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7

8 BEFORE THE LABOR COMMISSIONER
9 STATE OF CALIFORNIA

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|--|---|------------------|
| 11 MARTA GREENWALD, as personal |) | No. TAC 03-05 |
| representative of the Estate of |) | |
| 12 ELLIOT SMITH aka STEVEN PAUL SMITH, |) | |
| deceased, |) | |
| |) | DETERMINATION OF |
| 13 |) | CONTROVERSY |
| |) | |
| 14 |) | |
| vs. |) | |
| 15 |) | |
| JENNIFER CHIBA, |) | |
| 16 |) | |
| |) | |
| 17 |) | |
| |) | |

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

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

5 FINDINGS OF FACT

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

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

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

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

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

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

1 to the Labor Commissioner for determination of issues under the
2 Talent Agencies Act (Labor Code §1700, et seq.). On January 14,
3 2005, Greenwald filed this petition to determine controversy,
4 seeking a determination that pursuant to her oral agreement with
5 Smith, Chiba procured performing engagements for Smith, and since
6 she did so without the requisite talent agency license, the oral
7 agreement is void in its entirety from its inception, and that
8 Chiba has no enforceable rights under that agreement. Chiba filed
9 an answer to the petition, denying that she procured the
10 engagements that were alleged in the petition, and seeking a
11 determination that her oral agreement with Smith is not void,
12 invalid or unenforceable under the Talent Agencies Act.

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

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

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

17 LEGAL ANALYSIS

18 1. Smith is an "artist" within the meaning of Labor Code
19 §1700.4(b).

20 2. Labor Code §1700.4(a) defines "talent agency" as "a
21 person or corporation who engages in the occupation of procuring,
22 offering, promising, or attempting to procure employment or
23 engagements for an artist or artists, except that the activities
24 of procuring, offering or promising to procure recording contracts
25 for an artist or artists shall not of itself subject a person or
26 corporation to regulation and licensing under this chapter." The
27 term "procure," as used in this statute, means "to get possession
28 of: obtain, acquire, to cause to happen or be done: bring about."

1 *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628. Thus, under Labor
2 Code §1700.4(a), "procuring employment" is not limited to
3 initiating discussions with potential purchaser's of the artist's
4 services; rather, "procurement" includes any active participation
5 in a communication with a potential purchaser of the artist's
6 services aimed at obtaining employment for the artist, regardless
7 of who initiated the communication. *Hall v. X Management* (TAC No.
8 19-90, pp. 29-31.) The Labor Commissioner has long held that
9 "procurement" includes the process of negotiating an agreement for
10 an artist's services. *Pryor v. Franklin* (TAC 17 MP 114).
11 Significantly, the Talent Agencies Act specifically provides that
12 an unlicensed person may nevertheless participate in negotiating
13 an employment contract for an artist, provided he or she does so
14 "in conjunction with, and at the request of a licensed talent
15 agent." Labor Code §1700.44(d). This limited exception to the
16 licensing requirement would be unnecessary if negotiating an
17 employment contract for an artist did not require a license in the
18 first place. The uncontradicted evidence here plainly establishes
19 that Chiba promised to procure employment, and did procure
20 employment for Smith, so that she acted as a "talent agency"
21 within the meaning of Labor Code §1700.4(a).

22 3. Labor Code §1700.5 provides that "[n]o person shall
23 engage in or carry on the occupation of a talent agency without
24 first procuring a license . . . from the Labor Commissioner." The
25 Talent Agencies Act is a remedial statute that must be liberally
26 construed to promote its general object, the protection of artists
27 seeking professional employment. *Buchwald v. Superior Court*
28 (1967) 254 Cal.App.2d 347, 354. For that reason, the overwhelming

1 weight of judicial authority supports the Labor Commissioner's
2 historic enforcement policy, and holds that "even the incidental
3 or occasional provision of such [procurement] services requires
4 licensure." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51. "The
5 [Talent Agencies] Act imposes a total prohibition on the
6 procurement efforts of unlicensed persons," and thus, "the Act
7 requires a license to engage in any procurement activities."
8 *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th
9 246, 258-259; see also *Park v. Deftones* (1999) 71 Cal.App.4th 1465
10 [license required even though procurement activities constituted a
11 negligible portion of personal manager's efforts on behalf of
12 artist, and manager was not compensated for these procurement
13 activities].

14 4. Of course, an artist who procures employment for him or
15 herself does not act as a "talent agency," and need not be
16 licensed, in that the activity of procuring employment under the
17 Talent Agencies Act refers to the role an agent plays when acting
18 as an intermediary between the artist whom the agent represents
19 and a third-party employer. See *Chinn v. Tobin* (TAC No. 17-96),
20 *Bautista v. Romero* (TAC NO. 3-04). 'But a spouse, or live-in
21 boyfriend or girlfriend of an artist, who procures employment for
22 that artist falls under the statutory definition of a "talent
23 agency," as there is no exemption that would exclude such persons
24 from the definition. The artist's spouse, or significant other,
25 must be licensed as a talent agency to procure employment for the
26 artist, in the same way that a license to practice law would be
27 required to represent the person's spouse or significant other in
28 a court trial.

1 5. An agreement that violates the licensing requirement of
2 the Talent Agencies Act is illegal and unenforceable. "Since the
3 clear object of the Act is to prevent improper persons from
4 becoming [talent agents] and to regulate such activity for the
5 protection of the public, a contract between an unlicensed [agent]
6 and an artist is void." *Buchwald v. Superior Court*, supra, 254
7 Cal.App.2d at 351. Having determined that a person or business
8 entity procured, promised or attempted to procure employment for
9 an artist without the requisite talent agency license, "the
10 [Labor] Commissioner may declare the contract [between the
11 unlicensed agent and the artist] void and unenforceable as
12 involving the services of an unlicensed person in violation of the
13 Act." *Styne v. Stevens*, supra, 26 Cal.4th at 55. "[A]n agreement
14 that violates the licensing requirement is illegal and
15 unenforceable" *Waisbren v. Peppercorn Productions, Inc.*,
16 supra, 41 Cal.App.4th at 262.

17 6. The Labor Commissioner has exclusive primary jurisdiction
18 to determine all controversies arising under the Talent Agencies
19 Act. "When the Talent Agencies Act is invoked in the course of a
20 contract dispute, the Commissioner has exclusive jurisdiction to
21 determine his (or her) jurisdiction in the matter, including
22 whether the the contract involved the services of a talent
23 agency." *Ibid.* at 54. This means that the Labor Commissioner has
24 "the exclusive right to decide in the first instance *all the legal*
25 *and factual issues on which an Act-based defense depends.*" *Ibid.*,
26 at fn. 6, italics in original. In doing so, the Labor Commissioner
27 will "search out illegality lying behind the form in which a
28 transaction has been cast for the purpose of concealing such

1 illegality," and "will look through provisions, valid on their
2 face, and with the aid of parol evidence, determine [whether] the
3 contract is actually illegal or part of an illegal transaction."

4 *Buchwald v. Superior Court, supra*, 254 Cal.App.2d at 351.

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

1 enrichment or quantum meruit. *Yoo v. Robi, supra*, 126 Cal.App.4th
2 at 1104, fn. 30; *Waisbren v. Peppercorn Productions, supra*, 41
3 Cal.App.4th at 250, fn. 2. Knowing that they will receive no help
4 from the courts in recovering for their legal activities
5 undertaken pursuant to an agreement under which they also engaged
6 in unlawful procurement, personal managers are less likely to
7 enter into illegal arrangements. *Yoo v. Robi, supra*, 126
8 Cal.App.4th at 1104; *Waisbren v. Peppercorn Productions, supra*, 41
9 Cal.App.4th at 262, citing *Lewis & Queen v. N.M. Ball Sons* (1957)
10 48 Cal.2d 141, 150. In *Waisbren*, the court observed that one
11 reason the Legislature did not enact criminal penalties for
12 violations of the Talent Agencies Act was "because the most
13 effective weapon for assuring compliance with the Act is the power
14 ... to declare any contract entered into between the parties void
15 from the inception." *Waisbren v. Peppercorn Productions, supra*,
16 41 Cal.App.4th at 262, quoting from a 1985 report issued by the
17 California Entertainment Commission.

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

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

26 ORDER

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

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

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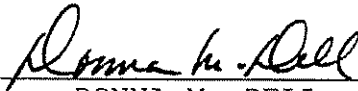
Dated: 10/20/05



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,
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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