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United States District Court, S.D. Florida.

DON KING PRODUCTIONS, INC., Plaintiff,
v.
Shane MOSLEY, et al., Defendants.

Case No. 15–61717–CV–WILLIAMS
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Signed 08/25/2015

Attorneys and Law Firms

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ORDER

KATHLEEN M. WILLIAMS, UNITED STATES DISTRICT JUDGE

***1 THIS MATTER** is before the Court on Plaintiff's emergency motion for temporary and preliminary injunctive relief (DE 8). The Court conducted a hearing in this matter on August 19, 2015 and August 20, 2015.

I. FACTS

A. The History of the Parties

After being introduced to Don King in 1999, 27 year-old Ricardo Mayorga ("Mayorga") signed a Promotional Agreement with Don King Productions, Inc. ("DKP") in December of 2000. (See *Mayorga v. Don King Productions, Inc.*, Case No. 09–22603 (S.D. Fla. 2009) (hereinafter, *Mayorga* I) at DE 1 ¶ 15). [1] DKP and Mayorga continued their relationship as set forth in various agreements for the next eight years. (*Mayorga* I at DE 1 ¶ 18). On June 20, 2008, Mayorga and DKP entered into another Promotional Agreement for DKP to promote Mayorga in future boxing matches. (*Mayorga* I at DE 1 ¶ 19). At this juncture in his professional life, Mayorga had enjoyed a successful and remunerative career with DKP and won multiple championships.

On September 1, 2009, Mayorga filed suit against DKP seeking to set aside the 2008 Promotional Agreement and questioning whether that Agreement "still governed the relationship between Mr. Mayorga and DKP." (*Mayorga* I at DE 1 ¶ 42). In that suit, Mayorga contended that although he had fully performed under the 2008 Promotional Agreement, DKP had breached it by failing to offer Mayorga three bouts between June 20, 2008 and June 20, 2009. (*Mayorga* I at DE 1 ¶¶ 36–37). Mayorga also filed an emergency motion for declaratory relief and an affidavit in support of that motion. (*Mayorga* I at DE 2). Mayorga never served DKP and the complaint was voluntarily dismissed. One month later, on October 1, 2009, DKP and Mayorga entered into yet another Promotional Agreement. (DE 1 ¶ 12; Ex. 1). The 2009 Promotional Agreement, which contains an affidavit bearing Mayorga's signature, was signed by Mayorga and Dana Jamison, the Senior Vice President of Boxing Operations for DKP, and notarized by Grace Johansson. (DE 1–1 at 10).

Thereafter, on May 7, 2010, DKP filed suit against Mayorga in Broward County Circuit Court seeking to enjoin him from participating in a mixed martial arts ("MMA") fight that DKP was not promoting. (DE 1 ¶¶ 18–19). The Broward court granted DKP's request for a preliminary injunction and barred Mayorga from participating in that MMA fight. (DE 1 ¶ 21; Plaintiff's Ex. 5). The court found that there was a substantial likelihood of success on the merits as demonstrated by the record and paragraph 16 of the Promotional Agreement. (*See* Plaintiff's Ex. 5). The court also ruled that there was "threatened injury to petitioner (reputation, ability to control fights for Mayorga and others)" and that irreparable harm existed "as stipulated by Mr. Mayorga in paragraph 14" of the Agreement. (*Id.*). As a result, the MMA fight did not occur. The injunction and cancellation of the MMA fight were reported in boxing publications and were "generally known throughout the boxing industry." (DE 1 ¶ 22).

***2** On March 12, 2011, Mayorga participated in a DKP-promoted professional boxing match against Miguel Cotto. Following that bout, and his loss to Cotto, Mayorga announced his retirement from professional boxing and informed Don King and Dana Jamison of his retirement. (DE 1 ¶ 23; Jamison Testimony). But, in 2012, Mayorga and DKP signed an "Addendum To Bout Agreement" demonstrating their intent that Mayorga box a suitable opponent on October 27 or November 17, 2012 in Venezuela. (Defense Ex. 2).

The 2012 Bout Addendum, which was signed by Mayorga, reaffirms the 2009 Promotional Agreement and states that the Agreement remains in full force and effect. (*Id.*). The 2012 bout never materialized. Between 2011 and 2014, Mayorga participated in various MMA fights which were not promoted under the aegis of DKP.

On July 10, 2014, Mayorga met with DKP at DKP's offices in Florida. (DE 1 ¶ 25; Mayorga Testimony; Jamison Testimony). That day, Mayorga signed a Memorandum of Understanding ("MOU") and an Addendum to the 2009 Promotional Agreement with DKP, which was co-signed by Dana Jamison and notarized by Grace Johansson. (DE 1 ¶¶ 25–26). Following the execution of that agreement, Mayorga participated in two professional boxing matches that were not promoted by DKP—one on September 27, 2014 in Oklahoma City and one on December 20, 2014 in Nicaragua. DKP sent a cease and desist letter to the promoter of the Oklahoma City fight but did not seek to enjoin that fight. There is no evidence in the record that DKP took any steps to prevent the December 20, 2014 fight.

On July 11, 2015, ESPN reported that Mayorga and Shane Mosley—a former boxing champion—would be participating in a match promoted by Mosley on August 29, 2015, at The Forum in Inglewood, California. (DE 8 at 52–53). In response, on July 30, 2015, DKP sent a cease and desist letter to Mosley asserting that DKP has the exclusive worldwide rights to promote all professional boxing matches involving Mayorga. (DE 1–4 at 2–3). DKP contended that Mosley's actions and the August 29, 2015 bout constituted tortious interference with DKP's contract with Mayorga. (*Id.*). On August 3, 2015, Mosley, Mosley Promotions, and GoBox Promotions responded to the cease and desist letter, asserting that Mayorga's agreement with DKP expired on June 20, 2013 and that it was never renewed. (DE 15–2 at 4–5). The letter, although not sent by Mayorga, claimed that DKP had breached the Promotional Agreement by failing to offer Mayorga three bouts per year and was therefore invalid. (*Id.*) The letter also pointed to the 2014 Oklahoma City and Nicaragua fights as evidence that Mayorga is currently an independent professional fighter. (*Id.*)

On August, 13, 2015, DKP filed the instant action against Defendants Shane Mosley, Ricardo Mayorga, Sugar Shane Mosley Promotions, Inc., and GoBox Promotions Inc., asserting three claims: (1) Tortious Interference with Contractual Relationship against Mosley, Mosley Promotions and GoBox Promotions; (2) Breach of Contract against Mayorga; and (3) Injunctive Relief against all Defendants. The next day, DKP filed an emergency motion seeking a preliminary injunction. (DE 8).

B. Terms of the 2009 Promotional Agreement and the 2014 Documents

The October 1, 2009 Promotional Agreement provides, in pertinent part:

> Fighter hereby grants Promoter the sole and exclusive right to secure and arrange all professional boxing bouts...requiring Fighter's services as a professional boxer and to secure, arrange and promote all such Bouts...

(DE 1–1 at 2, Section I. Promotion). According to the terms of the Promotional Agreement, Mayorga shall not participate "in any bouts other than Bouts promoted or co-promoted by Promoter or for which Promoter has granted Fighter prior written permission." (DE 1–1 at 4, Section XI. Exclusivity). Mayorga also promised that he would not render his services as a professional boxer to any person or entity other than DKP. (*Id.*).

***3** The 2009 Agreement was to run "for an initial term of three (3) years," commencing on October 1, 2009 and "excluding any time that Fighter is unable to compete due to injury or other cause." (DE 1–1 at 2, Section II. Term). At the conclusion of the three-year term, DKP had two separate one-year renewal options, which would automatically take effect unless DKP decided otherwise. (*Id.*) The renewal terms excluded "any time that Fighter is unable to compete due to injury or other cause." (*Id.*). At DKP's "sole election, this Agreement may be suspended during the period of Fighter's temporary retirement, if any, but shall become fully operative if and when Fighter resumes his professional boxing career." (DE 1–1 at 4, Section VII. Disability/Retirement). Therefore, if the 2009 Promotional Agreement remained in effect uninterrupted following its execution, it appears that it would have expired on October 1, 2014.

Under the 2009 Agreement, DKP agreed to offer Mayorga the right to participate in at least three bouts each year. (DE 1–1 at 1–2, Section III. Bouts). The bout offers could be communicated to Mayorga in any manner, including verbally,

telephonically, or by courier. (*Id.*). Regardless of whether the bouts actually occurred, DKP was considered to have complied with its obligations under the Agreement so long as it made three *bona fide* bout offers to Mayorga. (*Id.*).

The 2009 Agreement also granted DKP the right to, *inter alia*, all site and sponsorship fees made in connection with any such bout. (DE 1–1 at 3, Section V. Worldwide Rights to Bout). Finally, the Agreement contains a provision stating that Mayorga recognized that his services as a professional boxer were "special, unique, extraordinary, irreplaceable and of peculiar value," and that a breach of the Agreement would cause DKP to suffer "irreparable damage, which could not be reasonably or adequately compensated by an action at law." (DE 1–1 at 5, Section XIV. Equitable Relief).

On July 10, 2014, Mayorga signed, in English and Spanish, the MOU and an Addendum to the 2009 Promotional Agreement. (DE 1–2, 1–3). The 2014 documents were also signed by Dana Jamison and notarized by Grace Johansson. In the MOU, Mayorga acknowledged that he retired from boxing following his match with Miguel Cotto on March 12, 2011 and that he was "now making a comeback to professional boxing after a brief attempt at MMA." (DE 1–2). In both documents, Mayorga reaffirmed the 2009 Promotional Agreement with DKP, agreeing that it remained in full force and effect and releasing DKP from all claims based on any event occurring, in whole or in part, prior to July 10, 2014. (DE 1–2, 1–3). The Addendum also provides that "[p]ursuant to Paragraph VII of the DKP Promotional Agreement, Fighter agrees that the term of the Promotional Agreement is extended by the time of Fighter's temporary retirement on March 12, 2011 and is fully operative." (DE 1–3).

C. Dana Jamison's testimony

Dana Jamison testified that she has been employed by DKP for 29 years. Her responsibilities include negotiating contracts with boxers, setting up training for boxers, and arranging bouts and bout agreements for boxers promoted by DKP. Her duties also include tracking DKP boxers and their fights, both national and international. Ms. Jamison explained that while a promotional agreement is a broad agreement between a boxer and DKP establishing that DKP is that boxer's exclusive promoter, a bout agreement is directed to a specific fight, identifying the actual purse, date, site, opponent, weight required, and number of rounds for that fight.

Ms. Jamison has known Mayorga for fifteen years. Ms. Jamison, who is fluent in Spanish, communicates with Mayorga in Spanish because he does not speak English. Ms. Jamison recalled that since 2000, Mayorga has signed multiple agreements with DKP, each of which contain substantially similar terms and each of which was translated and witnessed by her. On October 1, 2009, Ms. Jamison translated the 2009 Promotional Agreement for Mayorga, which they both signed.

***4** Ms. Jamison acknowledged that from 2011 through 2014—following Mayorga's retirement after the 2011 Miguel Cotto fight—Mayorga continued to participate in MMA fights. She also stated that, to the best of her knowledge, an MMA fight is considered a bout under the Promotional Agreement. It was her understanding that the 2010 injunction was issued, in part, on the basis that the Promotional Agreement covers both MMA fights and boxing matches. With the exception of the 2010 MMA fight, there was no evidence presented that DKP sought to prevent Mayorga from participating in any other MMA fights. Ms. Jamison testified that after his announced retirement, Mayorga and DKP signed a Bout Addendum on October 16, 2012, reaffirming the 2009 Promotional Agreement. Since 2009, the only fight that DKP has promoted for Mayorga was the Miguel Cotto fight in 2011.

Thereafter, in July of 2014, Mayorga contacted DKP in order to discuss his career. Ms. Jamison met with Mayorga in DKP's offices on July 10, 2014, at which time Mayorga advised her that he wished to come out of retirement. Accordingly, that same day, she and Mayorga signed the 2014 MOU and the Addendum to the Promotional Agreement—both of which were provided to Mayorga in Spanish and in English.

Following the July 10, 2014 meeting, DKP set up a training regimen for Mayorga but Mayorga failed to comply with the training schedule. According to Ms. Jamison, Mayorga told her that he was not ready to fight and that he would inform her when that time came. He never did. Ms. Jamison explained that throughout his career, Mayorga has been very erratic in his training, has participated in matches without being adequately prepared, and has often missed training sessions. She stated that even when training, Mayorga has been known to drink and smoke cigarettes and that he does not "take his craft and his professional career seriously at all times." In addition to being erratic in his training, Ms. Jamison offered unrebutted testimony that Mayorga was exceedingly difficult to contact, that he would often refuse to return

phone calls, and that he does not have a permanent mailing address, landline, or e-mail address at which he reliably can be reached. In addition, Mayorga maintains multiple cellular telephones and frequently changes cellular numbers. Ms. Jamison could not say with specificity how many bouts DKP offered Mayorga after July 2014, but she explained that she was unable to present any offers to Mayorga because he took no calls and was, for all practical purposes, unreachable for the past year.

Although Ms. Jamison testified that she was responsible for tracking boxers signed to DKP, she did not know: (1) if Mayorga had participated in any fights following the July 2014 MOU and Addendum; (2) that he had participated in the Oklahoma City match; (3) that he had participated in the December 2014 boxing match in Nicaragua; and (4) the outcome of either of the two 2014 fights, although the results were available and reported on industry databases. She also could not recall if DKP had sent a cease and desist letter, through its attorneys, to the promoter of the Oklahoma City fight, although she had been copied on that letter.

In July of 2015, Ms. Jamison learned of the August 29, 2015 match scheduled between Mayorga and Mosley. She attempted to contact Mayorga regarding the event numerous times by telephone but was unable to reach him. Ms. Jamison asserted that DKP has a strong business interest in ensuring not only that its boxers adhere to the terms of their contracts but also that other promoters can rely on DKP to deliver its boxers pursuant to those contracts. She stated that it was "common knowledge" in the industry that DKP is Mayorga's exclusive promoter. Consequently, she believed the goodwill and reputation of DKP would be harmed by the August 29, 2015 fight. She opined that if Mayorga were to violate his contract, other fighters might also disregard their obligations to DKP.

***5** She also expressed DKP's serious reservations about Mayorga's physical fitness. Ms. Jamison testified that DKP has no knowledge of his training schedule, his weight, or his mental condition. She stated concern that Mayorga could be injured or perform poorly at the August 29, 2015 fight which, in her opinion, could result in harm to Mayorga and impair DKP's ability to promote him in future events. Finally, Ms. Jamison testified that, to her knowledge, there were no opponents (other than Mosley) currently interested in fighting Mayorga.

D. Shane Mosley's Testimony

Mosley testified that the contract for the August 29, 2015 fight was signed on July 8, 2015 and provides a $500,000 purse for Mosley and a $250,000 purse for Mayorga. In addition to the bout between Mosley and Mayorga, the event will also feature several undercard fights. The Forum, where the fight is to be held, has a capacity of 16,000 people. While Mosley testified that he expects the fight to sell out, he estimated that as of the hearing, only 2,000 to 3,000 tickets had been sold. Mosley conceded that he has been placing free tickets on park benches in order to drum up publicity for the event. Mosely stated that the fight will be available worldwide on pay-per-view and that he expects 1.2–1.4 million viewers. Although he is the event promoter, Mosley said he has no idea how many, if any, pay-per-view packages have been sold to date. [2]

According to Mosley, the August 29, 2015 fight came about as the result of a "Twitter battle" between himself and Mayorga. Mosley stated that Mayorga's adviser, Ivaylo Gotzev, reached out to him to arrange the fight. [3] Mosley testified that he had no knowledge that a contract between DKP and Mayorga was still in effect when he arranged the August 29, 2015 bout, although he knew that DKP and Mayorga had a relationship in the past. [4]

E. Ricardo Mayorga's Testimony

Mayorga first began working with DKP in 1999. Over time, he entered into multiple contracts with DKP, believing that DKP would be able to lead him to a world title. During his professional relationship with DKP, Mayorga did, in fact, win three championships. Mayorga confirmed that when he visited DKP's offices, a lawyer or Ms. Jamison would orally translate contracts for him into Spanish because he cannot read or write English or Spanish. Although he understood Ms. Jamison's translations, he suggested he did not believe she was translating truthfully.

Mayorga testified that in 2009, he filed suit against DKP in order to recover money DKP allegedly owed him as a result of a bout against Oscar De La Hoya. [5] Mayorga told the Court that the signature and initials on the affidavit submitted in support of the lawsuit—in which he attested that he had signed a 2008 agreement with DKP—were not his. Mayorga also claimed that the "Mayorga" signatures on the October 1, 2009 Promotional Agreement and the 2012 Bout Addendum were not his. [6] He maintained that he did not recall signing a contract with DKP in 2009 or 2012 and stated that his contract with DKP had "expired" by 2014 "due to the noncompliance

on [DKP's] part." At another point in his testimony, however, he admitted that from 1999 through the 2011 Cotto fight, he had signed multiple contracts with DKP.

***6** Mayorga admitted that at the press conference following the Cotto fight, he stated, "I am going to retire. I think I need to look for a job. I said at the start of this promotion that I would retire from boxing if I lost. And I think it's time to retire." Although he acknowledged making this statement, Mayorga denied that he ever retired, contending that the statement was meant to "intimidate" his opponents. Mayorga further stated that he never told anyone at DKP that he was retiring. Following his publicized, but perhaps not actual, retirement, Mayorga participated in four MMA fights and two boxing matches.

Mayorga first testified that other than the 2012 fight in Venezuela, DKP had not offered him any bouts since 2009. He later admitted that DKP did secure a fight for him against Michael Walker in February of 2010 at the American Airlines Arena in Miami and that DKP arranged the 2011 Miguel Cotto bout. Although Mayorga denied signing the 2009 Agreement with DKP and all subsequent agreements, he stated that from 2009 through 2014 he continued to reach out to DKP to secure bouts for him.

Despite his claim that DKP had cheated him and that he had no business relationship whatsoever with DKP, Mayorga testified that on July 10, 2014, he visited DKP's offices so that his new wife could meet Don King and take a picture with him. Mayorga stated that during that visit he did not discuss anything, including his career, with DKP personnel. He further testified that with the exception of a $200 receipt for a taxi from the airport to DKP's offices, he did not sign the MOU, the 2014 Addendum, a promissory note executed in his favor for $441,896.83, or a check for $2,000.00 (all of which were dated July 10, 2014) while at DKP's offices on July 10, 2014. When shown a July 10, 2014 taxi receipt for $200 indicating Ricardo Mayorga as the passenger and DKP's offices as the destination, Mayorga denied that the "Mayorga" signature on the receipt was his.[7] Interestingly, during his July 10, 2014 visit to Florida, Mayorga stayed with Ivaylo Gotzev—who would later promote his Oklahoma City fight and the August 29, 2015 bout against Mosley.

Mayorga testified that he has been in discussion with Julio Cesar Chavez regarding a subsequent bout if Mayorga beats Mosley. Mayorga believes that if that fight occurs, he may earn more than $1 million.

F. Grace Johansson's Testimony

Ms. Johansson testified that she has been licensed by the state of Florida as notary for more than a decade. Ms. Johansson testified that she observed Mayorga, who is personally known to her, sign the 2009 Promotional Agreement, the 2014 MOU, and the 2014 Addendum. After Ms. Jamison explained each of the documents to Mayorga in Spanish, Ms. Johansson notarized them. The parties do not dispute that Ms. Johansson was a licensed notary at the time those documents were signed or that the documents bear her notary stamp.[8]

II. LEGAL STANDARD

A. Choice of Law

***7** The Promotional Agreement provides that "[t]his Agreement shall be governed, construed and enforced in accordance with the substantive law of contracts of the State of New York and without regard to New York choice of law principles or conflicts of law principles." (DE 1–1 at 7). When a court "exercises jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, a federal court must apply the choice of law rules of the forum state to determine which substantive law governs the action." *U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp.*, 550 F.3d 1031, 1033 (11th Cir. 2008). "It is well settled that absent a public policy prohibition, Florida courts will enforce a choice-of-law provision in a contract 'unless the law of the chosen forum contravenes strong public policy.' " *Perez v. Fedex Ground Package Sys., Inc.*, 587 Fed.Appx. 603, 606 (11th Cir. 2014) (quoting *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1341 (11th Cir. 2005)).

The contract here contains a choice-of-law provision designating that interpretation and enforcement of the Promotional Agreement is to be governed by New York law. Neither party argues—and there is no indication in the record—that the choice-of-law provision in the Promotional Agreement conflicts with the public policy of the state of Florida. Consequently, at least at the preliminary injunction stage, the Court will apply the substantive law of the state of New York to Plaintiff's breach of contract claim. As for the tortious interference claim, the Parties argued, and the Court agrees, that at this stage of the proceeding, Florida law should apply.

B. Preliminary Injunction

Under Rule 65, the Court may enter a preliminary injunction on notice to the adverse party.[9] Fed. R. Civ. P. 65. At the preliminary injunction stage, the Court "may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (internal citations omitted).

However, a preliminary injunction is "an extraordinary and drastic remedy" that should only be granted if the moving party has clearly established four elements: (1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). Of the four factors, the first and second are recognized as the most important. *See* *Siegel*, 234 F.3d at 1176–77 (describing irreparable harm as the "sine qua non of injunctive relief"); *Oce N. Am., Inc. v. Caputo*, 416 F. Supp. 2d 1321, 1325 (S.D. Fla. 2006) (stating that "the first element, the likelihood of success on the merits, is generally considered the most important.").

III. ANALYSIS

A. Substantial Likelihood of Success on the Merits

***8** "Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005). If Plaintiff's claims are "questionable" the likelihood of success criterion will not be satisfied. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999).

Plaintiff seeks an injunction barring Mayorga from participating in the August 29, 2015 fight pursuant to the terms of the 2009 Promotional Agreement and subsequent contracts. Although all these documents bear a "Mayorga" signature, Mayorga has denied signing each and every one, including: (1) the affidavit submitted in support of his 2009 lawsuit against DKP; (2) the 2009 Promotional Agreement; (3) the 2012 Bout Addendum; (4) the July 10, 2104 MOU; (5) the July 10, 2014 Addendum; (6) the July 10, 2014 taxi receipt; (7) the July 10, 2014 $2,000 check; and (8) the July 10, 2014 promissory note. The Court finds that Mayorga's testimony regarding the contracts and his dealings with DKP lacks credibility.

Mayorga would have the Court believe that although he filed a lawsuit against DKP in 2009 and sought an emergency order, the affidavit of Ricardo Mayorga submitted in support of that lawsuit and bearing a "Mayorga" signature, was not signed by him. He further contends that despite the fact that Ms. Jamison and Ms. Johansson testified that they personally saw him sign the 2009 Promotional Agreement as well as subsequent agreements, and despite the fact that Ms. Johansson testified she notarized each one, the "Mayorga" signatures on those documents are also not genuine. Although Mayorga first testified that he could not recall signing any contracts with DKP after 2008, he later admitted he had signed multiple contracts with DKP from 1999 through 2011.

With respect to the 2012 Bout Addendum, Ms. Jamison and Ms. Johansson both testified that they personally observed Mayorga sign the agreement, which was then notarized by Ms. Johansson. Even though Mayorga admitted he and DKP discussed the 2012 bout, he denied that the "Mayorga" signature on the Addendum was his.

Mayorga would also have the Court believe that on July 10, 2014, he—a man of modest financial resources—flew from Nicaragua to Florida and immediately traveled to DKP's office for the sole purpose of having his new wife take a picture with Mr. King. Mayorga testified that DKP had arranged for a taxi to take him from the airport to DKP's office upon his arrival in Florida. While Mayorga adamantly denied that he engaged in any discussion regarding his career during the July 10, 2014 meeting, Plaintiff proffered a MOU, Addendum, a check for $2,000, and a promissory note, all dated July 10, 2014, witnessed by Ms. Jamison, notarized by Ms. Johansson, and bearing a "Mayorga" signature. Mayorga denied signing every one of those documents. The only document he admitted to signing on July 10, 2014 was a receipt for cab fare. Yet when presented with a July 10, 2014 taxi receipt for passenger Ricardo Mayorga from the Fort Lauderdale airport to DKP's offices for $200.00, Mayorga denied that it was, in fact, his signature on the document.

Based upon the documents and evidence proffered by Plaintiff, and in light of Mayorga's testimony, the Court

believes that DKP has produced sufficient evidence at this point to show that the 2009 Promotional Agreement was a validly executed contract. Nevertheless, on this record, Plaintiff has failed to establish a substantial likelihood of success on the merits because questions remain regarding: (1) whether the Promotional Agreement is still in effect; and (2) whether enforcement of certain provisions has been waived by DKP. Although Defendants will have the ultimate burden of proving their defenses to prevent enforcement of the contract, "at this stage of the proceedings Plaintiff has the burden of establishing a substantial likelihood of success on the merits by showing it can overcome these defenses." *Oce N. Am., Inc. v. Caputo,* 416 F. Supp. 2d 1321, 1325 (S.D. Fla. 2006).

***9** On this record, it is unclear whether or not the contract has expired. The Promotional Agreement was signed on October 1, 2009 and was in effect until at least March of 2011. Although Mayorga may have retired from professional boxing in 2011, he continued to participate professionally in MMA fights, which may qualify as bouts under the Promotional Agreement. Ms. Jamison conceded that, to the best of her knowledge, the Promotional Agreement covered MMA fights and that belief formed, at least in part, the basis for the 2010 injunction. In addition, in the 2012 Bout Addendum, Mayorga reaffirmed that the 2009 Promotional Agreement was in full force and effect. There was no indication in the record that the 2012 reaffirmation was temporally limited or that the agreement was tolled when the 2012 fight failed to materialize.

In other cases enjoining professional athletes, there was no question regarding the duration of the contract and whether the contract, absent some other affirmative defense, was still in effect. *See* *Arias v. Solis*, 754 F. Supp. 290 (E.D.N.Y. 1991) (granting injunction when boxer signed two-year contract on April 2, 1990 and promoter sought injunction to prevent boxer from fighting in bout without promoter's approval on January 8, 1991); *Lewis v. Rahman*, 147 F. Supp. 2d. 225, 238 (S.D.N.Y. 2001) ("In most of the cases in which negative covenants have been specifically enforced, the defendant owed a continuing obligation to the plaintiff for a specific term."); *Nassau Sports v. Peters*, 352 F. Supp. 870, 878 (E.D.N.Y. 1972) (granting injunction when hockey player signed contract for 1971–1972 with one year renewal option and suit was filed in 1972).

Additionally, the record is equivocal as to whether **DKP** offered Mayorga three bouts per year as required by the Promotional Agreement and whether **DKP** has waived or is otherwise estopped from enforcing the Promotional Agreement.[10] As such, the Court finds that based on the evidence presented, **DKP** has failed to establish a *substantial* likelihood of success on the merits.

B. Irreparable Injury

A party requesting a preliminary injunction must show a substantial threat of irreparable injury if the injunction were not granted. *Siegel,* 234 F.3d at 1176–77. "[T]he asserted irreparable injury 'must be neither remote nor speculative, but actual and imminent.' " *Id.* "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

Plaintiff has failed to meet its burden of establishing actual, imminent harm that could not be remedied through a monetary award. New York, following English common law, recognizes the availability of injunctive relief when the non-compete covenant is found to be reasonable and the employee's services are unique. *Ticor Title Ins. v. Cohen,* 173 F.3d 63, 70 (2d Cir. 1999). This is because when an employee has truly special, unique, or extraordinary services and those services "are available to a competitor, the employer obviously suffers irreparable harm." *Id.* Accordingly, when an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract. *See id.*; *Solis*, 754 F. Supp. at 293–94.

***10** Such unique services have been found to exist in various professions where the services are dependent on an employee's special talents, as in the case of "musicians, professional athletes, actors, and the like." *Ticor*, 173 F.3d at 70. "In those kinds of cases injunctive relief has been available to prevent the breach of an employment contract where the individual performer has such ability and reputation that his or her place may not easily be filled." *Id.* However,

"as to the specific performance of personal services contracts involving athletes, before granting an injunction, it must be shown 'that the player is an athlete of exceptional talent.' " *Solis*, 754 F. Supp. at 294. And in determining the value of the services, the focus should be on the employee's relationship to the employer's business. *Ticor,* 173 F.3d at 71.

While Mayorga proclaimed that he was still a boxer of exceptional talent and that he would undoubtedly beat Mosley, this characterization and this outcome are debatable. In *Solis,* the court noted that Plaintiff offered into evidence two ranking lists indicating that the boxer was ranked #7 and #10 by two different boxing associations. *See Solis*, 754 F. Supp. at 294. Here, the undisputed evidence is that Mayorga is not ranked, that he is not at the peak of his physical capabilities, and that whether he will participate in any future bouts is purely speculative. As Ms. Jamison testified, but for the Twitter-inspired August 29, 2015 fight against Mosley, she was not aware of any other opponents interested in fighting Mayorga. There was also an absence of evidence that Mayorga's relationship to DKP's business is of particular importance to its portfolio, all of which weighs against a finding of irreparable injury.

The Second Circuit has suggested that a contractual provision stating that the breach of a non-compete clause would cause an employer irreparable injury "might arguably be viewed as an admission by [defendant] that plaintiff will suffer irreparable harm" in the event of a breach. *Ticor,* 173 F.3d at 69. While such a provision "might" be viewed as evidence of an admission, in *Solis,* the court noted that it was not required to accept as true a provision stating that the employee's services are unique or exceptional or that irreparable harm will necessarily ensue. *See Solis,* 754 F. Supp. at 294. Although the 2009 Agreement contains such language, the Court is not bound by it, particularly in light of the fact that while the provision may have been applicable in 2009, six years later the record is silent as to whether Mayorga has remained an athlete of "exceptional" talent.

DKP contends that it will suffer irreparable injury if an injunction is not issued because "other fighters under contract with DKP *may* believe that they can simply abandon their contracts and immediately and openly compete against DKP." (DE 23 at 2) (emphasis added). While the record contains instances of Mayorga's seeming disregard for his contractual obligations, DKP's assertion of irreparable harm —with regard to Mayorga as opposed to any other fighter— is merely conclusory. Mayorga has already participated in at least two professional boxing matches in possible violation of his contract with DKP and DKP offered no evidence that Mayorga's flouting of his contractual obligations has, in fact, led other boxers to follow in his idiosyncratic footsteps. Further, Ms. Jamison testified that it was well known in the boxing industry that DKP represents Mayorga but did not offer any evidence that his unauthorized participation in MMA fighting from 2011 to 2014 or the two 2014 boxing matches, harmed DKP's reputation or that the August 29, 2015 event, in particular, would be more likely to harm its reputation.

In affirming an injunction preventing an employee from violating a non-compete clause, the Second Circuit in *Ticor* found that the irreparable harm was clearly evidenced because the year before the claim at issue, another employee had left and taken 75% of his clients with him. *Ticor,* 173 F.3d at 72. Plaintiff offered no comparable evidence and there is no basis on the record for the Court to conclude that Mayorga's prior participation in MMA and the 2014 fights resulted in the irreparable harm suggested by Plaintiff. *See Star Boxing, Inc. v. Tarver,* No. 02 CIV. 8446 (GEL), 2002 WL 31867729, at *3 (S.D.N.Y. Dec. 20, 2002) (finding that the harm a promoter might sustain as a result of embarrassment or injury to reputation if fighter was not enjoined from fighting for another promoter was not irreparable, particularly in light of the fact that it was already known in boxing circles that fighter had left promoter and thus "whatever embarrassment could arise from [fighter's] breach has already occurred").

***11** As such, the Court finds that Plaintiff has failed to proffer sufficient evidence showing that any loss in standing, reputation, [11] or prestige suffered if the injunction does not issue cannot be adequately compensated by money damages. *See Wolf v. Torres,* Case No. 87–Civ–1795, 1987 WL 10033, at *2, (S.D.N.Y. April 21, 1987) (denying injunction to prevent other managers from discussing contracts with boxer while validity of contract was determined and finding that promoter "had an adequate remedy at law since money damages are available to him for any alleged lost profits, injury to standing, reputation, prestige and credit").

DKP also contends that it will suffer irreparable harm if Mayorga is permitted to participate in the August 29, 2015 fight because if he performs poorly or is injured, DKP will have difficulty promoting him in the future. The Court finds

that DKP has not adduced sufficient evidence to establish irreparable injury in this regard. DKP has no knowledge of Mayorga's current physical condition and can only speculate as to how likely it is that he will be critically injured in the August 29, 2015 bout. In other cases where a court enjoined a fighter, expert evidence or other persuasive testimony had been introduced that the fighter was likely to sustain particular injuries. *See* *Solis,* 754 F. Supp. at 295 (enjoining boxer in part because boxer had suffered an arm injury and previously failed a neurological examination).

***12** Additionally, Ms. Jamison testified that, to her knowledge, no boxers, other than Mosley, were interested in fighting Mayorga, and that since July 2014, DKP had not successfully offered Mayorga any bouts.[12] As such, the Court fails to see how Mayorga's potentially poor performance in the August 29, 2015 bout would negatively impact DKP's efforts to promote him in the future. Admittedly, the loss of the opportunity to direct or influence Mayorga's career—under the right circumstances—might justify a finding of irreparable harm. However, Mayorga's career is nearing its end and Ms. Jamison testified that, since at least 2009, DKP had been unable to direct or strongly influence Mayorga's decisions. Mayorga's refusal to communicate with DKP and his persistence in fighting in MMA or for other promoters further undermines the notion that any loss in directing his career would be irreparable.[13] *See* *Tarver,* 2002 WL 31867729, at *4 (factual record regarding relationship between boxer and promoter did not support issuance of injunction because the boxer "very much chose his own course" and promoter "was unable to direct or strongly influence [boxer's] decisions.").

C. Balancing of the Hardships and Public Interest

Although the Court did not find defendants' arguments well taken regarding these factors, because Plaintiff has failed to meet its burden to clearly establish irreparable harm or a substantial likelihood of success on the merits, the Court need not address these factors at length. Nonetheless, the Court reiterates its position at the hearing: the public interest is always served by the enforcement of valid contracts. And while the defense argues that "Mr. Mayorga credibly explained the reasons why he chose the course of action he did" (DE 22 at 3), the Court cannot agree with this conclusion. Moreover, the harm Mayorga claims to have suffered as a result of DKP "not promoting him" (DE 22 at 3) appears to be, at least in part, a product of his own conduct.

Finally, Defendants have vehemently asserted that "the equities balance heavily in favor of allowing the fight to proceed, the proceeds of which will provide an ample adequate remedy to compensate DKP for any losses it may ultimately be entitled to recover in this case." (DE 22 at 1). In other cases, such as *Wolf*—which the Defendants cited repeatedly—the court found that because defendants had agreed to place future purse money into escrow, the plaintiff was protected financially and would not suffer irreparable harm. *See* *Wolf,* 1987 WL 10033, at *2 ("Because his financial interests are fully protected, Wolf has not demonstrated that he will suffer irreparable harm if his application is denied. [Defendants] are willing to place the manager's share of any purse into escrow pending the resolution of this action and the proceeding before the Commission. The defense asserts, and the Court agrees, that Wolf has an adequate remedy at law since money damages are available to him for any alleged lost profits, injury to standing, reputation, prestige and credit."); *Brettschneider v. Bell,* 814 N.Y.S.2d 559 (N.Y. Sup. Ct. 2005) (refusing to enjoin boxer but finding that "equity requires sums sufficient to pay Plaintiff's claims be held in escrow pending the resolution of this action" and ordering that the promoter's share of the proceeds from all fights participated in by boxer be deposited into the court's registry); *see also* *Witherspoon v. Rappaport,* Case No. 97 CV4052, 1999 WL 1288944, at *1 (E.D.N.Y. Nov. 3, 1999) (enjoining promoter from enforcing exclusivity agreement and permitting boxer to fight but noting that boxer "has agreed to put in escrow the share of all of his future purses to which [promoter] would be entitled").

***13** During the hearing, the Court inquired whether, in asserting that an adequate remedy at law was available to Plaintiff through the proceeds of the August 29, 2015 fight, Defendants—like the defendant in *Wolf*—were offering to put the disputed funds into escrow pending the resolution of the case. Defendants demurred. Although the Court has concluded that on this record, the extraordinary and drastic remedy of a preliminary injunction is not warranted, in light of Mayorga's uncertain status, his testimony, and the apparent difficulties in reliably locating and contacting him, it remains to be seen whether an adequate remedy at law will be illusory.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has failed to carry its burden and clearly establish that it is entitled to a preliminary injunction. Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's motion for preliminary injunction (DE 8) is **DENIED. By September**

11, 2015, the Parties shall file a joint pre-trial conference report and a joint proposed scheduling order, as required by S.D. Fla. Local Rule 16.1(b). As part of that filing, the Parties shall complete and submit the attached form proposing deadlines for the case. [14]

DONE AND ORDERED in chambers in Miami, Florida, this 25th day of August, 2015.

SCHEDULE JOINTLY PROPOSED BY THE PARTIES

THIS MATTER is set for trial for the week of [Month, Day, Year]. The Parties propose to adhere to the following schedule:

[Month, Day, Year] The Parties shall furnish lists with names and addresses of fact witnesses. The Parties are under a continuing obligation to supplement discovery responses with ten (10) days of receipt or other notice of new or revised information.

[Month, Day, Year] The Parties shall file motions to amend pleadings or join Parties.

[Month, Day, Year] The Plaintiff shall disclose experts, expert witness summaries and reports, as required by Federal Rule of Civil Procedure 26(a)(2).

[Month, Day, Year] The Defendant shall disclose experts, expert witness summaries and reports, as required by Federal Rule of Civil Procedure 26(a)(2).

[Month, Day, Year] The Parties shall exchange rebuttal expert witness summaries and reports, as required by Federal Rule of Civil Procedure 26(a)(2).

[Month, Day, Year] The Parties shall complete all discovery, including expert discovery.

[Month, Day, Year] The Parties shall complete mediation and file a mediation report with the Court.

[Month, Day, Year] The Parties shall file all dispositive pre-trial motions and memoranda of law.

[Month, Day, Year] The Parties shall file any motions to exclude expert testimony based on Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579(1993). [15]

[Month, Day, Year] The Parties shall file a joint pre-trial stipulation, as required by Local Rule 16.1(e) and final proposed jury instructions. Joint proposed jury instructions or conclusions of law (for non-jury trials) shall outline: 1) the legal elements of Plaintiff's claims, including damages; and 2) the legal elements of the defenses that are raised.

[Month, Day, Year] The Parties shall submit their deposition designations.

[Month, Day, Year] The Parties shall file witness and exhibit lists and all motions *in limine*. The witness list shall include only those witnesses the Parties actually intend to call at trial and shall include a brief synopsis of their testimony. The exhibit lists shall identify each witness that will introduce each exhibit.

***14** By: **[Attorney(s) for Plaintiff(s)] [Attorney(s) for Defendant(s)]**

All Citations

Not Reported in Fed. Supp., 2015 WL 11198251

Footnotes

1 The Court may take judicial notice on its own of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. As such, the Court takes judicial notice of the records of this court.

2 It should be noted that on August 29, 2015, a championship bout is scheduled to take place at the Staples Center in Los Angeles, California—less than 10 miles away. The championship fight is not on pay-per-view and will be broadcast on television worldwide.

3 Mosley testified that the contract signed by Mayorga for the August 29, 2015 bout was only in English. No mention was made of a Spanish translation and the contract was not offered into evidence.

4 Mosley testified that Mayorga told him that Mayorga had no agreement binding him to DKP. The Court inquired whether there was a conflict in Mayorga and Mosley sharing the same legal counsel and was assured that the issue had been addressed and no conflict exists.

5 The 2009 lawsuit makes no mention of the Oscar De La Hoya fight. Mayorga also accused DKP of failing to adequately compensate him for the 2011 bout with Miguel Cotto.

6 Mayorga denies signing the 2012 Bout Addendum despite admitting that DKP had offered him the bout referenced in that Addendum.

7 Throughout the hearing, the only document that Mayorga admitted bore his true signature was his recently issued passport which was introduced into evidence by his attorney. The contents of the passport indicate that Mayorga is in the United States on a tourist visa, which he said would not permit him to participate in any boxing matches for compensation. Mayorga assured the Court that appropriate visas were being procured for the August 29, 2015 fight.

8 Although Defendants contend there are some technical irregularities with the notarization, the Court does not find the argument availing. Such alleged defects in no way impact the validity of the documents or the contracts which Mayorga signed. Nonetheless, even discounting her status as a duly licensed notary, Ms. Johansson testified credibly that she personally observed Mayorga sign the various documents at DKP's offices.

9 Defendants protest that they had insufficient notice of the hearing. (*See* DE 15). This argument is without merit. At the hearing, Defendants conceded they were aware of the complaint and the emergency motion as early as August 14, 2015. Additionally, Defendants were aware of the likelihood of legal action at least as early as July 30, 2015, when Plaintiff sent the cease and desist letter. Defendants had, at a minimum, 6 days to prepare for the emergency hearing, which is sufficient notice. *See* *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.,* 51 F.3d 982, 985 (11th Cir. 1995) (noting that counsel had "at least a weekend to prepare their opposition to the preliminary injunction" and finding that the district court did not abuse its discretion in determining that counsel had sufficient time to prepare a defense).

10 As discussed at length, questions remain about whether DKP offered Mayorga the bouts or whether it was unable to do so given his refusal to communicate with DKP. Likewise, as discussed, in light of Mayorga's participation in the two 2014 boxing matches and MMA from 2011 through 2014, it is uncertain whether DKP may be estopped, or have otherwise waived, enforcement of the 2009 Promotional Agreement.

11 Defense incorrectly argued that in order to prove irreparable harm, DKP must produce evidence of Don King's personal reputation. In support of that argument, defense counsel sought to introduce self-selected, unauthenticated, hearsay news articles published two years ago from a variety of online sources regarding Don King's (as opposed to Plaintiff, DKP's) purported reputation in the industry. Not only were those documents inadmissible and inappropriate for the purposes of the preliminary injunction hearing, but defense counsel's assertion regarding Don King's obligation to offer reputation evidence and any adverse inference to be drawn from his failure to testify has no basis in law. Notably, defense counsel failed to cite to a single case where the plaintiff was required to come forward with affirmative evidence of its reputation during a preliminary injunction hearing and the cases cited by defense counsel are inapposite. *See* *Marcone v. Penthouse Int'l Magazine For Men,* 754 F.2d 1072, 1078 (3d Cir. 1985) (analyzing Pennsylvania defamation and libel law and finding that even if plaintiff had sullied reputation, the court "cannot say as a matter of law that [plaintiff] was libel proof...Evidence of tarnished reputation ... should be considered as a factor to mitigate the level of compensatory damages" and finding that plaintiff was not required to prove actual economic loss to recover for reputational damage); *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d

409, 413 (2d Cir. 1999) (analyzing Connecticut law regarding a teenager who had been sexually assaulted by a priest and noting that the jury would be permitted to draw an adverse inference from the Diocese's failure to call the priest as a witness); *Chevron Corp. v. Donziger,* 974 F. Supp. 2d 362, 700 (S.D.N.Y. 2014) (in a RICO bench trial, court would decline to draw adverse inference for failure to call certain witnesses); *Adelson v. Hananel,* 652 F.3d 75, 87 (1st Cir. 2011) ("We conclude that the district court, as factfinder, was under no obligation to draw the adverse inference, for the 'missing witness' rule *permits,* rather than *compels,* the factfinder to draw [the] inference particularly where the factfinder concludes that the party who requested the inference failed to subpoena a witness otherwise available to testify."). Moreover, Ms. Jamison testified that DKP has a reputation as "one of the leading boxing promoters of the world" and defense counsel elected not to cross-examine her on this issue.

12 Again, DKP's alleged failure to offer bouts may be the result of Ms. Jamison's inability to locate Mayorga and his refusal to communicate with DKP. It is also possible that Mayorga may have waived any claim he has with respect to the three bout provision of the 2009 Agreement (which he stated he did not sign) because he purportedly told Ms. Jamison that he was not prepared to fight and would inform her when he was ready.

13 With respect to Plaintiff's tortious interference claim, the Court also finds that, for the reasons outlined *supra,* Plaintiff has failed to establish a substantial likelihood of success on the merits or irreparable harm. In Florida, the elements of tortious interference with a contractual relationship are: (1) the existence of a contract; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the contract's breach; (4) the absence of any justification or privilege; and (5) damages resulting from the breach." *Mattocks v. Black Entm't Television* LLC, 43 F. Supp. 3d 1311, 1318 (S.D. Fla. 2014). First, there has been no evidence offered that Mosley knew that Mayorga and DKP had an existing contract or business relationship in 2015. Second, given Mayorga's participation in MMA and the two 2014 bouts, it appears he was pre-disposed to breach the agreement. *See Ingenuity, Inc. v. Linshell Innovations Ltd.,* Case No. 6:11–CV–93–ORL28KRS, 2014 WL 1230695, at *5 (M.D. Fla. Mar. 25, 2014) ("If a party already intends to breach a contract regardless of the alleged interferer, the plaintiff will be unable to establish that the interferer caused the breach."). Finally, as the Court has noted, questions remain whether in 2015, the 2009 Promotional Agreement is still enforceable.

14 Additionally, by **August 27, 2015,** defense counsel shall file a motion for admission *pro hac vice* for Kimberlina McKinney, Esq., who has signed multiple submissions to this Court (*see* DE 15, 17, 22, 24) and who was consulted extensively by Attorneys Vogt and Turkel during the hearing.

15 This deadline must be at least 6 weeks prior to calendar call.

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