

1 **STATE OF CALIFORNIA**
2 **DIVISION OF LABOR STANDARDS ENFORCEMENT**
3 Department of Industrial Relations
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10
11 **BEFORE THE LABOR COMMISSIONER**
12 **OF THE STATE OF CALIFORNIA**

13 TERESA DAY,) CASE NO. TAC 37-00
14)
15 Petitioner,)
16 vs.) **DETERMINATION OF CONTROVERSY**
17 MODELS, INCORPORATED, aka)
18 MODELS INC., An Ohio Corporation,)
19 Respondent.)

20 **INTRODUCTION**

21 The above-captioned petition was filed on December 6, 2000 by TERESA DAY (hereinafter,
22 "Petitioner"), alleging that MODELS, INCORPORATED, aka MODELS INC., An Ohio
23 Corporation, (hereinafter, "Respondent), acted as Petitioner's talent agent by procuring professional
24 engagements for Petitioner as an exotic model and entertainer. Petitioner further alleges that
25 Respondent was not licensed as a talent agency pursuant to Labor Code §1700 et seq. By this
26 petition Petitioner seeks the contracts entered into with Respondent be deemed void and requests
27 payment of all booking fees collected by Respondent and not paid to Petitioner and reimbursement
28 for all liquidated damages, advertising, and credit card tip collection fees that Respondent charged

1 Petitioner during the life of the contractual relationship. Lastly, Petitioner seeks prejudgment interest
2 and reasonable attorney fees pursuant to Labor Code §1700.25 (e)(1).

3 Respondent filed an Answer to the Petition on January 16, 2001, alleging that it is not a
4 "Talent Agency" within the meaning of the Talent Agency Act and that at no time relevant to the
5 controversy did it act or intend to act in a capacity of a talent agency. Further, Respondent alleges
6 that Petitioner is not a "Model" within the meaning of the Talent Agency Act and is not of a class of
7 persons legislatively protected by the Talent Agencies Act. Respondent alleges that its wrongful
8 acts, if any, are unintentional, and therefore no liability for Petitioner's attorney's fees arises.
9 Respondent requests attorney fees in an amount not less than \$35,000.00.

10 A hearing was commenced on June 19, 2001 and concluded on June 20, 2001, before the
11 undersigned attorney for the Labor Commissioner acting as Special Hearing Officer. Petitioner
12 appeared at the hearing and was represented by Donald E. Stevens, Esq., of Donald E. Stevens, A
13 Professional Corporation. Respondent appeared at the hearing through its President, Danny R.
14 Watson. Respondent was represented by Larry P. Adamsky, Esq., of Law Offices of Larry P.
15 Adamsky. Carrie A. Smith, Booking Agent, Christina McDannell, Adult Entertainer, and Karen S.
16 Miley, Office Manager, and Danny R. Watson, President, appeared as witnesses on behalf of
17 Respondent.

18 Based upon the testimony and evidence presented at this hearing, the Labor Commissioner
19 adopts the following Determination of Controversy.

20 FINDINGS OF FACT

21 1. Respondent Models Inc., incorporated in the State of Ohio with a branch office in
22 California as of August 1999, is in the business of marketing and booking persons who conduct
23 sexually oriented engagements, also known as exotic dancing.

24 2. Prior to opening its business in California, Respondent incurred \$40,000 to \$50,000 in
25 advertising fees for ads placed in approximately nine (9) local phone books under the adult heading
26 "escort services." Respondent also set up approximately ninety (90) telephone lines all with remote
27 forwarding to its main phone number and incurred fees for accounting, printing, locksmith services,
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1 security, office lease, office furniture and equipment, payroll, and courier services for the operation of
2 its business.

3 3. Respondent recruits exotic dancers by placing ads in adult entertainment mediums.
4 Prior to October 26, 1999 Petitioner responded to an ad for dancers, models and entertainers which
5 was placed by Respondent in the adult section of the Los Angeles Weekly newspaper. Soon
6 thereafter, Petitioner attended an interview with Danny R. Watson, President of Models Inc. and was
7 hired to perform work as an exotic dancer.

8 4. On October 26, 1999, Petitioner and Respondent entered into a written agreement
9 entitled "Independent Contractor Agreement Model / Exotic Entertainment Contract," (hereinafter,
10 referred to as "October 26, 1999 Agreement"), under which Petitioner agreed to utilize Respondent's
11 services on an independent contractor basis, and Respondent agreed to assist Petitioner in her
12 modeling and exotic entertainer business. Respondent agreed to provide booking, marketing, and
13 transportation services for Petitioner.

14 5. The October 26, 1999 Agreement also provided that Petitioner as Contractor, agreed
15 to pay Respondent, as Agency, a booking and marketing fee of 84% per "session" and a flat rate
16 advertising fee of \$100.00 per week in exchange for Respondent providing Petitioner with
17 advertising, telephone, transportation, clerical, and some accounting services. The term "session" is
18 defined in the agreement as "modeling and exotic entertainer services provided by Petitioner to her
19 clients where Petitioner's introduction to the client has been booked by Respondent or occurs as a
20 result of Respondent's introduction to the client." Additionally, the agreement provided that
21 Petitioner agreed to perform services marketed by Respondent to the satisfaction of Respondent and
22 Petitioner's clients, Petitioner agreed to collect all fees from Petitioner's clients for Petitioner's
23 services, and to remit to Respondent the booking and marketing fees provided in the agreement and
24 to pay Respondent \$400.00 per day as liquidated damages in the event Petitioner failed to perform
25 services for which she was scheduled to perform. On November 16, 1999, Petitioner and
26 Respondent executed a second written agreement entitled, "Agreement." Both Agreements defined
27 the relationship between the parties.

1 attempting to procure employment or engagements for an artist or artists..." See also, Waisbren v.
2 Peppercorn Productions (1995) 41 Cal.App.4th 246. A talent agency procures employment for an
3 artist when the agency represents the artist in locating employment and negotiating the terms of that
4 employment; that is, a talent agency is not the employer of the artist but rather the artist's agent for
5 purposes of employment procurement with a third party employer. (See Kern v. Entertainers Direct.
6 Inc., Case No. TAC 25-96; Chinn v. Tobin, Case No. TAC 17-96).

7 3. This dispute does not arise under the Talent Agencies Act because Respondent was
8 not acting as a talent agent. Respondent was not procuring entertainment engagements for Petitioner
9 vis-a-vis third party employers. Nor was Respondent negotiating with third party employers to
10 secure the best possible deal for Petitioner. Rather, Respondent was operating a business whereby it
11 sent girls out to perform exotic dancing services for Respondent's paying customers. As the
12 testimony revealed, a customer would call one of Respondent's phone lines, request a certain type of
13 girl (e.g. thin, blond), and Respondent would send out someone with the features requested by the
14 customer, not necessarily Petitioner. No negotiation was done by Respondent with the customers
15 regarding the basic services Petitioner would perform for the customer. Basic services Petitioner
16 performed were set by Respondent prior to a customer even contacting Respondent's business.
17 Moreover, the customers were not employing Petitioner or the other girls. It is ludicrous to conceive
18 of a situation where a worker's employment relationship consists of a one hour or shorter session
19 with a customer. Rather, the facts of this case show that Petitioner was working for a business
20 enterprise owned, managed and directed by Respondent, who was, as a matter of law, her employer.

21 4. In a typical talent agency relationship, an agent is an independent contractor of the
22 artist. As such, the agent procures work for the artist with a third party who becomes the employer
23 of the artist. Here, Respondent was not an independent contractor vis-a-vis the Petitioner but
24 instead, an employer of the Petitioner. Although the parties stipulated that Petitioner was an
25 independent contractor because she signed an Independent Contractor Agreement, the evidence
26 presented reveals that Respondent was Petitioner's employer. Borello & Sons v. Department of
27 Industrial Relations (1989) 48 Cal.3d 341 is the leading case on the issue of whether an employment
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1 relationship exists between the parties or whether an agency relationship exists. Under Borello, there
2 is considerable evidence which supports a finding that Respondent was Petitioner's employer.

3 5. Respondent exercised a great amount of control over Petitioner. Respondent
4 scheduled Petitioner and other dancers to work specific days. Petitioner did not have a choice of
5 what days she worked. Although Respondent's witness testified that Contractor Available Forms
6 were provided to the girls so they could select what days they were available to work, Petitioner was
7 never provided with these forms. Petitioner testified that on the days she was scheduled to work, she
8 had to report to work at 8:00 p.m. and stay until 6:00 a.m. regardless of whether she had any
9 sessions booked. Respondent also exercised control consistent with that exercised by an employer
10 by setting the session fees and dictating what those fees could include. Additionally, the work
11 Petitioner performed was an integral part, if not the essential core of the Respondent's business.
12 Respondent would not be able to operate its business without Petitioner and other girls performing
13 the types of services they performed. Moreover, the disproportionate share of Respondent's
14 investment in the business (cost of lease for the premises in which it sends out its dancers from and
15 from which dancers must remain if not at a session, costs of advertising in the nine local phone
16 books, cost of maintaining a website, cost of the numerous phone lines maintained, costs of payroll
17 for those individuals who are treated as employees including, the bookers) versus the cost of a city
18 business certificate, (which Petitioner was required to pay for by Respondent), also points very
19 strongly in the direction of an employer-employee relationship.

20 6. Thus, because Respondent was not acting as a talent agent but rather as Petitioner's
21 direct employer, this is not a dispute between a "talent agency," within the meaning of Labor Code
22 section §1700.4(a), and an artist or artists, and as such, this dispute does not arise under the Talent
23 Agencies Act. Labor Code §1700.44 vests the Labor Commissioner with jurisdiction to hear and
24 determine disputes between artists and talent agents that arise under the Talent Agencies Act. Since
25 this dispute does not arise under the Talent Agencies Act, the Labor Commissioner lacks jurisdiction
26 to determine this dispute under Labor Code §1700.44. Petitioner would be better served by filing a
27 wage claim or a civil action, as an employee, for reimbursement of the \$100 per week illegal
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1 deduction made by Respondent for advertising fees, the illegal deduction for liquidated damages, the
2 deduction for illegal credit card fees, and the illegal deduction for the City of Los Angeles Tax
3 Registration Certificate, as well as reimbursement for all unpaid tips under Labor Code §351 (i.e.,
4 charging Petitioner 15% of the total tips charged by credit card), and waiting time penalties pursuant
5 to Labor Code §§201 and 203.

6 **ORDER**

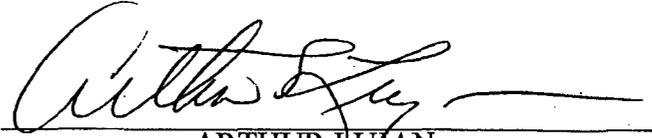
7 For the above-stated reasons, IT IS HEREBY ORDERED that the petition to
8 determine controversy under Labor Code §1700.44 is dismissed due to lack of controversy within the
9 meaning of the Talent Agencies Act..

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11 Dated: 12-19-01


EDNA GARCIA EARLEY
Special Hearing Officer

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

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18 Dated: 1-24-02


ARTHUR LUJAN
STATE LABOR COMMISSIONER

