

No. 75373-8-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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WORKHOUSE MEDIA, INC., a Washington Corporation,

Respondent/Plaintiff,

v.

FERNANDO VENTRESCA aka Fernando Ventura, a single person;  
GREG SHERRELL, a single person,

Appellants/Defendants,

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REPLY BRIEF OF APPELLANTS

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## I. ARGUMENT

Respondent/Plaintiff Workhouse Media, Inc. (“WHM” or “Plaintiff”) brazenly alleges that it is not required to comply with California Law while operating in California under contracts negotiated and executed in California with California residents for the rendering of services solely in California. In doing so, Plaintiff is attempting to use the Courts of the State of Washington as a shield for conduct that it concedes is unlawful under California Law. Defendants/Appellants Fernando Ventresca aka Fernando Ventura (Ventresca) and Greg Sherrell (Sherrell) (Ventresca and Sherrell will be referred to collectively as “Defendants”) respectfully submit this Reply Brief to respond to Plaintiff’s unsupported and meritless allegations.

### A. Summary Judgment Was Not Properly Granted

The grant of summary judgment is reviewed *de novo*, with the appellate court “engaging in the same inquiry as the trial court and viewing the facts and reasonable inference from those facts in the light most favorable to the nonmoving party.” *City of Spokane v. Spokane County*, 158 Wn.2d 661, 671 (2006). Summary judgment is appropriate only where the “pleadings, depositions, answers to interrogatories and admission on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law.” CR 56(c). Because the moving party has the burden of proving both that there is no genuine issue of material fact and entitlement to judgment as a matter of law, the nonmoving party, in whose favor all reasonable inferences are drawn, can defeat a motion for summary judgment merely by showing either that a genuine issue of material fact exists or that the moving party is not entitled to judgment as a matter of law.

Plaintiff, with no citation to the record, argues that summary judgment was properly granted because: 1) “[t]he documentary evidence shows a clear contractual obligation on the part of Appellants which they willfully refused to fulfill;” and 2) “Appellants could not show the existence of any genuine issue as to any material fact.” Resp’t Br. 25. As an initial important matter, a “respondent’s brief should include ‘[t]he argument in support of the issues presented for review, together with *citations to legal authority* and *references to relevant parts of the record.*’” *Satomi Owners Assoc. v. Satomi, LLC*, 167 Wn.2d 781, 808 (2009) (emphasis added) (citing RAP 10.3(a)(6).) Plaintiff’s failure to cite to relevant legal authority or the record renders these statements meaningless. An Appellate Court will not “wander through the complexities” of a party’s position “[a]bsent adequate, cogent argument and briefing.” *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 345 (1989). Additionally, these unsupported claims are flatly contradicted by the record and ample legal authority as will be addressed

below.

**B. The Trial Court Did Not Have Subject Matter Jurisdiction to Render a Decision as to Defendants' TAA Defense<sup>1</sup>**

Plaintiff urges this Court to find that the Trial Court has subject matter jurisdiction over the present dispute based on its misreading of the Washington Constitution and Washington State precedent interpreting the same, its misstatement of and attempt to insert facts into the record and its apparent misunderstanding of the legal issue at hand.

Defendants have asked this Court to reach a finding that California law, specifically the California Talent Agencies Act (TAA), California Labor Code § 1700, *et seq.*, applies to the instant dispute. As it relates to the issue of subject matter jurisdiction, the TAA states in relevant part that “[i]n cases of controversy arising under this chapter, the parties involved shall refer the matters in disputes to the [California] Labor Commissioner, who shall hear and determine the same, subject to an appeal . . . to the superior court where the same shall be heard *de novo*.” Cal. Lab. Code § 1700.44(a).

If a “statute’s meaning is plain on its face, then courts must give

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<sup>1</sup> Plaintiff devotes an entire section of its brief to the issue of whether the King County Superior Court has personal jurisdiction over the parties. CP 26-27. Defendant has not ever and does not by way of this appeal challenge the Trial Court’s personal jurisdiction over Defendants. Accordingly, Defendants will not address this portion of Plaintiff’s Brief.

effect to its plain meaning as an expression of what the Legislature intended.” *State v. J.M.*, 144 Wn.2d 472, 480 (2001) (citing *State v. Chapman*, 140 Wn.2d 436, 450 (2000)). The plain meaning of a statute is derived “from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statute provisions, and the statutory scheme as a whole.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708 (2007) (citing *State v. Jacobs*, 154 Wn.2d 596, 600 (2005)). Where interpreting a sister state statute, Washington Courts also look to sister state case law interpreting that statute to determine its meaning. *See, e.g., In re License Suspension of Richie*, 127 Wn. App. 935, 941 (2005) (looking to Idaho case law to interpret an Idaho statute’s use of the term “felony”).

In asking this Court to determine that the TAA is applicable to the instant dispute, which will be addressed further below, Defendants are also asking that the Court apply the above quoted language of the TAA to this dispute. *See infra*, I(C). The meaning of California Labor Code § 1700.44(a) is plain on its face: all disputes arising under the TAA must be referred to the California Labor Commissioner. Should the Court determine that Labor Code § 1700.44(a) is ambiguous, reference to California case law interpreting the statute is appropriate. *Richie, supra*. The California Supreme Court has interpreted the TAA to bestow

exclusive original subject matter jurisdiction on the California Labor Commissioner to hear all matters related to the TAA, including instances in which the TAA is being raised as a defense. *Styne v. Stevens*, 26 Cal. 4th 42, n. 6 (2001) (holding that the California Labor Commissioner has “the exclusive right to decide in the first instance all the legal and factual issues on which an Act-based defense depends.”)

Contrary to Plaintiff’s assertions, the Washington Constitution does not prohibit non-judicial agencies from performing such an adjudicative function. In fact, RCW 34.05.413, which relates to the authority of state agencies to conduct adjudicative proceedings, states that “[w]ithin the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.” Several Washington State Agencies, like the California Labor Commissioner, have exclusive original subject matter jurisdiction to hear certain disputes. Examples include the Washington Department of Labor and Industries, which under WAC 49.48.083 has exclusive original subject matter jurisdiction to hear disputes and render decisions related to employee wage claims; the Washington Department of Employment Security, which under RCW 50.32.120 and 50.32.180 has exclusive original subject matter jurisdiction to hear disputes related to unemployment compensation cases; the Washington Pollution Control

Hearings Board, which under RCW 43.21B.110 has exclusive original subject matter jurisdiction over decisions of the Department of Ecology. As is demonstrated by the above, Washington State Law routinely grants its state administrative agencies exclusive original subject matter jurisdiction to oversee disputes that fall within that agency's area of expertise. The same holds true in every state of the United States, including California. Deference to the California Labor Commissioner's exclusive original subject matter jurisdiction to oversee disputes related to the TAA does not, therefore, offend the Washington State Constitution.

In its effort to convince this Court that it should not apply the TAA to the instant dispute and should not, therefore, recognize the California Labor Commissioner's exclusive original subject matter jurisdiction over the same, Plaintiff attempts to minimize California's relationship with the instant dispute. In so doing, Plaintiff breaches its duty of candor to the Court by misstating, selectively citing, and attempting to add to the record before this Court. Specifically, Plaintiff states that "this matter involves a contract written by a Plaintiff in Washington State, executed by Plaintiff in Washington State, and performed by Plaintiff in Washington State." Resp't Br. 27 (citing CP 125). The evidence to which Plaintiff cites for this proposition, the Declaration of Paul B. Anderson (Anderson) in Support of Plaintiff's Motion for Partial Summary Judgment (MPSJ),

makes no mention of who drafted the Agency Agreements (the “Agreements”) or where they were executed and states only that “Workhouse conducted its business as media agent for Defendants from its offices in Seattle, Washington.” CP 125. In a subsequent declaration, Anderson retreated from this position and instead stating that “[t]he contract negotiations I performed for the Defendants almost all took place from my office in Seattle.” CP 182 (emphasis added).

Plaintiff also attempts to distance itself from its California contacts by claiming, again without citation to the record, that WHM “has no presence in California.” CP 129. This unsupported statement is apparently meant to refute the Declaration of Cameron D. Bordner in Opposition to the MPSJ, which stated that “Paul B. Anderson does appear to do business in Santa Monica, California, according to information found about him on the internet” with citation to Workhouse Media’s website. CR 163. Plaintiff never refuted this allegation in the Trial Court and instead now disingenuously attempts to introduce evidence outside of the record to establish that Workhouse Creative, which it alleges, again without citation to the record, is distinct from WHM, holds an office in Santa Monica, California. Resp’t Br. 22, 29 (citing Resp’t App. A-1). As an initial matter, Defendants object to the introduction of new evidence outside the record pursuant to RAP 9.1. However, should the Court find Plaintiff’s

supplemental evidence admissible, Defendants similarly attach a screenshot from WHM's website, which clearly shows that WHM both operates in and advertises its talent agency services in California. Appellant's Supp. App. A-174.

Lastly, Plaintiff alleges that "Appellant Sherrell travelled to Seattle, Washington to meet with Workhouse on more than one occasion." Resp't Br. 30 (citing CP 125). As before, the evidence before this Court contradicts Plaintiff's own prior statements. The Declaration of Sherrell in support of the Opposition to the MPSJ states as follows: "[a]t no time did Ventresca nor I travel to the state of Washington to negotiate the Agreements or anything else with Anderson." CR 167.

Plaintiff next alleges that Defendants' execution of the Agency Agreements was tantamount to consenting to the subject matter jurisdiction of the Trial Court. Resp't Br. 30-32. "[J]urisdiction over the subject matter cannot be conferred by consent, waiver or estoppel." *Rust v. Western Wash. State College*, 11 Wn. App. 410, 419 (1974) (citations omitted). "Subject matter jurisdiction does not turn on agreement, stipulation, or estoppel. Either a court has subject matter jurisdiction or it does not." *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730 (2011) (citing *Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94 (1959)). Accordingly, Defendants' execution of the Agency Agreements has no bearing

whatsoever on whether the Trial Court had subject matter jurisdiction over this dispute.

Plaintiff concludes its Brief by citing several authorities for the proposition that Defendants consented to the Trial Court's jurisdiction in this matter. Resp't Br. 32-36. However, each and every authority cited by Plaintiff concerns personal, not subject matter jurisdiction.<sup>2</sup> Plaintiff again fails to use candor with this Court by, on numerous occasions, citing to cases that do not even address the issue at hand; that being which state has original and exclusive subject matter, not personal, jurisdiction over this dispute. As Defendants state above and flatly stated to the Trial Court, they do not contest the personal jurisdiction of the Trial Court.

Plaintiff's reliance on Mr. Bordner's statement that Defendants

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<sup>2</sup> *Kuhlman Equip. Co. v. Tammermatic, Inc.*, 29 Wash. App. 419, 420 (1981) ("The dispositive question presented by this appeal is whether the defense of lack of personal jurisdiction is waived by a defendant who seeks affirmative relief in the form of a cross claim against third party defendants."); *Grange Ins. Ass'n v. State*, 110 Wash.2d 752, 765 ("[E]ven where the defendant has objected to personal jurisdiction under CR 12(b), he may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court" [citation omitted]); *Matson v. Kennecott Mines Co.*, 103 Wash 499, 502 (1918) and *F.C. Austin Mfg. Co. v. Hunter*, 16 Okl. 86, 87-88 ("[S]o long as he simply defends against the cause or causes of action pleaded in plaintiffs' petition, he can urge the want of jurisdiction over his person in the appellate court, but not so where he files a cross-petition and asks for affirmative relief . . .") Resp't App. A-28; *Livingston v. Livingston*, 43 Wn. App. 669, 671 (1986) and *In re Marriage of Parks*, 48 Wn. App. 166, 170-71 (1987) ("Even where the defendant has properly contested jurisdiction and preserved the objection under CR 12, the defendant may waive the defense of lack of personal jurisdiction by seeking affirmative relief and thereby invoking the jurisdiction of the court." [citation omitted]). Plaintiff also curiously cites to a California case concerning the Full Faith and Credit clause which is irrelevant to the present direct appeal. Resp't Br. 33-34 (citing *World Wide Imports, Inc. v. Bartel*, 145 Cal. App. 3d 1006, 1010 (1983)). Resp't App. A-127.

were not contesting jurisdiction or venue is similarly unavailing. Resp't Br. 35 (citing RP 13:10-22). As an initial matter, Mr. Bordner was responding to the Court's inquiry as to why the Crossclaims were filed in the Trial Court, a matter which, as detailed *ad nauseam* above, relates only to personal jurisdiction and not subject matter jurisdiction. As such Mr. Bordner's response referred only to personal jurisdiction. Further, because subject matter jurisdiction cannot be conferred on a tribunal by consent, waiver, agreement, estoppel or otherwise, no statement by Mr. Bordner could have any effect whatsoever on the Trial Court's subject matter jurisdiction, which it either possessed or it did not. Whether the Trial Court had subject matter jurisdiction over this matter turns on whether this Court determines that California law, specifically the TAA, should be applied to this dispute, which is addressed below.

**C. The Trial Court Did Not Engage in the Required Choice of Law Analysis, Under Which the TAA Clearly Applies**

Plaintiff alleges that the Trial Court engaged in "a thorough choice of law analysis, and found that Washington Law applies." Resp't Br. 36. In support for this position, Plaintiff directs the Court to one solitary statement by the Trial Court: "I also received and familiarized myself with your non-Washington authority –." *Id.* at 44 (citing RP 9:10-12). Neither this statement nor any other portion of the record before this Court evidences that

the Trial Court engaged in any choice of law analysis whatsoever. In fact, the record reveals that the Trial Court failed to apply Washington's long-established choice of law rules to determine what state's law to apply to this dispute. The record also reveals that had the Trial Court engaged in that analysis, it would have found that the TAA applies to the instant dispute.

Washington Courts have long utilized the approach set forth in the Restatement (Second) Conflict of Laws (1971) (the "Restatement") § 187 to determine whether to enforce a choice of law provision in a contract.<sup>3</sup> *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384 (2008); *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 698-94 (2007); *O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 685 (1978). "Where parties dispute choice of law, there must be an actual conflict between the laws or interests of Washington and the laws and interests of another state before Washington courts will engage in a conflict of law analysis." *Seizer v. Sessions*, 132 Wn.2d 642, 648 (1997) (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01 (1994)). An actual conflict exists where the result for a particular

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<sup>3</sup> Plaintiff directs the Court to *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 (1972) in support of its position that the Trial Court was free to disregard decades of Washington Supreme Court precedence requiring a Restatement § 187 analysis to settle choice of law issues. Resp't Br. 36-37. Plaintiff's reliance on *The Bremen* is misplaced, however, because as Plaintiff notes, *The Bremen* concerned the enforcement of a forum selection, not choice of law, clause. *Id.* (citing *The Bremen, supra*). Resp't App. A-114. A contractual choice of law provision concerns the law to be applied to a dispute whereas a forum selection clause, subject of course to subject matter jurisdiction limitations, concerns the jurisdiction where a dispute will be decided. *Erwin, supra*, at 691 n. 13. Forum is not choice of law.

issue “is different under the laws of the two states.” *Id.* (citing *Pac. Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 344-45 (1980)). Neither Party disputes that an actual conflict exists in this instance. Accordingly, the Trial Court was required to engage in a Restatement § 187 analysis to determine whether to apply California Law or Washington Law to this dispute. There can be no question that the Trial Court failed to engage in the required analysis.

Under Restatement § 187(2)(b),

[T]hree questions are posed, all of which must be answered in the affirmative for the exception to apply. To wit, (1) application of the parties’ chosen law must be ‘contrary to the fundamental policy of a state (2) which has a materially greater interest than the chosen state in the determination of the particular issue and (3) which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

*Erwin, supra*, at 696 (citing Restatement § 187(2)(b)).

In granting the MPSJ, the Trial Court stated as follows:

As far as choice of law, one starts with the very strong presumption in valid contracts of the parties’ meeting of the minds about this very issue. And the agreements here clearly indicate that both jurisdiction and venue is here. I see no argument anywhere that there was not a meeting of the minds, that there was undue coercion and all the rest.

RP 22:13-19. The Trial Court wholly failed to apply the standard set forth in Restatements § 187 or apply the facts to that standard. Had it done so, it would have concluded that the TAA clearly applies to the instant dispute.

**1. Application of Washington Law is Contrary to the Fundamental Policy of California**

Plaintiff, again without citation to legal authority, alleges that application of Washington Law is not contrary to a fundamental policy of California. “[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal.” Restatement § 187 cmt g. In applying this principle, the California Labor Commissioner has held that

The strict policy of invalidating contracts violative of the TAA and the TAA’s comprehensive licensing scheme for scrupulously regulating talent agencies – both of which are aimed at effectively protecting artists – makes it abundantly clear that the TAA “is a matter of significant importance to the state . . . is fundamental and may not be waived.”

*Sebert v. DAS Comms., LTD*, No. TAC-19800, at \*11 (Cal. Lab. Comr. Mar. 27, 2012) (citing *Brack v. Omni Loan Co., Ltd.*, 164 Cal. App. 4th 1312, 1327 (2008)). California has expressly held that the TAA is a fundamental policy of the State of California. On that basis alone, the TAA is, in fact, a fundamental policy of the State of California.

Additionally, however, in the matter of *Waisbren v. Peppercorn Productions, Inc.*, 41 Cal. App. 4th 246, 254 (1995), the California Court of Appeals explained the purpose and importance of the TAA as follows:

“The Act is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. . . . Such statutes are enacted for the protection of those seeking employment [i.e., the artists].” *Buchwald v. Superior Court*, 254 Cal.App.2d 347, 350-351 (1967) (citation omitted). Consequently, the Act should be liberally construed to promote the general object sought to

be accomplished; it should "not [be] construed within narrow limits of the letter of the law." *Henning v. Industrial Welfare Com.* (1998) 46 Cal.3d 1262, 1269; accord *Buchwald, supra*, at 354. To ensure the personal, professional, and financial welfare of artists, the Act strictly regulates a talent agent's conduct.

(footnotes omitted). California has made it abundantly clear that strict compliance with the TAA is required in all instances to further the TAA's goal of ensuring the "personal, professional and financial welfare of artists."

Conversely, in finding that California's *real estate broker licensing law* does not embody a fundamental policy of the State of California, in the matter of *Erwin*, the Supreme Court of Washington expressly relied upon California's statement that the real estate broker licensing law "'should not be so literally construed as to require exact compliance if it would transform the statute into an unwarranted shield for the avoidance of a just obligation.'" *Erwin, supra*, 697 (citing *Estate of Baldwin*, 34 Cal. App. 3d 596, 605 [quoting *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 292] (internal quotation marks omitted)). In this regard, California's real estate broker licensing law stands in stark contrast to the TAA, which California has expressed must be strictly complied with at all times.

The *Erwin* Court also relied upon the defendant's failure to allege that the unlicensed real estate broker's conduct violated the policy underlying the real estate broker licensing law or that he was harmed by his

dealings with the unlicensed real estate broker. *Id.* *Erwin* is distinguishable from the instant case on these points as well.

Defendants alleged that Plaintiff was grossly negligent in negotiating their employment agreements in that it misadvised them as to the effect of California Law on the same (and in so failing to properly advise Defendants, Anderson also practiced California law without a license) and forced them to be bound to a contract with an entity with which they had no desire to be contractually bound.<sup>4</sup> CP 48-57. Defendants also alleged that Plaintiff's negligence caused them substantial "personal, professional and financial" harm in that they are now contractually bound to an entity, CBS Radio, Inc., to which they specifically informed Plaintiff they did not want to be contractually bound and have lost significant national and international exposure and earning capacity as a result. *Id.* While these facts are not necessary to establish that the TAA embodies a fundamental policy of the State of California because the State of California has expressly stated that the TAA is a fundamental policy of the state, they provide another basis from which this Court should deviate from, and

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<sup>4</sup> Plaintiff makes a fleeting reference to Anderson's licensure as a Washington attorney in apparent support for its position that Anderson need not be licensed under the TAA. CP 43. Given that one of the central issues in Anderson's mishandling of Defendant's employment negotiations is Anderson's unlicensed practice of California Law and Plaintiff's failure to cite to legal authority for the proposition that one license is as good as the next, this argument is unavailing.

distinguish, the conclusion reached in *Erwin*. While the California real estate broker licensing law is not a fundamental policy of the State of California, under *Erwin*, the TAA clearly is pursuant to ample authority.

In summary, there can be no question that the TAA is a fundamental policy of the State of California.

**2. California has a Materially Greater Interest than Washington in the Determination of Whether the Agreements are Enforceable**

“[T]he interest of a state in having its contract rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties.” Restatement § 188 cmt c. The purpose of the TAA, in addition to “protect[ing] artists seeking professional employment from the abuses of talent agencies,” is “[t]o ensure the personal, professional, and financial welfare of artists.” *Waisbren, supra; Beky v. Bonilla*, No. TAC-11-02, at \* 6 (Cal. Lab. Comr. Nov. 22, 2003). Put in its simplest terms, the purpose of the TAA is to protect California artists in relation to their representation by talent agencies. Due to California’s international recognition as the entertainment capital of the world and home to a plethora of movie, television, music and radio artists and talent agencies, in addition to its substantial relationship to the instant transaction and the Parties, California has a materially greater interest in the application of the TAA to

the instant dispute than Washington has in not applying the TAA.

California is the state where both Defendants reside; where the Agreements were negotiated by the Parties; where the Agreements were executed by Defendants; where the subject of the Agreements, Defendants' employment, is located; and where Plaintiff holds an office and routinely renders talent agency services. CP 2, 25, 51, 163, 166-68. Appellant's Supp. App. A-174. Washington's relationship to the transaction and the parties is much less significant rendering California's interest in the present dispute "materially greater." Plaintiff is a Washington corporation but neither Defendant has any presence in Washington; some, but not all, of Plaintiff's efforts to procure employment for Defendants occurred from Plaintiff's Seattle office and were directed solely to California entities; Defendants never travelled to Washington for any dealings with Plaintiff while conversely Plaintiff travelled to California to negotiate the Agreements with Defendants and perform services thereunder. CP 167-68, 182. The entire purpose of the Agreements was to procure employment for California residents with California employers in California. The fact that WHM happens to be incorporated in Washington and may have placed some phone calls or emails to California from Washington in furtherance of that objective does not transform Washington into the state with the most significant relationship to the transaction or the parties. That state is

assuredly California.

Plaintiff, albeit in a different section of its brief, attempts to distinguish the facts in the matter of *Sebert, supra*, to persuade this Court that California does not have a materially greater interest than Washington in the application of the TAA to the instant dispute. Resp't Br. 29. In *Sebert*, the California Labor Commissioner determined that California had a materially greater interest than New York in application of the TAA because "viewing the totality of the [relevant period], California was the hub of the activities that the parties engaged in under the contract." *Sebert, supra*, at \*12. Plaintiff attempts to distinguish *Sebert* on the ground that the petitioner's day-to-day manager, who was employed by the respondent New York corporation, resided in Los Angeles for a period of time during while the subject contract was in effect. Resp't Br. 29 (citing *Sebert, supra*, at 12). This purportedly distinguishing fact is unavailing given that Plaintiff and Anderson both maintain an office, and frequently conduct business in California, much like the day-to-day manager in *Sebert*. CP 163. Appellant's Supp. App. A-174. Additionally, while "many of the activities asserted to constitute illegal procurement" in *Sebert* "involved performances, meetings, recording sessions, and other events" in California, all of the activities asserted to constitute illegal procurement in this case involved performances in California. CP 167-168. *Sebert, supra*,

at 12 (emphasis added). For these reasons, the facts of this case similarly support a finding that California has a materially greater interest in application of the TAA than Washington.

In a last-ditch effort to sway this Court to ignore California's interest in applying the TAA to this dispute, Plaintiff makes the meritless argument that any complaint filed by Defendants with the California Labor Commissioner would be time barred because "any dispute filed with the Labor Commissioner under the California TAA must be done with [sic] one-year statute of limitations. Resp't Br. 43 (citing *Blanks v. Seyfarth Shaw LLP*, 171 Cal. App. 4th 336, 346 (2009)). The filing of an action to collect commissions under a contract violative of the TAA is itself a violation of the TAA. See *Park v. Deftones*, 71 Cal. App. 4th 1465, 1469 (1999) ("The Labor Commissioner . . . found that the Deftones' petition was timely because it was brought within one year of Park's filing an action to collect commissions under the challenged contract. The Commissioner stated that the attempt to collect commissions allegedly due under the agreements *was itself a violation of the act.*" [emphasis added] [citation omitted]).

On August 26, 2015, Plaintiff filed a Complaint against Defendant to collect under the Agreements. CP 1-11. Defendants filed the Petition to Determine Controversy (the "Petition") with the California Labor

Commissioner on March 14, 2016 – approximately seven (7) months later. CP 469-76. Accordingly, the Petition to Determine Controversy was filed within the requisite statute of limitations and is not time barred.

**3. California Would be the State of the Applicable Law in the Absence of an Effective Choice of Law by the Parties**

Finally, under the Restatement § 187 (2)(b) exception, California law would apply in the absence of an effective choice of law by the parties under Restatement § 188. Section 188 of the Restatement sets forth the factors in determining the state with the most significant relationship as follows:

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) The place of contracting;
- (b) The place of negotiation of the contract,
- (c) The place of performance,
- (d) The location of the subject matter of the contract, and
- (e) The domicil, residence, nationality, place of incorporation and place of business of the parties.

In an attempt to avoid the obvious conclusion that California law would apply in the absence of an effective choice of law provision, Plaintiff tries to deceive this Court by misstating the record, again beaching its duty of candor to this Court. Plaintiff incorrectly states that the Anderson

Declaration supports the following findings: 1) the Agreements were entered into by Plaintiff in Seattle; 2) the Agreements were negotiated by Plaintiff in Seattle; and 3) the Agreements were “performed, in their entirety, by Workhouse, [sic] in Seattle.” Resp’t Br. 42 (citing CP 125, 182). Nowhere in the cited record is there a scintilla of evidence that the Agreements were negotiated or executed by Plaintiff in Seattle. CP 125. Defendants, on the other hand, produced evidence that the negotiations surrounding the Agreements took place in the San Francisco Bay Area and that Defendants executed the Agreements in the San Francisco Bay Area. CP 167. Additionally, while one Anderson Declaration states that “Workhouse conducted its business as media agent for the Defendants from its offices in Seattle, Washington,” Anderson’s subsequent Declaration, which Plaintiff quizzically also draws the Court’s attention, steps back from this position instead stating that “[t]he contract negotiations I performed for the Defendants almost all took place from my office in Seattle.” CP 182 (emphasis added). Plaintiff also apparently forgets its attempted deceit by, in the very next sentence of its brief, stating that “the Agency Agreements were service contracts which were performed by Workhouse primarily in Seattle.” CP 42 (emphasis added). Lastly, Plaintiff, again without support in the record, alleges that Plaintiff has no office in California. In fact, the record establishes that Plaintiff does have a location in and frequently

conducts business in California. CP 163; Appellant's Supp. App. A-174.

Contrary to Plaintiff's unsupported allegations, the record clearly shows that under a Restatement § 188 analysis, California law would be applied to this dispute. The place of contracting is California in that Defendants executed the contracts in California. CP 2, 25, 51, 163, 166-167. The place of negotiation is California in that that is where the Parties met to discuss the possibility of entering into the Agreements and discussed the proposed terms thereof. CP 167. The place of performance of the Agreements was California, which is where all potential employers of Defendants are located, where Defendants themselves are located and where any employment agreements brokered under the Agreements would necessarily be performed. CP 167-168. Similarly, the subject matter of the Agreements, Defendants' employment, is in California. *Id.* Plaintiff is domiciled in Washington while both Defendants are domiciled in California. CP 1, 25, 51, 166. However, while Plaintiff maintains a location and routinely operates in California, Defendant have no ties to Washington whatsoever. CP 163, 167. Appellant's Supp. App. A-174. Accordingly, in considering the domicile of the Parties, this factor should weigh in favor of applying California law.

For the foregoing reasons, there can be no question that California law would be applied in the absence of an effective choice of law provision

under Restatement §188.<sup>5</sup>

#### **4. Defendants Are Entitled to Their Attorney's Fees and Costs on Appeal**

RAP 1.2(a) states that the Rules of Appellate Procedure “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . .” (emphasis added). Defendants acknowledge that they failed to request attorney’s fees in their opening brief as required under RAP 18.1. However, strict application of RAP 18.1 in this instance would unjustly deny Defendants attorney’s fees due solely to a procedural error committed by their attorneys. As stated by the Washington Court of Appeals in the matter of *Simonson v. Fendell*, 34 Wn. App. 324, 330-331 (1983), *rev'd on other grounds*, 101 Wn.2d 88:

The primary consequence of denying attorney's fees because an attorney did not fully comply with RAP 18.1 is to place the monetary loss upon the client, not the attorney. If attorney's fees are denied because his attorney failed to fully comply with RAP 18.1, it is the client who must pay his attorney instead of the fees being rightfully paid by the

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<sup>5</sup> Plaintiff again devotes an entire portion of its brief to Defendants’ purported “forum shopping” by filing the Petition with the California Labor Commissioner and filing a civil case with the San Francisco County Superior Court to stop unlawful collections actions against them in California. CP 45-49, 469-76, 510-524. As this is a direct appeal and this Court considers only the Trial Court record in rendering its decision, these filings are wholly irrelevant and a transparent attempt to cast dispersions on Defendants rather than address the merits of the Appeal. RAP 9.1. Because these filings and Plaintiff’s attacks thereon have no bearing whatsoever on this Court’s determination, Defendants will not address them.

opposing party. Bearing in mind the rules on appeal are to be liberally construed to promote justice, RAP 1.2(a), it is inappropriate that the intent of RAP 18.1 be to deny a client his right to reasonable attorney's fees due to his attorney's failure to fully comply with the procedural rules.

Multiple Washington Courts have confirmed that strict adherence to RAP 18.1 is not required to support an award of attorney's fees in favor of the prevailing party. *Almanza v. Bowen*, 155 Wn. App. 16, 24 (2010); *Glesener v. Balholm*, 50 Wn. App. 1, 14 (1987); *Swanson v. May*, 440 Wn. App. 148, 158-59 (1985); *Mellor v. Chamberlin*, 34 Wn. App. 378, 385 (1983), *rev'd on other grounds*, 100 Wn.2d 643. Accordingly, and in order to promote justice, Defendants respectfully request that this Court excuse Defendants' counsels' failure to strictly comply with RAP 18.1.

Additionally, in applying its inherent equitable powers, this Court "may waive or alter provisions of any of the [Rules of Appellate Procedure] to serve the ends of justice." RAP 1.2(c). The ends of justice are promoted by an alteration of the requirements of RAP 18.1 because: 1) the Agreements that are the subject of this dispute contain a fee shifting provision stating that "the prevailing party in any action shall be entitled to reasonable attorney's fees from the non-prevailing party;"<sup>6</sup> 2) Plaintiff has itself sought attorney's fees related to this action under that same provision;

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<sup>6</sup> Under the mutuality of remedy doctrine, such fees are awardable even if the Agreements are determined to be void by this Court. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789 (2008).

and 3) Plaintiff would suffer no prejudice by an award of attorney's fees in Defendants' favor. Resp't Br. 49-50. CP 132-133, 135-136. As to the last point, Plaintiff anticipated Defendants' request for attorney's fees and already stated its position opposing the same to this Court. Resp't Br. 50. Plaintiff is not, therefore, prejudiced by Defendants' current request for fees under the Agreements. Defendants accordingly request fees under the Agreements should they prevail on this Appeal for the foregoing reasons and based on the well-recognized legal principles of equity and mutuality of remedy.

## II. CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court reach a determination that the Trial Court lacked subject matter jurisdiction, thereby overruling any Orders and Judgments entered by the Trial Court. Defendants also seek a determination by this Court that the Trial Court failed to engage in the required conflict of law analysis, that under that analysis, California law applies and that under California law the Agency Agreements are void *ab initio*. Alternatively, Defendants seek any other relief that this Court deems just and proper based on the foregoing Reply Brief. Defendants also seek an award of fees and costs pursuant to the Agreements should they prevail on this Appeal.

Respectfully submitted this 28<sup>th</sup> day of October, 2016.

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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on October 28, 2016 a true and correct copy of the foregoing Reply Brief of Appellants was served upon the parties listed below via the method indicated:

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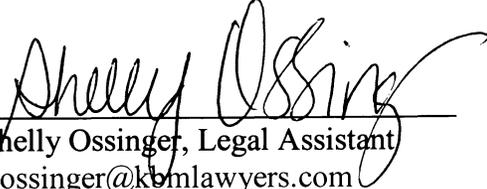
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### III. SUPPLEMENTAL APPENDIX

**Website:**

*www.workhousemedia.com* .....A-174

**Cases**

*Park v. Deftones*, 71 Cal. App. 4th 1465 (1999)..... A-175

*Waisbren v. Peppercorn Productions, Inc.*, 41 Cal. App. 4th 246 (1995)....  
..... A-180



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**DAVE PARK, Plaintiff and Appellant, v. DEFTONES et al., Defendants and Respondents.**

**No. B124598.**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION TWO**

*71 Cal. App. 4th 1465; 84 Cal. Rptr. 2d 616; 1999 Cal. App. LEXIS 463; 99 Cal. Daily Op. Service 3447; 99 Daily Journal DAR 4407*

**May 11, 1999, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Review denied July 28, 1999, Reported at: *1999 Cal. LEXIS 5248*.

(Superior Court of Los Angeles County, No. BC158457, Emilie H. Elias, Commissioner.)

**PRIOR HISTORY:** APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. BC158457. Emilie H. Elias, Commissioner.

**DISPOSITION:** The judgment appealed from is affirmed.

The Court of Appeal affirmed. The court held that the group's petition before the Labor Commissioner was timely filed under the Talent Agencies Act's one-year statute of limitations (*Lab. Code, § 1700.44, subd. (c)*), even though the manager had last booked a concert for the group more than two years before they filed their petition, since the petition was filed within one year after the former manager filed his legal action, which itself was a violation of the act. The court also held that the Labor Commissioner properly declared the agreements between the group and their former manager void under the act. The court further held irrelevant the former manager's statements that his goal in procuring engagements for the group was to obtain a recording agreement and that he had received no commission for the engagements, since even incidental activity in procuring employment for an artist is subject to regulation under the act, and the act does not expressly include or exempt procurement when no compensation is paid. (Opinion by Nott, Acting P. J., with Zebrowski, J., and Mallano, J., \* concurring.)

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In October 1996, the former personal manager of a singing group brought an action for breach of management agreements against the group and for intentional interference with contractual relations against a record company and its agent. In February 1997, the group filed a petition before the Labor Commissioner, seeking to void the management agreements. The commissioner found the petition to be timely filed, and declared the management agreements void because the former manager had violated the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) by obtaining 84 performance engagements for the group without being a licensed talent agency. The trial court entered summary judgment in favor of defendants based on the commissioner's finding.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

**HEADNOTES****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports

**(1a) (1b) Employment Agencies § 5--Actions--Brought Pursuant to Talent Agencies Act--Statute of Limitations.** -- --A singing group's petition before the Labor Commissioner under the Talent Agencies Act (*Lab. Code, § 1700 et seq.*), in which the group sought to void its management agreements with its former personal manager, was timely filed under the act's one-year statute of limitations (*Lab. Code, § 1700.44, subd. (c)*), even though the manager had last booked a concert for the group more than two years before they filed their petition. The petition was timely because it was filed within one year after the former manager filed a legal action based on the agreements, which itself was a violation of the act, since the manager was not licensed to procure engagements.

**(2) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.** -- --In construing a statute, the court gives considerable weight to the interpretation placed on the statute by the administrative agency charged with enforcing it.

**(3) Employment Agencies § 1--Regulation--Talent Agencies Act--Application to Personal Managers.** -- --Unlike talent agents, personal managers are not covered by the Talent Agencies Act (*Lab. Code, § 1700 et seq.*). Personal managers primarily advise, counsel, direct, and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists.

**(4a) (4b) (4c) Employment Agencies § 1--Regulation--Talent Agencies Act--Requirement of License for Procuring Engagements for Artist--Effect of Violation on Management Agreements.** -- --The management agreements between a singing group and its former personal manager were properly declared void by the Labor Commissioner because the former manager had violated the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) by obtaining 84 performance engagements for the group without being licensed as a talent agency. It was irrelevant that the former manager's goal in procuring engagements for the group was to obtain a recording agreement, since even incidental activity in procuring

employment for an artist is subject to regulation under the act. Furthermore, the former manager's statements that he received no commission for the engagements were also irrelevant, since the contracts provided for compensation, the manager intended to ultimately receive compensation when he obtained the recording contract for the group, and the act does not expressly include or exempt procurement when no compensation is paid.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 430, 450.]

**(5a) (5b) Employment Agencies § 1--Regulation--Talent Agencies Act--Constitutionality--Construction.** -- --The requirement in the Talent Agencies Act (*Lab. Code, § 1700 et seq.*) that an agent obtain a license before procuring employment for artists does not violate either the equal protection clause or due process. Furthermore, because the act is remedial, it should be liberally construed to promote its general object.

**COUNSEL:** Johnson & Rishwain and Neville L. Johnson for Plaintiff and Appellant.

Browne & Woods, Allen B. Grodsky and James D. Kozmor for Defendants and Respondents the Deftones, Camillo Wong Moreno, Stephen Carpenter, Abe Cunningham and Chi Ling Cheng.

Greenberg, Glusker, Fields, Claman & Machtinger, Lawrence Y. Iser and Matthew N. Falley for Defendants and Respondents Maverick Records and Guy Oseary.

**JUDGES:** Opinion by Nott, Acting P. J., with Zebrowski, J., and Mallano, J., \* concurring.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

**OPINION BY:** NOTT

**OPINION**

[\*1467] [\*\*617] **NOTT, Acting P. J.**

Dave Park appeals from the summary judgment entered against him in his action for breach of contract and intentional interference with contractual relations. His action arises from the termination of his personal

manager [\*\*\*2] contract by the Deftones, a music act whose members are Camillo Wong Moreno, Stephen Carpenter, Abe Cunningham, and Chi Ling Cheng (referred to collectively as the Deftones), without paying him commissions which he asserts are due him. In addition, Park alleges that after he secured a recording contract for the Deftones with Maverick Records (Maverick), the record company and one of its agents, Guy Oseary, purposefully interfered with Park's contractual relationship with the Deftones. The trial court granted summary judgment on the ground that the management contract between the Deftones and Park was void, Park [\*1468] having violated the Talent Agencies Act (the Act) by securing performance engagements for the Deftones without being licensed as a talent agency. (*Lab. Code, § 1700 et seq.*)<sup>1</sup> We affirm on that ground.

1 All statutory references are to the Labor Code, unless otherwise indicated.

#### PROCEDURAL AND FACTUAL BACKGROUND

Park filed this action in October 1996, alleging [\*\*\*3] breach of certain management agreements against the Deftones and the individual band members and intentional interference with contractual relations against Maverick and Oseary. He attached to his complaint his written agreements with the Deftones entered into in February 1992, February 1993, and January 1994. In February 1997, the Deftones filed a petition before the Labor Commissioner, seeking to void the management agreements. Park unsuccessfully sought dismissal of the petition as untimely filed. The Labor Commissioner determined that Park had violated the Act by obtaining performance engagements for the Deftones on 84 occasions without a license. He issued an order stating that the personal management agreements entered into in 1992, 1993, and 1994 were "null, void and unenforceable." Park demanded a trial de novo in the administrative proceeding.

[\*\*618] Maverick and Oseary filed a motion for summary judgment on the grounds that the undisputed facts showed that (1) Park and the Deftones entered into a written contract for management services dated January 18, 1994, (2) between September 1991 and September 1994, Park procured numerous performances for the Deftones, and (3) [\*\*\*4] Park was not a licensed talent agency during that period. Maverick and Oseary relied in part upon the transcript of the Labor Commission proceeding to establish the facts. The Deftones filed a

similar motion.

Park opposed the motions. He objected to use of the Labor Commission hearing transcript, but admitted that he had obtained more than 80 engagements for the Deftones. He asserted that the Deftones' petition before the Labor Commission was untimely filed and that his services did not require a talent agency license because they were rendered without a commission and were undertaken in order to obtain a recording agreement. The trial court entered summary judgment in favor of all defendants.

#### DISCUSSION

##### I. *Timeliness*

(1a) Park contends that the Deftones' petition before the Labor Commissioner and the defense based upon the Act are barred by the one-year statute [\*1469] of limitations: "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding." (*§ 1700.44, subd. (c).*)

In declaration testimony, Park stated that the last time he [\*\*\*5] booked a concert for the Deftones was in August 1994. He urges that the Deftones' petition, filed in February 1997, was therefore not timely. Park concludes that the Deftones may not rely upon the Act as a defense because Park's own action was filed more than one year after he last booked a concert for the Deftones.

The Labor Commissioner, who is statutorily charged with enforcing the Act (*§ 1700.44, subd. (a)*), found that the Deftones' petition was timely because it was brought within one year of Park's filing an action to collect commissions under the challenged contract.<sup>2</sup> The Commissioner stated that the attempt to collect commissions allegedly due under the agreements was itself a violation of the Act. (*Moreno v. Park* (Jan. 20, 1998, Lab. Comr.) No. 9-97, p. 4.)

2 The commissions sought were apparently for procuring a recording agreement, not procuring engagements.

(2) In construing a statute, the court gives considerable weight to the interpretation placed on the statute by the administrative [\*\*\*6] agency charged with

71 Cal. App. 4th 1465, \*1469; 84 Cal. Rptr. 2d 616, \*\*618;  
1999 Cal. App. LEXIS 463, \*\*\*6; 99 Cal. Daily Op. Service 3447

enforcing it. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal. 4th 226, 234 [5 Cal. Rptr. 2d 782, 825 P.2d 767].) **(1b)** The Labor Commissioner's interpretation avoids the encouragement of preemptive proceedings before it. It also assures that the party who has engaged in illegal activity may not avoid its consequences through the timing of his own collection action. We conclude that the Labor Commissioner's interpretation is reasonable, and that the Deftones' petition was timely filed.

## II. Incidental procurement of employment

The Act provides that "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." (§ 1700.5.) A talent agency is "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. . . ." (§ 1700.4, subd. (a).)

[\*\*\*7] **(3)** Unlike talent agents, personal managers are not covered by the Act. Personal managers primarily advise, counsel, direct, and coordinate the [\*1470] development of the artist's career. They advise in both business and personal matters, frequently lend money [\*\*619] to young artists, and serve as spokespersons for the artists. (See *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal. App. 4th 246, 252-253 [48 Cal. Rptr. 2d 437] (*Waisbren*).)

**(4a)** Park argues that as a personal manager his goal in procuring engagements for the Deftones was to obtain a recording agreement. He contends that his actions were therefore exempt from regulation. That position was rejected in *Waisbren, supra*, 41 Cal. App. 4th at page 259. In *Waisbren*, a promoter brought an action for breach of contract against a company engaged in designing and creating puppets. The defendant moved for summary judgment on the ground the parties' agreement for the plaintiff's services was void because he had performed the duties of a talent agent without obtaining a license. The plaintiff asserted that a license was unnecessary because his procurement activities were minimal and [\*\*\*8] incidental. He had also assisted in project development, managed certain business affairs,

supervised client relations and publicity, performed casting duties, coordinated production, and handled office functions. In return, he was to receive 15 percent of the company's profits. *Waisbren* holds that even incidental activity in procuring employment for an artist is subject to regulation under the Act.

The reasoning of *Waisbren* is convincing. It relies upon the remedial purpose of the Act and the statutory goal of protecting artists from long recognized abuses. The decision is also based upon the Labor Commissioner's long-held position that a license is required for incidental procurement activities. The court in *Waisbren* found the Labor Commissioner's position to be supported by legislative history and, in particular, by the recommendations contained in the Report of the California Entertainment Commission, which were adopted by the Legislature in amending the Act in 1986.

*Wachs v. Curry* (1993) 13 Cal. App. 4th 616 [16 Cal. Rptr. 2d 496], relied upon by Park, does not further his cause. In *Wachs*, the personal manager plaintiffs brought a declaratory [\*\*\*9] relief action challenging the constitutionality of the Act on its face. **(5a)** They took the position that the Act's exemption for procurement activities involving recording contracts violated the equal protection clause and that the Act's use of the term "procure" was so vague as to violate due process. *Wachs* rejected both of those positions. **(4b)** It also interpreted the Act, which applies to persons engaged in the occupation of procuring employment for artists, as applying only where a person's procurement activities constitute a significant part of his business. (*Id. at pp. 627-628.*) The court did not define "significant part." The court acknowledged that ". . . the only question before us is whether the word [\*1471] 'procure' in the context of the Act is so lacking in objective content that it provides no standard at all by which to measure an agent's conduct" (*id. at p. 628*, italics omitted). We agree with *Waisbren* that the interpretation stated in *Wachs* is dictum and that even incidental procurement is regulated.

## III. Absence of a commission

Park also contends that his procuring employment for the Deftones is not regulated by the [\*\*\*10] Act because he was not compensated for that work. We disagree.

Park's 1993 and 1994 agreements with the Deftones expressly provided that Park was to receive a 20 percent

commission on all income earned from employment that Park secured. Although Park stated in declaration testimony that he received no commission for procuring engagements for the Deftones, the contracts appear to provide for compensation.<sup>3</sup> In addition, Park would receive compensation for his services ultimately from commissions for obtaining a recording contract for the Deftones. Thus, it is not clear that Park should be treated as one who was not compensated for his services.

3 The agreements acknowledge that Park is not a licensed talent agent and is under no obligation to procure employment for the Deftones.

Park's position, moreover, is not supported by the language of the Act. The Act regulates those who engage in the occupation of procuring engagements for artists. (§ 1700.4, [\*\*620] *subd. (a)*.) The Act does not expressly [\*\*\*11] include or exempt procurement where no compensation is made. *Waisbren* states at footnote 6: "By using [the term 'occupation'], the Legislature intended to cover those who are compensated for their procurement efforts." (41 Cal. App. 4th at p. 254, *fn. 6*.) The issue of compensation, however, was not before the court in *Waisbren*. The language in footnote 6 is dictum which we conclude is not supported by the purpose and legislative history of the Act. One may engage in an occupation which includes procuring engagements without receiving direct compensation for that activity.

As explained in *Waisbren*, the purpose of the Act is remedial, and its aim goes beyond regulating the amount of fees which can be charged for booking acts. For example, an agent must have his form of contract approved by the Labor Commissioner, maintain his client's funds in a trust fund account, record and retain certain information about his client, and refrain from giving false information to an artist concerning potential employment. (See § 1700.23, 1700.25, 1700.26, 1700.32, and 1700.41.) (5b) Because the Act is remedial, it should be liberally construed to promote its general object. [\*\*\*12] (See *Buchwald v. Superior Court (1967)* 254 Cal. App. 2d 347, 354 [\*1472] [62 Cal. Rptr. 364].) (4c) The abuses at which these requirements are aimed apply equally where the personal manager procures work for the artist without a commission, but rather for the deferred benefits from obtaining a recording contract.

In 1982, the Legislature created the California

Entertainment Commission (the Commission) to study the laws and practices of this and other states relating to the licensing of agents and representatives of artists in the entertainment industry in order to recommend to the Legislature a model bill regarding licensing. (See *Waisbren, supra*, 41 Cal. App. 4th at p. 256.) In 1985, the Commission submitted its report to the Governor and the Legislature (the Report). The Legislature followed the Commission's recommendations in enacting the 1986 amendments to the Act. (See *Waisbren, supra*, 41 Cal. App. 4th at p. 258.)

The Report<sup>4</sup> states that the Commission reviewed and rejected a proposal which would have exempted from the Act anyone who does not charge a fee or commission for procuring employment for an artist. The [\*\*\*13] Commission concluded: "It is the majority view of the Commission that personal managers or anyone not licensed as a talent agent should not, under any condition or circumstances, be allowed to procure employment for an artist without being licensed as a talent agent, except in accordance with the present provisions of the Act." (Rep., *supra*, at p. 6.)

4 We grant respondents' request that we take judicial notice of the Report. (*Evid. Code*, § 452, *subd. (c)*.)

The Legislature accepted the Report and codified the Commission's recommendations, approving the Commission's view that no exemption should be created for those who do not charge a fee for procuring employment for an artist. We conclude that the Act requires a license to engage in procurement activities even if no commission is received for the service.

#### DISPOSITION

The judgment appealed from is affirmed.

Zebrowski, J. and Mallano, J., \* concurred.

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[\*\*\*14] Appellant's petition for review by the Supreme Court was denied July 28, 1999.



**BRAD WAISBREN, Plaintiff and Appellant, v. PEPPERCORN PRODUCTIONS,  
INC., et al., Defendants and Respondents.**

**No. B088448.**

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,  
DIVISION ONE**

***41 Cal. App. 4th 246; 48 Cal. Rptr. 2d 437; 1995 Cal. App. LEXIS 1237; 95 Cal. Daily  
Op. Service 9734; 95 Daily Journal DAR 16899***

**December 20, 1995, Decided**

**SUBSEQUENT HISTORY:** [\*\*\*1] Review Denied  
March 14, 1996, Reported at: *1996 Cal. LEXIS 1553*.

Court sitting under assignment by the Chairperson  
of the Judicial Council.

**PRIOR HISTORY:** Superior Court of Los Angeles  
County, No. EC001909, Thomas C. Murphy, Judge. \*

\* Retired judge of the Los Angeles Superior  
Court sitting under assignment by the Chairperson  
of the Judicial Council.

**DISPOSITION:** The judgment is affirmed.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action for breach of contract brought by a personal manager against his former client, an artistic production company, the trial court granted defendant's summary judgment motion on the ground that the parties' oral agreement was void because plaintiff had performed the duties of a talent agent, by procuring employment for defendant, without first obtaining the necessary license under the Talent Agencies Act (*Lab. Code, §§ 1700-1700.47*). (Superior Court of Los Angeles County, No. EC001909, Thomas C. Murphy, Judge. †)

† Retired judge of the Los Angeles Superior

The Court of Appeal affirmed. The court held that the trial court did not err in granting summary judgment for defendant, since plaintiff was required to be licensed as a talent agent, even though his efforts to procure employment for defendant were minimal or incidental to his other activities. The Talent Agencies Act (*Lab. Code, §§ 1700-1700.47*), is entirely consistent with the concept of dual occupations, i.e., being a personal manager and a talent agent, and a license was required even though plaintiff spent only an incidental part of his time procuring employment for defendant. The court further held that the trial court properly declared the parties' agreement void and precluded plaintiff from seeking any recovery under it. Declaring the parties' agreement to be void was not too severe a penalty, even though the act did not contain criminal penalties for licensing violations, since the existence of criminal penalties is not required as a prerequisite to declaring an illegal contract to be void. Further, since all of plaintiff's causes of action were based on his illegal agreement or business arrangement with defendant, he could not establish his case against defendant other than through the medium of an illegal transaction to which he was a party. (Opinion by Masterson, J., with Spencer, P. J., and Ortega, J., concurring.)

**HEADNOTES****CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports

**(1) Summary Judgment § 26--Appellate Review--Scope of Review.** -- --Summary judgment is appropriate if all of the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law (*Code Civ. Proc.*, § 437c, subd. (c)). A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court and must determine whether the facts as shown by the parties give rise to a triable issue of material fact. In making this determination, the reviewing court strictly construes the moving party's affidavits, liberally construes the opposing party's affidavits, and accepts as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. In other words, the facts alleged in the declarations of the party opposing summary judgment must be accepted as true.

**(2) Employment Agencies § 1--Regulation--Talent Agencies Act--Construction--Legislative Intent--Plain Meaning--"Occupation"--Necessity of Licensing as Talent Agent--When Employment Procurement Activities Are Minimal.** -- --In an action for breach of contract brought by a personal manager against his former client, an artistic production company, the trial court did not err in granting summary judgment for defendant, since plaintiff was required to be licensed as a talent agent, even though his efforts to procure employment for defendant were minimal or incidental to his other activities. The Talent Agencies Act (*Lab. Code*, §§ 1700-1700.47), is entirely consistent with the concept of dual occupations, i.e., being a personal manager and a talent agent, and a license was required even though plaintiff spent only an incidental part of his time procuring employment for defendant. In construing the provisions of the act, which applies only if a person engages in the "occupation" of procuring employment for

an artist, the court's goal is to ascertain and effectuate legislative intent. In determining that intent, the court looks first to the language of the statute, giving effect to its plain meaning. As the dictionary definitions of "occupation" make clear, a person can hold a particular occupation even if it is not his or her principal line of work.

**(3) Employment Agencies § 1--Regulation--Talent Agencies Act--Remedial Purpose of Act--Construction--Application.** -- --The Talent Agencies Act (*Lab. Code*, §§ 1700-1700.47), is a remedial statute. Statutes such as the act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. Such statutes are enacted for the protection of those seeking employment, i.e., the artists. Consequently, the act should be liberally construed to promote the general object sought to be accomplished; it should not be construed within narrow limits of the letter of the law. The licensing scheme contemplates that the occasional talent agent, like the full-time agent, is subject to regulatory control. Thus, the act covers personal managers, even if their procurement efforts were merely incidental, since the statutory goal of protecting artists would be defeated if the act applied only where a personal manager spent a significant part of his or her workday pursuing employment for artists. Such a standard is so vague as to be unworkable and would undermine the purpose of the act.

**(4) Administrative Law § 10--Powers and Functions of Administrative Agencies--Administrative Construction and Interpretation of Laws.** -- --The construction of a statute by an agency charged with its administration is entitled to great weight. If the administrative agency's construction is reasonable, a court should defer to it.

**(5) Employment Agencies § 1--Regulation--Talent Agencies Act--Purpose of Act--Validity of Contract Between Unlicensed Agent and Artist.** -- --Since the clear object of the Talent Agencies Act (*Lab. Code*, §§ 1700-1700.47), 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. 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.

**(6a) (6b) Employment Agencies § 1--Regulation--Talent Agencies Act--Dismissal of Complaint--Propriety of--Unlicensed Person Acting as Talent Agent: Contracts § 12--Legality--Effect of Illegality.** -- --In an action for breach of contract brought by a personal manager against his former client, an artistic production company, the trial court properly disposed of plaintiff's complaint in its entirety on the ground that the parties' oral agreement was void because plaintiff had performed the duties of a talent agent, by procuring employment for defendant, without first obtaining the necessary license under the Talent Agencies Act (*Lab. Code, §§ 1700-1700.47*). Declaring the parties' agreement to be void was not too severe a penalty, even though the act did not contain criminal penalties for licensing violations, since the existence of criminal penalties is not required as a prerequisite to declaring an illegal contract to be void. Moreover, the Legislature approved the remedy of declaring agreements void if they violate the act, by following the California Entertainment Commission's advice and not enacting criminal penalties for licensing violations. Further, since all of plaintiff's causes of action were based on his illegal agreement or business arrangement with defendant, he could not establish his case against defendant other than through the medium of an illegal transaction to which he was a party.

[See 1 **Witkin**, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 430, 450.]

**(7) Contracts § 12--Legality--Effect of Illegality.** -- --The courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit that he or she should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place. Further, a party to an illegal contract cannot come into a court of law and ask to have his or her illegal objects carried out. The test is whether the plaintiff can establish his or her case otherwise than through the medium of an illegal

transaction to which he or she is a party.

**COUNSEL:** Steven D. Waisbren for Plaintiff and Appellant.

Anker & Hymes, Jonathan L. Rosenbloom and Douglas K. Schreiber for Defendants and Respondents.

**JUDGES:** Opinion by Masterson, J., with Spencer, P. J., and Ortega, J., concurring.

**OPINION BY: MASTERSON, J.**

#### OPINION

[\*249] [\*\*438] **MASTERSON, J.**

In the entertainment industry, talent agents and personal managers perform valuable services for their clients. Talent agents, [\*250] who seek to procure employment for artists, must be licensed under the Talent Agencies Act (*Lab. Code, § 1700- 1700.47*). In contrast, personal managers, who advise and direct artists in the development of their careers, are not subject to any licensing requirements.

This appeal presents the question of whether a personal manager must be licensed under the Talent Agencies Act if he devotes an incidental portion of his business to the function of a talent agent--procuring employment [\*\*\*2] for an artist. We conclude that he must be so licensed.

#### BACKGROUND

Defendant Peppercorn Productions, Inc. (Peppercorn) is a California corporation [\*\*439] specializing in the design and creation of puppets for use in the entertainment industry and advertising media. Peppercorn has also been involved in producing various television projects. Defendants David Pavelonis and Terrie Pavelonis are officers of Peppercorn.

In 1982, plaintiff Brad Waisbren agreed to promote Peppercorn. From 1982 through 1988, he performed numerous services for the company pursuant to an oral agreement. Among other things, Waisbren assisted in project development, managed certain business affairs, supervised client relations and publicity, performed casting duties, advised Peppercorn regarding the selection of artistic talent, coordinated production, and handled

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office functions, such as the hiring and firing of personnel. Occasionally, Waisbren procured employment for Peppercorn, but his efforts in that regard were incidental to his other responsibilities. For his services, Waisbren was to receive 15 percent of Peppercorn's profits.<sup>1</sup>

<sup>1</sup> Waisbren contends that he was to receive 15 percent of "gross profits" less out-of-pocket expenses per project. Peppercorn claims that Waisbren's compensation was based on "net profits." To the extent the parties disagree on this point, it is not material to the question before us.

[\*\*\*3] In 1988, Peppercorn terminated its relationship with Waisbren. In 1990, he filed suit against defendants, alleging that they had not paid him in accordance with the parties' agreement. By way of a second amended complaint filed in 1991, Waisbren alleged six causes of action, all of which sought relief based on an alleged breach of the agreement.<sup>2</sup>

<sup>2</sup> Specifically, Waisbren alleged causes of action for breach of an oral contract, breach of an implied-in-fact contract, quantum meruit, fraud, bad faith denial of the existence of a contract, and accounting.

In March 1994, defendants moved for summary judgment on the ground that the parties' agreement was void because Waisbren had performed the [\*251] duties of a talent agent--by procuring employment for Peppercorn--without first obtaining the necessary license under the Talent Agencies Act. In opposing summary judgment, Waisbren admitted that he had no such license. However, he argued that a license was unnecessary since his procurement activities were [\*\*\*4] minimal and merely incidental to his other responsibilities.<sup>3</sup> In May 1994, the trial court granted defendants' summary judgment motion. Waisbren filed a timely appeal from the judgment.

<sup>3</sup> During discovery, defendants served Waisbren with the following request for admission: "That pursuant to the agreement you alleged existed between Peppercorn Productions, Inc. and you that you engaged in procuring employment for the services offered by Peppercorn Productions, Inc." Waisbren admitted the request, after objecting to it as vague, ambiguous, and unintelligible.

According to a declaration submitted by David Pavelonis, Waisbren negotiated deals on behalf of Peppercorn for regional television commercials and home video projects as well as a Dick Clark Productions pilot. Waisbren stated in his own declaration that his "attempt to explore new business opportunities for [Peppercorn] . . . constituted only a very small portion of the overall duties that I had with, and performed for, [Peppercorn]." Waisbren also submitted the declarations of two associates who stated that "any effort[] on the part of Mr. Waisbren to procure employment for Peppercorn Productions was relatively minimal" and that "[a] great majority of the functions and tasks performed by Mr. Waisbren for Peppercorn . . . were not associated or connected with the procurement of employment for Peppercorn . . ."

#### [\*\*\*5] DISCUSSION

(1) Summary judgment is appropriate if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. ( *Code Civ. Proc.*, § 437c, *subd. (c)*.)

"A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. . . . In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. . . . We must determine whether the facts as [\*\*440] shown by the parties give rise to a triable issue of material fact. . . . In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed." ( *Hanooka v. Pivko* (1994) 22 Cal. App. 4th 1553, 1558 [28 Cal. Rptr. 2d 70], citations omitted; see also *Code Civ. Proc.*, § [\*\*\*6] 437c, *subd. (o)(2)*.) We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. ( *Kelleher v. Empresa* [\*252] *Hondurena de Vapores, S.A.* (1976) 57 Cal. App. 3d 52, 56 [129 Cal. Rptr. 32].) In other words, the facts alleged in the declarations of the

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party opposing summary judgment must be accepted as true. ( *Zeilman v. County of Kern* (1985) 168 Cal. App. 3d 1174, 1179, fn. 3 [214 Cal. Rptr. 746].)

With these principles in mind, we turn first to the question of whether Waisbren had to be licensed as a talent agent, even though his efforts to procure employment for Peppercorn were minimal or incidental in relation to his other activities. Finding that a license was necessary, we then examine whether the trial court applied the proper remedy for Waisbren's unlicensed conduct (i.e., declaring the parties' agreement void and precluding Waisbren from seeking any recovery under it).

#### A. The Licensing Scheme

The Talent Agencies Act (the Act) provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the [\*\*\*7] Labor Commissioner." ( *Lab. Code, § 1700.5*.) A "talent agency" is "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." (*Id. § 1700.4, subd. (a)*.)<sup>4</sup> An "artist," in turn, includes a broad spectrum of persons and entities working in the entertainment field.<sup>5</sup>

4 The Act exempts procurement efforts related to recording contracts. ( *Lab. Code, § 1700.4, subd. (a)*.)

5 "Artists" is defined as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises." ( *Lab. Code, § 1700.4, subd. (b)*, italics added.) A "person" means "any individual, company, society, firm, partnership, association, corporation, . . . manager, or their agents or employees." ( *Lab. Code, § 1700*.) In this case, there is no dispute that defendants qualify as "artists" under the Act.

[\*\*\*8] Unlike a talent agent, a "personal manager" is not covered by the Act or any other statutory licensing scheme. (Yanover & Kotler, *Artist/Management*

*Agreements and the English Music Trilogy: Another British Invasion?* (1989) 9 Loy. Ent. L.J. 211, 211-214.) "Artists typically engage personal managers in addition to talent agents. . . [P] . . . In essence, 'the primary function of the personal manager is that of advising, counselling, directing and coordinating the artist in the development of the artist's career.' The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artist's finances, and they routinely organize the economic elements of the artist's personal and creative life necessary to bring the client's product to fruition. The personal [\*253] manager frequently lends money to the neophyte artist, thereby speculating on a return from the artist's anticipated future earnings. 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. On a more personal level, the manager often serves [\*\*\*9] as the artist's confidant and alter ego. . . [P] By orchestrating and monitoring the many aspects of the artist's personal and business life, the personal manager gives the artist time to be an artist. That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic function and to concentrate on their immediate creative task . . . In this regard, the personal manager is an indispensable element of an artist's career." (O'Brien, *Regulation* [\*\*441] of *Attorneys Under California's Talent Agencies Act: a Tautological Approach to Protecting Artists* (1992) 80 Cal.L.Rev. 471, 481-483, fns. omitted (hereafter *Regulation of Attorneys*).)

As a practical matter, personal managers may occasionally find themselves in situations where they would like to procure employment for their clients. (See Hertz, *The Regulation of Artist Representation in the Entertainment Industry* (1988) 8 Loy. Ent. L.J. 55, 58-59, 63 (hereafter *The Regulation of Artist Representation*); Johnson & Lang, *The Personal Manager in the California Entertainment Industry* (1979) 52 So.Cal.L.Rev. [\*\*\*10] 375, 375-376 (hereafter *The Personal Manager*).) That is not the issue before us, however. Rather, we must decide whether a person needs to be licensed under the Act if he occasionally procures employment for an artist. We conclude that a license is required.

#### 1. The Plain Meaning of the Act

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(2) In construing the provisions of the Act, our goal is to ascertain and effectuate legislative intent. (*Burden v. Snowden* (1992) 2 Cal. 4th 556, 562 [7 Cal. Rptr. 2d 531, 828 P.2d 672].) In determining that intent, we look first to the language of the statute, giving effect to its plain meaning. (*Ibid.*)

The Act applies only if a person engages in the "occupation" of procuring employment for an artist. (*Lab. Code*, § 1700.4, subd. (a), 1700.5.) Waisbren contends that because "occupation" is defined as "the principal business of one's life" (see Webster's Third New Internat. Dict. (1981) p. 1560, col. 3, italics added), a license is not needed unless a person's principal responsibilities involve procuring employment for an artist. We disagree.

By limiting the concept of "occupation" to one's "principal" business endeavor, Waisbren ignores the possibility that a person can [\*\*\*11] have more than [\*254] one job. Plainly, an individual can be engaged in an "occupation" even if he does not spend most of his time in that pursuit. Moreover, Waisbren's argument rests on only one definition of "occupation." That term also means "a craft, trade, profession or other means of earning a living." (Webster's Third New Internat. Dict., *supra*, p. 1560, col. 3.) Further, "occupation" is synonymous with "employment" (*ibid.*), which includes "temporary or occasional work or service for pay" (*id.* at p. 743, col. 3). As these additional definitions make clear, a person can hold a particular "occupation" even if it is not his principal line of work. Thus, the Act is entirely consistent with the concept of dual occupations--for example, being a personal manager *and* a talent agent. <sup>6</sup>

6 Our interpretation of the statutory language does not render the term "occupation" mere surplusage. (See *Lab. Code*, § 1700.4, subd. (a) [defining "talent agency" as a person who "engages in the occupation of procuring . . . employment . . . for an artist or artists"].) By using that term, the Legislature intended to cover those who are compensated for their procurement efforts.

[\*\*\*12] 2. *The Remedial Purpose of the Act*

(3) "The Act is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. . . . Such statutes

are enacted for the protection of those seeking employment [i.e., the artists]." (*Buchwald v. Superior Court* (1967) 254 Cal. App. 2d 347, 350-351 [62 Cal. Rptr. 364], citation omitted.) <sup>7</sup> Consequently, the Act should be liberally construed to promote the general object sought to be accomplished; it should "not [be] construed within narrow limits of the letter of the law." (*Henning v. [\*\*442] Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 1269 [252 Cal. Rptr. 278, 762 P.2d 442]; accord, *Buchwald v. Superior Court*, *supra*, 254 Cal. App. 2d at p. 354.) <sup>8</sup> To ensure the personal, professional, and financial welfare of artists, the Act strictly regulates a talent agent's conduct. <sup>9</sup>

7 When *Buchwald* was decided, *Labor Code* section 1700.4 used the term "artists' manager" instead of "talent agency" and was part of the Artists' Managers Act. (See Stats. 1959, ch. 888, § 1, pp. 2921, 2922.) An "artists' manager" was defined as "a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engagements for an artist . . ." (Stats. 1959, ch. 888, § 1, p. 2921.) In 1978, the Legislature changed the name of the statutory scheme and amended section 1700.4 to use the term "talent agency." (Stats. 1978, ch. 1382, § 3, 6, pp. 4575, 4576.) These changes did not alter the statute's remedial purpose.

[\*\*\*13]

8 This rule of construction counsels against adopting Waisbren's definition of "occupation" since, by focusing on one's *principal* business, it is the most narrow of the various definitions. (See pt. A.1., *ante.*)

9 For instance, an agent must (1) have his form of contract approved by the Labor Commissioner (*Lab. Code*, § 1700.23), (2) maintain his client's funds in a trust fund account (*id.* § 1700.25), (3) record and retain certain information about his client (*id.* § 1700.26), (4) refrain from giving false information to an artist concerning potential employment (*id.* § 1700.32), and (5) avoid certain payment practices (*id.* § 1700.39-1700.41). In addition to his statutory obligations, an agent must comply with the regulations promulgated by the Labor Commissioner to implement the Act (*Cal. Code Regs.*, tit. 8, § 12000 *et seq.*). (See

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generally, *Regulation of Attorneys, op. cit. supra*, 80 Cal.L.Rev. at pp. 487-490 [discussing the Act's restrictions on talent agents].)

The statutory goal of protecting artists would be defeated if the Act applied [\*\*\*14] only where a personal manager spends a significant part of his [\*255] workday pursuing employment for artists. The fact that an unlicensed manager may devote an "incidental" portion of his time to procurement activities would be of little consolation to the client who falls victim to a violation of the Act. As a result, the licensing scheme contemplates that the "occasional talent agent," like the full-time agent, is subject to regulatory control.

We refuse to believe that the Legislature intended to exempt a personal manager from the Act--thereby allowing violations to go unremedied--unless his procurement efforts cross some nebulous threshold from "incidental" to "principal." Such a standard is so vague as to be unworkable and would undermine the purpose of the Act. <sup>10</sup>

<sup>10</sup> Perhaps a personal manager's procurement activities should no longer be considered "incidental" when they exceed 10 percent of his total business. Or perhaps the line should be drawn at 25 or 50 percent. We simply cannot make this determination because the Act provides no rational basis for doing so. Moreover, even if we could somehow justify using a particular figure, it would be virtually impossible to determine accurately whether a personal manager had exceeded it.

[\*\*\*15] 3. *The Labor Commissioner's Interpretation of the Act*

The Labor Commissioner, who is statutorily charged with enforcing the Act (*Lab. Code, § 1700.44, subd. (a)*), has long taken the position that a license is required for incidental procurement activities. (See generally, *The Personal Manager, op. cit. supra*, 52 So. Cal. L. Rev. at pp. 389-393.) In *Derek v. Callan* (Jan. 14, 1982, Lab. Comr.) No. 08116, TAC 18-80, SFMP 82-80, a personal manager argued that "the Legislature meant to regulate only those whose primary purpose was the securing of employment for artists and not personal managers who might be involved in 'incidental' procurement of employment." (*Id.* at p. 6.) The Labor Commissioner rejected that argument, stating, "That is like saying you can sell one house

without a real estate license or one bottle of liquor without an off-sale license." (*Ibid.*) "A talent agency license is necessary even where procurement activities are only 'incidental' to the agent's duties and obligations . . ." (*Damon v. Emler* (Jan. 14, 1982, Lab. Comr.) No. TAC 36-79, SFMP 63, p. 4.)

(4) The construction of a statute by an agency charged with its administration is entitled [\*\*\*16] to great weight. (*Henning v. Industrial Welfare Com., supra*, 46 Cal. 3d at p. 1269.) If the administrative agency's construction is [\*256] reasonable, a court should defer to it. (*Ibid.*) Because the Labor Commissioner's interpretation of the Act is reasonable, we agree with his analysis of the licensing requirement.

4. *Recent Legislative Action: The California Entertainment Commission*

Significantly, the Legislature has adopted the view that a license is required for incidental procurement activities. <sup>11</sup> In 1982, the [\*\*\*443] Legislature created the California Entertainment Commission (the Commission) to "study the laws and practices of this state, the State of New York, and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry in general . . . , so as to enable the commission to recommend to the Legislature a model bill regarding this licensing." (Former *Lab. Code, § 1702*, added by Stats. 1982, ch. 682, § 6, p. 2816 and repealed by Stats. 1984, ch. 553, § 6, p. 2187.) <sup>12</sup> The Commission was required to submit its report to the Legislature and the Governor no [\*\*\*17] later than January 1, 1986. (Former *Lab. Code, § 1703*, added by Stats. 1982, ch. 682, § 6, p. 2816, as amended and repealed by Stats. 1984, ch. 553, § 5, 6, p. 2187.)

<sup>11</sup> We may properly resort to extrinsic aids, such as legislative history, in determining the intent of the Legislature. (*California Mfrs. Assn. v. Public Utilities Com. (1979)* 24 Cal. 3d 836, 844 [157 Cal. Rptr. 676, 598 P.2d 836]; *Burden v. Snowden, supra*, 2 Cal. 4th at p. 562.)

<sup>12</sup> The Commission consisted of ten members, three appointed by the Governor, three by the Speaker of the Assembly, and three by the Senate Rules Committee, plus the Labor Commissioner. (Former *Lab. Code, § 1701*, added by Stats. 1982, ch. 682, § 6, p. 2816 and repealed by Stats. 1984, ch. 553, § 6, p. 2187.) Each appointing power had

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to appoint a licensed talent agent, a personal manager, and an artist. (*Ibid.*) The members of the Commission were: talent agents Jeffrey Berg, Roger Davis, and Richard Rosenberg; personal managers Bob Finklestein, Patricia McQueeney, and Larry Thompson; artists Ed Asner, John Forsythe, and Cicely Tyson; and Labor Commissioner C. Robert Simpson, Jr. The Labor Commissioner chaired the Commission.

[\*\*18] Of the many issues considered by the Commission, "the most important was whether personal managers or anyone other than a licensed talent agent should be allowed to procure employment for an artist. This was the true issue that the Commission was formed to resolve, as it has been the main point of contention between talent agents and personal managers throughout their history." (*The Regulation of Artist Representation, op. cit. supra*, 8 Loy. Ent. L.J. at p. 66, fn. omitted.) From June 1983 to January 1985, the Commission met 15 times to accomplish its mandate. On December 2, 1985, the Commission submitted its report (the Report) to the Legislature and the Governor.

The Report noted that, "[p]ursuant to [its] statutory mandate, the Commission studied the laws and practices of California and of New York and other [\*257] entertainment capitals of the United States. In the course of its deliberations, it analyzed the [Talent Agencies] Act in minute detail. [P] In the judgment of a majority of the members of the Commission, the Talent Agencies Act of California is a sound and workable statute and the recommendations contained in this report will, if enacted by the California [\*\*\*19] Legislature, make that Act a model statute of its kind in the United States." (Report at p. 4.)

The Report phrased the first issue to be addressed as follows: "Under what conditions or circumstances, if any, should personal managers or anyone other than a licensed talent agent be allowed to procure employment for an artist without being licensed as a talent agent?" (Report at p. 6.) The Report acknowledged that "[t]he principal, and philosophically the most difficult, issue before the Commission, the discussion of which consumed a substantial portion of the time of most of the meetings of the Commission was this first issue." (*Id.* at p. 7.) The Commission concluded that "[n]o person, including personal managers, should be allowed to procure employment for an artist in any manner or under any

circumstances without being licensed as a talent agent." (Report, Executive Summary, p. 1.) The Report discussed the licensing issue at some length, stating:

"The position of the talent agents is that anyone who performs the same function as they in procuring employment for an artist should be subject to the same statutory and regulatory obligations as they are--nothing more and nothing [\*\*\*20] less. Those obligations include regulation of contract terms and fees by the Labor Commissioner and the requirements of franchise agreements with unions representing the artists. Talent agents increasingly find themselves in competition with personal managers and others in seeking employment for clients. In the opinion of the talent agents, the issue is simply one of fairness: all who seek employment for an artist should be licensed or none should be licensed.

" [\*\*444] Personal managers contend that the reality of the entertainment industry requires that, in the normal course of the conduct of their profession, they must engage in limited activities which could be construed as procuring employment. Such activity is only a minor and incidental part of their services to the artist. The essence of their service, which is counseling the artist in the development of his/her professional career, is not the kind of activity which can feasibly or legitimately be made the subject of licensure. They argue that if they are required to be licensed, they will not only be required to procure employment for their clients, but their fees, the length of the contracts, and other aspects of their [\*\*\*21] service will be controlled by the Labor Commissioner and the unions. . . .

"The Commission attempted over many hours, and by diligent exploration and analysis of alternatives, to find a common ground of compromise on [\*258] which an answer to this long-standing industry controversy could be formulated, but without success.

"

"Thus, in searching for permissible limits to activities in which an unlicensed personal manager, or anyone, could engage in procuring employment for an artist without being licensed as a talent agent, the Commission concluded that there is no such activity, that there are no such permissible limits, and that the prohibitions of the Act over the activities of anyone procuring employment for an artist without being licensed as a talent agent must remain, as they are

intended to be, total. *Exceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent, and, if not so licensed, one cannot expect to engage, with impunity, in any activity relating to the services which a talent agent is licensed to render* [\*\*\*22]. There can be no 'sometimes' talent agent, just as there can be no 'sometimes' professional in any other licensed field of endeavor." (Report at pp. 8-12, italics added.)

Although the Commission concluded that the Act should remain unchanged with respect to requiring a license for any procurement activities (incidental or otherwise), the Commission did recommend statutory changes on other matters. (See Report at pp. 22-34.) In response, the Legislature adopted all of the Commission's recommendations, and the Governor signed them into law. (See Stats. 1986, ch. 488, § 1-19, pp. 1804-1808; 3d reading of Assem. Bill No. 3649 as amended Apr. 15, 1986 (1985-1986 Reg. Sess.) p. 3 ["This Bill is the result of a one and one-half year study conducted by the California Entertainment Commission"]; *Regulation of Attorneys*, *op. cit. supra*, 80 Cal.L.Rev. at p. 495 [the Legislature and Governor adopted the Commission's recommendations with some minor alterations in language]; *The Regulation of Artist Representation*, *op. cit. supra*, 8 Loy. Ent. L.J. at p. 66 [the Legislature codified the Commission's Report in the Act].) In accordance with the Commission's advice, the Legislature [\*\*\*23] did not alter the requirement of a license for persons who occasionally procure employment for artists.

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13 Of significance, the Legislature had directed the Commission to study New York's licensing law (former *Lab. Code*, § 1702, added by Stats. 1982, ch. 682, § 6, p. 2816 and repealed by Stats. 1984, ch. 553, § 6, p. 2187), and the Commission did so (Report at p. 3). For several decades, New York's statutory scheme has expressly exempted persons whose "business only *incidentally* involves the seeking of employment [for artists]." (*N.Y. Gen. Bus. Law* § 171, *subd.* 8 (McKinney 1988), italics added; see also *Mandel v. Liebman* (1951) 303 N.Y. 88, 97-98 [100 N.E.2d 149, 155] [construing license exception for incidental procurement activities]; *Friedkin v. Harry Walker, Inc.* (1977) 90 Misc.2d 680, 682 [395

*N.Y.S.2d* 611, 613] [finding exception not applicable].) Thus, the Commission and the Legislature clearly decided not to adopt a licensing exception for incidental procurement efforts.

[\*\*\*24] By creating the Commission, accepting the Report, and codifying the Commission's recommendations in the Act, the Legislature approved the [\*\*\*259] Commission's view that "[e]xceptions in the nature of incidental, occasional or infrequent activities relating in any way to procuring employment for an artist cannot be permitted: one either is, or is not, licensed as a talent agent . . . ." (Report at p. 11.) This legislative approval extends [\*\*\*445] to the Commission's finding that the Act imposes a *total* prohibition on the procurement efforts of unlicensed persons. (*Ibid.*) Given the Legislature's wholesale endorsement of the Report, we conclude, as did the Commission, that the Act requires a license to engage in *any* procurement activities. (Cf. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1155-1156 [278 Cal. Rptr. 614, 805 P.2d 873] [in amending statute without altering portion previously construed by the courts, Legislature acquiesces in previous judicial construction].)

##### 5. The Act's Limited Exception for Unlicensed Persons

The Act specifically provides that an unlicensed person may nevertheless participate in negotiating an employment [\*\*\*25] contract for an artist, provided he does so "in conjunction with, and at the request of, a licensed talent agency." (*Lab. Code*, § 1700.44, *subd.* (d).)<sup>14</sup> Under this provision, a personal manager can seek employment for his client as part of a cooperative effort with a licensed talent agent. (See *Regulation of Attorneys*, *op. cit. supra*, 80 Cal.L.Rev. at p. 500.) However, this limited exception to the licensing scheme would be unnecessary if incidental or occasional procurement efforts did not require a license in the first place. We refuse to read the Act in such a way as to render superfluous the exception contained in *Labor Code* section 1700.44, *subdivision* (d).<sup>15</sup>

14 This provision was first enacted in 1982 (Stats. 1982, ch. 682, § 3, p. 2815) but was to remain in effect only until January 1, 1986 (Stats. 1984, ch. 553, § 3, p. 2186). As a result of the Commission's work (see Report at p. 19), the Legislature made the provision permanent,

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effective January 1, 1986 (Stats. 1986, ch 488, § 15, 19, pp. 1807, 1808).

15 Waisbren does not contend that this exception is applicable here.

[\*\*26] 6. *Prior Judicial Construction of the Act*

In *Buchwald v. Superior Court*, *supra*, 254 Cal. App. 2d 347, a dispute arose between the members of a musical group (known as the "Jefferson Airplane") and their personal manager. The parties' written agreement stated that the manager had not agreed to obtain employment for the group and that he was not authorized to do so. (*Id. at p. 351.*) The group alleged that, despite the contractual language, the manager had in fact procured bookings for them. In seeking to avoid the licensing requirement, the manager argued [\*260] that the written agreement established, as a matter of law, that he was not subject to statutory regulation.

The court rejected that contention, stating: "The court, or as here, the labor commissioner, is free to search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality. [Citation.] 'The court will look through provisions, valid on their face, and with the aid of parol evidence, determine that the contract is actually illegal or is part of an illegal transaction.'" (254 Cal. App. 2d at p. 355.) Thus, while *Buchwald* did not address [\*\*\*27] the precise question of whether a license is necessary for incidental procurement activities, it did hold generally that procurement efforts require a license and that the substance of the parties' relationship, not its form, is controlling.

Waisbren responds that the holding in *Wachs v. Curry* (1993) 13 Cal. App. 4th 616 [16 Cal. Rptr. 2d 496] compels the conclusion that a personal manager need not be licensed if he procures employment for an artist on an occasional basis. We disagree.

In *Wachs*, the plaintiffs, who were personal managers, raised a constitutional challenge to the Act on its face. More specifically, they argued that (1) the Act's exemption for procurement activities involving recording contracts (see fn. 4, *ante*) violated the equal protection clause, and (2) the Act's use of the term "procure" was so vague as to violate due process. (13 Cal. App. 4th at pp. 620, 624-625, 628-629.) The court rejected both contentions. On the first issue, the court held that there was a rational basis for exempting recording contracts

from the licensing requirement. (*Id. at pp. 624-626.*) On the second issue, the court held that the term "procure" was not [\*\*446] [\*\*\*28] unconstitutionally vague. (*Id. at pp. 628-629.*)

In resolving the question of whether the term "procure" was too vague, the court initially noted that the Act applies to persons engaged in the "occupation" of procuring employment for artists. (13 Cal. App. 4th at pp. 626-627.) After defining "occupation" as one's principal line of work, the court stated that the licensing scheme did not apply unless a person's procurement activities constituted a "significant part" of his business. (*Id. at pp. 627-628.*) Because the court expressly declined to say what it meant by "significant part" (*id. at p. 628*), the import of its discussion on this point is unclear. In any event, the court recognized that "[p]laintiffs[] concentrate their attack on the alleged vagueness of the word 'procure'" (*ibid.*) and that ". . . the *only* question before us is whether the word 'procure' in the context of the Act is so lacking in objective content that it provides no standard at all by which to measure an agent's conduct" (*ibid.*, italics deleted).

[\*261] Given *Wachs's* recognition of the limited nature of the issue before it, we regard as dicta the court's interpretation [\*\*\*29] of the term "occupation" and its statement that the Act does not apply unless a person's procurement function is significant. Because the *Wachs* dicta is contrary to the Act's language and purpose, we decline to follow it. In that regard, we note that *Wachs* applied an overly narrow concept of "occupation" and did not consider the remedial purpose of the Act, the decisions of the Labor Commissioner, or the Legislature's adoption of the view (as expressed in the California Entertainment Commission's Report) that a license is necessary for incidental procurement activities. Thus, we conclude that the *Wachs* dicta is incorrect to the extent it indicates that a license is required only where a person's procurement efforts are "significant."<sup>16</sup>

16 Waisbren's reliance on *Raden v. Laurie* (1953) 120 Cal. App. 2d 778 [262 P.2d 61] is also misplaced. In that case, a personal manager sued an artist for sums allegedly due under a written contract. The contract expressly stated that the manager was not authorized to seek employment for the artist. Nevertheless, the artist sought summary judgment on the ground that the manager had in fact agreed to procure such

employment. The manager opposed the summary judgment motion by submitting evidence that he had not so agreed. The trial court granted summary judgment. The Court of Appeal reversed, finding that there was conflicting evidence regarding the substance of the parties' agreement. (*Id. at p. 783.*) By contrast, in this case, there is no dispute that Waisbren actually engaged in some procurement activities. The undisputed evidence thus presents a pure question of law: whether a license is required where a personal manager occasionally procures employment for an artist. (See also *Buchwald v. Superior Court, supra, 254 Cal. App. 2d at pp. 355-357* [distinguishing *Raden* on ground that there was no evidence in that case indicating that personal manager had actually procured employment for artist].)

[\*\*\*30] B. *The Sanction for Unlicensed Work*

(5) "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, supra, 254 Cal. App. 2d at p. 351.*) "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." (*Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568 [177 P.2d 4, 172 A.L.R. 1107].*)

(6a) 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. We disagree. Nothing in the case law requires the existence of criminal penalties as a prerequisite to declaring an illegal contract to be void. Moreover, the legislative history of the Act directly contradicts Waisbren's contention. In examining the licensing issue, the California Entertainment Commission [\*\*\*31] [\*262] specifically addressed the question of whether criminal sanctions should be imposed for violations of the Act. (Report at pp. 15-18.) It recommended that the Legislature not enact criminal penalties, in part because "the most effective weapon for assuring [\*\*447] compliance with the Act is the power . . . to . . . declare any contract entered into between the

parties void from the inception." (*Id. at p. 17.*) By following the Commission's advice and not enacting criminal penalties, the Legislature approved the remedy of declaring agreements void if they violate the Act. Thus, an agreement that violates the licensing requirement is illegal and unenforceable despite the lack of criminal sanctions.

(7) As explained by our Supreme Court: "[T]he courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring [\*\*\*32] illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place." (*Lewis & Queen v. N. M. Ball Sons (1957) 48 Cal. 2d 141, 150 [308 P.2d 713].*)

Further, it does not matter that some of Waisbren's causes of action sounded in tort rather than contract. " 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out . . . [T]he test [is] whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party.' " (*Wong v. Tenneco, Inc. (1985) 39 Cal. 3d 126, 135 [216 Cal. Rptr. 412, 702 P.2d 570]*, internal citation and italics omitted; see also *Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 997-1002 [277 Cal. Rptr. 517, 803 P.2d 370]* [unlicensed contractor cannot sue for fraud].)<sup>17</sup>

17 Nothing in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18 [216 Cal. Rptr. 130, 702 P.2d 212]* is to the contrary. *Tenzer* simply recognized that the statute of frauds does not bar a cause of action for fraud based on an oral misrepresentation. (*Id. at pp. 28-31.*) *Tenzer* does not authorize any cause of action based on an *illegal* agreement.

[\*\*\*33] (6b) Because all of Waisbren's causes of action are based on his illegal agreement or business arrangement with Peppercorn, he cannot establish his case against defendants "otherwise than through the medium of an illegal transaction to which [he] [was] a party." (*Wong v. Tenneco, Inc., supra, 39 Cal. 3d at p.*

135, italics omitted.) Accordingly, the trial court properly disposed of the complaint in its entirety.

[\*263] C. *The Propriety of Summary Judgment*

Waisbren argues that summary judgment was improper because there were disputed issues of fact as to whether he was a partner and coproducer with Peppercorn. According to Waisbren, the Act does not apply to an artist's "partner" or "co-producer." Regardless of the merits of Waisbren's interpretation of the Act--on which we express no opinion--he did not properly raise this argument in opposing summary judgment. His opposition papers did not make any such legal argument, and his separate statement (see *Code Civ. Proc.*, § 437c, *subd. (b)*) did not set forth facts in support of that argument. Consequently, he waived this basis for opposing summary judgment. (See *North Coast Business Park v. Nielsen Construction* [\*\*\*34] *Co.* (1993) 17 Cal. App. 4th 22, 28-32 [21 Cal. Rptr. 2d 104]; *United Community Church v. Garcin* (1991) 231 Cal. App. 3d 327, 335-337 [282 Cal. Rptr. 368].)

Finally, Waisbren contends that the trial court should have continued the hearing on the summary judgment motion to allow him time to engage in additional discovery. This contention is without merit. We

recognize that a trial court must order a continuance and allow the taking of discovery where "facts *essential* to justify opposition exist but cannot, for reasons stated, then be presented." (*Code Civ. Proc.*, § 437c, *subd. (h)*, italics added.) However, in opposing summary judgment, Waisbren did not explain how the outstanding discovery was related to the issues raised by the motion. Further, the motion was based solely on an issue within Waisbren's knowledge, i.e., whether he had procured any employment for Peppercorn. He obviously did not need to obtain discovery [\*\*448] from defendants to dispute or address that issue. Indeed, the evidence he submitted in opposition to the motion left no doubt that he had engaged in such activities. (See fn. 3, *ante*.) For these reasons, the trial court did not abuse its [\*\*\*35] discretion in denying Waisbren's request that the hearing on the motion be continued.

DISPOSITION

The judgment is affirmed.

Spencer, P. J., and Ortega, J., concurred.

A petition for a rehearing was denied January 17, 1996, and appellant's petition for review by the Supreme Court was denied March 14, 1996.