

LEGAL STRATEGY AND NEGOTIATION THEORY IN ATHLETE ENDORSEMENT CONTRACTS

Haskell Murray *

I. INTRODUCTION

This essay details the importance of athlete endorsement contracts to the sponsoring firms, which often find it difficult to differentiate their products, and therefore often chose to build their brand identity on the success and personality of their endorsing athletes. This essay first argues that corporate sponsors should use the drafting and enforcement of athlete endorsement contracts in a way that is consistent with their desired brand image. This essay then argues that corporate sponsors can use optionality in the negotiated contracts—such as conditions precedent, conditions subsequent, morals clauses, and rights of first refusal—to gain strategic advantages. In a cautionary note, this essay opines that reputational costs and ethical boundaries should be seriously considered when enforcing the negotiated contractual options, and that sponsors should address these issues by clearly communicating expectations to endorsing athletes. Part II examines selected common contractual clauses in athlete endorsement contracts. Part III then examines athlete endorsement contracts using Professor Robert Bird’s five pathways legal strategy framework, as further described in his work with Professor David Orozco. Part IV provides a prescriptive approach for firms and athletes entering endorsement contracts, based on negotiation theory research and illuminated by the discussed insights from legal strategy. The essay ends with a brief conclusion in Part V.

II. TERMS OF ATHLETE ENDORSEMENT CONTRACTS

This part provides a brief overview of the Berian and Lochte situations, and then discusses selected common clauses in athlete endorsement contracts to set the stage for discussion of these clauses in later portions of the essay. This part focuses primarily on Nike’s offered contract to Boris Berian (the “Proposed Nike/Berian Contract”) and the general reporting surrounding Ryan Lochte’s endorsement contracts, as many of the specific terms of Lochte’s contract appear to have been kept confidential.¹

* Associate Professor of Management and Business Law, College of Business, Belmont University.

¹ *Ryan Lochte Has Lost All Four of His Major Sponsors, Now What?*, THE FASHION LAW (Aug. 23, 2016), <http://www.thefashionlaw.com/home/ryan-lochte-loses-all-four-of-his-major-sponsors-now-what> (noting that Lochte’s major sponsors seem to be keeping the terms of their contracts confidential).

A. BERIAN AND LOCHTE FACTS AND CONTRACTS

Boris Berian lived a true underdog story. After being passed on by Division I track programs and dropping out of Division II school, Adams State University, in 2012, 800-meter runner Boris Berian slept on a friend's couch, worked at a McDonald's inside a Wal-Mart, and trained by himself.² In October of 2014, Berian accepted an offer to train with the Big Bear Track Club.³ In less than a year, Berian improved his personal best by an impressive 5 seconds, and in mid-2015 he claimed the fastest time run by an American so far that year.⁴ On June 17, 2015, Berian signed a short-term endorsement contract with Nike, which expired on December 31, 2015, but the contract gave Nike a right of first refusal for 180 days after expiration.⁵ The facts after December 31, 2015, were disputed in a legal battle between Berian and Nike, but centered on Berian's decision to move to New Balance, whether New Balance had made a definite offer, and whether Nike had agreed to match that offer.⁶ In the dispute, Nike sued Berian to block him from signing with New Balance, and allegedly served him with the lawsuit at a track meet just months before the U.S. Olympic Trials.⁷ On June 7, 2016, a judge in the U.S. District Court for the District of Oregon granted Nike's temporary restraining order ("TRO") preventing Berian from running track

² Jere Longman, *Runner Boris Berian Goes From McDonald's Employee to a Symbol of Athletes' Rights*, THE N.Y. TIMES (July 4, 2016), http://www.nytimes.com/2016/07/05/sports/olympics/runner-boris-berian-goes-from-mcdonalds-employee-to-a-symbol-of-athletes-rights.html?_r=0; Tim Layden, *Boris Berian's Olympic Bid Caps His Stunning 18-Month Rise*, SPORTS ILLUSTRATED (July 5, 2016), <http://www.si.com/olympics/2016/07/04/boris-berian-olympics-2016-rio-track-and-field-trials>.

³ Dennis Young, *Boris Berian Finally Signs with New Balance*, FLOTRACK (June 30, 2016), <http://www.flotrack.org/article/43138-boris-berian-finally-signs-with-new-balance>.

⁴ Cameron Wolfe, *Boris Berian was serving fries at McDonald's. Now, he's a world-class 800 meter runner*, DENVER POST (July 22, 2015), <http://www.denverpost.com/2015/07/22/boris-berian-was-serving-fries-at-mcdonalds-now-hes-a-world-class-800-meter-runner/> (showing an improvement from 1:48.93 to 1:43.84, the fastest time for an American in 2015, at the time of the article).

⁵ *Get The Inside Scoop On Why Nike Is Suing World Indoor Champ Boris Berian For Breach Of Contract*, LETSRUN (May 21, 2016), <http://www.letsrun.com/news/2016/05/get-inside-scoop-nike-suing-world-indoor-champ-boris-berian-breach-contract/> (claiming that the short-term contract between Nike and Berian gave Nike a 60-day exclusive on negotiation and the right to match any outside offer during the first 180-days of 2016).

⁶ Rick Maese, *Nike digs in its heels for court battle with rising track star Boris Berian*, THE WASHINGTON POST (June 8, 2016), <https://www.washingtonpost.com/news/sports/wp/2016/06/08/nike-digs-in-its-heels-for-court-battle-with-rising-track-star-boris-berian/> (detailing the allegations in the Nike/Berian lawsuit).

⁷ Complaint, Nike USA, Inc. v. Boris Berian, No. 3:2016cv00743 (U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON, April 29, 2016); Chris Chavez, *Nike sues 800-meter runner Boris Berian, rocks track and field world*, SPORTS ILLUSTRATED (May 23, 2016), <http://www.si.com/olympics/2016/05/23/olympics-track-and-field-boris-berian-nike-caster-semenya>.

meets in non-Nike gear until June 21st.⁸ On June 22nd, the judge declined to extend the TRO and said he would rule on the case on June 29th.⁹ On June 23rd, Nike dropped its lawsuit, without prejudice, claiming that they wanted to “eliminate this distraction” for Berian because of the quickly approaching Olympic Trials.¹⁰ The dropping of the lawsuit may have been influenced by the June announcements that coveted college 800-meter runners Donovan Brazier and Clayton Murphy were turning professional.¹¹ On June 30^l, Berian signed with New Balance.¹² Also in late June, both Brazier and Murphy signed with Nike.¹³ Surprisingly, Brazier failed to make the U.S. Olympic team, while Murphy won Bronze and Berian finished 8th in the 800 meters.¹⁴

Ryan Lochte’s situation, which started during the Olympic Games, stemmed from his embellishing and omitting facts—if not flat-out falsifying information—

⁸ Robert Johnson and Weldon Johnson, *Nike Is Granted Temporary Restraining Order in Its Lawsuit Against Boris Berian*, LETSRUN (June 8, 2016), <http://www.letsrun.com/news/2016/06/nike-granted-temporary-restraining-order-lawsuit-boris-berian/> (noting that Nike’s TRO was granted for 14 days while discovery could be conducted).

⁹ Robert Johnson and Weldon Johnson, *Decision On Temporary Injunction Delayed To Wednesday June 29th After Boris Berian And Nike Square Off In Court In Portland*, LETSRUN (June 22, 2016), <http://www.letsrun.com/news/2016/06/judge-boris-berian-case-think-know-want-case-ruling-coming-730-pm-eastern/> (stating that the judge decided to lift the TRO on June 22, and would have a ruling on June 29).

¹⁰ Dennis Young, *Why Did Nike Drop Its Lawsuit Against Boris Berian*, FLOTRACK (June 24, 2016), <http://www.flotrack.org/article/42938-why-did-nike-drop-its-lawsuit-against-boris-berian>.

¹¹ Texas A&M University, *Texas A&M freshman Donovan Brazier decides to pursue professional career*, TEXAS A&M TRACK & FIELD: THE 12TH MAN (June 21, 2016), <http://12thman.com/news/2016/6/21/track-and-field-texas-am-freshman-donavan-brazier-decides-to-pursue-professional-career.aspx>; see also Robert Johnson and Weldon Johnson, *Clayton Murphy Turns Pro And Misses Olympic Standard By .03 At Portland Track Festival*, LETSRUN (June 12, 2016); see also Haskell Murray, *Legal Strategy: Boris Berian, Nike, and New Balance*, BUSINESS LAW PROF BLOG (July 1, 2016), http://lawprofessors.typepad.com/business_law/2016/07/legal-strategy-boris-berian-nike-and-new-balance.html.

¹² Dennis Young, *Boris Berian Finally Signs with New Balance*, FLOTRACK (June 30, 2016), <http://www.flotrack.org/article/43138-boris-berian-finally-signs-with-new-balance>.

¹³ *Donavan Brazier Signs Endorsement Agreement with Nike*, GLOBAL ATHLETICS & MARKETING INC. (June 28, 2016), <http://www.globalathletics.com/2016/06/Donavan-Brazier-Signs-Endorsement-Agreement-with-Nike.php>; Taylor Dutch, *Clayton Murphy, Courtney Okolo Sign With Nike*, FLOTRACK (June 27, 2016), <http://www.flotrack.org/article/43024-clayton-murphy-courtney-okolo-sign-with-nike>.

¹⁴ Karen Rosen, *Clayton Murphy Ends 24-Year Medal Drought In 800-Meter*, TeamUSA (Aug. 15, 2016), <http://www.teamusa.org/News/2016/August/15/Clayton-Murphy-Ends-24-Year-Medal-Drought-In-800-Meter>; Taylor Dutch, *Duane Solomon, Donovan Brazier OUT in Olympic Trials First*, FLOTRACK (July 2, 2016), <http://www.flotrack.org/article/43189-duane-solomon-donavan-brazier-out-in-olympic-trials-first-round>.

regarding an alleged robbery committed against him and fellow swimmers.¹⁵ According to Lochte's original version of the story, men dressed as police officers robbed the swimmers at gunpoint.¹⁶ After contrary evidence, including video evidence and claims that the swimmers had vandalized a gas station bathroom, called Lochte's story into question, Lochte revised his account of the occurrence and issued an apology.¹⁷ On August 25, 2016, Brazilian authorities charged Lochte with filing a false police report, and on September 7, 2016, the US Olympic Committee and US Swimming suspended Lochte for 10 months, including the 2017 World Championships.¹⁸ Following negative media attention highlighting Lochte's story, he lost his four major sponsors—Speedo, Polo Ralph Lauren, Gentle Hair Removal, and Airweave (a mattress maker).¹⁹ It is likely that the sponsors invoked "morals clauses" in their contracts with Lochte.²⁰ All was not lost, as Lochte managed to secure a spot on *Dancing with the Stars*.²¹

B. EXCLUSIVITY PROVISIONS

The Proposed Nike/Berian Contract, filed in the lawsuit, purported to contain Nike's "standard terms," including a robust exclusivity provision.²² The Proposed

¹⁵ ESPN.com News Services, *Ryan Lochte owns up to 'over exaggerated' robbery story*, ABCNEWS (Aug. 24, 2016), <http://abcnews.go.com/Sports/ryan-lochte-owns-overexaggerated-robbery-story/story?id=41611563>.

¹⁶ Simon Romero, *U.S. Swimmers' Disputed Robbery Claim Fuels Tension in Brazil*, THE N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/19/sports/olympics/police-say-ryan-lochte-lied-about-gunpoint-assault.html>.

¹⁷ Mark Sandritter, *A timeline of Ryan Lochte's claim that he and 3 USA swimming teammates were robbed in Rio*, SBINATION (Sept. 7, 2016), <http://www.sbnation.com/2016/8/18/12528300/ryan-lochte-robbed-rio-brazil-swimming-details>.

¹⁸ *Id.*

¹⁹ Chris Isidore & Jackie Wattles, *Ryan Lochte ditched by four major sponsors*, CNN:Money (Aug. 22, 2016), <http://money.cnn.com/2016/08/22/news/companies/ryan-lochte-speedo/>.

²⁰ *Ryan Lochte Has Lost All Four of His Major Sponsors, Now What?*, *supra* note 1 (noting that the "the vast majority of well drafted endorsement contracts come with explicit morals clauses" and opining that this type of clause allowed Lochte's major sponsors to cut ties with him); *see also*, Daniel Auerbach, *Morals Clauses As Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 3-5 (2005) (explaining morals clauses).

²¹ ESPN.com News Services, *Ryan Lochte, Laurie Hernandez on 'Dancing with the Stars'*, ABCNEWS (Sept. 7, 2016), <http://abcnews.go.com/Sports/ryan-lochte-laurie-hernandez-dancing-stars/story?id=41922072>.

²² Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian's Opposition To Plaintiff's Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *Nike USA, Inc. v. Boris Berian*, No. 3:2016cv00743 (U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON, June 17, 2016).

Nike/Berian Contract would prohibit Berian from entering into an endorsement contract with any firms that produce items including, athletic clothing, footwear, athletic accessories, sunglasses, athletic tracking devices, and sports equipment that Nike produces.²³ These exclusivity provisions are extremely common in track & field contracts.²⁴ As one sports and entertainment attorney states, “sponsors like Nike value exclusivity over everything.”²⁵ Presumably, Lochte’s endorsement contracts contained similar exclusivity provisions, bolstered by the fact that his four major sponsors are in significantly different industries.

C. CONDITIONS PRECEDENT AND CONDITIONS SUBSEQUENT

The Proposed Berian/Nike Contract also included various reductions and bonuses, common among athlete endorsement contracts.²⁶ As a condition precedent to owed bonuses, Berian could earn, for example, \$100,000 for an individual outdoor track world record in an Olympic event or \$150,000 for an Olympic Gold Medal, among many other possible performance bonuses.²⁷ As a condition subsequent, the contract gave Nike the right to reduce Berian’s annual base compensation for various events including a 20% reduction if he fell out of the top ten rankings in the world in the 800m; a 25% reduction if he did not compete in a major world championship (such as the Olympics or IAAF World Championship); a 20% reduction(s) for certain missed Nike sponsored track meets or press conferences; a 25% reduction(s) for each time Berian “partially or wholly covers or obscures, removes or defaces” the Nike logo (collectively, called “reductions”).²⁸ Nike could terminate the contract with Berian for a host of reasons, including if Berian takes “any action inconsistent with [his] recommendation and endorsement of [Nike] and/or its Products, or discourages use of [Nike] Products in any manner whatsoever,” Berian becomes disabled, Berian commits

²³ *Id.*

²⁴ Matthew Lane, *Economic Realities & Issues Olympic Athletes Encounter*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 121, 125 (2012).

²⁵ *Id.*

²⁶ Daniel R. Avery & Joseph S. Rosen, *Complexity at the Expense of Common Sense?: Emerging Trends in Celebrity Endorsement Deals*, ENT. & SPORTS LAW., Summer 2005, at 13, 16 (noting performance bonuses in tennis star Serena Williams’ endorsement contract with Nike); see also Seth William Stern, *The IRS’ Double-Bogey: Goosen v. Commissioner Remains A Fairway to Characterize Endorsement Income for Nonresident Alien Athletes in Garcia v. Commissioner*, 20 JEFFREY S. MOORAD SPORTS L.J. 605, 616-17 (2013) (noting performance and rankings bonuses in professional golfer’s Retief Goosen endorsement contracts); see also Andrew Zarriello, *A Call to the Bullpen: Alternatives to the Morality Clause As Endorsement Companies’ Main Protection Against Athletic Scandal*, 56 B.C. L. REV. 389, 416 (2015) (noting performance-based bonuses as a technique used in endorsement contracts).

²⁷ Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian’s Opposition To Plaintiff’s Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *supra* note 22.

²⁸ *Id.*

an anti-doping violation, Berian does not compete in at least six IAAF- or USATF-sanctioned meets in a year or Berian does not compete in an IAAF- or USATF-sanctioned meets for 180-days or more.²⁹ Reductions and termination rights are common, though not universal, in sports and in track & field endorsement contracts.³⁰

D. MORALS CLAUSES

The Proposed Berian/Nike Contract, (presumably) the Lochte endorsement contracts, and many other athlete endorsement contracts contain morals clauses.³¹ Morals clauses, as used in athlete contracts, “can be defined as a clause that gives the athlete’s team, league or the company paying the athlete to endorse its products the right to terminate a contract or otherwise punish a player who engages in criminal or unseemly behavior.”³² The Proposed Berian/Nike Contract gave Nike the right to terminate the contract if:

the commercial value of [Berian’s] Endorsement is substantially impaired by [Berian’s] commission of any act which shocks or offends the community (including indictment or charging in a criminal information or equivalent process for any crime, failing an officially sanctioned drug test or admission to a substance abuse treatment program) or which

²⁹ *Id.*

³⁰ Sara Germano, *At Olympic Track Trials, Spotlight Is on Boris Berian After Nike Lawsuit*, THE WALL STREET JOURNAL (July 4, 2016), <http://www.wsj.com/articles/at-olympic-track-trials-spotlight-is-on-boris-berian-after-nike-lawsuit-1467656783>.

³¹ Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian’s Opposition To Plaintiff’s Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *supra* note 22; *Ryan Lochte Has Lost All Four of His Major Sponsors, Now What?*, THE FASHION LAW (Aug. 23, 2016), <http://www.thefashionlaw.com/home/ryan-lochte-loses-all-four-of-his-major-sponsors-now-what> (noting the prevalence of morals clauses in endorsement contracts, including, in all likelihood, Ryan Lochte’s contracts); Daniel R. Avery & Joseph S. Rosen, *Complexity at the Expense of Common Sense?: Emerging Trends in Celebrity Endorsement Deals*, ENT. & SPORTS LAW., Summer 2005, at 13, 15 (noting that “morals clauses have become an industry standard for endorsements” and stating that “[o]bjectionable conduct may include the expression of unpopular political views.”)

³² Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 n. 10 (2009) (defining morals clauses and noting that alternative names for the term include “public image clauses,” “good-conduct clauses,” “morality clauses,” “moral turpitude clauses,” “personal conduct clauses,” “behavioral clauses.”)

manifests contempt or disregard for diversity, public morals or decency.³³

As the reader can see above, morals clauses tend to be quite broad and vague, giving sponsors a tremendous amount of power and flexibility.³⁴

E. RIGHT OF FIRST REFUSAL

Right of first refusal clauses are relatively common in endorsement contracts.³⁵ The Proposed Berian/Nike Contract gave Nike 180-days after termination to match a competing endorsement offer.³⁶ The full right of first refusal clause reads:

During the Contract Period and for a period of one hundred eighty (180) days thereafter, [Nike] shall have the right of first refusal for Endorsements/Services, as follows. If [Berian] receives any bona fide third-party offer at any time on or after the Exclusive Negotiating End Date with respect to any Endorsements/Services, [Berian] shall submit to [Nike] in

³³ Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian's Opposition To Plaintiff's Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *supra* note 22.

³⁴ Lauren Rosenbaum, *140 Characters or Less: A Look at Morals Clauses in Athlete Endorsement Agreements*, Note, 11 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 129, 141 (2015) (noting that Morals Clauses have been challenged as overly vague, but upheld while stating that the clauses have been "historically considered valid and enforceable."); Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009) (noting that morals clauses are sometimes vague and ambiguous); Kira N. Buono, *Athletes Sacked by Moral Turpitude Clauses: Presumed Guilty Unless Proven Innocent*, Note, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 367, 379 n.79 (2015) (noting the power retained by the firm that can terminate a contract due to violation of a morals clause).

³⁵ Andrew Zariello, *A Call to the Bullpen: Alternatives to the Morality Clause As Endorsement Companies' Main Protection Against Athletic Scandal*, 56 B.C. L. REV. 389, 429 (2015) (noting the use of right of first refusal clauses as one option available to sponsoring companies who contract with athletes); L.C. Johnson, *Endorsement Contract is in Dispute*, ORLANDO SENTINEL (July 7, 2006), available at http://articles.orlandosentinel.com/2002-07-07/sports/0207070276_1_culpepper-reebok-daunte (noting that Nike includes right of first refusal contracts in its endorsement contracts); World's #1 Golfer Sued for Breach of Endorsement Contract, Contracts Profs Blog (December 17, 2012), http://lawprofessors.typepad.com/contractsprof_blog/2012/12/worlds-1-golfer-sued-for-breach-of-endorsement-contract.html (noting a right of first refusal clause in Rory McIlroy's endorsement contract with Oakley sportswear).

³⁶ Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian's Opposition To Plaintiff's Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *supra* note 22.

writing the specific terms of such bona fide third-party offer in its entirety, in the form of a true and complete copy which shall be on the offeror's letterhead or other identifiable stationery or imprint readily authenticatable by [Nike] as having originated with such third-party offeror. [Nike] shall have twenty (20) business days from the date of its receipt of such third-party offer to notify [Berian] in writing if it will enter into a new contract with [Berian] on terms no less favorable to [Berian] than the material, measurable and matchable terms of such third-party offer. If [Nike] so notifies [Berian] within such 20 business day period, [Berian] shall enter into a contract with [Nike] on the terms of [Nike's] offer. If [Nike] fails or declines to match or better the material, measurable and matchable terms of such third-party offer within such 20 business day period, [Berian] may thereafter consummate an agreement with such third party on the terms of the offer made to [Berian]. Prior to the Exclusive Negotiating End Date, [Berian] shall not (nor shall [Berian] permit [Berian's] agents, attorneys, accountants, representatives or employees to) solicit, consider or present to NIKE, and NIKE shall not be obligated to respond to, any third-party offer for any Endorsements/Services.³⁷

Nike's right of refusal clause gives the company an exclusive negotiation period, limits the offers considered to "bona fide" offers, and only requires matching of the "material, measurable and matchable terms."³⁸ Right of first refusal clauses, in general, allow sponsors to test the market and help keep sponsors from paying an above-market price, as, the fact that another firm has made a similar offer means that the sponsor is paying the market price.³⁹

III. LEGAL STRATEGY AND ATHLETE ENDORSEMENT CONTRACTS

This section applies the prior work in the area of legal strategy to athlete endorsement contracts discussed in the previous part. As mentioned in the introduction, athlete endorsement contracts can be critical in the strategy of firms, especially those firms in commodity or near-commodity industries that have difficulty

³⁷ *Id.*

³⁸ *Id.*

³⁹ L.C. Johnson, *Endorsement Contract is in Dispute*, ORLANDO SENTINEL (July 7, 2006), available at http://articles.orlandosentinel.com/2002-07-07/sports/0207070276_1_culpepper-reebok-daunte.

differentiating their products solely on the product's uniqueness.⁴⁰ This section applies Professor Robert Bird's five legal strategy pathways framework, as elaborated on in his work with David Orozco, to the area of athlete endorsement contracts.⁴¹ This section argues that the sponsoring firms should choose a legal strategy pathway in their contract drafting and enforcement that is consistent with their desired brand identity. Including optionality in the contract may provide a firm with the greatest ability to pivot and also an ability to increase goodwill in the contract enforcement stage. Further, this section argues that firms should be mindful of both ethical boundaries and market forces in the contract drafting and enforcement processes. The five legal pathways are grouped, as Bird and Orozco note, into pathways that focus on managing risk (avoidance, compliance, and prevention), and pathways that seek to generate business opportunities (value and transformation).⁴²

A. MANAGING RISK: AVOIDANCE, COMPLIANCE, AND PREVENTION

Sponsors can negotiate and enforce athlete endorsement contracts to manage risk, using one or more of the three legal strategy pathways in this grouping. First, avoidance—described as “the conscious choice to disregard or remain willfully blind to the legal consequences of [one's] actions”—is the first path sponsors can take.⁴³ Avoidance tends to be an ineffective and unethical long-term strategy.⁴⁴ In the athlete

⁴⁰ Lauren Rosenbaum, *140 Characters or Less: A Look at Morals Clauses in Athlete Endorsement Agreements*, Note, 11 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 129, 134 (2015) (noting that athlete endorsement agreements “may also be a pivotal part of a company's marketing strategy”); Shontavia Johnson, *Branded: Trademark Tattoos, Slave Owner Brands, and the Right to Have “Free” Skin*, 22 MICH. TELECOMM. & TECH. L. REV. 225, 246 (2016) (noting that athlete endorsement contracts have produced strong financial returns for various companies); *Q&A: The strategy and the pitfalls of linking a brand with a celebrity*, NEWS@NORTHEASTERN (Jan. 14, 2010) (stating that “[i]n industries featuring undifferentiated and commodity-like products, it is sometimes a specific athlete or celebrity who helps to differentiate the brand in the mind of the consumer); cf. *Laura Lee Stapleton & Matt McMurphy, The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 23 (1999) (stating that a number of top athletes now make more money endorsing products than playing their sports because of the athletes value to the firm's seeking the endorsements); Pamela R. Lester, *Marketing the Athlete; Endorsement Contracts*, 47 ALI-ABA 405, 414 (noting that marketability can be impacted by “intangible factors contributing to an athlete's marketability include his or her image, reputation, geographic appeal, athletic and nonathletic achievements, unique skills, personality, public speaking ability, and physical appearance.”).

⁴¹ See generally, Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1 (2008); Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGT. REV. 81 (2014).

⁴² Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGT. REV. 81, 89 (2014).

⁴³ *Id.*

⁴⁴ Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 1, 12-17 (2008) (noting that avoidance as a legal strategy is often paired with unethical or illegal actions).

endorsement context, avoidance may take the form of drafting unenforceable contracts that are overly vague or unconscionable, and then using legal bullying to threaten costly lawsuits.⁴⁵ Avoidance is an easy pathway for sponsors to use when they have a significant bargaining power advantage and benefit from information asymmetry, for example, with a relatively young athlete with less significant resources. In the pre-contractual negotiation stage, sponsors could follow the avoidance legal pathway in encouraging the creation of sunk costs, such as legal fees reviewing extensive contracts, to put the athlete in a weak position late in the negotiation or even after the negotiation by threatening a break.⁴⁶ According to Olympian Nick Symmonds, “Nike did [to Berian] what Nike does, which is use bullying tactics when they don’t have a legal leg to stand on;” this is a classic avoidance description.⁴⁷ Also on the avoidance pathway, firms could also engage in what Larry DiMatteo calls “[n]egative strategic posturing” and negotiate with athletes who already signed with competitors with no intention of entering a contract, but rather in attempt to tease out confidential information about the athlete’s current sponsor.⁴⁸ Obviously, the avoidance legal strategy pathway can carry both legal and ethical consequences.

Next, sponsors can follow their athlete endorsement contract negotiation and enforcement down the compliance legal strategy pathway. Bird and Orozco describe the compliance legal strategy pathway as a “recogni[tion] that the law is an unwelcome but mandatory constraint on their activities.”⁴⁹ On this pathway, sponsors would not engage in impermissible contractual terms, such as overly vague or unconscionable language, but rather would seek to minimize the costs of the contracting and enforcement while doing the bare minimum needed to secure the athlete’s endorsement. Focusing on compliance only may lead to an overreliance on boilerplate, which may have been used strategically by a firm at one point, but is used in this case

⁴⁵ David Orozco, *Strategic Legal Bullying*, N.Y.U. J. L. & BUS. (forthcoming), available at https://docs.wixstatic.com/ugd/716e9c_546b852f0b184ac89880a0a7fad6cde6.pdf (describing “legal bullying” as “exploit[ing] the high costs of the legal system to advance a baseless legal position that yields a favorable result at the expense of a much weaker party”).

⁴⁶ See Larry A. DiMatteo, *Strategic Contracting: Contract Law As A Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 748-49 (2010) (discussing leveraging sunk costs to engage in opportunistic behavior in contract negotiation and contractual relationship).

⁴⁷ Tim Layden, *Boris Berian’s Olympic Bid Caps His Stunning 18-Month Rise*, SPORTS ILLUSTRATED (July 5, 2016), <http://www.si.com/olympics/2016/07/04/boris-berian-olympics-2016-rio-track-and-field-trials>; see also Rick Maese, *Nike digs in its heels for court battle with rising track star Boris Berian*, THE WASHINGTON POST (June 8, 2016) <https://www.washingtonpost.com/news/sports/wp/2016/06/08/nike-digs-in-its-heels-for-court-battle-with-rising-track-star-boris-berian/> (Berian “contends Nike is trying to sabotage his Olympic dream and his attorneys contend the company’s litigation is ‘designed to hinder Mr. Berian’s training and bully him into submission.’”).

⁴⁸ DiMatteo, *supra* note 46 at 759-60.

⁴⁹ Bird & Orozco, *supra* note 42 at 84.

to minimize cost.⁵⁰ With a compliance mindset, lawyers will be engaged by the sponsors, but only briefly at the negotiation and enforcement junctures, and will be largely left out and unaware of broader strategic maneuvering and plans.⁵¹

In the final “managing risk” legal strategy pathway of “prevention,” sponsors can draft athlete endorsement contract terms to proactively minimize legal risks.⁵² Mandatory arbitration clauses, choice of forum, choice of law, and clauses disclaiming an employer/employee relationship with the athlete may all be clauses that seek to minimize future legal costs.⁵³ Time could also be spent ensuring the athlete (or at least her lawyer) understands the terms of the endorsement agreement so that there is less likelihood of misunderstanding and dispute later. On the prevention legal strategy pathway, sponsors may incur more legal costs up-front, as their lawyers are likely to be more engaged, included in more strategy sessions, and customizing contracts to address the most current and relevant legal risks. In the long-run, however, the extra up-front costs may be more than offset by legal savings when a trial is avoided or the athlete’s lawyer notes the careful and protective language of the contract.⁵⁴

B. GENERATING BUSINESS OPPORTUNITIES: VALUE AND TRANSFORMATION

The second set of legal strategy pathways hold the possibilities of generating business opportunities for sponsors, leading to value or transformation.⁵⁵ On the value legal strategy pathway, “[l]aw is used with the goal of creating tangible, identifiable

⁵⁰ DiMatteo, *supra* note 46 at 768-69 (discussing legal strategy and the use of boilerplate contractual terms).

⁵¹ Bird & Orozco, *supra* note 42 at 85 (noting legal counsels policing role in the compliance pathway).

⁵² *Id.* at 86; accord George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641, 650 (2010) (discussing Bird’s “prevention” legal pathway).

⁵³ Alan S. Kaplinsky, Mark J. Levin, *Consumer Arbitration: If the FAA “Ain’t Broke,” Don’t Fix It*, 63 BUS. LAW. 907, 910 (2008) (noting that “(i) [s]eventy-eight percent of trial attorneys find arbitration faster than lawsuits; (ii) [e]ighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits; (iii) [s]eventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits”) (internal quotations and citations omitted); Michael H. Leroy & Peter Feuille, *When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 162 (2002) (noting that arbitration is generally less expensive than going to trial).

⁵⁴ *Cf.* Lieutenant Colonel John Gohl, *Acquisition Planning in the United States Army Reserve*, ARMY LAW., February 2008, at 1, 7 (noting that ambiguous contract language can lead to higher legal costs); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950-52 (1979) (noting how the law sets a framework for the parties to negotiate within).

⁵⁵ Bird & Orozco, *supra* note 42 at 85.

value.”⁵⁶ In the athlete endorsement context, sponsors could draft and enforce contracts in a way that leads to new and increased revenue streams. For example, in the proposed Nike/Berian Contract Nike includes terms that would direct Berian not only to wear and endorse Nike, but also to appear at certain events and stores where Nike could capitalize on the athlete’s presence. Further, sponsors could use exclusivity provisions to limit the appeal of rival brands, and boost their own sales.⁵⁷ Transformation, as a legal strategy pathway, goes a step beyond mere value creation and uses “[l]aw as an essential aspect of long-term strategic planning for the business.”⁵⁸ Sponsors could use law to transform their business by building on the exclusivity provision of the endorsement contract and building their brand image around one or more endorsing athletes. Further, sponsors could take especially popular athletes and create a separate brand using the athlete’s name, using law to license that brand to firms making other products. One example of this strategy is Nike’s use of law to secure a license for Michael Jordan’s name for use on a popular line of shoes; sponsors could negotiate for the rights to license the name to other companies as well.⁵⁹ Transformation would also require looking at how the contract is enforced to make sure such enforcement aligns with the desired brand image. Brooks, a running shoes and apparel company, for example, has embraced the tagline “Run Happy” so prominently that they are referred to as the “Run Happy Company.”⁶⁰ If Brooks were to engage in legal bullying with its sponsored athletes that strategy could have impact on the brand that went well beyond the individual case. Similarly, treating sponsored athletes fairly, and even generously, could entrench the pursued positive brand image and also lasso elusive authenticity because their legal maneuver required some sacrifice.⁶¹ While the transformation legal pathway leads to the highest potential gains,

⁵⁶ Second Declaration of Merhawi Keflezighi In Support Of Defendant Boris Berian’s Opposition To Plaintiff’s Motion For Order To Show Cause Why A Preliminary Injunction Should Not Issue, *supra* note 22.

⁵⁷ Keven J. Davis & Pamela R. Lester, *Exclusivity in Endorsement Contracts--The Athlete’s View*, ALI-ABA COURSE OF STUDY: ENTERTAINMENT, ARTS, AND SPORTS LAW, January 25-27, 2007 (AM. LAW INST. & AM. BAR ASS’N 2007).

⁵⁸ Bird & Orozco, *supra* note 42 at 85.

⁵⁹ David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, 49 CASE W. RES. L. REV. 671, 673 (1999) (noting the licensing of Michael Jordan’s names for shoes and cologne).

⁶⁰ *Run Happy is Behind Everything We Do*, BROOKS RUNNING, https://www.brooksrunning.com/en_us/meet-brooks/run-happy; see also Peter Gambaccini, *Nick Symmonds Leaves Oregon Track Club, Signs with Brooks*, RUNNER’S WORLD (Jan. 2, 2014), <http://www.runnersworld.com/newswire/nick-symmonds-leaves-oregon-track-club-signs-with-brooks> (calling Brooks the “Run Happy Company”).

⁶¹ D.J. Skee, *Why Being Authentic Is the Best Thing You Can Do for Your Brand*, INC. (Sept. 15, 2016), <http://www.inc.com/dj-skee/why-being-authentic-is-the-best-thing-you-can-do-for-your-brand.html> (noting some of the sacrifices required to earn authenticity for a brand); see also Jerre B. Swann, Sr., David A. Aaker & Matt Reback, *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 812 (2001) (noting that “‘authenticity,’ a measure of the brand’s credibility and legitimacy within the context of its product class. Authenticity is fueled by the

it also includes the highest potential costs, as weaving an athlete into the essential parts of the firm's business leave the sponsor vulnerable, which is why morals clauses, performance-based termination clauses, and other options can give firms some needed flexibility in athlete endorsement contracts.⁶²

IV. NEGOTIATION THEORY AND ATHLETE ENDORSEMENT CONTRACTS

Like the five legal strategy pathways discussed in the previous part, negotiation theory can inform sponsors' approach to athlete endorsement contracts. This part dissects the lessons of principled negotiations, applying the lessons to sponsors negotiating and enforcing athlete endorsement contracts.

A. PREPARATION: UNDERLYING INTERESTS, BATNA, AND OBJECTIVE STANDARDS

Negotiation theory teaches that significant time should be spent in the preparation phase.⁶³ Sponsors should first uncover and prioritize their own underlying interests that could be addressed in the negotiation.⁶⁴ These interests could include things like, build a financially sustainable company, protect and improve the firm's brand globally, increase youth sports apparel sales, improve community goodwill, expand successfully in Asia, minimize taxes paid, improve research and development regarding high end athletic products, successfully launch eyewear line, improve and increase technology products. Sponsors should also engage in perspective taking and attempt to identify the interests of the athlete, through research, recalling similar experiences with other athletes and asking the athlete or her agent.⁶⁵ The athlete's interests could include things like, find comfortable housing near training facility, access to excellent training facilities, financial stability that allows for sufficient time to train, buy a Sports Utility Vehicle, find good schools for children, improve personal brand, play on winning teams, play for a world class coach, travel the world. Identifying multiple interests in a negotiation increases the ability to trade items that the parties value differently, leading to a positive result for both parties.⁶⁶ For example, morals clauses were likely created from a top interest of sponsors, to protect the firm's

substance of the product or service as well as by aspects of the brand's heritage that the customer may know.").

⁶² See *supra* Part I.C-D. Conditions & Morals Clauses.

⁶³ MELISSA L. NELKEN, *NEGOTIATION: THEORY AND PRACTICE* 37 (2d. 2007).

⁶⁴ LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 13-14 (discussing the importance of understanding your own wants, alternatives, and aspirations prior to a negotiation).

⁶⁵ *Id.* at 75-76 (discussing how perspective taking leads to improved negotiating outcomes).

⁶⁶ *Id.* at 70-71 (noting how multiple issues and different values can lead to "win-win" negotiations).

brand image. Athletes, like Lochte and Berian, likely value their freedom, but, at least at the negotiating stage, giving up destructive immoral public behavior seems like a small price to pay to address a main concern of sponsors.

Prior to negotiation with an athlete, the potential sponsors should also uncover their best alternative to a negotiated agreement (“BATNA”).⁶⁷ A party’s BATNA is a major source of power in a negotiation.⁶⁸ If the sponsor’s BATNA is weak, they should consider seeking to improve their BATNA, by doing things like scouting for additional potential athlete endorsers, considering grooming or increasing promotion of existing athlete endorsers.⁶⁹ If negotiating regarding enforcement of an existing athlete endorsement contract, sponsors may be able to increase their BATNA by pre-negotiating rates with their lawyers, in case the best alternative is taking the issue to court. In some cases, taking an issue to court may set precedent that would improve future BATNAs, though such cases could also, potentially set harmful precedent, so the cases taken to trial should be chosen with extreme care, as the impact may be felt in various other endorsement negotiations in the future.

Further, in the preparation stage, sponsors should research objective standards to reference in the negotiation.⁷⁰ These objective standards will likely include precedent from previous endorsement deals, and the data available about norms or market terms in the industry.⁷¹ In the contract negotiation phase, the athlete has or has had previous endorsement deals, the details of those deals would likely be relevant, as would data on revenue generated that can be tied to the endorsement. Items like social media followers, the athlete’s professional sports contract terms, and amount of recent global media coverage may all be relevant. In the enforcement or litigation phase, past court case decisions or arbitration decisions will be the most helpful benchmark.⁷²

⁶⁷ ROY J. LEWICKI, DAVID M. SAUNDERS, BRUCE BARRY, *NEGOTIATION* 11 (7th ed. 2015) (defining BATNA and discussing its value); accord Richard Birke, *Evaluation and Facilitation: Moving Past Either/or*, 2000 J. DISP. RESOL. 309, 316 (2000) (citing ROGER FISHER, WILLIAM URY, & BRUCE PATTON, *GETTING TO YES* 97-106 (2d. ed. 1991)).

⁶⁸ Russell Korobkin, *Bargaining Power As Threat of Impasse*, 87 MARQ. L. REV. 867 (2004).

⁶⁹ Jennifer W. Reynolds, *Breaking Batnas: Negotiation Lessons from Walter White*, 45 N.M. L. REV. 611, 622 (2015) (stating that “knowing one’s BATNA and working to improve it when possible are fundamental to negotiation preparation and process).

⁷⁰ Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1, 17 (2005) (noting the importance of objective standards in successful negotiations).

⁷¹ ROY J. LEWICKI, DAVID M. SAUNDERS, BRUCE BARRY, *NEGOTIATION* 96 (7th ed. 2015) (noting that objective standards can take the form of precedence or industry standards); Omar M. Dajani, *Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT’L L. 61, 70 (2007) (explaining that norms can serve as objective standards in negotiations).

⁷² LEWICKI, *supra* note 71 at 96.

B. NEGOTIATION: INTEGRATIVE AND DISTRIBUTIVE

In the negotiation, the sponsors should first focus on integrative negotiation. Integrative negotiation is known more commonly as “expanding the pie,” or “win-win negotiation,” and has been defined as requiring “us[ing] their desire to satisfy both sides as the perspective from which to structure their dialogue.”⁷³ In the case of athlete endorsement contracts, morals clauses can represent a potential win-win, as the good behavior of the athlete is beneficial to both the sponsor and the athlete. The morals clause incentivizes good behavior, protecting the brand and protecting the athlete, at least to some degree, from himself. If interests are well understood, sponsors can use contract terms to address both sets of interests. For example, an athlete may value top training facilities, and the sponsor may be able to help fund those facilities in exchange for research and development for their products. And the athlete could then later benefit from the research and development, especially in the area of sporting equipment and shoes, which are used in the athlete’s sport. Conditions and optionality in contracts can help address the times that the sponsor and the athlete have different expectations. For example, the athlete may think he deserves \$200,000 a year for a sponsorship because he expects to be a top-10 athlete in the world. The sponsor can trade on that confidence and condition a large percent of the payment on the athlete achieving and maintaining that top-10 ranking. Once the pie is expanded and items the parties value differently are traded, distributive negotiation (or the slicing of the remaining pie) still has to be done. Here, the objective standards uncovered in preparation can be extremely useful as they can be used to justify the sponsor’s position without appearing to take advantage of the athlete. In the contract enforcement context, the contract language itself, coupled with precedent cases, will be the objective data most useful in a negotiation. With athlete endorsement contracts, having performance based conditions and a solid morals clause gives the sponsor the most strength in the negotiation when the endorsement agreement sours.

C. REPUTATION, NORMS, AND FUTURE NEGOTIATIONS

Even if the sponsor has the upper hand in endorsement contract negotiation and enforcement, the sponsor will want to consider its reputation, industry norms, and future negotiations. In today’s digital age, news of firm misbehavior travels quickly. Even if a sponsor has legal justification to impose onerous terms or terminate a contract, doing so may come across as mistreating their endorsing athletes, especially if the terms or decision violate industry norms.⁷⁴ As such, sponsors will want to consider both their desired image in the public and the industry norms before pursuing

⁷³ ROY J. LEWICKI ET AL., *ESSENTIALS OF NEGOTIATION* 66 (1999) (discussing integrative negotiation); *see also* LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 69-90 (discussing “win-win negotiation”).

⁷⁴ *See generally*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

harsh legal action. Further, the sponsor will want to consider potential future negotiations with that athlete (for example if that athlete is injured, and violates terms of the contract, but then fully recovers) and future negotiations with other athletes. News of one-sided contracts and uncharitable contract enforcement may be harmful if it spreads to other athletes that the sponsor is pursuing. The sponsor can cut against negative information flow with confidentiality agreements, though those agreements are unlikely to prevent all information flow and silencing the athlete may raise suspicions that are even worse than the truth.⁷⁵ On the other side, however, if a sponsor is consistently entering into contracts with below market terms and consistently fails to exercise its right, the sponsor may quickly find itself bankrupt.⁷⁶ Optionality in the contracts, giving the sponsors the right to terminate due to poor performance or immoral action can both provide downside protection and can allow the sponsor to charitably choose not to enforce the terms on occasion to preserve its reputation. In deciding whether to exercise its option to terminate or reduce payment, the sponsors should consider the athlete's reasonable expectations and the reasonable expectations of the general public, as violation of those expectations may have negative public relations consequences, even if the sponsor's actions were legally justified.

V. CONCLUSION

This essay has applied the wisdom of legal strategy and negotiation theory to the area of athlete endorsement contracts, with a special focus on the different fact patterns involving Olympians Boris Berian and Ryan Lochte. Legal strategy scholars have used a five pathways framework to organize options of firms, three pathways dealing with managing risk and two pathways dealing with generating business opportunities. This essay argues that sponsors can generate more business opportunities, through the value and transformation pathways, by dedicating significant resources to the athlete endorsement contract negotiation and enforcement stages. Clarity of communication regarding contract terms and expectations, and thoughtfully using contractual optionality through morals clauses and performance based conditions, can be useful to sponsors. Sponsors should endeavor to eliminate, to the extent possible, ambiguity, and to clearly communicate expectations to their endorsing athletes. Sponsors that develop trust, which starts with mutual

⁷⁵ See, e.g., Richard J. Peltz-Steele & Eric J. Booth, *In Tort Pursuit of Mass Media: Big Tobacco, Big Banks, and Their Big Secrets*, 44 U. MEM. L. REV. 267, 293-95 (2013) (discussing information leaks in spite of confidentiality agreements).

⁷⁶ Sara Germano, *At Olympic Track Trials, Spotlight Is on Boris Berian After Nike Lawsuit*, THE WALL STREET JOURNAL (July 4, 2016), <http://www.wsj.com/articles/at-olympic-track-trials-spotlight-is-on-boris-berian-after-nike-lawsuit-1467656783> (discussing firms with athlete friendly contractual terms, with guarantees and without conditions, and stating "Once they have a large portfolio of athletes not performing and who are literally sitting at home watching TV, and they have no recourse, they will change their thinking.").

understanding of the contractual terms through the negotiation process, will be able to improve their reputation and compete for the top endorsers.

Likewise, negotiation theory provides valuable insights for sponsors, suggesting significant pre-contractual preparation, perspective taking, and use of objective standards. In the cases detailed, Boris Berian's situation is a cautionary one for sponsors. There, the contractual terms did not appear well-communicated and were onerous. As such, the sponsor appeared to upset its former athlete, to lose customer goodwill, and to expend legal resources in a case the sponsor later dropped as the negative publicity mounted. In the Ryan Lochte example, however, the morals clauses appeared to be of the type expected by the athlete and the general public. As such, the morals clause and the optionality in the endorsement contract worked as intended, protecting the sponsor from significant downside risk without loss of goodwill.