

1 Miles E. Locker, CSB #103510
2 DIVISION OF LABOR STANDARDS ENFORCEMENT
3 Department of Industrial Relations
4 State of California
5 455 Golden Gate Avenue, 9th Floor
6 San Francisco, California 94102
7 Telephone: (415) 703-4863
8 Fax: (415) 703-4806
9 Attorney for State Labor Commissioner

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

FANNY GAMBLE, as guardian ad litem for)	No. TAC 40-03
MICHELLE GAMBLE, a minor,)	
)	
Petitioner,)	
)	
vs.)	
)	
SOMA MANAGEMENT, LLC,)	DETERMINATION OF
)	CONTROVERSY
Respondent.)	
<hr/>)	

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on April 1, 2004, in San Francisco, California, before
21 the Labor Commissioner's undersigned hearing officer. Petitioner
22 appeared in propria persona; Kim Chew appeared on behalf of the
23 Respondent. Based on the evidence presented at this hearing and
24 on the other papers on file in this matter, the Labor Commissioner
25 hereby adopts the following decision.

26 FINDINGS OF FACT

27 1. SOMA MANAGEMENT, LLC (hereinafter "SOMA") has been
28 licensed as a talent agency by the State Labor Commissioner,

1 pursuant to Labor Code section 1700.5, at all times relevant
2 herein.

3 2. In 2002, Fanny Gamble brought her daughter, Michelle
4 Gamble (hereinafter "Petitioner") to SOMA's office to discuss
5 whether SOMA could obtain modeling work for Michelle. Karen
6 Walterscheid, SOMA's director, advised Ms. Gamble that in order
7 to get modeling work, it would be necessary to schedule a photo
8 shoot and print composites that could be shown to potential
9 clients. Fanny Gamble informed Walterscheid that she did not
10 have the funds to pay for the photo shoot and prints. Ms. Gamble
11 testified that Karen Walterscheid told her that she would not
12 have to pay for the photo shoot, and that she would only need to
13 pay \$180 for the composite prints. SOMA disputes that, and
14 asserts that Ms. Gamble was told that although SOMA would advance
15 the funds for the photo shoot, and pay part of the total needed
16 to print the composites, once Petitioner obtained modeling work
17 she would have to reimburse SOMA for these advanced funds. As
18 discussed below, it is unnecessary to resolve this particular
19 factual dispute, as all other relevant fact are not in dispute,
20 and we would make the same determination that we reach below
21 without regard to whether Petitioner was told that she would have
22 to reimburse SOMA for these funds.

23 3. EC Morgan, SOMA's president and CEO, took the
24 photographs of Michelle Gamble that were later printed as
25 composites. The photo shoot took place at SOMA's studio. The
26 photos were printed by a separate photo printing business that is
27 not related to SOMA, and Fanny Gamble paid \$180 directly to this
28 separate business.

1 4. Almost nine months later, in January 2003, Karen
2 Walterscheid telephoned Fanny Gamble to inform her that SOMA
3 obtained a modeling job for Michelle, and that it would pay
4 \$2,500 less SOMA's 20% commission. Ms. Gamble agreed to have
5 Michelle take this job, and John Gamble, Petitioner's father,
6 signed a written contract with SOMA on Petitioner's behalf, for a
7 term of nine days, making SOMA the Petitioner's sole and
8 exclusive agent in the fields of modeling and entertainment. The
9 contract, signed on January 15, 2003, entitles SOMA to
10 commissions in the amount of 20% of petitioner's gross modeling
11 earnings during the period from January 15 to January 24, 2003.
12 The contract also provides that petitioner shall "reimburse
13 [SOMA] for all out-of-pocket expenses which you incur from time
14 to time on [petitioner's] behalf." Finally, the contract
15 provides that "all income may be paid directly to [SOMA], and
16 [SOMA] agree[s] to promptly pay the balance of such income to
17 [petitioner] after deducting [the] commission and any out-of-
18 pocket expenses which [SOMA] incur[s] on [petitioner's] behalf."
19 The form of the contract, that is, its general substantive
20 provisions, had been approved by the Labor Commissioner as part
21 of the talent agency licensing process.

22 5. On or about January 20, 2003, Petitioner performed print
23 modeling services for Sonic Solutions, on the job that had been
24 obtained by SOMA. Based on Karen Walterscheid's representation
25 that \$2,500 would be charged for this job, Fanny Gamble expected
26 that SOMA would deduct \$500 for their commission, and that
27 Michelle would receive \$2,000. Sonic Solutions was billed by
28 SOMA in the amount of \$2,500. By check dated March 4, 2003,

1 Sonic Solutions paid \$2,500 to SOMA for petitioner's modeling
2 services.

3 6. In April 2003, SOMA mailed a check to the petitioner for
4 her modeling services for Sonic Solutions. The check, dated
5 March 15, 2003, was written in the amount of \$277. It came with
6 a cover letter that explained the basis for the deductions from
7 the amount that petitioner was expecting to receive for her
8 services. The cover letter failed to state that SOMA billed
9 Sonic Solutions at the rate of \$2,500. Rather, according to this
10 cover letter, the rate was \$2,000, from which SOMA deducted its
11 20% commission, resulting in \$1,600 earned by the petitioner.
12 From this amount, according to the cover letter, SOMA deducted
13 \$1,323 for "advanced charges," consisting of \$750 for the photo
14 shoot, \$150 for the photo shop, \$300 for web hosting, and \$123
15 for mailing and messenger fees, leaving petitioner with the net
16 payment of \$277.

17 7. Fanny Gamble sent a letter to SOMA, dated May 14, 2003,
18 demanding payment of \$1,723, the difference between the \$2,000 of
19 net modeling earnings that Michelle was supposed to have received
20 (based on gross earnings of \$2,500 less SOMA's 20% commission),
21 and the amount of the check that had been sent. According to
22 this letter, and according to Ms. Gamble's testimony at this
23 hearing, Ms. Gamble did not authorize any of the deductions that
24 were made from petitioner's earnings, except for SOMA's 20%
25 commission. According to a letter from Karen Walterscheid to
26 Fanny Gamble, dated May 23, 2003, SOMA "advanced all charges for
27 the photos, web hosting and marketing cost. . . . I made it very
28 clear to you that if Michelle worked all charges are paid back to

1 the agency first." By letter to Karen Walterscheid, dated May
2 24, 2003, Fanny Gamble disputed the existence of any agreement to
3 re-pay any of the so-called advanced charges: "You didn't mention
4 anything about me paying anything."

5 8. SOMA did not pay any additional money to petitioner.
6 The next communication between the parties took place on July 25,
7 2003, following petitioner's unsuccessful attempt to deposit the
8 \$277 check that SOMA had sent to petitioner more than three
9 months earlier. The check was returned to petitioner by her bank
10 without payment, due to insufficient funds in SOMA's account. In
11 a letter to SOMA, John Gamble demanded payment. Shortly
12 thereafter, SOMA issued a new, negotiable check for \$277.

13 9. Ms. Gamble filed this petition to determine controversy
14 with the Labor Commissioner on November 7, 2003, seeking payment
15 of the amounts that had been deducted by SOMA from petitioner's
16 gross modeling earnings (except for amounts deducted for payment
17 of SOMA's 20% commission). Around the same time, Ms. Gamble
18 also filed a small claims court complaint against SOMA,
19 concerning the same dispute and seeking the same remedy. There
20 was a hearing in small claims court, and on January 21, 2004, the
21 small claims court issued a judgment in favor of SOMA, awarding
22 nothing to Ms. Gamble. (*Gamble v. SOMA Management, LLC*, Marin
23 County Small Claims Court, Case No. 0311563.) At the outset of
24 the Labor Commissioner hearing, SOMA's representative, Kim Chew,
25 moved for dismissal of the petition to determine controversy on
26 the ground that the dispute had already been heard, and resolved
27 in SOMA's favor, by the Marin County Superior Court.

28 //

1 ([*Buchwald v. Superior Court, supra, 254 Cal.App.2d 347,*] 357.)
2 The reference of disputes involving the [A]ct to the Commissioner
3 is *mandatory*. (*Id.* at p. 358.) Disputes *must* be heard by the
4 Commissioner, and all remedies before the Commissioner *must* be
5 exhausted before the parties can proceed to the superior court.
6 (*Ibid.*)" (*REO Broadcasting Consultants v. Martin* (1999) 69
7 Cal.App.4th 489, 494-495, italics in original.)

8 Therefore, the Labor Commissioner, not the court, has "the
9 exclusive right to decide in the first instance all the *legal and*
10 *factual issues*" that arise in connection with a claim or defense
11 based upon the Talent Agencies Act. *Styne v. Stevens* (2001) 26
12 Cal.4th 42, 56, fn. 6. There is no concurrent original
13 jurisdiction: "[T]he plain meaning of section 1700.44,
14 subdivision (a), and the relevant case law, negate any inference
15 that courts share original jurisdiction with the Commissioner in
16 controversies arising under the Act. On the contrary, the
17 Commissioner's original jurisdiction of such matters is
18 exclusive." *Styne v. Stevens, supra* at 58. Here, as in the two
19 *Bonilla* cases, the small claims court acted in excess of its
20 jurisdiction by hearing and deciding a matter over which the
21 Labor Commissioner has exclusive primary jurisdiction.

22 Here, as in the *Bonilla* cases, we are confronted by a final
23 judgment that was issued by a court that lacked subject matter
24 jurisdiction. For the same reasons that were extensively set
25 forth in the *Bonilla* cases, we conclude that this small claims
26 judgment was properly subject to collateral attack based on the
27 small claims court's lack of subject matter jurisdiction.

28 *Witkin, 8 Cal. Proc. (4th), Attack on Judgment in Trial Court,*

1 §6. A judgment "void on its face" may be collaterally attacked
2 when the defect may be shown without going outside the record or
3 judgment roll. *Becker v. S.P.V. Const. Co.* (1980) 27 Cal.3d 489,
4 493. Alternatively, a judgment that is not void on its face may
5 be collaterally attacked through extrinsic evidence as to which
6 no objection was made when the evidence is offered. See Witkin,
7 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §13. Thus,
8 whether we view the small claims judgment as void on its face, or
9 we consider the extrinsic evidence as to which no objection was
10 made showing that the dispute heard and decided by the small
11 claims court was the exact same dispute as that presented to the
12 Labor Commissioner through this petition to determine
13 controversy, we are compelled to conclude that the small claims
14 court judgment was void, as it was issued by a court that lacked
15 subject matter jurisdiction, and that this void judgment is
16 subject to collateral attack raised by this proceeding before
17 Labor Commissioner.

18 Having found that this proceeding to determine controversy
19 under the Talent Agencies Act is not barred by the judgment on
20 the small claims proceeding, we now turn to the merits of the
21 dispute. Labor Code section 1700.40(a) provides, in relevant
22 part: "No talent agency shall collect a registration fee." The
23 term "registration fee" is defined for purposes of the Talent
24 Agencies Act at Labor Code section 1700.02(b) to include, any
25 charge made, or attempted to be made, to an artist for
26 registering or listing an applicant for employment in the
27 entertainment industry, letter writing, photographs, film strips,
28 video tapes, or other reproductions of the applicant, or any

1 activity of a like nature. The amounts that SOMA charged
2 petitioner for the photo shoot (\$750), the photo shop (\$150), web
3 hosting (\$300), and mailing and messenger fees (\$123), all fall
4 within this definition of "registration fees," and thus, are all
5 prohibited by Labor Code section 1700.40(a).

6 Thus, even assuming, for the sake of argument, that SOMA had
7 informed petitioner of these fees and petitioner had agreed to
8 them, any such agreement would be unenforceable and void as
9 contrary to the express provisions of the Talent Agencies Act¹.

10 SOMA misplaces its reliance on language in its Labor
11 Commissioner approved talent agency agreement that requires an
12 artist to "reimburse [SOMA] for all out-of-pocket expenses"
13 incurred on the artist's behalf, and which allows SOMA to retain,
14 from income received from a client on behalf of an artist, "any
15 out-of-pocket expenses" which SOMA incurred on the artist's
16 behalf. Under the Labor Code, there are certain types of
17 expenses, that fall under the category of "registration fees,"
18 which an agency can never collect or attempt to collect from an
19 artist. SOMA's talent agency agreement must therefore be read to
20 allow SOMA to collect all out-of-pocket expenses incurred on the
21

22
23 ¹The statute goes beyond prohibiting the collection of any
24 "registration fee." Labor Code §1700.40(b) makes it unlawful for
25 a talent agency to refer an artist to any person, firm or
26 corporation in which the talent agency had a direct or indirect
27 financial interest for other services to be rendered to the
28 artist, including photography, audition tapes, demonstration
reels or similar materials, business management, personal
management, coaching, acting classes, casting or talent
brochures, agency-client directories, or other printing. Labor
Code §1700.40(c) prohibits a talent agency from collecting
referral fees from any person, firm or corporation providing any
of these sorts of services to an artist under contract with the
talent agency.

1 artist's behalf except for those as to which it is unlawful,
2 under the Labor Code, for an agency to collect or attempt to
3 collect from an artist. In other words, the talent agency
4 agreement cannot be construed to override the statutory
5 prohibition against collecting any "registration fee."

6 We therefore conclude that petitioner is entitled to payment
7 of the \$1,723, the amount that SOMA has unlawfully retained from
8 the \$2,500 that it received from Sonic Solutions. SOMA was
9 entitled to retain no more than its 20% commission, leaving
10 petitioner with net earnings of \$2,000. Crediting SOMA with its
11 belated payment of \$277, the amount of \$1,723 remains due and
12 owing to the petitioner.

13 Labor Code section 1700.25 provides that a licensed talent
14 agency that receives any payment of funds on behalf of an artist
15 shall immediately deposit that amount in a trust fund account
16 maintained by him or her in a bank, and shall disburse those
17 funds, less the agent's commission, to the artist within 30 days
18 after receipt. Section 1700.25 further provides that if, in a
19 hearing before the Labor Commissioner on a petition to determine
20 controversy, the Commissioner finds that the talent agency
21 willfully failed to disburse these amounts within the required
22 time, the Commissioner may award interest on the wrongfully
23 withheld funds at the rate of 10% per annum, and reasonable
24 attorney's fees (if the artist is represented by an attorney).

25 The term "willful" means that a person has a legal duty to
26 perform an act and intentionally fails to perform that act;
27 evidence of bad faith or intent to defraud is not a prerequisite,
28 and ignorance of the legal duty is not a defense. *Hale v. Morgan*

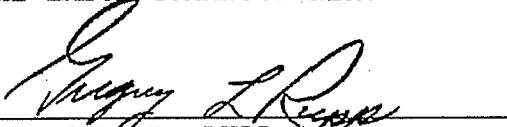
1 (1978) 22 Cal.3d 388, *Davis v. Morris* (1940) 37 Cal.App.2d 269.
2 Under this standard, we conclude that SOMA's failure to pay
3 petitioner the full \$2,000 owed (consisting of petitioner's gross
4 earnings of \$2,500 less the allowable 20% commission) by April 3,
5 2003 (that is, within thirty days of Sonic Solutions' payment of
6 \$2,500 to SOMA on March 4, 2003) was "willful" within the meaning
7 of Labor Code section 1700.25, and that petitioner is therefore
8 entitled to interest at the rate of 10% per annum on the
9 unlawfully retained amounts from the date payment was due.

10 ORDER

11 For the reasons set forth above, IT IS HEREBY ORDERED that
12 Respondent SOMA MANAGEMENT, LLC, shall pay petitioner FANNY
13 GAMBLE, as guardian ad litem for MICHELLE GAMBLE, a minor, a
14 total of \$ 1,897.66, consisting of the following:

- 15 1. \$ 1,723.00 for unlawfully withheld earnings;
16 2. \$ 174.66 for interest on the unlawfully withheld
17 earnings, as of the date of this decision, with interest accruing
18 at the rate of 47 cents per day until paid.

19
20
21 Dated: 4/8/04 
22 MILES E. LOCKER
23 Attorney for the Labor Commissioner

24 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
25
26 Dated: 
27 4-9-4 GREGORY L. RUPP
28 Acting Deputy Chief Labor Commissioner

