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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

BRENDAN O'BRIEN, an individual, *Petitioner*, *v*. LISA MARIE, an individual; MARIE MUSIC GROUP, LLC, a California limited liability company, f/k/a Moir-Marie Entertainment, LLC, *Respondents*.	Case No. - TAC 52848 **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

On July 26 and August 31, 2023, 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 BRENDAN O'BRIEN, an individual ("Petitioner"), appeared and was represented by Edwin F. McPherson of McPHERSON LLP. Respondents LISA MARIE, an individual; MARIE MUSIC GROUP, LLC, a California limited liability company, f/k/a Moir-Marie Entertainment, LLC (collectively, "Respondents"), appeared and were represented by Jeffrey G. Huron and Thi Hoang Ho of DYKEMA GOSSETT LLP.

Petitioner and Respondents submitted their post-hearing briefs on December 1, 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 is a music producer, songwriter, and mixer who has worked in the music industry for approximately 35 years. He has worked with musical performers like Pearl Jam, Stone Temple Pilots, Bruce Springsteen, Rage Against the Machine, and Soundgarden, among others.

2. As a producer of recordings, Petitioner was responsible for the beginning of a recording until its completion. This included arranging the songs on an album and ensuring he obtained the right musicians for the project. As a songwriter, he contributed to songs or helped write them. Petitioner referred to the profession of a mixer as being "its own skill." Once a record was completed, a mixer, like Petitioner, would arrange all the music, tracks, and the sound so it was balanced and appealing to the "ears" of those who wanted to hear the record.

3. Respondents were a reputable and well-established company in the music business that represented producers, mixers, and songwriters. Respondent LISA MARIE joined the company in 1989 when Steve Moir was still working with the company and became a partner in 1995 or 1996. In addition to representing Petitioner, Respondent LISA MARIE represented clients who had worked with musical performers like Madonna, Nirvana, and Limp Bizkit, among others.

4. Respondents were not licensed talent agents under Labor Code section 1700.5.

5. In or around 1993 or 1994, Petitioner hired Steve Moir as his manager because he needed someone to "handle the deals" and "the negotiations."

6. On January 11, 1995, Petitioner and Respondents entered into an agreement (the, ("Agreement") where Petitioner agreed Respondents would serve as Petitioner's personal manager in the music industry. As compensation for Respondents' services, Petitioner agreed to pay Respondents 10 percent of gross income received by Petitioner or for "57 Records" projects.

7. Petitioner had a company called 57 Records, which used to be a record company with Sony Music. 57 Records could be a signatory in agreements where the intention was to sign an artist to that record label. Petitioner made 57 Records his loan-out corporation in or around 1999.[1] 57 Records is not a party to this proceeding.

8. According to the Agreement, Respondents would be compensated for Petitioner's services on recording projects "pursuant to agreements approved by [Petitioner] substantially negotiated during the Term." Respondents would also be entitled to their commissions "in perpetuity" even if the Agreement was terminated. Petitioner signed the Agreement on behalf of himself and "57 Records, Inc."

9. On December 9, 2003, the parties amended their Agreement via a document entitled, "Amendment to the Management Agreement." This amendment included a section, stating:

> MME [Moir/Marie Entertainment, LLC] (and MME's members, employees and managers) shall not negotiate any deals or agreements or potential deals or agreements for O'Brien or O'Brien's company(ies) (including, without limitation, Fifty Seven Records) from the date of this Amendment and thereafter without obtaining first O'Brien's prior written consent in each instance (which O'Brien may communicate by email or other written media), it being agreed that MME is authorized to continue any negotiations or discussions concerning the current deals of Incubus, Graham Colton and Counting Crows.

10. At some undetermined date, whether on December 9, 2003 or anytime thereafter, Petitioner crossed out this section and initialed the same. Petitioner testified he did not recall the

[1] A loan-out corporation is a professional services corporation created by an artist for tax purposes. "Under this arrangement, a corporation will enter into an agreement with a studio to "'loan'" the artist to the production." (*Creative Artists Agency, LLC v. Vagrant, Inc.*, TAC Case No. 50209, at 2 (April 19, 2021).)

circumstances regarding his crossing out and initialing of this section.

11. While Respondents represented Petitioner, Petitioner would obtain opportunities for himself in different ways. For example, because Respondents were a reputable company, artists could contact Respondents directly about hiring Petitioner. However, because Petitioner was a well-known producer in the music industry, artists, including those who worked with him prior to the Agreement with Respondents, could contact Petitioner directly about working on a project. If Petitioner met with a musical performer to discuss the creative aspects of a project, he would then direct that performer to call Respondents or Petitioner would contact Respondents himself to discuss the potential project.

12. At the point Respondents were made aware of a potential project involving Petitioner, Petitioner and Respondent prepared a recording budget which was shared with the record company, or the record label, for approval. Once the recording budget was approved, Respondents would prepare a "deal memo" for the project. Subject to a few exceptions, deal memos were prepared for all of Petitioner's projects.

13. The deal memos included material terms such as whether and what amount Petitioner would receive as an advance for his services. They also included the number of points Petitioner would receive, which stemmed from the number of points an artist, *e.g.*, Pearl Jam, would receive based on sales generated by the record. The deal memos further included the scope of services Petitioner would provide, and the credits acknowledging Petitioner's work and how those credits would be organized.

14. At the time Respondents represented Petitioner, Petitioner would customarily receive four points or eight points if he was hired to produce a record. However, he would ask for three points if he worked with bands he previously collaborated with before Respondents represented him. Petitioner also received anywhere from one to two points when he worked as a mixer on a record project. In addition, throughout the course of Respondents' representation, Petitioner first requested either $50,000 or $75,000 as an advance, later increasing that amount to $100,000 or $125,000. The information included in the deal memos varied depending on the scope of services Petitioner

provided as either a mixer or producer and the number of songs he was expected to work on.

15. Respondents, including Respondent LISA MARIE, would include the terms in a deal memo. Once the deal memo was finalized, Respondent LISA MARIE or her staff would send the deal memo via fax to the artist's manager or other representative, *e.g.*, their attorney, for that representative's signature. Petitioner presented approximately 29 deal memos as exhibits. For these 29 deal memos, Respondent LISA MARIE was listed as the person who sent them to the artist's authorized representative for their signature on at least 27 occasions.

16. Respondent LISA MARIE testified the deal memos reflected all the terms Petitioner wanted included. Respondent LISA MARIE further testified she was "outlining" or "specifying" Petitioner's wishes.

17. Respondents would subsequently fax the deal memo to attorney, Jim Goodkind ("Goodkind"), after the artist's manager or attorney signed the deal memo. Respondents would include on their fax coversheet the artist's attorney's contact information so Goodkind, who previously worked with Petitioner and Respondents on music deals, could follow-up with that artist's attorney to negotiate what the parties referred to as the "long-form agreements."[2]

18. The long-form agreements included the terms of the deal memo and, relevant here, an exhibit or addendum referred to as a *letter of distribution*. An artist who worked with Petitioner would use the letter of distribution to direct the record company to pay Petitioner to produce or mix the album.

19. Respondent LISA MARIE testified she was in "constant communication" with Goodkind during the time he worked on the long-form agreements.

20. **The Korn Long-form Agreement.** The long-form agreements were between Petitioner and the artist with whom Petitioner worked. For example, in one long-form agreement

[2] Petitioner offered 71 exhibits in support of his position that Respondents violated the TAA. By the hearing officer's count, Petitioner's 71 exhibits reflect a combination of deal memos and/or long-form agreements. Approximately 56 long-form agreements are included in the 71 exhibits. Based on the hearing officer's review, it appears Petitioner's company, 57 Records, was included in multiple long-form agreements before it became a loan-out corporation in 1999. (See, *e.g.*, Petitioner's Exhibit Nos. 7, 10, 13.) The Petition only names Petitioner, Brendan O'Brien, an individual, and Petitioner did not include in his Petition any allegations of TAA violations by 57 Records. Accordingly, our findings here consider Petitioner Brendan O'Brien, an individual, only and do not extend to 57 Records.

dated May 11, 1998 with the band, Korn, Petitioner agreed to render his services as the "mixer" of up to 18 master recordings to constitute one record. This agreement referenced a separate agreement between Korn and the record company, Immortal Records. The long-form agreement also included an "Exhibit B," or a Letter of Distribution, where Korn instructed the Distributor, Sony Music, to pay Petitioner an advance and a royalty based on the net sales of the record. Neither Immortal Records nor Sony Music were signatories or parties to the agreement between Petitioner and Korn.

21. **The Flying Tigers Long-form Agreement.** On or around October 3, 2001, Petitioner entered into an agreement with the artist, "Flying Tigers," where he was contracted to produce and mix up to 12 master recordings for a record capturing the musical performances of the artist. This agreement referenced a separate agreement between Flying Tigers and the record company, Atlantic Recording Corporation. The long-form agreement with Petitioner provided he would be paid royalties and included an "Exhibit A" where Flying Tigers directed Atlantic Recording Corporation to pay Petitioner $100,000. Atlantic Recording Corporation was not a signatory or party to the long-form agreement between Petitioner and the Flying Tigers.

22. **The Offspring Long-form Agreement.** On or around October 12, 2001, Petitioner entered into an agreement with the band, The Offspring ("Offspring"), where he was contracted to produce and mix the master recording entitled, "Defy You," "embodying their musical performance." The master recording would also be included in the soundtrack of a movie. This agreement referenced a separate agreement between Offspring and Sony Music Corporation. The long-form agreement with Petitioner included a Letter of Distribution where Offspring authorized Sony Music Entertainment, Inc. to pay Petitioner $15,000 over two installments, a royalty of 0.667% for the soundtrack, and varying royalty rates based on record sales in the different countries in which the record was sold. Sony Music Corporation, Inc. was not a signatory or a party to the long-form agreement between Petitioner and Offspring.

23. In addition to preparing deal memos for Petitioner, Respondent LISA MARIE monitored his calendar to ensure he arrived at appointments in a timely manner. She counseled him on improving his relationships with record company executives, and advised him on whether

working with certain artists would be good for his career or whether songs he received from artists to produce would become number one hits. Respondent LISA MARIE also worked to expand the genres of music in which Petitioner worked, advised him on how to work with different personalities within the industry, located people Petitioner wanted to work with on a particular album, and helped him grow his career.

24. Respondent LISA MARIE stopped providing services for Petitioner in 2004. On June 3, 2005, Petitioner sent Respondent LISA MARIE a letter terminating their relationship. Petitioner continued to pay Respondent LISA MARIE her commissions until late 2019.

Relevant Procedural Background

25. Petitioner filed his *Petition to Determine Controversy* ("Petition") on November 8, 2021.

26. On December 27, 2021, Respondents moved to dismiss the Petition on the basis that, *inter alia*, the statute of limitations under Labor Code section 1700.44(c) barred Petitioner's Petition. On April 20, 2022, Petitioner filed his opposition to Respondents' motion to dismiss, followed by Respondents' reply on May 2, 2022.

27. On March 22, 2023, the hearing officer issued an Order where she denied, in part, Respondents' motion to dismiss based on *Styne v. Stevens* (2001) 26 Cal.4th 42 ("*Styne*"). *Styne* held that, "[u]nder 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* at 51.) In her Order, the hearing officer further stated that, in applying *Styne*, the one-year statute of limitations under Labor Code section 1700.44(c) does not prevent a party from relying upon the Talent Agencies Act ("TAA" or the "Act") as a defense to contract actions that would render the contract unenforceable.[3]

28. Respondents filed their Answer to Petitioner's *Petition* on or around April 11, 2023.

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[3] Respondents did not renew this statute of limitations defense as part of their closing arguments during the hearing or in their Post-Hearing Brief. Thus, the hearing officer does not reconsider this argument here.

III. ISSUES

1. Is Petitioner considered an "artist" as defined pursuant to Labor Code section 1700.4(b)?

2. Does the recording contract exemption under Labor Code section 1700.4(a) apply in this matter?

3. If the recording contract exemption does not apply, did Respondents procure employment in violation of the TAA?

4. If Respondents violated the TAA, 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?

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 a preponderance of the evidence." (*McCoy v. Bd. of Ret.* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) The "'preponderance 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. Is Petitioner an "artist" pursuant to Labor Code section 1700.4(b)?

The Act has long been considered a remedial statute. "Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subject of both legislative action and judicial decision. . . Such statutes are enacted for the protection of those seeking employment." (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 350)("*Buchwald*").) "Consequently, the [A]ct should be liberally construed to promote the general object sought to be accomplished; it should not be construed within narrow limits of the letter of the law.'" (*Waisbren v. Peppercorn Prods., Inc.* (1995) 41 Cal.App.4th 246, 248)("*Waisbren*").)

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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.

We have previously discussed the legislative intent of the term, "artist."

> [W]e believe the Legislature intended to limit the term artists to those individuals who perform creative services in connection with an entertainment enterprise. Without such a limitation, virtually every person rendering professional services connected with an entertainment project . . . would fall within the definition of artists. We do not believe the Legislature intended such a radically far reaching result. [Emphasis in original.]

(American First Run Studios v. Omni Entertainment Group, TAC Case No. 32-95, at 5 (April 8, 1996)("*American Run*"); see also *Bluestein v. Production Arts Management*, TAC Case No. 24-98, at 5 (November 3, 1999)("*Bluestein*").)

In an *Order on Respondent's Motion for Summary Judgment, or Alternatively, for Summary Adjudication* in the case, *Chris Lord Alge v. Moir/Marie Entertainment, LLC*, TAC Case No. 45-05, at 2 (January 22, 2007) ("*Lord Alge I*"), the same respondents in this matter asked us to find that petitioners, Chris Lord Alge and Thomas Lord Alge, were not artists within the meaning of the Act. Respondents in that case argued the Alge brothers, who were "mixers," and "re-mixers," were not artists within the meaning of the TAA thus warranting the granting of respondents' motion for summary judgment, or alternatively, for summary adjudication. (*Id*.)

Applying *American Run* and *Bluestein*, we found that petitioners in the *Lord Alge I* case were artists under the Act because "the services they provide are primarily 'creative.'" (*Id*. at 5.) After considering petitioner's declaration on the issue, we noted that a mixer "decides which performance is the most appropriate for the overall recording and makes the necessary changes." (*Id*. at 6.) Furthermore, we determined the petitioners in *Lord Alge I* were not engaging in de minimis creative input and that every decision they made regarding the recording of a song "is based on their continuous creativity." (*Id*.) "A mixer's skill lies in selecting the right combination and making the

right modifications and arrangement to create a sound recording that is most likely to be appealing and ultimately result in a hit song or record." (*Id*.) In finding petitioners were artists under the TAA, we also found it compelling that the petitioners were in "high demand by musicians such as Phil Collins, Eric Clapton . . . Bruce Springstein [sic] . . . to name a few." (*Id*.) "Obviously petitioners are viewed as two of the most creative and skilled 'mixers' . . . in the music industry. If their services were purely technical . . . then they wouldn't be in such high demand." (*Id*. at 7.)

Respondents claim Petitioner is not an artist under the TAA, in part, because he testified during the hearing that he did not consider himself an artist. However, the TAA, its legislative history, and the cases that discuss the definition of "artist" under the TAA differ when compared to who may be considered an "artist" in the music industry. Applying *American Run*, *Bluestein*, and *Lord Alge I*, we find Petitioner is an "artist" for purposes of Labor Code section 1700.4(b) because, as a mixer and producer, Petitioner contributed his creative services on a continuing basis to the recording projects in which he was involved. As a producer, Petitioner was responsible for the entire completion of the record, which included arranging the songs on an album and ensuring he obtained the right musicians. As a mixer, Petitioner was responsible for arranging all the music, the tracks, and sound to the album. Both Petitioner and the petitioners in *Lord Alge I* acknowledged the role of a "mixer" required a certain amount of skill, which lies in arranging the music on a record to create a final product, or album, that is appealing to the listener and hopefully results in a hit song. Also, like *Lord Alge I*, we find compelling that Petitioner was in such high demand that he worked with musical performers like Bruce Springsteen, Rage Against the Machine, and Pearl Jam, to name a few. Finally, as discussed above and in *Lord Alge I*, we liberally construe the TAA to promote the protection of Petitioner who was hired to work on recording projects. (See *Id*. at 7; see also *Waisbren*, *supra*, 41 Cal.App.4th at 248.)

C. Does the recording contract exemption under Labor Code section 1700.4(a) apply?

Labor Code section 1700.4(a), provides, in part:

> Talent agency means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter.

The recording contract exemption serves as an exception to the requirement that a person or corporation be a talent agent under section 1700.4(a) if that person's or corporation's activities of procuring, offering, or promising were to procure a recording contract for an artist.

Petitioner urges us to apply our conclusion in *Lindsey v. Lisa Marie*, TAC Case No. 28811 (August 5, 2014) ("*Lindsey*") where we determined that two engagements involving the same respondents in this matter did not fall within the recording contract exemption of the Act. Conversely, Respondents request we find, consistent with the reasoning in our *Order on Respondents' Motion to Dismiss* in *Chris Lord Alge v. Moir/Marie Entertainment, LLC*, TAC Case No. 45-05 (June 3, 2008) ("*Lord Alge II*"), that Petitioner's contracts are "recording contracts" under section 1700.4(a) of the TAA, and thus, exempt from the TAA's requirements.

We address this issue by first turning our attention to the discussion in *Eric Podwall v. William "Smokey" Robinson, Jr.*, TAC Case No. 45605 (June 22, 2018) ("*Podwall*"), followed by a review of the *Lord Alge II* and *Lindsey* cases.

In *Podwall*, we discussed whether petitioner, a manager who was not a licensed talent agent under the Act, was required to obtain a license for a recording agreement he helped obtain for the artist, Smokey Robinson and Verve Records. (*Id*. at 5.) Like *Lord Alge II* and *Lindsey*, we considered the legislative history of the TAA but did so by first evaluating Assembly Bill ("AB") 2535, which was passed during the 1977-1978 Legislative Session and was eventually adopted as the Talent Agencies Act of 1978. (*Id*. at 14.) We began by observing that:

> [AB 2535] . . . was introduced in order to bring Booking Agents, including Musician Booking Agencies and Personal Managers, under the jurisdiction of the Labor Commissioner; to change the name of the Act and definition of Artists' Manager to Talent Agencies; and to license Personal Managers. (internal citations omitted.)

(*Id*.)

The bill defined a "talent agency" to "be a person or corporation who engaged in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists." (*Id*.) We further noted that, during the legislative session, the Conference of Personal Managers proposed several amendments to the bill including the following:

> Any person may procure for an artist an agreement for recording, producing, manufacturing, distributing or selling records or tapes or any agreement for the composing or publishing of musical compositions.

(*Id*. at 14-15)(internal citations omitted.)

The final bill, which became the TAA, did not include this proposed amendment. (See *Id*.) We found significant the Legislature's rejection of the Conference of Personal Manager's request to broaden the definition of who could procure an agreement for an artist in the recording context. (*Id*. at 15.) By rejecting the proposed definition which would have included, "producing, manufacturing, distributing or selling records or tapes . . .," we determined the Legislature's intention was to limit, not broaden, the exemption to "recording." (See *Id*.) We determined the recording contract exemption applied based on a narrow interpretation and given the facts of the case. (*Id*. at 15) Specifically, the recording contract exemption applied in *Podwall* because the personal manager's work involved a recording agreement between Smokey Robinson and Verve Records. (*Id*.)

In *Lord Alge II*, we granted respondents' motion to dismiss on the basis that the recording contract exemption applied. The petitioner artists in *Lord Alge II* claimed a recording contract "means only a contract" under which a performing and recording artist, *e.g.*, a lead vocalist, agrees to deliver new recordings of their own performances. (*Lord Alge II*, *supra*, TAC Case No. 45-05, at 3.) We disagreed with petitioners, concluding that petitioner artists' "mixing" and "re-mixing" talents were "an equally integral part of the creative force behind the master recordings they helped to create." (*Id*. at 2.) In support of this position, we discussed the California Entertainment Commission ("CEC") who, in 1982, was created by the Legislature to review and recommend any appropriate changes to the Act, including whether changes should be made regarding the exemption for those who procure recording contracts for an artist. (*Id*. at 3.) The CEC recommended no change should be made to the present language of the Act exempting procurement of recording contracts, but recognized that many artists in the recording industry retain personal managers, not talent agents, to act as intermediaries and negotiate for a recording contract. (*Id*.) The CEC recognized the problems associated with licensing or regulating procurement in the recording industry given the "ambiguities, intangibles and imprecisions of the activity." (*Id*.) The CEC concluded, however, that

the industry was better served "resolving these ambiguities on the side of preserving the exemption of this activity from the requirements of licensure." (*Id*.)

In addition, we found significant the Legislature's decision to leave the exemption's reference to "artist" unchanged, recognizing the CEC had an opportunity to "narrow the exemption to cover only those artists who deliver new recordings *of their own performances*," as petitioners in *Lord Alge II* argued. (*Id*. at 3-4.) Accordingly, because the Legislature did not narrow the exemption to only cover artists who deliver recordings of their own performances, we concluded petitioners' services made them integral players such as other artists like a lead vocalist. (See *Id*. at 4-5.) Thus, we concluded, the contracts petitioners contended respondents procured for them were "recording contracts" within the meaning of Labor Code section 1700.4(a). (*Id*. at 5.)

As part our review, we also determined the contracts petitioners claimed respondents procured for them to be "recording contracts" because the contracts were, in fact, "actual recording contracts between [p]etitioners and various recording companies" such as, *e.g.*, contracts between petitioners and Maverick Recording Company, Inc., Warner Bros. Records, Inc., and Sony Music Entertainment. (*Id*.)

In *Lindsey*, *supra*, TAC Case No. 28811, the same respondents in this matter again asked us to conclude that the recording contract exemption under the Act applied to engagements they procured. The facts in the *Lindsey* decision involved petitioner artist, Steve Lindsey, who entered into two different agreements to produce a record for the band, Guster, (the, "Guster Deal"), and separately, an album as a songwriter and record producer for trumpeter and composer, Chris Botti (the, "Botti Deal"). (*Id*. at 3-5.) We found significant the similarities between the Guster and Botti Deals. First, the record companies, who distributed the albums, were neither a party nor signatory to the Guster or Botti Deals. (See *Id*.) Second, the royalties or earnings promised to Lindsey in both agreements were based on royalties the band or composer received pursuant to agreements each artist had with their respective record companies. (See *Id*.) Third, the facts in *Lindsey* showed there were separate recording agreements (apart from the Guster and Botti Deals) between the band, Guster, and trumpeter and composer, Chris Botti, with their respective record companies. In

addition, we concluded the Guster and Botti Deals required petitioner Lindsey to provide services for the production of master recordings for the artists with whom he worked. (See *Id*. at 7.)

In *Lindsey*, we discussed the legislative history of the Act by referring to the CEC who was formed to study the "efficacy of the [recording contract] exception." (*Id*. at 8.) In affirming the need for the recording contract exemption, we discussed the CEC's rationale for keeping the exemption in place by recognizing that a recording contract is an "employment contract of a different nature from those in common usage in the industry involving personal services." (*Id*.) *Lindsey* concluded the importance of the legislative history is that it appeared "the intent of the recording contract exemption was to exempt the act of negotiating recording contracts between artist and the recording companies," and not agreements for personal services between artists and producer/artists. (*Id*. at 9.) Stated differently, we concluded the Guster and Botti Deals were not recording contracts under the Act because they were agreements for personal services with the band, Guster, and trumpeter and composer, Chris Botti, and did not include their respective record companies as parties or signatories to these personal service contracts. We found equally compelling that there were separate agreements in place between the artists and their recording companies, and that Lindsey's earnings were based on royalties Guster or Botti received pursuant to the agreements between them and their respective record companies. In sum, we chose not to "expand the purview of the Act's exemption to encompass contracts for personal services between artists and producer/artists." (*Id*. at 9.)

The *Lindsey* case also acknowledged that any exemptions to the Act must be narrowly construed when it stated:

> The Talent Agencies Act has long been construed by the courts as a remedial statute intended for the protection of artists. '[T]he clear object of the Act is to prevent improper persons from being [talent agents] and to regulate such activity for the protection of the public. . . (internal citations omitted) As with all remedial legislation, exemptions must be **narrowly construed** and cannot be extended beyond their express provision. To do otherwise would defeat the remedial purpose of the legislation. [Emphasis added.]

(*Id*. at 10.)(internal citations omitted.)

Applying *Podwall*, *Lord Alge II*, and *Lindsey*, we find that the recording contract exemption does not apply to the agreements in this matter. First, in reviewing the legislative history of the TAA

based on AB 2535 in 1978 to the CEC study in 1982, we consistently found significant the Legislature's intention to limit, or leave unchanged, the recording contract exemption, including the Legislature's refusal to expand what activities could be covered under the exemption. (See *e.g.*, *Podwall*, *supra*, TAC Case No. 45605, at 15.) For example, the Legislature specifically rejected adding the activity of "producing . . . records" as an example of what a person could procure for an artist – one of the very activities Petitioner engaged in here. (See *Id*. at 14-15.) A decision finding that Petitioner's production of records falls under the recording contract exemption would contravene legislative intent and our consistent application in limiting the coverage of the exemption. (See *Lindsey* at 9.)

Second, Respondents appear to disregard that *Lord Alge II* identified specific recording contracts between petitioners and various recording companies. (See *Lord Alge II*, *supra*, TAC Case No. 45-05, at 5.) Similarly, we found the recording contract exemption applied in *Podwall* because the personal manager's work included an agreement between Smokey Robinson and the record company, Verve Records. (*Podwall*, at 5, 15.) Here, with respect to Petitioner, the evidence shows there were no deal memos or long-form agreements between Petitioner and the recording companies. All deal memos and long-form agreements involving Petitioner, as an individual, were between Petitioner and the artists with whom he worked. Respondents failed to prove otherwise.

Also, like the facts in *Lindsey*, the deal memos or long-form agreements were personal service contracts applicable to Petitioner and the musical performers for Petitioner to mix or produce master recordings for the performers. In addition, like *Lindsey*, Petitioner's earnings were based on the earnings or royalties the artists' earned. Here, artists would specifically instruct the record companies to pay Petitioner via a letter of distribution. And, like *Lindsey*, there were separate agreements between the artists Petitioner worked with and those artists' record companies.

Finally, the TAA requires us to narrowly construe the recording contract exemption. A determination to the contrary would defeat the remedial purpose of the legislation intended to protect artists. (See *Lindsey*, at 10.)

As stated in *Lord Alge II*, our conclusion here that Petitioner's agreements are not "recording

contracts" within the meaning of the Act is limited to the facts of this case. Thus, any future case where a party claims the recording contract exemption applies should be reviewed on a case-by-case basis. Here, however, we find that Petitioner's contracts are not "recording contracts" within the meaning of the Act.

D. If the recording contract exemption does not apply, did Respondents procure employment for Petitioner in violation of the TAA?

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." A talent agent is a corporation or person who procures, offers, promises, or attempts to procure employment or engagements for an artist or artists. (Labor Code § 1700.4(a).) Thus, an unlicensed talent agent who performs such activities is in violation of the TAA.

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 (July 22, 2005)("*McDonald*").) "The term "'procure,'" as used in Labor Code section 1700.4(a), means "'to get possession of: obtain, acquire, to cause to happen or be done: bring about." (*ICM Partners v. Bates*, TAC Case No. 24469, at 5 (September 18, 2017) ("*Bates*").) In addition, we have long held that procurement includes the "process of negotiating an agreement for an artist's services." (*Id*.)(citing *Pryor v. Franklin*, TAC Case No. 17 MP 114 (August 12, 1982).) Furthermore, the TAA extends to "individual incidents of procurement." (*Marathon*, *supra*, 42 Cal.4th at 988.)

In support of their position that Respondents did not procure employment for Petitioner, Respondents claim Petitioner failed to show his relationship with Respondents was "permeated and pervaded by employment activities." (See Respondents' Post-Hearing Brief, pg. 10:15-25.) Respondents also cite to examples of other services Respondents provided to Petitioner and contend there is no violation of the TAA because Respondents were "mere conduit[s]" in Petitioner's employment opportunities. (See *Id*., pg. 10-11:25-18.)

Contrary to Respondents' assertions, the evidence shows Respondents were involved with the procurement of employment for Petitioner from the inception of the Agreement and throughout

the course of Respondents' representation of Petitioner. The Agreement provides Respondents were to receive 10 percent of Petitioner's gross income in perpetuity and pursuant to agreements "substantially negotiated" during the term. From at least January 1995 to early December 2003, Respondents negotiated agreements for Petitioner's services. For at least eight years, Respondents incorporated the material terms of a deal - whether it originated with Petitioner speaking to an artist or that artist communicated with Respondents directly – into a recording budget. Once the record company approved the recording budget, Respondents prepared a deal memo for the project, which incorporated material terms such as, *e.g.*, Petitioner's advances, other compensation via a point system that translated to royalties, scope of services, and how to identify the credits for Petitioner's services. Respondents, in particular, Respondent LISA MARIE, sent the majority of the deal memos included here to the artist's authorized representative for their signature. Once signed by the artist's authorized representative, Respondents faxed the deal memo to Goodkind who would prepare the long-form agreements and incorporate the terms of the deal memo that Respondents negotiated.

Importantly, Respondent LISA MARIE testified she was "outlining" or "specifying" Petitioner's wishes and was in "constant communication" with Goodkind during the time he worked on the long-form agreements. While Respondents contend there was no variation in the deal memos because Petitioner usually had a set number of points or advance amounts he received, the hearing officer's review of the deal memos indicate there was variation in the deal memos ranging from the scope of services Petitioner would perform, the number of songs he might produce or mix, the amount of points Petitioner might receive, and/or the amounts he might receive as an advance. The evidence shows Respondents were not "mere conduits" as they otherwise argue. This is demonstrated by Respondents' active role in preparing the budget for approval, preparing deal memos for all of Petitioner's deals to include material terms such as compensation and scope of services, Respondent LISA MARIE sending the deal memos to the artist's authorized representative for signature, Respondents sending the deal memos to Goodkind, and Respondent LISA MARIE's "constant communication" with Goodkind while he prepared the long-form agreements.

In sum, the weight of the evidence demonstrates Respondents procured employment in

violation of the TAA when they negotiated and accepted Petitioner's engagements via the deal memos they prepared with Petitioner's material terms, and their subsequent communications with the artists' authorized representatives, and with Goodkind who incorporated the terms of the deal memos in the long-form agreements. (See *McDonald*, *supra*, TAC Case No. 27-04, at 8; *Bates*, *supra*, TAC Case No. 24469, at 5.) The TAA extends to "individual incidents of procurement." (*Marathon*, *supra*, 42 Cal. 4th at 988.) Here, we have at least 29 incidents of procurement via the deal memos Respondents prepared, negotiated, and sent to the artists' representatives for their signature and then to Goodkind to incorporate into the long-form agreements.

E. If Respondents violated the TAA, is the appropriate remedy to void the entire Agreement *ab initio* or sever the offending practices under *Marathon*?

In accord with *Marathon,* Respondents urge 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. However, 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, there were at least 29 incidents of unlawful procurement in violation of the TAA during Respondents' approximate ten-year representation of Petitioner. The central purpose of the Agreement as to Petitioner was tainted with illegality to the degree that it cannot be enforced. (*Id*. at 996.) Accordingly, we exercise our discretion to decline to find severance in this matter.

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F. Is Petitioner entitled to his requested relief for disgorgement and repayment of all monies?

In his Petition, Petitioner requests disgorgement and a return of all monies received by Respondents.

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 November 8, 2021. Petitioner terminated their Agreement on June 3, 2005 but stopped paying commissions to Respondents in late 2019. It is unclear from the evidence when exactly in late 2019 Petitioner stopped paying commissions to Respondents. However, assuming arguendo that it was in December 2019, Petitioner would have needed to file a valid petition by December 2020 to be able to claim disgorgement and repayment of all monies received or held by Respondents. Petitioner did not file a timely petition until nearly one year later in November 2021.[4] Thus, the Labor Commissioner denies Petitioner's request for disgorgement as untimely.

ORDER

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

1. The Agreement between Petitioner BRENDAN O'BRIEN, an individual, and Respondents LISA MARIE, an individual; MARIE MUSIC GROUP, LLC, a California limited liability company, f/k/a Moir-Marie Entertainment, LLC, is void *ab initio* under the Talent Agencies Act;

2. The Labor Commissioner takes no position regarding whether the Agreement is void *ab initio* as it relates to 57 Records.

[4] See *O'Brien v. Lisa Marie, et al.*, TAC Case No. 52848, *Order Re: Respondents' Motion to Dismiss*, issued March 22, 2023.

3. Petitioner BRENDAN O'BRIEN's request for disgorgement and repayment of any and all monies is denied as barred by the statute of limitations.

IT IS ORDERED.

Dated: December 30, 2024

Respectfully submitted,

Patricia Salazar

PATRICIA SALAZAR
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: December 26, 2024

LILIA GARCIA-BROWER
State Labor Commissioner

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