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Twittergate: Rethinking the Casting Director Contract

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Cover Page Footnote

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Twittergate: Rethinking the Casting Director Contract

Carter Anne McGowan, Esq.*

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INTRODUCTION

Sitting out in the hallway of the rehearsal studios, the actress said a silent prayer of thanks that auditions for *The New Musical* were running late—but, hopefully, not too late, because she had to get to the catering gig that paid most of her bills—and reviewed her “sides” one last time.¹ It had been a tough year; a number of regional theatres at which she usually worked had cancelled productions due to the economic downturn and others had swapped out large-cast musicals for smaller-cast plays (thus reducing her employment opportunities). She was starting to fear that she would end up paying for COBRA coverage as she had not hit the minimum number of Equity²-required work-weeks in order to qualify for the Equity plan,³ so every audition suddenly seemed crucially important.

After a few minutes, the casting director of *The New Musical* poked her head out into the hallway, called the actress into the audition room, and introduced her to the director and choreographer who sat a bit imposingly behind the folding table that separated the actors’ playing space from the production team’s side of the room. The actress took a moment to compose herself and then launched into the monologue on her sides, whereupon the

¹ “Sides” are those pages of a playscript that an actor is given to perform at an audition. *Audition Sides*, ACTORS PAGES, <http://www.actorspages.org/sides.php> (last visited Feb. 17, 2011).

² *About Us*, ACTORS’ EQUITY ASS’N, <http://www.actorsequity.org/AboutEquity/aboutequityhome.asp> (last visited Sept. 19, 2010) (Actors’ Equity Association, commonly called “Equity,” is “the labor union that represents more than 48,000 Actors and Stage Managers in the United States. . . . Equity negotiates wages and working conditions and provides a wide range of benefits, including health and pension plans, for its members. Actors’ Equity is a member of the AFL-CIO, and is affiliated with FIA, an international organization of performing arts unions.”).

³ *Benefits*, ACTORS’ EQUITY ASS’N, <http://www.actorsequity.org/Benefits/healthinsurance.asp> (last visited Sept. 19, 2010) (In order to obtain—and maintain—health insurance through Equity, actors must be employed for a minimum of twelve weeks of covered employment (employment on certain Equity contracts) in a twelve-month period to qualify for the succeeding six months of coverage or twenty weeks of covered employment to qualify for the succeeding twelve months of coverage).

casting director picked up her Blackberry, opened Twitterberry,⁴ and typed, “What in the world would possess her to wear such an ugly skirt to an audition? Note to actors: dress better!” This posting on Twitter, often called a “tweet,” replaced her last update, which read, “Wow. Pitch problems much? My ears are BLEEDING.” She then began to respond to the angry posts coming in from actors who followed her tweets, never noticing the comments about her tweeting that were popping up on theatre-oriented chatboards like Talkin’ Broadway⁵ and Broadway World.⁶ Nor did she know that the switchboard at Equity was lighting up with complaints from Equity members about the casting director’s recent tweets.

A few blocks away, the producer of *The New Musical* was in the middle of a marketing meeting, plotting the marketing strategy for the upcoming production with the press agent and representatives from the ad agency and the marketing agency. Every detail of the strategy was carefully laid out: when ads would be placed; what kind of internet presence the marketing agency would craft; what press angles the press agent would pursue; and what information about the production would be carefully avoided. They were sure there would be some unexpected bumps in the road—there always were—but they were fairly confident in their strategy.

The first unexpected bump came a few minutes later when *The New York Times* called to ask them how they felt about their casting director “Twittering” during auditions.

The above story contains only slight embellishments of fact and illustrates some of the consequences social networking tools

⁴ Twitterberry is a handheld application used to “tweet” while on Twitter. See Paul Boutin, *All You Need to Know to Twitter*, N.Y. TIMES, May 6, 2009, at B8, available at <http://www.nytimes.com/2009/05/07/technology/personaltech/07basics.html>.

⁵ See generally *All That Chat*, TALKIN’ BROADWAY, <http://www.talkinbroadway.com/allthatchat> (last visited Sept. 19, 2010) (operating as popular message board for theatre fans).

⁶ See generally *Broadway Message Board*, BROADWAY WORLD, <http://www.broadwayworld.com/board> (last visited Sept. 19, 2010) (acting as popular message board for theatre fans).

and the concomitant breakdown in industry custom may have in store for the theater industry. This story also elucidates some of the realities and power structures in the theatre world: actors desperately seeking employment; producers, who are the employers of the actors, often sitting far away from the audition room; casting directors exerting a significant amount of control over the audition process, and now, in one particularly egregious instance, “Twittering.” In August 2009, a casting director posted comments on Twitter throughout auditions, touching off a firestorm of protests among actors, drawing the attention of the national press, and prompting Equity to address the question of the appropriateness of new social networking applications in the audition room.⁷

This article examines that episode—“Twittergate”—in order to argue for the necessity of changes to the current standard contractual relationships among producers, Equity and casting directors. Part I of this article discusses the factual background of “Twittergate.” Part II looks at the role of the casting director in the casting process. Part III analyzes the two contracts impacting the producer’s relationship with a casting director: the collectively bargained agreement binding the producer and Equity and the individually negotiated agreement between the producer and the casting director. Finally, Part IV argues for a new approach to casting director agreements, proposing new language in both the Equity collective bargaining agreements and individually negotiated casting director agreements.

I. TWITTERGATE

During the summer of 2009, the musical *Gay Bride of Frankenstein* was accepted into the New York Musical Theatre Festival (“NYMF”).⁸ A widely-respected festival, NYMF has had past success in launching musicals such as *[title of show]* [sic], *The*

⁷ See Dave Itzkoff, *Casting Director Tweets at Tryouts, to Negative Reviews*, N.Y. TIMES, Aug. 15, 2009, at C1, available at <http://www.nytimes.com/2009/08/15/theater/15tweet.html>.

⁸ See *Meet the “Gay Bride of Frankenstein,”* NEW YORK MUSICAL THEATRE FESTIVAL (Aug. 31, 2009, 1:59 PM), <http://www.nymf.org/Story-363.html>.

Great American Trailer Park Musical, *Next to Normal*, *Altar Boyz*, and *Rooms*, all of which were later produced commercially on the Broadway or Off-Broadway stage.⁹ Once a musical is accepted into NYMF, the producer of the musical must actually pay for and mount a production. Like a general contractor on a construction project, the producer hires subcontractors to fulfill the numerous responsibilities associated with bringing a production to the stage. Billy Butler, the composer/producer of *Gay Bride of Frankenstein*, engaged Daryl Eisenberg Casting (“DEC”) to serve as casting director for the NYMF production of the musical.

In connection with casting this production, DEC held Equity Principal Auditions (“EPAs”) on August 12, 2009.¹⁰ The auditions started at seven in the morning. Eisenberg began posting to Twitter six minutes before the auditions started and continued to post comments throughout the day. “So . . . we’re here at the EPAs . . . to tweet or not to tweet . . . that is the question”¹¹ “One of my favorite songs to start the day!”¹² “That is what we call an appropriate song choice! Nice work!”¹³ “If you are going to sing about getting on your knees, might as well do it and crawl towards us . . . right?”¹⁴ A few hours later she continued: “No,

⁹ See Karen Nowosad, *The New York Musical Theatre Festival 2009*, NEWARK EXAM’R (Aug. 1, 2009), <http://www.examiner.com/theater-in-newark/the-new-york-musical-theatre-festival-2009>.

¹⁰ See *Equity Principal Audition Procedures New York and Los Angeles*, ACTORS’ EQUITY ASS’N, http://www.actorsequity.org/docs/auditions/Principal_Auditions_NY-LA.pdf (last visited Sept. 20, 2010) [hereinafter *AEA Audition Procedures*]. EPAs are open calls, or, as more familiar in the vernacular, “cattle calls,” wherein actors who have not been invited to audition directly by the casting director, or who lack agency representation (usually a prerequisite to being seen at the more desirable invited auditions) may be seen by the casting director. See Paul Russell, *The Cattle Call: Slaughter or Refuge?*, BACKSTAGE (July 12, 2010), <http://www.backstage.com/bsa/advice-casting-cues/the-cattle-call-slaughter-or-refuge-1004103592.story>.

¹¹ *DECasting*, TWITTER (Aug. 12, 2009, 10:54 AM), <http://twitter.com/decasting>. There were rumors of Equity attempting to ban all forms of social networking from the audition room prior to this date, which perhaps prompted her initial tweet.

¹² *Id.* (Aug. 12, 2009, 7:01 AM).

¹³ *Id.* (Aug. 12, 2009, 7:07 AM).

¹⁴ *Id.* (Aug. 12, 2009, 7:41 AM).

thank YOU for being a friend.”¹⁵ “If we wanted to hear it a different way, don’t worry, we’ll ask.”¹⁶

Later in the day, she responded to actors’ reactions about her use of Twitter during auditions. “Dear @ActorsEquity—it is MORE distracting dealing with your constant complaints right now than it is to tweet!”¹⁷ “There is NO rule/guideline against Twitter/Facebook/MySpace/Friendster. Freedom of speech. Ever heard of it?”¹⁸ “Hello to all my new followers! Join the debate! Do you appreciate tweets from inside the audition room?”¹⁹ “Thank you, Tony-award-winning composer, for weighing in on the debate!”²⁰ “TWITTERGATE!”²¹ “Statement of my own coming later . . . too busy now . . . IN AUDITIONS (as if you didn’t know).”²² “We have a quick break . . . for the record, we tweet when the actors are NOT IN THE ROOM.”²³

Almost unbelievably, Eisenberg’s casting assistant, Chana Spielberg, who was also in the audition room during the EPAs, posted to Twitter, too. An eagle-eyed poster at TalkinBroadway.com caught Spielberg’s similarly unprofessional tweets in a screen capture: “Let the games begin! And by games I mean auditions.”²⁴ “Your voice is def [sic] toxic, maybe not in a good way.”²⁵ “Who are you looking at? why did you bring an

¹⁵ *Id.* (Aug. 12, 2009, 12:48 PM).

¹⁶ *Id.* (Aug. 12, 2009, 1:02 PM).

¹⁷ *Id.* (Aug. 12, 2009, 1:46 PM).

¹⁸ *Id.* (Aug. 12, 2009, 1:48 PM). Were this Article geared for a non-lawyer audience, the author would explain the irrelevance of “freedom of speech” in this context. Given the audience that this article *is* intended for, the author will simply say, regarding the casting director’s knowledge of things Constitutional, *res ipsa loquitur*.

¹⁹ *Id.* (Aug. 12, 2009, 3:05 PM).

²⁰ *Id.* (Aug. 12, 2009, 3:22 PM) (referring to *Hairspray* composer Marc Shaiman); *see* Rialto Chatter, *Tony Winner Marc Shaiman Comments on Twittergate*, BROADWAY WORLD (Aug. 14, 2009, 2:08 PM), http://www.broadwayworld.com/article/Tony_Winner_Marc_Shaiman_Comments_on_Twittergate_20090814.

²¹ *DECasting*, TWITTER (Aug. 12, 2009, 3:41 PM), <http://twitter.com/decasting>.

²² *Id.* (Aug. 12, 2009, 12:39 PM).

²³ *Id.* (Aug. 12, 2009, 12:47 PM).

²⁴ Chana Spielberg, (*ChChChChana*) on Twitter, IMAGESHACK, <http://img268.imageshack.us/img268/2802/picture2lve.png> (last visited Feb. 15, 2011). Spielberg restricted access to her Twitter account immediately after Twittergate, so the exact timestamp of her tweets is no longer available.

²⁵ *Id.*

actual letter?”²⁶ “Why would you want your daddy to squeeze and kiss you? that’s gross!”²⁷ “There is nothing i hate more than girls that [sic] let their toes hang over their sandals!!!!”²⁸ “Your fly was open . . .”²⁹ “If you are going to hunch, do it with intention . . . i know i always do!”³⁰

She later deleted two tweets picked up by bloggers, chatboard posters, and casting director Paul Russell³¹ from her account. Those tweets read, “[w]ho is that person in your headshot? it is def [sic] not the person standing in front of me”³² and “Your skirt makes me think you’re Wiccan”³³

Several of Eisenberg’s “defensive tweets” seem particularly disingenuous. Her claim that she was tweeting only during breaks and when actors were not in the room is quite suspicious, as all of the tweets were written in the present tense, as if reacting to real-time events. Moreover, in accordance with the Equity regulation that “[s]ix performers [] be scheduled in twenty minute blocks of time,”³⁴ EPAs are extremely tightly scheduled with auditions held back-to-back. Eisenberg posted tweets at 7:01 AM and 7:06 AM and continued tweeting throughout the day, with posts coming only a few minutes apart. It is therefore extremely unlikely that Eisenberg composed her tweets only during breaks when no actors were in the room and virtually impossible that the production team was on a break at 7:01 AM when auditions had begun only a minute earlier.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Paul Russell later wrote a blog criticizing Eisenberg. *A Casting Director’s Rude Behavior: A Casting Director Calls Out a Casting Director for Bad Behavior*, ANSWERS FOR ACTORS, <http://answersforactors.wordpress.com/2009/08/13/a-casting-directors-rude-behaviour> (Aug. 13, 2009, 12:01 AM) [hereinafter *A Casting Director Calls Out*].

³² *Id.*

³³ *Id.*

³⁴ *Equity Principal Audition Procedures, New York and Los Angeles (1998)*, ACTORS’ EQUITY ASS’N, [hereinafter *Equity Principal Audition Procedures*], available at http://www.actorsequity.org/docs/auditions/Principal_Auditions_NY-LA.pdf.

Eisenberg's tweets caused an immediate firestorm on theatre-related chatboards. The acting community objected not only to the timing of the tweets, but to their unprofessional and demeaning tone; many felt Eisenberg violated industry practice and basic business ethics. Indeed, the tweets stood in stark contrast to a longstanding industry norm against publicizing what goes on in the audition room.³⁵ As one actor (who auditioned at that EPA and who believes he was the actor to prompt the "might as well do it and crawl" tweet) told Backstage, "[t]he upsetting thing is that an audition room should be a safe place for an actor It's like Vegas. What happens in the audition room should stay in the audition room."³⁶

On the evening of May 12th, Eisenberg tweeted again, informing her "followers"³⁷ (and as her tweets are public, anyone who cared to take a look), that she had contacted BroadwayWorld.com with her official response to the uproar.³⁸ The next morning, BroadwayWorld.com published an interview with Eisenberg, accompanied by a statement from Equity indicating that its membership had made it aware of the situation and that Equity was in the process of addressing it.³⁹ Eisenberg told BroadwayWorld, "I've yet to be contacted by Equity. I'd like to hear from them, as their opinion undoubtedly matters to me."⁴⁰

³⁵ See *A Casting Director Calls Out*, *supra* note 31.

³⁶ Daniel Holloway, *Casting Director's Tweets Trigger Debate*, BACKSTAGE.COM (Aug. 13, 2009), <http://www.backstage.com/bso/news-and-features-news/casting-director-s-tweets-trigger-debate-1004003032.story>.

³⁷ "Followers" is the cult-like name given to those who subscribe to any Twitter user's feed. *What is Following?*, TWITTER, <http://support.twitter.com/entries/14019-what-is-following>. "Following someone on Twitter means you are subscribing to their Tweets, and their updates will appear in your personal timeline on your Twitter homepage." *Id.*

³⁸ Daryl Eisenberg, *DECASTING on Twitter*, TWITTER, <http://twitter.com/decasting> (Aug. 13, 2009, 12:57 AM) (posting, "[j]ust sent off my official response to BroadwayWorld.com. Off to bed!").

³⁹ *BWW Interview: "Tweeting" Casting Director Daryl Eisenberg on Twitter, Equity, an Apology & More*, BROADWAYWORLD.COM (Aug. 13, 2009), http://www.broadwayworld.com/article/BWW_Interview_Tweeting_Casting_Director_Daryl_Eisenberg_on_Twitter_Equity_An_Apology_More_20090813.

⁴⁰ *Id.* Eisenberg's apparent sincerity is somewhat belied by her 9:46AM tweet of the previous day in which she bemoaned Equity's "constant complaints." *DECASTING*, TWITTER (Aug. 12, 2009, 9:46AM), <http://twitter.com/decasting>.

In addition, Eisenberg used the interview in order to clarify her position regarding her tweets:

I don't intend to hurt anyone's feelings when I Tweet. And I apologize to anyone who's been hurt by this. But, this is a tough business, and if there is something that is sabotaging an audition, chances are there are a bunch of actors who will also benefit from the feedback and avoid making the same mistakes."⁴¹

Eisenberg's protestations notwithstanding, it is difficult to see how her tweets help aspiring actors when Eisenberg's followers cannot hear the "appropriate song choice" or the "def toxic" voice to which she (or Spielberg) is reacting. More importantly, the auditioning actor does not actually receive the feedback.

Finally, when asked if she would be Tweeting at future auditions Eisenberg responded, "I guess you'll have to follow me at www.twitter.com/decasting and find out!"⁴²

Unsurprisingly, nothing in this interview quelled the media coverage or the industry controversy over Twittergate. Indeed, Eisenberg's lack of humility in the face of condemnation from Equity, performers, and even colleagues was fairly striking. Eisenberg just kept tweeting away, commenting a day or two later about her "quick interview to Backstage,"⁴³ and an article about Twittergate on *artsbeat.com*, the arts blog of *The New York Times*, entitled, "Should You Twitter at an Audition?"⁴⁴ On August 13, Billy Butler, the composer/producer of *Gay Bride of Frankenstein* and an Equity member himself, agreed to schedule another EPA for the following week at which he would be in attendance, pointedly noting on the Twitter account for the musical that "*Gay Bride of Frankenstein* Added EPAs on Monday . . . just for fun

⁴¹ *BWW Interview: "Tweeting" Casting Director Daryl Eisenberg on Twitter, Equity, an Apology & More*, BROADWAYWORLD.COM (Aug. 13, 2009), http://www.broadwayworld.com/article/BWW_Interview_Tweeting_Casting_Director_Daryl_Eisenberg_on_Twitter_Equity_An_Apology_More_20090813.

⁴² *Id.*

⁴³ *DECasting*, TWITTER (Aug. 13, 2009, 9:52 AM), <http://twitter.com/decasting>.

⁴⁴ *Id.* (Aug. 14, 2009, 10:58 AM).

(only non-tweeters need apply).”⁴⁵ DEC’s Twitter account replicated this tweet.⁴⁶ Butler later told *The New York Times*, “I’ll be running the audition. All cellphones, and computers and digital watches will be left in our bags.”⁴⁷

The following day, Equity and Eisenberg had a face-to-face meeting, resulting in yet another series of tweets by Eisenberg. These tweets finally put a bit of a lid on the immediate controversy. The tweets read:

After a productive meeting with AEA this afternoon, I’m happy to report that we have agreed to both put this behind us. By mutual agreement, future tweets will not be coming from the audition room regarding the actors auditioning. I apologize to the actors and professionals who put themselves on the line every time they audition, and will continually strive to make the audition room an inspiring, nurturing place for creativity and talent. I look forward to working with AEA and its members on future projects, and hope to see you all in the audition room soon.⁴⁸

Equity likewise released a statement (thankfully, not via Twitter), reading:

Earlier today representatives of AEA had a productive meeting with Ms. Eisenberg to discuss her use of [T]witter in auditions. AEA firmly believes that [T]witter is a valuable promotional tool for producers to reach a wide potential audience but that tweeting has absolutely no place in the audition room, which is a safe haven for actors who are seeking employment in this

⁴⁵ *GayBrideFrankenstein*, TWITTER (Aug. 13, 2009, 4:17 PM), <http://twitter.com/GayBride>.

⁴⁶ *DECasting*, TWITTER (Aug. 13, 2009, 6:29 PM), <http://twitter.com/decasting>.

⁴⁷ Dave Itzkoff, *Should You Twitter at an Audition?*, ARTSBEAT BLOG, NYTIMES (Aug. 14, 2009, 11:30 AM), <http://artsbeat.blogs.nytimes.com/2009/08/14/should-you-twitter-at-an-audition>.

⁴⁸ *Id.*

competitive market. We believe this incident is now closed.⁴⁹

However “closed” Equity may consider this specific incident, Twittergate pointed to a glaring flaw in the relationship among casting directors, producers, and Equity: the lack of structural accountability on the part of casting directors. Historically, industry norms of professionalism were sufficient to regulate the conduct of auditions. With the changing societal mores of the digital age, these traditional norms may be breaking down and therefore should be strictly enforced by explicit contractual language. First, however, the role of the casting director must be discussed.

II. THE ROLE OF THE CASTING DIRECTOR

Many misunderstand the role of the casting director. Despite the implications of the word “director,” casting directors have neither approval nor consultation over which actors are offered roles; they do not have any artistic approvals whatsoever.⁵⁰ Producer Marc Routh describes a casting director’s role as “an administrative function; to put the right people in front of the director.”⁵¹ In fact, casting directors used to be called “casting

⁴⁹ *Id.*

⁵⁰ Directors have approval rights pursuant to the terms of most SDC agreements. *See, e.g.,* LEAGUE OF AM. THEATRES AND PRODUCERS AND THE STAGE DIRS. AND CHOREOGRAPHERS SOC’Y, INC. COLLECTIVE BARGAINING AGREEMENT (Sept. 1, 2008). Article XIX (A)2 provides: “If the Director is available, and subject to the prior approval of the author and the final approval of the Producer, the Director shall have approval, not to be unreasonably withheld or delayed, of cast, replacements, understudies, designers and designs, production stage manager, and director of other companies.” Authors are provided with approval rights pursuant to the APC for Broadway Productions. *See, e.g.,* DRAMATISTS GUILD, APPROVED PRODUCTION CONTRACT FOR PLAYS, Art. 8, § 8.01(a).

⁵¹ Interview with Marc Routh, Broadway Producer, in New York, N.Y. (Jan. 7, 2010). Since 1985, Marc Routh’s credits include, as general manager and producer (with Steven Baruch, Richard Frankel and Thomas Viertel), *The Producers*, *The Rocky Horror Show*, *Swing!*, *The Weir*, *The Sound of Music*, *Smokey Joe’s Cafe*, *The Most Fabulous Story Ever Told*, *The Mystery of Irma Vep*, *Forever Tango*, *Inside Out*, *Das Barbecu*, *Later Life*, *Jeffrey*, *Marvin’s Room*, *Mnemonic*, *Song of Singapore*, *Love Letters*, *Driving Miss Daisy*, *Tap Dogs*, *Frankie and Johnny in the Claire de Lune*, *Bubbe Meises*, *Sills & Company* and *Penn & Teller*. As General Manager: *Ennio*, *Communicating Doors*, *Death Defying Acts*, *Grandchild of Kings*, *Wild Men!*, *Family Secrets*. As co-producer:

agents,” which, at least had the merit of indicating that a casting person’s authority, to the extent that it exists, derives from another. However, the Casting Society of America (“CSA”), a professional society comprised of casting directors who have elected to become members, is adamant that this terminology is:

altogether incorrect, although it is frequently used in the media. . . . Casting Directors are Studio or Production Company employees and their job is to find and hire talent—in a sense, human resource departments for actors. Casting Directors are not paid a commission like Talent Agents are, nor are they licensed or franchised by SAG, AFTRA, or Actors Equity.⁵²

Surprisingly, even the CSA’s description of the roles of its members is misleading. Casting directors in the theatrical industry are very rarely employees—only major not-for-profit theatres such as the Roundabout Theatre Company,⁵³ Lincoln Center Theater,⁵⁴ and Manhattan Theatre Club⁵⁵ employ in-house casting directors. As discussed in Part III below, the vast majority of theatrical

Angels in America, The Cocktail Hour and Damn Yankees. See Richard Frankel Productions/Marc Routh, PLAYBILL, available at <http://www.playbill.com/celebritybuzz/whoswho/biography/3214>. Casting Director Paul Russell has put it even more bluntly:

A casting director is nothing more than glorified human resources and any casting director who gives themselves “power” over an actor is not a collaborator of the arts but a dilettante. We are not to place ourselves on pedestals. We don’t hire. We’re traffic managers, bringing in and out of the audition room a flow of talent. We’re personal shoppers and nothing greater.

See *A Casting Director Calls Out*, *supra* note 31.

⁵² *Who We Aren’t*, CASTING SOC’Y OF AM., <http://www.castingsociety.com/component/content/article/45> (last visited Dec. 14, 2010).

⁵³ See *Celebrity Buzz: Who’s Who*, PLAYBILL.COM, <http://www.playbill.com/celebritybuzz/whoswho/biography/13556> (last visited Aug. 31, 2010) (indicating Jim Carnahan’s official title is director of artistic development and casting productions for Roundabout is one of his major functions).

⁵⁴ *Staff Directory*, LINCOLN CTR. THEATRE, <http://www.lct.org/aboutStaff.htm> (last visited Aug. 31, 2010) (listing Daniel Swee, CSA, as Lincoln Center Theatre’s in-house casting director).

⁵⁵ *Staff*, MANHATTAN THEATRE CLUB, http://www.mtc-nyc.org/about_staff.asp (last visited Aug. 31, 2010) (designating Nancy Piccione as Manhattan Theatre Club’s Director of Casting).

casting directors are independent contractors engaged by producers on a per-project or per-season basis. Second, the CSA's statement that casting directors "hire" talent is incorrect. In theatre, they *do not* hire talent, and most casting director agreements have a clause stating exactly that.⁵⁶ For example:

6. ACTORS AGREEMENTS: PRODUCER shall be responsible for the negotiation of Actors' Contracts and shall have the sole responsibility of preparing Contracts, delivery of such Contracts, and the execution thereof, after CASTING delivers a list of the director's choices for each role in the Play.⁵⁷

CSA's description of the status of the casting director is correct in one important respect: they are not licensed or franchised through the performers' unions. In fact, no contractual nexus exists at all between casting directors and the performers' unions, leaving the unions with no direct control over casting directors in cases of questionable actions regarding the employment process of actors. Casting director Paul Russell expanded on this issue on his blog soon after Twittergate:

Actors believe that casting directors are fully accountable to unions or an organization. We're not. . . . The unions for actors (AEA, SAG, and AFTRA) have little to no authority over a casting director's audition room behavior. Same goes for CSA (which is not a union but a membership organization). The only entity, besides the casting director themselves [sic] who can bring consequence is the casting director's client: the producer. As long as casting directors are not answerable to anyone but ourselves and our clients, it's only our professionalism and humanity that

⁵⁶ Casting director agreements are discussed in detail in Part III.B of this Article.

⁵⁷ Casting Director Contract C, 1993 Off-Broadway Play (on file with author).

keep an audition room from becoming a second layer of hell for actors.⁵⁸

Despite the casting director's lack of formal authority over the hiring of actors, the casting director exerts a tremendous amount of informal authority and influence. The casting director creates "breakdowns" for each role in the show.⁵⁹ Agents and managers receive the breakdowns and then submit to the casting director the headshots and résumés of the clients they believe would be appropriate for the roles being cast. The casting director selects which actors will actually get auditions. Both the director and producer may also submit a "wish list" of actors they want brought in for auditions as well, in which case the casting director must do his best to schedule an audition for those actors. Casting directors also often have significant behind-the-scenes information about actors which they may share with the creative team, such as who is difficult, who is prone to conflict-ridden work situations, and who auditions badly but comes through in performance (and vice versa).⁶⁰

The casting director also implements those Equity-mandated audition requirements discussed in Part III-A below. If Equity Principal Auditions ("EPAs") and Equity Chorus Calls ("ECCs")⁶¹ must be held, often only the casting director and her team are in the room, as was the case with Eisenberg and her assistant on *Gay Bride of Frankenstein*. Thus, only the casting director may be present to determine if these most vulnerable of actors (actors at

⁵⁸ *Twittergate—A Final Thought and Reflection*, ANSWERS FOR ACTORS (Aug. 16, 2009, 12:01 AM), <http://answersforactors.wordpress.com/2009/08/page/3/> [hereinafter *A Final Thought*]; see also *infra* Part III.

⁵⁹ "Breakdowns" are detailed character descriptions for each role being cast. They are delivered via "Breakdown Services" to agents and managers and also made available on Actors' Equity Casting Call and often appear in Backstage magazine as well. See *About Us*, BREAKDOWN SERVICES, <http://breakdownexpress.com/content/aboutus.html> (last visited Dec. 14, 2010); see, e.g., *Casting Call*, ACTORS' EQUITY ASS'N <http://www.actorsequity.org/CastingCall/castingcallhome.asp> (last visited Dec. 14, 2010).

⁶⁰ PAUL RUSSELL, *ACTING: MAKE IT YOUR BUSINESS* 177 (2008) [hereinafter RUSSELL] ("As an actor you can be the greatest talent in an audition, but if you speak negatively or behave improperly, don't expect a callback for that audition or an invite for future auditions. This also holds true for high-maintenance (non-box office draw) actors known to have attitude issues. They're not even brought into the audition process.")

⁶¹ See *id.* at 129.

EPAs and ECCs are often unrepresented by agents or managers) will be called back to an audition when creative team members with actual casting decision-making authority will be present. Finally, like all people, casting directors have actor friends and favorite actors whom they want to see perform well. They will often do what they can to get those actors an audition before the creative team.⁶²

None of this implies that any of the above-listed informal powers of the casting director are bad. Like any power, the delegated power the casting director receives from the contracting producer, and the casting director's informal power in the audition room, can be used for good or for ill. Those with authority over the casting director (producers)—and those who could assert some third-party power over casting directors (Equity)—must minimize the potential for these powers to be used as they were in Twittergate. Both Equity and producers can do more to protect actors (and themselves) from the abuse of the casting director's informal power.

III. CONTRACTUAL STRUCTURES RELATING TO THE RIGHTS AND OBLIGATIONS OF THE CASTING DIRECTOR

Contractual structures and contractual relationships in the theatre industry run on two tracks. On one track, collectively bargained agreements (“CBAs”) entered into between the theatrical unions themselves⁶³ and bargaining units comprised of producers producing in theatres of similar size and business

⁶² “That is why God created auditions and callbacks.” E-mail to Author from Casting Director Cindi Rush (Oct. 4, 2010). Cindi Rush owns Cindi Rush Casting, a New York-based casting agency. See *Cindi Rush Casting*, MANTA, <http://www.manta.com/c/mm3g68b/cindi-rush-castings>.

⁶³ For example, the Broadway League has collectively bargained agreements with Actors' Equity Association; the Stage Directors and Choreographers Society, Local One of the International Alliance of Theatrical Stage Employees (“IATSE”); the Association of Theatrical Press Agents and Managers (“ATPAM”); IATSE; Ushers and Doormen Local 306; Treasurers Local 751; IATSE Local 764 Wardrobe; IATSE Local 798 Makeup and Hairstylists; American Federation of Musicians (“AFM”) Local 802 Musicians; Local 30 of the International Union of Operating Engineers; Local 32BJ of the Services Employees International Union, Porters and Cleaners; and Local 829 of United Scenic Artists (“USA”).

organization (e.g., Broadway,⁶⁴ Off-Broadway,⁶⁵ LORT⁶⁶) govern the minimum terms and conditions of engagement for unionized creative team members.⁶⁷ Often, especially in the commercial theatre,⁶⁸ those creative team members enjoy the bargaining power to negotiate for themselves terms and conditions of engagement in excess of the minimum guaranteed terms. In that case, the producer⁶⁹ and the creative team member's agent will negotiate a contract rider setting forth those terms in excess of union-mandated minimums.

As Equity represents the actors seeking to be cast, Equity's CBAs, naturally, have the most impact on the casting process. Currently, Equity has over thirty collectively bargained agreements with different producer bargaining units⁷⁰ (and, in some cases, with individual producers⁷¹) as well as eight codes, which are not

⁶⁴ The bargaining unit for producers of Broadway productions and national tours is the Broadway League (long known as the "League of American Theatres and Producers"). BROADWAYLEAGUE, <http://broadwayleague.com> (last visited Feb. 13, 2011).

⁶⁵ The bargaining unit for producers of Off-Broadway productions is The League of Off-Broadway Theatres and Producers. LEAGUE OF OFF-BROADWAY, THEATRES AND PRODUCERS, <http://offbroadway.org> (last visited Feb. 13, 2011).

⁶⁶ The bargaining unit for major regional theatres is the League of Resident Theatres, known as LORT. LEAGUE OF RESIDENT THEATRES, <http://www.lort.org> (last visited Feb. 13, 2011).

⁶⁷ Casting directors are neither unionized nor considered to be on the creative team. There is no formal definition of "creative team," but informally, the creative team includes the authors, producer, director, choreographer, designers (light, set, sound, costume), orchestrator, musical director and arrangers.

⁶⁸ Commercial theatre is, simply, theatre produced by "an entity formed to make a profit." COMMERCIAL THEATRE INST. GUIDE TO PRODUCING PLAYS AND MUSICALS 374 (Frederic B. Vogel & Ben Hodges eds., 2006). Not-for-profit theatres are, specifically, those filing IRS Form 990 as tax-exempt organizations. THEATRE COMMC'NS GRP., *Not-For-Profit Theatre in America: The Field at a Glance*, <http://www.tcg.org/pdfs/advocacy/FieldGlance04.pdf>.

⁶⁹ Or, more likely, the producer's representative, the general manager. A general manager "will handle contract administration, negotiations, ticket sales, and the coordination of press, marketing, advertising, and production. . . . [A] general manager will generally hire a company manager to oversee payroll, the payment of invoices, nightly box office statements, and other day-to-day details." DAVID M. CONTE & STEPHEN LANGLEY, *THEATRE MANAGEMENT* 100 (2007).

⁷⁰ For a comprehensive list, see *Document Library, Agreements*, ACTORS' EQUITY ASS'N, <http://www.actorsequity.org/library/library.asp?cat=3>.

⁷¹ Disney Theatrical Productions is not a member of the Broadway League for purposes of negotiating their CBAs with the theatrical unions, instead choosing to

collectively bargained, but are instead terms promulgated by Equity alone governing the engagement of its members in circumstances for which no CBA can be negotiated.⁷² Because Equity considers the Production Contract, which governs employment of actors on Broadway and in national touring productions, its primary contract, and because the Production Contract offers the highest salary and most significant benefits of all the CBAs negotiated by Equity, this article focuses on the Production Contract.⁷³

On the second track are contracts individually negotiated between the producer and non-union production personnel such as the general manager, the marketing director, and the casting director. All of these contracts delegate a producer obligation to a third party. For example, the producer usually subcontracts to the general manager day-to-day control over nearly all business and financial aspects of a production, from preparing budgets, to negotiating nearly all contracts for other producer subcontractors (including the casting director), to managing cash flow.⁷⁴ Therefore, the general manager, in nearly all circumstances, negotiates and signs the casting director's contract as an authorized agent of the producer producing the production.

A. *The Equity Production Contract and Its Applicability to the Casting Process*

The current Equity Production Contract went into effect in June 2008 and expires in September 2011.⁷⁵ Although it is now closer to its expiration date than its commencement date, the

negotiate their agreements with the unions individually. *See, e.g.*, ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT UNDER THE EQUITY/DTP PRODUCTION CONTRACT (June 28, 2004), *available at* http://www.actorsequity.org/docs/rulebooks/Equity_DTP_Production_Rulebook_04-08.pdf (expired June 28, 2008).

⁷² For a comprehensive list of Equity codes, see *Document Library, Codes*, ACTORS' EQUITY ASS'N, <http://www.actorsequity.org/library/library.asp?cat=5>.

⁷³ ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT UNDER THE EQUITY/LEAGUE PRODUCTION CONTRACT (June 30, 2008) [hereinafter PRODUCTION CONTRACT], *available at* http://www.actorsequity.org/docs/rulebooks/Production_Rulebook_League_08-11.pdf (language not finalized).

⁷⁴ *See supra* note 68.

⁷⁵ *See* PRODUCTION CONTRACT, *supra* note 73.

Broadway League and Equity have not agreed upon the final language in the renewal contract;⁷⁶ it may expire without the language of the CBA ever being finally agreed upon by the parties.

The Production Contract is an extremely comprehensive document including rules governing everything from situations in which foreign actors may appear in Broadway productions⁷⁷ to producer obligations when an actor is called away to military service⁷⁸ to the requirement that the Equity emblem appear in production Playbills.⁷⁹ Rule 5 of the contract, Auditions, impacts the casting of productions. It is an extensive series of regulations setting forth who may be auditioned, when and where such auditions may take place, what may occur at the auditions, and what members of the production team must be present at auditions.⁸⁰

All obligations set out in Production Contract Rule 5 are defined as producer obligations, as would be expected in a contract between a producer bargaining unit and a union. In only one circumstance—the requirement of keeping a sign-in sheet to “denote arrival and departure times of all Equity performers”⁸¹—does the contractual language expressly permit “the Producer’s representative” to fulfill a contractual requirement on behalf of the Producer.⁸² Rule 5 only references casting directors five times in the course of its nine pages: first, to state that a professional casting director designated in writing by the Producer may conduct EPAs;⁸³ second, to permit a casting director to conduct an Equity interview with a principal performer;⁸⁴ third, to allow a casting

⁷⁶ *Id.*

⁷⁷ *Id.* Rule 3.

⁷⁸ *Id.* Rule 40.

⁷⁹ *Id.* Rule 73.

⁸⁰ *Id.* Rule 5; *see, e.g.*, Rule 5(B) (requiring replacement calls to be conducted by the producer, director, assistant director, any author and/or a casting professional) and Rule 5(C)(2) (requiring the director, musical director, choral director, or composer to be present at all auditions for singers and requiring the choreographer, assistant choreographer, or dance captain to be present at auditions for dancers).

⁸¹ *Id.* Rule 5(A)(2)(e)(viii).

⁸² *Id.*

⁸³ *Id.* Rule 5(A)(2)(b)(i). However, there is no guidance as to what constitutes a “professional” casting director.

⁸⁴ *Id.* Rule 5(A)(2)(c)(ii).

director to conduct an audition for screening purposes provided that the director or assistant director (and the musical director or assistant musical director, if the audition is a musical audition) is present for all subsequent auditions;⁸⁵ fourth, to permit a professional casting director to conduct replacement calls;⁸⁶ and, fifth, to allow a casting director to receive recommendations regarding casting from the Equity Equal Employment Opportunity Committee.⁸⁷

Despite the lack of casting director references in Rule 5, in practice the casting director does carry out nearly all the obligations charged to the producer in the rule, such as:

- Submitting cast breakdowns to Equity;⁸⁸
- Consulting with Equity regarding audition scheduling;⁸⁹
- Conducting EPAs;⁹⁰
- Conducting EPA callbacks;⁹¹
- Conducting Principal replacement calls;⁹²
- Conducting Chorus auditions.⁹³

While Equity can, and does, explicitly require producer compliance with Rule 5, stating, “The Producer shall follow all Equity rules regarding Equity interviews and auditions,”⁹⁴ nothing in Rule 5 requires the pass-through of these rules to the casting director as a subcontractor of the Producer.⁹⁵ By contrast, Equity does not show such reticence in making express requirements of

⁸⁵ *Id.* Rule 5(A)(2)(e)(vi).

⁸⁶ *Id.* Rule 5(B). When a production runs for an extended period of time, original cast members will leave the production and their roles will be recast. The casting calls at which these roles are recast are called “replacement calls.”

⁸⁷ *Id.* Rule 5(E)(4).

⁸⁸ *Id.* Rule 5(A)(2)(a)(i).

⁸⁹ *Id.* Rule 5(A)(2)(a)(v).

⁹⁰ *Id.* Rule 5(A)(2)(b).

⁹¹ *Id.* Rule 5(A)(2)(e).

⁹² *Id.* Rule 5(B).

⁹³ *Id.* Rule 5(C).

⁹⁴ *Id.* Rule 5(A)(1)(a).

⁹⁵ While producer liability for a casting director’s actions may nonetheless be appropriate, as a casting director may be acting as an agent of the production, the lack of language requiring the producer to require a casting director to adhere to these terms is somewhat surprising.

third parties in other parts of the Production Contract. In Rule 38, Juveniles, the Production Contract reads, “Tutors shall be required to familiarize themselves with the reasonable and customary schooling requirements of the Juvenile Actors by the first day of rehearsal.”⁹⁶ If such language regarding tutors can be included in the Production Contract, certainly more direct language regarding the appropriate role and behavior of the casting director can be included.

Furthermore, although during Twittergate Equity took proactive steps to force a resolution favorable to Equity actors, nothing in their own Production Contract, their Principal Audition Procedures,⁹⁷ or NYMF Code⁹⁸ comes anywhere near prohibiting producers or casting directors from social networking or revealing the content of auditions. The audition conduct and safe and sanitary provisions of Rule 5 require only:

- A warm-up/waiting area;
- Separate changing facilities for men and women;
- Properly lit and temperature-controlled audition rooms;
- A no-smoking policy;
- Appropriate dance surfaces;
- Drinking water and cups;
- Access to handicap-accessible audition spaces; and
- A ban on taping and recording auditions.⁹⁹

So, applying the facts of Twittergate to Equity’s current Production Contract and Audition Procedures, neither Eisenberg nor *Gay Bride of Frankenstein*’s producer was in breach of any Equity contract due to the tweeting. Nor did Eisenberg, or the producer, have any obligation to meet with Equity, schedule additional EPAs, or resolve the situation to Equity’s satisfaction. Despite the industry outrage, the media attention, and the

⁹⁶ PRODUCTION CONTRACT, *supra* note 73, Rule 36.

⁹⁷ See *Equity Principal Audition Procedures*, *supra* note 34.

⁹⁸ ACTORS’ EQUITY ASS’N, N.Y. MUSICAL THEATRE FESTIVAL CODE 2010, available at http://www.actorsequity.org/docs/codes/NYMF_Code_10.pdf.

⁹⁹ PRODUCTION CONTRACT, *supra* note 73, Rule 5(E)(1)–(3).

overwhelming industry consensus that Eisenberg's behavior was egregiously unprofessional, Equity had no legal authority to police such behavior. But does an individually negotiated casting director contract provide more direction as to what is and what is not acceptable casting director behavior? Would that protect a producer from a casting director who lacks respect for custom and tradition?

B. The Casting Director's Individually Negotiated Agreement

Less than thirty years ago, casting director contracts were very informal. For example, a complete casting agreement for a 1983 Broadway production read as follows [party names redacted]:

[Casting director] will be casting consultant for the Broadway Production of [Play]. The casting fee shall be fifteen hundred dollars (\$1500.) payable upon execution of this agreement plus a weekly fee of seventy five dollars (\$75.) weekly fee from the first public performance, pro-rated. [Casting director] will receive credit with the production staff: Casting Consultant: [Name]. Also, a bio to appear in theatre program.¹⁰⁰

Over the last several decades, these traditionally informal contracts, negotiated by the general manager on behalf of the production, have become longer in form and expanded in substance. One significant reason for the increasing formality of casting director contracts is the increasing number of casting directors who are represented by agents.¹⁰¹ These agents have successfully negotiated additional rights and income streams for their clients. The pre-1995 casting director contracts reviewed for this article set forth, at most, (1) a fee for casting the New York production;¹⁰² (2) a weekly retainer to compensate the casting director for any casting that is necessary;¹⁰³ (3) reimbursement of

¹⁰⁰ Casting Director Contract A, 1983 Broadway Play (on file with author).

¹⁰¹ Of the eight casting director agreements utilized in this article, none of those dated prior to 1995 (Contracts A, B, C and D) include agency clauses; three of the four of those negotiated post-1995 (Contracts E, F, G and H) include agency clauses.

¹⁰² Casting Director Contracts A, B, C and D (on file with author).

¹⁰³ *Id.*

expenses incurred in recasting;¹⁰⁴ and (4) in one case only, the right to cast additional companies of the play.¹⁰⁵ The post-1995 agreements, in addition to the grants set forth above, provide for additional rights and potential income streams, including (1) the right of first refusal to cast all North American productions of the play that are produced by the producer on the same fee and retainer terms as granted for the New York production (or on terms negotiated in good faith)¹⁰⁶ and (2) the right to cast (or requiring producer to use best efforts to obtain for the casting director such right) any audio-visual production of the play, including televised or theatrical motion picture versions of the play.¹⁰⁷ These rights, especially the additional company rights, can add up to significant income for a casting director. Consider 2001's *The Producers*, which spun off two touring companies and a Los Angeles company from its very successful New York production. Under terms similar to those set forth above, the casting director would have received four production casting fees plus a weekly retainer for each running week of all four productions.¹⁰⁸

One might expect that in return for the additional production rights granted and increasing compensation paid, producers would set out a casting director's obligations with some specificity. Surprisingly, that is not the case. The eight representative casting contracts used in this Article set out the casting directors' obligations as follows:

¹⁰⁴ Casting Director Contracts B, C and D (on file with author).

¹⁰⁵ Casting Director Contract B (on file with author).

¹⁰⁶ Casting Director Contracts E, F, G and H (on file with author).

¹⁰⁷ Casting Director Contracts E, F and H (on file with author).

¹⁰⁸ For Broadway productions, casting directors receive an initial casting fee of anywhere from \$20,000 to \$35,000. Once the show begins running on Broadway, for each week the show performs, the casting director receives a weekly maintenance retainer (in payment for ongoing casting services) in an amount ranging from \$800 per week to \$1300 per week. Those fees and retainers are then replicated for touring companies of the production. Therefore, if a show like *The Producers* runs for five years on Broadway, assuming a casting director fee in the amount of \$25,000 and a retainer of \$1,000 per week, the casting director would earn \$285,000 from the Broadway production alone. Adding in Los Angeles (which ran for eight months) and two tours (which ran for two years each), the casting director's compensation for *The Producers* would be in excess for \$500,000 for that one contract. See E-mail from Marc Routh, producer, to author (Feb. 3, 2011) (on file with author).

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- Contract A: “will be casting consultant . . .”¹⁰⁹
- Contract B: “shall begin providing services immediately to cast . . .”¹¹⁰
- Contract C: “we shall render our services as Casting Directors . . .”¹¹¹
- Contract D: “Casting shall provide services to cast the swings for the London engagement and all replacement casts for the Off-Broadway production . . .”¹¹²
- Contract E: “shall begin providing services immediately to cast the required cast and understudies . . .”¹¹³
- Contract F: “to render such services as are necessary to cast the production . . .”¹¹⁴
- Contract G: “. . . all services customarily rendered by the casting director of a first-class stage production.”¹¹⁵
- Contract H: “to provide the casting services of Casting Director . . .”¹¹⁶

These very general statements are as far as producers typically go in describing the services expected of a casting director. Clearly, producers rely on a shared understanding of industry custom and simply assume that the casting director will cast in accordance with Equity rules.¹¹⁷ However, if Twittergate is any indication, those shared understandings are breaking down. A producer’s reliance upon tacit assumptions and industry norms to regulate the conduct of auditions may no longer be wise.

But do producers have recourse under their contracts with casting directors should the casting director engage in unprofessional behavior? The answer is a resounding, “no.” One

¹⁰⁹ Casting Director Contract A, *supra* note 100.

¹¹⁰ Casting Director Contract B, 1992 Off-Broadway Play (on file with author).

¹¹¹ Casting Director Contract C, *supra* note 57.

¹¹² Casting Director Contract D, 1994 Off-Broadway Musical (on file with author).

¹¹³ Casting Director Contract E, 1997 Broadway Musical (on file with author).

¹¹⁴ Casting Director Contract F, 2007 Developmental Musical (on file with author).

¹¹⁵ Casting Director Contract G, 2008 Developmental Play (on file with author).

¹¹⁶ Casting Director Contract H, 2010 Broadway Musical (on file with author).

¹¹⁷ E-mail from Marc Routh, producer, to author (Feb. 2, 2011) (on file with author).

contract reviewed for this Article contained a buyout clause, allowing the Producer to elect to proceed toward production of the play without the casting director, for any reason, upon payment of a large sum to the casting director to buy out her rights, but this buyout option only remained in effect prior to the initial commercial production.¹¹⁸ Only one other contract contained any form of termination paragraph at all, and that paragraph provided for termination only in cases of (1) long-term illness or incapacity of the casting director, (2) a force majeure event interrupting production of the play, or (3) breach of contract.¹¹⁹ While termination for breach of contract is perhaps the closest these contracts come to termination for cause, the contractual language setting forth the casting director's obligations is so vague that proving a breach of those obligations would require a showing of total failure on the part of the casting director. Under any of these casting director contracts, Eisenberg's actions in Twittergate would almost certainly not have risen to the level of breach unless a producer could prove that by tweeting while overseeing auditions, Eisenberg did not "cast the show," a difficult argument to make when casting pursuant to vague industry contracts means little more than seeking out the right performers for review by creative team members with casting authority. Producers and their proxies—general managers—have allowed themselves to occupy an awkward position: theatre has ceased to be an informal culture regarding casting director's rights, but it has remained a handshake culture regarding their specific obligations.

IV. THE WAY FORWARD: A PROPOSAL

As seen in Part III, both contractual structures currently governing the relationship among producers, casting directors, and actors are inadequate. The CBA and the individually negotiated casting director contract, each of which lacks the involvement of one of the major parties to the relationship, create a complicated

¹¹⁸ Casting Director Contract G, *supra* note 115.

¹¹⁹ Casting Director Contract F, *supra* note 114.

triangle wherein one party is always lacking contractual privity.¹²⁰ Without contractual privity, a non-party to a contract can only assert rights in that contract if it is an intended third party beneficiary, when “recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties . . . and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”¹²¹ So, for example, since a producer-casting director contract is not intended to benefit Equity, Equity is only an incidental beneficiary, which has no privity and thus no potential of enforcing its regulations against casting directors, only against producers.

Relatively minor changes to the CBA, combined with more major modifications to the casting director contract itself, will serve to create more specificity in contractual structures and a more appropriate apportioning of liability. However, casting directors will likely balk at these changes. As one casting director interviewed for this Article stated, when reflecting on Twittergate, “If I have feedback for an actor, it is my choice to give it to them privately or through their agent. It’s just a more sensitive, constructive way of doing things. However, the day someone tries to impose any restrictions on what I have to say and where I can say it, that’s the day I walk.”¹²² Casting directors have become

¹²⁰ See, e.g., *IP Co., LLC v. Cellnet Tech., Inc.*, 660 F. Supp. 2d 1351, 1356 (N.D. Ga. 2009) (“[T]he doctrine of privity requires that only parties to a contract may sue to enforce it, but the right to sue is freely transferable.”).

¹²¹ RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

¹²² E-mail from Rich Cole, casting director, to author (Oct. 17, 2010) (on file with author). Rich Cole is a New York-based director, writer, and casting director. His directing work has been seen in New York at the MCC, the Roundabout’s Ensemble Company, the Provincetown Playhouse, the 78th Street Theatre Lab, the Pearl Theatre and elsewhere. Regional directing credits include: The Alabama Shakespeare Festival, George Street Playhouse, The Asolo, GeVA Theatre and many others. He is the author of *Robbie’s Eyes* and *Where the Earth Meets the Sky* both performed by The Urban Rock Project. As a casting director he has cast more than 500 plays for Broadway, Off-Broadway, London, Vienna, The Kennedy Center and more than 40 of the nation[’s] regional theatres. He was twice nominated for an Artois Award by the Casting Society of America and won an OOBRA Award for Urban Rock’s production of his play, *Unnatural Acts*.

very accustomed to believing that they have complete autonomy; both Equity and producers have been delinquent in failing to assert control over the specifics of the casting process. Perhaps Twittergate is a case of one bad apple spoiling it for the whole bunch, but it deserves attention as it reveals the pre-existing flaws in contractual structure that allowed it to occur without any party having real contractual recourse.

A. *Recommended Changes to Producer-Equity CBAs*

1. *Require Subcontractors to Adhere to Applicable Terms*

While casting directors cannot be directly regulated by Equity CBAs as they are not parties thereto or intended beneficiaries thereof,¹²³ a significant number of obligations attributed to producers in, for example, the Production Contract are in practice implemented by subcontractors to whom producers delegate their duties. Casting directors do implement many of the Audition obligations in Rule 5,¹²⁴ and press agents implement aspects of the Photographs, Publicity, and Promotions Rule¹²⁵ and the Billing Rule.¹²⁶ Equity CBAs lack language specifically requiring that the Producer obligate its third party subcontractors, specifically the casting director, to act in accord with the applicable terms of the Equity CBA agreed to by the producer. Therefore, language should be added to all Equity CBAs stating that the “Producer shall require that all third parties engaged by Producer to implement Producer’s obligations pursuant to this Contract adhere to all terms herein regarding the subject matter of their engagement.”

This language does not unduly burden producers, who are already obligated to adhere to the CBA terms. It instead achieves two other goals: (1) it puts subcontractors such as casting directors on notice that in all of their working engagements with Equity

Company Bios, URBAN ROCK PROJECT, <http://www.urockproject.org/companybios.htm> (last visited Feb. 13, 2011).

¹²³ See *supra* note 122 and accompanying text.

¹²⁴ See *supra* Part III.

¹²⁵ PRODUCTION CONTRACT, *supra* note 73, Rule 51.

¹²⁶ *Id.* Rule 7. Specifically, press agents implement those aspects of the billing rule that require all photographs containing the names and/or likenesses of more than three principal actors no longer in a show to be removed. *Id.* Rule 7(E)(2).

members, they will need to comply with terms agreed upon between producers and the union and (2) it makes it impossible for a casting director's agent to argue against the inclusion of language requiring the casting director's adherence to the CBA terms in the casting director's agreement. In addition, the concept of delegation of duties, in which one party assumes a contractual obligation initially guaranteed by another, is firmly enshrined in contract law.¹²⁷ And insofar as Equity is concerned, it is a win-win, as delegation does not typically relieve the original contractor (in this case, the Producer) of primary liability for the delegated obligation.¹²⁸ Instead, as the delegated duty is owed to Equity (the "obligee"), Equity will be transformed by the delegation into an intended beneficiary with rights to enforce the contract directly against the casting director *and* the producer.

2. Expand the Audition Rules

Rule 5's audition code and safe and sanitary provisions¹²⁹ provide a contractual clause for audition room do's and don'ts. This list, already containing a prohibition on smoking, could easily be expanded by producers and Equity to include language stating that (1) no cellphones, PDAs or computers shall be utilized in the audition room when actors are present and (2) producer shall prohibit parties present at the auditions and under contract to producer from discussing any actors auditioning or the content of any auditions presented with anyone other than (a) creative staff of the production being cast and (b) the auditioning actor and that actor's agent. In addition, the Equity Principal Audition Procedures should be expanded to include a prohibition on Equity audition monitors and staff discussing audition content at all, with such prohibition continuing during the period of auditions and for a

¹²⁷ RESTATEMENT (SECOND) OF CONTRACTS § 318 (1981); *see also* 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:28 (4th ed.) ("Though a party subject to a duty cannot escape its obligation, it may delegate performance of the duty provided there is no contractual provision to the contrary, and provided the duty does not require personal performance." (citations omitted)).

¹²⁸ PRODUCTION CONTRACT, *supra* note 73, Rule 51.

¹²⁹ *Id.* Rule 5(E).

reasonable time thereafter.¹³⁰ These proposed contractual modifications, once delegated pursuant to point one above, thus impose a higher level of confidentiality on all parties.

Casting directors will be very averse to turning off their cellphones; casting directors' offices are often small, two-to-three-person operations and casting directors tend to be in constant contact with their office while out at auditions. However, when a casting director is in an audition, the producer is paying for the casting director's time, the producer is paying for the audition room, and the producer should therefore be entitled to the casting director's undivided attention. All auditions have breaks built into the process. A casting director's communications with her office regarding other projects should be restricted to this break time. In addition, an audition is a job interview. In the world of non-audition job interviews, a potential hire would almost certainly not expect to see a human resources person pecking away on a Blackberry mid-interview. An auditioning actor should be extended the same courtesy any other interviewee could reasonably expect.

The recommended confidentiality provision could prove controversial. In addition to casting directors' unwillingness to be told what they can say and when they can say it, the extent to which confidentiality agreements will be upheld by courts is uncertain and jurisdiction-dependent.¹³¹ However, the mere presence of confidentiality clauses in contracts, even if sometimes unenforceable, serves an important purpose: it makes people think twice before talking and therefore may have a powerful deterrent effect on bad behavior. Perhaps it will also make people think twice before tweeting.

3. Several Procedural Challenges

Procedural challenges will make the phasing-in of additional language a somewhat slow process. Although the Production

¹³⁰ The Equity Principal Auditions Procedures already contain language prohibiting Equity monitors and audition staff from discussing auditioners and auditions with the producer's casting personnel. See *Equity Principal Auditions Procedures*, *supra* note 34.

¹³¹ See *infra* Part IV.B.3 (discussing confidentiality clauses in further detail).

Contract is up for renewal in 2011, and thus new language could be added and enforced fairly soon,¹³² other collective bargaining agreements, like the New Orleans, L.A. Theatres (NOLA) Rulebook¹³³ and the Western Civic Light Opera (WCLO) Rulebook¹³⁴ will not expire until 2013 and 2014, respectively. Therefore, it will take several years, at least, for new language clarifying and enhancing current practice to become standard Equity-wide.

Tailoring the proposed language for cities and theatres where audition customs and practices vary may also be necessary. As discussed earlier in this article, large institutional not-for-profits may have casting directors employed on staff. In those cases, language regarding casting director liability as a subcontractor would not apply, but their ordinary employment contracts could contain a confidentiality clause and, furthermore, the threat of termination of employment often serves as a potent deterrent to employee misbehavior. In some small theatres, producers and artistic directors serve as their own casting directors so, once again, subcontracting language would not apply.

Despite these few procedural challenges, the practical barriers to implementation of new CBA language are low, and although casting director resistance may be somewhat high, the lack of a strong political constituency that could stop producers and Equity from enacting new rules is one of the prices casting directors pay for their traditionally unregulated status.

B. Modifications to the Individually Negotiated Casting Director Agreement

While the proposed modifications to the Equity CBAs are in many ways minimal, the proposed changes to the individual casting agreements are substantial and likely to be much more controversial, especially as they are directly aimed at regulating a

¹³² With regard to Equity's codes, which Equity can change at will as there is no negotiating to be done, changes can likewise be immediate.

¹³³ ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT IN NEW ORLEANS AREA THEATRES (Jan. 3, 2011).

¹³⁴ ACTORS' EQUITY ASS'N, AGREEMENT AND RULES GOVERNING EMPLOYMENT UNDER THE WESTERN CIVIC LIGHT OPERA (WCLO) AGREEMENT (May 31, 2010).

casting director's autonomy and actions. Casting directors are typically represented by agents who negotiate vigorously on their behalf. Casting directors have, of late, become acclimated to contracts that are full of positive grants of rights and devoid of specifically enumerated obligations and repercussions for failure to comply with them. In short, these changes will not make casting directors happy.

1. Include a Detailed Description of Responsibilities

The vague language requiring a casting director "to cast" or "to provide services to cast"¹³⁵ a production should be replaced by language specifically enumerating those responsibilities that a producer desires a casting director to perform. The enumerated responsibilities should include:

- Completing all required breakdowns for all productions cast by the casting director;
- Drafting a wishlist for all productions;
- Placing casting calls in appropriate media;
- Interfacing with agents to determine actor interest and availability;
- Conducting EPAs, Equity Chorus Calls, and all callbacks;
- Casting all required replacements and understudies in all productions cast by the casting director; and
- Complying with all obligations required of the producer under Production Contract Rule 5¹³⁶ and delegated to the casting director.

Such an enumerated list of responsibilities is not without precedent in individually negotiated independent contractor deals: theatre marketing direction agreements, advertising agency agreements, and general management agreements include such lists.¹³⁷

¹³⁵ See *supra* notes 106–13 and accompanying text.

¹³⁶ Or similar rules in other Equity CBAs.

¹³⁷ A typical list of obligations set out in a Broadway advertising agency agreement includes among its required tasks to "create, prepare, and submit to Advertiser for its approval various advertising ideas and programs, including without limitation key art and

While the duties enumerated in the proposed list are already handled by casting directors in the course of casting a production, formalizing them in a contract removes the vagueness from the language requiring that a casting director “cast” a production. This formalization thus allows an arbitrator or mediator¹³⁸ to see a breach in black and white, instead of hunting for it in the penumbras and emanations of a vague contract.

2. Include a Specific Representation and Warranty

The casting director should be required to represent and warrant that she is knowledgeable regarding all Equity audition rules and will comply with them. This representation should be accompanied by an indemnification clause, in which the casting director agrees to hold harmless the producer against any costs, claims, or liabilities arising out of the casting director’s breach of this clause. Equity does have an arbitration and grievance procedure,¹³⁹ and failure of a casting director to observe audition procedures could result in an expensive and time-consuming grievance being instituted against the producer.¹⁴⁰ Moreover, warranties and indemnification clauses serve to undercut any argument that a casting director is an employee masquerading as an independent contractor, as they are not obligations found in an employee contract.

Attempts by a producer to add a warranty and indemnity to a casting director’s agreement will be strenuously resisted by casting directors and their agents. Being forced to indemnify a producer would be a very new concept for casting directors. As the likelihood that casting directors would obtain insurance to protect against those indemnified circumstances is slim, it is also more-or-less a producer scare tactic designed to prevent bad behavior. However, a warranty of the type given by a casting director is

logo(s) and to prepare and submit to Advertiser for its approval estimates of costs and expenses associated with the proposed advertising ideas and programs.” Advertising Agency Agreement (Feb. 20, 2007) (on file with author).

¹³⁸ Litigation is nearly unheard of in theatre due to its high costs.

¹³⁹ In the Production Contract, it is set forth in Rule 4: Arbitration and Grievance. *See* PRODUCTION CONTRACT, *supra* note 73, Rule 4.

¹⁴⁰ Equity is also alleged to have a fining procedure, but information regarding it is nearly impossible to verify.

simply a guarantee that its services will adhere to publicly-known and researchable rules. This representation is objective; it is not a representation that measures the quality of the casting director's services on the skill of the actors cast, but simply requires following certain rules. If this basic level of service cannot be provided, an indemnity requiring the casting director to pay costs flowing directly from that objective failure is appropriate, even though the chances of the indemnity actually protecting the producer may be small.

3. Require Confidentiality

This portion of the proposal recommends perhaps the most important modification to the casting director's agreement. The requirement that a casting director keep audition information confidential to the production creative team should become a standard part of a casting director's individual contract. However, as restrictive covenants, confidentiality clauses can come under significant judicial scrutiny,¹⁴¹ so producers and general managers must take care to limit the scope of the confidentiality to ensure that the clause remains enforceable. In addition, enforceability will vary from state to state.¹⁴² Generally, confidentiality agreements will be upheld if they "meet the formalities of contract law . . . are reasonable under the circumstances, are not overbroad, protect information that is not generally known or easily ascertainable, and are not illegal or against public policy."¹⁴³

First, regarding the observance of contractual formalities, the confidentiality clause proposed herein will be a material term of an independent contractor's engagement contract (as opposed to a stand-alone confidentiality agreement). Therefore, the apposite question will be whether the contract as a whole evidences mutual assent, consideration, and lacks any defenses to formation, not whether there is adequate consideration for the confidentiality clause itself. As contracts between casting directors and producers

¹⁴¹ See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999).

¹⁴² *Id.* at 639 (providing a partial list of state requirements for enforcement).

¹⁴³ Patricia Sanchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689, 711 (2010).

become more heavily negotiated questions as to whether the basic formalities have been complied with become more remote.

The second question, is the confidentiality clause reasonable under the circumstances, includes issues of scope of the confidentiality clause with relation to subject matter, the length of time the confidentiality requirement will remain in effect, and the geographical limitations on confidentiality. Courts have upheld confidentiality clauses in employment agreements, prenuptial agreements,¹⁴⁴ and sperm donation agreements,¹⁴⁵ among many others when such clauses are limited in duration and when the information considered confidential is also circumscribed.¹⁴⁶ The Ninth Circuit has even upheld a confidentiality clause lacking temporal and geographical limits.¹⁴⁷ Given this wide range of permissible scope, a clause requiring a casting director to keep confidential the identity of auditioning actors and the content of their auditions for the period of the casting director's engagement by the producer should be deemed reasonable under the circumstances. In fact, the term of confidentiality could probably be shortened further; three months after an audition, no one will be marginally interested in a story about something that happened in an audition room months before.

Third, overbreadth. The language of the confidentiality clause must be drafted in such a way that it does not protect as confidential more than is legitimately protectable. As this confidentiality clause aims for specificity, requiring a casting director to maintain confidentiality only as to the identity of the auditioner and the content of auditions, overbreadth should not present a significant problem.

¹⁴⁴ *Trump v. Trump*, 582 N.Y.S.2d 1008 (App. Div. 1992) (upholding the validity of a confidentiality provision in a prenuptial agreement).

¹⁴⁵ *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864 (Ct. App. 2000) (holding a confidentiality clause protecting sperm donor identity to be valid).

¹⁴⁶ *Sunstates Refrigeration Servs., Inc. v. Griffin*, 229 S.E.2d 858 (Ga. Ct. App. 1994) (finding that the time, territory, and business interests to be protected inform the validity of confidentiality clauses).

¹⁴⁷ *Henry Hope X-Ray Prods., Inc. v. Marron Carrel, Inc.*, 674 F.2d 1336 (9th Cir. 1982).

Fourth, the clause must not attempt to claim confidentiality for information that is public or easily ascertainable by the public. This presents no challenge for protecting the content of auditions. It may, however, present a problem for attempts to mark as confidential the identity of the auditioners. The comings and goings of actors at rehearsal studios are visible; other actors see them, the cast and creative teams of other productions rehearsing in the same studio see them. This type of visibility may be construed by a court to make the identity of an auditioner easily ascertainable by the public. Accordingly, such information should not fall within the scope of the confidentiality clause.

Finally, the clause must not relate to illegal subject matter or be contrary to public policy. These issues are not raised by the confidentiality clause proposed here. The primary public policy concern raised by confidentiality clauses is confidential protection so broad that it limits the ability of the bound party to work. No such circumstances exist here.

On the whole, a confidentiality clause will almost certainly be enforceable in a casting director contract. The inclusion of this type of clause in earlier casting contracts would have prevented Twittergate from happening (or would have made it an obvious breach of contract). The inclusion of this clause now would serve to prevent future Twittergates or other similar events that serve to humiliate auditioning actors and blindside producers.

4. Add a Termination Clause

As stated in Part III, only two of the casting director contracts reviewed for this article included any kind of termination language, and that language provided for termination in extremely limited circumstances (illness, production suspension, or pre-initial production buyout). Termination clauses including differing rights and obligations dependent on whether the termination was for-cause or without cause should become standard inclusions in the casting director's negotiated contract.

Buyouts are appropriate for termination-without-cause situations. A producer may wish to buy out a casting director for many reasons: a personality conflict on the creative team; belief that a different casting director would better serve the project; a

change in the production schedule which makes the producer uncomfortable about potential conflicts in the casting director's schedule. Good reasons exist to limit this buyout right to the period prior to the initial commercial production. Otherwise, once the casting director has cast the initial production, the producer will have access to the casting director's records from casting sessions and will be able to utilize those records to cast those actors as suitable replacements in an open-ended production.¹⁴⁸ The temptation to buy out an expensive casting director and replace her with a less expensive one could be irresistible to some producers.

With regard to termination-for-cause, the parties must first agree what shall constitute "cause," which can in itself result in a tense negotiation. However, uncured material breach is not an uncommon inclusion in termination-for-cause clauses.¹⁴⁹ Even Equity includes it in the Production Contract.¹⁵⁰

Confidentiality breaches may also be deemed just cause¹⁵¹ and may in and of themselves constitute a material breach of the contract. Although in the recent case of *Hodak v. Madison Capital Management*,¹⁵² the Sixth Circuit determined that the lower court had erred in granting summary judgment when triable issues of fact existed as to whether employee Hodak's confidentiality breaches were (1) material and (2) relied upon by the employer in terminating Hodak, the court also stated:

¹⁴⁸ Unlike not-for-profit productions, which tend to run for a limited engagement of six weeks, commercial productions such as Broadway and Off-Broadway are usually "open ended," meaning that they will run until such time as they are no longer profitable to the producer and the theatre in which they are housed.

¹⁴⁹ See *Hodak v. Madison Capital Mgmt., LLC*, 348 F. App'x 83 (6th Cir. 2009).

¹⁵⁰ PRODUCTION CONTRACT, *supra* note 73, Rule 68. When an actor is working under a Term Contract, the contract "may be terminated for egregious behavior." *Id.* Rule 68(B)(4). When an actor is working under a standard minimum contract, the actor may be terminated for just cause provided a warning is previously given Rule 68(D), unless the actor is dismissed for "intoxication or similar cause" in which case the notification may come within twenty-four hours after the dismissal. *Id.* Rule 59(A)(2).

¹⁵¹ See *Hodak*, 348 F. App'x at 83; see also *Termination, Human Resources*, VANDERBILT UNIVERSITY, <https://hr.vanderbilt.edu/toolbox/terminations.htm> (listing "Confidentiality Breach" among those forms of termination making an employee ineligible for rehire) (last visited Feb. 13, 2011).

¹⁵² 348 F. App'x 83 (6th Cir. 2009).

[The employer] cannot be deemed impotent to discipline an employee for a breach of confidentiality unless and until the breach results in substantial harm. Hodak did what he was prohibited from doing under the Confidentiality Agreement: he disclosed confidential information. By failing to maintain confidentiality on two occasions, Hodak arguably failed to perform a substantial part of the contract. Yet, determining whether the breaches justified termination, rather than some lesser discipline, under the terms of the Employment Agreement, requires a finding that the breaches were or were not material. And this determination would ordinarily entail some inquiry into the significance or impact of the breaches.¹⁵³

Therefore, a breach of confidentiality may legally suffice as a reason for just cause termination provided that it rises to the level of material breach, and that is a question of fact. Given the fallout from Twittergate described in Part I, the extra expenses the producer assumed in adding an EPA, the loss of the producer's control over the publicity spin for his own production and, if Twittergate were to occur in a Broadway context, the real possibility that the A-list celebrities a producer tries to attract would refuse to work with an indiscreet casting director, a breach of confidentiality could cut to the very heart of the contract's purpose.

In these cases of just cause termination, no buyout fee should attach. The very concept of cause implies some form of misfeasance or malfeasance. Payment for wrongdoing would be wrong.

CONCLUSION

Change comes slowly to the theatre world. It is a world where a ghost light—a single naked light bulb on a floor lamp—is still left on in a darkened theatre (whether that is just an old-fashioned

¹⁵³ Hodak, 348 F. App'x at 91.

safety mechanism or simply to appease the ghosts said to haunt every theatre, no one will quite admit). It is a world where rock music has just begun to make a significant mark in the last fifteen years.¹⁵⁴ And it is a world where producers and Equity have been slow to require that casting director contracts both accurately reflect the casting director's role relating to the production and protect the people being cast.

But change comes quickly to the world outside the theatre. And information comes even more quickly in a digital culture that puts a very low premium on personal privacy. Web-based gossip sites pump out a barrage of information that is available to the world as soon as it is typed. On social networking sites, users can become "friends" (Facebook), "fans" (Facebook fan pages), or "followers" (Twitter) of anyone who chooses to let them into the circle of cyber-acquaintances. Reality television turned the casting process of several productions into an acceptable forum for public comment and sneeringly harsh criticism.¹⁵⁵

Twittergate was perhaps a shot across the bow of theatre's traditional way of doing things. Those traditional norms which had long protected both the producer's right to control his show (and when and how information about it becomes public) and the working actor's union-protected rights to audition in a professional environment only work when they are universally shared. Therefore, in order to keep up with the times (and to protect themselves from the times!) producers and Equity need to formalize those traditional norms in their contracts. The addition of the proposed clauses to the CBAs and the addition of harsher terms and repercussions to casting director agreements will inevitably create some bad blood in the short term. Veteran casting directors are not used to seeing such terms in their contracts and will likely resent the implication that they are not

¹⁵⁴ See *Broadway: The American Musical*, PUB. BROAD. SERV., <http://www.pbs.org/wnet/broadway/index.html> (last visited Feb. 13, 2011).

¹⁵⁵ *Any Dream Will Do* (BBC television broadcast 2007); *Grease: You're the One That I Want* (NBC television broadcast 2007); *How Do You Solve a Problem Like Maria?* (BBC television broadcast 2008); *I'd Do Anything* (BBC television broadcast 2008); *Legally Blonde the Musical: The Search for Elle Woods* (MTV television broadcast 2008).

trustworthy. However, the current form of the casting director's contract is more than inadequate, it's one-sided, granting the casting director's rights concretely and explicitly, but in return asking for little to no specificity with regard to obligations.

New casting directors are making their way into the industry, perhaps less steeped in industry custom and shared notions of professionalism, but more steeped in a culture that thrives on public disclosure. Equity and producers must formalize effective ways of protecting their productions and the actors they employ. While catty backstabbing and gossip may be the price that public figures pay for their fame, it should not be a price also paid by anonymous, struggling actors who spend their days auditioning, their nights catering, and most of their lives waiting for a big break.