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5
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7
8 **BEFORE THE LABOR COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**

10
11 MICHAEL GRECCO, an Individual; and
MICHAEL PHOTOGRAPHY, INC., a
12 California Corporation,

13 Petitioners,

14 vs.

15
16 BLUR PHOTO, LLC, a California
17 Limited Liability Company, CLIO
BITBOUL, an Individual; and MICHAEL
18 LOHR, an Individual,

19 Respondents.

CASE NO. TAC 23297

**DETERMINATION OF
CONTROVERSY**

20
21 The above-captioned matter, a Petition to Determine Controversy under
22 Labor Code §1700.44, came on regularly for hearing before the undersigned attorney for
23 the Labor Commissioner assigned to hear this case. Petitioner MICHAEL GRECCO, an
24 Individual; and MICHAEL PHOTOGRAPHY, INC., a California Corporation,
25 (collectively, referred to as "Petitioner Grecco"), appeared represented by Michael D.
26 Kuznetsky, Esq. of Kuznetsky Law Group and Michael W. Fattorosi, Esq. of Fattorosi &
27 Associates. Respondents BLUR PHOTO, LLC, a California limited liability company;
28

1 CLIO BITBOUL, an individual; and MICHAEL LOHR, an individual, (collectively
2 referred to as "Respondents"), appeared represented by Steven Sandler, Esq., of Law
3 Offices of Steven Sandler.

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

6
7 **FINDINGS OF FACT**

8 1. At the commencement of the hearing, the parties entered into the following
9 Stipulations:

- 10 a. Respondents are not licensed as talent agents by the State of California.
11 b. Respondents procured work for Petitioner Grecco.
12 c. Respondents received a commission of 25% for all paid work that they
13 procured for Petitioner Grecco.
14 d. Exhibit 1-labeled *Artist Agreement* is the "Agreement" between the parties.
15 e. Per the Agreement, Respondents were obligated to solicit work for
16 Petitioner Grecco.

17 2. Petitioner Grecco has been a professional photographer for 34 years. He is the
18 author of two books on lighting in portrait photography called "*The Art of Portrait*
19 *Photography*," and "*Lighting and the Dramatic Portrait*" as well as author of a coffee-
20 table book called "*Naked Ambition: An R Rated Look at an X Rated Industry*." Petitioner
21 Grecco's works are part of a permanent collection at the San Diego Museum of
22 Photographic Arts and have been featured in exhibits and galleries around the world
23 including the Museum of Sex in New York, the Fahey/Klein Gallery, the Stephen Cohen
24 Gallery and the Jennifer Schwartz Gallery. Petitioner Grecco has won numerous awards
25 for his photography and has shot for and been on the cover of magazines such as "Time,"
26 "Newsweek," "People" magazine, "New York" magazine, and "Entertainment Weekly."

27 3. Respondent Blur Photo is a limited liability company that represents and
28 manages commercial still photographers. Respondents Michael Lohr and Clio Bitboul are
the principals of Blur.

1 4. In March, 2005, the parties entered into the Agreement which provides
2 Respondent would serve as Petitioner Grecco's exclusive representative in exchange for
3 25% commission for any work Respondents procured for Petitioner Grecco.

4 5. Respondents terminated their relationship with Petitioner Grecco on June 29,
5 2010.

6 6. In December, 2010, Petitioner Grecco filed a complaint in the Los Angeles
7 Superior Court against Respondents alleging Breach of Contract and Breach of Fiduciary
8 Duty. The superior court action is currently stayed pending resolution of this petition
9 which was filed by Petitioner Grecco on June 24, 2011.

10 7. With this filing, Petitioner Grecco seeks a determination from the Labor
11 Commissioner holding that Respondents acted as unlicensed talent agents under the
12 Talent Agencies Act ("Act") by procuring entertainment related engagements for
13 Petitioner Grecco in violation of the Act. Accordingly, Petitioner Grecco requests the
14 *Artist Agreement* between the parties be declared illegal and void. Petitioner Grecco
15 argues Respondents procured the following engagements for him in violation of the Act:

16 **Campbell's Chunky Soup**

17 a. Campbell's Chunky Soup's ad agency, Young & Rubicam, hired Petitioner
18 Grecco to photograph NFL football star LaDainian Tomlinson for a Campbell's Chunky
19 Soup commercial. Petitioner Grecco testified Respondent Lohr made the initial contact
20 with Young & Rubicam and prepared the estimate.¹ Invoices and emails produced for this
21 project show Respondent Lohr was instrumental in negotiating the fees related to this
22 commercial shoot. In one email to Young & Rubicam, Inc., Respondent Lohr emails, "*It*
23 *is straight fees as discussed. However, there will be a \$300.00 web gallery charge.*"
24 Similarly, in another email to Young & Rubicam, Respondent Lohr writes, "*Grecco will*
shoot (with the blessing of broadcast) their shots during our scheduling of May 5, 6, 7,

25 ¹ The "estimate" included Petitioner Grecco's "creative services" fee which encompassed the
26 photography, prep, tech scout, pre lite, preproduction, travel and usage fees. It also included
27 "production expenses" which covered digital package rental (hard drive, monitor, tech), assistants
28 needed, coordinator, producer's expenses, stylist expenses, wardrobe stylist, groomer, studio
rental, location scouts, permits, equipment rental, truck rental for the equipment, prop rentals, set
materials, catering, messengers, insurance and travel expenses for the photo shoot. Any variations
to the estimate had to be negotiated with Petitioner Grecco, usually through Respondents.

1 2008. We would like a \$16,000.00 guarantee to provide 15-20 shots for the locker room
2 and the same amount for the tunnel (total 30-40).”

3 **Leonard Maltin for DirecTV**

4 b. In February 2006, Petitioner Grecco was hired by DirecTV to photograph
5 well-known television and film critic and author, Leonard Maltin. Petitioner Grecco
6 testified that while this engagement was initially obtained through one of his contacts,
7 Respondent Lohr prepared the estimate and paperwork, negotiated the fees and closed the
8 deal. The paperwork for this shoot demonstrates Respondent Lohr forwarded pertinent
9 documents to DirecTV in order for Petitioner Grecco to receive payment. Petitioner
10 Grecco’s bank information was faxed and his estimate was emailed to DirecTV personnel.

11 **Martin Scorsese for DirecTV**

12 c. In April, 2006, Petitioner Grecco photographed Martin Scorsese for
13 promotional purposes for DirecTV. Specifically, the photos were used for a television
14 commercial, magazine ad and other advertising. Petitioner Grecco testified he obtained
15 the job through a contact he had in New York but Respondent Lohr helped him produce
16 the job. The exhibits demonstrate Respondent Lohr submitted an initial estimate to
17 DirecTV, a revised estimate to the Picture Editor for DirecTV, Tyler Pappas of JTP
18 Creative/Byzantium Inc., and tried to ascertain the photo shoot date.

19 **Bruce Jenner**

20 d. Petitioner Grecco testified Respondent Lohr obtained and negotiated
21 the fee for a photo shoot Petitioner Grecco shot of Bruce Jenner, an Olympic winning
22 decathlete and actor on the *Keeping Up with the Kardashians* reality show. The photos
23 were shot to accompany a WebMD webcast that featured Bruce Jenner promoting an
24 injectable product for osteoarthritis. Additionally, they were used for a magazine cover
25 wrap, article and for potential patient brochures. The agency directly contacted
26 Respondent Lohr asking for Petitioner Grecco’s availability. Once it was determined
27 Petitioner Grecco was available, the exhibits show Respondent Lohr submitted original
28 and revised estimates on Petitioner Grecco’s behalf.

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1 Howie Mandel

2 e. On July 21, 2008, Respondent Lohr was contacted by Vicki Stoiber, Head
3 of Production for M Street Creative seeking Petitioner Grecco's photography services on a
4 Public Service Announcement for ADHD, starring Howie Mandel. As with the previous
5 engagements, Respondent Lohr submitted Petitioner Grecco's estimate.

6 Shear Genius – NBC Bravo

7 f. In April, 2008, Petitioner Grecco appeared as on-air talent playing a judge
8 on the NBC Bravo show *Shear Genius*. Petitioner Grecco also helped create a photo shoot
9 that was part of the contest for the show which involved conceptualizing the contest and
10 helping put together all of the sets and create the contestant situation for the television
11 show. While Respondent Bitboul testified that her involvement was limited to negotiating
12 the photo shoot and that she was not involved in negotiating anything more, including
13 Petitioner Grecco's involvement as on-air talent on the show, the evidence revealed
14 Respondents submitted expenses, estimates, and the final bill to NBC Bravo on behalf of
15 Petitioner Grecco.

16 Game Lounge - DirecTV

17 g. In 2006, Petitioner Grecco shot the cast of the DirecTV show *Game Lounge*
18 during the filming of a commercial. Petitioner Grecco testified this job was procured
19 through contacts he had with people at DirecTV from whom Respondent Lohr solicited
20 work. As with the other jobs, Respondent Lohr created the estimates and negotiated
21 Petitioner Grecco's fees.

22 "The Biggest Loser" – Season 6

23 h. In January, 2009, Petitioner Grecco shot the 4 remaining cast members of
24 *The Biggest Loser* Season 6 for a *Got Milk?* photo shoot at the Sundance Film Festival.
25 Respondent Lohr negotiated the fee, created the estimate and sent it to the client.

26 "The Biggest Loser" – Season 5

27 i. Petitioner Grecco shot *The Biggest Loser* 4 Finalist/Winner on Friday,
28 March 21, 2008 for a *Got Milk?* photo shoot. The fee was negotiated by Respondent Lohr.

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1 Additionally, estimates for this job were created by and sent to the client by Respondent
2 Lohr.

3 **Terri Nunn – Lead Singer of Berlin**

4 j. In May, 2008, Petitioner Grecco shot Terri Nunn and the rest of the band
5 members of the musical band, Berlin, for the cover of their CD. This job was initially
6 obtained through a friend of Respondent Bitboul. Respondent Bitboul then created the
7 estimate, sent it to the client and negotiated Petitioner Grecco's fee.

8 **Blue Cross Blue Shield of Florida Commercial Starring Andy Cobb**

9 k. In April, 2006, Petitioner Grecco directed a commercial for Blue Cross Blue
10 Shield of Florida starring comedian, Andy Cobb. While the contact was initiated by
11 Petitioner Grecco, Respondent Lohr created the estimate, sent it to the client, negotiated
12 the fee structure and closed the deal. Respondent Bitboul explained that her agency
13 procures work for photographers in a directorial capacity in the sense that "if there's
14 motion attached to the print project, they can't get the print project without also doing the
15 video portion." She also explained "that a lot of the photographers are now being asked to
16 direct motion commercials or motion spots in association with the photography that
17 they're also shooting for the same project. However, these motion projects are typically
18 used for nothing more than as commercials for marketing and promotional pieces."

18 **Style Her Famous – ABC Family**

19 l. Petitioner Grecco was asked to bid on a photo shoot job for *Style Her*
20 *Famous*, an E Entertainment/Style Network show starring Jay Manual. Respondent Lohr
21 put the estimate together and submitted it; but ultimately, the job went to another
22 photographer.

23 **Photo Shoot with Matthew Leinart and Summer Altice**

24 m. In 2006, Petitioner Grecco photographed Heisman Trophy winning
25 football player, Matthew Leinart and Actress-Model Summer Altice for Icelink photo
26 shoots at the Viceroy hotel in Santa Monica, California. Respondent Lohr prepared the
27 estimate, provided it to the client and negotiated Petitioner Grecco's fee for both shoots.
28 Petitioner Grecco also directed some behind the scenes motion on this job but admitted

1 Respondents initially got him the job as a still photographer. While at the job, however,
2 Icelink asked him to shoot motion on set. Respondents did not procure or negotiate this
3 motion work for Respondent.

4 **Kathy Griffin for NBC Universal**

5 n. In June, 2005, Petitioner photographed Actress and Comedian Kathy Griffin
6 for Bravo TV. Respondent Bitboul negotiated a \$12,500 fee for this photo shoot.
7 Respondent Bitboul argued that neither the procurement nor negotiation of this photo
8 shoot fall within the Act because the work was used for promotional purposes only.
9 According to Respondent Bitboul, Petitioner Grecco was approached by NBC to
10 photograph Ms. Griffin for a promotional poster NBC would use to promote her show.
11 Petitioner Grecco was being asked to create photographic content that Respondents would
12 then license to NBC, and NBC would have the right to take Petitioner Grecco's picture
13 and use it for promotional and marketing purposes.

14 **Dane Reynolds for Surfer Magazine**

15 o. On November 9, 2007 Petitioner photographed surfer Dane Reynolds on the
16 Beach in Ventura, California for *Surfer Magazine*. This job was procured and negotiated
17 by Respondent Bitboul. The exhibits show Respondent Lohr had to obtain approval by
18 Petitioner Grecco first before sending the estimate to *Surfer Magazine*.

19 **Randy Jackson for Penguin Books**

20 p. In 2008, Petitioner Grecco photographed Randy Jackson, who has appeared
21 as a judge on *American Idol*, for the cover of his new book published by Penguin Books.
22 Respondent Bitboul prepared the estimate, sent it to the client and negotiated the fee on
23 behalf of Petitioner Grecco.

24 **The Pappas – ABC Family**

25 q. In 2007, Respondents submitted estimates to ABC Family for Petitioner
26 Grecco to perform video and photography services for the show *The Pappas*. Ultimately,
27 Petitioner Grecco did not perform either service.

28 **Cirque du Soleil**

r. In 2007, Respondents handled negotiations for Petitioner Grecco to

1 photograph the performers of Cirque du Soleil through an ad agency in San Francisco.
2 However, Petitioner Grecco did not perform the services for Cirque du Soleil.

3 **Iman for Project Runway Canada**

4 s. Petitioner Grecco testified Respondent Bitboul negotiated the fees for
5 him to photograph Supermodel Iman for her hosting job on *Project Runway Canada* in
6 2009. The photo shoot was ultimately canceled but Petitioner Grecco was still paid a fee
7 for the cancellation.

8 **Play it 4-Ward Internet TV Show**

9 t. *Play it 4-Ward* is a digital web series sponsored by Ford and Microsoft
10 which includes known intellectuals in the media world commenting about the future of
11 media and technology. In October, 2009, Petitioner Grecco was cast as a guest on the
12 show representing the film genre on a panel debating a wide range of subjects including
13 the future of film. Petitioner Grecco was allowed to promote his own material. Petitioner
14 Grecco testified Respondents negotiated his fee but the documents show he received a
15 \$500.00 flat honorarium plus paid expenses. Respondents argued *Play it 4-Ward* only
16 approached them about retaining Petitioner Grecco as a guest panelist in regards to “still”
17 photography and that this engagement was only for promotional purposes to help
18 Petitioner Grecco obtain more “still” photography assignments.

19 **LEGAL ANALYSIS**

20 **I. STATUTE OF LIMITATIONS**

21 Respondents argue the petition is time barred under Labor Code §1700.44(b)
22 because the last payment Petitioner Grecco made to Respondents was in March, 2010 and
23 the petition was not filed until June 24, 2011. Labor Code §1700.44(b) provides:

24
25 No action or proceeding shall be brought pursuant to this
26 chapter with respect to any violation which is alleged to have
27 occurred more than one year prior to commencement of the
28 action or proceeding.

1 Here, as Respondents point out, the petition was filed on June 24, 2011 but Respondents
2 terminated the relationship with Petitioner Grecco on June 29, 2010 when they sent him a
3 *Termination Letter and Letter of Financial Obligation* (“termination letter”). This
4 termination letter expressly states the following:

5 Pursuant to Clause 40 of BLUR Artist agreement, if Artist
6 fails to pay “commissions due Representative in conformity
7 with the terms of the Agreement: Representative has the right
8 to cure any such default. Artist has been aware of the
9 delinquency of \$2523.23 owed to Representative. This letter
10 will serve as notice of failure to pay. If payment is not
11 received in 30 days from the date of this agreement,
12 Representative will exercise its contractual right.

13 If Petitioner Grecco was seeking disgorgement in this petition, the action for
14 disgorgement would be time barred since the last payment made to Respondents was
15 made in March, 2010, more than 1 year prior to the filing of the petition. Petitioner
16 Grecco, however, is not seeking disgorgement in this administrative action. Nor is he
17 raising the Act as a defense to any *current* action filed by Respondents. Rather, Petitioner
18 Grecco is only seeking a declaration that the Agreement is unlawful and void under the
19 Talent Agencies Act. To the extent the declaration serves as an “anticipatory” defense to a
20 *potential* claim, (e.g. an action by Respondents seeking to collect the unpaid commissions
21 referred to in the termination letter or otherwise enforce the Agreement against Petitioner
22 Grecco), there is no statute of limitations issue and we proceed to issue this determination
23 on the merits. *Styne v. Stevens* (2001) 26 Cal.4th 42; *Church v. Brown* (TAC 52-92),
24 pp.5-7.

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1 **II. VIOLATION OF THE TALENT AGENCIES ACT**

2
3 A. “Artist” Within the Meaning of the Act

4 Labor Code §1700.4(b) defines “artists” as:

5
6 Actors and actresses rendering services on the legitimate stage
7 and in the production of motion pictures, radio artists, musical
8 artists, musical organizations, directors of legitimate stage,
9 motion picture and radio productions, musical directors,
10 writers, cinematographers, composers, lyricists, arrangers,
11 models, and other artists and persons rendering professional
12 services in motion picture, theatrical, radio, television and
13 other entertainment enterprises.

14 Respondents argue Petitioner Grecco, while being a creative professional, is not an
15 “artist” as defined under the Act when he is shooting “still” photography. Historically, we
16 have held that a person is an “artist” as defined in Labor Code §1700.4(b) if he or she
17 renders professional services in motion picture, theatrical, radio, television and other
18 entertainment enterprises that are “creative” in nature. For example, in *American First*
19 *Run dba American First Run Studios, Max Keller, Micheline Keller v. OMNI*
20 *Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier* (TAC 32-95),
21 (hereinafter, referred to as “*American Run*”), we discussed the meaning of the term
22 “artists” under the Act. In deciding whether a “producer” came under this definition we
23 explained that:

24 [a]lthough Labor Code §1700.4(b) does not expressly list
25 producers or production companies as a category within the
26 definition of ‘artists,’ the broadly worded definition includes
27 ‘other artists and persons rendering professional services
28 in...television and other entertainment enterprises.’ Despite

1 this seemingly open ended formulation, we believe the
2 Legislature intended to limit the term 'artists' to those
3 individuals who perform creative services in connection with
4 an entertainment enterprise. Without such a limitation,
5 virtually every "person rendering professional services"
6 connected with an entertainment project--including the
7 production company's accountant's lawyers or studio
8 teachers--would fall within the definition of 'artists.' We do
9 not believe the Legislature intended such a radically far
10 reaching result...[I]n order to qualify as an 'artist' there must
11 be some showing that the producer's services are artistic or
12 creative in nature as opposed to services of an exclusively
13 business or managerial nature.

14 *American Run* at pp. 4-5.

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

20 [o]ccasionally assisting in shot location or stepping in as a
21 second director as described by petitioner, does not rise to the
22 creative level required of an 'artist' as intended by the drafters.
23 Virtually all line producers or production managers engage in
24 de minimus levels of creativity. There must be more than
25 incidental creative input. The individual must be primarily
26 engaged in or make a significant showing of a creative
27 contribution to the production to be afforded the protection of
28

1 the Act. We do not feel budget management falls within these
2 parameters.

3 *Bluestein* at p. 6. See also, *Hyperion Animation Co., Inc. v. Toltec Artists, Inc.*, (TAC 07-
4 99).

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

12 Similarly, in applying this test to this case, for the reasons explained below, we do
13 not find that Petitioner Grecco is an “artist” under the Talent Agencies Act on
14 engagements where he performed “still” photography only. We, do, however find that he
15 is an “artist” under the Act on those engagements where he provided directorial services
16 or was engaged as on-air talent.

17
18 **1. “Still” commercial photography engagements.**

19 Respondents stipulated that the Agreement provided they were required to solicit
20 work for Petitioner Grecco. Respondents also stipulated they did in fact procure work for
21 him. It is also evident from the testimony and exhibits Respondents actively negotiated
22 most of the “still” commercial photography engagements for Petitioner Grecco at issue in
23 this petition. Respondent Bitboul described her company’s functions as:

24 What we attempt to do is secure assignments on behalf of the
25 photographer, and then we also manage the photographer’s
26 career in that we oversee the promotion and marketing of that
27 photographer’s career. We advise that photographer as to how
28 to promote themselves.

1 In certain cases, we will aid the photographer in estimating,
2 collecting funds, and managing budgets. But ultimately, it is
3 our job to secure assignments and oversee the negotiations of
4 creative fees and licensing of those images.

5 Reporter's Transcript 139:20-140:6.

6 Respondents argue that despite procuring and negotiating engagements for
7 Petitioner Grecco as a "still" photographer, they are not in violation of the Act because
8 "still" photographers are not considered "artists" under the Act. We agree and find
9 Respondents' procurement, including negotiation of "still" photography engagements for
10 Petitioner Grecco, do not violate the Act because a "still" photographer is not considered
11 an "artist" within the meaning of the Act. While Petitioner Grecco's artistic experience,
12 talent, and creativity inevitably play a role in how he photographs a subject, even a
13 celebrity subject, arguably many of the jobs performed "behind the scenes" require some
14 degree of artistic experience or creativity. But, this does not mean any professional who is
15 creative and artistic in performing their job is a covered "artist" under the Act. For
16 example, the wardrobe stylist who works on Petitioner Grecco's photo shoots is a creative
17 professional. The wardrobe stylist is responsible for selecting clothing and accessories for
18 the artist (celebrity or model) based on the direction or look that the director or
19 photographer wants for the photo shoot. In selecting the right outfit and look for the shoot,
20 the wardrobe stylist is relying on his or her creativity and artistic sense. Is that stylist then
21 considered an "artist" under the Act? We do not find the legislative intent behind the Act
22 would support a finding that the wardrobe stylist is an "artist."

23 Likewise, the set builders, prop stylists, and make-up artists who are also working
24 on the photo shoot, all use their creativity and talent to perform their various roles. While
25 all of them are artistic and creative in performing their roles, in most cases, they are not
26 considered "artists" within the meaning of the Act. As we explained in *American First*
27 *Run dba American First Run Studios, Max Keller, Micheline Keller v. OMNI*

1 *Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier* (TAC 32-95), *supra*,
2 “without any kind of limitation as to who is considered an ‘artist’ under the Act, virtually
3 every ‘person rendering professional services’ connected with an entertainment project
4 would fall within the definition of ‘artists.’ As a result, the scope of the Act would be
5 broadened far beyond its legislative intent.” The Act “must be given a reasonable and
6 common sense construction in accordance with the apparent purpose and intention of the
7 lawmakers—one that is practical rather than technical and that will lead to wise policy
8 rather than to mischief or absurdity.” *Buchwald v. Superior Court* (1967) 254 Cal.App.2d
9 347, 354-355 citing 45 Cal.Jur.2d, Statutes, §116, pp. 625-626.

10 The cases relied on by Petitioner Grecco to argue that an entertainment
11 photographer is an “artist” under the Act, are distinguishable. In both the *Billy Blanks, Jr.,*
12 *et al v. Anthony P. Riccio*, (TAC 7163) decision and the *Daniel Browning Smith v. Chuck*
13 *Harris aka Oaky Miller, et al.*, (TAC 53-05) decision, we held the petitioners were
14 “artists” under the Act because they were the actual performers on an entertainment
15 enterprise (i.e., the infomercial and the sports event). In the *Blanks v. Riccio* case, we
16 noted that not any person performing on a *Cardioke* video would be considered an “artist”
17 under the Act and explained that Mr. Blanks was considered an “artist” when performing
18 on his infomercial only because his celebrity coupled with his musical and exercise
19 experience were being used to market his product. Likewise, in the *Smith v. Harris* case,
20 we held that Daniel Browning Smith, a contortionist, was an “artist” under the Act when
21 he was performing at a sporting event (an entertainment enterprise) for the purpose of
22 entertaining the audience.

23 In *Leslie Redden v. Candy Ford Group*, (TAC 13-06) and *Nancy Sweeney v.*
24 *Penelope Lippincott dba Finesse Model Management*, (TAC 40-05), also relied upon by
25 Petitioner Grecco, we found the models, even the promotional model, “artists” under the
26 Act because “models” are expressly listed as part of the definition of “artist” under Labor
27 Code §1700.4(b).

28 In *William Morris Agency, LLC v. Dan O’Shannon, et al.*, (TAC 06-05), we held

1 Respondent Dan O'Shannon, a producer on the long running television series *Frasier* was
2 an "artist" under the Act because he was the *creative force* behind the television show.
3 While Petitioner Grecco may be the creative force behind his photography, the "still"
4 photos he took, which are at issue, were used for promotional and marketing purposes
5 only. Unlike Mr. O'Shannon who was creating, by writing and editing, each television
6 episode of *Frasier*, Petitioner Grecco had no direct role in the television shows being
7 promoted through his "still" photography.

8 Petitioner Grecco also argues he is an "artist" under the Act because he is a
9 celebrity photographer. The fact Petitioner Grecco was photographing celebrities does not
10 change our analysis. Petitioner Grecco's photography of a "still" photo to be used for
11 promotion of a product is no different than shooting a photo that is used for promotion of
12 a television show. A photo is a photo and just because a celebrity is being used to
13 promote the product or the product is the television show, does not make the person taking
14 the photo an "artist" within the meaning of the Act.

15 Consequently, we do not find that procurement, including negotiation, of the
16 following "still" photography engagements to be in violation of the Act: Campbell's
17 Chunky Soup, Leonard Maltin for DirecTV, Martin Scorsese for DirecTV, Bruce Jenner,
18 Howie Mandel, *Game Lounge* for DirecTV, *The Biggest Loser* – Seasons 5 and 6, Terri
19 Nunn-CD Cover, *Style Her Famous* for ABC Family, Matthew Leinart and Summer
20 Altice for Icelink, Kathy Griffin for NBC Universal, Dane Reynolds for Surfer Magazine,
21 Randy Jackson for Penguin Books, Cirque du Soleil and Iman for *Project Runway*
22 *Canada*.

23 2. Director Services

24 Petitioner Grecco also performed director services on a commercial for Blue Cross
25 Blue Shield of Florida featuring comedian Andy Cobb in April, 2006. Unlike "still"
26 photographers, directors of motion including, commercials, are considered "artists" within
27 the meaning of the Act. See *Howard Rose v. William Reilly*, (TAC 43-97) where we held
28 that a director of a television commercial is an "artist" under the Act. Consequently,

1 Respondent Lohr's act of creating the estimate, sending it to the client, negotiating the fee
2 structure, and closing the deal, were all done without a talent agency license, in violation
3 of the Act.

4 With regard to the photo shoot with Matthew Leinart and Summer Altice for
5 Icelink, there was testimony that Petitioner Grecco also directed behind the scenes motion
6 for this ad campaign. However, Petitioner Grecco admitted Respondents secured the
7 photo shoot for him as a still photographer but were not involved in procurement of the
8 *directorial work* which was later requested by the client and performed by Petitioner
9 Grecco. As such, we do not find Respondents in violation of the Act on this directorial
10 engagement.

11 In 2007, Respondents submitted estimates to ABC Family for Petitioner Grecco to
12 perform video services for the show referred to as *The Pappas*. While Petitioner Grecco
13 did not end up performing this engagement, there is still a violation of the Act by
14 Respondents since they submitted estimates for Petitioner Grecco to perform directing
15 services without a talent agency license. This constitutes an "attempt to procure"
16 employment under the Act.

17 Finally, in regard to Petitioner Grecco's argument Respondents were trying to
18 obtain employment for him as a film director by listing him on their film roster, we rule
19 there was insufficient evidence presented to establish a violation of the Act.

20 3. On-Air Talent

21 On April, 2008, Petitioner Grecco appeared as on-air talent on *Shear Genius* for
22 NBC Bravo. Petitioner Grecco submitted a copy of the script he was provided for this
23 show. The evidence established Respondents submitted expenses, estimates, and the final
24 bill to NBC Bravo on behalf of Petitioner Grecco. Consequently, Respondents violated the
25 Act by negotiating Petitioner Grecco's fee in connection with this on-air appearance as an
26 actor (which is covered by the Act).

27 We do not find any violation of the Act with respect to Petitioner Grecco's role as a
28 guest panelist on the Internet TV Show *Play it 4-Ward* because we do not find Petitioner

1 Grecco was performing as an “artist” in connection with this show. Instead, Petitioner
2 Grecco was serving as a panelist debating a wide range of subjects including the future of
3 film. We also do not find this engagement constitutes an “entertainment related
4 engagement” within the meaning of the Act.
5

6 **III. APPROPRIATE REMEDY FOR VIOLATIONS OF THE ACT**

7 Petitioner Grecco seeks a determination from us that the contract is void and illegal
8 because Respondents procured engagements for Petitioner Grecco in violation of the Act.
9 As noted above, we only find Respondents violated the Act on the following
10 engagements: directing services on the Blue Cross Blue Shield of Florida internet
11 commercial featuring comedian, Andy Cobb, attempted procurement of video services for
12 the ABC Family show *The Pappas*, and Petitioner Grecco’s appearance as on-air talent on
13 *Shear Genius* for NBC Bravo. The remainder of the engagements were procured lawfully
14 as they do not fall under the Act for the reasons explained in this determination.

15 We now address the appropriate remedy for the aforementioned violations of the
16 Act. In *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991, the court
17 recognized the Labor Commissioner may invalidate an entire contract when the Act is
18 violated. The court left it to the discretion of the Labor Commissioner to apply the
19 doctrine of severability to preserve and enforce the lawful portions of the parties’ contract
20 where the facts so warrant. As the Supreme Court explained in *Marathon*:

21 Courts are to look to the various purposes of the contract. If
22 the central purpose of the contract is tainted with illegality,
23 then the contract as a whole cannot be enforced. If the
24 illegality is collateral to the main purpose of the contract, and
25 the illegal provision can be extirpated from the contract by
26 means of severance or restriction, then such severance and
27 restriction are appropriate. [Citations omitted].
28

1 *Marathon, supra* at p.996.

2 In this case, we find that “‘the interests of justice...would be furthered’ by
3 severance.” *Id.* Accordingly, we sever the following engagements which were procured
4 in violation of the Act: Directing services on the Blue Cross Blue Shield of Florida
5 internet commercial featuring comedian, Andy Cobb; Attempted procurement of video
6 services for the ABC Family show, *The Pappas*; and Petitioner Grecco’s appearance as
7 on-air talent on *Shear Genius* for NBC Bravo. All other engagements that are the subject
8 of this petition, were lawfully obtained by Respondents.

9

10 **IV. ORDER**

11 For the reasons set forth above, IT IS HEREBY ORDERED the *Artist*
12 *Agreement* between Petitioner MICHAEL GRECCO and Respondents BLUR PHOTO,
13 LLC, a California limited liability company; CLIO BITBOUL, an individual; and
14 MICHAEL LOHR, an individual, is valid and enforceable under the Talent Agencies Act
15 except as to the following engagements which were procured in violation of the Act and
16 which we hereby sever from the Artist Agreement:

- 17 1 - Directing services on the Blue Cross Blue Shield of Florida internet
18 commercial featuring Comedian Andy Cobb;
19 2- Attempted procurement of video services for the ABC Family show - *The*
20 *Pappas*; and
21 3 - Petitioner Grecco’s appearance as on-air talent on *Shear Genius* for NBC
22 Bravo.

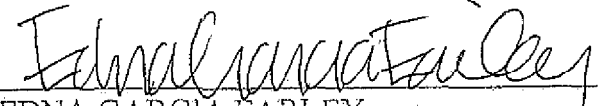
23 Respondents BLUR PHOTO, LLC, a California limited liability company; CLIO
24 BITBOUL, an individual; and MICHAEL LOHR, an individual have no rights or
25 entitlements to any monies arising from these three engagements.

26 ///
27 ///
28 ///

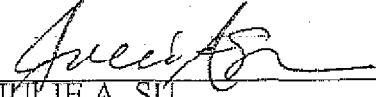
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DATED: July 24, 2013

Respectfully submitted,

By: 
EDNA GARCIA EARLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: July 24, 2013 By: 
JULIE A. SU
State Labor Commissioner

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES) ss.

4 I am employed in the County of Los Angeles, State of California. I am over the ag,
5 not a party to the within action. My business address is DIVISION OF LABOR STAI
6 ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angu
7 90013.

8 On July 24, 2013, I served the following document described as:

9 **DETERMINATION OF CONTROVERSY**

10 on the interested parties in this action [TAC 23297] by placing

11 the originals

12 a true copy thereof enclosed in a sealed envelope addressed as follows:

13 Steven Sandler, Esq.
14 LAW OFFICES OF STEVEN SANDLER
15 20335 Ventura Boulevard, Suite 200
16 Woodland Hills, CA 91364

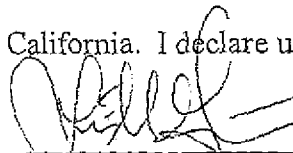
17 Michael D. Kuznetsky, Esq.
18 KUZNETSKY LAW GROUP, P.C.
19 6565 Sunset Boulevard, Suite 311
20 Hollywood, CA 90028

21 Michael W. Fattorosi, Esq.
22 FATTOROSI & ASSOCIATES, P.C.
23 5850 Canoga Avenue, Suite 400
24 Woodland Hills, CA 91367

25 BY MAIL I deposited such envelope in the United States Mail at Los Angeles, California,
26 postage prepaid.

27 BY MAIL I am readily familiar with the firm's business practice of collection and processing
28 of correspondence for mailing with the United States Postal Service and said correspondence
is deposited with the United States Postal Service the same day.

Executed on July 24, 2013 at Los Angeles, California. I declare under penalty of perjury the
foregoing is true and correct.


Lici Morales Garcia