JPRC, Inc., t/a Liquid Assets,
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 10577-10
AGENCY DKT. NO. DOL 08-030R
(ON REMAND LID 4185-08)

Issued: November 12, 2015

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (the Department or Respondent) assessed JPRC, Inc., t/a Liquid Assets (Liquid Assets or Petitioner) for unpaid contributions to the unemployment compensation fund and the State disability benefits fund for the period from 2002 through 2005. Liquid Assets requested a hearing with regard to the Department's assessment. The matter was transmitted to the Office of Administrative Law (OAL), where it was scheduled for a hearing before Administrative Law Judge John Schuster, III (ALJ). The issue to be decided was whether those individuals who had worked as exotic dancers at Liquid Assets' establishment during the audit period, the years 2002 through 2005, were employees of Liquid Assets and, therefore, whether Liquid Assets 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 that period.

As to what constitutes "employment," N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or UCL), defines the term 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
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> (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
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> (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.

Prior to a hearing, Liquid Assets filed a motion before the ALJ, pursuant to N.J.A.C. 1:1-12.5, for partial summary decision. Specifically, Liquid Assets sought summary decision for the portion of the audit period from late 2003 through 2005 on the basis of the following assertions which were contained in its motion papers:

> In 2003, Liquid Assets restructured its relationship with the professional entertainers after a review of applicable law and industry practice. From the 2003 change forward, the entertainers have paid a flat "house fee" to petitioner to purchase the right to perform their business activities on the premises as legal licensees. During this time, petitioner has not paid wages or other remuneration to the entertainers
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> Instead, the professional entertainers generate their income by selling private dances to the patrons present on Liquid Assets' premises. The entertainers also receive "tips" for state performances and receive tips above and beyond the price charged for the private dances. The entertainers are free to choose for whom they perform and the price charged for a private dances (sic).

Liquid Assets maintained that because of its restructured relationship with the professional entertainers, beginning in 2003 and continuing through 2005, none of the exotic dancers who had performed at Liquid Assets' establishment during that time had "performed personal services for remuneration from Liquid Assets" and that, therefore, "the business relationship did not constitute 'employment' within the meaning of N.J.S.A. 43:21-19(i)(6)."

In response to petitioner's motion for partial summary decision, described above, the Department asserted before the ALJ that, (1) Liquid Assets had conceded in its motion papers that the exotic dancers had regularly received "tips" during the period 2003 through 2005, (2) under N.J.S.A. 43:21-19(o) "wages" includes gratuities a worker regularly receives in the course of her employment from other than her employer, and (3) under N.J.S.A. 43:21-19(o) "remuneration" means all compensation for personal services, which must necessarily include wages. Thus, the Department maintained that by petitioner's own account, the dancers had performed services for tips-wages-remuneration during the period from 2003 to 2005 and that "employment' under N.J.S.A. 43:21-19(i)(6) had, therefore, been established, unless and until it could be proven that each of the three prongs of the ABC test had been met. Consequently, the Department urged the ALJ to deny petitioner's motion for partial summary decision.

The ALJ granted petitioner's motion for partial summary decision[1] and concluded that petitioner was not liable for contributions to the unemployment compensation fund and the State disability benefits fund for work performed by the exotic dancers at Liquid Assets "from the time in 2003 that it (Liquid Assets) stopped paying the dancers...through 2005, which is the end date of the subject matter of this proceeding." The ALJ explained, "[t]he dancers received fees and tips from patrons; however, petitioner did not compensate the dancers for their services during the period that is in dispute," adding, "[f]urthermore, the dancers did not provide a service to the petitioner in exchange for remuneration from the latter part of 2003 through 2005 and since this fact is not in dispute, summary decision in this matter is appropriate."

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[1] Actually, the ALJ indicated in his initial decision that he had granted "summary decision," rather than "partial summary decision," as had been sought by petitioner. In addition, along with his initial decision, the ALJ had returned the entire file in this matter to the Commissioner of Labor and Workforce Development, including the matter of assessments for audit year 2002 and the early part of 2003. These actions by the ALJ were clearly erroneous. By petitioner's own account, its relationship with the dancers in 2002/early 2003 met the threshold test for "employment" (petitioner conceded direct payment to the dancers for services), thereby necessitating that petitioner satisfy the ABC test in order to escape UI/DI contribution liability relative to the dancers for that period. Since the ALJ made no finding in his initial decision with regard to the ABC test, limiting his analysis only to the threshold issue, namely, whether the dancers had performed services for remuneration, the ALJ's issuance of summary decision with regard to 2002/early 2003 was inappropriate.

Upon de novo review of the record, and after consideration of the ALJ's initial decision, as well as the exceptions and reply to exceptions filed by the parties, I rejected the ALJ's conclusions in their entirety and ordered that the matter be remanded for a hearing on the following issue: whether Liquid Assets is able to satisfy its burden of meeting each one of the three criteria of the ABC test relative to its exotic dancers for the audit period from 2002 through 2005. That is, I found on the basis of the then existing record that the relationship between Liquid Assets and its exotic dancers for the period from 2002 through 2005 constituted "services performed...for remuneration." Specifically, I agreed with respondent that with regard to the period from 2002 through early 2003 (prior to the "restructure[ing]"), petitioner conceded that it had made direct payments to the dancers, which necessarily constitutes services for remuneration, and that with regard to the remainder of the audit period (the latter portion of 2003 through 2005), I agreed with respondent that the payments received by the exotic dancers from customers of Liquid Assets, which included dance fees and tips, did in fact constitute remuneration for services. Therefore, I concluded that the services performed by the exotic dancers during the entire audit period constituted "employment," as that term is defined at N.J.S.A. 43:21-19(i)(6), unless and until petitioner could establish that each of the three prongs of the ABC test had been met.

The matter was then re-transmitted to the Office of Administrative Law, where it was returned to ALJ Schuster. The ALJ conducted a hearing and issued a new initial decision. In that post-remand initial decision, the ALJ found relative to the period from January 1, 2002 through June 30, 2003 (the earlier part of the audit period), that the direct payments from Liquid Assets to the dancers had constituted "services performed...for remuneration," resulting in the above-referenced presumption of employment. Relative to that earlier part of the audit (the period from January 1, 2002 through June 30, 2003), the ALJ next turned to the ABC test analysis and found the following relative to each of the three prongs of the ABC test:

Prong "A"

The ALJ found that, "petitioner [Liquid Assets] had a certain degree of control over the dancers because they were paid a salary and could at any time refuse to pay the salary if they remained at petitioner's place of business." Thus, the ALJ concluded that "petitioner has not satisfied Part (A) of the ABC test since when the dancers were paid a salary they were under the control of the petitioner since it was the petitioner who determined when any given dancer was going to work."

Prong "B"

The ALJ found that, "[i]n this case all the services, meaning the dancing performed by the dancers, were performed in petitioner's establishment so in order to be successful in this part of the analysis petitioner must demonstrate that exotic dancing was outside its usual course of business." Regarding the latter question, namely, whether the exotic dancing had been performed outside the usual course of the business for which

such service had been performed [that is, Liquid Assets' business], the ALJ found the following:

> The unrefuted testimony in this matter is that petitioner's primary business was the selling of food and beverages. Entertainment was provided as an incentive for patrons to eat and drink in petitioner's establishment. The testimony by petitioner's owner and employees was that multiple forms of entertainment were used to draw customers to the establishment. That entertainment was mixed and varied. It consisted of comedy acts, exotic dancing, recorded musical entertainment as well as musicians, jugglers, magicians and other forms of variety acts. Therefore, Liquid Assets is what would generally be referred to as a gentlemen's club and not as a go-go bar. If it were the latter, then the exotic dancing would be in the normal course of the business, but since exotic dancing is only one type of entertainment offered it is outside the primary course of business of selling food and beverages. I therefore CONCLUDE that petitioner has demonstrated that exotic dancing is outside its usual course of business.

Prong "C"

The ALJ found the following:

> The unrefuted testimony given in this matter indicates that all the dancers worked at many go-go bars and/or gentlemen's clubs during the audit period. The general industry practice was for an individual dancer to work a day or two at one location and then move on to another client. It appears this practice is beneficial to the dancers so their performance is viewed by a patron as new and entertaining. Using a musical analogy in the entertainment industry while an individual enjoys a certain musical performer that individual would not attend the same concert repeatedly as listening to the same music would become stale over time. Presumably watching the same dance routine repeatedly would also have the same effect. For that reason it is assumed that the dancers perform from place to place on a regularly (sic) basis to be before a new patron base who would enjoy viewing the performance and would therefore me more likely to provide a gratuity. The unrefuted testimony of M.T., the Liquid Assets bartender, is telling in this regard as she described a schedule for the individual dancers as non-existent in that they may appear at the establishment twice in one week and then not again for weeks or even months. She also testified that there are times when there were too many dancers at Liquid Assets and if another dancer would arrive they would just leave and perform at some other location. This indicates that the nature of the exotic dancing business is one that is not built around one location but is better described as a number of part-time jobs at various locations. By working in that manner each of the dancers is not dependent on any one location and their individual business will survive the

termination of their relationship with any particular location. Based on that testimony, I FIND that petitioner has satisfied the...(C) Prong of the Statute.

Thus, for the period from January 1, 2002 through June 30, 2003, the ALJ concluded that because the dancers had performed services for remuneration, thereby resulting in a presumption of employment, and because Liquid Assets had failed to satisfy Prong "A" of the ABC test, the exotic dancers who had performed at Liquid Assets' establishment during that period had been employees of Liquid Assets.

Relative to the period from July 1, 2003 through 2005 (the latter part of the 2002-2005 audit period), the ALJ found that the exotic dancers who had performed at Liquid Assets' establishment received "no remuneration of any kind...paid directly or indirectly by petitioner to the dancer including using some form of conduit or third party." Thus, relative to that period of time, the ALJ concluded that "the (A)(B)(C) test would...not be reached," and the exotic dancers who had performed at Liquid Assets' establishment would be considered independent contractors, rather than employees. Nevertheless, according to the ALJ, "in response to the Remand directive of the Commissioner, that analysis [the ABC test analysis] will take place hereafter," to wit, the ALJ concluded the following relative to each of the three prongs of the ABC test:

Prong "A"

The ALJ found the following:

With respect to Prong (A) the unrefuted testimony indicates that petitioner exercised no control over the individual dancers at any time whether at the petitioner's location or otherwise. Petitioner did not provide make-up, hair dressing, costumes, or any personal services to the dancers. The petitioner does not provide transportation or training and the dancers choreograph their own routines and provide their own costumes and props. Petitioner does not instruct the dancers on what to say to the customers and does not allow the customer to use the petitioner's credit card service to pay the dancers for dance fees or gratuities. The dancers control their own schedule including days of work and hours that they wish to work on those days. Because they do not receive any remuneration from petitioner they can perform at petitioner's place of business whenever they chose (sic) and it makes no difference to petitioner if there are too many dancers on site at any given time. Petitioner does not tell the dancers how to dance or when to dance. The dancers set their own stage dance schedules by use of a "sign-up sheet" on a first come-first serve basis. Petitioner does not request the dancers perform any jobs at its place of business. Any monies received by the dancers is not shared with petitioner or any of its employees. Petitioner has no restrictions on where dancers can dancer (sic) or how or when they must dance.

Prong "B"

The ALJ found the following:

> The testimony in this matter established that petitioner's business model changed only in the respect that dancers were no longer paid but in fact paid a fee to perform at petitioner's establishment.[2] Petitioner maintained its primary business of selling food and beverages and used entertainment as an incentive for customers to patronize its establishment.

Prong "C"

The ALJ found the following:

> With respect to Prong (C) of the applicable statute both before and after petitioner's business model changed on July 1, 2003 each of the dancers that performed in petitioner's establishment were independently established as explained previously. The change of the business model on that date did not affect the independence of the dancers because after the business model changed on July 1, 2003 the dancers still performed at multiple other locations and the termination of any dancers' relationship with the petitioner would not have the effect of ending any of the dancers' business activity. The occupation of being exotic dancers was one that was stable and lasting as there were multiple locations where the dancers could apply their trade whether or not Liquid Assets remained a viable option as a location to perform. The previous discussion regarding Prong (C) did not change upon the modification of petitioner's business model in 2003.

Thus, for the period from July 1, 2003 through 2005, the ALJ concluded that, "they [the exotic dancers who had performed services for Liquid Assets] became independent contracts (sic) based on (A)(B)(C) test as explained previously." Respondent filed exceptions to the ALJ's initial decision. Petitioner filed a reply to respondent's exceptions.

In its exceptions, respondent takes issue with the ALJ's finding relative to the period from July 1, 2003 through 2005 that the exotic dancers who had performed at Liquid Assets' establishment received "no remuneration of any kind...paid directly or indirectly by petitioner to the dancer," and his resulting conclusions relative to the period from July 1, 2003 through 2005 that (1) "the (A)(B)(C) test would...not be reached," and

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[2] The ALJ did not expressly attribute this finding to his Prong "B" analysis. However, it is followed immediately within the initial decision by his finding that Liquid Assets' "primary business" was that of selling food and beverages, which had been the basis for his conclusion earlier in the initial decision relative to the period from January 1, 2002 through June 30, 2003, that Liquid Assets had satisfied Prong "B" of the ABC test.

(2) the exotic dancers who performed at Liquid Assets' establishment would be considered independent contractors, rather than employees. On this issue, respondent reasserts the argument it had made earlier in its exceptions to the ALJ's pre-remand initial decision – an argument which I had adopted in my June 8, 2010 remand decision – that (1) Liquid Assets conceded the exotic dancers had regularly received "tips" during the period from July 1, 2003 through 2005, (2) under N.J.S.A. 43:21-19(o) "wages" includes gratuities a worker regularly receives in the course of her employment from other than her employer, and (3) under N.J.S.A. 43:21-19(o) "remuneration" means all compensation for personal services, which must necessarily include wages. Thus, the respondent maintains that by petitioner's own account, the dancers had performed services for tips-wages-remuneration during the period from July 1, 2003 through 2005 and that "employment' under N.J.S.A. 43:21-19(i)(6) had, therefore, been established, unless and until it could be proven that each of the three prongs of the ABC Test had been met.[3]

With regard to Prong "A" of the ABC test, respondent notes that the court in Carpet Remnant, 125 N.J. 567 (1991), listed specific factors as indicative of control,

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[3] Respondent also asserts that the facts adduced during the hearing "demonstrate that the sole reason Liquid Assets changed its 'business model' after July 1, 20013 by discontinuing payment to the dancers…and began charging the dancers a rental fee was to defeat the remuneration requirement set forth in N.J.S.A. 43:21-19(i)(6)," adding, "[t]his action was taken by Liquid Assets because it could not satisfy any of the prongs of the ABC test." Respondent notes that the Commissioner and the courts have previously addressed "situations where, as here, remuneration has been paid by a third party for services rendered for the benefit of the alleged employer." Specifically, respondent cites, among others, the holding of the Commissioner in Steven Grand t/a, All Nations Driving School and All Nations Driving School, Inc., 2006 N.J. AGEN LEXIS 183, in which a driving school maintained that because its driving instructors had been paid directly by the students, there had been no remuneration for services, thereby obviating the need to undergo the statutory ABC test analysis. In that case, according to respondent, the Commissioner found in favor of the Department, explaining:

> The facts of this case are comparable to those in Interstate Wholesale and Distribution v. Department of Labor, A-1658-0121 (2003) (unpublished decision) and Special Care of New Jersey v. Board of Review, 327 N.J. Super. 197 (2000). In both of these matters, the Appellate Division pierced the veil created by the billing and collection processes to find that employment relationships existed between the respective petitioners in those cases and the individuals who provided direct service delivery to the end customers. Similarly, in the instant matter, an illusory façade cannot be permitted to mask the nature of the true business relationship between petitioner and the driving instructors. The instructors were clearly employees engaged by petitioners in order to deliver the service which petitioners were a business to provide.

including whether the worker is required to work any set hours or jobs, whether the enterprise has the right to control the details and means by which the services are performed, and whether the services must be rendered personally. Respondent added, citing Carpet Remnant, supra, and Schomp v. Fuller Brush Co., 124 N.J.L. 487, 490 (Sup. Ct. 1940), that "an employer need not control every facet of a person's responsibilities for that person to be deemed an employee." Applying the factors enumerated in Carpet Remnant to the case at hand, respondent asserts the following:

> Here, the ALJ incorrectly found that Liquid Assets did not direct or control the dancers after July 1, 2003. The ALJ found that prior to July 1, 2003 the payment of wages directly to the dancers without more, established direction and control. However, a review of the record shows that direction and control under the "A" prong was demonstrated for the entire audit period for the following reasons:
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> > Direction and control were established because Liquid Assets holds a liquor license issued by the State of New Jersey, Division of Alcoholic Beverage Control. Liquid Assets is a bar and the sale of liquor is an integral part of its business and provides the major source of income. In order to avoid revocation or suspension of that license, the dancers must adhere to certain standards (T113, 5-8; T126, 1-25)[4]. Therefore, the dancers had to abide by rules which were imposed by Liquid Assets in order to protect its investment in its liquor license (T147, 9-13). These rules encompassed certain behaviors such as that the customers were not permitted to touch the dancers and that the dancers had to remain fully covered at all times (T150, 17-25; T151, 3-7). Liquid Assets has a clear economic interest in directing and enforcing these rules. Consequently, Liquid Assets directed and controlled the behavior of the dancers through imposition of these rules which were necessary to protect its investment in its liquor license (T124, 7-25; T167, 24-25; T168, 1-2).
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> > Further, although the dancers testified that they were free to "come and go" as they pleased, and often enjoyed lengthy intervals between appearances at Liquid Assets, upon arrival at Liquid Assets dancers were "given a time" with time slot pre-determined by the club (T117, 8-25; T153, 2-7). Although the dancers were not assigned a specific time

[4] The citation (T113, 5-8; T126, 1-25) apparently denotes, hearing transcript, page 113, lines 5 through 8 and hearing transcript, page 126, lines 1 through 25. I also hereby adopt that method of citation to the hearing transcript and will use it hereafter within the body of this decision.

> to dance, the schedule of time slots was set by the club and the dancers were required to sign in and designate a time slot in order to perform (T117, 10-25).
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> The house fees paid by the dancers for performing were set by Liquid Assets. The house fees varied in amount by the day of the week, presumably in recognition of the fact that a dancer's earnings are diminished during days of the week which are less popular with Liquid Assets' patrons (T182, 6-17). No testimony was presented by Liquid Assets demonstrating that the house fee[s] assessed after July 1, 2003 were negotiable by the dancers. Consequently, there is no evidence in the record demonstrating that the dancers had any of the bargaining power normally afforded an independent contractor established in her own business.

With regard to Prong "B" of the ABC test, and specifically with regard to the ALJ's finding that because Liquid Assets is a "gentlemen's club," rather than a "go-go bar," exotic dancing is outside its usual course of business, respondent maintains that this distinction between a "gentlemen's club" and a "go-go bar" is, in fact, a distinction without difference for the purpose of assessing liability for employer contributions under the UCL. That is, respondent states that, "[t]he advertised presence of the dancers at Liquid Assets is the major attraction of the club as the club promotes and provides exotic entertainment." As to the ALJ's contrary finding that the entertainment at Liquid Assets was "mixed and varied," consisting of "comedy acts, exotic dancing, recorded musical entertainment as well as musicians, jugglers, magicians and other forms of variety acts," respondent states (1) that petitioner offered no testimony from any musicians, comedy acts, jugglers or any type of performer other than the two exotic dancers who testified during the hearing[5], and (2) that the Department's audit did not disclose any disbursements by Liquid Assets to any musicians, jugglers, magicians or any type of performer other than to exotic dancers.

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 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.

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[5] Three exotic dancers, not two, testified during the hearing. Those exotic dancers were referred to within the initial decision as J.F., Ms. D, and Ms. M, respectively. Only one of the three, J.F., testified that she had danced at Liquid Assets during the audit period, 2002 through 2005. (T129, 9; T163, 11; T179, 4)

In addition, respondent cites to the holding in Schomp, supra, wherein the court stated that "it is an analysis of the facts surrounding each employee that determines whether an alleged employee is an independent contractor according to the ABC test" (emphasis provided by respondent). Thus, respondent asserts that in order to satisfy Prong "C" of the ABC test, Liquid Assets must demonstrate that each dancer was engaged in a viable, independently established, business at the time that he or she rendered services to Liquid Assets. It is in this regard that respondent asserts Liquid Assets "has most convincingly failed the ABC test." That is, respondent notes that, "[t]he dancers [who testified during the hearing] failed to establish that they had a business name, federal tax identification number or other indicia that they were engaged in a viable independent business enterprise. (T159, 15-25; T176, 5-17)." Furthermore, regarding the testimony of the three dancers and the club owner, Mr. Colasanti, to the effect that the dancers had each worked at other clubs, respondent states that (1) Liquid Assets provided no "objective evidence" of the dancers' earnings at any other establishment during the audit period (such as "the dancers' Schedule "C" tax returns" reflecting earnings at such other establishments), and (2) "[t]he fact that an individual holds other simultaneous employment in a related trade, occupation or profession without further indicia of independence does not alone support the conclusion that the individual is an independent contractor." Regarding the latter, respondent states that, "[t]he UCL envisions multiple employment," adding, "[t]his is amply set forth in the law as follows: N.J.S.A. 43:21-3(d)(B)(i)(ii), N.J.S.A. 43:21-6(b), N.J.S.A. 43:21-14.1 and N.J.S.A. 43:21-19(u)."

In reply to the exceptions filed by respondent, Liquid Assets asserts that following the 2003 "restructuring," it ceased making payments directly to the dancers, which should result in a finding relative to the period from July 1, 2003 through 2005 that no services were performed by the dancers for remuneration. Consequently, according to Liquid Assets, it need not address the three prongs of the ABC test with respect to dancers who performed at Liquid Assets' establishment during the period from July 1, 2003 through 2005.[6] Petitioner also asserts relative to the period from July 1, 2003 through 2005 that tips or gratuities received by dancers from customers of Liquid Assets should not be considered "remuneration" for the purpose of determining under N.J.S.A. 43:21-19(i)(6) whether there were "services performed...for remuneration," because (1) those tips or gratuities were never reported by the dancers to Liquid Assets and (2) Liquid Assets did not permit the dancers to use its credit card processing equipment. In support of this argument, petitioner cites to N.J.A.C. 12:16-4.9 which it indicates states in part, "If a worker receives gratuities and/or tips regularly in the course of employment from other than the employer, the gratuities and/or tips received, if reported in writing to the employer, shall be considered taxable. The entire amount of charged tips are covered

[6] In support of this argument, petitioner cites most notably to the holdings in Koza v. New Jersey Department of Labor, 307 N.J. Super. 439 (App. Div. 1998); AC&C Dogs, LLC v. New Jersey Department of Labor, 332 N.J. Super. 330 (App. Div. 2000).

wages and are taxable to the maximum base even though the employee has not reported the entire amount to the employer."[7]

Regarding Prong "A" of the ABC test, petitioner asserts that the testimony during the hearing established an absolute lack of control by Liquid Assets over the dancers. In support of this assertion, petitioner includes the following string of citations to the hearing transcript, with descriptions in parentheses:

> M.T., 108:20-110:20 (dancers followed no set schedule and were permitted to come and go as they please), 111:6-16 (dancers provided their own costumes, props, hair styling and nail treatments), 112:23-25 (no one tells the entertainers how to perform), 113:4-8 (no one tells dancers how to act), 113:12-16 (dancers were only required to dress in a manner that complied with the law), 114:2-10 (dancers were not required to fill in for employees), 115:5-15 (there were no fines or punishments for dancers not showing up, not working enough hours, arriving late, or leaving early), 115:20-23 (entertainers could sit in the dressing room all night if they wanted), 117:8-13 (dancers choose when they want to go on stage), 120:18-121:8 (sometime dancers will come in, not like what they see and leave); J.K. 155:154:16-22 (previous testimony regarding entertainers coming and going as they pleased was accurate), 139:4-11 (dancer testified that she set her own schedule), 142:21-32 (she would sometimes perform once or twice a week and sometimes disappear for a month), 142:2-14 (she chose her own costumes and props), 146:13-147:7 (she could do as she pleased at Liquid Assets, including sitting in the dressing room all night doing nothing); D., 167:8-15 (dancer testified that previous testimony regarding lack of control by M.T. and J.K. was accurate), 170:24-171:3 (she was not required to work a certain number of days or number of hours); M., 180:12-19 (dancer testified that she would testify in the same regard as previous witnesses regarding the operation of Liquid Assets and lack of control); J. Colasanti, 204:23-205:25 (dancers had no set schedule), and 209:5011 (dancers did not fill in for employees).

In addition, petitioner takes issue with the two arguments made by respondent in its exceptions to the post-remand initial decision of the ALJ regarding direction and control under Prong "A" of the ABC test. That is, petitioner states that contrary to respondent's assertion that dancers had to maintain a stage rotation or steady stream of entertainment, M.T., a bartender at Liquid Assets, testified that the dancers chose when to

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[7] The part of N.J.A.C. 12:16-4.9 that petitioner omits from its recitation of the rule is the final sentence, which reads, "If the employee omits reporting tips, but the employer considers tips as part of an hourly rate for meeting the requirements of a Federal or State minimum wage law, it is considered that, in effect, tips have been reported to the employer to that extent and are therefore included as taxable wages."

go on stage. (T118:7-25).[8] Petitioner also maintains in response to respondent's assertion that Liquid Assets' "house rules" constitute evidence of direction and control over the performance of services by the dancers, that "restrictions [which] require compliance with generally applicable safety rules and/or state and local laws do not establish the type of control that demonstrates an employment relationship.[9]

Regarding Prong "B" of the ABC test, petitioner states that the specific facts of this case demonstrate that the dancers' activities are outside of Liquid Assets' "usual course of business." Specifically, petitioner asserts:

> Liquid Assets is a bar that is in the business of selling food and drink, and which also rents space for entertainers to offer their services. Liquid Assets is not in the business of dancing or selling dances.
>
> Liquid Assets does not realize income directly from selling dances or the dancers' dancing. It only receives income from renting space to entertainers, which only represents a small portion of its gross receipts.[10]

Regarding Prong "B," petitioner also states the following:

> If dancing were part of Liquid Assets' usual course of business, Liquid Assets would participate in the business of selling dances either by setting

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[8] Petitioner also cited to a 1942 holding of the Federal District Court for the Southern District of New York in Radio City Music Hall Corp. v. United States, 50 F. Supp. 329 (S.D.N.Y. 1942), aff'd., 135 F.2d 715 (2d Cir. 1943), in support of its assertion that "control necessary to 'present a connected, harmonious and consecutive show' does not render an entertainment venue to be an employer of the performers."

[9] In support of this principle, petitioner cites to a variety of non-New Jersey state court decisions, non-Federal District of New Jersey Federal District Court decisions, non-3rd Circuit Federal Circuit Court decisions, and non-New Jersey state administrative agency decisions, none of which address New Jersey's ABC test and none of which are binding on this agency or any New Jersey court. In a similar vein, petitioner notes that it provided the Department with "extensive case law authority finding exotic dance entertainers to be independent contractors as opposed to employees," citing another series of non-New Jersey administrative decisions and state court decisions as well as non-Federal District of New Jersey Federal District Court decisions; again, none of which are binding on this agency or on any New Jersey court.

[10] Petitioner also makes reference to Exhibit P-5, which it characterizes as a "chart comparing the club's gross receipts to the fees paid by the entertainers." Petitioner indicates that this chart, dated in the top right corner, 2012, demonstrates that the revenues form dancing are a small part of the business, representing only about a quarter of the total receipts.

> fees, sharing in the fee revenue, or at the very least by allowing its credit card machine to be used for the purchase of a dancer's services. That is not the case here. The bright line between the club's once-a-night set fee to rent space to an entertainer, and the entertainer's transactions for her dancing - - which are totally separate - - establishes that the dancers' business of dancing and selling dances is outside the "usual course of business" for Liquid Assets. Using transactions as a measure of business, it is clear that dancers do onto provide their services to Liquid Assets.

Regarding Prong "C" of the ABC test, petitioner maintains that "the fact that the entertainers testified that they performed at other clubs and engaged in other types of dance entertainment activities" demonstrated that the exotic dancers who performed at Liquid Assets' establishment were engaged in an independently established trade, occupation, profession or business. Petitioner adds, "all the entertainers testified that if [Liquid Assets] was to go out of business, they could nevertheless carry on their independent profession and perform at other facilities.[11]

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 the reply thereto filed by petitioner, I hereby accept, for reasons other than those set forth by the ALJ in his initial decision, the ALJ's conclusion that the exotic dancers who performed at Liquid Assets' establishment during the period from January 1, 2002 through June 30, 2003 were employees of Liquid Assets, rather than independent contractors. I also hereby reject the ALJ's conclusion that the exotic dancers who performed at Liquid Assets' establishment during the period from July 1, 2003 through 2005 were independent contractors, rather than employees. In other words, I find for reasons which will be described in detail below, that for the entire audit period, 2002 through 2005, the exotic dancers who performed at Liquid Assets' establishment were, in fact, employees and, therefore, that Liquid Assets is liable for unpaid contributions to the unemployment compensation fund and the State disability benefits fund on behalf of those employees for that entire period.

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[11] Petitioner also includes within its reply to respondent's exceptions two final point headings which state, "THE ACTIONS OF THE DEPARTMENT IN THE PROCEEDINGS DEMONSTRATE THAT THE ABC TEST IS UNCONSTITUTIONAL AS APPLIED TO ENTERTAINMENT VENUES" and, "THE ABC TEST IS IMPERMISSIBLY VAGUE." Since the responsibility to pass upon the constitutionality of a given law rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body, I hereby decline to rule on petitioner's constitutional argument. Instead, I will rest my decision on the hearing record and the law as it currently exists. Consequently, there will be no mention of petitioner's constitutional arguments within the remaining body of this decision.

Before I address the ABC test analysis, I must reject, for the reasons already set forth in my June 8, 2010 remand decision, the ALJ's finding, which appears on page 15 of his post-remand initial decision, that for the period from July 1, 2003 through 2005 (the latter part of the 2002-2005 audit period), the exotic dancers who had performed at Liquid Assets' establishment received "no remuneration of any kind...paid directly or indirectly by petitioner to the dancer including using some form of conduit or third party" and his resulting conclusion that relative to that period of time, "the (A)(B)(C) test would...not be reached," and the exotic dancers who had performed at Liquid Assets' establishment would be considered independent contractors, rather than employees. Instead, I hereby reaffirm the conclusion contained in my June 8, 2010 remand decision, based now not only on the assertions made and evidence contained in the original summary decision motion papers, but also on the post-remand hearing record, that the relationship between Liquid Assets and its exotic dancers for the period from 2002 through 2005 constituted "services performed...for remuneration." Nothing contained in petitioner's reply to respondent's exceptions changes my position in this regard.[12]

Turning to the ABC test analysis, I agree with respondent that Liquid Assets "most convincingly" failed to satisfy its burden under Prong "C" of the ABC test. Therefore, I will begin my analysis with that part of the statutory test. As noted by respondent in its exceptions to the post-remand initial decision of the ALJ and as reflected in the opinions in both Carpet Remnant and Gilchrist, 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. Multiple employment, such as that relied upon by the ALJ in support of his conclusion relative to Prong "C" of the ABC test[13], does not equate to an independently established enterprise or business. Furthermore, as observed by respondent in its exceptions to the ALJ's post-remand initial decision, in order to satisfy Prong "C" of the ABC test, Liquid Assets must demonstrate that each exotic dancer who performed at Liquid Assets' establishment during the audit period was engaged in a viable, independently established, business at the time that she rendered services to Liquid Assets. See Gilchrist, supra, and Schomp,

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[12] Particularly unpersuasive is petitioner's argument that under N.J.A.C. 12:16-4.9 it escapes the classification under the UCL of the dancers' tips as "wages" and, therefore, as "remuneration," because (1) it has chosen not to require the dancers who perform at the club to complete a tip declaration form, whereas it presents other individuals who work in its establishment for tips, such as bartenders, with a tip declaration form, which forms Liquid Assets then "passes on to a payroll company" (T188, 24 through T189, 3; T200, 11 through T201, 2), and (2) because Liquid Assets does not "permit" the dancers to use its credit card processing equipment. Petitioner's reading of N.J.A.C. 12:16-4.9 is simply incorrect.

[13] The ALJ concluded toward the bottom of page 18 of his post-remand initial decision that the testimony adduced at hearing, "indicates that the nature of the exotic dancing business is one that is not built around one location but is better described as a number of part-time jobs at various locations" (emphasis added).

supra. In Carpet Remnant, 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, [14] 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, Liquid Assets must prove by a preponderance of the credible evidence with regard to each exotic dancer who performed at its establishment during the audit period that the exotic dancer was during the audit period customarily engaged in an independently established business or enterprise (not multiple employment). Under the holding in Carpet Remnant, that means that relative to each exotic dancer who performed at its establishment during the audit period, Liquid Assets must address the duration and strength of each dancer's business during that period, the number of customers and their respective volume of business during that period, the number of employees of the dancer's business or enterprise during that period, the extent of each dancer's business resources during that period and, perhaps most importantly, the amount of remuneration each dancer received from Liquid Assets during that period compared to that received from other clubs; which is to say, not a general claim that each dancer worked for other clubs, but actual documentary evidence reflecting the amount of remuneration that each exotic dancer received from Liquid Assets compared to that received from other clubs.

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

The following individuals testified for Liquid Assets during the hearing: three exotic dancers - J.F., Ms. D. and Ms. M; one bartender – M.T.; and John Colasanti, the owner of Liquid Assets. Both Ms. D. and Ms. M. testified that they had not performed at Liquid Assets' establishment during the audit period, 2002 through 2005. Specifically, when during the September 25, 2012 hearing Ms. D. was asked, "[a]nd how long have you performed there [at Liquid Assets]," she responded, "I've been there about four months." (T163, 10-11) When during the hearing Ms. M. was asked, "[a]nd how long have you done that [performed as a dancer at Liquid Assets]," she responded, "Two years." (T179, 2-5) Since by their own account, neither Ms. D., nor Ms. M., had performed at Liquid Assets during the audit period, the testimony of neither individual is relevant to a discussion of the factors enumerated above under Prong "C" of the ABC test, each of which pertains to the existence and nature of the individual's business or enterprise during the audit period.[15]

J.F. testified at the time of the hearing that she had performed as an exotic dancer at Liquid Assets' establishment for "ten years on and off" (T129, 9). Relative to her work for clubs other than Liquid Assets during that time, the following is the sum total of J.F.'s testimony during the hearing:

> Q: And what other clubs did you perform at?
>
> A: I worked in Players Club.
>
> Q: Okay. And when you were at other clubs - -
>
> THE COURT: Are we going to go into more than just one? You asked a question, and she only answered with one.
>
> BY MR. WILLIAMS:
>
> Q: Was there more? Were there clubs that you performed at in New Jersey?
>
> A: Yes.
>
> Q: Which ones? I'm sorry.
>
> A: Player, Players Club.
>
> THE COURT: Any others where you danced?
>
> A: No. Just Player Club in New Jersey.

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[15] Incidentally, nothing contained in the testimony of either individual which would establish that she is or ever has been "customarily engaged" in an "independently established" business, as that concept is described within Carpet Remnant.

THE COURT: Okay. Where is that?

A: I think it's Route 1. I don't recall too much.

THE COURT: Okay.

BY MR. WILLIAMS:

Q: And Sin City, was this a waitress only or was it also a dancer?

A: Sin City I was only a waitress.

THE COURT: Okay.

BY MR. WILLIAMS:

Q: And at Players Club and even Liquid Assets, did you come in contact with dancers who also performed at other clubs?

A: Yes.

Q: Or maybe at Players Club did you talk to people that performed at Liquid Assets?

A: Yes.

Q: And I may have asked this, but did you ever perform out of town, back in North Carolina?

A: Yes.

Q: Okay. And this was in 2002 to 2005.

A: Yes.

THE COURT: The answer is yes.

THE WITNESS: No, no, no. Excuse me. Wait a minute. Can I - -

THE COURT: Yes.

THE WITNESS: Okay. Can you repeat that question?

BY MR. WILLIAMS:

Q: In 2002 to 2005, did you ever perform back in North Carolina?

A: No. I worked - -

Q: As a dancer.

A: - - I was already in New York at that time.

Q: Okay.

THE COURT: But you said you went back in - - wait a minute. I'm sorry. Hold on. Let me get it. I just want to make sure I got it right.

THE WITNESS: From 1997 to 1999 I lived in North Carolina.

THE COURT: Right. Prior in North Carolina as a dancer before 2000. Did some dancing in North Carolina you said two years ago in 2010.

THE WITNESS: I went back to North Carolina.

THE COURT: Right, but not between 2002 and 2005. It was after that you went back to North Carolina.

THE WITNESS: Yes.

(T142, 24 through T145, 11)

According to the ALJ's post-remand initial decision, J.F. also testified that she did not have a business trade name, did not have a federal tax identification number, did not advertise her services, and did not carry business insurance.

M.T. testified at the time of the hearing that she had worked at Liquid Assets' establishment as a bartender for the past 13 ½ years. (T104, 2-3). Following is the sum total of her testimony regarding whether dancers who had performed at Liquid Assets during the audit period worked at other clubs:

Q: Okay. Were they [the exotic dancers at Liquid Assets] able to perform at other clubs?

A: From conversations that I've had with them, absolutely. They do not solely dance at Liquid Assets.

(T111, 17-20)

Following is the entirety of Mr. Colasanti's testimony regarding whether dancers who had performed at Liquid Assets during the audit period worked at other clubs:

Q: What restrictions, if any, do you impose on dancers performing on other clubs?

A: There is no restriction

Q: Are you aware whether any entertainers who perform at your club perform at any other clubs?

A: I have heard that they do, but I don't actually visit other clubs to find out specifically.

(T206, 24 through T207, 4)

As to documentary evidence offered by Liquid Assets during the entirety of the post-remand hearing, an exhaustive list is contained at the conclusion of the ALJ's initial decision. It includes the following:

J-1: The Department's Audit Report 2002-2005
P-1: Letter to Redetermination Auditor with Exhibits[16]
P-2: Letter to petitioner confirming audit
P-3: Letter to Redetermination Auditor regarding resolution
P-4: Letter to petitioner's counsel
P-5: Ledger page showing receipts and house fees[17]

None of these documents contains even a scintilla of evidence that any given dancer who performed at Liquid Assets' establishment during the audit period received remuneration from any other club during that period, nor do these documents contain evidence from Liquid Assets addressing any of the remaining factors enumerated in Carpet Remnant for use in determining whether a putative employer has met its burden under Prong "C" of the ABC test.

Suffice it to say that a complete dearth of relevant documentary evidence, coupled with the testimony of (1) a single dancer, J.F., who performed at Liquid Assets during the audit period to the effect that in addition to dancing at Liquid Assets she believes she danced for an unspecified duration at an unspecified frequency at an establishment which

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[16] The letter consists entirely of legal argument and the exhibits are copies of determinations of courts and administrative agencies in jurisdictions other than New Jersey, none addressing the three prongs of New Jersey's ABC test.

[17] The "ledger page," is, in fact, one single page, with the year "2012" written at the top in the left-hand corner. What follows are three hand-written columns of information, the first listing dates in the range of September 1 through September 21, and the latter two listing club receipts and house fees collected.

she thinks may have been located on Route 1, but she does not "recall too much," (2) a single employee, M.T., who, at best, offers hearsay evidence of possible multiple employment by dancers who performed at Liquid Assets, and (3) the club owner who says that he has heard that dancers work at other clubs, but admits that he has no personal knowledge of same, falls woefully short of satisfying Prong "C" of the ABC test.

As to Prong "B" of the ABC test, the ALJ concluded that Liquid Assets had demonstrated during the hearing that "exotic dancing is outside its [Liquid Assets'] usual course of business." The ALJ explained,

> The unrefuted testimony in this matter is that petitioner's primary business was the selling of food and beverages.
>
> . . .
>
> Liquid Assets is what would generally be referred to as a gentlemen's club and not as a go-go bar. If it were the latter, then the exotic dancing would be in the normal course of the business, but since exotic dancing is only one type of entertainment offered[18] it is outside the primary course of business of selling food and beverages.

Regarding the ALJ's conclusion that Liquid Assets' primary business is the selling of food and beverages, the following testimony of Mr. Colasanti is, I think, illuminating:

> THE COURT: So you serve dinners.
>
> THE WITNESS: Yes. Yes. We don't have a - - it's not, you know, it's not a restaurant per se, but we do serve dinners, and our customers eat the dinners at the bar.
>
> THE COURT: Okay. Are there table also, booths?
>
> THE WITNESS: There is three tables, but as I said, I couldn't classify myself as a full scale restaurant, you know. We have a bar with a stage in the middle.
>
> THE COURT: Okay.
>
> THE WITNESS: Where the girls and the other performers perform.
>
> THE COURT: Right.

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[18] According to Mr. Colasanti, from time to time, "[i]n addition to [Liquid Assets'] regular dancers, [Liquid Assets] ha[s] entertainers come in in the form of film stars, singers, dancers, rappers, magicians, midgets." (T190, 1-6)

THE WITNESS: And then we have our customers sitting around the bar.

THE COURT: Okay. But it's full meals if you were - -

THE WITNESS: Yeah.

THE COURT: I mean, I'm not saying you have a 50 selection entrée.

THE WITNESS: No. It's basically bar food.

(T196, 13 through T197, 10)

Regarding the ALJ's characterization of Liquid Assets as a "gentlemen's club," rather than a "go-go bar," Exhibit A attached to respondent's response to petitioner's motion for partial summary decision is similarly illuminating. It consists of several pages from Liquid Assets' own website, www.liquidassetsnj.com. The following excerpt is taken verbatim from Exhibit A, under the heading "About us":

> Hold on tight now you are about to enter a different dimension of erotic entertainment.
>
> Liquid Assets Gentlemen's Club is an upscale, gentlemen's club & go-go bar with beautiful female exotic dancers. The action never stops with up to 20 girls on stage at a time. More than any one man can handle!
>
> (Emphasis added)

Interestingly, Liquid Assets' own witness, M.T., refers to the establishment on two occasions during her testimony as a go-go bar. Following are excerpts from that testimony:

> WITNESS: Customers are like that. They follow. They follow everywhere. I've worked in another go-go bar as well. It happens everywhere you work. There's a following for bartenders.
>
> (T122, 3-6)
>
> WITNESS: Yeah, but I mean that's just common sense in any establishment. Anywhere you go, if you're acting in lewd behavior, you're going to be escorted out of that establishment. It's not just because it's a go-go, you know, a gentlemen's club.
>
> (T124, 18-22)

On the basis of what I have seen in the record, both pre- and post-remand, I agree with respondent that this distinction between a "gentlemen's club" and a "go-go bar"

upon which both petitioner and the ALJ rely is, in fact, a distinction without difference. I also agree with respondent that there is insufficient evidence in the record to support the ALJ's finding that the entertainment at Liquid Assets was "mixed and varied." That is, the only evidence offered by petitioner to support this claim is the self-serving testimony of Mr. Colasanti, the club owner. Petitioner did not present corroborating testimony from even one individual who had performed entertainment at Liquid Assets' establishment in any capacity other than as an exotic dancer, nor did petitioner present even a shred of documentary evidence to substantiate its claim that such performances occurred. That is, petitioner presented nothing like a contract between such a performer and Liquid Assets, an invoice directed to Liquid Assets from such a performer, or any record whatsoever of payment having been made by Liquid Assets to any such performer.

The vast majority of testimony offered by petitioner pertains to Prong "A" of the ABC test. That is, each of the three dancers who testified stated that during the period of time that she worked at Liquid Assets she set her own schedule, she was not required to work any minimum number of days per week, she was not instructed by management when to take breaks, she chose and paid for her own "costumes," she chose and paid for her own "props," she chose and paid for her own make-up and hair, and the like. However, M.T., J.F., and Ms. D. also testified that dancers at Liquid Assets were required to adhere to a set of "house rules" or "club rules," which were intended to ensure compliance by Liquid Assets with the regulations of the State Division of Alcoholic Beverage Control. (T113, 4-25; T147, 8-13; T150, 17 through T151, 7; T167, 16 through T168, 2). Regarding those rules, Mr. Colasanti, the club owner, testified as follows:

> Q: Could you explain to the Judge what rules, if any, the club imposes against the entertainers?
>
> A: Yeah. You know, we have stringent rules that we have to abide by, and I'm talking about the Alcohol Beverage Control, and we have stringent fines that we'd have to pay in the event that one of these girls do something wrong.
>
> THE COURT: I've handled those cases. I'm familiar with them.
>
> THE WITNESS: Yeah, and we're always watching, and so we tell them that if they break one of those rules, it's our policy, and they're breaking our policy as well, and we won't stand for that, any kind of lewd or lascivious behavior and if they should expose themselves, if they should solicit someone, if they should bring drugs onto the premises and we find out about it, they're gone. I don't have time, you know, to sit them down and tell them why its wrong.
>
> (T203, 24 through T204, 16) (emphasis added)

The ALJ dismisses as insignificant under the Prong "A" analysis the requirement that dancers adhere to Liquid Assets' "house rules" or "club rules," because according to the

ALJ, these rules simply reflect the club's requirement that the dancers "not break the law." However, Mr. Colasanti expressly characterized these rules as "our policy;" he asserted that if a dancer acts in a lewd or lascivious manner then she is "breaking our policy as well;" he stated that in the event the ABC regulations which form the basis for at least some, if not all, of the "house rules" are broken by a dancer, then it is Liquid Assets which is required to pay "stringent fines;" and, finally, he testified that if a dancer breaks the "house rules," then "they're gone;" The existence of these "house rules" is not insignificant. In fact, quite the contrary, I tend to agree with respondent that they constitute evidence of control or direction by Liquid Assets over the performance of the service being provided to Liquid Assets by the dancers.[19]

ORDER

Therefore, with regard to all exotic dancers who performed at Liquid Assets' establishment during the audit period petitioner's appeal is hereby dismissed and Liquid Assets is hereby ordered to immediately remit to the Department for the years 2002 through 2005 $9,124.04 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

Harold J. Wirths, Commissioner
Department of Labor and Workforce Development

Inquiries & Correspondence:

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Legal and Regulatory Services
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[19] I also agree with respondent that the apparent non-negotiable nature of the "house fees" or stage rental fees required after July 1, 2003 to be paid by dancers to Liquid Assets as a condition to performing at that establishment is not indicative of the sort of bargaining power ordinarily attributed to an independent contractor established in her own business.