

Do Not Pass Go and Do Not Collect \$200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes from Living at Park Place

Jill K. Ingels

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Jill K. Ingels, *Do Not Pass Go and Do Not Collect \$200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes from Living at Park Place*, 27 Marq. Sports L. Rev. 171 (2016)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol27/iss1/7>

COMMENTS

DO NOT PASS GO AND DO NOT COLLECT \$200: NIKE'S MONOPOLY ON USATF VIOLATES ANTITRUST LAWS AND PREVENTS ATHLETES FROM LIVING AT PARK PLACE

JILL K. INGELS*

“I pledge allegiance to [the] Swoosh of the United States of Nike, and to the Republic for which it stands, one Nation under Phil Knight, indivisible, with liberty and justice for Michael Jordan, FuelBands, and cute running shorts.”¹

I. INTRODUCTION

This Comment discusses how the exclusive partnership agreement between USA Track & Field (USATF) and Nike places an undue burden on track and field athletes' freedom of contract and can actually decrease the value of such individual sponsorship agreements. This Comment examines track and field athletes' responses and actions following the announcement of USATF and Nike's agreement in order to note the effects on athletes and their individual sponsorship agreements. Further, this Comment examines the likelihood of this agreement, and agreements like it, violating federal antitrust laws, specifically section 1 of the Sherman Antitrust Act (Sherman Act). Included in this examination is the litigation brought by Nick Symmonds and how his claims may have survived USATF's Motion to Dismiss had he organized his arguments in the manner I propose. Finally, this Comment offers a few solutions to lessen the blow of exclusive sponsorship agreements on USATF athletes.

My proposed solutions include the possibility of finding USATF and Nike's

* Jill K. Ingels is a J.D. Candidate at Marquette University Law School and Editor-in-Chief of the *Marquette Sports Law Review*. She attended the University of Wisconsin–Madison and received a B.S. in Economics and a B.S. in Political Science.

1. *United States of Nike: USATF Sponsorship Has Failed Our Athletes, and Our Support*, AN ATHLETE'S BODY (Aug. 13, 2015), <http://anathletesbody.com/2015/08/13/united-states-of-nike-usatf-sponsorship-has-failed-our-athletes-and-our-sport/>.

agreement illegal as a violation of the Sherman Act; the possibility of USATF athletes being able to wear certain indirect sponsor logos on their uniforms, apparel, and equipment; and the possibility that USATF athletes should be allowed to wear individual sponsor logos at all competitions, including USATF-sponsored competitions, except during the race or event itself.

II. USATF AND NIKE'S EXCLUSIVE SPONSORSHIP AGREEMENT

USATF is the “National Governing Body for track [and] field, long-distance running[,] and race walking in the United States.”² USATF is a non-profit organization led by Stephanie Hightower and Max Siegel, its President and Chief Executive Officer (CEO) respectively.³ The USATF National Office is located in Indianapolis, Indiana,⁴ and USATF’s mission is to “drive[] competitive excellence and popular engagement in [its] sport.”⁵ Currently, there are almost 100,000 American members in USATF and USATF’s member organizations including “the U.S. Olympic Committee, NCAA, NAIA, Road Runners Club of America, Running USA[,] and the National Federation of State High School Associations.”⁶

As a national governing body (NGB), USATF must comply with the Olympic Charter; comply with the International Olympic Committee’s (IOC) rules; comply with the International Federation’s (IF) rules, which for track and field is the International Association of Athletics Federations (IAAF); and must “exercise a specific and real sports activity.”⁷ Because NGBs are subject to applicable domestic laws within their respective countries,⁸ USATF must comply with both United States federal law and Indiana state law.

On April 14, 2014, USATF and Nike expanded their partnership agreement such that their partnership extends from 2017 through 2040.⁹ While USATF and Nike are not disclosing the “financial details of the arrangement,” it is believed to double USATF’s current annual support, both “financial[ly] and

2. *About USATF*, USA TRACK & FIELD, <http://www.usatf.org/About.aspx> (last visited Dec. 15, 2016).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 260 (3d ed. 2013).

8. *Id.* at 261.

9. *USATF and NIKE Inc. Sign Long-term Partnership*, USA TRACK & FIELD (Apr. 16, 2014), <http://www.usatf.org/News/USATF-and-NIKE-Inc--sign-long-term-partnership.aspx>.

in-kind.”¹⁰ If this is true, and based on past USATF financial documentation and media reports, Nike will provide USATF with \$17–\$20 million annually.¹¹ This agreement maintains Nike as USATF’s “exclusive sponsor and supplier of products to the world’s No. 1 track and field team, while being USATF’s official sponsor in the footwear, apparel and retail categories, and exclusive athletic footwear and apparel licensee within its running and route tracking/management app and social network category.”¹² Nike stated this partnership expansion “marks an ongoing commitment from Nike to the sport” and “significantly increases the overall support for track and field athletes throughout the U.S.”¹³ Nike will remain the official outfitter of all Team USA gear and all USATF teams in international competitions, “including the Olympic Games, World Championships, Pan American Games[,] and World Junior Championships, among other meets.”¹⁴ In 2015, alone, Team USA events included an exhausting list of twenty-one events, spanning from January 10, 2015, to November 1, 2015.¹⁵

So does this sponsorship agreement accomplish anything other than USATF’s cash register ringing? Or will it actually promote the sport of track and field and its athletes? After all, USATF sought no other competitive bids and the company who got the contract is not only Max Siegel’s racing team’s sponsor, but also has a former ambassador, Sebastian Coe, conveniently serving as IAAF’s President.¹⁶ Has no one ever received media attention and public criticism for a conflict of interest before? And how is the nonexistence of bidding actually helping USATF? Kevin Durant’s contract “nearly quadrupled” when Nike and Under Armour got into a “bidding war” over his contract.¹⁷ And, Adidas’s Spencer Nel told LetsRun.com that “[A]didas was very interested in sponsoring USATF but was not given the chance to bid.”¹⁸ So while USATF tries to tell the public and its athletes that this sponsorship agreement greatly benefits the sport of track and field and provides more funding to its athletes,

10. Alan Abrahamson, *USATF, Nike in Apparent \$500 Million Deal*, 3 WIRE SPORTS (Apr. 16, 2014), <http://www.3wiresports.com/2014/04/16/usatf-nike-apparent-500-million-deal/>.

11. *Id.*

12. *USATF and NIKE Inc. Sign Long-term Partnership*, NIKE NEWS (Apr. 16, 2014), <http://news.nike.com/news/usatf-and-nike-inc-sign-long-term-partnership>.

13. *Id.*

14. *Id.*

15. *2015 Team USA Events*, USA TRACK & FIELD, <http://www.usatf.org/Events---Calendar/Team-USA-Events.aspx?year=2015> (last visited Dec. 15, 2016).

16. *Editorial: We Respect Nick Symmonds, But Don't Have a Lot of Sympathy He Won't Be at Worlds*, LETSRUN.COM (Aug. 12, 2015), <http://www.letsrun.com/news/2015/08/editorial-we-respect-nick-symmonds-but-dont-have-a-lot-of-sympathy-he-wont-be-at-worlds/>.

17. *Id.*

18. *Id.*

USATF athletes should be left wondering how much more they could have received, or how much more another company valued USATF, had another company like Adidas been given the chance to bid for this sponsorship deal.

III. USATF'S REVENUE-SHARING PLAN

Under the new sponsorship agreement with Nike, USATF has praised its revenue distribution model, which provides an additional \$9 million—over the course of the next five years—to its athletes.¹⁹ The plan was announced in September 2015, and USATF CEO Max Siegel and Athletes' Advisory Committee (AAC) Chairman Dwight Phillips signed the memorandum of understanding (MOU) two months later, in early November 2015.²⁰ Starting in 2016, approximately \$10,000 is provided annually to each IAAF World Outdoor Championships or Olympic Team athlete, making up roughly 75% of the new funds.²¹ This 75% amounts to approximately \$1.8 million per year and is “additional, cash funds . . . over and above current funds available through USATF Tier funding, development funding[,] and other programs.”²² The remaining 25% is divided between those IAAF World Outdoor Championships or Olympic Team athletes that medal that year.²³ Gold medalists are awarded \$25,000 as “medal bonus money,” while silver medalists receive \$15,000, and bronze medalists receive \$10,000.²⁴ Relay athletes split the bonus money equally between the “number of athletes who run at least one round on that medal-winning team.”²⁵

As of the USATF Annual Meeting in Houston, Texas, on December 3–4, 2015, terms regarding the revenue-sharing plan are still to be resolved. The AAC, led by its Chair, Dwight Phillips, and Vice Chair, Jeff Porter, will “get to play a big role in what those [terms] are.”²⁶

IV. REGULATION OF OLYMPIC ATHLETES

Several governing bodies govern each Olympic athlete: the IOC, the United States Olympic Committee (USOC), the individual athlete's specific team, and

19. *USATF, Athletes Sign MOU for Revenue Distribution Model*, USA TRACK & FIELD (Nov. 3, 2015), <http://www.usatf.org/News/USATF,-athletes-sign-MOU-for-revenue-distribution-.aspx>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Lauren Fleshman, *USATF Annual Meeting Wrap Up*, ASK LAUREN FLESHMAN (Dec. 8, 2015), <http://asklaurenfleshman.com/2015/12/usatf-annual-meeting-wrap-up/>.

the IAAF.²⁷ The IOC recognizes each IF as the “worldwide governing body for a particular sport or group of sports[,]” and each IF “encompasses the NGBs,” which serve as the national governing body for the “subject sport(s) in each country.”²⁸

The IOC creates the Olympic Charter, which has the supreme authority of the Olympic movement, and is domiciled in Lausanne, Switzerland.²⁹ The IOC is a private, international, non-governmental, non-profit organization that is recognized by the Swiss Federal Council and must comply with Swiss law.³⁰ On any questions regarding the Olympic Games, “[t]he IOC is the ‘authority of last resort.’”³¹ One hundred six elected individuals serve as the IOC’s representatives in their respective home countries.³²

The USOC generates a majority of its revenues through corporate sponsorships.³³ In the most basic sense, corporate sponsorships allow the sponsors to use the USOC logo, such as the five Olympic rings,³⁴ on its advertising and other products. The USOC has exclusive jurisdiction and authority over participation and representation of the United States in the Olympic Games, and can decide whether to send an American team to the Olympics or not.³⁵ The IAAF governs track and field on a national basis; has plenary authority to govern, through enforcement and regulation, the sport; and come up with the rules of the game.³⁶ More than sixty-five individuals make up the IAAF’s staff, representing “more than a dozen different nations.”³⁷

Within the United States, the Ted Stevens Olympic and Amateur Sports Act (ASA) allows internal governance of Olympic sports.³⁸ The ASA is a federal statute mandating that the USOC is the coordinating body for Olympic and

27. See MITTEN ET AL., *supra* note 7, at 260.

28. *Id.*

29. *Id.* at 259.

30. *Id.*

31. *Id.* (quoting INT’L OLYMPIC COMMITTEE, OLYMPIC CHARTER 17 (Aug. 2, 2015), http://www.olympic.org/Documents/olympic_charter_en.pdf).

32. MITTEN ET AL., *supra* note 7, at 259.

33. JOHN E. FINDLING & KIMBERLY D. PELLE, HISTORICAL DICTIONARY OF THE MODERN OLYMPIC MOVEMENT 398 (1996).

34. The USOC has authority to use and regulate the use of trademarks and logos associated with the Olympic, Paralympic, and Pan American Games. *Brand Usage Guidelines*, USOC, <http://www.teamusa.org/brand-usage-guidelines> (last visited Dec. 15, 2016).

35. *DeFrantz v. USOC*, 492 F. Supp. 1181, 1187 (D.D.C. 1980).

36. See MITTEN ET AL., *supra* note 7, at 260.

37. *New IAAF HQ Inaugurated in Monaco*, IAAF.ORG (May 11, 2015), <https://www.iaaf.org/news/iaaf-news/new-iaaf-hq-monaco>.

38. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220505(c)(3) (2016).

international “amateur” athletic competitions.³⁹ The USOC will select the NGB for each Olympic sport,⁴⁰ and domestic disputes are resolved through American Arbitration Association (AAA) arbitration. The ASA does not create a private right of action, and a court will not enforce a right that does not exist nor will it imply a private right of action.⁴¹

Individual teams are also allowed to create their own rules regarding athletic sponsorships, enforceable by the individual team as well as the USOC. The most extreme sanctions for violating these rules include disqualification and being stripped of medals,⁴² which is especially devastating for Olympic athletes where there is only one Olympic team per country every four years, prohibiting that athlete from competing on the country’s behalf. This is one of the reasons why it is extremely important for athletes to be aware of their governing body’s rules for their respective sport—all USATF rules, IF rules, IOC rules, USOC rules, and, finally, the Olympic Charter’s rules.

So what effect do sponsorship agreements and multiple governing bodies have on an athlete’s freedom of contract and ability to obtain sponsorship agreements?

Another area regulating Olympic athletes is known as the Olympic Charter’s “Rule 40,” which prohibits all USATF athletes from “endorsing, publicizing[,] etc[.] any company that is not a[n] International Olympic Committee sponsor.”⁴³ Rule 40 states, “Except as permitted by the IOC Executive Board, no competitor, team official[,] or other team personnel who participates in the Olympic Games may allow his person, name, picture[,] or sports performances to be used for advertising purposes during the Olympic Games.”⁴⁴ Rule 40 effectively requires a “media blackout period prior to, through, and just after the Olympic Games for non-IOC sponsors.”⁴⁵ This period is called the “Games Period” or “Rule 40 period,” beginning nine days prior to the Opening Ceremony and concluding three days after the Closing Ceremony.⁴⁶ The USOC

39. *Id.* § 220505(c)(1).

40. *Id.* § 220521. “Corporation” refers to the USOC. *Id.* § 220501.

41. *DeFrantz v. USOC*, 492 F. Supp. 1181, 1191 (D.D.C. 1980).

42. Chris Chavez, *Rule 40 and the Olympics: A Sponsorship Blackout Period*, SPORTS ILLUSTRATED (July 25, 2016), <http://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy>.

43. Maria Michta, *When It’s Not Black and White, but Still Worth the Right Fight!*, MARIA MICHTA’S JOURNEY (Aug. 10, 2015), <http://www.mariamichta.com/when-its-not-black-and-white-but-still-worth-the-right-fight/>.

44. INT’L OLYMPIC COMMITTEE, OLYMPIC CHARTER 79 (Aug. 2, 2015), http://www.olympic.org/Documents/olympic_charter_en.pdf [hereinafter OLYMPIC CHARTER].

45. Michta, *supra* note 43.

46. U.S. OLYMPIC COMMITTEE, 2012 INFORMATION FOR ATHLETES, THEIR AGENTS AND NGBS 2, 4 (Nov. 2011), http://www.usatf.org/events/2012/OlympicTrials-TF/athleteInfo/Rule40_Pamphlet

says Rule 40's motivation is to “prevent ambush marketing which might otherwise utilize athletes to imply an association with the Games.”⁴⁷ Rule 40 applies to “Participants” participating in the Olympic Games (competitors, coaches, trainers, and officials); athlete agents; NGBs; and sponsors, businesses, and other organizations.⁴⁸

But Rule 40 also means that USATF athletes who are trying to raise money to pay for travel expenses, or have their family come to the Olympics with them, cannot use any images from the Olympic Trials or even their Olympic title in doing so.⁴⁹ University of Birmingham Law School graduate Joanne Clark said that even a “‘thank you’ tweet” after winning an Olympic medal could be a violation of Rule 40.⁵⁰ A 140-character tweet may lead an athlete to lose his medal. Maria Michta, a USATF 20K Race Walk athlete, clearly stated that Rule 40 hurts the smaller and less well-known athletes the most.⁵¹

Due to USATF athletes' strong protest, including a Twitter campaign using the hashtag “#WeDemandChange2012” during the London Olympic Games, the IOC has changed Rule 40.⁵² The new rule “allow[s] ‘generic’ or ‘non-Olympic advertising’ during the games.”⁵³

The new Rule 40 is in effect for the Rio 2016 Olympic Games and implements a “new waiver process for the U.S. territory.”⁵⁴ This seemingly innovative and accommodating option for USATF athletes, however, is still as ambiguous as USATF's Statement of Conditions, which is discussed in detail below. Not only can there be “[n]o direct or indirect association with Rio Games,” whatever that means, but “[i]nitial campaign submissions” must be submitted to the USOC at least six months in advance “to ensure the USOC has time to review and respond, manage resubmissions[,] and allow for advertiser production schedules.”⁵⁵ This submission must show that the campaign will start more than four months before the “Rule 40 period” and “each and every

_4.pdf.

47. *Id.* at 2.

48. *Id.*

49. Maria Michta, *#WeDemandChange*, MARIA MICHTA'S JOURNEY (July 30, 2012), <http://www.mariamichta.com/wedemandchange/>.

50. *WE DEMAND CHANGE!*, JOANNE CLARKE (Oct. 24, 2015), <https://joanneclarke11.wordpress.com/2015/10/24/we-demand-change/>.

51. Michta, *supra* note 49.

52. Associated Press, *IOC Relaxes Rule on Athletes and Sponsors During Olympics*, USA TODAY (Feb. 26, 2015), <http://www.usatoday.com/story/sports/olympics/2015/02/26/ioc-relaxes-rule-on-athletes-and-sponsors-during-olympics/24084119/>.

53. *Id.*

54. *USOC Athlete Marketing – Rule 40 Guidance*, TEAM USA (Oct. 1, 2015), <http://www.teamusa.org/Athlete-Resources/Athlete-Marketing/Rule-40-Guidance>.

55. *Id.*

final tactic” requires a waiver.⁵⁶

I do not know how many athletes and their sponsors are going to be scrambling to make submissions to the USOC believing they have any hope of being granted a waiver. This new waiver process appears to be nothing more than a facade—the USOC can appear as though they are responding to its athletes' wants and desires while, in reality, nothing has changed. USATF athletes and their sponsors are as restricted as ever before.

Rule 50 of the Olympic Charter also governs Olympic athletes because Olympic athletes have to follow the Olympic Charter's rules, as previously mentioned. Rule 50 relates to “[a]dvertising, demonstrations, propaganda,” and does not allow “publicity or propaganda, commercial or otherwise,” to appear on an athlete's “sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by all competitors.”⁵⁷ The only identification allowed on clothing is the article or equipment's manufacturer, provided “that such identification shall not be marked conspicuously for advertising purposes.”⁵⁸ In effect, this rule means no Olympic athlete, even if he obtained an individual sponsor, can advertise for his sponsor at any time during the Olympic Games. Yet again, USATF athletes are disadvantaged and limited as to the number of times his sponsor can be advertised, directly affecting the contract price since the sponsor knows that its product cannot be advertised at the Games.

And looking at yet another rule, Rule 143 is applicable and while it does not state that athletes are bound to wear Nike apparel, it requires that “competitors must wear clothing that is clean, designed, and worn so as not to be objectionable[.], . . . must be made of a material that is not transparent even if wet[.], . . . [and] must not wear clothing that could impede the view of the judges.”⁵⁹ But in practice, this language appears extremely ambiguous because even temporary tattoos⁶⁰ are prohibited, which seem neither “objectionable,” “transparent,” or would “impede the view of the judges.”

Because USATF athletes have to comply with so many different organizations' rules, which can be conflicting, USATF athletes are at an extreme disadvantage when it comes to obtaining individual sponsorship deals and trying to negotiate a fair price when their sponsors know how seldom they

56. *Id.*

57. INT'L OLYMPIC COMMITTEE, *supra* note 44, at 93–94.

58. *Id.*

59. USA TRACK & FIELD, 2015 USATF COMPETITION RULES 49 (2015), <http://www.usatf.org/usatf/files/3a/3a9201fc-329e-4ec6-bd02-ff81ea14e71c.pdf>.

60. See Lauren Fleshman, *The New York Marathon (Part 2 of 3)*, ASK LAUREN FLESHMAN (Nov. 9, 2011), <http://asklaurenfleshman.com/2011/11/running-the-ny-marathon/>.

can actually advertise their brand.

V. NICK SYMMONDS

After the announcement of the agreement, USATF athletes threatened to take legal action against USATF.⁶¹ The athletes were worried about “Nike’s influence on the game and USATF rules” after two athletes were disqualified in the February 2014 meet “on grounds of reported interference with opponents.”⁶² The opponents were “trained by Nike’s long-distance runner, Alberto Salazar.”⁶³

One athlete, Nick Symmonds, has been very vocal about his disapproval of the extended partnership agreement. Symmonds is a “professional track athlete and two[-]time Olympian” who “competes internationally and specializes in the 800m.”⁶⁴ He is also a “six-time outdoor national champion at 800 meters” and “finished fifth at the 2012 London Olympics.”⁶⁵ He also tries to help “struggling athletes obtain sponsorship” after being disappointed in the “sponsorship logo and branding restrictions placed on track athletes,” which can make it hard to receive individual sponsorship deals.⁶⁶ Moreover, Symmonds is “determined to change the sport’s governing bodies’ marketing restrictions which only allow minimal advertising dollars to reach track athletes.”⁶⁷ Symmonds, himself, has an individual sponsorship agreement with Brooks, an apparel company.⁶⁸

In August 2015, Symmonds refused to sign the Statement of Conditions⁶⁹ governing the team gear that athletes in Beijing, at the World Track and Field Championships, must wear.⁷⁰ In part, the Statement of Conditions read as follows:

61. Zacks Equity Research, *Nike Extends Partnership with USATF*, YAHOO! FINANCE (Apr. 17, 2014), <http://finance.yahoo.com/news/nike-extends-partnership-usatf-155312412.html>.

62. *Id.*

63. *Id.*

64. *About Nick*, NICK SYMMONDS, <http://www.nicksymmonds.com/about-nick/bio/> (last visited Dec. 15, 2016).

65. Jeré Longman, *Runner Nick Symmonds Faces Ban Over Gear*, N.Y. TIMES (Aug. 7, 2015), http://www.nytimes.com/2015/08/08/sports/olympics/dispute-over-uniforms-may-keep-nick-symmonds-from-the-worlds.html?_r=0.

66. *About Nick*, *supra* note 64.

67. *Id.*

68. Longman, *supra* note 65.

69. Taylor Dutch, *USATF Clarifies Letter, Says Athletes Can Wear Sponsored Gear at Worlds*, FLOTRACK (Aug. 14, 2015), <http://www.flotrack.org/coverage/251077-News-from-the-Track-and-Field-World/article/32857-USATF-Clarifies-Letter-Says-Athletes-Can-Wear-Sponsored-Gear-at-Worlds#.VhHGYtNViko>.

70. *Id.*

I will dress appropriately and respectfully for all “official” Team functions, wearing the designated Team uniforms provided by USATF. I understand that USATF's sponsor contract for uniforms depends upon athletes wearing the uniform and using the uniform items at competitions, award ceremonies, “official” Team press conferences, and other “official” Team functions, and that I shall not participate in any of these activities with a logo of any competitor of USATF's sponsor affixed to me in any manner whatsoever.⁷¹

Symmonds called the document “ambiguous” and, in response, USATF left him off the World Championship team⁷² since Team USA athletes are required to sign this document before competing.⁷³ Symmonds also took issue with a USATF letter sent as a supplement, asking athletes to “[p]lease pack ONLY Team USA, Nike[,] or non-branded apparel.”⁷⁴ Jill Geer, USATF's public affairs officer, said USATF clarified the letter and subsequently changed the wording of the letter to be less ambiguous.⁷⁵ Geer also denied that USATF restricts athletes' apparel during “their personal time.”⁷⁶

But this has not stopped the public outlash from athletes on Twitter. On August 10, 2015, Dwight Phillips, an Olympic gold medalist and now the AAC Chair, tweeted, “It use[d] to be a[n] honor to have Team USA gear.”⁷⁷ A Twitter conversation also spurred between Bianca Knight, an Adidas athlete, and David Oliver, another Olympian, after the two athletes saw Dwight Phillips's tweet. Oliver tweeted a photo of his USATF participation agreement and stated that the Nike or non-branded apparel requirement did not apply to non-official team functions. Knight replied by saying, “They say that, but when we were walkin to Nando's one day & I was about to leave the hotel in an Adidas shirt I had to change.”⁷⁸ After Oliver responded about how Knight should have explained she

71. *Editorial: We Respect Nick Symmonds, But Don't Have a Lot of Sympathy He Won't Be at Worlds*, *supra* note 16.

72. Dutch, *supra* note 69.

73. *Id.*

74. *Id.*

75. *Id.*

76. Thomas Barrabi, *New IAAF President Sebastian Coe's Nike Ties Scrutinized Amid Nick Symmonds Sponsorship Flap*, INT'L BUS. TIMES (Aug. 21, 2015), <http://www.ibtimes.com/new-iaaf-president-sebastian-coes-nike-ties-scrutinized-amid-nick-symmonds-2063653>.

77. Dwight Phillips (@Dwightdagreat), TWITTER (Aug. 10, 2015, 3:11 PM), <https://twitter.com/dwightdagreat/status/630833862092959744>.

78. Bianca Knight (@MidKnightDreams), TWITTER (Aug. 10, 2015, 3:36 PM), <https://twitter.com/MsBiancaAK/status/630840244649115648>.

was not attending an “official team activity,”⁷⁹ Knight replied, “Me going to eat was not a team function. I was then told if I was leaving the hotel, I needed to wear the shirts they gave us.”⁸⁰

Amid the “public clash” between USATF and Nick Symmonds, who was “left off the U.S. roster for the 2015 IAAF World Championships in Beijing, China,” Sebastian Coe was elected president of the IAAF.⁸¹ Ironically, Sebastian Coe has been a global ambassador for Nike since 1978.⁸² Questions have been raised regarding a potential conflict of interest between Nike's exclusive sponsorship agreement with USATF and Coe's new leadership position.⁸³ In November 2015, BBC uncovered an email showing Coe discussed, with a senior Nike executive, a “successful bid to host the 2021 World Athletics Championships in Eugene, the birthplace of Nike.”⁸⁴

Despite alleged assurances that Coe could maintain his ambassadorial role with Nike and his chairman position with CSM, a sports-marketing company, while also serving as IAAF's President, Coe cut ties with Nike in November 2015.⁸⁵ Coe stated, “The current noise level around this ambassadorial role is not good for the IAAF and it is not good for Nike.”⁸⁶ After the Rio 2016 Olympics, Coe will also be stepping down as “the British Olympic Association chairman” and said that CSM will not “tender for any IAAF work.”⁸⁷ Coe claims, however, that there was never a conflict of interest between his position with Nike and his position with the IAAF.⁸⁸ Whether that is true or not, we may never know.

Nick Symmonds is only one example of the various issues that arise because of exclusive sponsorship agreements such as the one between USATF and Nike. On January 20, 2016, Symmonds' company, Run Gum, filed suit, which will be further explained after an introduction to corporate sponsorships and antitrust

79. David Oliver (@doliversub13), TWITTER (Aug. 10, 2015, 3:46 PM), <https://twitter.com/doliversub13/status/63083988433322241>.

80. Bianca Knight (@MidKnightDreams), TWITTER (Aug. 10, 2015, 3:37 PM), <https://twitter.com/MsBiancaAK/status/630840434126819328>.

81. Barrabi, *supra* note 76.

82. *Id.*

83. *Id.*

84. Owen Gibson, *Sebastian Coe Steps Down from Ambassadorial Role with Nike*, GUARDIAN (Nov. 26, 2015), <http://www.theguardian.com/sport/2015/nov/26/sebastian-coe-iaaf-nike>.

85. *Id.*

86. *Id.*

87. *Id.* Despite alleged assurances that Coe would step down as Chairman of the British Olympic Association, Coe remains listed as Chairman on the Association's website. *BOA Board Members*, TEAM GB, <https://www.teamgb.com/boa-board> (last visited Dec. 15, 2016).

88. *Id.*

law.⁸⁹

VI. LEGAL ISSUES ARISING FROM SPONSORSHIP AGREEMENTS

In order to fully understand the legal issues that may arise from corporate sponsorships, generally called endorsement contracts, an overview of endorsements is necessary. Analysis of professional athletes is used because while Olympic athletes, historically, were limited to amateur athletes, professional athletes are now allowed to participate in the Olympic Games. Also, few, if any, sources exist analyzing the details of a USATF athlete's sponsorship agreement and a lot of the basic principles remain the same.

There are three general categories of endorsement contracts for professional athletes: (1) headgear and clothing; (2) hard goods; and (3) non-marking sponsorships.⁹⁰ Headgear advertising, for some sports, can be the most lucrative and important because it allows for the "most exposure on television and in photos."⁹¹ In terms of other clothing sponsorship agreements, some leagues and teams, like the National Football League (NFL), do not allow its players to obtain individual endorsement contracts on their bodies, as it is "reserved for team sponsors."⁹² Nike is also the current sponsor of all NFL on-field apparel, an agreement that runs through 2019.⁹³ The result is that any "competitor-identifying marks must be covered" before playing or participating in any official NFL event, such as practice, games, and press conferences.⁹⁴ Hard goods endorsement contracts would include protective wear and equipment, such as a hockey goalie's pads, lacrosse sticks, or a baseball bat.⁹⁵ Finally, non-marking sponsorships use the athlete's "name, likeness, or appearance in its advertisements, autograph sessions, or speaking engagements."⁹⁶ An example of this type of agreement is United Airlines'

89. Complaint ¶ 15, *Gold Medal LLC v. USA Track & Field*, (No. 6:16-cv-00092-MC), 2016 WL 259539 (D. Or. Jan. 20, 2016). Run Gum is the designated business association for Gold Medal LLC. Run Gum manufactures and sells caffeinated chewing gum, providing track and field athletes with a coffee or energy drink alternative without the liquid. *Id.*

90. Leigh Augustine-Schlossinger, *Endorsement Contracts for Professional Athletes*, 32 *COLO. LAW.* 43, 43 (2003).

91. *Id.*

92. *Id.*

93. Terry Lefton, *Nike Extends On-field Deal with the NFL*, *SPORTSBUSINESS J.* (Mar. 16, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/16/Marketing-and-Sponsorship/NFL-Consumer-Products-Summit.aspx>.

94. Augustine-Schlossinger, *supra* note 91.

95. *Id.* at 44.

96. *Id.*

agreement with the United States Ski Team (U.S. Ski Team).⁹⁷ Because United Airlines “has purchased category exclusivity as part of its sponsorship,” no athlete on the U.S. Ski Team can appear in an advertisement with a competitor of United Airlines, such as Delta Airlines or Southwest Airlines.⁹⁸

USATF athletes are generally going to receive headgear and clothing endorsement contracts or non-marking endorsement contracts, as few track and field athletes use hard goods often enough to make an endorsement contract worth the cost. But currently, many USATF athletes are living below our Nation’s poverty level.⁹⁹ Several commentators already foresee difficulty for athletes trying to get individual, non-Nike sponsorship deals when Nike has monopolized the sport and all apparel and merchandise displayed at USATF events.¹⁰⁰

Maria Michta has described the difficulty that the majority of USATF athletes have in obtaining individual sponsorship agreements since many companies are not going to pay an athlete thousands of dollars when the “media spotlight attention” is so scarce.¹⁰¹ Only those “*endangered species*” USATF athletes are actually good enough to make a career out of being a professional track and field athlete.¹⁰² While USATF is most popular every four years at the Summer Olympics, many people are not tuning in to watch an annual invitational such as the Penn Relays or Drake Relays. And even if people tried to tune in, a three to five-day event only gets two to six hours of broadcast time on ESPN. Further, the World Championships are “often never on [television] in the United States, and [it is] difficult to find live webcasts.”¹⁰³ A USATF athlete’s individual sponsorship agreement may also hinge on the sport she is participating in. Deanna Latham, former USATF heptathlon athlete, said her sport hardly gets sponsored.¹⁰⁴ “It’s more of the sprints and distance runners.”¹⁰⁵

Even the athletes who are lucky enough to obtain individual sponsorship agreements because there are so few televised exposure opportunities for USATF athletes each year, the events that are televised are USATF-sanctioned,

97. *Id.*

98. *Id.*

99. Jon Gugala, *Is USA Track & Field's Massive Deal with Nike Bad for the Sport?*, DEADSPIN (Apr. 18, 2014), <http://fittish.deadspin.com/is-usa-track-fields-massive-deal-with-nike-bad-for-th-1564692266>.

100. *Id.*

101. Michta, *supra* note 43.

102. *Id.*

103. *Id.*

104. Interview with Deanna Latham, former USATF heptathlon athlete, in Milwaukee, Wis. (Oct. 8, 2015).

105. *Id.*

requiring athletes to wear only official Nike apparel. Latham said that in her personal experience, at all USATF meets, she would be required to have her gear checked and any logos that were not Nike and over a certain size would have to be covered.¹⁰⁶ While Latham admitted that the process “doesn’t seem like a lot,” it was “annoying” when she would want to “start [her] warm up and [USATF had] to search through all your things.”¹⁰⁷ At one time, Michta was approached by a company who thought about sponsoring Michta, if she could wear its logo on her racing jersey.¹⁰⁸ Michta had to say “no” as the company was “not a recognized athletic manufacture[r] or a pre-approved club,” again thanks to Rule 40.¹⁰⁹ Maybe Michta can go back to that company now that the USOC has so graciously implemented a new waiver process for the U.S. territory and see if this will change anything? My prediction: likely not.

Sports economist Andrew Zimbalist illustrated one of the other major problems with USATF beyond its sponsorship agreement with Nike.¹¹⁰ Zimbalist pointed out that USATF is “not redistributing revenues to its core athletes in line with other team or individual sports” and there needs to be “greater transparency within USATF reporting” so athletes can make informed decisions.¹¹¹ While the athletes at the very top of the spectrum receive some of the money from sponsorship agreements, “those in the lower tiers scrape by without any support.”¹¹² And while, as noted above, USATF’s revenue-sharing plan promises to distribute some of the new Nike funds to its athletes, this revenue continues to stay with the top-tier athletes who likely already have the most lucrative individual sponsorships. And by “the most lucrative,” I mean that approximately 20% of USATF athletes ranking in the top ten in the USA in their event make more than \$50,000 annually, while 50% of USATF in the top ten make less than \$15,000 annually from the sport.¹¹³

Some commentators have even made a list of recommendations that athletes should use before entering into a sponsorship agreement. The list, however, is

106. *Id.*

107. *Id.*

108. Michta, *supra* note 49.

109. *Id.*

110. *Revenue Sharing Agreements and Transparency*, TRACK & FIELD ATHLETES ASS’N, <http://trackandfieldathletesassociation.org/site/revenue-sharing-agreements-and-transparency/> (last visited Dec. 15, 2016).

111. *Id.*

112. Kathleen McLaughlin, *USA Track & Field Athletes Want More Freedom to Lure Sponsors*, INDIANAPOLIS BUS. J. (Dec. 31, 2011), <http://www.ibj.com/articles/31685-usa-track-field-athletes-want-more-freedom-to-lure-sponsors>.

113. *How Olympic Athletes Make a Living*, SPORTS MGMT. DEGREE HUB, <http://www.sportsmanagementdegreehub.com/olympic-athletes-salaries/> (last visited Dec. 15, 2016).

extensive and appears to place an undue burden on an athlete's freedom of contract. This list recommends that players do each of the following:

- Review the available league policies and memoranda regarding player endorsements.
- Confirm that the endorsed product or service does not fall within a prohibited category.
- Make sure the endorsement campaign does not run outside of a team's local market without league approval.
- Obtain consent from the required parties before sinking too much money or time into an endorsement campaign that may never run. In certain cases, it is advisable to discuss the endorsement with all relevant parties, even if not required to do so.
- Check for conflicting exclusivity arrangements with the league, team, or player.
- Bargain for an appropriate morals clause, if any, in order to create termination rights in the event the player's off-the-field conduct significantly depreciates the value of the endorsement.
- If a player's consent is not obtained for a league or team marketing effort, make sure the usage of the player or the player's likeness falls under a permissible group licensing agreement, uniform player contract, or similar document that allows the league or team to commandeer the player's services. If the player's consent is not obtained for an advertiser's campaign, watch out for right of publicity and false endorsement claims.
- Avoid using colors, slogans, or logos that may be confusingly similar to those associated with the league or team without first obtaining the appropriate consent.
- Consider traditional legal issues that are not exclusive to player endorsements.¹¹⁴

Any athlete who is expected to follow this entire list is at a serious disadvantage when it comes to making any kind of endorsement deal since the athlete has to expend so much effort—especially when those athletes are the

114. Casey Shilts, Kate Jett & Nick Desiato, *Making the Pitch: Player Endorsements in Professional Sports*, 25 ENT. & SPORTS LAW. 2, 5 (2007).

ones that allow a governing body, like USATF, to profit. And, the likelihood of a USATF athlete expressing any form of bargaining power is likely overshadowed by the sponsor's ability to review the rules governing the athlete to show how much he is, or is not, worth to the sponsor. An athlete may have to accept a much cheaper endorsement contract because of agreements like USATF and Nike's.

VII. ANTITRUST IMPLICATIONS

Exclusive sponsorship agreements such as the Nike and USATF agreement, however, appear to hinder the promotion of economic competitiveness and also appear to limit an individual athlete's ability to obtain his own sponsorship agreement.¹¹⁵ The procompetitive effects of exclusivity agreements appear insufficient to outweigh the anticompetitive effects such agreements cause, thereby likely violating federal antitrust laws.

In *TYR Sport Inc. v. Warnaco Swimwear Inc.*, the Central District of California held that USA Swimming does not have implied antitrust immunity from a claim that it conspired with Speedo to "exclusively promote" Speedo and "persuade Olympic-caliber swimmers to switch to Speedo's 'LZR Racer' suit."¹¹⁶ While the defendants, including Speedo and USA Swimming, the national governing body of swimming, were granted summary judgment because TYR Sport Inc. could not prove its claims,¹¹⁷ the possibility of an NGB, like USATF, being sued for violating antitrust laws is still viable.

Antitrust laws are designed to "preserve a competitive marketplace and protect consumer economic welfare."¹¹⁸ The main purpose of antitrust laws like the Sherman Act is to promote fair competition, protect consumer welfare, and ensure consumers receive the benefits of a competitive marketplace. Competition is hurt when conduct harms the market's ability to achieve lower prices, better products, and more efficient methods of production, all of which benefit consumers. For antitrust law to apply, the restraint at issue must be a business or commercial activity. The key issue is whether the challenged rule or activity has a predominantly anticompetitive commercial effect that harms sports fans, or consumers, or whether it is a valid regulation benefitting sports consumers more than unbridled market competition.

Section 1 of the Sherman Act, the main federal antitrust act, prohibits

115. See John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEX. REV. ENT. & SPORTS L. 33, 34–35 (2007).

116. See generally *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 821 (C.D. Cal. 2010); MITTEN ET AL., *supra* note 7, at 277.

117. *TYR Sport, Inc.*, 709 F. Supp. 2d at 843.

118. MITTEN ET AL., *supra* note 7, at 227.

contracts, combinations, or conspiracies that restrain trade or commerce.¹¹⁹ For a court to have Sherman Act jurisdiction, the challenged activity must (1) be concerted action; (2) cause an unreasonable restraint; and (3) affect interstate trade or commerce.¹²⁰ In terms of the exclusive sponsorship agreement between USATF and Nike, the agreement is concerted action because USATF is track and field's national governing body and has plenary authority to govern the sport. And, by becoming a USATF athlete, the athlete is agreeing to be bound by USATF's rules. Also, the agreement affects interstate trade or commerce because USATF's general business activities and regulation of track and field has a national scope, evidencing its interstate character, satisfying the third prong.

Courts generally apply either a *per se* rule or a rule of reason analysis when determining whether the challenged activity unreasonably restrains trade, which is the second prong needed to have Sherman Act jurisdiction. The *per se* rule is a conclusive presumption of illegality and the Plaintiff merely has to prove that there is an agreement and, if so, the agreement violates antitrust law.¹²¹ This rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.¹²² No justifications will be accepted for this type of activity.¹²³ However, the *per se* rule is rarely used in analyzing sports-related constraints because the business of sports requires some level of economic restraint.¹²⁴

The rule of reason analysis, on the other hand, is a case-by-case, fact-specific analysis requiring a determination of whether the challenged restraint has a substantially adverse effect on competition.¹²⁵ This test is similar to a reasonableness standard of negligence. The most paradigmatic examples of unreasonable restraints on trade are restrictions on price or output as both are unresponsive to consumer preference, and Congress specifically designed the Sherman Act as a "consumer welfare prescription."¹²⁶ Restrictions on price or output are also considered horizontal restraints on trade,¹²⁷ or an agreement among competitors on the way in which they will compete with one another,

119. Sherman Antitrust Act, 15 U.S.C. § 1 (2016).

120. Matthew J. Mitten, Executive Director, National Sports Law Institute, Amateur Sports Law Lecture at Marquette University Law School (Oct. 19, 2015).

121. Matthew J. Mitten, Executive Director, National Sports Law Institute, Amateur Sports Law Lecture at Marquette University Law School (Oct. 21, 2015).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. NCAA v. Bd. of Regents, 468 U.S. 85, 107 (1984).

127. Mitten, *supra* note 121.

and courts often hold these restrictions to be unreasonable as a matter of law.

Under this test, the Plaintiff must plead and prove the anticompetitive effects of the challenged restraint.¹²⁸ If anticompetitive effects are proven, the Defendant must prove that the restraint achieves positive, or procompetitive, effects.¹²⁹ Then, if the Defendant does so, the Plaintiff must prove that the restraint is not reasonably necessary to achieve procompetitive effects or that those procompetitive effects can be achieved in a substantially less restrictive manner.¹³⁰ And finally, if the Plaintiff does, a jury must balance the anticompetitive effects with the procompetitive effects to determine the net effect.¹³¹ If the net economic effect is negative, the challenged activity is an unreasonable restraint that is illegal and harms consumer interests.¹³² If the net economic effect is positive, the challenged activity will be deemed reasonable as it actually benefits consumers.¹³³ Acceptable justifications for otherwise anticompetitive agreements include increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality (or maintaining the integrity of the product), widening consumer choice,¹³⁴ promoting amateurism, integrating student-athletes with their school's academic community, maintaining competitive balance, protecting health and safety, and preserving academic integrity. Mere profitability or cost savings, alone, is not a sufficient justification.¹³⁵

To satisfy the first part of the rule of reason analysis, the Plaintiff, whether an athlete like Nick Symmonds or another apparel company like Symmonds' sponsor, Brooks, must plead and prove the anticompetitive effects of USATF and Nike's exclusive sponsorship agreement. The Plaintiff will have to show actual adverse effects on price or quantity in comparison to an unrestrained market, but market power may be inferred if the Defendant possesses market power and the practice has obvious anticompetitive effects like price fixing.

A Plaintiff may also have to plead and prove a relevant market. In *Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc.*,¹³⁶ a concessionaire brought suit against the Oakland Athletics for failure to pay a contract and the Oakland Athletics countersued the concessionaire for allegedly

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

135. *Id.*

136. 676 F.2d 1291 (9th Cir. 1982).

violating the Sherman Act. The court relied on a three-part test, established in *Tampa Electric Co. v. Nashville Coal Co.*, for finding “the market” that a contract may affect in an anticompetitive manner.¹³⁷ The test includes: (1) “a determination of the line of commerce involved”; (2) “a determination of the ‘area of effective competition’” within the line of commerce; and (3) “a determination of whether competition has been foreclosed in a substantial share of the relevant market.”¹³⁸ Defining the market requires consideration of the industry's special characteristics.¹³⁹ And determining the line of commerce involved “broadly defin[es] the type of business engaged in by competitors in the [specific] industry.”¹⁴⁰ The relevant market in *Twin City Sportservice* was deemed to not be merely confined to “concession opportunities [that] would attract only national concessionaires” and the relevant product was not confined to only Major League Baseball concession franchises.¹⁴¹

Now, here, if a track and field athlete like Nick Symmonds were the Plaintiff, he would likely argue that the exclusive sponsorship agreement has anticompetitive effects on the price of individual sponsorship agreements such as Symmonds' endorsement with Brooks because his inability to wear Brooks apparel at any USATF events drives the price of his Brooks deal down. USATF's overarching requirement that only apparel bearing either Nike's swoosh or no brand at all drives down the price of individual sponsorship agreements if other sponsors want to enter into the economic marketplace of sponsoring USATF athletes. Companies like Brooks will be significantly less willing to pay USATF athletes substantial sums of money if the athletes cannot actually wear their brand at races, trials, and other events. USATF athletes' sources of income are extremely hindered by this agreement and the only people benefiting from the deal are USATF and Nike.

Following the market analysis laid out in *Twin City Sportservice*, Symmonds could argue that the line of commerce is sponsorship agreements within Olympic athletics. Because the *Twin City Sportservice* court did not limit the market to merely concessionaires within Major League Baseball, a court would also likely not limit the sponsorship agreement market, and companies desiring to get into that market, to only sponsorship agreements for USATF athletes. However, even if a court did limit the market to merely sponsorship agreements for USATF athletes, Symmonds could still show that the sponsorship agreement between Nike and USATF forecloses competition in a

137. *Id.* at 1300.

138. *Id.*

139. *Id.* at 1299.

140. *Id.* at 1300.

141. *Id.* at 1299.

substantial share of the market since Nike is the exclusive apparel and equipment sponsor for USATF. In fact, a more restricted market appears to strengthen Symmonds' argument.

Because Symmonds could likely successfully argue that the sponsorship agreement has anticompetitive effects, the Defendant, USATF, has to overcome a heavy burden of proving that the challenged activity has procompetitive effects. USATF likely could not argue that the agreement promotes amateurism, integrates student-athletes with their school's academic community, maintains competitive balance, increases output, makes a new product available, protects health and safety, promotes academic integrity, or widens consumer choice. USATF's potential arguments are also likely weak and unconvincing. While USATF could argue that the agreement increases its profitability, since Nike is providing approximately seventeen to twenty million dollars annually, this justification must be coupled with another justification in order for a court to find that USATF has met its burden. USATF would have to argue that the agreement creates operating efficiencies or enhances a product or service quality. Creating operating efficiencies because of this exclusive sponsorship agreement seems unlikely to be convincing as USATF can likely operate just as efficiently without an exclusive deal. And, to show that the exclusive deal enhances product or service quality, USATF would have to show that Nike products are of higher quality than other brands, such as Adidas, Reebok, Mizuno, or Brooks. While some consumers and athletes have strong ties or loyalties to one brand, it seems unlikely that a court would find that Nike's products are superior to other products.

USATF would likely argue that the sponsorship agreement actually provides USATF athletes with more income. Because of the agreement, USATF provides 8% of its annual revenue to USATF athletes.¹⁴² This 8% revenue-sharing scheme, however, is still significantly less than other American team sports. In many other sports, the revenue derived by athletes is approximately 50%.¹⁴³ Also, as noted above, mere profitability, alone, is insufficient for a Defendant to overcome its heavy burden of proving the challenged activity has procompetitive effects. And, because it seems unlikely that a court would find convincing any of USATF's other justifications, this sponsorship agreement may very well be a violation of federal antitrust law, specifically section 1 of the Sherman Act.

142. Brian C. Konkel, *Track Champion Latest to Put Sponsorship Debate Before Public*, DUGGAN BERTSCH, LLC, <http://www.dugganbertsch.com/content/track-champion-latest-put-sponsorship-debate-public> (last visited Dec. 15, 2016).

143. *Id.*

VIII. WHY NICK SYMMONDS' LAWSUIT HAD NO LEGS TO RUN ON

Run Gum,¹⁴⁴ founded by Nick Symmonds and Sam Lapray, a running coach, filed a complaint in the United States District Court for the District of Oregon, alleging that USATF, USOC, and other unnamed coconspirators jointly agreed and conspired to “limit *the type* of individual sponsors that track & field athletes can display on their competition tops,” competition bottoms, leotards, “tops, t-shirts, sweatshirts, rain jackets, and lower body attire at the Olympic Trials.”¹⁴⁵ Run Gum specifically alleges that Defendants' agreement is a “price-fixing agreement with horizontal and vertical features,” making it *per se* illegal, or, in the alternative, an unreasonable restraint of trade under the rule of reason.¹⁴⁶ The complaint also alleges that Defendants do in fact possess “100% market share of the individual-sponsorship market.”¹⁴⁷ The complaint's only connection to Nike is that Run Gum could believe that Nike is one of the unnamed coconspirators because the complaint alleges that the agreement prohibits “certain businesses—while permitting others—from sponsoring individual athletes.”¹⁴⁸ Because Nike is an apparel company, and the exclusive sponsor of USATF, Nike's logo appears on every athlete competing at the 2016 Olympic Trials while non-sports apparel or equipment companies, like Run Gum, cannot even step up to the starting block.

USATF's rule that Run Gum is attacking only allows ““approved apparel manufacturers”” to “occupy the little [30cm²] allowable logo space” on an athlete's uniform.¹⁴⁹ Bye-Law to Rule 50 states,

No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by the athletes or other participants in the Olympic Games, except the identification [. . .] of the manufacturer of the article or equipment concerned, provided that such identification shall not be marked conspicuously for

144. Symmonds was smart to file his complaint under his company's name as the Ted Stevens Olympic and Amateur Sports Act does not create a private right of action.

145. Complaint ¶ 2, Gold Medal LLC v. USA Track & Field, (No. 6:16-cv-00092-MC), 2016 WL 259539 (D. Or. Jan. 20, 2016).

146. *Id.* ¶ 61–62.

147. *Id.* ¶ 42.

148. *Id.* ¶ 1.

149. Lauren Fleshman, *Thoughts on Run Gum Suing USOC/USATF*, ASK LAUREN FLESHMAN (Jan. 22, 2016), <http://asklaurenfleshman.com/2016/01/thoughts-on-run-gum-suing-usocusatf/>.

advertising purposes.¹⁵⁰

To be approved to occupy this logo space on an athlete's uniform at the 2016 Olympic Trials, a majority of the company's revenue must come from the sale of apparel, which Run Gum does not.¹⁵¹ As noted above, Lauren Fleshman points out that 30cm² is just big enough to fit the Nike swoosh trademark.¹⁵²

Because Run Gum is “an athlete-owned business” manufacturing, marketing, and selling a “performance-enhancing product for athletes,” defendants' agreement allegedly harms Run Gum by prohibiting it to display its logo on individual athletes' apparel at the Olympic Trials.¹⁵³ Run Gum seeks an injunction in exchange for sponsor identification on clothing at the Olympic Trials.¹⁵⁴

If only Run Gum had attacked the agreement between Nike and USATF and looked at the larger picture rather than attacking a USATF rule that only applies to the National Championships in an Olympic year, one that Symmonds personally agreed to, this lawsuit may have had legs to run on. Instead, USATF filed a Motion to Dismiss and Judge Michael J. McShane granted the motion.¹⁵⁵

Regarding Run Gum's allegations to establish a *per se* violation, Judge McShane said Run Gum's complaint

[L]ack[ed] the requisite evidentiary facts to survive Rule 12(b)(6). . . . While the complaint contains plenty of boilerplate antitrust language, it lacks any specific factual allegations as to any potential horizontal co-conspirator. . . . Run Gum's conclusory statements do not meet the high threshold of a *per se* violation. Under today's heightened pleading standards, Run Gum's bare allegations come up short.¹⁵⁶

Because we know from *NCAA v. Board of Regents* that courts generally apply

150. OLYMPIC CHARTER, *supra* note 44, at 94.

151. Fleshman, *supra* note 150.

152. *Id.*

153. Complaint, *supra* note 145, ¶ 48-49.

154. *Id.* ¶ 69.

155. *Judge Dismisses Nick Symmonds Lawsuit vs. USOC, USATF*, SPORTS ILLUSTRATED (May 12, 2016), <http://www.si.com/olympics/2016/05/12/judge-dismisses-nick-symmonds-run-gum-usoc-usatf-lawsuit>.

156. *Gold Medal LLC v. USATF*, No. 6:16-cv-00092-MC, 2016 WL 2757976, at *5 (D. Or. May 11, 2016).

the rule of reason analysis to sports-related cases,¹⁵⁷ Run Gum should have solely alleged that the USOC and USATF violated section 1 of the Sherman Act under the rule of reason. Also, had Run Gum's complaint more fully alleged the antitrust violations, as explained above, Run Gum may have moved past the summary judgment phase. Because Run Gum failed to do so, we will have to wait until the next athlete or apparel company can get USATF in court. For now, the only company advertising on athletes at the Olympics will be Nike. But, "[j]ust because USATF and the USOC can legally do something doesn't mean it is prudent to do it."¹⁵⁸

IX. PROPOSED SOLUTIONS

Even though exclusive sponsorship agreements like the agreement between Nike and USATF greatly benefit Nike, USATF, and USATF fans by showing an increased commitment to the sport of track and field, these agreements also greatly hinder an individual athlete's ability to contract. My proposed solution would be to allow athletes to endorse their individual sponsors at all times, including USATF-sponsored events, except when they are actually competing

157. *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984). Also of note, in a surprising turn of events which I find to be clearly erroneous and in stark opposition to this Comment, Judge McShane held that the USOC and USATF have implied immunity from antitrust violations under the 1978 Amateur Sports Act.¹⁵⁷ The ruling read, in part,

Because [C]ongress charged [the USOC and USATF] with financing the United States' participation in the Olympics, in part by preserving the value of the Olympic brand, Run Gum's challenge fails under an implied grant of immunity. USATF and the USOC may exercise control over the apparel worn by competitors on the field of competition at the Olympic Trials, particularly as it relates to individual advertisements and sponsorships that would undercut USOC's fundraising mission. For this reason, USATF's motion, ECF No. 43, and USATF's motion, ECF No. 41, are GRANTED and Run Gum's complaint is DISMISSED.

Gold Medal LLC, 2016 WL 2757976 at *1. Similar to the NCAA's rules which have been subject to antitrust scrutiny since the Court's 1984 decision in *NCAA v. Board of Regents*, USATF's rules should also be subject to antitrust laws. See *Bd. of Regents*, 468 U.S. at 107. As Nick Symmonds stated, "It is completely illogical and unfair to allow a very small sector of the market to have total control over the advertising space on an athlete's competition uniform." *Antitrust Suit by Nick Symmonds' Company vs. USATF, USOC Dismissed*, ESPN (May 13, 2016), http://www.espn.com/olympics/trackandfield/story/_/id/15526581/antitrust-lawsuit-nick-symmonds-company-vs-usatf-usoc-dismissed. On another note, I would also argue that the single-entity defense should not apply to USATF, a non-team sport governing body, as it conspired with Nike to restrain trade, but that discussion is outside the scope of this Comment.

158. *Federal Judge Dismisses Nick Symmonds' Run Gum Lawsuit, USATF and USOC Can Restrict Non-apparel Logos at Olympic Trials*, LETSRUN.COM (May 12, 2016), <http://www.letsrun.com/news/2016/05/federal-judge-dismisses-nick-symmonds-run-gum-lawsuit-usatf-usoc-can-restrict-non-apparel-logos-olympic-trials/>.

in a USATF-sponsored event or race. Nike and USATF's exclusivity agreement created a monopoly disallowing individual athletes to represent their sponsors and, thereby, hindering their ability to receive such sponsorship deals. This agreement also limits which sponsors fans see while watching or attending USATF-sponsored events, seemingly contradicting federal antitrust law's goals of promoting and protecting consumer economic welfare.

USATF's required Statement of Conditions that all athletes must sign before competing also needs to be altered to avoid the ambiguity displayed when Nick Symmonds refused to sign in August 2015. The Statement of Conditions required Symmonds to wear "Nike-branded, official team apparel at all team functions."¹⁵⁹ The phrase "team functions," however, was left undefined, providing an all-inclusive ban on any non-Nike-branded apparel.¹⁶⁰ In order to accommodate its athletes' interests, USATF should clearly define "team functions" and allow non-Nike-branded apparel at times that do not "seem to fit into any reasonable definition of a team function."¹⁶¹

Another viable solution that USATF should consider is allowing its athletes to wear apparel from a non-competing sponsor. For example, a USATF athlete who has a sponsorship agreement with a non-apparel company, like Lauren Fleshman's sponsorship agreement with Jaybird,¹⁶² a secure-fit sport Bluetooth headphones company,¹⁶³ should be allowed to wear any Jaybird-branded apparel at USATF events. Right now, the Olympic Charter's Rule 50 prohibits athletes from wearing any accessories that would advertise a certain brand and it is highly likely that the presence of Jaybird's trademark on the outside of headphones would be prohibited. But, companies like Jaybird that sponsor USATF athletes may have more of an incentive to pay USATF athletes, and may even pay more money, if their brands are visible and can be seen at USATF-sponsored events. USATF would be able to show a greater commitment to allowing its athletes to freely contract with sponsors and allowing its athletes to possibly bring in more income so they can continue to train, travel, and bring home the United States more gold medals in the Olympics if they are not required to work part-time jobs, or even full-time jobs, to survive. Allowing the presence of apparel or accessories from a

159. Ken Goe, *Nick Symmonds' Stand Highlights Sponsorship Issues Within USA Track & Field*, OREGONLIVE (Aug. 11, 2015), http://www.oregonlive.com/trackandfield/index.ssf/2015/08/nick_symmonds_stand_highlights.html.

160. *Id.*

161. *Id.*

162. Lauren Fleshman, *Sponsors*, ASK LAUREN FLESHMAN, <http://asklaurenfleshman.com/sponsors/> (last visited Dec. 15, 2016).

163. *Bluetooth Headphones*, JAYBIRDSPORT, <http://www.jaybirdsport.com/> (last visited Dec. 15, 2016).

non-competing sponsor would also not interfere with USATF and Nike's exclusive sponsorship agreement since Nike has no reason to compete with a Bluetooth headphones company like Jaybird.

Because this list is not exhaustive but merely states a few examples of the possible changes USATF could make to enhance its athletes' chances of obtaining individual sponsorship deals, it appears that USATF has a long way to go before athletes like Nick Symmonds appear satisfied and willing to sign their sponsors away to compete.

X. CONCLUSION

While the significant boost, if significant means a million-dollar partnership agreement that Nike and USATF committed to for the next twenty-three years, will help grow USATF, the agreement mainly only helps two entities: USATF and Nike. USATF athletes, like Nick Symmonds, are unable to represent and advertise their own brands, seemingly violating their own sponsorship agreements just to abide by this bigger, and, as seen through the eyes of USATF and Nike, better deal. Consequently, sponsors, especially apparel companies, are going to be less likely to sponsor USATF athletes when they know the athletes must wear Nike apparel or apparel with no brand at all.

Even more alarming, however, is Nike and USATF's disregard of federal antitrust laws. By what appears to be a backdoor bargain that led to an exclusive sponsorship deal, Nike has managed to unreasonably restrain the athlete sponsorship market. And because Nike likely has no other viable justification for this agreement other than profits, which we know alone cannot justify conduct that unreasonably restrains trade, the partnership agreement is likely in violation of antitrust laws.

But, even though Run Gum and Nick Symmonds were unsuccessful in court, USATF can still ease the burden that this agreement has caused to its athletes. While USATF likely needs to modify its participation agreement so future USATF athletes do not refuse to sign its Statement of Conditions, like Nick Symmonds, USATF could also allow athletes to wear their own sponsors and branded apparel at any time other than the actual race or event or allow them to wear apparel or accessories from their non-competing sponsors. By doing so, USATF would recognize its athletes' need to support their love for track and field and their desire to compete for a chance to represent the United States in the Olympic Games.