

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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9

10 BEFORE THE LABOR COMMISSIONER  
11 OF THE STATE OF CALIFORNIA

12

13 INNOVATIVE ARTISTS, ) No. TAC 40-95  
14 Petitioner, )  
15 vs. ) DETERMINATION OF CONTROVERSY  
16 ROY H. WAGNER, )  
17 Respondent. )  
18 \_\_\_\_\_)

19 INTRODUCTION

20 By its petition to determine controversy pursuant to Labor  
21 Code §1700.44, petitioner INNOVATIVE ARTISTS ("Innovative")  
22 alleges that respondent ROY H. WAGNER breached the terms of a  
23 contract by failing to pay commissions due to Innovative for its  
24 services as respondent's talent agency and seeks an order that  
25 Wagner pay all commissions owed pursuant to the parties' contract.  
Wagner filed an answer to the petition, asserting, inter alia,  
that Innovative committed material breaches of the contract,  
thereby extinguishing Wagner's obligation to pay commissions.

26 A hearing was held on May 30, 1996 in Los Angeles,  
27 California, before the undersigned attorney specially designated  
28 by the Labor Commissioner to hear this controversy. Petitioner

1 was represented by attorney Steven Davis; respondent was  
2 represented by attorney Joseph Schleimer.

3 At the outset of the hearing, respondent brought a motion to  
4 dismiss, arguing that the Labor Commissioner lacks jurisdiction  
5 over the controversy in that jurisdiction can only be founded upon  
6 an alleged violation of the Talent Agencies Act (Labor Code  
7 sections 1700-1700.47), and here, the petition only alleges a  
8 contract dispute between the parties rather than a violation of  
9 the Act. This motion to dismiss was denied, in that Labor Code  
10 §1700.23 provides that Labor Commissioner is vested with  
11 jurisdiction over "any controversy between the artist and the  
12 talent agency relating to the terms of the contract," and the  
13 Labor Commissioner's jurisdiction has been held to include the  
14 resolution of contract claims brought by artists or agents seeking  
15 damages for breach of a talent agency contract. Garson v. Div. of  
16 Labor Law Enforcement (1949) 33 Cal.2d 861, Robinson v. Superior  
17 Court (1950) 35 Cal.2d 379.

18 Following a ruling on this jurisdictional issue, the hearing  
19 began. Based on the testimony and evidence presented, the Labor  
20 Commissioner adopts the following determination of controversy.

21 FINDINGS OF FACT

22 1. Roy Wagner has worked a cinematographer for almost thirty  
23 years, both in television and motion pictures. In 1988 he entered  
24 into an agreement with a licensed talent agency then known as  
25 Harris & Goldberg, under which he engaged that agency to assist  
26 him in procuring employment. Harris & Goldberg later changed its  
27 name to Innovative Artists, and at all times relevant herein,  
28 Innovative Artists has been licensed by the State Labor

1 Commissioner to engage in business as a talent agency.

2       2. In October 1991, Innovative hired Debbie Haeusler as an

3 agent responsible for representing "below the line" talent, a

4 designation that includes cinematographers. Haeusler began

5 working as a talent agent in 1983, and represented over one

6 hundred cinematographers before joining Innovative. Haeusler

7 started representing Wagner as soon as she joined Innovative and

8 served as his agent until May 1995 when Wagner terminated

9 Innovative's services. She is presently Innovative's vice

10 president and continues to perform services as an agent for a

11 large roster of "below the line" talent.

12       3. On or about June 29, 1993, Wagner and Scott Harris, on

13 behalf of Innovative Artists, executed a written talent agency

14 contract, under which Wagner agreed to employ Innovative as his

15 sole and exclusive agent for a period of three years, and to pay

16 Innovative commissions equal to 10% of his earnings during the

17 term of the agreement (whether or not the employment generating

18 those earnings had been procured by Innovative), and 10% of his

19 earnings received after the termination, to the extent that such

20 post-termination earnings are the result of an employment

21 agreement negotiated during the term of the parties' agreement,

22 with Innovative's right to receive commissions after termination

23 of the agreement made subject to Innovative's continued

24 performance of its contractual obligations. Innovative undertook

25 the duty, under this contract, "to use all reasonable efforts to

26 procure employment for [Wagner] . . . in all branches of the

27 entertainment [industry] . . . in which [he is] willing or

28 qualified to render in all branches of services. . ."

1       4. Although Wagner faced serious financial problems at the  
2 time he entered into this contract, there was no evidence  
3 presented to support respondent's contention that he was induced  
4 to sign the contract through undue influence. Wagner requested a  
5 loan from Innovative immediately prior to signing this contract,  
6 and Innovative agreed to help Wagner by making this loan. Five  
7 months later, Wagner asked for, and received, a second loan.  
8 Wagner was not asked to give up any rights he would otherwise have  
9 had against Innovative in order to get these loans. Moreover,  
10 Wagner was generally pleased with the quality of services provided  
11 by Harris & Goldberg/Innovative, and there is no reason to believe  
12 that he would not have extended this relationship but for the  
13 agency's willingness to loan him funds against his future  
14 earnings.

15       5. Wagner was between projects and unemployed at the time  
16 the parties executed the June 29, 1993 representation agreement.  
17 Within two months, he began working as the director of photography  
18 on a television series, 'The Secret of Lake Success'. He was  
19 employed on that series for approximately two months. At the  
20 conclusion of his work on that series, he immediately started  
21 working as the director of photography for two television movies  
22 entitled 'Hart to Hart' and 'Hart to Hart, Part 2'. At the  
23 conclusion of that employment, in February 1994, he immediately  
24 started working as the director of photography for 'Drop Zone', a  
25 feature motion picture. His work on Drop Zone ended in June 1994,  
26 and within one month, he started working on a job procured by  
27 Innovative, as the director of photography for a television series  
28 entitled 'Party of Five', where he was employed until February

1 1995. Shortly thereafter, he was employed from April to June 1995  
2 as the director of photography on another feature motion picture,  
3 'Nick of Time'. Innovative received commissions for all of the  
4 jobs listed above.

5 6. On May 10, 1995, Wagner sent a letter to Innovative  
6 terminating their services as his talent agency, citing  
7 "significant problems in [his] relationship with Debbie  
8 [Haeusler]." Although Wagner had almost continuous employment  
9 during the period of his final contract with Innovative, he was  
10 unhappy with the nature of much of this employment. Wagner wanted  
11 to move away from television and get more work in feature motion  
12 pictures, which generally pays more money on a weekly basis,  
13 offers more opportunity for creativity, and carries greater  
14 prestige. He felt that Haeusler was not aggressive enough in  
15 trying to get the sort of employment that he wanted, that she was  
16 not "pitching [his] work" to movie producers, that he was not on  
17 her "A-list" of cinematographers, and that she was reluctant to  
18 "go to bat" for him. Specifically, Wagner was upset about  
19 Haeusler's failure to do certain things he requested, which he  
20 believed would help advance his career. Wagner testified that  
21 Haeusler ignored his requests to visit him on the set of 'Drop  
22 Zone' in the Florida Keys<sup>1</sup>, to attend the premiere screening of  
23 'Drop Zone'<sup>2</sup>, to intervene on his behalf in a "crisis" on the set

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24  
25 ' Haeusler was in Miami on business for another client, approximately two  
26 hours away from the 'Drop Zone' set. According to Wagner, there was no  
27 emergency requiring Haeusler's presence on the set, but a visit "would  
have showed that she cares". There was no business necessity for a  
visit to the set.

28 <sup>2</sup> Premiere screenings are often attended by producers, directors and  
studio executives, and may therefore present an opportunity to promote  
an artist to these potential employers. Nonetheless, Haeusler attended

1 of 'Party of Five'<sup>3</sup>, and to set up a meeting with Gale Ann Hurd, a  
2 leading Hollywood film producer, and someone Wagner very much  
3 wanted to work with.<sup>4</sup> These perceived deficiencies in Haeusler's  
4 performance led Wagner to terminate his contract with Innovative.

5       7. Haeusler testified that it would have proven difficult  
6 for any agent to obtain more feature film work for Wagner. First  
7 of all, Wagner was almost always working, and thus, he was tied to  
8 pre-existing professional commitments and unavailable for other  
9 work. Wagner disputed this, testifying that it is common for a  
10 cinematographer to leave a television series mid-season if a more  
11 attractive feature film offer comes along, and he was always ready  
12 and willing to leave whatever television work he was doing in

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14

(Continued)

15

only one or two premiere screenings in her thirteen years as an agent,  
testifying that this was "not an effective means of promoting a  
client." In view of her limited attendance at such screenings, we must  
view her conclusory testimony with some skepticism.

17

<sup>3</sup> Wagner testified that there was a great deal of tension on the set of  
'Party of Five', and that it was very difficult to work with the  
producer, Ken Topolsky, a person with "a reputation for firing  
cinematographers". But Haeusler had some conversations with Topolsky,  
and his assistant producer, and made one visit to the set, in an  
attempt to resolve the problems between Wagner and Topolsky. It  
therefore appears that Haeusler took appropriate actions in  
representing Wagner in connection with this job.

21

22

<sup>4</sup> In 1994 Wagner worked without pay as the cinematographer on a very  
low-budget Disney short entitled 'Cyclops Baby'. Wagner believed this  
was his most creative work ever, and he had been told that Gale Ann  
Hurd had seen the film and was impressed with the photography. In  
December 1994, hoping that this film could serve as the means of  
obtaining work with this leading producer, Wagner provided Haeusler  
with a copy of the film so that she would watch it and then discuss  
Wagner's work with Hurd. Wagner's relationship with Haeusler  
deteriorated over the next few months, as a result of his suspicion  
that she never watched this film and never contacted Hurd. Although  
Haeusler testified that she did watch 'Cyclops Baby', she never  
discussed her impressions of the film with Wagner. Haeusler also  
testified that she "did not recall pitching Wagner to Gale Ann Hurd".  
Her failure to initiate any communication with Hurd regarding Wagner's  
interest in working for Hurd was unreasonable and inexplicable.

1 order to work on a feature film. Wagner's wishes in this regard  
2 were well known to Haeusler, so it does not appear that his  
3 television work posed a significant stumbling block to obtaining  
4 employment in feature film. Haeusler also testified that Wagner's  
5 reputation for having done most of his feature film in the horror  
6 film genre made it difficult to find work outside that genre. But  
7 a review of Wagner's more recent work in feature films --  
8 'Stakeout II' in the spring of 1993, 'Drop Zone' in the spring of  
9 1994, followed by 'Nick of Time' in the spring of 1995 -- shows  
10 that he advanced well beyond the horror film genre. In  
11 particular, 'Drop Zone' was a high-budget action film with  
12 extremely difficult and creative camera work.

13        8. Innovative failed to present testimony or other evidence  
14 of any specific attempts, such as telephone calls or letters to  
15 producers, to procure feature film employment for Wagner<sup>5</sup>.  
16 Innovative's failure to present such evidence compels the  
17 conclusion that whatever efforts may have been made to obtain work  
18 in feature films, these efforts were insufficient. Whether or not  
19 another agent might have been more successful than Haeusler in  
20 obtaining feature film employment for Wagner is an open question;  
21 but based on the evidence presented, we must conclude that further  
22 efforts on the part of Innovative were warranted and would not  
23 necessarily have proven futile.

24 9. By letter dated May 19, 1995, Harris acknowledged

26       ' For example, the letter from Scott Harris to Wagner, dated May 17,  
27       1995, asserts that Harris and Haeusler "submitted [Wagner] for many  
28       features" that "have [not] come through." This letter fails to specify  
the names of any of these feature films, nor does it provide names of  
the producers who were purportedly contacted, or the dates that any  
such efforts were made.

1 Wagner's decision to terminate Innovative's services as his agent,  
2 but asserted that Innovative is "contractually entitled to  
3 continue [sic] commissions." Subsequent communications between  
4 the parties failed to resolve the issue of Innovative's right to  
5 commissions on Wagner's future earnings, and on October 31, 1995,  
6 Innovative filed the instant petition to determine controversy.

7       10. Following his termination of Innovative as his talent  
8 agency, Wagner worked as the director of photography on Party of  
9 Five's second season<sup>6</sup>, from June or July 1995 to February 1996, at  
10 a salary of \$6,500 per weekly episode. At the hearing, Wagner was  
11 unable to state with certainty the number of weekly episodes for  
12 which he was employed. After completing the second season on  
13 Party of Five, Wagner obtained employment as the cinematographer  
14 on a feature film entitled 'The Pest', for which he earned \$7,500  
15 per week for six or seven weeks of filming. Innovative played no  
16 role in procuring Wagner's employment on 'The Pest'.

## CONCLUSIONS OF LAW

18       1. Petitioner is a "talent agency" within the meaning of  
19 Labor Code §1700.4(a). Respondent is an "artist" within the  
20 meaning of Labor Code §1700.4(b). The Labor Commissioner has  
21 jurisdiction to hear and determine this controversy pursuant to  
22 Labor Code §1700.44(a).

23        2. The evidence presented leaves little room for doubt that  
24 while Innovative was enormously successful in obtaining employment  
25 for Wagner as a director of photography in the television  
26 industry, it cannot be said that Innovative used "all reasonable

<sup>6</sup> As previously noted, Wagner's employment on the initial season of 'Party of Five' came about as a result of Innovative's procurement efforts.

1 efforts", as required under the terms of its contract, to procure  
2 employment for Wagner as a feature film cinematographer. The key  
3 legal issue, therefore, is whether Innovative's failure to fully  
4 perform its contractual obligations excuses Wagner from further  
5 payment of commissions following his termination of Innovative as  
6 his talent agency. In support of his contention that no further  
7 commissions are owed, Wagner argues that Innovative's inadequate  
8 performance constitutes a material breach of the contract. A  
9 material breach, however, is a "substantial" or "total" breach of  
10 contract that excuses the other party from further performance  
11 under the contract. While every instance of non-compliance with a  
12 contract's terms constitutes a breach, not every breach is  
13 "material", that is, not every breach justifies complete  
14 termination of the other party's contractual obligations.  
15 Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195  
16 Cal.App.3d 1032, 1051.

17       3. We do not believe that Innovative's less than adequate  
18 performance with respect to procuring employment for Wagner in the  
19 area of feature films warrants a forfeiture of Innovative's  
20 contractual right to receive commissions on employment that it had  
21 procured for Wagner in the television industry. That is to say,  
22 we do not view this as a case involving a material breach of  
23 contract. Nonetheless, Innovative's failure to use "all  
24 reasonable efforts" to procure employment for Wagner in the area  
25 of feature films, that is, the lack of complete performance under  
26 the contract, entitles Wagner to compensatory damages in the form  
27 of relief from commissions for feature film work procured  
28 subsequent to his termination of Innovative's services. Thus, we

1 find that Innovative is entitled to commissions equal to 10% of  
2 Wagner's earnings during the second season of 'Party of Five', a  
3 job that had been procured by Innovative; but not entitled to  
4 commissions for Wagner's work on 'The Pest', a job that Innovative  
5 played no role in procuring.

6       4.     Wagner's obligation to pay any other commissions to  
7 Innovative terminated, pursuant to the parties' contract, on  
8 June 28, 1996, as any commissions after that date were made  
9 dependent upon Innovative's continued performance of its  
10 contractual obligations.   Wagner is obligated to pay commissions  
11 to Innovative for any other employment that he may have had in the  
12 television industry from the date of this hearing until June 28,  
13 1996.

## ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

16        1. Wagner provide to Innovative, within thirty days, an  
17 accounting of his earnings during the second season (June or July  
18 1995 to February 1996) of 'Party of Five', and any other earnings  
19 derived from employment in the television industry during the  
20 period from the date of this hearing to June 28, 1996, and pay  
21 commissions to Innovative in the amount of 10% of these earnings,  
22 plus interest at the rate of 10% per year from the dates that the  
23 earnings upon which these commissions are based were received by  
24 Wagner.

25 //

26 | //

27 //

28 | //

1       2. Wagner owes no commissions to Innovative for his work on  
2 the feature film 'The Pest', and owes no commissions to Innovative  
3 for any employment after June 28, 1996.

4 | DATED: 12/9/96

Mark E. Lockett

MILES E. LOCKER  
Attorney for the Labor Commissioner

10 The above Determination is adopted in its entirety by the  
11 Labor Commissioner.

12 DATED: 12/19/96

Roberta E. Mendonca  
ROBERTA E. MENDONCA  
STATE LABOR COMMISSIONER

