

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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7 BEFORE THE LABOR COMMISSIONER

8 STATE OF CALIFORNIA
9

10 TERESA S. BANKS, an individual,
11 Petitioner,

12 vs.

13 PENELOPE LIPPINCOTT dba FINESSE
FREELANCE DEVELOPMENT,
14 Respondent.
15

TAC No. 13510-12

DETERMINATION OF CONTROVERSY

16 The above captioned matter, a petition to determine controversy under Labor Code
17 §1700.44, came on regularly for hearing on January 10, 2010 in San Francisco, California, before
18 the undersigned attorney for the Labor Commissioner, assigned to hear the matter. Petitioner,
19 TERESA S. BANKS (hereinafter "Petitioner" or "Banks" appeared in propria persona.
20 Respondent, PENELOPE LIPPINCOTT, appeared in propria persona. For purposes of hearing this
21 matter was heard with four (4) other petitions filed against the same respondent, TAC No.11319,
22 filed by Sally Hoover as Guardian for Kristen Leacy, a minor; TAC No. 13509 filed by Judy
23 Funke; TAC No. 13643 filed by Arega Bagirian; and TAC 14621, filed by Jacqueline Ramos.

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

26 FINDINGS OF FACT

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

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

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

13 LEGAL ANALYSIS

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

17 2. Labor Code §1700.4(a) defines talent agency as any person or corporation "who engages
18 in the occupation of procuring, offering, promising, or attempting to procure employment or
19 engagements for an artist." In prior decisions, the Labor Commissioner has held that "a person or
20 entity that employs an artist does not 'procure employment' for that artist within the meaning of
21 Labor Code §1700.4(a), by directly engaging the services of that artist... [T]he 'activity of
22 procuring employment,' under the TAA refers to the role an agent plays when acting as an
23 intermediary between the artist whom the agent represents and the third party employer who seeks
24 to engage the artist's services. *Chin v. Tobin* (TAC No. 17-96) at page 7. Following this rationale,
25 in *Kern v. Entertainers Direct, Inc.* (TAC No. 25-96), the Labor Commissioner concluded that a
26 business that provided clowns, magicians, and costumed characters to parties and corporate events
27 did not act as a talent agency within the meaning of Labor Code §1700.4(a). In *Kern*, the
28 respondent set the prices that it charged to customers for the 'entertainers' services, selected the

1 entertainers that it provided to its customers, determined the compensation paid to the entertainers
2 for providing the services, and thus we concluded, “became the direct employer of the performers.”
3 Significantly, however, in both *Chinn* and *Kern* no evidence was presented that the respondents
4 “ever procured or promised or offered to attempt to procure employment for petitioners with any
5 third party. That lack of evidence as to the promises or offers to obtain employment with third
6 parties or actual procurement activities was found to distinguish those cases from cases in which
7 persons or businesses were determined to be acting as talent agencies within the meaning of Labor
8 Code §1700.4(a). *Chin v. Tobin, supra*, at page 11. Thus, in determining whether Respondent
9 engaged in the occupation of a “talent agency” we must analyze whether Respondent engaged in
10 any of the activities which fall within the statutory definition of “talent agency.”

11 3. Labor Code §1700.5 provides that “[n]o person shall engage or carry on the occupation
12 of a talent agency without first procuring a license...from the Labor Commissioner.” The TAA is a
13 remedial statute that must be liberally construed to promote its general object, the protection of the
14 artists seeking professional employment. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347,
15 354. For that reason, the overwhelming weight of judicial authority supports the Labor
16 Commissioner’s historic enforcement policy, and holds that “even incidental or occasional
17 provision of [talent agency] services requires licensure.” *Styne v. Stevens* (2001) 26 Cal.4th 42, 51.
18 These services are defined at Labor Code §1700.4(a) to include offering to procure or promising to
19 procure or attempting to procure employment for an artist. In analyzing the evidence of whether a
20 person engaged in activities for which a talent agency license is required, “the Labor
21 Commissioner is free to search out illegality lying behind the form in which the transaction has
22 been cast for the purpose of concealing such illegality.” *Buchwald v. Superior Court, supra*, 254
23 Cal.App.2d at 355.

24 4. In 2005 there were several petitions filed against Respondent in this matter. The
25 decisions in those cases are found at TAC Nos. 14-05, 16-05, 18-05. Since those decisions were
26 issued holding that Respondent acted as a talent agent operating without being licensed, Lippincott
27 has added a new wrinkle to her scheme. Now, with the addition of FUSE, Lippincott takes the
28 position that she is not a “talent agent” under the TAA, because she tells the models that she is not

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

8 5. The evidence before us in the instant case leads to the conclusion that at the inception of
9 the relationship, Respondent promised to procure modeling employment for Petitioner, and
10 attempted to do so whether successfully or not. Despite Respondent’s claim that whenever it
11 provided a client with a model’s services she did so as the “producer” of the client’s fashion
12 runway show or print advertisement, Respondent failed to present sufficient corroborating
13 evidence. The argument that Respondent acted as a “producer” of these print advertisements and
14 fashion shows is an affirmative defense to the allegation that Respondent acted as a “talent agency”
15 by promising to and/or obtaining work for the model(s), and as such, the burden of proof shifts to
16 the Respondent once the Petitioner establishes, as is the case here, that the Respondent obtained or
17 promised to obtain modeling work for the Petitioner.

18 6. But, even assuming *arguendo* that Respondent never actually procured and never
19 attempted to procure modeling employment for the petitioner with any third party employer (the
20 primary argument of Respondent in this case), that does not dispose of the question of whether
21 Respondent ever offered to procure or promised to procure such employment for the Petitioner.
22 Not only did the Petitioner testify that she believed that Respondent had offered and promised to
23 do just that, more importantly, taking the evidence as a whole, we conclude that any reasonable
24 person in the Petitioner’s position would have formed that same belief. There is simply no other
25

26 ¹ Indeed, Lippincott solely owns both Finesse and FUSE, thus controlling the entire
27 enterprise and whether Petitioner was used for any modeling work that FUSE obtained for third
28 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.

1 way to reasonably interpret many of the Respondent's policies and procedures, and Respondent's
2 written and oral representations of what she could and could not do for the Petitioner.
3 Consequently, we conclude that through Respondent's published policies and procedures and
4 representations to models, Respondent "offered to procure employment" for models with third
5 party employers, and therefore, engaged in the occupations of a "talent agency" within the meaning
6 of Labor Code §1700.4(a). As such, despite Respondent's efforts to structure her operations (or
7 perhaps more accurately, efforts to appear to have structured her operations) so as to avoid the
8 requirements of the TAA, Respondent violated the Act by operating as a "talent agency" without
9 the requisite license.

10 7. An agreement between an artist and a talent agency that violates the licensing
11 requirement of the TAA is illegal, void and unenforceable. *Styne v. Stevens, supra*, 26 Cal.4th at
12 51; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 262; *Buchwald v.*
13 *Superior Court, supra*, 254 Cal.App.2d at 351. Having determined that a person or business entity
14 procured, attempted to procure, promised to procure, or offered to procure employment for a
15 person meeting the definition of an artist under the Act without the requisite talent agency license,
16 "the [Labor] Commissioner may declare the contract between the unlicensed talent agent and the
17 artist void and unenforceable as involving the services of an unlicensed person in violation of the
18 Act." *Styne v. Stevens, supra*, 26 Cal.4th at 55. Moreover, the artist that is party to such an
19 agreement may seek disgorgement of amounts paid pursuant to the agreement, and may be
20 "entitle[d] to restitution of all fees paid to the agent." *Wachs v. Curry* (1993) 13 Cal.App.4th 616,
21 626. The term "fees" is defined at Labor Code §1700.2(a) to include "any money or other valuable
22 consideration paid or promised to be paid for services rendered or to be rendered by any person
23 conducting the business of a talent agency." Restitution is therefore not limited to the amounts that
24 an unlicensed agent charged for procuring or attempting to procure employment, but rather, may
25 include amounts paid for services for which a talent agency license is not required.

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

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

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

14 10. Petitioner may have additional remedies under the provisions of the Advance-Fee
15 Talent Services Act² (AFTSA) (Labor Code §§1701-1704.3.) Labor Code §1700.44 authorizes
16 the Labor Commissioner to hear and decide controversies under the TAA. In contrast, the
17 provisions of the AFTSA may be enforced by the Attorney General, any district attorney, or city
18 attorney, or through the filing of a private civil action. (See Labor Code §§1704.1, 1704.2.)
19 Furthermore, any person engaging in the business or acting in the capacity of an advance-fee talent
20 service must first file a bond with the Labor Commissioner in the amount of \$10,000 for the
21 benefit of any person damaged by any fraud, misstatement, misrepresentation or unlawful act or
22 omission under the AFTSA. (See Labor Code §§1703.3, 1704.3.) We hereby take administrative
23

24 ² The term "advance-fee talent service" is defined at Labor Code §1701(b) to mean a
25 person who charges, or attempts to charge, or receive an advance fee from an artist for any of the
26 following products or services: procuring, offering, promising or attempting to procure
27 employment or auditions; managing or directing the artist's career; career counseling or guidance;
28 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.

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

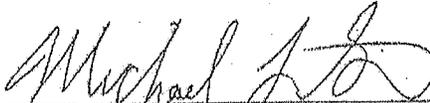
2 ORDER

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

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

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

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9 Dated: February 26, 2013


ANNE HIPSHMAN SBN 252726 for
Attorney for the Labor Commissioner

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15 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

16
17 Dated: February 26, 2013


JULIE A. SU
State Labor Commissioner

1 **PROOF OF SERVICE**

2 *Banks v Lippincott*
3 *TAC Case No. 13510-12*

4 I, the undersigned, declare that I am and was at the time of service of the papers herein
5 referred to, over the age of 18 and not a party to the within action or proceeding. My address is
6 455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102 which is located in the county in
7 which the within mentioned mailing occurred. I am familiar with the practice at my place of
8 business for collection and processing of documents for mailing with the United State Post
9 Office and by facsimile. Such documents will be deposited with the United States Postal Service
10 with postage prepaid and/or faxed to the addresses and/or facsimile numbers as stated below on
11 the same day in the ordinary course of business.

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

13 **DETERMINATION OF CONTROVERSY**

14 X by placing true copies thereof in an envelope(s) and then sealing the envelope with postage
15 thereon fully prepaid, depositing it in the United States mail in the city and county of San
16 Francisco by ordinary first-class mail, addressed as follows:

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

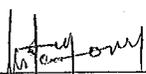
19 **Teresa S. Banks**
20 **1826 Santa Clara Ave**
21 **Alameda, CA 94501**

22 **Penelope Lippincott**
23 **dba Freelance Development**
24 **1475 Broadway, Ste. 250**
25 **Walnut Creek, CA 94596**

26 _____ by facsimile at the following facsimile number(s):

27 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.

28 
29 _____
30 Chike Ufombah