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Division of Labor Standards Enforcement
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

DANIEL BROWNING SMITH, Petitioner, vs. CHUCK HARRIS aka OAKY MILLER, An Individual; and VISUAL ARTS GROUP, An Entity of Unknown Form, Respondent.	Case No.: TAC 53-05 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing on October 6, 2006 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner DANIEL BROWNING SMITH, An Individual, appeared and was represented by Eric S. Syverson, Esq. of Pick & Boydston, LLP. Respondents CHUCK HARRIS aka OAKY MILLER, An Individual; and VISUAL ARTS GROUP, An Entity of Unknown Form, appeared in pro per.

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 DANIEL BROWNING SMITH, (hereinafter, "Petitioner"), is a contortionist performing on television and other entertainment enterprises, including major sporting events throughout the country. He can bend his body like a pretzel and is commonly known as the "Rubberboy." Petitioner has received the Guinness World Record for being the most flexible man on the planet. At the age of 18, Petitioner ran away with the circus. Petitioner is a resident of the State of California.

2. At all times relevant, Respondent CHUCK HARRIS aka OAKY MILLER who does business as VISUAL ARTS GROUP, (hereinafter, "Respondent"), has been a resident of the State of California. Respondent testified that he has been in the entertainment business for over 60 years working as a personal manager, producer, event planner and creative consultant.

3. Petitioner testified that in the Fall of 1998, he was performing in New York when an acquaintance, Tom Robbins, suggested he contact Respondent to see if Respondent could secure some work for Petitioner. Petitioner contacted Respondent and asked him what he needed from him in order to get him work. Petitioner testified that soon thereafter, in 1999, Respondent booked him for "gigs" in London and Singapore and in 2001 began booking Petitioner for the Cary Basketball Association ("CBA") half time shows.

4. Per Petitioner, the first CBA half time show that Respondent booked him

for was in Sioux Falls, South Dakota. Petitioner stated that he earned $1,500 of which he was paid $1,000. The remaining $500 was kept by Respondent as his fee for booking the gig.

5. In May 2003, the parties began working more frequently with each other. During this time, Respondent suggested that Petitioner hire him as his manager. As such, the two entered into an oral management agreement whereby Respondent would provide management services for Petitioner in exchange for a flat fee ($500) on live events and 15% of Petitioner's income on television and commercials engagements. Respondent testified that the three most important points of the oral agreement with Petitioner were that: (1) Petitioner could leave anytime he wanted; (2) Respondent would work as Petitioner's personal manager and take 15% from film and television and; (3) if Petitioner terminated the contract, Respondent would still be entitled to payment for an additional 6 months from the date of termination.

6. Petitioner testified that during 2003, he had a website which contained information on contacting him for events. All emails received requesting he perform at events were immediately forwarded to Respondent to negotiate the fees and book the dates for him.

7. Petitioner also testified that in 2003, he started working with Jennifer Chandler, a licensed commercial talent agent. Ms. Chandler's representation was limited to only booking and negotiating commercials for Petitioner. Consequently, the checks received for Petitioner's services on commercials went directly to Ms. Chandler who

would take her commission out and then forward a check to Respondent who took his management commission out. The remainder of the check was then paid to Petitioner.

8. Because Ms. Chandler's representation was limited to commercials, Respondent conducted negotiations with the National Basketball Association ("NBA") for Petitioner to perform live at the half time shows. Accordingly, all checks were made out to Respondent and he received his standard $500 fee for these live events he booked.

9. Petitioner terminated his oral contract with Respondent on September 20, 2004. At the time of his termination, Petitioner still had numerous jobs pending through the Winter of 2005 that had been booked by Respondent. Notwithstanding having terminated the contract, Petitioner honored such jobs by paying Respondent the agreed upon fees and commissions. The following engagements honored after Petitioner terminated the contract were:

a. December 13, 2004 Chicago: Petitioner earned $2500: $500 deducted by Respondent for his fee, $2,000 paid to Petitioner by Respondent.

b. January 5, 2005 – Dallas Mavericks: Petitioner performed but was not paid; Per a letter dated September 22, 2004, Respondent, on behalf of Petitioner, was to be paid $2,500 for this event.

c. February 4-5, 2005 - Idaho: Petitioner performed but not paid directly after monies paid to Respondent. Instead, Respondent lumped this payment with other engagements (i.e., Charlotte, Idaho and Washington D.C) and deducted money he felt he was entitled to, including engagements that Petitioner procured himself after terminating

Respondent. However, an email sent from Petitioner to Respondent dated November 29, 2004 listed $3,825 as the amount Petitioner believed he would be paid after commissions were paid out to Respondent for this engagement. Petitioner testified that he received $4,500 for both dates and believed that Respondent would take 15% of the total earnings leaving Petitioner with $3,825. Petitioner testified that in the past, they had done other engagements that were two days in a row and Respondent had taken 15% of the total earnings. In this instance, however, Respondent took out $500 per date for a total of $1,000 claiming that Petitioner was only entitled to $3,500 and not $3,825 as Petitioner believed.

d. February 9, 2005 – Washington D.C.: Petitioner performed and received $2,500.

e. March 28, 2005 – New Orleans: Petitioner performed but did not receive any payment from Respondent. Petitioner confirmed with the New Orleans Hornets by email dated June 8, 2005, that they paid Respondent $2,500. Additionally, a canceled check made payable to Visual Arts Group was submitted as evidence by Petitioner that the check was received and cashed by Respondent.

10. After terminating his contract with Respondent and honoring the aforementioned engagements that had been booked by Respondent, Petitioner started booking his own performances directly with Respondent's NBA contacts. Respondent

took this as an ultimate betrayal by Petitioner. In an email to Petitioner dated March 14, 2005, Respondent states:

> "As you know, I worked very hard on your behalf, I am the best personal manager for small time performers in the world. **Getting you $2,500 for a six minute act** for a [sic] who is a contortionist speaks for itself." [Emphasis added.]

11. Notwithstanding the foregoing statement, Respondent testified that during the time he represented Petitioner, he never sought to procure employment for Petitioner. In support of this position, Respondent submitted several letters from various individuals he has worked with in the entertainment industry who attest that he has never asked them to book talent that he represents and that he has never solicited business for his clients unless it was on a show that he produced. Additionally, Respondent described his relationship with Petitioner as being one of employer and employee. Specifically, Respondent testified that Petitioner was his employee. He sold Petitioner's services to third parties such as the NBA for half time performances and this is why the contracts and checks were always sent to his attention rather than to Petitioner. Furthermore, Petitioner described the arrangement with Petitioner on the live events as a buy/sell arrangement. Respondent explained this concept as such:

> "A buy/sell in the industry takes you out of the realm of being a personal manager or an agent and takes you in the realm of being a producer, an event planner, a party planner or being a creative consultant the same way as Steven Speilberg buys Whoopi Goldberg for X number of dollars to be in a film, the same way as a loan out would loan out a star, sometimes for much more than a star made. It is an industry standard in the business. When you go to a party planner and she charges you for an act, that is called a buy/sell. It's very

standard and done all the time."

However, contrary to Respondent's testimony and the foregoing evidence he submitted in support thereof, Petitioner introduced various emails showing that Respondent had been procuring work for Petitioner during the term of their oral management contract.

- Petitioner submitted a copy of a contract written on Respondent's letterhead for Petitioner to perform at the halftime show for the Chicago Bulls' December 8, 2003 game located in Chicago for a performance fee of $2,000. The contract specifies that payment is to be paid to Visual Arts Group after the show and is signed by Chuck Harris Visual Arts Group.
- Likewise, Petitioner also submitted a copy of a contract written on Respondent's letterhead from Petitioner to perform at the halftime show for the Washington Wizards' February 9, 2005 game in Washington D.C. for a performance fee of $2,500, also to be paid directly to Visual Arts Group. This contract was also signed by Chuck Harris Visual Arts Group.
- In an email dated March 15, 2005, after the parties had formally terminated their relationship and were disputing outstanding commission payments, Respondent wrote to

Petitioner, "**If I want to book you on a date and you want the date then and only then will we work together.**" [Emphasis added].

- In an email dated March 17, 2005, further disputing the outstanding amounts owed, Respondent wrote to Petitioner, "By your own admission you did three games **that I worked by [sic] butt off to get for you** this comes to $1,500 and you also owe me $300 for the one Carnival television show you did, I assume you got the full $2,000 a show or weekly **that I also worked my butt off to get you.**" [Emphasis added]. Later in the same email, Respondent writes, "As soon as you appear at the two more games **we have booked together**, and I receive the monies in full, Dallas and New Orleans, I will send you the full amount due you." And, "**I also need to make sure, which we are checking into now, did you do the show in India and a show in Spain, which I worked my butt of [sic] to get you.**"[Emphasis added].
- In an email dated March 21, 2005 to Petitioner, Respondent writes, "**As you know, I have a major basketball job for you on April 3rd which we discussed many times already, as well as the show in Paris.**"[Emphasis added].

- In an email dated November 5, 2005 from Chuck Harris under the email address "Worldwide Management" to a representative from Beacher Madhouse at the Hard Rock Hotel and Casino containing the proposed contract terms for Petitioner to appear at Beacher's Madhouse at the Hard Rock Hotel and Casino in Las Vegas, Nevada on November 6, 2005, Respondent states that **"any and all future bookings with Daniel Smith aka 'Rubber Boy' for Beacher's Madhouse, must be made through Visual Arts Group @ 323.933.9161."** [Emphasis added].
- In an email dated August 14, 2006, Petitioner writes to John Woodman, who was responsible for handling the booking for halftime performances for the Charlotte Bobcats, asking to confirm that Petitioner booked an event for him for January 28, 2005. In response, Mr. Woodman writes back that **Chuck Harris was their contact when booking Petitioner, that Chuck Harris negotiated the price Petitioner would be paid for his performance and that the Bobcats paid Petitioner via Chuck Harris and Visual Arts Group the sum of $2,500 for Petitioner's performance.** [Emphasis added].

12. Based on the foregoing, Petitioner claims that Respondent is not entitled to

any of the monies collected in connection with such engagements because Respondent acted as an unlicensed talent agent in violation of the Talent Agencies Act, ("Act").

LEGAL ANALYSIS

1. Petitioner is an artist as defined in Labor Code §1700.4(b).

2. At all times relevant herein, Respondent was not licensed as a talent agency.

3. Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefore from the Labor Commissioner." The term "talent agency" is defined at Labor Code §1700.4(a) 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, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing."

4. The testimony and evidence presented at this hearing clearly establishes that Respondent procured employment for Petitioner.

5. The issue then becomes whether Respondent was required to hold a talent agency license if he was booking the foregoing engagements for himself as a producer or creative consultant. Respondent argues that he employed Petitioner and that he would sell Petitioner's services just as he would buy a bottle of water for 50 cents and turn around and sell it to the NBA for 1 dollar. Furthermore, Respondent argues that all contracts he

made on Petitioner's behalf were made with his company and the team directly. In other words, his company sold Petitioner's services to third parties such as the NBA.

6. We have held that a person or entity who employs an artist does not procure employment within the meaning of Labor Code section 1700.4 by directly engaging the services of the artist. *Chinn v. Tobin*, TAC 17-96. In *Chinn,* petitioners argued that their former manager, with whom they had both an artists agreement and a management agreement, procured employment for them in violation of the Talent Agencies Act ("Act") by obtaining their songwriting services for his own music publishing business. We dismissed the petition because no evidence was presented to indicate that respondent procured, offered, attempted or promised to procure employment for petitioners with respect to petitioners' song writing services, for any person or entity other than the respondent himself and respondent's music publishing business. We held,

> "We do not believe that this alone would establish a violation of the Talent Agencies Act, in that a person or entity who employs an artist does not 'procure employment' for that artist within the meaning of Labor Code section 1700.4(a), by directly engaging the services of that artist. Instead, we hold 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 the third-party employer who seeks to engage the artist's services."

Chinn at p.6-7.

7. In the *Chinn* decision, we discussed (and distinguished) two other decisions on point: *Church v. Brown*, TAC 52-92 and *Humes v. Margil Ventures, Inc.,* TAC 19-81. In *Church*, the respondent, also an unlicensed talent agent, was a casting director for a production company when he hired the petitioner actor in the film that his production

company was producing. We noted, " there is no requirement that a casting director employed by a production company and who works exclusively for that production company be licensed as a talent agent in order to hire actors to work for the production company." *Church* at p.8. However, unlike in the *Chinn* case, the hearing officer in *Church* found that the respondent violated the Talent Agencies Act when he acted outside the scope of his employment as a casting director. Specifically, the respondent created a false resume for the petitioner actor, containing several false credits regarding the petitioner's prior work, as a means of ensuring that the petitioner would get hired by the production company. Additionally, following the completion of the film, the respondent undertook continuous efforts to procure employment for the petitioner with third party employers and repeatedly promised the petitioner that he would procure such employment.

8. Likewise, in the *Humes* case, the parties formed a theatrical production company wherein petitioner was a purported employee. The hearing officer found that the company was a "theatrical production company" in name only. That is, it was not engaged in the production of any entertainment or theatrical enterprises, but rather, merely functioned as a loan out company for providing the petitioner's artistic services to third party producers. These third party producers were the persons or entities with whom petitioner was seeking employment. Thus, the respondent's efforts in procuring and attempting to procure employment for the petitioner with these third party producers, violated the Talent Agencies Act.

9. We find the facts of this case distinguishable from *Chinn* and more similar

to the *Church* and *Humes* cases. Although Respondent argues he employed Petitioner and that he was, in addition to being a personal manager, also a producer and creative consultant, the evidence he presented does not show that he was acting as a producer or creative consultant on any of the engagements he procured for Petitioner which are at issue. Unlike the *Chinn* case, Respondent did not prove that he was engaging the services of Petitioner *for himself* on the CBA and NBA halftime performances and other events he admits he procured for Petitioner. Merely stating that he was Petitioner's employer or that it was a buy/sell arrangement, in and of itself, is not sufficient to meet his burden in proving that he actually acted as an employer or producer when procuring engagements for Petitioner. "The court, or as here, the Labor Commissioner is free to search out illegality lying behind the form in which the transaction has been cast for the purpose of concealing such illegality." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 355.

10. In *Chinn*, the petitioners had two separate agreements with respondent: one for personal management services and a separate "Artist Agreement." Under the "Artist Agreement", petitioners agreed to render their "exclusive recording services" to respondent; the respondent would be the sole owner of all master recordings recorded during the term of the agreement; the respondent would have exclusive rights to manufacture records from these master recordings, and to permit the public performance of these recordings; the respondent would hold the publishing rights to any compositions recorded by petitioners; and the respondent could subsequently assign all or part of these rights to a publishing company. No such type of agreement was present in this case. The

only agreement the parties had was an oral personal management agreement. Nor was there any evidence that parties operated under any type of agreement. Rather, it is clear that the parties were operating solely as manager and client. No evidence was presented that Petitioner ever considered himself to be an employee of Respondent's. Further, Petitioner testified that Respondent never used the terms "buy/sell" with him and explained that he only paid him $500 for the live events because Respondent booked them for him. When Petitioner terminated his relationship with Respondent, he contacted the third parties whom Respondent had booked the NBA gigs through to let them know that Respondent was no longer his personal manager. Furthermore, the parties' understanding that they were always operating as manager and client is supported by statements made by Respondent to Petitioner in emails such as: "As you know, I worked very hard on your behalf, **I am the best personal manager** for small time performers in the world. Getting you $2,500 for a six minute act for a [sic] who is a contortionist speaks of itself."[1] And,

> "For the record I know you called Kenny Glenn and others to complain about me. That does not negate the fact that you owe me money for my hard work, **I am a manger** [sic] not an agent and we had a contract, not written, but a contract nevertheless. It is called an implied contract. Do you think I would have worked by [sic] butt off for you, knowing that you would drop me in the middle of the basketball season, or the television season or even the commercial season, NO NO NO!"[2]

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[1] Email dated March 14, 2005 from Respondent to Petitioner.

[2] Email dated March 21, 2005 from Respondent to Petitioner.

Also, on the Beacher Madhouse event held at the Hard Rock Hotel and Casino in Las Vegas, Nevada, a dispute arose between the promoter for Beacher Madhouse and Respondent because the promoter would not agree to providing a hotel room and airfare for Respondent, whom he referred to as **"petitioner's agent"** (in addition to providing a hotel room and airfare for Petitioner).[3] Thus, even third parties negotiating deals with Respondent on Petitioner's behalf, viewed Respondent not as Petitioner's employer, but instead, as Petitioner's agent. Accordingly, the evidence submitted supports a finding that at all times relevant, Respondent was acting as a talent agent without being licensed by the State of California.

11. Nor was any evidence presented that Respondent was acting at the request of and in conjunction with a licensed talent agent when he procured the numerous engagements for Petitioner as he states in his response to the petition. While Petitioner did have a licensed talent agent during part of the period that Respondent represented him, she was a commercial talent agent and had no part in procuring any engagements for Petitioner other than commercial engagements. Thus, under the Act, Respondent does not have a valid defense to his unlawful activity.

12. An agreement that violates the licensing requirement of the Act is illegal and unenforceable. "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." *Buchwald v.*

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[3] Email dated November 5, 2005 from adam@beachersmadhouse.com to Respondent.

Superior Court, supra 254 Cal.App.2d 347 at 351. Having determined that a person or a business entity procured, promised or attempted to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed agent and the artist] void and unenforceable as involving the services of an unlicensed person in violation of the Act." *Styne v. Stevens* (2001) 26 Cal.4th 42, 55. "[A]n agreement that violates the licensing requirement is illegal and unenforceable...." *Waisbren v. Peppercorn Productions, Inc.,* (1995)41 Cal.App.4th 246, 262.

13. Respondent also argues that to the extent we find that he procured employment on behalf of Petitioner in violation of the Act, that the doctrine of severability of contracts applies. Respondent relies on *Marathon v. Entertainment, Inc. v. Blasi* (2006) 140 Cal.App.4th 1001, which at the time of this hearing had been ordered depublished due to the Supreme Court granting review on September 20, 2006. Nonetheless, Respondent argues that the doctrine of severability of contracts could apply to sever the illegal from the legal elements of an agreement between an artist and a manager, as the Court of Appeal held. As we recently stated in our decision in *Cham v. Spencer/Cowings*, TAC 19-05 (determination issued on July 27, 2007), our long standing position, which is supported by case law and legislative history, is 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. See *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1103-1104;

Styne v. Stevens, supra, 26 Cal.4th at 51; *Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1470; *Waisbren v. Peppercorn Productions, supra*, 41 Cal.App.4th at 1470.

14. Consistent with our long standing position and with current case law as stated above, we find that the oral Management Agreement entered into between the parties herein is void *ab initio*.

ORDER

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

1. Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and VISUAL ARTS GROUP violated Labor Code §1700 et seq.

2. The oral agreement between Petitioner DANIEL BROWNING SMITH and Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and VISUAL ARTS GROUP, is void *ab initio* and unenforceable, and that Petitioner DANIEL BROWNING SMITH has no liability thereon to Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and VISUAL ARTS GROUP, and Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and VISUAL ARTS GROUP have no rights or privileges thereunder.

3. Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and VISUAL ARTS GROUP must provide Petitioner DANIEL BROWNING SMITH with an accounting within 30 days of the date of this decision listing all monies received on behalf of Petitioner in connection with their representation of Petitioner DANIEL BROWNING SMITH.

4. Respondents CHUCK HARRIS aka OAKY MILLER, an individual; and

VISUAL ARTS GROUP are ordered to disgorge within 60 days of the date of this determination to Petitioner DANIEL BROWNING SMITH those monies collected on behalf of Petitioner DANIEL BROWNING SMITH during the one year period prior to Petitioner's filing of the instant petition: December 1, 2004 to November 30, 2005.

Dated: August 27, 2007

EDNA GARCIA EARLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: August 27, 2007

ANGELA BRADSTREET
State Labor Commissioner