

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
2 State of California  
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6

7 BEFORE THE LABOR COMMISSIONER

8 STATE OF CALIFORNIA  
9

10 JUDY FUNKE an individual, ) TAC No. 13509-12  
11 Petitioner, )  
12 vs. ) DETERMINATION OF CONTROVERSY  
13 PENELOPE LIPPINCOTT dba FINESSE )  
14 FREELANCE DEVELOPMENT, )  
15 Respondent. )

16 The above captioned matter, a petition to determine controversy under Labor Code  
17 §1700.44, came on regularly for hearing on January 10, 2010 in San Francisco, California, before  
18 the undersigned attorney for the Labor Commissioner, assigned to hear the matter. Petitioner,  
19 JUDY FUNKE, appeared in propria persona; Respondent, PENELOPE LIPPINCOTT, appeared in  
20 propria persona. For purposes of hearing, this matter was heard with four (4) other petitions filed  
21 against the same respondent, TAC No.11319, filed by Sally Hoover as Guardian for Kristen  
22 Leachty, a minor; TAC No. 13510 filed by Teresa S. Banks; TAC No. 13643 filed by Arega  
23 Bagirian; and TAC 14621, filed by Jacqueline Ramos.

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

26 FINDINGS OF FACT

27 1. At all time relevant herein, Penelope Lippincott was an individual doing business as  
28 Finesse Freelance Development (hereinafter collectively referred to as "Lippencott" "Respondent"

1 or "Finesse"), located in Sausalito and Lafayette, California. Respondent has not been licensed as  
2 a talent agency by the State Labor Commissioner at any time while doing business as Finesse  
3 Freelance Development.

4 2. At all time relevant herein, Judy Funke, resided in Antioch, California. In May, 2008,  
5 Funke answered a print ad in the Contra Costa Times placed by Respondent, Finesse Modeling of  
6 which Respondent Lippincott is the principal, seeking "mature" models for print work and runway  
7 shows. Petitioner attended an audition in Lafayette, CA on May 31, 2008, with others where the  
8 prospective talent walked a runway and were judged by a panel and videotaped by Lippincott.  
9 Then Patty Camras, identified as one of Lippincott's models, gave a speech about the many  
10 modeling jobs she had obtained through Respondent. Thereafter, Lippincott called Funke.  
11 Respondent asked Petitioner to attend another meeting. At the second meeting, Neela, who works  
12 with Respondent talked Funke into signing up, and explained that it would be necessary for Funke  
13 to sign up for modeling classes for \$3,495.00 and casting cards for \$1,495.00. Neela also explained  
14 that later on, it would be necessary to pay \$2,495.00 for a portfolio. After Funke agreed to this,  
15 Lippincott told Funke that she had several jobs for her, and that there was a fashion event in  
16 October at the Concord Hilton. Funke paid Lippincott a total of \$4,990.00 (Hearing Exhibits 1,2).  
17 Lippincott had Funke attend two "photo shoots" in Sausalito on June 14 and July 26 where many  
18 photos were taken. Lippincott instructed Petitioner to select 5 photos for her casting card. On  
19 January 28, 2009, Petitioner selected the photos, but never heard back from Lippincott on this  
20 matter and never received the casting cards.

21 3. During the July 26, 2008 photo shoot, Lippincott told Petitioner that she was a perfect  
22 model for Chicos and that she had contacts there. However Funke never received any work for  
23 Chicos or anyone else through Lippincott. Furthermore, Petitioner was told by Lippincott that the  
24 Concord Hilton show was canceled.

25 4. Petitioner's last contact with Lippincott was when she was asked to pay \$1,495.00 for  
26 acting classes. Funke declined.

27 5. Lippincott conducted this business of recruiting models under two separate company  
28 names: Respondent, Finesse Freelance Development and FUSE Integrated Marketing Solutions

1 (FUSE) which are solely owned by Lippincott. In furtherance of this enterprise, Lippincott had the  
2 models sign an “agreement” entitled “Business Development Registration.” The “agreement”  
3 signed by Funke is contained in Hearing Exhibit A to the instant case. While containing the  
4 disclaimer that neither FUSE nor Finesse are modeling agents, Lippincott used these entities to  
5 conduct the business of collecting money from models in exchange for the services of training and  
6 purportedly finding them work in the industry.

7 5. Over the course of Petitioner’s short time with Lippincott, she was never provided with  
8 work other than the couple of photo shoots taken at FUSE for \$150.00 each.

9 6. Lippinott testified in the combined proceeding that she did not act as a talent agent  
10 because she did not solicit work for the models or promised to do so, but merely looked for, trained  
11 and used models in productions that she herself produced through FUSE. The weight of the  
12 evidence of all of the Petitioners belies that testimony as explained in the decision regarding each  
13 Petition. It is found that Lippincott did in fact promise to solicit work and find work for Petitioner  
14 herein, but took her money and did not find any work for her.

15 **LEGAL ANALYSIS**

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

19 2. Labor Code §1700.4(a) defines talent agency as any person or corporation “who engages  
20 in the occupation of procuring, offering, promising, or attempting to procure employment or  
21 engagements for an artist.” In prior decisions, the Labor Commissioner has held that “a person or  
22 entity that employs an artist does not ‘procure employment’ for that artist within the meaning of  
23 Labor Code §1700.4(a), by directly engaging the services of that artist... [T]he ‘activity of  
24 procuring employment,’ under the TAA refers to the role an agent plays when acting as an  
25 intermediary between the artist whom the agent represents and the third party employer who seeks  
26 to engage the artist’s services. *Chin v. Tobin* (TAC No. 17-96) at page 7. Following this rationale,  
27 in *Kern v. Entertainers Direct, Inc.* (TAC No. 25-96), the Labor Commissioner concluded that a  
28 business that provided clowns, magicians, and costumed characters to parties and corporate events

1 did not act as a talent agency within the meaning of Labor Code §1700.4(a). In *Kern*, the  
2 respondent set the prices it charged to customers for the entertainers' services, selected the  
3 entertainers it provided to its customers, determined the compensation paid to the entertainers for  
4 providing the services, and thus we concluded, "became the direct employer of the performers."  
5 Significantly, however, in both *Chinn* and *Kern* no evidence was presented that the respondents  
6 "ever procured or promised or offered to attempt to procure employment for petitioners with any  
7 third party. That lack of evidence as to the promises or offers to obtain employment with third  
8 parties or actual procurement activities was found to distinguish those cases from cases in which  
9 persons or businesses were determined to be acting as talent agencies within the meaning of Labor  
10 Code §1700.4(a). *Chin v. Tobin, supra*, at page 11. Thus, in determining whether Respondent  
11 engaged in the occupation of a "talent agency" we must analyze whether Respondent engaged in  
12 any of the activities which fall within the statutory definition of "talent agency."

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

26 4. In 2005, there were several petitions filed against Respondent in this matter. The  
27 decisions in those cases are found at TAC Nos. 14-05, 16-05, 18-05. Since those decisions were  
28 issued holding that Respondent acted as a talent agent operating without being licensed, Lippincott

1 has added a new wrinkle to her scheme. Now, with the addition of FUSE, Lippincott takes the  
2 position that she is not a “talent agent” under the TAA, because she tells the models that she is not  
3 soliciting work on their behalf but merely training them to be “freelance models.” All of the  
4 written materials distributed by Finesse and FUSE use that terminology (See Exhibits A and B to  
5 the combined hearings).<sup>1</sup> Against this written evidence is the similar testimony of the four,  
6 unrelated petitioners who universally claim that Lippincott sought money from them for “training”  
7 and to find them jobs in the modeling industry in exchange for money. Lippincott has  
8 unsuccessfully attempted to create a fiction through the paper trail of her business in order to evade  
9 the requirements of the TAA.

10         5. The evidence before us in the instant case leads to the conclusion that at the inception of  
11 the relationship, Respondent promised to procure modeling employment for Petitioner, and  
12 attempted to do so whether successfully or not. Despite Respondent’s claim that whenever it  
13 provided a client with a model’s services she did so as the “producer” of the client’s fashion  
14 runway show or print advertisement, Respondent failed to present sufficient corroborating  
15 evidence. The argument that Respondent acted as a “producer” of these print advertisements and  
16 fashion shows is an affirmative defense to the allegation that Respondent acted as a “talent agency”  
17 by promising to and/or obtaining work for the model(s), and as such, the burden of proof shifts to  
18 the Respondent once the Petitioner establishes, as is the case here, that the Respondent obtained or  
19 promised to obtain modeling work for the Petitioner.

20         6. But, even assuming *arguendo* that Respondent never actually procured and never  
21 attempted to procure modeling employment for the petitioner with any third party employer (the  
22 primary argument of Respondent in this case), that does not dispose of the question of whether  
23 Respondent ever offered to procure or promised to procure such employment for the Petitioner.  
24 Not only did the Petitioner testify that she believed that Respondent had offered and promised to

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26         <sup>1</sup> Indeed, Lippincott solely owns both Finesse and FUSE, thus controlling the entire  
27 enterprise and whether Petitioner was used for any modeling work that FUSE obtained for third  
28 parties or for itself. “Freelance” and independent contractor principles apply to the determination  
of whether a person is an employee of another person or business. It has no relationship to  
whether a person is acting as a talent agent under the TAA. Nor did Lippincott present any  
argument or evidence to tie this legal principle to any of the issues in this case.

1 do just that, more importantly, taking the evidence as a whole, we conclude that any reasonable  
2 person in the Petitioner's position would have formed that same belief. There is simply no other  
3 way to reasonably interpret many of the Respondent's policies and procedures, and Respondent's  
4 written and oral representations of what she could and could not do for the Petitioner.  
5 Consequently, we conclude that through Respondent's published policies and procedures and  
6 representations to models, Respondent "offered to procure employment" for models with third  
7 party employers, and therefore, engaged in the occupations of a "talent agency" within the meaning  
8 of Labor Code §1700.4(a). As such, despite Respondent's efforts to structure her operations (or  
9 perhaps more accurately, efforts to appear to have structured her operations) so as to avoid the  
10 requirements of the TAA, Respondent violated the Act by operating as a "talent agency" without  
11 the requisite license.

12         7. An agreement between an artist and a talent agency that violates the licensing  
13 requirement of the TAA is illegal, void and unenforceable. *Styne v. Stevens, supra*, 26 Cal.4th at  
14 51; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262; *Buchwald v.*  
15 *Superior Court, supra*, 254 Cal.App.2d at 351. Having determined that a person or business entity  
16 procured, attempted to procure, promised to procure, or offered to procure employment for a  
17 person meeting the definition of an artist under the Act without the requisite talent agency license,  
18 "the [Labor] Commissioner may declare the contract between the unlicensed talent agent and the  
19 artist void and unenforceable as involving the services of an unlicensed person in violation of the  
20 Act." *Styne v. Stevens, supra*, 26 Cal.4th at 55. Moreover, the artist that is party to such an  
21 agreement may seek disgorgement of amounts paid pursuant to the agreement, and may be  
22 "entitle[d] to restitution of all fees paid to the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616,  
23 626. The term "fees" is defined at Labor Code §1700.2(a) to include "any money or other valuable  
24 consideration paid or promised to be paid for services rendered or to be rendered by any person  
25 conducting the business of a talent agency." Restitution is therefore not limited to the amounts that  
26 an unlicensed agent charged for procuring or attempting to procure employment, but rather, may  
27 include amounts paid for services for which a talent agency license is not required.

28         8. With these legal principles in mind, we conclude that as a consequence of Respondent's

1 violations of Labor Code §1700.5, all agreements between Petitioner and Respondent are illegal  
2 and void, and the Petitioner is entitled to restitution for all amounts that she paid to the respondent  
3 for promised goods and services pursuant to any such agreement. It is determined that this amount  
4 is \$4,990.00, which includes the two checks paid by Petitioner to Respondent.

5 9. Petitioner's right to reimbursement of some of the amounts paid to Respondent are  
6 separately founded upon Labor Code §1700.40(a), which provides that "[n]o talent agency shall  
7 collect a registration fee." Labor Code §1700.2(b) defines a "registration fee" as "any charge  
8 made, or attempted to be made, to an artist for any of the following purposes...(1) listing or  
9 registering an applicant for employment in the entertainment industry...(3) photographs...  
10 or other reproductions of the applicant..(5) Any activity of a like nature." Labor Code §1700.40(b)  
11 further provides that "[n]o talent agency may refer an artist to any person, firm or corporation in  
12 which the talent agency has a direct or indirect interest for other services to be rendered to the  
13 artist, including but not limited to photography...coaching, dramatic school...or other printing."  
14 Respondent's collection of that was paid by Petitioner for attendance at Respondent's modeling  
15 workshops was unquestionably illegal pursuant to Labor Code §1700.40.

16 10. Petitioner may have additional remedies under the provisions of the Advance-Fee  
17 Talent Services Act<sup>2</sup> (AFTSA) (Labor Code §§1701-1704.3.) Labor Code §1700.44 authorizes  
18 the Labor Commissioner to hear and decide controversies under the TAA. In contrast, the  
19 provisions of the AFTSA may be enforced by the Attorney General, any district attorney, or city  
20 attorney, or through the filing of a private civil action. (See Labor Code §§1704.1, 1704.2.)  
21 Furthermore, any person engaging in the business or acting in the capacity of an advance-fee talent  
22 service must first file a bond with the Labor Commissioner in the amount of \$10,000 for the  
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24 <sup>2</sup> The term "advance-fee talent service" is defined at Labor Code §1701(b) to mean a  
25 person who charges, or attempts to charge, or receive an advance fee from an artist for any of the  
26 following products or services: procuring, offering, promising or attempting to procure  
27 employment or auditions; managing or directing the artist's career; career counseling or guidance;  
28 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  
earning as an artist or that exceeds the actual earning received by the artist.

1 benefit of any person damaged by any fraud, misstatement, misrepresentation or unlawful act or  
2 omission under the AFTSA. (See Labor Code §§1703.3, 1704.3.) We hereby take administrative  
3 notice that Respondent has not posted such a bond with the Labor Commissioner.

4 ORDER

5 For all of the foregoing reasons, IT IS HEREBY ORDERED that:

6 1. All contracts or agreements between Respondent and Petitioner are void, and  
7 that Respondent has no enforceable rights thereunder; and

8 2. Respondent shall immediately reimburse Petitioner for \$4,900.00 that Petitioner  
9 paid to Respondent pursuant to such contracts and agreements.

10  
11 Dated: February 26, 2013

 SBN 252726  
for ANNE HIPSHMAN  
Attorney for the Labor Commissioner

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17 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

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19 Dated: February 26, 2013

  
JULIE A. SU,  
State Labor Commissioner



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**PROOF OF SERVICE**

*Funke v Lippincott dba Finesse Freelance Development*  
TAC no. 13509-12

I, the undersigned, declare that I am and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceeding. My address is 455 Golden Gate Avenue, 9<sup>th</sup> Floor, San Francisco, CA 94102 which is located in the county in which the within mentioned mailing occurred. I am familiar with the practice at my place of business for collection and processing of documents for mailing with the United State Post Office and by facsimile. Such documents will be deposited with the United States Postal Service with postage prepaid and/or faxed to the addresses and/or facsimile numbers as stated below on the same day in the ordinary course of business.

On February 26, 2013, I served the following document(s):

**DETERMINATION OF CONTROVERSY**

by placing true copies thereof in an envelope(s) and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail, addressed as follows:

by placing true copies thereof in a FEDEX overnight envelope for delivery by overnight mail with all fees prepaid and addressed as follows:

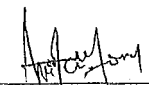
by facsimile at the following facsimile number(s):

**Judy Funke**  
3021 Sunset Lane  
Antioch, CA 94509

**Penelope Lippincott**  
Finesse Freelance Development  
1475 N. Broadway, 2<sup>nd</sup> Flr  
Walnut Creek, CA 94596

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of February, 2013 at San Francisco, California.

  
\_\_\_\_\_  
Chike Ufombah