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7  
8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10  
11 ANGEL S. MASSEY, as guardian ad litem ) No. TAC 42-03  
for KYLE ORLANDO MASSEY, a minor, )  
12 )  
Petitioner, )  
13 ) DETERMINATION OF  
vs. ) CONTROVERSY  
14 )  
JUDY LANDIS, an individual dba )  
15 JUDY LANDIS PERSONAL MANAAGEMENT, )  
16 )  
Respondent. )

17  
18 The above-captioned matter, a petition to determine  
19 controversy under Labor Code §1700.44, came on regularly for  
20 hearing on May 3, 2004, in San Francisco, California, before the  
21 undersigned attorney for the Labor Commissioner, assigned to hear  
22 the matter. Petitioner appeared and was represented by Stephen  
23 G. Weizenecker, and Respondent appeared and was represented by  
24 attorney Martin Singer. Based on the evidence presented at this  
25 hearing and on the other papers on file in this mater, the Labor  
26 Commissioner hereby adopts the following decision.

27 FINDINGS OF FACT

28 1. ANGEL S. MASSEY is the mother and guardian ad litem of

1 petitioner KYLE ORLANDO MASSEY, a minor. KYLE MASSEY is an  
2 actor, and is a regular character on a Disney television series,  
3 "That's So Raven" (originally titled "Absolutely Psychic").

4 2. Respondent JUDY LANDIS owns a business based in Westlake  
5 Village, California, under the name JUDY LANDIS PERSONAL  
6 MANAGEMENT, providing personal management services for child  
7 actors. At all relevant times herein, Landis has not been  
8 licensed as a talent agency by the California Labor Commissioner.

9 3. The Masseys are residents of the State of Georgia. In  
10 late 2000, Kyle Massey participated in an acting workshop in Los  
11 Angeles, California. In November 2000, Angel Massey contacted  
12 Cindy Osbrink, a talent agent in Los Angeles, asking if Osbrink  
13 would represent Kyle and help him find acting work. Osbrink  
14 agreed to provide services as Kyle's talent agent, and  
15 immediately started sending him out on auditions. On February 1,  
16 2001, Massey signed an agreement authorizing Osbrink to provide  
17 services as Kyle's talent agent, for which Massey agreed to pay  
18 commissions to Osbrink equal to 10% of Kyle's entertainment  
19 earnings.

20 4. Within a few days of signing this agreement with  
21 Osbrink, Angel Massey had a discussion with Judy Landis, seeking  
22 to obtain Landis' services as a personal manager. Landis advised  
23 Massey to replace Osbrink with a different talent agency, the  
24 Acme Talent and Literary Agency. Landis arranged for a meeting  
25 between MASSEY and Steve Simon, an agent for Acme.

26 5. On February 6, 2001, Massey signed an agreement with  
27 Acme Talent and Literary Agency, designating Acme as Kyle's  
28 talent agency. On February 7, 2001, Massey signed a letter that

1 had been prepared by Massey's attorney, Gina Henschen,  
2 terminating the February 6, 2001 agreement with Acme.

3         6. On February 12, 2001, Massey and Landis entered into a  
4 written "Artists Manager's Agreement" [sic], for a term of two  
5 years, under which Landis agreed to provide Kyle with "advice and  
6 counsel on all matters concerning [his] career in the  
7 Entertainment Industry," and to "[r]epresent [Kyle] for all  
8 phases of work in the Entertainment Industry." For these  
9 services, Massey agreed to pay commissions to Landis equal to 15%  
10 of all gross amounts received by Kyle for his work in the  
11 entertainment industry resulting from any offers of employment  
12 made during the term of the agreement, including amounts received  
13 after the agreement has expired. Paragraph 9 of the Agreement  
14 stated that Landis "IS NOT a talent agent and is not expected to  
15 perform any of the duties of a talent agent," and "is not  
16 expected to solicit, procure or negotiate employment for the  
17 Artist." Nonetheless, the Agreement suggests that with Massey's  
18 consent, Landis could enter into deals with third parties seeking  
19 to procure Massey's artistic services. This inference can be  
20 drawn from Paragraph 7, which states that Landis "will make no  
21 binding engagements on Artist's behalf without Artist's consent."

22         7. Massey never sent any sort of written termination notice  
23 to Osbrink. However, sometime late February 2001, Angel Massey  
24 telephoned Osbrink and advised her that she was terminating her  
25 services as a talent agent. About three weeks later, in mid-  
26 March, Massey reconciled with Osbrink, and from that point on,  
27 continued using Osbrink's services as a talent agent.

28         8. Production companies routinely supply talent agents and

1 personal managers with "sides" (partial drafts of scripts) and  
2 "breakdowns" (summaries of scripts), as a means of securing a  
3 supply of actors for auditions for roles that are highlighted in  
4 these sides and breakdowns. Talent agents and personal managers  
5 review these scripts and breakdowns in order to determine whether  
6 any of the actors they represent would be suitable for an  
7 upcoming audition.

8 9. Sometime in late February or early March 2001, Landis  
9 received a side and breakdown for an episode of a Disney  
10 television show, "Even Stevens." The Disney casting director,  
11 Joey Paul, was seeking to schedule auditions for a character  
12 named "Beans" that would appear on that episode. After reviewing  
13 this material, Landis telephoned Joey Paul, to schedule an  
14 audition for Kyle for this role. As a result of this telephone  
15 call, Kyle auditioned for the role.<sup>1</sup>

16 10. Kyle Massey was not successful in obtaining the role he  
17 had auditioned for in "Even Stevens." Nonetheless, casting  
18 director Joey Paul, was very impressed with the ability  
19 demonstrated by Kyle at this audition, and a week or two later,  
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21 <sup>1</sup> We credit Angel Massey's testimony that Landis telephoned  
22 Joey Paul to get this audition, and we discredit Landis testimony  
23 that she "had nothing to do with getting this audition" for Kyle.  
24 Furthermore, we credit Osbrink's testimony that she was not  
25 involved in obtaining this audition, and we discredit Joey Paul's  
26 testimony that the audition resulted from a submission by  
27 Osbrink, and not through the efforts of Landis. In resolving  
28 this utterly conflicting testimony, we rely on documentary  
evidence - Petitioner's Exhibit B - the copy of the breakdown and  
script for "Even Stevens." The top of each page of the breakdown  
and script bears the facsimile imprint of the date "03/06/01,"  
and the name "Judy Landis Mgmt" and the telephone number for  
Landis' business. This date coincides with the period of time  
between Massey's termination of Osbrink's services as Kyle's  
talent agent, and Massey's subsequent reconciliation with Osbrink  
in mid-March 2001.

1 Joey Paul decided to ask Kyle to audition for a part in another  
2 Disney series "That's So Raven." This audition also coincided  
3 with the period of time of the break in the relationship between  
4 Massey and Osbrink. However, there is no evidence that Landis  
5 solicited this audition. Instead, it was Joey Paul who sought  
6 out Kyle for the audition, and it was Joey Paul who asked Landis  
7 to tell Massey to come in for the audition. Landis informed  
8 Massey of Joey Paul's interest in setting up an audition, and  
9 then, with Massey's consent, telephoned Joey Paul to schedule the  
10 audition. Following the audition, the Disney production company  
11 decided to offer the role to Kyle Massey. By this point, Massey  
12 had reconciled with Osbrink, so Disney's production company  
13 contacted Osbrink to negotiate the deal on behalf of Massey.  
14 Landis did not play any role in negotiating the terms of Massey's  
15 employment as an actor on "That's So Raven."

16 11. During the period of time she was represented by both  
17 Osbrink and Landis, Massey paid commissions to both, as provided  
18 in their respective contracts. There were many occasions during  
19 this period when Landis would see a role in a script or breakdown  
20 which seemed appropriate for Kyle, and she would contact Massey  
21 in order to arrange for Kyle to review the script or breakdown,  
22 to enable Kyle to prepare for an audition. On various occasions,  
23 Landis would "set up" auditions for Kyle by submitting his name  
24 to the production company and arranging to have him appear for  
25 the audition. On these occasions, Landis would then call Osbrink  
26 to let Osbrink know that she had set up the audition for Massey.  
27 Although Osbrink never gave Landis permission to speak to casting  
28 directors on Massey's behalf, Osbrink never demanded that Landis

1 discontinue this practice, as Osbrink believed this is a  
2 "standard practice in Hollywood," and of course, Osbrink would  
3 stand to benefit from any engagements procured through these  
4 auditions, as commissions on Massey's entertainment earnings  
5 would flow to both Landis and Osbrink. During the hearing,  
6 Osbrink testified that "I was working in conjunction with  
7 Landis," and that "I had no objection to working with Landis."  
8 Based on documentary evidence presented at the hearing, we  
9 conclude that from March 2001 to February 2002, there were at  
10 least ten occasions in which Landis called production companies  
11 and either set up or attempted to set up auditions for Kyle for  
12 roles highlighted in scripts or breakdowns that Landis had  
13 previously obtained from these production companies.

14 12. On February 5, 2003, Massey sent a letter to Landis  
15 terminating the "management contract." Prior to that, pursuant  
16 to this contract, Massey had paid a total of approximately  
17 \$20,000 in commissions to Landis, mostly stemming from Kyle's  
18 earnings for appearing in 21 episodes of "That's So Raven."

19 13. On June 23, 2003, Landis filed a demand for arbitration  
20 against Massey for allegedly unpaid commissions pursuant to a  
21 paragraph in the management agreement that allows for binding  
22 arbitration of disputes as to payment under the agreement. On  
23 November 10, 2003, Massey filed the instant petition to determine  
24 controversy, seeking a determination that the management  
25 agreement is illegal and void from its inception as a result of  
26 Landis' having acted as a "talent agency," within the meaning of  
27 Labor Code §1700.4(a), without a license, and that Landis  
28 therefore has no enforceable rights under this agreement. Massey

1 does not seek reimbursement of any commissions previously paid to  
2 Landis. However, Massey seeks attorney's fees pursuant to the  
3 agreement, which provides, at Paragraph 10, that if any party to  
4 this agreement "initiates regulatory action, arbitration or  
5 litigation to enforce its provisions, the prevailing party shall  
6 be entitled to recover all costs and attorney's fees incurred."

7 LEGAL ANALYSIS

8 1. Petitioner is an "artist" within the meaning of Labor  
9 Code §1700.4(b).

10 2. Labor Code §1700.4(a) defines "talent agency" as "a  
11 person or corporation who engages in the occupation of procuring,  
12 offering, promising, or attempting to procure employment or  
13 engagements for an artist or artists, except that the activities  
14 of procuring, offering or promising to procure recording  
15 contracts for an artist or artists shall not of itself subject a  
16 person or corporation to regulation and licensing under this  
17 chapter." The term "procure," as used in this statute, means "to  
18 get possession of: obtain, acquire, to cause to happen or be  
19 done: bring about." *Wachs v. Curry* (1993) 13 Cal.App.4th 616,  
20 628. Thus, under Labor Code §1700.4(a), "procuring employment"  
21 is not limited to initiating discussions with production  
22 companies regarding employment; rather, "procurement" includes  
23 any active participation in a communication with a potential  
24 purchaser of the artist's services aimed at obtaining employment  
25 for the artist, regardless of who initiated the communication.  
26 *Hall v. X Management* (TAC No. 19-90, pp. 29-31.) To be sure, a  
27 person does not engage in the procurement of employment for an  
28 artist by merely taking a phone call or receiving a fax from a

1 casting director where the casting director provides information  
2 about an acting role, and then advising the artist of the  
3 information that was received from the casting director about the  
4 potential employment, leaving it to the artist (or the artist's  
5 licensed talent agent) to contact the casting director to set up  
6 an audition for the role. But calling and then speaking to a  
7 casting director to set up an audition for a role, or otherwise  
8 contacting a casting director for the purpose of obtaining a role  
9 for an artist, brings us into the realm of "procurement," as that  
10 term is used in Labor Code §1700.4(a).

11 3. Labor Code §1700.5 provides that "[n]o person shall  
12 engage in or carry on the occupation of a talent agency without  
13 first procuring a license . . . from the Labor Commissioner."  
14 The Talent Agencies Act is a remedial statute that must be  
15 liberally construed to promote its general object, the protection  
16 of artists seeking professional employment. *Buchwald v.*  
17 *Superior Court* (1967) 254 Cal.App.2d 347, 354. For that reason,  
18 the overwhelming weight of judicial authority supports the Labor  
19 Commissioner's historic enforcement policy, and holds that "even  
20 the incidental or occasional provision of such [procurement]  
21 services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th  
22 42, 51. "The [Talent Agencies] Act imposes a total prohibition  
23 on the procurement efforts of unlicensed persons," and thus, "the  
24 Act requires a license to engage in any procurement activities."  
25 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th  
26 246, 258-259; see also *Park v. Deftones* (1999) 71 Cal.App.4th  
27 1465 [license required even though procurement activities  
28 constituted a negligible portion of personal manager's efforts on



1 behalf of artist, and manager was not compensated for these  
2 procurement activities].

3 4. An agreement that violates the licensing requirement of  
4 the Talent Agencies Act is illegal and unenforceable. "Since the  
5 clear object of the Act is to prevent improper persons from  
6 becoming [talent agents] and to regulate such activity for the  
7 protection of the public, a contract between an unlicensed  
8 [agent] and an artist is void." *Buchwald v. Superior Court*,  
9 *supra*, 254 Cal.App.2d at 351. Having determined that a person or  
10 business entity procured, promised or attempted to procure  
11 employment for an artist without the requisite talent agency  
12 license, "the [Labor] Commissioner may declare the contract  
13 [between the unlicensed agent and the artist] void and  
14 unenforceable as involving the services of an unlicensed person  
15 in violation of the Act." *Styne v. Stevens, supra*, 26 Cal.4th at  
16 55. "[A]n agreement that violates the licensing requirement is  
17 illegal and unenforceable . . . ." *Waisbren v. Peppercorn*  
18 *Productions, Inc., supra*, 41 Cal.App.4th at 262. Moreover, the  
19 artist that is party to such an agreement may seek disgorgement  
20 of amounts paid pursuant to the agreement, and "may . . . [be]  
21 entitle[d] . . . to restitution of all fees paid the agent."  
22 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. Restitution, as a  
23 species of affirmative relief, is subject to the one-year  
24 limitations period set out at Labor Code §1700.44(c), so that the  
25 artist is only entitled to restitution of amounts paid within the  
26 one-year period prior to the filing of the petition to determine  
27 controversy. *Greenfield v. Superior Court* (2003) 106 Cal.App.4th  
28 743.

1           5. On the other hand, this statute of limitations does not  
2 apply to the defense of contract illegality and unenforceability,  
3 even where this defense is raised by the petitioner in a  
4 proceeding under the Talent Agencies Act. "If the result the  
5 [artist] seeks is [is a determination] that he or she owes no  
6 obligations under an agreement alleged by [the respondent] ...  
7 the statute of limitations does not apply." *Styne v. Stevens*,  
8 *supra*, 26 Cal.4th at 53. The Labor Commissioner has exclusive  
9 primary jurisdiction to determine all controversies arising under  
10 the Talent Agencies Act. "When the Talent Agencies Act is  
11 invoked in the course of a contract dispute, the Commissioner has  
12 exclusive jurisdiction to determine his [or her] jurisdiction in  
13 the matter, including whether the contract involved the services  
14 of a talent agency." *Ibid.* at 54. This means that the Labor  
15 Commissioner has "the exclusive right to decide in the first  
16 instance *all the legal and factual issues on which an Act-based*  
17 *defense depends.*" *Ibid.*, at fn. 6, italics in original. In  
18 doing so, the Labor Commissioner will "search out illegality  
19 lying behind the form in which a transaction has been cast for  
20 the purpose of concealing such illegality," and "will look  
21 through provisions, valid on their face, and with the aid of  
22 parol evidence, determine [whether] the contract is actually  
23 illegal or part of an illegal transaction." *Buchwald v. Superior*  
24 *Court, supra*, 254 Cal.App.2d at 351.

25           6. Applying these legal principles to the facts of this  
26 case, we conclude that despite the fact that Landis never  
27 negotiated an employment contract for Kyle Massey, and despite  
28 the fact that Landis may never have initiated a solicitation for

1 employment without first having received a phone call or fax from  
2 a production company or casting director informing her of an  
3 available role for a child actor, the fact that there were at  
4 least ten occasions in which Landis, after having learned of a  
5 role that would be appropriate for Kyle based upon a script or  
6 side that had been sent to her, then telephoned production  
7 companies or casting directors to inform them that Kyle was  
8 interested in being considered for the role and/or interested in  
9 an audition for the role, means that Landis crossed the line into  
10 the activity of "procuring or attempting to procure employment"  
11 within the meaning of Labor Code §1700.4(a), and thus, engaged in  
12 the occupation of a talent agency without the requisite license.

13 7. Under certain very narrow circumstances set out at Labor  
14 Code §1700.44(d), a person who is not licensed as a talent agency  
15 may engage in limited activities that would otherwise require  
16 licensure. Section 1700.44(d) provides: "It is not unlawful for  
17 a person or corporation which is not licensed pursuant to this  
18 chapter to act in conjunction with, and at the request of a  
19 licensed talent agency in the negotiation of an employment  
20 contract." This exception to the general remedial license  
21 requirement must be read narrowly. The exception must be limited  
22 to the express language of the statute. Thus, the exception will  
23 only apply if the unlicensed person is acting "in conjunction  
24 with **and** at the request of the licensed talent agency," and the  
25 **only** covered activity that such unlicensed person may engage in  
26 consists of "the negotiation of an employment contract." Landis'  
27 efforts in contacting casting directors to set up auditions for  
28 Kyle Massey do not fall within this narrow exception both because

1 these efforts were not undertaken "at the request of" Osbrink,  
2 and because these efforts did not consist of "the negotiation of  
3 an employment contract." The fact that Osbrink did not object to  
4 Landis' efforts to procure employment for Massey does not satisfy  
5 the statutory prerequisites for the exception. And of course,  
6 even if Osbrink is correct in her belief that this sort of  
7 activity by unlicensed personal managers is "a standard practice  
8 in Hollywood," the requirements of the Talent Agencies Act apply  
9 regardless of any contrary industry practice.

10 8. Having found that Landis acted as a talent agent without  
11 the requisite license, we must necessarily conclude that the  
12 management agreement between Landis and Massey is void *ab initio*,  
13 and that Landis has no enforceable rights thereunder. Landis  
14 therefore is not entitled to the recovery of any commissions  
15 purportedly owed under this agreement, regardless of whether  
16 Landis is seeking these commissions through a breach of contract  
17 action, or under claims of unjust enrichment or quantum meruit.

18 See *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1004 n. 30.

19 9. Ordinarily, in an action on a contract providing for  
20 attorney's fees, Civil Code §1717 entitles the prevailing party  
21 to attorney's fees, even when the party prevails on the ground  
22 that the contract is inapplicable, invalid, unenforceable or  
23 nonexistent, if the other party would have been entitled to  
24 attorney's fees had it prevailed. *Hsu v. Abbara* (1995) 9 Cal.4th  
25 863, 870. This general rule "serves to effectuate the purpose  
26 underlying Section 1717," which was enacted to establish  
27 mutuality of the contractual remedy of attorney's fees. *Ibid.*  
28 However, as noted in *Bovard v. American Horse Enterprises, Inc.*

1 (1988) 201 Cal.App.3d 832, and *Geffen v. Moss* (1975) 53  
2 Cal.App.3d 215, "a different rule applies when the contract is  
3 held unenforceable because of illegality." *Bovard* at 843, *Geffen*  
4 at 227. "A party to a contract who successfully argues its  
5 illegality stands on a different ground than a party who prevails  
6 in an action on a contract by convincing the court that the  
7 contract is inapplicable, invalid, nonexistent or unenforceable  
8 for reasons other than illegality." *Bovard* at 840. Because  
9 courts generally will not enforce an illegal contract, there is  
10 no need for a mutual right to attorney's fees, since neither  
11 party can enforce the agreement." *Ibid.* at 843. However, *Bovard*  
12 and *Geffen* do not provide the final word on the question of  
13 whether Massey, as the prevailing party in this matter, is  
14 entitled to attorney's fees under the parties' management  
15 agreement. Both *Bovard* and *Geffen* involved contracts that were  
16 entirely unenforceable by either party due to their illegal  
17 objects - - *Bovard* concerned a contract to manufacture drug  
18 paraphernalia, and *Geffen* concerned a contract to purchase the  
19 "good will" of a law practice. The laws that made these  
20 contracts illegal were laws that were designed to protect the  
21 public as a whole, not one of the parties to the agreement. In  
22 contrast, the Talent Agencies Act's "purpose is to protect  
23 artists seeking professional employment from the abuses of talent  
24 agencies." *Styne v. Stevens, supra*, 26 Cal.4th at 50. In other  
25 words, the Talent Agencies Act is a statute designed to protect  
26 artists when they enter into contracts with licensed or  
27 unlicensed talent agents. For this reason, we adopt the court's  
28 reasoning in *Yuba Cypress Housing Partners, Ltd. v. Area*

1 *Developers* (2002) 98 Cal.App.4th 1077, 1081-1083, limiting the  
2 *Bovard/Geffen* rule to instances where the contract was illegal  
3 and the law making the contract illegal was not designed to  
4 protect either party to the contract. In contrast, "when the  
5 legislature enacts a statute forbidding certain conduct for the  
6 purpose of protecting one class of persons from the activities of  
7 another, a member of the protected class may maintain an action  
8 notwithstanding the fact that he has shared in the illegal  
9 transaction. The protective purpose of the statute is realized  
10 by allowing the [party in the protected class], who is not in  
11 *pari delicto*, to enforce the contract or maintain the action  
12 against a defendant in the class primarily to be deterred."  
13 *Cypress Housing Partners, supra*, at 1082, citing *Lewis & Queen v.*  
14 *N.M. Ball Sons* (1957) 48 Cal.2d 141, 153. Moreover, if Landis  
15 were permitted to now assert the illegality of her contract with  
16 Massey as a basis for denying Massey's claim for attorney's fees  
17 incurred as a result of Massey's successful defense of Landis'  
18 attempt to enforce that contract, we would in effect be  
19 permitting an unlicensed talent agent to benefit from the  
20 illegality that she herself created, thus disserving the goal of  
21 deterring illegal conduct. See *Cypress Housing Partners, supra*  
22 at 1083; *Cf. Homestead Supplies, Inc. v. Executive Life Ins. Co.*  
23 (1978) 81 Cal.App.3d 978, 991. Thus, we conclude that Massey has  
24 a right to attorney's fees under Paragraph 10 of the parties'  
25 agreement, which provides that if any party to the agreement  
26 "initiates regulatory action, arbitration or litigation to  
27 enforce its provisions, the prevailing party shall be entitled to  
28 recover all costs and attorney's fees incurred." Landis

1 initiated an arbitration to enforce the agreement, and Massey in  
2 turn had no choice but to file this petition to determine  
3 controversy in order to contest the validity of the agreement.  
4 As the prevailing party, Massey is therefore entitled to  
5 reasonable attorney's fees.


6 ORDER

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

8 1) The so-called "Artists Manager's Agreement" between  
9 Landis and Massey is void *ab initio*, and Landis has no  
10 enforceable rights thereunder, and is not entitled to the  
11 recovery of any commissions or other amounts purportedly owed  
12 under this agreement.

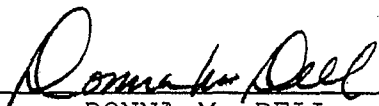
13 2) Massey is awarded reasonable attorney's fees incurred in  
14 connection with this proceeding, with the amount to be set by a  
15 supplemental order. Massey shall file and serve on opposing  
16 counsel any declaration(s) setting out the amount claimed no  
17 later than 21 days after this Determination is served on the  
18 parties, and Landis may file any papers opposing the amount  
19 claimed no later than 35 days after this Determination is served,  
20 and Massey may file a reply no later than 45 days after this  
21 Determination is served.

22  
23 Dated: 10/12/05

24   
MILES E. LOCKER  
Attorney for the Labor Commissioner

25  
26 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

27  
28 Dated: 11/7/05

  
DONNA M. DELL  
State Labor Commissioner

