

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

10	NICK SEVANO,)	No. TAC 8-93
11)	
12	Petitioner,)	DETERMINATION OF
13	vs.)	CONTROVERSY
14)	
15	ARTISTIC PRODUCTIONS, INC.,)	
16)	
17	Respondent.)	

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BACKGROUND

29 The above-captioned petition to determine controversy
30 pursuant to Labor Code § 1700.44 was filed on December 12, 1992 by
31 NICK SEVANO, seeking a determination as to (1) whether the one
32 year statute of limitations set forth at Labor Code § 1700.44(c)
33 bars ARTISTIC PRODUCTIONS, INC. ("API") from asserting, as a
34 defense in a pending court action brought by SEVANO to enforce the
35 provisions of a contract between the parties, that said contract
36 is void on the ground that it violates the Talent Agencies Act
37 (Labor Code sections 1700, et seq.), and (2) whether the contract
38 does, in fact, violate the Act.

39 An evidentiary hearing was conducted in Los Angeles,
40 California on March 7, April 4, May 9, and July 18, 1995, before
41 the undersigned attorney specially designated by the Labor

1 Commissioner to hear this matter. Petitioner was represented by
2 Richard Ferko, and Respondent was represented by Lee Sacks. Due
3 consideration having been given to the testimony, documentary
4 evidence, and arguments presented, the Labor Commissioner hereby
5 adopts the following Determination.

6 FINDINGS OF FACT

7 1. API is the exclusive loan out corporation for Julia
8 Migenes Johnson (hereinafter "Migenes"), an internationally
9 acclaimed opera singer. Migenes is the only performer whose
10 services are loaned out by API, and API's receipts are entirely
11 derived from Migenes' entertainment industry earnings. At all
12 relevant times, Migenes has been the president of API.

13 2. At all relevant times, SEVANO and Migenes have been
14 residents of the State of California. The contract between API
15 and SEVANO, referred to herein, was entered into and performed in
16 the State of California.

17 3. On December 6, 1985, Migenes entered into an agreement
18 with International Creative Management, Inc. ("ICM"), a talent
19 agency licensed by the State Labor Commissioner, under which ICM
20 agreed to serve as her exclusive talent agency in the area of
21 motion pictures, television and concert engagements. Migenes
22 terminated ICM's services in late 1987.

23 4. In February 1986, Migenes hired Maria Martone to serve as
24 her "manager", a job previously handled by Migenes' former
25 husband. Among her other duties, Martone was expected, pursuant
26 to Migenes' express request, to help find employment opportunities
27 for Migenes. As compensation for her services, Martone was to be
28 paid 15% of Migenes' professional earnings.

1 5. Shortly after starting work as Migenes' "manager",
2 Martone spoke to SEVANO about the possibility of having him join
3 as her partner in "managing" Migenes' career. Martone was
4 impressed with SEVANO's entertainment industry background and
5 believed that he could use his contacts to find film and
6 television work for Migenes. In her discussions with SEVANO,
7 Martone informed him that her responsibility was to try to find
8 work for Migenes. After viewing a performance tape highlighting
9 Migenes' talents, SEVANO stated that he was certain he could find
10 film and television work for her. In February 1986, during his
11 first meeting with Migenes, SEVANO promised to "work very hard to
12 get [her] the role of Evita" in the planned film to be based on
13 the Broadway musical, and offered to speak to the producers, whom
14 he said he knew very well. SEVANO stated that he was now "semi-
15 retired," but that he had represented other performers, including
16 Lindsay Wagner, for whom he had "negotiated a tremendous
17 contract." Wishing to broaden her career and obtain work in film
18 and television, convinced that ICM was not aggressively soliciting
19 producers on her behalf, persuaded by Martone that SEVANO's
20 entertainment industry background and contacts would lead to
21 greater employment opportunities, and very interested in obtaining
22 the role of 'Evita', Migenes decided to hire SEVANO to join with
23 Martone as her "managers."

24 6. Neither SEVANO nor Martone has ever been licensed by the
25 State Labor Commissioner as a talent agent. SEVANO, understanding
26 that a "manager" who tries to find employment for an artist must
27 be licensed as a talent agent, suggested to Martone that they
28 could "get around the conflict between managers and agents" by

1 entering into an agreement with API under which they would become
2 API corporate officers. By structuring his relationship with
3 Migenes in that manner, SEVANO believed that he would not be
4 subject to talent agency licensing requirements. At SEVANO's
5 suggestion, API's attorney drew up a written contract, executed on
6 March 7, 1986, under which SEVANO and Martone were hired by API to
7 serve as "executive vice presidents" for a period of five years,
8 to "guide and supervise the career of Julia Migenes Johnson," for
9 which SEVANO and Martone were to receive compensation in the form
10 of commissions equal to 15% of the gross income received by API
11 from Migenes' entertainment industry earnings. It was understood
12 that SEVANO and Martone would share equally in these commissions,
13 with each to receive 7.5% of Migenes' earnings.

14 7. The contract was amended in writing on June 24, 1986 to
15 make commissions payable for SEVANO and Martone on gross income
16 earned pursuant to the extension, modification, or renewal of any
17 agreements entered into during the course of SEVANO and Martone's
18 employment, irrespective of whether they are still employed by API
19 when the extension, modification, or renewal is executed.

20 8. Shortly after commencing his employment with API, Sevano
21 initiated a wide range of efforts to procure employment for
22 Migenes. Indeed, little evidence was presented to indicate that
23 SEVANO was responsible for anything other than obtaining new
24 employment for Martone. In his testimony, SEVANO repeatedly
25 denied that he was responsible for procuring employment for
26 Migenes, and instead asserted that his only role was to "counsel
27 Migenes and guide her career." SEVANO's characterization of his
28 role is belied by the contrary credible and unbiased testimony of

1 Maria Martone, by the fact that SEVANO lacked the background to
2 counsel or guide Migenes with respect to her career as an opera
3 singer, and that as to her career in movies and television,
4 without the procurement activities of SEVANO and Martone, there
5 would barely have been any career to "guide". In short, the
6 evidence presented leaves little doubt that the overwhelming bulk
7 of SEVANO's specific activities as an "executive vice president"
8 for API consisted of efforts to obtain employment for Martone.
9 These efforts included:

10 a. Initiating meetings with a number of movie and
11 television producers and executives, in order to (in SEVANO's own
12 words) "advertise [Migenes'] talents" and "make them aware of her
13 availability." At these meetings, SEVANO distributed copies of
14 Migenes' resume and videotapes of her recent appearance on '60
15 Minutes.'

16 b. Initiating discussions with the producers of the
17 movie 'Evita' in an ultimately unsuccessful attempt to secure the
18 lead role for Migenes.

19 c. Meeting with Lou Alexander and Howard Storm,
20 producers at Lorimar, and with producers at MTM Productions, in an
21 attempt to obtain television work for Migenes.

22 d. Meeting with the producers of Las Vegas shows,
23 obtaining an engagement for Migenes as the opening act for George
24 Burns in Las Vegas.

25 e. Obtaining appearances for Migenes on a number of
26 television shows, including 'Webster,' 'Nothing Is Easy,' a Perry
27 Como variety show, and the Merv Griffin show.

28 f. Obtaining employment for Migenes as the lead in a

1 Broadway musical entitled 'Rags.'

2 g. Along with Maria Martone, meeting with Menahem
3 Golan, the producer of the film 'Three Penny Opera,' in a
4 successful effort to procure a role for Migenes in that film. The
5 actual terms of Migenes' contract for her services on that film
6 were negotiated by George Hayums, an attorney representing API.
7 Hayums was not then licensed as a talent agent by the California
8 Labor Commissioner.

9 h. Along with Maria Martone, meeting with Emiliano
10 Piedra, the producer of the film 'Berlin Blues,' and negotiating
11 the details of Migenes' role in the film and the terms of her
12 compensation.

13 i. Along with Maria Martone, obtaining work for Migenes
14 on commercials for 'Sara Lee' and 'Nutragena', and negotiating the
15 terms of the contracts for her work on those commercials.

16 j. Along with Maria Martone, obtaining a lead role for
17 Migenes in the Disney film 'Ciro', and negotiating the terms of
18 Migenes' compensation for her work on that film.

19 9. Migenes' talent agency, ICM, played no role in setting up
20 these meetings or in the ongoing discussions with these producers.
21 SEVANO was not acting in conjunction with, at the request of, or
22 pursuant to the direction of anyone from ICM in connection with
23 these activities. In his testimony, SEVANO asserted that ICM was
24 involved in procuring or attempting to procure many of the
25 engagements listed above. But SEVANO's account of ICM's role was
26 contradicted by Maria Martone's convincing testimony. Moreover,
27 SEVANO's testimony was wracked by inconsistencies (for example, in
28 cross-examination he was unable to name a single engagement ICM

1 had procured or attempted to procure in 1986). Also, SEVANO
2 failed to present any sort of evidence to corroborate his account
3 of ICM's activity - - no documentation nor any testimony from one
4 of ICM's agents. And finally, some of the above-listed
5 procurement activities (such as the meetings with the producer of
6 'Three Penny Opera') took place following the termination of ICM's
7 services.

8 10. Throughout the entire period of SEVANO's employment as
9 an "executive vice president" for API, SEVANO was actively engaged
10 in the representation of a number of television and movie
11 scriptwriters, for which he was paid commissions out of the
12 proceeds earned by these writers for the sales of their scripts.
13 SEVANO conducted all of his business out of his own office,
14 including all business on behalf of API, as API did not have its
15 own office.

16 11. On June 27, 1988, API terminated SEVANO's employment.
17 Martone made this decision because of her dissatisfaction with
18 SEVANO's performance, and her belief that SEVANO violated his
19 fiduciary obligations by convincing her to retain the services of
20 Jeffrey Kruger as her European concert "booking agent," without
21 disclosing that he was a part-owner of Kruger's business.

22 12. On July 20, 1990, SEVANO filed a demand for arbitration
23 against Migenes, seeking the recovery of commissions allegedly
24 owed pursuant to his agreement with API. On April 4, 1991, SEVANO
25 dismissed his claim against Migenes, and refiled it against API.

26 13. An arbitration hearing took place in April 1992, and on
27 May 4, 1992 the arbitrator issued an award in favor of SEVANO for
28 unpaid commissions in the amount of 7.5% of the gross income

1 received by API from Migenes' services in the entertainment
2 industry during the period from March 7, 1986 to March 6, 1991,
3 and during the period of any extensions, modifications, or
4 renewals of any agreements that had been entered into during the
5 period from March 7, 1986 to March 6, 1991. The arbitrator made
6 an express finding that the contract between SEVANO and API did
7 not violate the California Labor Code.

8 14. On August 20, 1992, the Los Angeles Superior Court
9 denied SEVANO's petition to confirm the arbitrator's award and
10 instead, granted API's motion to vacate the award, on the ground
11 that the contract between the parties violated the Talent Agencies
12 Act and was therefore void *ab initio*, and unenforceable. The
13 court decision stated that SEVANO "contracted to be a talent agent
14 for Migenes and, indeed, he conducted himself at all times as an
15 agent for her. The contract language is a clear subterfuge to
16 allow SEVANO and Martone to act as talent agents for Migenes
17 without securing a license for that occupation." The court noted
18 that the Talent Agencies Act prohibits any person not licensed as
19 a talent agent from procuring, offering, promising, or attempting
20 to procure employment or engagements for an artist, and that under
21 Buchwald v. Superior Court (1967) 254 Cal.App.2d 347, an
22 unlicensed agent's contract to represent an artist is void and
23 unenforceable, and that an arbitration conducted under the
24 provisions of such a contract is likewise void and unenforceable.

25 15. On October 5, 1992, SEVANO moved the superior court for
26 a new trial on the grounds that: a) API waived any right to
27 challenge the validity of the contract under the Talent Agencies
28 Act by failing to assert this defense within one-year of SEVANO's

1 filing of the demand for arbitration, and b) the Labor
2 Commissioner has original and exclusive jurisdiction to hear and
3 determine all controversies under the Talent Agencies Act. The
4 court denied the motion for a new trial, but modified the orders
5 that had been issued on August 20, 1992 by changing the order
6 denying SEVANO's petition to confirm the arbitration award to a
7 "denial without prejudice to renew," and changing the order
8 granting API's motion to vacate the award to a "denial without
9 prejudice to renew."

10 16. API then filed a motion for reconsideration of the order
11 denying its motion to vacate the arbitration award. On
12 November 20, 1992, the court granted the motion for
13 reconsideration and entered a new order, granting API's motion to
14 vacate the arbitration award on the ground that jurisdiction to
15 resolve the controversy as to whether SEVANO's unlicensed status
16 rendered the contract void rested with the Labor Commissioner
17 rather than the arbitrator, and that once API raised the defense
18 of illegality, the arbitrator exceeded his authority by proceeding
19 with the matter and issuing an award.

20 17. Following the issuance of this order vacating the
21 arbitration award, SEVANO filed the instant petition with the
22 Labor Commissioner. On November 1, 1993, the Labor Commissioner,
23 finding that only legal issues were present and no factual
24 disputes requiring an evidentiary hearing existed, issued a
25 determination of controversy in favor of API without a hearing.
26 SEVANO filed objections, contending that a hearing was necessary
27 to resolve various factual matters that were not contained in the
28 petition. Specifically, SEVANO argued that 1) the Labor

1 Commissioner failed to consider the significance of API's
2 stipulation, in its arbitration brief, that the statute of
3 limitations set forth at Labor Code section 1700.44(c) applies to
4 this dispute, and 2) by determining this controversy without a
5 hearing, he was denied the opportunity to present evidence and
6 testimony that he did not procure employment for Migenes. On
7 August 30, 1994, the Labor Commissioner entered an order vacating
8 the previously issued determination, and scheduling this
9 controversy for hearing.

10 LEGAL ANALYSIS

11 1. Migenes is an "artist" within the meaning of Labor Code
12 section 1700.4(b). The Labor Commissioner has jurisdiction to
13 determine this controversy pursuant to Labor Code section
14 1700.44(a).

15 2. Labor Code section 1700.44(c) provides that "no action or
16 proceeding shall be brought pursuant to [the Talent Agencies Act]
17 with respect to any violation which is alleged to have occurred
18 more than one year prior to the commencement of this action or
19 proceeding." Here, neither API nor Migenes has brought any action
20 or proceeding against SEVANO. Rather, these proceedings were
21 initiated by SEVANO's filing of a demand for arbitration, followed
22 by his filing of a motion to confirm the arbitration award, and
23 finally, his filing of a petition to determine controversy before
24 the Labor Commissioner. API raised the issue of SEVANO's
25 unlicensed status purely as a defense to the proceedings brought
26 by API to enforce the purportedly illegal contract.

27 3. A statute of limitations is procedural, that is, it only
28 affects the remedy, not the substantive right or obligation. It

1 runs only against causes of action and defenses seeking
2 affirmative relief, and not against any other defenses to an
3 action. Neither the statute of limitations nor the doctrine of
4 laches operates to bar the defense of illegality of a contract,
5 and in any action or proceeding where the plaintiff is seeking to
6 enforce the terms of an illegal contract, the other party may
7 allege and prove illegality as a defense without regard to whether
8 the statute of limitations for bringing an action or proceeding
9 has already expired. See 3 Witkin, California Procedure 4th,
10 'Actions', pp. 512, 532. We thus conclude that the one year
11 limitations period set forth at Labor Code section 1700.44(c) does
12 not bar API from asserting the defense of illegality of the
13 contract on the ground that SEVANO acted as a talent agent without
14 a license.

15 4. In a brief filed in the course of the arbitration
16 proceedings, the attorney then representing API stated that "[t]he
17 Labor Commissioner does not have original jurisdiction over the
18 instant dispute as Labor Code §1700.44 contains a one-year statute
19 of limitations within which to bring [a] dispute before the Labor
20 Commissioner." (Respondent's Arbitration Brief, dated January 27,
21 1992, page 7, fn. 3.) It is, of course, well established that in
22 "controversies arising under the [Talent Agencies] Act . . . the
23 Labor Commissioner has original jurisdiction to hear and determine
24 the same as to the exclusion of the superior court, subject to an
25 appeal within 10 days after determination, to the superior court
26 where the same shall be heard de novo." Buchwald v. Superior
27 Court, supra, 254 Cal.App.2d 347, 359. And as noted above, the
28 statute of limitations contained at Labor Code section 1700.44

1 does not bar a defendant or respondent from asserting a purely
2 defensive matter regardless of whether the running of the statute
3 of limitations would have barred such party from using that matter
4 as the basis of a cause of action for affirmative relief.

5 Moreover, this Arbitration Brief appears to have been filed within
6 one year of the date that SEVANO filed his demand for arbitration
7 against API, and thus, the statute of limitations had not yet run
8 on any cause of action that may then have been filed by API for
9 affirmative relief. Thus, the statement made at footnote 3 in
10 Respondent's Arbitration Brief is incorrect, as a matter of law.
11 As an incorrect statement of law, it is to be accorded no
12 significance. And insofar as it may be viewed as a "stipulation",
13 to the extent it purports to prevent a competent tribunal from
14 hearing this matter, it just as objectionable and ineffective as
15 an attempt to confer jurisdiction by consent. See, 2 Witkin,
16 California Procedure 4th, 'Jurisdiction', pp. 547-548. We
17 therefore conclude that this purported "stipulation" does not
18 deprive the Labor Commissioner of jurisdiction to hear and
19 determine the instant controversy.

20 5. Labor Code section 1700.5 provides that "no person shall
21 engage in or carry on the occupation of a talent agency without
22 first procuring a license therefor from the Labor Commissioner."
23 Labor Code section 1700.4(a) defines "talent agency" as "a person
24 or corporation who engages in the occupation of procuring,
25 offering, promising, or attempting to procure employment or
26 engagements for an artist," and further provides that a talent
27 agency "may, in addition, counsel or direct artists in the
28 development of their professional careers."

1 The term "procure", as used in this statute, means "to get
2 possession of: obtain, acquire, to cause to happen or be done:
3 bring about." Wachs v. Curry (1993) 13 Cal.App.4th 616, 628.
4 Thus, under Labor Code section 1700.4(a), "procuring employment"
5 is not limited to soliciting employment or initiating
6 communications with producers leading to employment. Rather,
7 under the statute, "procuring employment" includes negotiating for
8 employment, and entering into discussions with a producer
9 concerning potential employment, notwithstanding the fact that the
10 producer may have been the person who initiated the discussions or
11 negotiations. See Hall v. X Management, Inc. (1992) TAC No. 19-
12 90, pp. 29-31. Of course, even using the restricted definition of
13 the term "procure" to mean "to solicit" as advocated by SEVANO,
14 Respondent committed numerous violations of the Talent Agencies
15 Act. But the definition of procuring employment is not limited to
16 mere soliciting of employment or the initiating of contacts with
17 potential employers as SEVANO contends. If all SEVANO had done
18 was to respond to calls from potential employers by referring
19 those calls to Migenes or to ICM, then SEVANO would not have
20 "procured employment" within the meaning of the Act. But the
21 evidence leaves no doubt that this is not what happened. Rather,
22 on those occasions when a producer initiated the contact with
23 SEVANO, as did the producers of the Merv Griffin show and the
24 Perry Como show, SEVANO negotiated with those producers to obtain
25 those engagements for Migenes.

26 6. In Buchwald v. Superior Court, *supra*, 254 Cal.App.2d 347,
27 351, the court held that because "the clear object of the [Talent
28 Agencies] Act is to prevent improper persons from becoming [talent

1 agents] and to regulate such activity for the protection of the
2 public, a contract between an unlicensed [agent] and an artist is
3 void." Buchwald involved a dispute between the musical group
4 'Jefferson Airplane' and their "personal manager." The parties'
5 written agreement stated that the manager had not agreed to obtain
6 employment for the group and that he was not authorized to do so.
7 The group alleged that, despite the contractual language, the
8 manager had in fact procured bookings for them. In seeking to
9 avoid the licensing requirement, the manager argued that the
10 written agreement established, as a matter of law, that he was not
11 subject to the Act's requirements. The court rejected that
12 contention, stating, "The court, or as here, the Labor
13 Commissioner, is free to search out illegality lying behind the
14 form in which a transaction has been cast for the purpose of
15 concealing such illegality. [citation.] The court will look
16 through provisions, valid on their face, and with the aid of parol
17 evidence, determine that the contract is actually illegal or is
18 part of an illegal transaction."

19 7. For years following the Buchwald decision, in cases
20 before the Labor Commissioner, the Commissioner interpreted the
21 Talent Agencies Act to require licensure even where the
22 procurement activities are only incidental to the agent's duties
23 and obligations. (See e.g., Derek v. Callan (1982) TAC No. 18-80;
24 Damon v. Emler (1982) TAC No. 36-79.) This approach was
25 disapproved by the appellate court in Wachs v. Curry (1993) 13
26 Cal.App.4th 616, 628, as follows:

27 "[T]he occupation of procuring employment was intended to be
28 determined according to a standard that measures the significance

1 of the agent's employment procurement function compared to the
2 agent's counseling function taken as a whole. If the agent's
3 employment procurement function constitutes a significant part of
4 the agent's business as a whole, then he or she is subject to the
5 licensing requirement of the Act even if, with respect to a
6 particular client, procurement of employment was only an
7 incidental part of the agent's duties. On the other hand, if
8 counseling and directing the clients' careers constitutes the
9 significant part of the agent's business, then he or she is not
10 subject to the licensing requirement of the Act, even if, with
11 respect to a particular client, counseling and directing the
12 client's career was only an incidental part of the agent's overall
13 duties."

14 In response to the Wachs decision, the Labor Commissioner, in
15 Church v. Brown (1994) TAC 52-92, formulated a new standard for
16 determining whether licensure is required: "The Wachs court
17 declined to quantify the term "significant", finding that it was
18 not necessary in that case. Since the term "significant" does not
19 appear anywhere in the statute, adoption of regulations designed
20 to quantify the term would be impossible." However, in order to
21 apply the Wachs decision, the Labor Commissioner had no choice but
22 to define the term "significant". The Commissioner concluded that
23 "conduct which constitutes an important part of the relationship
24 would be significant. . . . [P]rocurement of employment
25 constitutes a 'significant' portion of the activities of the agent
26 if the procurement is not due to inadvertence or mistake and the
27 activities of procurement have some importance and are not simply
28 a *de minimis* aspect of the overall relationship between the

1 parties when compared with the agent's counseling functions on
2 behalf of the artist."

3 Under the test enunciated in Church v. Brown, an artist who
4 "asserts a licensing violation under the Act satisfies his burden
5 if he establishes . . . a contractual relationship with the
6 [putative talent agent] and that [such] relationship was permeated
7 and pervaded by procurement activities undertaken by the [agent].
8 Such a showing supports an inference that these activities were a
9 significant part of the [agent's] business as a whole, and
10 suffices to establish a *prima facie* case of violation of the Act.
11 At that point, the burden shifts to the respondent to come forward
12 with sufficient evidence to sustain a finding that the procurement
13 functions were not a significant part of the [agent's] business"
14 *vis-a-vis* the agent's counseling function.

15 8. More recently, in Waisbren v. Peppercorn Productions,
16 Inc. (1995) 41 Cal.App.4th 246, the appellate court undertook an
17 exhaustive review of the legislative history of the Talent
18 Agencies Act, noting that in 1982 the Legislature created the
19 California Entertainment Commission to "study the laws and
20 practices of this state, the State of New York, and other
21 entertainment capitals of the United States relating to the
22 licensing of agents . . . so as to enable the commission to
23 recommend to the Legislature s model bill regarding this
24 licensing." On December 2, 1985, the Commission submitted its
25 Report to the Legislature and the Governor. In this Report, the
26 Commission concluded that "[n]o person, including personal
27 managers, should be allowed to procure employment for an artist in
28 any manner or under any circumstances without being licensed as a

1 talent agent." The Commission reasoned: "Exceptions in the nature
2 of incidental, occasional or infrequent activities relating in any
3 way to procuring employment for an artist cannot be permitted; one
4 either is, or is not, licensed as a talent agent, and if not so
5 licensed, one cannot expect to engage, with impunity, in any
6 activity relating to the services which a talent agent is licensed
7 to render." (Report, p. 19-20) Although the Commission concluded
8 that the Act should remain unchanged with respect to requiring a
9 license for any procurement activities (incidental or otherwise),
10 the Commission did recommend statutory changes on other matters.
11 In response, the Legislature adopted all of the Commission's
12 recommendations, and the Governor signed them into law. In
13 accordance with the Commission's advice, the Legislature did not
14 alter the requirement of a license for persons who occasionally
15 procure employment for artists.

16 The Waisbren court reasoned that "by creating the Commission,
17 accepting the Report, and codifying the Commission's
18 recommendations in the Act, the Legislature approved the
19 Commission's view that . . . the Act imposes a total prohibition
20 on the procurement efforts of unlicensed persons." The court then
21 held that "we conclude, as did the Commission, that the Act
22 requires a license to engage in any procurement activities."
23 Waisbren v. Peppercorn Productions, supra, 41 Cal.App.4th at 258-
24 259.

25 The Waisbren court correctly observed that the precise issues
26 before the Wachs court were whether the Act's use of the term
27 "procure" was so vague as to violate due process, and whether the
28 exemption for procurement activities relating to recording

1 contracts constitutes an equal protection violation. In its
2 discussion of the method to be used for determining whether a
3 person is engaged in the "occupation" of procuring employment, and
4 by focusing on the "significance" of the putative agent's
5 procurement function as the determinative factor, the Wachs court
6 went far beyond the issues presented by the parties in that case.
7 Thus, the Waisbren court reasoned: "Given Wachs's recognition of
8 the limited nature of the issue before it, we regard as dicta the
9 court's interpretation of the term "occupation" and its statement
10 that the Act does not apply unless a person's procurement function
11 is significant. Because the Wachs dicta is contrary to the Act's
12 language and purpose, we decline to follow it. In that regard, we
13 note that Wachs applied an overly narrow concept of "occupation"
14 and did not consider the remedial purpose of the Act, the
15 decisions of the Labor Commissioner, or the Legislature's adoption
16 of the view (as expressed in the California Entertainment
17 Commission's Report) that a license is necessary for incidental
18 procurement activities. Thus we conclude that the Wachs dicta is
19 incorrect to the extent that it indicates that a license is
20 required only where a person's procurement activities are
21 'significant.'" (Id. at p. 261.)

22 Waisbren sharply criticized the Wachs focus on whether the
23 procurement activities constitute a "significant part" of the
24 agent's business as unworkable. "Because the court expressly
25 declined to say what it meant by "significant part", the import of
26 its discussion on this point is unclear." (Id. at p. 260)
27 "Perhaps a personal manager's procurement activities should no
28 longer be considered 'incidental' when they exceed 10 percent of

1 his total business. Or perhaps the line should be drawn at 25 or
2 50 percent. We simply cannot make this determination because the
3 Act provides no rational basis for doing so. Moreover, even if we
4 could somehow justify using a particular figure, it would be
5 virtually impossible to determine accurately whether a personal
6 manager had exceeded it." (Id. at p. 255)

7 9. The Waisbren decision is well reasoned and persuasive on
8 the issue of whether a license is required for incidental or
9 occasional procurement activities. Its analysis of the dicta in
10 Wachs leaves little doubt that the contrary views expressed by
11 that court are in basic conflict with the Act's remedial purpose
12 and legislative history. In cases where this question is
13 presented, the Labor Commissioner will follow the holding of the
14 Waisbren decision; the "significance" of the putative agent's
15 procurement function is not relevant to a determination of whether
16 a license is required. To the extent that the Labor
17 Commissioner's earlier determination in Church v. Brown (1994)
18 TAC 52-92 is inconsistent with the Waisbren decision, it is hereby
19 overruled.

20 10. Because the hearing in this matter took place after the
21 Wachs decision but prior to the Waisbren decision, a great deal of
22 testimony was devoted to the question of whether SEVANO's
23 employment procurement activities constituted a significant part
24 of his business as an "executive vice president" for API. The
25 evidence presented leaves no doubt that SEVANO promised to procure
26 employment for Migenes, offered to procure employment for Migenes,
27 attempted to procure employment for Migenes, and that he procured
28 employment for Migenes. Indeed, these procurement activities were

1 so pervasive and continuous, and there was so little credible
2 evidence presented by SEVANO to indicate that these employment
3 procurement functions were not a significant part of his business,
4 that even if this case were being decided under the now overruled
5 test set forth in Church v. Brown, we would have to conclude that
6 SEVANO violated the Act by engaging in these activities without
7 having been licensed as a talent agent. A similar conclusion
8 obviously flows from the application of the stricter Waisbren
9 standard.

10 11. SEVANO cannot rely on Labor Code section 1700.44(d) as a
11 means of avoiding the licensing requirement. That subsection
12 provides that "[i]t is not unlawful for a person or corporation
13 which is not licensed pursuant to this chapter to act in
14 conjunction with, and at the request of a licensed talent agency
15 in the negotiation of an employment contract." The overwhelming
16 weight of the evidence establishes that SEVANO's employment
17 procurement activities were not undertaken at the request of any
18 licensed talent agent, and that these activities were not limited
19 to the negotiation of contracts for employment on jobs already
20 procured by a licensed talent agent.

21 12. SEVANO cannot rely on the fact that he was ostensibly
22 employed by API as an "executive vice president" as a means of
23 avoiding the licensing requirement. Following Buchwald, the fact
24 that the contract between API and SEVANO appears on its face not
25 to violate the Talent Agencies Act is obviously not dispositive.
26 Rather, we must look at the parties' relationship and activities
27 in their entirety in order to determine whether the contract was
28 designed as a subterfuge to evade the Act's requirements. And it

1 is evident from the surrounding circumstances that the "employment
2 agreement" between SEVANO and API was a nothing more than a
3 clever, albeit transparent, attempt to allow SEVANO to act as a
4 talent agent without securing a license. SEVANO understood the
5 need for a license and specifically advised Martone that by
6 structuring their relationship with API in the manner he proposed,
7 they could obtain employment for Migenes without being licensed.
8 The only reason that SEVANO was hired by API was so that he could
9 try to find work for Migenes. SEVANO's only responsibilities as a
10 corporate officer were to "guide and supervise" Migenes' career,
11 and, though obviously not stated in his contract, to procure
12 employment for Migenes. These functions are exactly those that
13 may be performed by a talent agent pursuant to Labor Code section
14 1700.4(a). Indeed, there is nothing that SEVANO did during his
15 ostensible employment as an "executive vice president" for API
16 that falls outside the typical duties of a talent agent.
17 Moreover, the manner in which SEVANO performed these services - -
18 devoting some portion of his time and efforts to representing
19 artists other than Migenes, and working in his own office, rather
20 than an API corporate office - - is characteristic of the manner
21 of operations of a talent agent, not a corporate officer.
22 Finally, the manner in which SEVANO was compensated for these
23 services - - in the form of commissions based on a percentage of
24 Migenes' entertainment industry gross earnings, rather than by
25 salary - - typifies the manner of compensating a talent agent,
26 not a corporate officer. In short, the overwhelming reality
27 behind the contract was that SEVANO was hired to engage in, and
28 did engage in, the occupation of a talent agent.

1 13. SEVANO cannot rely on the fact that the contract for his
2 services as an "executive vice president" was drafted by API's
3 attorney as a means of avoiding the licensing requirement.

4 Initially, we note that it was SEVANO himself who devised the plan
5 to characterize his position in this manner, and that he did so
6 specifically in order to evade the licensing requirements of the
7 Talent Agencies Act. Moreover, there was no evidence presented to
8 indicate that Migenes then had any awareness that a person who
9 procures employment for an artist must be licensed, or that she
10 understood that the "executive vice president" position was merely
11 a subterfuge. But even if Migenes and API's attorney had been
12 active and knowing participants in SEVANO's scheme, that would not
13 excuse SEVANO from the consequences of his violation of the law.

14 "Since the clear object of the [Talent Agencies] Act is to prevent
15 improper persons from being [talent agents] and to regulate such
16 activity for the protection of the public, a contract between an
17 unlicensed [talent agent] and an artist is void. . . . And as to
18 such contracts, artists, being of the class for whose benefit the
19 Act was passed, are not to be ordinarily considered as being in
20 *pari delicto*." Buchwald v. Superior Court, *supra*, 254 Cal.App.2d
21 347, 351. In short, an artist cannot consent to a violation of
22 the licensing requirement of the Talent Agencies Act. The
23 purpose of the licensing requirement is to protect all artists,
24 and that purpose would be defeated by allowing a talent agent to
25 enter into an agreement with an individual artist, or that
26 artist's loan-out company, to permit the agent to procure
27 employment for the artist without a license.

28 14. SEVANO cannot rely on the fact that his contract was

1 with API, rather than with Migenes, as a means of avoiding the
2 licensing requirement. SEVANO's contract with API was nothing
3 more than a clever device to obtain compensation for the very
4 activities for which a license is required, that is, the
5 activities of procuring, offering, attempting and promising to
6 procure employment for Julia Migenes. API was merely the legal
7 entity through which Migenes provided her artistic services to the
8 buyers of those services. We are unaware of any precedent
9 allowing for the enforcement of a contract between an unlicensed
10 talent agent and an artist's loan-out company when the very same
11 contract would be found void *ab initio* if it were between the
12 agent and the artist. To allow SEVANO to escape the consequences
13 of his unlawful activity and to enforce his purported right to
14 compensation under his contract with API would exalt form over
15 substance, and would suggest a disturbing means of evading the
16 licensing requirement of the Talent Agencies Act. The purpose of
17 this licensing requirement is to protect artists, and one of the
18 means of doing that is to deny enforcement of any contract under
19 which the agent would be compensated for unlawful procurement
20 activities. "The courts generally will not enforce an illegal
21 bargain or lend their assistance to a party who seeks compensation
22 for an illegal act." Lewis & Queen v. N.M. Ball Sons (1957) 48
23 Cal.2d 141, 150. Thus, the fact that SEVANO contracted with API
24 rather than with Migenes is immaterial; the contract violates the
25 Talent Agencies Act and is void *ab initio*.

26 15. It is well established that "[i]f the agreement is void
27 no rights, including the claimed right to private arbitration, can
28 be derived from it. . . . [T]he power of the arbitrator to

1 determine the rights of the parties is dependent upon the
2 existence of a valid contract under which such rights might
3 arise." Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,
4 360. Because SEVANO's contract with API is void *ab initio*, the
5 arbitrator who purported to determine the merits of SEVANO's claim
6 against API pursuant to the contract's arbitration provision acted
7 without jurisdiction. The arbitration award is therefore invalid
8 and cannot be enforced.

9 ORDER

10 For all of the reasons set forth above, IT IS HEREBY ORDERED
11 that:

12 1. The one year statute of limitations at Labor Code section
13 1700.44(c) does not bar API from asserting the defense of
14 illegality in any court action or Labor Commissioner proceeding
15 brought by SEVANO to enforce the provisions of the contract
16 between the parties; and

17 2. As a consequence of SEVANO having engaged in the
18 occupation of a talent agent, within the meaning of Labor Code
19 section 1700.4(a), without having been licensed therefor as

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1 required by Labor Code section 1700.5, the contract between
2 SEVANO and API is unlawful and void ab initio. SEVANO has no
3 enforceable rights under that contract.

4
5 Dated: 3/20/97

Miles E. Locker
MILES E. LOCKER
Attorney for the Labor Commissioner

7
8 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

9
10 Dated: 3/20/97

John C. Duncan
JOHN C. DUNCAN
Chief Deputy Director
DEPARTMENT OF INDUSTRIAL RELATIONS

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