BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

ARSENIO HALL, Petitioner, v. X MANAGEMENT, INC. Respondent	) TAC No. 19-90)) DETERMINATION ON PETITION) OF ARSENIO HALL))))))

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, State of California by Jack Allen, attorney for the Division of Labor Standards Enforcement, serving as Special Hearing Officer under the provisions of Labor Code Section 1700.44 of the State of California.

Petitioner Arsenio Hall appeared through Gang, Tyre, Ramer & Brown, Inc. by Howard King and Kevin S. Marks and Respondent X Management, Inc. (hereinafter "X Management") appeared through Katten Muchin Zavis & Weitzman by Howard L. Weitzman and David S. Bass.

Petitioner alleged that he was an artist as defined in Labor Code Section 1700.4(b). He alleged that he entered into a Personal Management Agreement dated September 1, 1987 with respondent X Management. He alleged that subsequent to September 1, 1987, respondent X Management engaged in numerous acts of procuring and attempting to procure employment or engagements through August 2,

1990 when petitioner terminated the Personal Management Agreement. He further alleged that respondent X Management at all times subsequent to September 1, 1987 acted as a talent agent without being licensed as required by Labor Code Section 1700.5. Petitioner requested that the Labor Commissioner determine whether or not the allegations were true, and if so, determine that the Personal Management Agreement is void and that respondent X Management be required to disgorge and return all fees and other monies collected from the petitioner or his employers related to his activities in the entertainment industry. Petitioner also challenged the right of respondent X Management to respond to the petition since Mr. Mark Lipsky, a 50% co-owner did not consent to the defense of X Management to the petition.

Respondent X Management answered denying that it acted as a talent agency or that it engaged in the procuring or attempting to procure employment for the petitioner in violation of the Talent Agencies Act and alleged 16 affirmative defenses.

Respondent X Management filed a motion to stay the proceedings before the Labor Commissioner pending the outcome of cases that X Management had filed in both the Los Angeles Superior Court and the U.S. District Court for the Central District of California challenging the jurisdiction of the Labor Commissioner to hear the controversy. The Hearing Officer denied the motion because it was improbable that X Management would succeed in either case.

During the hearing, the petitioner had 10 witnesses testify on his behalf and introduced 64 exhibits into evidence. The respondent

called no witnesses and introduced no exhibits.

Evidence, both oral and documentary having been introduced, and the matter having been briefed and submitted for decision, the following determination is made:

It is the determination of the Labor Commissioner:

1. That the petitioner was and is an artist as defined in Labor Code Section 1700.4(b).

2. That during the period of September 1, 1987, when the petitioner and the respondent entered into a Personal Management Agreement, until August 2, 1990, when the petitioner terminated said agreement, respondent X Management through its principles Robert Wachs and Mark Lipsky, engaged in and carried on the occupation of a talent agency as defined in Labor Code Section 1700.4, in the State of California, by either procuring or attempting to procure employment and engagements for the petitioner without being licensed as such as required by Labor Code § 1700.5.

3. That on at least eight occasions during the year immediately preceding the filing of the petition on August 8, 1989, respondent X Management engaged in and carried on the occupation of a talent agency on behalf of the petitioner.

4. That such actions by respondent X Management, between August 9, 1989 and August 8, 1990, did violate provisions of the Talent Agency Act ("Act") and that the violations were knowing and willingly committed.

5. That the Personal Management Agreement entered into on September 1, 1987 and any written or oral amendments thereto are

void and unenforceable and that neither party has any obligations or liabilities thereunder. Respondent X Management is not entitled to any further commissions.

6. That respondent X Management engaged in an act of self-dealing and overreaching while acting as an artist's manager and talent agent for the petitioner during the one year period prior to August 8, 1990, which was one of a number of such acts that respondent X Management engaged in while acting as an artist's manager and talent agent for the petitioner.

7. That respondent X Management is not entitled to compensation of any form received from the petitioner after August 8, 1989 which arose out of the Personal Management Agreement entered into on September 1, 1987.

8. That respondent X Management received $2,148,445.78 in compensation after August 9, 1989 from petitioner which arose out of the Personal Management Agreement entered into on September 1, 1987, which the petitioner is entitled to and which respondent X Management is ordered to pay to petitioner.

9. That respondent X Management is not precluded from responding to the petition.

10. That the Labor Commissioner does have jurisdiction over the controversy.

11. That the petition on its face states a valid claim upon which relief can be and is granted.

12. That the relief sought in the petition is not barred by the statute of limitations set forth in California Labor Code

§1700.44 (c) since it is determined that respondent X Management engaged in violations of the Act during the year immediately prior to August 8, 1990, and the relief sought in the petition requesting that the Labor Commissioner require the respondent to disgorge all commissions earned from the inception of the Personal Management Agreement on September 1, 1987, is within the power of the Labor Commissioner if the monies paid or earned were the fruits of an illegal contract.

13. That as a matter of law, the petitioner is not estopped from claiming the relief sought in the petition even if many of acts were taken at his express request, encouragement, and insistence of the petitioner and with his full knowledge of such acts, nor is he estopped even if he was fully informed of the acts complained of, and never objected thereto, or because any of the acts were taken for the sole and exclusive benefit of petitioner. In fact, not all acts complained of were taken at the express request of the petitioner, nor was he fully informed of all of said acts, and he did object to some of the acts complained of. In fact, none of the acts complained of were for the sole and exclusive benefit of the petitioner since respondent X Management stood to profit from all acts complained of.

14. That as a matter of law, the petitioner did not waive any right to complain of the acts of respondent X Management as alleged in the petition even if, as the respondent asserts, the acts were taken at the express request of petitioner and with his full knowledge, and that he was fully informed of said acts, and never ob-

jected thereto. Moreover, not all acts complained of were taken at the express request of the petitioner, nor was he fully informed of all of said acts as alleged by the respondent, and he did in fact, object to some of the acts complained of.

15. That as a matter of law, the defenses of laches and unclean hands do not apply since the petition herein is based on a statute and is not an action in equity; and further, absent a Legislative grant of authority, the Labor Commissioner does not have the power to invoke equitable principles.

16. That notwithstanding that the defenses of laches and unclean hands do not apply as a matter of law, there was no laches or unclean hands on the part of the petitioner.

17. That as a matter of law, the defense of unjust enrichment does not apply since the petition is a request that the Labor Commissioner exercise the police power of the State of California pursuant to Labor Code Section 1700.44 and not an action pursuant to the common law of contracts. Notwithstanding the determination that the defense of unjust enrichment does not apply, the Commissioner finds there will be no unjust enrichment on the part of the petitioner.

18. That as a matter of law, the defense that the law disregards trifles as stated in Civil Code Section 3533 does not apply to the exercise of the police power by the State of California.

19. That as a matter of law, the common law contract theory of *quantum meruit* does not apply to a statutory violation.

20. That notwithstanding that as a matter of law the theory

of *quantum meruit* does not apply, the reasonable value of the services rendered by X Management to petitioner from September 1, 1987 to August 3, 1990 did not exceed $400,000.

21. That as a matter of law, the defense that the petitioner at all times relevant consented to and was fully informed of any act complained of is not a valid defense since, as a matter of law, the petitioner cannot consent to any violation of Labor Code §1700.4.

22. That since the agreement is void *ab initio,* the provisions of the Personal Management Agreement providing for the arbitration of all disputes regarding the terms of the agreement do not deprive the Labor Commissioner of jurisdiction to hear the petition and make an award in the enforcement of the provisions of the Act. See *Buchwald v. Superior Court* (1967) 254 Cal.App.3d 347, 360, 62 Cal. Rptr. 364.

I. STATEMENT OF FACTS

ARSENIO HALL. Mr. Hall is a famous and very successful host of The Arsenio Hall late night show, a motion picture actor, and a comic. He is also the producer of The Arsenio Hall Show.

X MANAGEMENT, INC. X Management is a California Corporation incorporated in 1987 for the sole purpose of managing Arsenio Hall. Until late in 1989, X Management had three co-owners, Robert Wachs, Mark Lipsky, and Eddie Murphy, the actor. When in late 1989, X Management began to generate large profits as the result of its success in procuring employment for Mr. Hall, Mr. Murphy with-

drew from X Management because he did not want to become enriched from the efforts of his good friend, Arsenio.

ROBERT WACHS. Mr. Wachs was and is the president and co-owner of 50% of X Management. Mr. Wachs is a graduate of William and Mary College and of Harvard Law School where he graduated in 1964. He was admitted to the New York State Bar the same year. He began his law career by clerking for a Justice of the United States Court of Appeals, Second Circuit. He then went to work for Paul, Weiss, Rifkin, Wartin and Garrison, a prestigious New York law firm, in which he specialized in entertainment law. His work included reviewing contracts for persons involved in the entertainment industry. He left the firm in 1972 to be on his own where he continued to specialize in entertainment law until he left the practice of law in 1981. During that time he represented writers, actors, producers, literary agents, authors, and comedians. Mr. Wachs also began his career as a personal manager in approximately 1970 while in New York.

While still practicing law, he acquired interests in two nightclubs called The Comic Strip, one located in New York and one in Fort Lauderdale, Florida. It was in the New York club that he met Eddie Murphy and later Mr. Hall.

In 1985, Mr. Wachs moved to California and opened offices on the Paramount lot to work on an Eddie Murphy movie. Although he was still a member of the New York State Bar at the time of the hearing Mr. Wachs had not sought admission to the California State Bar.

MARK LIPSKY. Mr. Lipsky is a personal manager for Eddie Murphy and a co-owner of 50% of X Management. At the time of the hearing, he was also the chief financial officer and administrative officer of Arsenio Hall's companies, a position he had held since December 1990, and for which he was being paid $500,000 annually.

Mr. Lipsky is a certified public accountant in New York where he was certified in either 1969 or 1970. He was employed by the New York city firm that eventually became known as Rochlin, Lipsky, Stoler and Company. During the late 1970's, he became the business manager for several members of the Saturday Night Live Show including John Belushi and Dan Ackroyd. Through his connections with the Saturday Night Live Show, he met Eddie Murphy in April 1982, when he became his accountant. At that time he met Robert Wachs who was one of Eddie Murphy's personal managers. Mr. Lipsky also began doing personal accounting for Mr. Wachs at this time. On January 1, 1987, he became a personal manager of Eddie Murphy along with Mr. Wachs and a third man.

When he became a personal manager, he also became a stockholder in Eddie Murphy Productions along with Eddie Murphy, Robert Wachs and the other manager. He also became a stockholder in Eddy Murphy Television with the same principals. Until Mr. Lipsky became a personal manager for Mr. Murphy, he had no prior experience as a personal manager.

A. The Formation of the Personal Management Agreement.

Before 1980, Mr. Hall worked in comedy clubs in Chicago. It

was during these performances that his talents were recognized and he was brought to Los Angeles. His career began expanding and he began appearing on various television shows such as the Tony Tenille show, the Mike Douglas show, the Merv Griffin show, and eventually the Johnny Carson show. He became a regular on the Solid Gold show with Paramount. When Joan Rivers was fired by Fox Studios from her late night television show in about June of 1987, Mr. Hall was hired as her temporary replacement.

At about the same time, Mr. Hall began discussions with Mr. Wachs about retaining Mr. Wachs to manage his career. Mr. Hall had known Mr. Wachs casually before 1987 principally through his good friend Eddie Murphy. Because Mr. Hall's career was blossoming and he felt it more than he could control, at the suggestion of Eddie Murphy, Mr. Hall contacted Mr. Wachs.

The discussions resulted in Mr. Hall entering into a Personal Management Contract with X Management in September 1987. During the discussions, Mr. Wachs convinced Mr. Hall that by signing with him that he would get the best deal available. It was Mr. Hall's understanding that Mr. Wachs would provide all the services he needed including Mr. Wachs being his lawyer. Mr. Wachs had told Mr. Hall of his extensive experience in entertainment law and Mr. Hall was aware that Mr. Wachs provided legal counsel and all management services to his friend Eddie Murphy. While they were discussing Mr. Wachs becoming Mr. Hall's manager, Mr. Wachs would meet with Mr. Hall in his dressing room during his work on the Fox Late Show and Mr. Wachs would show Mr. Hall problems in contracts that

had been presented to him. Mr. Wachs told Mr. Hall that if he chose Mr. Wachs as his personal manager he would be getting the best deal because Mr. Wachs was a lawyer and thus better qualified to be his manager. What Mr. Wachs did not tell Mr. Hall was that he was not licensed to practice law in the State of California.

Based on his discussions with Mr. Wachs, Mr. Hall expected that as part of the duties Mr. Wachs would undertake to find employment for him. Mr. Hall recalled a conversation with Mr. Wachs as follows:

> "You don't need the William Morris Agency [a large and well known talent agency which represented Mr. Hall before he retained X Management]. I can function as your agent. I am a lawyer. And I can guide your career as a personal manager."

One result of their discussions was that Mr. Wachs convinced Mr. Hall that he was the one person Mr. Hall could trust and Mr. Hall placed his complete trust in Mr. Wachs. Mr. Hall became very close to Mr. Wachs, closer than he was to Eddie Murphy. As Mr. Hall described it: "Bob Wachs was like a father to me." In his testimony, Mr. Wachs agreed with Mr. Hall's characterization of their relationship adding that they became "almost inseparable."

Consequently, when Mr. Wachs presented the Personal Management Agreement to Mr. Hall in September, 1987, Mr. Hall signed it without reading it. The Agreement was presented to Mr. Hall in Mr. Wachs' office. No one else was present. Mr Hall asked Mr. Wachs if he should he get a lawyer to look over the contract. Mr. Wachs replied:

"It's a standard contract, and what's most important is that you're happy. This is a standard management contract. I want to go out and see what I can do for you, and I would like to have this contract of management signed."

Because Mr. Hall placed so much trust in Mr. Wachs, he believed that it would be insulting to Mr. Wachs to question him any further about the contract so he signed it without reading it. The meeting was brief and the only question Mr. Hall asked Mr. Wachs was how much was the commission. He was told 15 percent.

Mr. Hall did not have a lawyer and had never had a lawyer to advise him on his business affairs. Therefore, it never occurred to him to have counsel of his own choice review the Personal Management Agreement.

Mr. Wachs had his own personal attorney draft the Agreement. The Personal Management Agreement is a type of agreement often used by personal managers, and is frequently the subject of controversies submitted to the Labor Commissioner for determination involving personal managers acting as talent agents.

However, Mr. Hall testified that Mr. Wachs encouraged him not to rehire the William Morris Agency or another talent agent because Mr. Wachs was going to take care of Mr. Hall. Mr. Lipsky supported Mr. Hall's testimony. The evidence in the case showed that X Management did just that — procuring very lucrative contracts for Mr. Hall both as a television night show host and as a motion picture actor, as well as several personal appearance fees and product endorsement contracts.

That X Management would only receive commissions if Mr. Hall was employed was a powerful stimulus to encourage X Management to

do one of two things: 1) X Management had to assure Mr. Hall hired a talent manager to procure employment; or, 2) X Management had to do the procuring itself. Otherwise, if there was no employment, there would be no commissions.

According to Mr. Hall and Mr. Lipsky, neither X Management nor either of its principals ever suggested to Mr. Hall that he hire a talent agent. Mr. Wachs informed Mr. Hall that he could do a better job than other talent agents in negotiating contracts. It was not in Mr. Wachs' self interest for Mr. Hall to hire a talent agent. Had Mr. Wachs advised Mr. Hall before signing the Personal Manager Agreement that he had to hire a talent agent for which Mr. Hall would normally have to pay a ten percent commission; and hire an attorney to review his contracts, Mr. Hall might not have wanted to retain X Management at a 15% commission. Further, Mr. Wachs had a self-interest in procuring employment for Mr. Hall. It was to his advantage to be Mr. Hall's talent agent and negotiate his contracts. This opportunity placed Wachs in a position to negotiate deals that benefitted him at the expense of Mr. Hall. As will be described later, Wachs was successful in doing so on one occasion and except for Mr. Lipsky, would have done so a second time.

B. Procurement and Attempted Procurement of Employment by X Management

X Management committed numerous violations of the Talent Agencies Act between September 1, 1987, and the filing of the petition herein on August 8, 1990 in which X Management engaged in the procurement of or attempted procurement of employment on behalf

of Mr. Hall without having a license from the State to do so. The violations listed below are divided into two periods, the first being the period from September 1987 to August 1989, and the second from August 1989 until August 1990, the year before the filing of the petition in this case. The first period is relevant to show that the violations that occurred in the second period or statutory period, were part of a pattern of conduct on the part of X Management of illegally procuring employment in violation of the Talent Agencies Act.

1. SEPTEMBER 1987 TO AUGUST 1989 PROCUREMENT ACTIVITIES.

a. The Fox Square Productions Contract.

X Management did not waste any time after the signing of the Personal Management Agreement in procuring employment for Mr. Hall. Mr. Wachs initiated and pursued negotiations with Fox Square Productions for Mr. Hall to serve as the host of "The Late Show" (a nightly talk show that was broadcast on the Fox Network) for a minimum of eight weeks. Sixteen days after the signing of the Personal Management Agreement, the Fox Productions agreement was signed. A Fox Productions letter agreement addressed to Mr. Wachs stated the following:

> "This will confirm the basic terms of the agreement we've reached regarding Arsenio Hall's services as host of THE LATE SHOW. . ."

Prior to X Management negotiating the new agreement, Mr. Hall was receiving $1,000 a night for each appearance as the host of The Late Show and his appearances were irregular. Because of the ne-

cessity of acquiring a new wardrobe for each appearance, Mr. Hall was concerned that he at least break even. He told Mr. Wachs of his concerns and Mr. Wachs promised him that he would get more. Mr. Wachs suggested that he could get more money and also possibly a whole week of appearances and to let him handle it.

Mr. Wachs was successful. The agreement provided that Mr. Hall would receive compensation of $10,000 a week in salary and $2,000 a week in a wardrobe allowance. Presumably, X Management received at least $1,500 each week as provided in the Personal Management Agreement.

b. The Paramount Movie Contract.

Almost as fast as X Management negotiated the Fox contract, it also negotiated a contract with Paramount Pictures Corporation for Mr. Hall to act in a motion picture, starring Eddie Murphy, then known as "The Quest" (later entitled "Coming To America"). The contract was signed on September 30, 1987. Both Mr. Wachs and Mr. Lipsky participated in the negotiations.

The wheels were set in motion for the Paramount movie contract before the signing of the Personal Management Agreement. During one of his guest appearances on The Late Show, several people from Paramount visited the set and expressed an interest in meeting with Mr. Hall. Mr. Hall discussed this with Mr. Wachs who told him:

> "I know these guys. I've negotiated with these guys, and I can — no one can deal with them better than me."

The deal that X Management negotiated for Mr. Hall provided that he would receive $100,000 for his first picture, $300,000 for the second picture plus 2½% of the net profits, and $1,000,000 for

his third picture and 5% of the net profits. Paramount agreed that if Mr. Hall would provide his services exclusively to them as a motion picture actor, it would pay him $400,000 at the beginning of each year it exercised its right to his exclusive services. As of the date of the hearing, Mr. Hall had worked on two films. Based on the Personal Management Agreement, X Management should have received at least $120,000 in commissions by September 1989.

c. The Paramount Television Show.

While Mr. Hall was engaged in the filming of "Coming to America," Paramount expressed interest in having Mr. Hall host a late night television show. On behalf of X Management, Mr. Wachs and Mr. Lipsky conducted extensive negotiations lasting from February until July, 1988, to consummate a contract. The contract resulted in the "Arsenio Hall Show."

The contract provided that Mr. Hall receive a weekly salary of $50,000 and a percentage of any profits that Paramount derived from the commercial exploitation of the Arsenio Hall Show. Depending on the strength of the ratings, the profits could vary between 25% and 45%.

Mr. Wachs also negotiated a provision for himself and Mr. Lipsky that each be paid $5,000 a week as "Production Executives" and that their names appear in the credits for the Arsenio Hall Show. Mr. Wachs negotiated this payment to himself after Mr. Hall objected to Mr. Wachs, Mr. Lipsky, and Eddie Murphy forming a company called Eddy Murphy Productions and having that company designated as the Executive Producer of the Show. Mr. Hall did not become

aware that Mr. Wachs and Mr. Lipsky were being paid $5,000 a week as Production Executives until eight months later. When he found out about the arrangement, Hall objected because the money came out of his show's budget and in effect took money out of his pocket. He particularly objected because neither Mr. Wachs nor Mr. Lipsky had any experience as production executives and neither provided any services to his show. As a result, Mr. Wachs and Mr. Lipsky stopped taking pay as production executives, however, they still had their names shown as credits on the show. It was at this point that relations between Mr. Wachs and Mr. Hall became strained.

2. AUGUST 1989 TO AUGUST 1990 PROCUREMENT ACTIVITIES.

a. New Paramount Movie Contract.

The Arsenio Hall Show had enjoyed considerable success by the spring of 1990. As a result, Columbia Pictures called Mr. Wachs expressing interest in doing a film with Mr. Hall. Mr. Wachs was not interested. Mr. Lipsky suggested to Mr. Hall that he should seek to capitalize upon this success by seeking a new film contract. Mr. Lipsky felt that because of the success of the Show with Paramount that Mr. Hall had tremendous bargaining leverage with Paramount. Mr. Lipsky felt that Mr. Hall should test other waters to see whether Mr. Hall could get a better deal at another studio. Mr. Wachs opposed this because if Mr. Hall went to work at another studio, it would mean that Mr. Hall would have to have a separate office at another studio. This would mean that Mr. Wachs could not combine all the offices as he had done at Paramount, us-

ing offices that Paramount provided for Eddie Murphy. However, Mr. Lipsky persuaded Mr. Hall that it was in his best interest to contact other studios and Mr. Hall authorized X Management to do so.

Mr. Wachs then contacted Warner Bros., Disney Studios, and Columbia Pictures. He also asked Paramount Pictures if it was interested in negotiating a new contract for Mr. Hall. Mr. Wachs and Mr. Lipsky on behalf of X Management then had two meetings with executives from Warner Bros. The second meeting resulted in Warner Bros. making an offer for Mr. Hall's services. X Management conducted further negotiations with Warner Bros. over a period of a month.

Subsequently, there were three meetings with executives from Columbia Studios by both Mr. Wachs and Mr. Lipsky. The proposals made by Columbia were not acceptable to X Management and further negotiations were held in which Columbia made two more proposals.

X Management was also negotiating with Paramount and the negotiations were extensive; eventually involving the president of Paramount. X Management was concurrently negotiating with Disney Studios. Even after reaching an understanding with Paramount, X Management continued to negotiate with Disney Studios. There were at least four meetings with Disney representatives including one with the president of Disney. The final deal proposed by Disney was so good that X Management used it to get Paramount to improve its offer.

Ironically at this point, Mr. Wachs wanted Mr. Hall to sign with Disney and Mr. Lipsky wanted Mr. Hall to sign with Paramount.

Disney was proposing $10 million on signing but all of it was recoupable while Paramount was offering $7 million on signing with only $3 million recoupable. Paramount also offered a sixth year on the television contract at $125,000 a week and an increase in the net profit participation.

In a meeting with Mr. Lipsky and Mr. Landsman, X Management's accountant, to discuss the various movie offers, Mr. Wachs made it obvious why he was recommending that Mr. Hall sign with Disney. He stated:

"We have a shaky client here. We gotta think of ourselves."

Mr. Wachs asserted that X Management would receive higher commissions on the $10 million from Disney than it would receive on the Paramount contract. Mr. Wachs had reason to believe that X Management's relationship with Mr. Hall was shaky. This conversation occurred at a time when Mr. Hall had expressed considerable dissatisfaction with the services X Management was performing, particularly with Mr. Wachs who he felt was not giving him the services he felt were necessary. Mr. Hall was also still very unhappy with the deal Mr. Wachs cut for himself and Mr. Lipsky as production executives on his television show.

In addition to attempts to procure employment from Paramount, Columbia, Warner Bros. and Disney, X Management also attempted to procure offers of employment from MCA and Universal Studios. Mr. Hall decided to sign with Paramount and he received a $7 million dollar signing bonus. As its share of the signing bonus, X Management received a commission of $1,050,000.

b. The Coca-Cola Contract.

Because of the success of The Arsenio Hall Show, Mr. Hall was in demand to endorse products and X Management began efforts to procure employment in the line of endorsements. X Management negotiated a $1.5 million contract in the Fall of 1989 for Hall with the Coca-Cola Company to do television and radio commercials and other promotions between Hall, the Arsenio Hall Show, and the soft drink Sprite. Initially Coca-Cola contacted Mr. Wachs and made an offer of $500,000. He rejected the offer and told Mr. Lipsky that no deal was to be made because Mr. Hall was not interested. However, Mr. Lipsky continued to pursue the matter and discussed it with Coca-Cola. He reported the results of his discussion to Mr. Hall who agreed that Mr. Lipsky should look into the matter further. Mr. Lipsky continued negotiations until Coca-Cola raised its offer to $1.5 million which Hall accepted. As a result of the Coca-Cola contract, X Management collected commissions of $225,000.

c. The MTV Video Music Awards Contract.

Mr. Hall had hosted the MTV Video Music Awards in 1988 and 1989. MTV wanted Mr. Hall to host the program again in 1990. MTV contacted X Management to negotiate his appearance which was arranged. Mr. Hall's remuneration for his performance at the Video Music Awards was, in part, promotional consideration and, in addition, a subsidy of $35,000. As a result of the MTV contract, X Management collected a commission of $5,250.

d. Reebok.

In November, 1989, Reebok International Ltd. wanted Mr. Hall to sponsor or endorse a collection of Reebok athletic shoes and apparel. Mr. Wachs and Mr. Lipsky participated in a meeting with representatives of Reebok, which resulted in Reebok extending an offer to Hall involving an up front payment of $800,000, plus royalties. X Management demanded a higher offer. Reebok did not follow up with a higher offer and so the Reebok opportunity was not pursued.

C. Self Dealing and Over Reaching.

The incident in which X Management engaged in self-dealing by Mr. Wachs negotiating a $5,000 a week payment as "Production Executives", at the expense of Mr. Hall, on The Arsenio Hall Show has already been discussed. Because this incident occurred past the one-year period at issue here, it would not have the impact accorded it by this decision in determining the appropriate remedy if it were the only incident of misconduct on the part of X Management. However, it was one of several incidents of misconduct on the part of X Management that show a pattern of such conduct on the part of X Management throughout its' relationship with Mr. Hall.

X Management later engaged in a far more serious act of misconduct and over reaching in October, 1989. At that time, there was a meeting about ten o'clock in the evening at Mr. Wachs' home. Mr. Wachs, Mr. Lipsky, Mark Landsman, and Mr. Hall attended the meeting which was held in the den. During the meeting, which lasted only

about 10 minutes, Mr. Wachs told Mr. Hall that they had an oral agreement that X Management was entitled to 50 percent of all the profits from The Arsenio Hall Show. Mr. Hall called Mr. Wachs a liar and stated that there was no way he would be paying 50% to X Management and that there never was such an agreement. After a shouting match between the two, Mr. Hall walked out.

The meeting occurred shortly after the distribution of the first check including profits from the Show. (The check was for $1,559,568). After the meeting Mr. Lipsky apologized to Mr. Hall and told Mr. Hall that he was not interested in collecting 50%. However, both Mr. Wachs and Mr. Lipsky testified that during 1988, there were discussions with Mr. Hall in which he agreed to split the profits from the Arsenio Hall Show with X Management at 50%. If any such agreement was reached, X Management did not have it reduced to writing and signed by Mr. Hall.[1]

Any such agreement would have to be an amendment to the existing Personal Management Agreement. Since X Management was already receiving 15%, additional consideration was necessary for any such amendment to be valid. There was no evidence that any additional consideration was provided and therefore any such

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[1] One possible explanation for the discussion of 50% was that the alleged conversations took place during the negotiations with Paramount for The Arsenio Hall Show. During those negotiations, X Management, Inc. proposed the forming of a production company to produce the show which was to include Hall, Wachs, Lipsky, and Murphy. The deal called for Paramount to split the profits with 50% going to the production company. Since this was a key point in the deal, it was necessary to get Hall's consent to this point and that may have been the subject of the conversations. Since the deal never went through, that explains why it was never formalized in writing. Later, it appears, Mr. Wachs attempted to distort Hall's consent to split the profits with Paramount into an agreement to share the profits from the Show with Mr. Lipsky and he.

amendment was invalid. Mr. Wachs, as an experienced attorney in contract law, would know that.[2] It is bad faith and overreaching for him to even insist that such an agreement was made, particularly considering Mr. Hall's trust in and reliance on Mr. Wachs as his lawyer. This was another attempted act of self-dealing on the part of X Management. In addition, asking Mr. Hall to give up 50% of the profits of The Arsenio Hall Show is unconscionable, particularly when it is considered how little, if anything, X Management and its principals contributed to the success of the show.

D. The Role of Robert Wachs.

Because Mr. Wachs played such a dominant role in the affairs of X Management and its dealings with Mr. Hall, there is a tendency to ignore the fact that X Management is the defendant and not Mr. Wachs. Yet, because of his dominance, X Management for all practical purposes, was the alter ego of Mr. Wachs.

Eddie Murphy was very interested in having both Mr. Wachs and Mr. Lipsky manage Mr. Hall. X Management was formed as the management vehicle to manage Mr. Hall. Mr. Wachs made it clear in his testimony that he had a low opinion of Mr. Lipsky. He considered Mr. Lipsky as a lightweight, inexperienced, and overawed by the stars in Hollywood when Mr. Lipsky moved to Los Angeles. However,

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[2] Mr. Wachs has filed a separate action in the Los Angeles Superior Court seeking to affirm the purported amendment to the Personal Management Agreement and his share of the profits. It is not the purpose of the Labor Commissioner to determine whether or not such an agreement or amendment was made. It is the purpose of the Labor Commissioner to determine that if such an agreement or amendment was made, whether it was the result of a violation of the Talent Agents Act. The Commissioner does determine that it was a violation and therefore, invalid.

as stated previously, Mr. Lipsky was part of the team at the insistence of Eddie Murphy. Ironically, as the testimony of many witnesses revealed, it was the wisdom of Mr. Lipsky, and not that of Mr. Wachs, that made it possible for Mr. Hall to become the star he is today.

The testimony of all the witnesses at the hearing painted a picture of Mr. Wachs as a conniver, a self-serving deceitful and dishonest person who exploited Mr. Hall and who came very close to bungling his career. On the other hand, Mr. Lipsky came across as an honest and decent individual who wisely put the career and interests of Mr. Hall ahead of his own. As Mr. Hall testified, he was very grateful to Mr. Lipsky for the opportunities that Mr. Lipsky made possible for him despite Mr. Wachs. This loyalty was important to Mr. Hall and after terminating X Management, Mr. Hall hired Mr. Lipsky to assist him at a large salary.[3]

Mr. Wachs recognized that Mr. Hall had star potential when he watched him as a guest host on The Late Show. It was clear that Mr. Hall would be a valuable client. Mr. Wachs already knew that Eddie Murphy wanted Mr. Hall for a starring role in Mr. Murphy's next movie during the summer before he officially became Mr. Hall's personal manager and that Paramount was willing to satisfy its

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[3] X Management, Inc. argues that the testimony of Mr. Lipsky was self-serving and his credibility was very suspect because of his continued relationship with Mr. Hall. However, the Hearing Officer found Mr. Lipsky to be a very credible witness. Much of his testimony, unlike that of Mr. Wachs, was corroborated by other witnesses or documents. It was evident throughout his relationship with Mr. Hall, Mr. Lipsky was honest with Mr. Hall and made every effort to perform the responsibilities of X Management, Inc. to Mr. Hall as best he could. His continued relationship with Mr. Hall was the result of Mr. Hall's appreciation of that honesty and effort rather than any effort by Mr. Hall to use Mr. Lipsky against X Management, Inc.

star. As a result, a contract was executed with Paramount the same month as Mr. Wachs became his personal manager.

Therefore, Mr. Wachs had considerable incentive to persuade Mr. Hall to hire X Management as his personal manager as quickly as possible. As Mr. Lipsky testified, the reason X Management did not suggest that Mr. Hall hire a talent agent was that Mr. Wachs and he did not believe Mr. Hall needed one. X Management had the Paramount contract locked up. There was no reason to share the fees with a licensed Talent Agent. Mr. Lipsky also testified that neither Mr. Wachs nor he thought that Mr. Hall needed an attorney because "Mr. Wachs was his attorney." If Mr. Wachs had sent Mr. Hall to an outside attorney to review the X Management contract, there was a distinct possibility that the lawyer would have told Mr. Hall all the ramifications of the deal that Mr. Wachs did not explain to him, including the fact that X Management could not act as his talent agent and that he would have to pay an additional 10% to an agent.

Nor did Mr. Wachs explain to Mr. Hall the problems inherent in the contract with Fox for The Late Show. Although he obtained good compensation for Mr. Hall, the contract provided that Fox had exclusive rights to Mr. Hall until June, 1988, and gave Fox the right to negotiate with Mr. Hall during that period with the provision that if negotiations failed, he could not work as late night show host for one year afterwards.

This proved to be a difficult problem when Paramount sought Mr. Hall's services as a late night television show host the

following January. Paramount and X Management began negotiations in January with the intention of completing a deal before the National Association of Television Programming Executives (NATPE) convention in March where Paramount wanted to market the Show as a syndication and sign up stations to show it. The negotiations however, were very acrimonious. This acrimony was attributed to Mr. Wachs. He insisted that Paramount guarantee payments up front before Paramount had any opportunity to market the show. This Paramount refused to do. However, Paramount felt that they were close enough to a deal that it sent one of its top executives to the NATPE convention in anticipation that a deal would be reached.

However, during the NATPE convention, Paramount found it necessary to terminate the negotiations. While negotiations were in progress, Mr. Wachs "casually" pulled a copy of the Fox contract from his pocket and handed it to the Paramount negotiators, stating there was a problem. Paramount immediately concluded that it had no right to negotiate with Mr. Hall and could be subject to litigation from Fox if it proceeded any further.

Mr. Wachs was unable to straighten out the problem with Fox and he wanted to end all negotiations with Paramount. Mr. Lipsky however, felt that it was a golden opportunity for Mr. Hall. Paramount still wanted Mr. Hall but did not want to deal any further with Mr. Wachs. When June 1, 1988 passed, the date that Fox had to commence negotiations or lose the option, Paramount and Mr. Lipsky got together and Paramount officials stated that they wanted to meet with Mr. Hall personally. Mr. Lipsky told Mr. Hall

what had transpired and the meeting was arranged. Mr. Wachs had denied previous requests by Paramount to meet with Mr. Hall stating that Mr. Hall did not want to meet with Paramount. Mr. Hall denied ever telling Mr. Wachs he did not want to meet with Paramount.

After that meeting, negotiations went forward and Mr. Hall's highly successful late night talk show materialized. However, Mr. Hall became disenchanted that his positions were misrepresented by Mr. Wachs during the negotiations and that he was not kept informed of what was happening. He felt that if it had been left up to Mr. Wachs, he would never received the golden opportunity that Paramount offered him.

Again when Mr. Lipsky suggested that X Management shop Mr. Hall around for a new motion picture contract, Mr. Wachs did not want to. It was only because of Mr. Lipsky that efforts were made to see what the market offered. Then when the offers were in, Mr. Wachs was most interested in the Disney offer because that would increase his commissions, not because it was best for Mr. Hall.

The irony of the situation is that X Management, as a talent agent, successfully advanced Mr. Hall's career, not because of Mr. Wachs, but because of Mr. Lipsky.

II. ANALYSIS

A. X Management Has Standing To Defend Itself Without The Consent Of The Co-owner.

Mr. Hall argues that X Management has no authority to appear in this controversy because it does not have the consent of Mr. Lipsky, a 50% co-owner of the respondent to make such an appear-

ance. Mr. Hall submits no authorities to support his position.

Neither X Management nor the Hearing Officer were able to find any statutory or case law directly on point. However, applying general principles of corporation law, the better reasoning is that X Management has a fiduciary duty to Mr. Wachs to defend his interests. Further, since Mr. Wachs is the president of X Management, he has the authority to hire counsel and authorize the corporation to appear in the controversy and defend itself. Therefore, the Labor Commissioner determines that X Management has standing to appear and defend itself.

B. Did X Management Act As A Talent Agency?

Respondent X Management admits that it never procured a license to operate as a talent agency from the Labor Commissioner. It argues that it did not at any time act as a talent agency and therefore did not need a license. Petitioner argues otherwise and the Labor Commissioner has determined that X Management was acting as a talent agency in violation of Labor Code Section 1700.5 which provides that:

> "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner."

The Labor Commissioner determines that the X Management operated as a talent agency as defined in Labor Code Section 1700.4:

> "Talent agency, means 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. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."

X Management argues first, that it did not "procure" employment because it did not solicit employment. Second, it argues that it did not act in the "occupation" of procuring employment as defined in Labor Code Section 1700.4. The Labor Commissioner finds neither argument persuasive.

First, X Management argues that all it did was answer calls from the studios or "merely was responding to inquiries" and that it never initiated any contacts with potential employers. However, the evidence shows that X Management did initiate contacts with studios seeking employment for Mr. Hall. The testimony of Mr. Lipsky as well as that of studio executives clearly establishes that X Management approached Paramount, Warner Bros., MCA, Universal, and Disney Studios in 1990 in efforts to find future employment for Mr. Hall. Therefore, even using the restricted definition of the term "procure" to mean "to solicit" as advocated by X Management, it was guilty of five violations of Labor Code Section 1700.5.

Nevertheless, the definition of procuring employment is not limited to mere soliciting of employment or the initiating of contacts with employers as X Management argues. If all X Management did was to receive calls from potential employers there would be no problem. If X Management had responded to such calls by referring the employer to Mr. Hall's talent agent or to Mr. Hall himself, there would be no violation.

The violations occurred when X Management did more, much more. X Management not only received the contacts by employers, it exploited those contacts in efforts to obtain lucrative employment contracts for the services of Mr. Hall. And it was very successful on at least six occasions.

The first argument of X Management is a *non sequitur*. According to X Management, a talent agent is only one who seeks employment for its client. In other words, a talent agent is only acting as a talent agent when he or she (or it) initiates the contact. If the agent merely receives telephone calls or letters, or is approached by employers, the agent is not a talent agent even though the agent then negotiates a contract of employment for the artist the agent represents. The argument is absurd and would frustrate the purpose of the Talent Agencies Act.

As the court stated in *Buchwald v. Superior Court*, *supra*, 254 Cal.App.2d at p. 350-351:

> "The Act is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative and judicial decision. . . . [T]he clear object of the Act is to prevent improper persons from becoming artists' managers and to regulate such activity for the protection of the public. . . They properly fall under the police power of the state (citation omitted) and their constitutionality has been repeatedly upheld...."

The Court went on to state: (*Id.* at p. 354)

> "Remedial statutes should be liberally construed to effect their objects and suppress the mischief at which they are directed.....'Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers — one that is practical rather than technical, and that will lead to wise policy rather than to mischief or absurdity.'"

The interpretation offered by X Management is technical and not practical and would lead to mischief and absurdity. First, the definition of "procure" urged by X Management (i.e., "to solicit") is far more restrictive a definition than used in any dictionary for the word "procure."

The word "procure" is defined in *Webster's Third New International Dictionary, Unabridged* Merriam-Webster, as follows:

> "**procure...1 a** (1): to get possession of; OBTAIN, ACQUIRE...(2): GAIN, WIN... **2 a** (1): to cause to happen or be done: bring about: EFFECT <*procured* temporary agreement>: ACHIEVE...."

Webster's New Dictionary of Synonyms 1978, Merriam-Webster gives the following synonyms for "procure":

> "**procure** get, obtain, secure, acquire, gain, win
>
> *Analogous words:* negotiate, arrange, concert: reach, compass, gain, achieve, attain"

It is obvious that the word "procure" when used with the word "employment" means either to secure employment or to bring about employment or cause employment to occur. That is the common sense meaning of procure in this context. It means to arrange employment. It means to negotiate for employment.

As the court in *Buchwald v. Superior Court, supra,* stated (*Id.* at p. 354):

> "If possible, significance should be given to every word and phrase of an act in pursuance of the legislative purpose."

Secondly, X Management argues it was not in the "occupation" of acting as a talent agent for Mr. Hall. It selectively chose

those dictionary definitions which narrowly fit its purpose rather than the primary definition such as that stated in *Webster's Third New International Dictionary, Unabridged* Merriam-Webster, which is:

"**1.a.** An activity in which one engages."

However, the argument of X Management is faulty because it takes the word "occupation" out of context. Again, it is required that significance be given to every word of an act in pursuance of the legislative purpose. As the court stated in *Buchwald*, the clear object of the Act is to prevent improper persons from becoming talent agents and correct abuses.

It would frustrate the legislative purpose of the Talent Agency Act if any person could act as a talent agent and evade the licensing requirements of the Act merely by working as a talent agent on a part time basis or as only part of the person's duties. If Labor Code Section 1700.4 stated "'Talent agency' means a person or corporation who engages *solely* in the occupation of procuring..." or *'principally'* in the occupation of procuring" or *only* in the occupation of procuring" then the argument of X Management would have support in the legislation. But the legislature did not include the words "solely" or "principally" or "only" and therefore, there is no support for the statutory construction urged on the Labor Commissioner by X Management.

In fact, the court in *Buchwald* rejected an argument similar to that being made by X Management. In that case, a personal manager, (an "artist's manager" as personal managers are sometimes called), who was not licensed, argued that the Act did not apply to him

because it only applied to persons who had a license. Utilizing the principles of statutory construction previously mentioned, the court found that the Act applied to all persons, relying on the previously noted rule of statutory construction that remedial statutes should be liberally construed to effect their objects and to suppress the mischief at which they were directed and that such statutes must be given a reasonable and common sense construction in accordance with their apparent purpose and intention of the Legislature, practical rather than technical.

The construction urged by X Management simply doesn't address the practical world of entertainment. It overlooks the fact that being a talent manager is often an integral part of the personal managing business. Because of this very fact, the Personal Managers' lobby has worked long and hard to be exempted from the Talent Agency Act without success.[4] They were unsuccessful in the Legislature in 1982[5] and again in 1985 with the California Entertainment Commission[6] which strongly rejected the position asserted by X Management.

As the Commission stated in its report (page 7), this issue

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[4] See "The Personal Manager in the California Entertainment Industry", Johnson and Lang, *Southern California Law Review*, Vol. 52, pp. 375, 405-408 (1979).

[5] See discussion of legislative history of AB 997 *ante* in paragraph 7, p. 29.

[6] The California Entertainment Commission was created by the State Legislature in 1982 to specifically study the Talent Agency Act and report its recommendations for any amendments to the Act. The Commission specifically discussed the role of personal managers who only incidentally procured employment for their clients. The personal managers tried hard to convince the Commission to recommend that the Act be amended to exempt personal managers from the provisions of the Act. Obviously, the personal managers considered themselves covered by Labor Code Section 1700.4 or they would not have made such an effort to have themselves excluded.

consumed a substantial portion of the time of most of the meetings. The Commission concluded that the Act covered the personal managers and that the Act should not be amended to exempt them. (page 11):

> "[I]n searching for the permissible limits to activities in which an unlicensed personal manager, or anyone, could engage in procuring employment for an artist without being licensed as a talent agent, the Commission concluded that there is no such activity, that there are no such permissible limits, and the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are intended to be, total. Exceptions in the nature of incidental, occasional or infrequent activity relating in and to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the services which a talent agent is licensed to render. There can be no "sometimes" talent agent, just as there can be no "sometimes" professional in any other field of endeavor."

The Commission submitted its report to the Legislature and the Legislature did not amend the Act to exclude personal managers. Therefore, it must be presumed that the Legislature was aware of the interpretation that the Talent Agencies Act applied to personal managers whose primary occupation was not procuring employment for artists and that it accepted that interpretation as declaratory of existing law since the Legislature chose not to amend the Act to exclude personal managers.

Finally, the dictionary definitions that X Management provided of the word "occupation" do not assist X Management because the evidence showed that the procurement of employment for Mr. Hall was an occupation that X Management regularly or habitually engaged in.

Accordingly, having determined that X Management operated as a talent agency without a license, the Labor Commissioner will now

discuss the appropriate remedies to be applied.

C. The Personal Management Agreement Dated September 1, 1987 And Any Amendments Thereto, Written Or Oral, Are Void And Unenforceable.

X Management does not argue in the briefs it submitted that the Labor Commissioner does not have the authority to void the Personal Management Agreement entered into between it and Mr. Hall or that the Labor Commissioner does not have the authority to order restitution of any commissions received pursuant to a contract which is voided. The Labor Commissioner clearly has the authority. *Buchwald, supra,* at pp. 357-358.

Rather, X Management sets forth numerous reasons why the Labor Commissioner should not void the Agreement or in the alternative, not require the refund of commissions to Mr. Hall. The Commissioner rejects all the reasons stated by X Management in fashioning an appropriate remedy.

In fashioning a remedy, the Labor Commissioner must first consider that the Talent Agency Act is an exercise of the police power of the State. *Buchwald, supra,* at p. 351. Therefore, in determining the appropriate remedy, the Labor Commissioner is not bound by the principles of contract law, although the Commissioner may look to such principles for guidance. Principles of contract law and the remedies and limitations on remedies in contract law are for the purpose of determining a dispute between the contracting parties and the appropriate remedies to reimburse the injured party. In contrast, the primary purpose of the Talent Agencies Act is to compel talent agents to procure licenses and to abide by the Labor

Code provisions governing talent agencies. In fashioning the appropriate remedy, the Commissioner must decide how that remedy will most effectively implement the purpose of the Talent Agency Act to deter others from violating the Act. Reimbursing the complaining artist is secondary, although any award should remedy any injury suffered by the artist as a result of the illegal conduct by the violator. The primary purpose of voiding an illegal contract and compelling the violator to disgorge illegally gained profits is to make it unprofitable for any person to violate the Act.

The facts in this case clearly call for the voiding of the Agreement. Not to void the contract would permit X Management to continue to profit enormously from its violations of the Act. In voiding the Agreement, the Labor Commissioner also voids any oral agreement which provided that X Management or its principals were to receive 50% of the profits from The Arsenio Hall Show. The Commissioner finds that any such agreement was a modification of terms of the Personal Management Agreement.

The Commissioner rejects the position of X Management that Mr. Hall will be unjustly enriched if the Agreement is voided. The real issue is not whether Mr. Hall, who did not violate any law, will be unjustly enriched, but rather whether X Management should profit by its violations of the Act.[7] The question is one of public

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[7] From the evidence presented at the hearing, every cent collected by X Management, Inc. as commissions from Mr. Hall was profit. X Management, Inc. presented no evidence that it incurred any expenses. The Agreement provided that Hall reimburse X Management, Inc. for any expenses. The only investment of X Management, Inc. was the time of the principals and the principals were also the agents for Eddie Murphy. The evidence showed that they spent as much (and probably more) time on Eddie Murphy than on Mr. Hall. In fact, one of Mr. Hall's major complaints was that they spent far too little time with him.

policy. The question then is X Management's penalty.

D. What Effect Does The One Year Restriction In Labor Code §1700.449(c) Have On The Remedy Which The Labor Commissioner May Fashion?

X Management argues that the provisions of Labor Code Section 1700.44(c) restricts the remedies available to the Labor Commissioner and that the Commissioner cannot void any obligations which occurred prior to one year before the petition is filed.

Labor Code Section 1700.44(c) states:

> "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year before the commencement of the action or proceeding."

The language is clear and unambiguous. It means that if a violation occurs more than one year before the petition is filed, the Labor Commissioner has no jurisdiction to hear the controversy. However, nothing in the section limits the remedies that the Labor Commissioner can impose if they are appropriate and the Commissioner determines that violations occurred within the one year before the filing of the petition. Nothing in the statute provides for the overruling of the law stated in *Buchwald v. Superior Court, supra,* which provides that the Commissioner has authority to void the contract. Therefore, while Section 1700.44(c) restricts the Labor Commissioner from determining a controversy which is based on a violation which occurred over a year before the filing of the petition; the section does not restrict the Labor Commissioner from fashioning a remedy which voids the contract *ab initio* and requiring the reimbursement of all compensation from the date of the void contract.

However, the argument is moot in this controversy. For reasons that will be discussed later, the Labor Commissioner has decided to cut off all commissions due and owing as of one year before the petition is filed and to require reimbursement only of the commissions earned in that year.

E. The Defense That Mr. Hall Specifically Directed X Management To Counsel And Advise And Consented To Its Acts Is Irrelevant.

X Management argues that because Mr. Hall directed X Management to collect information for him and procure employment opportunities this somehow relieved it of the requirement to have a talent agency license. The contention of X Management, while not factually correct in its entirety, is also irrelevant.

As previously discussed, the evidence is clear that it was Mr. Lipsky's idea that Mr. Hall should seek a new contract for his services as an actor. Mr. Wachs was opposed to the idea. However, after discussions, Mr. Hall then asked X Management to proceed with the negotiations. But the fact that Mr. Hall directed that X Management proceed to negotiate deals has no bearing on whether or not X Management required a license. What happened is exactly what should have happened. The agent has a bright idea that the client, who is an artist, should test the market and seek the best deal available. The agent discusses the idea with the client and the client thinks it is a good idea. The agent, as any agent should, keeps the client abreast of what is happening. The agent contacts five studios and eventually negotiates a contract for the client.

That is what occurred in this controversy. It is not atypical

for an artist to direct his or her manager to seek better employment or new employment. The problem is that in this case the agent was not licensed, as required by the State, to perform these services. What aggravates the situation is that Mr. Hall was led to believe by X Management that he did not have to have any talent agent because X Management was acting in that capacity. He was never told by Mr. Wachs, who purported to be his lawyer, that X Management required a license from the State to act on his behalf as a talent agent. We know that Mr. Wachs did not tell Mr. Hall this because Mr. Wachs incredibly testified that he did not even know that talent agents were required to be licensed in California. Neither did Mr. Lipsky.

Mr. Hall cannot be held accountable for directing X Management to negotiate on his behalf. He is not in *pari delicto* with X Management which was operating as an unlicensed talent agency. The Talent Agency Act is written for the protection of the class of persons, artists, of which Mr. Hall is a member. *Bartholomew* v. *Hayden Properties* (1956) 132 Cal.App.2d, Supp. 889. To hold that Mr. Hall was just as culpable as X Management would turn the statutory scheme on its head. There is no evidence that Mr. Hall even knew that a license was required by X Management. Indeed, Mr. Wachs, his lawyer, did not know. However, even if he did know, that still does not excuse X Management from its violation of the law. The burden is upon X Management to procure a license to operate as a talent agency, not upon Mr. Hall.

Similarly, X Management has asserted the defense that because

Mr. Hall did not complain of the acts of X Management, he therefore consented and was fully informed of all the acts and therefore is not entitled to relief. The evidence shows that this was not true concerning all the acts of X Management, in particular the negotiations with Paramount concerning The Arsenio Hall Show. For example, Mr. Hall never was informed that X Management was negotiating a deal involving Eddie Murphy Productions being named as the producer of the Show until late in the negotiations, which he then objected to strongly. He was not advised that the Paramount executives wanted to meet with him until the negotiations came to an impasse. He was never advised until eight months after The Arsenio Hall Show went into production that Mr. Wachs had negotiated a deal with Paramount that he and Mr. Lipsky would be paid $5,000 a week as "Production Executives."

But, even if the above were not true, the fact that Mr. Hall consented to some of X Management's activity is immaterial. Mr. Hall cannot consent to a violation of the law. A violation of the Talent Agencies Act is an offense against the State of California, it is not directed to Mr. Hall. The purpose of the Talent Agencies Act is not just to protect Mr. Hall. Its purpose is to protect all artists and the Labor Commissioner must consider that purpose in deciding the controversy and fashioning the appropriate remedy.

F. The Act Applies Not Only To Struggling Artists But Also To Successful Artists Such As Hall.

X Management argues that the purpose of the Talent Agencies Act is to protect artists who lack the economic means to protect

themselves and should not be applied to artists who are wealthy and can protect themselves. If there ever was a case that illustrates the fallacy of that argument, it is this controversy.

When the Agreement which was the subject of this controversy was entered into, the evidence was that Mr. Hall was financially strapped. He was having trouble breaking even on The Late Night Show because of his expenses. Because the income flow was not sufficient to meet his needs, X Management initially did not attempt to collect its commissions. At the beginning, Mr. Wachs loaned money to Mr. Hall to buy a house evidencing the fact that when Mr. Hall signed the Personal Management Agreement, he was not wealthy.

Moreover, Mr. Wachs had deceived Mr. Hall into believing that he was acting as Mr. Hall's attorney and Mr. Hall was under this perception even when he became wealthy. Mr. Hall was exploited in the negotiations with Paramount concerning The Arsenio Hall Show. If Mr. Wachs had had his way, Mr. Hall would have accepted the Disney offer which was more beneficial to Mr. Wachs than it was to Mr. Hall. At this point Mr. Hall was a wealthy individual, yet he still needed protection from his agent.

The legislative history of the Talent Agencies Act clearly shows that it was the intention of the Legislature that the Talent Agencies Act apply to all artists. When Assembly Bill No. 997 was first introduced by Assemblyman Robinson and coauthored by Senator Campbell, it had a provision amending Labor Code Section 1700.4(a) which exempted from the provisions of that section any talent

manager whose artist earned not less than $50,000 net income per contract year. That provision was deleted from the Assembly Bill before passage. Therefore, it is clear that the Legislature recognized the necessity for protecting any artist and intended the Act apply to all artists regardless of income.

G. Mr. Hall Is Not Estopped From Bringing His Petition Before The Labor Commissioner.

X Management has asserted that Mr. Hall is estopped from seeking relief before the Labor Commissioner because (1) Mr. Hall was at all times informed and aware of the acts complained of, and never objected thereto; and (2) because such acts were taken for the sole and exclusive benefit of Mr. Hall.

As previously discussed, the evidence was that Mr. Hall was not always informed and aware of the acts of which he is complaining and he did in fact object to some of the actions taken by X Management. Additionally, the acts were not taken solely for the benefit of Mr. Hall. The evidence is strong that X Management engaged in procuring employment for Mr. Hall for its own benefit and one of its principals, Mr. Wachs, particularly sought to enrich himself at the expense of his client, Mr. Hall.

Because the administrative proceedings before the Labor Commissioner under Labor Code Section 1700.44 are for enforcement of the Labor Code provisions regarding licensing of talent agents, as a matter of public policy, the Labor Commissioner does not recognize the defense of estoppel. As a matter of public policy, it is in the interest of the State that each violation of the Talent Agencies Act is reported and the violators are deterred from

repeating the violations. As previously stated, the violations are against the State, not against Mr. Hall. Labor Code Section 1700.44 is the means provided by the Legislature to enforce The Talent Agency Act.[8] To recognize the defense of estoppel would defeat that public policy and handicap the enforcement of the Act by the Labor Commissioner.

Nevertheless, the Labor Commissioner determines that even if the defense of estoppel were appropriate, the elements of estoppel are not satisfied in this controversy. It is well established that a party is not estopped unless the party asserting the defense establishes all the elements. First, Mr. Hall must have either represented or concealed material facts. In this controversy, it was X Management that represented and concealed material facts, not Mr. Hall. Mr. Hall made no representations nor did he conceal any facts. Second, the representation or concealment must be made with knowledge, actual or virtual of the facts. Third, X Management must have been unaware of the truth of any of the facts that were represented or concealed from it. Fourth, Mr. Hall must have made the representation or concealed the facts with the intention that X Management act on it. Fifth, X Management must have been induced to act upon the representation or concealment of the facts.

There was no evidence that supported any of the elements and therefore, even if the doctrine of estoppel applied to law enforce-

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[8] Prior to 1982, the Labor Commissioner could seek criminal prosecution to punish violators. However, the Legislature eliminated the criminal sanctions that year thus making proceedings under Labor Codes Section 1700.44 the principal means of enforcing The Talent Agencies Act.

ment proceedings of the Labor Commissioner, Mr. Hall would not be estopped from filing his petition.

H. Mr. Hall Did Not Waive His Right To Relief.

X Management next asserts that Mr. Hall waived his right to relief before the Labor Commissioner. It asserts the same facts to support this relief that it asserted for estoppel. For the same reasons, the Labor Commissioner, as a matter of public policy, does not recognize the defense of waiver.

Regardless, there is no evidence to support the defense of waiver. For Mr. Hall to have waived his rights, there must be evidence that he intentionally waived those rights. To have intentionally waived his rights, the evidence would have to show that Mr. Hall knew that X Management was operating without a talent agent's license and that such a license was necessary to perform the services he requested. The evidence presented showed that Mr. Hall was unaware that X Management was operating without a license until he retained his own attorneys during the summer of 1990. The termination of the Agreement and the filing of this Petition followed shortly thereafter.

I. What Is The Appropriate Remedy For The Violations?

The appropriate remedy for any violation of the law is to deprive the violator of any gain that the violator may have obtained as a result of the violation. This will eliminate any incentive for the violator to repeat the violations and it will discourage and deter others from similar violations. Where the violator has engaged in the very conduct that the Talent Agencies

Act sought to prevent or remedy, then harsher remedies are justified.

In this controversy, X Management would have realized little if any gain because of its Personal Management Agreement unless Mr. Hall secured employment. Therefore, unless Mr. Hall was able to secure employment on his own or hire a licensed talent agent, the profits to X Management would have been insignificant. Until X Management began searching for employment for Mr. Hall, Mr. Hall was having difficulty landing steady work and that work was not very remunerative. It was the efforts of X Management acting as a talent agency that resulted in Mr. Hall obtaining highly lucrative employment, although it almost bungled several of the opportunities because of the activities of Mr. Wachs.

Since X Management derived all of its income from Mr. Hall as a result of procuring employment in violation of the Talent Agencies Act, the Labor Commissioner would be justified in depriving X Management of all of its earnings which resulted from such procurement. To do so is even more justified considering Mr. Wachs' self-dealing, deceptions, dishonesty, and lack of professionalism in dealing with Mr. Hall and Mr. Wachs' willful violations of the Act. Because Mr. Wachs was the president of X Management and its co-owner, his conduct thoroughly poisoned X Management.

The Labor Commissioner finds reprehensible the fact that Mr. Wachs represented to Mr. Hall that he would be his lawyer. Mr. Wachs denies this, but both Mr. Hall and Mr. Lipsky confirm it. The Hearing Officer found Mr. Wachs testimony in several instances

to be untrue and this is but one example.

The Labor Commissioner also finds that Mr. Wachs knowingly and willfully operated as a talent agent without a license. The Commissioner finds that Mr. Wachs' testimony to the effect that he was unaware that he needed a license to be incredible.

His testimony was not that he knew there was a licensing requirement, but he did not believe that it applied to him because he was not in the "occupation" of procuring employment or that he didn't believe the word "procure" applied to what he was doing. His testimony was that he was "absolutely not" aware there was a requirement under California law that those who procure or attempt to procure employment obtain a license. The testimony is incredible for two reasons. First, Mr. Wachs was a very experienced attorney in entertainment law. Most entertainment law is developed either in New York or California and the law is very similar in both states. For example, the State of New York has a statute similar to the Talent Agencies Act in California. In New York, talent agents, known as "theatrical employment agencies," are regulated under the General Business Law, Chapter 11, "Employment Agencies." Section 171, subd. 3 requires that theatrical employment agencies must obtain a license from the State. Section 171.8 defines a theatrical employment agency as:

> "Theatrical employment agency" means any person ... who *procures* or attempts to *procure* employment or engagements for circus, vaudeville, the variety field, the legitimate theater, *motion pictures,* radio, *television*, ... (Emphasis added).

Thus, it is inconceivable that Mr. Wachs, as experienced an

attorney as he is, was not aware that California like New York[9] had a requirement for licensing of talent agent. Anyone who practiced entertainment law would certainly inquire as to any requirements, particularly when he enters into a Personal Management Agreement such as the one entered into with Mr. Hall. The Agreement included the following boiler plate provision which is typical in this type of agreement. (See *Buchwald v. Katz, supra,* 254 Cal. App. 3d at p. 351):

> "You [Hall] have not retained our personal management firm under this agreement as an employment agent or a talent agent. This firm has not offered or attempted or promised to obtain employment or engagement for you and this firm is not obligated, authorized or expected to do so. You shall refer any and all inquiries from potential employers to your talent and/or employment agent and/or attorneys, and also inform us as to any such inquiries."

Further, the Agreement stated:

> "You agree to use reputable theatrical and/or other employment agencies to obtain engagements and employment, but you shall not engage any talent or employment agency without our consent."

Mr. Wachs testified he read the agreement. When asked if he understood what this language meant, he testified:

> "Yes, sir. That I -- yes, and I never did. I never called people and tried to get Mr. Hall work...I've never called anyone on his behalf..."

Notwithstanding Mr. Wachs' testimony to the contrary, there

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[9] The Employment Agencies law is slightly different in New York than in California. New York law exempts from the definition of theatrical employment agencies those businesses who only incidentally involve seeking of employment. As noted previously, personal managers have been unable to get such an exception included in California law. However, note the identical use of the term "procure".

was ample evidence that it was Mr. Wachs who initiated the contacts with Paramount, Columbia, and Disney in 1990. Furthermore, the language in the above quoted provisions from the Personal Management Agreement provided that any and all inquiries from potential employers should be referred to a talent agent, employment agent, and/or attorneys working for Mr. Hall. Mr. Wachs stated he understood the language, yet he accepted calls and inquiries when he did not initiate the calls.

The language in the Personal Management Agreement was there for a specific purpose and although Mr. Wachs would not admit he knew the what that purpose was, with his education and experience, he had to be aware of the reason for the language.

While Mr. Lipsky by his own testimony was involved in numerous violations of the Talent Agents Act, and there is some evidence that Mr. Murphy was also in violation, there is a lack of evidence that either knowingly or willfully violated the Talent Agencies Act. If anything, both relied on Mr. Wachs. Except for his sharing in the $5,000 a week Production Executive fee, which is attributable to Mr. Wachs, the evidence is that Mr. Lipsky did not double deal, overreach, or in anyway violate his responsibilities to Mr. Hall. In fact, it was Mr. Lipsky who was responsible for X Management bowing out of the Production Executive fee. Mr. Wachs did not want to do that.

It was also Mr. Lipsky who told Mr. Hall he was not interested in the 50% of the profits deal. It was Mr. Lipsky who advised Mr. Hall of the breakdown of the negotiations on The Arsenio Hall Show.

Therefore, to require X Management to disgorge all the commissions would also hurt Mr. Lipsky and to a lesser degree Eddie Murphy, who pulled out of X Management in 1989 because he did not want to take money from his friend, Mr. Hall.

While justice would demand that Mr. Wachs disgorge everything he gained as a result of his outrageous misconduct, it is X Management which is liable, including, of course, Mr. Lipsky and Mr. Murphy.

X Management received a total of $2,626,785.80 in commissions under the Personal Management Agreement. X Management received $2,148,445.78 of these fees after August 9, 1989. X Management shall reimburse that amount to Mr. Hall. A breakdown of the commissions which shall be refunded is attached as Appendix 1.

J. Should X Management Be Permitted To Retain Any Commissions On The Basis of Quantum Meruit?

X Management argues that it should be allowed to keep most if not all the commissions on the contract theory of *quantum meruit*. It argues that it provided services which had a substantial value and that it should be permitted to be paid for those services.

Again, this not a controversy over the performance or interpretation of a contract. This is a statutory action in which the controversy involves the unlawful act by X Management of procuring or attempting to procure employment without a license and the Labor Commissioner is exercising the police power of the State. Therefore, the common law contract theory of *quantum meruit* does not apply for to do so would, in fact, thwart the purpose of the law.

Nevertheless, even if it did apply, there is ample evidence that X Management received more than full value for its services.

K. There Is No Requirement That The Labor Commissioner Award All Commissions To The Petitioner.

Mr. Hall urges that if the Labor Commissioner voids the Personal Management Agreement, that the Commissioner should award Mr. Hall all the commissions he had paid to X Management since the inception of the Agreement. While petitioner cites several California and Federal cases where a person who operated without a license was not permitted to receive any commissions, none of these cases address the question of the reasons for the one-year statute of limitations which the Legislature inserted in the Act in 1986. Surely, the language of §1700.44(c) limiting the jurisdiction of the Labor Commissioner to acceptance of controversies alleging violations outside of a year period must have some meaning. In each of the cases cited by petitioner, the Legislature had enacted specific provisions prohibiting the violator from recovering any commissions. The courts, in light of the statutory prohibitions applicable in each case, refused to exercise their equitable powers. The Labor Commissioner finds none of the cases cited persuasive and decides that for reasons previously stated, that it is not appropriate to require all commissions to be disgorged.

III. AWARD

1. The Personal Management Agreement dated September 1, 1987 between petitioner Arsenio Hall and respondent X Management is declared void as of September 1, 1987.

2. To the extent that there was any agreement which constituted an amendment to the Personal Management Agreement requiring the petitioner to pay 50% of the profits of The Arsenio Hall Show to X Management or its principals, that agreement is declared null and void as of its inception.

3. The petitioner Arsenio Hall is awarded $2,148.445.78 which represents the commissions earned between August 9, 1989 and August 8, 1990.

DATED: April 17, 1992

JACK ALLEN,
Special Hearing Officer

ADOPTED:

DATED: April 24, 1992

VICTORIA BRADSHAW,
Labor Commissioner

APPENDIX 1

ANALYSIS OF COMMISSIONS TO BE REIMBURSED

1. The Arsenio Hall Show.

   Commissions paid from September, 1989 through August, 1990 . . . . . $854,653.16

2. Paramount Pictures, "Coming to America".

   Commissions paid from September, 1989 through August, 1990 . . . . . $3,729.89

3. Paramount Pictures, Feature Advance, 2d Contract.

   Commissions on $7 million advance $1,050,000.00

4. Coca-Cola.

   Commissions on $1,500,000 contract $225,000.00

5. MCA "Chunky A".

   Commissions paid from September, 1989 through August, 1990 . . . . . $9,658.70

6. MTV Host Awards.

   Commissions on 1990 Show fee of $20,000 . . . . . $3,000.00

7. ASCAP.

   Commissions on Feb. 1990 fees $558.78

8. Miscellaneous Fees.

   Commissions paid from September, 1989 through August, 1990 . . . . . $345.25

9. Paramount Pictures Feature Advance, 2d Film.

   Commissions on payment of $10,000, Nov., 1989 . . . . . $1,500.00

TOTAL $2,148,445.78