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DIVISION OF LABOR STANDARDS ENFORCEMENT
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

SCOTT CARGLE, An Individual, Petitioner, vs. BONNIE HOWARD, dba HOWARD TALENT WEST, Respondent.	**CASE NO. TAC-36595** **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing in Long Beach, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner SCOTT CARGLE, an individual, (hereinafter "Petitioner or Cargle") appeared and was represented by attorney Paul Menes. Respondent BONNIE HOWARD, dba HOWARD TALENT WEST, (hereinafter "Respondent or HTW") appeared through Michael P. Rubin of Michael P. Rubin & Associates.

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

II. FINDINGS OF FACT

1. On or about November 1, 2006, Cargle and HWT entered into a Commercial Agency Contract whereby HTW was to serve as Cargle's licensed talent agent for two years. Cargle and HTW entered into subsequent Commercial Agency Contracts, each identical to the 2006 Agreement, also for two year terms. The HTW 2006 Agreement and the subsequent agreements are collectively referred to as the "HTW Agreements".

2. Paragraph 4 of the HTW Agreements provide that Cargle would pay HTW "ten percent (10%) of the gross compensation of union work and twenty percent (20%) of the gross compensation of non-union work ..." for the engagement of Cargle's services in the entertainment field, during the term of the Agreements.

3. HTW is a California licensed talent agent and remained a licensed agent throughout the parties' relationship. HTW submitted to the Labor Commissioner's office contracts used by HTW and the amount of commission charged by HTW from its artists. The Labor Commissioner approved a 20% commission fee charged by HTW for securing non-union work and approved a 10% commission rate for union signatory work. During the Agreements, Cargle performed print, television, radio and voice over work all secured and negotiated by HTW.

4. Throughout the parties' relationship, HTW collected a 20% commission rate for all jobs secured and negotiated by HTW, including television and radio work. In time, Cargle began to notice that in addition to HTW collecting a 20% commission on these engagements, HTW was also receiving an additional 20% "agency fee" directly billed to third party production companies (hereinafter production companies), for Cargle's services. When Cargle asked HTW about the extra "agency fee" charged to the production companies, he was told it was industry standard for the agent to receive an additional 20% from production companies for non-union work. Notably, Lynn Eriks, an employee of HTW who acted as Cargle's primary agent responsible for negotiating the majority of Cargle's job, testified that if she could not negotiate a separate 20% "agency

fee" from the production companies, that could be a "deal breaker" for HTW. It was clear that HTW sought and received an extra 20% fee for the majority of Cargle's jobs negotiated by HTW. The practice of HTW seeking an extra 20% "agency fee" continued throughout the term of the Agreements.

5. Sometime on or around March 28, 2014, Cargle terminated HTW and obtained new talent representation. Cargle's new talent agency informed him that the practice of negotiating an extra 20% "agency fee" to be paid by the employer in addition to the artist's gross compensation, was not an industry standard. Cargle was also informed that television and radio work was considered union work, despite Cargle not being a member of SAG-AFTRA.

6. The production company who paid the overwhelming majority of Cargle' s earnings was Kovel/Fuller Advertising Agency. Mathew Coates, the executive producer in charge of casting for Kovel/Fuller testified convincingly that Kovel/Fuller did not know it was paying a 20% "agency fee" for the direct benefit of HTW, thereby paying HTW 40% of the contracted rate for Cargle' s services.

7. Cargle now demands a return of the 20% "agency fee" charged to all production companies by HTW. Cargle also demands a return of half of the 20% commissions paid to HTW for radio and television work, arguing that all radio and television work performed by Cargle is "union" work. As a result, Cargle argues that HTW collected 20% for union work and therefore collected commissions of double the rate approved by the Labor Commissioner.

8. HTW argues the 20% agency fee collected by HTW from the employer is industry standard, was negotiated outside and apart from Cargle's fee and therefore it is entitled to keep it. HTW also argues the production companies were expressly informed of and agreed to the "agency fee". Additionally, HTW argues that the production companies paying for Cargle's services, were not SAG-AFTRA signatories; Cargle was not member of SAG-AFTRA. Therefore the work performed by Cargle under the

Agreements was non-union work enabling HTW to collect 20% commissions and entitling HTW to all commissions received from 2006 through March of 2014.

III. LEGAL ANALYSIS

1. Labor Code §1700.4(b) includes "actors" and "radio artists" in the definition of "artist" and Cargle is therefore an "artist" within the meaning of Labor Code §1700.4(b).

2. At all times relevant, HTW was a licensed talent agency.

3. At all times relevant, HTW was a SAG-AFTRA franchised agent

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

A. 20% AGENCY FEE

5. A primary issue in this case is whether the 20% "agency fee" collected by HTW is a separate fee between HTW and the production companies having nothing to do with Cargle's earnings, in which case HTW is entitled to such fees, or whether the "agency fee" negotiated and collected by HTW belongs to Cargle and is part of his earnings.

6. This issue was discussed by the Labor Commissioner in *Shazi Ali aka Shazda Deen v. Nouveau Model and Talent Management, Inc., (Ali) TAC 14198.* The Labor Commissioner concluded in *Ali*,

> "[s]o long as said fees are not "registration fees" or fees charged for services expressly listed in Labor Code §1700.40(b) (or similar services), and are not intended to be

> part of an artist's compensation (even though they may be based on a percentage of the artist's total earnings), we find that the Agency Fees are between the talent agency and the third party companies and the Labor Commissioner has no jurisdiction over such fee arrangements. *We note that the evidence, however, must clearly establish that the Agency Fee is separate and apart from the fees the production company pays to the artist. There must be no question that the fees are intended for the agency and are not meant for the artist* [emphasis added]. *Shazi Ali aka Shazda Deen v. Nouveau Model and Talent Management, Inc., TAC 14198* at pg. 4.

7. Here, unlike *Ali,* ample evidence that the "agency fees" were intended for Cargle and not HTW comes from the testimony of Mathew Coates, executive producer for Kovel/Fuller Advertising Agency. Coates credibly testified that Kovel/Fuller was not aware the additional fees were for the direct benefit of HTW. Coates further testified that he believed HTW was only receiving 20% of the contract fee negotiated by HTW and not the 40% that HTW was actually collecting. As such, the "agency fee" was unlawfully collected by HTW in excess of the 20% commission rate approved by the Labor Commissioner pursuant to Labor Code §1700.24 which requires the Labor Commissioner to approve the maximum amount of fees charged and collected by a talent agent.

B. UNION v. NON-UNION WORK

8. We do not reach a determination as to whether all television and radio work is considered "union-work" in this context. Mathew Coates testified that Kovel/Fuller was not a union signatory and consequently considered the work performed by Cargle to be non-union work. Also, Cargle testified that he was not a member of SAG-AFTRA during the relevant time period. Importantly, the Schedule of Fees submitted by HTW and approved by the Labor Commissioner on February 11, 2011 states:

> The maximum rate of fees due this talent agency for services rendered to the artist is ten percent (10%) of the total earnings paid to the artist manages by this talent agency *for union signatory jobs*. The rate of fees for non-union jobs shall be no more than twenty percent (20%). [Emphasis added]

9. Cargle attempted to place into the record hearsay comments by SAG-AFTRA representatives that "the franchised agent is limited to 10% for non-union work in

all areas in which Legacy AFTRA and now SAG-AFTRA, has exercised jurisdiction." There was no reference in the record to what "exercising jurisdiction" means here. Notably, Rule 12-C, AFTRA's Regulations Governing Agents, section III (B.) states,

> "an artist who is not a member when s/he signs an agency contract with an agent is not affected by these regulations but nevertheless comes under the terms of these regulations .... as soon as s/he becomes a member ...."

10. To sum up, the record was insufficient to establish the proposition that all radio and television work is union work, whether or not the advertising agency is a union signatory and whether or not a non union member is governed by Rule 12-C before the artist becomes a union member. Consequently, we do not reach a conclusion on this issue today as Cargle did not meet his burden for his proposition.

C. STATUTE OF LIMITATIONS

11. Finally, HTW argues that Cargle waited too long to file this Controversy and Cargle's claim must be barred pursuant to the one year statute of limitations found at Labor Code §1700.44(c). Labor Code §1700.44(c) provides that "no action or proceeding shall be brought pursuant to the Talent Agencies Act with respect to any violation which is alleged to have occurred more than one year prior to the commencement of this action or proceeding. "

12. Petitioner cites *Park v. Deftones* (1999) Cal.App.4th 1465 for the proposition that the one year statute of limitations can be extended for an indefinite period. But in *Park*, the filing of the Petition to Determine Controversy was filed in response to and as an affirmative defense to a breach of contract action filed against the artist. The case of *Styne v. Stevens* (2001) 26 Cal.4th 42, held, "that statutes of limitations do not apply to defenses..... Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a

contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely. *Styne*, *supra* at p. 51; 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 423, p. 532. That is what occurred in *Park* but is not applicable here.

13. Here, Cargle seeks affirmative relief and therefore the one year statute of limitations applies. Cargle filed this action on July 23, 2014, thereby limiting his request *for affirmative relief* to HTW's violations occurring between July 23, 2013 and July 23, 2014.

D. ATTORNEY'S FEES

14. Cargle is awarded attorney's fees pursuant to Labor Code §1700.25(e)(1), stating in pertinent part:

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

(1) To the extent necessary to offset an obligation of the artist to the talent agency that is then due and owing.

(2) When the funds are the subject of a controversy pending before the Labor Commissioner under Section 1700.44 concerning a fee alleged to be owed by the artist to the licensee.

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

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

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

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

(1) Award reasonable attorney's fees to the prevailing artist.

15. In the case at hand, Bonnie Howard of HTW testified that she expressly told the production companies that the 20% "agency fee" collected by HTW was a separate amount negotiated between HTW and the productions companies for the direct benefit of HTW. This testimony was directly contradicted by Mathew Coates of Kovel/Fuller. Simply, the testimony of Ms. Howard was not believable. In short, HTW failed to pay Cargle his full earnings and concealed the true nature of the "agency fee" from Cargle and Kovel/Fuller. Consequently, HTW's failure to fully remit Cargle's earnings created a "willful" withholding within the meaning of Labor Code §1700.25.

ORDER

For the above-stated reasons, **IT IS HEREBY ORDERED** the Respondent, BONNIE HOWARD, dba HOWARD TALENT WEST, collected and willfully withheld $1,870.00 of Petitioner, SCOTT CARGLE'S earnings within the one-year statute of limitations prescribed by Labor Code §1700.44(c). HTW shall pay $374.00 in interest calculated at 10% per annum for an award of $2,244.00. HTW shall pay $10,000.00 in reasonable attorney's fees. HTW shall remit these fees within 30 days of this Order.

IT IS ORDERED.

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DATED: February 18, 2016

Respectfully submitted,

By: _____
DAVID L. GURLEY
Attorneys for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: February 18, 2016

By: _____
JULIE A. SU
STATE LABOR COMMISSIONER

PROOF OF SERVICE

STATE OF CALIFORNIA)
) **S.S.**
COUNTY OF LOS ANGELES)

I, Tina Provencio, declare and state as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: 300 Oceangate, Suite 850, Long Beach, CA 90802.

On February 18, 2016, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY,** on all interested parties in this action by placing a true copy enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☑ **(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our office address in Long Beach, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☑ **(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth in the attached service list.

☐ **(BY OVERNIGHT DELIVERY)** I served the foregoing document(s) by FedEx, an express service carrier which provides overnight delivery, as follows: I placed true copies of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

☐ **(BY FACSIMILE)** I caused the above-referenced document to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated on the attached service list.

☑ **(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 18th day of February, 2016, at Long Beach, California.

Tina Provencio

Tina Provencio
Declarant

SCOTT CARGLE vs. BONNIE HOWARD dba HOWARD TALENT WEST

TAC-36595

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