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Division of Labor Standards Enforcement
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BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

CHRIS LORD ALGE and THOMAS LORD ALGE, Petitioners, vs. MOIR/MARIE ENTERTAINMENT, LLC AND LISA MARIE, Respondents.	CASE NO. TAC 45-05 **ORDER ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, FOR SUMMARY ADJUDICATION; ORDER ON PETITIONERS' CROSS-MOTION FOR SUMMARY ADJUDICATION**

I.

PROCEDURAL AND FACTUAL BACKGROUND

Petitioners CHRIS LORD ALGE and THOMAS LORD ALGE, (hereinafter, collectively referred to as "Petitioners"), filed a Petition to Determine Controversy with the Labor Commissioner's Office on November 2, 2005. With leave from the Labor Commissioner's office, Respondents MOIR/MARIE ENTERTAINMENT, LLC AND LISA

MARIE, (hereinafter, collectively referred to as "Respondents"), filed the instant motion for summary judgment, or alternatively, for summary adjudication on the grounds that Petitioners, "mixers," and "re-mixers," are not "artists" within the meaning of custom and usage in the music industry or within the meaning of the Act and that their claims, premised on the Act, have no merit. In response, Petitioners filed an opposition and a Cross-Motion for Summary Adjudication on the grounds that Petitioners are "artists" within the meaning of the Talent Agencies Act.

II.

DISCUSSION

Summary judgment is appropriate if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Code of Civil Procedure §437c (c). "A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]...Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action." *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 251 citing to *Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1558.

"Pursuant to Code of Civil Procedure, section 437c (f)(1), '[a] party may move for summary adjudication as to one or more causes of action within an action...if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense...' Subdivision (f)(2) of Code of Civil Procedure section 437c states in relevant part that '[a] motion for summary adjudication...shall proceed in all procedural respects as a motion for summary judgment...'"

Greenfield v. Superior Court (2003) 106 Cal.App.4th 743.[1]

A.

ORDER ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION; ORDER ON PETITIONERS' CROSS-MOTION FOR SUMMARY ADJUDICATION

Respondents' motion for summary judgment, or alternatively, summary adjudication is denied on the grounds that Petitioners are "artists" within the meaning of the Talent Agencies Act, (hereinafter, referred to as the "Act").[2] Petitioners' motion for summary adjudication is granted on the grounds that Petitioners are "artists" within the meaning of the Act.

Historically, we have held that a person is an "artist" as defined in Labor Code §1700.4(b) if he or she renders professional services in motion picture, theatrical radio, television and other entertainment enterprises that are "creative" in nature.

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[1]We note initially that the Labor Commissioner does not customarily accept motions for summary judgment and summary adjudication in Talent Agency controversies. Since allowing the parties in this action to file the instant motion, a determination has been made that such motions are not appropriate for administrative proceedings held under Government Code §§11400-11475, California Code of Regulations, Title 8, Sections 1200-12033 or Labor Code §1700 et seq. Furthermore, just as we are not bound by the Rules of Evidence, we are also not bound by Code of Civil Procedure, section 437c in our determination of the issues raised in the instant motions.

[2]While it is correct, as Petitioners point out, that Respondents bring the motion for summary *judgment* based on Labor Code §1700(b), which does not provide a basis for summary judgment, Respondents explained in their Reply brief that reference to Labor Code §1700(b) rather than Code of Civil Procedure §437c was done in error. In any event, we deny the motion because we find that Petitioners are "artists" within the meaning of the Act.

With regard to Petitioners' contention that Respondents' motion for summary *adjudication* is also procedurally defective, we disagree. Again, as Respondents' have pointed out in their Reply brief, Respondents have raised as their First Affirmative Defense in their Answer, that the Petition fails to state a claim because the Act does not apply to managers of mixers and recording technicians (who are not "artists" under the Act). As explained in this Order, we are denying Respondents' motion for summary adjudication for the same reason we are denying its motion for summary judgment and granting Petitioners' motion for summary adjudication, i.e., because we find that Petitioners are "artists" within the meaning of the Act.

In *American First Run dba American First Run Studios, Max Keller, Micheline Keller v. OMNI Entertainment Group, A Corporation; Sheryl Hardy, Steven Maier* (TAC 32-95), (hereinafter, referred to as "*American Run*"), we discussed the meaning of the term "artists" under the Act. We first noted that under Labor Code §1700.4(b), "artists" is defined as:

> "Actors or actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion pictures, 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."

In deciding whether a "producer" came under this definition we explained that:

> "[a]lthough Labor Code §1700.4(b) does not expressly list producers or production companies as a category within the definition of 'artists,' the broadly worded definition includes 'other artists and persons rendering professional services in ... television and other entertainment enterprises.' Despite 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- - - including the production company's accountant's, lawyers and studio teachers - - would fall within the definition of 'artists.' We do not believe the Legislature intended such a radically far reaching result....**[I]n order to qualify as an 'artist,' there must be some showing that the producer's services are artistic or creative in nature, as opposed to services of an exclusively business or managerial nature**."

American Run at pp. 4-5.

Applying this test, in *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management; Gary Marsh; Steven Miley; Michael Wagner*, TAC 14-98, (hereinafter, referred to as "Bluestein"), we dismissed the petition because there wasn't a significant showing that the producer's services were creative in nature as opposed to services of an exclusively managerial or business nature. In reaching this conclusion, we explained that,

> "[o]ccasionally assisting in shot location or stepping in as a second director as described by petitioner, does not rise to the

> creative level required of an 'artist' as intended by the drafters. Virtually all line producers or production managers engage in de minimis levels of creativity. There must be more than incidental creative input. The individual must be primarily engaged in or make a significant showing of a creative contribution to the production to be afforded the protection of the Act. We do not feel budget management falls within these parameters."

Bluestein at p.6. See also, *Hyperion Animation Co., Inc. v. Toltect Artists, Inc.*, TAC 07-99. Likewise, in *Angela Wells v. Barmas, Inc. dba Fred Segal Agency* we did not find that the make-up artist was considered an "artist" under the Act because her skills did not rise to the level of special effects wizardry which might be afforded protection under the Act. We noted that "throughout the history of the Act, the definition of 'artist' only included above-the-line creative performers, or the creative forces behind the production whose contributions were an essential and integral element of the productions, (i.e., directors, writers and composers)." *Id.* at pp 4-5.

In contrast, petitioners herein are considered "artists" under the Act because the services they provide are primarily "creative." Along with the musical performer, we find that petitioners are part of the creative force behind the songs they "mix" or "re-mix." As Petitioner Chris Lord Alge explained in his declaration,

> "In the recording of a song, each band member performs separately and will perform multiple times so that the mixer can choose among the various different 'takes.' For a typical four minute song, the lead singer may perform and record 10 to 15 'takes' of his vocal performance. The lead guitarists may perform and record a solo 10 or 15 times. The bass player, drummer, background vocalists, keyboard player, synthesizer players and other players may also each record five to 15 versions of their respective performances. Each individual performance by each individual performer is different, sometimes dramatically and sometimes subtly, and is recorded and saved as a separate computer file and sometimes referred to as a 'track' I typically receive from the recording artist 40 to 100 'tracks' or computer files of recorded musical sounds, together with a 'rough mix.'"

A "rough mix" "is an initial mix of some of the computer files into the producer's rough interpretation of the song.

> "After studying the 'rough mix' and the up to 200 tracks I receive from the recording artist, I decide which of the tracks to include" and which not to include...The lead singer may perform the same part of a song with a clear

> voice on one 'take' and may perform it with a 'gravelly' voice on another 'take' and somewhere in between on a third 'take'."

The mixer decides which performance is most appropriate for the overall recording and makes the necessary changes.

> "...in creating the final mix I choose which 'takes' to include and in effect 'build' the recording... In addition to choosing from the many tracks the ones to include in a finished recording, as the mixer, I decide the relative loudness or 'placement' of the selected tracks to each other. For some songs, I may choose to have the vocal prominently featured, while for other songs, I may chose to place the vocal further 'back' in the mix to blend into the ambiance of the instruments, as opposed to standing out from them. I may also choose to change the prominence of the vocal over the duration of the recording. Likewise, I might decide to place a rhythm guitar track 'up front' relative to the sound of the other instruments to create a lively percussive feel, or to place the rhythm guitar track far back in the mix to give the song a 'softer' feel."

Declaration of Chris Lord Alge, pp.1-7. Thus, petitioners are not engaging in de minimis creative input. Every decision they make with respect to recording a song is based on their continuous creativity. A mixer's skill lies in selecting the right combination and making the right modifications and arrangement to create a sound recording that is most likely to be appealing and ultimately result in a hit song or record. *Declaration of Chris Lord Alge*, p.5.

Likewise, "re-mixing" a song to a different version such as a "club mix" also requires creativity. The mixer has to know how to change a regular song into a more "danceable" song. This requires the skill of enhancing, diminishing or altering certain sounds already in the original version. *Declaration of Chris Lord Alge*, p. 6.

Respondents characterize petitioners' duties as being technical rather than creative. However, as Petitioners point out, most mixers, including themselves, employ sound engineers who work under the mixer's direction and supervision and who perform purely technical tasks.

Also, Respondents dismiss the fact that Petitioners are in such high demand by musicians such as Phil Collins, Eric Clapton, Tina Turner, Faith Hill, Fleetwood Mac, U2, Bruce Springstein, and The Cars, to name a few. We, however, think this is telling.

Obviously petitioners are viewed as two of the most creative and skilled "mixers" and "re-mixers" in the music industry. If their services were purely technical, as respondents suggest, then they wouldn't be in such high demand.

Lastly, a great deal of respondents' motion for summary judgment or alternatively, motion for summary adjudication is spent discussing the music industry's narrow interpretation of the term "artists," which would not include specialty "mixers" and "re-mixers" such as petitioners, herein. We note, however, that the Act is a remedial statute. "Statutes such as the Act are designed to correct the abuses that have long been recognized and which have been the subject of both legislative action and judicial decision...Such statues are enacted for the protection of those seeking employment." *Buchwald v. Superior Court* (1967) 254 Cal.App.2d 347- 350-351. "Consequently, the Act should be liberally construed to promote the general object sought to be accomplished; it should 'not [be] construed within the narrow limits of the law.'" *Waisbren v. Peppercorn Productions, Inc. et al.* (1996) 41 Cal.App.4th 246 citing to *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.

We find that petitioners' services as specialty "mixers" and "re-mixers" are overwhelmingly "creative" in nature. Accordingly, petitioners herein, are considered "artists" within the meaning of the Act.

Dated: January 22, 2007

EDNA GARCIA EARLEY
Attorney for the Labor Commissioner

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angeles, CA 90013.

On **January 23, 2007**, I served the following document described as:

ORDER ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, FOR SUMMARY ADJUDICATION; ORDER ON PETITIONERS' CROSS-MOTION FOR SUMMARY ADJUDICATION

on the interested parties in this action [TAC 45-05] by placing

[ ] the originals

[x] a true copy thereof enclosed in a sealed envelope addressed as follows:

Jeffrey Huron
Huron Law Group
1875 Century Park East, Suite 1000
Los Angeles, CA 90067

Peter J. Anderson
Law Offices of Peter J. Anderson
100 Wilshire Boulevard, Suite 2010
Santa Monica, CA 90401

[x] BY MAIL I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day.

[ ] BY FACSIMILE I sent a copy of said document by fax machine for instantaneous transmittal via telephone line to the offices of the addressee(s) listed above using the following telephone number(s):

[ ] BY PERSONAL SERVICE I delivered a copy of said document to the parties set forth above, as follows:

Executed on January 23, 2007, at Los Angeles, California. I declare under penalty of perjury the foregoing is true and correct.

Edna Garcia Earley