PATRICIA SALAZAR, State Bar No. 249935
STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
320 W. 4th Street, Suite 600
Los Angeles, California 90013
Telephone: (213) 897-1511
Facsimile: (213) 897-2877

Attorney for the State Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

PETER BOSTANIAN, an individual, *Petitioner*, *v.* ABBY RAO, an individual, *Respondent*.	Case No. TAC-52836 **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

On April 5-6, 13-14, 2022, May 2 and May 20, 2022, and December 14, 2022, the above-captioned matter, a Petition to Determine Controversy under Labor Code section 1700.44, came before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner PETER BOSTANIAN, an individual, appeared and was represented by Amy Nashon of TROYGOULD PC. Respondent ABBY RAO, an individual, appeared and was represented by Jeffrey M. Galen and Glenn D. Davis of GALEN & DAVIS LLP.

The parties submitted their post-hearing briefs by May 31, 2023. The matter was taken under submission. Due consideration having been given to the testimony, documentary evidence and arguments presented, the Labor Commissioner hereby adopts the following determination ("Determination").

II. FINDINGS OF FACT

1. Petitioner PETER BOSTANIAN ("Petitioner") is an individual who worked in his family's trucking business in Los Angeles but sought to pursue other business ventures in the entertainment industry.

2. Petitioner is not a licensed talent agent under Labor Code section 1700.5.

3. Respondent ABBY RAO ("Respondent") is a model and social media influencer on Instagram.

4. In approximately 2017, Petitioner and Respondent met on a dating website. The parties' interaction materialized to a friendship where they primarily remained in touch via Instagram.

5. Between 2017 to 2018, Respondent was a hairdresser living in Louisiana. In 2018, Respondent contacted Petitioner about her interest in relocating to Los Angeles to pursue a career in the entertainment industry.

6. While Respondent was preparing to move to Los Angeles, Petitioner informed Respondent he could advise her on how to grow her social media presence on Instagram as an influencer. Petitioner and Respondent further discussed how Petitioner could introduce her to people who could help further her career, invest in the brand Respondent developed for herself on Instagram, market

Respondent, and manage her in other aspects of her career.

7. Petitioner and Respondent also agreed Petitioner would provide a loan to Respondent, which would cover her relocation expenses to Los Angeles, rent, cosmetic procedures, among other items. In approximately October or November 2018, Respondent moved to Los Angeles.

The Loan Investment and Exclusive Management Agreement

8. Petitioner and Respondent agreed to enter into a contract where Petitioner would serve as Respondent's manager and receive 25% of Respondent's earnings derived from his services as a manager. The parties intended the contract to serve as a way for Petitioner to recover his "investment," which was the money Petitioner loaned Respondent. Petitioner retained an attorney, Matthew Barhoma ("Barhoma"), to prepare the contract.

9. On or around November 7, 2018, Petitioner sent Respondent a contract to review. Respondent informed Petitioner she read the contract, followed by a question from Petitioner on whether he should inform Barhoma of any additions or changes Respondent wanted to the contract. Around the same time, Respondent spoke to her father about the contract and identified changes she wanted to make to the contract. Petitioner and Respondent spoke about Respondent's requested changes.

10. On or around November 29, 2018, Petitioner and Respondent signed the "Loan Investment and Exclusive Management Agreement" ("Agreement"). The term of the Agreement was for two years and provided Petitioner with three consecutive options to extend the term of the Agreement for an additional period of one year each.

11. Section I of the Agreement entitled, "Purpose of Agreement," stated that Petitioner, as "Agent and Holder," would represent Respondent, as "Talent and Borrower." It further provided:

> Talent and Borrower hereby fully agrees and mutually understands all the terms and conditions of representation by PETER BOSTANIAN, as set out below, for their mutual gain and benefit. Agent is in the business of representing and investing in talent such as the above-entitled talent, who is a model and an experiential producer.

12. Under the Agreement, Petitioner's duties included "invest[ing]" in Respondent's living accommodations and to:

> [N]egotiate, facilitate, and enable Talent to participate in any and all talent job duties, including but not limited to provide valuable content on any of Talent's social media outlets, model for various other companies, commercialize any and all other brands, and/or appearances and travel. Agent will solicit offers, negotiate contracts, through their counsel, for the sale of any entertainment project or package in which the Talent owns an interest.

13. The Agreement memorialized the parties' understanding regarding Petitioner's compensation. Section II(C) of the Agreement stated Petitioner's 25% compensation was "consideration for the services provided by [Petitioner]," requiring Respondent to pay Petitioner 25% "of any and all gross earnings received by the Talent directly or indirectly or in connection with the Talent's employment in the entertainment industry." Section II(C) further provided that Petitioner, who invested an "undefined sum" in Respondent and was "investing in the well-being and livelihood of Talent," to compensate Respondent for her move to California, "employee [sic] Talent while Talent is in California, and provide for any and all necessaries as defined by law."

14. The Agreement defined the term, "entertainment industry," to include "commercial advertising of any and all brands to any and all outlets" such as Instagram.

15. The Agreement further provided that:

a. Petitioner "use all reasonable efforts to procure and negotiate employment for [Respondent] in the entertainment industry."

b. Petitioner could serve as a "talent agent or representative of any other party or talent during the term of this [A]greement."

c. Respondent would not have another person, organization, or business entity serve as her talent agent during the term of the Agreement.

16. Section V(A) of the Agreement again stated Petitioner was to use "all reasonable efforts to procure employment for the Talent" and included terms regarding under what circumstances the Agreement could be terminated.

Petitioner's Representation of Respondent

17. On or around November 30, 2018, and at least on a second occasion, Petitioner provided the location for two of Respondent's photoshoots, researched and paid for the luxury rental cars that would be used in the photoshoots, and provided input regarding the photoshoots. For the second

photoshoot, Respondent asked Petitioner if he could provide his home as the location.[1]

18. During Petitioner's representation of Respondent, Petitioner discussed with Respondent different aspects of her career as an influencer. For example, Petitioner discussed with Respondent that growing her presence involved posting often and putting out more content, provided input on what pictures to remove from Instagram based on the number of likes the picture had, and advised on pictures Respondent intended to post on Instagram. Petitioner testified he intended to obtain as much exposure as possible for Respondent, ensure her growth on social media, and invest in her brand. He further testified he contacted brands to help develop Respondent's social media presence and to promote her with the goal that contacting such companies would eventually result in paid brand deals for Respondent.

19. On July 23, 2019, a Statement of Information was filed with the California Secretary of State for a company called, Zeal Management LLC.[2] Petitioner testified he is the owner of Zeal Management LLC. Petitioner further testified his goal with Zeal Management LLC was to formalize his relationship with Respondent. Zeal Management LLC is not a licensed talent agency under Labor Code section 1700.5.

Fashion Nova

20. Respondent had a pre-existing relationship with Fashion Nova, a clothing company, before working with Petitioner, and maintained that relationship with Fashion Nova upon contracting with Petitioner.

21. In or around March 2019, Petitioner contacted Erin (last name unknown), a representative from Fashion Nova, via email regarding Respondent's contract. Petitioner informed Erin he represented Respondent and "negotiate[d] her deals." As part of his negotiation, Petitioner requested an increase in the amount Respondent received per post, and the ability to include posts that included products from Fashion Nova and KO Watches[3] (a watch company) in the same picture. Fashion

[1] These two photoshoots are not at issue in this matter.
[2] Zeal Management LLC is not a named party in this matter.
[3] During the hearing, the evidence demonstrated Respondent directly negotiated her postings with KO Watches. Respondent testified Petitioner did not obtain the contract she entered with KO Watches while Petitioner represented her. Based on the evidence, Respondent's work with KO Watches is not at issue in this matter.

Nova informed Petitioner it does not "shar[e] tags" in an image but offered to renew Respondent's contract for $8,000 for 20 posts and 10 swipe-ups.

22. Respondent testified regarding the meaning of certain terms commonly used in social media platforms, including the terms, "post" and "swipe-up." Based on Respondent's testimony, a "hard post," or "post," involves the act of publishing content, *e.g.*, a message, information regarding a product, or other material on social media platforms. A "swipe-up" in the context of working with a company (or a brand) includes adding a link to the posted material, *e.g.*, an Instagram picture, with the brand's website or product so a person can purchase the product directly. A swipe-up may allow a person to browse other items available on a brand's website.

23. As part of his negotiation with Fashion Nova, Petitioner presented Fashion Nova with a counteroffer of $9,000 for 20 posts and 10 swipe-ups. Fashion Nova informed Petitioner their offer was "firm." Petitioner then accepted Fashion Nova's offer, asked Erin to send the contract for the deal with Fashion Nova, and instructed Erin that Fashion Nova could send the payment via PayPal to an email for Zeal Management.

24. On or around July 31, 2019, Petitioner asked Respondent whether she wanted to renew with Fashion Nova or whether he should "counter them with a high number." On September 1, 2019[4], Petitioner emailed Respondent informing her that he spoke with Fashion Nova and "was able to renegotiate a significantly higher rate for [Respondent] per post" at $1,000, or "6 posts and 3 swipe ups per month for $6,000.00 USD monthly for 3 months." Petitioner further stated, "[a]s your manager, I am advising you to accept this offer now. Time is of the essence."

25. Petitioner received a 25% commission for at least one of the brand deals he negotiated with Fashion Nova on Respondent's behalf.

Benjamin Watches

26. On or around March 20, 2019, Petitioner attempted to solicit a brand deal on Respondent's behalf with a company called Benjamin Watches. Petitioner informed Respondent he would contact Benjamin Watches and propose the rate of $5,000 per post.

[4] It is unclear from the evidence whether Petitioner's role in negotiating with Fashion Nova for Respondent on approximately July 31, 2019 and September 1, 2019 was for one deal or two separate deals.

Rockstar Energy

27. While Petitioner represented Respondent, he also attempted to solicit a brand deal on Respondent's behalf with a company called Rockstar Energy. Petitioner proposed to Respondent that he request $1,500 per post and a minimum of three posts per month. He further informed Respondent he would message Rockstar Energy to see if he could obtain "a good price."

Revolve

28. While Petitioner represented Respondent, he spoke to Respondent about working with a clothing company called Revolve. Petitioner suggested to Respondent she could "do a few posts and see how it goes" and proposed she do three posts a month. Petitioner informed Respondent he felt Revolve would pay but likes to "test out first." Respondent communicated her interest in working with Revolve and informed Petitioner she could "merge" the posts for Revolve with KO Watches.

Hello Molly

29. While Petitioner represented Respondent, he spoke to Respondent about "another potential brand" called Hello Molly, a women's clothing company. Petitioner informed Respondent he was speaking to one of their representatives and wanted to see "what they offer." Petitioner testified he recalled this exchange as an effort to collaborate with Hello Molly.

Suspicious Antwerp

30. While Petitioner represented Respondent, Petitioner informed Respondent that he contacted many clothing brands including one called Suspicious Antwerp. Petitioner informed Respondent he was "[m]ostly just sending inquiries out to see if we can do some sort of collaboration." Petitioner testified he would email brands to see if they were interested in collaborating with Respondent with the goal of bringing Respondent as much exposure as possible.

Termination of the Agreement

31. On August 9, 2019, Respondent terminated the Agreement with Petitioner via a letter sent to Petitioner by her counsel.

Procedural History

32. On October 29, 2019, Respondent filed a complaint against Petitioner in the Los Angeles

Superior Court ("Civil Matter") alleging, *inter alia*, Petitioner's breach of contract, failure to comply with the Talent Agencies Act (or, "Act" or "TAA"), and Petitioner's failure to procure any deals or employment and failure to solicit offers for Respondent.

33. On or around August 11, 2020, Respondent served Petitioner with a First Amended Complaint in the Civil Matter. The First Amended Complaint alleged, *inter alia*, Petitioner's breach of contract, and Petitioner's failure to solicit offers, failure to procure any offers of employment, and his misrepresentation as a talent agent.

34. On December 1, 2020, Respondent filed her Second Amended Complaint in the Civil Matter, which removed any previous allegations of Petitioner's failure to procure or solicit offers, failure to procure employment, and his misrepresentation as a talent agent.

35. On December 3, 2020, Petitioner filed a cross-complaint ("Cross-Complaint") against Respondent alleging breach of contract, intentional misrepresentation, express indemnity, among other causes of action.

36. On January 4, 2021, Respondent demurred to Petitioner's Cross-Complaint on several grounds including that the court lacked subject matter jurisdiction to consider Petitioner's claims because his claims involved a talent agency and the Labor Commissioner had proper jurisdiction under Labor Code section 1700.44.

37. On May 11, 2021, the court in the Civil Matter stayed the litigation and referred the dispute to the Labor Commissioner to determine whether we have jurisdiction over the alleged claims. The court also determined, the "proceedings for the [Second Amended] Complaint and Cross-Complaint must be stayed pending a final determination by the Labor Commissioner."

38. On or around March 29, 2021, Respondent responded to Form Interrogatories propounded by Petitioner as part of the Civil Matter. As part of her responses under oath, Respondent stated Petitioner was in material breach of the Agreement because he failed to, *inter alia*, pay Respondent's living accommodations and necessaries of life, failed to solicit offers and negotiate contracts for Respondent, and misrepresented himself as a talent agent.

39. On or around March 29, 2021, Respondent responded to Special Interrogatories propounded

by Petitioner as part of the Civil Matter. As part of her responses under oath, Respondent stated she was paid to promote a product for Fashion Nova and KO Watches during the term of the Agreement. She stated Petitioner failed to compensate her for her living expenses, personal expenses, and rent. Respondent further stated Petitioner failed to perform his duties under the Agreement when he failed to, *inter alia*, solicit offers that resulted in paid brand deals, failed to negotiate contracts for Respondent, and misrepresented himself as a talent agent.

40. On June 22, 2021, Petitioner filed his Petition to Determine Controversy (or, "Petition") with the Labor Commissioner, followed by Respondent's Answer on July 9, 2021.

III. ISSUES

1. Are Respondent's claims barred by the statute of limitations pursuant to Labor Code section 1700.44(c)?
2. Is Respondent an "artist" as defined pursuant to Labor Code section 1700.4(b)?
3. Did Petitioner procure employment in violation of the Talent Agencies Act?
4. Are Respondent's claims barred by the doctrines of judicial estoppel or equitable estoppel?
5. If Petitioner violated the Talent Agencies Act, is the appropriate remedy to void the entire Agreement *ab initio* or sever the offending practices under *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974?
6. Is Respondent entitled to her requested relief of disgorgement and repayment of all monies?

IV. LEGAL ANALYSIS

A. The Burden of Proof

The proper burden of proof in actions before the Labor Commissioner is found at Evidence Code section 115, which states in part, "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." "[T]he party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by preponderance of the evidence." (*McCoy v. Bd. of Ret.* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) "'[P]reponderance of the evidence standard . . . simply requires the

trier of fact' to believe that the existence of a fact is more probable than its nonexistence.'" (*In re Michael G*. (1998) 63 Cal.App.4th 700, 709, fn. 6.)

B. The One-Year Statute of Limitations under the Talent Agencies Act

Petitioner – the party who disputes Respondent's claim that he acted as an unlicensed talent agent in violation of the TAA – filed the Petition. In this matter, the question is reversed to consider not whether the Petition is timely but whether Respondent's claims that Petitioner acted as an unlicensed talent agent in violation of the TAA is timely.

Labor Code section 1700.44(c) states, "[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."

The evidence shows the last engagement Petitioner negotiated on Respondent's behalf was for Fashion Nova in approximately September 2019. On June 22, 2021, Petitioner filed the Petition after the court in the Civil Matter stayed the litigation pending the Labor Commissioner's final determination. Respondent filed her Answer to the Petition on July 9, 2021 where she claims Petitioner acted as an unlicensed talent agent and attempted to procure employment in violation of the Act.

The one-year statute of limitations under Labor Code section 1700.44(c) was addressed in *Styne v. Stevens* (2001) 26 Cal.4th 42 ("*Styne*"). In *Styne*, the California Supreme Court held:

> Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely . . .

(*Id.* at 51-52.)

Here, Respondent raised the defense that Petitioner violated the TAA in the Civil Matter. Specifically, Respondent raised it as a defense when she demurred to Petitioner's Cross-Complaint, contending the court lacked subject matter jurisdiction because Petitioner's claims involved a talent agency and proper jurisdiction lies with the Labor Commissioner under Labor Code section 1700.44.

Applying *Styne*, Respondent is not barred by the one-year statute of limitations under Labor Code section 1700.44(c) because she raised violations of the TAA as a defense in the Civil Matter when she filed a demurrer to Petitioner's Cross-Complaint.

C. The Definition of "Artist" Pursuant to Labor Code section 1700.4(b)

The TAA provides the Labor Commissioner with original exclusive jurisdiction over controversies between artists and talent agents. (See *Id*. at 55-56.) The Act is remedial, and its purpose is to "protect artists seeking professional employment from the abuses of talent agencies." (*Id*. at 50.) The Act "does not cover other services for which artists often contract, such as personal and career *management* (i.e., advice, direction, coordination, and oversight with respect to an artist's career or personal or financial affairs) . . ." (*Id*. at 51.) [Emphasis in original.]

Labor Code section 1700.4(b) defines "artists" as:

> [A]ctors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, **models**, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises. [Emphasis added.]

Labor Code section 1700.4(b) includes "models" within the definition of "artists" for purposes of the TAA. The issue addressed here is whether Respondent is an "artist" due to her work on Instagram. If Respondent does not fall within the definition of "artist," which includes "model," Petitioner could not have acted as a talent agent, which divests the Labor Commissioner of her jurisdiction to hear this matter. (See *Bluestein v. Production Arts Management*, TAC Case No. 24-98, at 4) ("*Bluestein*".)

We recently addressed whether an influencer on Instagram was considered an artist or model for purposes of the TAA. (See *Beaty v. Aiello, et al.*, TAC Case No. 52756) ("*Beaty*").) The petitioner in *Beaty* was a model and influencer on Instagram who worked on numerous projects. We found the petitioner in *Beaty* to be a model because she participated in different shoots and displayed clothes for companies. (*Id*. at 9.) In finding the petitioner an artist for purposes of the TAA, we stated:

> Whether the clothing or featured product is shown on television, a movie theater, or an online posting on social media is immaterial as the TAA makes no distinction between the forum or multiple outlets where the model's work is eventually displayed. What is material or relevant here is that the evidence establishes Petitioner is a model, and thus, an artist, as defined by Labor Code section 1700.4(b).

(*Id*.)

However, we clarified an influencer or person with a social media presence will not always be considered an "artist" under the TAA. "The TAA 'must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers – one that is practical rather than technical, and that will lead to wise policy rather than to mischief or absurdity.'" (*Id*. at 10)(internal citations omitted.) We cautioned that our conclusion was based on the evidence, and any matter where an influencer or person with a social media presence who purports to be an "artist" under Labor Code section 1700.4(b) would be evaluated on case-by-case basis. (*Id*.)

Applying the above principles, we now turn our attention to whether Respondent in this matter was an "artist" for purposes of Labor Code section 1700.4(b).

Respondent has the burden of proof to demonstrate she was an "artist" for purposes of Labor Code section 1700.4(b). The evidence presented indicates the Agreement identified Respondent as a "model." In her sworn discovery responses, Respondent stated she was paid to promote a product for Fashion Nova. Petitioner's correspondence with Fashion Nova in March 2019 proposed paying Respondent $8,000 for 20 posts and 10 swipe-ups, while Petitioner's correspondence with Fashion Nova in September 2019 shows Fashion Nova willing to pay Respondent "6 posts and 3 swipe ups per month for $6,000.00." Respondent's testimony indicated a "post" includes publishing information regarding a product. She further testified that a "swipe-up" in the context of working with a brand includes adding a link to the posted material with the brand's website or product so a person can purchase the product directly.

While Respondent presented no evidence of the Fashion Nova photoshoots or the Fashion Nova products she wore, the evidence shows she was paid for at least one or two Fashion Nova deals. Here, Respondent more likely than not participated in one to two photoshoots for Fashion Nova where she displayed their products, and included swipe-ups, allowing people to directly

purchase those products and/or access Fashion Nova's website. Like *Beaty*, as a model under the TAA, Respondent displayed clothes for a clothing company allowing potential buyers to purchase that company's products. That Respondent was a model when featuring Fashion Nova's clothing on Instagram as a forum is immaterial. (See *Id*. at 9.) What is material is the undisputed evidence that Petitioner was paid to promote a product (or products) for Fashion Nova, displayed clothing for Fashion Nova, and therefore, is a model as expressly included in the definition of "artist" under Labor Code section 1700.4(b). (See *Id*.)

Because we find Respondent to be a model under Labor Code section 1700.4(b), we now discuss whether Petitioner procured employment in violation of the TAA in his actions with Fashion Nova, Benjamin Watches, Rockstar Energy, Revolve, Hello Molly, and Suspicious Antwerp.

D. Petitioner's Procurement of Employment for Respondent

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." 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." Thus, an unlicensed talent agent who performs such activities violates the TAA. (See *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986) ("*Marathon*").)

The Labor Commissioner has ruled that procurement occurs if the evidence shows the solicitation, negotiation, or acceptance of a negotiated instrument for any of the engagements at issue. (See *McDonald v. Torres*, TAC Case No. 27-04, at 8) ("*McDonald*".) Additionally, procurement "includes an active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication." (*ICM Partners v. Bates,* TAC Case No. 24469, at 5) ("*Bates*")(citing *Hall v. X Management*, TAC Case No. 19-90.) "The Labor Commissioner has long held that 'procurement' includes the process of negotiating an agreement for an artist's services." (*Bates*, at 5)(citing *Pryor v. Franklin*, TAC Case No. 17 MP-114.) Furthermore, the TAA extends to "individual incidents of

procurement." (*Marathon*, *supra*, 42 Cal.4th at 988.)

i. Fashion Nova

It is undisputed Petitioner negotiated on Respondent's behalf at least twice in procuring a deal with Fashion Nova. In March 2019, Petitioner contacted Fashion Nova, informing them he was Respondent's representative and "negotiate[d] her deals." During several weeks and numerous emails, Petitioner requested multiple terms as part of the deal, including the amount paid per post and sharing tags with another company. He attempted to negotiate a higher price point for Respondent, followed up repeatedly with Fashion Nova on the terms of this deal, and accepted the original offer on Respondent's behalf. He then instructed Fashion Nova on where they could send the payment.

On or around July 31, 2019 and again on September 1, 2019, Petitioner contacted Fashion Nova to procure a deal for Respondent. While unclear from the evidence whether the July and September 2019 correspondence concern the same or two different deals, what is certain is Petitioner informed Respondent in September 2019 that he renegotiated a "significantly higher rate" of $6,000 for six posts and three swipe-ups per months for three months. He further informed her that, as her "manager," he "advised [her] to accept this offer now." Petitioner received a 25% commission for at least one of the brand deals he negotiated with Fashion Nova on Respondent's behalf.

Here, Petitioner procured employment when he negotiated and actively participated in many communications with Fashion Nova with the goal to obtain employment for Respondent. It is undisputed Petitioner is not a licensed talent agent. Thus, Petitioner violated the TAA as it relates to Fashion Nova because he illegally procured employment as an unlicensed talent agent.

ii. Benjamin Watches and Rockstar Energy

A plain reading of Labor Code section 1700.4(a) shows that "promising or attempting to procure employment or engagement for an artist" is an example of the activities a talent agency can perform. The Labor Commissioner has ruled that procurement occurs if the evidence shows the solicitation for any of the engagements at issue. (See *McDonald*, *supra*, TAC Case No. 27-04, at 8.)

The Agreement states Petitioner's duties included soliciting offers for Respondent. It further states Petitioner's duties included "negotiat[ing], facilitat[ing], and enabl[ing] Talent to participate in any and all talent job duties." Petitioner testified he would solicit offers to assist Respondent, but also contact brands to help Respondent obtain as much exposure so she could grow on social media. Petitioner's texts with Benjamin Watches and Rockstar Energy follow the former, *i.e.*, Petitioner's testimony regarding soliciting offers on behalf of Respondent. Petitioner informed Respondent he would contact Benjamin Watches and propose a rate of $5,000 per post. He also suggested to Respondent he contact Rockstar Energy and request $1,500 per post and a minimum of three posts per month. His actions of solicitation were further supported by his statements about messaging Rockstar Energy to see if he could obtain "a good price."

It appears these acts of solicitation did not materialize to paid employment. However, the evidence shows Petitioner more likely than not solicited or attempted to solicit potential employment with Benjamin Watches and Rockstar by proposing rates and number of posts to Respondent, explicitly stating he would contact these companies with proposed rates, and, at least in the case of Rockstar Energy, determine whether he could obtain a good price. Here, Petitioner's solicitation efforts amount to procurement. (See *Id*.) For these reasons, we find Petitioner also attempted to procure employment while an unlicensed agent in violation of the TAA.

iii. Revolve, Hello Molly, and Suspicious Antwerp

The evidence regarding Petitioner's communications with Revolve, Hello Molly, and Suspicious Antwerp supports a finding Petitioner acted in the capacity of a manager with the goal to help increase Respondent's exposure so she could grow on social media.

Regarding Revolve, Petitioner spoke to Respondent about doing a "few posts" for this clothing company to "see how it goes." Respondent expressed interest and indicated to Petitioner she could "merge" the posts for Revolve and KO Watches. The parties discussed Respondent's preference for paid posts, but Petitioner communicated that he thought Revolve liked to "test out first." The evidence here is consistent with Petitioner's more credible testimony, and Respondent's further corroboration, that the intent was to have Respondent collaborate with Revolve and

potentially KO Watches to see if this would help increase Respondent's exposure on Instagram.[5] It further supports Petitioner's testimony he wanted to create relationships with companies, "test[ing]" out the relationship first to "see how it goes" by having Respondent collaborate with these companies.

Petitioner also spoke to Respondent about "another potential brand" called Hello Molly. Petitioner told Respondent he was speaking to one of their representatives to see what they had to offer, and testified this communication was about collaborating with Hello Molly. Petitioner also informed Respondent he was contacting many clothing brands including one called Suspicious Antwerp. He states in the same text exchange with Respondent he was "[m]ostly just sending inquiries out to see if we can do some sort of collaboration."

Here, Respondent did not meet her burden in demonstrating Petitioner violated the TAA by procuring or attempting to procure employment as it relates to Revolve, Hello Molly, and Suspicious Antwerp. The limited evidence regarding these engagements indicates Petitioner more likely than not acted as a personal manager when communicating with Revolve, Hello Molly, and Suspicious Antwerp. Petitioner communicated with these brands with a view toward creating relationships with them, have Respondent collaborate with these brands so she could grow on social media, and provide her with as much exposure as possible. Such actions are akin to Petitioner acting as a manager where he tried to promote Respondent, advised her and helped chart the course of her career on Instagram, and engaged in such endeavors to make her "as marketable and attractive to talent buyers as possible." (See *Marathon*, *supra*, 42 Cal.4th at 983-984.)

For the reasons stated above, we find Petitioner did not violate the TAA when he communicated with Revolve, Hello Molly, and Suspicious Antwerp.

E. Are Respondent's Claims Barred by the Doctrine of Judicial Estoppel?

Petitioner argues Respondent should be "judicially estopped from taking the position that the contract is illegal and unenforceable and that [Petitioner] engaged in (or attempted to engage in) acts

[5] Respondent was not credible in certain aspects of her testimony, including her testimony she was unaware Petitioner worked for his father's trucking business, the full circumstances surrounding her signing of the Agreement, including the opportunities to review and make changes to the Agreement before she signed it, and the circumstances surrounding the photoshoots involving the luxury cars.

of illegal procurement." (Petitioner's Post-Hearing Brief, p. 9, lines 10-12.)

The TAA contains no limitation on the Labor Commissioner's ability, or that of superior courts in subsequent trials de novo, to apply equitable doctrines such as judicial estoppel. (See *Marathon*, 42 Cal.4th at 996; see also *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)("judicial estoppel 'is an equitable doctrine invoked by a court at its discretion'").)

Judicial estoppel applies when:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; **and** (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Emphasis added.]

(*Jackson v. Cnty. of Los Angeles* (1997) 60 Cal.App.4th 171, 183; *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1469.)

We consider each factor to determine if judicial estoppel applies in this matter.

i. Respondent has taken two different positions

Petitioner argues Respondent's Complaint and First Amended Complaint contained the same allegations that Petitioner failed to procure and solicit offers of employment for Respondent in support of the breach of contract action. (Petitioner's Post-Hearing Brief, pp. 9-10, lines 13-8.) Respondent ultimately filed a Second Amended Complaint, "the operative pleading on file in the Superior Court at this very moment," which removed any previous allegations regarding Petitioner's failure to procure or solicit offers and failure to procure employment. (See *Id*., p. 11, line 6.) Instead, the Second Amended Complaint alleges breach of contract based on Petitioner's failure to "hire a professional accounting service and/or keep a professional invoice and tally of any and all expenses made for or on behalf of [Respondent]," and Petitioner's alleged failure to "continue to pay [Respondent] for the necessaries of life . . ." (*Id*., pp. 10-11, lines 21-3.) "In other words, in the operative pleading . . . [Respondent] continues to take the unequivocal position that the contract she claims is illegal, invalid and unenforceable in these [Labor Commissioner] proceedings is, in fact, legal, valid and enforceable against [Petitioner]." (*Id*., p. 11, lines 6-9.)

We agree with Petitioner that Respondent takes a position in her Complaint and First Amended Complaint that differs from her position in the Second Amended Complaint. This factor is met.

ii. The positions were taken in judicial or quasi-judicial administrative proceedings

Respondent's different positions were taken in the Civil Matter, a judicial proceeding. This factor is also met.

iii. The party was successful in asserting the first position

In support of the third factor, Petitioner states Respondent "successfully avoided dismissal of her lawsuit against" Petitioner because "of the positions she took in the Superior Court action." (*Id*., p. 13, lines 4-5.) "Put more simply, because [Respondent] took the position the contract was legal, valid and binding on the parties, the Court allowed her to sue for its breach." (*Id*., p. 13, lines 7-9.)

We find Petitioner fails to show how this third factor is met. First, while it may be true the superior court in the Civil Matter abstained from dismissing Respondent's suit, that issue is not before this forum nor did Petitioner provide any evidence, *e.g.*, a Reporter's Transcript, a second minute order[6], or other judgment, to support this position. A finding this factor is met based solely on statements made by Petitioner's counsel in his Post-Hearing Brief with no supporting evidence is not appropriate. For these reasons, we find Petitioner failed to demonstrate this factor is met.

iv. The two positions are totally inconsistent

As stated above regarding the first factor, we find Respondent asserted one position in her Complaint and First Amended Complaint which is totally inconsistent with her position in the Second Amended Complaint. This factor is met.

v. The first position was not taken as a result of ignorance, fraud, or mistake

There is no evidence to indicate Respondent's inconsistent positions or that of her counsel resulted from fraud, ignorance or mistake. (See *Id*., p. 14, lines 6-8.) This factor is met.

While we find that four of the five factors are met, using the conjunctive "and" when

[6] Respondent's Exhibit 73, the superior court's Minute Order dated May 11, 2021, does not discuss what Petitioner claims was the court's apparent inclination to dismiss the Civil Matter but for Respondent's change in position.

applying the factors establishes the courts' intent that all five factors must be met for judicial estoppel to apply. Accordingly, we decline to apply judicial estoppel to Respondent's claims.

F. Are Respondent's Claims Barred by the Doctrine of Equitable Estoppel?

We next consider whether Respondent's claims are barred by the doctrine of equitable estoppel. "Estoppel is an equitable argument that deprives another of rights or defenses." (*Estate of Bonanno* (2008) 165 Cal.App.4th 7, 22) ("*Bonanno*").) The *Bonanno* court identified four elements that must be present for the doctrine of equitable estoppel to apply, including: (1) "the party to be estopped must be apprised of the facts;" (2) they must intend that their conduct be acted upon, "or must so act that the party asserting estoppel had a right to believe it was so intended;" (3) "the other party must be ignorant of the true state of facts;" and (4) the party asserting estoppel must rely upon the conduct to their injury. (*Id*.)

In *Bonanno*, a man died intestate and his daughter (Connolly), estranged wife (Jean) and girlfriend of 12 years (Stevens) all claimed portions of his estate. (*Id*. at 11.) In December 2003, all parties resolved their disputes through mediation but Stevens refused to sign the settlement agreement so it was never reduced to writing. (*Id*. at 13.) Over the years, Connolly served as administrator to the estate, paid off multiple creditors, gathered the decedent's estate, sued a major bank in relation to the decedent's assets, prepared taxes, and filed seven inventories of the estate. (*Id*. at 13-14.)

Nearly three years later, in March 2006, all parties entered into a nine-page settlement agreement where, *inter alia*, the estate was distributed under a court approved "Settlement Agreement and an Order of Final Distribution," all parties agreed to a "'full and final settlement of all matters," and the parties agreed and warranted they would undertake no action which would deprive any other party of the benefits in the settlement agreement. (*Id*. at 14-15.) Approximately two months later, Jean filed a spousal property petition under the Probate Code which reduced the administration commissions paid to Connolly who had acted as the estate administrator for years. (*Id*. at 11, 16.) Based on these facts, the *Bonanno* court held Jean was estopped from asserting her argument that the property she would receive would come to her "without probate administration

when Connolly ha[d] acted as administrator for years" and finding otherwise "would be unfair and inequitable to Connolly." (*Id*. at 23.)

Petitioner's argument regarding equitable estoppel is compelling because Respondent changed her position when she filed her Second Amended Complaint removing any allegations about illegal procurement or TAA violations. It appears Petitioner filed his Cross-Complaint in reliance of that changed position, followed by Respondent's demurrer which stayed the Civil Matter and sent it to the Labor Commissioner for review.

However, Petitioner's reliance on *Bonanno* is misplaced. In his Post-Hearing Brief, Petitioner states Connolly served as executor and administered the estate for several years "while their disputes were pending." (Petitioner's Post-Hearing Brief, p. 15, lines 8-9.) That assertion is only partially correct. Contrary to this case, the *Bonanno* court found equitable estoppel applied based on the facts, which included two settlement agreements and multiple instances of conduct Connolly relied upon after what was presumed to be the finality of the litigation. Here, Petitioner knew the litigation in this matter was not final when the court concluded in its Minute Order it was staying the Civil Matter pending the Labor Commissioner's final determination. Stated simply, the Labor Commissioner declines to apply the doctrine of equitable estoppel because the legal authority upon which Petitioner relies includes facts not present here. Our finding does not prevent the Labor Commissioner or superior courts in subsequent trials de novo from applying this equitable doctrine in future cases. (See *Marathon*, *supra*, 42 Cal.4th at 996.) However, we decline to apply equitable estoppel in this matter.

G. If Petitioner violated the Talent Agencies Act, is the appropriate remedy to void the entire Agreement *ab initio* or sever the offending practices under *Marathon*?

In accord with *Marathon,* Petitioner urges us to apply the doctrine of severability. In *Marathon*, the court recognized the Labor Commissioner may invalidate an entire contract when there is a violation of the Act. 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. [Citations omitted].

(*Marathon*, *supra*, 42 Cal.4th at 996).

We find that the interests of justice would not be furthered by severance. (*Id.*) The doctrine of severability is "equitable and fact specific, and its application is appropriately directed to the sound discretion of the Labor Commissioner and the trial courts in the first instance." (*Id*. at 998.) Here, while the evidence shows part of the purpose of the Agreement was to have Petitioner recoup his investment for all the expenses he incurred on behalf of Respondent, the Agreement is permeated with illegality such that it cannot as a whole be enforced. The facts demonstrate the Agreement required Petitioner to "negotiate, facilitate, and enable [Respondent] to participate in any and all talent job duties." Importantly, the Agreement expressly required Petitioner to "solicit offers" and "negotiate contracts" for Respondent and serve as her "talent agent." Petitioner was to receive 25% in commissions for all gross earnings connected to Respondent's employment in the "entertainment industry," which included "commercial advertising of any and all brands to any and all outlets" such as Instagram. In addition, the Agreement repeatedly stated Petitioner was to "use all reasonable efforts" to "procure" or "negotiate" employment for Respondent.

The facts demonstrate Petitioner's conduct was consistent with the terms of the Agreement. Petitioner negotiated a contract and procured employment for Respondent with Fashion Nova on at least one occasion which resulted in his receipt of 25% in commissions. He also procured or attempted to procure at least one additional job for Respondent with Fashion Nova. Petitioner also attempted to procure employment for Respondent when he solicited offers with Benjamin Watches and Rockstar Energy by offering pricing based on the number of posts. Consistent with its terms, Petitioner engaged in reasonable efforts to procure employment or solicit offers during the short span of the Agreement. These provisions, which are found throughout the Agreement, were supported by Petitioner's actions. Accordingly, we find the doctrine of severance does not apply in this matter.

H. Respondent's Requested Relief of Disgorgement and Repayment of all Monies

In her Answer, Respondent requests disgorgement and repayment of all monies earned by Respondent and received or held by Petitioner.

Labor Code section 1700.44(c) states: "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." Section 1700.44(c) "explicitly bars any claim for affirmative relief based on a violation which occurred more than one year prior to the filing of the petition." (*McDonald*, *supra*, TAC Case No. 27-04, at 6.)[Emphasis in original.] "Accordingly, if a violation of the Act is found, the one year statute of limitations limits disgorgement to commissions paid within one year of the filing of the [p]etition." (*Id*.)[Emphasis in original.]

This Petition was initiated when Petitioner filed a Petition on June 22, 2021. While it is unclear from the evidence how much Petitioner received in commissions, Respondent terminated their Agreement on August 9, 2019 via a letter sent to Petitioner by her counsel. Here, Respondent would needed to have filed a petition by August 9, 2020 to be able to claim disgorgement and repayment of all monies received or held by Petitioner. Thus, the Labor Commissioner denies Respondent's request for disgorgement as untimely.

V. ORDER

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

1. The Agreement between Petitioner PETER BOSTANIAN and Respondent ABBY RAO is void *ab initio* under the Talent Agencies Act;

2. Respondent ABBY RAO's request for disgorgement and repayment of any and all monies is denied as barred by the statute of limitations.

IT IS ORDERED.

Dated: May 8, 2024

Respectfully submitted,

PATRICIA SALAZAR
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: May 8, 2024

LILIA GARCIA-BROWER
State Labor Commissioner

STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT