IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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

PETITION FOR REHEARING

Appeal from Los Angeles Superior Court
Hon. Ronald M. Sohigian

TERRAN T. STEINHART
Attorney at Law
4311 Wilshire Boulevard
Suite 415
Los Angeles, California 90010-3713
(323) 933-8263
Fax (323) 933-2391
Bar No. 036196
Attorney for Plaintiffs and Appellants

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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

PETITION FOR REHEARING

Appeal from Los Angeles Superior Court
Hon. Ronald M. Sohigian

TERRAN T. STEINHART
Attorney at Law
4311 Wilshire Boulevard
Suite 415
Los Angeles, California 90010-3713
(323) 933-8263
Fax (323) 933-2391
Bar No. 036196
Attorney for Plaintiffs and Appellants

TABLE OF CONTENTS

PAGE

PETITION FOR REHEARING 1

ARGUMENT 2

I. THE HOLDING THAT THE SEVERANCE RULE MANDATED BY CIVIL CODE § 1599 IS NOT APPLICABLE TO CONTRACTS UNDER THE JURISDICTION OF THE ACT IS IN ERROR, BECAUSE: 2

A. The Opinion's Conclusion As To The Public Policy Underlying The Act Is Invalid. 5

1. Waisbren Is A Void Judgment And Cannot Properly Be Cited As Authority For Any Proposition. 5

2. Assuming For The Sake Of Argument That The Judgment In Waisbren Is Not Void, Its Public Policy Holding Is Invalid Because It Is Based On A Factual Inference Derived From The CEC Report, Impermissibly Premised On Speculation, Conjecture and Guesswork. 9

B. Even Assuming For The Sake Of Argument That The Conclusion As To The Public Policy Is Valid, The Severance Rule Mandated By Civil Code § 1599 Is Applicable To Contracts Cognizable Under The Act Because The Act Does Not Expressly Set Forth The Public Policy, Nor Does It Expressly Set Forth An Intention That The Severance Rule Of The Prior-Enacted Civil Code § 1599 Is Inapplicable To Contracts Coming Under The Act, And The Application Of A Prior Statute Cannot Be Abrogated By Implication By A Subsequent Statute. 16

C. The Severance Rule Of Civil Code § 1599 Is Mandatory On The Courts, And Is Not Within Their Equitable Discretion, Their Responsibility Being To Determine Whether There Is A Factual Basis Upon Which To Divide Between The Lawful And Unlawful Objects Of The Contract. 19

D. The Prior Cases Holding Contracts In Violation Of The Act Void Ab Initio Are Invalid Authority For That Proposition. 24

II. THE OPINION'S ELIMINATION OF APPELLANTS' RIGHT TO ARBITRATE (IN THE ARBITRATION PROCEEDING PENDING UNDER CASE 1) THE ISSUE OF WHETHER THE 1983-1984 MANAGEMENT CONTRACT WAS IN VIOLATION OF THE ACT IS INCORRECT, BECAUSE: 25

A. The Opinion Is Internally Inconsistent On This Point. 25

B. The Opinion Impermissibly Exalts Form Over Substance. 28

C. The Formal Procedural Requirements Imposed By The Opinion Are Arguably Not Applicable To This Case. . 30

III. THE OPINION'S HOLDING THAT THE TRIAL COURT'S FINDING THAT WOLF "PROCURED EMPLOYMENT" IS SUPPORTED BY SUBSTANTIAL EVIDENCE IS IN ERROR, BECAUSE: 31

A. In The First Instance, The Issue Is A Matter of Statutory Interpretation As To The meaning Of "Procure Employment" In The Factual Context Of The Instant Case, Rather Than The Review Of A Factual Finding As To Whether It Is Based On Substantial Evidence. 31

B. The Opinion Improperly Failed To Address The Statutory Interpretation Issue Raised By Appellants. 35

IV. THE OPINION CONTAINS A FACTUAL ERROR AS TO THE TIMING OF WOLF'S BANKRUPTCY WHICH ERRONEOUSLY REFLECTS ON WOLF'S PERSONAL LIFE IN A PUBLISHED OPINION. 39

CONCLUSION 40

ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH CRC 14(c) 41

TABLE OF AUTHORITIES

PAGE

CASES

Case	Page
Abelleira v. District Court of Appeal (1941) 17 C.2d 280, 292-293, 109 P.2d 942	5
Armendariz v. Foundation Health Psyche Care Services, Inc. (2000) 24 C.4th 83, 123 99 C.R.2d 745	21-24
Bank of America (Groucho Marx) v. Flemming Cal. Lab. Comm. Case No. 1098 ASC, MP 432 (decided 1982)	15, 16
Buchwald v. Superior Court (1967) 254 C.A.2d 347 62 C.R. 364	10, 14, 28
Cummings v. The Film Consortium Cal. Lab. Comm. Case No. TAC 5-83	15
Damon v. Emler, Cal. Lab. Comm. Case No. TAC 36-79 SF-MP 63 (decided 1982)	15, 16
Elser v. Gill Net No. One (1966) 246 C.A.2d 30 54 C.R. 568	29
Humes v. Margil Ventures, Inc., Cal. Lab. Comm. Case No. TAC 19-81 SF/MP 116 (decided 1982)	15
Kearney v. Singer, Cal. Lab. Comm. Case No. MP-429 AM-211, MC (decided 1977)	15
Keene v. Harling (1964) 61 C.2d 318, 324 38 C.R. 513	20, 23
Lewis & Queen v. N.M. Ball Sons (1957) 48 C.2d 141	13
Nussbaumb v. The Chickens Company, Inc. Cal. Lab. Comm. Case No. TAC 17-80, SF MP 81	16
O'Bannon v. Nelson, Cal. Lab. Comm. Case No. TAC 1-81 SS MP 98	15
Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 C.A.4th 635, 124 C.R.2d 363	4, 21, 24
Park v. Deaftones (1999) 71 C.A.4th 1465 84 C.R.2d 616	3, 9, 24

People v. American Contractors Indemnity Co.
(2004) 33 C.4th 653, 660, 16 C.R.3d 76 6

People v. Austin (1994) 28 C.R.2d 885
23 C.A.4th 1596 12

Pryor, Cal. Lab. Comm. Case No. TAC 17 MP-114 15

Rogers v. Portnoy, Cal. Lab. Comm. Case No. SF MP 40
(decided 1978) 15

Severance v. Knight-Counihan Co. (1947)
29 Cal.2d. 561, 568, 177 P.2d 4 14

Sharpe v. Superior Court (1983) 143 C.A.3d 469
192 C.R. 16 29

Stop Youth Addiction, Inc. v. Lucky Stores
(1998) 15 C.4th 553, 569, 71 C.R.2d 731 17, 18

Styne v. Stevens (2001) 26 C.4th 42
109 C.R.2d 14 3, 8, 24, 25

Todd-Stenberg v. Dalkon Shield Claimants Trust
(1996) 48 C.A.4th 976, 978-979,
56 C.R.2d 16, 17-18 31

United States Fidelity & Guaranty Co. v. Ceck
(1946) 73 C.A.2d 828, 831, 171 P.2d 731 30

Wachs v. Curry (1993) 13 C.A.4th 616
16 C.R.2d 496 36, 37

Waisbren v. Peppercorn (1995)
41 C.A.4th 256, 48 C.R.2d 437 1, 3, 5, 8-10, 12-14, 24, 32, 37

Westlake Community Hospital v. Superior Court
(1976) 17 C.3d 465, 474-477, 131 C.R. 90 5

Williams v. Housing Authority of City
of Los Angeles (2004) 121 C.A.4th 708, 722
17 C.R.3d 374, 384 5, 7

Wilson v. Bergman, Cal. Lab. Comm. Case No. MP 456
AMC 13-78 (decided 1980) 16

Wright v. State of California (2004)
122 C.A.4th 659, 664-666, 19 C.R.3d 92, 95-96 6

STATUTES

Business and Professions Code §§ 17200-17209	17
CCP § 403	30
CCP § 404	30
CCP § 1048	30, 31
Civil Code § 1598	19
Civil Code § 1599	1-5, 16, 18-22, 24, 32
Civil Code § 1670.5(a)	21, 24
Civil Code § 3528	28
CRC Rule 1(a)(2)	28
Evidence Code § 600(b)	12
Labor Code § 1700.4(a)	36
Labor Code § 1700.44(d)	38
Penal Code § 308	17
Stop Tobacco Access to Kids Enforcement Act ("STAKE Act") (Business and Professions Code § 22950 et seq.)	17

SECONDARY SOURCES

McPherson, "The Talent Agencies Act: Time For A Change" 19 Hastings Comm. & Ent. L.J. 899	15, 16, 37
O'Brien, Regulation of Attorneys under California's Talent Agencies Act: A Tautological Approach to Protecting Artists, 80 Cal. L. Rev. 471 (1992)	34
Rutter Group, Civil Procedure Before Trial, § 12:370	30
Rutter Group, Civil Procedure Before Trial § 12:340	31

PETITION FOR REHEARING[1]

Appellants hereby respectfully petition the Court for a rehearing, or in the alternative, for a rewriting and correction of its Opinion, 2005 WL 352383 (Cal. App. 2 Dist.) ("Opinion") filed on February 14, 2005, on the following grounds:

1. The holding that the severance rule mandated by Civil Code § 1599 is not applicable to contracts under the jurisdiction of the Talent Agencies Act ("Act") is in error, because:

a. The Court's reliance on the public policy conclusion in Waisbren v. Peppercorn (1995) 41 C.A.4th 256, 48 C.R.2d 437, is misplaced, because:

(1) Waisbren is a void judgment as it was entered in violation of the exclusive, original jurisdiction of the Labor Commissioner, and hence cannot be cited as authority for any proposition.

(2) Waisbren's conclusion as to the public policy underlying the Act is premised upon a factual inference impermissibly based upon speculation, surmise, conjecture and guesswork.

b. The Opinion's public policy holding impermissibly abrogates by implication the application of the severance rule of Civil Code § 1599 to contracts within the jurisdiction of

---

[1] Prior to the issuance of the Opinion, only the litigants have addressed the issues. One of the obvious reasons why a Petition for Rehearing is authorized is to permit an aggrieved litigant to address perceived errors in the Opinion, once the Court has spoken. The instant Petition is filed with all due respect to this Court, because Appellants sincerely believe that the Opinion contains fundamental errors that should be addressed and corrected. Hopefully, this Petition will be addressed by the Court with the respect in which it is presented.

the Act.

2. The elimination of appellants' right to arbitrate the issue of whether the 1983-1984 management contract is in violation of the Act is an error, because:

a. The Opinion is demonstrably internally inconsistent on this point.

b. The Opinion impermissibly exalts form over substance.

c. The formal procedural requirements imposed by the Opinion are arguably not applicable to this case.

3. The Opinions holding that the trial court's finding that Wolf "procured employment" is supported by substantial evidence is in error, because:

a. In the first instance, the reviewable issue is a matter of statutory interpretation as to the meaning of "procure employment," rather than review of the factual finding as to whether it is based on substantial evidence.

b. This Opinion fails to address the statutory interpretation issue raised by Appellants.

4. The Opinion contains a factual error as to the timing of Wolf's bankruptcy which erroneously reflects on Wolf's personal life in a published opinion.

ARGUMENT

I. THE HOLDING THAT THE SEVERANCE RULE MANDATED BY CIVIL CODE § 1599 IS NOT APPLICABLE TO CONTRACTS UNDER THE JURISDICTION OF THE ACT IS IN ERROR, BECAUSE:

The reasoning in support of the Opinion's holding that Wolf is

not entitled to have his right to commissions for lawful activity severed from his right to commissions for an unlawful activity may be summarized as follows:

1. California courts have uniformly held that a contract under which an unlicensed party procures or attempts to procure employment for an artist in violation of the Act is void ab initio, such that the party procuring the employment is barred from recovery of commissions for any activities under the contract, relying on: Styne v. Stevens (2001) 26 C.4th 42, 109 C.R.2d 14; Waisbren, supra; and Park v. Deaftones (1999) 71 C.A.4th 1465, 84 C.R.2d 616.

2. The rationale for denying a personal manager recovery even for activities which are entirely legal is based on the public policy of the Act to deter personal managers from engaging in illegal activities, relying on the legislative intent analysis in Waisbren which was derived from the 1985 Report by the California Entertainment Commission ("CEC Report"): the public policy being that the most effective weapon for assuring compliance with the Act is the power to declare any contract entered into between the parties void from the inception.

3. Wolf's attempt to distinguish the aforesaid prior cases on the ground that they did not address nor rule upon the applicability of the severance rule of Civil Code § 1599, such that only unlawful conduct under a management agreement should be deemed void, is without merit, because:

a. Although Civil Code § 1599 authorizes a court to severe the illegal object of a contract from the legal, it

does not require the court to do so; and the decision whether to severe the legal term of a contract is informed by equitable considerations, relying on Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 C.A.4th 635, 124 C.R.2d 363.

b. Balancing the giving of an unbargained for benefit to Robi (he receives a service he does not have to pay for) versus a dilution of the deterrent effect of invalidating an entire contract (managers will be more careful to avoid unlawful activities if they know they will not get paid for the lawful ones), the aforesaid public policy underlying the Act is best effectuating by denying all recover, even for legal activities which did not require a talent agency license.

The linchpin that holds the above analysis together is the conclusion that the public policy adopted by the Legislature for enforcement of the Act was to deny a personal manager recovery even for activities which were entirely legal in order to deter personal managers from engaging in illegal activities. Respectfully, if this is not the public policy underlying the Act, the Opinion's rejection of the severance rule mandated by Civil Code § 1599 is without support.

The argument developed below will persuasively show that:

1. The Opinion's conclusion as to the public policy underlying the Act is invalid.

2. Even assuming for the sake of argument that the conclusion as to the public policy is valid, the severance rule

mandated by Civil Code § 1599 is applicable to contracts cognizable under the Act because the Act does not expressly set forth that public policy, nor does it expressly set forth an intention that the severance rule of the prior-enacted Civil Code § 1599 is inapplicable to contracts coming under the Act, and the application of a prior statute cannot be abrogated by implication by a subsequent statute.

3. The severance rule of Civil Code § 1599 is mandatory on the courts, and is not within their equitable discretion, whenever a rational basis for severance between the lawful and unlawful objects of a contract can be discerned.

4. The prior cases holding contracts in violation of the Act void ab initio are invalid authority for that proposition.

A. The Opinion's Conclusion As To The Public Policy Underlying The Act Is Invalid.

The holding in the Opinion as to the public policy underlying the Act relies upon the holding and reasoning therefor in Waisbren, which in turn relies upon the CEC Report. This reliance is misplaced, because:

1. Waisbren Is A Void Judgment And Cannot Properly Be Cited As Authority For Any Proposition.

It is well-established that the requirement of exhaustion of administrative remedies is "a jurisdictional prerequisite to resort to the courts." Abelleira v. District Court of Appeal (1941) 17 C.2d 280, 292-293, 109 P.2d 942; see also Westlake Community Hospital v. Superior Court (1976) 17 C.3d 465, 474-477, 131 C.R. 90. This rule was explained in Williams v. Housing Authority of

City of Los Angeles (2004) 121 C.A.4th 708, 722, 17 C.R.3d 374, 384:

> "Generally, where an adequate administrative remedy is provided by statute or rule of an administrative agency 'relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation]. The requirement of exhaustion of the administrative remedy is 'a jurisdictional prerequisite to resort to the courts.' [Citations]. 'The administrative tribunal is created by law to adjudicate the issue sought to be presented to the court. The claim or 'cause of action' is within the special jurisdiction of the administrative tribunal, and the courts may act only to review the final administrative determination. If a court allowed a suit to be maintained prior to such final determination, it would be interfering with the subject matter jurisdiction of another tribunal. [Emphasis added]. Accordingly, the exhaustion of an administrative remedy has been held jurisdictional in California.'" Accord: Wright v. State of California (2004) 122 C.A.4th 659, 664-666, 19 C.R.3d 92, 95-96.

When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and thus vulnerable to direct or collateral attack at any time. People v. American Contractors Indemnity Co. (2004) 33 C.4th 653, 660, 16 C.R.3d 76. ("American Contractors"). American Contractors explained the two different types of jurisdictional errors at 660-661:

> "'Lack of jurisdiction in its most fundamental or strict

sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation]. When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' [Citation]. The second type of jurisdictional error occurs when the court has jurisdiction over the subject matter and the parties in the fundamental sense, but 'it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural perquisites.' [Citation]. When a court has fundamental jurisdiction but acts in excess of its jurisdiction, its act or judgment is merely voidable . . . . Errors which are merely in excess of jurisdiction should be challenged directly . . . and are generally not subject to collateral attack once the judgment is final . . . ."

As noted in Williams, the requirement of exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts in the most fundamental sense of jurisdiction, since a court's permitting a suit to be maintained prior to a final determination of the administrative tribunal constitutes an interference with the subject matter jurisdiction of the administrative tribunal. Therefore, when a court acts under such circumstances, it is acting in the absence of subject matter jurisdiction over the cause of action, and lacks jurisdiction in a fundamental sense.

In Styne v. Stevens, supra at 56, the Supreme Court held:

> "Our conclusion that section 1700.44 by its terms, gives the Commissioner exclusive original contradiction over controversies arising under the Talent Agencies Act comports with, and applies, the general doctrine of exhaustion of administrative remedies. With limited exceptions, the cases state that where an adequate administrative remedy is provided by statute, resort to that form is a "jurisdictional" prerequisite to judicial consideration of the claim. [Citations]."

On this point, the Court further elaborated at 56:

> "'The Commissioner has the authority to hear and determine various disputes, including the validity of artists' manager-artist contracts and the liability of the parties thereunder. [Citations]. The reference of disputes involving the [A]ct to the Commissioner is mandatory. [Citation]. Disputes must be heard by the Commissioner, and all remedies before the Commissioner must be exhausted before the parties can proceed to the superior court. [Citations].'" (Emphasis in original).

The Court in Waisbren violated the doctrine of exhaustion of administrative remedies and thus acted without fundamental jurisdiction. In Waisbren, a personal manager brought an action against puppet creators for alleged breach of agreement to pay him a percentage of their profits. The Superior Court granted summary judgment for the puppet creators, and the manager appealed. The Court of Appeal held that: (1) the personal manager who procured

employment for the artists as an incidental portion of his business was subject to the licensing requirements of the Act; and (2) the agreement between the manager and the puppet creators was unenforceable because the manager was unlicensed. There is no indication in the Opinion that the dispute was submitted for determination by the Labor Commissioner before it was adjudicated in the Superior Court nor the Court of Appeal. This situation is distinguishable from Park in which the Opinion recites that the matter was first adjudicated by the Commissioner.

Pursuant to the above authority, both the Superior Court and Court of Appeal judgements in Waisbren are void because both of those Courts lacked fundamental jurisdiction to rule on the Act-based issues involved in granting and affirming the summary judgment. No citation of authority is necessary to support the proposition that a void judgment is just that: void. Therefore, the judgment of the Court of Appeal in Waisbren, as reflected in its Opinion at 41 C.A.4th 246, 48 C.R.2d 437, is void and cannot properly be cited as authority for any proposition whatsoever.

2. Assuming For The Sake Of Argument That The Judgment In Waisbren Is Not Void, Its Public Policy Holding Is Invalid Because It Is Based On A Factual Inference Derived From The CEC Report, Impermissibly Premised On Speculation, Conjecture and Guesswork.

The reasoning in Waisbren with respect to its public policy conclusion is set forth at 261-262:

> "'Since 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 unlicensed [agent] and an artist is void.' (Buchwald v. Superior Court (1967) 254 C.A.2d 347, 62 C.R. 364 . . .) 'The general rule controlling in cases of this character is that where a statute prohibits . . . the doing of an act, the act is void, and this [is the consequence], notwithstanding that the statute does not expressly pronounce it so.' [Citation].

"Waisbren nevertheless contends that declaring the parties' agreement to be void is too severe a penalty, especially in light of the fact that the Act does not contain criminal penalties for licensing violations. . . . [T]he legislative history of the Act directly contradicts Waisbren's contention. In examining the licensing issue, the California Entertainment Commission specifically addressed the question of whether criminal sanctions should be imposed for violations of the Act. [Citation]. It recommended that the Legislature not enact criminal penalties **in part** because 'the most effective weapon for assuring compliance with the Act is the power . . . to . . . declare any contract entered into between the parties void from the inception.' [Citation]. By following the Commissions' advice in not enacting criminal penalties, the Legislature approved the remedy declaring agreements void if they violate the Act." (Emphasis supplied).

Note that Waisbren stated at the above-quoted reason in support of the CEC Report's recommendation that the Legislature not

enact criminal penalties was only **part** of the reason. In the CEC Report itself, three reasons for that recommendation were stated:[2]

First Reason (CEC Report at 25)

"The criminal penalties which were contained in the Act prior to their removal by AB 997 have been invoked on a number of occasions.

"There is, however, an inherent inequity--and some question of constitutional due process--in subjecting one to criminal sanctions in violation of a law which is so unclear and ambiguous as to leave reasonable persons in doubt about the meaning of the language or whether a violation has occurred.

"'Procure employment' is just such a phrase. While a majority of the Commission believes that there should be no unlicensed activity, involving any aspect of procurement of employment for artists, the uncertainty of knowing when such activity may or may not have occurred at pain of criminal punishment has left the personal manager uncertain and highly apprehensive about the permissible parameters of their daily activity."

Second Reason (Report at 26-27)

"The majority of the Commission believes that existing civil remedies which are available by legal action in the

---

[2] Pursuant to Evidence Code § 450, et seq., Appellants respectfully request that the Court take judicial notice of the CEC Report. To assist the Court in doing so, the cover page of the Report, dated December 2, 1985, and pages 24-26 of the Report, which contain the material quoted below, are attached to this Petition.

civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the Act and punishing breaches. These remedies include actions for breaches of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation, infliction of emotional distress and the like."

Third Reason (CEC Report at 27)

"Perhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from the inception and order the restitution to the artist of all fees paid to the artist and the forfeiture of all expenses advanced to the artist." (Emphasis added).

Evidence Code § 600(b) defines "inference" as follows:

"An inference is a deduction of fact that may logically and reasonably be drawn from another fact or a group of facts found or otherwise established in the action." (Emphasis added).

It is well-established that a reasonable inference from evidence may not be based on suspicion alone, nor on imagination, speculation, supposition, surmise, conjecture, or guesswork but, rather, must logically flow from other established facts. People v. Austin (1994) 28 C.R.2d 885, 23 C.A.4th 1596.

Respectfully, Waisbren's inference that in choosing not to

reenact criminal penalties in the Act, the Legislature adopted the Report's third reason for that recommendation, is an impermissible deduction. Surely, in drawing inferences, Appellate Courts are subject to the same evidentiary rules as are trial judges and juries. Respectfully, there is no way for the Court in Waisbren to have discerned whether the Legislature's decision was based on reason one, reason two, and/or reason three, or whether it was based on none of the reasons. Inferring that the Legislature's decision was based on the third reason is an impermissible inference based on suspicion alone, imagination, speculation, surmise, conjecture or guesswork, and not a deduction logically flowing from the evidence contained in the CEC Report. Indeed, as this Court pointed out during oral argument in indicating that it was relying on Lewis & Queen v. N.M. Ball Sons (1957) 48 C.2d 141, a Court of Appeal is not bound by the authorities nor the reasons set forth by the litigants. Similarly, the Legislature is not bound by any or all of the reasons cited in a Commissions Report, but may make decisions based on some or none of the reasons.

Since the Waisbren Court could not permissibly infer upon what reason or reasons the Legislature decided not to reenact criminal penalties in the Act, its public policy argument based on the inference that the Legislature acted upon the third reason is without support and thus is invalid. Respectfully, the reliance by this Court in its Opinion on that public policy conclusion is equally unsupported and invalid.[3]

---

[3] Waisbren's reliance on the CEC Report is also improper because the Report itself is internally inconsistent on the criminal sanctions issue. The Report at 24 states that the

Furthermore, Waisbren's reliance on Buchwald in support of the proposition that "a contract between an unlicensed [agent] and an artist is void" is also invalid. As noted in Waisbren at 261 in explaining the holding in Buchwald:

> "'Where a statute prohibits . . . the doing of an action, the act is void, and this [is the consequence], notwithstanding that the statute does not expressly pronounce it so.' (Severance v. Knight-Counihan Co. (1947) 29 Cal.2d. 561, 568, 177 P.2d 4)." (Emphasis added).

Buchwald cannot properly be cited for the proposition that under the present definition of "talent agency" the entire contract must be declared void if the manager engages in both lawful and prohibited activities. As noted in Waisbren, quoting from the Supreme Court case of Severance, where a statute prohibits the doing of an action, the "act" is void. Logically, therefore, if a manager performs two acts under a contract, one of which is prohibited by statute, and the other of which is not, the one prohibited by statute is void, but the one not prohibited is not void.

Conspicuously absent from Waisbren's analysis regarding the voidness ab initio sanction of contracts that are in violation of

---

Commission's conclusion on the issue is: "It is the majority view of the Commission that the industry would be best served without the imposition of civil or criminal sanctions for violation of the Act." (Emphasis added.) The remedy to declare a management contract "void from the inception and order the restitution to the artist of all fees by the artist and the forfeiture of all expenses advanced to the artist" (CEC Report at 27) is obviously a severe civil sanction. Since the Commission concluded that the industry would be best served without the imposition of civil or criminal sanctions for violation of the Act, the Commission was inconsistent in condoning the imposition of this Draconian civil sanction.

the Act is any indication in the statute itself that such a remedy is mandated.

Finally, the Labor Commissioner's decisions themselves aptly demonstrate that the significance and meaning of the remedy of voiding a personal management contract ab initio is anything but a clear public policy underlying the Act.

McPherson, "The Talent Agencies Act: Time For A Change", 19 Hastings Comm. & Ent. L.J. 899 ("McPherson Article"), amongst other things, contained a review of many decisions of the Labor Commissioner and the penalties imposed on managers for violation of the Act. The penalties imposed in these cases varied significantly. In some cases, the manager merely did not get paid a commission for the offending procurement. See O'Bannon v. Nelson, Cal. Lab. Comm. Case No. TAC 1-81, SS MP 98; Bank of America (Groucho Marx) v. Flemming, Cal. Lab. Comm. Case No. 1098 ASC, MP 432 (decided 1982). In others, the artist did not have to pay any further commissions to the manager. See Kearney v. Singer, Cal. Lab. Comm. Case No. MP-429, AM-211, MC (decided 1977); Damon v. Emler, Cal. Lab. Comm. Case No. TAC 36-79, SF-MP 63 (decided 1982). In still others, the manager was actually disgorged of commissions previously-earned and collected, and not permitted to recover either the reasonable value of his services nor any expenses that he advanced. Rogers v. Portnoy, Cal. Lab. Comm. Case No. SF MP 40 (decided 1978), Pryor, Cal. Lab. Comm. Case No. TAC 17 MP-114; Humes v. Margil Ventures, Inc., Cal. Lab. Comm. Case No. TAC 19-81, SF/MP 116 (decided 1982); Cummings v. The Film Consortium, Cal. Lab. Comm. Case No. TAC 5-83. In others, the

manager was only disgorged of amounts that he made after he became aware that a Talent Agency license was necessary. See Nussbaumb v. The Chickens Company, Inc., Cal. Lab. Comm. Case No. TAC 17-80, SF MP 81. Finally, the Labor Commissioner has often held that an innocent violator (i.e., not unsavory and otherwise qualified to obtain a Talent Agency license), particularly when there is a sophisticated artist, can recover or keep at least some monies under such an illegal agreement. See e.g., Wilson v. Bergman, Cal. Lab. Comm. Case No. MP 456, AMC 13-78 (decided 1980); Bank of America, Cal. Lab. Comm. Case No. 1098 ASC MP-432; Damon, Cal. Lab. Comm. Case No. TAC 36-79, SF MP 63. See footnotes 71 through 75 of the McPherson Article.

For all of the above reasons, any conclusion that the alleged power of the Commissioner to declare a management contract void from the inception constitutes the public policy underlying the Act is an invalid deduction from the evidence.

B. Even Assuming For The Sake Of Argument That The Conclusion As To The Public Policy Is Valid, The Severance Rule Mandated By Civil Code § 1599 Is Applicable To Contracts Cognizable Under The Act Because The Act Does Not Expressly Set Forth The Public Policy, Nor Does It Expressly Set Forth An Intention That The Severance Rule Of The Prior-Enacted Civil Code § 1599 Is Inapplicable To Contracts Coming Under The Act, And The Application Of A Prior Statute Cannot Be Abrogated By Implication By A Subsequent Statute.

There is a strong presumption against the implied repeal or abrogation of a prior-enacted statute by a later-enacted statute.

Stop Youth Addiction, Inc. v. Lucky Stores (1998) 15 C.4th 553, 569, 71 C.R.2d 731. In Stop Youth Addiction, plaintiff, a nonprofit corporation, sued Lucky Stores for unfair competition under the Unfair Competition Law ("UCL"), Business and Professions Code §§ 17200-17209. The complaint alleged that defendant, in the course of its retailing activities, violated Penal Code § 308, which prohibited the sale of cigarettes to minors. In reversing a general demurrer by the supermarket without leave to amend, the Supreme Court reasoned as follows: The UCL confers standing to prosecute actions for relief not only on the public official's named therein, but on private individuals. Thus, a private plaintiff who has suffered no injury at all may sue to obtain relief for others. The fact that the plaintiff could not directly enforce Penal Code § 308 (because it contained no language conferring such right of action) did not preclude the plaintiff from seeking relief under the UCL against the defendant. In enacting Penal Code § 308, and the related Stop Tobacco Access to Kids Enforcement Act ("STAKE Act") (Business and Professions Code § 22950 et seq.) the Legislature did not preclude plaintiff from seeking relief under the UCL against defendant. In enacting Penal Code § 308 and the STAKE Act, the Legislature did not intend to promulgate a comprehensive and exclusive scheme for combatting the sale of tobacco to minors so as to preclude plaintiff from seeking relief under the UCL. In so holding, the Court stated at 1096:

> "The governing principles in determining whether a statute repeals another by implication are well-established. [Citation]. The law shuns repeals by implication.

[Citation]. In fact, '[t]he presumption against implied repeal is so strong that, 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' [Citation]."

Civil Code § 1599 was enacted in 1872. The original enactment of the Talent Agencies Act as the Artists' Managers Act was in 1959, which was amended to the Talent Agencies Act in 1978. Clearly CC § 1599 is the prior-enacted statute.

Pursuant to the above authority, it is improper to hold that the Act abrogated by implication the application of the severance rule of Civil Code § 1599 with relation to contracts within the scope of the Act. As noted above, the presumption against implied repeal is so strong that to overcome the presumption the two acts must be irreconcilable, entirely repugnant and so inconsistent that the two cannot have concurrent operation; courts are bound, if possible, to maintain the integrity of both statutes so the two may stand together.

There is no express statement in the Act that evidences a legislative intention of making the severance rule of Civil Code § 1599 inapplicable to management contracts under the jurisdiction of the Act. Pursuant to the above authority, no such intention may be implied. Obviously, Civil Code § 1599 and the Act cannot be deemed to be irreconcilable, entirely repugnant or so inconsistent that the two cannot have concurrent operation. Therefore, pursuant to Stop Youth Addiction, the holding in the Opinion that the severance

rule of CC § 1599 is not applicable to management contracts held to be in violation of the Act is not permissible.

C. The Severance Rule Of Civil Code § 1599 Is Mandatory On The Courts, And Is Not Within Their Equitable Discretion, Their Responsibility Being To Determine Whether There Is A Factual Basis Upon Which To Divide Between The Lawful And Unlawful Objects Of The Contract.

Respectfully, the holding of the Opinion that Civil Code § 1599 authorizes but does not require a court to sever the illegal object of a contract, and that the decision of whether to sever the illegal term is informed by equitable considerations, is incorrect. First, such a holding does violence to the language of the statute itself. Civil Code § 1598 provides: "Where a contract has but a single object, and such object is unlawful, . . . <u>the entire contract **is** void</u>." (Emphasis added). 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, <u>the contract **is** void as to the latter, and valid as to the rest</u>." (Emphasis added). Sections 1598 and 1599 are contrasting statutes. Neither statute gives discretion, equitable or otherwise, to the courts to decided whether or not to declare an entire contract void when there is but a single unlawful object, or to declare the unlawful object of a contract void and the lawful object valid when there is more than one object. They simply state that in those contrasting cases, a contract <u>**is**</u> either entirely void, or <u>**is**</u> void in part and valid in part.

Second, the only statutory authority given to the courts under

CC § 1599 is the responsibility to determine whether a contract has several "distinct" objects, at least one of which is unlawful and one of which is lawful. Upon so finding, § 1599 mandates that the "distinct" lawful object is valid, and the "distinct" unlawful object is void. The task given to the courts is to determine whether the objects are "distinct," not to exercise equitable discretion to determine whether or not to sever a distinct lawful object from a distinct unlawful object. The rule for making the determination is stated in Keene v. Harling (1964) 61 C.2d 318, 324, 38 C.R. 513:

> "'. . . 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 commons sense; and having made that void that is against law, lets the rest stand. . . .' [Citations]. Thus, the rule relating to severability to partial 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, determinable portion of the consideration on the other side."

The Opinion correctly cites Oakland-Alameda County Coliseum Authority v. CC Partners, supra, for the purported equitable discretion proposition under CC § 1599. However, since its publication in August 2002, no other case has cited CC Partners for this rule. Furthermore, the case relied upon by CC Partners in support of the proposition, Armendariz v. Foundation Health Psyche Care Services, Inc. (2000) 24 C.4th 83, 123, 99 C.R.2d 745, does not so hold. Armendariz involved the issue of whether an agreement providing for mandatory arbitration when employees brought a wrongful termination action against their former employer was unenforceable as an adhesion contract that included unconscionable one-sided provisions that lacked mutuality between employer and employee in regard to the requirement to arbitrate disputes. With respect to contracts that have unconscionable clauses in them, there is a specific severance rule set forth in Civil Code § 1670.5(a) which provides:

> "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract or it may enforce the remainder of the contract with the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

The Legislative Committee Comment states:

> "Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause

or group of clauses tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results."

The aforesaid specific unconscionability section clearly gives the courts equitable discretion as to whether to void an entire unconscionable agreement, or sever unconscionable provisions. Since there were no cases decided under that section to give guidance, the Court in Armendariz reasoned from cases decided under the general severance rule enunciated in CC § 1599, stating at 123-124:

> "Two reasons for severing or restricting illegal terms rather than voiding the entire contract appear implicit in case law. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement--particularly when there has been full or partial performance of the contract. [Citations]. Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations]. The overarching inquiry is whether 'the interests of justice . . . would be furthered' by severance. [Citation]. Moreover, courts must have the capacity to cure the unlawful contract through severance or restriction of the offending clause, which, as discussed below is not invariably the case."

In concluding that it was required to declare void the entire unconscionable arbitration agreement that lacked mutuality of

enforcement, <u>Armendariz</u> reasoned at 124-125 as follows:

> "[I]n the case of the agreement's lack of mutuality, such permeation is indicated by the fact <u>there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement</u>. Rather, the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms. Civil Code Section 1670.5 does not authorize such reformation by augmentation, nor does the arbitration statute. . . . Nor do courts have any such power under their inherent, limited authority to reform contracts. [Citation]. . . . Because a court is unable to cure this unconscionability through severance or restriction, and is not permitted to cure it through reformation and augmentation, it must void the entire agreement."

Unlike <u>Armendariz</u>, in the instant case the lawful and unlawful objects of the contract are obviously distinct. There is no language in the contract which indicates an unlawful object. The unlawful object is only indicated by the manager's performance of services for the artist under the contract. Assuming for the sake of argument that Wolf's procurement of live performance engagements for Robi through regional talent agents constitutes an unlawful object or act, such procurement conduct is void. No one is entitled to compensation for performing a void act. On the other hand, Wolf's procurement of a recording artist agreement is a lawful object, and hence is valid. As noted in <u>Keene</u>: "[A] contract is severable if the court can consistent with the intent

of the parties, reasonably relate the illegal consideration on the one side to some specified and determinable portion of the consideration on the other side." Clearly, the court can do so in the instant case, denying compensation for the procurement of personal performance engagements, and permitting compensation for procurement of the record contract.

Based on the above analysis, it appears that CC Partners improperly distilled a general proposition of law from Armendariz that purportedly governed cases under CC § 1599, when the equitable discretion of which Armendariz spoke related not to CC § 1599, the general severance statute, which does not confer equitable discretion, but to CC § 1670.5(a), a specific severance statute for unconscionable contracts, that does expressly confer equitable discretion.

D. The Prior Cases Holding Contracts In Violation Of The Act Void Ab Initio Are Invalid Authority For That Proposition.

As noted above, the decision in Waisbren constitutes a void judgment that cannot be cited as authority for any proposition. Assuming it is not void, for the reasons set forth above, its conclusion, regarding the voiding of contracts ab initio based on the purported public policy underlying the Act, is incorrect.

Park expressly follows Waisbren. Since the authority of Waisbren is void, and in any event incorrect, the authority of Park is likewise invalid.

The statement in Styne at 46, "One must have a license to act as a talent agency . . . and any contract of an unlicensed person for talent agency services is illegal and void ab initio," is

dictum. There were only two essential issues before the Styne Court: (1) whether the defendant's Act-based defense that the plaintiff's management contract was void for violation of the Act was barred by the one-year statute of limitations; and (2) whether that defense could be litigated in the civil action without first being referred to and determined by the Labor Commissioner. The above-quoted observation was merely a scenario statement to generally set up the legal context in which the Court's discussion was presented. As noted in Styne itself at 57: "An opinion is not authority for a point not raised, considered or resolved therein." In other words, Styne's statement regarding contractual voidness is dictum, and thus not authoritative.

II. THE OPINION'S ELIMINATION OF APPELLANTS' RIGHT TO ARBITRATE (IN THE ARBITRATION PROCEEDING PENDING UNDER CASE 1) THE ISSUE OF WHETHER THE 1983-1984 MANAGEMENT CONTRACT WAS IN VIOLATION OF THE ACT IS INCORRECT, BECAUSE:

A. The Opinion Is Internally Inconsistent On This Point.

On page 4 of the Opinion, it held:

> "We see nothing wrong with filing the notice of appeal and request for trial de novo in a pending action between the parties when the pending action includes the same issues adjudicated by the Commissioner. From a practical standpoint it makes sense that if an existing Superior Court action is stayed so the Labor Commissioner can determine in the first instance whether there has been a violation of the Act, an appeal from the Commissioner's determination should be heard in the action which involves the issues determined by the

Commission. This procedure conserves the time and resources of the parties and the court because a trial de novo on a violation of the Act is equivalent to first trying the defendant's Act-based defense to the plaintiff's suit." (Emphasis added).

The Opinion goes on to say at page 5:

"The parties may be satisfied to have all the issues in the Commissioner's determination tried de novo in one action, be it one of the existing actions or a separate, independent action. <u>If, on the other hand, a party wants to separate the issues to be determined in a trial de novo so they align with the issues raised in each of the pending actions, that party may move to consolidate those issues for trial [referring to CCP 1048 with respect to the procedure for consolidation of actions, and CCP 404 for the procedure with respect to the coordination of actions]</u>. . . .

"In the present case, if Wolf did not want the 1983-1984 tried in the same action as the 1985-1986 contract he should have moved to consolidate the trial de novo on the validity of the 1983-1984 contract with the pending contract which raised that issue. He did not. He has no complaint."

Respectfully, the two above-quoted sections of the Opinion are inconsistent. First, the Opinion states that it is proper to file a notice of appeal and request for trial de novo in a pending action that includes the same issues adjudicated by the Commissioner, because as a practical matter, an appeal from the Commissioner's determination should be heard in the previously-

stayed action which involves the issues determined by the Commissioner. Logically, if a party follows that permitted procedure, there would be no need for that party to make a motion to consolidate or coordinate cases, since he would have lodged the notice of appeal and request for trial de novo in the very action in which he desires to have the issue previously-adjudicated by the Commissioner determined by the Court. Frankly, moving to consolidate the appeal into an action in which the appeal has already been filed does not make sense. Respectfully, it is mere redundant surplusage.

Wolf followed the procedure condoned by the Opinion in the first section of quoted verbiage. He filed a notice of appeal in Case 1 (as well as directly in the arbitration), and a separate notice of appeal in Case 2. As the Opinion points out on page 2, Wolf objected to the Court in Case 2 determining the Act-based defense with respect to the 1983-1984 contract, arguing to the Court that that issue was subject to the arbitration agreement between the parties in Case 1, and should be adjudicated in the pending Case 1 arbitration, pursuant to the notices of appeal filed therein.

Respectfully, the Opinion in essence required Wolf to wear a belt and suspenders in permitting him to both file a notice of appeal in Case 1 (which he did), and thereafter requiring him to move to consolidate or coordinate the issue in that appeal with Case 1 (where the issue was already pending on appeal).

The Opinion at page 2 observes that Wolf's notices of appeal were from "the Determination of Controversy by the California State

Labor Commissioner" and requested "a trial de novo before this tribunal in the above pending case;" but did not state the different appeals were "limited to a particular contract between the parties." Respectfully, this observation is not relevant in the context of appellate jurisprudence. For example, CRC Rule 1(a)(2) provides that a notice of appeal must be liberally construed, the notice being sufficient if identifies the particular judgment or order being appealed. The Advisory Committee Comment (2002) with respect to revised subdivision (a)(1) and (2) states that the revision "deletes as surplusage the reference to an appeal from 'a particular part of the judgment' in former subdivision (a), noting that reference to a judgment is intended to include part of a judgment. Respectfully, the Opinion's apparent criticism that Wolf's notices of appeal did not include reference to particular contracts seems to suggest that Wolf should have included non-required surplusage in his notices. Respectfully, this suggestion was improper.

B. The Opinion Impermissibly Exalts Form Over Substance.

The following legal principle is so well-established that it is codified as a maxim of juris prudence: "The law respects form less than substance." Civil Code § 3528. The applicability of this principle in the instant case was noted in footnote 28 of the Opinion which observes that the Court in Buchwald at 351 stated: "Clearly the Act may not be circumvented by allowing language of the written contract to control [otherwise] [t]he form of the transaction, rather than its substance would control." (Emphasis added).

This principle is applicable to overlook defects in the form of pleadings or motions in favor of acting upon their substance. For instance, in Sharpe v. Superior Court (1983) 143 C.A.3d 469, 192 C.R. 16, the defendant made a motion for judgment on the pleadings which the plaintiff opposed as if it were a motion for partial summary adjudication of issues. The trial court denied the defendant's motion. The Court of Appeal ruled that it was entitled to disregard the defective form of the motion below and review it as a motion for partial summary adjudication of issues. Another example is Elser v. Gill Net No. One (1966) 246 C.A.2d 30, 54 C.R. 568, in which the county district attorney initiated an action to forfeit gill net's in the names of fish and game commissioners, whereas the authority to institute such proceedings was vested in the Director of the State Department of Fish and Game. The Court held that the district attorney acted within his power as a representative of the Department, and the judgment rendered therein was not without force or effect on the ground that the commissioners had no capacity to sue and that the Director was deprived of his day in court.

Similarly, in the instant case, not only did Wolf file a notice of appeal in Case 1, but he formally advised the Court by objection in Case 2 that it was not proper to decide whether the 1983-1984 management agreement was in violation of the Act in Case 2, but that it should be decided in the Case 1 pending arbitration. Although in form Wolf did not make a motion to consolidate nor coordinate, in substance he achieved the same result by virtue of the above procedures. Respectfully, to hold, as the Opinion does,

that his failure to make a motion to consolidate or coordinate is a fatal defect is to impermissibly exalt form over substance. For example, the Opinion rejected Robi's argument that Wolf should have filed his notice of appeal as an independent action, in part because such a contention impermissibly exalts form over substance. The thrust of the substance over form principle was well-stated in United States Fidelity & Guaranty Co. v. Ceck (1946) 73 C.A.2d 828, 831, 171 P.2d 731, where the Court noted:

> "While such an [improper form] argument might find some support in decisions of an earlier day when mere technicalities were deemed important, it is out of harmony with modern enlightened jurisprudence which regards the substance as more important than mere form and will not permit a mere technicality to defeat substantial justice."

C. The Formal Procedural Requirements Imposed By The Opinion Are Arguably Not Applicable To This Case.

It is questionable whether the procedures enunciated in either CCP § 1048 or CCP § 404 would apply to the procedure required of Wolf in the Opinion. CCP § 404 is the procedure whereby actions pending in different courts can be tried together, and is applicable only to cases deemed "complex" as defined by the Judicial Council. Noncomplex cases can be transferred from one court to another and consolidated with cases pending in the transferee court under CCP § 403. Rutter Group, Civil Procedure Before Trial, § 12:370. This procedure clearly does not fit the instant case.

Consolidation under CCP § 1048 is a procedure for uniting

separate lawsuits for trial, where they involve common questions of law or fact and are pending in the same court. The purpose is to enhance trial court efficiency and to avoid the substantial danger of inconsistent adjudications, i.e., different results because tried before different juries, or a judge and a jury, etc. See Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 C.A.4th 976, 978-979, 56 C.R.2d 16, 17-18; Rutter Group, Civil Procedure Before Trial, § 12:340. Query whether this procedure is applicable to the instant case. CCP § 1048 is normally used to consolidate two actions pending in the same court either for all purposes, or solely for the purpose of trial. Although the statutory language would permit a Court to order a trial of any or all of the matters in issue in the actions (which might arguably make the procedure applicable to the instant case), that is not the normal use to which CCP § 1048 consolidation is put.

Nonetheless, even if CCP § 1048 is colorably applicable, for the reasons stated under subheadings A, B, above, respectfully, it was error for the Court to hold that Wolf's failure to specifically use that procedure constituted a fatal defect.

III. THE OPINION'S HOLDING THAT THE TRIAL COURT'S FINDING THAT WOLF "PROCURED EMPLOYMENT" IS SUPPORTED BY SUBSTANTIAL EVIDENCE IS IN ERROR, BECAUSE:

A. In The First Instance, The Issue Is A Matter of Statutory Interpretation As To The meaning Of "Procure Employment" In The Factual Context Of The Instant Case, Rather Than The Review Of A Factual Finding As To Whether It Is Based On Substantial Evidence.

In Argument IV of Appellants' Opening Brief and Argument IV of

Appellants' Reply Brief, Appellants clearly posited the issue of whether the manner in which Wolf worked through regional talent agents with respect to Robi's personal performance engagements constituted activity to "procure employment or engagements for an artist" within the meaning of the Act as a matter of statutory interpretation.

In making its public policy holding with respect to the nonapplicability of the severance rule mandated by Civil Code § 1599, the Opinion relied on page 7 on the public policy analysis contained in Waisbren, supra, which in turn relied upon a quotation from the CEC Report. Since the Opinion deems the Report a reliable reference, it may confidently be referred to with regard to the issue at hand. In discussing the criminal sanctions issue, the Report stated at 25:

> "The criminal penalties which were contained in the Act prior to their removal by AB 997 have been invoked on a number of occasions.
>
> "There is, however, an inherent inequity--and some question of constitutional due process--in subjecting one to criminal sanctions in violation of a law which is so unclear and ambiguous as to leave unreasonable persons in doubt about the meaning of the language or whether a violation has occurred.
>
> "'Procure employment' is just such a phrase. While a majority of the Commission believes that there should be no unlicensed activity, involving any aspect of procurement of employment for artists, the uncertainty of knowing when such

activity may or may not have occurred at pain of criminal punishment has left the personal manager uncertain and highly apprehensive about the impermissible parameters of their daily activity."

This issue was further implicated in the Report's discussion of Issue 2: "What changes, if any, should be made in the provisions of the Act exempting from the Act a person who procures recording contracts for an artist?" In this regard, the Report noted at page 22, amongst other things:

"In the recording industry, many successful artists retain personal managers to act as their intermediaries, and the negotiation of a recording contract is commonly done by a personal manager, not a talent agent. Personal managers frequently contribute financial support for the living and business expenses of entertainers. They may act as a conduit between the artist and the recording company, offering suggestions about the use of the artist or the level of effort which the recording company is expending on behalf of the artist. The personal manager may become involved in travel arrangements on behalf of the artist, sometimes accompanying the artist to oversee arrangements for planes and hotels.

"However, the problems of attempting to license or otherwise regulate this activity arise from the ambiguities, intangibles and the imprecisions of the activity, and its susceptibility of being interpreted as an employment activity, which it is not."

This ambiguous and hard to define conduct of a personal manner

was further elaborated upon in 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") at 481-482:

> "As business advisors, [personal managers] might attend to the artist's finances, and they routinely organize 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."

The manager's liaison activity between the artist and other personal representatives obviously encompasses arranging interactions and transactions on behalf of the artist with talent agents. This liaison activity with talent agents is what Wolf did on behalf of Robi in seeing to it that regional agents all over the country procured employment for Robi. The Opinion at page 5 specifically references this activity: "Leaving aside Wolf's admission in his opening brief he 'work[ed] through regional agents all over America to procure work for [Robi],' the record is replete with illustrations of Wolf's procurement activities on Robi's behalf." Respectfully, what the record is replete with is Wolf's working through talent agents who procured personal performance engagements for Robi. As noted on page 5 of Appellants' Opening Brief, and specifically in footnote 5, the findings in the Statement of Decision below were that Wolf worked through talent agents who procured employment for Robi, with the exception of

three engagement contracts (Exhibits 131, 155 and 156) which the Court found reflected engagements directly procured by Wolf. However, none of those engagements fell within the time period of the 1985-1986 management agreement which was the subject of Case 2. Therefore, they did not constitute evidence of employment procurement conduct on the part of Wolf that would vitiate that contract.

Of prime importance is that at no point did Wolf contend that the Trial Court's finding that he engaged in the above conduct on behalf of Robi was not supported by substantial evidence. What Wolf contended was that in so doing he did not "procure employment" for Robi within the meaning of the Act, in that he merely acted as a liaison with talent agents who were the procuring cause of the employment. Wolf posited this issue not as a substantial evidence question, but as a statutory interpretation issue as to the application of the statutory language "procure employment," in the context of a personal manager's routine activity of working with regional agents all over the country when representing a nostalgia personal performance artist such as Robi during the 1980s.

B. The Opinion Improperly Failed To Address The Statutory Interpretation Issue Raised By Appellants.

The Opinion addresses the "procure employment" issue purely as a review of the record for substantial evidence to support the Trial Court's findings. However, as noted above, it was clearly posited as a statutory interpretation issue by Wolf. Under the rule that an appellate court must issue a written opinion stating the reasons for its decision, Appellants are entitled to have this

issue expressly addressed in the Opinion. This is especially the case in light of the observations in the CEC Report as to the inherent ambiguousness of the phrase "procure employment" in the context of the normal lawful activities of a personal manager.

Moreover, the inherent ambiguity regarding this topic is pointed out poignantly in the conflicting opinions of Division 7 and Division 1 of the Court of Appeal, Second District, as to the meaning of the Act's definition of "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 . . ." in § 1700.4(a) of the Act. In the first of the two cases, Wachs v. Curry (1993) 13 C.A.4th 616, 16 C.R.2d 496, which apparently was written by the same Justice that wrote the instant Opinion, Division 7 held at 628 that:

> "[T]he 'occupation' of procuring employment was intended to be determined according to a standard that measures the significance of the agent's employment procurement function compared to the agent's counseling function taken as a whole. If the agent's employment procurement function constitutes a significant part of the agent's business as a whole, he or she is subject to the licensing requirement of the Act even if, with respect to the particular client, procurement of employment was only an incidental part of the agent's overall duties. On the other hand, if counseling and directing 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, even if, with respect to a

particular client, counseling and directing the client's career was only an incidental part of the agent's overall duties."

In total conflict with this decision, Division 1 in Waisbren, supra, held that the above-quoted statutory phrase applied even where a person's procurement of employment for an artist constituted a mere incidental portion of his business, and hence such a person was subject to the licensing requirements of the Act. In so holding, Waisbren incorrectly concluded that the above-quoted language in Wachs was mere dictum. A reading of Wachs makes it abundantly clear that the above-quoted language was a holding, not dictum. Accord: McPherson, The Talent Agencies Act: Time For A Change, 19 Hastings Comm. & Ent. L. J. 899, 912.

In addition to defining the specific term "occupation," Wachs also defined the word "procured" in Section 1700.4(a), relying on the definition in Webster's New International Dictionary, page 1809: "To 'procure' means to get possession of, obtain, acquire, to cause to happen or be done: bring about." The statutory interpretation issue posed by Wolf in the instant case was whether this definition of "procure" encompasses Wolf's activities in acting as a liaison on behalf of Robi with regional talent agents throughout America who were the professionals who dealt with the buyers who paid the money in order to buy the entertainer's performance at their venues. Respectfully, the Opinion improperly ignores the statutory interpretation issue.

Furthermore, in discussing the substantial evidence issue on this topic, respectfully, the Opinion erroneously refers to Donnie

Brooks' brokered engagements as examples of Wolf's procurement of employment activity, where the Opinion states at page 5:

> "Wolf obtained an engagement for Robi at the Santa Clara County Fair in August 1996. Donnie Brooks, a talent agent, testified he represented Santa Clara in negotiating with Wolf over Robi's appearance at the fair. Brooks also testified he negotiated with Wolf to have Robi perform for one of Brook's clients in Bristol, Connecticut in April 1996." (Emphasis added).

As noted by the emphasized language in the above quote, Brooks was a talent agent at the time of the negotiation of the above transactions. Indeed, Brooks testified that he was a talent agent duly licensed by the State of California at those times. See RT 419:25-420:10; 422:8-13; 430:3-4:32:12; 433:5-444:11; 443:21-444:8; 448:9-449:25; 450:8-451:24; 452:2-454:6; 454:18-455:10; 455:4-457:28; 459:13-27. In the aforesaid testimony, Brooks also testified that he contacted Wolf for the purpose of ascertaining whether Robi would be available to perform at the subject engagements, after which contact the negotiations ensued.

Labor Code § 1700.44(d) provides: "It is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." The conduct engaged in by Wolf with respect to the Santa Clara County and Bristol, Connecticut engagements falls squarely within the Section 1700.44(d) exemption. Therefore, the singling out of those two transactions in the Opinion as examples

of Wolf's unlawful procurement of employment, respectfully, was in error.

Of course, the Opinion states on page 5 that: "The evidence showed other occasions in 1986 in which Wolf procured or attempted to procure performance engagements for Robi." Respectfully, however, as noted above, the Opinion fails to address the statutory interpretation question of whether Wolf's activity in that regard, which was done through regional talent agents throughout the country, constituted unlawful procurement of employment on his part within the meaning of the Act.

IV. THE OPINION CONTAINS A FACTUAL ERROR AS TO THE TIMING OF WOLF'S BANKRUPTCY WHICH ERRONEOUSLY REFLECTS ON WOLF'S PERSONAL LIFE IN A PUBLISHED OPINION.

The Opinion states in footnote 1 on page 1: "After filing this action, Wolf declared bankruptcy and the bankruptcy trustee, Timothy J. Yoo, was substituted as plaintiff." This is an incorrect statement of fact. The correct facts are set forth in footnote 4 on page 5 of Appellants' Opening Brief as follows:

> "Based on an assertion by Robi per a motion filed in Case 2 on September 11, 2000, that the trustee in bankruptcy in 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."

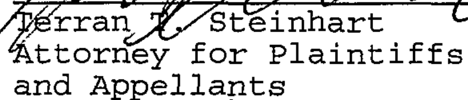
Wolf's bankruptcy was filed in 1986, not after the filing of the instant action, i.e., Case 2. Wolf merely reopened the prior-filed bankruptcy after this case was filed for the aforesaid reason.

Because filing for bankruptcy can have an adverse effect on one's credit, and possibly on other personal matters of reputation, especially since the Opinion has been certified for publication, this factual error should be corrected in the Opinion.

CONCLUSION

For all of the reasons set forth above, the Petition for Rehearing should be granted.

Respectfully submitted,

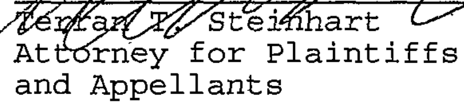


Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

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

Counsel for plaintiffs and appellants hereby certifies that the number of words in **PETITION FOR REHEARING** is 9,751 words.

Dated: February 28, 2005



Terran T. Steinhart
Attorney for Plaintiffs
and Appellants

Calif.
E2035
R4
1985

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
GOLDEN GATE AVENUE
SAN FRANCISCO 94102

ADDRESS REPLY TO:
P O BOX 603
San Francisco 94101

December 2, 1985

STANFORD
LIBRARIES

The Honorable George Deukmejian
Governor of California
State Capitol
Sacramento, CA 95814

✓ California Entertainment Commission.

The Honorable David A. Roberti
President Pro Tempore
State Capitol
Sacramento, CA 95814

STANFORD UNIVERSITY
MAY 1989
J. C. (JONSSON) LIBRARY OF GOVT DOCUMENTS

The Honorable Willie Brown, Jr.
Speaker of the Assembly
State Capitol
Sacramento, CA 95814

Dear Governor Deukmejian and Messrs. Roberti and Brown:

Enclosed for filing, pursuant to Labor Code Section 1703, is the Report of the California Entertainment Commission.

This report was prepared and is submitted pursuant to the legislative mandate of the statutes of 1982, Chapter 682, Labor Code Sections 1701 through 1704, inclusive.

If you have any questions, please advise the undersigned.

Very truly yours,

C. Robert Simpson, Jr.
Chair
California Entertainment Commission

enc.

cc: Darryl White
Secretary of the Senate

James D. Driscoll
Clerk of the Assembly

Honorable Walter Stiern
Chairman
Joint Legislative
Budget Committee

Honorable Richard Floyd
Chairman
Assembly Committee on
Employment

Honorable Alfred Alquist
Chairman
Senate Finance Committee

Honorable Bill Greene
Chairman
Senate Industrial
Relations Committee

Honorable Maxine Waters
Assembly Ways and Means
Subcommittee on State
Government

Honorable John Vasconcellos
Chairman
Assembly Ways and Means
Committee

Issue 3

> Should the criminal sanctions of the Act removed by AB 997 be reinstated and, if so, in what form?

Conclusion

It is the majority view of the Commission that the industry would be best served without the imposition of civil or criminal sanctions for violation of the Act.

Recommendation

The Commission recommends that the criminal sanctions which were removed from the Act by AB 997, not be restored to the Act.

It is further recommended that a new sentence be added to Section 1700.44 of the Act as follows:

> Any provision of any law or provision in the State of California to the contrary notwithstanding, failure of any person to obtain a license from the Labor Commissioner under this Act shall not be considered a

criminal act under any law of this State.

Discussions

The criminal penalties which were contained in the Act prior to their removal by AB 997 have been invoked on a number of occasions.

There is, however, an inherent inequity--and some question of constitutional due process--in subjecting one to criminal sanctions in violation of a law which is so unclear and ambiguous as to leave reasonable persons in doubt about the meaning of the language or whether a violation has occurred.

"Procure employment" is just such a phrase. While a majority of the Commission believes that there should be no unlicensed activity, involving any aspect of the procurement of employment for artists, the uncertainty of knowing when such activity may or may not have occurred at pain of criminal punishment has left the personal manager uncertain and highly apprehensive about the permissible parameters of their daily activity.

Therefore, the Commission indicated in its early discussions that if criminal penalties were to be reinstated, the failure to obtain a license should be no more than an infraction meaning that monetary but no criminal penalties should attach to the failure to obtain a license.

The Commission then considered the following:

> Any provision of any law or provision in the State of California to the contrary notwithstanding, any person who violates any provisions of this chapter is guilty of a misdemeanor punishable by a fine not to exceed $1,000 for the first offense, $5,000 for the second offense and $10,000 for the third and each succeeding offense, or by imprisonment for a period of not more than six months, or both, except that violation of Section 1700.5 of this Act shall be considered an infraction, punishable only by a fine in the above amounts.

Upon further deliberation, the Commission took no action on this proposed addition. Instead it concluded that the industry would be better served by having no criminal sanctions attached to the Act.

The majority of the Commission believes that existing civil remedies, which are available by legal action in the civil courts, to anyone who has been injured by breach of the Act, are sufficient to serve the purposes of deterring violations of the

Act and punishing breaches. These remedies include actions for breaches of contract, fraud and misrepresentation, breach of fiduciary duty, interference with business opportunity, defamation, infliction of emotional distress and the like. Perhaps the most effective weapon for assuring compliance with the Act is the power of the Labor Commissioner, at a hearing on a Petition to Determine Controversy, to find that a personal manager or anyone has acted as an unlicensed talent agent and, having so found, declare the contract void from the inception and order the restitution to the artist of all fees paid by the artist and the forfeiture of all expenses advanced to the artist.

These civil and administrative remedies continue to be available.

PROOF OF SERVICE BY MAIL

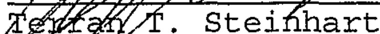
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4311 Wilshire Boulevard, Suite 415, Los Angeles, California 90010-3713, which is located in the county where the mailing described below took place.

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 **PETITION FOR REHEARING** 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 March 1, 2005.



Terran T. Steinhart

SERVICE LIST

CALIFORNIA SUPREME COURT
300 S SPRING ST
LOS ANGELES CA 90017

ALLEN HYMAN ESQ
LAW OFFICES OF ALLEN HYMAN
10737 RIVERSIDE DR
NORTH HOLLYWOOD CA 91602
[Attorney for defendant Robi]

DOUGLAS D KAPPLER ESQ
ROBINSON DIAMANT & WOLKOWITZ APC
1888 CENTURY PARK EAST STE 1500
LOS ANGELES CA 90067
[Attorneys for Timothy J. Yoo, Chapter 7 Trustee in bankruptcy]

HON RONALD M SOHIGIAN
C/O LOS ANGELES SUPERIOR COURT CLERK
111 N HILL ST
LOS ANGELES CA 90012

470\PtRhrng