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

PETITIONER:
Employer Account No. - 2698098
THE SPOT MARKETING INC
1327 E 7TH AVE # B
TAMPA FL 33605-3607

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

PROTEST OF LIABILITY
DOCKET NO. 2013-24516L

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 January 25, 2013, 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 June, 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 June, 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

By U.S. Mail:

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

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RECOMMENDED ORDER OF SPECIAL DEPUTY

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

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 25, 2013.

After due notice to the parties, a telephone hearing was held on May 6, 2013. The Petitioner, represented by the Petitioner's 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 working as office assistants/managers 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.

Findings of Fact:

1. The Petitioner, The Spot Marketing, Incorporated, is a corporation which was formed in 2005. The Petitioner established liability for payment of unemployment compensation tax effective May 1, 2006.
2. In early 2010 the Joined Party applied for work with the Petitioner's president to do housecleaning at the president's home and to run personal errands for the president. During the interview the Joined Party mentioned that she had some experience doing graphic design. The Petitioner's president hired the Joined Party to do the housekeeping at her home and agreed to pay the Joined Party $10 per hour. The Joined was paid by the Petitioner's president from personal funds rather

than from the business account. The Joined Party believed that she was an independent contractor while performing services as a housekeeper.

3. The Petitioner has a computer program which is used for graphic design. The Joined Party inquired about the program and the Petitioner's president showed the Joined Party how to use the program. Over time the Joined Party acquired additional knowledge concerning how to use the program. In approximately September 2010 the Petitioner began paying the Joined Party to develop websites and to do graphic design on an as needed basis. The Petitioner paid the Joined Party at the rate of $20 per hour as a graphic designer. The Petitioner's president continued to pay the Joined Party $10 per hour for housekeeping. The Joined Party believed that she performed the graphic design work as an independent contractor.

4. In approximately January 2011 the Joined Party's responsibilities began to transition into a position as an assistant for the Petitioner's office on an as needed basis. The Petitioner continued to pay the Joined Party $20 per hour as a graphic designer. Subsequently the Petitioner reduced the pay to $15 per hour. The Joined Party continued to believe that she was performing services as an independent contractor.

5. Effective on or about June 1, 2011, the Petitioner told the Joined Party that the Petitioner would pay the Joined Party $12.50 per hour for twenty hours per week, for a total of $250 a week, for performing the duties of office assistant. The Petitioner agreed to pay the Joined Party a flat rate for website and graphic design in addition to the $250 per week. A that point the Joined Party no longer believed that she was performing services as an independent contractor.

6. The Joined Party's duties included, among other things, designing websites, creating graphic designs, answering the telephone, ordering supplies for the office, picking up the mail, making bank deposits, running errands, empting the trash, providing paperwork to the marketing employees, and keeping track of the work flow. The Joined Party participated in the interview and hiring of a marketing intern and was responsible for overseeing and directing the work performed by a graphic design intern. The Joined Party was required to attend staff meetings. The Petitioner provided the Joined Party with a key to the office and it was the Joined Party's responsibility to open and close the office during the president's absence.

7. The Petitioner provided the Joined Party with business cards listing the Petitioner's name and logo as well as the Joined Party's name. The Petitioner assigned a company email address to the Joined Party.

8. Most of the Joined Party's duties as office assistant were performed at the Petitioner's office using the Petitioner's equipment and supplies. The Joined Party performed some of the graphic design work from her home but also performed some of the design work from the Petitioner's office. The Joined Party met with the Petitioner's clients at the Petitioner's office for graphic design consultations. The Joined Party was required to be in the office whenever the graphics intern was in the office and she was also required to be in the office to prevent any graphic or marketing intern from being in the office alone.

9. Whenever the Joined Party worked from home she was required to be available for contact by phone or email from 9 AM until 6 PM. The Joined Party was required to report the progress of the work to the Petitioner.

10. Whenever the Joined Party had to leave the office to pick up the mail or make deposits she generally used the president's car. On occasion the Joined Party had to pay for parking. The Petitioner reimbursed the Joined Party for her work associated expenses such as parking. The Joined Party did not have any unreimbursed work associated expenses in connection with the work.

11. The Joined Party was required to submit weekly invoices to the Petitioner showing that the Joined Party had worked twenty hours during the week and that she was due to be paid $250 at the rate of $12.50 per hour. The Joined Party usually submitted invoices for several weeks at the same time. The Petitioner never withheld any taxes from the Joined Party's pay. The Petitioner never provided any fringe benefits to the Joined Party such as bonuses, paid vacations, paid holidays, or health insurance. 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.

12. The Joined Party usually worked more that twenty hours each week. The Joined Party never worked less than twenty hours in any week and she grew dissatisfied with her pay.

13. Although the matter was never discussed with the Petitioner the Joined Party believed that she did not have the right to perform services for a competitor of the Petitioner. Even if the Petitioner had allowed the Joined Party to work for a competitor the Joined Party would not have felt comfortable working for a competitor. The Joined Party occasionally did design work for friends. On one or two occasions the Joined Party paid a friend to do research for her in connection with graphic design which she performed for the Petitioner.

14. The Joined Party did not have a financial investment in a business, did not have a business license or occupational license, did not have business liability insurance, and did not advertise or offer services to the general public.

15. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Petitioner discharged the Joined Party in February 2012 after the president's mother informed the president that the Joined Party had made a statement at an anniversary party that the Joined Party felt that her pay was too low.

16. The Joined Party filed an initial claim for unemployment compensation benefits, currently known as reemployment assistance benefits, effective November 4, 2012. When the Joined Party did not receive credit for her earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an independent contractor or as an employee.

17. On January 25, 2013, the Department of Revenue issued a determination holding that the Joined Party and other individuals performing services for the Petitioner as office assistants/managers are the Petitioner's employees retroactive to June 1, 2011. The Petitioner filed a timely protest on February 13, 2013.

Conclusions of Law:

18. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as office assistants/managers 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.

19. 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).

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

26. There were no written agreements or contracts between the Petitioner's president and the Joined Party or between the Petitioner and the Joined Party. The initial verbal agreement was between the president and the Joined Party which specified that the Joined Party would do housekeeping at the president's residence as an independent contractor. The actual relationship between the Petitioner and the Joined Party evolved from the initial verbal agreement, however, the relationship between June 1, 2011, and February 2012, bears no resemblance to the initial agreement.

27. The work performed by the Joined Party from June 2011 until February 2012 was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business. Although the Joined Party performed some work from her home the majority of the work was performed at the Petitioner's office using the Petitioner's equipment and supplies. The Joined Party did not have any unreimbursed expenses in connection with the work and was not at risk of suffering a financial loss from services performed.

28. The Petitioner controlled the method and rate of pay throughout the evolution of the relationship. The method of pay was by time worked rather than based on production or by the job. In the final relationship the Petitioner limited the Joined Party to being paid for twenty hours per week, regardless of the number of hours worked. Although the Joined Party worked on an as needed basis, it was the Petitioner who determined when the Joined Party's services were needed. Thus, the Petitioner was in control of the financial aspects of the relationship. The fact that the Petitioner chose not to withhold 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.

29. The Joined Party performed services for the Petitioner, The Spot Marketing, Incorporated, from approximately September 2010 until February 2012. Either party could 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. 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."

30. The evidence presented in this case reveals that the Petitioner generally controlled what work was performed, where it was performed, and when it was performed. The Joined Party was required to attend staff meetings, to open and close the office during the president's absences, and to supervise certain personnel. 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.

31. Based on the Joined Party's perception, the Joined Party was treated as an employee by the Petitioner beginning on or about June 1, 2011. The determination of the Department of Revenue holding that the services performed by the Joined Party beginning June 1, 2011, constitute insured employment is supported by the evidence presented in this case.

Recommendation: It is recommended that the determination dated January 25, 2013, be AFFIRMED.

Respectfully submitted on May 9, 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:
May 9, 2013

Copies mailed to:
Petitioner
Respondent
Joined Party

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