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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

RAY CHARLES LEONARD, pka SUGAR RAY LEONARD; BJORN REBNEY, Petitioners,	No. TAC 25-01
vs.	
SETH ERSOFF, an individual; ERSOFF/REBNEY PARTNERSHIP, Respondents.	DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on May 15, 2002, May 21, 2003, May 22, 2003, July 16, 2003, and July 24, 2003, in Los Angeles, California, before the Labor Commissioner's undersigned hearing officer. Petitioners were represented by Michael J. Plonsker and Jonathan A. Loeb; and Respondents were initially represented by Steven L. Zelig, who was later replaced by Philip A. Levy. Based on the evidence presented at this hearing and on the papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

PROCEDURAL BACKGROUND

On or about July 5, 2001, respondents herein, SETH ERSOFF and ERSOFF/REBNEY PARTNERSHIP (hereinafter "ERP") filed a First Amended Complaint ("FAC") against petitioners herein, RAY CHARLES LEONARD and BJORN REBNEY, seeking payment of commissions allegedly owed by Leonard and/or allegedly wrongfully withheld by Rebney. The FAC alleges, inter alia, that in 1996 Leonard entered into a "representation agreement" with Ersoff, under which Ersoff was to receive commissions in the amount of 20% (later modified to 15%) of Leonard's compensation generated from any opportunities created by Ersoff's marketing efforts. The FAC further alleges that in late 1997 or early 1998, Ersoff and Rebney entered into an oral partnership agreement, creating the ERP, under which Ersoff and Rebney were to divide marketing commissions earned by virtue of their efforts on behalf of Leonard. Finally, the FAC alleges that Leonard and Rebney breached these agreements by failing to pay or wrongfully withholding commissions due to Ersoff.

This petition to determine controversy was filed on August 31, 2001. By this petition, Leonard and Rebney present an affirmative defense to the FAC that must be heard and decided by the Labor Commissioner. (See *Styne v. Stevens* (2001) 26 Cal.4th 42.) The petition alleges that the various agreements between Ersoff and Leonard, between ERP and Leonard, and between Ersoff and Rebney are void and unenforceable because Ersoff and ERP acted as unlicensed talent agents by procuring or attempting to procure employment for Leonard as an artist within the meaning of the Talent Agencies Act (Labor Code §1700, et seq.); that these

agreements are a subterfuge to circumvent the Act's prohibition against procurement activities by unlicensed persons; and that as a consequence, Ersoff and ERP have no enforceable claim for commissions allegedly owed by Leonard, or for a share of the commissions allegedly wrongfully retained by Rebney.

Respondents Ersoff and ERP filed an answer to the petition to determine controversy, contending that respondents did not procure or attempt to procure employment for Leonard, that because the respondents did not violate the Talent Agencies Act the Act does not apply, and therefore, that the Labor Commissioner does not have jurisdiction over the parties' dispute.[1] Respondents also that Rebney cannot maintain any sort of claim under the Talent Agencies Act, as Rebney is not an "artist," and the Labor Commissioner therefore has no jurisdiction over Ersoff's claim that Rebney wrongfully withheld commissions that were to have been split between them pursuant to their partnership agreement.

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[1] Respondents' answer also asserts that Leonard is judicially estopped from asserting that Ersoff functioned as a talent agent, because in deposition testimony in other litigation Leonard took the position that Ersoff did not procure any employment. During the course of the hearing on the petition to determine controversy, we ruled that judicial estoppel does not apply. A party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding, and (2) that this prior position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment. *People ex rel. Sneddon v. Torch Energy Service, Inc.* (2002) 102 Cal.App.4th 181, 189. Without deciding whether Leonard ever took an inconsistent position in other litigation, no evidence was presented that another tribunal ever reached any determination upon which it could be said that such tribunal adopted any position espoused by Leonard.

FINDINGS OF FACT

1. Petitioner RAY CHARLES LEONARD, professionally known as SUGAR RAY LEONARD, is famous throughout the world for his accomplishments as a boxer. Since retiring from boxing, Leonard has sought to capitalize on his fame by making product endorsements, appearing in advertisements or infomercials, making live or televised public appearances, and the like.

2. Petitioner BJORN REBNEY has been licensed in California as an attorney since December 1993. He has never been licensed by the California Labor Commissioner as a talent agent. In 1996, he was working for Integrated Sports International ("ISI"), under the direction of Leigh Steinberg, representing athletes in obtaining "marketing deals." ISI has never licensed by the Labor Commissioner as a talent agency.

3. At all times since 1995, Respondent SETH ERSOFF has been engaged in various business enterprises as a producer of athletic or entertainment events, and as a "manager" of athletes. Most notably, Ersoff "managed" Leonard during the period from mid-1996 to late-1999. During this time period, Ersoff was never licensed as a talent agent, and was not employed by any licensed talent agency. According to Ersoff, his role in managing Leonard was to provide career guidance and counseling, to "create a platform relative to which he could sustain various sources of income from speeches, books, infomercials and other sources," all the while never "procuring" or "attempting to procure" employment for Leonard that would implicate the Talent Agencies Act. Much of what Ersoff did was focused on rehabilitating Leonard's somewhat tarnished public image, so as to increase his marketability, and

thereby create new opportunities for Leonard to generate income through product endorsements, appearances in commercials or infomercials, etc.

4. In mid-1996, Ersoff was working for Irv Fuller, the producer of a pay per view project, "Fight Zone." Ersoff hoped to hire Leonard as the host of the show, and towards that end, set up a meeting between Leonard and Fuller. Leonard attended this meeting with his talent agent, Bud Moss of the Shapiro Lichtman Agency (a licensed talent agency). Following this meeting, Ersoff (on behalf of Fuller), negotiated with Moss (on behalf of Leonard), and hired Leonard to be the host of Fight Zone, renamed "Sugar Ray Leonard's Fight Zone." Ersoff never sought any commissions from Leonard in connection with this project.

5. After hiring Leonard to host "Fight Zone," Ersoff began discussions with Leonard centered around Ersoff's proposal to "manage his career," and "to be in the Sugar Ray Leonard business." Ersoff told Leonard that with his many connections, he could create more deals and more opportunities for Leonard to significantly increase his income, and asked Leonard for a chance to show him what he could do. Among other things, Ersoff told Leonard that he would introduce him to Leigh Steinberg, and to the William Morris Agency, a licensed talent agency which Ersoff believed could obtain more entertainment related employment opportunities for Leonard. Leonard agreed to have Ersoff manage his career, and entered into a "representation agreement", under which Ersoff was to receive commissions in the amount of 20% (later modified to 15%) of all income earned by Leonard generated

by Ersoff's efforts.

6. Ersoff attempted to get the William Morris Agency to represent Leonard, but after meeting with Leonard and Ersoff, William Morris declined to represent Leonard. At some point soon thereafter, Bud Moss ceased acting as Leonard's talent agent, and as a result, by the latter months of 1996, Leonard was no longer represented by any licensed talent agency. Ersoff made no further efforts to secure a talent agency to represent Leonard with respect to the procurement of employment covered by the Talent Agencies Act. However, during the period of time in which Ersoff managed Leonard, Ersoff obtained the services of certain other individuals -- a publicist, an acting coach, and attorneys -- to provide Leonard with assistance in advancing his interests.

7. Ersoff took Leonard to meet with Leigh Steinberg in mid-1996. Bjorn Rebney, who was then working for Steinberg's sports marketing business, ISI, attended this meeting. At this meeting, Ersoff explained that his company, Fade In Entertainment, was in the business of getting deals for athletes, and that he hoped to form "an alliance" with ISI to get deals for Leonard doing advertisements and endorsements. Ersoff explained that by working together, they could leverage more and better deals for Leonard. Ersoff proposed that commissions would be split between him and ISI. At some point soon after this meeting, ISI and Ersoff agreed to share "representational duties" relative to Leonard, for which Leonard would pay commissions at 20% of his earnings pursuant to Leonard's agreement with Ersoff, with Ersoff and ISI to split these commissions equally for deals "brought to the table" by Ersoff, but with ISI getting a greater

percentage for deals procured by ISI.

8. This "alliance" between Ersoff and ISI ended in January or February 1997, with Rebney's termination from ISI. Immediately thereafter, Ersoff and Rebney entered into an oral agreement to form a partnership, the ERSOFF/REBNEY PARTNERSHIP ("ERP"), which has been named as a Respondent in this proceeding. ERP has never been licensed by the Labor Commissioner as a talent agency. This partnership between Ersoff and Rebney lasted until late 1999. The purpose of the partnership was to provide Leonard with "representation," in the same manner that Ersoff and ISI had been providing such representation, so as to enhance Leonard's marketability and income generating opportunities, and to obtain and negotiate engagements for Leonard relative to public speaking, product endorsements, acting in commercials and infomercials, etc. Under the terms of this partnership, Ersoff and Rebney were to equally split all commissions earned pursuant to Ersoff's agreement to represent Leonard. However, shortly after the formation of the ERP, Leonard re-negotiated his agreement with Ersoff, reducing the commissions payable to ERP to 15% of Leonard's earnings derived through the efforts of Ersoff or Rebney.

9. In his testimony, Ersoff maintained that throughout the entire time of his representation of Leonard, he never procured or attempted to procure any specific employment for Leonard, but rather, that his role was limited to "providing career guidance and counseling" to Leonard, and "developing and advancing Leonard's career" by "establishing a platform to create income opportunities." Primarily, according to Ersoff, this consisted of

creating a non-profit organization, the Sugar Ray Leonard Youth Foundation; and creating a concept called "Twelve Rounds to Victory," to enable Leonard to secure "inspirational" or "motivational" speaking engagements based on how he overcame adversity to become a champion boxer, and to enable Leonard to sell motivational books or tapes to adults and children based on this theme; and finally, in bringing Leonard into a relationship with D.A.R.E. America ("DARE"), a non-profit organization known for its programs to encourage school age children to resist drugs and violence. Leonard became a public spokesperson for DARE, serving as its "celebrity voice." All of these activities were designed by Ersoff to enhance Leonard's image, and to enable him to procure more and higher paying product endorsements, and acting roles in infomercials, advertisements, etc. According to Ersoff, while he was responsible for creating and implementing the concepts that would "build a career path for Leonard," his partners, first ISI and later Rebney with the creation of the ERP, were to be responsible for obtaining and negotiating all of the particular contracts for Leonard's endorsements or services. Ersoff testified that the ERP provided a full range of services for Leonard, with Rebney providing "legal and agency services" and Ersoff providing "management services." The ERP then shared the commissions that each of the partners earned for providing Leonard with these services.

10. During the period from the start of Ersoff's representation of Leonard in mid-1996, until the end of this representation in late-1999, Ersoff, or the "alliance" of Ersoff and ISI, or the partnership of Ersoff and Rebney, procured or

attempted to procure or promised to procure various endorsement deals, engagements, or employment for Leonard. Evidence was presented with respect to each of the following proposals or agreements:

a) "The Stimulator" - In mid-1996, Ersoff had discussions with Paul Monea, a businessman seeking to publicize a pain relief device known as the Stimulator, and Ersoff proposed an agreement whereby Leonard would endorse and serve as a spokesperson for this product. Initial negotiations were solely between Ersoff and Monea, but as the negotiations progressed, Rebney (then associated with ISI) was brought in.[2] A proposed contract was drafted by Rebney, pursuant to instructions from Ersoff. Under

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[2] Ersoff testified that he had a pre-existing business relationship with Monea, and that Monea called him about this product, and that Ersoff then called Bud Moss for instructions on how to proceed, and they agreed to hold a dinner meeting to discuss the proposal. Ersoff, Monea, Leonard and Moss attended this meeting, and Moss announced that he was delighted with the proposal, and asked Ersoff to pursue the opportunity and take the lead in negotiations based on Ersoff's prior relationship with Monea. Ersoff then began negotiating the deal, but ultimately passed off the negotiating to Rebney and ISI, at Leonard's request. Ersoff's version of these events is contradicted by Rebney, who testified that Ersoff did all of the negotiating, and his own role was limited to drafting the proposed contract for Leonard's endorsement and services in accordance with the terms that Ersoff told him had already been negotiated. Ersoff's version is also contradicted by Leonard, who testified that by the time Ersoff first told him anything about the Stimulator, he had already terminated Moss as his talent agent. Significantly, even under Ersoff's account of these events, Moss was out of the picture by the time the deal was executed. Ersoff does not claim that Moss approved, or was even asked to approve, the final terms of the deal. Moreover, in view of Ersoff's pre-existing relationship with Monea, it is simply not believable that Ersoff turned the final negotiations over to Rebney. Ersoff's claim that he did this at Leonard's request seems particularly unbelievable, as there was no prior relationship between Leonard and Rebney to warrant making such a request, and in view of Leonard's credible testimony that he had no idea (and no apparent interest) as to whether negotiations were handled by Ersoff or Rebney.

the terms of this contract, Leonard was to receive a minimum of $250,000 per year for his endorsement and related services, including "participat[ing] in and/or act[ing] as the host of a television commercial for the Stimulator," either "in the form of infomercials and/or standard :30 second advertising spots." This contract, on ISI letterhead, was executed by Rebney and a representative of the company that was to manufacture and/or sell the Stimulator. However, with the FDA's decision to prohibit the sale of this product, no commercial or infomercial was ever filmed.

b) "O2Go" - Either at the same time or very shortly after Ersoff and Monea started their negotiations about Leonard's endorsement and services in connection with the Stimulator, Ersoff and Monea began discussing the possibility of securing Leonard's endorsement and related services in connection with another product known as "O2Go," an oxygenated bottled water that Monea hoped to market. As was the case with the Stimulator, initial negotiations were solely between Ersoff and Monea, but as the negotiations progressed, Rebney (then associated with ISI) was brought in. A proposed contract was drafted by Rebney, pursuant to instructions from Ersoff. Under the terms of this contract, Leonard was to receive a minimum of $250,000 per year for his endorsement and related services, including "participat[ing] in and/or act[ing] as the host of a television commercial for O2Go," either "in the form of infomercials and/or standard :30 second advertising spots." This contract, on ISI letterhead, was executed on January 29, 1997 by Rebney and a representative of the company that was to manufacture and/or sell

the Stimulator.

c) Appearance on Jay Leno show - In early 1997, Leonard appeared as a guest on the Jay Leno show. No evidence was presented at this hearing that would suggest that Leonard performed as an entertainer in connection with this appearance. According to Ersoff, this appearance was obtained through the efforts of Leonard's publicist, Michael Simon. Simon worked for a public relations company, and was not employed by Ersoff.

d) "TaeBo" - In 1997, Leonard was filmed speaking at a series of testimonials for TaeBo, a fitness workout developed by Leonard's friend and personal trainer, Billy Blanks. This film was ultimately incorporated into an infomercial for TaeBo. Neither Ersoff nor Rebney played any role in securing Leonard's participation in the TaeBo project, or in negotiating Leonard's compensation (if any) for his involvement in the project. However, Rebney prepared a release to allow the producers of the TaeBo infomercial to use the film of Leonard speaking at the testimonials, and to incorporate that film into the infomercial, subject to Leonard's right to reject any of this footage upon his review of the infomercial. Rebney put this draft release on Ersoff's desk and told Ersoff to send it to the producers of the infomercial. Ersoff did more than that -- he signed Leonard's name ("Ray") to the release before faxing it to the producer. Ersoff testified that he then believed that he had authorization to sign the release.

e) Appearance on Taka TV show - In the spring of 1997, Leonard appeared as a guest on the "Taka Show," a television talk show in Japan. In this appearance, he simulated "boxing" with

the host of the show. This appearance was procured, and Leonard's fee of $100,000 was negotiated by Rebney, during the period of time when Rebney was still working at ISI, but commissions were split between ISI and Ersoff pursuant to Ersoff's "alliance" with ISI.

f) "MVP Small Print Collectibles" - In the spring of 1997, Ersoff and Rebney (who by that time was no longer associated with ISI) attempted to enter into a deal with Jack Wong, a Hong Kong businessman associated with a company called MVP Small Print Collectibles ("MVP"). Efforts to reach an agreement ultimately failed. MVP distributes and sells telephone debit cards which bear the likenesses of famous persons. The proposed agreement was to allow MVP to use eight "unique and marketable photographs" of Leonard that "chronicle great and interesting moments both in the ring and outside the ring." Nothing in the proposed agreement suggested that Leonard was to model or otherwise pose for new photographs, rather, it appears that the photographs were to be culled from what was no doubt an already large inventory of photographs depicting Leonard throughout his career. The proposed agreement would have required Leonard to travel to Hong Kong and participate in a series of three appearances on June 6, 7, and 8, 1997 to "meet and greet fans," and "be available for interaction with the public," and to attend "meetings with ... governmental officials or prominent members of the community." Nothing in the proposed agreement would have required Leonard to appear in any advertisements or infomercials.

g) Dr. Spagnoli boxing clinics - Sometime in 1997, Leonard's golfing buddy, Dr. Spagnoli, made a proposal to Leonard that they

put together a boxing workout and package it so that it could be sold to gyms and health clubs. Leonard asked Spagnoli to discuss this proposal with Ersoff. Ersoff began negotiations with Spagnoli, and eventually, Ersoff asked Rebney to join these negotiations. Among other things, these negotiations focused on the nature of Leonard's role in the enterprise, and the possibility of having Leonard act as a spokesperson for the workout, with appearances on television and radio commercials, and print advertisements. However, the parties failed to reach an agreement on whether the workout program would be jointly owned by Leonard and Spagnoli, or solely owned by Spagnoli. An agreement was never concluded.

h) Route American Sports - Sometime in 1997, Ersoff had discussions with a Japanese business called Route American Sports ("RAS") about having Leonard do a series of boxing clinics in Japan for businessmen, that would operate much the same way as a baseball team fantasy camp, with the participants watching films of Leonard's greatest fights, getting instruction from Leonard on how to box, receiving boxing gloves signed by Leonard, etc. Later in 1997 or in early 1998, Ersoff negotiated a deal with RAS to allow RAS to film various athletes, including Leonard, for a Japanese variety show. Leonard was filmed while he was speaking at a DARE charitable event.

I) "Sugar Ray Leonard's Hit Parade" on ESPN Classic Sports Network - On August 10, 1998, Sugar Ray Leonard Management, Inc. ("SRLM"), a loan out company for Leonard's services, entered into a written agreement with Classic Sports Network ("CSN"), under which Leonard was to provide on-screen services as a "program

host, moderator, guest host, interviewer, interviewee, analyst and announcer" for a cable television boxing show that was to replay the most notable fights in Leonard's boxing career, with Leonard to receive $100,000 per contract year for these services. Rebney negotiated this deal and executed the contract with CSN on behalf of Leonard, during the period of time that Rebney was Ersoff's partner in the ERP. Ersoff was kept apprised of these negotiations as they were taking place. The commissions that were based on Leonard's earnings in connection with this engagement were split between Rebney and Ersoff.

j) "Slam Man" - In the summer of 1998, Leonard entered into an agreement with Fitness Quest to endorse a product called "Slam Man," which was a "robot dummy" with lights that lit up when it was punched. Under this agreement, Leonard was also to act in an infomercial touting the virtues of this device, and possibly also to act in an instructional video that would be included with the product. Although Leonard entered into this agreement on his own, without the assistance of any representative, he later asked Ersoff and Rebney to "help clarify the terms of the agreement," or to help him cancel the agreement. Rebney then had some further discussions with Fitness Quest regarding Leonard's obligations under the agreement.

k) "VarTec" - In September 1998, Leonard entered into an agreement with VarTec Telecom, a telecommunications service, under which Leonard was to serve as a celebrity spokesperson for VarTec, and to make himself available for videotaping, audio taping, and photographing in connection with the production of print, radio and television advertising. This deal had been

procured and negotiated by Rebney, with Ersoff's knowledge. Commissions on Leonard's earning were paid to the ERP, and split between Rebney and Ersoff. During the negotiations, VarTec had been represented Richard Bachrach, the CEO of Celebrity Focus, a business that represents companies that want to use celebrities in their advertising campaigns. After the VarTec deal was negotiated, Bachrach met Ersoff at a Las Vegas press conference where the deal was announced.[3] Ersoff then told Bachrach that he was looking for more opportunities for Leonard to do product endorsements and advertisements. During the next month, Ersoff telephoned Bachrach on two occasions, asking whether any of Bachrach's other clients might be interested in engaging Leonard's services. Despite Ersoff's efforts, he did not procure any additional deals through Bachrach. Ersoff also made some follow-up telephone calls, to Bachrach or other persons who were representing VarTec, to extend the term of Leonard's deal with VarTec by another year.

1) "Track Bowling Ball" - In January 1999, Leonard entered into an agreement with Track, Inc., a company that manufactures and sells bowling balls, for his endorsement, use of his name and image in promotion, advertisement, distribution, marketing and sale of the product, and for up to 12 hours of his services in the creation and production of advertising materials. These

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[3] Though characterized as a "news conference," this event was little more than the start of VarTec's advertising campaign featuring Leonard as its new spokesperson. Leonard's comments and actions at this "news conference" were scripted by VarTec, and essentially amount to the performance of a live commercial for VarTec, with photographs to be taken of Leonard in various "boxing poses" showing him "challenging" another "fighter" who is wearing apparel that is labeled AT&T (VarTec's major competitor).

services were understood and intended to include acting in nationally televised commercials for Track, and for recording radio advertisements, and for modeling services in connection with print advertisements. Pursuant to this agreement, Leonard performed in the production of television commercials, and was photographed for print advertisements. This agreement was negotiated by Rebney, and the ERP received commissions on Leonard's earnings derived from this agreement, and these commissions were split between Rebney and Ersoff. Although Ersoff testified that he did not approve of this deal, because he believed a connection to this type of product would not enhance Leonard's image, Rebney's negotiation of the agreement came within the scope of work that Rebney was authorized to perform as a partner in the ERP, on behalf of the ERP.

m) "12 Rounds to Victory" book - On January 15, 1999, Ersoff, Leonard and DARE (by and through its president and founding director, Glenn Levant) entered into a written agreement for author Todd Gold to write a book that would appear to have been authored by Leonard, and to have this book distributed by DARE to school children in the DARE program. This agreement had been negotiated by Ersoff. The book is described a "the DARE America textbook version of Sugar Ray Leonard's 12 Rounds to Victory," and as a "character building motivational text." Gold was to be paid $50,000 for his work, by DARE ($20,000), Leonard ($18,000) and Ersoff/Rebney ($12,000), and DARE was to bear all other costs associated with the publishing, marketing, sale and distribution of the book. Apparently, participating schools or school children were to be charged for copies of this book,

because under this agreement, Leonard and DARE were to equally split 60 cents on each and every book distributed by DARE, with the expectation that at least 1,000,000 copies of the book would be distributed. Finally, under this agreement, Leonard was obligated to "assist DARE America in promoting distribution of the book in any reasonable manner as requested by DARE president Glenn Levant." There was nothing in the agreement that expressly required Leonard to act in an infomercial or advertisement promoting the book, and there were never any discussions about having Leonard perform such services in connection with the sale of this book.[4]

n) "Knock Out Kings" by Electronic Arts - In February 1998, Leonard entered into an agreement with Electronic Arts, Inc. ("EA"), under which Leonard was to endorse and otherwise aid in the publicity of an electronic game called "Knock Out Kings." Among other things, Leonard was engaged to record voice-overs that would be used in the game, and to be photographed and videotaped for use in advertising materials. This agreement was negotiated by Rebney, and his services in negotiating this agreement came within the scope of work that he was authorized to perform as a partner in the ERP, on behalf of the ERP.

o) Appearance for Protection One - In April 1999, Leonard appeared at a DARE event at Planet Hollywood that was sponsored

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[4] Levant testified that Leonard was to perform in an infomercial to promote this book, but he appears to have conflated Leonard's role in connection with this book with an agreement for Leonard to appear in an infomercial to promote a different product, the "12 Rounds to Victory" audiotapes and written materials discussed in paragraph 10(q), *infra*. Rebney credibly testified that the infomercial had nothing to do with this book.

by Protection One, a home security company. Ersoff asked Rebney to negotiate the appearance fee that Leonard was to receive for attending and speaking at this event. Under the agreement that was negotiated, Leonard was to receive $20,000, however, the agreement specified that Protection One had no right to use Leonard's voice or likeness for any advertising or promotion. Nonetheless, Ersoff told Leonard that he believed there was a good chance that this appearance could ultimately lead to an endorsement/advertising deal with Protection One.

p) "Buy Bid Win" - In the spring of 1999, Ersoff had some conversations with Bob Lorsch, the owner or CEO of an internet company called "Buy-Bid-Win," which ran a website where customers could purchase items for sale. Ersoff asked Lorsch if he would be interested in securing Leonard's services to do television, radio and print commercials, and to act as a celebrity spokesperson for this internet service. Lorsch expressed some interest, and Ersoff asked Rebney to handle the negotiations. Rebney and Lorsch exchanged proposals, but were unable to reach an agreement.

q) "12 Rounds to Victory" infomercial - On May 5, 1999, Leonard, Ersoff, Rebney, DARE (by and through its president and founding director Glenn Levant), and an artistic design company called Multi-Media International (owned by Levant's wife) executed a written agreement establishing a limited liability company for the purpose of producing an infomercial that would feature Leonard, to promote the sale of "12 Rounds to Victory" audiotapes and written materials ("Victory products"). This agreement was negotiated by Ersoff and Levant. Under this

agreement, the LLC has all rights to distribute the infomercial, and to sell the Victory products via direct response television, radio, print, the internet, and through retail sales. All of the signatories have an ownership interest in the LLC -- Leonard has a 37.5% share in the LLC, DARE has 20%, Multi-Media has 17.5%, and Ersoff and Rebney have 10% each.[5] Financing the production of the infomercial, and the creation of the audiotapes and written materials (the "Victory products") that would be sold through the infomercial, would be the responsibility of DARE and Multi-Media, through their deposit of $300,000 into an LLC account. The agreement provides that profits and losses will be allocated in proportion to each members' shares, unless agreed to otherwise by written election of all members of the LLC. However, this infomercial was never produced.

11. Ersoff testified that during the course of his representation of Leonard, he and Leonard entered into a separate contractual arrangement under which both, along with Rebney, were to be principals of a newly created boxing management business that would manage the professional boxing careers of up and coming boxers, for which this boxing management business would receive commissions and/or other compensation. Neither Ersoff nor Rebney ever used this boxing management business as a vehicle for obtaining or attempting to obtain commercial endorsements, appearances in advertisements, infomercials, or any other acting or modeling engagements for Leonard. No evidence was presented

[5] Added together, these persons or entities have a 95% interest in the LLC. The agreement does not specify who is to own the remaining 5% interest.

as to whether this boxing management business procured, attempted to procure, promised to procure, of offered to procure employment in connection with television, radio or print modeling for any other professional boxers.

LEGAL ANALYSIS

1. Labor Code section 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 enterprises." The Labor Commissioner has long construed this statutory language to include persons who act in commercials or advertisements or "infomercials" that are filmed, videotaped, or recorded for broadcast on television or radio -- as these persons are "actors . . . rendering professional services in . . . radio [and] television." The Labor Commissioner has also long construed the Act's coverage of "models" to apply to persons who pose for photographs that are intended to be used for print advertisements. As such, we conclude that Leonard is an "artist" within the meaning of Labor Code section 1700.4(b) in connection with any employment or engagement wherein he provided or was to provide such covered services.

2. Labor Code section 1700.4(a) defines a "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 . . . ." The term "employment or engagements for an artist or artists" means employment or engagements for the performance of services that are performed by "artists" within the meaning of subsection (b). Unless the term "employment or engagements for an artist or artists" is limited to such artistic employment or engagements, absurd and clearly unintended results would follow. If the term was broadly construed to mean *any* employment or *any* engagement for a person who is sometimes employed or engaged as an artist, a person who tries to find a waitress job for a part-time actress, or who tries to find an office clerical job for a part-time musician, would fall within the definition of a "talent agent," thereby subjecting such person to the Talent Agency Act's licensing and regulatory scheme. Moreover, a review of the relevant legislative history leaves no doubt that the intent of the Act was to protect artists in their capacities as artists, and to regulate persons who procure artistic employment for artists. The "purpose [of the Act] is to protect artists seeking professional employment from the abuses of talent agencies." *Styne v. Stevens* (2001) 26 Cal.4th 42, 50. Thus, "the Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).) Thus, it does not cover . . . assistance in an artist's business transactions other than professional employment." *Ibid*, at 50-51.

3. Labor Code section 1700.4(a) further provides that "[t]alent agencies, may, in addition, counsel or direct artists

in the development of their professional careers," however, this function is not part of the core definition of a talent agency. Labor Code section 1700.5 makes it unlawful for a person to "engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." It is therefore unlawful to procure, offer, promise, or attempt to procure artistic employment or engagements for an artist without having a valid talent agency license. The negotiation of an employment agreement for artistic services is an activity that constitutes "procuring . . . employment for an artist," within the meaning of Labor Code §1700.4(a).

4. In contrast, a person may counsel and direct artists in the development of their professional careers, or otherwise "manage" artists -- while avoiding any procurement activity (procuring, promising, offering, or attempting to procure artistic employment or engagements) -- without the need for a talent agency license. In addition, such person may procure non-artistic employment or engagements for the artist, without the need for a license. *Styne, supra,* 26 Cal.4th 42, 51.

5. An agreement that violates the licensing requirement of the Talent Agencies Act is illegal and unenforceable. "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 351. Having determined that a person or business entity procured, promised or attempted to procure artistic employment for an artist without the requisite talent

agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed agent and the artist] void and unenforceable as involving the services of an unlicensed person in violation of the Act." *Styne, supra*, 26 Cal.4th 42, 55. "[A]n agreement that violates the licensing requirement is illegal and unenforceable . . . ." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the artist that is party to such an agreement may seek disgorgement of amounts paid pursuant to the agreement, and "may . . . [be] entitle[d] . . . to restitution of all fees paid the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of restitution is, of course, subject to the one year limitations period set out at Labor Code §1700.44(c).[6]

6. We have previously held that a person or entity who employs an artist does not "procure employment" for the artist, within the meaning of section 1700.4(a), by directly engaging the services of the artist; and that the activity of procuring employment under the Talent Agencies Act refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and a third-party employer. See *Chinn v. Tobin* (TAC No. 17-96) pp. 5-8. Likewise, a television producer, or assistant to the producer, does not act as a talent agent by offering to directly employ an artist to perform professional artistic services in connection with a television program that the producer is producing. Consequently, Ersoff did

[6] Petitioners do not claim any amounts were paid to Respondents in the one year period preceding the filing of this petition, and do not seek disgorgement of amounts that were previously paid.

not violate the Talent Agencies Act by hiring Leonard to host "Fight Zone."

7. There is nothing inherent in the 1996 "representation agreement" between Ersoff and Leonard from which it can be said that the agreement itself violated the Talent Agency Act's proscription against procurement by an unlicensed agent. But in determining whether this agreement violated the Act, we must look to the Respondent's actual conduct in carrying out his representational services under this agreement. The Labor Commissioner must "look through provisions, valid on their face, and with the aid of parol evidence, determine whether the contract is illegal or part of an illegal transaction," and "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality." *Buchwald v. Katz*, supra, 254 Cal.App.2d at 355. We must therefore apply the law to the evidence that was presented as to each of the 17 projects as to which petitioners allege unlawful procurement.

8. First, however, we address an issue that is common to many of these projects -- whether Ersoff is liable for ISI's procurement activities during the period of the "alliance" between Ersoff and ISI, and for Rebney's procurement activities during the period of the partnership between Ersoff and Rebney. It is basic black letter law that every partner is an agent of the partnership for the purpose of its carrying out its business. By Ersoff's own admission, the purpose of his "alliance" with ISI and subsequent partnership with Rebney was to split commissions earned, in part, by procurement activities that were to be

undertaken by ISI and Rebney, and to procure more commercial endorsement/advertising deals for Leonard through the efforts of ISI and Rebney. Ersoff does not contend that the procurement activities undertaken by ISI and Rebney were in any way unauthorized or beyond the purpose of the "alliance" or partnership. Ersoff personally benefited from these procurement activities by receiving a share of the resulting commissions, and Ersoff's lawsuit against Leonard and Rebney seeks payment of his share of additional commissions that are allegedly owed. For Ersoff to now seek to wash his hands of the consequences of unlicensed procurement activity by asserting that only ISI or Rebney engaged in such activity -- when ISI and Rebney were working in concert with Ersoff, in accordance with the very purpose of the "alliance" or partnership, where such activity provided or was intended to provide a financial benefit to Ersoff -- amounts to a level of *chutzpah* that is nothing short of breathtaking. We reject out of hand Ersoff's attempt to insulate himself from the consequences of any such unlawful procurement activities.

9. Second, we address Respondents' assertion that Rebney cannot maintain any sort of claim under the Talent Agencies Act because he is not an "artist" within the meaning of the Act. Labor Code §1700.44(a) provides: "In cases of controversy arising under this chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same...." Nothing in section 1700.44 precludes a person who is not an artist from filing a petition to determine controversy. Rather, the prerequisite is that controversy be one

that arises "under this chapter," i.e., under the Talent Agencies Act. To be sure, the Talent Agencies Act governs the obligations of agents vis-a-vis the artists they represent, so as a general matter, a controversy under the Act is a dispute between an artist and an agent, or a person alleged to be an agent within the meaning of the Act. Here, we have a dispute between Leonard and Ersoff, over whether Ersoff functioned as an agent within the meaning of the Act, and whether the representation agreement is therefore void and unenforceable. As a separate matter, there is a dispute between Ersoff and Rebney over Ersoff's entitlement to amounts that were allegedly paid by Leonard to Rebney for services provided by the Ersoff/Rebney Partnership, pursuant (at least in part) to the representation agreement between Ersoff and Leonard. Ersoff's lawsuit seeks recovery from both Leonard and Rebney. Both Leonard and Rebney are defending this lawsuit by alleging that Ersoff has no enforceable claim because of his violation of the Talent Agencies Act. In short, Rebney (along with Leonard) have alleged the existence of a controversy that arises under the Talent Agencies Act, and we can perceive of no ground upon which the Labor Commissioner can decline to assert jurisdiction over Rebney's defensive claim.

10. We turn now to the various alleged instances of procurement or attempted procurement during the period from mid-1996 to mid-1999:

a) "The Stimulator" - We conclude that Ersoff and Rebney (acting pursuant to Ersoff's directions) negotiated this deal, under which Leonard was to perform services as an "artist" within the meaning of the Act. This attempt to procure employment for

Leonard **violated the Act.** Labor Code §1700.44(d), which provides that it is not unlawful for a person or corporation that is not licensed as a talent agent to "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract," is not applicable here, as we find that Ersoff and Rebney did not negotiate this deal "in conjunction with, and at the request of, a licensed talent agency."[7]

b) "O2Go" - We conclude that Ersoff and Rebney (acting pursuant to Ersoff's directions) negotiated this deal, under which Leonard was to perform services as an "artist" within the meaning of the Act. This attempt to procure employment for Leonard **violated the Act.**

c) Appearance on the Jay Leno show - First, there is no evidence that Ersoff, or anyone employed by Ersoff, or anyone in a partnership or joint venture with Ersoff, procured this appearance. Second, in appearing as a talk-show guest, there is no evidence that Leonard performed any professional services as an "artist", within the meaning of Labor Code §1700.4(b). We have previously observed that speaking about one's accomplishments (even one's acting accomplishments) is something that is separate and distinct from acting, and a talk show is different from a variety show (like Saturday Night Live) where actors perform skits, musicians perform songs, etc. A talent agency license is not required for the procurement of a guest appearance on a talk show provided the appearance does not

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[7] We further conclude that Labor Code §1700.44(d) is not applicable to any of the subsequent alleged instances of procurement or attempted procurement.

involve the rendition of artistic services[8]. (See *Gittelman v. Karolat,* TAC No. 24-02) As such, there was no violation of the Talent Agencies Act in connection with Leonard's appearance on the Jay Leno show.

d) "TaeBo" - A "testimonial" for a product or service is a fancy word for an "advertisement." Just as a rose would smell as sweet by any other name, so too, an appearance in a "filmed testimonial" or "infomercial" pitching the supposed merits of a product or service is no different from acting in an advertisement. While we have no difficulty concluding that Leonard therefore performed services as an "artist" in connection with this project, the evidence is equally clear that neither Ersoff nor Rebney had any involvement in procuring this acting engagement for Leonard. Rather, their involvement commenced after the "testimonials" featuring Leonard were filmed and appears to have been limited to the drafting and signing of a release allowing the use of the previously recorded film. No evidence was presented that Ersoff or Rebney played any role in negotiating the Leonard's terms of compensation for his services. Consequently, we conclude that neither Ersoff nor Rebney acted as a "talent agent," within the meaning of Labor Code §1700.44(a), in connection with this project, and hence, there was no violation of the Talent Agencies Act.

e) Appearance on Taka TV Show - Although this appearance was procured by ISI, through Rebney, while ISI was in an "alliance"

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[8] The host of a talk show plays a role that is very different from that of his or her guests, and functions in a manner much closer to that of a variety show host, so as to fall within the definition of an "artist".

with Ersoff, we are unable to conclude that Leonard was employed to provide services as an "artist" within the meaning of the Act. Boxing is not an "entertainment enterprise" within the meaning of Labor Code §1700.4(b). Leonard's simulated "boxing" on a television talk show does not constitute "acting" any more than Muhammad Ali "acted" at the recent major league baseball All Star Game by pretending to box by appearing to throw punches at persons standing next to him. As such, there was no violation of the Talent Agencies Act in connection with Leonard's appearance on the Taka TV show.

f) "MVP Small Print Collectibles" - An agreement authorizing the use of previously taken photographs for advertising purposes is not an agreement to perform modeling services. Likewise, an agreement to "meet and greet fans" and interact with members of the public is not an agreement to provide any services as an "artist" within the meaning of Labor Code §1700.4(b). We therefore conclude that there was no attempt to procure "employment or engagements for an artist" in connection with this deal, and therefore, no violation of the Talent Agencies Act.

g) Dr. Spagnoli boxing clinics- The negotiation of an agreement to perform as an actor in the production of television or radio advertising or as a model in the creation of print advertising constitutes the procurement of employment within the meaning of the Talent Agencies Act if the advertising is for the benefit of a third party that either directly or through an advertising agency or production company or photographer engages the professional services of the artist. On the other hand, if

the actor or model has a substantial bona fide ownership interest in the business that sells the product or service that is being advertised, it cannot be said that there is any procurement of employment with a third party, and hence, the Act does not apply. Here, we have negotiations over the role that Leonard was to play with regard to a business that did not yet exist, and where it was never determined that Leonard was not to be a bona fide co-owner of this proposed business. Under these circumstances, it is impossible to characterize these negotiations as attempted procurement of employment to provide services as an artist to a third party, and thus, we cannot conclude that there was any violation of the Act.

h) Route American Sports - Leonard's proposed involvement in the Japanese boxing clinics did not involve the "rendering [of] professional services in motion picture, theatrical, radio, television and other entertainment enterprises" within the meaning of the Act. As such, there was no attempt to procure Leonard's employment as an "artist" within the meaning of the Act. The deal that was ultimately negotiated with RAS, under which RAS was permitted to film Leonard while he was speaking at a DARE charitable event, for television broadcast in Japan, does not implicate the Act. No evidence was presented that Leonard did anything more than give a speech at this event -- an activity that does not amount to the rendition of professional services as an artist. As such, there was no violation of the Act in connection with the negotiation of this deal.

I) "Sugar Ray Leonard's Hit Parade" on ESPN Classic Sports Network - This is not a close call. Rebney, on behalf of the

ERP, negotiated this contract under which Classic Sports Network employed Leonard as a television show host, interviewer, analyst and announcer. Leonard was hired to render professional services in a television entertainment enterprise, and thus, was hired as an "artist" within the meaning of the Act. In negotiating this employment contract, ERP acted as a "talent agency" within the meaning of the Act, and thus, **violated the Act.**

j) "Slam Man" - Neither Ersoff nor Rebney procured Leonard's employment in this infomercial. No evidence was presented that Rebney's discussions with Fitness Quest, subsequent to Leonard's execution of this agreement, went beyond "clarifying" the terms of the agreement-- i.e, establishing what it was that Leonard, on his own, already agreed to. There is no evidence that Rebney or Ersoff attempted to re-negotiate any new substantive terms to this agreement. As such, we are unable to conclude that the Act was violated.

k) "VarTec" - The evidence is overwhelming that Rebney, on behalf of the ERP, procured a deal under which Leonard was to be employed to act in television and radio advertisements, and to perform services as a model in the creation of print advertising. This constituted procurement of employment as an artist within the meaning of the Act, and therefore **violated the Act.** Subsequent to the negotiation of this deal, Ersoff attempted to procure similar employment for Leonard, and attempted to extend the term of the VarTec deal, thereby further violating the Act.

l) "Track Bowling Ball" - Here too, the evidence is overwhelming that Rebney, on behalf of the ERP, negotiated a deal under which Leonard was to be employed as an artist within the

meaning of the Act, and therefore **violated the Act**.

m) "12 Rounds to Victory" book - We have previously held that the book publishing industry is not an "entertainment enterprise" within the meaning of Labor Code §1700.4(b), and the authors of published books are not "artists" within the meaning of the Act.[9] (*Hall v. Robb*, TAC No. 14-95.) Based on the evidence presented, we conclude that there was no agreement and no attempt to procure an agreement for Leonard to provide any services as an artist in connection with this project. As such, we find no violation of the Act.

n) "Knock Out Kings" - This was another agreement, negotiated by Rebney on behalf of the ERP, under which Leonard was to provide services as an "artist" within the meaning of the Act. These negotiations constitute the procuring of employment for an artist, within the meaning of Labor Code §1700.4(a), and thus, another instance in which the ERP functioned as a "talent agency," and thereby, **violated the Act.**

o) Appearance for Protection One - The negotiation of the appearance fee that Leonard was to receive for speaking at this corporate sponsored event did not constitute procurement of employment that is covered by the Act, even coupled with Ersoff's statement that the appearance could ultimately lead to an advertising deal with Protection One. No evidence was presented that Ersoff or Rebney attempted, offered or promised to procure such a deal. As such, we find no violation of the Act.

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[9] On the other hand, writers who render "professional services in motion picture, theatrical, radio, television and other entertainment enterprises," such as studio scriptwriters, for example, would fall within the definition of "artists."

p) "Buy Bid Win" - This was an attempt, by Ersoff and Rebney, to procure employment for Leonard to act in television and radio commercials, and to model in connection with print advertising. This attempt to procure such employment **violated the Act**.

q) "12 Rounds to Victory" infomercial - Leonard was to have a substantial ownership share in the limited liability company that was to own and sell the "Victory products," with profits to be allocated in proportion to each member's share.[10] Thus, the negotiation of the agreement creating this LLC, which included a provision for Leonard to act in an infomercial advertising the Victory products, did not constitute procurement of employment with a third party. Consequently, Ersoff and Rebney did not act as talent agents, within the meaning of Labor Code §1700.4(a), in negotiating this agreement, and therefore, there was no violation of the Act.

11. Reviewing our findings, above, we have determined that during the three year period from mid-1996 to mid-1999, Ersoff, or the Ersoff/ISI "alliance", or the Ersoff/Rebney partnership, violated the Talent Agencies Act in connection with seven separate projects, by procuring or attempting to procure employment for Leonard as an artist with third party employers.

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[10] Leonard's substantial ownership interest in the business that was to own the product or service that was to be sold to the public distinguishes this from *Styne v. Stevens*, TAC No. 33-01, where the Home Shopping Network ("HSN") purchased $1,000,000 of products from Stevens, and engaged Stevens' services to act in an infomercial, in order to sell the products that were then owned by HSN. Stevens had no ownership interest in HSN or in the products she had sold to HSN, so she was therefore performing professional services as an actress for a third party.

This pattern of ongoing unlawful procurement activities is scarcely surprising, in that obtaining such employment for Leonard was a central purpose of the Ersoff/ISI "alliance" and the subsequent creation of the Ersoff/Rebney partnership. These procurement activities were one of the services that Ersoff provided to Leonard pursuant to the 1996 representation agreement, and Ersoff now seeks to enforce this agreement through his lawsuit for commissions allegedly owed for services performed under the agreement. The overwhelming weight of judicial authority leaves no doubt that as a consequence of this unlawful procurement activity in violation of the Talent Agencies Act, this representation agreement is void *ab initio* and unenforceable. It is unenforceable as to any purported rights that Ersoff or the ERP seek or may seek to enforce under that agreement, including any rights to commissions or other compensation for services provided to Leonard, whether or not such services were provided in violation of the Talent Agencies Act. We can discern no reason for allowing Ersoff or the ERP to recover any amounts purportedly owed under this void agreement, for to do so would subvert the only effective mechanism for enforcing the prohibitions of the Talent Agencies Act. An agreement cannot be declared void *ab initio* as to some claims and enforceable for others that are founded under that same agreement. "If the agreement is void no rights . . . can be derived from it." *Buchwald v. Katz, supra,* 254 Cal.App.2d at 360.

12. We turn now to Rebney's claim that Ersoff's involvement in these unlawful procurement activities precludes Ersoff from

maintaining an action against Rebney for a share of commissions or other compensation that Leonard paid to Rebney for services that were provided by Ersoff, or Rebney, or the ERP pursuant to the terms of any agreements to provide representation to Leonard. We must reluctantly acknowledge the legal merits of this claim, even though the result is to allow Rebney -- at least as culpable as Ersoff when it comes to unlawfully acting as a talent agent -- to maintain sole possession of amounts derived from illegal transactions. The rationale for this is well established:

> No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction. He cannot set up a case in which he necessarily must disclose the illegal contract or the illegal transaction as the basis of his claim.... The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. If the issuance of a ... license was a necessary prerequisite to the legality of the firm transactions which [both partners] jointly carried on as copartners, then, since no such license was ever issued ... the partnership contract was illegal from its inception; for in that case the partnership contract necessarily would involve the performance of illegal acts. And since [one of the partners] in order to establish his case, necessarily must invoke the partnership contract, it follows that if the issuance of a ... license was requisite, the court will not lend its aid to assist either party to the contract in an action against the other, notwithstanding the receipt by the latter of the partnership profits, but will leave both parties where it finds them. *Wise v. Radis* (1925) 74 Cal.App. 765, 776 (internal cites and quotations omitted).

In seeking recovery against Rebney for amounts that were allegedly to be split pursuant to the terms of the Ersoff/Rebney partnership agreement (or the Ersoff/ISI "affiliation"

agreement), Ersoff is seeking to enforce agreements that were founded upon an illegal purpose -- namely, he purpose of procuring artistic employment for Leonard. The illegality results from the absence of a required talent agency license. In order for Ersoff to establish his claim against Rebney, he must at the very least disclose the existence of the illegal agreements with Rebney and ISI, if not the illegal transactions (i.e., the unlicensed procurement activities undertaken pursuant to these agreements).

Again, the court's reasoning in *Wise v. Radis* is instructive:

> [W]hether the partnership contract be regarded as illegal from the beginning because of the failure of the joint adventurers to take out a partnership license, or whether it became illegal after January 1, 1922, by reason of respondent's failure to maintain his status as a duly licensed real estate broker, in either case the action must be regarded as one to enforce an illegal contract. The courts refuse to enforce such a contract, and permit the defendant to set up its illegality as a defense. While the defense is not an honorable one, yet the courts permit it to be set up even though in doing so the defendant may allege his own moral turpitude. Violators of the law who are parties to such illegal contracts are repudiated by the courts because of the great supervening principle of public policy involved, without reference to the attitude which one of the parties may occupy to the other, where both are *in pari delicto*. . . . [T]he defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. *Ibid.* at 778 (internal cite and quotation omitted).

Likewise, in declining to enforce a partner's claim for his share of the partnership's profits that were allegedly wrongfully withheld by his co-partner, the California Supreme Court held:

> If this contract of copartnership had as its purpose the letting of apartments for purposes of prostitution, and if the business of the copartnership, as pleaded in the answer, was the doing of this precise thing, then the copartnership contract was illegal . . . and equity would no more entertain an action founded upon such contract for relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder. A void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity. *Chateau v. Singla* (1896) 114 Cal. 91, 93-94.

Though decided over a century ago, this reasoning applies with equal force to the present controversy between Ersoff and Rebney over Ersoff's attempt to enforce his partnership agreement with Rebney, by seeking a share of amounts that Leonard paid to Rebney pursuant to Leonard's obligations under the void 1996 representation agreement, or any other agreement under which Ersoff or Rebney provided unlicensed procurement services to Leonard.

13. When asked to identify all contracts that he believes he had entered into with Leonard which Leonard subsequently breached, Ersoff testified that there were three separate contracts upon which he is seeking amounts allegedly owed -- the 1996 representation agreement, the agreement establishing the LLC to market "Victory products," and the agreement establishing the boxing management business. Our conclusion that Ersoff has no enforceable rights under the void 1996 representation agreement is not determinative as to whether the Talent Agencies Act precludes enforcement of the latter two agreements. "There are certain cases in which a recovery may be authorized in spite of an illegal contract, when the action is not founded on the illegal contract, but when, on the contrary it is based upon a

subsequent legal contract or agreement which may be established without reference to the illegal contract." *Holm v. Bramwell* (1937) 20 Cal.App.2d 332, 337.

14. No evidence was presented upon which we can conclude that the Talent Agencies Act precludes enforcement of the "Victory products" LLC agreement[11] or the boxing management company agreement. The various unlawful procurement activities discussed above were undertaken pursuant to the 1996 representation agreement, and not pursuant to the agreement creating the "Victory products" LLC or the agreement creating the boxing management business. These latter two agreements were truly separate and distinct from the representation agreement. First, both of the latter two agreements established bona fide business entities that are co-owned by Leonard, in which Leonard was to share profits and losses. Second, Ersoff's rights under these two agreements are rights that he has a principal in these businesses -- namely, the right to profits based on his ownership share, rather than any right to commissions calculated as a percentage of Leonard's earnings (as provided under the void representation agreement). Third, in enforcing his rights under the "Victory products" LLC agreement or the boxing management business agreement, Ersoff would not (and cannot) base his claim

[11] The scope of the "Victory products" LLC agreement is discussed in paragraph 10(q) in the Findings of Fact, above. The separate, earlier agreement regarding the "12 Rounds to Victory" book, discussed at paragraph 10(m), is not part of the LLC agreement. Instead, any claims Ersoff might have regarding amounts owed under the book agreement are unenforceable, as Ersoff's only source of right to payment in regard to the book contract would be in the form of commissions owed under the terms of the void 1996 representation agreement.

on amounts allegedly owed pursuant to the void representation agreement -- i.e., any action to enforce obligations owed under the latter two agreements would not be a backdoor subterfuge for enforcing the right to any amounts purportedly owed under the void representation agreement. Instead, any claims based on these two agreements can be maintained only to the extent such claims are founded upon one or the other of these two agreements, and not the void representation agreement.

15. Just as the Talent Agencies Act does not preclude Ersoff from enforcing the "Victory products" LLC agreement and the boxing management business agreement against Leonard, so too, the Act does not preclude Ersoff from enforcing these agreements against Rebney, for amounts that Rebney allegedly owes to Ersoff pursuant to these agreements.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the 1996 representation agreement between ERSOFF and LEONARD is unlawful and void *ab initio*, and that ERSOFF has no enforceable rights thereunder, against LEONARD or REBNEY or anyone else. However, based on the evidence presented, the Talent Agencies Act would not prohibit enforcement of the separate "Victory products" LLC agreement and the boxing management business agreement, and to the extent that ERSOFF has any claims against LEONARD or

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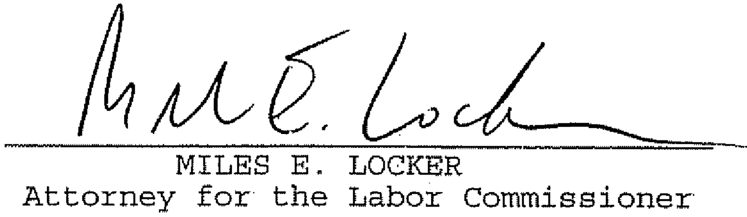
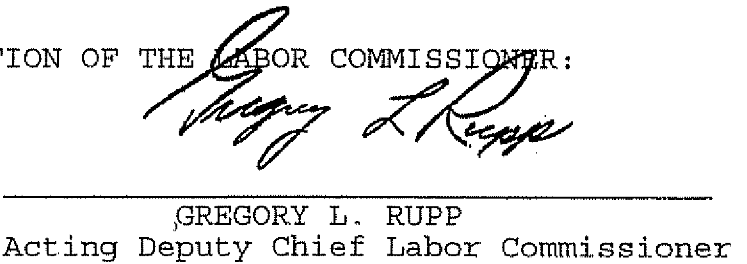
REBNEY arising under either the "Victory products" LLC agreement or the boxing management business agreement, he may proceed with such claims.

Dated: 8/30/04



MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:



Dated: September 2, 2004

GREGORY L. RUPP
Acting Deputy Chief Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(RAY CHARLES LEONARD; BJORN REBNEY v. SETH ERSOFF; ERSOFF/REBNEY PARTNERSHIP)
(TAC 25-01)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On September 2, 2004, I served the following document:

DETERMINATION OF CONTROVERSY

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

JONATHAN LOEB, ESQ.
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and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 2, 2004, at San Francisco, California.

MARY ANN E. GALAPON

CERTIFICATE OF SERVICE BY MAIL