Miles E. Locker, CSB #103510
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
Telephone: (415) 703-4863
Fax: (415) 703-4806
Attorney for State Labor Commissioner

BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

LAUREL SUESS, as guardian ad litem MARTINA SUESS, a minor, Petitioner, vs. PENELOPE LIPPINCOTT, an individual dba FINESSE MODEL MANAGEMENT aka FINESSE MODELS, Respondent.	No. TAC 14-05 DETERMINATION OF CONTROVERSY

~~The above-captioned matter, a petition to determine~~ controversy under Labor Code §1700.44, came on regularly for hearing on July 18, 2005 in San Francisco, California, before the undersigned attorney for the Labor Commissioner, assigned to hear the matter. Petitioner, LAUREL SUESS, as guardian ad litem for MARTINA SUESS, a minor, appeared in propria persona; Respondent, PENELOPE LIPPINCOTT appeared through her attorney, Ben Gale. For purposes of hearing, this matter was consolidated with two other petitions filed against the same respondent, TAC No. 16-05, filed by Leonor F. Tiongson, and TAC No. 18-05, filed by Virginia

Mylenki. Based on the evidence presented at this consolidated hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. At all times relevant herein, Penelope Lippincott was an individual doing business as Finesse Model Management aka Finesse Models (hereinafter "Respondent"), located in Sausalito, California. Respondent has not been licensed as a talent agency by the State Labor Commissioner at any time while doing business as Finesse Model Management aka Finesse Models.

2. Laurel Suess is the mother of Martina Suess, a minor, and at all times relevant herein, both have resided in San Francisco, California. In July 2004, Laurel Suess met the Respondent at a lunch, during which time Respondent told Suess that she was in the modeling business in Sausalito. When told that Suess' daughter was interested in modeling, Respondent told Suess that there were modeling opportunities even for persons without prior modeling experience, that Respondent could provide any necessary training, ~~and she urged Suess to bring her daughter to Respondent's modeling~~ studio. At the end of August 2004, Laurel and Martina Suess went to Respondent's studio, and during that meeting, Respondent stated that "there is a lot of work for the right people. I have lots of clients." Excited about the prospect of beginning a modeling career, on September 8, 2004, Martina Suess enrolled in a professional modeling workshop offered by the Respondent, and paid the Respondent for this workshop, and for an on-location photo shoot and a studio shoot, along with the services of a professional

make-up artist and hair stylist, and for 100 zed cards[1] and a portfolio, with a total payment of $5,529 to Finesse Model Management. There was no formal written contract reflecting the agreement between petitioner and respondent for the purchase of these products or services, however, Respondent provided the petitioner with a printed description of all of its "programs" and "packages," and their costs, and there is a written purchase order reflecting indicating which "programs" and "packages" were purchased, and the amount paid. Neither the written description of the various "programs" and "packages," nor the purchase order contain any statement indicating that petitioner had a right to a refund, or a right to cancel the agreement to purchase the services or products.

3. Also, on September 8, 2004, Respondent provided Martina and Laurel Suess with a document entitled "Job Payment Schedule-Year 2004," which stated some of respondent's practices regarding modeling assignments and the payment of models. Among other things, this document provided that "Finesse will invoice clients

[1] The two-sided zed cards show five photos of Martina, and list her first name, height, measurements, dress size, and the color of her hair and eyes. It also contains the name, address and telephone number of Finesse Model Management, printed onto the card (i.e., not affixed to a removable sticker). Zed cards are typically used in the modeling industry as the means of advertising the model to a potential customer, and providing the customer with a number to call for securing the model's services. In written materials provided to its models, Respondent explained, "your ZED card is the most important tool we have with which to market you.... Your fashion ZED card is submitted for Fashion Runway and Print work." In a document given to its models, explaining audition policies and procedures, models were instructed to "make sure to bring portfolio and zed card to all auditions." Respondent never offered to provide zed cards to petitioner without respondent's business name, address and phone number, or with any other business name, address and phone number as a contact for potential purchaser's of the petitioner's modeling services.

after all time sheets have been turned in," that models should "allow 60-90 days from completion of job for model pay," and that job checks are distributed only once a month, at a meeting on the second Tuesday of each month. Finally, the document purports that the models are independent contractors,[2] and further purports to release Finesse from liability for any injury that may occur while performing work on the premises. Another document, provided to petitioner on September 8, 2004, entitled "Model Checklist," purports: "Finesse Model Management or any part of the Finesse organization is not a Modeling & Talent Agency and are not subject to the rules and regulations of a licensed Agency."

4. About a week later, Petitioner received a postcard from Respondent stating that Martina had been "chosen" or "selected" to attend a modeling convention in New York City from March 26-31, 2005. In a subsequent telephone conversation, respondent stated that "only the best applicants are selected" to attend this convention, and invited Laurel and Martina to meet with her at her office to learn more about the convention. During this meeting, which took place on October 16, 2004, Respondent described what would happen at the convention, and said "I guarantee it will produce work for you." Respondent told petitioner that the deadline for registration was approaching, and urged petitioner to make a deposit to register. Petitioner charged the deposit of $2,847.50 on a credit card, payable to Finesse Model Management.

[2] Based on this characterization of all of its models as "independent contractors," Respondent concluded that work permits were not needed for its models below the age of 18, and Respondent never kept a work permit for Martina Suess, despite the fact that she was then 16 years old.

Two days later, Laurel Suess realized that due to a scheduling conflict, Martina would not be able to attend the modeling convention, and she then immediately contacted Respondent to ask for a refund. Although petitioner had not yet received any services, materials, products, or tickets in connection with the payment of this deposit, Respondent refused to reverse the credit card charge, telling petitioner that the deposit was non-refundable

5. Respondent maintained a telephone number that provided recorded information about upcoming auditions for modeling work. This information was frequently updated, and in a written document given to all models "on the Finesse roster," Respondent listed this number and directed the models to "call the Finesse 'hot line' daily.... It is your responsibility to keep abreast of open calls and job opportunities." This same document warned models to "never ever give out your home phone number or address to the client," on an audition, but instead to "always give out the Finesse phone number and address." Next, models were instructed to "call the Finesse 'Hot Line' for audition results, call backs, etc." In another document dealing with modeling assignment policies and procedures, Respondent instructed its models "to call Finesse and let us know of your finish time and a brief rundown on the job, as soon as the assignment is completed. Finally, in a document entitled "Who to Contact," Respondent instructed its models to contact Brandi Morgan (Penelope Lippincott's daughter) for "job/audition information," and to learn "what jobs I have been submitted for."

6. Lippincott's business card, which she provided to models and to clients, identified her as a "model & talent manager."

7. Petitioner testified that based on the manner in which Respondent operated its business, and the content of written and oral communications with the Respondent, petitioner believed that Respondent was offering or promising to obtain modeling employment for Martina with third party clients, and that Respondent was attempting to obtain (and had obtained) such employment for Martina.

8. Martina Suess obtained four modeling jobs through Respondent, during the period from October through November 2004, consisting of a runway modeling job at the New Park Mall (which involved modeling clothes sold by various stores in the mall), modeling fashions at an event called "Evening of Giving," for which Martina was paid $125; modeling for a print advertisement for the retail store Selix Formalwear, for which she was paid $150; and modeling for a print advertisement for a retail store, 21 Tango, for which she was paid $125. These payments were made by respondent[3], and the amounts earned by petitioner for each job are reflected in documents entitled "Model Job Payment Acknowledgment." According to this document, respondent did not deduct any commissions from these amounts, and there was never any agreement between the parties which would have allowed respondent to charge the petitioner any commission or fee in connection with these jobs.

9. Respondent testified that Finesse never procured employment for a model with any third party, and that she never negotiated with any third party as to what a model should be paid

[3] The payments for two of these jobs, however, were not sent to petitioner for more than four months after she had performed the work, and only after the filing of this petition, which itself came only after repeated complaints and demands for payment.

for modeling services. Instead, according to Respondent, Finesse enters into agreements with third parties for the purchase of Finesse's services as a "production company," and under these agreements the third party pays Finesse to produce a fashion runway show or a print advertisement.[4] Clients are not billed for the models' services, they are billed for Finesse's "production services." In its capacity as a "production company," Finesse hires the necessary models, photographers, graphic designers, hair stylists, etc., needed to perform the job for which Finesse was hired. Finesse, not the third party client, decides how much to pay the models, and anyone else hired in connection with the production, as compensation for their services, and these payments are made by Finesse.[5] However, Respondent admitted that the

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[4] Following the close of the hearing, Respondent provided copies of only two such agreements to produce events. The first, an agreement between "Finesse Creative" (a fictitious business name under which Respondent contracted) and Robin Montero Productions, concerning the October 7, 2004 "Weddings in the Wine Country Bridal Fashion Show," to "participate in" the event by providing no less than ten models, all needed dressers for the models, and "management of models, including fitting appointments, rehearsal, and fashion shows." The second, an agreement between "Finesse Modeling Agency" (yet another of Respondent's fictitious business names) and General Growth Properties, Inc./New Park Mall, concerning the November 13, 2004 fashion show at that mall, under which Respondent agreed to provide models, contact mall tenants for fittings prior to the start of the fashion show, run the fashion show, and return the merchandise to retailers after completion of the show. Respondent did not provide copies of agreements to produce any of the other fashion shows or print advertisements discussed during these hearings.

[5] Despite the fact that the model's rate of compensation was solely determined by Finesse, Respondent insisted that these models are not employees of Finesse, but rather, independent contractors. Models were required to sign an acknowledgment stating that "all models are independent contractors." Respondent testified that in accordance with her belief that the models are independent contractors, Respondent is not covered by any workers compensation insurance policy.

decision on which model to hire for a job is not hers alone, acknowledging that she "need[s] to show clients zed cards, so they can decide whether a model has the look they want."

10. Suess filed this petition to determine controversy on March 18, 2005, seeking a determination that all contracts or agreements between the parties are void, and that Respondent has no enforceable rights thereunder, and for an order that Respondent reimburse the petitioner for the $8,376.50 that petitioner paid to respondent pursuant to such contracts or agreements, and for an award of all appropriate penalties under the Talent Agencies Act.

11. Respondent filed an answer to the petition on May 23, 2005, asserting that "Finesse is not in the business of procuring work for models," but "simply hires models, photographers, stylists, make-up artists and graphic designers on a per assignment bases [sic] for the projects that we are engaged to develop or produce." According to Respondent, her business consists of "a full service marketing and production company," Finesse Creative Productions, which "specializes[s] in the production of print ads, live productions and promotional events, for retailers, designers and manufacturers," and which "own[s] a new bay area fashion magazine, where advertising is sold and ad development is a service provided to our clients." In addition, the answer states that "we have an In-House model development division, Finesse Model Management," which runs "workshop programs ... strictly for skill development." Finally, Respondent's answer acknowledged that although she operated a talent agency, known as Clymer's Modeling and Talent Agency, for a period of time from the late 1980's to early 1990's, "[d]ue to the change in laws at that time regarding

the agency business we chose to eliminate that service and proceed in production only.[6]" In short, as a defense to this petition, respondent asserts that she has not acted as a "talent agency," within the meaning of Labor Code §1700.4(a), in the course of her dealings with petitioner, and thus, petitioner has no remedy under the Talent Agencies Act. This central issue of this proceeding - whether Respondent acted as a "talent agency" in the course of its dealings with petitioner - is analyzed below.

LEGAL ANALYSIS

1. Labor Code §1700.4(b) includes "models" within the definition of "artists" for purposes of the Talent Agencies Act (Labor Code §§1700-1700.47). Petitioner is therefore an "artist" within the meaning of Labor Code section 1700.4(b).

2. Labor Code §1700.4(a) defines a "talent agency" as any person or corporation "who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist." To be sure, the Labor Commissioner has

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[6] Two determinations issued by the Labor Commissioner in cases that were filed against Clymer's Modeling and Talent Agency, TAC No. 11-87 and TAC No. 60-94, explained the various requirements of the Talent Agencies Act. In TAC 60-94, the Labor Commissioner concluded that Respondent (then known by her married name, Penny Clymer) had engaged in the occupation of a talent agency without a license, and for that reason, determined that her contract with a model was void and unenforceable, and ordered her to reimburse the model for unlawfully collected fees. Previously, in TAC No. 11-87, covering a period of time when Respondent was licensed as a talent agency, the Labor Commissioner ordered the partial reimbursement of amounts charged to a model for photo composites, and warned Respondent that pursuant to a newly enacted amendment to the Talent Agencies Act, talent agencies would no longer be allowed to charge models anything for photographs. In the face of these Labor Commissioner determinations, Respondent decided to change the method by which she conducts her business, believing that by restructuring as an ostensible "production company," the Talent Agencies Act would no longer apply to her business operations.

held that "a person or entity that employs an artist does not 'procure employment' for that artist within the meaning of Labor Code §1700.4(a), by directly engaging the services of that artist.... [T]he 'activity of procuring employment,' under the Talent Agencies Act, refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and the third party employer who seeks to engage the artist's services." *Chinn v. Tobin* (TAC No. 17-96) at p. 7. Following this rationale, in *Kern v. Entertainers Direct, Inc.* (TAC No. 25-96), the Labor Commissioner concluded that a business that provided clowns, magicians and costumed characters to parties and corporate events did not act as a talent agency, within the meaning of Labor Code §1700.4(a). In *Kern*, the respondent set the prices that it charged to customers for the entertainers' services, selected the entertainers that it provided to the customers, determined the compensation that it paid to these entertainers for providing these services, and thus, we concluded, "became the direct employer of the performers." Significantly, however, in both *Chinn* and in *Tobin*, no evidence was presented that the respondents "ever procured or promised or offered or attempted to procure employment for petitioners with any third party. That lack of evidence as to promises or offers to obtain employment with third parties or actual procurement activities" was found to distinguish those cases from cases in which persons or business were determined to be acting as talent agencies within the meaning of Labor Code §1700.4(a). *Chinn v. Tobin, supra,* at p. 11. Thus, in determining whether Respondent engaged in the occupation of a "talent agency," we must analyze whether Respondent engaged in any of the activities

which fall within the statutory definition of "talent agency," i.e., procuring or offering to procure or promising to procure or attempting to procure modeling employment for the petitioner with a third party employer.

3. Labor Code §1700.5 provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license ... from the Labor Commissioner." The Talent Agencies Act is a remedial statute that must be liberally construed to promote its general object, the protection of artists seeking professional employment. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 354. For that reason, the overwhelming weight of judicial authority supports the Labor Commissioner's historic enforcement policy, and holds that "even the incidental or occasional provision of [talent agency] services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. These services are defined at Labor Code §1700.4(a) to include offering to procure or promising to procure or attempting to procure or procuring employment for an artist. In analyzing the evidence of whether a person engaged in activities for which a talent agency license is required, "the Labor Commissioner is free to search out illegality lying behind the form in which the transaction has been cast for the purpose of concealing such illegality." *Buchwald v. Superior Court, supra,* 254 Cal.App.2d at 355.

4. The evidence before us leads us to conclude that at least on some occasions, Respondent procured modeling employment for petitioner with third party employers. Despite Respondent's claim that whenever it provided a client with a model's services, she did so as a "producer" of the client's fashion runway show or print

advertisement, Respondent failed to present corroborating testimony from any clients. Moreover, the Respondent's documentary evidence related to only some of the modeling engagements which she had obtained for the petitioner. The status of the respondent as a "producer" of these print advertisements and fashion shows is an affirmative defense to the allegation that respondent acted as a "talent agency" by obtaining work for the model(s), and as such, the burden of proof shifts to the Respondent once the petitioner establishes (as was the case here) that the Respondent obtained modeling work for the petitioner. At least as to some of the modeling employment at issue herein, Respondent failed to meet this burden of proof to establish she was the model's employer. But even assuming, *arguendo*, that respondent never procured and never attempted to procure modeling employment for the petitioner with any third party employer, that does not dispose of the question of whether Respondent ever offered to procure or promised to procure such employment for the petitioner. Not only did the petitioner believe that Respondent had offered and promised to do just that, but more importantly, taking the evidence as a whole, we conclude that any reasonable person in petitioner's position would have formed that same belief. There is simply no other way to interpret many of Respondent's policies and procedures, and Respondent's oral and written representations of what she could or would do for the petitioner. These policies and procedures and representations include the use of zed cards with Finesse's name, address and telephone number printed on the cards, instructions that the zed cards are used "to market you," instructions to telephone Respondent's business to find out "what jobs you have been

submitted for," business cards that identified the Respondent as a "model and talent manager," instructions to call Respondent's office at the completion of every modeling job to report that the job has ben completed (something that would scarcely seem necessary if Respondent or other employees of the Respondent were involved in the "production" of the fashion show or print advertisement for which the petitioner performed modeling services), and the Respondent's statement that work will be available because "I have lots of clients." Each and every one of these policies and procedures and representations necessarily has the effect of leading the model to believe that Respondent will attempt to procure employment on behalf of the model with third party employers, and thus, as a matter of law, constitutes an offer to procure such employment. Consequently, we conclude that through Respondent's published policies and procedures and representations to models, Respondent "offered to procure employment" for models with third party employers, and therefore, engaged in the occupation of a "talent agency" within the meaning of Labor Code §1700.4(a). As such, despite Respondent's efforts to structure its operations (or perhaps more accurately, efforts to appear to have structured its operations) so as to avoid the requirements of the Talent Agencies Act, Respondent violated the Act by operating as a "talent agency" without the requisite license[7].

[7] Ironically, these efforts to reconstitute her business as a "production company" have created a whole new set of liabilities for the Respondent. The evidence presented compels the conclusion that at least as to some of petitioner's modeling assignments, Respondent was the petitioner's employer - by effectively engaging her to perform modeling services as part of a fashion show or print advertisement produced by Respondent, by establishing her rate of compensation, and by exercising control over her work (determining

5. An agreement between an artist and a talent agency that violates the licensing requirement of the Talent Agencies Act is illegal, void and unenforceable. *Styne v. Stevens, supra,* 26 Cal.4th at 51; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262; *Buchwald v. Superior Court, supra,* 254 Cal.App.2d at 351. Having determined that a person or business entity procured, attempted to procure, promised to procure, or offered to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed talent agent and the artist] void and unenforceable as involving the services of an unlicensed person in violation of the Act." *Styne v. Stevens, supra,* 26 Cal.4th at 55. Moreover, the artist that is party to such an agreement may seek disgorgement of amounts paid pursuant to the agreement, and may be "entitle[d] to restitution of all fees paid to the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. The term "fees" is defined at Labor Code §1700.2(a) to include "any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by any person conducting the business of

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the time and place the work would be performed, the fashions she would wear while modeling, etc.). As an employer, Respondent violated a raft of Labor Code protections for employees, including Labor Code §204 (which requires the payment of wages to employees no later than 26 days after the work is performed, between the 16th and 26th day of any month in which the work was performed between the 1st and 15th day of that month, and between the 1st and 15th day of the month following any month in which work was performed between the 16th day and the final day of the month - - regardless of when the employer receives payment from a customer), Labor Code §226 (requiring itemized wage statements accompanying each payment of wages), Labor Code §1299 (requiring employers to keep work permits on file in connection with the employment of minors), and Labor Code §3700 (requiring workers compensation insurance coverage).

a talent agency." Restitution is therefore not necessarily limited to amounts that the unlicensed agent charged for procuring or for attempting to procure employment, but rather, may include amounts paid for services for which a talent agency license is not required.

6. With these legal principles in mind, we conclude that as a consequence of Respondent's violation of the Labor Code §1700.5, all agreements between the petitioner and the respondent are illegal and void, and that petitioner is entitled to restitution for all amounts that she paid to respondent for promised goods and services pursuant to any such agreements, i.e., that petitioner is entitled to reimbursement of $8,376.50.

7. Petitioner's right to reimbursement of some of the amounts that she paid to respondent is separately founded upon Labor Code §1700.40. Subsection (a) of §1700.40 provides that "[n]o talent agency shall collect a registration fee." Labor Code §1700.2(b) defines "registration fee" as "any charge made, or attempted to be made, to an artist for any of the following purposes ... (3) photographs ... or other reproductions of the applicant." Subsection (b) of §1700.40 provides that "[n]o talent agency may refer an artist to any person, firm or corporation in which the talent agency has a direct or indirect interest for other services to be rendered to the artist, including but not limited to photography, ..., coaching, dramatic school ... or other printing." Respondent's collection of the $5,529 that was paid by petitioner (for a photo shoot, zed cards, a portfolio and for attendance at respondent's modeling workshop) is unquestionably made illegal pursuant to Labor Code §1700.40. Penalties are available under

§1700.40(a), equal to the amount of the unlawfully collected "registration fee," but only if the artist fails to procure or be paid for employment for which a "registration fee" has been paid. Here, the facts do not allow for the imposition of this penalty.

8. Petitioner may have additional remedies under the provisions of the Advance-Fee Talent Services[8] Act (Labor Code §1701-1701.20), but those remedies cannot be awarded in the instant proceeding to determine controversy under the Talent Agencies Act (Labor Code §1700-1700.47). Labor Code §1700.44 authorizes the Labor Commissioner to hear and decide controversies arising under the Talent Agencies Act. In contrast, the provisions of the Advance-Fee Talent Services Act ("AFTSA") may be enforced by the Attorney General, any district attorney, any city attorney, or through the filing of a private civil action. (See Labor Code §§1701.15, 1701.16.) Furthermore, under Labor Code §1701.10(a), any person engaging in the business or acting in the capacity of an advance-fee talent service must first file a bond with the Labor Commissioner in the amount of $10,000, for the benefit of any person damaged by any fraud, misstatement, misrepresentation or unlawful act or omission under the AFTSA. We hereby take

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[8] The term "advance-fee talent service" is defined at Labor Code §1701(b) to mean a person who charges, or attempts to charge, or receives an advance fee from an artist for any of the following products or services: procuring, offering, promising or attempting to procure employment or auditions; managing or directing the artist's career; career counseling or guidance; photographs or other reproductions of the artist; lessons, coaching or similar training for the artist; and providing auditions for the artist.

The term "advance fee" is defined at Labor Code §1701(a) as any fee due from or paid by an artist prior to the artist obtaining actual employment as an artist or prior to receiving actual earnings as an artist or that exceeds the actual earnings received by the artist.

administrative notice of the fact that Respondent has not posted such bond with the Labor Commissioner.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1) All contracts or agreements between the Respondent and Petitioner are illegal and void, and that Respondent has no enforceable rights thereunder, and

2) Respondent shall immediately reimburse the Petitioner for the $8,376.50 that Petitioner paid to Respondent pursuant to such contracts or agreements.

Dated: 11/22/05

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 11/22/05

DONNA M. DELL
State Labor Commissioner