UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALITA PROMOTIONS CORP.,
A New York corporation,
Plaintiff,

Case No. 2:20-cv-12547-LJM-EAS

vs.

Hon. Laurie J. Michelson

SHOHJAHON ERGASHEV and
OLEG BOGDANOV,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants SHOHJAHON ERGASHEV ("Ergashev") and OLEG BOGDANOV ("Bogdanov") (collectively "Defendants"), by and through counsel, Conlin, McKenney & Philbrick, P.C., hereby file this Motion To Dismiss Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure ("FRCP") 8(a)(1), 12(b)(1), 12(b)(2), 12(b)(6), and authorities cited in Defendants' Brief in Support. As set forth more fully in Defendants' Brief in Support, Plaintiff's causes of action fail for the following reasons:

1. **First Cause of Action – Breach of Contract**: The Court lacks subject matter jurisdiction (FRCP 8(a)(1); 12(b)(1)). The Court lacks personal jurisdiction over Defendants (FRCP 12(b)(2)). Plaintiff fails to state a claim upon which relief can be granted (FRCP 12(b)(6)).

2. **Second Cause of Action – Tortious Interference with Contract:** The Court lacks subject matter jurisdiction (FRCP 8(a)(1); FRCP 12(b)(1)). The Court lacks personal jurisdiction over Defendants (FRCP 12(b)(2)). Plaintiff fails to state a claim upon which relief can be granted (FRCP 12(b)(6)).

3. **Third Cause of Action – Accounting:** The Court lacks subject matter jurisdiction (FRCP 8(a)(1); FRCP 12(b)(1)). The Court lacks personal jurisdiction over Defendants (FRCP 12(b)(2)). Plaintiff fails to state a claim upon which relief can be granted (FRCP 12(b)(6)).

4. **Fourth Cause of Action – Injunctive Relief:** The Court lacks subject matter jurisdiction (FRCP 8(a)(1); FRCP 12(b)(1)). The Court lacks personal jurisdiction over Defendants (FRCP 12(b)(2)). Plaintiff fails to state a claim upon which relief can be granted (FRCP 12(b)(6)).

5. Pursuant to E.D. Mich. LR 7.1(a), Defendants sought concurrence in their request and explained the basis for it as follows. On February 23, 2021, Defendants' counsel, Gregory M. Smith (admission pending to Eastern District of Michigan), called Plaintiff's counsel, Jason Canvasser, but Mr. Canvasser did not answer. Mr. Smith then sent email correspondence to Plaintiff's counsel outlining the reasons for this motion and requesting a call to discuss further. On February 24, Mr. Canvasser responded via email that he would not be available for a discussion until February 26 or March 1. On February 24, Mr. Smith responded via email to

remind Mr. Canvasser that the Defendants' responsive pleading deadline was February 26. Mr. Smith proposed a stipulation to continue that deadline in order to hold a further meet and confer call. On February 25, Mr. Canvasser responded via email to refuse the stipulated extension of time but reiterated he could be available to meet and confer either the day the responsive pleadings were due, or thereafter.

WHEREFORE, Defendants, SHOHJAHON ERGASHEV and OLEG BOGDANOV, respectfully request that this Court enter an Order dismissing this action in its entirety with prejudice pursuant to FRCP 8(a)(1), 12(b)(1), 12(b)(2), 12(b)(6), and authorities cited in Defendants' Brief in Support, and grant such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

By: /s/ W. Daniel Troyka

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Dated: February 26, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALITA PROMOTIONS CORP.,
A New York corporation,

Plaintiff,

vs.

SHOHJAHON ERGASHEV and
OLEG BOGDANOV,

Defendants.

Case No. 2:20-cv-12547-LJM-EAS

Hon. Laurie J. Michelson

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants SHOHJAHON ERGASHEV ("Ergashev") and OLEG BOGDANOV ("Bogdanov") (collectively "Defendants"), by and through counsel, Conlin, McKenney & Philbrick, P.C., hereby submit this Brief in Support of their Motion to Dismiss pursuant to FRCP 8(a)(1), 12(b)(1), 12(b)(2), 12(b)(6) and authorities cited herein.

CONCISE STATEMENT OF ISSUES PRESENTED

The issues presented are whether this Court has subject matter jurisdiction, whether this Court has personal jurisdiction over Defendants, and whether Plaintiff has stated a claim upon which relief may be granted as more fully supported in this Brief.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

The controlling or most appropriate authority for relief sought in this Motion brought pursuant to FRCP 8(a)(1), 12(b)(1), 12(b)(2), 12(b)(6) is: *Whitmire v. Victus Ltd. t/a Master Design Furniture*, 212 F.3d 885 (5th Cir. 2000); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Thomas v. Leja*, 187 Mich. App. 418 (1991); and *Reed v. Michigan Metro Girl Scout Council*, 201 Mich. App. 10, 13 (1993)

I. INTRODUCTION

Boxing is the only professional sport that operates without either a private governing organization or uniform business practices, making it uniquely complicated and ripe for abuse and corruption. See H.R. 1832, 106th Cong. § 2(1) (1999). As a result, boxers have often been exploited by unethical parties who control the boxing industry. *See* Lawrence Bershad & Richard J. Ensor, *Boxing in the United States: Reform, Abolition or Federal Control? A New Jersey Case Study*, 19 Seton Hall L. Rev. 865, 880, 900-12 (1989). In 2000, Congress passed the Muhammad Ali Boxing Reform Act ("Ali Act"), "to protect the rights and welfare of professional boxers on an interstate basis by preventing certain exploitive, oppressive, and unethical business practices...." Ali Act, Pub.L. No. 106–210, § 3, 114 Stat. 321 (2000).

This action, brought by plaintiff SALITA PROMOTIONS CORP. ("Salita") to prevent an undefeated boxer, SHOHJAHON ERGASHEV ("Ergashev"), from earning a living in his chosen profession, proves that little has changed in the 20 years since the passage of the Ali Act. Salita is attempting to enforce an illegal and illusory agreement to prevent Ergashev from participating in the biggest bouts of his career. Salita has also sued Ergashev's manager OLEG BOGDANOV ("Bogdanov") (collectively, with Ergashev, "Defendants") for doing nothing more than his job.

However, as pled, the First Amended Complaint fails to establish either subject matter or personal jurisdiction over the Defendants. Moreover, even if the facts alleged are assumed to be true, the Promotional Agreement is unenforceable for violating the Ali Act and illusory under Michigan state law. The accompanying action against Bogdanov for Interference with Contract cannot stand because an agent cannot interfere with the contract of his principal. Finally, the "actions" for accounting and injunctive relief are not causes of action at all, but misplaced prayers for relief. All told, the First Amended Complaint does not state grounds for relief. This matter must be dismissed.

II. BACKGROUND

To understand the parties and Plaintiff's claims it is useful to understand the terminology and the business of boxing, as regulated by the Ali Act. Plaintiff Salita is a promoter, "the person primarily responsible for organizing, promoting, and

producing professional boxing matches." 15 U.S § 6301. [First Amended Complaint, Doc.23 ("FAC") ¶6.] During the Senate hearings on the Ali Act, attorney Fredric G. Levin explained the role of the promoter in the boxing industry: "The job of the promoter is to go out and get as much money as he possibly can get from television, from the site, from foreign rights, from sponsorships, etc., and then to pay the fighter as little as he possibly can. The reason for this is the difference goes to the promoter." *Business Practices in the Professional Boxing Industry: Hearing on S. 2238 Before the S. Comm. On Commerce, Sci., and Transp.* 105th Cong. 9 (Mar. 24, 1998).

Bogdanov is Ergashev's manager, "a person who receives compensation for service as an agent or representative of a boxer." 15 U.S § 6301. [FAC ¶39.] A manager is an advisor and a fiduciary to boxer and "is supposed to have some degree of independent judgment" from the promoter. *Business Practices in the Professional Boxing Industry: Hearing on S. 2238 Before the S. Comm. On Commerce, Sci., and Transp.* 105th Cong. 29 (Mar. 24, 1998).

Professional boxing has four major sanctioning organizations, the WBO, WBC, IBF, and WBA, which are themselves regulated by the Ali Act. 15 U.S § 6307c. These bodies sanction bouts, rate professional boxers, and crown champions. In order to ensure that the best boxers compete against each other, instead of cherry-picking lesser competition, any sanctioning body can order champions and other highly ranked boxers to participate in bouts against "mandatory

opponents" in order to maintain their titles or advance in the rankings. In the event that the promoter of a highly ranked fighter cannot reach a financial agreement with his boxer's "mandatory," the organization can order a purse bid, which is essentially an auction for the right to promote the bout. "…[A]ny promoter registered with [the organization] and in good standing can bid for the right to promote a title fight. The amount of a purse bid determines the amounts the two fighters will receive as 'purses,' and the highest bid wins." *Ruiz v. Sauerland Event GmbH*, 801 F. Supp. 2d 118, 120–21 (S.D.N.Y. 2010).

III. FACTS AS ALLEGED

Salita is a New York corporation with its principal place of business in New York. [FAC ¶7.] Ergashev is an undefeated professional boxer who is ranked by boxing's sanctioning bodies as one of the best in his weight class. [FAC ¶2; 28.] Both Ergashev and Bogdanov are residents of Russia.[1] [FAC ¶8;10.] Salita alleges that at unspecified times within the last three years Defendants have visited Detroit, Michigan to train at the Kronk Gym. [FAC ¶8; 11.] On November 17, 2017, Salita and Ergashev executed a Promotional Agreement. [FAC ¶17; Exhibit A to FAC.] That Promotional Agreement purported to give Salita the "sole and exclusive right" to "secure, arrange, and promote all bouts" involving Ergashev. [Exhibit A to FAC, Sect. III "Promotion".]

[1] Plaintiff fails to allege the citizenship of Defendants.

Salita alleges that it performed its obligations under the Promotional Agreement. [FAC ¶32.] Salita alleges that Ergashev breached the Promotional Agreement by agreeing to participate in a boxing match to be held in St. Petersburg, Russia on September 21, 2020 that was promoted by an entity other than Salita. [FAC ¶33.] The FAC asserts the following causes of action:

1) Breach of Contract against Ergashev;

2) Tortious Interference with Contract against Bogdanov;

3) Accounting against both Defendants; and

4) Injunctive Relief against both Defendants.

IV. ARGUMENT

A. Plaintiff Has Failed to Plead Facts to Establish that the Court has Subject Matter Jurisdiction [FRCP 8(a)(1); 12(b)(1)]

Federal courts have subject matter jurisdiction only over matters authorized by the Constitution and Congress. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (emphasis added). In seeking to invoke this Court's jurisdiction, Plaintiff bears the burden of pleading and proving that jurisdiction exists. *Shea v. State Farm Ins. Co.*, 2 Fed.Appx. 478, 479 (6th Cir. 2001).

Absent unusual circumstances, a party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties. See *Whitmire v. Victus Ltd. t/a Master Design Furniture*, 212 F.3d 885, 887 (5th Cir. 2000) ("[I]n a diversity action, the plaintiff must state all parties' citizenships such

that the existence of complete diversity can be confirmed.") (emphasis added) (quoting *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 222 n. 13 (3d Cir. 1999)); see also 5 C.A. Wright & A. Miller, *Federal Practice and Procedure* § 1208 at 101 (2d ed. 1990).

The natural person's state citizenship is determined by his state of domicile, not his state of residence. A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state. See, e.g., *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957) ("Residence is physical, whereas domicile is generally a compound of physical presence plus an intention to make a certain definite place one's permanent abode, though, to be sure, domicile often hangs on the slender thread of intent alone, as for instance where one is a wanderer over the earth. Residence is not an immutable condition of domicile.").

Here, Plaintiff only pleads the residency of the Defendants, without reference to the citizenship of the parties at all. [FAC ¶14.] The Court of Appeals has repeatedly ruled that such a pleading defect is fatal to establishing jurisdiction of the District Court. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) ("'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another." (internal citations omitted)); *Menard v. Goggan*, 121 U.S. 253, 253 (1887) (holding that the circuit court lacked diversity of citizenship jurisdiction where plaintiff's petition alleged that he "resides

... in the state of Illinois" and the defendant "resides ... in the state of Texas"); *Bd. of Tr. of Mohican Twp., Ashland Cty., Ohio v. Johnson*, 133 F. 524, 524–25 (6th Cir. 1904) ("It has been many times decided that an averment that one is a resident of a particular state is not equivalent to an averment that he is a citizen of that state."). The requirement to properly plead the states of the parties' citizenship is "no mere exaltation of form over substance," but rather is essential to establish subject matter jurisdiction under § 1332(a). *Farmer v. Fisher*, 386 Fed.Appx. 554, 557 (6th Cir. 2010).

Because Salita has failed to allege the citizenship of the defendants, he cannot carry his burden to establish jurisdiction of this Court and the FAC must be dismissed. Of course, a court's power cannot be broader than its jurisdiction. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 72 (1988). Even a judgment is void if the court lacks jurisdiction to enter it. *In re G.A.D., Inc.*, 340 F.3d 331, 335 (6th Cir. 2003). Thus, when dismissing the action for lack of jurisdiction, the Court must also vacate all prior rulings in this matter.

B. Plaintiff Has Failed to Plead Facts to Establish that the Court has Personal Jurisdiction over the Defendants [FRCP 12(b)(2)]

A plaintiff bears the burden of establishing the district court's personal jurisdiction over the defendants before a case can proceed. *Nationwide Mut'l Ins. Co. v. Tryg Int'l Ins. Co., Ltd.*, 91 F.3d 790, 793 (6th Cir.1996). "Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the

defendant has with the forum state." *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002). The Court of Appeals explained the difference between these two types of jurisdiction as follows: "General jurisdiction is proper only where a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *Id.* Specific jurisdiction, however, is proper only "in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 874.

1. The Facts Alleged in the FAC Do Not Support General Personal Jurisdiction over the Defendants

Salita asserts that this Court has jurisdiction over Defendants, and that this District is the proper venue, because Defendants periodically traveled to Detroit to train at the Kronk Gym and the Promotional Agreement requires that any action arising out of or relating to the Agreement shall be brought here. [FAC ¶8;15.] However, the facts alleged do not create personal general jurisdiction under Michigan law.

MCL 600.701 governs general personal jurisdiction over individuals and requires one of the following:

(1) Presence in the state at the time when process is served.

(2) Domicile in the state at the time when process is served.

> (3) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.

Item three, "Consent" is clarified by MCL Section 600.745 which requires all of the following to establish jurisdiction where "the parties agreed in writing that an action on a controversy may be brought in this state...":

> (a) The court has power under the law of this state to entertain the action.
>
> (b) This state is a reasonably convenient place for the trial of the action.
>
> (c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (d) The defendant is served with process as provided by court rules.

Neither Item One nor Item Two from Section 600.71 is present here. The Proof of Service filed by Plaintiff on January 27, 2021 states that Defendants were personally served in Moscow, Russia and the FAC does not alleged that they were domiciled in Michigan when that event occurred. [Document No. 24.] Item Three cannot exist as to Bogdanov because he did not sign the Promotional Agreement and did not consent to be sued in Michigan. Thus, the Court does not have general personal jurisdiction over Bogdanov.

As to Ergashev, who is alleged to have consented to jurisdiction by signing the Promotional Agreement, Plaintiff has not pled facts to meet the requirements of Section 600.74. Part (a) fails because this Court lacks subject matter jurisdiction.

Part (b) fails there are no facts alleged in the FAC that Michigan is convenient for any party or witness involved. Plaintiff is a New York corporation with its principal place of business in New York, and Defendants are alleged to be residents of Russia. [FAC ¶6; 8; 10.] The Plaintiff alleges that Ergashev breached, and Bogdanov interfered, with the Promotional Agreement by agreeing to participate in a boxing match in Russia. [FAC ¶2; 33; 41.] The FAC does not contain any allegation that the actionable conduct occurred in the District, or even in the United States. The FAC does not allege any witnesses or evidence to the alleged breaches that might be found in the District. Given that neither the Defendants, nor the Plaintiff, are citizens of Michigan or residents of the District, and that the alleged breach did not occur in Michigan, there is no basis on which the Court could conclude that Michigan is a reasonably convenient place for a trial in this action.

Because Plaintiff has not alleged facts to meet all the requirements of Michigan's statutes, this Court lacks general personal jurisdiction over defendants.

2. The Facts Alleged in the FAC Do Not Support Specific Personal Jurisdiction over the Defendants

A federal court's exercise of personal jurisdiction in a diversity case must be both (1) authorized by the law of the state in which it sits, and (2) in accordance with the Due Process Clause of the Fourteenth Amendment. *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1115 (6th Cir. 1994).

It is absolutely clear that under Michigan law "[t]he 'transaction of any business' in Michigan by the [defendant] would ... confer no limited personal jurisdiction upon the District Court unless the cause of action pleaded by the plaintiff arose out of the business transacted there." *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 908 (6th Cir.), cert. denied, 488 U.S. 926 (1988). Here, the facts pled do not support the conclusion that this action arose from transactions that occurred in Michigan. The entire thrust of the FAC is that Ergashev and Bogdanov engaged in prohibited conduct in Russia. [FAC ¶ 33-43.]

Assuming, for the sake of argument, that this Court does determine the elements of the Michigan law are satisfied, Plaintiff is still required to present a prima facie case that the Court's exercise of personal jurisdiction over Defendants would not offend due process. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). Plaintiff must therefore establish with reasonable particularity that Ergashev and Bogdanov had sufficient "minimum contacts" with Michigan so that the exercise of jurisdiction over him would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945).

This Circuit has distilled the due process requirements into a three-part test: "First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or

consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

As pled, the FAC does not meet these requirements. Ergashev's only alleged contacts with Michigan are traveling from Russia to train at the Kronk Gym. [FAC ¶8.] Importantly, as explained above, the alleged breaches of the Promotional Agreement did not occur in Michigan; they occurred in Russia. [FAC ¶2; 33; 41.] Thus, the second and third of the *Mohasco* elements cannot be satisfied. Further, the damages caused by breach of the Promotional Agreement (if any) could only deprive a New York corporation, based in New York, of potential profit from promoting the bout. These consequences have no rational impact or relation to Michigan that would allow this Court to reasonably exercise jurisdiction over the Defendants.

Because this Court lacks either general or specific personal jurisdiction over the Defendants, this matter must be dismissed.

C. Plaintiff Has Not Asserted Claims on Which Relief Can Be Granted [FRCP 12(b)(6)]

Rule 12(b)(6) demands dismissal of an action where a complaint fails to adequately state a claim upon which relief can be granted. For a complaint to survive a Rule 12(b)(6) motion to dismiss, it must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility requires facts that allow the court "to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Twombly*, 550 U.S. at 555. To avoid dismissal, Plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* A plaintiff must plead facts sufficient to make a violation "plausible," and not merely "possible." *Iqbal*, 556 U.S. at 677-79.

1. First Cause of Action - Breach of Contract

The elements of a valid contract are: (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v. Leja*, 187 Mich. App. 418, 422 (1991). Importantly, Courts have long stated that illegal contracts are void. See, e.g., *McNamara v Gargett*, 68 Mich. 454, 462 (1888) ("If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise..."). As set forth below, the Promotional Agreement is illegal under the Ali Act and unenforceable under Michigan contract principles.

a. The Promotional Agreement Is Not Enforceable Because It Violates the Ali Act

In 2000, Congress passed the Ali Act to "reform unfair and anticompetitive practices in the professional boxing industry." Pub. L. No. 106-210, 114 Stat. 321

(2000). During Senate hearings, U.S. Senator Richard H. Bryan stated, "The relationships that exist between boxers, promoter, managers, and the sanctioning bodies is often so muddled that some boxers spend more time fighting in court than they do in the ring." *Business Practices in the Professional Boxing Industry: Hearing on S. 2238 Before the S. Comm. On Commerce, Sci., and Transp.* 105th Cong. 3 (Mar. 24, 1998).

Amongst other regulations, the Ali Act clearly defined and separated the roles of manager, "a person who receives compensation for service as an agent or representative of a boxer" and promoter, "the person primarily responsible for organizing, promoting, and producing professional boxing matches." 15 U.S.C. § 6301. Because of the adversarial nature of these roles, the Ali Act created a "firewall" between promoters and managers. 15 U.S.C. § 6308.

The Senate Report of the Ali Act explained the adversarial relationship between promoters and managers and the immense harm that boxers would suffer if managers were beholden to promoters:

> It is not plausible for a boxer to receive proper representation and counsel from a manager if the manager is also on the payroll of a promoter. This is an obvious conflict of interest which works to the detriment of the boxer and the advantage of the promoter. The Committee received testimony about instances wherein boxers had suffered significant career and economic injury due to their manager's clear conflicting interests. A manager must be a determined advocate for the boxer's interests and not be influenced by financial inducements from a promoter. This provision tracks a similar regulation of many State boxing commissions. S. Rep. No. 106-83, at 11 (1999).

Salita's Promotional Agreement is illegal because it fails to respect the Ali Act's firewall between managers and promoters. Instead, Salita seeks to dictate Ergashev's management team by requiring that Ergashev's manager be approved by Salita and requiring that Ergashev obtain Salita's permission to change managers. This would allow Salita to install a manager beholden to Salita who was less likely to advocate for his client – Ergashev – thereby allowing Salita to pay Ergashev less, and profit more.

Section XXIV of the Promotional Agreement, "New Fighter Representatives" required that:

> Therefore, Fighter understands and agrees to disclose any and all of his managers, advisors, consultants and/or representatives to Fighter to Promoter prior to Promoter's execution of this Agreement. Further, Fighter understands and agrees he will not engage, retain, hire, consult with, include, or involve any new or additional person or entity as a manager, advisor, consultant or any type of representative, not previously disclosed to Promoter as provided in this Paragraph, without first obtaining the express written consent and approval of Promoter of such person or entity. Fighter understands and agrees that this is a material provision of this Agreement and that Promoter has materially relied upon Fighter's representations and Fighter's disclosure of his present managers, advisors, consultants and representatives in agreeing to offer Fighter this Agreement.

In order to assure the integrity of the promoter/manager firewall, the Ali Act makes it unlawful for "a promoter to have a direct or indirect financial interest in the management of a boxer." 15 U.S.C. § 6308. In other words, a promoter is only allowed to pay a boxer the contracted purse to fight; the promoter cannot take money

from a boxer. However, Salita's Promotional Agreement (Section XXI "Purse Bids") failed to respect this prohibition. The Promotional Agreement requires Ergashev to pay Salita 25% of his purse in the event that another promoter won a purse bid to promote an Ergashev bout in which Ergashev would be required to compete or lose his ranking.

Section XXI of the Promotional Agreement, "Purse Bids" required that:

> In the event that Fighter is designated as a participant in a Purse Bid Bout and Promoter does not win the rights to promote such Purse Bid Bout, then, in consideration of Promoter's overall promotional obligations hereunder and with the understanding that Promoter will lose the opportunity to profit from said bout notwithstanding those efforts, Fighter shall pay to Promoter a fee in recognition of Promoter's overall promotional services and the benefits realized by Fighter thereby. The fee to be paid by Fighter to Promoter in such case shall bear a relationship to the benefits realized by Fighter and shall, accordingly, be an amount equal to Twenty-Five Percent (25%) of any amount paid to Fighter in respect of such Purse Bid Bout, unless otherwise agreed upon by the parties herein.

Taken together, the terms of the Promotional Agreement are indicative of Salita's plan to abuse Ergashev in the very manner that the Ali Act sought to prevent. The Promotional Agreement was designed to keep Ergashev under Salita's thumb while blocking him from competent advice of those who might have his best intertest in mind. In the event that Ergashev won a title, Salita would have him under indefinite control and could offer him nothing but purses below his contractual 'minimums." If an Ergashev bout were to go to purse bid, Salita could underbid knowing that it did not even have to promote the bout to turn an illegal profit by

taking part of Ergashev's purse. More to the point, the Promotional Agreement allows Salita to abdicate it promotional responsibilities and risks by underbidding, and then turn around and force Ergashev to pay Salita while another promoter does Salita's job.

Because the Promotional Agreement violates both the spirit and the letter of Ali Act, it is illegal and unenforceable as a matter of law. Without an enforceable Promotional Agreement, Salita's FAC cannot state a cause of action for breach of contract. The First Cause of Action must be dismissed.

b. The Promotional Agreement Is Not Enforceable Under State Law because Salita's "Promises" Are Illusory

In the event the Court is willing to look the other way as to the Ali Act violations that appear on the face of the Promotional Agreement, the agreement is also rife with empty promises that can unilaterally be altered by Salita. The dearth of concrete obligations from Salita to Ergashev renders the contract unenforceable under state law principles.

"An 'illusory contract' is defined as '[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable.'" *Employers Mut. Cas. v. Helicon Assoc.*, 880 N.W.2d 839, 843 (Mich. Ct. App. 2015) quoting *Ile v. Foremost Ins. Co.*, 293 Mich. App. 309, 315-16 (2011), rev'd on other grounds 493 Mich. 915 (2012).

The Promotional Agreement is both illusory because it requires Salita to do nothing while requiring that Ergashev be bound to Salita as his exclusive promoter, potentially indefinitely.

i. The Purses Salita Promised To Ergashev Can be Altered on Salita's Whim

Section I "Purses" contains a table of "Minimum Purses" for the various type of bouts in which Ergashev might participate over the life of the agreement. While these minimum sums are themselves shockingly below industry norms, the "minimums" are eviscerated by part (b) of the same section, which essentially allows Salita to change the terms of the agreement to the detriment of Ergashev, in order to assure its own profitability.

> Fighter further acknowledges and agrees that unanticipated circumstances may arise during the term of this Agreement (including, without limitation, the unavailability of quality opponents, the imposition of a mandatory opponent by a sanctioning organization, the unavailability of television dates, the scheduling of competing sporting or other events, the effect of losses, injuries, legal problems, unexciting fights or other events on Fighter's marketability, a general lack of public interest in Fighter, etc.) that may make it commercially unreasonable for Promoter to offer Fighter the purse amount otherwise applicable to such Bout. Accordingly and notwithstanding the foregoing provisions of this Paragraph I, an offer by Promoter to Fighter shall constitute a bona fide offer hereunder if such offer is fair and reasonable given all of the then prevailing market conditions.

Under the terms of the Promotional Agreement, Salita can "comply" with its obligations by making <u>any</u> offer that it believes to be "reasonable given all of the prevailing marketing conditions." This effectively amounts to no obligation at all.

Given that Salita has unilateral power to define whether its own offer is "bona fide" or "reasonable" it could claim to "comply" by offering Ergashev a nominal purse. Plainly, Salita's wide latitude to offer Ergashev essentially nothing under the contract, while restricting his right to participate in bouts promoted by others, renders the Promotional Agreement illusory.

ii. The Duration of the Promotional Agreement Can Be Unilaterally Modified at Salita's Election

The Promotional Agreement Section IV "Term" states that the agreement has an initial five-year term, but that this period is tolled indefinitely for any time that Ergashev is a world champion, with two additional years added thereafter following his title reign. However, Section XIII "Termination by Promoter" proves that Salita made no commitment to Ergashev at all: " In the event that Fighter does not win the first Bout or any subsequent Bout, Promoter shall have the right to terminate this Agreement at any time by providing notice to Fighter." Elsewhere, in Section XXVI "Interpretation" the phrase "does not win" is defined as "any outcome other than a win, including, without limitation, a loss, draw, no decision, no contest or disqualification."

This means that if, for example, in the event any of Ergashev's bouts ended prior to the completion of the 4th round, due to an accidental headbutt, Salita would be able to walk away from the rest of the "term" and "minimums" left on the Promotional Agreement without obligation.

Much like the minimum purses, addressed above, the duration of the Promotional Agreement is illusory in that it requires Ergashev to make substantial commitments – for potentially his entire career – while Salita can opt to forego its obligations and can terminate the Promotional Agreement at the first sign of adversity.

It would shock the conscience if a "normal" business made such empty promises to an employee but is even more troubling when one considers the fact that Ergashev risked his life every time he "went to work" by stepping in the ring and being punched in the head. Because the promises made by Salita could be revoked at will, the Promotional Agreement is illegal and unenforceable as a matter of law. Without an enforceable Promotional Agreement, Salita's FAC cannot state a cause of action for breach of contract. The First Cause of Action must be dismissed.

2. Second Cause of Action - Tortious Interference with Contract

Salita has sued Bogdanov for Tortious Interference with the Promotional Agreement. In order to establish such a claim, a plaintiff has the burden of proving: (a) that plaintiff had a contract at the time of the claimed interference, (b) that defendant knew of the contract at that time, (c) that defendant intentionally and improperly interfered with the contract, (d) that defendant's conduct caused a breach of the contract, and (e) that plaintiff was damaged as a result of defendant's conduct. *Jim-Bob, Inc v Mehling*, 178 Mich.App. 71, 95–96 (1989).

Simply put, if the Court rules that the Promotional Agreement is illegal and unenforceable, there can be no contract to interfere with and this cause must also be found to be defective. However, even if the Court finds that the Promotional Agreement is enforceable, Plaintiff's FAC still fails to state a cause for Tortious Interference with Contract against Bogdanov.

Courts have previously considered cases against agents and corporate representatives for tortious interference and found that cases could not proceed because a party or party agent cannot tortiously interfere with their own contract. "To maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a third party to the contract or business relationship. . . It is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their benefit and with no benefit to the corporation." *Reed v. Michigan Metro Girl Scout Council*, 201 Mich. App. 10, 13 (1993) (emphasis added).

As alleged in the FAC, Bogdanov is Ergashev's manager. [FAC ¶39.] As explained in the Ali Act, a manager is "an agent or representative of a boxer…" 15 U.S. § 6301. Thus, the acts of the Bogdanov at the direction of, or in furtherance of, Ergashev are imputed to Ergashev. Because Bogdanov is not alleged to be an independent third party, a cause of action for tortious interference cannot stand against him; this Second Cause of Action must be dismissed. Leave to amend need

not be granted because Salita cannot reframe its allegations to make Bogdanov a third-party actor.

3. Third Cause of Action - Accounting

As with the cause for Tortious Interference, above, if the Court finds there is no enforceable contract, this cause for Accounting must also be dismissed. However, should the Contract action survive, this cause should nonetheless be dismissed.

"An action for an accounting is equitable in nature, but whether a plaintiff has stated a cause of action for an accounting must be determined from the facts pled in the plaintiff's complaint rather than from the prayer for relief." *Boyd v. Nelson Credit Centers, Inc.*, 132 Mich. App. 774, 779 (1984). "An accounting is unnecessary where discovery is sufficient to determine the amounts at issue." *Id.* "The general rule is that courts have jurisdiction to compel an accounting where fiduciary relations exist, or fraud is charged." *Cass County v. Shattuck*, 288 Mich. 555, 560 (1939).

Salita has not pled facts that would allow for a cause for accounting, because there are no allegations that either Defendant was a fiduciary of Salita or committed fraud. Moreover, should this action proceed, discovery will show the finances of Ergashev's other bouts (if any). Salita's "cause of action" is a premature request for production in disguise; the Third Cause of Action must be dismissed.

4. Fourth Cause of Action - Injunctive Relief

As with the causes above, if the Court finds there is no enforceable contract, this cause for Injunctive Relief must also be dismissed. However, should the Contact action survive, this cause should nonetheless be dismissed. Recently the Court again affirmed that "[A]n injunction is a remedy, not an independent cause of action." *Redmond v. Heller*, No. 347505, 2020 WL 2781719, at *5 (Mich. Ct. App. May 28, 2020) (certified for publication); see also, *Terlecki v. Stewart*, 278 Mich. App. 644, 663 (2008). This action is properly pled as a remedy, not a cause; the Fourth Cause of Action must be dismissed.

D. Leave to Amend Need Not be Granted

Generally, leave to amend is "freely given when justice so requires." *Keweenaw Bay Indian Cmty. v. State of Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993) (quoting Fed.R.Civ.P. 15(a)). There are certain situations, however, in which it is appropriate to deny leave to amend, such as where there is undue delay in filing, a lack of notice and undue prejudice to the nonmoving party, bad faith by the moving party, or when the amendment would be futile. See *Foman v. Davis*, 371 U.S. 178 (1962); *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458–59 (6th Cir. 2001).

Here, should the Court agree that the Promotional Agreement is illegal and unenforceable leave to amend would be futile because Salita could not possibly plead around the text of the agreement it seeks to enforce.

V. CONCLUSION

As set forth more fully above, Salita's FAC fails to plead fact that can establish either subject matter or personal jurisdiction over this dispute and Defendants. Further, the FAC does not state causes of action on which relief can be granted because the Promotional Agreement is unenforceable for failure to conform with either the Ali Act or state law contract principles. Finally, the FAC does not plead facts that can establish Interference with Contract or the additional causes plead. This Motion to Dismiss should be granted.

Respectfully submitted,

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Dated: February 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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