

1 STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
2 DIVISION OF LABOR STANDARDS ENFORCEMENT
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8 BEFORE THE LABOR COMMISSIONER

9 STATE OF CALIFORNIA
10

11 STEVE LINDSEY, An Individual dba) **CASE NO.: TAC 28811**
BLOTTER MUSIC (ASCAP) and dba LIQUID)
12 ORANGE MUSIC (BMI), and BLOTTER,) **DETERMINATION OF**
INC., A California Corporation,) **CONTROVERSY**

13 Petitioners,

14 vs.
15

16 LISA MARIE, An Individual and MARIE
MUSIC GROUP, LLC fka MOIR/MARIE
17 ENTERTAINMENT, A California Limited
Liability Company and DOES 1-20, Inclusive.

18 Respondents.
19

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21 The above-captioned matter, a Petition to Determine Controversy under Labor
22 Code §1700.44, came on regularly for hearing in Long Beach, California, before the
23 undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner
24 STEVE LINDSEY, an Individual dba BLOTTER MUSIC (ASCAP) and dba LIQUID
25 ORANGE MUSIC (BMI), and BLOTTER, INC., A California Corporation, (hereinafter,
26 referred to as "Lindsey" or "Petitioner") appeared through their attorney Steven B.
27 Stiglitz of Freedman & Taitelman, LLP. Respondents LISA MARIE AND MARIE
28 MUSIC GROUP, LLC, f/k/a MOIR MARIE ENTERTAINMENT, LLC ("MMG")

1 (hereinafter, "MMG" or "Respondent"), appeared through counsel James S. Cooper, of
2 Levinson Arshonsky & Kurtz, LLP.

3 Petitioner was represented by Respondent as his personal manager. The Petition
4 seeks to void the Personal Management Agreement, in whole, or, alternatively, in part, on
5 the grounds MMG's services under that agreement violated the Talent Agencies Act,
6 California Labor Code Section 1700, et seq. (the "Act"), in that the services constituted
7 the unlawful procurement of employment without a license to conduct business as a talent
8 agency. Based on the evidence presented at this hearing and on the other papers on file in
9 this matter, the Labor Commissioner hereby adopts the following decision.

10
11 **I. FINDINGS OF FACT**

12 1. Lindsey is an artist and a record producer in the music industry whose skills
13 include record production, music composition, song writing, and musical performance.

14 2. In or about 1996, Lindsey wanted to continue working as a record producer,
15 but sought to work on more contemporary sounding albums believing this would expand
16 his opportunities. To pursue that goal, Lindsey retained MMG to act as his personal
17 management firm, with Bennett Kaufman ("Kaufman") to act as his primary manager.
18 Lindsey and Kaufman had known each other in a professional context for many years,
19 and Lindsey trusted Kaufman to help him obtain new opportunities as a producer of
20 musical content.

21 3. On April 23, 1996, Lindsey and MMG entered into an initial
22 personal management agreement (the "Initial Personal Management Agreement"). Under
23 the Initial Personal Management Agreement, MMG contracted to perform services as
24 Lindsey's personal manager in return for a commission of 15% of Lindsey's gross income
25 in connection with Lindsey's work as a record producer, arranger and songwriter.

26 **A. The Guster Deal**

27 4. After Lindsey and MMG entered into the Initial Personal Management
28 Agreement, Kaufman began searching for opportunities for Lindsey. Kaufman

1 successfully found Lindsey work as a songwriter and arranger as well as a record
2 producer. The first significant opportunity Kaufman arranged for Lindsey was securing a
3 deal for Lindsey to produce a record for the band Guster (hereinafter the "Guster Deal").
4 As a result of Kaufman's introduction, Lindsey ultimately produced Guster's album and
5 wrote one of the songs on that album.

6 5. A written agreement between Lindsey and Guster Recordings, Inc. (the
7 "Guster Agreement") memorializes that relationship. Notably, a review of the Guster
8 Agreement confirms that the only parties to the Guster Deal were Guster, the band, and
9 Lindsey, the producer. The record company, Sire Records (hereinafter company or label)
10 who distributed the album and provided royalty statements of the record's earnings via
11 record sales, was neither a party to the Guster Deal nor a signatory to the contract. The
12 royalties or earnings promised to Lindsey under the Guster Deal were calculated "on the
13 same basis as [Guster's] royalties are calculated, determined, adjusted and paid pursuant
14 to Guster's agreement with Company (the 'Recording Agreement')". The Recording
15 Agreement was the recording contract between Guster and Sire. In short, the Guster Deal
16 was a relationship for Lindsey to produce Guster's record wherein Lindsey's earnings
17 were paid as a direct percentage of Guster's earnings under Guster's recording contract
18 with Sire records.

19
20 **B. The Windswept Agreement**

21 6. Soon after securing the Guster Deal, Kaufman suggested Lindsey
22 explore the possibility of becoming a music publisher. Lindsey had no experience as a
23 music publisher, but Kaufman correctly ascertained that Lindsey had all of the skills
24 necessary to succeed in the field of publishing.

25 7. In furtherance of helping Lindsey obtain work as a music publisher,
26 Kaufman introduced Lindsey to Windswept Pacific Entertainment Company (hereinafter
27 Windswept). As a result of that introduction, Lindsey obtained work as a co-publisher

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1 with Windswept. The terms of the agreement are contained in the “Windswept
2 Agreement”.

3 8. Section 6 of the Windswept Agreement, which is entitled “Co-Publisher’s
4 Obligations,” contains subsection a. that provides: “As between Windswept and
5 [Lindsey], [Lindsey] shall be solely responsible for and shall use its best reasonable
6 efforts to locate publishing opportunities for the mutual benefit of [Lindsey] and
7 Windswept.” Section 7.a of the Windswept Agreement provides for certain business
8 terms of the deal. Subsection (i) provides for Windswept to pay Lindsey a salary in each
9 contract year (which is recoupable from royalties earned through musical compositions, if
10 any).

11 9. Pursuant to the Windswept Agreement, Lindsey worked virtually
12 exclusively for Windswept for a number of years. Lindsey received earnings from the
13 Windswept Agreement and paid commissions to Respondent during those years.

14
15 **C. The Amendment to the Initial Personal Management Agreement**

16 10. On April 2, 2003, Lindsey and MMG entered into an amendment to the
17 Initial Personal Management Agreement. The Initial Personal Management Agreement
18 and this amendment together constitute the entirety of the Personal Management
19 Agreement between the parties. The amendment provides, among other things, “[MMG]
20 shall also continue to be entitled to commission [for Lindsey’s] current publishing Joint
21 Venture with Windswept Music Publishing....” MMG had been commissioning
22 Lindsey’s income from the Windswept Agreement, and MMG continued to commission
23 such income thereafter.

24 **D. The Botti Deal**

25 11. Shortly after Lindsey and MMG entered into the amendment to the Initial
26 Personal Management Agreement, Kaufman again successfully sold Lindsey as a
27 songwriter as well as a record producer on an album for trumpeter and composer Chris
28 Botti. As a result of Kaufman’s introduction, Lindsey ultimately produce Botti’s album

1 and co-wrote one of the songs on that album. A written agreement between Lindsey and
2 Reverb, Inc. (The "Botti Agreement") memorializes that relationship. Notably, a review
3 of the Botti Agreement confirms that the parties to the Botti Deal were Botti, the artist,
4 and Lindsey, the producer. The record company, Sony Music Entertainment (company
5 or label), who distributed the album and provided royalty statements for the record, was
6 not a party to the Botti Deal. The royalties or earnings promised to Lindsey under the
7 Botti Deal were "computed in the same manner as [Botti's] royalties under [Botti's]
8 Agreement [with Sony.]" Again, like with the Guster Deal, the Recording Agreement
9 was the recording contract between Botti and Sony. In short, the Botti Deal was a
10 personal services contract for Lindsey to produce Botti's record wherein Lindsey's
11 earnings were paid as a direct percentage of Botti's earnings under Botti's recording
12 contract with Sony, the label.

13 **E. The Termination of the Personal Management Agreement**

14 12. On March 4, 2005, Lindsey terminated the Personal Management
15 Agreement in part because of Kaufman's departure from the firm. Sometime in 2005,
16 Lindsey sold his interest in the Windswept deal back to Windswept in four increments
17 paid to Lindsey on July 1, 2005, February 16, 2006, January 16, 2007, and July 28, 2008.

18 13. Lindsey stopped accounting for the royalties he obtained over the years
19 from the Windswept Co-Acquisition Agreement and at some point disclosed to
20 Respondent the sale of his Windswept interest back to Windswept. MMG requested the
21 unpaid commissions on the Windswept Agreement and when payment of those
22 commissions were refused, the Respondent filed a claim in Los Angeles Superior Court for
23 breach of contract. Lindsey now claims he is not required to pay any monies to
24 Respondent arguing the securing of the Windswept, Guster and Botti agreements by
25 Respondent violated the Talent Agencies Act.

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1 **II. ARGUMENT**

2 The two issues to be determined are as follows:

3 a. Has the Respondent acted as an unlicensed talent agency by securing a
4 publishing agreement (“The Windswept Deal”) for the Petitioner?

5 b. Does the “Recording Contracts” exemption from the Talent Agencies Act at
6 Labor Code §1700.4(a) apply to the Guster or Botti Deals?

7 14. The primary issue is whether based on the evidence presented at this
8 hearing, did the respondent operate as a “talent agency” within the meaning of Labor
9 Code §1700.4(a). Labor Code §1700.4(a) defines “talent agency” as:

10
11 “a person or corporation who engages in the occupation of procuring,
12 offering, promising, or attempting to procure employment or engagements
for an artist or artists.”

13 15. Petitioner is an “artist” within the meaning of Labor Code §1700.4(b).
14 Moreover, Labor Code §1700.5 provides that “no person shall engage in or carry on the
15 occupation of a talent agency without first procuring a license therefor from the Labor
16 Commissioner.” It was stipulated Respondent has never held a talent agency license.

17 **A. The Co-Acquisition Agreement with Windswept Publishing**

18 16. The Co-Acquisition Agreement or co-publishing agreement in question was
19 entered into by and between Steve Lindsey and Windswept, on or about July 21, 1998.

20 By its express terms, the purpose of the Co-Acquisition Agreement, as stated in Paragraph
21 4:

22 Shall be to engage in the worldwide acquisition and exploitation of
23 ownership rights (as contrasted to administrative rights) in copyrights of
24 musical compositions. (Windswept Agreement, ¶ 4.)

25 17. Specifically, Lindsey was a “talent finder” who was to work with
26 Windswept to locate musicians whose songs were deemed to have value and induce them
27 into signing over licensing of their publishing rights to himself and Windswept for an
28

1 agreed to sale price. The parties were owners of third, non-party songwriters' publishing
2 licensing rights whose ownership and profits they shared on a 50/50 basis. The
3 Windswept Co-Acquisition Agreement involves publishing, and relates to third parties
4 who are selling intangible property rights (royalties) to their musical compositions. Thus,
5 on its face this Co-Acquisition Agreement does not constitute the procurement of
6 employment or an engagement for an artist. Instead, it is simply a co-acquisition
7 agreement which represents a partnership or co-venture between Lindsey and Windswept
8 to purchase the property previously belonging to others for ownership and profit. In
9 short, these were simply investments and are outside the jurisdiction of the Talent
10 Agencies Act.

11
12 **B. The Guster and Botti Agreements**

13 18. The Petitioner entered into a series of recording producer agreements with
14 various record companies, including Sony Records, EMI Records, as well as directly with
15 some of the recording artists such as Guster and Botti. All of these agreements were to
16 secure Lindsey's services for the production of master recordings for artists. For
17 example, the Botti Agreement required Lindsey to "furnish to us your exclusive services
18 as the producer of up to 13 master recordings." Similarly, the agreement with Guster
19 required Lindsey to provide services as a record producer on certain master recordings.

20 19. Respondent argues the critical element of all these contracts was that they
21 related exclusively to the production of recordings as their end product, whether those
22 recordings were referred to as "master tapes," a film soundtrack recording, or other
23 reproduction medium. And Respondent moreover argues, the royalties paid to Mr.
24 Lindsey for these projects were royalties arising out of the sale and distribution of
25 recordings from the record companies themselves.

26 20. Thus, Respondent concludes that regardless of the services provided by Mr.
27 Lindsey, whether as a "producer," "mixer," or writer or co-writer of any songs, all these
28 activities were exclusively performed in connection with the production of recordings and

1 all royalties were paid based upon the production or the sales of the recordings.
2 Consequently, Respondent contends all of Lindsey's agreements as a producer, whether
3 made directly with a record company or directly with an artist, as with the Botti and
4 Guster agreements, fall within the purview of the Talent Agencies's recording contract
5 exemption. We disagree.

6
7 **C. The Recording Contract Exemption**

8 Labor Code §1700.4(a) provides:

9 'Talent Agency' means a person or corporation who engages in the
10 occupation of procuring, offering, promising, or attempting to
11 procure employment or engagements for an artist or artists, **except**
12 **that the activities of procuring, offering, or promising to procure**
13 **recording contracts for an artist or artist shall not of itself**
14 **subject a person or corporation to regulation and licensing**
15 **under this chapter.** Talent agencies may, in addition, counsel or
16 direct artists in the development of their professional careers.
17 [emphasis added]

18 21. The recording contract procurement exception was first placed into the
19 Labor Code in 1982 and allowed for a commission known as the California Entertainment
20 Commission (hereinafter the Commission) to study the efficacy of the exception. The
21 Commission spent two years studying the issue and whether any changes should be made
22 to it. (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 625.) In affirming the need for the
23 recording contract procurement exception, the commission provided its rationale for its
24 recommendation keeping it in place:

25 A recording contract is an employment contract of a different nature from
26 those in common usage in the industry involving personal services. The
27 purpose of the contract is to produce a permanent and re-playable showcase
28 of the talents of the artist. In the recording industry, many successful artists
retain personal managers to act as their intermediaries, and negotiations for
recording contracts are commonly conducted by a personal manager, not a
talent agency ... they may act as their intermediaries, and negotiations for
recording contracts are commonly conducted by a personal manager, not a
talent agent ... **they may act as a conduit between the artist and the**
recording company, offering suggestions about the use of the artist or
the level of effort which the recording company is expending on behalf
of the artist (*Id.* at p.625-626) [empahsis added].

1 22. Why is this important? Because based on limited legislative history it
2 appears the intent of the recording contract exemption was to exempt the act of
3 negotiating recording contracts between artists and the recording companies. Here the
4 Guster and Botti agreements are agreements made directly between a producer and the
5 artist. In short, the record company is not a party to these contracts. These contracts are
6 essentially contracts between two artists for services. And consequently, we choose not
7 to expand the purview of the Act's exemption to encompass contracts for personal
8 services between artists and producer/artists. The Act's recording contract exemption
9 was intended to exempt negotiations between a manager and record company on behalf of
10 artists. And we do not see, as the respondent fears, that this holding will "send
11 shockwaves through the industry and disturb long-held, highly developed rules and
12 territory between managers and agents, not to mention a flurry of new claims by artists or
13 non-artists involved in a recording contract." We find no evidence the exemption was
14 intended to exempt managers negotiating contracts between artists and producers that do
15 not contemplate involvement of record companies or labels other than providing royalty
16 statements. This would expand the exemption outside the intent of the legislature and the
17 findings of the Commission who studied the Act for more than two years.

18 23. The respondent's argument concludes that if the earnings paid to the
19 producer stem from advances to be offset by royalties, this fact alone determines whether
20 the managers actions on behalf of an artist falls subject to the recording contract
21 exemption. As stated by the Respondent at the hearing, the Guster contract will
22 essentially be paid by the record company via royalties even though it is between Guster
23 Recordings, a separate entity.

24 24. Finally, respondent argues that Pursuant to *Civil Code* section 2500,
25 Lindsey is a royalty recipient of a recording contract, meaning he is "a party to a contract
26 for the furnishing of services in the production of sound recordings...." Again, we
27 disagree. A review of all past Labor Commissioner determinations and relevant case law
28 does not lend support to the respondent's argument that if creative services are utilized in

1 support of a master recording and the earnings are paid via a percentage of the artists
2 royalties from a record company, the recording contract exemption *must* apply¹.

3 **D. Neither The Guster Employment Nor The Botti Employment Is Within**
4 **The Recording Contracts Exemption To The Act**

5 25. California Labor Code section 1700.4(b) exempts the activities of
6 “procuring ... recording contracts for an artist” ... from the definition of a “talent
7 agency.” “The ‘recording contract exemption’ does not, however, include contracts
8 between a producer on the one hand and artist on the other. In *Chinn v. Tobin* (1997)
9 TAC No. 17-96 at page 6, fn. 1, we concluded,

10 The Talent Agencies Act has long been construed by the
11 courts as a remedial statute intended for the protection of
12 artists. ‘[T]he clear object of the Act is to prevent improper
13 persons from being [talent agents] and to regulate such
14 activity for the protection of the public....’ *Buchwald v.*
15 *Superior Court* (1967) 254 Cal.App.2d 347, 351. See also
16 *Waisbren v. Peppercorn Productions* (1995) 41 Cal.App.4th
17 246. As with all remedial legislation, exemptions must be
18 narrowly construed and cannot be extended beyond their
19 express provision. To do otherwise would defeat the remedial
20 purpose of the legislation.

21 26. As a result, we are hesitant to expand the exemption for recording contracts
22 to include agreements directly between artists and producers absent an express inclusion
23 of the record company and do not have authority before us that would lead us to believe
24 the legislature intended such an expansive interpretation.

25 27. Labor Code 1700.5 requires a talent agent to procure a license from the
26 Labor Commissioner. Since the clear object of the Act is to prevent improper persons

27 ¹ The Respondent relies heavily on the hearing officer’s Order on Respondent’s Motion to
28 Dismiss granting the motion based on the fact that the negotiation of contracts between studio
mixing services and record companies fell within the recording contracts exemption. (See *Chris
and Thomas Lord Alge v. Moir/Marie Entertainment LLC, et al.*, TAC 45-05). This Order is
distinguished in that the hearing officer expressly held the exemption was applicable because
“the contracts which Petitioners allege were procured by Respondent without a talent agency
license are actual recording contracts between Petitioners and various recording companies.”
Including Maverick Recording Company and Warner Bros Records, Inc. (See Order on
Respondent’s Motion to Dismiss TAC 45-04 pg. 5 lines 10-12)

1 from becoming [talent agents] and to regulate such activity for the protection of the
2 public, a contract between an unlicensed artists' manager and an artist is void. *Buchwald*
3 *v. Superior Court, supra*, 254 Cal.App.2d 347. Consequently, MMG procured
4 engagements for an artist in the Guster and Botti deals and as a result the management
5 agreement between MMG and Lindsey is void *ab initio* and is unenforceable for all
6 purposes. *Waisbren v. Peppercorn Inc., supra*, 41 Cal.App.4th 246; *Buchwald v. Superior*
7 *Court, supra*, 254 Cal.App.2d 347.

8
9 **E. Severability**

10 28. In accord with *Marathon Entertainment v. Blasi* (2008) 42 Cal.4th 974,
11 MMG urges us to apply the doctrine of severability if we find MMG violated the Act. In
12 *Marathon*, the court recognized the Labor Commissioner may invalidate an entire
13 contract when the Act is violated. The court also left it to the discretion of the Labor
14 Commissioner to apply the doctrine of severability to preserve and enforce the lawful
15 portions of the parties' contract where the facts so warrant. As the Supreme Court
16 explained in *Marathon*:

17
18 Courts are to look to the various purposes of the contract.
19 If the central purpose of the contract is tainted with
20 illegality, then the contract as a whole cannot be
21 enforced. If the illegality is collateral to the main
22 purpose of the contract, and the illegal provision can be
23 extirpated from the contract by means of severance or
24 restriction, then such severance and restriction are
25 appropriate. [Citations omitted]. *Marathon, supra* at p.
26 996.

27 29. MMG urges us to simply sever those engagements we find to have been
28 procured in violation of the Act and preserve the contractual relationship between the
parties. As explained in this decision, we find MMG violated the Act on 2 of the 3
contracts identified in this case. Consequently, we find MMG engaged in substantial

1 procurement activities that are inseparable from the lawful managerial services provided
2 to MMG. Severing the two illegal engagements/contracts from the parties' contractual
3 relationship would only serve to condone such unlawful behavior and expand the
4 recording contract exemption beyond what the legislature envisioned.

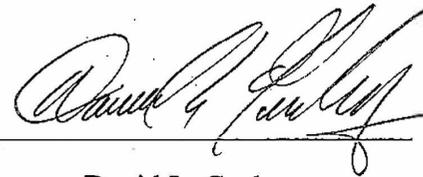
5 30. Accordingly, we exercise our discretion under *Marathon, supra*, in voiding
6 the Personal Management Agreement and conclude that severance is not appropriate
7 under these facts.

8 **III. ORDER**

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

10 The Amendment to the Initial Personal Management Agreement between
11 LINDSEY and MMG is invalid and unenforceable under the Talent Agencies Act and is
12 void ab initio; MMG has no rights or entitlements to any monies arising from such
13 engagements.

14
15
16 Dated: 8/5/14



17 David L. Gurley
18 Attorney for the Labor Commissioner

19
20 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

21
22
23 Dated: _____

24 _____
25 Julie A. Su
26 State Labor Commissioner
27
28

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14
15
16 Dated: _____

David L. Gurley
Attorney for the Labor Commissioner

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19
20 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

21
22
23 Dated: 8.6.14



Julie A. Su
State Labor Commissioner

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I, Tina Provencio, declare and state as follows:

4 I am employed in the State of California, County of Los Angeles. I am over the age of
5 eighteen years and not a party to the within action; my business address is: MOLINA CENTER -
300 Oceangate, Suite 850, Long Beach, CA 90802.

6 On August 6, 2014, I served the foregoing document described as: **DETERMINATION OF**
7 **CONTROVERSY**, on all interested parties in this action by placing a true copy thereof enclosed
in a sealed envelope addressed as follows:

8 James S. Cooper, Esq.
9 Yoonis J. Han, Esq.
10 LEVINSON, ARSHONSKY & KURTZ, LLP
11 15303 Ventura Boulevard, Suite 1650
12 Sherman Oaks, CA 91403
13 **Attorneys for Respondents,**
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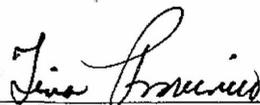
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MUSIC and BLOTTER, INC.
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15 X **(BY CERTIFIED MAIL)** I caused such envelope to be deposited in the United States
16 mail at Long Beach, California. The envelope was mailed with postage thereon fully prepaid. I am
17 "readily familiar" with the firm's practice of collection and processing correspondence for mailing.
Under the practice it would be deposited with the U.S. postal service on that same day in the ordinary
18 course of business. I am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date of deposit for mailing
in affidavit.

19 X **(BY EMAIL SERVICE)** I caused such document to be delivered electronically via
20 email to the email address of the addressees set forth above.

21 I declare under penalty of perjury under the laws of the State of California that the above is
true and correct.

22 Executed this 6th day of August, 2014 at Long Beach, California.

23
24 
25 Tina Provencio