

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

DIBELLA ENTERTAINMENT, INC., a
New York, Corporation

Plaintiff,

v.

O'SHAQUIE FOSTER,

Defendant.

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CASE NO. 21-cv-2709

JURY DEMANDED

**DEFENDANT O'SHAQUIE FOSTER'S ORIGINAL ANSWER,
AFFIRMATIVE DEFENSES, ORIGINAL COUNTERCLAIMS,
AND APPLICATIONS FOR A TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTIONS**

Defendant O'Shaquie Foster ("Foster") files this, his Original Answer, Affirmative Defenses, Original Counterclaims, and Applications for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunctions complaining of Plaintiff DiBella Entertainment, Inc. ("DBE"), and states as follows:

I. ORIGINAL ANSWER

The paragraphs below are responsive to and/or correspond to the equally-numbered paragraphs in DBE's First Amended Complaint ("Complaint"):

PRELIMINARY STATEMENT

1. Paragraph 1 contains argument of counsel for which no response is required; to the extent an answer is required, deny.

JURISDICTION & VENUE

2. Paragraph 2 contains legal contentions and conclusions of law for which no response is required; to the extent an answer is required, deny.

3. Paragraph 3 contains legal contentions, conclusions of law, and the interpretation

of a contract, for which no response is required; to the extent an answer is required, deny.

THE PARTIES

4. Foster lacks information to admit or deny the allegations in paragraph 4; to the extent an answer is required, deny.

5. Foster admits the allegations in paragraph 5 with the correction that he is a citizen of the United States of America and a resident of Texas.

FACTUAL ALLEGATIONS

6. Foster lacks information to admit or deny the dates therein, but admits he executed the Promotional Agreement attached as Exhibit 1.

7. As to paragraph 7, Foster avers that the terms of any written document speak for themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

8. As to paragraph 8, Foster avers that the terms of any written document speak for themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

9. As to paragraph 9, Foster avers that the terms of any written document speak for themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

10. Admit.

11. Admit that the first Contract Year expired July 16, 2020, deny the remainder of the allegations contained in paragraph 11.

12. Deny.

13. As to paragraph 13, Foster avers that the terms of any written document speak for

themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

14. Deny that boxing as a sport ceased during the Covid-19 pandemic, admit that Foster received an advance of \$2,500, lacks information to admit or deny whether Foster was the first to receive an advance, admit that Foster signed the letter agreement dated March 18, 2020, deny the remainder of the allegations contained in paragraph 14.

15. Deny.

16. As to paragraph 16, deny DBE sent an email on March 27, 2020 to Foster, deny that the contents of the purported email have any legal effect, and lacks information to admit or deny that all of DBE's fighters were sent said email.

17. As to paragraph 17, deny DBE sent a letter to Foster and deny that the contents of the purported letter have any legal effect.

18. As to paragraph 18, deny DBE sent a letter to Foster, deny that Foster kept in regular contact with the principals of DBE, and deny that either Foster or Keith Mills had an obligation to complain about DBE's admitted breach of the Promotional Agreement.

19. Admit the September 18, 2020 email was received by Keith Mills, but deny the remaining allegations.

20. Deny all of the allegations contained in paragraph 20 but admit that Foster fought on November 19, 2020.

21. As to paragraph 21, Foster avers that the terms of any written document speak for themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

22. As to paragraph 22, Foster avers that the terms of any written document speak for

themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

23. As to paragraph 23, Foster avers that the terms of any written document speak for themselves and/or are questions of law for the Court to determine. Insofar as an answer is required, deny.

24. Deny that Foster “publicly lauded” DBE for the job it had done as his promoter particularly because DBE failed to provide Foster notice by personal service that he had attained a top eight (8) ranking in his weight class, deny that DBE was a promoter, but rather, a boxing broker, but admit the remainder of the allegations contained in paragraph 24.

25. Admit that Rodney Drinnon wrote to Dombroff as stated therein but deny the remaining allegations.

26. Admit that Rodney Drinnon wrote to Dombroff as stated therein but deny the remaining allegations.

27. Deny.

28. Deny.

29. Deny.

30. Deny.

31. Deny.

COUNT 1 – BREACH OF CONTRACT

32. Paragraph 32 contains legal contentions and conclusions for which no response is required. Insofar as an answer is required, deny.

33. Paragraph 33 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

34. Paragraph 34 contains legal contentions and conclusions for which response is required. Insofar as a response is required, deny.

35. Paragraph 35 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

36. Paragraph 36 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

37. Paragraph 37 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

38. Paragraph 38 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

39. Paragraph 39 contains legal contentions and conclusions for which no response is required. Insofar as a response is required, deny.

40. Foster denies that DBE is entitled to any relief as pled therein.

II. AFFIRMATIVE DEFENSES

41. The affirmative defenses herein are supported by the facts stated below.

42. Foster asserts that DBE has failed to state a claim upon which relief can be granted.

43. Foster asserts the claims set forth in the Complaint are barred, in whole or in part, by DBE's prior material breach of contract, which excuses his performance under same.

44. Foster asserts the claims set forth in the Complaint are barred under the equitable doctrines of unclean hands, other related doctrines and principles, and by DBE's inequitable conduct.

45. Foster asserts that the claims set forth in the Complaint are barred because DBE's damages, if any, were caused by DBE's own actions or failures.

46. DBE's claims are barred because it failed to provide the requisite notice to Foster required under the Promotional Agreement.

47. Foster asserts that DBE's claims are barred because it failed to comply with the required conditions precedent set forth in the Promotional Agreement.

48. Foster asserts that DBE's claims are barred because it fraudulently induced Foster to enter into the Promotional Agreement by representing that it was a promotional company rather than a boxing broker.

49. Foster asserts that DBE's invocation of the notice and cure provision of the Promotional Agreement was rendered impossible because the terms of the first Contract Year and Big Bout Guarantee expired.

50. Foster asserts DBE has failed to mitigate its damages.

51. Foster asserts that the force majeure provision in the Promotional Agreement is ambiguous and cannot be enforced as written.

52. Foster reserves the right to supplement his Affirmative Defenses as discovery progresses.

III. EVIDENCE IN SUPPORT OF FACTS AND INJUNCTIVE RELIEF

53. The following exhibits are attached hereto and incorporated by reference for all purposes as if fully restated herein:

Exhibit A is a true and correct copy of the Promotional Rights Agreement;

Exhibit B is a true and correct copy of the July 14, 2020 email from Alex Dombroff to Keith Mills;

Exhibit C is a true and correct copy of the Affidavit of O'Shaquie Foster;

Exhibit D is a true and correct copy of the Letter dated March 18, 2020;

Exhibit E is a true and correct copy of the July 14, 2020 Letter from Alex Dombroff to O'Shaquie Foster;

Exhibit F is a true and correct copy of the email dated September 18, 2020 from Alex Dombroff to Keith Mills;

Exhibit G is a true and correct copy of the text messages between Keith Mills and Joe Vredevelt;

Exhibit H is a true and correct copy of the text messages between Keith Mills and Lou DiBella;

Exhibit I is a true and correct copy of the Affidavit of Joseph Vredevelt;

Exhibit J is a true and correct copy of the email dated October 14, 2020 between Alex Dombroff and Keith Mills;

Exhibit K is a true and correct copy of the Bash Boxing Agreement dated October 13, 2020;

Exhibit L is a true and correct copy of O’Shaquie Foster’s tweet dated December 8, 2020;

Exhibit M is a true and correct copy of the Letter dated February 11, 2021 from Rodney Drinnon to Alex Dombroff; and

Exhibit N is a true and correct copy of the Letter dated April 19, 2021 from Rodney Drinnon to John Wirt.

IV. FACTUAL BACKGROUND

1. The Parties To The Suit

54. Defendant, O’Shaquie Dominique Williams Foster (“Foster”), is a twenty-seven (27) year-old African-American professional boxer from Orange, Texas who is currently ranked #2 by the World Boxing Council (“WBC”). Foster has stepped into the ring twenty (20) times, each time risking his life and health, attempting to make a living at his chosen vocation. A 2012 Olympic team alternate, the high school dropout relocated to Houston, Texas to focus on his craft. By all accounts, Foster’s hard work and determination have paid off as he has not lost a bout in nearly five (5) years and is poised to prove himself against the best in the world if given the opportunity. Foster’s “biggest fear is to not live up to my potential, not to reach my full ability in

life.”¹

55. Aside from legends like Bernard Hopkins, Roberto Duran, and Manny Pacquiao, the competitive career of a professional boxer is relatively short. Consequently, it is vital that Foster enter the ring as often as the opportunity presents itself for two (2) reasons: first, boxing is his only source of significant income; and second, the more wins, titles, or belts he accumulates the more in purse – the amount a boxer is paid to fight – he can demand. If Foster is prevented from stepping into the ring for even a short amount of time, he stands to lose hundreds of thousands, if not millions, of dollars as his window of competitive opportunity inevitably draws to a close.

56. Plaintiff, DiBella Entertainment, Inc. (“DBE”), is a New York corporation owned and operated by a Harvard Law School graduate, Lou DiBella (“DiBella”). DiBella holds himself out as a boxing promoter. He cites as proof of his legitimacy his recent induction into the International Boxing Hall of Fame, whose membership also includes the infamous Don King.² Foster contracted with DBE to act as his promoter who claimed that it had “substantial relationships with a number of boxing venues, broadcasters, and other world-class boxers . . .”³ Unfortunately, this turned out not to be true. Now, DiBella is intent on punishing Foster for simply requiring DBE to live up to its obligations under the Promotional Rights Agreement (“Promotional Agreement”).

2. DiBella Is No Longer A Promoter, But A Fight Broker

57. DiBella made his name in the boxing world as a promoter. Though he no longer

¹ <https://fansided.com/2019/12/04/oshaquie-foster-from-tragedy-and-violence-to-triumph>.

² According to a complaint filed in federal court, Mike Tyson alleged that Don King, his promoter, took advantage of Tyson's inability to read and fully understand business contracts, which resulted in agreements that allowed King to be able to defraud Tyson of over \$ 100 million. John Wirt (“Wirt”), DBE’s counsel, represented Don King in that lawsuit. *Tyson v. King et al.*, No. 1:98 cv1628 (SD NY, complaint filed March 5, 1998).

³ Exhibit A – Promotional Agreement A, at ¶11.

has the connections and other characteristics of a boxing promoter, he continues to trade on his reputation as a former promoter to sign boxers to exclusive promotional agreements. The reality is that DiBella is nothing more than a fight broker who only promotes his own reputation as an alleged boxing promoter. Though the distinction may seem trivial, it is important to Foster's counterclaims. Typically, a promoter has affiliations with media platforms like a television network, pay-per-view provider, or some other media outlet that provides the promoter with a "date" to air the boxing event for a negotiated price. The promoter then arranges for a boxing event to take place on that date and on the media platform.⁴ Generally, the promoter matches boxers they have under contract with a suitable opponent and places them on the card. Conversely, a broker does not have the ability to decide if, when, and where to put on a boxing event; rather, brokers have a stable of fighters that they "rent out" to boxing promoters for a fee. Given the much more limited ability of a broker to influence a boxer's career by providing opportunities, brokers take less compensation from their fighters than a promoter.

58. This business structure is unique to the world of boxing as it pits the boxer's and the promoter's financial interests against each other. The promoter receives a flat fee from the media platform that, in essence, sets the budget for the boxing event and means that less the promoter pays the boxers the more the promoter makes for that event. Indeed, the Muhammad Ali Boxing Reform Act ("Ali Act") prohibits promoters from receiving any compensation in connection with a boxing match until they disclose to the boxer the compensation the promoter will receive from the match. 15 U.S.C. § 6307e(b) (2020).

59. Boxers, however, are not allowed to accept a fight with another promoter without the permission of the promoter who signed them. Consequently, boxers are at the mercy of the

⁴ The scheduled fights in a boxing event are referred to collectively as the "card," consisting of the "main event" and preliminary bouts referred to as the "undercard".

promoter who signed them in order to advance their careers. Promoters literally hold their boxer's careers in their hand and have resulted in dozens, if not hundreds, of lawsuits brought by boxers aggrieved and exploited by their promoters.

60. Seven (7) months before Foster executed the Promotional Agreement, Home Box Office (“HBO”) announced that they would be dropping boxing from its network.⁵ True to form, DiBella has pled that he “was a long-time key executive in Home Box Office’s Sports Division” to support the claim that he still is a boxing promoter. [Dkt. 27, at ¶2]. However, HBO’s decision to discontinue boxing on its network rendered his contacts there useless. Although DiBella continues to hold himself out as a promoter, he has become nothing more than a “fight broker.” Devoid of the backing of a television network, pay-per-view provider, or some other media outlet to provide him with “dates,” DBE has been relegated to depending on the kindness of other promoters that can provide slots on their card. Rather than putting on his own events, DiBella supplies other promoters with boxers signed to DBE for a fee. Consequently, DBE shares none of the costs borne by the other promoters in putting on the event but keeps any amount over and above the amount paid to his boxer. Despite DBE’s requirement to disclose its compensation to Foster, DBE has done so on only one occasion.

3. Foster Signs The Promotional Agreement

61. On or about April 14, 2019, Foster signed the Promotional Agreement. Under the Promotional Agreement, DBE promised to offer Foster an opportunity to participate in nine (9) bouts, or three (3) bouts per each year of the contract (“Contract Year”).⁶ The first Contract Year began on July 17, 2019, which was the date of Foster’s first bout pursuant to the Promotional

⁵ <https://www.nytimes.com/2018/09/27/sports/hbo-boxing.html>.

⁶ *Id.*, at ¶2.1.

Agreement.⁷ Moreover, DBE was required to provide Foster with an opportunity to fight for a world championship recognized by one of the four (4) main sanctioning bodies or a purse of no less than \$50,000 (“Big Bout Guarantee”) within eighteen (18) months of the beginning of Contract Year 1, which was on or before January 14, 2021.⁸ The chart below accurately summarizes the various deadlines by when DBE had to offer bouts to Foster:

| <u>Contract Year 1</u> (July 17, 2019 – July 16, 2020) | <u>Contract Year 2</u> (July 17, 2020 – July 16, 2021) | <u>Contract Year 3</u> (July 17, 2021 – July 16, 2022) |
|---|---|---|
| Bout 1 – July 17, 2019 (Foster v. Bravo in Costa Rica) | Bout 1 – November 19, 2020 (Foster v. Roman in California) | N/A |
| Bout 2 – December 5, 2019 (Foster v. Mercado in New York) | Bout 2 – Not offered | N/A |
| Bout 3 – Not offered (BREACH) | Bout 3 – Impossible* (BREACH) | N/A |

* Bout 3 in Contract Year 2 was not possible to complete in the time allotted following Foster’s February 11, 2021 letter giving DBE notice of breach because Foster would not have sufficient time to complete Bout 2 and then complete a six-week training camp for Bout 3.

January 14, 2021 – Deadline for Big Bout Guarantee, which was never offered. **(BREACH.)**

62. DBE could extend the term of the Promotional Agreement if one of several contingencies occurred. For example, if Foster was named the mandatory contender to participate in a world championship bout sanctioned by the one of the four (4) main sanctioning bodies, then DBE could extend the initial term of the Promotional Agreement for a period of one year (“Option Year”).⁹ Similarly, if Foster achieved a top 8 ranking by one of the four (4) main sanctioning bodies, Ring Magazine, or ESPN.com then, again, DBE could invoke the Option Year.¹⁰ However, to do so, the Promotional Agreement plainly required DBE to provide written notice to Foster within sixty (60) days after the contingency was met.¹¹ Of course, DBE failed to do so.

⁷ Exhibit A – Promotional Agreement, at ¶2.

⁸ *Id.*, at ¶3.6.

⁹ *Id.*, at ¶2.4 (1).

¹⁰ *Id.*, ¶2.4 (3).

¹¹ *Id.*, ¶2.4.

3. The Relevant Portions Of The Promotional Agreement

63. The present dispute centers around four (4) provisions of the Promotional Agreement: paragraph 28 (Notices), paragraph 22 (Non-Waiver), paragraph 20 (Force Majeure), and paragraph 27 (Cure).

64. Paragraph 28 requires the parties comply with the following to provide proper notice thereunder:

28. Notices

All notices, consents, requests, approvals, and other communications provided for or required herein, and all legal process in regard thereto, must be in writing and shall be deemed validly given, made or served, when delivered personally or sent by email if an address is listed below or telecopy if a facsimile number is listed below; or the next business day after delivery to a nationally recognized express delivery service (e.g., Federal Express or UPS) with instructions and payment for overnight delivery; or on the fifth (5th) calendar day after deposited in any depository regularly maintained by the United States postal service, postage prepaid, certified or registered mail, return receipt requested, addressed to the following addresses or to such other address as the party to be notified shall have specified to the other party in accordance with this section:

(a) To Promoter:
DiBella Entertainment, Inc.
359 Sea Cliff Avenue
Sea Cliff, NY 11579

(b) Fighter:
O'Shaquie Foster

Email: _____
Fax: _____

All such notices shall be deemed given when delivered by courier or sent by confirmed facsimile.¹²

Since Foster did not write in or otherwise provide a physical or email address, the only method by

¹² *Id.*, at ¶28 (emphasis added).

which notice could be “deemed validly given, made or served” by DBE was by *personal service*.¹³ Foster has been personally served by DBE with one document – the Original Complaint with Jury Demand on or about April 8, 2021.¹⁴

65. Paragraph 22 is a boilerplate “no-waiver,” “nonwaiver,” or “anti-waiver” permitting each party to decide whether to strictly enforce provisions of the Promotional Agreement without losing their right to assert a breach.¹⁵ Importantly, the provision plainly states that the “payment of monies” by either party “shall not be deemed a waiver” of any obligation of the paying party to the non-paying party unless it is memorialized in writing and signed by the non-paying party.¹⁶ Consequently, DBE’s recent claim that Foster’s acceptance of a \$2,500 advance on or about March 18, 2020 waived his objection to the tolling of the Contract Year under the force majeure clause is specifically prohibited under the plain terms of paragraph 22. Moreover, nowhere in DBE’s March 18, 2020 correspondence that was countersigned by Foster do the words “pandemic,” “force majeure,” “tolling,” “Contract Year” or “contingency” appear.¹⁷ Rather, DBE’s March 18, 2020 correspondence is akin to a promissory note permitting DBE to repay itself from the proceeds of Foster’s next purse. Clearly, Foster did not knowingly and intentionally waive his right to object to DBE’s breach of the Promotional Agreement by accepting a \$2,500 advance.

66. Paragraph 20 is a unique (non-boilerplate) force majeure clause that provides:

20. **Force Majeure**

If, because of an act of God or nature, inevitable accident, fire, hurricane, tornado, earthquake, sinkholes or other abnormal weather/natural conditions, lockout, strike or other labor dispute, riot or civil commotion, act of public enemy, enactment, rule, order or act of any government or governmental instrumentality

¹³ *Id.*, at ¶28; See Exhibit B - July 14, 2020 email from Alex Dombroff (“Dombroff”) to Keith Mills (“Mills”) (Dombroff, DBE’s general counsel, admits that he knew that Foster had not presented him with a valid mailing address or email.)

¹⁴ Exhibit C – Foster Affidavit.

¹⁵ Exhibit A – Promotional Agreement, at ¶22.

¹⁶ *Id.*, at ¶22.

¹⁷ Exhibit D – March 18, 2020 correspondence from Dombroff countersigned by Foster.

(whether federal, state, local or foreign), failure of technical facilities, failure or delay of transportation facilities, or other cause of similar or different nature not reasonably within Promoter's control, Promoter are [sic] materially hampered and its normal business operations or the normal business operation of the premises or event sites becomes commercially impractical, then, without limiting Promoter's rights, Promoter shall have the right by giving Fighter notice to suspend the term of this agreement for the duration of any such contingency plus such additional time as is necessary so that Promoter shall have no less than sixty (60) days after the cessation of such contingency in which to exercise its option, if any, for the next following Option Period.¹⁸

To “suspend the term of this agreement” or toll the Contract Year, DBE was required to give Foster “notice.”¹⁹ Once again, DBE failed to personally serve Foster with notice informing him that it planned to invoke the force majeure clause and toll the first Contract Year.²⁰

67. Paragraph 20 contemplates the “duration of any such contingency” and “cessation of such contingency” but does not provide any guidance to the parties as to the criteria to determine either.²¹ If the “contingency” referred to in the force majeure clause was the cessation of professional boxing in the United States, then it is undisputed that professional boxing activities resumed in earnest in ESPN on June 9, 2020 at the MGM Grand Hotel in Las Vegas Nevada.²² Of course, promoting an event and training for it simply do not happen without months of preparation, meaning that the June 9, 2020 bout had been planned for months. For all intents and purposes, professional boxing was one of the only professional sports that continued *through* the pandemic. For example, Saul “Canelo” Alvarez has fought three (3) times since the pandemic began.²³

68. Further, Foster cannot decipher the meaning of the undefined term “Option Period”

¹⁸ Exhibit A – Promotional Agreement, at ¶20.

¹⁹ *Id.*, at ¶20.

²⁰ Exhibit C – Foster Affidavit.

²¹ Exhibit A – Promotional Agreement, at ¶20.

²² <https://box.live/fights/stevenson-vs-caraballo>; <https://boxrec.com/en/proboxer/790719>. DBE continues to argue that no professional boxing events took place in the State of New York. [Dkt. 27, at ¶ 1]. This statement is a red-herring and should be roundly ignored. Regardless, the Promotional Agreement does not limit the scope of available bouts to the State of New York. Indeed, only one of the fights DBE offered Foster was in the State of New York. Exhibit C – Foster Affidavit.

²³ <https://boxrec.com/en/proboxer/348759>.

in the last sentence of paragraph 20 because it does not appear anywhere else in the Promotional Agreement. The terms “Option Year” and “Contract Year” are defined, however, but both would provide radically different results if substituted for “Option Period.” Considering the force majeure clause is hopelessly ambiguous, DBE cannot use it to excuse its admitted breach of the Promotional Agreement.

69. Paragraph 27 provides a breaching party an opportunity to cure following receipt of notice from the aggrieved party (“Cure Provision”).²⁴ However the Cure Provision does not allow DBE to remedy its deliberate failure to provide Foster with three (3) bouts within the Contract Year. Specifically, the Cure Provision does not contemplate the extension or tolling of the Contract Year. Once the Contract Year has expired, DBE cannot cure its failure to provide Foster with the opportunity to participate in three (3) bouts per year because doing so would require going back in time. Similarly, after the passage of eighteen (18) months, DBE cannot cure its failure to satisfy the Big Bout Guarantee.

4. The First Two Bouts Under The Promotional Agreement Go As Planned

70. On July 17, 2019, Foster stopped Jesus Bravo by knockout to win the WBA’s Fedecentro Super Featherweight Title in San Jose, Costa Rica.²⁵ This date is important as it marks the beginning of the first Contract Year and triggered DBE’s obligation to offer Foster two (2) additional bouts by July 16, 2020.²⁶ Similarly, DBE had until January 14, 2021, to satisfy its obligations to Foster under the Big Bout Guarantee.²⁷ On December 5, 2019, Foster won a unanimous decision against Alberto Mercado to retain the WBC’s Silver Super Featherweight

²⁴ Exhibit A – Promotional Agreement, at ¶27.

²⁵ Exhibit C – Foster Affidavit.

²⁶ Exhibit A – Promotional Agreement, at ¶2.1.

²⁷ *Id.*, at ¶ 3.6.

Title in New York City, New York.²⁸ DBE now had more than eight (8) months to offer Foster the third bout in the first Contract Year and a little over a year to satisfy the Big Bout Guarantee. As neither offer came, DBE breached its obligations to Foster under the Promotional Agreement.

5. Faced With The Spectre Of Losing All Of Its Fighters Under Contract, DBE Purportedly Invokes The Force Majeure Clause

71. On March 27, 2020, DBE alleged that it sent an email to *all of its fighters* claiming that it *would be* broadly invoking the force majeure clause across all of its “active promotional agreements” (the “Dombroff Email”). [Dkt. 27, at ¶16]. Presumably, Foster was one of those fighters, however, he did not receive the Dombroff Email.²⁹ Moreover, the Dombroff Email did not actually invoke the force majeure clause in the Promotional Agreement.

72. On July 14, 2020, two (2) days prior to the expiration of the first Contract Year, Dombroff, DBE’s counsel, emailed a letter to Foster’s manager, Mills, wherein he claimed to provide “formal notice” to Foster that DBE was exercising its rights under the force majeure clause to suspend the term of the Promotional Agreement “indefinitely” (the “Formal Notice Letter”).³⁰ Dombroff’s email to Mills admitted that “. . . the notice provision of the promotional agreement is incomplete, I am sending this to you as his manager.”³¹ Curiously, he conceded that professional boxing events had resumed earlier that year – at least a month before he emailed Mills the Formal Notice Letter.³² It is revealing of DBE’s motives that DBE invoked the force majeure clause two (2) days before the expiration of the Contract Year even though professional boxing had resumed. The proof is in the timing. DBE was two days away from breaching the Promotional Agreement by failing to offer a third fight within the first Contract Year when it sent the Formal Notice Letter

²⁸ Exhibit C – Foster Affidavit.

²⁹ Exhibit C – Foster Affidavit.

³⁰ Exhibit E – July 14, 2020, letter from Dombroff emailed to Mills, at ¶4.

³¹ *Id.*

³² *Id.*, at ¶2

purporting to indefinitely toll the term of the Promotional Agreement. Insofar as there was an event of force majeure, it was not the COVID-19 pandemic as, by DBE's own admission, it did not stop boxing events.

73. In a subsequent email to Mills, Dombroff claimed that the Formal Notice Letter tolled the calculation of the first Contract Year from March 16, 2020 until September 16, 2020.³³ However, Dombroff failed to explain the criteria he used to justify the six (6) month tolling period. Rather, Dombroff appeared to pick dates "out of thin air" that would work to DBE's benefit by keeping Foster bound to DBE under the exclusivity provisions of the Promotional Agreement while excusing DBE's contractual obligations that it had failed to perform. He also declined to identify any provision of the Promotional Agreement that would permit DBE to retroactively apply the force majeure clause.

6. DBE Turned Away Opportunities For Foster To Earn A Living During The Pandemic To Preserve Its Invocation Of The Force Majeure Clauses Contained In The Promotional Agreements Of Its *Other* Fighters

74. Dombroff neglected to mention that on or before June 11, 2020, three (3) days before Dombroff emailed the Formal Notice Letter to Mills, Joseph Vredevelt ("Vredevelt"), a Texas attorney and manager of a promotions company called NextFightUp, contacted Dombroff about having Foster headline a card in Houston, Texas on July 11, 2020 (the "NextFightUp Card").³⁴ Mills reached out to DiBella the same day and informed him that the Texas Department of Licensing and Regulation would be releasing the protocols for the July 11, 2020 event.³⁵ However, when Vredevelt spoke to Dombroff after their initial exchange, Dombroff informed him that DBE was not interested in having Foster headline the NextFightUp Card because DBE

³³ Exhibit F – September 18, 2020 email from Dombroff to Mills.

³⁴ Exhibit G – June 11, 2020 text string between Vredevelt and Dombroff.

³⁵ Exhibit H – June 11, 2020 text string between Mills and DiBella.

planned to invoke the force majeure provisions to extend the promotional agreements with not only Foster, *but all of the boxers DBE had under contract*.³⁶ He explained that if DBE let Foster participate in the NextFightUp Card, then it would have to find fights for *all* of its boxers.³⁷ Although the NextFightUp Card ultimately did not take place on July 11, 2020, it was cancelled *after* Dombroff spoke to Vredevelt.³⁸ This much is clear - DBE sacrificed the advancement of Foster's career by preventing him from fighting to prevent the wholesale exodus of its stable of boxers.

7. After Breaching The Promotional Agreement, DBE Was Paid \$10,000 To Allow Foster To Fight On *Another* Promoter's Card

75. On September 18, 2020, Dombroff emailed Mills and offered Foster \$25,000 to fight Miguel "Mickey" Roman ("Roman") on November 19, 2020 in Los Angeles, California.³⁹ For the first time, DBE disclosed that it was being paid \$10,000 by the promoter of record Bash Boxing, Inc. ("Bash Boxing").⁴⁰ Moreover, Dombroff advised Mills that Bash Boxing – and not DBE – would be remitting Foster's purse to him.⁴¹ Further, Foster was required to sign a separate bout agreement with Bash Boxing.⁴² This confirms that DBE is nothing more than a boxing broker that signs boxers to onerous and exclusive agreements reserved for boxing promoters that do have the ability to organize events.

76. Considering that DBE breached the Promotional Agreement before the scheduled Roman bout, Foster had no qualms about accepting the offer from Bash Boxing particularly because he had not fought for nearly a year. Foster was no longer obligated to DBE under the

³⁶ Exhibit I – Vredevelt Affidavit.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Exhibit F – September 18, 2020 email from Dombroff to Mills

⁴⁰ *Id.*

⁴¹ Exhibit J – October 14, 2020 email from Dombroff to Mills.

⁴² Exhibit K – Executed October 13, 2020 Bash Boxing Bout Agreement.

Promotional Agreement and was more than happy to entertain offers from DiBella – or any other promoter for that matter. However, DBE’s claim that Foster waived DBE’s breach of the Promotional Agreement by accepting the Roman bout ignores the nonwaiver provision in the Promotional Agreement.⁴³

77. Similarly, DBE claims that Foster agreed to the tolling of the term of the Contract Year when he failed to respond to the following September 18, 2020 email from Dombroff to Mills:

Pursuant to the tolling notice you were sent on July 14, the promotional rights agreement between O’Shaquie and DBE shall be understood to have tolled beginning March 16, 2020, with such tolling period lasting for 6 consecutive months (until September 16, 2020). As a result, the first Contract Year of the promotional agreement will end on January 16, 2021, and the second Contract Year will commence on January 17, 2021. For clarity, the initial Term of the promotional agreement will expire on January 16, 2023, subject to further instances that may cause the Term to extend or be suspended.⁴⁴

78. It is undisputed that Foster did not agree with Dombroff’s apparent attempt to amend the Promotional Agreement – particularly because DBE never personally served Foster with either the Formal Notice Letter or the aforementioned September 18, 2020 email from Dombroff to Mills.⁴⁵

79. Inexplicably, DBE continues to ignore the provisions of the Promotional Agreement. Specifically, paragraph 25 plainly states, “This Agreement may not be altered, amended or discharged, *except by a subsequent writing signed by the parties hereto.*”⁴⁶ Without question, Foster did not agree to the tolling of the first Contract Year in writing.⁴⁷ Consequently, by permitting DBE to broker the Roman bout promoted by Bash Boxing, Foster did not acquiesce

⁴³ *Id.*, at ¶ 22.

⁴⁴ Exhibit F – September 18, 2020 email from Dombroff to Mills.

⁴⁵ Exhibit C – Foster Affidavit.

⁴⁶ Exhibit A – Promotional Agreement, at ¶ 22 (emphasis added).

⁴⁷ Exhibit C – Foster Affidavit.

to DBE's attempts to unilaterally extend the terms of the Promotional Agreement that it had admittedly breached months before. Regardless, Foster knocked out Roman in the ninth round maintaining his then four-year winning streak.

8. Foster Declares The Breach Of The Promotional Agreement

80. Following the Roman bout, it became clear that DBE was no longer interested in pursuing opportunities for Foster because it failed to bring any additional offers to him prior to the expiration of the eighteen (18) month Big Bout Guarantee period.⁴⁸ Moreover, upon information and belief, DBE promoted no events prior to January 14, 2021 that could conceivably have suitable opponents for Foster. Shockingly, DBE failed to provide Foster with written notice that he had achieved a #4 world ranking as recognized by one of the four (4) main sanctioning bodies.⁴⁹ Foster discovered it on his own and Mills tweeted his accomplishment out to the world.⁵⁰

81. On or about February 11, 2021, Foster had endured enough and sent a letter to DBE declaring it in breach of several provisions of the Promotional Agreement.⁵¹ Specifically, Foster pointed out DBE's failure to secure the required three (3) bouts in the first Contract Year and satisfy the Big Bout Guarantee.⁵² Foster was not required to give DBE notice and an opportunity to cure its failure to secure the required bouts in the first Contract Year because DBE could not turn back the clock to meet its obligations. Moreover, paragraph 3.6 of the Promotional Agreement *required* DBE to release Foster upon written request if the Big Bout Agreement had not been met.⁵³ Clearly, DBE failed to acquiesce to Foster's request and, yet again, breached the Promotional Agreement. Foster concluded his letter by stating flatly that he did not consider

⁴⁸ Exhibit A – Promotional Agreement, at ¶ 3.6.

⁴⁹ Exhibit L – Foster's December 8, 2020 tweet.

⁵⁰ *Id.*

⁵¹ Exhibit M – February 11, 2021 letter from Foster's attorney, Rodney Drinnon ("Drinnon"), emailed to Dombroff.

⁵² *Id.*

⁵³ Exhibit A – Promotional Agreement, at ¶ 3.6.

himself bound by the Promotional Rights Agreement.⁵⁴

9. DBE Sues Foster And Blacklists Him

82. On March 30, 2021, DBE filed suit against Foster in the United States District Court for the Southern District of New York. Foster was personally served with process on April 8, 2021 at the Main Boxing Gym in Houston, Texas, roughly 1,600 miles away from New York City, New York.⁵⁵ Foster was forced to retain local counsel and respond to DBE's Complaint – despite the fact that DBE breached the Promotional Agreement first.

83. In the interim, Foster's counsel attempted to resolve the matter with DBE's counsel, John Wirt ("Wirt"), who candidly admitted that no other promoter would offer Foster a fight for fear that DBE would pursue legal action against them.⁵⁶ DBE claimed to have secured an undercard "slot" on a June 5, 2021 pay-per-view card headlined by Teofimo Lopez and George Kambosos, Jr. Of course, DBE was not the *promoter of record* for the event, but rather, Triller, LLC ("Triller"). Nevertheless, DBE offered Foster the bout for \$60,000 – failing to mention how much Triller was paying DBE for brokering the bout – if he agreed to revive/reform the Promotional Agreement. Unwilling to revive/reform the Promotional Agreement, Foster's counsel suggested the following:

In the meantime, **FOSTER WILL ACCEPT THE FIGHT OFFERED ON THE JUNE 5, 2021 TRILLER UNDERCARD** pursuant to the terms set forth below. As you once told me, it is in Foster's best interest to get in the ring as soon as possible. However, as you also stated, until we resolved this dispute with DBE no other promoter would offer Foster a fight for fear that DBE would sue them for tortious interference with the Promotional Agreement – regardless if it is enforceable. In effect, DBE plans to sideline Foster until this matter winds its way through the courts which could take months or years causing him irreparable harm. However, this is not an offer to revive/reform the Promotional Agreement, but rather, a one-off way that Foster does not have to miss this opportunity to ply his craft.

⁵⁴ Exhibit M – February 11, 2021 letter from Drinnon emailed to Dombroff.

⁵⁵ Exhibit C – Foster Affidavit.

⁵⁶ Exhibit N – April 19, 2021 letter from Drinnon to Wirt.

As a compromise, I propose that DBE accept the fight on Foster's behalf on the June 5, 2021 undercard and that DBE's share of the purse as set forth in the Promotional Agreement be placed in escrow until this matter is resolved. DBE wins, its gets the escrow. Foster wins, he keeps the escrow. That way, DBE has mitigated its damages when it loses the suit filed against Foster and other promoters won't be fearful of offering Foster opportunities to ply his trade. In the interim, we can go forward with the suit in the Southern District of New York. Make no mistake, if DBE continues purposefully to impede Foster's ability to make a living, we will produce expert testimony that will permit a jury to render a verdict in the millions. This compromise will permit DBE to "save face" while we hash out our differences in Court without setting back Foster's career more than it has already been.⁵⁷

DBE rejected this compromise out-of-hand thereby confirming its desire to punish Foster rather than reach a speedy resolution of the dispute. DBE's actions have left Foster a pariah in his chosen profession until the present litigation winds its way through this Court.

V. COUNTERCLAIMS

84. Foster reallages and incorporates the preceding paragraphs as if set forth herein.

Count 1 - Breach of Contract

85. DBE and Foster entered into a contract referred to herein as the Promotional Agreement on April 14, 2019.

86. Foster performed all of the obligations required of him pursuant to the Promotional Agreement.

87. DBE failed to perform and breached the Promotional Agreement in the following ways:

- a. DBE failed to offer Foster an opportunity to participate in three bouts in the first Contract year;
- b. DBE failed to offer Foster an opportunity to participate in the Big Bout Guarantee on or before January 14, 2021;
- c. DBE improperly attempted to invoke the force majeure clause to extend the

⁵⁷ *Id.*

term of the first Contract Year, Big Bout Guarantee, and the Promotional Agreement;

- d. DBE refused to release Foster from his obligations under the Promotional Agreement after it received notice of its failure to offer Foster an opportunity to participate in and complete the Big Bout Guarantee on or before January 14, 2021; and
- e. DBE breached its obligation to remain the sole and exclusive promoter of Foster in connection with Foster's professional boxing career.

88. As a result of DBE's breach of the Promotional Agreement, Foster has suffered general (direct) damages and consequential damages for the loss of professional opportunities. Specifically, DBE failed to provide Foster an opportunity to participate in the six (6) remaining bouts under the Promotional Agreement, including the guaranteed \$50,000 Big Bout Guarantee. Further, DBE's failure to release Foster from the Promotional Agreement at its first breach has prevented Foster from signing with a legitimate promoter causing him the loss of significant professional opportunities.

Count 2 - Fraudulent Inducement

89. DBE made representations to Foster and Mills through its principal, DiBella, that DBE was primarily engaged in the business of boxing promotion.

90. However, when DiBella made this representation, he knew that it was not true because DBE was nothing more than a boxing broker.

91. DBE knew its misrepresentation was false at the time it was made because DBE intended to induce Foster to sign the Promotional Agreement. Neither DBE nor DiBella disclosed any of this to Foster before he signed the Promotional Agreement.

92. DBE's fraudulent misrepresentation directly and proximately damaged Foster because Foster would not have entered the Promotional Agreement to the exclusion of other agreements had he known that DBE was nothing more than a "fight broker."

93. DBE's fraudulent representations directly and proximately damaged Foster because DBE's lawsuit is preventing other promoters and brokers from offering fights with Foster.

Count 3 - Declaratory Relief

94. The Federal Declaratory Judgment Act permits any court of the United States to declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

95. There is an actual controversy of a justiciable nature between DBE and Foster regarding their obligations with respect to the Promotional Agreement.

96. Foster is entitled to a binding declaration of his rights under the Promotional Agreement.

97. Therefore, Foster respectfully requests this Court to enter the following declarations under the Promotional Agreement:

- a. DBE failed to offer Foster an opportunity to participate in three (3) bouts on or before July 14, 2020;
- b. DBE failed to offer an opportunity to participate in a bout satisfying the Big Bout Guarantee on or before January 14, 2021;
- c. DBE breached the Promotional Agreement first thereby relieving Foster from any further obligations thereunder;
- d. Paragraph 28 of the Promotional Agreement required DBE to personally serve Foster with notices required thereunder;
- e. DBE failed to properly provide notice to Foster regarding its attempted invocation of the force majeure clause;
- f. Paragraph 20 of the Promotional Agreement is ambiguous because it fails to define either the "duration of any such contingency" and "cessation of such contingency;"
- g. Professional boxing was one of the few professional sports that continued *through* the pandemic;
- h. Paragraph 20 of the Promotional Agreement is ambiguous because

the term “Option Period” remains undefined thereby making the force majeure provision hopelessly ambiguous;

i. DBE could neither cure its failure to offer Foster an opportunity to participate in three (3) bouts on or before July 14, 2020 nor its failure to offer an opportunity to participate in a bout satisfying the Big Bout Guarantee on or before January 14, 2021;

j. Foster did not waive his right to declare a previous breach of the Promotional Agreement by accepting the Roman bout; and

k. DBE failed to provide notice that Foster had been ranked in the top ten by one of the four (4) main sanctioning bodies within sixty (60) days of attaining same.

Count 4 - Violation of the Muhammad Ali Boxing Reform Act

98. Section 3 of the Ali Act provides that one of its purposes is “to protect the rights and welfare of professional boxers on an interstate basis by preventing certain exploitive, oppressive, and unethical business practices.”

99. As Foster’s purported promoter, DBE has a duty to the boxer which includes ensuring that Foster is properly and adequately compensated for the upcoming bouts.

100. Section 6703e(b)(1) of the Ali Act requires a promoter to disclose “the amounts of any compensation or consideration that a promoter has contracted to receive from such match.”

101. On more than one occasion, DBE failed to disclose the compensation it received from the financier of Foster’s bouts.

102. DBE’s violation of the Ali Act has harmed Foster because he was entitled to know the amount of compensation he may have received from the aforementioned bouts.

VI. APPLICATION FOR TEMPORARY RESTRAINING ORDER

103. Foster reallages and incorporates the preceding paragraphs as if set forth herein.

104. A plaintiff seeking injunctive relief must establish that 1) he is likely to succeed on the merits, 2) he is likely to suffer irreparable harm in the absence of injunctive relief, 3) the

balance of equities tips in his favor, and 4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, (2008). In the Second Circuit, however, evidence of a “serious question” going to the merits that tip the scales for the plaintiff may be used as an alternative to the likelihood of success on the merits. *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 33 (2d Cir. 2010).

105. Foster is likely to succeed on the merits or, at a minimum, serious questions exist in favor of Foster. Here, Foster is likely to succeed on the merits because the facts above clearly establish that DBE breached the Promotional Agreement. Specifically, DBE failed to provide Foster with three (3) bouts for the first Contract Year of the Promotional Agreement. Moreover, DBE failed to provide Foster an opportunity to participate in a bout that satisfied the Big Bout Guarantee before January 14, 2021.

106. Paragraphs 2.4 and 2.5 of the Promotional Agreement expressly and unambiguously state that DBE could only extend the term of the Promotional Agreement if one of several contingencies occurred. DBE purported to invoke same based on the COVID-19 pandemic; however, DBE has not only admitted that boxing events were occurring before it purported to invoke the force majeure provision, but Foster was actually offered a bout that DBE rejected because it would contradict and undermine its stance vis-à-vis force majeure. As such, DBE had no good faith or other basis to properly invoke force majeure and extend the Contract Year. The Promotional Agreement also required DBE to provide written notice to Foster that it was invoking the extension within sixty (60) days after the contingency was met. DBE not only failed to provide notice within the required timeframe, but it also failed to provide legally sufficient notice under the terms of the Promotional Agreement.

107. Lastly, DBE failed to indicate how it determined that the “contingency” (i.e.

allegedly the COVID-19 pandemic) had begun and how it had determined that it would end. Of course, this belies the fact that boxing events were being planned and actively occurring when DBE claimed it was impossible to “promote” boxing events. These facts establish that Foster is likely to succeed on the merits of his claims and, at a minimum, raise serious questions that go towards the merits that tip the scales in Foster’s favor.

108. Foster will likely suffer irreparable injury. Foster’s ability to fight in boxing matches is special, unique, extraordinary, irreplaceable, and of peculiar value. Not many fighters are able to achieve top ten (10) rankings with the various internationally and industry-renowned boxing organizations. In fact, most do not even receive the type of opportunities to fight that Foster does. As this Court is aware, the competitive lifespan of a professional boxer is incredibly short. As Foster is in his prime, he is at the peak of his career-building and money-making opportunities.

109. However, to determine his true potential, with a world-championship bout within the realm of possibility, Foster needs to remain active and continue fighting. Foster has already been approached by several other promoters, who have all decided against putting Foster on their card because of this pending litigation and the fear of retaliation by DBE. Foster has essentially been blacklisted by other promoters and DBE knows this. No adequate alternative remedy in the form of money damages or other relief exists that can determine the damage and loss to Foster’s career if he continues to be prevented from fighting due to the exclusivity provisions of the Promotional Agreement that DBE breached. Foster will be irreparably harmed if he is denied the freedom to participate in bouts. As a professional fighter, Foster has a short economic life expectancy and his window to compete professionally diminishes daily.

110. The balance of the equities are in Foster’s favor. Foster is a twenty-seven (27) year-old high-school dropout from Orange, Texas. Boxing is, by far, his primary source of income.

Even if this Court sets aside the irreparable damage to Foster's career, Foster depends on fighting to earn a living. Foster has only one career and it is also his means of lifting himself out of poverty. DBE, on the other hand, purports to be a reputable and successful commercial enterprise with a stable of boxers. If Foster fights without DBE, all that is at stake for DBE is money that it would have earned from such a fight. The severity of DBE's potential financial loss is mitigated by the fact that DBE has dozens of other fighters that DBE can profit from. In fact, since DBE has made no efforts to provide Foster a fight in fourteen (14) months, it has made no money off Foster. Despite this, DBE appears to have emerged from the Covid-19 pandemic financially sound and without need to resort to bankruptcy protection like many other businesses.

111. Moreover, DBE's claim regarding the \$2,500 advance it provided Foster is disingenuous and does not tip the equities in DBE's favor. DBE neglects to mention that the \$2,500 advance was supposed to cover Foster's living expenses for six (6) months. This is significantly less than the Federal and Texas minimum wage. If only DBE would allow Foster to fight it could recoup that advance in a single bout. The injury Foster faces clearly outweighs any potential injury that DBE may suffer.

112. The public interest is neither prejudiced nor harmed if injunctive relief is granted as requested herein. To the contrary, the injunctive relief is in the public's interest as it would allow Foster to fight and provide entertainment to boxing fans throughout the world. Accordingly, this factor weighs in favor of granting injunctive relief.

113. Foster seeks a temporary restraining order to maintain the status quo, namely, Foster's continued ability to earn a living by fighting. Currently, no other promoter or broker will offer Foster a fight for fear of a lawsuit or retaliation from DBE. Injunctive relief is necessary to provide assurances to other brokers and promoters that they can deal with Foster and provide him

fighters without fear of legal action or retaliation in the industry. Foster therefore seeks to enjoin and restrain DBE, its employees, contractors, agents, servants, representatives, and all those in active concert or participation with DBE, or those acting at the direction of DBE, from directly or indirectly:

- a. Enforcing paragraph 11 (Exclusivity) of the Promotion Agreement to prevent Foster from participating in any bouts other than bouts promoted or co-promoted by DBE or any other DiBella affiliate;
- b. Enforcing paragraph 11 (Exclusivity) of the Promotion Agreement to prevent Foster from rendering his services as a professional boxer to any person, firm or entity other than DBE or any other DiBella affiliate.

114. In the spirit of maintaining the status quo, and should this Court grant the injunctive relief requested, Foster will deposit 28.5% of his total purse from any bout not promoted or co-promoted by DBE into the registry of the Court pending a full trial on the merits. As stated herein, the total purse for Foster's most recent fight was \$35,000. Foster earned \$25,000 and DBE disclosed it was paid \$10,000. Therefore, 28.5% is DBE's typical "profit margin" under the Promotional Agreement and what DBE stands to earn on any future Foster bout. Of course, any funds deposited into the registry of the court would then be disbursed to the prevailing party in the lawsuit. Thus, if Foster prevails on his claim that he is no longer bound by the Promotional Agreement because DBE breached the agreement first, then Foster is entitled to receive all funds in the registry of the court. Conversely, if DBE prevails on its claim that it properly extended the Promotional Agreement by invoking the force majeure clause, then DBE is entitled to receive all funds in the registry of the court.

115. Foster is willing and able to post a bond or any equivalent for any injunctive relief granted herein.

**VII. APPLICATION FOR PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION**

116. Foster reallages and incorporates the preceding paragraphs as if set forth herein.

117. Unless enjoined, Foster has demonstrated that he will not be able to fight pending resolution of his matter. If the relief requested herein is not granted and DBE is not restrained from enforcing the exclusivity provision of the Promotional Agreement, its actions will directly result in imminent and irreparable harm to Foster for which there is no adequate remedy at law. Specifically, Foster's ability to fight in boxing matches is special, unique, extraordinary, irreplaceable, and of peculiar value. Given that the competitive lifespan of a professional boxer is incredibly short, Foster needs to remain active and continue fighting. Foster has already been approached by several other promoters who have all decided against putting Foster on their card because of this lawsuit and the fear of retaliation by DBE. Foster has essentially been blacklisted by other promoters and DBE knows this. No adequate alternative remedy in the form of money damages or other relief exists that can determine the damage and loss to Foster's career and potential if he continues to be prevented from fighting due to the exclusivity provisions of the Promotional Agreement that DBE breached. Foster will be irreparably harmed if he is denied the freedom to participate in bouts. As a professional fighter, Foster has a short economic life expectancy and his window to compete professionally diminishes daily.

118. These injuries will be the direct result of DBE conduct. Foster is likely to prevail on the merits of his claims against DBE because DBE has breached the Promotion Agreement but continues to purport to hold Foster to its exclusivity provisions and is threatening to enforce such against other brokers and promoters. Foster is blacklisted in the boxing industry and cannot obtain a fight due to the specter of impending litigation and retaliation in the industry presented by DBE. In the absence of a temporary restraining order and an injunction, DBE will continue to engage in

activities directly contrary any temporary restraining order and applicable law. At a minimum, Foster has presented serious questions regarding his claims that favor granting injunctive relief.

119. Foster also seeks a preliminary injunction to maintain the status quo, namely, Foster's continued ability to earn a living by fighting and a permanent injunction for same. Currently, no other promoter or broker will offer Foster a fight for fear of a lawsuit or retaliation from DBE. Injunctive relief is necessary to provide assurances to other brokers and promoters that they can deal with Foster and provide him fights without fear of legal action or retaliation in the industry. Foster therefore seeks to enjoin and restrain DBE, its employees, contractors, agents, servants, representatives, and all those in active concert or participation with DBE, or those acting at the direction of DBE, from directly or indirectly:

- a. Enforcing paragraph 11 (Exclusivity) of the Promotion Agreement to prevent Foster from participating in any bouts other than bouts promoted or co-promoted by DBE or any other DiBella affiliate;
- b. Enforcing paragraph 11 (Exclusivity) of the Promotion Agreement to prevent Foster from rendering his services as a professional boxer to any person, firm or entity other than DBE or any other DiBella affiliate.

120. In the spirit of maintaining the status quo, and should this Court grant the injunctive relief requested, Foster will deposit 28.5% of his total purse from any bout not promoted or co-promoted by DBE into the registry of the Court pending a full trial on the merits. As stated herein, the total purse for Foster's most recent fight was \$35,000. Foster earned \$25,000 and DBE disclosed it was paid \$10,000. Therefore, 28.5% is DBE's typical "profit margin" under the Promotional Agreement and what DBE stands to earn on any future Foster bout. Of course, any funds deposited into the registry of the court would then be disbursed to the prevailing party in the lawsuit. Thus, if Foster prevails on his claim that he is no longer bound by the Promotional Agreement because DBE breached the agreement first, then Foster is entitled to receive all funds

in the registry of the court. Conversely, if DBE prevails on its claim that it properly extended the Promotional Agreement by invoking the force majeure clause, then DBE is entitled to receive all funds in the registry of the court.

PRAYER

Defendant O’Shaquie Foster prays that Plaintiff DiBella Entertainment, Inc. takes nothing from its claims and that Foster prevail on its claims and declarations sought herein, and be awarded:

- a) Actual damages in the amount of \$325,000;
- b) Consequential damages in excess of \$1 million;
- c) Pre-judgment interest at the maximum legal rate;
- d) For post-judgment interest at the maximum legal rate;
- e) For the declarations requested herein;
- f) The injunctive relief requested herein;
- g) For such other and further relief as deemed just and proper.

Respectfully submitted,

DATED: June 7, 2021

MCCATHERN HOUSTON

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O’SHAQUIE FOSTER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was served on, this 7th day of June, 2021, via the Court's ECF system, upon all attorneys of record:

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