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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

WAYNE C. BRAITHWAITE,

Debtor.

Chapter 7

Case No. 03-12046-DEM

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MILLENNIUM EVENTS, INC.,

Plaintiff,

Adv. Pro. No. 03-1680-DEM

-against-

WAYNE C. BRAITHWAITE,

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFF'S ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Defendant-Debtor Wayne C. Braithwaite ("Braithwaite" or the "Debtor") submits this memorandum of law in opposition to the Order to Show Cause and complaint filed by Millennium Events, Inc. ("Millennium" or the "plaintiff") by which Millennium seeks an order for a preliminary injunction preventing Braithwaite from (i) participating or agreeing to participate in a professional boxing contest; (ii) promoting, soliciting, negotiating, or otherwise communicating with any person or entity, including Don King Productions, and its representatives or agents, about staging a professional boxing contest involving Braithwaite or holding out any person other than Millennium as his promoter without Millennium's approval and consent, and (iii) granting further relief as may be just and proper. For the reasons set forth below, and as discussed more fully herein, the request for a preliminary injunction must be denied.

At the outset, the party-plaintiff, a New York corporation, does not have standing to obtain the relief it seeks or to maintain the instant adversary proceeding. Indeed, the Promotional Agreement which the plaintiff seeks to enforce is in the name of "Millennium Productions Pt. Ltd.", a New South Wales corporation. Accordingly, the plaintiff does not have standing, is not in privity of contract with the Debtor, and the complaint fails to allege how, if at all, the plaintiff has standing to sue the Debtor.

Even if the plaintiff can show that it has standing to maintain the present action, then it is respectfully submitted that this Court does not have subject matter jurisdiction to decide the motion based upon a mandatory forum selection clause contained in the Promotional Agreement, in which the court in New South Wales is the jurisdiction and venue for resolving all disputes under arising under or relating to the agreement.

If this Court decides to exercise subject matter jurisdiction, then it is respectfully submitted that the Court lacks personal jurisdiction over Braithwaite in the context of the adversary proceeding. Indeed, as set forth in the accompanying affidavit of Wayne Braithwaite, the plaintiff failed to serve Braithwaite, which failure is fatal to this Court's jurisdiction over Braithwaite despite the Order to Show Cause, pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure.

Moreover, the motion and complaint seek injunctive and other relief which will subject

Braithwaite to double, multiple or otherwise inconsistent obligations under his contract with the plaintiff and Don King Promotions. Accordingly, plaintiff is not entitled to the relief it seeks by virtue of its failure to join a necessary party under Rule 19 the Federal Rules of Civil Procedure.

Even if the plaintiff can somehow get to the merits of its motion, this Court must nevertheless deny plaintiff the relief it seeks based upon plaintiff's lack of success on the merits and a consideration of the equities. Indeed, as explained in detail below, plaintiff recites a litany of New York cases in support of its position that it is entitled to injunctive relief. Those cases, however, are inapposite to the instant case because the Promotional Agreement that plaintiff seeks to enforce specifically provides that it is governed by the laws of the State of New South Wales, not New York. Moreover, in determining the equities, the salient facts reveal that this Court invited plaintiff to commence the adversary proceeding in a July 31, 2003 Decision and Order. The plaintiff, however, waited approximately five (5) months before seeking this injunction by Order to Show Cause to prevent Braithwaite from earning a living.

Finally, in the event that this Court is inclined to issue a preliminary injunction, then it is respectfully submitted that it should require the plaintiff to post an undertaking sufficient to protect Braithwaite in the event that plaintiff does not succeed on the merits.

ARGUMENT

I.

PLAINTIFF LACKS STANDING TO SEEK A PRELIMINARY INJUNCTION OR MAINTAIN THE PRESENT ADVERSARY PROCEEDING

Federal Rule of Civil Procedure 17(a), as incorporated by the Federal Rules of Bankruptcy Procedure 7017, provides that "every action shall be prosecuted in the name of the party in interest." This rule requires that a claim for relief be brought "by the person who, according to the governing substantive law, is entitled to enforce the right." United States Fidelity and Guaranty Company et. al. v. Petroleo Brasileiro S.A., 98 Civ. 3099 (JGK), 2001 U.S. Dist. LEXIS 3349 (S.D.N.Y. 2001), citing, Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 6A Federal Practice and the Procedure §1543, p. 334 (1990).

The Promotional Agreement upon which plaintiff seeks relief states that it is entered into by

"Millennium Productions Pt. Ltd. A company incorporated in New South Wales with offices at 58 Carlton Crescent Kogarah Bay NSW Sydney Australia 2217 and 2 Lucy Street Merrylands NSW Sydney Australia 2160. . . ". Clearly, the appropriate party in interest with standing to maintain the present action is Millennium Productions Pt. Ltd., and not Millennium Productions, Inc.

In the present case, the Order to Show Cause and the complaint are brought by "Millennium Events, Inc." and it is alleged in paragraph 6 of the complaint that "Millennium is a corporation organized and existing under the laws of the State of New York, with its principal offices located at 99 Arthur Hills Court, Henderson, Nevada . . . ". Nowhere in the complaint does Millennium allege that it is the assignee of the Promotional Agreement.

Accordingly, the present party-plaintiff does not have standing to maintain this action, does not have privity of contract with the Debtor, and may not obtain a preliminary injunction nor may it maintain the instant adversary proceeding.

II.

THE AGREEMENT CONTAINS A FORUM SELECTION CLAUSE AND, ACCORDINGLY, THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ISSUE AN INJUNCTION

The Promotional Agreement that forms the basis for Millennium=s motion for a preliminary injunction contains a forum selection clause at paragraph 16. Specifically, the agreement provides that any Aaction or proceeding brought hereunder shall be brought only in New South Wales or Federal court sitting in New South Wales.@ Accordingly, although this Court may have subject matter jurisdiction to determine whether certain provisions of a previously rejected executory contract survive rejection,[1] the Court lacks subject matter jurisdiction based upon the foregoing forum selection clause.

It is axiomatic that a forum selection clause will be enforced if jurisdiction and venue are specified with mandatory or exclusive language. See United States Fidelity and Guaranty Company

[1] On that point, the Debtor does not concede jurisdiction regarding any determination as to the survival of any remaining provisions of the agreement post-rejection, since those matters are arguably non-core proceedings pursuant to 28 U.S.C. '157(b).

et. al. v. Petroleo Brasileiro S.A., 98 Civ. 3099 (JGK), 2001 U.S. Dist. LEXIS 3349 (S.D.N.Y. 2001). A mandatory forum selection clause is presumptively valid and it must be enforced absent a strong showing that the clause should be set aside by the party resisting the clause. Id. The presumptive validity of the forum selection clause can only be overcome if the resisting party establishes that the clause is unreasonable under the circumstances. Id. Forum selection clauses will only be found to be unreasonable if (1) their incorporation into the agreement was the result of fraud or overreaching, (2) the complaining party will be deprived of his day in court due the grave inconvenience or unfairness of the selected forum, (3) fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, or (4) the clauses contravene a strong public policy of the forum state.

In the present case, Millennium cannot show that the forum selection clauses are unreasonable. Indeed, given the relative bargaining power of the parties and the resulting contract of adhesion in this case, one can only presume that it was not the Debtor who prepared the contract in this case, but rather it was Millennium that selected New South Wales as the sole forum for the resolution of all disputes under the agreement. In that regard, Millennium must now take the untenable position that the forum selection clause that it prepared is somehow the result of fraud or overreaching by Braithwaite, will deprive Millennium of its day in court due to grave inconvenience, will deprive plaintiff of a remedy, or is against public policy.

Based on the foregoing, this Court does not have subject matter jurisdiction to issue a preliminary injunction preventing Braithwaite from engaging in the boxing match on December 13, 2003.

III.

THIS COURT LACKS PERSONAL JURISDICTION OVER BRAITHWAITE, THE DEFENDANT-DEBTOR, BECAUSE PLAINTIFF HAS FAILED TO SERVE BRATHWAITE PURSUANT TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Although the Order to Show Cause and accompanying complaint in this adversary proceeding were served upon the Debtor=s prior attorney in the Chapter 7 proceeding, presumably in accordance with the Order, that service was ineffective to bring Braithwaite within the jurisdiction of this Court in the context of the pending adversary proceeding and Millennium=s concomitant motion for a preliminary injunction. Indeed, Rule 7004(b)(9) of the Federal Rules of Bankruptcy Procedure requires a plaintiff in an adversary proceeding commenced against a debtor to serve the debtor and the debtor=s attorney. Specifically, Rule 7004(b)(9) requires service:

> Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney=s post-office address. (Emphasis supplied).

The foregoing clearly required Millennium to serve the Debtor and his attorney, but Millennium has failed to do so. Failure to strictly adhere to the service requirements of Rule 7004(b)(9) has been held to be fatal to a Court=s jurisdiction over the debtor. See In re Cole, 142 B.R. 140, 143 (Bankr.N.D.Tex.1992) (plaintiff=s service only upon the debtor=s attorney but not the debtor Ais insufficient to require the Debtor to answer and defend@ the adversary proceeding) citing In re Johannsen, 82 B.R. 547, 548 (Bankr.D.Mont.1988). Under Rule 7004(b)(9) Aproper service must be made by serving the debtor and the attorney, both, not just either one.@ In re Johannsen, at 548, citing In re C.R. McKenzie, 57 B.R. 42 (Bankr.S.C.1985) (AService upon the debtor=s attorney, and not the debtor is fatal@); In re Terzian, 75 B.R. 923 (Bankr.S.D.N.Y.1987) (AService upon the debtor, and not the attorney, warrants dismissal of the Complaint@); In re Dahowski, 48 B.R. 877 (Bankr.S.D.N.Y.1985) (AFailure to properly serve both the attorney and the debtor cannot

be cured by a re-issuance of the Summons and Complaint@). Federal Rule of Civil Procedure 65, as incorporated by Federal Rule of Bankruptcy Procedure 7065, provides that no preliminary injunction shall issue without notice to the adverse party. Notice requires proper service and, absent personal jurisdiction over a defendant, a preliminary injunction may not issue. See Securities and Exchange Commission v. Capital Growth Co., S.A. (Costa Rica), 391 F.Supp. 593 (D.C.N.Y. 1974); Carty v. Rhode Island Dep=t of Corrections, 198 F.R.D. 18 (D.C.R.I. 2000) (Awhen an injunction is sought, service of the summons and complaint is required . . . [and] [i]t is well settled that without service of process, this Court has no jurisdiction over the named defendants . . .@ [citations omitted]).

As set forth in the Braithwaite Affidavit, and as evidenced by the Order to Show Cause, Millennium has failed to properly serve the Order to Show Cause and complaint in this adversary proceeding under Rule 7004(b)(9). That failure deprives this Court of personal jurisdiction over Braithwaite so that a preliminary injunction cannot issue to prevent Braithwaite from engaging in the boxing match on December 13, 2003 in Atlantic City, New Jersey.

IV.

THE ADVERSARY PROCEEDING MUST BE DISMISSED IN THAT PLAINTIFF HAS FAILED TO JOIN A NECESSARY PARTY

Federal Rule of Civil Procedure 19, as incorporated by Federal Rule Bankruptcy Procedure, specifically provides that:

> (a) Persons to Be Joined If Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In this case, it cannot be seriously challenged that the failure to join Don King Productions ("King"), which is alleged by Millennium to be a fierce competitor and is the entity with whom Braithwaite contracted to serve as Braithwaite=s promoter, thus inspiring the instant motion for a preliminary injunction and the adversary proceeding in general, as a necessary party would subject Braithwaite to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of King's interest under its contract with Braithwaite. Accordingly, King is a necessary and an indispensable party to the instant action, the absence of which will severely prejudice the Debtor. More specifically, if plaintiff is permitted to proceed against Braithwaite and is successful, then Braithwaite will be subject to liability to King under its contract. Accordingly, the absence of King as a necessary party in this action will increase the possibility of inconsistent and prejudicial determinations and increase the expenditure of judicial and litigant resources. Under the circumstances, plaintiff=s motion should be denied and plaintiff should be directed to either join King as a necessary party or proceed in a forum in which jurisdiction can be obtained against all necessary and indispensable parties.

V.

A PRELIMINARY INJUNCTION CANNOT BE ISSUED AGAINST THE DEBTOR BECAUSE MILLENNIUM'S FAILURE TO SATISFY ITS BURDEN OF PROOF UNDER RULE 65 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Preliminary injunction is an extraordinary remedy, which should be granted only in extreme circumstances and only if the movant has clearly carried the burden of persuasion on all four prerequisites to grant preliminary injunctive relief. Calhoun v. USDA Farm Service Agency, 920 F.

Supp 696 (N.D. Miss 1996); Maxey v. Smith, 823 F. Supp 1321, (N.D. Miss. 1993.) Because preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal. Metro Brokers, Inc., v. Tann, 815 F. Supp 377 (D. Colo 1993). Preliminary injunctive relief should be granted as the exception rather than the rule. Shell Oil Co., v. Zewe, 805 F. Supp. 394 (E.D. La 1992). A preliminary injunction may be granted only on a clear and convincing showing that the movant has carried the heavy burden imposed by Rule 65. In re Regency Realty Assoc.,179 B.R. 717 (Bankr. M.D. Fla. 1995).

The "clear and convincing" standard requires the movant to prove that his version of the facts is "highly probable" or "reasonably certain." EH Yacht, LLC, v. Egg Harbor, 2000 U.S. Dist. LEXIS 156,D. N.J. As illustrated below, Millennium has clearly failed to meets its burden of proof and it is clear that Millennium's version of the facts are neither "highly probable" nor "reasonably certain."

Millennium must make a showing of possible irreparable injury and either (1) probable success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting preliminary relief. Pashaian v. Eccelston Properties, Ltd., 88 F.3d 77, 85 (2d Cir. 1996). In re Feit & Drexler, Inc., 760 F.2d 406, 415, 13 C.B.C. 2d 148, 159 (2d Cir. 1985).

In the instant case, as clearly demonstrated below, Millennium has failed to meet its burden of proof inasmuch as it fails to provide citations to any laws according to the substantive contract law for the state of New South Wales as required in paragraph 16 of the Agreement; (2) fails to establish standing to commence the adversary proceeding; (3) fails to establish personal jurisdiction over the Debtor; and (4) fails to establish subject matter jurisdiction. For all of these reasons, Millennium cannot prevail on the merits of its complaint and therefore Millennium's request for a preliminary injunction must be denied.

A. Plaintiff Failed to Show a Strong or Substantial Likelihood or Probability of Success on the Merits inasmuch as Substantive Contract Law of New South Wales is the Controlling Law in this Case

Wayne Braithwaite (the "Debtor"), a native of Guyana, and English being his second

language, was 22 years old when he entered in the pre-petition promotion agreement with Millennium Promotions Pty Ltd., on July 27, 1999 (the "Agreement").

The Agreement provides, among other things, that its term is at a minimum of 4 years.[2] Thus, at a minimum, Wayne, 22 years old when he entered into the Agreement, not represented by counsel and in a language not his native tongue, obligates himself to perform exclusively for Millennium from the time he is 22 years old to 26 years old – arguably the prime of his fighting career in terms of the potential physical longevity of a professional boxer.

Importantly, the Agreement also provides that if Wayne becomes a "world champion" of either the World Boxing Council, the World Boxing Association, the World Boxing Organization, and/or the International Boxing Federation at any time during the 4 year term of the Agreement, then the Agreement is automatically extended up to and including the entire time Wayne is a "world champion" plus 2 years.[3]

The Agreement further provides that if Wayne is injured, then Millennium may terminate the Agreement "without any liability or obligations to Wayne." Millennium, at its sole discretion, also has the right to extend the term of the agreement during any time of his temporary retirement.[4]

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[2] See paragraph "2" of the Agreement.

[3] See paragraph "2" of the Agreement.

[4] See paragraph "7" of the Agreement.

Pursuant to the Agreement, Wayne is obligated to "assist in the advertising and publicity of Wayne's bouts as well as other bouts promoted by Millennium without additional consideration or compensation.[5]

Millennium also has the absolute right to assign, license or transfer any or all of the rights under the Agreement but, pursuant to paragraph "11" of the Agreement, Wayne is prohibited from participating in any bout other than bouts promoted by Millennium. The Agreement also makes clear that Wayne is an independent contractor not an employee of Millennium who is "responsible for his own actions and expenses."[6] Wayne is also prohibited from disclosing any information regarding the terms and provisions of the Agreement. [7]

Despite Millennium's frequent citations to paragraph 13 of the Agreement when it exclaims that the Debtor acknowledged that his services are "special, unique and extraordinary" Millennium fails to guide this Court to the provisions of paragraph 16 for authority as to the interpretation of the Agreement.

Most significantly, paragraph 16, entitled "Forum Selection/Governing Law" provides in pertinent part: . . . .

> **This agreement shall be governed, construed and enforced in accordance with the substantive law of contracts of the State of New South Wales and without regard to New South Wales choice of law principles or conflicts of law principles . . . .** (emphasis added.)

Millennium seeks to enjoin the Debtor from fighting on Saturday night, an extraordinary remedy which can only be granted after clear and unequivocal evidence that it will succeed on the merits of its claim. Thus, Millennium seeks an Order of this Court that brings with it a heightened burden of proof, with citations to the laws of the State of New York not, New South Wales.

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5 See paragraph "9" of the Agreement.
6 See paragraph "12" of the Agreement.
7 See paragraph "19" of the Agreement.

On page 2 of its memorandum of law, Millennium states that because paragraph 13 of the Agreement provides that the Debtor declares his services to be "special, unique, extraordinary…" then the Agreement "comports with seventy years of judicial precedent….." Millennium however fails to provide any citation to the contract law for New South Wales which is applicable in this case. All of the issues regarding the (1) validity of the contract; (2) the enforceability of the terms of the Agreement; and (3) the alleged breach of the Agreement must, according to paragraph 16, be "governed, construed, and enforced in accordance with the substantive law of contracts of the State of New South Wales." Millennium neither acknowledges the governing law of New South Wales nor provides any guidance to the substantive contract law of New South Wales. Obviously, its motion is defective and must be denied.

Millennium's reliance on the cases cited in its memorandum of law do not provide any value in resolving the issues presented here (i.e. whether the contract is even enforceable and whether there was a breach under the provisions of the substantive contract law of New South Wales.) As such, Millennium fails to meet its burden for the imposition of the extraordinary relief enjoining Wayne from earning a living.

If Millennium promptly moved for a declaratory judgment after the Bankruptcy Court invited it to do so in July 2003, this Court and the Debtor would have had sufficient time to determine the issues of whether the extraordinary relief of imposing an injunction against Debtor is appropriate. Millennium now seeks the entry of an Order based upon a hearing to be held the day before the scheduled fight, when Millennium knew before July 2003 of the Debtor's intention to fight for third-parties after the Bankruptcy Court entered its Order rejecting the Agreement. Despite Millennium's actual knowledge of the Debtor's intentions, it waited for almost 5 months to seek relief, without which Millennium now claims to be "irreparably harmed."

B. Plaintiff Failed to Show a Strong or Substantial Likelihood or Probability of Success on the Merits inasmuch as it Failed to Establish Standing to Commence the Adversary Proceeding

The caption of the Complaint states that the plaintiff is "Millennium Events, Inc." However, the Agreement annexed thereto as Exhibit A states Wayne Braithwaite contracted with an entity named "Millenium Promotions Pty Ltd." Additionally, paragraph 6 of Millennium's Complaint states "Millennium is a corporation organized and existing under the laws of the State of New York, with its principal offices located at 99 Arthur Hills Court, Henderson, Nevada." Conversely, the Agreement attached as Exhibit A states that it is by and between W[]ayne Bra[i]thwaite and "Millenium Promotions Pty Ltd., a company incorporated in New South Wales with offices at 58 Carlton Crescent Kogarah Bay NSW Sydney Australia 2217 and 2 Lucy Street, Merrylands NSW Sydney Australia 2160."

Plaintiff therefore cannot prove that it will succeed on the merits of the case when it is not a party to the Agreement and his no privity of contract with the Debtor. Similarly, Plaintiff cannot prove that it will suffer irreparable injury because Plaintiff, "Millennium Events, Inc.," is not a party to the Agreement. For this reason, Plaintiff's Motion must be denied.

C. Plaintiff Failed to Show a Strong or Substantial Likelihood or Probability of Success on the Merits inasmuch as it Failed to Establish Subject Matter Jurisdiction

As discussed above [See Legal Argument, Point II, in addition to failing to establish that Millennium is the proper party plaintiff, Millennium also fails to establish subject matter jurisdiction. The Agreement, at paragraph 16 states that . . . . "any such action or proceeding brought hereunder shall be brought only in New South Wales or Federal court sitting in New South Wales."

Again, Plaintiff cannot meet its burden of proof under Bankruptcy Rule 7065 that it is likely that Plaintiff will succeed on the merits insofar as it has failed to establish subject matter jurisdiction in this case. For this reason, Millennium's motion must be denied.

D. Plaintiff Failed to Show a Strong or Substantial Likelihood or Probability of Success on the Merits inasmuch as it Failed to Establish Personal Jurisdiction Over the Debtor

As discussed above [See Legal Argument, Point II], in addition to failing to establish that Millennium is the proper party plaintiff and failing to establish subject matter jurisdiction, it also failed to establish personal jurisdiction over the Defendant. Bankruptcy Rule 7004(b)(9) requires service of the summons and complaint upon the debtor by mailing a copy of the summons and complaint to the debtor at the address shown in the petition …and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address. Millennium's failure to serve a copy of the summons and complaint on the Debtor is fatal. In re Cole, 142 BR 140, 143 (BAKR N.D. Tex. 1992).

Moreover, F.R.Civ.P. Rule 65(a)(1) states that no preliminary injunction shall be issued without notice to the adverse party. In light of Bankruptcy Rules 7004(b)(9) and 7065(a)(1), Millennium cannot establish that it will succeed on the merits of its Complaint when it has failed to establish personal jurisdiction over the Defendant. Clearly, Millennium fails to meet its burden of proof for the imposition of a preliminary injunction in this case.

E. Plaintiff has Failed to Show that it will Sustain Irreparable Injury

In the instant case, Plaintiff's request for a preliminary injunction must also be denied because of Millennium's failure to show that it will sustain irreparable injury if the Debtor is permitted to fight on Saturday night. Clearly, Plaintiff waited 5 months before commencing this action. That illustrates that the injury to it must not be that "irreparable" or Millennium would have taken steps to prevent the fight over the last 4 months and certainly would not have waited until 8 days before the fight to file its request for an injunction. If Millennium, as it argues in its papers, is suffering such injury because of the "perception in the boxing community" Millennium would have run into bankruptcy court the minute it knew of the Defendant's wishes to be promoted by another party; knowledge which Millennium admits to having as early as July 2003. Millennium admits that it, and everyone in the boxing community knew about the Defendant's intentions, but still waited until 8 days before the fight to take action.

At page 17 of its Memorandum of Law, Millennium states that the worst scenario in this case is that "other fighters promoted by Millennium will get the impression that they too can leave

Millennium with impunity in search of greener pastures and other promoters will view Millennium as a target for stealing top fighters." What Millennium fails to recognize that in order for these "other fighters promoted by Millennium" to get the impression that they can leave with impunity misses one important factor- the Debtor did not seek "greener pastures" with impunity, he subjected himself and his assets to the jurisdiction of the Bankruptcy Court. He testified in Court to his assets and liabilities. He completed bankruptcy schedules and related papers disclosing his financial condition and swore to the accuracy of those papers under the penalties of perjury. He turned over his assets to the Chapter 7 trustee which assets are currently being administered by the Trustee in accordance with the Bankruptcy Code. To say that the Debtor's actions will give other fighters the idea that they too can leave Millennium without liability or loss ignores the reality that the Debtor voluntarily subjected himself and his assets to the jurisdiction of the Bankruptcy Court and will suffer those financial consequences for many years. Thus, the injury of which Millennium speaks regarding the impression given to other fighters simply does come with impunity but rather severe financial, emotional, and economic consequences.

F. The Balance of the Equities Clearly falls Against Millennium

Millennium states in it Memorandum of law at page 19 that the harm to Millennium if injunctive relief is denied far outweighs any potential harm to Braithwaite because Millennium has "met all of its obligations under the terms of the Agreement." It goes further to accuse the Debtor of an "egregious breach" of the contract, a contract that must be interpreted under the laws of New South Wales. Thus, Millennium's assertion that there has been a "breach" is unsubstantiated because it has failed to provide any controlling law to support its position.

If Millennium sought a declaratory judgment at the time the Bankruptcy Court issued its decision on July 31, 2003, then the merits of the case could have been properly litigated with ample time for the parties to have notice and an opportunity to present its case.

However, Millennium delayed commencing an adversary proceeding until 8 days prior to the fight. Because of Millennium's delay, it now seeks to burden this Court with its request to enter the extraordinary relief of a preliminary injunction. Millennium admits in its Memorandum of Law of having knowledge of the Debtor's desire to be promoted by third parties as early as July 2003. Millennium states in its memorandum at page 19, "Braithwaite apparently was secretly negotiating a contract with Don King and waited to reveal this unlawful[8] agreement until after the court ruled on his motion to reject."

In an effort to sway this Court that the equities tip in favor of Millennium, it again makes the argument that the Debtor has not acted in good faith despite this Court's Order entered July 31, 2003 addressing and dismissing this argument. It should be clear that Wayne properly moved before the Bankruptcy Court for an order deeming the Agreement rejected. Thereafter, he pursued the only means of supporting himself and his family by continuing to box. Millennium's bad faith argument is not supported by the facts and has also been addressed and dismissed by this Court in its Order entered July 31, 2003.

VI.

ANY ALLEGED EXCLUSIVE PERFORMANCE OBLIGATION CONTAINED IN THE AGREEMENT CONSTITUTES A CLAIM WHICH HAS BEEN DISCHARGED

The Debtor obtained a discharge by Order of this Court on June 10, 2003, under §727 of the Bankruptcy Code. This section is the heart of the fresh start provisions of the bankruptcy law. Section 727 makes clear that the debtor is discharged from all debts that arose before the date of the order for relief under chapter 7. Thereafter, by operation of law under §365 and by Order of this Court dated July 31, 2003, the Agreement was rejected. The remaining issue therefore is whether any such alleged exclusive performance obligation constitutes a claim which could be or has been discharged.

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[8] On two occasions, Millennium refers to the alleged agreement with Don King as "unlawful" (memorandum at page 19) and "illegal" (Affidavit of Vlad Warton at paragraph 4). Obviously, absolutely no criminal implications exist regarding the parties contract dispute. Millennium's use of these terms is inflammatory and irresponsible.

Here, the Plaintiff cannot succeed on the merits of this argument because of its failure to provide an analysis under the substantive laws of contract under New South Wales. In this case, any pre-petition breach by the Debtor giving rise to a monetary claim for damages has been discharged. According to §101(5), a "claim" means …(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

An equitable remedy, such as an injunction, will give rise to a right to payment, and therefore is discharged, if payment of a monetary remedy is an alternative to the equitable remedy. An injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable. In re Davis, 3 F.3d 113, 116 (5th Cir. 1993). State law, here the contract laws of New South Wales, determines whether a party's breach gives rise to a right to payment. In re Mitchell, 249 B.R. 55 (Bankr. S.D.N.Y 2000) citing, In re Udell, 18 F3d at 408. Millennium fails to provide any basis in law to support its proposition that the alleged "exclusive performance" component of the Agreement survived the Discharge inasmuch as it fails to provide this Court with case law to interpret the Agreement in accordance with the choice of law provisions contained therein.[9]

VII.

MILLENNIUM IS REQUIRED TO POST AN UNDERTAKING IN AN AMOUNT SUFFICIENT TO PROTECT BRATHWAITE IN THE EVENT A PRELIMINARY INJUNCTION IS ISSUED

Federal Rule of Civil Procedure 65(c), as incorporated by Federal Rule of Bankruptcy Procedure 7065, provides that A[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper . . . A. The purpose of the rule is to provide a protection to a defendant who is under an injunction but ultimately prevails on the merits. See Commerce Tankers Corp. V. National Maritime Union of America, AFL-ClO, 553 F.2d 793 (2d Cir. 1977) cert. denied 98 S.Ct. 400, 434 U.S. 923, 54 L.Ed.

[9] Millennium goes to great lengths in its memorandum to point out that Wayne expressly stated in paragraph 13 that his services are unique or extraordinary. If this Court was bound by New York State Law, it is not bound by the statement and it does not preclude the Court from making a finding to the contrary. Frederick Bros. Artists Corp. v. Yates, 271 A.D. 69, 62 N.Y.S. 2d 714, 715. The fact that the employee

280 (1977). Although the amount of any security to be required rests within the sound discretion of this Court, Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc., 475 F.Supp. 973 (D.C. Mass. 1979), in the present case Braithwaite stands to lose, at a minimum, $40,000.00 if he is not permitted to fight in Atlantic City on December 13, 2003. This dollar figure does not account for any consequential damages such as exposure to a breach of contract action by King, losses suffered by the other participant in the boxing match due to the cancellation, damages from event planners, vendors, ticket holders, and owners of the site where the event is to take place.

All of the foregoing requires that Millennium issue an undertaking in the sum of at least $1 million, see, Equipment & Systems For Industry, Inc. v. Zevetchin, 864 F.Supp. 253 (D. Mass. 1994), and it is respectfully requested that if this Court decides to issue a preliminary injunction then this Court should also require Millennium to post a bond in that amount, at a minimum.

CONCLUSION

Based upon all of the foregoing, plaintiff's motion for a preliminary injunction must be denied in its entirety and the adversary proceeding dismissed.

Respectfully submitted,

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acknowledged that his abilities and capabilities were unique is not controlling upon a court of equity. Magid v. Tannenbaum, 72 N.E. 2d 13 (NY 1947); 164 A.D. 142, 149 N.Y.S. 445, 446 (N.Y. App. Div. 1914).