

1 STATE OF CALIFORNIA
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3 DIVISION OF LABOR STANDARDS ENFORCEMENT
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9 Special Hearing Officer for the Labor Commissioner

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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

ALEX MACKEY,

Petitioner,

vs.

L.A. MODELS, INC. aka L.A. MODELS,

Respondent.

CASE NO.: TAC-20337

DETERMINATION OF
CONTROVERSY

The above-captioned matter, a petition to determine controversy under Labor Code §1700.44, came on regularly for hearing on December 8, 2011 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner ALEX MACKEY (hereinafter "Petitioner") appeared personally and was represented by Michael J. Gulden, Esq. Respondent L.A. MODELS, INC. aka L.A. MODELS (hereinafter "Respondent") appeared by and through its authorized agent and representative Sergio Garcia, and was represented by Paul G. Szumiak, Esq.

Based on the evidence presented at the hearing and on the other papers on file in this matter, the Labor Commissioner hereby adopts the following decision.

FINDINGS OF FACT

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3 1. Respondent operated a licensed talent agency under its own name.
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5 2. Petitioner is a model. In or about September, 2009 Petitioner engaged
6 Respondent to act as his agent and represent him in obtaining work in the field of
7 modeling and also in film, television, and commercials.
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9 3. The parties did not actually execute a written representation agreement.
10 Respondent's representative, Sergio Garcia, stated that a representation agreement was
11 provided to Petitioner at the time of the engagement, but that through oversight a signed
12 copy of the agreement was never retrieved from Petitioner. For his part, Petitioner does
13 not recall ever seeing a representation agreement. Nonetheless, the testimony of both
14 parties indisputably establishes there was an oral representation agreement, pursuant to
15 which Petitioner agreed to pay Respondent a 20% commission or fee for engagements
16 obtained by Respondent on Petitioner's behalf. This arrangement was confirmed by an
17 "Independent Contractors and Loan Agreement" signed by both parties on September 8,
18 2009.
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20 4. After it had been retained, Respondent obtained a number of engagements
21 for Petitioner on photo shoots. On two of the engagements, Respondent collected the
22 money that was due, deducted its 20% fee, and remitted the balance to Petitioner. On a
23 third engagement, "The Abbey" photo shoot, Respondent collected the money due for the
24 shoot, \$250.00, and remitted the entire amount to Petitioner without deducting its
25 commission. At the hearing, Petitioner acknowledged he is making no claim with respect
26 to the two engagements on which a 20% fee was withheld, and also that he was paid in
27 full on all of the engagements obtained for him by Respondent.
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1 3. This case is within the jurisdiction of the Labor Commissioner under Labor
2 Code section 1700.44, subdivision (a).

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4 4. The claim that Petitioner is asserting in this proceeding is not clear.

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6 5. One contention that Petitioner has made is that the Talent Agencies Act
7 (TAA), Labor Code §1700 et seq., was violated because there was no written
8 representation agreement between the parties on a contract form approved by the Labor
9 Commissioner. However, it is established law that a talent agency can represent an artist
10 pursuant to an oral contract and that such a contract will be enforceable. (California Code
11 of Regulations, title 8, section 1002; *Beyeler v. Williams Morris Agency, Inc.* (Cal. Lab.
12 Com., Sept. 5, 2001) TAC No. 32-00.) In this case, it is undisputable that the parties
13 entered into and performed under an oral representation agreement, and Petitioner has
14 conceded that fact. Consequently, Petitioner is unable to assert a viable claim under the
15 TAA based on the absence of a written representation agreement.

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18 6. Another contention the Petitioner advances is that the representation
19 agreement between the parties is “unfair, unjust and oppressive” to Petitioner. (See Lab.
20 Code §1700.23.) Petitioner has made absolutely no showing to support this contention.
21 Under the agreement in this case, Petitioner agreed to pay a 20% commission on all
22 earnings generated by work that Respondent obtained for Petitioner. This 20%
23 commission is precisely the same as the commission specified in the form contract
24 submitted to the Labor Commissioner for review and approved by the Labor
25 Commissioner for use by Respondent. This approval constituted a determination by the
26 Labor Commissioner that the agreement was not unfair, unjust, or oppressive.
27 Furthermore, Petitioner conceded he was making no claim that he was entitled to
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1 recoupment of the commissions actually paid to Respondent under the representation
2 agreement. In short, the contention that the agreement was unfair, unjust, and oppressive
3 in unsupported.

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5 7. Petitioner also contends the actions of Respondent in connection with
6 securing the engagement for the photo shoot at The Abbey constituted fraud and a
7 misappropriation of Petitioner's image. It is now settled law, however, that the Labor
8 Commissioner is without "jurisdiction to hear and determine tort law claims." (*Hecht v.*
9 *William Morris Agency* (Cal. Lab. Com., May 11, 1995) TAC No. 31-92, at p. 8; see *id.* at
10 pp. 5-9.) Petitioner's claims for damages based on fraud and misappropriation are tort
11 law claims. Accordingly, the Labor commissioner is without jurisdiction to adjudicate
12 such claims.

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14 8. Petitioner has not advanced a claim for breach of contract—i.e., a claim that
15 Respondent failed to perform an obligation under the oral representation agreement
16 between the parties. Accordingly, we have no occasion to consider whether such a claim
17 would have been permissible under the TAA in the present context, whether there would
18 have been some plausible factual basis for asserting a viable claim of failure to perform a
19 contractual obligation, whether in the event a claim was viable there would have been
20 evidence sufficient to support a finding of failure to perform, and whether there would
21 have been evidence to support an award of actual or nominal damages.

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23 9. In sum, Petitioner has failed to show he has any right whatsoever to recover
24 any amount from the Respondent in this TAA proceeding.

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27 **ORDER**

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2 Accordingly, for the reasons set forth above,
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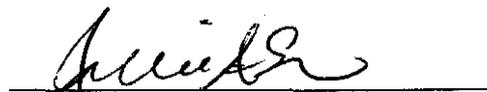
4 **IT IS HEREBY ORDERED** Petitioner ALEX MACKEY shall have and recover
5 nothing from Respondent L.A. MODELS, INC aka L.A. MODELS by reason of the
6 petition filed in this case.
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10 Dated: 9-7-12


11 William A. Reich
12 Special Hearing Officer

13 Adopted:
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16 Dated: 9-11-12


17 Julie A. Su
18 State Labor Commissioner
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