

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

5 Attorney for the Labor Commissioner
6
7

8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA
10

11 DWIGHT YOAKAM,

12 Petitioner,
13

14 vs.

15 THE FITZGERALD HARTLEY CO., a
16 Tennessee corporation, and GARY
EBBINS,
17

18 Respondents.

CASE NO. TAC 8774

**DETERMINATION OF
CONTROVERSY**

19 The above-captioned matter, a Petition to Determine Controversy under
20 Labor Code §1700.44, came on regularly for hearing in Los Angeles, California, before
21 the undersigned attorney for the Labor Commissioner assigned to hear this case.
22

23 Petitioner DWIGHT YOAKAM, (hereinafter, referred to as "YOAKAM") appeared
24 represented by Joseph R. Taylor, Esq., Miles J. Feldman, Esq., and Erica D. Stambler,
25 Esq. of LINER GRODE STEIN YANKELEVITZ SUNSHINE REGENSTREIF &
26 TAYLOR LLP. Respondents THE FITZGERALD HARTLEY CO., a Tennessee
27
28

1 corporation, (hereinafter, referred to as "FHC") who appeared through Mark Hartley, a
2 partner and principal in FHC and GARY EBBINS (hereinafter, referred to as "EBBINS"),
3 (hereinafter, both Respondents collectively referred to as "Respondents"), appeared
4 represented by Michael Anderson, Esq. and Brad C. Robertson, Esq. of Loeb & Loeb
5 LLP. The matter was taken under submission.
6

7 Based on the evidence presented at this hearing and on the other papers on
8 file in this matter, the Labor Commissioner hereby adopts the following decision.
9

10 FINDINGS OF FACT

11 1. YOAKAM is a well known songwriter, performer, musician, actor, writer,
12 director, and producer.

13 2. EBBINS, who previously worked for YOAKAM as his personal assistant,
14 agreed to return as his "in house" manager in early 2001 pursuant to an oral management
15 agreement that included a \$75,000-\$90,000 salary with the possibility of a 3% bonus.
16 YOAKAM fired EBBINS in December, 2006.
17

18 3. In early 2002, FHC was hired by YOAKAM pursuant to an oral
19 management agreement for the purpose of securing a recording contract with a major
20 label. FHC is a music management firm for recording artists, songwriters, producers,
21 actors and different projects in the music industry. Mark Hartley is one of the co-founders
22 of the firm. Mr. Hartley testified that as YOAKAM'S managers, in addition to securing
23 recording contracts, FHC dealt with YOAKAM'S talent agents, business management
24 company, public relations firms, charities, road personnel, office personnel, handled travel
25 logistics related to personal appearances, helped to coordinate and organize recording
26
27
28

1 sessions, and handled YOAKAM'S scheduling. In 2004, the parties orally modified their
2 agreement to reduce the commissions to 7%. YOAKAM terminated FHC's services in
3 March, 2007.
4

5 4. Respondents were not licensed talent agents during the time they
6 represented YOAKAM.

7 5. Since 2001, the William Morris Agency ("William Morris") has represented
8 YOAKAM as his licensed talent agent. Specifically, Rick Shipp represents YOAKAM as
9 his music contact and Joanne Wiles and Jason Tawick represent YOAKAM as his acting
10 contacts at William Morris.
11

12 6. On March 11, 2008, Respondents filed an action in the superior court
13 against YOAKAM seeking unpaid commissions. In defense of the superior court action,
14 YOAKAM filed the instant petition to determine controversy on April 16, 2008 alleging
15 that Respondents violated the Talent Agencies Act, ("Act") by acting as licensed talent
16 agents without obtaining a license from the Labor Commissioner. The superior court
17 action is currently stayed pending resolution of this matter.
18
19

20 7. In his Petition, YOAKAM seeks a determination that "(1) Respondents have
21 violated the Talent Agencies Act; (2) That each and every alleged agreement under which
22 Respondents have contended or could possibly contend exist or exists is and would be
23 void *ab initio* and that Petitioner has no liability there to the Respondents; (3) That
24 Respondents have no right or claim to any past or future commissions or other
25 compensation from Petitioner; (4) That Petitioner has a complete defense to any court
26 proceeding by Respondents, including the Action which has been commenced by
27
28

1 Respondents, to recover commissions or other forms of compensation from Petitioner; (5)
2 That Respondents are required to account for all past commissions and other benefits,
3 compensation or value they have received from or in connection with Petitioner; (6) That
4 Respondents must disgorge all benefits (including management commissions or other
5 compensation) received as a result of or in connection with their relationship with
6 Petitioner to the fullest extent permitted by law; (7) That Petitioner is entitled to recover
7 from Respondents interest at the maximum legal rate or rates on any management
8 commissions or other benefits, compensation or value ordered disgorged hereunder; (8)
9 That Petitioner is entitled to recover his costs incurred in this proceeding; and (9) That
10 Petitioner is entitled to such other and further relief in his favor as the Labor
11 Commissioner may deem just and proper.”
12
13
14

15 8. Specifically, Petitioner alleges that Respondents violated the Act in
16 unlawfully procuring additional creative services included in the recording contracts that
17 are not covered by the “recording contract exemption” found at Labor Code §1700.4(a)
18 and that Respondents violated the Act by procuring or attempting to procure appearances
19 for YOAKAM on television shows, live performances and concert tours.
20

21 RECORDING CONTRACTS

22 Audium/Koch Recording Deal (2002)

23 9. In 2002, Respondents procured an Exclusive Recording Artist Agreement
24 with the independent label Audium/Koch Recording. Under this recording deal,
25 Audium/Koch had the right to require YOAKAM to perform for the production of video
26 masters. YOAKAM testified that he produced and performed as an actor and a musician
27
28

1 for the video *Back of Your Hand* under this contract. Although YOAKAM did not direct
2 this video, he testified that he co-wrote the treatment and collaborated with Margaret
3 Malandrucolo regarding wardrobing, styling and casting.
4

5 New West Records, LLC (2004)

6 10. In February 2004, FHC obtained a recording deal for YOAKAM with the
7 independent label, New West Records, LLC ("New West"). The recording deal, however,
8 was not limited to securing a recording contract, that is, to the "Exclusive Recording
9 Agreement." Instead, FHC also negotiated a separate "Administration Agreement"
10 wherein YOAKAM was required to write new material for the albums that he was
11 recording for New West. YOAKAM wrote 12 original songs for the first album *Blame*
12 *the Vain*, including the title track. Like the Audium/Koch recording deal, this recording
13 deal also included a provision for music videos which YOAKAM testified he wrote,
14 directed and starred in, months after the album was completed. YOAKAM described the
15 duties involved in directing the music video as including two weeks of pre-production
16 (hiring a cinematographer, line producer, make-up, hair, set designer scripting the
17 treatment for the video, scouting locations for shooting the video, casting, and selecting a
18 lab for the "telecline"¹ post-production process, among other duties), two days of actual
19 shooting the video in which he starred and directed and two weeks of post-production
20 editing (i.e., film development, "telecline," editing, and supervision of the online of the
21 video for broadcast on television networks).

22 11. Barry Tyerman, an attorney at Jackoway Tyerman Wertheimer Austen
23
24
25

26
27
28 ¹ "Telecline" was described as transferring the film stock over to either videotape or digital video. (R.T. 47:20-48:1).

1 Mandelbaum Morris & Klein in Century City, who currently represents YOAKAM and
2 who specializes in negotiation of recording contracts, testified that based on his
3
4 experience, recording agreements require the recording of audio masters for release in
5 phonograph records and CD form and do not typically include provisions requiring an
6 artist to write songs, act or direct in music videos. Mr. Tyerman also testified that during
7 his representation of YOAKAM over the last two years, he has engaged in discussions
8 with New West regarding artistic services YOAKAM was contractually required to
9 perform such as production of future videos and recording a DVD. Based on his
10 discussions with New West and his experience in negotiating music recording agreements;
11 Mr. Tyerman testified that under the New West "Exclusive Recording Agreement,"
12
13 YOAKAM was obligated to perform all services required to produce video masters such
14 as approving the concepts and budgets, approving the producer, director, story board, and
15 all other services related to production of the video and opined that such artistic services
16 were totally different than recording services.
17

18
19 12. Neither of the aforementioned record deals which included music video
20 productions and songwriting services (the New West deal only) were procured through the
21 efforts of William Morris. In fact, Mr. Hartley admitted that FHC procured the two
22 recording deals on YOAKAM'S behalf. YOAKAM also admitted on cross examination
23 that he was not paid an additional fee for his role in directing or performing in the music
24 videos included in both recording contracts because he waived the fees due to the
25 expenses for producing the video going over budget.
26

27 ///
28

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

TELEVISION SHOWS

13. During the years 2002 through 2006, YOAKAM musically performed on various television shows such as: *The Tonight Show*, *Jimmy Kimmel Live*, *Imus in the Morning*, *Late Night with Conan O'Brien* and *The Late Show with Craig Ferguson*, to name a few. Although YOAKAM was represented by William Morris at the time, he testified that these shows were booked by FHC and EBBINS. YOAKAM testified that his appearances included performing sets of music, not just one song, and that the appearances were akin to playing a live show. YOAKAM spoke in detail about Respondents contacting him to tell him that they were negotiating for him to perform on the *CBS Special Tribute to Johnny Cash: Walk the Line* with Alison Kraus. Similarly, YOAKAM testified that Respondents contacted him in 2006 to notify him that they were negotiating with the Dick Clark Production Company for him to perform a tribute to Buck Owens on *The Academy of Country Music Awards*. Again, YOAKAM testified that William Morris was not involved in these bookings.

14. YOAKAM also testified that Respondents attempted to book him (without assistance from William Morris) on shows such as the *Ellen DeGeneres Show*, *Good Morning America*, *Iconoclast*, *Last Call with Carson Daly*, *Regis & Kelly*, *The Late Show with David Letterman* and *The Today Show* but for various reasons, those appearances did not transpire. YOAKAM, however, admitted on cross examination that he did not have firsthand knowledge as to whether Respondents booked or attempted to book the various engagements or whether his publicity firms, Rogers & Cowan or Mitch Schneider

1 Organization,² booked the various television appearances with the exception of one or two
2 *Tonight Show* appearances that he is sure were booked directly by EBBINS or Mr.
3 Hartley. Various emails were produced showing that YOAKAM'S publicity firms were
4 responsible for booking and attempting to book him on the various talk shows.
5

6 VENUE PERFORMANCES

7 *Ten Man Jam Show* (February 2005)

8 15. FHC booked and negotiated YOAKAM'S live performance at a show called
9 *Ten Man Jam Show* in Houston, Texas with a radio station called "KILT." YOAKAM
10 testified that he spoke only to FHC about this performance. YOAKAM also testified on
11 cross examination that he did not pay Respondents commissions for this event. Mr.
12 Hartley testified that this concert was booked by New West Records and that it was a
13 record company promotional event.
14

15 *YMCA Benefit Concert, Ketchum, Idaho* (August 2007)

16 16. In August, 2007, YOAKAM performed at a benefit concert for
17 the YMCA in Ketchum, Idaho, which was booked by FHC through Mr. Hartley's
18 association with Michael Owens, a board member. A letter from Mr. Hartley to Michael
19 Owens confirms that Mr. Hartley was directly involved in negotiating YOAKAM'S salary
20 for this performance. The salary, however, was limited to an amount sufficient to cover
21 expenses. In other words, YOAKAM did not receive a fee and did not pay Respondents
22 commissions for this charity event.
23
24

25 ///
26

27 _____
28 ² Both publicity firms were hired and paid by the record companies to promote
YOAKAM'S album releases.

1 Crystal Palace (2002-2006)

2 17. YOAKAM testified that he appeared numerous times at the *Crystal Palace*
3 in Bakersfield, California for Valentine's Day or New Year's Eve. Generally, a call
4 would be placed by Mel Owens, Manager of Buck Owens Enterprises or Jerry Hufford,
5 Manager of the *Crystal Palace* to EBBINS or Mr. Hartley, who would work out the
6 details of the appearances. In support, YOAKAM submitted the declarations of Mr.
7 Hufford and Mr. Mel Owens. In his declaration, Mr. Hufford states that he negotiated
8 many of YOAKAM'S appearances directly with EBBINS and that William Morris was
9 not involved in any negotiations. Likewise, Mr. Mel Owens declares in his declaration
10 that he negotiated some engagements directly with Mr. Hartley and that William Morris
11 was not involved. Mr. Hartely, however, denied procuring any of these engagements and
12 testified that they were arranged due to an ongoing relationship between YOAKAM and
13 the Owens Family. EBBINS admitted that he negotiated the details of YOAKAM'S
14 *Crystal Palace* performances with Mr. Hufford.

15
16
17
18 18. Respondents produced two 3-inch binders and one 5-inch binder full of
19 copies of contracts for live performances negotiated by William Morris, copies of checks
20 for live appearances negotiated by William Morris and copies of booking slips, all for the
21 years 2006 and 2007. Respondents further testified that similar documents exist for the
22 years 2002 through 2005.

23
24
25 19. YOAKAM also produced copies of emails showing people in the industry
26 soliciting various projects for him to consider that were sent directly to Anita Helig,
27 Executive Assistant to Mr. Hartley at FHC. Ms. Helig, however, testified that she neither
28

1 affirmatively solicited the various engagements nor did she procure them for YOAKAM.
2 Mr. Hartley, likewise, explained that it was not unusual for a manager to get such emails
3 because they typically coordinate such opportunities with the different public relations
4 firms.
5

6 TOURS

7 2005 Europe Tour

8
9 20. YOAKAM testified that Mr. Hartley called him and EBBINS sometime in
10 2005 from Europe to notify them that he was discussing some tour dates for YOAKAM in
11 Cork, Ireland, the Netherlands and London at which YOAKAM actually performed in the
12 Summer of 2005. YOAKAM also admitted that he paid William Morris a commission for
13 this tour but stated that he did so because they "issued contracts."
14

15 2006 Australia Tour

16 21. YOAKAM testified that again, Mr. Hartley and EBBINS contacted him by
17 phone and told him that Mr. Hartley had been down in Australia on an unrelated matter
18 and had entered into discussions with an Australian promoter that he had worked with
19 before who was offering \$500,000, airfares, air freight, and hotels for 10 performances.
20 YOAKAM testified that after he accepted the deal and there became a question about
21 hotels, he spoke with Rick Shipp, his musical agent at William Morris, who informed him
22 that he did not know the promoter and that Mr. Hartley was the one who negotiated the
23 tour. After the tour, YOAKAM met with the promoter in Los Angeles who confirmed
24 that he was talking again with Mr. Hartley about having YOAKAM go back for another
25 tour. YOAKAM acknowledged that William Morris issued a booking memo for this
26
27
28

1 engagement which was described as, “a report created by an agent when they book an
2 engagement,” but insisted that Mr. Hartley solicited and negotiated the tour, which was
3 confirmed months later by the tour promoter.
4

5 Mr. Hartley testified that all concerts were procured by William Morris.

6 LEGAL DISCUSSION

7 Issues

- 8
- 9 1. Is the exemption in the Act for negotiation of a “recording contract” limited to
10 “recordings” or can the exemption encompass other artistic endeavors such as
11 production of music videos and songwriting services?
 - 12 2. Did Respondents violate the Act by instructing YOAKAM’S publicists to
13 procure engagements for him on various talk shows?
 - 14 3. Did Respondents violate the Act by procuring live performances and concert
15 tours for YOAKAM?
16
 - 17 4. If Respondents violated the Act, is the appropriate remedy to void the
18 entire contract *ab initio* or sever the offending practices under *Marathon*
19 *Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974?
20

21 Analysis

22 YOAKAM is an artist within the meaning of Labor Code §1700.4(b). Labor
23 Code §1700.4(a) defines “talent agency” as “a person or corporation who engages in the
24 occupation of procuring, offering, promising, or attempting to procure employment or
25 engagements for an artist or artists.” Labor Code §1700.5 provides that “[n]o person shall
26 engage in or carry on the occupation of a talent agency without first procuring a
27 license....from the Labor Commissioner.”
28

1 Recording Contract Exemption

2 The undisputed evidence established that FHC procured two recording
3 contracts for YOAKAM during the period of 2002-2004. In addition to the standard
4 recording of audio masters for release in phonograph records and CD form, both recording
5 contracts required YOAKAM to provide artistic services in connection with production of
6 music videos. Moreover, the New West recording contract also encompassed a separate
7 “Administration Agreement” wherein YOAKAM was required to provide songwriting
8 services. While YOAKAM acknowledges that procurement of recording contracts is
9 exempt from the licensing requirements of the Act, YOAKAM argues that such
10 procurement is limited to “recording.” In other words, other acts which YOAKAM
11 performed in addition to recording the album, such as directing music videos under both
12 recording contracts and providing songwriting services under the “Administration
13 Agreement,” do not fall within the exemption.

14 Labor Code §1700.4(b) exempts the activities of “procuring, offering, or
15 promising to procure recording contracts for an artist or artists...” from the definition of a
16 “talent agency.” In *Chinn v. Tobin* (1997) TAC No. 17-96 at page 6, fn. 1, we concluded
17 that the exemption does not expressly extend to the procurement of music publishing
18 contracts or songwriting services. As we explained,

19 “...The Talent Agencies Act has long been construed by the
20 courts as a remedial statute intended for the protection of
21 artists. “[T]he clear object of the Act is to prevent improper
22 persons from being [talent agents] and to regulate such activity
23 for the protection of the public...” *Buchwald v. Superior*
24 *Court* (1967) 254 Cal.App.2d 347, 351. See also *Waisbren v.*
25 *Peppercorn Productions* (1995) 41 Cal.App.4th 246. As with
26 all remedial legislation, exemptions must be narrowly
27 construed and cannot be extended beyond their express
28

1 provisions. To do otherwise would defeat the remedial
2 purpose of the legislation.

3 Respondent argues, however, that the rights granted him
4 under the music publishing provision of the Artist Agreement
5 are expressly defined to include only those musical
6 compositions that are “recorded by [Petitioners] under this
7 [Artist] Agreement” and that these music publishing rights
8 were therefore dependent upon and “merely incidental to” the
9 recording contract, and thus, that these music publishing rights
10 fall within the statutory exemption for recording contracts.
11 This argument ignores the fact that music publishing and
12 recording are two separate endeavors, that musicians who
13 compose and record their own songs may have separate music
14 publishing and recording contracts, that there are recording
15 artists who are not songwriters, and that there are songwriters
16 who are not recording artists. We therefore conclude that
17 music publishing and songwriting does not fall within the
18 recording contract exemption, regardless of whether the right
19 to publish an artist’s music is limited only to compositions that
20 are contained on that artist’s record.
21

22 The legislative history for the “recording contract exemption,” supports our
23 conclusion in *Chinn* that musical publishing contracts and songwriting services do not fall
24 within the “recording contract exemption.” During the 1977-1978 Legislative Session,
25 Assembly Bill 2535 (“AB 2535”) (Chap. 1382, Stats. 1978), which was eventually
26 adopted as the Talent Agencies Act of 1978, was introduced in order to bring Booking
27
28

1 Agents, including Musician Booking Agencies and Personal Managers, under the
2 jurisdiction of the Labor Commissioner; to change the name of the Act and definition of
3 Artists' Manager to Talent Agencies; and to license Personal Managers. (See *Max*
4 *Herman, President, American Federation of Musicians, Local 47 – February 27, 1978*
5 *Press Release* included in Legislative History for AB 2535). In the bill, a “talent agency”
6 was defined “to be a person or corporation who engaged in the occupation of procuring,
7 offering, promising, or attempting to procure employment or engagements for an artist or
8 artists. Talent agencies may, in addition, counsel, or direct artists in the development of
9 their professional careers.” (See *Assembly Bill Final History for AB 2535, p.5, included in*
10 *Legislative History for AB 2535*). During the legislative session, the Conference of
11 Personal Managers proposed several amendments to the bill including the following:
12 “Any person may procure for an artist an agreement for “recording, producing,
13 manufacturing, distributing or selling records or tapes or any agreement for the composing
14 or publishing of musical compositions.” (See *Testimony before The Assembly Standing*
15 *Committee for Labor, Employment and Consumer Affairs on April 25, 1978, p. 180*
16 included in Legislative History for AB 2535). The final bill did not include this proposed
17 amendment. In 1982, however, the Act was amended by Assembly Bill 997 to adopt
18 several of the proposed amendments previously put forth by the Conference of Personal
19 Managers. Significantly, the definition of “talent agent” was amended to provide that “the
20 activities of procuring, offering, or promising to procure recording contracts for an artist
21 or artists shall not of itself subject a person or corporation to regulation or licensing under
22 this chapter.” (See *Report of the California Entertainment Commission dated 5/23/1985,*
23
24
25
26
27
28

1 p. 9 included in Legislative History for AB 2535). The Legislature rejected the
2 Conference of Personal Manager's request to broaden the definition to include
3
4 "producing, manufacturing, distributing or selling records or tapes or any agreement for
5 the composing or publishing of musical compositions." Consequently, its intent to limit
6 the exemption to "recording," is clear.

7 Based on the Legislative History for the "recording contract exemption," as well as
8 our prior decision in *Chinn*, we also hold in this case that the exemption is narrowly
9 interpreted to include "recording" of a musical contract. Thus, Respondents' negotiation
10 of a musical recording contract wherein YOAKAM was obligated to record audio masters
11 for release in phonograph records and CD form, is covered by the "recording contract"
12 exemption. The "recording contract exemption" does not, however, include additional
13 creative services such as production of a musical video, (which in this case included
14 writing a treatment, casting, producing, directing, acting), even if the purpose is to
15 promote the recording under contract. Nor does the exemption cover separate songwriting
16 services included in the New West "Administration Agreement." Procurement and
17 negotiation of such services without a talent agency license constitute violations of the
18 Act.
19
20
21
22

23 Procurement and Attempted Procurement of Appearances on Television Shows

24 Petitioners argue that each time Respondents directed or instructed YOAKAM'S
25 two publicity firms, Rogers & Cowan or the Mitch Schneider Organization, to solicit
26 and/or procure television appearances for YOAKAM on various talk shows or special
27
28

1 television tributes, Respondents violated that Act. Relying on our previous decision in
2 *Troyer v. Simanton* (2006), (“Troyer”) TAC 25-04 and *Jones v. The La Roda Group*
3 (2005), (“Jones”) TAC 35-04, YOAKAM argues that procuring employment through
4 unlicensed intermediaries constitutes illegal procurement that violates the Act.
5

6 The *Troyer* and *Jones* cases are factually distinguishable from this case. In *Troyer*,
7 Verne Troyer’s management team consisted of three individuals, none of whom were
8 licensed as talent agents, and all of whom directly attempted and procured employment
9 for Mr. Troyer with third parties. Likewise, in the *Jones* case, respondents also actively
10 participated in the solicitation or negotiation of employment contracts for the petitioners
11 with third party employers and then handed the deal over to talent agents (some of which
12 were not licensed) to complete the deals. In contrast, in this case, YOAKAM’S publicists
13 directly negotiated the terms for most (but not all) of YOAKAM’S talk show appearances.
14 For instance, in late Spring, Summer and the Fall of 2005, YOAKAM’S publicists were
15 pitching or negotiating his appearance to the *Ellen DeGeneres Show*, *Good Morning*
16 *America*, *Iconoclast*, *Last Call with Carson Daly*, *Regis & Kelly*, *The Late Show with*
17 *David Letterman* and *The Today Show*. The same publicists procured employment for
18 YOAKAM on *Late Night with Conan O’Brien*, *The Late Late Show with Craig Furgeson*
19 and *The View*, among others. In those instances where Respondents may have been
20 directing or instructing Rogers & Cowan and Mitch Schneider to procure these
21 employments or were discussing scheduling with the publicists, as many of the emails
22 produced by YOAKAM show, but where neither Respondent was entering into
23 discussions or participating in negotiations directly with the third party employers
24
25
26
27
28

1 regarding contractual terms, there is no violation of the Act.

2 We do find, however, that Respondents violated the Act in at least four instances
3 where they directly and actively engaged in solicitation and procurement. Those instances
4 are: two appearances on *The Tonight Show*, *CBS Special Tribute to Johnny Cash: I*
5 *walked the Line* and *The Academy of Country Music Awards*.
6

7 8 Procurement of Live Performances and Concert Tours 9

10 The evidence presented established that both Respondents directly participated in
11 procurement (and negotiation) of YOAKAM'S live performances at the *Crystal Palace*
12 and that FHC directly participated in the procurement of the *Wood River Community*
13 *YMCA Benefit Concert*. Respondents argue that these engagements were obtained
14 through YOAKAM'S long standing relationship with Buck Owens and his family and that
15 Respondents were not paid commissions on these shows. It is well settled that "the Act
16 requires a license to engage in procurement activities even if no commission is received
17 for the service." *Park v. Deftones* (1999) 71 Cal.App.4th 1465. Moreover, there is no
18 exemption from the Act for engagements that may result from long standing relationships
19 between an artist and an employer where a manager is actively involved in negotiating
20 contract terms for the engagement. Nor is there an exemption from engagements where
21 the artist's payment goes towards repayment of a prior loan from the third party employer
22 or where the artist's fee is limited to a fee sufficient to cover the expenses incurred for the
23 performance. As to the *Ten Man Jam Show*, we do not have enough evidence to
24 determine who procured this engagement. YOAKAM testified that the only person he
25
26
27
28

1 ever spoke with about this show was FHC, but that does not necessarily mean that Mr.
2 Hartley procured the engagement. A completely reasonable interpretation is that he was
3 simply communicating the information to YOAKAM, as managers typically do.
4
5 Moreover, Mr. Hartley testified that he did not procure this engagement and that it was a
6 record show promotion.

7 With regard to concert tours, YOAKAM testified that Mr. Hartley would call him
8 from Europe to inform him that he was entering into discussions with promoters for
9 concert tours. While YOAKAM'S talent agency, William Morris, may have negotiated
10 the terms and put the contracts together for his Australian concert, we credit YOAKAM'S
11 testimony that after the Australian tour, he ran into the promoter who admitted Mr.
12 Hartley solicited the concert. As such, we find that Respondent FHC violated the Act by
13 soliciting and negotiating YOAKAM'S Australian concert tour. The evidence does not,
14 however, support a finding that Respondents procured the European tour.
15

16 Significantly, Respondents produced copies of hundreds of documents including
17 contracts, booking slips, and checks paid to YOAKAM for concerts and other live
18 performances procured by William Morris for 2006 and the beginning of 2007.
19
20 Respondents testified that there were binders with similar documents for 2002, 2003, 2004
21 and 2005. These exhibits show the amount of work YOAKAM undertook during the
22 period of 2002-2007, most of which appears to have been procured by William Morris.
23
24 Thus, we find that the great majority of YOAKAM'S live appearances and concert tours,
25 were procured by William Morris.
26

27 ///
28

1 Appropriate Remedy for Violations of the Act

2 In accord with *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991,
3
4 Respondents urge us to apply the doctrine of severability if we find that they violated the
5 Act in any of the identified engagements at issue herein. In *Marathon*, the court
6 recognized that the Labor Commissioner may invalidate an entire contract when the Act is
7 violated. The court left it to the discretion of the Labor Commissioner to apply the
8 doctrine of severability to preserve and enforce the lawful portions of the parties' contract
9 where the facts so warrant. As the Supreme Court explained in *Marathon*:

11 "Courts are to look to the various purposes of the contract. If
12 the central purpose of the contract is tainted with illegality,
13 then the contract as a whole cannot be enforced. If the
14 illegality is collateral to the main purpose of the contract, and
15 the illegal provision can be extirpated from the contract by
16 means of severance or restriction, then such severance and
17 restriction are appropriate." [Citations omitted].
18
19

20 *Marathon, supra* at p.996.

21 In this case, we find that "the interests of justice...would be furthered' by
22 severance." *Id.* Specifically, we find that EBBINS was primarily engaged in management
23 duties while representing YOAKAM from 2001 through 2006. While EBBINS violated
24 the Act when directly negotiating YOAKAM'S appearances in connection with the
25 *Crystal Palace*, we conclude that the illegality is collateral to the main purpose of the
26 parties' management relationship. Accordingly, under the doctrine of severability, we
27
28

1 sever any rights and entitlements to commissions that may have resulted from
2 YOAKAM'S performances at the *Crystal Palace* that were procured through EBBINS'
3 efforts. Since EBBINS did not receive any commissions from these engagements and
4 because the violations were more than one year prior to YOAKAM filing this petition,
5 there is nothing to disgorge. The remainder of EBBINS' contract with YOAKAM shall
6 remain valid and enforceable.
7

8
9 We also find severance appropriate as to FHC. The evidence established that FHC
10 violated the Act by negotiating artistic services in connection with the production of
11 music videos and songwriting services that were above and beyond the services included
12 in a typical recording contract and thus not covered by the "recording contract exemption"
13 in Labor Code §1700.4(b). Additionally, the evidence established that FHC actively
14 negotiated live performances for YOAKAM at the *Crystal Palace*, *Wood River*
15 *Community YMCA Benefit Concert*, at least two *The Tonight Show* appearances, *CBA*
16 *Special Tribute to Johnny Cash* and *The Academy of Country Music Awards* as well as the
17 2006 Australia Tour.³ Notwithstanding these violations of the Act, we cannot ignore the
18 amount of checks, contracts and booking slips negotiated by William Morris that were
19
20
21

22 ³ We do not find that the evidence conclusively established that FHC attempted to procure
23 a TV performance for YOAKAM at the Grand Ole Opry for a Salute to Porter Wagoner
24 on May 19, 2007, a performance engagement at the "Weekend for the Troops" event in
25 Washington D.C., a performance engagement at the Burma Lifeline Benefit Concert at the
26 Indochine Warehouse in Boulder, Colorado, a writing assignment in a tribute to Merle
27 Haggard to be published in the Grammy Awards program book, and a writing assignment
28 for Charlie Daniels' book "Growing Up Country." We recognize that unsolicited offers
are typically presented to artist managers. In fact, FHC Executive Assistant, Anita Helig,
testified that she herself did not procure the various offers presented to her in the various
emails.

1 submitted by Respondents just for 2006 and a small part of 2007. According to
2 Respondent FHC, hundreds of similar documents exist for the years 2002 through 2005.
3
4 As such, the violations of the Act which were established by YOAKAM and discussed
5 hereinabove, appear to be collateral to the main objective of the contract, that is, to the
6 managerial services Respondent FHC provided to YOAKAM since most of YOAKAM'S
7 engagements appear to have been negotiated by his licensed talent agency, William
8 Morris. We in no way condone the unlawful activity undertaken by FHC, however, we do
9 not find it to be "substantial" in comparison to the many engagements that appear to have
10 been legally procured for YOAKAM by William Morris during the FHC'S managerial
11 representation. Consequently, Respondent FHC's violations of the Act, as discussed
12 herein, are severed from the remainder of its 2002 oral contract (and 2004 oral
13 modification).
14
15

16 Since Respondent FHC did not receive any commissions from some of the
17 television appearances and most of the live engagements and because some of the
18 violations occurred more than one year prior to YOAKAM filing this petition, there is
19 nothing to disgorge. With regard to severance of the unlawful provisions of the recording
20 contracts, we do not have before us the monetary amounts collected by FHC from April
21 17, 2007 to April 16, 2008 (one year prior to this Petition being filed), presumably
22 because YOAKAM stopped paying FHC in late 2006/early 2007. Therefore, we cannot
23 order disgorgement as to said violations.
24
25

26 ///

27 ///

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

DATED: January 11, 2010

Respectfully submitted,

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

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: January 11, 2010

By: Angela Bradstreet
ANGELA BRADSTREET
State Labor Commissioner