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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

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

22 The above-captioned matter, a petition to determine
23 controversy under Labor Code §1700.44, came on regularly for
24 hearing on March 23, 2005, in Los Angeles, California, before the
25 Labor Commissioner's undersigned hearing officer. Petitioner
26 appeared and was represented by attorney Joseph Golden, and
27 Respondent appeared and was represented by attorney Robert Frank.
28 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
23 MILES E. LOCKER
24 Attorney for the Labor Commissioner

25 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
26
27 Dated: 8/22/05 Donna M. Dell
28 DONNA M. DELL
State Labor Commissioner

