

1 **STATE OF CALIFORNIA**
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3 LABOR COMMISSIONER'S OFFICE
4 Jean Hyung Choi (SBN 295267)
5 320 West 4th Street, Suite 600
6 Los Angeles, CA 90013
7 Tel (213) 576-7732
8 Fax (213) 402-2027
9 jchoi@dir.ca.gov

10 Hearing Officer for the Labor Commissioner

11
12 **BEFORE THE LABOR COMMISSIONER**
13 **STATE OF CALIFORNIA**

14 CREATIVE ARTISTS AGENCY, LLC,
15 a California Limited Liability Company;

16 Petitioner,

17 v.

18 SAGE STEELE, an Individual; and
19 SMS, LLC, a California Limited Liability
20 Company,

21 Respondents.

Case No.. TAC-52867

**DETERMINATION OF
CONTROVERSY AND ORDER**

22 Petitioner Creative Artists Agency, LLC ("CAA") filed a Petition on September 14, 2022.
23 CAA alleges that Respondents Sage Steele and SMS, LLC (hereinafter referred to collectively as
24 "Steele") failed to pay commissions for a procured multi-year television hosting contract with
25 ESPN. CAA seeks \$750,000 in commissions and interest or, in the alternative, an accounting.
26 Steele answered the Petition on September 19, 2023.

27 The Labor Commissioner heard the matter from May 8-10, 2024 in Los Angeles,
28 California. Kendall Brill & Kelly LLP represented Petitioner; Freedman Taitelman & Cooley,
LLP represented the Respondents. The parties submitted closing briefs on June 21, 2024.

The Labor Commissioner has considered the testimony, documentary evidence, and
arguments presented, and adopts the following determination of controversy and order.

I. Summary

This case involves whether CAA did enough to protect Steele's interests in a public relations crisis. Steele appeared on a podcast and stirred controversy through her comments. CAA stepped in to negotiate with her employer. After a week of back-and-forth, CAA secured an optimal result: Steele kept her lucrative job, without suspension or dock in pay, for the remaining 32 months on her contract. But it came at a cost: she apologized to make peace.

Steele then learned about her free speech rights and saw a missed opportunity. She contends that CAA failed her at this critical moment by not exploring a way forward that avoided an apology. In her view, CAA walked away from both its promise and its duty to her. She concludes that CAA should have done better, so she did not have to pay what she promised to pay. Accordingly, she stopped paying commissions.

But CAA met Steele's stated goal at the time – to preserve her job. And Steele's retrospective view of what CAA should have done stretches beyond the deal they made.

Steele is not excused from her end of the bargain.

II. Findings of Fact

1. In 2013, Steele hired CAA to be her talent agent. At the time, she was a television host for ESPN. Steele specifically wanted to work with CAA's Nick Khan, who agreed to be her direct agent. Steele recalls that she verbally agreed with Mr. Khan to pay 10% commission on employment-based earnings for CAA to procure employment contracts and manage relations between herself and her employers. Steele and Khan understood that CAA would provide some transactional legal services in procuring her employment contracts.

2. That same year, Mr. Khan procured a seven-year contract with ESPN. He procured amendments to that contract in 2016 and 2017, extending Steele's employment with ESPN to June 30, 2024. From Steele's perspective, her continued employment at ESPN fulfilled a lifelong dream. From CAA's perspective, its client had secured a decade-plus premium hosting role on ESPN's flagship daily sports show. All appeared to be going well. As agreed, Steele paid CAA 10% commissions on her employment earnings from ESPN.

1 3. Mr. Khan left CAA in 2020. He tapped CAA’s Matt Kramer and Tom Young to replace
2 him as Steele’s direct agents. In August 2020, Kramer and Young flew to Steele’s home for an
3 in-person meeting. Steele, Kramer, and Young agreed that the only change to CAA’s agency
4 representation would be Kramer and Young’s replacement of Khan as Steele’s direct agent.
5 Steele was also concerned that Young represented her co-host, Kevin Negandhi, with whom she
6 had an ongoing conflict, so Kramer and Young confirmed that they would prioritize her. They
7 memorialized their continued agency relationship with a hug and went their separate ways.

8 4. A month and a half later in September 2020, Kevin Negandhi mistakenly sent Steele a
9 disparaging text about her. ESPN bosses arranged a call for Negandhi to apologize directly to
10 Steele. He did so. However, Tom Young, who also represented Negandhi, failed to
11 communicate with Steele at all after the incident, so Steele removed Young from her direct
12 representation team and proceeded with Kramer.

13 5. Steele instructed Kramer to look for outside opportunities due to her ongoing conflict
14 with Negandhi. Kramer set to work, arranging meetings with NBC for opportunities with the
15 Olympics and with CBS News. He also negotiated a solution with ESPN: to move Steele from
16 the 6 PM SportsCenter show, where she co-hosted with Negandhi, to the noon show. That
17 arrangement included a new, separate one-on-one interview show for Steele to host on ESPN+.
18 Steele continued paying commissions.

19 6. In the summer of 2021, ESPN mandated that all employees vaccinate from COVID-19
20 by October 1, 2021. On Steele’s request, Kramer investigated whether her employment contract
21 allowed ESPN to enforce this policy and whether she could get an exemption. Kramer
22 consulted with CAA legal experts to review Steele’s employment contract, but he exaggerated to
23 Steele that he would get the “head of CAA legal” to do it. He returned with some answers:
24 ESPN could enforce its vaccine policy, but Steele could request an exemption. Steele was
25 disappointed with this news: she reiterated her desire to leave ESPN “While still getting a good
26 portion of my contracted money.” Nearly three years remained on her ESPN contract.

27 7. Steele reluctantly complied with her employer’s vaccine mandate. Shortly afterwards, on
28 or around September 17, 2021, she appeared on a podcast without ESPN approval. There, she

expressed her misgivings with her employer's vaccine mandate and commented on some other hot-button issues. The podcast aired in late September 2021.

8. Steele's podcast comments led to internal and external controversy. From September 28 to October 5, 2021, Kramer monitored the situation, guided Steele's conversation with ESPN, and vigorously negotiated, to the word, a joint public relations response with ESPN. His efforts yielded an apology that Steele reviewed and approved, published on ESPN's website and sent to 6 media outlets. ESPN did not suspend, terminate, or deny payment to Steele as a result.

9. Kramer continued procuring future employment for Steele and pivoted to conservative media for new opportunities. However, by December 2021, Steele's marketing opportunities had dried up, signaling similar concerns for her employment prospects.

10. Steele stopped paying CAA's commissions in December 2021. Despite this, Kramer continued procuring employment and tried to maintain a line of communication with Steele.

11. In August 2023, Steele announced on a social media platform that she had settled a free speech lawsuit with ESPN and decided to leave her employment there.

III. Issues

- A. Did CAA and Steele form a contract?
- B. Did CAA perform its end of the contract?
- C. Did CAA's provision of legal services void the contract?
- D. Did CAA breach a fiduciary duty?
- E. Did CAA show a right to damages or an accounting?

IV. Legal Discussion

Evidence Code section 115 requires CAA to prove its breach of contract and accounting causes of action by a preponderance of the evidence. Likewise, Steele must prove affirmative defenses by a preponderance of the evidence.

However, the burden can shift when the parties have unequal access to information. "Where essential facts necessary to proof lie within the exclusive knowledge or control of one party, 'fundamental fairness' is what justifies shifting the burden of proof to this party." (*Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1190 (2008).)

1 A. CAA and Steele Formed a Contract

2 Steele contends that CAA did not prove contract formation. CAA conflates oral and
3 implied contracts, contending both that Steele reached an oral agreement with CAA in 2013 and
4 that the parties' course of conduct shows a contract.

5 An express contract is one, the terms of which are stated in words. (Civil Code § 1620.)
6 Contracts may be oral. (Civil Code § 1622.) An implied contract is one, the existence and terms
7 of which are manifested by conduct.

8 In 2013, Steele orally agreed with then-agent Nick Khan to represent her. Steele recalls
9 discussing specific terms such as 10% commissions and the scope of CAA's procurement,
10 counsel, and direction. In spoken words, Steele and CAA formed a contract.

11 In August 2020, Matt Kramer and Tom Young met with Steele to affirm CAA's
12 continuing talent agency relationship after former agent Nick Khan left. The parties did not
13 discuss specific terms, and Kramer wasn't even aware of them. But they agreed that CAA would
14 continue to represent Steele, and that Kramer and Young would replace Khan. The August 2020
15 meeting does two things: it implies the existence of the 2013 oral contract, and it stands alone as
16 a separate oral agreement to continue the talent-agent relationship that contract created.¹

17 B. CAA Performed its End of the Contract, Whether it Knew the Terms or Not

18 Steele contends that CAA agreed to, then failed, to provide legal services. She argues that
19 CAA thereby breached the contract and excused her from paying further commissions.

20 1. *CAA Agreed to Provide Procurement, Counsel, and Direction That Included Contractual Legal*
21 *Services, but Not Free Speech Legal Counsel*

22 Steele contends that CAA agreed to provide legal services, including free speech services.
23 CAA denies this and suggests that it could not provide legal services as a matter of law.

24 CAA has the burden of proving the terms of the contract. (*See Sieck v. Hall* (1934) 139
25 Cal.App. 279, 291 ("... a burden corresponding to that of proving the existence of the contract
26 exists as to the proof of its terms.")).

27
28 ¹ Steele moved for a non-suit after CAA's case in chief, arguing that CAA failed to prove
contract formation. The facts in this paragraph establish that CAA met its burden.

1 A party can show a contract for legal services through express terms or conduct. (*See*
2 *Responsible Citizens v. Sup. Ct.* (1993) 16 Cal.App.4th 1717, 1732.) In the absence of a formal
3 agreement, “whether the client reasonably believes that they are consulting a lawyer in a
4 professional capacity” demands “primary attention.” (*See Responsible Citizens, supra*, 16 Cal.App.4th
5 at 1733; Cal. State Bar Form. Opn. 2003-161, at 3 [citing various sources].)²

6 Transactional attorneys perform legal services when they negotiate contract terms to
7 reflect client positions. (*See Tommy Lee Jones v. William Morris Agency*, TAC 16396, at p. 5, 13
8 (2012) (“*Jones*”) [“It is the role of a transactional attorney to verify that a contract’s terms
9 purport what they are supposed to say.”]) Attorneys provide legal advice when they construct or
10 interpret a client’s rights or obligations under an employment contract, or advise on the
11 consequences of disobeying an employer’s order.

12 i. CAA Agreed to Provide Contract-Based Legal Services.

13 CAA, in its case in chief, only proved that in August 2020, Kramer, Young, and Steele
14 agreed to continue a prior talent agency relationship. In doing so, CAA left the door open for
15 Steele to fill in her understanding of the actual terms of the prior agreement – including CAA’s
16 duties to “procure,” “counsel,” and “direct.”

17 She did so convincingly. Steele recalled that CAA, through Khan, agreed for her to pay
18 10% of her employment earnings in exchange for procuring employment and “servicing the
19 contract” by managing Steele’s relationship with her employers.

20 Strong evidence supports Steele’s reasonable belief that these duties included legal
21 services. First, Steele and Khan verbally agreed that CAA would provide “business affairs”
22 services to meet the transactional end of her representation, so she did not need outside counsel
23

24 ² Per the California Bar Formal Opinion, other factors include:

- 25
- 26 - Whether the attorney volunteered their services or provided it upon request;
 - 27 - Whether the attorney agreed to investigate a case and provide legal advice;
 - 28 - Whether the attorney previously represented the client, and if so, the time and scope of representation;
 - Whether the client paid fees or other consideration; and
 - Whether the client consulted the attorney in confidence.

1 to separately perform this role. Kramer admitted that CAA’s business affairs department “puts
2 eyeballs on [contracts] to make sure that the contracts that are signed are the same by which we
3 negotiate it.” (*Cf. Jones, supra*, TAC-16396, at 5 [“It is the role of a transactional attorney to verify
4 that a contract’s terms purport what they are supposed to say.”])

5 Second, Kramer also admitted that CAA reviewed the legal effects of her contract at least
6 twice: to determine if her employment contract allowed ESPN to enforce a COVID-19 vaccine
7 mandate, and if her apology would trigger financial penalties in a buyout or departure. Kramer
8 even promised to have the “head of CAA legal” look into the first issue.

9 CAA does not rebut Steele’s reasonable belief. Instead, CAA denies ever agreeing to
10 provide legal services and vehemently litigates the characterization of the business affair
11 department’s role, arguing that it does not cross into legal services. But Khan and Kramer’s
12 admissions on what CAA agreed to do and did for Steele undermines these contentions.

13 CAA also argues that it provides “only talent agent services,” which excludes legal
14 services as a matter of law. It cites inapposite authority. (*See Solis v. Blancarte*, TAC-27089, at 8
15 (2013) [an attorney not licensed as a talent agent cannot perform such services.]) *Solis* narrowly
16 holds that attorneys can, in fact, be talent agents – they just need a license.

17 CAA and Steele’s talent agency contract included legal services based in contract law.

18 ii. CAA Did Not Agree to Provide Free Speech Legal Services.

19 However, Steele fails to show that the scope of CAA’s legal services extended to free
20 speech rights. She knew that Khan was a transactional attorney and would use that experience in
21 negotiating contracts. But Khan never represented that CAA’s legal services went any further.
22 Steele also knew that, when questions of a contract’s legal interpretation arose, CAA reviewed
23 them for her. Both forms of legal services focus solely on contract law. They go no further.
24 Therefore, Steele lacked a reasonable belief that CAA would provide her free speech legal
25 counsel. (*See Responsible Citizens, supra*, 16 Cal.App.4th at 1733.)

26 Therefore, the parties’ contract required CAA to provide legal services for contractual
27 negotiation and interpretation, but nothing more.
28

1 2. *CAA Procured and Serviced the ESPN Contract*

2 CAA contends that it met its end of the bargain by procuring and servicing the ESPN
3 contract. Steele contends that CAA failed to service that contract by failing to either push back
4 on the need for an apology or advise her to seek legal services.

5 A person can only rescind or abandon a contract for a breach that goes to the “root of
6 the consideration.” (*Karx v. Department of Professional Vocational Standards* (1936) 11 C.A.2d 554,
7 557.) The primary job of a talent agency is to obtain work. (*See Jones, supra*, TAC 16396, at 12.) In
8 this context involving a high-profile, lucrative, multi-year hosting gig, the “root of the
9 consideration” was to get the work, then preserve it amidst a public and internal relations crisis.

10 No one disputes that Nick Khan procured the ESPN contract by negotiating 2016 and
11 2017 amendments that extended Steele’s ESPN tenure through June 2024.

12 Steele also cannot reasonably dispute that Kramer “serviced” the ESPN contract. She
13 had a contract that would pay through the end of June 2024, but also had a brewing conflict
14 with her co-host, Kevin Negandhi. From when Kramer stepped in to replace Khan in August
15 2020, Steele expressed a desire to leave ESPN on good financial terms – in her words, “While
16 still getting a good portion of my contracted money.”

17 In the ensuing months, Kramer provided the following services:

- 18 - He navigated a work-around for Steele’s ongoing conflict with co-host Negandhi,
19 securing a hosting gig for the same show at a different time slot, along with her own
20 one-on-one interview show;
- 21 - He reviewed her contractual rights with respect to ESPN’s mandatory vaccine policy
22 and navigated potential exemptions; and
- 23 - He monitored the internal and external outcry arising from her September 2021
24 podcast appearance and vigorously negotiated an apology.

25 The results speak for themselves: ESPN did not terminate, suspend, or withhold wages
26 from Steele because of her unauthorized and controversial podcast appearance. She retained the
27 full rights to her dream job for the remaining 32 months on the contract. The root of her deal
28 with CAA was to get, then keep, her work at ESPN, not to protect her free speech rights.

 CAA procured and serviced Steele’s ESPN contract.

1 C. CAA’s Provision of Legal Services did not Violate the Business and Professions Code
2 and Thereby Void the Contract

3 Steele contends that CAA violated Business and Professions Code sections 6147 and
4 6148 by providing legal services without a written contract. CAA contends that the Labor
5 Commissioner cannot rule on this matter and that these provisions do not apply.

6 The Labor Commissioner has jurisdiction over “any controversy between the artist and
7 the talent agency relating to the terms of the contract...” (Labor Code § 1700.23.) CAA agreed to
8 provide legal services to Steele. Steele invokes Business and Professions Code sections 6147 and
9 6148 as affirmative defenses against enforcement of the contract. Whether they apply is a
10 “controversy... relating to the terms of the contract.”

11 Therefore, the Labor Commissioner has jurisdiction over this issue.

12 However, Steele merely contends that CAA “violated” these provisions; she does not
13 explain which one of them applies to her contract. She also misunderstands how Business and
14 Professions Code sections 6147 and 6148 affect an existing contract. Both expressly create an
15 option for the client to render an agreement voidable. (Bus. & Prof. Code §§ 6147(b), 6148(c).)
16 There is no “violation” here; instead, Steele has an option to void the contract.

17 Therefore, CAA’s provision of legal services without a written contract did not (yet) void
18 or excuse Steele from paying commissions.

19 D. CAA did not Materially Breach Its Fiduciary Duties

20 Steele contends that CAA breached its fiduciary duty in three ways. First, CAA did not
21 disclose the scale of its relationship with ESPN. Second, Kramer exaggerated that the “head of
22 legal” would review Steele’s employment contract, and that Jalen Rose was “basically done” at
23 ESPN after his own public relations crisis. Third, Kramer did not explore an alternative to an
24 apology. CAA contends that none of these mistakes or omissions matter. In its view, they did
25 not negatively affect the optimal outcome it secured for Steele – a watered-down apology
26 without termination, suspension, or reduced pay.

27 Misrepresenting, omitting, or failing to uncover a fact only excuses the principal from a
28 contract when the fact is material. (*See Assilzadeh v. California Fed. Bank* (2000) 82 Cal.App.4th

1 399, 410.) A “material” fact affects the root of what the parties bargained for. (*See Karz, supra*, 11
2 Cal.App.2d at 557.) Mere mistakes that do not cause harm are not material. (*See Jones, supra*,
3 TAC-16396, at 14-15 [agent mis-stated that deal had closed, but this did not affect client’s right
4 to full compensation under the deal, so no harm and no material breach found].)

5 In this context, a “material” fact would affect Steele’s perceived options when she
6 decided to apologize to ESPN. In other words, material breaches of fiduciary duties would
7 result in missed alternatives to an apology that would have better served Steele’s interests.

8 Steele suggests that CAA could have done better in at least two ways: exploring a refusal
9 to apologize and comparing the resolution of Jalen Rose’s public relations crisis. Both
10 arguments speculate, at best, that these actions would yield a better result.

11 First, Steele argues that had CAA truly been loyal, it would have pushed back on an
12 apology. But CAA correctly notes that Steele’s only stated expression at the time was to preserve
13 her financial rights under the ESPN contract. Steele does not explain how refusing to apologize
14 would better serve her interests. Presumably, violating an employer’s rule by making an
15 unapproved appearance, then refusing to apologize for the controversy caused by that
16 appearance, would not better serve Steele’s interests in preserving her ESPN contract.

17 Second, Jalen Rose’s public relations crisis appears to have happened in late November,
18 more than a month-and-a-half after ESPN published Steele’s apology. Steele also does not
19 explain how Rose’s situation resembles hers, or how he secured a better outcome.

20 CAA correctly argues that preserving that contract while Steele found a way out was her
21 stated goal at the time. CAA met this goal. Steele does not establish that any of CAA’s actions or
22 omissions closed the door to a better option. Therefore, they did not matter. (*Cf. Jones, supra*,
23 TAC-16396, at 14-15 [client received full compensation, so mistakes caused no harm and
24 therefore were not material breaches.])

25 CAA did not materially breach its fiduciary duty to Steele.

26 E. CAA has a Right to an Accounting Since It Cannot Prove the Amount of Damages

27 CAA contends that it is entitled to either \$750,000 or an accounting of Steele’s remaining
28 ESPN earnings. Steele contends that CAA overstates its commissions claim and abandoned its

1 argument for an accounting.

2 Steele's departure from ESPN on or around August 2023 disproves CAA's claim to the
3 full \$750,000 in commissions. However, CAA has shown that it suffered damages in the form of
4 unpaid commissions, so the only remaining question is how much.

5 A party seeking an accounting must show "(1) that a relationship exists between the
6 plaintiff and defendant that requires an accounting and (2) that some balance is due the plaintiff
7 that can only be ascertained by an accounting." (*Sass v. Cohen* (2020) 10 Cal.5th 861, 869.) This
8 cause of action functions as a means of discovery when "the defendant... possesses information
9 unknown to the plaintiff that is relevant for the computation of money owed." (*Ibid.*)³

10 On its face, CAA and Steele's contract relies on accounting to assess commissions.

11 Moreover, the parties have shown that Steele owes CAA an indeterminate amount that
12 requires an accounting. Steele stopped paying CAA in December 2021 but continued working
13 for ESPN until on or around August 2023, and therefore continued earning on her ESPN
14 contract for that time but paid no commissions. Much remains unclear: the exact date she
15 separated from employment, the terms under which she agreed to leave, and most importantly,
16 the total amount of earnings she ultimately received from the contract since January 2022.
17 Steele's settlement of a separate lawsuit with ESPN only further muddies the water.

18 Steele, not CAA, has all of that information. She therefore had the burden of proof as to
19 the second element for an accounting: she must show that there are other ways to determine
20 damages. (*See Amaral, supra*, 163 Cal.App.4th at 1190 ["Where essential facts necessary to proof
21 lie within the exclusive knowledge or control of one party, 'fundamental fairness' is what
22 justifies shifting the burden of proof to this party.'])

23 Steele did not meet her burden. As a result, neither CAA nor the Labor Commissioner
24 can calculate her unpaid commissions. An accounting is necessary.

27 ³ Steele seeks a windfall, arguing that *Sass v. Cohen* bars CAA from pleading an accounting
28 because it also pled for \$750,000 in commissions as a "sum certain." *Sass* holds the opposite:
parties pleading for an accounting must also plead an estimate of damages to support a default
judgment. (*See Sass, supra*, 10 Cal.5th at 891.) CAA, accordingly, did both.

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