

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

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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

JOHN BRANCA and JOHN McCLAIN,  
as Executors of the Estate of Michael J.  
Jackson,

Petitioner,

vs.

TOHME R. TOHME,

Respondent.

CASE NO.: TAC-26372

DETERMINATION ON PETITION  
OF JOHN BRANCA AND JOHN  
MCCLAIN, AS EXECUTORS OF  
THE ESTATE OF MICHAEL J.  
JACKSON

This proceeding arose under the provisions of the Talent Agencies Act (“TAA” or “Act”), Labor Code §§ 1700 – 1700.47<sup>1</sup>. On March 1, 2013, petitioners JOHN BRANCA and JOHN McCLAIN, as Executors of the Estate of Michael J. Jackson (“petitioners”), filed a petition with the Labor Commissioner pursuant to §1700.44 seeking determination of an alleged controversy with respondent TOHME R. TOHME (“respondent” or “Tohme”). On April 10, 2012 respondent filed an answer to the petition. Thereafter, on November 13, 2012, February 13, 2013, and October 9, 2013, a full evidentiary hearing spanning three days was held before William A. Reich, attorney for the Labor

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

1 Commissioner assigned as a hearing officer. Due consideration having been given to the  
2 testimony, documentary evidence, briefs, and arguments submitted by the parties, the  
3 Labor Commissioner now renders the following decision.

4  
5 FACTUAL AND PROCEDURAL BACKGROUND

6  
7 The multi-talented and internationally renowned artist Michael Jackson  
8 (“Jackson”) died on June 25, 2009. Jackson was an extraordinarily gifted singer,  
9 songwriter, composer, dancer, and actor.

10  
11 Subsequent to Jackson’s death, a proceeding to probate Jackson’s estate was  
12 initiated in the Los Angeles County Superior Court. Pursuant to that proceeding,  
13 petitioners were appointed as the executors and personal representatives of the estate of  
14 Michael Jackson.

15  
16 On June 6, 2012, respondent Tohme filed a civil action in the Los Angeles County  
17 Superior Court against petitioners in their capacity as the executors and personal  
18 representatives of the Jackson estate. The complaint alleged that Jackson and his estate  
19 had breached three written contracts that had been entered into by and between Tohme  
20 and Jackson in 2008, and sought declaratory relief, damages for the contract breaches,  
21 and an accounting for certain revenues received by Jackson and the Jackson estate since  
22 July 2, 2008.

23  
24 One of the contracts sued upon was a management Services Agreement  
25 (“management agreement”) entered into on July 2, 2008, pursuant to which Tohme agreed  
26 to provide services relating to the management and coordination of the various facets of  
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1 Jackson's artistic career. In exchange for these services, Jackson agreed to pay Tohme  
2 the sum of \$35,000.00 per month plus 15% of "all gross compensation received by  
3 [Jackson] for his services within the entertainment industry, including live performances,  
4 merchandising, electronic arts, recorded and live telecasts, motion pictures, and animation  
5 projects." It was with respect to this contract that the complaint sought an accounting of  
6 the "gross compensation" received by Jackson and the Jackson estate.

7  
8 Another contract sued upon in the civil action was a letter agreement dated May 2,  
9 2008, pursuant to which Tohme was promised three separate finder's fees for bringing  
10 Jackson into contact with the investment entity Colony Capital, LLC ("Colony") and  
11 facilitating Colony's purchase of the promissory note secured by a deed of trust on the  
12 real property owned by Jackson in California known as the Neverland Ranch. This  
13 purchase prevented the holder of the note from foreclosing on the Neverland Ranch  
14 property, and also served to secure a release of the liens that the note holder had against  
15 Jackson's personal property and memorabilia. The fees payable to Tohme were 10% of  
16 the amount of the loan purchased by Colony, 10% of the proceeds realized upon the  
17 subsequent sale of the Neverland Ranch property, and 10% of the proceeds of any  
18 subsequent transactions brought to Jackson by Colony. The complaint alleged the fees  
19 due under this contract had not been paid.

20  
21 A third contract sued upon in the complaint was an Indemnity Agreement entered  
22 into on August 6, 2008. The complaint alleged that under this agreement Tohme was  
23 entitled to reimbursement for the expenses incurred, including legal fees, in rendering his  
24 services to Jackson pursuant to the agreements between Tohme and Jackson. More  
25 particularly, the complaint alleged that under the agreement Tohme was entitled to be  
26 indemnified for the costs, expenses, and attorney's fees incurred in seeking to enforce the  
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1 three sued-upon contracts in the pending civil action.<sup>2</sup>

2  
3 Petitioners responded to the civil action by requesting a stay of the action so that  
4 they could pursue appropriate proceedings before the Labor Commissioner under the  
5 provisions of the TAA. Specifically, it was petitioners' position that the TAA furnished a  
6 defense of illegality to the contract causes of action asserted in the complaint—namely,  
7 that in rendering services under the management agreement Tohme had engaged in the  
8 activities of a talent agency without having a license to do so, and that consequently the  
9 management agreement and the other related agreements were illegal, void, and  
10 unenforceable. Given the Labor Commissioner's exclusive original jurisdiction over  
11 defenses of illegality predicated on the provisions of the TAA, a stay was necessary to  
12 allow the Commissioner to address this issue first. Accordingly, the court granted a stay  
13 of the civil action pending a determination by the Labor Commissioner.

14  
15 The petition in this case alleges that Tohme violated the TAA, and in particular  
16 section 1700.5, which provides that no person shall engage in the occupation of a talent  
17 agency without first obtaining a license to do so. More particularly, the petition alleges  
18 that, without being licensed as a talent agent, Tohme engaged in the occupation of a talent  
19 agency by procuring and attempting to procure engagements for Jackson to perform as an  
20 artist. The petition seeks a determination from the Labor Commissioner that, because of  
21 the violations of the TAA, the management agreement and the other agreements related  
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23 <sup>2</sup> It should be noted that on February 17, 2012, petitioners initiated a proceeding  
24 against Tohme in the probate court in which they set forth eight causes of action seeking  
25 relief based on various acts of alleged misconduct on the part of Tohme in his dealings  
26 with Jackson. The relief sought in that proceeding is based on rights and protections  
27 conferred by laws other than the TAA. The present proceeding is concerned only with the  
28 rights and protections that artists have under the TAA with respect to conduct that  
violates the TAA's provisions. Therefore, the determination rendered in this proceeding  
is not intended to affect, and should not be construed as affecting, any rights or duties that  
the parties may have with respect to conduct that is outside the scope of the TAA and that  
is therefore governed by laws other than the TAA.

1 thereto are void ab initio and unenforceable and that consequently Jackson and his estate  
2 have no liability under such contracts and no rights can be asserted against either Jackson  
3 or his estate under the contracts' provisions.  
4

5 In his answer to the petition, and in various other papers filed in this proceeding,  
6 Tohme denies the factual allegations of the petition and disputes the legal contentions  
7 advanced therein. Although Tohme's answer is packed with boilerplate affirmative  
8 defenses that have no application to this case, the answer essentially joins issue on the  
9 petitioners' allegations by directly contradicting and challenging the core contention set  
10 forth in the petition—that is to say, Tohme unequivocally asserts that during the course of  
11 his management-artist relationship with Jackson he did not procure or attempt to procure  
12 engagements for Jackson to perform as an artist.  
13

14 Tohme first became involved in Jackson's business affairs sometime in the spring  
15 of 2008. At the time, Jackson was in default on the promissory note that was secured by a  
16 deed of trust on the Neverland Ranch property and by a lien on Jackson's personal  
17 property, memorabilia, and ownership interest in his music catalogs. By virtue of  
18 forthcoming foreclosure proceedings, Jackson was in serious danger of losing all of these  
19 very valuable real property and personal property interests. It was at the request of  
20 Jackson's brother, Jermain Jackson, that Tohme agreed to meet with Jackson regarding  
21 this matter. As a result of the meeting, Tohme decided he would assist Jackson in seeking  
22 to avoid the threatened foreclosure on the Neverland Ranch property and on the personal  
23 property interests that were subject to a lien. After extensive efforts, involving reaching  
24 out to various contacts in the investment world, Tohme finally succeeded in arranging for  
25 the investment firm Colony to purchase the promissory note from the then holder of the  
26 note, the Fortress Investment Group. Through Tohme's efforts, the purchase of the note  
27 was implemented pursuant to a transaction that effected a cancellation of the foreclosure  
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1 on the Neverland Ranch property, secured a release of the lien on Jackson's personal  
2 property, memorabilia, and ownership interest in his music catalog, and created a joint  
3 venture structure for eventually selling the Neverland Ranch property and realizing a  
4 proper return on its value. Tohme was to be compensated for these activities pursuant to  
5 the previously mentioned finder's fee agreement dated May 2, 2008.

6  
7 After Tohme had rescued Jackson from the dire consequences of the impending  
8 foreclosure, Jackson asked Tohme to become his manager and provide guidance, advice,  
9 and assistance with respect to his business affairs and his professional career as an artist.  
10 Tohme accepted, and the parties entered into the previously described July 2, 2008  
11 management agreement. The agreement delineates certain of the services to be performed  
12 by Tohme as follows:

13 (1) coordinate and authorize Warner/Chappell releases; (2) assist in  
14 event management; (3) assist in maintaining license agreements and  
15 relationships with licensors; (4) assist in coordinating payments to  
16 those providing services to Mr. Jackson, including, without limitation,  
17 accountants, advisors, attorneys, and assistants; (5) negotiate and  
18 manage housing and personal business matters; (6) coordinate with  
19 Sony Music regarding licensing, acquisitions, and distributions; (7)  
20 negotiate product placements, memorialize licensing arrangements  
21 and animation projects; and (8) assist in live and taped performance,  
22 motion picture, and music career issues.

21 As previously noted, in exchange for the services, Jackson agreed to pay Tohme  
22 \$35,000.00 per month plus a 15% commission on all of the "gross compensation received  
23 by [Jackson] for his services within the entertainment industry."

24  
25 The evidence in this case conclusively establishes that Tohme provided Jackson  
26 with a broad range of exclusively managerial services that were extremely beneficial to  
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1 Jackson. From the outset of Tohme's involvement, it was evident that, due to a variety of  
2 pre-existing personal problems, Jackson's professional career was in the throes of a  
3 potentially destructive downward spiral. Tohme immediately set out to reverse that spiral  
4 and rebuild Jackson's career. Tohme convinced Jackson that he should leave the negative  
5 environment of Las Vegas, where he and his family were living, and move to the healthier  
6 and more hospitable environment of Los Angeles. Through focused efforts and  
7 discussions, he persuaded Jackson that he needed to return to work in order to earn the  
8 money required to clear away the cobwebs of the financial bind he was in. Despite some  
9 initial resistance, Jackson accepted the advice and committed to returning to work.  
10 Tohme coordinated Jackson's housing and living arrangements in Los Angeles.

11  
12 Tohme was in charge of handling Jackson's financial affairs. He handled the  
13 payment of bills, expenses, outstanding loans, and other debt obligations, including tax  
14 obligations. Tohme was also responsible for overseeing the status of Jackson's business  
15 ventures with Sony Music. These duties included making sure that Sony Music was  
16 paying Jackson all of the money that was due to him. At one point, Tohme discovered  
17 that Sony Music was withholding money due and payable to Jackson as a result of the re-  
18 release of the album "Thriller". Tohme contacted Sony Music, overcame its  
19 recalcitrance, and eventually succeeded in inducing Sony Music to pay Jackson what was  
20 owed to him, which turned out to be over \$10,000,000.00.

21  
22 Tohme was also in charge of hiring, firing, and overseeing the business  
23 representatives and personal staff that provided needed services to Jackson, inclusive of  
24 attorneys, accountants, and security personnel. During his tenure as manager, Tohme  
25 hired various attorneys to handle a number of litigation and transactional matters affecting  
26 Jackson and his interests. During this period, Tohme also discharged the pre-existing  
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1 security team and brought in an entirely new staff to handle the security for Jackson.  
2

3 Tohme was Jackson's official spokesperson in dealings with the media. He  
4 handled the issuance of press releases and the communication of statements to the press,  
5 which included responding to false or malicious news reports that might have a negative  
6 impact on Jackson's reputation. Tohme's duties also included regularly taking care of the  
7 needs of Jackson and his family with respect to a wide variety of personal matters.  
8

9 In addition to providing the above-described managerial activities, Tohme played a  
10 crucial role in finessing the resolution of a legal matter that stood as a seemingly  
11 insurmountable obstacle to the revival of Jackson's career. During the time that Jackson  
12 had been forced to defend himself against charges of child molestation, Sheikh Abdullah  
13 of Bahrain had covered a substantial portion of the fees incurred by Jackson in mounting  
14 his defense. Following his acquittal, Jackson and his family moved to Bahrain, where  
15 they lived as guests of Sheikh Abdullah at the Sheikh's expense. While residing in  
16 Bahrain, Jackson entered into a contract with a company controlled by the Sheikh, 2 Seas  
17 Records LLC (the "2 Seas Contract"). Under this 2 Seas Contract, Sheikh Abdullah was  
18 given the exclusive right throughout the world to any and all of Jackson's new creative  
19 undertakings; this contract operated to preclude Jackson from recording, performing, or  
20 otherwise pursuing any sort of artistic activity without first obtaining the consent of the  
21 Sheikh.  
22

23 After Jackson left Bahrain in 2006, Sheikh Abdullah brought suit in London,  
24 England to enforce the rights conferred by the 2 Seas Contract. The suit sought \$7  
25 million in damages, and injunctive relief either compelling performance or enjoining  
26 Jackson from engaging in artistic activities not authorized under the contract. The  
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1 London lawsuit and the relief that might be awarded in effect prevented Jackson from  
2 obtaining or accepting any engagements to perform as an artist.

3  
4 Subsequent to becoming Jackson's manager, Tohme initiated a sustained and  
5 intense effort to get Jackson out of the constraints of the 2 Seas Contract. Through his  
6 own extensive negotiations and exchanges with Sheikh Abdullah and those representing  
7 him, and utilizing the services of attorneys he decided to hire, Tohme succeeded in  
8 orchestrating a settlement agreement that resolved the London lawsuit and that, upon  
9 payment of the agreed upon settlement amount, relieved Jackson of the strictures of the 2  
10 Seas contract, enabling him to embark upon and accept new engagements to perform.

11  
12 During the period from the date Tohme became Jackson's manager in July, 2008  
13 and until the date of Jackson's death on June 25, 2009, Jackson entered into only one  
14 contractual engagement pursuant to which he agreed to render services as a performing  
15 artist—that was the January, 2009 contract that Jackson entered into with AEG Live, LLC  
16 dba Concerts West ("AEG") to deliver live performances at a series of 31 or more  
17 concerts to be held in 2009 at AEG's 02 Arena in London, England (the "02 Concert Tour  
18 agreement").

19  
20 A proposal for Jackson to engage in a concert tour at the 02 Arena in London had  
21 been the subject of negotiations between AEG's representatives and Jackson's  
22 representatives at an earlier time in 2007. Those negotiations, however, did not culminate  
23 in a contract because at a certain point in February, 2008 Jackson decided that he did not  
24 want to do a concert tour.

25  
26 The idea of a Jackson concert tour at the 02 Arena was revived around the  
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1 beginning of September, 2008. At that time, a representative or representatives of  
2 Colony, the company that had acquired the promissory note secured by the Neverland  
3 Ranch property, contacted Phil Anschutz, the head of the Anschutz Entertainment Group,  
4 of which AEG is a division. The contact involved the suggestion of Jackson performing  
5 concerts at the 02 Arena. As a result of this contact, Phil Anschutz called Brandon  
6 Phillips ("Phillips"), the president and CEO of AEG, and directed him to meet with  
7 Colony's representatives Tom Barrack and Richard Nanule.

8  
9 The meeting with Colony's representatives took place around the middle of  
10 September. At that meeting Tom Barrack and Richard Nanula asked Phillips to set up a  
11 meeting with Tohme, who was managing Jackson. They brought up the potential for a  
12 Jackson tour, and wanted Phillips to begin discussions with Tohme about putting together  
13 such a tour. Thereafter, Richard Nanula arranged for Phillips to meet with Tohme at the  
14 old bar at the Bel Air Hotel; the meeting took place that same night or the next day.

15  
16 The one-on-one meeting between Phillips and Tohme lasted approximately an  
17 hour-and-a-half. There was a discussion of the prior proposal for a concert tour that had  
18 not come to fruition. There was also a discussion of the desirability of a residency at one  
19 of AEG's arenas, particularly the London one, which was an ideal market for Jackson to  
20 begin the rebirth of his live career. This initial meeting was followed in succession by  
21 two additional meetings, one of which was again just between Phillips and Tohme and  
22 another one which included a third individual, Paul Gongaware, the co-CEO for AEG's  
23 touring division. There was also a subsequent meeting at which Jackson was present  
24 along with Phillips and Tohme. There was also an additional meeting at which Phil  
25 Anschutz was present, along with Phillips, Tohme, Jackson, and several other individuals.

1 Early on in these preliminary meetings Tohme determined that he liked what he  
2 was hearing from AEG. At a certain point, it became evident to Tohme that Phillips had  
3 been green lighted to negotiate a Jackson tour at the 02 Arena with Tohme. For his part,  
4 Tohme was also ready: he started working with Phillips, met with him, and told him what  
5 was needed from AEG in order for the deal to happen. Eventually the parties reached an  
6 agreement, and a deal was signed.

7  
8 During the course of the meetings between Tohme and Phillips, Tohme identified  
9 certain items that had to be included in the contract for an agreement to be concluded;  
10 these consisted of: (1) an advance of \$5 million, \$3 million of which would go to Sheikh  
11 Abdullah's company to give effect to the settlement of the London lawsuit, a precondition  
12 to Jackson being able to perform the concert tour; (2) an advance of \$100,00.00 per  
13 month to cover the rental of a house in Bel Air, California; and (3) an optional advance of  
14 \$15 million to be used for the purchase of a specifically identified house located in Las  
15 Vegas, Nevada. Contractual provisions providing for each of these specific items were  
16 included in the final 02 Concert Tour agreement signed by the parties.

17  
18 The documentation and negotiation of the details of the specific terms to be  
19 incorporated into the final contract for the concert tour was carried out by AEG's  
20 attorneys and by the attorneys—Dennis Hawk and Peter Lopez—that were hired by  
21 Tohme to represent Jackson's interests. Neither Dennis Hawk nor Peter Lopez was  
22 licensed as a talent agent pursuant to the TAA.

23  
24 Following the execution of the 02 Concert Tour agreement, Jackson began  
25 rehearsing for the concert performances that he would give at the 02 Arena beginning in  
26 July, 2009. Sadly, and unexpectedly, Jackson passed away before the date of the first  
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1 scheduled concert. As a result, Jackson never earned and never became entitled to the  
2 contingent percentage compensation provided for under the agreement, namely 90% of  
3 the Net Pool Revenue from the concerts.  
4

5 The rehearsals that Jackson was engaged in as he prepared for the concerts,  
6 however, were recorded as they took place. The material contained in these recordings  
7 was later put together to create a film about Jackson entitled "This Is It." The film was  
8 released commercially and generated substantial revenues for Jackson's estate. Tohme's  
9 civil action against petitioners evidently includes a claim to 15% of those revenues  
10 pursuant to the management agreement.  
11

12 Petitioners' position in this case is that AEG's engagement of Jackson for the 02  
13 Arena concert tour was procured by Tohme, that such procurement was illegal because  
14 Tohme was not licensed as a talent agency pursuant to the TAA, and that consequently  
15 the management agreement is void ab initio in its entirety, precluding Tohme from  
16 recovering any commissions or other compensation under its provisions. Tohme counters  
17 that he did not procure the engagement for the 2009 London tour, that Tohme has thus not  
18 violated the TAA, and that consequently the right of Tohme to commissions and other  
19 compensation under the management agreement is fully enforceable. Alternatively,  
20 Tohme contends that, if there was illegal procurement, the proper remedy is to sever the  
21 illegal portion of the agreement and enforce his compensation rights under the part of the  
22 agreement that is legal. Although petitioners categorically oppose severance, they argue  
23 that if severance is indeed appropriate, their approach to severance should be followed,  
24 rather than the markedly different approach advanced by Tohme. Another question  
25 presented concerns the impact, if any, that a finding of illegal procurement on the part of  
26 Tohme would have on the enforcement of either the finder's fee contract or the Indemnity  
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1 Agreement. We now turn to consideration of these issues.  
2

3 DETERMINATION ON ISSUE OF VIOLATION  
4 OF LICENSING REQUIREMENTS OF TAA  
5

6 As a threshold matter, the evidence in this case establishes that Jackson was an  
7 artist within the meaning of section 1700.4, subdivision (b) and that during the period  
8 July 2, 2008 to June 25, 2009 Tohme was not licensed as a talent agency under the  
9 provisions of the TAA.  
10

11 Section 1700.4 provides in relevant part as follows:

12 “Talent agency” means a person or corporation who engages in the  
13 occupation of procuring, offering, promising, or attempting to procure  
14 employment or engagements for an artist or artists.

15 Section 1700.5 provides in pertinent part:

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

19 As the Supreme Court has explained:

20 The Act establishes its scope through a functional, not a titular,  
21 definition. It regulates *conduct*, not labels; it is the act of procuring  
22 (or soliciting), not the title of one’s business, that qualifies one as a  
23 talent agency and subjects one to the Act’s licensure and related  
24 requirements. (§1700.4, subd. (a).) Any person who procures  
25 employment—any individual, any corporation, any manager—is a  
26 talent agency subject to regulation. (§1700.4, subd. (a).)

27 (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 986.) As the foregoing  
28 makes perfectly clear, anyone who procures engagements for an artist is carrying on the

1 occupation of a talent agency and must be licensed.

2  
3 The Labor Commissioner has long recognized that the acts undertaken in the  
4 course of negotiating an agreement for the employment of an artist constitute “procuring .  
5 . . . or attempting to procure employment” within the meaning of section 1700.4,  
6 subdivision (a).

7  
8 The term “procure,” as used in Labor Code §1700.4(a), means “to  
9 get possession of: obtain, acquire, to cause to happen or be done:  
10 bring about.” *Wachs v. Curry* (1993) 13 Cal.App.4th 616, 628. Thus,  
11 “procuring employment” under the Talent Agencies Act is not limited  
12 to initiating discussions with potential purchasers of the artist’s  
13 professional services or otherwise soliciting employment; rather,  
14 “procurement” includes any active participation in a communication  
15 with a potential purchaser of the artist’s services aimed at obtaining  
16 employment for the artist, regardless of who initiated the  
17 communication. *Hall v. X Management* (TAC No. 19-90, pp. 29-31.)  
18 The Labor Commissioner has long held that “procurement” includes  
19 the process of negotiating an agreement for an artist’s services. *Pryor*  
20 *v. Franklin* (TAC 17 MP 114).

21  
22 (*Danielewski v. Agon Investment Company* (Cal.Lab.Com., October 28, 2005) TAC No.  
23 41-03, pages 15-16.)

24  
25 The evidence in this case clearly establishes that Tohme was directly involved in  
26 negotiating the engagement of Jackson for the 02 Arena Concert Tour and that  
27 consequently the actions of Tohme constituted procurement and attempted procurement  
28 of an engagement of an artist in violation of the TAA.

The evidence demonstrates that at the inception of their contacts with one another  
AEG through its representatives and Tohme on behalf of Jackson were engaged in a

1 process of sizing each other up to determine whether there was trust, compatibility, and a  
2 sufficient and reliable basis for committing to a major project. This process was a  
3 threshold negotiation to determine whether the parties were willing to enter into a binding  
4 contract with one another. The three most prominent principals of AEG—Phil Anschutz,  
5 Brandon Phillips, and Paul Gorgaware—met with and talked to Tohme regarding the  
6 concert tour, and Tohme met and talked to them. In addition, there were recurring  
7 meetings between Tohme and Phillips, and one or more of the other principals, which  
8 spanned a period of at least six to eight weeks. At a certain point, this process culminated  
9 in both parties recognizing that they were satisfied with one another and ready to  
10 negotiate the detailed provisions of a Jackson concert tour at AEG's 02 Arena in London,  
11 England.

12  
13 The culmination of that initial negotiation is aptly summed up in Tohme's own  
14 words as spoken in a deposition taken in the action entitled *Allgood Entertainment, Inc. v.*  
15 *Estate of Michael Jackson*, U.S. Dist. Ct. S.O.N.Y., Case No. 09CV5377(HB) ("Allgood  
16 deposition").

17  
18 So Michael at that time was living in Las Vegas. So I flew to Las  
19 Vegas, and I told Michael. So I took Michael. We went – me and him  
20 and his son Blanket, we went to the MGM hotel with Mr. Phil  
21 Anschutz. And Paul Gongaware, Randy Phillips, and Tim Leiweke  
22 were there and Mr. Anschutz's wife.

23 So Michael came in. I was there with Michael, and we spent like  
24 an hour. Then Michael left, and I told him I'll follow him home.

25 And I stayed and I spoke with the people at AEG that were  
26 present at the meeting, and we decided to move forward. And I think  
27 his superior gave Randy the green light to continue negotiation with  
28 me. And we started working on it, and we met. And I told him what I  
need from them, and we came to an agreement, and we signed the  
deal.

1 The initial negotiations were followed by specific negotiations between Tohme  
2 and Phillips, where Tohme identified certain basic terms that had to be made part of the  
3 contract for the agreement to be consummated. These terms included: (1) an advance of  
4 \$5 million, with \$3 million being disbursed to implement the Sheikh Abdullah settlement,  
5 (2) a monthly advance of \$100,000.00 to be used for payment of the rent on a house in  
6 Bel Air, and (3) an available advance of \$15 million that could be accessed for the  
7 purpose of purchasing a certain house located in Las Vegas, Nevada. After discussing  
8 each of these items and acknowledging that they were included as provisions in the final  
9 02 Arena Concert Tour agreement, Phillips testified at the hearing as follows:

10 Q. And would it be fair to say that these were all provisions, the ones  
11 we've talked about, that were provisions that Mr. Tohme indicated  
12 Mr. Jackson needed to have in the agreement in order to conclude the  
13 agreement?

14 A. That is correct.

15 Phillips further testified that in their discussions Tohme was a "hard negotiator," and that  
16 he believed Tohme had done "a good job representing [] Jackson" in connection with the  
17 efforts undertaken to help put together the 02 Arena tour. This characterization coincides  
18 with Tohme's own description of his central role in bringing about the concert tour  
19 agreement.

20  
21 Tohme has failed to provide a meaningful response to this compelling evidence.  
22 In an effort to explain away his testimony in the Allgood deposition, Tohme focuses on  
23 the word "negotiation" and refers to the testimony he gave at the hearing to the effect that  
24 by "negotiation" he merely meant that he was acting as a messenger between AEG and  
25 Jackson. This explanation, however, is completely refuted by the rest of what was said at  
26 the Allgood deposition—namely that Phillips and Tohme started to work on the  
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1 negotiation, that they met, and that Tohme then told Phillips what he needed from AEG in  
2 order to come to an agreement. Apart from its evident incredulity, the explanation rings  
3 hollow for another reason. As evidenced by the many transactions he negotiated on  
4 behalf of Jackson, Tohme was a very effective and persuasive negotiator; the notion that  
5 he would use “negotiation” to mean he acted as a passive messenger is untenable.

6  
7 Referring to his deposition testimony in another action entitled *Livitsky*  
8 *Productions, Inc. v. Optimum Productions*, Los Angeles Superior Court – West District,  
9 Case No. SC101420 (“Livitsky deposition”), Tohme points to generalized statements he  
10 made denying that he ever negotiated artistic employment for Jackson. However, these  
11 generalized denials must yield to the very specific, clear, and forthright statements Tohme  
12 made at the Allgood deposition in regard to his dealings with AEG. Moreover, Tohme  
13 directly contradicts himself in the Levitsky deposition, admitting that he met with  
14 representatives of AEG and that he was involved in negotiating the AEG – Jackson  
15 agreement. This testimony is on all fours with the testimony in the Allgood deposition.  
16 Therefore, Tohme’s generalized denials of negotiating on behalf of Jackson cannot be  
17 accorded any weight.

18  
19 Tohme contends that he did not negotiate the AEG agreement because he did not  
20 participate in the attorney meetings where the details of the final contract language were  
21 hammered out. But, as has been made clear, the attorney meetings were not the only  
22 meetings at which the concert tour agreement was discussed and negotiated. Whether an  
23 agreement would or would not be entered into and the inclusion of certain basic  
24 indispensable terms were negotiated at separate meetings without the involvement of the  
25 attorneys. Plainly these meetings were as critical as the attorney meetings—if not more  
26 critical—to reaching a final satisfactory agreement. It is evident that Tohme was directly  
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1 involved in negotiating the 02 Arena Concert Tour agreement even though he did not  
2 attend the meetings at which the attorneys were engaged in negotiating the details of the  
3 language for the final contract.  
4

5 Tohme also fails to provide a meaningful response to Phillips' testimony  
6 acknowledging the negotiation of contract terms with Tohme. Although Tome advances  
7 the conclusory assertion that the meetings between Phillips and Tohme did not involve  
8 negotiation of the AEG contract, he never presents any evidence that dispels or negates  
9 Phillips' unequivocal statement that the meetings did involve such negotiation with  
10 respect to specific terms. While Tohme points extensively to various statements made by  
11 Phillips, suggesting that these statements are indicative of a lack of negotiation, in fact  
12 none of the statements in any way contradicts Phillips' firm, forthright assertion, that  
13 negotiations regarding the AEG contract did indeed take place. Tohme points to  
14 testimony by Philips regarding meetings with Tohme where there was definitely no  
15 discussion of the 02 Arena Concert Tour. Obviously, however, the fact that the  
16 agreement for the concert tour was not discussed at some meetings does not mean that it  
17 was not discussed at other meetings. Phillips' testimony makes clear that the agreement  
18 was discussed and negotiated at some of the meetings he had with Tohme. With regard to  
19 Phillips, Tohme once again makes the argument that there was no negotiation between  
20 Phillips and Tohme because neither attended the meetings at which the attorneys  
21 negotiated the language and terms of the contract. But as has already been discussed, this  
22 argument is without force—Phillips and Tohme engaged in essential contractual  
23 negotiations at meeting that were entirely separate and apart from the meetings conducted  
24 by the attorneys. In sum, nothing has been presented that would refute Phillips' testimony  
25 regarding his contract negotiations with Tohme.  
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1 (*Marathon, supra*, 42 Cal. 4th at p. 998.)  
2

3 In assessing the appropriateness of severance, two important considerations are (1)  
4 whether the central purpose of the contract was pervaded by illegality and (2) if not,  
5 whether the illegal portions of the contract are such that they can be readily separated  
6 from those portions that are legal.  
7

8 In this case, we turn initially to a consideration of the management agreement  
9 pursuant to which Tohme illegally procured and sought to procure an engagement for  
10 Jackson as a performing artist.  
11

12 As a threshold matter, it is abundantly clear that the management agreement  
13 between Tohme and Jackson was not pervaded by illegality. In the present case, as is  
14 evident from the discussions earlier in this determination, there was overwhelming  
15 evidence that the primary purpose of the management agreement was not the illegal  
16 procurement of engagements. Rather, the manifest primary purpose was to provide  
17 managerial guidance, advice, direction, and assistance to the end of reviving Jackson's  
18 artistic career and at the same time revitalizing and restructuring Jackson's badly  
19 damaged personal and business affairs. Tohme's accomplishments, as manager, in this  
20 connection were very substantial and highly beneficial to Jackson. Building on his pre-  
21 management rescue of Jackson from the impending foreclosure on Jackson's Neverland  
22 Ranch property and on various significant items of personal property, Tohme undertook a  
23 wide range of restorative activities that served to lift Jackson's personal, professional, and  
24 artistic life to a new plateau, where he now had the confidence to reignite his career as an  
25 entertainer and performing artist. Two of Tohme's major achievements in this regard  
26 were inducing Sony Music to cough up \$10 million that had been improperly withheld  
27 from Jackson and finessing a settlement of the Sheikh Abdullah London lawsuit that  
28

1 essentially constrained Jackson from entering into any new contracts to render services as  
2 an artist. Thus, as a preliminary matter, it is clear that the “primary purpose” standard  
3 does not require invalidation of the entire management agreement.  
4

5 The second line of inquiry, for assessing severability, entails determining whether  
6 the illegal portions of the contract can be readily separated from the legal portions. In  
7 many instances, this line of inquiry will require consideration of two subsidiary questions.  
8 The first is whether, on the one hand, the illegal activities are separable and distinct from  
9 the legal activities, or whether, on the other hand, the illegal and legal activities are  
10 inextricably intertwined. Here, it is readily apparent that Tohme’s illegal activities—  
11 namely the procurement and attempted procurement of the AEG concert tour—are  
12 entirely separate and distinct from his legal activities, which involved intense focused  
13 efforts aimed at reviving Jackson’s artistic career and reshaping and strengthening his  
14 personal, business, and professional affairs.  
15

16 The second subsidiary question is whether the revenues from the illegal activities  
17 can be reasonably separated from the revenues derived from the legal activities. In  
18 general, income that is generated under the provisions of an illegally procured  
19 engagement contract cannot be the source for payment of an earned commission to the  
20 manager that procured the engagement. In other words, income payable to an artist under  
21 the provisions of an illegally procured engagement contract must be completely excluded  
22 from the payment of any commissions under the management agreement, even if as to  
23 that agreement the manager retains the right to receive some commissions or revenues  
24 that are not derived from illegal procurements.  
25

26 In this case, the revenues from Tohme’s illegal procurement activities are  
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1 completely separable from any other revenues that may be commissionable under the  
2 management agreement. Indeed, in this case there are no revenues from Tohme’s illegal  
3 procurement activities. More particularly, here the only engagement contract illegally  
4 procured was the 02 Arena agreement, which called upon Jackson to perform 31 or more  
5 concerts in London. However, the compensation that would have been payable to  
6 Jackson under that contract—and that therefore would have been potentially subject to a  
7 commission under the management agreement—never materialized. Jackson died before  
8 the first concert, and therefore none of the compensation based on concert earnings ever  
9 became payable to Jackson pursuant to the engagement contract’s provisions. Since  
10 Tohme never became entitled to illegal commission revenues from compensation paid  
11 pursuant to the engagement contract, there are no such revenues that need to be severed  
12 from the legal revenues for purposes of applying the severability doctrine.

13  
14 Petitioners contend that the income from the film “This Is It” that was made from  
15 the preserved recordings of Jackson’s rehearsals for the 02 Arena concerts should be  
16 treated as illegally procured and therefore excluded from any commissions that Tohme  
17 might still be entitled to receive under the management agreement.<sup>3</sup> This contention lacks  
18 merit.

19  
20 In this case there was no evidence presented that Tohme was involved in procuring  
21 any sort of engagement for Jackson to undertake rehearsals in preparation for the  
22 concerts, or for Jackson’s rehearsals to be visually recorded, or for those recordings to be  
23 compiled into a film of the rehearsals, or for such a film to be released commercially and  
24 marketed to the public. In other words, for all that appears in the present case there was  
25 no engagement contract of any kind with respect to the rehearsals and the recording of

26  
27 <sup>3</sup> For purposes of this discussion, it is assumed that the income from the film,  
28 “This Is It” would be subject to the provision in the management agreement requiring  
payment of a 15% commission.

1 those rehearsals. Why these recordings were made and who decided to make them are  
2 matters which are not before this tribunal. Through a sad and unexpected turn of events,  
3 these preserved recordings suddenly acquired significant artistic and commercial value.  
4 Since these unexpectedly valuable recordings and the film derived therefrom were not  
5 produced pursuant to an illegally procured contract requiring the payment of  
6 compensation to Jackson that was commissionable to Tohme, there is no basis under the  
7 TAA for excluding the film's revenues from being subject to commissions in favor of  
8 Tohme based on his legal activities as a manager. Enforcement of the policies underlying  
9 the TAA do not require the exclusion of commissionable revenues that do not have their  
10 source in payments due under an illegally procured contract. Nor does the equitable  
11 doctrine of severability require such a result in the circumstances of this case. Finally, the  
12 metaphysical argument that these valuable recordings might never have come into being  
13 but for the illegal procurement of the concert tour is entirely too speculative—in any  
14 event, for the reasons stated, that possibility does not implicate any policies that would  
15 require outright exclusion of the film's revenues from commissions properly attributable  
16 solely to legal management activities.

17  
18 The question now becomes what is the appropriate method of implementing  
19 severance in the circumstances of this case. In its current lawsuit against petitioners,  
20 Tohme is seeking to recover 15% of the gross compensation received by Jackson or his  
21 estate for the services rendered by Jackson within the entertainment industry. This 15%  
22 in commissions claimed by Tohme is not based on any specific service rendered by  
23 Tohme, but rather constitutes undifferentiated compensation payable to Tohme as  
24 consideration for the undifferentiated services Tohme has provided to Jackson under the  
25 contract. The undifferentiated services provided by Tohme to Jackson include both legal  
26 managerial services and illegal talent agency services. However, Tohme is not entitled to  
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1 receive compensation for his illegal services. In such circumstances, the proper approach  
2 is to deduct the value of the illegal services and permit recovery only for the value of the  
3 legal services. (*Marathon, supra*, 42 Cal. 4th at p. 997; *Birbrower, Montalbano, Condon*  
4 *& Frank v. Superior Court* (1998) 17 Cal. 4th 119, 139-140; *Whorton v. Dillingham*  
5 (1988) 202 Cal. Ap.3d 447.452-454.)

6  
7 In the present case, it is determined that the illegal activities engaged in by Tohme  
8 were substantial and significant. Securing and finalizing the 02 Arena agreement with  
9 AEG required a very significant and dedicated expenditure of time, effort and resources  
10 on the part of Tohme. The magnitude of that effort is self-evident, and is reflected in the  
11 importance of the concert tour to Jackson's career and in the fact that the income to  
12 Jackson from the concerts would be enormous and constitute the only income Jackson  
13 was then earning from live performances. When the illegal activities are measured  
14 against the totality of Tohme's activities, and compared with the activities that were legal,  
15 one is led to the conclusion that the illegal services provided by Tohme to Jackson  
16 amounted to roughly 50% of the total services provided under the contract. It follows that  
17 the value of the legal services provided by Tohme were equal to only 50% of the value of  
18 the total services provided pursuant to the contract, and that accordingly Tohme should  
19 receive and be paid only 50% of the amount that would have been due for the full value  
20 of all the services. Put another way, the value of the services that were legal represents  
21 only 50% of the 15% in commissions that was to be paid for the full value of all the  
22 services, and therefore the commissions payable to Tohme for the compensable legal  
23 services must be reduced to 7.5%.

24  
25 In sum, based on the application of the doctrine of severability, it is concluded that  
26 Tohme can recover for the services that he provided legally under the management  
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1 agreement. However, since these services represent only 50% of the value of all the  
2 services furnished under the agreement, the compensation due pursuant to the terms of the  
3 agreement must be reduced by 50%, such that the commissions payable to Tohme shall be  
4 limited to 7.5% of those amounts payable to Jackson or his estate that constitute “gross  
5 compensation” under the terms of the agreement.  
6

7 In this petition, the petitioners also sought invalidation of other agreements  
8 between Tohme and Jackson that were related to the management agreement. This  
9 request appears to be a reference to (1) the finder’s fee agreement arising out of the  
10 purchase of the promissory note secured by the Neverland Ranch property and (2) the  
11 indemnity agreement of August 6, 2008. The issues raised by the request were not  
12 discussed by the parties at the hearing or in their papers, and therefore will not be  
13 addressed in this determination. However, a few observations are in order. The finder’s  
14 fee agreement does not implicate Tohme’s illegal talent agency activities on behalf of  
15 Jackson, and therefore the agreement does not appear to run afoul of the TAA. On the  
16 other hand, the indemnity agreement appears to be an appendage and supplement to the  
17 management agreement. Evidently, under its provisions, a manager that brings suit to  
18 enforce the management agreement can recover attorneys fees and other forms of  
19 indemnification from the artist, even though the artist has asserted a plausible defense that  
20 the management agreement is illegal under the TAA. To the extent that the indemnity  
21 agreement would authorize that type of recovery in those circumstances, it would appear  
22 that the indemnity agreement is incompatible with the policies underlying the TAA and  
23 therefore illegal and unenforceable under the TAA’s provisions.  
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