STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

JESSICA MEUSE, Petitioner, vs. L.A. ENTERTAINMENT, INC. and JIM ERVIN, Respondents.	**CASE NO.: TAC-52769** **DETERMINATION OF CONTROVERSY**

On December 16 and December 17, 2020, a Petition to Determine Controversy under Labor Code section 1700.44 in the above-captioned matter came before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner JESSICA MEUSE, an individual (hereinafter, referred to as "Meuse" or "Petitioner") was represented by Ramona DeSalvo. Respondents L.A. ENTERTAINMENT, INC. and JIM ERVIN (hereinafter, referred to as "Respondents") were represented by Robert Besser.

The matter was taken under submission. Based on the evidence presented at this hearing and on the closing briefs filed in this matter, the Labor Commissioner hereby adopts the following decision.

I. FINDINGS OF FACT

1. This case arises out of a dispute between a musician, Jessica Meuse, and her manager, Jim Ervin. Meuse alleges that Ervin and the agency for which he worked acted as an

unlicensed talent agency.

2. In March 2017, Meuse and Respondents entered into a Personal Management Agreement. That same month, Meuse entered into a Recording Agreement and a Songwriter's Agreement with Respondent L.A. Entertainment.

3. The Personal Management Agreement stated that Ervin would provide Meuse with counsel regarding the industry while Meuse would work exclusively with Ervin as her manager and pay him a commission on her earnings. The contract stated that Ervin could provide loans or advances on costs; however, Ervin had to receive prior written approval from Meuse for any expenses over five hundred dollars; or any cumulative expenses over the period of a month for more than two thousand dollars. The Personal Management Agreement also specified that Ervin was not an agent and would not act to procure jobs for Meuse.

4. The Recording Agreement and Songwriter's Agreement are separate from the Personal Management Agreement. In the Recording Agreement, *inter alia*, Meuse agreed to record exclusively with L.A. Entertainment, Inc. in exchange for payment of recording costs and royalties. In the Songwriter's Agreement, Meuse agreed to sell fourteen compositions to L.A. Entertainment in exchange for royalties.

5. Despite the Personal Management Agreement's statement that Ervin was not an agent, Ervin acted repeatedly throughout the contract period with Meuse to solicit and procure employment for her.

6. Ervin negotiated and signed performance agreements on Meuse's behalf on numerous occasions, including in May 2017 for a performance at an Arkansas festival where Ervin was listed[1] as the manager and agent on the contract, in August 2018 for a Birmingham Jefferson Convention Complex performance, in March 2019 for a Shelby County Arts Council Black Box Theater performance, and in June 2019 for the Alabaster City Fest performance.

7. Additionally, in October 2018, Ervin booked Meuse at the Red Lodge Songwriter festival for a performance as part of the larger festival.

[1] The contract lists "Jimmy Erwin," but there was no dispute at the hearing that this referred to the respondent.

8. The parties agreed that Meuse was often losing money on her performances but disagreed on the cause.

9. Meuse testified that Ervin would book band members for her performances that were either unneeded or comparatively more expensive than local talent available. She also testified that Ervin booked himself tickets to her performances, performed in her band without her permission, and often did not view her performances when he came. She also stated that he never cleared expenses with her as required in the Personal Management Agreement.

10. Ervin testified that Meuse understood her expenses as she charged expenses to his credit card, that he booked band members as required for many of her contracts, and that he incurred necessary expenses for her performances. He stated that he lost money on her Personal Management Agreement and presented expenses showing that, after the costs he incurred, he came out at a loss. He also stated that he chose to forgo commissions on several occasions.

11. The disagreement over expenses, as well as Ervin's performance on the Songwriter's Agreement and Recording Agreements, came to a head in late 2019. At that point, Meuse consulted counsel, entered notices of breach, and asked for an accounting.

12. On May 20, 2020, Petitioner filed this talent agent controversy, alleging that Ervin acted as an unlicensed talent agent and requesting that the Personal Management Agreement, Recording Agreement, and the Songwriter's Agreement be declared void.[2]

II. LEGAL DISCUSSION

This case raises the following legal issues:

A. Has the Respondent procured entertainment engagements without a talent agency license under the Talent Agencies Act (the Act)?

B. If Respondents violated the Act, is the appropriate remedy to void the entire

[2] The Petition requests that the provisions of the agreement with respect to Respondents' actions as an unlicensed talent agency be declared null and void; although "the agreement," as used in the petition could refer to the Personal Management Agreement, the petition argues that the Respondents "did not distinguish between the three agreements." The Labor Commissioner therefore reads the request for relief as voiding all three agreements.

contracts ab initio, or sever the offending practices under the principles articulated in *Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974 (2008)?

C. Is Petitioner entitled to disgorgement and attorney's fees?

A. Did the Respondents Procure Entertainment Engagements without a Talent Agency License?

The first issue is whether, based on the evidence presented at this hearing, Respondents operated as a "talent agency" within the meaning of Labor Code section 1700.4(a). Based on the evidence and testimony presented at hearing, Respondents acted as a talent agency without a license by procuring entertainment engagements for Meuse.

Labor Code section 1700.4(a) defines "talent agency" as:

> "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."

The term "procure," as used in this statute, means to get possession of: obtain, acquire, to cause to happen or be done: bring about." *Wachs v. Curry*, 13 Cal.App.4th 616, 628 (1993), *abrogated on other grounds as recognized by Marathon*, 42 Cal. 4th at 987. Thus, "procuring employment" under the statute includes attempting to attain employment on behalf of an artist, negotiating for employment, sending an artist's work to prospective employers, and entering into discussions regarding employment contractual terms with a prospective employer.

Labor Code section 1700.5 provides that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner." In *Waisbren v. Peppercorn Production, Inc.*, 41 Cal.App.4th 246 (1995), the court held that any single act of procuring employment subjects the agent to the Talent Agencies Act's licensing requirements, thereby upholding the Labor Commissioner's longstanding interpretation that a license is required for any procurement activities, no matter how incidental such activities are to the agent's business as a whole.

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In contrast, a person may counsel and direct artists in the development of their professional 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. In addition, such person may procure non-artistic employment or engagements for the artist, without the need for a license. *Styne v. Stevens*, 26 Cal.4th 42 (2001).

At the outset, it is undisputed that Ervin lacked a talent agency license from the Labor Commissioner and that Meuse is an artist. The question is therefore whether Ervin "engaged in the occupation of procuring, offering, promising, or attempting to procure employment or engagements" for Meuse.

Applying *Waisbren*, it is clear Respondents acted as a talent agency within the meaning of Labor Code section 1700.4(a) and procured employment without a license in violation of Labor Code section 1700.5 on these occasions. Throughout Ervin's time as Meuse's manager, he repeatedly and continuously negotiated on behalf of Meuse for performances and signed performance agreements on her behalf. Ervin also represented himself as Meuse's talent agent in at least one of the performance contracts.

Respondents maintain that, while Ervin did complete a number of the contracts, Meuse solicited the majority of the engagements; accordingly, Respondents contend, they did not violate the Talent Agencies Act because the Act does not prohibit a manager from completing contracts when an artist solicits the employment. The argument is unconvincing. "Completing" the contract in this case included the negotiation and signature of the performance agreements. That negotiation and the signature are what "bring about" employment or engagement for artists. *Wachs*, 13 Cal.App.4th at 628. The mere fact that an artist sends an email or Facebook message to a potential contact for employment does not give license to an unlicensed manager to assume the role of an agent. Indeed, cabining the meaning of "procure" to solicitation would both make the "attempting to procure" language in Labor Code Section 1700.4(a) surplusage and open an unstated exception never considered in the Talent Agencies Act. In short, it is well settled the negotiation of a contract is to "procure" employment or engagements within the meaning of Labor Code section 1700.4(a)

B. If Respondents violated the Act, is the appropriate remedy to void the entire contracts ab initio, or sever the offending practices under the principles articulated in *Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974 (2008)?

Generally, an agreement that violates the licensing requirements of the Talent Agencies Act is illegal and unenforceable. "Since the clear object of the Act it to prevent improper persons from becoming [talent agents] and to regulate such activity for the protection of the public, a contract between and unlicensed [agent] and an artist is void." *Buchwald v. Superior Court*, 254 Cal. App 2d 347, 351 (1967).

However, in *Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974 (2008) (*Marathon*), the Supreme Court held that a violation of the Talent Agencies Act does not automatically require invalidation of the entire contract. The Court explained that the Act does not prohibit application of the equitable doctrine of severability and that therefore, in appropriate cases, a court is authorized to sever the illegal parts of a contract from the legal ones and enforce the parts of the contract that are legal. *Id*. at 990-96.

In discussing how severability should be applied in Talent Agencies Act cases involving disputes between managers and artists as to the legality of a contract, the Court in *Marathon* recognized that the Labor Commissioner may invalidate an entire contract when the Act is violated. The Court left it to the discretion of the Labor Commissioner to apply the doctrine of severability to preserve and enforce the lawful portions of the parties' contract where the facts so warrant. As the Supreme Court explained in *Marathon:*

> Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate.
>
> [. . . .]
>
> Inevitably, no verbal formulation can precisely capture the full contours of the range of cases in which severability properly should be applied, or rejected. The doctrine is equitable and fact specific

> and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial court in the first instance.

Marathon, 42 Cal.4th at 996, 998.

In assessing the appropriateness of severance, two important considerations are (1) whether the central purpose of the contract was pervaded by illegality and (2) if not, whether the illegal portions of the contract are such that they can be readily separated from those portions that are legal.

In accord with *Marathon*, Respondents urge the Commissioner to apply the doctrine of severability if the Commissioner concludes Respondents violated the Act in any of the identified engagements at issue herein while Petitioner maintains that severability does not apply in this case.

The parties address two separate questions of severability. The first question is whether any part of Personal Management Agreement can be severed—that is, whether the Personal Management Agreement is so tainted by illegality as to be void as a whole or whether the Labor Commissioner should sever those engagements or actions for which Ervin acted as an unlicensed talent agent rather than a manager.

Here, the Personal Management Agreement is pervaded by illegality given Ervin's repeated and continuous actions to procure employment throughout his relationship with Meuse. Based on Meuse's credible testimony and the evidence of repeated procurement of employment by Ervin throughout the contract period, Ervin's actions to procure employment pervaded his actions under the Personal Management Agreement. At a minimum, given Ervin's repeated negotiations and executions of performance contracts between May 2017 and June 2019 on behalf of Meuse, the Labor Commissioner cannot disentangle his managerial duties and expenses from his actions procuring employment. The Personal Management Agreement is void as a whole.

The second question of severability is whether the Songwriter's Agreement and the Recording Agreement must also be declared void or whether these agreements can be severed from the Personal Management Agreement. While Petitioner acknowledges that these agreements are separate, she argues that all contracts should be severed because Ervin rarely, if ever, performed services other than procuring employment. Respondents contend that the Songwriter's Agreement

and Recording Agreement are completely separate from the Personal Management Agreement and that procuring recording contracts is exempted from the Talent Agencies Act.

We agree with the Respondents. Petitioner attempts to consolidate three contracts into a single contract that she then contends must be declared void. The Songwriter's Agreement and Recording Agreement had different purposes than the Personal Management Agreement, and Ervin credibly testified that he performed different services under the former two contracts. For the Recording Agreement, Ervin recorded Meuse as promised and attempted to procure recording contracts, as allowed for unlicensed managers under Labor Code Section 1700.4(a). The Songwriter's Agreement, in which Ervin bought Meuse's songs and agreed to royalties, is even farther afield from the Personal Management Agreement. It did not involve Ervin's actions as a manager or unlicensed agent for Meuse.

Even assuming that Ervin performed separate duties under each Agreement, Meuse points to the intermingled accounts for the three agreements and argues the three separate contracts should be considered as a whole. Ervin's accounting practices are difficult to decipher at best and potentially troubling. Nevertheless, Petitioner failed to provide any legal authority that intermingling funds alone requires that separate contracts, unrelated to a manager or talent agent's work, can be voided in a talent agency controversy.

In sum, the Personal Management Agreement is void in its entirety. The Songwriter's Agreement and Recording Agreement are considered separate contracts which we decline to void.

C. Is Petitioner entitled to restitution and attorney's fees?

An artist that is party to a void agreement under the Talent Agencies Act may seek disgorgement of amounts paid pursuant to the agreement, and "may ... [be] entitle[d] ... to restitution of all fees paid the agent." *Wachs*, 13 Cal.App.4th at 626. Restitution, as a species of affirmative relief, is subject to the one-year limitations period set out at Labor Code § 1700.44(c), so that the artist is only entitled to restitution of amounts paid within the one-year period prior to

the filing of the petition to determine controversy. *Greenfield v. Superior Court* 106 Cal.App.4th 743 (2003).

The parties dispute the amount of restitution that Petitioner is entitled to in this case. Petitioner maintains that all payments made to Ervin for her performances should be provided as restitution to her. Although she recognizes that Ervin claims costs that he incurred on her behalf, she argues that his failure to provide an accurate, separate accounting of the costs and to follow the provisions in the Personal Management Agreement regarding Petitioner's approval of costs over $500 individually or over $2,000 cumulative in a month mean that all amounts received by Respondents should be paid as restitution, without any offset for costs. Respondents, on the other hand, contend that the payments Ervin received for Petitioner's employment should be offset by the costs he incurred. Indeed, he states that he often lost money on Petitioner's employment and that, accordingly, Petitioner is not entitled to any disgorgement. At most, under Respondents' view, Petitioner could be entitled to the small amounts Ervin labeled as commissions in his accounting to the hearing officer.

The question of whether to allow for a repayment of the advancement of costs by a manager even given a manager's unlawful procurement activity is a question of severability. *See Almendarez v. Unico Talent Management, Inc.* (Cal.Lab.Com., Aug. 26, 1999) TAC No. 55–97. In *Almendarez*, for example, the Labor Commissioner severed the lawful provision of the contract requiring repayment of advances by an artist to a manager from a manager's unlawful procurement of employment. *Id.*; *see also Marathon*, 42 Cal. 4th at 991 (citing *Almendarez* approvingly). As noted above, "the doctrine [of severability] is equitable and fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance." *Marathon*, 42 Cal. 4th at 998.

We decline to exercise our equitable discretion to sever the advance "costs" incurred by Ervin from the amount of restitution owed to Petitioner. The costs identified by Respondents were opaque at best, including numerous costs above $500 without pre-approval as well as costs for Ervin to fly in and perform with Petitioner without clear approval. Additionally, Meuse's

testimony was credible that she had not received a breakdown of the costs until her later dispute with Respondents and that the original accounting she received confusingly lumped together costs and revenues from the different contracts she signed with Respondents.

Petitioner's right to restitution, however, is limited to one-year from the date of filing of the petition. Under the Talent Agencies Act, "[n]o 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." California Labor Code § 1700.44. "Statutes of limitations bar 'actions or proceedings,' thus guarding against stale claims and affording repose against long-delayed litigation." *Styne v. Stevens*, 26 Cal. 4th 42, 52 (2001) (internal citations omitted).

Petitioner contends that the discovery rule should toll the one-year statute of limitations in this case. "The limitations period commences when the cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements. An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. [. . . .] The discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *E-Fab, Inc. v. Accts., Inc. Servs.*, 153 Cal. App. 4th 1308, 1317-18 (2007) (internal citations and quotation marks omitted). The discovery rule protects a Petitioner who is "blamelessly ignorant of the cause of [their] injuries" and its application is "particularly appropriate where the relationship between the parties is one of special trust such as that involving a fiduciary, confidential or privileged relationship." *Id.* at 1318 (internal quotation marks omitted).

Petitioner argues that because Respondents failed in their duty to properly report and record expenses under the contract, she could not have known about the claims in this controversy until reviewing the accounting. While Petitioner may choose to pursue a breach of contract claim in other venues, the question for the Labor Commissioner—and which leads to the remedy sought here—is whether Respondents acted as unlawful agents in violation of the Talent Agencies Act. The fact that Ervin repeatedly and continuously procured employment on Meuse's behalf cannot

have been a surprise. Petitioner could or should have known that Ervin booked employment on her behalf, even if she did not know the financial details. The discovery rule thus does not apply because Petitioner was or should have been aware that Respondents unlawfully procured her employment since the beginning of her contract with Respondents. Whether a discovery rule would apply to other causes of action, including any breach of contract action, is not a question for the Labor Commissioner to resolve.

As such, Petitioner is entitled to the following restitution from May 20, 2019 to the present: (i) $2000 for the Clearwater/Lanier/ATL performance; (ii) $530 for the Red Lodge performance, and (iii) $1000 for the Alabaster City Fest performance. The total owed is $3,530.

Finally, Petitioner prays for attorney's fees and costs under Labor Code Section 1700.25(e). That section provides:

> If the Labor Commissioner finds, in proceedings under Section 1700.44, that the licensee's failure to disburse funds to an artist within the time required by subdivision (a) was a willful violation, the Labor Commissioner may, in addition to other relief under Section 1700.44, order the following:
>
> (1) Award reasonable attorney's fees to the prevailing artist.
>
> (2) Award interest to the prevailing artist on the funds wrongfully withheld at the rate of 10 percent per annum during the period of the violation.

Labor Code Section 1700.25(e) does not apply here. Respondents disbursed the money from employment engagements. Although the parties dispute whether the costs incurred by Respondent in advance were legitimate, it does not appear that Respondents were willfully withholding funds as required under the statute.[3]

III. CONCLUSION

Respondents acted as an unlicensed talent agency for Petitioner. Because actions taken under the Personal Management Agreement were pervaded by illegality, the Personal Management Agreement as a whole is null and void. The Songwriter's Agreement and Recording Agreement

[3] Additionally, licensees—the subject of Labor Code Section 1700.25(e), are defined in Labor Code Section 1700.3 as talent agencies with a valid license. Respondents here were never licensed.

are severed and remain valid. Petitioner is entitled to recover $3,530 for unpaid performance fees from May 20, 2019 to the present.

Dated: April 19, 2021

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

By: Casey Raymond
CASEY RAYMOND,
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: April 19, 2021

By: _____
LILIA GARCIA-BROWER
California State Labor Commissioner

PROOF OF SERVICE

(Code of Civil Procedure § 1013A(3))

STATE OF CALIFORNIA)
) **S.S.**
COUNTY OF LOS ANGELES)

I, Jhonna Lyn Estioko, declare and state as follows:

I am employed in the State of California, County of Los Angeles. I am over the age of eighteen years old and not a party to the within action; my business address is: Department of Industrial Relations, Division of Labor Standards Enforcement, 320 W. 4th Street, Suite 600; Los Angeles, California 90013.

On April 20, 2021, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY,** on all interested parties in this action as follows:

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☒ **(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

☒ **(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 20th day of April 2021, at Los Angeles, California.

Jhonna Lyn Estioko
Declarant