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2 Department of Industrial Relation, State of California
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9 **BEFORE THE LABOR COMISSIONER**
10 **OF THE STATE OF CALIFORNIA**

11 SCOTT MONTOYA; PAYASO
12 ENTERTAINMENT INC.,

13 Petitioners,

14 vs.

15 DAVID SHAPIRA & ASSOCIATES,

16 Respondent,

Case No. TAC 17129

DETERMINATION OF CONTROVERSY
[Labor Code § 1700.44(a)]

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20 The above-captioned matter, a Petition for Determination of Controversy under
21 Labor Code §1700.44, came on regularly for hearing on September 14, 2010 in Los Angeles,
22 California, before Robert N. Villalovos, Attorney for the Labor Commissioner, assigned to hear
23 this matter.

24 Petitioners SCOTT MONTOYA and PAYASO ENTERTAINMENT, INC.,
25 appeared and were represented by John G. Burgee, Esq., of Burge & Abramoff, P.C. Respondent
26 DAVID SHAPIRA & ASSOCIATES appeared and was represented by S. Michael Kernan, Esq.
27 and Jessica Wood, Esq., of the Law Offices of Stephen M. Kernan.
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1 2. DSA is a sole proprietorship of David Shapira and is a licensed talent agency under
2 the provisions of the TAA. Douglas Warner is employed as a talent manager with DSA. After
3 filming of the picture was completed, Warner viewed parts of the film after which DSA and
4 Montoya verbally agreed that DSA would sell the film to a distributor. Warner testified that that
5 DSA rendered services, made introductions, set meetings, and arranged viewings of the film for
6 the purpose of selling it to a distributor and he personally made efforts to sell the film rights
7 following an oral agreement that DSA would undertake to sell the film.

8 3. Paramount Pictures was shown parts of the film and an oral agreement for
9 Paramount to distribute the film was made. On January 11, 2002, Paramount Pictures and Payaso
10 Entertainment executed a "License Agreement" which granted Paramount Pictures the exclusive
11 right to "manufacture, reproduce, sell license, exhibit, broadcast, transmit, distribute, publicize,
12 advertise, market, promote and otherwise exploit the picture."

13 4. On October 10, 2002, Petitioners and Respondent executed a Memorandum
14 Agreement (Agreement) which provides that DSA represented Petitioners *as a talent agent* in
15 connection with the production of the motion picture which was a "finished production" which
16 "has been acquired by and is being distributed by Paramount" The Agreement also provides
17 that "DSA is entitled to receive *commissions* equal to ten (10%) percent of (i) all monies (in
18 excess of union scale payments) received by Client for services rendered in connection with the
19 Picture including commissions heretofore paid or hereafter becoming due and (ii) 10% of all
20 monies received by Client as its/his Participations from Paramount's distribution and exploitation
21 of the Picture and any rights therein."

22 5. The parties do not dispute that the Agreement memorialized their earlier oral
23 agreement but differ on the purpose, scope, and meaning of the Agreement.

24 6. Montoya's screen credit for the film is producer and executive producer. Montoya
25 testified that his compensation for the picture was for a "producer's fee" of approximately
26 \$125,000 which was deferred due to constant budget issues and that he has not received any
27 producer fees for the film. Montoya's testified without dispute that he worked on the design and
28 did some camera work shooting dancers (but ultimately cut from the film). After the director left

1 the project, Montoya performed director activities putting the show together. Montoya testified he
2 also provided creative input which included sound mixing, sound choices, tests at the theatre,
3 clearing music, designed the cover, and did some artwork.

4 7. Montoya testified that he was shown the written Agreement by DSA when the film
5 aired at Showtime but did not thoroughly review it and was not given a copy after he signed it. At
6 the time, he understood that the agreement memorialized the prior oral understanding that
7 provided 10% compensation to DSA from Montoya's "producer's fee." Montoya states that, after
8 the oral agreement with DSA, he performed creative services which including writing scenarios
9 and an opening for the film, sound mixing, sound choices, running theatre tests, clearing music,
10 designing the DVD cover, and generally completing the project.

11 8. Regarding compensation to DSA, Montoya testified that he recalled telling Warner
12 that a percentage of fees would be paid to DSA when Montoya got paid. Montoya stated that due
13 to the financial burdens during the production of the film, his "producer's fee" was deferred and
14 he has not received a "producer's fee" in connection with the film. Montoya testified that DSA
15 had other agreements with others involved in the project which he understood provided DSA with
16 10% of their compensation, and he understood his agreement to be the same. According to
17 Montoya, any agreement for DSA to receive payment on "gross" revenues would have been
18 ludicrous and would have presented a major problem especially with so much debt on the project.
19 Montoya understood his agreement with DSA was to compensate DSA's for its services, but he
20 has not been paid for his services and never will.¹ Montoya stated that initial funding for
21 production of the film was independently raised but continuing financing was an on-going
22 problem and additional money was needed to finalize the picture for distribution. The needed
23 money for finalization of the picture was subsequently provided by Paramount which was largely
24 controlled and distributed directly by Paramount to vendors and creditors.

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27 ¹ According to Montoya, in February 2005 a suit was filed by Paul Rodriguez, a creative partner of the film project,
28 against Payaso Entertainment and Montoya. The dispute resulted in a settlement and release of claims and
counterclaims whereby Montoya and Payaso assigned all rights to Rodriguez. Montoya stated he received no monies
prior to the settlement and has no expectation to receive any money from Paramount.

1 9. DSA's witness, Douglas Warner, testified that Montoya was an executive producer
2 and Payaso Entertainment, Inc. was the production company for the film. Warner testified that
3 DSA and Petitioners had a previous oral agreement that Respondent would sell the film to a
4 distributor which was entered into after footage for the film was completed. Warner testified that
5 the Agreement memorialized the previous relationship between the parties; and further, that
6 although the Agreement indicates that "creative services" were performed, DSA did not represent
7 Montoya for any creative services and did not procure *any* employment for him. Warner indicated
8 that the Agreement was to memorialize the previous activities and services prior October 10,
9 2002, all of which were to sell the film to a distributor. He stated that he did not draft the
10 Agreement, but is aware that the form of the Agreement is not a typical agreement between DSA
11 and artists for talent agency representation. Warner testified that there was no prior agreement to
12 represent Montoya for creative services and DSA did not represent Montoya for ~~his~~ creative
13 services on the film project. According to Warner, DSA was to receive for its services in selling
14 the film 10% of the gross revenues generated by the film.

15 10. The language in the Agreement supports a finding that the events described in the
16 Agreement's recitals, including DSA's services in selling the film occurred prior to October 10,
17 2002. While Montoya and DSA offered varying explanations regarding the nature of both the
18 prior oral agreement and the subsequent written Agreement which both parties maintain was to
19 memorialize their previous agreement, the written agreement executed by the parties controls the
20 agency relationship between the signatory parties.

21 11. The Agreement addresses two distinct subjects and purposes. First, the recitals
22 acknowledge that a *completed film was sold* to Paramount Pictures and is supported by the
23 License Agreement executed on January 11, 2002, by Payaso Entertainment and Paramount
24 Pictures. Secondly, the Agreement also acknowledges that the "Client" (described as the
25 corporate entity and/or individual, i.e., Montoya and/or Payaso Entertainment) *rendered creative*
26 *services in connection with the production* of the motion picture. (Agreement, ¶ B)

27 12. These two distinct objects of the Agreement are further reflected in the language
28 regarding compensation and revenue payments which will be received by both clients in

1 connection with the film for *services rendered* and additional payments of *participations* from
2 Paramount. (Agreement ¶ C) Also, the provision for compensation to DSA for its services to both
3 clients similarly correspond to these two subjects in that DSA is to receive commissions of 10%
4 “of (i) all monies (in excess of union scale payments) received by Client for *services rendered* in
5 connection with the Picture ... and (ii) 10% of all monies received by Client as its/his
6 *Participations from Paramount’s distribution and exploitation of the Picture* and any rights
7 therein.” (Agreement, ¶ 1)

8 13. Montoya admitted that DSA did not make any deal between Montoya and Payaso
9 Entertainment regarding his services; DSA did not make any deal between Montoya and investors
10 on the project regarding his services; Paramount did not hire Montoya for production related
11 services; and there was no employment of Montoya by Paramount regarding the film.

12 14. DSA filed suit against Montoya and Payaso Entertainment currently pending in Los
13 Angeles County Superior Court (Case No. BC435824) for breach of contract, accounting, unjust
14 enrichment, misrepresentation, concealment, and seeks monies allegedly due DSA under the
15 subject Agreement. The judicial action is currently pending and awaiting determination by the
16 Labor Commissioner of the controversy under the instant petition.

17 18 CONCLUSIONS OF LAW

19 Jurisdiction

20 1. The Labor Commissioner has jurisdiction to determine this controversy pursuant
21 to Labor Code § 1700.44. The instant controversy consists of a dispute regarding an agreement
22 which purports to include a licensed talent agency’s representation of an alleged artist (Montoya)
23 who performed creative services on a film and raises issues regarding rights and activities of
24 Montoya, Payaso Entertainment, and DSA under the TAA. It is not disputed that DSA is a talent
25 agency licensed by the Labor Commissioner pursuant to the licensing requirement under Act.²
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27 ² The term “talent agency” is defined as “a person or corporation who engages in the occupation of procuring
28 employment or engagements for an artist or artists” (Labor Code § 1700.04(a)) No person shall engage in or carry
on the occupation of a talent agency without first procuring a license from the Labor Commissioner. (Labor Code §
1700.5)

1 2. Contrary to the allegations in the petition and language in the Agreement, DSA
2 maintains that, as preliminary matters affecting coverage of the TAA (and jurisdiction of the
3 Labor Commissioner), it did not represent Montoya for creative services in connection with the
4 production of the picture but provided services regarding the sale of the license to Paramount on
5 behalf of Montoya and Payaso Entertainment. DSA further argues that Montoya was not an
6 "artist" within the meaning of the TAA and that DSA did not procure any employment for
7 Montoya which is a required activity for coverage under the Act.

8 3. DSA's proffered position disregards provisions in the Agreement which contain
9 express recital to the contrary that acknowledge both that DSA "is a talent agency and that, as
10 such, represented Montoya and Payaso as his/its agent in connection with the production of the
11 motion picture." While there is credible evidence from both parties that DSA *in fact* performed
12 services of "selling" a completed film to Paramount and did *not* procure employment for Montoya
13 in connection with the picture, the Agreement is quite clear in its intent that DSA represent
14 Montoya as a talent agent in connection with the production of the film.

15 4. The Agreement contains an integration clause which states that the written
16 memorandum is the entire understanding of the parties with respect to the picture and the
17 agreement can only be modified by a subsequent writing signed by all parties. In spite of the
18 integration clause, DSA argues that because its understanding of its services was only to sell the
19 finished film, the reference to performing services as a talent agent for Montoya's creative
20 services was inaccurate or a mistake in the written Agreement. DSA thus attempts to modify the
21 Agreement to only pertain to its right to compensation for selling the film in disregard of language
22 acknowledging performance of creative services and DSA intent to represent Montoya as a talent
23 agent.

24 5. Since the petition seeks review of the Agreement and a determination of its
25 validity under the TAA, DSA cannot avoid jurisdiction of the Labor Commissioner regarding the
26 dispute under the Agreement through evidence that, *in fact*, no talent agency representation
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1 occurred, or that Montoya was not an artist under the TAA. To allow otherwise would effectively
2 prevent or impede the Labor Commissioner from its charged duty to enforce talent agency
3 requirements and determine disputes between artists and agents under the Act.

4 6. Accordingly, the Labor Commissioner has jurisdiction to determine the dispute
5 stated in the petition under Labor Code § 1700.44(a).³

6 **Violations of the TAA**

7 7. The term “artist” is defined to include “persons rendering professional services in
8 motion picture, theatrical, radio, television and other enterprises.” (Labor Code § 1700.04(b)) The
9 term “professional services” as used in Labor Code § 1700.04(b), has been interpreted by the
10 Labor Commissioner as limited to services that are of a creative or artistic nature. (*William Morris*
11 *Agency, LLC v. O’Shannon et al*, TAC 06-05, p.10)

12 8. It is undisputed that Montoya was a producer and that Payaso Entertainment was
13 the production company for the film. DSA maintains that Montoya’s role as a producer and
14 executive producer of the film shows that he was not an “artist” under the TAA. DSA cites Labor
15 Commissioner TAA determinations which purportedly indicate that a “producer” is not an
16 “artist.” An examination of the proposition, however, reveals that while, ordinarily, a “producer”
17 is not expressly included in the definition of “artist,” the inquiry is whether the person who
18 purportedly is a producer renders covered services. “In order to qualify as an ‘artist,’ there must be
19 some showing that producer’s services are artistic or creative in nature, as opposed to services of
20 an exclusively business or managerial nature.” (*William Morris Agency, LLC v. O’Shannon*, TAC
21 06-05, quoting *American First Run, etc. v. OMNI Entertainment Group*, TAC 32-95; see also,
22 *Marathon Entertainment Inc. v. Blasi* (2008) 42 Cal.4th 974, 986 [the Act establishes its scope
23 through a functional definition; it regulates conduct, not labels])

24 9. When a contract is reduced to writing, the intention of the parties is to be
25 ascertained from the writing alone; however, a contract may be explained by reference to the
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27 ³ The one year statute of limitations in Labor Code § 1700.44(c) does not apply to affirmative defenses (*Nathaniel*
28 *Stroman v NW Entertainment, Inc. et al*, TAC 3805; see *Styne v. Stevens* (2001) 26 Cal.4th 42). Here, Petitioner does
not seek affirmative relief but raises the TAA act as a defense to DSA’s claims under the Agreement.

1 circumstances under which it was made and the matter to which it relates. (Civil Code §§ 1639,
2 1647; see, Code of Civil Procedure § 1860) It is also appropriate to look through provisions of a
3 contract with the aid of parole evidence to determine whether the contract is actually illegal or part
4 of an illegal transaction. (Witkin, *Summary of California Law*, 10th Ed., Vol.1, Contracts, §435)

5 10. Evidence supports that some creative services were performed by Montoya in
6 connection with the production of the film and the creative services were performed both prior to
7 and following sale of the film in January 2002 to Paramount. In addition to the representation in
8 the Agreement that Montoya performed creative services for the motion picture, Montoya testified
9 that he worked on design aspects of the film and did some camera work shooting dancers (but
10 ultimately cut from the film). After the director left the production project, Montoya stated he
11 performed director activities putting the show together.⁴ After the film was shot and in finalizing
12 the picture for Paramount, Montoya testified he also provided creative services which included
13 sound mixing, making sound choices, running tests at the theatre, designing, and artwork.

14 11. Additionally, there is sufficient undisputed evidence to conclude that DSA only
15 performed services to sell a finished production of the film to Paramount. This is consistent with
16 the acknowledgement in the instrument that refers to the acquisition by Paramount of a finished
17 production of the motion picture "...as specified in agreements between such parties [Clients] and
18 Paramount." (Agreement ¶ C) The Agreement does not refer to any other creative services or
19 selling of other projects or productions beyond the specified film.

20 12. In view of the evidence discussed above, the undersigned concludes that there
21 are two distinct and separate purposes for the underlying Agreement. The Agreement identifies
22 two objects of compensation *receivable by Montoya and Payaso Entertainment from Paramount*.
23 First, compensation for services rendered in connection with the production of the picture; and
24 secondly, additional payments ("participations") from Paramount if and when Paramount has
25 recouped its advances, distribution fees and costs of prints and advertising and the like, all
26 specified in agreements between such parties and Paramount." (Agreement ¶ C)

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28 ⁴ The statutory definition of "artists" also expressly includes "... *directors of legitimate stage, motion pictures and radio productions, ...*" (Labor Code § 1700.4(b) italics added)

1 13. Similarly, the Agreement further provides two respective aspects of
2 compensation *due to DSA* for its services: (i) 10% *commissions* for all monies (in excess of union
3 scale payments) received by Client for services rendered including commissions heretofore paid
4 or hereafter becoming due, *and* (ii) 10% of all monies received by Client as its/his “participations”
5 from Paramount’s distribution and exploitation of the Picture and any rights therein. (Agreement ¶
6 1)

7 14. These two distinct purposes and compensation provisions reveal that the parties
8 sought to provide DSA a stated percentage of Montoya’s compensation for personal services, and
9 a stated percentage of “participations” received by Payaso Entertainment under the licensing
10 agreement between *it and Paramount* following the sale of the licensing rights to Paramount.

11 15. Regarding the TAA, the legislation has a fundamental objective of protecting
12 artists. (*Marathon Entertainment, Inc., supra*, 42 Cal.4th at 984) In addition to requiring anyone
13 who solicits or procures artistic employment or engagements for artists to obtain a license, the
14 TAA establishes detailed requirements for how licensed talent agencies conduct their business,
15 including a code of conduct, submission of contracts and fee schedules to the state, maintenance
16 of client trust account, posting a bond, and prohibitions against discrimination, kickbacks and
17 certain conflicts of interest. (*Id.*, at 985). Unlike cases where a petition was filed under Labor Code
18 §1700.44(a) but denied due to the failure to establish that an unregulated “personal manager”
19 procured or attempted to procure employment for an artist (e.g., *American First Run dba*
20 *American First Run Studios, et al v. Omni Entertainment Group, et al*, TAC 32-95), here the
21 talent agent specifically purported to perform talent agency services in the written agreement
22 despite the testimony that the agent did not in fact perform talent agency services for Petitioners.

23 16. Notwithstanding a showing, *de facto*, of no procurement or attempts to procure
24 employment of Montoya, the dispute requires review of the Agreement under the TAA as the
25 agreement purports to establish a talent agency relationship between Montoya and DSA. The Act
26 includes content requirements for contracts entered into between a talent agency and an artist
27 wherein the talent agency agrees to act or function as such for, or on behalf of, the artist. Such
28 agreements must: be consistent with a form of agreement approved by the Labor Commissioner

1 (Labor Code § 1700.23; 8 CCR § 12001); indicate that the talent agent is licensed by the
2 California Labor Commissioner (Labor Code § 1700.23); provide for referral of disputes to the
3 Labor Commissioner unless arbitration of disputes is provided subject to specified conditions.
4 (Labor Code § 1700.23); and, a talent agency must provide a copy of an executed contract to the
5 artist (8 CCR § 12001.1).

6 17. The Agreement, as the instrument giving rise to the relationship between an artist
7 and talent agency and compensation for services in connection therewith, must comply with the
8 statutory and regulatory requirements as specified in the TAA with respect to a talent agency's
9 procurement of employment on behalf of an artist. The evidence establishes that the above-cited
10 TAA requirements were not satisfied with respect to the Agreement between Montoya and DSA
11 in connection with DSA's talent agency relationship with Montoya. Therefore, to the extent that
12 the contract provisions purport to establish a talent agency relationship and corresponding
13 compensation to DSA, the Agreement violates the TAA.

14 Remedy for Violations

15 18. A contract is illegal where it is contrary to an express provision of law or
16 contrary to the policy of express law. (Civil Code § 1667) Where illegality occurred in the
17 formation of the contract, it (or its unlawful severed provision) is void and unenforceable.
18 (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 351 [contracts between unlicensed
19 talent agents and artists and *otherwise in violation of the Act* are void]) In determining disputes
20 under the TAA, the courts have more recently interpreted the Act to allow severance of contract
21 provisions found to be in violation of the act. (*Marathon, supra*, 42 Cal.4th at 991, citing Civil
22 Code § 1599). The overarching inquiry is whether the interests of justice would be furthered by
23 severance based upon the various purposes of the contract. (*Marathon, supra*, 42 Cal.4th at 996)

24 19. In the instant matter, the evidence amply reveals that the services performed by
25 DSA in selling the completed film to Paramount did not involve procurement or attempts to
26 procure employment of Montoya. Rather than simply providing for compensation for an
27 (unregulated) activity beyond the purview of the Act, the Agreement also provided for rights and
28 obligations under a talent agency relationship between Petitioners and Respondent (a licensed

1 talent agency) which did not comply with TAA requirements. At the time of the written
2 agreement, DSA was well aware of its activities and role in *selling* a completed film and not for
3 procuring employment for an artist. It is apparent that under the Agreement, DSA sought to ensure
4 compensation both as a talent agent and for selling the completed film to Paramount in order to
5 ensure a source of compensation from either or both Montoya or Payaso for monies received from
6 Paramount made under the two identified categories.

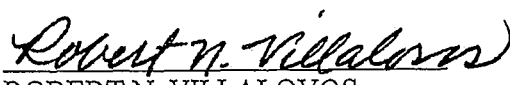
7 20. In order to prevent and avoid exploitation of the talent agency status of DSA
8 under an Agreement which, by its terms, invoke a talent agency relationship and provide for
9 compensation to the agent for services, it is appropriate to sever and void the agreement under the
10 doctrine of severability based upon the failure to comply with requirements under the TAA.
11 Voidance is applied to those contract provisions which relate to DSA's right under the Agreement
12 to receive any compensation (including "commissions") for services rendered by Montoya in
13 connection with the motion picture.

14 21. Furtherance of the protective purposes of the Act and fairness justify the
15 appropriateness of partial voidance of the contract provisions pertaining to DSA's entitlement to
16 any commissions or other compensation for Montoya's services, individually, in connection with
17 the film. The remedy is justified based upon the Agreement's expression that DSA represented
18 Montoya as a talent agent in connection with the film, Montoya in fact performed both creative
19 services and non-creative services in connection which cannot be reasonably apportioned, and
20 there was no indication from the parties to treat the respective services differently. DSA cannot be
21 permitted to use its status of a talent agent to provide any basis for compensation from Montoya
22 for services he rendered in connection with the film.⁵

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25 ⁵ Where "the parties' performances can be apportioned into corresponding pairs of part performances so that the parts
26 of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that portion of
27 the agreement is enforceable by a party who did not engage in serious misconduct." (*Keene v. Harling* (1964) 61
28 Cal.2d 318, 324). Here, there are no separate and distinct objects of agreement regarding the *nature of services*
Montoya would perform in the production of the film. Thus, further severance *within the compensation provision*
regarding Montoya's services in connection with the film is improper.

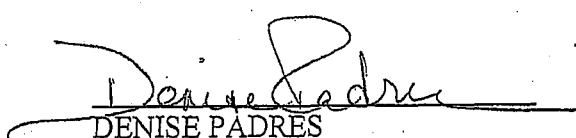
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Dated: 2/16/11


ROBERT N. VILLALOVOS
Attorney for Labor Commissioner

Adopted as the determination of the Labor Commissioner.

Dated: 2/16/11


DENISE PADRES
DEPUTY CHIEF LABOR COMMISSIONER