

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
1 Department of Industrial Relations  
2 State of California  
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6  
7 BEFORE THE LABOR COMMISSIONER  
8  
9 OF THE STATE OF CALIFORNIA

10 RICHARD LEE EMLER, et al., ) CASE NO. TAC 56-93  
11 Petitioner, )  
12 v. ) DETERMINATION  
13 JOHN DEBNAY, )  
14 Respondent. )  
15 \_\_\_\_\_)

16 The above-entitled controversy came on regularly for  
17 hearing on January 17, 1995, before the Labor Commissioner,  
18 Division of Labor Standards Enforcement, Department of  
19 Industrial Relations, State of California, by Stuart M. Kaye,  
20 attorney for the Division of Labor Standards Enforcement,  
21 serving as Special Hearing Officer under the provisions of  
22 California State Labor Code Section 1700.44. Petitioner,  
23 RICHARD LEE EMLER dba RICHARD LEE EMLER ENTERPRISES TALENT  
24 AGENCY, appeared through their attorney of record, J. William  
25 Nosel and Respondent JOHN DEBNAY appeared through his attorney  
26 of record, Jeffrey M. Blue of the Law Offices of Ross T.  
27 Schwartz.

1 Evidence, both oral and documentary having been  
2 presented, at the conclusion the matter was submitted for  
3 decision and the labor Commissioner makes the following  
4 determination:

5 1. Petitioner RICHARD LEE EMLER dba RICHARD LEE  
6 EMLER ENTERPRISES TALENT AGENCY, was a talent agency, as that  
7 term is defined in Labor Code Section 1700.4(a) and acted on  
8 Respondent's behalf, in that capacity during the period  
9 relevant to this proceeding.

10 2. Respondent JOHN DEBNEY was an artist as that term  
11 is defined in Labor Code Section 1700.4(b), during the period  
12 relevant to this proceeding.

13 3. Petitioner and Respondent entered into an  
14 agreement entitled "EXCLUSIVE TALENT AGENCY AGREEMENT", the  
15 form of same having previously been submitted to and approved  
16 by the Labor Commissioner, pursuant to the provisions of Labor  
17 Code Section 1700.23.

18 4. Respondent was not induced to accept the terms of  
19 the "EXCLUSIVE TALENT AGENCY AGREEMENT" on the basis of any  
20 fraudulent representation by Petitioner.

21 5. That Respondent be ordered to provide to  
22 Petitioner a complete accounting of all earnings received  
23 continuously from July 6, 1992 resulting from the employment  
24 procured for Respondent by Petitioner.

25 6. That Respondent pay to Petitioner the sum equal  
26 to fifteen percent (15%) of the earnings received by

'Respondent, continuously from July 6, 1992, resulting from the employment procured for Respondent by Petitioner pursuant to the provisions of the "EXCLUSIVE TALENT AGENCY AGREEMENT."

7. Petitioner's request that Respondent be ordered to pay reasonable attorney's fees is denied.

## INTRODUCTION

On July 6, 1993, Petitioner RICHARD LEE EMLER dba  
RICHARD LEE EMLER ENTERPRISES TALENT AGENCY (hereinafter  
"EMLER") filed a Petition to Determine Controversy pursuant to  
Section 1700.44 with the Labor Commissioner of the State of  
California against Respondent JOHN DEBNEY (hereinafter  
"DEBNEY"). The petition alleged that EMLER acted as a talent  
agency, "duly licensed by the laws of the State of California";  
that EMLER acted in the capacity of a talent agent on behalf of  
Respondent DEBNEY, pursuant to a "written agency contract", a  
copy of which was attached to the petition; that petitioner,  
pursuant to the terms of the parties agreement, "would be paid  
a sum equal to fifteen (15) percent of all of respondent's  
earnings, in perpetuity, which resulted from work obtained  
during the term of said contract"; and that "respondent has  
failed to pay petitioner, all sums due and owing to petitioner  
from April 1, 1992 to the present".

At the commencement of the proceeding, the petition was amended, on the record, to reflect "all sums due and owing to petitioner from July 6, 1992 to the present", the one year

1 period commencing prior to the filing of the Petition to  
2 Determine Controversy.

3 Petitioner prayed for the following relief:

4 1. That respondent provide a complete accounting of  
5 all earnings under the afore-mentioned contracts.

6 2. That a determination be made as to what sums are  
7 due and owing to petitioner.

8 3. That respondent be ordered to pay petitioner all  
9 sums due and owing under said contracts.

10 4. That respondent be ordered to pay attorneys' fees  
11 due and owing.

12 On September 19, 1993, respondent filed an answer in  
13 letter form conceding the parties agreement; that payments were  
14 made by respondent to petitioner, under the agreement until  
15 January of 1993 and that the payments made by respondent to  
16 petitioner were made "on the basis of fraudulent  
17 representation".

19 DISCUSSION

20 Labor Code Section 1700.4(a) defines talent agency to  
21 mean:

22 ". . . . a person or corporation who engages in the  
23 occupation of procuring, offering, promising, or  
24 attempting to procure employment or engagements  
25 for an artist or artists . . . ."

26 Labor Code Section 1700.4(a) also provides:

27 "Talent agencies may, in addition, counsel or  
28 direct artists in the development of their

1 professional careers."

2 Labor Code Section 1700.4(b) defines artists as:

3 ". . . musical directors, writers . . . lyricists  
4 . . . and other artists and persons rendering  
5 professional services in motion pictures,  
6 theatrical, radio, television and other  
7 entertainment enterprises."

8 The parties did not dispute Petitioner's status as a  
9 Talent Agency, and Respondent's status as an artist.  
10 Additionally, documentary evidence submitted at the hearing,  
11 particularly Petitioner's Exhibit 2 setting forth the various  
12 film, television and other "entertainment enterprises"  
13 projects, procured by EMLER, as a talent agency, for DEBNEY, to  
14 work as an artist, as defined herein above, as well as evidence  
15 of EMLER'S active involvement in the development of DEBNEY'S  
16 career, supports this conclusion.

17 Crucial to a determination of this dispute is a  
18 review of the "EXCLUSIVE TALENT AGENCY AGREEMENT" signed by  
19 EMLER and DEBNEY, the circumstances leading to DEBNEY'S  
20 acceptance of the terms and the parties execution of the  
21 agreement.

22 Labor Code Section 1700.23 provides in part:

23 "Every talent agency shall submit to the Labor  
24 Commissioner a form or forms of contract to be  
25 utilized by such talent agency in entering into  
written contracts with artists for the employment  
of the services of such talent agency by such  
artists, and secure the approval of the Labor  
Commissioner thereof.

26 . . . There shall be printed on the back of the

1 contract in prominent type the following: "This  
2 talent agency is licensed by the Labor Commissioner  
3 of the State of California."

4 Petitioner's Exhibit 1, submitted at the hearing is  
5 a copy of Petitioner's "EXCLUSIVE TALENT AGENCY AGREEMENT". A  
6 review of Petitioner's Exhibit 1 establishes that EMLER  
7 submitted their "form of contract" to the Labor Commissioner,  
8 pursuant to the provisions of Labor Code Section 1700.23 and  
9 that said talent agency agreement was "approved as to form" on  
April 5, 1983, by the Labor Commissioner.

10 Respondent's Exhibit "B" submitted at the hearing is  
11 a copy of the talent agency agreement executed by the parties.  
12 A comparison of Petitioner's Exhibit 1 and Respondent's  
13 Exhibit "B" demonstrates that with limited exception, the form  
14 is substantially the same. Of significant interest is that  
15 Petitioner's Exhibit 1 calls for a fee of twenty percent (20%)  
16 to be paid to petitioner for services rendered, whereas  
17 Respondent's Exhibit "B" establishes that Petitioner reduced  
18 the fee to fifteen percent (15%) as between the parties, for  
19 all such services.

20 In addition to establishing the rate of "compensation  
21 for services to be rendered hereunder" as fifteen percent  
22 (15%), paragraph 3(a) of the parties talent agency agreement  
23 provides as follows:

24 " I also agree to pay to you a similar sum  
25 following the expiration of the term hereof  
upon and with respect to any and all  
engagements, contracts and agreements entered  
into during the term hereof relating to any of  
the foregoing, and upon any resumptions of such

1                       engagements, contracts and agreements, which  
2                       may have been discontinued during the term  
3                       hereof and resumed within one (1) year  
4                       thereafter."

5                       There is no dispute that the parties understood this  
6                       to mean that DEBNEY was to pay EMLER fifteen percent (15%) of  
7                       all sums received by DEBNEY after termination of the parties  
8                       contract, on the various "entertainment enterprises" procured  
9                       for DEBNEY by EMLER during the term of the contract.

10                      There is no dispute that the parties entered into the  
11                     agreement on June 21, 1985; that the contract terminated three  
12                     years later on June 21, 1988; that EMLER procured numerous  
13                     projects in feature films, television series, single episodes,  
14                     television pilots and others, for DEBNEY, during the term of  
15                     the contract; that pursuant to paragraph 3(a) of the parties  
16                     talent agency agreement, DEBNEY, after termination of the  
17                     agreement, continuously paid EMLER fifteen percent (15%) of  
18                     sums DEBNEY received on work EMLER procured for DEBNEY during  
19                     the term of the talent agency agreement and that DEBNEY stopped  
20                     making such payments in January of 1993.

21                      Neither DEBNEY nor EMLER raised the issue, at the  
22                     time of the hearing, as to whether the obligation imposed upon  
23                     DEBNEY, pursuant to paragraph 3(a) of the talent agency  
24                     agreement creates a contract in perpetuity. As the issue is  
25                     raised by the allegations, it necessarily requires  
26                     determination.

27                      It is a fundamental principal that perpetual  
28                     obligations are disfavored by law.

1           In Lura v. Multaplex, Inc. (1982) 129 Cal. App. 3d  
2 410, the court was asked to review the issue of whether a  
3 contract, requiring commissions to be paid on business procured  
4 and is silent as to duration, as here, creates a contract in  
5 perpetuity. The court said:

6           "The mere fact that an obligation under  
7 a contract may continue for a very long  
8 time is not reason in itself for declaring  
9 the contract to exist by perpetuity, or for  
10 giving it a construction which would do  
violence to the express intent of the parties.  
(Warner-Lambert Pharm. Co. v. John J. Reynolds,  
Inc. (S.D. N.Y. 1959) 178 F. Supp. 655, 661,  
aff'd. 280 F. 2d 193)"

11           In Lura, Supra, the court also noted that the  
12 reasoning in Warner-Lambert was particularly instructive. That  
13 reasoning is particularly instructive here, as well.

14           In Warner-Lambert, plaintiff sought a judgment  
15 determining that it was no longer obligated to make periodic  
16 payments to the defendant based on the sale of Listerine.  
17 Payments had been made for some seventy-five (75) years based  
18 upon an agreement to provide royalty payments for the use of  
19 the formula for Listerine. No fixed date for the termination  
20 of this obligation was provided in their contract.

21           The Warner-Lambert court rejected the arguments as to  
22 the creation of a perpetual obligation where no fixed date is  
23 provided, stating:

24           "contracts which provide no fixed date  
25 for the termination of the promisor's  
obligation, but conditions the obligation  
upon an event which would necessarily  
terminate the contract are in quite a  
different category . . . The important

1 factor, then, is not whether the contract  
2 fails to specify a termination date, but  
3 whether there is an ascertainable event which  
4 necessarily implies termination."

5 The payment by DEBNEY to EMLER of fifteen percent  
6 (15%) of the sums DEBNEY receives "is subject to the  
7 construction that it is to continue for as long as 'billings'  
8 are made."

9 Since this obligation imposed upon DEBNEY will  
10 terminate upon the aforementioned "ascertainable event", a  
11 contract in perpetuity was not created.

12 DEBNEY contends that he was induced to accept  
13 paragraph 3(a) of the parties talent agency agreement by  
14 EMLER'S representations; that the provisions of paragraph 3(a)  
15 "is industry standard and common place" and that as such, he  
16 was induced to sign the talent agency agreement based on a  
17 fraudulent misrepresentation.

18 In its broad, general sense, the concept of fraud  
19 embraces anything which is intended to deceive. There is no  
20 absolute or fixed rule for determining what facts will  
21 constitute fraud. Fraud may be proved by direct evidence or it  
22 may be inferred from all the circumstances in the case and  
23 whether or not it is found depends upon the particular facts of  
24 the case under inquiry. See Ach v. Finkelstein (1968) 264  
25 Cal.App. 2d 667.

26 In Pinney & Topliff v. Chrysler Corp. (1959) 176 F.  
27 Supp. 801, the Court said:

1         ". . . evidence in proof of fraud must be  
2                  clear and convincing."

3                  The evidence offered at the hearing is as follows:

4                  First, as noted above, the form of contract signed by  
5                  the parties herein was submitted to the Labor Commissioner for  
6                  approval and was approved as to form by the Labor Commissioner  
7                  more than two (2) years prior to the parties execution of the  
8                  agreement.

9                  Second, DEBNEY and EMLER met to discuss the terms of  
10                 their agreement approximately two (2) months prior to the time  
11                 it was actually signed. Two (2) to three (3) weeks lapsed  
12                 between the time the talent agency agreement was mailed to  
13                 DEBNEY for execution and its return to EMLER, and DEBNEY  
14                 testified that EMLER advised him to speak to others in the  
15                 industry and to an attorney, about the terms of the contract,  
16                 prior to its execution.

17                 Third, EMLER testified that he never advised DEBNEY  
18                 that the "contract met Industry Standard." Rather, paragraph  
19                 3(a) was included in the agreement, as a result of EMLER'S  
20                 experience in the entertainment industry in the development of  
21                 the artists careers and the contract was EMLER'S standard  
22                 agreement for the industry.

23                 Lastly, DEBNEY testified that his family has been  
24                 involved in this business for years; that he understood that in  
25                 addition to procuring employment, EMLER would work to develop  
26                 his career; that his position in the industry was enhanced by  
27                 EMLER'S efforts and that he may have been naive in signing the

1 agreement.

2 Apart from his testimony, the only evidence offered  
3 by DEBNEY in support of what is "industry standard" in this  
4 context, is a copy of a letter from the Society of Composers  
5 and Lyricists, Inc., addressed to "SCL Member", prepared on  
6 September 16, 1985 and suggesting at best, that the provisions  
7 of the talent agency agreement DEBNEY complains of, are not  
8 unique to EMLER but rather a "relatively new development" and  
9 a departure from a previous standard.

10 Upon application of the above-cited authority, after  
11 a review of all the evidence presented by the parties, this  
12 hearing officer finds that DEBNEY'S inducement to sign the  
13 'EXCLUSIVE TALENT AGENCY AGREEMENT' as offered by EMLER, was  
14 not on the basis of a fraudulent representation by EMLER.

15 Accordingly, DEBNEY, having demonstrated that he is  
16 "a person with the capacity of reading and understanding the  
17 instrument" which he has signed, "he is, in the absence of  
18 fraud" bound by its contents. Dobler v. Story (1959) 268 F.2d  
19 274.

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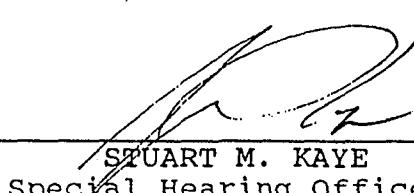
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1 No specific statutory authority exists granting the  
2 Labor Commissioner the authority to award attorney's fees in  
3 this proceeding. Although Petitioner has prayed for such  
4 relief, as Petitioner has failed to allege or otherwise  
5 demonstrate a basis for such award, Petitioner's request for  
6 attorney's fees is denied.  
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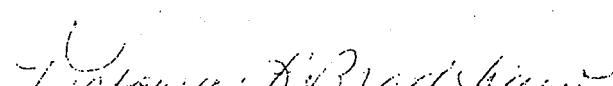
9 DATED: February 2, 1995



10 STUART M. KAYE  
11 Special Hearing Officer

12 ADOPTED

13  
14 DATED: 2/10/95



15 VICTORIA L. BRADSHAW  
16 State Labor Commissioner

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