



Your Hometown Title, LLC,
Petitioner,

**STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT**

v.

**New Jersey Department of Labor
and Workforce Development,**
Respondent.

**FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER**

**OAL DKT. NO LID 02396-2020
AGENCY DKT. NO. DOL 20-007**

Issued: November 8, 2021

The appeal of Your Hometown Title, LLC (“YHT” or petitioner) concerning an assessment by the New Jersey Department of Labor and Workforce Development (“Department” or respondent) for unpaid contributions by petitioner to the unemployment compensation fund and the State disability benefits fund for the period from 2015 through 2018 (“the audit period”)¹ was heard by Administrative Law Judge Catherine A. Tuohy (ALJ). In her initial decision, the ALJ concluded that YHT had presented sufficient proofs to establish that each of the Closers, Notary Signing Agents and Title

¹ The Department’s original August 14, 2019 assessment against YHT for \$6,576.88 in unpaid contributions to the unemployment compensation and State disability benefits funds was amended twice: first, removing the assessment for unpaid contributions based on services provided to YHT by Mid Atlantic Business Products, resulting in a recalculation of the total contribution liability assessed against YHT to \$6,093.43; and second, removing the assessment for unpaid contributions based on services provided to YHT by Eugene H. Gillen, Esq., resulting in a final assessment of contribution liability against YHT of \$6,065.88. It is the final amended assessment against YHT for \$6,065.88 in unpaid contributions to which I will be referring throughout this decision as “the assessment by the Department” or “the Department’s assessment.”

Abstractors, whose services had been the basis for the Department's assessment, with the exception of Helen Madrigali, were bona fide independent contractors exempt from coverage under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., applying the test for independent contractor status set forth at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the "ABC test." Regarding Ms. Madrigali, the ALJ concluded that YHT had failed to present sufficient proofs to establish independent contractor status under the ABC test. Regarding the one individual whose services had been among the bases for the Department's assessment who was not a Closer, Notary Signing Agent or Title Abstractor, but rather, who had provided office cleaning services to YHT (Saida Yusupova), the ALJ concluded that YHT had met its burden under the ABC test to establish that she was, in fact, a bona fide independent contractor exempt from coverage under the UCL. Based on the foregoing, the ALJ affirmed the Department's assessment against YHT for unpaid contributions based on services provided during the audit period by Helen Madrigali, and ordered that the balance of the Department's assessment against YHT be reversed.

The issue to be decided is whether the Closers, Notary Signing Agents and Title Abstractors, as well as the single Office Cleaner, whose services were engaged during the audit period by petitioner were employees of petitioner and, therefore, whether petitioner 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 those individuals during the audit period.

Under the UCL, 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 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, 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.

Relative to Prong "A" of the ABC test, the ALJ found that the Closers, Notary Signing Agents and Title Abstractors, who had provided services to YHT during the audit period were free from control or direction by YHT. In support of this conclusion, the ALJ cited to the following findings of fact: the Independent Vendor Services Agreement between those performing Closer, Notary Signing Agent and Title Abstractor services for YHT and the Fenix and Surety family of companies, which includes YHT, reflected a "minimum service level...required by their (YHT's) underwriters and in conformity with the best practices of ATLA (the American Land Title Association);" "[t]he execution of the Independent Vendor Services Agreement does not render the independent contractors employees;" "the Independent Vendor Services Agreement, requiring E&O (errors and omissions) insurance of an independent contractor is common practice in order to distribute the risk of loss;" "[t]he fact that the independent contractors at issue here were all required to maintain their own insurance is evidence of their independent contractor status;" "paragraph 7 of the Independent Vendor Services Agreement itself clearly sets forth that the contractors are independent contractors and not employees of Surety;" the Closers, Notary Signing Agents and Title Abstractors were "free to accept work from other entities;" the Closers, Notary Signing Agents and Title Abstractors "set their own prices and hours and conducted their services as required by industry standards;" "YHT did not withhold taxes and the Independent Vendor Services Agreement specifically set forth that the independent contractors were responsible for any taxes on the income they received from YHT."

Relative to Prong "B" of the ABC test, the ALJ concluded that YHT had met its burden with regard to all Closers, Notary Signing Agents and Title Abstractor, with the sole exception of Helen Madrigali, explaining as follows:

With regard to the first part of the B test, Mr. Council² is correct in that notary/singing/closing services and abstract searches are an integral part of the business of providing title insurance. However, there is a second part to that prong and part B can be satisfied if the services are provided outside of all of the locations of the employer's business. The independent notaries/signing agents and abstractors do not provide their services at YHT's business location (except for Ms. Madrigali). The notaries/signing agents provide mobile services and perform closing services outside of YHT's offices. The abstractors work out of the clerk's office or remotely via computer from their home. There has been no testimony that any of the abstractors work out of YHT's offices. So,

² Mr. Council is an Auditor with the Department and was the Department's witness at hearing.

despite notary and abstracting services being integral to the business of title insurance, the fact that these services are provide outside of YHT's offices allows the independent notary/signing agents/abstractors to satisfy part B, except for Ms. Madrigali. Ms. Madrigali testified that she did not use YHT's equipment unless she was doing a closing in their office and had to make copies. This leads me to conclude that at least some of her services were performed at YHT's offices and were not outside of all of the places of YHT's business, as was the case with the other notaries, closing agents and abstractors and therefore she would not pass part B of the test.

Relative to Prong "C" of the ABC test, the ALJ concluded, as she had relative to Prong "B," that YHT had met its burden with regard to all Closers, Notary Signing Agents and Title Abstractors, with the sole exception of Helen Madrigali, explaining as follows:

The independent contractors were all engaged in an independently established enterprise and had been for years, each with multiple clients and not just YHT. The 2017 audit (except for Ms. Madrigali) showed the 1099 income each of the independent contractors derived from YHT was not the main source of their income based on their Schedule C filings. Mr. Council reasoned that this only showed that they had multiple employers. I disagree and believe it shows that they were independent contractors with multiple clients and not relying on YHT as their main source of income. Part C of the test is satisfied if the independent contractors can continue to exist independently of and apart from their particular service relationship with YHT. If losing YHT's business would render the independent contractors unemployed, the C standard is not satisfied. Conversely, the C standard is satisfied when a person has a business, trade, occupation or profession that will clearly continue despite termination of the challenged relationship. Aside from Ms. Madrigali, all of the independent contractors met part C of the test in that all of the income they derived from YHT made up a small part of their total income and therefore, if their relationship with YHT were to terminate, they still had sufficient business to continue on in their independent business enterprise. Ms. Madrigali, however, whose 1099 income from YHT in 2017 was 88% of her gross receipts was dependent on YHT for the bulk of her income and does not meet part C of the test.

Regarding Saida Yusupova, the individual who provided office cleaning services to YHT, the ALJ found as follows:

[Ms. Yusupova] provided cleaning services for YHT. YHT did not exercise control over the manner in which Ms. Yusupova cleaned their offices. Office cleaning services are outside the usual course of business of a title insurance company. Ms. Yusupova is engaged in the office

cleaning business which is independent from the business of title insurance.

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 YHT by the Closers, Notary Signing Agents and Title Abstractors at issue (with the exception of Ms. Madrigali) and as each was applied by the ALJ to the office cleaning services performed for YHT by Ms. Yusupova. Specifically, respondent notes that under the holding in Carpet Remnant Warehouse v. New Jersey Dep't of Labor, 125 N.J. 567 (1991), in order to satisfy Prong "A," one must, "establish not only that the employer has not exercised control in fact, but also that the employer has not reserved the right to control the individual's performance," adding that "an employer need not control every facet of a person's responsibilities for that person to be deemed an employee." Carpet Remnant, 125 N.J. at 582. Applying the principles enumerated in Carpet Remnant, *supra*, to the case at hand, respondent cites to exhibits entered into evidence during the hearing before the ALJ in support of its assertion that YHT has failed to meet its burden under Prong "A." Included among the exhibits cited by respondent are the "Independent Vendor Services Agreement" between YHT/Surety and the Closers, Notary Signing Agents and Title Abstractors at issue (See Exhibit J-3, pages 44 – 48), the "Vendor Services Agreements," which were attached to each of the "Independent Vendor Services Agreements" as Exhibit A to the "Independent Vendor Services Agreements," (See Exhibit J-3, pages 14 – 16, pages 21 – 23, page 49, pages 148 – 150, and pages 167 – 169), the "Instructions for Witness Only Closer," which were attached to each "Independent Vendor Services Agreement" between YHT/Surety and the individuals engaged to provide Closer services to YHT/Surety (See Exhibit J-3, pages 9, 51, 106, and 114), and the "Notary Signing Agent Code of Conduct," which was attached to each "Independent Vendor Services Agreement" between YHT/Surety and the individuals engaged to provide Notary Signing Agent services to YHT/Surety (See Exhibit J-3, pages 52, 108 and 115). Respondent asserts that these documents contain "rules, practices and procedures," to which all YHT "contractors" must "adhere, abide and be bound." This, according to respondent, constitutes direction and control by YHT over the performance of Closer, Notary Signing Agent and Title Abstractor services for YHT. Other indicia of direction and control cited by respondent include the following:

- (1) The requirement imposed by YHT that those engaged to "perform notary and abstract search services maintain a million-dollar Errors and Omissions insurance policy that includes YHT as an additional insured,"
- (2) "YHT has acknowledged employees that assist both the notaries and abstract searchers (H2, 1:51:00) while services are being rendered," adding, "[b]oth the notary and the abstract searcher received instruction from YHT when there were questions during the closing or title search." Specifically, respondent cites to the testimony of Ms. Madrigali, where according to respondent, Ms. Madrigali stated that she would contact YHT if there were any questions during the signing of YHT's closing packages (H2, 12:00), and the testimony of Mr. Hathaway that YHT employs a title

examiner, who would review the abstract for the Title Abstractor for any missing information (H1, 4:40:00);

(3) “YHT has restricted its contractors from taking any assignment that the contractor cannot perform in the time frame specified by YHT ([Exhibit] J-3, page 45);”

(4) “A contractor when providing services is to remain in contact with YHT regarding the status of services being performed by [the] contractor on behalf of YHT ([Exhibit] J-3, page 45);”

(5) “YHT maintains the right to immediately terminate [the] Agreement for any reason whatsoever or for no reason ([Exhibit] J-3, page 44, para 3);” and

(6) “YHT requires the contractors to personally perform the services where ‘contractor shall not assign or subcontract this agreement or any rights or obligations hereunder without prior written consent of YHT’ ([Exhibit J-3, page 47 ‘Independent Vendor Service[s] Agreement’).”

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 notes 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. Carpet Remnant, supra, at 592. Relative to the latter part of that definition, respondent maintains with regard to the Closers and Notary Signing Agents that since the activities of preparing closing documents, witnessing the signing of closing documents and executing post-closing requirements are among the principal components of YHT’s business, the clients’ locations where those services are performed are locations where YHT conducts an “integral part of its business” and, therefore, are among all of YHT’s “places of business.” In support of this assertion, respondent notes that during the audit period YHT used the services of “Internal Closers,” each of whom performed functions identical to those performed by the contracted outside Closers and Signing Agents, the only difference being that the “Internal Closers” prepared closing documents, witnessed the signing of closing documents and executed post-closing requirements for real-estate closings conducted at YHT’s offices in Marlton, N.J., whereas the contracted outside Closers and Signing Agents performed those functions during real-estate closings conducted at YHT’s clients’ locations.

As to the Title Abstractors engaged by YHT, respondent maintains that since the services provided by those individuals to YHT are also a principal part of YHT’s business, the locations where Title Abstractors perform those services for YHT are locations where YHT conducts an “integral part of its business” and, therefore, are

among all of YHT's "places of business." In support of this argument, respondent cites to N.J.S.A. 17:46B-1b(2), which defines the "business of title insurance" to include, "the transacting or proposing to transact, any phase of the title insurance, including abstracting, examination of title, solicitation, negotiation preliminary to execution of a contract of title insurance, and execution of a contract of title insurance, insuring and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance" (emphasis added by respondent). Similarly, respondent maintains that since among the principal parts of YHT's business enterprise is the abstracting and examination of title, the preparation of closing documents, the witnessing and signing of closing documents and the executing post-closing requirements, the performance of those services by the Closers, Signing Agents and Title Abstractors engaged by YHT are services performed within, not outside of, YHT's usual course of business. Therefore, respondent asserts, YHT failed to meet its burden of proof under Prong "B" relative to the Closers, Signing Agents and Title Abstractors whose services it engaged during the audit period.

In support of its exceptions to the ALJ's conclusions regarding Prong "C" of the ABC test, respondent cites to the opinion in Gilchrist v. Division of Employment Sec., 48 N.J. Super. 147 (App. Div. 1957), wherein the court stated the following:

The double requirement [within Prong "C"] that an individual must be customarily engaged and independently established calls for an enterprise that exists and can continue to exist independently and apart from a particular service relationship. The enterprise must be one that is stable and lasting – one that will survive the termination of the relationship.

Thus, according to respondent, in order to satisfy Prong "C" of the ABC test, petitioner must demonstrate that each Closer, Signing Agent and Title Abstractor was engaged in a viable, independently established business providing Closer, Signing Agent or Title Abstractor services, respectively, at the time that he or she rendered that service to petitioner. Relative to the facts adduced during the YHT hearing, with an eye to addressing the above-cited standard, respondent states the following:

The record is clear that the individuals in question are not customarily engaged in an independently established trade occupation, profession, or business during the audit period. The individuals did not have business phone listings, did not maintain a business location apart from their personal residence, were not registered as an employer with the Department, did not have any investment in business equipment or tools beside their personal vehicles, personal cellphone, personal laptop and personal printer. The individuals did incur the expense for errors and omission insurance. However, this was a requirement for employment

that YHT placed on its contractors. Furthermore, title searchers were reimbursed for business expenses that included copying costs.³

As to Saida Yusupova, the individual who provided cleaning services to YHT during the audit period, respondent asserts the following:

There were no proofs provided for Saida Yusupova showing that she maintained an established cleaning business. There was no evidence that Yusupova maintained other clients besides YHT, maintained a business location apart from her apartment, maintained a business phone number and/or listing, or had an investment in equipment or employment. The only document was an invoice (J-3, page 185). Furthermore, the auditor testified that Saida Yusupova failed to demonstrate that she operated an independent and established cleaning business, because she did not maintain a business phone number, did not advertise, did not maintain a business location or demonstrate that she had other clients besides YHT. (H1, 2:08:00).⁴

³ In its exceptions, respondent also takes issue with petitioner's assertion through the testimony of its witnesses at hearing that treatment of Closers, Notary Signing Agents and Title Abstractors as independent contractors is an "industry norm" upon which the federal government recognizes an exemption from coverage under the Federal Unemployment Tax Act (FUTA), and that based on this, without regard to application of the UCL's ABC test, the services of Closers, Notary Signing Agents and Title Abstractors should be considered exempt from coverage under the UCL. Respondent explains that the Department cannot accept as proof of UCL-exempt status an IRS determination of FUTA-exemption under FUTA's "safe harbor provision" at 26 U.S.C. 530, because a determination by the IRS of FUTA-exempt status under Section 530 does not equate to a finding of independent contractor status, but rather, is simply relief from payment of FUTA taxes. The UCL contains no equivalent "safe harbor provision." Consequently, notwithstanding relief from FUTA taxes on the payment for worker's services under 26 U.S.C. 530, the worker remains an employee under New Jersey's UCL unless and until the putative employer is able relative to those services to meet its burden under New Jersey's test for independent contractor status at N.J.S.A. 43:21-19(i)(6) (the ABC test). See N.J.A.C. 12:16-23.2(a)2 and 27 N.J.R. 502.

⁴ Respondent does not appear to take exception to the ALJ's findings of fact and conclusions as to whether petitioner met its burden under Prongs "A" and "B" of the ABC test relative to the office cleaning services provided to YHT by Saida Yusupova. Rather, respondent appears only to take issue with the ALJ's findings of fact and conclusion as to whether YHT met its burden under Prong "C" of the ABC test with respect to Ms. Yusupova's office cleaning services, and the resulting conclusion of the ALJ that Ms. Yusupova's services during the audit period are exempt from UCL coverage.

In reply to the exceptions filed by respondent, petitioner asserts the following with regard to Prong "A:"

[T]he ALJ found the testimony here showed the challenged YHT contractors had the ability accept or decline assignments consistent with their schedules, was not subject to any material direction and supervision by YHT, had full autonomy on how to complete the work or assign it to employees, and furnished the contractor's own equipment. Moreover, in this case, each of YHT's contractors set their own pricing and had the opportunity to profit from their business. Indeed, these contractors' tax filings showed that they incurred operating expenses, including advertising, phone transportation, and equipment costs, which further indicates that they operate as separate businesses outside of the control of YHT.

To the extent that the Department tries to argue that the challenged contractors were subject to HYT's control due to the terms of the Independent Vendor Services Agreement and/or Code of Conduct, that argument is unavailing. First, the agreements in the record were not even put into place until 2017, yet the Department challenges these vendors in years 2015 and 2016 as well, when no such agreements were in force and there are no other indicia of control. Moreover, as Mr. DeSantis testified, the standards set forth in these documents merely reiterate the regulatory requirements of the industry and each witness testified that YHT never exercised any control over their work and they performed services for YHT in the same manner they performed services for other clients. Admittedly, YHT does include a sentence that notary contractors should dress professionally, but it did not impose a dress code or have any material control over how the work was done. Likewise, YHT also required each contractor to maintain its own insurance, which is not an exercise of control but, rather, indicative of a separate business. YHT knows, as Mr. DeSantis testified, that if a title policy becomes the subject of litigation, it is often the case that any business involved in the transaction may be named and YHT wanted to be sure its contractors had sufficient insurance so YHT was not the only viable defendant in such an action.

Relative to Prong "B" petitioner maintains the following:

In this case the testimony was undisputed and unequivocal that the notary [and abstracting services] challenged were performed exclusively outside of YHT's place of business in Marlton, New Jersey. Indeed, the notaries were only used for closings out of the office when YHT's in-house closers were too busy with in-office closings that they needed to enlist help to cover closings outside of the office. Likewise, the abstracting work can only be performed in the County Clerk's offices []. Additionally, as to

the abstractors [], these services are outside of the scope of YHT's business. Although YHT uses abstracts just as it uses judgment searches, it does not sell itself as a title searcher. In this way, the abstractors are no different than Charles Jones or the other reporting agencies that YHT uses to determine the status of title.

As to Prong "C" petitioner asserts the following:

Mr. Hathaway, Mr. Levin and others all testified that they were among many other contractors serving the title business and had operated their businesses for many years independent of YHT, relying on a large volume of customers outside of YHT.

...

The key inquiry is whether the enterprise can survive the termination of the YHT relationship and the testimony on this point showed that each of the challenged contractors was engaged in a long-term business enterprise. There was simply no evidence to the contrary. There is literally not a shred of evidence that any of the challenged contractors would be unemployed if YHT ceased giving them work. On the contrary, the audit records show that YHT did cease working with certain challenged contractors and there is no evidence those vendors went out of business as a result.

Relative specifically to the office cleaning services provided to YHT by Saida Yusupova, petitioner asserts the following:

Prong B: While Ms. Yusupova did perform cleaning services on-site at YHT's offices, cleaning services are far afield from the usual course of YHT's title insurance services. Again, Ms. Yusupova cleaned YHT's offices, as she did many other offices, and is no different than any other cleaning service YHT could have engaged. The mere fact that she did not respond to Investigator Council's request for tax filings is of no significance when there are no indicia that she provided services within the scope of YHT's business.

...

Prong C: Ms. Yusupova was not even available to clean other offices for YHT affiliates because she had so many other clients.⁵

⁵ Petitioner included arguments within its reply to exceptions with regard to the legal services provided to YHT by Eugene Gillen, Esq. However, as indicated within Footnote 1, above, the YHT's tax liability based on its payment to Mr. Gillen for his legal services

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 accept the ALJ's conclusion that Helen Madrigali was an employee of YHT during the audit period and that YHT is, therefore, responsible for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of Ms. Madrigali for the audit period. However, I reject the ALJ's reversal of the Department's determination that YHT had employed the other Closers, Notary Signing Agents and Title Abstractors and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of those Closers, Notary Signing Agents and Title Abstractors for the audit period. I also reject the ALJ's reversal of the Department's determination that YHT had employed Saida Yusupova to provide office cleaning services at the Marlton, New Jersey, offices of YHT and, therefore, that petitioner is liable for unpaid contributions to the unemployment compensation and State disability benefits funds on behalf of Ms. Yusupova for the audit period.

Regarding Prong "A" of the ABC test, I agree with respondent that YHT has failed to meet its burden relative to the Closers, Notary Signing Agents and Title Abstractors whose services it engaged during the audit period (including Ms. Madrigali). That is, I agree that the "Independent Vendor Services Agreement," various "Vendor Services Agreements," "Witness Only Closer Instructions," and "Notary Signing Agent Code of Conduct," as well as the testimony of witnesses confirming the practices of YHT, reflect a degree of control over the Closers, Notary Signing Agents and Title Abstractors that is consistent with an employment relationship and belies petitioner's assertion that these individuals were free from control or direction by YHT. Specifically, the "Independent Vendor Services Agreement" which Closers, Notary Signing Agents and Title Abstractors were required to sign as a condition to being engaged to perform services for YHT, contains among the following requirements:

- (1) "CONTRACTOR shall complete tasks in strict compliance with SURETY's instructions and parameters;"
- (2) "CONTRACTOR shall perform services for SURETY within the specific time frame set forth in SURETY's instructions;"
- (3) "CONTRACTOR will advise SURETY of any inability or failure to complete any assignment as per the instructions provided to CONTRACTOR, immediately upon such inability or failure to complete the assignment as per the instructions;"

has already been removed from the Department's assessment. Consequently, arguments regarding YHT's liability for contributions based on Mr. Gillen's services are moot.

(4) "CONTRACTOR possesses, and at all times during the term of this Agreement shall maintain, at his/her/its sole expense, errors and omissions insurance coverage in an amount of not less than \$1,000,000.00 per occurrence and in the aggregate, as well as workers' compensation insurance and auto insurance, and shall provide proof of the same and, shall name SURETY as an additional insured;"

(5) "CONTRACTOR warrants that he/she/it will not respond to, or take, any assignment to perform services hereunder unless CONTRACTOR can perform such services in the time frame specified by SURETY. CONTRACTOR is required to remain in contact with SURETY regarding the status of services being performed by CONTRACTOR for SURETY;"

(6) "In the event CONTRACTOR provides notary or related services, CONTRACTOR has thoroughly read the Notary Signing Agent Code of Conduct (the "Code") provided by SURETY to CONTRACTOR and agrees to adhere, abide and be bound by the CODE, as may be amended by SURETY from time to time;" and

(7) "CONTRACTOR shall not assign or subcontract this Agreement or any rights or obligations hereunder without the prior written consent of SURETY, which SURETY may withhold in its sole, absolute and subjective discretion."

Attached to each Independent Vendor Services Agreement and incorporated therein is a separate document entitled, "Exhibit A Vendor Services Agreement," which contains instructions regarding the performance of the job for which the individual is being engaged by YHT, within the Fenix and Surety family of companies. The "Vendor Services Agreement" for Title Abstractors contains among the following instructions

(1) "If an open or unsatisfied mortgage/deed of trust to an Institutional Lender is evidenced in your research, you must report complete information regarding that instrument. In addition, if an open or unsatisfied mortgage/deed of trust to an Institutional Lender is evidenced in your research by the PRIOR OWNER, please provide the corresponding chains back to when the parties obtained title. NOTE: open assumed mortgages must show all deeds back to the original loan;"

(2) If an open or satisfied mortgage/deed of trust is NOT evidenced in your research, you must perform a search on the prior owner of the subject property, reporting complete deed Abstractor Setup Package information, any open or up to three satisfied mortgages/deeds of trust, judgments, pertinent legal descriptions and any other matters affecting the subject real estate. The prior reported deed must be a bona fide sale, evidencing a valid consideration (i.e.

family conveyances do not count as a prior owner). Thus, it may be necessary to extend the period of the search to report additional chains of title beyond the two-owner assignment;”

(3) “This report [of the chain of title including the current deed of title] must be submitted in writing and include COPIES OF ALL DEEDS IN THE CHAIN OF TITLE and notes of title, along with any pertinent document copies. If search evidences that there is a current land contract on the property, please provide a copy of the contract, as well. Finally, the search must show if the subject property is a condominium, PUD, or waterfront;”

(4) “Copies of Documents Required in Search Package: Copy of plat map required if available;”

(5) “A minimum search of 60 years or the prescribed number of years dictated by the client for your area must be completed. (The search must be to an arm’s length transaction and not between family members and it must show a valid consideration.) The grantor must be checked for any open mortgages and judgments. All easements and restrictions within the scope of the search must be reported;”

(6) “You will perform a bring-down search from the EFFECTIVE DATE of the commitment up to the day of recording;”

(7) “If the bring-down search evidences no change from the original search, or if all grantees from the title deed have not executed the mortgage/deed of trust received for recording, contact your SURETY representative and/or its affiliates for further instructions;”

(8) “CONTRACTOR is and at all times during the term of this Agreement shall remain, duly licensed, as applicable, in the jurisdiction(s) where CONTRACTOR will be performing services for SURETY;” and

(9) “CONTRACTOR possesses, and at all times during the term of this Agreement shall maintain, at his/her/its sole expense, errors and omissions insurance coverage in an amount of not less than \$1,000,000.00 per occurrence and in the aggregate, as well as workers’ compensation insurance and auto insurance, and shall provide proof of the same and shall name SURETY as an additional insured.”

The Vendor Services Agreement for a “Witness Only Closer” refers the Closer to an attached document entitled, “Instructions for Witness Only Closer.” That document contains among the following instructions:

(1) “Maintain professionalism at all times. The dress code expected is ‘business casual;”

(2) "Contact customer prior to arrival to confirm your identity and time of arrival;"

(3) "Provide your photo ID to the customer to verify your identity;"

(4) "Obtain customer photo ID and complete information on the provided form;"

(5) "Have borrower(s) sign off on all judgments. If any belong to borrower(s), please call office immediately;"

(6) "Collect balance due on settlement sheet. Payments must be via a certified check made payable to Surety Title Company, LLC. Contact Surety Title Company, LLC for approval of personal check;"

(7) "Have borrower(s) fill out marital history on Affidavit of Title and please notarize this document;"

(8) "Advise borrower(s) that in most cases, it is the policy of Surety Title Company, LLC to send credit card payments directly to them for forwarding to their creditors;"

(9) "Have all borrower(s) sign all documents in the mortgage package EXACTLY as their names appear on the documents. Do not initial pages unless there is a place on the page for initials, in which case borrowers must initial;"

(10) "Non-borrowing spouse must sign the Mortgage, Right-to-Cancel, Truth-In-Lending and Itemization of Amount Financed;"

(11) "Please keep package in the order received and return in that order;" and

(12) "Return package to our office in UPS envelope provided as soon as possible. Closings scheduled prior to 6PM must be sent out on the day of signing."

A Notary Signing Agent signs a document entitled, "Notary Signing Agent Code of Conduct," which states that by signing the Notary Signing Agent acknowledges and agrees to the "attached code of conduct and that the Notary Signing Agent Code of Conduct is incorporated into the Vendor Services Agreement executed by [the Notary Signing Agent] as may be amended from time to time."

The above-cited clauses taken as a whole reflect a substantial degree of control over the Closers, Notary Signing Agents and Title Abstractors by YHT; which is to say, they describe not just what YHT expects to be done, but the manner in which YHT expects it to be done. To illustrate this concept in the simplest terms, if one engages the services of a painter to paint a room and says to the painter, I want the walls painted in blue and the trims in white, then leaves the painter to his work, that evinces a lack of direction and control consistent with independent contractor status. However, if the individual engaging the services of the painter says to the painter, I want the walls painted in blue and the trims in white; I want you to start by placing painters' tape along the trims at the base of the wall and along the top of the wall at the ceiling; I then want you to use a 3-inch flat edge brush with synthetic bristle to paint the borders of the wall in blue using horizontal brush strokes; I then want you to use a 9-inch by ¾ inch polyester pressure roller to apply three coats of the blue paint to each wall using vertical strokes; I then want you to wait one hour before removing the painters' tape and one full day before applying the white paint to the trim, at which point I want you to apply two coats of white paint to the trims using a 2.5-inch angular edge brush with synthetic bristle – those sorts of instructions evinces the type of direction and control that one does not ordinarily associate with independent contractor status. The instructions that are contained within the “Independent Vendor Services Agreement,” various “Vendor Services Agreements,” and “Witness Only Closer Instructions” quoted above are akin to the latter set of instructions for the painter; which is to say, they expressly state that the individual whose services are being engaged “shall” complete tasks “in strict compliance” with YHT’s “instructions and parameters” and they enumerate those “instructions and parameters” in great detail – everything from, “[i]f the bring-down search evidences no change from the original search, or if all grantees from the title deed have not executed the mortgage/deed of trust received for recording, contact your SURETY representative and/or its affiliates for further instructions” to “keep package in the order received and return in that order;” indeed, everything from, “[i]f an open or unsatisfied mortgage/deed of trust is NOT evidenced in your research, you must perform a search on the prior owner of the subject property, reporting complete deed Abstractor Setup Package information, any open or up to three satisfied mortgages/deeds of trust, judgments, pertinent legal descriptions and any other matters affecting the subject real estate,” to, “the dress code expected is ‘business casual.’” These documents instruct the “CONTRACTOR” that he or she must maintain at his or her own expense during the term of the agreement with YHT/SURETY E&O insurance in an amount of not less than \$1 million per occurrence and in the aggregate, as well as workers’ compensation insurance and auto insurance, shall provide proof to YHT/SURETY of same and shall name YHT/SURETY as an additional insured. These documents require “CONTRACTORS” to agree to adhere to, abide by and be bound by codes of conduct and instructions, which may be amended by YHT/SURETY at its discretion “from time to time.” These documents prohibit the “CONTRACTOR” from assigning or subcontracting any of the agreement or any rights or obligations under the agreement without prior written consent of YHT/SURETY, which the “CONTRACTOR” is told may be withheld in YHT/SURETY’s “sole, absolute and subjective discretion.” None of this resembles in any way the absence of direction and control that is ordinarily associated with the relationship between a bona fide independent contractor and the party that has engaged his or her services. Furthermore, I find

unpersuasive petitioner's assertion that because these instructions to YHT's Closers, Notary Signing Agents and Title Abstractors reflect "best practices" of its industry association, ATLA (the American Land Title Association), they should not be considered indicia of direction and control by YHT. As noted by respondent in its exceptions, "best practices" announced by an industry association do not equate to legal or regulatory requirements, as petitioner would have us believe. The decision to impose upon the individuals whose services it engaged the instructions contained in the documents described above, regardless of whether they reflect "best practices" announced by an industry association, is a decision that was made by YHT/SURETY, using the verbiage of one of the very documents at the center of this controversy, in its "sole, absolute and subjective discretion," without any input from the Closers, Notary Signing Agents or Title Abstractors, who YHT would have us believe were bona fide independent contractors and not employees. What appears in these documents is the very essence of direction and control. Thus, suffice it to say, I disagree with the ALJ that YHT has met its burden under Prong "A" of the ABC test relative to the Closers, Notary Signing Agents and Title Abstractors whose services it engaged during the audit period and find instead that the overwhelming weight of the evidence in the record supports the opposite conclusion.

Regarding Prong "B" of the ABC test, relative to the Closers and Notary Signing Agents, I agree with respondent that petitioner has failed to meet its burden; which is to say, petitioner has failed to establish that the services provided to YHT by the Closers and Notary Signing Agents; namely preparing closing documents, witnessing the signing of closing documents and executing post-closing requirements during real estate closings conducted at the location of YHT's clients, was either outside the usual course of business for which such service was performed, or that such service was performed outside of all the places of business of the enterprise for which such service was performed. In that regard, I would note, as did respondent in its exceptions, 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 among the principal components of YHT's business enterprise is providing closing and notary signing services to its clients during real estate closings, the client locations where those services are performed are locations where YHT conducts an "integral part of its business." Similarly, I would agree with respondent that since among the principal components of YHT's business enterprise is providing closing and notary signing services to its clients during real estate closings, the performance of those services by the Closers and Notary Signing Agents engaged by YHT are services performed within, not outside of, YHT's usual course of business. Furthermore, YHT employs individuals to perform precisely the same functions for "in-house" real estate closings (those performed at YHT's offices in Marlton, N.J.) as the Closers and Notary Signing Agents at issue perform during real estate closings conducted at the locations of YHT's clients, and according to petitioner, the Closers and Notary Signing Agents at issue "were only used for closings out of the office when YHT's in-house closers were too busy with in-office closings that they (YHT) needed to enlist help to cover closings outside the office." Both of these facts support the integral nature of these functions to

YHT's business enterprise and highlight the artificial nature of YHT's distinction for employment status purposes only between in-house closers/signing agents and those who perform closing/signing agent functions for YHT during closings conducted at the locations of YHT's clients outside of YHT's Marlton office.

Regarding the Title Abstractors, although the function they perform is clearly within YHT's usual course of business, I believe that it is unfair to characterize the County Clerk's office, where Title Abstractors perform abstracting services for YHT, as among YHT's places of business. Consequently, I find that petitioner has met its burden under Prong "B" relative to the Title Abstractors.

Regarding Prong "C" of the ABC test, as reflected in the opinions in both Carpet Remnant, supra., and Gilchrist, supra., 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.

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.

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

Thus, in order to satisfy Prong “C” of the ABC test, YHT must prove by a preponderance of the credible evidence with regard to each Closer, Notary Signing Agent and Title Abstractor whose services it engaged during the audit period that that individual was during the audit period customarily engaged in an independently established business or enterprise (not multiple employment). Under the holding in Carpet Remnant, *supra.*, that means that relative to each Closer, Notary Signing Agent and Title Abstractor whose services YHT engaged during the audit period, 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 individual’s business or enterprise during that period, the extent of each individual’s business resources during that period and, perhaps most importantly, the amount of remuneration each individual received from YHT during that period compared to that received from others.

In the instant matter, I find that petitioner has met its burden under Prong “C” with regard to all of the Closers, Notary Signing Agents and Title Abstractors at issue, with the exception of Helen Madrigali. I believe it must be acknowledged that there are legitimate independent business enterprises conducted by individuals, without employees and without much in the way of “tools, equipment, vehicles and similar resources.” One must evaluate the totality of the circumstances when applying the Prong “C” factors. Thus, for example, I do not fault petitioner for failing to provide evidence of the number of employees that the Closers, Notary Signing Agents and Title Abstractors have, since in order to sustain a business as a freelancer in one of these fields, one would not necessarily require employees, but rather, could conceivably sustain such a business with one’s own services alone. Of course, if the provider of the services at issue were to *have* employees, that would certainly, under Carpet Remnant, be a factor mitigating in favor of a finding that Prong “C” had been satisfied, but I don’t believe it is absolutely necessary in every case. Similarly, there are services which can be performed and business enterprises based on the performance of those services, which require little or no “tools” or “similar resources.” Thus, where the “tools” of a freelancer’s trade legitimately consist of his or her personal laptop computer, printer, cable and Wi Fi connection, cell phone, and automobile, that alone should not disqualify the individual provider of the service from being considered engaged in an independently established business enterprise. That said, I agree with the ALJ that applying *all* of the Prong “C” factors enumerated in Carpet Remnant to the facts of this particular case petitioner has satisfied its burden under Prong “C” relative to the services provided to YHT by the Closers, Notary Signing Agents and Title Abstractors (with the exception of Ms. Madrigali). It has been stated in prior final administrative determinations that among the most important of the “C” Prong factors to consider is the amount of remuneration the alleged contractor received from the putative employer relative to the amount of remuneration received by the alleged contractor from others for performance of the same services. As reflected in the ALJ’s findings of fact, the record in this case reveals that with the exception of Ms. Madrigali,⁷ each of the Closers, Notary Signing Agents and Title

⁷ Ms. Madrigali received 88% of her Schedule C income from YHT.

Abstractors at relevant times earned between 1% and 28% of their Schedule C income as Closers, Notary Signing Agents and Title Abstractors from YHT and the balance of their Schedule C income from other clients. These individuals held themselves out as being available to perform the subject services on a fee-for-service basis and performed those services for multiple clients over the course of multiple years during the audit period.

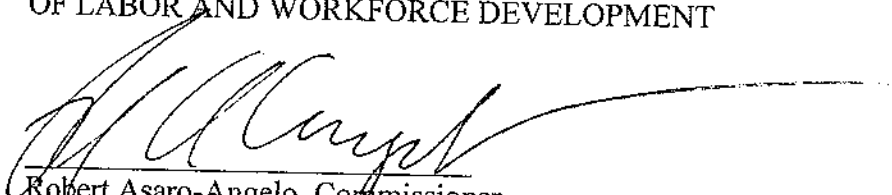
As to the office cleaning services provided to YHT by Ms. Yusupova, I agree with the ALJ that petitioner met its burden under Prongs "A" and "B" of the ABC test, but disagree with her findings and conclusions relative to Prong "C." Specifically, I agree with respondent that petitioner failed to present any evidence relative to the "C" Prong factors enumerated in Carpet Remnant. For example, petitioner failed to present even a modicum of evidence that Ms. Yusupova maintained other clients besides YHT. Indeed, the only evidence produced by petitioner as to Ms. Yusupova's services was a single invoice presented by Ms. Yusupova to YHT for cleaning services in October and November of 2017 (Exhibit J-3, page 185). This single piece of evidence speaks to none of the Prong "C" factors listed above. In its reply to exceptions, petitioner asserts, "[t]he mere fact that she (Ms. Yusupova) did not respond to Investigator Council's request for tax filings is of no significance when there are no indicia that she provided services within the scope of YHT's business." 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. That is, by law once it has been established that services have been performed for remuneration, as is undisputed in this case, 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. Thus, the Department is under no statutory or other obligation to obtain Ms. Yusupova's tax documents, as maintained by petitioner, and petitioner's failure to produce any evidence addressing the Prong "C" factors is fatal to its claim of UCL-exempt status for the office cleaning services provided to YHT by Ms. Yusupova.

ORDER

Therefore, with regard to all of the Closers, Notary Signing Agents and Title Abstractors, as well as with regard to Ms. Yusupova, who provided office cleaning services to YHT, petitioner's appeal is hereby dismissed and petitioner is hereby ordered to immediately remit to the Department for the years 2015 through 2018 \$6,065.88 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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