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BEFORE THE LABOR COMMISSIONER  
OF THE STATE OF CALIFORNIA

11 THE GERSH AGENCY, INC., a  
12 California corporation,

13 Petitioner,

14 vs.

15 DARRYL HUGHLEY, an individual (aka  
16 "DL HUGHLEY"); FIVE TIMZ  
17 PRODUCTIONS, INC., a California  
18 corporation,

19 Respondents.

CASE NO. TAC 47191

**DETERMINATION OF CONTROVERSY**

**I. INTRODUCTION**

20 The above-captioned matter, a Petition to Determine Controversy under Labor Code  
21 section 1700.44, came on regularly for hearing in Los Angeles, California, on December 7, 2017  
22 before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner,  
23 THE GERSH AGENCY, INC., a California corporation (hereinafter, referred to as "TGA") was  
24 represented by Joseph P. Costa, Esq. of COSTA BESSER & CHILDRESS, LLP. Respondents,  
25 DARRYL HUGHLEY, an individual (aka "DL HUGHLEY"); FIVE TIMZ PRODUCTIONS,  
26 INC., a California corporation (hereinafter, collectively referred to as "Hughley") were  
27 represented by Joseph R. Taylor, Esq. and Tiffany R. Caterina, Esq. of FRANKFURT KURNIT  
28 KLEIN + SELZ, PC. The matter was taken under submission and post-trial briefs submitted.

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

3 **II. FINDINGS OF FACT**

4 1. Petitioner TGA is a talent and literary agency. TGA operates six full-service  
5 departments, including a Comedy department.

6 2. Respondent Hughley is a well-known comedian. He has performed in the comedy  
7 industry for decades, including from 1998 to 2002 when he wrote, produced, and starred in his  
8 television series, *The Hughleys*.

9 3. Prior to joining TGA, Hughley was represented by ICM Partners (ICM), including  
10 talent agent, William Rodriguez (hereinafter, referred to as "Rodriguez"). According to Hughley,  
11 he was dissatisfied with ICM, in part, because ICM continued to engage Hughley at the same  
12 comedy clubs he had performed for years for which Hughley paid a 10% commission. Hughley  
13 testified he no longer wanted to pay 10% to an agency for comedy clubs ("comedy club dates") in  
14 which he had a "standing invitation".

15 4. In 2014, Rodriguez left ICM and became an agent at TGA. Hughley testified as an  
16 incentive to sign him, Rodriguez told Hughley that TGA would not commission the same comedy  
17 club dates Hughley had performed at for years and previously commissioned by ICM.

18 5. In or around September 2014, Hughley and TGA entered into an oral agreement  
19 whereby TGA would serve as Hughley's talent agency. What specific performances were  
20 commissionable is the basis of this dispute, as TGA asserts it is entitled to ten percent (10%) of  
21 all compensation earned by Hughley for his services as an entertainer, including comedy club  
22 dates.

23 6. Hughley continued to perform at the same comedy club dates he had been  
24 performing for years and Rodriguez continued to book those engagements on behalf of Hughley.  
25 When executives at TGA discovered that Hughley was not paying commissions on comedy club  
26 dates, they looked to Rodriguez for answers. Rodriguez denied promising Hughley he would not  
27 commission comedy club dates.

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1           7.     On March 16, 2015, a few months after Hughley joined TGA, Hughley's  
2 representative, Sonya Vaughn, sent Rodriguez the following email:

3                   Good morning William,

4                   Per DL, *Gersh is not to commission club dates?* If that is the case,  
5 \$3200 was commissioned in Pleasanton, CA and \$2000 was  
6 commissioned in Tacoma, WA.

7                               *Please advise . . . .*

8                               Thanks!  
9 Sonya

10           8.     On the same day, Rodriguez responded by email: "Correct, b/c those are icm [sic]  
11 dates." This email response along with the credible testimony of Hughley and evasive responses  
12 by Rodriguez established Rodriguez promised Hughley that TGA would not commission comedy  
13 club dates.

14           9.     Around the time that Hughley joined TGA, Hughley performed at a charity  
15 comedy event with Cedric "The Entertainer", Eddie Griffin, George Lopez and Charlie Murphy  
16 to honor the late comic legend, Richard Pryor, and to raise funds for a memorial in his honor.  
17 This assembly of popular comedians generated interest in a comedy tour featuring the five  
18 comedians, which became known as "The Comedy Get Down" or the "Black and Brown Tour"  
(hereinafter, referred to as, "Tour Dates").

19           10.    Hughley testified the five comedians wanted to negotiate and organize Tour Dates  
20 through the United Talent Agency ("UTA") and it was UTA that arranged Tour Dates. At first,  
21 TGA sought 10% commission for Tour Dates but during pre-hearing discovery, it became  
22 undisputed that Hughley agreed to pay a 5% commission on the guarantees for each Tour Date.  
23 This agreement was confirmed in an April 6, 2015 email from Hughley's representative, Allen  
24 Chanzis:

25                   Hi William,

26                   I just wanted to follow up on the conversation you just had with  
27 Mark Landesman about DL's commission to Gersh on the Black &  
28 Brown shows.

*You told Mark that Gersh is commissioning 5% of the guarantee*

1                    *on these shows. It is our understanding that the guarantees on*  
2                    *these shows is \$30,000.* Per the settlements that we received, there  
3                    have been deposits of \$3,000 on each of the 5 shows that have  
4                    already played.

5                    Can you please send us a statement accounting for these deposits,  
6                    and *clarify if we [sic] incorrect about the guarantees.* Based on  
7                    these numbers, it looks like there is money due DL from Gersh on  
8                    this.

9                    Please advise.

10                    Thanks  
11                    Allen

12                    Rodriguez confirmed the agreement and responded as follows:

13                    *Sure.* We refunded the extra money a while back and we will with  
14                    this past weekend[.]

15                    11.            Hughley testified that after one of the Comedy Get Down Tour Dates, two writers  
16                    approached Hughley and the other comedians about developing a scripted television show based  
17                    upon the Tour (hereinafter, referred to as, "Series"). In March 2016, TGA was sent a draft of a  
18                    proposed offer and agreement for a television series starring Hughley as a principal cast member.  
19                    The offer came directly from Black Entertainment Television (BET) to Hughley's manager  
20                    Michael Rotenberg. At the request of Hughley's manager, BET then sent the offer to Danielle  
21                    Schoenberg of TGA. The email indicates " ... it would be helpful if you would please coordinate  
22                    the comments with all representatives of the principal cast so that we can expedite the  
23                    documentation process." The testimony was conflicting as to TGA's level of involvement but the  
24                    evidence suggests this was the extent of TGA's efforts for the Series. Hughley was paid  
25                    \$562,000 for his participation in the Series and consequently TGA seeks 10% or \$56,200 in  
26                    unpaid commissions. Hughley testified TGA was not involved in any aspect of procuring the  
27                    Series, and as a result, TGA is not entitled to commission this project.

28                    12.            Hughley did not receive another commission statement from TGA until May 12,  
29                    2016. Like prior statements, the May 12, 2016 statement reflected that Hughley paid a \$1,500  
30                    commission for each of the "Tour Dates". However, unlike the prior statement, the May 12, 2016  
31                    statement included unpaid charges for commissions on comedy club dates.

32                    13.            On May 17, 2016, Hughley's representative, Ms. Steingruber, replied (consistent

1 with Hughley's position in March 2016):

2  
3 Hi Sarah,

4 I heard back from DL, *he indicated he doesn't pay commission on*  
5 *club dates, just on concerts.* Do you want to re-do your statement  
6 and send to me?

7 Thanks!

8 Suzie

9 14. This disagreement as to whether a promise was made to Hughley by Rodriguez  
10 that TGA would not commission comedy club dates became insurmountable. Hughley  
11 terminated TGA in or around October 2016. On October 7, 2016, Steven M. Kravit, Executive  
12 Vice President of TGA, sent Hughley a "protection letter" with a copy to Rodriguez. The letter  
13 states:

14 . . . this will confirm that in addition to all other prior projects and  
15 deals, projects for which we shall remain entitled to our *10%*  
16 *agency commission* on all guarantees as well as backend  
17 compensation [include deals listed on the attached exhibits to the  
18 letter].

19 15. The exhibits to the letter include comedy club dates and unpaid Tour Dates. As  
20 for the unpaid Tour Dates, TGA asserts Hughley stopped paying commissions for Tour Dates  
21 engaged in during the parties' relationship. In contrast, Hughley argues TGA is not entitled to  
22 commissions for Tour Dates performed after the termination. In support of this argument,  
23 Hughley described a complicated multi-step process for engaging Hughley for the Tour Dates.  
24 Specifically, Hughley argued the process for booking venues for Tour Dates required UTA to put  
25 together a performance offer sent many months prior to the actual performance date. UTA would  
26 send the "performance offer" to venues and wait for venues to either offer the date, provide  
27 another date or reject the date. Hughley argued the venues responded a few months before the  
28 actual event and therefore argued it was absurd for TGA to assert rights to commissions on Tour  
29 Dates played many months after Hughley terminated TGA.

30 16. This post-termination letter is the first time TGA asserted Hughley owed the  
31 agency a 10% commission on all projects and deals, including comedy club performances.

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17. On April 3, 2017, TGA filed this Petition to Determine Controversy seeking the unpaid commissions for comedy club dates and unpaid Tour Dates in the amount of \$56,615.58. At some point after TGA filed the petition and documents exchanged, TGA increased their claim to \$118,115.58, which includes unpaid commissions for earnings from the BET television series.

18. Further complicating matters was Hughley’s discovery that after the October 2016 termination, during the months of May through December 2016, TGA diverted \$26,698.86 from Hughley’s earning in connections with the comedy club dates. TGA argues these monies were authorized deductions for unpaid commissions on comedy club dates due TGA. According to Hughley, he did not notice the amounts withheld by TGA from Hughley’s earnings until well after this litigation was commenced. As a result, Hughley seeks disgorgement for these amounts received by TGA. Notably, TGA provided credible authorization from Hughley enabling TGA to receive, accept, deliver, endorse and deposit or negotiate and deduct its commissions from Hughley’s earnings.

**III. ARGUMENT**

Labor Code section 1700.4(b) includes “artists rendering professional services in television ... and other entertainment enterprises” in the definition of “artist” and petitioner is therefore an “artist” within the meaning of Labor Code section 1700.4(b). It was stipulated that TGA is a California licensed talent agency.

Labor Code section 1700.23 provides that the Labor Commissioner is vested with jurisdiction over “any controversy between the artist and the talent agency relating to the terms of the contract,” and the Labor Commissioner’s jurisdiction has been held to include the resolution of contract claims brought by artists or agents seeking damages for breach of a talent agency contract. *Robinson v. Superior Court* (1950) 35 Cal.2d 379, *Garson v. Div. Of Labor Law Enforcement* (1949) 33 Cal.2d 861. Therefore, the Labor Commissioner has jurisdiction to determine this matter.

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1 The issues in this case are as follows:

2 A. Are “Comedy Club Dates” Commissionable?

3 B. Are Post-Termination Commissions Owed for “Tour Dates” Performed After  
4 Termination?

5 C. Does a Violation of Title 8, California Code of Regulations, section 12002, Forfeit  
6 the Petitioner’s Right to Commission the “BET Television Series”?

7 **A. Are “Comedy Club Dates” Commissionable?**

8 The essential elements of a contract were present - parties capable of contracting who  
9 consented with a lawful object and sufficient consideration. (Civil Code, “C.C”, §1550.) The  
10 parties’ agreement for the procurement of employment in the entertainment industry was for a  
11 lawful purpose and the understanding that TGA would seek 10% commission for engagements  
12 procured is sufficient consideration. Hughley’s acceptance established the requisite “meeting of  
13 the minds”. Consequently, a contract was formed. (C.C. §1621)

14 The question here is whether the parties intended that TGA be entitled to commission  
15 comedy club dates. The answer, based on the conduct of the parties, is no.

16 The March 16, 2015 email from Hughley’s representative, Sonya Vaughn, sent to  
17 Rodriguez was instructive:

18 Good morning William,  
19 Per DL, *Gersh is not to commission club dates?* If that is the case,  
20 \$3200 was commissioned in Pleasanton, CA and \$2000 was  
commissioned in Tacoma, WA.

21 Please advise . . . .

22 Thanks!  
Sonya

23 Rodriguez responded by email: “*Correct*, b/c those are icm [sic] dates.”

24 If Rodriguez did not make this promise he could and should have stated it right here. He  
25 did not. Instead, he answered affirmatively to the question whether “Gersh is not to commission  
26 club dates?” This email response along with the credible testimony of Hughley and evasive  
27 responses by Rodriguez established Rodriguez promised Hughley that TGA would not  
28 commission comedy club dates.

1 In sum, TGA has not met their burden of proof on this issue. The proper burden of proof  
2 is found at Evidence Code §115 which states, “[e]xcept as otherwise provided by law, the burden  
3 of proof requires proof by preponderance of the evidence.” Further, *McCoy v. Board of*  
4 *Retirement of the County of Los Angeles Employees Retirement Association* (1986) 183  
5 Cal.App.3d 1044 at 1051 states, “the party asserting the affirmative at an administrative hearing  
6 has the burden of proof, including both the initial burden of going forward and the burden of  
7 persuasion by preponderance of the evidence (cite omitted).” “The ‘preponderance of the  
8 evidence’ standard of proof requires the trier of fact to believe that the existence of a fact is more  
9 probable than its nonexistence.” *In re Michael G.* 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700. The  
10 evidence suggests it is more likely than not that Rodriguez promised Hughley TGA would not  
11 commission comedy club dates. Consequently, TGA is not entitled to commission comedy club  
12 dates. Moreover, it is undisputed that TGA diverted \$26,698.86 from Hughley’s earning in  
13 connection with the comedy club dates. Although, TGA was authorized to make these deductions  
14 as Hughley’s agent, Hughley is entitled to disgorgement for these amounts received by TGA.

15 **B. Are Post-Termination “Tour Dates” Commissions Owed?**

16 The second issue is whether TGA is entitled to the payment of commissions for Tour  
17 Dates discussed during the relationship but performed after termination.

18 In short, Hughley reaped the financial benefits for work he agreed was commissionable  
19 and then unilaterally determined he did not want to pay anymore once he terminated TGA. Courts  
20 have long held, “he who shakes the tree is the one to gather the fruit.” *Willison v. Turner* 89  
21 Cal.App.2d 589 (1949). Certainly, Hughley may terminate a personal services agreement if he  
22 feels his agent is not providing for the services contracted. However, he may not unilaterally  
23 determine he has no further obligation to pay for work already performed. TGA, at minimum,  
24 had a hand in the Tour Dates and is therefore entitled to commission those dates set in motion  
25 during the parties’ relationship.

26 Further, California Code of Regulations, Title 8, section 12001(b) states, “[t]o be entitled  
27 to the payment of compensation after termination of the contract between the artist and the talent  
28 agency, the talent agency shall be obligated to serve the artist and perform obligations with



1 respect to any employment contract or to extensions or renewals of said employment contract or  
2 to any employment requiring the services of the artist on which such compensation is based.” It  
3 was clear through testimony and documentary evidence TGA was willing and able to conduct  
4 services on behalf of Hughley. As such, TGA is entitled to commissions for Tour Dates.

5 **C. Does a Violation of California Code of Regulations, Title 8, Section 12002**  
6 **Forfeit the Petitioner’s Right to Commission the “Series”?**

7 Finally, in defense of TGA’s claim for commissions owed on the “Series”, Hughley  
8 alleges TGA violated Title 8, California Code of Regulation, section 12002, thereby foregoing  
9 their right to commission the “Series.” Section 12002 states:

10 A talent agency shall be entitled to recover a fee, commission or  
11 compensation under an oral contract between a talent agency and an  
12 artist as long as the particular employment for which such fee,  
13 commission or compensation is sought to be charged shall have  
14 been procured directly through the efforts or services of such talent  
15 agency and shall have been confirmed in writing within 72 hours  
thereafter. Said confirmation may be denied within a reasonable  
time by the other party. However, the fact that no written  
confirmation was ever sent shall not be, in and of itself, be  
sufficient to invalidate the oral contract.

16 TGA did not comply with this regulation. It was determined the “Series” was not  
17 procured directly through the efforts of TGA within the meaning of section 12002. TGA was not  
18 the procuring force behind the “Series”, and was not directly involved in the negotiation of the  
19 financial terms. Here, Hughley did not benefit from TGA’s efforts. As a result, noncompliance  
20 with this regulation under these circumstances is sufficient to invalidate TGA’s right to  
21 commission this engagement.

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**IV. ORDER**

**Tour Dates:** The parties agreed Hughley would pay a commission of 5% of the guarantee (or \$1,500) for each Tour Date initiated during the agency relationship. Hughley did not pay commissions for all Tour Dates initiated during the agency relationship. The remaining unpaid commissions for Tour Dates initiated during the relationship but performed after termination remain unpaid. Therefore, Hughley owes TGA additional commissions for all Tour Dates initiated prior to October 2016. These Tour Dates and unpaid commissions include the following:

LA Forum initiated in March 2016, \$625.00 owed;

Memphis initiated March 2016, \$1,500.00 owed;

Oklahoma initiated in March 2016, \$1,500.00 owed;

Cincinnati, OH initiated in April 2016, \$1,500.00 owed;

Charlotte, initiated in May 2016, \$1,500.00 owed;

Jacksonville, initiated in March 2016, \$1,500.00 owed;

August GA, initiated in March 2016, \$1,500.00 owed;

Baltimore initiated in May 2016, \$1,500.00 owed;

Tampa, initiated in April 2016, \$1,500.00 owed;

Sunrise, FL, initiated in July 2016, \$1,500.00 owed;

Raleigh, NC, initiated in March 2016, \$1,500.00 owed;

Dallas, TX, initiated in July 2016, \$1,500.00 owed;

Orlando, FL, initiated in July 2016, \$1,500.00 owed;

Detroit, initiated in July 2016, \$1,500.00 owed;

Chicago, IL initiated in July 2016, \$1,500.00 owed;

Total Commissions due TGA for Tour Dates: \$21,625.00 plus \$4,363.04 in interest calculated at 10% per annum for a total award of **\$25,988.04 owed to TGA for Tour Dates.**

**The Series:** TGA was not involved in Hughley's employment on the Series. The Series was not procured directly through the efforts or services of TGA within the meaning of California Code of Regulations, Title 8, section 12002. Therefore, Hughley does not owe TGA commission on the Series.

1           **Comedy Club Dates:** The parties' agreement was that Hughley would not pay  
2 commissions on comedy club dates. Therefore, Hughley does not owe TGA commissions on  
3 comedy club Dates. TGA received \$26,698.86 of Hughley's earnings and applied it to disputed  
4 commissions for comedy club dates. Therefore, **TGA must disgorge \$26,698.86 back to**  
5 **Hughley.**


6 **(\$25,988.04 owed to TGA for Tour Dates)**

7 **Final Accounting: TGA owes Hughley \$710.82**

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9           **IT IS SO ORDERED.**

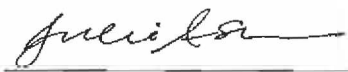
10  
11 DATED: October 17, 2018

Respectfully submitted,

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14 By:   
15 DAVID L. GURLEY  
16 Attorney for the Labor Commissioner

17 **ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER**

18  
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21 Dated: October 17, 2018

By:   
22 JULIE A. SU  
23 State Labor Commissioner  
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**PROOF OF SERVICE**

**STATE OF CALIFORNIA** )  
 ) S.S.  
**COUNTY OF LOS ANGELES** )

I, Lindsey Lara, declare and state as follows:

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

On October 17, 2018, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY**, on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Joseph P. Costa, Esq.  
COSTA BESSER & CHILDRESS  
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[jcosta@cbc-llp.com](mailto:jcosta@cbc-llp.com)

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**Attorneys for Respondents**

**(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with fully prepaid postage thereon for certified mail with the United States Postal Service this same day in the ordinary course of business at our office address in Long Beach, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

**(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

**(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 17th day of October 2018, at Long Beach, California.

  
\_\_\_\_\_  
Lindsey Lara  
Declarant