

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 JAMES CUBINAR, BONNIE LANDY as) TAC No. 17-01
14 guardian ad litem for MOLLY LANDY)
15 and JAMES LANDY; AUSTEN L. BEVERLY,) DETERMINATION OF
16 MAUREEN A. GANNON, and JUSTON) CONTROVERSY
17 CLARKSTON,)
18)
19) Petitioners,)
20 vs.)
21)
22) MITCHELL AGENCY, INC.; MITCHELL)
23 TALENT AGENCY, INC., TROY SOLAREK and)
24 MITCHELL SOLAREK, as individuals)
25 and DOES 1 through 10, inclusive,)
26)
27) Respondents.)
28)

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19 INTRODUCTION

20 The above-captioned petitions were filed by JAMES CUBINAR
21 on November 8, 2001; BONNIE LANDY as guardian ad litem for MOLLY
22 LANDY and JAMES LANDY on July 26, 2001; AUSTEN L. BEVERLY on July
23 5, 2001; MAUREEN A. GANNON on October 24, 2001; and JUSTON
24 CLARKSTON on November 8, 2001, (hereinafter "Petitioners"). The
25 aforementioned petitions were consolidated for all purposes.
26 Petitioners alleged that TROY McVEY-SOLAREK and MITCHELL SOLAREK
27 acting on behalf of MITCHELL AGENCY INC., a.k.a. MITCHELL TALENT

1 AGENCY INC., and/or MITCHELL MODEL MANAGEMENT, (hereinafter
2 "Respondents" or "Mitchell"), failed to pay wages earned for
3 modeling performed in violation of Labor Code §1700.25(a)¹.
4 Petitioners further allege respondents willfully withheld
5 petitioner's earnings and are therefore entitled to attorney's fees
6 and interest pursuant to §1700.25(e)(1) and (2).

7 Respondents filed their response on November 19, 2001,
8 claiming they did not act as a talent agent and consequently were
9 not required to possess a talent agency license. Further,
10 respondents deny they were paid by their client/advertisers for
11 services performed by petitioners. And finally, respondents deny
12 individual liability. The hearing was originally scheduled on
13 January 18, 2002. The Solareks were not served in their individual
14 capacity and did not appear. On petitioners' motion, the hearing
15 was continued to August 30, 2002. The petitioners collectively
16 amended the petition and personally served the Solareks in
17 Tennessee where they relocated after closing the talent agency
18 business².

19 Respondents filed their response to the amended petition
20 on July 11, 2002, again denying liability in the Solareks
21 individual capacity and alleging the claims are barred by the one-
22 year statute of limitations.

23 On August 30, 2002, the day of the hearing the
24 respondents appeared telephonically and requested a continuance.

25 ¹ All statutory citations will refer to the California Labor Code unless
26 otherwise indicated.

27 ² This is the fourth Talent Agency Controversy filed against
28 respondents. The respondents were found liable in all three previous
controversies and ordered to pay petitioners in excess of \$323,000.00.

1 Respondents' attorney, James Wattson argued neither he nor his
2 clients were notified of the August 30, 2002 hearing date. A
3 review of the proof of service indicated respondents were
4 personally served in Tennessee with the notice of hearing. Thus
5 respondents had actual notice of the hearing date. The request for
6 a continuance was denied. The hearing was held before the
7 undersigned attorney for the Labor Commissioner. Based upon the
8 testimony and evidence presented at this hearing, the Labor
9 Commissioner adopts the following Determination of Controversy.

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11 FINDINGS OF FACT

12 1. Petitioners, professional models, entered into an
13 oral contract with the respondents. Respondents procured modeling
14 engagements on behalf of petitioners in exchange for 20% of
15 petitioners' earnings. Typically, the advertiser/client paid
16 petitioners' earnings directly to the respondent who then deducted
17 a 20% commission and remitted the remaining wages to the
18 petitioners.

19 2. Between September 13, 2000, through May 18, 2001,
20 petitioners performed modeling engagements procured by the
21 respondents, whereby the respondents collected petitioner's
22 earnings from the advertiser/client, but then failed to remit those
23 earnings to petitioners.

24 3. The modeling assignments procured by the respondent
25 and performed by the petitioners, and monies not disbursed include
26 the following:

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1	<u>CLAIMANT</u>	<u>CLIENT</u>	<u>DATE</u>	<u>AMOUNT</u>
2	JAMES CUBINAR	RSA SECURITIES	1/15/2001	1,906.25
3			TOTAL	1,906.25
4	AUSTEN L.	LEVI STRAUSS	3/20/2001	1,453.12
	BEVERLY	LEVI STRAUSS	3/21/2001	1,031.25
5		LEVI STRAUSS	3/28/2001	1,500.00
		BOUNCED CHECK	4/1/2001	30.00
6			TOTAL	4,014.37
7	LIAM LANDY	CALIFORNIA CLOSETS	3/29/2001	1,225.00
		CHRIS AD		
8		(NATIONAL DENTAL BOARD)	4/9/2001	375.00
			TOTAL	1,600.00
9	MOLLY LANDY	HERTZ RENTAL CAR	9/13/2000	1,500.00
		EDDIE BAVER	9/21/2000	396.08
10		EDDIE BAVER	10/14/2000	323.56
		GAP	1/3/2001	405.00
11		GAP	1/4/2001	630.00
		GAP	3/8/2001	270.00
12		CALIFORNIA CLOSETS	3/29/2001	1,225.00
		CHRIS AD		
13		(NATIONAL DENTAL BOARD)	4/9/2001	375.00
			TOTAL	5,124.64
14	MAUREEN GANNON	GAP	3/20/2001	150.00
15		GAP	3/26/2001	375.00
		GAP	3/27/2001	150.00
16		GAP	3/27/2001	450.00
		GAP	3/29/2001	450.00
17		GAP	3/30/2001	150.00
		GAP	4/3/2001	525.00
18		GAP	4/4/2001	150.00
		GAP	4/5/2001	450.00
19		GAP	4/5/2001	150.00
		GAP	4/6/2001	150.00
20		DEBORAH HAMPTON	4/8/2001	750.00
		GAP	4/10/2001	300.00
21		LEVI STRAUSS & CO.	4/10/2001	300.00
		GAP	4/11/2001	150.00
22		DEBORAH HAMPTON	4/11/2001	300.00
		GAP	4/11/2001	300.00
		GAP	4/13/2001	150.00
23		LEVI STRAUSS & CO.	4/16/2001	150.00
		LEVI STRAUSS & CO.	4/19/2001	150.00
24		GAP	4/20/2001	150.00
		LEVI STRAUSS & CO.	4/24/2001	300.00
25		GAP	4/25/2001	150.00
		LEVI STRAUSS & CO.	4/26/2001	300.00
26		LEVI STRAUSS & CO.	4/30/2001	300.00
		GAP	5/2/2001	150.00
27		GAP	5/4/2001	150.00
		LEVI STRAUSS & CO.	5/7/2001	150.00
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1		NORTH FACE	5/8/2001	600.00
2		GAP	5/8/2001	150.00
		LEVI STRAUSS & CO.	5/14/2001	225.00
3		GAP	5/15/2001	1,068.00
		GAP	5/15/2001	900.00
4		GAP	5/16/2001	1,350.00
		LEVI STRAUSS & CO.	5/18/2001	300.00
5		GAP	5/18/2001	150.00
		TOTAL		12,093.00
6	JUSTON	MACY'S	11/22/2000	750.00
7	CLARKSTON	MACY'S	1/2/2001	750.00
		BLOOMINGDALE'S	9/13/2000	225.00
8		BLOOMINGDALE'S	9/14/2000	285.00
9		TOTAL		2,010.00

10 4. Credible testimony and evidence in the form of work
11 vouchers signed by the advertisers were produced establishing
12 respondents procured and petitioners performed all modeling
13 engagements. Additionally, credible testimony by petitioners,
14 buttressed by phone logs and detailed memorandums reflected that
15 respondents stated Mitchell Talent had not been paid by the
16 advertiser/client and that monies earned would be forthcoming as
17 soon as payment was rendered. Petitioners, skeptical of
18 respondent's excuse, directly contacted the various
19 advertiser/clients of Mitchell to verify whether the clients had
20 indeed paid Mitchell for petitioner's services. The clients, all
21 well known retailers including, *Levis, The Gap, Macy's* and *Eddie*
22 *Bauer*, indicated that payment had been made to respondents soon
23 after the modeling was performed.

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3 LEGAL ANALYSIS

4 1. Labor Code 1700.4(b) includes "models" in the
5 definition of "artist". Petitioner's is an "artist" within the
6 meaning of Labor Code §1700.4(b).

7 2. Labor Code §1700.4(a) defines "talent agency" as, "a
8 person or corporation who engages in the occupation of procuring,
9 offering, promising, or attempting to procure employment or
10 engagements for an artist or artists." It is undisputed that
11 respondents procured all modeling engagements on behalf of the
12 petitioners. Moreover, respondents were a licensed California
13 talent agent operating under license No. 3530 until expiration of
14 their license on September 17, 2001. Therefore, respondents
15 argument that they were not acting in the capacity of a talent
16 agency is preposterous and nonsensical.

17 3. Labor Code 1700.25 states in pertinent part:

18 (a) A licensee who receives any payment of funds on
19 behalf of an artist shall immediately deposit that amount
20 in a trust fund account maintained by him or her in a
21 bank or other recognized depository. The funds, less the
22 licensee's commission, shall be disbursed to the artist
23 within 30 days after receipt.

24 4. The respondents failed to disburse petitioner's
25 earnings within 30 days of receipt and consequently are in
26 violation of 1700.25(a).

27 Further Labor Code §1700.25(e) states,
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2 If the Labor Commissioner finds, in proceedings under
3 Section 1700.44, that the licensee's failure to disburse
4 funds to an artist within the time required by
5 subdivision (a) was a willful violation, the Labor
6 Commissioner may, in addition to other relief under
7 Section 1700.44, order the following:

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

10 (2) Award interest to the prevailing artist on the funds
11 wrongfully withheld at the rate of 10 percent per annum during the
12 period of the violation.

13 5. Respondent's misrepresentations regarding the
14 alleged non-payment of the employer/client violates respondent's
15 fiduciary duty toward the petitioners and establishes a willful
16 violation within the meaning of Labor Code §1700.25(e).

17 6. Respondents argue Labor Code §1700.44(c) precludes
18 petitioner's recovery. Labor Code §1700.44(c) provides that "no
19 action or proceeding shall be brought pursuant to [the Talent
20 Agencies Act] with respect to any violation which is alleged to
21 have occurred more than one year prior to the commencement of this
22 action or proceeding." The petitions were originally filed from
23 July 5, 2001 through November 8, 2001. All work was performed
24 between September 13, 2000, through May 18, 2001. As a result, all
25 petitions are timely and petitioners are entitled to recovery. The
26 amended petition relates back to the date of the original petition.

27 7. As to respondents denial of individual liability,
28 the court in Michaelis v. Benavides 61 Cal.App.4th 681 a. 684
quoting Haidinger-Hayes maintains, "[a]s president and principal
officer of defendant corporation, [Haidinger] was a fiduciary to

1 and an agent of that corporation. He had a duty to the corporation
 2 to exercise his corporate powers in good faith and with a view to
 3 its interests (Corp.Code, § 820). ... Directors or officers of a
 4 corporation do not incur personal liability for torts of the
 5 corporation merely by reason of their official position, **unless**
 6 **they participate in the wrong or authorize or direct that it be**
 7 **done** [emphasis added]. They may be liable, under the rules of tort
 8 and agency, for tortious acts committed on behalf of the
 9 corporation." 3 Witkin, *Summary of Cal. Law* (7th ed. 1960) § 48(c),
 10 pp. 2342-2343; 13 Cal.Jur.2d, § 353; 19 C.J.S., § 845; Knepper,
 11 *Liabilities of Corporate Officers and Directors* (1969). Here,
 12 respondents while acting as corporate officers for the corporation
 13 and fiduciaries of petitioners, knowingly converted for their own
 14 financial gain monies earned by petitioners. Respondents knowingly
 15 misrepresented the whereabouts of petitioner's earnings and will be
 16 held individually liable for their nefarious and criminal activity.

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 18 ORDER

19 For the above-stated reasons, respondents are ordered to
 20 immediately pay petitioners according to the following
 21 calculations:

22	<u>CLAIMANT</u>	<u>AMOUNT</u>	<u>INTEREST</u>	<u>TOTAL</u>
23				
24	JAMES CUBINAR	\$1,906.25	\$190.62	\$2,096.87
25	AUSTEN BEVERLY	\$4,014.37	\$401.43	\$4,415.80
26	LIAM LANDY	\$1,600.00	\$160.00	\$1,760.00
27	MOLLY LANDY	\$5,124.64	\$512.46	\$5,637.10
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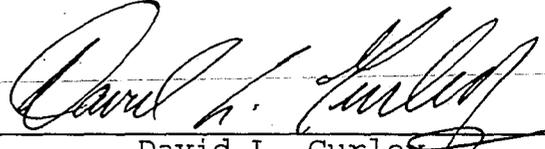
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MAUREEN GANNON	\$12,093.00	\$1,209.30	\$13,302.30
JUSTON CLARKSTON	\$2,010.00	\$201.00	\$2,211.00

Additionally, petitioners are entitled to reasonable attorney's fees according to proof. Petitioner's shall submit a claim for any attorney's fees incurred within 10 days of this determination.

IT IS SO ORDERED.

Dated: 10/2/02



David L. Gurley
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 10-02-2002



ARTHUR S. LUJAN
State Labor Commissioner

