

FINDINGS OF FACT

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2 1. At all times relevant herein, Penelope Lippincott, was an individual doing business
3 as Finesse Model Management ("Respondent" or "Finesse") located in Sausalito, California.
4 Respondent was not licensed as a talent agency by the State Labor Commissioner at any time while
5 doing business as Finesse Model Management.

6 2. At all times relevant herein, Nancy Sweeney, who brings this Petition on behalf of
7 her minor children Connor and Erlin Sweeney ("Sweeney") resided in Sacramento, California. The
8 Petition was filed on September 30, 2005.

9 3. In March of 2004 Sweeney took her two children to audition at the Barbizon
10 Modeling School in Sacramento where they met with Elyssa Aubrey. Ms. Aubrey indicated that the
11 children did not need the school and could starting working as models immediately. She then told
12 Sweeney that the best agency in the business was Finesse located in Sausalito. She then gave
13 Sweeney the Finesse phone number. Thereafter, the Sweeneys met with Penelope Lippincott who
14 told them that the children would get work immediately and offered them each \$200 to model in an
15 upcoming show. Lippincott also told them that one of the children should sign up for the Pro-
16 Modeling One Workshop. When the Sweeneys indicated that they could not afford the workshop,
17 Lippincott offered to sign up both children for the workshop for the cost of one. The cost of the
18 workshop was \$2,495.00. The Sweeneys were also assured that the children would get a lot of work
19 and that the fee would be recouped in monies received for the work by the end of the summer.
20 When the Sweeneys told Lippincott that Elyssa Aubrey of Barbizon recommended Finesse,
21 Lippincott indicated that she never heard of Ms. Aubrey. The next week Elyssa Aubrey was at
22 Finesse as Director of Modeling. Sweeney testified that she drove her children from Sacramento to
23 Sausalito due to Lippincott's promise to procure employment for the children and she would not
24 have driven that distance just for a school.

25 4. There was no formal written contract reflecting the agreement between petitioner
26 and respondent for the purchase of the Workshop, however, Respondent provided the petitioner
27 with a printed description of all of its "programs" and "packages," and their costs, and there is a

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1 written purchase order indicating which program was purchased, and the amount that was paid.
2 Neither the written description of the various "programs" and "packages," nor the purchase order
3 contain any statement indicating that petitioner had a right to a refund, or a right to cancel the
4 agreement to purchase the services or products. The description of the programs is attached to the
5 Petition as Exhibit "B" and the purchase order and receipt are attached to the Petition as Exhibit
6 "A."

7 5. The children worked at the spring fashion show at the promised rate of \$200 each
8 but were paid \$75 each three months later. The only other work obtained for the children was on
9 the Sylex Tuxedo Shoot for which they were offered \$250 each. On October 30, 2004, the children
10 worked on the shoot. When they got to the location, they were told that the pay was \$150 each since
11 they were not adults. Attached to the Petition as Exhibits C and D are the Model Job Payment
12 Acknowledgments for the Selix job. Neither have been paid for the work.

13 6. On or about March 31, 2004, Sweeney purchased two Fashion Marketing Packages,
14 one for each child at the total price of \$2,228.65. Again, there was no written contract for the
15 services or any written statement indicating that petitioner had a right to a refund, or a right to
16 cancel the agreement to purchase the services or products. Sweeney understood that she was
17 purchasing a Professional Photo Session where the children would be provided the services of a
18 professional make-up artist and stylist and at the end would receive 100 Finesse Zed Cards
19 containing five photo images. Sweeney testified that she received the zed cards seven months after
20 the photo shoot and the children did their own make-up and hair and only four and not 5 images
21 appeared on the zed cards. A sample of each child's zed card was admitted as Exhibit 2. Each of
22 the zed cards list Finesse Model Management with its address and phone number prominently at the
23 bottom.

24 7. Respondent provided Sweeney with a document entitled "Job Payment Schedule-
25 Year 2004," Exhibit B, which stated some of respondent's practices regarding modeling
26 assignments and the payment of models. Among other things, this document provided that "Finesse
27 will invoice clients after all time sheets have been turned in," that models should "allow 60-90 days

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1 from completion of job for model pay,” and that job checks are distributed only once a month, at a
2 meeting on the second Tuesday of each month. Finally, the document purports that the models are
3 independent contractors, and further purports to release Finesse from liability for any injury that
4 may occur while performing work on the premises.

5 8. Respondent maintained a telephone number that provided recorded information
6 about upcoming auditions for modeling work. Sweeney attended monthly meetings where
7 prospective work and auditions were discussed. A copy of a meeting agenda for October 12, 2004
8 was admitted as Exhibit 3.

9 9. In Spring 2005, Sweeney’s daughter wanted to audition for an ad for Pottery Barn,
10 which she heard about through her friends. She telephoned Finesse to let them know of the audition
11 and was told to “have them call us.” The child never auditioned since she was told that she needed
12 a work permit and an Entertainment permit, neither of which she had or was told by Finesse that she
13 needed. Sweeney made a demand for reimbursement of all of the fees she paid to Finesses for the
14 Workshop and Marketing Package by letter dated July 12, 2005, which is attached to the Petition as
15 Exhibit F. Finesse failed to reimburse the fees.

16 10. Petitioner testified that based on the manner in which Respondent operated its
17 business, and the content of written and oral communications with the Respondent, Petitioner
18 believed that Respondent was offering or promising to obtain modeling employment on her
19 children’s behalf with third party clients.

20 11. According to Respondent, her business consists of “a full service marketing and
21 production company,” Finesse Creative Productions, which “specializes[s] in the production of print
22 ads, live productions and promotional events, for retailers, designers and manufacturers,” and which
23 “own[s] a new bay area fashion magazine, where advertising is sold and ad development is a service
24 provided to our clients.” In addition, Finesse has an In-House model development division, Finesse
25 Model Management,” which runs “workshop programs ... strictly for skill development.”

26 Respondent’s stated that although she operated a talent agency, known as Clymer’s Modeling and
27 Talent Agency, for a period of time from the late 1980's to early 1990's, “[d]ue to the change in laws

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1 at that time regarding the agency business we chose to eliminate that service and proceed in
2 production only.¹”

3 12. Respondent insisted that she never procured employment for a model with any third
4 party, and that she never negotiated with any third party as to what a model should be paid for
5 modeling services. Instead, according to Respondent, Finesse enters into agreements with third
6 parties for the purchase of Finesse’s services as a “production company,” and under these
7 agreements the third party pays Finesse to produce a fashion runway show or a print advertisement.
8 Clients are not billed for the models’ services, they are billed for Finesse’s “production services.” In
9 its capacity as a “production company,” Finesse hires the necessary models, photographers, graphic
10 designers, hair stylists, etc., needed to perform the job for which Finesse was hired. Finesse, not the
11 third party client, decides how much to pay the models, and anyone else hired in connection with the
12 production, as compensation for their services, and these payments are made by Finesse.²

13 13. Respondent’s witness Barbara Kelley testified that she is a freelance model and
14 signed up with Finesse to develop her creative side. She knew that Finesse was not an agency and
15 she paid Finesse for training and developing her skills so that she would be hired. Ms. Kelley is still
16 associated with Finesse. She has been with Finesse since Spring 2004 and has been hired by

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18 ¹ Two determinations issued by the Labor Commissioner in cases that were filed against
19 Clymer’s Modeling and Talent Agency, TAC No. 11-87 and TAC No. 60-94, explained the various
20 requirements of the Talent Agencies Act. In TAC 60-94, the Labor Commissioner concluded that
21 Respondent (then known by her married name, Penny Clymer) had engaged in the occupation of a
22 talent agency without a license, and for that reason, determined that her contract with a model was
23 void and unenforceable, and ordered her to reimburse the model for unlawfully collected fees.
24 Previously, in TAC No. 11-87, covering a period of time when Respondent was licensed as a talent
25 agency, the Labor Commissioner ordered the partial reimbursement of amounts charged to a model
26 for photo composites, and warned Respondent that pursuant to a newly enacted amendment to the
27 Talent Agencies Act, talent agencies would no longer be allowed to charge models anything for
28 photographs. In the face of these Labor Commissioner determinations, Respondent decided to
change the method by which she conducts her business, believing that by restructuring as an
ostensible “production company,” the Talent Agencies Act would no longer apply to her business
operations.

25 ² Despite the fact that the model’s rate of compensation was solely determined by Finesse,
26 Respondent insisted that these models are not employees of Finesse, but rather, independent
27 contractors. Models were required to sign an acknowledgment stating that “all models are
28 independent contractors.” Respondent testified that in accordance with her belief that the models
are independent contractors, Respondent is not covered by any workers compensation insurance
policy.

1 Lippincott for modeling jobs and has not worked for anyone else. When hired by Lippincott, she
2 was told by her what time to be at the job. She never met with Finesse's clients. Her understanding
3 was that Lippincott submits one to three people for a job and the client gets to pick which model and
4 that the rate differs depending on the client. Fran Dugan also testified that she signed with Finesse
5 to learn how to become a model. She just wanted to look like a model. She never expected to be
6 paid for modeling.

7 14. Sweeney filed this petition to determine controversy on September 30, 2005, and
8 seeking an order for reimbursement of the \$5,023.65: \$2,495.00 for the Pro-Modeling I Workshop;
9 \$2,228.65 for the Fashion Marketing Program; and \$150 for each child for work performed on the
10 October 30, 2004 modeling shoot.

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12 LEGAL ANALYSIS

13 1. Labor Code §1700.4(b) includes "models" within the definition of "artists" for purposes
14 of the Talent Agencies Act (Labor Code §§1700-1700.47). Petitioner's children are therefore
15 "artists" within the meaning of Labor Code section 1700.4(b).

16 2. Labor Code §1700.4(a) defines a "talent agency" as any person or corporation "who
17 engages in the occupation of procuring, offering, promising, or attempting to procure employment
18 or engagements for an artist." To be sure, the Labor Commissioner has held that "a person or entity
19 that employs an artist does not 'procure employment' for that artist within the meaning of Labor
20 Code §1700.4(a), by directly engaging the services of that artist.... [T]he 'activity of procuring
21 employment,' under the Talent Agencies Act, refers to the role an agent plays when acting as an
22 intermediary between the artist whom the agent represents and the third party employer who seeks
23 to engage the artist's services." *Chinn v. Tobin* (TAC No. 17-96) at p. 7. Following this rationale,
24 in *Kern v. Entertainers Direct, Inc.* (TAC No. 25-96), the Labor Commissioner concluded that a
25 business that provided clowns, magicians and costumed characters to parties and corporate events
26 did not act as a talent agency, within the meaning of Labor Code §1700.4(a). In *Kern*, the
27 respondent set the prices that it charged to customers for the entertainers' services, selected the

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1 entertainers that it provided to the customers, determined the compensation that it paid to these
2 entertainers for providing these services, and thus, we concluded, “became the direct employer of
3 the performers.” Significantly, however, in both *Chinn* and in *Tobin*, no evidence was presented
4 that the respondents “ever procured or promised or offered or attempted to procure employment for
5 petitioners with any third party. That lack of evidence as to promises or offers to obtain
6 employment with third parties or actual procurement activities” was found to distinguish those cases
7 from cases in which persons or business were determined to be acting as talent agencies within the
8 meaning of Labor Code §1700.4(a). *Chinn v. Tobin, supra*, at p. 11. Thus, in determining whether
9 Respondent engaged in the occupation of a “talent agency,” we must analyze whether Respondent
10 engaged in any of the activities which fall within the statutory definition of “talent agency,” i.e.,
11 procuring or offering to procure or promising to procure or attempting to procure modeling
12 employment for the petitioner with a third party employer.

13 3. Labor Code §1700.5 provides that “[n]o person shall engage in or carry on the occupation
14 of a talent agency without first procuring a license . . . from the Labor Commissioner.” The Talent
15 Agencies Act is a remedial statute that must be liberally construed to promote its general object, the
16 protection of artists seeking professional employment. *Buchwald v. Superior Court* (1967) 254
17 Cal.App.2d 347, 354. For that reason, the overwhelming weight of judicial authority supports the
18 Labor Commissioner’s historic enforcement policy, and holds that “even the incidental or
19 occasional provision of [talent agency] services requires licensure.” *Styne v. Stevens* (2001) 26
20 Cal.4th 42, 51. These services are defined at Labor Code §1700.4(a) to include offering to procure
21 or promising to procure or attempting to procure or procuring employment for an artist. In
22 analyzing the evidence of whether a person engaged in activities for which a talent agency license is
23 required, “the Labor Commissioner is free to search out illegality lying behind the form in which the
24 transaction has been cast for the purpose of concealing such illegality.” *Buchwald v. Superior*
25 *Court, supra*, 254 Cal.App.2d at 355.

26 4. The status of the respondent as a “producer” of these print advertisements and fashion
27 shows is an affirmative defense to the allegation that respondent acted as a “talent agency” by

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1 obtaining work for the model(s), and as such, the burden of proof shifts to the Respondent once the
2 petitioner establishes (as was the case here) that the Respondent obtained modeling work for the
3 petitioner. Assuming, *arguendo*, that respondent never procured and never attempted to procure
4 modeling employment for the petitioner with any third party employer, that does not dispose of the
5 question of whether Respondent ever offered to procure or promised to procure such employment
6 for the petitioner. Not only did the petitioner believe that Respondent had offered and promised to
7 do just that, but more importantly, taking the evidence as a whole, we conclude that any reasonable
8 person in petitioner's position would have formed that same belief. There is simply no other way to
9 interpret many of Respondent's policies and procedures, and Respondent's oral and written
10 representations of what she could or would do for the petitioner. These policies and procedures and
11 representations include the use of zed cards with Finesse's name, address and telephone number
12 printed on the cards, instructions that the zed cards are used "to market you," instructions to
13 telephone Respondent's business to find out "what jobs you have been submitted for," and the
14 Respondent's statement to "Have them call us," when Erlin Sweeney wanted to audition for a
15 modeling job with The Pottery Barn. In fact, Sweeney was told by a representative of Barbizon in
16 Sacramento, who later became Director of Modeling at Finesse, that the children did not need
17 training and should contact Finesse to get work. As Sweeney argued, it is not reasonable to assume
18 that she would commute to Sausalito from Sacramento to get professional development and not
19 jobs. In fact, the reason Sweeney signed up for the Finesse services, which she told Lippincott that
20 she could not afford, was because she was assured that the children would get work. Each and every
21 one of these policies and procedures and representations necessarily has the effect of leading the
22 model to believe that Respondent will attempt to procure employment on behalf of the model with
23 third party employers, and thus, as a matter of law, constitutes an offer to procure such employment.
24 Consequently, we conclude that through Respondent's published policies and procedures and
25 representations to models, Respondent "offered to procure employment" for models with third party
26 employers, and therefore, engaged in the occupation of a "talent agency" within the meaning of
27 Labor Code §1700.4(a). As such, despite Respondent's efforts to structure its operations (or

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1 perhaps more accurately, efforts to appear to have structured its operations) so as to avoid the
2 requirements of the Talent Agencies Act, Respondent violated the Act by operating as a "talent
3 agency" without the requisite license³.

4 5. An agreement between an artist and a talent agency that violates the licensing
5 requirement of the Talent Agencies Act is illegal, void and unenforceable. *Styne v. Stevens, supra*,
6 26 Cal.4th at 51; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262;
7 *Buchwald v. Superior Court, supra*, 254 Cal.App.2d at 351. Having determined that a person or
8 business entity procured, attempted to procure, promised to procure, or offered to procure
9 employment for an artist without the requisite talent agency license, "the [Labor] Commissioner
10 may declare the contract [between the unlicensed talent agent and the artist] void and unenforceable
11 as involving the services of an unlicensed person in violation of the Act." *Styne v. Stevens, supra*,
12 26 Cal.4th at 55. Moreover, the artist that is party to such an agreement may seek disgorgement of
13 amounts paid pursuant to the agreement, and may be "entitle[d] to restitution of all fees paid to the
14 agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. The term "fees" is defined at Labor Code
15 §1700.2(a) to include "any money or other valuable consideration paid or promised to be paid for
16 services rendered or to be rendered by any person conducting the business of a talent agency."
17 Restitution is therefore not necessarily limited to amounts that the unlicensed agent charged for
18 procuring or for attempting to procure employment, but rather, may include amounts paid for
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21 ³ Ironically, these efforts to reconstitute her business as a "production company" have
22 created a whole new set of liabilities for the Respondent. The evidence presented compels the
23 conclusion that at least as to some of petitioner's modeling assignments, Respondent was the
24 petitioner's employer – by effectively engaging her to perform modeling services as part of a fashion
25 show or print advertisement produced by Respondent, by establishing her rate of compensation,
26 and by exercising control over her work (determining the time and place the work would be
27 performed, the fashions she would wear while modeling, etc.). As an employer, Respondent
28 violated a raft of Labor Code protections for employees, including Labor Code §204 (which requires
the payment of wages to employees no later than 26 days after the work is performed, between the
16th and 26th day of any month in which the work was performed between the 1st and 15th day of that
month, and between the 1st and 15th day of the month following any month in which work was
performed between the 16th day and the final day of the month - - regardless of when the employer
receives payment from a customer), Labor Code §226 (requiring itemized wage statements
accompanying each payment of wages), Labor Code §1299 (requiring employers to keep work
permits on file in connection with the employment of minors), and Labor Code §3700 (requiring
workers compensation insurance coverage).

1 services for which a talent agency license is not required.

2 6. With these legal principles in mind, we conclude that as a consequence of Respondent's
3 violation of the Labor Code §1700.5, all agreements between the petitioner and the respondent are
4 illegal and void.

5 7. However, Labor Code § 1700.44(c) provides that no action or proceeding may be
6 brought for violations alleged to have occurred more than one year prior to the commencement of
7 the proceeding. Since the Petition was filed September 30, 2005, more than one year after Sweeney
8 paid \$2,495.00 for the Pro-Modeling I workshop on March 24, 2004 and paid \$2228.65 for the
9 Fashion Market Program, the Labor Commissioner does not have jurisdiction to order
10 reimbursement of these fees. However, since the work on the Selix Tuxedo job was within the year,
11 Respondent is ordered to pay Sweeney \$300.00.

12 8. Labor Code §1700.40(a) provides that "[n]o talent agency shall collect a registration
13 fee." Labor Code §1700.2(b) defines "registration fee" as "any charge made or attempted to be
14 made, to an artist for any of the following purposes . . . (3) photographs . . . or other reproductions
15 of the applicant." Subsection (b) of §1700.40 provides that [n]o talent agency may refer an artist to
16 any person, firm or corporation in which the talent agency has a direct or indirect interest for other
17 services to be rendered to the artist, including but no limited to photography, . . . , coaching,
18 dramatic school . . . or other printing." Respondent's collection of the \$4,723.65 that was paid by
19 Sweeney (for a photo shoot, zed cards and for attendance at respondent's modeling workshop) is
20 unquestionably made illegal pursuant to Labor Code §1700.40. Penalties are available under
21 §1700.40(a), equal to the amount of the unlawfully collected "registration fee." Sweeney made a
22 demand for reimbursement of the fees by letter, in July 2005. Respondent failed to reimburse the
23 fees within 48 hours. Respondent's failure to reimburse the fees started the statute of limitations for
24 the penalties. Since Sweeney filed the Petition in September 2005, i.e. less than one year from the
25 failure, she is entitled to penalties pursuant to this section in the amount of \$4,723.65.

26 9. Petitioner may have additional remedies under the provisions of the Advance-Fee Talent
27 Services Act (Labor Code §1701-1701.20), but those remedies cannot be awarded in the instant

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1 proceeding to determine controversy under the Talent Agencies Act (Labor Code §1700-1700.47).
2 Labor Code §1700.44 authorizes the Labor Commissioner to hear and decide controversies arising
3 under the Talent Agencies Act. In contrast, the provisions of the Advance-Fee Talent Services Act
4 (“AFTSA”) may be enforced by the Attorney General, any district attorney, any city attorney, or
5 through the filing of a private civil action. (See Labor Code §§1701.15, 1701.16.) We take this
6 opportunity, however, to note that an artist injured by any violation of AFTSA may be entitled to up
7 to three times the amount of damages incurred, plus punitive damages if the violation was willful,
8 and that remedies under AFTSA are supplemental to any other remedies provided in any other law.
9 (Labor Code §§1701.16, 1701.17.) Under AFTSA every contract between an artist⁴ and an advance-
10 fee talent service⁵ for an advance fee⁶ must be in writing, and must contain certain specified
11 provisions, including notification of a right to refund, and a right to cancel without any penalty or
12 obligation for 10 business days following execution of the contract. (Labor Code §1701.4(a).) Any
13 contract that does not contain the required specifications shall be voidable at the election of the artist.
14 (Labor Code §1701.4(d).) Failure to provide a full refund to the artist within 10 business days after
15 the artist timely provided written notice of cancellation subjects the advance fee talent service to a
16 penalty equal to the amount of fee. (Labor Code §1701.4(e)(2).) Furthermore, under Labor Code
17 §1701.10(a), any person engaging in the business or acting in the capacity of an advance-fee talent
18 service must first file a bond with the Labor Commissioner in the amount of \$10,000, for the benefit
19 of any person damaged by any fraud, misstatement, misrepresentation or unlawful act or omission
20 under the AFTSA. We hereby take administrative notice of the fact that Respondent has not posted
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22 ⁴ The term “artist” is defined at Labor Code §1701(c) to include models.

23 ⁵ The term “advance-fee talent service” is defined at Labor Code §1701(b) to mean a person
24 who charges, or attempts to charge, or receives an advance fee from an artist for any of the
25 following products or services: procuring, offering, promising or attempting to procure employment
26 or auditions; managing or directing the artist’s career; career counseling or guidance; photographs or
27 other reproductions of the artist; lessons, coaching or similar training for the artist; and providing
28 auditions for the artist.

⁶ The term “advance fee” is defined at Labor Code §1791(a) as any fee due from or paid by
an artist prior to the artist obtaining actual employment as an artist or prior to receiving actual
earnings as an artist or that exceeds the actual earnings received by the artist.

1 such bond with the Labor Commissioner.

3 ORDER


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

5 1) All contracts or agreements between the Respondent and Petitioner are illegal and void,
6 and that Respondent has no enforceable rights thereunder, and

7 2) Respondent shall immediately reimburse the Petitioner for the \$300.00 that Petitioner
8 owes to Petitioner for print work.

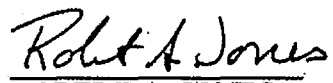
9 3) Respondent shall immediately pay the Petitioner \$4,723.65 in penalties pursuant to Labor
10 Code §1700.40(a).

11
12 Dated: March 6, 2007


ANNE STEVASON
Attorney for the Labor Commissioner

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14 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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17 Dated: March 6, 2007


ROBERT A. JONES
Acting State Labor Commissioner