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2 STATE OF CALIFORNIA
3 DEPARTMENT OF INDUSTRIAL RELATIONS
4 DIVISION OF LABOR STANDARDS ENFORCEMENT
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10
11 **BEFORE THE LABOR COMMISSIONER**
12 **OF THE STATE OF CALIFORNIA**

13 JILL WINTERBOTTOM DEMKO,
14 ROBERTO EZZEVALLI, WALTER
15 LEE, KAZ MAYEDA, DUFF MOSES,
16 WILLIAM PERRY, AND JERRY VIVIT,

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18 Petitioners,

19 vs.

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21 CRAIG KOKESH, AN INDIVIDUAL,

22 Respondent.

CASE NO. TAC 9223

**DETERMINATION OF
CONTROVERSY**

23 The above-captioned matter, a Petition to Determine Controversy under Labor
24 Code §1700.44, came on regularly for hearing on October 9, 2008 in Los Angeles,
25 California, before the undersigned attorney for the Labor Commissioner assigned to hear
26 this case. Petitioners JILL WINTERBOTTOM DEMKO, ROBERTO EZZEVALLI,
27 WALTER LEE, KAZ MAYEDA, DUFF MOSES, WILLIAM PERRY AND JERRY
28 VIVIT, (hereinafter, collectively referred to as "Petitioners") appeared represented by
Adam Levin, Esq. of Mitchell Silberberg & Knupp LLP. Respondent CRAIG KOKESH,
AN INDIVIDUAL (hereinafter, "Respondent KOKESH"), who was properly served with

1 the Petition, failed to appear but did file an Answer to the Petition generally denying the
2 allegations of the Petition.

3 Petitioners DUFF MOSES, WILLIAM PERRY and JERRY VIVIT appeared at the
4 hearing as witnesses.

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

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8 **FINDINGS OF FACT**

9 Petitioners, who are storyboard artists, filed a petition against their former talent
10 agency, Artist Logic, Inc., for reimbursement of monies collected and unlawfully withheld
11 (*Ciccati v. Artist Logic, Inc.*, TAC Case No. 4485¹). In that case, we held that Artist
12 Logic, Inc. violated the Talent Agencies Act by promising to procure employment for
13 Petitioners without first having obtained a talent agency license from the Labor
14 Commissioner. We also held that Artist Logic, Inc. violated the Talent Agencies Act after
15 becoming licensed as a talent agent by: (1) failing to immediately deposit payment of
16 funds on behalf of Petitioners in a trust fund account maintained by Artist Logic, Inc. until
17 an accountant was appointed to set up such an account on Petitioners' behalf, (2) failing to
18 pay Petitioners \$376,894.80 in payment of funds less Artist Logic, Inc.'s commissions
19 within 30 days of receipt or anytime thereafter, and (3) failing to maintain a separate
20 record of all funds received on behalf of Petitioners. We ordered payment of the
21 \$376,894.80 unlawfully withheld plus \$57,824.96 in interest on the withheld funds,
22 disgorgement of commissions received by Artist Logic, Inc. as well as \$49,757.79 in
23 reasonable attorney's fees.

24 Petitioners subsequently filed this action on May 19, 2008 against Artist Logic,
25 Inc.'s owner and President, Respondent KOKESH. Petitioners argue that Artist Logic,
26 Inc. and Respondent KOKESH are alter egos such that Respondent KOKESH should be
27 held personally liable for all monies unlawfully withheld by Artist Logic, Inc., interest

28 ¹ A copy of the Labor Commissioner's determination issued in *Ciccati v. Artist Logic, Inc.*, TAC Case No. 4485 is attached to this determination.

1 that has accrued on the withheld earnings, attorney's fees and disgorgement of all
2 commissions received by Artist Logic, Inc.

3 As previously noted, Respondent KOKESH did not appear at the hearing in this
4 matter. He did, however, appear on behalf of Artist Logic, Inc. at the hearing in *Ciccati v.*
5 *Artist Logic, Inc.*, TAC Case No. 4485 where he testified that he opened up a bank
6 account at Bank of America, albeit not the required trust fund account, in Artist Logic,
7 Inc.'s name. Respondent KOKESH also testified that he deposited all monies that came
8 in for Petitioners for work performed into this account but failed to disburse hundreds and
9 thousands of dollars to Petitioners that he collected on their behalf. When money came in
10 for a particular Petitioner, rather than paying the Petitioner for whom the money came in,
11 Respondent KOKESH testified that he paid other artists whom he concluded needed their
12 money sooner. Additionally, Respondent KOKESH testified that he used Petitioners'
13 money to pay overhead expenses for the business because he did not have enough funds to
14 operate Artist Logic, Inc. Respondent KOKESH also used Petitioners' money to pay
15 employee salaries, including paying himself a very generous salary of slightly over
16 \$12,000 a month in 2004 and 2005, a \$180,000 annual salary in 2006 and a \$40,000 salary
17 for January – April, 2007 all while failing to pay Petitioners' their earnings. Respondent
18 KOKESH also testified that he had three business lines of credit which he secured with
19 his \$1.2 million dollar personal home which he bought in May, 2006. Significantly, he
20 admitted that when the Bank of America account was closed, he deposited monies that
21 belonged to Artist Logic, Inc. into his wife's personal bank account.

22 Petitioners submitted into evidence at this hearing a copy of a Tolling Agreement
23 entered into with Artist Logic Inc. and Respondent KOKESH on April 2, 2007 agreeing to
24 toll all applicable statute of limitations while the parties worked out a payment plan for
25 repayment of the monies owed to Petitioners. Notably, two signature lines appear on the
26 tolling agreement; one for Artist Logic, Inc. by Craig Kokesh, President and another for
27 Respondent KOKESH as a separate party.

28 Petitioners also submitted as evidence at this hearing an email from Respondent

1 KOKESH suggesting that his wife's signature was needed to make changes to the Artist
2 Logic, Inc. bank account. Additionally, an email from Respondent KOKESH to
3 Petitioners' counsel was produced showing that Respondent was moving money from a
4 personal account into Artist Logic, Inc's bank account in order to pay off some of his debt
5 to Petitioners.

6 Petitioners also submitted declarations establishing the amounts their records show
7 were unlawfully withheld by Artist Logic, Inc.

8 Lastly, Petitioners ask us to take administrative notice of the testimony and
9 evidence presented at the *Ciccati v. Artist Logic, Inc.*, TAC Case No. 4485 hearing.

10 CONCLUSIONS OF LAW

11 As previously stated, Petitioners seek to hold Respondent KOKESH individually
12 liable for earnings that were unlawfully withheld from them by Respondent KOKESH'S
13 company, Artist Logic, Inc. Petitioners also seek interest on the withheld earnings,
14 disgorgement of commissions paid to Respondent KOKESH and attorney's fees.

15 Alter Ego Theory

16 Petitioners argue that under the applicable law, Respondent KOKESH is the alter
17 ego of Artist Logic, Inc. and therefore, should be held liable for all debts owed to
18 Petitioners by Artist Logic, Inc., including those discussed in *Ciccati v. Artist Logic, Inc.*,
19 TAC Case No. 4485.

20 Ordinarily, a corporation is regarded as a legal entity,
21 separate and distinct from its stockholders, officers and
22 directors, with separate and distinct liabilities and
23 obligations. [Citations omitted]. A corporate identity
24 may be disregarded-the "corporate veil" pierced-where
25 an abuse of the corporate privilege justifies holding the
26 equitable ownership of a corporation liable for the
27 actions of the corporations. [Citations omitted]. Under
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the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations omitted]. The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds.[Citations omitted].

In California, two conditions must be met before the alter ego doctrine will be invoked. First, there is such a unity of interest in ownership between the corporation and its equitable owner that the separate personalities of the corporation and the sole shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question, are treated as those of the corporation alone.[Citations omitted]. Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.[Citations omitted]. Other factors which

1 have been described in the case law include inadequate
2 capitalization, disregard of corporate formalities, lack
3 of segregation of corporate records, and identical
4 directors and officers.” [Citations omitted].

5 *Sonora Diamond Corp. v. The Superior Court of Tuolumne County* (2000) 83 Cal.App.4th
6 523, 538-539.

7 The evidence presented in this matter as well as the evidence presented in the
8 *Ciccati v. Artist Logic, Inc.*, TAC Case No. 4485 hearing, of which we take administrative
9 notice, establishes that Respondent KOKESH is the alter ego of Artist Logic, Inc. for
10 several reasons.

11 First, Respondent KOKESH was the only owner and officer of Artist Logic, Inc.
12 For a great deal of its representation of Petitioners, Artist Logic, Inc. was operated out of
13 Respondent KOKESH’S home in Redondo Beach and later in Orange County.

14 Second, Respondent KOKESH admitted that he commingled Artist Logic, Inc.’s
15 money with his wife’s personal bank account on at least one occasion. He also admitted
16 he held several business credit lines for Artist Logic, Inc. secured by his personal home.
17 Additionally, evidence was introduced showing that Respondent KOKESH treated the
18 Artist Logic, Inc. bank account as his personal bank account as evidenced by the fact that
19 his wife was also a signatory to the account.

20 Third, Respondent KOKESH admitted that he failed to adequately capitalize Artist
21 Logic, Inc. He explained that he failed to disburse payments to Petitioners within 30 days
22 or at all so that he could pay Artist Logic Inc.’s business overhead expenses and continue
23 to run the company.

24 Lastly, evidence was presented showing that Respondent KOKESH held himself
25 out to be liable for the debts of the corporation, Artist Logic, Inc. Specifically, Respondent
26 KOKESH entered into a tolling agreement in his individual capacity along with Artist
27 Logic, Inc. and Petitioners. Respondent KOKESH also moved personal funds into an
28 Artist Logic, Inc. account in order to pay off some of Artist Logic Inc.’s debt to

1 Petitioners.

2 In sum, the evidence presented at both hearings establishes that Respondent
3 KOKESH and Artist Logic, Inc. are one in the same. The aforementioned factors show the
4 unity of interest in ownership between Artist Logic, Inc. and its equitable owner,
5 Respondent KOKESH, such that their separate personalities do not in reality exist.
6 Moreover, it would be unjust to hold only Artist Logic, Inc. liable for the failure to pay
7 Petitioners their earnings when in reality, Respondent KOKESH was the one making the
8 decisions to unlawfully withhold such earnings from Petitioners. Additionally, it was
9 Respondent KOKESH who decided he would receive a personal salary of slightly over
10 \$12,000 a month in 2004 and 2005, \$180,000 in 2006 and \$40,000 for January – April,
11 2007 rather than pay Petitioners their earnings. Based on all these factors, Artist Logic,
12 Inc.'s corporate veil should be pierced and Respondent KOKESH should be held liable for
13 all monies unlawfully withheld from Petitioners.

14 **Disgorgement of Commissions and Attorney's Fees**

15 While Petitioners would normally be entitled to disgorgement of commissions
16 received by Respondent CRAIG KOKESH, AN INDIVIDUAL (as alter ego of Artist
17 Logic, Inc.) for the one year period preceding the filing of the instant Petition against
18 Respondent CRAIG KOKESH, AN INDIVIDUAL (May 19, 2007 – May 19, 2008),
19 Petitioners have not presented evidence establishing the amount of commissions received
20 by Artist Logic, Inc. or Respondent CRAIG KOKESH, AN INDIVIDUAL from May 19,
21 2007 up to May 19, 2008. As such, we cannot award disgorgement of commissions
22 received after May 19, 2007.

23 Likewise, we find that Respondent CRAIG KOKESH, AN INDIVIDUAL
24 "willfully" failed to disburse funds to Petitioners in violation of Labor Code §1700.44
25 which would entitle Petitioners to an award of attorney's fees under Labor Code
26 §1700.25(e)(1). But, again, no evidence was presented establishing how much attorney
27 time was spent on prosecuting the instant action. Accordingly, we do not award
28 attorney's fees in this action.

1 **ORDER**

2 Based on the foregoing, we hold that Petitioners are entitled to an award against
3 Respondent CRAIG KOKESH, AN INDIVIDUAL as follows:

4 1. Petitioners are entitled to those funds wrongfully withheld from them by
5 Respondent CRAIG KOKESH, AN INDIVIDUAL. The total amount is **\$376,894.80** and
6 is broken down in the table below.

7 2. Petitioners are entitled to interest on the funds wrongfully withheld at the
8 rate of 10 percent per annum during the period of the violation per Labor Code
9 §1700.25(e)(2). Interest will be computed from February 6, 2007, the date that Petitioners
10 confronted Respondent CRAIG KOKESH, AN INDIVIDUAL about not receiving
11 payments on time to the date this decision is issued by the Hearing Officer since the funds
12 wrongfully withheld still have not been returned to Petitioners. The total amount is
13 **\$77,960.43** and is broken down in the table below.

14 3. The April 2004 oral contract and the written agency agreement entered into
15 between Petitioners and Respondent CRAIG KOKESH, AN INDIVIDUAL (as alter ego
16 of Artist Logic, Inc.) are both deemed void *ab initio*. Severability under *Marathon*
17 *Entertainment Inc. v. Rosa Blasi* (2008) 42 Cal.4th 974 is not appropriate in this matter.

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Petitioner	Earnings Unlawfully Withheld	Interest on Earnings 2/6/07 to 3/2/09	TOTAL DUE
Ezevalli	\$36,456.92	\$7,541.09	\$43,998.01
Moses	\$45,231.40	\$9,356.08	\$54,587.48
Perry	\$17,971.34	\$3,717.36	\$21,688.70
Mayeda	\$56,813.14	\$11,751.76	\$68,564.90
Lee	\$87,672.14	\$18,134.92	\$105,807.06
Demko	\$18,617.36	\$3,850.99	\$22,468.35
Vivit	\$114,132.50	\$23,608.23	\$137,740.73
TOTAL	\$376,894.80	\$77,960.43	\$454,855.23

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DATED: March 3, 2009

Respectfully submitted,

By: Edna Garcia Earley
EDNA GARCIA EARLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated:

March 2, 2009

By:

Angela Bradstreet

ANGELA BRADSTREET
State Labor Commissioner

ATTACHMENT

1 Respondent ARTIST LOGIC, A California Corporation (hereinafter, "Respondent")
2 appeared represented by Craig Kokesh, its President and John M. Houkom 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.

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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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25 ¹ Respondent's original report of invoices unpaid to the artists was attached as an exhibit to
26 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.

27 ² This amount is the revised amount due to errors which were pointed out by Respondent
28 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

5
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 _____
26 ³ Id.

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.

25
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:

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23 If the Labor Commissioner finds, in proceedings under
24 Section 1700.44, that the licensee's failure to disburse
25 funds to an artist within the time required by
26 subdivision (a) was a willful violation, the Labor
27 Commissioner may, in addition to other relief under
28 Section 1700.44, order the following: (2) Award

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:

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

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

18 Disgorgement and Severability

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

27 ///

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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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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
EDNA GARCIA EARLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

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

