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

OF THE STATE OF CALIFORNIA

GERARDO ORTIZ MEDINA, an individual, p.k.a GERARDO ORTIZ; BADSIN ENTERTAINMENT, LLC., Petitioners / Cross-Respondents, vs. DEL ENTERTAINMENT, INC.; JOSE ANGEL DEL VILLAR; DEL PUBLISHING, LLC; DEL RECORDS, LLC; and DEL ENTERTAINMENT, LLC; Respondents / Cross Petitioners.	CASE NO. TAC 52728 **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

Respondents and Cross Petitioners here DEL ENTERTAINMENT, INC., JOSE ANGEL DEL VILLAR, DEL PUBLISHING, LLC, DEL RECORDS, LLC and DEL ENTERTAINMENT, LLC filed a lawsuit in Los Angeles Superior Court to enforce ongoing rights under alleged contracts between them and Petitioner and Cross Respondent here, GERARDO ORTIZ MEDINA. Thereafter, Petitioner filed here his Petition to Determine Controversy pursuant to Labor Code section 1700.44 seeking the alleged agency contract be ruled *void ab initio* as a defense to Respondents' Superior Court action. Respondents and Cross Petitioners here thereafter filed a

Cross Petition to Determine Controversy seeking to enforce their rights under the alleged oral agency contract.

The matter came on regularly for hearing on July 25 and 26, 2022 via Zoom teleconference before the undersigned attorney assigned by the Labor Commissioner to hear this matter (hereinafter, referred to as the "TAC Hearing").

Petitioner GERARDO ORTIZ MEDINA, an individual, appeared and was represented by Neville Johnson and Melissa Eubanks of JOHNSON & JOHNSON LLP. Respondents DEL ENTERTAINMENT, INC.; JOSE ANGEL DEL VILLAR; DEL PUBLISHING, LLC; DEL RECORDS, LLC; and DEL ENTERTAINMENT, LLC, appeared and were represented by Lawrence Iser and Allen Secretov of KINSELLA WEITZMAN ISER KUMP HOLLEY, LLP. The matter was taken under submission after the parties submitted post-hearing briefs.

Based on the evidence presented at hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

II. FINDINGS OF FACT

1. Petitioner GERARDO ORTIZ MEDINA p.k.a. GERARDO ORTIZ ("ORTIZ") is an artist in the music business as defined at Labor Code section 1700.4 who started his career as a regional musician in Mexico, gaining some notoriety via his music videos on YouTube.

2. Respondent individual JOSE ANGEL DEL VILLAR ("VILLAR") is the principal of Respondents DEL ENTERTAINMENT, INC., DEL PUBLISHING, LLC, DEL RECORDS, LLC and DEL ENTERTAINMENT, LLC.

3. BADSIN ENTERTAINMENT, LLC. is ORTIZ's personal service company that loans out ORTIZ for live performances.

4. On or around October 2009, VILLAR approached ORTIZ to sign him to his record label, then a California Limited Liability Company, DEL RECORDS, LLC. Shortly thereafter, ORTIZ and Respondent DEL RECORDS LLC entered into a recording agreement ("2009 Recording Agreement"). The 2009 Recording Agreement did not cover the procurement of live performances by ORTIZ, instead calling for ORTIZ to record two albums during its initial one-

year term, with options to renew.

5. Also, on or around October 2009, ORTIZ signed a publishing agreement with DEL PUBLISHING, LLC ("2009 Publishing Agreement"). Similarly, the publishing agreement did not contemplate live performances by ORTIZ.

6. Despite the lack of a talent agency license or contract, between 2009 and 2012, Respondents booked live performances for ORTIZ and charged ORTIZ commissions for those booking services. ORTIZ paid commissions at a rate of at least twenty five percent (25%) for this time period, as admitted by Respondents in their Closing Brief.

7. On March 14, 2012, ORTIZ and DEL RECORDS, LLC entered into a new recording agreement (the "2012 Recording Agreement"). Also in March 2012, ORTIZ and DEL PUBLISHING LLC entered into an amended publishing agreement ("2012 Publishing Agreement"). As before, neither agreement contemplated live performances by ORTIZ.

8. Also On March 14, 2012, ORTIZ and DEL ENTERTAINMENT, LLC. entered into a management contract ("2012 Management Agreement") which provided that DEL ENTERTAINMENT, LLC would "execute in [ORTIZ's] name, contracts for [his] services and for [his] personal appearances as a live performer" and that DEL ENTERTAINMENT, LLC would charge ORTIZ a thirty percent (30%) commission on ORTIZ's gross earnings for all live performances.

9. With VILLAR in control of the various DEL entities, VILLAR was representing ORTIZ through his entities in the capacity of record label, publishing company, manager and importantly here, unlicensed talent agent procuring live performance jobs for ORTIZ.

10. Between 2012 and 2019, Respondents through DEL ENTERTAINMENT, INC. continued to book live performances for ORTIZ. Respondents asserted at hearing that they charged ORTIZ thirty percent (30%) commission on gross earnings for those live performances that it booked for ORTIZ. ORTIZ alleges that he was likely charged more than thirty percent (30%) commissions, as the gross revenues were never shared with him. ORTIZ never received accountings of cash revenue at live performances, and alleges DEL overpaid themselves commissions.

11. DEL ENTERTAINMENT, INC. is a corporate entity formed by VILLAR in 2014 through the converting out of DEL ENTERTAINMENT, LLC into a corporation with the California Secretary of State on January 14, 2014.

12. DEL PUBLISHING, LLC was VILLAR's publishing company which ORTIZ signed to for music publishing. VILLAR later converted DEL PUBLISHING, LLC out into DEL PUBLISHING, INC. with the California Secretary of State on or around January 14, 2014.

13. DEL RECORDS, LLC was VILLAR's record company which ORTIZ signed to for sound recordings. VILLAR later converted DEL RECORDS, LLC out into DEL RECORDS, INC. with the California Secretary of State on or around January 14, 2014.

14. Only in August 2014 did DEL ENTERTAINMENT, INC. become licensed as a talent agency in California by the California Labor Commissioner's Office (also known as Division of Labor Standards Enforcement, Department of Industrial Relations, State of California).

15. Thereafter, on October 18, 2018, the Labor Commissioner approved a schedule of fees for DEL ENTERTAINMENT, INC. which stated: "The maximum rate of fees due this talent agency for services rendered to the artist is TWENTY (20%) of the total earnings paid to the artist managed by this talent agency."

16. On February 1, 2019, counsel for Respondent sent a letter to counsel for Petitioner announcing the termination of all agreements between the DEL entities and ORTIZ.

17. On May 20, 2019, the parties entered into an agreement to toll the applicable statute of limitations.

III. ISSUES

1. Did Respondents violate Labor Code section 1700.23 by taking a commission which was unfair, unjust and oppressive to ORTIZ?
2. If Respondents violated the TAA, is the appropriate remedy to void the "2012 Management Contract" and all oral and written agency contracts *ab initio* or sever the offending practices per *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974?
3. If the contracts are ruled *void ab initio*, is disgorgement appropriate, and if so, what amount should be disgorged?

IV. LEGAL ANALYSIS

The burden of proof in actions before the Labor Commissioner is found at Evidence Code section 115, which states, "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evidence Code §115.) "[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, 1051-52). "'[P]reponderance of the evidence standard . . . simply requires the trier of fact' to believe the existence of a fact is more probable than its nonexistence.'" (*In re Michael G.* (1998) 63 Cal.App.4th 700, 709, fn 6).

The subject matter jurisdiction of the Labor Commissioner is confined to disputes that are governed by the TAA. Here, we have a dispute between a talent agent as defined by Labor Code section 1700.4(a) and an artist as defined by Labor Code section 1700.4(b) concerning whether the talent agent took unfair, unreasonable and oppressive commissions from the artist.

A. Respondents Acted as an Unlicensed Talent Agent by Procuring Live Performances for Petitioner and Taking Commissions Before Becoming Licensed.

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." It is undisputed that DEL ENTERTAINMENT, INC f.k.a. DEL ENTERTAINMENT, LLC did not become a licensed talent agency until August of 2014. Before that, Respondents were without a license to procure live performance employment for an artist as defined under the TAA. Despite that, Respondents did just that.

A manager may counsel and direct artists in the development of their professional careers, or otherwise "manage" artists – while avoiding any procurement activity (procuring, promising, offering, or attempting to procure artistic employment of engagements) – without the need for a talent agency license. In addition, a manager may procure non-artistic employment or engagements for the artist without the need for a license. (*Styne v. Stevens* (2001) 26 Cal.4th 42).

An agreement that violates the licensing requirements of the TAA is illegal and unenforceable. "Since the clear object of the Act is to prevent improper persons from becoming

[talent agents] and to regulate such activity for the protection of the public, a contract between an unlicensed [agent] and an artist is void." (*Buchwald v. Sup. Ct.* (1967) 254 Cal.App.2d 347, 351).

Until 2014, Respondents were not licensed as talent agents. To ascertain whether VILLAR and his entities violated the licensure requirement of Labor Code section 1700.5 we must determine whether he engaged in any of the talent agency activities delineated in Labor Code section 1700.4. A talent agent is a corporation or person who *procures, offers, promises, or attempts to procure employment or engagements for an artist or artists*. (See Labor Code § 1700.4(a), emphasis added). An unlicensed talent agent who performs such activities does so in violation of the TAA. The Labor Commissioner has ruled, "[p]rocurement could include soliciting an engagement; negotiating an agreement for an engagement; or accepting a negotiated instrument for an engagement." (*McDonald v. Torres*, TAC 27-04; *Gittelman v. Karolat,* TAC 24-02). "Procurement" includes any 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 or who finalized the deal. (*Hall v. X Management*, TAC 19-90).

Here Respondents violated the TAA by acting in the capacity of a licensed talent agent without a license by procuring live performances for Petitioner on numerous occasions and taking commissions of at least thirty percent (30%). This pre-license procurement by Respondents was in violation of the Talent Agencies Act.

B. Once Respondents Secured a Talent Agency License, They Continued to Violate the TAA, Specifically Labor Code section 1700.23 By Charging Unfair and Unreasonable Commissions Above 20%.

Respondents seem to believe that acquiring their talent agency license from the Labor Commissioner in California in 2014 ends the inquiry as to their alleged violations of the TAA. Unfortunately, despite acquiring a license and having a form contract approved by the California Labor Commissioner, Respondents continued to violate the TAA.

Labor Code section 1700.24 states the following:

> Every talent agency shall file with the Labor Commissioner a schedule of fees to be charged and collected in the conduct of that occupation, and shall also keep a copy of the schedule posted in a conspicuous place in the office of the talent agency. Changes in the schedule may be made from time to time, but no fee or change of

> fee shall become effective until seven days after the date of filing thereof with the Labor Commissioner and until posted for not less than seven days in a conspicuous place in the office of the talent agency.

(Lab. Code §1700.24.) As discussed above, in October 2018 the Labor Commissioner approved a maximum commission rate of "TWENTY (20%) of the total earnings paid to the artist manage by this talent agency."

Despite this, DEL admits in its closing brief: "During the relevant time period, Del Entertainment booked Ortiz's shows, collected Ortiz's earnings, took up to thirty percent (30%) total commission for its talent agency and personal management services, and disbursed the rest to him." (*Defendant's Closing Brief*, pg. 6, lines 11-13, see Footnote 6.) The double dipping on management and talent agency commissions is in clear violation of the Labor Commissioner's approved commission rate for DEL, which is a clear violation of Labor Code section 1700.24, and the Talent Agencies Act generally.

C. The Statute of Limitations is Not Relevant Here as a Defense.

Respondents attempt to seek cover behind the TAA's one-year statute of limitations. Labor Code §1700.44(c) provides that "no action or proceeding shall be brought pursuant to the Talent Agencies Act with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding." Yet, Petitioner's filed their Petition in response to Respondents Superior Court contract action to enforce rights under the same contract. Thus, Petitioner does not seek to void this contract affirmatively, but rather as a defense.

In *Styne v. Stevens* (2001) 26 Cal.4th 42, the court held, "that statutes of limitations do not apply to defenses...." 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. (*Id.*) The rule applies in particular to contract actions, such as this one. 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. (*Styne, supra* at p. 51; see also 3 Witkin, Cal. Procedure (4th Ed. 1996) Actions, § 423, p. 532; see also *Park v. Deftones* (1999) Cal.App.4th 1465.) That said, disgorgement should be limited to a one-year look back per

Labor Code section 1700.44(c).

D. If Respondents violated the TAA, is the appropriate remedy to void the oral management contract *ab initio* or sever the offending practices under *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974?

Respondents argue that ruling the contracts *void ab initio* is not appropriate, and instead severance should be asserted to sever out any illegal terms. (See *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal. 4th 974.) This does not make sense here in the face of the facts at hand. Here, the violations were outside of the four corners of any specific agreement or contract. Instead, Respondents violated the TAA by taking commissions above and beyond those approved by the Labor Commissioner in the schedule of fees submitted by Respondent to her.

Respondents admitted in their closing brief that they took commission above and beyond the amount authorized by the Labor Commissioner in its approved schedule of fees. Beyond Labor Code section 1700.24, this is also in clear contravention and violation of Labor Code section 1700.23, taking unfair, unreasonable and oppressive amounts of commission from Petitioner by relying on multiple agreements. While there is nothing wrong with a licensed agent wearing multiple hats for an artist, such an agent cannot take separate commissions for each hat that they wear.

As historically applied by the Labor Commissioner, commissions that exceed 20% are unfair, unjust and oppressive to the artist within the meaning of Labor Code section 1700.23. Bad faith violations outside of specific terms of an agreement are not those appropriate for severance. (See *Ciccati et al. v Artist Logic, Inc.* (TAC No. 44-85) [ruling an oral and written agency agreement *void ab initio* where agent performed unlicensed talent agency services for only a period of time but thereafter continued to violate the TAA]; *North v. SJV Management et al.* (TAC No. 23-01) [declaring management agreement *void ab initio* where manager performed talent agency services thereunder without a license for only a period of time].) The agency agreements are ruled *void ab initio*, severance is not appropriate.

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E. The Amount of Disgorgement Cannot Be Ascertained Due to Respondent's Refusal to Provide Records, As Such the Labor Commissioner Orders an Accounting.

Where contracts are ruled *void ab initio* by the Labor Commissioner, the remedy of disgorgement is usually appropriate, and is ruled appropriate here. Unfortunately, due to Respondents failure to produce appropriate records, Ortiz was unable to carry his burden of what amounts should be disgorged, so while disgorgement is ordered, an accounting is appropriate first.

Labor Code section 1700.25(b) requires an agent to maintain records of all funds received on behalf of an artist and records that show disposition of those funds. The evidence shows that Respondents either never maintained these records in violation of the act, destroyed those records or simply refused to provide them to Petitioner. Labor Code section 1700.27 requires that all records required to be maintained by the agency shall be available to the artist. While Petitioner's may not have issued subpoenas, there was no excuse for Respondents, as licensed agents, to refuse to act in good faith in these proceedings and provide the documentation required under the Act.

While Ortiz went so far as to hire an accountant to audit what documents they were able to obtain, the accountant admits in his report that his findings are speculative as Respondent failed to provide appropriate documentation. The numbers provided are thus based on speculation, leaving an accounting as appropriate. Ordering an accounting is appropriate where a fiduciary relationship exists, such as between an agent and an artist under the TAA. (*Jolley v Chase Home Fin., LLC.* (2013) 213 Cal.App.4th 872, 910; *Prakashpalan v Engstrom, Lipscomb & Lack* (2014) 221 Cal.App.4th 1105, 1136; see also *Borcia v. Lester*, TAC-41839.)

Labor Code section 1700.27 requires a talent agent to "make such reports as the Labor Commission prescribes." Pursuant to Section 1700.27, as such it is appropriate for the Labor Commissioner to order an accounting. Such an accounting is ordered here, see order below.

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IV. ORDER

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

1. Respondents violated the Talent Agencies Act by acting as an unlicensed agent in the procurement of live performances for Petitioners between 2009 and 2014.
2. Respondents violated the Talent Agencies Act by taking unfair, unreasonable and oppressive commissions of thirty percent (30%) from 2009 to 2019, both while unlicensed and later while licensed.
3. Any and all agency contracts and the "2012 Management Agreement" between Petitioner and Respondents are ruled *void ab initio*.
4. All commissions received by Respondents, as well as all other amounts of money retained by Respondents from monies collected for Petitioners, within one year of the filing of the petition (August 7, 2018, through August 7, 2019) are hereby ordered to be disgorged.
5. Per Labor Code section 1700.27, the Labor Commissioner orders Respondents to make a true accounting of all amounts received on behalf of Petitioners for live performances, and all amounts they have paid or retained of those funds within one year of the filing of the petition (August 7, 2018, through August 7, 2019). This accounting is to be served on both to the Labor Commissioner through the undersigned attorney appointed to hear the matter, as well as counsel for Petitioners by email no later than sixty (60) days from the issuance of this determination. This accounting must include all documentation that the accounting is based thereupon in relation to Respondents' live performances including but not limited to: venue settlements, box office settlements, promoter settlements, proof of payment of deposit before performance, amounts paid to Petitioners, receipts for cash paid to Petitioners, all venue agreements, and proof of payment of fees to other artists.

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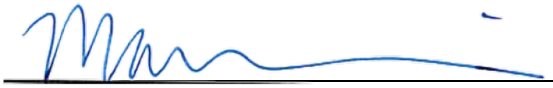
Dated: October 1, 2024



MAX NORRIS
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: October 1, 2024

LILIA GARCIA-BROWER
California State Labor Commissioner