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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

CURT MENEFEE, **Petitioner,** **v.** **OCTAGON, INC., a District of Columbia Corporation,** **Respondent.**	Case No. TAC 42950 **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 CURT MENEFEE appeared and was represented by Kyle P. Kelly, Esq. Respondent OCTAGON, INC. was represented by Adriana Cara. 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.

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FINDINGS OF FACT

1. Petitioner Curt Menefee ("Petitioner") is a television personality and sportscaster who, among other things, is the co-host of the television program "NFL on Fox," as well as several other television enterprises. Petitioner is an artist as that term is defined in the Talent Agency Act at Labor Code Section 1700.4(b).

2. Respondent Octagon, Inc. ("Respondent") is a firm which holds itself out as talent managers, and denies it acts as a talent agent. The company acknowledges it is not licensed as a talent agent.

3. The Petitioner and Respondent entered into a written agreement in September of 2010 which provided Respondent corporation would provide management services to Petitioner in exchange for "ten percent of any and all gross compensation". The agreement specifically states the corporation was not a licensed talent agency, and it would not attempt to "obtain, seek or procure employment or engagements" for the Petitioner.

4. In October of 2011, the Fox network offered to renew Petitioner's contract for "NFL on Fox" for a two-year period beginning in 2012. A representative of the Respondent negotiated with the network for about six weeks and closed a deal on behalf of Petitioner for renewal of the contract.

5. Respondent asserts Petitioner owes the corporation commissions under the management agreement, and has filed suit in Los Angeles Superior Court for that money.

6. On April 4, 2016, the Petitioner filed this action with the Labor Commissioner, asserting Respondent acted as an unlicensed talent agent, in violation of California law. Petitioner seeks a finding from the Labor Commissioner the contract is illegal, and therefore void *ab initio*. Consequently, he argues, he is entitled to the return of any commissions he paid the Respondent during the one-year period prior to the filing of his Petition to Determine Controversy.

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(a) defines "Talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." Labor Code Section 1700.5 provides that "no person shall engage in or carryon the occupation of a talent agency without first procuring a license from the Labor Commissioner."

The Labor Commissioner has previously held, in interpreting the meaning of "procure":

> The term "procure," as used in Labor Code §1700.4(a), means "to get possession of: obtain, acquire, to cause to happen or be done: bring about." *Wachs v. Curry* (1993) 13 Cal.App.4th 15 616, 628. Thus; "procuring employment" under the Talent Agencies Act is not limited to initiating discussions with potential purchasers of the artist's professional services or otherwise soliciting employment; rather, "procurement" includes any active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication. *Hall v. X 22 Management* (TAC No. 19-90, pp. 29-31.) The Labor Commissioner has long held that "procurement" includes the process of negotiating an agreement for an artist's services. *Pryor v. Franklin* (TAC 17 MP, 114).

Danielewiski v. Agon Investment Company (Cal. Labor Com., October 28, 2005) TAC No. 41-03, pages 15-16.

The *Danielewski* decision is analogous to the facts presented in this case. In *Danielewski*, the respondents argued their activities on behalf of the artist amounted to nothing more than acting as "a conduit" for communication between the artist and the business seeking to engage the artist. In this case, Respondent argues "Octagon was Menefee's 'spokesperson' in connection with the 2012 Fox Agreement, not his 'negotiator.'" Respondent further argues "Octagon's primary role was to make

Menefee's specific desires and demands known to Fox."

In ruling on that same issue, the Labor Commissioner held in *Danielewski*:

> In the context of negotiations to engage the services of an artist, the negotiator for the artist is engaged in procurement activities regardless of whatever limitations might exist on the negotiator's independent decision making authority. For that reason, we disagree with the court's dicta in *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1102, regarding the "distinction" between "spokespersons who merely pass on the client's desires or demands to the person who is contemplating engaging the client, or 'merely' pass messages back and forth between the principals," and 'negotiators [who] use their understanding of their client's values, desires, and demands; and other parties' values, desires and demands, and through discretion and intuition bring about through give-and-take a deal acceptable to the principals." This subjective test would prove utterly unworkable, and is a poor substitute for what we believe was the Legislature's intent to create a bright line separating procurement from other activities which do not require a license.

Danielewiski, at page 17.

The evidence presented at the hearing, primarily in the form of emails between the parties and Fox management, show the Respondent performed extensive and continued negotiation regarding the terms of the contract on behalf of the Petitioner. The Respondent violated the Talent Agency Act in negotiating the terms of Petitioner's contract with Fox.

The Respondent argues even if it violated the Talent Agencies Act, the primary purpose of the contract at issue was management activity, not for the procurement of employment. The Respondent requests the Labor Commissioner sever the legal activities performed under the contract from those which violate the Act.

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 went on to state:

> 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. v. Blasi (2008) 42 Cal.4th 974, 998, *as modified (Mar. 12, 2008).*

Since application of the severance doctrine is, as the *Marathon* court stated, specific to the facts of the case, an evaluation of the facts and the comparative volume and value of the services the Respondent provided to the Petitioner, it falls to the Respondent to present adequate evidence to allow the Labor Commissioner to apply the doctrine and weigh in the balance the violating and lawful services of the Respondent. In this case, however, the Respondent did not provide sufficient evidence at hearing to provide the basis for that computation. Accordingly, the request for severance is denied.

Petitioner presented a copy of his "QuickReport" ledger for the relevant period as evidence of the amounts he paid Respondent in commissions, going back to November, 2011. During the one-year statute of limitations for claims under the Talent Agency Act, set forth in Labor Code Section 1700.44(c), the Petitioner paid $55,000.00 in commissions. Those commissions are ordered disgorged and returned to the Petitioner.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED:

The contract between the Petitioner and Respondent is declared to be illegal, void and unenforceable, and Respondent is barred from enforcing or seeking to enforce the contract against the Petitioner in any manner.

Respondent Octagon, Inc. is ordered to repay the Petitioner Curt Menefee $55,000.00 in unlawfully charged commissions, together with interest of $8,177.58, for a total award of $63,177.58.

Dated: March 24, 2017

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:

Kyle P. Kelley, Esq.
Law Offices of Kyle P. Kelley
51 Rainey Street, Suite 801
Austin, TX 78701

Adriana Cara, Esq.
Joseph S. Leventhal
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655 W. Broadway, Suite 840
San Diego, CA 92101

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-42950

PROOF OF SERVICE