1	DIVISION OF LABOR STANDARDS ENFORCE	EMENT
2	Department of Industrial Relations	
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7	Attorney for the Labor Commissioner	
8		CT AND ADDOC ENTED CONTO
9	BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT	
10	DEPARTMENT OF INDUSTRIAL RELATIONS	
11	STATE OF CAL	IFORNIA
		Case No.: TAC 30631
12		Case No.: TAC 30031
13	ADOLFO ALVAREZ, a minor by and through his	DETERMINATION OF
14	guardian <u>ad litem</u> , JOSE ALVAREZ,	CONTROVERSY (LABOR CODE § 1700.44(a))
15	Petitioner,	[1700.44(a)]
16	v.	Petition filed: February 19, 2013
17	TIEFANIV ATWOOD, on individuals RDM	-
18	TIFFANY ATWOOD, an individual; RPM TALENT GROUP / THE AGENCY, LLC, a	
	California limited liability company dba RPM	
19	TALENT; and DOES 1-5, inclusive,	
20		
21	Respondents,	
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DETERMINATION

I.

INTRODUCTION

On February 19, 2013, Adolfo, Alvarez ("Adolfo"), a minor by and through his guardian ad litem, Jose Alvarez ("Mr. Alvarez"), filed with the Labor Commissioner (the "Labor Commissioner"), Division of Labor Standards Enforcement, Department of Industrial Relations, State of California a petition (the "Petition") to determine controversy pursuant to Labor Code Section 1700.44. The Petition was brought against Tiffany Atwood (also known as "Tiffany Richer") and what was described as "RPM Talent Group, a corporation"; the description of the latter entity was corrected at hearing to be: "RPM Talent Group / The Agency, LLC, a California limited liability company dba RPM Talent" ("RPM") (Ms. Atwood and RPM collectively "Respondents").

The Petition was heard on December 3, 2015 in the Los Angeles office of the Labor Commissioner. Barton L. Jacka, an attorney for the Labor Commissioner from the Sacramento office, heard the matter on assignment by the Labor Commissioner. Mr. Alvarez appeared; Debbie DeOliveira appeared as a potential witness for Adolfo; Mayra Alvarez, Adolfo's mother, also was present. Adolfo was represented by counsel Mark Brifman. Ms. Atwood appeared for herself and for RPM. Homero Cano provided interpretive services.

On December 15, 2015, the Hearing Officer issued an Order (the "December 15, 2016 Order") that allowed Adolfo and Respondents to submit and serve additional evidence and objections to such evidence and to request a second session of the hearing on the Petition. As of March 1, 2016, no party took such action; the Hearing Officer seeing no need for a second session of hearing, the record was deemed closed so that this Determination could be issued.

II.

PLEADINGS AND HEARING

A. <u>Allegations of the Petition.</u>

The Petition alleges in pertinent part that Adolfo resides in Los Angeles County,

California and is an "artist" as defined in Section 1700.4 of the Labor Code; each Respondent

acted in relation to Adolfo as a "talent agency". On May 5, 2012, the Parties entered into a written contract (the "Contract"). Respondents, pursuant to the Contract, have collected nine checks for residual payments to Adolfo and have failed and refused to pay him a total of \$25,982.10 that they owed him from those checks.

B. Facts to which the Parties stipulated at hearing.

Although witnesses were sworn at the December 3, 2015 hearing, no actual testimony was taken. After opening arguments and agreement on some predicate facts, the Parties met without the Hearing Officer. Following that meeting, the Parties stipulated to the truth of certain additional facts and agreed on the scope of facts that were disputed and on a process by which they each could submit additional evidence or request a second session of the hearing. These stipulations and agreements were as follows:

- Adolfo, during the pertinent period, was a minor and a talent client of both Ms. Atwood and RPM under two May 5, 2012 contracts (the "Contracts") each of which was entitled "American Federation of Television and Radio Artists Standard AFTRA Exclusive Agency Contract" and which was appended to the Petition; the contract between Adolfo and RPM pertained to RPM's agency of Adolfo for "the television and radio industries" and the contract between Adolfo and Ms. Atwood pertained to Ms. Atwood's agency of Adolfo for "television and radio commercials". Ms. Atwood, during the pertinent period, was a licensed talent agent who did business as "RPM Talent" and signed both contracts. ¹
- The Contracts afforded each Respondent a 10% commission on gross (pre-tax) sums received by Adolfo pursuant to that Respondent's respective agency; Respondents were to receive the appropriate payroll check for the net (post-tax) amount for Adolfo from

¹ Both RPM and Ms. Atwood appear to have done business as "RPM Talent". For purposes of this Determination, there appears to be no dispute that whatever liability exists, it is either entirely borne by Ms. Atwood or is jointly and severally borne by Ms. Atwood and by RPM. With respect to each job, there was only one "agent" and one commission owed.

Talent Partners (a payroll processing agency for Adolfo's employers), take out the 10% commission from the (pre-tax) gross (a single 10% commission, depending on whether owed to Ms. Atwood or to RPM), issue a check to Adolfo for the remaining 90% and send that check to Mr. or Ms. Alvarez.

- At some point a dispute arose over Respondents' payments to Adolfo; Adolfo left Respondents' agencies and hired Ms. DeOliveira as his agent. Ms. DeOliveira met with Ms. Atwood and received from her a set of documents that purport to show that Adolfo had deposited into his account nine checks (collectively the "Disputed Checks"), totaling \$25,982.10, that Respondents assert they mailed to Mr. or Ms. Alvarez (usually to the former).
- Each document, according to Ms. Atwood, was obtained by her through her on-line access to Respondents' bank accounts and contains printed information about the Disputed Check (posting date, account number, check number, amount) provided by the bank, as well as a copy of the obverse and reverse of the Disputed Check. (Counsel for Mr. Alvarez argued that one could not necessarily know that the obverse and reverse shown on each document was of the same Disputed Check.)
- The documentation for each Disputed Check is accompanied, on a separate page, by a copy of the appropriate pay stub from Respondents. Finally, with respect to one of the alleged payments by Respondents to Adolfo, the documentation from Talent Partners to Respondents also was admitted into evidence so that one could determine the normal sequence of events from payment from Talent Partners to Respondents and from Respondents to Adolfo.
- Six of the nine Disputed Checks, totaling \$16,708.75, appear to be drawn on RPM's account with Chase; each shows an alleged endorsement by "Alonso Alvarez" (on one check, for \$3,417.50) and by "Adolfo Alvarez" on the remaining five (totaling

² Mr. Alvarez testified that his normal practice was to sign Adolfo's name (but not to indicate an account number) on the back of a check made out to Adolfo before depositing it into Adolfo's account.

- \$13,291.25); none of the reverse sides of these six Disputed Checks contains an indication (e.g., bank stamp) that the Disputed Check was deposited; in addition, the printed information allegedly provided by Chase on the same document as the image of the Disputed Check contains the notation "N/A" under "Posting Date".
- The three remaining Disputed Checks, totaling \$9,273.35, appear to be drawn on an "RPM Talent" account with Bank of America: the reverse of one (for \$2,453.49) shows no endorsement but contains a bank stamp stating that the check was credited to the payee (Adolfo); the reverse of another (for \$2,118.80) contains an endorsement by "Adolfo Alvarez" along with a stamp of some sort that cannot be deciphered; and the reverse of the third (for \$4,701.06) shows no endorsement but contains a bank stamp indicating that it was deposited (although not clearly, as with the first of these three, to the payee).
- In contrast to the documentation for the 6 Chase Disputed Checks, the documentation for the 3 Bank of American Disputed Checks shows a "Posting Date" that is relatively close to and after the date the Disputed Check allegedly was issued.
- Mr. Alvarez testified that neither he nor Ms. Alvarez received any of the Disputed Checks. Ms. DeOliveira testified that her and Mr. Alvarez' inquiries to Respondents' banks (Ms. DeOliveira to Chase and Mr. Alvarez to Bank of America) led to Mr. and Ms. Alvarez' sending a November 7, 2012 letter to Ms. Atwood that said: "Bank of America and Chase informed us that the checks [with the 9 check numbers at issue] do not exist in their systems and have never been paid out of or deposited into any accounts on record." (The Parties agreed that Respondents' account numbers, shown on the Disputed Checks, are genuine.) Specifically, Ms. DeOliveira testified that the Chase branch manager/vice president told her that although she could not give Ms. DeOliveira information, without authorization, about Respondents' bank accounts, none of the six Disputed Check numbers appeared to be for a check drawn on Respondents' account. Mr. Alvarez did not testify about any statement from Bank of America to him on this issue.

The Parties discussed filing a fraud claim with Bank of America and/or Chase if Mr. or
Ms. Alvarez did not receive the checks soon after their inquiry to Ms. Atwood; Mr.
Alvarez testified that neither he nor Ms. Alvarez ever received the checks and the
Parties agreed that no one filed a fraud claim.

The Parties agreed, at the conclusion of the hearing, to cooperate in obtaining from Chase and Bank of America documentation that would help establish whether any of the Disputed Checks had been deposited into Adolfo's bank account (or at least had been negotiated by Mr. or Ms. Alvarez). They also agreed to the terms of a December 15, 2015 Order following December 3, 2015 hearing on petition that said:

- 1. Any Party, by February 16, 2016, may submit and serve additional evidence (whether or not supported by declaration or stipulation) in support or of in defense of the allegations of the Petition;
- 2. Any Party, by March 1, 2016, may submit and serve objections to any evidence submitted in accord with Item #1 above; and
- 3. Any Party, by March 1, 2016, may request a second session of the hearing of the Petition.
- 4. The Hearing Officer retains the discretion, whether as a consequence of evidence, objections or requests made, or otherwise, to order a second session of the hearing of the Petition but if nothing is submitted by any Party by February 16, 2016 then, unless the Parties notify the Hearing Officer that they have settled the matter, the Hearing Officer will issue a Determination, in accordance with Labor Code Section 1700.44, based on the record as it existed as of the close of the December 3, 2015 hearing.

No Party submitted additional evidence or objections or requested a second session of the hearing on the Petition.

III.

FINDINGS OF FACT

1. Ms. Atwood was during the relevant period licensed as a talent agent under the name "Tiffany Richer" and was doing business as "RPM Talent". In addition to using the

name "RPM Talent", Ms. Atwood also used RPM³ (which was not separately licensed as an agent although that issue was not raised by Mr. Alvarez) as a mechanism through which she worked as an agent.

- 2. During the relevant period, Adolfo was an artist and, through the Contracts (entered through Mr. Alvarez) retained Respondents as his talent agents; only one Respondent was Adolfo's agent for each job, depending on whether the job involved "the television and radio industries" (RPM) or "television and radio commercials" (Ms. Atwood).
- 3. Under the Contracts, both as written and as performed by the Parties, Talent Partners, which worked as the payroll processing agent for Adolfo's employers, sent to the appropriate Respondent a check for Adolfo's wages, net of taxes; the appropriate Respondent retained a commission equal to 10% of the gross wage (i.e., before taxes were withheld) and was to mail to either Mr. or Ms. Alvarez a check equal to the remainder.
- 4. Three of the Disputed Checks (totaling \$9,273.35) were received and successfully negotiated by either Mr. or Ms. Alvarez.
- 5. Six of the Disputed Checks (totaling \$16,708.75), whether or not received by Mr. or Ms. Alvarez, were not successfully negotiated by either Mr. or Ms. Alvarez.

IV.

CONCLUSIONS OF LAW

Labor Code Section 1700.44(a) states: "In cases of controversy arising under this chapter [4, of Part 6 of Division 2 of the Labor Code], the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo. To stay any award of money, the party aggrieved shall execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment. In all

³ It was not established that RPM was licensed as a talent agent but the issue of whether RPM was unlicensed was not raised by Mr. Alvarez.

other cases the bond shall be in a sum of not less than one thousand dollars (\$1,000) and approved by the superior court."

Pursuant to Section 1700.25:

- (a) A licensee who receives any payment of funds on behalf of an artist shall immediately deposit that amount in a trust fund account maintained by him or her in a bank or other recognized depository. The funds, less the licensee's commission, shall be disbursed to the artist within 30 days after receipt. However, notwithstanding the preceding sentence, the licensee may retain the funds beyond 30 days of receipt in either of the following circumstances: ...
- (2) When the funds are the subject of a controversy pending before the Labor Commissioner concerning a fee alleged to be owed by the artist to the licensee.
- (b) A separate record shall be maintained of all funds received on behalf of an artist and the record shall further indicate the disposition of the funds.
- (c) If disputed by the artist and the dispute is referred to the Labor Commissioner, the failure of a licensee to disburse funds to an artist within 30 days of receipt shall constitute a "controversy" within the meaning of Section 1700.44.
- (d) Any funds specified in subdivision (a) that are the subject of a controversy pending before the Labor Commissioner under Section 1700.44 shall be retained in the trust fund account specified in subdivision (a) and shall not be used by the licensee for any purpose until the controversy is determined by the Labor Commissioner or settled by the parties.
- (e) If the Labor Commissioner finds, in proceedings under Section 1700.44, that the licensee's failure to disburse funds to an artist within the time required by subdivision (a) was a willful violation, the Labor Commissioner may, in addition to other relief under Section 1700.44, order the following:

(2) Award interest to the prevailing artist on the funds wrongfully withheld at the rate of 10 percent per annum during the period of the violation.

"[I]t is the general rule that an allegation of nonpayment, though necessary to the sufficiency of the complaint, need not be proved, since it is a negative allegation. The plaintiff need only prove the existence of the obligation. The burden of proving payment then rests on the defendant, even though he has denied the allegation of nonpayment." Giesler v. Berman, 6 Cal. App. 3d 919, 930 (1970).

The evidence is undisputed that the sum represented by the Disputed Checks (\$25,982.10) was owed by Respondents (again, without regard to which Respondent) to Adolfo. The evidence about whether the Disputed Checks were tendered (mailed to Mr. or Ms. Alvarez) is equivocal. It is, however, Respondents' burden to prove actual payment by showing that the Disputed Checks were successfully negotiated and it is Respondents' responsibility, pursuant to Section 1700.25(b) to maintain the records needed to avoid this kind of dispute by, for example, maintaining contemporaneous records of checks that had cleared.

Respondents could have met their burden by submitting copies of cancelled checks or of their bank records, by subpoening and submitting bank records of Adolfo or of Mr. or Ms. Alvarez or by providing copies of Respondents' bank statements. It is not clear, despite the Parties' agreement at the close of the December 3, 2015 hearing, why none of this was done.

Nevertheless, it was not, and accordingly the record stands on the basis of the evidence submitted on December 3, 2015.

It appears more likely than not that the three Disputed Checks (totaling \$9,273.35) drawn on the "RPM Talent" account with Bank of America were negotiated; the bank records appear authentic (and never were challenged by Mr. Alvarez other than by innuendo) and suffice to show payment.

The remaining six Disputed Checks (totaling \$16,708.75) drawn on RPM's account with Chase, however, even if they were tendered, do not appear to have been negotiated: taking at face value the documents Respondents provided that purport to be Chase records, no bank stamp appears on any of the checks and no posting date is shown. The fact that the

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1	checks were accessible on-line to Respondents (assuming that is the case) begs the question of		
2	how Chase could make them available on-line if they had not been deposited by someone but		
3	there simply is not enough evidence that any of the six Disputed Checks actually was deposite		
4	by Mr. or Ms. Alvarez or by Adolfo to warrant the conclusion that Adolfo was paid.		
5	That said, there is no evidence of "willfulness" here (see § 1700.25(e) that would justif		
6	a finding that the sums were wrongfully withheld and therefore to warrant an award of interest		
7	V.		
8	ORDER		
9	The relief sought in the Petition is granted as follows:		
10	Adolfo Alvarez, an individual, shall recover, jointly and severally, from Tiffany		
11	Atwood, an individual; and RPM Talent Group / The Agency, LLC, a California limited		
12	liability company, the sum of: \$16,708.75.		
13			
14	Respectfully submitted:		
15	- 1 20×1/		
16	Dated: October 3.2016 DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations,		
17	State of California		
18			
19	By: 1502 Love		
20	Attorney for the Labor Commissioner		
21			
22	Adopted as the determination of the Labor Commissioner:		
23	Dated:		
24	JULIE A. SU		
25	CALIFORNIA LABOR COMMISSIONER		
26			
27			
28			

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14	Respectfully submitted:		
15			
16	Dated: DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations,		
17	State of California		
18			
19	By:		
20	BARTON L. JACKA Attorney for the Labor Commissioner		
21	¥		
22	Adopted as the determination of the Labor Commissioner:		
23	h. 10.03-2010		
24	Dated: 10 03 - 20 14 JULIE A. SU		
25	CALIFORNIA LABOR COMMISSIONER		
26			
27			

PROOF OF SERVICE (C.C.P. 1013)

CASE NAME:

Adolfo Alvarez v. Tiffany Atwood; RPM Talent Group/The Agency, LLC; and Does

1-5 inclusive

CASE NO:

TAC - 30631

I, David Spicer, hereby certify that I am employed in the County of Sacramento, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: DIVISION OF LABOR STANDARDS ENFORCEMENT, Legal Unit, 2031 Howe Avenue, Suite 100, Sacramento, California 95825.

On October 05, 2016 I served the following document:

Determination of Controversy

- A. First Class Mail I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.
- **B.** By Facsimile Service I caused a true copy thereof to be transmitted on the date shown below from telecopier (916) 263-2920 to the telecopier number published for the addressee.
- **C.** By Overnight Delivery I caused each document identified herein to be picked up and delivered by Federal Express (FedEx), for collection and delivery to the addressee on the date shown below following ordinary business practices.
- **D.** By Personal Service I caused, by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and at the address(es) set forth below.
- E. By Certified Mail I caused each such envelope, with fully prepaid postage thereon for certified mail, to be deposited in a recognized place of deposit of the U.S. mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.

Type of Service

<u>Addressee</u>

E

Mark A. Brifman Brifman Law Corporation 15545 Devonshire St. Mission Hills, CA 91345

Tiffany Atwood 239 N. California Street Burbank, CA 91505

RPM Talent Group / The Agency, LLC c/o Tiffany Atwood, Agent for Service 2600 W. Olive Avenue, 5th Floor Burbank, CA 91505

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 5, 2016 at Sacramento, California.

David Spicer

Assistant to Barton Jacka

Burbank, CA 91505



2. Article Number (Transfer from service label)

Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery Collect on Delivery
- Collect on Delivery Restricted Delivery Insured Mail
- Insured Mail Restricted Delivery
- (over \$500)
- ☐ Priority Mail Express® ☐ Registered Mail™
- Registered Mail Restricted Delivery
 Return Receipt for
- Merchandise Signature Confirmation™
 - Signature Confirmation Restricted Delivery