

1 **STATE OF CALIFORNIA**
DEPARTMENT OF INDUSTRIAL RELATIONS
2 DIVISION OF LABOR STANDARDS ENFORCEMENT
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7 **DIVISION OF LABOR STANDARDS ENFORCEMENT**

8 **DEPARTMENT OF INDUSTRIAL RELATIONS**

9 **STATE OF CALIFORNIA**

10
11 BENJAMIN BURNLEY p/k/a BREAKING
12 BENJAMIN, an individual; BB TOURING,
LLC, a Delaware limited liability company;
13 BENJAMIN BURNLEY MERCHANDISE,
LLC, a Pennsylvania limited liability company;
14 BEN BURNLEY PUBLISHING, LLC, a
Delaware limited liability company; and
15 BENJAMIN BURNLEY RECORDING, LLC,

16 *Petitioners,*

17
18 *v.*

19 KOVAC MEDIA GROUP, INC. d/b/a
20 TENTH STREET ENTERTAINMENT, a
21 California Corporation,

22 *Respondent.*
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Case No.: TAC - 52852

DETERMINATION OF CONTROVERSY

1 I. INTRODUCTION

2 This Petition to Determine Controversy under Labor Code § 1700.44, came before the
3 undersigned attorney for the Labor Commissioner assigned to hear the case. Petitioners Benjamin
4 Burnley p/k/a Breaking Benjamin, BB Touring, LLC, Benjamin Burnley Merchandise, LLC, Ben
5 Burnley Publishing, LLC, and Benjamin Burnley Recording, LLC (hereinafter “Petitioners” and/or
6 “Burnley”) were represented by Edwin F. McPherson and Pierre B. Pine. Respondent Kovac Media
7 Group, Inc. d/b/a Tenth Street Entertainment (hereinafter “Respondent” and/or “Tenth Street”) was
8 represented by David W. Schecter and A. Sasha Frid.

9 The parties submitted post-hearing briefs and the matter was taken under submission. Due
10 consideration having been given to the testimony, documentary evidence, and arguments presented,
11 the Labor Commissioner hereby adopts the following determination.

12 II. FINDINGS OF FACT

13 1. The issue here is whether Respondent, a talent management company, unlawfully
14 procured work for Petitioners in violation of the Talent Agencies Act (hereinafter “TAA”).

15 2. Respondent Tenth Street specializes in managing rock bands and musicians in the hard
16 rock music genre. Chris Nilsson (hereinafter “Nilsson”) is Tenth Street’s President and has been in the
17 business for over 20 years. Petitioner Benjamin Burnley is a musician and lead artist of the rock band
18 known as Breaking Benjamin. Burnley is an “artist” within the meaning of Labor Code § 1700.4(b).

19 3. In or about early 2019, Tenth Street and Burnley entered into an oral agreement under
20 which Tenth Street became Burnley’s manager for a 10% commission.

21 4. At the time Burnley and Tenth Street entered into their agreement and throughout the
22 relevant period, Creative Artists Agency (CAA) served as Burnley’s talent agent. Ryan Harlacher
(hereinafter “Harlacher”) was assigned as Burnley’s lead agent.

23 5. On or about April 18, 2019, Tenth Street sent Burnley a proposed Personal
24 Management Agreement. Paragraph 1 of the proposed agreement provides that Tenth Street would be
25 Burnley’s exclusive personal manager until one of three events occurs. The third reason that would
26 end the relationship pursuant to the proposed agreement would be “...the termination or expiration of
27 the Live Nation touring agreement term **currently being negotiated by Manager on Artist’s behalf.**”
28 (Emphasis added) The proposed agreement also describes the service Tenth Street is to provide

1 Burnley as "... advise and direct Artist in connection with all matters relating to Artist's career in all
2 branches of the entertainment industry, including without limitation: ... (g) with respect to the
3 selection of theatrical agencies, talent agencies, and other person or, firms or corporations who will
4 counsel, advise, seek and procure employment and engagements for Artist..." The parties never
5 executed the proposed Personal Management Agreement.

6 **Live Nation Tour**

7 6. Soon after Tenth Street began managing Burnley, it occurred to Nilsson that Burnley
8 should have an exclusive touring deal with Live Nation. One of Nilsson's other clients had a similar
9 deal with Live Nation, and it had turned out very lucrative for the artist. Nilsson communicated his
10 idea to Harlacher. On March 29, 2019, Nilsson emailed Harlacher asking if there had been any
11 movement on the tour with Live Nation. Nilsson followed up again with Harlacher on April 9, 2019,
12 and Harlacher responded that same day indicating he had some updates for Nilsson and would call
13 him to discuss that afternoon.

14 7. On April 22, 2019, Nilsson text messaged Charlie Goldstone (hereinafter "Goldstone"),
15 President of Frank Productions (hereinafter "FPC"). During the relevant period FPC was operated
16 and/or partially owned by Goldstone and two other individuals known as the Frank Brothers. However,
17 it was also undisputed that during the relevant period Live Nation owned at least 50% of FPC. In the
18 text message, Nilsson asks Goldstone if they are "...going to rock and roll." Goldstone responds that
19 he received the routing from Harlacher and has an offer worked up but that he still needs approval on
20 the overall dollar amount for the deal. That same day, Goldstone emailed Harlacher explaining that
21 Nilsson had texted him before he had a chance to update them both on the deal. Goldstone tells
22 Harlacher he has an offer worked up but that he is still filling in the business plan for Live Nation (not
23 FPC) to approve because of the dollar amount.

24 8. On April 23, 2019, Goldstone emailed Harlacher and Nilsson FPC's Breaking
25 Benjamin Worldwide Tour—Deal Proposal (hereinafter "FPC Offer"). Although the FPC Offer lists
26 "Frank Productions" in the header, it names Live Nation Worldwide, Inc., as the promoter, with the
27 corresponding rights and obligations of the proposed deal. The FPC Offer contemplates Burnley
28 performing 150 shows for a guaranteed amount of 22.5 million dollars, plus an overage of 90% net
pot revenues. On April 29, 2019, Angie Rho from CAA emailed Goldstone a redlined and revised

1 version of the FPC Offer, and indicated she was sending it to Nilsson at the same time and is thus
2 reserving the right to make further comments. On April 24, 2019, Nilsson emailed Harlacher telling
3 him he thought they should ask for another million dollars.

4 9. On May 9, 2019, Rick Franks¹ (hereinafter “Franks”) from Live Nation emailed
5 Harlacher Live Nation’s Breaking Benjamin North America Tour –2020-2022—Deal Proposal
6 (hereinafter “Live Nation Offer”). The Live Nation Offer is very similar to the FPC Offer. The Live
7 Nation Offer also provides Burnley would perform 150 shows or concerts for a guarantee amount of
8 23 million dollars, plus an overage of 90% of net pot revenue. Nilsson was not copied in the email
9 from Franks, but Harlacher forwarded the email to Nilsson that same day. On May 23, 2019, Harlacher
10 emailed Nilsson a redlined version of the offer for Nilsson to review before it was sent back to Franks.²
11 On July 10, 2019, Nilsson emailed Franks informing him he was going to see Burnley the following
12 week and that he could possibly get Burnley to sign the agreement if Franks has it ready to go. Nilsson
13 also proposes to Franks that the parties use the same documents previously used in a deal for a different
14 band called Five Finger Death Punch. Nilsson asks Franks to let “him” know what will work best and
15 reiterates that he wants to take advantage of his time with Burnley to get the deal done. It is unclear
16 from the copy of the email submitted if Nilsson copied Harlacher. Franks seems to respond to
17 Nilsson’s email copying Harlacher and others from CAA.

18 10. Harlacher and other CAA representatives went back and forth with Franks and others
19 from Live Nation over the following few months. And on or about September 13, 2019, Burnley and
20 Live Nation entered into the Tour Agreement (hereinafter referenced as the “Live Nation
21 Agreement”). Under the Live Nation Agreement, Burnley agrees to perform 150 concerts for 23.5
22 million dollars, plus 90% of the overage or net pot revenue.

23 11. Burnley received an advance on the Live Nation Agreement of about half the total
24 guaranteed amount. From this amount, in or about December 2019, it paid Tenth Street its 10%
25 commission or about 1.175 million dollars.

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27 ¹ No relation to the Frank Brothers from FPC.

28 ² Goldstone from FPC emailed Harlacher and Nilsson on July 15, 2019, informing them that Franks
from Live Nation had essentially decided FPC would no longer be involved in the deal, except
maybe to allow them to individually promote a few shows.

1 **Recording Contracts**

2 12. Nilsson also obtained three recording offers for Burnley. One offer came from Better
3 Noise Music (hereinafter “Better Noise”), described by Nilsson in his email to Burnley as Tenth
4 Street’s sister company. The other two offers came from Hollywood Records and Fearless Records.
5 The Better Noise and Hollywood Records offers require Burnley to produce two music videos each.
6 The Fearless Records deal contemplates creation of music videos by Burnley in connection with the
7 record or LP. The Better Noise offer also states that Burnley provide “album artwork, and all other
8 materials necessary for Better Noise’s commercial release of each LP, unless Better Noise creates
9 such materials on Artist’s behalf which would be subject to Artist’s approval.” It was undisputed that
10 Burnley did not sign any of the three recording offers obtained by Nilsson.

11 **Lawsuit**

12 13. The parties ended their relationship in July 2021. On November 2, 2021, Mike
13 Filippone (hereinafter “Filippone”) from Better Noise, who also served as Tenth Street’s “Income
14 Tracker”, emailed Burnley’s Business Manager, Robin Kerrs (hereinafter “Kerrs”), an invoice for
15 \$40,250.00 in commissions owed to Tenth Street from Burnley’s September 2021 tour dates. Filippone
16 followed up with Kerrs on November 4, 2021. That same day, Nilsson responds to the email reminding
17 Kerrs-- “[a]s you know, this is part of the Live Nation deal that 10th St procured for Ben.”

18 14. On January 25, 2022, Tenth Street sued Burnley in Superior Court for the County of
19 Los Angeles for, *inter alia*, breach of contract and unjust enrichment. In the lawsuit, Tenth Street seeks
20 over one million dollars in commissions from the Live Nation Tour. In the Complaint, Tenth Street
21 alleges that it sourced and negotiated the Live Nation Tour and potential record deals for Burnley.
22 According to the Complaint, “Tenth Street sourced and negotiated that deal [Live Nation Tour] and
23 made sure that Breaking Benjamin got the best terms possible.”

24 **III. LEGAL DISCUSSION**

25 The main issue in this case is whether Tenth Street unlawfully procured the Live Nation Tour or
26 whether it acted at the request of and in conjunction with CAA for the negotiation of the same.

27 **A. Tenth Street Unlawfully Procured The Live Nation Tour**

28 Under the Talent Agencies Act (TAA), any person, including any manager, cannot procure or
attempt to procure employment for an artist without a talent agency license. Labor Code §§ 1700.4;

1 1700.5; *see also* *Marathon Ent., Inc. v. Blasi*, 42 Cal. 4th 974, 985, 989 (2008), *as modified* (Mar. 12,
2 2008). The TAA applies even to an incidental or occasional act of procurement. *Id* at p. 987. But the
3 TAA provides a “safe harbor” if the unlicensed person: (1) acts in conjunction with a licensed talent
4 agent; (2) acts at the request of a licensed talent agent; and (3) the actions are limited to the negotiations
5 of the contract. Labor Code § 1700.44(d)³. All three prongs must be established for the safe harbor to
6 apply. In this case, Tenth Street failed to establish the safe harbor under § 1700.44 (d).

7 1. Nilsson Procured and/or Attempted to Procure the Live Nation Tour for Burnley.

8 To “procure” under the TAA means:

9to initiate a proceeding; to cause a thing to be done; to instigate; to
10 contrive, bring about, effect or cause[,] [t]o persuade, induce, prevail
11 upon, or cause a person to do something. Procurement also includes the
12 solicitation, negotiation or acceptance of a negotiated instrument for the
13 engagements at issue. Additionally, procurement includes an active
14 participation in a communication with a potential purchaser of the
15 artist’s services aimed at obtaining employment for the artist, regardless
16 of who initiated the communication.

17 *Gersh Agency v. Grant*, TAC 52726, at 5-6 (2021) (internal brackets, quotations, and citations
18 omitted).

19 Nilsson procured the Live Nation Tour on behalf of Burnley within this definition. Nilsson
20 testified that he conceived of the idea of the Live Nation Tour and soon after communicated it to
21 Harlacher. Nilsson followed up with Harlacher on March 29, 2019, and again on April 9, 2019.
22 Harlacher responded to Nilsson on April 9, 2019, indicating that he had some updates. However,
23 Nilsson contacted Goldstone by text message on April 22, 2019, asking Goldstone if they were
24 “...going to rock and roll.” This was clearly a direct solicitation to Goldstone for the Live Nation Tour
25 on behalf of Burnley. During the hearing, Nilsson explained that his text messages with Goldstone
26 included some lighthearted references or jokes because he did not want Goldstone to get the
27 impression that he, Nilsson, was trying to hit Goldstone over the head with the deal –*i.e.* to come off
28 a bit casual and not seem desperate to get the deal. Although Goldstone had been in contact with
29 Harlacher regarding the deal prior to receiving the text from Nilsson, Nilsson did not copy Harlacher
30 in the text message. This is clear from the text itself and from the subsequent email Goldstone sent

31 ³ § 1700.44 (d) states: “It is not unlawful for a person or corporation which is not licensed pursuant to
32 this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation
33 of an employment contract.”

1 Harlacher and Nilsson, in which Goldstone explains that Nilsson had texted him before he had a
2 chance to update them on the deal.

3 Other evidence supports a finding that Tenth Street procured and/or attempted to procure the
4 Live Nation Tour deal for Burnley. In the proposed Personal Management Agreement Tenth Street
5 sent Burnley in April 2019, Tenth Street states that it was currently *negotiating* the Live Nation Tour
6 on behalf of Burnley. In an email to Burnley’s Business Manager, Kerrs, on November 4, 2021,
7 Nilsson reminds her that Tenth Street *procured* the Live Nation Tour for Burnley. In the Complaint
8 Tenth Street filed against Burnley in Superior Court, Tenth Street alleges it *sourced and negotiated*
9 the Live Nation Tour and made sure Burnley got the best terms possible. At the hearing, Nilsson
10 testified that *procured, negotiated, and sourced* meant only that he conceived of the idea for the Live
11 Nation Tour. Nilsson’s attempt to give these terms a narrow and special meaning was not persuasive.
12 As discussed previously, the evidence supports a finding that Nilsson reached out to Goldstone to
13 directly solicit the Live Nation Tour. Thus, it is especially difficult to accept Nilsson’s unique meaning
14 to the terms *sourced, procured, and negotiated*, as simply having conceived of the idea. It is even more
15 difficult since Nilsson testified that Tenth Street attempted to *procure* record deals for Burnley, and
16 that with regards to those attempts, *sourced and negotiated* did not mean having conceived of the idea,
17 but actually approaching the record labels on behalf of Burnley.

18 Tenth Street also argues that even if Nilsson attempted to procure the FPC Offer such
19 conduct is not relevant to the Live Nation Offer that the parties eventually agreed to as the Live
20 Nation Agreement. Tenth Street’s attempt to distinguish the two deals falls short. Although the
21 negotiations may have started with Goldstone from FPC, it is evident that the deal was intended for
22 Live Nation. It was undisputed that during the relevant time Live Nation owned at least 50% of
23 FPC. Nilsson testified that he conceived of the deal as a *Live Nation tour* because of similar tour
24 agreements his other clients (artists) had with Live Nation. Goldstone’s proposed deal lists Live
25 Nation as the promoter even though FPC appears on the heading. The terms of the FPC Offer and
26 the Live Nation Offer, and eventual deal reached, are almost identical. Both provide for 150 shows
27 to be performed by Burnley. Both deals provided for 90% of net pot revenues to Burnley.

28 We are also not persuaded by Franks testimony that he did not negotiate the deal with
Nilsson, and that “it was all Harlacher.” Nilsson emailed Franks on July 10, 2019, informing him

1 that he would be seeing Burnley the following week and can possibly get the agreement done if
2 Franks can finalize it on his end. Nilsson proposes that they use the same agreement for another band
3 and reiterates that he wants to take advantage of his time with Burnley to get the deal done and asks
4 Franks to let *him* (Nilsson) know. There is no evidence that Nilsson copied Harlacher in his email to
5 Franks, although Franks copied Harlacher and other CAA representatives in his response to Nilsson.

6 The evidence supports a finding Tenth Street procured the Live Nation Tour for Burnley.

7 2. Nilsson’s Actions Were Not In Conjunction Or At The Request of CAA.

8 Managers walk a “very thin line” when communicating with potential employers of an artist.
9 *Shirley*, TAC 08-01, at 8. For the safe harbor to apply, managers must prove that in each negotiation
10 they acted in conjunction with and at the request of the agent. *Id.* at 8-9; *see also Bacall v. Shumway*,
11 61 Cal. App. 5th 950, 960 (2021), *review denied* (June 30, 2021). “A manager who obtained the talent
12 agent’s overall permission” to negotiate a contract does not fall within the safe harbor. *Shirley*, TAC
13 08-01, at 8. Such a large loophole would allow managers to become *de facto* agents, subject to none
14 of the restrictions meant to protect artists. Instead, “...the agent must advise the manager or request
15 the manager’s activity for each and every submission. At the very minimum an agent must be aware
16 of the manager’s procurement activity.” *Id.*; *see also id.* at 6-8 (detailing the legislative history from
17 the 1980s in which a legislatively-created Entertainment Commission considered and rejected
18 softening this requirement).

19 In this case, Nilsson text messaged Goldstone directly regarding the Live Nation Tour. In his
20 message, Nilsson asks Goldstone if they are going to “rock n roll” on the Live Nation Tour deal.
21 Nilsson explained during the hearing that he joked with Goldstone in the text messages to not give
22 Goldstone the impression that was “hitting him over the head” with the deal. Nilsson’s contact of
23 Goldstone was not at the request of or in conjunction with Harlacher or CAA agents. In fact, it appears
24 that Nilsson reached out directly to Goldstone after not receiving an update from Harlacher. Nilsson
25 did not copy Harlacher in the text messages. Goldstone emailed them both telling Harlacher that
26 Nilsson had texted him before he had a chance to get back to them.

27 Nilsson also emailed Franks on July 10, 2019, seeking to get the deal done given his upcoming
28 meeting with Burnley. There was no evidence that this contact with Franks was at the request of and

1 in conjunction with Harlacher or CAA. It appears that Nilsson did not copy Harlacher in his email to
2 Franks.

3 Tenth Street argues that the fact Burnley did not call Harlacher to testify should be held against
4 Burnley since Harlacher would have “directly relevant personal knowledge, and [...] much stronger
5 evidence...” pertinent to the case. (Respondents Post-Hearing Brief at p. 7:12-13). We agree with
6 Tenth Street that testimony from Harlacher would have been very helpful. But we disagree that
7 absence of such testimony should be construed against Burnley. The safe harbor under § 1700.44(d)
8 is an affirmative defense that must be established by the party raising it. It was thus incumbent, perhaps
9 critical, for Tenth Street to introduce testimony from Harlacher supporting its claim that its
10 procurement actions were at the request of and in conjunction with CAA. Tenth Street could have
11 requested to subpoena Harlacher to testify at hearing but chose not to do so. Cal. Code Regs. Title 8
12 §12027. We agree with Burnley that if anyone was required to produce testimony from Harlacher, it
13 was Tenth Street. (Petitioners Post-Hearing Brief at p. 9, fnt. 15)

14 Other evidence supports a finding that Tenth Street’s procurement activities were not in
15 conjunction with or at the request of CAA. As already mentioned, Tenth Street makes several
16 statements that it procured, negotiated, and/or sourced the Live Nation Tour for Burnley. This
17 admission is made in the Management Agreement Tenth Street proposed to Burnley, in the email
18 Nilsson sent Burnley’s business manager attempting to collect outstanding amounts, and in the
19 Complaint Tenth Street filed against Burnley. Nowhere in these different documents does Tenth Street
20 state that it procured the Live Nation Tour in conjunction with and/or at the request of CAA.

21 Tenth Street failed to establish that its procurement activities were at the request of and in
22 conjunction with CAA.

23 3. Nilsson’s Actions Were Not Limited To Negotiations Of The Live Nation Tour.

24 The safe harbor in Labor Code § 1700.44(d) applies only to negotiations by the unlicensed
25 person. Although the Act does not define what it means to negotiate, the term has generally been
26 interpreted narrowly. In *Shirley*, the hearing officer found that the manager’s review of roles and
27 contacting of the casting director for the advertised role did not fall within the safe harbor. TAC
28 08-01 at 9-10. In *Echo Lake*, the safe harbor did not apply when the manager set up an initial
meeting for a writer to sell his work. *Echo Lake*, TAC-52681 at 3. While the management team kept

1 the agent informed at all times, the managers admitted that they set up initial meetings because they
2 had a better relationship with a potential employer. *Id.* Although the managers worked in
3 conjunction with and at the request of the agent, the hearing officer held that the managers were not
4 engaged in negotiation of a contract as required for the safe harbor because they set up the initial
5 meeting to obtain an audition. *Id.* at 7.

6 Here, it was unclear if Harlacher or Nilsson made the initial contact with Goldstone
7 regarding the Live Nation Tour. But even if the initial contact was made by Harlacher, Nilsson’s text
8 message to Goldstone was not negotiations of the Live Nation Tour. As discussed previously,
9 Nilsson texted Goldstone asking him if they were “going to rock and roll”. He sent this text after not
10 receiving an update from Harlacher. This action by Nilsson was more in line with soliciting an offer
11 from Live Nation for Burnley’s live performances, than negotiating the terms of the tour. In
12 addition, like the managers in *Echo Lake*, it appears that Nilsson texted Goldstone because he had a
13 close relationship with him. Nilsson testified he had known Goldstone for a long time, and the
14 humor in the text messages revealed their close relationship.

15 To be clear, our finding is not based on whether or not Nilsson made the initial contact with
16 Goldstone regarding the Live Nation Tour. As we recently held in *Clarkson v. Blackstock*, TAC-
17 52781, the initial contact is not necessarily *per se* solicitation and not negotiation under the TAA. *Id.*
18 ap. 19. In *Clarkson*, we held that although the manager made the initial contact with the network,
19 such contact qualified as negotiations under the TAA because the manager was informing one
20 employer with whom the artist had an exclusivity agreement of an offer from a competing potential
21 employer. *Id.* at p. 18-19. Under the exclusivity agreement, the artist was required to inform her
22 employer network of any offers for a talent show and talk show. *Id.* The manager informed them of
23 competing offers for similar engagements from a rival network, essentially starting a bidding process
24 from the employer network. *Id.* at p. 20. The hearing officer drew a distinction between that case and
25 cases like *O’Dell*, TAC 26-99, *Echo Lake*, TAC-52681, and *Massey*, TAC-42-03, which essentially
26 involved cold calling by the unlicensed person. *Id.* ap. 20. Nilsson text message to Goldstone asking
27 him if they were going to “rock n roll” was more in line with cold calling a potential employer.

28 Thus, even assuming that Nilsson’s actions were at the request of and in conjunction with
CAA, Nilsson’s conduct was not limited to negotiation of the Live Nation Tour.

1 **B. Tenth Street Unlawfully Attempted to Procure The Recording Contracts**

2 Petitioners also allege that Tenth Street unlawfully attempted to procure recording contracts
3 for Burnley. Tenth Street argues that the recording contract exemption at § 1700.4 (a) applies. We
4 disagree with Tenth Street.

5 Section 1700.4 (a) exempts "...the activities of procuring, offering, or promising to procure
6 recording contracts for an artist or artists..." from the definition of "talent agency". This is referred
7 to as the recording contracts exemption under the TAA. Given the TAA's remedial nature, this
8 exemption is generally narrowly construed. Thus, in *Chinn v. Tobin* (1997) TAC No. 17-96 at page
9 6, fnt. 1, we held that music publishing and songwriting does not fall under the recording contracts
10 exemption. In *Yoakam v. The Fitzgerald Hartley Co., et al.* (2010), at p. 15, we relied on the
11 Legislative History of the exemption and on *Chinn* and determined that the recording contracts
12 exemption does not extend to additional creative services such as production of musical videos or
13 separate songwriting services.

14 In this case, it was undisputed that Tenth Street obtained three recording offers for Burnley.
15 It was also undisputed that the offers required and/or contemplated Burnley producing music videos,
16 and the other creative materials. Tenth Street argues that the offers still fall within the recording
17 contracts exemption because they do not actually require that Burnley appear in the music videos. In
18 other words, the music videos could have been animated or made with actors instead of Burnley.
19 Tenth Street misunderstands the exemption and its burden to establish it. As already mentioned, we
20 have generally construed the recording contracts exemption narrowly. A record deal that requires
21 music videos or other materials to be produced by the artist falls outside this narrow exemption. The
22 exemption is an affirmative defense that must be established by the party raising it. It is not the
23 artist's obligation to establish, as Tenth Street seems to argue, that the music videos could not have
24 been produced without the artist.

25 Tenth Street failed to establish that the recording contract offers it obtained for Burnley fall
26 under the recording contracts exemption of the TAA.

27 **C. Severance**

28 Tenth Street argues we should apply severance under *Marathon*. In *Marathon Entertainment, Inc. v. Blasi*, 42 Cal.4th 974 (2008) (*Marathon*), the California Supreme Court held that a violation of

1 the TAA does not automatically require invalidation of the entire contract. According to the Court, the
2 Labor Commissioner has discretion to apply the equitable doctrine to sever the illegal parts of a
3 contract from the legal ones and enforce the parts of the contract that are legal. *Id.* at 990-96.

4 The central dispute between the parties in this proceeding involves the Live Nation Tour. The
5 only other issue raised by the parties at the hearing was the recording offers—which, it was undisputed,
6 did not actually result in any recording contracts for Burnley. Thus, the testimony and evidence of the
7 parties’ business relationship revolved mostly around the Live Nation Tour/Deal. However, even
8 based on this limited evidence, we find it proper to apply the doctrine of severance in this particular
9 case.

10 Tenth Streets illegal acts with the Live Nation Tour and recording contracts appear collateral
11 to and can be severed from the main purpose of the parties’ agreement. *Marathon, supra*, 42 Cal.4th at
12 998. Tenth Street managed Burnley for approximately two years and provided Burnley with extensive
13 lawful management services during this time. This is also true even with the Live Nation Tour. In
14 *Marathon*, the court considered the percentage of time the manager spent procuring or soliciting versus
15 the time dedicated to management functions such as counseling and organizing the client’s affairs.
16 *Marathon*, 42, Cal.4th at 997-998. Thus, and consistent with *Marathon*, we recently explained in
17 *Clarkson v. Blackstock et al.* (2023) TAC-52781 at pp. 28-29, that while a manager is not entitled to
18 commissions for unlawfully procured engagements, the amount of time spent performing lawful
19 management activities in such engagements can be considered in determining whether to apply the
20 doctrine of severance. In this case, the majority of Tenth Street’s efforts with the Live Nation Tour
21 were lawful management activities. Tenth Street served as the hub of information and spent a
22 significant amount of time reviewing and providing feedback on the different drafts of the agreement.

23 We find that although Tenth Street unlawfully procured the Live Nation Tour and recording
24 offers, those engagements can be equitably served from the parties’ agreement.

25 **D. Disgorgement and/or Accounting Are Time Barred**

26 Labor Code section 1700.44 (c) states: “No action or proceeding shall be brought pursuant to
27 this chapter with respect to any violation which is alleged to have occurred more than one year prior
28 to commencement of the action or proceeding.” This one-year statute of limitations does not bar a
party from bringing a purely defensive petition before the Labor Commissioner. *Styne v. Stevens*

1 (2001) 26 Cal.4th 42, 59. A defensive action is one that seeks a finding that the defendant owes no
2 obligation to the plaintiff under the agreement. *Id* at p. 54.

3 In this case, although the TAA's one-year statute of limitations does not bar Burnley from
4 seeking to invalidate the agreement based on Tenth Street's unlawful procurement activities, it bars
5 Burnley from seeking accounting and/or disgorgement of commissions it paid Tenth Street. Burnley
6 entered into the tour agreement with Live Nation in September 2019. Burnley paid Tenth Street
7 approximately 1.175 million dollars in commissions in or about December 2019. There was no
8 evidence that Burnley paid Tenth Street any other commissions. Burnley filed the instant Petition on
9 February 11, 2022, more than two years after paying Tenth Street any commissions.

10 Thus, the TAA's one-year statute of limitations bars disgorgement and/or accounting of
11 commissions Burnley paid Tenth Street.


12 **IV. ORDER**

13 Accordingly, it is hereby ordered as follows:

14 1. Tenth Street unlawfully procured and/or attempted to procure the Live Nation Tour, the
15 Better Noise, Hollywood Records, and Fearless Records recording offers on behalf of Burnley, and to
16 that extent, the parties' oral management agreement is illegal, void, and unenforceable, and as such
17 Tenth Street is precluded and barred from pursuing any claims or seeking any commissions from
18 Burnley.


19 2. Burnley's requests for disgorgement and accounting are barred by the TAA's
20 one-year statute of limitations.

21 Dated: May 8, 2024

22 
23 _____
24 Abdel Nassar
25 Special Hearing Officer for the Labor Commissioner

26 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

27 Dated: May 8, 2024

28 

Lilia Garcia-Brower
State Labor Commissioner