

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
4 BY: DAVID L. GURLEY (Bar No. 194298)
5 300 Oceangate, Suite 850
6 Long Beach, CA 90802
7 Telephone: (562) 590-5461
8 Attorney for the Labor Commissioner

9 BEFORE THE LABOR COMMISSIONER
10 OF THE STATE OF CALIFORNIA

11 BRIDGET VAN AUKEN,) No. TAC 11532
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13) DETERMINATION OF
14) CONTROVERSY
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I. INTRODUCTION

The above-captioned petition was originally filed by BRIDGET VAN AUKEN on December 4, 2008, (hereinafter "Petitioner"), and against ELAINE PARKER, an individual, dba RAGE MODELS, (hereinafter "Respondent" or "Parker"), alleging inter alia, that respondent entered into an illegal agreement with the petitioner by providing a contract to the petitioner which was not approved by the Labor Commissioner in violation of

1 Labor Code 1700.23¹. Petitioner seeks a determination voiding
2 the contract *ab initio* and a return of all commissions paid to
3 the respondent during the course of the relationship. She also
4 seeks a return of fees paid to the respondent for attending a
5 modeling class taught by the respondent in violation of
6 §1700.40(b) and attorney's fees.

7 The respondent filed her response and cross-complaint
8 alleging that the petitioner breached the parties' agreement by
9 failing to pay the respondent commissions for all employment
10 obtained through Parker, including work performed for clients of
11 Parker for a period of 48 months following termination of the
12 agreement.

13 A hearing was scheduled before the undersigned
14 attorney, specially designated by the Labor Commissioner to hear
15 this matter. The hearing commenced on February 3-4, 2010, in
16 Long Beach, California. Petitioner was represented by Geoffrey
17 Crisp of Steven M. Garber & Associates; respondent appeared
18 through her attorney Fredric R. Brandfon of the Law Offices of
19 Barry K. Rothman. Post trial briefs were submitted and the
20 matter taken under submission. Due consideration having been
21 given to the testimony, documentary evidence, arguments and
22 briefs presented, the Labor Commissioner adopts the following
23 Determination of Controversy.

24
25
26
27
28 ¹ All statutory citations will refer to the California Labor Code unless
otherwise indicated.

1 II. FINDINGS OF FACT

2
3 1. The petitioner had no experience modeling and was
4 seeking an opportunity to supplement her income. The parties
5 met and respondent indicated she would submit the petitioner for
6 jobs modeling cloths for designers, commonly know as "fit
7 modeling". On or about March 3, 2004, the parties entered into
8 a Model Independent Contractor Agreement (hereinafter
9 Agreement). The Agreement provided that the petitioner would
10 pay 15%-20% commission to Parker on any model fees earned by the
11 petitioner resulting from direct or indirect efforts of Parker.

12 2. The Agreement also provided that upon
13 termination by the petitioner, the petitioner would be required
14 to bill all future bookings with Parker's clients, through Rage
15 Models for a period 48 months after termination². In short, this
16 enabled Parker to continue receiving commissions for each job
17 performed by the petitioner originally derived from a Parker
18 introduction for four years after petitioner's termination of
19 the relationship.

20 3. The respondent has been a licensed California
21 talent agent representing fit models since 1993. A prerequisite
22 of the licensing process requires all agents to file with the
23 Labor Commissioner a contract which the agent will use with
24 artists for the agent's representation services. This contract

25
26
27 ² "In the event that I decide not to be represented by RAGE MODELS, I will
28 notify the agency in writing. I understand that all accounts and clients
contacted through RAGE MODELS will continue to be billed through RAGE MOFDELS
for a period of 48 months after the date of the written request of non-
representation by RAGE MODELS." [The Agreement, pg. 2 paragraph 2]

1 will be reviewed and approved by the Labor Commissioner's
2 Licensing and Registration Unit prior to licensure.

3 4. The Agreement signed by the parties was not
4 filed, authorized or approved by the Labor Commissioner's office
5 as required under §1700.23³. The respondent did file a contract
6 to be used with artists, which was in fact approved, but not
7 used with this artist. The Agreement was ostensibly used in
8 lieu of the approved contract. It appears the respondent was
9 utilizing two contracts, one approved by the Labor Commissioner
10 for print models and the non-approved Agreement used for fit
11 models. Clearly, the respondent did not believe that fit models
12 were subject to the protections of the Talent Agencies Act
13 (hereinafter The Act).

14 5. On or around March 31, 2004, the petitioner
15 attended a workshop taught by the respondent. The workshop was
16 intended to train the petitioner, inexperienced in all aspects
17 of modeling, how to become a proper "fit Model." Petitioner was
18 charged \$95.00 for the workshop which was paid directly to the
19 respondent.

20 6. During the next several years, the petitioner's
21 earnings increased exponentially as she proved to be a very
22 successful fit model. Testimony from both parties indicated a
23 fit model primarily models cloths for designers to ensure a
24 perfect fit of the garment for that model's particular size.
25 The garment would be worn, the model photographed, alterations
26
27

28 ³ Labor Code §1700.23 states, "Every talent agent shall submit to the Labor
Commissioner a form of contract to be utilized by such talent agent in
entering into written contracts with artists..."

1 made and the process repeated. This would ensure the garment
2 was a perfect fit for the model's specific size before
3 production. The model was asked throughout the process how the
4 garment fit and felt and asked to move in the garment to verify
5 its comfort. This process would occur several times before the
6 garment was ultimately approved for production. Fit modeling is
7 used by designers primarily for fitting the garment and is a
8 necessary and instrumental component of the design and
9 production process for all garments.

10 7. On September 5, 2007 the petitioner severed the
11 relationship with the respondent in writing and cited late
12 payment of earnings as the primary reason. No evidence was
13 submitted establishing the respondent paid the petitioner
14 untimely. Conversely, it was established that all payments were
15 made timely after the respondent was paid by the 3rd party
16 client/designers.

17 8. On or around January 8, 2008, the respondent
18 received its final commission payment from the petitioner. The
19 petitioner continued to work with many of the clients and
20 designers originally introduced by Parker. In lieu of billing
21 through Rage Models, the petitioner began billing the clients
22 directly thereby earning an increase in wages of 15%-20% as a
23 result of no longer having to pay commission to Parker.
24 According to Parker, this practice violated the 48-month
25 provision of the Agreement. Notably, one Parker client,
26 Torrid/Hot Topic, refused to pay the petitioner directly and
27 continued to bill all earnings through Rage Models. Parker then

1 in turn deducted her commission and remitted the remaining
2 payment to petitioner.

3
4 **III. LEGAL ANALYSIS**

5
6 **Primary Issues:**

- 7 A. Is petitioner an artist within the meaning of
8 Labor Code section 1700.4(a)?
- 9 B. Can the Agreement be voided *ab initio*?
- 10 C. Is the petitioner entitled to reimbursement of
11 monies paid for the modeling class?
- 12 D. Is the petitioner entitled to disgorgement of all
13 commissions paid to respondent?
- 14 E. Is the petitioner entitled to attorney's fees?

- 15
16
17 **A. Is petitioner an artist within the meaning of**
18 **Labor Code section 1700.4(a)?**

19
20 1. The Labor Commissioner has jurisdiction to hear
21 and determine controversies, arising between an artist and an
22 agent, pursuant to Labor Code section 1700.44(a).

23 Labor Code §1700.4(b) defines "artists"

24
25 "Artists," means actors and actresses rendering
26 services on the legitimate stage in the production of motion
27 pictures, radio artists, musical artists . . . **models** and other
28 artists and persons rendering professional services in motion .

1 picture, theatrical, radio, television and other entertainment
2 enterprises." [Emphasis Added]

3
4 2. Labor Code § 1700.4(b) specifically includes
5 "models" in the definition of "artist". Moreover, the DLSE has
6 historically considered a fit model to be a model (see Hartman
7 v. Integrity Casting TAC 01-99). Petitioner is therefore an
8 "artist" within the meaning of Labor Code § 1700.4(b).

9 3. It was stipulated that the Respondent was a
10 licensed California talent agency. Therefore, the Labor
11 Commissioner has jurisdiction to hear and determine this matter.

12
13 **B. Can the Agreement be voided *ab initio*?**

14
15 4. Labor Code §1700.00 et.seq. is commonly referred
16 to as the Talent Agencies Act. The Act requires a talent agent
17 to procure a license from the Labor Commissioner and provides a
18 comprehensive licensing scheme allowing the Labor Commissioner
19 to regulate agent activity through, inter alia, the approval of
20 all contracts and commission structures. "Since the clear object
21 of the Act is to prevent improper persons from becoming [talent
22 agents] and to regulate such activity for the protection of the
23 public, a contract between an unlicensed artists' manager and an
24 artist is void." Waisbren v. Peppercorn Inc., 41 Cal.App. 4th 246
25 at pg. 261; Buchwald v. Superior Court, supra, 254 Cal.App.2d at
26 pg 351. Moreover, the Court in Waisbren v. Peppercorn supra, 41
27 Cal.App.4th 246 a.262, citing the California Entertainment
28 Commission, ruled "the most effective weapon for assuring

1 compliance with the Act is the power ... to ... declare any
2 contract entered into between the parties void from the
3 inception.' By following the Commission's advice and not
4 enacting criminal penalties, the Legislature approved the remedy
5 of declaring agreements void if they violate the Act."

6 5. Allowing licensed agents to use unapproved
7 contracts without consequence, invites unregulated conduct that
8 runs counter to the Act's remedial purpose. In construing a
9 statute, court[s] must consider consequences that might flow
10 from particular construction and should construe the statute so
11 as to promote rather than defeat the statute's purpose and
12 policy. Escobedo v. Estate of Snider (1997) 60 Cal.Rptr.2d 722,
13 14 Cal.4th 1214, 930 P.2d 979. As discussed, the purpose of the
14 Acts' statutory scheme is to protect artists from unregulated
15 activity. Consequently, we see no distinction between a
16 licensed talent agent using an unapproved contract with that of
17 an unlicensed agent using an unapproved contract. To conclude,
18 the Agreement is void *ab initio* and is unenforceable for all
19 purposes.

20
21 **C. Is the petitioner entitled to reimbursement of**
22 **the modeling class?**
23

24 6. Labor Code §1700.40(b) provides that, "[n]o
25 talent agency may refer an artist to any person, firm, or
26 corporation in which the talent agency has a direct or indirect
27 financial interest for other services to be rendered to the
28 artist, including, but not limited to, ... coaching, dramatic

1 schools ... " Respondent stipulated that in 2004 she charged
2 petitioner for the class and collected the fees directly.
3 Respondent has therefore violated Labor Code §1700.40(b) by
4 referring petitioner to a class which was taught by her and
5 whereby she directly financially benefitted.

6 7. Labor Code §1700.44(c) provides that "no action
7 or proceeding shall be brought pursuant to [the Talent Agencies
8 Act] with respect to any violation which is alleged to have
9 occurred more than one year prior to the commencement of this
10 action or proceeding." As a result, Van Auken is not entitled
11 to a return of monies paid for the modeling class which was paid
12 more than 4 1/2 years prior to her filing of the petition.

13
14
15 **D. Is the petitioner entitled to disgorgement**
16 **of all the commissions paid to respondent?**

17
18 8. Petitioner seeks disgorgement of all commissions
19 paid to the respondent during the entire relationship between
20 the parties. In Bank of America N.T.S.A. v. Fleming No. 1098
21 ASC MP-432, the special hearing officer held that he has broad
22 discretion in fashioning a remedy that is appropriate under the
23 facts of the case. Consequently, the contract between the
24 parties is void *ab initio*, and the respondent may not benefit
25 from this illegal contract. Van Auken filed her petition on
26 December 4, 2008. Consequently, with Labor Code §1700.44(c)
27 one-year statute of limitations in effect, the petitioner is
28 entitled to a return of commissions for any commissions paid to

1 petitioner during the period of December 4, 2007 through the
2 date of this determination.

3
4 **E. Is petitioner entitled to attorney's fees?**

5
6 9. Labor Code 1700.25 states in pertinent
part:

7
8 (a) A licensee who receives any payment
of funds on behalf of an artist shall
9 immediately deposit that amount in a trust
fund account maintained by him or her in a
10 bank or other recognized depository. The
funds, less the licensee's commission, shall
11 be disbursed to the artist within 30 days
after receipt.

12
13
14 Further Labor Code §1700.25(e) states,

15 If the Labor Commissioner finds, in
proceedings under Section 1700.44, that the
16 licensee's failure to disburse funds to an
artist within the time required by
17 subdivision (a) was a **willful** violation, the
Labor Commissioner may, in addition to other
18 relief under Section 1700.44, order the
following:

19
20 (1) Award reasonable attorney's fees to the
prevailing artist.

21
22
23 10. The respondent did not hold onto funds in
violation of Labor Code 1700.25(a) and any commissions held in
24 reserve from Torrid/Hot Topic earnings were set aside as a
25 result of a good faith dispute. As a result, the respondent did
26 not act willful and the petitioner is not entitled to an award
27 of attorney's fees.

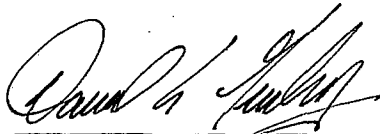
ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the 2004 Model Independent Contractor Agreement between respondent ELAINE PARKER dba RAGE MODELS and petitioner BRIDGET VAN AUKEN is unlawful and void *ab initio*. Respondent has no enforceable rights under that contract.

The respondent must provide an accounting to petitioner within 30 days of this determination of all commissions received from petitioner during the period of December 4, 2007 through the date of this determination and shall reimburse the petitioner for those monies within sixty (60) days from the date of this determination.

IT IS SO ORDERED.

Dated: 6-23-10



DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: JUN 23 2010



ANGELA BRADSTREET
State Labor Commissioner

