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DIVISION OF LABOR STANDARDS ENFORCEMENT
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8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA

10

11 NSPSY RECORDING PARTNERS;)	No. TAC 43-02
BENJAMIN BLAINE CARTWRIGHT;)	
12 RUYTER SUYS; collectively p/k/a)	
NASHVILLE PUSSY,)	
13)	
Petitioners,)	
14)	
vs.)	
15)	
SCOTT JEFFREY WEISS, d/b/a/)	DETERMINATION OF
16 HIGHWATT MANAGEMENT,)	CONTROVERSY
17)	
Respondent.)	

18

19 The above-captioned matter, a petition to determine
20 controversy under Labor Code §1700.44, came on regularly for
21 hearing on October 31, 2003, in Los Angeles, California, before
22 the Labor Commissioner's undersigned hearing officer.
23 Petitioners appeared through their counsel, Edwin McPherson, and
24 Respondent appeared through his counsel, Eric Lagin. Based on
25 the evidence presented at this hearing, the Labor Commissioner
26 hereby adopts the following decision.

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1 between respondent and concert promoters were made before it had
2 been agreed between respondent and Riley that Nashville Pussy
3 would perform as the opening act -- that is, most of these shows
4 were booked for Reverend Horton Heat to perform with an as yet
5 undesignated opening act. However, at least some of the
6 agreements with concert promoters specified that Nashville Pussy
7 would be the opening act. With one exception, discussed below,
8 by January 1, 2002, all negotiations between respondent and
9 concert promoters for the tour were concluded, with some of the
10 shows already confirmed (i.e., the bands had cleared the dates
11 and confirmed their availability), and other shows "on hold"
12 (i.e., the bands had not yet confirmed their availability for
13 those particular shows). As to all of these shows that were
14 confirmed or on hold, there were no further monetary negotiations
15 with promoters after January 1, 2002.

16 6. Respondent had negotiated a total payment with the
17 promoter of each concert, and this total payment was subsequently
18 divided between the two bands without any input from the
19 promoters as to how much each band should receive. Instead, the
20 amount that petitioners were to receive for each show during the
21 Reverend/Nashville tour was determined by the respondent,
22 generally following discussions with Frank Riley as to how much
23 Nashville Pussy ought to receive for each engagement. Respondent
24 testified that in deciding how much to pay Nashville Pussy for
25 each engagement, he would "have to determine if it was in
26 Reverend Horton Heat's interest to have that amount paid."
27 Actual payments to the bands were ultimately made by the shows'
28 promoters, who were informed by respondent as to how much of the

1 total payments were to be paid to each band.

2 7. On or about January 1, 2002, petitioners entered into an
3 oral agreement with respondent, whereby respondent was to act as
4 petitioners' "personal manager", for which respondent was to
5 receive a percentage of petitioners' music related income.

6 8. Respondent testified that as "personal manager", he was
7 expected "to oversee petitioners' business affairs", to handle
8 their "merchandising issues" and "record deal issues", and to
9 "get licenses for overseas recordings." Respondent testified
10 that petitioners did not ask him to help them secure employment,
11 or to find venues for their performances, as this was the
12 function of their talent agent, Frank Riley, and that Riley never
13 asked him to get involved in any particular negotiation for
14 Nashville Pussy's services. Respondent testified that Riley is a
15 very good, experienced agent, so that he had a "hands-off"
16 approach with respect to the functions that Riley was engaged to
17 perform.

18 9. On May 15, 2002, respondent received an unsolicited
19 offer from Joe Dorgan, a concert promoter, for a July 2, 2002
20 engagement in El Paso, Texas for Reverend Horton Heat and
21 Nashville Pussy. Respondent sent an e-mail to Frank Riley,
22 advising him of this offer, stating "should we do it, the pussy
23 would get 1K." The offer was accepted by Riley, whereupon
24 respondent advised the promoter that Nashville Pussy would
25 perform the engagement.

26 10. As the Reverend/Nashville tour progressed, petitioners
27 became increasingly dissatisfied with the way in which the tour
28 was being promoted. This led to a breakdown in the band's

1 relationship with the respondent, and in late July 2002,
2 petitioners terminated respondent's services.

3 11. On October 7, 2002, respondent filed a lawsuit against
4 petitioners for breach of contract and other causes of action,
5 alleging that petitioners owed the respondent commissions on
6 revenues earned by Nashville Pussy for "bookings that
7 [respondent] arranged on behalf of [Nashville Pussy] during the
8 period of time that [respondent] was actively serving as manager
9 for Nashville." The complaint that initiated this lawsuit was
10 unverified. Respondent testified that he "did not arrange any
11 bookings" and "did not book anything as an agent" for Nashville
12 Pussy, but that he did "help finalize arrangements as a manager."

13 12. On November 22, 2002, Nashville Pussy filed this
14 petition to determine controversy against the respondent,
15 alleging that respondent violated the Talent Agencies Act (Labor
16 Code §1700, et seq.) by acting in the capacity of a talent
17 agency, by procuring, offering, promising or attempting to
18 procure employment or engagements on behalf of petitioner,
19 without having obtained a talent agency license from the
20 California Labor Commissioner. Petitioners seek a determination
21 that the agreement with the respondent for his services as
22 "personal manager" is void and unenforceable, and that respondent
23 has no enforceable rights thereunder; an order for an accounting
24 of all amounts that respondent received pursuant to this
25 agreement, and for the reimbursement of all such amounts. On
26 January 3, 2003, respondent filed an answer to the petition,
27 denying that he engaged in any actions requiring a license as a
28 talent agency.

1 licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. The
2 consequences of engaging in covered procurement activities
3 without a license are severe. An agreement that violates the
4 licensing requirement of the Talent Agencies Act is illegal and
5 unenforceable. "Since the clear object of the Act is to prevent
6 improper persons from becoming [talent agents] and to regulate
7 such activity for the protection of the public, a contract
8 between an unlicensed [agent] and an artist is void." *Buchwald*
9 *v. Superior Court* (1967) 254 Cal.App.2d 347, 351. Having
10 determined that a person or business entity procured, promised or
11 attempted to procure employment for an artist without the
12 requisite talent agency license, "the [Labor] Commissioner may
13 declare the contract [between the unlicensed agent and the
14 artist] void and unenforceable as involving the services of an
15 unlicensed person in violation of the Act." *Styne v. Stevens*,
16 *supra*, 26 Cal.4th at 55. "[A]n agreement that violates the
17 licensing requirement is illegal and unenforceable"
18 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th
19 246, 262. Moreover, the artist that is party to such an
20 agreement may seek disgorgement of amounts paid pursuant to the
21 agreement, and "may . . . [be] entitle[d] . . . to restitution of
22 all fees paid the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th
23 616, 626. This remedy of restitution is, of course, subject to
24 the one year limitations period set out at Labor Code
25 §1700.44(c).

26 It is undisputed that petitioners are "artists" within the
27 meaning of Labor Code §1700.4(b). It is also undisputed that
28 respondent, although never licensed as a talent agent by the

1 State Labor Commissioner, did act as a "talent agent", within the
2 meaning of Labor Code §1700.4(a), by procuring live engagements
3 for Reverend Horton Heat. The issue here, however, is whether
4 respondent's activities on behalf of petitioners come within the
5 definition of a "talent agency" under Labor Code §1700.4(a), and
6 if so, on whether the exception provided by Labor Code
7 §1700.44(d) applies to excuse the respondent from the Act's
8 licensing requirement. If respondent did not act as a "talent
9 agency" with respect to the petitioners, or if all such actions
10 came within the scope of section 1700.44(d), then the fact that
11 respondent was never licensed as a talent agency would not affect
12 the validity of his "personal management contract" with
13 petitioners.

14 But for respondent's efforts, petitioners would not have
15 obtained any engagements as the opening act in the
16 Reverend/Nashville tour. That alone, however, does not mean that
17 respondent acted as a "talent agency" for petitioners within the
18 meaning of Labor Code §1700.4(a). We have previously held that a
19 person or entity who employs an artist does not "procure
20 employment" for the artist, within the meaning of section
21 1700.4(a), by directly engaging the services of the artist; and
22 that the activity of procuring employment under the Talent
23 Agencies Act refers to the role an agent plays when acting as an
24 intermediary between the artist whom the agent represents and a
25 third-party employer. (*Chinn v. Tobin* (TAC No. 17-96) pp. 5-8.)
26 For example, a movie producer does not act as a talent agent by
27 offering to directly employ artists to act in the movie that the
28 producer is producing.

1 But here, we have a more complicated situation, in that
2 Respondent was not the producer or promoter of any of the various
3 engagements during the Reverend/Nashville tour. Respondent acted
4 not as employer, but rather, as an agent for Reverend Horton Heat
5 by procuring engagements from concert producers or promoters.
6 The same cannot be said for Respondent's role vis-a-vis Nashville
7 Pussy. Most of the engagements on the tour were booked before it
8 was determined that Nashville Pussy would be the opening act. As
9 to these engagements, the concert producers and promoters
10 delegated the right to employ an opening act to the respondent.
11 By offering these engagements to petitioners (through their
12 licensed talent agent), and by negotiating with petitioners
13 (through their licensed talent agent) for the amount that they
14 would receive for performing as the opening act, respondent's
15 role was that of an employer, not a talent agent.

16 As to those engagements that were booked by respondent with
17 producers or promoters who specified that Nashville Pussy was to
18 be the opening act, respondent performed procurement services for
19 petitioners that fall within the ambit of Labor Code §1700.4(b).
20 But all of these engagements were obtained by respondent at the
21 request of petitioners' licensed talent agent, and petitioners'
22 compensation for these engagements was determined by respondent
23 in conjunction with petitioner's licensed talent agent. In
24 short, the evidence presented compels the conclusion that as to
25 these engagements, respondent's procurement services for
26 petitioners came within the exception to the license requirement
27 provided by Labor Code §1700.44(d).

28 Finally, there is no evidence that respondent did anything

1 for Nashville Pussy in connection with the May 22, 2002
2 unsolicited offer from an El Paso concert promoter that would
3 require a talent agency license. The evidence before us is that
4 after being presented with this offer, respondent conveyed the
5 offer to petitioners' licensed talent agent, and that the offer
6 was not accepted until it had been approved by petitioner's
7 licensed talent agent.

8 ORDER

9 For the reasons set forth above, we find that respondent
10 did not engage in any activities for which a talent agency
11 license is required. Consequently, IT IS HEREBY ORDERED
12 that the petition to declare the personal management agreement
13 void is denied. Having reached this conclusion, the Labor
14 Commissioner has no further jurisdiction over the parties'
15 dispute over the enforcement of this agreement.

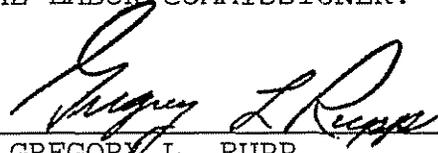
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17 Dated: 4/26/04



18 _____
MILES E. LOCKER
Attorney for the Labor Commissioner

19
20 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

21
22 Dated: 4-29-04



23 _____
GREGORY L. RUPP
Acting Deputy Chief Labor Commissioner

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

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

(NSPSY Recording; Nashville Pussy v. Scott Jeffrey Weiss dba Highwatt Management)
(TAC 43-02)

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 April 29, 2004, I served the following document:

DETERMINATION OF CONTROVERSY

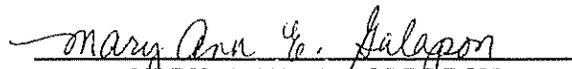
by placing a true copy thereof in envelope(s) addressed as follows:

EDWIN F. McPHERSON, ESQ.
PENNY J. MANSHIP, ESQ.
McPHERSON & KALMANSOHN
1801 Century Park East, 24th Floor
Los Angeles, CA 90067

ERIC L. LAGIN, ESQ.
9200 Sunset Boulevard, Penthouse 30
West Hollywood, CA 90069-3601

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 April 29, 2004, at San Francisco, California.



MARY ANN E. GALAPON