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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

ASHLEY CONRAD, **Petitioner,** **v.** **AL HASSAS, an Individual; SWEET LEMONS LLC, a California Limited Liability Company,** **Respondents.**	Case No. TAC 34757 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code Section 1700.44, came on regularly for hearing in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner ASHLEY CONRAD appeared and was represented by Walter C. Pfeffer, Esq. Respondents AL HASSAS AND SWEET LEMONS LLC were represented by Jordan Sussman, Esq. At the conclusion of the hearing, the matter was taken under submission.

Based upon the evidence presented at the hearing and on the other papers on file in this matter, the Labor Commissioner adopts the following decision.

FINDINGS OF FACT

1. Petitioner Ashley Conrad ("Petitioner") is a fitness trainer who markets her services not only as a trainer to celebrities in their pre-shoot and on-set preparation for performance in movies and television, but also develops and markets her "brand" for use in endorsement, product sales, advertising, and original content in the form of books and other written material and photographs for websites.

2. Respondents Al Hassas and Sweet Lemons LLC (collectively, "Respondents") are business and personal managers who primarily provide services and advice to clients in the development and marketing of their clients' brands, reputations and likenesses. Respondents are not licensed talent agents.

3. Petitioner and Respondents entered into an oral agreement which was later confirmed by correspondence in writing by which Petitioner would pay Respondents a commission of "no less than 15%" of Petitioner's earnings in "supplement and nutritional products category, publishing, television appearances and program development including direct response, sponsorships, endorsements and licensing, food products category, DVD and other recorded content, personal appearances, and new media and web-based initiatives." The agreement also contemplated the addition of other sources of commissions and fees in projects like television shows when those conditions arose. The parties later affirmed an agreement providing the commission rate on the sales of vitamins and supplements would be at a rate of 5%, rather than the 15% agreed to under the other sources of income. The parties operated under this agreement for two and one-half years commencing December 29, 2010.

4. Respondents assert Petitioner owes them commissions on money she has received in proceeds from her business relationship with a website called bodybuilding.com, where Petitioner markets nutritional supplements and other products. To that end, Respondents have filed suit in Los

Angeles Superior Court for breach of contract and quantum meruit on their agreement, as well as an accounting and declaratory relief. Petitioner brings this action before the Labor Commissioner seeking a determination Respondents have violated the Talent Agencies Act, by acting as unlicensed talent agents and as such, Respondents are not entitled to any recovery in their court action. Petitioner also seeks treble damages for $4,650.00 she has paid Respondents, as well as attorney fees for both the defense of the court action and prosecution of this action before the Labor Commissioner. Respondents assert Petitioner is not an "artist" as defined by the Talent Agencies Act, the services performed were not in violation of the Talent Agencies Act, and recovery of the money Petitioner seeks is time-barred by the one-year statute of limitations set forth in Labor Code Section 1700.44(c).

LEGAL ANALYSIS

The Talent Agencies Act provides that the Labor Commissioner exercises original jurisdiction over controversies between "artists" and "agents". Labor Code §1700.4. Labor Code Section 1700.4(b) defines "artists" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment."

Petitioner alleges Respondents violated the Talent Agencies Act by their activities in seven specific transactions. As noted above, Petitioner holds herself out as a celebrity fitness trainer, and has developed a line of food and nutritional supplement products which is marketed in part by reference to her professional reputation as a celebrity trainer. One of the matters at issue in this case is the conflicting positions of the parties as to the nature of the services contracted for and provided by Respondents. Respondents' position is the services they supplied were in the nature of

development and marketing of Petitioner's brand, and not efforts to procure employment for Petitioner as an "artist" as that term is defined in the Talent Agencies Act. Petitioner argues Labor Code Section 1700.4 prohibits an unlicensed talent agent from "procuring or attempting to procure employment *or engagements,*" apparently arguing an attempt to procure a contract not strictly for employment but which may qualify for regulation under the broader term "engagement" is a violation of the Talent Agencies Act. However, even if we were to hold Respondents' attempts to negotiate contracts clearly not meant to be employment should be classified as attempts to procure "engagements," the question stills remains as to whether the seven transactions cited by Petitioner were for contracts for Petitioner to render services as an "artist." The California Supreme Court has clearly limited the scope of the Talent Agencies Act to an artist's *professional employment*, applying the following distinction:

> [T]he Act's definition of a talent agency is narrowly focused on efforts to secure professional "employment or engagements" for an "artist or artists." (§ 1700.4, subd. (a).) Thus, it does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) (*Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1469-1470 [84 Cal.Rptr.2d 616]; *Waisbren, supra*, 41 Cal.App.4th 246, 252-253), nor does it govern assistance in an artist's business transactions other than professional employment.

Styne v. Stevens (2001) 26 Cal.4th 42, 50–51.

Petitioner testified at the hearing she was a "celebrity fitness personality," she worked as a fitness model, and had appeared in that capacity in advertisements. Petitioner also described appearances at events where she might direct a mass workout of participants, stated she wrote about fitness topics for magazines and on-line publications, and made television appearances in relation to fitness topics. Petitioner further testified she is owner of a company whose primary functions are to develop and market fitness products and to bring about "celebrity transformations."

Prior decisions of the Labor Commissioner have addressed the application of the term "artist" and the broad language of the definition as used in the statute. In examining the use of the

term, we have held:

> Although Labor Code §1700.4(b) does not expressly list producers or production companies as a category within the definition of 'artist,' the broadly worded definition includes 'other artists and persons rendering professional services in. . .television and other entertainment enterprises.' Despite this seemingly open-ended formulation, we believe the Legislature intended to limit the term ' artists' to those individuals who perform creative services in connection with an entertainment enterprise. Without such limitation, virtually every "person rendering professional services" connected with an entertainment project -- including the production company's accountants, lawyers and studio teachers....would fall within the definition of 'artists.' We do not believe that the Legislature intended such a radically far-reaching result.

American First Run dba American First Run Studios, Max Keller, Micheline Keller v. Omni Entertainment Group, Sheryl Hardy, Steven Maier, TAC 1995-32-1. See also *James Mark Burnett, an Individual; Mark Burnett Productions, Inc.; JMBP, Inc., DJB Inc.; and Jump In, Inc. v. Congrad Rioss; and Cloudbreak Entertainment, Inc.,* TAC 10192.

The Petition alleges Respondents violated the Talent Agencies Act in seven transactions:

1. **Stevia in the Raw.** The Petition alleges Respondents engaged in "efforts to procure an engagement with Stevia in the Raw," "to include Ms. Conrad's appearance on television, in videos, in print advertising, and in person, as well as Ms. Conrad's creation of original content for promotion of the Stevia in the Raw brand." However, when asked about the Stevia in the Raw deal, Petitioner stated Respondents did not submit her for consideration for the contract.

2. **SheKnows TV.** While the Petition alleges Respondents "represented Ms. Conrad in efforts to procure an engagement hosting a video" for the production company, Petitioner provided no evidence Respondents acted on her behalf on that project.

3. **The Biggest Loser.** The parties agree Respondents submitted Petitioner as a possibility to replace one of the trainers on this television show. Petitioner was not hired for that role.

4. **K-Swiss.** The Petition alleges Respondents "represented Ms. Conrad in efforts to procure an advertising engagement with shoemaker K-Swiss, Inc." At hearing, Petitioner testified

that while she discussed the possibility with Respondent Hassas, she did not know whether he submitted her for consideration for the contract.

5. **ABC Television Shows "The Chew" and "The Revolution".** The Petition states Respondents represented Petitioner "in efforts to procure a role" on those television shows. In testimony at the hearing, Petitioner stated she did not know whether Respondents had actually submitted her for consideration for those shows.

6. **Us Weekly.** Although the Petition alleges an attempt to procure a print advertising engagement with the magazine, Petitioner testified she did not believe Respondents submitted her for consideration, or that Respondents negotiated on her behalf with the publication.

7. **"Original Television Show".** The Petition alleges Respondents "attempted to procure for Petitioner an original television show." Correspondence presented at the hearing evidenced discussion with third parties about development of proposals for television shows based upon concepts developed by Petitioner, and further showed Respondent Hassas would serve as executive producer of such a show. Further evidence showed the parties planned to seek representation of Creative Artists Agency for proposals to producers for "television concepts."

8. **Adidas.** While this transaction was not alleged in the Petition, it appears Respondents represented Petitioner in procuring work with Adidas to produce original written content, and Petitioner did perform work for which Adidas paid her.

Of the transactions considered at the hearing, only The Biggest Loser and the Adidas deals were supported by substantial evidence the attempts at procurement actually occurred. In both of those cases, it appears Respondents either procured or attempted to procure employment or engagements for work which would be subject to the terms of the Talent Agencies Act. In those two instances, it appears Petitioner either performed or would have performed services which could be considered those of an "artist" under the definition in the Talent Agencies Act. In the case of The

Biggest Loser, Petitioner was being considered for a role in television series in which she would be called upon to provide services of a creative nature. In the case of the Adidas deal, Petitioner was engaged to provide what was intended to be original written material, and thereby arguably creative content.

The Labor Commissioner has held when the services provided were primarily of a managerial or business nature, as opposed to creative, the party supplying the services does not meet the statutory definition of "artist" under the Talent Agencies Act. In determining to what extent a petitioner qualifies as an "artist," we have previously held: "The individual must be primarily engaged in or make a significant showing of a creative contribution to the production to be afforded the protection of the Act." *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management; Gary Marsh, Steven Miley, Michael Wagner,* TAC 1998-2.

Respondents argue even if there were some violations of the Talent Agencies Act, those isolated violations were not central to the parties' agreement, and they should be severed from the agreement as a whole. In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, the California Supreme Court held that in applying the Talent Agencies Act, the Labor Commissioner may exercise discretion to sever illegal portions of the contract from the contract as a whole.

> In deciding whether severance is available, we have explained "[t]he overarching inquiry is whether the interests of justice ... would be furthered by severance." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) "Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Ibid.;* accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074, 130 Cal.Rptr.2d 892, 63 P.3d 979.)

Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal.4th 974, 996, *as modified (Mar. 12, 2008).*

The court further held

> Inevitably, no verbal formulation can precisely capture the full contours of the range of cases in which severability properly should be applied, or rejected. The doctrine is equitable and

> fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance.

Marathon Entertainment, Inc., supra, 42 Cal.4th at p.998.

The facts in this case support application of the severance doctrine, given the evidence presented of both the plain language of the agreement, as well as Respondents' showing that both the parties' expectations and their performance under the contract contemplated development and promotion of Petitioner's brand, and the marketing of the Petitioners goods and services. *See* Findings of Fact, paragraph 3, above. The primary purpose of the contract was not the procurement of employment or engagements for Petitioner as an artist, but rather the promotion of her work as a businessperson. Accordingly, the unlawful portions of the agreement which resulted in the violation of the Talent Agency Act when Respondents sought to procure Petitioner's employment with The Biggest Loser, and when they actually did procure employment with Adidas, are severed from the contract as a whole.

Petitioner seeks an order from the Labor Commissioner for not only return of the money she has paid Respondents, but also an order that due to Respondents' violations of the Talent Agencies Act, Respondents are not entitled to any money from Petitioner in their court action. That request is denied, and the order of the Labor Commissioner applies only to the two violations we have set forth in this decision.

The evidence shows Petitioner paid $4,640.00 to Respondent for commissions from her work for Adidas. Exhibits 150, 151 and 152 are cancelled checks showing payment of $4,640.00 was made between January 11, 2012 and June 15, 2012. Since Petitioner's Petition to Determine Controversy was filed with the Labor Commissioner on February 19, 2014, the dates of those payments fall outside of the one-year limitation set forth in Labor Code Section 1700.44(c), and are therefore time-barred. Petitioner's request for treble damages for those payments is not supported by any provision of the Talent Agencies Act and is also barred by the statute of limitations.

ORDER

Respondents Al Hassas and Sweet Lemons LLC violated the Talent Agencies Act in procuring or attempting to procure employment for Petitioner Ashley Conrad with the shoe company Adidas and with the television show The Biggest Loser. The violations arising from those two transactions are severed from the contract as a whole based upon our finding the central purpose of the contract was not to procure or attempt to procure employment, but to develop and promote Petitioner Ashley Conrad's brand, as well as sales of her food and nutritional supplement products. As such, this order has no effect on whatever claim Respondents may have to enforce other portions of the contract.

Recovery of the money Petitioner Ashley Conrad paid Respondents Al Hassas and Sweet Lemons LLC for actions they undertook on Petitioner Ashley Conrad's behalf in violation of the Talent Agencies Act is barred by the one-year statute of limitations of the Talent Agencies Act. As such, no monetary award is made.

Dated: March 24 2017

Respectfully submitted,

By _____
MICHAEL N. JACKMAN
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER.

Dated: 3/24/2017

_____
JULIE A. SU
California Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, JUDITH A. ROJAS, do hereby certify that I am a resident of or employed in the County of San Diego, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: 7575 Metropolitan Drive, Suite 210, San Diego, CA 92108-4421

On March 24, 2017, I served the within **DETERMINATION OF CONTROVERSY** by placing a true copy thereof in an envelope addressed as follows:

Walter C. Pfeffer, Esq.
Colt/Singer/Bea
601 Montgomery Street, Suite 1950
San Francisco, CA 94111

Jordan Susman, Esq.
Harder Mirell & Abrams LLP
132 S. Rodeo Drive, Fourth Floor
Beverly Hills, CA 90212

and then sealing the envelope and with postage and certified mail fees (if applicable) thereon fully prepaid, depositing it for pickup in this city by:

_____ Federal Express Overnight Mail

___X___ Ordinary First Class Mail

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 24, 2017, at San Diego, California.

JUDITH A. ROJAS

Case No. TAC-34757

PROOF OF SERVICE