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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

In the matter of:
RICHARD LEE EMLER, ET AL.,
Petitioner,
v.
ESTATE OF RICHARD MARKOWITZ,
Respondent.

Case No. TAC 27-93
DETERMINATION OF CONTROVERSY
(Labor Code Section 1700.44)

Having heard testimony on behalf of both parties at the hearing in this matter on January 16, 1996, having received and reviewed briefs and exhibits submitted on behalf of both parties at the hearing, and having reviewed the supplemental briefs submitted on behalf of both parties on January 26, 1996, the Labor Commissioner makes the following determination pursuant to *Labor Code Section 1700.44*.

FINDINGS OF FACT

Respondent Richard Markowitz, now deceased, was a songwriter who wrote theme songs for television shows such as "Murder She Wrote", "The Streets of San Francisco", "The Wild Wild West", "The FBI", "Mission Impossible" and "Police Story". On August 1, 1984,

1 Respondent entered into an Exclusive Talent Agency Agreement with Petitioner Richard Lee
2 Emler of Richard Lee Enterprises. (Respondent's Exhibit A) Similar agreements were entered
3 into between Respondent and Petitioner on August 1, 1985 and August 1, 1986 (Respondent's
4 Exhibits B and C) At the time the parties executed the 1984, 1985 and 1986 agreements
5 (collectively referred to as "Agreements"), Petitioner was a licensed talent agent pursuant to
6 *Labor Code Section 1700.5*.

7 The Agreements provided in pertinent part that Respondent would pay to Petitioner a sum
8 equal to fifteen percent (15%) of income earned by Respondent as a result of Petitioner's
9 activities in the entertainment, amusement, music, recording and publishing industries on behalf of
10 Respondent. The Agreements further state that Respondent agrees to pay to Petitioner a similar
11 sum following the expiration of the term(s) with respect to any and all engagements, contracts and
12 agreements entered into during the term(s) of the Agreements and upon any and all extensions,
13 renewals, substitutions and resumptions of such engagements, contracts and agreements. (Exhibits
14 A, B and C, para. 3(a)) On August 1, 1987, a similar agreement was prepared but not executed
15 by the parties (Respondent's Exhibit D)

16 In 1989 Petitioner commenced work with the Robert Light Agency. Respondent executed
17 a Talent Agency Contract with the Robert Light Agency on February 22, 1990. (Respondent's
18 Exhibit F) The Robert Light Agency is licensed by the State Labor Commissioner pursuant to
19 *Labor Code Section 1700.5*.

20 Payments were made by Respondent to Petitioner pursuant to the terms of the
21 Agreements up through December 31, 1991. On August 21, 1992, Respondent informed
22 Petitioner that no further payments on royalties would be made. On July 6, 1993, Petitioner filed
23 a Petition To Determine Controversy with the State Labor Commissioner pursuant to *Labor Code*
24 *Section 1700.44*. A Cross-Petition to Determine Controversy was filed by Respondent on
25 September 15, 1993, seeking reimbursement of \$21,843.00 allegedly paid as commissions to
26 Petitioner since February 23, 1990.

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CONCLUSIONS OF LAW

The operative contracts in this case are the 1984, 1985 and 1986 Agreements Respondent contends that the 1987 Agreement constituted a novation of the 1984 and 1985 Agreements, and therefore, any rights Petitioner may have under the 1984 and 1985 Agreements were extinguished upon execution of the 1987 Agreement. The Labor Commissioner rejects Respondent's contention

A novation occurs upon the substitution of a new obligation between the same parties with the intent to extinguish the old obligation. The burden of proving novation is on Respondent. Respondent is correct in its assertion that each Agreement contains a one-year term. However, paragraph 3(a) of each Agreement provides for continued payment of commissions on royalties following expiration of the term. The Labor Commissioner finds that insufficient evidence was submitted by Respondent as to the intent of the parties to extinguish the original obligation to overcome the express contractual language contained in each Agreement, and specifically, the 1987 Agreement. Thus, Petitioner's action is not barred by the statute of limitations based on the 1987 Agreement, but rather, the statute of limitation continues to run with each failure of Respondent to make commission payments when due.

Petitioner requested at the hearing leave to amend his Petition to allege sums due and owing to Petitioner from July 6, 1992, instead of from January 1, 1992 to present, as alleged in the original Petition. In light of the liberality accorded amendments, and in conformance with the evidence presented at the hearing, Petitioner's request for leave to amend is granted

Petitioner's obligation to "continue to service [any] engagements, contracts and agreements" obtained for Respondent was a condition precedent to Petitioner's right, under paragraph 3(a) of the Agreements, to receive commissions on royalties, and that condition precedent was material to the Agreements. The Labor Commissioner finds that insufficient evidence was presented by Petitioner that he continued to service the engagements, contracts and agreements after 1987. In fact, by Petitioner's own testimony, no negotiations for reuse arose

1 with respect to Respondent during the relevant time period. It would be unconscionable to allow
2 Petitioner to recover sums for which no services were provided to Respondent. Relief to
3 Petitioner is therefore denied.

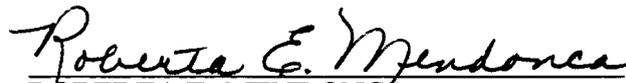
4 The relief sought by Respondent on the Cross-Petition - - reimbursement of commissions
5 paid--is barred by the one-year statute of limitations provided by Labor Code Section 1700.44(c)
6 in that the evidence shows that no commissions were paid within the one year prior to the filing of
7 the Cross-Petition.

8
9 Dated: June 17, 1996


BARBARA J. FERGUSON
Attorney for the Labor Commissioner and
Special Hearing officer

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15 The above Determination of Controversy is adopted by the Labor Commissioner in its
16 entirety.

17 Dated: June 20, 1996


ROBERTA E. MENDONCA
State Labor Commissioner