

1 EDNA GARCIA EARLEY, Bar No. 195661  
STATE OF CALIFORNIA  
2 DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF LABOR STANDARDS ENFORCEMENT  
3 320 W. 4th Street, Suite 430  
Los Angeles, California 90013  
4 Telephone: (213) 897-1511  
Facsimile: (213) 897-2877

5 Attorney for the Labor Commissioner  
6  
7

8 BEFORE THE LABOR COMMISSIONER  
9 OF THE STATE OF CALIFORNIA

10  
11 BRIAN TRANSEAU,

12 Petitioner,

13 vs.  
14

15 3 ARTIST MANAGEMENT,

16 Respondent.  
17

CASE NO. TAC 7306

**DETERMINATION OF  
CONTROVERSY**

18 The above-captioned matter, a Petition to Determine Controversy under  
19 Labor Code §1700.44, came on regularly for hearing on August 21, 2008 in Los Angeles,  
20 California, before the undersigned attorney for the Labor Commissioner assigned to hear  
21 this case. Petitioner BRIAN TRANSEAU, professionally known as BT, (hereinafter,  
22 referred to as "BT") appeared represented by Mark L. Share, Esq. of De CASTRO,  
23 WEST, CHODOROW, GLICKFIELD & NASS, INC. Respondent 3 ARTIST  
24 MANAGEMENT (hereinafter, referred to as "3AM"), appeared through its owner,  
25 Richard Bishop and was represented by Donald V. Smiley of Law Offices of Donald V.  
26  
27  
28

1 Smiley.

2 Based on the evidence presented at this hearing and on the other papers on  
3 file in this matter, the Labor Commissioner hereby adopts the following decision.  
4

5 **FINDINGS OF FACT**

6 1. BT is a musician, performer, composer, producer, and writer. He  
7 has scored the following movies: *Stealth, Fast and Furious, Monster, Go, Driven, Catch*  
8 *& Release*, among others.  
9

10 2. 3AM is owned by Richard Bishop, (hereinafter, "Bishop") who has been a  
11 manager in the music industry for over 30 years. 3AM served as BT's manager from  
12 April 1, 1998 to July, 2006, when BT terminated 3AM's services. 3AM became a  
13 licensed talent agency on October 23, 2006, and continues to be licensed. As BT's  
14 manager, Bishop testified that he was involved in all elements of BT's career from  
15 scheduling, working with BT's various agents and attorneys, helping negotiate record  
16 deals alongside BT's attorneys, and helping to place existing masters on BT's behalf.  
17

18 3. BT testified that one of the first times he met Bishop was at the House  
19 of Blues in Chicago where BT was opening for a client of Bishop's, Crystal Method. BT  
20 testified that in order to induce BT to sign Bishop as his manager, Bishop told him he  
21 could get him shows headlining of the size Crystal Method was currently headlining.  
22 Bishop also told BT he could get him much better shows than BT, a new artist at the time,  
23 was currently doing. Additionally, Bishop told BT he was "worth a lot of money" in  
24 publishing and that as his manager, Bishop could get BT huge publishing deals. BT  
25 subsequently agreed to have 3AM represent him as his manager. The parties entered into  
26  
27  
28

1 a written Personal Management Agreement as of April 1, 1998, entered into a  
2 Modification Agreement as of April 19, 2001, and entered into an Amendment Agreement  
3 as of December 30, 2003, which expired on December 31, 2006. (All three agreements  
4 hereinafter, are collectively referred to as "Personal Management Agreement").  
5

6 4. BT testified that throughout his representation by Bishop, Bishop's practice  
7 was to solicit the work for him, negotiate all the big deal points and at the very end, pass  
8 the deal to an attorney or agent to "paper" the deal. The parties explained the meaning of  
9 "papering" a deal which is to draw up the contract (paper work) for the specific  
10 engagement/ employment at issue. BT also testified that in approximately April, 2005,  
11 while the parties were in San Jose, Costa Rica, for one of BT's performances, Bishop  
12 informed him that if either BT or his other client, Crystal Method, ever got upset at him,  
13 Bishop would lose his house due to the Talent Agencies Act ("Act"). BT testified that, as  
14 his manager, Bishop mainly got him jobs, negotiated the deal points on every contract BT  
15 did while under 3AM's representation, managed BT's day-to-day scheduling, helped him  
16 make decisions about artwork related to his music, helped him hire a publicist and  
17 provided advice and counsel to BT regarding his career and personal life.  
18  
19  
20

21 5. BT alleges that 3AM, through Bishop's efforts, procured or attempted to  
22 procure the following engagements/employment opportunities for him in violation of the  
23 Act: Jensen Concert Tour, Heineken Tour, Two Music Publishing Deals, one with  
24 Warner/Chappell and one with Dreamworks/Cherry Lane, the score for a James Bond  
25 Video game, the score for a Tiger Woods video game and placed two tracks, *The*  
26 *Revolution* and *Kimosabe*, on other video games for Electronic Arts. Additionally, BT  
27  
28

1 alleges that Bishop procured and/or negotiated work for BT to score the films *Go, Driven,*  
2 *Monster, Fast and Furious, The Underclassmen,* and the television shows, *Queer Eye for*  
3 *the Straight Girl, Kevin Hill* and *Tommy Goes to College.* Lastly, BT alleges that Bishop  
4 also procured a live appearance for him on *Live 105,* a San Francisco radio station.  
5

6 Bishop denies violating the Act. Specifically, he argues that BT had talent agents  
7 at all times who were responsible for procuring the aforementioned engagements and that  
8 he worked in conjunction and at the request of these agents. Additionally, he argues that  
9 to the extent he procured work for BT, it was for the purpose of securing a recording  
10 contract or it was on work that does not fall under the Act.  
11

12 **A. Concert Tours**

13 1. Jensen Concert Tour (2002) - BT testified that Bishop went to him  
14 informing him that he found a company called Jensen who agreed to pay BT between  
15 \$250,000-\$400,000 of tour support to do a domestic tour with 30 shows. Per BT, Bishop  
16 told him that his attorney, Kurosh Nasserri ("Kurosh"), would not understand the deal and  
17 therefore, they had to do it through Bishop's wife, who is an attorney. When BT would  
18 not agree to cut his attorney Kurosh out of the deal, Bishop became angry and informed  
19 BT that the deal would go away if his wife did not "paper" it. BT subsequently agreed to  
20 do the tour with Bishop's wife "papering" the deal. BT testified that he did not make  
21 much money off the tour due to expenses and that he later found out that Bishop made  
22 \$100,000-\$150,000 in commissions on this deal, much more than the percentage Bishop  
23 was entitled to under their Personal Management Agreement. BT testified that the amount  
24 he would be paid for this tour, the number of shows and all other material terms, were  
25  
26  
27  
28

1 presented to him directly by Bishop and nobody else. When asked on cross examination  
2 if he knew whether his live concert agent at the time, Sam Kirby, arranged this tour, BT  
3 admitted that he did not know whether Kirby arranged it and that all he knew was what  
4 Bishop told him that Bishop was negotiating. Bishop testified that Sam Kirby booked this  
5 concert tour for BT and that Bishop worked in conjunction with her on this tour.  
6

7 Bishop also testified that all other live concert tours were later booked, negotiated  
8 and contracted by Phil Eagenthal, another talent agent representing BT. Bishop denies  
9 ever booking any live concert tours for BT.  
10

11 2. Heineken Tour – Bishop testified that BT’s London agents booked  
12 this tour and denied making the initial contact. Additionally, Bishop testified that his only  
13 involvement was to help with scheduling.  
14

15 **B. Music Publishing Deals – (2003-2006)**

16 Bishop testified that the principal terms of BT’s Publishing Agreements with  
17 Warner Chappell and Dreamworks/Cherry Lane were negotiated by BT’s attorney,  
18 Kurosh, and that in his 30 years of experience as a music manager, talent agents never get  
19 involved in music publishing deals because they involve work that has already been  
20 completed by the artist.  
21

22 1. Warner Chappell – BT testified that Bishop took his friend, Kenny  
23 McPherson, from Warner Chappell, to BT’s home to introduce him to BT and to inform  
24 BT that the two had been talking about getting BT a publishing deal for his third artist  
25 album, *Moving in Still Life*. Per BT, Bishop got an offer from McPherson, negotiated the  
26 terms of the offer, including the split, money and tracks and went to BT with the final  
27  
28

1 offer. BT introduced an email dated February 27, 2003 from Bishop to BT's attorney,  
2 Kurosh, stating that Bishop had spoken with Warner Chappell who was waiving both first  
3 negotiation and last right of refusal. In the email, Bishop also writes that Dreamworks  
4 wants to make a deal and wants a memo describing the proposal. Bishop then writes, "I'll  
5 work on it over the weekend." BT also testified that he was still in the process of  
6 completing the album when this deal was negotiated by Bishop. Bishop testified that he  
7 does not remember if he had the initial conversation with Kenny McPherson with regard  
8 to this deal but that this deal was made based on substantially completed work although  
9 BT may have had some additional mixing to do in the future.  
10  
11

12 2. Dreamworks/Cherry Lane – BT testified that when he and Bishop  
13 were looking for publishers for BT's album *Emotional Technology*, Bishop suggested that  
14 they contact his friend, Chuck Kaye, who was a Publisher at Dreamworks. Bishop  
15 testified that he did not recall how this publishing deal came about. He also testified that  
16 BT's attorneys would have negotiated the specific terms of this music publishing  
17 agreement. However, an email dated March 6, 2003 from Bishop to BT's attorney,  
18 Kurosh, submitted by BT, states that Bishop sat down with Dreamworks and went through  
19 the deal memo that he, Bishop, drafted earlier in the week. Bishop did not deny that he  
20 wrote this email or that any of the statements on the email were inaccurate. Rather, he  
21 testified that he simply did not recall writing the email. As with the Warner Chappell  
22 deal, BT testified that when the publishing deal for Dreamworks/Cherry Lane was  
23 negotiated by Bishop, BT was still writing and recording tracks for the album. Bishop  
24 testified that he did not remember who the first person to speak to Dreamworks about this  
25  
26  
27  
28

1 project was but that it is quite possible it was him. Additionally, Bishop testified that like  
2 the Warner Chappell deal, this deal was made for a substantially completed album. Bishop  
3 also admitted that no talent agents were involved in this deal or the Warner Chappell deal.  
4

5 **C. Video Games**

6 1. Electronic Arts – BT testified that there were discussions going back  
7 and forth between Steve Schnur, an executive at Electronic Arts (EA), which is in the  
8 business of video games, and Bishop for BT to score a video game based upon the James  
9 Bond character. Ultimately, BT did not score this game but scored a Tiger Woods golf  
10 game for EA through the efforts of Bishop. BT also testified that Bishop was responsible  
11 for placing two of BT's tracks, *The Revolution* and *Kimosabi*, on EA video games. On the  
12 *Kimosabi* track, BT testified that he had to do additional re-mixing.  
13  
14

15 An email was produced dated March 2, 2003, from Bishop to Schnur where Bishop  
16 outlines the terms for a deal with Schnur on behalf of his client, The Crystal Method. In  
17 this email, Bishop also writes that he had spoken with BT about writing a score during the  
18 period of mid-March to mid-May for the James Bond video game for EA and that the deal  
19 would be similar to the deal he was proposing in the email for The Crystal Method. In a  
20 separate email dated March 24, 2003 from Bishop to BT, Bishop writes: "As discussed I  
21 am trying (at your request) to secure the scoring of a major game and am pretty close on  
22 EA's forthcoming James Bond game." Again, Bishop did not deny the content of these  
23 emails.  
24  
25

26 **D. Distribution of *Emotional Technology* Record in Europe**

27 BT testified that Bishop made efforts on his behalf, including to Sony in Europe, to  
28

1 distribute his album, *Emotional Technology*. The purpose of distributing the record was  
2 to procure a record deal.

3  
4 **E. Films**

5 1. *GO* – BT testified that he scored the film *Go* through the  
6 efforts of Bishop. BT also testified that he did not have an agent during this time. No  
7 specific testimony or evidence was submitted by Bishop to refute BT’s testimony with  
8 regard to this film. The only testimony provided by Bishop was that, in general, BT’s  
9 licensed talent agents procured scores for him on films.

10  
11 2. *Driven* – BT testified that he personally witnessed Bishop  
12 procure the score for the movie, *Driven*, on his behalf. Per BT, Bishop informed him that  
13 he could get him the score for this movie for a “crazy amount of money” and in fact, did  
14 negotiate BT’s fee for scoring this film. Bishop, on the other hand, testified that he never  
15 knew anyone on this film until after being introduced by BT’s agent, Kathy Schlossinger,  
16 who made the introduction to him after she negotiated the deal for BT to score the film.

17  
18 3. *Monster* – BT testified that Bishop introduced him to Brad  
19 Wyman, the producer of *Monster* and a long time friend of Bishop’s. BT further testified  
20 that the fee for scoring the movie was very low and that is why Bishop was hesitant to  
21 have BT do the movie, but BT insisted on scoring the film. BT testified that Bishop  
22 negotiated the fee and term and passed it on to BT’s attorney or agent to turn the deal  
23 point into long form (i.e., paper it). An email dated April 7, 2003 from Bishop to BT was  
24 produced which states that a meeting with BT’s agent, Laura Engel, to discuss the final  
25 deal that is on the table for BT scoring this movie, needed to be rescheduled. Bishop  
26  
27  
28

1 testified that Engel made and closed all the deals on this film for BT.

2           4.     *Fast and Furious* – BT testified that it was Bishop, who first told  
3 him about scoring this car racing movie. Per BT, Bishop told him he thought he could get  
4 him this project. BT was not sure if Bishop negotiated the terms or someone else did on  
5 his behalf.  
6

7           5.     *The Underclassmen* – BT testified that Bishop came to him with  
8 this movie to score. Per Bishop, the movie was “crappy” but paid a lot of money and  
9 would not take that much time to do. Bishop told BT that he negotiated the fee as well as  
10 the reversionary language, whereby BT would get his songs back.  
11

12           **F.     Television Shows**

13           1.     *Queer Eye for the Straight Girl* – BT wrote the theme for this  
14 show which Bishop procured for him through his friendship with the show’s producer.  
15 BT testified that Bishop first told him that he had a friend that works at the studio where  
16 the show was shot and that he could get the theme for Bishop and it would be quick  
17 money. Bishop negotiated a flat fee of \$30,000-\$40,000 with his producer friend. Bishop  
18 testified that this show was procured for BT through his talent agent and that his only  
19 involvement was to talk to those working on the show regarding the amount of time they  
20 were spending with BT on this project.  
21

22           2.     *Kevin Hill* – BT wrote the theme song and scored this show for a  
23 while. BT testified that he did not know if anyone else negotiated this show on his behalf  
24 in addition to Bishop.  
25

26           3.     *Tommy Lee Goes to College* – During the scoring of the major  
27  
28

1 motion picture *Monster*, BT came up with an idea for a reality show where an aging rock  
2 star returns to college. BT was the creator and producer on this show in addition to  
3 performing the score. BT testified he was present when Bishop negotiated the entire deal  
4 with NBC, including his fee of \$35,000 to \$50,000 per episode as a producer and  
5 composer. Bishop produced a side letter agreement regarding the project showing that  
6 Bishop also received a producing credit on the project. Bishop testified that the idea for  
7 this show was BT's but that he was responsible for writing the treatment as well as six  
8 additional episodes.  
9

10  
11 Bishop testified that BT had film and television agents representing him at  
12 all times, namely, Kathy Schlossinger and John Tempero of Soundtrack Music Associates  
13 and later Laura Engel. Bishop testified that Schlossinger not only procured but also  
14 negotiated BT's fees for scoring films and television.  
15

### 16 G. Radio

17 1. *Live 105* – BT testified that Bishop procured an engagement for  
18 him to perform live at a *Live 105* radio station show in San Francisco in exchange for the  
19 radio station adding one of BT's song's to the radio's play list. During this time period,  
20 BT was represented by Phil Eganthouse of William Morris. BT testified that Bishop  
21 procured this engagement and then referred it to his agent, Eganthal, to "paper." Bishop  
22 testified that this show would have been contracted directly by BT's agent, Sam Kirby.  
23  
24 However, on cross examination, Bishop admitted that it is possible he spoke with  
25 someone at the radio station about BT performing live at a concert sponsored by the radio  
26 station and then probably went to William Morris to tell BT's agent to "paper" a deal with  
27  
28

1 the radio station for this performance.

2 6. Bishop testified that his understanding of the verb "book" is when an agent  
3 makes a contract with a promoter, agrees as to the terms on which the artist is going to  
4 play the concert, and then confirms the terms on behalf of the artist.  
5

6 7. 3AM filed a lawsuit in the Los Angeles Superior Court against BT alleging  
7 that BT has failed to pay 3AM commissions in breach of the parties Personal Management  
8 Agreement. In response, BT filed the instant petition on January 8, 2008, seeking to have  
9 the Personal Management Agreement declared void *ab initio* based on 3AM's violation of  
10 the Act. BT also seeks a declaration that 3AM is not entitled to any further commissions  
11 under such agreement. Lastly, BT seeks attorney's fees on the grounds that the violations  
12 alleged, were willful.  
13  
14

### 15 LEGAL ANALYSIS

16 3AM was not licensed as a talent agency until after the parties terminated  
17 their relationship in July, 2006 and *after* the events at issue in this proceeding took place.  
18 Accordingly, during all relevant times, 3AM was not a licensed talent agency. Labor  
19 Code §1700.5 provides that "no person shall engage in or carry on the occupation of a  
20 talent agency without first procuring a license therefore from the Labor Commissioner."  
21 The term "talent agency" is defined at Labor Code §1700.4(a) as "a person or corporation  
22 who engages in the occupation of procuring, offering, promising or attempting to procure  
23 employment or engagements for an artist or artists, except that the activities of procuring,  
24 offering, promising or attempting to procure recording contracts for an artist or artists  
25 shall not of itself subject a person or corporation to regulation and licensing." It is  
26  
27  
28

1 undisputed that BT is an artist under Labor Code §1700.4(b), as a “musical artist” and  
2 “composer” is expressly defined as an “artist.” The question that is presented here is  
3 whether 3AM, through the actions of Bishop, acted as a “talent agency” within the  
4 meaning Labor Code §1700.4(a) during the time the relevant events occurred.  
5

6 **Concert Tours**

7 Although BT had a live concert agent, Sam Kirby, during the time the Jensen tour  
8 was booked, BT testified that all material terms were presented to him directly by Bishop.  
9 BT admitted that he did not know if Kirby participated in the negotiations for this tour for  
10 him but testified credibly that Bishop discussed terms, he, Bishop, negotiated with respect  
11 to this tour and that Bishop’s wife, “papered” the deal. Bishop testified that he worked in  
12 conjunction with Kirby, who booked this tour. Bishop also testified that his understanding  
13 of the term “book” was when an agent makes a contract with a promoter, agrees as to the  
14 terms on which the artist is going to play the concert and then confirms the terms on  
15 behalf of the artist.  
16  
17

18 As we have noted in prior determinations, the proper burden of proof in actions  
19 before the Labor Commissioner is found at Evidence Code §115 which states, “[e]xcept as  
20 otherwise provided by law, the burden of proof requires proof by a preponderance of the  
21 evidence.” “The party asserting the affirmative at an administrative hearing has the  
22 burden of proof, including both the initial burden of going forward and the burden of  
23 persuasion by preponderance of the evidence.” *McCoy v. Board of Retirement of the*  
24 *County of Los Angeles Employees Retirement Association* (1986) 183 Cal.App.3d 1044,  
25 1051. “Preponderance of the evidence standard of proof requires the trier of fact to  
26  
27  
28

1 believe that the existence of a fact is more probable than its nonexistence.” *In re Michael*  
2 74 Cal.Rptr.2d 642. Additionally, we have also noted in *Golden Brooks v. Rick Ax, et al.*,  
3 TAC 43-04 at p. 6 and *A.C. Watson and Clarang, Inc. v. Richard Glasser, et al.*, TAC 24-  
4 99 at p. 11-12, “[w]hen establishing a preponderance of the evidence, the moving party  
5 must supply more than ‘he said/she said’ **when both parties testify credibly...**” We  
6 recognize that the parties in this matter were testifying about matters that occurred 2-6  
7 years prior to the hearing. Notwithstanding, we find the testimony provided by BT to be  
8 precise, detailed and credible. The testimony of Bishop, on the other hand, was not  
9 credible. Bishop was called as Petitioner’s first witness. When BT’s attorney questioned  
10 Bishop about the numerous entertainment engagements and jobs at issue, Bishop could  
11 not recall the details of the specific engagements or how they came about. Yet, when  
12 Bishop’s attorney conducted direct examination and asked him similar questions, he  
13 testified that one of BT’s many talent agents procured the deal but failed to provide any  
14 evidence other than his testimony that such was the case. Consequently, Bishop’s  
15 testimony was not as credible as BT’s.

16  
17  
18  
19  
20 Given Bishop’s understanding of the term “booking,” which is consistent with  
21 BT’s testimony that Bishop’s standard practice was to solicit deals, negotiate terms and  
22 then pass on to BT’s attorney or agents to “paper” the deal, and the fact that we do not  
23 find Bishop as credible as BT, we find that it is more likely than not that Bishop solicited  
24 the Jensen live concert tour for BT and that Bishop’s wife “papered” the deal. We have  
25 ruled that “[p]rocurement could include soliciting an engagement; negotiating an  
26 agreement for an engagement; or accepting a negotiated instrument for an engagement.”  
27  
28

1 *McDonald v. Torres*, TAC 27-04; *Gittelman v. Karolat*, TAC 24-02. Additionally,  
2 “[p]rocurement” includes any active participation in a communication with a potential  
3 purchaser of the artist’s services aimed at obtaining employment for the artist, regardless  
4 of who initiated the communication or who finalized the deal. *Hall v. X Management*,  
5 TAC 19-90. We find that Bishop’s actions with regard to this concert tour constitute  
6 procurement under the aforementioned cases.  
7

8  
9 Bishop’s position that his conduct with regard to the Jensen live concert tour, as  
10 well as other engagements at issue, fell within the safe harbor found at Labor Code  
11 §1700.44(d), is not persuasive. Labor Code §1700.44(d) provides that it is not unlawful  
12 for a person or corporation which is not licensed to act in conjunction with, and at the  
13 request of, a licensed talent agency in the negotiation of an employment contract. Here,  
14 BT has established that it is more likely than not that Bishop procured the Jensen concert  
15 independent of any talent agent and that Bishop’s wife “papered” the deal. Bishop failed  
16 to present credible testimony or evidence to establish that he did not independently  
17 procure *this* engagement, (or other engagements discussed in this decision where we find  
18 he violated the Act), but instead acted in conjunction with and at the request of a licensed  
19 talent agent. See *Shirley v. Artists’ Management West, et al.*, TAC 08-01, *Tommy Lister v.*  
20 *Tamara Holzman*, TAC 04-00, and *Creative Artists Entertainment Group, LLC v. Jennifer*  
21 *O’Dell*, TAC 26-99 which all held that for the safe harbor under Labor Code §1700.44(d)  
22 to apply, the manager must: (1) act in conjunction with a licensed talent agent; and (2) act  
23 at the request of a licensed talent agent; and (3) such actions are limited to the negotiation  
24 of an employment contract. Accordingly, we find a violation of the Act with respect to  
25  
26  
27  
28

1 the Jensen live concert tour.

2 As to the Heineken Tour, we simply do not have enough evidence to make a ruling.

3  
4 **Music Publishing Deals**

5 A considerable amount of time during the hearing was spent on the two music  
6 publishing deals BT signed while represented by Bishop. The first music publishing deal  
7 was with Warner Chappell for BT's third artist album, *Moving in Still Life*. The second  
8 music publishing deal was with Dreamworks/Cherry Lane for BT's album *Emotional*  
9 *Technologies*. We do not find a violation of the Act with respect to either deal because we  
10 find that these music publishing deals did not constitute employment or engagements  
11 under the Act. See *Kilcher v. Vainshtein*, TAC 02-99 at pp. 21-24. Labor Code §1700.4  
12 defines a talent agency as "a person or corporation who engages in the occupation of  
13 procuring, offering, promising, or attempting to procure *employment or engagements* for  
14 an artist or artists..." [Emphasis added]. Here, the two albums for which BT obtained  
15 music publishing deals were substantially completed albums. Although BT testified that  
16 he was required to do additional re-mixing, the music publishing deals were not formed  
17 for the purpose of BT re-mixing a track or two on an otherwise completed album. He was  
18 not being employed to provide entertainment in this regard. These music publishing deals  
19 are not employment or engagements within the meaning of the Act, but are instead deals  
20 that "are structured upon a transfer of copyright in one or more musical compositions by a  
21 composer to a music publisher in exchange for royalty rights in the publisher's  
22 exploitation of the musical composition." Robert Lind, Mel Simensky, Tom Selz, Patricia  
23 Acton, *2 Entertainment Law 3d: Legal Concepts and Business Practices* §9:56 Music –  
24  
25  
26  
27  
28

1 Music publishing agreements. In other words, these music publishing deals give a  
2 songwriter a share of certain rights and income that he or she would not be entitled to  
3 under the standard writer-publisher contract. Accordingly, we find that these music  
4 publishing deals do not implicate the Act.  
5

### 6 Video Games

7 The preparation of a score for a video game *does* implicate the Act. In *Jeremy*  
8 *Soule aka Artistry Entertainment v. Robert E. Rice*, TAC 21-03, we held that composers  
9 performing musical scores for video games are “artists” within the meaning of the Act. In  
10 this case, the credible evidence establishes that Bishop *attempted* to procure employment  
11 for BT scoring the James Bond video game which BT did not end up scoring. Emails  
12 dated March 2, 2003 from Bishop to an executive at EA and March 24, 2003 from Bishop  
13 to BT, were produced which corroborated BT’s testimony that Bishop *attempted* to  
14 “secure” the score for this video game for BT in violation of the Act.  
15  
16

17 Likewise, evidence was presented that credibly established that BT was hired to  
18 score a Tiger Woods golf game for EA through the efforts of Bishop, which also  
19 constitutes a violation of the Act.  
20

21 Lastly, evidence was presented that Bishop was responsible for placing two of  
22 BT’s tracks, *The Revolution* and *Kimosabi*, on other EA video games. Because *The*  
23 *Revolution* track was a completed work, we do not find a violation of the Act with respect  
24 to placement of that track on the EA video game. See *Kilcher v. Vainshtein*, TAC 02-99.  
25 Placement of the *Kimosabi* track, however, involved future work which EA specifically  
26 hired BT to perform in order to get that track placed on one of its video games. *Id.* As  
27  
28

1 such, we find that Bishop's negotiation for BT to perform the re-mixing necessary to get  
2 that track placed on a video game for EA, constitutes a violation of the Act.

3  
4 **Distribution of Emotional Technology Record**

5 There was evidence presented that Bishop was attempting to distribute BT's  
6 *Emotional Technology* record in Europe. The parties both testified that these attempts  
7 were for the purpose of securing a record deal for BT. Accordingly, there is no violation  
8 under the Act since Labor Code §1700.4 expressly exempts recording contracts from the  
9 licensing requirements of the Act.  
10

11 **Films**

12 The evidence supports a finding that Bishop secured the score for the film *Go* for  
13 BT, who did not even have an agent at the time, as well as the films *The Underclassmen*,  
14 *Driven* and *Monster*. BT credibly testified that he personally witnessed Bishop procure  
15 the score for the movie *Driven* and that Bishop negotiated the fee and term for the movie  
16 *Monster* then passed it on to BT's talent agent, Laura Engel, to "paper." Moreover, while  
17 Bishop testified that BT's agents booked the scores for these movies and it appears that  
18 BT's agent, Engel, was indeed involved in the negotiation of *Monster* and therefore  
19 worked "in conjunction with" Bishop, no credible evidence was presented by Bishop that  
20 he was also acting "at the request of" Engel in the negotiation of this employment  
21 contract.  
22  
23

24 We do not find that Bishop procured the score for the movie *Fast and Furious* as  
25 BT was not even sure if Bishop solicited or negotiated this movie on his behalf.  
26

27 ///  
28

1 TV Shows

2 The credible evidence also supports a finding that Bishop booked and negotiated  
3 the \$30,000-\$40,000 flat fee for BT to do the theme for *Queer Eye for the Straight Girl*  
4 through Bishop's friendship with the show's producer. Likewise, the credible evidence  
5 establishes that Bishop negotiated the theme song and score for the *Kevin Hill* show for  
6 BT.  
7

8 The parties testified that BT served as the creator, producer and performed the  
9 score on the *Tommy Lee Goes Back to College* television reality show. BT testified that  
10 he personally witnessed Bishop negotiate the entire deal for him with NBC, including his  
11 fee of \$35,000 to \$50,000 per episode as a producer and composer. A side agreement was  
12 produced showing that Bishop also received a producing credit on this project and was  
13 responsible for writing the treatment as well as six additional episodes. Bishop argues  
14 that under our previous decision, *American First Run v. Omni*, TAC 32-95, producers are  
15 not under the jurisdiction of the Labor Commissioner. It was not clear if Bishop was  
16 arguing that the Labor Commissioner does not have jurisdiction over this engagement  
17 because BT received a producing credit and therefore BT is not an "artist" within the  
18 meaning of the Act or whether Bishop is arguing that he was not acting as a "talent agent"  
19 under the Act because BT, as a producer, was the employer on this show, as was the case  
20 in *American First Run, supra*. We address both scenarios.  
21  
22  
23  
24

25 Historically, we have held that a person is an "artist" under the Act if he or she  
26 renders professional services in motion picture, theatrical radio, television and other  
27 entertainment enterprises that are "creative" in nature. *American First Run v. Omni*,  
28

1 *supra*; *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management*, TAC 14-  
2 98; *Hyperion Animation Co., Inc. v. Toltect Artists, Inc.*, TAC 07-99; *Cham v.*  
3 *Spencer/Cowings*, TAC 19-05 and *William Morris v. Dan O'Shannon*, TAC 06-05.

4  
5 Here, BT is an "artist" within the meaning of the Act because he produced the score for  
6 this television show and accordingly, rendered professional services that are "creative" in  
7 nature regardless if he also received a producer's credit for creating this show.

8  
9 Similarly, we hold here that Bishop acted as a "talent agent" within the meaning of  
10 the Act. In *American First Run v. Omni, supra*, we ruled that the respondents were not  
11 "talent agents" within the meaning of the Act because they were not "procuring, offering,  
12 promising, or attempting to procure employment or engagements" for petitioners with  
13 third-party employers. In addition to being artists, petitioners in that case were also self-  
14 employed owners of an independent production company who hired respondents to help  
15 them obtain co-producers willing to invest funds to enable them to independently produce  
16 a television series. *American First Run v. Omni, supra* at page 5. Thus, petitioners in  
17 *American First Run* were acting as the employer. Moreover, respondents were not  
18 seeking work with third-party employers for petitioners to perform as artists.

19  
20  
21 In contrast, in the present case, no evidence was presented by either party to  
22 support the fact that BT and Bishop, who both received producer credits on this show, had  
23 formed their own production company or were somehow acting as employers on this  
24 show. Rather, the credible testimony established that Bishop negotiated the entire deal for  
25 BT to serve as a producer and composer with a third-party employer, NBC. "The 'activity  
26 of procuring employment,' under the Act, refers to the role an agent plays when acting as  
27  
28

1 an intermediary between the artist whom the agent represents and the third-party employer  
2 who seeks to engage the artist's services." *Chinn v. Tobin*, TAC 17-96 at p.7. Because  
3 we find that NBC was the third-party employer on this reality show and not BT nor  
4 Bishop, we find that Bishop acted as a "talent agent," in violation of the Act when he  
5 negotiated BT's compensation as a composer for this show with third party employer,  
6 NBC.  
7

### 8 Radio

9  
10 The undisputed evidence established that Bishop procured an engagement for BT  
11 to perform live at a *Live 105* radio station in San Francisco in exchange for the radio  
12 station adding one of BT's songs to their play list, in violation of the Act.  
13

### 14 No Penalty in the Labor Code

15 Bishop argues that even if we find that 3Am violated the Act, we cannot impose a  
16 remedy because the Labor Code is silent as to what remedy is appropriate when the Act is  
17 violated. This argument is misplaced. Although the Act is silent on the subject of the  
18 proper remedy for illegal procurements, "the Act defines conduct, and hence contractual  
19 arrangements that are illegal: An unlicensed talent agency may not contract with talent to  
20 provide procurement services." *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4<sup>th</sup>  
21 974, 991. The *Marathon* court extensively analyzed the availability of contract voidance  
22 and severability as remedies under the Act and the historical application of these doctrines  
23 under the Act. As discussed by the court, several appellate decisions voided manager-  
24 talent contracts in their entirety. *Id.* at 995. The court concluded that, despite the absence  
25 of a remedy for violations of the Act, ordinary rules of interpretation render the codified  
26  
27  
28

1 common law remedy of severance in Civil Code §1599 fully applicable to disputes under  
2 the Act, such that fully voiding the parties' contract is available (Civil Code §1598), but  
3 not mandatory, and likewise, severance is available (Civil Code §1599), but not  
4 mandatory. *Id.* at 996.

5  
6 **Severability**

7 In accord with *Marathon, supra*, 3AM urges us to apply the doctrine of severability  
8 if we find that Bishop, on behalf of 3AM, violated the Act in any of the eighteen  
9 identified engagements at issue herein. While there was testimony that there were  
10 hundreds, if not thousands of engagements that BT worked on while represented by  
11 Bishop, both parties opted to proceed in this hearing through a sampling of such  
12 engagements.  
13

14  
15 In *Marathon*, the court recognized that the Labor Commissioner may invalidate an  
16 entire contract when the Act is violated. The court left it to the discretion of the Labor  
17 Commissioner to apply the doctrine of severability to preserve and enforce the lawful  
18 portions of the parties' contract where the facts so warrant. As the Supreme Court  
19 explained in *Marathon*:  
20

21 "Courts are to look to the various purposes of the  
22 contract. If the central purpose of the contract is tainted  
23 with illegality, then the contract as a whole cannot be  
24 enforced. If the illegality is collateral to the main  
25 purpose of the contract, and the illegal provision can be  
26 extirpated from the contract by means of severance or  
27  
28

1 restriction, then such severance and restriction are  
2 appropriate.” [Citations omitted].

3  
4 *Marathon, supra* at p.996.

5 Bishop urges us to simply sever those engagements we find to have been procured  
6 in violation of the Act and preserve the contractual relationship between the parties. BT,  
7 on the other hand, argues that because the parties chose to proceed on a sampling, we  
8 must presume the methods, custom and practice for securing all other contracts not before  
9 us, were the same as the eighteen identified and discussed in this proceeding. Since the  
10 parties did in fact select to proceed on a sampling, we are persuaded by BT’s argument  
11 that Bishop’s custom and practice on securing the contracts not before us, was the same  
12 custom and practice used on the eighteen identified and discussed in this proceeding. As  
13 explained in this decision, we find that 3AM violated the Act on 13 of the 18 contracts  
14 identified in this case. Of the 5 contracts where no violation was found, two were music  
15 publishing deals that we do not consider to be entertainment engagements, one fell within  
16 the recording contract exemption (*Distribution of Emotional Technology*), one involved a  
17 completed work which did not contemplate future work (“*The Revolution*”) and one we  
18 simply did not have enough information to make a ruling (The Heineken tour). In other  
19 words, on all of the employment engagements identified that do come within the Act, the  
20 majority were found to have been illegally procured by Bishop.

21 While the parties testified that Bishop provided management duties such as  
22 assisting BT with his day to day scheduling, helping BT make decisions about artwork  
23 related to his music, assisting BT in his personal life, helping him hire a publicist and  
24

1 providing advice and counsel to BT regarding his career and personal life, we find that the  
2 central purpose of the contractual relationship between the parties was to procure  
3 engagements for BT and that this was done without a license from the State. This is  
4 evident in the sampling of 18 contracts presented to this Commission. We find that 3AM  
5 through Bishop, engaged in substantial procurement activities that are inseparable from  
6 the managerial services provided to BT. This is not a case about a personal manager who  
7 truly acts as a personal manager except in one or a few isolated instances when he  
8 unlawfully procures an engagement for his client in violation of the Act. Rather, the  
9 evidence presented establishes that Bishop's pattern and practice was to solicit, procure,  
10 negotiate and then pass off the contract to a licensed talent agent to "paper." Having a  
11 licensed talent agent finalize the deal by preparing written contracts neither falls within  
12 the safe harbor found at Labor Code §1700.44(d) nor does it shield Bishop from liability  
13 under any other theory under the Act.

14  
15  
16  
17 We recognize that the express terms of the written Personal Management  
18 Agreement were to provide management services. Our job, however, is to examine the  
19 substantive reality behind the contractual language presented by the parties. "The court,  
20 or as here, the Labor Commissioner is free to search out illegality lying behind the form in  
21 which the transaction has been cast for the purpose of concealing such illegality."  
22 *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 355. The evidence presented  
23 establishes that the Personal Management Agreement is really a subterfuge intended to  
24 conceal the actual nature of the parties' business relationship. Accordingly, we exercise  
25 our discretion under *Marathon, supra*, in voiding the Personal Management Agreement *ab*  
26  
27  
28

1 *initio.*

2 **Attorney's Fees**

3  
4 BT seeks attorney's fees based on Bishop's willful violations of the Act. Labor  
5 Code §1700.25(e)(1) provides for an award of reasonable attorney's fees to the prevailing  
6 artist in proceedings pending before the Labor Commissioner where the failure to disburse  
7 funds to the artist is found to be willful. We point out, however, that fees are awarded  
8 against a "licensee" when that "licensee's" failure to disburse funds to an artist within 30  
9 days of receipt is willful. In this case, Bishop was not a "licensee" at the time of the  
10 violations discussed herein. Additionally, no evidence was presented that he withheld  
11 funds from BT. Accordingly, this section does not apply. BT's request for attorney's fees  
12 based on Bishop's willful violations of the Act is denied.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the Personal Management Agreement which consists of the (1) Personal Management Agreement entered as of April 1, 1998; (2) the Modification Agreement entered as of April 19, 2001; and (3) the Amendment Agreement entered as of December 30, 2003, are all deemed void *ab initio* and 3AM has no enforceable rights thereunder. It is also ordered that all parties are to bear their own costs and attorney's fees.

DATED: June 16, 2009

Respectfully submitted,

By: Edna Garcia Earley  
EDNA GARCIA EARLEY  
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: June 16 2009 By: Angela Bradstreet  
ANGELA BRADSTREET  
State Labor Commissioner

