

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

9 SHAPIRO-LICHTMAN, INC.,)	No. TAC 5-02
)	
10 Petitioner,)	DETERMINATION OF
)	CONTROVERSY
11 vs.)	
)	
12 CAROLINE MARX,)	
)	
13 Respondent)	
)	

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15 INTRODUCTION

16 Petitioner Shapiro-Lichtman, Inc. filed its Petition to
17 Determine Controversy in the above-captioned case on February 4,
18 2002. The Petition seeks past and prospective commissions from
19 Respondent Caroline Marx. Respondent filed a Response to the
20 Petition to Determine Controversy on March 8, 2002. The Response
21 denies that any commissions are due and claims as affirmative
22 defenses that the contract between the parties was terminated on
23 November 8, 2001, that said contract had been breached by the
24 Petitioner, and that by failing to perform in a professional
25 manner, Petitioner had "unclean hands", which should preclude it
26 from being awarded commissions.

27 A hearing was held on October 1, 2002 before the undersigned
28 attorney, specially designated by the Labor Commissioner to hear

1 this matter. Petitioner Shapiro-Lichtman, Inc. appeared
2 represented by Arthur L. Stashower, Esq. of the Law Offices of
3 Arthur L. Stashower. Respondent Caroline Marx appeared,
4 represented by Kent E. Seton, Esq. of Seton & Associates, a P.C.
5 Due consideration having been given to the testimony, documentary
6 evidence, and arguments presented, the Labor Commissioner adopts
7 the following determination of controversy.

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9 **FINDINGS OF FACT**

10 1. Petitioner Shapiro-Lichtman, Inc. is a talent agency duly
11 licensed by the State of California. Petitioner has been licensed
12 as a talent agency since 1969.

13 2. The Labor Commissioner approved Shapiro-Lichtman, Inc.'s
14 form contract on November 26, 1979. A copy of the approved form
15 contract is attached hereto as Exhibit A and incorporated herein by
16 reference.

17 3. Respondent Caroline Marx, a costume designer who has been
18 in the industry 15 years and a guild member for 8 years, is an
19 "artist" under the terms of Labor Code §1700.4.

20 4. Respondent initially met Shapiro-Lichtman, Inc. agent
21 Laura Bernstein at a party at which they briefly discussed Ms.
22 Marx's interest in the possibility of retaining an agent. A week
23 later, at the end of July or beginning of August of 2001, Ms.
24 Bernstein called Ms. Marx and suggested the two meet for lunch to
25 discuss talent agent representation. The two met at Griddles Café.
26 The next meeting between Ms. Bernstein and Ms. Marx occurred on
27 August 16, 2001 at the offices of Shapiro-Lichtman, Inc. Shapiro-
28 Lichtman, Inc. agent Sarita Choy was present for part of that

1 meeting.

2 5. Ms. Marx executed a talent agency contract with Shapiro-
3 Lichtman, Inc. on August 16, 2001. A copy of the contract was
4 admitted as Petitioner's Exhibit 1 at the hearing. The text of the
5 contract signed by Ms. Marx is identical to the Shapiro-Lichtman,
6 Inc. form contract approved by the Labor Commissioner in 1979 with
7 the exception of additional language at the end of Paragraph 3 in
8 the 1979 version, which is more onerous to the artist than the
9 version Ms. Marx signed.

10 6. The contract has no key player clause and does not mention
11 Laura Bernstein's name anywhere.

12 7. Toward the end of September or the beginning of October
13 2001, Ms. Bernstein stopped working at the Shapiro-Lichtman, Inc.
14 office and worked from her home. On October 23, 2001 she stopped
15 working altogether, and went on a stress disability leave.

16 8. During October and early November, 2001 Ms. Marx left a
17 number of telephone messages for Ms. Bernstein, but did not receive
18 return calls from her.

19 9. Ms. Marx never gave Shapiro-Lichtman, Inc. written notice
20 pursuant to Paragraph 2 of the contract stating that she considered
21 the lack of communication from Ms. Bernstein, or any other alleged
22 failure by the talent agency to perform the terms of the agreement,
23 to be a breach of the contract between the parties.

24 10. During the last week of October, 2002, Ms. Marx was
25 contacted by Jessie Ward of Paramount, who told Ms. Marx that she
26 was interested in scheduling a general meeting to discuss the
27 possibility of Ms. Marx designing costumes for the television
28 series "Raising Dad".

1 11. On or about November 7, 2002 Ms. Ward offered Ms. Marx
2 a job designing costumes for the "Raising Dad" television series.

3 12. On November 7, 2002 at 7:22 p.m. Ms. Marx left a
4 voicemail message for Laura Bernstein at Ms. Bernstein's extension
5 at Shapiro-Lichtman, Inc. advising her of the "Raising Dad" job
6 offer. The text of the voicemail message was introduced as
7 Petitioner's Exhibit 2 at the hearing and admitted into evidence.
8 In the message Ms. Marx notified Laura Bernstein of the "Raising
9 Dad" job offer, and advised her that Jennifer Ward of Paramount
10 would probably call her the next day. Ms. Marx acknowledged that
11 the talent agent would be entitled to a fee for this job by stating
12 near the beginning of the message: "Well guess what? I just made
13 you some money."

14 13. On November 8, 2002 Shapiro-Lichtman, Inc. principal
15 Martin Shapiro picked up Ms. Marx's November 7, 2002 voicemail
16 message to Ms. Bernstein, as Ms. Bernstein was no longer working
17 for the agency then.

18 14. Mr. Shapiro assigned talent agent Sarita Choy to follow-
19 up on Ms. Marx's voicemail message. Ms. Choy, a Shapiro-Lichtman,
20 Inc. employee, had met Ms. Marx on August 16, 2002, the day she
21 signed the contract with Shapiro-Lichtman, Inc.

22 15. Ms. Choy contacted Ms. Ward at Paramount. Based on the
23 salary requirements Ms. Marx had previously discussed with Laura
24 Bernstein, Ms. Choy was able to persuade Paramount to increase its
25 offer for the "Raising Dad" series to \$2500.00 per week from its
26 initial offer of \$2350.00 per week.

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1 16. Ms. Choy did not speak with Ms. Marx before negotiating the
2 raise. However she left a message for Ms. Marx on Ms. Marx's home
3 telephone voicemail the evening of November 8, 2002.

4 17. Ms. Ward of Paramount called Ms. Marx late on November 8,
5 2002 to notify her that she had been contacted by Sarita Choy
6 rather than Laura Bernstein from Shapiro-Lichtman, Inc. about the
7 offer to Ms. Marx to design costumes for "Raising Dad". Ms. Ward
8 notified Ms. Marx that Laura Bernstein was no longer working for
9 Shapiro-Lichtman, Inc., a fact that no one from Shapiro-Lichtman,
10 Inc. had previously disclosed to Ms. Marx.

11 18. Ms. Marx faxed a handwritten signed termination letter to
12 Shapiro-Lichtman, Inc. at 11:01 P.M. the evening of November 8,
13 2001. The letter was on Ms. Marx's letterhead and the portion
14 handwritten by Ms. Marx stated in its entirety:

15 "11/8/01

16 TO SHAPIRO-LICHTMAN -

17 AS OF 11/8/01 I AM TERMINATING YOUR SERVICES."

18 This text was followed by Ms. Marx's signature. A copy of the
19 termination letter was admitted into evidence as Petitioner's
20 Exhibit 3.

21 19. Martin Shapiro called Ms. Marx on November 12, 2001. He
22 told her that the terms of the contract she had signed with
23 Shapiro-Lichtman, Inc. were binding until August of 2003, and that
24 she would be liable for fees to the talent agency for all costume
25 design work obtained through that date.

26 20. On November 12, 2002 Shapiro-Lichtman, Inc. sent Ms. Marx
27 a fully executed copy of the contract she had signed on August 16,
28 2001. Martin Shapiro had signed the contract on behalf of Shapiro-

1 Lichtman, Inc. Petitioner had not sent or given Respondent a copy
2 of the contract prior to November 12, 2002. A cover letter signed
3 by Michael Shlain was sent with the copy of the contract and was
4 admitted as Respondent's Exhibit A. The contract itself had
5 previously been admitted as Petitioner's Exhibit 1.

6 21. On November 14, 2001 Mr. Shapiro attempted to send Ms.
7 Marx a letter by certified mail notifying her that she was still
8 bound by the agency agreement she had signed, as Shapiro-Lichtman,
9 Inc. "remains ready, willing and able to perform services pursuant
10 to the agency agreement." A copy of the letter and receipt for
11 Certified Mail were collectively admitted into evidence at the
12 hearing as Petitioner's Exhibit 4. A copy of the envelope noting
13 that a second delivery attempt had been made on November 28, 2001
14 and that the envelope had been returned unclaimed was admitted into
15 evidence as Exhibit 5 A. A copy of the Domestic Return Receipt
16 attached to the envelope, which Ms. Marx would have been asked to
17 sign had she claimed the envelope, was admitted into evidence as
18 Exhibit 5 B.

19 22. Ms. Marx worked as a costume designer for "Raising Dad",
20 earning \$2500.00 a week, for 9 episodes, with 3 hiatuses. She also
21 earned vacation and holiday pay. In addition she received a car
22 allowance for which Shapiro-Lichtman, Inc. would not be entitled to
23 a commission. Ms. Marx earned \$34,471.90, excluding the car
24 allowance, for her work on "Raising Dad".

25 23. Since obtaining employment designing costumes for "Raising
26 Dad", Respondent has also worked as a costume designer as follows:

27 a. A pilot for Universal, earning \$2500.00 per week for
28 about 4 weeks,

1 b. a television series "The Grubs", earning \$2500.00 per
2 week, for seven episodes and 3 hiatuses, earning
3 \$25,000.00 for 10 weeks' pay, and
4 c. the Paramount series "Bram and Alice", earning
5 \$2500.00 per week. Ms. Marx was still working on that
6 series on the October 1, 2002 hearing date.

7 Ms. Marx obtained all three positions after November 8, 2001
8 without any assistance from Shapiro-Lichtman, Inc.

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CONCLUSIONS OF LAW

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1. Applicable Statutes and Regulations

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The rights and responsibilities of talent agencies and artists are governed by Labor Code §1700 et seq. and Title 8 California Code of Regulations (CCR) §12000 et seq. Petitioner Shapiro-Lichtman, Inc. is a "talent agency" under the terms of Labor Code §1700.4 (a) and has been licensed by the State of California since 1969. Respondent Caroline Marx is an "artist" under the terms of Labor Code § 1700.4 (b).

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The contract between the parties conforms to the requirements of 8 CCR §12001. The form contract presented to and signed by Ms. Marx on August 16, 2001 had been approved by the Labor Commissioner. The slight modification of the language of Paragraph 3 of the contract noted above in Paragraph 5 of the Findings of Facts did not require approval of the Labor Commissioner because it involved a reduction in the compensation to be paid by the artist to the talent agency for work used outside the United States. [See 8 CCR §12003.3(3).

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8 CCR §12001.1 places the responsibility on the talent agency

1 to provide the artist with a copy of the contract. Shapiro-
2 Lichtman, Inc. did not provide Ms. Marx with a fully executed copy,
3 or indeed any copy of the contract, until November 12, 2001, almost
4 three months after Ms. Marx signed the contract. The November 12,
5 2001 mailing was 5 days after Respondent had notified Petitioner of
6 the "Raising Dad" job offer by leaving a voicemail message on Laura
7 Bernstein's extension. Most significantly, the November 12, 2001
8 "delivery" of the contract by mailing it to Ms. Marx by certified
9 mail was 4 days after Ms. Marx had faxed a termination notice to
10 Petitioner on November 8, 2001.

11 **2. Affirmative defense of "unclean hands"**

12 Respondent is seeking equitable relief by claiming that
13 Petitioner's alleged misconduct or "unclean hands" should preclude
14 awarding Petitioner the full monetary damages it is seeking: 10% of
15 all of Ms. Marx's earnings as a costume designer from August 16,
16 2001 through August 15, 2003. Shapiro-Lichtman, Inc. employees
17 certainly could have acted more professionally if they had been
18 more forthcoming about the reasons for Ms. Bernstein's absence, if
19 they had promptly returned Ms. Marx's telephone messages to Ms.
20 Bernstein, and if Ms. Choy had spoken with Ms. Marx prior to
21 speaking with Ms. Ward at Paramount concerning the "Raising Dad"
22 job offer. However, these listed actions or failures to act
23 complained of by the Respondent do not rise, either individually or
24 collectively, to the level of egregious misconduct which would
25 permit the Labor Commissioner to ignore the explicit terms of the
26 contract between the parties and award equitable relief. Nor do
27 the above listed actions or failures to act violate the explicit

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1 terms of the statutes and regulations governing the rights and
2 responsibilities of talent agencies and artists.

3 Pursuant to the contract that she signed with Shapiro-
4 Lichtman, Inc. on August 16, 2001, Ms. Marx understood that she
5 would be liable to her talent agent for fees for the "Raising Dad"
6 job offer and so acknowledged in her November 7, 2001 voicemail
7 message to Ms. Bernstein. Accordingly, Petitioner should be
8 awarded 10% of her "Raising Dad" earnings, together with interest
9 thereon.

10 However, under the circumstances of this case, in which
11 Petitioner did not even mail or deliver a copy of the contract to
12 Respondent as required under 8 CCR §12001.1 until after she
13 obtained the "Raising Dad" job offer on her own and after she
14 notified Petitioner of her intent to terminate the contract, it
15 would not be equitable to award Respondent a full two years of
16 fees. Petitioner shall therefore be awarded the fees for "Raising
17 Dad" only. Respondent shall not be liable to Petitioner for fees
18 for any other costume design jobs obtained by Ms. Marx before
19 August 15, 2003, including but not limited to the three (3)
20 projects listed in Paragraph 23 of the above Findings of Fact: 1.
21 the pilot for Universal, 2. the "Grubs" and 3. "Bram and Alice",
22 all of which Ms. Marx obtained after the "Raising Dad" offer,
23 without any assistance from Shapiro-Lichtman, Inc.

24 ORDER

25 For the foregoing reasons, IT IS HEREBY ORDERED that
26 Respondent Caroline Marx is liable to Petitioner Shapiro-Lichtman,
27 Inc. for 10% of her earnings from the "Raising Dad" television
28 series. Ms. Marx shall forthwith pay Petitioner Shapiro-Lichtman,

1 Inc. the sum of \$3,447.19 representing 10% of her earnings from
2 "Raising Dad" together with 10% interest from the date the earnings
3 were received.

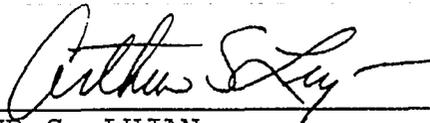
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Dated: December 17, 2002


ANNE J. ROSENZWEIG
Attorney and Special Hearing Officer
for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

Dated: December 19, 2002


ARTHUR S. LUJAN
State Labor Commissioner

