BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of: BAJA CONCRETE USA CORP., ROBERTRO 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 CLOSING BRIEF**

I. INTRODUCTION

The evidence presented over 14 days of testimony demonstrates that Appellant Newway Forming Inc. ("Newway") was not a joint employer with its subcontractor, Respondent Baja Concrete USA Corp. ("Baja"). In issuing its Determination, the Seattle Office of Labor Standards ("OLS") erroneously applied the law to the facts. The OLS brought no knowledge of the construction industry when interpreting the *Becerra* joint employment factors, disregarded important evidence clearly establishing that Newway was not a joint employer, and relied on erroneous assumptions instead of conducting additional inquiry into the facts with Newway personnel. In fact, despite testifying that would have been helpful in determining whether Newway was a joint employer, during its lengthy investigation the OLS never visited the construction site to observe the how the site operated, or witness who exercised any control over the workers.

Furthermore, after erroneously labeling Newway as a joint employer of the 53 subject workers ("Workers"), the OLS assessed an excessive fine that was both unsubstantiated and

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punitive in nature. This is especially true against Newway, as the evidence demonstrates that Newway fully cooperated with the investigation and had never been subject to a wage violation in over 30 years of operation.

II. FACTS

A. Newway is a Contractor who Did Not Employ Any of the Subject Workers

Newway is a concrete forming contractor operating in both Canada[1] and the United States. Newway has been operating in the US for over 25 years.[2] Newway first contracted with Baja Concrete USA in approximately 2018 to provide concrete services for approximately three construction sites in Seattle, primarily located at 1120 Denny Way, Seattle, WA 98109 (the "Project").

The Project was owned/developed by Onni Group, who also served as the general contractor. In turn, Onni subcontracted with Newway to perform concrete work. Newway then subcontracted with Baja Concrete USA ("Baja"), where Baja agreed to perform concrete work – primarily concrete finishing and labor.[3]

Baja was concrete finishing contractor who first incorporated in the United States in September 2017, representing its nature of business to be "construction" on the Secretary of State's Corporations Filing System.[4] Baja hired Roberto Soto Contreras ("Roberto"), allegedly to performing a supervisory role for Baja. Despite Baja arguing that Roberto did not work for it, all evidence demonstrates the Roberto served as Baja's employee and site supervisor.[5] Baja

[1] In Canada, Newway operates under separate corporate entities: Newway Concrete Forming Ltd. And Newway Concrete Structures, Ltd. Any work Baja performed for Newway in Canada was for these Canadian entities, not Respondent Newway Forming, Inc.

[2] Newway obtained unofficial transcripts based on the audio recordings from the Hearing, which Newway includes as attachments to this Closing Brief. *See* Hearing Transcript ("Hearing"), Day 9, part 2 at 00:27:51 – 00:27:55.

[3] HEX Exhibit 41, 30(b)6 Deposition of Newway at 46:25-47:6.

[4] HEX Exhibits 33 & 89.

[5] *See, for example*, HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 00:55:42-00:56:28; HEX Exhibit 20; Worker testimony; and Determination.

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also had other supervisors present at the 1120 Denny Way site, including an individual named Noe Rios.[6]

B. Agreement Between Baja and Newway

The agreement between Newway and Baja was an oral agreement. For Newway to pay Baja (the entity), Baja would submit periodic invoices with timesheets or timecards attached to them. Newway paid Baja for each hourly unit of work that Baja provided.[7] The timesheets were prepared by Baja superintendent Roberto Soto Contreras, and provided to Newway supervisors as back-up for Baja's invoices.[8] As demonstrated in HEX Exhibit 13, the invoices that Baja provided to Newway provided limited information - the dates, number of hours worked, and the rate that Baja charged Newway (i.e. "178 hours of cement finishers at $40 per hour, for a total of $7,120.00). Baja did not provide Newway with any information regarding what Baja was paying its Workers, and Newway never exercised any control over the rate that Baja paid its Workers.[9]

Fairly early on, Newway became suspicious that Baja was invoicing Newway for work not performed. To curtail any potential fraud, Newway had some personnel sign the timesheets. All the evidence demonstrates that the sole purpose of signing off on these timesheets was to verify that Baja was not invoicing Newway for work not performed.[10] Later down the line, Newway provided Baja with an old timeclock that the Workers would use to punch-in and out, again just to verify that Baja was invoicing Newway correctly.[11] Newway employees never used timesheets or timecards to record their own time – they used a phone application called

[6] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 3 at 00:46:31 - 00:47:05.
[7] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 3 at 01:10:03 – 01:10:25.
[8] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 00:30:52 - 00:31:08.
[9] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 3 at 00:15:53 – 00:15:59.
[10] See, for example, HEX Hearing, Daron Williams Testimony, Day 13 at 02:43:05-02:43:32; HEX Hearing, Adam Pilling Testimony at 03:17:53 – 03:19:00.
[11] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:20:00-03:20:09.

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"Time Clock".[12] As the evidence demonstrates, Newway was not involved with Baja's payroll or the employment of the Workers.

C. The Investigation and OLS Findings of Fact, Determination, and Final Order

i. Investigation

After receiving a tip from Casa Latina into potential violations of Wage Theft Ordinance and the Paid Sick and Safe Time Ordinance, the OLS initiated an investigation on May 22, 2020. *See* Determination. The alleged violations involved work that occurred between February 2018 and August 2020. *Id*.

During its investigation, OLS only interviewed 8 of the 53 Workers. *See* Determination. The investigation largely focused on Baja. In fact, OLS conducted just one interview of Newway employee Tony Machado, and the interview of one foreman for Newway, who the OLS still refuses to disclose, relying on an unfounded "government informant" privilege. OLS never interviewed, nor requested to interview, anyone from Newway who was involved in the agreement with Baja, who was involved in the payroll, or any other active superintendents at the Denny Way site, including Kwynne Forler-Grant. OLS also never interviewed any of the individuals who "signed-off" on the Baja timesheets, including Adam Pilling, who was also involved in the day-to-day activities at the site.[13]

Baja Concrete did not make any of its officers or representatives available.[14] Mercedes De Armas, the accountant and representative of Baja, responded to written questions and document requests.[15] Further, Roberto Soto Contreras, who was hired by Baja, failed to respond to OLS' Requests for Information, its subpoena, or initial offer of settlement. The OLS was not able to interview Mr. Soto Contreras.[16] The OLS also reviewed written responses to

[12] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:20:16 – 03:20:26.
[13] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:24:38-03:24:48; Daron Williams Testimony, Day 13 at 02:46:21 – 02:46:42; see also, Determination.
[14] Determination at page 1.
[15] Determination at page 1.
[16] Determination at page 2.

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Requests for Information to Newway, Baja, and Onni Contracting, payroll records, Baja Concrete's invoices for payment and timesheets (provided by Newway), and text message records from workers showing the hours they tracked and self-reported to Baja.[17]

ii. Determination

On February 5, 2021, the OLS issued its Findings of Fact, Determination and Final Order ("Determination"). The OLS did not find that any of the Workers were direct employees of Newway. Instead, the OLS's sole basis for including Newway in its Determination was on the basis that Newway was a joint employer of the Workers based on its evaluation of the *Becerra* factors. The evidence presented at the Hearing reveals that this was an erroneous conclusion, as Newway and Baja had a typical contractor-subcontractor relationship. Despite Newway's full cooperation with the OLS investigation, first time violation, and limited evidence, the OLS assessed a massive fine in the amount of $2,223,945.11 against Appellants.

D. Appeal

Newway timely appealed this matter on September 10, 2021, and a hearing was held beginning June 12, 2023 and concluding on September 20, 2023, consisting of 14 days of testimony.

III. ARGUMENT

A. Standard of Review

Seattle Municipal Code 14.20.070 provides the procedure for an appeal to the Hearing Examiner and states that review shall be conducted de novo and the Director shall have the burden of proof by preponderance of the evidence before the Hearing Examiner. Here, the OLS has not met its burden in proving that Newway was a joint employer of the Workers.

B. Joint Employment

[17] Determination at Page 2.

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Washington law, using federal law as a guideline, uses an "economic reality" test to determine whether a joint employment relationship exists. *Becerra v. Expert Janitorial LLC*, 181 Wn.2d 186, 196 (2014). As the Determination admits, OLS follows the same test. When determining whether a joint employer relationship exists, the court considers 13 nonexclusive factors, beginning with 5 formal or regulatory factors:

> 1) The nature and degree of control of the workers;
> 2) The degree of supervision, direct or indirect, of the work;
> 3) The power to determine the pay rates or the methods of payment of the workers;
> 4) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; [and]
> 5) Preparation of payroll and the payment of wages.

Id. at 639–40 (alteration in original) (quoting 29 C.F.R. § 500.20(h)(4)(ii)). Courts also consider 8 common law (sometimes called "functional") factors:

> 6) whether the work was a "specialty job on the production line," *Rutherford* [*Food Corp. v. McComb*], 331 U.S. [722,] 730, 67 S.Ct. [1473, 91 L.Ed. 1772 (1947)];
> 7) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without "material changes," *id.;*
> 8) whether the "premises and equipment" of the employer are used for the work, *id.; see also Real,* 603 F.2d at 754 (considering the alleged employee's "investment in equipment or materials required for his task, or his employment of helpers");
> 9) whether the employees had a "business organization that could or did shift as a unit from one [worksite] to another," *Rutherford,* 331 U.S. at 730, 67 S.Ct. 1473 ...;
> 10) whether the work was "piecework" and not work that required "initiative, judgment or foresight," *id.; see also Real,* 603 F.2d at 754 (considering "whether the service rendered requires a special skill");
> 11) whether the employee had an "opportunity for profit or loss depending upon [the alleged employee's] managerial skill," *Real,* 603 F.2d at 754;
> 12) whether there was "permanence [in] the working relationship," *id.;* and
> 13) whether "the service rendered is an integral part of the alleged employer's business," *id.*

Becerra v. Expert Janitorial, LLC, 181 Wash. 2d 186, 196–97, 332 P.3d 415, 421 (2014).

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In the joint employment context, the Court need not decide that every factor weighs against joint employment in order to find that joint employment does not exist. *Becerra v. Expert Janitorial, LLC,* 181 Wash. 2d 186, 194, 332 P.3d 415, 419 (2014).

Here, comparing the *Becerra* factors against the evidence clearly shows that Newway was not a joint employer of the Workers.

C) <u>Weighing Becerra Factors Shows Newway is Not a Joint Employer</u>

1. *Becerra* Factor 1: Nature and Degree of Control of the Workers

The evidence presented demonstrates that Newway did not exercise the requisite degree of control of the Workers to be considered a joint employer. The limited control it did exercise is common in construction contractor-subcontractor relationships. In the construction industry, it is very common, and necessary, for subcontractors to get their scope of work from the contractor that retained them. Mr. Pilling, superintendent for Newway, testified that it is common for a contractor the coordinate daily tasks with subcontractors, and if they did not, the project would fall behind.[18] As Ms. Forler-Grant testified, if subcontractors did not get direction from the contractor as to what the scope of work was, they would not know where to go.[19]

Newway, as the cement contractor who subcontracted with Baja, has the right, and obligation, to control aspects of the work without being assumed to be a joint employer. Courts recognize that some control is reserved to contractors. For example, in *Bozung v. Condominium Builders, Inc.*, 42 Wn.App. 442, 444, 711 P.2d 1090 (Div. II 1985) at 444, the court was presented with an issue as to whether the general contractor exercised sufficient control over the subcontractor to face liability for the employee's injury. *Id.* at 445. The court held that the general contractor exercised only usual control expected from a general contractor over a subcontractor. *Id.* at 447. The court acknowledged that there is a level of actual supervisory

[18] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:16:30-03:16:36.
[19] HEX Hearing, Forler-Grant Testimony, Day 9 part 2 at 01:19:12-01:19:28.

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control that is "usually reserved to general contractors" and that, if the general contractor's control is limited to this role, the general contractor is not liable for the injury of a subcontractor's employee. *Id.* The general contractor typically has the right to stop and start work, control the order of work, and inspect the progress of work without being found to exercise sufficient control over the subcontractor to be liable for injuries to the subcontractor's employees. *Id.*

Here, like *Bozung*, the evidence presented demonstrates that the control that Newway exercised over the Workers was limited to its role as the contractor, including the right to stop and start work, control over the order of work, and its right to inspect the progress of the work. Like on all construction projects, this "control" originated with the general contractor, Onni, which then directed, on a daily basis, Newway and all other subcontractors what to work on and when.[20] Newway would then instruct its subcontractors with their scope of work.[21] While there is testimony that Newway may have directed Baja, through Roberto, what hours they needed to be there, the setting the hours for the scope of work to be met does not create a joint employment relationship. *Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 776 (D. Md. 2008). In reality, Newway had very little control over the daily activities because the work schedule at the job site was primarily based on the use of the tower crane that Onni controlled at the job site.[22] Even more, the evidence reveals that Roberto and Baja – not Newway - retained exclusive control over how many hours each Worker could work at the site.[23] Newway would not tell Baja exactly how many Workers it needed for the day, that was at the discretion

[20] HEX Exhibit 41, 30(b)6 Deposition of Newway Forming at 120:2-23 and 121:12-19; HEX Hearing, Adam Pilling Testimony, Day 13 at 03:15:50-03:15:59.
[21] HEX Hearing, Adam Pilling Testimony at 03:15-59-03:16:17.
[22] HEX Exhibit 41, 30(b)6 Deposition of Newway Forming at 120:2-23 and 121:12-19.
[23] HEX Exhibit 41, 30(b)6 Deposition of Newway Forming at 72:10-15.

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of Baja.[24] Finally, several of the Workers actually testified that it was Roberto, not Newway, who directed their work.[25]

Further, evidence that the Workers attended safety meetings held by Newway is not indicative of "control" needed to be considered a joint employer. The Ninth Circuit, in *Moreau v. Air France*, 343 F.3d 1179, 1184-85 (9th Cir. 2003), the Court interpreted the *Torres-Lopez* factors that are adopted by Washington courts in *Becerra* regarding joint employment. In *Moreau*, the employee was a ground handler at an airport who subcontracted under a larger company, Air France, and wanted to sue air France for violations of the FMLA. *Id.* at 1181. The Ninth Circuit determined that the company, Air France, was not a joint employer of its ground handling subcontractor when Air France lacked the ability to hire or fire employees, determine rate of pay, keep employment records, set work schedules or working conditions, and it communicated performance concerns through the subcontractor. *Id.* at 1188. Air France did ensure that performance standards were met on the job site and ensured compliance with various safety and security regulations on the job site. *Id.* at 1188-89. The court noted that it would be "counterproductive to equate ensuring lawful compliance with 'control' or supervision of employees" for purposes of joint employment. *Id.* at 1189. The court ultimately concluded that despite there being evidence of supervisory control, that Air France was not a joint employer. *Id.* at 1190.

Similar to Air France in the *Moreau* case, here the Workers attended safety meetings held by Newway. All Newway's subcontractors, not just Baja, attended these meetings.[26] Newway, like Air France, is lawfully required to maintain a safe worksite. As the Court noted in Moreau, it would be counterproductive for Newway to ensure general performance

[24] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 3 at 00:57:57-00:58:09.
[25] *See, for example*, HEX Hearing, Jonathan Ivan Parra Ponce Testimony, Day 2, part 1 at page 43; Raul Alejandro Fiol Martinez Testimony, Day 3, part 1 at page 115: "*He [Roberto] was the person in charge. On some occasions we did floor repairs, and he would say what needed to be done and how it needed to be done*."
[26] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:15:07-03:15:38.

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standards were met on the site and ensure lawful compliance regarding safety, and label them a joint employer for it.

2. *Becerra* Factor No. 2: Degree of Supervision

The degree of supervision that Newway exercised over the Workers does not amount to joint employment. At the hearing, there was some Worker testimony that Newway personnel would occasionally direct the Workers or tell the Workers to correct certain mistakes. Again, Newway, like any other contractor who contracts with another subcontractor, is entitled to verify that the services it is paying for are being performed adequately and to raise dissatisfaction issues and have them addressed without becoming a joint employer. *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 (D. Md. 2010) ("Detailed instructions and a strict quality control mechanism will not, on their own, indicate an employment relationship.").

Some oversight does not constitute the requisite degree of supervision. In *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012), the purported joint employer, DHL, had managers that oversaw the purported employees load packages into their trucks and even criticized the purported employees' loading techniques. *Id.* DHL audited the purported employees' vehicles and uniforms, and even communicated with the purported employees through scanners if a non-routine situation occurred. *Id*. Even with this, the court found that these actions evidenced a small amount of supervision.

Further, the evidence demonstrates that Baja's supervisor Roberto was not always on site while the Workers were performing work.[27] However, Baja did have other supervisors on site who would direct the Workers on what they should do. Roberto told Newway that Noe Rios was one of Baja's supervisors at the Denny Way site, and Ruben Gonzalez was Baja's other supervisor at the Fairview site.[28]

[27] *See, for example,* HEX Hearing, Raul Alejandro Fiol Martinez Testimony, Day 3, part 1 at page 115.
[28] HEX Hearing, Kwynne-Forler Grant Testimony, Day 9, part 3 at 00:46:31-00:47:05.

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Occasionally, Newway personnel would have to exercise some degree of supervision over the Workers, and the Workers would sometimes ask Newway for direction. However, there is no evidence that Newway's supervision of the Workers during these times was continual and frequent to amount to being considered a joint employer.

3. *Becerra* Factor No. 3: Power to Determine Pay Rates or Methods of Payment

OLS have not presented any evidence to demonstrate that Newway had the power to determine pay rates or methods of payment.

i. Subject Workers Testified that they had agreement with Roberto Soto Contreras Regarding Rate of Pay

There is absolutely no evidence that Newway determined pay rates or methods of payment. All the Workers testified that they negotiated their rate of Pay with Roberto Soto Contreras who is in no way affiliated with Newway. [29] Newway representative Kwynne Forler-Grant testified that Newway did not determine the pay rates of the subject workers.[30] Newway also did not control the rate that Baja paid the Workers. [31] Further, testimony reveals that Newway was not in control of when a Worker would get a raise or promotion.[32] In fact, Newway did not even know h ow the Workers were paid, as it was not aware whether the Workers were salaried employees, paid hourly, or paid on a flat rate basis.[33]

ii. Workers were Paid by Direct Deposit by Baja and the Baja Paystubs listed Rate of Pay

The evidence is clear that the Workers were paid by direct deposit from Baja – not Newway. The Baja paystubs listed the rate of pay for the Workers.[34] The paystubs clearly

[29] HEX Hearing, Worker Testimony, days 1-7.
[30] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 3 at 00:06:17-00:06:32.
[31] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 3 at 00:15:53-00:15:53.
[32] *Id*.
[33] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 3 at 01:21:52-01:22:02.
[34] HEX Exhibits 1, 3, 11, 14, 17, 18, 19, 24, 26, 28, 53-86 – Paycheck Stubs.

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identify Baja as the employer of the Workers.[35] No evidence was presented to show that Newway had any involvement with Baja's payroll.

iii. Baja's Invoices to Newway and Accompanying Timesheets Contained no Information about what Workers were Paid

The timesheets that Baja provided to Newway in support of its invoices contain no information about what the Workers were paid, including their pay rates.[36] Similarly, the time clock records only show the number of hours each Worker worked on a given day.[37] The only information on the invoices was the rate that Baja (the entity) charged Newway (the entity) for work performed.

iv. Baja Workers Not Dependent on Newway Paying Baja

The OLS attempts to argue that the Baja Workers were dependent on Newway paying Baja, but again, there is no evidence of this. Newway representative Kwynne Grant testified that she did not know whether Baja could pay its Workers if Newway didn't pay Baja, as it does not know Baja's business structure.[38] Newway did not control Baja's profitability – Baja is its own separate entity.[39]

4. *Becerra* Factor No. 4: Right to Hire, Fire, or Modify Employment Conditions

i. Every Single Worker Testified that Roberto Soto/Baja Hired and/or Fired Them

[35] *Id*.
[36] HEX Exhibits 12 and 13.
[37] *See* HEX Exhibit 16.
[38] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 00:14:59-00:15-18.
[39] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 3 at 00:15:31-00:15:59.

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The OLS presented the testimony of 10 Workers, every single one testified that Roberto and/or Baja hired them.[40] When the Workers quit or were fired, they also told Roberto.[41] To the contrary, not one single Worker that the OLS presented testified that Newway hired them or fired them.

ii. Evidence Demonstrates that Newway had no Right to Hire, Fire, or Modify Employment Conditions.

Newway personnel also confirmed that Newway did not hire, fire, or modify the Worker's employment conditions. Ms. Forler-Grant testified that it had no control over where Baja recruited its laborers.[42] Newway did not hire any of the Workers during the relevant time period.[43] It also did not look at any resumes of the Workers.[44]

It should also be noted that any evidence that the OLS presented to show that Newway had "authority" to hire or fire the Workers is purely speculative, hearsay, and not based on first-hand knowledge or evidence. In is anticipated that the OLS will attempt to establish that two of the Workers believed that Newway's Antonio Machado would occasionally tell Roberto to fire other employees from the job. There is no direct evidence of this. Regardless, removal from a project is different than Newway instructing Baja to fire the worker from Baja's payroll. The federal courts have held that a company's request to remove particular employees from working on a contract does not support a finding of joint employment. *See, e.g., Godlewska v. EDA*, 916 F. Supp. 2d 246, 258 (E.D.N.Y. 2013).

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[40] HEX Hearing, Jonathan Ivan Parra Ponce Testimony; Day 1, part 1, page 30 and Day 2, part 1, page 12; Matias Catalan Toro Testimony, Day 2, part 1, page 40; Hector Amin Cespedes Rivera Testimony, Day 2, part 1, page 102; Raul Hernandez Fiol Martinez Testimony, Day 3, part 1, page 2; Claudio Ivan Gamboa Lopresti Testimony, Day 4, part 1, page 16; Angel Martin Gomez Chavez Testimony, Day 4, part 1, page 98; John Edward Hinestroza Diaz Testimony, Day 5, part 1, page 9; Jose Alfredo Acosta Caballero Testimony, Day 5, part 1, pages 93-94; Patricio Fernandez Borquez Testimony, Day 6, part 2, page 21; Jose Ascension Estrada Parra Testimony, Day 7, page 6.

[41] *See, for example*, HEX Hearing, Raul Hernandez Fiol Martinez Testimony, Day 3 part 1, page 62.

[42] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 3 at 00:21:16-00:21:30.

[43] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 2 at 01:18:37.

[44] *Id*.

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iii. Newway did not Maintain Employment Records of the Workers

The only documentation that Newway had related to the hours the Workers allegedly worked were in the form of written timesheets or timeclock cards, which were solely used for Newway to verify that Baja was reporting the correct amount of compensation it was entitled to. There is no evidence that Newway had any of the employment records of the Workers, including paystubs, tax documents, or personnel files.

5. *Becerra* Factor No. 5: Preparation of Payroll and Payment of Wages

i. Evidence Demonstrates that Newway did not Prepare Payroll or Payment of Wages

The Worker paystubs were prepared by Baja Concrete, using Mercedes Accounting, and Newway was not involved.[45] The testimony reveals that Newway had no information about what Baja paid the Workers.[46] Baja's accountant further testified that Roberto Soto Contreras and/or Baja gave her the information necessary to process payroll for the subject workers – not Newway.[47] Baja would provide payroll information via email to Mercedes De Armas. No one from Newway was included on these emails.[48]

Newway had its own timekeeping application that were on its employees' phones, that only Newway employees used.[49] This is the information Newway used to process its own payroll. Further, the evidence demonstrates that Newway employees did not use the same timeclock the Workers used. *Id*. None of the Workers testified that they used this phone application that the Newway employees used, and there is no evidence thereof.

ii. Time Clock and Timesheets were Only Used to Verify what Newway Owed Baja.

[45] HEX Hearing, Claudia Penunuri Testimony, Day 8 part 1 at 00:21:57; *see also*, Worker Paycheck Stubs, HEX Exhibits 1, 3, 11, 14, 17, 18, 19, 24, 26, 28, 53-86.
[46] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 2 at 01:15:52-01:15:59.
[47] *See* Deposition of Mercedes De Armas at 32:22-33:11.
[48] HEX Exhibits 100, 101, and 102.
[49] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 2 at 01:28:35-1:28:58; Day 9 part 3 at 00:02:01-00:02:026.

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All evidence presented at the hearing supports that the sole purpose of the timesheets and time clock was to verify that Newway was being invoiced correctly, essentially functioning as a receipt for work performed. They served no function related to Baja's payroll. The timesheets contain the signatures of Newway personnel, and the OLS focuses on these "sign offs" as some kind of approval of the Worker's time, but this is a blatant red herring which further demonstrates the OLS is not a true neutral in this matter. In fact, during its investigation the OLS never asked anyone from Newway the point of these timesheets or invoices, and never requested to interview anyone from Newway who could have easily explained this.[50] The hearing was completely lacking any evidence showing that Newway was involved in the preparation of payroll and payment of wages. Even OLS Senior Investigator Daron Williams testified that he believes the Newway signatures on the time sheets were Newway's way of verifying that they were being charged the correct amount by Newway.[51] Mr. Williams also could not think of any method Newway could have used to verify that it was being charged the correct amount by Baja Concrete where the OLS would not have labeled Newway as a joint employer.[52]

Stepping back even further, it would be logistically impossible for Newway to prepare the Worker's payroll from these timesheets, as they were devoid of nearly all identification of the Workers (some Workers just have first or abbreviated names), do not contain any information about the hourly rate, information about breaks, or information about whether overtime premiums were paid.[53]

6. *Becerra* Factor No. 6: Whether Work was Specialty Job on Production Line

The Workers did not perform a specialty job on the production line, and the OLS has not presented any evidence to establish this. Because production line work has traditionally

[50] HEX Hearing, Daron Williams Testimony, Day 13 at 2:46:21-04:46:53.
[51] HEX Hearing, Daron Williams Testimony, Day 13 at 2:43:04-2:43:25.
[52] *Id*. at 2:45:48-02:46:08.
[53] HEX Exhibits 12-13.

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been performed by employees, the courts subject subcontracting of such work to greater scrutiny. For example, in *Torres-Lopez v. May*, 111 F.3d 633,643 (9th Cir. 1997), the court found that farmworkers' task of picking cucumbers was analogous to a "specialty job on the production line" because "[w]hat they did constituted one small step in the sequence of steps taken by [defendant] to grow the cucumbers and prepare them for processing at the cannery". In *Torres-Lopez*, the farmworkers' only function was to pick cucumbers.

Here, the Workers performed a variety of tasks alongside the Newway employees. This included general labor and concrete finishing work, which are commonly outsourced. The evidence demonstrates that the work performed varied day to day. The work that the Workers did was not "production line work", that is traditionally performed by employees, and this factor weighs against Newway being a joint employer.

7. *Becerra* Factor No. 7: Whether Responsibility under the Contracts Between a Labor Contractor and an Employer Pass to Another Without Material Changes

When assessing this factor, courts look at whether responsibility under the contracts between a contractor and an employer passes from one contractor to another without "material changes." *See Torres-Lopez*, 111 F.3d at 640; *Zheng*, 355 F.3d at 61. As the Court stated in Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 74 (2d Cir. 2003):

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> "… this factor weighs in favor of a determination of joint employment when employees are tied to an entity such as the slaughterhouse rather than to an ostensible direct employer such as the boning supervisor. In such circumstances, it is difficult *not* to draw the inference that a subterfuge arrangement exists. Where, on the other hand, employees work for an entity (the purported joint employer) only to the extent that their direct employer is hired by that entity, this factor does not in any way support the determination that a joint employment relationship exists."

Here, Newway had a verbal agreement with Baja, and there is no evidence presented that shows that Newway used the same terms of this oral agreement Baja with other concrete

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subcontractors or labor subcontractors in the past. Like in *Zheng*, the Workers only worked for Newway to the extent that their direct employer, Baja, was hired by Newway. This factor weighs against joint employment.

8. *Becerra* Factor No. 8: Premises and Equipment

It is undisputed that the Workers did not use Newway's premises to perform the work. The site was owned by Onni – not Newway. Newway also had no ownership interest at the jobsite. This factor weighs heavily in Newway's favor. See *Zhao v. Bebe Stores, Inc.,* 247 F. Supp. 2d 1154, 1159 (C.D. Cal. 2003) (fact that manufacturer did not provide premises was a critical factor in distinguishing case from joint employment situation.)

Further, the personal equipment, such as hand tools and helmets that the Workers used were provided by Baja and/or Roberto, not Newway.[54] The larger equipment on site, such as scissor lifts, generators, and forklifs, was provided by Newway, and used by both the Workers and Newway employees along with other workers on the jobsite.[55] This is very common in the construction industry, as it would be impractical for each subcontractor of every trade to bring their own large equipment. The equipment was not limited to just Baja's use – any of the trades could use the equipment.[56]

9. *Becerra* Factor No. 9: Whether Employees Had Business Organization that Shifted as Unit from One Worksite to Another

The Becerra factor regarding whether the Workers could and did shift as a unit from one worksite to another and from one customer to another is largely inapplicable here. Baja just began working in the US in 2018 and brought down Workers from Canada. It did have some Workers that shifted from one jobsite to another, but Baja only operated in the US for a

[54] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:21:20-03:21:31.
[55] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, Part 2, at 00:15:47-00:15:52.
[56] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:22:09 – 03:22:37.

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brief period. Baja also testified that it intended to have projects with other companies aside from Newway. [57] This indicates that Baja's Workers would have shifted to other worksites, indicating that Newway was not a joint employer.

10. *Becerra* Factor No. 10: Whether Work was "Piecework"

Here, the Workers did not perform "piecework", that required no initiative, judgment, or foresight. Baja paid the Workers for each hour worked, regardless of the work they were doing. They were not paid per unit of work performed, such as on an assembly line. Further, the evidence demonstrates that the work performed varied among the Workers. Some did general labor work, and some did concrete finishing work.

Even more, concrete finishing work is a skilled trade that requires initiative, judgment, and foresight.[58] Concrete finishers, such as some of the Workers, needed to know the certain concrete finishes and know what equipment to use to obtain the desired effect.[59]

11. *Becerra* Factor No. 11: Whether Workers had Opportunity for Profit/Loss

Courts have rejected using the "opportunity for profit and loss" as a joint employment factor, holding that it is more helpful for distinguishing independent contractors from employees than it is for determining whether employees have joint employers. *Zheng*, 355 F.3d at 67-68, 72 (declining to include workers' opportunity for profit or loss and investment in the business in list of functional factors, because they "do not bear directly" on the joint employer question). The Ninth Circuit has listed it as a functional factor but has interpreted it loosely. *See Moreau v. Air France*, 356 F.3d 942, 952 (9th Cir. 2004) (holding that employees had an opportunity for "profit or promotion" by their direct employer).

[57] HEX Exhibit 37 – 30(b)6 Deposition of Baja at 89:9-15.
[58] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 2 at 01:21:56-01:22:07.
[59] *Id*.

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Here, the Workers were paid by Baja for hour worked. Like in *Moreau*, some of the Workers testified that they received pay increases by their direct employer – Baja.[60] While this factor is not necessarily relevant in determining whether the Workers have joint employers, it nevertheless weighs in favor of Newway not being a joint employer.

12. *Becerra* Factor No. 12: Whether there was Permanence in Working Relationship

OLS presented no testimony establishing that there was permanence in the working relationship between Newway and the Baja Workers. To the contrary, there was testimony that confirmed that Newway hired Baja on a project basis – not a permanent basis.[61] Newway operated as a concrete contractor in the US for over 25 years. [62] This means that for over 20 years, Newway did not work with Baja USA, and instead utilized its own employees and other concrete subcontractors to perform work. Newway continues to operate in the US, no longer subcontracts with Baja.[63] In fact, Newway currently uses different concrete subcontractors – Builders Blue Concrete and Olympic.[64]

13. *Becerra* Factor No. 13: Whether service rendered was Integral Part of alleged employer's business.

Baja's service was not an integral part of Newway's business, it was simply a subcontractor. Newway needed to hire subcontractors to assist with its scope of work on the multiple large projects it was working on. This does not indicate a joint employer relationship; it simply shows that Newway was busy and subcontracted out some of its work. At any given time, there were several contractors working on the site who were essential to Newway's business, including excavators, electricians, plumbers, and mechanical contractors.[65]

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[60] *See, e.g.*, HEX Hearing, Jose Ascension Estrada Parra Testimony, Day 7 part 1 at 04:03:48 – 04:04:08.
[61] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9 part 3 at: 00:16-00:16:42.
[62] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 00:27:51 – 00:27:55.
[63] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 01:21:06-01:21:42.
[64] *Id*.
[65] HEX Exhibit 47 - Deposition of Antonio Machado at 132:2-13.

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Further, Newway has its own cement finishers on its staff, so they could have done the roll of cement finishing without hiring Baja.[66] As mentioned above, Newway subcontracts out with other cement subcontractors. Newway could have also hired other laborers, such as from PeopleReady.[67] The Workers work was not an integral part of Newway's business, as the evidence demonstrates that Newway could have self-performed the work or retained other subcontractors to complete the work.

C) <u>Balancing the *Becerra* Factors Shows that Newway was not a Joint Employer</u>

The Becerra test is flexible and depends on the totality of the circumstances of each case. *Becerra v. Expert Janitorial, LLC*, 181 Wash. 2d 186, 197, 332 P.3d 415, 421 (2014). The determination of the relationship does not depend on isolated factors, but rather upon the circumstances of the whole. *Id*. at 198. The factors that are important in a particular employment situation depended on which revealed the economic reality of the working relationship. *Id*. Industry custom and historical practice should be consulted in weighing the factors. *See*, *Zheng v. Liberty Apparel Co. Inc*., 355 F.3d 61, 73 (2d Cir. 2003).

Here, when analyzing the Becerra factors, the nature of the construction industry should be taken into consideration. What the OLS has presented regarding control and supervision is nothing more than a typical contractor-subcontractor relationship. Further, there is absolutely no evidence that Newway played any role in the preparation of the Workers' payroll or involvement with the Workers' rate of the Workers' pay. The evidence also supports that Newway did not control the Workers' employment conditions and was not involved in the hiring or firing of the Workers. The balance of the functional factors also disfavors joint employment.

[66] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 00:02:54.
[67] HEX Hearing, Kwynne Forler-Grant Testimony, Day 9, part 2 at 01:08:06.

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As noted in *Becerra*, additional factors can be considered by the Court, including whether the putative joint employer had knowledge of the wage and hour violation. *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 198 Wash. 2d 524, 537, 497 P.3d 353, 360 (2021). Here, Newway had no knowledge of the wage and hour violations, as it did not even know what Baja was paying the Workers. It is also important to note that while not a direct factor, the Workers testified that Baja was their employer – not Newway.

Even assuming several factors weigh in favor of joint employment, the totality of the circumstances taken in light of industry norms demonstrates that Newway is not a joint employer. In *Espinoza v. MH Janitorial Services, LLC*, 2017 WL 11475299 (February 8, 2017) (trial court order) the court considered whether MH Janitorial Services and Fred Meyer were joint employers of night shift janitors after the decision was remanded in *Becerra v. Expert Janitorial*, LLC, 181 Wn.2d 186, 332 P.3d 415 (2014). When applying the factors established in *Becerra*, the trial court found that, regarding whether Fred Meyer was a joint employer, seven factors weighed in favor of joint employment (Factors 1, 7, 8, 9, 10, 11, 12), eight factors weighed against joint employment (2, 3, 4, 5, 6, 13, 14, 16), and one factor was neutral (15). *Id.* at *31-34. The court found that Fred Meyer was not a joint employer even though almost half the factors weighed in favor of joint employment. *Id.* at *34. It is significant to note that the trial court found that Fred Meyer was not a joint employer despite that they found the first factor, whether Fred Meyer exercised control over the workers, to weigh "heavily in favor of joint employment." *Id.* at *31.

D) <u>Holding Newway as Joint Employer Would Have Significant Policy Implications</u>

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

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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 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.

E) "Evidence" Of Missed Meal and Rest Breaks Was Simply Opinions

The OLS has not presented any reliable evidence to support its assertion that the Workers were not given proper meal and rest breaks. In fact, some of the evidence supports that the Workers received paid meal breaks.[68] The Workers testified that they were given a meal break which they did not clock out for, and the timesheets and timeclock records show that the Workers did not "clock out" for meal breaks, indicating that they were paid for that time.[69]

First, the Workers largely testified that they were given rest breaks. Second, test breaks can be intermittent, so long as the intermittent breaks add up to 10 minutes over a four-hour period. WAC 296-126-092(5). Here, the OLS provided no reliable evidence that the Workers were not provided intermittent rest breaks, instead, it just offered testimony where the Workers stated they were not given some breaks. OLS investigators did not first provide the Workers with the legal definition of a break, nor explain the law pertaining to intermittent breaks.[70]

[68] *See* Timesheets, HEX 12-13, and Timeclock Records which do not indicate Workers "clocked out" for lunch. See also, HEX Hearing, Patricio Fernandez Borquez Testimony, Day 6 part 2 at page 75.
[69] *Id.*
[70] HEX Exhibits 49-51, Interview Notes.

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Consequently, the Workers answers regarding rest breaks amounted to simply opinions, not facts. However, Newway's site superintendent Adam Pilling testified that breaks at the site often happened naturally, and sometimes work is at a standstill.[71] The OLS has not met its burden to prove that the Workers were not provided adequate meal and rest breaks.

F) Fine was Excessive and Unsubstantiated

a. The OLS Assessed Maximum Liquidated Damages as a Punishment

Here, OLS calculated $631,288.54 owed in back wages, but assessed a staggering amount of liquidated damages - in the amount of $1,262,577.19. This is the maximum that OLS could assess. For first violations, such as here, liquidated damages are discretionary.[72] In support of this award, the OLS testified that part of the reason they assessed the maximum amount of liquidated damages despite it being a first violation was due to the parties failure to settle this matter.[73] This is essentially the OLS abusing its discretion and punishing Appellants.

b. Newway Should not be Responsible for Baja's Failure to Respond

The evidence demonstrated that Newway fully cooperated with the investigation. When asked in detail about what Newway did not provide in response to the initial Request for Information, the OLS could not think of any item that Newway did not provide.[74]

Newway, because it was not the Workers' employer, obviously did not have the employee records that were requested by OLS in its subpoena which was clearly directed at Baja whereby Baja failed to comply. It is manifestly unfair for Newway to be liable for the maximum amount of damages allowed when it fully cooperated with the investigation.

[71] HEX Hearing, Adam Pilling Testimony, Day 13 at 03:23:55-03:24:32.
[72] HEX Hearing, Ashley Harrison Testimony, Day 11 at 04:35:06-04:35:11.
[73] HEX Hearing, Ashley Harrison Testimony, Day 11 at 03:20:03-03:20:15.
[74] HEX Hearing, Ashley Harrison Testimony, Day 10, pages 12-14.

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G) Procedural Errors - OLS Relied on Undisclosed Evidence that Appellants Could Not Ask About During Hearing.

The OLS in preparing its Determination relied on evidence it obtained from a Newway Foreman. When attempting to inquire about this evidence at the Hearing, the City Attorney objected based on government-informant privilege.[75] The Hearing Examiner sustained the objection and did not allow further testimony regarding this evidence.[76] This was improper and prejudiced Newway.

First, there is no governmental-informant privilege outside the criminal realm. The government-informant privilege protects from compelled disclosure the identity of informers who supply information about legal violations to the appropriate law enforcement personnel. *Roviaro v. United States,* 353 U.S. 53 (1957). The basis for this privilege does not apply here. Second, the party asserting the privilege has the burden of showing the attorney-client relationship existed and that relevant materials contain privileged communications. *Soter v. Cowles Pub. Co*. (2007) 162 Wash.2d 716, 174 P.3d 60. The City of Seattle did not meet its burden of showing how the information the OLS relied on was privileged.

What is clear from the hearing is that in preparing its Determination, the OLS relied on evidence, including testimony, it received from a Newway Foreman. It withheld this information from the Appellants during the investigation and the subsequent appeal period, and Newway therefore could not adequately prepare for the hearing or present testimony to refute this information. Compounding the issue is that Appellants were not allowed to elicit testimony about this important evidence during the Hearing. It is fundamentally unfair and prejudicial that the OLS can rely on evidence it obtained during the course of its investigation, refuse to tell the Appellants what it is, and the Appellants were not allowed to examine the witnesses about this information.

[75] HEX Hearing, Daron Williams Testimony, Day 13, pages 10-12.
[76] HEX Hearing, Daron Williams Testimony, Day 13, pages 10-12.

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IV. CONCLUSION

The evidence shows that Newway is not a joint employer with Baja, Newway did not commit any wage violations itself, and Newway should not be held liable for Baja's actions. Newway respectfully requests that it be dismissed and not held liable for any damages or penalties assessed. Should Newway be found to be a joint employer, it respectfully requests that alleged damages be limited to the damages actually proved by OLS, not to exceed damages pertaining to the 10 Workers that OLS called to testify.

DATED this Wednesday, October 25, 2023.

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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 Wednesday, October 25, 2023, 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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SIGNED at Seattle, Washington this Wednesday, October 25, 2023.

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