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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 EXPEDITED
PRELIMINARY INJUNCTION
HEARING AND RELATED DISCOVERY**

Nike's proposal for expedited discovery is unreasonable and highly prejudicial to Defendant Boris Berian, who is in the midst of what is, indisputably, one of the most important summers of his professional track and field career. As a threshold matter, before turning to the shortcomings in the motion at bar, Mr. Berian would like to take the opportunity to advise the Court and Nike that Mr. Berian will *not* be competing on June 11-12 or June 18 (as Mr. Berian's counsel had previously advised Nike's counsel). Due to the stress of trying to compete under present circumstances, Mr. Berian has withdrawn from the final two races on his schedule leading up to the Olympic Trials. He will not compete again until July 1.

For this reason, and the others given below, Nike's motion to expedite should be denied outright, or at a minimum addressed at a scheduling conference or held over until the parties have appeared before the Court on Nike's request for a temporary restraining order ("TRO") and order to show cause (which, itself, should not be set for hearing until Mr. Berian has had a reasonable opportunity to prepare and file a written opposition).

ARGUMENT

I. Nike's Motion Should Be Denied Because Deciding The Merits Will Require Little Or No Discovery.

The premise of Nike's requested relief (indeed, of its very complaint) is wrong. (1) Nike did *not* match New Balance's offer. Documentary evidence already in Nike's possession, supplemented by certain declarations, will establish this beyond cavil—and without the need for anything remotely resembling the discovery that Nike now proposes. (2) Even if Nike had matched, that would not have created a new contract, as Nike contends; it would only have forced Mr. Berian to make a choice between signing with Nike or endorsing no one for six months. Out of an abundance of caution and threats of lawsuits by Nike, he has been kept from signing a footwear endorsement contract with New Balance and other companies, including

Under Armour and Asics—which is to say, he has endorsed no one. (3) What is more, even if Mr. Berian was obliged to sign with Nike for 2016, under the circumstances presented here, his refusal to do so might put him in breach of the 2015 contract, but it would not entitle Nike to force him to execute a contract for 2016 through 2018.

Nike must prevail on *all three* of these merits issues to show a likelihood of success. As we look forward to explaining in detail in opposition to Nike’s pending motion for a TRO and order to show cause (Doc. 6 (“Nike TRO Mot.”)), Nike can prevail on none. And, more to the point for present purposes, it will require little or no discovery for the Court to assess these issues—certainly far less discovery than Nike has proposed—because these are disputes over the meaning of written contracts and offers. Parole evidence is one thing; the discovery that Nike now proposes is something else altogether.

In fact, we respectfully submit that the Court will not need to reach any issue beyond Nike’s failure to match. Briefly: Nike concedes that, when Mr. Berian’s agent presented the offer, he explicitly advised that “the ‘lack of reductions’ was a ‘material element of the offer.’” Nike TRO Mot. at 5 n.1 (quoting Cesar Decl., Ex. 2 at p.1). But Nike’s purported match included reductions. *See* Cesar Decl. Ex. 4 at p.1. That should have ended the matter. Instead, Nike insisted that the New Balance offer must have been incomplete because reductions are purportedly “industry standard.” Among other several serious flaws in this position, it is demonstrably false that reductions are standard; they are not. The lack of reductions was thus a material element of New Balance’s offer, not the absence of boilerplate as Nike contends.¹

¹ Further, if Mr. Berian and his team had somehow misunderstood New Balance’s offer, that would have become clear to Mr. Berian if and when presented with a long-form agreement by New Balance, at which point he would have been obliged to go back to Nike. The unstated assumption of Nike’s position is that Mr. Berian would not have done so. That is, Nike’s argument baselessly assumes that Mr. Berian was acting (or would have acted) in bad faith.

II. Nike Faces No Meaningful Threat Of Harm If Matters Are Not Expedited.

Even if Mr. Berian is wrong on each of the points just noted—in other words, even if Nike is correct that its proposed 2016 Contract is actually in force right now—***Mr. Berian is not violating it by running in the New Balance gear of his club team.*** Entirely absent from Nike’s submissions to date is any mention of the following provision from what is, according to Nike, the governing agreement:

NIKE shall permit ATHLETE to compete under the Big Bear Track Club affiliation, and ATHLETE may wear the official uniform and footwear of Big Bear Track Club in all domestic competitions, including the US Indoor Championships and US Olympic Trials, in 2016. ATHLETE shall compete for Team NIKE and wear the Team NIKE official uniform in all international events.

Declaration of Merhawi Keflezighi, filed herewith, at ¶ 4.²

Nike contends that it is suffering irreparable harm, and that TRO and preliminary injunction hearings must be held as quickly as possible before Mr. Berian competes yet again in New Balance gear. But now, Mr. Berian has decided not to compete again before July 1. In addition, and in any event, on Nike’s own theory and purported contract, Mr. Berian has every right to continue competing in New Balance gear. (This, by the way, is one of the central problems with Nike’s claim to emergency injunctive relief: Mr. Berian has been running in his club’s New Balance gear since January 29, 2016. Nike TRO Mot. at 6. Nike thus does not seek to “preserv[e] the status quo” (*id.* at 8); it seeks to *change* it.)

² Surprisingly, Nike did not attach the 2016 Contract to its Complaint or TRO Motion—even though this is supposedly the operative contract between the parties, and Nike’s request for extraordinary and emergency relief is based on its supposed breach. Mr. Berian intends to submit this document in its entirety to the Court with his opposition to Nike’s TRO Motion, or at the hearing on same, whichever comes first. However, given the short notice of Nike’s motion provided to undersigned counsel on Friday afternoon, the parties have not yet had an opportunity to discuss whether Nike would like to move for the 2016 Contract to be redacted or filed under seal. Thus, in an abundance of caution, the Keflezighi Declaration submitted herewith provides only the text of the AFFILIATION provision quoted above. *Id.* at ¶ 5.

Further, and on a related note, Nike is the sponsor of Team USA. Accordingly, if Mr. Berian makes it to the Olympics he will be training, competing, and essentially living in Nike gear for the entire 2016 Summer Olympics—except for footwear—*regardless of whether he is under contract with Nike, a Nike competitor, or no one*. Moreover, with exceptions not implicated here, US Olympic Committee Rule 40 protects Nike, as an Olympic sponsor, from any Olympian being part of a marketing campaign for a non-Olympic sponsor between July 27 and August 24 (which includes the whole Olympic Games window, August 5 to August 21).³

III. The Press Of Time Is A Problem Entirely Of Nike’s Own Making—And It Threatens Irreparable Harm Not To Nike, But To Mr. Berian.

While Nike has attempted to explain its delay in serving its complaint (which was filed on April 29, but not served on Mr. Berian until May 20), it has been conspicuously silent about the delay between service and its TRO Motion, which it did not file until after close of business on June 1. There is no reason Nike could not have served its motion together with its complaint on May 20, or even a week later. If it had, that would have made a huge difference as far as providing Mr. Berian a full and fair hearing on these issues. Now, Nike is proposing June 8 as the *deadline* to serve written discovery—which is less than a week after Mr. Berian’s counsel was served with the motion for a TRO and preliminary injunction!

IV. The Requested Discovery Is Unreasonable, Unnecessary, And Would Be Highly Prejudicial To Mr. Berian.

Nike presents its proposed discovery as “narrow and focused”. *E.g.*, Nike Mot. at 2. In fact, it is incredibly broad. We respectfully submit that this overbreadth, as well as the expense and burden of what Nike proposes, is all too clear on the face of Nike’s proposed schedule and

³ 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>.

requests for production. Indeed, it is incredible that Nike presents this to Mr. Berian and the Court as “limited” and “narrowly tailored”. *Id.* at 6, 7. It is not.

What is more, Nike’s proposed discovery is not even necessary—and certainly not at this time. What Nike seeks in such a hurry goes far beyond the causes of action pleaded in its Complaint. For example, though Nike has not asserted any business tort claims (such as interference with contractual relations), it asks the Court to allow a fishing expedition for communications between Mr. Berian or his agent with “any other person or entity ... related to any potential or actual endorsement relationship between Boris Berian and New Balance, including communications regarding the impact of Mr. Berian’s contractual relationship with Nike on any potential contractual relationship with New Balance.” *See* Doc. 13-1 at 4. Such discovery, particularly stated so broadly (*see id.* at 2, defining “Communications”, “Relates to”, and “Document”), should not be necessary *ever*—and even if it might be undertaken later, it certainly cannot be justified on the proposed expedited basis right now.

Nike has asserted claims for declaratory and injunctive relief that turn principally on a relatively straightforward question of contract law: did Nike match the offer given Mr. Berian by New Balance. And that question should be resolved based principally on the 2015 Contract, the New Balance offer, and the Nike offer, along with (possibly) certain limited parole evidence. Nike complains that “[it] should be permitted to take limited discovery of the communications between Defendant, his agent, and New Balance relating to the terms of the New Balance Offer and/or any form contracts actually proposed by New Balance, all of which Defendant has refused to produce on a voluntary basis.” Nike Mot. at 7. This representation is most unfair. What Nike actually demanded from Mr. Berian is far more than this, as reflected in the Proposed Requests For Production attached to Nike’s motion (which are ominously captioned as a “First”

request). *See generally* Doc. 13-1. If Nike had been more reasonable, perhaps the parties could have reached an agreement.

Nor is the combination of Nike's proposed schedule and scope of discovery fairly characterized as "not overly burdensome." *Id.* at 7. Nike is a massive corporation with a large in-house counsel department and ample funds to staff an army of attorneys on this matter for a month; Mr. Berian is not. And not only will Nike's proposal cost an inordinate amount of time and money, it will divert Mr. Berian's attorneys from tasks that are far more important to the ultimate resolution of this matter (including preparing a written opposition to Nike's motion for a TRO and order to show cause, and preparing for the hearing(s) on same). Further, and plainly the most significant and irreparable harm of all, Nike's litigation strategy is likely to interfere with Mr. Berian's training—and, clearly, is designed to do so.

Indeed, Nike's purported concern with Mr. Berian's success seems highly disingenuous. Insofar as one is generally deemed to intend the likely effects of his or her actions, Nike's legal maneuvering appears designed to hinder Mr. Berian's training and bully him into submission. Nike could and should have pursued this matter in March or April, or at a minimum moved with alacrity in pressing its requests for discovery and emergency relief after it served Mr. Berian on May 20. Instead, Nike ran down the clock, and now makes one extraordinary request after another just as Mr. Berian approaches the peak of the best track and field season of his nascent pro career in a sport where longevity, particularly in his event, is uncommon.

In sum, with Mr. Berian less than a month from Olympic Trials (which begin on July 1), Nike has suddenly demanded not only the extraordinary relief of a TRO—to which it is most certainly *not* entitled, as we look forward to showing the Court—but also permission to engage in unnecessary, highly expedited, and highly burdensome discovery, which it proposes to

commence before the parties have even appeared on the TRO, and before the Court has had an opportunity to receive or review any submission from Mr. Berian on the contract issues that are truly dispositive of Nike's requests for a TRO and injunction—and, indeed, of its complaint. To this, Mr. Berian strenuously objects.

V. There Are More Reasonable Ways Forward.

Finally, to be clear, Mr. Berian's proposal is not that there be no discovery, and certainly not that the preliminary injunction hearing be postponed indefinitely. To the contrary, it may make sense to hold a consolidated preliminary injunction hearing and trial on the merits, per Fed. R. Civ. P. 65(a)(2)—and, moreover, to do so on or about June 28, as Nike proposes. In addition, limited discovery may be appropriate in the form of interrogatories or even (very limited) depositions (of Mr. Berian and/or of other declarants, whose declarations Mr. Berian intends to submit next week in opposition to Nike's TRO motion). Further, Mr. Berian is more than willing to work with Nike to stipulate to as many facts as possible to streamline the hearing.⁴

Mr. Berian, too, has an interest in speedy resolution of this matter—and believes it is readily available, if he is just given a meaningful opportunity to respond to Nike's motion for a TRO and order to show cause, without being sidetracked and bombarded with a full-court press by Nike's litigators and sudden alarms that Nike can no longer live with a status quo (*i.e.*, Mr. Berian competing in New Balance gear) that it *has* been living with since January. Track and field season, as Nike well knows, runs from January to October. Again, Mr. Berian believes this matter can be quickly resolved based on Nike's manifest failure to match the New Balance offer.

⁴ Undersigned counsel conveyed all of this to Nike's counsel as part of the meet-and-confer discussions on Nike's motion.

But if a quick resolution is not possible after all, the parties should take up discovery and further litigation in September (after the Olympics), if not November (after the season ends entirely).

CONCLUSION

The only irreparable harm threatened here is by Nike against Mr. Berian. Mr. Berian respectfully requests that Nike's motion to expedite discovery and schedule the preliminary injunction hearing be denied outright or, at a minimum, held over to the hearing on Nike's TRO Motion. In the alternative, Mr. Berian would not object to a preliminary telephone conference devoted to scheduling issues, if the Court prefers. This alternative route may be appropriate if the Court decides to wait to hold a TRO and/or preliminary injunction hearing until the week of June 20, to give Mr. Berian an opportunity to fully respond to the issues raised by Nike's TRO Motion (which response is presently due by June 20).

Dated: June 5, 2016

Respectfully submitted,

s/William P. Ferranti

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