DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 3124142
R THOMAS & CO LLC
ATTN ROBERT J BALUNAS PRESIDENT
759 SW FEDERAL HWY
STUART FL 34994-2914

RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2013-24515L

O R D E R

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated November 28, 2012, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY]* en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt *Lòd* sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 2013**.

Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Shanedra Y. Barnes
DEPUTY CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of August, 2013.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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MSC 347 CALDWELL BUILDING
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PROTEST OF LIABILITY
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RESPONDENT:
State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Altemese Smith,
Bureau Chief,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated November 28, 2012.

After due notice to the parties, a telephone hearing was held on June 27, 2013. The Petitioner, represented by its president, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals in sales constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions, and if so, the effective date of liability, pursuant to Sections 443.036(19); 443.036(21), Florida Statutes.

Findings of Fact:

1. The Petitioner is a Florida limited liability company formed on September 30, 2010. The Petitioner is a single member limited liability company which has elected to be treated as a sole proprietorship for federal income tax purposes. The Petitioner's president is active in the operation of the business.

2. The Petitioner's president has extensive experience in the oil and gas industry and has maintained files on individuals with whom he has had dealings with over the years. The Petitioner was created so that the president could contact the many individuals whose names appear in the files to solicit investments in oil and gas companies. In approximately August 2011 the president determined that there were too many names in the files for the president to personally contact. The Petitioner placed a help wanted advertisement on Craigslist to obtain workers who would contact the individuals in the files to obtain qualified leads for the president to contact. As a result of the Craigslist advertisement the Petitioner hired an individual, Mark, on or about August 22, 2011.

3. The Joined Party is an individual with an employment history in the hospitality industry. The Joined Party also has had experience working as a telephone solicitor. In April 2010 the Joined Party attempted to start a business under the registered fictitious name of Rite Track Consultants to provide credit counseling to clients. The Joined Party's attempt to start that business was not successful. In August 2011 the Joined Party responded to the advertisement on Craigslist and contacted the Petitioner.

4. The Petitioner's president interviewed the Joined Party during the latter part of August 2011 or the early part of September 2011. During the interview the president told the Joined Party that the Petitioner was looking for prospects for oil and gas investment leads, that the hours of work were Monday through Friday from 9 AM until 5 PM, that on some days the Joined Party would be required to work after 5 PM, and that on those late days the Petitioner would provide pizza. The president informed the Joined Party that the rate of pay was $2,000 per month, paid biweekly, and that a 1099 form would be issued to the Joined Party. The Joined Party accepted the offer of work and began work on September 2, 2011.

5. The parties did not enter into any written contract or agreement.

6. Since the Joined Party did not have any experience in the oil and gas industry the Petitioner provided extensive training. The Petitioner provided the Joined Party with a training manual which the Joined Party was required to read. Each morning the president met with Mark and the Joined Party for approximately forty-five minutes to provide on-going training.

7. The Petitioner provided the Joined Party with workspace containing a desk and a telephone. The Petitioner provided all equipment and supplies which were needed to perform the work. All of the Joined Party's work was performed in the Petitioner's office and the Joined Party did not have any expenses in connection with the work.

8. The Joined Party was not allowed to work for a competitor. The Petitioner frowned upon the Joined Party doing anything during the workday other than performing services for the Petitioner.

9. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.

10. After the Joined Party and Mark had worked for the Petitioner for a period of time, the president gave both of them keys to the Petitioner's office.

11. The Joined Party was supervised by the president, by the president's son who also worked in the office, and by Mark. The Joined Party was required to keep the Petitioner informed of the progress of the work.

12. The Petitioner set a quota requiring the Joined Party to obtain at least forty leads per week.

13. The Joined Party was not required to complete a timesheet. He was not required to submit a bill or invoice for the services which he performed.

14. If the Joined Party wanted to take time off from work he was required to request the time off in advance. He was not free to come and go as he pleased. The Joined Party was absent on two days and the Petitioner reduced the amount of pay for those two pay periods.

15. The Petitioner did not withhold any payroll taxes from the Joined Party's pay. The Petitioner did not provide any fringe benefits such as health insurance or paid vacations. The Petitioner did provide the Joined Party with paid holidays and bonuses, such as a Christmas bonus.

16. At the end of 2011 the Petitioner reported the Joined Party's earnings to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.

17. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On June 20, 2012, the Petitioner terminated both the Joined Party and Mark.

18. The Joined Party filed a claim for unemployment compensation benefits, now known as reemployment assistance benefits, effective October 21, 2012. When the Joined Party did not receive credit for his earnings a *Request for Reconsideration of Monetary Determination* was filed and an investigation was issued to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor.

19. On November 28, 2012, the Department of Revenue issued a determination holding that the Joined Party, who performed services in sales, and all workers who performed services for the Petitioner in sales were not independent contractors but were employees of the Petitioner. The determination also held that the Petitioner was liable for payment of unemployment tax retroactive to September 2, 2011. The Petitioner filed a timely protest by mail postmarked December 18, 2012.

Conclusions of Law:

20. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals in sales constitute employment subject to the Florida Reemployment Assistance Program Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

21. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

22. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.

23. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

24. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

25. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.

26. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

27. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

28. The Petitioner's business is to obtain investments for the oil and gas industry. The Joined Party was engaged by the Petitioner to screen contacts provided by the Petitioner to obtain leads for the Petitioner's president to contact in an attempt to obtain the investments. The service performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the business. In fact, it was a part of the business which was previously performed by the Petitioner's president.

29. The Petitioner provided the place of work and all equipment and supplies that were needed to perform the work. The Joined Party was not required to provide anything to perform the work and he did not have any expenses in connection with the work. It was not shown that the Joined Party had any financial risk from services performed.

30. It was not shown that any skill or special knowledge was needed to perform the work. The Joined Party did not have previous experience in the oil and gas industry and any knowledge of the industry was provided to the Joined Party by the Petitioner during the initial and on-going training. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

31. The Joined Party performed services for the Petitioner for a period of approximately ten months. The Joined Party was not engaged for a specific period of time and either party had the right to terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. Both the Joined Party and the other worker were terminated by the Petitioner on the same date. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section

44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

32. The Petitioner determined the days and hours of work and determined the method and rate of pay. The Petitioner paid the Joined Party a flat amount per month but reduced the Joined Party's pay if the Joined Party was absent from work. Thus, the Joined Party was paid by time worked rather than based on production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Reemployment Assistance Program Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash.

33. The Petitioner controlled what work was performed, where it was performed, when it was performed, by whom it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.

34. It is concluded that the services performed for the Petitioner by the Joined Party and other individuals in sales constitute insured employment.

35. Section 443.1215, Florida States, provides:
    (1) Each of the following employing units is an employer subject to this chapter:
        (a) An employing unit that:
            1. In a calendar quarter during the current or preceding calendar year paid wages of at least $1,500 for service in employment; or
            2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or the preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.

36. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

37. The president's testimony reveals that the Petitioner is a single member limited liability company which is not classified as a corporation for federal income tax purposes. Thus, the services performed for the Petitioner by the Petitioner's president do not constitute employment. The Petitioner's first employee was Mark who was hired on August 22, 2011. It has not been shown that the Petitioner had at least one employee during twenty different weeks of 2011. No evidence was submitted concerning Mark's earnings. The evidence establishes that the Petitioner paid the Joined Party $2,000 per month beginning September 2, 2011. Thus, the evidence supports the conclusion that the Petitioner paid wages of at least $1,500 in a calendar quarter and that the

Petitioner has established liability for payment of reemployment assistance contributions effective September 2, 2011.

Recommendation: It is recommended that the determination dated November 28, 2012, be AFFIRMED.

Respectfully submitted on July 2, 2013.

R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envió por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenz jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

Shanedra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:
July 2, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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