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Division of Labor Standards Enforcement
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Attorney for the Labor Commissioner

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

WILLIAM MORRIS AGENCY, LLC, a Delaware Limited Liability Company, Petitioner, vs. DAN O'SHANNON, An Individual; ATOMIC TELEVISION, INC., A Purported Corporation, Respondents.	Case No.: TAC 06-05 **DETERMINATION OF CONTROVERSY**

The above-captioned matter, a Petition to Determine Controversy under Labor Code §1700.44, came on regularly for hearing on February 27, 2007 and concluded on February 28, 2007 in Los Angeles, California, before the undersigned attorney for the Labor Commissioner assigned to hear this case. Petitioner WILLIAM MORRIS AGENCY, LLC, A Delaware Limited Liability Company, appeared and was represented by Michael B. Garfinkel, Esq. of Rintala, Smoot, Jaenicke & Rees LLP who is presently

with the firm, Venable, LLP. Respondents DAN O'SHANNON, An Individual and ATOMIC TELEVISION, INC. appeared and were represented by Robert M. Barta, Esq. and W. Dennis Snyderman, Esq. of Rossof, Schiffres & Barta.

The parties were allowed to submit closing briefs and the matter was taken under submission on July 20, 2007.

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 WILLIAM MORRIS AGENCY, LLC, A Delaware Limited Liability Company, (hereinafter, referred to as "William Morris"), is a licensed talent agency.

2. During the period of June 1, 2002 to April, 2003, Respondent DAN O'SHANNON, An Individual, was an Executive Producer / Showrunner on the television sitcom *Frasier*. During the period of June, 2003 to May, 2004, Respondent DAN O'SHANNON served as a Consulting Producer for *Frasier* and had a development deal with Paramount Network Television, (hereinafter, "Paramount."). Respondent ATOMIC TELEVISION, INC. is Respondent O'Shannon's loan out company.[1] (Respondent Dan O'Shannon, An Individual and Respondent ATOMIC TELEVISION, INC., will hereinafter, be referred to collectively as "O'Shannon.").

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[1] O'Shannon testified that Atomic Television is the company through which he gets paid. It is the company that loans him out for services to various studios or productions. He then gets paid a salary from that company. Loan out companies are very common in the entertainment industry.

3. O'Shannon testified that he first signed a William Morris Agency "General Materials and Packages" contract on January 26, 1988 which provided that he would pay William Morris Agency 10% of his earnings in exchange for William Morris finding him work. Subsequent agency agreements were signed with William Morris through 1996. After 1996, William Morris continued to represent O'Shannon and was paid 10% of O'Shannon's gross earnings on employment engagements obtained for O'Shannon. However, O'Shannon testified that although he continued to receive renewal agency agreements from William Morris, beginning in 1996, he stopped signing them so that he would not be "tied down" to William Morris. O'Shannon explained that he didn't have a relationship with anyone at William Morris except for his agent, Gary Loder, (hereinafter, "Loder"), and, while happy with the services Loder was providing to him, he wanted to keep his options open. As such, he found it would be easier to do this if he wasn't contractually bound to William Morris.

4. O'Shannon testified that on May 1, 2002, Loder negotiated and closed a 2 year deal with Paramount for O'Shannon to serve as the Executive Producer / Showrunner of *Frasier*.[2] The two-year deal covered the 2002/2003 (10th Season) and

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[2] O'Shannon described a "Showrunner" as being the head writer on a multicamera sitcom. As a Showrunner, his duties were to oversee all of the writers' writings of every single episode, to figure out what the stories are, the dialogue, where the stories are going to go for the course of the season, to creatively weigh in on everything from editing to casting, and to be responsible for every creative idea that came up during the course of the season. As Executive Producer, he would get all the writers around the table, read an outline or a first draft of an episode that was coming up and try to make it better. He would map out the plot of every episode and worked with the writers as

2003/2004 (11th and final season) seasons at $125,000.00 per episode. Per O'Shannon, the 2003/2004 season included 24 episodes while the 2003/2004 final season included 25 episodes of which he only worked on 23 episodes.

5. O'Shannon testified that during this time period, he had not signed an agency agreement with William Morris. However, he was of the opinion that William Morris would be entitled to commissions on the *Frasier* 2 year deal since Loder, on behalf of William Morris, negotiated and closed the deal.

6. In between the two final seasons of *Frasier*, in approximately January, 2003, Loder left William Morris and began working for The Gersh Agency. After Loder left William Morris, O'Shannon testified that he received a phone call from Lanny Noveck of William Morris asking him to come in and meet with William Morris to establish some sort of working relationship. In response, O'Shannon informed Mr. Noveck that he did not consider William Morris to be his agency anymore. However, he informed Mr. Noveck that it was his intention that William Morris would receive their commission on the two-year deal they had obtained for him and which he was working under at the time.

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a group and then send the scripts off to be written with individual writers. Afterwards, he and the writers would go see a rehearsal and after the rehearsal, return to the writing table to do rewriting, if necessary. Throughout the week, he would visit the editing room, look at an episode being cut and give recommendations. O'Shannon testified that he had final say on the editing and creative responsibility. He stressed that he did not have contractual responsibility of the show – that it was not his job to look at contracts for actors or day players that come in, or assemble the extras, or build the sets or anything like that. Those duties fell on the line producer. He was only responsible for the creative decisions of the show.

7. After Loder left William Morris and after O'Shannon's phone conversation with Mr. Noveck, O'Shannon testified that he represented himself for a while.

8. O'Shannon completed the first year of his two-year contract on *Frasier* and paid William Morris 10% of his earnings, $300,000. However, in between his first and second years, sometime in May, 2003, he heard a rumor that the show was bringing back Christopher Lloyd, (hereinafter, "Lloyd") and Joe Keenan, (hereinafter, "Keenan"), former *Frasier* Showrunners, to run the final season of *Frasier* with him. Soon thereafter, O'Shannon confirmed that the rumor was true in a conversation with Peter Casey, one of the creators of *Frasier*. The following day, an article appeared in the *Variety* newspaper announcing that Lloyd and Keenan were returning to *Frasier* for the last season and would be sharing showrunning duties with O'Shannon. O'Shannon testified that later that afternoon, he received a phone call from Lloyd who stated that he hoped O'Shannon could still run the show with him and Keenan. In response, O'Shannon informed Lloyd that it would not be possible to share showrunner responsibilities with him and Keenan. O'Shannon testified that having worked under Lloyd years earlier, he knew they had very different styles of writing, of running the writers' room and of producing the show. As such, he believed that the idea of them running the show together seemed counterproductive.

9. After his conversation with Lloyd and having just quit the show as Executive Producer and Showrunner, O'Shannon testified that he contacted Loder who was now at The Gersh Agency and set up a lunch meeting with him. At this meeting, he

asked Loder to represent him again since he was back on the market and needed work. Loder agreed to the representation.

10. One of the first things Loder did as O'Shannon's agent, was to call Garry Hart of Paramount to discuss the situation with him. During this phone call, Loder testified that he informed Mr. Hart that O'Shannon had a two year contract to be the Showrunner for *Frasier*. While Mr. Hart acknowledged this, Loder testified that his impression was that Paramount would be willing to let O'Shannon go, if it came to it. As such, he set up a meeting with Mr. Hart in June, 2003 in New York, which was also attended by O'Shannon's transactional attorney, Michael Gender, to see if they could work something out with Paramount. At this meeting, it was agreed that O'Shannon would continue to work for Paramount but in a different capacity. Instead of being the Executive Producer/Showrunner on *Frasier* for the last and final season (2003/2004), O'Shannon would provide services on *Frasier* as a consultant, going in two days a week. The remainder of the time, (3 days a week), he would develop new projects for Paramount. O'Shannon was paid the same $3 million dollar guaranteed annual salary for his work as a Consulting Producer and Developer as he would have been paid had he continued to work as one of the Executive Producers/ Showrunners on *Frasier*.

11. Loder explained that O'Shannon received the same salary, a "guaranteed" $3 million dollars, because that was his value in the marketplace, despite this being, as he characterized it, a "new" deal negotiated with Paramount for development and consulting services. Additionally, he testified that he felt Paramount had breached their initial 2 year deal with O'Shannon for Executive Producer/ Showrunner services by bringing in two

other showrunners. However, despite this breach, he didn't want to burn any bridges with Paramount and didn't want O'Shannon to never be able to work for Paramount again and this is why he negotiated a new deal for O'Shannon.

12. O'Shannon testified that his duties as a Consulting Producer two days a week on *Frasier* were to simply come up with ideas or to try and improve ideas that other people had come up with for new episodes. As for the other three days when he was developing for Paramount, his job was to meet with talent coming in, new actors or actresses or people that Paramount had under deals, and try to think of new series ideas.

13. O'Shannon also testified that there was no signed final agreement for the Executive Producer / Showrunner jobs just as there wasn't any signed agreement for the Consulting Producer and Development jobs. Additionally, he testified that The Gersh Agency was paid 10% of his $3 million dollar earnings for the 2003/2004 final season of *Frasier* in which he provided consulting producer services two days a week along with development services provided to Paramount three days a week. However, Loder testified that The Gersh Agency only received $264,000 in commissions because $36,000 had been "mistakenly" paid to William Morris. Loder explained that he felt it was a "mistake" for William Morris to have received the $36,000 because this was a "new" deal, his deal, The Gersh Agency's deal, and that there was no correlation or connection to the other deal. Loder also testified that a letter dated May 29, 2003 to Garry Hart, President of Paramount Network Television from Mr. Gendler, stating: "As discussed, once we reach agreement on the development terms, all the agreed upon terms will be incorporated into a new agreement and the existing agreement between Paramount and

Atomic Television, Inc. will be terminated," supported his understanding that a "new" deal had been negotiated with Paramount. Moreover, Loder testified that he felt O'Shannon had hired him again in April, 2003 to negotiate a new deal for him with Paramount and that he had extensive negotiations with Paramount in closing the new deal for O'Shannon.

14. O'Shannon testified that as far as he was concerned, he paid 10% of his earnings to The Gersh Agency for his consulting producer and development deal and therefore met his obligations. Moreover, he felt that the $36,000 that was "mistakenly" paid to William Morris is something that William Morris and The Gersh Agency should work out. O'Shannon also testified that The Gersh Agency had agreed to indemnify him in the event it was determined that he owed William Morris (and not The Gersh Agency) commissions on his entire $3 million dollar earnings on the consulting and development services he provided for Paramount.

15. William Morris has sued O'Shannon in the Los Angeles Superior Court for the remainder of the commissions it contends are due on the last season of *Frasier*. In response to the lawsuit, O'Shannon asserted the Talent Agencies Act as a defense. Consequently, on February 4, 2005, William Morris filed a *Petition for Certification of Controversy Within the Meaning of Labor Code Section 1700.44 Or, Alternatively, Petition to Determine Controversy* with the Labor Commissioner.

16. On April 3, 2006, we issued an order denying the Motion for Certification of Lack of Controversy within the meaning of Labor Code §1700.44 and set this matter for hearing.

ISSUES

1. Whether Respondent is an "artist" as defined in Labor Code §1700.4(b).
2. Whether the 2-Day Creative Consulting on *Frasier* and 3-Day Development Deal with Paramount constitutes a "new" deal negotiated by The Gersh Agency or is simply a "replacement" or "substitution" of the original 2-Year Executive Producer/Showrunner deal negotiated by William Morris.
3. Whether the petition is time barred by the statute of limitations.

LEGAL ANALYSIS

William Morris is a California licensed talent agency. For the reasons set forth below, we find that O'Shannon is an "artist" within the meaning of Labor Code §1700.4(b). Labor Code §1700.44(a) provides that all controversies arising under the Talent Agencies Act shall be referred to the Labor Commissioner. We will address the issues presented in this hearing in the order stated above.

1. O'Shannon is an "artist" within the meaning of Labor Code §1700.4(b)

William Morris argues that O'Shannon is not an artist within the meaning of Labor Code §1700.4(b) because he provided services as an Executive Producer on Frasier. As such, William Morris argues that historically, the Labor Commissioner has taken the position that the definition of "artist" does not include producers.

Labor Code §1700.4(b) defines "artists" to include, "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."

While we have ruled that some producers are not considered artists within the meaning of the Talent Agencies Act, ("Act"), we have historically held that a person is an "artist" under the Act if he or she renders professional services in motion picture, theatrical radio, television and other entertainment enterprises that are "creative" in nature. In deciding whether a "producer" comes under the Act, we have explained that:

> "[a]lthough Labor Code §1700.4(b) does not expressly list producers 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' to those individuals who perform creative services in connection with an entertainment enterprise. Without such limitation, virtually every "person rendering professional services" connected with an entertainment project—including the production company's accountants, lawyers and studio teachers...would fall within the definition of 'artists.' We do not believe that the Legislature intended such a radically far reaching result... [I]n order to qualify as an 'artist,' there must be some showing that producer's services are artistic or creative in nature, as opposed to services of an exclusively business or managerial nature."

American First Run dba American First Run Studios, Max Keller, Micheline Keller v. OMNI Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier, TAC 32-95.

Applying this test, in *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management; Gary Marsh; Steven Miley; Michael Wagner, ("Bluestein")*, TAC 14-98, we dismissed the petition because there wasn't 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 that,

> "[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 minimum 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 that budget management falls within these parameters."

Blustein, supra, at p. 6. See also, *Hyperion Animation Co., Inc. v. Toltect Artists, Inc.*, TAC 07-99.

O'Shannon testified that his duties as an Executive Producer on *Frasier* were to: get all the writers around the table, read an outline or a first draft of an episode that was coming up and try to make it better. Additionally, he would map out the plot of every episode and worked with the writers as a group and then send the scripts off to be written with individual writers. Afterwards, he and the writers would go see a rehearsal and after the rehearsal, return to the writing table to do rewriting, if necessary. Throughout the week, he would visit the editing room, look at an episode being cut and give recommendations. O'Shannon testified that he had final say on the editing and *creative* responsibilities. <u>He also stressed that he did not have contractual responsibility of the show – that it was not his job to look at contracts for actors or day players that come in, or assemble the extras, or build the sets or anything like that. Those duties fell on the line producer. He was only responsible for the creative decisions of the show</u>.

As a Showrunner, O'Shannon testified that his duties were to oversee all of the writers' writings of every single episode, to figure out what the stories are, the dialogue, where the stories are going to go for the course of the season, to *creatively* weigh in on everything from editing to casting, and to be responsible for every *creative* idea that came up during the course of the season.

Lastly, as a Creative Consultant during the final episode of *Frasier*, O'Shannon's duties consisted of coming up with ideas or to try and improve ideas that other people had come up with for new episodes.

Thus, we find that O'Shannon did not engage in de minimum levels of creativity. Rather, every aspect of his job as an Executive Producer, Showrunner and Creative Consultant, was based on creativity. As such, he is considered an "artist" within the meaning of the Act.

2. The 2-Day Creative Consulting on *Frasier* / 3-Day Development Deal with Paramount is a "replacement," or "substitution" of the original 2-year Executive Producer/Showrunner deal procured directly through the efforts or services of William Morris.

William Morris argues that the 2-Day Creative Consulting on *Frasier* / 3 Day Development Deal with Paramount, (hereinafter, referred to as "consulting/development deal"), is a replacement or substitution of the original 2 Year Executive Producer/ Showrunner deal, (hereinafter, referred to as "*Frasier* deal"). In support of this argument, William Morris asserts that the terms and language in the original agency deal O'Shannon signed with William Morris in 1989 controlled the parties' agency

relationship even after O'Shannon terminated the relationship in early 2003. Further, William Morris argues that the fact that O'Shannon refused to sign any agency contracts after 1996 does not relieve him of his obligations to pay William Morris on jobs procured for him during the term of their relationship since O'Shannon continued to operate under the oral and implied agency agreements, (which terms were essentially the same as those terms contained in the written agreements he had signed), and never took the position that the agreements were unenforceable because they were not in a signed, written document. Relying on the written agency agreements provided to O'Shannon, (which he signed up until 1996), William Morris argues that said agreements made it clear that O'Shannon's commission obligation survived their termination. In support thereof, William Morris relies on the following language contained in the April 19, 1989, (term commencing January 26, 1989), *William Morris Agency General Services Agreement* signed by O'Shannon:

> "I agree to pay you, as and when received by me or by any person, firm or corporation on my behalf, directly or indirectly, or by any person, firm, or corporation owned or controlled by me, directly or indirectly, or in which I now have or hereafter during the term hereof acquire any right, title or interest, directly or indirectly, and you agree to accept, as and for compensation, a sum equal to ten (10%) percent of the gross compensation paid and/or payable, during or after the term hereof, under or by reason of every engagement, employment or contract covered by this agreement, now in existence or made or negotiated during the term hereof, and whether procured by you, me or any third party...You shall be entitled to our said compensation...with respect to any specific aforesaid engagement, employment or contract, for so long as I may continue to be entitled to receive compensation pursuant thereto, including all modifications, additions, options, extensions, renewals, substitutions for, and replacements of such engagements, employment for contracts, directly or indirectly," and

> "For this purpose, any engagement, employment or contract with the same employer, directly or indirectly,...made, entered into or resumed within four months immediately following termination of any prior engagement, employment or contract with such employer, shall be deemed a substitution or replacement of such engagement, employment or contract."

William Morris also relies on Paragraph 6(c) of the same document which provides that after termination, O'Shannon remains obligated to pay William Morris on the employment agreements entered into during the term of its representations, "including all modifications, additions, options, extensions, renewals, substitutions for, and replacements" of such agreements.

Thus, because it procured and negotiated the *Frasier* deal, William Morris contends it was entitled to 10% commissions from the $3 million dollar per year guaranteed salary for both years of the deal even though O'Shannon terminated his relationship with William Morris after the first year of said deal.

In support of its contention that the consulting/development deal is a replacement or substitution of the original *Frasier* deal and not a new deal as O'Shannon argues, William Morris relying on the above quoted language, explains that there was no breach by Paramount of O'Shannon's *Frasier* deal when it brought Lloyd and Keenan in to share the showrunning duties with O'Shannon. After, all, Paramount's *Preliminary Deal Summary* provided that O'Shannon would be an Executive Producer (showrunner) for the 2002/2003 and 2003/2004 seasons. It did not provide that he would be *the only* Executive Producer (showrunner) on the show. Paramount intended O'Shannon to continue working as a showrunner as evidenced by its announcement in the *Variety*

newspaper that Lloyd and Keenan were returning to the show to share showrunner responsibilities with O'Shannon. But, it was O'Shannon who was not willing to continue working as the Executive Producer/Showrunner with Lloyd and Keenan even though he would still be guaranteed $3 million dollars per year. William Morris argues that, at this point, O'Shannon contacted Loder who agreed to represent him again and was able to work out a deal with Paramount whereby O'Shannon continued to receive his $3 million dollar guaranteed salary during the final season of *Frasier* for providing consulting producer services on *Frasier* and development duties for Paramount. William Morris argues that the only reason O'Shannon and Loder are characterizing this as a "new" deal is because Loder understands that unless he terms it a "new" deal, his current agency, The Gersh Agency, would not be entitled to any commissions on a deal that he negotiated for O'Shannon while still at William Morris, unless there were "improvements[3]," which there turned out not to be.

O'Shannon, on the other hand, argues that the consulting/development deal is a "new" deal, independent and unrelated to the original *Frasier* deal that was procured and negotiated by William Morris. In support of this argument, O'Shannon argues that when Paramount brought Lloyd and Keenan in to run *Frasier* with him, Paramount materially breached the *Frasier* deal. This testimony was supported by Loder. Additionally Loder

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[3] "Improvements" were described as follows: For example, if The Gersh Agency were able to renegotiate O'Shannon's salary from $3,000,000 to $4,000,000, The Gersh Agency typically would be entitled to its 10% commission on the $1,000,000 improvement, or $100,000. See P.7 of William Morris' closing brief citing to the Reporter's Transcript 197:6-198:17.

testified that he believed that Paramount was willing to let O'Shannon go if it came to it. O'Shannon also argues that the consulting/development deal is a new deal because O'Shannon's duties were drastically different from his duties under the *Frasier* deal. For instance, under the *Frasier* deal, he was prohibited from engaging in any development activities. Additionally, under the *Frasier* deal, his job was an all consuming, seven day a week job in which he was responsible for every creative decision made on the show. In contrast, under the creative/development deal, he was only required to show up on the *Frasier* set two days per week and think of ideas for new episodes. Lastly, O'Shannon argues that even Paramount viewed the consulting/development deal as a new deal as indicated in a letter from Michael Gender, O'Shannon's transactional lawyer, to Paramount, dated May 29, 2003, wherein he states:

> "As discussed, once we reach agreement on the development terms, all the agreed upon terms will be incorporated into a new agreement and the existing agreement...will be terminated."

Not surprisingly, O'Shannon rejects William Morris' interpretation that the written terms of the agency contracts signed by O'Shannon up until 1996 control the issue of who is entitled to commissions on the consulting/development deal. O'Shannon argues that he and William Morris were not operating under the terms of any written contracts during the 5 ½ year period between 1996 when he stopped signing agency contracts given to him by William Morris and May 2002 when William Morris procured the *Frasier* deal on his behalf. Thus, the parties never came to a "meeting of the minds" that

the terms in the previous written contracts would continue to control especially in light of the fact that O'Shannon refused to sign anymore written contracts after 1996.

While we understand that O'Shannon did not want to be tied down to William Morris and therefore, refused to sign agency agreements after 1996, we don't think this relieves him of his obligations under those contracts which he had been signing or at least receiving for many years with William Morris and which essentially continued from term to term without any material modifications. The evidence presented shows that even though O'Shannon was dodging signing the written contracts, William Morris continued to present him with copies and O'Shannon continued to work under the representation of Loder up until Loder left for The Gersh Agency in early 2003. O'Shannon admitted that he would be obligated to pay a 10% commission to William Morris on any engagements procured on his behalf. And, in fact he did during the period he was represented by William Morris. Payment of 10% of his commissions is a term expressly derived from the written contracts and one which O'Shannon clearly felt controlled despite having signed a written agreement with William Morris after 1996 to pay that amount of commissions. Why then, would he not be bound by the remaining terms? We think it would be undeniably unfair to let O'Shannon pick and chose which terms he felt he wanted to be bound by, especially without having given William Morris any notice as to those terms he felt were not binding. By his silence, O'Shannon acquiesced to the terms that had been in place since 1989 and which continued to be presented to him even after he stopped signing agency agreements in 1996. Thus, we find that the written terms control.

Our holding today is consistent with our previous determinations and with the custom and practice in this industry.

In *Beyeler v. William Morris Agency, Inc.* (2001), TAC 32-00, a case relied on by both William Morris and O'Shannon, we found that the artist, Kevin Beyeler, of the "Kevin & Bean" morning show broadcast on *KROQ*, owed commissions to William Morris despite the parties never having executed the written agency agreements presented to Beyeler by William Morris. It was undisputed that William Morris negotiated a more favorable three year contract for Beyeler with *KROQ*. And, Beyeler paid William Morris 10% commissions on the new contract for the first year and part of the second year but then stopped payments because he felt that William Morris had abandoned him after negotiating the *KROQ* deal. We noted that Beyeler's acceptance of the written agency contracts as well as the "meeting of the minds" required to form a contract were established through Beyeler's conduct. Specifically, he paid 10% commissions on the *KROQ* deal to William Morris for over a year. Thus, we found that an implied oral contract had been formed.

Likewise, in *Stein Agency v. James Tripps-Haith*, (2006), TAC 46-05, (hereinafter, referred to as "Stein"), relying on *Beyeler*, we found that an implied oral contract had been formed despite the fact that the artist, Tripps-Haith, never signed the written agency contract he was presented with by The Stein Agency. We found that despite Tripps-Haith never having signed the written agreement, he was aware of the terms including the standard language reflecting industry custom and providing that commissions encompass all option periods where the initial engagement is procured during the agency

relationship. In making our determination that commissions were due the agency, we also looked at the behavior of the parties. We noted that upon Tripps-Haith's termination of the agency relationship, The Stein Agency made it clear to Tripps-Haith that it expected to continue receiving commissions for any future options. Tripps-Haith did not take issue with this demand but instead, in letters sent to The Stein Agency by his attorney, agreed to pay the future commissions.

O'Shannon argues that the present case is factually distinguishable from *Stein* because of the lapse of time. However, this is not a case where O'Shannon was represented by another talent agency during the period of 1996 through May, 2002. If that were the case, then we would agree that written agreements signed for the period of 1989-1996 would have no bearing on the parties' relationship in 2002. However, that's not the evidence that was presented to us. The evidence presented establishes that William Morris continuously represented O'Shannon from 1989 to 2003. There was no break in the relationship. And, as previously stated, William Morris continued to present O'Shannon with agency agreements during the period of 1996 to 2002. O'Shannon had legal representation during these years and could have objected to any of the terms in the contracts presented to him. The fact that he didn't do so is significant as it can only lead to a conclusion that he understood the terms of the contracts even if he wasn't signing them after 1996. Certainly he understood that he had to pay 10% commissions to William Morris for any work procured on his behalf. It follows then that he understood he was bound to the terms of the previous written and signed contracts.

We note that the terms "substitution" and "replacement" are terms commonly used in the industry. As William Morris points out, they are included in Rider W of the Writers Guild of America Artists' Manager Basic Agreement of 1976, of which we take judicial notice. Thus, our findings today are also consistent with industry practice.

Having determined that the unsigned agency contracts, (which were based on the written signed contracts), control, we now examine the contract language cited by William Morris to determine if the consulting/development deal constituted a "new" contract or was simply a replacement / substitution of the original *Frasier* contract. Specifically, Paragraph 5 of the April 19, 1989, (term commencing January 26, 1989), William Morris Agency General Services Agreement signed by O'Shannon provides in pertinent part:

> "...You shall be entitled to our said compensation...with respect to any specific aforesaid engagement, employment or contract, for so long as I may continue to be entitled to receive compensation pursuant thereto, including all modifications, additions, options, extensions, renewals, substitutions for, and replacements of such engagements, employment for contracts, directly or indirectly," and
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> "For this purpose, any engagement, employment or contract with the same employer, directly or indirectly,...made, entered into or resumed within four months immediately following termination of any prior engagement, employment or contract with such employer, shall be deemed a substitution or replacement of such engagement, employment or contract."

It is undisputed that William Morris procured the *Frasier* deal for O'Shannon. Loder left William Morris in January 2003. Approximately 6 weeks later, O'Shannon testified that he informed Lanny Noveck of William Morris that he did not consider

himself to be a client of William Morris any longer – thus, for the first time, expressing his desire to terminate the agency relationship. In early May, 2003, after O'Shannon discovered that Paramount was bringing back Lloyd and Keenan, he went to Loder at The Gersh Agency and asked him to represent him again. Soon thereafter, Loder met with Garry Hart in New York and worked out different working terms for O'Shannon whereby he would retain his $3 million dollar guaranteed salary. O'Shannon's termination of William Morris and Loder's subsequent negotiation of the consulting/development deal appear to have taken place within 4 months. Thus, even if O'Shannon characterizes the *Frasier* deal as terminating when Paramount decided to bring Lloyd and Keenan on to share showrunning duties, per the language quoted above and contained in the General Services Agreement, the consulting/development deal is deemed a substitution or replacement of the original *Frasier* deal and not a "new" deal.

We also find that the consulting/development deal is a substitution or replacement of the original *Frasier* deal and not a new deal for reasons unrelated to the language in the General Services Agreement. Most significantly, we are persuaded that O'Shannon was guaranteed a $3 million dollar salary regardless of whether he performed services on the second year of the contract or not. The fact that the consulting/development deal was also for the same $3 million dollar salary supports the fact that Paramount was trying to maintain the key terms of the original *Frasier* deal, (i.e. compensation), while also saving face by keeping O'Shannon on as a consultant on the last season of *Frasier* and offering him development duties. We would be persuaded that the consulting / development deal was a new deal if, for example, the deal was for different compensation, had no

connection to the *Frasier* sitcom, was just for development or was for a period longer than one year. However, the fact that Paramount kept O'Shannon on the *Frasier* show as a consultant, for the remainder of the two year term and for the same guaranteed compensation, leads us to believe that the consulting/development deal was a replacement or substitution deal.

We note that Title 8, *California Code of Regulations*, Section 12002 provides:

> "A talent agency shall be entitled to receive a fee, commission or compensation under an oral contract between a talent agency and an artist as long as the particular employment for which such fee, commission or compensation is sought to be charged shall have been procured directly through the efforts or services of such talent agency and shall have been confirmed in writing within 72 hours thereafter. Said confirmation may be denied within a reasonable time by the other party. However, the fact that no written confirmation was ever sent shall not be, in the of itself, sufficient to validate the oral contract."

Thus, because we find that William Morris procured the original *Frasier* deal and because we find that the consulting/development deal is a replacement or substitution of the *Frasier* deal, and not a new deal, it follows that the conditions of Title 8, *California Code of Regulations*, Section 12002 are met.

3. The Petition is Timely.

Labor Code §1700.44(c) provides: "No action or proceeding shall be brought pursuant to this chapter with respect to any violation which is alleged to have occurred more than one year prior to the commencement of the action or proceeding." William Morris argues that this section is expressly limited to claims brought with respect to a "violation" of the Act. It argues that O'Shannon's failure to pay commissions does not

violate the Act, but rather the oral agency agreement between the parties. As such, a two-year statute of limitations found at Code of Civil Procedure §339 applies. In its closing brief, William Morris attaches the legislative history and also argues that the one year statute was added to the Act to ameliorate the concerns of personal managers acting as unlicensed talent agents in violation of the Act. Furthermore, it argues that the Legislative History does not reflect any intent to have the one-year statute override longer statutes of limitations applicable to common law claims between talent agencies and artists.

O'Shannon, however, argues that the one year statute of limitations found at Labor Code §1700.44, which is part of Article 3 of the Act, entitled "Operation and Management" applies. O'Shannon explains that the Chapter covers a broad range of topics including the proper form of talent agency contracts, the governance of the trust funds, working conditions, and record-keeping, and it imposes prohibitions against the division of commissions. Consequently, the issues in dispute here implicate the same considerations and issues touched on in that Chapter of the Act: the nature, extent, terms (including the intent of the parties) and the enforceability of the contracts. As such, O'Shannon argues that because the claims herein fall within the penumbra of matters governed by the Act, the claims at issue address arguable violations of the Act.

We have analyzed the Legislative History provided by William Morris and unfortunately, do not find it very telling with regard to why a one year statute of limitations was added. We do agree that it was added as part of a compromise between managers and talent agents, however we do not find anything in the Legislative History

that the reflects that the drafters did not mean for it to override longer statute of limitations applicable to a breach of contract action, as William Morris suggests. Moreover, we note that the Talent Agencies Act was enacted in 1978. We know of at least two published cases prior to 1978 that dealt with the Labor Commissioner's jurisdiction to hear purely contract claims arising under the Act, (which at that time was referred to as the "Artists' Managers Act"): *Garson v. Division of Labor Law Enforcement* (1948) 199 P.2d 288 and *Robinson v. Superior Court* (1950) 35 Cal.2d 379. Thus, the Legislature was well aware of these cases when it enacted the Talent Agencies Act in 1978 and added section (c) to Labor Code §1700.44 in 1982. As such, had the Legislature intended that there be two different statutes of limitations, one for purely contract claims and one for other violations of the Act, we believe the Legislature would have stated so. Furthermore, we interpret the word "violation" found in Labor Code §1700.44(c) broadly to include any rights arising out of contracts which we are charged with approving and regulating. See Labor Code §1700.23. Therefore, we agree with O'Shannon that the statute of limitations applicable in this action is a one year statute of limitations.

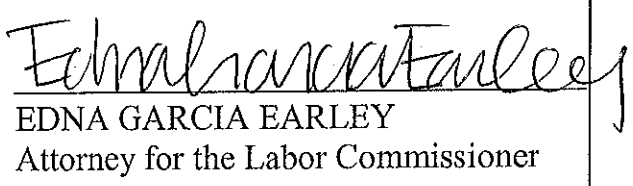
However, we find that even under the one year statute of limitations set forth in Labor Code §1700.44(c), William Morris' petition was timely filed. Having ruled that O'Shannon is bound by the agency agreements presented to him by William Morris, (both signed and unsigned), we agree that O'Shannon's commission obligations on the original *Frasier* deal continued after termination of the agency agreement with William

Morris.[4] The evidence presented established that O'Shannon's $3 million dollar guaranteed salary was to be paid in equal weekly installments over the term of June 1, 2003 through May 14, 2004. Thus, the last commission payment would have been due on or around May 14, 2004. This petition was filed on February 4, 2005, within the one year statute of limitations. Therefore, the petition was timely filed.

ORDER

For all the reasons set forth above, IT IS HEREBY ORDERED that William Morris is entitled to $264,000 in unpaid commissions plus interest at the legal rate of 10% from O'Shannon.

Dated: September 26, 2007



EDNA GARCIA EARLEY
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: 9/27/07

ANGELA BRADSTREET
State Labor Commissioner

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[4] Thus, as William Morris argues, the agreement is executory in nature and under California law, the limitations period on a claim based on such an executory contract does not commence upon the initial breach of contract, but rather when the time for complete performance has arrived. *Lambert v. Commonwealth Land Title Insurance Co.* (1991) 53 Cal.3d 1072, 1078; *McMillan Process Co. v. Brown* (1939) 33 Cal.App.2d 279, 286; *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 745-46.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angeles, CA 90013.

On **September 28, 2007**, I served the following document described as:

DETERMINATION OF CONTROVERSY

on the interested parties in this action [06-05] by placing

[ ] the originals

[x] a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael B. Garfinkel, Esq.
Venable LLP
2049 Century Park East, Suite 2100
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Robert Barta, Esq.
Dennis Snyderman, Esq.
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FAX (310) 478-1439

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

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

[x] BY FACSIMILE I sent a copy of said document by fax machine for instantaneous transmittal via telephone line to the offices of the addressee(s) listed above using the following telephone number(s): **as indicated above.**

Executed on September 28, 2007, at Los Angeles, California. I declare under penalty of perjury the foregoing is true and correct.

Lici Morales-Garcia