

1 STATE OF CALIFORNIA  
2 DEPARTMENT OF INDUSTRIAL RELATIONS  
3 DIVISION OF LABOR STANDARDS ENFORCEMENT  
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BEFORE THE LABOR COMMISSIONER

STATE OF CALIFORNIA

INTERNATIONAL CREATIVE  
MANAGEMENT PARTNERS LLC dba  
ICM PARTNERS,

Petitioner,

vs.

COREY HOLCOMB and BAYMAN  
PRODUCTIONS, INC.,

Respondents.

CASE NO.: TAC-47847

**DETERMINATION OF CONTROVERSY**

**I. INTRODUCTION**

The above-captioned matter, a Petition to Determine Controversy under Labor Code section 1700.44, was heard over three days of hearing, ending on October 17, 2019 in Long Beach, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner, INTERNATIONAL CREATIVE MANAGEMENT PARTNERS LLC, dba ICM PARTNERS (hereinafter, referred to as “ICM”) was represented by L. Katie Machado, Esq. and Jamie O. Kendall of DOLL AMIR & ELEY LLP. Respondents, CORY HOLCOMB and BAYMAN PRODUCTIONS, INC., (hereinafter referred to as “HOLCOMB”) was represented by Holly M. Parker of HMP LAW. The matter was taken under submission and post-trial briefs

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

3 **II. FINDINGS OF FACT**

4 Petitioner, ICM, is a California licensed talent agency. ICM partner, Chris Smith, was  
5 HOLCOMB's primary talent agent involved in this controversy (hereinafter, referred to as  
6 "Smith").

7 Respondent HOLCOMB is a comedian performing extensively in comedy clubs  
8 throughout the United States.

9 In June of 2014, Smith on behalf of ICM, entered into an oral talent agency agreement  
10 with HOLCOMB, in which ICM agreed to exclusively represent HOLCOMB and provide talent  
11 agency services in exchange for 10% of HOLCOMB's gross earnings for all performances in the  
12 entertainment industry (hereinafter "Oral Agreement").

13 In 2014 and 2015, the parties' performed under the Oral Agreement. ICM procured and  
14 negotiated HOLCOMB's comedy engagements throughout the country and in exchange  
15 HOLCOMB paid 10% of his gross earnings to ICM for all of HOLCOMB's performances.  
16 During the course of the Oral Agreement, HOLCOMB paid ICM more than \$110,000 in  
17 commission payments for all of his comedy performances.

18 **A. University of North Carolina at Greensboro (UNC)**

19 The first significant problem between the parties arose in the fall of 2015. ICM procured  
20 a one-night engagement for HOLCOMB at the University of North Carolina at Greensboro  
21 (hereinafter "UNC"), scheduled for October 15, 2015. There was conflicting testimony  
22 concerning whether UNC was required to tender payment to HOLCOMB either before or after  
23 the performance. HOLCOMB's road manager Maurice Stafford (hereinafter "Stafford") testified  
24 that UNC was required to compensate HOLCOMB upon his arrival at the venue and the  
25 documents and testimony presented at hearing supported Stafford's account.

26 HOLCOMB and Stafford traveled to the venue and upon their Friday night arrival were  
27 told HOLCOMB's payment for the performance was accidentally locked in a drawer and the  
28

1 person with the key had gone home for the night. As a result, nobody at the venue had access to  
2 HOLCOMB'S payment until the next morning. HOLCOMB was assured by UNC staff his  
3 money was safe and secure and he would be presented with payment the first thing in the  
4 morning.

5 Smith testified he was also assured payment would be tendered to HOLCOMB in the  
6 morning. According to Smith, he told HOLCOMB the payment would not be an issue and  
7 advised him to perform as scheduled. Although HOLCOMB and Stafford traveled to the venue,  
8 and Smith advised HOLCOMB to perform, HOLCOMB ultimately chose not to perform because  
9 UNC could not pay him upon arrival. HOLCOMB cancelled his performance shortly before he  
10 was scheduled to go onstage.

11 HOLCOMB and Stafford traveled home from the UNC event and upon their return  
12 HOLCOMB requested reimbursement for his travel expenses, and half of his unpaid contractual  
13 rate directly from ICM. ICM advised HOLCOMB the cause of nonpayment was because of his  
14 refusal to perform, and any damages he suffered by choosing not to perform should be directed at  
15 UNC and not ICM. It was from this point on, the parties' relationship unraveled.

#### 16 **B. HOLCOMB Stopped Paying Commissions on Club Dates**

17 In or around January 2016, HOLCOMB fell behind on his commission payments to ICM.  
18 On February 16, 2016, four months after ICM rejected HOLCOMB's request to be reimbursed  
19 for the UNC event, HOLCOMB sought to renegotiate the commission structure under the Oral  
20 Agreement. Specifically, HOLCOMB through Stafford, advised Smith that HOLCOMB would  
21 no longer pay commissions on comedy clubs in markets HOLCOMB had previously played in  
22 prior to ICM's representation. On February 16, 2016, Stafford emailed Smith:

23 "Corey told me last night that **he can't continue to pay**  
24 **commissions** on dates (clubs and promoters we already have  
25 relationships with) he can get whether he is with an agency or not.  
26 He stated that he has no problem paying commissions on all dates  
if you are bringing him new opportunities to the table, but that  
hasn't consistently happened yet." [Emphasis added]

27 ///

1 Smith responded:

2 "In response to your last comment about commissioning dates –  
3 ICM has a policy, and it's exclusivity.... It's not an overnight  
4 process, and it is absolutely inhibited when your client does  
5 business behind your back ... I promise you, and I think you know,  
6 that I will always beat more money out of them than you and Corey  
7 can on your own."

8 In sum, Smith confirmed the 10% commission rate was not negotiable and that all dates  
9 performed by HOLCOMB are commissionable whether or not they were procured and negotiated  
10 by ICM.

11 During the next several months, HOLCOMB continued to perform at comedy clubs  
12 procured by ICM, and just as Stafford promised in his February 16, 2016 email to Smith,  
13 HOLCOMB stopped paying commissions on comedy clubs he had performed at prior to ICM's  
14 representation.

### 15 **C. Lyric Theater (Miami, Florida)**

16 On July 7, 2016, ICM procured another engagement for HOLCOMB at the Lyric Theater  
17 in Miami, Florida. Under the terms of the contract negotiated by ICM, the purchaser, Miami  
18 Takeover, LLC, was required to, and did, pay a deposit of \$5,000 for HOLCOMB's services.  
19 Prior to the engagement, the purchaser cancelled the show. Pursuant to the contract's terms, if  
20 the purchaser cancelled the show, the purchaser forfeited its deposit (otherwise known as a "kill  
21 fee") back to the artist.

22 According to ICM, at the time of the purchaser's cancellation, HOLCOMB owed a  
23 balance of approximately \$19,857.27 in back due commissions to ICM for refusing to pay  
24 commissions owed in connection with comedy club dates procured by ICM. Consequently, ICM  
25 retained the \$5,000 kill fee and applied it to pay down HOLCOMB's past due commission  
26 balance.

27 On July 19, 2016, Smith advised Stafford that HOLCOMB hadn't paid commissions on  
28 club dates since January and as a result HOLCOMB owed ICM \$21,091.47 in unpaid  
commissions. Smith further advised Stafford that as a result of HOLCOMB's unpaid commission

1 balance, ICM retained the \$5,000 kill fee to recoup a portion of HOLCOMB's unpaid  
2 commissions.

3 ICM's explanation as to why ICM retained the \$5,000 kill fee infuriated HOLCOMB.  
4 According to HOLCOMB and Stafford, this was ICM "pocketing" HOLCOMB's money.

5 **D. Termination (July 19, 2016)**

6 The combination of ICM's refusal to renegotiate the commission structure for comedy  
7 club dates, and HOLCOMB's belief that ICM was pocketing his kill fee to recoup more than  
8 \$21,000 in unpaid commissions was the proverbial straw that broke the camel's back. In  
9 response to Smith's July 19, 2016 explanation, HOLCOMB terminated the relationship.

10 Within hours of HOLCOMB's termination, ICM sent a protection letter advising  
11 HOLCOMB that notwithstanding the termination of representation, ICM remained entitled to  
12 receive commission on any sums received by HOLCOMB in connection with all engagements  
13 procured, entered into, or negotiated during the term of ICM's representation. In this letter, ICM  
14 also expressly informed HOLCOMB that ICM stood ready, willing, and able to render all agency  
15 services to HOLCOMB, with respect to all engagements for which ICM was entitled to receive a  
16 commission, and would do so upon request.

17 **E. Bell Auditorium (Augusta, Georgia)**

18 After HOLCOMB received the July 19, 2016 protection letter from ICM, the already  
19 broken relationship went from bad to worse. Prior to the July 19, 2016 termination, ICM  
20 procured a one-night engagement for HOLCOMB on August 13, 2016, at the Bell Auditorium in  
21 Augusta, Georgia. Pursuant to the Performance Agreement, the purchaser, Headliners Live Inc.,  
22 was required to and did pay a deposit of \$10,000 to ICM Partners.

23 The conflicting testimony from both sides concerning this engagement was extensive.  
24 HOLCOMB already incensed with ICM for retaining the Lyric Theater kill fee did not want ICM  
25 retaining another deposit. As a result, from July 21-27, Stafford sent Smith multiple emails  
26 demanding ICM return the \$10,000 deposit to either the promoter or to HOLCOMB directly.  
27 The parties were in agreement that HOLCOMB refused to promote the Bell Auditorium show

1 unless and until ICM either returned the deposit to HOLCOMB or the promoter.

2 ICM refused to return the deposit and instead held the deposit in trust in compliance with  
3 the terms of the Performance Agreement until the “date played”. As a result of HOLCOMB’s  
4 continued refusal to promote the show, on July 29, 2016, the purchaser canceled the engagement.  
5 On August 1, 2016, ICM returned the deposit back to the purchaser. At the hearing, HOLCOMB  
6 did not dispute the purchaser was entitled to its deposit back. Rather, HOLCOMB questioned  
7 whether the \$10,000 was actually returned to the purchaser. The evidence provided at hearing, in  
8 the form of both bank documents and direct testimony by ICM’s Senior Vice-President of  
9 Administration, Erin Oremland, unequivocally established the deposit was returned to the  
10 purchaser.

11 On January 24, 2018, ICM filed this Petition to Determine Controversy. By the Petition,  
12 ICM seeks \$50,717.67 in past due commissions which is 10% of the compensation received by  
13 HOLCOMB for commissionable engagements procured by ICM prior to the termination of the  
14 agency agreement.

15 HOLCOMB makes several arguments in response to the Petition. First, HOLCOMB  
16 argues he is not required to pay commissions on preexisting comedy club relationships  
17 HOLCOMB had prior to retaining ICM. Second, HOLCOMB argues he is not required to pay  
18 for post-termination commissions for dates performed after termination. Finally, HOLCOMB  
19 argues ICM’s failure to perform under the oral agreement, excuses HOLCOMB from paying  
20 commissions both during the agency relationship and after termination.

### 21 22 **III. LEGAL ARGUMENT**

23 Labor Code section 1700.4(b) defines “artist” and states, “‘artists’ means actors and  
24 actresses rendering professional services on the legitimate stage ... and other artists rendering  
25 professional services in ... other entertainment enterprises.” It is undisputed that petitioner is an  
26 “artist” within the meaning of Labor Code section 1700.4(b). It was stipulated that ICM is a  
27 California licensed talent agency.

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

8 The issues in this case are as follows:

- 9 A. Are “comedy club” dates commissionable for performances prior to and after  
10 termination?  
11 B. Is HOLCOMB entitled to any credits for ICM’s actions in connection with the UNC, The  
12 Lyric Theater or Bell Auditorium Engagements?  
13 C. Is HOLCOMB excused from paying commissions for ICM’s alleged failure to perform  
14 under the Oral Agreement?

15  
16 **A. Are “Comedy Club Dates” Commissionable?**

17 The essential elements of a contract were present - parties capable of contracting who  
18 consented with a lawful object and sufficient consideration. (Civil Code, “C.C”, §1550.) The  
19 parties’ agreement for the procurement of employment in the entertainment industry was for a  
20 lawful purpose and the understanding that ICM would seek 10% commission for engagements  
21 procured is sufficient consideration. HOLCOMB’s acceptance of these terms established a  
22 “meeting of the minds”. Consequently, a contract was formed. (C.C. §1621)

23 The question here is whether the parties intended that ICM be entitled to commission  
24 comedy club dates. The answer, based on the conduct of the parties, is yes.

25 The following February 16, 2016 email from HOLCOMB’s representative, Maurice  
26 Stafford, sent to Smith was dispositive:

1           “Corey told me last night that **he can’t continue to pay**  
2           **commissions** on dates (clubs and promoters we already have  
3           relationships with) he can get whether he is with an agency or not.  
4           He stated that he has no problem paying commissions on all dates  
5           if you are bringing him new opportunities to the table, but that  
6           hasn’t consistently happened yet.” [Emphasis added]

7           It is undisputed that all of the comedy club dates in which ICM seeks unpaid  
8           commissions were procured prior to the July 19, 2016 termination. It is undisputed that  
9           HOLCOMB paid ICM 10% commission throughout the parties’ relationship up and until January  
10          of 2016 as admitted by Stafford (with four irrelevant exceptions). ICM never agreed to  
11          renegotiate or modify any of these original terms.

12          In short, HOLCOMB reaped the benefits for the work performed by ICM, and after  
13          paying commissions for more than a year, unilaterally determined he didn’t want to pay anymore.  
14          Courts have long held, “he who shakes the tree is the one to gather the fruit.” *Willison v. Turner*  
15          89 Cal.App.2d 589 (1949). Certainly, HOLCOMB may terminate a personal services agreement  
16          if he feels that his agent is not providing the services contracted for. But he may not, as he did  
17          here, unilaterally determine he has no further obligation to pay for work already performed.  
18          Therefore, the Oral Agreement and its material terms are enforceable.

19          Further, California Code of Regulations Title 8 § 12001(b) states, “[t]o be entitled to the  
20          payment of compensation after termination of the contract between the artist and the talent  
21          agency, the talent agency shall be obligated to serve the artist and perform obligations with  
22          respect to any employment contract or to extensions or renewals of said employment contract or  
23          to any employment requiring the services of the artist on which such compensation is based.” It  
24          was clear through testimony and documentary evidence that ICM was willing and able to conduct  
25          services on HOLCOMB’s behalf.

26          Consequently, ICM is entitled to commission comedy club dates procured by ICM before  
27          termination, and performed either before or after termination.

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1           **B. Is HOLCOMB entitled to any credits for ICM’s actions in connection with the UNC,**  
2           **The Lyric Theater or Bell Auditorium Engagements?**

3           **1. UNC**

4           HOLCOMB is not entitled to an offset from ICM in connection with this failed  
5 engagement. The Performance Agreement was between HOLCOMB and UNC. ICM was not a  
6 party to this engagement. Accordingly, any cause of action for breach of contract in  
7 HOLCOMB’s favor is properly against UNC, not ICM. To the extent HOLCOMB was damaged  
8 by UNC’s alleged breach of the Performance Agreement, damages are recoverable against UNC  
9 (not as an offset from ICM).

10           **2. Lyric Theater**

11           At the time of the purchaser’s cancellation, HOLCOMB owed a balance of approximately  
12 \$19,857.27 in back due commissions to ICM. Consequently, the \$5,000 kill fee was retained by  
13 ICM and applied to pay down HOLCOMB’s past due commission balance. HOLCOMB is not  
14 owed an offset or credit for the \$5,000 Lyric Theater kill fee retained by ICM.

15           **3. Bell Auditorium**

16           HOLCOMB does not dispute that, in this instance, the purchaser was entitled to its  
17 deposit back. Specifically, on July 21, 2016, Stafford writes an email to Smith and states, “[t]he  
18 \$10k deposit you received in Corey’s name for the Augusta show needs to be returned to Greg  
19 [the promoter Greg Harris] ... give the promoter his money back.” And that is exactly what ICM  
20 did. Instead, HOLCOMB questions whether the \$10,000 was actually returned to the purchaser.  
21 The evidence, in the form of both bank documents and direct testimony by ICM’s Senior Vice-  
22 President of Administration, Erin Oremland, unequivocally established the deposit was returned  
23 to the purchaser. Therefore, HOLCOMB is not entitled to a credit for ICM’s return of the Bell  
24 Auditorium deposit.

25           ///

26           ///

1           **C. Is HOLCOMB excused from paying commissions for ICM's alleged failure to**  
2           **perform under the Oral Agreement?**

3           Finally, HOLCOMB argues ICM's failure to fully perform under the Oral Contract excuses  
4 HOLCOMB from paying commissions. Specifically, HOLCOMB alleges ICM failed to respond  
5 timely to HOLCOMB's inquiries; failed to timely send notifications to HOLCOMB for overdue  
6 commissions; unlawfully retained deposits; and failed to act on HOLCOMB's behalf when UNC  
7 failed to pay HOLCOMB upon arrival. HOLCOMB argues these actions taken collectively excuse  
8 HOLCOMB from further payment of commissions, both during the agency relationship and after  
9 terminations. We are not persuaded.

10           The legal issue is whether ICM's alleged failure to fully perform its contractual obligations  
11 excuse HOLCOMB from further payment of commissions, both during the agreement's term and  
12 following its termination. As we discussed in *Natural Talent, Inc. v. Gavin Dell, et al.*  
13 (Cal.Lab.Comm. Aug. 18, 2004) (TAC Nos. 48-02 & 8-03), while every instance of non-  
14 compliance with a contract's terms constitutes a breach, not every breach, is "material;" that is,  
15 not every breach justifies complete termination of the other party's contractual obligations.  
16 (*Superior Motels, Inc, v. Rinn Motor Hotels, Inc* (1987) 195 Cal.App.3d 1032, 1051 [241  
17 Cal.Rptr. 4871.]

18           Here, even if true, ICM's alleged failure to timely respond to HOLCOMB's inquiries and  
19 their failure to timely send notifications to HOLCOMB for overdue commissions hardly  
20 rises to the level of a material breach. While the failure to timely communicate to a client's  
21 inquires may be frustrating, it does not excuse HOLCOMB's promise to pay 10%  
22 commissions for engagements procured by ICM prior to termination of the Oral Agreement.

23           Moreover, as discussed, we do not conclude ICM unlawfully retained the deposits for  
24 either the Lyric Theater or the Bell Auditorium engagements and therefore ICM was not in  
25 breach of the Oral Agreement. And finally, we do not conclude ICM is responsible for  
26 HOLCOMB's decision not to perform the UNC engagement, as any loss suffered by  
27 HOLCOMB for UNC's alleged failure to pay HOLCOMB upon his arrival is against UNC  
28

1 and not ICM. HOLCOMB's claim that ICM is responsible for 50% of HOLCOMB's lost  
2 earnings is therefore unpersuasive.

3  
4 **IV. ORDER**

5 For the above-stated reasons, IT IS HEREBY ORDERED that Petitioner,  
6 INTERNATIONAL CREATIVE MANAGEMENT PARTNERS LLC, dba ICM PARTNERS is  
7 entitled to 10% commission for all earnings in connection with performances procured by ICM  
8 for Respondent, CORY HOLCOMB and BAYMAN PRODUCTIONS, INC. in the amount  
9 \$49,754.05, plus \$16,371.13 in interest calculated at 10% per annum (January 28, 2017 through  
10 May 13, 2020 [1201 days]) for a total award of \$66,125.18.<sup>1</sup>

11  
12 **IT IS SO ORDERED.**

13  
14 Dated: May 26, 2020

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF LABOR STANDARDS ENFORCEMENT

15  
16 By: \_\_\_\_\_

  
DAVID L. GURLEY,  
Attorney for the Labor Commissioner

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18  
19 **ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER**

20  
21 Dated: May 22, 2020

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF LABOR STANDARDS ENFORCEMENT

22  
23 By: \_\_\_\_\_

  
LILIA GARCIA-BROWER,  
California Labor Commissioner

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26 \_\_\_\_\_  
27 <sup>1</sup> The Order does not include commissions claimed for the West Nyack, New York performance in the  
28 amount of \$963.82 as this engagement, although originally procured by ICM prior to termination, was  
cancelled and renegotiated by HOLCOMB's representatives after termination of the Oral Agreement.

