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

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

JANE DOE aka/pka Nicole Doshi, an individual,

Petitioner,

v.

TWICE BAKED MEDIA, INC. dba MOTLEY MODELS, a California Corporation, and DAVID CLIFFORD BACON II, an individual,

Respondents.

CASE NO.: TAC - 52887

DETERMINATION OF CONTROVERSY

I. INTRODUCTION

From February 5 to February 6, 2024, the above-captioned matter, a Petition to Determine Controversy under Labor Code section 1700.44, came before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner Jane Doe aka/pka Nicole Doshi ("Doshi" or "Petitioner") was represented by Allan Gelbard. Respondents Twice Baked Media, Inc. dba Motley Models and David Clifford Bacon II (hereinafter, collectively referred to as "Respondents") were represented by Richard Freeman. Petitioner Doshi and Respondent Bacon both testified. Suzette York also testified for Respondent.

The parties submitted post-hearing briefing on March 12 and March 13, 2024. The matter was taken under submission. Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following determination.

II. FINDINGS OF FACT

1. This case arises out of a dispute between Petitioner Doshi, an artist in the adult entertainment industry, and her talent agency Respondent Twice Baked Media Inc. dba Motley Models (Motley). Motley was led by Respondent David Bacon II aka Dave Rock (Bacon), who operated Motley out of his home (Motley Manor) since 2015.

Motley's Standard Contract and Schedule of Fees

2. Like all licensed talent agencies operating in California, Motley's standard contracts with the artists it represented and the schedule of fees it charged and collected as part of its representation had to be approved by the California Labor Commissioner's Office.

3. Pursuant to this requirement, Suzette York, the executive assistant to Bacon (and his mother), emailed the Labor Commissioner's Office on November 2, 2020 with a request to approve a new schedule of fees for Motley, altering the schedule previously approved in June 2020. The proposed schedule of fees included a disclosure of a "service/booking fee," described as follows:

> Artist acknowledges disclosure of a separate agency service/booking fee that will be collected in an agreement between "Agency and Producer." This service/booking fee is a preset fee accepted by the Production Company, Casting Company and/or Director or Representative requesting such booking for agency services provided. Service/Booking fees are not included, or any part of the Artist fees negotiated nor paid to the Artist.

York also attached the Schedule of Fees from another agency (ATM/LA) that the Labor Commissioner previously approved with the same booking fees' language.

4. As context, Bacon testified that Motley had been assessing booking fees since the inception of the agency as was industry practice. The booking fee was generally a $100 flat fee Motley charged the production company each time it booked an artist for a shoot. According to Bacon, "The producer pays us the booking fee for our ongoing support of the booking to make sure that [the artist] is prepared and that she is going to show up on set prepared as possible." Motley received the booking fees directly from the production company. This is in contrast with Motley's general practice of having a production company pay the artist other compensation directly, after which the artist provides the agreed upon commissions to Motley. Although Motley had not included booking fees previously in its schedule of fees, Bacon heard in an adult entertainment business group meeting in 2020 that the Labor Commissioner required disclosure of such fees in the Schedule of Fees—hence, his later request through York to the Labor Commissioner's Office to approve a new schedule of fees.

5. On November 3, 2020, Mario Abungin from the Labor Commissioner's Office responded to York that Motley must remove the booking fee language from the schedule of fees and move the language to its exclusive contract. Abungin instructed York to re-send the exclusive contract for the Labor Commissioner to review with the additional language. Abungin reiterated the same message to Bacon a few days later. He informed Bacon to notify any artist who received the schedule of fees with booking fees that the form was not approved.[1]

6. On November 9, 2020, Abungin emailed York and Bacon regarding the Labor Commissioner's review of the new exclusive contract, which included booking fees. He relayed the following response from the legal unit:

> This is a controversial issue. These additional contract provisions are a direct result of a recent Determination and legal needs to discuss whether this can be approved. Please advise the agencies that legal is reviewing the language and will get back to them late this week or next week. We really do need to discuss this internally before responding.

[1] Abungin responded to York as if she were submitting a Schedule of Fees for ATM/LA and Motley. She later clarified she submitted the ATM/LA language as a comparison point.

Abungin continued that he or the legal department would be in touch and for Motley to wait for the legal department's response.

7. On December 9, 2020, Abungin emailed York and Bacon stating that the legal department was experiencing a backlog and that the contracts were pending review. He assumed the review would take another 1-2 weeks.

8. On June 25, 2021, Abungin notified York and Bacon that the contract had been reviewed but not approved. He included a contract revision letter with redline changes. According to Bacon's and York's testimony, the revision letter removed the booking fee language from the exclusive contract, after having previously excised it from the proposed schedule of fees.[2]

9. On July 1, 2021, York responded with the revised exclusive contracts based on the Labor Commission's edits. She also asked whether the executed contracts with the nonapproved language would be invalidated given that Motley "acted in good faith when executing them, not knowing they contained nonapproved verbiage."

10. After suggesting one additional technical change on July 6, 2021, the Labor Commissioner approved the exclusive agreement for Motley. Abungin did not answer whether previous contracts were invalid.

Doshi's signing with Motley

11. In late 2021 or early 2022, a photographer working on a set with Doshi referred her to Ryan Kona, an agent who worked at Motley from 2016 to September 2023. Motley interviewed Doshi and agreed to sign her.

[2] Neither party presented the revision letter referenced in this email. In post-hearing briefing, Petitioner requested judicial notice of the contents of the Labor Commissioner's Motley file, which presumably would have included this information. The request for judicial notice is denied. While the formal rules of evidence do not apply in Talent Agency Controversy hearings, 8 C.C.R. § 12031, we decline to take judicial notice because the request did not provide appropriate notice for Respondent to challenge or explain the contents of the licensing file. *See, e.g., Lent v. California Coastal Com.*, 62 Cal. App. 5th 812, 854 (2021), *as modified on denial of reh'g* (Apr. 16, 2021). Indeed, Petitioner could have questioned Respondent Bacon or York regarding the file during the hearing but only requested judicial notice of the contents afterwards. The request for judicial notice also did not include the documents in question, meaning that the hearing officer was being asked to locate the file and rule on it, potentially with *neither party* knowing the full contents. For similar reasons, we deny the request for judicial notice of Performers First Talent Agency LLC's file.

12. To onboard Doshi, York sent a set of documents to Doshi via DocuSign on January 19, 2022.[3] According to York, all the documents had to be signed for the DocuSign package to be returned to her as complete. The documents were:

- The exclusive contract agreement between Doshi and Motley approved by the Labor Commissioner in July 2021 as recounted above. The contract set a 15% commission rate for the agency and established Motley as Doshi's exclusive representative for two years;
- A Record-Keeping Compliance Form required under federal law for adult entertainment performers;
- A Model Release Agreement in which the artist granted the right to Motley to any photographs or videos made at Motley Manor, including consent to "digital compositing or distortion: of the portraits or pictures"; and
- A Reimbursement Agreement Form in which the artist acknowledged that Motley may front some expenses, but the artist is responsible for reimbursement. It includes *inter alia* a timeframe for reimbursement (the first week of working or within fifteen days of purchase, whichever is sooner) and an authorization for Motley to withhold reimbursable expenses from payments received from shoots.

13. Doshi signed all four documents sent by York on January 19, 2022.

14. Upon receipt of the signed documents, York sent a second batch of seven documents for Doshi's signature. The documents were:

- The Schedule of Fees approved by the Labor Commissioner noting the 15% agency commission fee and two-year contract for new artists at Motley;
- A Talent Fee Disclosure regarding kill fees and booking fees. As relevant here, this disclosure included an acknowledgment that the artist had been "informed of a separate Agency Service/Booking Fee, which will be collected from the production Company" as part of "an agreement between Motley Models and Producer." The disclosure continues that a booking fee is "a common business practice and a preset fee" accepted by the Production company for Motley's "provided services" and that such fees "are **NOT** included, **NOR** are any part of the Artists Fees negotiated or paid to the

[3] Doshi recalled that Kona had sent her the documents via DocuSign. We credit the detailed testimony of York that she sent these documents to Doshi.

Artist." The artist also had to "acknowledge and claim that [they] have **NO** right to these past, present or future Booking Fees.";

- A COVID-19 Talent Agency and Performer Waiver of Liability, Assumption of Risk, And Indemnity Agreement, in which an artist waived their right to sue Motley for any injury related to participation in the creation of adult content (seemingly even beyond COVID-related risks);
- A Motley Manor Accident and COVID-19 Waiver and Release of Liability Form releasing Motley from COVID risk or other risks arising at Motley Manor;
- A Non-Disclosure Agreement in which an artist, in consideration for periodically lodging at Motley Manor, agrees not to disclose any personally identifying information seen at Motley Manor or any social or business activities observed at Motley Manor for 20 years[4];
- An attestation that the artist received educational materials on eating disorders and sexual harassment along with the accompanying information; and
- Motley Models COVID-19 Minimum Shoot Requirements detailing what Motley demands from any production studios to protect against COVID-19.

15. Doshi signed these documents on January 24, 2022.

16. Doshi testified that she was required to sign all eleven documents for Motley to begin its representation. Bacon testified that artists could refuse to sign any document except for the exclusive agreement and that some artists in fact had previously pushed back on some forms and had them removed from the packet; however, there is no indication that Kona or Bacon communicated this option to Doshi. Instead, as York testified, DocuSign would return an executed contract to Motley only when all documents within a package were signed.

Doshi's Early Work and Success with Motley

17. Kona served as Doshi's primary agent and touchpoint with Motley, including booking shoots for Doshi. Once Kona confirmed a shoot, he would enter the details of the shoot including the compensation, date of the shoot, the type of shoots, the city, and the production company into a shared application called Portfolio Pad. Doshi would rely on this information to prepare for and attend the shoot.

[4] It is unclear if this is applicable if the artist rarely or never lodges at Motley Manor.

18. After a performance, Doshi generally received payment directly from the production company. Kona generated a report on Portfolio Pad to determine the total paid to Doshi and invoice her for Motley's 15% commission as approved in the exclusive contract and schedule of fees. Separately, Kona billed the production companies for booking fees based on Doshi's shoots. The booking fee for most productions was $100, although a few were $50 or $200.

19. Doshi was a prodigious artist in her first year in the industry, filming over 100 shoots from February 2022 to February 2023. By June 2023, she had earned over $200,000 before commissions in jobs booked through Motley. Motley in turn earned close to $30,000 in commissions and well over $10,000 in booking fees related to Doshi's shoots.

20. Doshi also received several nominations for industry awards, including one for best new performer. She also won awards in other categories.

21. Doshi pointed to one concrete issue in her first year with Motley. She stated that on one occasion, Kona inserted the incorrect address into Portfolio Pad for a shoot, and she took an Uber to that address. The incorrect address was in an area of Los Angeles with poor cell phone reception. Although Doshi was eventually able to call Kona and obtain the correct address, she was standing on the side of the street for around 30 minutes waiting for another Uber to pick her up and take her to the correct address.

Breakdown in the Relationship Between Doshi and Motley

22. The relationship between Doshi and Motley began to break down in late 2022 and early 2023. In January 2023, Motley ended its relationship with Vixen, a large adult entertainment production company for whom Doshi had worked. Bacon testified that Motley ended this relationship when a Motley model sued Vixen for poor treatment on set. Doshi testified that she heard the break was due to Motley's use of Vixen's promotional photographs in its booth at a trade conference. Doshi also testified that starting in November 2022, she heard rumors that Bacon had filmed models without their permission in Motley Manor.

23. On February 9, 2023, Doshi set up a lunch meeting with Bacon. At the meeting, she informed Bacon she wanted to fire Motley as her agency because it had terminated its relationship with

Vixen and because it had provided incorrect information in Portfolio Pad for several shoots, including using the wrong address for at least one shoot as detailed above.

24. The same day, Bacon sent an email refusing Doshi's request to terminate the contract. Bacon described Doshi's success in booking and offered to decrease the commission percentage to ten percent.

25. On February 10, 2023, Doshi stated that she would take the dispute to the Labor Commissioner's Office if necessary. She offered a $5,000 buyout.

26. On February 15, 2023, Bacon refused the buyout and reiterated Motley's intention to enforce its rights under the exclusive contract.

27. On February 16, 2023, Doshi was scheduled for a shoot. The Portfolio Pad description by Kona listed the shoot as a "boy/girl shoot." When Doshi arrived on set, however, the director stated it was a large dildo insertion—a type of shoot that Doshi was not comfortable performing. Doshi informed the director that she would not perform the shoot and called Kona. Kona stated to Doshi that he had made a mistake and that Doshi had been a last-minute substitution for the shoot; the director, however, told Doshi that she had always been scheduled to perform. The director changed the shoot to avoid the l insertion. The day after the shoot, Bacon emailed Doshi to apologize for the oversight and to waive the commission fee.

28. In mid-March 2023, Doshi's attorney sent a letter to Motley seeking to terminate the contract. From that point forward, Doshi attended and paid commissions on all work booked by Motley. She separately booked her own work and did not pay commissions to Motley on self-booked work.

The Effective End of Motley as an Agency

29. On September 15, 2023, Bacon resigned from Motley based on allegations by another artist that he had recorded her without her consent while staying at Motley Manor. Bacon denies the allegations.

30. Soon thereafter, Motley was acquired by a private equity company with an "adult industry veteran" and "marketing and sales executive" running operations on a day-to-day basis.

31. Within the same week, Kona "parted ways" with Motley. From the testimony provided, it appears that as of Kona's resignation, Motley did not have any functioning agents. Bacon admitted that as of the hearing date, Motley had no agents. Motley also had no agent for service of process as of December 2023.[5]

32. On October 9, 2023, Performers First Agency LLC (PFA) presented a term sheet for the acquisition of Motley Models. As relevant here, the term sheet stated that the acquisition was a transfer of "only the assets of Motley Models, Inc." with "any legal liabilities or debts [. . .] to be retained by Twice Baked Media, Inc. and David C. Bacon." PFA was "receiving only the assets, the good will, and industry contacts of Seller and is NOT receiving or acquiring any existing contracts with any Artists."

33. Although Bacon had resigned from Motley in September 2023, he authorized Motley to cancel Doshi's debt at some point thereafter if she signed with PFA. Doshi refused to do so.

Petition and Counterclaim

34. On March 21, 2023, Doshi filed a petition to determine controversy with the Labor Commissioner's Office. Respondents filed an answer and counterclaims on April 25, 2023. Petitioner filed an amended petition on December 7, 2023, and Respondent filed a corresponding amended answer and counterclaims on December 28, 2023.

III. LEGAL DISCUSSION

Doshi contends Respondents violated the Talent Agencies Act (TAA) and their fiduciary duty as her agents by charging her booking fees, adding contractual terms not approved by the Labor Commissioner's Office, and sending her into unsafe spaces. She prays that the contract be voided in its entirety, that she recover all amounts she paid to Motley for the year preceding her filing of this action, and that she receive attorney's fees based on Motley's unlawful withholding of the booking fees. Motley denies these allegations and counterclaims for unpaid commissions for self-bookings Doshi performed during the two-year exclusive period of the contract.

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[5] Petitioner requests judicial notice of the records from the California Secretary of State pertaining to Twice Baked Media. Given the exhibits admitted as part of the hearing, taking judicial notice of these records is unnecessary. We therefore deny the request.

A. The Purpose and Structure of the TAA

For over a century, the California Legislature has been concerned "that those representing aspiring artists may take advantage of them" by creating unfair contracts or sending them into unsafe situations. *Marathon Ent., Inc. v. Blasi*, 42 Cal. 4th 974, 984 (2008), *as modified* (Mar. 12, 2008). The Legislature therefore has regulated the relationship between agents and artists to ensure the agents' incentives aligned with those of their clients. *Id.* As early as 1913, the Legislature targeted unscrupulous agents who violated their fiduciary duty when they "split fees with the venues where they booked their clients." *Id.* The Legislature's concern, in other words, was that an agent being paid by both sides would have an incentive to maximize their revenue, even if that sacrificed their client's pay for an agent's increased cut from the booking.

The TAA has evolved, but "[e]xploitation of artists by representatives has remained the Act's central concern through subsequent incarnations to the present day." *Id.* The current version of the TAA establishes licensed agents as the only representatives of artists that can procure work on the artists' behalf; it does not regulate those who simply conduct "business transactions other than professional employment" for artists. *Styne v. Stevens*, 26 Cal. 4th 42, 50–51 (2001). Because the TAA establishes licensed agents as the exclusive gatekeepers for artists who wish to procure work (except if an artist does it themselves) and because of the inherent power that comes with acting as the exclusive gatekeeper, the Act strictly regulates these agents. The TAA establishes, as a threshold, that all agents must be registered with the Labor Commissioner's Office to procure work for an artist. Cal. Labor Code § 1700.5. To obtain a license, applicants must show they are persons of "good moral character" or, for a corporation, that it has "a reputation for fair dealing." *Id.* § 1700.6. The applicant must also post a bond of $50,000 in case they are found to have committed unlawful acts or fraud against their clients. *Id.* §§ 1700.15, 1700.16. If a person fails to obtain an agency license and procures work for an artist, they must at least disgorge all earnings from the illegal procurement and could face disgorgement of all earnings from the contract as a whole. *Marathon*, 42 Cal. 4th at 991 (discussing severability in the context of unlawful procurement).

The Labor Commissioner also regulates the contracts between artists and their agents. The Labor Commissioner must approve all "form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists." Cal. Lab. Code § 1700.23. As part of this approval process, the Labor Commissioner has articulated at least six required provisions to protect the artist and inform them of their rights. 8 C.C.R. § 12001. The agency must also submit a list of all the fees the agent will charge and collect and reflect the maximum rate of compensation in the contract. Cal. Labor Code § 1700.24; 8 C.C.R. § 12001(b). The Labor Commissioner may reject any contract term that is "unfair, unjust or oppressive to the artist." Cal. Lab. Code § 1700.23.

Consistent with its remedial purpose, the Talent Agencies Act "should be liberally construed to promote the general object sought to be accomplished; it should not be construed within narrow limits of the letter of the law." *Waisbren v. Peppercorn Prods., Inc.*, 41 Cal. App. 4th 246, 254 (1995) (internal brackets and quotation marks omitted).

B. Alleged Violations

1. Whether Respondents unlawfully charged booking fees

Doshi contends that Motley violated the Talent Agencies Act and breached its fiduciary duty by charging production companies booking fees (variously known as Agency Fees or Service Fees) for Petitioner's performances. She contends that the booking fees are a backdoor attempt by Motley to receive more than the maximum rate of compensation under the exclusive contract and schedule of fees. Motley maintains that the booking fees are a separate matter between an agency and production company, which are permitted under the law—and have been approved by the Labor Commissioner—so long as the artist understands the booking fee is meant for the agency and not as compensation to the artist.

The Labor Commissioner has two conflicting lines of decisions on the legality of booking fees. In 2010, two decisions released simultaneously approved of booking fees if the fees were clearly intended for

the agency and not the artist. *See Harriel v. Chase*, TAC 10296 (2010); *Shazia Ali v. Noveau Model and Talent Management*, TAC 14198 (2010).

For example, in *Ali*, a model and an agent agreed that the agent was entitled to twenty percent commissions on two modeling jobs. TAC 14198 at 2-3. For each of the jobs, the agent also received a twenty percent "Agency Fee"—i.e. booking fees—from the production company on top of the twenty percent commission. *Id.* The model argued that the Agency Fee constituted commissions and that she was not required to pay any additional commission to the agent under the contract. The hearing officer rejected the model's argument, holding that because the agent had explained that the booking fee was separate and that it was industry practice, the artist was not entitled to it even if the fees were not disclosed in the contract or schedule of fees.[6] *Id.* at 3-4. In other words, as long as the booking fee was "separate and apart from Petitioner's earnings" and the agent explained it as such, the agent could receive whatever size payment from the production company for booking an artist in addition to the maximum commission described in the contract and schedule of fees.

Several subsequent Labor Commissioner decisions adopted the *Ali* test to determine whether an agency lawfully charged booking fees. *See Cargle v. Howard*, TAC 36595 (2016) (determining that agency fees were unlawful because the artist was not put on notice the fees were intended for the agency); *Cappucci v. Lovestone Talent Agency*, TAC 50502 (2018) (finding artist failed to meet their burden to show agency fees were intended for the artist rather than the agency); *Green v. Scott*, TAC 52671 (2020) (finding artist failed to meet their burden to show agency fees were intended for the artist rather than the agency). None of these decisions addressed the statutory basis for this "intent of the fee" test nor did they grapple with the purpose of the Talent Agencies Act.

The two most recent Labor Commissioner decisions have found that an Agency cannot collect booking fees in excess of the compensation listed in the exclusive contract because it would be collecting

[6] The decision also noted the guardrail that the fee could not be a "registration fee" under Labor Code § 1700.40(b) even if the artist understood it to be for the agent.

more than the maximum fees in the exclusive contract. *Does v. Hay et al.*, TAC 52663/52670 (2020) (hereinafter *Hay*); *Direct Models v. Baggott*, TAC 52764/52829 (2022). In *Hay*, several adult entertainment models challenged their agency's practice of collecting booking fees of $110 per booking in addition to commission. To evaluate the claim, the hearing officer started with the requirement that a talent agency contract must disclose the maximum compensation the agent will receive, inclusive of any fees, and that the compensation ultimately received by the agent must not be more than the compensation set forth in the schedule of fees. *Id.* at 37 (citing 8 C.C.R § 12001(b)). The hearing officer then turned to the broad definition of "fees" in Labor Code § 1700.2(a), which includes "any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by a person conducting the business of a talent agency." *Id.* Because the booking fees were fees "rendered by a person conducting the business of a talent agency" and such fees were neither disclosed in the schedule of fees nor included in the maximum compensation in the contract, the hearing officer found the booking fees to be unlawful. *Id.* at 37-38.

We agree with the latter line of cases as based in the text and purpose of the Talent Agencies Act and disapprove of *Ali* and its progeny. Booking or agency fees cannot be used by an agent to evade the maximum compensation rate in the approved contract and schedule of fees. 8 C.C.R § 12001(b).

The concept that booking fees are separate and apart from an artist's compensation for a shoot simply because the agent describes it as such is fiction—indeed, not one of the previous cases upholding such fees nor Motley here provides a credible explanation of how the booking fee is not inextricably tied to an artist's work on particular shoots. Bacon testified booking fees compensate for "ongoing support of the booking to make sure that [the model] is prepared" and "[the model] is going to show up on set." His briefing reiterated that the justification for booking fees is that the Agency "took on a lot of effort and work to insure [sic] the booked shoot happened." The underlying assumption is that an agent's work for the artist stops once they book work for the artist and that they effectively become agents of the producers (in the principal-agent sense) entitled to compensation from the production company if they do undefined,

"extra" work to make sure their client their obligation under the contract. This theory defies the commonsense role of an agent to ensure a client performs work and the corresponding broad definition of fees an agent receives "for services rendered . . . by any person conducting the business of a talent agency." Cal. Labor Code § 1700.2(a). The "business of a talent agency" includes ensuring artists fulfill their contract and complete the employment.

Booking fees also betray the purpose of the TAA to remove conflicts of interest between artists and agents and instead to align their incentives. With a commission-based system, the more an artist earns, the more the agent earns. In contrast, with booking fees, an agent has an incentive to work with production companies that provide higher booking fees even if the production company offers lower compensation to an artist. The agent in *Ali* made half its revenue on each shoot from booking fees. *Ali*, TAC 14198 (agent obtained 20% commission and 20% agency fee for two modeling jobs). Here, Motley generally made a third to a half of its revenue from booking fees per shoot and that ratio would have been more heavily weighted to booking fees when Motley's commissions dropped to 10% in a second year. If a production company offered $200 per shoot rather than $100 per shoot with slightly less pay to the artist, the incentive for the agent would be to take the lower paying shoot with higher booking fees—a clear conflict with the artist's interest of receiving the highest compensation per shoot.

Even if booking fees were the same across the industry, an agent receiving booking fees still has a financial incentive to book more shoots rather than obtain additional compensation for existing shoots given the percentage of revenue an agency receives from booking fees. Motley generally received $100 per shoot for a booking fee. To obtain that amount in additional commission, Motley would have had to bargain for $666.66 more in compensation to Doshi for any particular shoot at 15% commission. The risk of booking fees is that the agent and production company have an incentive to depress wages (e.g. not seek a $600 increase or even a $300 increase in the compensation to the artist) so long as the agent earns more money from the booking fee than it would have from an increased commission and the production

company pays less overall between the artist and the agent. This, again, creates a clear conflict between the agent's interest and the artist's interest.

In their briefing, Respondents contend "there has NEVER been any evidence offered" to support the theory that booking fees depress wages. The TAA, however, must be read liberally for the protection of artists. An artist should not have the burden to contradict what logic suggests, especially when the agent is making additional fees based on an artist's shoot without any of those fees going to the artist performing the work. It is unclear what Respondents suggest would happen to the tens of thousands of dollars paid in booking fees if they were not going exclusively to an agent.

Respondents next rightfully point out the confusion on booking fees, in both Motley's interactions with the Labor Commissioner when seeking approval of booking fees and the conflicting decisions of hearing officers in Talent Agency Controversies. The confusion does not make booking fees lawful; however, the confusion will be considered in addressing remedies.

In sum, when an agent receives a booking fee, the fee counts towards the maximum rate of compensation under the approved Labor Commissioner contract because the agent's work that led to the booking fee is central to its role as a talent agency. Moreover, having the agent on both sides of the contract—that is, receiving payment directly from the production company in booking fees and commission from the artist—creates a textbook conflict of interest that violates the purpose of the TAA and the broad, remedial construal of the Act case law requires. The inclusion of booking fees violated Labor Code § 1700.24, breached Motley's fiduciary duty to Doshi, and breached the exclusive contract by charging more than agent's maximum compensation rate.

2. Whether Respondents unlawfully subjected Doshi to contract terms not approved by the Labor Commissioner

Labor Code § 1700.23 requires that an agency submit "form or forms of contract to be utilized by such talent agency in entering into written contracts with artists for the employment of the services of such talent agency by such artists, and secure the approval of the Labor Commissioner thereof."

Petitioner and Respondents agree that Respondent submitted only the exclusive contract and Schedule of Fees to the Labor Commissioner for approval and did not submit the Record-Keeping Compliance Form, the Model Release Agreement, the Reimbursement Agreement Form, the Talent Fee Disclosure regarding booking fees, the COVID-19 Talent Agency and Performer Waiver of Liability, the Motley Manor Accident and COVID-19 Waiver, the Non-disclosure agreement, the attestation regarding education materials on eating disorders and sexual harassment, and the Motley Manor minimum shoot requirements. The question is whether these documents are part of the contract Motley had with Doshi to perform work as her talent agent or were either separate agreements or personnel file documents unrelated to the contract.

In interpreting the TAA, we "look first to the language of the statute, giving effect to its plain meaning." *Waisbren*, 41 Cal. App. 4th at 253. The TAA requires "all form or forms of contract" used by the agency for them to provide "the services of such talent agency" to be submitted and approved by the Labor Commissioner. Cal. Labor Code § 1700.23 (emphasis added). The plain language reading is that if an artist signs a document that is part of the agreement for the agency to represent them (whether at signing or later used by the agency) and that document involves any substantive right of the artist, such form must be reviewed and approved by the Labor Commissioner. Simply putting a document outside of the exclusive contract or schedule of fees does not insulate it from Labor Commissioner review.

Here, York and Doshi testified that the contract would only be executed when all the DocuSign documents had been signed by Doshi. We credit this testimony and find that the documents signed were part of the contract for Motley to provide Doshi representation. With the exceptions of the recording keeping compliance form, the attestation regarding receiving materials on sexual harassment and eating disorders, and the minimum shoot requirements, all the other documents Doshi signed involved substantive rights she was gaining or waiving to be represented by Motley. The plain language of the TAA requires these forms to be submitted to the Labor Commissioner for review and approval.[7]

This reading is consistent with the purpose of the TAA. The TAA's driving concern is that agents will force unfair contract terms on artists (particularly new artists) because agents hold power as the

[7] Bacon testified that some artists (but not Doshi) refused to sign certain forms and that Motley accommodated those requests. The question in this case, however, is what terms Doshi and Motley agreed to for Motley's representation and whether those terms were unlawful.

gatekeeper to procuring work. To combat potential abuses, the Legislature requires the Labor Commissioner to ensure no terms in the contracts governing the relationship between agents and artists are "unfair, unjust or oppressive." *Id.* These abusive terms may not just be the commission charged, as shown in this case.

For example, in the misleadingly labeled "COVID-19 Talent Agency and Performer Waiver of Liability, Assumption of Risk, and Indemnity Agreement," Motley had Doshi waive the right to sue Motley for anything arising out of, but not limited to, the creation of sexual activity—that is, a waiver for almost any action of the agency, including the agent's statutory obligation to perform due diligence on the safety of any shoot under Labor Code § 1700.33.

The Non-Disclosure Agreement raises similar concerns. Without any oversight, Motley required Doshi to agree to a 20-year NDA that waived her right to disclose any activity (including social activity) she observed at Motley Manor—the agent's place of business. The NDA fails to mention observation of sexual harassment or other concerning practices the artist may wish to report to law enforcement.

We do not decide here whether such forms are unfair, unjust and oppressive or whether wording changes could prevent them from being so. We hold that these forms should have been presented to the Labor Commissioner for review and approval because they were part of the contracts governing Motley's performance of talent agency services for Doshi. Because the forms were not approved by the Labor Commissioner, Motley violated Labor Code § 1700.23.

3. Whether Respondents issued a contract of employment with an unlawful term in violation of Labor Code § 1700.31

Labor Code § 1700.31 states:

> No talent agency shall knowingly issue a contract for employment containing any term or condition which, if complied with, would be in violation of law, or attempt to fill an order for help to be employed in violation of law.

Petitioner contends that Motley violated Labor Code § 1700.31 by including unlawful terms in the contract between Motley and Doshi. Petitioner misreads the statute. Section 1700.31 applies to employment contracts—that is, it prohibits the agent from knowingly drafting or agreeing to a contract

between a production company (the employer) and the artist (the employee of the production company) that contains unlawful terms. The statute does not address unlawful terms in a contract between an agent and an artist, which is not an employment relationship. Respondents therefore did not violate Labor Code § 1700.31.

4. Whether Respondents sent Doshi into unsafe spaces under Labor Code § 1700.33

Doshi contends that Respondents violated their obligation to perform reasonable diligence on the safety of bookings when Kona sent her to the wrong address on one occasion and mistakenly indicated a shoot was "boy/girl" rather than an insertion shoot.

Labor Code § 1700.33 provides:

> No talent agency shall send or cause to be sent, any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonable inquiry.

In *Szarko v. Direct Models, Inc.*, TAC 50639 (October 2018), the Labor Commissioner explained the agent had an ongoing obligation to perform a reasonable inquiry into the safety of any job booked for an artist; failure to perform such inquiry can be a material breach of an agency agreement.

Here, Doshi has not proven that Respondents violated their duty to perform reasonable inquiries. The single time Doshi was sent to the wrong address does not indicate that Motley put Doshi in an unsafe situation. While it was unfortunate the wrong address was in an area of spotty cell phone reception, Doshi relatively quickly was able to contact Kona and then waited half an hour for an additional Uber. While repeated mistakes like this would constitute a violation, this mistake did not rise to the level of failing to do due diligence on the safety of the shoot.

Likewise, listing the wrong type of shoot on Portfolio pad as "boy/girl" rather than an insertion shoot did not mean Motley sent Doshi into an unsafe situation. Indeed, the production company appeared to be professionals who changed the nature of the shoot when Doshi objected. Doshi did not testify that she faced a safety risk at any point. If there were professional ramifications for Doshi refusing to perform

the shoot, that could be grounds for claiming an agency breached the contract, but it does not mean an artist was sent into an unsafe situation without reasonable diligence. In any event, Doshi did not credibly testify to any professional ramifications here.

Finally, Doshi did not provide any corroborating evidence to the news stories regarding Bacon filming artists without their consent at Motley Manor. She therefore failed to meet her burden to show that requiring Doshi to come to Motley Manor was sending her into an unsafe space.[8]

C. Whether the Contract between Motley and Doshi Should be Severed or Void *Ab Initio*

The parties dispute whether the unlawful portions of the contract should be severed or whether the contract should be void *ab initio* based on the violations above. We hold that severability can apply when an agent violates Labor Code §§ 1700.23 and 1700.24—that is, when an agent charges unlawful fees or uses forms that have not been approved by the Labor Commissioner. Nevertheless, applying the severability test to the specific facts of this case, we find that the contract between Motley and Doshi should be void *ab initio*.

1. Whether severability is available for violations of Labor Code §§ 1700.23 and 1700.24

The California Supreme Court provided a roadmap on how to address severability questions under the TAA in *Marathon*, 42 Cal. 4th at 986. In *Marathon*, the Court addressed whether a contract between a personal manager and an artist was void altogether when the personal manager unlawfully procured work without a talent agency license or whether the unlawful procurement actions could be severed from the contract. *Id.* at 990. The question was a significant one—severability would mean a manager would have

[8] Petitioner also brought causes of action for fraud and unlawful business practices under California's Unfair Competition Law. As to fraud, because we void the contract *ab initio* based on the other alleged violations per below and because the only remedy credibly alleged by the fraud was voiding of the contract, we have no need to rule on the cause of action. As to the cause of action alleging unlawful business practices, we find that the cause of action does not arise under the Talent Agencies Act and therefore cannot be adjudicated in an administrative hearing under California Labor Code § 1700.44(a). While unlawful conduct under the Talent Agencies Act could potentially be predicate violations to prove the unlawful business practices claim, we see no indication the Legislature intended the Labor Commissioner's Office to adjudicate these disputes and potentially award the treble damages or injunctive relief remedies that fall under the unfair competition law. *See, e,g.* Cal. Bus. & Prof. Code §§ 17070, 17082 (injunctive relief and damages remedies under the unfair competition law).

to disgorge (or disclaim a right to) any earnings from unlawfully procured work but could still be paid for other lawful work whereas voiding the contract *ab initio* could require a manager to disgorge all earnings within the applicable limitations period even if the manager spent a vast majority of their time on lawful work for the artist.

To determine whether severability applied in *Marathon*, the Court first noted that the TAA was "silent—completely silent—on the subject of the proper remedy for illegal enforcement." *Id.* at 991. The Court therefore turned to general contract principles under California Civil Code § 1599, which codifies the "generally applicable and long-standing rule of severability." *Id.* The Court found that severability in the context of unlawfully procured work was consistent with the purpose of the TAA and instructed that the Labor Commissioner's determination to apply severability was an equitable and fact-specific inquiry on whether the "central purpose of the contract is tainted with illegality." *Id.* at 995-96.

Marathon's rationale allowing severability for unlawful procurement applies to the unlawful charging of booking fees. As in *Marathon*, the TAA is silent as to the appropriate remedy when an employer charges an unlawful fee above the maximum compensation rate. *See id.* at 991. Turning to general principles of severability, we find that severability can be an appropriate remedy when the charging of booking fees did not taint the contract with illegality. *Id.* As recognized in *Marathon*, this will be a fact-specific and equitable question, addressing *inter alia* whether the agent made significant revenue from the unlawful fees and whether the agent intended to mislead the artists. Moreover, separating the booking fees from other revenue is easy to administer, as the fees can simply be disgorged. *See id.* at 997 (holding that severing unlawful procurement by a manager was administrable even if the contract was for commission on an "undifferentiated set of services").

We next address whether severability can be appropriate when an agent uses a form that is not approved by the Labor Commissioner as required under Labor Code § 1700.23. Petitioner contends severability is always inappropriate, citing *Van Auken v. Parker*, TAC 11532 (2010). In *Van Auken*, a licensed agent utilized two versions of a contract—one approved by the Labor Commissioner and another

that it provided to the artist in lieu of the approved one. *Id.* at 3-4. Faced with this duplicity, the Labor Commissioner voided the contract *ab initio*. The hearing office reasoned, "Allowing licensed agents to use unapproved contracts without consequence, invites unregulated conduct" that undermined the purpose of the TAA "to protect artists from unregulated activity." *Id.* at 8.

We agree with *Van Auken* to the degree that duplicity by an agent imposing significant but unapproved terms on an artist violates the purpose of the TAA and merits voiding a contract *ab initio*. Even when an agent believes in good faith that they do not have to disclose contract terms to the Labor Commissioner's Office, failing to disclose such terms still conflicts with the purpose of the TAA to protect artists from onerous or unfair contracts. Administrability of severability in most cases of agents failing to obtain approval for forms also would be more difficult than disgorging revenues from an unlawful procurement or unlawful fees; instead, the Labor Commissioner would have to estimate the value of an unlawfully imposed non-disclosure agreement or general wavier of liability, which may or may not be enforceable on their own terms.

Nevertheless, severability in certain circumstances when an agent uses an unapproved form may be appropriate without conflicting with the purpose of the TAA. *Cf. Baggott*, TACs 52764, 52829 at 24-25 (awarding booking fees without voiding contract *ab initio*). For example, if an agent had a form charging booking fees before the Labor Commissioner's decisions in 2020, it would be unduly harsh to void the contract *ab initio* when the Labor Commissioner's Office previously allowed such contracts and the fees received from the unlawful form would be ascertainable. Additionally, if an agent could show confusion in the law regarding which forms had to be approved and that the unapproved forms did not include the artist waiving significant legal rights, severability may be appropriate.

2. Whether the contract between Doshi and Motley should be severed

Whether severability should apply based on Motley's charging of booking fees alone is a close consideration in this case. As Petitioner contends, Motley charged booking fees to Doshi even after the Labor Commissioner clarified that booking fees could not be included in the exclusive contract or the

schedule of fees. Bacon's explanation that he read Abungin's communications to allow booking fees in a separate contract after Abungin rejected booking fees in the schedule of fees and exclusive contract lacks credibility.

On the other hand, Respondents correctly point to several mitigating factors. First, the Labor Commissioner issued conflicting decisions on booking fees in talent agency controversies. Although the most recent decisions had disapproved of such fees, all talent agency controversy decisions are persuasive but not binding. In any event, Respondents represent that these decisions rejecting booking fees are on appeal de novo in superior court. Second, Motley would be at a competitive disadvantage if the Labor Commissioner had approved booking fees for a rival agency but not for Motley. While it appears that Abungin informed the rival agency that booking fees should not be included in the schedule of fees or exclusive contract, it was not entirely clear. Third, Abungin's emails to York did not definitively instruct Motley to stop charging booking fees altogether. While a reasonable reader would have understood that intent, there was some ambiguity as Respondents contend.

Motley's use of unapproved contracts combined with the charging of unlawful fees, however, make severability inappropriate in this case. Motley required Doshi's agreement to unapproved forms to provide representation, including a broad waiver of liability and a 20-year NDA based on questionable consideration. Similar to *Van Auken*, Motley received approval from the Labor Commissioner for certain forms and then added another, potentially onerous set of terms on Doshi for Motley to represent her without approval from the Labor Commissioner. The contract therefore was tainted with illegality from the start and is void *ab initio*.

Because the contract is void *ab initio*, Motley must disgorge all amounts received from one year prior to the filing of the petition. Labor Code § 1700.44. The total amount of such disgorgement is $10,850 in booking fees and $25,875 in commissions.

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D. Whether Bacon is individually liable

In determining the personal liability of directors in relation to the acts of a corporation, the California Supreme Court has held, "[d]irectors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct." *Frances T. v. Vill. Green Owners Assn.*, 42 Cal.3d 490, 504 (1986). Furthermore, "[d]irectors are liable to third persons injured by their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable." *Id.* A corporate officer or director may also be held personally liable if they directly authorized or actively participated in the wrongful conduct. *Taylor-Rush v. Multitech Corp.*, 217 Cal.App.3d 103, 113 (1990).

The Labor Commissioner has previously applied individual liability when a director has acted as an alter ego of the licensed agency or engaged personally in the tortious conduct. In *Hay*, for example, the hearing officer held an owner of an adult entertainment agency personally liable when he commingled assets with the agency, used his personal relationships to send models into unsafe situations, and committed acts of sexual coercion against the artists. TAC 52663, at 46-49.

Here, Bacon engaged personally in the tortious breach of Motley's fiduciary duty to Doshi. While Kona may have managed the day-to-day activities of Doshi, Bacon was responsible for the booking fees policies and the onboarding—the areas where the violations in this case arise. Indeed, Bacon testified that he instructed York on how to onboard clients of Motley, including sending the unapproved forms. He also received the emails from Abungin stating that the booking fees language was not approved for the contract or schedule of fees and decided to still charge booking fees. For these reasons, we find that Bacon is individually liable for the violations.

E. Whether Doshi is entitled to attorney's fees and interest under Labor Code § 1700.25

If an agent receives funds on behalf of an artist and willfully fails to disburse the funds within 30 days, a prevailing artist seeking such fees is entitled to attorney's fees and ten percent interest per year on the unlawfully held funds. Labor Code § 1700.25(a), (e).

As detailed above, the booking fees Motley collected were above the maximum compensation set out on the exclusive contract. The booking fees therefore belonged to Doshi and should have been

disbursed to her within 30 days of their collection. Motley failed to disburse the money. The action was willful as the Labor Commissioner had rejected Motley's use of booking fees in any approved contract or schedule of fees and Motley proceeded to charge them through an unapproved document. Doshi is therefore entitled to attorney's fees as well as interest on the unpaid booking fees.

For attorney's fees, Petitioner's attorney submitted a declaration stating he spent 51.2 hours of time on this case doing attorney work at a rate of $400 an hour, for a total of $20,480; 2.6 hours of paralegal work at $80 per hour, for a total of $208; and incurred $261.24 in costs for a Public Records Act request. We find the rates charged by Petitioner's attorney to be reasonable given his nearly 30 years in practice, and the paralegal rates are likewise appropriate. The costs of $261.24 are also reasonable.

As to the hours, Petitioner's attorney did not provide any indication of how he spent the 51.2 hours, aside from the time spent in hearing. We have previously stated that attorneys do not need to file separate attorney's fees motions in Talent Agency Controversies, *Hay*, TAC 52663 at 51; nevertheless, some breakdown would be helpful in determining the reasonableness of the hours claimed. In *Hay*, we found that $103,264.92 were reasonable fees to the same attorney for an eleven-day hearing with five petitioners. This hearing was a day and a half and involved three witnesses. Given the lack of any breakdown from Petitioner and our decision in *Hay* as a guidepost, we find that Petitioner reasonably worked 40 legal hours on this case, in addition to the 2.6 paralegal hours. In total, Petitioner is entitled to $16,208 in attorney's fees and $261.24 in costs.

F. <u>Counterclaims</u>

Motley counterclaims for unpaid commissions for projects that Doshi booked during the time period the exclusive contract was in effect. We reject the counterclaims for three alternate reasons.

First, because we find the contract between Motley and Doshi void and all commissions within the applicable limitations period disgorged, the counterclaims are rejected.

Second, Motley has not proven that it has standing to assert the counterclaims. "Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing

lies with the plaintiff." *San Diegans for Open Gov't v. Fonseca*, 64 Cal. App. 5th 426, 434 (2021), *as modified on denial of reh'g* (June 8, 2021) (internal quotation marks omitted). It is undisputed that Motley sold some of its assets to PFA in late 2023. The term sheet—the only direct evidence of the deal—states that the Motley transferred its "assets" to PFA and Motley maintained the "liabilities or debts." The terms sheet also clarified that PFA was "receiving only the assets [. . .] and is NOT receiving or acquiring any existing contracts with any Artists." Accounts receivable are assets. *See M & M Foods, Inc. v. Pac. Am. Fish Co.*, 196 Cal. App. 4th 554, 561 (2011) (noting that accounts receivable have to be included on the schedule of assets in bankruptcy and that the assets transfer to the bankruptcy estate). The terms sheet twice emphasized that all assets were transferred to PFA. Even though the terms sheet leaves all existing contracts with Motley, it does not state that accounts receivable from past performances also remained with Motley. At the least, Respondent has not met their burden to prove that Motley had the standing to seek accounts receivable after the transfer of its assets.

Third, Motley admittedly had no agents for at least part of the exclusive contract period in fall 2023. Motley cannot claim commissions based on a period when it could not have exercised its fiduciary duty to represent Doshi, even if Doshi's attorney sent a letter in March 2023 seeking to terminate the contract.

IV. ORDER

For the above stated reasons, it is ordered that:

1. All form or forms of contract utilized by Respondents to represent Petitioner, including the exclusive contract, are void and terminated. Petitioner is excused from further performance and any contractual obligations based on the contract.
2. Respondents Twice Baked Media, Inc. dba Motley Models, a California corporation, and David Clifford Bacon II, an individual, are jointly and severally liable for the following:
    a. $25,875 for disgorgement of all commissions paid by Petitioner;
    b. $10,850 for disgorgement of booking fees and ten percent interest thereon;
    c. $16,208 in attorney's fees; and
    d. $261.24 in costs

3. Respondents take nothing on the counterclaims.

Dated: 4/30/2024

Casey L. Raymond

Casey Raymond
Special Hearing Officer for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 4/30/2024

Lilia Garcia-Brower

LILIA GARCÍA-BROWER
State Labor Commissioner

STATE OF CALIFORNIA
Department of Industrial Relations
DIVISION OF LABOR STANDARDS ENFORCEMENT