

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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9  
10 BEFORE THE LABOR COMMISSIONER  
11 OF THE STATE OF CALIFORNIA  
12  
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14 JOSEPH NIPOTE and PORT SALVO ) Case No. TAC 13-99  
15 PRODUCTIONS, INC., a California Corp., )  
16 )  
17 Petitioners, )  
18 vs. ) DETERMINATION OF  
19 ) CONTROVERSY  
20 )  
21 )  
22 HOWARD LAPIDES, an individual, and )  
23 WORLD WIDE WARRANTY CORP., )  
24 dba LAPIDES ENTERTAINMENT an )  
25 individual, )  
26 Respondents. )  
27 )

28 INTRODUCTION

29 The above-captioned petition was filed on April 13, 1999,  
30 by JOSEPH NIPOTE and PORT SALVO PRODUCTIONS, Mr. Nipote's loan out  
31 corporation, (hereinafter "Petitioner"), alleging that HOWARD  
32 LAPIDES dba LAPIDES ENTERTAINMENT, (hereinafter "Respondent"), was  
33 conducting unlawful activities by acting as an unlicensed talent  
34 agent in violation of Labor Code §1700.5<sup>1</sup>. Additionally,  
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36 <sup>1</sup> All statutory citations will refer to the California Labor Code unless  
37 otherwise specified.

1 petitioner alleges respondent breached his fiduciary duty owed to  
2 petitioner by acting negligently and engaging in transactions  
3 containing inherent conflicts of interest causing petitioner  
4 substantial economic injury. Petitioner seeks a determination  
5 voiding *ab initio* the 1995 oral management agreement between the  
6 parties and requests disgorgement of all commissions paid to  
7 respondent arising from this agreement.

8 Respondent filed his answer with this agency on May 14,  
9 1999. A hearing was scheduled before the undersigned attorney,  
10 specially designated by the Labor Commissioner to hear this matter.  
11 The two day hearing commenced as scheduled on October 15, 1999, and  
12 continued on November 16, 1999, in Los Angeles, California.  
13 Respondent was represented by Stuart M. Richter and Stacey McKee  
14 Knight of Katten Muchin & Zavis; petitioner appeared through his  
15 attorney Martin D. Singer of Lavelly & Singer. Due consideration  
16 having been given to the testimony, documentary evidence and  
17 arguments presented, the Labor Commissioner adopts the following  
18 determination of controversy.

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20 FINDINGS OF FACT

21 1. The parties first associated as a result of a 1993  
22 management agreement between petitioner and respondent's then  
23 partnership with Bernstein Enterprises. In early 1995, Mr.  
24 Bernstein passed away and respondent, through the terms of an oral  
25 agreement, continued to provide personal services as petitioner's  
26 representative in the entertainment industry. Respondent maintains  
27 those services exclusively included counseling, directing and

1 developing of petitioner's career. Petitioner argues the oral  
2 agreement conferred the authority to procure employment on his  
3 behalf, which respondent allegedly provided on various occasions  
4 without a talent agency license in violation of Labor Code §1700.5.  
5 It was stipulated the respondent has never been licensed by the  
6 State Labor Commissioner as a talent agency. It was also  
7 established that various times throughout the relationship,  
8 petitioner retained a licensed talent agent.

9           2. The primary issue is what activity constitutes the  
10 procurement of employment and whether respondent procured, offered,  
11 promised, or attempted to procure employment on behalf of the  
12 petitioner without the aid of a licensed talent agent. The  
13 following employment engagements were in issue:

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15                   CATCH A RISING STAR

16           3. In August of 1994, petitioner performed a stand-up  
17 comedy routine at the MGM Hotel and Casino in Las Vegas, Nevada.  
18 Respondents long-time friend, Geary Rindels, booked the hotel's  
19 talent and contacted respondent directly in search of a comedienne  
20 to perform the engagement. Respondent testified Mr. Rindels  
21 offered a "take it or leave it job", consequently without  
22 negotiation, which he relayed to his client. Respondent argues  
23 these facts do not constitute the procurement of employment. The  
24 only direct evidence cited by petitioner in support of their  
25 assertion that respondent acted as an unlicensed agent was the  
26 testimony of Bill Normyle, respondents secretary of four years.  
27 Mr. Normyle's recollection for this engagement was limited and

1 facts implicating respondent of procurement activity were not  
2 elicited.

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4 EDIE & PEN

5 4. On July 24, 1995, petitioner acquired the role of  
6 Socrates the Cabbie in the film Edie & Pen. Petitioner was  
7 approached directly by the producer of the picture and offered the  
8 role. Petitioner then handed the producer respondent's card and  
9 suggested the details be worked out with his manager. Again,  
10 respondent testified the job was offered directly to the  
11 petitioner, accepted at scale<sup>2</sup>, and ultimately no employment  
12 contract negotiations were conducted. Credible testimony from the  
13 film's casting director Bruce Newberg, supported respondent's  
14 version. Mr. Newberg testified he conducted the employment  
15 negotiations and as a result of the productions' tight budget, only  
16 the film's principal stars negotiated the terms of their salary and  
17 benefits, which did not include petitioner.

18 5. The only evidence cited by petitioner in support of  
19 their assertion that respondent acted as an unlicensed agent for  
20 Edie & Pen was the Artist Deal Memorandum. (see Exhibit 1) The Deal  
21 Memo stated Lapides Entertainment Organization was the agent for  
22 the petitioner, notwithstanding the fact petitioner possessed an  
23 independent licensed talent agent that was not commissioned for the  
24 project.

25 6. Listing respondent as the agent on the Deal Memo is

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27 <sup>2</sup> Actors represented by the Screen Actors Guild are entitled to a  
guaranteed minimum compensation.

1 not dispositive of procurement activity and does not sustain  
2 petitioner's burden of persuasion by a preponderance of the  
3 evidence. Consequently, respondent did not procure employment for  
4 this engagement.

5  
6 "GO TV" or "ON THE GO"

7 7. In October of 1995, petitioner was cast as a  
8 principal performer for an interactive cable TV entertainment  
9 guide, developed by Time Warner.

10 8. Respondent again testified the producer contacted  
11 respondent directly and offered a scale, "take it or leave it deal".  
12 On cross examination respondent testified he did not recall whether  
13 any negotiations were conducted. Testimony conflicted whether  
14 petitioner maintained a licensed talent agent during this booking,  
15 but unrefuted testimony elicited that petitioner was the sole  
16 representative obtaining commissions on this deal. Additionally,  
17 petitioner offered declarations<sup>3</sup> from the director and segment  
18 producer, stating that the respondent solicited this engagement on  
19 behalf of the petitioner by sending them a tape of various segments  
20 of petitioner's stand up routines pieced together. These  
21 declarations were timely objected on hearsay grounds and given  
22 minimal weight<sup>4</sup>.

23 9. The evidence was circumstantial. The fact no other  
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25 <sup>3</sup> California Code of Regulations §12027(a) provides a subpoena mechanism  
26 for in-state witnesses, consequently declarations are admissible but carry little  
weight.

27 <sup>4</sup> Cal. Code of Regulations §12031 states, "the Labor Commissioner is not  
bound by the rules of evidence or judicial procedure."

1 representative collected a commission, coupled with timely hearsay  
2 objections to the declarations, without additional direct testimony  
3 does not sustain petitioner's burden of proof.  
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5 CHRISTMAS PARTY

6 10. In December of 1994 petitioner was hired to perform  
7 his stand up routine for a private Christmas party. The one time  
8 engagement paid \$2,500, though it was indeterminable from the  
9 parties testimony whom conducted the negotiations.

10 11. Respondent's secretary, Bill Normyle, credibly  
11 testified that he specifically recalls respondent sent petitioner's  
12 video tape directly to the contact person, who then called back to  
13 hire the petitioner. Mr. Normyle is in a unique position to  
14 testify as to the daily operations of respondent's business and his  
15 unbiased and unfettered recollection of certain events elicited  
16 specific elements which we believe constitutes the procurement of  
17 employment within the meaning of §1700.4(a), which sets forth the  
18 definition of talent agency.

19 12. Mr. Normyle's testimony included his vivid  
20 recollection of sending out resumes and biographical tapes of  
21 artists, including petitioner, directly to casting directors. This  
22 testimony was buttressed by evidence of petitioner's video tapes  
23 being sent by a messenger service to casting directors and later  
24 billed to the artist for this service. (see Exhibit 8 and 9), Mr.  
25 Normyle testified, "it was my understanding that sending out  
26 resumes was to get jobs for the client [artist]." Mr. Normyle's  
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1 testimony regarding respondent's activity for the Christmas party  
2 engagement and his additional testimony stating, that as  
3 respondent's secretary he remembers other occasions where he sent  
4 petitioner's tapes directly to casting directors in an effort to  
5 secure employment, provided the first direct evidence of  
6 respondent's procurement activity.

7 Viper Series

8 13. In April of 1996, petitioner entered into a contract  
9 with Paramount Pictures for acting services in connection with the  
10 Viper Series. It was stipulated that petitioner possessed and  
11 utilized a licensed talent agent in connection with the  
12 negotiations of this employment contract. On February 28, 1997,  
13 petitioner disillusioned with respondent's performance on his  
14 behalf, terminated the 1995 oral agreement.

15 14. On February 26, 1999, respondent filed a claim in  
16 the Superior Court of Los Angeles for, *inter alia*, breach of  
17 contract, seeking unpaid commissions for the aforementioned Viper  
18 series. The superior court action was stayed pending the results  
19 of this petition.

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21 CONCLUSIONS OF LAW

22 1. Labor Code §1700.4(b) includes "actors" in the  
23 definition of "artist" and petitioner is therefore an "artist"  
24 within the meaning of §1700.4(b).

25 2. The primary issue is whether based on the evidence  
26 presented at this hearing, did the respondent operate as a "talent  
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1 agency" within the meaning of §1700.40(a). Labor Code §1700.40(a)  
2 defines "talent agency" as, "a person or corporation who engages in  
3 the occupation of procuring, offering, promising, or attempting to  
4 procure employment or engagements for an artist or artists."

5 3. Labor Code section 1700.5 provides that "no person  
6 shall engage in or carry on the occupation of a talent agency  
7 without first procuring a license therefor from the Labor  
8 Commissioner."

9 4. In Waisbren v. Peppercorn Production, Inc (1995) 41  
10 Cal.App.4th 246, the court held that any single act of procuring  
11 employment subjects the agent to the Talent Agencies Act's  
12 licensing requirements, thereby upholding the Labor Commissioner's  
13 long standing interpretation that a license is required for any  
14 procurement activities, no matter how incidental such activities  
15 are to the agent's business as a whole. Applying Waisbren, it is  
16 clear respondent acted in the capacity of a talent agency within  
17 the meaning of §1700.4(a).

18 5. Respondent argued the petitioner has not met his  
19 burden of proof. The proper burden of proof is found at Evidence  
20 Code §115 which states, "[e]xcept as otherwise provided by law, the  
21 burden of proof requires proof by preponderance of the evidence."  
22 Further, McCoy v. Board of Retirement of the County of Los Angeles  
23 Employees Retirement Association (1986) 183 Cal.App.3d 1044 at 1051  
24 states, "the party asserting the affirmative at an administrative  
25 hearing has the burden of proof, including both the initial burden  
26 of going forward and the burden of persuasion by preponderance of  
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1 the evidence(cite omitted). "Preponderance of the evidence"  
2 standard of proof requires the trier of fact to believe that the  
3 existence of a fact is more probable than its nonexistence. In re  
4 Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700. Here, the  
5 petitioner has established by a preponderance of the evidence the  
6 respondent procured employment by sending petitioner's video tapes  
7 directly to casting agents. In light of Mr. Normyle's testimony  
8 regarding respondents business practices, it is not necessary to  
9 affirmatively demonstrate respondent procured employment for the  
10 other engagements in issue, but it is highly unlikely that Edie  
11 &Pen; On the Go; Catch a Rising Star; and the Christmas engagement  
12 all resulted from direct solicitation of an employer without any  
13 negotiations by the respondent. The same defense proffered by  
14 respondent for all of these employment engagements, bolstered by  
15 the lack of evidence that a licensed talent agent was commissioned  
16 for any of these deals, leaves little doubt the respondent acted as  
17 a talent agent within the meaning of §1700.4(a). The procurement  
18 smoking gun was not present, but the evidence taken as a whole  
19 satisfies the minimal standard described in Waisbren.

20 6. Respondent's makes an interesting argument that the  
21 original intent of the Talent Agencies Act was created for the  
22 protection of the artist and was not intended by the legislature to  
23 be used offensively as a sword by artists attempting to avoid the  
24 payment of commissions. As correct as this assertion may be, it  
25 does not alter the plain language of the statute or the appellate  
26 court's interpretation of the Act. The Labor Commissioner must  
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1 continue to strictly enforce the Act's licensing provisions and  
2 hold responsible those who attempt to evade its requirements. If  
3 a manager engages in talent agency activity and wants to protect  
4 him/herself from the harsh outcome of securing engagements for an  
5 artist without a license, then he/she must work in conjunction with  
6 a licensed agent<sup>5</sup> or secure a license and become an agent.

7           7. Petitioner seeks disgorgement of all commissions paid  
8 to respondent stemming from the 1995 oral agreement and makes the  
9 novel argument that the Second District Court of Appeals recent  
10 ruling in Park v. Deftones 71 Cal.App.4th 1465, displaces the Labor  
11 Commissioner's long held historical policy that only commissions  
12 paid to an unlicensed talent agent within one year of the filing of  
13 the petition must be disgorged.

14           8. In Park, the manager was found to have procured  
15 employment from 1992 through 1994. The petition was filed in  
16 February of 1997, and Park argues the petition was not timely,  
17 based on the statute of limitations set forth at Labor Code  
18 1700.44(c)<sup>6</sup>. The Park court found the Deftones' petition was  
19 timely because it was brought within one year of Park's filing an  
20 action [in superior court] to collect commissions under the  
21 challenged contract. Park v. Deftones supra, p.1469. The court

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23           <sup>5</sup> Labor Code §1700.44(d) provides, "It is not unlawful for a person or  
24 corporation which is not licensed pursuant to this chapter to act in conjunction  
with, and at the request of, a license talent agency in the negotiation of an  
employment contract.

25           <sup>6</sup> §1700.44(c) provides that "no action or proceeding shall be brought  
26 pursuant to [the Talent Agencies Act] with respect to any violation which is  
27 alleged to have occurred more than one year prior to the commencement of this  
action or proceeding."

1 reasoned, the filing of the superior court action was itself a  
2 violation of the Act, thus extending the one year limitation. In  
3 the case at bar, petitioner argues the Park holding subsequently  
4 opens the door for disgorgement of all commissions paid throughout  
5 the duration of an illegal agreement.

6           9. In Park, commissions were not paid to the manager and  
7 the court was silent on this issue. The Park decision does not  
8 have a significant impact on the historical rulings of this agency.  
9 The Labor Commissioner has long held that when a petitioner raises  
10 the issue of respondent's unlicensed status purely as a defense to  
11 the proceedings brought by respondent's action against the  
12 petitioner filed in superior court, the statute of limitations does  
13 not apply. A statute of limitations is procedural, that is it only  
14 affects the remedy, not the substantive right or obligation. It  
15 runs only against causes of action and defenses seeking affirmative  
16 relief, and not against any other defenses to an action. The  
17 statute of limitations does not bar the defense of illegality of a  
18 contract, and in any action or proceeding where the plaintiff is  
19 seeking to enforce the terms of an illegal contract, the other  
20 party may allege and prove illegality as a defense without regard  
21 to whether the statute of limitations for bringing an action or  
22 proceeding has already expired. Sevano v. Artistic Production,  
23 Inc., (1997)TAC No. 8-93 pg.11. Undertaking either the  
24 aforementioned defense of illegality argument, or applying the Park  
25 ruling, the Labor Commissioner and the Park court are in agreement.  
26 As Park holds, "it also assures that the party who has engaged in  
27 illegal activity may not avoid its consequences through the timing  
of his own collection action." Park, supra at 618. We thus



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ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 1/10/00

Marcy Saunders  
MARCY SAUNDERS  
State Labor Commissioner

