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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

PHILLIP B. GITTELMAN, Petitioner, vs. DARYL KAROLAT, aka TYLER MANE Respondent.	No. TAC 24-02 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on April 25, 2003, in Los Angeles, California, before the Labor Commissioner's undersigned hearing officer. Petitioner was represented by Jay Coggan, and Respondent was represented by Eli Kantor. Based on the evidence presented at this hearing and on the papers on file in this mater, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. Petitioner PHILLIP GITTELMAN manages professional entertainers. During the period from 1994 to 2001, he was not licensed as a talent agent by the California Labor Commissioner.

2. Respondent DARYL KAROLAT, aka TYLER MANE is a professional actor. Prior to becoming an actor, he was a professional wrestler.

3. On July 20, 1994, the parties entered into a written Personal Management Agreement, under which Karolat engaged Gittelman as his personal manager for a period of two years, with Gittelman to be compensated for his services with the payment of commissions equal to 15% of Karolat's gross earnings stemming from his activities in the entertainment industry. The Management Agreement expressly stated that Gittelman is not licensed as a talent agent, and does not offer, agree or promise to seek or obtain employment for Karolat. Gittelman's duties, under the Management Agreement, were to "advise [Karolat] . . . and to direct and advance all matters which increase the market demand for [Karolat's] services, products and creative abilities."

4. On or about January 28, 1997, the parties signed a letter agreement extending the term of the Management Agreement to January 28, 2000. On January 10, 2000, the parties signed another letter agreement extending the term of the Management Agreement to January 28, 2002.

5. On or about January 9, 2001, the parties executed an Amendment to the Management Agreement, as extended. It was agreed that Gittelman would cease taking an active part in Karolat's career, with the exception of an appearance for Creation Entertainment on January 28, 2001, for which Gittelman would receive a 15% commission on Karolat's earnings for that appearance. The Amendment further specified that as to all other

money or residuals forthcoming from contracts Karolat had entered into prior to January 9, 2001, Gittelman would receive a 15% commission, and as to any future contracts pertaining to any existing contract for Karolat's artistic services, Gittelman would receive a 5% commission.

6. Later in 2001, Karolat refused to pay commissions that were due under the terms of the Management Agreement, as amended. Gittelman then filed a complaint against Karolat in Los Angeles Superior Court, seeking payment of these commissions. Karolat filed an answer to the complaint, alleging that Gittelman violated the Talent Agencies Act by acting as an unlicensed talent agent, and that as a consequence, the Management Agreement is void and unenforceable. Thereafter, on July 26, 2002, Gittelman filed the instant petition to determine controversy, so as to permit the Labor Commissioner to exercise its initial primary jurisdiction to determine the issues arising under the Talent Agencies Act. By this petition, Gittelman seeks a determination that he did not violate the Talent Agencies Act, and therefore, that the Management Agreement, as amended, is not made void or unenforceable by application of the Talent Agencies Act. Karolat, by his answer to the petition, seeks a determination that Gittelman violated the Act by acting as an unlicensed talent agent in violation of Labor Code §1700.5, and that as a result, the Management Contract is void and unenforceable. Karolat also seeks an order from the Labor Commissioner requiring the disgorgement of all commissions that were paid to Gittelman pursuant to the Management Agreement.

7. There is no dispute that Gittelman obtained several

appearances for Karolat at comic book conventions or at retail stores, and negotiated the terms of these appearances. Karolat was not engaged to perform services as a professional actor at these conventions or retail stores. Rather, Karolat was engaged to sign comic books, trading cards, photographs or other memorabilia, to talk to persons attending the convention or visiting the store, and to participate in question and answer sessions and to talk about his movie roles and the characters he plays. Karolat did not wear a costume at any of these appearances and was not required to perform, either as a wrestler or as an actor.

8. Karolat testified that almost immediately after he retained Gittelman's services as a personal manager, in 1994, Gittelman obtained professional employment for Karolat as an actor in the San Diego Repertory Theatre production of "Trafford Tanzi." Karolat further testified that he was sitting in Gittelman's office when Gittelman negotiated the deal with the Repertory Theatre's casting agent. Karolat was paid the Actors' Equity minimum salary of $432 per week for this performance, for approximately two months until the show closed in December 1994. Gittelman disputed Karolat's account of how Karolat obtained this engagement. Gittelman testified that he received a telephone call from the casting director, who told him that the Repertory Theater was producing a wrestling musical. Gittelman states that he merely suggested that to the casting director that she meet with Karolat, that the casting director later met with Karolat, and that Gittelman was not present at this meeting. Gittelman asserts he did not engage in any negotiations with the Repertory

Theatre, either before or after Karolat met with the casting director.

9. Karolat also testified that in 1999 Gittelman told Karolat that the producer of the film "Gladiator" was a friend of his, and based on Gittelman's encouragement, Karolat sent this producer an audition tape in an attempt to get a part in the motion picture. Gittelman admitted that he knew this producer, but testified that he did not do anything to procure or attempt to procure work for Karolat on this film, other than letting Karolat know about the film and how to get an audition tape to the producer. There was no evidence presented by Karolat to suggest that Gittelman did anything more than that.

10. Karolat testified that he obtained a role in the motion picture "Son of the Beach" after Gittelman contacted his friend, a producer on that film, and told this producer that Karolat "would be right for the job." Karolat admitted that he was represented by a talent agency at the time he got this job, and this talent agency negotiated the terms of the deal for "Son of the Beach," but nonetheless, according to Karolat, Gittelman did all the preliminary work getting this job. Gittelman disputed this account, testifying that he never contacted any film producer on behalf of Karolat, and that although there are occasions when producers he knows will call him, it was his practice in such situations to merely "act as a conduit", by passing on whatever the producer says to Karolat or to Karolat's talent agent.

11. On or about July 17, 2000, Karolat appeared as a guest on the X-Show, a taped television talk show on the FX Network.

During his appearance, Karolat spoke about his role in the film "X-Men"[1] and his wrestling career. Karolat testified that Gittelman obtained this television show appearance; Gittelman testified that the producers of the X-Show did call him and asked if Karolat would appear for the "union minimum", and that Gittelman merely conveyed this offer to Karolat, for Karolat to accept or reject. However, after Karolat decided to accept the offer, Gittelman (not Karolat) communicated this acceptance to the show's producers. Karolat was paid $660 for this appearance, and Karolat paid Gittelman $99 in commissions in connection with this appearance.

12. On or about July 17, 2000, a representative of Marvel Enterprises contacted Gittelman, while Gittelman was in New York with Karolat, seeking to obtain Karolat's services to provide the voice of a comic book character, Wolverine, in a recorded promotional spot for Marvel Enterprises "Online Wolverine Radio Show." Gittelman relayed this offer to Karolat, who agreed to do the spot. The next day, Karolat signed a "Talent Consent, Release and Work For Hire" Agreement, under which Marvel agreed to pay him $1 in compensation for doing this promotional spot, and his voice was then recorded.

13. On or about October 26, 2000, Gittelman received a letter from a publicity manager for Twentieth Century Fox Home Entertainment International (TCFHEI), inquiring as to Karolat's

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[1] It should be noted that Karolat's role in the film X-Men had been procured by his talent agent, not by Gittelman, and that his talent agent negotiated the terms of the contract for his services in connection with that film. Also, Karolat used the services of a talent agency, not Gittelman, to obtain a role in an AT&T commercial.

availability "to work with TCFHEI in supporting [the] upcoming releases" in video and DVD, of the film X-Men, and towards that end, to appear at a conference of DVD rental dealers in Las Vegas in December 2000. The letter from TCFHEI did not contain any proposal for terms of compensation. After determining that Karolat was interested in the Las Vegas appearance, Gittelman negotiated the terms of this appearance in Las Vegas, for which Karolat was paid $2,700, out of which Gittelman received $375 in commissions. During this appearance, Karolat took the stage, and "went into a wrestling mode," characterized by "ranting and raving." He then answered audience questions and signed autographs.

LEGAL ANALYSIS

1. Labor Code section 1700.4(b) defines "artists" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television, and other entertainment enterprises." Karolat is an "artist" within the meaning of Labor Code section 1700.4(b); however, as discussed below, only certain of the employments or engagements at issue herein were for the performance of services that fall within this definition.

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 . . . ." The term "employment or engagements for an artist or artists" means employment or engagements for the performance of artistic services that are performed by "artists" within the meaning of subsection (b); that is, "professional services in motion picture, theatrical, radio, television, and other entertainment enterprises," including advertising, performed by actors, musicians, models, writers, cinematographers, directors, composers, and the like. Unless the term "employment or engagements for an artist or artists" is limited to such artistic employment or engagements, absurd and clearly unintended results would follow. If the term was broadly construed to mean *any* employment or *any* engagement for a person who is sometimes employed or engaged as an artist, a person who tries to find a waitress job for a part-time actress, or who tries to find an office clerical job for a part-time musician, would fall within the definition of a "talent agent," thereby subjecting such person to the Talent Agency Act's licensing and regulatory scheme. Moreover, a review of the relevant legislative history leaves no doubt that the intent of the Act was to protect artists in their capacities as artists, and to regulate persons who procure artistic employment for artists. The "purpose [of the Act] is to protect artists seeking professional employment from the abuses of talent agencies." *Styne v. Stevens* (2001) 26 Cal.4th 42, 50. Thus, "the Act's definition of a talent agency is narrowly focused on efforts to secure professional 'employment or engagements' for an 'artist or artists.' (§1700.4, subd. (a).)

Thus, it does not cover . . . assistance in an artist's business transactions other than professional employment." *Ibid,* at 50-51.

3. Labor Code section 1700.4(a) further provides that "[t]alent agencies, may, in addition, counsel or direct artists in the development of their professional careers," however, this function is not part of the core definition of a talent agency. Labor Code section 1700.5 makes it unlawful for a person to "engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." It is therefore unlawful to procure, offer, promise, or attempt to procure artistic employment or engagements for an artist without having a valid talent agency license. The negotiation of an employment agreement for artistic services is an activity that constitutes "procuring . . . employment for an artist," within the meaning of Labor Code §1700.4(a).

4. In contrast, a person may counsel and direct artists in the development of their professional careers, or otherwise "manage" artists -- while avoiding any procurement activity (procuring, promising, offering, or attempting to procure artistic employment or engagements) -- without the need for a talent agency license. In addition, such person may procure non-artistic employment or engagements for the artist, without the need for a license. *Styne, supra,* 26 Cal.4th 42, 51.

5. An agreement that violates the licensing requirement of the Talent Agencies 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. Superior Court* (1967) 254 Cal.App.2d 347, 351. Having determined that a person or business entity procured, promised or attempted to procure artistic 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, supra,* 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. 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, of course, subject to the one year limitations period[2] set out at Labor Code §1700.44(c).

6. Karolat's appearances at comic book conventions and at retail stores, where he signed comic books, trading cards, and photographs, spoke to attendees about his movie roles and wrestling career, and answered audience questions were not employment or engagements of an artistic nature, so as not to constitute "employment or engagements for an artist" within the

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[2] Here, there was no evidence that Karolat paid any commissions to Gittelman in the one year period prior to the filing of the petition. Consequently, Karolat's claim for reimbursement of amounts paid as commissions is barred by the statute of limitations.

meaning of Labor Code §1700.4(b). Gittelman therefore did not violate the Talent Agencies Act by procuring or attempting to procure these engagements for Karolat.

7. Karolat's account of how he obtained a role in the 1994 production of "Trafford Tanzi" would obviously compel the conclusion that Gittelman acted as a talent agent in procuring this role. Even if we were to credit Gittelman's testimony, and his denial that he negotiated the terms of compensation for Karolat, we would still be left with Gittelman's admission that during the telephone call from the show's casting director, Gittelman suggested that the casting director meet with Karolat. By his own admission, Gittelman did more in this instance than merely act as a conduit transmitting information received from a producer or casting director who makes an unsolicited call to advise Gittelman of an available part in a production, with Gittelman then calling the artist to advise him of this information, with the artist then deciding (perhaps based on the manager's recommendation) whether to call the producer or casting director in order to try to obtain the role. By suggesting to the casting director that the casting director meet with Karolat, Gittelman played an active role beyond that of a "mere conduit" in promoting Karolat for this engagement. The making of this suggestion crosses the line into the zone of procurement or attempted procurement. By doing so without a talent agency license, Gittelman violated the Talent Agencies Act.

8. On the other hand, Gittelman's conduct in encouraging Karolat to contact the producer of the motion picture "Gladiator" in order to attempt to obtain a role in that film, did not, in

any way whatsoever, constitute procurement or attempted procurement under the Act.

9. On the basis of the evidence before us, we are unable to conclude that Gittelman procured Karolat's role in "Son of the Beach." The only evidence presented on this issue was the testimony of Karolat and the testimony of Gittelman. Each witness disputed the account presented by the other. There was nothing inherent as to the testimony of either witness that made it more or less credible than that of the other witness. As the party seeking to prove violation(s) of the Talent Agencies Act, Karolat has the burden of proving that Gittelman procured or attempting to procure artistic employment or engagements. We would not hesitate to find unlawful procurement in connection with "Son of the Beach" if Karolat's account had been supported by any sort of corroborating evidence.[3] However, no such corroborating evidence was presented.

10. In appearing as a talk-show guest on the X-Show, Karolat did not "render[] professional services in . . . television and other entertainment enterprises." The mere fact that an actor appears as a guest on a talk show does not mean that the actor is acting, or otherwise performing any professional services as an "artist", within the meaning of Labor Code §1700.4(b). Speaking about one's work as an actor is something that is separate and

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[3] Labor Code §1700.44(d) provides that it is not unlawful for a person or corporation that is not licensed as a talent agent to "act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." This provision is not applicable here as Gittelman does not contend, and did not provide any evidence, that anything he did anything in connection with "Son of the Beach" at the request of Karolat's licensed talent agent.

distinct from acting, and a talk show is different from a variety show (like Saturday Night Live) where actors perform skits, musicians perform songs, etc. A talent agency license is not required for the procurement of a guest appearance on a talk show provided the appearance does not involve the rendition of artistic services[4]. As such, there was no violation of the Talent Agencies Act in connection with Karolat's appearance on the X-Show.

11. No evidence was presented that would establish that Gittelman engaged in any unlawful procurement activity in connection with Karolat's recorded promotional spot for Marvel Enterprises "Online Wolverine Radio Show." The mere relaying of an initial, unsolicited offer from the producer of the promotional spot, absent evidence of any follow-up discussions or negotiations between Gittelman and the producer, does not comprise a violation of the Act.

12. There was no evidence presented from which we can conclude that Karolat was employed or engaged to "render professional services" as an "actor" or in any capacity as an "artist," within the meaning of Labor Code §1700.4, in connection with his appearance at the conference of DVD rental dealers in Las Vegas in December 2000. The letter from TCFHEI did not propose that Karolat perform any professional artistic services. There was no evidence that Karolat's contract to appear at this event required him to perform any services as an actor, or that

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[4] The host of a talk show plays a role that is very different from that of his or her guests, and functions in a manner much closer to that of a variety show host, so as to fall within the definition of an "artist".

anyone from TCFHEI ever requested that Karolat act or otherwise provide any services as an artist at this event. Moreover, even assuming, *arguendo*, that Karolat had been expected to go "into a wrestling mode," replete with "ranting and raving," before signing autographs and answering questions from the audience, we cannot conclude that this sort of "performance" -- from a former professional wrestler, well known for his wrestling career -- constitutes "acting" any more than Muhammad Ali "acted" at the recent major league baseball All Star Game by pretending to box by appearing to throw punches at persons standing next to him.

13. Thus, in reviewing all of the evidence, we have exactly one instance of unlawful procurement that took place early in the first year of a seven year relationship. We must now determine whether this isolated, long ago violation of the Act should now preclude Gittelman from enforcing the Management Agreement, as amended in January 2001 -- over six years after the only unlawful procurement activity took place. We acknowledge the line of cases that correctly hold that even incidental procurement is regulated under the Talent Agencies Act, and that the Act is violated whenever an unlicensed person or business entity procures, offers, promises, or attempts to procure artistic employment. *Styne, supra,* 26 Cal.4th 42, 51; *Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1470; *Waisbren, supra,* 41 Cal.App.4th 246, 253-261. But these cases do not establish a rule that would void each and every renewal and amendment of the original contract between the artist and the artist's manager when the manager committed one isolated procurement violation of the Act during the first few months of an initial contract. There is no

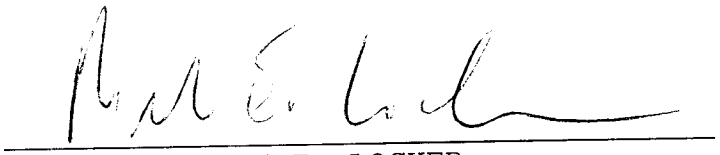
question that the Labor Commissioner *may* declare that the initial management agreement between Karolat and Gittelman, executed in 1994, is void as a consequence of the unlawful procurement activity that occurred shortly after its execution. But absent proof of unlawful procurement activity at any time since 1994, the unlawful procurement activity in 1994 does not void any of the subsequent renewals or amendments that were executed in 1997, 2000, and 2001, and the Talent Agencies Act does not make any of these subsequent renewals or amendments unenforceable, at least to the extent that the commissions sought under these subsequent renewals or amendments are based upon employment contracts that were entered into subsequent to the execution of the first renewal of the management agreement in 1997. To conclude otherwise, so as to void every subsequent agreement between the parties because of this one isolated violation would do nothing to further the remedial purposes of the Act, and would instead turn Act into a vehicle for injustice.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the parties' initial management agreement of 1994 is void, and that Gittelman has no right to commissions on any employment contracts that Karolat entered into from the inception of this agreement until its renewal on January 28, 1997. IT IS FURTHER ORDERED that the various renewals and modifications of this management agreement, that were executed in 1997, 2000, and 2001, are not void and are not unenforceable by application of the Talent Agencies Act, except to the extent that Gittelman seeks commissions on any employment contracts that were entered into

prior to January 28, 1997. Consequently, we hold that Gittelman may proceed with his action for breach of the Management Agreement, as amended in 2001, to the extent that he is claiming commissions or other amounts due pursuant to employment contracts that Karolat entered into on or after January 28, 1997.

Dated: July 19, 2004



MILES E. LOCKER
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ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: July 19, 2004

GREGORY L. ROPP
Acting Deputy Chief Labor Commissioner