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DIVISION OF LABOR STANDARDS ENFORCEMENT
    Department of Industrial Relations
   State of California
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                        BEFORE THE LABOR COMMISSIONER
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                        OF THE STATE OF CALIFORNIA
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    NATALIE HINDS p/k/a MACY GRAY,
                                                   Case No. TAC 18-00
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                             Petitioner,
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   llvs.
                                                   DETERMINATION OF
                                                   CONTROVERSY
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   LORI LEVE, d/b/a LORI LEVE
    MANAGEMENT,
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                             Respondents.
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                                 INTRODUCTION
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              The above-captioned petition was filed on June 20, 2000,
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   by NATALIE HINDS p/k/a "MACY GRAY", (hereinafter Petitioner, or
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    "GRAY"), alleging that LORI LEVE dba LORI LEVE MANAGEMENT,
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    (hereinafter Respondent or "LEVE"), acted as an unlicensed talent
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   agency in violation of §1700.51 of the California Labor Code.
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All statutory citations will refer to the California Labor Code unless otherwise specified.

Petitioner seeks a determination voiding ab initio the management

disgorgement of all sums respondent earned for purported management

between the parties,

and

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agreement

services.

Respondent filed her answer with this agency on August 1, 2000, maintaining various affirmative defenses including, inter alia, lack of jurisdiction, statute of limitations, estoppel and waiver. A hearing was scheduled before the undersigned attorney, specially designated by the Labor Commissioner to hear this matter. The hearing commenced on January 31, 2001, in Los Angeles, California. Petitioner was represented by Stephen D. Rothschild of King, Purtich, Holmes, Paterno & Berliner, LLP; respondent appeared through her attorney Henry D. Gradstein of Gradstein, Luskin & Van Dalsem. Due consideration having been given to the testimony, documentary evidence, arguments and briefs presented, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

- 1. In January of 1998, Macy Gray was searching for a personal manager to guide her suddenly flourishing musical career. Gray was introduced to Leve in January of 1998 and soon thereafter Gray accepted Leve's proposal to act as her personal manager, albeit on a six-month trial basis. Under the terms of the oral contract for Leve's personal services, Leve would be compensated by 15% of Gray's earnings, 7 1/2% paid directly to Leve and the remaining 7 1/2% placed in a trust account for Gray's benefit. If at the end of the six month period, the parties mutually agreed that the relationship would continue, the monies held in the trust account would be transferred to Leve.
- 2. On July 30, 1998, Leve wrote Gray's transactional attorney, Jill Berliner, asserting her perceived new position as

Grav's "official" manager, seeking the contents of the trust On September 10, 1998, Ms. Berliner transferred the amounts held in trust to Leve who then received her entire 15% commission directly thereafter.

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3. The gravamen of petitioner's claim include two engagements allegedly procured by Leve during the initial six-month probationary period. On February 16, 1998, Gray performed an engagement at the Los Angeles nightclub Luna Park. This performance was created by the respondent. Leve contacted the owner of the club, her friend, and requested whether she could utilize the club in order to "showcase" her new client for the 12 purpose of securing a recording contract. Leve invited various executives from several record companies hoping Gray's 14 performance would arouse interest and prompt a record deal. That is exactly what occurred. As a direct result of the Luna Park showcase, Gray signed with Epic records in or around April of 1998. Gray did not receive compensation from Luna Park and consequently, Leve did not receive a commission. It was determined through credible testimony of both parties that the sole purpose of this event was to secure a recording contract.

The second engagement allegedly procured by the respondent included a June 28, 1998 performance at a small venue named The Mint. Gray had performed at The Mint several times and in the past booked her own engagements with Jed the owner of the The president of Epic Records, Gray's new label, thought a

² To "showcase" an artist, contemplates a live performance intended to accomplish a specific desired result. The performance is not for immediate profit, but rather for a deferred benefit, i.e., publicity, securing a recording contract, seeking a talent agent and/or a myriad of other purposes.

showcase displaying Gray's musical talents for the executives at Epic was a good idea. The respondent and petitioner both testified that the intent behind The Mint showcase was not only to display Gray's talents, but moreover to attract a talent agent. In pursuit of that goal, Leve invited Epic executives, Gray's transactional team and scores of agents from various high profile music industry talent agencies. The show accomplished the desired result and Gray was signed by Mitch Rose of CAA the next day.

- Jed and discussed the date and time of the show, audio concerns, and questioned Jed about The Mint's ticket policy. This discussion revealed that Gray would be required to sell a minimum of five tickets at \$5.00 a piece and the band would then receive \$4.00 of every ticket sold after the initial five. Leve conveyed the ticket policy to Gray, who immediately accepted. The Mint's maximum occupancy was 125 persons. The show was sold out and Gray received \$665.00 in compensation. Leve received a \$99.76 commission for this event.
- 6. In April of 1998, Gray began recording her album, "On How Life Is". Consequently, Gray expended her creative energy to the production of the album and thought minimally about her representation. Gray testified that during the production of the album she received a call from Leve after the six-month probationary period. Gray maintained she wasn't sure whether she wanted to continue the relationship with Leve and instead wanted to focus on completing the album. Gray did not terminate the relationship, and conversely allowed the relationship to continue under the same terms, except Leve was now receiving a 15%

commission directly. When Leve attempted to have the terms and conditions of the relationship memorialized in an October 2, 1998 letter, petitioner did not accept, reject or counter Leve's written Gray testified in October of 1998, she began to experience concern over whether she wanted to continue with Leve as her manager. Gray testified that Leve didn't get along with the band and according to Gray, Leve didn't participate in some of the creative aspects normally associated with the duties of a manager.

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On November 16, 1998, Gray terminated Leve. 7. thereafter, Gray discontinued commission payments to Leve and has since failed to remit commission payments for the sales of "On How 13 Life Is", which to date has sold over six million copies. September 1, 1999, Leve filed suit in the Los Angeles Superior Court against Gray for breach of contract and unjust enrichment, Case No. BC 216122. That case is stayed pending the determination of this petition.

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CONCLUSIONS OF LAW

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The primary issue is whether based on the evidence 1. presented at this hearing, did the respondent operate as a "talent agency" within the meaning of Labor Code §1700.4(a). Specifically, has the Respondent acted as an unlicensed talent agency by procuring the Luna Park or The Mint engagements? Labor Code §1700.4(a) defines "talent agency" as:

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"a person or corporation who engages

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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 shall not of itself subject a person...to regulation and licensing under this chapter."

2. The parties stipulated that the petitioner is an "artist" within the meaning of Labor Code §1700.4(b), and that the respondent has never held a talent agency license.

LUNA PARK

- 3. It was clearly established that the intent behind the Luna Park showcase was to procure a recording contract for Gray. In furtherance of that intent, Leve invited a host of label executives. Leve surmised that when record companies witnessed Gray's live performance, they would assuredly offer her a deal. As a direct result of the showcase, Epic Records did.
- Labor Code §1700.4(a) exempts from licensing requirements the activities of procuring, offering, or promising to procure recording contracts for an artist. Notably, legislature did not include an "attempt" to procure a recording contact as an exemption from licensure. This would have created the exception that swallowed the rule. Creative artist's representatives, as in Park v. Deftones, infra., could always. argue that unlicensed activity was in furtherance of procuring a recording contract. "Attempt" as defined in Black's Law Dictionary 5th Edition means, "an intent combined with an act falling short of

the thing intended." Here, the attempt did not fall short of the desired result, and instead materialized into a recording contract. This showcase was no longer an attempt to secure a recording contract when the recording contract was ultimately procured. To "procure" means "to get possession of: obtain, acquire, to cause to happen or be done; bring about." Webster's New International. Dict., at p. 1809. The sole purpose for this performance was to procure a record deal. That is what occurred, and in this case, the end justifies the means. The respondent's efforts in creating this engagement was an activity to procure a recording contract. Consequently, the procurement of this engagement does not require a license.

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The petitioner cites Park v. Deftones 71 Cal.App.4th 1465, which stands for the proposition that a manager who procured more than eighty (80) engagements over several years, and did not take a commission for his involvement was still subject to the Act's licensing requirements. Like Leve, Park argued that securing these performances were attempts to secure a recording contract. The Park court disregarded that argument and held 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 Because the Act is remedial, it should be liberally employment. construed to promote its general object. The abuses at which these requirements are aimed apply equally where the personal manager

Deftones is distinguishable in several respects. First, it is preposterous to embrace Park's argument that more than eighty (80) performances were procured solely for the purpose of securing a record deal. As discussed, 80 performances procured by an artist's representative is precisely the conduct the legislature intended to regulate. Here, evidenced by the invited guests and irrefutable testimony of both parties, the sole intent of the Luna Park engagement was to secure a record contract; which was This was a one shot performance. accomplished. The concerns addressed in Park, were simply not present here.

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7: Secondly, the Deftones performances were clearly Gray's unpaid "showcase" cannot be considered employment. 15 l Bloomberg v. Butler Labor Commissioner Case No. TAC employment. 31-94, states, "[t]he term `employment', if it is to have any logical meaning within the context used in the Act, implies payment for the services rendered." Moreover, Leve satisfied a primary responsibility to her unsigned musical artist, by creating a record deal enabling Gray to concentrate on her artistic endeavors. Consequently, the Luna Park performance was not the procurement of employment or an engagement for an artist within the meaning of the Act because this engagement did not present any issues and/or concerns contemplated by the legislature when drafting the protective mechanisms of the Act. Even, arguendo, if Luna Park was considered the procurement of an engagement for an artist, this engagement was the procurement of a recording contract and is thus

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exempt from a licensing requirement. This holding does not create a blanket exemption for all "showcases" attempting to secure a recording contract. Each alleged engagement must be scrutinized on a case by case basis. Here, the intent of the parties, coupled with the invited guests and ultimate outcome, clearly established the sole purpose for this event and demonstrated to the hearing officer that the procurement of this event was not the type of engagement requiring a license.

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THE MINT

In addition to securing a recording contract on 8. behalf of an artist, the primary duties of a manager are, "[i]n essence ... advising, counseling, directing and coordinating the artist in the development of the artist's career. The manager's matters of both business task encompasses and personal significance. ... The manager also serves as a liaison between the other personal representatives, arranging their artist interactions with, and transactions on behalf of, the artist... By orchestrating and monitoring the many aspects of the artist's personal and business life, the personal manager gives the artist time to be an artist. That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic function and to concentrate on their immediate creative task In this regard, the personal manager is an indispensable element of an artist's career. " Waisbren v. peppercorn 41 Cal.App.4th 246, 252 citing, O'Brien, Regulation of Attorneys Under California's Talent Agencies Act: a Tautological Approach to Protecting Artists (1992)

80 Cal.L.Rev. 471, 481-483.

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- Leve's job was to alleviate Gray's logistical To accomplish that, Gray required a representative concerns. licensed talent agent. And that is what Leve did. secured Gray's recording contract, Gray was free to concentrate on her art, producing her highly celebrated and successful album "On How Life Is". Throughout this time period, Leve did not procure employment for Gray. Instead, she concentrated on securing Gray a licensed talent agent, necessary for competent anv performances, personal appearances or concert tours associated with the album. In pursuit of this goal, Leve again created another "showcase" intended to display Gray's capabilities. This time the "showcase" was created for talent agents. Again, Leve envisioned agents scampering to represent Gray after viewing her performance.
- 10. The method was similar to that of Luna Park. The issue is whether the compensation received by Leve for her participation in procuring The Mint, or the fact that an engagement procured for the intended result of securing a talent agent, which is not exempted within the Act, requires a talent agency license.
- 11. The \$98.00 received by Leve for this one-time show was simply fortuitous. On the one hand, "we recognize the legislature intended to cover those who are compensated for their procurement activities." Waisbren supra pg. 254. While on the other, we do not believe the existence of compensation is dispositive of whether procurement requires licensure. Again, the guest list was provided, disclosing talent agents and Epic employees. The intent of this show was adequately established

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through documentary evidence and the testimony of both parties. Gray needed an agent and that is what she received, stemming directly form Leve's conduct. The Labor Commissioner cannot in good conscious punish a manager for being an unlicensed talent agent for coordinating an event created for the purpose of securing a licensed talent agent.

12. Waisbren establishes "[t]he clear object of the Talent Agencies Act is to prevent improper persons from becoming talent agents and to regulate such activity for the protection of the public." Waisbren, at 261 supra. Leve acted in good faith, is not an improper person and does not require regulation for the protection of the public. Her actions [The Mint] were conducted not for the purpose of evading or avoiding the Act, but to comply with it. Leve did her job. She obtained a recording contract and acquired an agent. And she did so in the most expeditious and effective way possible. She highlighted her client's talents through a live performance. The legislature surely did not intend to prohibit a manager from serving her client in this fashion.

13. This is not a radical departure, as some might arque, from the historical holdings of the Labor Commissioner. The facts of this case are unique and the holding is fact specific. As discussed, this determination does not conflict with Deftones, nor does it conflict with Waisbren. Waisbren negotiated deals on behalf of Peppercorn for regional television commercials and home video projects as well as a Dick Clark Productions pilot. Leve's involvement with the two supra pq. 251. performances encroach upon illegal do not procurement demonstrated in these Second District Court of Appeals decisions.

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14. In <u>Buchwald</u>, "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. 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.' "Buchwald v. Superior Court 254 Cal.App.2d at p. 355. Try as we might, we do not discern an illegal transaction on behalf of Leve.

that fall on the periphery of illegal conduct, so we must be clear in stating that Leve's activities under this specific fact pattern, coupled with this specific evidence do not trigger the Act. If any agreement procured by an unlicensed agent are reasonably calculated to lead to a future performance, engagement or employment, then those actions must be liberally construed to trigger the Act and suppress the mischief at which it is directed. Buchwald, supra.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 1998 contract between Petitioner, NATALIE HINDS p/k/a MACY GRAY and respondent LORI LEVE dba LORI LEVE MANAGEMENT is neither illegal, nor invalid, nor unenforceable. Therefore, the petition of HINDS is denied.

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4	Dated: July 13, 2001 DAVID L. GURLEY Attorney for the Labor Commissioner
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