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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

DARIO CERNILE, an individual,)
ANDY FRANK, an individual, DAVID WANLES,)
an individual, GARNET MAHER, an individual,)
GREGG FRIEDENBERG, professionally known)
as GREGG GERSON, an individual,)
professionally and collectively known as)
SVEN GALI,)

Petitioners,)

vs.)

D.B. MANAGEMENT, a/k/a DEAN-BILLES)
MANAGEMENT, MARK BILLES, An Individual,)
and KEITH DEAN, An Individual.)

Respondents.)

CASE NO. TAC 77-92
TAC DETERMINATION

INTRODUCTION

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, State of California by Anne Stevason, attorney for the Division of Labor Standards Enforcement, serving as Special Hearing Officer under the provisions of Labor Code Section 1700.44 of the State of California.

Petitioners Dario Cemile, an individual, Andy Frank, an individual, David Wanles, an individual, Gregg Friedenber, professionally known as Gregg Gerson, an individual, professionally and collectively known as Sven Gali (hereinafter referred to as "Petitioners" or "Sven Gali") appeared

1 through Lavelly & Singer by Martin Singer and Respondents D.B. Management, aka Dean-Billes
2 Management, Mark Billes, an individual and Keith Dean, an individual, appeared through Sklar,
3 Levinson & Domstein by Christine V. Perakis.

4 On October 29, 1992, petitioners filed a Petition with the Labor Commissioner seeking a
5 determination of an alleged controversy with respondents. Petitioners alleged that they were artists
6 as defined in Labor Code Section 1700.4(b). They alleged that they entered into an Exclusive
7 Management Agreement with Respondents in May of 1991. They alleged that subsequent to May of
8 1991, respondents engaged in numerous acts of promising to procure, procuring and attempting to
9 procure employment or engagements for petitioners without being licensed as required by Labor Code
10 Section 1700.5. Petitioner requested that the Labor Commissioner determine that the Management
11 Agreement is void and unenforceable and that respondents be required to provide an accounting and
12 provide full restitution of all monies received.

13 Respondents answered the Petition on January 27, 1993, objecting to the asserted jurisdiction
14 of the Labor Commissioner due to the fact that they acted as personal managers rather than talent
15 agents and that any employment services rendered were outside of the jurisdiction of the State of
16 California. In addition, respondents denied that they ever acted as talent agents or solicited or
17 procured employment for petitioners.

18 Based on the evidence and testimony received, and after having reviewed the parties' post-
19 hearing briefs, the Labor Commissioner adopts the following determination of controversy.

20 FINDINGS OF FACT

21 1. In May of 1991, Sven Gali, a rock and roll band based out of Canada, met with Mark
22 Billes and Keith Dean in Los Angeles about their possible management of the group. Sven Gali was
23 playing night clubs in the Los Angeles area at the time. Billes and Dean had never acted as personal
24 managers before but had experience in doing the management and accounting of tours. In order to
25 induce the band to sign with them, Billes and Dean informed the band of their contacts within the
26 industry and made promises concerning obtaining tours and personal performances.

27 2. Thereafter, Billes and Dean formed D.B. Management aka Dean Billes Management
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1 for the specific purpose of managing Sven Gali. D.B. Management was based in California.

2 3. In June of 1991, in Toronto, Canada, Sven Gali and D.B. Management signed a formal
3 Exclusive Management Agreement. The circumstances concerning the signing are in dispute but it
4 is reasonable to assume that the main reason behind signing the contract was to foster the signing
5 of a record contract with BMG Records. Although Sven Gali failed to consult an attorney, they were
6 in possession of the contract days in advance of signing and had ample opportunity to consult one,
7 if they so chose.

8 4. Although the testimony was conflicting concerning what D.B. Management actually did
9 as managers of Sven Gali, the credible evidence was that their actions as personal managers for the
10 bank were substantial. It is also credible, however, that the managers were often unavailable,
11 conducted most of their business by telephone from California and failed to develop a working
12 relationship with The Agency, the exclusive Canadian talent agent for Sven Gali.

13 5. The majority of time during the period July 1991 to October 1992 was spent by Sven
14 Gali either writing or recording their record. All but five of the band's approximately thirty personal
15 appearances during this time were through a Tour arranged by the record company and booked by
16 The Agency. The testimony of Joe Mrkalj, Rick Kazmarek and Andy Frank, however, established that
17 Keith Dean attempted to procure employment for Sven Gali on two occasions at Rock N Roll Heaven
18 on July 21, 1991 and February 6, 1992 and in fact, did procure employment for Sven Gali on two
19 occasions at Uncle Sam's, on October 31, 1991 and February 5, 1992. Negotiations took place in
20 part, over the phone from Los Angeles. Mr. Billes lacked first hand knowledge of these bookings and
21 Mr. Dean was not present at the hearing to refute the testimony. Although the hearing officer
22 acknowledges that Sven Gali had a friendly relationship with Uncle Sam's and played there numerous
23 times, the fact that the Agency was not paid for these performances along with Mr. Dean's signature,
24 receiving payment for the band, lends credence to the testimony of the witnesses that Mr. Dean
25 procured or attempted to procure these engagements.

26 6. By letter dated October 9, 1992, petitioners informed respondents that they were
27 terminating the Exclusive Management Agreement for, among other reasons, procuring employment
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1 in violation of the California Labor Code. Respondents refuted petitioners' ability to terminate the
2 contract and requested unpaid commissions and reimbursement of loans and expenses. The instant
3 controversy ensued.

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5 CONCLUSIONS OF LAW

6 1. Petitioners are "artists" within the meaning of Labor Code Section 1700.44(b). The
7 Labor Commissioner has jurisdiction to determine this controversy pursuant to Labor Code Section
8 1700.44(a).

9 2 Labor Code Section 1700.5 provides that "no person shall engage in or carry on the
10 occupation of a talent agency without first procuring a license therefor from the Labor Commissioner."
11 The term "talent agency" is defined at Labor Code Section 1700.4(a) as: "a person or corporation who
12 engages in the occupation of procuring, offering, promising or attempting to procure employment or
13 engagements for an artist or artists..."

14 3. A contract between an artist and a person acting as an unlicensed talent agent is
15 unlawful and void ab initio. The unlicensed talent agency has no right to collect commissions
16 purportedly earned pursuant to such an unlawful agreement. Buchwald v. Superior Court (1967) 254
17 Cal.App.2d 347. "Since the clear object of the Act is to prevent improper persons from becoming
18 (talent agents) and to regulate such activity for the protection of the public, a contract between an
19 unlicensed (talent agent) and an artist is void." Id. at 351.

20 4. The petition to declare the contract void so as to preclude future commission claims
21 is not time barred. Section 1700.44© contains the following statute of limitations provision:

22 "No action or proceeding shall be brought pursuant to this chapter
23 with respect to any violation which is alleged to have occurred more
than one year prior to commencement of the action or proceeding."

24 Contrary to the argument asserted by respondents, this provision does not bar a declaration that the
25 contract is void so as to preclude further commissions or other claims by the respondents under the
26 contract. It is well established that the statute of limitations runs only against a cause of action which
27 seeks affirmative relief and does not operate to bar a pleading which sets up purely defensive matter.

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1 Section 1700.44© was designed to bar the untimely assertion of affirmative claims for damages and
2 not to prevent the invocation of legitimate defenses based on purely defensive matter. Therefore, in
3 the instant case, petitioners' claims for a declaration that the contract is void and for a disgorgement
4 of commissions paid within a year of the filing of the petition are not time-barred.

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6 5. Although personal managers are not covered by the Talent Agency Act requiring
7 licensing, personal managers who spend even an "incidental" portion of time in procurement activities
8 must obtain a talent agency license. Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal.App.4th
9 246.

10 6. Respondents' promise to procure employment at the inception of their relationship with
11 Petitioners, their attempts to procure employment at Rock n Roll Heaven on two occasions and the
12 procurement of employment at Uncle Sam's made respondents subject to the Talent Agency Act.
13 Their failure to be licensed as talent agents pursuant to the Act rendered their contract with petitioners
14 void ab initio.

15 7. The Labor Commissioner has jurisdiction to determine this controversy in that
16 respondents' business was based in California, initial negotiations between the parties took place in
17 California, and a substantial amount of business, including negotiating the employment contract with
18 Uncle Sam's, was carried out by telephone from California. In addition, as stated above, the interest
19 of California in licensing talent agents is "to prevent improper persons from becoming (talent agents)
20 and to regulate such activity for the protection of the public." Buchwald v. Superior Court, supra at 351.
21 Since respondents' business is located in California, the state has an interest in its compliance with
22 California laws.

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DETERMINATION

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For all of the above reasons, IT IS HEREBY ORDERED:

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1. The parties' written personal management contract is declared to be illegal, void and
unenforceable, and it is declared that Sven Gali shall have no further obligation to D.B. Management
under the contract for commissions or otherwise.

1 2. The claim of Sven Gali for restitution of commissions previously paid is granted and
2 D.B. Management is hereby ordered to pay back all expenses and commissions earned after October
3 29, 1991. Based on proof at the hearing the following commissions and expenses must be disgorged
4 by defendants:

- 5 1. Commission for Front 54 performance on 7/23/92 \$ 300.00
6 2. Commission for Rock n Roll Heaven performance on
7 2/10/92 300.00
8 3. Commission for two performances at Uncle Sam's,
9 10/31/91 and 2/5/92 600.00
10 4. Expenses paid to Respondents based on bill dated
11 5/18/92 3,761.45
12 5. Expenses paid to Respondents based on bill dated
13 6/23/92 1,417.89

14 Therefore, Respondents are ordered to pay back \$6,379.34 in commissions and expenses.

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16 Dated: December 6, 1996


ANNE P. STEVASON
Attorney and Special Hearing Officer
For the Labor Commissioner

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21 The above determination is adopted in its entirety by the Labor Commissioner.

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23 Dated. 12/13/96


ROBERTA E. MENDONCA
State Labor Commissioner

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1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
4 BY: MILES E. LOCKER, No. 103510
5 455 Golden Gate Avenue, Suite 3166
6 San Francisco, CA 94102
7 Telephone: (415) 703-4150

8 Attorney for the Labor Commissioner

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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

11 SECHABA MOKOENA, RON VAN LEEUWAARDE,) No. TAC 76-92
12 JEROME LEONARD, PAAJOE AMISSAH,)
13 BABATUNDE GARAYA, MLUNGISI GIDEON)
14 BENDILE, and MATTHEW LACQUES,)
15 professionally known as ZULU SPEAR,) DISMISSAL OF PETITION
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Petitioners,)
vs.)
RON TERRY,)
Respondent.)

The above-captioned petition to determine controversy is hereby dismissed pursuant to petitioner's request.

DATED: 9/21/94

Miles E. Locker
MILES E. LOCKER, Attorney for
the Labor Commissioner

