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8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10

11 EDGAR FRANCISCO JIMENEZ GARCIA,) No. TAC 4-02
12)
Petitioner,)
13)
vs.)
14)
PIEDAD BONILLA, an individual dba) DETERMINATION OF
Pinata Productions and Management,) CONTROVERSY
15)
Respondent.)
16 _____)

17

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on October 16, 2002, in Los Angeles, California,
21 before the Labor Commissioner's undersigned hearing officer.
22 Edgar Francisco Jimenez Garcia (hereinafter "Petitioner") was
23 represented by Ronald G. Rosenberg; Piedad Bonilla, an
24 individual dba Pinata Productions and Management (hereinafter
25 "Respondent") appeared in propria persona. Based on the
26 evidence presented at this hearing and on the other papers on
27 file in this mater, the Labor Commissioner hereby adopts the
28 following decision.

1 //

2 FINDINGS OF FACT

3 1. Petitioner performs as a Spanish language voice-over
4 artist in radio and television commercials and movie trailers.

5 2. On April 17, 2000, Petitioner entered into a written
6 "personal management agreement" with Respondent for a period
7 of three years whereby Respondent was to provide advice and
8 counsel "with respect to decisions concerning employment ...
9 and all other matters pertaining to {Petitioner's}
10 professional activities and career in entertainment,
11 amusement, music, recording, literary fields and in any and
12 all media." Under the terms of this contract, petitioner
13 agreed to pay commissions to respondent in the amount of 15%
14 of his gross earnings in these fields during the term of the
15 agreement, and his earnings following expiration of the
16 agreement as to any agreements entered into or substantially
17 negotiated during the term of the contract. The contract
18 specified that respondent is not a theatrical agent, and is
19 not licensed to obtain, seek or procure employment for the
20 petitioner. The contract also provided that "in any
21 arbitration or litigation under this agreement, the prevailing
22 party shall be entitled to recover from the other party any
23 and all costs reasonably incurred by the prevailing party in
24 such arbitration or litigation, including without limitation,
25 reasonable attorney's fees."

26 3. Respondent has never been licensed by the State Labor
27 Commissioner as a talent agency.

28 4. Prior to January 2001, petitioner was not represented

1 by a licensed talent agency. Since January 2001, petitioner
2 has been represented by Larry Hummel, an agent employed by ICM
3 (International Creative Management, Inc.), a licensed talent
4 agency.

5 5. During the period from April 28, 2000 to October 18,
6 2000, during which time petitioner was not represented by a
7 licensed talent agent, petitioner performed voice overs in
8 approximately 50 commercials for the following advertisers:
9 Southern California Edison, Sears, JC Penny, Circle K,
10 Mitsubishi, and Burger King. All of these engagements were
11 procured by respondent. Respondent was paid commissions for
12 all of these engagements.

13 6. On May 14, 2001 petitioner performed a voice over on
14 a radio spot for Planned Parenthood. Even though petitioner
15 was then represented by ICM, the engagement was procured
16 solely by the respondent, without any sort of involvement by
17 ICM. The production company that produced the radio spot paid
18 \$460 to respondent for petitioner's voice over performance.
19 Respondent retained \$60 as her commission, and transmitted the
20 \$400 balance to petitioner.

21 7. On or about November 29, 2001, respondent filed a
22 small claims action against petitioner for payment of
23 allegedly due "management commissions" in the sum of \$2,000.

24 8. By letter dated December 7, 2001, Steve Holguin, an
25 attorney acting on behalf of the petitioner, advised
26 respondent that because she procured employment for the
27 petitioner without having been licensed as a talent agent by
28 the State Labor Commissioner, the "personal management

1 agreement" is unenforceable and void from its inception. By
2 this letter, petitioner demanded reimbursement of all
3 commissions paid to respondent under this agreement, that
4 respondent cease and desist from any further attempts to
5 secure commissions from petitioner, and that respondent cease
6 interfering with petitioner's career and with his relationship
7 with his licensed talent agent.

8 9. Despite the letter from petitioner's attorney,
9 respondent proceeded with her small claims action against the
10 petitioner. The small claims court entered a judgment in
11 favor of respondent, from which petitioner filed an appeal. A
12 trial de novo took place before Los Angeles County Superior
13 Court Judge Lisa Hart Cole, with both parties appearing in pro
14 per. Following the trial de novo, on March 27, 2002, the
15 superior court entered a judgment in favor of respondent, in
16 the amount of \$1,878.67. The next day, petitioner mailed a
17 check to the respondent for the full amount of this judgment.

18 10. On January 31, 2002, during the pendency of the
19 small claims proceeding, petitioner filed this petition to
20 determine controversy with the Labor Commissioner, seeking a
21 determination that the "personal management agreement" is
22 unenforceable and void from its inception, with reimbursement
23 for all amounts paid to the respondent pursuant to this
24 agreement, and payment of petitioner's attorney's fees
25 incurred in this proceeding. Despite the filing of this
26 petition to determine controversy, and despite having asserted
27 the Talent Agencies Act as a defense to the small claims
28 action, neither the small claims court nor the superior court

1 stayed their judicial proceedings to first allow the Labor
2 Commissioner to resolve the petition to determine controversy.
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4
5 LEGAL ANALYSIS

6 Petitioner is an artist within the meaning of Labor Code
7 section 1700.4(b). Labor Code section 1700.4(a) defines
8 "talent agency" as "a person or corporation who engages in the
9 occupation of procuring, offering, promising, or attempting to
10 procure employment or engagements for an artist or artists."
11 Labor Code §1700.5 provides that "[n]o person shall engage in
12 or carry on the occupation of a talent agency without first
13 procuring a license . . . from the Labor Commissioner." The
14 Talent Agencies Act is a remedial statute; its purpose is to
15 protect artists seeking professional employment from the
16 abuses of talent agencies. For that reason, "even the
17 incidental or occasional provision of such [procurement]
18 services requires licensure." *Styne v. Stevens* (2001) 26
19 Cal.4th 42, 51. Here, the procurement activities began
20 virtually at the start of the parties' contractual
21 relationship, and these procurement activities were ongoing
22 and pervasive. By attempting to procure and by procuring
23 employment as a voice over artist for petitioner, Respondent
24 acted as a "talent agency" within the meaning of Labor Code
25 §1700.4(a), and by doing so without having obtained a talent
26 agency license from the Labor Commissioner, respondent
27 violated Labor Code §1700.5.

28 An agreement that violates the licensing requirement of

1 the Talent Agencies Act is illegal and unenforceable. "Since
2 the clear object of the Act is to prevent improper persons
3 from becoming [talent agents] and to regulate such activity
4 for the protection of the public, a contract between an
5 unlicensed [agent] and an artist is void." *Buchwald v.*
6 *Superior Court* (1967) 254 Cal.App.2d 347, 351. Having
7 determined that a person or business entity procured, promised
8 or attempted to procure employment for an artist without the
9 requisite talent agency license, "the [Labor] Commissioner may
10 declare the contract [between the unlicensed agent and the
11 artist] void and unenforceable as involving the services of an
12 unlicensed person in violation of the Act." *Styne v. Stevens,*
13 *supra*, 26 Cal.4th at 55. "[A]n agreement that violates the
14 licensing requirement is illegal and unenforceable"
15 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th
16 246, 262. Moreover, the artist that is party to such an
17 agreement may seek disgorgement of amounts paid pursuant to
18 the agreement, and "may . . . [be] entitle[d] . . . to
19 restitution of all fees paid the agent." *Wachs v. Curry*
20 (1993) 13 Cal.App.4th 616, 626. This remedy of restitution
21 is, of course, subject to the one year limitations period set
22 out at Labor Code §1700.44(c), so that the Labor Commissioner
23 will not, absent extraordinary circumstances, order the
24 reimbursement of amounts paid to an unlicensed agent prior to
25 one year before the filing of the petition to determine
26 controversy.

27 The primary legal question presented herein is whether
28 the Labor Commissioner has the authority to reimburse

1 petitioner for the amount that petitioner was required to pay
2 to the respondent pursuant to the superior court's judgment
3 after trial de novo on appeal from the small claims court on
4 respondent's claim that petitioner owed this amount under the
5 "personal management agreement." The question that we must
6 address is whether the court judgment can now be attacked
7 through this proceeding before the Labor Commissioner.

8 Our analysis begins with the observation that the Labor
9 Commissioner has exclusive primary jurisdiction to determine
10 all controversies arising under the Talent Agencies Act. The
11 Act specifies that "[i]n cases of controversy arising under
12 this chapter, the parties involved shall refer the matters in
13 dispute to the Labor Commissioner, who shall hear and
14 determine the same, subject to an appeal . . . to the superior
15 court where the same shall be heard de novo.' (Labor Code
16 §1700.44(a).) Courts cannot encroach upon the Labor
17 Commissioner's exclusive original jurisdiction to hear matters
18 (including defenses) arising under the Talent Agencies Act.

19 "The Commissioner has the authority to hear and determine
20 various disputes, *including the validity of artists' manager-*
21 *artist contracts and the liability of parties thereunder.*
22 ([*Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,*
23 *357.*) The reference of disputes involving the [A]ct to the
24 Commissioner is *mandatory.* (*Id.* at p. 358.) Disputes *must* be
25 heard by the Commissioner, and all remedies before the
26 Commissioner *must* be exhausted before the parties can proceed
27 to the superior court. (*Ibid.*)" (*REO Broadcasting Consultants*
28 *v. Martin* (1999) 69 Cal.App.4th 489, 494-495, italics in

1 original.)

2 Therefore, “[w]hen the Talent Agencies Act is invoked in
3 the course of a contract dispute, the Commissioner has
4 exclusive jurisdiction to determine his jurisdiction in the
5 matter, including whether the contract involved the services
6 of a talent agency.” *Styne v. Stevens, supra*, 26 Cal.4th 42,
7 54. This means the Commissioner, not the court, has “the
8 exclusive right to decide in the first instance *all the legal*
9 *and factual issues on which an Act-based defense depends.*”
10 *Ibid.* at fn. 6, italics in original. Here, the court’s
11 failure to defer to the Labor Commissioner’s jurisdiction
12 compels the conclusion that the court acted in excess of its
13 own jurisdiction. “Our conclusion that section 1700.44, by
14 its terms, gives the Commissioner exclusive original
15 jurisdiction over controversies arising under the Talent
16 Agencies Act comports with, and applies, the general doctrine
17 of exhaustion of administrative remedies. With limited
18 exceptions, the cases state that where an adequate
19 administrative remedy is provided by statute, resort to that
20 forum is a “jurisdictional” prerequisite to judicial
21 consideration of the claim.” *Ibid.* at 56. Even when the
22 Talent Agencies Act is only being raised as a defense to an
23 action for commissions purportedly due under a “personal
24 management contract”, there is no concurrent original
25 jurisdiction: “[T]he plain meaning of section 1700.44,
26 subdivision (a), and the relevant case law, negate any
27 inference that courts share original jurisdiction with the
28 Commissioner in controversies arising under the Act. On the

1 contrary, the Commissioner's original jurisdiction of such
2 matters is exclusive." *Ibid.* at 58.

3 Here we are confronted by a final judgment of the
4 superior court -- albeit a judgment that the superior court
5 issued without having subject matter jurisdiction. After a
6 final judgment has been rendered in an action, a new action or
7 proceeding based on the same cause of action or defense,
8 ignoring the normal effect of judgment as a merger or bar, is
9 a collateral attack. *Woulridge v. Burns* (1968) 265 Cal.App.2d
10 82, 84. This petition to determine controversy constitutes a
11 collateral attack on the superior court judgment. In a
12 collateral attack, a judgment may be effectively challenged
13 only if it is so completely invalid as to require no ordinary
14 review to annul it. *Ibid.* The grounds for collateral attack
15 include lack of subject matter jurisdiction. Witkin, 8 *Cal.*
16 *Proc.* (4th), *Attack on Judgment in Trial Court*, §6.

17 When a collateral attack is made against a California
18 judgment, including a judgment issued by a court of limited or
19 special jurisdiction (such as small claims court or a superior
20 court hearing an appeal de novo of a small claims judgment),
21 there is a presumption of that the court acted in the lawful
22 exercise of its jurisdiction, and the judgment is presumed
23 valid. Evidence Code §666. In a collateral attack made
24 against a California judgment, jurisdiction is *conclusive* if
25 the jurisdictional defect does not appear on the face of the
26 record. *Superior Motels v. Rinn Motor Hotels* (1987) 195
27 Cal.App.3d 1032, 1049. Extrinsic evidence is inadmissible
28 even though it might show that jurisdiction did not in fact

1 exist. *Hogan v. Superior Court* (1925) 74 Cal.App. 704, 708.
2 A judgment "void on its face" may be collaterally attacked
3 when the defect may be shown without going outside the record
4 or judgment roll. *Becker v. S.P.V. Const. Co.* (1980) 27
5 Cal.3d 489, 493. Here, as we are dealing with a judgment
6 stemming from a de novo appeal of a small claims judgment, the
7 record does not appear to reveal any jurisdictional defect.
8 Nonetheless, there are exceptions to the rule that collateral
9 attack against a California judgment will fail unless the
10 judgment is void on its face. Of significance here, a party
11 relying on a judgment may waive the benefit of this rule
12 excluding extrinsic evidence by failure to object to the
13 extrinsic evidence when offered. See Witkin, 8 *Cal. Proc.*
14 (4th), *Attack on Judgment in Trial Court*, §13, and various
15 cases cited therein.

16 In the hearing of this controversy, the petitioner
17 presented extrinsic evidence to which no objection was raised
18 that the respondent had engaged in unlawful procurement
19 activities in violation of the Talent Agency Act, so as to
20 constitute a defense to respondent's small claims action for
21 payment of commissions owed under the personal management
22 agreement. This evidence establishes that the small claims
23 court and the superior court that entered the judgment
24 following the de novo trial on the appeal from the small
25 claims judgment lacked subject matter jurisdiction, and
26 therefore, that the superior court judgment is void.

27
28 Having found that this proceeding to determine

1 controversy under the Talent Agencies Act is not barred by the
2 judgment of the superior court following the de novo appeal of
3 respondent's small claims action against the petitioner, and
4 having found that respondent engaged in unlawful procurement
5 activities, we necessarily conclude that the personal
6 management contract was unlawful and void from its inception,
7 and that respondent has no enforceable rights thereunder. We
8 find that in order to effectuate the purposes of the Act, the
9 petitioner must be reimbursed for all amounts paid to
10 respondent pursuant to this contract from one year prior to
11 the date of the filing of this petition to the present. The
12 amounts that must therefore be reimbursed include the \$60 paid
13 as commissions for the Planned Parenthood radio spot on May
14 14, 2001, plus the \$1,878.67 paid as commissions on March 28,
15 2002 pursuant to the judgment in the de novo appeal following
16 the small claims proceeding, for a total of \$1,938.67.

17 Turning to petitioner's request for attorneys' fees
18 incurred in connection with this proceeding, the contract
19 between the parties did provide for an award of reasonable
20 attorney's fees to the prevailing party "in the event of
21 litigation or arbitration arising out of this agreement or the
22 relationship of the parties created hereby." But an
23 administrative proceeding before the Labor Commissioner
24 pursuant to Labor Code §1700.44 neither constitutes
25 "litigation" nor "arbitration". Litigation is commonly
26 understood as "the act or process of carrying out a lawsuit."
27 (Webster's New World Dictionary, Third College Edition (1988))
28 Lawsuits take place in courts, not before administrative

1 agencies. Black's Law Dictionary defines "litigation" as a
2 "contest in a court of justice for the purpose of enforcing a
3 right." And an "arbitration", obviously, takes place before
4 an arbitrator, not an administrative agency authorized to hear
5 disputes pursuant to statute. Consequently, we conclude that
6 the contract does not provide for an award of attorneys' fees
7 incurred in a proceeding to determine controversy before the
8 Labor Commissioner. Therefore, even though the petitioner
9 prevailed before the Labor Commissioner, he is not entitled to
10 attorneys' fees in this proceeding.

11 We take this opportunity, however, to caution the
12 respondent that failure to pay the full amount awarded herein
13 to the petitioner within ten days of the date of service of
14 this determination may result in liability for petitioner's
15 attorneys fees in any subsequent judicial proceedings. Such
16 subsequent proceedings could either be initiated by the
17 respondent through the filing of a de novo appeal from this
18 determination, pursuant to Labor Code §1700.44(a), or by the
19 petitioner through the filing of a petition to confirm the
20 determination and enter judgment thereon. See *Buchwald v.*
21 *Katz* (1972) 8 Cal.3d 493.

22 Of course, the respondent can prevent any subsequent judicial
23 proceedings by expeditiously paying the petitioner the full
24 amount found due herein.

25 ORDER

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

- 28 1. The personal management contract between petitioner

1 and respondent is illegal and void from its inception, and
2 respondent has no enforceable rights thereunder;

3 2. The judgment that was entered by the superior court
4 following the de novo appeal of the small claims judgment on
5 respondent's claim for unpaid commissions is void for lack of
6 subject matter jurisdiction;

7 3. Respondent reimburse petitioner for the commissions
8 paid to respondent from January 31, 2001 to the present,
9 consisting of \$60 paid as commissions for the Planned
10 Parenthood radio spot on May 14, 2001, plus \$1,878.67 paid as
11 commissions on March 28, 2002 pursuant to the judgment in the
12 de novo appeal following the small claims proceeding, for a
13 total of \$1,938.67;

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15 //

16 4. All parties shall bear their own costs and
17 attorney's fees incurred in this proceeding.

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19

20 Dated:

MILES E. LOCKER
Attorney for the Labor Commissioner

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23 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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25 Dated:

ARTHUR S. LUJAN
State Labor Commissioner

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