2003 WL 23951399 (S.D.N.Y.) (Trial Pleading)
United States District Court, S.D. New York.

Carolyn FEARS, Donna Gibbs, Ann Rogan (a/k/a Anne Hopson), Angela Shelton, Carol Mcilvaine (a/k/a Carol Alston), Sharon Simon, Tiffany Connor, and Monica Walker, on their own behalf and on behalf of a class of similarly situated persons, Plaintiffs,

v.

WILHELMINA MODEL AGENCY, INC.; Ford Models, Inc. (f/k/a Ford Model Agency); Gerard W. Ford; Elite Model Management, Inc.; Click Model Management, Inc.; Next Management Corp.; Mfme Model Management Company Ltd. (a/k/a Company Management); Boss Models, Inc.; Zoli Management, Inc.; Q Model Management; Dna Model Management, LLC; Images Management; IMG Models, Inc.; and Model Management Corporation (f/k/a International Model Managers Association, Inc.), Defendants.

No. 02-CV-4911 (HB) (HBP).
April 30, 2003.

Jury Trial Demanded

Third Consolidated Amended Complaint

Pursuant to the Court's Opinion and Order dated April 28, 2003, plaintiffs, on their own behalf and on behalf of a class of all those similarly situated persons described below, by their undersigned counsel, as and for their Third Consolidated Amended Complaint in this action, aver as follows, with knowledge of their own actions and conduct and events occurring in their presence, and upon information and belief as to all other matters:

NATURE OF THE ACTION

1 This is a class action under federal law on behalf of present and former professional models who are or have been under contract to Defendants, various New York modeling agencies. As set forth in detail below, Defendants are and have for several years been engaged in an unlawful combination and conspiracy to violate federal antitrust law and state law, including by

a. conspiring to set the fees they each charge to models, and to fix other terms and conditions of the models' contracts, in violation of federal antitrust law;

b. concealing their unlawful conduct by drafting contracts purporting to characterize themselves as “managers” and disavowing any state licensing requirements - while advertising themselves as “agencies” and admitting (in court documents and elsewhere) that they regularly procure employment for models for a fee, making them employment agencies as a matter of law;

c. knowingly violating state law limiting the fees that Defendants, as employment agencies, can charge; and

d. deliberately violating their fiduciary duties to their models through various other unlawful practices, such as earning undisclosed profits from third parties, billing models for phony expenses, making a profit from services required to be provided at cost, and imposing excessive charges and fees, as detailed below.

2. Defendants' violations of federal antitrust law and state law regulating employment agencies are legally distinct, but factually interwoven and mutually reinforcing. Defendants have not only conspired to fix their fees - itself a *per se* violation of federal law - they have also agreed to charge fees above what state law allows employment agencies to charge, which is also flatly unlawful; and they have worked together to affirmatively misrepresent their legal status in their dealings with Plaintiffs - to whom they owe fiduciary duties of honesty and full disclosure - through sham contracts and other dishonest tactics that have persisted for years.

3. There are several reasons why Defendants have been able to maintain their conspiracy for a very substantial period of time. In particular:
a. Throughout the Class Period, and continuing today, the domestic modeling agency business has been highly concentrated, both geographically (in New York City) and in terms of market share among the large agencies based in New York City;

b. Throughout the Class Period, and continuing today, there has been a strong continuity in the ownership and management of the principal defendants, including particularly Defendant Ford, which (not coincidentally) has maintained its position as a market leader while taking a leading role in Defendants' unlawful conduct; and

c. Throughout the Class Period, and continuing today, the nature of the domestic modeling agency business is such that the models are at a very large, structural disadvantage in terms of bargaining power with the agencies: most models' careers are short; they are almost completely dependent on agencies to get them work; they are given form contracts, which the agencies claim are “standard” and not subject to negotiation; and they are told they will be blackballed if they complain.

4. Thus while the domestic modeling agency business now involves hundreds of millions of dollars a year in bookings, it is still largely run as an unregulated private club, dominated by a handful of agencies that are owned and run by people who have known each other a very long time. Those club members occasionally complain about each other in public, or fight over the most successful models, but long ago recognized their mutual interest in setting standard terms and rates for the vast majority of models they have under contract. Few if any other large business in modem America have been run for such a long time by such a small group of persons with the power that Defendants have to dictate terms to the thousands of clients they purport to serve.

5. Plaintiffs therefore bring this action on their own behalf and on behalf of a class of all models now or formerly employed by Defendants since the inception of Defendants' unlawful conspiracy, which began as of the early 1970's with regard to Defendants Ford and Wilhelmina, soon joined by Elite, and later joined by each of the other Defendants. Plaintiffs seek damages under Section 1 of the Sherman Act in the form of treble damages for Defendants' price-fixing, and interest and costs as allowed by law.

PARTIES

6. Representative Plaintiff Carolyn Fears is a resident of Orange County, California. Ms. Fears had a modeling contract with Defendant Ford Models, Inc. during the Class Period.

7. Representative Plaintiff Donna Gibbs is a resident of Norristown, PA. Ms. Gibbs had a modeling contract with Defendant Wilhelmina Model Agency, Inc. during the Class Period.

8. Representative Plaintiff Anne Rogan d/b/a Anne Hopson is a resident of Swarthmore, PA. Ms. Rogan had a modeling contract with Defendant Ford Models, Inc. during the Class Period.

9. Representative Plaintiff Angela Shelton is a resident of Los Angeles, California. Ms. Shelton had modeling contracts with IMG Models, Elite Model Management, Inc., DNA Model Management and Wilhelmina Model Agency, Inc. during the Class Period.

10. Representative Plaintiff Carol Mcllvaine a/k/a Carol Alston is a resident of Philadelphia, Pennsylvania. Ms. Alston had modeling contracts with Ford Models, Inc. and Wilhelmina Model Agency, Inc. during the Class Period.

11. Representative Plaintiff Sharon Simon is a resident of St. Petersburg Florida. Ms. Simon had a modeling contract with Wilhelmina Model Agency, Inc. during the class period.

12. Representative Plaintiff Tiffany Connor is a resident of Los Angeles, California. Ms. Connor had modeling contracts with Defendant Ford Models, Inc. and Wilhelmina Model Agency, Inc. during the class period.

13. Representative Plaintiff Monica Walker is a resident of Philadelphia, PA. Ms. Walker had modeling contracts with Defendant Click Model Management, Inc. during the class period.

14. Defendant Wilhelmina Model Agency, Inc., ("Wilhelmina"), is a New York corporation with its principal place of business located at 300 Park Avenue South, New York, New York 10010.

15. Defendant Ford Models, Inc. ("Ford") is a Delaware corporation authorized to do business in the State of New York, with its principal place of business located at 142 Greene Street, New York, New York 10012.

16. Defendant Gerard W. Ford, a/k/a Jerry Ford, residence currently unknown, is Co-Chairman of the Board of Ford Models, Inc., located at 142 Greene Street, New York, New York 10012.

17. Defendant Elite Model Management, Inc. ("Elite") is a corporation duly organized under the laws of the State of New York with its principal place of business located at 111 East 22nd Street, 2nd Floor, New York, New York 10010.

18. Defendant Click Model Management, Inc. ("Click") is reported to be a corporation maintaining its principal place of business at 129 West 27th Street, New York, New York 10001.

19. Defendant Next Management Corp. ("Next") is a corporation duly organized under the laws of the State of New York with its principal place of business located at 23 Watts Street, 5th Floor, New York, New York 10013.

20. Defendant The MFME Model Management Company Ltd. ("Company"), also known as Company Model Management, has its principal place of business located at 270 Lafayette Street, #1400, New York, New York 10012.

21. Defendant Boss Models, Inc. ("Boss") is reported to be a corporation established under and pursuant to the laws of the State of New York with its principal place of business located at 1 Gansevoort Street, New York, New York 10014.

22. Defendant Zoli Management, Inc. ("Zoli") is a corporation duly organized under the laws of the State of New York with its principal place of business located at 3 West 18th Street, New York, New York 10011.

23. Defendant Q Model Management ("Q") has its principal place of business located at 180 Varick Street, New York, New York 10014.

24. Defendant DNA Model Management, LLC ("DNA") is a corporation duly organized under the laws of the State of New York with its principal place of business located at 520 Broadway, New York, New York 10012.

25. Defendant Images Management ("Images") has its principal place of business located at 30 East 20th Street, 6th Floor, New York, New York 10003.

26. Defendant IMG Models, Inc. ("IMG") is a corporation duly organized under the laws of the State of New York with its principal place of business located at 304 Park Avenue South, New York, New York 10010.

27. Defendant Model Management Corporation ("MMC"), a New York corporation, has been sued herein in its own capacity and as the successor to the International Model Managers' Association, Inc. ("IMMA"), a New York corporation.

JURISDICTION AND VENUE

28. The Court has jurisdiction over this action pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a), 28 U.S.C. § 1337, as well as principles of supplemental jurisdiction.

29. All of the Defendants to this civil action reside in New York and regularly conduct business in this District.

30. Venue is proper in this District pursuant to Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391(b) and (c).

CLASS ACTION ALLEGATIONS

31. Representative Plaintiffs Carolyn Fears, Donna Gibbs, Anne Rogan a/k/a Anne Hopson, Angela Shelton, Sharon Simon, Monica Walker, Carol Mcllvain a/k/a Carol Alston, and Tiffany Connor, bring the claims asserted in the first, second and third causes of action alleged herein on behalf of themselves and all current and former models who have or had oral or written contracts with any of the Defendants during the Class Period. All other plaintiffs are not proffered as class representatives with respect to these claims.

32. Representative Plaintiffs do not presently know the exact time when the unlawful conspiracy began, but are informed and believe - based, in part, on the sworn statements of Defendant Elite's own counsel, submitted as part of a lawsuit against Ford and Wilhelmina - that the unlawful conspiracy began between Defendants Ford and Wilhelmina no later than 1977, and later grew to include each of the other Defendants (including Elite itself, which decided to drop its lawsuit and join the conspiracy). However, pursuant to the Court's Order of April 28, 2003, plaintiffs seek damages only for the period from June 25, 1998 to the date of this Complaint.

33. Representative Plaintiffs do not know the exact size of the Class because such information is in the exclusive control of Defendants. Nonetheless, there are thousands of Class members geographically dispersed throughout the United States. The Class is so numerous that joinder of all Class members, whether required or permitted, is impracticable.

34. Representative Plaintiffs' claims are typical of the claims of the members of the Class because Representative Plaintiffs, like all Class Members, were models who entered into contracts, both written and oral, with various Defendants at various times during the Class Period, and have each been damaged by Defendants' unlawful conspiracy to fix prices in violation of federal antitrust law. Similarly, Representative Plaintiffs, like all Class Members, have been damaged by Defendants' unlawful fees and charges, in violation of New York state law, during the class period.

35. Representative Plaintiffs will fairly and adequately protect the interests of the Class because Plaintiffs' interests are coincident with, and not antagonistic to, those of the Class. Representative Plaintiffs have retained counsel with substantial experience in the prosecution of antitrust and class action litigations.

36. Questions of law and fact that are common to the members of the Class predominate over questions that affect only individual members. The questions of law and fact that are common to the class include:
a. whether Defendants are engaged in a conspiracy to fix prices relating to fees charged to models and persons who employ models, and whether Defendants conspired to standardize other terms and conditions of the employment of professional models; and

b. whether Defendants have conspired to violate GBL § 172 by operating as employment agencies without being licensed by the Department of Consumer Affairs.

37. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this case that would preclude its maintenance as a class action.

38. Defendants have acted on grounds generally applicable to the entire Class, thereby making final relief appropriate with respect to the Class as a whole. As discussed in more detail below, Defendants have collectively acted to fix prices, create standardized contracts and preclude new modeling agencies from entering the market. Defendants continue to coordinate their efforts by communicating through formal trade associations and through other less formal means. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants.

FACTUAL BACKGROUND

The Business of Modeling and the Long-Standing New York Law Regulating Employment Agencies

39. The domestic modeling agency business is reported to involve over a hundred million dollars a year in bookings, and New York is one of the industry's worldwide hubs. Though market size and share data are private and within the control of Defendants, Defendants collectively are reported to be the largest modeling agencies in New York and the United States as a whole, and to control a substantial majority, and certainly well over half, of the market, measured by total volume of bookings, for models under contract to New York-based agencies.

40. The primary service Defendants provide to the models they have under contract is to get the models work. This service is carried out through persons who are employed by Defendants and known as “bookers”. As Defendant Wilhelmina admitted in a recent court pleading, “Bookers act as the liaisons between [the modeling agencies] and the models, and often provide the only contact and connection between [an agency] and its models. The bookers and models are the heart and soul of the modeling agency.” *Wilhelmina Artist Management LLC v. Fernandez,* Index No. 01114665 (Aug. 1, 2001), Complaint ¶ 6.

41. Wilhelmina's own pleadings admit that it is the booker's job to “negotiate and schedule bookings [or jobs] for models [and] contact and procure clients who might be interested in hiring [the agencies'] models.” *Id.*

42. Wilhelmina's admissions that (1) the booker's job is to get the model work, and (2) the bookers “often provide the only contact and connection between [an agency] and its models” are judicial admissions of facts that are well known to those in the business, which are repeated in numerous industry publications and textbooks endorsed by the other Defendants. For example:

a. One industry publication, endorsed by Defendants Ford and Elite as a reputable guide to the modeling industry, claims that: "A model agent is commonly referred to as a booker. Your booker/agent will become one of the most important people in your career." Debbie Press & Skip Press, *Your Modeling Career: You Don't Have to be a Super Model to Succeed* ("*Your Modeling Career*") 87 (Allworth Press 2000);

b. Another publication, written by former Wilhelmina president Natasha Esch as a guide to the modeling industry, states: "Next we have the agents (bookers).... The model-agent (booker) relationship is a vital one.... At the beginning of your career, your agent (or booker) will be your link with your agency and with the entire industry." Natasha Esch, *The Wilhelmina Guide to Modeling* ("*The Wilhelmina Guide*") 38-39 (Simon & Schuster 1996); and

c. A leading textbook on the industry, to which Defendants Ford, Click, Wilhelmina and Zoli contributed, states: "A modeling agency employs bookers to act as the link between the clients and the models." Linda A. Balhorn, *The Professional Model's Handbook A Comprehensive Guide to Modeling and Related Fields* ("*The Professional Handbook*") 186 (Milady Publishing Company 1990).

43. Acting on behalf of the agency, the booker speaks to third parties, such as photographers, casting agents, advertising agencies, magazines and retailers about employment opportunities for models; contacts the models on a regular basis to inform them of possible employment opportunities; schedules or "books" employment engagements and negotiates the model's fees for modeling engagements. In addition, the agencies bill the models' employers for the jobs their models have performed and collect money from the models' employers on the model's behalf.

44. For these services, Defendants have for several years agreed to charge, and regularly charge, a 20% commission on all monies Plaintiffs receive for modeling. This "standard rate" applies to the vast majority of the models who are under contract to Defendants. A small percentage of highly successful models (usually defined as those who have earned over $200,000) are allowed to bargain their commission rate down to 15%, and a very small percentage of models (usually those who earn more than $500,000) are able to retain their own, actual managers and lawyers and negotiate their own contracts.

45. Defendants have claimed that this variation in pricing among models who earn different amounts reflects the absence of a conspiracy, but Defendants' own statements show that the opposite is true - when such discounts began, Defendants sought to conceal them from the models and from each other, so as not to be seen to be undercutting the standard rate. Thus John Casablancas of Elite was quoted referring to rates lower than 20% as follows: "Everybody does it. *But there is no point doing it unless it is secret.* When we started we had telephones and nothing else. It was spooky. A few of the top girls got a ... discount." (emphasis added). This kind of covert variation from a standard price is flatly contrary to what one would expect in a competitive market - and exactly consistent with the existence of an industry-wide agreement on prices that individual defendants might opportunistically violate to keep a particularly lucrative account.

46. Another salient feature of the standard modeling contract - and one that is flatly contrary to Defendants' claim to be personal managers rather than employment agents - is the "mother agency" clause. The "mother agency" in a typical modeling contract recites that the agency shall act as the "mother agent" at all times, which means that Defendants claim a commission on any modeling job Plaintiff obtains, even if the job was procured by another agency. In such a circumstance - or when, as is often the case, one agency has agreed to send a model to work with another agency (such as IMG sending a model to work in Europe with Elite's European affiliate) - the "mother agent" gets its cut from the commission that the booking agent collects.

47. Similar to a mother agent is a "scout", who discovers a model and has the model sign a contract then claims a percentage (such as 5%) of the model's earnings from the agency to which the scout refers the model. These "scouts"

operate in many states in the country, and regularly charge aspiring models hundreds or thousands of dollars on the promise of an audience before the major agencies in New York, who might sign them to a contract.

48. The Defendants have adopted the "mother agent" clause (and many other clauses) as a standard clause in their contracts. As stated in *The Modeling Life,* a book endorsed by Eileen and Katie Ford (Defendant Ford's founder and current president respectively) and Monique Pillard (Defendant Elite's president) as a reputable guide to the modeling industry: "When models sign with multiple agencies, one agency, usually the one that discovers or signs the model first is designated as the 'mother agent.' " Donna Rubenstein, *The Modeling Life* 244 (Penguin Putnam Inc. 1998). And, as stated in *The Modeling Handbook,* a publication endorsed by Defendant Company's owner, Michael Flutie, as a reputable guide to the modeling industry, "If a model signs a contract with Elite, New York, she might have ten other agencies she works with in Paris, Milan, Germany and Switzerland. Elite New York will still remain her 'mother' agency." Debbie Press & Skip Press, *Your Modeling Career* 92 (Allworth Press 2000). Similarly, Defendant Q's web page "modelsearch" asserts, "It is customary for your 'mother' agency to arrange your placement with agencies in other markets." *http:// www.qmodels.com/modelsearch/modelsearch.html.*

49. On top of the standard 20% commission, Defendants also charge Plaintiffs for:
a. Incidental "services", such as advertising the models' portfolios to photographers, casting agents, advertising agencies, magazines, and others who might be interested in hiring the models; and

b. Salary advances, charged against the models' anticipated but uncollected fee for a completed modeling job. (Ford claims on its website that "Ford was the first, and remains one of the few, to pay models at the end of every week rather than waiting for client payments." *http:/ www.fordmodels.com/content.cfm.)* Defendants treat these payments as loans, to be repaid in the event Plaintiffs' employers do not pay.

c. Defendants not only charge Plaintiffs a flat 5% fee for these "salary advances" (for a total fee of 25%), but do so regardless of how much time elapses between the time of the advance and the agency's receipt of the model's fee from the model's employer - even if it is just a matter of days.

50. Defendants also earn substantial income from the employers who hire models. Defendants regularly charge the models' employers an *additional* 20% of the model's fee for a job. This double-dipping means that when a model is "paid" $100 for a job, the agency collects $20 from the model, plus *another* $20 from the employer, or $40 total, while the model takes home $80. In effect, on any given job, the agencies pocket *one-third* of the total amount paid by the employers who hire professional models.

51. These and other of Defendants' practices described herein are exactly the types of "extortionate overcharges" [1] that the New York State Legislature long ago declared unlawful, enacting Article 11 of the New York General Business Law ("GBL"), §§ 170-90, which set forth specific and clear rules regulating employment agencies. Among other things, that statute requires employment agencies to be licensed, limits their fees, and prohibits the operation of other business on the same premises as the employment agency.

52. Specifically, GBL § 171 defines an "employment agency" as any individual or company "who, for a fee, procures or attempts to procure employment or engagements for...modeling or other entertainments or exhibitions or performances." The statute excludes from the definition of "employment agency" "the business of managing...where such business only incidentally involves the seeking of employment." This exception to GBL § 171 is commonly known as the "incidental booking exception", and has been repeatedly held by the courts to mean exactly what it says - that the seeking of employment must be *incidental* to the provision of management services.

53. In short, to take advantage of the "incidental booking" exception, Defendants must not only be in the "business of managing", but must *also* show that their business "only incidentally involves the seeking of employment." As set forth in the following section, Defendants cannot possibly meet that very narrow exception, and yet have banded together to falsely represent to Plaintiffs that they are "managers" exempt from the statute.

54. If a person or entity falls within the definition of "employment agency" in GBL § 171, that person or entity:
a. Must be licensed by the Department of Consumer Affairs -- GBL § 172 requires all employment agencies conducting business in the city of New York to be licensed by the Department of Consumer Affairs;

b. May not charge fees in excess of 10% -- GBL § 185(8) provides in relevant part: "For a placement in class 'C' employment (which includes the field of modeling) the gross fee shall not exceed, for a single engagement, ten percent of the compensation payable to the applicant";

c. May not conduct any business other than that of an employment agency on its premises -- GBL § 187(8) prohibits employment agencies from "engaging in any business on the premises other than the business of operating an employment agency..."; and

d. May not pass on to the models the incidental costs of advertising the models' portfolios -- GBL § 187(10) prohibits employment agencies from "requir[[ing] applicants ... to contribute to the cost of advertising."

Defendants' Concerted Efforts to Evade Regulation as Employment Agencies

55. For decades after their enactment, GBL §§ 170-90 were consistently understood to apply to "modeling agencies" such as Defendants - until the 1970's, when (according to court papers filed by counsel for Defendant Elite, which was then a newcomer challenging the duopoly of Ford and Wilhelmina) "the principals of the major modeling agencies of the City of New York, *agreed among themselves* to raise commissions charged to the models and to circumvent the licensing requirements required by the statutes of the State of New York." *Ford Models, Inc. v. Pillard,* Index No. 1148/77, Levinson Affidavit, Aug. 26, 1977, at ¶ 9 (emphasis added).

56. This affidavit told the Court that Elite was prepared to present sworn testimony from a witness to the meeting at which Ford and Wilhelmina agreed to collude to raise prices above the 10% legislative cap.

57. According to that affidavit from Elite's own lawyer, Ford led this coordinated move to circumvent GBL §§ 170 - 190 when it returned its employment agency renewal notice in 1971 and claimed that the agency had "now become management." This statement appears in an April 15, 1971 letter from Jerry Ford to the New York City Department of Consumer Affairs in the *Ford v. Pillard* docket.

58. While the affidavit is probative of whether Defendants Ford and Wilhelmina had entered into a price-fixing conspiracy in about 1971, there are several reasons why it was not the kind of public statement that would suffice to constitute notice to the Plaintiffs. First, the affidavit itself was submitted by Elite's own lawyer in a private civil litigation, which litigation was settled. No government agency brought any enforcement action based on the statement, as members of the public might think would follow from a credible accusation of price-fixing; in fact, the agencies were allowed to proceed in business as purported managers, instead of as licensed agencies. The affidavit was not publicized at the time, and when it was publicized, years later, it was in an article that had numerous quotes from the parties indicating their dislike of each other, from which one would reasonable infer the absence of any price-fixing conspiracy among any of the defendants, or at least that any such agreement which might have existed at the time the affidavit was made had since terminated.

59. Lengthy research and detailed investigation of documents not readily available to the public, has determined that Plaintiffs have been the subject of a long-running price fixing agreement, and Defendants' concerted efforts to conceal that agreement from Plaintiffs and the public. These facts of concealment begin with the claim made by Ford and other agencies in the 1970s that they had "become management". Investigation shows that these claims were superficial: For example, work vouchers that used to read "Ford Model Agency Incorporated" were changed to read "Ford Models, Inc." The day-to-day operations of both Ford and Wilhelmina changed little if at all. Indeed, both Ford and Wilhelmina now represent to the public that they have been in business *continuously* as "model agencies" since before the purported change in their status. *See http://www.fordmodels.com/content.cfm?contentïd=5&clientïd=& clientëmail=* (Ford's website) (May 23, 2002), *http:// www.wilhelmina.com/about/about index01.html* (Wilhemina's website) (May 23, 2002). And in fact, each Defendant continues to regularly procure employment for its models.

60. Shortly after Ford returned its license to the Department of Consumer Affairs, Ford, Wilhelmina and Elite - which later decided to drop its lawsuit and join with Ford and Wilhelmina in their unlawful conspiracy - raised their standard fees charged to models above 10%, the maximum amount allowed under New York law.

61. Today, no Defendant is licensed by the Department of Consumer Affairs and each Defendant routinely charges above 10% commissions.

62. Defendants have also agreed and conspired to impose additional charges on Plaintiffs that would be unlawful if Defendants were licensed agencies and were required to abide by GBL §§ 170 - 190. For example, Defendants, as unlicensed agencies, currently charge Plaintiffs for the costs incurred in advertising the Plaintiffs' portfolios, in violation of GBL § 187(10), and operate "management" divisions and other ancillary businesses from their premises, often charging Plaintiffs additional fees, all in violation of GBL § 187(8).

63. Defendants' concerted efforts to evade state law applicable to employment agencies have damaged Plaintiffs and continue to damage Plaintiffs in their business or property in that Plaintiffs are required to pay non-competitive prices for Defendants' services in the form of artificially inflated commissions, and are charged other unlawful fees and costs.

Defendants' Unlawful Price Fixing Scheme

64. Defendants' scheme to evade state law limiting their fees, and their agreement on what fees to charge, is also a clear violation of federal antitrust law.

65. As noted, evidence of the inception of this unlawful scheme comes from the sworn statement of Defendant Elite's own counsel, who stated in an affidavit that Wilhelmina and Ford had agreed in the 1970s "to raise commissions charged to the models". *Ford Models v. Pillard,* Levinson Aff. ¶ 9. Pursuant to that agreement, Defendants in fact did raise their commissions charged to models to 15%, and then to 20%, which Defendants represent to aspiring and current models as the "standard", non-negotiable rate for model contracts in New York.

66. Since the inception of the price-fixing scheme between Ford and Wilhelmina, other Defendants - including Elite itself- agreed to join the conspiracy and charge the same rate to their models.

67. The Defendants later agreed among themselves to start imposing charges on the clients who hired the models, and admitted that they had reached an agreement to do so before seeking to impose such charges.

68. While Defendants continue to charge most models the standard 20% rate, Defendants have not acknowledged that an agency can lower that rate when the model begin to command a substantial amount of fees from clients. For example, the industry norm is now to charge models earning over $200,000 15% commissions.

69. Defendants also agreed and conspired to implement and maintain additional price-related restraints, both individually and as an industry, that have unlawfully restrained competition and artificially inflated the price models must pay to retain an agency. For example, Defendants have collectively worked together to draft progressively more onerous "standard" contracts that currently: (a) require the models to reimburse the agencies for any out of pocket costs incurred by the agencies in advertising the models' portfolios; (b) require the models to pay the "mother" agency for any modeling job the models obtain, even if the models procured the employment without an agent or with the help of another agency; and (c) require the models to pay usurious interest rates on salary advances (As discussed above, Defendants treat these salary advances as loans, which is why the additional charge imposed by Defendants can be described as "usurious".)

Defendants' Illegal Exchanges of Information to Facilitate their Price-Fixing Conspiracy

70. Defendants have maintained their collusive price structure through the years in various ways, including through formal and informal meetings at which they have exchanged information on rates, charges, and other economic terms of the models' contracts, and in which Defendants have plotted strategy on how to respond to new competitors who have offered models lower rates than Defendants.

71. One principal means of this illegal information exchange - but not the only means - has been the periodic meetings of the International Model Management Association (the "IMMA"), founded several years ago by (*inter alia*) Jerry Ford of Defendant Ford Models, Inc. as a purported trade organization. Membership in the IMMA is reported to be comprised of the established modeling agencies, and since 1991, the IMMA has included, *inter alia,* Defendants Ford, Wilhelmina, Elite, Zoli, and Next.

72. The IMMA began out of meetings among at least Ford and Wilhelmina; by 1980, these meetings occurred once a month. Among the initial topics of discussion between the three agencies were how to set rates and respond to new competitors, as well as addressing the problem of models who sign with one agency then "switch" to another. Later discussions included newer agency participants and focused on issues such as setting client rates for big campaigns such as cosmetic company campaigns, where top models from various agencies compete for the most lucrative modeling job.

73. Defendant Jerry Ford participated in the initial meeting among Ford, Wilhelmina, and others at which the agreement to fix prices was first made. Later, as an officer and controlling shareholder of Ford Model Agency, Jerry Ford helped found the IMMA. Both as an officer and controlling shareholder of Ford Modeling Agency and as a founder and officer of IMMA, Jerry Ford is represented to have played a leading role in facilitating the conspiracy between Defendants, and performed specific overt acts in furthering this price fixing scheme by spreading it to other agencies.

74. One of Ford's stated goals in founding and seeking to build the IMMA was (as noted in an article written by a Ford employee, with Ford's cooperation and approval) the adoption of standardized industry contracts -- particularly important given Defendants' need to refer to themselves as managers and not agents in their contracts, and including such terms as the "mother agency" clause and the charging of a flat fee for salary advances.

75. According to reports of its meetings that have been disseminated to persons involved in the modeling business, the IMMA functions as a clearinghouse for the Defendants' exchange of information regarding prices and terms and conditions of employment, and the organization through which Defendants have discussed how to respond to upstart agencies that seek to undercut Defendants' pricing structure.

76. The IMMA has also purported to represent the leading agencies (including Defendants) to discuss uniform rates that Plaintiffs would be paid for their services. Indeed, some smaller agencies have privately complained that the large agencies have used the IMMA as a vehicle for enforcing compliance by the smaller agencies with the conspiracy.

77. Defendants and their officers and agents also regularly exchange information regarding other aspects of the market for professional modeling services, including the "day rate", which is the rate charged to a client for a full day's work by a model in New York City. Instead of seeking to use that knowledge to compete against each other, the agencies use such knowledge to ensure conformance with the price-fixing conspiracy, and to restrain competition.

78. As a direct and proximate result of Defendants' unlawful agreement to fix prices and their exchanges of information, Plaintiffs have been damaged and continue to be damaged in their business and property in that they have to pay supra-competitive prices for Defendants' services, in the form of artificially inflated commissions, and additional costs that are standard in the industry as a result of Defendants' conspiracy.

Characteristics of the Market that have Allowed the Conspiracy to Continue

79. There are several unique characteristics to the domestic model agency business that have allowed Defendants' unlawful practices to continue and thrive. First, the market is concentrated by geographically and in terms of market share. The domestic modeling agency business is largely run out of agencies headquartered in New York City, and dominated by a handful of large agencies (initially Ford, Wilhelmina, and Elite, joined more recently by Next and IMG); between them, these agencies are reported to control a large percentage of the total bookings for professional models in the United States.

80. Many of these and other agencies have West Coast offices, but those offices report to management in New York City, and (for reasons that go to the heart of Defendants' misconduct) many if not most of Defendants' contracts with models in California are made subject to New York law; similarly, American models who are sent to work in Europe are often referred by New York-based agencies, pursuant to contracts that are subject to New York law.

81. The continuity of private ownership and management of the leading Defendants has also been a unique factor allowing their scheme to continue. Ford, which has been publicly identified as a leader in efforts to organize the agencies, through the IMMA and otherwise, has been owned or run by Eileen Ford, her husband Jerry Ford, or their daughter Katie Ford since 1947, with their daughter, Katie currently at the helm as CEO.

82. From the early 1970s until the 1990s, Elite was owned or run by John Casablancas, who is reported to still be involved in the company.

83. Monique Pillard was a top booker at Ford who left to join Elite in the 1970s, and is now a member of Elite's senior management.

84. Fran Rothchild co-founded the Wilhelmina Agency in 1967, with the agency's namesake, Wilhelmina. When Wilhelmina died in 1980, Rothchild continued to own and participate in management. The agency was acquired several years ago by Dieter Esch (who has been reported as having been convicted of financial fraud).

Defendants Have Admitted That They Are Unlicensed Employment Agencies

85. Though Defendants represent to the models whom they have under contract that they are "managers" exempt from GBL §§ 170 - 190, there is overwhelming evidence - including numerous admissions from Defendants themselves, in court papers and elsewhere - that they are, in fact, employment agencies. (As noted, to avoid "employment agency" status under New York law, Defendants must prove *both* that they are managers, *and* that the procurement of employment is incidental to their management services. Even if Defendants could prove that some aspect of their services to Plaintiffs are in the nature of management, they would still be liable to regulation because they cannot deny that the procurement of employment is one of their principal services.).

86. Most tellingly, Defendants have acknowledged in court pleadings that one of their principal functions is to obtain employment for the models. Wilhelmina has recently admitted as much in its own Complaint, filed in New York State Supreme Court, in Wilhelmina v. Fernandez. Nor is this admission new: Jerry Ford made a similar admission in the late 1970s, describing the function of a booker in a sworn affidavit in Ford Models v. Pillard. Models expect - and the agencies know - that the agent's main job is to find employment for the model. And Defendant Elite's Chairman, John Casablancas, has been quoted as saying: "We are just people who sell people to other people." Dun's Business Month, Oct. 1983 v123 p.100(3).

87. In fact, the only place where Defendants consistently purport to characterize themselves as managers is in their form contracts with Plaintiffs. These contracts have steadily evolved over the years, first referring to Defendants as "managers" instead of "agents"; more recently, they have purported to include express "acknowledgments" by Plaintiffs that Defendants are not employment agencies under New York law. Defendants have adopted these clauses even though they know that GBL §§ 170 - 190 is not waivable by the model, and that courts look to the nature of the defendant's business, not the language in its contracts, to determine whether defendant is subject to the statute.

88. Contrary to the language of their contracts, in their daily parlance and in their solicitations to the public, Defendants regularly (and correctly) refer to themselves as agencies. For example:
a. Defendant Wilhelmina's website boasts that "it is one of the leading modeling *agencies* in the industries... As *agent* for over 1000 models... Wilhelmina is a full service *agency." http://www.wilhelmina.com* (May 24, 2002) (emphasis added);

b. Defendant Ford's website touts, "Eileen and Jerry [Ford] went on to create the world's most recognized and respected modeling *agency*" and explains, "Katie Ford took over in 1995 after working in the *agency* for 15 years." *http:// www.fordmodels.com* (May 24, 2002) (emphasis added);

c. Defendant Boss's website advertises that it is "World renowned as the *agency* that invented the male supermodel...one of the world's most progressive and modem model *agencies*..." and that "[u]ntil the *agency* changed the industry, even the most successful male models only served as backdrops for their female counterparts." *http://www.bossmodels.com* (May 24, 2002) (emphasis added). Boss's website also states that "Boss Models is a fashion model *agency* representing professional models only...the *agency* negotiated an ever larger deal for Polo/Ralph Lauren," and refers to "...100 of the *agency's* top boys" and its "annual *agency* portfolio." *Id.* (May 24, 2002) (emphasis added);

d. Defendant Elite claims on its web page that "In the world of modeling, few *agencies* have the recognition, respect and reputation of Elite Model Management, Inc." The website goes on to proclaim that, "Elite, more than ever, has positioned itself as an *agency* built on a solid foundation of history and experience... Elite has launched the careers of more industry superstars than any other *agency* in the world." *http://www.elitemodel.com* (May 24, 2002) (emphasis added);

e. Defendant Elite's founder, John Casablancas writes in his forward to *The Complete Idiot's Guide to Being a Model* ("The Complete Guide"), "...for a lucky few, all they need to do is send a couple of snapshots to an *agency,* or drop by when the *agency* is seeing new models." Roshumba Williams, *The Complete Idiot's Guide to Being a Model* (MacMillan, Inc. 1999) (emphasis added);

f. defendant Elite often refers to itself as the "Elite Agency Group". *See, e.g.,* the website for John Casablancas Modeling and Career Centers *http:// www.jc-* centers.com/faqs.html (May 24, 2002) and the cover of *The Complete Guide;*

g. Defendant Company's owner, Michael Flutie, is quoted in a book he endorsed as referring to "...an *agency* like Company..." *The Modeling Handbook* at 47 (emphasis added);

h. Defendant Click's website claims that, "Prior to founding the *agency,* Ms. Grill was an agent for fashion photographers..." *www.clickmodel.com/ny-aboutus.html* (May 24, 2002) (emphasis added);

i. Defendant Next's website broadcasts, "...Next has grown from a small group of models into the second largest international modeling *agency." http:// www.nextmodels.com (May 24, 2002) (emphasis added);*

j. Defendant Zoli's web page "About Us" begins with the sentence, "Zoli Management Inc. which celebrates its 30th year as one of New York's most dynamic model *agencies* in October of 2000, was established in 1970 by Zoltan Rendessy." *www.zolimodels.com/aboutus.html*[2] (November 9, 2001) (emphasis added);

k. Defendant Q directs visitors to its web page titled "the agency" and makes clear, "While considered still in its infancy, Q has become known as the first *agency* to fuse a dynamic fully functioning web based virtual agency and a talented team of the newest most progressive agents." Its biography web page of Jeffrey Kolsrud, Director of Defendant Q, declares, "[Kolsrud's] enthusiasm and vision prompted him to branch off and develop a new innovative *agency* of his own... Kolsrud's new *agency* attracted high caliber models very quickly, including Armani campaign model Peter De Vries and supermodel Magali." *http:// www.qmodels.com/agency/agency.html* (August 7, 2002) (emphasis added);
l. Defendant IMG's "Models" web page boasts that it is "Ranked the world's number one international model *agency* by Models.com and Businesswire..." *http://www.imgworld.com* (August 7, 2002) (emphasis added); and

m. Defendant IMG, through the 9/7/00 Models.com "Chat Event" assures that, "We look for all different types of models as we are a full service *agency.*" (Kevin Apana, Men's Division) *http://models.com/chats/transcripts/img.cfm.* (August 7, 2002) (emphasis added).

89. Defendants' senior executives also refer to Defendants as agencies. Joe Hunter, former President of both Defendant Ford and the IMMA, and "visionary" of Modelwire, Inc., is described in Modelwire's website as "the model industry legend who helped build the Ford Agency." *Http://www.modelwire.com* (May 24, 2002) (emphasis added). The website also presents a list of Modelwire's "Model Agency Partners" that includes Defendants Ford, Click and Elite. Similarly, Natasha Esch, Defendant Wilhelmina's former president, presents in her book, The Wilhelmina Guide, "A Portrait of an Agency" in which she assures, "Most major agencies are divided along lines similar to those at Wilhelmina Models." Id. at 33 (emphasis added).

90. Major publications in the modeling industry, including publications endorsed by Defendants, consistently refer to Defendants as modeling "agencies" and state that Defendants are, or function like, employment agencies. For example, The Professional Handbook (contributed to by Click, Wilhelmina and Zoli), in the chapter called "The Modeling Agency and its Functions", states that "A modeling agency is an employment agency for models." (Id at 181.) Your Modeling Career (endorsed by Ford, contributed to by Ford, Wilhelmina and Elite), in a chapter entitled "All about Agencies", states that Defendants "functions like an employment agency, obtaining work for models by providing models for clients." (Id. at 86). And The Modeling Life (endorsed by Ford and Elite), in the chapter entitled "The Agency", states that "The agency is a model's link to jobs." (Id. at 239).

91. Defendants are also referred to as "agencies" in the major industry directories. Model and Talent, International Directory of Model and Talent Agencies and Schools (Peter Glenn Publications 2002), lists Defendants Boss Models, Click, Company, Elite, Ford, Next, Wilhelmina, IMG, Q and DNA as modeling agencies (with their New York addresses and details), and Defendants Click, Ford, Next, Wilhelmina, IMG and Q appear in the directory in enlarged advertisements. See also First Option, A Directory of Legitimate U.S. Modeling Agencies (Tear Sheet Publications Inc. 2000) (listing all defendants as agencies, and including ads for Defendants Elite, Ford, Next, Click and IMG).

92. Defendants' status as agencies is also confirmed by the fact that they occasionally agree to divide their commissions based on the geographic location in which a model works. For example, a commission agreement between two Defendants might be reached where one receives commissions for the model's work in New York, while the other reaps commissions for the model's work in Paris, France. By contrast, managers do not split their fees based on the location where their client earns professional income.

93. Reports that some of Defendants, including at least Wilhelmina, have recently started to operate "management divisions" within their agencies (such as Wilhelmina Artist Management LLC) simply underscores the fact that the rest of Defendants' business is that of an employment agency: If the Defendants were already acting as Plaintiffs' managers, the new management divisions would be redundant.

94. Similarly, when Plaintiffs are booked to appear in broadcast ads where their work is governed by union agreements that limit an agent's commission to 10%, Defendants reportedly evade this union rule by splitting their 20% fee into a 10% "management fee" and a 10% "booking fee", charged to a captive "booking agency" that is in reality just another part of Defendants' operations. This practice is both unlawful under GBL § 187(8) and contrary to Defendants' claim to be managers entitled to a flat 20% fee regardless of any limitation on an agent's fee.

95. Any remaining doubt regarding whether Defendants are really employment agents or managers is erased by the fact that, with regard to their operations in California (which does not have the "incidental booking exception" of New York law or the 10% cap on fees), Defendants enter into "talent agency contracts" with models to "act as [the model's] sole and exclusive *agent.* " (emphasis added). Thus while Defendants refer to themselves as "managers" in New York, they admit that they are "agents" in California - even though Defendants perform the same exact services in both states.

96. For the reasons set forth above, Defendants have each engaged in, and agreed and conspired with the other Defendants to engage in, the following unlawful conduct:
a. violation of BCL § 172 by operating as employment agencies without a license;

b. violation of BCL § 185(8) -- which prohibits agencies from taking more than 10% of models' earnings -- by regularly charging Plaintiffs 20% commissions; in fact, the typical modeling contract explicitly requires Plaintiffs to pay Defendants 20% of any monies that Plaintiffs receive for modeling, even if Plaintiffs obtained employment without Defendants' help or with the help of another agency;

c. violation of BCL § 187(8) -- which prohibits agencies from engaging in any business on its premises other than the business of operating an employment agency;

d. violation of BCL § 187(10) -- which prohibits agencies from charging models for incidental services or the cost of advertising -- by charging Plaintiffs for various expenses, such costs associated with sending a model's portfolio to perspective employers.

FIRST CAUSE OF ACTION

(Price-Fixing as *Per Se* Violation of Section 1 of the Sherman Act)

97. Representative Plaintiffs repeat and reallege the allegations of Paragraphs 1 through 96 as if set forth fully herein.

98. For least the last several years, Defendants have been engaged in an unlawful conspiracy to fix the commissions and charges to professional models and persons who employ professional models. This conspiracy began in or around the mid-1970's, when Defendants Ford (represented by Defendant Jerry Ford) and Wilhelmina agreed to fix the commissions

that they charged Plaintiffs to an amount above the statutory limit as provided by GBL § 185, and to charge uniform commissions to Plaintiffs. Defendants' agreement to fix prices was later expanded to include Elite and each of the other Defendants, at times and on terms that are known only to Defendants.

99. Pursuant to Defendants' unlawful price fixing agreement, Defendants first raised the commissions they charged to their models to 15%, and then to 20%, which Defendants represent to be the standard commissions models pay in New York (although models earning over $200,000 generally receive a reduced commission rate of 15%). Defendants also conspired over the years regarding the commissions they would charge to the models' employers.

100. Defendants also agreed to implement, and implemented, other pricerelated restraints that have artificially inflated the costs Plaintiffs must pay to retain an agent. For example, Defendants have worked together and through the IMMA to draft progressively more onerous "standard" contracts that: (a) require the models to reimburse the agencies for any out of pocket costs incurred by the agencies in advertising the models' portfolios; (b) require the models to pay the "mother" agency for any modeling job the models obtain, even if the models procured the employment without an agent or with the help of another agency; (c) require the models to pay usurious interest rates on advanced salaries.

101. Defendants, Representative Plaintiffs and members of the Class work in interstate commerce in the United States and elsewhere.

102. As a direct and foreseeable result of Defendants' violations, Representative Plaintiffs and other members of the Class have been damaged and continue to be damaged in their business or property in that they have to pay non-competitive prices for Defendants' services in the form of the standard 20% commissions (or 15% commissions for those Plaintiffs that are more successful), and revenue that they would otherwise be earning if Defendants did not also charge and collect their additional 20% commission to Representative Plaintiffs' employers.

103. Defendants' price fixing agreement is *a per se* violation of Section 1 of the Sherman Act. Pursuant to 15 U.S.C. § 15(a), Representative Plaintiffs are therefore entitled to recover treble their actual damages caused as a result of Defendants' unlawful price-fixing and such other and further relief as permitted by law, their attorneys fees and the costs of this action.

SECOND CAUSE OF ACTION

(Conspiracy to Evade State Price Regulation as *Per Se* Violation of Section 1 of the Sherman Act)

104. Representative Plaintiffs repeat and reallege the allegations of Paragraphs 1 through 103, as if set forth fully herein.

105. For least the last several years, Defendants have been engaged in an unlawful conspiracy to evade state regulations that limit the commissions and charges that Defendants could collect as employment agencies.

106. Defendants' conspiracy began in or around the mid-1970's, when Defendants Ford and Wilhelmina agreed to resign their licenses as employment agencies and declare themselves to be managers not subject to state regulation.

107. Defendants' agreement to set prices above the state maximum was later expanded to include Elite and each of the other Defendants, at times and on terms that are known only to Defendants, and has been maintained through the years through various acts, including by the adoption of form contracts and terms that purport to disavow Defendants' legal status as employment agencies.

108. As a direct and foreseeable result of Defendants' unlawful conspiracy, Plaintiffs and other members of the Class have been damaged and continue to be damaged in their business or property in that they have to pay non-competitive prices for Defendants' services in the form of commissions above 10%, and have been required to pay other unlawful charges.

109. Defendants' concerted actions to avoid the price restrictions contained in GBL §§ 170 - 190 - that is, to fix prices - constitute a *per se* violation of Section 1 of the Sherman Act. Pursuant to 15 U.S.C. § 15(a), Plaintiffs are therefore entitled to recover treble their actual damages caused as a result of Defendants' unlawful price-fixing and such other and further relief as permitted by law, their attorneys fees and the costs of this action.

THIRD CAUSE OF ACTION

(Violation of Section 1 of the Sherman Act)

110. Plaintiffs repeat and reallege the allegations of Paragraphs 1 through 109, as if set forth fully herein.

111. Defendants possess significant market power. Collectively, Defendants are reported to be the largest modeling agencies in the industry and are reported to control well over half of the market, measured by total volume of bookings, for models in New York.

112. As noted above, through Defendants concerted actions, Plaintiffs are required to pay (i) 20% commissions for any modeling engagements, (ii) usurious interest rates for salary advances, and (iii) for the costs incurred by the agencies in advertising the models' portfolios.

113. Defendants have been able to maintain their anti-competitive prices through various formal meetings, such as the IMMA meetings, and through various less formal meetings, at which information on rates, charges, and other terms are discussed, and in which Defendants recently discussed how to respond to new competitors who have offered lower rates than Defendants.

114. Because of Defendants' market power, Defendants have been able to maintain these restraints on competition in violation of Section 1 of the Sherman Act.

115. As a direct and foreseeable result of Defendants' violations, Plaintiffs and other members of the Class have been damaged and continue to be damaged in their business or property in that they have to pay non-competitive prices for Defendants' services in the form of commissions above 10%.

116. Defendants' standardization practices constitute a violation of Section 1 of the Sherman Antitrust Act. Pursuant to 15 U.S.C. § 15(a), Plaintiffs are therefore entitled to recover treble their actual damages caused as a result of Defendants' unlawful price-fixing and such other and further relief as permitted by law, their attorneys fees and the costs of this action.

RELIEF REQUESTED

WHEREFORE, Plaintiffs demand judgment against defendants as follows:
(A) That the Court determine that this action may be maintained as a Class Action under Rule 23 of the Federal Rules of Civil Procedure and that Plaintiffs be certified as a Class Representatives and their attorneys as Class Counsel;

(B) That the unlawful conspiracy alleged herein be adjudged and decreed a *per se* restraint of trade or commerce in violation of Section 1 of the Sherman Act;

(C) Pre-judgment interest and post judgment interest from the date of entry until the date of satisfaction at the highest rates allowable by law;

(D) Reasonable attorneys fees and costs incurred by Plaintiffs in this action; and

(E) Such other and further relief as this Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs, on their own behalf and on behalf of the Class, request a trial by jury.

Footnotes

1 *See Society of Models, Inc. v. Moss,* 53 N.Y.S.2d 424, 425-426 (Sup. Ct. 1944) ("Especially laudable is [the Commissioner's] obvious sincere desire to protect models against stratagems and machinations to mulct them of illegal fees for procuring jobs. The elaborate law regulating employment agencies bespeaks the necessity of such protection...although there were other evils, the business was subject to the abuse of extortionate overcharges. The legislators regarded this as one of the principal reasons for regulation.")

2 This website for Defendant Zoli is no longer accessible.

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