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6
7 BEFORE THE LABOR COMMISSIONER

8 STATE OF CALIFORNIA

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11 RAY CHARLES LEONARD, pka SUGAR RAY)
LEONARD; BJORN REBNEY,) No. TAC 25-01
12)
Petitioners,)
13)
vs.)
14)
SETH ERSOFF, an individual;) DETERMINATION OF
15 ERSOFF/REBNEY PARTNERSHIP,) CONTROVERSY
16)
Respondents.)
17 _____)

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on May 15, 2002, May 21, 2003, May 22, 2003, July 16,
21 2003, and July 24, 2003, in Los Angeles, California, before the
22 Labor Commissioner's undersigned hearing officer. Petitioners
23 were represented by Michael J. Plonsker and Jonathan A. Loeb;
24 and Respondents were initially represented by Steven L. Zelig,
25 who was later replaced by Philip A. Levy. Based on the evidence
26 presented at this hearing and on the papers on file in this
27 matter, the Labor Commissioner hereby adopts the following
28 decision.

1 agreements are a subterfuge to circumvent the Act's prohibition
2 against procurement activities by unlicensed persons; and that as
3 a consequence, Ersoff and ERP have no enforceable claim for
4 commissions allegedly owed by Leonard, or for a share of the
5 commissions allegedly wrongfully retained by Rebney.

6 Respondents Ersoff and ERP filed an answer to the petition
7 to determine controversy, contending that respondents did not
8 procure or attempt to procure employment for Leonard, that
9 because the respondents did not violate the Talent Agencies Act
10 the Act does not apply, and therefore, that the Labor
11 Commissioner does not have jurisdiction over the parties'
12 dispute.¹ Respondents also that Rebney cannot maintain any sort
13 of claim under the Talent Agencies Act, as Rebney is not an
14 "artist," and the Labor Commissioner therefore has no
15 jurisdiction over Ersoff's claim that Rebney wrongfully withheld
16 commissions that were to have been split between them pursuant to
17 their partnership agreement.

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21 ¹ Respondents' answer also asserts that Leonard is
22 judicially estopped from asserting that Ersoff functioned as a
23 talent agent, because in deposition testimony in other litigation
24 Leonard took the position that Ersoff did not procure any
25 employment. During the course of the hearing on the petition to
26 determine controversy, we ruled that judicial estoppel does not
27 apply. A party invoking judicial estoppel must show that (1) the
28 party against whom the estoppel is asserted took an inconsistent
position in a prior proceeding, and (2) that this prior position
was adopted by the first tribunal in some manner, such as by
rendering a favorable judgment. *People ex rel. Sneddon v. Torch
Energy Service, Inc.* (2002) 102 Cal.App.4th 181, 189. Without
deciding whether Leonard ever took an inconsistent position in
other litigation, no evidence was presented that another tribunal
ever reached any determination upon which it could be said that
such tribunal adopted any position espoused by Leonard.

1 thereby create new opportunities for Leonard to generate income
2 through product endorsements, appearances in commercials or
3 infomercials, etc.

4 4. In mid-1996, Ersoff was working for Irv Fuller, the
5 producer of a pay per view project, "Fight Zone." Ersoff hoped
6 to hire Leonard as the host of the show, and towards that end,
7 set up a meeting between Leonard and Fuller. Leonard attended
8 this meeting with his talent agent, Bud Moss of the Shapiro
9 Lichtman Agency (a licensed talent agency). Following this
10 meeting, Ersoff (on behalf of Fuller), negotiated with Moss (on
11 behalf of Leonard), and hired Leonard to be the host of Fight
12 Zone, renamed "Sugar Ray Leonard's Fight Zone." Ersoff never
13 sought any commissions from Leonard in connection with this
14 project.

15 5. After hiring Leonard to host "Fight Zone," Ersoff began
16 discussions with Leonard centered around Ersoff's proposal to
17 "manage his career," and "to be in the Sugar Ray Leonard
18 business." Ersoff told Leonard that with his many connections,
19 he could create more deals and more opportunities for Leonard to
20 significantly increase his income, and asked Leonard for a chance
21 to show him what he could do. Among other things, Ersoff told
22 Leonard that he would introduce him to Leigh Steinberg, and to
23 the William Morris Agency, a licensed talent agency which Ersoff
24 believed could obtain more entertainment related employment
25 opportunities for Leonard. Leonard agreed to have Ersoff manage
26 his career, and entered into a "representation agreement", under
27 which Ersoff was to receive commissions in the amount of 20%
28 (later modified to 15%) of all income earned by Leonard generated

1 by Ersoff's efforts.

2 6. Ersoff attempted to get the William Morris Agency to
3 represent Leonard, but after meeting with Leonard and Ersoff,
4 William Morris declined to represent Leonard. At some point soon
5 thereafter, Bud Moss ceased acting as Leonard's talent agent, and
6 as a result, by the latter months of 1996, Leonard was no longer
7 represented by any licensed talent agency. Ersoff made no
8 further efforts to secure a talent agency to represent Leonard
9 with respect to the procurement of employment covered by the
10 Talent Agencies Act. However, during the period of time in which
11 Ersoff managed Leonard, Ersoff obtained the services of certain
12 other individuals -- a publicist, an acting coach, and attorneys
13 -- to provide Leonard with assistance in advancing his interests.

14 7. Ersoff took Leonard to meet with Leigh Steinberg in
15 mid-1996. Bjorn Rebney, who was then working for Steinberg's
16 sports marketing business, ISI, attended this meeting. At this
17 meeting, Ersoff explained that his company, Fade In
18 Entertainment, was in the business of getting deals for athletes,
19 and that he hoped to form "an alliance" with ISI to get deals for
20 Leonard doing advertisements and endorsements. Ersoff explained
21 that by working together, they could leverage more and better
22 deals for Leonard. Ersoff proposed that commissions would be
23 split between him and ISI. At some point soon after this
24 meeting, ISI and Ersoff agreed to share "representational duties"
25 relative to Leonard, for which Leonard would pay commissions at
26 20% of his earnings pursuant to Leonard's agreement with Ersoff,
27 with Ersoff and ISI to split these commissions equally for deals
28 "brought to the table" by Ersoff, but with ISI getting a greater

1 percentage for deals procured by ISI.

2 8. This "alliance" between Ersoff and ISI ended in January
3 or February 1997, with Rebney's termination from ISI. Immediately
4 thereafter, Ersoff and Rebney entered into an oral agreement to
5 form a partnership, the ERSOFF/REBNEY PARTNERSHIP ("ERP"), which
6 has been named as a Respondent in this proceeding. ERP has never
7 been licensed by the Labor Commissioner as a talent agency. This
8 partnership between Ersoff and Rebney lasted until late 1999.
9 The purpose of the partnership was to provide Leonard with
10 "representation," in the same manner that Ersoff and ISI had been
11 providing such representation, so as to enhance Leonard's
12 marketability and income generating opportunities, and to obtain
13 and negotiate engagements for Leonard relative to public
14 speaking, product endorsements, acting in commercials and
15 infomercials, etc. Under the terms of this partnership, Ersoff
16 and Rebney were to equally split all commissions earned pursuant
17 to Ersoff's agreement to represent Leonard. However, shortly
18 after the formation of the ERP, Leonard re-negotiated his
19 agreement with Ersoff, reducing the commissions payable to ERP to
20 15% of Leonard's earnings derived through the efforts of Ersoff
21 or Rebney.

22 9. In his testimony, Ersoff maintained that throughout the
23 entire time of his representation of Leonard, he never procured
24 or attempted to procure any specific employment for Leonard, but
25 rather, that his role was limited to "providing career guidance
26 and counseling" to Leonard, and "developing and advancing
27 Leonard's career" by "establishing a platform to create income
28 opportunities." Primarily, according to Ersoff, this consisted of

1 creating a non-profit organization, the Sugar Ray Leonard Youth
2 Foundation; and creating a concept called "Twelve Rounds to
3 Victory," to enable Leonard to secure "inspirational" or
4 "motivational" speaking engagements based on how he overcame
5 adversity to become a champion boxer, and to enable Leonard to
6 sell motivational books or tapes to adults and children based on
7 this theme; and finally, in bringing Leonard into a relationship
8 with D.A.R.E. America ("DARE"), a non-profit organization known
9 for its programs to encourage school age children to resist drugs
10 and violence. Leonard became a public spokesperson for DARE,
11 serving as its "celebrity voice." All of these activities were
12 designed by Ersoff to enhance Leonard's image, and to enable him
13 to procure more and higher paying product endorsements, and
14 acting roles in infomercials, advertisements, etc. According to
15 Ersoff, while he was responsible for creating and implementing
16 the concepts that would "build a career path for Leonard," his
17 partners, first ISI and later Rebney with the creation of the
18 ERP, were to be responsible for obtaining and negotiating all of
19 the particular contracts for Leonard's endorsements or services.
20 Ersoff testified that the ERP provided a full range of services
21 for Leonard, with Rebney providing "legal and agency services"
22 and Ersoff providing "management services." The ERP then shared
23 the commissions that each of the partners earned for providing
24 Leonard with these services.

25 10. During the period from the start of Ersoff's
26 representation of Leonard in mid-1996, until the end of this
27 representation in late-1999, Ersoff, or the "alliance" of Ersoff
28 and ISI, or the partnership of Ersoff and Rebney, procured or

1 attempted to procure or promised to procure various endorsement
2 deals, engagements, or employment for Leonard. Evidence was
3 presented with respect to each of the following proposals or
4 agreements:

5 a) "The Stimulator" - In mid-1996, Ersoff had discussions
6 with Paul Monea, a businessman seeking to publicize a pain relief
7 device known as the Stimulator, and Ersoff proposed an agreement
8 whereby Leonard would endorse and serve as a spokesperson for
9 this product. Initial negotiations were solely between Ersoff
10 and Monea, but as the negotiations progressed, Rebney (then
11 associated with ISI) was brought in.² A proposed contract was
12 drafted by Rebney, pursuant to instructions from Ersoff. Under
13

14 ² Ersoff testified that he had a pre-existing business
15 relationship with Monea, and that Monea called him about this
16 product, and that Ersoff then called Bud Moss for instructions on
17 how to proceed, and they agreed to hold a dinner meeting to
18 discuss the proposal. Ersoff, Monea, Leonard and Moss attended
19 this meeting, and Moss announced that he was delighted with the
20 proposal, and asked Ersoff to pursue the opportunity and take the
21 lead in negotiations based on Ersoff's prior relationship with
22 Monea. Ersoff then began negotiating the deal, but ultimately
23 passed off the negotiating to Rebney and ISI, at Leonard's
24 request. Ersoff's version of these events is contradicted by
25 Rebney, who testified that Ersoff did all of the negotiating, and
26 his own role was limited to drafting the proposed contract for
27 Leonard's endorsement and services in accordance with the terms
28 that Ersoff told him had already been negotiated. Ersoff's
version is also contradicted by Leonard, who testified that by
the time Ersoff first told him anything about the Stimulator, he
had already terminated Moss as his talent agent. Significantly,
even under Ersoff's account of these events, Moss was out of the
picture by the time the deal was executed. Ersoff does not claim
that Moss approved, or was even asked to approve, the final terms
of the deal. Moreover, in view of Ersoff's pre-existing
relationship with Monea, it is simply not believable that Ersoff
turned the final negotiations over to Rebney. Ersoff's claim
that he did this at Leonard's request seems particularly
unbelievable, as there was no prior relationship between Leonard
and Rebney to warrant making such a request, and in view of
Leonard's credible testimony that he had no idea (and no apparent
interest) as to whether negotiations were handled by Ersoff or
Rebney.

1 the terms of this contract, Leonard was to receive a minimum of
2 \$250,000 per year for his endorsement and related services,
3 including "participat[ing] in and/or act[ing] as the host of a
4 television commercial for the Stimulator," either "in the form of
5 infomercials and/or standard :30 second advertising spots." This
6 contract, on ISI letterhead, was executed by Rebney and a
7 representative of the company that was to manufacture and/or sell
8 the Stimulator. However, with the FDA's decision to prohibit the
9 sale of this product, no commercial or infomercial was ever
10 filmed.

11 b) "O2Go" - Either at the same time or very shortly after
12 Ersoff and Monea started their negotiations about Leonard's
13 endorsement and services in connection with the Stimulator,
14 Ersoff and Monea began discussing the possibility of securing
15 Leonard's endorsement and related services in connection with
16 another product known as "O2Go," an oxygenated bottled water that
17 Monea hoped to market. As was the case with the Stimulator,
18 initial negotiations were solely between Ersoff and Monea, but as
19 the negotiations progressed, Rebney (then associated with ISI)
20 was brought in. A proposed contract was drafted by Rebney,
21 pursuant to instructions from Ersoff. Under the terms of this
22 contract, Leonard was to receive a minimum of \$250,000 per year
23 for his endorsement and related services, including
24 "participat[ing] in and/or act[ing] as the host of a television
25 commercial for O2Go," either "in the form of infomercials and/or
26 standard :30 second advertising spots." This contract, on ISI
27 letterhead, was executed on January 29, 1997 by Rebney and a
28 representative of the company that was to manufacture and/or sell

1 the Stimulator.

2 c) Appearance on Jay Leno show - In early 1997, Leonard
3 appeared as a guest on the Jay Leno show. No evidence was
4 presented at this hearing that would suggest that Leonard
5 performed as an entertainer in connection with this appearance.
6 According to Ersoff, this appearance was obtained through the
7 efforts of Leonard's publicist, Michael Simon. Simon worked for
8 a public relations company, and was not employed by Ersoff.

9 d) "TaeBo" - In 1997, Leonard was filmed speaking at a
10 series of testimonials for TaeBo, a fitness workout developed by
11 Leonard's friend and personal trainer, Billy Blanks. This film
12 was ultimately incorporated into an infomercial for TaeBo.
13 Neither Ersoff nor Rebney played any role in securing Leonard's
14 participation in the TaeBo project, or in negotiating Leonard's
15 compensation (if any) for his involvement in the project.
16 However, Rebney prepared a release to allow the producers of the
17 TaeBo infomercial to use the film of Leonard speaking at the
18 testimonials, and to incorporate that film into the infomercial,
19 subject to Leonard's right to reject any of this footage upon his
20 review of the infomercial. Rebney put this draft release on
21 Ersoff's desk and told Ersoff to send it to the producers of the
22 infomercial. Ersoff did more than that -- he signed Leonard's
23 name ("Ray") to the release before faxing it to the producer.
24 Ersoff testified that he then believed that he had authorization
25 to sign the release.

26 e) Appearance on Taka TV show - In the spring of 1997,
27 Leonard appeared as a guest on the "Taka Show," a television talk
28 show in Japan. In this appearance, he simulated "boxing" with

1 the host of the show. This appearance was procured, and
2 Leonard's fee of \$100,000 was negotiated by Rebney, during the
3 period of time when Rebney was still working at ISI, but
4 commissions were split between ISI and Ersoff pursuant to
5 Ersoff's "alliance" with ISI.

6 f) "MVP Small Print Collectibles" - In the spring of 1997,
7 Ersoff and Rebney (who by that time was no longer associated with
8 ISI) attempted to enter into a deal with Jack Wong, a Hong Kong
9 businessman associated with a company called MVP Small Print
10 Collectibles ("MVP"). Efforts to reach an agreement ultimately
11 failed. MVP distributes and sells telephone debit cards which
12 bear the likenesses of famous persons. The proposed agreement
13 was to allow MVP to use eight "unique and marketable photographs"
14 of Leonard that "chronicle great and interesting moments both in
15 the ring and outside the ring." Nothing in the proposed
16 agreement suggested that Leonard was to model or otherwise pose
17 for new photographs, rather, it appears that the photographs were
18 to be culled from what was no doubt an already large inventory of
19 photographs depicting Leonard throughout his career. The
20 proposed agreement would have required Leonard to travel to Hong
21 Kong and participate in a series of three appearances on June 6,
22 7, and 8, 1997 to "meet and greet fans," and "be available for
23 interaction with the public," and to attend "meetings with ...
24 governmental officials or prominent members of the community."
25 Nothing in the proposed agreement would have required Leonard to
26 appear in any advertisements or infomercials.

27 g) Dr. Spagnoli boxing clinics - Sometime in 1997, Leonard's
28 golfing buddy, Dr. Spagnoli, made a proposal to Leonard that they

1 put together a boxing workout and package it so that it could be
2 sold to gyms and health clubs. Leonard asked Spagnoli to discuss
3 this proposal with Ersoff. Ersoff began negotiations with
4 Spagnoli, and eventually, Ersoff asked Rebney to join these
5 negotiations. Among other things, these negotiations focused on
6 the nature of Leonard's role in the enterprise, and the
7 possibility of having Leonard act as a spokesperson for the
8 workout, with appearances on television and radio commercials,
9 and print advertisements. However, the parties failed to reach
10 an agreement on whether the workout program would be jointly
11 owned by Leonard and Spagnoli, or solely owned by Spagnoli. An
12 agreement was never concluded.

13 h) Route American Sports - Sometime in 1997, Ersoff had
14 discussions with a Japanese business called Route American Sports
15 ("RAS") about having Leonard do a series of boxing clinics in
16 Japan for businessmen, that would operate much the same way as a
17 baseball team fantasy camp, with the participants watching films
18 of Leonard's greatest fights, getting instruction from Leonard on
19 how to box, receiving boxing gloves signed by Leonard, etc.
20 Later in 1997 or in early 1998, Ersoff negotiated a deal with RAS
21 to allow RAS to film various athletes, including Leonard, for a
22 Japanese variety show. Leonard was filmed while he was speaking
23 at a DARE charitable event.

24 I) "Sugar Ray Leonard's Hit Parade" on ESPN Classic Sports
25 Network - On August 10, 1998, Sugar Ray Leonard Management, Inc.
26 ("SRLM"), a loan out company for Leonard's services, entered into
27 a written agreement with Classic Sports Network ("CSN"), under
28 which Leonard was to provide on-screen services as a "program

1 host, moderator, guest host, interviewer, interviewee, analyst
2 and announcer" for a cable television boxing show that was to
3 replay the most notable fights in Leonard's boxing career, with
4 Leonard to receive \$100,000 per contract year for these services.
5 Rebney negotiated this deal and executed the contract with CSN on
6 behalf of Leonard, during the period of time that Rebney was
7 Ersoff's partner in the ERP. Ersoff was kept apprised of these
8 negotiations as they were taking place. The commissions that
9 were based on Leonard's earnings in connection with this
10 engagement were split between Rebney and Ersoff.

11 j) "Slam Man" - In the summer of 1998, Leonard entered into
12 an agreement with Fitness Quest to endorse a product called "Slam
13 Man," which was a "robot dummy" with lights that lit up when it
14 was punched. Under this agreement, Leonard was also to act in an
15 infomercial touting the virtues of this device, and possibly also
16 to act in an instructional video that would be included with the
17 product. Although Leonard entered into this agreement on his
18 own, without the assistance of any representative, he later asked
19 Ersoff and Rebney to "help clarify the terms of the agreement,"
20 or to help him cancel the agreement. Rebney then had some
21 further discussions with Fitness Quest regarding Leonard's
22 obligations under the agreement.

23 k) "VarTec" - In September 1998, Leonard entered into an
24 agreement with VarTec Telecom, a telecommunications service,
25 under which Leonard was to serve as a celebrity spokesperson for
26 VarTec, and to make himself available for videotaping, audio
27 taping, and photographing in connection with the production of
28 print, radio and television advertising. This deal had been

1 procured and negotiated by Rebney, with Ersoff's knowledge.
2 Commissions on Leonard's earning were paid to the ERP, and split
3 between Rebney and Ersoff. During the negotiations, VarTec had
4 been represented Richard Bachrach, the CEO of Celebrity Focus, a
5 business that represents companies that want to use celebrities
6 in their advertising campaigns. After the VarTec deal was
7 negotiated, Bachrach met Ersoff at a Las Vegas press conference
8 where the deal was announced.³ Ersoff then told Bachrach that he
9 was looking for more opportunities for Leonard to do product
10 endorsements and advertisements. During the next month, Ersoff
11 telephoned Bachrach on two occasions, asking whether any of
12 Bachrach's other clients might be interested in engaging
13 Leonard's services. Despite Ersoff's efforts, he did not procure
14 any additional deals through Bachrach. Ersoff also made some
15 follow-up telephone calls, to Bachrach or other persons who were
16 representing VarTec, to extend the term of Leonard's deal with
17 VarTec by another year.

18 1) "Track Bowling Ball" - In January 1999, Leonard entered
19 into an agreement with Track, Inc., a company that manufactures
20 and sells bowling balls, for his endorsement, use of his name and
21 image in promotion, advertisement, distribution, marketing and
22 sale of the product, and for up to 12 hours of his services in
23 the creation and production of advertising materials. These

24
25 ³ Though characterized as a "news conference," this event
26 was little more than the start of VarTec's advertising campaign
27 featuring Leonard as its new spokesperson. Leonard's comments
28 and actions at this "news conference" were scripted by VarTec,
and essentially amount to the performance of a live commercial
for VarTec, with photographs to be taken of Leonard in various
"boxing poses" showing him "challenging" another "fighter" who is
wearing apparel that is labeled AT&T (VarTec's major competitor).

1 services were understood and intended to include acting in
2 nationally televised commercials for Track, and for recording
3 radio advertisements, and for modeling services in connection
4 with print advertisements. Pursuant to this agreement, Leonard
5 performed in the production of television commercials, and was
6 photographed for print advertisements. This agreement was
7 negotiated by Rebney, and the ERP received commissions on
8 Leonard's earnings derived from this agreement, and these
9 commissions were split between Rebney and Ersoff. Although
10 Ersoff testified that he did not approve of this deal, because he
11 believed a connection to this type of product would not enhance
12 Leonard's image, Rebney's negotiation of the agreement came
13 within the scope of work that Rebney was authorized to perform as
14 a partner in the ERP, on behalf of the ERP.

15 m) "12 Rounds to Victory" book - On January 15, 1999,
16 Ersoff, Leonard and DARE (by and through its president and
17 founding director, Glenn Levant) entered into a written agreement
18 for author Todd Gold to write a book that would appear to have
19 been authored by Leonard, and to have this book distributed by
20 DARE to school children in the DARE program. This agreement had
21 been negotiated by Ersoff. The book is described a "the DARE
22 America textbook version of Sugar Ray Leonard's 12 Rounds to
23 Victory," and as a "character building motivational text." Gold
24 was to be paid \$50,000 for his work, by DARE (\$20,000), Leonard
25 (\$18,000) and Ersoff/Rebney (\$12,000), and DARE was to bear all
26 other costs associated with the publishing, marketing, sale and
27 distribution of the book. Apparently, participating schools or
28 school children were to be charged for copies of this book,

1 because under this agreement, Leonard and DARE were to equally
2 split 60 cents on each and every book distributed by DARE, with
3 the expectation that at least 1,000,000 copies of the book would
4 be distributed. Finally, under this agreement, Leonard was
5 obligated to "assist DARE America in promoting distribution of
6 the book in any reasonable manner as requested by DARE president
7 Glenn Levant." There was nothing in the agreement that expressly
8 required Leonard to act in an infomercial or advertisement
9 promoting the book, and there were never any discussions about
10 having Leonard perform such services in connection with the sale
11 of this book.⁴

12 n) "Knock Out Kings" by Electronic Arts - In February 1998,
13 Leonard entered into an agreement with Electronic Arts, Inc.
14 ("EA"), under which Leonard was to endorse and otherwise aid in
15 the publicity of an electronic game called "Knock Out Kings."
16 Among other things, Leonard was engaged to record voice-overs
17 that would be used in the game, and to be photographed and
18 videotaped for use in advertising materials. This agreement was
19 negotiated by Rebney, and his services in negotiating this
20 agreement came within the scope of work that he was authorized to
21 perform as a partner in the ERP, on behalf of the ERP.

22 o) Appearance for Protection One - In April 1999, Leonard
23 appeared at a DARE event at Planet Hollywood that was sponsored
24 _____

25 ⁴ Levant testified that Leonard was to perform in an
26 infomercial to promote this book, but he appears to have
27 conflated Leonard's role in connection with this book with an
28 agreement for Leonard to appear in an infomercial to promote a
different product, the "12 Rounds to Victory" audiotapes and
written materials discussed in paragraph 10(q), *infra*. Rebney
credibly testified that the infomercial had nothing to do with
this book.

1 by Protection One, a home security company. Ersoff asked Rebney
2 to negotiate the appearance fee that Leonard was to receive for
3 attending and speaking at this event. Under the agreement that
4 was negotiated, Leonard was to receive \$20,000, however, the
5 agreement specified that Protection One had no right to use
6 Leonard's voice or likeness for any advertising or promotion.
7 Nonetheless, Ersoff told Leonard that he believed there was a
8 good chance that this appearance could ultimately lead to an
9 endorsement/advertising deal with Protection One.

10 p) "Buy Bid Win" - In the spring of 1999, Ersoff had some
11 conversations with Bob Lorsch, the owner or CEO of an internet
12 company called "Buy-Bid-Win," which ran a website where customers
13 could purchase items for sale. Ersoff asked Lorsch if he would
14 be interested in securing Leonard's services to do television,
15 radio and print commercials, and to act as a celebrity
16 spokesperson for this internet service. Lorsch expressed some
17 interest, and Ersoff asked Rebney to handle the negotiations.
18 Rebney and Lorsch exchanged proposals, but were unable to reach
19 an agreement.

20 q) "12 Rounds to Victory" infomercial - On May 5, 1999,
21 Leonard, Ersoff, Rebney, DARE (by and through its president and
22 founding director Glenn Levant), and an artistic design company
23 called Multi-Media International (owned by Levant's wife)
24 executed a written agreement establishing a limited liability
25 company for the purpose of producing an infomercial that would
26 feature Leonard, to promote the sale of "12 Rounds to Victory"
27 audiotapes and written materials ("Victory products"). This
28 agreement was negotiated by Ersoff and Levant. Under this

1 agreement, the LLC has all rights to distribute the infomercial,
2 and to sell the Victory products via direct response television,
3 radio, print, the internet, and through retail sales. All of the
4 signatories have an ownership interest in the LLC -- Leonard has
5 a 37.5% share in the LLC, DARE has 20%, Multi-Media has 17.5%,
6 and Ersoff and Rebney have 10% each.⁵ Financing the production
7 of the infomercial, and the creation of the audiotapes and
8 written materials (the "Victory products") that would be sold
9 through the infomercial, would be the responsibility of DARE and
10 Multi-Media, through their deposit of \$300,000 into an LLC
11 account. The agreement provides that profits and losses will be
12 allocated in proportion to each members' shares, unless agreed to
13 otherwise by written election of all members of the LLC.
14 However, this infomercial was never produced.

15 11. Ersoff testified that during the course of his
16 representation of Leonard, he and Leonard entered into a separate
17 contractual arrangement under which both, along with Rebney, were
18 to be principals of a newly created boxing management business
19 that would manage the professional boxing careers of up and
20 coming boxers, for which this boxing management business would
21 receive commissions and/or other compensation. Neither Ersoff
22 nor Rebney ever used this boxing management business as a vehicle
23 for obtaining or attempting to obtain commercial endorsements,
24 appearances in advertisements, infomercials, or any other acting
25 or modeling engagements for Leonard. No evidence was presented
26

27
28 ⁵ Added together, these persons or entities have a 95%
interest in the LLC. The agreement does not specify who is to
own the remaining 5% interest.

1 as to whether this boxing management business procured, attempted
2 to procure, promised to procure, or offered to procure employment
3 in connection with television, radio or print modeling for any
4 other professional boxers.

5 LEGAL ANALYSIS

6 1. Labor Code section 1700.4(b) defines "artists" as
7 "actors and actresses rendering services on the legitimate stage
8 and in the production of motion pictures, radio artists, musical
9 artists, musical organizations, directors of legitimate stage,
10 motion picture and radio productions, musical directors, writers,
11 cinematographers, composers, lyricists, arrangers, models, and
12 other artists and persons rendering professional services in
13 motion picture, theatrical, radio, television, and other
14 entertainment enterprises." The Labor Commissioner has long
15 construed this statutory language to include persons who act in
16 commercials or advertisements or "infomercials" that are filmed,
17 videotaped, or recorded for broadcast on television or radio --
18 as these persons are "actors . . . rendering professional
19 services in . . . radio [and] television." The Labor
20 Commissioner has also long construed the Act's coverage of
21 "models" to apply to persons who pose for photographs that are
22 intended to be used for print advertisements. As such, we
23 conclude that Leonard is an "artist" within the meaning of Labor
24 Code section 1700.4(b) in connection with any employment or
25 engagement wherein he provided or was to provide such covered
26 services.

27 2. Labor Code section 1700.4(a) defines a "talent agency"
28 as "a person or corporation who engages in the occupation of

1 procuring, offering, promising, or attempting to procure
2 employment or engagements for an artist or artists" The
3 term "employment or engagements for an artist or artists" means
4 employment or engagements for the performance of services that
5 are performed by "artists" within the meaning of subsection (b).
6 Unless the term "employment or engagements for an artist or
7 artists" is limited to such artistic employment or engagements,
8 absurd and clearly unintended results would follow. If the term
9 was broadly construed to mean any employment or any engagement
10 for a person who is sometimes employed or engaged as an artist, a
11 person who tries to find a waitress job for a part-time actress,
12 or who tries to find an office clerical job for a part-time
13 musician, would fall within the definition of a "talent agent,"
14 thereby subjecting such person to the Talent Agency Act's
15 licensing and regulatory scheme. Moreover, a review of the
16 relevant legislative history leaves no doubt that the intent of
17 the Act was to protect artists in their capacities as artists,
18 and to regulate persons who procure artistic employment for
19 artists. The "purpose [of the Act] is to protect artists seeking
20 professional employment from the abuses of talent agencies."
21 *Styne v. Stevens* (2001) 26 Cal.4th 42, 50. Thus, "the Act's
22 definition of a talent agency is narrowly focused on efforts to
23 secure professional 'employment or engagements' for an 'artist or
24 artists.'" (§1700.4, subd. (a).) Thus, it does not cover . . .
25 assistance in an artist's business transactions other than
26 professional employment." *Ibid*, at 50-51.

27 3. Labor Code section 1700.4(a) further provides that
28 "[t]alent agencies, may, in addition, counsel or direct artists

1 in the development of their professional careers," however, this
2 function is not part of the core definition of a talent agency.
3 Labor Code section 1700.5 makes it unlawful for a person to
4 "engage in or carry on the occupation of a talent agency without
5 first procuring a license therefor from the Labor Commissioner."
6 It is therefore unlawful to procure, offer, promise, or attempt
7 to procure artistic employment or engagements for an artist
8 without having a valid talent agency license. The negotiation of
9 an employment agreement for artistic services is an activity that
10 constitutes "procuring . . . employment for an artist," within
11 the meaning of Labor Code §1700.4(a).

12 4. In contrast, a person may counsel and direct artists in
13 the development of their professional careers, or otherwise
14 "manage" artists -- while avoiding any procurement activity
15 (procuring, promising, offering, or attempting to procure
16 artistic employment or engagements) -- without the need for a
17 talent agency license. In addition, such person may procure non-
18 artistic employment or engagements for the artist, without the
19 need for a license. *Styne, supra*, 26 Cal.4th 42, 51.

20 5. An agreement that violates the licensing requirement of
21 the Talent Agencies Act is illegal and unenforceable. "Since the
22 clear object of the Act is to prevent improper persons from
23 becoming [talent agents] and to regulate such activity for the
24 protection of the public, a contract between an unlicensed
25 [agent] and an artist is void." *Buchwald v. Superior Court*
26 (1967) 254 Cal.App.2d 347, 351. Having determined that a person
27 or business entity procured, promised or attempted to procure
28 artistic employment for an artist without the requisite talent

1 agency license, "the [Labor] Commissioner may declare the
2 contract [between the unlicensed agent and the artist] void and
3 unenforceable as involving the services of an unlicensed person
4 in violation of the Act." *Styne, supra*, 26 Cal.4th 42, 55.
5 "[A]n agreement that violates the licensing requirement is
6 illegal and unenforceable" *Waisbren v. Peppercorn*
7 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the
8 artist that is party to such an agreement may seek disgorgement
9 of amounts paid pursuant to the agreement, and "may . . . [be]
10 entitle[d] . . . to restitution of all fees paid the agent."
11 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of
12 restitution is, of course, subject to the one year limitations
13 period set out at Labor Code §1700.44(c).⁶

14 6. We have previously held that a person or entity who
15 employs an artist does not "procure employment" for the artist,
16 within the meaning of section 1700.4(a), by directly engaging the
17 services of the artist; and that the activity of procuring
18 employment under the Talent Agencies Act refers to the role an
19 agent plays when acting as an intermediary between the artist
20 whom the agent represents and a third-party employer. See *Chinn*
21 *v. Tobin* (TAC No. 17-96) pp. 5-8. Likewise, a television
22 producer, or assistant to the producer, does not act as a talent
23 agent by offering to directly employ an artist to perform
24 professional artistic services in connection with a television
25 program that the producer is producing. Consequently, Ersoff did

27 ⁶ Petitioners do not claim any amounts were paid to
28 Respondents in the one year period preceding the filing of this
petition, and do not seek disgorgement of amounts that were
previously paid.

1 not violate the Talent Agencies Act by hiring Leonard to host
2 "Fight Zone."

3 7. There is nothing inherent in the 1996 "representation
4 agreement" between Ersoff and Leonard from which it can be said
5 that the agreement itself violated the Talent Agency Act's
6 proscription against procurement by an unlicensed agent. But in
7 determining whether this agreement violated the Act, we must look
8 to the Respondent's actual conduct in carrying out his
9 representational services under this agreement. The Labor
10 Commissioner must "look through provisions, valid on their face,
11 and with the aid of parol evidence, determine whether the
12 contract is illegal or part of an illegal transaction," and
13 "search out illegality lying behind the form in which a
14 transaction has been cast for the purpose of concealing such
15 illegality." *Buchwald v. Katz*, supra, 254 Cal.App.2d at 355. We
16 must therefore apply the law to the evidence that was presented
17 as to each of the 17 projects as to which petitioners allege
18 unlawful procurement.

19 8. First, however, we address an issue that is common to
20 many of these projects -- whether Ersoff is liable for ISI's
21 procurement activities during the period of the "alliance"
22 between Ersoff and ISI, and for Rebney's procurement activities
23 during the period of the partnership between Ersoff and Rebney.
24 It is basic black letter law that every partner is an agent of
25 the partnership for the purpose of its carrying out its business.
26 By Ersoff's own admission, the purpose of his "alliance" with ISI
27 and subsequent partnership with Rebney was to split commissions
28 earned, in part, by procurement activities that were to be

1 undertaken by ISI and Rebney, and to procure more commercial
2 endorsement/advertising deals for Leonard through the efforts of
3 ISI and Rebney. Ersoff does not contend that the procurement
4 activities undertaken by ISI and Rebney were in any way
5 unauthorized or beyond the purpose of the "alliance" or
6 partnership. Ersoff personally benefited from these procurement
7 activities by receiving a share of the resulting commissions, and
8 Ersoff's lawsuit against Leonard and Rebney seeks payment of his
9 share of additional commissions that are allegedly owed. For
10 Ersoff to now seek to wash his hands of the consequences of
11 unlicensed procurement activity by asserting that only ISI or
12 Rebney engaged in such activity -- when ISI and Rebney were
13 working in concert with Ersoff, in accordance with the very
14 purpose of the "alliance" or partnership, where such activity
15 provided or was intended to provide a financial benefit to Ersoff
16 -- amounts to a level of *chutzpah* that is nothing short of
17 breathtaking. We reject out of hand Ersoff's attempt to insulate
18 himself from the consequences of any such unlawful procurement
19 activities.

20 9. Second, we address Respondents' assertion that Rebney
21 cannot maintain any sort of claim under the Talent Agencies Act
22 because he is not an "artist" within the meaning of the Act.
23 Labor Code §1700.44(a) provides: "In cases of controversy arising
24 under this chapter, the parties involved shall refer the matters
25 in dispute to the Labor Commissioner, who shall hear and
26 determine the same...." Nothing in section 1700.44 precludes a
27 person who is not an artist from filing a petition to determine
28 controversy. Rather, the prerequisite is that controversy be one

1 that arises "under this chapter," i.e., under the Talent Agencies
2 Act. To be sure, the Talent Agencies Act governs the obligations
3 of agents vis-a-vis the artists they represent, so as a general
4 matter, a controversy under the Act is a dispute between an
5 artist and an agent, or a person alleged to be an agent within
6 the meaning of the Act. Here, we have a dispute between Leonard
7 and Ersoff, over whether Ersoff functioned as an agent within the
8 meaning of the Act, and whether the representation agreement is
9 therefore void and unenforceable. As a separate matter, there is
10 a dispute between Ersoff and Rebney over Ersoff's entitlement to
11 amounts that were allegedly paid by Leonard to Rebney for
12 services provided by the Ersoff/Rebney Partnership, pursuant (at
13 least in part) to the representation agreement between Ersoff and
14 Leonard. Ersoff's lawsuit seeks recovery from both Leonard and
15 Rebney. Both Leonard and Rebney are defending this lawsuit by
16 alleging that Ersoff has no enforceable claim because of his
17 violation of the Talent Agencies Act. In short, Rebney (along
18 with Leonard) have alleged the existence of a controversy that
19 arises under the Talent Agencies Act, and we can perceive of no
20 ground upon which the Labor Commissioner can decline to assert
21 jurisdiction over Rebney's defensive claim.

22 10. We turn now to the various alleged instances of
23 procurement or attempted procurement during the period from mid-
24 1996 to mid-1999:

25 a) "The Stimulator" - We conclude that Ersoff and Rebney
26 (acting pursuant to Ersoff's directions) negotiated this deal,
27 under which Leonard was to perform services as an "artist" within
28 the meaning of the Act. This attempt to procure employment for

1 Léonard violated the Act. Labor Code §1700.44(d), which provides
2 that it is not unlawful for a person or corporation that is not
3 licensed as a talent agent to "act in conjunction with, and at
4 the request of, a licensed talent agency in the negotiation of an
5 employment contract," is not applicable here, as we find that
6 Ersoff and Rebney did not negotiate this deal "in conjunction
7 with, and at the request of, a licensed talent agency."⁷

8 b) "O2Go" - We conclude that Ersoff and Rebney (acting
9 pursuant to Ersoff's directions) negotiated this deal, under
10 which Leonard was to perform services as an "artist" within the
11 meaning of the Act. This attempt to procure employment for
12 Leonard violated the Act.

13 c) Appearance on the Jay Leno show - First, there is no
14 evidence that Ersoff, or anyone employed by Ersoff, or anyone in
15 a partnership or joint venture with Ersoff, procured this
16 appearance. Second, in appearing as a talk-show guest, there is
17 no evidence that Leonard performed any professional services as
18 an "artist", within the meaning of Labor Code §1700.4(b). We
19 have previously observed that speaking about one's
20 accomplishments (even one's acting accomplishments) is something
21 that is separate and distinct from acting, and a talk show is
22 different from a variety show (like Saturday Night Live) where
23 actors perform skits, musicians perform songs, etc. A talent
24 agency license is not required for the procurement of a guest
25 appearance on a talk show provided the appearance does not

26

27

28 ⁷We further conclude that Labor Code §1700.44(d) is not
applicable to any of the subsequent alleged instances of
procurement or attempted procurement.

1 involve the rendition of artistic services⁸. (See *Gittelman v.*
2 *Karolat*, TAC No. 24-02) As such, there was no violation of the
3 Talent Agencies Act in connection with Leonard's appearance on
4 the Jay Leno show.

5 d) "TaeBo" - A "testimonial" for a product or service is a
6 fancy word for an "advertisement." Just as a rose would smell as
7 sweet by any other name, so too, an appearance in a "filmed
8 testimonial" or "infomercial" pitching the supposed merits of a
9 product or service is no different from acting in an
10 advertisement. While we have no difficulty concluding that
11 Leonard therefore performed services as an "artist" in connection
12 with this project, the evidence is equally clear that neither
13 Ersoff nor Rebney had any involvement in procuring this acting
14 engagement for Leonard. Rather, their involvement commenced
15 after the "testimonials" featuring Leonard were filmed and
16 appears to have been limited to the drafting and signing of a
17 release allowing the use of the previously recorded film. No
18 evidence was presented that Ersoff or Rebney played any role in
19 negotiating the Leonard's terms of compensation for his services.
20 Consequently, we conclude that neither Ersoff nor Rebney acted as
21 a "talent agent," within the meaning of Labor Code §1700.44(a),
22 in connection with this project, and hence, there was no
23 violation of the Talent Agencies Act.

24 e) Appearance on Taka TV Show - Although this appearance was
25 procured by ISI, through Rebney, while ISI was in an "alliance"
26

27 ⁸ The host of a talk show plays a role that is very
28 different from that of his or her guests, and functions in a
manner much closer to that of a variety show host, so as to fall
within the definition of an "artist".

1 with Ersoff, we are unable to conclude that Leonard was employed
2 to provide services as an "artist" within the meaning of the Act.
3 Boxing is not an "entertainment enterprise" within the meaning of
4 Labor Code §1700.4(b). Leonard's simulated "boxing" on a
5 television talk show does not constitute "acting" any more than
6 Muhammad Ali "acted" at the recent major league baseball All Star
7 Game by pretending to box by appearing to throw punches at
8 persons standing next to him. As such, there was no violation of
9 the Talent Agencies Act in connection with Leonard's appearance
10 on the Taka TV show.

11 f) "MVP Small Print Collectibles" - An agreement
12 authorizing the use of previously taken photographs for
13 advertising purposes is not an agreement to perform modeling
14 services. Likewise, an agreement to "meet and greet fans" and
15 interact with members of the public is not an agreement to
16 provide any services as an "artist" within the meaning of Labor
17 Code §1700.4(b). We therefore conclude that there was no attempt
18 to procure "employment or engagements for an artist" in
19 connection with this deal, and therefore, no violation of the
20 Talent Agencies Act.

21 g) Dr. Spagnoli boxing clinics- The negotiation of an
22 agreement to perform as an actor in the production of television
23 or radio advertising or as a model in the creation of print
24 advertising constitutes the procurement of employment within the
25 meaning of the Talent Agencies Act if the advertising is for the
26 benefit of a third party that either directly or through an
27 advertising agency or production company or photographer engages
28 the professional services of the artist. On the other hand, if

1 the actor or model has a substantial bona fide ownership interest
2 in the business that sells the product or service that is being
3 advertised, it cannot be said that there is any procurement of
4 employment with a third party, and hence, the Act does not apply.
5 Here, we have negotiations over the role that Leonard was to play
6 with regard to a business that did not yet exist, and where it
7 was never determined that Leonard was not to be a bona fide co-
8 owner of this proposed business. Under these circumstances, it
9 is impossible to characterize these negotiations as attempted
10 procurement of employment to provide services as an artist to a
11 third party, and thus, we cannot conclude that there was any
12 violation of the Act.

13 h) Route American Sports - Leonard's proposed involvement in
14 the Japanese boxing clinics did not involve the "rendering [of]
15 professional services in motion picture, theatrical, radio,
16 television and other entertainment enterprises" within the
17 meaning of the Act. As such, there was no attempt to procure
18 Leonard's employment as an "artist" within the meaning of the
19 Act. The deal that was ultimately negotiated with RAS, under
20 which RAS was permitted to film Leonard while he was speaking at
21 a DARE charitable event, for television broadcast in Japan, does
22 not implicate the Act. No evidence was presented that Leonard
23 did anything more than give a speech at this event -- an activity
24 that does not amount to the rendition of professional services as
25 an artist. As such, there was no violation of the Act in
26 connection with the negotiation of this deal.

27 I) "Sugar Ray Leonard's Hit Parade" on ESPN Classic Sports
28 Network - This is not a close call. Rebney, on behalf of the

1 ERP, negotiated this contract under which Classic Sports Network
2 employed Leonard as a television show host, interviewer, analyst
3 and announcer. Leonard was hired to render professional services
4 in a television entertainment enterprise, and thus, was hired as
5 an "artist" within the meaning of the Act. In negotiating this
6 employment contract, ERP acted as a "talent agency" within the
7 meaning of the Act, and thus, **violated the Act.**

8 j) "Slam Man" - Neither Ersoff nor Rebney procured Leonard's
9 employment in this infomercial. No evidence was presented that
10 Rebney's discussions with Fitness Quest, subsequent to Leonard's
11 execution of this agreement, went beyond "clarifying" the terms
12 of the agreement-- i.e, establishing what it was that Leonard, on
13 his own, already agreed to. There is no evidence that Rebney or
14 Ersoff attempted to re-negotiate any new substantive terms to
15 this agreement. As such, we are unable to conclude that the Act
16 was violated.

17 k) "VarTec" - The evidence is overwhelming that Rebney, on
18 behalf of the ERP, procured a deal under which Leonard was to be
19 employed to act in television and radio advertisements, and to
20 perform services as a model in the creation of print advertising.
21 This constituted procurement of employment as an artist within
22 the meaning of the Act, and therefore **violated the Act.**
23 Subsequent to the negotiation of this deal, Ersoff attempted to
24 procure similar employment for Leonard, and attempted to extend
25 the term of the VarTec deal, thereby further violating the Act.

26 l) "Track Bowling Ball" - Here too, the evidence is
27 overwhelming that Rebney, on behalf of the ERP, negotiated a deal
28 under which Leonard was to be employed as an artist within the

1 meaning of the Act, and therefore violated the Act.

2 m) "12 Rounds to Victory" book - We have previously held
3 that the book publishing industry is not an "entertainment
4 enterprise" within the meaning of Labor Code §1700.4(b), and the
5 authors of published books are not "artists" within the meaning
6 of the Act.⁹ (*Hall v. Robb*, TAC No. 14-95.) Based on the
7 evidence presented, we conclude that there was no agreement and
8 no attempt to procure an agreement for Leonard to provide any
9 services as an artist in connection with this project. As such,
10 we find no violation of the Act.

11 n) "Knock Out Kings" - This was another agreement,
12 negotiated by Rebney on behalf of the ERP, under which Leonard
13 was to provide services as an "artist" within the meaning of the
14 Act. These negotiations constitute the procuring of employment
15 for an artist, within the meaning of Labor Code §1700.4(a), and
16 thus, another instance in which the ERP functioned as a "talent
17 agency," and thereby, violated the Act.

18 o) Appearance for Protection One - The negotiation of the
19 appearance fee that Leonard was to receive for speaking at this
20 corporate sponsored event did not constitute procurement of
21 employment that is covered by the Act, even coupled with Ersoff's
22 statement that the appearance could ultimately lead to an
23 advertising deal with Protection One. No evidence was presented
24 that Ersoff or Rebney attempted, offered or promised to procure
25 such a deal. As such, we find no violation of the Act.

26

27 ⁹On the other hand, writers who render "professional
28 services in motion picture, theatrical, radio, television and
other entertainment enterprises," such as studio scriptwriters,
for example, would fall within the definition of "artists."

1 p) "Buy Bid Win" - This was an attempt, by Ersoff and
2 Rebney, to procure employment for Leonard to act in television
3 and radio commercials, and to model in connection with print
4 advertising. This attempt to procure such employment violated
5 the Act.

6 q) "12 Rounds to Victory" infomercial - Leonard was to have
7 a substantial ownership share in the limited liability company
8 that was to own and sell the "Victory products," with profits to
9 be allocated in proportion to each member's share.¹⁰ Thus, the
10 negotiation of the agreement creating this LLC, which included a
11 provision for Leonard to act in an infomercial advertising the
12 Victory products, did not constitute procurement of employment
13 with a third party. Consequently, Ersoff and Rebney did not act
14 as talent agents, within the meaning of Labor Code §1700.4(a), in
15 negotiating this agreement, and therefore, there was no violation
16 of the Act.

17 11. Reviewing our findings, above, we have determined that
18 during the three year period from mid-1996 to mid-1999, Ersoff,
19 or the Ersoff/ISI "alliance", or the Ersoff/Rebney partnership,
20 violated the Talent Agencies Act in connection with seven
21 separate projects, by procuring or attempting to procure
22 employment for Leonard as an artist with third party employers.
23

24 ¹⁰ Leonard's substantial ownership interest in the business
25 that was to own the product or service that was to be sold to the
26 public distinguishes this from *Styne v. Stevens*, TAC No. 33-01,
27 where the Home Shopping Network ("HSN") purchased \$1,000,000 of
28 products from Stevens, and engaged Stevens' services to act in an
infomercial, in order to sell the products that were then owned
by HSN. Stevens had no ownership interest in HSN or in the
products she had sold to HSN, so she was therefore performing
professional services as an actress for a third party.

1 This pattern of ongoing unlawful procurement activities is
2 scarcely surprising, in that obtaining such employment for
3 Leonard was a central purpose of the Ersoff/ISI "alliance" and
4 the subsequent creation of the Ersoff/Rebney partnership. These
5 procurement activities were one of the services that Ersoff
6 provided to Leonard pursuant to the 1996 representation
7 agreement, and Ersoff now seeks to enforce this agreement through
8 his lawsuit for commissions allegedly owed for services performed
9 under the agreement. The overwhelming weight of judicial
10 authority leaves no doubt that as a consequence of this unlawful
11 procurement activity in violation of the Talent Agencies Act,
12 this representation agreement is void *ab initio* and
13 unenforceable. It is unenforceable as to any purported rights
14 that Ersoff or the ERP seek or may seek to enforce under that
15 agreement, including any rights to commissions or other
16 compensation for services provided to Leonard, whether or not
17 such services were provided in violation of the Talent Agencies
18 Act. We can discern no reason for allowing Ersoff or the ERP to
19 recover any amounts purportedly owed under this void agreement,
20 for to do so would subvert the only effective mechanism for
21 enforcing the prohibitions of the Talent Agencies Act. An
22 agreement cannot be declared void *ab initio* as to some claims and
23 enforceable for others that are founded under that same
24 agreement. "If the agreement is void no rights . . . can be
25 derived from it." *Buchwald v. Katz, supra*, 254 Cal.App.2d at
26 360.

27 12. We turn now to Rebney's claim that Ersoff's involvement
28 in these unlawful procurement activities precludes Ersoff from

1 maintaining an action against Rebney for a share of commissions
2 or other compensation that Leonard paid to Rebney for services
3 that were provided by Ersoff, or Rebney, or the ERP pursuant to
4 the terms of any agreements to provide representation to Leonard.
5 We must reluctantly acknowledge the legal merits of this claim,
6 even though the result is to allow Rebney -- at least as culpable
7 as Ersoff when it comes to unlawfully acting as a talent agent --
8 to maintain sole possession of amounts derived from illegal
9 transactions. The rationale for this is well established:

10 No principle of law is better settled than that a party
11 to an illegal contract or an illegal transaction cannot
12 come into a court of law and ask it to carry out the
13 illegal contract or to enforce rights arising out of
14 the illegal transaction. He cannot set up a case in
15 which he necessarily must disclose the illegal contract
16 or the illegal transaction as the basis of his
17 claim... The test whether a demand connected with an
18 illegal transaction is capable of being enforced is
19 whether the plaintiff requires the aid of the illegal
20 transaction to establish his case. If the plaintiff
21 cannot establish his case without showing that he has
22 broken the law, the court will not assist him, whatever
23 his claim in justice may be upon the defendant. If the
24 issuance of a ... license was a necessary prerequisite
25 to the legality of the firm transactions which [both
26 partners] jointly carried on as copartners, then, since
27 no such license was ever issued ... the partnership
28 contract was illegal from its inception; for in that
29 case the partnership contract necessarily would involve
30 the performance of illegal acts. And since [one of the
31 partners] in order to establish his case, necessarily
32 must invoke the partnership contract, it follows that
33 if the issuance of a ... license was requisite, the
34 court will not lend its aid to assist either party to
35 the contract in an action against the other,
36 notwithstanding the receipt by the latter of the
37 partnership profits, but will leave both parties where
38 it finds them. *Wise v. Radis* (1925) 74 Cal.App. 765,
39 776 (internal cites and quotations omitted).

25 In seeking recovery against Rebney for amounts that were
26 allegedly to be split pursuant to the terms of the Ersoff/Rebney
27 partnership agreement (or the Ersoff/ISI "affiliation"
28

1 agreement), Ersoff is seeking to enforce agreements that were
2 founded upon an illegal purpose -- namely, the purpose of
3 procuring artistic employment for Leonard. The illegality
4 results from the absence of a required talent agency license. In
5 order for Ersoff to establish his claim against Rebney, he must
6 at the very least disclose the existence of the illegal
7 agreements with Rebney and ISI, if not the illegal transactions
8 (i.e., the unlicensed procurement activities undertaken pursuant
9 to these agreements).

10 Again, the court's reasoning in *Wise v. Radis* is
11 instructive:

12 [W]hether the partnership contract be regarded as
13 illegal from the beginning because of the failure of
14 the joint adventurers to take out a partnership
15 license, or whether it became illegal after January 1,
16 1922, by reason of respondent's failure to maintain his
17 status as a duly licensed real estate broker, in either
18 case the action must be regarded as one to enforce an
19 illegal contract. The courts refuse to enforce such a
20 contract, and permit the defendant to set up its
21 illegality as a defense. While the defense is not an
22 honorable one, yet the courts permit it to be set up
23 even though in doing so the defendant may allege his
24 own moral turpitude. Violators of the law who are
25 parties to such illegal contracts are repudiated by the
26 courts because of the great supervening principle of
27 public policy involved, without reference to the
28 attitude which one of the parties may occupy to the
29 other, where both are *in pari delicto*. . . . [T]he
30 defense is a very dishonest one, and it lies ill in the
31 mouth of the defendant to allege it, and it is only
32 allowed for public considerations and in order the
33 better to secure the public against dishonest
34 transactions. To refuse to grant either party to an
35 illegal contract judicial aid for the enforcement of
36 his alleged rights under it tends strongly towards
37 reducing the number of such transactions to a minimum.
38 *Ibid.* at 778 (internal cite and quotation omitted).

26 Likewise, in declining to enforce a partner's claim for his
27 share of the partnership's profits that were allegedly wrongfully
28 withheld by his co-partner, the California Supreme Court held:

1 If this contract of copartnership had as its purpose
2 the letting of apartments for purposes of prostitution,
3 and if the business of the copartnership, as pleaded in
4 the answer, was the doing of this precise thing, then
5 the copartnership contract was illegal . . . and equity
6 would no more entertain an action founded upon such
7 contract for relief of either of the parties to it,
8 than it would entertain an action between two thieves
9 for an equitable division of their plunder. A void
10 contract, a contract against public policy or against
11 the mandate of the statute, may not be made the
12 foundation of any action, either in law or in equity.
13 *Chateau v. Singla* (1896) 114 Cal. 91, 93-94.

8 Though decided over a century ago, this reasoning applies with
9 equal force to the present controversy between Ersoff and Rebney
10 over Ersoff's attempt to enforce his partnership agreement with
11 Rebney, by seeking a share of amounts that Leonard paid to Rebney
12 pursuant to Leonard's obligations under the void 1996
13 representation agreement, or any other agreement under which
14 Ersoff or Rebney provided unlicensed procurement services to
15 Leonard.

16 13. When asked to identify all contracts that he believes
17 he had entered into with Leonard which Leonard subsequently
18 breached, Ersoff testified that there were three separate
19 contracts upon which he is seeking amounts allegedly owed -- the
20 1996 representation agreement, the agreement establishing the LLC
21 to market "Victory products," and the agreement establishing the
22 boxing management business. Our conclusion that Ersoff has no
23 enforceable rights under the void 1996 representation agreement
24 is not determinative as to whether the Talent Agencies Act
25 precludes enforcement of the latter two agreements. "There are
26 certain cases in which a recovery may be authorized in spite of
27 an illegal contract, when the action is not founded on the
28 illegal contract, but when, on the contrary it is based upon a

1 subsequent legal contract or agreement which may be established
2 without reference to the illegal contract." *Holm v. Bramwell*
3 (1937) 20 Cal.App.2d 332, 337.

4 14. No evidence was presented upon which we can conclude
5 that the Talent Agencies Act precludes enforcement of the
6 "Victory products" LLC agreement¹¹ or the boxing management
7 company agreement. The various unlawful procurement activities
8 discussed above were undertaken pursuant to the 1996
9 representation agreement, and not pursuant to the agreement
10 creating the "Victory products" LLC or the agreement creating the
11 boxing management business. These latter two agreements were
12 truly separate and distinct from the representation agreement.
13 First, both of the latter two agreements established bona fide
14 business entities that are co-owned by Leonard, in which Leonard
15 was to share profits and losses. Second, Ersoff's rights under
16 these two agreements are rights that he has as a principal in these
17 businesses -- namely, the right to profits based on his ownership
18 share, rather than any right to commissions calculated as a
19 percentage of Leonard's earnings (as provided under the void
20 representation agreement). Third, in enforcing his rights under
21 the "Victory products" LLC agreement or the boxing management
22 business agreement, Ersoff would not (and cannot) base his claim

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25 ¹¹ The scope of the "Victory products" LLC agreement is
26 discussed in paragraph 10(q) in the Findings of Fact, above. The
27 separate, earlier agreement regarding the "12 Rounds to Victory"
28 book, discussed at paragraph 10(m), is not part of the LLC
agreement. Instead, any claims Ersoff might have regarding
amounts owed under the book agreement are unenforceable, as
Ersoff's only source of right to payment in regard to the book
contract would be in the form of commissions owed under the terms
of the void 1996 representation agreement.

1 on amounts allegedly owed pursuant to the void representation
2 agreement -- i.e., any action to enforce obligations owed under
3 the latter two agreements would not be a backdoor subterfuge for
4 enforcing the right to any amounts purportedly owed under the
5 void representation agreement. Instead, any claims based on
6 these two agreements can be maintained only to the extent such
7 claims are founded upon one or the other of these two agreements,
8 and not the void representation agreement.

9 15. Just as the Talent Agencies Act does not preclude
10 Ersoff from enforcing the "Victory products" LLC agreement and
11 the boxing management business agreement against Leonard, so too,
12 the Act does not preclude Ersoff from enforcing these agreements
13 against Rebney, for amounts that Rebney allegedly owes to Ersoff
14 pursuant to these agreements.

15 ORDER

16 For the reasons set forth above, IT IS HEREBY ORDERED that
17 the 1996 representation agreement between ERSOFF and LEONARD is
18 unlawful and void *ab initio*, and that ERSOFF has no enforceable
19 rights thereunder, against LEONARD or REBNEY or anyone else.
20 However, based on the evidence presented, the Talent Agencies Act
21 would not prohibit enforcement of the separate "Victory products"
22 LLC agreement and the boxing management business agreement, and
23 to the extent that ERSOFF has any claims against LEONARD or

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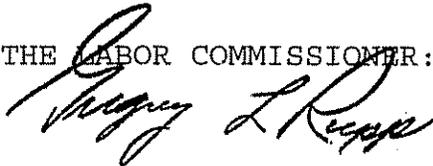
1 REBNEY arising under either the "Victory products" LLC agreement
2 or the boxing management business agreement, he may proceed with
3 such claims.

4
5 Dated: 8/30/04


MILES E. LOCKER
Attorney for the Labor Commissioner

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7
8 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

9
10 Dated: September 2, 2004


GREGORY L. RUPP
Acting Deputy Chief Labor Commissioner

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STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(RAY CHARLES LEONARD; BJORN REBNEY v. SETH ERSOFF; ERSOFF/REBNEY PARTNERSHIP)
(TAC 25-01)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On September 2, 2004, I served the following document:

DETERMINATION OF CONTROVERSY

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

JONATHAN LOEB, ESQ.
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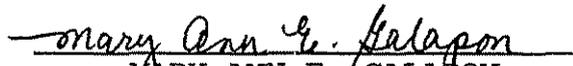
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and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 2, 2004, at San Francisco, California.


MARY ANN E. GALAPON