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Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

JAN EMERSON BIXBY, an individual, Petitioner, vs. CARLO CAPOMAZZA, an individual; CAPOCOM ENTERTAINMENT, a corporation, Respondents.	TAC No. 37-03 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on June 18, 2004 in San Francisco, California, before the undersigned attorney for the Labor Commissioner assigned to hear the matter. Petitioner was represented by attorney Marc Toberoff, and Respondent was represented by attorney Amir S. Salehi. Based on the evidence presented at this hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. Petitioner Jan Emerson Bixby is, and at all times relevant herein has been, a resident of the County of San

Bernardino, State of California. Since 1989, he has rendered professional services in the motion picture and television industries as a writer and screenwriter.

2. Respondent Carlo Capomazza is, and at all times relevant herein has been, a resident of the County of Los Angeles, State of California. Capomazza is the principal and controlling shareholder of Respondent Capocom Entertainment, a California corporation with its principal place of business in Los Angeles, California. Capocom describes itself as a production/management company. Respondents have never been licensed as a talent agency by the State Labor Commissioner.

3. Bixby first met Capomazza through a mutual acquaintance in 1994 or 1995. Capomazza had seen a script that Bixby had written, and told Bixby he was interested in becoming his manager. On October 17, 1995, Bixby and Capomazza executed a "Management Agreement," under which Capomazza agreed to provide services as a personal manager to Bixby with regard to Bixby's career in the entertainment industry, for which Bixby agreed to pay Capomazza commissions equal to 15% of all gross amounts earned by Bixby pursuant to employment or agreements for employment or other entertainment industry related agreements entered into during the term of the Management Agreement, regardless of whether Bixby receives such amounts during or after the term of the Management Agreement, including amounts earned after expiration of the Management Agreement resulting from renewals, extensions, or modifications of any such agreements. In what can only be described as a shockingly one-sided provision, the term of the Management Agreement was set for nine

years (with an initial term of three years, plus two subsequent three year extensions at the sole option of Capomazza, with the extensions taking effect automatically unless Capomazza provides Bixby with notice to the contrary), although Capomazza (but not Bixby) was expressly given the right to terminate the Agreement at any time with 90 days notice. Bixby had no right, under the Agreement, to either terminate the Agreement or to prevent an extension. The Agreement contained a provision under which "the prevailing party shall be entitled to recover any and all reasonable attorney's fees and other costs incurred in the enforcement of the terms of this Agreement or for the breach thereof." The Agreement had been prepared by Capomazza, and Bixby signed it without negotiating any of its terms or having it reviewed by an attorney.

4. The Management Agreement contained a provision stating that Capomazza "is prohibited from procuring, offering, promising or attempting to procure employment or engagements for [Bixby]," and that Capomazza "is not licensed to practice as an agent under any statute." Despite this provision, the evidence presented at the hearing overwhelmingly establishes that throughout their relationship, Cappomaza engaged in pervasive procurement activities on Bixby's behalf, for the purpose of obtaining employment as a motion picture screenwriter. We find that Capomazza attempted to procure or procured employment for Bixby as a screenwriter in connection with the following motion picture projects:

a. "Outer War" for Cineville- In 1995, Capomazza telephoned Bixby with news that he had contacted Carl-Jan

Colpaert at Cineville in order to get Bixby a writing assignment. Bixby met with Colpaert and pitched an idea for a script. Colpaert liked the idea, and he then negotiated an agreement with Capomazza for Bixby's services as a screenwriter. Under the terms of he negotiated deal, Bixby was to write a script (there was no script prior to this deal), and complete at least one "rewrite" and "polish". Under this deal, Bixby received $2,000 or $3,000 for initial compensation, and was to be paid a percentage (either 4 or 5%) of the film's total production budget. Although Bixby wrote the script and completed one rewrite, the film never was produced.

b. "The New World" for Cineville- In 1997, Capomazza called Colpaert at Cineville to pitch a script that Bixby had already written.[1] The concept behind the script could best be described as "Jurassic Park in space." Colpaert wanted the script rewritten, and entered into an agreement with Capomazza for Bixby to rewrite the script to change the concept to "Heart of Darkness in space." Capomazza negotiated a deal with Colpaert under which Bixby wrote a new script, with this new concept, for which Bixby received compensation.

c. "Bikini Island II" for Lion's Gate Studios- In 1995, Capomazza made several telephone calls initiating conversations with film producer Zachary Matz at Lion's Gate

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[1] Capomazza testified that he never saw this script and never submitted it to Cineville. Our findings in connection with this project are based on Bixby's testimony, which we find to be more credible than Capomazza's, based on evidence that Capomazza did not tell the truth about Bikini Island II, another project discussed below.

Studios, during which Capomazza tried to convince Matz to produce a film sequel to "Bikini Island," and to employ Bixby to write the screenplay for this sequel.[2] Despite these solicitations, Matz ultimately decided not to move ahead with this proposed sequel.

d. "Windows" for Lion Head Films- In 1997, Capomazza negotiated with James Fargo of Lion Head Films, regarding a screenplay that Bixby had previously written. Capomazza was seeking an agreement to have the production company purchase the screenplay, and employ Bixby for all rewriting. The parties failed to reach an agreement.

e. "Fantastic Voyage II: Battle In the Mind" and "Fantastic Voyage III: The Visitor" for Bottom Line Films- On August 20, 1996, Bottom Line Films, a motion picture production company, entered into a written agreement with Capomazza, Bixby and Bixby's father (Jerome Bixby) for the sequel rights to the 1966 motion picture "Fantastic Voyage," under which Bottom Line Films was given the exclusive right, for a period of two years, to enter into agreements with third parties for the production of these two sequels. Bixby and his father had previously written the screenplays for these two sequels, but the contracting parties understood that if the sequels were produced, the screenplays would have to be rewritten. Under the August 20, 1996 agreement with Bottom Line Films, Bixby was guaranteed "the

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[2] Capomazza testified that he never tried to get Zachary Matz to hire Bixby as a writer for this sequel, but we credit Bixby's contrary testimony, which is supported by Matz' declaration, which states that Capomazza contacted Matz on behalf of Bixby, and urged Matz to employ Bixby to write a screenplay for this proposed sequel.

first opportunity to write the screenplay" (actually, rewrite the screenplay) "for the first Sequel, for a guaranteed pay-or-play of $100,000," if Bottom Line were to enter into a production agreement with an entity other than Twentieth Century Fox Film Corporation ("Fox"). If Bottom Line were to enter into a production agreement with Fox, Bottom Line promised to "use its best efforts to get Fox to engage [Bixby] to write the first draft screenplay" (actually, the first revised screenplay) "for such Sequel." Finally, the August 20, 1996 agreement with Bottom Line Films specified that if Bixby is entitled to any writing credit on the first sequel, he "shall also be entitled to a first negotiation for his writing services in connection with all subsequent Sequels, the terms and conditions of which shall be no less favorable than those accorded to [Bixby] in connection with the [first] Sequel." All negotiations with Bottom Line Films leading up to this agreement were conducted by Capomazzza.

f. "Fantastic Voyage II: Battle In the Mind" and "Fantastic Voyage III: The Visitor" for Gotham Entertainment-Bottom Line Films failed to produce either of the sequels to "Fantastic Voyage," and on June 17, 1999, Capomazza, on behalf of the estate of Jerome Bixby, entered into a written agreement with Gotham Entertainment, a motion picture production company, giving Gotham the right, for a period of 18 months to be followed by possible renewals, to seek and secure a motion picture or television deal for either "Fantastic Voyage II" or "Fantastic Voyage III," at Gotham's discretion, and the right to produce and exploit one motion picture based on the sequel. The June 17, 1999 agreement further provided that in any deal to produce the

sequel, Gotham will require that "Bixby will be hired as Creative Consultant on the Project," for which Bixby would be paid no less than $15,000, and that if "Fantastic Voyage II" is chosen as the property upon which to base the film, "Bixby shall be considered for rewrite of said property." All negotiations with Gotham leading up to this agreement were conducted by Capomazza.

g. "Shredders" - In 1996, Capomazza set up several meetings with potential producers, including Lawrence Pereria, to obtain a deal for the production of a motion picture based on a screenplay for "Shredders," that had been written by Bixby and his father, and for the employment of Bixby to rewrite the script as needed. These meetings did not lead to a deal.

h. "The Man From Earth" - In 1999, Capomazza met with Gary Depew, a motion picture producer, to pitch this screenplay which had been written by Bixby's father. Capomazzza insisted that if Depew wanted to go forward with the project, Bixby must be hired to complete all rewrites and polishes.

5. Bixby credibly testified that his employment as a writer, to rewrite a screenplay (or at the very least, to assist with the rewriting as a paid creative consultant) was always a condition of any pitch made by Capomazza to potential producers for the sale of an already existing, previously written screenplay.

6. Bixby was never represented by a licensed talent agency during the period of time that Capomazza performed services on his behalf. On two separate occasions, Bixby told Capomazza that he believed he should have an agent, but Capomazza responded that "you don't need an agent," and "it would be redundant since I

already am doing the same things that an agent would do," and that "if you get an agent, you will be paying extra money for no reason."

7. Bixby testified that, sometime during the period from 1995 to 1997, he paid commissions to Capomazza based on his earnings for writing services in connection with "Outer War" and "The New World." Capomazza testified that Bixby never paid any commissions to him. There is no evidence that any commissions, or any other form of compensation, was paid by Bixby to Capomazza at any time from one year prior to the filing of this petition to the present.

8. According to Bixby, problems developed in the parties' relationship, not the least of which was Capomazza's insistence that he get screen credit as a producer for films with screenplays written by Bixby. In negotiations with production companies, Capomazza's insistence on this, and his assertions that he should receive compensation from such production companies for his "services" as a producer, made it more difficult, in Bixby's view, for Bixby to get employment as a writer. Also, Bixby felt that, to the extent that production companies have a fixed budget for making a film, Capomazza's demands for payment for his ostensible services as a "producer" limited the amounts that Capomazza could seek for Bixby's writing services, and Bixby thought it was unfair that Capomazza was seeking to get paid both his commissions from Bixby, and his "producer fees" from the production company, in connection with

the same project.[3] In reassessing their relationship, Bixby realized that since Capomazza had never before produced a motion picture, "he wasn't bringing me any value as a producer." In short, Bixby concluded that there was an irreconcilable conflict between his interests and those of Capomazza, and in May 2002, Bixby terminated Capomazza's services.

9. Capomazza's testimony concerning the reasons for the termination of his services is quite different. According to Capomazza, he never received any commissions from Bixby, and he continued to work as Bixby's manager during this time only because he had been promised a producer credit on "Fantastic Voyage II." But in order to secure the property of "Fantastic Voyage II" for Bixby (it had been partly owned by Bixby's father), it was necessary to retain the services of an attorney, for which Capomazza paid $44,000. In May 2002, a motion picture studio paid $1,500,000 for the rights to "Fantastic Voyage II," and around that same time, Bixby terminated Capomazza to avoid paying commissions allegedly due under the parties' Management Agreement. With respect to the issue of whether he had engaged in procurement activities, Capomazza acknowledged his efforts to obtain employment as a writer for Bixby, but testified that he was doing so as a "producer" pursuant to options he had obtained on the projects in question. Initially, we note that Capomazza

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[3] In his testimony, Capomazza confirmed that he was always entitled to 15% of Bixby's earnings as a commission for serving as his manager, including projects in which Bixby could have been compensated for his writing services and Capomazza could have had compensation as a producer. Capomazza's right to commissions included those projects in which Capomazza was, or thought he was, a producer.

did not claim that he ever had an option, or that he was acting as a producer, for either "The New World" or "Bikini Island II." We now look to the remaining projects at issue, in order to evaluate Capomazza's contention that he acted as a "producer," and not as an "agent" for Bixby with respect to his efforts to obtain employment for Bixby on these projects:

a. Outer War- The only document Capommazza presented in support his claim that he had an option on this screenplay consisted of a typed note, signed by Bixby and dated October 28, 1995, describing "the status of all current Bixby/Carlo projects." The status of Outer War was conveyed in exactly one sentence, as follows: "Carlo has one week to read script and tell Emerson it's great, or else Emerson gets to sleep with Julie." We cannot fathom how this evidences an option to produce this project. Furthermore, the summary of the negotiated terms of the agreement between Bixby and Cineville refer to Capomazza as "the manager," not as a producer. Absolutely no credible evidence was presented that would indicate that Capomazza ever acted as a producer, or ever sought to act as a producer, on this project.

b. Windows- Capomazza presented evidence that on August 1, 1995, Bixby executed a written agreement granting Capomazza a six month option "to acquire all right, title, and interest in [this] screenplay," for which Bixby would be paid $100 per month. The agreement further provided that the option could be extended by a payment of $1,000, and that the option could be exercised with the payment of $10,000. Capomazza testified that he and Bixby had "an understanding," that was not reduced to writing, that the option would extend beyond February

1, 1996, but there is no evidence that Capomazza made any payments beyond that date. Also, there is no evidence whatsoever that Capomazza ever exercised this option. We conclude that in 1997, when attempting to procure employment for Bixby in connection with this project, Capomazza had no right, title or interest in the screenplay, and was not acting as a producer.

c. Fantastic Voyage II/Fantastic Voyage III- Capomazza admitted that he had no option for Fantastic Voyage III. Capomazza presented a typed note, dated October 28, 1995, and signed by Bixby, stating, "Fantastic Voyage II- as of 8/95, Carlo has no longer needed to pay 'option $$$.' Carlo will represent the script for 15%, and Emerson [Bixby] agrees that in no way will the film ever get made unless Carlo is involved and credited in a production capacity." When asked during the hearing whether this document actually provided him with an ownership interest in the screenplay, Capomazza acknowledged, "it does look a little bit thin." In the entertainment industry, the term "producer" includes not only persons with ownership interests in a property, but also persons without any such ownership interest who were nonetheless involved in somehow overseeing or coordinating the production of the final product. However, Capomazza presented uncontradicted testimony that the parties had an "oral understanding that in consideration of my paying his legal fees," to enable Bixby to secure the rights to the screenplay, "I'd have an option on the property." Assuming for now that this "oral understanding" effectively created such an option, there is still the question of whether, in attempting to procure employment for Bixby as a writer on this project,

Capomazza was attempting to interest third party employers, in the form of production companies as to which Capomazza had no ownership interest, in employing Bixby as a writer. We find that is precisely what Capomazza attempted to do in his negotiations both with Bottom Line Films and Gotham Entertainment. Capomazza failed to provide a scintilla of evidence that he had any ownership interest in either of these production companies, or with any production companies that Bottom Line or Gotham in turn may have negotiated with, or with the motion picture studio that ultimately purchased the screenplay. As such, we find that Capomazza failed to prove that he ever functioned as Bixby's employer, or that he necessarily would have functioned as Bixby's employer upon sale of the screenplay, with respect to "Fantastic Voyage II."

d. Shredders- Bixby admitted that Capomazza had an option on this screenplay for a period of six months. There was no evidence, however, of a written option agreement. In an undated written communication from Bixby to Capomazza, there is a reference to an option for this screenplay, and a "$20,000 purchase price." There was no testimony or other evidence from any witness indicating that this purchase price was ever paid, so we now conclude that whatever option may have existed was never exercised. Moreover, there is no evidence that the Capomazza had an option on the screenplay at the time of his discussions with producer Lawrence Pereria. Thus, we conclude that Capomazza's discussions with Pereria were aimed at obtaining employment for Bixby with a third-party employer, and that in carrying out these discussions, Capomazza did not act as a producer.

e. The Man From Earth- By written agreement executed on May 10, 1999, in consideration for payment of $1,000, Bixby granted Capomazza a one year "option to purchase [this screenplay]" for commercial exploitation. The "purchase price for the property" was set at 3% of the entire production budget (increased to 5% if the budget goes over $5,000,000), to become due and payable upon the commencement of filming. There is therefore no question that Capomazza had an option on this screenplay at the time he conducted discussions with producer Gary Depew aimed at getting Depew to commit to making the film and to hire Bixby to rewrite the script. But this does not necessarily mean that Capomazza would have had any ownership interest in the film if it had been made. To acquire such an interest, Capomazza would have had to pay Bixby the purchase price established under the terms of the written option agreement. This never happened. Since the option to purchase the screenplay was never exercised, we cannot conclude that Capomazza was acting as a producer when he conducted discussions with Depew.

10. On August 12, 2003, Capomazza filed an action against Bixby with the Los Angeles Superior Court, alleging that Bixby had breached the terms of the parties' Management Agreement by failing to pay the commission purportedly due to Capomazza under this Agreement for the amount received by Bixby in connection with Fox's purchase, earlier in 2002, of the right to produce a sequel of Fantastic Voyage. The complaint also alleges unjust enrichment and fraud. The complaint seeks compensatory and punitive damages, and reasonable attorney's fees.

11. On October 20, 2003, Bixby filed the instant petition to determine controversy, seeking a determination that respondents violated the Talent Agencies Act by procuring or attempting to procure covered employment for Bixby without the requisite talent agency license, and that as a consequence, the Management Agreement is void *ab initio* and unenforceable by Capomazza, and that Capomazza has no rights thereunder. Beyond that, the petition also seeks an order for a full accounting from respondents of all monies and things of value received by respondents pursuant to the Management Agreement or pursuant to any other agreements between the parties, and for reimbursement of all such amounts, plus 10% interest, and an order requiring respondents to forfeit and return to petitioner any and all equity, ownership interest, or participation in any businesses entertainment projects which the parties' entered into during the term of the Management Agreement. Finally, the petition seeks an award of reasonable attorney's fees.

12. On November 24, 2003, Respondents filed an answer to the petition to determine controversy, asserting that Respondents have never procured or attempted to procure employment on behalf of the petitioner in that Respondent has never been involved in attempts to arrange for Petitioner to provide future services to a third party; that the Labor Commissioner lacks jurisdiction with respect to the "Fantastic Voyage" work in dispute because petitioner was not an "artist" in connection with this project; and that petitioner's claims are barred by the one year statute of limitations prescribed At Labor Code §1700.44(c) because Respondents did not receive any commissions at any time during

the one year period prior to the filing of the petition to determine controversy. Respondents request an order that the parties' agreement is neither illegal, nor invalid, nor unenforceable under the Talent Agencies Act, that the Labor Commissioner has no jurisdiction over the dispute involving "Fantastic Voyage," and an award of attorney's fees.

LEGAL ANALYSIS

1. Labor Code §1700.4(b) defines "artists" to include, *inter alia*, "writers....rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises." Bixby is therefore an "artist" within the meaning of the Talent Agencies Act.

2. The Labor Commissioner has jurisdiction to hear and determine this controversy pursuant to Labor Code §1700.44(a). "When the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction in the matter, including whether the the contract involved the services of a talent agency." *Styne v. Stevens* (2001) 26 Cal.4th 42, 54. This means that the Labor Commissioner has "the exclusive right to decide in the first instance *all the legal and factual issues on which an Act-based defense depends.*" *Ibid.*, at fn. 6, italics in original. In doing so, the Labor Commissioner will "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality," and "will look through provisions, valid on their face, and with the aid of parol evidence, determine [whether] the contract is actually illegal or part of an illegal transaction." *Buchwald v. Superior*

Court, supra, 254 Cal.App.2d at 351.

3. Labor Code section 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." Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license . . . from the Labor Commissioner." The Talent Agencies Act is a remedial statute; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 354. For that reason, the overwhelming judicial authority supports the Labor Commissioner's historic enforcement policy, and holds that "[E]ven the incidental or occasional provision of such [procurement] services requires licensure." *Styne v. Stevens, supra,* 26 Cal.4th at 51; "The [Talent Agencies] Act imposes a *total* prohibition on the procurement efforts of unlicensed persons," and thus, "the Act requires a license to engage in *any* procurement activities." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 258-259; see also *Park v. Deftones* (1999) 71 Cal.App.4th 1465 [license required even though procurement activities constituted a negligible portion of personal manager's efforts on behalf of artist, and manager was not compensated for these procurement activities].

4. The Labor Commissioner has held that the activity of procuring employment under the Talent Agencies Act refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and a third party employer or

prospective purchaser of the artist's services. Thus a person or entity (like a film production company or a casting director employed by a film production company) that directly employs or engages the services of an artist does not 'procure employment' for that artist within the meaning of Labor Code §1700.4(a). *Chinn v. Tobin* (TAC No. 17-96) at p. 7. Conversely, an artist does not need to be licensed to negotiate directly with a prospective purchaser of the artist's services. Recently, in *Bautista v. Romero* (TAC No. 3-04) at pp. 12-14, we held that a musical group, consisting of two or more artists, may authorize one member of the group to negotiate directly with a prospective purchaser of the group's artistic services, without the need for that artist to be licensed as a talent agent as long as these factors are met: a) the person negotiating on behalf is making a bona fide artistic contribution to the performance that is being purchased, b) income that is earned by members of the musical group as a result of the purchase of the performance is divided among the members of the group on the basis of each artist's creative contribution and/or the artist's prior accomplishments, however necessary and reasonable expenses that were incurred in procuring the employment may be deducted from income derived from the performance and given to the artist who procured the employment as reimbursement for these expenses, and c) the artist who procured the engagement does not collect, or seek to collect, any commission or other fee from any of the other artists in the group, except for the allowable recovery of reasonable expenses that were necessarily incurred in procuring the employment.

5. Respondent's defense that whenever he sought to obtain

employment for Bixby he was doing so as a producer boils down to the assertion that as a producer, Capomazza was not subject to the Act's licensing requirement. Applying the rationale of *Chinn* and *Bautista* to the matter now before us, in order for this defense to prevail, Capomazza must prove **for every single project** in which he attempted to obtain employment as a writer for Bixby, Capomazza was either: 1) the employer or prospective employer of Bixby's services, or 2) an "artist" within the meaning of the Act, who, as part of an "artistic organization" which included Bixby, attempted to procure employment for all members of that organization with third party employers in accordance with the restrictions set out in *Bautista.* Capomazza's defense fails on all counts. First, as we have determined above, Capomazza procured or attempted to procure employment for Bixby as a writer for three projects, "The New World," "Bikini Island II," and "Fantastic Voyage III" for which Capomazza, by his own admission, did not have an option. That alone is determinative, as a license is required for **any** procurement activities. Next, notwithstanding Capomazza's assertions regarding his role as a producer, we have determined, above, that Capomazza never acted as a producer of "Outer War," and was not acting as a producer at the time that he engaged in procurement activities on behalf of Bixby in connection with "Windows," "Shredders," and "The Man from Earth."[4] As for "Fantastic Voyage II," the fact that

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[4] Once an artist establishes that a person not licensed as a talent agent attempted to procure employment for that artist, the burden shifts to the unlicensed person to affirmatively prove that a license was not required for the procurement activities. Thus, Capomazza had the burden of proving that he was acting as a producer at the time he attempted to obtain employment for Bixby.

Capomazza had an "oral understanding" that he had an option on the screenplay was not sufficient, as a matter of law, to establish an exclusive right to produce the screenplay.[5] More importantly, the fact that Capomazza failed to prove that he ever functioned as Bixby's employer, or that he necessarily would have functioned as Bixby's employer upon sale of the screenplay, with respect to "Fantastic Voyage II," means that Capomazza acted as a talent agent for Bixby in connection with this project. Again, however, we must emphasize that for Bixby, this is mere "icing on the cake," in that **any single instance of attempted procurement** of employment with a prospective third party purchaser of the artist's services is all that is needed, under the controlling case law, to establish the need for a license. Finally, turning to the factors set out in *Bautista,* which, when every enumerated factor is present would make licensure unnecessary, we note that the evidence presented showed that Capomazza was not an "artist" within the meaning of Labor Code §1700.4(b), was not part of an an "artistic organization" which included Bixby, and therefore made no bona fide artistic contribution to any such organization, and lastly, that Capomazza has asserted the right to commissions

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Capomazza did not meet this burden.

[5] Section 204(a) of the Copyright Act (29 U.S.C. §204(a)) provides: "A transfer of copyright ownership ... is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." See *Konigsberg Int'l v. Rice* (9th Cir. 1994) 16 F.3d 355. While it is true that a non-exclusive license to make use of an artist's copyrighted work may be effected by an oral agreement, under a non-exclusive license the artist retains the right to transfer ownership of the work to others. *Effects Assoc., Inc. v. Cohen* (9th Cir. 1990) 908 F.2d 555, 558-559.

from Bixby on projects for which Capomazza procured or attempted to procure artistic employment for Bixby. Far from satisfying all of the *Bautista* factors, Capomazza satisfies none of them. Consequently, we conclude that Capomazza violated the Talent Agencies Act by procuring or attempting to procure artistic employment for Bixby without the requisite talent agency license.

6. California courts have uniformly held that a contract under which an unlicensed party procures or attempts to procure employment for an artist is void *ab initio* and the party procuring the employment is barred from recovering payments for *any* activities under the contract, including activities for which a talent agency license is not required. *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1103-1104; *Styne v. Stevens, supra,* 26 Cal.4th at 51; *Park v. Deftones, supra,* 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 1470. The courts have also unanimously denied all recovery to personal managers even when the overwhelming majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104; *Park v. Deftones, supra,* 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 250, 261-262. The rationale for denying a personal manager recovery even for activities which were entirely legal, where that personal manager also unlawfully engaged in employment procurement without the requisite talent agency license, is based on the public policy of the Talent Agencies Act to deter unlicensed persons from engaging in activities for which a talent agency license is required.

This rationale is not limited to actions for breach of contract; it also applies to actions seeking recovery on theories of unjust enrichment or quantum meruit. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104, fn. 30; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.app.4th at 250, fn. 2. Knowing that they will receive no help from the courts in recovering for their legal activities undertaken pursuant to an agreement under which they also engaged in unlawful procurement, personal managers are less likely to enter into illegal arrangements. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 262, citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150. In *Waisbren,* the court observed that one reason the Legislature did not enact criminal penalties for violations of the Talent Agencies Act was "because the most effective weapon for assuring compliance with the Act is the power ... to declare any contract entered into between the parties void from the inception." *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 262, quoting from a 1985 report issued by the California Entertainment Commission.

7. Moreover, the artist that is party to such an agreement may seek disgorgement of amounts paid pursuant to the agreement, and "may . . . [be] entitle[d] . . . to restitution of all fees paid the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of restitution is, however, subject to the one year limitations period set out at Labor Code §1700.44(c). *Greenfield v. Superior Court* (2003) 106 Cal.App.4th 743.

8. On the other hand, this statute of limitations does not apply to the defense of contract illegality and unenforceability,

even where this defense is raised by the petitioner in a proceeding under the Talent Agencies Act. "If the result the [artist] seeks is [is a determination] that he or she owes no obligations under an agreement alleged by [the respondent] ... the statute of limitations does not apply." *Styne v. Stevens, supra,* 26 Cal.4th at 53.

9. Having found that Capomazza acted as a talent agent without the requisite license, we must necessarily conclude that the management agreement between Capomazza and Bixby is void *ab initio*, and that Capomazza has no enforceable rights thereunder. Capomazza is therefore is not entitled to the recovery of any commissions or other compensation purportedly owed under this agreement, or purportedly resulting from any services provided by Capomazza pursuant to this agreement.

10. However, because there is no allegation, and certainly no evidence that Bixby made any payments to Capomazza, or that Capomazza received any compensation pursuant to this agreement, at any time since October 20, 2002 (one year prior to the date of the filing of the petition to determine controversy), the statute of limitations found at Labor Code §1700.44(c) precludes us from ordering reimbursement of amounts purportedly paid to Capomazza prior to that date, or from ordering Capomazza to provide an accounting of such payments.

11. Ordinarily, in an action on a contract providing for attorney's fees, Civil Code §1717 entitles the prevailing party to attorney's fees, even when the party prevails on the ground that the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to

attorney's fees had it prevailed. *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870. This general rule "serves to effectuate the purpose underlying Section 1717," which was enacted to establish mutuality of the contractual remedy of attorney's fees. *Ibid.* However, as noted in *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, and *Geffen v. Moss* (1975) 53 Cal.App.3d 215, "a different rule applies when the contract is held unenforceable because of illegality." *Bovard* at 843, *Geffen* at 227. "A party to a contract who successfully argues its illegality stands on a different ground than a party who prevails in an action on a contract by convincing the court that the contract is inapplicable, invalid, nonexistent or unenforceable for reasons other than illegality." *Bovard* at 840. Because courts generally will not enfore an illegal contract, there is no need for a mutual right to attorney's fees, since neither party can enforce the agreement." *Ibid.* at 843. However, *Bovard* and *Geffen* do not provide the final word on the question of whether Bixby, as the prevailing party in this matter, is entitled to attorney's fees under the parties' management agreement. Both *Bovard and Geffen* involved contracts that were entirely unenforceable by either party due to their illegal objects - - *Bovard* concerned a contract to manufacture drug paraphernalia, and *Geffen* concerned a contract to purchase the "good will" of a law practice. The laws that made these contracts illegal were laws that were designed to protect the public as a whole, not one of the parties to the agreement. In contrast, the Talent Agencies Act's "purpose is to protect artists seeking professional employment from the abuses of talent agencies."

Styne v. Stevens, supra, 26 Cal.4th at 50. In other words, the Talent Agencies Act is a statute designed to protect artists when they enter into contracts with licensed or unlicensed talent agents. For this reason, we adopt the court's reasoning in *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1081-1083, limiting the *Bovard/Geffen* rule to instances where the contract as illegal and the law making the contract illegal was not designed to protect either party to the contract. In contrast, "when the legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the statute is realized by allowing the [party in the protected class], who is not in pari delicto, to enforce the contract or maintain the action against a defendant in the class primarily to be deterred." *Cypress Housing Partners, supra,* at 1082, citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 153. Moreover, if Capomazza were permitted to now assert the illegality of his contract with Bixby as a basis for denying Bixby's claim for attorney's fees incurred as a result of Bixby's successful defense of Capomazza's attempt to enforce that contract, we would in effect be permitting an unlicensed talent agent to benefit from the illegality that he himself created, thus disserving the goal of deterring illegal conduct. See *Cypress Housing Partners, supra* at 1083; *Cf. Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 991. Thus, we conclude that Bixby has a right to attorney's fees under

parties' management agreement, which provides that "the prevailing party shall be entitled to recover any and all reasonable attorney's fees and other costs incurred in the enforcement of the terms of this Agreement or for the breach thereof." Capomazza initiated an action to enforce the agreement, and Bixby in turn had no choice but to file this petition to determine controversy in order to contest the validity of the agreement. By operation of CCP §1717, as the prevailing party herein, Bixby is therefore entitled to reasonable attorneys fees.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1) The Management Agreement between Capomazza and Bixby is void *ab initio*, Capomazza has no enforceable rights thereunder, and is not entitled to the recovery of any commissions or other amounts purportedly owed under this agreement, or as a result of services performed pursuant to this agreeement;

2) Bixby is not entitled to reimbursement of amounts previously paid to Capomazza pursuant to this agreement, as such payments were made prior to October 20, 2002, and therefore, reimbursement is barred by the applicable statute of limitations;

3) Bixby is not entitled to an accounting of amounts paid to Capomazza pursuant to the Management Agreement as there is no allegation of any payments made within the applicable limitations period; and

4) By virtue of our determination that the Management Agreement is void and unenforceable, Bixby is the prevailing party in this proceeding, and pursuant to Civil Code §1717, he is

therefore awarded reasonable attorney's fees incurred in connection with this proceeding, with the amount to be set by a supplemental order. Bixby shall file and serve on opposing counsel any declaration(s) setting out the amount claimed no later than 21 days after this Determination is served on the parties, Capomazza may file any papers opposing the amount claimed no later than 35 days after this Determination is served, and Bixby may file a reply no later than 45 days after this Determination is served.

Dated: 10/31/05

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: Nov. 3, 2005

DONNA M. DELL
State Labor Commissioner