

1 Miles E. Locker, CSB #103510
DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
State of California
3 455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
4 Telephone: (415) 703-4863
Fax: (415) 703-4806
5 Attorney for State Labor Commissioner

7 BEFORE THE LABOR COMMISSIONER

8 STATE OF CALIFORNIA

11 ANNIE DANIELEWSKI, professionally known) No. TAC 41-03
as POE,)

12)
13 Petitioner,)

14 vs.)

15 AGON INVESTMENT COMPANY, successor in) DETERMINATION OF
interest to AGON INVESTMENT PARTNERS,) CONTROVERSY
16 LP; and ROBERT EDESEL,)

17 Respondents.)

18 The above-captioned matter, a petition to determine
19 controversy under Labor Code §1700.44, came on regularly for
20 hearing on April 8, 2004 in San Francisco, California, before the
21 undersigned attorney for the Labor Commissioner assigned to hear
22 this case. Petitioner appeared and was represented by attorney
23 Carrie M. Hemphill, and Respondents appeared and were represented
24 by attorneys Glenn Plattner and Drew R. Heard. Based on the
25 evidence presented at this hearing and on the other papers on
26 file in this matter, the Labor Commissioner hereby adopts the
27 following decision.

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1 4. Respondent ROBERT EDSEL is the president and chief
2 executive officer of AGON INVESTMENT COMPANY, a business located
3 in Dallas, Texas. Neither EDSEL nor AGON has ever been licensed
4 by the California Labor Commissioner as a talent agency. AGON
5 makes investments in other businesses that need financial
6 assistance by providing financing for these other businesses.
7 EDSEL is long-time friend of POE's fiancée's father, and POE
8 first met with EDSEL in September 2001, to obtain his advice and
9 guidance on how she should handle her business affairs, and in
10 particular, her contract issues with Fishkin Entertainment and
11 Atlantic Records. EDSEL and POE discussed whether and how AGON
12 could assist POE in her business dealings. Towards that end,
13 EDSEL agreed to conduct a preliminary review of POE's various
14 contracts and agreements, without any charge to POE. However,
15 after looking at these documents, EDSEL advised POE that it would
16 be best to retain the services of AGON's long-time counsel, David
17 Helfant of Akin Gump Strauss Hauer & Feld, in order to fully
18 assess her legal position. POE expressed concern about Helfant's
19 legal fees, but EDSEL insisted that he could not help POE without
20 Helfant's legal services. EDSEL stated that initially, AGON would
21 pay Helfant's legal fees for services on her behalf, but it was
22 understood that at some future point POE would reimburse EDSEL
23 for these fees. EDSEL instructed POE that she should not contact
24 Helfant with any questions, but rather, to direct any questions
25 to EDSEL for him to convey to Helfant. Based on Helfant's
26 review of POE's contracts and his communications with his
27 contacts at Atlantic Records, both Helfant and EDSEL told POE
28 that she could expect a substantial settlement from Fishkin

1 and/or Atlantic within the next six months for prematurely
2 dropping her from its label.

3 5. Based on this potential settlement from Fishkin and/or
4 Atlantic, EDSEL advised POE to terminate her relationships with
5 at least some of the persons or entities that had previously
6 provided her with representation, including Jacqueline Patterson,
7 and Netzwerk Management. EDSEL did this because he did not want
8 these persons or entities to share a portion of the proceeds from
9 the potential Fishkin/Atlantic settlement, and because he
10 believed these persons or entities were failing to provide POE
11 with effective assistance. By late April 2002, POE terminated
12 her agreements with Netzwerk Management and Jacqueline Patterson.

13 6. The parties dispute whether EDSEL advised POE to also
14 terminate her relationship with CAA. POE testified that she
15 terminated CAA in early 2002 pursuant to EDSEL's instructions, so
16 that from that point, she had no talent agency that could procure
17 engagements for her. POE's testimony is belied both by EDSEL,
18 who testified that he never advised POE to terminate her
19 relationship with CAA (and that he never had any communication

20 with CAA at any time), and by the declaration of CAA agent Carole
21 Kinzel, filed by the petitioner after the close of this hearing.
22 Kinzel's declaration states that in early 2003 (this is
23 unquestionably a typographical error, and the correct date is
24 2002), she received a phone call from POE stating that she had
25 "new management" (as opposed to a "new talent agent"), and that
26 POE asked "whether her relationship with CAA would be damaged or
27 strained if someone other than CAA booked shows for [her] in the
28 future." Kinzel stated that she "advised Poe that such a

1 decision would not adversely affect her relationship with CAA."
2 Thus, it appears that rather than terminating CAA, POE actually
3 communicated her intention to keep CAA available to perform at
4 least some future procurement services. This interpretation is
5 bolstered by a document that was prepared by POE and given to
6 EDSEL sometime after April 10, 2002, entitled "Music Ventures
7 Proposal 2002," in which POE suggested that as a means of earning
8 some money, CAA could attempt to obtain bookings for a limited
9 tour, with low overhead achieved by using only two other
10 musicians and performing acoustically. POE wrote, "CAA has
11 represented me and booked all my tours thus far. We could
12 request they peruse [sic] gigs of this kind...." A note in the
13 margin, written by EDSEL, next to this suggestion, asks: "DH
14 [presumably, David Helfant] would they do this? Cost?" We
15 therefore find that EDSEL never instructed POE to terminate her
16 relationship with CAA, and that the relationship between POE and
17 CAA was not terminated.

18 7. By written agreement dated April 10, 2002, POE and EDSEL
19 confirmed that for its efforts in attempting to settle the

20 contract dispute between POE and Fishkin/Atlantic, "AGON's fee
21 will be \$1.00 greater than the total legal costs of Akin Gump for
22 their work on your behalf, plus reimbursement of any other
23 directly related expenses." The agreement stated that "AGON has
24 invested a considerable amount of time to determine the status of
25 your contractual obligations to Fishkin/Atlantic, understand your
26 financial position, and to advise you on how to proceed to
27 accomplish the goals" of improving POE's financial picture. The
28 agreement further stated that AGON is paying for work that David

1 Helfant of Akin Gump is performing on POE's behalf, and has
2 already paid \$8,000 to Akin Gump for legal work concerning POE's
3 contract issues. Under this agreement, payment would not be due
4 from POE until there was some sort of resolution of her dispute
5 with Fishkin, either through a formal settlement involving a cash
6 payment, or rejection of a final settlement offer in favor of
7 litigation or "the pursuit of other options." Moreover, the
8 agreement provided that it would terminate upon resolution of the
9 dispute with Fishkin, at which point POE and AGON would be "free
10 to negotiate a new agreement or not based on [POE's] needs and
11 {EDSEL's} availability at that time." The petition to determine
12 controversy refers to this agreement as a "preliminary management
13 contract."

14 8. Concurrently, on April 10, 2002, AGON, through EDSEL,
15 sent a letter to POE summarizing her financial picture and
16 outlining "a plan of attack to pay old debts and put you in an
17 improved financial position." As outlined in this letter, POE's
18 current financial picture was bleak. POE owed money to her
19 former attorney, Kim Guggenheim, and to the Internal Revenue
20 Service, Nettwerk Management, Jacqueline Patterson, in addition
21 to credit card debt, unpaid tour expenses, a bank loan, and
22 medical bills, for a total owed in excess of \$100,000. Thus,
23 EDSEL concluded, in this letter, "Even under the best scenario
24 (i.e., your share of the settlement [with Fishkin/Atlantic]
25 equals \$105,000) the money you have left after paying these debts
26 may not entirely cover AGON's fee and direct costs for legal fees
27 to Helfant." Thus, EDSEL urged POE to consider "what specific
28 steps you can take outside the recording contract area to earn

1 enough money to cover your monthly expenses of \$5,000."

2 9. Starting in April 2002, AGON began loaning money to POE
3 for her monthly living expenses. In discussions with POE, EDSEL
4 urged her to borrow more money from AGON to enable her to pay off
5 all of her creditors and consolidate her debt. Over the next
6 three months, AGON made a series of loans to POE for this
7 purpose.

8 10. With the April 2002 termination of her former
9 accountant/bookkeeper and her former management service, POE
10 needed to make alternative arrangements for the performance of
11 the services previously provided by Jacqueline Patterson and
12 Network Management. In discussions with POE, EDSEL suggested
13 that AGON could provide these services for her more effectively
14 and at a lower cost than she had been paying. In May 2002, POE
15 agreed to have AGON start providing her with accounting and
16 bookkeeping services, for which POE was to pay \$1,500 a month to
17 AGON, starting on June 1, 2002. AGON also continued to provide
18 POE with "business management" services, by providing her with
19 ongoing advice on how to advance her career and business

20 interests. This advice covered many areas, going well beyond the
21 limited scope of the parties' April 10, 2002 written agreement.
22 Nonetheless, the terms of this agreement seem to have governed
23 AGON's payment for management services, except for the separate
24 oral agreement regarding bookkeeping/accounting services. Thus,
25 AGON continued to charge POE a nominal amount above the actual
26 cost of Helfant's legal fees, and POE was responsible for
27 reimbursement of AGON's expenses incurred in providing these
28 management services. In a letter to POE dated June 14, 2002,

1 EDSEL proposed ending the existing management agreement as of
2 May 31, 2002, and entering into a new management agreement, which
3 would provide AGON with commissions equal to 20% of POE's future
4 entertainment earnings plus reimbursement of AGON's expenses.
5 Over the course of the summer and fall, discussions regarding
6 this proposal failed to result in a new management agreement.
7 Documents introduced into evidence at the hearing show that AGON
8 continued to bill POE for management services through the end of
9 September 2002, pursuant to the terms of the April 10, 2002
10 agreement.

11 11. By June 1, 2002, the amount that had been loaned by
12 AGON to POE reached \$200,000. It was understood that these loans
13 were not gifts, and that amounts loaned to POE would be repaid
14 with interest. The terms of these loans were set forth in an
15 "Amended and Restated Secured Promissory Note," effective June 1,
16 2002. This Promissory Note, signed by POE, recited that POE was
17 to repay the \$200,000 principal on May 31, 2003, that monthly
18 interest payments on the unpaid principal balance would commence
19 on June 30, 2002, with the final interest payment due on May 31,

20 2003, and that interest would be set at 4% per annum above the
21 prime rate, or the maximum legal rate of interest, whichever is
22 lower. The Note provided that should a default occur in the
23 payment of the indebtedness, the whole sum of principal and
24 interest would become immediately due at the option of the Note
25 holder. The Note was secured by collateral specified in the
26 Note, consisting of POE's interest and rights in, and all
27 resulting proceeds from: (a) a music publishing agreement
28 executed in 1995 between POE and Sony/ATV Songs LLC, (b) all

1 agreements relating to the publishing, sale or exploitation of
2 POE's current and future musical works, (c) all of POE's personal
3 property, including but not limited to her collection of Peter
4 Max paintings, (d) all compensation payable to POE in settlement
5 of, or in connection with the adjudication of her claims against
6 Fishkin Entertainment and/or Atlantic Recording Corporation
7 relating to her recording agreements with these entities, and (e)
8 any new recording and/or musical publishing agreements for POE's
9 services. AGON's security interest was perfected by the filing
10 of a UCC financing statement shortly after the execution of the
11 Note. The Note contains a severability clause, which provides
12 that "[i]f any provision of this Note is invalid or unenforceable
13 in any jurisdiction, then, to the fullest extent permitted by
14 law, the other provisions of this Note shall remain in full force
15 and effect in such jurisdiction." Finally, the Note contains a
16 unilateral attorney's fee provision, stating that "[i]f this Note
17 is not paid in full when due, Poe promises to pay all reasonable
18 costs and expenses of collection and the reasonable attorney's
19 fees and expenses and court costs incurred by the holder hereof

20 on account of such collection whether or not suit is filed
21 thereon."

22 12. These loan proceeds were used for POE's monthly living
23 expenses, and to pay off her debts to other persons and entities,
24 and finally, to pay for the various management services that were
25 being provided by AGON pursuant to the April 10, 2002 written
26 agreement, and the accounting/bookkeeping services provided
27 pursuant to the parties' oral agreement. AGON established an
28 bank account on POE's behalf which was funded by these loan

1 proceeds. POE only had limited access to the account, through an
2 ATM card which allowed her to make limited withdrawals for
3 personal needs. AGON exercised control over the account by
4 keeping the checkbooks, and providing POE with checks made out to
5 those persons or entities (including AGON) to whom she owed
6 money, so that POE was signing the checks pursuant to EDSEL's
7 instructions. In this manner, EDSEL was able to ensure that POE
8 made payments owed for AGON's management and accounting and
9 bookkeeping services, at least until October 2002, when the
10 entire amount of the loan proceeds were spent. As of September
11 30, 2002, POE had paid AGON a total of \$74,909.78, an amount
12 equal to 37.45% of the loan proceeds.

13 13. With the depletion of the loan proceeds, POE was unable
14 to continue paying AGON's interest on the Promissory Note, and
15 for other amounts owed for AGON's management and accounting and
16 bookkeeping services. The anticipated settlement with Fishkin
17 and/or Atlantic failed to materialize, and POE failed to follow
18 EDSEL's advice to start selling her collection of Peter Max
19 paintings as a means of raising capital. EDSEL voiced his

20 unhappiness about "working for free" and became more insistent
21 that POE sign a new management agreement under which AGON would
22 be paid a percentage of POE's future earnings, threatening to
23 call the Note unless POE entered into a commission agreement.

24 14. Throughout 2002, most of POE's energies were focused on
25 dealing with her deteriorating financial situation, and composing
26 new music. For reasons that aren't entirely clear, only the most
27 minimal efforts were made towards obtaining live paid engagements
28 which might have provided POE with a badly needed source of

1 revenue. Poe did perform at a benefit concert for RAINN (the
2 Rape, Abuse and Incest National Network) in Los Angeles on August
3 13, 2002. One of the organizers of this benefit, Erin Russell,
4 contacted Nettwerk Management to inquire about POE's
5 availability, and Nettwerk referred her request to EDSEL, who
6 followed up with an e-mail to Russell asking whether there is
7 "any sort of production budget available for the musicians" to
8 allow POE "to procure musicians to donate their talents."
9 Russell responded to EDSEL by e-mail, informing him that although
10 there is no production budget, "we can probably find a way to
11 offer \$400 in total for musicians." Ultimately, POE performed
12 without receiving any compensation for this engagement.

13 15. On or shortly before September 13, 2002, Brad Walsh, a
14 program assistant for the Oberlin College Student, responsible
15 for booking musical acts and speakers at campus events), sent an
16 e-mail to POE's website, inquiring as to POE's availability for a
17 concert performance anytime from then until May 2003. The e-mail
18 requests "information regarding your booking fees, availability,
19 interest, etc." POE's fiancée, John Gheur, forwarded this e-mail

20 to EDSEL¹, who responded to Walsh by e-mail dated October 11,
21 2002, asking for "information about what you had in mind, general
22 dates, financial considerations, etc." Walsh then responded with
23 an e-mail to EDSEL, stating "we are on a tight budget this year
24 but are open to negotiations on booking fees. I'm not in a place
25 to make an offer yet, but I would like to forward on to my
26 superior any ballpark figure you might be able to provide as a

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28 ¹ EDSEL had previously instructed POE not to respond herself
to any inquiries regarding possible performances, but rather, to
forward all such inquiries to his attention.

1 bill for this type of show." EDSEL followed this up with a
2 telephone call to Walsh, during which EDSEL requested \$10,000 for
3 the engagement. Walsh conveyed that request to his supervisor,
4 and was instructed to present a counter-offer for \$5,500 plus
5 airfare and hotel accommodations. In a follow-up telephone
6 conversation, EDSEL negotiated with Walsh, and almost reached an
7 agreement for POE to perform for \$6,000 plus air and hotel
8 accommodations². However, EDSEL and Walsh failed to conclude an
9 agreement, and POE did not perform at Oberlin until April 2004,
10 long after EDSEL had ceased performing any services for POE.
11 Neither EDSEL nor AGON ever charged any fee to POE for his
12 efforts in connection with her appearance at Oberlin.

13 16. On October 4, 2002, EDSEL drafted a one page document
14 entitled "POE PROJECT." Under the heading "Ideas for Income,"
15 EDSEL listed, among other things, "top bar/restaurant private
16 performances." This was an idea that EDSEL had previously
17 discussed with POE, telling her that he knew the owners of
18 several "upscale" restaurants and nightclubs in the Dallas, Texas
19 area, and that it would be possible to obtain engagements for her

20 to perform at these venues, and that she might get paid from
21 \$5,000 to 10,000 for each of these performances. According to
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23 ² In his testimony, EDSEL admitted that he communicated with
24 Walsh regarding POE's possible appearance and compensation, but
25 denied conducting any "negotiations" with Walsh, and insisted
26 that he merely served as a "conduit," passing information between
27 Walsh and POE. For the reasons discussed *infra*, it does not
28 really matter whether or not EDSEL was "negotiating" on his own
authority or was only acting as a "conduit" (while creating the
appearance of "negotiating" with Walsh) during these
conversations. We credit Walsh's account of the conversations,
based upon his demeanor and forthrightness, and in any event, do
not perceive any significant factual issues as to what took place
during these conversations.

1 POE, EDSEL told her that he would attempt to obtain these
2 engagements for her. EDSEL admitted that he discussed this idea
3 with POE, but insisted that he never promised POE that he would
4 try to book any engagements for her. In prior deposition
5 testimony, EDSEL stated that "it needed somebody's full-time
6 attention" to implement this idea, and that if it were
7 implemented, it would have been handled by AGON through one of
8 its attorneys, Drew Gitlin.

9 17. POE failed to make her scheduled payment of the
10 Promissory Note on October 31, 2002, and has not made any
11 payments thereafter. As a result of her default, AGON declared
12 that all sums under the Note (including the \$200,000 principal
13 plus interest) were immediately due and payable. In December
14 2002, the relationship between POE and AGON came to an end, and
15 AGON ceased providing her with accounting/bookkeeping and
16 management services. POE failed to pay AGON since September 30,
17 2002 for its accounting and bookkeeping services, or for any
18 other services.

19 18. On March 7, 2003, AGON filed a lawsuit against POE in
20 the Los Angeles Superior Court, on various causes of action,
21 including: (a) breach of promissory note, (b) breach of oral
22 contract (for accounting and bookkeeping services), (c) money had
23 and received, (d) quantum meruit (for accounting and bookkeeping
24 sevices), and (e) breach of security agreement and judicial
25 foreclosure.

26 19. On November 7, 2003, POE filed the instant petition to
27 determine controversy, seeking a determination that AGON engaged
28 in activities for which a talent agency license is required

1 without the requisite license, and that as a result, all of the
2 various agreements between POE and AGON, including the written
3 agreement of April 10, 2002 (designated in the petition as the
4 "Preliminary Management Contract"), the subsequent oral agreement
5 for AGON to provide accounting and bookkeeping services
6 (designated in the petition as the "Accounting Contract"), and
7 the Promissory Note, are void *ab initio* and that AGON and EDSEL
8 have no enforceable rights thereunder, and that AGON and EDSEL
9 are not owed anything for the services or funds provided pursuant
10 to these agreements. The petition also seeks reimbursement of
11 all amounts that have been paid by POE to AGON or EDSEL pursuant
12 to these agreements.

13 20. On December 2, 2003, Respondents filed their answer to
14 the petition, asserting, *inter alia*, that AGON and EDSEL did not
15 procure employment or engagements for POE, and did not hold
16 themselves out as talent agents, and that the agreements that the
17 petition seeks to void are not unlawful under the Talent Agencies
18 Act. Respondents seek a determination that the challenged
19 agreements are outside the scope of the Act, leaving AGON to
20 pursue its remedies in the superior court action. Finally,
21 Respondents seek an award of attorney's fees.

22 LEGAL ANALYSIS

23 1. Petitioner is an "artist" within the meaning of Labor
24 Code section 1700.4(b).

25 2. The contested issues here are whether Respondents
26 functioned as a "talent agency" within the meaning of Labor Code
27 §1700.4(a), and if so, what consequences should flow from the
28 fact that Respondents were not licensed by the Labor Commissioner

1 as a talent agency.

2 3. Labor Code §1700.4(a) defines "talent agency" as "a
3 person or corporation who engages in the occupation of procuring,
4 offering, promising, or attempting to procure employment or
5 engagements for an artist or artists, except that the activities
6 of procuring, offering or promising to procure recording
7 contracts for an artist or artists shall not of itself subject a
8 person or corporation to regulation and licensing under this
9 chapter." Labor Code §1700.5 provides that "[n]o person shall
10 engage in or carry on the occupation of a talent agency without
11 first procuring a license . . . from the Labor Commissioner."

12 4. The term "procure," as used in Labor Code §1700.4(a),
13 means "to get possession of: obtain, acquire, to cause to happen
14 or be done: bring about." *Wachs v. Curry* (1993) 13 Cal.App.4th
15 616, 628. Thus, "procuring employment" under the Talent Agencies
16 Act is not limited to initiating discussions with potential
17 purchasers of the artist's professional services or otherwise
18 soliciting employment; rather, "procurement" includes any active
19 participation in a communication with a potential purchaser of

20 the artist's services aimed at obtaining employment for the
21 artist, regardless of who initiated the communication. *Hall v. X*
22 *Management* (TAC No. 19-90, pp. 29-31.) The Labor Commissioner
23 has long held that "procurement" includes the process of
24 negotiating an agreement for an artist's services. *Pryor v.*
25 *Franklin* (TAC 17 MP 114). Significantly, the Talent Agencies Act
26 specifically provides that an unlicensed person may nevertheless
27 participate in negotiating an employment contract for an artist,
28 provided he or she does so "in conjunction with, and at the

request of a licensed talent agent." Labor Code §1700.44(d). This limited exception to the licensing requirement would be unnecessary if negotiating an employment contract for an artist did not require a license in the first place. To be sure, a person does not engage in the procurement of employment for an artist by merely taking a phone call or receiving a fax from a concert promoter where the promoter conveys interest in having a musician perform at an event, and then advising the musician of the promoter's interest, leaving it to the musician (or the musician's licensed talent agent) to enter into communications with the promoter regarding availability and terms of compensation. But sending an e-mail or making a telephone call to a promoter to discuss the musician's availability and compensation, and communicating proposals and counter-proposals regarding the proposed terms of compensation - even when any such proposals must first be cleared with the musician, and even where the initial contact was made by the promoter - brings us into the realm of "procurement," as that term is used in Labor Code §1700.4(a).

5. The dictionary definition of negotiate does not require that the person negotiating possess ultimate decision making authority, or for that matter, possess authority to make any proposals or agree to any proposals without first obtaining the consent of the negotiator's principal. The Merriam-Webster online dictionary defines "negotiate" as: "to deal with (some matter or affair that requires ability for its successful handling); to arrange or bring about through conference, discussion and compromise." (<http://www.m-w.com/cgi-bin/>

dictionary?book=Dictionary&va=negotiate.) In the context of negotiations to engage the services of an artist, the negotiator for the artist is engaged in procurement activities regardless of whatever limitations might exist on the negotiator's independent decision making authority. For that reason, we disagree with the court's dicta in *Yoo v. Robi* (2005) 126 Cal.App.4th 1089, 1102, regarding the "distinction" between "spokespersons who merely pass on the client's desires or demands to the person who is contemplating engaging the client," or "merely ... pass messages back and forth between the principals," and "negotiators [who] use their understanding of their client's values, desires, and demands; and other parties' values, desires and demands, and through discretion and intuition ... bring about through give-and-take a deal acceptable to the principals." This subjective test would prove utterly unworkable, and is a poor substitute for what we believe was the Legislature's intent to create a bright line separating procurement from other activities which do not require a license. There is no other case which even remotely suggests that a personal manager who is not licensed as a talent

agent can engage in discussions, on behalf of an artist, with a potential purchaser of the artist's services, where such discussions are carried out for the purpose of obtaining employment and/or reaching an agreement for compensation for the artist's services, without violating the licensing requirement of the Talent Agencies Act.

6. A case that is cited in *Yoo* in support of this purported distinction between "spokespersons" and "negotiators," *Park v. Deftones* (1999) 71 Cal.App.4th 1465, in fact provides no such

1 support; although *Park* acknowledges that personal managers often
2 act as "spokespersons" for the artists they represent (as indeed,
3 they do, in a variety of contexts), that case did not say an
4 unlicensed person may act as a "spokesperson" for an artist in
5 the context of discussions with potential purchasers of the
6 artist's services, where such discussions are intended to result
7 in the procurement of employment and the establishment of a rate
8 of compensation for purchaser's of the artist's services. *Park*
9 simply explained: "Personal managers primarily advise, counsel,
10 direct and coordinate the development of the artist's career.
11 They advise in both business and personal matters, frequently
12 lend money to young artists, and serve as spokespersons for the
13 artists." *Id.* at 1469. A personal manager who is not licensed
14 as a talent agent can no sooner act as a "spokesperson" for the
15 artist in procurement-related discussions with a potential
16 purchaser of the artist's services than a personal manager
17 without a license to practice law can act as a "spokesperson" for
18 the artist in court during a trial.

19 7. Unlike talent agents, "personal managers" are not
20 covered by the Act or any other statutory licensing scheme -
21 provided, of course, that the personal manager does not "engage
22 in or carry on the occupation of a talent agency," by "procuring,
23 offering, promising, or attempting to procure employment or
24 engagements for an artist or artists." (Labor Code §§1700.4(a),
25 1700.5) Explaining the legitimate role of an unlicensed personal
26 manager in *Waisbren v. Peppercorn Productions, Inc.* (1995) 41
27 Cal.4th 246, 252-253, the court stated: "Artists typically engage
28 personal managers in addition to talent agents. In essence, the

1 primary function of the personal manager is that of advising,
2 counseling, directing and coordinating the artist in the
3 development of the artist's career. The manager's task
4 encompasses matters of both business and personal significance.
5 As business advisors, they might attend to the artists's
6 finances, and they routinely organize the economic elements of
7 the artist's personal and creative life necessary to bring the
8 client's product to fruition. The personal manager frequently
9 lends money to the neophyte artist, thereby speculating on a
10 return from the artist's anticipated future earnings. The
11 manager also serves as a liaison between the artist and other
12 personal representatives, arranging their interactions with, and
13 transactions on behalf of the artist. On a more personal level,
14 the manager often serves as the artist's confidante and alter
15 ego.... By orchestrating and monitoring the many aspects of the
16 artist's personal life, the personal manager gives the artist
17 time to be an artist. That is, managers liberate artists from
18 burdensome yet essential business and logistical concerns so that
19 artists have the requisite freedom to discharge their artistic
20 functions and to concentrate on their immediate creative tasks."
21 It is not an accident that carrying on discussions with potential
22 purchasers of the artist's services for the purpose of obtaining
23 engagements and establishing the rate of compensation for such
24 engagements in nowhere on this exhaustive listing of the
25 legitimate functions of an unlicensed personal manager, as such
26 activities fall into the scope of "procurement."

27 8. The Talent Agencies Act is a remedial statute that must
28 be liberally construed to promote its general object, the

1 protection of artists seeking professional employment. *Buchwald*
2 *v. Superior Court* (1967) 254 Cal.App.2d 347, 354. For that
3 reason, the overwhelming weight of judicial authority supports
4 the Labor Commissioner's historic enforcement policy, and holds
5 that "even the incidental or occasional provision of such
6 [procurement] services requires licensure." *Styne v. Stevens*
7 (2001) 26 Cal.4th 42, 51. "The [Talent Agencies] Act imposes a
8 total prohibition on the procurement efforts of unlicensed
9 persons," and thus, "the Act requires a license to engage in any
10 procurement activities." *Waisbren v. Peppercorn Productions,*
11 *Inc.* (1995) 41 Cal.App.4th 246, 258-259; see also *Park v.*
12 *Deftones* (1999) 71 Cal.App.4th 1465 [license required even though
13 procurement activities constituted a negligible portion of
14 personal manager's efforts on behalf of artist, and manager was
15 not compensated for these procurement activities].

16 9. Applying these legal principles to the facts of this
17 case, we conclude that Respondents crossed the line into the
18 activity of "procuring, offering, promising or attempting to
19 procure employment" within the meaning of Labor Code §1700.4(a),
20 and thus, engaged in the occupation of a talent agency without
21 the requisite license. First, we find it significant that EDSEL
22 instructed POE to refer to him all inquiries from persons
23 interested in engaging POE's services as a musician. It is also
24 significant that EDSEL never once had any contact with POE's
25 licensed talent agency, CAA. Thus, we conclude that EDSEL
26 insisted that all inquiries about potential engagements go to him
27 so that he would be the person responding to any such inquiries,
28 and so that he would be a party to any ensuing discussions

1 regarding potential engagements. Respondents unquestionably
2 conducted negotiations with the music promoter in connection with
3 the proposed concert appearance at Oberlin College, furthering
4 the discussion that had been initiated by the promoter, in an
5 attempt to secure the engagement and set the rate of POE's
6 compensation for her performance. Although a closer question, we
7 also find that Respondents carried on negotiations with the
8 organizers of the RAINN benefit concert, in order to secure some
9 payment (albeit minimal) for POE's appearance. Finally, turning
10 to EDSEL's discussions with POE about the possibility of
11 performing at upscale Dallas restaurants and nightclubs, we
12 conclude that in view of the fact that these discussions took
13 place very close in time to the other procurement activities, POE
14 reasonably believed that Respondents were in fact offering to
15 procure these Dallas engagements, rather than merely raising this
16 as a hypothetical possibility.

17 10. We now turn to the question of whether, as a result of
18 Respondents' failure to comply with the licensing requirement of
19 the Talent Agencies Act, the various agreements between the

20 parties (including the April 10, 2002 "preliminary management
21 agreement," the subsequent agreement for accounting and
22 bookkeeping services, and the Promissory Note) must now be
23 declared void *ab initio*, leaving Respondents with no enforceable
24 rights under those agreements, or whether the violations of the
25 Talent Agencies Act should have no effect on the enforceability
26 of these agreements, or alternatively, whether the agreements
27 should be found to be partially unenforceable to the extent that
28 some of the obligations under the agreements implicate the Talent

1 Agencies Act.

2 11. As a general matter, an agreement that violates the
3 licensing requirement of the Talent Agencies Act is illegal and
4 unenforceable. "Since the clear object of the Act is to prevent
5 improper persons from becoming [talent agents] and to regulate
6 such activity for the protection of the public, a contract
7 between an unlicensed [agent] and an artist is void." *Buchwald*
8 *v. Superior Court, supra*, 254 Cal.App.2d at 351. Having
9 determined that a person or business entity procured, promised or
10 attempted to procure employment for an artist without the
11 requisite talent agency license, "the [Labor] Commissioner may
12 declare the contract [between the unlicensed agent and the
13 artist] void and unenforceable as involving the services of an
14 unlicensed person in violation of the Act." *Styne v. Stevens,*
15 *supra*, 26 Cal.4th at 55. "[A]n agreement that violates the
16 licensing requirement is illegal and unenforceable"
17 *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th
18 at 262. California courts have uniformly held that a contract
19 under which an unlicensed party procures or attempts to procure
20 employment for an artist in violation of the Talent Agencies Act
21 is void *ab initio* and the party procuring the employment is
22 barred from recovering commissions for any activities under the
23 contract; i.e, even though some (or even all) of the activities
24 for which compensation is sought were legal activities, for which
25 a license was not required, the fact that there was any illegal
26 procurement makes the entire contract unenforceable. *Yoo v. Robi,*
27 *supra*, 126 Cal.App.4th at 1103-1104. Moreover, the artist that
28 is party to such an agreement may seek disgorgement of amounts

1 paid pursuant to the agreement, and "may . . . [be] entitle[d] .
2 . . to restitution of all fees paid the agent." *Wachs v. Curry*
3 (1993) 13 Cal.App.4th 616, 626. Restitution, as a species of
4 affirmative relief, is subject to the one year limitations period
5 set out at Labor Code §1700.44(c), so that the artist is only
6 entitled to restitution of amounts paid within the one year
7 period prior to the filing of the petition to determine
8 controversy³. *Greenfield v. Superior Court* (2003) 106
9 Cal.App.4th 743.

10 12. On the other hand, this statute of limitations does not
11 apply to the defense of contract illegality and unenforceability,
12 even where this defense is raised by the petitioner in a
13 proceeding under the Talent Agencies Act. "If the result the
14 [artist] seeks is [is a determination] that he or she owes no
15 obligations under an agreement alleged by [the respondent] ...
16 the statute of limitations does not apply." *Styne v. Stevens*,
17 *supra*, 26 Cal.4th at 53.

18 13. The Labor Commissioner has exclusive primary
19 jurisdiction to determine all controversies arising under the
20 Talent Agencies Act. "When the Talent Agencies Act is invoked in
21 the course of a contract dispute, the Commissioner has exclusive
22 jurisdiction to determine his jurisdiction in the matter,
23 including whether the contract involved the services of a talent
24 agency." *Ibid.* at 54. This means that the Labor Commissioner
25 has "the exclusive right to decide in the first instance all the

26
27 ³ Since POE did not make any payments to Respondents after
28 September 30, 2002, which was more than one year prior to the
filing of the petition to determine controversy, the statute of
limitations bars POE's claim for restitution of amounts that have
been paid.

1 legal and factual issues on which an Act-based defense depends."
2 *Ibid.*, at fn. 6, italics in original. In doing so, the Labor
3 Commissioner will "search out illegality lying behind the form in
4 which a transaction has been cast for the purpose of concealing
5 such illegality," and "will look through provisions, valid on
6 their face, and with the aid of parol evidence, determine
7 [whether] the contract is actually illegal or part of an illegal
8 transaction." *Buchwald v. Superior Court, supra*, 254 Cal.App.2d
9 at 351.

10 14. AGON had three agreements with POE that were in effect
11 at the time of the unlawful procurement activities - (a) the
12 initial management agreement of April 10, 2002 (as EDSEL's
13 efforts to replace that agreement with a new one never came to
14 fruition, and AGON continued to provide management services
15 pursuant to that initial agreement), (b) the agreement for
16 accounting and bookkeeping services, and (c) the Promissory Note.
17 The services that AGON provided to POE were all rendered pursuant
18 to the first two of these three agreements, and although neither
19 of these agreements stated that AGON was to provide procurement

20 services, the fact that such unlawful services were provided
21 compels a determination that both of these agreements are void *ab*
22 *initio* and that Respondents have no enforceable rights
23 thereunder.

24 15. The more difficult question here, of course, is
25 presented by the Promissory Note. Both sides have presented
26 cogent arguments about the similarities or differences between
27 this case and *Almendarez v. Unico Talent Management, Inc.* (TAC
28 No. 55-97). In *Almendarez*, the petitioner entered into a "1995

1 management agreement" with respondent that obligated petitioner
2 to pay 20% commissions on petitioner's gross earnings. During a
3 subsequent period in which the petitioner was unemployed, the
4 respondent loaned him over \$650,000 to pay his petitioner's legal
5 obligations and lavish personal expenses. The parties then
6 entered into a "1997 agreement" that obligated petitioner to
7 repay the loans as well as the 20% commissions owed pursuant to
8 the 1995 management agreement (although the obligation to pay the
9 commissions was carefully disguised so as not to be apparent
10 without the aid of parole evidence). The petitioner later sought
11 to invalidate both agreements and to escape from any liability
12 under the agreements due to numerous violations of the Talent
13 Agencies Act committed by respondent during the period between
14 the agreements. The Labor Commissioner found that the respondent
15 had engaged in employment procurement activities and invalidated
16 the 1995 agreement. The Labor Commissioner also determined that
17 the 1997 agreement contained an obligation to pay for services
18 that had been rendered by the respondent, and invalidated that
19 obligation. Nevertheless, the Labor Commissioner concluded that
20 petitioner could not escape his liability to respondent for the
21 loans that were made to him. The Labor Commissioner determined
22 he would "sever what was legally collected as a loan repayment
23 and what was illegally collected as payment of commissions
24 derived from an illegal management contract. To hold otherwise
25 would undermine the intent of the parties, result in an
26 inequitable holding, produce an injustice, and allow a contract
27 to be enforced which violates public policy." *Id.* at 19.

28 16. In certain respects, this case presents a more

1 compelling case than *Almendarez* for declaring the loan agreement
2 void in its entirety. Here, 37.45% of the loan proceeds were
3 used (and intended to be so used when the loans were made) to pay
4 AGON for services provided pursuant to two agreements determined
5 to be void *ab initio* as a result of violation of the Act's
6 licensing requirement. Respondents' argument that the Promissory
7 Note is separate and distinct from any other agreements it had
8 with POE rings false in that this money was loaned, in part,
9 precisely so that POE could pay her obligations to AGON under the
10 initial management agreement. In contrast, it does not appear
11 that any of the loan proceeds in *Almendarez* were used, or
12 intended to be used, to pay amounts owed by the artist to his
13 manager. Furthermore, here AGON did not advance the loan
14 proceeds directly to POE, but rather, funded a bank account from
15 which AGON provided checks to POE for her to sign so that
16 payments could be made to specified payees. In further contrast,
17 loan proceeds were advanced directly to the artist in *Almendarez*,
18 and he appeared to have complete discretion on how to spend those
19 proceeds. In short, *Almendarez* looks a lot more like a
20 traditional loan while here, the Promissory Note appears to be a
21 means, at least in significant part, of ensuring payment to AGON
22 for its services, and then, ensuring payment of the loan which
23 was used to pay for its services by collateralizing POE's future
24 earnings. But, in fairness to the other side of this story, the
25 money that was loaned enabled POE to pay off over \$100,000 in
26 pre-existing debt to persons and entities other than the
27 Respondents, and enabled POE to meet her ongoing personal
28 expenses for a period of about six months. Under these

circumstances, we believe that *Almendarez* provides the right template to follow in resolving this issue. In order to effectuate the remedial purposes of the Act, we hold the Promissory Note is partially invalid to the extent that it was used as a source of payment for AGON's representation of POE, and that Respondents have no enforceable right to repayment of the \$74,909.78 in loan proceeds that were used for that purpose. On the other hand, however, we hold that it would be inequitable to deny repayment to AGON of those loan proceeds that were not used or intended to be used as a source of payment for AGON's services, and that the Talent Agencies Act does not preclude Respondents from enforcing AGON's contractual right, to repayment of such amount - i.e., \$125,090.22, but without any interest. Interest payments would allow AGON to profit or benefit from having provided services to POE, and could be viewed, as they were in *Almendarez*, as nothing more than a substitute for commissions for services that were provided to the artist. Just as a claim for commissions would be unenforceable as a consequence of the unlawful procurement (even if the commissions

were owed only for activities which did not require licensure as a talent agency), so too, a claim for interest on money loaned by the unlicensed talent agency must be unenforceable, no matter what purpose the money was loaned for or how it was used.

17. Finally, Respondents' request for attorney's fees is denied. Respondents are not the prevailing party in this proceeding. Petitioner did not request fees, presumably because the Promissory Note's unilateral fee provision provides for fees only to AGON. (But see Civil Code §1717; *Hsu v. Abbata* (1995) 9

1 Cal.4th 863, 870; *Yuba Cypress Housing Partners, Ltd. v. Area*
2 *Developers* (2002) 98 Cal.App.4th 1077, 1081-1083, *Massey v.*
3 *Landis* (TAC No. 42-03, pp. 12-15.) Thus, each side shall bear
4 its own costs and fees.

5 ORDER

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

7 (1) The parties' April 10, 2002 management agreement, and
8 the subsequent accounting/bookkeeping agreement are void ab
9 initio, and Respondents have no enforceable rights thereunder,
10 and are not entitled to payment of anything for amounts
11 purportedly due under these agreements;

12 (2) The Promissory Note is partially invalid to the extent
13 that it was used or intended to be used as a source of payment
14 for AGON's representation of POE, and Respondents have no
15 enforceable right to repayment of the \$74,909.78 in loan proceeds
16 that were used for that purpose. However, the Talent Agencies
17 Act does not preclude Respondents from enforcing AGON's
18 contractual right to repayment of the balance of the loan
19 principals that was not used or intended to be used as a source

20 of payment for AGON's representation of POE, in the amount of
21 \$125,090.22, with no right to interest payments on said amount.

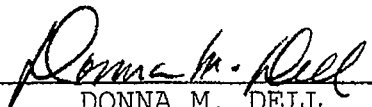
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23 Dated: 10/28/05



MILES E. LOCKER
Attorney for the Labor Commissioner

24
25 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:
26

27
28 Dated: Oct. 28, 2005



DONNA M. DELL
State Labor Commissioner