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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

BILLY BLANKS, JR., an individual, SHARON CATHERINE BLANKS, an individual, and CARDIOKE, INC., a California Corporation, Petitioners, vs. ANTHONY P. RICCIO, an individual, Respondent.	CASE NO. TAC 7163 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing on July 17, 2008 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioners BILLY BLANKS, JR, an individual, SHARON CATHERINE BLANKS, an individual, and CARDIOKE, INC., a California Corporation, appeared represented by Charles M. Coate, Esq. of Costa, Abrams & Coate. Petitioners BILLY BLANKS JR. and SHARON CATHERINE BLANKS are hereinafter collectively referred to as "Petitioners." Respondent ANTHONY P. RICCIO, an individual (hereinafter,

referred to as "Respondent"), appeared and was represented by Walter B. Batt of Law Office of Walter B. Batt.

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. Petitioners are musical performers and residents of California. They are also known as "The Blanx" and perform Top 40 / Rock and Soul. In addition to performing music, both Petitioners also act, write, and dance.

2. Respondent is also a resident of California. At no time relevant to these proceedings has Respondent been a licensed talent agent in the State of California.

3. Respondent began representing Petitioners as their manager in June, 2006. The parties, who had been friends for a number of years prior to deciding to work together, agreed that Respondent would assist Petitioners in obtaining a record deal and other entertainment opportunities in television, film and theater. At some point, Petitioner BILLY BLANKS, JR. drafted an *Informal Management Agreement* which was never executed by the parties. Nonetheless, Petitioners paid Respondent a 10% commission on an animated film they allege Respondent negotiated on behalf of Petitioner SHARON CATHERINE BLANKS.

4. In October, 2006, the parties agreed to form a partnership for the purpose of marketing and distributing a fitness program known as "Cardioke," which the parties jointly created. Cardioke is described on Petitioners' website as a fitness program that combines Petitioners' cardio workout with a Karaoke screen. At the commencement of the partnership, the parties agreed that Respondent would act as a silent partner and would be entitled to a 30% interest in the partnership. Petitioner BILLY BLANKS, JR. drafted a *Billy Blanks Jr's Cardioke® Silent Partnership Informal Agreement*, but, like the *Informal Management Agreement*, the parties failed to execute the partnership agreement.

5. In early 2007, Respondent, not feeling he had the experience to continue to manage Petitioners' careers, referred them to Ron DeBlasio, an experienced Personal

Manager. Mr. De Blasio began representing Petitioners in connection with Cardioke in February, 2007. Around the same time, Creative Artist Agency (CAA) also began to represent Petitioners as their agent, also in connection with their Cardioke project. As a silent partner in Cardioke, Respondent continued to be included in the prospective entertainment opportunities related to Cardioke, although with less frequency. In fact, Respondent testified that he was not kept apprised of CAA negotiations which ultimately led to investor Razor & Tie Direct, LLC, dba Razor & Tie Entertainment contracting to produce and distribute the video for Cardioke.

6. Petitioner BILLY BLANKS, JR. testified that after he and his wife signed the "Exclusive Video Production Agreement" with Razor & Tie Entertainment for distribution of the Cardioke videos, they had a meeting with Respondent to discuss their dissatisfaction with his lack of performance in promoting Cardioke. Petitioner BILLY BLANKS, JR. admitted that he and his wife were finally able to afford to have an attorney review the draft of the *Billy Blanks Jr's Cardioke® Silent Partnership Informal Agreement* he had previously prepared and had been advised not to sign the agreement. Consequently, when Petitioners met with Respondent, they proposed that any partnership agreement entered into between the parties provide Respondent with only a 10% interest. Petitioner BILLY BLANKS, JR. testified that he felt 10% was more than fair for Respondent's role in "dreaming up the idea" and suggesting the name, "Cardioke." Petitioners also presented Respondent with a check for $900.00 reflecting 10% of the first advance check from the Razor & Tie Entertainment contract at this meeting. Although Respondent acknowledged receiving the check on Wednesday, September 19, 2007, he testified that, on advice of his attorneys, he has not cashed the check.

7. The parties all testified that the aforementioned meeting was their last meeting before Respondent filed a Breach of Contract action in the Los Angeles Superior Court on December 10, 2007. Nine days after Respondent filed his superior court action, Petitioners filed the instant Petition for Determination of Controversy alleging that Respondent violated the Talent Agencies Act ("Act") by procuring employment and

entertainment opportunities for them without being licensed as a talent agent. Petitioners allege that Respondent unlawfully procured and/or negotiated the following employment / entertainment opportunities for Petitioners in violation of the Act: (1) Burnlounge; (2) the Computer Animated Film "FOODFIGHT;" (3) an Appearance on the "Ellen DeGeneres Show;" and (4) Meetings with Beach Body and Guthy-Renker for the purpose of distributing and promoting "Cardioke."

Burnlounge

8. Respondent testified that Burnlounge was a network of marketing companies where artists would sell their music online and cut out the middleman. Registration on Burnlounge cost between $400-$500. Artists were promised 50 cents per each song sold/downloaded. Respondent testified that he helped Petitioners register on Burnlounge and even fronted the $400-$500 registration fee. Respondent admitted that on Burnlounge's recommendation, he arranged for Petitioners to perform live at four unpaid events sponsored by Burnlounge in order to get publicity and eventually sell their songs which were posted on Burnlounge's website. Through these promotional events, Petitioners sold 114 individual songs on Burnlounge. It is undisputed that Burnlounge turned out to be a scam and was eventually shut down by the federal government. As such, the parties never received any monies from their involvement with Burnlounge.

"FOODFIGHT"

9. FOODFIGHT was a computer animated film produced by Threshold Entertainment. Petitioner SHARON CATHERINE BLANKS testified that in the Fall of 2006, she performed the "motion capture" for the film which is an animated character's movements. Petitioner SHARON CATHERINE BLANKS also testified that Respondent negotiated this entertainment opportunity for her and hence, received a 10% commission check as payment for his services. Respondent, on the other hand, testified that Petitioner SHARON CATHERINE BLANKS got this opportunity on her own through contacts made by her husband who had previously performed work on the film. Respondent testified that he accepted the commission check despite not having procured the

employment because Petitioners insisted he be paid 10% as their manager.

The Ellen DeGeneres Show

10. Petitioners appeared on the Ellen DeGeneres show in early 2007 to promote Cardioke. The show aired on February 12, 2007. Petitioner BILLY BLANKS, JR. testified he was paid at union scale for this appearance. His wife, Petitioner SHARON CATHERINE BLANKS, also appeared but was not paid. Petitioners testified that Respondent procured the appearance on their behalf. While Respondent denied at the hearing that he contacted anyone on the show and denied that he negotiated any of the terms related to this appearance, this testimony was in direct conflict with his Response to the instant Petition as well as an allegation made in Respondent's superior court action. In Paragraph 17 of the Response to the instant Petition, Respondent states: *"Respondent and Petitioner continued to work together and through Respondent's personal efforts, personal costs and diligence, he was able to subsequently negotiate and place Petitioners without any re-numeration to Petitioners or Respondent on the "Ellen Degeneres Show" on or about February 2007 to showcase and promote the packaged concept now called Cardioke."* Additionally, in his Superior Court Complaint for Breach of Contract, Respondent alleges *"Plaintiff [Respondent in this action] while working with Defendants [Petitioners in this action] and through Plaintiff's sole efforts and diligence subsequently negotiated and placed Defendants on the "Ellen Degeneres Show" on or about February 2007 to showcase the packaged concept now called Plaintiff's trademark name Cardioke."*

Meetings with Beach Body and Guthy-Renker

11. Petitioners allege that Respondent attempted to arrange meetings with Beach Body, a video production company and Guthy-Renker, who puts together infomercials and is known for hip hop ads. The purpose of these meetings was to secure investors to support developing Cardioke, that is, to produce and make the first set of videos of Cardioke. The plan was that once the investors were secured, Petitioners would serve as spokespersons for Cardioke and would perform on the videos and infomercials.

Petitioners claim that at their direction, Respondent began setting up these meetings in the Fall of 2006, soon after Cardioke was conceptualized. While Petitioners had an agent, Nancy Abt of the Daniel Hoff Agency, during this time, she was not involved in setting up any of these meetings and was fired by the parties in February, 2007. Petitioners' current manager, Mr. DeBlasio testified that he never made contact with anyone at Beach Body. Respondent explained that he promoted Cardioke because he had a business interest in the company as a silent partner.

LEGAL ANALYSIS

1. Labor Code §1700.4(b) defines "artists" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment." When Petitioners performed as "The Blanx" they were performing as musicians. As musicians, they are considered "artists" within the meaning of Labor Code §1700.4(b).

Respondent claims in his Response to the Petition that Petitioners are not "artists" under the jurisdiction of the Labor Code when they perform as aerobics instructors. In *Styne v. Stevens*, TAC 33-01, (on remand from the California Supreme Court) we were faced with a similar issue. Connie Stevens, a well known entertainer, developed a restorative skin care line known as Forever Spring, Inc., which she personally sold on the Home Shopping Network (HSN) through infomercials. Profits from Forever Spring, Inc. exceeded everyone's expectations. During the first couple of years of selling this skin line on HSN, Stevens regularly compensated her manager, Norton Styne. Payments, however, ceased at some point resulting in Styne filing a breach of contract lawsuit against Stevens seeking more than $4,000,000.00 in unpaid profits. The issue of whether Stevens acted as an "artist" when selling her products on HSN via her infomercials, was raised in the talent agency controversy. In concluding that Stevens'

show-business life and her wholesale business enterprise life were "inextricably interwined," the Labor Commissioner noted that Stevens used her name, personality, charm and charisma to sell the product on television. Additionally, HSN required Stevens to appear on television as a condition of the sale. The Commissioner also noted that a rough script was followed and entertaining stories were told by Stevens during the infomercials.

The evidence in this case establishes that Cardioke was being marketed as Petitioner BILLY BLANKS, JR's Cardioke. Petitioner BILLY BLANKS, JR. is the son of Tae Bo creator Billy Blanks. As such, like Connie Stevens, Petitioner BILLY BLANKS, JR. was selling his name. But, more importantly, Cardioke was being promoted in this case by the parties, including Respondent, for the goal of securing an investor who could assist in creating a video production of Cardioke. It was contemplated by the parties that as part of the video production, Petitioners would be required to perform Cardioke in an infomercial similar to the one Connie Stevens performed in her efforts to sell her product. In fact, when the parties actually succeeded in securing investor, Razor & Tie Entertainment, the video production contract provided that Petitioners would perform as fitness instructors / musicians. Per the Razor & Tie Entertainment contract (and consistent with the parties expectations at all times), the performance on the video infomercial could not be performed by anyone but Petitioners because of their musical talent and exercise experience. While Petitioners might not normally be considered "artists" within the meaning of the Act had they been merely teaching Cardioke classes, the evidence here supports the conclusion that Petitioners were required to perform in an infomercial for distribution of their video while capitalizing on the well known Blanks name. Accordingly, like the circumstances involving Connie Stevens, Petitioners are considered "artists" within the meaning of the Act.

2. Labor Code §1700.4(a) defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring,

offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter." "To 'procure' means 'to get possession of: obtain, acquire, to cause to happen or be done: bring about.'" *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628.

3. 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." It is undisputed that Respondent has never been licensed as a talent agency in the State of California.

4. The evidence presented establishes that Respondent procured all four of the engagements at issue. Specifically, Respondent admitted that he was responsible for arranging Petitioners' live performances in connection with Burnlounge. This procurement is in violation of the Act despite the fact that Petitioners did not get paid for these promotional performances. "The Act regulates those who engage in the occupation of procuring engagements for artists. The Act does not expressly include or exempt procurement where no compensation is made." *Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1471. Thus, the fact that Respondent did not get paid a commission because Petitioners did not get paid to perform does not exempt Respondent from the Act's licensure requirements. Additionally, procurement of these promotional performances does not fall within the limited recording contract exemption since Burnlounge was not a record label and no evidence was presented that the purpose of these promotional performances was to secure a recording contract but instead, to sell individual songs.

5. We also find that the evidence presented supports a finding that Respondent negotiated the FOODFIGHT engagement on behalf of Petitioner SHARON CATHERINE BLANKS. Respondent's contention that he did not provide any services in return for the 10% commission that he collected on this engagement is unconvincing.

6. While Respondent testified that he did not procure the Ellen DeGeneres performance, as previously recognized, his Response to this Petition as well as his Complaint for Breach of Contract filed in the Los Angeles Superior Court indicates

otherwise. In both pleadings, Respondent openly and admittedly stated that through his personal efforts, personal costs and diligence, he was responsible for negotiating and placing Petitioners on the Ellen DeGeneres show. (See *Nathaniel Stroman pka Earthquake v. NW Entertainment, Inc. dba New Wave Entertainment, et al.*, TAC 38-05 (July 11, 2006) where the Labor Commissioner held that statements made by personal manager in pleadings filed in the Superior Court constituted admissions of procurement in violation of the Act since manager was not a licensed talent agent).

Even though this appearance was made for the purpose of promoting Cardioke, a program in which Respondent was a silent partner and had a business interest in promoting, Respondent's role as Petitioners' manager cannot be so easily and conveniently separated for purposes of avoiding liability under the Act as Respondent somehow suggests. Simply put, Respondent was wearing two hats, one as Petitioners' Manager and one as Petitioners' silent partner in the Cardioke joint venture. From the inception of Cardioke until the time Respondent stopped managing Petitioners in early 2007, those two roles were intertwined. Because, in addition to being Petitioners' business partner on Cardioke, Respondent also served as their manager and unlawfully negotiated the Ellen DeGeneres appearance, he is in violation of the Act.

We are not ruling today that anyone who enters into a business relationship with an artist and who then promotes the joint product/service that inevitably involves entertainment efforts by the artist/business partner, violates the Act. Rather, we are holding that in a situation such as the present one, where the business partner has *also* agreed to be the artist's manager, there will be a violation of the Act if the manager is procuring employment without a license and without working at the request of and in conjunction with a licensed agent. This conclusion is supported by the express language of the Act which does not exempt "business partners" from the licensing requirements.

7. Lastly, we find that the documentary evidence presented at the hearing supports a finding that Respondent, at Petitioners' behest, set up meetings and attempted to procure financing for Cardioke with Beach Body and Guthy-Renker. The emails produced as

evidence indicate that production of the Cardioke videos would require future performances by Petitioners. As such, these meetings constitute attempts to procure entertainment engagements for Petitioners, whom we have already ruled, are considered "artists" within the meaning of the Act when promoting Cardioke.

8. In accord with *Marathon Entertainment Inc. v. Rosa Blasi* (2008) 42 Cal.4th 974, Respondent urges us to apply the doctrine of severability if we find that Respondent violated the Act in any of the four identified engagements at issue herein. While the *Marathon* court recognized that the Labor Commissioner may invalidate an entire contract when the Act is violated, the Court also left it to the discretion of the Labor Commissioner to apply the doctrine of severability to preserve and enforce the lawful portions of the parties' contract where the facts so warrant. As the Supreme Court explained in *Marathon:*

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

Marathon, supra at p.996.

In this case, we find that Respondent unlawfully attempted and actually procured employment / entertainment opportunities for Petitioners without being licensed as a talent agent. We also find that although the parties failed to execute the *Informal Management Agreement* prepared by Petitioner, the parties nonetheless operated under an oral management agreement. While the term of this oral management agreement was brief, (from June 2006 through January 2007), Respondent presented no compelling

evidence that the duties Respondent primarily performed during this period of time were of the type typically considered "managerial" such as providing career advice, counsel and coordinating the development of Petitioners' careers. Instead, the evidence presented establishes that during this brief period, Respondent was engaged in procuring employment for Petitioners and that Respondent unlawfully procured employment on the four engagements alleged by Petitioners. Consequently, we find that the central purpose of this oral management agreement is tainted with illegality and cannot be enforced. In such a case, severance is not appropriate. The oral management agreement is therefore deemed void *ab initio*.

Petitioners seek an order of disgorgement of all paid commissions. Yet, the only commission paid to Respondent during the management term was in connection with Petitioner SHARON CATHERINE BLANKS' performance on FOODFIGHT. While Respondent received this commission payment within one year prior to the filing of the Petition, the actual violation of procurement appears to have been committed more than one year prior to the filing of the Petition. As such, Petitioners are not entitled to disgorgement of this commission.

We make no determination regarding the effect of this decision on the *Billy Blanks Jr's Cardioke® Silent Partnership Informal Agreement* which the parties also failed to execute nor any oral partnership agreement between the parties in connection with Cardioke. The Petition to Determine Controversy filed by Petitioners did not present that question for determination by the Labor Commissioner and Petitioners did not argue at the hearing that we dismiss this separate partnership contract.

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ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the oral management agreement entered into between Petitioners and Respondent in June, 2006 is deemed void *ab initio*. Petitioners have no liability thereon to Respondent, and Respondent has no rights or privileges thereunder.

DATED: January 9, 2009

Respectfully submitted,

By: _____
EDNA GARCIA EARLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: January 9

By: _____
ANGELA BRADSTREET
State Labor Commissioner