

1 **DETERMINATION**

2 **I.**

3 **INTRODUCTION**

4 Scott Devine's August 15, 2011 petition (the "Petition") against Diverse Talent Group,
5 Inc. ("DTG"), a California corporation (Mr. Devine and DTG collectively the "Parties") to
6 determine controversy pursuant to Section 1700.44 of the Labor Code was heard on June 7,
7 2012 in the Los Angeles office of the Labor Commissioner (the "Labor Commissioner"),
8 Division of Labor Standards Enforcement, Department of Industrial Relations, State of
9 California. Barton L. Jacka, an attorney for the Labor Commissioner from the Sacramento
10 office, heard the matter on assignment by the Labor Commissioner.

11 Mr. Devine appeared; he was not represented by counsel. DTG's counsel, Neil C.
12 Evans (Law Office of Neil C. Evans) appeared for DTG but no officer, director or employee of
13 DTG or percipient witness for DTG appeared.

14 **II.**

15 **FACTS**

16 **A. Allegations of the Petition.**

17 The Petition alleges in pertinent part that Mr. Devine is an "artist" as defined in Section
18 1700.4(b) of the Labor Code and that DTG was acting as a "talent agency" as defined in
19 Section 1700.4(a). The Parties entered into a contract (which was not provided at the hearing)¹
20 that is alleged to govern the controversy between them. Also attached to the Petition is a July
21

22 ¹ The Petition identifies a May 1, 2011 written contract that it alleges is the subject of the dispute between the
23 Parties, but this allegation is apparently incorrect. The contract attached to the Petition is not the contract between
24 Mr. Devine and DTG that governs their relationship and is the subject of this dispute. Rather, the contract is a
25 "Standard Performer's Agreement" between Mr. Devine and two producers (the "Producers") – with respect to
26 which DTG was the talent agency – that led, as discussed below, to DTG receiving compensation from the
27 Producers for Mr. Devine's services and failing to provide to Mr. Devine his share of those sums, thereby leading
28 to the dispute at hand.

1 21, 2011 letter from DTG to its clients, saying in sum that due to a fraud perpetrated by an
2 “outside consultant”, “clients’ checks sent to DTG were being intercepted and cashed by
3 someone other than a DTG employee and other than the client before DTG received the
4 check.” As a result, according to the letter, DTG had not received monies that were to be used
5 to pay its clients (i.e., persons such as Mr. Devine) and to pay DTG its commissions.

6 **B. Agreement between the Parties as to the facts and the award.**

7 When the hearing commenced, Mr. Devine and Mr. Neil asked the hearing officer to
8 leave so that they could privately try to settle the dispute. The hearing officer acceded to the
9 Parties’ request; he then recommenced the hearing and the Parties stipulated to the facts and
10 conclusion of this Determination, as follows:

11 1. Mr. Devine is an actor signed by DTG for a commercial for AAMCO (AAMCO
12 Transmissions, Inc. and AAMCO National Creative Committee – the Producers that are with
13 Mr. Devine parties to the Standard Performer’s Agreement referenced in and attached to the
14 Petition).

15 2. Pursuant to the Standard Performer’s Agreement between Mr. Devine and the
16 Producers, he was to receive \$500.00 for a day of shooting a commercial and \$2,500.00 for a
17 five-year “buyout” if the commercial aired.²

18 3. According to the agreement between Mr. Devine and DTG, DTG was required, within
19 30 days of receiving the check from the Producers, to forward to Mr. Devine all sums he
20 received in connection with the commercial, minus DTG’s 20% commission.

21 4. The commercial was shot, the commercial aired and accordingly, the producers
22 tendered a \$3,000.00 check, dated May 17, 2011, to DTG; while it is not known when this
23 check was received, it was cashed on June 6, 2011.

24 5. DTG never paid Mr. Devine the \$2,400.00 (\$3,000.00 minus 20% commission) it owed
25 him.

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² These terms are consistent with the written terms of the Standard Performer’s Agreement attached to the Petition.

1 Mr. Evans, as DTG's counsel, would not stipulate to a finding that DTG's failure to pay
2 was "willful" but did, on DTG's behalf, agree that interest at the annual rate of 10%, from July
3 6, 2011 (30 days from the date the check was cashed), could be added to the award.

4 **III.**

5 **LAW**

6 Labor Code Section 1700.44(a) states: "In cases of controversy arising under this
7 chapter [4, of Part 6 of Division 2 of the Labor Code], the parties involved shall refer the
8 matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject
9 to an appeal within 10 days after determination, to the superior court where the same shall be
10 heard de novo. To stay any award of money, the party aggrieved shall execute a bond
11 approved by the superior court in a sum not exceeding twice the amount of the judgment. In all
12 other cases the bond shall be in a sum of not less than one thousand dollars (\$1,000) and
13 approved by the superior court."

14 Pursuant to Section 1700.25:

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

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

23 ...

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

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

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

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

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

13 The Parties agree that within 30 days of (at least) the date on which the \$3,000.00 check
14 from the producers was cashed (i.e., by July 6, 2011), DTG should have disbursed to Mr.
15 Devine his 80% share of that check.

16 Although DTG has stipulated to an award of interest on the \$2,400.00 principal, Mr.
17 Devine has proven that DTG's "failure to disburse funds to [him] within [30 days] was a
18 willful violation. The check is endorsed in the name of DTG and DTG provided no evidence
19 of any reason for its failure to disburse to Mr. Devine the sums owed him. Accordingly, its
20 failure to disburse the sum was "willful". In addition, in light of DTG apparently not having
21 the \$2,400.00 available to pay Mr. Devine at this time, DTG appears to have violated Labor
22 Code Section 1700.25(a) by failing to keep the funds in a separate account. Accordingly, DTG
23 owes Mr. Devine a total of \$294.57 in interest.

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IV.

ORDER

The relief sought in the Petition is granted as follows:

DTG shall pay Mr. Devine: \$2,400.00 for failure to pay him sums owed to him under his agreement with DTG; and \$294.57 in interest; for a total of: \$2,694.57.

Dated: October 2, 2012

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

By: Barton L. Jacka

BARTON L. JACKA

Attorney for the Labor Commissioner

