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8 **BEFORE THE LABOR COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**
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11 EZRA PATCHETT, an Individual,
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13 Petitioner,
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14 vs.
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16 DLM LA, INC.; DLMUS, LLC,
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Respondents.
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CASE NO. TAC 47367

**DETERMINATION OF
CONTROVERSY**

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

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

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1 **FINDINGS OF FACT**

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

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

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

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

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

21 6. With this filing, Petitioner seeks a determination from the Labor
22 Commissioner finding Respondents acted as unlicensed talent agents under the Talent
23 Agencies Act ("Act") by procuring work for Petitioner in violation of the Act.
24 Accordingly, Petitioner seeks recovery of \$68,409.50 in proceeds collected by
25 Respondents for work he performed on the Parker Media and Full Beauty engagements.
26 Petitioner also seeks disgorgement of all other commissions collected by Respondents for
27 work he performed.
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1 7. Petitioner testified his work consists of taking still photographs only. He
2 considers himself an “artist” under the Act because his work, amongst other things,
3 requires creativity in considering factors such as lighting, positioning of subjects, and
4 selection of photographs.

5 **LEGAL ANALYSIS**

6 **I. SCOPE OF THE TALENT AGENCIES ACT**

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

14 A. **“Artist” Within the Meaning of the Act**

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

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17 Actors and actresses rendering services on the legitimate stage
18 and in the production of motion pictures, radio artists, musical
19 artists, musical organizations, directors of legitimate stage,
20 motion picture and radio productions, musical directors,
21 writers, cinematographers, composers, lyricists, arrangers,
models, and other artists and persons rendering professional
services in motion picture, theatrical, radio, television and other
entertainment enterprises.

22 Historically, we have held a person is an “artist” as defined in Labor Code
23 §1700.4(b) if he or she renders professional services in motion picture, theatrical, radio,
24 television and other entertainment enterprises “creative” in nature. For example, in
25 *American First Run dba American First Run Studios, et al. v. OMNI Entertainment*
26 *Group, A Corporation, et al.*, (TAC 32-95), (hereinafter, referred to as “*American Run*”),
27 we discussed the meaning of the term “artists” under the Act. In deciding whether a
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1 “producer” came under this definition we explained:

2 [a]lthough Labor Code §1700.4(b) does not expressly list
3 producers or production companies as a category within the
4 definition of ‘artists,’ the broadly worded definition includes
5 ‘other artists and persons rendering professional services
6 in...television and other entertainment enterprises.’ Despite
7 this seemingly open ended formulation, we believe the
8 Legislature intended to limit the term ‘artists’ to those
9 individuals who perform creative services in connection with
10 an entertainment enterprise. Without such a limitation, virtually
11 every “person rendering professional services” connected with
12 an entertainment project---including the production company’s
13 accountant’s lawyers or studio teachers—would fall within the
14 definition of ‘artists.’ We do not believe the Legislature
15 intended such a radically far reaching result...[I]n order to
16 qualify as an ‘artist’ there must be some showing that the
17 producer’s services are artistic or creative in nature as opposed
18 to services of an exclusively business or managerial nature.

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

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

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

26 *Bluestein* at p. 6. See also, *Hyperion Animation Co., Inc. v. Toltec Artists, Inc.*, (TAC 07-
27 99).

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

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

10 **1. Petitioner is not an “artist” under the Act because his work**
11 **consists exclusively of taking still photographs for marketing**
12 **and/or promotion of products.**

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

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

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

14 In *Michael Grecco, et al. v. Blur Photo, et al.*, (TAC 23297) we held Petitioner, a
15 famous photographer, not an artist within the Act on projects he performed “still”
16 photography only. *Id* at pp. 12-15. This work included photographing an NFL football star
17 for a Campbell’s Chunky Soup commercial; photographing film director Martin Scorsese
18 for a DIRECTV television commercial; photographing comedian Howie Mendel for a
19 public service announcement; and photographing actor and comedian Kathy Griffin for
20 Bravo TV. *Id* at pp. 3-7. We found Petitioner not an ‘artist’ under the Act on these
21 projects because his work consisted of taking still photographs used for promotional and
22 marketing purposes only. *Id* at p. 15. In this case, Petitioner testified his work on the
23 Parker Media and Full Beauty projects, and in fact, his work generally, consists of taking
24 still photographs for the promotion and/or marketing primarily of clothing. Thus, like the
25 Petitioner in *Grecco*, Petitioner is not an “artist” within the meaning of Labor Code §
26 1700.4(b).

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

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

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

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

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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

1 **PROOF OF SERVICE**

2
3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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

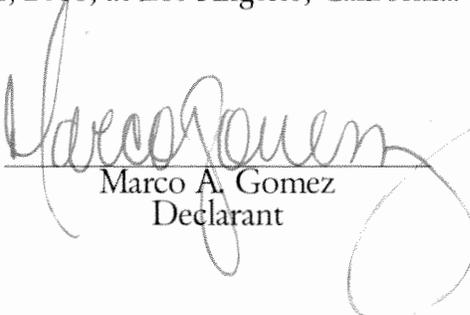
8 **DETERMINATION OF CONTROVERSY**

9 on the persons below as follows:

<p>10 LAUREN GREENE GERARD FOX LAW 1880 CENTURY PARK EAST #1410 LOS ANGELES, CA 90067</p>	<p>ANDREW PATTERSON, CEO DLMLA, INC. 1880 CENTURY PARK EAST, # 200 LOS ANGELES, CA 90067</p>
<p>11 EZRA PATCHET </p>	<p>12 DLMUS, INC. C/O GERBER & CO., INC. 1880 CENTURY PARK EAST, # 200 LOS ANGELES, CA 90067</p>

- 13
- 14
- 15 **(BY OVERNIGHT DELIVERY)** I enclosed the documents in an envelope or package provided
16 by an overnight delivery carrier and addressed to the persons at the addressee(s) set forth above.
17 I placed the envelope or package for collection and overnight delivery at an office or a regularly
18 utilized drop box of the overnight delivery carrier.
- 19 **(BY E-MAIL SERVICE)** I caused such document(s) to be delivered electronically via e-
20 mail to the e-mail address of the addressee(s) listed above.
- 21 **(STATE)** I declare under penalty of perjury, under the laws of the State of
22 California that the above is true and correct.

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

24 

25 **Marco A. Gomez**
26 **Declarant**