DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
BY: DAVID L. GURLEY (Bar No. 194298)
455 Golden Gate Ave., 9th Floor
San Francisco, CA 94102
Telephone: (415) 703-4863

Attorney for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

NICHOLAS SCOTT CANNON, an individual; and BETH GARDNER, an individual, Petitioner, vs. SAMIR Y. TOMA, Respondent.	Case No. TAC 11-00 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned petition was filed on May 11, 2000, by NICHOLAS SCOTT CANNON and BETH GARDNER as guardian at litem for petitioner, (hereinafter "Petitioner"), alleging that SAMIR Y. TOMA, (hereinafter "Respondent"), acted in the capacity of a talent agency without possessing the required California talent agency license pursuant to Labor Code §1700.5[1]. The petitioner seeks from the Labor Commissioner a determination voiding the parties 1998 management agreement *ab initio* and requests disgorgement of all

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[1] All statutory citations will refer to the California Labor Code unless otherwise specified.

commissions paid to respondent stemming from this agreement.

Respondent filed his answer with this agency on June 15, 2000. A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on September 25, 2000, at the San Diego Office of the Labor Commissioner. Petitioner was represented by Jeffrey M. Byer of Sandler, Lasky, Laube, Byer & Valdez LLP; respondent appeared through his attorney Gastone Bebi. Due consideration having been given to the testimony, documentary evidence and arguments presented, the Labor Commissioner adopts the following determination of controversy.

FINDINGS OF FACT

1. Petitioner is a musician, comedian and actor. The parties entered into a 3-year exclusive management agreement executed on February 17, 1998. The agreement provided, *inter alia*, that the respondent's responsibility included all engagements and other types of public appearances[2]. By the terms of the agreement, the parties were to split 50/50 all profits earned by the petitioner.

2. From February 1998 through July 1998, the respondent, eager to promote petitioner and introduce him to the Los Angeles comedy community drove then 17-year-old Nicholas to and from L.A., setting up stand-up engagements at *The Comedy Store* and

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[2] Section 2 of the "Contract Agreement" between the parties provided, "AS MANAGER IT IS AGREED THAT, BUT NOT LIMITED TO, ALL ENGAGEMENTS AND OTHER TYPES OF PUBLIC APPEARANCES WILL BE THE MANAGER'S RESPONSIBILITY."

the *Improv*.

3. Petitioner soon established a following and made regular appearances at both the *Improv* and *The Comedy Store* venues. Petitioner soon began appearing on cruises, radio shows, and colleges in the San Diego and Los Angeles areas. Television opportunities soon materialized reflected by petitioner's performance on the Keenan Ivory Wayans television program *Keenan and Kel* and appearances on *Nickelodeon*.

4. In October of 1997, the petitioner engaged the services of Marquee Tollin/Robbins Inc., an additional talent manager to handle all of petitioner's televison and film work. In the summer of 1998 Tollin Robbins hired Karen Forman of Metropolitan Talent to act as petitioner's talent agent.

5. On October 8, 1998, petitioner dissatisfied with respondent's services terminated the agreement. In November of 1999, respondent filed a breach of contract law suit against the petitioner in the Superior Court, County of San Diego, Case No. GIC737891 seeking past and future commission. In response, petitioner filed this action seeking a determination by the Labor Commissioner that the contract is illegal and void against public policy.

CONCLUSIONS OF LAW

1. It is undisputed that as an actor and comedienne, petitioner is "artist" within the meaning of Labor Code §1700.4(b).

2. The only issue is whether based on the evidence presented at this hearing, did the respondent operate as a "talent

agency" within the meaning of Labor Code §1700.40(a)? If so, are there any applicable defenses afforded the respondent?

3. Labor Code §1700.40(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." In Waisbren v. Peppercorn Production, Inc (1995) 41 Cal.App.4th 246, the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirement, thereby upholding the Labor Commissioner's long standing interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole.

4. Respondent contends that his primary duty was to counsel and guide petitioner's career and that any incidental acts of procurement should not subject him to the Act's licencing requirements. In respondent's moving papers, he quotes Wachs v. Curry, which stands for the proposition that, "if counseling and directing the clients' careers constitutes the significant part of the agent's business then he or she is not subject to the licensing requirement of the Act." Wachs, supra., 13 Cal.App.4th 616 at 627. The Waisbren decision soundly rejects this idea. Waisbren, states, "Given Wachs's recognition of the limited nature of the issue before it, we regard as dicta . . . its statement that the Act does not apply unless a person's procurement function is significant. Because the Wachs dicta is contrary to the Act's language and purpose, we decline to follow it. In that regard, we

note that Wachs applied an overly narrow concept of 'occupation' and did not consider the remedial purpose of the Act, the decisions of the Labor Commissioner, or the Legislature's adoption of the view (as expressed in the California Entertainment Commission's Report) that a license is necessary for incidental procurement activities. Thus, we conclude that the Wachs dicta is incorrect to the extent it indicates that a license is required only where a person's procurement efforts are 'significant.'" Waisbren, supra, at 261. As a result, the Labor Commissioner continues to follow Waisbren and the long-standing policy that even incidental procurement of employment requires a license.

5. Respondent maintains that Tollin Robbins, petitioner's film and television manager, as well as other "agents" procured most if not all of petitioner's engagements. Notably, respondent did not provide testimony from any licensed talent agent, nor produced any competent evidence that other talent agents were involved in the negotiation or procurement of petitioner's stand-up engagements. Conversely, the respondent's testimony was severely impeached when comparing his sworn deposition. In respondent's deposition he stated, "[I] scheduled him to perform at the Improv up in L.A." (Depo. Pg. 199 line 27) When asked whether respondents actually booked performances at the Improv, he stated, "Yes sir." Respondent also stated in his sworn deposition that he set up appearances at The Comedy Store. (Depo. Pg. 121 line 1) Respondent further stated that he made the arrangements with the particular club to have him appear. (Depo. Pg. 121 line 11). Respondent's testimony was riddled with similar inconsistencies.

6. Finally, respondent's contract that he created and entered into with the petitioner, expressly maintained that the responsibility for all engagements and public appearances was the managers. Applying Waisbren, it is clear respondent acted in the capacity of a talent agency within the meaning of Labor Code §1700.4(a).

7. Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." It was stipulated the respondent had never procured a talent agency license.

8. Respondent argues that the petitioner filed his petition late, and therefore the petition must be dismissed. Respondent argues that Labor Code section 1700.44(c) provides that "no action or proceeding shall be brought pursuant to [the Talent Agencies Act] with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding." Respondent contends that any violations must have occurred prior to the October 1998 termination. The petition being filed on May 11, 2000, consequently violates the statute of limitations. Here, the petitioner raises the issue of respondent's unlicenced status purely as a defense to the proceedings brought by respondent's action against the petitioner filed in superior court.

9. A statute of limitations is procedural, that is it only affects the remedy, not the substantive right or obligation. It runs only against causes of action and defenses seeking

affirmative relief, and not against any other defenses to an action. The statute of limitations does not bar the defense of illegality of a contract, and in any action or proceeding where the plaintiff is seeking to enforce the terms of an illegal contract, the other party may allege and prove illegality as a defense without regard to whether the statute of limitations for bringing an action or proceeding has already expired. Sevano v. Artistic Production, Inc., (1997)TAC No. 8-93 pg.11.

10. Additionally, this issue was brought before the California Court of Appeals in Park v. Deftones 84 Cal.Rptr.2d 616, at 618, which agreed with the Labor Commissioners ruling in Moreno v. Park (1998) TAC No. 9-97, p.4, stating, "the attempt to collect commissions allegedly due under the agreement was itself a violation of the Act." In that case, as here, the petitioner has brought this case before the Labor Commissioner as a result of respondents superior court action. Park adds, "it also assures that the party who has engaged in illegal activity may not avoid its consequences through the timing of his own collection action." Park, supra at 618. We thus conclude that §1700.44(c) does not bar petitioner from asserting the defense of illegality of the contract on the ground that respondent acted as a talent agent without a license.

11. In Buchwald v. Superior Court(1967) 254 Cal.App.2d 347, 351, the court held that because "the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicenced [agent] and an artist is void." We do

recognize the respondent went to great lengths in providing travel, expenses and opportunities to the petitioner; however, the resulting contract establishing a 50/50 split of the profits between the parties is unconscionable.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1998 contract between petitioner NICHOLAS SCOTT CANNON and respondent, SAMIR Y. TOMA is unlawful and void *ab initio*. Respondent has no enforceable rights under that contract.

Having made no clear showing that the respondent collected commissions within the one-year statute of limitations prescribed by Labor Code §1700.44(c), petitioner is not entitled to a monetary recovery.

Dated: 1/30/01

DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 1/30/01

TOM GROGAN
Deputy Chief Labor Commissioner