

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
2 State of California
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4 Attorney for the Labor Commissioner
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6 BEFORE THE LABOR COMMISSIONER
7 OF THE STATE OF CALIFORNIA
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9

10 NOELLE FORBES,)	Case No. TAC 10-98
)	
11 vs.)	DETERMINATION OF
)	CONTROVERSY
12 FEMME FATAL INC.,)	
dba SIRENS MODEL MANAGEMENT,)	
)	
13 Respondent.)	
)	
)	

14
15 INTRODUCTION

16 The above-captioned petition was filed on April 13, 1998
17 by NOELLE FORBES (hereinafter "Petitioner") alleging that FEMME
18 FATAL INC., dba SIRENS MODEL MANAGEMENT (hereinafter "Respondent")
19 violated the Talent Agencies Act (Labor Code §§1700.23 an 1700.32)
20 in attempting to use unapproved contracts, advertising false
21 information and making false promises or representations concerning
22 employment. Petitioner also alleges Respondent committed fraud and
23 breached a binding contract that would have required Respondent to
24 procure \$25,000.00 worth of modeling contracts for Petitioner.
25 Petitioner seeks \$25,000.00 in damages.

26 Respondent filed an answer on August 19, 1998 asserting
27 thirty eight affirmative defenses, inter alia the contract lacks

1 the requisite formation elements, the Labor Commissioner lacks
2 jurisdiction and both parties are precluded from performance due to
3 impossibility and/or frustration of purpose.

4 A hearing was scheduled on July 31, 1998 in Los Angeles
5 at the office of the Labor Commissioner. The President of Femme
6 Fatal Inc., Mr. Eric Rhulen could not attend and a continuance was
7 requested and granted. The hearing was rescheduled to August 21,
8 1998 before the undersigned special hearing officer designated by
9 the Labor Commissioner. Petitioner was represented by attorney
10 Jack D. Samuels; Respondent was represented by attorneys Warren L.
11 Nelson and John K. Skousen. At the outset of the hearing
12 Petitioner brought a Motion for Default as Mr. Rhulen did not
13 appear. Mr. Rhulen was not under subpoena, and the motion was
14 therefore denied. Based upon the testimony and evidence presented
15 at this hearing, the Labor Commissioner adopts the following
16 Determination of Controversy.

17 FINDINGS OF FACT

18 1. In early September 1997, Petitioner responded to an
19 advertisement in the L.A. Times Weekly edition. The ad stated:
20 "hollywood bike jam '97 produced by New Millennium Pictures is in
21 search of next years official Hollywood Bike Jam Spokes Models.
22 You will not only become next years official spokes models but the
23 exclusive Sirens Modeling Agency will be awarding over \$100,000
24 worth of modeling contracts to the four winners." Additionally, in
25 bold print the ad read, "SIRENS MODELING AGENCY OFFERING \$100,000
26 IN MODELING CONTRACTS". Petitioner submitted her photo and resume
27 to the Respondent and was selected by Respondent's employee to

1 appear at the final competition on September 13, 1997.

2 2. Petitioner attended the contest and was chosen as
3 one of the four winners. After the contest, Petitioner was handed
4 a letter stating: "Congratulations you are one of the lucky winners
5 of the Hollywood bike Jam spokesmodel search. Please stop in
6 Sirens within the next 30 days to discuss the terms and conditions
7 of the contract." This letter was signed by Sirens Models
8 President, Eric Rhulen.

9 3. Petitioner retained attorney Martin J. Groothuis.
10 On October 31, 1997, Petitioner and her attorney were presented
11 with two contracts consisting of a general Sirens Model Management
12 Agreement and a Hollywood Bike Jam Spokesmodel Search Supplemental
13 Agreement. The two contracts set forth the duties and obligations
14 of the parties. Petitioner had concerns with some of the contract
15 provisions. A series of communications between the parties ensued.
16 On December 11, 1997, Petitioner sent Respondent a letter seeking
17 clarification of vague terms within the agreements. Respondent did
18 not respond to the letter. Petitioner continued attempted
19 negotiations, albeit unsuccessfully. At some point in January,
20 Petitioner substituted counsel and retained present counsel Jack D.
21 Samuels. On January 28, 1998 Mr. Samuels sent a letter to
22 Respondent setting forth alleged inconsistencies between the two
23 contracts, as well as listing an additional ten requests and
24 questions. At this point contract negotiations ceased. It was
25 stipulated at the hearing that no contract was ever signed.

26 4. On April 13, 1998, Petitioner filed the Petition
27

1 alleging violation of Labor Code §§1700.23 and 1700.32.¹
2 Petitioner does not offer sufficient evidence in support of these
3 allegations and neither will be considered in this determination.²

4 Petitioner concludes her petition by stating, "that
5 Respondent be ordered and perform all of its obligations which it
6 assumed with regard to the contest which Forbes won." Petitioner
7 seeks for Respondent to represent her and procure \$25,000 in
8 modeling contracts.

9 5. At the conclusion of the August 21, 1998 hearing,
10 the Hearing Officer requested post trial briefs on the issue of
11 whether the Labor Commissioner had the authority to grant specific
12 performance of a personal services contract. Both parties
13 concluded that the Labor Commissioner does not have such authority.
14 Petitioner in her post-trial brief amends her remedy and seeks
15 \$25,000 in monetary damages.

16 6. Petitioner's primary cause of action is breach of
17 contract. Petitioner analogizes, "The winner of Miss America wins
18 prizes. She has to enter, she has to perform, and if she is lucky
19 enough to win, she wins the prize. Here my client entered,

21 ¹ Labor Code §1700.23 states in pertinent part: Every talent agency shall submit
22 to the Labor Commissioner a form or forms of contract to be utilized by such talent agency
23 in entering into written contracts with artists for the employment of the services of such
24 talent agency by such artists, and secure the approval of the Labor Commissioner thereof.
25 Labor Code §1700.32 states in pertinent part: No talent agency shall publish or cause to
26 be published any false, fraudulent, or misleading information representation, notice, or
27 advertisement....No talent agency shall give any false information or make any false
promises or representations concerning an engagement or employment to any applicant who
applies for an engagement or employment.

28 ² Violation of these statutes may serve as the basis for talent agency license
29 denial or revocation proceedings, but in themselves do not constitute an appropriate cause
30 of action that would require an award for monetary damages pursuant to Labor Code
31 §1700.44.

1 performed, and was lucky enough to win. She did not receive the
2 prize." Petitioner states in her post trial brief that the
3 contractual portion of this case is rather simple: "There was an
4 offer which was made by a publication as well as by an application.
5 Petitioner accepted the offer and satisfied all of the terms and
6 conditions required for her to receive the prize of \$25,000 in
7 modeling contracts. While Petitioner cannot specifically cause
8 Respondent to utilize her services or furnish modeling contracts,
9 she is entitled to damages in the amount of \$25,000."

10 7. Petitioner further pleads that Respondent is guilty
11 of common law fraud³ and cites the applicable elements.

12 8. Respondent argues that the Labor Commissioner lacks
13 jurisdiction over the controversy. Respondent opines that
14 jurisdiction can be founded only upon a violation of the Talent
15 Agencies Act (Labor Code §§1700-1700.47), which the Petitioner has
16 failed to establish. Respondent contends that jurisdiction may not
17 be founded upon a breach of contract. Respondent further contends,
18 that if the Labor Commissioner was to rule on the breach of
19 contract claim, Respondent must prevail. Respondent argues there
20 was no "meeting of the minds" and hence a contract was never formed.

21 9. Various witnesses testified that the advertisement
22 was published without Eric Rhulen's knowledge or consent.
23 Respondent contends the advertisement should not be considered an
24 offer and Respondent should not be held liable for its terms.
25 Respondent's lack of knowledge as to the existence of the ad is not

26
27 ³ The Labor Commissioner does not have jurisdiction over tort causes of action.

1 credible. Rhulen was not present for cross examination, and
2 Respondents general counsel asserted the attorney client privilege
3 in response to questions on this issue. Additionally, immediately
4 after Petitioner won the contest, Rhulen handed Petitioner a letter
5 requesting her to come in to the office within thirty days to
6 discuss the terms of the contract. During the contest, the award
7 of \$25,000 in modeling contracts was mentioned repeatedly in front
8 of the parties with no objection from Rhulen. Respondent knew the
9 contestants would have expectations of modeling contracts and
10 Sirens Model Management would likely have future obligations.

11 10. Respondent states that the \$25,000 in gross
12 bookings due each winner would have been fulfilled by "Bike Jam's"
13 upcoming promotional events, but the primary organizer of the
14 event, New Millennium Pictures, became insolvent and ceased
15 operations. Sirens was not paid, and all of the upcoming
16 promotional events were canceled. Respondent contends Sirens was
17 dependant on "Bike Jam's" promotional events to fulfill the
18 \$100,000 in modeling contracts promised to the winners. Respondent
19 argues that the disappearance of "New Millennium" renders the
20 contract void due to impossibility of performance and/or
21 frustration of purpose.

22
23 CONCLUSIONS OF LAW

24 1. Petitioner is an "artist" within the meaning of
25 Labor Code §1700.4(b).

26 2. Respondent is a "talent agency" within the meaning
27 of Labor Code §1700.4(a).

1 3. Respondent's argument that the Labor Commissioner's
2 jurisdiction can only be founded upon a violation of the Talent
3 Agencies Act and not a breach of contract is dismissed. Labor Code
4 §1700.23 provides that the Labor Commissioner is vested with
5 jurisdiction over "any controversy between the artist and the
6 talent agency relating to the terms of the contract," and the Labor
7 Commissioner's jurisdiction has been held to include the resolution
8 of contract claims brought by artists or agents seeking damages for
9 breach of a talent agency contract. Garson v. Div. Of Labor Law
10 Enforcement (1949) 33 Cal.2d 861, Robinson v. Superior Court (1950)
11 35 Cal.2d 379.

12 4. The real issue in this case is whether a legally
13 binding contract was formed. Was there mutual consent? Petitioner
14 contends the advertisement contained the offer. Simply by winning
15 the contest, Petitioner accepted, entitling her to \$25,000 in
16 modeling contracts, and creating an enforceable obligation on the
17 Respondent to deliver its promise.

18 5. *Witkin, Summary of California Law 9th Ed. §123*
19 states, "If the writing does not reasonably appear to be a
20 contract, and its contractual terms are not called to the attention
21 of the person who receives it, he is not bound." The advertisement
22 did not reasonably appear to be a contract. There were no
23 contractual terms within the advertisement. Petitioner's
24 contention that the ad contained the essential terms, namely by
25 winning the contest, Petitioner accepted Respondent's offer to
26 provide representation and modeling contracts is not reasonable.
27 The ad stated that "You will not only become next years official

1 spokesmodels but the Sirens exclusive Modeling agency will be
2 awarding over \$100,000 worth of modeling contracts to the four
3 winners." There is no indication of material terms. The ad does
4 not include such essential terms as the duration of the contract,
5 calculation of how the \$100,000 will be awarded, how commissions
6 are to be calculated, duties and obligations of the parties, and
7 what limitations will be placed on the parties. Looking at the ad
8 to determine the terms of the agreement is an exercise in futility.
9 The advertisement appears to be a promotional add designed to
10 create interest in the public for the "1997 Hollywood Bike Jam".
11 Petitioner, a law student and sophisticated plaintiff under
12 contract to a commercial agent could not reasonably have expected
13 representation and \$25,000 in future modeling contracts without
14 realizing the need to work out the details. Using Petitioner's own
15 analogy, a Miss America Pageant is easily distinguished. Miss
16 America contestants are invariably aware of the terms of the
17 agreement. Releases are signed and duties and obligations of the
18 parties are well publicized, unlike the case at hand.

19 6. Case law agrees, "sometimes a party suggests the
20 terms of a possible contract, **by advertisement**, letter or
21 catalogue, without making a definite proposal. The result is a
22 mere invitation to others to make offers." *Lonergan v. Scolnick*
23 *(1954) 129 C.A.2d 179* This ad reasonably appears to be an offer
24 to negotiate or an invitation to deal.

25 7. An offer must be sufficiently definite, or must call
26 for such definite terms in the acceptance, that the performance
27 promised is reasonably certain. *Restatement 2d. Contracts sec. 33*

1 sets forth the rule and test as follows:

2 (1) Even though a manifestation of intention is intended
3 to be understood as an offer, it cannot be accepted so as to form
4 a contract unless the terms of the contract are reasonably certain.

5 (2) The terms of the contracts are reasonably certain if
6 they provide a basis for determining the existence of a breach and
7 for giving an appropriate remedy.

8 (3) The fact that one or more terms of a proposed
9 bargain are left open or uncertain may show that a manifestation of
10 intention is not intended to be understood as an offer or as an
11 acceptance."

12 The lack of terms in addition to the many uncertainties
13 left open for negotiation reflect a lack of intent by Respondent to
14 be bound by the contents of the proposed offer.

15 8. *Witkin(supra) §156* states that, "a contract which
16 leaves an essential element for future agreement of the parties is
17 usually held fatally uncertain and unenforceable. The court said
18 in *Ablett v. Clauson (1954) 43 C.2d 280, 284*, quoting Williston:

19 "if an essential element is reserved for the future
20 agreement of both parties, the promise can give rise to
21 no legal obligation until such future agreement. Since
22 either party by the terms of the promise refuse to agree
23 to anything to which the other party will agree, it is
24 impossible for the law to affix any obligation to such a
25 promise."

26 As the parties have attempted to negotiate without
27 success, the Labor Commissioner is prohibited to attach reasonable

1 meaning to all of the missing terms. By post trial briefs, both
2 parties agree that the Labor Commissioner is prohibited to require
3 specific performance for a personal service contract.

4 9. "An acceptance must be absolute and unqualified
5 ..., a qualified acceptance or a counteroffer constitutes a
6 rejection of the original offer, and the original offer cannot
7 thereafter be accepted by the offeree." *Witkin (supra)* § 189.

8 Petitioner's argument that by winning, she accepted the offer and
9 thus formed a contract fails. The advertisement, by its lack of
10 terms does not constitute an offer. The first offer was the
11 initial contract proposed on October 31, 1997 to Petitioner and her
12 attorney Groothuis. When Petitioner requested material changes in
13 the proposed contracts, her requests became a counteroffer
14 extinguishing the original offer contained in Mr. Rhulen's
15 contracts.

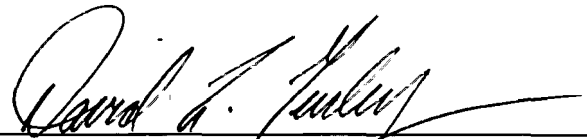
16 10. The Petitioner seeks \$25,000.00. The Petitioner
17 has not performed any of her future obligations. The winner of the
18 contest was to be offered modeling contracts. In order to receive
19 \$25,000 in fees, a model must perform modeling. Petitioner has not
20 modeled in any capacity which would entitle her to damages. To
21 award Petitioner \$25,000 would result in unjust enrichment. Though
22 Petitioner may be justifiably disappointed, she is not entitled to
23 the benefit of the bargain, nor has she suffered a loss.

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ORDER

For the above-state reasons, IT IS HEREBY ORDERED that this petition is dismissed.


Dated: 11-17-98



DAVID L. GURLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: 11/17/98



JOSE MILLAN
State Labor Commissioner

