

1 **STATE OF CALIFORNIA**
Department of Industrial Relations
2 Division of Labor Standards Enforcement
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8 **BEFORE THE LABOR COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**
10

11
12 VERNE TROYER,) CASE NO. TAC 25-04
13 Petitioner,)
14 vs.) **DETERMINATION OF**
15) **CONTROVERSY**
16)
17 JON SIMANTON; AND SIMANTON)
& FONDACARO MANAGEMENT,)
18 Respondents.)

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20 The above-captioned matter, a petition to determine controversy under Labor Code
21 §1700.44, came on regularly for hearing on August 31, 2005 in Los Angeles, California,
22 before the undersigned attorney for the Labor Commissioner assigned to hear this case.
23 Petitioner Verne Troyer appeared, represented by Edwin G. McPherson, Esq. and Tracy
24 Rane, Esq. of McPherson & Kalmansohn. Respondents Jon Simanton and Simanton &
25 Fondacaro Management appeared, represented by Steven M. Gluck, Esq. and Richard Rome,
26 Esq. Elena Bertagnolli, (also known as Elena Fondacaro), appeared as a witness on behalf
27 of Petitioner Verne Troyer, (hereinafter, referred to as "petitioner"). Thomas Griggs
28 appeared as a witness on behalf of Respondents Jon Simanton (hereinafter, referred to as



1 “respondent Simanton”) and Simanton & Fondacaro Management.

2 Based on the evidence presented at this hearing and on the other papers on file in this
3 matter, the Labor Commissioner hereby adopts the following decision.

4 **FINDINGS OF FACT**

5 1. Petitioner is an actor who has appeared in numerous television shows and
6 motion pictures. He is best known for playing “Mini-Me” in Mike Meyer’s films “*Austin*
7 *Powers: The Spy Who Shagged Me*” and “*Austin Powers in Goldmember*”.

8 2. Respondent Jon Simanton is an actor and former manager for petitioner.
9 Respondent Simanton & Fondacaro Management is a partnership that was formed between
10 Respondent Simanton and Phil Fondacaro for the sole purpose of managing petitioner.

11 3. Respondents Jon Simanton and Simanton & Fondacaro hereinafter, will also
12 be collectively referred to as “respondents.”

13 4. In 1998, the same year petitioner was offered the role of “Mini-Me” in the
14 movie “*Austin Powers: The Spy Who Shagged Me*”, he asked his friend and fellow actor,
15 respondent Simanton, to represent him as his personal manager. Petitioner asked respondent
16 Simanton to handle all communications and initial negotiations for this role. Respondent
17 Simanton admitted at the hearing that, among other things, he negotiated such items as
18 “more money than scale” and per diem for petitioner.

19 At some point during the negotiations for this role, respondent Simanton formed a
20 partnership with Phil Fondacaro, also an actor. The partnership was named Simanton &
21 Fondacaro Management and served as petitioner’s management company. Elena
22 Bertagnolli, who is now married to Mr. Fondacaro, along with respondent Simanton and Mr.
23 Fondacaro, jointly managed petitioner during this period¹. At no time during negotiation of
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25 ¹Petitioner stated in his trial brief that both Mr. Fondacaro and Ms. Bertagnolli deny that either
26 of them has ever entered into any agreement with respondent Simanton with respect to providing
27 management services to petitioner or anyone else. At the hearing in this matter, Ms. Bertagnolli, who
28 still manages petitioner, testified that she has never entered into a business relationship with respondent
Simanton with respect to providing services to petitioner. However, she admitted that she provided
management services and procured work for petitioner during the same period of time that respondent
Simanton provided management services and procured work for petitioner. Additionally, she admitted
that petitioner instructed her to pay respondent Simanton 10% of his earnings as commissions. No

1 the role "Mini-Me" were any of these three individuals licensed with the State of California
2 as talent agents.

3 In return for acting as petitioner's management team, respondents and Ms.
4 Bertagnolli were promised 20% of petitioner's earnings, including residuals. Respondent
5 Simanton testified that he was entitled to ½ of the 20% paid as commissions.

6 5. Respondents and Ms. Bertagnolli continued to jointly manage petitioner
7 beyond the filming of the movie "*Austin Powers: The Spy Who Shagged Me*". Respondents
8 and Ms. Bertagnolli procured work for petitioner on Saturday Night Live², the Shasta
9 McNasty television series, various autograph signing appearances, and other events,
10 including an appearance at a Boston night club.

11 6. The evidence also established that on several occasions, respondent Simanton
12 negotiated and procured work for petitioner on his own, without the assistance or input of
13 the management team, including Ms. Bertagnolli. For instance, respondent Simanton
14 negotiated for petitioner to appear on the cover of a CD with a guitar player. Respondent
15 Simanton negotiated the terms, including the compensation that would be paid to petitioner
16 for this employment. Respondent Simanton also procured a personal appearance for
17 petitioner at an event that took place in Harrah's Casino in Lake Charles, Louisiana.
18 Respondent Simanton negotiated the terms of this appearance directly with Mike Gold of
19 Celebrity Placement Services which is an agency that finds and pays talent to make
20 advertising appearances for their customers.

21 7. The parties relationship came to an end sometime in 2002.

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23 testimony was provided at the hearing which contravened respondent Simanton's testimony that he
24 formed a partnership with Mr. Fondacaro for the purpose of managing petitioner. As such, we find that
25 respondent Simanton and Mr. Fondacaro did form a partnership called Simanton & Fondacaro for the
26 sole purpose of managing petitioner. Furthermore, we find that even though Ms. Bertagnolli may not
have formed a formal business relationship with respondents for the purpose of managing petitioner, she,
along with respondents, made up petitioner's management team.

27 ²Respondent Simanton testified that Ms. Bertagnolli procured and negotiated the Saturday Night
28 Live appearance for petitioner. In contrast, Ms. Bertagnolli testified that respondent Simanton procured
and negotiated the performance. We find that both parties jointly procured and negotiated the
performance.

1 **LEGAL ANALYSIS**

2 1. Petitioner, an actor in television and motion pictures, is an "artist" within the
3 meaning of Labor Code §1700.4(b).

4 2. Labor Code §1700.4(a) defines "talent agency" as, "a person or corporation
5 who engages in the occupation of procuring, offering, promising, or attempting to procure
6 employment or engagements for an artist or artists."

7 3. Labor Code §1700.5 provides that no person shall engage in or carry on the
8 occupation of a talent agency without first procuring a license therefor from the Labor
9 Commissioner. Any agreement between an artist and an unlicensed talent agency is
10 unlawful and void *ab initio* and the licensed talent agency has no right to retain commissions
11 arising under such an agreement. *Waisbren v. Peppercorn Productions, Inc.* (1995) 41
12 Cal.App.4th 246, *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347.

13 4. Labor Code §1700.44 provides that "in cases of controversy arising under this
14 chapter, the parties involved shall refer the matters in dispute to the Labor Commissioner,
15 who shall hear and determine the same, subject to an appeal within 10 days after
16 determination, to the superior court where the same shall be heard de novo."

17 5. Labor Code §1700.44(c) provides that "no action or proceeding shall be
18 brought pursuant to this chapter with respect to any violation which is alleged to have
19 occurred more than one year prior to the commencement of the action or proceeding." On
20 May 26, 2005 we issued a ruling in this matter denying respondents' motion to dismiss the
21 petition on the grounds that it was time barred. We held that the one year statute of
22 limitations provided by Labor Code §1700.44(c) does not apply to affirmative defenses, and
23 to the extent that this petition seeks a determination that any representation agreement
24 between petitioner and respondents is void *ab initio* and unenforceable, it operates as an
25 affirmative defense to a pending superior court action in which respondents herein seek
26 compensation based on said representation agreement. The evidence established that there is
27 a pending superior court action wherein respondent Simanton seeks compensation based on
28 the contract at issue herein. Petitioner, consequently, only seeks a determination that any

1 contract between petitioner and respondents is void *ab initio* and that respondents have no
2 enforceable rights thereunder. As such, this action is timely.

3 6. The evidence and testimony presented established that during the relevant
4 time period, respondents Jon Simanton and Simanton & Fondacaro Management procured
5 employment and engagements for petitioner Verne Troyer without being licensed as talent
6 agents with the State of California Labor Commissioner.³

7 7. Respondent Simanton admitted that he participated in the negotiation of
8 petitioner's role as "Mini-Me" in the movie "*Austin Powers: The Spy that Shagged Me*".
9 Specifically, respondent Simanton admitted that he was involved in the initial negotiations
10 for this role and then later brought Mr. Fondacaro and Ms. Bertagnolli in to assist in
11 finalizing the deal. These admissions alone are sufficient to establish a violation of the
12 Talent Agencies Act, ("Act"). See *Waisbren v. Peppercorn Productions, Inc., supra*, which
13 held that any single act of procuring employment subjects the agent to the Act's licensing
14 requirement, thereby upholding the Labor Commissioner's long-standing interpretation that
15 a license is required for *any* procurement activities, no matter how incidental such activities
16 are to the agent's business as a whole. Petitioner also introduced into evidence *Request for*
17 *Admissions* propounded on respondent Simanton in the superior court action as well as his
18 responses to the request. Respondent Simanton's responses established that he violated the
19 Act as he did not deny that he secured, arranged and negotiated work for petitioner between
20 1998 and June 2004 (the date the requests were propounded). Additionally, respondent
21 Simanton violated the Act when he procured work for petitioner to pose on the cover of a
22 CD with a guitar player and when he negotiated an appearance for petitioner at Harrah's
23 Casino in Lake Charles, Louisiana.

24 8. Respondents also violated the Act each time they arranged and negotiated
25 events for petitioner to appear at for the purpose of signing autographs. Additionally, the
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27 ³The evidence also established that Elena Bertagnolli is in violation of the Talent Agencies Act
28 since she procured employment for petitioner without being licensed as a talent agent with the State of
California. However, because petitioner has only filed this petition against respondents Simanton and
Simanton & Fondacaro Management, this determination is limited to such parties.

1 Saturday Night Live appearance, Boston Night Club appearance and all appearances at car
2 shows, casinos and other events, were procured by respondents in violation of the Act.

3 9. Respondent Simanton argued that any negotiation or communications relative
4 to employment on behalf of petitioner were merely incidental to the overall picture of the
5 work he performed as a manager. Respondent Simanton relied on *Wachs v. Curry* (1993) 13
6 Cal.App.4th 616 for the proposition that a talent agency license is not required in such
7 situations. As stated above, the court in *Waisbren v. Peppercorn Productions, Inc., supra*,
8 held that any single act of procuring employment subjects the agent to the Act's licensing
9 requirement.

10 10. Moreover, at the hearing, respondent Simanton attempted to establish that the
11 standard contract entered into with Celebrity Placement Services was already negotiated by
12 Ms. Bertagnolli and therefore, he did not negotiate any new terms. While Ms. Bertagnolli
13 may have negotiated a standard contract with Mr. Gold for petitioner to use at all events in
14 which he appeared on behalf of Celebrity Placement Services, respondent Simanton violated
15 the Act when he entered into discussions with Mr. Gold which resulted in petitioner
16 appearing at the event in Harrah's Casino. Such discussions constitute "procurement". The
17 term "procure" as used in this statute, means "to get possession of; obtain, acquire, to cause
18 to happen or be done; bring about." *Wachs v. Curry, supra* at 628, disapproved on other
19 grounds in *Waisbren v. Peppercorn Productions, Inc., supra*. Thus, "procuring"
20 employment under the statute includes entering into discussions regarding contractual terms
21 with prospective employers that leads to employment.

22 11. Respondent Simanton also argued that at all times relevant, he worked as part
23 of petitioner's management team. He argued that he, Mr. Fondacaro, Ms. Bertagnolli and
24 petitioner would discuss various engagements and employment opportunities for petitioner
25 and collectively they would decide whether petitioner should accept such opportunities.
26 Respondent Simanton testified that due to Ms. Bertagnolli's business background, she
27 would handle the negotiations and draw up all the contracts. While Labor Code
28 §1700.44(d) exempts from the licensing requirements procurement by unlicensed

1 individuals who are acting in conjunction with, and at the request of, a licensed talent
2 agency in the negotiation of an employment contract, said exemption does not apply in this
3 case since neither Mr. Fondacaro nor Ms. Bertagnolli were licensed talent agents during the
4 relevant time period.

5 12. Based on the foregoing, it is determined that respondents violated Labor Code
6 §1700.5, in that they, and each of them, engaged in and carried on the occupation of a talent
7 agency without first procuring a license therefor from the Labor Commissioner. The
8 contract between petitioner and respondents is therefore void *ab initio* and respondents have
9 no enforceable rights thereunder. *Waisbren v Peppercorn, supra*, 41 Cal.App.4th 246;
10 *Buchwald v. Superior Court, supra*, 254 Cal.App.2d 347.

11 **ORDER**

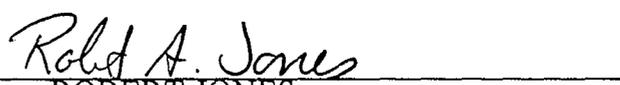
12 For the reasons set forth above, IT IS HEREBY ORDERED that the contract between
13 petitioner and respondents is void *ab initio*, that respondents have no enforceable rights
14 thereunder, and that petitioner owes nothing to respondents for any services that were
15 provided pursuant to the contract.

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17 Dated: 3-30-06

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EDNA GARCIA EARLEY
Special Hearing Officer

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20 **Adopted:**

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23 Dated: 4-3-06

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ROBERT JONES
Acting State Labor Commissioner

