

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
BY: DAVID L. GURLEY (Bar No. 194298)
3 455 Golden Gate Ave., 9th Floor
San Francisco, CA 94102
4 Telephone: (415) 703-4863

Attorney for the Labor Commissioner

5
6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA
8

9
10 BARON ROGERS,)

Petitioner,)

11 vs.)

12)

13 ART MINDS, individually, and ART MINDS)
SURF AND SPORT PHOTOGRAPHY, and ART)
14 MINDS AND ASSOCIATES,)

15 Respondents.)
16)

17 ART MINDS, individually, and ART MINDS)
SURF AND SPORT PHOTOGRAPHY, and ART)
18 MINDS AND ASSOCIATES,)

19 Cross-Petitioner,)

20 vs.)

21 BARON ROGERS,)

22 Cross-Respondents.)
23)

24 ///

25 ///

26 ///

27 ///

28

Case No. TAC 28-00

DETERMINATION OF
CONTROVERSY

1
2 INTRODUCTION

3 The above-captioned petition was filed on August 28,
4 2000, by BARON ROGERS, (hereinafter Petitioner, or "ROGERS"),
5 alleging that ART MINDS, dba ART MINDS SURF AND SPORT PHOTOGRAPHY,
6 and ART MINDS AND ASSOCIATES, (hereinafter Respondent or "MINDS"),
7 acted as an unlicensed talent agency in violation of §1700.5¹ of
8 the California Labor Code. Petitioner seeks a determination
9 voiding *ab initio* the management agreement and various "talent
10 release agreements" entered into between the parties; disgorgement
11 of all commissions paid to the respondent; \$8,550.00 in licensing
12 fees earned by the respondent; attorney's fees; and an order
13 preventing the use of petitioner's likeness.

14 Respondent, a photographer/personal manager, filed his
15 answer and cross-petition with this agency on October 16, 2000.
16 Respondent requests the Labor Commissioner find, the "talent
17 release agreements"; the securing of licensing agreements and the
18 resulting income from those agreements; and various "publicity
19 activity", are not within the purview of the Labor Commissioner's
20 jurisdiction; and seeks \$8,000.00 in out of pocket expenses.

21 A hearing was scheduled before the undersigned attorney,
22 specially designated by the Labor Commissioner to hear this matter.
23 The hearing commenced on July 20, 2001, in Los Angeles, California.
24 Petitioner was represented by Brian C. Carlin of Huskinson and
25 Brown, LLP; respondent, a law school graduate, appeared *in propria*
26 *persona*. Due consideration having been given to the testimony,

27 ¹ All statutory citations will refer to the California Labor Code unless
28 otherwise specified.

1 documentary evidence, arguments and briefs presented, the Labor
2 Commissioner adopts the following Determination of Controversy.

3
4 FINDINGS OF FACT

5 1. Baron Rogers, an aspiring model, contacted the
6 respondent through Minds' website. Respondent, Art Minds, is a
7 photographer specializing in the photography of males in various
8 beach and sport settings. In January of 1999, the petitioner
9 visited Minds in Los Angeles and was photographed for Minds
10 business. Minds creates images for subsequent licensing to
11 publishers, with the model receiving a percentage of royalties
12 stemming from the licensing agreement between Minds and the
13 publisher. Typically, the model receives between 10 and 20 percent
14 of Minds net revenue pursuant to "Talent Release Agreements"
15 entered into between Minds and the model.

16 2. Between January 21, and January 29, 1999, Minds
17 photographed Rogers in several settings. On January 23rd and 24th,
18 the parties executed two "talent release agreements", allowing
19 Minds to use petitioner's likeness for publishing purposes.
20 According to the "talent release agreements", Rogers would receive
21 20% of Minds net revenue from the sales of these images.

22 3. Evidently, Minds saw a special quality captured in
23 the images of respondent and sought to represent Rogers as his
24 personal manager, anticipating a rapidly growing career. On
25 February 14, 1999, Minds and Rogers entered a representation
26 agreement whereby Minds would promote and guide Rogers career, as a
27 model. In return, Minds would receive 15% of Rogers compensation,
28

1 gain.

2 9. The Respondent argued that a license sold to
3 distribute previously shot images could not implicate the Act
4 because the licensing of previously filmed images does not require
5 the petitioner to render any services and therefore could not be
6 the procurement of an engagement or employment [which requires an
7 affirmative act of the model]. As such, to include this type of
8 transaction within the purview of the Talent Agencies Act would
9 effect a radical expansion of the Act. Essentially, respondent
10 argues that for implication of the Act, the manager must "procure
11 employment or an engagement" for an artist as described in the
12 definition of "talent agency" at Labor Code 1700.4(a). And the
13 sale of a pre-shot image is not an engagement, nor does it involve
14 employment. That argument has merit, but not here, because the
15 "At-A-Glance" contract provided for three remaining images of
16 petitioner that had not been shot and which were eventually
17 completed on February 1, 2000. Consequently, future employment was
18 intended for Rogers as referenced by the express terms of the "At-
19 A-Glance" deal, and the "At-A-Glance" contract was the procurement
20 of employment within the meaning of the statute. As a result of
21 contracting Rogers to additional images shot by Minds, Minds is now
22 contractually obligated to act simultaneously as both Rogers
23 personal manager and employer. Moreover, Minds acts as his talent
24 agent implicating the Talent Agencies Act.

25 10. Minds contracted with other publishers, selling
26 petitioner's images and profiting through licensing agreements.
27 Minds argues "the Talent Agencies Act was not intended to regulate

28

1 Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 861,
2 Robinson v. Superior Court (1950) 35 Cal.2d 379.

3 2. Similarly, in Buchwald, the court reasoned, The Act
4 is broad and comprehensive. The Labor Commissioner is empowered to
5 hear and determine disputes under it, including the validity of the
6 artists' manager-artist contract and the liability, if any, of the
7 parties thereunder. Buchwald v. Superior Court, 254 Cal.App.2d 347
8 at p.357. Therefore, the Labor Commissioner has jurisdiction to
9 determine this controversy.

10 3. The issues to be determined are as follows:

11 a. Has the Respondent acted as an unlicensed
12 talent agency, including Minds' self-described "publicity" effort
13 on Rogers' behalf?

14 b. Are respondent's "talent release agreements"
15 executed by the parties, and incorporated by reference in the
16 management agreement, subject to the Talent Agencies Act?

17 c. Are respondent's profits obtained from the
18 licensing of petitioner's images to publishers, the improper
19 collection of commissions and thus subject to disgorgement.

20 d. Does the one-year statute of limitations found
21 at Labor Code §1700.44(d), provide a defense for the respondent?

22 e. Are the parties entitled to attorney's fees?
23
24

25 Has the Respondent Acted as an Unlicensed Talent Agency?

26 4. Labor Code §1700.4(a) defines "talent agency" as:
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

5. Petitioner is a model and therefore an "artist", which expressly includes "model" in the definition of "artist" found at Labor Code §1700.4(b). In Waisbren v. Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirement, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole.

6. It was established that the respondent did procure employment on several occasions, including the "At-A-Glance" deal, negotiating compensation for print work, sending "casting kits" directly to casting directors, and respondent's admitted efforts in his June 26, 2000, letter to petitioner. Respondent's argument that sending "casting-kits" for publicity purposes is not an attempt to procure employment is misguided. The sending of resumes and headshots directly to casting directors and/or production companies is seeking employment opportunities and the Labor Commissioner has consistently held that this activity done by an unlicensed artist's representative is a violation of the Act.

7. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of Labor Code §1700.4(a). Labor Code §1700.5 provides that "no person shall

1 Rogers financial percentage to 50% of the net revenue from the "At-
2 A-Glance" contract. The photography talents of Minds do not go
3 unnoticed. Minds is entitled to a reasonable compensation for his
4 photography. Consequently, §1700.40(b) has not been violated as
5 intended by the legislature and Rogers is not entitled to the
6 \$6,000.00 image fee collected by Minds from "At-A-Glance".
7

8 Does the One-Year Statute of Limitations
9 at Labor Code §1700.44(d), Provide a Defense?
10

11 14. Labor Code §1700.44(c) provides that "no action or
12 proceeding shall be brought pursuant to [the Talent Agencies Act]
13 with respect to any violation which is alleged to have occurred
14 more than one year prior to the commencement of this action or
15 proceeding.

16 15. Petitioner files this action on August 28, 2000,
17 thereby limiting petitioner's request for affirmative relief to
18 respondent's violations occurring after August 28, 1999.
19 Petitioner seeks the voidance of the management agreement which was
20 executed on February 14, 1999. The question arises whether the
21 management agreement can be voided. It can.

22 16. On October 10, 2000, respondent filed his response
23 and cross-petition seeking, *inter alia*, a monetary recovery
24 "reimbursable under the terms of the Personal Management Agreement
25 signed by Baron Rogers on February 14, 1999." The petitioner
26 therefore raises the issue of respondent's unlicensed status as a
27 defense to respondent's cross-petition. The recent case of Styne

1 (1) Award reasonable attorney's fees to the prevailing
2 artist.

3 (2) Award interest to the prevailing artist on the funds
4 wrongfully withheld at the rate of 10 percent per annum during the
5 period of the violation.

6 19. The petitioner was guaranteed \$7,500.00 in
7 royalties under the "At-A-Glance" deal. He was paid only
8 \$3,825.00, [\$4,500.00 subtract 15%]. The respondent was paid by
9 "At-A-Glance" and admitted that the petitioner was owed the
10 remaining \$3,000.00. The hearing officer warned the Respondent
11 that Rogers' minimum guarantee was owed irrespective of this
12 controversy. Minds indicated he would pay the respondent, but
13 instead has refused payment. The remaining \$3,000.00 was not in
14 issue at this hearing and therefore, the respondent wilfully
15 retained petitioner's earnings. Petitioner is entitled to
16 attorney's fees and 10% interest per annum.

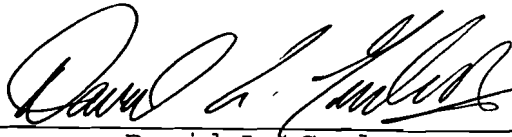
17 ORDER

18 For the above-stated reasons, IT IS HEREBY ORDERED that
19 the 1999 personal management contract and all Talent Release
20 Agreements between Petitioner, BARON ROGERS and respondent, ART
21 MINDS dba ART MINDS SURF & SPORT PHOTOGRAPHY and ART MINDS AND
22 ASSOCIATES, are unlawful and void *ab initio*. Respondent has no
23 enforceable rights under these agreements.

24 Petitioner made a showing that the respondent collected
25 \$675.00 in commissions, and wilfully withheld \$3,000.00 of Rogers
26 earnings, within the one-year statute of limitations prescribed by
27 Labor Code §1700.44(c). Respondent shall pay the petitioner
28 \$3,675.00 in damages, \$735.00 in interest [10% for 2 years], for a

1 total of \$4,410.00 within 30 days of this Determination of
2 Controversy. Within 5 of receipt of this Determination, the
3 Petitioner shall calculate his reasonable attorney's fees, and
4 submit that amount to the Labor Commissioner for approval. The
5 Labor Commissioner does not have the authority to grant injunctive
6 relief.

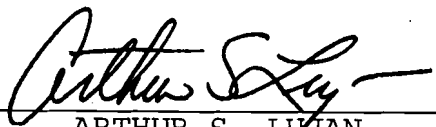
7
8 Dated: 1-22-02



David L. Gurley
Attorney for the Labor Commissioner

9
10
11
12
13 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

14
15
16 JAN 22 2002
17
18 Dated: _____



ARTHUR S. LUCAN
State Labor Commissioner

