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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

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| TABITHA SZARKO, an individual,<br><br>Petitioner,<br><br>vs.<br><br>DIRECT MODELS, INC., a California Corporation, dba L.A. DIRECT MODELS<br><br>Respondent. | CASE NO. TAC 50639<br><br>**DETERMINATION OF CONTROVERSY** |

## I. INTRODUCTION

The above-captioned matter, a Petition to Determine Controversy under Labor Code section 1700.44, came on regularly for hearing in Long Beach, California on July 31, 2018 (hereinafter, referred to as the "TAC Hearing"), before the undersigned attorney for the Labor Commissioner, Max D. Norris, Esq., assigned to hear this case. Petitioner TABITHA SZARKO, an individual (hereinafter "SZARKO") appeared and was represented by Courtney L. Puritsky, Esq. of GRODSKY & OLECKI LLP. Respondent DIRECT MODELS, INC., a California Corporation dba L.A. DIRECT MODELS, (hereinafter "DM"), appeared and was represented by John R. Baldivia, Esq. and David Pierce, Esq. of PIERCE LAW GROUP LLP, with Derek Hay, Chief Executive Officer of DM (hereinafter "HAY"), as its sole witness. The matter was taken under

submission on August 6, 2018 after the parties submitted post-hearing briefs.

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. SZARKO is an artist in the adult entertainment industry within the meaning of Labor Code section 1700.4(b).

2. DM is a licensed talent agency within the meaning of Labor Code section 1700.4(a) who has represented more than 5,000 models in the adult entertainment industry.

3. HAY is the Chief Executive Officer and founder of DM.

4. SZARKO sought out DM's representation to advance her career in the adult entertainment industry. On September 8, 2017 SZARKO and DM, through its Chief Executive Officer, HAY, entered into a five (5) year exclusive agency agreement entitled "DIRECT MODELS, INC. dba LA MODELS EXCLUSIVE CONTRACT BETWEEN ARTIST AND TALENT AGENCY" (hereinafter "Agency Contract") in Las Vegas, Nevada. Attached to that Agency Contract and executed that same day were several addendums including: a "Schedule of Fees"; "Best Practices and Rules of Conduct Required – Guidelines" (hereinafter "Best Practices Addendum"); an "Authorization for Release of Health Information"; and a permission form allowing DM to cash checks for SZARKO.

5. The Agency Contract, a single page document, is stamped as approved by the Labor Commissioner on October 22, 2015, as is the "Schedule of Fees" but neither the Best Practices Addendum, nor the other addendum, are stamped as approved by the Labor Commissioner. The Agency Contract, as approved by the Labor Commissioner, provides at paragraph 9 that the one-page Agency Contract is "the entire agreement between us...," (hereinafter "Entire Agreement Clause"). This Entire Agreement Clause along with the lack of approval by the Labor Commissioner brings into question the validity of those addendum presented by DM at the TAC Hearing as included in the Agency Contract, especially the Best Practices Addendum which is not approved by the Labor Commissioner, and is not even a part of the Agency Contract at all.

6. SZARKO was not provided with a copy of the Agency Contract, nor its addendums at the time of signing nor thereafter, in violation of California Code of Regulations, Title 8, section 12001.1, which provides that a "[t]alent agency shall deliver to the artist a copy of the contract required by California Code of Regulations, Title 8, Section 12001 which has been executed by the talent agency and artist." *Ibid.*

7. It is undisputed that after the first thirty (30) days of the five (5) year Agency Contract elapsed, when SZARKO provided her own transportation, DM was entitled to only ten (10) percent commission, whereas if DM provided SZARKO with transportation, DM was entitled to fifteen (15) percent commission. SZARKO thus never used DM's transportation, instead using cheaper means of transportation.

8. On September 9, 2017, DM had SZARKO take "Agency Photos" which DM billed SZARKO $200.00 for in its running account balance with SZARKO. These Agency Photos were to be used by DM for its website and to help DM procure work for SZARKO.

9. On September 25, 2017, SZARKO and HAY, as an individual, entered into a "Rental Agreement" whereby SZARKO was to be HAY's tenant at his house in Valley Village, California, where he boarded other adult entertainment stars. The terms of the Rental Agreement called for the lease to run from September 25, 2017 to March 25, 2018, with rent set at $1,000.00 per month. The Rental Agreement specifically notes that said rental agreement is between SZARKO and HAY and is wholly separate and apart from DM's agency relationship with SZARKO.

10. During the Fall of 2017, DM procured SZARKO several jobs in the adult entertainment industry, mostly "boy/girl," "boy/girl/girl" or "solo" hardcore pornography shoots including still photo modeling and acting on camera, in most cases involving explicit sex acts.

11. It was standard that at least twenty-four (24) hours prior to a shoot, SZARKO would receive information from DM in the form of calls, text messages and/or emails from one of its agents communicating to her the details of the job, including but not limited to, the type of shoot, other actors she would be working with and what type of sex acts would be involved therein.

12. Some of the employers would pay SZARKO directly thus she would owe DM a

commission, some would pay DM directly thus DM would owe SZARKO her pay less their commission. In either case, DM kept a running tally of this balance of what DM and SZARKO owed each other (hereafter, "Statement"). SZARKO only had access to this Statement through inquiries to DM's accountants during specific days and times.

13. DM procured SZARKO a job as an "ambience model" at a private event, a Poker Party, which DM told SZARKO about a month or so before the event on November 30, 2017. SZARKO understood the job to be "ambience modeling" where she would be topless but was not required to perform any sex acts, filmed or otherwise, just passive topless modeling. At past "ambience modeling" SZARKO had worked, security was always provided so that models could approach security for help without fear of retaliation by the agent or employer.

14. DM sent SZARKO and three other female adult entertainment performers to the private Poker Party to do "ambience modeling" at a mansion in the Newport Beach area of Orange County with no security or supervision.

15. 50 to 100 men were in attendance at the Poker Party, many of whom were quite drunk and some of whom were taking illegal drugs. SZARKO was offered cocaine and "molly" at the Poker Party. SZARKO was also groped aggressively by several men on several occasions at the party, and was asked to give men "favors" (presumably sexual) in exchange for cash tips. Two of the other adult models that DM procured employment for engaged in consensual sex acts amongst themselves in the form of an impromptu "girl/girl" live show for cash tips. SZARKO witnessed some of the men at the party attempting digital penetration of those two adult models during their impromptu performance, clearly without their consent, which the performers resisted.

16. SZARKO did not immediately report the incidents at the Poker Party to DM, as she did not want to be viewed as "difficult" by DM and thereafter face retaliation. A week or so later DM offered SZARKO a job as an "ambience model" at a follow up Karaoke Party being hosted by a similar group of men as the Poker Party. At this point SZARKO reported to DM her issues with the Poker Party, including the aggressive groping and other sexual advances she faced, her lack of consent to these things and the lack of security for the models at the job. HAY admitted later at hearing that he responded to SZARKO's concerns that "this might not be the industry for her."

17. HAY and DM let SZARKO pass on the job as an "ambience model" at the Karaoke Party, but still sent eight (8) other female adult entertainment performers without taking remedial measures to assure the health, safety and welfare of DM's models. DM did not provide security to escort the performers despite SZARKO bringing to DM and HAY's attention the incidents at the last party hosted by a similar group.

18. Around this time, DM procured SZARKO a "girl/boy point of view" adult video shoot where the male talent was also the camera person. The Parties agree that it is industry standard for performers not to be left to perform alone for various legal and liability related reasons. At the outset of this shoot, SZARKO and the male talent were accompanied by a still photographer. When the still photo portion of the shoot was completed, SZARKO was left alone with the male talent to shoot the video portion of the job. SZARKO was very uncomfortable being left alone with the male talent, and felt it was an unsafe and an unprofessional setting. The male talent also admitted to SZARKO that other female performers had complained about him from past shoots, which did not help put SZARKO at ease. The male talent asked SZARKO on a personal date at the end of the shoot.

19. SZARKO sought out a male adult entertainment star named Owen Gray to do an adult photo shoot and video shoot together as an "artists swap" to build out her personal portfolio. On November 19, 2017, DM emailed SZARKO taking issue with SZARKO working with Gray, free or otherwise, and charged SZARKO $250.00 for what it says was a commission and booking fee for a typical "boy/girl" scene.

20. On December 6, 2017 SZARKO sent HAY an email in which she states:

> ...
>
> I cannot allow myself to be connected to some of the activities that LADM has ties to.
>
> It has also become clear that my lack of participation in functions that threaten my safety and test my limits is an issue. This is not something I am comfortable compromising on and neither of us will be best served by an arrangement where I have these expectations placed on me that I cannot meet.
>
> ...

21. The Statement dated 3/6/2018 shows that as of December 7, 2017 DM owed

SZARKO $2,055.00 for jobs she had performed thus far procured by DM.

22. The Statement dated 3/6/2018 also shows that on January 3, 2018, DM alleges it "paid" SZARKO by paying HAY "$1000 FOR JAN 2018 RENT+ $1000 for February 2018 + $505 for March 1st – March – March 16th 2018" and that on February 27, 2018 DM alleges it "paid SZARKO by paying HAY Rent for March 16th – March 24th – Leaving March 25th." This left SZARKO with a balance of only $130.90 on the 3/6/2018 Statement. That $130.90 was later paid to SZARKO by DM on March 8, 2018.

23. Testimony at hearing made clear that HAY directed DM to withhold SZARKO's pay to secure the rents he alleges SZARKO owed him.

24. After terminating her contract with DM on December 6, 2017, SZARKO continued to work in the adult entertainment industry as a self-represented artist.

## III. ISSUES

1. Did DM's actions and/or omissions amount to a breach of its duty as a licensed talent agency to provide for the health, safety and welfare of SZARKO pursuant to Labor Code section 1700.33? Did this breach justify SZARKO's unilateral termination of the Agency Contract?

2. Did DM unlawfully withhold monies owed to SZARKO to satisfy future rents owed to DM's CEO Derek Hay arising from a wholly separate Rental Agreement? If so, was this withholding willful pursuant to Labor Code section 1700.25(e)?

3. Did DM charging SZARKO for "Agency Photos" amount to a "Registration Fee" pursuant to Labor Code section 1700.2(b)(3) and in violation of Labor Code section 1700.40? If so, did this result in a willful withholding pursuant to Labor Code section 1700.25(e)?

4. Did DM unlawfully charge SZARKO a commission on an unpaid photo shoot which SZARKO characterizes as a "content-trade photo shoot with a friend"? If so, did this result in a willful withholding pursuant to Labor Code section 1700.25(e)?

## IV. LEGAL ANALYSIS

It is undisputed that DM is a licensed "talent agency" within the meaning of Labor Code

section 1700.4(a) and SZARKO is an "artist" within the meaning of Labor Code section 1700.4(b).

All cases of controversy arising under the Act must be referred by the parties to the Labor Commissioner for resolution, subject to de novo appeal to the superior court. Labor Code §1700.44(a). No action or proceeding shall be brought pursuant to the Act with respect to any violation which is alleged to have occurred more than one year previously. *Id.*, subd. (c).

The burden of proof in actions before the Labor Commissioner is found at Evidence Code section 115, which states, "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Evidence Code §115. "[T]he party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by preponderance of the evidence . . ." *McCoy v. Bd. of Ret.* (1986) 183 Cal.App.3d 1044, 1051-52. "'[P]reponderance of the evidence standard . . . simply requires the trier of fact' to believe the existence of a fact is more probable than its nonexistence.'" *In re Michael G.* (1998) 63 Cal.App.4th 700, 709, fn 6.

**A. The History and Legislative Intent Behind Labor Code section 1700.33 and The Talent Agencies Act.**

The Labor Code generally is remedial in nature, as the Legislature has decided to make special and specifically regulate the relationship between employers and employees. Where the Legislature goes further and specifically regulates an industry to remedy abuse of workers within that industry, the remedial nature is intensified. And, where the Legislature assigns the Labor Commissioner to enforce those remedial provisions and gives her the power to award remedies to correct or discourage abuses by an employer, the Labor Commissioner's duty is clear and unmistakable.

In 1937 the Legislature enacted Labor Code section 1637, now Labor Code section 1698.4, part of the then section of the Labor Code regulating Employment Agencies, which provided upon enactment:

> No employment agency shall send or cause to be sent, any woman or minor under the age of twenty-one years, as an employee to any house of ill fame, to any house or place of amusement for immoral purpose, to places resorted to for purposes of prostitution, or to gambling houses, the character of which places the artists' manager could have ascertained upon reasonable inquiry.

Lab. Code §1637 as enacted in 1937.

Labor Code section 1700.33 as first added to the Labor Code by the Legislature in 1959 provided similarly:

> No artists' manager shall send or cause to be sent, any woman or minor under the age of 21 years, as an employee to any house of ill fame, to any house or place of amusement for immoral purpose, to places resorted to for purposes of prostitution, or to gambling houses, the character of which places the artists' manager could have ascertained upon reasonable inquiry.

Lab. Code §1700.33 as enacted by Assembly Bill 885 in 1959.

Labor Code section 1700 et. seq. was enacted to separate and more specifically regulate talent managers from the general chapter regulating employment agencies. As can be seen in the similarity between the plain language, Labor Code section 1700.33 was initially based off of then Labor Code section 1637, now Labor Code section 1698.4.

In 1972, Labor Code section 1700.33 was amended to strike out reference to age by the enactment of Assembly Bill 686, which modified the age of majority as 18 instead of 21 in the chapter, but the Legislature decided instead to omit language about age altogether. The Talent Agencies Act (hereinafter the "Act") as enacted in 1978 by Assembly Bill 2535, amended and replaced the regulations of managers enacted in 1959. Specifically, as to Labor Code section 1700.33, the 1978 amendments replaced "artists' manager" with "talent agency" and removed references to gambling.

The remedial—indeed, even custodial—nature of the Act is clear from its plain language, and a careful reading of its history supports this reading. Historical statutes upon which it is modeled call for a duty or covenant of the agent, upon reasonable inquiry, to provide for the health, safety and welfare of the artist.

In 1986, the Act was amended again by Assembly Bill 3649, which gives us the current version of Labor Code section 1700.33, which provides:

> No talent agency shall send or cause to be sent, any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonable inquiry.

Lab. Code §1700.33.

In the "Legislative Counsel's Digest" to the 1986 Assembly Bill 3649, the amendment is discussed as "repealing these restrictions, and would instead prohibit any talent agency from sending, or causing to be sent, any artist to any place where the health, safety or welfare of the artist could be adversely affected." Assembly Bill 3649 (1986). Thus the amendment made the duty of agents to artists broader and more general, encompassing all artists and any place that could affect the artist's health, safety or welfare, rather than artists of a certain age or gender and specific places of ill repute. The broadening of this protection was intended to keep up with the changes in the entertainment industry it regulated.

"The Act is a remedial statute. Statutes such as the Act are designed to correct abuses that have long been recognized and which have been the subjection of both legislative action and judicial decisions . . . Such statutes are enacted for the protection of those seeking employment [ie., the artists]. (*Buchwald v. Superior* Court (1967) 254 Cal.App.2d 347, 350-351." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 254. "Consequently, the Act should be liberally construed to promote the general object sought to be accomplished; . . . To ensure the personal, professional, and financial welfare of the artists, the Act strictly regulates a talent agent's conduct." *Id.* at p. 254. *Waisbren* viewed the Act's remedial nature across these amendments in citing to *Buchwald*, a case predating the 1972 and 1986 amendments, making clear that the nature of Act has not changed while it has been updated to accommodate the modern era in the entertainment industry it regulates.

The Act's express purpose "is to protect artists seeking professional employment from the abuses of talent agencies." *Styne v. Stevens*, (2001) 26 Cal. 4th 42. The Labor Commissioner was given the express power to invalidate contracts under the Act's schematic, and that power is to be executed in a remedial nature to protect artists from abusive agents.

"In construing the provisions of the Act, our goal is to ascertain and effectuate legislative intent. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.). In determining that intent, we look first to the language of the statute, giving effect to its plain meaning. (*Ibid.*)." *Waisbren, supra at p.* 253. The plain language of the Act expresses the legislative intent thereof, as best illustrated by Labor Code sections 1700.33 (requiring an agent to look out for its client's health, safety and welfare in a general sense); Labor Code section 1700.34 (restricts minors from working in bars); and, Labor Code section 1700.35 (prohibits a talent agency from associating with persons of bad character, specifically prostitutes and "procurers" (i.e. pimps and panderers)).

Thus, the Act implies into each and every Talent Agency contract the covenant that "[n]o talent agency shall send or cause to be sent, any artist to any place where the health, safety, or welfare of the artist could be adversely affected, the character of which place the talent agency could have ascertained upon reasonable inquiry." Labor Code section 1700.33. **This amounts to an explicit covenant and duty of the agent or agency to engage in reasonable inquiry to determine whether an artist's health, safety or welfare would be adversely affected by being sent to a job they are attempting to procure for the artist.** "Procurement" includes any active participation in a communication with a potential purchaser of the artist's services aimed at obtaining employment for the artist, regardless of who initiated the communication or who finalized the deal. *Hall v. X Management* (1992) TAC 19-90. Thus, it is a covenant implied by law into the Agency Contract and all agency contracts, that an agent has an on-going and ever-present duty to perform "reasonable inquiry" to assure that the job they procure for the artist provides for the "health, safety and welfare" of the artist. **This is an essential part of the agent's covenant with the artist and its negotiations with the employer (the reasonable inquiry), and an agent's failure to do so is a material breach of any agency agreement.**

**B. DM's Actions and/or Omissions Breached its Duty as a California Licensed Talent Agency to Provide for the Health, Safety and Welfare of SZARKO, and Warranted SZARKO'S Unilateral Termination of the Agency Contract.**

In the instant case we need not reach the allegations regarding DM's alleged involvement with escort services to invalidate the talent agency contract here, as DM's failure to secure the

health, safety and welfare of SZARKO in the course and scope of the employment DM procured for her is enough. Simply put, SZARKO's concerns for her health, safety and welfare as of December 6, 2017 were reasonable and her email effectively announced DM's ongoing material breach of its duty to provide for SZARKO's health, safety and welfare and thus a material breach of the Agency Contract. SZARKO cannot be forced to continue working with an agency who has failed to provide upon reasonable inquiry for her health, safety and welfare in the past and who made no attempts to remedy the material breach arising therefrom, effectively implying repudiation by DM of the covenant to secure the artist's health, safety and welfare.

At hearing, the two witnesses discussed adult industry standards and practices at length, and a review of that testimony is illustrative. As discussed by HAY at Hearing, it is the industry standard that during a hardcore pornographic video shoot that there be more people in the room than the adult actors performing the sex acts. Both witnesses discussed how it was normal for several people to be in the room including: directors, producers, production assistants, make-up artist, camera people, sound and lighting people, etc. HAY expressed his understanding that the number of people in the room is important due to a United States Supreme Court Case, *Miller v. California* (1973) 413 US 15 ("*Miller*"). While not explicitly stated in *Miller*, HAY was trying to articulate the legal line between prostitution and pornography, basically who is paying for the sex acts, the producer paying for the display of sex acts to be filmed (pornography) or the individual paying to receive the gratification of the sex acts (prostitution). HAY admitted that it would be improper to allow for a shoot where only the two actors were present, as the line regarding who paid for and received gratification from said sex acts would be blurred by the fact that the person paying for the sex act was participating therein.

Despite the agreement by the parties that it would be unprofessional, SZARKO was sent by DM to the "Point of View" job discussed above, where she was left alone with the male artist during a hardcore "point of view" shoot. SZARKO explained at Hearing that prior to agreeing to a job, and effectively consenting to the sex acts involved therein, it was an industry standard for all participants to be health and identification screened and made known to each other via call lists or otherwise communicated. Thus, before SZARKO would agree to a specific job it was industry

standard that she would be made aware of who she would be working with and what expectations there were of her in regards to modeling, acting and sex acts. This advance notice is essential to meaningful informed consent of the artist to engage in specific sex acts with specific people in a specific setting, which along with the identification and health screening of participants are essential to the reasonable inquiry regarding the health, safety and welfare of the artist. But for this advance notice, an artist confronted with new demands from an employer at the gig may face duress to comply or face being seen as "unprofessional," and where the duress is in regards to sex acts, consent becomes blurred, if not fully coerced.

At Hearing, SZARKO explained what "ambience work" or "eye candy work" was from her experience as: semi-nude in person modeling without sexual acts involved. This is in contrast to the hardcore pornography shoots discussed above, where here the artist's expectation is that there will be no sex acts involved as a part of that job. Where sex acts become involved in this "ambience modeling" work, it raises issues not of sexual harassment, as Respondent suggests, but of consent to those sex acts and hence sexual assault and even prostitution/pandering where consent is given, as this would blur the line articulated by HAY in regards to the *Miller* case.

As to identification screening, SZARKO explained that if something were to happen that violated her rights, it was essential that the person be correctly identified ahead of time so that they could be held accountable. Similarly, along with identification screening, health screening assured all those involved that the person they would be working with would not get them sick. While the amateur adult actors in the hardcore adult shoots were identified ahead of time for the shoots DM procured for SZARKO, no such identification or health screening was made prior to the "Poker Party" DM procured and described to SZARKO as an "ambience modeling" gig.

As discussed above, DM procured "ambience modeling" work for SZARKO at a "Poker Party" on November 30, 2017. The Poker Party was a private party in the basement of a large mansion in the Newport Beach area of Orange County where 50 to 100 men were partying, playing poker, drinking alcohol, smoking cigars and in some cases imbibing illegal drugs. DM sent SZARKO and three other models to this Poker Party without security to accompany them. DM made no inquiries of the hosts of the "Poker Party" in regards to their security at the party. Unlike

the "ambience modeling" work SZARKO was accustomed to where she simply stood there topless, the men at the Poker Party took liberties with the models, groping them aggressively and attempting to trade tips for sexual favors.

Respondent incorrectly suggests that this behavior be viewed in the context of workplace sexual harassment, when the reality is that SZARKO did not consent to these sexual acts ahead of time or contemporaneously, which implicates sexual assault, rather than only workplace harassment.[1] As to this specific job, SZARKO only consented to semi-nude modeling, and when the men at the Poker Party took liberties, she was alone to enforce the terms of her employment contract, which did not call for sex acts to be involved at all.

DM did not send security or supervision along with its artists to the Poker Party, who would have served as a deterrence to such unwanted advances as well as an outlet for SZARKO to ensure that the unwanted advances stopped. As DM failed to send security to the Poker Party with its models, ostensibly because HAY knew that these were wealthy men in a nice house, DM failed to secure SZARKO health, safety and welfare in the context of the job it procured for her. A **reasonable agent upon reasonable inquiry would have realized that this situation required security, and would have either secured assurances during procurement that the party's host would provide security and provide that information to the artists or would have sent the artists with security provided by the agency.**

HAY attempts to further excuse DM's actions by pointing to the other models who were seemingly happy with the Poker Party job because of the lucrative tips they received. Where these tips were part of a *quid-pro-quo* for sex acts, the line between "ambience modeling" and prostitution starts to blur again.

Further, SZARKO witnessed the sexual assault of two other models, who were engaging in consensual sex acts between themselves but whom men at the party attempted to digitally penetrate during the models' impromptu "girl/girl" live show without the models' consent. While these artists may not have complained about their experience, it does not detract from the reality of the unsafe

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[1] Sexual assault can of course be a form of workplace harassment, but the "severe and pervasive" standard suggested by Respondent is not applicable in this situation.

situation DM was sending them into. While security may not stop all unwanted sexual advances, to send a group of models to do topless "ambience modeling" work at a large private stag party was reckless on DM's part in regards to the models' health, safety and welfare. Reasonable inquiry into the event would have led a reasonable agent to require the host to provide security to assure the safety of the artists. HAY testified that he had sent models to these parties for years without security, ostensibly given as an excuse, but which only makes clearer his disregard for the artists' health, safety and welfare. The fact that the other women brushed this behavior off or failed to report it to DM out of fear of not being invited back to these lucrative jobs is irrelevant.

This behavior was condoned by DM, who knew or should have known upon reasonable inquiry of such activity. SZARKO, who had not consented to sex work ahead of time, as she does before other jobs where sex acts are required, also did not give consent to the sex acts while at the party and was forced to push men who were assaulting her off of her.

SZARKO's talent agency, DM, was responsible for her health, safety and welfare, and failed to give her enough information about the Poker Party event to allow her to have informed consent over the sex acts her patrons seemingly expected her to perform. Once an employee is at the job, it is often too late for freely given informed consent to sex acts, as the employee is under duress to perform and be a "professional," a point driven home by HAY's retort to SZARKO to the affect that this may not be the business for her. As discussed above, in the case of the Poker Party, the men at the party were never prescreened for identity and health purposes, leaving SZARKO and the other models open to harm even if consent was freely given at the party.

DM takes issue with the time it took SZARKO to bring the matter of the sexual assault she faced at the Poker Party to the agency's attention. It must first be pointed out that the "Best Practices and Rules of Conduct Required – Guidelines" (hereafter "Guidelines") addendum to the Agency Contract was never approved by the Labor Commissioner, and thus is not legally part of the Agency Contract. Regardless, even though the Guidelines contemplate a more immediate reporting, such a requirement cannot be allowed to have a chilling effect on artists reporting after the contemplated time period has run.

When SZARKO brought her concerns to DM in response to being offered work at a similar "ambience" gig with a similar group of patrons, while SZARKO was allowed to pass on the job, DM and HAY sent eight other models to the Karaoke Party, again without security. This makes clear that DM and HAY saw SZARKO as the issue here, not the wealthy male perpetrators of sexual assault or the lack of security, and that DM did not plan to make any remedial efforts to provide security for its models at similar jobs in the future.

DM's agency contract further explicitly discourages its clients from using its drivers, who ostensibly double as security or at least an immediate outlet for help in the face of danger, by requiring an additional 5% commission of its clients when drivers were utilized. This requirement further illustrates the lack of concern DM shows for the health, safety and welfare of its clients.

Based on the evidence presented at hearing, DM breached the Agency Contract by failing to provide for SZARKO's health, safety and welfare, a covenant and duty prescribed to DM as a licensed talent agency under the Act. Labor Code §1700.33. This breach of duty amounted to a material breach of the Agency Contract, which DM did not attempt to cure, hence implying repudiation of the covenant, once SZARKO announced it in her December 6, 2017 email. Rather than work with SZARKO to rebuild trust and assure her health, safety and welfare going forward, DM and HAY ignored SZARKO's email and hurriedly moved to secure the money it thought it was owed by SZARKO from her earnings it was holding for her in trust. Having failed to remedy its material breach and impliedly repudiating the covenant to provide for SZARKO's health, safety and welfare, DM caused the Agency Contract to be terminated as of December 6, 2017.

**C. DM Unlawfully and Willfully Withhold Monies Owed to SZARKO to Satisfy Future Rents Owed to DM's CEO Derek Hay Arising From a Wholly Separate Rental Agreement.**

As discussed above, once DM was on notice of SZARKO's intent to get out of the Agency Contract due to DM's material breach and repudiation of the covenant, discussed at length above, DM at the direction of HAY moved to secure what it believed was monies owed to HAY (but not DM) from the trust account DM held for SZARKO's benefit. At HAY's direction, DM improperly withheld funds from SZARKO due for work already performed, and handed those over to HAY to

satisfy rent allegedly due to HAY from SZARKO, only some of which had become due and all of which was due to HAY not DM.

Labor Code section 1700.25, subsection (a) provides 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. . . .

Lab. Code §1700.25(a) (emphasis added).

Labor Code section 1700.25, subsection (e) provides in pertinent part:

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

Lab. Code §1700.25(c).

As discussed above, the Rental Agreement between HAY and SZARKO and the Agency Contract between DM and SZARKO are wholly unrelated. HAY as CEO of DM abused his position to direct DM to withhold payments from SZARKO which it owed her for work it had been paid for on her behalf. Based upon Labor Code section 1700.25(a), DM was required to pay SZARKO the money it owed her for work performed in late November and early December 2017 within 30 days or around mid-January 2018. Instead, upon inquiry by SZARKO, SZARKO was told by DM's accountant that DM, at HAY's direction, was withholding these payments to satisfy rent SZARKO allegedly owed HAY. Subsection (1) of Labor Code section 1700.25(a) provides for occasions where an agency can withhold funds, basically when the artist owes the agency money. Here, SZARKO did not owe DM anything, it was HAY who was allegedly owed rent, not

DM, thus DM unlawfully and willfully withheld these payments when HAY should have handled collection of rent separate and apart from the agency relationship between DM and SZARKO.

Thus, DM owes SZARKO $2,774.00 pursuant to Labor Code section 1700.25(a), plus interest and reasonable attorneys pursuant to Labor Code section 1700.25(e).

**D. DM Unlawfully and Willfully Charged SZARKO for "Agency Photos" Which Amounted to a "Registration Fee" Pursuant to Labor Code section 1700.2(b)(3) in Violation of Labor Code section 1700.40.**

Labor Code section 1700.2 provides in pertinent part:

> (b) As used in this chapter, "registration fee" means any charge made, or attempted to be made, to an artist for any of the following purposes:
>
> ...
>
> (3) Photographs, film strips, video tapes, or other reproductions of the applicant.

Labor Code §1700.2.

Labor Code section 1700.40, subsection (a) provides:

> (a) No talent agency shall collect a registration fee. In the event that a talent agency shall collect from an artist a fee or expenses for obtaining employment for the artist, and the artist shall fail to procure the employment, or the artist shall fail to be paid for the employment, the talent agency shall, upon demand therefor, repay to the artist the fee and expenses so collected. Unless repayment thereof is made within 48 hours after demand therefor, the talent agency shall pay to the artist an additional sum equal to the amount of the fee.

Labor Code §1700.40.

As discussed above at the outset of DM and SZARKO's agent/artist relationship DM required SZARKO to take what DM called "Agency Photos" which were used by DM for its website and to help DM procure work for SZARKO. Labor Code section 1700.2 makes clear that this $200.00 charge for these "Agency Photos" was an improper Registration Fee imposed on SZARKO by DM. Thus, DM owes SZARKO the $200.00 it deducted for this improper Registration Fee. As HAY testified that he and DM had been in this business for fifteen years and that he is very familiar with the Act and its requirements, this withholding of other wages in the form of charging and improper Registration Fee is found to be willful, giving rise to an award of interest and attorneys' fees pursuant to Labor Code section 1700.25(e).

**E. DM Unlawfully and Willfully Charged SZARKO a Commission on an Unpaid Photo Shoot.**

On November 19, 2017, DM found out that SZARKO had engaged in an unpaid photo shoot where she had arranged with a male adult entertainment star, Owen Gray, to do an "artists swap" to build out her personal portfolio and social media presence. DM emailed SZARKO taking issue with SZARKO working with Gray, free or otherwise, and charged SZARKO $250.00 for what it says was a booking fee for a typical "boy/girl" scene.

As SZARKO was not paid for this job, DM had no right under the Agency Contract or otherwise to charge SZARKO a booking fee or commission. This unlawful charge resulted in an unlawful and willful withholding of other earned moneys by DM from SZARKO. Thus, DM owes SZARKO the unlawfully withheld $250.00 plus interest and reasonable attorneys' fees pursuant to Labor Code section 1700.25(e).

## IV. ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. The Agency Contract between Petitioner TABITHA SZARKO and Respondent DIRECT MODELS, INC., a California Corporation dba L.A. DIRECT MODELS, was breached by Respondent DIRECT MODELS, INC., a California Corporation dba L.A. DIRECT MODELS as announced by Petitioner TABITHA SZARKO in her December 6, 2017 email, which lawfully extinguished the contract from that point forward after Respondent failed to cure its breach.

2. Prior to the termination of the contract, Respondent DIRECT MODELS, INC., a California Corporation dba L.A. DIRECT MODELS unlawfully and willfully withheld from Petitioner TABITHA SZARKO the following amounts:

   a. $2,774.00, withheld unlawfully and willfully at the direction of Derek Hay to satisfy alleged rent due on the Rental Agreement which does not involve Respondent agency, plus interest and reasonable attorneys pursuant to Labor Code section 1700.25(e);

b. $200.00, withheld unlawfully and willfully for charges for "Agency Photos" which were improper Registration Fees, plus interest and reasonable attorneys pursuant to Labor Code section 1700.25(e);

c. $250.00, withheld unlawfully and willfully for commissions not due to Respondent Agency, plus interest and reasonable attorneys pursuant to Labor Code section 1700.25(e).

3. Respondent DIRECT MODELS, INC., a California Corporation dba L.A. DIRECT MODELS is to pay the following amounts to Petitioner TABITHA SZARKO:

a. $3,224.00 as unpaid earnings;

b. $276.45 as interest on those withheld earnings from December 6, 2017 until the date of this Decision, October 15, 2018 pursuant to Labor Code section 1700.25(e)(2) (or $0.88 per day);

c. $11,459.01 ($10,459.01 is the amount SZARKO has paid thus far, plus $500.00 for the closing brief submitted and $500.00 to have this Order conformed as a judgment in Superior Court) as reasonable attorneys' fees pursuant to Labor Code section 1700.25(e)(1).

Dated: October 16th, 2018

MAX D. NORRIS
Attorney for the Labor Commissioner

**ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER**

Dated: October 16, 2018

Julie A. Su
California Labor Commissioner

## PROOF OF SERVICE

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

I, Lindsey Lara, declare and state as follows:

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

On October 17, 2018, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY,** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Attorneys for Respondent

☒ **(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 fully prepaid postage thereon for certified mail 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 EMAIL SERVICE)** I caused the above-referenced document(s) to be delivered electronically via email to the email address of the addressee(s) set forth above.

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

Executed this 17th day of October 2018, at Long Beach, California.

Lindsey Lara
Declarant