STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

BETINA GOLDSTEIN, Petitioner, vs. LOWE & CO., INC., a California Corporation; GERALD MORRONE, an individual; and INDIA GENTILE, an individual, Respondents.	**CASE NO. TAC-52776** **DETERMINATION OF CONTROVERSY**

I. INTRODUCTION

This Petition to Determine Controversy, pursuant to Labor Code section 1700.44, was filed on August 11, 2020 by BETINA GOLDSTEIN, an individual (hereinafter "Petitioner"), alleging that LOWE & CO., INC., a California Corporation, GERALD MORRONE, an individual, and INDIA GENTILE, an individual (hereinafter collectively "Respondents") unlawfully acted as a talent agents without a license in violation of Labor Code sections 1700.5 and 1700.23; and, charged "registration fees" to Petitioner within the meaning of Labor Code section 1700.2. Petitioner seeks a determination voiding the management agreement *ab initio* and disgorging Respondents' commissions received under their oral agreement.

On December 18, 2020, a hearing was held via Zoom by the undersigned attorney specially designated by the Labor Commissioner to hear this matter. Petitioner was represented by Jonathan W. Brown, Esq. of LIPSITZ GREEN SCIME CAMBRIA LLP. Respondents filed an

answer and represented themselves in *pro per*. Due consideration having been given to the testimony of all appearing parties, documentary evidence and both oral and written arguments presented, the Labor Commissioner adopts the following determination of controversy.

II. BACKGROUND FACTS

1. Petitioner BETINA GOLDSTEIN creates and promotes fingernail artwork for promotional and marketing purposes, mostly in the social media space. GOLDSTEIN has a large following on Instagram that she developed by featuring fingernail artwork she created as original content to promote her own brand. Since attaining internet fame through featuring her content on Instagram, GOLDSTEIN has monetized her work on social media and had her fingernail artwork featured in various print publications, including but not limited to *Dior Magazine*, *Vogue*, *Maxim*, *Modern Luxury* and *Glamour*. GOLDSTEIN's Instagram account features her original fingernail artwork content. Some of this original content is paid promotion for the purpose of marketing and promoting other brands to GOLDSTEIN's Instagram audience. GOLDSTEIN also does in-person promotional events for the brands she promotes, also featuring that content on her Instagram account as branded content. GOLDSTEIN contends she is a "social media influencer" a term not defined under or contemplated by the Talent Agencies Act ("TAA"). It is undisputed that GOLDSTEIN has been influential in the niche of fingernail art, especially as it relates to the promotion and marketing of high fashion and luxury brands.

2. Respondent LOWE & CO., INC. is a talent agency that holds itself out as an agency for "below the line talent" such as make-up artists, costume designers, finger nail artists, etc. LOWE & CO., INC. is not a licensed talent agency, nor has it ever been. "Below the line talent" is an industry term not included in the TAA definitions.

3. GERALD MORRONE and INDIA GENTILE are individuals who run the LOWE & CO., INC. agency. Neither is a licensed talent agent in California.

4. On July 28, 2017, GOLDSTEIN and LOWE & CO., INC., through MORRONE, entered into an oral agreement, memorialized in several emails between the parties, contemplating LOWE & CO., INC. receiving 15% in commissions from employment they procured for GOLDSTEIN. It is undisputed that LOWE & CO., INC. procured work for

GOLDSTEIN and deducted a 15% commission from the principal amount promised to GOLDSTEIN.

5. It is disputed whether GOLDSTEIN is an "artist" under the TAA.

III. LEGAL ANALYSIS

A. Scope of the Talent Agencies Act.

The California Talent Agencies Act ("TAA") provides the Labor Commissioner with original exclusive jurisdiction over controversies between "artists" and "talent agents." (Lab. Code §1700.44, subd. (a).) Labor Code §1700.4, subdivision (a) defines "talent agency" in pertinent part as a: "person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists... ." If Petitioner does not fall within the definition of "artist", it follows that Respondents could not have acted as a talent agency, which divests the Labor Commissioner of jurisdiction to hear this matter.

Whether Petitioner GOLDSTEIN is an "artist" under the TAA is a threshold issue here. While Petitioner's craft requires creativity and is an art form in the broader sense of the word, it is not work covered under the definition of "artist" under the TAA.

1. The Definition of "Artist" Within the Talent Agencies Act.

Labor Code section 1700.4 defines artist as:

> 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 state, 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.

Although Labor Code section 1700.4, subdivision (b), does not expressly cover "fingernail artists" within the definition of "artist", the broadly worded definition does leave room for interpretation. The statute ends with the phrase, "and other artists and persons rendering professional services in . . . other entertainment enterprises." (Lab. Code §1700.4, subd. (b).) This open-ended phrase indicates the Legislature's anticipation of occupations which may not be expressly listed but warrant protection under the TAA, or industry developments not contemplated at the time of drafting. (*Bluestein v. Production Arts Mgmt.* Case No. TAC 24-98,

p. 4.) At the same time, the Legislature limited the scope of the TAA to regulating the entertainment industry as broadly defined.

Historically, the Labor Commissioner has held a person is an "artist" as defined in Labor Code section 1700.4, subdivision (b), if she renders professional services in motion picture, radio, television and other entertainment enterprises "creative" in nature. As discussed in a 1996 *Certification of Lack of Controversy*, the special hearing officer held: "[d]espite 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 a limitation, virtually every 'person rendering professional services' connected with an entertainment project – would fall within the definition of "artists". We do not believe the Legislature intended such a radically far reaching result." (*American First Run Studios v. Omni Entertainment Group*, Case No. TAC 32-95, pg. 4-5, emphasis added; see also *Bluestein, supra*.)

2. Petitioner is Not an "Artist" Within the Meaning of the Talent Agencies Act.

Throughout the history of the TAA, the definition of 'artist' only included creative performers or the creative forces behind the production whose contributions were an essential and integral element of the entertainment production, (i.e. directors, writers and composers). In the past carve outs have been afforded where an individual's special effects makeup is protected under the TAA where the contributions were as crucial to the production's artistry and success as were the performances of many of the cast members.

More similar here, in *Michael Grecco, et al. v. Blur Photo, et al.*, (TAC 23297), we held that a famous photographer was not an "artist" as defined within the TAA on projects he performed "still" photography only. (*Id* at pp. 12-15.) Grecco's work included photographing a National Football League star for a Campbell's Chunky Soup commercial; photographing film director Martin Scorsese for a DIRECTV television commercial; photographing comedian Howie Mendel for a public service announcement; and photographing actor and comedian Kathy Griffin for Bravo TV. (*Id* at pp. 3-7.) In *Grecco* we found Petitioner was not an 'artist" where he only shot still photos because that work was not contemplated by the TAA. The Labor Commissioner in *Grecco* ruled that:

> While Petitioner Grecco's artistic experience, talent, and creativity inevitably play a role in how he photographs a subject, even a celebrity subject, arguably many of the jobs performed "behind the scenes" require some degree of artistic experience or creativity. But, this does not mean any professional who is creative and artistic in performing their job is a covered "artist" under the Act. For example, the wardrobe stylist who works on Petitioner Grecco's photo shoots is a creative professional. The wardrobe stylist is responsible for selecting clothing and accessories for the artist (celebrity or model) based on the direction or look that the direct or photographer wants for the photoshoot. In selecting the right outfit and look for the shoot, the wardrobe stylist is relying on his or her creativity and artistic sense. Is that stylist then considered an "artists" under the Act? We do not find the legislative intent behind the Act would support a finding that the wardrobe stylist is an "artist." Likewise, the set builders, prop stylists, and make-up artists who are also working on the photo shoot, all use their creativity and talent to perform their various roles. While all of them are artistic and creative in performing their roles, in most cases, they are not considered "artists" within the meaning of the Act.

(*Id* at p. 13.) Similar to in *Grecco*, we do not find the legislative intent behind the Act would support a finding that a fingernail artist is an "artist" under the TAA.

Here, we must draw the line of who is an "artist" under the TAA short of including fingernail artists such as Petitioner. As discussed, Petitioner's work is creative and artistic in nature, but it does not fit within the confines of whom the Legislature intended to protect under the definition of "artist". Similar to *Grecco*, while Petitioner's work is artistic and may involve other artists covered under the Act (ie. models and celebrities), the Legislature did not intend to protect all artistic professionals, just those enumerated and those essential in related entertainment industries. But here the wardrobe stylist, set builders and make-up artists discussed in *Grecco* are more analogous to Petitioner than Grecco himself.

In the *Billy Blanks, Jr., et al. v. Anthony P. Riccio*, (TAC 7163, "*Blanks*") determination and the *Daniel Browning Smith v. Chuck Harris aka Oaky Miller, et al.*, (TAC 53-05, "*Harris*") determination, we held petitioners were "artists" under the TAA because they were the actual performers on an entertainment enterprise (i.e., the infomercial and the sports event), despite that entertainment enterprise having a component of marketing and promotion.

In *Blanks*, we noted that not any person performing on a "Cardioke" video would be considered an "artist" under the TAA and explained that Mr. Blanks was considered an "artist" when performing on his infomercial only because his celebrity coupled with his musical and

exercise experience were being used to market his product. Likewise, in *Harris*, we held that Daniel Browning Smith, a contortionist, was an "artist" under the TAA when he was performing at a sporting event (an entertainment enterprise) to entertain the audience.

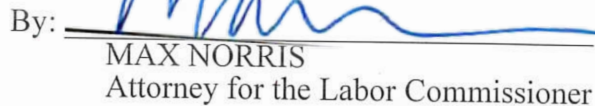
Fingernail artists are not one of the types of artists expressly named under the definition of "artist" in the TAA. Nor is Petitioner the driving creative force behind an entertainment industry named under the TAA. Petitioner is thus not an "artist" protected under the TAA.

ORDER

For the above-state reasons, IT IS HEREBY ORDERED that this petition is denied and dismissed.

Dated: April 28, 2022

Respectfully Submitted,



By: ______________________
MAX NORRIS
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER

Dated: April 28, 2022

By: ______________________
LILIA GARCIA-BROWER
California State Labor Commissioner