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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

ANNIE DANIELEWSKI, professionally known as POE, Petitioner, vs. AGON INVESTMENT COMPANY, successor in interest to AGON INVESTMENT PARTNERS, LP; and ROBERT EDSEL, Respondents.	No. TAC 41-03 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on April 8, 2004 in San Francisco, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner appeared and was represented by attorney Carrie M. Hemphill, and Respondents appeared and were represented by attorneys Glenn Plattner and Drew R. Heard. Based on the evidence presented at this hearing and on the other papers on file in this mater, the Labor Commissioner hereby adopts the following decision.

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FINDINGS OF FACT

1. Petitioner ANNIE DANIELEWSKI, professionally known as POE (hereinafter "POE" or "Petitioner"), is a singer and musical recording artist. At all times relevant herein, she has been a resident of California. She signed her first record contract in 1994, and has released two albums since then. Soon after her second album was released in 2001, she was dropped by Atlantic Records, due in part to a dispute between the label to which she was signed, Fishkin Entertainment, and Atlantic Records, her record distributor.

2. During 2001, POE performed in a concert tour as the opening act for Depeche Mode, and performed in a tour sponsored by Pantene to promote her new album, and performed on the Jay Leno and Conan O'Brien shows. These engagements were obtained through her talent agency, Creative Artists Agency ("CAA"). CAA became POE's talent agency pursuant to a written contract that was executed on January 6, 1996, covering a term of three years. Following the expiration of this contract in 1999, CAA continued to book engagements for POE, functioning as her talent agency.

3. POE was then also represented by Nettwerk Management, pursuant to an oral agreement under which Nettwerk provided her with talent management services for which she paid Nettwerk commissions on her earnings. POE was also using the services of Jacqueline Patterson as her accountant and bookkkeper, for which she was paying Patterson $2,500 a month. Finally, prior to the summer of 2001, POE had been represented as to legal matters by an attorney, Kim Guggenheim, for which POE owed Guggenheim approximately $36,000.

4. Respondent ROBERT EDSEL is the president and chief executive officer of AGON INVESTMENT COMPANY, a business located in Dallas, Texas. Neither EDSEL nor AGON has ever been licensed by the California Labor Commissioner as a talent agency. AGON makes investments in other businesses that need financial assistance by providing financing for these other businesses. EDSEL is long-time friend of POE's fiancee's father, and POE first met with EDSEL in September 2001, to obtain his advice and guidance on how she should handle her business affairs, and in particular, her contract issues with Fishkin Entertainment and Atlantic Records. EDSEL and POE discussed whether and how AGON could assist POE in her business dealings. Towards that end, EDSEL agreed to conduct a preliminary review of POE's various contracts and agreements, without any charge to POE. However, after looking at these documents, EDSEL advised POE that it would be best to retain the services of AGON's long-time counsel, David Helfant of Akin Gump Strauss Hauer & Feld, in order to fully assess her legal position. POE expressed concern about Helfant's legal fees, but EDSEL insisted that he could not help POE without Helfant's legal services. EDSEL stated that initially, AGON would pay Helfant's legal fees for services on her behalf, but it was understood that at some future point POE would reimburse EDSEL for these fees. EDSEL instructed POE that she should not contact Helfant with any questions, but rather, to direct any questions to EDSEL for him to convey to Helfant. Based on Helfant's review of POE's contracts and his communications with his contacts at Atlantic Records, both Helfant and EDSEL told POE that she could expect a substantial settlement from Fishkin

and/or Atlantic within the next six months for prematurely dropping her from its label.

5. Based on this potential settlement from Fishkin and/or Atlantic, EDSEL advised POE to terminate her relationships with at least some of the persons or entities that had previously provided her with representation, including Jacqueline Patterson, and Nettwerk Management. EDSEL did this because he did not want these persons or entities to share a portion of the proceeds from the potential Fishkin/Atlantic settlement, and because he believed these persons or entities were failing to provide POE with effective assistance. By late April 2002, POE terminated her agreements with Nettwerk Management and Jacqueline Patterson.

6. The parties dispute whether EDSEL advised POE to also terminate her relationship with CAA. POE testified that she terminated CAA in early 2002 pursuant to EDSEL's instructions, so that from that point, she had no talent agency that could procure engagements for her. POE's testimony is belied both by EDSEL, who testified that he never advised POE to terminate her relationship with CAA (and that he never had any communication with CAA at any time), and by the declaration of CAA agent Carole Kinzel, filed by the petitioner after the close of this hearing. Kinzel's declaration states that in early 2003 (this is unquestionably a typographical error, and the correct date is 2002), she received a phone call from POE stating that she had "new management" (as opposed to a "new talent agent"), and that POE asked "whether her relationship with CAA would be damaged or strained if someone other than CAA booked shows for [her] in the future." Kinzel stated that she "advised Poe that such a

decision would not adversely affect her relationship with CAA." Thus, it appears that rather than terminating CAA, POE actually communicated her intention to keep CAA available to perform at least some future procurement services. This interpretation is bolstered by a document that was prepared by POE and given to EDSEL sometime after April 10, 2002, entitled "Music Ventures Proposal 2002," in which POE suggested that as a means of earning some money, CAA could attempt to obtain bookings for a limited tour, with low overhead achieved by using only two other musicians and performing acoustically. POE wrote, "CAA has represented me and booked all my tours thus far. We could request they peruse [sic] gigs of this kind...." A note in the margin, written by EDSEL, next to this suggestion, asks: "DH [presumably, David Helfant] would they do this? Cost?" We therefore find that EDSEL never instructed POE to terminate her relationship with CAA, and that the relationship between POE and CAA was not terminated.

7. By written agreement dated April 10, 2002, POE and EDSEL confirmed that for its efforts in attempting to settle the contract dispute between POE and Fishkin/Atlantic, "AGON's fee will be $1.00 greater than the total legal costs of Akin Gump for their work on your behalf, plus reimbursement of any other directly related expenses." The agreement stated that "AGON has invested a considerable amount of time to determine the status of your contractual obligations to Fishkin/Atlantic, understand your financial position, and to advise you on how to proceed to accomplish the goals" of improving POE's financial picture. The agreement further stated that AGON is paying for work that David

Helfant of Akin Gump is performing on POE's behalf, and has already paid $8,000 to Akin Gump for legal work concerning POE's contract issues. Under this agreement, payment would not be due from POE until there was some sort of resolution of her dispute with Fishkin, either through a formal settlement involving a cash payment, or rejection of a final settlement offer in favor of litigation or "the pursuit of other options." Moreover, the agreement provided that it would terminate upon resolution of the dispute with Fishkin, at which point POE and AGON would be "free to negotiate a new agreement or not based on [POE's} needs and {EDSEL's] availability at that time." The petition to determine controversy refers to this agreement as a "preliminary management contract."

8. Concurrently, on April 10, 2002, AGON, through EDSEL, sent a letter to POE summarizing her financial picture and outlining "a plan of attack to pay old debts and put you in an improved financial position." As outlined in this letter, POE's current financial picture was bleak. POE owed money to her former attorney, Kim Guggenheim, and to the Internal Revenue Service, Nettwerk Management, Jacqueline Patterson, in addition to credit card debt, unpaid tour expenses, a bank loan, and medical bills, for a total owed in excess of $100,000. Thus, EDSEL concluded, in this letter, "Even under the best scenario (i.e., your share of the settlement [with Fishkin/Atlantic] equals $105,000) the money you have left after paying these debts may not entirely cover AGON's fee and direct costs for legal fees to Helfant." Thus, EDSEL urged POE to consider "what specific steps you can take outside the recording contract area to earn

enough money to cover your monthly expenses of $5,000."

9. Starting in April 2002, AGON began loaning money to POE for her monthly living expenses. In discussions with POE, EDSEL urged her to borrow more money from AGON to enable her to pay off all of her creditors and consolidate her debt. Over the next three months, AGON made a series of loans to POE for this purpose.

10. With the April 2002 termination of her former accountant/bookkeeper and her former management service, POE needed to make alternative arrangements for the performance of the services previously provided by Jacqueline Patterson and Nettwork Management. In discussions with POE, EDSEL suggested that AGON could provide these services for her more effectively and at a lower cost than she had been paying. In May 2002, POE agreed to have AGON start providing her with accounting and bookkeeping services, for which POE was to pay $1,500 a month to AGON, starting on June 1, 2002. AGON also continued to provide POE with "business management" services, by providing her with ongoing advice on how to how to advance her career and business interests. This advice covered many areas, going well beyond the limited scope of the parties' April 10, 2002 written agreement. Nonetheless, the terms of this agreement seem to have governed AGON's payment for management services, except for the separate oral agreement regarding bookkeeping/accounting services. Thus, AGON continued to charge POE a nominal amount above the actual cost of Helfant's legal fees, and POE was responsible for reimbursement of AGON's expenses incurred in providing these management services. In a letter to POE dated June 14, 2002,

EDSEL proposed ending the exisiting management agreement as of May 31, 2002, and entering into a new management agreement, which would provide AGON with commissions equal to 20% of POE's future entertainment earnings plus reimbursement of AGON's expenses. Over the course of the summer and fall, discussions regarding this proposal failed to result in a new management agreement. Documents introduced into evidence at the hearing show that AGON continued to bill POE for management services through the end of September 2002, pursuant to the terms of the April 10, 2002 agreement.

11. By June 1, 2002, the amount that had been loaned by AGON to POE reached $200,000. It was understood that these loans were not gifts, and that amounts loaned to POE would be repaid with interest. The terms of these loans were set forth in an "Amended and Restated Secured Promissory Note," effective June 1, 2002. This Promissory Note, signed by POE, recited that POE was to repay the $200,000 principal on May 31, 2003, that monthly interest payments on the unpaid principal balance would commence on June 30, 2002, with the final interest payment due on May 31, 2003, and that interest would be set at 4% per annum above the prime rate, or the maximum legal rate of interest, whichever is lower. The Note provided that should a default occur in the payment of the indebtedness, the whole sum of principal and interest would become immediately due at the option of the Note holder. The Note was secured by collateral specified in the Note, consisting of POE's interest and rights in, and all resulting proceeds from: (a) a music publishing agreement executed in 1995 between POE and Sony/ATV Songs LLC, (b) all

agreements relating to the publishing, sale or exploitation of POE's current and future musical works, (c) all of POE's personal property, including but not limited to her collection of Peter Max paintings, (d) all compensation payable to POE in settlement of, or in connection with the adjudication of her claims against Fishkin Entertainment and/or Atlantic Recording Corporation relating to her recording agreements with these entities, and (e) any new recording and/or musical publishing agreements for POE's services. AGON's security interest was perfected by the filing of a UCC financing statement shortly after the execution of the Note. The Note contains a severability clause, which provides that "[i]f any provision of this Note is invalid or unenforceable in any jurisdiction, then, to the fullest extent permitted by law, the other provisions of this Note shall remain in full force and effect in such jurisdiction." Finally, the Note contains a unilateral attorney's fee provision, stating that "[i]f this Note is not paid in full when due, Poe promises to pay all reasonable costs and expenses of collection and the reasonable attorney's fees and expenses and court costs incurred by the holder hereof on account of such collection whether or not suit is filed thereon."

12. These loan proceeds were used for POE's monthly living expenses, and to pay off her debts to other persons and entities, and finally, to pay for the various management services that were being provided by AGON pursuant to the April 10, 2002 written agreement, and the accounting/bookkeeping services provided pursuant to the parties' oral agreement. AGON established an bank account on POE's behalf which was funded by these loan

proceeds. POE only had limited access to the account, through an ATM card which allowed her to make limited withdrawals for personal needs. AGON exercised control over the account by keeping the checkbooks, and providing POE with checks made out to those persons or entities (including AGON) to whom she owed money, so that POE was signing the checks pursuant to EDSEL's instructions. In this manner, EDSEL was able to ensure that POE made payments owed for AGON's management and accounting and bookkeeping services, at least until October 2002, when the entire amount of the loan proceeds were spent. As of September 30, 2002, POE had paid AGON a total of $74.909.78, an amount equal to 37.45% of the loan proceeds.

13. With the depletion of the loan proceeds, POE was unable to continue paying AGON's interest on the Promissory Note, and for other amounts owed for AGON's management and accounting and bookkeeping services. The anticipated settlement with Fishkin and/or Atlantic failed to materialize, and POE failed to follow EDSEL's advice to start selling her collection of Peter Max paintings as a means of raising capital. EDSEL voiced his unhappiness about "working for free" and became more insistent that POE sign a new management agreement under which AGON would be paid a percentage of POE's future earnings, threatening to call the Note unless POE entered into a commission agreement.

14. Throughout 2002, most of POE's energies were focused on dealing with her deteriorating financial situation, and composing new music. For reasons that aren't entirely clear, only the most minimal efforts were made towards obtaining live paid engagements which might have provided POE with a badly needed source of

revenue. Poe did perform at a benefit concert for RAINN (the Rape, Abuse and Incest National Network) in Los Angeles on August 13, 2002. One of the organizers of this benefit, Erin Russell, contacted Nettwerk Management to inquire about POE's availability, and Nettwerk referred her request to EDSEL, who followed up with an e-mail to Russell asking whether there is "any sort of production budget available for the musicians" to allow POE "to procure musicians to donate their talents." Russell responded to EDSEL by e-mail, informing him that although there is no production budget, "we can probably find a way to offer $400 in total for musicians." Ultimately, POE performed without receiving any compensation for this engagement.

15. On or shortly before September 13, 2002, Brad Walsh, a program assistant for the Oberlin College Student, responsible for booking musical acts and speakers at campus events), sent an e-mail to POE's website, inquiring as to POE's availability for a concert performance anytime from then until May 2003. The e-mail requests "information regarding your booking fees, availability, interest, etc." POE's fiancee, John Gheur, forwarded this e-mail to EDSEL[1], who responded to Walsh by e-mail dated October 11, 2002, asking for "information about what you had in mind, general dates, financial considerations, etc." Walsh then responded with an e-mail to EDSEL, stating "we are on a tight budget this year but are open to negotiations on booking fees. I'm not in a place to make an offer yet, but I would like to forward on to my superior any ballpark figure you might be able to provide as a

[1] EDSEL had previously instructed POE not to respond herself to any inquiries regarding possible performances, but rather, to forward all such inquiries to his attention.

bill for this type of show." EDSEL followed this up with a telephone call to Walsh, during which EDSEL requested $10,000 for the engagement. Walsh conveyed that request to his supervisor, and was instructed to present a counter-offer for $5,500 plus airfare and hotel accommodations. In a follow-up telephone conversation, EDSEL negotiated with Walsh, and almost reached an agreement for POE to perform for $6,000 plus air and hotel accommodations[2]. However, EDSEL and Walsh failed to conclude an agreement, and POE did not perform at Oberlin until April 2004, long after EDSEL had ceased performing any services for POE. Neither EDSEL nor AGON ever charged any fee to POE for his efforts in connection with her appearance at Oberlin.

16. On October 4, 2002, EDSEL drafted a one page document entitled "POE PROJECT." Under the heading "Ideas for Income," EDSEL listed, among other things, "top bar/restaurant private performances." This was an idea that EDSEL had previously discussed with POE, telling her that he knew the owners of several "upscale" restaurants and nightclubs in the Dallas, Texas area, and that it would be possible to obtain engagements for her to perform at these venues, and that she might get paid from $5,000 to 10,000 for each of these performances. According to

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[2] In his testimony, EDSEL admitted that he communicated with Walsh regarding POE's possible appearance and compensation, but denied conducting any "negotiations" with Walsh, and insisted that he merely served as a "conduit," passing information between Walsh and POE. For the reasons discussed *infra*, it does not really matter whether or not EDSEL was "negotiating" on his own authority or was only acting as a "conduit" (while creating the appearance of "negotiating" with Walsh) during these conversations. We credit Walsh's account of the conversations, based upon his demeanor and forthrightness, and in any event, do not perceive any significant factual issues as to what took place during these conversations.

POE, EDSEL told her that he would attempt to obtain these engagements for her. EDSEL admitted that he discussed this idea with POE, but insisted that he never promised POE that he would try to book any engagements for her. In prior deposition testimony, EDSEL stated that "it needed somebody's full-time attention" to implement this idea, and that if it were implemented, it would have been handled by AGON through one of its attorneys, Drew Gitlin.

17. POE failed to make her scheduled payment of the Promissory Note on October 31, 2002, and has not made any payments therafter. As a result of her default, AGON declared that all sums under the Note (including the $200,000 principal plus interest) were immediately due and payable. In December 2002, the relationship between POE and AGON came to an end, and AGON ceased providing her with accounting/bookkeeping and management services. POE failed to pay AGON since September 30, 2002 for its accounting and bookkeeping services, or for any other services.

18. On March 7, 2003, AGON filed a lawsuit against POE in the Los Angeles Superior Court, on various causes of action, including: (a) breach of promissory note, (b) breach of oral contract (for accounting and bookkeeping services), (c) money had and received, (d) quantum meruit (for accounting and bookkeeping sevices), and (e) breach of security agreement and judicial foreclosure.

19. On November 7, 2003, POE filed the instant petition to determine controversy, seeking a determination that AGON engaged in activities for which a talent agency license is required

without the requisite license, and that as a result, all of the various agreements between POE and AGON, including the written agreement of April 10, 2002 (designated in the petition as the "Preliminary Management Contract"), the subsequent oral agreement for AGON to provide accounting and bookkeeping services (designated in the petition as the "Accounting Contract"), and the Promissory Note, are void *ab initio* and that AGON and EDSEL have no enforceable rights thereunder, and that AGON and EDSEL are not owed anything for the services or funds provided pursuna to these agreements. The petition also seeks reimbursement of all amounts that have been paid by POE to AGON or EDSEL pursuant to these agreements.

20. On December 2, 2003, Respondents filed their answer to the petition, asserting, *inter alia*, that AGON and EDSEL did not procure employment or engagements for POE, and did not hold themselves out as talent agents, and that the agreements that the petition seeks to void are not unlawful under the Talent Agencies Act. Respondents seek a determination that the challenged agreements are outside the scope of the Act, leaving AGON to pursue its remedies in the superior court action. Finally, Respondents seek an award of attorney's fees.

LEGAL ANALYSIS

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

2. The contested issues here are whether Respondents functioned as a "talent agency" within the meaning of Labor Code §1700.4(a), and if so, what consequences should flow from the fact that Respondents were not licensed by the Labor Commissioner

as a talent agency.

3. Labor Code §1700.4(a) defines "talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter." 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."

4. The term "procure," as used in Labor Code §1700.4(a), means "to get possession of: obtain, acquire, to cause to happen or be done: bring about." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628. Thus, "procuring employment" under the Talent Agencies Act is not limited to initiating discussions with potential purchasers of the artist's professional services or otherwise soliciting employment; rather, "procurement" includes any active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication. *Hall v. X Management* (TAC No. 19-90, pp. 29-31.) The Labor Commissioner has long held that "procurement" includes the process of negotiating an agreement for an artist's services. *Pryor v. Franklin* (TAC 17 MP 114). Significantly, the Talent Agencies Act specifically provides that an unlicensed person may nevertheless participate in negotiating an employment contract for an artist, provided he or she does so "in conjunction with, and at the

request of a licensed talent agent." Labor Code §1700.44(d). This limited exception to the licensing requirement would be unnecessary if negotiating an employment contract for an artist did not require a license in the first place. To be sure, a person does not engage in the procurement of employment for an artist by merely taking a phone call or receiving a fax from a concert promoter where the promoter conveys interest in having a musician perform at an event, and then advising the musician of the promoter's interest, leaving it to the musician (or the musician's licensed talent agent) to enter into communications with the promoter regarding availability and terms of compensation. But sending an e-mail or making a telephone call to a promoter to discuss the musician's availability and compensation, and communicating proposals and counter-proposals regarding the proposed terms of compensation - even when any such proposals must first be cleared with the musician, and even where the initial contact was made by the promoter - brings us into the realm of "procurement," as that term is used in Labor Code §1700.4(a).

5. The dictionary definition of negotiate does not require that the person negotiating possess ultimate decision making authority, or for that matter, possess authority to make any proposals or agree to any proposals without first obtaining the consent of the negotiator's principal. The Merriam-Webster on-line dictionary defines "negotiate" as: "to deal with (some matter or affair that requires ability for its successful handling); to arrange or bring about through conference, discussion and compromise." (http://www.m-w.com/cgi-bin/

dictionary?book=Dictionary&va=negotiate.) In the context of negotiations to engage the services of an artist, the negotiator for the artist is engaged in procurement activities regardless of whatever limitations might exist on the negotiator's independent decision making authority. For that reason, we disagree with the court's dicta in *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1102, regarding the "distinction" between "spokespersons who merely pass on the client's desires or demands to the person who is contemplating engaging the client," or "merely ... pass messages back and forth between the principals," and "negotiators [who] use their understanding of their client's values, desires, and demands; and other parties' values, desires and demands, and through discretion and intuition ... bring about through give-and-take a deal acceptable to the principals." This subjective test would prove utterly unworkable, and is a poor substitute for what we believe was the Legislature's intent to create a bright line separating procurement from other activities which do not require a license. There is no other case which even remotely suggests that a personal manager who is not licensed as a talent agent can engage in discussions, on behalf of an artist, with a potential purchaser of the artist's services, where such discussions are carried out for the purpose of obtaining employment and/or reaching an agreement for compensation for the artist's services, without violating the licensing requirement of the Talent Agencies Act.

6. A case that is cited in *Yoo* in support of this purported distinction between "spokespersons" and "negotiators," *Park v. Deftones* (1999) 71 Cal.App.4th 1465, in fact provides no such

support; although *Park* acknowledges that personal managers often act as "spokespersons" for the artists they represent (as indeed, they do, in a variety of contexts), that case did not say an unlicensed person may act as a "spokesperson" for an artist in the context of discussions with potential purchasers of the artist's services, where such discussions are intended to result in the procurement of employment and the establishment of a rate of compensation for purchaser's of the artist's services. *Park* simply explained: "Personal managers primarily advise, counsel, direct and coordinate the development of the artist's career. They advise in both business and personal matters, frequently lend money to young artists, and serve as spokespersons for the artists." *Id.* at 1469. A personal manager who is not licensed as a talent agent can no sooner act as a "spokesperson" for the artist in procurement-related discussions with a potential purchaser of the artist's services than a personal manager without a license to practice law can act as a "spokesperson" for the artist in court during a trial.

7. Unlike talent agents, "personal managers" are not covered by the Act or any other statutory licensing scheme - provided, of course, that the personal manager does not "engage in or carry on the occupation of a talent agency," by "procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." (Labor Code §§1700.4(a), 1700.5) Explaining the legitimate role of an unlicensed personal manager in *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.4th 246, 252-253, the court stated: "Artists typically engage personal managers in addition to talent agents. In essence, the

primary function of the personal manager is that of advising, counseling, directing and coordinating the artist in the development of the artist's career. The manager's task encompasses matters of both business and personal significance. As business advisors, they might attend to the artists's finances, and they routinely organize the economic elements of the artist's personal and creative life necessary to bring the client's product to fruition. The personal manager frequently lends money to the neophyte artist, thereby speculating on a return from the artist's anticipated future earnings. The manager also serves as a liaison between the artist and other personal representatives, arranging their interactions with, and transactions on behalf of the artist. On a more personal level, the manager often serves as the artist's confidante and alter ego.... By orchestrating and monitoring the many aspects of the artist's personal life, the personal manager gives the artist time to be an artist. That is, managers liberate artists from burdensome yet essential business and logistical concerns so that artists have the requisite freedom to discharge their artistic functions and to concentrate on their immediate creative tasks." It is not an accident that carrying on discussions with potential purchasers of the artist's services for the purpose of obtaining engagements and establishing the rate of compensation for such engagements in nowhere on this exhaustive listing of the legitimate functions of an unlicensed personal manager, as such activities fall into the scope of "procurement."

8. 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 such [procurement] services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. "The [Talent Agencies] Act imposes a *total* prohibition on the procurement efforts of unlicensed persons," and thus, "the Act requires a license to engage in *any* procurement activities." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 258-259; see also *Park v. Deftones* (1999) 71 Cal.App.4th 1465 [license required even though procurement activities constituted a negligible portion of personal manager's efforts on behalf of artist, and manager was not compensated for these procurement activities].

9. Applying these legal principles to the facts of this case, we conclude that Respondents crossed the line into the activity of "procuring, offering, promising or attempting to procure employment" within the meaning of Labor Code §1700.4(a), and thus, engaged in the occupation of a talent agency without the requisite license. First, we find it significant that EDSEL instructed POE to refer to him all inquiries from persons interested in engaging POE's services as a musician. It is also significant that EDSEL never once had any contact with POE's licensed talent agency, CAA. Thus, we conclude that EDSEL insisted that all inquiries about potential engagements go to him so that he would be the person responding to any such inquiries, and so that he would be a party to any ensuing discussions

regarding potential engagements. Respondents unquestionably conducted negotiations with the music promoter in connection with the proposed concert appearance at Oberlin College, furthering the discussion that had been initiated by the promoter, in an attempt to secure the engagement and set the rate of POE's compensation for her performance. Although a closer question, we also find that Respondents carried on negotiations with the organizers of the RAINN benefit concert, in order to secure some payment (albeit minimal) for POE's appearance. Finally, turning to EDSEL's discussions with POE about the possibility of performing at upscale Dallas restaurants and nightclubs, we conclude that in view of the fact that these discussions took place very close in time to the other procurement activities, POE reasonably believed that Respondents were in fact offering to procure these Dallas engagements, rather than merely raising this as a hypothetical possibility.

10. We now turn to the question of whether, as a result of Respondents' failure to comply with the licensing requirement of the Talent Agencies Act, the various agreements between the parties (including the April 10, 2002 "preliminary management agreement," the subsequent agreement for accounting and bookkeeping services, and the Promissory Note) must now be declared void *ab initio*, leaving Respondents with no enforceable rights under those agreements, or whether the violations of the Talent Agencies Act should have no effect on the enforceability of these agreements, or alternatively, whether the agreements should be found to be partially unenforceable to the extent that some of the obligations under the agreements implicate the Talent

Agencies Act.

11. As a general matter, an agreement that violates the licensing requirement of the Talent Agencies Act is illegal and unenforceable. "Since the clear object of the Act is to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." *Buchwald v. Superior Court, supra,* 254 Cal.App.2d at 351. Having determined that a person or business entity procured, promised or attempted to procure employment for an artist without the requisite talent agency license, "the [Labor] Commissioner may declare the contract [between the unlicensed 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. "[A]n agreement that violates the licensing requirement is illegal and unenforceable . . . ." *Waisbren v. Peppercorn Productions, Inc., supra,* 41 Cal.App.4th at 262. California courts have uniformly held that a contract under which an unlicensed party procures or attempts to procure employment for an artist in violation of the Talent Agencies Act is *void ab initio* and the party procuring the employment is barred from recovering commissions for *any* activities under the contract; i.e, even though some (or even all) of the activities for which compensation is sought were legal activities, for which a license was not required, the fact that there was any illegal procurement makes the entire contract unenforceable. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1103-1104. 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 the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 626. Restitution, as a species of affirmative relief, is subject to the one year limitations period set out at Labor Code §1700.44(c), so that the artist is only entitled to restitution of amounts paid within the one year period prior to the filing of the petition to determine controversy[3]. *Greenfield v. Superior Court* (2003) 106 Cal.App.4th 743.

12. On the other hand, this statute of limitations does not apply to the defense of contract illegality and unenforceability, even where this defense is raised by the petitioner in a proceeding under the Talent Agencies Act. "If the result the [artist] seeks is [is a determination] that he or she owes no obligations under an agreement alleged by [the respondent] ... the statute of limitations does not apply." *Styne v. Stevens, supra,* 26 Cal.4th at 53.

13. The Labor Commissioner has exclusive primary jurisdiction to determine all controversies arising under the Talent Agencies Act. "When the Talent Agencies Act is invoked in the course of a contract dispute, the Commissioner has exclusive jurisdiction to determine his jurisdiction in the matter, including whether the contract involved the services of a talent agency." *Ibid.* at 54. This means that the Labor Commissioner has "the exclusive right to decide in the first instance *all the*

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[3] Since POE did not make any payments to Respondents after September 30, 2002, which was more than one year prior to the filing of the petition to determine controversy, the statute of limitations bars POE's claim for restitution of amounts that have been paid.

legal and factual issues on which an Act-based defense depends." *Ibid.*, at fn. 6, italics in original. In doing so, the Labor Commissioner will "search out illegality lying behind the form in which a transaction has been cast for the purpose of concealing such illegality," and "will look through provisions, valid on their face, and with the aid of parol evidence, determine [whether] the contract is actually illegal or part of an illegal transaction." *Buchwald v. Superior Court, supra,* 254 Cal.App.2d at 351.

14. AGON had three agreements with POE that were in effect at the time of the unlawful procurement activities – (a) the initial management agreement of April 10, 2002 (as EDSEL's efforts to replace that agreement with a new one never came to fruition, and AGON continued to provide management services pursuant to that initial agreement), (b) the agreement for accounting and bookkeeping services, and (c) the Promissory Note. The services that AGON provided to POE were all rendered pursuant to the first two of these three agreements, and although neither of these agreements stated that AGON was to provide procurement services, the fact that such unlawful services were provided compels a determination that both of these agreements are *void ab initio* and that Respondents have no enforceable rights thereunder.

15. The more difficult question here, of course, is presented by the Promissory Note. Both sides have presented cogent arguments about the similarities or differences between this case and *Almendarez v. Unico Talent Management, Inc.* (TAC No. 55-97). In *Almendarez*, the petitioner entered into a "1995

management agreement" with respondent that obligated petitioner to pay 20% commissions on petitioner's gross earnings. During a subsequent period in which the petitioner was unemployed, the respondent loaned him over $650,000 to pay his petitioner's legal obligations and lavish personal expenses. The parties then entered into a "1997 agreement" that obligated petitioner to repay the loans as well as the 20% commissions owed pursuant to the 1995 management agreement (although the obligation to pay the commissions was carefully disguised so as not to be apparent without the aid of parole evidence). The petitioner later sought to invalidate both agreements and to escape from any liability under the agreements due to numerous violations of the Talent Agencies Act committed by respondent during the period between the agreements. The Labor Commissioner found that the respondent had engaged in employment procurement activities and invalidated the 1995 agreement. The Labor Commissioner also determined that the 1997 agreement contained an obligation to pay for services that had been rendered by the respondent, and invalidated that obligation. Nevertheless, the Labor Commissioner concluded that petitioner could not escape his liability to respondent for the loans that were made to him. The Labor Commissioner determined he would "sever what was legally collected as a loan repayment and what was illegally collected as payment of commissions derived from an illegal management contract. To hold otherwise would undermine the intent of the parties, result in an inequitable holding, produce an injustice, and allow a contract to be enforced which violates public policy." *Id.* at 19.

16. In certain respects, this case presents a more

compelling case than *Almendarez* for declaring the loan agreement void in its entirety. Here, 37.45% of the loan proceeds were used (and intended to be so used when the loans were made) to pay AGON for services provided pursuant to two agreements determined to be void *ab initio* as a result of violation of the Act's licensing requirement. Respondents' argument that the Promissory Note is separate and distinct from any other agreements it had with POE rings false in that this money was loaned, in part, precisely so that POE could pay her obligations to AGON under the initial management agreement. In contrast, it does not appear that any of the loan proceeds in *Almendarez* were used, or intended to be used, to pay amounts owed by the artist to his manager. Furthermore, here AGON did not advance the loan proceeds directly to POE, but rather, funded a bank account from which AGON provided checks to POE for her to sign so that payments could be made to specified payees. In further contrast, loan proceeds were advanced directly to the artist in *Almendarez*, and he appeared to have complete discretion on how to spend those proceeds. In short, *Almendarez* looks a lot more like a traditional loan while here, the Promissory Note appears to be a means, at least in significant part, of ensuring payment to AGON for its services, and then, ensuring payment of the loan which was used to pay for its services by collateralizing POE's future earnings. But, in fairness to the other side of this story, the money that was loaned enabled POE to pay off over $100,000 in pre-existing debt to persons and entities other than the Respondents, and enabled POE to meet her ongoing personal expenses for a period of about six months. Under these

circumstances, we believe that *Almendarez* provides the right template to follow in resolving this issue. In order to effectuate the remedial purposes of the Act, we hold the Promissory Note is partially invalid to the extent that it was used as a source of payment for AGON's representation of POE, and that Respondents have no enforceable right to repayment of the $74,909.78 in loan proceeds that were used for that purpose. On the other hand, however, we hold that it would be inequitable to deny repayment to AGON of those loan proceeds that were not used or intended to be used as a source of payment for AGON's services, and that the Talent Agencies Act does not preclude Respondents from enforcing AGON's contractual right, to repayment of such amount - i.e., $125,090.22, but without any interest. Interest payments would allow AGON to profit or benefit from having provided services to POE, and could be viewed, as they were in *Almendarez*, as nothing more than a substitute for commissions for services that were provided to the artist. Just as a claim for commissions would be unenforceable as a consequence of the unlawful procurement (even if the commissions were owed only for activities which did not require licensure as a talent agency), so too, a claim for interest on money loaned by the unlicensed talent agency must be unenforceable, no matter what purpose the money was loaned for or how it was used.

17. Finally, Respondents' request for attorney's fees is denied. Respondents are not the prevailing party in this proceeding. Petitioner did not request fees, presumably because the Promissory Note's unilateral fee provision provides for fees only to AGON. (But see Civil Code §1717; *Hsu v. Abbara* (1995) 9

Cal.4th 863, 870; *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1081-1083, *Massey v. Landis* (TAC No. 42-03, pp. 12-15.) Thus, each side shall bear its own costs and fees.

ORDER

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

(1) The parties' April 10, 2002 management agreement, and the subsequent accounting/bookkeeping agreement are void *ab initio*, and Respondents have no enforceable rights thereunder, and are not entitled to payment of anything for amounts purportedly due under these agreements;

(2) The Promissory Note is partially invalid to the extent that it was used or intended to be used as a source of payment for AGON's representation of POE, and Respondents have no enforceable right to repayment of the $74,909.78 in loan proceeds that were used for that purpose. However, the Talent Agencies Act does not preclude Respondents from enforcing AGON's contractual right to repayment of the balance of the loan principals that was not used or intended to be used as a source of payment for AGON's representation of POE, in the amount of $125,090.22, with no right to interest payments on said amount.

Dated: 10/28/05

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: Oct. 28, 2005

DONNA M. DELL
State Labor Commissioner