Coverall North America, Inc.,
Petitioner,

v.

New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION OF THE COMMISSIONER

OAL DKT. NO LID 07278-2019
AGENCY DKT. NO. DOL 16-004

Issued: September 9, 2024

The appeal of Coverall North America, Inc. (Coverall or petitioner) concerning an unemployment and temporary disability assessment of the New Jersey Department of Labor and Workforce Development (Department or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and State disability benefits fund for the period from 2006 through 2008 ("the audit period") was heard by Administrative Law Judge Kathleen M. Calemmo (ALJ).[1] In her Initial Decision, the ALJ concluded that none of the individuals to whom Coverall had sold commercial cleaning "franchises"[2] and who had been engaged by Coverall during the audit period to perform

[1] The hearing was conducted by Administrative Law Judge Jeffrey R. Wilson. Before Judge Wilson could issue an Initial Decision, he was appointed to the Superior Court. Judge Calemmo was assigned by Deputy Director and Assignment Judge Edward J. Delanoy, with the consent of the parties, to render an Initial Decision based on her review of the hearing transcripts, exhibits and other materials in the record without recalling witnesses.

[2] Coverall sells "franchises" to perform commercial cleaning services. In the start-up phase, Coverall provides new "franchisees" with a training program covering aspects of

commercial cleaning services for Coverall's customers (hereafter, "commercial cleaners" or "franchisees") had been employees of Coverall, but rather, all had been independent contractors. Based on this conclusion, the ALJ ordered the reversal of the Department's determination regarding petitioner's unemployment compensation and State disability benefits fund liability relative to the work performed by the commercial cleaners.

The issue to be decided is whether the commercial cleaners engaged and paid by Coverall during the audit period were employees of Coverall and, therefore, whether Coverall was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to the work performed by those individuals.

Under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., the term "employment" is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(i)(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment and the individual who performed the service an employee subject to the UCL, unless and until it is shown to the satisfaction of the Department that:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> N.J.S.A. 43:21-19(i)(6).

This statutory criteria, commonly referred to as the "ABC test," is written in the conjunctive. Therefore, where a putative employer fails to meet any one of the three criteria listed above with regard to an individual who has performed a service for remuneration, that individual is considered to be an employee and the service performed is considered to be employment subject to the requirements of the UCL; in particular,

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the commercial cleaning business and Coverall cleaning techniques, among other things. Coverall provides new "franchisees" with a "starter kit" of cleaning supplies. Coverall also provides new "franchisees" with an initial customer base. Each month, Coverall directly bills all customers. In turn, each "franchisee" receives payment from Coverall for the services rendered to the customers. Finance charges, royalties and management fees are deducted by Coverall from the monthly payments to the "franchisees."

subject to N.J.S.A. 43:21-7, which requires an employer to make contributions to the unemployment compensation fund and the State disability benefits fund with respect to its employees.

Prior to a hearing, petitioner filed a motion before ALJ Wilson for summary decision. Petitioner asserted that the Department had failed to meet its threshold burden under N.J.S.A. 43:21-19(i) to establish that the commercial cleaners had received remuneration for services or under any contract of hire, written or oral, express or implied. ALJ Wilson granted petitioner's motion for summary decision. However, I rejected the ALJ's grant of summary decision and ordered that the matter be remanded to the ALJ so that he could conduct a full evidentiary hearing to determine whether petitioner was able to satisfy its burden of meeting each one of the three criteria of the ABC test relative to the commercial cleaners Coverall had engaged during the audit period, explaining as follows:

> "In Philadelphia Newspapers, Inc. v. Board of Review, 397 N.J. Super. 309 (App. Div. 2007), the court found that, "[s]imply stated, a **presumption** is created by statute that all services performed by an individual for remuneration constitutes employment for purposes of the UCL unless the services are statutorily excluded, N.J.S.A. 43:21-19(i)(7), or the party that was determined to have acted as an employer proves that the services satisfied the ABC test." (emphasis added). N.J.S.A. 43:21-19(i)(6). Id, at 325. The Department's audit and attached exhibits include Form 1099 Summary Reports for each audit year indicating the existence of Form 1099s provided by Coverall to each of the alleged "franchisees" at issue in this matter. By petitioner's own account, the amounts reported on the Form 1099s represent money Coverall collected for the cleaning services provided pursuant to its "Janitorial Franchise Agreements" with its "franchisees;" that is, payments for cleaning services provided to Coverall's customers, which Coverall then remitted to its "franchisees," minus "royalties." Coverall's "Janitorial Franchise Agreement" (See R-1 pgs. 169 through 213)[3] is replete with references to "services…provided [to the customer] by the Franchisee," "services performed by Franchisee on any Coverall customer account(s)," "payment…received by Coverall from the customer account(s)…serviced by Franchisee," "amounts billed to customers serviced by Franchisee." Thus, I agree with respondent that the payments received by Coverall's alleged "franchisees" did in fact constitute remuneration for services and that those services constituted "employment," as that term is defined at N.J.S.A. 43:21-19(i)(6), unless and until petitioner can establish that each of the three prongs of the ABC test have been met."

[3] Exhibit R-1, pages 169 through 213, is a citation to the exhibit containing the "Janitorial Franchise Agreement" that was presented by respondent in opposition to petitioner's motion for summary decision. The exhibit that contains the "Janitorial Franchise Agreement," within the hearing record currently before me is Exhibit R-5, pages 72-93.

In accordance with my remand decision, ALJ Wilson conducted a full evidentiary hearing. Following that hearing, ALJ Calemmo, based on her review of the hearing transcripts, exhibits and other materials in the record, found that Coverall had met its burden under Prong "A" of the ABC test, explaining:

> "Coverall submitted its Franchise Disclosure Document (Exhibit R-6) as proof that it does not control the cleaning work performed by the franchisees. Franchisees are free to accept or reject offered contracts. Once accepted, the franchisee owns the account, which they are free to service without interference from Coverall or sell the account, if they choose. Franchisees do not submit any information to Coverall regarding the services they perform. The Franchise Disclosure Document outlined the independent nature of the franchisee's business performance, including requirements for maintaining all appropriate insurances to support its cleaning services."

Regarding Prong "B" of the ABC test, the ALJ found Coverall had established that the services performed by the commercial cleaners were both outside the usual course of Coverall's business and were performed outside of all of Coverall's places of business. Specifically, the ALJ found the following:

> "Coverall's business is different from its franchisees. Coverall secures business, which it offers to its franchisees to perform the cleaning service. The locations where the franchisees perform their cleaning services are not owned or controlled by Coverall."

Regarding Prong "C" of the ABC test, the ALJ found the following:

> "In East Bay Drywall, LLC v. Department of Labor and Workforce Development, 251 N.J. 477 (2022), the Supreme Court illustrated the various factors that have been utilized to show [a] worker's independence under prong C. These factors include, the duration and strength of the worker's business, the investment in tools of their trade, whether they bore the risk of loss and benefitted from the goodwill of the company, whether they were required to maintain their own insurance, and whether they formed business structures.
>
> Here, I submit that Coverall has shown from its Franchise Disclosure Document, that the franchisees all committed to a significant investment in their business which provided them with a twenty-year renewable franchise relationship with Coverall. As stated in the agreement, 'the investment necessary to begin operation of a Coverall franchise is $10,612 to $37,345 depending on the package you chose.' (Exhibits R-6 and R-1). In addition to this expenditure, all franchisees were required to maintain a significant amount of insurance coverage, including janitorial bond and

> liability insurance (Exhibit R-6, at 73). It was also shown from the 1099s in the Auditor's Report that some franchisees generated hundreds of thousands of dollars a year. These investments by Coverall franchisees documented and protected by contract satisfy prong C."

Based on the foregoing, the ALJ concluded that the individuals to whom Coverall had sold commercial cleaning "franchises" and who had been engaged by Coverall during the audit period to perform commercial cleaning services for Coverall's customers had been independent contractors, rather than employees of Coverall. Therefore, the ALJ granted Coverall's appeal and reversed the Department's assessment against Coverall for unpaid contributions to the unemployment compensation and State disability benefits funds. Respondent filed exceptions. Petitioner filed a reply to exceptions.

In its exceptions, respondent takes issue with the findings and conclusions of the ALJ with regard to each prong of the ABC test as it was applied by the ALJ to the services performed for Coverall by the commercial cleaners.[4] Specifically, respondent cites to exhibits entered into evidence during the hearing before the ALJ in support of its assertion that Coverall has failed to meet its burden under Prong "A." That is, respondent cites to the "Janitorial Franchise Agreement" (Exhibit R-5, pages 72-93), the "Franchise Disclosure Agreement" (Exhibit R-6), and the Coverall website (Exhibit R-4) and asserts that these documents contain indicia of direction and control by Coverall over the performance of services by the commercial cleaners, including the following:

[4] Respondent also asserts that the relationship between Coverall and the commercial cleaners is not that of a bona fide franchisor/franchisee relationship, because "the Coverall business model does not meet the criteria of [N.J.S.A. 56:10-1 et seq.], the New Jersey Franchise Practices Act." According to respondent, the ALJ agreed that the commercial cleaners were not bona fide franchisees when she found that "[m]ost Coverall franchisees operate their business from their homes" and when she added, "[f]or that reason, the Coverall model does not fit the requirements set forth in the New Jersey Franchise Practices Act, which requires the franchisee to maintain a place of business within the State of New Jersey and to exceed $35,000 in gross sales or services." The ALJ followed this statement in her Initial Decision with citations to and corresponding quotes from 56:10-4, which, among other things, limits application of the New Jersey Franchise Practices Act to a franchise the performance of which contemplates or requires the franchise to establish or maintain "a place of business within the State of New Jersey," and N.J.S.A. 56:10-3, which excludes from the definition of the term "place of business," for purposes of the New Jersey Franchise Practices Act, "an office, a warehouse, a place of storage, a residence or a vehicle, except that with respect to persons who do not make a majority of their sales directly to consumers, 'place of business' means a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services, or an office or a warehouse from which franchisee personnel visit or call upon customers or from which the franchisor's goods are delivered to customers."

"(1) Coverall controlled the business model including not giving the workers the option to be employees via the Coverall contract (Exhibit R-5, p. 73-93), disclosure documents (Exhibit R-6) and website (Exhibit R-4).

(2) Coverall controls the flow of the work to the franchisees (Exhibit R-5, p. 74).

(3) Coverall requires training and retraining. Coverall can suspend the franchisee's work until the retraining is completed (Exhibit R-6, p. 14).

(4) Coverall owns the trade name and what the franchisees can sell or market (Exhibit R-6, p. 38).

(5) Coverall has the right to reassign the franchise agreement without the consent of the franchisees (Exhibit R-5, p. 87).

(6) Coverall requires the workers to be franchisees and not employees (Exhibit R-5, p. 85).

(7) Coverall has a non-compete clause as part of the contract (Exhibit R-5, p. 89).

(8) Coverall monitors the quality of the franchisees' work including audits of the client list and cleaning procedures (Exhibit R-5, c. 82).

(9) Coverall provides new accounts with staff, equipment, materials and supplies (Exhibit R-5, p. 83).

(10) Coverall controls the flow of the money including management, royalty and other related fees charged to the franchisees (Exhibit R-5, p. 79).

(11) All advertising materials that have Coverall insignias must be returned upon cancellation of the contract (Exhibit R-5, p. 88).

(12) Coverall offers a replacement service for franchisees taking approved time off for up to two full cycles without issue (Exhibit R-5, p. 78).

(13) Coverall conducts all billing services (Exhibit R-5, p. 77).

(14) Coverall sets the prices that are charged for the services (Exhibit R-5, p. 76)."

With regard to Prong "B" of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which such service is performed, or that such

service is performed outside of all the places of business of the enterprise for which such service is performed, respondent states the following:

> "Under Part B, Coverall again does not meet either prong for independence because the services performed by the workers are not outside Coverall's usual course of business. Coverall advertises on its website that Coverall is a commercial cleaning service (Exhibit R-4, p. 4, p. 32-33, p. 35) and the services provided by the workers are cleaning services (Exhibit R-4, p. 10). This demonstrates that the workers are an integral part of Coverall's business and perform the services that Coverall advertises it does.
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> Under part two, Coverall must demonstrate the services are performed outside of all the places where Coverall conducts its services. As detailed, Coverall secures the clients and then contracts with workers (franchisees) to perform services. Since Coverall's main work is cleaning services and Coverall sends workers to client-contracted locations to perform the services, the client locations are considered an extension of Coverall's business location."

Respondent also includes a separate "argument," in its exceptions under the heading, "COVERALL IS NOT A MARKETING FIRM," in which it states the following:

> "[The ALJ] stated that Coverall is a marketing firm that markets cleaning services for the franchises contracted with alleged franchises to perform cleaning services. Here [the ALJ] is wrong. The auditor determined Coverall to be a cleaning service and not a marketing company. The auditor reviewed the Franchise Agreement (Exhibit R-6), the Coverall website (Exhibit R-4), and interviews, including [the interview with] the Administrator of Suburban High School, Linda Lueuzarder, who stated the school contracted with Coverall. Lueuzarder informed the auditor that Coverall, not the contractor, was suing the school for not paying the bill (Exhibit R-1). Coverall secured contracts with the clients and then doled the work out to the alleged [franchisees] after taking the fees. The work was performed under the Coverall name. The alleged franchisees do not have the option of collecting the money [from] the clients."

Regarding Prong "C" of the ABC test, respondent cites to the holding in Carpet Remnant Warehouse, 125 N.J. 567 (1991), in which the Court instructs:

> That determination [whether Prong "C" has been satisfied] should take into account various factors relating to the installers ability to maintain an independent business or trade, including the duration and strength of the installers' business, the number of customers and their respective volume of business, the number of employees, and the extent of the installers' tools, equipment, vehicles, and similar resources. The Department should

> also consider the amount of remuneration each installer received from CRW [Carpet Remnant Warehouse, Inc.] compared to that received from other retailers.

Respondent maintains that none of the Prong "C" factors enumerated in Carpet Remnant Warehouse, supra, were addressed by Coverall. Respondent adds that:

> "The entire business structure utilized by Coverall has been shown to be so restrictive that the alleged franchisees could not exist outside the relationship. Coverall secures the clients, sets the rates for services to be provided and the services to be rendered, secures the payments for [the services], withholds any loan, expenses and Coverall's portion of the services, Coverall requires the relationship to be that of an independent contractor nature, requires training prior to servicing Coverall's clients, Coverall guarantees a specific amount of work, Coverall set working requirements for the services performed such as, quality control, Coverall's right to audit the work and customer lists (to verify work is only performed for Coverall's customers and that accounts are properly run through Coverall's accounts), Coverall requires and finances the insurances for the workers, Coverall has the right to assign the contract to another entity without the franchisee's consent, the franchise cannot assign interest without Coverall's approval and Coverall even controls the relationship upon separation with a non-compete."
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> (Internal citations omitted).

Respondent asserts that records provided by the commercial cleaners engaged by Coverall who responded to the Department's "subcontractor letters," which solicited, among other things, federal income tax returns, including Forms 1040 and Schedule Cs, showed that "a majority, if not all gross receipts, were obtained from Coverall. (Exhibit R-5, p. 7-12, p. 41-48), adding, "[t]hose workers who received less than 100% of their income [from Coverall] were determined to be in multiple employment under the UCL. (Exhibit R-5, p. 21-22)." Finally, respondent takes issue with the ALJ's inclusion within the Prong C factors, "whether [the commercial cleaners] were required to maintain their own insurance." Respondent maintains that Coverall requiring the commercial cleaners to maintain their own insurance "does not make them independent, it means that they are just doing what they were instructed to do as part of the contract," adding, "[i]t demonstrates direction and control." [5]

[5] Respondent also objects within its exceptions to what it believes to have been (1) an incorrect ruling by ALJ Wilson regarding introduction by petitioner during the hearing of certain "late supplied documentation" (i.e., Exhibits P-1 through P-16), (2) unfair treatment by ALJ Wilson of the non-attorney Department representative, T. Raymond Kilgore, with respect to his interactions with respondent's witness, Auditor Carolyn Onyema, regarding that "late supplied documentation," and (3) ALJ Wilson's order from the bench striking Ms. Onyema's testimony on re-direct regarding the "late supplied

In reply to the exceptions filed by respondent, petitioner asserts that the following "undisputed facts" support the ALJ's finding that Coverall has met its burden under Prong "A" of the ABC test:

> "(1) Franchisees are free to choose which customer contracts they accept and which they reject (Tr. Vol. 3 at 90: 10-22);

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documentation," because non-attorney representative Kilgore had discussed the exhibits with Ms. Onyema prior to the start of the third day of hearing on March 30, 2022 while Ms. Onyema had been ordered "sequestered" by ALJ Wilson. Respondent asserts that, "[the ALJ] foreclosing consideration of the testimony by the auditor [Ms. Onyema] concerning the late supplied information is clearly so prejudicial to the Department's position that the entire packet of exhibits P-1 through P-16 and any associated representations or testimony should be removed from the record and not considered for use in the Initial Decision." ALJ Calemmo addressed these issues on Page 3 of her Initial Decision. That is, she found the following:

> "Judge Wilson issued two orders during Ms. Onyema's testimony. In his first order, Judge Wilson limited Ms. Onyema's testimony to what was written in her Audit Report and to the information the Department supplied in its Interrogatory responses after petitioner's counsel objected that her answer went beyond the scope of his cross-examination. In his second order, Judge Wilson struck Ms. Onyema's re-direct testimony because she spoke with respondent's representative while still under oath. The discussions were about exhibits P-7 through P-13 that had not been provided until after the first day of hearing. Respondent's representative strenuously objected and argued that Judge Wilson had not understood his role as a non-attorney representative. Respondent's representative did not seek interlocutory review of Judge Wilson's orders. In his summation brief, respondent's representative asked that exhibits P1 through P-16 be removed from the record. However, during a telephone conference, after the matter was reassigned to me, the parties agreed that Exhibits P-1 through P-16 be included as evidence for this Initial Decision."

In light of ALJ Calemmo's statement within her Initial Decision that during a telephone conference the parties agreed that petitioner's exhibits would be included as evidence for the Initial Decision, and in the absence of a denial by respondent within its exceptions that this telephone conference occurred, I will consider the exhibits introduced by petitioner that were ultimately accepted into the record by the ALJ; specifically, Exhibits P-3, 4, 7 through 11, and 13 through 16. I will also not disturb ALJ Wilson's order striking the testimony of Ms. Onyema on re-direct, since it does appear that Mr. Kilgore conferred with the witness regarding petitioner's exhibits while the witness was still under oath and sequestered. There will be no further mention of either of these issues within the body of this decision.

(2) The requirements in those contracts are established by the customers, not Coverall (id. at 89:23-90:9);

(3) Franchisees are free to renegotiate, without Coverall's involvement or approval, the terms of any contracts they accept from Coverall (id. at 107:20-108:25);

(4) Franchisees own the accounts they choose to accept and can solicit and obtain their own accounts, which likewise belong to them (id. at 95:2-4 and Exhibit P-10);

(5) Franchisees independently negotiate the terms of any accounts they obtain (Tr. Vol. 3 at 95:16-25);

(6) There are no geographic restrictions on where franchisees can solicit accounts (id. at 96:3-7);

(7) Coverall does not supervise its franchisees' operations, inspect customers' facilities to review franchisees' performance, or monitor its franchisees' day-to-day operations (id. at 98:5-10, 99:2-4);

(8) Franchisees are not required to submit any information to Coverall regarding the services they provide (id. at 99:5-14);

(9) Customer complaints are handled by the franchisees, not Coverall, who are solely responsible for addressing their clients' concerns (id. at 99:15-100:14);

(10) Coverall does not require franchisees to be at accounts on specific days, at specific times, or for set amounts of time (id., at 100:15-101:1);

(11) Franchisees are not required to perform any cleaning work themselves – they can delegate 100% of the required services to employees (id. at 101:2-17);

(12) Franchisees are solely responsible for all their labor relations – Coverall does not approve, train, hire, fire, schedule or discipline a franchisee's employees and, as a matter of fact, does not even know who they are (id. at 101:18-102:25);

(13) Coverall does not pay any salaries or provide any benefits to its franchisees, nor does it withhold any monies from their revenue for taxes (id., at 112:3-113:3); and

(14) Franchisees are free to sell their accounts or their entire franchise (id. at 1-09:18-110:8)."

Regarding Prong "A," petitioner also characterizes as significant that the "Janitorial Franchise Agreement" provides that each commercial cleaner (1) is an independent contractor, (2) is "responsible for personal self-employment, income, and other taxes required to be withheld,…assumes full responsibility for payment of the employer's portion of any social security and other taxes required to be withheld for all of the Franchisee's employees, and (3) must "pay and/or withhold taxes and premiums for unemployment and workers' compensation insurance for itself and all of its employees, as required by law." (See Exhibit R-6, page 69, para. 9(D), and page 73, para. 13)).

With regard to Prong "B" of the ABC test, which requires that in order to establish independent contractor status, one must prove that the service at issue is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed, petitioner asserts that unlike its franchisees who perform cleaning services, Coverall is not in the business of performing cleaning services, but rather, Coverall secures business, which it offers to its franchisees to perform cleaning services. Furthermore, petitioner maintains that the locations where the franchisees perform their cleaning services are not among Coverall's places of business, because they are not owned or controlled by Coverall, adding that the phrase, "place of business" refers only to those locations where the enterprise has a physical plant or conducts an integral part of its business, "and does not include customers' job sites." Finally, petitioner responds to respondent's assertion that "Coverall is not a marketing firm." Specifically, petitioner cites to the testimony of Shirley Yvonne Klein, the Chief Operating Officer for Coverall North America, Inc., who explained, according to petitioner, that Coverall sells franchises in the commercial janitorial cleaning industry and markets its franchisees' services through a dedicated sales force, who are responsible for finding new customer accounts, which Coverall then offers to its franchisees.

With regard to Prong "C" of the ABC test, petitioner maintains the following:

> "The evidence [introduced at the hearing]…proved that franchisees' businesses can – and do- continue to exist if and when franchisees decide to end their relationship with Coverall. First, franchisees own their own equipment, which can range from ordinary vacuums to ride-on scrubbers and floor machines. (Tr. Vol. 3 at 114:12-115:1). If a franchisee elects to end his relationship with Coverall, the franchisee keeps all his supplies and equipment. (Id. at 118:19-24). Second, franchisees have business cards, advertise their services, and (if they want to) establish physical business locations. (Id. at 116:3-117:16; see also [Initial] Decision at 13). Third, franchisees can – and do – use the skills they learn from Coverall to operate their own cleaning businesses, some of which gross hundreds of thousands of dollars a year. (Id. at 92:11-22; see also Exhibit P-15). Finally, and most importantly, if a franchisee's relationship with Coverall ends, both the accounts they purchased from Coverall and those they obtained themselves are theirs to keep (or, if they choose, sell to other

franchisees or Coverall). (Id. at 118:25-119:6; see also [Initial] Decision at 5)."

Petitioner also criticizes the audit that was conducted by Carolyn Onyema, characterizing "every step of [Ms. Onyema's] process and analysis" as "flawed." For example, petitioner states that "very few franchisees responded to the auditor's letters requesting documents," adding, "at [the] hearing it was shown that the franchisees' 'failure' to respond and submit documents was due almost entirely to the auditor's flawed efforts to obtain responses from franchisees." Petitioner also states, "[w]hether a result of [Ms. Onyema's] bias against Coverall or her lack of care, the auditor's determinations regarding which franchisees were independent contractors and which were employees were as flawed and arbitrary as the steps she took to obtain the documents she…acknowledged were essential to determining whether the franchisees were bona fide independent contractors," adding, "[the Department of Labor and Workforce Development] had no guidelines as to which factors or which combination of factors would be sufficient to render an individual an independent contractor in the Department's view."

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ's Initial Decision, as well as the exceptions filed by respondent and petitioner's reply, I hereby reject the ALJ's reversal of the Department's determination that Coverall had employed the commercial cleaners it engaged and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation fund and State disability benefits fund on behalf of those employees for the audit period, 2006 through 2008.

Regarding Prong "C" of the ABC test, as reflected in the opinions in both Carpet Remnant, supra., and Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957)., the requirement that a person be customarily engaged in an independently established trade, occupation, profession or business calls for an "enterprise" or "business" that exists and can continue to exist independently of and apart from the particular service relationship. Furthermore, in order to satisfy Prong "C" of the ABC test, Coverall must demonstrate that *each* of the commercial cleaners who performed services for Coverall during the audit period was engaged in a viable, independently established, business at the time that he or she rendered services to Coverall. See Gilchrist, supra, and Schomp v. Fuller Brush Co., 124 N.J.L. 487 (Sup. Ct. 1940).

In Carpet Remnant, supra., which concerned the work of carpet installers, the Court remanded the matter to the Department with the following direction as to how one should undertake the Prong "C" analysis:

> That determination [whether Prong "C" has been satisfied] should take into account various factors relating to the installers ability to maintain an independent business or trade, including the duration and strength of the installers' business, the number of customers and their respective volume

> of business, the number of employees, and the extent of the installers' tools, equipment, vehicles, and similar resources. The Department should also consider the amount of remuneration each installer received from CRW [Carpet Remnant Warehouse, Inc.] compared to that received from other retailers.

Relative to the latter part of the Prong "C" analysis; that is, consideration of the amount of remuneration each individual received from the putative employer compared to that received from others, the holding in Spar Marketing, Inc. v. New Jersey Department of Labor and Workforce Development, 2013 N.J. Super. Unpub. LEXIS 549 (App. Div. 2013), certification denied, 215 N.J. 487 (2013), is instructive. In that case, the services of retail merchandisers were at issue and the court observed:

> No proof that the merchandisers worked simultaneously for other merchandising companies was provided; Brown's general claims to the contrary, [6] without documentary support, are not persuasive. As a result, petitioner failed to provide, by a preponderance of the credible evidence, proofs sufficient to satisfy subsection (C) of the ABC test.

Thus, in order to satisfy Prong "C" of the ABC test, Coverall must prove by a preponderance of the credible evidence with regard to *each* of the commercial cleaners whose services it engaged during the audit period that the he or she was during the audit period customarily engaged in an independently established business or enterprise. Under the holding in Carpet Remnant, supra., that means that relative to each of the commercial cleaners, it must address the duration and strength of each individual's business during that period, the number of customers and their respective volume of business during that period, the number of employees of the business or enterprise during that period, the extent of each individual's business resources during that period, and the amount of remuneration each individual received from Coverall during that period compared to that received from others; which is to say, not a general claim that each commercial cleaner worked for or was free to work for others, but actual evidence reflecting the amount of remuneration that *each* commercial cleaner received from Coverall compared to that received from others for performance of the same service. I agree with respondent that Coverall has failed to demonstrate that the commercial cleaners were engaged in a business that could have continued to exist independently and apart from their relationship with Coverall, and that Coverall, has therefore failed to meet its burden under Prong "C" of the ABC test.

Petitioner's only witness was Ms. Klein, who testified regarding Coverall's business practices, including the process followed by Coverall when it sells "franchises" to provide commercial cleaning services, the manner in which Coverall's "force of sales consultants…prospect for new customer service contracts," how Coverall's commercial

[6] Brown was one of the merchandisers who had been engaged to perform services for Spar Marketing, Inc.

cleaning customers sign service agreements with Coverall, how Coverall transfers those Service Agreements to their "franchisees," the way in which Coverall bills and collects payments for the commercial cleaning services provided by Coverall's "franchisees," the training that "franchisees" undergo pursuant to the "Janitorial Franchise Agreement," and the content of the business documents utilized by Coverall to govern its relationships with its "franchisees" and customers. That is, Ms. Klein testified to all manner of Coverall's business model, generally. However, nowhere within Ms. Klein's testimony does she address any of the Prong "C" factors enumerated in Carpet Remanent Warehouse, supra, relative to any of the "franchisees" at issue in this matter. That is, nowhere within Ms. Klein's testimony does she address the duration and strength of a single "franchisee's" business, the number of customers of a single "franchisee" and their respective volume of business, the number of employees of a single "franchisee," the extent of a single "franchisee's" business resources, or, most importantly, the amount of remuneration any one "franchisee" received from Coverall during the audit period compared to that received from others.

As to Coverall's documentary evidence, following is a complete list of petitioner's hearing exhibits:

Exhibit P-3: ALJ Wilson's June 28, 2017 letter order regarding discovery.

Exhibit P-4: Respondent's June 17, 2017 letter regarding discovery.

Exhibit P-7: 16 C.F.R. 436.1.

Exhibit P-8: McDonald's Franchise Disclosure Agreement.

Exhibit P-9: 2021 Top Home-Based & Mobile Franchises Ranking.

Exhibit P-10: A blank Coverall "Franchised Business Service Agreement."

Exhibit P-11: A blank "Coverall Service Agreement."

Exhibit P-13: A single "Franchise Statement Summary," dated February, 2022 (fourteen years after the end of the audit period), for JYC Cleaning Services, LLC, that lists the amounts billed by Coverall for services performed by JYC Cleaning Services, LLC, during that month, the royalties and fees deducted by Coverall during that month, and the amount paid by Coverall to JYC Cleaning Services, LLC, during that month.

Exhibit P-14: An "Acknowledgment Copy" of JYC Cleaning Services, LLC's Articles of Organization with the State of New York, on a form that was most recently revised in February, 2012 (four years after the end of the audit period).

Exhibit P-15: Instaclean Services, LLC's Certificate of Registration with the New Jersey Department of the Treasury, Division of Revenue and Enterprise Services, dated January, 2019 (eleven years after the end of the audit period).

Exhibit P-16: The first and last page (Pages 1 and 24) of Coverall's "Janitorial Franchise Agreement" with Sonya L. Kithcart, dated December 1, 2006, and Ms. Kithcart's acknowledgment of receipt of the "Janitorial Franchise Agreement."

Like Ms. Klein's testimony, none of petitioner's exhibits address a single one of the Prong "C" factors enumerated in Carpet Remanent Warehouse, supra, relative any of the "franchisees" at issue in this matter. Thus, suffice it to say, I find that Coverall has fallen woefully short of meeting its burden under Prong "C" of the ABC test.

I need not address either Prong "A" or Prong "B" of the ABC test in this decision, because, as indicated earlier, the ABC test is written in the conjunctive and, therefore, Coverall's failure to meet its burden of proving Prong "C" alone is sufficient to find that that the commercial cleaners in question are employees, rather than independent contractors. Nevertheless, I do feel compelled to express for the record my disagreement with the ALJ's conclusions regarding the "A" and "B" prongs. That is, regarding Prong "A," I disagree with the ALJ that petitioner successfully demonstrated that the commercial cleaners were free from control or direction over the performance of the services they had performed for Coverall. Rather, I find that the overwhelming weight of the evidence in the record supports the conclusion that the commercial cleaners engaged by Coverall during the audit period were ***not*** free from control or direction over the performance of their work. That is, the following, contained in the "Janitorial Franchise Agreement" (Exhibit R-5, pages 72-93) reflects a degree of control over the commercial cleaners that is consistent with an employment relationship and belies petitioner's assertion that these individuals were free from control or direction by Coverall:

> (1) The "Janitorial Franchise Agreement" (JFA) states that the "Franchisee may conduct its business **solely** in the area(s) in which the Coverall office through which the Franchisee has purchased the Coverall franchise conducts business." (emphasis added) (Exhibit R-5, page 74).
>
> (2) The JFA states that "Coverall provides a limited [12-month] guarantee for the Franchisee's Initial Business. **The guarantee applies only to customers lost through no fault of the Franchisee**. Customers lost because of faulty workmanship, Franchisee's lack of trustworthiness or any other defaults by Franchisee are not guaranteed." (emphasis added) (Exhibit R-5, p. 75).
>
> (3) The JFA states that "To qualify for the 12-month guarantee, for each month from the date Franchisee begins servicing an account, Franchisee **must perform an inspection with the customer**, and **submit the Inspection Report, which must be signed by the customer, to Coverall** no later than the 5th day following the inspection." (emphasis added) (Exhibit R-5, p. 75).

(4) The JFA states that Coverall may offer the Franchisee "additional dollar volume," (that is, in addition to the "initial business offering"), which is "guaranteed for up to six months," but that the "guarantee," like the 12-month limited guarantee for the "Franchisee's Initial Business," applies "only to customers lost through no fault of the Franchisee," adding, "[c]ustomers lost because of faulty workmanship, Franchisee's lack of trustworthiness or any other defaults by Franchisee are not guaranteed." Also, like the 12-month limited guarantee for the "Franchisee's Initial Business," in order to qualify for the six-month guarantee of "additional dollar volume," "for each month from the date [the] Franchisee begins servicing an account, [the] Franchisee **must perform an inspection with the customer**, and **submit the Inspection Report, which must be signed by the customer, to Coverall** no later than the 5th day following the inspection." The JFA adds that "[the] Franchisee must do all 6 inspections to qualify for this guarantee." (emphasis added) (Exhibit R-5, page 76).

(5) The JFA states that "Franchisee **shall attend** the Initial Training…, which is provided by Coverall to all new franchisees, and any other training courses Coverall may **prescribe** with respect to the needs of Franchisee or a particular customer serviced by Franchisee." (emphasis added) (Exhibit R-5, page 81).

(6) The JFA states the following: "Franchisee understands and acknowledges that **every detail of the System is essential to Coverall**, Franchisee, and other System franchisees in order to (i) develop and maintain quality operating standards, (ii) increase the demand for the services sold by all franchisees operating under the System, and (iii) protect Coverall's reputation and goodwill. Franchisee agrees to operate its business and provide service to customers **in a manner consistent with the procedures, methods, and standards established in training programs, all manuals and directives, which shall include, but shall not be limited to, the Coverall Janitorial Franchise Policy and Procedures Manual** ('the Policy and Procedures Manual'), as it may be amended from time to time, **and/or other policies or procedures which Coverall may issue from time to time**. Franchisee **shall refrain** from operating in any manner which reflects adversely on Coverall's Marks or System. **Franchisees may not** implement any modification to the System without Coverall's prior written consent." (emphasis added) (Exhibit R-5, page 82).

(7) The JFA requires "franchisees" to "use…**only** uniforms, equipment, supplies, products, sales and promotional materials, control forms and other business forms **as are prescribed or permitted by Coverall**." (emphasis added) (Exhibit R-5, page 82).

(8) The JFA states the following: "Coverall has the **exclusive right** to perform all billing for services and supplies provided by Franchisee. All **customer payments made to Coverall** and all credits due Franchisee **shall** be applied, in whole or in part, to Franchisee's then due or past due obligations under [the JFA] and all other agreements, present and future, between Coverall and Franchisee. At the beginning of each month, **Coverall shall invoice and collect payment from the customers** for all services and supplies provided by the Franchisee. On the last day of the month…following the month in which the services and supplies were provided by Franchisee, **Coverall will pay Franchisee** amounts collected from customers, excluding amounts retained by Coverall on Strategic Accounts, less amounts due Coverall for the fees described in Paragraphs 7 and 14, as well as note payments, transfer fees, equipment lease payments, advances, and any other amounts due Coverall or any third party lender through whom Franchisee has financed any purchase from Coverall." (emphasis added) (Exhibit R-5, page 77).

(9) The JFA states that, "Coverall will use its best efforts to provide employees or contractors of Coverall to perform janitorial services in substitution of Franchisee…for up to two consecutive services, in the event of a bona fide emergency," and that "[w]hether or not an event is a bona fide emergency **shall be determined by Coverall in its sole discretion**." (emphasis added) (Exhibit R-5, page 78).

(10) The JFA states the following: "Franchisee agrees to keep true and accurate business records and books of account which **shall be open to inspection by Coverall** or its duly authorized agent during regular business hours and **Coverall shall have the right to examine same, including other related records**. Upon Coverall's request, **Franchisee shall prepare and/or produce to Coverall any other information, including without limitation financial statements and personal and business income tax returns**, that will permit Coverall to verify that all fees due Coverall are fully, accurately, and truthfully accounted for and that Franchisee is not otherwise in breach of [the JFA]." (emphasis added) (Exhibit R-5, p. 82).

(11) The JFA states that "Customer accounts are delegated [by Coverall] to the Franchisee to service." (Exhibit R-5, page 83).

(12) The JFA requires the franchisee to "provide satisfactory service." (Exhibit R-5, page 83).

(13) The JFA states that, "[the] franchisee **shall** contact each customer account serviced by Franchisee, which has regular monthly service revenues of $500 or less." (emphasis added) (Exhibit R-5, page 83).

(14) The JFA states that, "For each month commending on the date that Franchisee begins servicing the customer account, Franchisee **must** contact the customer account either in person or by telephone **and obtain a rating of Franchisee's performance**," and that, "Franchisee **must** complete an **Account Contact Report** for each customer account contacted **and submit them to Coverall** no later than the 5th day of the month following contact." (emphasis added) (Exhibit R-5, page 83).

(15) The JFA states that "Coverall has the right to discontinue Franchisee's services to any customer upon the occurrence of any of the following:

> (a) Franchisee fails to perform its obligations to the customer's satisfaction; or
> (b) The customer has made an oral or written complaint to Coverall; or
> (c) Coverall or the customer has given Franchisee written notice of Franchisee's failure to perform and five (5) days after delivery of the notice either the customer or Coverall is not satisfied that Franchisee has performed; or
> (d) Franchisee receives three (3) written notices of failure to perform within a period of sixty (60) consecutive days, regardless of whether the Franchisee cured the deficiencies; or
> (e) Coverall receives a request from a customer to terminate its contract; or
> (f) Coverall receives a request from a customer to replace the Franchisee; or
> (g) Franchisee services any customer other than as a Franchisee of Coverall; or
> (h) Franchisee fails to service a customer on any two (2) occasions within a period of sixty (60) days; or
> (i) Franchisee ceases or refuses to service, or discontinues servicing, a customer for any reason without Coverall's consent; or
> (j) Franchisee engages in conduct that reflects materially and adversely upon the operation and reputation of Coverall's and/or Franchisee's business(es) or the Marks or the System.

(16) Finally, the JFA contains a "non-competition" clause that states the following:

> "In-Term Covenant Not to Complete: Franchisee agrees during the Term of [the JFA] and any Renewal Term that Franchisee will not engage in, or have any financial interest

> in, either as an individual, principle, owner, agent, employee, partner, stockholder, or director, any business (other than the franchise granted hereunder) which performs janitorial and related cleaning and management services, franchising, sales or contracting or any related business anywhere.
>
> Post-Termination Covenant Not to Compete: In the event [the JFA] is assigned, terminated, or expires for any reason whatsoever, Franchisee agrees not compete, directly or indirectly, for a period of eighteen (18) months from the date of assignment, termination, or expiration with Coverall or any of Coverall's affiliates or franchisees by engaging in (either as an individual, principal, owner, agent, employee, partner, stockholder, director, or in any other capacity) or having any financial interest in any business that performs building cleaning and maintenance services, in any county located partially or entirely within, or contiguous to, the Metropolitan Statistical Araes in which Franchisee's Coverall Regional office conducts business, or within 100-mile radios of that Coverall Regional office, whichever distance is greater. Franchisee will not, during the time period and in the geographic area covered by this Paragraph 19B, influence or attempt to influence previously existing cleaning customers, whether of Franchisee or of other Coverall franchisees, to divert or attempt to divert from Coverall or its franchisees any cleaning accounts which were being serviced by the Coverall system during the year preceding the date on which Franchisee left the Coverall system."

Each of the foregoing from the JFA constitute indica of direction and control. That is, the express terms of the JFA described above, which by petitioner's own account governs the relationship between Coverall and its "franchisees," directly contradict Ms. Klein's testimony through which Coverall seeks to establish that the commercial cleaners engaged by Coverall were each free from control or direction by Coverall. Therefore, I find that Coverall has failed to meet its burden under Prong "A" of the ABC test relative to services performed by the commercial cleaners.

Regarding Prong "B" of the ABC test, I agree with respondent that relative to the commercial cleaners petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the services at issue are either outside the usual course of business for which such services are performed, or that such services are performed outside of all the places of business of the enterprise for which such services are performed. In that regard, I would note that the Court in Carpet Remnant, supra, defined the phrase "all places of business" to mean those locations where the enterprise has a

physical plant ***or conducts an integral part of its business***." (emphasis added). Relative to the latter part of that definition, I agree with respondent that since the principal part of Coverall's business enterprise is providing commercial cleaning services to Coverall's customers and the customers of Coverall's agents, the work sites where those services are performed are locations where Coverall conducts an "integral part of its business," and are, therefore, among Coverall's "places of business." Similarly, I agree with respondent that since the principal part of Coverall's business enterprise is providing commercial cleaning services to Coverall's customers and the customers of Coverall's agents, the performance of those services by the commercial cleaners engaged by Coverall is a service performed within, not outside of, Coverall's usual course of business.

In its reply to exceptions, petitioner criticizes the audit that was conducted by Carolyn Onyema for, among other reasons, that she was unable to obtain many responses to the "contractor letters" that were sent by the Department to solicit relevant information from the commercial cleaners engaged by Coverall during the audit period. This and other similar remarks contained within petitioner's reply to exceptions evince a failure to recognize the fundamental precept that it is ***petitioner*** who has the burden of establishing that the services at issue satisfy each of the three prongs of the ABC test. The law is absolutely crystal clear on this point. That is, in addition to the unambiguous language of the UCL itself; in particular, N.J.S.A. 43:21-19(i)(6), which states that"[s]ervices performed by an individual for remuneration shall be deemed to be employment subject to [Chapter 21 of Title 43 of the New Jersey Statutes, including the Unemployment Compensation Law], unless and until it is shown to the satisfaction of the division that" the services and the individual providing the services meet each of the three prongs of the statutory ABC test," the New Jersey Supreme Court has ruled on three separate occasions over the past 30+ years, most recently in 2022, as have countless Appellate Division panels over that same period, that the burden of proof to establish independent contractor status lies with the putative employer. See Carpet Remnant Warehouse, supra., and East Bay Drywall, supra. (the party challenging the Department's employment classification must establish the existence of all three criteria of the ABC test); and Hargrove v. Sleepy's, LLC, 200 N.J. 289 (2015) (The ABC test "presumes that the claimant is an employee and **imposes the burden to prove otherwise on the employer**"). That is, by law once it has been established that services have been performed for remuneration, there arises a rebuttable presumption of employment. In order to successfully rebut that presumption of employment, it is petitioner's burden to establish that the services and the individuals providing those services satisfy each prong of the ABC test. Thus, in order for there to be employment the Department need not establish that the individual providing services was subject to control or direction by the putative employer, but rather, ***petitioner*** must establish that the individual has been and will continue to be ***free from*** control or direction in order to satisfy Prong "A." Similarly, under Prong "C" it is ***petitioner*** who must establish that the individual providing the services was customarily engaged in an independently established trade, occupation, profession or business. It is not the Department's burden to prove that the individual was ***not*** customarily engaged in an independently established trade, occupation, profession or business. Therefore, in the instant matter, the Department is under no statutory or other obligation to obtain documentation addressing the Prong "C" factors directly from the commercial cleaners

engaged by Coverall during the audit period, as maintained by petitioner, and petitioner's failure to produce any evidence addressing the Prong "C" factors enumerated above is fatal to its claim of UCL-exempt status for the services performed during the audit period by the commercial cleaners.[7]

ORDER

Therefore, petitioner's appeal is hereby dismissed and Coverall is hereby ordered to immediately remit to the Department for the years 2006 through 2008 $958,115.90 in unpaid unemployment and temporary disability contributions, along with applicable interest and penalties.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Robert Asaro-Angelo, Commissioner
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[7] Petitioner also asserts that inclusion of a clause within the JFA stating that the "franchisee is and shall remain at all times a completely independent contractor" (Exhibit R-5, page 85), should result in the individual being classified as an independent contractor under the UCL. However, controlling case law indicates otherwise. See Philadelphia Newspapers, supra., at 320 (finding that a newspaper salesman was an employee even though his employment contract explicitly classified him as an independent contractor and he received an IRS Form 1099).