BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING, INC., and ANTONIO MACHADO from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	Hearing Examiner File Nos.: LS-21-002 LS-21-003 LS-21-004 **APPELLANT NEWWAY FORMING, INC.'S REPLY TO CITY OF SEATTLE'S OPPOSITION**

I. REPLY

The City of Seattle's (the "City") Response to Newway's Motion for Summary Judgment is almost identical to the City of Seattle's Motion for Summary Judgment. As outlined in Newway's Opposition to the City's Motion for Summary Judgment, the City continues to misinterpret the deposition testimony in an attempt to make it appear that Newway had more control than it actually did. In reality, putting aside the misconstrued testimony, the only support the City presents to demonstrate that Newway was a joint employer of Baja's workers comes down to those workers' limited use of Newway's timeclock and an incorrect argument that Newway controlled the project schedule. This "support" fails, as both the

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testimonial and documentary evidence clearly demonstrate that the purpose of the time clock was only to verify that the workers Baja asserted were working on the site were in fact present on the days claimed, and the "control" that the City discusses is nothing more than a typical contractor-subcontractor relationship found on nearly every construction site in the Seattle area and beyond.

Regardless, even assuming that one or two of the *Becerra* factors weigh in favor of Newway being a joint employer (which they do not), a balance of the remaining factors clearly shows that Newway did not employ the workers and therefore summary judgment is appropriate. *Ling Nan Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 77 (2d Cir.2003) ("[T]he Court need not decide that every factor weighs against joint employment." (emphasis omitted) (citing *Moreau v. Air France,* 343 F.3d 1179, 1188–89 (9th Cir.2003)). *Becerra v. Expert Janitorial, LLC,* 181 Wash. 2d 186, 194, 332 P.3d 415, 419 (2014). For a complete explanation of all the facts which demonstrate that Newway was not a joint employer, Newway directs the Hearing Examiner to its Motion for Summary Judgment and its Opposition to the City of Seattle's Motion for Summary Judgment.

1) Newway did Not Control the Conditions of Workers' Employment

Despite the City's contention, Newway did not exercise control over the Workers. Any examples of "control" evidenced by the City are typical contractor-subcontractor interactions. These examples include a general project schedule (which was provided and managed by Onni – the general contractor for the project and for whom Newway worked). As outlined in Newway's opposition, the City misinterprets the deposition testimony to make it appear as if

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Newway controlled where and when the individual Baja workers performed their duties, but that is simply not true.

The City admits that it was Onni who created the general site schedule. This is typical in the construction industry - the general contractor is responsible for project scheduling and coordination. *See*, *Able Elec. Co. v. Vacanti & Randazzo Constr. Co*., 212 Neb 619, 324 N.W. 2.d 667 (1982); *S. Leo Harmonay, Inc. v. Binks Mfg. Co.,* 597 F.Supp. 1014 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 990 (2d Cir. 1985). Newway was a subcontractor for Onni, who subcontracted with Baja to perform a portion of the concrete finishing services Newway agreed to perform under its subcontract with Onni. Creating and following a general work schedule is a contractor's job – it does not mean that the subcontractor's employees are actually employees of the contractor. Further, the evidence establishes that it was Baja's on-site representative, Roberto Soto Contreras - not Newway - who determined how many hours the Baja workers worked. *See* 30(b)6 deposition of Newway, at pages 68:4-9, attached as **Exhibit 1** to Wolfe Dec. Newway had no control over determining what hours the Baja workers worked, when they took breaks, nor direct what the employees did on a day-by-day basis. Baja and Roberto Soto Contreras exercised "control" over the their own workers – not Newway.

2) Newway's Timeclock had Nothing to Do with Baja's Worker's Payroll

The City again belays on the timeclock. The purpose of the timeclock is clear and simple – Newway had Baja workers use it in order to ensure that Baja (the entity) was not overbilling Newway. Newway had absolutely no control over what Baja actually paid its workers and it is undisputed that the use of the timeclock had nothing to do with payment of Baja workers. *See* 30(b)6 deposition of Newway at 62:13-20, attached as Exhibit 1 to Wolfe

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Dec. in Support of Opposition to City's Motion for Summary Judgment (previously filed). The City investigators never actually visited the job site to "investigate" how or why the timeclock was being utilized and merely made unsupported assumptions as to its purpose – assumptions upon which the City now places great weight in advancing its false narrative that Newway was a joint employer of the Baja workers.

3) Weighing all the Factors Demonstrates that Newway was Not a Joint Employer

The constant misinterpretation of the testimony and lack of citations in the City's motion evidences that there is very limited evidence to support the allegation that Newway is a joint employer of the workers. Instead, after weeding through the red herrings and weighing the reliable evidence, it is clear that Newway was not a joint employer. Newway had no authority over hiring and firing the workers – this was confirmed by the City of Seattle during its deposition. *See* 30(b)6 deposition of Newway at 85:12-23; 89:9-12; 90:3-12, attached as Exhibit 1 to Wolfe Dec.; *See also,* 30(b)(6) Deposition of City of Seattle (Daron Williams) at 69:3-5, attached as Exhibit 2 to Wolfe Dec. (acknowledging that it was Baja who hired and fired the workers). Newway had no authority over the processing of Baja workers' payroll. *See* 30(b)6 Deposition of Newway Forming at 74:16-19; 75:15-24; 76:5-16, attached as Exhibit 1 to Wolfe Dec. It was Baja who determined how the workers performed their work. *See* 30(b)6 Deposition of Newway Forming at 111:21- 112:6, attached as Exhibit 1 to Wolfe Dec. Newway had no knowledge of what Baja workers were paid, or whether they ever got paid for overtime. *See* Deposition of Antonio Machado at 96:7-19; 101:1-17, attached as Exhibit 3 to Wolfe Dec. This was confirmed by the City, who determined that Baja set the wages and pay rates for the workers. See 30(b)(6) Deposition of City of Seattle (Daron Williams) at 68:25-

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69:2, attached as Exhibit 2 to Wolfe Dec. The work performed by the Baja workers was not an integral part of Newway's business as Newway has extensively used, and continues to extensively use, other cement finishing subcontractors. See 30(b)6 Deposition of Newway Forming at 93:11-23, attached as Exhibit 1 to Wolfe Dec. Even more, Baja USA intended to work for other companies. See 30(b)6 Deposition of Baja at 89:4-15, attached as Exhibit 4 to Wolfe Dec.

As outlined in Newway's Opposition to the City's Motion for Summary Judgment, the City's "evidence" consists of a single self-serving declaration of an identified worker with no first-hand knowledge of the relationship between Baja and Newway, anonymous witness "statements," and deposition testimony that the City inaccurately paraphrased. The only case law the City relies on in advancing is misguided arguments involves factual scenarios where employers have significant control over day-to-day operations, direct payment of employees, and businesses that were integrally intertwined - none of which occurred here.

4) Holding Newway to Be a Joint Employer Would Have a Significant Impact on the Construction Industry

What the OLS continues to describe is nothing more than a typical contractor-subcontractor relationship at a construction site. The economic realities test is intended to expose outsourcing relationships that lack a substantial economic purpose but not intended to inhibit normal contracting relationships, such as what occurred between Newway and Baja. *Jacobson v. Comcast Corp.,* 740 F. Supp. 2d 683, 689 (D. Md. 2010).

Holding Newway out to be a joint employer in this context would be impeding a normal contractor-subcontractor relationship. Essentially, it would be finding that all contractors are

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employers of sub-contractor's employees. This precedent would upend the construction industry, as the liability imposed on each contractor in the construction process would force a significant change in how contractors conduct their businesses and would lead to considerably increased construction costs.

Newway's motion for summary judgment should be granted, as the direct and reliable evidence demonstrates that Newway is not joint employer of Baja's workers.

DATED this 17th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned certified under penalty of perjury under the laws of the state of Washington that on this 17th day of August, 2022, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

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