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DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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Special Hearing Officer for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

KESHA ROSE SEBERT pka KE$HA, an individual, Petitioner, vs. DAS COMMUNICATIONS, LTD., a corporation, Respondent.	CASE NO.: TAC-19800 DETERMINATION ON PETITION OF KESHA ROSE SEBERT

This proceeding arose under the provisions of the Talent Agencies Act ("TAA" or "Act"), Labor Code §§ 1700 – 1700.47[1]. On September 29, 2010, petitioner KESHA ROSE SEBERT pka KE$HA ("petitioner" or "Sebert") filed a petition with the Labor Commissioner pursuant to §1700.44 seeking determination of an alleged controversy with respondent DAS COMMUNICATIONS, LTD. ("Respondent" or "DAS"). On October 25, 2010 respondent filed an answer to the petition. Thereafter, on July 20 and 21, 2011, a full evidentiary hearing was held before William A. Reich, attorney for the Labor Commissioner assigned as a hearing officer. Due consideration having been given to the

[1] Unless otherwise specified, all subsequent statutory references are to the Labor Code.

testimony, documentary evidence, briefs, and arguments submitted by the parties, the Labor Commissioner now renders the following decision.

I. DETERMINATION ON ISSUE OF SUBJECT MATTER JURIDICTION.

A. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is a performing artist, who is recognized for her work as a singer, songwriter, and musician. Respondent is an artist management firm that is incorporated in the state of New York, and has its principal office in New York City. On January 27, 2006, petitioner and respondent entered into a written artist management agreement (also sometimes herein referred to as the "contract") under the terms of which petitioner engaged respondent to act as her manager. The contract contains a choice-of-law clause which provides as follows:

> This agreement is made and executed in the State of New York and shall be construed in accordance with the laws of said State applicable to contracts wholly to be performed therein.

On September 11, 2008, petitioner, through her counsel, sent respondent a notice purporting to terminate the artist management contract. One year and eight months later, on May 26, 2010, respondent filed a lawsuit in the New York Supreme Court seeking to recover moneys due under the contract and also a declaration that the contract remained in effect. Petitioner entered her appearance in the New York action by filing a motion to dismiss. The motion was eventually denied, and the New York action remains an actively litigated case.

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On September 29, 2010, while the motion to dismiss was pending, petitioner initiated the instant proceeding by filing the aforementioned petition with the Labor Commissioner alleging a case and controversy under the TAA. In her petition, petitioner specifically alleged that over the course of more than two years, despite not being licensed as a talent agent, respondent repeatedly engaged in the occupation of procuring or attempting, promising, or offering to procure engagements for petitioner as an artist in contravention of the provisions of the TAA. Petitioner asserted that, by virtue of these statutorily prohibited acts, the contract was illegal under the TAA and therefore void and unenforceable. Respondent's answer countered with a denial of all of the petitioner's allegations. In the answer, respondent also interposed an affirmative defense which asserted that the instant dispute concerning the legality of the parties' contract was governed by New York law and not by the provisions of California's TAA, and that consequently the petition was barred and should be dismissed. Since the Labor Commissioner's subject matter jurisdiction is confined to cases and controversies that arise under the TAA, the affirmative defense essentially advanced the contention that the Labor Commissioner lacked subject matter jurisdiction to hear the case.

In late March, 2011, the parties were asked to submit briefs addressing the conflict of laws issue raised by the lack of subject matter jurisdiction defense. Following consideration of the briefs and other supporting papers submitted by the parties in response to the request for briefing, the Labor Commissioner issued a tentative determination addressing the related questions of which state's law is to be applied in this case and whether the Commissioner lacks subject matter jurisdiction. The Labor Commissioner now renders a final determination on these questions. Some additional facts bearing on this determination are set out where appropriate in the discussion that follows.

B. DISCUSSION

The subject matter jurisdiction of the Labor Commissioner is confined to disputes that are governed by the TAA. Where one of the parties to a TAA case contends that the dispute is governed not by California law (*i.e.,* the TAA) but by the law of some other state, the Labor Commissioner must decide the question of jurisdiction by applying the apposite choice-of-law rules to determine whether or not California law applies.

The issue presented by this case is whether the parties' artist management contract is legal and enforceable. Respondent contends that this issue must be decided under New York law because the contract contains a choice-of-law clause that calls for such questions to be decided in accordance with the law of the state of New York. In response, petitioner asserts that, for reasons of fundamental California public policy and the superior interest of California in having its law applied, the choice-of-law clause should not be given effect and the issue of the legality of the contract should be resolved based on the application of California law.

A threshold question that must be addressed is whether as to the issue of legality there is in fact a conflict between California law and New York law. An analysis of the parties' presentations reveals that the laws of the two states are markedly different. Under New York law, a contract that authorizes an unlicensed manager to engage in procurement activities on behalf of an artist is not illegal, provided such activities are only incidental to the management of the artist. (New York General Business Law §§171(f) and 172.) By contrast, under California law any contract which authorizes a manager to engage in procurement activities on behalf of an artist is at least partially, if not entirely, illegal, except where the contract is one that authorizes activities aimed at

procuring recording contracts. (Lab. Code §§1700.4, 1700.5.) Given the operative difference in the two laws and their capacity to produce different results, it is clear that a true conflict exists. Accordingly, the Commissioner must address and resolve that conflict.

In determining what effect should be given to a choice-of-law clause contained in a contract, California follows the choice-of-law approach set forth in section 187 of the Restatement Second of Conflict of Laws (Restatement). (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464 (*Nedlloyd*).

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
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> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
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> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

In this case, respondent's initial argument is that the reference to New York law in the choice-of-law clause is intended to encompass not only New York's local substantive law but also its choice-of-law rules for determining whether a choice-of-law clause in an agreement should be given effect. In light of the language of the choice-of-law clause,

and subject to application of the standard in Restatement section 187, California would normally look to the law of the chosen state to interpret the scope of the choice-of-law clause. (*Nedlloyd, supra*, 3 Cal.4th at p. 469, fn. 7.) Here, however, no showing has been made of how this interpretive issue would have been resolved under New York law. Accordingly, this becomes an issue that must be resolved under California law. (Ibid.)

Restatement section 187, subdivision (3) states that "[i]n the absence of a contrary indication of intention," the reference to a state's law in a choice-of-law clause is to the state's "local law." (Cf. *Nedlloyd; Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312 (*Brack*); *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881 (*Application Group*) – cases in which the choice-of-law clause was treated as referring solely to the chosen state's local substantive law, without consideration being given to the clause encompassing the state's choice-of-law rules.) As stated in *Nedlloyd, supra*, 3 Cal.4th at p. 464, California has chosen to follow section 187's approach. Here, not only is there no "contrary indication of intention," but the choice-of-law clause plainly manifests an intent to refer solely to the local law of the chosen state – *i.e.*, the contract is to be "construed in accordance with the laws of said State applicable to contracts wholly to be performed therein." (Emphasis added.) In other words, the agreement is to be viewed as a purely local contract that is to be construed exclusively under New York local law. It follows that the choice-of-law clause must be interpreted as referring only to New York's local substantive law.

The proper standard for resolving the instant choice-of-law issue is set out in subdivision (2) of Restatement section 187. The Supreme Court has summarized how that standard is to be applied.[2]

[2] Subdivision (1) of section 187 does not apply here because this is not a case in which the parties have explicitly incorporated a provision of foreign law to permissibly resolve a particular issue. (See *Nedlloyd, supra*, 3 Cal.4th at p. 465, n. 3.)

> Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue...." (*Rest.*, § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.

(*Nedlloyd*, *supra*, 3 Cal.4th at p. 466.)

As a preliminary matter, it is clear that, since New York was respondent's state of incorporation, New York had a "substantial relationship" with the parties. (*Nedlloyd*, *supra*, 3 Cal.4th at p. 467; *Brack*, *supra*, 164 Cal.App.4th at p. 1325.) Consequently, there was a reasonable and sufficient basis for the parties' choice to have New York law applied to their agreement.

The next matter to be determined is whether New York law is in conflict with the fundamental public policy of the state of California.

In the *Brack* case, the court addressed the public policy issue in the context of a statutory scheme known as the California Finance Lenders Law ("Finance Lenders Law"), Financial Code section 22000 et seq., which regulates consumer lending in California. The Finance Lenders Law provides that a loan company cannot engage in the business of a "finance lender" and make personal consumer loans unless it has obtained a license from the Commissioner of Corporations. In *Brack*, the defendant loan company engaged in the prohibited activity of making consumer loans in California without having

secured the requisite license. Relying on a choice-of-law provision in its loan agreements which called for the application of Nevada law, the loan company, which was incorporated in Nevada, asserted that the Finance Lenders Law did not apply and that any claim based on its lending activities should be decided under Nevada law.

After reviewing the purpose of the Finance Lenders Law, the legal remedies provided to redress violations of the Law's statutory provisions, and the administrative mechanism established to enforce the Law's requirements, the court in *Brack* found that the Finance Lenders Law embodied the fundamental public policy of the state which could not be waived by agreement of the parties. (*Brack, supra*, 164 Cal.App.4th at pp. 1325-1329.)

First, the *Brack* court observed that a significant and core purpose of the Finance Lender's Law was the protection of consumers from unfair lending practices. Second, the court focused on the remedies for statutory violations. The court pointed out that willful violations of the statutory prohibition on lenders entering into loan contracts without a license rendered the contracts void, and that even where such violations were not willful, the lender nevertheless forfeited any charges or interest. Third, the court examined the comprehensive licensing scheme established for the purpose of regulating finance lenders. The court noted the requirements for licensure and the authority of the Commissioner to ensure those requirements are satisfied before a license is issued. The court then explained that the licensees must comply with various substantive and procedural obligations which are subject to regulation, oversight, and enforcement by the Commissioner – these include Commissioner imposed requirements on clearly stating the rates to be charged, Commissioner imposed requirements on advertising copy, and various statutory restrictions on the charges, fees, interest, and terms that may be imposed

under the loan agreements. The court then observed that all the requirements established by or under the Finance Lenders Law could be enforced by the Commissioner through the power of suspension or revocation of any license. The court commented that this comprehensive licensing scheme would be rendered essentially useless if it could be waived through the simple expedient of an agreement between the lender and the borrower.

The court stated its conclusion as follows:

> In sum, the Legislature, in voiding contracts made in violation of the Finance Lenders Law and in creating a licensing scheme through which it directly regulates the finance lenders market, has made it clear that the Finance Lenders Law is a matter of significant importance to the state and…is fundamental and may not be waived.

(*Brack, supra*, 164 Cal.App.4th at p. 1327.)

The analysis undertaken in *Brack* applies with equal force to the TAA, and compels the same conclusion.

First, the core objective of the TAA is to provide protection to artists. "The Act is remedial; its purpose is to protect artists seeking professional employment from the abuses of talent agencies." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 50; *Waisbren v. Peppercorn Productions, Inc.*, (1995) 41 Cal.App.4th 246, 254.) Second, the TAA prohibits anyone from acting in the capacity of a talent agency without securing a license from the Labor Commissioner (Lab. Code §1700.5), and makes illegal contracts pursuant to which such unlicensed persons seek to represent artists as talent agents. "In furtherance of the Act's protective aims, an unlicensed person's contract with an artist to provide the services of a talent agency is illegal and void." (*Styne v. Stevens, supra*, 26 Cal.4th at p. 51; *Waisbren v. Peppercorn Productions, Inc., supra*, 41 Cal.App.4th at p. 261.)

Third, as an integral means of insuring that artists are properly and effectively protected, the TAA regulates talent agencies through a comprehensive licensing scheme that is administered by the Labor Commissioner. Application for licensure requires specifying the business location, describing at least the prior two years of business activity, identifying persons with a financial interest in the contemplated talent agency operation, supplying fingerprints, and providing the affidavits of at least two reputable persons who vouch for the good moral character or reputation for fair dealing of the applicant. (Lab. Code §1700.6.) The Commissioner is empowered to investigate an applicant and where appropriate deny a license. (Lab. Code §§1700.7, 1700.8.) Licensees must comply with numerous substantive and procedural obligations, which include, among others, the following: they must post a $50,000.00 bond to guarantee compliance with the TAA and performance of their obligations to artists (Lab. Code §§1700.15, 1700.16), submit proposed forms of written contracts to be entered into with artists for review and approval by the Labor Commissioner (Lab. Code §1700.23), file a schedule of fees to be charged artists with the Labor Commissioner and conspicuously post the schedule (Lab. Code §1700.24), deposit fees received on behalf of an artist in a trust account and disburse the fees promptly after deducting commissions (Lab. Code §1700.25), maintain accurate records of their dealings with and/or on behalf of each artist (Lab. Code §1700.25), refrain from entering into employment contracts that are illegal (Lab. Code §1700.31), refrain from publishing false, fraudulent, or misleading information (Lab. Code §1700.32), refrain from sending artists to places that are unsafe (Lab. Code §1700.33), abstain from dividing fees with an employer or agent of an employer (Lab. Code §1700.39), and reimburse artists for expenses incurred in traveling outside the city in unsuccessful attempts to obtain employment (Lab. Code §1700.41). Licensees are subject to additional regulations that have been or may be promulgated by the Labor Commissioner. (Lab. Code §1700.20.) All of these obligations and

requirements are enforced by the Labor Commissioner through the Commissioner's power to revoke or suspend a license pursuant to Labor Code section 1700.21, which authorizes revocation or suspension for, among other things, any violation of the TAA or ceasing to be of good moral character.

The strict policy of invalidating contracts violative of the TAA and the TAA's comprehensive licensing scheme for scrupulously regulating talent agencies – both of which are aimed at effectively protecting artists – make it abundantly clear that the TAA "...is a matter of significant importance to the state and ... is fundamental and may not be waived." (*Brack, supra*, 164 Cal.App.4th at p. 1327.)

Having concluded that the TAA represents the fundamental public policy of the state of California, it becomes necessary to determine whether California has a materially greater interest in the application of the TAA to the issue of the contract's legality than New York has in the application of its conflicting law, and whether California is the state whose law would be applied in the absence of a valid choice of law by the parties. In answering the latter inquiry, of which state's law would be applicable in the absence of a contractual choice-of-law clause, California follows the "governmental interest" and "comparative impairment" approach to resolving a choice-of-law issue. (*Application Group, supra*, 61 Cal.App.4th at p. 896.) Where, as here, the conflict is between the law of the forum state and the law of the chosen state, the "governmental interest"/ "comparative impairment" inquiry will frequently overlap with and be determinative of the separate inquiry as to which state has the materially greater interest in the application of its law. (*Brack, supra*, 164 Cal.App.4th at pp. 1328-1329; *Application Group, supra*, 61 Cal.App.4th at pp. 898-905.)

The evidence establishes the following facts that bear on the governmental interest analysis. During the period from the inception of the relationship between petitioner and respondent in the latter part of 2005 until petitioner gave respondent notice that she was terminating the contract in September 2008, petitioner resided in the state of California, and more particularly in the county of Los Angeles. The meetings and discussions between petitioner and respondent's representative, that led to the parties entering into the contract, took place in Los Angeles, California. The representative of respondent who was assigned as the day to day manager of petitioner resided in Los Angeles at the time of the parties' initial contact in 2005 and continued to reside there for the first eleven months that the contract was in effect. The day to day manager then moved to New York but continued to regularly manage petitioner in California, through frequent e-mail and telephone communications to petitioner in California, and through periodic trips to California to personally meet with her and participate in a variety of career related activities. It is the activities engaged in by this day-to-day manager—both directly in California and indirectly in California through the communications with petitioner—that petitioner contends constituted unlawful procurement activities violative of the TAA. In addition, many of these activities asserted to constitute illegal procurement involved performances, meetings, recording sessions, and other events that took place or were scheduled to take place in California. Viewing the totality of the 2005 to 2008 period, California was the hub of the activities that the parties engaged in under the contract.

The delineated facts make clear that California has a very strong interest in having its law, the TAA, apply to this case. California has an overwhelming interest in protecting its resident artist, petitioner. California also has a critical interest in insuring that its fundamental public policy is not flouted with impunity by out of state entities that enter the state and then proceed to engage in illegal procurement activities within the state's boundaries. Additionally, California has a crucial interest in insuring

that California is not used as a base of operations for orchestrating or pursuing procurement activities that are illegal under the TAA, even though they may relate to a performance the artist will ultimately deliver out of state. By contrast, New York's interest in having its law apply is limited to its general interest in the application of New York contract law to a dispute in which one of its corporations is involved.

Turning next to the question of "comparative impairment," it is evident that to apply New York law in this case will effect a very substantial impairment of California's interests. If New York law is applied, California will be unable to protect its resident artists from out of state entities which enter the state and utilize their contracts to engage in unlicensed procurement activities that violate the state's fundamental public policy. In addition, if New York law is applied, California's legal protections will be rendered a nullity through the simple expedient of a contractual choice of the law of another state, and California will be forced to countenance conduct within its boundaries that is illegal under California law and antithetical to the state's fundamental public policy. On the other hand, New York will suffer no such drastic impairment of its interests if California law is applied. New York has no significant interest in having its law applied to activities with no substantial connection to the state, and has no interest in precluding its corporation from complying with California's TAA requirements where the activities of the corporation are substantially connected to California. Thus, it is clear that California would suffer a far greater impairment of its interests from the application of New York law, than New York would suffer from the application of California law.

The foregoing analysis establishes that in this case California would be the state of the applicable law in the absence of a valid choice of law clause in the parties' contract. The analysis also establishes that California has a materially greater interest in the application of its law to the issue of the legality of the parties' contract than New York

has in the application of its law. Accordingly, it is concluded that—notwithstanding the choice of law provisions in the contract—California law, namely the TAA, applies to the parties' dispute in this case, and that consequently the Labor Commissioner has jurisdiction to adjudicate the instant controversy, which arises under the TAA.

II. DETERMINATION ON ISSUE OF VIOLATION OF LICENSING REQUIREMENTS OF TAA.

A. ADDITIONAL FACTUAL BACKGROUND

As noted earlier, the contract between petitioner Sebert and respondent DAS was entered into on January 27, 2006. DAS was owned and operated by David Sonenberg, and he actively directed and controlled all of DAS's activities. At the inception of the relationship between Sebert and DAS, Sonenberg designated Georgina McAvenna as the agent and representative of DAS charged with managing and coordinating DAS's day to day activities on behalf of Sebert. McAvenna and Sonenberg undertook a number of efforts on Sebert's behalf as early as December 12, 2005, even before the contract was signed.

The contract, which was to remain in effect for five years, provided for DAS to render a wide range of services as a personal manager for the purpose of furthering Sebert's career as a musical artist. The contract also contained a provision pursuant to which Sebert authorized DAS to "negotiate for me on my behalf any and all agreements, documents and contracts for my services, talents and/or artistic, literary and musical materials." In exchange for DAS's services, and subject to the time limitations established under the contract, Sebert agreed to pay DAS twenty percent (20%) of the gross monies generated by any and all of her income producing activities as a musical

artist. DAS's services, which were provided by McAvenna and by Sonenberg, spanned the period from December 12, 2005 to September 11, 2008, the date on which Sebert sent her letter communicating her intention to terminate the artist management agreement.

The evidence establishes that McAvenna, acting on behalf of DAS, provided Sebert with an extensive range of strictly managerial services that were quite beneficial. She connected Sebert with writers and producers so she could co-write songs, produce recordings, and build up her catalogue. She sought to further Sebert's career by regularly introducing her to influential people in the music industry. She encouraged Sebert to explore various musical ideas and concepts, and provided feedback and direction on the material she developed. She provided advice on Sebert's appearance, attire, fashion, and health, and arranged for a stylist and fitness instructor. In addition, McAvenna provided Sebert with personal advice, guided her on establishing her presence on the web, and brought her into contact with visual artists and photographers.

The evidence establishes that Sonenberg also provided Sebert with many strictly managerial services. He set up meetings and contacts with record companies with an eye toward obtaining a recording contract for Sebert. He assisted Sebert in selecting songs, and regularly provided evaluation and feedback on the songs and arrangements that she created. He assisted Sebert in her difficult dealings with her prior manager, and provided advice on her health, fitness, and attire. Sonenberg maintained regular contact with McAvenna to keep abreast of the day to day activities affecting Sebert and to provide overall guidance and direction to DAS's efforts on Sebert's behalf.

Irrespective of DAS's managerial activities, Sebert contends that the evidence in this case also shows that DAS was engaged in unlicensed talent agency activities in violation of the TAA. Specifically, Sebert asserts that the evidence demonstrates that

McAvenna and Sonenberg, acting on behalf of DAS, were engaged in procuring engagements or employment for Sebert and in attempting, promising, or offering to procure such engagements or employment.

The unlicensed talent agency activities ascribed to DAS fall into four categories. The first category pertains to certain activities which Sebert asserts involved the procurement or attempted, promised, or offered procurement of engagements for live performances by Sebert. The second category encompasses activities which are said to involve the attempted procurement of publishing/songwriting agreements with publishing houses, whereby Sebert would be engaged to write songs and compositions to be administered by the publishing house. The third category covers those activities which—it is asserted—involved procuring or attempting, promising, or offering to procure engagements or employments pursuant to which Sebert would provide songwriting and vocal services to other artists. The fourth category denotes those activities which Sebert claims involved the procurement of engagements or employments calling for Sebert to perform in or write songs for films, television, and commercials. The specifics of the activities embraced within each of these categories and whether they evidence unlicensed talent agency conduct violative of the TAA are examined in detail in the discussion that follows.

B. DISCUSSION

Section 1700.5 provides in pertinent part:

> No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner.

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Section 1700.4 provides in relevant part as follows:

> "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.

Since DAS was not licensed as a talent agency, to ascertain whether DAS violated the licensure requirements of section 1700.5 we must determine whether it engaged in any of the talent agency activities delineated in section 1700.4.

1. Live Performances

On February 25, 2008, McAvenna received an e-mail suggesting that between April 24 and 27, 2008 Sebert should participate in a four-city tour as the support for a show to be headlined by musical artist Calvin Harris. The e-mail had been sent by Harris's manager, Mark Gillespie, and McAvenna passed the information onto Sebert. In an e-mail dated March 20, 2008, McAvenna acknowledged that this e-mail had been an offer for Sebert to tour with Harris. At some point, McAvenna sent Mark Gillespie, an e-mail indicating that Sebert could do the four shows and that DAS could get her travel covered. On April 14, 2008, nine days before the date of the first scheduled show at the Henry Fonda Theater in Los Angeles, McAvenna forwarded this e-mail to Sebert. Although ultimately Sebert did not participate in the Harris tour, the recounted facts plainly show that McAvenna attempted to arrange and therefore to procure this four-show engagement on behalf of Sebert. DAS has sought to characterize the e-mail to Gillespie as merely informing him that Sebert would be available for the tour provided they could get funding for it from Warner Brothers, with whom they were trying to negotiate a recording contract for Sebert. Given the precise and unequivocal language in the e-mail, however, which stated that Sebert could do the shows and that her travel was covered, the characterization advanced by DAS is rejected as unconvincing. The acts of DAS

constituted the attempted procurement of an engagement for Sebert.

On September 24, 2007, McAvenna sent Sebert an e-mail stating that she could probably get Sebert a "mini performance" at a musical event scheduled to take place at the Avalon Hollywood Club on September 28, 2007. There was no mention of using a talent agent, and the e-mail makes clear that McAvenna intended to make the arrangements herself. The e-mail plainly constituted an offer to procure employment for Sebert.

On March 20, 2008, McAvenna sent Mark Gillespie an e-mail stating that there might be a gig at a hot new club in New York for Sebert and for Calvin Harris and Tom Neville, who were managed by Gillespie. There was never an appearance at that club, and neither the e-mail nor any other evidence shows an offer, promise, or attempt by McAvenna to procure an engagement for Sebert at the club.

On April 14, 2008, McAvenna sent an e-mail to Sebert stating that when Sebert traveled to London in June it was contemplated that she would be doing some little down-n'dirty club shows. This statement was informational and far too general to constitute an offer or promise to procure employment or engagements for Sebert. There was no evidence of attempted procurement, and the performances never took place.

Sebert points to three instances in which she gave live performances, and contends that those performances were procured by McAvenna. One was a performance at a house party in Coachella, California; the second a performance at a private home in Malibu, California; and the third at a bar in Los Angeles, California knows as Molly Malone's. Although McAvenna attended two of the performances, the evidence is insufficient to support a finding that McAvenna personally procured any of the three performances.

In sum, the evidence establishes that DAS was involved in offering or attempting to procure two engagements for live performances by Sebert.

2. Songwriting and Publishing Agreements.

A central objective of DAS was to obtain a recording contract for Sebert. To that end, Sonenberg spent a considerable amount of time attempting to negotiate a recording agreement for Sebert with Warner Bros. Records, Inc. These activities were not subject to the licensure requirements of section 1700.5 by virtue of the exemption for "the activities of procuring, offering, or promising to procure recording contracts for an artist or artists." (§1700.4, subd. (a).)

During the same period that he was negotiating with Warner Bros., Sonneberg was expending a great deal of time and effort attempting to negotiate a publishing agreement for Sebert with a publishing company known as Arthouse. While the attempt to negotiate a combined recording agreement and publishing agreement may have been driven in part by Warner Bros. insistence that such agreements be entered into concurrently as part of one package, the evidence unequivocally establishes that it was always the intention of DAS to solicit and negotiate a publishing agreement on behalf of Sebert, as well as a recording agreement.

DAS advances two arguments for why its unlicensed attempts to procure a publishing agreement with Arthouse should not be treated as violative of the TAA. First, DAS asserts that the publishing agreement was inextricably intertwined with the record deal being negotiated with Warner Bros., and that Warner Bros. conditioned its acquiescence to the recording contract on Sebert agreeing to concurrently execute the

publishing contract. Based on these assertions, DAS contends that the exemption for procurement of "recording contracts" (§1700.4, subd. (a)) should encompass not only the Warner Bros. record contract but also the interconnected Arthouse publishing agreement.

The argument fails for a couple of reasons. To begin with, the fact that Warner Bros. wanted to have the recording and publishing agreements executed together, as part of one combined document, is not an excuse for not bringing in a licensed talent agent to handle and negotiate that part of the deal——i.e., the publishing agreement—requiring for its legality the participation of a talent agency duly licensed under the TAA. In addition, importantly, the Labor Commissioner has explicitly concluded that publishing agreements do not fall within the scope of the "recording contracts" exemption even where the musical rights they confer are inextricably linked to the songs generated pursuant to the terms of a recording agreement.

> Respondent argues, however, that the rights granted to him under the music publishing provision of the Artist Agreement are expressly defined to include only those musical compositions that are "recorded by [Petitioners] under this [Artist] Agreement", that these music publishing rights were therefore dependent upon and "merely incidental to" the recording contract, and thus, that these music publishing rights fall within the statutory exemption for recording contracts. This argument ignores the fact that music publishing and recording are two separate endeavors, that musicians who compose and record their own songs may have separate music publishing and recording contracts, that there are recording artists who are not songwriters, and that there are songwriters who are not recording artists. We therefore conclude that music publishing and songwriting does not fall within the recording contract exemption, regardless of whether the right to publish an artist's music is limited only to compositions that are contained on that artist's record.

(*Chinn v. Tobin* (Cal.Lab.Com., March 26, 1997) TAC No. 17-96, p. 6, n.1.)

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It follows that DAS cannot invoke the recording contract exemption to exclude its attempted procurement of a publishing agreement with Arthouse on behalf of Sebert from the licensure requirements of the TAA.

The second argument advanced by DAS, in support of the proposition that the attempted procurement of the proposed publishing agreement with Arthouse did not require licensure, is that the agreement that was being sought and negotiated did not contemplate the employment or engagement of Sebert. Put another way, DAS argues that the proposed agreement was purely a deal for the administration of existing and newly created compositions, and did not require Sebert to render any services. (See *Kilcher v. Vainshtein* (Cal.Lab.Com., May 30, 2001) TAC No. 02-99.) This argument is unsustainable. The combined recording agreement and publishing agreement gave Warner Bros. the option to require Sebert to create and record up to six albums. With respect to at least two and up to four of those albums, a request by Warner Bros. for an album would give rise to a concomitant obligation on the part of Sebert to create and provide the newly written compositions to Arthouse. Furthermore, the publishing agreement set forth a "minimum delivery obligation," which if not complied with might give rise to a breach of contract claim against Sebert, especially in light of the initial and other advances payable under the agreement's provisions. Finally, there were certain circumstances under which the publishing agreement imposed a minimum delivery commitment of ten newly written compositions and a minimum record and release commitment of six compositions. In short, it is clear that the publishing agreement contemplated Sebert rendering services under its provisions. Since the solicitation and negotiation of the publishing agreement involved the attempted procurement of an engagement for Sebert, DAS violated the TAA by engaging in these activities without being licensed as a talent agency in compliance with section 1700.5.

During the period December 2005 to September 2008, DAS solicited interest in a publishing agreement for Sebert from five other publishing houses: EMI Music Publishing U.S., EMI Music Publishing U.K., Universal Music Publishing, Sony Music Publishing, and Global Publishing. These solicitation activities were pursued by both McAvenna and Sonenberg. DAS contends that these unlicensed activities did not contravene the TAA because DAS was not seeking an engagement or employment for Sebert; specifically, DAS asserts that it never pursued publishing deals that would have required Sebert to provide services to a publishing company. This assertion, however, is belied by the contemplated publishing agreement with Arthouse, the final version of which was put together based on the negotiations between DAS and Arthouse. That agreement plainly shows that DAS envisioned the possibility of negotiating a publishing agreement that would require Sebert to render services. Because that distinct possibility was known to exist, DAS was engaged in the attempted procurement of publishing agreements that it understood might result in the engagement or employment of Sebert. To engage in such activities legally, DAS was required to be licensed as a talent agency. It follows that DAS's attempted procurement of publishing agreements on behalf of Sebert violated the requirements of section 1700.5.

3. Songwriting and Vocal Services for Other Artists

Sebert contends that DAS procured or attempted to procure engagements for Sebert to provide vocal services on the recordings of five or more different artists. The evidence establishes that it was McAvenna's practice to continually introduce and connect Sebert to other artists. McAvenna's goal, among other things, was to energize and develop Sebert's talents, to have her write and record songs, to acquaint her with the various facets of the music industry, and to achieve broad exposure for her with artists, producers, and various other members of the music community. As part of these efforts,

McAvenna sought to arrange opportunities for Sebert to work collaboratively with other artists to record songs that would be included on the artists' record albums. McAvenna viewed these collaborations as joint efforts where both Sebert and the other artist would retain reciprocal rights and a 50/50 ownership interest in the recorded songs. These hook-ups raised the possibility that in some particular instance a collaborating artist might seek to engage or employ Sebert to render services as a hired vocalist on a song or songs being recorded by the artist. The existence of this possibility, however, did not mean that McAvenna was required to refrain from engaging in her proactive activities on behalf of Sebert, nor did it mean that McAvenna was required to have a talent agent tag along with her at all times just because some offer of employment might unexpectedly materialize. Provided the activities were not a subterfuge for procuring engagements or employment, McAvenna and DAS were entitled to pursue the legitimate managerial strategy they had devised for maximizing Sebert's potential as an artist.

The evidence in this case does not show that the collaborative recording efforts that McAvenna arranged or attempted to arrange were aimed at procuring employment for Sebert. Nor does the evidence show that these were in fact occasions when such offers of employment were made, and that DAS treated those occasions as an opportunity to negotiate the terms of the prospective employment. In short, there was no evidence of procurement or attempted procurement, and accordingly it is concluded that these collaborative vocal recordings, arranged by Sebert, did not involve talent agency activity requiring licensure under the TAA.

Sebert also contends that DAS procured or attempted to procure engagements for Sebert to provide songwriting services to four different artists. Pertinent here, once again, is the above description of the activities McAvenna undertook in seeking to accomplish DAS's goal of effectively managering Sebert's career as a musical artist. As part of her

efforts on behalf of Serbert, and in furtherance of the continuous objective of increasing Sebert's catalogue, McAvenna arranged or sought to arrange opportunities for Sebert to work in collaboration with other artists to write songs that would involve reciprocal rights and be owned 50/50 by Sebert and the other artist. Under these collaborations, the songs would be retained for future use by either artist, or be licensed for use in an album put together by another artist, as occurred on a few occasions. Here again, of course, the possibility would exist that such collaborations might lead an artist to offer Sebert an engagement to become a songwriter for the artist on the artist's album. But as explained above, such a possibility cannot be viewed as providing a proper basis for restricting otherwise legitimate managerial activities that seek to exploit and maximize the artist's creative potential.

In this case, there is no evidence that DAS employed the songwriting collaborations that were arranged or sought to be arranged by McAvenna as a subterfuge for procuring engagements or employment for Sebert. The collaborations that actually occurred were just that: joint efforts that resulted in the creation of co-owned songs, which songs were then retained for future use or, on a few occasions, licensed to other artists for use in their albums. Also, here there was no evidence of an artist making an offer of employment to Sebert, and DAS then proceeding to negotiate the terms of that employment on Sebert's behalf. In other words, there was no evidence of procurement or attempted procurement of engagements or employment. Consequently, the songwriting collaboration activities arranged by DAS did not constitute unlicensed talent agency activity violative of the TAA.

4. Songwriting and Performing on Films, Television Shows, and Commercials

Sebert contends that DAS procured or attempted to procure engagements for Sebert to provide services as a songwriter and/or performer in connection with a motion picture, a television show, and a number of commercials.

Sebert asserts that DAS attempted to arrange for Sebert to write and perform a song for a McDonald's commercial. The evidence establishes that at some point McAvenna became aware of an opportunity for Sebert to work on a song to be used by McDonald's in a commercial that was to be part of an advertising campaign. McAvenna asked Sebert to write a song that might garner McDonald's interest in having Sebert do the work on the song to be used in the commercial. Sebert wrote a song and, around March 12, 2008, McAvenna arranged for the song to be submitted to McDonald's for the purpose of trying to obtain this work opportunity for Sebert. It is evident that the objective of this effort was not to sell the specific song that had been submitted, but rather to cause McDonald's to select Sebert as the artist who would write and possibly perform the actual song that would ultimately be used by McDonald's in the advertising campaign. These activities clearly constituted an offer and attempt by DAS to procure an engagement for Sebert and therefore required licensure under the TAA.

Sebert asserts that DAS attempted to procure an engagement for Sebert to write songs for the movie "Sex and the City." The evidence shows that DAS arranged for three of Sebert's songs to be submitted for the movie. All three were previously written songs that already existed. At McAvenna's suggestion, all three of the songs were modified and fine-tuned prior to their submission. There is no evidence that the submitted final versions of these songs contemplated any further or future songwriting services on the part of Sebert. In other words, the evidence indicates that the submission was made for the purpose of licensing the finished songs and did not envision further work by Sebert. Consequently, the submission of the songs did not involve an attempt to unlawfully

procure employment.

Sebert asserts that DAS attempted to procure an engagement for Sebert to provide songwriting services in connection with the submission of her song "Backstabber" to MTV for use in the television show "The Hills." The evidence establishes that McAvenna submitted the song "Backstabber" to the television program's supervisor with the recognition that those responsible for the show might require changes in the song before they used it. In other words, this submission clearly contemplated the possibility that Sebert might be required to render additional songwriting services before a final version of the song would be used on the show. It follows that the submission of the proposed song in these particular circumstances constituted an illegal attempt to procure an engagement for Sebert.

Sebert asserts that DAS attempted to procure an engagement for Sebert to provide songwriting services in connection with her previously written song "Red Lipstick," which was submitted to Revlon. The evidence shows that McAvenna asked Sebert to prepare a clean version of the song which would then be provided to Revlon. (A clean version of a song is one in which the lyrics have been tweaked to remove any profanities.) The evidence indicates that the clean version of "Red Lipstick" was submitted to Revlon with the objective of licensing it for use as a finished song. There is no evidence to indicate that the submission contemplated further songwriting services on the part of Sebert. Accordingly, the submission did not constitute an attempt to procure employment for Sebert.

Sebert asserts that DAS promised to secure engagements for Sebert to sing jingles, and that it secured one such engagement, where Sebert sang in a candy bar commercial. The evidence in this case is insufficient to support a finding that DAS promised Sebert

that it would obtain engagements for her to sing jingles. Also, the evidence is insufficient to establish that DAS was in some way involved in securing or lining up the candy bar commercial on which Sebert sang. Accordingly, it cannot be found that DAS promised to procure, attempted to procure, or actually procured engagements for Sebert to sing jingles.

In sum, the evidence establishes that, in contravention of the TAA, DAS did attempt to procure songwriting engagements for Sebert on both a film and a television commercial.

III. DETERMINATION OF APPROPRIATE REMEDY FOR VIOLATIONS OF SECTION 1700.5

As has been discussed, DAS contracted with Sebert to engage in unlicensed talent agency activity that is illegal under the TAA. Although this illegality affects the enforceability of the parties' contract, in *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974 (*Marathon*) the Supreme Court held that a violation of the TAA does not automatically require invalidation of the entire contract. More particularly, the court explained that the TAA does not prohibit application of the equitable doctrine of severability and thus, in appropriate cases, authorizes a court to sever the illegal parts of a contract from the legal ones and enforce the latter. (*Id.* at pp. 990-996.)

In discussing how severability should be applied in TAA cases involving disputes between managers and artists as to the legality of a contract, the court in *Marathon* made the following observations.

> 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 appropri-

ately directed to the sound discretion of the Labor Commissioner and trial courts in the first instance.

(*Marathon, supra*, 42 Cal. 4th at p. 998.) In the present case, for the reasons set out below, we find that severance is appropriate.

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 this case, as the prior discussion has already shown, it is clear that the central purpose of the parties' contract was not the illegal procurement of employment or engagements for Sebert. Rather, the plain primary purpose was to secure a recording contract for Sebert and to provide effective managerial guidance to Sebert in furthering, promoting, and maximizing her career as an artist. Furthermore, the illegal activities engaged in by DAS, though substantial and significant, were clearly separable and distinct from the legal activities. Thus, the threshold criteria for severance are met.

The question now becomes what is the appropriate method of implementing that severance in the circumstances of this case. In its current lawsuit against Sebert, DAS is seeking to recover 20% of all of Sebert's earnings based on the provisions of the contract entitling it to such payments. This 20% in commissions claimed by DAS is not based on any specific service rendered by DAS, but rather constitutes undifferentiated compensation payable to DAS as consideration for the undifferentiated services DAS has provided to Sebert under the contract. The undifferentiated services provided by DAS to Sebert include both legal managerial services and illegal talent agency services. However, DAS is not entitled to receive compensation for its illegal services. In such circumstances, the proper approach is to deduct the value of the illegal services

and permit recovery only for the value of the legal services. (*Marathon, supra*, 42 Cal. 4th at p. 997; *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal. 4th119, 139-140; *Whorton v. Dillingham* (1988) 202 Cal. Ap.3d 447.452-454.)

In the present case, it is determined that the illegal activities engaged in by DAS were substantial and significant, especially when it is considered that the efforts and negotiations directed at procuring a publishing agreement involved a considerable expenditure of time and effort commensurate with and in excess of the time and effort expended in pursuing the primary objective of securing a recording contract. When the illegal activities are measured against the totality of DAS's activities, and compared with the activities that were legal, one is led to the conclusion that the illegal services provided by DAS to Sebert represent roughly 45% of the total services provided under the contract. It follows that the value of the legal services provided by DAS is equal to only 55% of the value of the total services provided pursuant to the contract, and that accordingly DAS should receive and be paid only 55% of the amount that would have been due for the full value of all the services. Put another way, the value of the services that were legal represents only 55% of the 20% in commissions that was to be paid for the full value of all the services, and therefore the commissions payable to DAS for the compensable legal services must be reduced to 11%.

In sum, based on the application of the doctrine of severability, it is concluded that DAS can recover for the services that it provided legally under the contract. However, since these services represent only 55% of the value of all the services furnished under the contract, the compensation due pursuant to the terms of the contract must be reduced by 45%, such that the commissions payable to DAS shall be limited to 11% of the earnings generated by Sebert during the period covered by the contract.

DISPOSITION

Accordingly, it is hereby ordered as follows:

1. The artist management agreement entered into by Sebert and DAS is determined to be partially illegal, and it is further determined that the illegal parts of the agreement are severable from the remainder of the agreement.

2. Severance of the illegal portions of the agreement requires a 45% reduction in the commissions due to DAS under the agreement, and by virtue of such reduction the commissions to which DAS is entitled under the agreement shall be limited to 11% of the earnings generated by Sebert during the period covered by the agreement.

Dated: MARCH 27, 2012

William A. Reich
Attorney and Special Hearing Officer
for the Labor Commissioner

The above determination is adopted in its entirety by the Labor Commissioner.

Dated: 3.29.12

Julie A. Su
State Labor Commissioner