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Division of Labor Standards Enforcement
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

RAYMOND CHAM, An Individual; and LAST MAN STANDING, INC., A California Corporation, Petitioners, vs. SPENCER/COWINGS ENTERTAINMENT, LLC, A California Limited Liability Company; DEMETRIUS SPENCER, An Individual; and EVERETT COWINGS, An Individual, Respondents.	Case No.: TAC 19-05 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing on July 10, 2006 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioners RAYMOND CHAM, An Individual and LAST MAN STANDING, INC., A California Corporation, appeared and were represented by Yakub Hazzard, Esq. and Jonathan E. Stern, Esq. of Dreier Stein & Kahan LLP. Respondents

SPENCER/COWINGS ENTERTAINMENT, LLC, A California Limited Liability Company, DEMETRIUS SPENCER, An Individual and EVERETT COWINGS, An Individual, appeared and were represented by Alan S. Gutman, Esq. of Law Offices of Alan S. Gutman.

At the conclusion of the hearing, the parties were allowed to submit closing briefs. Accordingly, the matter was submitted to the hearing officer on August 8, 2006.

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 RAYMOND CHAM, (hereinafter, "Cham"), is a music producer, songwriter, and music supervisor. As a music producer, Cham directs the overall coming together of a song from vocalist, lead vocalist, back vocalist, vocal arrangements, to every other aspect of the audible elements. Specifically, he takes songs that are already written and arranges them, chooses the sounds of the song, the overall feel and tempo, palette, musicians, instruments to be played, and how the instruments will be played. Some of the artists he has produced records for include: Sting, Mya, Christina Aguilera, Hoky, Raven and The Cheetah Girls. As a music supervisor, Cham works in conjunction with a film or some type of visual medium to bring to it musical score and other musical components to the film to complement the on-screen actions.

In connection with these services, Cham has received various gold and platinum plaques for album sales, has been awarded a 2002 American Society of Composers, Authors, and Publishers (ASCAP) songwriter award, pop songwriter award, and at the time of this hearing, was an Emmy nominee.

2. Cham has never been represented by a talent agent.

3. Petitioner LAST MAN STANDING, INC. is a production company formed by Cham. It signs and develops talent and furnishes the services of Cham as a music supervisor.

4. Respondent SPENCER COWINGS, LLC, (hereinafter, "SpenCow"), is a management and production company and is comprised of, among others, respondents and Chief Executive Officers DEMETRIUS SPENCER and EVERETT COWINGS. None of the named respondents has ever been licensed as a talent agency by the State of California.

5. Cham first met respondent DEMETRIUS SPENCER, hereinafter, "Spencer"), in 2000, while producing a record for an artist by the name of Girl Society. Two years later, in February, 2002, Spencer introduced Cham to Respondent EVERETT COWINGS, (hereinafter, "Cowings"). During this time, Cham was looking for new management and due to his growing friendship with Spencer, he approached SpenCow by telephone to see if they would be interested in managing his career. Cham informed SpenCow that he was looking for someone who could help transform him from being "pigeon-holed" into pop categories to helping him expand into other genres such as urban categories.

During the telephone meeting with Cham, Spencer expressed that one of the first things he would do as his manager would be to increase Cham's current $15,000 producing fee to $30,000, given Cham's accomplishments as a music producer. Additionally, Spencer informed Cham that because he had other artists signed to various record companies under recording contracts, that it would be easy to place Cham's songs on these records since, as he described it, SpenCow was in the unique position of being able to control the selection of songs that were recorded on the records.

Spencer also informed Cham during this meeting that Cowings would also be working on managing Cham's career. Specifically, Spencer explained that Cowings would be handling the administrative work and described Cowings as having various film and television ties which would benefit Cham.

6. Not long after the aforementioned telephone meeting, the parties met in person and came to a final decision to work together. SpenCow agreed to provide Petitioner Cham with a written management agreement. However, it wasn't until August,

2002 that the parties entered into a "Personal Management Agreement," (hereinafter, "Agreement"), which they dated April 30, 2002. The term of the Agreement was two years.

7. The parties ended their relationship at the end of the two year term on April 30, 2004. On or about November 30, 2004, Cham received a demand letter from SpenCow's attorney seeking unpaid commissions. In response to this demand letter, on May 2, 2005, Cham and LAST MAN STANDING, INC. filed a Petition to Determine Controversy and on or about March 10, 2006, filed an Amended Petition to Determine Controversy alleging that respondents Spencer, Cowings and SpenCow violated the Talent Agencies Act, (hereinafter, "Act") by: (a) negotiating an agreement for Cham's services as producer on a record by the Def Jam Soul recording artist El Dubois; (b) attempting to negotiate an agreement for Cham's services as music producer and songwriter on a record by Columbia recording artist Jhene; (c) attempting to negotiate an agreement for Cham's services as music producer and songwriter for a soundtrack album for Warner Bros.; and (d) attempting to negotiate an agreement for increased compensation for Cham's services as a music producer and songwriter on the Disney film *Cheetah Girls.*

Negotiating an Agreement for Cham's Services as Producer on a Record by Def Jam Soul Recording Artist El Dubois

8. In April 2002, Cham was hired by Island Def Jam Recordings Music Group, (hereinafter, "Def Jam"), to produce a song for the artist El Dubois p/k/a/ "L", (hereinafter, " Dubois"). The name of the song was *Sunshine.* Cham had previously worked with Dubois in 2001, before being represented by SpenCow and had produced the same song for Dubois as a demo production. Shortly after Cham produced this demo for Dubois, Dubois received a record deal from Def Jam. Thus, in April, 2002, Dubois' manager contacted Cham to let him know that Dubois had been signed and was working on a record for Def Jam. During this same time, Def Jam had been working on the movie *Deliver Us From Eva* and wanted to put Cham's song *Sunshine* on the movie soundtrack.

Cham informed Spencer of this opportunity. In response, Spencer communicated to Cham that he knew a woman at Def Jams by the name of Tina Davis and that he intended on negotiating a $30,000 fee for Cham for this project. Spencer corroborated this testimony by admitting that at Cham's direction, he contacted Ms. Davis to let her know Cham was interested in doing the record for a fee of $30,000. Additionally, Spencer testified that prior to informing Ms. Davis of the requested fee, he did not have any conversations with Cham's attorney, Brian Schall, regarding the fee. Shortly thereafter, Cham received a deal memo from Def Jam, which the parties testified was actually a producer's declaration. The producer's declaration outlined the main terms Cham was hired to perform under, including that he would be paid a front end of $15,000, (half of his $30,000 fee), by Def Jam.[1] Cham testified that his attorney, Mr. Schall, who usually negotiated contracts on his behalf, had not seen this producer's declaration until after Cham received it from SpenCow, who had received it directly from Def Jams. Mr. Schall corroborated this testimony. He testified that he did not have any involvement in drafting the producer's declaration. He also testified that while his associate may have negotiated the *language* only on the long form agreement, Mr. Schall testified that it was done after the material terms, (i.e., fee, producer royalties), as memorialized on the producer's declaration, were already negotiated by someone other than his firm.

Only upon receiving the producer's declaration, signing it and receiving the $15,000 front end, did Cham fly to New York to begin work on the single. Cham testified that per his Agreement with SpenCow, he paid them 20% commissions, ($3,000), from the front end fee.

Approximately one year after recording the song *Sunshine* for Def Jams, Def Jams generated a long form agreement which was negotiated by Mr. Schall's firm.

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[1] The parties testified that a deal memo is usually followed by a long form agreement.

Attempting to Negotiate an Agreement for Cham's Services as Music Producer and Songwriter on a Record by Columbia Recording Artist Jhene

9. In May, 2002, SpenCow arranged a meeting for Cham with Max Gouse, an A&R representative at Columbia Records. The meeting was held at Mr. Gouse's office in Santa Monica and attended by Cham, Spencer, Cowings and Mr. Gouse. Spencer testified that the meeting was set up by SpenCow for the purpose of introducing Cham to Mr. Gouse and finding out if Mr. Gouse had any urban production work in which he could use Cham's services. During the course of the meeting, a project for the artist Jhene came up. Mr. Gouse discussed that he was trying to find a general sound for Jhene's projects and had worked with several producers and writers but had been unable to find a direction they were happy with using. Mr. Gouse expressed interest in giving Cham a chance at finding a workable sound for Jhene and stated that if he were successful in finding the right sound for her, he would have further opportunities on the project. Consequently, Cham wrote a song for Jhene called *That Wouldn't Happen to Me*. The song was written in collaboration with two other writers, David Young and Erika Nuri, both who were affiliated with SpenCow. Cham then produced a demo of the song which was delivered to Mr. Gouse by Spencer. However, Mr. Gouse ultimately did not end up using the song and soon thereafter, released Jhene from her obligations with Columbia Records.

Attempting to Negotiate an Agreement for Cham's Services as Music Producer and Songwriter for a Soundtrack Album for Warner Brothers

10. Cham testified that in the Summer of 2002, he was informed by Spencer and Cowings that they were in talks with Warner Brothers Pictures trying to drum up work over there due to Cowing's film and television contacts. Spencer and Cowings informed Cham that there was an opportunity to place an opening title song on a project called *Looney Tunes Back in Action*, a feature animation film that was in the beginnings of production. Cham subsequently composed and produced a demo titled *Tune In* which was submitted to Warner Brothers Pictures by SpenCow.

Spencer, on the other hand, testified that Warner Brothers wanted to hire SpenCow to work in their video game or animation projects as a production company. Thus, if Cham was hired to do any work, he would have been hired by the production side of SpenCow, not by a third party such as Warner Brothers.

Attempting to Negotiate an Agreement for Increased Compensation for Cham's Services as a Music Producer and Songwriter on the Disney Film *Cheetah Girls*

11. In the Summer of 2002, Cham's brother and former manager, Gregory Cham, was contacted by an executive at the Disney Channel in regards to a project that had just been approved and which was about to start production. The project was called *The Cheetah Girls*. Cham had previously worked with Disney on a movie called *Got to Kick it Up* in which he provided co-music supervisor services and wrote and produced original songs. Disney wanted Cham to provide the same type of services for *The Cheetah Girls*. Accordingly, it was agreed that Cham would receive separate fees for music supervising, writing the music and producing the music. Because Cham did not want to take on the music supervisor role in this engagement, but wanted to remain completely creative and strictly write and produce songs and music for this project, he had SpenCow split the music supervisor duties with his brother, Greg, who indicated he wanted to be involved in the project.[2] However, a dispute arose as to what percentage of the music supervising fees SpenCow would be entitled. Cham explained to Spencer that in the past, he would give his brother 75% of the fees and keep 25% since his brother did most of the supervising duties. Cham testified that he eventually decided that if Spencer put in equal time and equal work with his brother, he would pay SpenCow 50% of the fees but still pay his brother 75% of the total fee. In other words, he would pay the additional 25% to SpenCow out of his own money.

Indeed, after Cham received 50% of his $22,500 fee as an advance for the music supervisor role, he paid 75% to his brother, paid the remaining 25% to SpenCow plus

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[2] The fee that SpenCow agreed to split with Greg Cham for the music supervisor role was in addition to its 20% commission fee for managerial duties.

another 25% to SpenCow from his own money. However, after paying SpenCow this money, Cham testified that he informed Spencer that if he does not end up putting in equal time as a music supervisor as his brother does, then this amount will be all that SpenCow receives for the music supervisor duties on this project.

In July, 2003, when the music supervisor duties were completed, Cham decided that SpenCow was not entitled to 50% of the back end due to Spencer's lack of involvement as a music supervisor on the project. Cham met with SpenCow at his apartment to discuss his dissatisfaction with SpenCow's lack of involvement in the music supervisor duties as well as his dissatisfaction with SpenCow's management services. A couple of days later, on July 14, 2003, Cham wrote SpenCow an email, again, expressing his dissatisfaction with SpenCow's music supervisor duties on *The Cheetah Girls* project. In response, on July 17, 2003, Cowings wrote Cham an email stating: "Just wanted to let you know I am getting close to closing a few deals. We got your back. Thanks."

Also related to this project, Disney agreed to use one of Cham's previously written, produced and recorded songs, *Girlfriend*, on *The Cheetah Girls* soundtrack. Initially, Disney offered to pay Cham 10 royalty points for use of the song. When he communicated this royalty rate to Spencer, Spencer opined that 10 points was much too low for royalty points on a master license and suggested that at the very least, 12 or 13 points would be reasonable. As such, Spencer contacted Katrina Carden in the business affairs department at Disney for the purpose of attempting to negotiate a higher royalty rate for Cham. Cham was then informed by Spencer that the request was under consideration and that they would hear back from Disney at a later time. Soon thereafter, Cham's brother, Greg, informed him that he had a conversation with Julie Enzer, also from the business affairs department at Disney, who informed him that 10 points is the standard that Disney pays on licenses where they don't own the publishing rights. As such, if Cham insisted on being paid more than 10 points, it would be a deal breaker and would ultimately put his relationship with Disney in jeopardy. Following his brother's

advice, Cham agreed to accept 10 royalty points from Disney for use of the song *Girlfriend* on *The Cheetah Girls* soundtrack.

While Spencer admitted having several conversations with Ms. Carden from the business affairs department at Disney, he testified that he did so as a team with Cham and Cham's brother, Greg. Additionally, he testified that in his view, 10 royalty points was an extremely good fee, thus, implying that he would not have suggested negotiating for an additional 2-3 royalty points.

Despite Cowing's July17, 2003 email to Cham, the parties had very little contact for the remainder of 2003. On January 27, 2004, Cowings sent Cham another email stating, among other things: "We are sitting down with labels about client's production work. Some of the current artists compliment your skills. It is our wish that we be allowed to promote you as a producer." It is unclear whether there were any further communications between the parties during the period of January 27, 2004 through November 30, 2004, when Cham received a demand letter from SpenCow's attorney seeking unpaid commissions.

CONCLUSIONS OF LAW

1. The Labor Commissioner has jurisdiction to hear and determine this controversy pursuant to Labor Code §1700.44(a).

2. Labor Code §1700.4(b) defines "artists" to include, "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 parties stipulated that Cham functioned as an artist under the Talent Agencies Act ("Act") when he was serving as a songwriter. However, respondents questioned whether Cham functioned as an artist under the Act when he was serving as a music supervisor or music producer.

Historically, we have 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 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 wasn't 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."

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

Cham's services as a music supervisor and music producer are unquestionably "creative" in nature. Cham described what a music supervisor does by stating: "A music supervisor works in conjunction with a film or some type of visual medium to bring to it music, musical elements, score, anything musical to the film to complement the on-screen actions." Reporter's Transcript ("R.T.") 13:5-9. Likewise, he described his role as a music producer as one where he,

> "...takes a song that is already written and arranges it, chooses the sounds of the song, chooses the overall feel and tempo of the song, chooses the palette of the song. Much like a cook, you know, in coming up with a meal chooses the flavor and spices, a music producer would choose the musicians, chooses the instruments to be played, how they would be played, and direct the overall coming together of the song from vocalist, lead vocalist, back vocalist, vocal arrangements, every aspect of the audible elements."

R.T. 12:15-13:1.

We find these services to be inherently "creative" in nature. Thus, we find that Cham's services as a songwriter, music supervisor and music producer all fall under the definition of "artists" under the Act.

3. 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." The parties stipulated that at no time have respondents Spencer, Cowings, or SpenCow ever been licensed as talent agents by the State of California.

4. 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." The Act is a remedial statute; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. For that reason, the overwhelming judicial authority supports the Labor Commissioner's historic enforcement policy, and holds that "[E]ven the incidental or occasional provision of such [procurement] services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. "The Act imposes a total prohibition on the procurement efforts of unlicensed persons," and thus, "the Act requires a license to engage in any procurement activities." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 258-259; see also *Park v. Deftones* (1999) 71 Cal.App.4th 1465 [license required even though procurement activities constituted a negligible portion of personal manager's efforts on behalf of artist, and manager was not compensated for these procurements activities].

5. Respondents Spencer, Cowings and SpenCow all acted as talent agents in violation of the Act by promising, attempting to procure and procuring employment for Cham during the term of the Agreement.

6. First, we find that SpenCow negotiated an agreement for increased compensation for Cham to produce his song *Sunshine* on the *Deliver us from Eva* soundtrack for Def Jam. Prior to this project and prior to being represented by SpenCow, Cham only charged $15,000 to produce songs. However, when the parties initially spoke about SpenCow representing Cham as his manager, this standard fee was extensively discussed. The parties all testified that SpenCow communicated to Cham that $15,000 was too low a fee and that he should be charging at least $30,000 given his experience. Thus, this was the first opportunity that SpenCow was able to obtain this higher fee for

Cham. SpenCow argues that they were merely "communicating" the fee to Def Jam at Cham's specific request. However, as the parties both point out in their closing briefs, we have previously held 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 the third-party employer who seeks to engage the artist's services." *Chinn v. Tobin* TAC 17-96. SpenCow argues that this engagement was already procured when they communicated to Tina Davis of Def Jam, Cham's desire to be paid $30,000 for his producer services on this project. Accordingly, they argue that the Act does not prohibit communications *after* the artist has already been engaged. We find this argument unpersuasive as the engagement had not been procured until the job offer was accepted and the material terms, (e.g., fee), were agreed to by Cham and Def Jam. And, since Spencer testified that he contacted Ms. Davis to accept the job for Cham *and* to communicate the requested fee, Cham had not yet been officially engaged by Def Jam.

Mr. Hazzard: And—But you ultimately did contact Tina Davis at Def Jam to Discuss Mr. Cham's services as producer of "Sunshine"; correct?

Mr. Spencer: I contacted Tina Davis after he and I spoke and he said they wanted him to do "Sunshine" on "L's" project.

At the same time we discussed there was a—I don't know if it was a prearranged fee or there was conversation of a fee at that time, and they wanted to give him $15,000 to do the record.

I said I think that's too low for you. Because he's just coming offer [sic] Christine [sic] Aguilera's, one of

her biggest record, and so forth, that's too low, we should get more. We talked about the fee of $30,000. He asked me to contact Tina Davis and let her know that he wanted a fee of $30,000.

Mr. Hazzard: And so during your—And so you, after your conversation with Mr. Cham, contacted Tina Davis at Def Jam to discuss the producer fee?

Mr. Spencer: **To let her know that Ray wanted to do it, was interested in doing the record** and wanted a fee of $30,000.

R.T. 204:13-205:11. [Emphasis added].

"Procurement" includes any active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication or who finalized the deal. *Hall v. X Management*, TAC 19-90. Thus, because neither Cham nor his attorney, Mr. Schall,[3] were involved in negotiating the producer's declaration which contained the increased fee, we find that such fee, along with all the other terms stated on the producer's declaration, had to have been negotiated by SpenCow.

7. Second, we find that SpenCow attempted to procure employment for Cham's services as a music producer and songwriter by setting up a meeting with Max Gouse, an A&R representative at Columbia Records. The meeting, which was initiated by SpenCow and attended by SpenCow, *albeit* with Cham, was clearly for the purpose of obtaining future work for Cham. And indeed, the meeting resulted in an opportunity for

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[3] We find that Mr. Schall was responsible for finalizing the deal by negotiating the long form agreement approximately one year after Cham had performed the services for Def Jam.

Cham to write a song for one of Mr. Gouse's artists, Jhene. Cham wrote the song for Jhene and created a demo for Mr. Gouse which was provided to Mr. Gouse by SpenCow. While the song that Cham wrote for Jhene was ultimately not accepted, this does not diminish the fact that SpenCow *attempted* to procure such employment. In this regard, we have held that initiating or attending meetings with executives in order to advertise the artist's talent and make them aware of the artist's availability violates the Act. *Sevano v. Artistic Productions, Inc.*, TAC 8-93, p.5. See also, *Anderson v. D'Avola*, TAC 63-93, at p. 10 [discussions with producers or casting directors in an attempt to obtain auditions for an artist violates the Talent Agencies Act] and *Baker v. BNB Associates, Ltd.*, TAC 12-96 at 3,6 [manager secured "promotional" television engagements for artist on, among other things, various awards shows].

8. Third, we find that SpenCow asked Cham to compose and produce a demo to submit to Warner Brothers Pictures for the opening title song on the *Looney Tunes Back in Action* feature animation film that was in the beginnings of production. Cham composed and produced a demo titled *Tune In* which was submitted to Warner Brothers by SpenCow, for consideration as the opening title song on this project. SpenCow argues that they were attempting to establish their own production deal at Warner Brothers and would therefore be the ones to hire Cham directly for this project. Thus, they argue, there was no attempt to secure employment for Cham with a third party. The problem with this argument is that SpenCow had not yet secured this production deal at Warner Brothers when they submitted Cham's demo *Tune In* to Warner Brothers for consideration as the opening title song on the *Looney Tunes Back in Acti*on film. In fact, the testimony revealed that they never secured a production deal with Warner Brothers. Thus, their submission of *Tune In*, while ultimately not accepted as the opening title song, was a further attempt by SpenCow to procure employment for Cham in violation of the Act.

9. Fourth, we find that SpenCow attempted to negotiate increased royalty points on the master license for Cham's previously produced and recorded song *Girlfriend*, which was used on *The Cheetah Girls* soundtrack. While we have held in the

past that there's no violation of the Act where a manager seeks to license an artist's pre-recorded music that does not contemplate future services of the artist, (See *Kilcher v. Vainshtein*, TAC 02-99), that is not the case here. The credible testimony by Cham revealed that he did perform additional work for Disney on his previously recorded song *Girlfriend.* Specifically, he testified that he had to "perform different mixes for the film and TV version as opposed to what would ultimately end up on the –on the sound track." R.T. 137:21-25. SpenCow's attempt to negotiate an additional 2-3 royalty points with Katrina Carden of the business affairs department at Disney was, therefore, in violation of the Act.

10. Lastly, we find that Cowings' email to Cham dated July 17, 2003 where he states: "Just wanted to let you know that I am getting close to closing a few deals. We got your back. Thanks," having been emailed just a couple of days after Cham discussed with SpenCow his dissatisfaction with their management services, constitutes a "promise" to procure employment. Similarly, Cowings' email to Cham dated January 27, 2004 wherein he states: "It is our wish that we be allowed to promote you as a producer," coupled with the other evidence submitted at the hearing where SpenCow actually did promote Cham as a music producer, also constitutes a "promise" to procure employment for Cham, in violation of the Act.

11. An agreement that violates the licensing requirement of the 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 a business entity procured, promised or attempted to procure 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 v. Stevens, supra*, 26 Cal.4th at 55.

"[A]n agreement that violates the licensing requirement is illegal and unenforceable...." *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th at 262.

12. We note that at the time of this hearing, *Marathon v. Entertainment, Inc. v. Blasi* (2006) 140 Cal.App.4th 1001, which held that the doctrine of severability of contracts could apply to sever the illegal from the legal elements of an agreement between an artist and a manager, was issued by the Court of Appeal. However, since the hearing in this matter, the California Supreme Court has granted review on the issue of whether the doctrine of severability of contracts applies under the Act and accordingly, has ordered the above-referenced Court of Appeal decision depublished. As such, our long standing position, which is supported by case law and legislative history, that a contract under which an unlicensed party procures or attempts to procure employment for an artist is void *ab initio* and the party procuring the employment is barred from recovering payments for any activities under the contract, including activities for which a talent agency license is not required, still stands. See *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1103-1104; *Styne v. Stevens, supra*, 26 Cal.4th at 51; *Park v. Deftones, supra*, 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra*, 41 Cal.App.4th at 1470.

Furthermore, California courts have unanimously denied all recovery to personal managers even when the overwhelming majority of the mangers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104; *Park v. Deftones, supra*, 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra*, 41 Cal.App.4th at 250, 261-262.

> "The rationale for denying a personal manager recovery even for activities which were entirely legal, where that personal manager also unlawfully engaged in employment procurement without the requisite talent agency license, is based on the public policy of the Talent Agencies Act to deter unlicensed persons from engaging in activities for which a talent agency license is required."

Marta Greenwald, as personal representative of the Estate of Elliot Smith aka Steven Paul Smith deceased v. Jennifer Chiba, TAC 03-05.

Moreover, in *Waisbren, supra,* the court observed that one reason the Legislature did not enact criminal penalties for violations of the Act was "because the most effective weapon for assuring compliance with the Act is the power...to declare any contract entered into between the parties void from the inception." *Waisbren v. Peppercorn Productions, supra* 41 Cal.App.4th at 262, quoting from a 1985 report issued by the California Entertainment Commission.

13. Notwithstanding the Court of Appeal's ruling in *Marathon, supra,* which as stated previously, is up on review, the doctrine of severability of contracts would have no effect on this decision given that we have found SpenCow violated the Act in each instance alleged in the Amended Petition of Raymond Cham and Last Man Standing, Inc. to Determine Controversy.

ORDER

For all the reasons set forth above, IT IS HEREBY ORDERED that the April 30, 2002 Personal Management Agreement between Petitioners RAYMOND CHAM and LAST MAN STANDING, INC. and SPENCER/COWINGS ENTERTAINMENT, LLC, A California Limited Liability Company is void from its inception, in its entirety, and that SPENCER/COWINGS ENTERTAINMENT, LLC; DEMETRIUS SPENCER, An Individual; and EVERETT COWINGS, An Individual, have no enforceable rights thereunder.

Dated: July 27, 2007

EDNA GARCIA EARLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: July 30, 2007

ANGELA BRADSTREET
State Labor Commissioner