DAVID L. GURLEY, ESQ. (SBN 194298)
STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
300 Oceangate, Suite 850
Long Beach, California 90802
Telephone: (562) 590-5461
Facsimile: (562) 499-6438

Attorney for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

MICHAEL LESSA,

Petitioner,

vs.

FILMTRIX, INC., A California Corporation dba THE FILMTRIX AGENCY,

Respondent.

CASE NO.: TAC 27707

DETERMINATION OF CONTROVERSY

The above-captioned petition was filed on June 26, 2012, by MICHAEL LESSA (hereinafter "Petitioner"), alleging that FILMTRIX, INC., A California Corporation dba THE FILMTRIX AGENCY (hereinafter "Respondent"), provided a talent agency contract to the Petitioner that failed to comply with the California Labor Code and the supporting Regulations governing licensed California talent agents. Additionally, Petitioner alleges the Respondent failed to procure the work for which the Respondent was seeking unpaid commissions, as the work was procured solely by the Petitioner's efforts. And finally, the type of work obtained fell outside the scope of the agreement between the parties. By this petition, Petitioner seeks the contract be deemed void *ab ignition* and requests reimbursement for all commissions paid to respondent during the life of the contractual relationship.

The Respondent was a licensed California talent agent during all applicable time periods. Respondent through their attorney argued that Respondent complied with all rules and regulations governing California talent agents, including the validity of the contract which had been approved by the California Labor Commissioner. Respondent argues he is entitled to full commissions stemming from Petitioner's employment. A hearing was held before the undersigned attorney for the Labor Commissioner. Petitioner appeared through his counsel Jeffrey Spitz of the law firm of Lerman, Pointer & Spitz, LLP. Respondent, FILMTRIX, INC., A California Corporation dba THE FILMTRIX AGENCY, appeared through counsel Ryan M. Lapine. Based upon the testimony and evidence presented at this hearing, the Labor Commissioner adopts the following Determination of Controversy.

FINDINGS OF FACT

1. On or about May 5, 2011, the parties entered into a written contract entitled "General Services Agreement" (the "Agreement") for one year in which the Respondent was to use reasonable efforts to procure employment for the Petitioner.

2. The Agreement provided that Petitioner would engage the Respondent as his exclusive talent agent with respect to Petitioner's "services as VFX Supervisor/Producer in the technical, supervisory and production branches of the entertainment industries and all related fields throughout the world." Moreover, Petitioner agreed to pay the Respondent 10% of all earnings paid to Petitioner in connection with every employment entered into during the term of the Agreement whether or not procured by the Respondent.

3. On November 21, 2011, the Petitioner, without the assistance of Respondent, obtained employment with RGH Studios Inc., (hereinafter RGH) as a producer of an animation film.

4. Petitioner's duties and responsibilities as a producer of an animated feature film included hiring the creative people to make the film, including the writers, and storyboard artists. The petitioner was responsible for reading other writers' scripts,

conducting interviews and negotiating salaries all designed to keep the production within a predetermined budget.

5. Petitioner's creative responsibilities were a significant interest to the hearing officer who indicated the Labor Commissioner can only assert jurisdiction if the controversy at issue is between an artist and a talent agent. When pressed whether petitioner took any part in the creative process during his employment with RGH, the Petitioner testified that "I find the people." When asked the requirements of the job, the Petitioner testified, "they basically threw anything that needed budgeting or production at me for an animated TV series … I was interviewing and hiring directors, and the storyboard guy?" When asked whether this explanation of his job functions continued throughout the employment with RGH the Petitioner answered, "Yes."

6. When asked whether the Petitioner missed the creative aspects of the job, he stated, "sometimes yeah as I started out as a character animator … I literally cannot draw anymore and I am in envy of people who can still draw." The Petitioner testified that his responsibilities throughout the duration of his employment with RGH remained the same.

7. The parties were instructed the creative aspects of petitioner's duties could be dispositive of the Labor Commissioner's jurisdiction. When the Petitioner was invited to discuss his creative contributions to the projects under his supervision, Petitioner added, "if a director is going off on a tangent that we can't afford I will assist." It was clear that petitioner's responsibility and input toward the creation of the production was minimal at best and his responsibilities fell within the ambit of maintaining the financial structure of the project.

8. On April 13, 2012, the Petitioner severed the relationship, by indicating he revoked all authorization, canceled the power of attorney and expressly stated the week of May 4, 2012 will be the last week for which payments will be made to the agency with respect to the Petitioner's earnings from RGH Entertainment. Petitioner filed the instant petition to determine controversy with the Labor Commissioner, pursuant to Labor Code §1700.44, seeking a determination that respondent's violated the Labor Code as the

Agreement did not comply with various technical requirements under the Code and supporting Regulations. As a consequence of the alleged violations of the Talent Agencies Act, petitioner seeks the parties agreement is void *ab initio* and that respondent has no rights thereunder.

CONCLUSIONS OF LAW

1. Labor Code §1700.44 vests the Labor Commissioner with exclusive and primary jurisdiction in cases arising under the Talent Agencies Act. The Act governs the relationship between artists and talent agencies.

2. The issue at bar is whether petitioner's job responsibilities as a producer of animation performed during the life of the Agreement fall within the definition of "artist" found at Labor Code §1700.4(b).

3. Labor Code §1700.4(a) defines "talent agency" in pertinent part as: "a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements **for an artist or artists...**" Therefore, if petitioner does not fall within the definition of "artist", it follows that respondents could not have acted as a talent agency, which divests the Labor Commissioner of jurisdiction to hear this matter.

Labor Code §1700.4(b) defines "artists" as:

> actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organization, directors of legitimate stage, motion pictures and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists rendering professional services in the motion picture, theatrical, radio, television and other entertainment enterprises."

4. Although Labor Code §1700.4(b) does not expressly cover the term "animation film producer" or "production manager" within the definition of "artist", the broadly worded definition does leave room for interpretation. The statute ends with the phrase,

"and other artists and persons rendering professional services in... other entertainment enterprises." This open ended phrase indicates the Legislature's anticipation of occupations which may not be expressly listed but warrant protection under the Act, or industry developments not contemplated at the time of drafting.

5. The Labor Commissioner has historically taken the following position with respect to this phrase. As discussed in a 1996 Certification of Lack of Controversy, the special hearing officer held, "[d]espite this seemingly open ended formulation, we believe the Legislature intended to limit the term 'artists' to those individuals who perform creative services in connection with an entertainment enterprise. Without such a limitation, virtually every 'person rendering professional services' connected with an entertainment project - - would fall within the definition of "artists". We do not believe the Legislature intended such a radically far reaching result." *American First Run Studios v. Omni Entertainment Group No. TAC 32-95, pg. 4-5.*

6. This is not to imply that animation film producers can never be considered "artists" within the meaning of 1700.4(b), only there must be a significant showing that the producer's services were creative in nature as opposed to services of an exclusively managerial or business nature. Here, petitioner testified he did not occupy such a role and conversely testified the bulk of his responsibility was hiring the creative people, negotiating salaries and maintaining the budget. Occasionally assisting a "director going off on a tangent that we can't afford" further demonstrates the job was to maintain costs of production and does not rise to the creative level required of an "artist" as intended by the drafters. Virtually all producers or production managers engage in de minimis levels of creativity. There must be more than incidental creative input. The individual must be primarily engaged in or make a significant showing of a creative contribution to the production to be afforded the protection of the Act. We do not feel budget management falls within these parameters.

7. Who did the Legislature intend to include in the protected class? In determining legislative intent, one looks at both legislative history and the statutory scheme within

which this statute is to be interpreted.

LEGISLATIVE HISTORY

8. In 1913 the "Employment Agencies Act" regulated a select few industries, including California's entertainment industries, namely circuses, vaudeville and theater. Protection focused on exhibitors and performers.

9. In 1937 the California Labor Code was established. The Legislature added "the motion picture employment agency" as an industry that required regulatory controls.

10. By 1959 the Labor Code included regulation of four categories of agents: employment agents; theatrical employment agents; motion picture employment agent; and the so-called "artists' manager." While the other categories were either repealed or moved to a different body of law and placed under the jurisdiction of other regulatory agencies, regulation of "artists' managers" remained in the Labor Code and under the jurisdiction of the Labor Commissioner. In 1978, the Act was renamed the Talent Agencies Act (1978, Stats. Ch. 1382) and "artists' managers" became "talent agents" and remains this way today. Throughout, the definition of "artist" always expressly included only the creative forces behind the entertainment industry.

11. In 1982, AB 997 established the California Entertainment Commission. Labor Code §1702 directed the Commission to report to the Governor and the Legislature as follows: The Commission shall study the laws and practices of this state,...relating to the licensing of agents, and representatives of artists in the entertainment industry in general, ... so as to enable the commission to recommend to the Legislature a model bill regarding this licensing.

12. Pursuant to statutory mandate the Commission studied and analyzed the Talent Agencies Act in minute detail. The Commission concluded that the, "Talent Agencies Act of California is a sound and workable statute and that the recommendation contained in this report will, if enacted by the California Legislature, transform that statute into a model statute of its kind in the United States." (Report pg. 5) All recommendations were reported to the Governor, accepted and subsequently signed into law.

13. This is not to say the Legislature has never expanded on the term "artist". A very significant change made by the Commission was to add the occupation of "models" to the definition of artist as defined by Labor Code §1700.4(b). The Commission reasoned that, "as persons who function as an integral and significant part of the entertainment industry, models should be included within the definition of artist."(Report p. 33-34) I am not advocating that production managers in animation are not an integral and significant part of the entertainment industry, I am simply stating that if the Commission, who by statutory mandate analyzed the Act in minute detail, thought that production mangers and/or line producers required express protection under the Act, they could have made this recommendation to the Legislature. This was certainly the forum do make such a recommendation. Production managers are not new occupations in the entertainment industry resulting from industry evolution *i.e.*, interactive media and digital animation. These are well established industry occupations. The Commission's utter silence with respect to production managers and line producers can only be interpreted, that the Labor Commissioner's jurisdiction is invoked if in the discretion of the hearing officer, a significant showing of creative contribution is made.

14. The Division concludes that Petitioner is not an artist within the meaning of Labor Code 1700.4(b), not engaged in the performing arts and hence, not a member of the protected class.

15. Once it is determined that Petitioner was not an "artist", it follows that respondent did not act as a "talent agent" in this particular relationship, as a talent agency is defined as procuring employment for "artists".

16. We therefore find the parties agreement does not fall within the provisions of the Talent Agencies Act. Consequently, there are no grounds under the Act to declare the parties agreement void. The Labor Commissioner is without jurisdiction to hear or decide the merits of this case.

ORDER

For the above-state reasons, **IT IS HEREBY ORDERED** that this petition is denied and dismissed on motion by the undersigned hearing officer.

Dated: July 30, 2014

Respectfully submitted,

By: _____
DAVID L. GURLEY
Attorney for the California State
Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 8-1-2014

By: _____
JULIE A. SU
California State Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Tina Provencio, declare and state as follows:

I am employed in the State of California, County of Los Angeles. I am over the age of eighteen years and not a party to the within action; my business address is: 300 Oceangate, Suite 850, Long Beach, CA 90802.

On August 1, 2014, I served the foregoing document described as: **DETERMINATION OF CONTROVERSY,** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Ryan M. Lapine, Esq.
ROSENFELD, MEYER & SUSMAN, LLP
232 N. Canon Drive
Beverly Hills, CA 90210
RLapine@rmslaw.com

Jeffrey Spitz, Esq.
LERMAN POINTER & SPITZ, LLP
12100 Wilshire Boulevard, Suite 600
Los Angeles, CA 90025
JSpitz@lpslawfirm.com

☑ **(BY CERTIFIED MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our office address in Long Beach, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☐ **(BY E-MAIL SERVICE)** I caused such document (s) to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth above.

☐ **(BY OVERNIGHT DELIVERY)** I served the foregoing document(s) by FedEx, an express service carrier which provides overnight delivery, as follows: I placed true copies of the above-referenced document(s) in sealed envelopes or packages designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

☐ **(BY FACSIMILE)** I caused the above-referenced document(s) to be transmitted to the interested parties via facsimile transmission to the fax number(s) as stated on the attached service list.

☐ **(BY PERSONAL SERVICE)** I caused such envelope(s) to be delivered by hand to the offices of the above-named addressee(s).

☑ **(STATE)** I declare under penalty of perjury, under the laws of the State of California that the above is true and correct.

Executed this 1st day of August, 2014, at Long Beach, California.

Tina Provencio