

In the Matter of Arbitration between:)
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SCREEN ACTORS GUILD-AMERICAN)
FEDERATION OF TELEVISION AND)
RADIO ARTISTS)
)
and)
)
TALENT DIRECT, INC.)
)
)
(Allocation of P&H Contributions))
_____)

**ARBITRATOR'S
OPINION
AND
AWARD**

SAG-AFTRA Case No. TM 9276

Impartial Arbitrator: Fredric R. Horowitz, Esq.

Appearances:

Talent Direct, Inc.: Toby M.J. Butterfield
Frankfurt Kurnit Klein & Selz PC

SAG-AFTRA: Lucas Novak, Esq.
Counsel

This arbitration arises under the Screen Actors Guild 2009 Commercials Contract ("2009 CC") between Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA" or "Guild") and Talent Direct, Inc. ("TD" or "Respondent"). The parties have waived their right to an evidentiary hearing pursuant to Section 46.E.2. of the 2009 CC and agreed to submit the dispute to the undersigned for final and binding determination with opening briefs submitted on December 20, 2013, and reply briefs submitted on January 10, 2014. No useful purpose is served by summarizing the entire record of evidence and argument presented by the parties, all of which has been reviewed and considered. Rather, only those matters deemed necessary in deciding the claim at issue are discussed herein.

BACKGROUND

TD is based in Portland, Oregon and is a signatory to the 2009 CC and predecessor 2003 Commercials Contract ("2003 CC"). TD assists its advertising agency and brand clients produce commercials and pay talent in accordance with applicable industry contracts. One of TD's clients is Tommy Bahama Group, Inc. ("Bahama"), a designer, manufacturer and retailer of men's and women's fashion. The 2003 and 2009 CC's are collective bargaining agreements negotiated with SAG-AFTRA by the ANA-AAAA Joint Policy Committee on Broadcast Talent Relations ("JPC") on behalf of advertisers and advertising agencies.

Section 46.A. of the 2009 CC requires producer/employers to pay pension and health contributions to the SAG-Producers Pension & Health Plans ("SAG Plans") in the amount of 15.5% of gross compensation for covered services. Late payments (over 60 days) are subject to a 20% penalty under Article III, Section 4. of the SAG-Producers Health Plan Trust Agreement. Where other services are also provided, such as photography for print or magazine advertisements, Section 46.E.2. calls for an allocation to covered services be made for benefit contribution purposes. The instant dispute is a claim by the Guild for additional pension and health contributions from TD on behalf of a member performer under a multiple services contract. The Guild and TD disagree as to the appropriate allocation to broadcast services under the performer's agreement.

On March 15, 2007, Bahama and Babylon Asset Management, Inc. ("BAM") entered into a multiple services contract ("2007 Agreement") for the rights to feature SAG-AFTRA member model/performer Andy Lucchesi ("Lucchesi") in print advertisements, television commercials, and in-store promotional materials for Bahama from June 1, 2007, through May 31, 2009. The 2007 Agreement allocated 10% of the \$500,000 in annual compensation for Lucchesi's services to broadcast and 90% to non-broadcast for purposes of making the requisite contributions to the SAG Plans. In 2008, SAG Plans challenged this allocation. After a period of negotiation, TD and SAG Plans entered into a Settlement Agreement on January 30, 2009, establishing an allocation of 20% to broadcast services to be applied to the total compensation under the 2007 Agreement.

On April 16, 2009, Bahama and BAM executed a new multiple services contract ("2009 Agreement") on substantially the same terms as the 2007 Agreement. This contract provided

annual compensation of \$250,000, however, but retained the clause which allocated covered services at 10%/90% for benefit purposes contained in their 2007 Agreement. Despite the presence of that clause, TD decided to allocate 20% of the total compensation for pension and health contributions under the 2009 Agreement using the settlement of the 2007 Agreement as the appropriate standard. The Guild responded with a demand for a 40% allocation based on the Guidelines added to Section 46.E. of the 2009 CC plus liquidated damages for late payment. TD denies any contribution beyond the 20% allocation already paid to the SAG Funds is required by the 2009 CC and insists SAG-AFTRA is bound by its settlement covering the 2007 Agreement.

EXCERPTS FROM THE 2003 COMMERCIALS CONTRACT

46. CONTRIBUTIONS TO PENSION AND HEALTH PLANS

A. Producer and advertising agencies signatory to Letters of Adherence, shall become parties to the "Screen Actors Guild-Producers Pension Plan for Motion Picture Actors" and "Screen Actors Guild-Producers Health Plan for Motion Picture Actors" and to the "Industry Advancement and Cooperative Fund" ("IACF"). Producers shall contribute an amount equal to 14.30% of all gross compensation paid to principal performers as herein defined with respect to television commercials produced on and after October 30, 2003. Such contribution shall be allocated as follows: 0.3% to the IACF and 14% to the Pension and Health Plans. Of such 14%, 4.75% will be allocated to the Pension Plan and 9.25% to the Health Plan. The allocation of the 14% between the Health Plan and the Pension Plan may be changed at any time during the term hereof by the Boards of Trustees of said Plans based on actuarial studies.

B. This Section 46 applies with respect to extra performers employed in accordance with Schedule D.

C. The term "gross compensation" as used in this subsection A means all salaries, session fees and other compensation or remuneration including holding fees and use fees, foreign use payments and theatrical or industrial use payments; excluding however, allowances; payments for meal period violations; rest period violations; traveling, lodging, or living expenses; liquidated damages for late payments; flight insurance allowance; reimbursements for special hairdress or for wardrobe maintenance or damage to wardrobe or personal property; but without any other deductions whatsoever. Such term also includes amounts paid to an employee with respect to services as a principal performer or as an extra performer ("performer") (including compensation paid as salary settlements) whether or not any services were performed.

D. If, during the term of this Contract, the Union negotiates a higher rate of employer contributions than 14.30% with the AMPTP or any successor organization, for its theatrical and TV film contracts, this Contract may be reopened for negotiations with respect to pension and health contributions only.

E. Where Producer borrows acting services from a signatory loan-out company, or enters into a contract with a principal performer under which covered services and noncovered services are to be provided, the following shall apply:

1. There will be a separate provision in principal performer's agreement or loan-out agreement covering only acting services. Where other services are involved and there is a dispute over the portion of the compensation

allocated to acting services, the principal performer's "customary salary" shall be given substantial consideration in resolving such dispute.

2. Contributions shall be payable on the amount allocated to covered services.

3. The Producer shall have the obligation to make the contributions directly to the Plans whether the agreement is with the principal performer or with the principal performer's loan-out company.

4. If, prior to the date on which Producer assumed the obligation to make the contributions directly to the Plans, a loan-out company has failed to make the applicable pension and health contributions on behalf of the loaned-out principal performer pursuant to the provisions of any applicable SAG Commercials Contract, Producer shall not be liable for such contributions if the loan-out company failed to pay such contributions more than 4 years prior to the date of commencement of the audit that gives rise to the claim (whether or not it is of the loan-out company's records or the borrowing Producer's records). The date of commencement of the audit shall be deemed to be the date of actual audit entry, but in no event later than 90 days after the date of the Plans' notice of intent to audit. In the event that the Plans conclude, based on an audit of a loan-out company's records, that there exists a claim for unpaid contributions, the Plans or the Union must give the borrowing Producer written notification of any such claim for unpaid contributions at the time that the loan-out company is notified of such claim.

5. Claims against Producer for pension and health contributions on behalf of principal performers borrowed from a loan-out company, or claims against Producer on behalf of principal performers employed directly by the Producer, must be brought within 4 years from the date of filing of the compensation remittance report covering such principal performers.

6. Any claim for contributions not brought within the 4-year period referred to in subsections F 4 and 5 above shall be barred.

57. ARBITRATION

F. Nothing herein contained shall be deemed to give the arbitrator(s) the authority, power or right to alter, amend, change, modify, add to or subtract from any of the provisions of this Contract.

EXCERPTS FROM THE 2009 COMMERCIALS MEMORANDUM OF AGREEMENT

1. Term and Effective Date

a. This contract shall be for a term commencing April 1, 2009 and continuing to and including March 31, 2012 and shall continue in effect thereafter until terminated by either party by 60 days notice in writing to the other. Except as otherwise specifically provided, the terms and provisions hereof shall apply to all commercials produced on or after April 1, 2009.

b. For services performed in commercials made between April 1, 2009 and June 15, 2009, all retroactive payments must be made not later than June 16, 2009.

c. The new working conditions shall be effective not later than June 1, 2009.

2. Applicability of Prior Contracts

Except as is otherwise expressly provided herein, the terms and provisions of the 2006 Extension to the 2003 Commercials Contract (2003 Contract as amended by 2006 Extension) shall apply to all commercials produced hereunder. The making of this agreement shall not modify any terms and provisions in any existing contracts of employment which are more favorable to the principal performer than the terms and provisions of this agreement. All Section references used below are references to the 2003 Contract as amended by the 2006 Extension.

13. Contributions to Pension and Health Plans

a. Amend Section 46.A as follows:

Producer and advertising agencies signatory to Letters of Adherence, shall become parties to the "Screen Actors Guild-Producers Pension Plan for Motion Picture Actors" and "Screen Actors Guild-Producers Health Plan for Motion Picture Actors" and to the "Industry Advancement and Cooperative Fund" ("IACF"). Producers shall contribute an amount equal to ~~14.80%~~ 15.5% of all gross compensation paid to principal performers as herein defined with respect to ~~television commercials produced on and after October 30, 2003~~ April 1, 2009. Such contribution shall be allocated as follows: ~~0.3%~~ .5 % to the IACF and ~~14.8%~~ 15% to the Pension and Health Plans. Of such ~~14.8%~~ 15%, ~~5.25%~~ 5.75% will be allocated to the Pension Plan and 9.25% to the Health Plan. The allocation of the ~~14.8%~~ 15% between the Health Plan and the Pension Plan may be changed at any time during the term hereof by the Boards of Trustees of said Plans based on actuarial studies. Effective January 1, 2012, no Producer shall be obligated to make Pension & Health contributions on behalf of any individual performer on gross compensation in excess of \$1,000,000 for covered services in a contract year where all such compensation has been paid on the basis of a single contract with a single Producer."

b. Replace Section 46 E 1 – 2 with the following:

E.

1. There will be a separate provision in principal performer's agreement or loan-out agreement allocating that portion of the performer's compensation between acting services covered by this Contract ("covered services") and all other services ("non-covered services"). Such allocations must be stated in the agreement as either a flat amount or a percentage of the total compensation. With respect to such allocations, the Guidelines for Allocations in Overscale Agreements, attached hereto as Exhibit I, have been agreed upon between SAG and Producer to provide non-binding guidance in determining such allocations (the "Allocation Guidelines"). Producer shall designate multi-service contract status on the contribution remittance reports filed with the Plans when contributions are tendered in connection with services related to a multiple-service agreement. Producer agrees to provide unredacted copies of all contracts relating to services provided under such multiple-service agreements to SAG and to the Plans at the time of submission of initial contribution reports to the Plans or, should Producer fail to do so, Producer agrees to provide such unredacted copies upon SAG's or the Plans' written request. If justified by unusual circumstances, Producer may request that SAG's or the Plans' representatives inspect the agreements at a mutually-agreed location in Los Angeles or New York. SAG will be entitled to demand unredacted copies of agreements inspected if needed solely for the purpose of arbitrating a dispute hereunder. As a condition of providing any copies of contracts, the Producer may require that either or both SAG and the Plans execute a confidentiality agreement substantially in the form attached hereto as Exhibit A.

2. Where non-covered services are involved and there is a dispute between SAG and the Producer over the portion of the compensation allocated to covered services, the parties will use their reasonable efforts to negotiate a mutually agreeable allocation and failing to come to an agreement, the dispute will be resolved pursuant to the arbitration provisions contained in paragraph 57.C. hereof. In any such arbitration, the principal performer's "customary salary" for acting services and the Allocation Guidelines shall be given substantial consideration in resolving such dispute. The arbitrator shall also consider the weighting of services between covered and non-covered services, and may also consider any other evidence submitted by the parties that the arbitrator deems to be probative."

c. The parties shall modify Exhibit B of the contract to include a space to designate multi service contract status.

d. Add the following as Exhibit I to the Contract:

Introduction

These Guidelines have been developed by the Screen Actors Guild ("SAG") and the ANA-AAAA Joint Policy Committee on Broadcast Talent Relations ("JPC") to assist Producers and Performers in determining appropriate

allocations between covered and non-covered services as required pursuant to paragraph 46.E.1. of the Commercials Contract.

These Guidelines provide an important indication to producers regarding those situations in which contributions to the Plans may be considered by SAG to be inadequate. In those situations, producers will therefore have an opportunity to bring to SAG's attention circumstances that a Producer believes warrants different contribution levels. In making the allocation, if a Producer believes that the application of these Guidelines is inappropriate in a particular situation, or has questions about the application or appropriateness of the Guidelines in a particular situation, the Producer may bring those concerns to SAG's and the JPC's attention. In particular in the case of music tour contracts, or race car driver endorsement contracts meriting special consideration, Producers may wish to contact SAG and the JPC.

Provided a Producer allocates in accordance with the following Guidelines, such allocation shall be rebuttably presumed to be proper in any proceeding brought to challenge such allocation under paragraphs 46.E.2. and 57 of this agreement. These Guidelines are also subject to the provisions of paragraph 46.E.3. of the Commercials Contract.

GUIDELINES

Commercial services include the right to produce and use commercials and to hold the performer to exclusivity, whether or not that right is exercised.

A. 100% of contract amount is reportable where compensation paid is solely for covered services.

B. A 50% allocation for a multi-service contract where SAG commercial services are involved with non-covered services. This allocation also applies where no SAG commercials are produced or used in a given period but the Producer has a right to do so and to hold the performer to exclusivity. Notwithstanding the foregoing, in the event the performer's principal source of income in the entertainment industry is derived from modeling services, the allocation may be 40% for such contracts.

C. In lieu of any other allocations provided herein, 20% allocation for a multi-service contract of currently active or inactive athletes who endorse a product/brand with which they are strongly associated and who generally wear the corporate logo/image on their clothes or equipment or who have product lines or other collateral merchandise associated with their endorsement. This allocation does not apply to athletes advertising products that are unrelated to their sport. Guideline B would be applicable in those cases.

D. In lieu of any other allocations provided herein, 40% allocation for commercials used exclusively outside the United States.

E. In lieu of any other allocations provided herein, 40% allocation for a performer in commercials for products or product lines which the performer has had an active role in developing and features the performer's name or image in the product, product line, or collateral merchandise.

F. In lieu of any allocations provided herein, where compensation is comprised, in part, of royalties or stock, 40% of any upfront non-refundable guarantee to performers appearing in commercials for products or product lines, where performers have a financial interest in the sale of products or product lines, and other non-covered services are involved.

G. Where contracts under paragraph A hereof include services covered by both the SAG and AFTRA Television Commercials Contracts and the AFTRA Radio Commercials Contract, allocations for covered services may be split 80% to services covered by the SAG and AFTRA Television Commercials Contracts and 20% to services covered by the AFTRA Radio Commercials Contract. Where contracts include non-covered services and services covered by both the SAG and AFTRA Television Commercials Contracts and the AFTRA Radio Commercials Contract, allocations for covered services may be split 90% to services covered by the SAG and AFTRA Television Commercials Contracts and 10% to services covered by the AFTRA Radio Commercials Contract. This provision is not intended to reduce the allocation to covered services to less than 50% as specified in Guideline B (e.g. a contract with covered services in both television and radio would result in a guideline allocation of 45% to television services and 5% to radio services for a total 50% allocation).

OPINION BY THE ARBITRATOR

The question presented for decision is the proper allocation to covered services under the 2009 Agreement between Bahama and BAM for the two year period from June 1, 2009 through May 31, 2011. TD maintains the 20% allocation used in settlement of the 2007 Agreement is more than fair and appropriate for the substantially identical 2009 Agreement under the facts and circumstances of this case. SAG-AFTRA, however, contends Guidelines added to the 2009 CC now require a 40% allocation in such cases and are fully applicable to the 2009 Agreement. A review of all the documents and argument submitted in this proceeding supports the position of the Guild. It follows the claim must be granted.

In any dispute over the interpretation and application of the provisions in a collective bargaining agreement, the task of the arbitrator is to ascertain and apply the mutual intent of the parties. St. Antoine, *The Common Law of the Workplace* (2d. ed.), §2.2. The most reliable indicator of mutual intent is the words used by the parties in their labor contract. Where the terms of a disputed clause are clear, the arbitrator will give full effect to the meaning of those terms. *Id.* Importantly, an arbitrator does not have the authority to ignore or modify any terms of a collective bargaining agreement. This fundamental precept of labor arbitration was codified by the Guild and JPC in Section 57.F. of the 2009 CC.

TD and SAG-AFTRA agree the 2009 Agreement at issue is subject to the terms and conditions of the 2009 CC which, under Section 1., was made effective April 1, 2009, prior to the commencement of services on June 1, 2009, under the 2009 Agreement. As noted by the Guild, Guidelines were added to the 2009 CC not present in the 2003 CC for "determining the appropriate allocations between covered and non-covered services as required pursuant to paragraph 46.E.1. of the Commercials Contract." The Guidelines state that "Commercial services include the right to produce and use commercials and to hold the performer to exclusivity, whether or not that right is exercised." Guideline B. requires a 50% allocation for a multiple services contract, yet allows for a 40% allocation in the event a performer's principal income is derived from modeling services. The Guild urges application of the 40% allocation in Guideline B. to the compensation in the 2009 Agreement because Lucchesi's principal source of income in the industry is from modeling.

Applying these provisions in the Commercials Contract to the 2009 Agreement in question, a conclusion the services fall squarely within the 40% allocation in Guideline B. is manifest. The 2009 Agreement by its terms was effective June 1, 2009, and the amendments to the 2009 CC by its terms became effective April 1, 2009. The 2009 Agreement is a multiple services contract which includes the right to broadcast commercials as well as an exclusivity clause with respect to products competing with Bahama. Because the performer functioned principally as a model, the 40% allocation rather than the standard 50% in Guideline B. is the more appropriate figure to be applied in this case.

The defenses posited by TD to the 40% allocation are unavailing. The previously agreed 20% allocation urged by TD herein was in settlement of the dispute over the 2007 Agreement under the 2003 CC which contained no specific guidelines. That settlement was reached on January 15, 2009, and there was no understanding between TD and SAG-AFTRA this compromise would apply to any future multiple service agreements. Meanwhile, new Guidelines applicable to multiple service agreements were negotiated and adopted by JPC on behalf of all producer/employers. It is recognized TD and Lucchesi may not have been aware of the Guidelines when the 2009 Agreement was signed. But as signatory to the 2009 CC, TD is charged with notice and compliance with its terms.

TD correctly observes the allocations in the Guidelines can be rebutted in an appropriate case, but the evidence presented is insufficient to compel a different result. It is accepted that Lucchesi was not utilized by Bahama in any covered services in the performance of the 2009 Agreement. But Section 46.E. and the Guidelines thereunder are quite clear the allocation is attributed to the rights to those services whether or not such rights are exercised. TD argues a 20% allocation is the more reasonable given the nature of the services performed and the prior settlement. Yet as discussed above, that figure was a compromise in a 2007 dispute and has been superseded by the adoption of new Guidelines. Section 57.F. prohibits an arbitrator from altering any of the provisions of the 2009 CC. If the allocations established by the bargaining parties are viewed by a signatory to be unfair or unreasonable, the remedy lies in the crucible of collective bargaining.

Having determined the 40% allocation sought by the Guild is required by Section 46.E. of the 2009 CC, Respondent will be ordered to pay the remaining \$15,500.00 to the SAG Plans due under Section 46.A. plus liquidated damages in the amount of \$3,100.00 for late

payment pursuant to Article III, Section 4, of the SAG-Producers Health Plan Trust Agreement. The fee of the Arbitrator shall be shared equally by the parties, with the Guild advancing Respondent's share to be promptly reimbursed by Respondent.

Based on the foregoing, and the entire record in this proceeding, the following Award is issued.

AWARD

1. Within three weeks of the date of this Award, Respondent shall pay an additional \$15,500.00 in contributions to the applicable SAG Plans plus \$3,100.00 in liquidated damages, for a total of \$18,600.00.
2. SAG-AFTRA shall advance the Arbitrator fees in the amount of \$4,400.00. Within three weeks of the date of this Award, Respondent shall reimburse SAG-AFTRA its one-half share advanced in the amount of \$2,200.00

DATED: March 18, 2014
Santa Monica, California



FREDRIC R. HOROWITZ, Arbitrator