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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

11	ERNESTO BAUTISTA,	)	No. TAC 3-04
12		)	
13		)	
14	Petitioner,	)	
15		)	
16	vs.	)	
17		)	
18	VIVIAN ROMERO, individually and dba	)	DETERMINATION OF
19	DIAMOND HEART MUSIC,	)	CONTROVERSY
20		)	
21	Respondent.	)	
22		)	

23 The above-captioned matter, a petition to determine  
24 controversy under Labor Code §1700.44, came on regularly for  
25 hearing on March 23, 2005, in Los Angeles, California, before the  
26 Labor Commissioner's undersigned hearing officer. Petitioner  
27 appeared and was represented by attorney Joseph Golden, and  
28 Respondent appeared and was represented by attorney Robert Frank.  
Based on the evidence presented at this hearing and on the other  
papers on file in this matter, the Labor Commissioner hereby  
adopts the following decision.

FINDINGS OF FACT

1. Petitioner ERNESTO BAUTISTA (hereinafter "Petitioner" or  
Bautista") is a musician and songwriter.

1           2. Respondent VIVIAN ROMERO (hereinafter "Respondent" or  
2 "Romero") has been, at all times relevant herein, the sole owner  
3 of DIAMOND HEART MUSIC, a music publishing business based in Los  
4 Angeles County. Romero has never been licensed by the State  
5 Labor Commissioner as a talent agent. Romero has had formal  
6 training as a musician, and she has played the piano  
7 professionally.

8           3. In late 2001, Romero learned that a television  
9 production company, Barn Productions, was creating the pilot  
10 television show for what was to become "The Shield," a dramatic  
11 series on the FX Network. Bob Knight, with Barn Productions,  
12 asked Romero if she was interested in submitting the theme music  
13 for the series. Knight specified that he wanted the theme to  
14 sound Latin and edgy. Romero agreed to undertake this project.  
15 She then invited Bautista and another musician, Rodney Alejandro,  
16 to accompany her to a screening of the pilot in order to get a  
17 better sense of what sort of music would complement the dramatic  
18 content.

19           4. After attending this screening, Romero, Bautista and  
20 Alejandro went to a coffee shop to discuss the show's style and  
21 demographics. Shortly thereafter, the three of them met at  
22 Alejandro's recording studio, to create and record the theme  
23 music. The parties' testimony differs sharply as to their  
24 respective roles in the creative process.

25           According to Bautista, Romero played almost no role in  
26 creating or recording the music. Instead, the music was written  
27 entirely by Alejandro, prior to the meeting at his recording  
28 studio. The lyrics were also written by Alejandro, with the

1 exception of one line ("throw your hands up") that was written by  
2 Bautista. The vocals on the theme that was submitted were  
3 performed entirely by Bautista, although he did admit that Romero  
4 "tried singing over the music" on the line "just another day,"  
5 but her voice was removed from the mix because the music sounded  
6 better with a "rougher" masculine voice. The music that was  
7 submitted to Barn Productions was initially recorded in November  
8 2001, and re-recorded in February 2002. Alejandro was the only  
9 person who played an instrument during these recording sessions -  
10 in November 2001 he "programmed" the music using an electronic  
11 keyboard, and in February 2002 he added some piano backing. In  
12 summary, according to Bautista, Romero did not compose any of the  
13 music, did not have any suggestions for changing the composition,  
14 and did not perform any instrument when the music was recorded.  
15 According to Bautista, other than "getting us the gig," Romero  
16 made "zero contribution" to the theme music that was submitted to  
17 Barn Productions.

18 In contrast, Romero testified that she wrote some of the  
19 lyrics and some of the musical notes for the theme song. But,  
20 while maintaining that the theme song, in its entirety, was the  
21 result of the collaborative artistic efforts of Alejandro,  
22 Bautista, and herself, Romero was unable to identify any specific  
23 suggestions that she made regarding lyrics or music. Romero  
24 testified that Bautista wasn't even at every recording session,  
25 so that he couldn't possibly know the full extent of her  
26 contribution. There were three sessions at which Bautista,  
27 Alejandro and Romero worked together, and two or three other  
28 sessions with just Romero and Alejandro. During these two or

1 three sessions without Bautista, Romero and Alejandro decided  
2 whether and how to "restructure" the theme, and worked on mixing  
3 the music, changing the sounds, and adding vocals. Finally,  
4 Romero testified that her vocals were on the music that was  
5 submitted to Barn Productions, and that this version is still  
6 used as the television show's opening theme song. To be sure,  
7 Romero acknowledged that as a result of sound mixing, it is very  
8 difficult to identify her voice in the final version.  
9 Nonetheless, Romero testified that she sang or said words that  
10 were layered over the entire chorus, including the recurring  
11 phrase "just another day," and the line "papi ven aqui."

12         Neither side produced Rodney Alejandro as a witness.  
13 However, Alejandro signed a declaration on April 8, 2004, in  
14 which he stated that Romero "actively participated in the writing  
15 and composition of the song."

16         For the reasons set forth in the Conclusions of Law, below,  
17 we find it unnecessary to resolve these conflicting accounts of  
18 Romero's actual role in the creative process.

19         5. During this period of late 2001 to early 2002, Romero's  
20 business relationship with Bautista extended beyond the writing  
21 and recording of the theme music for The Shield. Romero wanted  
22 to represent Bautista as his personal manager. Romero testified  
23 that she manages other performers in the music business, and that  
24 in that capacity, she tries to get songs that they own used on  
25 television commercials, and also, that she tries to obtain  
26 recording contracts for these musicians. Romero further  
27 testified that she never represents actors, and never offered to  
28 obtain or help obtain acting work for Bautista. Ultimately,

1 Bautista was unwilling to enter into an agreement with Romero to  
2 have her serve as his personal manager. Nonetheless, on or about  
3 December 19, 2001, Bautista signed a one page letter that had  
4 been prepared by Romero authorizing Diamond Heart Music to  
5 represent his interests in connection with certain specified  
6 published music, to be pitched for use on television, film and  
7 commercials. Under this agreement, Diamond Heart would "collect  
8 the synchronization fee from the vendor" and pay those fees to  
9 Bautista, less a 30% "administration fee" for Diamond Heart's  
10 services. A separate agreement, entitled a "Finder's Fee  
11 Agreement," was drafted and signed by Bautista sometime during  
12 December 2001 or January 2002, under which he agreed to pay 15%  
13 of "the entire recording budget" to Romero, if "solely and  
14 exclusively through [her] own efforts," she were to "cause  
15 Ernesto Bautista to enter into a recording contract with a major  
16 record label." Finally, on January 20, 2002, Bautista executed a  
17 third written agreement with Romero, authorizing Diamond Heart  
18 the non-exclusive right to represent Bautista with respect to  
19 "various copyrights from [his] publishing catalogue to be pitched  
20 to for film, TV & commercials," so as to allow Diamond Heart "the  
21 opportunity to negotiate a deal for the song's use in film, TV,  
22 and another related media," and to "administer the copyright only  
23 for the life of the licensing and synchronization agreement  
24 negotiated by Diamond Heart." Under this contract, Diamond Heart  
25 was authorized to collect any synchronization fees directly from  
26 the purchaser of the copyright, and to pay Bautista these  
27 synchronization fees less a 30% "administration/finders fee" that  
28 would be retained by Diamond Heart for its services. This

1 contract further provided, with respect to royalties for use of  
2 published music, that "any performance moneys that result from a  
3 synchronization licensing agreement will be collected by the  
4 performance rights society (ASCAP, BMI, SESAC) and distributed  
5 directly to the writers and publishers of the song."

6 6. On March 26, 2002, Barn Productions entered into a  
7 written contract with Diamond Heart Music, with an effective date  
8 of January 22, 2002. This contract was signed by Romero,  
9 Bautista and Alejandro. Under the terms of this contract, Barn  
10 Productions purchased the "services of Vivian Romero, Ernesto  
11 Bautista and Rodney Alejandro ... to compose, package, perform  
12 and deliver all of the music ... [Barn Productions] may require  
13 ... for the first season of the television series entitled 'The  
14 Shield'." The contract further provided that Barn Productions  
15 would become the copyright owner of any such music, that Romero,  
16 Bautista and Alejandro would get a screen credit for the music  
17 theme, that upon completion of their services, Barn Productions  
18 would pay \$6,000 to Diamond Heart Music, and would pay future  
19 royalties for any publication and use of the music. In an  
20 addendum to this contract, the parties also entered into an  
21 agreement for "borrowing of services," under which Diamond Heart  
22 Music agreed to make the artists' services available to Barn  
23 Productions upon request for writing, composing, arranging,  
24 recording, producing, mixing, and delivering music for future  
25 episodes. In a second addendum to the contract, the parties  
26 agreed on the circumstances under which royalties would be paid  
27 by Barn Productions to Diamond Heart, and the basis upon which  
28 they would be calculated.

1           7. Bautista testified that the only engagement that Romero  
2 ever obtained for him, and the only engagement Romero ever  
3 attempted to obtain for him, 'was the engagement to create the  
4 music and record music for The Shield. Romero never procured,  
5 attempted to procure, or offered or promised to procure live  
6 musical performances or acting work for Bautista.

7           8. After receiving the \$6,000 from Barn Productions as  
8 compensation for the theme song, Romero paid Bautista and  
9 Alejandro their shares. In late April 2002, Romero personally  
10 delivered this payment to Bautista, along with a letter dated  
11 April 18, 2002, explaining the basis for deductions from the  
12 \$2,000 gross amount of his share, resulting in a net payment to  
13 Bautista of \$1,144. The deductions, which Romero retained for  
14 herself, included \$600 for a "30% administration fee" and \$256  
15 for "legal fees." The 30% administration fee was expressly  
16 authorized by the January 20, 2002 written contract between  
17 Bautista and Romero. The "legal fees" were based on a purported  
18 oral agreement under which Romero, Bautista and Alejandro had  
19 agreed (according to Romero) to split payment of attorney's fees  
20 associated with the efforts that were undertaken by a law firm,  
21 Lopez & Associates, to review and revise the document that  
22 eventually became the January 22, 2002 written agreement between  
23 Barn Productions and Diamond Heart Music. According to an  
24 invoice dated April 17, 2002, Lopez & Associates charged Diamond  
25 Heart a total of \$770 for these legal services.

26           9. Shortly thereafter, on April 27, 2002, Romero paid  
27 Alejandro for his share of the \$6,000 from Barn Productions.  
28 However, Romero did not deduct any "administration fee" from

1 Alejandro's gross compensation. Instead, the only deduction made  
2 against Alejandro was the \$260 deduction for "legal fees," so  
3 that Alejandro received a net payment of \$1,740.

4 10. On January 15, 2004, Romero filed a superior court  
5 action (LASC No. EC 038387) against Bautista for breach of  
6 contract and other related causes of action, alleging that on or  
7 about May 1, 2002, Romero procured a licensing, synchronization,  
8 and/or publishing agreement(s) on Bautista's behalf with Deston  
9 Songs and/or Deston Child and/or affiliated entities of Warner  
10 Music Group and/or Warner Chappell, for which Romero was entitled  
11 to payments under her January 20, 2002 agreement, and her undated  
12 "Finder's Fee Agreement" with Bautista. In the course of the  
13 superior court proceedings, Bautista raised the affirmative  
14 defense that these agreements were void and unenforceable in that  
15 Romero was acting as a talent agent for Bautista without the  
16 requisite license.

17 11. Bautista filed this petition to determine controversy  
18 on March 10, 2004, seeking a determination that all agreements  
19 between Romero and Bautista (the two alleged in the lawsuit, and  
20 the earlier December 19, 2001 agreement) are void and  
21 unenforceable, that Romero has no liability to Bautista under  
22 these agreements, and that Bautista has no rights thereunder.  
23 Additionally, Romero seeks an accounting from Bautista of all  
24 amounts she has received pursuant to such agreements, and an  
25 order directing that no monies relating to The Shield be paid to  
26 Romero, and that 50% of Romero's claimed share of any such future  
27 monies instead be paid to Bautista, and that the \$600  
28 "administration fee" and \$256 in "legal fees" that Romero

1 deducted from the amounts payable to Bautista for the composition  
2 and recording of The Shield theme song and 50% of all monies  
3 previously received by Romero in connection with The Shield be  
4 disgorged to Bautista.

5 12. In her response to the petition, filed on April 14,  
6 2004, Romero asserts that none of the agreements between her and  
7 Bautista, and none of her activities on behalf of Bautista,  
8 violated the Talent Agencies Act. Romero seeks a determination  
9 that these agreements and activities did not violate the Act.

10 LEGAL ANALYSIS

11 1. Petitioner is an "artist" within the meaning of Labor  
12 Code section 1700.4(b). The issue here is whether Respondents  
13 functioned as a "talent agency" within the meaning of Labor Code  
14 §1700.4(a), and if so, what consequences should flow from the  
15 fact that Respondents were not licensed by the Labor Commissioner  
16 as a talent agency.

17 2. Labor Code section 1700.4(a) defines "talent agency" as  
18 "a person or corporation who engages in the occupation of  
19 procuring, offering, promising, or attempting to procure  
20 employment or engagements for an artist or artists, except that  
21 the activities of procuring, offering or promising to procure  
22 recording contracts for an artist or artists shall not of itself  
23 subject a person or corporation to regulation and licensing under  
24 this chapter." Labor Code §1700.5 provides that "[n]o person  
25 shall engage in or carry on the occupation of a talent agency  
26 without first procuring a license . . . from the Labor  
27 Commissioner." The Talent Agencies Act is a remedial statute;  
28 its purpose is to protect artists seeking professional employment

1 from the abuses of talent agencies. For that reason, the  
2 overwhelming judicial authority supports the Labor Commissioner's  
3 historic enforcement policy, and holds that "[E]ven the  
4 incidental or occasional provision of such [procurement] services  
5 requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51.  
6 An agreement that violates the licensing requirement of the  
7 Talent Agencies Act is illegal and unenforceable. "Since the  
8 clear object of the Act is to prevent improper persons from  
9 becoming [talent agents] and to regulate such activity for the  
10 protection of the public, a contract between an unlicensed  
11 [agent] and an artist is void." *Buchwald v. Superior Court*  
12 (1967) 254 Cal.App.2d 347, 351. Having determined that a person  
13 or business entity procured, promised or attempted to procure  
14 employment for an artist without the requisite talent agency  
15 license, "the [Labor] Commissioner may declare the contract  
16 [between the unlicensed agent and the artist] void and  
17 unenforceable as involving the services of an unlicensed person  
18 in violation of the Act." *Styne v. Stevens; supra*, 26 Cal.4th at  
19 55. "[A]n agreement that violates the licensing requirement is  
20 illegal and unenforceable . . . ." *Waisbren v. Peppercorn*  
21 *Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. Moreover, the  
22 artist that is party to such an agreement may seek disgorgement  
23 of amounts paid pursuant to the agreement, and "may . . . [be]  
24 entitle[d] . . . to restitution of all fees paid the agent."  
25 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of  
26 restitution is, of course, subject to the one year limitations  
27 period set out at Labor Code §1700.44(c).

28 3. In analyzing the legal significance of the facts herein,

1 we note that Labor Code §1700.4(a) expressly provides that "the  
2 activities of procuring, offering, or promising to procure  
3 recording contracts for an artist or artists shall not of itself  
4 subject a person or corporation to regulation and licensing under  
5 this chapter." The so-called Finder's Fee Agreement authorized  
6 Romero to make efforts to "cause Ernesto Bautista to enter into a  
7 recording agreement with a major record label." Thus, on its  
8 face, this Agreement does not implicate the Talent Agencies Act.  
9 Moreover, apart from Romero's efforts towards obtaining work for  
10 Bautista in connection with the composition and recording of  
11 music for The Shield (the legal significance of which is  
12 discussed below), there is no evidence that Romero procured,  
13 offered, attempted or promised to procure any other work as a  
14 performing artist.

15 4. The statutory definition of a talent agent, at Labor  
16 Code §1700.4(a), expressly is tied to the procurement of  
17 "employment or engagements" for an artist, that is, to obtaining  
18 some sort of creative work or performance for the artist. Thus,  
19 we have previously held that music publishing agreements which do  
20 not contemplate the future performance of creative services by  
21 the artist do not constitute "employment or engagements" within  
22 the meaning of §1700.4(a). *Kilcher v. Vainshtein* (TAC No. 02-  
23 99). Here, neither the December 19, 2001 agreement nor the  
24 January 20, 2002 agreement relate to the procurement of future  
25 employment. Rather, these agreements merely authorize Romero to  
26 pitch composed and/or recorded copyrighted music, for the purpose  
27 of negotiating deals to have that music used in television, film  
28 or commercials. Therefore, these agreements on their face do not

1 implicate the Talent Agencies Act. Of course, the Labor  
2 Commissioner and the courts will "look through provisions, valid  
3 on their face, and with the aid of parol evidence determine  
4 [whether] the contract is actually illegal or part of an illegal  
5 transaction." *Buchwald, supra*, 254 Cal.App.2d at 355. As there  
6 is no evidence of any procurement of employment other than the  
7 engagement to compose and record the music for The Shield, this  
8 claim will rise or fall on the determination of whether, in  
9 obtaining that creative work for Bautista, Romero violated the  
10 Talent Agencies Act.

11 5. The Labor Commissioner has held that the activity of  
12 procuring employment under the Talent Agencies Act refers to the  
13 role an agent plays when acting as an intermediary between the  
14 artist whom the agent represents and the third party employer who  
15 seeks to engage the artist's services. Thus, a person or entity  
16 (like a film production company, or a concert producer) that  
17 directly engages the services of an artist does not "procure  
18 employment" within the meaning of Labor Code §1700.4(a). *Chinn*  
19 *v. Tobin* (TAC No. 17-96). Conversely, an artist does not need to  
20 be licensed to negotiate directly with a prospective purchaser of  
21 the artist's services. Musical groups, consisting of two or more  
22 artists, may authorize one member of the group to negotiate  
23 directly with a prospective purchaser of the group's artistic  
24 services, without the need for that artist to be licensed as a  
25 talent agent as long as the following circumstances are present:

26 a) The person negotiating on behalf of the musical group is  
27 a making a bona fide artistic contribution to the performance  
28 that is being purchased;

1 b) Income that is earned by the members of the musical group  
2 as a result of the purchase of the performance is divided among  
3 the members of the group on the basis of each artist's creative  
4 contribution and/or the artist's prior accomplishments;

5 c) Necessary and reasonable expenses that were incurred by  
6 the artist who procured the engagement, in order to procure the  
7 work and negotiate the terms of the agreement with the purchaser  
8 of artistic services, may be shared among all members of the  
9 musical group, and thus, may be deducted from income derived from  
10 the performance; AND

11 d) The artist who procured the engagement does not collect,  
12 or seek to collect, any commission or other fee (other than  
13 recovery of reasonable expenses that were necessarily incurred in  
14 procuring the engagement) from any of the other artists in the  
15 musical group.

16 This last factor is critical, as it provides a bright line  
17 demarcation between an artist trying to obtain an engagement for  
18 his or her musical group and a talent agent "who engages in the  
19 occupation of procuring, offering, promising or attempting to  
20 procure employment or engagements for an artist or artists,"  
21 within the meaning of Labor Code §1700.4(a). In the former case,  
22 the artist who procures work for his or her fellow artists  
23 derives his or her compensation entirely from his or her role as  
24 an artist in the musical group, i.e., as a share of the income  
25 paid to the musical group for their performance. In the latter  
26 case, compensation is also based on having procured work for the  
27 other members of the musical group, i.e., for performing services  
28 as an intermediary between the other members of the group and the

1 purchaser of the group's artistic services. This is precisely  
2 the function of a talent agent, and by earning compensation for  
3 performing that procurement function, and especially when that  
4 compensation comes from the other musician's earnings, the artist  
5 who performs that procurement function "engages in the  
6 occupation" of a talent agent.

7 6. We therefore conclude that by charging Bautista a  
8 commission - a 30% "administration fee" - for having procured the  
9 engagement for Bautista to assist in the composition and  
10 recording of music for The Shield, Romero "engage[d] in the  
11 occupation" of a talent agency, within the meaning of Labor Code  
12 §1700.4, so as to require licensure under Labor Code §1700.5.

13 7. Not all contracts between an artist and an unlicensed  
14 talent agent are void and unenforceable. Rather, this remedy  
15 applies only to those contracts which "involv[e] the services of  
16 an unlicensed person in violation of the Act." *Styne v. Stevens*,  
17 *supra*, 26 Cal.4th at 55. Only "an agreement that violates the  
18 licensing requirement is illegal and unenforceable." *Waisbren*  
19 *v. Peppercorn Productions, Inc.*, *supra*, 41 Cal.App.4th at 262.  
20 Here, we conclude that any contracts under which Romero was  
21 arguably authorized to collect commissions for Bautista's work in  
22 connection with The Shield are void from their inception,  
23 unenforceable, and that Romero has no rights, and Bautista has no  
24 obligations thereunder. The only contracts which fall into this  
25 category are the agreements of December 19, 2001 and January 20,  
26 2002.

27 8. In contrast, the so-called Finder's Fee Agreement, and  
28 any services that were provided by Romero pursuant to this

1 Agreement, did not in any manner implicate the licensing  
2 requirement of the Talent Agencies Act. Romero's unlawful  
3 procurement activities regarding The Shield were not undertaken  
4 pursuant to this Agreement. In short, this Agreement was  
5 separate and distinct from any other agreements between the  
6 parties, and no evidence was presented upon which we might  
7 conclude that it was a subterfuge to conceal unlawful activities.  
8 It was an agreement to pay Romero for procuring a recording  
9 contract with a major label, an activity for which a talent agent  
10 license is not required. As such, we conclude that this  
11 Agreement, and any activities to procure a recording contract  
12 undertaken pursuant to this Agreement, do not violate the Talent  
13 Agencies Act.

14 9. Labor Code §1700.44(c) provides for a one year statute  
15 of limitations for the recovery of amounts previously paid by an  
16 artist to an unlicensed agent. As this petition to determine  
17 controversy was filed on March 10, 2004, section 1700.44(c)  
18 precludes an order of disgorgement of amounts paid to or retained  
19 by Romero prior to March 10, 2003. However, Bautista is entitled  
20 to recover all amounts that were paid to or retained by Romero as  
21 commissions, including all so-called "administration fees", from  
22 March 10, 2003 to the present, pursuant to the agreements of  
23 December 19, 2001 and January 20, 2002, including any commissions  
24 based on Bautista's earnings in connection with his services in  
25 composing and recording music for The Shield. Romero shall be  
26 required to provide Bautista with a full accounting of all such  
27 amounts, and make reimbursement, within 15 days of the date of  
28 this decision.

1 ORDER

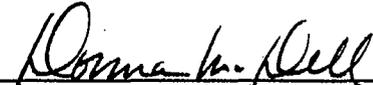
2 For the reasons set forth above, IT IS HEREBY ORDERED that  
3 the agreements of December 19, 2001 and January 20, 2002 between  
4 Romero and Bautista are void and unenforceable, and that Romero  
5 has no rights, and Bautista has no obligations thereunder. It is  
6 further ordered that within 15 days of the date of this  
7 determination, Romero shall provide Bautista with a full  
8 accounting of all amounts that were paid to or retained by Romero  
9 as commissions, including all so-called "administration fees",  
10 from March 10, 2003 to the present, pursuant to the agreements of  
11 December 19, 2001 and January 20, 2002, including any commissions  
12 based on Bautista's earnings in connection with his services in  
13 composing and recording music for The Shield, and that Romero  
14 shall reimburse Bautista for all such amounts plus interest at  
15 10% per annum from the date any such commissions were paid or  
16 retained. Finally, it is ordered that the so-called Finder's Fee  
17 Agreement does not implicate the Talent Agencies Act and is not  
18 void or unenforceable under the Act, so that the Labor  
19 Commissioner is without jurisdiction to resolve any other  
20 disputes concerning that Agreement.

21  
22 Dated: 8/19/05

  
MILES E. LOCKER  
Attorney for the Labor Commissioner

23  
24  
25 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

26  
27 Dated: 8/22/05

  
DONNA M. DELL  
State Labor Commissioner

