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

RENAN ALMENDAREZ, Petitioner, vs. UNICO TALENT MANAGEMENT, INC., and GERSHON GABEL Respondent.	Case No. TAC 55-97 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on October 23, 1997 by RENAN ALMENDAREZ (hereinafter "Petitioner"), alleging that GERSHON GABEL dba UNICO TALENT MANAGEMENT, INC., (hereinafter "Respondent"), acted as an unlicensed talent agency in violation of Labor Code §1700.5[1]. Petitioner seeks a determination from the Labor Commissioner voiding a 1995 Management Agreement *ab initio*, a 1997 Agreement *ab initio*, and disgorgement of all consideration collected by respondent stemming from either agreement.

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

Respondent was personally served with a copy of the petition on November 4, 1997. Respondent filed his answer with this agency on August 3, 1998. A hearing was scheduled and commenced before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter on July 16, 1999, in Los Angeles, California. Petitioner was represented by Edward N. Sabin of Greenberg, Glusker, Fields, Claman & Machtinger; Respondent appeared through his attorneys David R. Lira and Gita Saigal of Girardi & Keese.

After three days of hearing, due consideration having been given to the testimony, documentary evidence and arguments presented, the matter was taken under submission on July 20, 1999. The Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. In 1995, Renan Almendarez, was employed by radio station KKHJ as an on-air morning radio personality. Respondent, Gershon Gable, was a frequent advertiser on KKHJ, benefitting from petitioner's quickly rising popularity. A friendship developed and on November 16, 1995, the parties executed a three year "Management Agreement" (hereinafter "1995 Management Agreement") providing, *inter alia*, that respondent would counsel and advise petitioner in all matters pertaining to the entertainment industry and receive as compensation, 20% commission on petitioner's gross earnings.

2. The testimony established respondent, well aware of

petitioner's potential to attract a massive audience and uncanny ability to promote and sell products far in excess of other radio personalities, promised petitioner that he would make millions in the radio industry and assured petitioner that through his many contacts he could obtain for petitioner a far more lucrative job. On December 11, 1995, petitioner resigned from KKHJ.

3. The "1995 Management Agreement" expressly maintained, respondent was prohibited from engaging in employment procurement activities. Respondent testified his only responsibility was to guide and counsel petitioner's career, but that testimony is contradicted by countless documents and unbiased witness testimony. In short, the evidence leaves little doubt that respondent's activities during petitioner's fourteen (14) month unemployment period were performed primarily for obtaining employment for petitioner. These efforts included the following:

a. Respondent promised petitioner that after the "1995 Management Agreement" was executed, respondent would obtain a nationally syndicated radio deal for petitioner by, "having the freedom to negotiate with any radio station." Respondent specifically promised petitioner a job by January 20, 1996.

b. On January 8, 1996, respondent issued the following press release:

> "Unico Talent Management, Inc., has been retained to represent Mr. Renan Almendarez Coello, "El Cucuy", L.A.'s number one Spanish-language morning disc jockey. Beginning January 29, 1996, Renan will produce the first LIVE, Spanish-language, daily morning drive radio program for national syndication....[w]ith Renan's track record

and current high-profile status, radio station and network operators from across the United States who are interested in broadcasting this new program **have initiated negotiation discussions with Unico Talent Management, Inc."**

Notwithstanding respondent's prohibition from negotiating employment contracts, petitioner was unemployed and did not have the ability to produce a live show. The press release was simply a ploy to solicit offers from radio station owners in an attempt to find a home base to launch petitioner's radio show.

c. Again, on January 8, 1996, Respondent sent dozens of letters to radio stations across the country stating in pertinent part: "we are currently accepting written offers from any station or station group that would be interested in broadcasting this program throughout Hispanic U.S. **To submit an offer** or if you have any questions, please contact us at Unico Talent Management." Respondent argues, this was an offer for radio stations to receive his client's show by accessing an existing signal, and not an act of procuring employment. Again, petitioner did not have a show to access. This was another attempt at soliciting offers to employ petitioner. Once petitioner was employed, respondent could hopefully launch a successful syndication effort.

d. In 1995, shortly after representation began, Jim Kalmenson, General Manager of KWKW, initiated contact with respondent to employ petitioner. Had Respondent simply turned all negotiation responsibilities over to petitioner, this in itself, would not be procuring employment, but Mr. Kalmenson testified that he initially negotiated all of the employment terms with

respondent, including cars, ratings performance bonus, and salary.

The negotiations fell through because respondent required a very unusual condition precedent before allowing petitioner to sign with Mr. Kalmenson's station. Any employment package for petitioner was conditioned upon respondent receiving from the radio station, a fixed number of free advertising minutes during petitioner's show, used to advertise respondent's other business ventures.[2] This very unusual and inflexible employment provision required by the respondent, persuaded Mr. Kalmenson to initiate employment opportunities directly with petitioner. Petitioner refused to sign a contract without respondent's approval and contract negotiations broke down.[3]

e. Similar procurement efforts developed between petitioner's current employer, Richard Heftel, general manager of radio station KSCA. Mr. Heftel testified that discussions between the parties were also conditioned on mandatory advertising minutes being bestowed upon respondent. When the agreement was executed between petitioner and KSCA, (hereinafter "Employment Agreement"), credible testimony reflected respondent negotiated the terms of the agreement by requesting and receiving various material changes in petitioner's contract.

f. Respondent's own financial advisor, Robert Markus,

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[2] Respondent owned and operated a legal referral business.

[3] Respondent produced a letter from the petitioner, sent to Mr Kalmenson, stating petitioner was a "free agent" and could negotiate terms on his own. Testimony confirmed that the letter was sent at the insistence of respondent. Even had petitioner subsequently negotiated his own terms, early negotiations were conducted solely by respondent.

testified that respondent explicitly told Mr. Markus that he negotiated the salary, car, ratings bonus and advertising minutes as part of petitioner's initial employment agreement with KSCA.

g. Uncontroverted evidence in the form of "program agreements" provided by respondent to Mr. Kalmenson and Mr. Heftel asserted respondent's ability to demand petitioner provide a reasonable number of personal appearances on behalf of the station advertisers at rates to be negotiated by respondent.

h. Unbiased testimony of radio program producer, Craig Kichen, reflected respondent conducted all employment negotiations on behalf of petitioner, culminating in, "Mr. Gabel doing his important client a real disservice."

i. KSCA legal representative, Mr. Michael S. Sherman, drafted petitioner's "Employment Agreement" and the advertising minutes agreement between respondent and KSCA (hereinafter "minutes agreement"). Mr. Sherman credibly testified all negotiations for these two contracts were conducted with Unico Talent Management's attorney Mr. Robert Conrad, negotiating on behalf of Unico. Testimony revealed that Mr. Conrad did not represent petitioner's interests during these negotiations.

Petitioner rarely, if ever, participated in employment discussions and respondent occupied the primary negotiating role. Respondent's activities described above constituted illegal procurement of employment. Additionally, respondent's credibility was called into question as his testimony was wracked with inconsistent statements, impeached by prior sworn deposition

testimony[4].

4. Between December 11, 1995, and February 4, 1997, petitioner was unemployed and without income. Respondent knowing Mr. Almendarez would eventually pay large dividends and eager to keep his artist happy, arranged to have petitioner's living expenses met. In fact, throughout 1996, respondent paid petitioner's credit cards, child support, children's schooling and legal expenses from litigation arising from his KKHJ resignation. Respondent also provided petitioner with hotels, a home, vehicles for petitioner and his wife, monies to petitioner's morning show crew, monthly cash, vacations and at least once, a bag containing $50,000.00 in cash. Respondent alleges over $657,202.00 was advanced.

5. After fourteen months of respondent attempting to procure employment for the petitioner, coupled with KSCA's desire to employ the very popular radio personality, KSCA succumbed to respondent's request for free advertisement minutes as part of the employment deal. This resulted in the February 4, 1997 "employment agreement" between KSCA and petitioner. Simultaneously, respondent entered into the aforementioned "minutes agreement" with KSCA, whereby respondent was provided a specific number of free

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[4] Both respondent and petitioner were impeached often by inconsistent statements casting credibility questions upon both parties. It was pointed out numerous times on cross-examination, Respondent's answers under oath would contradict prior sworn deposition testimony. Petitioner testified he spoke no English, and it was later discovered petitioner passed a driver's license test written in English. Additionally, petitioner characterized the "1997 Agreement" as a loan and later recanted his testimony under oath.

advertising minutes per hour on stations KSCA and KTNQ.[5]

6. Petitioner finally employed, was ostensibly in debt for the $657,000.00 advance, and the 20% commissions owed to respondent pursuant to the "1995 Management Agreement".[6] On May 16, 1997, respondent entered into a loan repayment schedule with petitioner, (hereinafter "1997 Agreement"). This repayment schedule provided that petitioner would obtain[7] advertising minutes for respondent. These minutes were given a monthly monetary value calculated for reducing the debt[8]. The "1997 Agreement" also contained a provision which allowed the respondent to use the

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[5] Section 1(a) of the "Minutes Agreement" between the respondent and petitioner's employer states in pertinent part: "[W]e shall make available, or shall cause to be made available , to you during each day, Monday through Saturday, six (6) sixty second (:60) spots (each, a "Spot") for the broadcast of Spanish language radio commercials (each, a "Commercial") on our radio stations in the Los Angeles TSA (as defined by Arbitron) under the call letters KTNQ and KSCA during the hours of 5 a.m. until 12 noon each broadcast day."

[6] Throughout the hearing, respondent testified the 20% commission was not part of petitioner's loan repayment schedule. In fact, respondent did not make a claim for the commissions. To do otherwise could effectively void the lucrative 1997 loan agreement between the parties as a modification of an illegal contract.

[7] Section 1 of the "1997 Agreement" contained a provision that petitioner would "obtain for and provide to Unico" advertising minutes in consideration for reduction of the debt. The contract does not specifically state how petitioner would "obtain" these minutes. In fact, the minutes in issue were already negotiated and obtained by respondent as reflected in the "Minutes Agreement" between respondent and KSCA. The contract provision, on it's face doesn't make sense. It purports that somehow the minutes negotiated by respondent in February of 1997 from KSCA are to be transferred to the "1997 Agreement" and credited against petitioner's debt. The relationship between these two agreements is vague at best. Neither side produced evidence to clear up this gap.

[8] The "1997 Agreement" established that petitioner would be given a credit against his debt in the amount of $7,000.00 per month no matter what the true value of the commercial time provided to respondent. An accounting of the minutes received, divided into $7,000.00, revealed a $44.00 value for each minute credited against the petitioner's debt. Testimony reflected the fair market value of advertising minutes during petitioner's show to be between $300.00 and $1,000.00.

signature, name, person, likeness, voice, biography, performance, picture and photograph of petitioner..., to market and sell any product in all commercials aired during the commercial time.

7. Throughout 1997, respondent collected an estimated 2,000 minutes of free advertising time during petitioner's show. Testimony reflected the cumulative value of these advertising minutes ranged from $600,000.00 to $2,000,000.00. The petitioner claims he did not understand the terms of this "1997 Agreement", until he was provided with a Spanish translation of the document. It was only then petitioner realized the contents of the "1997 Agreement" contained an unconscionable repayment schedule. Petitioner immediately sought independent counsel and quickly severed the management relationship and filed this petition to determine controversy, seeking disgorgement for the value of the minutes received by respondent as an illegal collection of commissions upon a contract void as to public policy.

8. Respondent then filed a superior court action for breach of the "1997 Agreement" seeking damages. Petitioner moved the superior court seeking an order staying the superior court action pending the determination of the Labor Commissioner's Talent Agent Controversy. On May 28, 1998, that motion was denied. The superior court reasoned the "1997 Agreement" was a loan agreement containing a severability clause not subject to the Labor Commissioner's jurisdiction, thus still enforceable. Respondent then applied to the superior court for Right to Attach Order and Order for Issuance of Writ of Attachment. On October 15, 1998, that application was granted.

9. The central issue in this case turns on whether the "1997 Agreement" shall be construed as a loan repayment agreement or a commission modification to the "1995 Management Agreement". The respondent alleges the $657,202.00 advance was a loan understood by the petitioner and the "1997 Agreement" was simply a memorialization of an oral agreement between the parties on how the $657,202.00 advances were to be repaid. The petitioner argues, the "1997 Agreement" is simply an amendment or modification to the 20% commission structure provided for respondent in the original "1995 Management Agreement"[9]. If the "1997 Agreement" is ruled a separate and distinct loan repayment contract, this would effectively divest the Labor commissioner of jurisdiction. Alternatively, if the "1997 Agreement" is considered an amendment or modification of the illegal "1995 Management Agreement", the effect would be a modification of an illegal contract. Of course, that modification must also be void, and any profits earned through the modification must be disgorged by the respondent.

"1997 AGREEMENT" IN LIEU OF COMMISSIONS

10. The advertising minutes that respondent received from KSCA and KTNQ were provided as a substitute to the 20% commission provision contained within the "1995 Management Agreement" evidenced by the following:

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[9] Section 5(a) of the 1995 management agreement reads, "In consideration of the services rendered by Company to you hereunder, you hereby irrevocably assign to Company, and you shall pay to Company, as and when received by you or applied in your behalf, a sum equivalent to twenty (20%) percent of your Gross Compensation (the 'Fee')".

a. Established through the testimony of Mr. Heftel, Mr. Kalmenson, Mr. Kichen, Mr. Sherman and Mr. Markus, the respondent pre-determined that employment of his client would be conditioned upon respondent receiving aforementioned advertising minutes. Respondent, well aware that the value of free advertising considerably outweighed the 20% commission he would receive pursuant to the express terms of the "1995 management agreement", negotiated for minutes with petitioner's employer as direct compensation for his management efforts. Not once did respondent consider an employment agreement for his client without procuring advertising minutes.

b. Richard Heftel testified that prior to the execution of petitioner's "employment agreement" with KSCA, Mr. Heftel had offered respondent $250,000.00 for petitioner with a $250,000.00 bonus schedule. Respondent disregarded this offer stating, "you are not in the right ballpark". Eventually the actual employment agreement contained only a $150,000.00 salary, a bonus schedule[10], and 2,000 minutes of advertising for the respondent. This clear breach of fiduciary duty displayed not only respondent's self dealing, but more importantly, reflected respondent's intent to collect advertising minutes in lieu of commissions.

c. Mr. Sherman testified, and the "minutes agreement" between respondent and KSCA expressly reflected, the minutes given are in lieu of any 20% commissions structure previously

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[10] For each book, petitioner could receive between $10,000.00 and $100,000.00 bonus depending on his market share.

negotiated.[11]

d. Mr. Gabel's own financial advisor, Mr. Kichen, also testified the minutes negotiated would be received in lieu of commissions. In short, respondent knew all along that his profits for management services would be derived from free advertising.

"1997 AGREEMENT" DESIGNATED A LOAN

11. Designating the "1997 Agreement" as a modification of the "1995 Management Agreement" does not end the analysis. Respondent's argument that the "1997 Agreement" is a valid loan agreement must also be considered.

12. Testimony reflected the petitioner was well aware the expenses advanced by respondent were not a gift and would be repaid. Petitioner testified that he questioned the respondent about the 657,202.00, and respondent stated, "just sign this and you wont owe us the 20% or anything. All you have to do is give me your voice." It is clear, prior to signing this "1997 Agreement" petitioner was well aware that this would extinguish all debt to the respondent including advances and commissions. Testimony also reflected he took the "1997 Agreement" home to his wife, who examined and supported his decision to sign it. The petitioner initialed provisions throughout the contract, signed it, dated it.

13. There was considerable testimony on behalf of the petitioner, that respondent utilized his superior bargaining power

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[11] Section 2(a)(i) of the "minutes Agreement" states in pertinent part: "[T]he advertising time to be provided to you hereunder is in full and complete satisfaction of any obligation to you that Coello might have to compensate you in connection with the Coello Agreement ["Employment Agreement"] other than as it may be extended beyond the current one (1) year term thereof;"

to deceive the petitioner into signing this document. The petitioner went to great lengths establishing he spoke little or no English and didn't understand the "1997 Agreement". The evidence contrasted petitioner's story. The petitioner has lived in the United States since 1982. He is an intelligent, savvy individual, well experienced in complex business affairs, who on many occasions signed important documents that were only afforded to him in English without Spanish translation. The petitioner must not be allowed to hide behind an immigrant status to avoid repayment obligations. Though respondent breached his fiduciary duty, negotiated his clients employment contract for his own selfish interests and violated the Talent Agencies Act, he also allowed the petitioner, his wife and children, and his "Tropa Loca", the luxury to continue as productive citizens in society by providing for all of life's necessities. Indeed, the petitioner maintained a lavish lifestyle throughout his unemployment period through the generosity of the respondent. In short, the petitioner must be held responsible for the agreement's contents.

CONCLUSIONS OF LAW

1. Labor Code §1700.4(b) defines "artists"

> "'Artists' means actors and actresses rendering services on the legitimate stage in the production of motion pictures, **radio artists**, musical artists...and other artists **and persons** rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

2. Labor Code §1700 defines "person" as:

> "any individual, **company**, society, firm, partnership, association, corporation, limited liability company,

manager, or their agents or employees"

3. Petitioner does not perform his show alone. He regularly performs with other individuals who assist petitioner in his jokes, skits, and interviews, aptly named "Tropa Loca". Respondent argues that because petitioner works with a crew, he is not an artist within the meaning of §1700.4(b). Respondent rationalizes that the definition is meant only to encompass individuals and not a "radio production" which is not expressly contained in the definition of "artist". Notwithstanding the definition of "artist" includes "company", "[t]he Act[12] is a remedial statute...Consequently the Act should be liberally construed to promote the general object sought to be accomplished. Waisbren v. Peppercorn 41 Cal.App.4th 246 at 254. Petitioner is clearly the artist and it is petitioner's talents, name and likeness that provide the popularity surrounding the show. His morning crew are simply "sidekicks". To exempt an artist from the definition of §1700.4(b), on the basis that he works regularly with others, would render countless artists without protection, allow violations to go unremedied, fly in the face of legislative intent and undermine the protective mechanisms of the Act. Petitioner is an "artist" within the meaning of §1700.4(b).

4. The Labor Commissioner has jurisdiction to hear and determine controversies, arising between an artist and an agent, pursuant to Labor Code section 1700.44(a). Indeed, the Labor Commissioner has primary and exclusive jurisdiction to hear matters

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[12] The "Act" refers to the "Talent Agencies Act", Labor Code §§1700 through 1700.47 et. seq., regulating talent agencies and creating protection for those artists seeking employment.

arising under the Talent Agencies Act. Buchwald v. Superior Court (1967) [the Labor Commissioner has "original jurisdiction, to the exclusion of the superior court, over controversies" arising under the Act.]

5. Respondent maintains he never acted as a talent agent. Labor Code §1700.40(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." 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 requirements, 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. The term "procure", as used in this statute, means to get possession of: obtain, acquire, to cause to happen or be done: bring about." Wachs v. Curry (1993) 13 Cal.App.4th 616, 628. Thus "procuring employment" under the statute includes negotiating for employment, and entering into discussions regarding employment contractual terms with a prospective employer, all of which were engaged in by the respondent. Applying Waisbren, it is clear respondent acted as a talent agency within the meaning of Labor Code §1700.4(a).

6. Labor Code section 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 the respondent has never been a

licensed talent agent.

"1995 MANAGEMENT AGREEMENT"

7. "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 and unlicensed agent and an artist is void." Buchwald v. Superior Court supra.; Waisbren v. Peppercorn supra, at 261. Under *Civil Code section 1667*, contracts that are contrary to express statutes or public policy as set forth in statutes are illegal contracts and the illegality voids the entire contract. The evidence does not leave a doubt that respondent procured employment for his artist without possessing a talent agency license. Therefore, the "1995 Management Agreement" between the parties must fall.

"1997 AGREEMENT"

8. In determining the legal significance of the "1997 Agreement" and it's relationship to the "1995 Management Agreement", we must discern the intent of the parties by examining extrinsic evidence. Understanding all of the circumstances surrounding the advances, the commission scheme and the relationship between the parties is crucial in determining the parties' intent with respect to the "1997 Agreement". The California Civil Code states, "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. *C.C. §1657*

9. The "1997 Agreement", drafted by respondent's counsel, seems to be a clear loan repayment schedule for monies advanced to

the petitioner. The contract looks valid on it's face and appears to be an integrated agreement reflecting the true intent of the parties. Under general rules of contract interpretation, where the language of a contract is clear and not absurd, it will be followed. *Civil Code 1638* Similarly, it is said that the rules of interpretation of written contracts are for the purpose of ascertaining the words used therein [and] evidence cannot be admitted to show intention independent of the instrument. Barnhart Aircraft v. Preston (1931) 212 C. 19, 22. As the superior court held, absent extraordinary circumstances, this contract should be left intact.

10. However, if it is shown that the words were used to conceal rather than to express the true intent of the parties, the court will look through the form over substance. *Witkin, Summary of California Law, 9th Ed. Vol. 1 §684.* In the case at bar, the true intent of the parties was established by careful examination of all the extrinsic evidence produced at the hearing. *Witkin §681* states, "[w]here extrinsic evidence has been properly admitted and the evidence is in conflict, [with the contract] any reasonable construction by the trial judge will be upheld under the general rule of conflicting evidence." The Labor Commissioner proceedings are not governed by traditional rules of evidence or judicial procedure, and thus most relevant evidence will be admitted. *Title 8 California Code of Regulation §12031* After examination of all relevant evidence submitted at the hearing, it is clear that even though the document omitted a provision expressly providing the agreement was to encompass commission owed, both parties understood

and intended the "1997 Agreement" to extinguish all of petitioner's debt, including commissions.

11.. Further, if respondent's argument was to be believed, then he never intended to be compensated for his management efforts. "Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. The conduct of the parties may be, in effect, a *practical construction* thereof, for they are probably least likely to be mistaken as to the intent." *Witkin, supra §689.* "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent. Crestview Cemetery Assn. v. Dieden (1960) 54 C.2d 744, 754. Common sense dictates that the respondent would be compensated for his efforts on behalf of his artist. There was no evidence presented that respondent received any form of compensation other than the ad minutes. Had evidence been presented, an argument may exist that the "1997 Agreement" was not partially created for respondent's payment for services in lieu of commissions. That evidence was not produced and there can be no other logical conclusion. Through careful drafting of the contract, specifically the omission of this material term, respondent has dramatically changed the legal significance of the document. With the aid of parole evidence, it is clear the

repayment terms contained within the "1997 Agreement" include payment in lieu of commissions stemming from the original "1995 Management Agreement".

SEVERABILITY

12. To uphold the contract as written would produce an inequitable result. It is the role of the hearing officer to look to the intent of the parties and to produce that desired result if possible. 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. The $675,202.00 advances to petitioner should be repaid. In addition, any profit gained by the respondent as a result of his illegal procurement activities must be disgorged to the petitioner.

13. The "1997 Agreement" contains a severability clause.[13] The California cases take a very loose view of severability, enforcing valid parts of an apparently indivisible contract where

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[13] Section 7(h) of the "1997 Agreement" states: "Should any provision or portion of this Agreement be held unenforceable or invalid for any reason by a court of competent jurisdiction, the remaining provisions and portions of this Agreement shall be unaffected by such holding and shall remain in full force and effect. If any provision of this Agreement or its application to any party or circumstance is restricted, prohibited, or unenforceable, such provision shall be ineffective only to the extent of such restriction, prohibition or unenforceability without invalidating the remaining provision of the Agreement and without affecting the validity or enforceability of such provision or its application to other parties or circumstances."

the interests of justice or the policy of the law (as the court conceives it) would be furthered. Carter Finance Co. (1949) 33 C.2d 564, at 573. As the intent of both parties was to execute the "1997 Agreement" as a means to alleviate petitioner's $675,202.00 advances, as well as, petitioner's obligation to pay 20% of his gross earnings to respondent, the interest of justice require the intent be carried out.

14. The courts have held in the (1964) case of Keene v. Harling, that "where the consideration is only partly illegal and the agreement is severable, the legal portion may be enforced. Keene v. Harling (1964) 61 C.2d 318, 324

15. Similarly, if the contract has several distinct objects, of which at least one is lawful, the contract is valid and enforceable as to the lawful object, provided that this is clearly severable from the rest. *C.C. 1599*; Hedges v. Frink (1917) 174 C. 552, 554. Here, the consideration received by the respondent is both legal in part and illegal in part. Any value received by the respondent over and above the advances, must be considered payment for services in lieu of commissions. The question becomes can we place a reasonable value on the minutes received by respondent to determine the actual monetary value of the consideration received. If so, it is then easy to sever what was legally collected as a loan repayment and what was illegally collected as payment for commissions derived from an illegal management contract. To hold otherwise would undermine the intent of the parties, result in an inequitable holding, produce an injustice and allow a contract to be enforced which violates public policy.

16. Here, the "1997 Agreement", provides for the value of the minutes.[14] Testimony reflected the value of the minutes contained within the agreement is grossly undervalued and yet again, another example of respondents' unfair self dealing and breach of fiduciary duty owed his client.

17. Rest.2d, Contracts §208, reads as follows:

"If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." In the "1997 Agreement" the respondent has arbitrarily given the petitioner credit of 7,000.00 a month in reduction of the debt, reflecting all minutes received during the month, regardless of the true value. This amount calculates at around $44.00 a minute credit. Testimony and documentary evidence produced at the hearing placed fair market value for a one minute commercial on petitioner's show at $350.00 to $1,000.00 per minute. Calculations were entered into evidence placing actual value on each minute received by respondent over the applicable time period. The court will use those calculations, and substitute those values for Sect. 2 of the "1997 Agreement"

18. The respondent has violated the Talent Agencies Act,

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[14] Section 2. of the "1997 Agreement" Reduction of Debt provides: "From March 1, 1997 through February 28, 2002, for each full month period that Renan provides to Unico the Commercial Time as agreed upon..., Renan shall be entitled to a credit of $7,000.00 at the end of each month against the debt, no matter what the true value is of the Commercial Time provided to Unico... It is the intention of Renan and Unico that by using this method, Renan will satisfy his debt in full to Unico by February 28, 2007. Renan and Unico each bears the risk that the Commercial Time may be valued higher of lower than the amount of the credit given to Renan under this paragraph."

breached his fiduciary duty to his client and the result must reflect that violation.

ORDER

1. For the above-stated reasons, IT IS HEREBY ORDERED that the "1995 Management Agreement" between respondent GERSHON GABEL dba UNICO TALENT MANAGEMENT INC., and petitioner RENAN ALMENDAREZ is void *ab initio*.

2. The "1997 Agreement" is held lawful in part as a loan repayment contract in the amount of $675,202.00. The "1997 Agreement" is held unlawful in part as to all value received in excess of $675,202.00, which reflects unlawful commissions received.

3. In the interest of justice, the total fair market value for minutes received by the respondent are valued at $946,302.00. The $675,202.00 will be deducted from the total compensation received, and Respondent must pay petitioner the remainder in the amount of $271,100.00 plus interest at 10% per annum from the date of the initial violation (March 1997), at $67,750.00 for a total of $338.850.00.

4. The respondent has no further enforceable rights under this contract.

IT IS SO ORDERED

Dated: 8/26/99

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 8/26/99

Marcy V Saunders

MARCY SAUNDERS
State Labor Commissioner