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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

RIVERS CUOMO, an individual; PAT WILSON, an individual; BRIAN BELL, an individual; and MIKEY WELSH, an individual; collectively and professionally known as "WEEZER" Petitioners, vs. ATLAS/THIRD RAIL MANAGEMENT, INC., a California corporation; and PAT MAGNARELLA, an individual, Respondents.	No. TAC 21-01 DETERMINATION OF CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on October 31, 2001 in Los Angeles, California, before the Labor Commissioner's undersigned hearing officer. Petitioners were represented by Stanton L. Stein and Yakub Hazzard, and Respondents were represented by Martin D. Singer and Paul N. Sorrell. 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.

FINDINGS OF FACT

1. Petitioners are musicians who perform under the names "Weezer" and, on certain occasions, "Goat Punishment". Weezer was formed in 1992. Starting in 1998 through 2000, Weezer performed under the name Goat Punishment on seven or eight separate occasions, generally when the musicians wanted to play before a relatively small audience of knowledgeable fans, without the pressure of performing under their more-widely known name.

2. In late 1993, petitioners hired Roven Cavallo Entertainment, Inc., to provide "personal management" services. This agreement was later set out in a written contract, which was executed around January 1, 1994. Under the terms of this contract, petitioners agreed to pay commissions to their personal manager in the amount of 15% of their gross earnings. The contract specified that Roven Cavallo Entertainment was not a licensed talent agency and is not licensed, permitted or authorized to attempt, offer or promise to procure employment for petitioners. The contract also provided that "in the event of litigation or arbitration arising out of this agreement or the relationship of the parties created hereby, the prevailing party shall be entitled to recover any and all reasonable attorney's fees and other costs incurred in connection herewith."

3. At some point between 1994 and 2001, the corporate name of Roven Cavallo Entertainment was changed to Atlas/Third Rail Management, Inc. Respondent Atlas/Third Rail Management, (hereinafter "Atlas") continued to represent petitioners as their personal manager until May 2001. Respondent Pat Magnarella testified that he is a "partner" at Atlas. Neither Atlas nor

Maganrella has ever been licensed as a talent agent.

4. From 1995 until May or June 2001, petitioners were represented by Creative Artists Agency as their booking/talent agents. Prior to 1995, William Morris Agency served as petitioners' booking/talent agents.

5. Weezer's first record was released on May 1994. Petitioner Rivers Cuomo testified that as the date for the release approached, he expressed his frustration to Pat Magnarella that no record release party had been scheduled. According to Cuomo, Magnarella said that he'd get the band a record release party/show, "and then the show was booked." Weezer performed at this show, which took place at Club Lingerie on May 9, 1994, and which, like any other live performance, was open to the public. Magnarella testified that he had no role in obtaining that engagement, and that he believed that it had been booked by William Morris Agency, Weezer's booking/talent agent at that time. Petitioners failed to present any evidence to rebut Magnarella's testimony on this issue.

6. In October or November 2000, Magnarella asked Rivers Cuomo whether petitioners would be interested in performing as actors in the movie "Scooby Doo", which was scheduled to be filmed in January or February 2001. Cuomo testified that Magnarella sent copies of the movie script to the petitioners. Magnarella testified that the film was being produced by Atlas, and that along with managing musicians, Atlas/Third Rail also produces movies. Rivers ultimately advised Magnarella that petitioners were not interested in appearing in this film.

7. In November 2000, petitioners agreed to perform at the

KROQ Acoustic Christmas shows, scheduled for December 16, and December 17, 2000. Petitioners wanted to do some live performances before these shows, under the name "Goat Punishment", in order to "warm up" for the Christmas shows. Rather than contact their booking agents at Creative Artists Agency to obtain engagements for these "warm up" performances, petitioners contacted Christopher Donahoe, an Atlas employee who had been working as an assistant to Pat Magnarella since December 1998, to arrange for these performances. Among his duties as an Atlas employee, Donahoe was responsible for setting up rehearsals for musicians. Previously, Donahoe had set up rehearsals for Weezer both without any audience and with non-paying private audiences of record company executives. Donahoe was not licensed as a talent agent, and prior to November 2000, had never sought to procure live public engagements for petitioners.

8. On or about December 1, 2000, Donahoe made telephone calls to Jennifer Teft, the booker at a music club called "Spaceland", and Paul McGuigan, the booker at a music club called "The Troubadour", seeking to procure engagements for Weezer to perform before live, paying audiences under the name "Goat Punishment" immediately prior to petitioners' scheduled engagement at the KROQ Christmas shows. As a result of Donahoe's calls, both venues booked petitioners to perform -- on December 14, 2000 at Spaceland, and on December 15, 2000 at the Troubadour. In a subsequent telephone discussion with Jennifer Teft, on December 7, 2000, Donahoe negotiated the financial terms of petitioners' Spaceland appearance, agreeing to a $500 guarantee plus a percentage of the gate. Patrons were charged an

admission fee for that show, and petitioners received $900 compensation for the performance. Donahoe did not negotiate any terms of compensation for petitioners' appearance at the Troubadour, however, petitioners were paid $250 for that appearance. Goat Punishment was one of four musical groups performing on the bill at the Troubadour, and members of the audience had to pay an admission fee. The show was advertised in the LA Weekly.

9. Petitioners' booking/talent agency at the time, Creative Artists Agency, played no role whatsoever in procuring or negotiating the terms of the Spaceland and Troubadour performances. Creative Artists Agency never booked any of petitioners' performances under the name "Goat Punishment."

10. Atlas never received any compensation for itself as a result of any of any of petitioners' Goat Punishment shows. Atlas did not seek to collect any commissions for these shows.

11. During the one-year period prior to the filing of this petition to determine controversy, petitioners paid a total of $134,011.13 ($55.655.59 prior to December 1, 2000, and $78,355.54 on or after that date) in commissions to Atlas as follows: Weezer collectively paid $96,490.99 ($48,191.74 before, and $48.299.25 on or after 12/1/00), Rivers Cuomo paid $35,206.75 ($7,353.84 before, and $27,852.91 on or after 12/1/00), Pat Wilson paid $2,190.74 ($65.39 before, and $2,125.35 on or after 12/1/00), and Brian Bell paid $122.65 ($44.62 before, and $78.03 on or after 12/1/00).

12. Respondent Pat Magnarella testified it was not until October 2001 that he learned that Donahoe had obtained the

December 2000 engagements at Spaceland and the Troubadour. However, there was no indication from the testimony presented that Magnarella had ever instructed Donahoe that he could not procure live public engagements for petitioners.

13. In May 2001, petitioners sought to reduce Atlas' commission rate. Magnarella refused to reduce Atlas' rate, and petitioners thereafter terminated the personal management agreement. Atlas filed a demand for arbitration against petitioners pursuant to the arbitration clause in the personal management agreement. Thereafter, Atlas filed a superior court action seeking writs of attachment against petitioners. Petitioners responded with this petition to determine controversy, filed with the Labor Commissioner on July 20, 2001. By this petition, petitioners seek an order declaring the personal management contract void *ab initio* on the ground that respondents performed functions of a talent agency without a license therefor, reimbursement of all amounts paid to respondents pursuant to the personal management contract in the one year period preceding the filing of the petition, and reimbursement of attorney's fees incurred in connection with this proceeding.

LEGAL ANALYSIS

Petitioners are artists within the meaning of Labor Code section 1700.4(b). The issue here is 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.

Labor Code section 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." 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; its purpose is to protect artists seeking professional employment from the abuses of talent agencies. For that reason, the overwhelming judicial authority supports the Labor Commissioner's historic enforcement policy, and holds that "[E]ven the incidental or occasional provision of such [procurement] services requires licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51.

Petitioners allege four separate acts of procurement or offers to procure employment. The first, the May 9, 1994 record release party at Club Lingerie, fails for lack of evidence that the engagement had been procured by Atlas. The second, Magnarella's offer to employ petitioners for acting roles in the movie "Scooby Doo", fails because as a matter of law, this offer of employment does not constitute procurement within the meaning of Labor Code §1700.4(a), in that Atlas was the producer of this movie. We have previously held that a person or entity who employs an artist does not "procure employment" for the artist, within the meaning of section 1700.4(a), by directly engaging the services of the artist; and 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) pp. 5-8. Likewise, a movie producer does not act as a talent agent by offering to directly employ artists to act in the movie that the producer is producing.

The third and fourth instances of alleged procurement -- the engagements at Spaceland and the Troubadour in December 2000 -- are more troubling. These were musical performances before a live paying audience that were advertised and open to the public. The fact that petitioners performed these engagements under the name "Goat Punishment" rather than the name "Weezer" is entirely irrelevant, as is the fact that Atlas did not collect or seek to collect any commissions for these shows. (See *Park v. Deftones* (1999) 71 Cal.App.4th 1465, 1471-1472, holding that the Talent Agencies Act requires a license to engage in procurement activities even if no commission is received for the service.) Respondents' argument that there was no procurement of employment because there was no attempt to secure payment for petitioners for their artistic services is equally unavailing, as it ignores the evidence that Donahoe negotiated with Spaceland for compensation for petitioners. Even assuming, arguendo, that Donahoe did not negotiate the amount of compensation for that engagement, the fact remains that petitioners were paid for both the Spaceland and Troubadour engagements, and thus, this case has nothing in common with the securing of a pay-to-play engagement (under which the artist pays for the right to perform) discussed in *Bloomberg v. Butler* (TAC No. 31-94).

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* (1967) 254 Cal.App.2d 347, 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.* (1995) 41 Cal.App.4th 246, 262. 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. This remedy of restitution is, of course, subject to the one year limitations period set out at Labor Code §1700.44(c). This is a remedy that petitioners seek herein.

Respondents contend, however, that no liability should attach for the acts of procuring engagements at Spaceland and the Troubadour because Christopher Donahoe, the Atlas employee who procured these engagements for petitioners, was not authorized by Atlas or Magnarella to do so. This raises the issue of whether Atlas, as Donahoe's employer, is strictly liable for the consequences that might otherwise stem from unlawful procurement

activities undertaken by an employee of Atlas, or whether some other standard of liability should apply.

Initially, we note that definitions of key terms in the Talent Agencies Act suggest that the Legislature intended to make business entities that perform the functions of a talent agency (whether legally under a license, or unlawfully without a license) strictly liable for the acts of their employees. The term "talent agency" is defined as "a person or corporation who engages in the occupation of procuring...." Labor Code §1700.4(a). The prohibition of functioning as a talent agency without a license provides that "[n]o person shall engage in . . . ." Labor Code §1700.5. The term person, as used throughout the Talent Agencies Act, is defined as "any individual, company, society, firm, partnership, association, **corporation**, limited liability company, manager, **or their agents or employees**." Labor Code §1700. By expressly including "agents or employees" within this definition, it would appear that a corporation cannot escape liability for the misdeeds of any of its employees.

We further note that there is nothing in the Act, or in any of the case law construing the Act, that would suggest any standard other than strict liability for violations of an artist's rights under the Act. Any weaker standard of liability would tend to impede the remedial purposes of the Act. Standards under which an employer may escape liability for the unauthorized acts of its employee -- for example, liability based on common law theories of agency or the doctrine of *respondeat superior* -- are more applicable in dealing with an innocent employer's liability for a tort committed by the employer's employee against

a third party towards whom the employer owes no statutory duty. This model is inappropriate here because the artist enjoys the protections of a comprehensive statutory scheme designed to regulate the conduct of those persons or business entities who provide employment procurement services. Common law doctrines of liability would leave artists unprotected from unlawful conduct and would fail to adequately discourage the sorts of practices that are prohibited by the Act. For these reasons, we conclude that Atlas is liable for the consequences of the unlawful procurement activities of its employee, regardless of whether these activities were authorized.

This approach is consistent with that of the United States Supreme Court in assessing the liability of an employer under the National Labor Relations Act for unfair labor practices committed by low level supervisors or lead persons when the employer had neither authorized nor ratified the unlawful conduct. See *I.A. of M. v. Labor Board* (1940) 311 U.S. 72, 61 S.Ct. 83, and *H.J. Heinz Co. v. Labor Board* (1941) 311 U.S. 514, 61 S.Ct. 320. This is also the approach followed by the California Supreme Court in addressing this same question under the Agricultural Labor Relations Act. "[I]n general an employer's responsibility for coercive acts of others under the ALRA, as under the NLRA, is not limited by technical agency doctrines or strict principles of respondeat superior, but rather must be determined, as *I.A. of M.* and *Heinz* suggest, with reference to the broad purposes of the underlying statutory scheme." *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 322.

Even under a standard of liability based on *respondeat*

superior, we find that under the facts herein, Atlas would not escape liability for Donahoe's unlawful procurement activities. Under the doctrine of *respondeat superior,* the innocent employer is vicariously liable for its employees' torts committed while acting within the scope of employment, without regard to whether the employee is acting in excess of his authority or contrary to instructions. The employee is considered to be acting within the scope of his employment if he is engaged in work he was employed to perform, during his working hours. The employer can be liable for his employee's unauthorized intentional torts committed within the scope of his employment despite lack of benefit to the employer. *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962. At the time the engagements at issue here were procured, Donahoe had been employed by Atlas for one year, and among his other duties as an employee of Atlas, he was responsible for setting up rehearsals for the petitioners. Viewing the engagements as "rehearsals" for the upcoming KROQ Christmas show (as Atlas itself argues), the procurement of these engagements came within the scope of Donahoe's employment. As such, liability attaches to Atlas under the doctrine of *respondeat superior.*

On the other hand, the facts do not support a finding of liability as to respondent Magnarella. There is no evidence that he personally engaged in any unlawful procurement activities. Petitioners' contract was with the corporate predecessor to Atlas, not with Magnarella individually. Petitioners paid commissions to Atlas, not to Magnarella. Atlas itself is a corporation, and there was no evidence presented that would

warrant the imposition of personal liability for amounts that may be owed by Atlas.

Having found that Atlas, through its employee Christopher Donahoe engaged in unlawful procurement activities, and that Atlas is responsible for the unlawful procurement activities, we necessarily conclude that the contract between Atlas and petitioners is void, and that Atlas has no enforceable rights thereunder. Under the facts herein, the contract cannot be held to have been void *ab initio,* in that at the time the parties entered into this contract, it was not a subterfuge for the unlicensed performance of employment procurement services. Indeed, for a period of seven years, Atlas (and its predecessor, Roven Cavallo Entertainment) functioned as personal managers for petitioners, not as talent agents, operating within the letter of the law. Throughout this seven year period of time, the contract to perform personal management services was valid and enforceable. The contract became invalid, and void (or, more accurately, voidable by petitioners) once Atlas, through its employee, Christopher Donahoe, started functioning as a talent agency within the meaning of the Act by performing employment procurement services for the petitioners.

As for disgorgement of commissions previously paid to Atlas, we note that in *Bank of America NTSA v. Fleming* (No. 1098 ASC MP-432), the Labor Commissioner held that in a proceeding under the Talent Agencies Act, the Commissioner has broad discretion in fashioning a remedy that is appropriate under the facts of the case. Under the facts of this case, where we find that the contract was not void *ab initio*, but rather, became void once

Atlas engaged in unlawful procurement activities on December 1, 2000, it would be inappropriate to order disgorgement of any amounts that petitioners paid to Atlas prior to December 1, 2000. Disgorgement is an appropriate remedy, however, as to amounts paid to Atlas pursuant to the personal management contract starting on December 1, 2000.

Turning to petitioner's request for attorneys' fees incurred in connection with this proceeding, the contract between the parties did provide for an award of reasonable attorney's fees to the prevailing party "in the event of litigation or arbitration arising out of this agreement or the relationship of the parties created hereby." But an administrative proceeding before the Labor Commissioner pursuant to Labor Code §1700.44 neither constitutes "litigation" nor "arbitration". Litigation is commonly understood as "the act or process of carrying out a lawsuit." (Webster's New World Dictionary, Third College Edition (1988)) Lawsuits take place in courts, not before administrative agencies. Black's Law Dictionary defines "litigation" as a "contest in a court of justice for the purpose of enforcing a right." And an "arbitration", obviously, takes place before an arbitrator, not an administrative agency authorized to hear disputes pursuant to statute. Consequently, we conclude that the contract does not provide for an award of attorneys' fees incurred in a proceeding to determine controversy before the Labor Commissioner. Therefore, even though the petitioners have prevailed before the Labor Commissioner, they are not entitled to attorneys' fees.

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ORDER

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

1. The personal management contract between petitioners and Atlas/Third Rail Management, Inc., became void and unenforceable on December 1, 2000, and Atlas now has no enforceable rights thereunder;

2. Atlas reimburse petitioners for the commissions paid to Atlas from December 1, 2000 in the amount of $78,355.54, consisting of $48.299.25 to Weezer collectively, $27,852.91 to Rivers Cuomo, $2,125.35 to Pat Wilson, and $78.03 to Brian Bell;

3. The petition is dismissed as to respondent Pat Magnarella;

4. All parties shall bear their own costs and attorney's fees.

Dated:

MILES E. LOCKER
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated:

ARTHUR S. LUJAN
State Labor Commissioner