

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

Chapter 7 Bankruptcy Estate of) B165843
HOWARD BURTON WOLF.)
_____) (Super. Ct. No. BC 184552)
) Los Angeles County
HOWARD BURTON WOLF,)
)
Plaintiff and Appellant,)
)
v.)
)
MARTHA ROBI,)
)
Defendant and Appellant.)
_____)
Chapter 7 Bankruptcy Estate of)
HOWARD BURTON WOLF.)
_____)
TIMOTHY J. YOO, Trustee, and)
HOWARD BURTON WOLF,)
)
Plaintiffs and Appellants,)
)
v.)
)
MARTHA ROBI,)
)
Defendant and Appellant.)
_____)

APPELLANTS' OPENING BRIEF

Appeal from Los Angeles Superior Court

Hon. Ronald M. Sohigian

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STATEMENT OF THE CASE

Introduction

This appeal is from a final judgment in favor of defendant Robi ("Robi") in LASC Case No. BC 184552, filed on January 20, 1998 ("Case 2"), in which Wolf, a personal manager, alleged that Robi, as successor in interest of her late husband, Paul Robi ("Paul"), a musical artist, breached a 1985 written personal management agreement between Wolf and Paul by failing to pay to Wolf a 10% management fee on the proceeds of the sale of record product (cassettes, CDs, etc.) that was manufactured from recordings made by Paul pursuant to a recording agreement between Paul and Jango Records negotiated by Wolf during the term of the 1985 management agreement. See AA¹ 244.

This appeal also involves a sister action between Wolf and Robi, LASC Case No. BC 144404, filed prior to Case 2 on February 14, 1996 ("Case 1"), in which Wolf alleged that Robi breached a 1983 written management agreement between Wolf and Paul by failing to pay Wolf a 10% management fee on the collected proceeds of a judgment obtained by Paul in a federal lawsuit against his previous personal manager, Buck Ram. See AA 236; Exhibit 2.

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¹ Appellant's Index in Lieu of Clerk's Transcript.

Factual Scenario²

From late 1983 through early 1988, Wolf was the personal manager of Paul and his music group known as the Platters. Paul was a member of the original Platters, the music group that was a hit-maker during the late 1950s. Paul left the original Platters in the mid 1960s and formed his own music group called the Platters, which primarily earned income by performing the songs made famous by the original Platters in live engagements throughout the United States and in foreign countries.

Wolf's management of Paul was pursuant to three separate one year written contracts, the first commencing in or about November 1983 ("1983 contract") (Ex. 101), the second commencing in November 1984 ("1984 contract") (Ex. 102), and the third commencing in or about November 1985 ("1985 contract"); and an oral agreement that commenced in July 1986 and terminated in February 1988. The 1985 contract was lost. However, the parties agreed that the terms of the 1985 contract were the same as those of the two prior written contracts, except for the beginning and ending dates. RT³ 14:21.

Each written contract provided that as compensation for his management services, Wolf would be paid 10% of any and all gross monies or other considerations received by Paul as a result of his

² Robi's contention that the subject personal management contracts were void for violation of the Talent Agency's Act, Labor Code 1700, et seq., was tried as a special defense, prior to the trial on the merits of Wolf's breach of contract claim. Hence, all of the facts involved in the merits were not fully developed on the record. The recitation of the factual scenario, therefore, is taken from a combination of the Second Amended Complaint in Case 2 (AA 141), and the Statement of Decision (AA 645-01).

³ Reporter's Transcript.

activities in and throughout the entertainment, amusement and publishing industries, including any and all sums resulting from the use of his artistic talents and the results and proceeds thereof. It also provided that Wolf would be entitled to such compensation following the expiration of the term of the agreement with respect to any and all engagements, contracts and agreements entered into or substantially negotiated during the term of the agreement relating to any of the foregoing, and upon any and all extensions, renewals, substitutions, amendments, or modifications thereof.

During the term of the 1985 contract, Paul and his Platters group were engaged by Jango Records to perform for the making of a record album pursuant to a written contract between Paul and Jango Records (Ex. 106) that was negotiated by Wolf as Paul's personal manager. RT 1552:11-18; 396:25-397:13. The recording sessions occurred in Nashville, Tennessee in June 1986.

Shortly after the recording of the album, on July 28, 1986, Wolf and Paul signed a written agreement wherein they terminated their rights and obligations under the 1985 contract. Ex. 105. Shortly thereafter, Paul prevailed upon Wolf to re-commence managing him pursuant to an oral management agreement terminable at will by either party. RT 370:13-15. Wolf managed Paul under the oral agreement through February 25, 1988, at which time Paul terminated Wolf's management services by a written termination letter. Ex. 112.

Subsequent to the recording of the album for Jango Records, Robi advised Wolf that Jango Records had run into financial

problems as a result of which it did not release the Platters record album. Thus, as far as Wolf knew at the time, other than a small quantity of sample vinyl albums and cassettes that Jango Records transmitted to Paul after the recording sessions, there were no albums or cassettes released or distributed.

Paul died on February 1, 1989. Approximately a month before his death, he won a judgment for several million dollars against Buck Ram and others. In or about August 1995, in a meeting between Wolf and Robi's attorney, Allen Hyman (who had been Paul's attorney during his lifetime), Wolf learned that Robi had recovered on the judgment against Buck Ram an interest in several million dollars worth of music copyrights owned by Buck Ram's estate (Ram having died in the early 1990s). When defendant refused to pay Wolf a management fee on the collections on the Ram judgment, Wolf commenced Case 1. In or about December 1996, Wolf first learned that during the late 1980s and into the 1990s, Robi had sold cassette and CD copies of the Jango Records sound recordings at live engagements of the Platters. Thereafter, Wolf commenced Case 2. AA 132:8-133:6.

Procedural History

Although this is an appeal from the final judgment in Case 2, the procedural histories of both Cases 1 and 2 are relevant.

In Case 1, on May 21, 1997, the Court dismissed that case per the Stipulation of the parties to dispose of the case by binding arbitration; however, the Court retained jurisdiction for the purpose of enforcing the arbitration and arbitration award. AA 243, 337:23. Pursuant to the Stipulation, on August 7, 2000, an

arbitration was commenced by Wolf against Robi with JAMS/Endispute in Case No. 12100235051 ("JAMS/Endispute action"), before Honorable Judge Steven Stone (Ret.) as arbitrator. The arbitration was conducted on five days: August 22, 23, and 24, 2000, and September 5 and 10, 2000. On September 22, 2000, Judge Stone stayed the JAMS/Endispute action pending certain of Wolf's bankruptcy matters, and pending a decision by the California Labor Commissioner on Robi's petition to the Labor Commissioner. The JAMS/Endispute action is currently stayed. AA 338:4-23.

On September 1, 2000, Robi filed a Petition to Determine Controversy with the California Labor Commissioner pertaining to the 1983, 1984, and 1985 written management contracts, and the subsequent oral management contract between Wolf and Paul. On September 11, 2000, Robi moved for an order staying proceedings in Case 2 as a result of Wolf's bankruptcy proceeding⁴ and the pending hearing before the Labor Commissioner. On September 25, 2000, the day set for trial in Case 2, the Court stayed the trial pending the decision of the Labor Commissioner.

On March 21, 2002, the Labor Commissioner made a Determination of Controversy, ruling that the 1983, 1984, 1985 written contracts, and subsequent oral contract were unlawful and void ab initio, and that Wolf had no enforceable rights under those contracts. AA

⁴ Based on an assertion by Robi per a motion filed in Case 2 on September 11, 2000, that the trustee in bankruptcy on Wolf's September 5, 1986 Chapter 7 Bankruptcy and not Wolf, was the real party in interest plaintiff in the case, Wolf reopened his bankruptcy proceeding to obtain a court determination of who the real party in interest was. The bankruptcy court ruled that Trustee Timothy J. Yoo was the real party in interest. Per leave of Court, on June 1, 2001, a Second Amended Complaint was filed in Case 2 naming Yoo as plaintiff. AA 645:01.

340:22.

On March 22, 2002, Wolf filed three separate appeals from the Labor Commissioner's Determination of Controversy: one in Case 1, one in Case 2, and one in the JAMS/Endispute action. On October 11, 2002, Robi filed a motion to dismiss Wolf's appeal of the Labor Commissioner award, contending that Wolf should have filed an appeal from the award as a new, separate, plenary action in the Superior Court, rather than filing appeals in Case 1, Case 2, and the JAMS/Endispute action. In opposition to the motion, Wolf argued that by filing the appeals, he was entitled to a trial de novo on the issue determined by the Labor Commissioner, whether the subject management contracts were void as being in violation of the Talent Agencies Act, Labor Code § 1700 et seq. ("Act"). Since that issue constituted an affirmative defense in Case 1 as to the 1983 contract, and in Case 2 as to the 1985 contract, the issue should be determined in those actions as affirmative defenses. Moreover, since the parties had stipulated to resolve Case 1 by binding arbitration, and had already concluded five days of arbitration hearing in the JAMS/Endispute action, the Labor Code issue with respect to the 1983 contract was required to be decided in the JAMS/Endispute action. However, since Labor Code 1700.44 required the appeal from the Labor Commissioner's determination to be taken to the Superior Court, in an abundance of caution, Wolf filed an appeal in both Case 1 and the JAMS/Endispute action.

On November 8, 2002, the Court in Case 2 denied Robi's motion to dismiss Wolf's appeal, and ruled that a trial de novo of the Labor Code issue would be tried prior to trial of the remainder of

the issues in the case. AA 503. Wolf objected to this ruling on the ground that the Labor Code issue with regard to the 1983 contract should properly be litigated in the JAMS/Endispute action pursuant to the stipulation of the parties to resolve the issues in that case by binding arbitration. AA 369; RT 29:19-30:10.

Pursuant to the aforesaid ruling, on November 18, 2002, trial was commenced before the Court sitting without a jury on the issue of whether all or any of the written or oral management contracts were void for violation of the Act. At the beginning of Robi's opening statement, her attorney, Hyman, stated: "We're going to proceed with the Labor Commissioner matters;" to which the Court replied: "The thing that you're going to raise as an affirmative defense." (Emphasis added). RT 9:24-27. Hyman then proceeded: "Your Honor, as to the affirmative defense violation of Labor Commission Code [sic], 1700.5 of the Labor Commission [sic] provides that no person shall engage in or carry on the occupation of a talent agency without first procuring a license from the Labor Commissioner." (Emphasis added). RT 10:9-13.

Thereafter, during the course of the opening statements, the Court stated:

"What I intend to do is try the affirmative defense and the appeal from determination of controversy by the Labor Commissioner and request for trial de novo dated March 22, 2002. . . . I regard myself as having the power to act to the full extent provided for in the Notice of Appeal I'm going to decide every issue raised in the appeal." (Emphasis added). RT 56:23-27, 57:23-24, 58:20-21.

Prior to the commencement of the trial in Case 2, on November 4, 2002, Wolf filed a Motion in Limine to exclude evidence relating to the defense that the management contract was void for violation of the Act, contending: (1) the defense based upon Wolf's alleged violation of the Act should not be considered because it was waived in that it was not timely pleaded as an affirmative defense; and (2) the Act expressly exempts from its licensing requirement the procurement of a recording contract, and since in Case 2 Wolf sought only payment of his management fee with respect to the sale of record product based on a recording contract he had negotiated during the term of the 1985 contract, the 1985 contract should not be voided as to his conduct underlying that claim, even if it were found to be void in other respects, pursuant to the rule of severance between legal and illegal objects of a contract.

During the trial, Hyman conceded that Wolf was not claiming any compensation with respect to personal performance engagements, because he had been fully paid as to every such engagement; but his claim was only for compensation limited to the proceeds from the sale of recordings emanating from the 1986 Jango Records contract. RT 311:10-26.

Following the trial, the Court orally rendered its tentative decision. RT 1565-1578. Thereafter, on December 20, 2002, the Court issued a minute order stating that it had signed the "(Tentative) Statement of Decision with modifications by interlineation as specified in the minute order; and also signed and filed the Judgment on that date. AA 641-644, 637, 645-01. On December 31, 2002, Appellants filed an Objection to the premature

signing and filing of the Statement of Decision and Judgment. AA 726. Thereafter, the Court ordered that the Statement of Decision and Judgment were deemed to be filed as of January 16, 2003. AA 1032-1033. Notice of Appeal from the Judgment was filed within the requisite 60 days on March 13, 2003. AA 1112.

Thereafter, on May 23, 2003, a Supplemental Notice of Appeal was filed, being an appeal from the Order awarding to Robi attorney's fees in the amount of \$107,501.50 as against Wolf and Yoo, Chapter 7 Trustee, made and entered on or about April 22, 2003. AA 1550. Subsequent to filing said Supplemental Notice of Appeal, Appellants have decided not to proceed with the appeal from the attorney's fee Order, and hereby withdraw that appeal.

The issues presented for resolution on this appeal were all timely presented for determination by the Court below, both orally during opening statement and summation argument, as well as in writing in pretrial motions, and post-trial objections and motions: AA 369, 421, 507, 515, 547, 544 (in AA out of order by mistake), 560, 575, 587, 650, 776, 780, 785, 991-01, 991-11, 992, and 998.

I. THE COURT BELOW ERRED IN FAILING TO RULE THAT ROBI'S ACT-BASED DEFENSE OF VOIDNESS OF THE MANAGEMENT CONTRACTS ON THE GROUND OF ILLEGALITY WAS WAIVED BY ROBI'S FAILURE TO TIMELY SPECIALLY PLEAD IT AS AN AFFIRMATIVE DEFENSE.

The operative complaint in Case 2 is the Second Amended Complaint. AA 141. Robi's Answer to Plaintiff's First Amended Complaint (AA 15) was deemed to be her answer to the Second Amended Complaint. AA 1162:14. A review of that Answer reflects that Robi did not allege an Act-based defense of illegality of the subject

management contract. Moreover, during his summation argument, Robi's attorney conceded that no such affirmative defense had been pleaded. RT 1239:9-21.

A defense that is not timely raised by demurrer or answer is waived, unless the defense is an objection to the subject matter jurisdiction of the Court or that the matter pleaded does not state a cause of action. CCP 430.80(a). The application of this statutory rule is illustrated in California Concrete Co., Inv. v. Beverly Hills Savings & Loan Association (1989) 215 C.A.3d 260, 261 C.R. 484, in which a concrete supplier brought an action against a federal savings and loan association after the supplier was allegedly not paid for material supplied to a construction project financed by the association's predecessor. Two years after the defendant appeared in the action, it filed a motion for summary judgment on the basis of the defense that the plaintiff's action was barred by a federal statute limiting claims against institutions acquired by the FDIC. The Court of Appeal affirmed the trial court's ruling that the defendant could not maintain its motion for summary judgment on that ground because it had waived that defense by failing to timely raise it as an affirmative defense in its answer. In so holding, the Court stated at 272-273:

"Although amendments of pleadings are to be liberally allowed in the interests of justice [citation], under both state and federal rules of procedure, the failure to raise a particular defense at the earliest possible time may result in a waiver of the defense [citing cases which held that defenses based upon the statute of limitations, statute of frauds,

laches and estoppel had been waived by not being timely pleaded]."

Robi seeks to avoid this rule by contending that an affirmative defense that a contract is void because of illegality can be raised at any time, and cannot be waived by failure to specially plead it. This contention is invalid, because the rule of non-waiveability of an illegality defense applies only when the illegality appears on the face of the contract (with reference to a written contract) or is disclosed by the evidence which proves the contract (with reference to an oral agreement).

In Styne v. Stevens (2001) 26 C.4th 42, 109 C.R.2d 14, relied upon by Robi for the proposition that the one year statute of limitations contained in Labor Code 1700.44(c) does not bar the interposition of a defense based on voidness of a management contract for violation of the Act, the Court mentioned, but did not rule upon, the procedural issue of whether such a defense is waived by failure to assert it in a timely fashion once a lawsuit has commenced. In footnote 5 of the opinion at 54, the Court said in relevant part:

"As an additional basis for arguing that her defense is not barred, Stevens cites the maxim that the illegality of a contract need not be plead, can be asserted at any time, and is never waived. [Citation]. However, this principle appears concerned not with limitations periods as such, but with the procedural issue whether a defense is waived by failure to assert it in a timely fashion once a lawsuit has commenced. Moreover, it is not clear that all issues of illegality in a

contract fall within the unwaiveable category. [Citation]. . . Because we conclude on other grounds that section 1700.44 subdivision (c) does not bar Stevens's defense, we do not reach Stevens's additional argument. . . . Styne did not argue, in his opposition to the new trial order here under review, that Stevens had waived her Act-based defense by failing to follow the general rules of timely and correct pleading. He has only vaguely alluded to the issue on appeal, and the Court of Appeal did not address it. Thus, the issue is not before us." (Emphasis in original).

The authority cited by the Court in the aforesaid footnote was 1 Witkin, Summary of California Law (9th Ed., 1987) Contracts, § 444, p. 397, where Witkin observes:

"The failure to plead illegality as a defense is not a waiver. The point may be raised at any time, in the trial court or on appeal, by the parties or on the court's own motion. [Citations].

"However, this rule is sometimes limited to illegality which appears on the face of the contract or which is disclosed by the evidence. [Citation]. And it is good practice for the defendant to raise the issue at the first opportunity, by appropriate pleading. [Citation]."

This rule is further explained in 5 Witkin, California Procedure (4th Ed., 1997) Pleading, § 1024, which states:

"The general proposition that an illegal contract is void is often qualified as follows: Illegality appearing on the face of the contract or illegality disclosed by the evidence

which proves the contract, will bar recovery notwithstanding the failure to plead. And, as so qualified, the converse of the proposition is sometimes stated as a rule that illegality that does not appear on the face of the contract and is not disclosed by the evidence is not a defense unless specially pleaded." (Emphasis added).

The rule that illegality that does not appear on the face of a written contract may not be asserted as a defense unless specially pleaded was applied in the Supreme Court case of Sharon v. Sharon (1885) 68 C.29, 8 P. 614. Although this is an old case, it is still good law, and was cited in 5 Witkin, California Procedure (4th Ed., 1997) Pleading § 1024. Sharon was an action on an agreement in writing: "I hereby agree to pay Ms. S. A. Hill two hundred and fifty dollars for each and every month of the year A.D. 1883. WM. SHARON." The defendant admitted execution and delivery of the writing to plaintiff, and that he did not pay the installments alleged to be due for October, November, and December 1883; and alleged that to induce plaintiff to desist from making unwelcome visits, and annoying him and disturbing him in his room, and in consideration that she would cease to disturb or annoy him, or make any demand upon him, he made certain other payments to plaintiff, and gave her the above written contract. The answer contained a statement that defendant "denies that there ever was any consideration for the Note" sued on. The case went on appeal on the judgment role, without the evidence, which included the following finding by the trial court: "That said instrument was given by defendant to the plaintiff in consideration of past

illicit intercourse between them, and also in consideration of a promise then and there made by plaintiff to defendant to make no further demand upon defendant and not to further annoy him in any manner" On appeal, defendant contended that as the trial court found a portion of the consideration to be past illicit cohabitation, the entire contract was void; and contended that the illegality of the consideration was sufficiently pleaded by the denial of any consideration, and that the defense of illegality need not be specially pleaded. In overruling the defendant's contention and affirming the judgment for breach of contract in favor of the plaintiff, the Court held at 30:

"Without deciding that a contract to pay money for past illicit cohabitation can be enforced or avoided under a proper plea, we are of the opinion that the defense was not pleaded in this case, and was not in the issues, and the finding of the court in that respect should therefore be disregarded. .

. .

"In the case at bar there is nothing in the case as stated in the complaint to suggest any illegal consideration. The defendant admitted the execution and delivery of the writing, and stated the consideration to be that she should cease to disturb or annoy him, or make any demands upon him. The defendant doubtless studiously avoided pleading illicit cohabitation. He was, under our system of pleading, bound by the omission, and it was not competent for him to give in evidence the matters omitted." (Emphasis added).

In Sharon, although the defendant did not specially plead the

affirmative defense of illegality, he obviously adduced evidence of illegality which supported the trial court's finding that the consideration for the agreement included past illicit intercourse. However, the Supreme Court held that since the defense of illegality was not specially pleaded, it was waived, and the finding of the trial court regarding illegality should therefore be disregarded.

The rule applied in Sharon is applicable in the instant case, in that no illegality appears on the face of the contract. Indeed, on its face, the contract provides to the contrary in paragraph 3:

"YOU HAVE SPECIFICALLY ADVISED ME THAT YOU ARE NOT A `TALENT AGENT' BUT ACTIVE SOLELY AS A PERSONAL MANAGER, AND THAT YOU ARE NOT LICENSED AS A `TALENT AGENT' UNDER THE LABOR CODE OF THE STATE OF CALIFORNIA; YOU HAVE AT ALL TIMES ADVISED ME THAT YOU ARE NOT LICENSED TO SEEK OR OBTAIN EMPLOYMENT OR ENGAGEMENTS FOR ME, AND YOU DO NOT AGREE TO DO SO, YOU HAVE MADE NO REPRESENTATIONS TO ME, EITHER ORAL OR WRITTEN, TO THE CONTRARY."

The instant case involves a situation similar to that in Styne, supra, in which in a pending civil action brought by a personal manager for breach of his management contract, an artist relies on the defense that the management contract is void for violation of the Act. Robi's contention that the 1985 contract, as well as the other two written contracts and the subsequent oral management agreement, are void for violation of the Act is simply an affirmative defense. This was made clear by the decision in Styne, wherein the Court stated:

"On review, we reach the following conclusions: Contrary to the Court of Appeal's holding, a statute of limitations [emphasis in original] does not bar a defense [emphasis in original] involving no claim for affirmative relief. Hence, section 1700.44, subdivision (c), the one-year limitations period contained in the Talent Agencies Act, did not affect the times within which Stevens could take actions necessary to assert her Act-based defense against Styne's suit for breach of contract. On the other hand, the Court of Appeal was correct insofar as it determined that under section 1700.44, subdivision (a), Stevens's Act-based claims, if colorable, must first be referred to the Commissioner for resolution. Stevens's claim that section 1700.44, subdivision (a) does not apply to defenses lacks merit. [At 47]

". . .

"Accordingly, Stevens is entitled to maintain her Act-based defense, though it must be pursued in the first instance before the Commissioner. [At 48]

". . .

"Stevens implies that requiring submission to the Commissioner of defenses under the Talent Agencies Act will somehow inhibit artists from availing themselves of its protective purposes. We disagree. When an issue under the Act arises in this fashion, the appropriate course is simply to stay the Superior Court proceedings and file a 'petition to determine controversy' before the Commissioner. [Citations]. Accordingly, we agree with Styne and the Court of Appeal that

when a defendant in a court suit raises a colorable defense,
based on a violation of the Act, the merits of that issue
cannot be considered by the Court until it has first been
submitted to and examined by the Commissioner. [At 58-59]"
(Emphasis added).

Appellants respectfully submit that if the illegality which forms the basis of the Act-based defense does not appear on the face of the management contract, in order to raise it in a civil action, the defendant must specially plead it as an affirmative defense, or it is waived. Furthermore, only after the defendant timely specially pleads the Act-based defense in the civil action is that action ripe for a stay order while the Labor Code issue raised by the defense is detoured to the Commissioner for his administrative adjudication of the issue.

Appellants were substantially prejudiced by Robi's failure to timely plead the Act-based issue as an affirmative defense. If it had been timely pleaded, the matter would have been detoured for determination by the Labor Commissioner early in the case. Once the issue returned to the Superior Court after determination by the Commissioner, it could have been severed from the case on the merits and tried separately as a potentially dispositive affirmative defense, as it was so tried in November 2002.

The above analysis applies equally to both Cases 1 and 2. The Act-based defense was first raised by Robi in Case 2 by a motion on September 11, 2000, with a trial date pending on September 25, 2000. The Court granted the motion on the trial date, September 25, ordering the case stayed until determination of the issue by

the Commissioner. By that time, Appellants had already spent thousands of dollars completing their discovery and preparing to commence jury trial on the merits of their breach of contract claim, with a slate of witnesses under subpoena on September 25. The scenario in the JAMS/Endispute action is even more egregious. There, the Act-based defense was not initially raised until about 80% of the testimony was concluded in the arbitration, and the arbitrator did not issue his stay order until all of the evidence had been taken in the arbitration.

II. THE TRIAL COURT IN CASE 2 ERRED IN RULING ON ROBI'S ACT-BASED AFFIRMATIVE DEFENSE WITH RESPECT TO THE 1983 CONTRACT, SINCE THAT CONTRACT WAS THE SUBJECT OF CASE 1 AND THE ARBITRATION IN THE JAMS/ENDISPUTE CASE, AND WOLF AND ROBI HAD STIPULATED IN CASE 1 THAT THE DISPUTE RELATING TO THE 1983 CONTRACT WOULD BE RESOLVED BY SAID ARBITRATION.

Case 1 involves Wolf's claim for breach of the 1983 contract. In May 1997 the parties entered into a Stipulation wherein they agreed that all matters relating to the issues therein would be disposed of by binding arbitration. Pursuant to that Stipulation, the Court ordered Case 1 dismissed, retaining jurisdiction for the purpose of enforcing the arbitration and the arbitration award.

Thereafter, pursuant to the Stipulation, an arbitration was held before the Honorable Justice Stephen Stone (Ret.) of JAMS/Endispute. Robi's Petition to Determine Controversy was filed with the Labor Commissioner after three days of evidentiary hearings in the arbitration. An additional approximate half day of evidentiary hearing (on two different dates) was held thereafter.

In its Statement of Decision in Case 2, the Court concluded that the issue of whether any of the three written management agreements or the subsequent oral management agreement were void for violation of the Act was to be determined separately as to each contract. AA 645-16:22; RT 1567:25-28. By virtue of making a separate determination as to each such contract, there is no possibility that there would be inconsistent rulings if the validity of the 1983 contract is determined in the JAMS/Endispute action, and the validity of the 1985 contract is determined in Case 2. The validity of the 1984 contract and the subsequent oral agreement are irrelevant, since Wolf has made no breach of contract claims other than with respect to the 1983 and 1985 contracts.

Under all of the above circumstances, separate Notices of Appeal from the Labor Commissioner's determination were filed: one in Case 1, one in Case 2, and one in the JAMS/Endispute action commenced to determine the issues raised in Case 1. The purpose of filing said three Notices of Appeal was to litigate the validity of the 1985 agreement in Case 2, and the validity of the 1983 agreement in the JAMS/Endispute action arbitration (pursuant to an anticipated order of Court in Case 1 referring that issue to arbitration, pursuant to the Court's previous order retaining jurisdiction to enforce the arbitration).

The Trial Court's ruling that the validity of all of the management contracts should be determined in Case 2 was erroneous and prejudicial to Wolf. During opening statements of counsel, both the Court and Robi's attorney, Hyman, recognized that Robi's contention that Wolf's management contracts were void for violation

of the Act constituted an affirmative defense. The parties stipulated in Case 1 that Wolf's claim for damages based on breach of the 1983 contract would be determined by binding arbitration in the JAMS/Endispute action. Since Robi's assertion that the 1983 contract was void for violation of the Act constitutes an affirmative defense to Wolf's breach of contract claim, determination of that affirmative defense is encompassed within the stipulation, and therefore should be made in the JAMS/Endispute action, not in Case 2.

Furthermore, the resolution of Robi's Act-based defense requires a determination of the credibility of the witnesses, namely: Robi, Wolf, and Donnie Brooks. All three of the same witnesses testified during evidentiary hearing in the JAMS/Endispute action on the merits of Wolf's breach of contract claim. Wolf contends that during the arbitration hearing, the testimony of Wolf and Brooks was unimpeached, whereas the testimony of Robi was substantially impeached. Thus, the arbitrator would have been able to include his assessment of the credibility of the witnesses regarding their testimony on the merits in determining the credibility of their testimony regarding the Act-based defense. To Wolf's prejudice, the Court in Case 2 did not have the benefit of presiding over the previous arbitration hearing testimony. AA 781:7-24.

The Statement of Decision reflects the Trial Court's notion that Wolf's appeal from the Labor Commissioner determination constitutes a plenary proceeding with a life of its own. Respectfully, this notion is erroneous. Where an artist initiates

a Labor Commissioner proceeding to obtain a determination that a personal management contract is void for violation of the Act prior to the manager's commencement of a civil action for breach of the management contract, an appeal from the Commissioner's determination of the Superior Court would constitute a plenary proceeding. This is not the case, however, when the manager commences a civil action first and the artist raises the Labor Code issue defensively in the civil action. Styne v. Stevens, supra, held that when an Act-based defense is raised in a civil action, the appropriate course is to stay the action pending determination of the issue by the Commissioner. Because the civil action is stayed, rather than dismissed, the clear implication is that after the determination is made by the Commissioner, pursuant to Labor Code 1700.44(a), either party may timely appeal to the Superior Court where the issue is to be heard de novo. Logically, the appeal should be filed in the stayed civil action, because the reason for the stay has been eliminated by virtue of the Commissioner's determination. The Act-based defense should thereupon be litigated in the civil action as an affirmative defense.

Case 2 was filed in January 1998. The Act-based defense was not pleaded as an affirmative defense by Robi. She has never sought leave of Court to amend her answer to plead the same as an affirmative defense. Robi's contention that Wolf's management contracts are void for violation of the Act was first brought to the attention of Wolf and the Court in September 2000, almost three years after Case 2 was filed, and virtually on the eve of trial.

By that time, the defense had long since been waived by Robi's failure to specially plead it. The fact that over two years elapsed from September 2000 until the commencement of trial in November 2002 does not serve to resurrect this previously-waived defense. Furthermore, the fact that the issue was litigated before the Labor Commissioner and an appeal was taken from the adverse determination of the Commissioner does not resurrect this previously-waived illegality defense.

Labor Code 1700.44(a) provides that on appeal to the Superior Court, the Act-based defense is to be tried de novo. The essence of trying an issue de novo is captured in CRC 1616, which relates to trials de novo after judicial arbitration, where it is provided in subsection (c):

"The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial."

Rule 1616 applies to trials de novo after judicial arbitrations and is not specifically applicable to trials de novo after Labor Commissioner determinations. Nonetheless, Rule 1616 reflects that once the detour of the issue to the ancillary tribunal has been completed, the litigation and determination before that tribunal evaporates, and the matter is tried in the original tribunal as if

there had never been a detour. Therefore, in the case of the Act-based defense of illegality, the issue should be tried de novo in the Superior Court as an affirmative defense as if there had never been a detour to the Labor Commissioner.

III. THE TRIAL COURT ERRED IN RULING THAT THE ENTIRETY OF THE 1985 CONTRACT WAS VOID AB INITIO, BECAUSE IT SHOULD HAVE APPLIED THE RULE OF SEVERANCE BETWEEN LEGAL AND ILLEGAL OBJECTS OF A CONTRACT, AND HELD THAT THE CONTRACT WAS VALID AS TO WOLF'S ENTITLEMENT TO COMPENSATION ARISING FROM THE JANGO RECORDS CONTRACT, EVEN IF HELD VOID IN OTHER RESPECTS.

The premise of Robi's Labor Code defense is that Wolf's management contracts are void and therefore unenforceable because he procured employment for Paul without a license, in violation of the Act, relying on the holdings of Buchwald v. Superior Court (1967) 254 C.A.2d 347, 62 C.R. 364, and Waisbren v. Peppercorn Productions, Inc. (1995) 41 C.A.4th 246, 48 C.R.2d 437. Waisbren relied on Severance v. Knight-Counihan Co. (1947) 29 Cal.2d 561, 568, 177 P.2d 4. In addition to relying on Severance, Buchwald cited two other cases, including Loving & Evans v. Blick (1949) 33 C.2d 603, 204 P.2d 23. In Severance, a contract to sell printing plates in violation of the Uniform Fraudulent Conveyance Act was declared void. In Loving & Evans, a building contract executed by parties that were not properly licensed under the contractor's license law was declared void. The principle requiring these contracts to be declared void was elaborated in Severance at 568:

"It is settled that a contract must have a lawful object [citations] and that a contract for an object prohibited by a

penal law is void. `The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum. . . . The imposition by the statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void.'" (Emphasis added).

The above general rule pronouncing a contract void for illegality is subject to the rule of severance between legal and illegal objects of a contract. Civil Code 1599 provides: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter, and valid as to the rest." "The California cases take a very loose view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law (as the court conceives it) would be furthered." 1 Witkin, Summary of California Law (9th Ed., 1990) Contracts, § 432. The following three cases are illustrations of instances in which the Supreme Court enforced valid parts of a contract even though the contract was indivisible in its terms; and without regard to whether the contracts contained an express apportionment between legal and illegal objects.

In Keene v. Harling (1964) 61 C.2d. 318, 324, 38 C.R. 513, plaintiff sold defendants a coin machine route and equipment for \$50,000, payable in installments. Part of the equipment consisted

of illegal pinball machines, the market value of which at the time of sale was found to be \$4,600. In this action against the buyers on the promissory note, the trial judge deducted the above amount as severable illegal consideration, and gave judgment for the balance. In affirming the judgment, the Supreme Court held at 320-321, 323:

" . . . Whether a contract is entire or severable depends upon its language and subject-matter, and this question is one of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. [Citations]. It has long been the rule in this state that 'When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction for the . . . law . . . (divides) according to common sense; and having made that void that is against law, lets the rest stand. . . .' [Citations]. Thus, the rule relating to severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified and determinable portion of the consideration on the other side.

". . .

"Since the consideration on the buyer's side was money, the court properly construed the contract by equating the established market price of the illegal machines to a portion of the money consideration. 'The rule is well settled that

where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent.' [Citation]. The argument that the court cannot apportion because the parties did not expressly apportion . . . exalts form over substance."

In Edwards v. Mullin (1934) 220 C. 379, 30 P.2d 977, a partnership dissolved pursuant to a written agreement. The partnership had conducted an office in San Francisco and another in Los Angeles. The dissolution agreement provided that plaintiffs would have the exclusive right to conduct the business in the entirety of Northern California, and defendant in the entirety of Southern California, and that neither would compete with the other's business in the other's territory for 25 years. Plaintiffs thereafter brought an action for breach of contract alleging that defendant solicited and accepted business originating in the city of San Francisco. Defendant objected to the introduction of any evidence on the ground that the contract was void under Civil Code 1673-1675 which makes every contract void which restrains one from exercising a lawful profession, trade or business of any kind, with the exception that partners in the anticipation of dissolution of the partnership may agree that none of them will carry on a similar business "within the same city or town" where the partnership business has been transacted. The Court held that while the contract prohibiting defendants from doing business in the whole northern part of the state was prohibited by statute, it would sever the contract so as to uphold the prohibition against

defendant's conducting business in the city of San Francisco, thereby holding that plaintiffs were entitled to pursue their breach of contract action against defendant on the allegation that his wrongful competition involved his doing business originating in the city of San Francisco. See also Trutalli v. Meraviglia (1932) 215 C. 698, 12 P.2d 430; Hedges v. Frink (1917) 174 C. 552, 163 P. 884; and Joy Mfg. Co. v. Julian Petroleum Corporation (1929) 208 C. 168, 280 P. 952.

The closest case applying the severance rule is Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 C.4th 119, 949 P.2d 1, in which a California client sued a New York lawfirm for malpractice, and the firm counterclaimed for fees due under a fee agreement. The Supreme Court held that the firm violated the law by practicing law in California when it represented the California client in a dispute, making preliminary arbitration arrangements and negotiating a settlement in California, using attorneys who were not members of the State Bar. Hence, the firm could not recover under the fee agreement for services constituting the illegal practice of law in California. However, the firm could recover under the agreement for services performed for the client outside the state, not constituting the illegal practice of law in California. The essentially undisputed facts in Birbrower were as follows: Birbrower was a professional law corporation with its principal place of business in New York. None of its attorneys were licensed to practice in California. Birbrower's attorneys performed substantial work in California relating to the lawfirm's representation of ESQ. ESQ was a California corporation with its

principal place of business in Santa Clara County. In July of 1992, the parties negotiated and executed the fee agreement in New York, providing that Birbrower would perform legal services for ESQ, including all matters pertaining to the investigation and prosecution of all claims and causes of action against TANDEM, a corporation with its principal place of business in Santa Clara County. The claims and causes of action mentioned related to a software development and marketing contract between TANDEM and ESQ which provided that the laws of California shall govern the validity, interpretation and enforcement of the contract. A major portion of the services rendered under the fee agreement took place in California. A minor portion took place in New York.

In applying the severance rule, Birbrower held at 138:

"The fee agreement between Birbrower and ESQ became illegal when Birbrower performed legal services in violation of [the California licensing law]. It is true that courts will not ordinarily aid in enforcing an agreement that is either illegal or against public policy. [Citations]. Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement. [Citation]. `When the transaction is of such a nature that the good part of a consideration can be separated from that which is bad, the Courts will make the distinction for the . . . law . . . [divides] according to common sense,

and having made that void that is against law, lets the rest stand'"

Birbrower is analogous to Case 2 in that there was nothing in the Birbrower fee agreement nor the Wolf 1985 management contract which made those contracts illegal on their face. What made the contract in Birbrower illegal was Birbrower's performance of services in California without a license pursuant to its fee agreement. Similarly, in Case 2, what arguably made the 1985 contract illegal, was Wolf's purportedly performing the services of procuring personal performance engagements for Paul without a license. In both Birbrower and Case 2, there were legitimate services performed under the respective contracts. Since the legitimate services performed by the attorneys in Birbrower were severed by the Supreme Court and deemed compensable, the legitimate services performed by Wolf under the 1985 management contract should also be severed and deemed compensable.

The severance rule is particularly applicable in Case 2, since the purportedly illegal services performed by Wolf are easily distinguishable from the legitimate services performed by him. The Act provides: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." § 1700.5. The Act 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" § 1700.4(a). The Act, however, contains an exemption from its licensing requirement for those who procure employment in the form

of recording contracts, wherein § 1700.4(a) provides 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."

The Second Amended Complaint (AA 141), which is the operative pleading in this case, demonstrates that Appellants are seeking payment of Wolf's management fee from revenues received by Robi from the sale of record product derived from the recording contract with Jango Records that Wolf negotiated as Paul's personal manager during the term of the 1985 contract. In colloquy with the Court, Robi's attorney conceded that Appellants in Case 2 were seeking compensation only relating to management fees from the sale of copies of the recordings produced under the Jango Records contract, in that Wolf had been previously fully paid with respect to every personal performance engagement. RT 311:10-26. In rendering its oral tentative decision, the trial court stated: "[T]he only reason that this case has been pleaded as it has been is simply a matter of artful pleading on the part of Mr. Steinhart." RT 1569:27. Appellants respectfully submit that the trial court was mistaken in this observation. The Complaint sought compensation relating only to proceeds of the sale of the record product, and not relating to proceeds derived from personal performance engagements, because Wolf had been fully paid with reference to the personal performance engagements, but had not been paid with reference to the record product sales. Thus, the Complaint was based on historical facts, rather than "artful pleading."

Since the activity of procuring, offering, or promising to procure recording contracts for an artist is exempted from the licensing provisions of the Act, assuming purely for the sake of argument that everything else Wolf did under the 1985 contract was illegal as having been done without a license in violation of the Act, the compensation Appellants seek relating to the sale of record product emanating from the negotiation of the Jango Records contract should be severed from any purportedly illegal portion of the contract declared to be void for violation of the Act.

IV. THE COURT BELOW ERRED IN FINDING AND/OR CONCLUDING THAT WOLF ENGAGED IN THE OCCUPATION OF "PROCURING, OFFERING, PROMISING, OR ATTEMPTING TO PROCURE EMPLOYMENT OR ENGAGEMENTS" FOR PAUL ROBI WITHIN THE MEANING OF LABOR CODE 1700.4(a), BECAUSE THE "PROCURING CAUSE" OF PAUL ROBI'S LIVE PERFORMANCE ENGAGEMENTS WERE VARIOUS REGIONAL TALENT AGENTS UTILIZED BY WOLF TO OBTAIN EMPLOYMENT FOR THE ARTIST; AND A MANAGER'S WORKING THROUGH TALENT AGENTS IN THIS MANNER DOES NOT CONSTITUTE LICENSABLE CONDUCT UNDER THE ACT.

Labor Code 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. . . ." As noted above, the subject management contracts contained an express disclaimer, to the effect that Wolf was not licensed as a talent agent, and had at all times advised the artist that he was not licensed to seek or obtain employment or engagements for the artist, and did not agree to do so, and had made no representation to the artist, either oral or written, to the contrary.

Evidence Code 622 provides: "Facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

By reason of the above contractual disclaimer and Evidence Code 622, the statement that Wolf did not agree to seek nor obtain employment for Paul and had made no representation to that effect are conclusively presumed to be true as to Paul, as well as to Robi, his successor in interest. Therefore, no viable contention can be made by Robi that Wolf offered or promised to procure employment or engagements for Paul. Robi's contention that Wolf violated the Act must rest on proof that he attempted to procure or actually procured such employment or engagements.

In contending that Wolf did so, Robi largely relied upon Wolf's own testimony and the business documents generated by Wolf while acting as manager for Paul: personal performance engagement contracts, engagement itineraries, correspondence, financial statements from Wolf to Paul, and engagement schedule sheets. With the exception of disputed testimony between Wolf and Robi regarding engagement contracts, Exhibits 131, 155 and 156, Robi did not dispute Wolf's testimony as to his mode of operation as Paul's manager.⁵

⁵ Each of these engagement contracts was prepared by Wolf on his own form of contract, rather than being on a talent agent's contract form. Wolf testified that these were engagements which were directly booked by Robi, based on contacts that she had developed during her many years of working with Paul when he was unrepresented by a personal manager; and that the persons with whom Wolf dealt in the transactions were talent agents. Robi testified that she did not procure the engagements. The Trial Court resolved the credibility contest in favor of Robi. Notwithstanding, that

In describing his activities as Paul's manager, in brief summary, Wolf testified: He replaced two bad singers. He procured a new publicity shoot, selecting the photographer, choosing and cropping the photographs which were used in promo packs and on the front and back of album covers. He wrote new bios. He provided a graphic design used for the promo pack cover and cassette cover. He negotiated the Jango Records contract, helped to hire the music arranger, musical director and keyboard player for the Jango recording sessions, and helped put elements of the recording sessions together, such as the order of songs to be recorded. He was in the studio during the entire recording sessions, and negotiated one additional recording session. RT 745:20-751:13.

At the time of entering into the artist-manager relationship, Wolf advised Paul that his game plan was to function through a network of talent agents, and that he would be contacting agents all over America. RT 910:24-911:9. The first thing he did upon becoming Paul's manager was to contact talent agents all over the country, sending pictures and bios to these agents. RT 760:16-25.

He located various agents by referrals from the Diamonds and Little Anthony, other nostalgia acts that he represented as manager, as well as by referrals from Paul and Robi as to agents they had worked with in the past. Furthermore, there are certain books in the entertainment business that list agents, such as Cavalcade and Billboard. He looked through these books to find

finding does not support a determination that Wolf procured employment in violation of the Act during the term of the 1985 contract, since none of those transactions occurred during that contractual period.

agents that worked in the nostalgia musical genre. With the exception of Chuck Berry and Little Richard, nostalgia acts were not big enough to sign with a major agency like William Morris. All other nostalgia acts got work by using regional talent agents all over the country. RT 761:1-762:10.

As a personal manager, one would work through agents because of their capacity to procure many engagements. This was especially true with Paul. There were a minimum of four other Platters groups out there. Since Wolf felt that Paul had the best group, his game plan was to show the regional agents how good the group was, and thereby secure a multitude of engagements for Paul through agents' networking in their respective areas. RT 908:4-19. It would be totally nonproductive for Wolf to have worn several hats and not to use agents. The whole idea for Paul was to increase his importance in the marketplace in order to increase his income. That is done through agents. RT 910:4-9.

If you give agents the opportunity to work on your behalf and they are making money, they are happy to work with you. Wolf had artists other than Paul that he was representing as a manager in working with agents. Agents are in constant contact with all the vendors in their territory and know what is going on. If an act comes into their area and performs at a venue, the agent will ask the venue who booked them there. Therefore, if a manager were to go behind an agent's back and secure employment at a venue on the agent's turf, the manager would be cutting his own throat, because the agent would not work with him again. RT 908:28-909:8. It is different for an artist to book himself into a venue, unless he has

previously been booked there by an agent, in which event the agent would not do business with the artist any more. RT 910:15-23.

Witness Donnie Brooks, who was a California licensed talent agent during the 1980s, as well as a nostalgia music artist and M.C. (RT 419:25-420:10; 430:20-22; 453:28-454:5), rendered testimony that corroborated Wolf's testimony: During the 1980s, the style for getting live performance engagements for nostalgia acts was to work through a number of regional agents, rather than being exclusively signed to one agent. RT 422:18-423:9. It is a talent agent's job to book engagements for artists. If a manager were to go behind an agent's back and procure engagements for an artist himself, he would obtain a reputation as a back-stabber and other agents would not work with him. RT 444:14-27. During the 1980s, when working through regional agents, most of the time the agent would furnish his own form of contract to document an engagement. However, sometimes the agent would ask the artist to furnish the contract, saying that he was too busy to prepare it. RT 426:24-428:17.

Wolf's testimony as to the mechanics of how he worked with agents in procuring personal performance engagements for his nostalgia acts, including Paul, was as follows: Often it works on what is called "anchor dates." For example, an agent would call Wolf and say he had four performance dates in Florida in March. In order to make it worthwhile for his artist to go to Florida to perform on those dates, other dates would have to be obtained. Wolf would then call other agents and put out the word that he had the possibility of an artist going to Florida for four days in

March. Agents would then call back. One would say he could give him two dates in his territory, and another would call and say he could give him four dates in his territory, and an itinerary would be built from there. Wolf would look on a map and see how long it would take to get from one venue to another. He would also discuss with the agents other points of importance: how many shows per night; how long were the shows; how many people would attend. He would put a rider together, which is not the performance contract per se, but certain important logistical points: when do flights arrive; who would pick the artists up at the airport; what kind of hotel rooms were available; was there food at the venue; were there musical instruments and lighting there? These points were discussed orally with the agents by phone. RT 762:16-764:26. Wolf was usually in contract with Robi who was generally on the road with Paul, and she would discuss the rider points with Wolf, advising him of what the group wanted. RT 765:4-8.

With respect to the mechanics of engagement contracts being signed and monies being paid, Wolf testified: Engagement contracts and money deposits by check payable to Wolf's company would be sent to Wolf's office. He deposited the money into a trust account. He made sure the contract was signed before it reached him, sometimes being signed by the agent, other times by the venue owner. He would transmit the contract to Paul who would sign it and send it back to Wolf, who would thereupon send it to the facilities, sometimes in a furnished self-addressed envelope. RT 765:18-766:23.

With regard to the concept of "selling" and "buying" the

performance services of an artist, Wolf testified an agent's function is to sell an artist to a promoter or a venue. The promoter or venue buys the act from the agent. A manager is on the selling side. He presents the act to the agent, who then goes to solicit employment by selling the act to the buyer. Sometimes the agent will function as the person that packages a show. A venue may say to an agent, I want to put on a show, and the agent may put together a package of artists for the show. Sometimes the agent will solicit employment for the artist with a promoter and take a commission. At times, an agent will not take a commission; for example, when he wants a particular artist on a show where there is not a sufficient budget, especially if the agent does a lot of work with the artist. Sometimes the agent in packaging a show is on the buyer's side; but he is still getting employment for the artist. Normally, the agent would not advise the manager as to whether he was working on the buyer's side; sometimes it would be discussed. It made no difference to Wolf as a manager whether the agent was working on the buyer's or seller's side of a transaction, as long as he was procuring employment for Wolf's artists. RT 916:14-919:7.

Wolf followed the normal manner of working through regional agents all over America to procure work for Paul and the other nostalgia acts he represented as manager. He contended that in so doing, the agents, rather than himself, were the procuring cause of the engagements. It became an issue during the trial as to whether Wolf indeed so worked through agents, and whether they were licensed. In this regard, Wolf's attorney, Steinhart, stated to

the Trial Court: "Wolf would not be able to show that all the people he dealt with to get engagements for Paul were actually licensed talent agents. What he was trying to show was that they held themselves out in the music business as being licensed agents, and Wolf in good faith believed that they were obeying the law, and were what they represented themselves to be. Wolf was attempting to show that in doing business in the entertainment industry, he was not directly procuring employment for his artists, but was going through people who held themselves out as being licensed talent agents to procure such employment. RT 938:13-940:2.

In response, the Trial Court stated: What Steinhart wants to show is that the persons that Wolf worked with held themselves out to be talent agents, and Wolf dealt in good faith with them, based on a belief that they were talent agents. The legal effect of whether they were or not is something Steinhart plans to argue later. RT 941:16-26. The Court then ruled that he would permit Wolf to testify as to whether he functioned in good faith in the belief that the organizations that he dealt with were talent agents. RT 943:22-26.

Thereupon, Wolf testified that as to the various persons and organizations he worked with, he in good faith believed they were licensed talent agents, stating that they told him they were agents, and they performed the work of agents by procuring engagements for artists. In his testimony, he identified over 30 different persons and/or companies with whom he worked in this manner, referring to documentary evidence in support of his testimony, including written engagement contracts, engagement

itineraries, and statements reflecting deposits received from and commissions paid to agents, including Exhibits 126, 127, 128, 129, 130, 132, 133, 134, 136, 137, 138, 140, 141, 142, 144, 145, 147, 149, 160, 161, 163, 164, 165, 166, and 171. RT 945:27-961:25; 1204:13-1207:9.

Although the Act defines several other terms, it does not define the phrase "procure employment or engagements for an artist." In order to determine the meaning of that phrase within the Act, the Court must engage in statutory interpretation, many rules for which have been developed by case law. The Court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. DeYoung v. San Diego (1983) 147 C.A.3d 11, 17, 194 C.R. 722. In legislating with regard to an industry or an activity, the Legislature must be regarded as having had in mind the actual conditions to which the legislation would apply, that is, the customs and usages of such industry or activity. Irvine Co. v. California Employment Commission (1946) 27 C.2d 570, 165 P.2d 908. When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation; in this regard, it is presumed that the Legislature intended reasonable results consistent with its express purpose, not absurd consequences. Jurcoane v. Superior Court (2001) 93 C.A.4th 886, 113 C.R.2d 483. Therefore, a Court should give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity. DeYoung v. San Diego, supra. The Court should give significance,

if possible to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole. DeYoung v. San Diego, supra.

Robi contends that the phrase, "procure employment or engagements for an artist," within the meaning of the Act includes the following conduct in which Wolf testified he engaged on behalf of Paul:

1. Sending out promotional packages to present the artist to talent agents in order to solicit their assistance and participation in procuring employment for the artist.

2. Discussing and/or negotiating deal points of potential engagements proffered by a talent agent to the manager, acting as the spokesperson for the artist.

3. Serving as a liaison to obtain the artist's signature on engagement contracts.

4. Receiving engagement deposit monies and making expense disbursements therefrom on behalf of the artist, including talent agent commissions and management fees.

Appellants submit that the interpretation of the statutory phrase in question posited by Robi creates a mischievous and absurd consequence, rather than a reasonable and common sense interpretation consistent with the purpose of the Act, and the wise policy the Legislature is presumed to have intended.

Sending Out Promotional Packages

When a manager sends out promotional packages on behalf of an artist to talent agents, he has in mind utilizing the services of the talent agents to procure employment for the artist. In that

sense, it could be argued that the manager in so doing is indirectly attempting to procure such employment, and thus requires a license under the Act to do so. However, such an interpretation would then require that entertainment industry public relations companies, publicists and advertising agencies be licensed under the Act, because their activities constitute indirect attempts to obtain employment for the artists they represent. Indeed, if an artist employed a secretary or a personal assistant to engage in such conduct, if the conduct constitutes a procurement activity under the Act, the secretary or personal assistant would also be required to be licensed. Such an interpretation creates an absurd consequence, which pursuant to the rules of statutory interpretation, cannot be imputed to the Legislature.

Acting as Liaison for Signing and Receiving Cash Deposits

If the activity of being a liaison for the signing of engagement contracts and/or receiving and disbursing engagement deposit monies constitutes an act of procurement under the Act, then if an artist employs a CPA, business manager, investment advisor, personal assistant or secretary to perform these functions, each of those persons would be required to be licensed under the Act. Such an interpretation creates an absurd consequence which cannot be imputed to the Legislature.

Discussing/Negotiating Deal Points With an Agent

Finally, the activity of a personal manager's discussing and/or negotiating the deal points of a potential engagement proffered by a talent agent arguably comes the closest to being included in the concept of engaging "in the occupation of procuring

. . . employment or engagements for an artist." However, in that scenario, it is the talent agent, not the personal manager, that is engaging in the licensable activity. The personal manager is merely acting as the spokesperson of the artist, in order to free the artist from personally engaging in such conversations with talent agents with respect to each engagement proffered to the artist, and permitting the artist to concentrate upon his artistry, rather than the business aspects of his career.

As noted above, the Legislature must be regarded as having had in mind the actual conditions, customs and usages of the industry or activity with reference to which it is legislating. Thus, the Legislature should be deemed to have promulgated the Act in the context of the roles played by personal managers and talent agents in the entertainment business. The roles were described in detail in the well-recognized law review article, "O'Brien, Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists," 80 Cal. L. Rev. 471 (1992) ("O'Brien Article"). This Article was cited with approval in Waisbren v. Peppercorn Productions, Inc. (1995) 41 C.A.4th 246, 48 C.R.2d 437, as well as in Wachs v. Curry (1993) 13 C.A.4th 616, 16 C.R.2d 496, and was quoted at length in Waisbren.

In describing the functions of talent agents, the O'Brien Article stated at 478-479:

Functions of Talent Agents

"The talent agent's primary function is to market the artist's talent to buyers within the entertainment industry. After locating such purchasers, talent agents often negotiate

the particulars of employment. They might also counsel and advise artists in the development of their careers, although talent agents are under no statutory obligation to do so.

"The service a talent agent renders contemplates two types of clients: sellers and buyers of talent. While the mainstay of the talent agent's clientele is his or her roster of artists (the sellers), his other kind of client is the buyer of such talent--producers, record companies, publishers, packagers, promoters and club owners. The talent agent's job is to deliver his artists to talent buyers. He serves as the middle man, the negotiator. He knows, or should know, what an artist is worth, and he must know what the buyer is willing and able to pay. (Emphasis supplied).

From the above description of the functions of talent agents, it is apparent that they generally operate as "the middle man, the negotiator," on behalf of clientele on the selling side (the artist) as well as clientele on the buying side (producers, record companies, publishers, packagers, promoters, and club owners).

Functions of Personal Managers

With respect to the functions of personal managers, the O'Brien Article states at 481-482:

"Artists typically engage personal managers in addition to talent agents. . . . Such agreements generally contain an exclusivity clause similar to that found in the artist-agent contract.

"The management agreement ordinarily includes an array of provisions equivocally delineating the personal manager's

obligations to the artist. In essence, 'the primary function of the personal manager is that of advising, counselling, directing and coordinating the artist in the development of the artist's career.' . . . As business advisors, they might attend to the artist's finances, and they routinely organize the economic elements of the artist's personal and creative life necessary to bring the client's product to fruition. . . . The manager also serves as a liaison between the artist and other personal representatives, arranging their interactions with, and transactions on behalf of, the artist.

"By orchestrating and monitoring the many aspects of the artist's personal and business life, the personal manager gives the artist time to be an artist. That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic function and to concentrate on their immediate creative task--writing a script, acting in a motion picture, recording a demo tape, or performing in a concert, for example. In this regard, the personal manager is an indispensable element of an artist's career." (Emphasis added).

A live performance artist, such as Paul, is essentially in the business of selling his talents to performance venues on a show by show basis. The talent agent serves as the broker in such talent selling transactions, his services contemplating two types of clients: sellers and buyers of artistic live performance services. He serves as the middle man, the negotiator in such transactions.

The personal manager serves as a liaison between the artist and the talent agent, overseeing the transactions proffered by the talent agent on behalf of the artist.

As noted above, when acting as the broker, a talent agent knows, or should know, what an artist is worth in attempting to bring about an engagement contract between the artist (seller) and performance venue (buyer). In this regard, one of the primary functions of the personal manager is to impart to the talent agent the relevant information needed by the talent agent to understand the artist's worth.

As the broker in personal performance engagement transactions, the talent agent, not the personal manager, is the "procuring cause" of the employment. This can plainly be seen by analogy to the function of a real estate broker in a real estate sale transaction. Assume the following hypothetical: Smith obtains the services of a real estate broker to sell his house because he has taken a job in another country. The listing agreement conditions payment of the broker's commission upon his procurement of a ready, willing and able buyer. It is well-established that a condition precedent requiring the broker to "procure" a ready, willing and able buyer is satisfied only if the broker is the "procuring cause," which is a question of fact in each case. Coldwell Co. v. Hubert (1967) 248 C.2d 567, 577, 56 C.R. 753, 760-761. Generally, the broker is deemed to be the "procuring cause" if he or she originates a series of events which, without any break in continuity, result in the intended transaction. Coldwell Co. v. Hubert, supra. Stated another way, the broker must put in motion

a chain of events which, without a break in continuity, are the "proximate cause" of the transaction. Nelson v. Mayer (1954) 122 C.A.2d 438, 445, 265 P.2d 52, 56.

In Rose v. Hunter (1957) 155 C.A.2d 319, 325, 317 P.2d 1027, 1031, the Court held:

"`Procuring cause' has been defined as the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of the employment.' [Citation]. `Where several agencies have been active in bringing about a sale . . . the crucial question is, which was the predominating efficient cause? The word `procure' does not necessarily imply the formal consummation of an agreement . . . in its broadest sense, the word means to prevail upon, induce or persuade a person to do something . . . the originating cause, which ultimately leads to the conclusion of the transaction is held to be the procuring cause.'" (Emphasis supplied).

In Nelson v. Mayer, supra at 446, the Court held:

"`To constitute himself the causa causans, the predominating effective cause, it is not enough that the broker contributes indirectly or incidently to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity cause the buyer and seller to come to terms as the proximate result of his peculiar activities.'" (Emphasis added).

In the above hypothetical, neither the seller nor buyer are

deemed to be the procuring cause, i.e., the proximate cause or predominating effective cause of the transaction. The broker who procures a ready, willing and able buyer is deemed to be the procuring cause. Although both the participation of the seller and buyer are obviously part of the cause of the transaction, since their participation is not the "procuring cause," their participation does not require a broker's license.

Now let us change the hypothetical slightly: Before the broker obtains a ready, willing and able buyer, Smith leaves the country to begin his new job, and appoints his business manager as his spokesperson to negotiate with the broker on the deal points of any proffered sale transaction. In such capacity, Smith's business manager merely stands in the shoes of Smith as his spokesperson. Since Smith is not required to have a broker's license to participate as a partial cause of the transaction, neither is his business manager required to have a broker's license merely to perform the function of standing in Smith's shoes in the transaction.

Similarly, in a transaction involving the selling of an artist's performance for a live engagement, neither the artist, his personal manager, nor any other person standing in the shoes of the artist as his spokesperson in dealing with the talent agent (broker), is required to be licensed as a talent agent (broker). Interpreting the act to require an artist's spokesperson to be licensed as a talent agent would create an absurd result, rather than a reasonable and common sense result consistent with actual conditions, customs and usages in the entertainment industry, and

consistent with the analogous roles pertaining to transactions involving real estate brokers. In such transactions, the only party whose conduct requires licensing is the broker, not the seller nor buyer, nor any person acting as the spokesperson standing in the shoes of the seller or buyer. This is so because the broker is the only party in the transaction who is in the occupation of being the procuring cause of such transactions; and as such, he is the only participant requiring licensure. Similarly, when a talent agent is involved in the procurement of live performance engagements, only the talent agent, and not the artist nor his manager (standing in the artist's shoes as his spokesperson) requires licensing.

In the Trial Court's Statement of Decision, there is a suggestion that when a licensed talent agent acts on the buyer's side of a personal performance engagement, a personal manager is prohibited from using the agent in the transaction unless the manager is licensed. AA 645-19:23. Appellants respectfully submit that this notion is based upon an erroneous interpretation of the Act. In legislating with regard to an industry or activity, the Legislature is presumed to have had in mind the actual conditions to which the legislation would apply, that is, the customs and usages of such industry or activity. As noted above:

"The service a talent agent renders contemplates two types of clients: sellers and buyers of talent. . . . He serves as the middle man, the negotiator." (Emphasis added).

O'Brien Article, pp. 478-479.

The typical genesis of a live performance engagement transaction is

a performance venue's contacting a talent agent to provide the venue with a performer. This does not make the talent agent the buyer's agent, as differentiated from the artist's agent. Regardless of how negotiations for the live performance engagement are initiated, the agent acts as a middleman broker, attempting to get the artist and the venue into an engagement contract which is satisfactory to both sides. In the context of how business is done in the live performance entertainment industry, it is absurd to interpret the Act as providing that a personal manager needs a license when he deals with an agent who is on the "buyer's side" of the transaction, where the agent has first been contacted by the buyer to procure an engagement contract with an artist. The agent's function is that of a broker, bringing buyer and seller together in a satisfactory engagement contract. The talent agent regards as his clients both the artists for whom he procures employment and the buyers who come to the agent seeking to engage the services of the artists. Therefore, talent agents often act in the dual capacity of broker for both seller and buyer, as is also often the case with real estate brokers.

A personal manager should be free to deal with a talent agent as the procuring cause of an engagement regardless of the characterization of the agent's orientation as being on the buyer's side or seller's side, because such characterization is specious in the context of how business is actually done in the entertainment industry. As the undisputed evidence establishes, this was especially the case in the 1980s nostalgia live engagement portion of the industry, in which with the exception of Little Richard and

Chuck Berry, nostalgia entertainers were not exclusively signed to a talent agency, but obtained engagements by utilizing the brokerage services of regional talent agents throughout America on a nonexclusive basis.

With reference to the rule of statutory interpretation that the Court is to give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole, the Court's attention is invited to the language of certain relevant sections of the Act. Labor Code 1700.2(a) defines "fee" as meaning, amongst other things: (1) any money or consideration paid for services rendered by a talent agency under the Act; and (2) "[t]he difference between the amount of money received by any person who furnished performers for performances, and the amount paid by the person to the performer." Labor Code 1700.24 provides that every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation. Labor Code 1700.25 provides that a talent agency that receives any payment of funds on behalf of an artist shall immediately deposit the sum in a trust fund account maintained by it, and disburse the funds, less the licensee's commission, to the artist within 30 days after receipt. Labor Code 1700.39 provides that no talent agency shall divide fees with an employer, an agent or other employee of an employer. Interpreting all of the aforesaid sections together, it can be seen that the Act contemplates the talent agent's fee to be derived both by payment directly from the artist to the agent, as well as the agent's receiving a lump sum from a performance

venue in exchange for the agent's furnishing the performer, out of which the agent is obligated to pay the performer through the agent's trust account. In this regard, because the agent's fee schedule must be filed with the Commissioner, the agent cannot legally deduct from the lump sum payment received from the venue more than his scheduled fee. Since the Act defines a talent agent's fee as both monies paid directly to him by an artist in exchange for the talent agency's services, as well as the difference between what the talent agent receives from the venue and the amount paid by him to the performer, the Act does not contemplate a distinction based upon the direction from which the talent agent's commission is paid, whether from the seller's side or buyer's side. Regardless of the genesis of such payment, it merely constitutes a fee paid to the agent for his brokering services. Therefore, within the meaning of the Act, whether an agent's orientation in a transaction is deemed to be on the seller's side or the buyer's side is not a relevant consideration. What is relevant is that the agent's brokering function in bringing the transaction to fruition is the procuring cause of the engagement. As such, the agent is the only entity requiring licensing under the Act.

Obviously, a live performance artist performing on the road in venues throughout America needs someone to routinely organize the economic elements of the artist's life and serve as a liaison between the artist and the talent agent, arranging engagement transactions on behalf of the artist. This was especially the case during the 1980s when there were no faxes, cell phones, nor email.

The role of the personal manager fulfills this need. See O'Brien Article's recitation of the functions personal managers, above at page 43. Respectfully, an interpretation of the Act that would require a personal manager who liaisons with a talent agent on behalf of an artist to himself be licensed as a talent agent creates an impermissibly absurd result. For example, suppose a major country music artist that resides in Los Angeles, as many do, utilizes a Los Angeles-based personal manager, and is exclusively signed with a Nashville-based major country music talent agent, as many are. If a personal manager who liaisons with a talent agent is required himself to be licensed under the Act, the country artist's personal manager would be of no use to the artist in that capacity since the artist cannot be signed to his Los Angeles manager as a talent agent because he is exclusively signed to his Nashville talent agent. Therefore, in such a situation, the artist would be inconveniently and unproductively relegated to himself performing all of the liaison services that were performed by Wolf for Paul. Such an interpretation impermissibly imputes lack of wisdom to the Legislature.

CONCLUSION

For all of the reasons stated above, the judgment of the Court below should be reversed.

Respectfully submitted,

Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c)

Counsel for plaintiffs and appellants hereby certifies that the number of words in **APPELLANTS' OPENING BRIEF** is 13,527 words.

Dated: February 19, 2004

Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, at the aforesaid place of business, one copy each of the document described as **APPELLANTS' OPENING BRIEF** was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully pre-paid, addressed as set forth in the attached Service List to opposing counsel and the Superior Court judge care of the court clerk, and five copies to the California Supreme Court per said Service List; and that envelope was placed for collection and mailing on said date following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct.

Executed on February 20, 2004.

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