(Endorsed) DIVISION OF LABOR STANDARDS ENFORCEMENT FILED 1 LOUIS GIANNINI, GUY T. GURNEY, CHARLOTTE Labor Commissioner 2 C. DANFORTH, RÍCHARD N. DINALLO & JOHN State of California C. HERBERT 455 Golden Gate Ave. - Rm 3264 3 San Francisco, CA 94102 Clerk Telephone: (415) 557-2516 5 Attorneys for LABOR COMMISSIONER 6 State of California 7 BEFORE THE LABOR COMMISSIONER 8 STATE OF CALIFORNIA 9 10 ROSEMARY ROGERS. 11 Petitioner. NO. SF MP 40 12 vs. DETERMINATION AND AWARD 13 HOWARD PORTNOY, 14 Respondent. 15 16 The above-entitled controversy came on regularly for 17 hearing before the Labor Commissioner of the State of California, 18 19 ; before Richard N. Dinallo, attorney for the DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State 20 21 + of California, and Special Hearing Officer, appointed under the **S**3 provisions of Section 1700.4 of the Labor Code of the State of 23 California, on November 7 and 8, 1977. Petitioner was present 24 with her attorneys, David C. Phillips, of Goldstein & Phillips. 25 . and Richard Schindler, and respondent was present with his 26 attorney, A. David Parnie, Jr., of Thompson, Hubbard and Parnie, 27 a Law Corporation.

Witnesses were sworn and examined, and documentary evidence was introduced: and the matter having been argued and submitted for decision and after deliberation thereon, the following determination and award is made:

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DETERMINATION AND AWARD

The Labor Commissioner makes the following Findings of Fact:

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1. Respondent was not at any time licensed as an
10 Artist's Manager pursuant to Labor Code §§1700, et sen., and did 11 comply with the provisions thereof.

12 2. Petitioner at all relevant times was and is a writer 13 and a best-selling author of entertainment "escapist" novels.

3. Beginning in October 1975, and at all times relevant thereafter, respondent rendered career counseling services to petitioner involving her publishers, agents, lawyers, accountants, motion pictures, television, investments, cash flow, tax planning and other related matters.

4. Respondent attempted to procure employment engage-20 ments for petitioner, including, but not limited to, engagements 21 in television, the movies and related entertainment enterprises / 22 from January 1, 1976, until his termination, as follows:

a. In January of 1976, petitioner and respondent agreed that respondent would undertake to renegotiate certain publishing contracts (Exhibit 7 herein) which petitioner had entered into with publisher AVON BOOKS, and petitioner and respondent further greed that respondent would also negotiate the sale of an eighth

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1 novel to AVON BOOKS.

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b. Respondent undertook such negotiations, and successfully renegotiated said contracts as well as a new contract for
the eighth novel known as "The Steve Morgan Sequel." The results
of those negotiations were embodied in Exhibit 10 herein.

c. Respondent discussed petitioner's talents with John 7 Payne, petitioner's literary agent for several books, Leon Memoli 8 and Owen Laster, employees of the William Morris Agency, a talent 9 agency, and Ron Konecky, an attorney in New York, and attempted to 10 get Leon Memoli and Owen Laster interested in her career.

d. Respondent advised and counseled petitioner concerning her future plans as a writer; and discussed with her the making of her novels into movies and TV shows.

e. Respondent encouraged petitioner to premare two short outlines (Exhibits 17 and 19) for concepts to be used as a possible TV soap opera and a possible future book and TV series and delivered those outlines to Leon Memoli, an employee of William Morris Agency, a talent agency.

19 f. Respondent particinated in negotiating employment
20 engagements for petitioner with her publisher, AVON BOOKS, in the
21 period February to April 1976.

22 g. Respondent promoted a potential writing contract with 23 the publishing firm of Simon and Schuster.

h. Respondent initiated discussions relating to obtaining employment engagements for petitioner in television and the
movies.

i. Respondent advised petitioner that the proposed sale

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of the rights to film her novels <u>Sweet Savage Love</u> and <u>Dark Fires</u> to Dino DeLaurentis, which sale had been negotiated by Stuart Miller for AVON BOOKS, was not a good contract for petitioner: and further discussed the sale of those rights with an attorney for Dino DeLaurentis.

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j. Respondent arranged and had lunch with petitioner 7 and a San Francisco movie producer, James Palokoff.

5. Prior to January 1, 1976, respondent did not advise, 9 counsel, or direct petitioner in the development of her profes-10 sional career, and did not procure, offer, promise, or attempt to 11 procure employment or engagements for petitioner.

6. Respondent advised and counseled petitioner relative to her career by advising her in the selection of an agent during 1976.

The original oral acreement between the parties-that 15 7. respondent would handle all of petitioner's business affairs and 16 17 would be paid for his services at the rate of \$50.00 per hour-was revised at the instance of respondent in December 1975 to 18 19 provide that respondent be paid a total of \$25,000.00, plus expenses for the next twelve months, payable at \$2,000.00 a month 20 21 for ten months and \$2,500.00 for two months (Januarv and July 8, 1976) with the agreement terminable at any time by either party. 22 There was no modification of agreement as to respondent's handling 23 all of petitioner's business affairs. Pursuant to these oral 24 agreements, petitioner paid respondent \$17,000.00 for the period 25 from October 1975, through July 1976: \$2,500.00 of which was naid 26 by petitioner and received by respondent during 1975. 27

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8. In July of 1°76, petitioner discharged respondent and he performed no further services for her thereafter.

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9. The parties' oral agreement relating to how respon-3 dent would be compensated by petitioner was further revised on or 4 about January 6, 1976, to provide that petitioner pay respondent 5 a percentage of any sums from employment as a writer -- which 6 employment respondent was able to obtain for her in excess of her 7 pre-existing employment engagements. No fees were received by 8 respondent as to these commissions, however, as none were paid by 9 third parties prior to respondent's termination. 10

The extent of respondent's financial counseling to 10. 11 12 petitioner was advice relating to four investments, all made during 1975. During 1976, his role with petitioner as a financial advisor 13 was of a very minor nature, and the vast majority of his services 14 was related to career counseling and promotion and attempting to 15 procure employment engagements for petitioner's career as a writer 16 of original fiction, including as a writer in television, the 17 18 movies and related entertainment enterprises.

CONCLUSIONS OF LAW

20 The Labor Commissioner makes the following Conclusions 21 of Law:

22 11. At all times relevant, petitioner was an "artist"
23 as defined in Labor Code §1700.4.

24 12. The Labor Commissioner has jurisdiction to hear the 25 controversy between petitioner and respondent as to all aspects of 26 their contractual relationship with each other.

13. Respondent acted in the capacity of an "artists'

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manager" as defined in Labor Code §1700.4 in performing his dutie: L for petitoner subsequent to December 31, 1975, through July of 2 1976, but in so acting, he was not duly licensed as an "artists' ذ manager", and, therefore, respondent was in violation of the 4 Artist's Managers' Act, Labor Code §§1700, et sed., between 5 6 January 1, 1976, through July of 1976. 7 14. Respondent was not an artists' manager prior to January 1, 1976. 8 9 ISSUES 10 WAS PETITIONER AN "ARTIST" FOR PURPOSES OF \$1700.4 Τ. 11 OF THE LABOR CODE? 12 II. WAS RESPONDENT AN "ARTISTS' MANAGER" FOR PURPOSES OF LABOR CODE §1700.4? 13 14 ASSUMING THAT RESPONDENT WAS AN UNLICENSED ARTISTS' III. 15 . MANAGER, MUST HE DISGORGE FEES RECEIVED FROM THE PETITONER? 16 I. 17 Was petitoner an "artist" for purposes of §1700.4 18 of the Labor Code? 19 Section 1700.4 of the Labor Cole defines an artist as 20 follows: 21 The word 'artists' as used herein refers to actors and actresses rendering services 22 on the legitimate stage and in the production of motion pictures; radio artists; 23 musical artists; musical organizations; directors of legitimate stage, motion 24 picture, and radio productions: musical directors: writers: cinematographers; 25 composers; lyricists; arrangers; and other artists and persons rendering professional 26 services in motion picture, theatrical, radio, television and other entertainment 27 enterprises. (Emphasis supplied.) -6-

1	Clearly, then, petitioner was an artist for purposes of
2	the Act: The unrefuted evidence at the hearing was that petitioner
3	was a writer.
4	II.
5	Was respondent an "artists' manager" for purposes of
G	Labor Code, Section 1700.4?
7	Section 1700.4 defines an "artists' manager" as follows:
s (An artists' manager is hereby defined to be a person who engages in the occupation
9	of advising, counseling, or directing artists in the development or advancement of their
10	professional careers and who procures, offers, promises or attempts to procure employment
11	or engagements for an artist only in connec- tion with and as part of the duties and
12	obligations of such person under contract with such artist by which such person con-
15	tracts to render services of the nature above mentioned to such artist.
14	"Remedial statutes should be liberally construed to
15	effect their objects and suppress the mischief at which they are
16	directed." (Citations omitted) Buchwald v. Superior Court,
17	254 C.A. 2d 247, 354; 162 Cal.Rptr. 364 (1967). "It would be
18	unreasonable to construe the Act as applying only to licensed
19	artists' managers, thus allowing an artists' manager by nonsub-
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21	mission to the licensing provisions of the Act, to exclude himself
25	from its restrictions and regulations enacted in the public inter-
23	est. <u>id</u> .
24	Further, "Statutes must be given a reasonable and common
25	sense construction in accordance with the apparent purpose and
56	intention of the lawmakers-one that is practical rather than
27	technical and that will lead to wise policy rather than to mischie

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or absurdity." (Citations omitted.) id at 354-355.

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Clearly the Act may not be circumvented by allowing language of the written contract to control...The form of the transaction, rather than its substance, would control." <u>id</u> at 355. No discernable difference applies in a situation involving an oral contract as allegedly existed between Rogers and Portnoy. One Accordingly,/who functions as an artists' manager <u>is</u> an artists' manager and must, therefore, be licensed under the Act.

9 The fact that respondent did not refer to himself as an 10 "artists' manager" is, therefore, not dispositive of his status. 11 During the period of his dealings with petitioner, he, and he 12 alone, acted as the vehicle between her and the outside business 13 world. No evidence adduced at the Hearing was introduced or 14 admitted to the contrary.

In this regard, respondent, with the exception of four 15 investments made on petitioner's behalf, sought to "advise, counse 16 or direct" petitioner in the "development or advancement" of her 17 professional career and did, in fact, "procure, offer, promise or 18 19 attempted to procure employment or engagements" for petitioner 20 pursuant to a modified agreement from the beginning of 1976 until 21 July 1976, when respondent was terminated. The fact that respon-22 dent did not actually reap harvest from his purported percentage 23 interest with regard to petitioner's theatrical and literary 24 successes--albeit through respondent's efforts--rendered him no 25 less accountable for having acted as an artists' manager, since all 58 of respondent's efforts and dealings in 1976 vis-a-vis petitioner 27 and third parties were directed towards effectuation of her

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1 artistic career.

The unsuccessful accomplishment of an act is not 2 necessarily dispositive of one's status any more than a sleeping 3 novelist is any the less a writer. Respondent's failures to reap 4 fuller rewards from his endeavors on petitioner's behalf develved วิ upon him through no fault of his own. Nor was his self-imposed 6 7 appellation as "financial analyst" or counselor dispositive of whether he was an artists' manager. Once again, "The form of the 8 9 transaction, rather than its substance, would control." Euchwalsupra, at 355. 10 The evidence adduced at the Hearing overwhelming! 11 when matrixed with Labor Code \$1700.4 -- requires the conclusion the 12 respondent was an unlicensed artists' manager during 1976. 13 III. 14 Assuming that respondent was an unlicensed artists' 15 manager, must he disgorge fees received from the petitioner? 16 Having determined that petitioner was an artist and 17 respondent was an artists' manager for purposes of the Act, it 18 remains to be decided whether fees received from petitioner must 19 be disgorged and returned to petitioner, and, if so, in what amoun 20 Labor Code §1700.5 states, in part, as follows: 21 No person shall engage in or carry on the occupation of an artists' manager without 22 first procuring a license therefor from the Labor Commissioner. 23 24 Respondent having stipulated at the Hearing that he was unlicensed, the fact is conslusive on the issue. He was, there-25 fore, in violation of §1700.5, since it has already been determine. 26 that he "engaged in or carried on the occupation of an artists' 27

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1 manager."

And the Court of Appeal of the State of California has 2 held that "...a contract between an unlicensed artists' manager 3 and an artist is void ... and as to such contracts, artists -- being 4 of the class for whose benefit the Act was passed -- are not to be 5 ordinarily considered as being in pari delicto;" Buchwald v. 6 Superior Court, 254 C.A. 2d 347, 351; 62 Cal.Rptr. 364 (1967). 7 Moreover, the Court in Buchwald held that "...Artists' managers ... 8 whether they be licensed or unlicensed, are bound and regulated 9 by the Artists' Managers' Act." id. at 355. Additionally, "the 10 Labor Commissioner is free to search out illegality lying behind 11 the form in which a transaction has been cast for the purpose of 12 concealing such illegality." id. at 355. 13

The December agreement between petitioner and respondent as to prospective compensation during 1976 being void, <u>supra</u>, <u>Buchwald</u> at 351, it is clear that "no rights...can be derived from it." id. at 360.

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WHEREFORE, THE FOLLOWING Award is made:

20 That the management renegotiated contract in December 21 of 1975 between petitioner and respondent is void; all moneys received by respondent from petitioner, to-wit: \$14,500 during 25 23 the calendar year of 1976 is, and has remained, the sole property 24 of petitioner and she is not subject to any claim by respondent 25 for service fees or other remuneration; and further, petitioner is 56 released from any obligations or liabilities arising thereunder; 27 that in addition, no moneys expended by respondent during the

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calendar year of 1976, in which he acted as an unlicensed artists L manager and pursuant to a void artists' manager's contract, shall 2 Я be recovered by him from petitioner. 5 Petitioner is awarded the sum of \$14,500.00. 4 5 DATED: March 8, 1978. 6 JAMES L. QUILLIN $\overline{7}$ Labor Commissioner for the State of California 3 9 By 10 RICHARD N. DINALLO Attorney and Hearing Officer 11 DATED: 12 ADOPTED: 13 14 ' JAMES L. QUILLIN Labor Commissioner, 15 | State of California ч. н. 16 1-٩v 17 1 ALBERT J. / RE YFF Deputy Chief Labor Commissioner 18 INDU - . 19 20 21 21 ŝŝ 22 Z 23 24 24 25 26 27 -11-109