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Department of Industrial Relations,
State of California
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BEFORE THE STATE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA

NANCY SWEENEY, ON BEHALF OF CONNOR SWEENEY AND ERLIN SWEENEY, MINORS, Petitioners, v. PENELOPE LIPPINCOTT individually and dba FINESSE MODEL MANAGEMENT, Respondent.	CASE NO. TAC 40-05 DETERMINATION OF CONTROVERSY

INTRODUCTION

The above-captioned matter, a petition to determine controversy under Labor Code Section 1700.44, came on regularly for hearing on November 3, 2006 in Sacramento, California, before the Labor Commissioner's undersigned attorney specially designated to hear this matter. Petitioner NANCY SWEENEY, appeared on behalf of CONNOR SWEENEY and ERLIN SWEENEY, her minor children; PENELOPE LIPPINCOTT appeared and represented herself. Appearing as witnesses for Respondent were Barbara Kelley and Fran Dugan.

Due consideration having been given to the testimony, documentary evidence and arguments submitted by the parties, the Labor Commissioner now renders the following decision:

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

11. According to Respondent, her business consists of "a full service marketing and production company," Finesse Creative Productions, which "specializes[s] in the production of print ads, live productions and promotional events, for retailers, designers and manufacturers," and which "own[s] a new bay area fashion magazine, where advertising is sold and ad development is a service provided to our clients." In addition, Finesse has an In-House model development division, Finesse Model Management," which runs "workshop programs ... strictly for skill development." Respondent's stated that although she operated a talent agency, known as Clymer's Modeling and 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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at that time regarding the agency business we chose to eliminate that service and proceed in production only.[1]"

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

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

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[1] Two determinations issued by the Labor Commissioner in cases that were filed against Clymer's Modeling and Talent Agency, TAC No. 11-87 and TAC No. 60-94, explained the various requirements of the Talent Agencies Act. In TAC 60-94, the Labor Commissioner concluded that Respondent (then known by her married name, Penny Clymer) had engaged in the occupation of a talent agency without a license, and for that reason, determined that her contract with a model was void and unenforceable, and ordered her to reimburse the model for unlawfully collected fees. Previously, in TAC No. 11-87, covering a period of time when Respondent was licensed as a talent agency, the Labor Commissioner ordered the partial reimbursement of amounts charged to a model for photo composites, and warned Respondent that pursuant to a newly enacted amendment to the Talent Agencies Act, talent agencies would no longer be allowed to charge models anything for 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.

[2] Despite the fact that the model's rate of compensation was solely determined by Finesse, Respondent insisted that these models are not employees of Finesse, but rather, independent contractors. Models were required to sign an acknowledgment stating that "all models are 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.

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

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

LEGAL ANALYSIS

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

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

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

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

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

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

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

5. An agreement between an artist and a talent agency that violates the licensing requirement of the Talent Agencies Act is illegal, void and unenforceable. *Styne v. Stevens, supra,* 26 Cal.4th at 51; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262; *Buchwald v. Superior Court, supra,* 254 Cal.App.2d at 351. Having determined that a person or business entity procured, attempted to procure, promised to procure, or offered to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed talent agent and the artist] void and unenforceable as involving the services of an unlicensed person in violation of the Act." *Styne v. Stevens, supra,* 26 Cal.4th at 55. Moreover, the artist that is party to such an agreement may seek disgorgement of amounts paid pursuant to the agreement, and may be "entitle[d] to restitution of all fees paid to the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. The term "fees" is defined at Labor Code §1700.2(a) to include "any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by any person conducting the business of a talent agency." Restitution is therefore not necessarily limited to amounts that the unlicensed agent charged for procuring or for attempting to procure employment, but rather, may include amounts paid for

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[3] Ironically, these efforts to reconstitute her business as a "production company" have created a whole new set of liabilities for the Respondent. The evidence presented compels the conclusion that at least as to some of petitioner's modeling assignments, Respondent was the petitioner's employer – by effectively engaging her to perform modeling services as part of a fashion show or print advertisement produced by Respondent, by establishing her rate of compensation, and by exercising control over her work (determining the time and place the work would be performed, the fashions she would wear while modeling, etc.). As an employer, Respondent 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).

services for which a talent agency license is not required.

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

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

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

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

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

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[4] The term "artist" is defined at Labor Code §1701(c) to include models.

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

such bond with the Labor Commissioner.

ORDER

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

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

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

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

Dated: March 6, 2007

ANNE STEVASON
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: March 6, 2007

ROBERT A. JONES
Acting State Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is Division of Labor Standards Enforcement, Department of Industrial Relations, 320 West Fourth Street #430, Los Angeles, CA 90013.

On March 7, 2007, I served the foregoing document described as **DETERMINATION OF CONTROVERSY** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, addressed as follows:

Nancy Sweeney, on behalf of Connor
Sweeney and Erlin Sweeney, Minors
2814 Alamitos Way
Sacramento CA 95821

Penelope Lippincott, individually dba
Finesse Model Management
80 Forest Avenue
San Anselmo CA 94960

By Mail: I am readily familiar with the firm's business practices of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day with postage fully prepaid thereon.

Executed on March 7, 2007, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Randi Guerrero