DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

BARON ROGERS, Petitioner, vs. ART MINDS, individually, and ART MINDS SURF AND SPORT PHOTOGRAPHY, and ART MINDS AND ASSOCIATES, Respondents.	Case No. TAC 28-00 DETERMINATION OF CONTROVERSY
ART MINDS, individually, and ART MINDS SURF AND SPORT PHOTOGRAPHY, and ART MINDS AND ASSOCIATES, Cross-Petitioner, vs. BARON ROGERS, Cross-Respondents.	

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INTRODUCTION

The above-captioned petition was filed on August 28, 2000, by BARON ROGERS, (hereinafter Petitioner, or "ROGERS"), alleging that ART MINDS, dba ART MINDS SURF AND SPORT PHOTOGRAPHY, and ART MINDS AND ASSOCIATES, (hereinafter Respondent or "MINDS"), acted as an unlicensed talent agency in violation of §1700.5[1] of the California Labor Code. Petitioner seeks a determination voiding *ab initio* the management agreement and various "talent release agreements" entered into between the parties; disgorgement of all commissions paid to the respondent; $8,550.00 in licensing fees earned by the respondent; attorney's fees; and an order preventing the use of petitioner's likeness.

Respondent, a photographer/personal manager, filed his answer and cross-petition with this agency on October 16, 2000. Respondent requests the Labor Commissioner find, the "talent release agreements"; the securing of licensing agreements and the resulting income from those agreements; and various "publicity activity", are not within the purview of the Labor Commissioner's jurisdiction; and seeks $8,000.00 in out of pocket expenses.

A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on July 20, 2001, in Los Angeles, California. Petitioner was represented by Brian C. Carlin of Huskinson and Brown, LLP; respondent, a law school graduate, appeared *in propria persona*. Due consideration having been given to the testimony,

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[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

documentary evidence, arguments and briefs presented, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

1. Baron Rogers, an aspiring model, contacted the respondent through Minds' website. Respondent, Art Minds, is a photographer specializing in the photography of males in various beach and sport settings. In January of 1999, the petitioner visited Minds in Los Angeles and was photographed for Minds business. Minds creates images for subsequent licensing to publishers, with the model receiving a percentage of royalties stemming from the licensing agreement between Minds and the publisher. Typically, the model receives between 10 and 20 percent of Minds net revenue pursuant to "Talent Release Agreements" entered into between Minds and the model.

2. Between January 21, and January 29, 1999, Minds photographed Rogers in several settings. On January 23rd and 24th, the parties executed two "talent release agreements", allowing Minds to use petitioner's likeness for publishing purposes. According to the "talent release agreements", Rogers would receive 20% of Minds net revenue from the sales of these images.

3. Evidently, Minds saw a special quality captured in the images of respondent and sought to represent Rogers as his personal manager, anticipating a rapidly growing career. On February 14, 1999, Minds and Rogers entered a representation agreement whereby Minds would promote and guide Rogers career as a model. In return, Minds would receive 15% of Rogers compensation,

except for the images covered in the talent release agreements which were expressly excluded from the management agreement. Minds' received 80% and Rogers 20% of net revenues from the licensing of those images.

4. Minds immediately began to promote or "publicize" Rogers by sending press-kits[2] directly to casting directors. According to Minds, this was done to create a celebrity status, and not to obtain work. In April 1999, after several months of "publicizing" Rogers, he won a *Bacardi* model search. In July of 1999, *Entertainment Tonight* featured Minds and Rogers in a segment on shooting a male calendar. Rogers argued that Minds secured this entertainment engagement for Rogers. The testimony conflicted as to how this engagement was procured, but irrespective of the representation agreement and Minds fiduciary duty toward Rogers, Minds testimony made it abundantly clear he thought he was the featured artist in the E.T. segment, and not Rogers. Minds' focus on promoting his photography business, and not his model client, is the reason combining these two occupations has historically been dissuaded by previous Labor Commissioner Determinations and the Legislature.

5. Rogers alleged additional unlicensed procurement activities. In January of 2000, Minds contacted a publisher who had offered Rogers compensation for print work. Minds countered the offer and it was stipulated that a talent agent was not contacted for this deal. Respondent unconvincingly controverted

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[2] "Press-kits" included headshots and resume.

this allegation by testifying that the respondent told him not to contact the agent.

6. On January 25, 2000, Minds and Rogers entered a deal with publisher, "At-A-Glance, Inc.", for a calendar of Rogers. Nine previously shot images of Rogers were accepted by "At-A-Glance" with three other images due in three weeks. Minds was compensated by 10% of the publisher's total sales, a $6,000.00 guaranteed "imaging fee" and 15% of Rogers royalty payments.

7. On February 1, 2000, Minds shot additional images of Rogers and concurrently convinced Rogers to execute another "Talent Release Agreement", ostensibly covering the newly photographed images to be used in the "At-A-Glance" calendar. This release increased Rogers royalty payments to 50% of the net revenues received under the "At-A-Glance" deal. Under the "At-A-Glance" contract, [executed by Rogers and Minds], Minds guaranteed Rogers a minimum of $7,500.00 in royalties [subtract Minds 15%]. To date, Rogers has been compensated $3,825.00 [$4,500.00 subtract 15%]. Three thousand dollars and 00/100 [$3,000.00] remain outstanding.

8. Clearly, the bulk of Minds compensation resulted from the licensing agreements with publishers, and not from his management fees. The financial arrangement created an obvious conflict of interest for Minds. Minds never negotiated a compensation arrangement seeking the best financial deal for the artist [model], because Minds believed he was the artist, and not the model under representation. This conflict serves as another reason a photographer should not serve as a personal manager to a model the photographer shoots for the photographer's own financial

gain.

9. The Respondent argued that a license sold to distribute previously shot images could not implicate the Act because the licensing of previously filmed images does not require the petitioner to render any services and therefore could not be the procurement of an engagement or employment [which requires an affirmative act of the model]. As such, to include this type of transaction within the purview of the Talent Agencies Act would effect a radical expansion of the Act. Essentially, respondent argues that for implication of the Act, the manager must "procure employment or an engagement" for an artist as described in the definition of "talent agency" at Labor Code 1700.4(a). And the sale of a pre-shot image is not an engagement, nor does it involve employment. That argument has merit, but not here, because the "At-A-Glance" contract provided for three remaining images of petitioner that had not been shot and which were eventually completed on February 1, 2000. Consequently, future employment was intended for Rogers as referenced by the express terms of the "At-A-Glance" deal, and the "At-A-Glance" contract was the procurement of employment within the meaning of the statute. As a result of contracting Rogers to additional images shot by Minds, Minds is now contractually obligated to act simultaneously as both Rogers personal manager and employer. Moreover, Minds acts as his talent agent implicating the Talent Agencies Act.

10. Minds contracted with other publishers, selling petitioner's images and profiting through licensing agreements. Minds argues "the Talent Agencies Act was not intended to regulate

the communications between photographers and models, nor was it intended to prohibit compensating models on a royalty basis for subsequent use of their images." We disagree with respondent's characterization and analysis of the Talent Agencies Act. Once a photographer undertakes a representation relationship with a model and that representation includes the procurement of employment or engagements, the communications and terms of that relationship are exactly what the legislature intended the Labor Commissioner to regulate.

11. On June 22, 2000, Rogers justifiably terminated the relationship. In response, Minds sent Rogers a letter listing several other examples of procurement, including, "discussions with Bikini.com" attempting to secure a modeling assignment, "pitching [Rogers] as a co-host...in the making of a male calendar to *E! Entertainment Television*," and an attempt to obtain "extra" work for Rogers on *V.I.P.* with Pamela Anderson.

12. On August 28, 2000, Rogers filed this petition to determine controversy.

CONCLUSIONS OF LAW

1. Labor Code §1700.23 provides that the Labor Commissioner is vested with jurisdiction over "any controversy between the artist and the talent agency relating to the terms of the contract," and the Labor Commissioner's jurisdiction has been held to include the resolution of contract claims brought by artist or agents seeking damages for breach of a talent agency contract.

Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861, Robinson v. Superior Court (1950) 35 Cal.2d 379.

2. Similarly, in Buchwald, the court reasoned, The Act is broad and comprehensive. The Labor Commissioner is empowered to hear and determine disputes under it, including the validity of the artists' manager-artist contract and the liability, if any, of the parties thereunder. Buchwald v. Superior Court, 254 Cal.App.2d 347 at p.357. Therefore, the Labor Commissioner has jurisdiction to determine this controversy.

3. The issues to be determined are as follows:

a. Has the Respondent acted as an unlicensed talent agency, including Minds' self-described "publicity" effort on Rogers' behalf?

b. Are respondent's "talent release agreements" executed by the parties, and incorporated by reference in the management agreement, subject to the Talent Agencies Act?

c. Are respondent's profits obtained from the licensing of petitioner's images to publishers, the improper collection of commissions and thus subject to disgorgement.

d. Does the one-year statute of limitations found at Labor Code §1700.44(d), provide a defense for the respondent?

e. Are the parties entitled to attorney's fees?

Has the Respondent Acted as an Unlicensed Talent Agency?

4. Labor Code §1700.4(a) defines "talent agency" as:

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

5. Petitioner is a model and therefore an "artist", which expressly includes "model" in the definition of "artist" found at Labor Code §1700.4(b). In Waisbren v. Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirement, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole.

6. It was established that the respondent did procure employment on several occasions, including the "At-A-Glance" deal, negotiating compensation for print work, sending "casting kits" directly to casting directors, and respondent's admitted efforts in his June 26, 2000, letter to petitioner. Respondent's argument that sending "casting-kits" for publicity purposes is not an attempt to procure employment is misguided. The sending of resumes and headshots directly to casting directors and/or production companies is seeking employment opportunities and the Labor Commissioner has consistently held that this activity done by an unlicensed artist's representative is a violation of the Act.

7. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of Labor Code §1700.4(a). Labor Code §1700.5 provides that "no person shall

engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." It was stipulated that the respondent has never held a talent agency license. Consequently, it is clear that the respondent indeed procured employment without a license in violation of Labor Code §1700.5.

8. Waisbren adds, "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicenced [agent] and an artist is void." Waisbren, supra, 41 Cal.App.4th 246 at p. 261; Buchwald v. Superior Court, supra, 254 Cal.App.2d 347 at p. 351. Thus, the February 14, 1999, management agreement between the parties is void *ab initio*.

Are Respondent's "Talent Release Agreements" Executed by the Parties, and Incorporated by Reference within the Management Agreement, Void Ab Initio?

9. The parties entered into the management agreement on February 14, 1999. That agreement provided, "[a]ny earnings I [Rogers] receive from licensing or use of photographs or images of me created by you in your capacity as photographer, which are covered by a separate talent release agreement entered into with you, shall not be subject to any additional commission thereunder." Notably, notwithstanding the provision prohibiting the collection of commissions on royalties received by petitioner, the respondent collected his 15% commission on petitioner's guaranteed earnings

from the "At-A-Glance" contract, further evidencing breaches in Respondent's fiduciary duty toward Rogers.

10. Again, "[because] the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicenced [agent] and an artist is void." Waisbren, supra, 41 Cal.App.4th 246 at p. 261.

11. The Act is a remedial statute ... [and is] designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision . . . Such statutes are enacted for the protection of those seeking employment [i.e., the artists]. Consequently, the Act should be liberally construed to promote the general object sought to be accomplished.. To ensure the personal, professional, and financial welfare of artists. Waisbren, supra,41 Cal.App.4th 246 at 254. It is clear that the "talent Release Agreements" limited Rogers' compensation, and conversely benefitted the respondent by limiting petitioner's earnings. As a result of these inequities, coupled with respondent's efforts to procure employment for Rogers without a license, necessitates all "talent release agreements" be voided *ab initio*. The management agreement contained a standard integration clause, but obviously this integration clause is void with the management contract.

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Are Respondent's Profits Obtained from the Licensing of Petitioner's Images to Publishers, the Improper Collection of Commissions and thus Subject to Disgorgement?

12. Petitioner seeks disgorgement of respondent's earnings in connection with the "At-A-Glance" contract, specifically respondent's $6,000.00 "image fee", and argues that respondent violated §1700.40(b). Labor Code §1700.40(b) provides that, "[n]o talent agency may refer an artist to any person, firm, or corporation in which the talent agency has a direct or indirect financial interest for other services to be rendered to the artist, including, but not limited to, photography... or other printing." Respondent stipulated that he owns both the company representing artist, as well as, the photography business.

13. Legislative history and prior Labor Commissioner Determinations reveal the intent behind the statute. Shawn Asselin v. Andy Anderson (No. TAC 14-97), maintains, "that the statute is violated anytime an agent **collects such fees from an artist** (emphasis added), even if the agent transmits the entire fee to another person without retaining any portion as a profit,... the purpose of the statute was to create a firewall between agents and photographers, and to prevent agents from running "photo mill" operations using independent photographers, who are in reality, dependent on the agent for their economic livelihood." This was not the case. The respondent did not charge Rogers for photos, but instead manipulated a financial deal that may not have been in the best interest of the artist model. In mitigation, Minds elevated

Rogers financial percentage to 50% of the net revenue from the "At-A-Glance" contract. The photography talents of Minds do not go unnoticed. Minds is entitled to a reasonable compensation for his photography. Consequently, §1700.40(b) has not been violated as intended by the legislature and Rogers is not entitled to the $6,000.00 image fee collected by Minds from "At-A-Glance".

Does the One-Year Statute of Limitations at Labor Code §1700.44(d), Provide a Defense?

14. Labor Code §1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding.

15. Petitioner files this action on August 28, 2000, thereby limiting petitioner's request for affirmative relief to respondent's violations occurring after August 28, 1999. Petitioner seeks the voidance of the management agreement which was executed on February 14, 1999. The question arises whether the management agreement can be voided. It can.

16. On October 10, 2000, respondent filed his response and cross-petition seeking, *inter alia*, a monetary recovery "reimbursable under the terms of the Personal Management Agreement signed by Baron Rogers on February 14, 1999." The petitioner therefore raises the issue of respondent's unlicensed status as a defense to respondent's cross-petition. The recent case of Styne

v. Stevens 26 Cal.4th 42, held, "that statutes of limitations do not apply to defenses..... Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely. Styne, supra at p. 51; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 423, p. 532.

17. We thus conclude, §1700.44(c) does not bar petitioner from asserting the defense of illegality of the contract on the ground that respondent acted as an unlicensed talent agent. As for respondent's request for affirmative relief, (i.e., reimbursement under "At-A-Glance"), is limited to violations after August 28, 1999.

Attorney's Fees

18. Finally, the petitioner seeks attorney's fees under Labor Code §1700.25(e).

Labor Code §1700.25(e) states,

> If the Labor Commissioner finds, in proceedings under Section 1700.44, that the licensee's failure to disburse funds to an artist within the time required by subdivision (a) was a **willful** violation, the Labor Commissioner may, in addition to other relief under Section 1700.44, order the following:

(1) Award reasonable attorney's fees to the prevailing artist.

(2) Award interest to the prevailing artist on the funds wrongfully withheld at the rate of 10 percent per annum during the period of the violation.

19. The petitioner was guaranteed $7,500.00 in royalties under the "At-A-Glance" deal. He was paid only $3,825.00, [$4,500.00 subtract 15%]. The respondent was paid by "At-A-Glance" and admitted that the petitioner was owed the remaining $3,000.00. The hearing officer warned the Respondent that Rogers' minimum guarantee was owed irrespective of this controversy. Minds indicated he would pay the respondent, but instead has refused payment. The remaining $3,000.00 was not in issue at this hearing and therefore, the respondent wilfully retained petitioner's earnings. Petitioner is entitled to attorney's fees and 10% interest per annum.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1999 personal management contract and all Talent Release Agreements between Petitioner, BARON ROGERS and respondent, ART MINDS dba ART MINDS SURF & SPORT PHOTOGRAPHY and ART MINDS AND ASSOCIATES, are unlawful and void *ab initio*. Respondent has no enforceable rights under these agreements.

Petitioner made a showing that the respondent collected $675.00 in commissions, and wilfully withheld $3,000.00 of Rogers earnings, within the one-year statute of limitations prescribed by Labor Code §1700.44(c). Respondent shall pay the petitioner $3,675.00 in damages, $735.00 in interest [10% for 2 years], for a

total of $4,410.00 within 30 days of this Determination of Controversy. Within 5 of receipt of this Determination, the Petitioner shall calculate his reasonable attorney's fees, and submit that amount to the Labor Commissioner for approval. The Labor Commissioner does not have the authority to grant injunctive relief.

Dated: 1-22-02

David L. Gurley
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

JAN 2 2 2002

Dated: _____

ARTHUR S. LUUAN
State Labor Commissioner