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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

STEFAN GORDY, an individual, SKYLER GORDY, an individual, collectively p/k/a LMFAO, **Petitioners,** **v.** **RENE McLEAN, dba: RPMGRP, INC., a New York corporation,** **Respondents.**	Case No. TAC27195 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioners, STEFAN GORDY and SKYLER GORDY (hereinafter Petitioners) appeared and were represented by Edwin McPherson, Esq. Respondents, RENE McLEAN and RPMGRP, INC. (hereinafter Respondents) appeared and were represented by William Hochberg, Esq. At the conclusion of the hearing, the matter was taken under submission.

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Petitioners are musical artists who together compose the group LMFAO. They bring this action against Respondents, claiming 136 alleged violations of the California Talent Agency Act between December 2007 and July 2010. They seek from the Labor Commissioner a finding that the management agreement entered into by the parties is void *ab initio*, and request disgorgement of any fees paid to Respondents within the one-year period prior to the filing of the action.

Respondents argue, while they were not licensed talent agents and acknowledge they procured employment in violation of the Act, they also performed business services for Petitioners for which a license is not required. Respondents argue, the Labor Commissioner should sever lawful services from those services that may violate the Act and consider whether the contract had some lawful purpose upon which the Respondents could properly collect fees.

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

FINDINGS OF FACT

1. In 2007, the parties entered into an oral agreement under which Respondents acted as managers for Petitioners, professionally know as LMFAO. On March 7, 2008, the parties entered into a written agreement whereby Respondents continued to represent Petitioners as their personal managers. The written agreement (hereinafter Agreement) contained a two-year term and provided a 20% commission fee to Respondent on all money Petitioners received for entertainment contracts entered into during the term of the Agreement. The Agreement provided for diminishing commission rates as time elapsed following the end of the agreement.

2. Respondents acknowledge during all times relevant to this action, they were not licensed talent agents in the State of California. The Agreement contains a disclaimer stating Respondents were not licensed talent agents, and did not offer to "obtain, seek, or procure employment or engagements for artists which would require a manager to be licensed as a 'talent

agency', and the manager is not obligated to do so." (Respondent's Exhibit 1, paragraph 7)

3. In spite of the disclaimer, Respondents admit they either procured or attempted to procure employment for Petitioners for thirteen engagements between April 29, 2008 and December 31, 2009. Respondents limit that admission to procurement of the following thirteen performances: House of Blues Foundation Room for MUSEXPO Showcase on April 29, 2008; Canyon Club, May 30, 2008; Arena Niteclub, on June 23, 2008; Geisha Lounge, on July 31, 2008; Tatou Club, on August 1, 2008; Area, on August 23, 2008; Boss Night Club, on September 5, 2008; Rock N Saddle, on September 6, 2008; Axis Radius, on September 11, 2008; Avalon on September 26, 2008; 740 Night Club with Big Boy on January 16, 2009; The Church, Denver, on February 5, 2009; and XIV, on December 31, 2009.

4. Respondents' admissions establish they procured employment for Petitioners minimally ten times during the first six months of the contract. The remaining three bookings on the admission list further acknowledge Respondents continued the unlawful practice of procuring employment in both the beginning and end of 2009.

5. With regard to the remaining 123 alleged violations of the Act, Respondent RENE McLEAN testified he could not recall the negotiations, and while he made the initial overtures for obtaining the jobs, the work was actually "procured" when the agreement was completed either by Johnny Maroney, a New York booking agent, or by the band's attorney, Todd Compton. Neither Mr. Maroney nor Mr. Compton were licensed talent agents.

6. Mr. Compton appeared at the hearing and credibly testified in every instance when he prepared a contract for LMFAO's services, it was to memorialize an agreement negotiated by Mr. McLean. The evidence also makes clear Respondents did not retain Mr. Maroney, the New York booking agent until December of 2008 – nine months into the two-year management contract.

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7. McLEAN's testimony lacked credibility. While McLEAN had no problem recalling details of negotiations and transactions during direct examination by his attorney, in response to questions posed by the hearing officer, or Petitioners' counsel in cross-examination, he testified he could not remember those same details, or he did not understand the questions.

8. In addition to McLEAN's lack of credible testimony, the documentary evidence directly contradicted his testimony regarding his role in the negotiations of numerous agreements at issue. Nearly all of the transactions presented at the hearing were evidenced by a series of email communications between McLEAN and the party on the other side of the negotiations.

9. Ian Fletcher is a self-employed personal manager who worked for Respondents and was assigned to work on Respondents' behalf with LMFAO beginning in April or May of 2008. Mr. Fletcher testified that McLEAN negotiated employment agreements for Petitioners and part of Mr. Fletcher's job involved "bringing opportunities, whether it be shows, remixes, appearances, walk-throughs. That's just part of what we did." Mr. Fletcher booked or negotiated at least 25 shows for Respondents on behalf of LMFAO. Mr. Fletcher also testified McLEAN provided him with "booking templates", which were documents intended to serve as the foundation for LMFAO's artist engagement agreements. According to Mr. Fletcher, the company's practice was to negotiate the terms of contracts to the point where the agreement could be sent to the New York booking agent Johnny Maroney, and that Mr. Maroney would put the agreement on his letterhead.

LEGAL ANALYSIS

The Talent Agencies Act provides the Labor Commissioner with original jurisdiction over controversies between "artists" and "agents". (Labor Code §1700.4) Labor Code §1700.4(a) defines "Talent agency" as "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, 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. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers." Labor Code §1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license from the Labor Commissioner."

The Labor Commissioner previously held, in interpreting the meaning of "procure":

> The term "procure," 'as used in Labor Code §1700.4(a), means "to get possession of: obtain, acquire, to cause to happen or be done: bring about." *Wachs v. Curry* (1993) 13 Cal.App.4th 15 616, 628. Thus; "procuring employment" under the Talent Agencies Act is not limited to initiating discussions with potential purchasers of the artist's professional services or otherwise soliciting employment; rather, "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. *Hall v. X 22 Management* (TAC No. 19-90, pp. 29-31.) The Labor Commissioner has long held that "procurement" includes the process of negotiating an agreement for an artist's services. *Pryor v. Franklin* (TAC 17 MP, 114). *Danielewiski v. Agon Investment Company* (Cal. Labor Com., October 28, 2005) TAC No. 41-03, pages 15-16.

The evidence presented at the hearing clearly established Respondents acted as talent agents without the requisite license under California law. The evidence also showed throughout the two-year agreement, McLEAN procured employment for Petitioners routinely. Respondents put in place a system whereby their employee negotiated the terms of the artist's performance agreements and finalized the deal to the point where the agreement was sent to their unlicensed booking agent, who put the writing on his letterhead in an effort to lend the appearance of compliance with the Talent Agencies Act. Respondents intentionally and repeatedly violated the Act and attempted to hide their violations by enlisting the aid of a booking agent, who in fact, was also not licensed to perform the duties of a talent agent under California law.

While the Petition to Determine Controversy alleges only 136 violations of the Act, the uncontroverted testimony of Respondents' employee Ian Fletcher, established during the period of his employment alone, LMFAO performed between 250 and 350 times. Respondent failed to

present evidence that any of those performances were procured by a licensed talent agent. It is therefore reasonable to conclude that Respondents violated the Act more than the 136 violations alleged by Petitioners.

Respondents seek to invoke the equitable principle of severance to isolate services provided which Respondents assert do not violate the Act. Respondents argue under the case of *Marathon Entertainment Inc. v. Rosa Blasi* (2008) 42 Cal.4th 974, the Labor Commissioner should exercise discretion and apply the doctrine of severance to protect Respondents' right to compensation for the lawful portion of the contract.

In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, the California Supreme Court held:

> In deciding whether severance is available, we have explained "[t]he overarching inquiry is whether the interests of justice ... would be furthered" by severance." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) "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." (*Ibid.;* accord, *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074, 130 Cal.Rptr.2d 892, 63 P.3d 979.) *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996, *as modified (Mar. 12, 2008).*

In this case, we find the number, frequency and extent of the Act's violations permeate the contract and we therefore decline to apply the equitable doctrine of severance. The evidence is clear Respondents not only acted in complete disregard for the licensing requirement, but also contrived a scheme to cloak their actions with the appearance of legality by engaging a booking agent to memorialize performance contracts that they had procured themselves. The unlawful acts permeate the contractual relationship between Respondents and Petitioners, and Respondents seek to apply an equitable doctrine when they come to the table with dirty hands. The sheer number of violations

committed in the short period of the management agreements, together with the clear intention of Respondents to avoid the obligation for licensure, leads us to hold the management services contract is void *ab initio.*

Petitioners seek an order of disgorgement of all commissions paid during the one-year period preceding the filing of this action. At the hearing, the Petitioners presented evidence that during the one-year period claimed, Petitioners paid Respondents a total of $59,581.50. Accordingly, Respondents are ordered to disgorge $59,581.50 to the Petitioners.

ORDER

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

The Agreement between Petitioners and Respondents is declared to be illegal, void and unenforceable for all purposes, and Respondents are barred from enforcing or seeking to enforce the Agreement against Petitioner in any manner.

Respondents are ordered to pay $59,581.50 to Petitioners in disgorgement of commissions collected in violation of the Talent Agency Act.

Respectfully submitted,

Dated: 8/29/17

By _____
MICHAEL N. JACKMAN
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER.

Dated: 8/29/17

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JULIE A. SU
California Labor Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, JUDITH A. ROJAS, do hereby certify that I am a resident of or employed in the County of San Diego, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: 7575 Metropolitan Drive, Suite 210, San Diego, CA 92108-4424

On August 30, 2017, I served the within **DETERMINATION OF CONTROVERSY** by placing a true copy thereof in an envelope addressed as follows:

Rene McLean
RPMGRP, Inc.
138 Mulberry Street, #3A
New York, NY 10013

McPherson Rane, LLP
Edwin McPherson, Esq.
1801 Century Park East, 24th Floor
Los Angeles, CA 90067

and then sealing the envelope and with postage and certified mail fees (if applicable) thereon fully prepaid, depositing it for pickup in this city by:

_____ Federal Express Overnight Mail

___X___ Ordinary First Class Mail

I certify under penalty of perjury that the foregoing is true and correct.

Executed on August 30, 2017, at San Diego, California.

Judith A. Rojas
JUDITH A. ROJAS

Case No. TAC-27195

PROOF OF SERVICE