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3 Division of Labor Standards Enforcement
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10
11 **BEFORE THE LABOR COMMISSIONER**
12
13 **OF THE STATE OF CALIFORNIA**

14 WILLIAM MORRIS AGENCY, LLC, a) Case No.: TAC 06-05
15 Delaware Limited Liability Company,)
16) **DETERMINATION OF**
17) **CONTROVERSY**
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1 The above-captioned matter, a Petition to Determine Controversy under Labor
2 Code §1700.44, came on regularly for hearing on February 27, 2007 and concluded on
3 February 28, 2007 in Los Angeles, California, before the undersigned attorney for the
4 Labor Commissioner assigned to hear this case. Petitioner WILLIAM MORRIS
5 AGENCY, LLC, A Delaware Limited Liability Company, appeared and was represented
6 by Michael B. Garfinkel, Esq. of Rintala, Smoot, Jaenicke & Rees LLP who is presently

1 with the firm, Venable, LLP. Respondents DAN O'SHANNON, An Individual and
2 ATOMIC TELEVISION, INC. appeared and were represented by Robert M. Barta, Esq.
3 and W. Dennis Snyderman, Esq. of Rossof, Schiffres & Barta.
4

5 The parties were allowed to submit closing briefs and the matter was taken under
6 submission on July 20, 2007.
7

8 Based on the evidence presented at this hearing and on the other papers on file in
9 this matter, the Labor Commissioner hereby adopts the following decision.
10

11 **FINDINGS OF FACT**

12 1. Petitioner WILLIAM MORRIS AGENCY, LLC, A Delaware Limited
13 Liability Company, (hereinafter, referred to as "William Morris"), is a licensed talent
14 agency.
15

16 2. During the period of June 1, 2002 to April, 2003, Respondent DAN
17 O'SHANNON, An Individual, was an Executive Producer / Showrunner on the television
18 sitcom *Frasier*. During the period of June, 2003 to May, 2004, Respondent DAN
19 O'SHANNON served as a Consulting Producer for *Frasier* and had a development deal
20 with Paramount Network Television, (hereinafter, "Paramount."). Respondent ATOMIC
21 TELEVISION, INC. is Respondent O'Shannon's loan out company.¹ (Respondent Dan
22 O'Shannon, An Individual and Respondent ATOMIC TELEVISION, INC., will
23 hereinafter, be referred to collectively as "O'Shannon.".)
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25

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

1 3. O'Shannon testified that he first signed a William Morris Agency "General
2 Materials and Packages" contract on January 26, 1988 which provided that he would pay
3 William Morris Agency 10% of his earnings in exchange for William Morris finding him
4 work. Subsequent agency agreements were signed with William Morris through 1996.
5 After 1996, William Morris continued to represent O'Shannon and was paid 10% of
6 O'Shannon's gross earnings on employment engagements obtained for O'Shannon.
7 However, O'Shannon testified that although he continued to receive renewal agency
8 agreements from William Morris, beginning in 1996, he stopped signing them so that he
9 would not be "tied down" to William Morris. O'Shannon explained that he didn't have a
10 relationship with anyone at William Morris except for his agent, Gary Loder,
11 (hereinafter, "Loder"), and, while happy with the services Loder was providing to him, he
12 wanted to keep his options open. As such, he found it would be easier to do this if he
13 wasn't contractually bound to William Morris.
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18 4. O'Shannon testified that on May 1, 2002, Loder negotiated and closed
19 a 2 year deal with Paramount for O'Shannon to serve as the Executive Producer /
20 Showrunner of *Frasier*.² The two-year deal covered the 2002/2003 (10th Season) and
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24 ² O'Shannon described a "Showrunner" as being the head writer on a multicamera sitcom. As a Showrunner, his
25 duties were to oversee all of the writers' writings of every single episode, to figure out what the stories are, the
26 dialogue, where the stories are going to go for the course of the season, to creatively weigh in on everything from
27 editing to casting, and to be responsible for every creative idea that came up during the course of the season. As
28 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

1 2003/2004 (11th and final season) seasons at \$125,000.00 per episode. Per O'Shannon,
2 the 2003/2004 season included 24 episodes while the 2003/2004 final season included 25
3 episodes of which he only worked on 23 episodes.
4

5 5. O'Shannon testified that during this time period, he had not signed an
6 agency agreement with William Morris. However, he was of the opinion that William
7 Morris would be entitled to commissions on the *Frasier* 2 year deal since Loder, on
8 behalf of William Morris, negotiated and closed the deal.
9

10 6. In between the two final seasons of *Frasier*, in approximately January,
11 2003, Loder left William Morris and began working for The Gersh Agency. After Loder
12 left William Morris, O'Shannon testified that he received a phone call from Lanny
13 Noveck of William Morris asking him to come in and meet with William Morris to
14 establish some sort of working relationship. In response, O'Shannon informed
15 Mr. Noveck that he did not consider William Morris to be his agency anymore.
16
17 However, he informed Mr. Noveck that it was his intention that William Morris would
18 receive their commission on the two-year deal they had obtained for him and which he
19 was working under at the time.
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22 a group and then send the scripts off to be written with individual writers. Afterwards, he and the writers would go
23 see a rehearsal and after the rehearsal, return to the writing table to do rewriting, if necessary. Throughout the week,
24 he would visit the editing room, look at an episode being cut and give recommendations. O'Shannon testified that
25 he had final say on the editing and creative responsibility. He stressed that he did not have contractual responsibility
26 of the show – that it was not his job to look at contracts for actors or day players that come in, or assemble the
27 extras, or build the sets or anything like that. Those duties fell on the line producer. He was only responsible for the
28 creative decisions of the show.

1 7. After Loder left William Morris and after O’Shannon’s phone
2 conversation with Mr. Noveck, O’Shannon testified that he represented himself for a
3 while.
4

5 8. O’Shannon completed the first year of his two-year contract on *Frasier* and
6 paid William Morris 10% of his earnings, \$300,000. However, in between his first and
7 second years, sometime in May, 2003, he heard a rumor that the show was bringing back
8 Christopher Lloyd, (hereinafter, “Lloyd”) and Joe Keenan, (hereinafter, “Keenan”),
9 former *Frasier* Showrunners, to run the final season of *Frasier* with him. Soon
10 thereafter, O’Shannon confirmed that the rumor was true in a conversation with Peter
11 Casey, one of the creators of *Frasier*. The following day, an article appeared in the
12 *Variety* newspaper announcing that Lloyd and Keenan were returning to *Frasier* for the
13 last season and would be sharing showrunning duties with O’Shannon. O’Shannon
14 testified that later that afternoon, he received a phone call from Lloyd who stated that he
15 hoped O’Shannon could still run the show with him and Keenan. In response,
16 O’Shannon informed Lloyd that it would not be possible to share showrunner
17 responsibilities with him and Keenan. O’Shannon testified that having worked under
18 Lloyd years earlier, he knew they had very different styles of writing, of running the
19 writers’ room and of producing the show. As such, he believed that the idea of them
20 running the show together seemed counterproductive.
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26 9. After his conversation with Lloyd and having just quit the show as
27 Executive Producer and Showrunner, O’Shannon testified that he contacted Loder who
28 was now at The Gersh Agency and set up a lunch meeting with him. At this meeting, he

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

2 Loder agreed to the representation.

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

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23 11. Loder explained that O'Shannon received the same salary, a "guaranteed"
24 \$3 million dollars, because that was his value in the marketplace, despite this being, as he
25 characterized it, a "new" deal negotiated with Paramount for development and consulting
26 services. Additionally, he testified that he felt Paramount had breached their initial 2 year
27 deal with O'Shannon for Executive Producer/ Showrunner services by bringing in two
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1 other showrunners. However, despite this breach, he didn't want to burn any bridges
2 with Paramount and didn't want O'Shannon to never be able to work for Paramount
3 again and this is why he negotiated a new deal for O'Shannon.
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5 12. O'Shannon testified that his duties as a Consulting Producer two days
6 a week on *Frasier* were to simply come up with ideas or to try and improve ideas that
7 other people had come up with for new episodes. As for the other three days when he
8 was developing for Paramount, his job was to meet with talent coming in, new actors or
9 actresses or people that Paramount had under deals, and try to think of new series ideas.
10

11 13. O'Shannon also testified that there was no signed final agreement for the
12 Executive Producer / Showrunner jobs just as there wasn't any signed agreement for the
13 Consulting Producer and Development jobs. Additionally, he testified that The Gersh
14 Agency was paid 10% of his \$3 million dollar earnings for the 2003/2004 final season of
15 *Frasier* in which he provided consulting producer services two days a week along with
16 development services provided to Paramount three days a week. However, Loder
17 testified that The Gersh Agency only received \$264,000 in commissions because \$36,000
18 had been "mistakenly" paid to William Morris. Loder explained that he felt it was a
19 "mistake" for William Morris to have received the \$36,000 because this was a "new"
20 deal, his deal, The Gersh Agency's deal, and that there was no correlation or connection
21 to the other deal. Loder also testified that a letter dated May 29, 2003 to Garry Hart,
22 President of Paramount Network Television from Mr. Gendler, stating: "As discussed,
23 once we reach agreement on the development terms, all the agreed upon terms will be
24 incorporated into a new agreement and the existing agreement between Paramount and
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1 Atomic Television, Inc. will be terminated,” supported his understanding that a “new”
2 deal had been negotiated with Paramount. Moreover, Loder testified that he felt
3 O’Shannon had hired him again in April, 2003 to negotiate a new deal for him with
4 Paramount and that he had extensive negotiations with Paramount in closing the new deal
5 for O’Shannon.
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8 14. O’Shannon testified that as far as he was concerned, he paid 10% of his
9 earnings to The Gersh Agency for his consulting producer and development deal and
10 therefore met his obligations. Moreover, he felt that the \$36,000 that was “mistakenly”
11 paid to William Morris is something that William Morris and The Gersh Agency should
12 work out. O’Shannon also testified that The Gersh Agency had agreed to indemnify him
13 in the event it was determined that he owed William Morris (and not The Gersh Agency)
14 commissions on his entire \$3 million dollar earnings on the consulting and development
15 services he provided for Paramount.
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18 15. William Morris has sued O’Shannon in the Los Angeles Superior Court for
19 the remainder of the commissions it contends are due on the last season of *Frasier*. In
20 response to the lawsuit, O’Shannon asserted the Talent Agencies Act as a defense.
21 Consequently, on February 4, 2005, William Morris filed a *Petition for Certification of*
22 *Controversy Within the Meaning of Labor Code Section 1700.44 Or, Alternatively,*
23 *Petition to Determine Controversy* with the Labor Commissioner.
24
25

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

1 **ISSUES**

- 2 1. Whether Respondent is an “artist” as defined in Labor Code §1700.4(b).
- 3
- 4 2. Whether the 2-Day Creative Consulting on *Frasier* and 3-Day Development
- 5 Deal with Paramount constitutes a “new” deal negotiated by The Gersh
- 6 Agency or is simply a “replacement” or “substitution” of the original 2-Year
- 7 Executive Producer/Showrunner deal negotiated by William Morris.
- 8
- 9 3. Whether the petition is time barred by the statute of limitations.
- 10

11 **LEGAL ANALYSIS**

12 William Morris is a California licensed talent agency. For the reasons set forth

13 below, we find that O’Shannon is an “artist” within the meaning of Labor Code

14 §1700.4(b). Labor Code §1700.44(a) provides that all controversies arising under the

15 Talent Agencies Act shall be referred to the Labor Commissioner. We will address the

16 issues presented in this hearing in the order stated above.

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19 **1. O’Shannon is an “artist” within the meaning of Labor Code §1700.4(b)**

20 William Morris argues that O’Shannon is not an artist within the meaning of

21 Labor Code §1700.4(b) because he provided services as an Executive Producer on

22 *Frasier*. As such, William Morris argues that historically, the Labor Commissioner has

23 taken the position that the definition of “artist” does not include producers.

24

25 Labor Code §1700.4(b) defines “artists” to include, “actors and actresses

26 rendering services on the legitimate stage and in the production of motion pictures, radio

27 artists, musical artists, musical organizations, directors of legitimate stage, motion picture

28

1 and radio productions, musical directors, writers, cinematographers, composers, lyricists,
2 arrangers, models, and other artists and persons rendering professional services in motion
3 picture, theatrical, radio, television and other entertainment enterprises.”

4
5 While we have ruled that some producers are not considered artists within the
6 meaning of the Talent Agencies Act, (“Act”), we have historically held that a person is an
7 “artist” under the Act if he or she renders professional services in motion picture,
8 theatrical radio, television and other entertainment enterprises that are “creative” in
9 nature. In deciding whether a “producer” comes under the Act, we have explained that:
10

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

23 *American First Run dba American First Run Studios, Max Keller, Micheline Keller v.*

24 *OMNI Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier, TAC 32-95.*

25
26 Applying this test, in *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts*
27 *Management; Gary Marsh; Steven Miley; Michael Wagner, (“Bluestein”), TAC 14-98,*

28 we dismissed the petition because there wasn’t a significant showing that the producer’s

1 services were creative in nature as opposed to services of an exclusively managerial or
2 business nature. In reaching this conclusion, we explained that,

3
4 “[o]ccasionally assisting in shot location or stepping in as a
5 second director as described by petitioner, does not rise to
6 the creative level required of an ‘artist’ as intended by the
7 drafters. Virtually all line producers or production managers
8 engage in de minimum levels of creativity. There must be
9 more than incidental creative input. The individual must be
10 primarily engaged in or make a significant showing of a creative
11 contribution to the production to be afforded the protection of
12 the Act. We do not feel that budget management falls within
13 these parameters.”

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

16 O’Shannon testified that his duties as an Executive Producer on *Frasier* were to:
17 get all the writers around the table, read an outline or a first draft of an episode that was
18 coming up and try to make it better. Additionally, he would map out the plot of every
19 episode and worked with the writers as a group and then send the scripts off to be written
20 with individual writers. Afterwards, he and the writers would go see a rehearsal and after
21 the rehearsal, return to the writing table to do rewriting, if necessary. Throughout the
22 week, he would visit the editing room, look at an episode being cut and give
23 recommendations. O’Shannon testified that he had final say on the editing and *creative*
24 responsibilities. He also stressed that he did not have contractual responsibility of the
25 show – that it was not his job to look at contracts for actors or day players that come in,
26 or assemble the extras, or build the sets or anything like that. Those duties fell on the line
27 producer. He was only responsible for the creative decisions of the show.
28

1 As a Showrunner, O'Shannon testified that his duties were to oversee all of the
2 writers' writings of every single episode, to figure out what the stories are, the dialogue,
3 where the stories are going to go for the course of the season, to *creatively* weigh in on
4 everything from editing to casting, and to be responsible for every *creative* idea that came
5 up during the course of the season.
6

7
8 Lastly, as a Creative Consultant during the final episode of *Frasier*, O'Shannon's
9 duties consisted of coming up with ideas or to try and improve ideas that other people had
10 come up with for new episodes.
11

12 Thus, we find that O'Shannon did not engage in the minimum levels of creativity.
13 Rather, every aspect of his job as an Executive Producer, Showrunner and Creative
14 Consultant, was based on creativity. As such, he is considered an "artist" within the
15 meaning of the Act.
16

17 **2. The 2-Day Creative Consulting on *Frasier* / 3-Day Development Deal**
18 **with Paramount is a "replacement," or "substitution" of the original 2-year**
19 **Executive Producer/Showrunner deal procured directly through the efforts or**
20 **services of William Morris.**
21

22 William Morris argues that the 2-Day Creative Consulting on *Frasier* / 3 Day
23 Development Deal with Paramount, (hereinafter, referred to as "consulting/development
24 deal"), is a replacement or substitution of the original 2 Year Executive Producer/
25 Showrunner deal, (hereinafter, referred to as "*Frasier* deal"). In support of this
26 argument, William Morris asserts that the terms and language in the original agency deal
27 O'Shannon signed with William Morris in 1989 controlled the parties' agency
28

1 relationship even after O'Shannon terminated the relationship in early 2003. Further,
2 William Morris argues that the fact that O'Shannon refused to sign any agency contracts
3 after 1996 does not relieve him of his obligations to pay William Morris on jobs procured
4 for him during the term of their relationship since O'Shannon continued to operate under
5 the oral and implied agency agreements, (which terms were essentially the same as those
6 terms contained in the written agreements he had signed), and never took the position that
7 the agreements were unenforceable because they were not in a signed, written document.
8 Relying on the written agency agreements provided to O'Shannon, (which he signed up
9 until 1996), William Morris argues that said agreements made it clear that O'Shannon's
10 commission obligation survived their termination. In support thereof, William Morris
11 relies on the following language contained in the April 19, 1989, (term commencing
12 January 26, 1989), *William Morris Agency General Services Agreement* signed by
13 O'Shannon:
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18 "I agree to pay you, as and when received by me or by any
19 person, firm or corporation on my behalf, directly or indirectly,
20 or by any person, firm, or corporation owned or controlled by me,
21 directly or indirectly, or in which I now have or hereafter during
22 the term hereof acquire any right, title or interest, directly or
23 indirectly, and you agree to accept, as and for compensation, a
24 sum equal to ten (10%) percent of the gross compensation paid
25 and/or payable, during or after the term hereof, under or by reason
26 of every engagement, employment or contract covered by this
27 agreement, now in existence or made or negotiated during the term
28 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

1
2 “For this purpose, any engagement, employment or contract with
3 the same employer, directly or indirectly, . . . made, entered into or
4 resumed within four months immediately following termination of
5 any prior engagement, employment or contract with such employer,
6 shall be deemed a substitution or replacement of such engagement,
7 employment or contract.”

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

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

17
18 In support of its contention that the consulting/development deal is a replacement
19 or substitution of the original *Frasier* deal and not a new deal as O’Shannon argues,
20 William Morris relying on the above quoted language, explains that there was no breach
21 by Paramount of O’Shannon’s *Frasier* deal when it brought Lloyd and Keenan in to share
22 the showrunning duties with O’Shannon. After, all, Paramount’s *Preliminary Deal*
23 *Summary* provided that O’Shannon would be an Executive Producer (showrunner) for the
24 2002/2003 and 2003/2004 seasons. It did not provide that he would be *the only*
25 Executive Producer (showrunner) on the show. Paramount intended O’Shannon to
26 continue working as a showrunner as evidenced by its announcement in the *Variety*
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28

1 newspaper that Lloyd and Keenan were returning to the show to share showrunner
2 responsibilities with O'Shannon. But, it was O'Shannon who was not willing to continue
3 working as the Executive Producer/Showrunner with Lloyd and Keenan even though he
4 would still be guaranteed \$3 million dollars per year. William Morris argues that, at this
5 point, O'Shannon contacted Loder who agreed to represent him again and was able to
6 work out a deal with Paramount whereby O'Shannon continued to receive his \$3 million
7 dollar guaranteed salary during the final season of *Frasier* for providing consulting
8 producer services on *Frasier* and development duties for Paramount. William Morris
9 argues that the only reason O'Shannon and Loder are characterizing this as a "new" deal
10 is because Loder understands that unless he terms it a "new" deal, his current agency,
11 The Gersh Agency, would not be entitled to any commissions on a deal that he negotiated
12 for O'Shannon while still at William Morris, unless there were "improvements³," which
13 there turned out not to be.

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18 O'Shannon, on the other hand, argues that the consulting/development deal is a
19 "new" deal, independent and unrelated to the original *Frasier* deal that was procured and
20 negotiated by William Morris. In support of this argument, O'Shannon argues that when
21 Paramount brought Lloyd and Keenan in to run *Frasier* with him, Paramount materially
22 breached the *Frasier* deal. This testimony was supported by Loder. Additionally Loder
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24

25
26 ³ "Improvements" were described as follows: For example, if The Gersh Agency were able to renegotiate
27 O'Shannon's salary from \$3,000,000 to \$4,000,000, The Gersh Agency typically would be entitled to its 10%
28 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.

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

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

19 Not surprisingly, O'Shannon rejects William Morris' interpretation that the written
20 terms of the agency contracts signed by O'Shannon up until 1996 control the issue of
21 who is entitled to commissions on the consulting/development deal. O'Shannon argues
22 that he and William Morris were not operating under the terms of any written contracts
23 during the 5 ½ year period between 1996 when he stopped signing agency contracts
24 given to him by William Morris and May 2002 when William Morris procured the
25 *Frasier* deal on his behalf. Thus, the parties never came to a "meeting of the minds" that
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1 the terms in the previous written contracts would continue to control especially in light of
2 the fact that O'Shannon refused to sign anymore written contracts after 1996.

3
4 While we understand that O'Shannon did not want to be tied down to William
5 Morris and therefore, refused to sign agency agreements after 1996, we don't think this
6 relieves him of his obligations under those contracts which he had been signing or at least
7 receiving for many years with William Morris and which essentially continued from term
8 to term without any material modifications. The evidence presented shows that even
9 though O'Shannon was dodging signing the written contracts, William Morris continued
10 to present him with copies and O'Shannon continued to work under the representation of
11 Loder up until Loder left for The Gersh Agency in early 2003. O'Shannon admitted that
12 he would be obligated to pay a 10% commission to William Morris on any engagements
13 procured on his behalf. And, in fact he did during the period he was represented by
14 William Morris. Payment of 10% of his commissions is a term expressly derived from
15 the written contracts and one which O'Shannon clearly felt controlled despite having
16 signed a written agreement with William Morris after 1996 to pay that amount of
17 commissions. Why then, would he not be bound by the remaining terms? We think it
18 would be undeniably unfair to let O'Shannon pick and chose which terms he felt he
19 wanted to be bound by, especially without having given William Morris any notice as to
20 those terms he felt were not binding. By his silence, O'Shannon acquiesced to the terms
21 that had been in place since 1989 and which continued to be presented to him even after
22 he stopped signing agency agreements in 1996. Thus, we find that the written terms
23 control.
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1 Our holding today is consistent with our previous determinations and with the
2 custom and practice in this industry.

3
4 In *Beyeler v. William Morris Agency, Inc.* (2001), TAC 32-00, a case relied on by
5 both William Morris and O’Shannon, we found that the artist, Kevin Beyeler, of the
6 “Kevin & Bean” morning show broadcast on *KROQ*, owed commissions to William
7 Morris despite the parties never having executed the written agency agreements presented
8 to Beyeler by William Morris. It was undisputed that William Morris negotiated a more
9 favorable three year contract for Beyeler with *KROQ*. And, Beyeler paid William Morris
10 10% commissions on the new contract for the first year and part of the second year but
11 then stopped payments because he felt that William Morris had abandoned him after
12 negotiating the *KROQ* deal. We noted that Beyeler’s acceptance of the written agency
13 contracts as well as the “meeting of the minds” required to form a contract were
14 established through Beyeler’s conduct. Specifically, he paid 10% commissions on the
15 *KROQ* deal to William Morris for over a year. Thus, we found that an implied oral
16 contract had been formed.

17
18 Likewise, in *Stein Agency v. James Tripps-Haith*, (2006), TAC 46-05, (hereinafter,
19 referred to as “Stein”), relying on *Beyeler*, we found that an implied oral contract had
20 been formed despite the fact that the artist, Tripps-Haith, never signed the written agency
21 contract he was presented with by The Stein Agency. We found that despite Tripps-
22 Haith never having signed the written agreement, he was aware of the terms including the
23 standard language reflecting industry custom and providing that commissions encompass
24 all option periods where the initial engagement is procured during the agency
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1 relationship. In making our determination that commissions were due the agency, we
2 also looked at the behavior of the parties. We noted that upon Tripps-Haith's termination
3 of the agency relationship, The Stein Agency made it clear to Tripps-Haith that it
4 expected to continue receiving commissions for any future options. Tripps-Haith did not
5 take issue with this demand but instead, in letters sent to The Stein Agency by his
6 attorney, agreed to pay the future commissions.
7
8

9 O'Shannon argues that the present case is factually distinguishable from *Stein*
10 because of the lapse of time. However, this is not a case where O'Shannon was
11 represented by another talent agency during the period of 1996 through May, 2002. If
12 that were the case, then we would agree that written agreements signed for the period of
13 1989-1996 would have no bearing on the parties' relationship in 2002. However, that's
14 not the evidence that was presented to us. The evidence presented establishes that
15 William Morris continuously represented O'Shannon from 1989 to 2003. There was no
16 break in the relationship. And, as previously stated, William Morris continued to present
17 O'Shannon with agency agreements during the period of 1996 to 2002. O'Shannon had
18 legal representation during these years and could have objected to any of the terms in the
19 contracts presented to him. The fact that he didn't do so is significant as it can only lead
20 to a conclusion that he understood the terms of the contracts even if he wasn't signing
21 them after 1996. Certainly he understood that he had to pay 10% commissions to
22 William Morris for any work procured on his behalf. It follows then that he understood
23 he was bound to the terms of the previous written and signed contracts.
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1 We note that the terms “substitution” and “replacement” are terms commonly used
2 in the industry. As William Morris points out, they are included in Rider W of the
3 Writers Guild of America Artists’ Manager Basic Agreement of 1976, of which we take
4 judicial notice. Thus, our findings today are also consistent with industry practice.
5

6 Having determined that the unsigned agency contracts, (which were based
7 on the written signed contracts), control, we now examine the contract language cited by
8 William Morris to determine if the consulting/development deal constituted a “new”
9 contract or was simply a replacement / substitution of the original *Frasier* contract.
10 Specifically, Paragraph 5 of the April 19, 1989, (term commencing January 26, 1989),
11 William Morris Agency General Services Agreement signed by O’Shannon provides in
12 pertinent part:
13
14

15 “...You shall be entitled to our said compensation...with respect
16 to any specific aforesaid engagement, employment or contract, for
17 so long as I may continue to be entitled to receive compensation
18 pursuant thereto, including all modifications, additions, options,
19 extensions, renewals, substitutions for, and replacements of such
20 engagements, employment for contracts, directly or indirectly,”
21 and

22 “For this purpose, any engagement, employment or contract with
23 the same employer, directly or indirectly,...made, entered into or
24 resumed within four months immediately following termination of
25 any prior engagement, employment or contract with such employer,
26 shall be deemed a substitution or replacement of such engagement,
27 employment or contract.”
28

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

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

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16
17 We also find that the consulting/development deal is a substitution or replacement
18 of the original *Frasier* deal and not a new deal for reasons unrelated to the language in
19 the General Services Agreement. Most significantly, we are persuaded that O’Shannon
20 was guaranteed a \$3 million dollar salary regardless of whether he performed services on
21 the second year of the contract or not. The fact that the consulting/development deal was
22 also for the same \$3 million dollar salary supports the fact that Paramount was trying to
23 maintain the key terms of the original *Frasier* deal, (i.e. compensation), while also saving
24 face by keeping O’Shannon on as a consultant on the last season of *Frasier* and offering
25 him development duties. We would be persuaded that the consulting / development deal
26 was a new deal if, for example, the deal was for different compensation, had no
27
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1 connection to the *Frasier* sitcom, was just for development or was for a period longer
2 than one year. However, the fact that Paramount kept O’Shannon on the *Frasier* show
3 as a consultant, for the remainder of the two year term and for the same guaranteed
4 compensation, leads us to believe that the consulting/development deal was a
5 replacement or substitution deal.
6

7
8 We note that Title 8, *California Code of Regulations*, Section 12002 provides:

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

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

23
24 **3. The Petition is Timely.**

25 Labor Code §1700.44(c) provides: “No action or proceeding shall be brought
26 pursuant to this chapter with respect to any violation which is alleged to have occurred
27 more than one year prior to the commencement of the action or proceeding.” William
28 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

1 violate the Act, but rather the oral agency agreement between the parties. As such, a two-
2 year statute of limitations found at Code of Civil Procedure §339 applies. In its closing
3 brief, William Morris attaches the legislative history and also argues that the one year
4 statute was added to the Act to ameliorate the concerns of personal managers acting as
5 unlicensed talent agents in violation of the Act. Furthermore, it argues that the
6 Legislative History does not reflect any intent to have the one-year statute override longer
7 statutes of limitations applicable to common law claims between talent agencies and
8 artists.
9
10

11
12 O'Shannon, however, argues that the one year statute of limitations found at Labor
13 Code §1700.44, which is part of Article 3 of the Act, entitled "Operation and
14 Management" applies. O'Shannon explains that the Chapter covers a broad range of
15 topics including the proper form of talent agency contracts, the governance of the trust
16 funds, working conditions, and record-keeping, and it imposes prohibitions against the
17 division of commissions. Consequently, the issues in dispute here implicate the same
18 considerations and issues touched on in that Chapter of the Act: the nature, extent, terms
19 (including the intent of the parties) and the enforceability of the contracts. As such,
20 O'Shannon argues that because the claims herein fall within the penumbra of matters
21 governed by the Act, the claims at issue address arguable violations of the Act.
22
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25 We have analyzed the Legislative History provided by William Morris and
26 unfortunately, do not find it very telling with regard to why a one year statute of
27 limitations was added. We do agree that it was added as part of a compromise between
28 managers and talent agents, however we do not find anything in the Legislative History

1 that the reflects that the drafters did not mean for it to override longer statute of
2 limitations applicable to a breach of contract action, as William Morris suggests.
3
4 Moreover, we note that the Talent Agencies Act was enacted in 1978. We know of at
5 least two published cases prior to 1978 that dealt with the Labor Commissioner's
6 jurisdiction to hear purely contract claims arising under the Act, (which at that time was
7 referred to as the "Artists' Managers Act"): *Garson v. Division of Labor Law*
8 *Enforcement* (1948) 199 P.2d 288 and *Robinson v. Superior Court* (1950) 35 Cal.2d 379.
9
10 Thus, the Legislature was well aware of these cases when it enacted the Talent Agencies
11 Act in 1978 and added section (c) to Labor Code §1700.44 in 1982. As such, had the
12 Legislature intended that there be two different statutes of limitations, one for purely
13 contract claims and one for other violations of the Act, we believe the Legislature would
14 have stated so. Furthermore, we interpret the word "violation" found in Labor Code
15 §1700.44(c) broadly to include any rights arising out of contracts which we are charged
16 with approving and regulating. See Labor Code §1700.23. Therefore, we agree with
17 O'Shannon that the statute of limitations applicable in this action is a one year statute of
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21 limitations.

22 However, we find that even under the one year statute of limitations set forth in
23 Labor Code §1700.44(c), William Morris' petition was timely filed. Having ruled that
24 O'Shannon is bound by the agency agreements presented to him by William Morris,
25 (both signed and unsigned), we agree that O'Shannon's commission obligations on the
26 original *Frasier* deal continued after termination of the agency agreement with William
27
28

1 Morris.⁴ The evidence presented established that O'Shannon's \$3 million dollar
2 guaranteed salary was to be paid in equal weekly installments over the term of June 1,
3 2003 through May 14, 2004. Thus, the last commission payment would have been due
4 on or around May 14, 2004. This petition was filed on February 4, 2005, within the one
5 year statute of limitations. Therefore, the petition was timely filed.
6

7
8 **ORDER**

9 For all the reasons set forth above, IT IS HEREBY ORDERED that William
10 Morris is entitled to \$264,000 in unpaid commissions plus interest at the legal rate of
11 10% from O'Shannon.
12

13 Dated: September 26, 2007

14 _____
EDNA GARCIA EARLEY
Attorney for the Labor Commissioner
15

16
17 **ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER**
18

19 Dated:

20 _____
ANGELA BRADSTREET
State Labor Commissioner
21

22
23 _____
24
25 ⁴ Thus, as William Morris argues, the agreement is executory in nature and under California law, the limitations
26 period on a claim based on such an executory contract does not commence upon the initial breach of contract, but
27 rather when the time for complete performance has arrived. *Lambert v. Commonwealth Land Title Insurance Co.*
28 (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.