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

BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

MARTA GREENWALD, as personal representative of the Estate of ELLIOT SMITH aka STEVEN PAUL SMITH, deceased, Petitioner, vs. JENNIFER CHIBA, Respondent.	No. TAC 03-05 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on for telephonic pre-hearing conference on July 13, 2005, and following that pre-hearing conference, the parties agreed that the Labor Commissioner could adjudicate the controversy without a live hearing, but rather, on the basis of evidence to be submitted by declaration and/or through the submission of Respondent's prior deposition testimony in a related action. Pursuant to this agreement, the parties, through their respective counsel, Roy G. Rifkin for the petitioner, and Eric S. Jacobson and Ronald Gold for the

respondent, simultaneously filed opening papers on August 2, 2005, and reply papers on August 16, 2005. Having reviewed the evidence and argument submitted, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. Petitioner Marta Greenwald is the administrator of the estate of Elliott Smith. The estate is being administered in a probate action that is pending in the Los Angeles County Superior Court. Prior to his death on October 21, 2003, Smith resided in Los Angeles, California. Smith was a well-known composer, singer and musical recording artist.

2. Respondent Jennifer Chiba is a resident of Los Angeles. She met Smith during the summer of 1999, and began a romantic relationship with him. On August 26, 2002, Smith moved into Chiba's apartment, and they resided together from then until his death. Chiba has never been licensed by the State Labor Commissioner as a talent agency.

3. On July 28, 2004, Chiba filed a creditor's claim, which was subsequently amended, against Smith's estate in the probate matter. On July 30, 2004, Chiba filed an action against Greenwald in Los Angeles Superior Court, alleging, *inter alia*, that in August 2002 she and Smith entered into an oral agreement under which "the parties agreed that they would live together, cohabitate and combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined....and that Plaintiff would render her services as a homemaker, housekeeper, and cook to the decedent, and that Plaintiff would further forego any independent

career opportunities to devote her full time to decedent as a homemaker, housekeeper, cook, secretary, bookkeeper, and financial counselor to the decedent, in consideration for which decedent agreed to provide for all of plaintiff's financial needs and support for the rest of her life." The complaint further alleged that as part of this oral agreement, "plaintiff would also act as decedent's manager and agent for the purposes of arranging the booking and scheduling appearances for musical performances by decedent ... in consideration for which Plaintiff would be specifically entitled to 15% of the proceeds earned and received on all such performances...."

4. On November 1, 2004, before any responsive pleading had been filed, Chiba filed a First Amended Complaint, which omitted any allegation that she had agreed to act or acted as Smith's manager or agent for the purposes of arranging the booking and scheduling appearances for his musical performances, and omitted any claim for any commissions on his earnings for such musical performances. The First Amended Complaint retained all of the other allegations detailed above regarding the parties' oral agreement and her performance of services as a homemaker, housekeeper, cook, secretary, bookkeeper, financial counselor, and added to this list her services as a "personal and career manager to the decedent." In her court action, Chiba alleges that Greenwald, as the administrator of Smith's estate, breached this agreement to provide for her financial needs and support for the rest of her life, resulting in damages in excess of $1,000,000.

5. By order dated January 10, 2005, the Los Angeles Superior Court stayed the civil action pending the reference of this matter

to the Labor Commissioner for determination of issues under the Talent Agencies Act (Labor Code §1700, *et seq.)*. On January 14, 2005, Greenwald filed this petition to determine controversy, seeking a determination that pursuant to her oral agreement with Smith, Chiba procured performing engagements for Smith, and since she did so without the requisite talent agency license, the oral agreement is void in its entirety from its inception, and that Chiba has no enforceable rights under that agreement. Chiba filed an answer to the petition, denying that she procured the engagements that were alleged in the petition, and seeking a determination that her oral agreement with Smith is not void, invalid or unenforceable under the Talent Agencies Act.

6. During a deposition that was taken on September 29, 2004 in connection with the parties' civil action, Chiba testified that she and Smith entered into the oral agreement that is the subject of the lawsuit sometime between August 26 and August 31, 2002, during a conversation in her home, and that during this conversation, she agreed to help him by becoming his manager and agent for the purpose of arranging the booking and scheduling appearances for Smith's musical performances, for which she would receive commissions on his entertainment earnings. Chiba testified that this discussion did not take place separately from the discussion about the other matters included in the alleged oral agreement, such as Smith's promise to provide for her financial needs and support her, and her promise to perform housekeeping, cooking, secretarial, bookkeeping, and financial counseling services for Smith. There was just one conversation during which all of these matters were discussed, and, according

to Chiba, the parties reached one oral agreement regarding all of these matters. Following this discussion, Chiba became involved in arranging the booking and scheduling Smith's performances for every one of his engagements. He performed at 20 engagements from the end of August 2002 until his death. Chiba testified that for some of these engagements, she initiated contact with the venue where the performance ultimately took place in order to procure the booking for Smith, and that for the others, she received telephone calls from persons requesting that he perform at their venue, and in those instances, she communicated with these callers to agree to and schedule the performances. She testified that for all of these engagements, she was involved in negotiations for Smith's fee.

7. No evidence was submitted that contradicts or casts any doubt upon Chiba's testimony as outlined above, so we rely on this testimony in deciding this case.

LEGAL ANALYSIS

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

2. 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." The term "procure," as used in this statute, 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, under Labor Code §1700.4(a), "procuring employment" is not limited to initiating discussions with potential purchaser's of the artist's services; 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. The uncontradicted evidence here plainly establishes that Chiba promised to procure employment, and did procure employment for Smith, so that she acted as a "talent agency" within the meaning of Labor Code §1700.4(a).

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 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 activites constituted a negligible portion of personal manager's efforts on behalf of artist, and manager was not compensated for these procurement activities].

4. Of course, an artist who procures employment for him or herself does not act as a "talent agency," and need not be licensed, in that the 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 a third-party employer. See *Chinn v. Tobin* (TAC No. 17-96), *Bautista v. Romero* (TAC NO. 3-04). But a spouse, or live-in boyfriend or girlfriend of an artist, who procures employment for that artist falls under the statutory definition of a "talent agency," as there is no exemption that would exclude such persons from the definition. The artist's spouse, or significant other, must be licensed as a talent agency to procure employment for the artist, in the same way that a license to practice law would be required to represent the person's spouse or significant other in a court trial.

5. 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.

6. 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 (or her) jurisdiction in the matter, including whether the 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 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.

7. California courts have uniformly held that a contract under which an unlicensed party procures or attempts to procure employment for an artist is void *ab initio* and the party procuring the employment is barred from recovering payments for *any* activities under the contract, including activities for which a talent agency license is not required. *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1103-1104; *Styne v. Stevens, supra,* 26 Cal.4th at 51; *Park v. Deftones, supra,* 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 1470. The courts have also unanimously denied all recovery to personal managers even when the overwhelming majority of the managers' activities did not require a talent agency license and the activities which did require a license were minimal and incidental. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104; *Park v. Deftones, supra,* 71 Cal.App.4th at 1470; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 250, 261-262. The rationale for denying a personal manager recovery even for activities which were entirely legal, where that personal manager also unlawfully engaged in employment procurement without the requisite talent agency license, is based on the public policy of the Talent Agencies Act to deter unlicensed persons from engaging in activities for which a talent agency license is required. This rationale is not limited to actions for breach of contract; it also applies to actions seeking recovery on theories of unjust

enrichment or quantum meruit. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104, fn. 30; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.app.4th at 250, fn. 2. Knowing that they will receive no help from the courts in recovering for their legal activities undertaken pursuant to an agreement under which they also engaged in unlawful procurement, personal managers are less likely to enter into illegal arrangements. *Yoo v. Robi, supra,* 126 Cal.App.4th at 1104; *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 262, citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150. In *Waisbren,* the court observed that one reason the Legislature did not enact criminal penalties for violations of the Talent Agencies Act was "because the most effective weapon for assuring compliance with the Act is the power ... to declare any contract entered into between the parties void from the inception." *Waisbren v. Peppercorn Productions, supra,* 41 Cal.App.4th at 262, quoting from a 1985 report issued by the California Entertainment Commission.

8. Here, Chiba argues that with the filing of her First Amended Complaint in the superior court action, she abandoned any prior claim for compensation for her procurement activities, so that she is now seeking recovery only for those activities for which she did not need a talent agency license, and that the Talent Agencies Act cannot apply to deny her right to recovery for activities that are not covered by the Act. This argument was made and rejected in *Yoo v. Robi:* "The fact that procuring recording contracts without a license does not in itself violate public policy is not determinative. The same thing could be said about numerous other activities personal managers engage in which

do not require a license such as counseling artists in the development of their professional careers, selecting material for their performances, managing their money, and the like. Engaging in those activities without a talent agency license does not violate public policy but those activities are nevertheless noncompensable if they are mixed in with activities which do require a license because of the overriding public policy of deterring unlicensed activities." *Yoo v. Robi, supra,* 126 Cal.App.4th at 1105. The fact that Chiba has abandoned her prior claim for commissions for her procurement activities is essentially irrelevant to the validity and enforceability of the alleged oral agreement between her and Smith. What matters is not whether or not she is seeking recovery for procurement activities, but whether she engaged in such activities without a talent agency license pursuant to an agreement under which she agreed to perform (and did perform) many other activities for which a license is not required. The evidence here is that there was but one integrated oral agreement, and that pursuant to that agreement, she performed unlawful procurement activities "mixed in" with activities for which a license was not required. As a result, the oral agreement is void from its inception, in its entirety, and Chiba has no enforceable rights thereunder. Whether or not, under the facts herein, this is a harsh result we cannot say, as it is the result that is unquestionably mandated by the line of cases interpreting the Talent Agencies Act.

ORDER

For all of the reasons set forth above, IT IS HEREBY ORDERED that the August 2002 oral agreement between Jennifer Chiba and

Elliott Smith is void from its inception, in its entirety, and that Chiba has no enforceable rights thereunder.

Dated: 10/20/05

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 11/16/05

DONNA M. DELL
State Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. §1013a)

(Marta Greenwald for Elliott Smith, etc. v. Jennifer Chiba)
(TAC 03-05)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102.

On November 22, 2005, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope(s) addressed as follows:

ROY G. RIFKIN, ESQ.
Wolf, Rifkin, Shapiro & Schulman, LLP
11400 West Olympic Boulevard, 9th Floor
Los Angeles, CA 90064-1582

RONALD GOLD, ESQ.
MEREDITH C. LEVY, ESQ.
Oldman, Cooley, Leighton, Sallus,
Gold & Birnberg
16133 Ventura Blvd., Penthouse Suite A
Encino, CA 91436-1818

ERIC S. JACOBSON, ESQ.
EDWIN M. ROSENBERG, ESQ.
3435 Wilshire Boulevard, Suite 2360
Los Angeles, CA 90010

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on November 22, 2005, at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON