BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:	)	Hearing Examiner File:
	)	**No.: LS-21-002**
BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING INC., and ANTONIO MACHADO	)	**LS-21-003** **LS-21-004**
	)	RESPONDENT CITY OF SEATTLE'S RESPONSE TO APPELLANT BAJA CONCRETE USA CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT
from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	)	

I. INTRODUCTION

Appellant Baja Concrete USA Corp.'s ("Baja") Motion for Summary Judgment should be denied. Baja fails to establish that it is entitled to summary judgment as a matter of law. Pursuant to Seattle Municipal Code Sections 14.16.010, 14.19.010, 14.20.010, Baja employed its workers ("Workers") in this case. If Baja's role with regard to the Workers is analyzed pursuant to the Seattle Human Rights Rules and based on the factors outlined in *Becerra*, Baja is an employer. In its motion for summary judgment, Baja ignores facts that establish Baja as an employer and attempt to paint themselves as helpless bystanders at the mercy of Roberto Soto Contreras. This attempt should be rejected since Baja paid Soto Contreras for his services and he acted as Baja's agent. In addition, the Office of Labor Standards ("OLS") gathered substantial evidence which led to the conclusion that Baja employed the workers. Accordingly, Baja's motion for summary judgment fails as a matter of law and should be denied.

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II. STATEMENT OF FACTS

This case involves OLS' investigation of the working conditions at several construction sites in Seattle. The material facts in this case are undisputed. Newway Forming, Inc. ("Newway") is a concrete high-rise subcontractor, tasked with handling the concrete work for construction at the 1120 Denny Way, 707 Terry Avenue, and 2014 Fairview Avenue worksites in Seattle.[1] Baja subcontracted with Newway to provide additional labor to Newway for cement finishing, patching and sanding concrete, and building forms for pouring concrete.[2] Baja was formed to provide labor to Newway and worked exclusively for Newway.[3] Baja hired each of the Workers listed in the Director's Findings of Fact, Determination and Final Order ("Determination") to perform work at the 1120 Denny Way site.[4] Some Workers also performed work at the two other sites.[5] Newway and Baja agreed on the hourly rate that Newway was to pay Baja for Workers' labor.[6] Roberto Soto Contreras was a labor broker who worked on behalf of Baja, recruited workers paid by Baja, and occasionally provided some degree of supervision.[7]

Beginning in mid-2019, Newway began tracking Workers' start- and end-times at the 1120 Denny Way site and required Workers to sign in and out using Newway timesheets or time clocks.[8] Soto Contreras, on behalf of Baja, reviewed his records with Newway, attached Baja timesheets to the invoices submitted to Newway,[9] and then Newway paid the invoiced amount to Baja, not to Soto

[1] Declaration of Lorna S. Sylvester, Exhibit A, 30(b)(6) Deposition of Kwynne Forler-Grant on behalf of Newway Forming, page 90, line 24 to page 93, line 21.
[2] *Id.* at page 92, lines 2-18.
[3] Declaration of Lorna S. Sylvester, Exhibit B, 30(b)(6) Deposition of Mercedes De Armas on behalf of Baja Concrete, page 88, lines 11 to page 89, line 23.
[4] *Id.* at page 110, lines 14-18; page 144, line 14 to page 147, line 15.
[5] *Id.* at page 92, lines 4 to 19; 30(b)(6) Deposition of Kwynne Forler-Grant at page 91, line 8 to page 93, line 25.
[6] *Id.* at page 64, lines 15-17.
[7] 30(b)(6) Deposition of Mercedes De Armas at page 164, line 24 to page 165, line 15 (stating that "obviously, Baja Concrete USA is the one in charge here, right?").
[8] 30(b)(6) Deposition of Kwynne Forler-Grant at page 37, line 15 to page 38, line 5, page 54, lines 22-25.
[9] 30(b)(6) Deposition of Mercedes De Armas, (referring to Deposition Exhibit 2 [Timesheets and Invoices] which was previously filed in support of City's Motion for Summary Judgment).

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Contreras, each pay period.[10]

Workers were on Baja's payroll and received their pay from Baja.[11] Baja used Soto Contreras' services for help with Workers but Baja paid Soto Contreras for his services.[12] Soto Contreras used a business card with "Baja USA" on it.[13] Soto Contreras' services benefited Baja.[14] Soto Contreras tracked Workers' hours,[15] prepared invoices and provided them to Newway so Baja could be paid by Newway,[16] and he provided the payroll information to payroll processing.[17] Soto Contreras would keep Baja informed as he carried out his duties.[18]

Baja paid payroll taxes on behalf of the Workers.[19] Newway compensated Baja at a higher rate than the rate that Baja paid its Workers.[20] Accounting and payroll services were provided to Baja, not to Soto Contreras.[21] Soto Contreras and other Baja workers used Baja's credit card to pay some Workers' expenses.[22] Soto Contreras functioned as an extension of Baja.

During OLS' investigation, Baja communicated with the OLS investigators through Baja's representative, Mercedes De Armas, who provided detailed information about each Worker to OLS and consistently referred to the Workers as "employees."[23] On the Workers' paystubs, Baja listed "Baja Concrete USA Corp" as the employer.[24] Baja made sure payroll was done and taxes were

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[10] 30(b)(6) Deposition of Kwynne Forler-Grant at page 58, line 22 to page 61, line7.
[11] 30(b)(6) Deposition of Mercedes de Armas at page 50, line 24 to page 51, line 11; page 122, line 2 to page 123, line 19.
[12] *Id.* at page 107, line 11 to page 110, line 18; *see also Id.* at page 111, line 12 to page 113, line 1 (Baja attempts to conceal Soto Contreras' compensation by using Baja Concrete Ltd. in Canada as an intermediary, but the goal was to pay Soto Contreras for his services to Baja Concrete USA Corp.).
[13] *See Id.*, Ex. 8, Photo of Roberto Soto Contreras' business card.
[14] *Id.* at page 155, lines 18-21.
[15] *Id.* at page 34, line 9 to page 35, line 4, (referring to Deposition Exhibit 2 [Timesheets and Invoices] which was previously filed in support of City's Motion for Summary Judgment).
[16] *Id.* at page 25, line 17 to page 26, line 9.
[17] *Id.* at page 122, lines 8-18.
[18] *Id.* at page 145, lines 8-25.
[19] *Id.* at page 164, lines 3-13.
[20] *Id.* at page 68, line 22 to page 72, line 14.
[21] Declaration of Lorna S. Sylvester, Exhibit C, Individual Deposition of Mercedes De Armas, page 22, lines 3-9; page 22, lines 17 to page 23, line 2; page 23, line 21 to page 24, line 7.
[22] 30(b)(6) Deposition of Mercedes De Armas, page 161, lines 5-16; page 162, lines 15-19.
[23] Declaration of Lorna S. Sylvester, Exhibit D, Email Correspondence from Mercedes De Armas, dated July 31, 2020; see also Declaration of Lorna S. Sylvester, Exhibit E, Email Correspondence from Mercedes De Armas, dated December 7, 2020.
[24] Individual Deposition of Mercedes De Armas, page 105, lines 4-21.

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paid.[25]

III. EVIDENCE RELIED UPON

The City relies on the pleadings, stipulations, declarations, and attachments already on file with the Hearing Examiner, including the following: City's Motion for Summary Judgment and Declaration of Lorna S. Sylvester in Support of City's Response to Baja Concrete USA Corp.'s Motion for Partial Summary Judgment with Exhibits.

IV. ARGUMENT

A. The parties agree as to the summary judgment standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[26] A material fact is one upon which the outcome of the litigation depends in whole or in part."[27] In determining whether a genuine issue of material fact exists, the court views all facts and draws all reasonable inferences in favor of the nonmoving party.[28] Here, there is no genuine issue as to any material fact. The only question raised by Baja is whether Baja is an employer. Based on substantial evidence and the Seattle Municipal Code definition of "employer," Baja employed each worker. Accordingly, Baja's motion for summary judgment should be denied as a matter of law.

B. The totality of the facts and circumstances indicate that Baja acted as the primary employer of the Workers.

Based on all the facts and circumstances of the case, Baja employed the Workers listed in the

[25] 30(b)(6) Deposition of Mercedes De Armas, page 165, lines 6-15.

[26] CR 56(c); When questions of practice or procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure most appropriate and consistent with providing fair treatment and due process. The Hearing Examiner may look to the Superior Court Civil Rules for guidance. Hearing Examiner Rules of Practice and Procedure - 1.03(c).

[27] *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 898-99, (2009) (*citing Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co*., 115 Wn.2d 506, 516, (1990)).

[28] *Id.,* at 899 (*citing Owen v. Burlington N. Santa Fe R.R. Co*., 153 Wn.2d 780, 787, (2005)).

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Determination. Baja asserts that it is not a joint employer based on the factors outlined in *Becerra*.[29] However, that argument misses the point that Baja falls under the Seattle Municipal Code definition of "employer." OLS used the joint employment analysis to examine whether any other entities could be considered employers, along with Baja. As OLS noted in the Determination, there "is no dispute that Respondent Baja Concrete employed the employees listed in Attachment B."[30]

For purposes of Seattle's Minimum Wage, Wage Theft, and PSST Ordinances ("Ordinances"), the term "Employer" is defined as "any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee."[31] The Ordinances are remedial in nature and subject to liberal construction to effect their purpose in protecting workers.[32] Like the Fair Labor Standards Act ("FLSA"), the Ordinances broadly define the term "Employ" as "to suffer or permit to work."[33] Because these enactments use the same, expansive language as the FLSA to define employment, it is appropriate to look to FLSA jurisprudence in interpreting the Ordinances.[34] In the FLSA context, "[a]n entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity."[35] This "definition of 'employ' is far broader than that in common law and encompasses working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category."[36]

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[29] *See* Baja's Motion for Partial Summary Judgment, pages 5, 6.
[30] Director's Findings of Fact, Determination and Final Order, attached to the City's Moton for Summary Judgment, incorporated herein by reference.
[31] SMC 14.16.010. 14.19.010, 14.20.010.
[32] *See Peninsula School District No. 401 v. Public School Employees of Peninsula,* 130 Wn.2d 401, 407, 924 P.2d 12 (1996); *see also U.S. for Benefit and on Behalf of Sherman v. Carter,* 353 U.S. 210, 216, 77 S.Ct. 793, 1L.Ed.2d 776 (1957).
[33] SMC 14.16.010. 14.19.010, 14.20.010; *see* 29 U.S.C. § 203(g) (FLSA).
[34] *Cf. Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 195, 332 P.3d 415 (2014) (looking to FLSA's "suffer or permit" standard in considering joint employment under Washington's Minimum Wage Act).
[35] *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) (citing *Goldberg v. Whitaker House Cooperative, Inc*., 366 U.S. 28, 33 (1961)).
[36] *Becerra*, 181 Wn.2d at 195 (internal quotation marks omitted, alteration in original).

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In addition to broadly defining employment, the Ordinances also contemplate joint employment. Under the Ordinances, "[m]ore than one entity may be the 'employer' if employment by one employer is not completely disassociated from employment by the other employer."[37] In administering Seattle's minimum wage and minimum compensation rates, OLS holds joint employers jointly and severally liable for violations. "If the facts establish that the employee is jointly employed by two or more employers, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the ordinance with respect to the entire employment for the particular work week and pay period."[38]

Here, the undisputed facts demonstrate that Baja was the primary employer and acted as the entity which permitted each Worker to work; each Worker was dependent on Baja for their pay, including payment of taxes. Soto Contreras was tasked with assisting Baja with carrying out the duties of Baja's agreement with Newway. In the Determination, OLS's joint employment analysis examined whether Newway, Anthony Machado, and Soto Contreras were joint employers, along with Baja.

Substantial and undisputed evidence supports the conclusion that Baja employed the Workers. The undisputed facts outlined above in Section II and listed below, clearly establish that Baja was the primary employer:

1. Baja was formed to provide labor to Newway.
2. Baja received compensation directly from Newway for providing Workers to Newway.
3. Baja arranged the accounting services that processed the payroll to pay the Workers.
4. Baja stayed involved in the hiring process (the president of the company needed to be informed of new hires).
5. Soto Contreras acted as Baja's representative and Baja paid for Soto Contreras' services.
6. Baja paid the Workers.
7. Baja also paid Workers' payroll taxes.
8. Baja listed themselves as the employer on Workers' paystubs.

[37] SMC 14.16.010. 14.19.010, 14.20.010.
[38] Seattle Human Rights Rule ("SHRR") 90-045(6).

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9. Baja arranged housing and transportation for Workers and paid other expenses using a company credit card.
10. Baja's representative referred to Workers as "employees" during OLS' investigation.
11. Baja admitted they were "in charge."

Based on these undisputed facts and based on the totality of the circumstances, Baja acted as an employer from its creation, throughout the relevant time period, and during OLS' investigation. Baja's claim that they did not employ the Workers, after years of acting as the employer, is without merit and should be rejected in its entirety. Baja's motion for partial summary judgment on this basis should be denied.

C. Baja is a joint employer based on Seattle Human Rights Rule 90-045(3).

Based on the undisputed material facts of this case, Baja also is a joint employer pursuant to the Seattle Human Rights Rules ("SHRR"). The purpose of the rules is to govern the practices of the Office of Labor Standards in administering requirements for minimum wage and minimum compensation under Seattle Municipal Code section 14.19.[39] SHRR 90-045(3) provides guidance for OLS to determine whether employment is joint employment, or separate and distinct employment in a given case.[40] The rule explains that whether employment is joint employment or not "depends upon all the facts in the particular case."[41] OLS may find joint employment "where the employee performs work that simultaneously benefits two or more employers, or works for two or more employers

a. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; **or**
b. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; **or**
c. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under

[39] SHRR 90-001.
[40] SHRR 90-045(3).
[41] *Id.*

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common control with the other employer."[42]

Baja claims none of these factors are present in this case. Clearly, Soto Contreras acted directly in the interest of Baja in relation to the Workers. Soto Contreras negotiated the rate that Baja subsequently would have to pay to the Workers. If Soto Contreras negotiated a low enough rate, Baja benefited because the funds to pay the Workers came from Baja, not Soto Contreras. Clearly, Baja and Soto Contreras were not completely disassociated with respect to the Workers because Soto Contreras had a "Baja Concrete USA" business card, was paid for the services he provided to Baja, and Soto Contreras acted as Baja's agent. Everything Soto Contreras did was to benefit Baja because Baja was in charge.

Baja's actions with respect to the Workers demonstrate that they jointly employed the Workers. OLS' finding that Baja was an employer is supported by Baja's own 30(b)(6) witness who said "Well, obviously, Baja Concrete USA is the one in charge here, right?"[43] Based on all the undisputed material facts, Baja jointly employed the Workers and their motion for summary judgement should be denied.

D. Pursuant to the factors outlined in *Becerra*, the undisputed material facts establish Baja is a joint employer.

Becerra Becerra v. Expert Janitorial, LLC[44] involved an examination of joint employer liability under the Minimum Wage Act ("MWA"), Revised Code of Washington ("RCW") Ch. 49.46, for minimum wage and overtime requirements.[45] In that case, the plaintiffs were janitorial workers *directly employed* by second-tier service providers and then subcontracted by another company, Expert, to provide janitorial services at Fred Meyer stores.[46] The Washington Supreme

[42] *Id.* (emphasis added).
[43] 30(b)(6) Deposition of Mercedes De Armas, page 165, lines 6-15.
[44] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014).
[45] *Id.*
[46] *Id.* at 190-91 (emphasis added).

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Court examined whether Expert and Fred Meyer were employers under the MWA.[47] The Washington Supreme Court reversed the lower court's summary judgment dismissal and remanded for further consideration of all relevant factors.[48]

The Washington Supreme Court discussed the factors outlined in *Torres-Lopez*[49] and ruled that these factors should be used as an "economic reality" test to determine whether a joint employment relationship exists under minimum wage statutes.[50] The high court ruled that the economic reality test involves an examination of 13 nonexclusive factors, beginning with five formal or regulatory factors:

> (A) The nature and degree of control of the workers;
> (B) The degree of supervision, direct or indirect, of the work;
> (C) The power to determine the pay rates or the methods of payment of the workers;
> (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
> (E) Preparation of payroll and the payment of wages.[51]
>
> The eight common law or functional factors are:
> (1) whether the work was a specialty job on the production line,
> (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes,
> (3) whether the "premises and equipment" of the employer are used for the work,
> (4) whether the employees had a business organization that could or did shift as a unit from one [worksite] to another,
> (5) whether the work was piecework and not work that required initiative, judgment or foresight,
> (6) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill,
> (7) whether there was permanence [in] the working relationship, and
> (8) whether the service rendered is an integral part of the alleged employer's business.[52]

The Washington Supreme Court explained that "the factors are not exclusive and are not to

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[47] *Id.* at 193.
[48] *Id.* at 196-200.
[49] *Torres–Lopez v. May,* 111 F.3d 633 (9th Cir.1997).
[50] *Becerra*, 181 Wn.2d at 196-97.
[51] *Id.* (citing *Torres-Lopez*, 111 F.3d at 639-40).
[52] *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original).

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be applied mechanically or in a particular order."[53] A court considering joint employment must examine the totality of the circumstances and the "determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."[54] In addition to the 13 factors, a court can "consider any other factors it deems relevant to its assessment of the economic realities."[55] The economic reality test "offers a way to think about the subject and not an algorithm. That's why toting up a score is not enough."[56]

Baja asserts that Soto Contreras and Newway were the employers and Baja's role in this case should be analyzed using the *Becerra* factors, or an economic reality test.[57] However, the joint employment analysis and factors articulated in *Becerra* are not central to the analysis of Baja's culpability because in *Becerra*, the existence of an employment relationship with the second-tier service providers was not in dispute.[58] Baja's role falls squarely within the SMC definition of "employer" and Baja's role is similar to the role of the second-tier employers in *Becerra*.[59]

Still, Baja claims that at most, three of the factors outlined in *Becerra* apply with respect to Baja and the Workers.[60] According to the court's reasoning in *Becerra*, the Hearing Examiner could find Baja is a joint employer based on those three factors alone since, as noted above, the economic reality factors are not an algorithm. One factor "can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining

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[53] *Becerra*, 181 Wn.2d at 198.
[54] *Id*. (quoting *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947)).
[55] *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61, 71-72 (2d Cir. 2003))
[56] *Becerra*, 181 Wn.2d at 198 (quoting *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007).
[57] Baja's Motion for Summary Judgment, p. 5.
[58] *Becerra*, 181 Wn.2d at 192-93.
[59] SMC 14.16.010, 14.19.010, and 14.20.010 ("Employer" means any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee.).
[60] *Id.* at p. 6.

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the essential terms and conditions of a worker's employment."[61]

If the economic reality test factors are examined with respect to Baja, the undisputed material facts demonstrate that Baja employed the Workers.

Baja determined the methods of payment of the Workers. Baja paid Workers every two weeks through direct deposit but never paid in cash.[62]

Baja had the right to hire the Workers. Soto Contreras selected candidates and made the decisions with the president of Baja.[63]

Baja prepared payroll and paid the wages. Baja reviewed Soto Contreras' payroll summaries and all the documents needed for the Workers' pay; Baja made sure payroll was done, taxes were paid, and bookkeeping was done; Baja contacted Newway for payments so they could pay the Workers.[64]

There were no material changes between the labor Baja provided and the labor provided to Newway by a prior labor subcontractor. Also, Workers were economically dependent on Baja because Baja's subcontractor duties were linked to the work Workers performed. If Baja did not get paid, they could not pay the Workers for their services.[65]

Workers did not function as a unit that shifted from one worksite to another. Although Baja sent Workers to different sites, they did not shift as an entire unit. Instead, a few Workers were sent to other sites for additional work.[66]

Baja's paystubs sometimes described the work performed by Workers as "piecework." Baja's tasks were part of a broader effort to perform concrete work similar to the way picking

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[61] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 142 (4th Cir. 2017).
[62] 30(b)(6) Deposition of Mercedes De Armas, page 73, lines 9-18.
[63] *Id.* at page 144, line 14 to page 145, line 15.
[64] *Id.* at page 122, lines 4-21, page 165, line 6 to page 166, line 10.
[65] *Id.* at page 166, lines 1-10.
[66] *Id.* at page 92, lines 4-19; 30(b)(6) Deposition of Forler-Grant, page 23, lines 17-22, page 93, lines 3-8, page 93, line 24 to page 94, line 2.

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cucumbers "constituted one small step in the sequence of steps" to grow cucumbers and prepare them for processing in *Torres-Lopez*.[67] Baja did not require Workers to have any specialized skill set.[68]

Baja Workers had no opportunities for profit or loss based on their own managerial skill. Although paystubs often included a "bonus," the bonus amount was used to pay taxes and was never a real bonus based on a Worker's performance or managerial skills.[69]

Workers did not have permanence in their working relationship with Baja. Workers did not sign any contracts at the time of hire, so Workers could be fired at any time.[70]

Lastly, it should be "beyond dispute that the collective effort of the workers" was an "integral part" of Baja's business.[71] The Workers' services were the *only* part of Baja's business. Baja was created for the purpose of providing labor to Newway and Baja contracted with no other businesses or entities for the Workers' services.[72] All of these factors indicate Baja employed the Workers.

Baja's reliance on *Tradesmen Int'l, LLC*[73] is misplaced. In *Tradesman*, the court examined whether under an economic realities test, a staffing company was an employer of a temporary worker for purposes of the Washington Industrial Safety and Health Act of 1973 ("WISHA").[74] Tradesman was a staffing company that assigned temporary workers to other employers.[75] Tradesmen entered into a contract with Dochnahl.[76] In their contract, Tradesmen agreed to assign temporary workers as needed and Dochnahl agreed to be solely responsible for, among other things, "controlling

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[67] *Torres-Lopez*, 111 F.3d at 643.
[68] *See* 30(b)(6) Deposition of Forler-Grant, page 88, lines 13-22.
[69] 30(b)(6) Deposition of Mercedes De Armas, page 94, lines 6-17, page 125, line 20 to page 126, line 3.
[70] *See Id.* at page 155, lines 7-10; *see also* Individual Deposition of Mercedes De Armas, page 129, line 17 to page 130, line 2, page 131, lines 9-14.
[71] *Torres-Lopez*, 111 F.3d at 644 (quoting *Real v. Driscoll Strawberry Assocs., Inc.,* 603 F.2d 748, 754 (9th Cir. 1979)).
[72] 30(b)6) Deposition of Mercedes De Armas, page 88, line 9-17, page 89, lines 4-23.
[73] *Dept. of Labor and Industries v. Tradesman Int'l, LLC*, 198 Wn.2d 524, 497 P.3d 353 (2021).
[74] *Id.* at 534.
[75] *Id.* at 529.
[76] *Id.*

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Tradesmen employees as well as their work."[77] Tradesmen established a protocol with its clients that if a temporary worker was to be moved to a site that had not been inspected by Tradesmen, the client was to notify Tradesmen.[78]

One day, Dochnahl sent Tradesmen's temporary worker to a different jobsite that had not been inspected by Tradesmen and did so without notifying Tradesmen.[79] After a site inspection, the Washington Department of Labor and Industries found multiple WISHA violations and cited Dochnahl and Tradesmen.[80]

The Washington Supreme Court ruled that courts should utilize a seven-factor economic realities test to determine joint employer liability for WISHA violations.[81] The Washington Supreme Court declined "to fully adopt the approach taken in *Becerra* … because not all the considerations are relevant."[82] The eight additional common law factors articulated in *Becerra* are not particularly relevant to a joint employment arrangement under WISHA because the concern in WISHA cases involves whether a staffing agency and host employer possess substantial control over the work environment involved in the violations.[83] *Tradesmen* is distinguishable in all respects and the reasoning discussed in *Tradesmen* does not apply to this case.

Despite Baja's attempts to point the finger at Soto Contreras and Newway, the *Becerra* factors illustrate Baja employed the Workers. Soto Contreras played a role in this joint employment relationship with the Workers, but the issue is not whether Workers were more dependent on one employer or another. Rather, the inquiry should focus on the reality of the relationship between the

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[77] *Id.*
[78] *Id.* at 530.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 542 (citing *Potelco, Inc. v. Dep't of Labor & Indus.*, 191 Wn. App 9, 361 P.3d 767 (2015)).
[82] *Tradesmen*, 198 Wn.2d at 548.
[83] *Tradesmen*, 198 Wn.2d at 541.

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Workers and Baja.[84] Taken as a whole, the undisputed evidence demonstrates the economic reality that the Workers were employed by Baja. Accordingly, Baja's motion for partial summary judgment on this basis should be denied.

V. CONCLUSION

The undisputed facts conclusively establish that Baja employed the Workers, based on the plain definition of "employer" in the SMC, the SHRR, and the economic reality factors outlined in *Becerra*. Baja is jointly and severally liable for the violations of Seattle's labor standards that occurred within the relevant time period. For the reasons stated above, the City respectfully requests that the Hearing Examiner deny Baja's Motion for Partial Summary Judgment.

DATED this 3rd day of August, 2022.

ANN DAVISON
Seattle City Attorney

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[84] *See Antenor,* 88 F.3d at 932 ("[T]he question in 'joint employment' cases is not whether the worker is more economically dependent on the independent contractor or the grower, with the winner avoiding responsibility as an employer.").

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing document, **Respondent City Of Seattle's Response to Appellant Baja Concrete USA Corp.'s Motion for Partial Summary Judgment and Declaration of Lorna S. Sylvester with Exhibits A-E**, on the parties listed below and in the manner indicated:

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the foregoing being the last known mailing address and email addresses of the above-named parties.

DATED this 3rd day of August, 2022, at Seattle, Washington.

/s/ Sheala Anderson
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