

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
2 State of California  
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Attorney for the Labor Commissioner

5  
6 BEFORE THE LABOR COMMISSIONER  
7 OF THE STATE OF CALIFORNIA  
8  
9

10	JEWEL KILCHER, professionally known	)	Case No. TAC 02-99
	as "JEWEL," an individual,	)	
11		)	
	Petitioner,	)	
12	vs.	)	DETERMINATION OF
		)	CONTROVERSY
13		)	
	INGA VAINSHTEIN, an individual, and	)	
14	COLD WAR MANAGEMENT, a business	)	
	entity of unknown origin,	)	
15		)	
	Respondents.	)	
16		)	

17  
18 INTRODUCTION

19 The above-captioned petition was filed on January 21,  
20 1999 by JEWEL KILCHER, a.k.a. "JEWEL", (hereinafter Petitioner,  
21 "KILCHER" or "JEWEL"), alleging that INGA VAINSHTEIN dba COLD WAR  
22 MANAGEMENT, (hereinafter Respondent or "VAINSHTEIN"), acted as an  
23 unlicensed talent agency in violation of §1700.5<sup>1</sup> of the California  
24 Labor Code. Petitioner seeks a determination voiding *ab initio* the  
25 management agreement entered into between the parties, and requests

26 <sup>1</sup> All statutory citations will refer to the California Labor Code unless  
27 otherwise specified.

1 disgorgement of \$1,843,450.00 in commissions paid to the respondent  
2 throughout the length of the relationship.

3 Respondent filed her answer with this agency on February  
4 18, 1999. A hearing was scheduled before the undersigned attorney,  
5 specially designated by the Labor Commissioner to hear this matter.  
6 The hearing commenced on January 8, 2001 through January 16, 2001,  
7 in Los Angeles, California. Petitioner was represented by Patricia  
8 L. Glaser and Larry S. Greenfield of Christensen, Miller, Fink,  
9 Jacobs, Glaser, Weil & Shapiro, LLP; respondent appeared through  
10 her attorneys David E. Koropp, Ray Perkins and Catherine A. Cook of  
11 Winston & Strawn. Due consideration having been given to the  
12 testimony, documentary evidence, arguments and briefs presented,  
13 the Labor Commissioner adopts the following Determination of  
14 Controversy.

15  
16 FINDINGS OF FACT

17 1. In 1992, Jewel Kilcher moved to San Diego,  
18 California to pursue her dream of becoming a professional  
19 singer/songwriter. Soon thereafter, Kilcher and her mother, Nedra  
20 Carroll, moved into Volkswagen vans to cut expenses and searched  
21 San Diego coffee houses for an opportunity to perform. The  
22 opportunity was realized in 1993 when Kilcher met Nancy Porter,  
23 owner of an obscure coffee house named The Inner Change. The Inner  
24 Change needed customers and Jewel needed exposure. The match was  
25 perfect and soon Jewel developed a strong following of local fans  
26 that loyally attended Kilcher's Thursday night regular engagement.

27 2. Kilcher and Porter agreed that when Jewel performed,

1 Porter would charge a three dollar per person entrance fee. Two  
2 dollars went to Jewel, with one dollar and all of the coffee  
3 receipts going to Porter. As Jewel's reputation as a talented  
4 singer/songwriter spread, the record companies soon took notice.  
5 At some point in mid 1993 record companies including, Virgin  
6 Records, Sony and Atlantic attended her shows. After one  
7 particular Thursday night performance in mid 1993, Kilcher was  
8 approached by the respondent who attended the show accompanied by  
9 Jenny Price of Atlantic Records. Vainshtein indicated she  
10 currently managed a local San Diego band and expressed interest in  
11 representing Jewel. Kilcher and Vainshtein entered into an oral  
12 agreement for Vainshtein to manage Jewel's blossoming career.

13 3. At the hearing, Jewel alleged that Vainshtein  
14 immediately took an active role in securing employment engagements  
15 on her behalf. Kilcher testified that Vainshtein not only secured  
16 several small "gigs" throughout California, but also created  
17 several opportunities for Jewel to contribute songs to movie  
18 soundtracks; secured deals for Jewel to record songs for CD  
19 compilations and tribute albums; created and negotiated several  
20 licensing letter agreements to have pre-recorded songs included on  
21 those CD's and movies soundtracks; attempted to negotiate a  
22 publishing agreement on Jewel's behalf; created opportunities for  
23 Jewel to perform live at special engagements; and secured and  
24 negotiated a photo shoot for Jewel. The allegations and  
25 conflicting documentary evidence and testimony include the  
26 following:  
27

1 a. Vainshtein will take care of booking arrangements.

2 Immediately after representation commenced, Jewel  
3 testified that Vainshtein told her that, "she [Vainshtein] would  
4 take care of booking arrangements until Jewel is successful enough  
5 to hire a booking agent." Other than Kilcher's testimony, the  
6 petitioner did not offer other competent evidence to support that  
7 testimony. The respondent steadfastly maintained the conversation  
8 did not occur. As for most of the engagements in issue, it was the  
9 word of Kilcher and her mother pitted against Vainshtein's. The  
10 testimony of the parties was unavailing as to what actually  
11 occurred.

12 Notably, Vainshtein was an experienced manager who  
13 clearly knew she was precluded from booking shows without  
14 possessing a talent agency license. This was demonstrated by the  
15 management agreement which expressly provided that Vainshtein would  
16 not procure, promise or attempt to procure employment or  
17 engagements for Jewel.

18  
19 b. Inner Change Café

20 Kilcher testified that Vainshtein was immediately pro-  
21 active in booking her performances. Kilcher maintained that  
22 Vainshtein approached Nancy Porter, owner of The Inner Change, to  
23 discuss the new arrangements. Vainshtein told Porter that Porter  
24 would have to deal with Vainshtein from now on and that \$3.00 per  
25 person was not enough compensation for a talent like Jewel. Nancy  
26 Porter supported Kilcher's testimony. Porter testified that when  
27 Vainshtein made this request, she was offended by Vainshtein's

1 behavior and stated, "no, I book my own music.". Later that same  
2 evening Vainshtein accused Porter of taking money from the door.  
3 In retaliation, Porter asked Vainshtein to leave the Inner Change  
4 and demanded that she never come back. The respondent attacked  
5 Porter's testimony alleging bias. The respondent maintained that  
6 Porter had maintained a friendship with the petitioner, her mother  
7 and petitioner's counsel and that Porter had collectible  
8 memorabilia from those early days that Atlantic Records or others  
9 may be interested in purchasing. Notwithstanding respondent's  
10 claim of bias, Ms. Porter's testimony was credible. And  
11 irrespective of Vainshtein's understanding of relevant Talent  
12 Agency Act prohibitions, the totality of the testimony established  
13 that in 1993 Vainshtein unsuccessfully sought to secure increased  
14 compensation for Jewel from Porter at The Inner Change.

15  
16 c. Engagements between Mid 1993 through January 1995

17 Prior to Kilcher securing ICM as her licensed talent  
18 agency, Kilcher performed countless engagements throughout Southern  
19 California that she attributes to Vainshtein's efforts. These  
20 venues located primarily in the San Diego area include, The Belly  
21 Up Tavern; The Live Wire Bar; The Green Circle Bar; Sunfest; The  
22 Wickiup Café; The Art House; The Edge; and an unidentified location  
23 in Sacramento. Again, the parties testimony was in direct  
24 contradiction on every allegation. Kilcher and Carroll argued it  
25 was Vainshtein's connections in the San Diego area that lead to  
26 these "gigs", while Vainshtein maintained it was Kilcher herself  
27 who booked the shows.

1           The petitioner did not provide other witnesses in  
2 addition to Kilcher and Carroll to support their claims, though it  
3 was established that Kilcher's label, Atlantic Records wasn't  
4 involved with these performances. The petitioner sought to prove  
5 that Vainshtein booked these engagements because no one else could  
6 have. The circumstantial evidence offered by the petitioner did  
7 not rise to the level to support that finding. In fact, Kilcher's  
8 own testimony was unavailing and her memory of those early  
9 engagements was refreshed through an unauthenticated Internet cite  
10 that purported to list all of Kilcher's early performances.

11  
12           d. "Clueless"

13           In May of 1995 after Jewel had secured ICM as her  
14 licensed talent agent, Jewel testified that Vainshtein secured and  
15 negotiated the opportunity for Jewel to record "All by Myself" to  
16 be included in the movie "Clueless". Vainshtein, unequivocally  
17 denied the charge. The documents offered by the parties  
18 established that the deal was negotiated and finalized by both  
19 Steve Crawford of ICM and Jewel's transactional attorney, Eric  
20 Greenspan. As demonstrated by credible documentary evidence, the  
21 respondent was provided with the terms and agreement, but it was  
22 not established that she negotiated or procured this engagement.

23  
24           e. "Modern Rock Live"

25           Kilcher maintained the Vainshtein was responsible for her  
26 participation on "Modern Rock Live". "Modern Rock Live" was a CD  
27 compilation of live performances by various artists that would be

1 included with every purchase of a Sony Playstation. Sony requested  
2 that Global Satellite Network (GSN) produce the CD and it was GSN  
3 who sought to include Jewel's August 20, 1995, live recording of  
4 "Race Car Driver" on the CD. It was established through  
5 documentary evidence that as early as August 29, 1995, the  
6 respondent was involved in discussions with The Global Satellite  
7 Network long before either Atlantic or Greenspan entered the  
8 picture. The documents indicated that Vainshtein had discussions  
9 with GSN regarding material terms of the licensing agreement,  
10 including compensation of twelve cents (.12) per unit for Jewel.

11 As with many of the projects that were completed  
12 throughout the relationship, Jewel's transactional attorney Eric  
13 Greenspan was brought in to finalize the legal terms of the deal.  
14 There was evidence that Jewel's label, Atlantic was involved with  
15 the licensing of "Race Car Driver", but there was no evidence that  
16 Vainshtein or Greenspan's roles were conducted at the request of a  
17 licensed talent agent<sup>2</sup>.

18 The Respondent argued that if the Labor Commissioner  
19 found involvement by Vainshtein with "Modern Rock Live", the  
20 licensing of a previously recorded song for inclusion on a CD could  
21 not implicate the Act because the licensing of a previously  
22 recorded song does not require the petitioner to render any  
23 services, and that constitutes "nothing more than the sale or  
24 licensing of pre-existing intellectual property." As such, to  
25

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26 <sup>2</sup> Labor Code §1700.44(d) states, "it is not unlawful for a person or  
27 corporation which is not licensed pursuant to this chapter to act in conjunction  
with and at the request of a licensed talent agency in the negotiation of an  
employment contract."

1 include this type of transaction within the purview of the Talent  
2 Agencies Act would effect a radical expansion of the Act."  
3 Essentially, respondent argues that for implication of the Act, the  
4 manager must "procure employment or an engagement" for an artist as  
5 described in the definition of "talent agency" at Labor Code  
6 1700.4(a). And the sale of a pre-recorded song is not an  
7 engagement, nor does it involve employment.

8  
9 f. "The Wizard of Oz"

10 During the holiday season of 1995, Kilcher offered her  
11 talents to support the "Children's Defense Fund". Kilcher  
12 performed as Dorothy in the live version of "The Wizard of Oz",  
13 filmed in New York and later released on CD and Videotape. Nedra  
14 Carroll testified that she saw Respondent negotiate the terms, but  
15 this testimony was not buttressed by any documentary evidence nor  
16 supported by other testimony. Alternatively, the negotiations  
17 reflected in the correspondence establish Eric Greenspan's role in  
18 the process. The testimony of the parties again were in stark  
19 contradiction. Consequently, the petitioner did not sustain her  
20 burden and it was not established that the respondent procured or  
21 negotiated this charitable engagement.

22  
23 g. "VH-1 Duets with Melissa Ethridge"

24 On September 20, 1995, the respondent received a letter  
25 from MTV Networks enclosing an agreement for Jewel to perform a  
26 duet with Melissa Ethridge. The document was then turned over to  
27 Eric Greenspan to "look over". This document did not establish



1 Vainshtein's alleged procurement efforts. Conversely, this single  
2 piece of evidence used by the petitioner to establish procurement  
3 was refuted by the videotaped deposition of Linda Ferrando, Vice  
4 President of Atlantic Records Video Promotion Department. Ferrando  
5 indicated that her promotions department produced Jewel's itinerary  
6 for this duet and testified that her primary responsibility was to  
7 set-up concerts, interviews and performances for Jewel on  
8 television. And though she did not have specific recollection of  
9 setting up this event, she couldn't imagine any other possibility.  
10 Based on the Atlantic Records representative's testimony and this  
11 document, it is likely that Atlantic Records set up this engagement  
12 which was finalized by Greenspan in his customary role.

13  
14 h. Efforts to secure a music publishing deal with EMI  
15 Music Publishing

16 There was a great deal of testimony aiming to establish  
17 that Vainshtein discussed a possible music publishing agreement  
18 with EMI Music Publishing employee, Carla Ondrasik. Ondrasik  
19 testified that she desperately coveted Jewel as an EMI client and  
20 was devastated when Kilcher signed with Warner/Chappell. It was  
21 evident that Ondrasik did not have the authority to make this deal,  
22 but she was close enough with those who were and Ondrasik relayed  
23 her conversations with Vainshtein to those individuals. It was  
24 also clear that Vainshtein engaged in conversations with Ondrasik  
25 regarding a possible EMI publishing agreement. The extent of those  
26 conversations were not clear, but Vainshtein was interested in what  
27 Ondrasik had to say and Vainshtein was at minimum, testing the

1 proverbial waters by engaging in hypothetical discussions with an  
2 EMI employee. Eric Greenspan, who was intrinsically involved with  
3 Jewel's publishing contract, testified that Vainshtein engaged  
4 regularly in conversations with the creative personnel of several  
5 potential publishers and consequently, the totality of the evidence  
6 demonstrated that the respondent was an active participant in  
7 attempting to secure a publishing deal for Jewel, including the  
8 discussions with EMI employee Ondrasik.

9           Again, the issue is whether the solicitation or  
10 negotiation of a publishing agreement should be considered  
11 "procuring employment or engagements for an artist", and thus  
12 implicating the Act.

13  
14           i. "Under the Water" for "The Craft"

15           In or around February of 1996, Jewel agreed to perform  
16 the song "Under the Water" for the motion picture "The Craft".  
17 This recording was produced by Respondent's friend Ralph Sall. The  
18 petitioner and her mother, as well as Greenspan testified that this  
19 opportunity came through the respondent. The documents disclosed  
20 that as early as October 30, 1995, Jewel's talent agent, ICM was  
21 aware of the opportunity and was initially involved in the original  
22 negotiations, but these documents did not establish who initiated  
23 contact with Sony Pictures regarding the recording and to what  
24 extent ICM was involved.

25           On February 22, 1996, Jewel replaced ICM as her talent  
26 agent with CAA. CAA representative Brian Loucks testified that CAA  
27 had no involvement in the soundtrack. It was difficult to discern

1 what conversations Vainshtein had with respect to this engagement,  
2 with either ICM, or Ralph Sall the producer. Again, it was  
3 Greenspan who negotiated the terms of the deal, and Vainshtein was  
4 not referenced in those documents. Conspicuously absent to testify  
5 was Steve Crawford of ICM, the originator of the correspondence  
6 reflecting this deal and Ralph Sall, the producer. As a result,  
7 the circumstantial evidence, including Vainshtein's friendship with  
8 producer Sall, was not enough to established that Vainshtein  
9 created or attempted to procure this deal.

10  
11 j. "I Shot Andy Warhol"

12 In March of 1996, correspondence between Eric Greenspan  
13 and Philip Wild of Atlantic records ensued regarding Jewel's  
14 participation to record the song "Sunshine Superman" for the movie  
15 "I Shot Andy Warhol". Petitioner alleged that Respondent procured  
16 this engagement through Vainshtein's friend, the director of the  
17 movie. Absent was the testimony of this director, and again it was  
18 Kilcher's word against her manager. The documents proved  
19 unavailing and again without further evidence, Jewel could not  
20 sustain her burden of proof for this engagement. Troubling was the  
21 fact that Brian Loucks, Jewel's soundtrack agent for CAA testified  
22 that CAA was not involved, thus implying Vainshtein's involvement.  
23 To what extent remains a mystery and the proximity between this  
24 engagement and Kilcher's replacement of ICM with CAA may explain  
25 CAA's noninvolvement.

26 k. Concert to benefit the "Pedro Zamora Foundation"  
27

1           In June of 1996 Brian Quintana, Producer and member of  
2 the Board of Directors for the "Pedro Zamora Foundation", began his  
3 quest to promote a concert in an effort to raise awareness of AIDS  
4 to America's youth. After a series of letters to Kilcher's talent  
5 agents that were forwarded to Jewel's mother and manager, Quintana  
6 had a phone conversation with the respondent regarding Jewel's  
7 possible participation. The contents of the conversation were not  
8 established via testimony, but the subsequent correspondence proved  
9 far more availing as to what actually occurred. After the  
10 conversation with Vainshtein, Quintana began to advertise Jewel as  
11 an artist scheduled to perform at the event. This advertising  
12 campaign was conducted without Jewels approval, acceptance, or  
13 knowledge. When Vainshtein realized Kilcher would not perform, she  
14 unsuccessfully attempted to have Quintana retract the  
15 advertisements. After several conversations with Quintana,  
16 Vainshtein was unable to thwart Quintana's advertising efforts.  
17 Vainshtein then contacted Eric Greenspan to handle the escalating  
18 public relations problem of Jewel not performing at a well  
19 publicized charitable event in which she was scheduled to perform.  
20 In response to Greenspan's threatening letters, Quintana forwarded  
21 to Greenspan a fax received by Quintana purportedly from  
22 Vainshtein's employee, Lou Niles. The fax was consistent with  
23 Vainshtein's business letterhead and stated the following:

24  
25           Dear Brian,

26           Per your conversation the other day  
27           with Inga. This is to confirm that  
            Jewel will perform at the Oct. 5,  
            1996 concert to benefit the Pedro

1 Zamora Foundation. She will already  
2 be in town for an HBO taping on that  
3 Sunday so she will not have to be  
4 flown in.

5 Thank you for your  
6 consideration. We look forward to  
7 working with you.

8 Best,  
9 Lou Niles/Inga Vainshtein

10 The respondent admitted to having conversations with  
11 Quintana but denied accepting the offer for Jewel to perform.  
12 Respondent's testimony was in direct contrast to that of Jewel's  
13 mother who indicated that Vainshtein admitted after being  
14 confronted by Carroll that she had indeed confirmed Jewel's  
15 participation. Notwithstanding, respondent's attempts to impeach  
16 Carroll through her deposition testimony, Carroll's account was  
17 more credible than Vainshtein's.

18 Vainshtein testified that she was completely unaware that  
19 her former employer Lou Niles had sent this acceptance via  
20 facsimile to Quintana. A review of the correspondence that bounced  
21 between Jewel's representatives and the Pedro Zamora Foundation  
22 established that Quintana did not begin his advertisement campaign  
23 without Vainshtein's confirmation. In a January 28, 1997 letter to  
24 Greenspan, Quintana wrote, "We did not advertise or promote Jewel's  
25 involvement until we had such confirmation from her management."  
26 This position is both supported by Carroll's testimony and bellied  
27 by the fact that Vainshtein conversed with Quintana prior to the  
28 mysterious facsimile transmission.

29 Vainshtein did attempt to book Jewel for an event she  
30 thought worthwhile, albeit without Kilcher's knowledge.

1 Vainshtein's account that she had no idea why this occurred is not  
2 credible.

3  
4 l. "Rolling Stone: Women in Rock"

5 In October of 1997, Rolling Stone magazine was  
6 celebrating its 30<sup>th</sup> year by creating a 15 track CD, including songs  
7 from contemporary female super artists. It was clear that Jewel's  
8 label was involved in receiving the offer, but it was Vainshtein  
9 who accepted the offer, transmitted via facsimile from Warner  
10 Special Products. The correspondence leaves no doubt that  
11 Vainshtein, along with Eric Greenspan agreed to the licensing of  
12 "Who will Save Your Soul", to be included on the Rolling Stone CD  
13 compilation. This evidence was buttressed by Vainshtein's self-  
14 prepared computer generated notes which reflected she "approved the  
15 use of [the] Jewel track". Clearly approving an agreement is  
16 included in the definition of "procuring employment". Procurement  
17 is not simply solicitation or negotiation. Again, the real issue  
18 lies in whether the licencing of a pre-recorded song is an  
19 "employment or an engagement" within the meaning of the Act?

20  
21 m. Cartier Photo Shoot

22 In October of 1997 the Cartier Company sought to create  
23 a photo book that would include Kilcher photographed with an animal  
24 of her choice, with the proceeds going to a charitable cause. On  
25 October 3, 1997, Vainshtein received a facsimile confirming  
26 Kilcher's interest. The fax expressed Kilcher's desire to be  
27 photographed with a cheetah or a horse. The fax denotes Vainshtein

1 was the first person to disclose the opportunity to Jewel. And on  
2 October 21, 1997, it was Vainshtein who was first provided with the  
3 draft agreement for Jewel's signature. It was not until one week  
4 later that the draft agreement was forwarded by Cartier's  
5 representatives to Eric Greenspan, again for Jewel's signature.

6 As was the case for every alleged procured engagement,  
7 the testimony of Jewel and her mother agreed that Vainshtein  
8 created the deal. Vainshtein disavowed all solicitation and  
9 negotiation of the material terms. The conflicting testimony  
10 placed greater importance on the documentary evidence. And it was  
11 the aforementioned documents addressed to Vainshtein that did not  
12 mention a talent agent, Nedra Carroll, Eric Greenspan or Atlantic  
13 Records that prevails in this battle of conflicting evidence.

14  
15 n. Y100 Compilation CD: "Who Will Save Your Soul (Live)"

16 Y100 radio station and Sonic Recording Studios  
17 collaborated on a CD compilation that included Jewel's previously  
18 recorded "Who Will Save Your Soul". Petitioner offered a letter  
19 (pet. Ex. No. 11) from the radio station's program director  
20 stating, "It's hard to describe how excited we were when you agreed  
21 to let us put it on the CD." This letter speaks volumes. The  
22 respondent argues the letter does not prove that Vainshtein  
23 solicited or negotiated the terms for the licensing of this song  
24 and should not be considered. We disagree. Procurement of  
25 employment is not contingent upon solicitation and/or negotiation.  
26 Acceptance of a negotiated instrument constitutes an important  
27 element of procurement. And though solicitation and/or negotiation

1 was not established by a preponderance of the evidence, acceptance  
2 of the deal was; and that acceptance satisfied the petitioner's  
3 burden of proof. Moreover, a talent agent was not involved with  
4 this deal.

5           Again the issue is whether negotiating with an entity  
6 interested in procuring the license for a pre-recorded song to used  
7 on a CD compilation constitutes "employment or engagements for an  
8 artist."?

9           o. \$2,000.00 a month Stipend form Atlantic Records

10           The petitioner demonstrated that for one year in 1994  
11 through 1995, Vainshtein accepted a \$2,000.00 a month "consulting  
12 fees" stipend from Atlantic Records unbeknownst to Kilcher.  
13 Petitioner argues the receiving of these monies constitutes a  
14 breach of fiduciary duty owed to Kilcher and should be held in  
15 constructive trust for Kilcher's benefit.

16           No evidence was brought demonstrating these payments,  
17 totaling \$24,000, either altered Jewel's compensation or inhibited  
18 or affected Vainshtein's performance toward Jewel. The Labor  
19 Commissioner will not condone referral fees to talent agents from  
20 production companies or clients that could lead to a breach of  
21 fiduciary duty toward the artist, but no evidence was offered that  
22 this "consulting fee" fell into this category.

23           4.       There were several other alleged procurement  
24 engagements plead by the petitioner, which do not require  
25 discussion because the evidence did not establish Vainshtein's  
26 procurement involvement other than the unavailing testimony of  
27 Kilcher and Carroll.



1           5.     Kilcher's testimony was credible, and her account  
2 of the relationship was illustrated in her detailed memory of  
3 Vainshtein's daily business practice, as described by the following  
4 quote:

5  
6                    "She sent me, broken down, detailed  
7 descriptions of the different things  
8 she was working on during the day.  
9 She would tell me which things she  
10 was seeking out, if they were  
11 soundtracks or personal appearances  
12 or whatever they would be. She  
13 would tell me about where the  
14 negotiations were, how far along  
15 they were and she would give me a  
16 daily update up until something was  
17 done or signed, as well as other  
18 parts of her management job, which  
19 would be clothing details, things  
20 like that." Transcript pg. 126-127

21  
22           6.     On the one hand, this testimony reflects Jewel's  
23 perception of Vainshtein's procurement, while on the other, the  
24 testimony should not be overlooked as to the attention to detail  
25 Vainshtein displayed with her client.

26           7.     The petitioner did not establish that Vainshtein  
27 engaged in egregious violations or engage in a pattern of reckless  
behavior designed to evade the protective mechanisms of the Act.  
As discussed in Buchwald v. Superior Court 254 Cal.App.2d 347, 356,  
The contract was not a mere sham and pretext designed by the  
respondent to misrepresent and conceal the true agreement of the  
parties.

          8.     Conversely, the hearing established that Kilcher  
benefitted from Vainshtein's involvement in her career. It was

1 Vainshtein who assisted Kilcher in securing Greenspan and it was  
2 Vainshtein who brought Atlantic Records to Jewel's Inner Change  
3 performance. Vainshtein proved to be a very capable representative  
4 and Jewel's success is attributable in part to the hard working  
5 efforts of Vainshtein. Vainshtein played a central role in Jewel's  
6 career, and she made sound decisions with the projects she  
7 recommended for Kilcher, guiding Kilcher's meteoric rise. But for  
8 a few incidents, early in Kilcher's career in which Vainshtein  
9 crossed the well established bright line precluding unlicensed  
10 representatives from engaging in the procurement of employment, the  
11 relationship proved a very successful one.

12  
13 CONCLUSIONS OF LAW  
14

15 1. The Labor Commissioner interprets the provisions of  
16 this remedial statute broadly as intended by the legislature for  
17 the protection of California artists. We also recognize the  
18 legislature did not intend the Act to be used as a sword to  
19 preclude representatives from their earned commissions. Also, we  
20 appreciate the duty of this administrative proceeding, which is  
21 designed not to focus on the Superior Court breach of contract  
22 suit, but instead to focus on the alleged illegal activity of the  
23 respondent. With those concepts in mind, the evidence was viewed  
24 equitably, noting the tremendous financial loss potentially  
25 suffered by the respondent for what we believe, not to be de  
26 minimis illegal activity, but also not the type of illegal behavior  
27 the legislature intended to correct and punish as reflected in  
prior judicial decisions and legislative action. Notably, the

1 Labor Commissioner has consistently encountered more culpable  
2 violations, whereby the petitioner has actually endured a loss as  
3 a result of unlicensed activity. We realize a loss was not the  
4 focus of petitioner's case, but close scrutiny of the evidence and  
5 testimony of countless witnesses did not discern such a loss.

6 2. The issues to be determined are as follows:

7 a. Has the Respondent acted as an unlicensed talent  
8 agency?

9 b. Does an attempt to secure a publishing and/or  
10 licensing agreement through solicitation, actual negotiation,  
11 and/or successful completion of that attempt, implicate the Talent  
12 Agencies Act?

13 c. Can a transactional attorney shield a manager  
14 from liability under Labor Code 1700.44(d)?

15  
16 Has the Respondent acted as an unlicensed talent agency?

17  
18 3. The primary issue is whether based on the evidence  
19 presented at this hearing, did the respondent operate as a "talent  
20 agency" within the meaning of Labor Code §1700.4(a). Labor Code  
21 §1700.4(a) defines "talent agency" as:

22 "a person or corporation who engages  
23 in the occupation of procuring,  
24 offering, promising, or attempting  
25 to procure employment or engagements  
26 for an artist or artists."

27 4. Petitioner is an "artist" within the meaning of  
Labor Code §1700.4(b). Moreover, Labor Code §1700.5 provides that

1 "no person shall engage in or carry on the occupation of a talent  
2 agency without first procuring a license therefor from the Labor  
3 Commissioner." It was stipulated that the respondent has never  
4 held a talent agency license.

5           5. In Waisbren v. Peppercorn Production, Inc (1995) 41  
6 Cal.App.4th 246, the court held that any single act of procuring  
7 employment subjects the agent to the Talent Agencies Act's  
8 licensing requirement, thereby upholding the Labor Commissioner's  
9 long standing interpretation that a license is required for any  
10 procurement activities, no matter how incidental such activities  
11 are to the agent's business as a whole.

12           6. It was established that the respondent did procure  
13 employment on several occasions, including: Vainshtein's attempt to  
14 increase Kilcher's compensation with Nancy Porter at The Inner  
15 Change Café; Vainshtein's attempt to accept Quintana's offer for  
16 Jewel to perform at the "Pedro Zamora Foundation" concert for AIDS  
17 awareness; Vainshtein's discussions and negotiations with the  
18 representatives at Cartier for Jewel's participation in a photo  
19 shoot; and Vainshtein's participation with "Modern Rock Live",  
20 Rolling Stone's "Women in Rock", Y100's compilation using "Who Will  
21 Save Your Soul" and Vainshtein's efforts to press Carla Ondrasik of  
22 EMI for information on a publishing deal.

23           7. Applying Waisbren, it is clear respondent acted in  
24 the capacity of a talent agency within the meaning of Labor Code  
25 §1700.4(a). Vainshtein's efforts of combining her management  
26 responsibilities with the above referenced procurement activities  
27 was established on those occasions, and it is clear that the  
respondent indeed procured employment without a license in

1 violation of Labor Code §1700.5.

2 8. Notably, the bulk of procurement activity fell  
3 within the parameters of securing licensing and/or publishing  
4 agreements which may not implicate the Act. The other areas of  
5 procurement activity were directed toward charitable events, and  
6 one occasion designed to obtain more than two dollars per person  
7 (no commission for Vainshtein) at The Inner Change Café for  
8 Kilcher.

9  
10 Does an Attempt to Secure a Publishing and/or Licensing  
11 Agreement Through Solicitation, Actual Negotiation, and/or  
12 Successful Completion of that Attempt, Implicate the Talent  
13 Agencies Act?

14 9. Considerable time was expended on the allegation  
15 that Vainshtein's conversations with Carla Ondrasik created an  
16 attempt by the respondent to secure Kilcher a publishing deal with  
17 EMI Music Publishing. Labor Code §1700.4(a) defines "talent  
18 agency" as, "a person or corporation who engages in the occupation  
19 of procuring, offering, promising, or attempting to procure  
20 employment or engagements for an artist or artists." The initial  
21 question is whether the procuring, offering, promising or  
22 attempting to procure a music publishing agreement constitutes  
23 "employment or engagements for an artist"?

24 10. "Employment" is not defined under the Act. The  
25 Supreme Court case of Malloy v. Board of Education 102 Cal.642  
26 defined "employment" to mean, "Employment implies a contract on the  
27 part of the employer to hire, and on the part of the employee to  
perform services." Section 2(E) of Industrial Welfare Commission

1 (IWC) Order 12-2000, regulating the wages, hours and working  
2 conditions in the motion picture industry defines "employ" as,  
3 "means to engage, suffer, or permit to work." Black's Law  
4 Dictionary (5<sup>th</sup> ed. 1979) defines "employment" as "[a]ct of  
5 employing or state of being employed; that which engages or  
6 occupies, that which consumes time or attention; also an  
7 occupation, profession, trade, post or business". We are unable to  
8 locate a definition of employment which does not require an act on  
9 behalf of the employed.

10 11. A music publishing deal according to Eric  
11 Greenspan,

12  
13 "[is] one of the important income  
14 sources in an artist's career.  
15 Publishing in general, is -- or  
16 publishing income is created anytime  
17 a music composition ... is exploited  
18 anywhere in the world. Exploited by  
19 personal appearance, by public  
20 performance on the radio, on  
21 television, in the movie theater, on  
22 a phonograph record, sheet music,  
23 any of these various areas....In  
24 North America, you can collect your  
25 mechanicals directly ...from the  
26 publisher...[Publishers] monitor the  
27 record companies to made secure the  
money is properly directed. They  
file copyright notices. They  
approve all licenses ... They  
introduce artists to third party --  
to other writers, and they look for  
covers and means to exploit the  
publisher's catalog to create other  
sources of income."

12. This testimony is important, not because of what

1 it reveals about a music publishing deal, but for what it does not.  
2 Essentially, according to Mr. Greenspan, a publishing deal is a  
3 collection device for the artist, as the publisher is responsible  
4 for the collection of royalties domestic and abroad. Mr. Greenspan  
5 alluded that a music publishing deal contemplates future services  
6 but was unable to explain in any meaningful way what those future  
7 services are with respect to EMI's publishing agreement.

8           13. Clearly, "employment" or "engagement" requires a  
9 duty of the employee to act. One cannot be an employee if there is  
10 no affirmative to duty to render services. We are not concluding  
11 that a music publishing agreement does not contemplate the  
12 rendering of future services, we are stating that if a music  
13 publishing agreement **does not** contemplate future services on behalf  
14 of the artist, then consequently that agreement is not "employment"  
15 within the meaning of 1700.4(a).

16           14. Here, there was no meaningful evidence that  
17 suggests Vainshtein's discussions with Ondrasik contemplated an  
18 agreement that included future services and we are therefore unable  
19 to conclude that Vainshtein's conversations with Ondrasik were an  
20 attempt to procure "employment or engagements for and artist"  
21 within the meaning of the Act.

22           15. The same analysis applies for a person seeking to  
23 license an artist's pre-recorded music, that does not contemplate  
24 future services of the artist. A review of the licensing letter  
25 agreements revealed no duty by Kilcher to render any future  
26 services of any kind. Therefore, Vainshtein's negotiation and  
27 acceptance for "Modern Rock Live", "Rolling Stone/Women in Rock",  
and the Y100 CD compilations do not implicate the Talent Agencies

1 Act.

2           16. The Labor Commissioner does not want to encourage  
3 activities that fall on the periphery of illegal conduct, so we  
4 must be clear in stating that Vainshtein's activity toward these  
5 compilations do not trigger the Act, because they do not logically  
6 lead to any future services of the artist. If any agreement  
7 procured by an unlicensed agent are reasonably calculated to lead  
8 to a future performance, engagement or employment, then those  
9 actions must be liberally construed to trigger the Act and suppress  
10 the mischief at which it is directed. Buchwald, supra.

11  
12           Can a Transactional Attorney Shield a Manager from  
13 Liability under Labor Code 1700.44(d)?

14           17. It was the parties method of operation that Jewel's  
15 transactional attorney, Eric Greenspan would enter negotiations for  
16 various projects when an experienced attorney with Greenspan's  
17 legal skills were required. Greenspan would be called to, *inter*  
18 *alia*, review contracts offered by third parties to protect Jewel's  
19 interest. This was demonstrated in Greenspan's refusal to allow  
20 Cartier to use Jewel's likeness for any other purposes other than  
21 the intended purpose of the animal photo shoot. He would also  
22 handle all of the licensing agreements for a Jewel recording to be  
23 used for another purpose. And he would be called to handle any  
24 situation where possible litigation existed, i.e., "The Pedro  
25 Zamora Foundation".

26           18. As a result of Greenspan's pervasive presence, the  
27 question arose as to whether an attorney, not licensed as a talent  
agent, might implicate the exemption found at Labor Code



1 §1700.44(d). Labor Code §1700.44(d) states, "it is not unlawful  
2 for a person or corporation which is not licensed pursuant to this  
3 chapter to act in conjunction with and at the request of a licensed  
4 talent agency in the negotiation of an employment contract." If  
5 the Labor Commissioner were to allow a California licensed attorney  
6 to satisfy this exemption, it is possible that several of  
7 Vainshtein's alleged procurement activities would be protected by  
8 Greenspan's involvement. Notably, it was determined that Greenspan  
9 did not solicit any of these engagements, nor request that  
10 Vainshtein do so.

11 19. The express language of the exemption provides that  
12 a "licensed talent agency" may invoke the exemption. An attorney  
13 is not specified in 1700.44(d), or for that matter anywhere else  
14 within the Act that could be construed to extend the exemption to  
15 licensed California attorneys.

16 20. In construing a statute, court[s] must consider  
17 consequences that might flow from particular construction and  
18 should construe the statute so as to promote rather than defeat the  
19 statute's purpose and policy. Escobedo v. Estate of Snider (1997)  
20 60 Cal.Rptr.2d 722, 14 Cal.4th 1214, 930 P.2d 979. As discussed,  
21 the purpose of the statute is to protect artists from unscrupulous  
22 representatives. The Act provides a comprehensive licensing scheme  
23 that allows the Labor Commissioner to regulate agent activity  
24 through, *inter alia*, the approval of all contracts and commission  
25 structures. Expanding the exemption to licensed attorneys invites  
26 unregulated conduct that runs counter to the Act's remedial  
27 purpose.

21. In addition, an exception contained in a statute to

1 the general rule laid down therein must be strictly construed.  
2 Thorpe v. Long Beach Community College Dist. (App. 2 Dist. 2000) 99  
3 Cal.Rptr.2d 897, 83 Cal.App.4th 655. Consequently, the Labor  
4 Commissioner may not add words to a statute, particularly an  
5 exception to the general rule, that would essentially change the  
6 meaning of the statute. There may be considerable opposition that  
7 could argue an attorney's license involves far greater protections  
8 for an artist/client than a talent agency license. However, we  
9 cannot rewrite the statute. That is for the legislature. To hold  
10 otherwise would be counter to the remedial purpose of the Act and  
11 provide unregulated managers the ability to avoid the Act's  
12 liability through a means possibly not contemplated by the drafter.

13           22. The application of 1700.44(d) has historically been  
14 construed very narrowly. All elements of the statute must be  
15 independently met. The exemption is not satisfied when a licensed  
16 talent agent appears to finalize a deal. The manager is only  
17 relieved of liability when he/she "negotiates an employment  
18 contract", not solicits one. And that negotiation must be "at the  
19 request of" and "in conjunction with" a licensed talent agent.  
20 Here, the burden of proof is on the respondent when invoking  
21 1700.44(d). Even if Greenspan was a licensed talent agent, which  
22 he is not, the areas where Greenspan's presence was felt, were not  
23 done at his request.

24           23. Labor Code 1700.5 requires a talent agent to  
25 procure a license from the Labor Commissioner. Since the clear  
26 object of the Act is to prevent improper persons from becoming  
27 [talent agents] and to regulate such activity for the protection of  
the public, a contract between an unlicensed artists' manager and

1 an artist is void. Buchwald v. Superior Court, supra, 254  
2 Cal.App.2d 347. Consequently, the management agreement between  
3 Vainshtein and Kilcher is void *ab initio* and is unenforceable for  
4 all purposes. Waisbren v. Peppercorn Inc., supra, 41 Cal.App. 4<sup>th</sup>  
5 246; Buchwald v. Superior Court, supra, 254 Cal.App.2d 347. .

6 24. Labor Code §1700.23 provides that the Labor  
7 Commissioner is vested with jurisdiction over "any controversy  
8 between the artist and the talent agency relating to the terms of  
9 the contract," and the Labor Commissioner's jurisdiction has been  
10 held to include the resolution of contract claims brought by artist  
11 or agents seeking damages for breach of a talent agency contract.  
12 Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861,  
13 Robinson v. Superior Court (1950) 35 Cal.2d 379.

14 25. Similarly, the Buchwald, court reasoned, The Act is  
15 broad and comprehensive. The Labor Commissioner is empowered to  
16 hear and determine disputes under it, including the validity of the  
17 artists' manager-artist contract and the liability, if any, of the  
18 parties thereunder. Buchwald, supra. at 357.

19 26. In Bank of America N.T.S.A. v. Fleming No. 1098 ASC  
20 MP-432, the special hearing officer held that he has broad  
21 discretion in fashioning a remedy that is appropriate under the  
22 facts of the case. Consequently, the contract between the parties  
23 is void *ab initio*, but in recognition of Vainshtein's minimal  
24 illegal activity, the lack of mal intent, and the benefit conferred  
25 upon Kilcher, it would be inequitable and a windfall for Kilcher  
26 to require disgorgement.  
27

