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April 29, 2021

VIA ECF:

The Honorable John G. Koeltl
United States District Judge
United States District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Re: DiBella Entertainment, Inc. v. O'Shaquie Foster, Case No.: 21-cv-2709 (JGK)

Dear Judge Koeltl:

We represent Plaintiff DiBella Entertainment, Inc. ("DBE") in the above-captioned proceeding. On April 28, 2021, Defendant O'Shaquie Foster's ("Foster") counsel of record, Jason Lampert, Esq., filed a letter with the Court requesting an extension of time to respond to the complaint (which is due today) as well as a pre-motion conference to file a motion to dismiss. *ECF No. 12*. For the reasons stated herein, DBE agrees to a 10 day extension for Foster to file his response, but objects to Foster's application for a pre-motion conference to file a motion to dismiss.

First, as an initial matter, DBE did not and does not want this lawsuit. DBE was left with no alternative but to institute legal proceedings against its own fighter after Foster's lead counsel, Rodney Drinnon, Esq., wrote DBE on February 11, 2021 asserting that Foster was not "bound by the Promotional Rights Agreement" (the "PA") -- the contract at the center of this dispute -- because DBE did not provide Foster the requisite number of bouts (notwithstanding the pandemic and the shutdown of live sporting events worldwide) and threatening that if DBE did not make a number of concessions shortening and otherwise limiting its rights under its PA, then Foster would sue DBE in Texas (notwithstanding the exclusive forum selection clause in the PA) and that Mr. Drinnon did not "think DBE would want to challenge this publically [sic] as a defeat would result in the wholesale departure of its remaining stable of fighters."

Second, Mr. Drinnon has been very vocal publicly in the media claiming that DBE was stalling Foster's career. On March 30, 2021, we sent Mr. Drinnon a copy of the complaint. The next day, a leading boxing news website, BoxingScene.com, quoted Mr. Drinnon that,

> [m]eanwhile, DiBella Entertainment, Inc. is satisfied to simply sit back and let this matter wind its way through the legal system, taking months or years off of Foster's career, thereby costing him hundreds of thousands if not millions of dollars. DiBella Entertainment, Inc. has filed what amounts to a 'test case' regarding the extension of fighter promotional agreements throughout the combat sports arena, and, if

> unsuccessful, will free scores of fighters from the yokes of the promoters who sat on their hands claiming that COVID-19 excused their failure to do their respective jobs.[1]

Similarly, Bloomberg Law quoted Mr. Drinnon that "Dibella claims he can keep his boxers in indentured servitude until the Covid epidemic has passed" and further stated "the boxer will be filing his own suit against the promoter for $9.5 million in damages."[2] While we would have normally granted Mr. Lampert's request for an extension as a matter of professional courtesy, given Mr. Drinnon's accusations that DBE was going to "sit back" and stall Foster's career through this litigation, we felt it incumbent upon us to ask DBE its position. DBE consented to the requested 10-day extension on the condition that "Foster and his representatives will no longer allege that DBE is trying to 'sit back' and stall Foster's career through this lawsuit and delays (particularly after DBE offered the big bout guarantee on Triller on June 5)."

Third, given Mr. Drinnon's repudiation of the PA on behalf of Foster and that DBE was facing significant legal fees in Texas to have a Foster-filed lawsuit dismissed based on the exclusive forum selection clause in the PA, DBE instituted these proceedings in order to have this dispute decided expeditiously in the forum the parties agreed upon and so as to not lose valuable time which is in both Foster's and DBE's economic interests. DBE is very much cognizant of Foster's short career as a boxer and does not understand why Mr. Drinnon did not just apply for PHV status without engaging local counsel as the SDNY local rules permit or why Mr. Lampert was only retained on the afternoon of April 27, 2021, when Mr. Drinnon had a copy of the complaint since March 30, 2021. This lack of diligence coupled with Mr. Drinnon's aspersions that DBE's lawsuit was instituted solely to delay Foster's career, do not justify an extension and in fact counsel against one.

Fourth, the filing of a motion to dismiss will only further delay resolution of this matter on its merits and unnecessarily stall Foster's career. Foster has admitted that he was previously "bound" by the PA and has asserted that he had the legal right to terminate the PA due to DBE's breach for failing to offer Foster the requisite number of bouts during the contractual years affected by the COVID-19 pandemic because the force majeure clause in the PA "as a rule, cannot be used to extend or avoid performance relating to personal services contracts."

The alleged pleading defects asserted by Foster in Mr. Lampert's letter are all technical in nature and even if Foster were to prevail (and we submit that he will not), any dismissal would in all likelihood be a dismissal without prejudice giving DBE the right to attempt to cure such alleged pleading defects and would only result in a procedural delay.

Addressing briefly Foster's claims of technical defects, the allegation that DBE's breach of contract claim is defective because DBE has not "sufficiently pled any damages" is nonsense. Under New York law, there are "two different forms of redress in breach of contract suits: 'expectation damages' and 'reliance damages.'" *World of Boxing LLC v. King*, 107 F. Supp. 3d 265, 268 (S.D.N.Y. 2015). DBE is not required at this preliminary stage to prove up its damages with specificity. Indeed, Mr. Lampert's statement that DBE has "failed to provide any factual allegations to support their request for $500,000 in damages" is itself a misstatement. DBE did not assert $500,000 in damages. Instead, DBE asserted that it "has suffered damages in an amount to be proven

[1] https://www.boxingscene.com/promoter-lou-dibella-sues-contender-oshaquie-foster-citing-breach-contract--156559
[2] https://news.bloomberglaw.com/us-law-week/world-ranked-boxer-seeking-contract-exit-faces-suit-by-promoter

at trial, but believed to be in excess of Five Hundred Thousand dollars." This is all that is required under the "notice pleading" paradigm adopted by the Federal Rules of Civil Procedure.

With respect to the implied obligation of good faith, Foster has admitted that "[a] separate cause of action . . . may stand, only when the breach of implied covenant claim 'is based on allegations different from those underlying the accompanying breach of contract claim. *Ari & Co. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 522 (S.D.N.Y. 2003) (Marrero, J.)." In Count I of the complaint for breach of contract, DBE asserts that Foster breached the PA by repudiating it. Conversely, in Count II, DBE alleges that Foster breached the implied covenant by, *inter alia*, "accept[ing] and participat[ing] in an additional bout from DBE on November 19, 2020" while "secretly harboring, and not notifying DBE and providing it with the opportunity to cure" Foster's claim that the pandemic did not extend the PA and that as a result, DBE was in breach.

With respect to DBE's claim for declaratory relief, Foster argues that that claim should be dismissed because it would be "inappropriate, as a matter of law, for DBE be granted attorney's fees paid in connection with their efforts to prove an element of a cause of action pled by them." That argument, however, does not address whether DBE set forth the elements required for a claim for declaratory relief. We submit that it did.

With respect to DBE's claim for injunctive relief, DBE has not sought temporary or preliminary injunctive relief and, therefore, Foster has plainly misstated the law. DBE does not have to show likelihood of success. DBE is seeking an injunction if it prevails on the merits. Foster admitted in Section 13 of the PA that "his services as a professional boxer are special, unique, . . . and that in the event of Fighter's breach or threatened breach of this Agreement, Promoter would suffer irreparable damage [and therefore] Promoter shall be entitled . . . to, an injunction." If DBE prevails, then an injunction should be issued.

The facts are not in dispute and the issues are narrow: (i) did Foster agree to a 6-month extension when he accepted DBE's offer for a fight on November 19, 2020, (ii) was Foster required to notify DBE of the alleged breach and give DBE an opportunity to cure, and (iii) is the force majeure extension that the parties agreed to in the PA enforceable and did DBE properly extend the PA due to the COVID-19 pandemic which resulted in the shutdown of all live sporting events worldwide? While determining DBE's monetary damages would be a fact intensive inquiry, deciding whether DBE or Foster is in breach is something that should and could be decided now on summary judgment and DBE respectfully requests the Court to order the parties to brief those issues as opposed to wasting time on a motion to dismiss.

Finally, we would note that Mr. Lampert's letter is internally inconsistent regarding the extension Foster is seeking. In the first paragraph of Mr. Lampert's letter, he requests "an extension of time to respond to Plaintiff's Complaint until May 28, 2021 – 30 days from today;" however, in his second paragraph, he states, "[i]n short, we are requesting an unconditional 10-day extension." DBE submits that a 10-day extension is ample enough time given that lead counsel has been on notice of this lawsuit since March 30, 2021.

Respectfully submitted,

/s/ John S. Wirt

cc: Rodney Drinnon, Esq.
Jason Lampert, Esq.