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7
8 BEFORE THE LABOR COMMISSIONER
9 OF THE STATE OF CALIFORNIA

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11 GARY CICCATI, JILL
WINTERBOTTOM DEMKO, ROBERTO
12 EZZEVALLI, WALTER LEE, MERIDEE
MANDIO, KAZ MAYEDA, DUFF
13 MOSES, WILLIAM PERRY, STEVE
WORTHINGTON AND JERRY VIVIT,

CASE NO. TAC 4485

DETERMINATION OF
CONTROVERSY

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16 Petitioners,

17 vs.

18 ARTIST LOGIC, INC.,

19 Respondent.
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22 The above-captioned matter, a Petition to Determine Controversy under
23 Labor Code §1700.44, came on regularly for hearing on May 6, 2008 and concluded on
24 May 13, 2008 in Los Angeles, California, before the undersigned attorney for the Labor
25 Commissioner assigned to hear this case. Petitioners JILL WINTERBOTTOM DEMKO,
26 ROBERTO EZZEVALLI, WALTER LEE, KAZ MAYEDA, DUFF MOSES, WILLIAM
27 PERRY AND JERRY VIVIT, (hereinafter, collectively referred to as "Petitioners")
28 appeared represented by Adam Levin, Esq. of Mitchell Silberberg & Knupp LLP.

1 Respondent ARTIST LOGIC, A California Corporation (hereinafter, "Respondent")
2 appeared represented by Craig Kokesh, its President and John M. Houikom Esq. of
3 Quintana Law Group.

4 Petitioners STEVE WORTHINGTON, MERIDEE MANDIO, and GARY
5 CICCATI did not appear and requested that their respective petitions against Respondent
6 be dismissed. Accordingly, said petitions are hereby dismissed without prejudice.

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

9
10 FINDINGS OF FACT

11 Petitioners are storyboard artists who work in the motion picture and
12 television industries and for advertising agencies ("clients"). In April 2004, Petitioners
13 entered into an oral contract with Respondent to represent them as their talent agent in
14 exchange for a 20% commission on all work procured by Respondent ("April 2004 oral
15 contract"). According to the Division of Labor Standards Enforcement's Licensing and
16 Registration Unit, Respondent did not obtain a talent agency license until August 10,
17 2005, over a year after entering into the April 2004 oral contract with Petitioners to
18 represent them as their talent agent. Notwithstanding, in April 2004 when the parties
19 formed their agency relationship, Respondent promised Petitioners it would obtain work
20 for them in Southern California as well as all over the United States. Respondent also
21 submitted as evidence invoice reports showing that over 800 invoices were issued to
22 clients for work performed by Petitioners from May 20, 2004 to August 9, 2005 which
23 Respondent procured for Petitioners prior to becoming licensed as a talent agent.

24 At the time the parties entered into the April 2004 oral contract, Respondent
25 was operating out of an office in El Segundo, California. At some point, however,
26 Respondent moved its office to its President, Mr. Kokesh's, residence, also in El Segundo.

27 Pursuant to the April 2004 oral contract, Respondent agreed to turn over all
28 earnings to Petitioners, less its 20% commission, within 30 days of receiving payment

1 from the client. Despite this agreement, payments to Petitioners became increasingly late.
2 Consequently, on February 6, 2007, Petitioners confronted Respondent about outstanding
3 invoices. In response, Petitioners were told that a new trend had begun between
4 advertising agencies and production companies to take longer in paying freelancers such
5 as Petitioners. Petitioners did not believe this explanation and took it upon themselves to
6 contact their clients directly on the outstanding invoices. As a result, Petitioners learned
7 that the invoices they believed to be outstanding had in fact been paid by most of their
8 clients to Respondent months prior to the February 6, 2007 informal meeting they had
9 with Respondent. Petitioners confronted Mr. Kokesh individually showing him evidence
10 that invoices they thought were outstanding had been paid to Respondent months prior.
11 At no point in time did Mr. Kokesh deny this was true. Moreover, Mr. Kokesh responded
12 by stating that he was sorry and had screwed up and promised to repay Petitioners by
13 getting a loan from his family and selling his home. Mr. Kokesh also explained that the
14 reason for not paying Petitioners their earnings in a timely manner or at all, was due to
15 Respondent shuffling money between artists whenever it got checks and paying those
16 artists who needed the money more or who complained more about not receiving payment
17 from their clients.

18 In March 2007, Petitioners discovered that Respondent had moved from Mr.
19 Kokesh's home in El Segundo to Orange County. Petitioners testified that they were
20 never informed by Respondent of the move and only found out when one of Respondent's
21 representatives notified one of them that Mr. Kokesh had sold his El Segundo home and
22 purchased a home in Orange County.

23 In approximately April 2007, the parties memorialized an agency agreement
24 set up for the purpose of Respondent paying Petitioners back all earnings it unlawfully
25 withheld ("written agency agreement"). Pursuant to the written agency agreement,
26 Respondent agreed to make a lump sum payment of \$25,000 to be split proportionately
27 amongst Petitioners. Respondent also agreed to change its commission structure. Instead
28 of receiving 20% commissions on Petitioners' outstanding earnings, Respondent's

1 commission was reduced to 8.5%. The remaining 11.5% of the original 20% was to be
2 returned to the artist so that each artist would receive 91.5% of his or her earnings (instead
3 of only 80% under the original commission structure). This commission structure was
4 designed to enable Respondent to pay back its debt to Petitioners. The parties even hired
5 an accountant, Maria Lambias, to set up a trust account as required under the Labor Code
6 and to collect all income checks and distribute monies according to the written agency
7 agreement. Despite entering into the written agency agreement, Respondent failed to
8 repay all monies owed. Mr. Kokesh testified that he could not honor the written agency
9 agreement because Petitioners refused to accept any work from him after April 2007.

10 The parties submitted spreadsheets listing the invoices Petitioners had not
11 been paid earnings. Additionally, each Petitioner submitted a table listing: (1)
12 Respondent's original report of invoices unpaid to the artist¹; (2) Additional Unpaid
13 Invoices not included in Respondent's original report of unpaid invoices; (3) The amount
14 deducted as part of the artist's percentage of the \$25,000 lump sum paid by Respondent in
15 April, 2007; (4) Less invoice payments received after the April 2007 written agency
16 agreement had been signed and which had been collected by Accountant Maria Lambias;
17 and (5) Less commissions paid directly by clients to the artists. The bottom of each table
18 listed the balance due the artist which is as follows:

19	Roberto Ezzevalli	\$36,456.92
20	Duff Moses	\$45,231.40
21	William Perry	\$17,971.34
22	Kaz Mayeda	\$56,813.14 ²

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¹ Respondent's original report of invoices unpaid to the artists was attached as an exhibit to the written agency agreement entered into by the parties in April, 2007. As of April, 2007, the total liability to all Petitioners (including those who have been dismissed) was \$448,006.27.

² This amount is the revised amount due to errors which were pointed out by Respondent on cross examination.

1	Walter Lee	\$87,672.14 ³
2	Jill Winterbottom Demko	\$18,617.36 ⁴
3	Jerry Vivit	\$114,132.50
4	TOTAL	\$376,894.80

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6 Mr. Kokesh admitted that he used the earnings collected on behalf of
7 Petitioners to pay general business expenses in order to keep the company going.
8 Additionally, he admitted that he paid himself a salary of \$150,000 for the period of April
9 2004 to December 2004; \$150,000 for the year 2005; \$180,000 for the year 2006; and
10 \$40,000 for the year 2007 (January-March only). Mr. Kokesh also admitted that he
11 purchased his home in Orange County for over \$1.2 million dollars but claims the home is
12 currently in foreclosure. Additionally, Mr. Kokesh testified that Respondent did not
13 maintain any records of commission payments collected from Petitioners' earnings.

14 Each Petitioner testified as to the approximate amount of commissions paid
15 to Respondent for the years 2004, 2005 and 2006. These amounts are as follows:

	2004	2005	2006
16 Roberto Ezzevalli	\$30,000	\$30,000	\$30,000
17 Duff Moses	\$25,000-\$30,000	\$25,000-\$30,000	\$25,000-\$30,000
18 William Perry	\$25,000	\$25,000	\$25,000
19 Kaz Mayeda	\$20,000	\$20,000	\$20,000
20 Walter Lee	\$25,000-\$30,000	\$25,000-\$30,000	\$25,000-\$30,000
21 Jill Winterbottom 22 Demko	\$25,000 ⁵	\$25,000	\$25,000
23 Jerry Vivit	\$30,000	\$30,000	\$30,000

25 ³ Id.

26 ⁴ Id.

27 ⁵ No testimony was given directly by Petitioner Winterbottom Demko as to her estimate of
28 commissions paid to Respondent on an annual basis. The amount of \$25,000 is an
estimate made by the Hearing Officer based on Petitioner Winterbottom Demko's
earnings as testified to at the hearing.

1 Licensed Activity

2 Respondent also violated the Act *after* becoming licensed as a talent agent.
3 The purpose of the Act is to protect artists seeking professional employment from the
4 abuses of talent agencies. *Styne v. Stevens* (2001) 26 Cal.4th 42, 50. Although Respondent
5 obtained a license from the Labor Commissioner on August 10, 2005, it failed to operate
6 under the rules and regulations required of all talent agents licensed by the State of
7 California.

8 Labor Code §1700.25(a) requires licensed talent agents to immediately
9 deposit any payment of funds on behalf of an artist in a trust fund account maintained by
10 the agency or in the agency's bank. The undisputed evidence establishes that Respondent
11 failed to maintain such an account until April-May 2007 when Petitioners appointed an
12 accountant to set up such an account on their behalf.

13 Labor Code §1700.25(a) also requires licensed talent agents to pay their
14 artist clients payment of funds less the agency's commissions within 30 days of receipt.
15 The undisputed evidence clearly establishes that this was not done. In fact, Petitioners still
16 have not been forwarded funds /earnings collected by Respondent from third parties on
17 their behalf. The evidence, which was subject to cross examination, establishes that
18 Petitioners are owed an aggregate amount of \$376,894.80.⁶

19 Labor Code §1700.25(b) requires the licensed talent agent to maintain a
20 separate record of all funds received on behalf of the artist and the record shall further
21 indicate the disposition of funds. Respondent admitted through Mr. Kokesch that it failed
22 to keep such records in violation of this section.

23 By failing to comply with the aforementioned Labor Code sections,
24 Respondent not only violated the Act but also breached its fiduciary duty with Petitioners.

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26 ⁶ While Labor Code §1700.44(c) provides that "No action or proceeding shall be brought
27 pursuant to this chapter with respect to any violation which is alleged to have occurred
28 more than one year prior to the commencement of the action or proceeding," we find that
this amount reflects earnings due when the written agency agreement was entered into in
April 2007 and earnings that became due after such agreement was executed by the
parties, all within one year of filing of the Petition on June 19, 2007.

1 The evidence establishes that rather than pay back the earnings Mr. Kokesh wrongfully
2 withheld from Petitioners in accordance with the April 2004 oral contract, Mr. Kokesh
3 instead purchased a new home in Orange County for over a million dollars and paid
4 himself a very generous salary during the years 2004, 2005, 2006 and the three month
5 period in 2007 (January-March). During this same period of time, Petitioners were all
6 struggling to make ends meet by cashing in mutual funds and borrowing against their
7 credit cards. Petitioners testified not just to the financial burden they were placed under
8 but also testified to the emotional strain not being paid put on their families. It is clear
9 that Respondent completely disregarded the welfare of Petitioners who it was hired to
10 represent and completely disregarded its obligations under Labor Code §1700.25(a).
11 Respondent's actions are "willful" within the meaning of Labor Code §1700.25(e). A
12 "willful" violation of a civil statute occurs when the person owing the statutory duty
13 intentionally fails to perform that statutory duty. *Hale v. Morgan* (1978) 22 Cal.3d 388;
14 *Davis v. Morris* (1940) 37 Cal.App.2d 269. Here, there is overwhelming evidence that
15 Respondent intentionally failed to disburse earnings it collected on behalf of Petitioners in
16 violation of Labor Code §1700.25(a).

17 Interest

18 Having found that Respondent "willfully" violated Labor Code §1700.25(a), we
19 find that Petitioners are entitled to interest on the funds wrongfully withheld at the rate of
20 10 percent per annum during the period of the violation per Labor Code §1700.25(e)(2)
21 which provides:

22 If the Labor Commissioner finds, in proceedings under
23 Section 1700.44, that the licensee's failure to disburse
24 funds to an artist within the time required by
25 subdivision (a) was a willful violation, the Labor
26 Commissioner may, in addition to other relief under
27 Section 1700.44, order the following: (2) Award
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1 interest to the prevailing artist on the funds
2 wrongfully withheld at the rate of 10 percent per
3 annum during the period of the violation.

4 [Emphasis added].

5 Attorney's Fees

6 Likewise, having found that Respondent "willfully" violated Labor Code §1700.25,
7 we also find that Petitioners are entitled to reasonable attorney's fees in the sum of
8 \$49,757.79 per Labor Code §1700.25(e)(1) which provides:

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10 If the Labor Commissioner finds, in proceedings under
11 Section 1700.44, that the licensee's failure to disburse
12 funds to an artist within the time required by
13 subdivision (a) was a willful violation, the Labor
14 Commissioner may, in addition to other relief under
15 Section 1700.44, order the following: (1) Award
16 reasonable attorney's fees to the prevailing artist.

17 [Emphasis added]. This amount is the amount requested by Petitioners and is supported
18 by billing records submitted to the hearing officer at the close of the hearing.

19 Disgorgement and Severability

20 In addition to reimbursement of unlawfully withheld earnings, interest and
21 attorney's fees, Petitioners are also requesting disgorgement of *all* commissions collected
22 by Respondent based on Respondent's unlawful activity. Respondent argues that
23 disgorgement is not appropriate but if it is awarded, Respondent requests that the Labor
24 Commissioner limit it to the one year prior to the filing of the instant Petition.
25 Additionally, Respondent requests that the Labor Commissioner take into consideration
26 the California Supreme Court's decision in *Marathon Entertainment Inc. v. Rosa Blasi*
27 (2008) 42 Cal.4th 974 but fails to specify what lawful portions of the parties' contract
28 should be preserved and enforced.

1 While the *Marathon* court recognized that the Labor Commissioner may
2 invalidate an entire contract when the Act is violated, the Court also left it to the
3 discretion of the Labor Commissioner to apply the doctrine of severability to preserve and
4 enforce the lawful portions of the parties' contract where the facts so warrant. In the
5 instant action, Respondent acted as an *unlicensed* talent agent for approximately half of
6 the relationship with Petitioners (April 2004 to August 9, 2005) and therefore, violated the
7 Act during that period of time. Respondent also violated the Act *while licensed* (August
8 10, 2005 to approximately April 2007 when the parties entered into the written agency
9 agreement for the purpose of Respondent paying back the debt owed to Petitioners).
10 Thus, there are no lawful portions of either the April 2004 oral contract or the written
11 agency agreement. As the Supreme Court explained in *Marathon*:

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

20 *Marathon, supra* at p. 996. Because the central purpose of both the April 2004 oral
21 contract and the written agency agreement herein are tainted with illegality, both contracts
22 cannot be enforced. In such a case, severance is not appropriate. Thus, as a consequence
23 of Respondent violating the Act both *before* and *after* becoming licensed, both contracts
24 entered with Petitioners are deemed void *ab initio*. Consequently, Petitioners are entitled
25 to disgorgement of commissions received by Respondent for the one year period
26 preceding the filing of the Petition (June 19, 2006 to June 19, 2007).

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1 Restitution

2 Petitioners also request that we make an order of restitution of all commissions
3 ever collected from Respondents, not just those that have been ordered disgorged (i.e.,
4 those subject to the one year statute of limitations). Petitioners rely on our previous
5 determination in *Richard Pryor v. David McCoy Franklin* (1982) TAC17 MP114, p.23 for
6 authority to make such an award.

7 "Restitution" is defined as "act of making good, or of giving the equivalent for,
8 any loss, damage, or injury; indemnification. As a remedy, restitution is available to
9 prevent unjust enrichment, to correct an erroneous payment, and to permit an aggrieved
10 party to recover deposits advanced on a contract."⁷ As such, an award of restitution of all
11 commissions here would be above and beyond what Petitioners are due under the Labor
12 Code, i.e., their withheld earnings, interest, attorney's fees and disgorgement of those
13 commissions paid to Respondent in the year prior to the filing of the Petition. While we
14 made such an award in the *Richard Pryor* case as Petitioners point out, it should be noted
15 that the determination in *Richard Pryor* was issued by the hearing officer on July 27, 1982
16 and adopted by the Labor Commissioner on August 12, 1982, prior to the passage of the
17 one year statute of limitations provided for in Labor Code §1700.44(c).⁸ Thus, we find
18 that an order of restitution of all commissions ever collected by Respondent to Petitioners
19 as Petitioners are requesting, is now limited under Labor Code §1700.44(c) to those
20 commissions collected by Respondent during the one year preceding the filing of the
21 Petition. Since we have already ordered this in the form of disgorgement, no restitution is
22 awarded in this case.

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27 ⁷ See Barron's Legal Guides, Law Dictionary, Third Edition, 1991 by Steven H. Gifis.
28 ⁸ The one year statute of limitations (Labor Code §1700.44(c)) was added to the Labor
Code in the last amendment of Assembly Bill 997 dated August 26, 1982. Then Governor
Edmund G. Brown, Jr. signed Assembly Bill 997 on August 31, 1982.

ORDER

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

1. Petitioners are awarded those funds wrongfully withheld from them by Respondent. The total amount is \$376,894.80 and is broken down in the table below.

2. Petitioners are entitled to interest on the funds wrongfully withheld at the rate of 10 percent per annum during the period of the violation per Labor Code §1700.25(e)(2). Interest will be computed from February 6, 2007, the date that Petitioners confronted Respondent about not receiving payments on time to the date this decision is issued by the Hearing Officer since the funds wrongfully withheld still have not been returned to Petitioners. The total amount is \$57,824.96 and is broken down in the table below.

3. Petitioners are entitled to reasonable attorney's fees in the sum of \$49,757.79 per Labor Code §1700.25(e)(1):

4. The April 2004 oral contract and the written agency agreement entered into between Petitioners and Respondent are both deemed void *ab initio*. Severability under *Marathon Entertainment Inc. v. Rosa Blasi* (2008) 42 Cal.4th 974 is not appropriate in this matter. Petitioners are therefore awarded disgorgement of commissions received by Respondent for the one year period preceding the filing of the Petition (June 19, 2006 to June 19, 2007). The total amount is \$185,000.00 and is broken down in the table below.

5. Petitioners are also entitled to recover from the \$50,000 bond posted by Respondent with the Labor Commissioner as a condition of being licensed as a talent agent.

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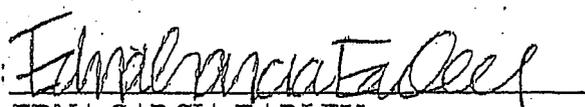
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Petitioner	Earnings Unlawfully Withheld	Interest on Earnings Withheld 2/6/07 to 8/19/08	Disgorgement (Commissions) 6/19/06 to 6/19/07	TOTAL DUE
Ezevalli	\$36,456.92	\$5,593.39	\$30,000.00	\$72,050.31
Moses	\$45,231.40	\$6,939.61	\$27,500.00	\$79,671.01
Perry	\$17,971.34	\$2,757.25	\$25,000.00	\$45,728.59
Mayeda	\$56,813.14	\$8,716.54	\$20,000.00	\$85,529.68
Lee	\$87,672.14	\$13,451.07	\$27,500.00	\$128,623.21
Demko	\$18,617.36	\$2,856.36	\$25,000.00	\$46,473.72
Vivit	\$114,132.50	\$17,510.74	\$30,000.00	\$161,643.24
TOTAL	\$376,894.80	\$57,824.96	\$185,000.00	\$619,719.76 + Fees

DATED: August 19, 2008

Respectfully submitted,

By: 
EDNA GARCIA EARLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: August 19, 08 By: 
ANGELA BRADSTREET
State Labor Commissioner

