STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

ZHIKAI FENG, an individual, Petitioner, vs. EIGER AGENCY LLC, a New York Limited Liability Company, Respondent.	**CASE NO.: TAC-47628** **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

The above-captioned matter, a Petition to Determine Controversy under Labor Code section 1700.44, came on regularly for hearing in Long Beach, California before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner, ZHIKAI FENG, an individual (hereinafter "Petitioner") was represented by Joshua Graubart, Esq. Respondent, EIGER AGENCY LLC, a New York Limited Liability Company, (hereinafter "Respondent") was represented by Douglas Roy, Esq. The matter was taken under submission and post-trial briefs submitted. 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.

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II. FINDINGS OF FACT

Petitioner is a sought after fashion photographer. His work includes celebrity portraits and high fashion, shooting both commercial and editorial work for many international brands and publications. Petitioner occasionally directs and shoots moving videos as part of his photography services. Respondent is a New York artist management agency and production company that primarily procures work for high-end photographers from all over the world. The parties entered into a 2014 Agency Agreement (Agreement) whereby Respondent agreed to procure photography engagements on Petitioner's behalf in exchange for 25% of Petitioner's earnings. The relationship began in 2014 and terminated in December of 2016. During the course of the relationship, Respondent procured more than 60 photography jobs on Petitioner's behalf.

During the term of the Agreement and at all relevant times, both Petitioner and Respondent were New York citizens. The contract in dispute was negotiated and executed in New York but the work was scheduled to be performed in California. Nine of the more than 60 photography jobs procured for Petitioner were procured in New York but California was the chosen shot location.

Notably, the parties stipulated that all but two jobs were outside of the Labor Commissioner's jurisdiction, as Petitioner was not performing as an "artist" for those engagements within the meaning of the Talent Agencies Act (TAA). Specifically, the parties agreed that when Petitioner performed "still photography" he was not acting as an artist within the meaning of the Act, as previously held by the Labor Commissioner in *Grecco v. Blur Photo, LLC* (2013) TAC 23297. Additionally, the parties agreed that only two of the jobs procured in California included a video component in addition to still photography, although only one of those jobs was performed within the relevant statute of limitations. In short, as Petitioner states in his post-trial brief, "only one of the [nine jobs procured in California] is in controversy here." The single act of procurement at issue in this controversy shall be referred to as the "Bolon Job."

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In September 2016, Respondent procured Petitioner a combined photo and video shoot for a Chinese sunglasses brand – Bolon – featuring the actor Anne Hathaway. The shoot took place in Malibu, California in September 2016. The three-day shoot consisted of both still and video photography. The first day was devoted to setting up the location. The second day Petitioner performed still photography. The third day was devoted to a video shoot. Petitioner directed both shoots and his creative influence on the shoots was both significant and pervasive.

Petitioner and his team completed the work in September 2016. According to Paragraph 2 of the Agreement, Respondent will receive a commission of 25% of all fees invoiced by Petitioner. Petitioner invoiced $270,000.00 and Respondent withheld 25% or $67,500.00 as his earned commissions, pursuant to Paragraph 2 of the Agreement.

On or around December 26, 2016, Petitioner severed the relationship. Following termination of the Agreement in December 2016, Respondent withheld an additional 25% from the invoiced Bolon Job pursuant to Paragraph 4 of the Agreement. Paragraph 4 of the Agreement is titled "Severance Commission" and states in pertinent part:

> Verbal and written notice shall be delivered should either party wish to terminate the Agency/Artist relationship. Upon leaving the agency, the artist agrees to pay the agency a severance commission on all services. These services will be for all clients that the artist worked with while with the agency and other related fees negotiated and collected for six (6) months from the last day represented. The artist agrees to pay the agency commission on all usages negotiated and collected by the agency in perpetuity … The severance commission is 25% of all creative services.

The parties disagree as to the meaning of Paragraph 4 and therefore disagree whether Paragraph 4 applies to the Bolon Job. According to Respondent's interpretation, the six months "severance commission" period applies retroactively from the date of termination. Conversely, Petitioner concludes the "severance commission" period applies prospectively and therefore the Bolon Job is not covered by the severance provision reflected in Paragraph 4. Petitioner opposes Respondent's unilateral withholding of an additional 25% of Petitioner's earnings.

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Because of the parties' conflicting interpretation of the meaning of the severance commission and the corresponding withheld earnings by Respondent, Petitioner filed two lawsuits. The first suit filed in California was this Talent Agency Controversy alleging a violation under the TAA. In this Talent Agency Controversy, Petitioner requests the Labor Commissioner conclude Respondent acted as an unlicensed California talent agent and order disgorgement for all amounts withheld for the Bolon Job. Petitioner also filed a complaint against the Respondent seeking disgorgement of funds on a breach of contract theory in New York (New York lawsuit). Respondent stipulated he never possessed a California Talent Agency License.

The threshold issue is whether the Labor Commissioner has jurisdiction over this matter.

III. LEGAL ANALYSIS

1. Petitioner, as a director of a video, is an "artist" within the meaning of Labor Code section 1700.4(b).

2. Labor Code section 1700.4(a) defines a "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."

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

4. Respondent's principal place of business is in New York. No evidence was provided at the hearing that Respondent conducts business in California on a regular and continuous basis for matters arising under the Talent Agencies Act. Rather, Petitioner argues that California has jurisdiction over this Respondent because on two occasions, Respondent procured employment for Petitioner in the State of California. One of those engagements is outside the one-year statute of limitations prescribed at Labor Code section 1700.44(c)

5. California's power to compel a nonresident defendant to answer in its courts of law is limited by principles of due process. In essence, due process prohibits a state's assertion of jurisdiction where it would be unreasonable in light of the defendant's limited relation to the forum state. See *International Shoe Co. v. Washington* (1946) 326 U.S. 310. If a nonresident defendant's activities may be described as "extensive or wide-ranging" *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 898-900) or "substantial...continuous and systematic" *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, there is a constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him. In such circumstances, it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum. *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.

6. If, however, the defendant's activities in the forum are not so pervasive as to justify the exercises of general jurisdiction over him, then jurisdiction depends upon the quality and nature of his activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction. (*Hanson v. Denckla* (1958) 357 U.S. 235; *McGee v. International Life Ins. Co.*, (1957) 355 U.S. 220.) *Cornelison v. Chaney, supra* 16 Cal.3d at 147-148; *James v. Thompson* TAC 17-03.

7. Applying these rules to the instant case, we find that respondent's activities in California are not so substantial or wide-ranging as to justify general jurisdiction over him to adjudicate all matters regardless of their relevance to the cause of action by Petitioner. Respondent procured employment for Petitioner in the State of California on two occasions.

There was evidence presented that Respondent traveled to the State of California in an effort to procure work for Petitioner who is now domiciled in California.

8. We turn then, to an assessment of the relation between Petitioner's activities in California and the cause of action alleged by Petitioner. Respondent purposefully availed itself of the privilege of conducting activities within California by procuring employment for Petitioner in California in which he directly benefited thus invoking the benefits and protections of its laws. See *Sibley v. Superior* Court (1976) 16 Cal.3d 442, 446-447. Moreover, Petitioner's claim under the Talent Agencies Act is unquestionably connected with and arises out of Respondent' forum-related activities of procuring employment for Petitioner without the requisite talent agency license. Therefore the exercise of jurisdiction is fair and reasonable in this case.

9. Petitioner relies on our decision in *Breuer v. Top Draw Entertainment, Inc.*, (1996) TAC 18-95 for the proposition that we have jurisdiction over respondent and we agree. *Breuer* is similar to this case in that the respondents in *Bruer*, both New York residents, traveled to California with the petitioner for a one week period in order to promote the petitioner's talents to potential employers at Los Angeles events. Moreover, the respondents charged the petitioner for their expenses in connection with the business trip to California, obtained auditions for the petitioner at various comedy clubs in Los Angeles, and sent written materials to Disney Studios and other promoters/employers in an effort to procure employment for the petitioner. We found that all these activities taken together, constituted sufficient contacts with California for us to assert jurisdiction over the respondents.

10. Similarly, Respondent engaged his client for employment in California, flew to California to attend the shoot and hired California subcontractors to assist with the three-day shoot. Assertion of jurisdiction over Respondent in this case, based on actual procurement of employment on more than one occasion, in our opinion, does not offend "traditional notions of fair play and substantial justice. See *International Shoe Co. Washington, supra.* As such, we find that we have jurisdiction over this respondent.

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a. Disgorgement

11. The Labor Commissioner has original jurisdiction over all controversies arising under the TAA. (Labor Code section 1700.44(a), *Styne v. Stevens* (2001) 26 Cal.4th 42, 54) It is clear, respondent unlawfully procured the Bolon Job for Petitioner without a license. It is undisputed the Labor Commissioner has the authority to order an unlicensed talent agent to disgorge fees paid pursuant to illegal procurement (*Hall v. X Management, Inc.* TAC No. 19-90; *Cuomo v. Atlas/Third Mgmt. Inc.* (2003) TAC 21-01). Here, Petitioner seeks disgorgement of 50% of the paid commission under paragraph 2 as Petitioner stipulated that 50% of the Bolon job ("still photography") is not covered by the TAA and therefore not subject to disgorgement. Accordingly, we grant Petitioner's request and conclude Petitioner is entitled to 50% disgorgement of the Bolon job commissions withheld pursuant to Paragraph 2 of the Agreement.

b. Severance

12. In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, the California Supreme Court confirmed the applicability of the Talent Agencies Act to personal managers and other unlicensed representatives, and changed the standards for determining the remedy available to artists in the event of a violation. The *Marathon* Court confirmed, (a) if a commission is sought for employment procured by the unlicensed representative, the unlicensed representative is not entitled to recover that commission and (b) if the "main purpose" of the agreement was for the manager to procure employment or the management relationship was so "tainted by" or "permeated by" unlawful procurement, then the contract as a whole cannot be enforced. *Id* at 996

13. Here, a final question is whether Respondent's activities were "permeated by" unlawful procurement requiring us to void the contract *ab initio*, precluding him from claiming any earnings in connection with any job procured in violation of the TAA. We choose not to go that far. In accordance with *Marathon*, *supra*, we believe the doctrine of severance applies here. The Talent Agencies Act was not implicated by the bulk of Respondent's services, and the vast majority of the employment was not procured in California. Importantly, on all but two occasions Petitioner was not engaged as an artist within the meaning of the Act, as stipulated by the parties.

14. In *Marathon*, the court recognized that the Labor Commissioner may invalidate an entire contract when the Act is violated. The court also left it to the discretion of the Labor Commissioner to apply the doctrine of severability to preserve and enforce the lawful portions of the parties' contract where the facts so warrant. As the Supreme Court explained in *Marathon:*

> Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate. [*Citations omitted]. Marathon, supra* at p. 996.

15. Here, we choose to exercise our discretion and sever the Bolon Job, procured in violation of the TAA and preserve the remainder of the contractual relationship between the parties. Respondent provided many lawful services to Petitioner and those services consumed the bulk of the relationship between the parties. We leave the remainder of the contract intact and sever only the Bolon Job precluding the Respondent from earning commissions for this job. We do not make any findings or legal conclusions as to the severance provision contained in paragraph 4 of the Agreement and expressly do not make any determination as to the legal characterization of those withheld funds and leave that issue for the courts of the parties' domiciled state.

IV. ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that this petition is granted in part:

1. Respondent, EIGER AGENCY LLC, a New York Limited Liability Company, unlawfully collected and withheld $67,500.00 of Petitioner, ZHIKAI FENG's earnings within the one-year statute of limitations prescribed by Labor Code section 1700.44(c) and is therefore required to disgorge 50% of these commissions earned in connection with the Bolon Job in the amount of $33,750.00 and $6,750.00 in interest calculated at 10% per annum for a total award of $40,500.00. Respondent shall disgorge funds to the Petitioner within 30 days of this Order.

DATED: May 7, 2019

Respectfully submitted,

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: May 7, 2019

By: Carlos Torres

Digitally signed by Carlos Torres
Date: 2019.05.07 17:42:41 -07'00'

CARLOS TORRES
Assistant Chief

PROOF OF SERVICE

(Code of Civil Procedure § 1013A(3))

STATE OF CALIFORNIA)
) **S.S.**
COUNTY OF LOS ANGELES)

I, Lindsey Lara, declare and state as follows:

I am employed in the State of California, County of Los Angeles. I am over the age of eighteen years old and not a party to the within action; my business address is: 300 Oceangate, Suite 850, Long Beach, CA 90802.

On May 8, 2019, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY,** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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☒ **(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with fully prepaid postage thereon for certified mail with the United States Postal Service this same day in the ordinary course of business at our office address in Long Beach, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

☒ **(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 8 day of May 2019, at Long Beach, California.

L Lara

Lindsey Lara
Declarant