

Per A. Ramfjord, OSB No. 934024

per.ramford@stoel.com

Kennon Scott, OSB No. 144280

kennon.scott@stoel.com

STOEL RIVES LLP

900 SW Fifth Avenue, Suite 2600

Portland, OR 97204

Telephone: (503) 224-3380

Facsimile: (503) 220-2480

Attorneys for Plaintiff Nike, Inc.

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.: _____

COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Nike USA, Inc. (“Nike”) brings this action against Defendant Boris Berian, and alleges as follows:

INTRODUCTION

1. This is an action for breach of contract, and declaratory and injunctive relief brought by Nike against Defendant Boris Berian (“Defendant” or “Berian”). Nike and Defendant are parties to an exclusive endorsement agreement. This agreement was initiated when Defendant began endorsing Nike pursuant to a written endorsement contract. Under the

terms of this initial contract, Nike had the right to match specific written terms of any bona fide third-party offer presented to Defendant during a specified matching period of the agreement.

2. Shortly after the expiration of the initial agreement—but during the period in which Nike was entitled to match any third-party offer—Defendant presented Nike with a proposal from New Balance Athletics, Inc. (“New Balance”) for an individual endorsement agreement, creating an option contract for Nike to consider. Nike timely matched New Balance’s offer, forming a new agreement between Nike and Defendant. Defendant now refuses to recognize an agreement with Nike and has refused to perform under its terms.

3. In this action, Nike seeks a declaratory judgment that it properly exercised its right of first refusal and that a new agreement was formed as a result or, alternatively, that Defendant is obligated to execute an agreement with Nike on the same terms as those contained in Nike’s match of the New Balance offer. Nike also seeks injunctive relief prohibiting Defendant from entering into any other endorsement deal that would violate his agreement with Nike.

THE PARTIES

4. Nike is an Oregon corporation with its principal place of business in Washington County, Oregon. Nike is the world’s leading innovator in athletic footwear, apparel, equipment and accessories.

5. Defendant is an individual resident of the State of California. He is a professional middle distance runner.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter under 28 U.S.C. § 1332(a) because it is a civil action between citizens of different states, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$75,000.

7. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in this District and because Defendant is subject to personal jurisdiction in this District.

8. Defendant has engaged in sustained and significant business in Oregon, including traveling to Oregon to compete, and he is party to two contracts at issue in this action in which he consented to the personal jurisdiction within the State of Oregon.

GENERAL ALLEGATIONS

9. Nike is the world's leading innovator in athletic footwear, apparel, and equipment. Nike's ability to succeed in this highly competitive environment is, in part, contingent on its ability to establish deep brand connections to consumers through a sports category lens, reinforced by forming endorsement relationships with high-profile athletes across the sporting spectrum.

The 2015 Contract Between Nike and Defendant

10. Nike's contractual relationship with Defendant began on June 17, 2015, when Nike and Defendant entered into a Track & Field Contract (the "2015 Contract"). The 2015 Contract had a nearly seven-month term, ending on December 31, 2015, and it gave Nike the exclusive right to Defendant's endorsement of athletic footwear and apparel throughout the term.

11. Defendant has proven to be a very valuable member of Nike's track and field roster. During the term of the 2015 Contract, Defendant Boris Berian finished fourth in the Monaco Diamond League 800 meter event with the fifth-fastest American mark of all-time. His reputation as one of the fastest runners in the world was confirmed recently, when he won the 800 meter event at the IAAF World Indoor Championships held in Portland, Oregon in March.

12. From the outset, the parties contemplated a potential renewal of the 2015 Contract. To that end, the 2015 Contract includes several mechanisms for the parties to negotiate a renewal.

13. First, the 2015 Contract provides for an exclusive negotiating period during the Contract Period to 60 days prior to the expiration of the Contract, during which Defendant and his agents and attorneys are allowed to negotiate a renewal with Nike but are prohibited from negotiating with third parties with respect to the products Defendant endorses for Nike.

14. Second, the 2015 Contract also includes a right of first refusal provision that applies in the event Defendant chooses to negotiate with third parties after the expiration of the exclusive negotiating period. Under that provision, Defendant “*shall* submit to Nike” (in a contractually specified format) offers he receives “and desires to accept” during the Contract Period and in the 180 days after the expiration of the 2015 Contract. Under the 2015 Contract, after Defendant submits such an offer to Nike, Nike then has ten business days to decide whether to enter into an agreement with Defendant on terms no less favorable than the “material, measurable and matchable terms” contained in that third-party offer.

Nike’s Exercise of Its Right of First Refusal and the Formation of the 2016 Contract

15. On January 20, 2016, Defendant’s agent, Merhawi Keflezighi (“Keflezighi”), emailed Nike an offer received by Defendant from New Balance (the “New Balance Offer”). In his email, Keflezighi noted that Defendant found the offer “agreeable.” Presenting this offer to Nike converted Nike’s right of first refusal into an option to enter into a contract on the same terms as the New Balance Offer. At that point, Nike could accept or decline to match the New Balance Offer, but acceptance would bind both parties to the material terms of the New Balance Offer.

16. On January 22, 2016, Nike sent a letter to Keflezighi stating that “NIKE matches the New Balance Offer,” the written terms of which were included as an attachment to the letter. By sending this letter, Nike exercised its right of first refusal and created a binding contract between Defendant and Nike (the “2016 Contract”).

17. Nonetheless, on February 15, 2016, after receiving a long-form written agreement that was presented to memorialize the terms of the 2016 Contract, Keflezighi contacted Nike purportedly on behalf of Berian. In an email to Ben Cesar, Nike’s Sports Marketing Manager, Running/Track & Field, Keflezighi stated that Defendant “has expressed an interest not to resume a relationship with Nike,” but nevertheless offered to provide Nike with a “revised offer.” In sending this letter, Defendant, by and through his agent, ignored that Defendant was already bound under the 2016 Contract to the terms initially presented to Nike on January 20, 2016. Neither Defendant nor his agent was free to go back to New Balance to try to get a different or better offer to present to Nike.

18. Nike responded with letters to both Defendant and Keflezighi, insisting that Defendant was bound by the 2016 Contract. In addition, on April 12, 2016, Nike wired Defendant payment for all amounts due to Defendant under the 2016 Contract. Nike has also otherwise performed all of its obligations under the 2016 Contract, including, among other things, providing Defendant with access to an online site for ordering Nike product as permitted for product allowance under the 2016 Contract.

19. Upon information and belief, Defendant is receiving payment and/or product from New Balance either directly or indirectly through his track club, the Big Bear Track Club. In March, despite being bound to compete exclusively in Nike product, when Defendant won the 800 meters at the IAAF World Indoor Championships, he competed in New Balance footwear.

Defendant also competed in New Balance apparel and footwear during the term of the 2016 Contract on (1) January 29, 2016 at the House of Track event in Portland, Oregon, (2) February 14, 2016 at the New Balance Indoor Games in Boston, Massachusetts, and (3) March 11 and 12, 2016 at the USATF Indoor Track & Field Championships in Portland, Oregon.

20. Despite Defendant's violation of the 2016 Contract, Nike has made continual attempts to reach Defendant through his agent to discuss a way forward. However, such efforts have been rebuffed by Defendant's agent.

21. Two of the most important 2016 events in the track and field world are approaching in the coming months. In July, Defendant is set to compete at the U.S. Olympic Team Trials in Eugene, Oregon. If successful there, Defendant will presumably have an opportunity to compete at the 2016 Olympics in Rio de Janeiro, Brazil in August. Unfortunately, without court intervention, it now appears that Defendant will continue to wear competitor product when competing at these events, in violation of his obligations under the 2016 Contract. Indeed, on February 14, 2016, Berian erroneously claimed to be "unsponsored" and happy to be sponsored by New Balance or "anybody that wants to support [him]."

22. Defendant's repudiation of the 2016 Contract, if allowed, will cause irreparable harm to Nike. The Olympics and Olympic Trials are only held once every four years, and there is no guarantee that Berian will continue to be top contender that he is today in 2020. Therefore, Berian's endorsement of Nike in 2016, is a unique marketing and promotional opportunity, the value of which is unquantifiable and irreplaceable if Berian competes in a competitor's product. For these reasons, damages are impossible to measure, (although they clearly exceed the \$75,000 jurisdictional limit of this Court) and no adequate remedy at law exists.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

23. Nike incorporates all preceding paragraphs above as if fully set forth herein.

24. The 2016 Contract between Nike and Defendant is a valid and enforceable contract.

25. Nike has fully performed its obligations under the 2016 Contract.

26. An actual and justiciable controversy exists between Nike and Defendant relating to the parties' respective rights, duties, and obligations under the 2015 Contract and 2016 Contract under Oregon law, and the parties have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

27. Nike will be irreparably damaged if Defendant continues to breach the 2016 Contract. Declaratory relief is necessary to preclude further harm to Nike.

28. Through its request for declaratory relief, Nike requests that this Court adjudicate and declare the parties' legal rights, duties, and obligations under the 2015 Contract and 2016 Contract. In particular, Nike seeks a declaratory judgment holding that:

a. Nike properly exercised its right of first refusal under the 2015 Contract, thereby forming the 2016 Contract, which constitutes an agreement, binding upon and enforceable against the parties during its term; and

b. Under the 2016 Contract, Defendant may not endorse, or be sponsored by, athletic apparel and footwear companies including New Balance during the term of the 2016 Contract, or take any further actions inconsistent with the terms of the 2016 Contract without being in breach thereof.

29. Alternatively, if it is determined that a new agreement was not formed by virtue of Nike's match, Nike seeks a declaration that, pursuant to the right of first refusal in the 2015 Contract, Defendant is obligated to enter into an agreement on the terms contained in Nike's match of the New Balance Offer, and that the long-form contract sent by Nike to Defendant on February 15, 2016, contains such terms.

SECOND CLAIM FOR RELIEF

(Preliminary and Permanent Injunctive Relief)

30. Nike incorporates all preceding paragraphs above as if fully set forth herein.

31. Nike has fully performed under the 2016 Contract, and satisfied all covenants and conditions required of it under the 2016 Contract, both up to and after Defendant's repudiation of the 2016 Contract on or about February 15, 2016 and breach of the 2016 Contract on or about January 29, February 14, and March 11 and 12, 2016 when he competed in competitor footwear and apparel and on or about March 18 and 19, 2016 when he competed in competitor footwear.

32. Defendant's and Keflezighi's statements and conduct evince a positive and unequivocal intention without justification to refuse to perform under the 2016 Contract. Defendant's and Keflezighi's statements and conduct are wholly inconsistent with Defendant's obligations and duties under the 2016 Contract.

33. Nike would suffer serious, substantial and irreparable harm if Defendant endorsed the products of a competitor, including New Balance for the reasons stated above. Nike has no adequate remedy at law. Therefore, Nike is entitled to preliminary and permanent injunctive relief barring Defendant from entering into an endorsement relationship with a Nike competitor (including New Balance) and from endorsing any product of any of Nike's competitors for the remaining term of the 2016 Contract.

PRAYER FOR RELIEF

WHEREFORE, Nike prays for the following relief:

A. On Nike's First Claim for Relief, a declaration that Defendant is contractually bound to the terms of the 2016 Contract. Or, alternatively, a declaration that Defendant is contractually obligated to enter into an agreement Nike on the terms contained in Nike's match of the New Balance Offer, and that the long-form contract sent by Nike to Defendant on February 15, 2016, contained such terms.

B. On Nike's Second Claim for Relief, a preliminary and permanent injunction enjoining Defendant from

1. Entering into an endorsement relationship or agreement with any Nike competitor, including New Balance, or participating in the creation, development, or production of any promotional material of any medium for the remaining term of 2016 Contract; and
2. Competing in or otherwise endorsing any Nike competitor's product (including, but not limited to, footwear and apparel).

C. An award to Nike of its costs and disbursements herein.

D. Any other relief the Court deems to be appropriate.

DATED: April 29, 2016.

STOEL RIVES LLP

/s/ Per A. Ramfjord

PER A. RAMFJORD, OSB No. 934024

paramfjord@stoel.com

KENNON SCOTT, OSB No. 144280

kennon.scott@stoel.com

Attorneys for Plaintiff Nike, Inc.

