STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

TURTLE ROCK STUDIOS, INC., A California Corporation, Petitioner, vs. DIGITAL DEVELOPMENT MANAGEMENT, INC., A Delaware Corporation, Respondent.	**Case No.: TAC-41987** **CERTIFICATION OF LACK OF CONTROVERSY WITHIN THE MEANING OF LABOR CODE §1700.44; ORDER DISMISSING PETITION TO DETERMINE CONTROVERSY**

I. INTRODUCTION

The above-captioned petition to determine controversy, filed on December 29, 2015, alleges that Petitioner, TURTLE ROCK STUDIOS, INC., a California Corporation (hereinafter "Petitioner" or "Turtle Rock"), is a video game design and development studio. Petitioner argues that as a company, they exist solely to create video games and companies like Petitioner, including large corporations employing scores if not hundreds of employees that create video game software are "artists" within the meaning of Labor Code section 1700.4.

Petitioner argues that as an "artist" within the meaning of the California Talent Agencies Act ("The Act"), Petitioner is afforded certain protections provided to artists under the Labor Code. Specifically, any attempt by an artist's representative to procure employment or engagements for an artist requires a talent agency license. Petitioner argues that if an "artist" representative procures employment or engagements for that artist and that representative fails to secure a talent agency license issued by the California Labor Commissioner, any agreement between the unlicensed talent agent and the artist is unlawful and void ab initio. Petitioner argues an unlicensed talent agent has no right to recover compensation purportedly due under such an agreement. Petitioner alleges Respondent procured an engagement for Petitioner, failed to secure the required talent agency license during the applicable period and as a result, the agreement reached between the parties should be invalidated.

Conversely, Respondent argues Petitioner, as a corporation, is not an individual or a person afforded protection under the Act and is therefore not an "artist" within the meaning of the Act. And as such, the Labor Commissioner is without jurisdiction to hear this matter. Accordingly, Respondent filed a Motion to Dismiss Petition of Turtle Rock Studios, Inc. for lack of jurisdiction.

II. FACTS

Petitioner, Turtle Rock Studios, Inc. is a California Corporation employing 84 full-time employees. Petitioner argues that the company's sole purpose is to create video games. The 84 employees, according to Petitioner, include 33 visual artists, designers, directors, writers, concept artists and environmental artists. Petitioner also employs 23 engineers. The remaining 28 employees include quality assurance managers, production employees, and administrative employees.

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Respondent, DIGITAL DEVELOPMENT MANAGEMENT, INC., A Delaware Corporation (hereinafter "Respondent" or "DDM"), advertises itself as "The World's Leading Video Game Agency" offering representation for studios, like Petitioner, that create video games. According to Respondent's website, their core mission it to bring opportunities to video game developers. Opportunities can mean many things but in this instance, it meant arranging an influx of capital enabling the Petitioner to develop a video game named, *Evolve*. Respondent prided itself and advertised itself as having the ability to "secure publishing deals for games on any platform" and boasted in their advertising material they helped secure over 275 development and distribution deals.

On June 11, 2010, Petitioner entered into an Agency Representation Agreement ("Agreement") with Respondent. The Agreement stated that Petitioner "desires the services of a professional agency in locating and negotiating with third parties the use and/or sale of such software program and titles … and where for a fee … Agency attempts to locate the most appropriate third parties for their services, and to negotiate the most favorable agreements on their behalf." Under the Agreement, Respondent had the exclusive rights to represent the Petitioner and "attempt to locate the most appropriate third parties".

After carefully reviewing the materials provided by the parties in arguing and opposing this Motion to Dismiss Petition, it appears in this case the primary purpose for locating a third party, was that a third party could provide millions of dollars to the Petitioner enabling the Petitioner to finance and develop *Evolve*. The "Agreement" provided that if DDM secured a third party "Producer", Petitioner would pay Respondent (5%) of the Gross Project Development Compensation ("GPDC").

On or around December 17, 2010, Respondent secured a Producer for Petitioner in the form of a binding publishing agreement with THQ, Inc. ("THQ"). The publishing agreement enabled Petitioner to develop *Evolve* through the influx of twenty-one million

dollars ($21,000,000) provided by THQ whereby THQ retained all rights to *Evolve*. During this time, Respondent was not licensed as a talent agency by the Labor Commissioner's office, although according to the pleadings in opposition to the Motion, they are now a California licensed talent agency.

On or around January 2012, Petitioner advised Respondent they no longer wanted to be represented by Respondent. The parties entered into a Fee Splitting Amendment with Petitioner's new agency and the relationship was formally severed. A dispute subsequently arose between the parties that led to the filing of a superior court action for the alleged failure of Petitioner to pay the 5% GPDC allegedly owed pursuant to the Agreement. Respondent argues Petitioner breached the Fee Splitting Amendment (and a subsequent amendment) and on November 12, 2015, filed a breach of contract action against Petitioner in Los Angeles Superior Court, (L.A.S.C. Case No C600874) ("Superior Court Action").

Petitioner now argues Respondent's act of securing THQ and negotiating the Agreement on Turtle Rock's behalf, were services performed by Respondent as a "talent agent" within the meaning of Labor Code section 1700.4. Petitioner argues Respondent was not licensed by the State Labor Commissioner as talent agent at any time relevant herein. Petitioner's defense to the Superior Court Action and argued in these proceedings is that by acting as talent agents without securing the necessary license, Respondents violated Labor Code section 1700.5 and seeks an order requesting the following: (1) determining that DDM violated the Labor Code by acting as an unlicensed talent agent; (2) declaring the agreement between the parties to be void ab initio; (3) an accounting of all monies obtained by DDM stemming from the Agreement and any amendments; (4) requiring DDM to disgorge and repay Turtle Rock for any amounts paid to DDM under the agreement and any amendments; (5) and suspending or revoking DDM's license for violating the Labor Code.

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Respondent filed their answer along with the Motion to Dismiss Petition, contending that as a matter of law, the allegations set forth in the petition do not establish any violation of Labor Code sectin1700.5. Specifically, Respondent contends that Petitioner, as a corporate entity employing more than 100 full-time employees, including those who do not perform any creative services are not "artists" within the meaning of Labor Code §1700.4; and that DDM's attempt and ultimate location of a producer to finance or fund the development of video games is not an act of "procuring employment" for an artist, and are therefore not "talent agents" within the meaning of Labor Code §1700.4; the parties' agreement is therefore not subject to the provisions of the Talent Agencies Act (Labor Code sections 1700, et seq.); and since there is no controversy arising under the Talent Agencies Act, the petition must be dismissed by the Labor Commissioner for lack of jurisdiction.

Petitioner's opposition to the Motion to Dismiss argues that Turtle Rock adequately plead a claim arising under The Act, and that Turtle Rock, as a video game designer and development studio are "artists" under Labor Code section 1700.4.

III. ARGUMENT

The sole issue we must determine here is whether Petitioner is an "artist" within the meaning of The Act.

Labor Code section 1700.44 vests the Labor Commissioner with exclusive primary jurisdiction "in cases of controversy arising under [the Talent Agencies Act]". The Act governs the relationship between artists and talent agencies. The term "talent agency" is defined at Labor Code section 1700.4(a) 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". The term "artists" is defined at section 1700.4(b) as:

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

Labor Code section 1700.5 provides that "no person shall engage in or carry on the occupation of a talent agency without first procuring a license thereof from the Labor Commissioner." A person engages in the occupation of a talent agency by "procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists". Any agreement between an unlicensed talent agent and an artist is unlawful and void ab ignition, and the unlicensed talent agent has no right to recover compensation purportedly due under such an agreement. *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347.

The question of whether the instant controversy "arises under" The Act turns both on (1) whether Petitioner, as a corporation employing 84 full time employees who create video games, falls within the definition of "artists" at Labor Code section 1700.4 and (2) whether Respondents, in connection with locating and negotiating the Agreement between Turtle Rock and the producer/financier (THQ), were engaging in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. In order for this controversy to "arise under" the Act, both of these questions must be answered affirmatively.

The question as to whether this corporation is an "artist" under the Act is a novel one. We have been unable to locate any Labor Commissioner Determination from the last 35 years holding a corporate entity employing close to 100 employees, without naming one or more individual artists is an "artist" under the Act. In support of Turtle Rock's position, Petitioner argues a production company was found to be an "artist" under Labor Code section 1700.4 in the case of *Waisbren v. Peppercorn Productions,*

Inc..(1995) 41 Cal.App.4th 246. Moreover, since the purpose of Respondents' efforts to locate a producer and negotiate the best possible deal on behalf of Turtle Rock, effectively enabled Turtle Rock to create video games, clearly an entertainment engagement and creative in nature, Respondents were acting as talent agents within the meaning of Labor Code section 1700.4. Therefore, the parties' agreement is subject to the Talent Agencies Act and this controversy is properly before the Labor Commissioner.

Although Labor Code section 1700.4(b) does not expressly list video game designer and development studio or production companies as a category within the definition of "artist", the broadly worded definition includes "other artists and persons rendering professional services in … television and other entertainment enterprises." Despite this seemingly open ended formulation, we believe the Legislature intended to limit the term "artists." There is no dispute that Petitioner creates software which is enjoyed by the public much like any major motion picture, scripted television show or any other form of entertainment. In short, Turtle Rock Corporation clearly performs creative services in connection with an entertainment enterprise. But this does not end the inquiry. The issue here is whether a corporation, employing many persons, including the production company's accountants, lawyers and human resources department, collectively falls within the definition of "artist"?

We do not believe the Legislature intended such a radically far reaching result. We do not hold here that employees of a video game designer and development studio or a production company can never be an "artist", under the Act. Historically, creative employees working for animation studios, *i.e.*, story board artists, animators and other creative personnel of a production company qualify as an "artist" under the Act. (See, *Miravalles v. Artist, Inc.*, TAC 33-99). But here, we are asked whether the entire corporate entity can be considered an artist?

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As referenced above, *Waisbren v. Peppercorn Productions* 41 Cal.App. 4th 246 held that a production company qualified as an "artist" under the Act. But the *Waisbren* decision is silent as to why the corporation was deemed an "artist". In short, there is no explanation of the basis upon which the court reached the conclusion that Peppercorn Productions Inc. was an "artist" under the Act, nor does it appear that this was even raised as an issue before the court. (At footnote 5 in the decision, the court notes "in this case, there is no dispute that defendants qualify as artists under the Act.") Thus, *Waisbren* is not dispositive on this issue.

The Labor Commissioner has previously named a corporate entity as an artist[1], but those Determinations were primarily limited to Determinations issued to a petitioner who filed on behalf of the individual artist as well as a named "loan-out company[2]". (See, *Billy Blanks; an individual; BG Star Productions, Inc.,* TAC 27-00; *Cher, Eye of Horus Productions, Inc., Isis Productions, Inc., Apis Productions, Inc., v. Bill Sammeth* TAC 17-99; *Joseph Nipote; and Port Salvo Productions, Inc., v. Howard Lapides* TAC 13-99).

To logically extend the conclusion that Turtle Rock wants us to reach would be to conclude that Walt Disney Pictures, Warner Brothers Entertainment, Inc., Universal Pictures, Lucasfilm Ltd. LLC, Industrial Light and Magic or any major production company can be an "artist" under the Act, so long as the production company sought financing to complete a project and utilized a third party representative to do so. This is simply not the legislative intent behind The Act. In construing a statute, court[s] must consider consequences that might flow from particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy. *Escobedo*

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[1] *In Hyperion Animation Company, Inc., a California corporation; Hyperion Entertainment, Inc., a corporation; Keswick Films, Inc., a corporation; Tom Wilhite and Willard Carroll, individuals, (collectively "Hyperion") v. Toltec Artists, Inc., a California Corporation* TAC 7-99, the Labor Commissioner held *Hyperion*, an animation studio, was creative in nature and therefore an artist within the meaning of the Act, but in *Hyperion*, unlike here, two individual artists were named.

[2] A "loan-out company" is a legal business entity established for the purpose of providing the personal services of its owner/employee to third parties. Loan-out companies can take many different forms such as LLC, an S-Corporation or a C-Corporation. The loan-out company "lends" it's employee's services by making contracts with the end-users of those services... often producers, production companies, record labels, etc.

v. Estate of Snider (1997) 60 Cal.Rptr.2d 722, 14 Cal.4th 1214, 930 P.2d 979. As discussed, the purpose of the statute is to protect artists from unscrupulous representatives. The Act provides a comprehensive licensing scheme that allows the Labor Commissioner to regulate agent activity through, *inter alia*, the approval of all contracts and commission structures. We cannot fathom that expanding the definition of artist to include any corporate enterprise that conducts some form of creative entertainment, would promote the Act's legislative intent, which is after all intended to protect artists from unscrupulous representatives. We do not see that concern here.

To conclude, we do not believe the Legislature intended to revolutionize the entertainment industry by requiring the licensing of all corporate representatives in which the corporation has as one of its primary business functions to create entertainment related products, created by dozens if not hundreds of employees, including non-creative personnel. This would dramatically expand the role of the Labor Commissioner to function as the arbiter of all business disputes that might arise in the course of financing entertainment deals.

Importantly, we are not holding here that all corporations cannot be an artist within the meaning of the Act, but rather this holding is limited to the specific set of facts herein. We will of course take each subsequent Petition which names a corporation as an artist and apply its unique set of facts and evaluate those on a case-by case basis.

Once it is determined that Petitioners were not "artists" within the meaning of the Act, it follows that Respondents could not be "talent agents" since a talent agency is defined by its role in procuring employment or engagements "for an artist or artists". We expressly do not reach a determination as to whether Respondents were engaged in an attempt to procure or did procure employment for Petitioners. We therefore find that the parties' agreement is not subject to the provisions of the Talent Agencies Act, and that the controversy does not "arise under" the Act. Consequently, the Labor Commissioner

is without jurisdiction to hear or decide the merits of this controversy, and this petition is hereby DISMISSED.

Dated: March 20, 2017

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

By: _____
DAVID L. GURLEY
Special Hearing Officer for the Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
) S.S.
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 18 years old and not a party to the within action; my business address is: 300 Oceangate, Suite 850, Long Beach, California 90802.

On March 20, 2017, I served the foregoing document(s) described as: **CERTIFICATE OF LACK OF CONTROVERSY WITHIN THE MEANING OF LABOR CODE §1700.44; ORDER DISMISSING PETITION TO DETERMINE CONTROVERSY,** on the interested parties to this action by delivering a copy thereof in a sealed envelope at the following addresses:

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☑ **(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 in the attached service list.

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

Executed this 20th day of March, 2017, at Long Beach, California.

Tina Provencio
Declarant