

1 STATE OF CALIFORNIA  
2 DEPARTMENT OF INDUSTRIAL RELATIONS  
3 DIVISION OF LABOR STANDARDS ENFORCEMENT  
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9 Special Hearing Officer for the Labor Commissioner

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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

JOSH TODD,

Petitioner,

vs.

TODD A. MEAGHER; TODD  
ENTERTAINMENT, LLC; MARILYN  
D. GARNER, CHAPTER 7 TRUSTEE  
FOR TODD ENTERTAINMENT, LLC

Respondents.

CASE NO.: TAC-13418

DETERMINATION ON PETITION  
OF JOSH TODD

This proceeding arose under the provisions of the Talent Agencies Act (“TAA” or “Act”), Labor Code §§ 1700 – 1700.47<sup>1</sup>. On May 14, 2009, petitioner JOSH TODD (“TODD”) filed a petition with the Labor Commissioner pursuant to §1700.44 seeking determination of an alleged controversy with respondents TODD A. MEAGHER, (“MEAGHER”), TODD ENTERTAINMENT, LLC (“TODD ENTERTAINMENT” or “LLC”), and Marilyn D. Garner, Chapter 7 Trustee for Todd Entertainment, LLC hereinafter sometimes collectively referred to as “respondents”. MEAGHER filed an

<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Labor Code.

1 answer, followed by a first amended answer. Thereafter, over a period of three days,  
2 November 9 and 10, 2010 and April 20, 2011, a full evidentiary hearing was held before  
3 William A. Reich, attorney for the Labor Commissioner assigned as a hearing officer.  
4 Due consideration having been given to the testimony, documentary evidence, briefs, and  
5 arguments submitted by the parties, the Labor Commissioner now renders the following  
6 decision.

7 FACTUAL AND PROCEDURAL BACKGROUND

8 TODD is a singer, songwriter, and recording artist. In January 2003, TODD  
9 entered into a Management Agreement with MEAGHER, pursuant to which MEAGHER  
10 agreed to provide services as a personal manager in connection with TODD's activities as  
11 an artist. MEAGHER would be paid 20% of TODD's gross earnings and be entitled to  
12 recover expenses incurred in furtherance of TODD's work as an artist.

13 In June 2003, TODD and MEAGHER decided to replace their existing  
14 Management Agreement with a new agreement. Specifically, they entered into an  
15 Operating Agreement that called for jointly establishing and operating a new California  
16 Limited Liability Company to be known as TODD ENTERTAINMENT, LLC. The  
17 purpose of the company was to conduct activities pertaining to TODD in his professional  
18 role as a musician; the contemplated activities consisted of "the creation and exploitation  
19 of musical recordings, live performances and touring, merchandising, publishing and  
20 other activities in the entertainment industry." Both parties made capital contributions to  
21 the company: TODD contributed the rights to 22 previously recorded Master Recordings,  
22 while MEAGHER contributed \$218,000.00 in cash.

23 Under the terms of the operating agreement, TODD was to provide services as a  
24 songwriter, producer, and performer in the field of music and to have final discretionary  
25 authority on all artistic matters. His services as a musician and recording artist were to be  
26 rendered exclusively for the benefit of the company for a period of three years or until  
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1 TODD released three studio albums, whichever was longer. As to MEAGHER, the  
2 operating agreement provided that he would be the manager of the company and charged  
3 with managing its administrative and business affairs. The terms of the agreement also  
4 spelled out that the net cash flow of the company would be distributed regularly to the  
5 parties, as the two members of the LLC, and specified that the minimum monthly  
6 distribution to each party would be \$4,000.00.

7 With respect to contracts for live engagements and performances, the operating  
8 agreement stated that they had to be contracted through the company. The agreement  
9 further provided that only MEAGHER, as the manager, had authority to bind the  
10 company.

11 In June 2003, MEAGHER and TODD ENTERTAINMENT retained the services  
12 of Andrew Goodfriend, a licensed talent agent employed in the offices of The Agency  
13 Group talent agency, to act as the booking agent for TODD in procuring and arranging for  
14 engagements for live performances and appearances by TODD and his band. The evident  
15 plan was to have TODD and his band tour the United States and appear at numerous live  
16 venues throughout the country, which is precisely what occurred between the time  
17 Goodfriend was retained and sometime around August 2004, when the relationship  
18 between TODD and MEAGHER soured. The monies earned from TODD's  
19 performances at the various live venues were paid to and retained by TODD  
20 ENTERTAINMENT. During this period, TODD was paid the minimum distribution of  
21 \$4,000.00 each month.

22 The relationship between TODD and MEAGHER began to deteriorate sometime  
23 around August 2004. On September 24, 2004, TODD filed an action against MEAGHER  
24 and TODD ENTERTAINMENT in the Los Angeles County Superior Court, alleging  
25 breach of contract and breach of fiduciary duty. The complaint sought damages and an  
26 accounting. MEAGHER and TODD ENTERTAINMENT answered the complaint, and  
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1 at the same time filed a cross-complaint seeking damages for breach of contract,  
2 interference with contract, interference with prospective economic advantage, and  
3 conversion. The complaint sought damages and also injunctive relief.

4 On September 14, 2005, MEAGHER commenced a Chapter 7 bankruptcy proceed-  
5 ing in the Bankruptcy Court in the Northern District of Texas. MEAGHER was given a  
6 discharge on August 9, 2006. On November 9, 2006, he reacquired his ownership interest  
7 in TODD ENTERTAINMENT, and based on that reacquisition resumed his participation  
8 as a party in the state court litigation.

9 In February, 2007, there was a new round of pleadings in the state court action.  
10 TODD filed a first amended and supplemental complaint that was duly answered, while  
11 MEAGHER and TODD ENTERTAINMENT each filed separate first amended cross-  
12 complaints that were also duly answered. Although additional allegations, causes of ac-  
13 tion, parties, and prayers for relief were inserted into these new pleadings, essentially the  
14 parties continued to seek monetary and equitable redress from one another for alleged  
15 breaches and violations of contractual obligations and rights created by the operating  
16 agreement. TODD's first amended and supplemental complaint also included a cause of  
17 action for dissolution of the LLC.

18 On October 2, 2007, MEAGHER caused a Chapter 7 bankruptcy proceeding to be  
19 initiated on behalf of TODD ENTERTAINMENT in the Bankruptcy Court in the North-  
20 ern District of Texas. It is by virtue of that proceeding, which is still pending, that the  
21 Chapter 7 trustee for TODD ENTERTAINMENT, Marilyn D. Garner, is participating in  
22 this case as a respondent.

23 On October 7, 2008, TODD applied to the Texas Bankruptcy Court for relief from  
24 the automatic stay so that it could initiate a TAA proceeding before the Labor Commis-  
25 sioner. Specifically, TODD wished to interpose an illegality defense to the causes of ac-  
26 tion asserted in the cross-complaints of MEAGHER and TODD ENTERTAINMENT—  
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1 and, in particular, to assert that because MEAGHER and TODD ENTERTAINMENT had  
2 used the operating agreement to engage in the activities of a talent agency, without being  
3 licensed to do so, the operating agreement was illegal and void, and therefore unenforce-  
4 able. Because of the Labor Commissioner's exclusive original jurisdiction over claims  
5 and defenses arising under the TAA, TODD's defense to the cross-complaints had to first  
6 be adjudicated by the Commissioner.

7 The Texas Bankruptcy Court transferred the case to the Bankruptcy Court in the  
8 Central District of California, which in turn remanded the matter to the superior court.  
9 That court then stayed the pending action and granted TODD leave to file the proposed  
10 Petition To Determine Controversy with the Labor Commissioner. TODD did so on May  
11 14, 2009, and thereby initiated the instant proceeding.

12 The petition alleges that MEAGHER and TODD ENTERTAINMENT violated the  
13 TAA, and in particular section 1700.5, which provides that no person shall engage in the  
14 occupation of a talent agency without first obtaining a license to do so. More specifically,  
15 the petition alleges that, without being licensed as talent agents, MEAGHER and TODD  
16 ENTERTAINMENT engaged in the occupation of a talent agency by procuring and of-  
17 fering, promising, and attempting to procure engagements and public performances for  
18 TODD, a musical artist. The petition seeks a determination from the Commissioner that,  
19 because of the violations of the TAA, the operating agreement is void ab initio and unen-  
20 forceable, and that consequently TODD has no liability thereunder and no rights can be  
21 asserted against him under its provisions.

22 In their answer and in other papers responding to the petition, MEAGHER and  
23 TODD ENTERTAINMENT deny the allegations of the petition, dispute its legal conten-  
24 tions, and proffer certain threshold legal defenses which they assert are a bar to any relief.  
25 Their first defense asserts that the one-year statute of limitations (§1700.44, subd. (d))  
26 bars the request for a determination that the operating agreement is illegal. They contend

1 that TODD is seeking not only defensive relief but affirmative relief as well, and that as a  
2 result he is barred from obtaining any relief. The second defense asserts that the relation-  
3 ship between TODD and TODD ENTERTAINMENT was that of employee and  
4 employer, and that such a relationship precludes TODD from establishing a violation of  
5 the licensing requirements of the TAA.

6 A core contested issue at the heart of this case centers on the contentions advanced  
7 by TODD to support his charge that MEAGHER and TODD ENTERTAINMENT  
8 violated section 1700.5 by engaging in the occupation of a talent agency without being  
9 licensed. At the hearing in this case, both parties introduced considerable evidence  
10 addressed to this issue.

11 As noted earlier, MEAGHER and TODD ENTERTAINMENT retained a licensed  
12 talent agent, Andrew Goodfriend, to act as the booking agent for TODD. As Goodfriend  
13 acknowledged at the hearing, the job of a talent agent requires carrying out essentially  
14 four tasks: the first is contacting the prospective venue and soliciting the engagement; the  
15 second is negotiating the terms; the third is confirming the dates; and the fourth is sending  
16 out the contract memorializing the engagement. With respect to the majority of the  
17 engagements that were obtained for TODD during the June 2003 to August 2004 period,  
18 it was Goodfriend who performed all of these tasks.

19 In this case, however, it is TODD's contention that with respect to a substantial  
20 number of engagements, including one very significant one, it was MEAGHER and  
21 TODD ENTERTAINMENT—and not Goodfriend—who carried out the basic tasks of a  
22 talent agent in securing the engagements for TODD. The significant major engagement  
23 was the one involving TODD's live appearances in Japan in July 2004, for which the  
24 payment was \$120,000. TODD contends that MEAGHER himself acted as the talent  
25 agent with respect to this engagement. There are a few other isolated engagements that  
26 TODD attributes to MEAGHER's direct involvement as an unlicensed talent agent. The

1 evidence adduced by the parties or the question of whether MEAGHER personally  
2 engaged in the activities of a talent agent is discussed more fully later in this decision, in  
3 the context of addressing the issue of whether there was a violation of §1700.5.

4 TODD also charges that there were a large number of engagements that were  
5 procured through the unlicensed talent agency activities of a third party and that, as to  
6 these engagements, the illegal activities and consequent TAA violations must be imputed  
7 to MEAGHER and TODD ENTERTAINMENT. In October, 2003, TODD  
8 ENTERTAINMENT entered into a licensing agreement with XS Records, Inc., a  
9 company owned by Edward Phillips, pursuant to which XS Records was given an  
10 exclusive license to manufacture and distribute the album "You Made Me", which had  
11 been recorded by TODD. To promote sales of the album, Phillips subsequently became  
12 actively involved in soliciting and lining up numerous engagements and live  
13 performances for TODD. After an interest in the prospective live appearance had been  
14 elicited or the terms negotiated, Phillips would virtually always refer the specifics of the  
15 engagement to Goodfriend so that he could finalize the arrangement. Phillips was not a  
16 licensed talent agent. It is TODD's position that based on the relationship that existed  
17 between Phillips and MEAGHER, the unlicensed talent agency activities of Phillips  
18 should be viewed and treated as constituting the unlicensed talent agency activities of  
19 MEAGHER and TODD ENTERTAINMENT. The evidence presented by the parties  
20 pertaining to the activities engaged in by Phillips is reviewed below in connection with  
21 the discussion of the issue of whether there was a violation of section 1700.5.

22 A corollary question related to the issue of whether there has been a violation of  
23 the TAA is whether the appropriate remedy for a violation is to declare the entire contract  
24 void or to apply the doctrine of severability and declare part of the contract illegal and  
25 part of it valid and enforceable. On these questions, the parties take conflicting positions,  
26 with TODD contending the illegality in this case precludes severance and MEAGHER

1 and TODD ENTERTAINMENT contending that even if there is some illegality severance  
2 provides the appropriate approach. The question is one directed to the sound discretion of  
3 the Labor Commissioner.

4 The issues raised by the parties, and the contentions with respect to those issues,  
5 are addressed in the discussion that follows.

6  
7 DECISION  
8

9 1. Application of statute of limitations to defense of illegality.  
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11 The petition in this case seeks a declaratory determination that MEAGHER and  
12 TODD ENTERTAINMENT violated the TAA by procuring engagements for TODD  
13 without being licensed as talent agents, and that these illegal activities render the parties'  
14 operating agreement illegal, void, and unenforceable, thus precluding any claims against  
15 TODD under the provisions of the agreement. In other words, the petition interposes a  
16 defense to MEAGHER and TODD ENTERTAINMENT's amended cross-complaint in  
17 the superior court, which asserts claims and seeks relief based on the parties' operating  
18 agreement.

19 MEAGHER and TODD ENTERTAINMENT contend that the illegality defense is  
20 barred by the TAA's one-year statute of limitations, which is set out at section 1700.44,  
21 subdivision (c) and reads as follows:

22 No action or proceeding shall be brought pursuant to  
23 this chapter with respect to any violation which is alleged to  
24 have occurred more than one year prior to commencement of  
the action or proceeding.

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26 ///



1 Specifically, they assert that because the 2003-2004 illegal acts attributed to them  
2 occurred more than one year prior to the filing of the petition, the one-year statute  
3 of limitation bars TODD's defense.

4 The foregoing argument was squarely rejected by the Supreme Court in  
5 *Styne v. Stevens* (2001) 26 Cal. 4th 42, 51-54. In that case, the Court of Appeal  
6 had adopted the view that an invocation of the defense of illegality under the TAA  
7 was subject to and could be barred by the TAA's one-year statute of limitations.  
8 Rejecting this conclusion and reversing, the Court stated:

9  
10 [T]he Court of Appeal's holding contravenes the clear  
11 rule that statutes of limitations do not apply to defenses. . . .  
12 Under well-established authority, a defense may be raised at  
13 any time, even if the matter alleged would be barred by a stat-  
14 ute of limitations if asserted as the basis for affirmative relief.  
15 The rule applies in particular to contract actions. One sued on  
16 a contract may urge defenses that render the contract unen-  
17 forceable, even if the same matters, alleged as grounds for  
18 restitution after rescission, would be untimely. (E.g., *Estate of*  
*Cover* (1922) 188 Cal. 133, 140; *Bank of America v. Vannini*  
(1956) 140 Cal.App.2d 120, 127; *Stiles v. Bodkin* (1941) 43  
Cal.App.2d 839, 844; [Citations].)

18 (*Id.* at pp. 51-52.)

19 MEAGHER and TODD ENTERTAINMENT argue that the statute of limitations  
20 nevertheless applies here because, by requesting a declaratory determination that the  
21 parties' contract is illegal, TODD is in effect seeking affirmative relief. In rejecting this  
22 same argument, when it was made in *Styne v. Stevens, supra*, the court commented as  
23 follows:

24  
25 Styne asserts that Stevens has actually sought affirma-  
26 tive relief by asking, in effect, for a declaration that the con-  
27 tract is void and unenforceable. But the cases belie such an  
28 argument; one who raises the defense that a contract is illegal  
and unenforceable necessarily asks for a determination to that  
effect. If the result the defendant seeks is simply that he or  
she owes no obligations under an agreement alleged by the

1 plaintiff, the matter must be deemed a defense to which the  
2 statute of limitations does not apply.

3 (*Styne v. Stevens, supra*, 26 Cal.4th at p. 53.)

4 MEAGHER and TODD ENTERTAINMENT assert that TODD is not merely  
5 seeking a declaration that he owes nothing under the operating agreement; they contend  
6 that, in addition, he is seeking a determination that will lay the foundation for restitution  
7 of the musical, publishing, and recording rights that TODD transferred to TODD  
8 ENTERTAINMENT at the time the limited liability company was formed pursuant to the  
9 operating agreement. TODD has in fact asked the Labor Commissioner to declare the  
10 agreement void ab initio, and has taken the view that such a declaration would restore the  
11 parties' to the position they were in prior to entering into the agreement—in other words,  
12 that any property rights that TODD had parted with would be restored to TODD. To the  
13 extent that TODD seeks and expects such an effect to result from a declaration of  
14 illegality, it is evident that TODD is pursuing not only defensive relief but affirmative  
15 relief as well. MEAGHER and TODD ENTERTAINMENT contend that because TODD  
16 is seeking affirmative relief that is barred by the statute of limitations he has forfeited the  
17 right to pursue defensive relief that is not barred by the statute of limitations. This  
18 argument is incorrect.

19 In *Church v. Brown* (Cal.Lab.Com., June 2, 1994) TAC No. 66-92, which was  
20 cited with approval in *Styne v. Stevens, supra*, 26 Cal. 4<sup>th</sup> at p.53, the Labor  
21 Commissioner recognized that the one-year statute of limitations contained in section  
22 1700.44 did not apply to the artist's purely defensive invocation of TAA illegality, even  
23 though it did bar his use of TAA illegality to pursue an affirmative claim for recoupment  
24 of commissions paid more than one year prior to the filing of the petition. In other words,  
25 to the extent that a doctrine such as illegality is invoked defensively it is not barred by the  
26 statute of limitations, while to the extent such a doctrine is invoked affirmatively it is  
27 subject to the statute of limitations. For purposes of the statute of limitations, the

1 defensive and affirmative uses of these doctrines are separate and distinct, and do not  
2 affect one another. Plainly, there is no rational reason why a party should be deemed to  
3 forfeit his valid contractual defense of illegality merely because he has asserted an  
4 affirmative claim of illegality that turns out to be barred by the statute of limitations. No  
5 policy underlying the statute of limitations warrants such a result, nor does any authority  
6 support it.

7 MEAGHER and TODD ENTERTAINMENT's reliance on *Greenfield v. Superior*  
8 *Court* (2003) 106 Cal.App.4<sup>th</sup> 743, as supportive of a contrary view, is misplaced. In that  
9 case, the artist, Blanks, filed a civil complaint against Greenfield asserting a cause of  
10 action under the TAA. Asserting that his artist-manager contract with Greenfield was  
11 illegal because the latter had acted as a talent agent without being licensed, Blanks sought  
12 restitution of all moneys paid to Greenfield. The action was stayed while the claim was  
13 heard by the Labor Commissioner. Finding that the one-year limitations period applied  
14 and that all monies had been paid more than one year prior to the filing of the petition, the  
15 Commissioner held that Blanks could not recoup his commission payments. When the  
16 case returned to the superior court, Greenfield moved for summary adjudication of the  
17 TAA claim. After the court denied the motion, the Court of Appeal issued a writ to  
18 review that decision.

19 On appeal, apart from arguing that the filing of the civil complaint had tolled the  
20 statute of limitations, Blanks contended that he had filed his petition with the Labor  
21 Commissioner solely in defense of Greenfield's cross-complaint. Noting that Blanks had  
22 proceeded before the Commissioner because he needed a ruling in order to pursue his  
23 TAA cause of action for restitution, the court rejected the contention as without merit.  
24 "Blanks. . . was clearly seeking to affirmatively recover under the statute." (*Greenfield v.*  
25 *Superior Court, supra*, 106 Cal.App.4<sup>th</sup> at p. 753.)

26 The only issue before the Court of Appeal in *Greenfield v. Superior Court* was  
27 whether Greenfield was entitled to summary adjudication of Blank's TAA cause of action

1  
2 for the recoupment of previously paid commissions. The answer to that question was a  
3 simple yes; the affirmative claim for restitution was barred by the one-year statute of  
4 limitations. In this context, any suggestion of acting defensively was wholly inaccurate  
5 and entirely devoid of merit. The issue of whether Blanks could have set up a TAA  
6 defense to Greenfield's cross-complaint was not before the Court of Appeal.

7 Consequently, the court had no occasion to consider or address the issue. As discussed  
8 above, the correct view is that a party does not forfeit the right to assert a valid defense of  
9 illegality under the TAA merely because that party has asserted an affirmative claim of  
10 illegality under the TAA that turns out to be barred by the statute of limitations. Nothing  
11 in the holding or decision in *Greenfield v. Superior Court, supra*, contradicts this view.

12 It follows from the foregoing that the one-year limitations period of section  
13 1700.44, subdivision (c) does not bar TODD's assertion of an illegality defense under the  
14 TAA. The defense may be interposed against the causes of action in the first amended  
15 cross-complaints filed in superior court, and also against any other causes of action that  
16 may be alleged based on rights conferred by or arising under the operating agreement.

17 As to the affirmative claims that TODD has asserted in his first amended  
18 complaint in superior court, and that do not rely in whole or in part on violations of the  
19 TAA (all but one clearly fall into this category), it is axiomatic that such claims have no  
20 bearing on the application of the one-year statute of limitations to TAA defenses. In point  
21 of fact, these affirmative claims that do not involve TAA violations seek remedies that  
22 constitute an alternative to a defense of illegality under the TAA. In other words, the  
23 non-TAA affirmative claims based on the parties' contract are properly pursued if the  
24 defense of illegality of the contract under the TAA fails or is otherwise abandoned.

25 One of the causes of action in TODD's first amended complaint, however, namely  
26 the one for dissolution of the LLC, may implicate the issue of illegality under the TAA.  
27 Dissolution relates directly to the claims that the parties may have, or believe they have,

1  
2 to property rights that were transferred to TODD ENTERTAINMENT. For the reasons  
3 stated, the affirmative dissolution claim does not impair TODD'S right to raise the  
4 defense of illegality under the TAA. Nevertheless, given the complexities attending the  
5 instant operating agreement, delineating the precise contours of invoking illegality  
6 defensively—as distinct from asserting it affirmatively—is certain to require a specific  
7 and detailed explanation. This is a matter that is properly addressed not at this juncture  
8 but in the context of discussing the scope and effect of the relief that is appropriate for a  
9 violation of section 1700.5.

10  
11 2. Employee Status As Furnishing Exemption From TAA Licensing  
12 Requirements.

13  
14 MEAGHER and TODD ENTERTAINMENT contend that under the terms of the  
15 operating agreement, which defined the parties' working relationship, TODD was the  
16 employee of TODD ENTERTAINMENT and not an independent contractor.

17 MEAGHER and TODD ENTERTAINMENT further contend that because TODD was an  
18 employee they were exempt from the licensing requirements of the TAA and that any  
19 talent agency activities they may have engaged in without being licensed did not violate  
20 section 1700.5. This argument is unsound and must be rejected.

21 Section 1700.4 provides in relevant part as follows:

22 "Talent agency" means a person or corporation who  
23 engages in the occupation of procuring, offering, promising,  
24 or attempting to procure employment or engagements for an  
25 artist or artists.

26 Section 1700.5 provides in pertinent part:

27 No person shall engage in or carry on the occupation  
28 of a talent agency without first procuring a license therefor  
from the Labor Commissioner.

1  
2 As the Supreme Court has explained:

3 The Act establishes its scope through a functional, not  
4 a titular, definition. It regulates *conduct*, not labels; it is the  
5 act of procuring (or soliciting), not the title of one's business,  
6 that qualifies one as a talent agency and subjects one to the  
7 Act's licensure and related requirements. (§1700.4, subd. (a).)  
8 Any person who procures employment—any individual, any  
9 corporation, any manager—is a talent agency subject to regu-  
10 lation. (§§1700.4, subd. (a).)

11 (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986.) As the foregoing  
12 makes perfectly clear, anyone who procures or solicits engagements for an artist is  
13 carrying on the occupation of a talent agency and must be licensed.

14 There is nothing in the TAA that provides an exemption or exclusion from  
15 licensure for a person who procures employment or engagements on behalf of an artist  
16 who is an employee of that person. The fact that the artist is an employee of the person  
17 with whom he has contracted poses no impediment to that person entering into an  
18 arrangement with a third party whereby the artist becomes simultaneously the employee  
19 of both the person and the third party, who then become the joint employers or co-  
20 employers of the artist. Likewise, the fact that the artist is the employee of such a person  
21 poses no impediment to that person entering into an arrangement with a third party which  
22 secures the engagement of the artist to deliver a live performance other than as an  
23 employee of the third party. It is evident that these activities, when engaged in, fall  
24 squarely within the scope and coverage of the TAA, and that there is absolutely no  
25 statutory or other basis for their exclusion from the explicit—and purposefully broad—  
26 protections afforded to artists by the TAA.

27 The argument advanced by MEAGHER and TODD ENTERTAINMENT seeks to  
28 import—into the TAA coverage analysis—the factors identified in *S.G. Borello & Sons,  
Inc. v. Department of Industrial Relations* (1989) 48 Cal 3d 341 (*Borello*) for determining  
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1 when an individual rendering services to another is an employee or an independent con-  
2 tractor. These factors were developed in an entirely different context and involved a  
3 significant broadening of the definition of employee to insure that the classification of  
4 independent contractor would not be used as a subterfuge for depriving employees of im-  
5 portant public benefits and protections. Not only is the context examined in *Borello*  
6 wholly inappropriate to the domain regulated by the TAA, but importation of the *Borello*  
7 factors would produce the distorted result of an expansive policy designed to protect  
8 employees in one area being used to circumscribe and limit the protections available to  
9 artists in an entirely different area. Of course, no such misuse of *Borello* is tenable or  
10 possible. The *Borello* factors merely serve to identify when an individual is an employee  
11 and not an independent contractor. But as has been pointed out, an artist's status as an  
12 employee has no bearing on the application of the TAA's licensing requirements—i.e.,  
13 employee status does not exempt the artist's employer from compliance with the licensure  
14 requirements of section 1700.5. Consequently, the *Borello* factors and their focus on the  
15 employee-independent contractor distinction are not germane and have no role to play in  
16 a determination of whether there has been a violation of the TAA.

17 In advancing their employee-independent contractor argument, MEAGHER and  
18 TODD ENTERTAINMENT understandably relied on the Labor Commissioner's decision  
19 in *Nixon v. Mo Swang Productions, Inc.*, (Cal. Lab. Com., October 3, 2001) TAC No. 30-  
20 00. However, that decision never undertook to elucidate why the artist's status as an  
21 employee should be deemed determinative of whether the TAA's licensing requirements  
22 apply. That analysis has been undertaken here, and it has been explained that not only is  
23 the artist's status as an employee not a determinative consideration but also that it has no  
24 direct bearing on whether the TAA applies. In any event, the *Nixon* decision can be  
25 explained in terms of the proper standard to be applied in determining whether the TAA's  
26 licensing requirements have been violated.

1 The TAA is violated when a person, who is not licensed as talent agent, procures  
2 or attempts to procure “employment or engagements for an artist.” (§1700.4.) A person  
3 who contracts with an artist engages in such procurement when the objective underlying  
4 the person’s contacts with third parties is the marketing, promotion, and placement of the  
5 artist. In other words, the person acts as a talent agent when the driving force behind the  
6 communications and negotiated transactions with third parties is a focus on the artistic  
7 attributes of the artist and on the solicitation of employment or engagements based on  
8 those attributes.

9 There is no procurement of employment, however, where the efforts of the person  
10 who contracted with the artist are directed not at placing the artist but rather at marketing  
11 or selling a distinct product or service, in relation to which the artist may have made some  
12 contribution. Put another way, even though the talents of the artist may contribute  
13 significantly to the creation of the product or the delivery of the service, the person is not  
14 acting as a talent agent if the focal point of the transaction with the third party is the  
15 provision of the product or service and not the placement of the artist.

16 It goes without saying, that there will not always be a bright line between what  
17 constitutes arranging for the placement of an artist, on the one hand, and what constitutes  
18 selling a product or service, on the other. For close cases, there is no single formulation  
19 that can delineate on which side of the line the activity falls. Thus, each case must be  
20 decided independently, based on a review of the evidence and a careful assessment of the  
21 totality of the facts and circumstances in the particular case. In addition, the Labor  
22 Commissioner and courts must be attuned to the possibility of subterfuge. Where  
23 appropriate, the Commissioner and courts must be prepared to declare that contractual  
24 arrangements that are couched in terms of selling a product or service are in truth a  
25 disguise for contracts that are designed to permit the illegal procurement of employment  
26 without a license. (*Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 355.) .



1 In the *Nixon* case, the Labor Commissioner found that Mo Swang Productions,  
2 Inc. (“Mo Swang”), which contracted with the artist, Nixon, was selling a product and not  
3 procuring employment for the artist. Mo Swang was a musical production house that pro-  
4 duced master recordings for its clients. Mo Swang employed several producers and  
5 provided the facilities, equipment, and environment for the creation of the master  
6 recordings requisitioned by its clients. In placing their orders, many clients of Mo Swang  
7 would request that Nixon be assigned as the producer on the project; in those instances,  
8 Nixon and his artistic talents would play a significant role in the creation of the final  
9 product. After reviewing the totality of the facts and circumstances in that case, the  
10 Labor Commissioner found that Mo Swang was engaged in selling a distinct product and  
11 not in securing employment or engagements for Nixon. Consequently, Mo Swang was  
12 not acting as a talent agency and there was no violation of the TAA.

13 The present case, by contrast, falls squarely on the other side of the equation.  
14 Here, all of the transactions at issue pertain to public performances and engagements that  
15 were arranged for TODD during the period July 2003 to August 2004. All of these  
16 performances and appearances were obtained through the promotion and marketing of  
17 TODD, undertaken with the objective of securing engagements for TODD and placing  
18 him at various venues. There was no purported selling of products or services. Thus, it is  
19 clear that TODD’s performances during the period were the result of someone procuring  
20 or attempting to procure engagements for TODD. The question that remains is whether  
21 MEAGHER and TODD ENTERTAINMENT were involved in the procurement or  
22 attempted procurement of one or more of those engagements.

23  
24  
25 3. Procurement Of Engagements in Violation Of Section 1700.5

26  
27 Direct Procurement By Meagher.

1  
2           TODD contends that MEAGHER and TODD ENTERTAINMENT violated the  
3 licensing requirements of section 1700.5 as a result of MEAGHER engaging in the  
4 activities of directly procuring and attempting to procure engagements and employment  
5 for TODD. The principal engagement attributed to MEAGHER's actions is the Japan  
6 tour, which involved two live performances in Japan in July 2004. The pertinent facts are  
7 the following.

8           At the inception of the relationship between TODD ENTERTAINMENT and  
9 Andrew Goodfriend, the retained talent agent, MEAGHER and Goodfriend discussed the  
10 possibility of TODD appearing in Japan. Goodfriend indicated he did not have any  
11 contacts in Japan. When MEAGHER stated that he had many friends and connections  
12 who were familiar with touring in Japan and who were acquainted with people with inside  
13 knowledge of the Japan scene, Goodfriend told MEAGHER to go ahead and get whatever  
14 information he could. MEAGHER then proceeded to make some contacts, including  
15 communicating with a well established tour promoter known as Udo Artists to see if there  
16 was an interest in having TODD appear and perform. MEAGHER passed the contact  
17 information onto Goodfriend in late June 2003. Nothing came of these initial contacts  
18 and inquiries.

19           Subsequently, TODD told MEAGHER about his strong interest in touring Japan.  
20 Following this discussion, MEAGHER—acting alone—engaged in extensive personal  
21 efforts to obtain engagements for TODD in Japan. He described these efforts in his  
22 deposition in the civil action taken on December 10, 2004. He approached Udo Artists.  
23 “I contacted Udo Artists directly and asked them if they would be interested in booking  
24 shows for Josh Todd. They declined.” He contacted Udo Artists again, unsuccessfully,  
25 and then asked his friends and contacts to see if they could assist him in getting TODD  
26  
27

1 booked with Udo Artists. He then researched and looked into all the music festivals in  
2 Japan, including the Fuji Festival, and contacted the managers of other bands to see if  
3 TODD could be packaged with one of their bands so that he could perform live in Japan.

4 As a result of his efforts, MEAGHER was contacted by a tour promoter known as  
5 Creative Man, and on March 3, 2004 that promoter made an offer for TODD to appear at  
6 its Summer Sonic festival. While the offer was being considered, MEAGHER continued  
7 to seek other show opportunities for TODD, which included continuing discussions with  
8 TODD ENTERTAINMENT's prospective licensee in Japan, JVC. In the course of these  
9 discussions, JVC advised MEAGHER that Udo Artists was considering putting on a  
10 music festival and wanted to know if he and TODD were interested. MEAGHER replied  
11 that they were if the money was better than the other offer of \$50,000.00. Thereafter, on  
12 March 9, 2004, Udo Artists presented MEAGHER with an offer of \$100,000.00 for  
13 TODD to appear at the Rock Odyssey festival on July 24 and 25, 2004.

14 MEAGHER forwarded the Udo Artists offer to Goodfriend, and on March 11,  
15 2004 Goodfriend confirmed acceptance of that offer. MEAGHER undertook to negotiate  
16 certain aspects of the Udo Artists offer, although it is not clear whether those negotiations  
17 began before or after the offer had been accepted.

18 MEAGHER was not happy with the stage that had been assigned to TODD, nor  
19 with the bands he was going to have to play with. He tried to negotiate a different stage  
20 but was told that was not possible. MEAGHER was also unhappy with TODD's  
21 placement on the bill, and tried to negotiate a different placement. Udo Artists said it  
22 could not alter the placement. As a result of these negotiations, and because of its  
23 disappointment at not being able to accommodate MEAGHER'S requests, Udo Artists  
24 agreed to pay an additional \$20,000.00 for the TODD appearances, or a total of  
25 \$120,000.00. MEAGHER acquiesced in this monetary accommodation.

26 MEAGHER made the following comments regarding the activities that led to the  
27 deal for the Japan tour.

1  
2 Because I had done all of the initial research myself and  
3 basically found the shows myself, I told The Agency Group I  
4 didn't think it was fair that they charge us a full commission.  
5 And I then told them that I would only be willing to pay them  
6 a commission on the \$100,000 and not the additional \$20,000  
7 that we were able to get ourselves.

8 In his testimony at the hearing in this case, MEAGHER sought to distance himself  
9 from his prior forthright description of his activities, and to suggest that Goodfriend was  
10 somehow concurrently involved with MEAGHER in soliciting potential prospects in  
11 Japan as well as the specific offers that were eventually submitted by Creative Man and  
12 Udo Artists. Similarly, MEAGHER sought to suggest that Goodfriend was directly  
13 involved in pursuing the negotiations with Udo Artists that led to the commitment to pay  
14 an additional \$20,000.00. This later testimony is rejected as unreliable and unconvincing;  
15 it does not in any way undermine the account of events set forth in MEGHER's earlier  
16 deposition, which account is determined to be factually accurate.

17 The facts, as found above, conclusively establish that it was MEAGHER who  
18 personally and directly solicited interest among promoters, tour operators, and others in  
19 having TODD perform in Japan and that it was MEAGHER's solicitations that were  
20 instrumental in eliciting the offers from Creative Man and Udo Artists. These activities  
21 constituted the procurement and attempted procurement of engagements for which a  
22 talent agency license is required by section 1700.5. MEAGHER also engaged in  
23 negotiations regarding the Udo Artists' offer which resulted in the payment of an extra  
24 \$20,000.00 for TODD's performances. These additional activities likewise constituted  
25 procurement of employment for which section 1700.5 requires a talent agency license.

26 MEAGHER and TODD ENTERTAINMENT assert that MEAGHER's activities  
27 did not violate section 1700.5 because they came within the safe harbor provided by  
28 section 1700.44, subdivision (d), which reads as follows:

1 It is not unlawful for a person or corporation which is not  
2 licensed pursuant to this chapter to act in conjunction  
3 with, and at the request of, a licensed talent agency in the  
4 negotiation of an employment contract.

5 As the Labor Commissioner has explained, the safe harbor afforded by this provision is  
6 narrow in scope.

7  
8 Under certain very narrow circumstances set out at  
9 Labor Code §1700.44(d), a person who is not licensed as a  
10 talent agency may engage in limited activities that would  
11 otherwise require licensure. . . . This exception to the general  
12 remedial license requirement must be read narrowly. The  
13 exception must be limited to the express language of the  
14 statute. Thus, the exception will only apply if the unlicensed  
15 person is acting “in conjunction with **and** at the request of the  
16 licensed talent agency,” and the **only** covered activity that  
17 such unlicensed person may engage in consists of “the  
18 negotiation of any employment contract.”

19 (*Massey v. Landis* (Cal.Lab.Com., November 7, 2005) TAC No. 42-03, p.11.)

20 MEAGHER and TODD ENTERTAINMENT contend that the safe harbor  
21 provision applies because MEAGHER acted in conjunction with and at the request of  
22 Goodfriend. They point to the testimony of MEAGHER which they claim shows that  
23 from the very first meeting between MEAGHER and Goodfriend in April, 2003 there was  
24 an understanding between them that they would pool all their resources, use all their  
25 relationships and connections, and “work every angle” to the end of obtaining leads and  
26 securing performances and engagements for TODD. According to MEAGHER and  
27 TODD ENTERTAINMENT, this understanding constituted an ongoing request by  
28 Goodfriend that MEAGHER work in conjunction with Goodfriend to procure  
engagements for TODD. They assert that this is corroborated by the many instances in  
which Goodfriend specifically requested MEAGHER’s assistance, sometimes using the

1 phrase “we should work every angle.” Contrary to MEAGHER and TODD  
2 ENTERTAINMENT’S assertions, however, this evidentiary showing does not establish  
3 the applicability of the safe harbor provision in this case.

4 As noted above, the safe harbor exemption applies only to those activities of an  
5 unlicensed person that consist of “the negotiation of an employment contract.” The safe  
6 harbor does not extend to nor encompass activities which consist of approaching third  
7 parties and soliciting them to offer engagements to an artist—and this is so without regard  
8 to whether the talent agent has requested the unlicensed person to engage in such  
9 activities, either independently or in conjunction with the talent agent. As has been made  
10 clear, in this case the Japan tour was procured as a result of the independent activities of  
11 MEAGHER which consisted of approaching promoters and other interested parties and  
12 soliciting them to offer TODD an engagement to perform publicly in Japan. These  
13 solicitation activities were plainly outside the scope of the safe harbor exemption, and  
14 consequently any request by Goodfriend that MEAGHER engage in these activities was  
15 ineffectual and irrelevant.

16 Furthermore, the contention that MEAGHER acted at the request of and in  
17 conjunction with Goodfriend is unpersuasive even as to the negotiation component of the  
18 Japan engagement. As noted earlier, after the deal with Udo Artists had been concluded  
19 MEAGHER took the position that it would not be fair to pay Goodfriend and The Talent  
20 Agency Group a full commission; he was of this view based on the fact that he had done  
21 all the research, he had found the show himself, and he had been the one who was able to  
22 get the additional \$20,000.00. The existence of this view on MEAGHER’s part belies  
23 any suggestion that MEAGHER had an understanding with Goodfriend that everything  
24 was to be done pursuant to a collaborative effort. Had such an ongoing understanding  
25 actually existed there would have been no reason to begrudge paying Goodfriend and the  
26 Talent Agency Group a full commission in accordance with the parties’ established  
27 practice of cooperating in procuring engagements. Consequently, it is concluded that no

1 such understanding existed and that MEAGHER did not act in accordance with any such  
2 understanding. Additionally, when this so-called understanding is stripped away, there is  
3 no evidentiary basis for finding that Goodfriend specifically asked MEAGHER to work  
4 with him in further negotiating the terms of the Udo Artists deal or that MEAGHER  
5 worked in conjunction with Goodfriend in undertaking those negotiations. It follows that  
6 MEAGHER did not negotiate at the request of or in conjunction with Goodfriend.

7 In sum, the safe harbor provision did not exempt MEAGHER and TODD  
8 ENTERTAINMENT's procurement activities in connection with the Japan tour from the  
9 licensing requirements of section 1700.5.

10 TODD asserts that three other engagements were secured for him as a result of  
11 MEAGHER's personal solicitation and procurement activities. The evidence proffered  
12 by TODD is insufficient to support a finding that MEAGHER directly engaged in  
13 procurement activities in connection with these three engagements. Consequently, the  
14 contention that MEAGHER was directly involved in three additional instances of  
15 unlicensed talent agency activity is rejected.

#### 16 17 Responsibility For Procurement By Phillips

18  
19 TODD contends that during the period October 2003 to August 2004 Edward  
20 Phillips was engaged in illegally procuring employment and engagements for TODD, and  
21 that, based on the circumstances of Phillip's relationship to MEAGHER, these activities  
22 must be treated as constituting illegal procurement activities engaged in by MEAGHER  
23 and TODD ENTERTAINMENT.

24 As previously discussed, Edward Phillips was the owner of XS Records, Inc., the  
25 company that was licensed by TODD ENTERTAINMENT to distribute an album that  
26 TODD had recorded entitled "You Made Me." Phillips was anxious to promote sales of  
27 the album. Therefore, although he was not licensed as a talent agent, he proceeded to

1 become intensely involved in soliciting and lining up live performance engagements for  
2 TODD. Phillips would contact venues throughout the country to ascertain their interest in  
3 booking TODD. In most instances, Phillips would work out a performance date, discuss  
4 or negotiate the terms, and then forward the specifics to Goodfriend so that he could  
5 finalize and confirm the booking. In other instances, Phillips would initiate preliminary  
6 discussions with a prospective venue and then direct that venue to Goodfriend so that the  
7 specific details of the performance and booking could be ironed out. The evidence  
8 reveals at least 23 engagements that Phillips procured or attempted to procure through his  
9 efforts directed at soliciting bookings for TODD.

10 In pursuing procurement activities on behalf of TODD, Phillips acted entirely on  
11 his own initiative. MEAGHER neither asked, nor directed, nor required Phillips to  
12 engage in the solicitation of engagements for TODD. Nevertheless, the undisputed  
13 testimony of Phillips establishes that MEAGHER was fully informed and aware of the  
14 fact that Phillips was engaged in the activity of trying to find engagements and live  
15 performances for TODD. Phillips was in regular contact with MEAGHER during this  
16 period, and on approximately twenty occasions brought up the fact that he had found  
17 potential live appearances for TODD. MEAGHER did not tell Phillips to stop; instead,  
18 he told Phillips to contact Goodfriend and work it out with him. Phillips procured  
19 numerous engagements for TODD and the revenues from those engagements were paid to  
20 TODD ENTERTAINMENT.

21 The facts in this case, viewed in their totality, compel the conclusion that the  
22 illegal procurement activities of Phillips must be imputed to MEAGHER and TODD  
23 ENTERTAINMENT, and that therefore such activities must be treated as the illegal  
24 procurement of engagements for TODD by MEAGHER and TODD ENTERTAINMENT  
25 in violation of the licensing requirements of section 1700.5. First, although MEAGHER  
26 did not invite the illegal activity, he knew that it was going on and that it was continually  
27



1 occurring over and over again. Second, MEAGHER also knew that each of the  
2 engagements procured by Phillips was generating revenues and income for TODD  
3 ENTERTAINMENT. Third, under the terms of the operating agreement, MEAGHER, as  
4 the manager of TODD ENTERTAINMENT, had the sole authority to approve or reject  
5 proposed contracts for live engagements or performances by TODD. Thus, MEAGHER  
6 had the exclusive authority and responsibility to control the performance transactions  
7 being entered into on behalf of TODD, the performing artist, and TODD  
8 ENTERTAINMENT, the entity that would receive the revenues from those transactions.  
9 Despite the existence of this authority and responsibility, MEAGHER made no attempt to  
10 discourage the illegal procurement activities being engaged in by Phillips, and he never  
11 once invoked or exercised his authority to refuse to approve a contractual engagement  
12 unlawfully procured through Phillips' unlicensed talent agency activities. Instead,  
13 MEAGHER gave his approval to all of the illegal transactions, thereby ratifying Phillips'  
14 activities and endorsing their continuation.

15 By allowing and in effect encouraging Phillips to continue to engage in the illegal  
16 activities, MEAGHER sought to capitalize on those activities so that TODD  
17 ENTERTAINMENT would reap the benefit of the revenues they generated. In so doing,  
18 MEAGHER made the transgressions of Phillips into the transgressions of MEAGHER  
19 and TODD ENTERTAINMENT. Put another way, the illegal procurement activities of  
20 Phillips became the illegal procurement activities of MEAGHER and TODD  
21 ENTERTAINMENT, and thus constituted the illegal procurement of engagements for  
22 TODD by MEAGHER and TODD ENTERTAINMENT in violation of the licensing  
23 requirements of section 1700.5.

24 MEAGHER and TODD ENTERTAINMENT contend that Phillips' procurement  
25 activities were undertaken at the request of and in conjunction with Goodfriend, and that  
26 therefore they are exempt from the TAA's licensure requirements by virtue of the safe  
27 harbor provision set out in section 1700.44, subdivision (d). However, as discussed

1 earlier, the statute only provides a safe harbor for those activities that consist of “the  
2 negotiation of an employment contract.” Here, the bulk of Phillips’ activities involved not  
3 contract negotiation but approaching prospective venues and attempting to solicit and  
4 soliciting offers of engagements for TODD to appear and deliver a live performance.  
5 These solicitation activities were clearly outside the scope of the safe harbor provision,  
6 irrespective of any request from Goodfriend that Phillips engage in such activities. In  
7 addition, even with respect to the small portion of activities that involved negotiation, the  
8 evidence in this case plainly establishes that Phillips acted on his own initiative and not at  
9 the request of Goodfriend. Furthermore, there is no evidence that Goodfriend ever asked  
10 Phillips to work in conjunction with Goodfriend in negotiating an employment contract  
11 for TODD.

12 In sum, the safe harbor provision does not apply to Phillips’ illegal activities, and  
13 therefore it cannot be invoked by MEAGHER and TODD ENTERTAINMENT to escape  
14 the conclusion that based on those activities they violated the TAA.

15  
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17  
18 4. Appropriate Remedy for Section 1700.5 Violation.

19  
20 Having concluded that MEAGHER and TODD ENTERTAINMENT violated the  
21 TAA by engaging in procurement activities without first obtaining a license (§§1700.4,  
22 1700.5), it now becomes necessary to determine whether the parties’ operating agreement  
23 should be declared entirely void or whether the doctrine of severability should be applied  
24 so as to invalidate only certain portions found to be illegal while preserving others not  
25 tainted by illegality. In its recent decision holding that severability may be applied in  
26 cases involving illegality challenges under the TAA, the Supreme Court made the  
27 following observations.

1  
2 No verbal formulation can precisely capture the full  
3 contours of the range of cases in which severability properly  
4 should be applied, or rejected. The doctrine is equitable and  
5 fact specific and its application is appropriately directed to the  
6 sound discretion of the Labor Commissioner and trial courts  
7 in the first instance.

8 (*Marathon Entertainment, Inc. v. Blasi, supra*, 42 Cal. 4th at p. 998.) For the reasons  
9 discussed below, in the present case it is determined that severance is inappropriate and  
10 that the entire operating agreement must be declared void and unenforceable.

11 It is recognized that voiding the entire contract is appropriate where the person  
12 who contracted with the artist has “engaged in substantial procurement activities that are  
13 inseparable from” the person’s other activities. (*Marathon Entertainment, Inc. v. Blasi,*  
14 *supra*, 42 Cal.4th at p. 998.) One of the purposes for the operating agreement’s creation  
15 of the LLC was to “conduct activities in connection with . . . . live performances and  
16 touring” by TODD. As has been seen, MEAGHER and TODD ENTERTAINMENT  
17 implemented this provision in part by engaging in substantial unlicensed talent agency  
18 activities. During the period July, 2003 to August, 2004, there were at least 24 instances  
19 involving the unlawful procurement or attempted procurement of engagements for  
20 TODD. The revenues generated by these illegal activities were significantly greater than  
21 50% of the \$237,562.97 in revenues received by TODD ENTERTAINMENT for  
22 TODD’s performances. Indeed, the \$120,000.00 payment for the Japan Tour alone was  
23 in excess of 50% of the performance revenues. Furthermore, the revenues from the  
24 illegal engagements represented well over one third of TODD ENTERTAINMENT’s  
25 total income of \$347,157.90 for the period. Of course, MEAGHER and TODD  
26 ENTERTAINMENT did engage in other activities, which were legal, including  
27 attempting to promote and market TODD’s album, attempting to obtain licensing  
28 agreements, coordinating the logistics of TODD’s tours, and managing a number of  
miscellaneous matters. Nevertheless, the magnitude and volume of the illegal activities,

1 and their virtually central role in the LLC's finances, makes the illegal activities  
2 inseparable from the lawful ones, and therefore precludes application of the severability  
3 doctrine in this case.

4 Severance is inappropriate here for another reason: the structure of the operating  
5 agreement precludes disentangling its illegal aspects from the legal ones. Under the  
6 parties' agreement, TODD and MEAGHER do not receive direct compensation based on  
7 the revenues generated by TODD's performances. Those revenues are all funneled to  
8 TODD ENTERTAINMENT. TODD and MEAGHER are compensated over and above  
9 their monthly distributions if and only if TODD ENTERTAINMENT earns a profit from  
10 all of its business activities. To the extent that the non-performance revenues are poor, as  
11 was true here, the costs of operating the business must be borne by the revenues realized  
12 through the performance activities. If as a result of severance a substantial portion of the  
13 revenues to TODD ENTERTAINMENT were to be cut off as illegal, then this would  
14 deprive the business of needed funds and doom the ostensibly legitimate side of the  
15 enterprise to failure—to the detriment of TODD. Moreover, any effort to delineate how  
16 future expenses and profits might be shared in the aftermath of the illegal procurement  
17 activities would necessitate entirely revamping the operating agreement in a manner that  
18 is not readily discernible. The severability doctrine does not contemplate the reformation  
19 of an agreement as a means of preserving its legality. (See *Armendariz v. Foundation*  
20 *Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 124.) In the present case, the  
21 illegality of the procurement activities has infected the structure of the parties' operating  
22 agreement in a manner that cannot be cured through severance. Consequently, the  
23 severability doctrine cannot be applied.

24 The determination that the parties' operating agreement is void in its entirety  
25 establishes that TODD has a complete defense to the claims for affirmative relief that  
26 MEAGHER and TODD ENTERTAINMENT are asserting based upon rights conferred

1 by or derived from the agreement. Those claims are set forth as causes of action in the  
2 first amended cross-complaints of MEAGHER and TODD ENTERTAINMENT, and the  
3 causes of action are accordingly barred by TODD's defense of illegality under the TAA.

4 The determination that the operating agreement is entirely void also bars TODD  
5 from pursuing any affirmative claims against MEAGHER and TODD  
6 ENTERTAINMENT that are based upon rights conferred by or derived from the  
7 agreement. A meritorious defense of total illegality leaves no contractual provision that is  
8 valid and capable of being enforced. Thus, TODD is precluded from pursuing the causes  
9 of action in his first amended complaint that assert the claims for affirmative relief based  
10 on the provisions of the operating agreement.

11 There is one remaining issue that needs to be addressed. As discussed earlier in  
12 this decision, the TAA statute of limitations places a one year limit on any claim for  
13 affirmative relief that is based on the illegality of a contract under the TAA. Thus, an  
14 action that seeks to rescind an illegal contract and recoup property transferred pursuant to  
15 that contract may not be pursued with respect to property that was transferred more than  
16 one year prior to the filing of the petition.

17 In the present case, it appears that pursuant to the operating agreement TODD  
18 transferred certain musical and publishing rights to TODD ENTERTAINMENT.  
19 However, because TODD ENTERTAINMENT is an artificial entity that was created in  
20 furtherance of and pursuant to an illegal contract, TODD ENTERTAINMENT has no  
21 continuing legal validity or status, and therefore cannot take further actions or enforce any  
22 rights on its own behalf. Of course, TODD ENTERTAINMENT does continue to have a  
23 limited existence as a conduit and surrogate for the interests of those who created the  
24 LLC, namely the 50-50 co-owners TODD and MEAGHER. Any property that was ever  
25 transferred to the LLC belongs to and is held for the benefit of the co-owners. Thus, the  
26 musical and publishing rights that were transferred by TODD to TODD

1 ENTERTAINMENT belong to and are held for TODD and MEAGHER, as tenants in  
2 common each as to a 50% interest.

3 In his petition, TODD has asked for a declaration that the parties' operating  
4 agreement was void ab initio, and has suggested that such a declaration would restore the  
5 parties to the position that they were in prior to entering into the agreement. Under this  
6 view, TODD would be entitled to recoup any property transferred pursuant to the terms of  
7 the agreement, regardless of when that transfer occurred. As has been pointed out,  
8 however, this view is incorrect. By virtue of the TAA's one year limit on the pursuit of  
9 affirmative relief (§1700.44, subd. (d)), TODD cannot recoup property transferred more  
10 than one year prior to the filing of the petition. Consequently, since the transfer of the  
11 aforementioned musical and publishing rights to TODD ENTERTAINMENT occurred  
12 more than one year prior to the filing of the petition and resulted in MEAGHER acquiring  
13 a 50% interest in such rights, TODD is precluded by the one year statute of limitations  
14 from recouping the 50% interest acquired by MEAGHER. The respective rights of  
15 TODD and MEAGHER in any properties transferred to TODD ENTERTAINMENT may  
16 arise in the context of the dissolution cause of action set forth in TODD's first amended  
17 cross-complaint—and, as this discussion makes clear, any assertion by TODD of a right  
18 to recoup a property interest acquired by MEAGHER as a result of an illegal transfer to  
19 TODD ENTERTAINMENT more than one year prior to the filing of the petition is time  
20 barred by section 1700.44, subdivision (d).

21 The foregoing discussion is concerned solely with property rights as between  
22 TODD and MEAGHER. It does not purport or seek to address the question of what  
23 equitable or other rights third party creditors of TODD ENTERTAINMENT may have  
24 with respect to property interests that were transferred to TODD ENTERTAINMENT  
25 under an illegal contract and as a result became property interests co-owned by TODD  
26 and MEAGHER. The intervening rights that such creditors may have, and what priorities  
27 and preferences they may be entitled to in relation to TODD and MEAGHER, are matters

1 outside the competence and jurisdiction of the Labor Commissioner, and will have to be  
2 adjudicated in another forum.


3  
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5  
6 DISPOSITION

7  
8 Accordingly, it is hereby ordered as follows:

9  
10 1. The operating agreement entered into by and between TODD and  
11 MEAGHER is determined to be completely illegal, void, and unenforceable, and in  
12 conformity therewith it is further determined that MEAGHER and TODD  
13 ENTERTAINMENT shall be precluded and barred from pursuing any claims or seeking  
14 any relief against TODD based on the provisions of the operating agreement.

15  
16 2. Any assertion by TODD of a right to recoup or recover a property interest  
17 acquired by MEAGHER as a result of a transfer of property pursuant to the operating  
18 agreement is determined to be barred by the statute of limitations where such transfer  
19 occurred prior to May 14, 2008.

20  
21 Dated: *MARCH 27, 2012*

22  
23   
24 William A. Reich  
25 Attorney and Special Hearing Officer  
26 for the Labor Commissioner

27 The above determination is adopted in its entirety by the Labor Commissioner.

Dated: 3.29.12

  
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Julie A. Su  
State Labor Commissioner

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