

1 DIVISION OF LABOR STANDARDS ENFORCEMENT

2 Department of Industrial Relations

3 State of California

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8 **BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT**

9 **DEPARTMENT OF INDUSTRIAL RELATIONS**

10 **STATE OF CALIFORNIA**

11 Case No.: TAC 24166

12 JAMES BABSON,

13 Petitioner,

14 v.

15 DIVERSE TALENT GROUP, INC., a California
16 corporation,

17 Respondent.

**DETERMINATION OF
CONTROVERSY (LABOR CODE §
1700.44(a))**

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DETERMINATION

I.

INTRODUCTION

James Babson’s August 26, 2011 petition (the “Petition”) against Diverse Talent Group, Inc. (“DTG”), a California corporation (Mr. Babson and DTG collectively the “Parties”) to determine controversy pursuant to Section 1700.44 of the Labor Code was heard on July 27, 2012 in the Los Angeles office of the Labor Commissioner (the “Labor Commissioner”), Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. Barton L. Jacka, an attorney for the Labor Commissioner from the Sacramento office, heard the matter on assignment by the Labor Commissioner.

Mr. Babson appeared; he was not represented by counsel. No officer, director, employee, attorney or other person appeared for DTG and no witness appeared offering to proffer testimony for DTG. DTG, however, was served by mail on June 25, 2012 with the June 25, 2012 notice of hearing, through Christopher Nassif, at: 9911 W. Pico Boulevard, #350 West Lobby, Los Angeles, CA 90035; 8750 Wilshire Boulevard, #301, Beverly Hills, CA 90211; 19016 Devenport Lane, Tarzana, CA 91356; 7055 Trolleyway Street, Los Angeles, CA 90293; and 8550 Balboa Boulevard, Suite 200, Los Angeles, CA 91325; and through Neil Evans at: Law Offices of Neil Evans, 3351-D Riverside Drive, #612, Sherman Oaks, CA 91423. Certified mail receipts showed that Mr. Nassif had accepted service at the Devenport Lane address and that Mr. Evans had accepted service at the Riverside Drive address.

II.

FACTS

A. Allegations of the Petition.

The Petition alleges in pertinent part that Mr. Babson is an “artist” as defined in Section 1700.4 of the Labor Code, residing in Los Angeles County, California and that DTG was acting as a “talent agency”. The Parties entered into a contract (which was not provided with the

1 Petition or at the hearing)¹ that is alleged to govern the controversy between them. The
2 Petition then alleges:

- 3 • Payment for commercial voice-over services by Mr. Babson were paid
4 by BBDO to DTG;
- 5 • DTG was to take its 10% commission from these payments and pay the
6 remaining 90% to Mr. Babson;
- 7 • DTG cashed July 1, 2011, July 8, 2011, July 25, 2011 and July 26, 2011
8 checks from BBDO and retained the funds but never remitted to Mr. Babson the 90% of
9 these funds that were owed;
- 10 • DTG has “refused to commit to any payment date or schedule.”

11 **B. Mr. Babson’s testimony.**

12 Approximately in 2011, Mr. Babson and DTG, through Adrienne McWhorter, entered
13 into an oral agreement for DTG to serve as Mr. Babson’s talent agent. In return for its services
14 to Mr. Babson, DTG was to receive a 10% commission on Mr. Babson’s “gross” earnings from
15 jobs procured by DTG. Mr. Babson’s understanding was that money was to be paid to DTG,
16 that DTG would put the money into trust, retain its 10% commission and send the rest to him.

17 In June 2011, Mr. Babson obtained a job through DTG whereby he would do “voice-
18 over” work for two pet food commercials to be broadcast nationally. The commercials were to
19 be produced by BBDO West for the agency BBDO San Francisco. Pursuant to two agreements
20 (only one of which Mr. Babson adduced – dated June 15, 2011 between himself and BBDO
21 West), DTG was to receive from Talent Partners Commercial Services LLC (“TPCS”) (Mr.
22

23
24 ¹ The Petition identifies a July 1, 2011 written contract that it alleges is the subject of the dispute between the
25 Parties, but this allegation is apparently incorrect. Two items are attached to the Petition: (1) exhibit “A.1”
26 appears to be a record of Mr. Babson’s year to date earnings pertaining to BBDO San Francisco and exhibit “A.2”
27 appears to be a “standard employment contract for television commercials between Mr. Babson and BBDO West
28 (as producer) for BBDO San Francisco (as agency) identifying DTG as the party to receive payments on Mr.
Babson’s behalf.

1 Babson's employer of record for the work) the payments for Mr. Babson's work – which
2 payments were to include residuals to be paid when the commercial aired.

3 Mr. Babson performed the work; between July 1-26, 2011, BBDO West paid Mr.
4 Babson a total of \$6,757.16; this sum was sent to TPCS, which withheld taxes and then
5 tendered to DTG eight checks made out to "James Babson c/o Diverse Talent Group", totaling
6 \$5,327.01.

7 None of this sum was tendered by DTG to Mr. Babson. Mr. Babson inquired of several
8 occasions about the sums owed to him and was advised by various persons – John Boggs
9 (counsel for DTG and for Christopher Nassif, NTG's agent for service of process and apparent
10 principal), Natalie Niewerth (an associate of Mr. Nassif's) and Neil Evans (counsel for DTG) –
11 that DTG was having financial difficulties and would pay the sums owed. At one point, Mr.
12 Boggs offered a payment plan to Mr. Babson, which offer he did not accept.

13 On September 26, 2011, Mr. Babson wrote to HCC Surety and made a claim for
14 \$4,794.00 against DTG's bond (issued by HCC Surety) with the Labor Commissioner. HCC
15 responded on October 31, 2011 to Mr. Babson and to other persons with claims against DTG:
16 because the claims exceeded the \$38,067.30 available, the claimants were offered payments
17 based on the ratio of their respective claims to the total amount claimed on DTG's bond.
18 Accordingly, Mr. Babson was offered \$3,684.91 on his claim, accepted it and was paid that
19 sum by HCC Surety.

20 In addition, Mr. Babson contacted TPCS and was able to get all further payments from
21 BBDO West sent directly from TPCS to him instead of to DTG.

22 III.

23 LAW

24 Labor Code Section 1700.44(a) states: "In cases of controversy arising under this
25 chapter [4, of Part 6 of Division 2 of the Labor Code], the parties involved shall refer the
26 matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject
27 to an appeal within 10 days after determination, to the superior court where the same shall be
28 heard de novo. To stay any award of money, the party aggrieved shall execute a bond

1 approved by the superior court in a sum not exceeding twice the amount of the judgment. In all
2 other cases the bond shall be in a sum of not less than one thousand dollars (\$1,000) and
3 approved by the superior court.”

4 Pursuant to Section 1700.25:

5 (a) A licensee who receives any payment of funds on behalf of an artist shall
6 immediately deposit that amount in a trust fund account maintained by him or her in a
7 bank or other recognized depository. The funds, less the licensee’s commission, shall
8 be disbursed to the artist within 30 days after receipt. However, notwithstanding the
9 preceding sentence, the licensee may retain the funds beyond 30 days of receipt in
10 either of the following circumstances: ...

11 (2) When the funds are the subject of a controversy pending before the
12 Labor Commissioner concerning a fee alleged to be owed by the artist to the licensee.

13 ...

14 (b) A separate record shall be maintained of all funds received on behalf of an
15 artist and the record shall further indicate the disposition of the funds.

16 (c) If disputed by the artist and the dispute is referred to the Labor
17 Commissioner, the failure of a licensee to disburse funds to an artist within 30 days of
18 receipt shall constitute a "controversy" within the meaning of Section 1700.44.

19 (d) Any funds specified in subdivision (a) that are the subject of a controversy
20 pending before the Labor Commissioner under Section 1700.44 shall be retained in the
21 trust fund account specified in subdivision (a) and shall not be used by the licensee for
22 any purpose until the controversy is determined by the Labor Commissioner or settled
23 by the parties.

24 (e) If the Labor Commissioner finds, in proceedings under Section 1700.44, that
25 the licensee's failure to disburse funds to an artist within the time required by
26 subdivision (a) was a willful violation, the Labor Commissioner may, in addition to
27 other relief under Section 1700.44, order the following:

28 ...

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

3 The evidence is undisputed that DTG had an obligation to deposit into a trust fund
4 account all sums paid by TPCS for Mr. Babson and then within thirty days to disburse those
5 sums, less DTG's 10% commission, to Mr. Babson. The evidence on whether DTG's 10% is
6 based on the gross (i.e., before taxes were withheld) sum paid to Mr. Babson or on the net (i.e.,
7 after taxes were withheld) sum is conflicting:

- 8 • The correspondence between Mr. Babson on the one hand, and DTG and HCC
9 Surety on the other, indicates that Mr. Babson acted as if DTG was entitled to
10 retain \$537.20 – i.e., 10% of the \$5,327.01 after-tax sum paid by TPCS to DTG.
- 11 • The Petition, at ¶ 5 and Mr. Babson's testimony, however, lead to the
12 conclusion that DTG was entitled to retain \$675.72 – 10% of the \$6,757.16
13 before-tax sum paid by BBDO West to TPCS.

14 The latter appears to be more likely the case. Calculating DTG's commission based on
15 Mr. Babson's gross pay from BBDO West is more consistent with the allegations of the
16 Petition and with Mr. Babson's sworn testimony at the hearing; it also is more logical: sums
17 withheld from paychecks for income taxes do not necessarily reflect the amount of tax that the
18 taxpayer will eventually pay. DTG was not going to be able to recoup additional money if Mr.
19 Babson was entitled to a refund and would not be required to pay more money if Mr. Babson
20 turned out to owe additional income tax.

21 Accordingly, DTG was entitled to retain \$675.72 - 10% of the amount paid by BBDO
22 West to TPCS from July 1-26, 2011 – and was required, within 30 days of its receipt of the
23 checks totaling \$5,327.01 from TPCS, to disburse a total of \$4,651.29 to Mr. Babson. From
24 this sum, which DTG did not disburse, Mr. Babson has recovered \$3,684.91 and since at least
25 August 25, 2011, has been owed \$966.38.

26 Mr. Babson has also shown that DTG's not only failed to segregate the sums tendered
27 to it by TPCS as required by Section 1700.25(a) but also willfully "fail[ed] to disburse funds to
28 [him] within [30 days]". (§ 1700.25(e).) Accordingly, pursuant to Section 1700.25(e)(2), Mr.

1 Babson is awarded interest the rate of 10% per year on the \$966.38 since August 26, 2011 – a
2 total in interest of \$111.20

3 **IV.**

4 **ORDER**

5 The relief sought in the Petition is granted as follows:

6 DTG shall pay Mr. Babson: \$966.38 for failure to pay him sums owed to him under his
7 agreement with DTG; and \$111.20 in interest; for a total of: \$1,077.58.

8
9 Dated: October 18, 2012

DIVISION OF LABOR STANDARDS ENFORCEMENT,
Department of Industrial Relations, State of California

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11 By: 
12 BARTON L. JACKA
13 Attorney for the Labor Commissioner
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PROOF OF SERVICE
(C.C.P. 1013)

CASE NAME: *James Babson v. Diverse Talent Group, Inc.*
CASE NO: TAC-24166

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 September 10, 2013 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.

Type of Service

Addressee

A

Christopher Nassif
Diverse Talent Group
9911 W. Pico Boulevard, #350 West Lobby
Los Angeles, CA 90035

Christopher Nassif
Diverse Talent Group
8750 Wilshire Boulevard, #301
Beverly Hills, CA 90211

Christopher Nassif
Diverse Talent Group
19016 Devenport Lane
Tarzana, CA 91356

Christopher Nassif
Diverse Talent Group
7055 Trolleyway Street
Los Angeles, CA 90293

Christopher Nassif
Diverse Talent Group
8550 Balboa Boulevard, Suite 200
Los Angeles, CA 91325

Christopher Nassif
Diverse Talent Group
9250 Wilshire Boulevard
Beverly Hills, CA 90212

Neil Evans
Law Offices of Neil Evans
13351 D Riverside Drive, #612
Sherman Oaks, CA 91423

James Babson
1230 ½ N. Hoover Street
Los Angeles, CA 90029

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 10, 2013 at Sacramento, California.



David Spicer
Assistant to Barton Jacka