

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
2 Department of Industrial Relations  
3 State of California  
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9  
10 BEFORE THE LABOR COMMISSIONER  
11 OF THE STATE OF CALIFORNIA  
12

13 DANNY NIXON, ) Case No. TAC 30-00  
14 )  
15 Petitioners, )  
16 vs. ) DETERMINATION OF  
17 ) CONTROVERSY  
18 )  
19 )  
20 MO SWANG PRODUCTIONS, INC., )  
21 JSJ PRODUCTIONS, INC.; )  
22 MONTEL JORDAN; and KRISTEN HUDSON, )  
23 Respondents. )  
24 )  
25 )  
26 )

27 INTRODUCTION

28 The above-captioned petition was filed on September 18,  
2000, by DANNY NIXON (hereinafter Petitioner or "NIXON"), alleging  
that MO SWANG PRODUCTIONS, INC., JSJ PRODUCTIONS, INC., MONTEL  
JORDAN and KRISTEN JORDAN, (hereinafter Respondent or "MO SWANG"),  
acted as a talent agency by procuring work with third parties for  
the petitioner without possessing the required California talent  
agency license pursuant to Labor Code §1700.5<sup>1</sup>. Petitioner seeks  
a determination voiding *ab initio* various agreements entered into

<sup>1</sup> All statutory citations will refer to the California Labor Code unless  
otherwise specified.

1 between the parties which enabled the petitioner to produce songs  
2 for clients of the respondent's music production company.

3 Respondent filed his answer on December 22, 2000,  
4 asserting various affirmative defenses including, unclean hands,  
5 waiver, estoppel, and the petition was filed untimely and therefore  
6 should be barred by the statute of limitations set forth at Labor  
7 Code §1700.44(c). Respondent filed a pre-hearing brief on April  
8 24, 2001, alleging the parties relationship was that of an  
9 employer/employee and consequently, the Labor Commissioner is  
10 without jurisdiction to hear the matter. A hearing was scheduled  
11 before the undersigned attorney, specially designated by the Labor  
12 Commissioner to hear this matter. The hearing commenced on April  
13 27, 2001, in Los Angeles, California. Petitioner was represented  
14 by Hayes F. Michel and William M. Brockschmidt of Proskauer Rose  
15 LLP; respondent was represented by Allen B. Grodsky and Eric M.  
16 George of Browne & Woods LLP. Due consideration having been given  
17 to the testimony, documentary evidence, arguments and briefs  
18 presented, the Labor Commissioner adopts the following  
19 Determination of Controversy.

20  
21 FINDINGS OF FACT

22  
23 1. Danny Nixon is a talented musician who began playing  
24 keyboards for the popular Montel Jordan band at an early age. Soon  
25 thereafter, Jordan established Mo Swang Productions, Inc., which  
26 offered producing, songwriting and mastering services for musical  
27 entertainers, record companies and other music producers. The  
28 respondent describes MO Swang as an all-encompassing production

1 house. To provide a full array of production services to its  
2 clients, Mo Swang hired a stable of musical "producers" to work for  
3 his production business. The "producers" would render their  
4 talents by mixing tracks, writing lyrics and/or melodies and  
5 utilizing any combination of production skills, ultimately intended  
6 to create a "master recording" to be sold to the purchaser or  
7 client of Mo Swang. Sometimes the purchaser would seek a song or  
8 track from any one of Mo Swang's stable of producers who could  
9 provide the requested material, and other times, the purchaser  
10 would request a specific producer of Mo Swang to arrange the  
11 recording. Nixon, eager to learn these various skills, hung around  
12 the studio initially programming the drum machine and eventually  
13 absorbing and practicing the skills necessary to create and produce  
14 "master" recordings. Nixon displayed a tremendous aptitude for  
15 producing and was eventually offered an "Exclusive Producer  
16 Agreement" (hereinafter Agreement) by Jordan.

17 2. In June of 1998, the parties entered into the  
18 Agreement whereby Mo Swang would "present producer [Nixon] to  
19 record companies and artists to negotiate for purposes of obtaining  
20 furnishing agreements."<sup>2</sup> In a nutshell, if the client approved of  
21 the producer or his work, the client would enter into a "furnishing  
22 Agreement" with Mo Swang. The producer would be contracted to  
23 create a recording or "master", and upon final approval of the  
24 product, the client would market the song for distribution. Mo  
25 Swang would typically receive an advance and if the recording

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26  
27 <sup>2</sup> The "furnishing agreement" was a contract between Mo Swang and the  
28 purchaser or "distributor" of the recording which provided the terms, conditions,  
legal obligations and rights of the "producer", "distributor" and Mo Swang.

1 landed on a CD, Mo Swang and the producer would receive royalties  
2 from the distribution of the master recording pursuant to the terms  
3 of the furnishing agreement.

4           3.       The "Exclusive Recording Agreement" between the  
5 parties established Nixon's responsibilities and provided for his  
6 compensation under the contract. Nixon was guaranteed a minimum  
7 salary, including a publishing advance and a minimum advance which  
8 was paid in equal monthly installments. Nixon was guaranteed  
9 \$50,000.00 for his first year as a Mo Swang Producer. If Nixon  
10 produced a master recording, mixed or remixed a previously recorded  
11 master he would be paid a predetermined amount which would be  
12 credited against his \$50,000.00 advance. Similarly, if the master  
13 commercially sold, thirty percent (30%) of the royalties collected  
14 from the master by Mo Swang pursuant to the furnishing agreement  
15 would also be credited against Nixon's minimum advances. If the  
16 amounts paid to Nixon in royalties and/or masters exceeded Nixon's  
17 advances, that additional compensation would be paid directly to  
18 Nixon. In short, Nixon was paid a draw against commissions.

19           4.       Throughout 1998, the petitioner created a limited  
20 number of masters and received minimal royalties to be credited  
21 against his advances. As Nixon developed his skills as a producer,  
22 he soon emerged as a talented artist and quickly his specific  
23 talents were in demand by outside purchasers. In June of 1999,  
24 Nixon renegotiated his "exclusive producer agreement" and received  
25 an increase in advances. In addition, the royalties credited  
26 against his advances were increased to fifty percent (50%) of the  
27 total royalties collected by Mo Swang for Nixon's work sold to

1 major labels.

2           5. Nixon soon began producing tracks for various third  
3 party clients of Mo Swang, including, Tamia, Boyz to Men, Coco,  
4 Maxi Preist, Kelly Price and Darius Rucker among others. Several  
5 artists insisted that Nixon specifically produce the tracks and  
6 requested that Nixon specifically be a party to the furnishing  
7 agreements in conjunction with Mo Swang. This request was  
8 ostensibly to assure the purchaser that Nixon was aware of all of  
9 the material terms. Throughout 1999, Nixon's masters were  
10 routinely purchased and consequently, Mo Swang reaped the benefits  
11 through advances and royalties. Nixon became increasingly  
12 discontented with his compensation structure when he realized the  
13 substantial amounts of money Mo Swang collected stemming directly  
14 from Nixon's creative efforts.

15           6. In response to Nixon's complaint, the respondent  
16 argued that it was Mo Swang who covered all of the production costs  
17 associated with producing, and moreover it is Montel Jordan's name  
18 that attracts the clients. Nixon is simply an ungrateful Mo Swang  
19 "in-house" employee<sup>3</sup> who has reaped substantial benefits by way of  
20 a regularly increased salary and unlimited training and experience.

21           7. In early 2000, as Nixon's unhappiness with his  
22 compensation scheme continued, he again sought additional monies.  
23 The dispute between the parties elevated and in March of 2000, a  
24 settlement agreement was executed. The settlement agreement  
25 provided for, *inter alia*, an increase in the percentage [now 80%]

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26           <sup>3</sup> Section 17 of the "Exclusive Producer Agreement" provides: "Nothing  
27 contained in the Agreement shall be deemed to create the relationship of  
28 employer-employee or any other relationship other than that of independent  
contractor between Producer and Company..."

1 of total royalties collected by Mo Swang used to offset Nixon's  
2 advances for specific furnishing agreements. The settlement  
3 agreement did not alleviate the problems between the parties and in  
4 September of 2000, the instant petition was filed with the Labor  
5 Commissioner.

6  
7 CONCLUSIONS OF LAW  
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9 1. The sole issue for consideration is whether the  
10 petitioner is an employee of Mo Swang, or conversely, whether the  
11 petitioner is an independent contractor and the respondent has  
12 acted as an unlicensed talent agency seeking to procure employment  
13 for the petitioner with third parties. If it is determined that  
14 Nixon and Mo Swang possess an employee/employer relationship and  
15 not an agency relationship, then the Labor Commissioner is without  
16 jurisdiction to hear this matter.

17 2. The logical conclusion is that Mo Swang was Nixon's  
18 employer and Nixon was not an independent contractor whereby Mo  
19 Swang sought to seek employment opportunities on his behalf.

20 3. The leading California case on the issue of  
21 whether a service provider is an independent contractor or an  
22 employee is Borello & Sons v. Department of Industrial Relations  
23 (1989) 48 Cal.3d 341. In the words of the Borello court, "[t]he  
24 determination of employee or independent contractor status is one  
25 of fact if dependent upon the resolution of disputed evidence or  
26 inferences....If the evidence is undisputed, the question becomes  
27 one of law." Id., at p. 349. The conclusions set forth herein are



1 service is an employee of the principal and not an independent  
2 contractor. "Yellow Cab Cooperative, Inc. v. Workers Compensation  
3 Appeals Bd. (1991) 226 Cal.App.3d 1288, 1295, citing to Borello,  
4 supra, 48 Cal.3d at pp.355-358.

5           6. Here, the principal retains pervasive control over  
6 the operation as a whole, and the petitioner's work is an integral  
7 and necessary element of respondents' production company. All  
8 master recordings are an indistinguishable part of the principal's  
9 production business and without the producer's efforts, Mo Swang's  
10 full service production house would not be that. It is the  
11 producer's services in creating masters that make-up the regular  
12 business of the principle. "This permanent integration of the  
13 workers into the heart of [the] business is a strong indicator that  
14 [the principal] functions as an employer ... The modern tendency is  
15 to find employment when the work being done is an integral part of  
16 the regular business of the employer and when the worker, relative  
17 to the employer, does not furnish an independent business service."  
18 Borello, supra, at p.357.

19           7. Turning to the remaining Borello factors, Mo Swang  
20 provides the customers, the facilities, the studio, equipment, and  
21 all other conceivable tools of the production business. These  
22 facts point very strongly in the direction of an employer-employee  
23 relationship.

24           8. The petitioner does have a meaningful "opportunity  
25 for profit or loss" based on his "managerial skills." Nixon's  
26 ability to earn more or less is primarily dependent on the number  
27 of projects sold and distributed. The creative nature and ultimate  
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1 success of Nixon's work would dictate the amount of compensation he  
2 received.

3           9. Finally, the terms of employment were contained  
4 within the Agreement. The Agreement provided for a one-year term  
5 with three one-year irrevocable options. A four-year contract is  
6 sufficiently permanent to invoke a presumption the parties entered  
7 into an employee/employer relationship. The so-called sharefarmers  
8 found to be employees in Borello had signed agreements to provide  
9 services during a sixty-day harvest season. Despite the seemingly  
10 temporary nature of this arrangement, the court observed that this  
11 seasonal work is permanently integrated into the grower's business,  
12 that many of the same "sharefarmers" return to their positions in  
13 following years, and that "this permanent integration of the  
14 workers into the heart of Borello's business is a strong indicator  
15 that Borello functions as an employer under the Act." Id., at p.  
16 357. Moreover, Nixon entered into an exclusive contract with Mo  
17 Swang and was therefore precluded from conducting producing  
18 services for any other employer or party.

19           10. The contract expressly maintains that the  
20 relationship is that of an independent contractor. Nixon's  
21 testimony was unavailing as to what his intent of the relationship  
22 was, while Mo Swang and their transactional attorney maintained  
23 this provision was inserted at the request of Nixon, who simply  
24 desired to file his own taxes. In Borello, the ostensible intent  
25 of the parties, is treated as one of the least significant factors.  
26 In this respect, this characterization is similar to those reviewed  
27 by the courts in Borello and Yellow Cab, and there is no reason to

1 give this fictional characterization any more weight than did those  
2 courts. "Where the principal offers no real choice of terms, but  
3 imposes a particular characterization of the relationship as a  
4 condition of employment, the workers' acquiescence in that  
5 characterization does not by itself establish a forfeiture of the  
6 [law's] protections." Yellow Cab v. Workers Comp. Appeals Bd.,  
7 supra, 226 Cal.App.3d at pp. 1301-1302. "An employer cannot  
8 change the status of an employee to one of an independent  
9 contractor by illegally requiring him to assume a burden which the  
10 law imposes directly on the employer." Toyota Motor Sales v.  
11 Superior Court (1990) 220 Cal.App.3d 864, 877. While Borello  
12 discussed the statutory protection an employee receives under other  
13 remedial legislation, (i.e., worker's compensation), the factors  
14 and analysis discussed under Borello remain an indispensable tool  
15 in determining the nature of an employment relationship. When  
16 weighing these various factors, it is clear that the relationship  
17 between the parties was that of an employee/employer under  
18 Borello's criteria.

19 11. The petitioner maintains, "[t]his employee versus  
20 independent contractor is the ball game, and petitioner wins it,  
21 based on Respondents' own authority." We disagree. The gravamen  
22 of petitioner's claim is that Mo Swang presented Nixon's artistic  
23 creativity to third parties, in the hopes that they would engage  
24 his services and this activity implicates the Talent Agencies Act.  
25 In support of this proposition, petitioner [and respondent] advance  
26 Rose v. Reilly (1998) TAC 43-97. Rose involved a director who was  
27 hired by a commercial production company to act as the production

1 companies "in-house" commercial director. The director and owner  
2 of the production company created a visual resume which the  
3 director utilized to obtain jobs for the production company. The  
4 hearing Officer in Rose concluded that an employment relationship  
5 did not exist, and the production company indeed procured work for  
6 the director. But he stated, "the question [is one] of fact, and  
7 turns on the details of the arrangement between the parties." Rose,  
8 supra. at pg 5.

9           The primary factors used by the hearing officer in  
10 reaching that conclusion were that the respondent did not  
11 compensate the petitioner for his services in the preparation of  
12 the visual resume. Here, Nixon was compensated for all work done  
13 in preparation for his master recordings. Also in Rose, the  
14 petitioner was not employed on a day-to-day basis, and was not  
15 provided with a regular salary, and instead was only compensated  
16 when a successful bid was accepted by a third party for a project.  
17 Our case is clearly distinguishable in that Nixon was employed  
18 daily. Nixon testified that he worked six days a week and twelve  
19 hours a day. Also, Nixon was guaranteed a monthly salary. The  
20 hearing officer in Rose also indicated that "it seems unlikely  
21 that he [petitioner] would have agreed to an exclusive employment  
22 contract which provided compensation only when, as, and if  
23 respondent was successful in bidding on a project." Rose, supra.  
24 at pg. 5. In our case, it is clear by the terms of the agreement  
25 that Nixon did agree to an exclusive deal, further distinguishing  
Rose.

26           Finally, the hearing officer in Rose added, "[i]t is  
27 certainly possible that a television production company might hire  
28

1 a director as an employee, compensated on a salary or other basis  
2 ... It is then possible that such a production company, could bid  
3 on projects, and complete such projects, without having acted as a  
4 talent agency." Rose, supra. at pg. 4. That is precisely the  
5 scenario here. In short, based upon the testimony of the parties,  
6 applicable case law, and our reading of all past Labor Commissioner  
7 Determinations, we find overwhelming evidence for the conclusion  
8 that Nixon is an employee of Mo Swang rather than an independent  
9 contractor.

10           12. To hold that Mo Swang is subject to the Talent  
11 Agencies Act in this employment situation, would create the  
12 possibility that every employer engaged in production, employing  
13 workers who provide creative services, would run the risk of  
14 violating the Act. Additionally, in those situations, as here,  
15 where an apprentice, artist, employee reaches some arbitrary point,  
16 or achieves a certain commercial success, or is specifically  
17 requested by a third party, the employer must determine when that  
18 occurs and either divest themselves of those employees or face  
19 potential Talent Agency Act litigation. This potentially would  
20 expand the Act beyond reasonable boundaries and create a burden on  
21 legitimate employers that would make compliance with the Act  
22 untenable. As an enforcement agency on the one hand, we must  
23 create standards to effectuate the Act's remedial purpose, and on  
24 the other hand we must establish guidelines that make compliance  
25 an achievable goal. Notably, when a production company hires  
26 creative talent, the facts of that relationship must be carefully  
27 analyzed. The status of the relationship will be a question of  
28 fact that must be addressed on a case-by-case basis. The

1 conclusion drawn here is limited to this specific set of facts.

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ORDER

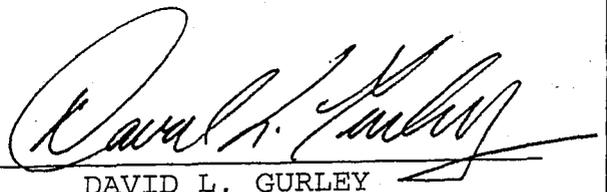
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For the above-stated reasons, IT IS HEREBY ORDERED that  
5 the petition to determine controversy under Labor Code §1700.44  
6 is dismissed due to a lack of controversy within the meaning of  
7 the Talent Agencies Act.

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10 Dated: October 3, 2001



DAVID L. GURLEY  
Attorney for the Labor Commissioner

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ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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18 Dated: 10-3-01



ARTHUR S. LUJAN  
State Labor Commissioner

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