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6
7 BEFORE THE LABOR COMMISSIONER

8 STATE OF CALIFORNIA
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11 PHILLIP B. GITTELMAN,) No. TAC 24-02
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17 The above-captioned matter, a petition to determine
18 controversy under Labor Code §1700.44, came on regularly for
19 hearing on April 25, 2003, in Los Angeles, California, before the
20 Labor Commissioner's undersigned hearing officer. Petitioner was
21 represented by Jay Coggan, and Respondent was represented by Eli
22 Kantor. Based on the evidence presented at this hearing and on
23 the papers on file in this mater, the Labor Commissioner hereby
24 adopts the following decision.

25 FINDINGS OF FACT

26 1. Petitioner PHILLIP GITTELMAN manages professional
27 entertainers. During the period from 1994 to 2001, he was not
28 licensed as a talent agent by the California Labor Commissioner.

1 2. Respondent DARYL KAROLAT, aka TYLER MANE is a
2 professional actor. Prior to becoming an actor, he was a
3 professional wrestler.

4 3. On July 20, 1994, the parties entered into a written
5 Personal Management Agreement, under which Karolat engaged
6 Gittelman as his personal manager for a period of two years, with
7 Gittelman to be compensated for his services with the payment of
8 commissions equal to 15% of Karolat's gross earnings stemming
9 from his activities in the entertainment industry. The
10 Management Agreement expressly stated that Gittelman is not
11 licensed as a talent agent, and does not offer, agree or promise
12 to seek or obtain employment for Karolat. Gittelman's duties,
13 under the Management Agreement, were to "advise [Karolat] . . .
14 and to direct and advance all matters which increase the market
15 demand for [Karolat's] services, products and creative
16 abilities."

17 4. On or about January 28, 1997, the parties signed a
18 letter agreement extending the term of the Management Agreement
19 to January 28, 2000. On January 10, 2000, the parties signed
20 another letter agreement extending the term of the Management
21 Agreement to January 28, 2002.

22 5. On or about January 9, 2001, the parties executed an
23 Amendment to the Management Agreement, as extended. It was
24 agreed that Gittelman would cease taking an active part in
25 Karolat's career, with the exception of an appearance for
26 Creation Entertainment on January 28, 2001, for which Gittelman
27 would receive a 15% commission on Karolat's earnings for that
28 appearance. The Amendment further specified that as to all other

1 money or residuals forthcoming from contracts Karolat had entered
2 into prior to January 9, 2001, Gittelman would receive a 15%
3 commission, and as to any future contracts pertaining to any
4 existing contract for Karolat's artistic services, Gittelman
5 would receive a 5% commission.

6 6. Later in 2001, Karolat refused to pay commissions that
7 were due under the terms of the Management Agreement, as amended.
8 Gittelman then filed a complaint against Karolat in Los Angeles
9 Superior Court, seeking payment of these commissions. Karolat
10 filed an answer to the complaint, alleging that Gittelman
11 violated the Talent Agencies Act by acting as an unlicensed
12 talent agent, and that as a consequence, the Management Agreement
13 is void and unenforceable. Thereafter, on July 26, 2002,
14 Gittelman filed the instant petition to determine controversy, so
15 as to permit the Labor Commissioner to exercise its initial
16 primary jurisdiction to determine the issues arising under the
17 Talent Agencies Act. By this petition, Gittelman seeks a
18 determination that he did not violate the Talent Agencies Act,
19 and therefore, that the Management Agreement, as amended, is not
20 made void or unenforceable by application of the Talent Agencies
21 Act. Karolat, by his answer to the petition, seeks a
22 determination that Gittelman violated the Act by acting as an
23 unlicensed talent agent in violation of Labor Code §1700.5, and
24 that as a result, the Management Contract is void and
25 unenforceable. Karolat also seeks an order from the Labor
26 Commissioner requiring the disgorgement of all commissions that
27 were paid to Gittelman pursuant to the Management Agreement.

28 7. There is no dispute that Gittelman obtained several

1 appearances for Karolat at comic book conventions or at retail
2 stores, and negotiated the terms of these appearances. Karolat
3 was not engaged to perform services as a professional actor at
4 these conventions or retail stores. Rather, Karolat was engaged
5 to sign comic books, trading cards, photographs or other
6 memorabilia, to talk to persons attending the convention or
7 visiting the store, and to participate in question and answer
8 sessions and to talk about his movie roles and the characters he
9 plays. Karolat did not wear a costume at any of these
10 appearances and was not required to perform, either as a wrestler
11 or as an actor.

12 8. Karolat testified that almost immediately after he
13 retained Gittelman's services as a personal manager, in 1994,
14 Gittelman obtained professional employment for Karolat as an
15 actor in the San Diego Repertory Theatre production of "Trafford
16 Tanzi." Karolat further testified that he was sitting in
17 Gittelman's office when Gittelman negotiated the deal with the
18 Repertory Theatre's casting agent. Karolat was paid the Actors'
19 Equity minimum salary of \$432 per week for this performance, for
20 approximately two months until the show closed in December 1994.
21 Gittelman disputed Karolat's account of how Karolat obtained this
22 engagement. Gittelman testified that he received a telephone
23 call from the casting director, who told him that the Repertory
24 Theater was producing a wrestling musical. Gittelman states that
25 he merely suggested that to the casting director that she meet
26 with Karolat, that the casting director later met with Karolat,
27 and that Gittelman was not present at this meeting. Gittelman
28 asserts he did not engage in any negotiations with the Repertory

1 Theatre, either before or after Karolat met with the casting
2 director.

3 9. Karolat also testified that in 1999 Gittelman told
4 Karolat that the producer of the film "Gladiator" was a friend of
5 his, and based on Gittelman's encouragement, Karolat sent this
6 producer an audition tape in an attempt to get a part in the
7 motion picture. Gittelman admitted that he knew this producer,
8 but testified that he did not do anything to procure or attempt
9 to procure work for Karolat on this film, other than letting
10 Karolat know about the film and how to get an audition tape to
11 the producer. There was no evidence presented by Karolat to
12 suggest that Gittelman did anything more than that.

13 10. Karolat testified that he obtained a role in the motion
14 picture "Son of the Beach" after Gittelman contacted his friend,
15 a producer on that film, and told this producer that Karolat
16 "would be right for the job." Karolat admitted that he was
17 represented by a talent agency at the time he got this job, and
18 this talent agency negotiated the terms of the deal for "Son of
19 the Beach," but nonetheless, according to Karolat, Gittelman did
20 all the preliminary work getting this job. Gittelman disputed
21 this account, testifying that he never contacted any film
22 producer on behalf of Karolat, and that although there are
23 occasions when producers he knows will call him, it was his
24 practice in such situations to merely "act as a conduit", by
25 passing on whatever the producer says to Karolat or to Karolat's
26 talent agent.

27 11. On or about July 17, 2000, Karolat appeared as a guest
28 on the X-Show, a taped television talk show on the FX Network.

1 During his appearance, Karolat spoke about his role in the film
2 "X-Men"¹ and his wrestling career. Karolat testified that
3 Gittelman obtained this television show appearance; Gittelman
4 testified that the producers of the X-Show did call him and asked
5 if Karolat would appear for the "union minimum", and that
6 Gittelman merely conveyed this offer to Karolat, for Karolat to
7 accept or reject. However, after Karolat decided to accept the
8 offer, Gittelman (not Karolat) communicated this acceptance to
9 the show's producers. Karolat was paid \$660 for this appearance,
10 and Karolat paid Gittelman \$99 in commissions in connection with
11 this appearance.

12 12. On or about July 17, 2000, a representative of Marvel
13 Enterprises contacted Gittelman, while Gittelman was in New York
14 with Karolat, seeking to obtain Karolat's services to provide
15 the voice of a comic book character, Wolverine, in a recorded
16 promotional spot for Marvel Enterprises "Online Wolverine Radio
17 Show." Gittelman relayed this offer to Karolat, who agreed to do
18 the spot. The next day, Karolat signed a "Talent Consent,
19 Release and Work For Hire" Agreement, under which Marvel agreed
20 to pay him \$1 in compensation for doing this promotional spot,
21 and his voice was then recorded.

22 13. On or about October 26, 2000, Gittelman received a
23 letter from a publicity manager for Twentieth Century Fox Home
24 Entertainment International (TCFHEI), inquiring as to Karolat's
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26 ¹It should be noted that Karolat's role in the film X-Men
27 had been procured by his talent agent, not by Gittelman, and that
28 his talent agent negotiated the terms of the contract for his
services in connection with that film. Also, Karolat used the
services of a talent agency, not Gittelman, to obtain a role in
an AT&T commercial.

1 availability "to work with TCFHEI in supporting [the] upcoming
2 releases" in video and DVD, of the film X-Men, and towards that
3 end, to appear at a conference of DVD rental dealers in Las Vegas
4 in December 2000. The letter from TCFHEI did not contain any
5 proposal for terms of compensation. After determining that
6 Karolat was interested in the Las Vegas appearance, Gittelman
7 negotiated the terms of this appearance in Las Vegas, for which
8 Karolat was paid \$2,700, out of which Gittelman received \$375 in
9 commissions. During this appearance, Karolat took the stage, and
10 "went into a wrestling mode," characterized by "ranting and
11 raving." He then answered audience questions and signed
12 autographs.

13 LEGAL ANALYSIS

14 1. Labor Code section 1700.4(b) defines "artists" as
15 "actors and actresses rendering services on the legitimate stage
16 and in the production of motion pictures, radio artists, musical
17 artists, musical organizations, directors of legitimate stage,
18 motion picture and radio productions, musical directors, writers,
19 cinematographers, composers, lyricists, arrangers, models, and
20 other artists and persons rendering professional services in
21 motion picture, theatrical, radio, television, and other
22 entertainment enterprises." Karolat is an "artist" within the
23 meaning of Labor Code section 1700.4(b); however, as discussed
24 below, only certain of the employments or engagements at issue
25 herein were for the performance of services that fall within this
26 definition.

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 artistic
5 services that are performed by "artists" within the meaning of
6 subsection (b); that is, "professional services in motion
7 picture, theatrical, radio, television, and other entertainment
8 enterprises," including advertising, performed by actors,
9 musicians, models, writers, cinematographers, directors,
10 composers, and the like. Unless the term "employment or
11 engagements for an artist or artists" is limited to such artistic
12 employment or engagements, absurd and clearly unintended results
13 would follow. If the term was broadly construed to mean any
14 employment or any engagement for a person who is sometimes
15 employed or engaged as an artist, a person who tries to find a
16 waitress job for a part-time actress, or who tries to find an
17 office clerical job for a part-time musician, would fall within
18 the definition of a "talent agent," thereby subjecting such
19 person to the Talent Agency Act's licensing and regulatory
20 scheme. Moreover, a review of the relevant legislative history
21 leaves no doubt that the intent of the Act was to protect artists
22 in their capacities as artists, and to regulate persons who
23 procure artistic employment for artists. The "purpose [of the
24 Act] is to protect artists seeking professional employment from
25 the abuses of talent agencies." *Styne v. Stevens* (2001) 26
26 Cal.4th 42, 50. Thus, "the Act's definition of a talent agency
27 is narrowly focused on efforts to secure professional 'employment
28 or engagements' for an 'artist or artists.'" (§1700.4, subd. (a).)

1 Thus, it does not cover . . . assistance in an artist's business
2 transactions other than professional employment." *Ibid*, at 50-
3 51.

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

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

25 5. An agreement that violates the licensing requirement of
26 the Talent Agencies Act is illegal and unenforceable. "Since the
27 clear object of the Act is to prevent improper persons from
28 becoming [talent agents] and to regulate such activity for the

1 protection of the public, a contract between an unlicensed
2 [agent] and an artist is void." *Buchwald v. Superior Court*
3 (1967) 254 Cal.App.2d 347, 351. Having determined that a person
4 or business entity procured, promised or attempted to procure
5 artistic employment for an artist without the requisite talent
6 agency license, "the [Labor] Commissioner may declare the
7 contract [between the unlicensed agent and the artist] void and
8 unenforceable as involving the services of an unlicensed person
9 in violation of the Act." *Styne, supra*, 26 Cal.4th 42, 55.
10 "[A]n agreement that violates the licensing requirement is
11 illegal and unenforceable" *Waisbren v. Peppercorn*
12 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the
13 artist that is party to such an agreement may seek disgorgement
14 of amounts paid pursuant to the agreement, and "may . . . [be]
15 entitle[d] . . . to restitution of all fees paid the agent."
16 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of
17 restitution is, of course, subject to the one year limitations
18 period² set out at Labor Code §1700.44(c).

19 6. Karolat's appearances at comic book conventions and at
20 retail stores, where he signed comic books, trading cards, and
21 photographs, spoke to attendees about his movie roles and
22 wrestling career, and answered audience questions were not
23 employment or engagements of an artistic nature, so as not to
24 constitute "employment or engagements for an artist" within the
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27 ² Here, there was no evidence that Karolat paid any
28 commissions to Gittelman in the one year period prior to the
filing of the petition. Consequently, Karolat's claim for
reimbursement of amounts paid as commissions is barred by the
statute of limitations.

1 meaning of Labor Code §1700.4(b). Gittelman therefore did not
2 violate the Talent Agencies Act by procuring or attempting to
3 procure these engagements for Karolat.

4 7. Karolat's account of how he obtained a role in the 1994
5 production of "Trafford Tanzi" would obviously compel the
6 conclusion that Gittelman acted as a talent agent in procuring
7 this role. Even if we were to credit Gittelman's testimony, and
8 his denial that he negotiated the terms of compensation for
9 Karolat, we would still be left with Gittelman's admission that
10 during the telephone call from the show's casting director,
11 Gittelman suggested that the casting director meet with Karolat.
12 By his own admission, Gittelman did more in this instance than
13 merely act as a conduit transmitting information received from a
14 producer or casting director who makes an unsolicited call to
15 advise Gittelman of an available part in a production, with
16 Gittelman then calling the artist to advise him of this
17 information, with the artist then deciding (perhaps based on the
18 manager's recommendation) whether to call the producer or casting
19 director in order to try to obtain the role. By suggesting to
20 the casting director that the casting director meet with Karolat,
21 Gittelman played an active role beyond that of a "mere conduit"
22 in promoting Karolat for this engagement. The making of this
23 suggestion crosses the line into the zone of procurement or
24 attempted procurement. By doing so without a talent agency
25 license, Gittelman violated the Talent Agencies Act.

26 8. On the other hand, Gittelman's conduct in encouraging
27 Karolat to contact the producer of the motion picture "Gladiator"
28 in order to attempt to obtain a role in that film, did not, in

1 any way whatsoever, constitute procurement or attempted
2 procurement under the Act.

3 9. On the basis of the evidence before us, we are unable to
4 conclude that Gittelman procured Karolat's role in "Son of the
5 Beach." The only evidence presented on this issue was the
6 testimony of Karolat and the testimony of Gittelman. Each
7 witness disputed the account presented by the other. There was
8 nothing inherent as to the testimony of either witness that made
9 it more or less credible than that of the other witness. As the
10 party seeking to prove violation(s) of the Talent Agencies Act,
11 Karolat has the burden of proving that Gittelman procured or
12 attempting to procure artistic employment or engagements. We
13 would not hesitate to find unlawful procurement in connection
14 with "Son of the Beach" if Karolat's account had been supported
15 by any sort of corroborating evidence.³ However, no such
16 corroborating evidence was presented.

17 10. In appearing as a talk-show guest on the X-Show, Karolat
18 did not "render[] professional services in . . . television and
19 other entertainment enterprises." The mere fact that an actor
20 appears as a guest on a talk show does not mean that the actor is
21 acting, or otherwise performing any professional services as an
22 "artist", within the meaning of Labor Code §1700.4(b). Speaking
23 about one's work as an actor is something that is separate and
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25 ³ Labor Code §1700.44(d) provides that it is not unlawful
26 for a person or corporation that is not licensed as a talent
27 agent to "act in conjunction with, and at the request of, a
28 licensed talent agency in the negotiation of an employment
contract." This provision is not applicable here as Gittelman
does not contend, and did not provide any evidence, that anything
he did anything in connection with "Son of the Beach" at the
request of Karolat's licensed talent agent.

1 distinct from acting, and a talk show is different from a variety
2 show (like Saturday Night Live) where actors perform skits,
3 musicians perform songs, etc. A talent agency license is not
4 required for the procurement of a guest appearance on a talk show
5 provided the appearance does not involve the rendition of
6 artistic services⁴. As such, there was no violation of the
7 Talent Agencies Act in connection with Karolat's appearance on
8 the X-Show.

9 11. No evidence was presented that would establish that
10 Gittelman engaged in any unlawful procurement activity in
11 connection with Karolat's recorded promotional spot for Marvel
12 Enterprises "Online Wolverine Radio Show." The mere relaying of
13 an initial, unsolicited offer from the producer of the
14 promotional spot, absent evidence of any follow-up discussions or
15 negotiations between Gittelman and the producer, does not
16 comprise a violation of the Act.

17 12. There was no evidence presented from which we can
18 conclude that Karolat was employed or engaged to "render
19 professional services" as an "actor" or in any capacity as an
20 "artist," within the meaning of Labor Code §1700.4, in connection
21 with his appearance at the conference of DVD rental dealers in
22 Las Vegas in December 2000. The letter from TCFHEI did not
23 propose that Karolat perform any professional artistic services.
24 There was no evidence that Karolat's contract to appear at this
25 event required him to perform any services as an actor, or that

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27 ⁴ 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 anyone from TCFHEI ever requested that Karolat act or otherwise
2 provide any services as an artist at this event. Moreover, even
3 assuming, *arguendo*, that Karolat had been expected to go "into a
4 wrestling mode," replete with "ranting and raving," before
5 signing autographs and answering questions from the audience, we
6 cannot conclude that this sort of "performance" -- from a former
7 professional wrestler, well known for his wrestling career --
8 constitutes "acting" any more than Muhammad Ali "acted" at the
9 recent major league baseball All Star Game by pretending to box
10 by appearing to throw punches at persons standing next to him.

11 13. Thus, in reviewing all of the evidence, we have exactly
12 one instance of unlawful procurement that took place early in the
13 first year of a seven year relationship. We must now determine
14 whether this isolated, long ago violation of the Act should now
15 preclude Gittelman from enforcing the Management Agreement, as
16 amended in January 2001 -- over six years after the only unlawful
17 procurement activity took place. We acknowledge the line of
18 cases that correctly hold that even incidental procurement is
19 regulated under the Talent Agencies Act, and that the Act is
20 violated whenever an unlicensed person or business entity
21 procures, offers, promises, or attempts to procure artistic
22 employment. *Styne, supra*, 26 Cal.4th 42, 51; *Park v. Deftones*
23 (1999) 71 Cal.App.4th 1465, 1470; *Waisbren, supra*, 41 Cal.App.4th
24 246, 253-261. But these cases do not establish a rule that would
25 void each and every renewal and amendment of the original
26 contract between the artist and the artist's manager when the
27 manager committed one isolated procurement violation of the Act
28 during the first few months of an initial contract. There is no

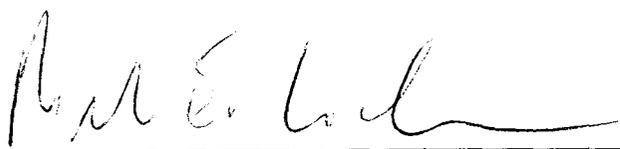
1 question that the Labor Commissioner may declare that the initial
2 management agreement between Karolat and Gittelman, executed in
3 1994, is void as a consequence of the unlawful procurement
4 activity that occurred shortly after its execution. But absent
5 proof of unlawful procurement activity at any time since 1994,
6 the unlawful procurement activity in 1994 does not void any of
7 the subsequent renewals or amendments that were executed in 1997,
8 2000, and 2001, and the Talent Agencies Act does not make any of
9 these subsequent renewals or amendments unenforceable, at least
10 to the extent that the commissions sought under these subsequent
11 renewals or amendments are based upon employment contracts that
12 were entered into subsequent to the execution of the first
13 renewal of the management agreement in 1997. To conclude
14 otherwise, so as to void every subsequent agreement between the
15 parties because of this one isolated violation would do nothing
16 to further the remedial purposes of the Act, and would instead
17 turn Act into a vehicle for injustice.

18 ORDER

19 For the reasons set forth above, IT IS HEREBY ORDERED
20 that the parties' initial management agreement of 1994 is void,
21 and that Gittelman has no right to commissions on any employment
22 contracts that Karolat entered into from the inception of this
23 agreement until its renewal on January 28, 1997. IT IS FURTHER
24 ORDERED that the various renewals and modifications of this
25 management agreement, that were executed in 1997, 2000, and 2001,
26 are not void and are not unenforceable by application of the
27 Talent Agencies Act, except to the extent that Gittelman seeks
28 commissions on any employment contracts that were entered into

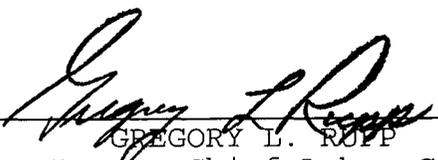
1 prior to January 28, 1997. Consequently, we hold that Gittelman
2 may proceed with his action for breach of the Management
3 Agreement, as amended in 2001, to the extent that he is claiming
4 commissions or other amounts due pursuant to employment contracts
5 that Karolat entered into on or after January 28, 1997.

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7 Dated: July 19, 2004

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MILES E. LOCKER
Attorney for the Labor Commissioner

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11 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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14 Dated: July 19, 2004

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GREGORY L. RUPP
Acting Deputy Chief Labor Commissioner