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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

OLADAPO TORIMIRO, an Individual, Petitioner, vs. ANNE L. ROBERTS, an Individual, Respondent.	**CASE NO. TAC 52674** **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

The above-captioned matter, a Petition to Determine Controversy pursuant to Labor Code section 1700.44, came on regularly for hearing in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner OLADAPO TORIMIRO (hereinafter "Petitioner") appeared and represented himself. Respondent ANNE L. ROBERTS (hereinafter "Respondent") appeared and represented herself.

The matter was taken after submission after the parties filed post-hearing briefing.

Due consideration having been given to the testimony and documentary evidence presented, and post-hearing briefing submitted by the parties, the Labor Commissioner hereby adopts the following determination of controversy.

II. BACKGROUND FACTS

1. Petitioner is a musical artist, composer, and lyricist.

2. Petitioner and Respondent were acquaintances for a number of years. At some point and prior to any business relationship between them, Respondent introduced Petitioner to renowned musical artist Kenny "Babyface" Edmonds (hereinafter "Edmonds").

3. On or about September 29, 2014, Petitioner retained Respondent to be his co-Manager, along with Petitioner's wife, Lisa Murray (hereinafter "Murray"). Pursuant to the agreement, Respondent would receive 15% commission. In an email between Murray and Respondent, Murray explains that Respondent and Murray would, among other things, pitch Petitioner's "… songs for artist projects and for tv/film/commercials/etc."

4. It was undisputed that during the relevant time period Respondent was not a licensed talent agent under the Talent Agencies Act (hereinafter "the Act").

5. On or about October 10, 2014, Petitioner entered into a written agreement with Edmond's music production company, ECAF Production, Inc. (hereinafter "ECAF"). Under the agreement, Petitioner would provide services of a co-producer along with Edmonds for eight master recordings featuring the performance of signer Alex Kogan (Kogan Project). Respondent was not involved in negotiating details of the agreement, but argued she is entitled to her commission because the work resulted from her introduction of Petitioner to Edmonds. The parties agree that Respondent performed management duties related to this project such as

handling plane tickets and hotel reservations when Petitioner traveled to Miami, Florida to perform the work. Respondent did not travel to Miami with Petitioner but was available to assist over the phone while Petitioner was there. The work performed by Petitioner on this project consisted of writing songs and playing the drums, the guitar, and base. Petitioner worked on ten songs, which were all recorded but not released. Section 2 of the agreement between Petitioner and ECAF provides in part: "[b]y executing this agreement, you [Petitioner's production company] and Torimiro [Petitioner] agree that Def Jam Recordings ("Label"), will be the owner of each Master as a "work made for hire" (excluding the underlying musical composition recorded in each Master)." The agreement provides that Petitioner may be granted a "bonus" of up to 30% in royalties received by ECAF for each master recording. The agreement also provides that Petitioner and Edmonds will be credited as producers for the master recordings. Petitioner was paid $60,000.00 for his work on this project. Petitioner conceded that pursuant to his agreement with Respondent, Respondent was to receive $9,000.00 or 15% of the $60,000.00 he received. Petitioner and/or Murray actually tried to pay Respondent her commission sometime in November 2014, but were not able to because Respondent failed to provide them a W-9 IRS Form.

6. In or about November 2015, Petitioner entered into another written agreement with ECAF to serve as a co-producer with Edmonds of a master recording of a musical composition titled "Stay Low" to be performed by renowned singer Rita Wilson (Wilson Project). Petitioner played every instrument in the recording and was paid $7,500.00. Under the agreement with ECAF, Petitioner agreed that Sing It Loud, LLC would be the owner of the master recording"…as a "work made for hire" (excluding the underlying musical composition recorded in the Master)." The agreement also provides that Petitioner will be considered for a "bonus" of up to half of the royalties received by ECAF. Pursuant to the agreement, Petitioner will also to be listed in the credits as having provided "additional production". Petitioner paid Respondent 15% or $1,125, as her commission on this project.

7. On or about December 7, 2015, Respondent provided Petitioner the W-9 Form and demanded her commission payment for the Kogan Project. Petitioner refused and fired Respondent in January 2016. Respondent made a further demand on Petitioner on or about May

9, 2016, to no avail. Thereafter, Respondent sued Petitioner in small claims court and obtained a favorable result but Petitioner raised the Talent Agencies Act as a defense, resulting in this Petition.

8. In March 2017, Petitioner entered into a third written agreement with ECAF to co-produce, along with Edmonds, the master recordings of two songs featuring the performance of famous signer Tony Braxton (Braxton Project). Petitioner played the piano and strings, and wrote lyrics for these recordings. Pursuant to the agreement with ECAF, Petitioner agreed that Def Jam Recordings (the Label) would be the owner of each Master recording as a "work for hire" –again, excluding the underlying musical composition in the recording. The agreement provides that Petitioner will be paid $7,000.00 in full compensation for each recording. However, under the agreement Petitioner can also receive a "bonus" of up to half of the royalties received by ECAF. The agreement also provides that Petitioner will be credited as a producer.

9. In his Petition, Petitioner alleges Respondent violated the Talent Agencies Act (hereinafter "the Act") by attempting to procure and/or procuring employment for him without a talent agent license. Specifically, Petitioner alleges Respondent unlawfully procured the Kogan, Wilson, and Braxton Projects described above. Petitioner seeks an order determining that Respondent violated the Act, and that any agreements with Respondent are illegal, unenforceable, and void *ab initio*. Petitioner also seeks disgorgement of any and all monies paid to Respondent.

III. LEGAL DISCUSSION

Issues

1. Has Respondent acted as an unlicensed talent agent and therefore violated the Act?

2. Does the Recording Contracts exemption from the Act at Labor Code section 1700.4(a) apply?

3. If Respondent violated the Act, is the appropriate remedy to void the entire contract *ab initio* or sever any offending practices under *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974?

4. If Respondent violated the Act, is Petitioner entitled to disgorgement of commissions

paid to Respondent or is such remedy barred to Petitioner by the Act's one-year statute of limitations in Labor Code section 1700.4 (c)?

Analysis

Labor Code section 1700.23 vests the Labor Commissioner with jurisdiction over "any controversy between the artist and the talent agency relating to the terms of the contract." The Labor Commissioner's jurisdiction includes the resolution of contract claims brought by artists or agents seeking damages for breach of a talent agency contract. *Garson v. Div. Of Labor Law Enforcement (1949) 33 Cal.2d 86; Robinson v. Superior Court* (1950) 35 Cal.2d 379. The Labor Commissioner has jurisdiction to determine this matter.

Labor Code section 1700.4, subsection (b), includes "musical artists" in the definition of "artist." Petitioner is therefore an "artist" under the Act.

Labor Code section 1700.5 provide in relevant part that "[n]o person shall engage in in or carry on the occupation of a talent agency without first procuring a license…from the Labor Commissioner." However, "a person may counsel and direct artist in the development of their careers, or otherwise "manage" artists – while avoiding any procurement activity (procuring, promising, offering, or attempting to procure artistic employment of engagements)—without the need for a talent agency license. (*Determination of Controversy Katina v. Buckley*, TAC 43106, at p. 8:24-27)

A. Respondent Procured Work for Petitioner with ECAF.

In *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.246, the Court held that even a single act of procurement subjects the individual to the Act's licensing requirement. This is consistent with the Labor Commissioner's long standing interpretation that a talent agent license is required for procurement activities no matter how incidental they may be to the agent's representation of the artist. Here, Respondent admitted she procured work for Petitioner with ECAF. According to Respondent, Edmonds was her friend and mentor even before her business relationship with Petitioner. During the relevant time period and after Petitioner hired Respondent as a manager, Respondent admits she "was always in Edmonds' ear trying to get Petitioner work." Although, Respondent did not directly negotiate the specific terms of the agreements for

the Kogan and Wilson projects, according to Respondent she discussed job opportunities with Edmonds and passed the information on to Petitioner.

B. The Recording Contracts Exemption Does Not Apply.

Labor Code section 1700.4(a) provides:

> Talent Agency means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, **except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artist shall not of itself subject a person or corporation to regulation and licensing under this chapter.** Talent agencies may, in addition, counsel or direct artists in the development of their professional careers. [emphasis added]

Respondent argues that her procurement activities related to the three projects with ECAF are exempt under the Act's Recording Contracts exemption.

Petitioner argues, *inter alia*, that the exemption does not apply because his contracts with ECAF were not with a Label or "recording company" since ECAF is a "production" company. Petitioner's argument has merit. In *Lindsey v. Marie* (2014) TAC 28811, we held that the Act's Recording Contracts exemption did not apply because the intent of the legislature was to exempt negotiations of recording contracts between artist and recording companies. (*Id* at pp. 8-9.) We held that the exemption did not apply because the contracts at issue were between "…a producer and the artist." (*Id* at p. 9:4-5) We explained:

> In short, the record company is not a party to these contracts. These contracts are essentially contracts between two artists for services. And consequently, we choose not to expand the purview of the Act's exemption to encompass contracts for personal services between artist and producer/artists. The Act's recording contracts exemption was intended to exempt negotiations between a manager and record company on behalf of artist…We find no evidence the exemption was intended to exempt managers negotiating contracts between artists and producers that do not contemplate involvement of record companies or labels other than providing royalty statements [sic]. This would expand the exemption outside the intent of the legislature and the findings of the Commission who studied the Act for more than two years.

(*Id* at p. 9:5-17)

Here, the evidence introduced at hearing supports a finding that ECAF is not a Label or recording company, but rather a music production company. Indeed, the agreements between

Petitioner and ECAF expressly provide that Petitioner is to serve as co-producer on the projects with Edmonds. Thus, like in *Lindsey*, the agreements here at issue were not between Petitioner (an artist) and a recording company or Label, but rather between an artist and another artist or co-producer. In addition, although the contracts between Petitioner and ECAF provide that Epic Records, Sing It Loud, LLC, and Def Jam Records will be the owners of the relevant master recordings, the ownership is expressly stated "as a work made for hire" and does not include the underlying musical compositions. The fact that Petitioner may be entitled to "bonuses" based on a percentage of royalties ECAF is paid by the Labels does alter our conclusion. The bonuses appear to be discretionary, and in any event, as we held in *Lindsey*, the fact that "…creative services are utilized in support of a master recording and the earrings are paid via a percentage of the artists royalties from a record company…" does not mean "…the recording contracts exemption must apply." (*Id* at p. 9:28—10:2)

Based on the facts of this case, we find that the Act's Recording Contracts exemption does not apply to any procurement activities by Respondent relating to the Kogan, Wilson and/or Braxton Projects.[1]

C. **Severability Under *Marathon* Does Not Apply.**

Petitioner wants his contract with Respondent declared illegal and void *ab initio* due to Respondent's unlawful procurement. In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, the California Supreme Court held that the Labor Commissioner may apply the doctrine of severability to preserve and enforce the lawful portions of a contract if the facts warrant. In this case, the evidence presented at hearing focused exclusively on the three projects with ECAF. It was undisputed that Respondent did not negotiate the details of the contracts for these projects. However, the first term in the agreement between Petitioner and Respondent contemplates illegal procurement by Respondent, since it provides that as co-manager Respondent will help "pitch" Petitioner's songs for television, film and commercials. Respondent also readily admitted she

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[1] Similarly to Respondent in *Lindsey,* Respondent in this case relies on the Hearing Officer's Order on Respondent's Motion to Dismiss in *Chris and Thomas Lord Alge v. Moir/Marie Entertainment LLC, et al. (Alge)*, TAC 45-05. However, and as noted in *Lindsey*, the Hearing Officer in *Alge* expressly held that the exemption applied because the contracts at issue were between the Petitioner and various recording companies. (*See Alge*, Order on Respondent's Motion to Dismiss TAC-45-5 p. 5:11-13; *Lindsey v. Marie* (2014) TAC 28811, pg. 10, fnt. 1.)

procured the projects with ECAF because she "was always in Edmond's ear" about obtaining work for Petitioner.

Based on the evidence introduced at hearing, applying severance in this case would not be feasible. The contracts between Petitioner and ECAF are tainted by Respondent's admitted procurement on behalf of Petitioner. The illegal procurement was not collateral to nor can it extirpated from the lawful managerial services provided by Respondent. *See Marathon v. Blasi, supra,* at p. 998.

As such, we decline to apply the doctrine of severability to the facts of this case.

D. Disgorgement Relief is Barred by the Act's One-Year Statute of Limitations.

Labor Code section 1700.44 (c) provides:

> No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to commencement of the action or proceeding.

This one-year statute of limitations does not apply to purely defensive petitions arising under the Act. *Styne v. Stevens* (2001) 26 Cal.4th 42, 53. However, a request for *affirmative* relief under the Act must be made within one year from when the alleged violation occurred. In this case, Petitioner not only seeks that his agreements with Respondent be declared void and unenforceable, he also requests disgorgement of any commissions paid to Respondent. The only evidence presented at hearing about any commissions paid by Petitioner to Respondent involved the $1,125.00 for the Wilson Project paid on or about November 2015. Petitioner did not file his Petition until September 27, 2018 – almost three years after he paid Respondent the alleged illegal commission. Thus, based on the evidence presented at hearing, even if severance were not applied, discouragement of the Wilson Project commission Petitioner paid Respondent is barred by the Act's one-year statute of limitations.

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IV. ORDER

For the reasons set forth above, **IT IS HEREBY ORDERED** as follows:

1. The management agreement between Petitioner and Respondent is void and unenforceable. Respondent has no rights or entitlements to any commissions arising from such agreement.
2. Petitioner's request for disgorgement is denied.

Dated: May 10, 2021

Respectfully Submitted

By: _____
Abdel Nassar
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: May 7, 2021

By: _____
Lilia Garcia-Brower
California State Labor Commissioner