that time? 10 A Yes. 11 Q Who? 12 A New Balance, Under Armour, and ASICS. 13 Q Why did you choose Nike? 14 A They had the best offer. 15 Q Did you discuss the Nike contract with your 16 agent at the time you entered into it? 17 A No. 18 Q Did you read it yourself? 19 A Yes. 20 Q You understood that your sponsorship 21 agreement with Nike contained a right of first 22 refusal provision; correct? 23 A Yes. 24 Q Okay. How did you meet Mr. Keflezighi? 25 A When did we first meet, or --</p>
<p style="text-align: right;">Page 10</p> <p>1 days? 2 A No. 3 Q Have you talked to anyone else at Big Bear 4 Track Club about this litigation in the past few 5 days? 6 A Yes. 7 Q Who? 8 A My coach. 9 Q And what -- what did you discuss with your 10 coach? 11 A Just that I was going to have a -- have 12 this meeting today. 13 Q Did you discuss anything about the actual 14 case? 15 A No. 16 Q Like, whether or not Nike had matched the 17 New Balance offer, for example? 18 A No. 19 Q All right. Nike was your first sponsor; is 20 that right? 21 A Yes. 22 Q How did you come to be sponsored by Nike? 23 A They had the best deal. 24 Q They approached you? 25 A Yes. Or --</p>	<p style="text-align: right;">Page 12</p> <p>1 Q How did you come to meet him? Yeah. 2 A I'm not exactly sure. My coach knew who he 3 was. 4 Q Okay. Your coach introduced you to -- if 5 you don't mind, I'm going to call him by his first 6 name Merhawi because it's easier for me to say -- 7 correctly, that is. 8 Did your coach introduce you to Merhawi? 9 A Yes. 10 Q Did your coach recommend that you work with 11 Merhawi? 12 A Yes. 13 Q Did he suggest that you could get a better 14 sponsorship contract through Merhawi than you had 15 through your prior arrangement? 16 A No. 17 Q No? Is Mr. Merhawi -- is Merhawi still 18 your agent? 19 A Yes. 20 Q I want to talk a little bit about your 21 history wearing Nike footwear. I've seen some 22 Instagram pictures of you wearing Nike footwear in 23 the past. 24 Am I right that you wore Nike footwear when 25 you were racing in high school and college?</p>

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1 A Yes.

2 Q And that was by choice; correct?

3 A Yes.

4 Q And during the time period in which you

5 were sponsored by Nike after -- you know, in this

6 most recent period, I understand you ran your

7 personal best in the 800 meters at the Diamond Lake

8 event in Monaco last July; is that correct?

9 A Yes.

10 Q That was the fifth fastest time run by an

11 American ever; is that right?

12 A Yes.

13 Q Congratulations on that, by the way. You

14 were wearing Nike that day, were you not?

15 A I was.

16 Q So you've run the fastest 800-meter race of

17 your career in Nike shoes; correct?

18 A Yes.

19 Q Now, you're aware, I assume, that your

20 coach Carlos Handler occasionally communicated with

21 Nike about your training; is that right?

22 A Yes.

23 Q I'd like the court reporter to hand the

24 witness what's been marked for identification as

25 Exhibit 5.

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1 THE REPORTER: Okay. He has it.

2 (Exhibit 5 was marked for identification by

3 the Certified Shorthand Reporter.)

4 BY MR. RAMFJORD:

5 Q Mr. Berian, this is an e-mail dated

6 December 8th, 2015, from Carlos Handler to

7 Ben Cesar.

8 Do you see that?

9 A Yes.

10 Q And you understood that Mr. Cesar is with

11 Nike; correct?

12 A Yes.

13 Q And the e-mail states:

14 "Hi Ben, thank you for checking in. I hope

15 you and your family are doing well. Everyone is

16 doing well over here. Boris is getting in a really

17 good base phase and preparing for the indoor

18 season."

19 Do you see that?

20 A Yes.

21 Q Do you see that?

22 A Yes.

23 Q And was it true that everyone at Big Bear

24 Track Club was doing well, to your knowledge, at

25 that time?

Page 15

1 A Everyone was, yes.

2 Q And it was true that you were getting in a

3 good base for the indoor season?

4 A Yes.

5 Q Your training was going well at that point

6 in time?

7 A It was.

8 Q I'd like you to turn to what's been

9 marked -- or have the court reporter hand you what's

10 been marked as Exhibit 28. And while she is pulling

11 that together, I just want to ask one more question

12 about why you chose Nike in terms of it being a

13 better deal.

14 Was it a better deal because of the money?

15 A The situation I was in with my agent, it

16 was.

17 Q How so?

18 A Nike offered to pay the 15 percent to Kim

19 at the time.

20 Q So Nike offered to pay your agent's

21 commission in addition to paying you, and that made

22 the Nike deal a better deal than, say, New Balance

23 offered at that time?

24 A Yes.

25 Q And at that point in time you were

Page 16

1 satisfied with the idea of running in Nike shoes; is

2 that right?

3 A Yes.

4 Q Now, turning back to Exhibit 28, which I

5 believe you have in front of you now?

6 A Not yet.

7 Q Okay.

8 THE REPORTER: I can't do it and write at

9 the same time.

10 MR. RAMFJORD: I'm sorry.

11 THE REPORTER: That's okay. Okay.

12 (Exhibit 28 was marked for identification

13 by the Certified Shorthand Reporter.)

14 BY MR. RAMFJORD:

15 Q By the way, when you chose to go to Nike

16 for this sponsorship arrangement, you had been

17 wearing New Balance immediately prior to that; is

18 that right?

19 A Yes.

20 Q But you switched from New Balance to Nike;

21 is that right?

22 A Yes.

23 Q Okay. All right. But now I believe you

24 have Exhibit 28 in front of you.

25 A Yeah.

Page 17

1 Q This is another e-mail from Mr. Handler to
2 Ben Cesar dated January 14th, 2016.

3 Do you see that?

4 A Yes.

5 Q And it attaches some invoices. But at the
6 end of the e-mail on the first page it says:

7 "By the way, Boris is doing very well!

8 Training is going well and Boris is healthy! This
9 is going to be a big year for him. Thanks for your
10 time, Ben. Hope to hear from you soon."

11 Do you see that?

12 A Yes.

13 Q Was that true?

14 A Yes.

15 Q It was true that you were doing very well
16 and that your training was going well?

17 A Yes.

18 Q To your knowledge, before January 22nd,
19 2016, when Nike sent your agent a letter stating
20 that it matched the New Balance offer, did you or
21 your coach ever inform anyone at Nike that you had
22 any problems wearing Nike footwear?

23 A No.

24 Q Have you or your coach ever asked Nike if
25 it could make any modifications or adjustments to

Page 18

1 the Nike shoes you were wearing during the time you
2 were sponsored by Nike to make them more
3 comfortable?

4 A No.

5 Q You never asked for that?

6 A No. We didn't know we could.

7 Q And you didn't ask to see if you could
8 either?

9 A No.

10 Q Now, I want to talk a little bit about the
11 negotiations with New Balance. And I understand
12 that some point in time after Merhawi began
13 representing you, he began talking to New Balance
14 about a sponsorship agreement for you; is that
15 right?

16 A Yes.

17 Q Did he talk to any other companies?

18 A No.

19 Q So New Balance was the only company, to
20 your knowledge, that he spoke with after he started
21 representing you in the fall of 2015?

22 A Yes.

23 Q Did Merhawi talk to you about what you
24 wanted in terms of a new contract?

25 A Yes.

Page 19

1 Q What did -- what did he talk to you about
2 and what did you want?

3 A We talked about the starting base salary
4 and what shoes I felt most comfortable in.

5 Q A higher base salary and what shoes you
6 felt most comfortable in?

7 A Yes.

8 Q Anything else?

9 A That was it.

10 Q All right. I want to have the court
11 reporter pass you what's been marked for
12 identification as Exhibit 3.

13 THE REPORTER: Okay. He has it.

14 (Exhibit 3 was marked for identification by
15 the Certified Shorthand Reporter.)

16 BY MR. RAMFJORD:

17 Q Mr. Berian, Exhibit 3 is a chain of e-mails
18 between Mr. -- or Merhawi and John Evans of
19 New Balance and then it's forwarded to you on
20 December 11th, 2015.

21 Do you see that?

22 A Yes.

23 Q And I want to start by looking at the last
24 two pages of this e-mail. And at the bottom of
25 this -- actually, not the last two pages. Starting

Page 20

1 at the bottom of what's been marked as page 2, there
2 is an e-mail from Mr. -- or from Merhawi,
3 Mr. Keflezighi, to Mr. Evans dated November 25th.

4 Do you see that?

5 A Yes.

6 Q All right. And this e-mail includes some
7 proposed terms for a deal with New Balance, does it
8 not? If you look on the left of page 3?

9 A Yes.

10 Q Did you talk about Merhawi offering these
11 terms before this e-mail was sent?

12 A Yes.

13 Q So you approved his sending of this offer
14 before he sent it out?

15 A Yes.

16 Q Okay. I want to talk a little bit about
17 some of the terms here. I'd like to start with the
18 one -- it's the fourth dash point.

19 Says: "Allow third party logo on the race
20 uniform (Big Bear Track Club logo, or other
21 noncompetitive logo)."

22 Do you see that language?

23 A Yes.

24 Q What was the purpose of that term, as you
25 understood it?

<p style="text-align: right;">Page 21</p> <p>1 A Just to make the track club's own logo for 2 whatever company. 3 Q So was it to make sure that you could put a 4 third party logo on your race uniform like the 5 Big Bear Track Club logo? 6 A I don't understand "third party." Was 7 it -- 8 Q Well, was it -- I mean, it's not -- by 9 "third party," I mean not you and not New Balance. 10 In other words, you could put some other logo on 11 your race outfit like the logo at the time for 12 Big Bear Track Club? 13 A Yeah. 14 Q Okay. And the term -- this provision 15 refers to the Big Bear Track Club logo or other 16 noncompetitive logos. 17 Do you see that language? 18 A Yes. 19 Q Did you understand at the time that 20 whatever logo you put on your uniform could not be 21 the logo of a New Balance competitor? In other 22 words, couldn't put a Nike Swoosh on your uniform 23 but you could put the Big Bear Track Club logo on 24 your uniform -- 25 A Yes.</p>	<p style="text-align: right;">Page 23</p> <p>1 Do you see that? 2 A Yes. 3 Q Now, it also says at the end of the e-mail 4 here that: 5 "In addition to a sponsorship deal for 6 Boris, I have also been given authorization to 7 discuss a deal for the Big Bear Track Club." 8 Do you see that? 9 A Yes. 10 Q And was it your understanding that Merhawi 11 was attempting to negotiate an arrangement with 12 New Balance that would include both a sponsorship 13 agreement for you and a sponsorship agreement for 14 the Big Bear Track Club? 15 A Yes. 16 Q And you understood, I assume, that if there 17 was a sponsorship agreement for the Big Bear Track 18 Club, it would include a provision, like most club 19 sponsorship agreements, that says that club members 20 could not wear or use products manufactured by 21 competitors of New Balance? 22 A Yes. 23 Q Do you know whether Merhawi had an agency 24 agreement with Big Bear Track Club at this time? 25 A With the team?</p>
<p style="text-align: right;">Page 22</p> <p>1 Q -- if it didn't include a Nike Swoosh? 2 A Yes. 3 Q Do you understand or -- did you have any 4 discussions with Merhawi about why you were putting 5 this provision in? 6 A No. 7 Q Did you talk about whether or not it would 8 make it easier or harder for Nike to match any 9 New Balance offer? 10 A Yes. 11 Q What did you talk about with that? 12 A If New Balance agreed to that, it would 13 make it harder for them to just match that. 14 Q Make it harder for Nike to match the offer 15 if New Balance put it into their offer; is that 16 right? 17 A Yes. 18 Q And this was not a term that, you know, 19 gave you economic benefit; you didn't get more money 20 from putting this term in the contract, did you? 21 A No. 22 Q The fifth term right below that says: 23 "New Balance being a sponsor of the 24 Big Bear Track Club and sponsoring Boris as part of 25 that deal."</p>	<p style="text-align: right;">Page 24</p> <p>1 Q With the group, with the club. Does he 2 have an agency agreement with them? 3 A No. 4 Q He was just doing this informally, 5 negotiating on their behalf? 6 A Yes. 7 Q Was the idea of this that these two 8 agreements would start at the same time? In other 9 words, your agreement with New Balance and the 10 agreement with Big Bear Track Club would both start 11 on January 1, 2016, when your deal with Nike 12 expired? 13 A No. 14 Q What was your understanding about that? 15 How was that going to work? 16 A The team would be sponsored. 17 Q Okay. It says here, looking at that 18 language again: 19 "New Balance being a sponsor of the Big 20 Bear Track Club and sponsoring Boris as part of that 21 deal." 22 Do you see that language? 23 A Yes. 24 Q Wasn't it the case that New Balance would 25 be a sponsor of the team and you would be sponsored</p>

1 as part of the overall arrangement as well?
 2 A Not individually, but I'm a member of the
 3 Big Bear Track Club so I would be wearing
 4 New Balance.
 5 Q Yeah. You would be a member of the Big
 6 Bear Track Club, but you would also have your own
 7 separate agreement with New Balance that sponsored
 8 just you; is that right?
 9 A Not individually at the time, no.
 10 Q As of this time in November of 2015, wasn't
 11 Merhawi trying to negotiate an individual
 12 sponsorship agreement for you with an annual base
 13 compensation level of \$150,000 as he suggested in
 14 this e-mail?
 15 A Yes.
 16 Q Okay. So at this point in time, Merhawi
 17 was attempting to negotiate an individual
 18 sponsorship agreement for you, one; and a
 19 sponsorship agreement for the Big Bear Track Club,
 20 two; correct?
 21 A Yes.
 22 Q And both of those sponsorship agreements
 23 would start on January 1, 2016, when your contract
 24 with Nike expired; correct? Or as close thereto as
 25 possible?

1 A As close as possible. But with everything
 2 legally, the individual one wouldn't start on the
 3 1st.
 4 Q Yeah, is that -- that changed over time
 5 because of some of the legal issues that arose?
 6 A Yes.
 7 Q Correct?
 8 A Yes.
 9 Q Okay. All right.
 10 All right. I'd like to have the reporter
 11 give the witness what's been marked as Exhibit 4.
 12 THE REPORTER: Okay.
 13 (Exhibit 4 was marked for identification by
 14 the Certified Shorthand Reporter.)
 15 BY MR. RAMFJORD:
 16 Q All right. This, Mr. Berian, I believe, is
 17 screen shots of texts sent between you and Merhawi
 18 that were produced in this case.
 19 Do you recognize these as texts between you
 20 and Mr. Merhawi -- or I mean Merhawi?
 21 A Yes.
 22 Q Okay. All right. I'd like to have you
 23 start by looking at page 6 of this document. There
 24 are page numbers at the bottom there.
 25 A Page 6?

1 Q Yes.
 2 A Okay.
 3 Q And the top line of this text is cut off at
 4 the top of the page, but it appears to say:
 5 "John Evans. He has made an offer for 125K
 6 per year for three years. He will send me the offer
 7 in the next few days."
 8 Do you see that language?
 9 A Yes.
 10 Q And you respond that that's great news and
 11 you're pretty excited; correct?
 12 A Yes.
 13 Q And just by looking at the text below this,
 14 it appears that this exchange that you had with
 15 Merhawi was before December 19th, 2015; is that
 16 right?
 17 A Yes.
 18 Q Did you have any follow-up calls with
 19 Merhawi to talk about this offer?
 20 A I don't remember.
 21 Q Okay. Do you remember whether you
 22 discussed any other terms that might be part of this
 23 offer?
 24 A No.
 25 MR. RAMFJORD: Let's turn -- if the court

1 reporter would show the witness what's been marked
 2 as Exhibit 6.
 3 THE REPORTER: Okay.
 4 (Exhibit 6 was marked for identification by
 5 the Certified Shorthand Reporter.)
 6 BY MR. RAMFJORD:
 7 Q Mr. Berian, this is an e-mail exchange
 8 between Merhawi and John Evans relating to the offer
 9 made by New Balance.
 10 Do you see that?
 11 A Yes.
 12 Q If we start on the second page, Merhawi
 13 e-mails Mr. Evans stating:
 14 "I hope all is well with you. I just
 15 wanted to check in regarding Boris and Big Bear
 16 Track Club. I know I asked you to wait until the
 17 new year, so I am responsible for the delays.
 18 "When should I accept the offer for Boris
 19 and any documents to make the Big Bear Track Club
 20 deal official?"
 21 Do you see that?
 22 A Yes.
 23 Q And then on the e-mail that precedes that
 24 in the first page, there is a response. And that's
 25 dated January 12th, and from Mr. Evans to Merhawi

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1 and he encloses the offer for Berian -- for Boris.
 2 And he says he's putting together the contract for
 3 Big Bear and should have that to him shortly as
 4 well; correct?
 5 A Yes.
 6 Q And attached to this is a copy of a
 7 document titled "Boris Berian Offer Compensation and
 8 Bonus Schedule."
 9 Do you see that?
 10 A Yes.
 11 Q And that was the initial offer that --
 12 written offer that you actually received from
 13 New Balance; is that correct?
 14 A Yes.
 15 Q Okay. Now, at this time you knew that you
 16 would have to present any New Balance offer that you
 17 wanted to accept to Nike under the right of first
 18 refusal provision in the Nike contract; right?
 19 A Yes.
 20 Q And you understood under that provision
 21 Nike might agree to match the New Balance offer;
 22 right?
 23 A Yes.
 24 Q Did you talk to Mr. Keflezighi about that
 25 possibility?

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1 A Yes.
 2 Q What did you talk about?
 3 A If Nike would have matched the offer, then
 4 I'd have no choice and have to go with Nike.
 5 Q Did you talk about ways that you could get
 6 around that right of first refusal if you wanted to
 7 be sure that you could go with New Balance?
 8 A Um -- yes.
 9 Q What did you talk about in terms of ways to
 10 get around the Nike right of first refusal?
 11 A By just adding no reductions.
 12 Q Adding no reductions and adding that -- the
 13 affiliation clause? Do you recall that?
 14 A What is that?
 15 Q Well, let's actually look at the --
 16 A Oh, okay.
 17 Q -- last page of this document of the
 18 exhibit in front of you. It has a clause that's
 19 Roman numeral five, "Affiliation."
 20 Do you see that?
 21 A Yes.
 22 Q And that provision says:
 23 "New Balance shall permit ATHLETE to
 24 compete under the Big Bear Track Club affiliation,
 25 and ATHLETE may wear the official uniform and

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1 footwear of Big Bear Track Club in all domestic
 2 competitions, including the US Indoor Championships
 3 and the US Olympic trials, in 2016. ATHLETE shall
 4 compete for Team New Balance and wear the Team New
 5 Balance official uniform at all international
 6 events."
 7 Do you see that language?
 8 A Yes.
 9 Q Did you talk to Mr. Keflezighi about this
 10 provision?
 11 A Briefly, yes.
 12 Q And did you understand that one of the
 13 goals of this provision was to make it difficult for
 14 Nike to match the New Balance offer?
 15 A Yes.
 16 Q And this is not a provision that gave you
 17 any economic benefit? Again, this is just to make
 18 it hard for Nike to match the offer; right?
 19 A Yes.
 20 Q And did you understand that another goal of
 21 this provision was to try to ensure that even if
 22 Nike matched the New Balance offer, you would still
 23 be able to run in New Balance apparel and footwear
 24 because it would be the official apparel and
 25 footwear of the Big Bear Track Club?

Page 32

1 A Yes.
 2 Q Did you ever discuss this provision with
 3 anyone else at Big Bear Track Club such as your
 4 coach Carlos Handler?
 5 A Carlos, yes.
 6 Q Did you explain how this provision would
 7 work?
 8 A Briefly, yes.
 9 Q And you explained to him that it was
 10 designed to help -- designed to make it difficult
 11 for Nike to match the New Balance offer?
 12 A I didn't do, like, all that. I just let
 13 him know. But Merhawi, he explained most of this
 14 stuff to Carlos.
 15 Q Okay. All right. Now, this attachment to
 16 the e-mail, which is titled "Boris Berian Offer
 17 Compensation and Bonus Schedule," this is not an
 18 actual sponsorship contract, is it?
 19 A What do you mean?
 20 Q Well, it does not include some of the terms
 21 that you would expect in a normal sponsorship
 22 agreement, like provisions allowing the sponsor to
 23 use your name or image, or provisions saying that
 24 you would make appearances on behalf of the sponsor,
 25 those kinds of provisions?

<p style="text-align: right;">Page 37</p> <p>1 recent version of the offer that you had received 2 from New Balance; correct? 3 A Yes. 4 Q And this included a few little sweeteners 5 from the original written offer that you received in 6 terms of track time, bonuses, and rollovers; is that 7 right? 8 A Yes. 9 Q But it still included the affiliation 10 clause we mentioned earlier, which is now clause 11 Roman numeral seven; correct? 12 A Yes. 13 Q Did you discuss with Merhawi the language 14 in his cover e-mail, how he was going to present the 15 New Balance offer before he sent it? 16 A What do you mean? 17 Q Well, did you -- did Merhawi call you up 18 and say here's -- or write to you and say, "Here's 19 what I'm going to say to Nike. I'm going to tell 20 them that in addition to the financial terms and 21 lack of reductions, we consider the affiliations 22 clause in the contract to be a material element of 23 the offer." 24 Did you discuss that with him? 25 A No. He just told me he was going to send</p>	<p style="text-align: right;">Page 39</p> <p>1 matches the New Balance offer as set forth in 2 Attachment 2 and will enter into a new contract with 3 Boris for the exclusive right and license for his 4 'Athlete Endorsement' in connection with the 5 'products' and/or NIKE brands (as each is defined in 6 the Contract) and otherwise in accordance with the 7 matched terms set forth in Attachment 2." 8 Do you see that language? 9 A Yes. 10 Q And that language says that Nike matches 11 the New Balance offer; correct? 12 A Yes. 13 Q And Attachment 2, which is included with 14 this letter, is a version of the Boris Berian Offer 15 Compensation and Bonus Schedule that Mr. Keflezighi 16 had sent to Nike substituting Nike for New Balance? 17 Do you see that? 18 A No. Everything New Balance is substituted? 19 Q Yeah. Nike is substituted for New Balance. 20 Do you see that? 21 A No. 22 Q Okay. Let's start a little bit more 23 simply. If you look at -- there's some numbers in 24 the lower right-hand corner of the pages of these 25 documents.</p>
<p style="text-align: right;">Page 38</p> <p>1 off the contract. 2 Q Okay. Did you know that he was going to 3 draw attention to the affiliation clause in the hope 4 that Nike would not agree to match it? 5 A No. 6 Q All right. I'd like -- if the court 7 reporter could show the witness what's been marked 8 as Exhibit 13. 9 THE REPORTER: 13? 10 MR. RAMFJORD: Yeah, please. 11 THE REPORTER: Okay. 12 (Exhibit 13 was marked for identification 13 by the Certified Shorthand Reporter.) 14 BY MR. RAMFJORD: 15 Q Mr. Berian, you have in front of you what's 16 been marked as Exhibit 13, which is an e-mail from 17 Ben Cesar to Mr. Keflezighi dated January 22nd, 18 2016. And it attaches a letter from John Capriotti. 19 Do you see that? 20 A Yes. 21 Q Did Mr. Keflezighi show you this document? 22 A Yes. 23 Q Okay. If you look at the attached letter, 24 the second sentence states: 25 "This letter is to notify you that NIKE</p>	<p style="text-align: right;">Page 40</p> <p>1 A Yes. 2 Q Do you see those numbers? 3 A Yes. 4 Q And if you look at the page ending in 60. 5 A Yes. 6 Q That's the New Balance Boris Berian Offer 7 Compensation and Bonus Schedule; correct? 8 A Yes. 9 Q That's the offer you had received from 10 New Balance; correct? 11 A Yes. 12 Q And then if you look at the document with 13 the number at the bottom of the page ending 63. 14 A 63. Okay. 15 Q That says Boris Berian Offer Compensation 16 and Bonus Schedule; correct? 17 A Yes. 18 Q And if you look at each section, for 19 example, under Section Roman Numeral, "IV.A. 20 Performance Bonus," says: 21 "To attain a performance bonus set forth 22 below ATHLETE must (1) have competed exclusively in 23 NIKE products," et cetera. 24 A Yes, I see that. 25 Q Do you see that?</p>

<p style="text-align: right;">Page 41</p> <p>1 A I do now, yes.</p> <p>2 Q So this provision or this document takes</p> <p>3 the New Balance offer and substitutes NIKE for</p> <p>4 New Balance in each and every term; correct?</p> <p>5 A Yes.</p> <p>6 Q So Nike was agreeing to match each and</p> <p>7 every term set forth in the attachment from</p> <p>8 New Balance, the New Balance Boris Berian</p> <p>9 Compensation and Bonus Schedule; correct?</p> <p>10 A Yes.</p> <p>11 Q Now, turning back to the first, the letter</p> <p>12 which accompanies this, in the second full paragraph</p> <p>13 of that letter, Mr. Capriotti comments that the</p> <p>14 New Balance offer is silent on reductions and Nike</p> <p>15 is only obligated to match the terms stated in the</p> <p>16 New Balance offer.</p> <p>17 Do you see that?</p> <p>18 A Yes.</p> <p>19 Q Now, there's nothing in this letter that</p> <p>20 says that Nike will not agree to the New Balance</p> <p>21 offer because it contains reductions, is there?</p> <p>22 A No.</p> <p>23 Q In fact, the first paragraph says that Nike</p> <p>24 matches the New Balance offer, and this paragraph</p> <p>25 also says that Nike is obligated to match the terms</p>	<p style="text-align: right;">Page 43</p> <p>1 responds:</p> <p>2 "Got it."</p> <p>3 And he goes on to say:</p> <p>4 "There's a few ways to get the desired</p> <p>5 results. Let me analyze them and get back to you</p> <p>6 with a good game plan and options."</p> <p>7 Do you see that?</p> <p>8 A Yes.</p> <p>9 Q And am I correct that what Carlos had told</p> <p>10 you, that you're referring to in that first text, is</p> <p>11 that Nike had matched the terms of the New Balance</p> <p>12 offer; is that right?</p> <p>13 A I don't remember.</p> <p>14 Q Do you remember what Carlos told you you</p> <p>15 had to do with the New Balance offer?</p> <p>16 A Yes.</p> <p>17 Q Nike's match of the New Balance offer?</p> <p>18 A Yes.</p> <p>19 Q Did you talk to Carlos about what you</p> <p>20 should do in response to Nike's letter?</p> <p>21 A I don't remember.</p> <p>22 Q Did you talk to Carlos or anyone else about</p> <p>23 the potential impact of Nike's letter on the ability</p> <p>24 of Big Bear Track Club to get a New Balance</p> <p>25 sponsorship agreement?</p>
<p style="text-align: right;">Page 42</p> <p>1 stated in the New Balance offer; correct?</p> <p>2 A Yes.</p> <p>3 Q Now, I'd like to go back to the chain of</p> <p>4 e-mails or texts between you and Mr. Keflezighi,</p> <p>5 which is Exhibit 4.</p> <p>6 A Okay.</p> <p>7 Q And I'd like you to turn to what's been</p> <p>8 marked as page 12 at the bottom.</p> <p>9 A Okay.</p> <p>10 Q And there's a text there dated Friday,</p> <p>11 January 22nd, 2016.</p> <p>12 Do you see that?</p> <p>13 A Yes.</p> <p>14 Q And that's the same day, same date as the</p> <p>15 letter that we just looked at from Nike, which is</p> <p>16 Exhibit 13; correct? January 22nd, 2016.</p> <p>17 A Yes.</p> <p>18 Q And the text says:</p> <p>19 "Hey Hawi. Just got done with my run.</p> <p>20 Carlos came over and told me what's going on. You</p> <p>21 can call back anytime right now."</p> <p>22 You go on to say:</p> <p>23 "I'd basically go anybody but Nike ... or</p> <p>24 hoka, haha. But yea NB as main."</p> <p>25 And then on the next page, Mr. Keflezighi</p>	<p style="text-align: right;">Page 44</p> <p>1 A What do you mean?</p> <p>2 Q Well, I mean, that if Nike had matched the</p> <p>3 New Balance offer and you were obliged to go with</p> <p>4 Nike, then wouldn't that make it difficult for</p> <p>5 New Balance to get a sponsorship agreement with</p> <p>6 Nike -- with -- wouldn't that make it difficult for</p> <p>7 Big Bear Track Club to get a sponsorship agreement</p> <p>8 with New Balance that required club members to wear</p> <p>9 New Balance footwear and apparel?</p> <p>10 A Yes.</p> <p>11 Q Did you talk about that with Carlos --</p> <p>12 A Um --</p> <p>13 Q -- your coach?</p> <p>14 A I believe so. Yes.</p> <p>15 Q What do you remember talking about in</p> <p>16 regard to that?</p> <p>17 A He briefly let me know that Nike sent over</p> <p>18 the contract. And I was going to go over it more</p> <p>19 with Hawi in that phone call.</p> <p>20 Q And he briefly let you know that it appears</p> <p>21 that Nike had matched the New Balance offer?</p> <p>22 A I think it was something like that, yeah.</p> <p>23 Q Okay. All right. Now, turning back to the</p> <p>24 exhibit that the -- your -- or you respond to</p> <p>25 Mr. Keflezighi. And then he comes back and says</p>

<p style="text-align: right;">Page 45</p> <p>1 "There's a few ways to get the desired results. Let 2 me analyze them and get back to you with a good game 3 plan and option." 4 Do you see that language again? 5 A Yes. 6 Q And I take it that the desired result at 7 this point in time was avoiding an agreement with 8 Nike since you wanted to go to New Balance; correct? 9 A No. 10 Q What was the desired result? 11 A I don't remember. But it was basically to 12 go to New Balance. 13 Q The desired result was to go to 14 New Balance; right? 15 A Yes. 16 Q And to go to New Balance, you couldn't 17 have -- you couldn't go to New Balance if you had an 18 agreement with Nike, could you? 19 A No. 20 Q And so the desired result was avoiding an 21 agreement with Nike so you could go to New Balance; 22 correct? 23 A At the time I wasn't aware that there was a 24 complete agreement, but yeah. 25 Q Well, but you did -- you wanted to make</p>	<p style="text-align: right;">Page 47</p> <p>1 with John Evans today and he is discussing their 2 options with the NB -- New Balance; that is -- 3 lawyer. I will have our options and strategy --" 4 And you have to turn to the next page to 5 finish. 6 "-- to discuss with you." 7 Do you see that? 8 A Yes. 9 Q And, again, did you understand that the 10 options and strategies were to allow you to go 11 forward with the New Balance agreement and avoid any 12 agreement with Nike? 13 A Yes. 14 Q Did you have a follow-up conversation with 15 Mr. Keflezighi regarding what he learned from the 16 New Balance lawyer? 17 A I don't remember. 18 Q Do you remember Mr. Keflezighi telling you 19 that New Balance could not enter an agreement with 20 you because of the language of Mr. Capriotti's 21 letter stating that Nike matches the New Balance 22 offer? 23 A I believe so, yes. 24 Q Yes, he told you that? 25 A Yeah.</p>
<p style="text-align: right;">Page 46</p> <p>1 sure it was not a complete agreement with Nike so 2 you could go to New Balance; correct? 3 A I thought there wasn't at the time. 4 Q What? 5 A During all this Hawi told me that Nike 6 couldn't match, so that's what I was thinking the 7 whole time. 8 Q Couldn't match you say? 9 A Yes. 10 Q So Hawi was telling you that Nike could not 11 match the New Balance offer; is that correct? 12 A Yes. 13 Q Okay. Did he say why? 14 A With mainly the affiliation. 15 Q Okay. So putting that affiliation clause 16 in the New Balance offer would make it impossible 17 for Nike to match the New Balance offer? 18 A Yes. 19 Q All right. Looking, again, at the bottom 20 of page 13 of this same exhibit. On January 25th, 21 it appears that you e-mail Mr. Keflezighi saying: 22 "Hey Hawi. Just wondering if anything new 23 has happened." 24 And Mr. Keflezighi responds saying: 25 "Thanks for checking in, Boris. I spoke</p>	<p style="text-align: right;">Page 48</p> <p>1 Q Okay. And did he tell you that New Balance 2 would have to wait, at a minimum, until the 180-day 3 matching period in your contract with Nike expired 4 before New Balance could enter into a contract with 5 you? 6 A Yes. 7 Q And, in fact, New Balance refused to enter 8 into an agreement with you in January of 2016 9 because Nike had sent this letter saying that it 10 matched the New Balance offer; correct? 11 A Yes. 12 Q Okay. All right. I'd like to have you 13 turn to what's been marked for identification as 14 Exhibit 15, or have the court reporter hand you 15 that. 16 THE REPORTER: Okay. He has it. 17 (Exhibit 15 was marked for identification 18 by the Certified Shorthand Reporter.) 19 BY MR. RAMFJORD: 20 Q This is an e-mail from Mr. Keflezighi to 21 Mr. Cesar and Mr. Capriotti dated January 27th, 22 2016. And it says, in part: 23 "After chatting with Boris, I think it's a 24 good idea for all of us to chat by phone. Is there 25 a good day and time that works for you?"</p>

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1 Do you see that?
 2 A Yes.
 3 Q And do you recall having a conversation
 4 with Mr. Keflezighi after receiving the January 22nd
 5 letter from Nike in which Mr. Keflezighi said, you
 6 know, "Let me call up Nike and see if I can persuade
 7 them that you don't want to be with them, you want
 8 to be with New Balance, and see if we can get out of
 9 this"? Or something along those lines?
 10 A I think so, yeah. He sent an e-mail,
 11 maybe.
 12 Q What do you recall Mr. Keflezighi telling
 13 you that he was going to say to Mr. Cesar and
 14 Mr. Capriotti?
 15 A I remember that he asked me if I just
 16 wanted to chat with Ben and John, just to see if
 17 they would just release me.
 18 Q Okay. And, actually, let's turn
 19 to -- let's have the court reporter hand you what's
 20 been marked as Exhibit 17.
 21 THE REPORTER: Okay.
 22 (Exhibit 17 was marked for identification
 23 by the Certified Shorthand Reporter.)
 24 BY MR. RAMFJORD:
 25 Q All right. And, Mr. Berian, this is a

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1 series of e-mails. I'm going to focus on the one at
 2 the bottom of the first page, which is dated
 3 February 1st, 2016, from Mr. Keflezighi to Mr. Cesar
 4 and Mr. Capriotti. And it talks about:
 5 "Is there a good time to chat today or
 6 tomorrow?"
 7 And right below that there's actually an
 8 e-mail dated January 28, 2016, in which
 9 Mr. Keflezighi writes Mr. Cesar and says:
 10 "As discussed yesterday, let's set up a
 11 time for you, me -- or for me, you, Boris and Cap to
 12 get on the phone together. Boris and I are
 13 available and flexible on Monday and Tuesday of next
 14 week for this call. We hope to be -- we are able to
 15 resolve any issues and clarify the process during
 16 the phone call."
 17 Do you see that?
 18 A Yes.
 19 Q And this is the phone call you're talking
 20 about where -- this phone call actually took place
 21 after this e-mail was sent and you, Mr. Keflezighi,
 22 and Mr. Cesar, and Mr. Capriotti were all on the
 23 phone; correct?
 24 A Yes.
 25 Q And during that phone call, as I understand

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1 it, you told Nike that you would prefer to be with
 2 New Balance; correct?
 3 A Yes.
 4 Q And Nike told you that it wanted to
 5 continue working with you, having you as its
 6 sponsored athlete; correct?
 7 A Yes.
 8 Q And during that call there was no legal
 9 discussion about whether or not Nike had or had not
 10 matched the New Balance offer, it was really about
 11 your preference; correct?
 12 A Yes.
 13 Q Did you do anything to prepare for that
 14 phone call?
 15 A No, not really.
 16 Q What did you tell Nike in terms of your
 17 preference why you wanted to go with New Balance?
 18 A Footwear was bothering me. And two, as,
 19 like, Ben Cesar wasn't really communicating too much
 20 with us.
 21 Q Okay. Had you complained before about the
 22 footwear bothering you in any way?
 23 A No.
 24 Q Did Mr. Cesar or Mr. Capriotti say, "Well,
 25 we're happy to work with you on that and try to

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1 figure out a way to make the footwear more
 2 comfortable for you"?
 3 A In the phone call, yes.
 4 Q Yeah. And did they also indicate that, you
 5 know, they'd be happy to try to communicate more
 6 with you if that was an issue?
 7 A I believe so, yes, in the call.
 8 Q It was clear to you that they wanted to go
 9 forward and work with you in the future; correct?
 10 A Yes.
 11 Q All right. I'd like to have the court
 12 reporter show you what's been marked as Exhibit 20.
 13 And while we're getting that, I just need one
 14 second.
 15 (Brief pause in proceedings.)
 16 (Exhibit 20 was marked for identification
 17 by the Certified Shorthand Reporter.)
 18 BY MR. RAMFJORD:
 19 Q Do you have in front of you what's been
 20 marked as Exhibit 20?
 21 A Yes.
 22 Q Yes?
 23 A Yes.
 24 Q Okay. In the bottom e-mail here, that's
 25 dated February 15th, 2016. And it's from Mr. Cesar

<p style="text-align: right;">Page 53</p> <p>1 and it says:</p> <p>2 "Hello Merhawi. Attached is a long form</p> <p>3 contract for Boris for your review. As we discussed</p> <p>4 on our last call, we're looking forward to</p> <p>5 continuing our relationship with Boris."</p> <p>6 Do you see that?</p> <p>7 A Yes.</p> <p>8 Q And in response, right above that, there is</p> <p>9 an e-mail from Mr. Keflezighi to Mr. Cesar on the</p> <p>10 same day saying:</p> <p>11 "Hello Ben, as discussed, Boris has</p> <p>12 expressed an interest not to resume a relationship</p> <p>13 with Nike. You asked us to discuss internally and</p> <p>14 notify you. Boris' position has not changed since</p> <p>15 our conference call.</p> <p>16 "Additionally, your original letter asked</p> <p>17 for a revised proposal/offer. We reserved the right</p> <p>18 to submit the requested information if you decide</p> <p>19 not to honor Boris' personal preference.</p> <p>20 "If you decide not to honor Boris' personal</p> <p>21 preference, I can have a revised offer to you in the</p> <p>22 next week."</p> <p>23 Do you see that?</p> <p>24 A Yes.</p> <p>25 Q And this -- nowhere in this e-mail does</p>	<p style="text-align: right;">Page 55</p> <p>1 preliminary injunction hearing so we're just on the</p> <p>2 tightest possible schedule.</p> <p>3 THE REPORTER: Okay. And when is your</p> <p>4 hearing?</p> <p>5 MR. RAMFJORD: Hearing right now is set for</p> <p>6 Tuesday morning. We're trying to move that. But,</p> <p>7 you know, if we're not able to, we'd like to be able</p> <p>8 to have something sometime tomorrow morning if we</p> <p>9 could.</p> <p>10 THE REPORTER: Yeah, I can turn it in</p> <p>11 tomorrow morning, and they can probably e-mail it to</p> <p>12 you.</p> <p>13 MR. RAMFJORD: Okay.</p> <p>14 THE REPORTER: Okay.</p> <p>15 MR. RAMFJORD: Thank you.</p> <p>16 THE REPORTER: You're welcome.</p> <p>17 And, Mr. Ewing, do you need a copy?</p> <p>18 MR. EWING: Yes. A copy synched with the</p> <p>19 video, please, if possible.</p> <p>20 THE REPORTER: Okay.</p> <p>21 MR. EWING: But the expedited one, as soon</p> <p>22 as you can get that to us, that'd be great.</p> <p>23 THE REPORTER: Okay. Thank you.</p> <p>24 MR. EWING: Boris, you're done.</p> <p>25 MR. RAMFJORD: Thank you, Boris.</p>
<p style="text-align: right;">Page 54</p> <p>1 Mr. Keflezighi indicate that Nike did not match the</p> <p>2 New Balance offer, does he?</p> <p>3 A No.</p> <p>4 Q Did Mr. Keflezighi show you the long form</p> <p>5 agreement that was proposed by -- as a starting</p> <p>6 point by Nike?</p> <p>7 A No.</p> <p>8 Q Give me one second, if you would.</p> <p>9 (Brief pause in proceedings.)</p> <p>10 MR. RAMFJORD: We have no further</p> <p>11 questions.</p> <p>12 Are you there?</p> <p>13 THE WITNESS: Yeah.</p> <p>14 THE REPORTER: Yeah. So --</p> <p>15 MR. RAMFJORD: We have no further -- you're</p> <p>16 done.</p> <p>17 THE REPORTER: Okay. Thank you.</p> <p>18 MR. EWING: Excuse me. Ms. Reporter, can</p> <p>19 we get an expedited transcript and video?</p> <p>20 THE REPORTER: Yes. When do you need it</p> <p>21 by?</p> <p>22 MR. EWING: As soon as possible.</p> <p>23 THE REPORTER: Okay. Well, I can turn it</p> <p>24 in on Monday.</p> <p>25 MR. RAMFJORD: We have an upcoming</p>	<p style="text-align: right;">Page 56</p> <p>1 THE WITNESS: Thank you.</p> <p>2 THE VIDEOGRAPHER: This concludes this</p> <p>3 deposition of Boris Berian. Going off the record,</p> <p>4 4:07 P.M.</p> <p>5 (End time: 4:07 P.M.)</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>