DIVISION OF LABOR STANDARDS ENFORCEMENT
By: Carl G. Joseph, Special Hearing Officer
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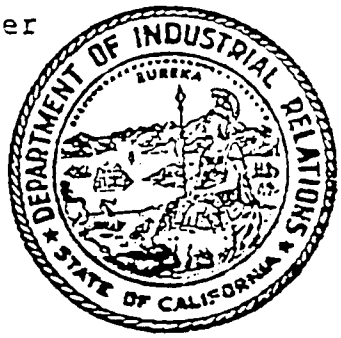

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

RICHARD PRYOR, an individual, INDIGO, INCORPORATED, a California corporation, Petitioners, vs. DAVID McCOY FRANKLIN, individually and doing business as DAVID FRANKLIN & ASSOCIATES, Respondents.	CASE NO. TAC17 MP114 DETERMINATION

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, by Carl G. Joseph, Attorney for the Division of Labor Standards Enforcement, serving as Hearing Officer under the provisions of Section 1700.44 of the Labor Code of the State of California, Petitioners RICHARD PRYOR and INDIGO, INCORPORATED appearing by the Law Office of Lavely & Singer, by John H. Lavely, Jr. and Martin D. Singer, and

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Respondent DAVID McCOY FRANKLIN, individually and doing business as DAVID FRANKLIN & ASSOCIATES, appearing by the Law Offices of Joseph E. Porter, III, by Joseph E. Porter, III, Thomasina Reed, and Robert Pryce. Evidence, both oral and documentary having been introduced, and the matter having been briefed and submitted for decision, the following determination is made:

It is the determination of the Labor Commissioner:

1. That during the time period of 1975 through September 1980, Respondent agreed to act and acted as an artists' manager and talent agent as those terms are defined in Labor Code, Section 1700.4 on behalf of Petitioners in the State of California, without being licensed as such as required by the Labor Code.

2. That the agreement entered into between Petitioners and Respondent in 1975 is void and unenforceable and that Petitioners have no liability thereunder to Respondent and Respondent has no rights or privileges thereunder.

3. That Respondent is ordered to return to Petitioners the sum of Three Million One Hundred Ten Thousand Nine Hundred Eighteen ($3,110,918) Dollars representing all monies and things of value which Respondent received for services performed as an unlicensed artists' manager and talent agent[1] and all monies and things of value which Respondent

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1/ Amounting to Seven Hundred Fifty-Three Thousand Two Hundred Seventeen ($753,217) Dollars paid to Respondent by Petitioners over the period 1975 through 1980.

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willfully misappropriated from Petitioners through his role as Petitioners' artist's manager and talent agent.[2]

4. Because of the fact that the Labor Commissioner has no power to subpena Respondent's records from Georgia and because of the related impracticability of ordering Respondent to render an accounting as to any additional monies which he may have obtained from Petitioners in connection with his procurement of employment on Petitioners' behalf, we decline to order Respondent to render an accounting to Petitioners, although we recognize Petitioners' right to receive an accounting from Respondent as to all such monies which he obtained in his role as Petitioners' representative.

5. That Respondent is guilty of serious moral turpitude and is therefore not entitled to any claim or offset based on the reasonable value of services rendered to Petitioners.

I.

INTRODUCTION

On August 25, 1981, Petitioners RICHARD PRYOR (hereinafter sometimes "Pryor") and INDIGO, INCORPORATED (hereinafter collectively "Petitioners") filed a Petition to

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2/ Amounting to Two Million Three Hundred Fifty-Seven Thousand Seven Hundred One ($2,357,701) Dollars which includes interest at the legal rate of seven (7%) percent per annum, amounting to Five Hundred Six Thousand Nine Hundred Twenty-Nine ($506,929) Dollars as of June 21, 1982.

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Determine Controversy pursuant to Labor Code § 1700.44 with the Labor Commissioner of the State of California, against Respondent DAVID McCOY FRANKLIN, individually and doing business as DAVID FRANKLIN & ASSOCIATES (hereinafter "Respondent" or "Franklin"). The Petition alleged that Respondent acted as an unlicensed artists' manager and talent agent in the State of California during his five year representation of Petitioners.

In Petitioners' prayer for relief, Petitioners have requested:

1. A determination that the agreement between Petitioners and Respondent Franklin is void and unenforceable and that Petitioners have no liability thereunder to Respondent and Respondent has no rights or privileges thereunder;

2. An accounting from Respondent Franklin concerning all monies, and things of value received by Respondent from Petitioners, directly or indirectly, in connection with Respondent's representation of Petitioners during the period of 1975 through 1980;

3. An Order requiring Respondent to return to Petitioners all monies and things of value received by Respondent, directly or indirectly, pursuant to the agreement and/or in connection with Respondent's representation of and procurement of employment for Petitioners;

4. A determination denying Respondent Franklin any claim or offset based on the alleged reasonable value of services rendered by Respondent on behalf of Petitioner; and

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5. For such other and further relief as the Labor Commissioner may deem just and proper.

Respondent filed an Answer to the allegations in the Petition to Determine Controversy and admitted that he negotiated on behalf of Petitioners almost all of the agreements that were referred to in the Petition but denied the material allegations of the Petition regarding the claimed violations of the Artists' Managers Act and Talent Agency Act.

A hearing on the Petition was originally scheduled to commence on December 3, 1981. However, Respondent's original attorney of record, Tony Axam, ("Axam") requested a continuance of the hearing, and Petitioners' attorneys of record entered into a stipulation with Axam in which it was agreed that the hearing would commence on December 21, 1981.

On December 21, 1981, when the hearing on the Petition was scheduled to commence, Petitioner Richard Pryor and Petitioners' attorneys appeared at the hearing. However, neither Respondent nor his attorney, Axam, appeared at the hearing. An attorney from the office of Joseph E. Porter appeared at the hearing on December 21, 1981, and requested a

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continuance. The hearing was continued to February 8, 1982, pursuant to Respondent's Motion for a Continuance.[3] After Respondent obtained new counsel, the Law Offices of Joseph E. Porter, III, the hearing on the Petition was continued a third time to March 1, 1982. A request by Respondent for a fourth continuance of the hearing was denied. The hearing before the Labor Commissioner commenced on March 1, 1982, and continued through March 25, 1982, concluding after seven days of hearings.

Prior to the opening of Petitioners' case and the taking of evidence, Respondent made a Motion to Dismiss the Petition on the grounds that Petitioners were estopped to assert any claims against Respondent. The Motion to Dismiss the Petition was denied.

In addition, prior to the taking of evidence, Petitioners made a motion that the hearing be held as a confidential proceeding in order to maintain confidentiality of privileged communications. The Motion that the hearing be held

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3/ As a condition of the order continuing the hearing, Respondent was also ordered to pay to Petitioners' attorneys, Lavely & Singer, the sum of $750, as reasonable attorneys fees incurred in preparing for and attending the hearing, and was also ordered to pay to Petitioner Richard Pryor the sum of $600 as costs incurred in connection with the continuance of the hearing. However, Respondent refused to pay any of the attorneys fees or costs which he was ordered to pay and as a result thereof, the Hearing Officer signed a Certified Statement of Facts regarding the Refusal of David Franklin to Obey the Lawful Order of the Labor Commissioner in connection with a contempt proceeding instituted against Respondent in the Los Angeles Superior Court.

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as a confidential proceeding was granted. After the ruling on Respondent's Motion to Dismiss and Petitioners' Motion that the hearing be held as a confidential proceeding, the hearing commenced.

After Petitioners presented their case and rested, Respondent made a motion for a judgment pursuant to Code of Civil Procedure Section 631.8. The Motion for a judgment or determination in Respondent's favor was denied. The hearing continued and Respondent put on his evidence. After the conclusion of the hearing, a complete transcript was prepared, briefs were submitted by Petitioners and Respondent and the matter was submitted to the Hearing Officer for a determination.

II.

ISSUES

The issues presented are twofold:

1. Did Respondent function as an artists' manager and talent agent as those terms are defined in the Labor Code without a license?

2. If so, what relief, if any, are Petitioners entitled to?

III.

APPLICABLE LAW

The law which will determine the outcome of the claims asserted by Petitioners is contained in Labor Code, Sections 1700-1700.47, which was known as the Artists' Managers Act during part of the period of time in question in this

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proceeding, until the Act was amended in 1978 when it became known as the Talent Agencies Act.

Section 1700.5 of the Artists' Managers Act[4] prohibits anyone from engaging in the occupation of an artists' manager or talent agent without having obtained a license from the California Labor Commissioner. Respondent has admitted that he never sought or obtained such a license during the almost five year period that he represented Petitioners.

One of the critical issues which will be discussed hereinbelow is whether Respondent performed services of an artists' manager or talent agent on Petitioners' behalf. An

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4/ All statutory citations will be to the California Labor Code unless otherwise specified.

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artists' manager is defined in Section 1700.4 as:

> "* * *A person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist.***"[5]

5/ Effective January 1, 1979, Section 1700.4 was amended to read as follows:

> "A talent agency is hereby defined to be 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. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.***"

The services and conduct of Respondent that took place before January 1, 1979, will be judged based on the definition of "artists' manager" as it existed at that time; whereas, Respondent's services and conduct after January 1, 1979, will be weighed against the amended definition of "talent agency". It is noted, however, that the change of definition did not have any significant impact on the outcome of this case. Since none of the changes which the California Legislature passed in 1978 is outcome-determinative on any of the issues in this case, we will, for ease of reference, use the term "Talent Agencies Act" (sometimes simply "the Act") to refer collectively to both the Artists' Managers Act and the Talent Agencies Act.

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The Act, as supplemented by the California Administrative Code[6] and as interpreted in part by some significant California court decisions[7] establishes a comprehensive regulatory scheme governing the conduct of talent agents, including licensing requirements, investigation of character, conduct of business, bonding requirements, approval of contracts, posting of fees, verifying employer experience, maintaining books and records, prohibition of fee spliting and false advertising, and other regulatory provisions.

Respondent has not disputed the state of California's right and power to enforce this regulatory scheme, maintain its integrity, and protect artists from unlicensed talent agents. However, Respondent does dispute and deny that the services he rendered for Petitioners during the period 1975 through 1980 were those of a talent agent. Notwithstanding this contention by Respondent, the dispute between Petitioners and Respondent is clearly a "controversy arising under [the Act]", as referred to in Section 1700.44, which controversy must be decided, in the first instance, by the Labor Commissioner. Buchwald vs. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364, 372 (1967); Garson vs. Division of Labor Law Enforcement, 33 Cal. 2d 861, 864, 206 P.2d 368 (1949).

6/ Title 8, Article 6, Chapter 6, Group 3.

7/ Raden vs. Laurie, 120 Cal. App. 2d 778, 262 P.2d 61 (1953); Buchwald vs. Superior Court, 254 Cal. App. 2d 347; 62 Cal. Rptr. 364 (1967); and Buchwald vs. Katz, 8 Cal. 3d 493, 105 Cal. Rptr. 368 (1972).

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IV.

DISCUSSION AND FINDINGS

Respondent has admitted, and there is no question, that Pryor is an "artist" as that term is defined in Section 1700.4.

The next question, which was the principal issue in dispute in this proceeding, is whether Respondent acted as an artist's manager or talent agent in rendering services for Pryor or whether the services were rendered in a capacity, or capacities, other than that of an artist's manager/talent agent. We will first consider that portion of the definition of artists' manager in Section 1700.4 which deals with promises, representations, and the process of entering into an agreement concerning prohibited services. The evidence at the hearing clearly established that the Respondent promised to procure employment for Pryor, in all fields of entertainment. With regard to the contractual arrangements made between Pryor and Respondent, Pryor testified in some detail about conversations he had had with Respondent, in which Respondent promised and assured Pryor that he would get him work and would negotiate his employment agreements in the entertainment fields as well as handling Pryor's other business affairs.

Respondent was hired to perform those services and did in fact procure employment for Pryor for a period of almost five years, as will be discussed more fully hereinbelow.

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Respondent did not offer any evidence to challenge or contradict Pryor's testimony or the substance of the June 1, 1975 memorandum that outlined some of the things that Respondent would do to procure employment for Petitioners. In fact, even Respondent's own sworn testimony[8] included an admission that he had made an oral agreement with Pryor "to represent him in his career endeavors, [and] negotiate contracts..." among other things, that Respondent was compensated for these services under his oral agreement with Pryor, and that during the period of Respondent's representation Pryor did not have any other agents or artists' managers.[9] There was additional evidence that Respondent had even referred to himself as Pryor's "agent" and had resisted attempts by other agents to establish an agency relationship with Pryor for the reason that he, Respondent, was already performing those services. Moreover, almost immediately upon beginning his representation of Petitioners, Respondent presided at the termination of the other representatives that Pryor had previously used to procure employment and Respondent also controlled the hiring of Petitioners other representatives,, including an accountant and attorneys who handled litigation, and corporate matters for Petitioners.

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8/ Offered in the form of a deposition of Respondent taken in another proceeding.

9/ Exhibit "AAA", pp. 13-15.

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The unchallenged and unimpeached evidence that Respondent did in fact promise and agree to procure employment for Petitioners, in violation of Section 1700.5, is also corroborated by the overwhelming and unrefuted evidence that Respondent actually did procure employment for Petitioners over a period of almost five years in motion pictures, television, live concerts and recordings, and was paid substantial sums of money for those services.

Pryor's testimony also followed the evolution or change in the contractual relationship between Respondent and Pryor, based on Pryor's increasing activity in motion pictures, which prompted Respondent to increase his own compensation because of his expectation of receiving more for additional responsibilities in procuring employment for Pryor in motion pictures, as well as in live concerts and in connection with sound recordings.

Now we will turn to the question as to whether Respondent's actual conduct or activity (as contrasted with his promises and representations) constituted procurement and attempted procurement of employment. Petitioners submitted testimony and documentary evidence, again unchallenged by Respondent, proving that Respondent had procured and attempted to procure employment for Pryor at Universal Studios, Paramount Pictures, Twentieth Century Fox Film Corporation, Columbia Pictures, Tandem Productions, Steven Krantz Productions, Hanna Weinstein Productions, Rastar Productions, Marble Arch Productions, Special Event Entertainment, Mel Brooks

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Productions, Warner Bros. Records, National Broadcasting Company, and had set up a tour of approximately 75 live concerts throughout the United States.[10]

Respondent even admitted in his Response to the Petition and in his sworn deposition testimony that he had negotiated the employment agreements and engagements for Petitioners during the period 1975 through September 1980. Furthermore, Respondent's counsel conceded at the hearing that Respondent had been Petitioners' "sole and exclusive negotiator".

The evidence of Respondent's active and continuous participation in the process of negotiating the terms of Pryor's employment over the five year period would, standing

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10/ Respondent procured employment for Petitioners in connection with the following motion pictures: Adios Amigo, Bingo Long and the Travelling Allstars & Motor Kings, Cyrano de Bergerac, Greased Lightning, Which Way Is Up, Blue Collar, Silver Streak, California Suite, The Wiz, Car Wash, In God We Trust, Wholly Moses, The Muppet Movie, History of the World - Part I, Stir Crazy, Richard Pryor Live In Concert, Bustin' Loose, and the contract which eventually resulted in the Paramount release entitled "Some Kind Of Hero". In addition to motion pictures, Respondent procured employment for Pryor in connection with television specials on NBC and procured and renegotiated employment for Pryor in connection with sound recordings for Warner Bros. Records. Not only did Respondent procure employment for Pryor on motion picture, television, and sound recording engagements which actually came to fruition, but Respondent also attempted to procure employment for Pryor on some projects which were not made, including the Charlie Parker Story, Macho Man, Purple Heart, Nobody, Gordon Entertaining Nightly, Animal Farm, the writing of a book, a live concert film for Warner Bros., the Lilly Palmer film, and other projects.

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alone, constitute sufficient evidence of unlawful procurement and attempted procurement to warrant and justify a finding that Respondent had engaged in the occupation of an artist's manager and talent agent without a license and in so doing had flagrantly violated the Act.

We reject Respondent's contention that to prove unlawful procurement or attempted procurement one must offer evidence of solicitation or an initiated contact. This argument runs afoul of well established principles which we choose to follow, namely, that the furthering of an offer constitutes a significant aspect of procurement prohibited by law since procurement includes the entire process of reaching an agreement on negotiated terms where the intended purpose is to market an artist's talent. These principles are totally in accordance with the purposes of the Act.

To use Respondent's narrow and restrictive interpretation of "procurement" would mean that many artists would lose much of the protection that the Act was intended to afford, particularly the most sought after artists whose services are in the greatest demand. We decline Respondent's invitation to adopt such a restrictive view, for the reasons mentioned herein.

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However, we should note that even if we adopted Respondent's argument[11] we would still find that Respondent has committed numerous acts of unlawful procurement by soliciting employment for Pryor, that is by initiating contacts that were logically intended to market Pryor's talents as an artist and by initiating or demanding material changes in existing employment agreements.[12] Respondent offered no evidence to dispute or impeach Pryor's testimony that Respondent had even conceived and sought to implement an "overall strategy" with regard to Respondent's concurrently obtaining multiple picture commitments from various motion picture studios and producers, doing a live concert tour,

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11/ That is, the argument that to constitute unlawful procurement there must be evidence of solicitation or initiated contact rather than just negotiations of an employment, initially proposed by an employer.

12/ The testimony and documentary evidence established that Respondent had engaged in solicitation-type of conduct on the following projects among others: a writing and acting development deal and multiple picture agreement with Universal Studios, and a similar agreement with Paramount Pictures, a motion picture for Warner Bros. entitled "A Day In The Life...", a motion picture entitled "The Charlie Parker Story", a motion picture entitled "Bustin' Loose", 75 of the approximately 80 live concerts done by Pryor in 1978, the writing of a book based on comedy characters created by Pryor, a recording agreement and renegotiation and renewal of that agreement with Warner Bros. Records, a motion picture of a Richard Pryor live concert, a proposed film entitled "Nobody", several films that Respondent proposed to Warner Bros. Pictures, several motion pictures that Respondent proposed to Universal, the motion pictures "Bingo Long", "Bustin' Loose", "Blue Collar", "Nobody", and "Gordon Entertaining Nightly".

In addition, there was extensive testimony and documentation establishing that Respondent had often initiated requests to amend and sometimes significantly change or replace an employment agreement.

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and doing recordings of Pryor's performances as well as a motion picture of a live concert, and juggling these various commitments to keep Pryor in demand, and keep employers on the hook. Respondent's both conceiving and implementing an "overall strategy" concerning Pryor's employment and career, represents an illustration of Respondent's dual activities in both advising, counseling or directing Pryor in the development or advancement of his professional career, while at the same time Respondent was engaged in procuring and attempting to procure employment for Pryor in various entertainment fields.

We reject Respondent's arguments wherein Respondent attempts to justify his engaging in unlawful procurement activities by characterizing those activities as the services of an attorney at law or an officer and general counsel of Richard Pryor Enterprises, Inc.[13] In exercising the Labor Commissioner's duty and power to "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality"[14] we find and determine that these characterizations by Respondent of his services in procuring employment for Petitioners constitute blatant subterfuge.

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13/ The predecessor of Petitioner Indigo, Incorporated.

14/ Buchwald vs. Superior Court, 62 Cal. Rptr. at p. 370.

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Respondent admitted, in his sworn deposition testimony that was accepted into evidence, that he was not licensed to practice law in California or in Georgia and, thus, Respondent is not in a position to urge that he pursued his procurement activities as an attorney, since such a contention could invite both civil and criminal proceedings and since any underlying contract for such services would be void and unenforceable. Furthermore, Respondent did not offer evidence to support the contention that his procurement activities were, in actuality, the legal services of an attorney.

Because of these considerations, we do not need to reach the question as to whether Respondent's conduct would have constituted a violation of the Act if he had been licensed to practice law in the state of California -- a professional status which would have rendered him subject to another panoply of regulatory statutes, rules and judicial decisions.

As to those purely business and corporate matters which Respondent may have handled for Richard Pryor Enterprises, Inc. -- which we emphatically distinquish from services constituting procurement of employment -- we do not find a violation of the Act. However, the evidence established that the dominant purpose for the existence and use of Richard Pryor Enterprises, Inc., was to loan out or furnish Pryor's services, as an artist, and to obtain the benefits of advantageous tax planning. Thus, we find that almost all of the "corporate" business of Richard Pryor Enterprises, Inc. was the marketing of Pryor's services as an artist.

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Respondent did not offer evidence as to any corporate services or purported legal services which he rendered for Richard Pryor Enterprises, Inc., which did not have the intended purpose of marketing Pryor's services and procuring employment for him.

Neither do we find that Respondent violated the Act by referring Petitioners' legal and corporate matters to be handled by other attorneys, such as Michael Ashburne and attorneys in Georgia. But these referral activities were certainly not the focal point, or even a significant aspect, of Respondent's services on behalf of Petitioners, and Respondent's attempts to characterize them as such must fail. To accept Respondent's arguments we would have to elevate form over substance, which would emasculate the Act and permit wide ranging abuses through subterfuge and artifice.

Having found that Respondent's conduct constituted unlawful procurement in violation of Section 1700.5, we now turn to Respondent's other violations of the Act.

Respondent used his position as Pryor's influential representative to secure for himself and some of Respondent's other entertainment clients, employment opportunities and other valuable consideration. Respondent did not attempt to refute Petitioners' evidence that Respondent had secured for himself the position of executive producer on the motion picture "Bustin' Loose", without having to render any services, by using his position and influence as Petitioners' sole representative, and thereby obtaining compensation for himself

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in the amount of Seventy-Five Thousand ($75,000) Dollars, whic monies would have otherwise been payable to Petitioners for Pryor's services in the Film. Respondent further abused his position as Pryor's representative to obtain commitments from Paramount Pictures and from Warner Bros. Pictures to use Respondent as executive producer on motion pictures in which Pryor was to render acting services, under contracts which Respondent negotiated as Pryor's talent agent. We have taken into account this conduct evidencing conflict of interest and blatant self-dealing in fashioning an appropriate remedy, as will be discussed hereinbelow.

Another way in which Respondent violated his duties to Petitioners and abused his trust, and at the same time violated the Act, was his refusal to turn over Petitioners' books and records or to even permit inspection of the records. By maintaining the records which disclosed Respondent's involvement in Petitioners' contractual and financial affairs in Georgia, beyond the effective reach and subpena power of the California Labor Commissioner, Respondent not only frustrated Petitioners' attempts to obtain records and information from Respondent, but thwarted the purpose of Section 1700.27 which requires that such books and records not only be available for inspection, but also, be furnished on request and be available for copying. The seriousness of this violation and abuse by Respondent is not lessened by the fact that Petitioners were able to obtain contractual and financial documents by

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subpenaing records from employers that had used Pryor's services under contracts procured by Respondent.

Finally, Respondent used and abused his position of trust and power, which included his principal role as Petitioners' talent agent, to obtain from motion picture producers and other employers substantial amounts of money which were payable to Petitioners in connection with Pryor's services as an artist. Petitioners offered evidence, which Respondent did not challenge or impeach, that Respondent did not account to Petitioners or return monies belonging to Petitioners amounting to more than One Million Eight Hundred Fifty Thousand ($1,850,000) Dollars. It is precisely these types of egregious abuses that the Talent Agencies Act and the Administrative Code were intended to prevent.

We find and determine that because of Respondent's violations of the Act, as discussed above, the agreement between Petitioners and Respondent pursuant to which Respondent procured and attempted to procure employment for Pryor is void and unenforceable.

In view of the unconscionable and continuing wrongful conduct by Respondent including numerous acts of embezzlement, fraud and defalcation while acting in a fiduciary capacity, and in view of Respondent's numerous violations of the Act, we hold

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that this an appropriate case for the exercise of the broadest remedy of restitution.[15] Although the Petitioner did not specifically allege misappropriation of money by Respondent, that part of the Determination ordering that Respondent make restitution to Petitioners is warranted and justified for several reasons.

First, it was alleged in the Petition that Respondent receive "no less than" the designated sums of money referred to in the Petition, and Petitioners went on to allege that since the agreement was void and unenforceable and since Respondent had violated the Labor Code on repeated occasions throughout the period 1975 through 1980, all monies previously paid to Respondent by Petitioners "must be returned to Petitioners". In addition, in the prayer to the Petition, Petitioners request an accounting of all things of value received by Respondent from Petitioners during the period of representation and requested an order requiring Respondent to return to Petitioners all monies and things of value received

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15/ Lewis & Queen vs. N.M. Ball & Sons, 48 Cal. 2d 141, 150-151, 308 P.2d 713, 719 (1957); Homestead Supplies vs. Executive Life Insurance Company, 81 Cal. App. 3d 978, 990, 147 Cal. Rptr. 22, 28-29 (1978); Buchwald vs. Superior Court, 254 Cal. App. 2d at 357, 62 Cal. Rptr. at 371. The courts have recognized the broad powers of the Labor Commissioner to settle controversies arising out of the Artists' Managers Act. Garson vs. Division of Labor Law Enforcement, 33 Cal. 2d 861, 864, 206 P.2d 363 (1949); Buchwald vs. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364, 371 (1967). There is a very strong presumption that the judicial construction and interpretation of these powers have been adopted by the legislature when the Act was amended in 1978. Greve vs. Leger, Ltd., 64 Cal. 2d 853, 965, 52 Cal. Rptr. 9, 17; Buchwald vs. Superior Court, 62 Cal. Rptr. at 371.

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by Respondent pursuant to the agreement and/or in connection with the representation of Petitioners. Taken in context with the broad grant of power under the Labor Code, the allegations and prayer in the Petition are broad enough to permit an award by which Respondent is ordered to make full restitution of not only those monies which Respondent received with Petitioners' knowledge and consent but also the monies which Respondent wrongfully misappropriated without Petitioners' knowledge or consent.

Secondly, Petitioners proceeded at the hearing, without objection by Respondent, on the theory that the request for restitution of all monies and things of value received by Respondent included such amounts as had been misappropriated by Respondent. Respondent as much as conceded during the hearing that if it were determined that he had in fact acted as an unlicensed talent agent and was liable for unlawful procurement of employment in violation of the Labor Code, that the Labor Commissioner could order and require Respondent to make full restitution to Petitioners not only of compensation received with Petitioners' knowledge but also of monies misappropriated by Respondent. Expressed differently, by the conduct of the parties at the hearing and by Respondent's acquiescence and implied agreement, the Petition was amended to conform to the evidence with regard to the claim of misappropriation.

Thirdly, Petitioners and Respondent were requested to set forth all issues to be determined when they prepared the Post Hearing Memorandum of Points and Authorities. Respondent

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did not raise as an issue, or assert any legal argument, to the effect that Petitioners were barred from seeking recovery of monies in addition to the salary compensation on the grounds there was no specific allegation of misappropriation of such monies in the Petition. Rather, Respondent merely asserted that Petitioners had not proven that Respondent had been guilty of misappropriation or conversion with sufficient credible evidence and that there were claims of misappropriation in a legal proceeding pending in another jurisdiction which might result in a double recovery. We reject both of Respondent's arguments in that regard and find that Respondent waived any argument that the claim of wrongful misappropriation was not properly alleged in the Petition.

We find that Petitioners were not in pari delicto and that Respondent is solely culpable for the numerous violations of law and Petitioners do not share in any of the blame or guilt. As evidenced by a memorandum which was prepared for Respondent in 1975 and which discussed in detail the Artists' Managers Act and consequences of violating the Act, we conclude that Respondent even had actual knowledge of the Act and the regulatory scheme which Respondent then proceeded to disregard and violate in numerous respects.

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Accordingly, we grant restitution to Petitioners of all compensation which Respondent received from Petitioners for his services in procuring and attempting to procure employment, which we find to be the amount of Seven Hundred Fifty-Three Thousand Two Hundred Seventeen ($753,217) Dollars[16]. In addition, we grant restitution to Petitioners of all monies which Respondent misappropriated from Petitioners and which would have been payable to Petitioners for services rendered by Pryor as an artist, or payable pursuant to contracts of employment negotiated for Petitioners by Respondent, which we

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16/ The order of restitution of all compensation previously paid to Respondent does not include an award of pre-judgment interest, which, at the legal rate of seven (7%) percent per annum would have amounted to almost Two Hundred Thousand ($200,000) Dollars.

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find to be the amount of One Million Eight Hundred Fifty Thousand Seven Hundred Seventy-Two ($1,850,772) Dollars together with interest at the legal rate in the amount of Five Hundred Six Thousand Nine Hundred Twenty-Nine ($506,929) Dollars.[17]

In determining the amount of monies misappropriated by Respondent and which related to Petitioners' employment, we considered the following circumstances and have granted

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17/ Since Respondent had been entrusted by Petitioners with fiduciary obligations and because of this relationship which required the highest degree of loyalty and trust, Respondent should have expected that an award against him for violation of the Labor Code, and for grossly abusing his position as a trusted fiduciary, would justifiably and necessarily include an order for restitution of the maximum amount allowed by law and justified by the evidence. Certainly, an award of interest on monies embezzled or misappropriated by Respondent over the years is justified and permitted by law and we find that this is an appropriate case to exercise our discretionary power to include an award of interest, but limited to the misappropriated monies. In fact it would be a clear injustice to Petitioners to allow Respondent to keep the interest on embezzled monies. An award of pre-judgment interest is proper under Civil Code Section 3287 and Section 3336, since the amount and date of each misappropriation are known. Interest is allowable from the date of each misappropriation. Newberry vs. Evans, 97 Cal. App. 120, 275 P. 465 (1929); Murphy vs. Wilson, 153 Cal. App. 2d 132, 314 P.2d 507 (1957); See also Cambrosa County Water District vs. Southwest Welding & Manufacturing Company, 49 Cal. App. 3d 951, 123 Cal. Rptr. 93 (1975); Levy-Zentner Company vs. Southern Pacific Transportation Company, 74 Cal. App. 3d 762, 142 Cal. Rptr. 1 (1977). To be entitled to recover pre-judgment interest it is not necessary to have included an allegation or prayer in the Complaint or Petition. Shell Chemical Corp. vs. Owl Transfer Company, 173 Cal. App. 2d Supp. 796, 344 P.2d 108, 114 (1959); Deaux vs. Trinidad Beam & Elevator Company, 8 Cal. App. 2d 149, 47 P.2d 535, 536 (1935). By not awarding pre-judgment interest to Petitioners on the return of compensation in the amount of $753,217 we are, in effect, allowing Respondent to keep the sum of One Hundred Ninety-Seven Thousand Two Hundred Nine ($197,209) Dollars.

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restitution as to the following sums of money received by Respondent:

1. The sum of all checks from motion picture producers and other employers who used Pryor's services as an artist in the entertainment fields, which checks were deposited into Respondent's bank accounts, and amounted to the sum of One Million One Hundred Ten Thousand Six Hundred Eighty-Seven ($1,110,687).[18]

18/ The evidence showed that Respondent received the following checks belonging to Petitioners but for which Respondent never accounted to Petitioners and that Respondent never repaid these monies:

DATE	PAYOR	AMOUNT
8/21/79	Universal City Studios	$ 70,000.00
4/24/80	Columbia Pictures	$ 100,000.00
3/2/78	Warner Bros. Pictures	$ 25,000.00
7/12/77	Warner Bros. Records	$ 100,000.00
11/14/77	Warner Bros. Records	$ 75,000.00
1/18/80	Warner Bros. Records	$ 117,118.00
5/27/80	Warner Bros. Records	$ 100,000.00
8/22/80	Warner Bros. Records	$ 55,671.19
5/25/77	National Broadcasting Co.	$ 25,000.00
3/11/80	Columbia Pictures	$ 100,000.00
6/7/78	Columbia Pictures	$ 15,000.00
7/16/77	Warner Bros.	$ 25,000.00
8/31/79	Special Event Entertainment	$ 50,000.00
9/2/77	Warner Bros. Records	$ 20,000.00
3/20/78	Warner Bros. Records	$ 16,505.64
8/25/79	Warner Bros. Records	$ 1,926.03
2/26/79	Warner Bros. Records	$ 4,462.92
8/15/79	Warner Bros. Records	$ 4,469.37
9/27/79	Warner Bros. Records	$ 16,454.06
2/13/80	Warner Bros. Records	$ 5,602.47
11/20/75	Warner Bros. Records	$ 1,500.00
11/21/75	Warner Bros. Records	$ 60,000.00
9/2/77	Warner Bros. Records	$ 100,000.00
9/2/77	Warner Bros. Records	$ 20,000.00
	TOTAL.....	$1,110,687.03

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2. In addition to the evidence of misappropriated and embezzled funds, as reflected on the copies of checks which were obtained by Petitioners through subpena of former employers' records, and admitted into evidence at the hearing, which transactions are enumerated in footnote 18, supra, Petitioners offered additional evidence of Respondent's defalcation and conversion of Petitioners' earnings through the testimony of John Carruth who had audited certain of Respondent's bank records covering a portion of the period that Respondent was acting as Petitioners' representative. Mr. Carruth's conclusions, based on his audit of those bank records, were set forth in an exhibit referred to throughout the hearing as the Carruth Report. Based on deposits into and disbursements from Respondent's bank account during the period February 11, 1977, through April, 1980, Respondent received One Million One Hundred Eight Thousand Three Hundred Thirty-Eight Dollars Thirty Cents ($1,108,338.30) of Petitioners' earnings, consisting of payments which were to be made directly to Petitioners but were diverted by Respondent to his own bank account. The evidence established that Respondent only returned to Petitioners, or disbursed for their benefit, the sum of Three Hundred Eleven Thousand Seven Hundred Sixty-Three Dollars Twenty-Six Cents ($311,763.26) from his bank account. The remaining sum of Seven Hundred Ninety Six Thousand Five Hundred Seventy-Five Dollars Four Cents ($796,575.04) Respondent converted and misappropriated without Petitioners' knowledge and consent. After deducting those transactions or

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deposits included among the list in footnote 18, supra, which were also enumerated in the Carruth Report, the remaining sum of Petitioners' earnings which Respondent misappropriated, as reflected on the Carruth Report, amounts to Seven Hundred Thirty-Three Thousand Nine Hundred Thirteen Dollars Eighty-Eight Cents ($733,913.88).[19] Therefore, we find that

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19/ As reflected on the Carruth Report, the following sums of money were deposited by Franklin into his bank account in Georgia on the dates indicated, which monies belonged to Petitioners and represented Petitioners' earnings and would have otherwise been payable directly to, and received by, Petitioners. This list does not include some of the entries on the Carruth Report which are already included in the list of transactions set forth in footnote 18, supra. The reason that some of the transactions reflected on the Carruth Report were itemized in footnote 18 and dealt with separately is that copies of the actual checks constituting those transactions were admitted into evidence at the hearing. The following are the balance of transactions reflected on the Carruth Report constituting wrongful misappropriation by Respondent.

DATE	AMOUNT
1977	
February 11	$ 1,060.00
February 22	2,626.50
March 2	9,016.00
March 29	18,841.00
April 15	4,100.00
June 1	4,000.00
June 10	4,000.22
June 21	3,707.22
June 23	1,316.44
September 9	7,500.00
September 12	1,500.00
September 16	1,077.00
September 21	11,100.00
October 10	100,000.00
October 11	7,146.30
November 29	500.00
November 29	275.47

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the total of Petitioners' monies misappropriated by Respondent in the form of checks deposited into his account consisting of the transactions enumerated in footnotes 18 and 19, amount to One Million Eight Hundred Forty-Four Thousand Six Hundred Dollars Ninety-One Cents ($1,844,600.91). Since the sum of Three Hundred Eleven Thousand Seven Hundred Sixty-Three Dollars Twenty-Six Cents ($311,763.26) was returned to Petitioners by Respondent, or disbursed for their benefit, as reflected on the

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19 cont./

1978	
January 3	3,895.00
March 7	223.90
June 6	9,242.25
July 11	29.12
September 21	4,854.15
October 26	35.04
November 15	2,617.96
December 18	2,000.00
1979	
January 15	2,496.15
January 22	250,000.00
February 26	7,000.00
February 26	10,000.00
March 15	250,000.00
May 22	2,869.66
July 17	450.00
October 8	2,500.00
October 17	2,644.39
December 11	4,330.69
1980	
February 11	959.64
TOTAL.....	$ 733,913.88

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Carruth Report, the net amount that Respondent wrongfully obtained, withheld and failed to account for, which we order Respondent to repay to Petitioners, is the sum of One Million Five Hundred Twenty-Three Thousand Eight Hundred Thirty-Three Dollars Sixty Cents ($1,523,833.60)[20].

3. Respondent must repay monies misappropriated from Petitioners' account at the Citizen's Trust Bank in

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20/ In granting restitution as to monies proven to have been misappropriated, we did not include those transactions which were shown to be misappropriations of Pryor's investment monies, since the Act confers no jurisdiction over such transactions if they are not related to the artist's employment or the talent agent's unlawful procurement activities. For example, restitution is not granted as to the Sixty Thousand ($60,000) Dollar check related to the purported Excaliber investment. Nor is Respondent ordered to repay Petitioners for any monies which he may have misappropriated or obtained through Pryor's investments in the Courtyard Shopping Center or Peyton Towers, since such transactions are beyond the jurisdiction of the Labor Commissioner. We do however grant restitution as to the Five Hundred Thousand ($500,000) Dollars representing loan proceeds from the National Bank of Georgia, consisting of the two Two Hundred Fifty Thousand ($250,000) Dollar transactions referred to in footnote 19, since Respondent obtained these monies by creating a Deferred Compensation Plan and channeling Petitioners' earnings from Warner Bros. Records to Respondent's own bank account through a purported loan from the National Bank of Georgia, supposedly for the purpose of deferring taxes. Restitution of such monies is clearly within the jurisdiction of the Labor Commissioner and is appropriate under the present circumstances.

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Georgia totalling Thirty-One Thousand Nine Hundred Thirty-Seven Dollars and Seventy-One Cents ($31,937.71), since those monies also represented earnings under Petitioners' contract with Warner Bros. Records which, for purported tax reasons, were channeled through the Citizen's Trust Bank account. As in the case of the two Two Hundred Fifty Thousand ($250,000) Dollar "loans" in the form of checks issued by the National Bank of Georgia to Petitioners, and referred to in footnotes 19 and 20, the money which Respondent obtained from the Citizen's Trust Bank in the amount referred to above was, in effect, a payment by Warner Bros. Records to Petitioners for services rendered under the recording agreement that Respondent had procured and negotiated for Petitioners. The payments by Warner Bros. Records were merely structured, or disguised, as "loans", rather than payments under the employment agreement, to defer or delay recognition of income for tax purposes, at least as intended -- but more importantly, this device which was conceived and implemented by Respondent enabled Respondent to more easily embezzle monies from Petitioners and to conceal his actions until recently. We must and will disregard such sham transactions and order Respondent to repay Petitioners these misappropriated earnings.

4. Petitioners offered evidence which was not contradicted or challenged, that Respondent used Two Hundred Twenty Thousand ($220,000) Dollars of monies from Warner Bros. Records which belonged to Petitioners and were payable for

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services rendered under the recording contract, to invest in a television cable company. This was established both by Pryor's testimony and by an August, 1979 Memorandum from Respondent. However, as indicated in the Carruth Report, based on the audit of some of Respondent's bank records, Respondent had also disbursed another Two Hundred Thousand ($200,000) Dollars of Petitioners' monies, previously misappropriated by Respondent from Petitioners' earnings as an artist, purportedly for the same investment. Since Respondent failed to offer any evidence to account for the disbursement of the Two Hundred Twenty Thousand ($220,000) Dollars of Petitioners' earnings under the Warner Bros. Records contract, we find that those monies were also wrongfully converted and misappropriated by Respondent, which actions were facilitated by his role as Petitioners' talent agent, and we order Respondent to repay Petitioners that sum of Two Hundred Twenty Thousand ($220,000) Dollars.

5. Since we have determined that Respondent was able to secure the position of executive producer on "Bustin' Loose" <u>only</u> because of his position as Pryor's agent and in view of the producer's testimony that Respondent did not act as executive producer on the film, and in view of the testimony of Universal's executives that Respondent would not have been hired as executive producer but for the fact that he was Pryor's representative, we find and determine that the fee that Respondent received would have been part of Petitioners' compensation for Pryor's services in the film "Bustin Loose" if Respondent had not wrongfully diverted it to himself, and

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therefore, we determine that Respondent is not entitled to keep the Seventy-Five Thousand ($75,000) Dollars he received but must pay it over to Petitioners, since Petitioners were entitled to it in the first place. Respondent offered no evidence to challenge or refute Petitioners' claim and the evidence offered in support thereof that Respondent had obtained the executive producer fee only because of his representation of Pryor, that Respondent had not rendered any services as executive producer on the film, and that Petitioners would have received the additional sum of Seventy-Five Thousand ($75,000) Dollars as compensation for Pryor's services in the film if Respondent had not obtained this fee through his self dealing.

6. As mentioned above, Petitioners are entitled to recover, and are hereby awarded, pre-judgment interest at the legal rate of 7% per annum on each of the amounts misappropriated by Respondent from the date of each misappropriation, which amounts to an additional Five Hundred Six Thousand Nine Hundred Twenty-Eight Dollars and Fifty-Seven Cents ($506,928.57) as of June 21, 1982, with additional interest on the total sum accuring at the daily rate of Three

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Hundred Fifty-Four Dollars and Ninety-Four Cents ($354.94).[21]

21/ Because of the number of transactions involved, we have included the following schedule reflecting the interest accrued on each transaction through June 21, 1982. Some of the smaller amounts have been omitted. Thereafter, daily interest at the legal rate computed on the sum of $1,850,772 equals $354.94 per day.

DATE	PAYOR	AMOUNT	ACCRUED INTEREST
8/21/79	Universal City Studios	$ 70,000.00	$ 13,881.08
8/24/80	Columbia Pictures	100,000.00	$ 15,112.32
3/2/78	Warner Bros. Pictures	25,000.00	$ 7,532.18
7/12/77	Warner Bros. Records	100,000.00	$ 34,597.23
11/14/77	Warner Bros. Records	75,000.00	$ 24,149.98
1/18/80	Warner Bros. Records	117,118.00	$ 19,855.49
5/27/80	Warner Bros. Records	100,000.00	$ 14,479.45
8/22/80	Warner Bros. Records	55,671.00	$ 7,131.97
5/25/77	National Broadcasting Co.	25,000.00	$ 8,879.45
3/11/80	Columbia Pictures	100,000.00	$ 15,956.15
6/7/78	Columbia Pictures	15,000.00	$ 4,240.27
7/16/77	Warner Bros. Pictures	25,000.00	$ 8,630.13
8/31/79	Special Event Enter.	50,000.00	$ 9,819.16
9/2/77	Warner Bros. Records	20,000.00	$ 6,719.99
3/30/78	Warner Bros. Records	16,505.00	$ 4,915.50
8/25/79	Warner Bros. Records	1,926.00	$ 380.43
2/26/79	Warner Bros. Records	4,463.00	$ 1,035.65
8/15/79	Warner Bros. Records	4,469.00	$ 891.33
9/27/79	Warner Bros. Records	16,454.00	$ 3,146.07
2/13/80	Warner Bros. Records	5,602.00	$ 921.79
11/20/75	Warner Bros. Records	1,500.00	$ 691.25
11/21/75	Warner Bros. Records	60,000.00	$ 23,439.44
9/2/77	Warner Bros. Records	100,000.00	$ 33,599.97
9/2/77	Warner Bros. Records	20,000.00	$ 6,719.99
8/31/79	Warner Bros. Records	220,000.00	$ 43,204.35
6/80	Citizen's Trust Bank (Warner Bros. Records Royalties)	31,938.00	$ 4,416.16
1/31/80	Universal City Studios	75,000.00	$ 12,528.07
10/77	Richard Pryor C.D.	100,000.00	$ 32,468.47
11/15/77	Richard Pryor	75,000.00	$ 24,135.60
6/6/78	Richard Pryor Enterprises/ Western Hemisphere Records	9,242.00	$ 2,614.34
1/22/79	Nat'l Bank of Georgia (Warner Bros. Records Deferred Compensation)	250,000.00	$ 59,691.78
2/26/79	UCB/Richard Pryor Enterprises	7,000.00	$ 1,624.37
2/26/79	Special Event Enter./ Richard Pryor Enterprises	10,000.00	$ 2,320.54
3/15/79	Nat'l Bank of Georgia/ (Warner Bros. Records Deferred Compensation)	250,000.00	$ 57,198.62
			$506,928.57

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CONCLUSION

Accordingly, the agreement between Petitioners and Respondent is determined to be void and unenforceable and Respondent is ordered to pay to Petitioners the total sum of Three Million One Hundred Ten Thousand Nine Hundred Eighteen ($3,110,918) Dollars, plus interest of seven (7%) percent per annum on the sum of One Million Eight Hundred Fifty Thousand Seven Hundred Seventy Two ($1,850,772) Dollars accruing daily from June 21, 1982, at the rate of Three Hundred Fifty-Four Dollars and Ninety-Four Cents ($354.94) per day.

DATED: July 27, 1982

CARL G. JOSEPH
Hearing Officer

ADOPTED
DATED: August 12, 1982

PATRICK HENNING
California Labor
Commissioner

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