

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

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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

10	KEITH BROCK,	)	Case No. TAC 03-01
		)	
	Petitioner,	)	
11	vs.	)	DETERMINATION OF
		)	CONTROVERSY
12		)	
		)	
13	MARIO and KAREN TAMBELLINI,	)	
	individually and dba ENTERTAINMENT	)	
14	CONSULTANTS, ,	)	
		)	
15	Respondent.	)	
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INTRODUCTION

29 The above-captioned petition was filed on January 30,  
30 2001, by KEITH BROCK, (hereinafter "Brock" or "Petitioner"),  
31 alleging that MARIO and KAREN TAMBELLINI dba ENTERTAINMENT  
32 CONSULTANTS, (hereinafter "EC" or "Respondents"), acted in the  
33 capacity of a talent agency without possessing the required  
34 California talent agency license pursuant to Labor Code §1700.5<sup>1</sup>.  
35 The petitioner seeks from the Labor Commissioner a determination  
36 voiding the parties' 1995, representation agreement *ab initio* and  
37 requests disgorgement of all commissions paid to respondent

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

1 stemming from this agreement. Additionally the petitioner seeks an  
2 order enjoining the respondent from further distribution of a  
3 marketing video containing petitioner's name and likeness. The  
4 respondent did not file an answer.

5 A hearing was scheduled before the undersigned attorney,  
6 specially designated by the Labor Commissioner to hear this matter.  
7 The hearing commenced on August 24, 2001, at the Orange County  
8 office of the Labor Commissioner. Petitioner was represented by  
9 Nancy R. Tragarz of Prenovost, Normandin, Bergh & Dawe; respondent  
10 appeared through his attorney Stuart L. Wallach. Due consideration  
11 having been given to the testimony, documentary evidence and  
12 arguments presented, the Labor Commissioner adopts the following  
13 determination of controversy.

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15 FINDINGS OF FACT

16 1. Petitioner is a guitar player who performs both in  
17 a band and as a solo act. Additionally, the petitioner is a  
18 storyteller, and disc jockey who is hired primarily to perform his  
19 various talents at wedding receptions. In 1995, the petitioner  
20 entered into an exclusive representation agreement with the  
21 respondent, whereby the respondent would "represent said artist in  
22 all branches of the entertainment field". The representation  
23 agreement maintained that, "in the event that the Artist's  
24 [petitioner's] personal services are booked for a customer by Agent  
25 [respondent], the Artist agrees that Agent shall receive a fee or  
26 commission for each job secured or negotiated by Agent."

27 2. The respondent owns a wedding consulting business  
28 designed to provide a "one-stop" alternative to couples with

1 nuptials on the horizon. The respondent testified that he could  
2 not only provide the entertainment for the event, but also furnish  
3 limousines, tuxedos and the photographer and/or videographer.

4           3. For several years the relationship progressed very  
5 smoothly and eventually the petitioner became the respondent's most  
6 consistently engaged entertainer. The respondent offered credible  
7 evidence that the petitioner performed often utilizing all aspects  
8 of his aforementioned talents. In fact, the relationship initially  
9 proved to be so mutually beneficial that Brock and EC partnered in  
10 the creation of a one-hour marketing video designed to showcase  
11 both the services offered by the respondent and the talents of the  
12 petitioner.

13           4. The video was widely distributed at local bridal  
14 shops. If an interested third party contacted the respondent for  
15 information, the respondent would discuss the possible booking with  
16 the petitioner and ask him how much he needed to earn for that  
17 particular engagement. The respondent would then use that figure  
18 to negotiate the price for services with the third party. In most  
19 cases, the respondent would double Brock's price when submitting  
20 the bid to the third party. If the entertainment was booked, the  
21 respondent would keep 50% for himself and remit the remaining 50%  
22 to the petitioner.

23           5. In 2000, the parties had a falling out and according  
24 to the petitioner, Brock discovered that the respondent was not a  
25 licensed talent agent and as a result seeks to void the contract  
26 between them and requests disgorgement of all commissions paid to  
27 the respondent during the length of the relationship. The  
28 respondent alleges that the Talent Agencies Act should be narrowly



1 incorrect. The percentage of time in which the petitioner performs  
2 as a wedding D.J. in ratio to his performances as a guitar player  
3 or band leader is insignificant. He is a guitar player and leader  
4 of a band and conducts these activities consistently for the  
5 respondent. Consequently, the petitioner is an artist within the  
6 meaning of Labor Code §1700.4(b).

7           2. The only remaining issue is whether based on the  
8 evidence presented at this hearing, did the respondent operate as  
9 a "talent agency" within the meaning of Labor Code §1700.40(a)?  
10 And if so, are there any applicable defenses afforded the  
11 respondent?

12           3. Labor Code §1700.40(a) defines "talent agency" as,  
13 "a person or corporation who engages in the occupation of  
14 procuring, offering, promising, or attempting to procure employment  
15 or engagements for an artist or artists." In Waisbren v.  
16 Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court  
17 held that any single act of procuring employment subjects the agent  
18 to the Talent Agencies Act's licensing requirement, thereby  
19 upholding the Labor Commissioner's long standing interpretation  
20 that a license is required for any procurement activities, no  
21 matter how incidental such activities are to the agent's business  
22 as a whole.

23           4. Again, respondent contends that his primary duty was  
24 to book the petitioner as a D.J. and not as a guitar player and  
25 therefore the Act should not apply. This primary duties test is  
26 inapplicable to the analysis. Waisbren, supra., rejects the idea  
27 that incidental procurement is not covered by the Act and maintains  
28 that this view "[does] not consider the remedial purpose of the

1 Act, the decisions of the Labor Commissioner, or the Legislature's  
2 adoption of the view (as expressed in the California Entertainment  
3 Commission's Report) that a license is necessary for incidental  
4 procurement activities." Waisbren, supra, at 261. As a result,  
5 the Labor Commissioner continues to follow Waisbren and the long-  
6 standing policy that even incidental procurement of employment as  
7 an artist requires a license. Applying Waisbren, it is clear  
8 respondent acted in the capacity of a talent agency within the  
9 meaning of Labor Code §1700.4(a).

10           5. Labor Code section 1700.5 provides that "no person  
11 shall engage in or carry on the occupation of a talent agency  
12 without first procuring a license therefor from the Labor  
13 Commissioner." It was stipulated the respondent did not possess a  
14 talent agency license during the course of the relationship.

15           6. Finally, respondent argues that the petitioner  
16 mistakenly seeks affirmative relief, in the form of a request for  
17 disgorgement of all commissions paid to the respondent throughout  
18 the relationship. Respondent contends that a request for damages  
19 beyond the one-year statute of limitations found at Labor Code  
20 section 1700.44(c) is counter to the express language of the Act.  
21 The statute provides that "[n]o action or proceeding shall be  
22 brought pursuant to [the Talent Agencies Act] with respect to any  
23 violation which is alleged to have occurred more than one year  
24 prior to the commencement of this action or proceeding."  
25 Respondent contends that any violations occurring prior to January  
26 30, 2000 are not recoverable. He is correct. Disgorgement is  
27 limited to the commissions paid during the one-year prior to the  
28 filing of the action with the Labor Commissioner.

1                   7. Finally, in Buchwald v. Superior Court (1967) 254  
2 Cal.App.2d 347, 351, the court held that because "the clear object  
3 of the Act is to prevent improper persons from becoming [talent  
4 agents] and to regulate such activity for the protection of the  
5 public, a contract between an unlicensed [agent] and an artist is  
6 void." Consequently, the resulting contract which often  
7 represented a 50/50 split of the profits between the parties is  
8 unconscionable and void *ab initio*.

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ORDER

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For the above-stated reasons, IT IS HEREBY ORDERED that the 1995 contract and accompanying "Agreement Not to Compete" between petitioner KEITH BROCK and respondents, MARIO and KAREN TAMBELLINI as individuals and dba ENTERTAINMENT CONSULTANTS is unlawful and void *ab initio*. Respondents have no enforceable rights under that contract.

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Having made a clear showing that the respondents collected \$24,319.00 in commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), petitioner is entitled to a monetary recovery. Respondents shall disgorge to the petitioner \$24,319.00 in illegally received commissions within 30 days from receipt of this Determination of Controversy. Petitioner's request for injunctive relief is denied as the Labor Commissioner is without authority to award injunctive relief.

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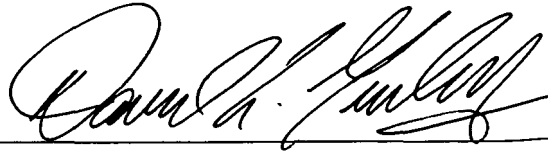
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IT IS SO ORDERED

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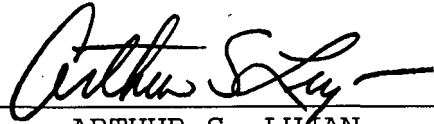
Dated: December 17, 2001



DAVID L. GURLEY  
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: December 17, 2001



ARTHUR S. LUCAN  
State Labor Commissioner



