DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:
Employer Account No. – 3124562
MEGA MODZ PLANET LLC
NATALIA MATSYSHEVSKAYA, OWNER
20233 NE 16TH PL
MIAMI FL 33179-2719

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

PROTEST OF LIABILITY
DOCKET NO. 0023 4434 17-02

ORDER

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 June 19, 2014, 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 7th day of **January, 2015**.

Magnus Hines,
RA Appeals Manager,
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

1.7.15
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 7th day of January, 2015.

Shanedra Y. Barnes
SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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RESPONDENT:
State of Florida

DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines,
RA Appeals Manager,
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 June 19, 2014.

After due notice to the parties, a telephone hearing was held on October 23, 2014.

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 constitute employment pursuant to Sections 443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. Petitioner is a Limited Liability Company which began operating in May 2012. The company is in the business of selling gaming controllers and equipment over the internet. In addition, the Petitioner performed customer service functions by assisting customers with their purchases.

2. The Petitioner does not have any workers it classifies as employees. The Petitioner classified all of the workers as independent contractors.

3. The Joined Party was a Customer Service Representative. He was previously a customer service representative for prior employers. He had never worked for these previous employers as an independent contractor. The co-owner of the Petitioner previously worked for a prior employer at the same time as the Joined Party and knew the Joined Party from that employment. The Joined Party did not advertise his services and had no business of his own.

4. The Petitioner initiated a meeting with the Joined Party and told the Joined Party the terms of the offer of work. The terms included the job duties, pay and hours. There was no written agreement. The Joined Party accepted the offer of work of the Petitioner without any counter offer. There was no discussion of whether the Joined Party would be an independent contractor.

5. The Petitioner trained the Joined Party in the aspects of the business, including customer service, e-mails, phone calls and live-chat. The Petitioner oversaw the content and form of the job duties.

6. The Joined Party performed his services at the Petitioner's place of business. He had an office and used the phone and supplies of the Petitioner. The Joined Party used his own laptop computer only after the Petitioner could not provide one due to economic difficulty on the part of the Petitioner. Although the schedule of the Joined Party varied, he was required to perform his services during the normal business hours of the Petitioner. The Joined Party incurred no expenses and no travel was involved. The Joined Party was supervised on how to answer voicemails, write and send e-mails and the sequence in which to perform his daily duties.

7. The Petitioner told the Joined Party what services were to be performed, when to perform them and how to perform them. The Petitioner supervised the progress of the duties and made corrections if there were any errors on the part of the Joined Party. The Joined Party could not perform services for competitors. The Joined Party could not sub-contract the job or hire and pay others to do the work.

8. The Petitioner gave the Joined Party a Form 1099, and no taxes were withheld from his pay. The Joined Party received no benefits of any type. When the Joined Party did provide services outside of the Petitioner's normal business hours, it was only occasionally and he worked for the Petitioner. The Joined Party was paid by the hour. The Petitioner determined the rate of pay which was $15.00 per hour. The Joined Party did not submit a bill or invoice for his services, and he only submitted a list of the hours he had worked during the pay period.

9. The Petitioner had the right to discipline the Joined Party. The Joined Party had to inform the Petitioner if he was going to be late or absent. The Petitioner set the work schedule of the Joined Party and sent him home if work was slow.

10. The Petitioner and the Joined Party could each terminate the relationship at will and without penalty.

11. The Joined Party filed a claim for benefits on April 29, 2014. When he did not receive credit for the wages he had earned, the Respondent conducted an investigation and entered a determination dated June 19, 2014 holding the Joined Party was an employee. The Petitioner filed a timely protest on July 7, 2014.

Conclusions of Law:

12. The issue in this case, whether customer service services performed for the Petitioner by Joined Party 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.

13. 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).

14. 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.

15. 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.

16. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:

17. 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.

18. 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.

19. 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.

20. 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 cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

21. The relationship of employer and employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and to the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Company, 247 So.2d 461, 463 (Fla. 4th DCA 1971); See also La Grande v. B. & L. Services, Inc., 432 So.2d 1364 (Fla. 1st DCA 1983).

22. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmen's 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."

23. It was shown in this case that the Petitioner exercised sufficient control over the Joined Party as to create an employer-employee relationship. The Petitioner determined what work was performed, when the work was performed, and how the work was performed. The Petitioner trained the Joined Party in all aspects of the business, including customer service, editing the content of e-mails, phone calls and live-chat. The Petitioner oversaw the content and form of the job duties.

24. Although the schedule of the Joined Party varied, he was required to do the work within the normal business hours of the Petitioner. The Joined Party was required to do the work at the place of business of the Petitioner. The Joined Party was not free to accept or decline an assignment of work.

25. The Joined Party did not have the right to hire others to assist him in the performance of the work. The Joined Party was required to personally perform the work. The Joined Party was restricted from performing similar services for a competitor and was not in business for himself at any time.

26. The Petitioner provided the place of work and all equipment, with the exception of a laptop computer, that were needed to perform the work. The Petitioner provided all business supplies.

27. The Parties did not enter into any written agreement or contract and no testimony was provided concerning any verbal agreement that the Joined Party would perform services as an independent

contractor. 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 cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

28. The work performed by the Joined Party did not require any skill or special knowledge. 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).

29. The Petitioner paid the Joined Party based on time rather than based on production or by the job. The Petitioner determined the hours of work, the rate of pay, and the method of pay. The Petitioner controlled the financial aspects of the relationship.

30. The Joined Party performed services for the Petitioner from January 1, 2013 until April 10, 2014, a period of almost one and one-half years. 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."

31. The evidence presented in this case reveals that the services performed for the Petitioner by the Joined Party as a customer service representative did constitute insured employment.

Recommendation: It is recommended that the determination dated June 19, 2014, be AFFIRMED.

Respectfully submitted on December 4, 2014.

William C. Childers, 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

Date Mailed:
December 4, 2014

Copies mailed to:
Petitioner
Respondent
Joined Party

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