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Department of Industrial Relations
State of California
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

TERESA S. BANKS, an individual, Petitioner, vs. PENELOPE LIPPINCOTT dba FINESSE FREELANCE DEVELOPMENT, Respondent.	TAC No. 13510-12 DETERMINATION OF CONTROVERSY

The above captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on January 10, 2010 in San Francisco, California, before the undersigned attorney for the Labor Commissioner, assigned to hear the matter. Petitioner, TERESA S. BANKS (hereinafter "Petitioner" or "Banks" appeared in propria persona. Respondent, PENELOPE LIPPINCOTT, appeared in propria persona. For purposes of hearing this matter was heard with four (4) other petitions filed against the same respondent, TAC No.11319, filed by Sally Hoover as Guardian for Kristen Leacy, a minor; TAC No. 13509 filed by Judy Funke; TAC No. 13643 filed by Arega Bagirian; and TAC 14621, filed by Jacqueline Ramos.

Based on the evidence presented at the hearing in this matter and on the other papers on file in this case, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

1. At all time relevant herein, Penelope Lippincott was an individual doing business as Finesse Model Management aka Finesse Models (hereinafter collectively referred to as

(FUSE) which are solely owned by Lippincott. In furtherance of this enterprise, Lippincott had the models sign an "agreement" entitled "Business Development Registration." A copy of the "agreement" signed by Petitioner is included in Hearing Exhibit A in the instant case. While containing the disclaimer that neither FUSE nor Finesse are modeling agents, Lippincott used these entities to conduct the business of collecting money from models in exchange for the services of training and purportedly finding them work in the industry.

6. Lippinott testified in the combined proceeding that she did not act as a talent agent because she did not solicit work for the models or promise to do so, but merely looked for, trained and used models in productions that she herself produced through FUSE. The weight of the evidence of all of the Petitioners belies that testimony as explained in the decision regarding each Petition. It is found that Lippincott did in fact promise to solicit work and find work for Petitioner herein, but took her money and did not find any work for her.

LEGAL ANALYSIS

1. Labor Code §1700.4(b) includes models within the definition of artists for purposes of the Talent Agencies Act (TAA) (Labor Code §§1700-1700.47). Petitioner is therefore an "artist" within the meaning of Labor Code section 1700.4(b).

2. Labor Code §1700.4(a) defines 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." In prior decisions, 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 TAA 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. *Chin v. Tobin* (TAC No. 17-96) at page 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

entertainers that it provided to its customers, determined the compensation paid to the entertainers for providing the services, and thus we concluded, "became the direct employer of the performers." Significantly, however, in both *Chinn* and *Kern* no evidence was presented that the respondents "ever procured or promised or offered to attempt to procure employment for petitioners with any third party. That lack of evidence as to the 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 businesses were determined to be acting as talent agencies within the meaning of Labor Code §1700.4(a). *Chin v. Tobin, supra,* at page 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."

3. Labor Code §1700.5 provides that "[n]o person shall engage or carry on the occupation of a talent agency without first procuring a license...from the Labor Commissioner." The TAA is a remedial statute that must be liberally construed to promote its general object, the protection of the 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 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 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. In 2005 there were several petitions filed against Respondent in this matter. The decisions in those cases are found at TAC Nos. 14-05, 16-05, 18-05. Since those decisions were issued holding that Respondent acted as a talent agent operating without being licensed, Lippincott has added a new wrinkle to her scheme. Now, with the addition of FUSE, Lippincott takes the position that she is not a "talent agent" under the TAA, because she tells the models that she is not

soliciting work on their behalf but merely training them to be "freelance models." All of the written materials distributed by Finesse and FUSE use that terminology (See Exhibits A and B to the combined hearings).[1] Against this written evidence is the similar testimony of the four, unrelated petitioners who universally claim that Lippincott sought money from them for "training" and to find them jobs in the modeling industry in exchange for money. Lippincott has unsuccessfully attempted to create a fiction through the paper trail of her business in order to evade the requirements of the TAA.

5. The evidence before us in the instant case leads to the conclusion that at the inception of the relationship, Respondent promised to procure modeling employment for Petitioner, and attempted to do so whether successfully or not. Despite Respondent's claim that whenever it provided a client with a model's services she did so as the "producer' of the client's fashion runway show or print advertisement, Respondent failed to present sufficient corroborating evidence. The argument that Respondent acted 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 promising to and/or obtaining work for the model(s), and as such, the burden of proof shifts to the Respondent once the Petitioner establishes, as is the case here, that the Respondent obtained or promised to obtain modeling work for the Petitioner.

6. But, even assuming *arguendo* that Respondent never actually procured and never attempted to procure modeling employment for the petitioner with any third party employer (the primary argument of Respondent in this case), 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 testify that she believed that Respondent had offered and promised to do just that, more importantly, taking the evidence as a whole, we conclude that any reasonable person in the Petitioner's position would have formed that same belief. There is simply no other

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[1] Indeed, Lippincott solely owns both Finesse and FUSE, thus controlling the entire enterprise and whether Petitioner was used for any modeling work that FUSE obtained for third parties or for itself. "Freelance" and independent contractor principles apply to the determination of whether a person is an employee of another person or business. It has no relationship to whether a person is acting as a talent agent under the TAA. Nor did Lippincott present any argument or evidence to tie this legal principle to any of the issues in this case.

way to reasonably interpret many of the Respondent's policies and procedures, and Respondent's written and oral representations of what she could and could not do for the Petitioner. 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 occupations of a "talent agency" within the meaning of Labor Code §1700.4(a). As such, despite Respondent's efforts to structure her operations (or perhaps more accurately, efforts to appear to have structured her operations) so as to avoid the requirements of the TAA, Respondent violated the Act by operating as a "talent agency" without the requisite license.

7. An agreement between an artist and a talent agency that violates the licensing requirement of the TAA 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 a person meeting the definition of an artist under the Act 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 unlicnsed 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 limited to the amounts that an unlicensed agent charged for procuring or attempting to procure employment, but rather, may include amounts paid for services for which a talent agency license is not required.

8. With these legal principles in mind, we conclude that as a consequence of Respondent's violations of Labor Code §1700.5, all agreements between Petitioner and Respondent are illegal and void, and the Petitioner is entitled to restitution for all amounts that she paid to the respondent

for promised goods and services pursuant to any such agreement. It is determined that this amount is $4,284.00, which includes the two checks paid by Petitioner to Respondent.

9. Petitioner's right to reimbursement of some of the amounts paid to Respondent are separately founded upon Labor Code §1700.40(a), which provides that "[n]o talent agency shall collect a registration fee." Labor Code §1700.2(b) defines a "registration fee" as "any charge made, or attempted to be made, to an artist for any of the following purposes...(1) listing or registering an applicant for employment in the entertainment industry...(3) photographs... or other reproductions of the applicant..(5) Any activity of a like nature." Labor Code §1700.40(b) further 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 not limited to photography...coaching, dramatic school...or other printing." Respondent's collection of that was paid by Petitioner for attendance at Respondent's modeling workshops was unquestionably illegal pursuant to Labor Code §1700.40.

10. Petitioner may have additional remedies under the provisions of the Advance-Fee Talent Services Act[2] (AFTSA) (Labor Code §§1701-1704.3.) Labor Code §1700.44 authorizes the Labor Commissioner to hear and decide controversies under the TAA. In contrast, the provisions of the AFTSA may be enforced by the Attorney General, any district attorney, or city attorney, or through the filing of a private civil action. (See Labor Code §§1704.1, 1704.2.) Furthermore, 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. (See Labor Code §§1703.3, 1704.3.) We hereby take administrative

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[2] The term "advance-fee talent service" is defined at Labor Code §1701(b) to mean a person who charges, or attempts to charge, or receive 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.

The term "advance fee" is defined at Labor Code §1701(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 earning as an artist or that exceeds the actual earning received by the artist.

notice that Respondent has not posted such a bond with the Labor Commissioner.

ORDER

For all of the foregoing reasons, IT IS HEREBY ORDERED that:

1. All contracts or agreements between Respondent and Petitioner are void, and that Respondent has no enforceable rights thereunder; and

2. Respondent shall immediately reimburse Petitioner for $4,284 that Petitioner paid to Respondent pursuant to such contracts and agreements and resultant bank charges.

Dated: February 26, 2013

Michael L. Hipshman SBN 252726 for
ANNE HIPSHMAN
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: February 26, 2013

JULIE A. SU,
State Labor Commissioner

PROOF OF SERVICE

Banks v Lippincott
TAC Case No. 13510-12

I, the undersigned, declare that I am and was at the time of service of the papers herein referred to, over the age of 18 and not a party to the within action or proceeding. My address is 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102 which is located in the county in which the within mentioned mailing occurred. I am familiar with the practice at my place of business for collection and processing of documents for mailing with the United State Post Office and by facsimile. Such documents will be deposited with the United States Postal Service with postage prepaid and/or faxed to the addresses and/or facsimile numbers as stated below on the same day in the ordinary course of business.

On February 26, 2013, I served the following document(s):

DETERMINATION OF CONTROVERSY

X by placing true copies thereof in an envelope(s) 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, addressed as follows:

___ by placing true copies thereof in a UPS envelope for delivery by overnight mail with all fees prepaid and addressed as follows:

Teresa S. Banks
1826 Santa Clara Ave
Alameda, CA 94501

Penelope Lippincott
dba Freelance Development
1475 Broadway, Ste. 250
Walnut Creek, CA 94596

____ by facsimile at the following facsimile number(s):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26th day of February, 2013 at San Francisco, California.

Chike Ufombah