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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

NSPSY RECORDING PARTNERS; BENJAMIN BLAINE CARTWRIGHT; RUYTER SUYS; collectively p/k/a NASHVILLE PUSSY, Petitioners, vs. SCOTT JEFFREY WEISS, d/b/a/ HIGHWATT MANAGEMENT, Respondent.	No. TAC 43-02 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on October 31, 2003, in Los Angeles, California, before the Labor Commissioner's undersigned hearing officer. Petitioners appeared through their counsel, Edwin McPherson, and Respondent appeared through his counsel, Eric Lagin. Based on the evidence presented at this hearing, the Labor Commissioner hereby adopts the following decision.

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FINDINGS OF FACT

1. Petitioners are members of a musical group professionally known as "Nashville Pussy." At all times herein relevant, petitioners were represented by High Road Touring, LLC, a talent agency licensed by the State Labor Commissioner. Frank Riley, an agent with High Road Touring, served as petitioner's talent agent. Riley booked all live appearances at which the petitioners performed, with the exception of appearances in which Nashville Pussy served as the opening band for "Reverend Horton Heat", the headliner band during a six month tour commencing January 2002.

2. Respondent, Scott Jeffrey Weiss, has served as Reverend Horton Heat's talent agent and manager since the early 1990's. Respondent has never been licensed by the Labor Commissioner as a talent agent.

3. In October or November 2001, respondent contacted Frank Riley, and asked whether Nashville Pussy would be interested in performing as the opening band on a six month tour with Reverend Horton Heat, starting in January 2002. Shortly thereafter, Riley agreed that Nashville Pussy would perform as the opening band during this tour (hereinafter referred to as the "Reverend/Nashville tour").

4. All engagements for the Reverend/Nashville tour were secured through the efforts of the respondent. Frank Riley played no direct role in securing these engagements; however, he had given his assent to respondent to obtain these engagements for Nashville Pussy.

5. Most of the Reverend Horton Heat tour bookings made

between respondent and concert promoters were made before it had been agreed between respondent and Riley that Nashville Pussy would perform as the opening act -- that is, most of these shows were booked for Reverend Horton Heat to perform with an as yet undesignated opening act. However, at least some of the agreements with concert promoters specified that Nashville Pussy would be the opening act. With one exception, discussed below, by January 1, 2002, all negotiations between respondent and concert promoters for the tour were concluded, with some of the shows already confirmed (i.e., the bands had cleared the dates and confirmed their availability), and other shows "on hold" (i.e., the bands had not yet confirmed their availability for those particular shows). As to all of these shows that were confirmed or on hold, there were no further monetary negotiations with promoters after January 1, 2002.

6. Respondent had negotiated a total payment with the promoter of each concert, and this total payment was subsequently divided between the two bands without any input from the promoters as to how much each band should receive. Instead, the amount that petitioners were to receive for each show during the Reverend/Nashville tour was determined by the respondent, generally following discussions with Frank Riley as to how much Nashville Pussy ought to receive for each engagement. Respondent testified that in deciding how much to pay Nashville Pussy for each engagement, he would "have to determine if it was in Reverend Horton Heat's interest to have that amount paid." Actual payments to the bands were ultimately made by the shows' promoters, who were informed by respondent as to how much of the

total payments were to be paid to each band.

7. On or about January 1, 2002, petitioners entered into an oral agreement with respondent, whereby respondent was to act as petitioners' "personal manager", for which respondent was to receive a percentage of petitioners' music related income.

8. Respondent testified that as "personal manager", he was expected "to oversee petitioners' business affairs", to handle their "merchandising issues" and "record deal issues", and to "get licenses for overseas recordings." Respondent testified that petitioners did not ask him to help them secure employment, or to find venues for their performances, as this was the function of their talent agent, Frank Riley, and that Riley never asked him to get involved in any particular negotiation for Nashville Pussy's services. Respondent testified that Riley is a very good, experienced agent, so that he had a "hands-off" approach with respect to the functions that Riley was engaged to perform.

9. On May 15, 2002, respondent received an unsolicited offer from Joe Dorgan, a concert promoter, for a July 2, 2002 engagement in El Paso, Texas for Reverend Horton Heat and Nashville Pussy. Respondent sent an e-mail to Frank Riley, advising him of this offer, stating "should we do it, the pussy would get 1K." The offer was accepted by Riley, whereupon respondent advised the promoter that Nashville Pussy would perform the engagement.

10. As the Reverend/Nashville tour progressed, petitioners became increasingly dissatisfied with the way in which the tour was being promoted. This led to a breakdown in the band's

relationship with the respondent, and in late July 2002, petitioners terminated respondent's services.

11. On October 7, 2002, respondent filed a lawsuit against petitioners for breach of contract and other causes of action, alleging that petitioners owed the respondent commissions on revenues earned by Nashville Pussy for "bookings that [respondent] arranged on behalf of [Nashville Pussy] during the period of time that [respondent] was actively serving as manager for Nashville." The complaint that initiated this lawsuit was unverified. Respondent testified that he "did not arrange any bookings" and "did not book anything as an agent" for Nashville Pussy, but that he did "help finalize arrangements as a manager."

12. On November 22, 2002, Nashville Pussy filed this petition to determine controversy against the respondent, alleging that respondent violated the Talent Agencies Act (Labor Code §1700, et seq.) by acting in the capacity of a talent agency, by procuring, offering, promising or attempting to procure employment or engagements on behalf of petitioner, without having obtained a talent agency license from the California Labor Commissioner. Petitioners seek a determination that the agreement with the respondent for his services as "personal manager" is void and unenforceable, and that respondent has no enforceable rights thereunder; an order for an accounting of all amounts that respondent received pursuant to this agreement, and for the reimbursement of all such amounts. On January 3, 2003, respondent filed an answer to the petition, denying that he engaged in any actions requiring a license as a talent agency.

LEGAL ANALYSIS

Labor Code §1700.5 makes it unlawful for any person "to engage or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." The term "talent agency" is defined at Labor Code §1700.4(a) as "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 [the Talent Agencies Act]." A license is also not required for those procurement activities which come within the scope of Labor Code §1700.44(d), which provides "[i]t is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." Of course, a talent agency license is not required for counseling and directing artists in the development of their professional careers, or otherwise acting as a "personal manager", provided that the person performing this function does not cross over the line so as to engage in any covered activity -- procuring, offering, promising or attempting to procure employment, for which a license is required.

The Talent Agencies Act is a remedial statute; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. For that reason, "even the incidental or occasional provision of such [procurement] services requires

licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. The consequences of engaging in covered procurement activities without a license are severe. An agreement that violates the licensing requirement of the Talent Agencies Act is illegal and unenforceable. "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* (1967) 254 Cal.App.2d 347, 351. Having determined that a person or business entity procured, promised or attempted to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed 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. "[A]n agreement that violates the licensing requirement is illegal and unenforceable . . . ." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262. 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 the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. This remedy of restitution is, of course, subject to the one year limitations period set out at Labor Code §1700.44(c).

It is undisputed that petitioners are "artists" within the meaning of Labor Code §1700.4(b). It is also undisputed that respondent, although never licensed as a talent agent by the

State Labor Commissioner, did act as a "talent agent", within the meaning of Labor Code §1700.4(a), by procuring live engagements for Reverend Horton Heat. The issue here, however, is whether respondent's activities on behalf of petitioners come within the definition of a "talent agency" under Labor Code §1700.4(a), and if so, on whether the exception provided by Labor Code §1700.44(d) applies to excuse the respondent from the Act's licensing requirement. If respondent did not act as a "talent agency" with respect to the petitioners, or if all such actions came within the scope of section 1700.44(d), then the fact that respondent was never licensed as a talent agency would not affect the validity of his "personal management contract" with petitioners.

But for respondent's efforts, petitioners would not have obtained any engagements as the opening act in the Reverend/Nashville tour. That alone, however, does not mean that respondent acted as a "talent agency" for petitioners within the meaning of Labor Code §1700.4(a). We have previously held that a person or entity who employs an artist does not "procure employment" for the artist, within the meaning of section 1700.4(a), by directly engaging the services of the artist; and that the 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 a third-party employer. (*Chinn v. Tobin* (TAC No. 17-96) pp. 5-8.) For example, a movie producer does not act as a talent agent by offering to directly employ artists to act in the movie that the producer is producing.

But here, we have a more complicated situation, in that Respondent was not the producer or promoter of any of the various engagements during the Reverend/Nashville tour. Respondent acted not as employer, but rather, as an agent for Reverend Horton Heat by procuring engagements from concert producers or promoters. The same cannot be said for Respondent's role vis-a-vis Nashville Pussy. Most of the engagements on the tour were booked before it was determined that Nashville Pussy would be the opening act. As to these engagements, the concert producers and promoters delegated the right to employ an opening act to the respondent. By offering these engagements to petitioners (through their licensed talent agent), and by negotiating with petitioners (through their licensed talent agent) for the amount that they would receive for performing as the opening act, respondent's role was that of an employer, not a talent agent.

As to those engagements that were booked by respondent with producers or promoters who specified that Nashville Pussy was to be the opening act, respondent performed procurement services for petitioners that fall within the ambit of Labor Code §1700.4(b). But all of these engagements were obtained by respondent at the request of petitioners' licensed talent agent, and petitioners' compensation for these engagements was determined by respondent in conjunction with petitioner's licensed talent agent. In short, the evidence presented compels the conclusion that as to these engagements, respondent's procurement services for petitioners came within the exception to the license requirement provided by Labor Code §1700.44(d).

Finally, there is no evidence that respondent did anything

for Nashville Pussy in connection with the May 22, 2002 unsolicited offer from an El Paso concert promoter that would require a talent agency license. The evidence before us is that after being presented with this offer, respondent conveyed the offer to petitioners' licensed talent agent, and that the offer was not accepted until it had been approved by petitioner's licensed talent agent.

ORDER

For the reasons set forth above, we find that respondent did not engage in any activities for which a talent agency license is required. Consequently, IT IS HEREBY ORDERED that the petition to declare the personal management agreement void is denied. Having reached this conclusion, the Labor Commissioner has no further jurisdiction over the parties' dispute over the enforcement of this agreement.

Dated: 4/26/04

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 4-29-4

GREGORY L. RUPP
Acting Deputy Chief Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(NSPSY Recording; Nashville Pussy v. Scott Jeffrey Weiss dba Highwatt Management)
(TAC 43-02)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On April 29, 2004, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope(s) addressed as follows:

EDWIN F. McPHERSON, ESQ.
PENNY J. MANSHIP, ESQ.
McPHERSON & KALMANSOHN
1801 Century Park East, 24th Floor
Los Angeles, CA 90067

ERIC L. LAGIN, ESQ.
9200 Sunset Boulevard, Penthouse 30
West Hollywood, CA 90069-3601

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.

I certify under penalty of perjury that the foregoing is true and correct. Executed on April 29, 2004, at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON