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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NIKE USA, INC., an Oregon corporation,

Plaintiff,

v.

BORIS BERIAN, an individual California resident,

Defendant.

Case No. 3:16–cv–00743-SB

DEFENDANT BORIS BERIAN'S OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Nike demands Defendant Boris Berian's personal endorsement. But Mr. Berian does not want to endorse Nike or its products. He is not contractually obliged to do so. And even if he were, Oregon law would not permit specific performance. Further, unlike the TRO, a preliminary injunction threatens *far* more harm to Mr. Berian than it could save for Nike, whose speech, economic well-being, and place in Olympic history are not at stake. Most glaringly, Nike wants this Court to order Mr. Berian to change his shoes—replacing the New Balance shoes he has been training and racing in all season long, with Nike shoes that he finds less effective—for what could be the most important footraces of his life.

The harm and equities thus should preclude an injunction regardless, but Nike's motion also fails at the first step—likelihood of success. Although the Court concluded otherwise on a preliminary assessment, as shown below, there are at least five reasons why Nike cannot prevail.

First, Nike did not match the New Balance offer because it did not accept unconditionally and unequivocally—and, ***second***, even if it did, Nike's purported match was not a contract; it was *an agreement to agree*. Nike plainly did not intend its offer to be the full, final, and enforceable contract between the parties. This is reflected in both Nike's January 22 letter and Section 5 of the 2015 Contract (the right of first refusal provision). Nike even invited Mr. Berian to submit a "revised offer from New Balance that reflects [no reductions] and all other material terms." Nike January 22 letter, Cesar Decl. Ex. 4 at p.1. This is a classic "agreement to agree."

Third, Section 5 provides Nike nothing more than the opportunity to refuse Mr. Berian from signingwith a competitor. To do so, Nike had to provide timely notification that "it *will enter* into a new contract with ATHLETE on terms no less favorable to ATHLETE than the material, measurable and matchable terms of such third-party offer." 2015 Contract, Cesar Decl. Ex. 1 at p.1 (emphasis added). Accordingly, a match would do two things: (1) effectively veto the

competitor's offer, while (2) extending to Mr. Berian an offer from Nike. It would still remain for Mr. Berian to accept a contract with Nike. Mr. Berian declined to do so.

Fourth, even if a contract was established by Nike's purported match on January 22, Nike repudiated it on February 15. On that day, Nike sent "a written agreement to memorialize the terms of the 2016 Contract," *i.e.*, the January 22 offer. *See* Nike Motion For Order To Show Cause Why Preliminary Injunction Should Not Issue, Doc. 6 ("Nike Mot.") at 5. That February 15 contract includes 10 pages of "Nike Standard Terms & Conditions," including a punishing nine-part reduction provision and at least two "covenants" in conflict with Section 7 of the New Balance Offer (the Affiliation provision). Nike also tried to add two option years, and unconscionably broad, one-sided termination rights. If the Nike Offer on January 22 was actually a contract, as Nike contends, it was repudiated by this Long-Form Contract.

Finally, Oregon law is clear that the purported contract is not subject to specific performance. Indeed, the Court's analysis could easily start—and end—here. As a general rule, personal service contracts are not subject to specific performance. Nike admits, moreover, that any contract between the parties at this point would consist of the bare terms in the January offer sheet, which are too indefinite to enforce by judicial decree. Such a decree also would have an adverse impact on third-parties who are not before the Court (the Big Bear Track Club and New Balance). And Nike's unclean hands further warrant denial of any injunctive relief.

Turning to irreparable harm and the equities, the dispositive fact is this: Nike wants this Court to tell an athlete—a world class *runner*—what *shoes* to wear at the Olympics and the Olympic Trials. Even in the context of extraordinary relief, this is an exceptional request. Mr. Berian has been training and racing in New Balance shoes this entire season, since January. In those shoes, he has done well, to say the least, winning both the U.S. Indoor Championship and

the World Indoor Championship in the Men's 800m. Now, Nike wants him forced into what he has determined to be inferior equipment for his feet, made by a company he does not want to support, which ***will*** reduce his chances for success in the series of races necessary to prevail at the Trials and the Olympics itself—what could be a once in a lifetime opportunity to represent his country and win on the biggest stage in track. A decade (or a century) from now, few outside the industry will remember or care whether Mr. Berian was wearing New Balance or Nike. But history will remember where he finishes.

Nike, on the other hand, "the world's leading innovator in athletic footwear, apparel, and equipment" (Nike Mot. 3), sponsors countless other athletes and will be well-represented on the podium in Rio—regardless of whether it can force Mr. Berian into its shoes. Indeed, Mr. Berian himself, if he makes it to the Olympics, will be precluded by US Olympic Committee rules from engaging in any ad campaign for anyone else between July 27 and August 24, and dressed from head to ankle in Nike, which sponsors Team USA. (The fact that Nike's sponsorship rights do not extend to shoes underscores their importance to the individual athlete—and we defy Nike to say that the shoes do not matter.)

Though mundane compared to Olympic glory, Nike also cannot dispute that this is a critical moment for Mr. Berian financially: he has an opportunity in the coming weeks to sign a new multi-year endorsement contract—but his endorsement is substantially more valuable *right now* than it will be after a full adjudication on the merits, when the Trials and Olympics have come and gone. Further, as Nike itself acknowledges, the value of Mr. Berian's choice of "footwear and apparel" in these high-profile, upcoming races is "both unquantifiable and irreplaceable"; "his endorsement" at this time is "a unique marketing and promotional opportunity." Nike Mot. 2-3. But this is true for *Mr. Berian*, not for Nike—which has paid any number of other track and

field athletes to sport the swoosh—and it cuts strongly *against* an injunction. Whatever value a man's speech has to someone else, it has even more to himself.

This is also where the public interest lies: Personal autonomy and freedom of speech are fundamental to our democracy and way of life. It would be contrary to the public interest, and an embarrassment to the First Amendment, for an athlete to be forced to compete—while representing the United States in competitions for and potentially at the Olympic Games—under the federal court order that Nike seeks.

When Nike signed Mr. Berian, the parties agreed to a seven-month contract, which has expired. That contract provided Nike with a conditional, post-expiration right to keep Mr. Berian from endorsing any of its competitors for 180 days, up to and including June 28, 2016. Nike tried and failed to properly exercise that right, but in an abundance of caution (and facing an industry giant perfectly willing to threaten and sue both him and his suitors), Mr. Berian decided to put his head down and just race—unendorsed. Now, Nike's exclusivity period is about to end. And end it must; Nike's request for a judicially-ordered extension is devoid of merit.

II. FACTS

A. The 2015 Contract

In 2010 and 2011, Mr. Berian won Colorado state high school titles in the 400- and 800-meter events. In 2012, as a freshman at Adams State University, he won the NCAA Division II championship in the 800 meters. By early 2014, however, Mr. Berian had left Adams State. He was training on his own, sleeping on a friend's couch, and working at McDonalds. Then, he connected with the Big Bear Track Club, and by early 2015 he was turning heads—including at Nike—with strong finishes in middle distance events at U.S. Outdoor Track & Field meets.

Mr. Berian agreed to endorse Nike in a contract dated June 17, 2015, with a term ending December 31, 2015. *See* Cesar Decl. Ex. 1 ("2015 Contract") at p.1, ¶ 1. Section 5 of that 2015

Contract gave Nike a conditional right of first refusal lasting through and until June 28, 2016:

> During the Contract Period and for a 180-day period thereafter, NIKE shall have a right of first refusal with regard to any bona fide third-party offer received by ATHLETE and which ATHLETE desires to accept. ATHLETE shall submit in writing to NIKE (on the third-party's letterhead) the specific terms of any such offer. NIKE shall have ten (10) business days from the date of its receipt of such third-party offer to notify ATHLETE in writing if it will enter into a new contract with ATHLETE on terms no less favorable to ATHLETE than the material, measurable and matchable terms of such third-party offer.

Id. at p.1, ¶ 5.

B. The New Balance Offer

In November 2015, through his agent, Merhawi Keflezighi, Mr. Berian began conversations with New Balance about a potential endorsement agreement for 2016. *See* Second Declarations, filed herewith, of Merhawi Keflezighi ("2d Keflezighi Decl.") ¶ 5, and John Evans ("2d Evans Decl.") ¶ 3. One reason for this was that Mr. Berian is, quite simply, more comfortable in New Balance's shoes than Nike's. 2d Keflezighi Decl. ¶ 6. Mr. Keflezighi also reached out to New Balance, and aggressively pursued that opportunity for Mr. Berian, because Nike had been unresponsive to issues raised by Boris during the 2015 Contract and to Mr. Keflezighi's meeting requests. *Id.* ¶¶ 3-7. Aware of Nike's right of first refusal, Mr. Keflezighi explored with New Balance terms that Nike might be unwilling to match—including no reductions, non-exclusivity for New Balance with respect to certain wearables (*e.g.*, watches), and allowing Mr. Berian to race in Big Bear Track Club gear. *See id.* ¶ 8; *see also* 2d Evans Decl. ¶¶ 4-6 (addressing negotiations from New Balance's end, and explaining that New Balance "had every intention of competing aggressively for Mr. Berian," which its proposals reflected).

Ultimately, negotiations with New Balance produced a set of terms that Mr. Berian found "agreeable," which Mr. Keflezighi sent to Nike by email dated January 19, 2016. *See* Cesar

Decl. Ex. 2 at p.1 (Keflezighi email). In response, Nike did not ask for clarification about reductions; it asked only that Mr. Keflezighi "resend the offer on official company letterhead," which he did the next day. *See* Cesar Decl. Ex. 3 at p.1.

New Balance's offer was comprised of seven terms, including a base fee, allotments for travel and merchandise, two multi-part provisions for performance bonuses, a rollover provision (increasing the base fee paid to Mr. Berian for specified achievements), and an affiliation provision allowing Mr. Berian "to compete under the Big Bear Track Club affiliation" and in the Club's "official uniform and footwear ... in all domestic competitions, including the US Indoor Championships and US Olympic Trials, in 2016." *See id.* at pp. 3-5 ("the New Balance Offer").[1]

The New Balance Offer did not include reductions—of any sort. *See* Evans Decl. (Doc. 17) ¶ 3; 2d Evans Decl. ¶ 10. Indeed, "[t]he lack of any reductions was a major part of [New Balance's] offer." 2d Evans Decl. ¶ 8. Mr. Keflezighi flagged "the lack of reductions" and "the affiliation clause" as "material element[s] of the offer." Cesar Decl. Ex. 2 at p.1.

C. The Nike Offer

On January 22, 2016, Nike responded to the New Balance offer: "This letter is to notify you that NIKE matches the New Balance Offer … *and will enter into a new contract* with Boris for the exclusive right to license for his 'Athlete Endorsement' in connection with the 'Products' and/or NIKE brands (as each is defined in the [2015 Contract] and otherwise in accordance with the matched terms set forth in Attachment 2." Cesar Decl. Ex. 4 at p.1 (emphasis added).

Continuing, Nike wrote: "Notwithstanding your email, because *the New Balance Offer is silent on reductions and NIKE is only obligated to match the terms stated in the New Balance*

[1] New Balance became the sponsor of the Big Bear Track Club in mid-January 2016 or soon after. 2d Keflezighi Decl. ¶ 10. Given certain allegations by Nike, it is also worth noting that this sponsorship is product only; there is no cash compensation to the athletes or coach. *Id.*

Offer, we will send to you a new contract which will include the stated terms of the New Balance Offer as received. However, if material terms were omitted from the New Balance Offer, such as the purposeful exclusion of reductions, *please provide to us for review a revised offer from New Balance* that reflects that and all other material terms." *Id.* (emphasis added). In other words, Nike read the terms it was matching as including reductions, stated that it would send a "new contract" that included reductions, and invited Mr. Berian to send "a revised offer."

To this cover letter, Nike attached a copy of the New Balance Offer (*id.* at pp. 2-4), and its own offer, an exact copy of New Balance's except with all references to "NB" changed to "NIKE" (*id.* at pp. 5-7).

On January 27, Mr. Keflezighi spoke with Nike's Ben Cesar and advised, again, that the New Balance Offer included no reductions. 2d Keflezighi Decl. ¶ 14. He also pointed out that there was no contract at that point because, plainly, the parties had not reached agreement on all material terms. For example, Mr. Keflezighi asked whether there were reductions in the offer, ***and Mr. Cesar said that he did not know***. *Id.* Mr. Keflezighi also advised that Mr. Berian was not interested in resuming a relationship with Nike, and further reserved the right, in the event Nike declined to respect that preference, to submit the "revised offer" from New Balance explicitly requested by Nike in its January 22 letter. *See id.* ¶ 15.

In addition, in this same conversation on January 27, Mr. Keflezighi discussed with Mr. Cesar the fact that New Balance had decided to sponsor the Big Bear Track Club (which Mr. Cesar said he already knew), and how this was permissible under the terms of the Affiliation provision in the Nike Offer. 2d Keflezighi Decl. ¶ 16. Then, on January 29, and again on February 14, Mr. Berian competed in Big Bear gear that had the insignia of *both* the Big Bear Track Club and New Balance. *Id.* ¶ 17; 2d Evans Decl. ¶ 9.

D. The Nike Long-Form Contract

On February 15, 2016, Nike sent Mr. Keflezighi "a written agreement to memorialize the terms of [the Nike Offer]." Nike Mot. 5; *see also* Cesar Decl. Ex. 5 (Feb. 15, 2016 cover email from B. Cesar: "Attached is the long form contract for Boris for your review."). That agreement was comprised of a "Track and Field Contract" (pages 1 and 2), ***ten pages*** of "Nike Standard Terms & Conditions" (pages 3-12), "Schedule A," which is the Nike Offer (the three-page term sheet from January 22), and one page of policies and procedures for athlete visits to Nike retail stores. *See generally* 2d Keflezighi Decl. Ex. 1 ("Long-Form Contract").[2]

Though purporting to "memorialize" agreement on the New Balance Offer terms, Nike's Long-Form Contract directly contradicted those terms, and added other problematic provisions:

1. First and foremost, ¶ 10 of Nike's "Standard" terms is a nine-part reduction provision allowing Nike to "EXTEND, REDUCE, AND PRORATE" Mr. Berian's compensation. *Id.* at p. 6-7. It says that Nike may "in its sole discretion" reduce Mr. Berian's compensation in any or all of the following ways:

(a) by withholding some or all base competition if Mr. Berian fails to compete for 120 days (or simply terminate if he fails to compete for 180 days);

(b) by withholding base compensation, bonuses, and travel reimbursement during any period of review by any anti-doping organization;

(c) by a reduction of 25% to 50% if Mr. Berian does not compete in at least 10 IAAF or USATF sanctioned competitions during any contract year;

(d) by a reduction of 20% if Mr. Berian is not ranked in the top 10 worldwide for the 800 meter event, and by 25% if Mr. Berian does not compete in a "major outdoor championship"—even if the reason he does not compete is a failure to qualify;

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[2] Mr. Berian proposed filing a redacted version of this document, balancing the established rules requiring public disclosure of documents in the judicial record, against any overriding confidentiality interest that the parties may have. *See generally Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678-79 (9th Cir. 2010). Nike, however, opposed redactions, and advised that the document in its entirety should be sealed or public.

(e) by withholding bonuses and up to a 25% reduction in base compensation if any ***third-party*** (including, for example, the International or US Olympic Committees, or any of their broadcast partners) "enforces or threatens to enforce any regulation, restriction, prohibition or practice that deprives NIKE of the promotional benefits and/or product/brand exposure contemplated by NIKE's use of the ATHLETE Endorsement in any advertising or promotion";

(f) by a reduction of 20% per missed meet or press conference if Mr. Berian "for any reason does not compete on behalf of NIKE in, or attend a press conference at, either one or both of the Prefontaine Classic or the Penn Relays (or, at NIKE's discretion, alternate NIKE-sponsored competitions)";

(g) by a reduction of 25% per occurrence if Mr. Berian covers or obscures "(including, without limitation, through the placement of any numbered or other bib) any NIKE Marks on any NIKE Products" that he is wearing or using, or if he wears any "tattoos" with any third-party marks, names, or identifications;

(h) by a reduction of 25% for any failure, "for any reason" to wear NIKE Products at any and all athletic or athletic-related activities (including, per ¶ 2, during competition, training, press conferences, camps, autograph sessions, interviews, etc.); by 25 % for any missed appearance, after the first in each contract year)

See Long-Form Contract at pp. 7-9, Standard Terms ¶ 10.

2. The New Balance Offer was for 2016, 2017, and 2018. Nike, however, added in its "Standard" terms two additional option years, for 2019 and 2020—options for *Nike* to exercise in its sole discretion, with or without Mr. Berian's agreement. *Id.* at p.6, ¶ 9(a). There are no similar options in the 2015 Contract, much less the New Balance Offer.

3. The New Balance Offer did not include any exclusive negotiating period or right of first refusal. Nike, however, added them (revising the latter to give itself a longer matching period of 20 days, compared to the 10 days in the 2015 Contract), as well as a brand new provision requiring that, "[a]t NIKE's request, ATHLETE shall negotiate with NIKE in good faith with respect to the terms of a renewal of this Contract." *See id.* at pp. 6-7, ¶ 9(b)-(c).

4. In conflict with the "AFFILIATION" provision in the New Balance Offer (purportedly matched at § VII of the Long-Form Contract's "Schedule A")—and with what Nike already knew at this time about the Big Bear Track Club's kit and sponsorship by New Balance—

Nike's "Standard" terms provided that "ATHLETE shall not compete for or be associated in any way with any non-NIKE sponsored track club" and that "ATHLETE may use the Big Bear Track Club logo on NIKE Products worn or used by ATHLETE in domestic competitions in accordance with Schedule A, Paragraph VII…." *Id.* at p.10, ¶ 13(a)(vi), (vii); *see also id.* ¶ 13(a)(iii); *contra id.* at p.15, Schedule A § 7 ("ATHLETE may wear the official uniform and footwear of Big Bear Track Club…").

5. Nike imposed a draconian termination provision, giving itself "the right to terminate this Contract immediately upon written notice" if, among other things: Mr. Berian "takes any action inconsistent with ATHLETE's recommendation and endorsement of NIKE and/or its Products, or discourages use of NIKE Products in any manner whatsoever"; "dies, voluntarily retires or becomes permanently disabled"; "partially or wholly covers or obscures, removes or defaces (or causes or permits any third party to 'spat' or otherwise partially or wholly cover, obscure, remove or deface) any NIKE Marks on any NIKE Products"; breaches "any material term of this Contract" or any of a list of nine additional "REPRESENTATIONS, WARRANTIES AND COVENANTS," including the two anti-Affiliation terms quoted in the paragraph immediately above. *See* Long-Form Contract at pp. 9-10, Standard Terms ¶¶ 11(b), 13.

According to Nike, these and the other provisions added in this Long-Form Contract address "a variety of items that are standard in track and field endorsement contracts, including reductions." *See* Nike Mot. 3. But, beyond its own executives bare say-so, Nike has made no attempt to show that these additional "Terms & Conditions" are "standard." Nor are they, as Mr. Berian's 2015 Contract shows. For example, with the exception of ¶ 10(a) (the reduction for 120 days of non-competition), the 2015 Contract included *none* of the draconian reductions that found their way into the Long-Form Contract. *See* 2015 Contract at pp. 1-2, ¶ 8(a)-(b).

Numerous declarations in the record further belie Nike's assertion that these are "industry-standard" terms (Nike Mot. 5 & n.1, 10 & n.4). *See* Evans Decl. ¶ 5, 2d Evans Decl. ¶ 10 (New Balance General Manager of Running Sports Marketing) (reductions are *not* standard in New Balance contracts); Bergeson Decl. (Doc. 19) (CEO of Oiselle Running) (reduction provisions are *not* standard; "reductions, as well as option years, are viewed as being abusive to athletes"); Williams Decl. (Doc. 20) (Senior Global Sports Marketing Manager for Brooks Running) (reduction provisions are *not* standard; "in the twelve years that I have been at Brooks, we have not signed any athletes to a contract with reductions"; at least one athlete advised "that this was one of the reasons he decided to endorse Brooks"); Symmonds Decl. (Doc. 21) (former Nike athlete) (reduction provisions are *not* standard; "one of the main reasons [he] left Nike for Brooks was that Nike demanded reductions and Brooks did not").

E. Nike's threats and conflicting messages

On February 15, 2016, Mr. Keflezighi responded to Nike's email with the Long-Form Contract. He advised that Mr. Berian still did not wish "to resume a relationship with Nike" and reminded Nike that Mr. Berian had "reserved the right to submit the requested information" regarding the New Balance Offer (referencing Nike's January 22 letter, discussed above). *See* Cesar Decl. Ex. 5. Mr. Keflezighi closed by advising: "If you decide not to honor Boris' personal preference, I can have a revised offer to you in the next week." *Id.*

Nike responded by calling its own outside counsel: In a matter of days, on February 19, Nike's counsel sent letters to Mr. Berian and New Balance threatening litigation. *See* 2d Keflezighi Decl. ¶ 24. To Mr. Berian, Nike reiterated its position that it had matched the New Balance Offer "[a]s set forth in the written terms you provided" (in other words, with reductions), and threatened to file a lawsuit and seek an injunction "[s]hould you refuse to enter a new agreement with NIKE." Cesar Decl. Ex. 6. In addition, Nike contradicted its January 22 letter:

"We also want to make clear that NIKE is not required to and will not consider matching any additional or alternative offers from New Balance. We understand that Mr. Keflezighi has suggested that Mr. Capriotti somehow invited you to present a 'revised offer' from New Balance. That is not the case." *Id.*; *contra* Cesar Decl. Ex. 4 (January 22 letter from J. Capriotti) ("if material terms were omitted from the New Balance Offer, such as the purposeful exclusion of reductions, please provide to us for review a revised offer from New Balance …").

Further muddying the waters, Nike's letter added that, because of the purported "silen[ce]" in the New Balance Offer, Nike had "asked you to confirm whether reductions or any other material terms were excluded from written terms you provided Nike." *See* Cesar Decl. Ex. 6. Apparently Mr. Keflezighi's written and oral confirmations were not sufficient for Nike; and then, despite inviting Mr. Berian to obtain a "revised offer," when Mr. Keflezighi said that he would (an effort complicated by Nike's warning that, in Nike's view, Mr. Berian and New Balance were forbidden from negotiating with each other), Nike said that the company would not consider matching any additional or alternative offers from New Balance. Cesar Decl. Ex. 6.

F. This litigation

Nike's counsel continued to send threatening letters, but Mr. Berian's position never changed: the New Balance Offer did not include reductions; the Nike Offer did; and Nike's February 15 Long-Form Contract confirmed all too clearly that Nike was not matching the New Balance Offer. *See* 2d Keflezighi Decl. ¶¶ 25-26. For those reasons, as well as Nike's unwillingness to accept Mr. Berian's representations about the content of the New Balance Offer, its interference with his business relations, and its litigation threats—not to mention the superior product offered by New Balance—Mr. Berian refused to enter a new contract with Nike. *Id.*

Thus, all season long—including at competitions from January 29, 2016, through June 4, 2016—Mr. Berian has been training and competing in New Balance shoes and the New Balance-

sponsored uniform and gear of the Big Bear Track Club. *See id.* ¶ 28. He has also referred to New Balance favorably on social media, *id.* ¶ 27, expressing personal views genuinely held.

On April 29, 2016, Nike filed this action. Doc. 1. After some confusion about how to effectuate service, Nike served Mr. Berian personally on May 20. Nike then did nothing until after close of business on June 1, when it filed the motion at bar, seeking a temporary restraining order and preliminary injunction. On June 3, Nike filed another emergency motion, this time demanding expedited scheduling of a preliminary injunction hearing and discovery. Doc. 13. Mr. Berian responded to that motion to expedite (Doc. 14), advising among other things that, due to the stress of this litigation, he was withdrawing from the final two competitions on his schedule in June—and thus would not race again until the Olympic Trials on July 1. *Id.* at 2.

Against that backdrop, on June 7, the Court heard argument on Nike's requests to expedite and for a TRO. Doc. 22. As pertinent here, the Court ruled that Nike had made the requisite showing for a TRO, including because: (1) "Nike has shown that it is likely that when, on January 22, 2016, Nike notified Defendant that it agreed to match the terms of the New Balance offer, a contract was formed. Based on the record currently before the Court, it is likely that the resulting contract between Nike and Defendant does not include reductions because the New Balance offer did not include reductions"; and (2) the Affiliation Clause may be "unenforceable …. Given the timing of negotiations between the parties and the appearance of the New Balance logo on Big Bear Track Club footwear and apparel, it appears likely that the clause was designed to undermine Nike's contractual rights and expectations." Doc. 24 at 2.

On June 21, 2016, the Court will hold a preliminary injunction hearing. As shown below, the merits positions by which Nike obtained the TRO do not withstand scrutiny, and the equities

are fundamentally different now than they were two weeks ago, when Mr. Berian had already decided not to race for the rest of June.

III. ARGUMENT

"A preliminary injunction is an 'extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.' The party seeking the injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest." *Adidas Am., Inc. v. Skechers U.S., Inc.*, No. 3:15-CV-01741-HZ, slip op. 7 (D. Or. Feb. 12, 2016) (internal citations omitted); *accord* Nike Mot. 7. Nike has not established *any* of these criteria, much less has it made the "clear showing" required to carry its burden. *Id.* (citation omitted).

A. Nike Is Not Likely To Succeed On The Merits.

To succeed on the merits, Nike must prevail on *each* of at least *five* issues, only two of which (points 1 and 3 below) were addressed by this Court at the TRO stage. And, because Nike seeks specific performance, Nike "must prove its claim by clear and convincing evidence." *Murray v. Laugsand*, 179 Or. App. 291, 294 (2002). It has not, will not, and cannot do so.

1. Nike did not match the New Balance Offer.

To be sure, in its January 22 response, Nike wrote, "NIKE matches the New Balance Offer …." But Nike did not stop there. Referring to Mr. Keflezighi's email advising that this was a no-reductions offer, Nike added: "Notwithstanding your email, because the New Balance Offer is silent on reductions," Nike will "send [Mr. Berian] a new contract which will include the stated terms of the New Balance Offer as received"—in other words, a contract with reductions. Ceasar Decl. Ex. 4 at p.1. And, of course, that is exactly what Nike sent, despite representations and protests from Mr. Berian and his agent that this was not the deal.

As a matter of blackletter contract law, this is not an acceptance: "The one who makes an offer can not be bound by a conditional acceptance. Not only must the acceptance be unconditional, but it must be identical with the terms of the offer. It must not vary from the proposal either by way of omission, addition, or alteration." *Hecketsweiler v. Parrett*, 185 Or. 46, 51 (1948). Or, as the Restatement (2d) of Contracts § 59 puts it: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."

This is precisely how Nike replied on January 22—and Nike itself recognizes as much. That is why it argues that reductions are "industry-standard" such that they could be raised in its January 22 letter without turning a purported acceptance into a counteroffer. *See id.*, cmt. 2 & illus. 3 (where an offer itself implies a condition, an acceptance may reference that same condition and still be effective, for example: "A makes a written offer to B to sell him Blackacre. By usage the offer is understood as promising a marketable title. B replies, 'I accept your offer if you can convey me a marketable title.'"); *Hecketsweiler*, 185 Or. at 51. But Nike's qualified response fails—it cannot fit within this Comment 2 caveat—because the record establishes that reductions are *not* industry standard and the New Balance Offer in no way implied that it contained reductions. *See* Evans, Bergesen, Williams, and Symmonds Declarations, Docs. 17, 19, 20, 21; 2d Evans Decl. ¶¶ 8, 10. Nike attempted to manufacture this implication with its reductions-are-industry-standard position—yet has no supporting evidence beyond its own say-so.

Nike also draws no support from the *Culpepper* case, where Nike was allowed to exercise a right of first refusal without "match[ing] an oral promise from Reebok that was not contained in the written offer." Nike Mot.10-11 (summarizing case). Here, Nike's purported "match" conflicted with the New Balance Offer or, at a minimum, *added* a materially negative additional

term. Further, as Nike itself explains, the *Culpepper* court concluded that the oral promise there at issue "was 'too vague' and 'too uncertain' to be 'material, measurable, and matchable' by Nike." Nike Mot. 11 (quoting *Culpepper*). Here, however, the absence of a reduction provision—*i.e.*, zero reductions—is perfectly clear. Nike cannot manufacture an ambiguity from its own self-serving assumption that, just because it would have imposed reductions on Mr. Berian, surely that is what New Balance intended as well. That assumption has no basis in the term sheet provided by New Balance, and it is belied by substantial evidence in the record.

Accordingly, because Nike did not effectively match the New Balance Offer within the 10 days provided by Section 5 of the 2015 Contract, Mr. Berian was and is free to sign with New Balance at any time under the terms of the New Balance Offer—or with anyone under any terms after Nike's rights of first refusal expire on June 28, 2016.[3]

2. Nike's January 22 letter was, at best, an agreement to agree.

Another fatal problem with Nike's purported match is that it was at most an agreement to agree. Under Section 5 of the 2015 Contract, Nike could exercise its right of first refusal without providing a full contract—which is exactly what it did. As shown by the January 22 letter and Nike's subsequent course of conduct, Nike never intended the January 22 offer sheet to be the full, enforceable agreement between the parties.

First, it is clear on the face of the January 22 letter that Nike did not intend for the bare term sheet to be the full, final, and enforceable agreement: "This letter is to notify you that NIKE matches the New Balance Offer … and *will enter into a new contract* with Boris for the exclusive right and license for his 'Athlete Endorsement' in connection with the 'Products'

[3] Nike says that the fact Mr. Berian did not sign with New Balance months ago proves that he knew Nike had matched. Nike Mot. 12. Not so. It proves Mr. Berian did not want to get sued. Instead, he has been patiently waiting for Nike's 180-day matching period to expire.

and/or NIKE brands (as each is defined in the [2015 Contract]) and *otherwise in accordance with* the matched terms…." Cesar Decl. Ex. 4 at p.1 (emphasis added). Confirming the point that there were terms yet to resolve, Nike added: "we will send to you *a new contract* which will *include* the stated terms of the New Balance Offer as received." *Id.* (emphasis added).

And Nike *continued* to be on the wrong page on January 27, when Mr. Keflezighi and Mr. Cesar spoke: Mr. Cesar stated that *he did not know* whether or not Nike's purported agreement included reductions. 2d Keflezighi Decl. ¶ 14. As already discussed, this alone defeats Nike's contention that a contract had been formed on January 22; by definition, an offer must be precisely mirrored by an *understanding* and unconditional acceptance of all material terms: "In Oregon, it is settled that '[t]he acceptance of an offer ... must ... correspond to the offer at every point, leaving nothing open for future negotiations.'" *Arboireau v. Adidas-Salomon AG*, 347 F.3d 1158, 1163 (9th Cir. 2003) (quoting *C.R. Shaw Wholesale Co. v. Hackbarth*, 102 Or. 80 (1921)). What is more, not only had the parties failed to reach the requisite "meeting of the minds" (given their fundamentally different understanding of the New Balance Offer), but Nike also plainly knew and intended that the January 22 offer sheet standing alone would *not* be the final contract between the parties.

In other words, this is a classic "agreement to agree"—not an acceptance. *E.g.*, *Blakeslee v. Davoudi*, 54 Or. App. 9, 14 (1981) ("An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of reply justify a probable inference of assent.") (citation omitted); *Klimek v. Perisich*, 231 Or. 71, 78-79 (1962) ("An offer must be certain so that upon an unqualified acceptance the nature and extent of the obligations of each party are fixed and may be determined with reasonable certainty.").

Instructive here is this Court's decision in *Circle K Stores, Inc. v. Zillman*, 827 F. Supp.

2d 1251 (D. Or. 2011), where the plaintiff purported to accept an offer and exercise its right of first refusal to enter into a lease—but in the same breath, requested "modifications and clarifications prior to signing the lease." The Court denied summary judgment for lack of definitive evidence on whether Circle K's "willingness to perform" was conditional on its added requests. *Id.* at 1261. In so ruling, the Court explained that, under Oregon law, a "purported acceptance" is ineffective if it requests "clarifications [or] modifications" that are "not minor." If they "qualify the offer, then the requested changes must be considered a counter-offer—not an acceptance." *See id.*; *see also Stevens v. Foren*, 154 Or. App. 52, 60 (1998) (as characterized and quoted in *Circle K*: "optionee's acceptance of a third-party contract was not valid, and was in fact a rejection, because the optionee refused to complete a requirement specifically included in the terms of the offer, and the optionee was required to 'match all terms of the offer'").

Here, Nike demanded that Mr. Berian prove that Nike would not be allowed to impose reductions ranging from 20% to complete termination for any of a whole slew of reasons, as minor as missing a press conference or allowing a swoosh symbol to be obscured by his numbered bib during a race. *See supra* 9. This "clarification" is material, not minor—and clearly not the "unconditional" acceptance to which Mr. Berian was entitled as a matter of Oregon law. *See also Blakeslee*, 54 Or. App. at 14 (in option context, "both parties are entitled to know whether or not they have a contract," and thus, though they attempted to exercise an option, "proposals by plaintiffs to alter lease terms … amounted to counteroffers not accepted by defendants").

Second, if there is any doubt about Nike's response from the January 22 letter standing alone, it should be dispelled by the Long-Form Contract sent by Nike on February 15. Nike calls the January term sheet the "2016 Contract"; but its communications and actions in January and February show that it was actually the Long-Form Contract that Nike intended to be the parties'

contract. *See also* Cesar Decl. ¶ 9 (admitting that Nike sent Mr. Berian on February 15 "a written agreement to memorialize the terms of Mr. Berian's new agreement with Nike"). As further detailed in Argument A.1.4 below, that contract goes well beyond standard boilerplate, imposing numerous, highly material terms intended to govern the relationship, rights, and obligations between Nike and Mr. Berian for 2016 through at least 2018, if not 2020. Absent agreement on all of those additional terms and conditions, there is no contract.

Third, the failure of the parties to reach the requisite meeting-of-the-minds is also shown by the slew of terms that Mr. Berian could have offered (or demanded) during negotiations with Nike over a long-form contract, such as:

- No reductions;
- California, rather than Oregon, as governing law;
- Mandatory non-binding arbitration;
- A provision governing attorney's fees and costs for any dispute;
- No confidentiality of any terms of the agreement;
- A coaching stipend of $5,000 per month;
- A right of first refusal clause limited to 60 or none; and
- No option years

See 2d Keflezighi Decl. ¶ 21. Nike may argue that Mr. Berian had no right and could not force Nike to agree to any of these terms, insofar as Section 5 obliges Nike to match only the "the material, measurable and matchable terms" of the New Balance Offer. But that argument cuts both ways (Mr. Berian could not have been forced on these terms either).

More to the point, even if Nike could prevent a Berian-New Balance deal without agreement on these issues, that is not the same thing as closing a Berian-Nike deal. Section 5 itself says as much: to match, Nike had to notify Mr. Berian that "it *will enter into a new contract* … on terms no less favorable … than the material, measurable and matchable terms of such third-party offer." (Emphasis added). In short, the parties still had work to do; Nike's purported match did not create a contract.

3. Section 5 does not require Mr. Berian to sign with Nike.

Picking up on the last point above—match or no match, Nike's exercise of its first-refusal right could not force Mr. Berian to sign with Nike. Nike contends that, by presenting the New Balance Offer, Mr. Berian gave Nike an "option." Nike Mot. 9. Not so. That is not how rights of first refusal work as a general matter, nor how Section 5 in particular was designed.

An "option" arises only where specifically agreed-upon when a contract is negotiated. At a minimum, an option can only arise where the circumstances provide the full terms and conditions, such that the "option"-holder need only assent, as in the cases cited by Nike at Mot. 9 (*e.g.*, where a party fully negotiates an executable land sale, and then presents it to a right-of-first-refusal holder). More typically, however, an option looks like this:

> NIKE shall have the option to extend this Contract for two (2) additional Contract Years (i.e., January 1, 2019 to December 31, 2019 and January 1, 2020 to December 31, 2020) exercisable upon written notice of such election furnished to ATHLETE by no later than December 1, 2018 for the 2019 Contract Year and December 1, 2019 for the 2020 Contract Year.

Long-Form Contract at p.6, Standard Terms ¶ 9(a). ***That*** is an option. The right of first refusal in the 2015 Contract is an entirely different animal. In that provision, Nike bargained for a conditional right to keep competitors from signing Mr. Berian: Nike could refuse a competitor by committing, within 10 days, to a new contract with Mr. Berian on terms no less favorable than in the competitor's offer. That is a veto and a promise, not an option and a contract.

Of course, Nike disagrees. It says Section 5 should be read as requiring *the athlete to make an offer to Nike* (in which case, a proper match by Nike would be an "acceptance," and the deal done). But that is not what the provision says, nor what the parties did. When Mr. Berian sent along the New Balance Offer, he was giving *Nike* a chance to make *him* an offer—"to notify ATHLETE in writing if it will enter into a new contract with ATHLETE on terms no less favorable to ATHLETE than the material, measurable and matchable terms of such third-party offer."

It then remains for Mr. Berian to actually accept—to say that he, too, "will enter into a new contract" with Nike. He has never made that commitment.

Nike concedes, as it must, that Section 5 gave Mr. Berian the choice of remaining unendorsed for 180 days, after which he could sign with anyone. *See* TRO Hearing Tr. 19. According to Nike, however, this is true if and only if "he doesn't present us an offer" (*id.*); an athlete who does not want to remain with Nike may not even *entertain* offers—may not even *ask* Nike if it cares enough to match—without risking being forced into endorsing a company and gear that he or she no longer wants anything to do with. This interpretation of Section 5 is unreasonable, and has no support in the contractual language.

4. Nike repudiated any agreement.

A fourth, and independently fatal, problem with Nike's claims here—and the reason why the parties never managed to negotiate from Nike's January 22 "agreement to agree" to a new contract—is that Nike completely failed to establish a meeting of the minds over reductions within the 10 days provided to it by Section 5 (which is a critical term of the parties' agreement, designed to protect the athlete from just this sort of situation). And then, when Nike finally did get back Mr. Berian on February 15, it was with a Long-Form Contract that was filled with new terms—terms that squarely contradicted the supposed "contract" of January 22, and terms purporting to impose additional, onerous obligations on Mr. Berian. This is not a matter of interpretation; it is objective fact. *See supra* 8-10 (summarizing reductions provisions and several other new and notably terms); *see also* 2d Keflezighi Decl. ¶¶ 19-20.

Nike's conduct is a repudiation. As this Court has explained: "A party repudiates a contract when its conduct evinces a fixed purpose not to perform the contract." *Crown Cork & Seal USA, Inc.*, No. 03-CV-251-HZ, slip op. 21 (D. Or. Jan. 12, 2012) (quoting *Butler Block, LLC v. Tri-Cnty Metro. Transp. Dist. of Or.*, 242 Or. App. 395 (2011)); *see also Aurora Aviation, Inc. v.*

AAR W. Skyways, Inc., 75 Or. App. 598, 603-04 (1985) ("a declaration by one party to a contract made prior to the time fixed for the performance that he will not comply with such contract, if not withdrawn, may dispense with or excuse an offer to perform by the other party …") (citation omitted). "[T]he rule in Oregon excuses tender of performance if one party has repudiated the contract." *Id.* (quoting *Aurora Aviation*); *cf. Ratcliffe v. Union Oil Co.*, 159 Or. 221, 232 (1938) (upon default "accompanied by an announcement of intention not to perform the contract upon the agreed terms" or "a deliberate demand, 'insisting upon new terms different from the original agreement, the other party may treat the contract as being at an end'") (citations omitted).

The first and most glaring problem with Nike's Long-Form Contract is that it added reduction clauses. In "SCHEDULE A," Nike matched the New Balance "Base Fee," but then subjected that base to a set of extensive and severe reduction provisions. *See* Long-Form Contract at p.1, Contract § E ("NIKE shall pay ATHLETE annual 'Base Compensation' (as defined in the Standard Terms) in the amount set opposite the indicated Contract Year in SCHEDULE A (subject to subsection E(2), Paragraphs 10 and 11 of the Standard Terms, and any withholding obligations required by law)"); *id.* at p. 7-10, Standard Terms ¶¶ 10-11 (reduction and termination provisions) (summarized above at 8, 10).

In addition, Nike purported to add terms fundamentally inconsistent with the Affiliation provision from the New Balance Offer. Specifically, although Nike included the original Affiliation provision in SCHEDULE A, two of its "Standard" Terms—¶ 13(a)(vi) and (vii)—purported to defeat that right by requiring, *on pain of termination*, that Mr. Berian "not compete for or be associated in any way with any non-NIKE-sponsored track club" and by making the Affiliation provision "subject to NIKE's prior approval of the application of the logo to the NIKE Product, which may be done by NIKE on ATHLETE's behalf." *Id.* at p.10.

Standing alone, the first added term effectively conditions the Affiliation provision on Big Bear accepting a Nike sponsorship—which was not part of the deal in January, and, moreover, was *impossible* by February 15 because, as Nike knew, Big Bear was already sponsored by New Balance no later than January 27. 2d Keflezighi Decl. ¶¶ 16-17, 20. And the second new provision turned the Affiliation right on its head, effectively requiring Mr. Berian to wear *Nike gear* to which he could apply the Big Bear logo, when Section 7 of the New Balance Offer provided that Mr. Berian could compete in *the club's own* "official uniform and footwear."

Nike has represented to this Court that these new terms, and the others added in the ten-page "Nike Standard Terms & Conditions" are "standard in track and field endorsement contracts." Nike Mot. 5. Even if that were true, it could not excuse Nike's manifest attempt to change the terms to which it had already agreed in the January term sheet. Further, it is *not* true, as already discussed above with respect to reduction clauses, and as shown with respect to the other provisions by a simple comparison to Mr. Berian's 2015 Contract—which did not contain, for example, two option years, 20 days to match a third party offer, a good-faith negotiation provision, or the termination or reduction provisions as set forth in the Long-Form Contract.

Making bad matters worse, Nike's approach to negotiations was unreasonable and not undertaken in good faith. Indeed, its mixed messages and conflicting demands were intended to, and did, interfere with Mr. Berian's relationship with New Balance. After telling Mr. Berian to confirm that there were no reductions with New Balance and inviting him to submit "a revised offer," Nike refused to accept Mr. Keflezighi's representations about reductions, sent the Long Form Contract (complete with reductions and a slew of other problematic terms), and had its outside counsel renege on the January 22 invitation to submit a "revised offer" while threatening both New Balance and Mr. Berian with litigation.

In short, Mr. Berian had every right to decline to negotiate under these circumstances. Nike had "objectively manifested—through its conduct—that it unequivocally and absolutely would not proceed in accordance with its obligations under the agreement." *Butler Block*, 242 Or. App. at 411.[4]

5. Nike is not entitled to specific performance.

Even if there were a contract here, it would not be enforceable by specific performance.

First, the January term sheet standing alone is too indefinite to enforce by judicial decree. "It is a well-established rule of law in this state that equity will not decree specific performance unless the contract is definite, certain and complete." *Smith v. Vehrs*, 194 Or. 492, 499 (1952). "To be entitled to specific performance, a contract must be definite in all material respects, with nothing left to future negotiations, except details of performance that are subordinate to the material terms." *Johnstone v. Zimmer*, 191 Or. App. 26, 34 (2003) (citation and internal quotation marks omitted). The open issues here, as the Long-Form Contract reflects, were neither "details" nor "subordinate." *See also, e.g.*, *Booras v. Uyeda*, 295 Or. 181, 191 (1983) ("A court of equity cannot, under the guise of 'filling gaps' make the contract which it thinks the parties would have agreed to.") (denying specific performance of earnest money agreement).

For example, in *Miller v. Ogden*, 134 Or. App. 589 (1995), *aff'd*, 325 Or. 248 (1997), the court held that the parties' agreement to a land sale was too indefinite to order specific performance, even though the parties' "Memorandum of Contract Agreement" had described the

[4] It proves nothing that Mr. Berian did not, until this litigation, accede to Nike's demand for additional "evidence" that New Balance had not proposed reductions. Nike Mot. 5 n.1. For one, providing that information in the form requested would have required New Balance's cooperation; it was not entirely and solely within Mr. Berian's power. More importantly, Mr. Berian was under no contractual obligation to provide further information—particularly not after 10 days came and went and Nike still had not agreed to no reductions—and perfectly within his rights to take offense at Nike's bad faith handling of the matter and walk away.

proper, and set a price, down payment amount, payment schedule, and interest rate. The parties had not specified the form of the sale (land sale contract or trust deed), or addressed such terms as prepayment, taxes, or certain permits and easements—because they had contemplated preparing a fuller agreement. *See id.* at 594. The situation here is much the same.

Indeed, Nike outright *admits* that the New Balance Offer (and thus its purported match) was "*not a full written agreement* and was silent on a variety of terms that are standard in track and field endorsement contracts, including reductions." Nike Mot. 4-5 (emphasis added); Cesar Decl. ¶ 8. And Nike's repeated admission of uncertainty on reductions further confirms that, even if Nike could prevail in showing that there is *some* contract between the parties, specific performance will not be available here. *See Landura Corp. v. Schroeder*, 272 Or. 644, 651 (1975) ("contract is not properly subject to enforcement by specific performance" where "two important and material contract provisions were inconsistent, when viewed in relation to the intent of the parties); *Tallman v. Floren*, 53 Or. App. 65, 69-70 (1981) (no specific performance where "contract language permits two inconsistent results" with respect to allocation of taxes);

Second, personal services contracts are not enforceable by specific performance: "A teacher, a machinist, corporate executive, or college president, with or without an employment contract, may quit his or her job at any time and may not be compelled specifically to perform an employment contract." *Pierce v. Douglas Sch. Dist. No. 4*, 297 Or. 363, 371 (1984).

Following the same rule, the New York Appellate Division refused to grant specific performance in *Am. Broadcasting Cos. v. Wolf*, 430 N.Y.S.2d 275 (1980), a case involving a prominent sportscaster who switched networks:

> While equity has fashioned injunctive relief in other right of first refusal cases, *we are unable to find any instance where personal services were involved*. Aside from equity's disdain for the specific enforcement of contracts for personal services, specific enforcement of ABC's right to match CBS' offer under the first refusal clause

> and ultimate award of the contract to ABC is *all the more impractical as a remedy here in light of Wolf's stated reluctance to continue working for ABC*.

Id. at 283 (internal citations omitted). Affirming, New York's high court explained that courts will "refuse[] to order an individual to perform a contract for personal services" not only for "practical" and "policy" reasons, but also for a "more compelling reason," to whit, "the Thirteenth Amendment's prohibition of involuntary servitude." 438 N.Y.S.2d 482, 485 (1981). Where there is an existing employment contract, involving "unique or extraordinary services," and a showing of irreparable harm, "negative enforcement" may be awarded; that is, an employee may be barred from working elsewhere. *Id.* at 486. Nike has not shown that this narrow exception is recognized in Oregon, but even if it is, there are other exceptional runners in the world—and, in any event, Mr. Berian still could not be subjected to "affirmative enforcement," that is, forced to work for Nike.

Third, when deciding whether to order specific performance, a court must consider whether the rights of third parties not before the court would be adversely affected. *Wittick v. Miles*, 274 Or. 1, 7 (1976). Here, the decree requested by Nike would have an adverse effect on the Big Bear Track Club and New Balance, which is Big Bear's sponsor, by forbidding Mr. Berian from wearing the Club's official uniform and footwear at the upcoming Olympic Trials. *See also infra* 30 (further discussing the "Affiliation" provision).

Finally, Nike comes to Court with unclean hands. Nike's decision to time this lawsuit and its motion for injunctive relief just as the track season peaked is grounds for denying the preliminary injunction, as discussed under the "balance of equities" below. But Nike's conduct, including in January and February, *also* cuts against any order of specific performance—ever. *E.g.*, *Harris v. Bancroft*, 273 Or. 804, 807 (1975) (no specific performance of contract involving a dog, because plaintiff had attempted to steal the dog).

Nike's response to the New Balance Offer—insisting that the offer was subject to reductions, and trying to force Mr. Berian to obtain further documentation that it should have known would be difficult or impossible to provide, while effectively accusing Mr. Berian and Mr. Keflezighi of fraud or bad faith—was objectively unreasonable. Indeed, Nike gives itself away with the "industry-standard" argument. To maintain its complaint and requested relief, Nike had to find some way to fill the critical and, we submit, painfully obvious gap between its offer and the New Balance Offer. It came up with "industry-standard." The overwhelming record against that proposition, together with the speed with which Nike abandoned its position that the New Balance Offer was subject to reductions, supports an inference of bad faith.

For any and all of these reasons, even if Nike's January offer gave rise to a contract (and it did not), Nike will not be entitled to specific performance—and accordingly, should not be granted that remedy on a preliminary basis now.

B. Mr. Berian is likely to suffer irreparable harm; Nike is not.

1. No irreparable harm to Nike.

There are at least four serious shortcomings in Nike's irreparable-harm argument.

First, Nike is wrong as a matter of law in asserting a presumption of irreparable harm. Nike Mot. 13. Nike's cited cases, involving copyright and trademark infringement, have been overruled by *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) and *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which held, respectively, that irreparable harm may not be presumed, and that an injunction may not issue based on a mere "possibility" of irreparable harm. *See Flexible Lifeline Sys. Inc. v. Precision Lift Inc.*, 654 F.3d 989, 995-98 (9th Cir. 2011) (overruling contrary circuit precedent and holding that, "even in a copyright infringement case, the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, whether preliminary or permanent"); *see also Herb Reed Enters., LLC v. Fla.*

Entm't Mgmt., Inc., 736 F.3d 1239, 1249 (9th Cir. 2013) (same ruling, trademark infringement).

Second, Nike has not met the actual standard, which requires it to *prove* an actual *likelihood* of irreparable harm. *Flexible Lifeline*, 654 F.3d at 998. Indeed, Nike has not even tried to quantify any loss if Mr. Berian does not wear a Nike kit—and there is no basis for assuming (much less finding) that any such loss would be substantial. This is an emerging track and field athlete, not Michael Jordan. Nike has made no showing of how track and field endorsements impact its retail sales or any other aspect of its bottom line. Further, on information and belief, a heavy majority of track and field athletes at Mr. Berian's meets are sponsored by Nike, including the majority of the top 20 hopefuls in Mr. Berian's main event, the 800m.

Third, Nike is the sponsor for Team USA. Accordingly, if Mr. Berian makes it to the Olympics, he will be wearing Nike gear from head to ankle—everything except his shoes—just as he did at the World Indoor Championships, in March 2016. *See* 2d Keflezighi Decl. ¶ 28. It also means that, under US Olympic Committee Rule 40, he will be barred from participating in ad campaigns for any of Nike's competitors during a blackout period of July 27 through August 24, which includes the entire Olympic Games (August 5-21).[5]

Fourth, under the "Affiliation" term that Nike purported to match, Mr. Berian has every right to run at the upcoming Olympic Trials in the uniform and footwear of the Big Bear Track Club. Cesar Decl. Ex. 4 at p.7. As the Court indicated at the TRO hearing, the language of this provision is clear: by running at the Olympic Trials, as he has been doing all season long, in the "official uniform and footwear of Big Bear Track Club," Mr. Berian would not be breaching any contract that might exist with Nike. Nike responds that this provision cannot apply to Big Bear's

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[5] *See* http://www.teamusa.org/~/media/TeamUSA/Documents/Rule-40-Guidelines-ENG.pdf?la=en; *see also* http://www.teamusa.org/News/2015/June/09/USOC-Announces-Updated-Rule-40-Guidelines.

current uniform and footwear because the club had no sponsor in January when this term was first proposed. But nothing in the contract language supports fixing the Big Bear kit to any particular time. Rather, the language points, clearly and precisely, to the club's "official" uniform.

Accepting Nike's "poison pill" theory, the Court made a preliminary ruling that the term is unenforceable as written because it would "thwart [Nike's] legitimate contractual expectation," and thus violate the duty of good faith and fair dealing. *See* TRO, Doc. 24 at 2 (quoting *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship*, 76 F.3d 1003, 1007 (9th Cir. 1996). Not so, for three reasons. ***First***, Nike's claimed "contractual expectation" must have some traction in the language of the right of first refusal provision, *see Stevens*, 154 Or. App. at 58—but it doesn't. Section 5 requires only that Nike have a chance to match any offer before Mr. Berian signs with anyone else. There is no substantive constraint on the terms that Nike would have to match. Rather, to keep Mr. Berian, Nike would have to match any material term that one of its competitors was willing to live with. New Balance was willing to take the risk that Big Bear would sign with another company, leaving Mr. Berian free to run in a "uniform and footwear" with a competitor's logo. By matching, Nike took the same risk.

Second, while Nike may not like its athletes sporting a different logo, *it happens all the time*. LeBron James wears the Cleveland Cavs jersey with an Adidas logo, while being paid millions of dollars to endorse Nike. Stephen Curry wears the Golden State Warriors jersey with an Adidas logo, while being paid millions of dollars to endorse Under Armour. There is no reason why Boris Berian cannot wear the Big Bear Track Club's jersey with a New Balance logo and footwear. Left to its own devices, Nike may not have offered Mr. Berian that opportunity. The Big Bear Track Club is not the NBA, and Mr. Berian is not LeBron James. But New Balance *did*

offer that opportunity, *see* 2d Evans Decl. ¶ 6—and Nike purported to match it.[6]

Third, by no later than January 27, Nike knew full well that the Big Bear Track Club was being sponsored by New Balance, and knew or should have known that its "official uniform and footwear," which Mr. Berian was entitled to wear in "all domestic competitions," would be New Balance-emblazoned. Indeed, by the time Nike sent the Long-Form Contract, Mr. Berian had already run at least twice in gear with club and New Balance insignia. A court will not deem a party's reasonable expectations thwarted based on circumstances that exist at the signing of the contract. *Pride v. Exxon Corp.*, 911 F.2d 251, 256 (9th Cir. 1990) (Oregon law).

In any event, Affiliation provision aside, Nike faces minimal harm if the preliminary injunction is denied. To be sure, Mr. Berian is a special man and athlete—and, without an injunction, Nike therefore may lose a marketing opportunity that is rare, if not necessarily "unique." *See* Nike Mot. 2. But nothing actually *happens* to Nike; it faces no financial loss, much less any that is irreparable. Or, at a minimum, Nike has failed to prove its claimed harm. Nike's decision to rely on an unlawful presumption of harm, rather than making a record, is fatal. *Herb Reed Enters.*, 736 F.3d at 1250 (finding abuse of discretion and reversing where irreparable harm analysis was not "grounded in any evidence or showing offered by [movant]").

2. Irreparable harm to Mr. Berian.

Nike's showing also pales in comparison to the harm threatened to Mr. Berian.

First, an injunction that forces Mr. Berian to change shoes will impact his performance. Nike suggests that ordering Mr. Berian to change shoes is no big deal because he has competed

[6] Nike may complain that Mr. Berian and his team thought that this provision would make a Nike match less likely, but that makes no difference. *Stevens*, 154 Or. App. at 58 ("the duty of good faith and fair dealing" does not "provide a remedy for an unpleasantly motivated act that is permitted expressly by contract").

in Nike's before. Nike Mot. 14. It is true, Mr. Berian competed in Nike's for part of 2015. But before that, he competed in New Balance (2d Evans Decl. ¶ 3), and one of the reasons he wanted to leave Nike is that he feels better in New Balance shoes (2d Keflezighi Decl. ¶ 6). (Tellingly, in his first race as a Nike sponsored athlete, the 2015 US Outdoor Championships, Mr. Berian failed to make the 2015 World Championship team, even though he was the top ranked runner in the nation.) Further, Mr. Berian has been training and competing in New Balance shoes all season, since January—and he has been highly successful. The harm threatened from failing to respect his preference, particularly at this stage of the season, should be dispositive against Nike's motion. No amount of damages awarded after the fact could compensate for an Olympic opportunity derailed.

Second, an injunction would inflict severe harm on Mr. Berian by keeping him from entering a new endorsement contract ***right now***. On June 29, 2016, on his view of the contract issues, Mr. Berian will be free to sign with anyone. This is what he bargained for in the 2015 Contract. And he has waited patiently for that opportunity all year long.

If Nike is given an injunction, Mr. Berian is in a lose-lose situation. He would run in Nike, as ordered by the Court (or not run at all), but it is not clear that Nike would pay him insofar as he would be running under an injunction, not a contract. If he then establishes, at a trial on the merits or in the Ninth Circuit, that there is no contract, he is free of Nike—but Nike then does not have to pay him for the rest of this season, or in 2017 and 2018. At that point, with the Olympic Trials and Olympics come and gone, he will have lost forever the opportunity to sell his endorsement for those events and to leverage his current top-level performance into a multi-year endorsement agreement. As Nike well knows, the value of sponsorship contracts in Track and Field revolve around the Olympic Games. In other words, if Mr. Berian is enjoined now and

prevented from signing with anyone else until after the Olympics, and then prevails in showing he is not under contract with Nike, he could lose everything.

Third, an injunction would inflict irreparable harm on Mr. Berian by infringing his right to freedom of speech. "The loss of First Amendment freedoms, for even minimal periods of time, unquestioningly constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. The balance of equities tips strongly in Mr. Berian's favor.

The balance of equities here is crystal clear. Nike wants to force Mr. Berian to endorse Nike at the Olympic Trials and the Olympics, and to restrain him from signing with or otherwise endorsing any Nike competitor. And the compelled endorsement would take the form of the *shoes* that this world-class runner will wear at some of the most important competitions of his career—shoes that are different from and less comfortable than the shoes Mr. Berian has been wearing, successfully, all season long. It is telling that Nike's Team USA sponsorship rights do not include putting the track team in its shoes. That carve-out reflects the obvious: shoes are too important to the performance of individual athletes to be dictated by a sponsor.

At the same time, any number of other runners will be wearing Nike shoes, and Mr. Berian himself would be wearing Nike from the ankle up as part of Team USA. The marginal loss to Nike from not having Mr. Berian in its stable of endorsers has not been quantified (which is itself a fatal problem for Nike's requested relief). And even if it could be quantified, it is overwhelmingly outweighed by the harm to Mr. Berian from being forced to change shoes and from being made to appear to support a company that he does not support.

Further, Mr. Berian has an opportunity *right now* to ink a multi-year endorsement contract while he stands at the top of his field, and with these high-profile events immediately ahead. Once the Olympic season has gone, it may do Mr. Berian little good to show that he is not under contract with Nike. In fact, it could cause him substantial harm: If Nike wins this litigation, at

least Mr. Berian would get paid under the contract; if Nike obtains an injunction, and then he wins his freedom months from now, he is likely to find that any contract offers are worth significantly less than he could have commanded right now.

One final point: Nike's decisions with respect to the timing of this litigation warrant denying the requested injunction. Bringing this litigation now was inequitable, or at a minimum, ill-conceived. The track calendar is no mystery to Nike, nor are the normal processes of litigation. Nike should have known that waiting until the eleventh hour to press litigation would prejudice Mr. Berian, who is now training for what may be the most important races of his professional running career. Nike should not be given emergency relief—not when the emergency is one Nike itself created.

D. The public interest also favors Mr. Berian.

Nike asserts that the public interest is "neutral," but its premise—that the injunction would "ha[ve] no impact on non-parties" (Nike Mot. 14-15 (citation omitted))—is incorrect. As discussed above, an injunction would impact Big Bear and New Balance.

Further, as Nike's own authority admonishes: "If … the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (quoted at Nike Mot. 15) (injunction that impacted public interest in health). That is the situation here. The proposed injunction would govern at the Olympic Trials and the Olympics themselves—high-profile, public competitions where Mr. Berian will be attempting to earn a spot on Team USA and the right and opportunity to represent his country. He should not be subject to an order requiring specific performance on a personal services contract (which has overtones of forced servitude), involving forced speech (anathema to the First Amendment), on a preliminary adjudication (as opposed to a full trial on the merits

followed by appellate review—which may not be a due process violation, but certainly is less process than our legal system would usually provide).

It would send a poor message to the world, to the say the least, and conflict with core principles for which this country stands, if Mr. Berian is compelled under these circumstances to speak for a company that he does not support. *Cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff") (citation omitted).

E. Nike is not entitled to an injunction, but if the Court disagrees, it should require a bond of no less than $2 million.

No preliminary injunction should issue. But if the Court disagrees, Nike should be ordered to post a bond of not less than $2 million. At the TRO stage, the Court observed that there is no economic threat to Mr. Berian because Nike is bound to match the New Balance Offer and thus Mr. Berian cannot lose money. With all due respect, that is not correct.

If Mr. Berian is under contract with Nike, then, yes, Nike is required to match the New Balance Offer. Nike, however, has not committed to paying Mr. Berian under those terms if Mr. Berian runs in Nikes at the Trials and the Olympics because ordered to do so by the Court. Nor, if Nike's injunction is granted, will Mr. Berian be able to offer an endorsement to anyone else for these upcoming races. Further, an injunction would keep Mr. Berian from entering a new multi-year endorsement contract during what could be the peak of his career. Mr. Berian has an imminent opportunity to enter a multi-year, highly valuable endorsement contract *right now*—before the Olympic Trials (which start July 1) and the Olympics (in August). Nike contests this position, and one of the proposed injunction's central purposes is to stop Mr. Berian from executing

just such an agreement. Thus, if a preliminary injunction wrongfully issues, it will keep Mr. Berian from getting paid by anyone for these upcoming races, and from executing a new endorsement agreement right now—and Mr. Berian's only recourse will be the bond.

Accordingly, Nike should be required to post a $2 million bond, which is the maximum amount that Mr. Berian could have earned under the New Balance Offer, for 2016-2018, including bonuses ($1,657,500[7]), plus a margin to account for Mr. Berian's strong performance on the track since January (he likely could command more now) and for damages for emotional distress and infringement of speech. If this is a little high, that is only fair. Nike, a wealthy corporation, declined to address this issue in its moving papers, and can have no legitimate complaint with an amount that is not just *probably*, but *certainly* high enough to compensate to Mr. Berian for at least some of the harm an injunction is likely to inflict.

IV. CONCLUSION

Nike's request for a preliminary injunction should be denied. At a minimum, Nike should be required to post a bond for not less than $2 million. For all the reasons above, however—including most notably first principles of contract law, the unavailability of specific performance even if a contract did exist, Nike's bad faith, and the unreasonableness of ordering a world class runner to change his shoes for the Olympics—no injunction may issue.

[7] Base compensation of $125,000 per year x 3; a record bonus up to $100,000 per year; a ranking bonus up to $25,000 per year; a time bonus up to $20,000 per year; competition bonuses up to a total of $287,500 in an Olympic year, or $130,000 in non-Olympic years; and rollover increases in base compensation of up to $150,000 for the second and third years. *See generally* New Balance Offer, Cesar Decl. Ex. 3 at pp. 3-5.

Dated: June 17, 2016

Respectfully submitted,

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