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8 **BEFORE THE LABOR COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**
10

11 **VIVER BRASIL DANCE COMPANY,**
a Corporation; and **LINDA YUDIN, an**
12 **Individual,**

13 **Petitioners,**

14 v.

15 **DIVINE RHYTHM PRODUCTIONS,**
and **ELKA SAMUELS SMITH, an**
16 **Individual,**

17 **Respondents.**
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Case No. TAC38423

DETERMINATION OF CONTROVERSY

19 The above-captioned matter, a Petition to Determine Controversy under Labor Code
20 §1700.44, came on regularly for hearing in Los Angeles, California, before the undersigned attorney
21 for the Labor Commissioner assigned to hear this case. Petitioners VIVER BRASIL DANCE
22 COMPANY, a corporation, and LINDA YUDIN, an individual appeared and were represented by
23 Melissa Cahill, Esq.. Respondents DIVINE RHYTHM PRODUCTIONS and ELKA SAMUELS
24 SMITH were represented by Gregory H. Griffith, Esq. At the conclusion of the hearing, the matter
25 was taken under submission.
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27 Based upon the evidence presented at the hearing and on the other papers on file in this
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1 matter, the Labor Commissioner adopts the following decision.

2 **FINDINGS OF FACT**

3 1. Petitioner Viver Brasil Dance Company, (“Viver Brasil”), is a non-profit public
4 charitable corporation organized under the provisions of Internal Revenue Code 501(c)(3). In
5 addition to presenting “contemporary dance theater,” Viver Brasil “promotes awareness of Afro-
6 Brazilian dance and music through performances, residencies, lectures, interactive workshops, an
7 annual cultural immersion travel program to Salvador, Bahia (Brazil) and arts education programs.”
8 (Respondent’s Exhibit 1). The corporation employs a staff of technical and managing directors,
9 lighting designers and an accountant. (Respondent’s Exhibit 2). Petitioner Linda Yudin is the
10 organization’s Artistic Director.

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12 2. Respondent Divine Rhythm Productions (DRP) is a management agency headquartered
13 in the state of New York, and was not, during the time relevant to this action, a licensed talent
14 agency in the state of California. Respondent Elka Samuels Smith is a principal of the agency, and
15 is also not a licensed talent agent in the state of California.

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17 3. On February 14, 2013, Viver Brasil entered into a written agreement which provided
18 that DRP would act as the organization’s manager “to provide . . . advice, guidance, direction and
19 counsel and any other services as Artist may reasonably require to further Artist’s career . . .” for a
20 period of one year, with the option for the parties to extend the term beyond that one-year period. In
21 return, Viver Brasil agreed to pay 20 percent of the organization’s “adjusted yearly earnings
22 receipts.” Petitioner Linda Yudin was not a named party to the agreement, and signed the agreement
23 as Artistic Director of Viver Brasil Dance Company, as a corporation, but not in any individual
24 capacity. (Petitioner’s Exhibit A). On January 8, 2014, Viver Brasil gave notice of its desire to
25 terminate the agreement at the end of the agreement’s one-year term.

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27 4. During the term of the agreement, Viver Brasil paid DRP a total of \$41,366.00 in
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1 commissions. Viver Brasil now seeks to void the contract *ab initio* and to recover the commissions
2 it paid DRP, plus interest, on the grounds DRP was acting as an unlicensed talent agent. The
3 Respondents assert the Petitioners do not meet the legal definition of "artist" under the Talent
4 Agencies Act, and even if they did, recovery of the commissions they paid the Respondents would
5 be barred by the applicable statute of limitations.

6 LEGAL CONCLUSIONS

7 **A. Viver Brasil is not an "artist" under the Talent Agencies Act.**

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9 The Talent Agencies Act provides the Labor Commissioner exercise original jurisdiction
10 over controversies between "artists" and "talent agents". Labor Code §1700.44(a). Labor Code
11 section 1700.4(b) defines "artists" as "actors and actresses rendering services on the legitimate stage
12 and in the production of motion pictures, radio artists, musical artists, musical organizations,
13 directors of legitimate stage, motion picture and radio productions, musical directors, writers,
14 cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering
15 professional services in motion picture, theatrical, radio, television and other entertainment."
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17 Prior decisions of the Labor Commissioner have addressed the application of the term
18 "artist" in relation to controversies presented by producers or production companies. In examining
19 that issue, we have held:

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21 Although Labor Code §1700.4(b) does not expressly list producers or production companies
22 as a category within the definition of 'artist,' the broadly worded definition includes 'other
23 artists and persons rendering professional services in . . .television and other entertainment
24 enterprises.' Despite this seemingly open-ended formulation, we believe the Legislature
25 intended to limit the term 'artists' to those individuals who perform creative services in
26 connection with an entertainment enterprise. Without such limitation, virtually every "person
27 rendering professional services" connected with an entertainment project -- including the
28 production company's accountants, lawyers and studio teachers....would fall within the
definition of 'artists.' We do not believe that the Legislature intended such a radically far-
reaching result.

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

28 *Entertainment Group, Sheryl Hardy, Steven Maier, TAC 1995-32-1. See also James Mark Burnett,*

1 *an Individual; Mark Burnett Productions, Inc.; JMBP, Inc., DJB Inc.; and Jump In, Inc. v. Congrad*
2 *Rioss; and Cloudbreak Entertainment, Inc., TAC 10192.*

3 The Labor Commissioner has further held when the services provided were primarily of a
4 managerial or business nature, as opposed to creative, the party supplying the services does not meet
5 the statutory definition of “artist” under the Talent Agencies Act. In determining to what extent a
6 producer provided the requisite level of creative services, we’ve held:
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8 Virtually all line producers or production managers engage in de minimis levels of creativity.
9 There must be more than incidental creative input. The individual must be primarily engaged
10 in or make a significant showing of a creative contribution to the production to be afforded
the protection of the Act.

11 *Burt Bluestein, aka Burton Ira Bluestein v. Production Arts Management; Gary Marsh, Steven*
12 *Miley, Michael Wagner, TAC 1998-2.*

13 Here, the evidence shows Viver Brasil Dance Company provides services as a non-profit
14 corporation which has as its stated purpose to provide educational and cultural enrichment not only
15 by performance of dance, but in significant part through “residencies, lectures, interactive
16 workshops, an annual cultural immersion travel program to Salvador, Bahia (Brazil) and arts
17 education programs.” (Respondent’s Exhibit 1). The petitioners did not make a showing their
18 services were primarily creative in nature in relation to the several other functions they perform.
19 The organization is more appropriately classified as a charitable, non-profit enterprise than as an
20 “artist” as defined by the Talent Agencies Act.
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22 **B. The Respondents are not “talent agents” under the Talent Agency Act.**

23 It logically follows if the petitioners cannot be properly denominated as “artists,” the
24 respondents cannot be classified as “talent agents.” Labor Code section 1700.4(a) provides, in
25 relevant part: “‘Talent agency’ means a person or corporation who engages in the occupation of
26 procuring, offering, promising, or attempting to procure employment or engagements **for an artist**
27 **or artists...**” (Emphasis supplied). The respondents do not dispute they negotiated engagements for
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1 performances for Viver Brasil Dance Company, but assert they did not do so for Linda Yudin, who
2 is employed by Viver Brasil as its Artistic Director. Under cross-examination, Ms. Yudin
3 acknowledged the respondents did not seek to procure employment for her, but rather they provided
4 their services under the agreement to, and on behalf of, Viver Brasil. The evidence therefore shows
5 respondents performed their services for a business enterprise, rather than on behalf of “artists” as
6 that word is defined under the Talent Agencies Act and prior decisions of the Labor Commissioner.
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8 **C. Recovery of the commissions at issue is barred by the statute of limitations.**

9 Even if the petitioners were to meet the statutory definition of “artists” under the Act, the
10 recovery they seek is barred by the statute of limitations set forth in the Talent Agencies Act. The
11 act provides: “No action or proceeding shall be brought pursuant to this chapter with respect to any
12 violation which is alleged to have occurred more than one year prior to commencement of the action
13 or proceeding.” Labor Code §1700.44(c). The pleadings in this case state the petitioners made a
14 series of payments to the respondents beginning in November of 2013, and the final payment at issue
15 was made on January 21, 2014. Since the Petition in this case was filed on January 25, 2015, all of
16 the payments at issue were made beyond the one-year limitation of actions under the Talent
17 Agencies Act.
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ORDER

For the reasons set forth above, we find that the parties' written agreement is not subject to the Talent Agencies Act. Additionally, the commissions which the petitioners seek to recover in this action are barred by the Act's statute of limitations.

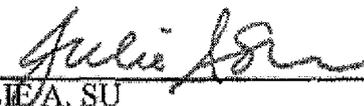
Dated: 11/7/2016

Respectfully submitted,

By: 
MICHAEL N. JACKMAN
Attorney for the Labor Commissioner

ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER.

Dated: 11-7-2016

By: 
JULIE A. SU
California Labor Commissioner

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT**

**CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL**

I, JUDITH A. ROJAS, do hereby certify that I am a resident of or employed in the County of San Diego, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: 7575 Metropolitan Drive, Suite 210, San Diego, CA 92108-4421

On November 8, 2016, I served the within **DETERMINATION OF CONTROVERSY** by placing a true copy thereof in an envelope addressed as follows:

Melissa Cahill, Esq.
11919 Culver Blvd. #205
Los Angeles, CA 90066

Gregory H. Griffith, Esq.
244 5th Ave., Suite G211
New York, NY 10001

and then sealing the envelope and with postage and certified mail fees (if applicable) thereon fully prepaid, depositing it for pickup in this city by:

Federal Express Overnight Mail

Ordinary First Class Mail

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2016, at San Diego, California.



JUDITH A. ROJAS

Case No. TAC-38423

PROOF OF SERVICE