

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California (LB0665)  
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8 BEFORE THE STATE LABOR COMMISSIONER  
9 OF THE STATE OF CALIFORNIA

11  
12 SHAWN ANTIONE IVY,  
13 p.k.a. "Domino",  
14 Petitioner,  
15 v.  
16 JEROME HOWARD, an  
17 individual,  
18 Respondent.

Case No. TAC 18-94  
DETERMINATION ON  
PETITION OF SHAWN  
ANTIONE IVY, p.k.a.  
"DOMINO"

19 This proceeding arose under the provisions of the Talent  
20 Agencies Act (the "Act"), Labor Code §§ 1700 through 1700.47<sup>1</sup>. On  
21 February 7, 1994, petitioner Shawn Antione Ivy, p.k.a. "Domino"  
22 ("IVY") filed a petition with the Labor Commissioner pursuant to  
23 California Labor Code Section 1700.44 seeking determination of an  
24 alleged controversy with respondent Jerome Howard ("HOWARD").  
25 Howard filed an answer, and on June 6, 1994, a full evidentiary  
26 hearing was held before Michael S. Villeneuve, attorney for the

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28 <sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Labor Code.

1 Labor Commissioner assigned as a hearing officer. Due  
2 consideration having been given to the testimony, documentary  
3 evidence, briefs, and arguments submitted by the parties, the Labor  
4 Commissioner now renders the following decision.

5 PROCEDURAL AND FACTUAL BACKGROUND

6 The event which triggered the filing of the instant petition  
7 was a lawsuit filed by Respondent Howard to enforce the terms of a  
8 "Personal Management Agreement" signed by the parties in February  
9 1992. The court action is stayed pending the resolution of this  
10 matter.

11 By all accounts, the parties met around the beginning of 1992,  
12 and, at the behest of Cherie Kirkwood, Howard was persuaded to  
13 attempt to use his contacts in the recording industry to obtain a  
14 recording contract. It is disputed whether Howard or Kirkwood was  
15 to perform those portions of the contract which called for Howard  
16 and Kirkwood, as joint managers, to also attempt to obtain personal  
17 engagements to advance the career. Kirkwood claims there was no  
18 such division of duties. Howard claims that there was a separate  
19 oral agreement to that effect. The contract on its face, however,  
20 contains at paragraph 9, a clause stating that the written  
21 agreement supersedes all other agreements relating to the subject  
22 matter of the agreement.

23 It was also undisputed that Howard did nothing to attempt to  
24 obtain personal bookings for Ivy, other than respond to, and later  
25 reject, a possible offer from the Montel Williams show to book Ivy  
26 to perform on the show in exchange for Howard's appearance on the  
27 show to discuss matters related to his knowledge of the Jackson  
28 family.



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1 provisions of the contract which called for him to perform  
2 activities requiring a license are surplusage. Under Civil Code  
3 Section 1667, however, contracts that are contrary to express  
4 statutes or public policy as set forth in statutes are illegal  
5 contracts; the illegality voids the entire contract. Thus, absent  
6 a savings clause, the entire contract must fall if it purports to  
7 bind the parties to an arrangement expressly forbidden by statute.  
8 No savings clause can be found in the contract, express or implied.  
9 Nor can such a savings clause be inferred, since the contract by  
10 its express terms supersedes all prior contracts, and any oral side  
11 agreements would be negated by the Statute of Frauds, since they  
12 would relate to the two-year period of the written contract, and  
13 thus could not be performed within one year.

14 Howard further argues that he is not required to have a  
15 license since he was not engaged in the occupation of a talent  
16 agent. But that is what he expressly promised in writing to do.  
17 The true contractual and business relationship between Howard and  
18 Ivy was defined at the outset by the agreement drafted by Howard.  
19 It is elemental that ambiguities in contracts are construed against  
20 the person who drafted them. But in this case, there was no  
21 ambiguity. Howard expressly warranted that he would undertake on  
22 a professional basis the duties of a talent agent with respect to  
23 matters not subject to the recording industry exclusion of the  
24 Labor Code. It was this contractually promised behavior which  
25 constituted the prototype of what was being offered to Ivy when he  
26 was presented with a contract by Howard in February 17, 1992.

27 Howard nevertheless contends that, under the recent decision  
28 of *Wachs v. Curry*, 13 Cal.App. 4th 616 (1993), Howard was still not a "talent

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1 agent" within the meaning of section 1700.4. In particular, Howard  
2 asserts that Ivy failed to demonstrate that Howard's procurement  
3 functions constituted a "significant part" of his business as a  
4 whole. (Id. at 628) In this regard, Howard is mistaken

5 As we have explained in precedent decision Thomas Church v.  
6 Ross Brown, TAC 52-92, adopted June 2, 1994, the holding in Wachs  
7 v. Curry sets forth when licensure as a talent agent is required under  
8 the Act:

9 "We conclude from the Act's obvious purpose to protect  
10 artists seeking employment and from its legislative  
11 history, the "occupation" of procuring employment was  
12 intended to be determined according to a standard that  
13 measures the significance of the agent's employment  
14 procurement function compared to the agent's counseling  
15 function taken as a whole. If the agent's employment  
16 procurement function constitutes a significant part of  
17 the agent's business as a whole then he or she is subject  
18 to the licensing requirement of the Act even if, with  
19 respect to a particular client, procurement of employment  
20 was only an incidental part of the agent's overall  
21 duties. On the other hand, if counseling and directing  
22 the clients' careers constitutes the significant part of  
23 the agent's business then he or she is not subject to the  
24 licensing requirement of the Act, even if, with respect  
25 to a particular client, counseling and directing the  
26 client's career was only an incidental part of the  
27 agent's overall duties. (Wachs v. Curry, supra, 13 Cal.App.4th at  
28 628)"

20 The governing principles are clear. The Wachs court intended  
21 to distinguish between the personal manager who, while operating in  
22 good faith, inadvertently steps over the line in a particular  
23 situation and engages in conduct which might be classified as  
24 procurement. It clearly was not the court's intention to encourage  
25 individuals to engage in activities which the Legislature has  
26 determined require a license.

27 It is clear from a reading of the decision in Wachs that the  
28 court intended that in determining whether the Act requires a

1 talent agency license, only the person's employment procurement  
2 functions on behalf of talent compared to his talent counseling  
3 functions are to be taken into account in establishing the person's  
4 business for purposes of determining the significance of the  
5 procurement activity. Other activities in which the person may  
6 engage, even those related to investment counseling, motion picture  
7 distribution, or being a casting director, are not considered or  
8 counted as part of the person's "business as a whole" in making the  
9 assessment. Were this not true even non-related occupations such  
10 as operating a fast food outlet could be counted. Such a result  
11 would encourage individuals to dabble in procuring employment for  
12 artists as a sideline without the need for licensure and would  
13 hardly be in keeping with "the Act's obvious purpose to protect  
14 artists seeking employment." *Wachs v. Curry, supra*, at 628.

15 The Wachs court declined to quantify the term "significant",  
16 finding that it was not necessary in that case. Since the term  
17 "significant" does not appear in the statute, adoption of  
18 regulations designed to quantify the term would be impossible.  
19 Mindful, however, of the teachings of the California Supreme Court  
20 in the case of *Auto Equity Sales, Inc. v. Superior Court* 57 Cal.2d 450, 455  
21 (1962), the Labor Commissioner recognizes that as an inferior  
22 tribunal, her hearing officers are required to follow decisions of  
23 courts exercising superior jurisdiction. The Labor Commissioner,  
24 in exercising her mandated primary jurisdiction in these cases on  
25 a day-to-day basis, finds that it is imperative that definition be  
26 given to the term "significant" if that term is to be applied in  
27 determining the need for licensing.

28 The word "significant" is defined in American Heritage

1 Dictionary, as follows: "Having or expressing a meaning;  
2 meaningful." This definition, coupled with the obvious purpose of  
3 the Wachs court, seems to imply that conduct which constitutes an  
4 important part of the relationship would be significant. The  
5 Commissioner finds that procurement of employment constitutes a  
6 "significant" portion of the activities of an agent if the  
7 procurement is not due to inadvertence or mistake and if the  
8 activities of procurement have some importance and are not simply  
9 a *de minimis* aspect of the overall relationship between the parties  
10 when compared with the agent's counseling functions on behalf of  
11 the artist. This meaning would seem to be in line with the tenor  
12 of the court's decision in *Wachs v. Curry*.

13 In the context of the foregoing principles, a petitioner who  
14 asserts a licensing violation under the Act satisfies his burden if  
15 he establishes that the petitioner was involved in a contractual  
16 relationship with the respondent and that relationship was  
17 permeated and pervaded by employment procurement activities  
18 undertaken by the respondent. Such a showing supports an inference  
19 that these activities were a significant part of the respondent's  
20 business as a whole, and suffices to establish a *prima facie* case of  
21 violation of the Act. At that point, the burden shifts to the  
22 respondent to come forward with sufficient evidence to sustain a  
23 finding that the procurement functions were not a significant part  
24 of the respondent's "business as a whole" as that term is defined  
25 above.

26 In the present case, Ivy clearly demonstrated that the  
27 contract with Howard was permeated and pervaded by promises to  
28 procure personal appearances and like activities not connected with

1 procurement of recording contracts. The contract which requires  
2 Howard to procure personal appearances speaks for itself. Such  
3 activity requires one to be licensed in the State of California.  
4 The argument that simply because there has been no such procurement  
5 there is no violation of the licensing statute defies logic.

6 Since the contract was illegal it was void. As the California  
7 Supreme Court stated in *Buchwald, supra*, "to regulate such activity for  
8 the protection of the public, a contract between an unlicensed  
9 [talent agent] and an artist is void." It is not simply the  
10 illegal terms which are void, the whole of the contract is void.  
11 Howard is precluded from obtaining any further recovery of any kind  
12 under the contract.

13 DISPOSITION

14 Accordingly, it is hereby ordered as follows:

15 The contract between Howard and Ivy is declared to be illegal,  
16 void, and unenforceable, and it is declared that Ivy shall have no  
17 further obligation to Howard under the contract for commissions or  
18 otherwise.

19 DATED: Oct. 27, 1994

Michael S. Villeneuve  
MICHAEL S. VILLENEUVE  
Attorney and Special Hearing  
Officer for the Labor Commissioner

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23 The above Determination is adopted in its entirety by the  
24 Labor Commissioner.

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26 DATED: 11/7/94

Victoria L. Bradshaw  
VICTORIA L. BRADSHAW  
State Labor Commissioner

