ABDEL NASSAR, Bar No. 275712
STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
320 W. 4th Street, Suite 600
Los Angeles, California 90013
Telephone: (213) 897-1511
Facsimile: (213) 897-2877

Attorneys for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

EZRA PATCHETT, an Individual, Petitioner, vs. DLM LA, INC.; DLMUS, LLC, Respondents.	CASE NO. TAC 47367 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code § 1700.44, came on regularly for hearing before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner EZRA PATCHETT, an Individual, ("Petitioner"), appeared *in propria persona*. Respondents DLM LA, INC., and DLMUS, LLC, (collectively referred to as "Respondents"), failed to appear.

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

///

///

FINDINGS OF FACT

1. Petitioner has been a professional fashion photographer for more than twenty years. His work has been featured in fashion magazines such as *Vogue*. Petitioner has photographed celebrities and athletes including Katy Perry and Kevin Love.

2. In 2015, Petitioner met Respondents' representative Dolores Levin (Levin). Levin owns and operates Respondents. Through Levin, Petitioner entered into an oral agreement whereby Respondents agreed to promote and secure work for Petitioner. The agreement was of unlimited duration and provided Respondents with 20% of earnings from any work performed by Petitioner.

3. On or around April 2015, Petitioner performed work for Parker Media. The work consisted of taking hundreds of still photographs of a wealthy individual in her home for use on her fashion blog. This job also consisted of retouching approximately one hundred photographs chosen by the client. Petitioner contracted another entity to perform the retouching work.

4. During September and/or October 2015, Petitioner conducted a photo shoot for a clothing catalog for Full Beauty. Full Beauty is a designer and manufacturer of clothing. Petitioner selected the shooting locations and took still photographs of models wearing different items of clothing to be advertised.

5. On or about November 2015, the relationship between Petitioner and Respondents ended.

6. With this filing, Petitioner seeks a determination from the Labor Commissioner finding Respondents acted as unlicensed talent agents under the Talent Agencies Act ("Act") by procuring work for Petitioner in violation of the Act. Accordingly, Petitioner seeks recovery of $68,409.50 in proceeds collected by Respondents for work he performed on the Parker Media and Full Beauty engagements. Petitioner also seeks disgorgement of all other commissions collected by Respondents for work he performed.

7. Petitioner testified his work consists of taking still photographs only. He considers himself an "artist" under the Act because his work, amongst other things, requires creativity in considering factors such as lighting, positioning of subjects, and selection of photographs.

LEGAL ANALYSIS

I. SCOPE OF THE TALENT AGENCIES ACT

The California Talent Agencies Act ("the Act") provides the Labor Commissioner with original jurisdiction over controversies between "artists" and "talent agents." Labor Code § 1700.44(a). Thus, as a threshold issue, we must first determine whether Petitioner is an "artist" under the Act. Although we have no doubt Petitioner's craft requires creativity and is an art form in the broader sense of the word, because his work consists exclusively of taking still photographs for marketing and/or promotional purposes, we do not find him an "artist" within the more limited meaning of the Act.

A. "Artist" Within the Meaning of the Act

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 organizations, directors of legitimate stage, motion picture 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.

Historically, we have held a person is an "artist" as defined in Labor Code §1700.4(b) if he or she renders professional services in motion picture, theatrical, radio, television and other entertainment enterprises "creative" in nature. For example, in *American First Run dba American First Run Studios, et al. v. OMNI Entertainment Group, A Corporation, et al.,* (TAC 32-95), (hereinafter, referred to as "*American Run*"), we discussed the meaning of the term "artists" under the Act. In deciding whether a

"producer" came under this definition we explained:

> [a]lthough Labor Code §1700.4(b) does not expressly list producers or production companies as a category within the definition of 'artists,' 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' 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---including the production company's accountant's lawyers or studio teachers—would fall within the definition of 'artists.' We do not believe the Legislature intended such a radically far reaching result...[I]n order to qualify as an 'artist' there must be some showing that the producer's services are artistic or creative in nature as opposed to services of an exclusively business or managerial nature.

American Run at pp. 4-5.

Applying this test in *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management, et al.,*(TAC 14-98), (hereinafter, referred to as "*Bluestein*"), we dismissed the petition because there was not a significant showing that the producer's services were creative in nature as opposed to services of an exclusively managerial or business nature. In reaching this conclusion, we explained,

> [o]ccasionally assisting in shot location or stepping in as a second director as described by petitioner, does not rise to the creative level required of an 'artist' as intended by the drafters. Virtually all line producers or production managers engage in de minimus 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.

Bluestein at p. 6. See also, *Hyperion Animation Co., Inc. v. Toltec Artists, Inc.*, (TAC 07-99).

Likewise, in *Angela Wells v. Barmas, Inc. dba Fred Segal Agency* (17-00), we did not find the make-up artist an "artist" under the Act because her skills did not rise to the level of special effects wizardry which might be afforded protection under the Act. We noted that "throughout the history of the Act, the definition of 'artist' only included above-the-line creative performers or the creative forces behind the production whose contributions were an essential and integral element of the productions, (i.e., directors, writers and composers)." *Id.* at pp 4-5.

Similarly, for the reasons explained below, we do not find Petitioner, a professional fashion photographer, an "artist" under the Talent Agencies Act.

1. Petitioner is not an "artist" under the Act because his work consists exclusively of taking still photographs for marketing and/or promotion of products.

Petitioner testified his work consists exclusively of taking still photographs primarily for marketing and promotion of clothing. He contends he is an "artist" under the Act because this work, amongst other factors, requires creativity gauging light, positioning subjects, and selection of photographs. We disagree. While Petitioner's artistic experience, talent, and creativity inevitably play a role in how he photographs a subject, even a celebrity, arguably many types of work require some degree of artistic experience or creativity. But, this does not mean any professional who is creative and artistic in performing their job is a covered "artist" under the Act. For example, the wardrobe stylist who works on Petitioner's photo shoots is a creative professional. The wardrobe stylist is responsible for selecting clothing and accessories for the subjects (celebrity or model) based on the direction or look that the client wants for the photo shoot. In selecting the right outfit and look for the shoot, the wardrobe stylist is relying on his or her creativity and artistic sense. Is that stylist then considered an "artist" under the Act? We do not find the legislative intent behind the Act would support a finding that the wardrobe stylist is an "artist."

Likewise, the set builders, prop stylists, and make-up artists who may also work on

a photo shoot, all use their creativity and talent to perform their various roles. While all of them are artistic and creative in performing their roles, in most cases, they are not considered "artists" within the meaning of the Act. As we explained in *American First Run dba American First Run Studios, et al. v. OMNI Entertainment Group, A Corporation, et al.,* (TAC 32-95), *supra*, "without any kind of limitation as to who is considered an 'artist' under the Act, virtually every 'person rendering professional services' connected with an entertainment project would fall within the definition of 'artists.' As a result, the scope of the Act would be broadened far beyond its legislative intent." The Act "must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical and that will lead to wise policy rather than to mischief or absurdity." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347, 354-355 citing 45 Cal.Jur.2d, Statutes, §116, pp. 625-626.

In *Michael Grecco, et al. v. Blur Photo, et al.,* (TAC 23297) we held Petitioner, a famous photographer, not an artist within the Act on projects he performed "still" photography only. *Id* at pp. 12-15. This work included photographing an NFL football star for a Campbell's Chunky Soup commercial; photographing film director Martin Scorsese for a DIRECTV television commercial; photographing comedian Howie Mendel for a public service announcement; and photographing actor and comedian Kathy Griffin for Bravo TV. *Id* at pp. 3-7. We found Petitioner not an 'artist" under the Act on these projects because his work consisted of taking still photographs used for promotional and marketing purposes only. *Id* at p. 15. In this case, Petitioner testified his work on the Parker Media and Full Beauty projects, and in fact, his work generally, consists of taking still photographs for the promotion and/or marketing primarily of clothing. Thus, like the Petitioner in *Grecco*, Petitioner is not an "artist" within the meaning of Labor Code § 1700.4(b).

Cases where an entertainment photographer has been found an "artist" under the Act are distinguishable from this case. In the *Billy Blanks, Jr., et al. v. Anthony P. Riccio,*

(TAC 7163) determination and the *Daniel Browning Smith v. Chuck Harris aka Oaky Miller, et al.,* (TAC 53-05) determination, we held petitioners were "artists" under the Act because they were the actual performers on an entertainment enterprise (i.e., the infomercial and the sports event). In the *Blanks v. Riccio* case, we noted that not any person performing on a *Cardioke* video would be considered an "artist" under the Act and explained that Mr. Blanks was considered an "artist" when performing on his infomercial only because his celebrity coupled with his musical and exercise experience were being used to market his product. Likewise, in the *Smith v. Harris* case, we held that Daniel Browning Smith, a contortionist, was an "artist" under the Act when he was performing at a sporting event (an entertainment enterprise) for the purpose of entertaining the audience.

In *Leslie Redden v. Candy Ford Group*, (TAC 13-06) and *Nancy Sweeney v. Penelope Lippincott dba Finesse Model Management*, (TAC 40-05) we found the models, even the promotional model, "artists" under the Act because "models" are expressly listed as part of the definition of "artist" under Labor Code §1700.4(b).

While Petitioner is the creative force behind his photography, based on the evidence introduced at hearing, his "still" photographs were used for promotional and/or marketing purposes only. The fact that Petitioner may have photographed celebrities does not change our analysis. Petitioner's "still" photographs used for promotion of a product are no different even if the photographs involved a model or celebrity. Consequently, Petitioner is not an "artist" within the meaning of the Act.

///

///

///

///

///

///

///

///

ORDER

Because Petitioner is not an "artist" under the California Talent Agencies Act, the Labor Commissioner does not have jurisdiction to grant the relief he seeks. Accordingly, the Petition is dismissed.

Respectfully submitted,

Dated: 10/18/2018

By: _____
ABDEL NASSAR
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 10/18/2018

By: _____
JULIE A. SU
State Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is Division of Labor Standards Enforcement, Department of Industrial Relations, 320 W. 4th Street, Room 600, Los Angeles, California 90013.

On October 22, 2018, I served the following documents described as:

DETERMINATION OF CONTROVERSY

on the persons below as follows:

LAUREN GREENE **GERARD FOX LAW** **1880 CENTURY PARK EAST #1410** **LOS ANGELES, CA 90067**	**ANDREW PATTERSON, CEO** **DLMLA, INC.** **1880 CENTURY PARK EAST, # 200** **LOS ANGELES, CA 90067**
EZRA PATCHET [redacted]	**DLMUS, INC.** **C/O GERBER & CO., INC.** **1880 CENTURY PARK EAST, # 200** **LOS ANGELES, CA 90067**

☒ **(BY OVERNIGHT DELIVERY)** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addressee(s) set forth above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **(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) listed above.

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

Executed on October 22, 2018, at Los Angeles, California.

Marco A. Gomez
Declarant