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8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA
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11 TONY PLANA, an individual and GACELA,
INC., a business entity,

12 Petitioners,
13

14 vs.

15 TRACY QUINN, an individual; QUINN
MANAGEMENT, a business entity.

16 Respondents.
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CASE NO. TAC 15652

DETERMINATION OF CONTROVERSY

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20 I. INTRODUCTION

21 The above-captioned petition was filed on November 3, 2009, by TONY PLANA, an
22 individual and GACELA, INC., a business entity, Mr. Plana's loan out corporation,
23 (hereinafter "Petitioner"), alleging that TRACY QUINN, an individual; QUINN
24 MANAGEMENT, a business entity (hereinafter "Respondent"), was conducting unlawful
25 activities by acting as an unlicensed talent agent in violation of Labor Code §1700.5¹.
26 Petitioner seeks a determination voiding *ab initio* the oral management agreement
27 between the parties.

28 ¹ All statutory citations will refer to the California Labor Code unless otherwise specified.

1 Respondent filed her answer with this agency on March 1, 2010. A hearing was
2 scheduled before the undersigned attorney, specially designated by the Labor
3 Commissioner to hear this matter. The hearing was rescheduled at the request of the
4 parties. On February 3, 2011, Petitioners substituted their attorneys and on March 23,
5 2011, Respondent substituted their attorneys. Eventually, Respondent was represented by
6 Christopher Good of Fowler & Good, LLP; Petitioner appeared through his attorney Tom
7 A. Nunziato of Nunziato, Buckley & Weber. The parties stipulated to submitting their
8 dispute to the Labor Commissioner for resolution solely through documentary evidence
9 without the benefit of live testimony. Due consideration having been given to the
10 declarations, deposition transcripts, documentary evidence and arguments presented, the
11 Labor Commissioner adopts the following determination of controversy.

12 13 **II. FINDINGS OF FACT**

14 1. The Petitioner is and has been a working character actor since 1976. Petitioner
15 hired the Respondent as his manager in or around August 2005 and terminated the
16 relationship on July 1, 2008. During this time period Petitioner was cast in the role of
17 Ignacio Suarez on the Touchstone Television Production series of *Ugly Betty* in
18 approximately March of 2006. When the Petitioner ended the relationship on July 1,
19 2008, he suspended prospective commission payments on future earnings and residuals.
20 Petitioner continued in the role until the show was cancelled in 2010. There is a factual
21 and legal dispute as to whether the parties' agreement contemplated the continued
22 payment of commissions on residuals and earnings after the relationship ended and if so,
23 what was the understanding between the parties?

24 2. The Respondent argues that she acted solely as the Petitioner's manager and not
25 as her talent agent, as the Petitioner contends, and that all of her actions were consistent
26 with the type of activities performed by talent managers. The Respondent testified in her
27 deposition that her daily responsibilities included choosing pictures, discussing strategies,
28 assisting in nurturing relationships and helping to secure business opportunities with the

1 help of the Petitioner's talent agent. It was also the Respondent who recommended and
2 ultimately secured the Petitioner's talent agents.

3 3. Conversely, the Petitioner established that the Respondent not only acted as his
4 talent manager, but also acted on five occasions as his unlicensed talent agent in violation
5 of the California Talent Agencies Act. The Petitioner argues, "because of the limited
6 nature of discovery in this proceeding, particularly that lack of deposition testimony from
7 third parties, it has been especially difficult to obtain evidence of illegal procurement.
8 Nevertheless, the [P]etitioner has been able to substantiate five clear examples of
9 procurement." The illegal procurement activities conducted by the Respondent included,
10 negotiating the material terms for Mr. Plana as a spokesperson for Allstate Insurance, two
11 episodes of Radio Series, The Twilight Zone Radio Drama, an attempted endorsement
12 effort for Tropicana Juice and a couple of speaking engagements.

13 **The Procurement of "Ugly Betty"**

14 4. The primary claim for unpaid commissions sought by the respondent are for
15 Petitioner's earnings for the role secured in *Ugly Betty*. The Respondent was directly
16 involved in the procurement of that project. Petitioner's Talent Agent, Todd Eisner of the
17 Agency for Performing Arts ("APA") first submitted the Petitioner for the role of Ignacio
18 Suarez. Mr. Eisner was told that Petitioner was too young for the role. After conveying
19 that response to Ms. Quinn, Ms. Quinn, without being requested by Mr. Eisner and
20 without discussing the situation with Mr. Eisner, contacted Lisa Soltau, one of the casting
21 directors for *Ugly Betty*, to pitch Mr. Plana and to try to convince Ms. Soltau to audition
22 Mr. Plana for the role. Petitioner thereafter auditioned and was ultimately selected for the
23 role. These facts are undisputed but that is not the end of the inquiry.

24 5. The Respondent argues that she worked in conjunction with and at the request
25 of Petitioner's licensed talent agent, which is an express exemption from the Act's
26 limitations. It was established that Mr. Eisner was not the only agent from APA who
27 actively participated in securing the role for Petitioner in *Ugly Betty*. The Petitioner
28 utilized a second agent from Petitioner's talent agency, Mr. Todd Neville, and it is the

1 declaration of Neville that provided the most convincing account of what occurred. Mr.
2 Neville submitted a signed declaration under penalty of perjury stating the following
3 account:

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5 During the entire process I was regularly communicating with Tony Plana's
6 talent manager Tracy Krivis Quinn of Quinn Management, and it was agreed
7 between us that she could talk with the Casting Director of the ABC Network
8 Casting Talent Executive and further discuss Tony Plana for the role.

9
10 6. This declaration is extremely telling and subsequent attempts to discount this
11 declaration on cross-examination at Mr. Neville's deposition were unsuccessful. Mr.
12 Neville's appeared evasive and ultimately unconvincing during his deposition.

13 7. On July 24, 2009, Respondent filed a lawsuit in the Superior Court against
14 Petitioner, alleging *inter alia*, breach of contract in connection with managerial services
15 and seeking post termination commissions on future earnings and residuals in connection
16 with *Ugly Betty*. Petitioner answered asserting, *inter alia*, affirmative defenses based
17 upon violations of the California Talent Agencies Act, *Labor Code* §1700 et seq.

18 19 III. CONCLUSIONS OF LAW

20 The primary issues are as follows:

21 A. Do the efforts of the Respondent in securing the role in *Ugly Betty* on behalf
22 of the Petitioner, fall within the activities described at Labor Code §1700.44(d),
23 exempting persons conducting certain traditional talent agency functions from the
24 licensing requirement? Labor Code §1700.44(d) states, "it is not unlawful for a person or
25 corporation which is not licensed pursuant to this chapter to act in conjunction with and at
26 the request of a licensed agency in the negotiation of an employment contract."

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1 B. Whether the principles of severance enumerated by the California Supreme
2 Court in *Marathon Entertainment v. Blasi* 42 Cal.4th 974 apply in this context?

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4 1. The Labor Commissioner has exclusive jurisdiction to determine her
5 jurisdiction over issues colorably arising under the Talent Agencies Act; thus, she alone
6 is empowered to decide, in the first instance, whether the facts do bring the case within the
7 Act. *Styne v. Stevens* (2001) 26 Cal.4th 42, 56.

8 2. Labor Code §1700.4(b) includes “actors” in the definition of “artist”
9 and petitioner is therefore an “artist” within the meaning of §1700.4(b).

10 3. “Talent Agent” is defined at §1700.4(b) and states, “[t]alent agency”
11 means a person or corporation who engages in the occupation of procuring, offering,
12 promising, or attempting to procure employment or engagements for an artist”

13 4. Labor Code §1700.5 provides that “no person shall engage in or carry
14 on the occupation of a talent agency without first procuring a license therefore from the
15 Labor Commissioner.” It was stipulated the Respondent does not possess a talent agency
16 license. Based on the evidence presented, the respondent operated as a “talent agency”
17 within the meaning of §1700.4(b) on the five occasions mentioned above.

18 A. Does The Safe Harbor Exemption Enumerated at Labor Code section
19 1700.44(d) apply to the Respondent’s efforts in securing *Ugly Betty*?

20 5. A primary issue in this case is whether Petitioner’s actions on
21 behalf of the Respondent fall within the activities described at Labor Code §1700.44(d),
22 exempting persons conducting certain traditional talent agency functions from the
23 licensing requirement. Labor Code §1700.44(d) states:

24 [I]t is not unlawful for a person or corporation which is not
25 licensed pursuant to this chapter to act in conjunction with and
26 at the request of a licensed talent agency in the negotiation of
27 an employment contract.

28 6. This exemption requires a two-part analysis and both parts must be satisfied for
respondent to prevail. First, we must determine whether Respondent’s acts of
communicating directly with the casting agent for *Ugly Betty* were done “in conjunction

1 with and at the request of a licensed talent agency” and second; whether Respondent’s
2 activities on behalf of Plana are considered “the negotiation of an employment contract.”
3 A review of Mr. Neville’s declaration satisfies both prongs of the exemption. Mr. Neville
4 clearly states that “[d]uring the entire process I was regularly communicating with Tony
5 Plana’s talent manager Tracy Krivis Quinn of Quinn Management, and it was agreed
6 between us that she could talk with the Casting Director of the ABC Network Casting
7 Talent Executive and further discuss Tony Plana for the role.” Moreover, the Labor
8 Commissioner has historically considered acts completed in furtherance of securing
9 employment for artists aspects of the negotiation of an employment contract.
10 Consequently, Respondent was acting in conjunction with and at the request of a licensed
11 agent in the negotiation of an employment contract and Respondent’s efforts were thus
12 not unlawful and shall not be used to void the agreement between the parties. In short, the
13 elements of Labor Code section 1700.44(d) have been met with respect to the
14 Respondent’s role in securing *Ugly Betty*.

15 SEVERANCE

16 B. Do the other five acts of procurement conducted by the respondent
17 without a talent agency license render the entire agreement void *ab initio*?

18 7. In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, the California
19 Supreme Court recently confirmed the applicability of the Talent Agencies Act to
20 personal managers and, while changing standards for determining the remedy available to
21 artists in the event of a violation, confirmed that (a) if a commission is sought for
22 employment procured by the manager, the manager is not entitled to recover that
23 commission and (b) if the “main purpose” of the agreement was for the manager to
24 procure employment or the management relationship was so “tainted by” or “permeated
25 by” unlawful procurement, commissions are not recoverable for project that were not
26 directly procured by the manager.

27 8. The final question is whether Ms. Quinn’s activities were “permeated by”
28 unlawful procurement requiring us to void the contract *ab initio*, precluding her from

1 claiming commissions on *Ugly Betty*?

2 9. In accordance with *Marathon, supra*, the Respondent argues that the doctrine of
3 severability should apply in that “management services took up the bulk of the
4 relationship.” We agree. There was minimal evidence presented or argued that
5 Respondent’s procurements activity either tainted the *Ugly Betty* role or permeated the
6 management relationship. In fact, the Petitioner argued that “it has been especially
7 difficult to find evidence of illegal procurement.” In *Marathon*, the court recognized that
8 the Labor Commissioner may invalidate an entire contract when the Act is violated. The
9 court also left it to the discretion of the Labor Commissioner to apply the doctrine of
10 severability to preserve and enforce the lawful portions of the parties’ contract where the
11 facts so warrant. As the Supreme Court explained in *Marathon*:

12 Courts are to look to the various purposes of the contract. If the
13 central purpose of the contract is tainted with illegality, then the
14 contract as a whole cannot be enforced. If the illegality is collateral
15 to the main purpose of the contract, and the illegal provision can be
extirpated from the contract by means of severance or restriction,
then such severance and restriction are appropriate. [*Citations
omitted*]. *Marathon, supra* at p. 996.

16 10. Here, we choose to exercise our discretion and sever those engagements we
17 found to have been procured in violation of the Act and preserve the contractual
18 relationship between the parties. Clearly, the Respondent provided managerial services to
19 Petitioner and that her managerial services consumed the bulk of the relationship between
20 Plana and Quinn. And notably, a central issue of whether the Respondent illegally
21 procured *Ugly Betty*, can also be answered in the negative.

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