INTRODUCTION

The above-captioned petition was filed on August 31, 1998 by TOM CHASIN dba THE CHASIN AGENCY (hereinafter "Petitioner"), alleging that CHRIS BEARD (hereinafter "Respondent"), breached their agency contract by failing to remit commissions owed to the petitioner, stemming from petitioner’s efforts to secure employment engagements in the entertainment industry on respondent’s behalf. The petition seeks $47,500.00 in commissions, reflecting 10% of respondent’s earnings for the engagement in issue. Respondent was personally served with the petition on January 18, 1999.
Respondent filed his answer on April 27, 1999, asserting seven affirmative defenses, most notably, petitioner should be barred from relief pursuant to the one-year statute of limitations found at Labor Code §1700.44(c).

A hearing was scheduled for and held on December 3, 1999, in Los Angeles, California, before the undersigned attorney specially designated to hear this matter. Petitioner appeared through his attorney, Allison S. Hart, of Barab, Kline & Coate, LLP; Respondent appeared through his attorney, Eric S. Jacobson.

Based on the testimony, evidence, and briefs submitted, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. On May 1, 1993, the parties signed an exclusive one-year personal services contract whereby petitioner would act as respondent's exclusive talent agent in the entertainment industry. Respondent is a writer/producer, who pursuant to the terms of the contract was obligated to pay 10% of all his earnings in connection with the entertainment industry to petitioner. In return, petitioner was to use best efforts to secure respondent employment.

2. In or around January of 1994, petitioner began negotiating a deal with Vin DiBona Productions for respondent's services as writer/producer/creator for a weekly series named "SHERMAN OAKS". Testimony reflected petitioner was instrumental in creating and negotiating the deal points for the April 1994 contract eventually signed between respondent and Vin DiBona.
3. On June 13, 1994, respondent terminated the contract between the parties but assured petitioner that, "your company will be entitled to any commission from the 'SHERMAN OAKS' project..."

On June 1, 1995, respondent signed another two-year deal between himself and Vin DiBona, creating an overall production deal for "Sherman Oaks" and various other projects. Respondent worked on "Sherman Oaks" throughout 1995 and the show aired during the 1995 and 1996 television seasons. Despite respondent's assurances to pay petitioner commissions for the "Sherman Oaks" project, respondent failed to remit commissions to the petitioner for monies earned in connection with the show.

4. On February 10, 1997, petitioner hired counsel to collect on the debt. After two letters from petitioner's counsel directly to respondent, Beard obtained counsel on March 12, 1997. On March 13, 1997, petitioner through his attorney, threatened litigation if the respondent did not "change [his] attitude". Again, on March 31, 1997, petitioner threatened litigation and stated, "[i]n not responding to our letter, ..., we will proceed forward with the understanding that you are not [authorized to accept service on your client's behalf] and will serve your client directly." Respondent's following correspondence authorized discussions to be commenced regarding commissions for "Sherman Oaks", "so we can resolve this matter and [have] a settlement and release prepared." Throughout the correspondence, both parties expressly retained all rights in law and equity via standard non-
waiver language¹.

5. Throughout April and May of 1997, petitioner continued to correspond with respondent seeking documents that could establish respondent's earnings for " Sherman Oaks". On May 6, 1997, petitioner losing patience with respondent's lack of cooperation, placed a two-week deadline for respondent to produce documents or face "all remedies available to redress the situation."

6. On May 8, 1997, respondent provided correspondence asserting that he had received $239,800.00 as compensation for his work on " Sherman Oaks". Petitioner immediately requested supporting documentation, stating petitioner believed the amount to be much higher. Testimony and evidence conflicted on the amount respondent had received for " Sherman Oaks". Evidence was introduced reflecting various amounts earned for the show and testimony was equally unavailing. The dispute as to how much of respondent's per episode salary for " Sherman Oaks" included advances and development fees from the overall production agreement was not resolved.

7. Between June and August of 1997, petitioner continued to seek complete documentation for respondent's earnings on " Sherman Oaks". Respondent failed to supply the documents that

¹ The last paragraph of Petitioner's correspondence stated, "[t]his letter is without prejudice to my client's claims and rights and all of which are expressly reserved."

Respondent's correspondence ended with the phrase, "[u]ntil such time as the parties reach agreement on the terms of a settlement and release, please be assured that nothing contained herein should be deemed a waiver of any of Mr. Beard's rights or remedies, at law or in equity, and all such rights are expressly reserved."
would clear up the compensation discrepancy, and again on August 7, 1997, petitioner threatened to "pursue its legal rights to ascertain and collect said amount." Petitioner sent a letter on September 22, 1997, setting another deadline for respondent to provide the requested documentation. The deadline came and passed.

On October 7, 1997, respondent wrote the following:

Chris is prepared to commission the Chasin Agency on income attributable to his services on Sherman Oaks. His writing fees, producing fees and royalties total $239,800; therefore, $23,980.00 represents the 10% commission fee. If this is acceptable to your client I will prepare an appropriate agreement and arrange payment.

Nothing contained herein shall be deemed a waiver of my client's rights or remedies, at law or in equity, and all such rights and remedies are expressly reserved.

8. On May 26, 1998, seven months after the October 7, 1997 offer of $23,980, petitioner made a demand for $45,700.00, subsequently raised to $47,400.00 on June 1, 1998. Respondent did not reply. On July 21, 1998, petitioner made one last demand and set yet another deadline. After no response from respondent was received, petitioner filed the petition on August 31, 1998, seeking $47,450.00 in unpaid commissions.

CONCLUSIONS OF LAW

1. Petitioner is an "artist" within the meaning of Labor Code §1700.4(b), defining "artist" to include, "directors and
other artists and persons rendering professional services in motion pictures, ...and other entertainment enterprises."

2. It was stipulated respondent is a "talent agency" within the meaning of Labor Code §1700.4(a), defining "talent agency" as a person who "engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist." Therefore, the Labor Commissioner has jurisdiction to hear this matter pursuant to Labor Code §1700.44.

3. The issue is whether Labor Code §1700.44(c) bars petitioner from bringing this action. §1700.44(c) states, "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding."

4. Initially, we must establish a definitive date for respondent's most recent and final alleged violation. This will provide a specific date for purposes of calculating the statute of limitations. Petitioner alleges breach of contract for failing to pay commissions when due. In looking to the contract provisions, section seven communicates the parties' intention when commissions are due and payable. Section seven of the contract mandates that petitioner is entitled to receive commissions promptly after respondent is compensated. The evidence, which was not disputed,

2 Section (7) of the contract states in pertinent part: "Your commission under this Agreement shall be payable as an when gross compensation is received by you or me, my firm, or any other person or entity on my behalf...With respect to gross compensation subject to this Agreement which is paid directly to me, my firm, or any other person or entity on my behalf, an amount equal to said commission shall be deemed to received an held by me or them in trust for you and your commission thereon shall be paid to you promptly after receipt by me or them of such gross compensation."
established that respondent’s final payment for his work performed in connection with "Sherman Oaks" was received in June of 1997. Petitioner did not receive commissions promptly after this date or any other. Respondent failing to remit commissions upon this last payment, allegedly breached his duty to petitioner and committed his last violation. We will use this date to calculate when the action should have been brought for purposes of addressing the statute of limitations defense. Consequently, petitioner should have filed the petition by June of 1998. The petition was filed on 8-31-98 and as a result the petition is time barred.

5. Petitioner makes various arguments in support of his contention that §1700.44(c) is inapplicable. First, petitioner argues that respondent’s October 7, 1997 letter, acknowledges the debt and subsequently extends the statutory time period from this date. Petitioner cites several cases, standing for the proposition that the acknowledgment of a prior unenforceable obligation gives rise to new enforceable promise. General Credit Corporation v. Pichel 44 Cal.App.3d 844, 848. Petitioner is misguided, as the October 7, 1997 letter from respondent was still an enforceable debt.

6. The Supreme Court case of Southern Pacific v. Prosser 122 Cal. 413, 416 states, "an acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise" If the October 7, 1997 letter is categorized as an acknowledgment and the statutory period is tolled pursuant to Southern Pacific, then petitioner’s claim survives. An
acknowledgment is defined in the Supreme Court case of McCormick v. Brown. There the Court held, "an acknowledgment, within the statute [of limitations], to support an implied promise, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment cannot be deduced from an offer or promise to pay part of the debt, or the whole debt in a particular manner, or at a specified time, or upon specified conditions." McCormick v. Brown 36 Cal. 180, 185. This rule expressed by the Court is clearly not applicable to the case at bar. Here, the correspondence between the parties immediately established an adversarial relationship, with petitioner threatening litigation throughout. Further, correspondence and evidence produced at the hearing, clearly demonstrated many questions of fact in issue, including: how much respondent was compensated; what percentage of that compensation related to "Sherman Oaks"; and whether petitioner was entitled to compensation derived from the 1995 modified contract. Cases relied on by petitioner present the defendant in a far more unqualified demeanor. In General Credit v. Pichel, the defendant writes, "I, Jack Pichel, hereby acknowledgment [sic] my debt to...Hecht... in the sum of $19,157.065 and I promised [sic] to pay this amount to them." General Credit, supra at 847. This presents dramatically different facts. Here, a close analysis of respondent's correspondence demonstrates an aggressive posture by petitioner followed by respondent's vague and uncertain answers to petitioner's questions. This behavior by both parties certainly does not reflect a "direct, distinct, unqualified, and
unconditional admission of the debt which the party is liable and willing to pay."

7. In respondent's May 8, 1997 letter he states he received $239,800 in compensation for "Sherman Oaks" and is willing to settle. On June 27, 1997, he forwards a portion of the "Sherman Oaks" contract between respondent and the production company, reflecting potentially $457,000.00 in compensation. Finally, on October 7, 1997, respondent is "prepared to commission the Chasin Agency on ...$239,800; therefore, $23,980 represents the 10% commission fee. If this is acceptable to your client, I will prepare an appropriate agreement." This language established a conditional payment to an amount obviously in controversy. The letter is consistent with settlement language and will not be considered an acknowledgment for purposes of tolling the statute.

8. The only acknowledgment is the April 1994 severance letter, inapplicable to toll the statute because of its remoteness in time. Importantly, both parties expressly reserved their rights in law and equity. Many of the cases tolling the statute involve express waivers. That simply is not the case here. The evidence taken as a whole leaves no doubt the respondent was not motivated by moral obligation and did not acknowledge his debt as reflected in case law. As such, the acknowledgment cases have no bearing.

9. Secondly, petitioner argues the doctrine of estoppel should prohibit respondent from asserting the statute. In applying estoppel, Estate of Pieper 224Cal.App2d 670, states: "A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing and action is induced by the conduct of the defendant,
it cannot be availed by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct." Pieper, supra, at 690

10. Here, there was evidence of settlement discussions. There was no evidence of fraud or any attempt by the respondent to "lull his adversary into a false sense of security." While we agree respondent did not cooperate with petitioner at every turn, petitioner's conduct did not rise to the level of deceit or even bad faith. Notably, petitioner failed to act on its promise of filing suit time and time again. In fact, petitioner threatened to file suit at every corner and inevitably and no doubt regrettably, chose not to exercise that option.

11. Finally, we reject petitioner's argument that petitioner's cause of action accrued on October 7, 1997. Petitioner contends the statute of limitations does not begin until all elements of petitioners cause of action are met. Petitioner maintains that respondent first breached the contract when respondent offered $23,980.00 pursuant to the October 7, 1997 letter. Petitioner asserts this is "when Beard first refused to pay Chasin his rightful commission" which evokes accrual of the statute. As discussed, the breach occurred when respondent did not promptly pay commissions after receipt of compensation. Breach began when respondent first received compensation and ended shortly after respondent received his final compensation in June 1997. "A plaintiff must bring a cause of action within the limitations
period, ... after accrual of the cause of action. Under the general rule, a cause of action accrues when,..., the wrongful act is done, or the wrongful result occurs, and the consequent liability arises. In other words, it accrues when the cause of action is complete with all its elements." Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 397. The evidence reflected that as early as February 10, 1997, petitioner was aware respondent received compensation and was seeking commissions based on this belief. As 1997 progressed, it was abundantly clear petitioner felt respondent was not fully cooperating and believed that respondent was in breach. Petitioner may not lie in wait almost 18 months after requesting payment to file this action.

12. We therefore conclude, the petitioner is barred from bringing the action pursuant to Labor Code §1700.44(c).

ORDER

For the above-state reasons, IT IS HEREBY ORDERED that this petition is dismissed.

Dated: 4/19/00

[Signature]

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER: