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BEFORE THE LABOR COMISSIONER

OF THE STATE OF CALIFORNIA

DUANE "DOG" CHAPMAN and ALICE BARMORE-SMITH, Petitioners, vs. BORIS KRUTONOG; PIVOT POINT ENTERTAINMENT, LLC, Respondents,	Case No. TAC 3351 **DETERMINATION OF CONTROVERSY** [Labor Code § 1700.44(a)]

The above-captioned matter, based upon a Petition for Determination of Controversy under Labor Code §1700.44 filed on March 27, 2007, came on regularly for hearing on various dates commencing on October 15, 2007 and ending on October 23, 2009 in Los Angeles, California, before James E. Osterday, Attorney for the Labor Commissioner, assigned to hear this matter. At the close of the hearing proceedings, the parties filed respective post-hearing briefs and reply briefs and the matter was submitted for decision in January 2010.[1]

[1] Following the conclusion of the hearing proceedings, Mr. Osterday retired from employment with the State. The undersigned attorney was assigned to review the entire file, including all testimony and evidence in this matter, and issue a proposed decision for the Labor Commissioner.

Petitioners DUANE "DOG" CHAPMAN ("DDC") and ALICE BARMORE-SMITH (petitioners will be referred to collectively as "Chapmans") appeared and were represented by Stephen D. Rothschild, Esq., of King Holmes, Paterno & Berliner, LLP. Respondents BORIS KRUTONOG and PIVOT POINT ENTERTAINMENT, LLC, appeared and were represented by Martin D. Singer, Esq. of LAVELY & SINGER.

Based on the evidence presented at the hearing and on the other papers on file in this matter, the disputed controversy is determined as follows.

SUMMARY OF POSITIONS

The Petitioners filed a petition to determine controversy alleging that Respondents violated the Talent Agency Act (TAA) in connection with activities of Respondents made on behalf of Petitioners involving "Dog The Bounty Hunter" television program ("DBH").

Petitioners maintain that, prior to working on DBH, the relationship between them and Krutonog (and later with Pivot Point Entertainment LLC, Krutonog's loan out company) was governed by several Life Rights Agreements–the last version dated September 24, 2004. Petitioners assert that the purpose of the Life Rights Agreements was for Respondents to procure employment and solicit and negotiate opportunities for Petitioners in the entertainment industry in connection with motion picture, television and various other entertainment enterprises. Petitioners allege that pursuant to the Life Rights Agreement, Respondents agreed to procure employment for them as their *de facto* talent agents with respect to their professional endeavors as artists within the meaning of the Talent Agencies Act. In exchange for rendering services as *de facto* talent agents, Respondents would receive certain fees as either paid directly to Respondents from third parties or from the Petitioner's earnings in connection with activities or services rendered in the entertainment industry.

Petitioners assert that Respondents performed unlawful activities as unlicensed talent agents in seeking to solicit and procure employment in the State of California for Petitioners who are "artists" in the entertainment industry, and further, that the unlawful procurement activities were not done in conjunction with or at the request of any licensed talent agent.

Specifically, Respondent allegedly attempted to procure and negotiate employment of Petitioners by arranging meetings and negotiating with producers and studio executives in projects, including the George Lopez television show, the series "Dog the Bounty Hunter," and multiple personal appearances for Mr. Chapman.

Regarding procurement and negotiating of Petitioners' employment in DBH, Petitioners allege that Respondent executed a separate confidential agreement with A&E Television Networks, Hybrid Films Inc. and/or D&D Television Productions, Inc. ("Producers") whereby Respondents were paid a "producer fee" directly from Producers out of the amount Petitioners believed they were to receive for services in DBH. Petitioners maintain that the "producer fee" was a fraudulent subterfuge (a disguised commission in that the previous Life Rights Agreement provided that Respondent Krutonog was to be named as a producer and shall receive a producer fee on feature films and television series involving Petitioners as opposed to receiving a commission under the Life Rights Agreement for projects including books, merchandising rights, video games, apparel, sponsorship and spokesperson work).

In acting in the capacity of a talent agent by procuring, offering, promising or attempting to procure employment for Petitioners as artists without first obtaining a license from the California Labor Commissioner, Respondents allegedly violated the TAA. Petitioners claim since unlawful procurement activities so tainted the illegality of the agreements; both the Producer Agreement for DBH and the Life Rights Agreement should be declared null and void and unenforceable in their entirety *ab initio*. Petitioners claim they are entitled to a full accounting concerning all monies received by Respondents, directly or indirectly, which pertain in any way to the personal services of Petitioners as artists in the entertainment industry. And Petitioners claim entitlement to a full and complete disgorgement from Respondents of any and all monies or things of value received by Respondents pursuant to the Producer Agreement, plus interest.

Respondents deny that Petitioners are "actors" or "artists" within the meaning of the TAA and deny that they are or have been acting as unlicensed talent agents and deny they have been engaged in procuring, offering, promising or attempting to procure employment for any

artist within the meaning of the TAA. Respondents assert that Petitioners are professional bounty hunters and licensed bail bondsman in multiple states. In their response to the petition, Respondents assert that Respondent Krutonog is a co-executive producer of the DBH television show which is a documentary-style observational program which records and replays for the public the day-to-day activities of Petitioners as they conduct their business as bounty hunters and bail bondsmen. Respondents also maintain that Krutonog previously served as an executive producer and cameraman for Petitioners in connection with a program regarding the 2003 capture of a convicted rapist.

Respondents allege numerous affirmative defenses including that they can not be liable for acts of others, unclean hands, failure to mitigate, laches, lack of standing, waiver, offset, estoppel, statute of limitations, that any acts of alleged procurement of employment were done in conjunction with a licensed talent agent or other licensed professional, and the Labor Commissioner lacks jurisdiction over the subject matter and the parties to this dispute.

FINDINGS OF FACT

The Life Story Option Agreements

The business relationship between the DDC and Krutonog goes back to approximately 1994. Under several "Life Story Option Agreements" dated March 2, 1995 (Exh. B), August 25, 1995 (Exh. C), December 5, 1995 (Exh. D), March 12, 1998 (Exh. F), May 7, 1999 (Exh. H), and April 25, 2001 (Exh. I), Krutonog was authorized to acquire rights to DDC's life story, including related information and materials for use in efforts to obtain a commitment for development and production of motion pictures and television programs.

The parties dispute the purposes of these Life Story Option Agreements. Petitioner argues that the purpose of these agreements was for Respondents to procure employment and solicit and negotiate for opportunities for the DDC in the entertainment industry. Evidence was presented that Petitioners believed that Respondent Krutonog was their "manager" and that third parties understood and treated Krutonog as Petitioner's manager who solicited and negotiated many opportunities in the entertainment industry. Petitioners maintained that Krutonog did not deny to third parties that he was Petitioner's manager. DDC testified that the series of Life Story

Option Agreements were really never meant to be binding, that he was sent only the last signature page of the agreements to sign and return to Krutonog, and further, DDC testified that he did not review and voluntarily enter into any of these agreements. According to DDC, Krutonog asked that DDC sign the agreements to show people in Hollywood that he was DDC's manager and get him work and were not to be binding agreements. As further indication that the Life Story Option Agreements were not intended to be binding, Petitioner points out that Respondents provided no evidence that the specified consideration was made in exercising the option and the requisite notice was given; rather, all that was done was that a new Life Rights Agreement would be prepared and executed. The last version of the Life Option Story Option agreement was dated April 25, 2001 (Exh. I)

Respondents argue that, starting in 1994 under the series of Life Story Options agreements, Krutonog contributed his entertainment industry experience and contacts to develop and produce projects that would show the story of DDC's rise to a world-renowned bail bondsman and bounty hunter and exploits in his chosen profession. The Life Story Option agreements provided that Krutonog would use his efforts to obtain a commitment for development and production of motion picture and television projects based upon material (defined as "the incidents of [Dog's] life and any information and materials in connection with [Dog's] life story), and gave Krutonog an exclusive option to acquire all theatrical, motion picture, and related and ancillary rights to the material."

Petitioners do not assert a claim for relief under the above Life Story Option Agreements (and moreover, maintain that they are unenforceable agreements since, even if valid, conditions in those agreements were never satisfied) but rely on them primarily for purposes of background of DDC's early relationship with Krutonog and for establishing that Krutonog repeatedly negotiated employment deals for Petitioners since 1995.

Respondent acknowledges that the term of the last Life Story Option, which was operative during the period at issue in this case was 36 months (i.e, until April 2004).

Producer's Agreement Between Krutonog & Hybrid

On December 19, 2003, Krutonog entered into an agreement known as the Co-Executive Producer Agreement (hereafter, Producer's Agreement) with producers, Hybrid Films, Inc. and D&D, regarding the television program "Dog The Bounty Hunter" (DTBH) (Exh. K). Under this agreement, Krutonog received specified payments per episode with pro rata increases in compensation *commensurate* with increases given to Petitioner. In a subsequent amendment to the agreement (2 days after the initial agreement was signed), Krutonog was to similarly receive compensation increases based on the same that Petitioners received. (Exh. K, L)

According to Krutonog, he performed production type activities during production of the DTBH program which included attendance at shooting of the show (approximately five weeks of production day in 1st season and regularly present through the beginning of the fourth season), providing logistical support on bounty hunts (holding camera, transporting equipment or personnel, obtaining releases from bystanders, transporting and hiding desperate informants, helping with catering, and general assistance), assisting in production of A&E promotional material (3 trips to New York in 2004 and 2005 helping with logistics and wardrobe), and interacted with crew and co-producers (attending meeting, staying with the crew, providing production ideas/advice).

According to Hybrid's co-owner, David Houts, Krutonog did not, in fact, render producer services on DTBH and his role was to be Chapman's manager, confidant, and a liaison between the Chapman's and producers of the program.

On December 19, 2005, Hybrid and Krutonog amended the Producer's Agreement (Amendment 3). The amendment (between Hybrid through its special purpose entity D&D Television Productions, and Pivot Point Entertainment, Krutonog's loanout company) provided that Krutonog would receive $16,394 per episode for the third season plus other compensation. The memorandum provided that the "The Dog Team" was to receive a total sum of $100,000 per episode for Season 3 of DBH, which included compensation for Krutonog. (Exh. Q)[2]

[2] This amendment was executed shortly after the time that Petitioner DDC's deal memorandum with the producers of the DTBH program (Hybrid and D&D Television Productions) was made. (See Exh. 30).

As of January 2007, Respondents are owed $539,450.21 from Hybrid (Exh. 63) representing amounts which accrued within 1 year of the filing of the instant petition in connection with the DTBH program.

Life Rights Agreements

On June 30, 2004, a "Life Rights Agreement" between Krutonog and both petitioners covered merchandising and licensing of Duane's name and likeness, including books, video games, apparel, other merchandise, and sponsorships. This agreement also provided that Krutonog would be attached as *a producer* to future television programs and films incorporating Petitioners' stories.

Respondents denied that this agreement was to obtain employment for Petitioners and Krutonog maintained that he did not refer to himself as DDC's manager. According to Krutonog, he spent countless hours trying to market and grow "The Dog" brand performing various activities. Respondents assert that the Life Rights Agreement between Petitioners and Respondents was negotiated by attorney Leslie Abell who represented the Petitioners.

The Life Rights Agreement (Exh. N) provided that Krutonog would receive a percentage commission on books, merchandising rights, video games, apparel, and sponsorship/spokesperson opportunities. The agreement further provides payments of "producer fees" but only as to feature films and television programs. Paragraph 6 provides that Krutonog will receive payments with respect to feature films and television programs involving DDC.

Krutonog denies that he sought employment for the Chapmans under the Life Rights Agreement or otherwise. However, Krutonog acknowledged that he participated in phone calls and emails for an endorsement engagement for Powerlock and asserts he did so for DDC to obtain SAG membership for the purpose of obtaining health insurance. Krutonog received a $5,000 commission within the one year period before the filing of the instant petition.

Petitioners alleged that Krutonog also procured an appearance for DDC on The George Lopez Show within the one year period before the filing of the instant petition. Krutonog acknowledges forwarding an email from the show's casting director to Beth Chapman but denies he negotiated the appearance or received any commission.

December 2005 Renegotiation for Season 3 of DTBH

In Fall 2005, A&E renegotiated its agreements with the DTBH "team" which consisted of Duane Chapman, Alice Barmore-Smith (aka Beth Chapman), Duane Lee Chapman, Leland Chapman, Tim Chapman, and Boris Krutonog. (Exh. 27; RT 379:25-380:14). The new agreements provided for an increase of 2.44 times the amount from Season 2 of the show for a total of $100,000 per episode for the "team" which included compensation for Krutonog in connection with DTBH.

Krutonog admitted to preparing the written proposal sent to A&E for an increase in compensation for the team. (Exh. 55) While Krutonog claims that he was negotiating his own deal as a producer along with the Chapman's transactional attorney, Les Abell, the evidence establishes that Krutonog actively proposed and negotiated various terms of the Chapmans' new deal with A&E.

Abell testified that Krutonog communicated with A&E without his knowledge and involvement. Krutonog would report to him on conversations the former had with A&E regarding the Chapmans' deal. According to Abel, the per episode figure of $100,000 was negotiated for all participants of the program and he had no involvement in negotiating a separate fee for "producing services" that would be paid to Krutonog.

Margaret Reilly-Brooks, A&E's Vice President and Deputy General Counsel in charge of negotiating talent agreements for the network, testified that Krutonog acted similar to other agents in negotiating terms, length of contract and pricing issues; received several documents from Krutonog on behalf of DDC and the team during the negotiations (Exh. 27, 28, & 29). She also stated that there were numerous conversations in which Krutonog communicated requests on behalf of the Chapmans, including repeated attempts to increase the per episode compensation to the Chapmans. Ms. Reilly-Brooks recalled that Krutonog sought compensation for the Chapmans higher than the amount which A&E ultimately agreed. According to Ms. Reilly-Brooks, although she understood that Krutonog's compensation was tied directly to Chapman's increases, she did not negotiate that aspect and, among deals she has negotiated with

producers, she was not aware of a situation where talent contract provisions were negotiated tying a producer's compensation to the talent's compensation.

Ms. Reilly Brooks who participated in the DTBH negotiations testified that they agreed to the $100,000 figure with Krutonog; that they never considered, cared, or negotiated how the number was to be distributed among the Dog Team; and made no provision for separate payment to Krutonog as a "producer." Krutonog admitted that he sent an email (Exh. 18) to Petitioner Beth Chapman a proposed breakdown of the $100,000 figure which included compensation for Krutonog.

Hybrid co-owner David Houts testified that he had direct communication with Krutonog regarding the 2005 renegotiation of the contact and that Krutonog requested additional money on behalf of the Chapmans. Houts understood that Krutonog was acting as the Chapmans' manger or agent and, to his knowledge, Krutonog did not in fact perform producer services and did not provide any service other than managing the relationship between the Chapmans and the production company.

DDC did not have previous knowledge of Krutonog's portion of the $100,000 per episode for Season 3 and was informed by Krutonog that the latter was negotiating his own contract separately. DDC was later told by Krutonog that there was a separate deal had with the producers and when asked to see the deal, was told by Krutonog that it was confidential.

Both Petitioners testified that Krutonog was always introduced as their manager and continuously referred to him as their manager. Krutonog's wife, a publicist for the program, also referred to Krutonog as the Chapmans' manager.

Krutonog takes issue with his characterization as a manager but acknowledges his long and many efforts in *contributing* to the "Material" under the Life Story Option Agreements.[3] He refers to time-consuming "wrangling" of the Chapmans due to their behavior in order for

[3] "Material" is defined in the Life Story Option Agreements as "the incidents of [Dog's] life and any information and materials in connection with [Dog's] life story." The Life Story Option provided that Krutonog would use his efforts to "obtain a commitment for the development and production of motion picture and television projects based upon the 'Material.'" (Exh. I, preamble and ¶ 1)

production of DTBH to continue. The latter activities were corroborated by evidence of email communications from Hybrid and the testimony of Houts.

Jayson Haddrich, a cameraman and director for Hybrid testified that he worked on all four seasons of the DTBH program that were filmed prior to his testimony. Haddrich testified that Krutonog was introduced to him as the Chapmans' manager, and that Krutonog was never a producer on the series nor did he represent himself as a producer.

Krutonog admitted that neither he nor his company, Pivot Point Entertainment, LLC is a licensed talent agent.

CONLUSIONS OF LAW

1. JURISDICTION

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 under this chapter." Talent agencies may, in addition, "counsel or direct artists in the development of their professional careers." There is no dispute that *neither* Krutonog nor his loan out company, Pivot Point Entertainment LLC, was a licensed talent agency.

"Artists" is defined to include, *inter alia,* "persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises." Respondents argue that Petitioner Duane Chapman is not an actor but a bondsman and bounty hunter and that Respondent Krutonog's activities were directed towards selling rights to films and television programs about Chapman's adventures and not finding acting parts for Chapman, relying heavily on Krutonog's role as set forth in early Life Story Option Agreements and a subsequent Life Rights Agreement.

Petitioner is an artist as defined in Labor Code §1700.4(b) as it includes persons in addition to actors and actresses, "other artists and persons rendering professional services in ... television and other entertainment enterprises." (See also, *Leonard v. Rebney,* TAC 23-04 (2005) and *Blanks v. Greenfield,* TAC 27-00 (2002) [reality-type television show talent are artists whose fame and likeness are used to boost ratings/advertisement]. Additionally, the evidence supports that both petitioners performed as actors by acting in transition scenes, pick-up lines, reshoots, scripted specials, television commercials and promotional shoots.

Respondent also argues that the Labor Commissioner lacks authority to determine rights under the Producer's Agreement between Respondents and Hybrid which is independent of any agreement between Petitioners and Respondents, and further, that Petitioners have no right to a determination in this matter for recovery of monies due Respondents from non-parties (Hybrid). Petitioners, however, argue that its petition only seeks a determination of rights only as between Petitioners and Respondents and that the Producer's Agreement was a ruse to disguise payment of commissions to Respondents for procuring employment for the Chapmans regarding the DTBH program as well as other various jobs obtained for Chapman.

The jurisdictional challenge raised by Respondents is unavailing. "The Talent Agency Act is a remedial statute that must be liberally construed to promote its general objective, the protection of artists seeking professional employment." (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 354). The Supreme Court has recognized that the scope of the TAA is established through a functional definition and regulates conduct--not titles or labels, such that it is the act of procuring (or soliciting) that qualifies one as a talent agency and subjects one to the licensing and related requirements. (*Marathon Entertainment Inc. v. Blasi* (2008) 42 Cal.4th 974, 986). The scope of the TAA thus depends on the circumstances regarding the procurement of employment and cannot be avoided by agreements which, although relevant to creating contractual relationships among parties, cannot control the ultimate scope of the TAA.[4] Rather than determine contractual rights under the

[4] Indeed, many disputes determined by the Labor Commissioner involve or require interpretation of agreements between an artist and licensed talent agency. Also, many involve determinations of disputes of coverage under the TAA such as between an artist and personal manager (not regulated under the TAA) but who become subject to the TAA when they procure or attempt to procure employment. However, an agreement governing the contractual

Producer's Agreement, the appropriate determination for the Labor Commissioner is whether Respondents violated the TAA with respect to employment obtained on behalf of Petitioners and the determination of an appropriate remedy.

Under the pleadings in the instant case and the extensive evidence presented addressing the issue of coverage, the instant controversy consists of a dispute regarding several agreements, and more importantly, conduct which purport to constitute violations of the TAA. Since the issues raised in the petition and answer pertain to the rights between the parties and requires a determination whether Respondents acted as "talent agents" without a license as required under the TAA, the Labor Commissioner has jurisdiction pursuant to Labor Code § 1700.44 to determine the matter.

2. VIOLATIONS OF THE TAA

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 v. Tobin*, TAC 17-96, pp. 6-7). Procurement includes any active participation on a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication or who finalized the deal. (*Hall v. X Management,* TAC 19-90)

Beginning with the several "Life Story Option Agreements," Krutonog undertook activities from as far back as 1994 and until April 2004 which utilized his entertainment industry experience and contacts *to develop and produce projects* that would show the story of DDC's rise to a world-renowned bail bondsman and bounty hunter. The Life Story Option Agreements were followed by the "Life Rights Agreement" on June 30, 2004 which provided that Krutonog would receive a percentage commission on books, merchandising rights, video games, apparel, and sponsorship/spokesman opportunities, and further, payments with respect to feature films and television programs involving DDC. (Exh. N) According to Krutonog, he spent countless hours trying to market and grow "The Dog" brand performing various activities.

relationships where one party is an artist, although relevant evidence which is probative on the issue of an intended relationship, do not and cannot vitiate TAA requirements. To allow otherwise would impermissibly permit a party to "contract around" statutory requirements.

Krutonog's attempts to couch his activities in sole alignment with the terms of the Life Rights Agreement, including attempting to secure producer fees for himself on projects, is inconsistent with the quantity and quality of evidence demonstrating his active attempts to procure employment opportunities for DDC. While there may be a natural connection between Krutonog maximizing his return under the Life Rights Agreement and enhancement of DDC's employment opportunities in the television and motion picture industry, his actions in connection with the latter violate the TAA.

It is evident that Krutonog from as far back as 1995 undertook to develop DDC's career in the entertainment industry which was manifested by acting as DDC's representative and contact for negotiating and communicating employment opportunities with third parties on behalf of the Chapmans. (e.g., Exhs. 2, 8, 15, 19, 21, 22, 23, 25, 27, 28, 29, 33, 37 & R.T 602:24-603:25), 38, 41, 50, 54, 55, 57, 61, 62, TT, LLL). In several activities Krutonog performed in connection with attempts to obtain employment, the evidence establishes that he received commissions between of 10% or 15% commission which is standard compensation for managers and agents of artists in the entertainment industry. (Exh. 7 & R.T. 104:24—105:3 [Powerlock Infomercial); Exh 15 [The George Lopez Show]. Testimony and documents were presented showing 23 opportunities for which Krutonog played a major, if not singular, role in procuring such employment for DDC.

These activities reveal a pervasive and on-going effort by Krutonog to develop DDC's entertainment career by securing projects which also involved attempts to procure employment of DDC, and thus, the procurement of such employments constituted violations of the TAA regardless of other non-talent agency activities performed by Krutonog .

The undersigned is persuaded that the preponderance of the evidence shows that Krutonog, in fact, performed services as a personal manager who also acted as a talent agent for Petitioners *in addition to* services provided in the several agreements.

A. Life Rights Agreement

As previously stated, the Life Rights Agreement provides payments of "producer fees" but only as to feature films and television programs. Paragraph 6 provides that Krutonog will

receive payments with respect to feature films and television programs involving Mr. Chapman. (Exh. N [June 30, 2004, amended 9/24/04, Exh. O])[5] Under the Life Rights Agreement, Krutonog would also receive a percentage commission on books, merchandising rights, video games, apparel, and sponsorship/spokesperson opportunities.

To the extent that Krutonog based his activities on the Life Rights Agreements for which Krutonog actively sought entertainment-related business opportunities for Petitioners, Krutonog's activities were contrary to TAA requirements. The fact that Krutonog did not solicit any employment opportunity is not dispositive, but rather his actions to respond to offers, negotiate terms, or otherwise attempt to secure the terms constituted activity covered under the TAA.

The on camera appearances by DDC in both the Powerlock infomercial for which Krutonog received $5,000 (Exh. 6,7, RT 108:9-13, 115:12-17) were specific services procured by Krutonog representing DDC and performed within the year prior to filing of the instant petition in violation of the TAA. The petition also alleged and the evidence establishes a violation of the TAA in securing DDC's appearance on the The George Lopez Show (Petition, p. 4; Exh. 14, 15; RT 218:25-222:2)

B. "Dog The Bounty Hunter" Program (DTBH)

The Labor Commissioner has authority to determine Respondents' compliance with TAA requirements in connection with conduct under the TAA with respect to artists for which the act is aimed at protecting. (*Marathon Entertainment Inc. v. Blasi* (2008), 42 Cal.4th 974, 986 [the Act establishes its scope through a functional definition; it regulates conduct, not labels]) *Buchwald v. Superior Court (Katz)* (1967) 254 Cal.App.2d 347, 355 [Labor Commissioner is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality, looking through provisions, valid on their face, and with the aid of parole evidence, determine that the contract is actually illegal or is part of an illegal transaction])

[5] Under the Life Rights Agreement, Beth Chapman was also a party to the contract. She was not a party to previous Life Story Option Agreements.

The instant petition, by its terms, is not limited to a single procurement activity, but is to be determined in relation to the alleged violations of the statute. To hold otherwise would make the Act subservient to private contracts[6] and interfere with its underlying purposes to protect artists and undermine the procedure which allows the Labor Commissioner and courts authority to determine whether *conduct* violates the Act under a dispute properly before the tribunal.

The testimony and evidence presented at this hearing establishes that Respondent procured employment for Petitioner in connection with the A&E television program, *Dog The Bounty Hunter* (DTBH). DDC ultimately signed a deal with independent film company Hybrid for two seasons of the "observational television" (reality) series. (Exh. 32 & 30[¶ 2]). The engagement of DDC and the team for the program was negotiated by Krutonog (RT 830:1-9, 1251:6-15) who was paid a percentage of monies received for the program under DDC's contract with Hybrid (RT 829:24-25, 830:10-831:1,, 924:4-11) and was consistent with evidence of Krutonog's conduct of representing DDC in connection with other actions involving procurement of employment opportunities during the same period.

The evidence is even more compelling that Krutonog had a major and active role in negotiating for the third season of the television program in Fall 2005 which resulted in a deal for DDC in December 2005, including the compensation for the Chapman team. Despite DDC having transactional legal representation, the evidence indicates that Krutonog was instrumental in negotiating the terms of the deal, including the compensation figures. Testimony of witnesses involved in negotiating the deal from DDC's transactional attorney, the production company Hydrid, and A&E demonstrated that Krutonog was acting as representatives for Petitioners in securing their continuing employment for the television program.[7] While Respondents deny that Krutonog had any role in negotiating the first two seasons of *DTBH*, a correspondence from Krutonog to Beth Chapman indicate the contrary and, moreover, admits that Krutonog received a

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[6] *Buchwald, supra,* 254 Cal.App.2d at 355 [the Act may not be circumvented by allowing language of a contract to control])

[7] The fact that Krutonog acted along with DDC's transactional attorney does not exempt the former's activity from coverage under the TAA because the transactional attorney was not a licensed talent agency.

percentage of the amounts for seasons 2 and 3 from the total amount negotiated for services of DDC team performers. (Exhibit 18)

Krutonog's arguments which cast his efforts under contractual authority provided in the Life Story Option Agreement does not align with the evidence that demonstrates Krutonog was also actually acting as a manager who acted as talent agent for DDC during both the initial contract in 2003 and subsequent contract in 2005 and demonstrated employment procurement activities by Krutonog which are covered and regulated under the TAA.

C. The Producer's Agreement

Prior to the Life Rights Agreement (amended 9/24/04), Krutonog executed a *Producer Agreement* with A&E production companies on December 23, 2003 (Exh. K, L) under an apparent contractual right to exploit DDC's life story under the Life Story Option Agreement. Under the Producer Agreement, Krutonog received certain payments per episode, and pro rata increases commensurate with increases given to DDC. The Producer Agreements were not known to Petitioners prior to the instant proceeding.

Both evidence and argument from the parties addressed the Producer Agreement and its impact on violation of the TAA. Petitioners maintain that it was a ruse providing an instrument for cover for Respondents to not only generally develop DDC's story in the publishing and entertainment industries but also extended to actively pursuing professional employment opportunities for DDC in violation of TAA licensing requirements. Petitioner's argument maintains that the unlawful activities under the TAA were born in the Life Story Option Agreements and followed through in the subsequent Life Rights Agreements and Producer's Agreement. Under Petitioners' view, all these agreements are part of a consistent and continuing circumvention of the TAA and that Krutonog utilized the Producer's Agreement to obtain the equivalent of a "commission" typical of managers and talent agents in the entertainment industry because, in part, Respondent's compensation was expressly tied to DDC's performance and compensation which is unlike standard producer agreements in the industry. Additionally, Petitioner points to testimony and evidence regarding Krutonog's actual activities for the television program prior to his separation as a producer and severance of his relationship with

DDC that reveal Krutonog did not, in fact, act as a producer and was not viewed by the production company as a producer.

Respondents assert that Krutonog was a previously producer on other projects unrelated to DDC projects. According to Respondents, each contract stands alone and the 2003 Producer's agreement for the first two seasons predated the 2004 Life Rights Agreement.

For purposes of this determination, the Labor Commissioner finds that she does not have jurisdiction over all parties to the Producer's Agreement and, thus, cannot determine the validity and enforceability of that contract as between those contracting parties.

It is, however, also established that the Labor Commissioner has authority to determine violations of the TAA arising from disputes between artists and agents--either as licensed talent agents or unlicensed agents performing regulated activities. (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986 ["any person who procures employment-any individual, any corporation, *any manager*-is a talent agency subject to regulation under the TAA"]) Accordingly, if conduct of a party in a dispute before the Labor Commissioner pertains to activities under the TAA, the fact that such conduct is also relevant to other third party relationships or contracts does not preclude this agency from determining whether the conduct of a party before the Labor Commissioner violates the TAA.

There is ample evidence to find Krutonog's activities in connection with the television program were in large part as a manager and unlicensed talent agent for, initially, DDC and subsequently, on behalf of the Dog's team which included Beth Chapman. Even though some of Krutonog's activities may have been in direct furtherance of Krutonog's contract-based right under either the 2004 Life Story Option Agreement[8] (in effect from April 25, 2001 to April 24, 2004) or the Life Rights Agreement (commencing June 30, 2004) which provided entitlement to a producer's fee for a television program, the 2005 renegotiation of Petitioners' personal services

[8] The Life Story Option Agreement would subject to the consent of DDC, allow Krutonog to act on DDC's behalf with production companies or studios for development and production of motion pictures and television projects based on "material" as specified.

in DTBH violated the TAA regardless of whether Krutonog was also engaged as a co-executive producer for the show.

Respondent's conduct *independently* violated the TAA without regard to the contractual rights under the Producer's Agreement. Krutonog's on-going post-procurement activities followed, both logically and in fact, his significant role in procuring Petitioners for the program under the 2003 and 2005 deals, i.e., "but for" Krutonog's procurement activities in the two deals, there would be no "producer fee" for the television program arising under the Life Rights Agreement.

It is the actions relating to procurement of employment for Petitioners on the show which violate the TAA which requires that persons engaged in procurement activities for an artist be licensed (Labor Code 1700.5) and must comply with various other requirements for the operation and management of a talent agency (Labor Code §1700.23 et seq.). Although the Producer's Agreement was apparently used as an instrument by Krutonog to be involved on an on-going basis with the program and be paid by Hybrid, this agency cannot determine the validity and contractual rights established between Krutonog and Hybrid under said agreement. Nonetheless, the undersigned finds that Krutonog's actions to recover a producer's fee in connection with the Life Rights Agreement was a veiled attempt to secure compensation for both managing and representing DDC which conduct included procuring employment of Petitioners for the television program.

3. REMEDIES FOR VIOLATIONS

A contract is illegal where it is contrary to an express provision of law or contrary to the policy of express law. (Civil Code §1667) Where illegality occurred in the formation of the contract, it (or its unlawful severed provision) is void and unenforceable. (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 351 [contracts between unlicensed talent agents and artists and *otherwise in violation of the Act* are void]) In determining disputes under the TAA, the courts have more recently interpreted the Act to allow severance of contract provisions found to be in violation of the act. (*Marathon, supra,* 42 Cal.4th at 991, citing Civil Code §1599). The

overarching inquiry is whether the interests of justice would be furthered by severance based upon the various purposes of the contract. (*Marathon, supra,* 42 Cal.4th at 996)

The Act does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) nor does it govern assistance in an artist's business transactions other than professional employment. (*Styne v Stevens* (2001) 26 Cal.4th 42, 51) However "[a]ny person who procures employment-any individual, any corporation, *any manager*-is a talent agency subject to regulation under the TAA (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986) and "a personal manager who solicits or procures employment for their artist-client is subject to and must abide by the Act [Citations]." (*Id.*)

The 2001 Life Story Option Agreement (effective to April 25, 2004) and 2004 Life Rights Agreement fundamentally provided ostensible authority for Krutonog to perform a potentially wide range of personal services which intended to develop, sell, and market, the life story of DDC, initially, and subsequently Beth Chapman, which included services more than procurement of employment. However, through his conduct, Krutonog stepped into the realm of making deals which involved procurement of the services of Petitioners as artists which, whether naturally or by design, contributed to the value and marketability of any merchandising or development of television or motion picture products under the agreements which were based upon DDC life and experiences.

There are multiple purposes and objects in those two agreements beyond procurement of employment for which severance would be appropriate if the agreements were susceptible for carve outs of illegal portions. While Krutonog asserts that the agreements under which he acted for many years prior and subsequent to the DTBH television program are valid and enforceable, the evidence establishes illegal procurement of services and those agreements cannot stand as an obstacle to compliance with the TAA. Additionally, the mere fact that unlawful activities were, in fact, performed by Krutonog, does not make an agreement which purports to fundamentally involve one's life story rights and other business matters (not related to procurement of employment activities) entirely void and unenforceable.

Severance is not appropriate in this case. Neither of the two agreements expressly provide for Respondents to procure *employment opportunities* for Petitioners individually or jointly.[9] As previously stated, the undersigned is persuaded by the evidence that Krutonog, in fact, performed services as a personal manager and talent agent for Petitioners *independently and in addition to* services provided in the agreements. Moreover, it is significant that Krutonog received compensation for *all services* in connection with DTBH, apparently through payments under the contract for monies due to his client artists.

In the interests of fairness and justice for the Petitioners and the public's interest in enforcement of the TAA which is legislation intended to protect artists and in view of established unlawful conduct by Krutonog which cannot result in improper gain (or potential gain) through such illegality, Petitioners must be awarded amounts which are appropriate to remedy the violations of the TAA occurring within one year prior to the filing of the instant petition. (Labor Code §1700.44(c))

1. Petitioner seeks recovery of $5,000 for the Powerlock infomercial engagement where Krutonog received a $5,000 for securing the engagement. This was an engagement for which there was no written agreement between Krutonog and DDC but evidence supports the violation and it is appropriate for DDC to recover said amount paid to Krutonog who was not a licensed talent agent.

2. Petitioner seeks $534,450.21 for amounts received from Hybrid (the production company of DTBH) within one year prior to the filing of the instant petition. There was evidence presented which represented that such amounts have been withheld by Hybrid or are otherwise being held in trust pending the outcome of the instant petition.

As indicated above, this determination does not purport to determine any *contractual rights* under the Producer's Agreement between Respondents and Hybrid. However, it is also

[9] To the extent that there is any interpretation of the agreements which contemplates that Krutonog, in developing projects involving rights conferred in the agreements, could also procure employment for petitioners with buyers, including production companies, such interpretation would directly contravene the TAA which is aimed at protecting artists by requiring persons who perform such services to be licensed as talent agents. (See Civil Code §1596 [the object of a contract must be lawful])

significant that the evidence presented in this matter proved by a preponderance of the evidence that Respondents had negotiated both an independent Producer's Agreement and secured the artist's agreement with Hybrid independently without knowledge of Petitioners, i.e., the artists' agreements for DTBH in 2003 and 2005 coincided with the respective Producer's Agreements for the same periods.[10] An arrangement (not included in the respective agreements) providing that compensation, including services performed by Krutonog as a manager and agent who procured the employment, were to be paid through the amounts under the artist agreements resulted in a commingling of compensation directly connected to services performed on behalf of the artists with compensation for his personal services for Hybrid.

This commingling of Krutonog's compensation received from Hybrid can only be effectively addressed by requiring Respondents to be disgorged of all amounts Respondent unlawfully received or will receive in payments from Hybrid under the artists' agreement as the portions cannot be reasonably ascertained and apportioned according to the source of compensation. Respondents cannot, on their own, obtain unjust enrichment nor contravene the TAA by declaring that all monies received from Hybrid are only for a lawful activity where Krutonog created multiple sources for compensation aimed at ensuring recovery through effectively negotiating terms for engagement of artists where all his compensation in connection with the DTBH program are through apportionment under the artist's contract.

Such result is appropriate in view of the fact that, but for the procurement of Petitioners for DTBH, there would have been no right for Krutonog to receive any amounts under any rights he had or otherwise exercised under the Life Option Agreement or Life Rights Agreement. These two agreements represent the basis for Respondent to conduct his business and must be considered in establishing a remedy which addresses wrongs for which Respondent was unjustly enriched by receiving compensation as an agent of Petitioners who fundamentally procured the employment without previously complying with the licensing requirement. The remedy for the

[10] These acts may also give rise to a conflict of interest created by Krutonog who purportedly negotiated for amounts as part of the Dog's team single negotiated amount with Hybrid but also independently secured his own independent contract with Hybrid.

violation is thus not strictly an enforcement of the two contracts but a necessary quasi-contract remedy based upon an implied obligation for Respondent to act lawfully and for disgorgement of ill-gotten gain from his actions.[11] Where appropriate, the law will imply a contract or, rather, a quasi-contract without regard to the parties' intent, in order to avoid unjust enrichment. (*McBride v. Boughton*, 123 Cal. App. 4th 379, 388)[12] Also, this remedy recognizes that the two contracts have an object and purpose independent of the determined violations of the TAA.

Accordingly, Petitioners are due $534,450.21 which amount reflects amounts which Respondents concededly received from Hybrid/D & D Productions during the year prior to filing the instant petition and fairly represents an appropriate redress for Petitioners who were victims of Respondent's conduct and violations of the TAA in connection with the artists services.

The undersigned does not find it appropriate to determine that the 2001 Life Story Option Agreement, the 2004 Life Rights Agreement, or the Producer's Agreement are null and void.

ORDER

1. The relief sought in the petition for voidance of the 2004 Life Rights Agreement between Petitioners and Respondents is denied.

2. This decision expresses no determination regarding any obligations under the Producer's Agreement between Krutonog and Hybrid in its capacity as *the production company* of DTBH, under the agreement or otherwise. Such determination would extend beyond the

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[11] In discussing the ability of the Labor Commissioner to void agreements and the legislative history of the TAA, the Supreme Court noted: "Nothing in the Entertainment Commission's description of the available remedies suggests she is obligated to do so [void contracts], or that the Labor Commissioner's power is untempered by the ability to apply equitable doctrines such as severance to achieve a more measured and appropriate remedy where the facts so warrant." (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th at 995)

[12] The *McBride* Court stated in footnote 6: "'Quasi-contract' is simply another way of describing the basis for the equitable remedy of restitution when an unjust enrichment has occurred. Often called quantum meruit, it applies '[w]here one obtains a benefit which he may not justly retain.... The quasi-contract, or contract 'implied in law,' is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money.' (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 91, p. 122, italics omitted.) 'The so-called 'contract implied in law' in reality is not a contract. [Citations.] 'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.' [Citation.] (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 794, 256 P.2d 947.)" (*McBride v. Boughton* (2004)123 Cal. App. 4th 379, 388, fn 6)

scope of the TAA and the jurisdiction of the Labor Commissioner under Labor Code §1700.44(a) which is limited to activities regulated under the Act.

5. Disgorgement is appropriate in this matter as the evidence establishes that Krutonog engaged in procurement or attempts to procure employment for Petitioners in connection with violations occurring within the one year prior to the instant petition, for the amount of $539,450.21, as set forth above.

Dated: 10/29/12

R. N. Villalovos

ROBERT N. VILLALOVOS
Attorney for Labor Commissioner

Adopted as the determination of the Labor Commissioner.

Dated: 10/31/12

Julie A. Su
LABOR COMMISSIONER