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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

JAMES MARK BURNETT, an individual; MARK BURNETT PRODUCTIONS, INC., a corporation; JMBP, INC., a corporation; DJB INC., a corporation; and JUMP IN, INC., A corporation, Petitioners, vs. CONGRAD RIGSS, an individual; and CLOUDBREAK ENTERTAINMENT, INC., A California corporation, Respondents.	CASE NO. TAC 10192 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioners JAMES MARK BURNETT, an individual; MARK BURNETT PRODUCTIONS, INC., a corporation; JMBP, INC., a corporation; DJB INC., a corporation; and JUMP IN, INC., A corporation, appeared represented by Steven A. Marenberg, Harry A. Mittleman, and Juliet Youngblood of IRELL & MANELLA LLP. Respondents CONRAD RIGGS, an

individual; and CLOUDBREAK ENTERTAINMENT, INC., A California corporation, were represented by Bart H. Williams, Esq., Sean Eskovitz, Esq., Susan R. Szabo and Soraya C. Kelly of Munger Tolles & Olson. At the conclusion of the hearing, the matter was taken under submission.

Based on the evidence presented at this hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. Petitioner Mark Burnett is a successful creator and producer of unscripted ("reality") television series such as *Survivor, The Apprentice, The Restaurant, and The Contender*, to name a few. Burnett frequently conducts business through his wholly owned companies, Petitioners Mark Burnett Productions, Inc., JMBP, Inc., DJB, Inc. and Jump In, Inc., all California corporations. (Mark Burnett, Mark Burnett Productions, Inc., JMBP, Inc., DJB, Inc. and Jump In, Inc., hereinafter, collectively referred to as "Burnett").

2. From 1998 through 2007, Respondent Conrad Riggs, a licensed California Attorney, served as Burnett's main business affairs negotiator. Respondent Cloudbreak, Inc. serves as Conrad Riggs' loan-out company but has also operated as a talent and literary management company. (Conrad Riggs and Cloudbreak, Inc., hereinafter, collectively referred to as "Riggs"). At no time has Riggs been licensed as a talent agency with the Labor Commissioner.

3. Burnett and Riggs met in December 1997 through Riggs' client, Director Zalman King, and began working together in early 1998. At the time, Burnett was producing a successful cable television series called *Eco-Challenge* through the Discovery Channel and was in negotiations with the Discovery Channel to sell *Eco Challenge's* production and distribution company, Eco Challenges Lifestyles, Inc. With respect to this sale, Burnett and Riggs entered into an oral agreement for Burnett to pay Riggs 2.5% of the sale of Eco Challenges Lifestyles, Inc. in exchange for Riggs analyzing the financial, business and distribution aspects of the deal. Riggs testified that he advised

Burnett not to make this sale to the Discovery Channel because the sale would result in Burnett's producing services being "exclusive" to the Discovery Channel. Instead, Riggs thought that it would make more sense to enter into an agreement to sell only the licensing rights to broadcast *Eco Challenge* and have Eco Challenges Lifestyle, Inc. remain an independent production company. The deal with the Discovery Channel did not close and subsequently, Riggs negotiated a license agreement between Eco Challenges Lifestyles, Inc. and the USA Network which sought the license to broadcast *Eco Challenge* in the United States.

4. Not long after they began working together, Burnett told Riggs that he had acquired an option on the rights to an idea created by a British television producer named Charlie Persons. The rights to this idea, known as "*Survive*," were owned by a company partly owned by Mr. Parsons called Planet 24. The option Burnett had acquired was about to expire and Burnett needed an extension so that he could continue trying to sell the show *Survive* to a network. Accordingly, Burnett and Riggs entered into another oral agreement, the terms of which the parties now dispute.

5. According to Burnett, Riggs represented that he had many industry contacts and could help Burnett sell *Survive*, later known as *Survivor*, as well as other Burnett shows. Burnett testified that he agreed to pay Riggs 10% of whatever monies he made from this show in exchange for: (1) Riggs first negotiating an extension to the original option Burnett had previously negotiated with Mr. Parsons to license the American rights to the format of *Survive*; (2) setting up meetings for Burnett to pitch this show to the different networks; (3) negotiating a contract with a network; and thereafter, (4) servicing the deal. Burnett explained that he opted to pay 10% of his net earnings to Riggs rather than pay him an hourly fee for working on a deal that could potentially not close.

The parties operated under this oral agreement from 1998 to 2007 on the *Survivor* series and also on other series produced by Burnett such as *Eco Challenge*, *Combat Missions*, *The Apprentice*, *The Restaurant*, *The Casino*, *RockStar*, *Gold Rush, The Contender*, *Martha* and *On the Lot*. Burnett testified that his deal to pay Riggs 10% of his

net earnings was limited to shows that Riggs negotiated and serviced.

6. While Riggs agreed that he was entitled to 10% of Burnett's net earnings on shows he negotiated under the parties' oral agreement, Riggs testified that the parties also agreed they would do *all* reality television together. Furthermore, Riggs testified that his oral agreement with Burnett was modified in the summer or fall of 2005 when there was an offer to purchase Burnett's companies by a media company called CKX. According to Riggs, the new oral agreement provided that he would receive 10% from the sale of Burnett's companies, and like Burnett, he would be hired at a $1 million dollar annual salary for a 6 year term by this new company. Under this new company, Burnett would be CEO and Riggs would be COO. Additionally, Riggs would be entitled to 2 ½ percent of the stock in the new company which reflects 10% of the 22 1/2 % stock Burnett would be entitled to under this purchase. Riggs testified that if the sale of Burnett's company closed, that he and Burnett agreed that Riggs would receive money even on shows where Riggs did not render any services.

7. The purchase deal with CKX, however, never closed and the parties continued to operate under the original oral agreement wherein Riggs received 10% of Burnett's net earnings on deals he negotiated and serviced with the exception of *The Apprentice* where Riggs received more than his customary 10% of Burnett's net earnings due to earnings the parties agreed he would receive on ancillary deals related to the show. Eventually the parties' relationship began to deteriorate and in July, 2008, Riggs filed suit against Burnett in the Superior Court claiming that Burnett orally agreed to make Riggs his "partner" and that Riggs owns a stake in Burnett's companies.

8. In response to this lawsuit, Burnett filed the instant petition to determine controversy alleging that Riggs violated the Talent Agencies Act ("Act") by unlawfully procuring and negotiating employment or engagements for Burnett to render executive producing services with third parties such as networks and independent production companies. Consequently, Burnett seeks to void his oral contract with Riggs under the Act. Burnett also seeks disgorgement, an accounting and requests that the Labor

Commissioner set up a constructive trust on all funds received by Riggs from third-parties that relate to improper and/or illegal services in violation of the Act. Lastly, Burnett seeks a declaratory judgment or other determination confirming that neither Riggs nor Cloudbreak has any ownership interest in any of Burnett's companies or any right to additional payment from Burnett or Burnett's companies. [1]

9. Riggs' defense to this petition is that the parties were creating a business empire under which they agreed to jointly create independent production companies that retained as many rights to Burnett's shows as possible, but could make the show within budget and thus, make a profit. Under this business model, the negotiations with networks and other third parties were for the purpose of licensing the rights to broadcast the shows in exchange for the networks financing the production. Thus, the independent production companies created by Burnett for each of the shows he produced were responsible for making the shows and hiring the employees. Riggs argues that under this business model, Mark Burnett was self employed by his various independent production companies. As such, Riggs argues that there is no violation of the Act where there is no procurement of third party employment or engagements. Riggs also argues, in the alternative, that the deals he negotiated for Burnett and his companies are exempt from the Act as packaging agreements.[2]

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[1] Burnett also argues that the oral contract is void between the parties because Riggs was acting as Burnett's attorney and under California Rule of Professional Conduct, Rule 3-300, a written contract is required between a lawyer and a client. The determination of whether Riggs acted as Burnett's attorney is outside of the Labor Commissioner's jurisdiction. Likewise, whether Riggs is Burnett's "business partner" as a matter of law or part owner of Burnett's companies, is also outside of our jurisdiction. In *Blanks v. Riccio*, TAC 7163, we ruled that formation of a partnership does not exempt one from the licensing requirements of the Act, however, in that case, there was no dispute that a partnership was created between the parties. Here, Burnett disputes that he was ever Riggs' "partner." Accordingly, the partnership issue is left for the court to decide in the pending superior court action. Our review of this matter is limited to determining whether there has been a violation of the Talent Agencies Act by Riggs. That is, did Riggs unlawfully operate as an unlicensed talent agent under the Act.

[2] A "Packaging Agreement" is a business arrangement that involves "pitching" an idea and bundling the talent and production to sell to a third party in this "packaged" form. See *Hyperion Animation Co. v. Toltec Artist, Inc.*, TAC 7-99. We have held that the Labor Commissioner lacks jurisdiction under the Act to resolve disputes concerning packaging agreements. See October 30, 1998 Opinion Letter issued by then Labor Commissioner

10. For the reasons stated in more detail below, we agree with Riggs that the Act is not implicated on the following shows: *Survivor, Eco-Challenge, Combat Missions, The Apprentice, The Restaurant, The Casino, RockStar, Gold Rush, The Contender* and *On the Lot*. We do, however, find a violation of the Act with respect to negotiation of the show *Martha* and accordingly sever the *Martha* agreement from the parties' oral contract.

LEGAL CONCLUSION

A. Burnett is an "artist" under the Talent Agencies Act.

Labor Code §1700.4(b) defines "artists" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment." While we have ruled that some producers are not considered artists within the meaning of the Act, we have historically held that a person is an "artist" under the Act if he or she renders professional services in motion picture, theatrical radio, television and other entertainment enterprises that are "creative" in nature. In deciding whether a "producer" comes under the Act, we have explained that:

> [a]lthough Labor Code §1700.4(b) does not expressly list producers or production companies as a category within the definition of 'artist,' the broadly worded definition includes 'other artists and persons rendering professional services in...television and other entertainment enterprises.' Despite this seemingly open ended formulation, we believe the Legislature intended to limit the term 'artists' to those individuals who perform creative services in connection with an entertainment enterprise. Without such limitation, virtually every "person rendering professional services" connected with an entertainment project—including the production company's accountants, lawyers and studio teachers...would fall within the definition of 'artists.' We do not believe that the

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> Legislature intended such a radically far reaching result... [I]n order to qualify as an 'artist,' there must be some showing that producer's services are artistic or creative in nature, as opposed to services of an exclusively business or managerial nature.

American First Run dba American First Run Studios, Max Keller, Micheline Keller v. OMNI Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier, TAC 32-95.

Applying this test, in *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management; Gary Marsh; Steven Miley; Michael Wagner, ("Bluestein")*, TAC 14-98, we dismissed the petition because there was not a significant showing that the producer's services were creative in nature as opposed to services of an exclusively managerial or business nature. In reaching this conclusion, we explained that,

> [o]ccasionally assisting in shot location or stepping in as a second director as described by petitioner, does not rise to the creative level required of an 'artist' as intended by the drafters. Virtually all line producers or production managers engage in de minimum levels of creativity. There must be more than incidental creative input. The individual must be primarily engaged in or make a significant showing of a creative contribution to the production to be afforded the protection of the Act. We do not feel that budget management falls within these parameters.

Bluestein, supra, at p. 6. See also, *Hyperion Animation Co., Inc. v. Toltect Artists, Inc.*, TAC 07-99.

Here, there can be no doubt that producer Mark Burnett is an "artist" within the meaning of the Act. Burnett testified that he took Charlie Parson's concept of putting a few people on an island and having a billionaire on a yacht offshore kick them off one by one and turned this idea into one of the most successful dramatic non-scripted shows of all time. Moreover, Burnett was described by *Survivor* Producer Jay Bienstock, former *Survivor* Producer Tom Shelly and Roy Bank who worked on the productions of *The Restaurant* and *The Casino*, as being a very active and "hands on" producer who had the

final say on creative decisions on all of his shows. On *Survivor*, Burnett was involved in casting, scouting locations, hiring the crew, talking with producers about marooning contestants, talking to producers about the theme of the show, creating the dramatic arc of the shows to assisting in editing hundreds of hours of raw footage to create a dramatic story. Likewise, on *The Restaurant*, Burnett laid out a creative vision for what the show should be that was described as "cohesive and complete" and from there, oversaw every step of the creative from casting to approval of the final creative story line. On *The Apprentice*, Burnett made the creative decision that Donald Trump's boardroom should look like a Harvard law library without the books. Similarly, Burnett decided that Donald Trump should have two lieutenants who serve as the eyes and ears of Donald Trump and who observe the contestants on their various business tasks and then report back to Donald Trump. Thus, it is evident from the testimony provided at this hearing by Riggs, Burnett and third party witnesses, that Burnett's success as a producer of reality television shows is greatly attributed to his creativity and vision as a producer and storyteller. As such, Burnett is an "artist" within the meaning of the Act.

B. Riggs' Negotiation of Licensing, Distribution and Financing Agreements with the Networks and an Internet Provider Does Not Violate the Act.

Labor Code §1700.4(a) defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter." "To 'procure' means 'to get possession of: obtain, acquire, to cause to happen or be done: bring about.'" *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628. Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license...from the Labor Commissioner."

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1. Burnett was Self Employed by his Own Independent Production Companies.

It is undisputed that Riggs has never been licensed as a talent agency in the State of California. It is also undisputed that Riggs set up pitches and negotiated contracts with television networks in exchange for 10% of Burnett's earnings on the following shows: *Eco Challenge, Survivor, Combat Missions, The Apprentice, The Casino, The Contender, RockStar,* and *On the Lot* and an internet provider for *Gold Rush.* These agreements that Riggs negotiated, however, were licensing, distribution and financing deals negotiated between the networks (or, in the case of *Gold Rush*, an internet service provider) and a Mark Burnett Production company which was wholly owned by Mark Burnett and created specifically for each show Mark Burnett produced. They were not artist employment agreements with the networks, as Burnett now argues.

On *Survivor*, for instance, Burnett and Riggs structured the deal with the network, CBS, in a manner that would allow Mark Burnett, through his production company, to retain as many rights to the show as possible, including copyright and distribution rights. At the same time, the production company would be responsible for making the show and delivering it to the network. Thus, in this structure, a Mark Burnett entity known as DJB, Inc., entered into a joint venture with CBS Productions to form an independent financing and distribution entity which was also the copyright holder. This new company was known as Survivor Productions, LLC. Survivor Productions, LLC then formed a separate independent production company called Survivor Entertainment Group, Inc. which was responsible for hiring the staff and crew and was contractually required to hire Mark Burnett, Charlie Parsons and Conrad Riggs as producers.

We reject Burnett's argument that DJB, Inc. served only as his loan out company indicating that Burnett was not paid through his independent production company, and therefore his producing services were a work-for-hire with CBS. Instead, we recognize that DJB, Inc. is the licensor of the *Survivor* format rights and significantly, is CBS Production's partner in the joint venture that monetizes *Survivor* distribution and

merchandise rights, that is, the independent production company known as Survivor Productions, LLC.[3] Accordingly, Burnett's producing services were not work-for-hire with CBS. Rather, his personal producing services were provided to his own independent production company.

On *The Apprentice*, Burnett formed an independent production company known as JMBP, Inc., the copyright holder. In exchange for a license fee from the network, NBC, JMBP, Inc. produced and delivered the show to NBC for broadcast. As in the case of *Survivor*, Burnett's independent production company, JMBP, Inc., retained all ancillary rights to monetize the show. JMBP, Inc. then created the independent production company wholly owned by Mark Burnett known as Archie Worldwide which was responsible for hiring the staff and crew to make the show.

The evidence presented establishes that this business model was followed in other shows made by Burnett such as *Eco Challenge*, *Combat Missions, The Casino, The Contender, RockStar, Gold Rush* and *On the Lot*. That is, Riggs negotiated corporate licensing and financing deals whereby the networks would pay one of Burnett's independent production companies a license fee in exchange for which the network would receive a limited license to a portion of the worldwide copyright in order to broadcast a Burnett show in the United States for a certain term. Because the Burnett entity owned (or co-owned) the rights to the shows it produced, it expressly retained ownership and control over all rights that were not expressly licensed to the network.[4] Burnett, through his independent production companies, was responsible for hiring the production staff, physically producing the show, and supplying show episodes to the network in a format

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[3] DJB, Inc. is also a party to the licensing, distribution and financing agreements with the USA Network on the show *Combat Missions*.

[4] Since Burnett, through his independent production companies, retained the intellectual property rights to his shows, he was able to generate millions of dollars through foreign licensing and distribution deals, music licensing deals, location agreements, and internet distribution arrangements. Burnett also generated enormous revenue from sponsorship and product integration deals with many Fortune 500 companies. (Product integration deals are a form of marketing and advertising in which a company's brand, product, or services are integrated into a television show.)

suitable for broadcast. Thus, while Burnett and his independent production companies were able to apply the network's license fee to finance the costs of production, including payment of staff, Burnett's independent production companies bore ultimate responsibility for overtures.

We have consistently held that the "activity of procuring employment under the Act refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and the *third-party employer* who seeks to engage the artists's services." *Chinn v. Tobin*, TAC 17-96 [Emphasis added]; See Also *Cham v. Spencer/Cowings Entertainment, LLC*, TAC 19-05; *Smith v. Chuck Harris*, TAC 53-05. Burnett described his companies as being "content" companies that independently produce their own shows from beginning to end and bear ultimate legal and financial responsibility for the series that the networks licensed. Thus, the evidence establishes that Burnett was self employed by his various production companies and not the networks, as he now argues. As such, there is no violation of the Act where, as here, there is no procurement of employment or engagements with *a third party employer* since Burnett is self employed by his own independent production companies. See also *American First Run v. Omni Entertainment Group*, TAC 32-95 where we held there is no violation of the Act where petitioners were self employed principals of an independent production company that produced its own content.

In reaching our holding in *American First Run, supra*, we found that respondents were not seeking employment with studios or production companies. Rather, respondents were looking for outside investors to invest in their production company so that they could produce a television series for which they already owned the production rights. We noted:

> The purpose of respondents' efforts to locate "co-producers" was not to obtain "employment" for petitioners, but rather to obtain funds so as to allow a business enterprise and its executives to realize their goal of producing a television series. It is simply ludicrous to suggest that in order for respondents to engage in fund raising activities on behalf of a production company, they must be licensed as a talent agency

by the State Labor Commissioner.

See also *Rose v. Reilly*, TAC 43-97 where we found that the petitioner, a director, was already an employee of respondent's production company so no new employment was being sought or obtained for him *with a third party employer*.

Similarly, in *Chinn v. Tobin*, (TAC 17-96), ("*Chinn*") we held that there was no violation of the Act where there was no negotiation *with third party employers* for employment or entertainment engagements. Respondent was negotiating with third parties to distribute petitioner's music which respondent's production company owned. We noted:

> [Respondent's] role was analogous to an in independent television production company that hires actors and other necessary employees for the production, that bears the expenses incurred in completing the production, that owns the movie or television series that it produces, and that has the right to enter into distribution agreements with networks for this movie or series. The Talent Agencies Act does not require that independent television producers be licensed to engage in such activities.

Chinn, at p. 11, fn.2.

Like *Chinn*, the independent production companies formed by Burnett for his various shows, were bona fide production companies which physically produced, controlled and bore ultimate financial and legal responsibility for the shows that the networks licensed. While Riggs did not own the various Burnett independent production companies or hired Burnett to work in such companies, as was in the case in *American First Run, Chinn* and *Rose, supra*, his negotiation with the networks was for the purpose of selling shows of which Burnett owned and controlled the rights. Thus, Burnett's argument that said cases are inapplicable ignores the fact that while Riggs may have been acting as an intermediary between Burnett and his independent production companies and the various networks, he was not negotiating for Burnett to be employed or engaged *by the*

networks as an artist. The testimony and evidence presented establish that Mark Burnett was self employed *by his own companies* and not by the networks (or other third party production companies) and that Riggs served as an intermediary with the networks for the purpose of selling Burnett's shows and not for the purpose of obtaining employment for Burnett with the networks or other third party employers.

Notably, Burnett did not view Riggs as negotiating employment or engagements for him with the networks or other third parties. Rather, he testified that Riggs's role was to help him *sell* his shows to the various networks and then to get him the best deal to produce the shows:

> Q: What would describe as the central purpose of your deal with Mr. Riggs?
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> A: Well, the central purpose was once I had *something to sell*, that he would set the meetings with the networks and actually make me the absolute – I mean to be honest with you, the absolute best deal he could make, the best producing deal he could make for me.

(Direct Examination of Mark Burnett by Steve Marenberg, R.T. 1348:20-1349 [Emphasis added]:1. See also R.T. 1413:8-16 where Burnett explains how he *sold* his show *The Apprentice* to NBC, including the right to creatively produce the show.)[5] In this regard, we have held that "in looking at the entertainment industry as a whole, it is without exception the creator of the entertainment product is the employer. Whether film, television, stage, commercials or print modeling, the production company is invariably the employer." *Miravalles v. Artists, Inc.* No. TAC 33-99, p. 10. There can be no doubt that Burnett individually and through his independent production companies was the creator of the various reality shows at issue herein. In fact, Burnett even states this in a deposition transcript from an unrelated lawsuit that was read into the record at this hearing relating to

[5] To be accurate, the testimony established that the terms "sell," "sold" and "selling" are colloquial terms commonly used in this industry to describe the process of licensing rights to broadcast the tapes of the shows or use the format of the shows, to third parties for a period of time. That is, the shows are not being sold outright.

Riggs' compensation:

> "Q (Attorney in Unrelated Case) Let me ask you about this statement 'What I make on shows, he gets 10 percent,' you said. When you said, 'What I make on shows,' are you talking about what you, and through your corporate entities, what you make?"
>
> "A (By Burnett) No. What I make. Conrad's understanding with me, it's of what I make"
>
> "Q And what do you mean by what I make?"
>
> "A Well, **I'm physically creating and producing the shows**. As a result of that, I'm a specified earner on these shows, and Conrad would receive 10 percent of what I make."

[Emphasis added. R.T. 1373:4-20]. As the creator of the shows discussed herein, Burnett inevitably serves as the employer.

We find Burnett's reliance on *Brian Cummins and Scotsmanagement Corporation v. The Film Consortium*, (1983) TAC 5-83, ("*Cummins*"), misplaced. In *Cummings*, we held that the respondent violated the Act because he negotiated for employment for petitioner with third party employers, the advertising agencies. Respondent argued that it was not in violation of the Act because it was a production company that employed petitioner. However, upon further review, we found that it was the advertising agencies who employed petitioner, not respondent's production company. The advertising agencies developed the advertising campaign, paid the entire cost of producing the commercials, and employed the production staff which produced the commercials. Respondent's production companies, on the other hand, neither exercised nor possessed control over petitioner's working conditions and performed very little or no actual production work. Burnett relies on *Cummins* to argue that Riggs violated the Act because his primary function was to act as an intermediary between networks and Burnett to arrange for networks to pay for Burnett's personal producing services. This argument, however, ignores the reality of the business transaction between Burnett's independent

production companies and the networks. As stated above, the evidence presented at the hearing does not establish that Riggs was negotiating for Burnett to be employed by the networks. Instead, the evidence establishes that Riggs was negotiating for the *sale of shows*, the rights of which are owned by Burnett, to networks for the networks to air the shows domestically, in exchange for a license fee that would fund the production of the series. This business reality leads us to conclude there is no violation of the Act in this case.

2. "Producing fee," "Services of the Essence," and/or "Producing Credit Clauses in the Various Network Agreements do not Transmute the Networks into Burnett's Employer.

It is undisputed that Riggs negotiated licensing and distribution deals with networks and a third party internet provider which provided for Burnett to render future *personal producing services*. And, while many of the contracts Riggs negotiated included "producing fee," "services of the essence," and/or "producing credit provisions," as Riggs correctly points out, an employment relationship is not created between Burnett and the networks by virtue of these rights and obligations. The evidence at the hearing establishes that "producing fees" that were set for Mark Burnett and others in the licensing and distribution agreements, were set to ensure that the money that was financed by the networks for the production of the show, actually went to the making of the show and was not all pocketed by Mark Burnett or other producers involved in making the shows. Likewise, the "service of the essence" provisions were set so that the key producers/ players (e.g., Mark Burnett), actually produced the shows. The purpose of these clauses therefore, were for the production companies (which were wholly owned by Mark Burnett or owned in partnership with another production company) to actually hire Burnett to provide those services. Such clauses do not transmute the networks into Burnett's employer.

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C. The Evidence Does Not Support a Finding that Riggs Violated the Act with Respect to *The Restaurant.*

Burnett argues that Riggs also violated the Act when he negotiated with independent production company Reveille to hire Burnett to provide personal producing services that constituted a work-for-hire deal on the show *The Restaurant*. Unlike the other shows, Burnett did not own the intellectual property rights associated with *The Restaurant*.

The evidence, however, supports a finding that Burnett, and not Riggs, initially negotiated Burnett's work-for-hire agreement for *The Restaurant*, including his compensation. Riggs later converted the business agreement for this show from a work-for-hire to one that fit the business model of the other shows discussed in this decision, where through production and joint venture agreements, Burnett would co-own and physically produce the series and share in the proceeds. As such, as in the other production, licensing and financing agreements, there is not violation of the Act where Burnett is self employed by his own production company, even where it is through a joint venture with another independent production company such as Reveille.

D. Our Holding That The Act is Not Implicated on Licensing, Distribution and Financing Deals Negotiated by Riggs For Burnett's is in Accord with the Legislative Intent of the Act.

Our holding that Riggs did not violate the Act in a situation where as here, he negotiated license, distribution and financing agreements with networks, an internet services provider and an independent production company (Reveille), which agreements included Burnett providing future personal producing services to his own, wholly owned independent production companies, is consistent with the legislative intent of the Act. As the courts have held, the Act "must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers – one – that will lead to wise policy rather than mischief and absurdity." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 354-355. And as we stated in our decision in *American First*

Run, supra, we do not believe the Legislature intended to revolutionize the entertainment industry by requiring the licensing of all individuals engaged in raising funds, and in this case, negotiating licensing and distribution deals for bona fide independent production companies wholly owned by petitioner, or to dramatically expand the role of the Labor Commissioner to function as the arbiter of all business disputes that might arise in the course of such deals.[6]

E. Riggs Unlawfully Procured Employment for Burnett on the Show *Martha.*

Riggs admitted that he procured employment for JMBP Inc. for the services of Mark Burnett to render personal production services to Martha Stewart's company Martha Stewart Omnimedia. Unlike the licensing, distribution and financing deals made on the other shows discussed in this determination, the *Martha* show was a work-for-hire deal. There were no co-ownership rights to the show as there were with the other shows licensed to the networks. As such, when Riggs negotiated this agreement, he was doing it with a third party employer, Martha Stewart Omnimedia, in violation of the Act.

Riggs argues that even if he procured this work-for-hire employment for Burnett, Burnett failed to provide any evidence at the hearing that he provided "artistic" services on this employment/engagement. We reject this argument. We have ruled today that Burnett is an "artist" under the Act. There is no reason to doubt that he did not provide the same type of artistic services on this show that he provided on every other show he produced which is at issue in this case. As such, based on the totality of the evidence presented, we find that Burnett must have been creatively producing this engagement for third party production company Martha Stewart Omnimedia. Accordingly, Riggs violated the Act in negotiating this deal without first having obtained a talent agency license from the Labor Commissioner.

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[6] Since we do not find that Riggs acted as a talent agent when negotiating licensing, distribution and financing deals with the networks, an internet provider (*Gold Rush*) and an independent production company (Reveille for *The Restaurant*), there is no need for us to determine the issue of whether Riggs was negotiating "package deals."

F. Severability under Marathon Entertainment v. Blasi.

In past decisions we have voided entire agreements between the parties for a single violation of the Act. And, in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991, the California Supreme Court recognized that the Labor Commissioner may invalidate an entire contract when the Act is violated. The court, however, left it to the discretion of the Labor Commissioner to apply the doctrine of severability to preserve and enforce the lawful portions of the parties' contract where the facts so warrant. As the Supreme Court explained in *Marathon:*

> "Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." [Citations omitted].

Marathon, supra at p.996.

Since the *Martha* agreement is the only agreement where we find that Riggs violated the Act, there is no question that severance is appropriate under *Marathon.* Accordingly, we find that Riggs is not entitled to any further commissions, payments or monies associated with the *Martha* show. Additionally, Riggs is ordered to disgorge any commissions or monies he received from this show during the one year period preceding the filing of this petition on July 31, 2008.

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ORDER

For the reasons set forth above, we find that the parties' oral agreement is not subject to the provisions of the Talent Agencies Act on the following shows: *Survivor, Eco-Challenge, Combat Missions, The Apprentice, The Restaurant, The Casino, RockStar, Gold Rush, The Contender,* and *On the Lot.* With regard to the *Martha* show, we do find a violation of the Act and accordingly sever that agreement, pertaining to that show, from the remainder of the parties' oral contract. Additionally, we hereby declare that Riggs has no rights to any monies that have been paid or may be paid in connection with the *Martha* show. Riggs is also ordered to disgorge any monies he collected from Burnett with regard to the *Martha* show during the one year period prior to Burnett filing this petition, that is, from July 31, 2007 to July 31, 2008.

DATED: May 10, 2011

Respectfully submitted,

By: _____
EDNA GARCIA EARLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: May 10, 2011

By: _____
JULIE A. SU
California Labor Commissioner

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