

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

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13	AMERICAN FIRST RUN dba AMERICAN	)	No. TAC 32-95
14	FIRST RUN STUDIOS, MAX KELLER,	)	
15	MICHELINE KELLER,	)	
16		)	DETERMINATION OF
17	Petitioners,	)	CONTROVERSY
18		)	
19	vs.	)	
20		)	
21	OMNI ENTERTAINMENT GROUP, a	)	
22	corporation; SHERYL HARDY,	)	
23	STEVEN MAIER,	)	
24		)	
25	Respondents.	)	

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27 The above-captioned controversy came on for a hearing on  
28 specified issues<sup>1</sup> on July 16, 1996 before the undersigned  
attorney, specially designated by the Labor Commissioner to hear  
this matter. Petitioners were represented by Robert G. Leff and  
Laura Tunberg; Respondents were represented by James Curry. Based  
upon the evidence and testimony presented, the Labor Commissioner

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30 <sup>1</sup> The issues to be considered at this hearing were limited to whether  
31 petitioners are "artists", and whether respondents, in connection with  
32 the services they provided to petitioners, functioned as a "talent  
33 agency" within the meaning of Labor Code §1700.4. Despite the limited  
34 scope of this hearing, the resolution of these two foundational issues  
35 permits the Labor Commissioner to fully determine all issues raised by  
36 this petition to determine controversy.

1 adopts the following determination of controversy.

2 FINDINGS OF FACT

3 1. In 1986 or 1987, Max Keller, a film and television series  
4 producer, developed the idea of a television series based on the  
5 story of Tarzan. Max Keller, along with his wife Micheline  
6 Keller, negotiated with the estate of Edgar Rise Burroughs, the  
7 owner of the rights to Tarzan, and obtained a license from the  
8 estate to produce a series. Max and Micheline Keller then  
9 assigned those rights to AMERICAN FIRST RUN dba AMERICAN FIRST RUN  
10 STUDIOS ("AFRS"), a production company owned by the Kellers.

11 2. The Kellers/AFRS needed outside capital in order to begin  
12 producing the Tarzan series. In order to help secure the  
13 necessary financing, on December 12, 1989, the Kellers/AFRS  
14 entered into a written agreement with Sheryl Hardy, the president  
15 of Omni Entertainment Group, Inc. ("OMNI"), under which OMNI was  
16 appointed, for two-month period, as agent for AFRS to locate  
17 European co-producers to invest in the production of the  
18 television series. Under this agreement, OMNI was to receive 5%  
19 of all revenues received by AFRS as a result of OMNI's efforts.

20 3. This agreement was amended by a subsequent written  
21 agreement, executed on February 15, 1990. Under this amended  
22 agreement, Sheryl Hardy and Steve Maier, rather than OMNI, were  
23 designated to serve as the agent for the Kellers/AFRS, and the  
24 term of the agreement was extended for another three months. The  
25 geographic scope of the agent's representation was amended to the  
26 entire "foreign marketplace" and the terms of compensation were  
27 modified as follows: "In lieu of a 5% commission in the 12/12/89  
28 agreement, Agent shall receive 15% of AFRS' gross receipts

1 commission derived from licensing the foreign television and video  
2 series rights to a third party brought to AFRS by agent only if  
3 AFRS receives a minimum net of \$300,000 per episode . . . for the  
4 foreign series rights exclusive of agent's commission and foreign  
5 taxes and withholdings. . ." The duties of Hardy and Maier under  
6 this amendment were no different than those of OMNI under the  
7 initial agreement - - that is, to find investors willing to  
8 provide the Kellers/AFRS with the needed funds to produce the  
9 Tarzan television series. In return for their investment in the  
10 production, foreign co-producers were to obtain foreign television  
11 and video licensing rights, with the Kellers/AFRS retaining  
12 domestic television and video licensing rights.

13 4. The Kellers, in their capacity as producers of television  
14 films and series, have been responsible for coordinating,  
15 supervising and controlling a wide range of creative functions,  
16 including the approval of final scripts, the approval of set  
17 design and locations, the approval of props and wardrobe, the  
18 approval of the filming schedule, the ordering of retakes and  
19 additional scenes, the viewing and approval of dailies, the  
20 director's cut, and the final cut, to name but a few of these  
21 functions. The Kellers/AFRS intended to exercise supervision and  
22 control over these creative functions with respect to the making  
23 of the Tarzan television series.

24 5. Neither OMNI nor Hardy nor Maier have ever been licensed  
25 as talent agents by the State Labor Commissioner.

26 6. Petitioners failed to present any evidence that either  
27 OMNI, Hardy or Maier ever procured, or attempted to procure, or  
28 offered to procure, or promised to procure, any employment for the

1 Kellers/AFRS. Rather, the evidence presented established that  
2 respondents' sole function, pursuant to the parties' agreements,  
3 was to attempt to obtain funding from co-producers to finance  
4 petitioners' independent production of the Tarzan television  
5 series.

6 7. Hardy and Maier have filed a lawsuit against the  
7 Kellers/AFRS seeking damages for breach of the parties' written  
8 agreement, along with various other causes of action. In  
9 response, the Kellers/AFRS filed the instant petition to determine  
10 controversy with the Labor Commissioner, pursuant to Labor Code  
11 §1700.44, seeking a determination that OMNI, Hardy and Maier  
12 violated Labor Code §1700.5 by having functioned as talent agents  
13 without having been licensed, and as a consequence of this alleged  
14 violation of the Talent Agencies Act, that the parties' agreements  
15 are void ab initio and that respondents have no rights thereunder.

16 CONCLUSIONS OF LAW

17 1. Labor Code §1700.5 provides that "no person shall engage  
18 in or carry on the occupation of a talent agency without first  
19 procuring a license therefor from the Labor Commissioner". The  
20 term "talent agency" is defined at Labor Code §1700.04(a) as: "a  
21 person or corporation who engages in the occupation of procuring,  
22 offering, promising, or attempting to procure employment or  
23 engagements for an artist or artists. . . ." The term "artists"  
24 is defined at Labor Code §1700.04(b) to include "persons rendering  
25 professional services in motion picture, theatrical, radio,  
26 television and other entertainment enterprises." The term  
27 "professional services", as used in section 1700.04(b), has been  
28 interpreted by the Labor Commissioner as limited to services that

1 are of a creative or artistic nature.

2 2. Although the evidence establishes that petitioners are  
3 "artists" within the meaning of Labor Code §1700.04(b), the utter  
4 ~~lack of evidence that respondents engaged in any acts of~~  
5 "procuring, offering, promising, or attempting to procure  
6 employment or engagements" for petitioners compels the conclusion  
7 that neither OMNI, nor Hardy, nor Maier, are talent agents within  
8 the meaning of section 1700.04(a). A person acts as a talent  
9 agent, and therefore must be licensed under the Talent Agencies  
10 Act, if that person engages in any act of procuring employment for  
11 an artist. Waisbren v. Peppercorn Productions (1995)  
12 41 Cal.App.4th 246. "Procuring employment" means obtaining  
13 employment for the artist from an employer of the artist's  
14 services. But here, the artists were the self-employed owners of  
15 an independent production company who retained the services of  
16 respondents in order to help them obtain co-producers willing to  
17 invest funds to enable the Kellers/AFRS to independently produce a  
18 television series. Respondents' efforts at fund raising cannot,  
19 by any stretch of the imagination, be construed as the  
20 "procure[ment] of employment or engagements" within the meaning of  
21 the Act. Petitioners' bizarre view that this sort of fund raising  
22 activity on behalf of an independent production company is subject  
23 to regulation under the Talent Agencies Act is unsupported by any  
24 legislative history or judicial interpretation of the Act.  
25 Petitioners' theory of this case would require the licensing of  
26 all individuals who are engaged in raising funds for entertainment  
27 productions, and would dramatically expand the role of the Labor  
28 Commissioner into the arbiter of all business disputes that might

1 arise in the course of financing entertainment deals. These far  
2 reaching consequences go beyond any plausible reading of the Act.

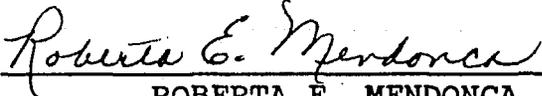
3 3. Respondents did not violate Labor Code §1700.05, in that  
4 their activities on behalf of the Kellers/AFRS did not subject  
5 them to the licensing requirements of the Talent Agencies Act.  
6 Consequently, there are no grounds under the Talent Agencies Act  
7 to declare the parties' agreements void or unenforceable.

8 DATED: 8/29/96

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11 MILES E. LOCKER  
12 Attorney for the Labor Commissioner  
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14 The above Determination is adopted by the Labor Commissioner  
15 in its entirety.

16 DATED: 8/30/96

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19 ROBERTA E. MENDONCA  
20 STATE LABOR COMMISSIONER  
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