



THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER
AND WORKER PROTECTION,

Petitioner,

-against-

JUDSON MANAGEMENT GROUP, INC.,
AND BAKER ARTISTS, LLC

Respondents.

OATH Index No. 032/20

Final Agency Decision

On April 20, 2022, Administrative Law Judge Kevin F. Casey of the Office of Administrative Trials and Hearings (“OATH”) issued a Report and Recommendation in the above-captioned matter. OATH recommended that Respondents be liable for \$1500 and \$750 in civil penalties against Baker Artists. LLC and Judson Management Group, Inc., respectively, for violating New York’s General Business Law section 172 by operating employment agencies without a license between 2015 to 2018. On May 20, 2022, the Department of Consumer and Worker Protection (“Department”) received a written argument from Respondents.

The Department now issues this Final Agency Decision pursuant to section 2203(h)(1) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York.

Following review of the record, the Department adopts OATH’s Report and Recommendation without modification.

Date: 6/30/2022

Vilda Vera Mayuga
Commissioner
Department of Consumer and Worker Protection

***Dep't of Consumer & Worker Protection v. Judson
Management Group, Inc. and Baker Artists, LLC***

OATH Index No. 032/20 (Apr. 20, 2022)

Petitioner proved that respondents operated employment agencies without a license. Penalty of \$2,250 recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
DEPARTMENT OF CONSUMER AND WORKER PROTECTION
Petitioner
- against -
JUDSON MANAGEMENT GROUP, INC. AND BAKER ARTISTS, LLC
Respondents

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Consumer and Worker Protection, brought this proceeding under section 2203 of the Administrative Code, alleging that respondents, Judson Management Group, Inc. (“JMG”) and Baker Artists, LLC (“Baker Artists”), violated section 172 of New York’s General Business Law (“GBL”) by operating employment agencies without a license from 2015 to 2018 (Pet. Ex. 1).

At a 16-day trial, held via videoconference due to the COVID-19 pandemic, petitioner relied on documentary evidence and testimony from five witnesses. Respondents relied on documentary evidence and testimony from four witnesses.

For the reasons below, I find that the petition should be sustained and recommend a penalty of \$2,250.

BACKGROUND

Introduction

As part of its mission to protect consumers and workers from unfair business practices, petitioner is responsible for licensing employment agencies in New York City. GBL § 172; Admin. Code § 20-101 (Lexis 2022). Employment agencies include any company that “procures

or attempts to procure . . . employment or engagements” for a fee. GBL §§ 171(2)(a)(1), (7). Theatrical employment agencies are employment agencies that procure or attempt to procure employment or engagements for artists. GBL §§ 171(2)(d), (8). Section 171(8) of the GBL exempts from the licensing requirement certain theatrical employment agencies that are in the business of managing artists “where such business *only incidentally* involves the seeking of employment.” GBL § 171(8) (emphasis added). Respondents procure engagements for artists. The main disputed issue is whether they are in the business of managing artists and procuring engagements is only an incidental activity.

Stephen H. Judson founded respondent JMG in 1988 and incorporated it in 1992 (Tr. 165). Mr. Judson founded respondent Baker Artists, a limited liability company and an affiliate of JMG, in 2013 (Tr. 2558). Respondents operate from the same location in midtown Manhattan (Tr. 2561-12). Neither respondent is licensed by petitioner.

The charges stem from respondents’ contracts with and conduct on behalf of three classical musical groups: Christina and Michelle Naughton (“the Naughtons”); the Orpheus Chamber Orchestra (“Orpheus”); and Junction Trio (“Junction”). In July 2015, Baker Artists signed a four-year contract with the Naughtons to be “their sole and exclusive manager and representative, for all of their engagements worldwide” (Pet. Ex. 35). In April 2017, Baker Artists entered into a three-year contract with Orpheus to be the “sole and exclusive manager and personal representative” for engagements in North America, except for certain engagements in the New York City area (Pet. Ex. 61). In January 2018, JMG entered into a three-year contract with Junction to be “their sole and exclusive manager and representative, for all engagements worldwide” (Pet. Ex. 79).

Petitioner contends that respondents engaged in unlicensed employment agency activity based on their contracts with the three specified artists “and their conduct in practice” (Pet. Ex. 1 at ¶ 20; Petitioner’s Summation Memo (“Pet. Mem.”) at 44). Respondents maintain that they procure engagements “only as an incident of providing” a broad range of management services (Respondent’s Summation Memo (“Resp. Mem.”) at 5, 96). Because the evidence showed that procuring or attempting to procure engagements was an integral activity and respondents failed to prove that they were “only incidentally” involved in seeking employment, the charges should be sustained.

Motion to dismiss

Respondents moved to dismiss the charges on the ground that the petition only alleges that they entered into “employment agency agreements” (Resp. Mem. at 6). Respondents argue that entering an agreement, without more, does not violate the GBL and that the contracts are “managerial” rather than “employment” agreements (Resp. Mem. at 7, 10-11, 20, 42, 96).

In an administrative proceeding, due process requires that the allegations “be reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him and to allow for the preparation of an adequate defense.” *Berkley v. NYC Dep’t of Education*, 159 A.D.3d 525, 526 (1st Dep’t 2018), quoting *Block v. Ambach*, 73 N.Y.2d 323, 333 (1989). The petition does not simply allege that respondents entered into agreements. Petitioner also alleged that respondents “are primarily in the business of finding engagements for various musical artists” and based on their agreements, as well as “their conduct in practice,” they operate unlicensed theatrical employment agencies (Pet. at ¶ 1, 20). The petition gave respondents ample notice of the charges and a full opportunity to present an adequate defense.

Though respondents labeled the contracts as “managerial agreements,” that is not controlling. Instead, the relevant inquiry includes the substance of the agreements and the actual work performed. Whether respondents are theatrical employment agencies “only incidentally” involved in the seeking of employment or engagements was a factual issue to be decided at trial. *See, e.g., Hyde v. Vinolas*, 234 A.D. 364, 365 (1st Dept. 1932) (whether the incidental booking exception applies is a question of fact to be decided “upon proof of all the facts and circumstances, including the conduct of the parties,” even though the contract specifically stated that the agency was not employed to procure or provide engagements); *see also Friedkin v. Harry Walker, Inc.*, 90 Misc. 2d 680, 683 (N.Y. City Civ. Ct. 1977), *abrogated on other grounds by Rhodes v. Herz*, 84 A.D.3d 1, 15 n.2 (1st Dep’t 2011) (agent’s “self-serving statement that it is ‘a business representative’ and ‘not an employment agency which gets job placements for a fee,’” is not dispositive; courts look to the substance of the agreement).

Respondents also claim that the charges pertaining to the Naughtons are time-barred because they are based on a contract executed in July 2015 and the petition was not filed until June 2019 (Resp. Mem. at 13, *citing* CPLR 214(2) (actions to recover liability or penalty imposed by statute must be commenced within three years)). However, the CPLR, which governs procedures in civil judicial proceedings, does not apply to administrative proceedings. *See IESI NY Corp. v.*

Martinez, 8 A.D.3d 667, 668 (2nd Dep't 2004) (because an administrative proceeding is not a civil judicial proceeding, the CPLR does not apply). Hence, the charges pertaining to the Naughtons are not time-barred. *See Taxi & Limousine Comm'n v. Hussain*, OATH Index No. 984/10 at 3-4 (Nov. 12, 2009), *adopted*, Comm'r Dec. (Dec. 2, 2009) (CPLR's statute of limitations does not apply to administrative proceedings); *see also Louis Harris & Assoc., Inc. v. NYC Comm'n on Human Rights*, 84 N.Y.2d 698, 705 (1994) (delay of more than seven years in processing a discrimination complaint did not require dismissal of an administrative proceeding, absent a showing of "substantial prejudice").

The Evidence

The following facts are undisputed or established by conclusive evidence. Mr. Judson has been involved in the classical music business since the 1980s. When he founded JMG, it mostly represented corporate clients and a few classical musicians. In 2003, JMG began to represent professional violinist Lara St. John, who married Mr. Judson in 2018 (Tr. 1269).

In 2013, Mr. Judson founded Baker Artists, named after Christina Baker. Mr. Judson hired Ms. Baker, a booking agent who had represented Ms. St. John at Columbia Artists Management, Inc. ("CAMI") to be Baker Artists' president (Tr. 2558). Laura Duni, who had been Mr. Judson's personal assistant and provided administrative assistance at some of Mr. Judson's other companies, was hired as an associate at Baker Artists (Tr. 2130-31; Pet. Ex. 157). In July 2016, Baker Artists hired Christopher Williams as a vice-president. His responsibilities included securing engagements for their roster of classical musicians (Pet. Ex. 3). From 2015 to 2018, respondents had a roster of 8 to 11 clients, including Ms. St. John, the Naughtons, Junction, Orpheus, the Attacca Quartet, Natalie Clein, the Ulysses Quartet, and the Westerlies (Tr. 1265, 2255).

In the autumn of 2017, Mr. Judson fired Ms. Baker (Tr. 861). In July 2018, Mr. Williams resigned from Baker Artists (Tr. 106-07). The following month, Junction wrote to JMG and asked to be released from the agreement they had signed in January 2018 (Pet. Ex. 32). Later that year, Orpheus also sought to end its relationship with respondents (Tr. 569-70, 761-62).

In September 2018, respondents sued Mr. Williams in Supreme Court New York County and sought damages of at least \$1.5 million for tortious interference with business relations and tortious interference with contracts (Pet. Ex. 32). In response to that lawsuit, Mr. Williams's attorneys drafted a complaint that he filed with petitioner alleging that respondents are operating

unlicensed employment agencies (Tr. 271; Resp. Ex. V). Junction and Orpheus, represented by the same law firm as Mr. Williams, filed similar complaints with petitioner (Tr. 563-64, 632). Respondents' civil lawsuit has been dismissed without prejudice, pending the outcome of this administrative proceeding (Tr. 299-301, 1694-95; Resp. Mem. at 15, n. 10).

At trial, the parties offered conflicting evidence concerning the extent to which respondents procured engagements for the artists on their rosters. Ms. Baker and Mr. Williams testified that they spent the bulk of their time securing or attempting to secure engagements for respondents' clients. Mr. Judson downplayed the amount of time respondents spent securing engagements and, instead, claimed that they provided a range of managerial services.

Petitioner's Evidence

Ms. Baker testified that she has more than 20 years' experience in the classical music industry (Tr. 781-82, 866). In 2012, when Ms. Baker worked as a booking agent for CAMI, Mr. Judson approached her about developing her own roster of clients (Tr. 781). When Mr. Judson hired Ms. Baker in 2013 to be president of Baker Artists, Ms. St. John was her only client (Tr. 783, 890). By 2015, after helping Ms. Baker build Baker Artists' roster, Mr. Judson became less involved in day-to-day operations and he was rarely involved with clients (Tr. 788).

At trial, Ms. Baker estimated that she spent 80% of her time procuring engagements for clients and 20% of her time assisting clients with other issues (Tr. 784, 893-94). According to Ms. Baker, the most important service that Baker Artists provided was procuring the right engagements for artists (Tr. 792, 897). She credibly explained that securing engagements involved numerous phone calls and emails to presenters (Tr. 931). Even when Ms. Baker sent "blast emails" simultaneously to many presenters, she followed up with individual phone calls (Tr. 804-05, 904, 931). On average, it took 10 to 20 emails or phone calls with a presenter over the span of six to nine months to secure an engagement (Tr. 810-11, 846, 896). More than half of the presenters were from state universities, which took longer to secure engagements because they had a more complex budget and approval process (Tr. 811, 849). After obtaining an offer from a presenter, with a proposed fee and performance dates, Ms. Baker would relay that offer via email to the artist for approval and send a copy to Mr. Judson (Tr. 834, 856; Pet. Exs. 70, 71, 73, 74).

Ms. Baker traveled to clients' concerts and industry conferences where she met presenters and promoted clients (Tr. 974-75). After Ms. Baker procured engagements, Ms. Duni assisted by

preparing itineraries and contracts (Tr. 788-89). Lisa Mallia joined Baker Artists in approximately 2016 as a part-time assistant to Ms. Duni. When Ms. Duni was on maternity leave in 2017, Ms. Mallia took over her duties (Tr. 790, 917). Baker Artists hired Mr. Williams, an experienced booking agent, in an effort to “increase the amount of bookings significantly” (Tr. 785).

According to Ms. Baker, unlike pop musicians who have separate managers and booking agents, classical musicians hire agencies, such as CAMI or Baker Artists, to perform the dual role of manager and booking agent (Tr. 886-87, 874-75). Occasionally, Baker Artists made suggestions to artists about repertoire. If Orpheus wanted to play a symphony in a particular city, but another orchestra was scheduled to play the same piece a few weeks earlier in the same market, Ms. Baker would suggest that Orpheus change its program (Tr. 835). On one occasion, Baker Artists advised Orpheus not to tour with an unmarketable soloist (Tr. 900-902, 915-16). Ms. Baker emphasized that her clients were highly-skilled professional musicians; she did not critique musical performances (Tr. 980). Instead, her occasional suggestions to artists were based on marketing considerations (Tr. 834, 858-59, 981).

Ms. Baker acknowledged that respondents provided assorted other services to clients. Speechwriters from one of Mr. Judson’s other companies, Prides Crossing, helped revise biographies (Tr. 917, 921). Though most artists had their own Facebook pages and social media accounts, Baker Artists also posted positive reviews on its own website and social media accounts (Tr. 930, 978). Baker Artists occasionally sent “takedown letters” to individuals who had posted substandard videos of artists on YouTube (Tr. 947-48, 952; Resp. Exs. UU, VV). For two clients, Baker Artists assisted with outreach to Grammy voters (Tr. 966-68; Resp. Ex. ZZ). On another occasion, Baker Artists advised one client, the Attacca Quartet, about the reasonableness of fees that they were being charged by a public relations firm (Tr. 942).

Ms. Baker received an annual salary and discretionary bonuses (Tr. 782). When Mr. Judson fired Ms. Baker in 2017, he told her that she was too combative and she had not procured enough engagements, especially for Ms. St. John (Tr. 861, 864-66, 889). After Mr. Judson fired Ms. Baker, she worked for two years as a booking agent at another agency, Opus 3. But she was unable to bring her roster of clients to that agency and her employment ended during a corporate downsizing (Tr. 882-83). By the time of trial, Ms. Baker was attending to family issues and she was not working in the classical music industry (Tr. 883).

Mr. Williams testified that he has 12 years' experience in artist administration (Tr. 31). He worked for Baker Artists for two years, beginning in July 2016, when he was hired as vice-president (Tr. 31-33, 113, 284; Pet. Ex. 3). According to Mr. Williams, the terms "bookers," "agents," and "managers" are synonymous in the classical music field, but "everyone in the business calls themselves a manager" (Tr. 264, 312, 321).

At Baker Artists, Mr. Williams and Ms. Baker were responsible for procuring engagements in North America (Tr. 33-34, 57, 142). Mr. Williams estimated that he worked ten hours per day on weekdays and he also worked on weekends procuring engagements by making many phone calls, using social media, preparing and sending thousands of emails, distributing brochures, attending approximately six to nine professional conferences, and going on five to nine sales trips to the Midwest, South, and Northeast United States (Tr. 39, 42, 58, 66, 116, 256-58; Pet. Exs. 10, 11). Besides drafting and sending "blast emails," Mr. Williams contacted presenters dozens of times each day (Tr. 57). When he attended clients' out-of-town concerts, Mr. Williams checked to see whether his clients needed anything, but he also used those trips to meet with other presenters (Tr. 120). Seeking and procuring engagements was his most important task and he estimated that he spent 90% of his time seeking engagements for the Naughtons, Junction, Orpheus, and other clients (Tr. 35, 46, 65, 106, 267). He spent the rest of his time working on administrative tasks and assisting clients (Tr. 35, 144, 274, 314).

Among the other services that he performed, Mr. Williams recruited Junction and the Westerlies to join Baker Artists' roster (Tr. 78, 150). He helped the Naughtons select photographs to promote an appearance at a radio station and he coordinated a performance at Steinway and Sons (Tr. 171-73, 250; Resp. Ex. I). Mr. Williams circulated promotion materials prepared by Orpheus (Tr. 165-66; Resp. Ex. G). And he helped the Attacca Quartet coordinate lighting, rehearsal time, and the stage set-up for an engagement (Tr. 230-33; Resp. Ex. Q). Mr. Williams provided one artist with a list of eligible voters for Grammy nominees (Tr. 190-92; Resp. Exs. L, M). He emphasized, however, that some clients, such as Orpheus and Junction were more independent and required less "hand-holding" (Tr. 257, 319, 322).

According to Mr. Williams, Ms. Baker managed Baker Artists' day-to-day operations (Tr. 47, 127). Mr. Judson, who had other business interests, was copied on most emails that Mr. Williams sent and was involved in some private interactions with clients, but he was not involved in Baker Artists' daily activities (Tr. 40, 127-28). Mr. Williams acknowledged that Mr. Judson

assisted with applying for and sponsoring visa applications for some artists and he arranged for professional writers from one of his other companies to assist in the drafting and editing of client biographies (Tr. 156-58, 244-45, 262-63, 274; Resp. Ex. D).

Mr. Williams described Ms. Duni as a “servicing associate,” who helped finalize engagements by generating contracts and performing other tasks, such as sending schedules, arranging for sound checks, handling expense reports, and sending tax withholding documents (Tr. 41, 79, 95-96, 151, 247, 251, 310). Most artists handled their own travel arrangements, but Ms. Duni occasionally helped with transportation and lodging (Tr. 228-42). Ms. Duni and her assistant, Ms. Mallia, also circulated positive reviews of clients’ performances (Tr. 151, 160, 262-63).

According to Mr. Williams, Mr. Judson fired Ms. Baker for “poor performance,” because she did not procure a sufficient number of engagements (Tr. 77). Mr. Williams took over Ms. Baker’s responsibilities (Tr. 39-40, 72, 151, 307). During the final six months that Mr. Williams worked for Baker Artists, Alana Klonoski was hired to help secure engagements (Tr. 71-72). Baker Artists later hired its former consultant, Desiree Halac, as a booking agent to help secure engagements in Spain, Portugal, and Latin America (Tr. 72, 151).

Based on his employment agreement, Mr. Williams received a salary and he was also eligible for bonuses based on his “contribution to revenue of the business” (Tr. 112; Pet. Ex. 3). According to Mr. Williams, his bonus was based on “vague” targets (Tr. 32, 111). He left Baker Artists in July 2018 to work for a not-for-profit agency, Concert Artists Guild (Tr. 31, 106, 108, 110). Mr. Williams quit Baker Artists because he was “under a lot of sales pressure” and he wanted to find a position where his earnings were not based on the number of engagements or commissions procured (Tr. 106).

Alexander Scheirle, Orpheus’s executive director since May 2016, has 25 years’ of experience in classical music administration (Tr. 502; Pet. Ex. 60). He provided detailed testimony about Orpheus’s history, organizational structure, and relationship with Baker Artists.

Orpheus is a world-famous classical chamber orchestra, known for its collaborative process (Tr. 504, 591). It has been in existence for 50 years, recorded more than 70 albums, and has approximately 34 members, who perform without a conductor (Tr. 614). Orpheus hosts a children’s program (Access Orpheus) and an executive leadership program for universities and corporations (Orpheus Process); it also collaborates with NYU Langone on a program for patients with dementia (Orpheus Reflections) (Tr. 504-06). Orpheus has a 20-member board of directors

and ten non-musician employees who oversee administration, development, marketing, ticket sales, finance, and educational outreach (Tr. 508-09). Orpheus handles its own transportation and lodging for tours (Tr. 516). An artistic planning group, including a full-time artistic director and three musicians from the orchestra, make recommendations regarding programming and personnel (Tr. 510). Orpheus retains a public relations firm and used an executive search firm to hire Mr. Scheirle (Tr. 503, 513-14, 546-47, 757; Pet. Ex. 60).

According to Mr. Scheirle, revenue from recordings is negligible due to the rise of music-streaming services (Tr. 617). Orpheus's primary activity is concert performances (Tr. 516). It performs approximately 35 to 50 times per year (Tr. 517, 705-06). Mr. Scheirle testified that Orpheus had a very successful professional relationship with Ms. Baker and it relied on Baker Artists to procure North American engagements outside the New York City area (Tr. 520). In 2014, Orpheus signed a one-year contract with Baker Artists and one year later, renewed the contract for two years (Tr. 517-18; Pet. Ex. 2; Resp. Ex. Vx6). In April 2017, Orpheus renewed its contract with Baker Artists for three more years (Pet. Ex. 61). The contracts excluded concerts in the New York City area that Orpheus self-presented at Carnegie Hall, the 92nd Street Y, and the Naumberg Bandshell in Central Park (Tr. 579-80; Pet. Ex. 61). For international tours, Orpheus has separate booking agents in Europe and Asia (Tr. 517).

Mr. Scheirle sent or received hundreds of emails per day and attended 25 to 30 meetings per week with musicians, presenters, bookings agents, public relations agencies, and others in the classical music industry (Tr. 764). He, along with Orpheus's general manager (Ms. Curatolo) and director of artistic administration (Mr. Volpert), regularly communicated with Ms. Baker, Mr. Williams, and Mr. Judson (Tr. 524, 733). Mr. Scheirle spoke with Mr. Williams and Ms. Baker multiple times per week, he spoke two or three times per month with Mr. Judson, and he met with Mr. Judson approximately twice per year (Tr. 523-24, 541, 558-59, 687, 763). Ms. Duni also communicated with Orpheus employees (Tr. 582).

Mr. Scheirle recalled some of the conversations that he had with Ms. Baker, Mr. Williams, and Mr. Judson over the years. Twice a year they met to ensure that they were "on the same page" in terms of how to promote Orpheus's programs to certain markets (Tr. 537-38). Mr. Judson did not normally attend those meetings, but he offered advice on other occasions (Tr. 538-39). Mr. Scheirle and Mr. Judson met for lunch and discussed possible soloists, including one of respondents' clients, who could perform with Orpheus (Tr. 587, 601-02, 604, 684, 703). As

executive director, Mr. Scheirle spoke to many people who offered opinions about possible soloists; he forwarded to the artistic planning group Mr. Judson's feedback "from a sales perspective," about the popularity of soloists in different regions (Tr. 587-88, 608).

Mr. Judson also asked Mr. Scheirle about speeding up the process for accepting engagements (Tr. 539, 667; Pet. Ex. 65). Because of the orchestra's collaborative decision-making structure, Mr. Scheirle referred Mr. Judson to Mr. Volpert and three members of the artistic planning group, with whom Mr. Scheirle met every week (Tr. 540, 667-668). Mr. Judson attended one of those meetings (Tr. 687-89). In 2017, Orpheus hired a European consultant to discuss rebranding (Tr. 672, 737, 742). One day the consultant conducted a focus group with donors, subscribers, board members, and others (Tr. 672-73, 682, 686, 731-32, 739). Mr. Judson participated in the focus group (Tr. 747). There was also one occasion when a pianist cancelled a Carnegie Hall appearance with Orpheus on short notice and Mr. Scheirle reached out to "every agency," including Baker Artists to find a replacement performer (Tr. 710; Pet. Exs. GG, HH).

On another occasion, Mr. Scheirle recalled that he asked Mr. Judson, who has experience with commercial real estate, for his opinion about relocating Orpheus's offices (Tr. 584, 700; Resp. Ex. EE). And on another occasion, Mr. Judson secured an additional \$5,000 funding from a foundation to subsidize one of Orpheus's concerts (Tr. 593, 751, 767). Mr. Scheirle also talked with Mr. Judson about becoming a member of the board of directors based on his interest in classical music and fundraising ability, but they dropped the idea because it would be a conflict of interest (Tr. 594-98). They discussed the possibility of obtaining a corporate sponsorship and reaching out to retired CEOs to participate in Orpheus Leadership programs (Tr. 610-11, 696-98).

Mr. Scheirle confirmed that, after Mr. Judson fired Ms. Baker in 2017, Mr. Williams assumed more of her responsibilities for securing engagements (Tr. 542-544, 684-85). And Mr. Scheirle recalled that he was concerned that respondent Baker Artists would only have one person, instead of two, responsible for booking engagements (Tr. 684-85). When Mr. Williams left in 2018, respondent Baker Artists did not have "a seasoned and experienced" booking agent who could handle a client like Orpheus (Tr. 545, 560). Mr. Scheirle sent Mr. Judson an email asking for more information about Baker Artists' efforts regarding "hiring a new booking manager" (Pet. Ex. 66). In the email, Mr. Scheirle described this as "critical" information and he expressed concern that nobody from Mr. Judson's office had shared "updates from the recent booking conferences, or better, communicated potential dates/offers" (Pet. Ex. 66). Mr. Judson promised

that he would hire someone immediately (Tr. 544-45). According to Mr. Scheirle, “booking managers” and “booking agents” are the same—they procure engagements (Tr. 545).

In late 2018, Orpheus was unhappy with Baker Artists’ failure to secure engagements (Tr. 635). After conferring with counsel, Orpheus ended its relationship with Baker Artists and filed a complaint with petitioner (Tr. 563-64, 632). From October 2018 to date, Orpheus has asked presenters to pay them directly and has placed in escrow approximately \$25,000 to \$28,000 in commissions claimed by Baker Artists (Tr. 566-67, 577, 772). Since 2019, Dorn Music, LLC, has replaced Baker Artists as Orpheus’s representative for securing engagements in North America (Tr. 517, 569, 661, 703, 761).

Stefan Jackiw testified that he has been a professional concert violinist for 15 years (Tr. 326, 353). In 2015, Mr. Jackiw and two other experienced classical musicians, with their own solo careers, formed Junction as a part-time project (Tr. 326). Mr. Jackiw estimated that he spent 10% or less of his time working with Junction in 2018 (Tr. 327-38, 492).

Mr. Jackiw has known Mr. Williams since 2016 (Tr. 333). In 2018, based on its relationship with Mr. Williams, the group signed a contract with JMG to secure engagements (Tr. 333-37, 353, 378). The trio paid JMG the industry-standard commission rate of 20% on revenues from concerts and recitals (Tr. 334, 392; Pet. Ex. 79). Junction was previously represented by Opus 3, which continued to represent Mr. Jackiw for his solo engagements (Tr. 384-85). Mr. Jackiw testified that performances are the primary way artists develop their reputation and it is how they made their living (Tr. 444, 490).

Junction dealt mostly with Mr. Williams, who secured engagements (Tr. 338, 483-84; Pet. Exs. 80, 81). Ms. Duni and Ms. Klonoski assisted with travel, lodging, rehearsal logistics, and itineraries for engagements (Tr. 341-44, 416-19, 483-84). JMG did not provide advice regarding wardrobe, finances, or media (Tr. 347-48). Junction selected its own repertoire and paid a separate firm to handle public relations (Tr. 330, 340-41, 347, 367-68, 444, 477).

In July 2018, Mr. Williams notified Junction that he was leaving JMG (Tr. 350-51, 407-09). A few weeks later, the trio met with Mr. Judson, who assured them that he was looking for a replacement for Mr. Williams (Tr. 352-53, 407-08). Shortly afterward, the trio asked to be released from its contract because no replacement for Mr. Williams had been hired (Tr. 369, 410, 490). Mr. Judson agreed to release the trio but insisted on 20% of their revenue for the remaining two years of their contract (Tr. 369, 404, 410). In October 2018, the trio hired a new agent, Kirschbaum

Associates, who has secured 10 to 20 engagements with a total value of less than \$100,000 (Tr. 460-67, 497). In an effort to void the contract with JMG, the trio's attorneys filed a complaint with petitioner (Tr. 375, 424, 469, 473-74). During the eight months that it represented the trio in 2018 JMG secured approximately \$10,000 worth of engagements (Tr. 435, 493).

The Naughtons did not testify. According to complaints they filed with petitioner, Ms. Baker and Mr. Williams were their primary contacts at Baker Artists and procuring engagements was the main service provided (Pet. Exs. 36, 37). Baker Artists also helped negotiate and secure recording contracts (*Id.*). Baker Artists did not provide the Naughtons with "financial management" services and the Naughtons hired their own publicist for public relations (*Id.*).

Respondents' Evidence

Mr. Judson testified that he founded JMG in 1988 after working at CAMI, where his primary duties involved securing engagements for artists (Tr. 1224-26, 2536-41; Pet. Ex. 31). Besides being the president and sole shareholder of JMG, Mr. Judson has several other business interests. From 2006 to 2019, he was the sole owner of Prides Crossing, a "thought leadership" consulting firm for large corporations (Tr. 2673-74). He holds a real estate broker's license, he is a managing member of Judson Realty, a company that deals with high-end commercial real estate, and he signs all of that company's legal documents (Tr. 2670-72). Mr. Judson also runs Ancalagon, LLC, a record label owned by Ms. St. John, that designs and manufactures compact discs (Tr. 1311, 2894). Finally, he is a member of the board and former chief executive officer of Masterpack, Inc., a shipping supply company (Tr. 2854-56, 2863-94; Pet. Exs. 137, 138).

According to Mr. Judson, JMG is a broad-based management company involved in the branding and promotion of high culture (Tr. 2544-45, 2738). JMG's clients were primarily multinational corporations (Tr. 1226-27, 1262, 2254-57). From 2013 to 2017, JMG employed two employees overseas and had various "casual" or temporary employees (Tr. 2583-84).

When asked why he formed Baker Artists, Mr. Judson explained that he had been speaking to Ms. Baker who wanted to manage artists (Tr. 1268). Mr. Judson told Ms. Baker to send him a plan and perhaps he could finance it, she could work for him, and if she did well, she could become an owner of the company (Tr. 1268). Later, Mr. Judson testified that his goal was to provide comprehensive management services to a small number of artists, "where we were integrated into their lives on all levels where appropriate" (Tr. 1265-66).

From 2013 to 2017, Baker Artists had four employees: Ms. Baker, Ms. Duni, Mr. Williams, and Ms. Mallia (Tr. 2557). After Ms. Baker left in 2017, Baker Artists continued to operate but JMG became the public face of the company (Tr. 1263, 2579). After Mr. Williams left in 2018, respondents hired Ms. Halac and Ms. Klonoski to secure engagements, negotiate contracts, and provide other services (Tr. 1271, 1274, 1277, 2243, 2582). Employees from Mr. Judson's other companies, such as speechwriters from Prides Crossing, and a bookkeeper and the controller from Judson Realty, also served Baker Artists' clients (Tr. 2520-22).

While acknowledging that respondents secured engagements for clients, Mr. Judson sought to minimize how much time respondents spent on that task. He described it as a "small fraction" of their activity and said that they were called upon to procure engagements "on occasion" (Tr. 1261, 1267, 2644). In his view, procuring engagements "was a very small time commitment on a part of a small minority of my staff" (Tr. 2524; Resp. Mem. at 26). Instead, Mr. Judson insisted that all of his staff were "primarily" engaged in managing or attending to a wide range of clients' needs, such as business and financial services, branding and imaging, programming advice, consulting about repertoire, personal advice, performance management, and other management services (Tr. 1129, 1227, 1241, 1256, 1278, 2397, 2524).

For example, Mr. Judson noted that, when requested, respondents assisted clients with travel and lodging arrangements (Tr. 1128). Respondents assisted clients by preparing itineraries, answering fan mail, completing paperwork for tax withholding, drafting or editing biographies for liner notes, collecting past-due royalties, and posting favorable reviews on respondents' websites (Tr. 1241, 1256, 2437, 2476, 2517). Respondents even made suggestions about what attire an artist should wear while performing (Tr. 2450-51).

Mr. Judson conceded that not all of his clients required the full menu of services that respondents provided (Tr. 1261). He also admitted that he had less contact with Junction—he was unsure whether he had met the group before Mr. Williams left Baker Artists in July 2018 (Tr. 2747). Mr. Judson did not know how many engagements respondents had secured for the trio or how much it charged presenters for a performance (Tr. 2607-09).

Though Orpheus was an established orchestra with its own full-time staff, Mr. Judson insisted that he had provided it with a variety of managerial services. For example, in 2014, Mr. Judson met a Lufthansa executive and exchanged a few emails in an unsuccessful effort to underwrite Orpheus's European tour (Tr. 1528-30; 2392; Resp. Ex. Xx5). Mr. Judson further

claimed that he assisted Orpheus's efforts to hire Mr. Scheirle in 2015 (Tr. 1260-61, 1504). According to Mr. Judson, his recruitment efforts included meeting one of Orpheus's board members for lunch, exchanging emails, and meeting with an executive search firm for less than an hour to "contextualize" Orpheus's place as a "force in classical music" (Tr. 1505-09, 1511; Resp. Ex. Qx5). On another occasion, he helped secure a \$5,000 donation from a foundation to help subsidize a performance (Tr. 2783-94, 2811). In 2017, Mr. Judson was one of a dozen stakeholders who participated in a focus group with the consultant that Orpheus had retained to assist with branding (Tr. 1522-27; Resp. Ex. Vx5). Though Orpheus had previously performed at the Naumberg Bandshell, Judson helped the orchestra secure a multi-year engagement at the Naumberg Orchestral Concert series (Tr. 2258, 2272).

The services that respondents provided to the Naughtons included dealing with a composer who had been harassing them; accompanying them to a recording session in Boston; assisting their record label in album promotion; persuading a record label to pay royalties on time; selecting a photographer and photographs for an album cover and promotional material; and spending approximately 150 hours trying to secure the rights for an all-Bernstein album to coincide with Leonard Bernstein's centenary (Tr. 1282, 2336-44; Resp. Ex. H). Mr. Judson acknowledged that, after he fired Ms. Baker in 2017, the Naughtons "expressed a desire to leave" Baker Artists, but he refused to release them from their contract (Tr. 2623). When Mr. Williams quit in 2018, the Naughtons again sought to be released from their contract and Mr. Judson denied that request (Tr. 2623-24). Baker Artists continued to represent the Naughtons until their contract expired in 2019 (Tr. 2624).

Mr. Judson is an executive producer on Ms. St. John's recordings (Tr. 2860-61). Respondents handle bookkeeping, banking, and tax matters for Ms. St. John and her record company, Ancalagon (Tr. 1317-22, 2253, 2355). Mr. Judson helped her set up an LLC and based on their accountant's advice, Mr. Judson and Ms. St. John transferred more than \$600,000 to Ancalagon's accounts to purchase a violin and take advantage of more favorable depreciation rates (Tr. 2873-75). Ancalagon also charged the Naumberg Orchestral Concert series \$100,000 over the span of five years for compact discs that were given to audience members (Tr. 2869-72).

For another client, the Attacca Quartet, Mr. Judson assisted with selecting a record company and promoting an album that eventually led to a Grammy award (Tr. 1131). And Mr. Judson helped propose an exit agreement when one member of the quartet decided to leave (Tr.

1232, 1436). Respondents also provided banking and bookkeeping services for the quartet (Tr. 1232-33, 1258, 1284, 1490-92, 2355). For another client, the Ulysses Quartet, respondents helped set up a not-for-profit foundation, assisted with the promotion of a music video, drafted and edited biographies, and assisted one of the members with a landlord-tenant dispute (Tr. 2251, 2280-81, 2299-300, 2414, 2449).

Mr. Judson offered varying estimates of how much time he and his staff spent addressing client issues. He testified that he rarely secured engagements from 2013 to 2018; Ms. Baker and Mr. Williams only spent 30% of their time talking to presenters or arranging for engagements and the other 70% of their time was spent managing or attending to clients' issues; and Ms. Duni and Ms. Mallia did not secure engagements (Tr. 2525, 2637). Mr. Judson further estimated that, from 2013 to 2018, he traveled 100 to 120 days per year, 95% of that time was outside of the United States, and all of that travel was "primarily" for JMG clients (Tr. 2462, 2682). He estimated that, besides his other business interests, he spent 20 to 30 hours per week providing services for artists and 5 to 10 hours per week representing corporate clients (2286-87).

Ms. Duni testified that she has worked for Mr. Judson since 2010, when she was his personal assistant (Tr. 1886, 2130). In 2013, she began working for Baker Artists as an assistant and she now works for JMG (Tr. 2132). Ms. Duni does not secure engagements (Tr. 2127). Instead, she performs an array of administrative tasks, including processing expense reports for artists; collecting tax information; posting information on respondents' websites and social media; contacting local media outlets; coordinating with presenters about rehearsal space, stage setups, and food preferences or allergies; finalizing contracts; creating itineraries, and helping with changes in travel plans (Tr. 1888, 1906, 2025, 2080-82, 2096). She once helped Junction collect money owed by a prior representative and, on another occasion, she helped a member of the trio obtain ground transportation for a solo performance (Tr. 1921, 2085).

Ms. Duni acknowledged that some clients required more attention than others (Tr. 2200). She estimated that she spent most of her time handling matters for Ms. St. John, Ancalagon, and the Naughtons (Tr. 2200). Ms. Duni helped Ms. St. John set up a database for all of her concerts and recordings (Tr. 2107-08; Resp. Exs. Vx8, Xx7). When Ms. St. John performed the soundtrack of the film *The Red Violin* in concert with an orchestra, Ms. Duni aided with scheduling and logistics (Tr. 1892-93). For the Naughtons, Ms. Duni assisted with ground transportation, hotel

arrangements, ensuring that presenters provided the proper make and model of pianos, and scheduling press interviews (Tr. 1905, 1923, 1928, 2005, 2013, 2043).

Professional violinist Keiko Tokunaga is a former member of the Attacca Quartet, which was represented by Baker Artists from 2014 to 2018 (Tr. 1573, 1663-64). Ms. Tokunaga testified that the quartet initially dealt mostly with Ms. Baker and Mr. Williams, who were primarily responsible for securing engagements and they exchanged emails at least once per week (Tr. 1577-78, 1680). Ms. Duni assisted with routine matters, such as providing itineraries for engagements (Tr. 1599). The itineraries listed travel and accommodations, contact information, and the program to be performed (Tr. 1599). Every few months the quartet met with Mr. Judson, but he did not become their main contact at Baker Artists until after Mr. Williams left in mid-2018 (Tr. 1579).

According to Ms. Tokunaga, the quartet handled most of its own travel arrangements and hired separate publicists to handle public relations (Tr. 1585-86, 1597). Mr. Judson provided guidance on a variety of matters and the quartet relied on his financial expertise (Tr. 1590). For example, he helped the quartet: select a publicist; form an LLC; process paperwork for foreign taxes; select an accountant; negotiate an exit agreement for one member and find a replacement; obtain insurance for performances; update their biographies for publicity materials; reviewed grant applications; secure payments owed by a previous recording label; and negotiate a recording contract with a new label that led to a Grammy award (Tr. 1593, 1596, 1602, 1606-09, 1622). He also met with the quartet to develop a distinctive brand, he hosted a cd-release party at his mother's home, and he used his elite customer status with an airline to help obtain seating for the quartet's cello (Tr. 1579, 1583, 1600).

Ms. Tokunaga testified that "a big part" of her income, as a soloist and member of the quartet, was from live performances (Tr. 1674). Most of the Attacca Quartet's income also came from performing and 80% of those engagements were procured by Baker Artists (Tr. 1674, 1681). Ms. Tokunaga acknowledged that securing engagements around the country was not easy, it was Ms. Baker and Mr. Williams's "primary" task, and they were effective (Tr. 1674, 1676, 1680). After Mr. Williams left Baker Artists in 2018, the quartet's members were nervous about the impact on their engagements "because that's what gave us the checks" (Tr. 1730). At the quartet's request, Mr. Judson agreed to release the group from its contract once it had completed the engagements that Baker Artists had secured (Tr. 1669, 1684-89).

Krishna Thiagarajan, chief executive and president of the Seattle Symphony Orchestra, was Orpheus's executive director from January 2013 to August 2015 (Tr. 1755, 1761, 1848). He has known Mr. Judson for at least a dozen years and considers him a manager, friend, colleague, and mentor (Tr. 1945, 1950, 1997). In 2013, they met to discuss ways to shore up Orpheus's finances (Tr. 1853, 1967, 1982, 1995; Resp. Ex. Px5). They discussed obtaining a line of credit and Mr. Judson helped Orpheus secure a three-year engagement with the Naumberg Orchestral Concert series, where he was a major donor (Tr. 1937-38, 1946-48, 1990). Later in 2013, Mr. Judson and Mr. Thiagarajan exchanged emails about finding a foundation to support an Asian tour for Orpheus (Tr. 1953-54).

In 2014, after Orpheus signed its first contract with Baker Artists, Mr. Thiagarajan communicated with Mr. Judson and Ms. Baker by phone and text every two or three days (Tr. 1767, 1799, 1849, 1989). They also met for breakfast, lunch, or dinner (Tr. 1799). Mr. Thiagarajan recalled that Baker Artists helped cultivate audiences for sustained, repeated appearances in various markets, instead of securing a single concert in a city, to develop a "market presence (Tr. 1797, 1835). By securing engagements outside of New York City, Baker Artists also helped "amortize" the cost of programs that Orpheus presented at Carnegie Hall (Tr. 1835). Mr. Thiagarajan acknowledged "agent" and "manager" were interchangeable terms and that it could take up to a year to secure an engagement (Tr. 1966, 1971, 1976).

Mr. Thiagarajan noted that Mr. Judson has many contacts with New York and international society and corporate executives (Tr. 1774, 1934, 1973). Mr. Judson contributed to and promoted Orpheus's fundraising gala at the Metropolitan Club (Tr. 1823-24). He provided advice about long-term strategy and developing a broader basis of sponsors, donors, and foundations, and unsuccessfully attempted to secure corporate sponsorships (Tr. 1780, 1784, 1796, 1813, 1820, 1836, 1986; Resp. Wx6). Mr. Judson also offered advice about improving the collection of royalties from streaming services, identifying new board members, finding Mr. Thiagarajan's successor, updating biographies, and using social media (Tr. 1807, 1811, 1826, 1828-30).

Though Mr. Judson offered suggestions about the orchestra's artistic direction and potential soloists, Mr. Thiagarajan acknowledged that Orpheus had a collaborative, internal process for making programming decisions (Tr. 1794-1800, 1811, 1867-74). Mr. Thiagarajan, who left Orpheus in 2015 to lead the Scottish National Orchestra, acknowledged that he was unfamiliar with the relationship between Orpheus and Baker Artists after his departure (Tr. 1850).

He further conceded that Orpheus built its reputation and developed its brand by performing concerts, which was one of the orchestra's "primary" activities (Tr. 1939, 1964, 1999). As Mr. Thiagarajan put it, the orchestra "plays for people" (Tr. 1793).

Respondents offered seven affidavits from other current and former clients who stated that they were unable to testify at the remote proceeding due to their personal and professional schedules (Tr. 2530-31, 2691; Resp. Ex. Ox10). For example, Natalie Clein averred that JMG was her management company and was available "for assistance, guidance, consultation, promotion, and advice on all matters impacting my professional career" (Resp. Ex. Ox10, Clein Affidavit). In the 2019 contract appended to Ms. Clein's affidavit, JMG explicitly agreed to provide management services including, but not limited to "counseling on career strategy, communication issues, booking of engagements, negotiation of contracts, advising on work visas, programming, directing booking agents, accounting and taxes, etc." (*Id.*). A member of the Westerlies submitted a similarly worded affidavit along with a 2019 contract containing the same language about the scope of services provided by JMG (*Id.*, Bouey Affidavit).

ANALYSIS

Petitioner licenses employment agencies. GBL § 172. Employment agencies include "theatrical employment agencies" that "procure or attempt to procure employment or engagements for an artist." GBL § 171(8). As noted, however, there is an exemption from the licensing requirement for theatrical employment agencies that are in "the business of managing entertainments, exhibitions or performances, or the artists or attractions . . . where such business *only incidentally* involves the seeking of employment." GBL § 171(8) (emphasis added). It is undisputed that respondents secured engagements for artists. Thus, the main contested issue is whether respondents met their burden of proving the affirmative defense that they were in the business of managing artists and it "only incidentally" involved securing engagements.

Resolution of this issue begins with the statute's plain wording. The ordinary meaning of "incidentally" is "loosely, casually, or by the way." Garner, *A Dictionary of Modern Legal Usage* (1987 ed.); *see also* Oxford English Dictionary (Online ed. 2022) (defining "incidentally" as "a subordinate and casual circumstance"); Merriam-Webster (Online ed. 2022) (defining incidentally as "not intentionally" or "by the way"); *see Lend Lease (U.S.) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 136 A.D.3d 52, 57 (1st Dep't 2015) (relying on dictionaries to determine that "incidental"

ordinarily means “minor, casual or subordinate in nature”). Thus, for respondents to prevail, they needed to prove that procuring engagements was a minor or subordinate activity. Because the evidence showed that, from 2015 to 2018, procuring engagements was integral—and not merely incidental—to the work that respondents performed for Orpheus, Junction, and the Naughtons, respondents failed to meet their burden.

Petitioner offered compelling evidence regarding the significance of procuring engagements to respondents’ business. To begin with, the clients’ contracts repeatedly refer to engagements. In the 2015 agreement with the Naughtons, Baker Artists agreed to be the manager and representative for all “engagements worldwide with the exception of Europe” and “all engagements” were subject to the Naughtons’ approval (Pet. Ex. 35). In the 2017 contract with Orpheus, Baker Artists agreed to “use its reasonable efforts to arrange suitable Engagements,” Orpheus agreed “to conscientiously fulfill all Engagements contracted by Manager on behalf of Orpheus,” and the “duration, nature, and terms of all Engagements” were subject to Orpheus’ approval (Pet. Ex. 61). In its 2018 contract with Junction, JMG agreed to be the manager and representative “for all engagements worldwide,” “All engagements for the services of Junction will be subject to its approval,” and Junction agreed to pay JMG the specified rates of compensation “for all engagements secured” by JMG or others (Pet. Ex. 79).

Based on the contracts’ wording, securing engagements was not an incidental activity. It was a key term of the contracts. Moreover, by designating respondents to be the exclusive representatives for engagements, the contracts restricted the artists’ ability to hire anyone else to secure engagements. The contracts also make no mention of branding, imaging, business advice, financial services, programming, repertoire, or other services that respondents referred to at trial. Though respondents presented evidence that JMG’s more recent contracts with other clients specified the managerial services to be performed, that only highlighted the absence of such language from the contracts with the Naughtons, Orpheus, and Junction.

Petitioner also presented clear, credible, and convincing testimony from respondents’ former employees who testified about the time and energy that they spent securing engagements. Ms. Baker and Mr. Williams were experienced and successful booking agents at CAMI before they went to perform the same work for respondents. After Ms. Baker built her client roster from 2013 to 2015, she spent most of her time, from 2015 forward, seeking and securing engagements. Ms. Baker cogently explained how this work included numerous emails, phone calls, and attending

conferences. A typical engagement required repeated follow-up conversations and took at least six months to secure. Similarly, Mr. Williams testified in vivid detail about the long hours he spent making phone calls, sending emails, using social media, traveling, and distributing materials—all to secure engagements.

Client testimony corroborated the bulk of Ms. Baker and Mr. Williams's testimony. Mr. Scheirle described how Orpheus is a well-established, world-famous orchestra with a complete staff of full-time employees responsible for administration, financing, and development. Orpheus self-promoted its own concerts in New York City and the surrounding area. Though Orpheus may have appreciated Mr. Judson's input on some issues, it hired Baker Artists to secure engagements.

Mr. Jackiw confirmed that Junction hired JMG to secure engagements and that the trio primarily worked with Mr. Williams. Junction's members were all experienced musicians with their own careers. They had their own publicists and they handled their own finances. They did not look to respondents for career advice, input on repertoire, tax planning, or help with record deals. Instead, they counted on respondents to secure engagements. As Mr. Jackiw succinctly put it, he made his living by performing.

Respondents acknowledge that it was their burden to prove that procuring or attempting to procure engagements was only an "incidental" activity (Resp. Mem. at 41). In an effort to meet that burden, respondents offer a two-pronged defense. First, they argue that petitioner's "entire case rested on partial and distorted facts, not whole truths, untrustworthy affidavits in lieu of live testimony, and biased witnesses" (Resp. Mem. at 19). Second, respondents argue that over the span of 30 years they have provided a wide range of managerial services to at least 50 artists (Resp. Mem. at 29, 41). Those arguments are unpersuasive.

In assessing credibility, relevant factors include demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, respondents contend that petitioner's witnesses should not be credited because Mr. Williams, Orpheus, and Junction were involved in a related civil lawsuit and the Naughtons did not testify (Resp. Mem. at 13-16, 30, 34). Respondents also allege that Mr. Williams should not be believed because he made inconsistent statements

(Resp. Mem. at 32-34). For the most part, those claims are unconvincing because petitioner's witnesses were generally more credible than respondents' main witness, Mr. Judson.

Respondents brought a \$1.5 million lawsuit against Mr. Williams for tortious interference with contracts and business relationships. In an effort to aid the defense of that civil lawsuit, Mr. Williams and his attorneys filed a complaint with petitioner. Respondents correctly note that the lawsuit provides Mr. Williams with a motive to testify falsely. But the same is true for Mr. Judson. As the founder and owner of respondents, who are the plaintiffs in the lawsuit, he has a material interest in the outcome of that litigation.

There were some inconsistencies in Mr. Williams's testimony. For example, at trial, he estimated that he spent 90% of his time procuring engagements for clients and he acknowledged that he spent the remainder of his time performing unrelated duties (Tr. 266-69, 275-76). This conflicted with his earlier sworn statements, where he averred that his responsibilities consisted "solely" of soliciting and procuring engagements and that his "entire tenure" at Baker Artists was spent on those tasks (Resp. Exs. U, V). Ms. Baker may also have harbored ill-will against Mr. Judson because he fired her. However, those inconsistencies and possible biases did not detract from the overall credibility of Mr. Williams and Ms. Baker, who both impressed me as persuasive witnesses who made good faith efforts to recall events as they occurred.

In contrast, Mr. Judson's testimony was marred by material exaggerations and omissions. For example, in the civil lawsuit, Mr. Judson claimed that respondents expected to earn \$100,000 in commissions per year from Junction. But Mr. Judson's trial testimony showed that his estimate was wildly inflated. Based on a 20% commission rate, JMG would need to secure \$500,000 in performance fees per year for Junction, a part-time ensemble, to earn commissions of \$100,000 (Tr. 2603-06). Considering that Junction earned only \$10,000 in performance fees for eight months of 2018, it defied belief that Mr. Judson expected the trio to earn \$500,000 over each of the next three years.

During direct examination, Mr. Judson displayed an impressive memory and was able to recall specific details about remote events, such as technical advice he provided for an appearance by Ms. St. John in 2014, the Italian city where a 2015 summer intern came from, and tickets that he secured for a reporter in 2016 (Tr. 1343, 1361, 1364). But on cross-examination, he suffered from a lack of recall when the questions concerned bookings.

For example, Mr. Judson could not recall that Mr. Scheirle was concerned about JMG having sufficient resources to secure engagements for Orpheus in the fall of 2018, after Mr. Williams quit (Tr. 2626-27). Instead, Mr. Judson remembered that they discussed the importance of replacing Mr. Williams because Mr. Scheirle “was concerned that he receive the management services that we had successfully provided to Orpheus for the five or six years prior to that” (Tr. 2627). When confronted with the September 2018 email where Mr. Scheirle specifically expressed concern about the impact of Mr. Williams’s departure on Orpheus’s bookings and the need to hire a new booking manager, Mr. Judson repeatedly testified that he did remember receiving the email and that Mr. Scheirle did not mean what he wrote (Tr. 2635-36; Pet. Ex. 66).

Similarly, Mr. Judson could not recall how many performances respondents had secured for Junction or how much they had earned (Tr. 2607-09). When asked how much Junction received per engagement, Mr. Judson initially stated that he thought the group charged \$15,000 for a single performance (Tr. 2607). After petitioner showed him records indicating booking fees ranging from \$6,000 to \$13,500, Mr. Judson claimed that he did not recognize the document (Tr. 2607; Pet. Ex. 18). Eventually, he admitted that he did not know how many engagements the trio had performed or how much money they had received while represented by respondents (Tr. 2608-09).

Mr. Judson was similarly evasive when asked how many engagements respondents had generated for Orpheus and the Naughtons. At first, he claimed that he did not have that information (Tr. 2877). Next, he said that he could not make an estimate (Tr. 2876-77). When pressed, he could only guess that respondents secured 35 or 40 engagements for Orpheus and 40 or 50 for the Naughtons (Tr. 2877).

Mr. Judson repeatedly offered inconsistent and implausible testimony about respondents’ record-keeping. Ms. Baker testified that respondents used a specialized program, Overture, to track productivity and engagements (Tr. 1090; Pet. Exs. 14, 111-118). This was corroborated by Ms. Duni, who credibly testified that respondents used Overture to keep track of “information on contacts and engagements and artists” (Tr. 2108). She stated that “everything” was in Overture, she inputted data when respondents procured an engagement, and she checked it monthly to ensure that it included up-to-date information regarding such details as contracts that needed to be executed and payments that had not been received (Tr. 2118, 2148, 2150).

Ms. Duni’s testimony was supported by an email that she sent to Mr. Judson on July 26, 2017, where she stated, “Per our conversation, attached, please find the requested [O]verture

reports” (Pet. 111). Eight Excel spreadsheets, attached to the email, referred to Ms. Baker and Mr. Williams, the years 2016 to 2018, and more than 150 engagements (Pet. Exs. 111-118). This evidence supported Ms. Baker and Mr. Williams’s claims that Mr. Judson monitored their productivity, it directly refuted Mr. Judson’s claim that he did not keep track of their productivity, and it undercut his claim that he based their discretionary bonuses solely on whether clients were “happy” (Tr. 1306, 2843).

The email and attachments showed that Ms. Baker and Mr. Williams invested significant time and effort into securing or attempting to secure engagements. For example, one spreadsheet referred to 72 engagements booked by Ms. Baker in 2017 (Pet. Ex. 117). The spreadsheet listed bookings, dates, contract status, artists’ names, presenters, and performance locations (*Id.*). Of the 72 engagements listed, 60 had executed contracts and the remaining 12 were either awaiting contracts or signatures (*Id.*).

Contradicting Ms. Baker, Ms. Duni, and Ms. Duni’s email, Mr. Judson claimed that “we don’t use” Overture, respondents did not use it to track schedules or engagements, it was a “customer relationship management software,” and he had “no idea” what his staff used it for (Tr. 2518, 2639, 2644). After noting a few inaccurate entries on some spreadsheets, Mr. Judson also referred to “light penciled” engagements on other worksheets and said that they had “no bearing on reality” (Tr. 2667). Instead of using a central database, like Overture, to track clients’ schedules, potential engagements, confirmed engagements, and payments, Mr. Judson claimed that he used multiple other sources to track activity, including QuickBooks, Google Calendar, Outlook, and artists’ contracts (Tr. 2639-40, 2644, 2705).

Even accepting Mr. Judson’s self-serving claims that Overture records should be accorded little or no weight, it was noteworthy that respondents never introduced any QuickBook, Google Calendar, or Outlook records to show how much time Mr. Judson or any of his employees spent on any particular task or client. Respondents introduced emails, spanning several years, to show Mr. Judson and others performed a variety of tasks. But they did not introduce any daily, weekly, or monthly calendars, diaries, journals, timekeeping records, payroll records, or other reliable reports to support their claims about how much time employees from respondents and their various affiliates had actually spent performing particular tasks for its clients. Instead, respondents relied on precise-sounding estimates, like Mr. Judson’s claims that he spent 95% of his travel outside of

the country primarily representing JMG clients and 46% of JMG staff represented corporate clients, which represented 35% of staff time (Tr. 2259, 2462, 2682).

Respondents also fault petitioner for examining “less than 10% of the years” that JMG has been in business, looking at “a very narrow window—regarding time and scope of services” for three clients, and focusing “solely upon the period from 2015 to 2018” (Resp. Mem. at 2, 29). In respondents’ view, the “pertinent inquiry” requires looking at respondents’ entire business going back to 1988 (*Id.*). This argument ignores the obvious import of the licensing statute.

The statute is designed to protect artists. It broadly defines artists as actors, musicians, directors, writers, composers, models, “and any other artists or persons rendering professional services in motion pictures, theatrical, radio, television, or other entertainment enterprises.” GBL 171(8-a). Licensees are also required to post bonds and there are limits on the fees that a licensee may charge. GBL §§ 177(1), 181.5(8), 185(1); see *Russell-Stewart, Inc. v. Birkett*, 24 Misc. 2d 528, 530 (Sup. Ct. N.Y. Co. 1960) (a contract that requires a commission to be paid to an agency whether or not it procured employment for a model was contrary to law and public policy). Whatever services respondents provided 30 years ago, or even 10 years ago, shed no light on the question of whether they operated or maintained an employment agency from 2015 to 2018.

For the same reasons, it does not matter that respondents may have provided unrelated consulting services to corporate clients or more comprehensive services to a few clients, such as Ms. St. John. Rather, the relevant inquiry is whether respondents engaged in unlicensed employment agency activity regarding Orpheus, Junction, and the Naughtons. To hold otherwise, would undermine the licensing statute’s remedial purpose.

Petitioner proved that the main reason that Orpheus renewed its contract with Baker Artists in 2017 was to secure engagements in North America, outside of the New York City metropolitan area. Ms. Baker was the person primarily responsible for performing that vital task. Because Orpheus had a well-established staff of full-time employees who handled finance, development, marketing, and artistic direction, they did not need respondents to provide managerial services.

Mr. Judson may have offered advice to Orpheus, but that was not a contract-required service. Respondents also exaggerated the importance of those additional services. For example, respondents played a minimal part in hiring Mr. Scheirle. Orpheus hired an executive search firm for that purpose and Mr. Judson simply attended a meeting and suggested the name of a possible candidate. Respondents played only a minor role in aiding in any “rebranding” effort. Orpheus

hired a consultant for that job. Mr. Judson's role in that project consisted of joining a focus group of a dozen stakeholders for 90 minutes, followed by a 45-minute phone call (Tr. 1426-27). To the extent that respondents made suggestions about soloists or programming for Orpheus on other occasions, those efforts were aimed at securing appropriate engagements.

With regard to Junction, the evidence showed that Mr. Williams was the group's main contact at Baker Artists and he focused primarily on securing engagements. The trio had its own publicist and it handled its own travel arrangements and finances. By his own admission, Mr. Judson had minimal contact with the trio.

Compared to Orpheus and Junction, the Naughtons received more services from respondents, but the evidence failed to show that securing engagements was merely an incidental activity. Under the terms of their contract, Baker Artists was the "sole and exclusive manager and representative" for all the Naughtons' engagements worldwide (Pet. Ex. 35).

To the extent that respondents provided additional services for the Naughtons, they were secondary to the primary task of securing engagements. For example, respondents made much of the fact that Ms. Baker drove the Naughtons up to Boston for a recording session and she made sure that they had the right type of pianos (Resp. Mem. at 77, 80). As petitioner notes, a recording session may qualify as employment or an engagement under the GBL (Pet. Mem. at 31, 37). But even if assistance with a recording session did not qualify as an employment-procuring activity, a car ride and a few calls or emails about a piano were secondary activities. Credible evidence established that revenue from recordings for professional classical musicians was a minor source of revenue (Tr. 2731; Pet. Ex. 153). Instead, they rely in large part on their earnings from live performances before audiences.

Before and after trial, respondents requested an adverse inference to be drawn from petitioner's failure to call the Naughtons as witnesses (Resp. Mem. at 13-17). A fact-finder is permitted, but not required, to draw an unfavorable inference from "the failure of a party to produce at trial a witness who presumably has evidence that would elucidate the transactions." *See People v. Gonzalez*, 68 N.Y.2d 424, 427-30 (1986); *see also 318 E. 93rd, LLC v. Ward*, 276 A.D.2d 277 (1st Dep't 2000) (noting, in a nonjury trial, the inference that a trier of fact may draw from the failure to call a witness is permissive rather than mandatory). However, the extent of the inference to be drawn may vary depending on the particular facts of a case and a negative inference does not relieve a party of its burden of proof on the ultimate issue to be decided. *See Matter of Adam K.*,

110 A.D.3d 168, 179 (2nd Dep't 2013); *see also See Dep't of Sanitation v. Richins*, OATH Index No. 167/01 (Oct. 15, 2001) (finding that adverse inference could not be used to supply a deficiency in the requesting party's proof or be regarded as proof of an essential fact).

Here, the Naughtons were knowledgeable about material issues and were initially identified as complainants. Thus, they could be expected to testify favorably for petitioner. *See People v. Smith*, 33 N.Y.3d 454, 458-59 (2019). Though petitioner requested and received a subpoena to compel Ms. Baker to testify, it did not do the same for the Naughtons. Instead, petitioner offered the bare assertion that the Naughtons have declined to cooperate since October 2018 and "as a result" petitioner has not been in contact with them (Pet. Opposition to Respondents' Motion in Limine for Missing Witness Charge, Oct. 5, 2020). Based on this record, I inferred that the Naughtons' testimony would not have added anything to petitioner's case and I declined to give any weight to the affidavits that they signed in 2018 (Pet. Exs. 36, 37).

However, I did not infer that the Naughtons' testimony would have supported respondents' affirmative defense. Though respondents speculate that "perjury or fear of perjury was the sole reason" that the Naughtons did not testify (Resp. Mem. at 16), it was more likely that, having finished their contract with Baker Artists in 2019, the duo no longer wished to be involved in a dispute with Mr. Judson or respondents. Moreover, nothing prevented respondents from calling the Naughtons as witnesses.

The balance of petitioner's evidence, including the Naughtons' contract with respondent, and testimony from Ms. Baker and Mr. Williams, corroborated by emails and other documentary proof, showed that respondents expended considerable effort to secure engagements for the duo (Pet. Exs. 19, 20, 21, 35). *See 300 Gramatan Avenue Associates v. NYS Division of Human Rights*, 45 N.Y.2d 176, 179-80 (1978) (hearsay is admissible at an administrative proceeding and may form the sole basis for a finding of fact); *Taxi & Limousine Comm'n v. Kyei*, OATH Index No. 1793/12 at 6 (Aug. 27, 2012), *adopted*, Comm'r Dec. (Dec. 19, 2012) (revoking taxicab driver license based on unsworn hearsay); *see also People ex. rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985) (reliable hearsay may sustain an agency's burden of proof); 48 RCNY § 1-46(a) (strict rules of evidence do not apply at administrative proceeding). And respondents' proof fell short of meeting its burden of showing that they "only incidentally" secured engagements for the Naughtons.

Even crediting respondents' claims that employees from Baker Artists, JMG, Prides Crossing, and Judson Realty, spent a significant amount of time performing what respondents characterize as "managerial tasks," that evidence fell short of proving that securing engagements was an "incidental activity." As petitioner notes, many of the tasks that respondents describe as managerial were directly related to procuring engagements and other employment for artists. For example, Ms. Duni's responsibilities included following up with presenters to ensure that contracts were signed and that clients were paid, which are necessary parts of procuring or attempting to procure an engagement. *See Friedkin*, 90 Misc. 2d at 683 ("The fee billing and collection functions were incidental conveniences, perhaps for defendant's protection but in any event unrelated to the alleged personal management of plaintiff"). Similarly, Ms. Duni testified that she and Ms. Mallia devoted a great deal of time to preparing itineraries for clients. Those itineraries, listing basic information about upcoming performances, such as the travel arrangements and the programs to be performed, were closely connected to engagements.

Former clients who testified for respondents did not add much to their defense. Mr. Thiagarajan had not worked for Orpheus since 2015 and was admittedly unfamiliar with the relationship between Baker Artists and Orpheus from 2017 to 2018, the relevant period under the most recent Orpheus contract cited in the petition. Mr. Thiagarajan also testified about services that Mr. Judson provided, such as helping secure a line of credit, which occurred before Orpheus hired Baker Artists. More significantly, Mr. Thiagarajan and Ms. Tokunaga both bolstered petitioner's case when they testified about the importance of procuring engagements (Tr. 1674, 1730, 1793, 1999).

In sum, petitioner presented credible evidence that respondents were in the business of securing engagements for their clients. For this activity, respondents were required to be licensed. Though respondents performed other services for their clients, they failed to prove that securing engagements was merely an "incidental" activity.

FINDINGS AND CONCLUSIONS


1. Petitioner proved that respondent Baker Artists engaged in unlicensed employment agency activity.
2. Petitioner proved that respondent JMG engaged in unlicensed employment agency activity.

3. Respondents failed to prove that procuring or attempting to procure engagements were only incidental to their businesses.

RECOMMENDATION¹

The authorized penalty for operating an employment agency without a license is \$750. 6 RCNY § 6-59. Petitioner requested a penalty recommendation of \$750 for each agreement that respondents entered into without a license (Pet. Mem. at 46). That is appropriate. The evidence established that Baker Artists operated without a license on at least two occasions when it entered into employment agency agreements with Orpheus and the Naughtons. JMG operated without a license on at least one occasion when it entered into an employment agency agreement with Junction.

Accordingly, I recommend penalties of \$1,500 and \$750 to be imposed against Baker Artists and JMG, respectively.



Kevin F. Casey
Administrative Law Judge

April 20, 2022

SUBMITTED TO:

VILDA VERA MAYUGA
Commissioner

APPEARANCES:

SHIRLEY BOUTIN, ESQ.

¹¹ Petitioner began this proceeding by filing a petition at this tribunal in June 2019. In July 2020, the City Council passed Bill Int. No. 1609-A, to require this tribunal to issue recommended decisions, instead of final decisions, for cases brought by petitioner. The bill became law on August 28, 2020, and went into effect “immediately.” See Charter § 2203(h)(1), amended Local Law 80 of 2020 § 11. Because these procedural changes do not impair rights that respondents possessed when they acted, increase liability for past conduct, or impose new duties with respect to completed transactions, they do not affect respondents’ substantive rights. See *Regina Metro Co., LLC v. NYS Dep’t of Housing & Community Renewal*, 35 N.Y.3d 332, 365 (2020) (statute that affects only “nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when liability arises from past conduct”), citing *Landsgraf v. Usi Film Prods.*, 511 U.S. 244, 275 (1994) (noting that changes in procedural rules may be applied to pending lawsuits “without raising concerns about retroactivity”).

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