

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:) Hearing Examiner File:
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BAJA CONCRETE USA CORP., ROBERTO) No.: LS-21-002
CONTRERAS, NEWWAY FORMING INC.,) LS-21-003
and ANTONIO MACHADO) LS-21-004
)
from a Final Order of the Decision issued by) CITY'S CLOSING ARGUMENT
the Director, Seattle Office of Labor Standards)
)
_____)

I. INTRODUCTION

The City of Seattle and the Seattle Office of Labor Standards (collectively “the City”) ask the Hearing Examiner (“HE”) to affirm the Final Order of the Director and find that Appellants Baja Concrete USA Corp. (“Baja”), Newway Forming Inc. (“Newway”), and Antonio Machado (“Machado”) are joint employers and that they violated the Seattle Municipal Code (“SMC”) Wage Theft Ordinance, Minimum Wage Ordinance, and Paid Sick and Safe Time Ordinance (collectively, “the Ordinances”) in their employment of laborers and cement finishers in Seattle. Appellant Roberto Soto Contreras (“Contreras”) is the only respondent that did not appeal this Finding, e

The remedial nature of wage and hour laws and the broad definition of employer dictates that a court should evaluate whether the totality of the circumstances demonstrate the “economic reality” when multiple employers control the economic or day-to-day aspects of the workers’ employment. None of the Appellants can escape this reality—or evade liability for the rampant wage and hour

violations that occurred—by using intermediaries to hire and pay workers or by attempting to shift responsibility to a transient and judgment-proof labor broker.

II. ALL RESPONDENTS ARE JOINT EMPLOYERS

The evidence demonstrated the control Appellants Baja Concrete USA , Newway Forming, Inc. and Antonio Machado exercised over all aspects of the employer-employee relationship. The Office of Labor Standards (“OLS”) investigation, as well as the testimony and exhibits during the hearing, established that Appellants violated the Ordinances between February 2018 and August 2020. Although the appellants constantly pointed the blame at each other during the 14-day hearing, the evidence confirmed their joint employment relationship.

A. Definitions of Employee, Employer and Joint Employer

OLS’ senior investigators in this case testified as to the definitions of an employee and an employer under the Seattle Municipal Code ordinances. Under the Ordinances, an employer is defined as “someone who suffers or permits an employee to work on their behalf” and an employee is defined as “someone whose work benefits a particular entity or employer.”

The Ordinances are remedial in nature and subject to liberal construction to effect their purpose in protecting workers.¹ Like the Fair Labor Standards Act (“FLSA”), the Ordinances broadly define the term “Employ” as “to suffer or permit to work.”² Because these definitions use the same expansive language as the FLSA to define employment, it is appropriate to look to FLSA jurisprudence in interpreting the Ordinances.³ 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.”⁴

¹ 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).

² SMC 14.16.010, 14.19.010, 14.20.010; see 29 U.S.C. § 203(g) (FLSA).

³ 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).

⁴ *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)).

1 “The ‘suffer or permit to work’ standard was developed to assign responsibility to businesses that did
2 not directly supervise putative employees.”⁵ This “definition of ‘employ’ is far broader than that in
3 common law and encompasses working relationships, which prior to [the FLSA], were not deemed
4 to fall within an employer-employee category.”⁶

5 In addition to broadly defining employment, Seattle’s ordinances explicitly contemplate joint
6 employment. Under the Ordinances, “[m]ore than one entity may be the ‘employer’ if employment
7 by one employer is not completely disassociated from employment by the other employer.”⁷

8 OLS Senior Investigator, Daron Williams, described his training on joint employment. He
9 described how the U.S. Court of Appeals Ninth Circuit’s economic realities test was used when
10 considering joint employment. *Becerra v. Expert Janitorial, LLC*, 181 Wash. 2d 186, 332 P.3d 415
11 (2014).

12 **B. Respondents Controlled Hiring and Living Arrangements**

13 Roberto Soto Contreras managed the hiring of the workers for Baja Concrete USA Corporation
14 (“Baja”). All ten of the workers provided testimony that Mr. Soto Contreras hired them to work for
15 Baja at the Denny Way location in Seattle, WA. They all testified that Mr. Soto Contreras worked
16 for Baja.

17 During their investigation, OLS interviewed eight workers who were paid by Baja. These workers
18 also confirmed being hired by Roberto Soto Contreras to work for Baja. Some workers indicated that
19 they shared a hometown with Mr. Soto Contreras, or a friend recommended them to Soto Contreras
20 for work at Baja.

21 One witness, Claudio Gomez, testified that although he understood that Soto Contreras worked
22 for Baja, Soto Contreras reported to Carlos Penunuri in Canada. Carlos is the brother of Claudia
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⁵ *Id.* at 933.

⁶ *Becerra*, 181 Wn.2d at 195 (internal quotation marks omitted, alteration in original).

⁷ SMC 14.16.010, 14.19.010, 14.20.010.

1 Penunuri and both of their names were listed on the 2017 Articles of Incorporation for Baja. **HE**
2 **Ex.33.** Although Mr. Penunuri was listed as an officer or director in the 2017 Articles of
3 Incorporation and Ms. Claudia Penunuri described him as the Vice President. She testified that he is
4 no longer the Vice President and that she is the only officer listed for Baja. Mr. Williams testified
5 that no additional Articles of Incorporation were provided during the investigation to indicate
6 something different than what is listed in the 2017 Articles.

7 Newway had a contract with Onni for the construction project at 1120 Denny Way in Seattle
8 Washington. Meetings about scheduling would take place often between Newway and Onni
9 regarding the work to be accomplished and whether the project was remaining on schedule according
10 to Adam Pilling (Newway). From these meetings, Newway would know the number and type of
11 workers needed and would communicate this to Baja. Newway set the pace of work according to
12 testimony by Kwynne Forler-Grant. According to Adam Pilling of Newway, Baja was not a party to
13 those meetings. Nine of the ten workers testified that Roberto Soto Contreras made living
14 arrangements for them once they were hired to work for Baja. Jonathan Ivan Parra Ponce stated that
15 he could only live at the apartment for two months then he had to move because things “did not work
16 out.” Multiple witnesses testified to workers sleeping in the living room and two workers living in
17 each bedroom. Jose Alfredo Acosta Caballero testified to sharing an apartment with Roberto Soto
18 Contreras.

19 This testimony was consistent with that of Senior OLS Investigator Ashley Harrison. She testified
20 that the workers were told the first month of rent would be free, but that was not the case. Rent was
21 also deducted from nine of the workers’ pay stubs regularly, irrespective of how many workers lived
22 in the apartment. When Jose Alfred Acosta Cabellero was asked by Respondent Baja why did he not
23 contest the rent deduction, Mr. Caballero stated “I had no other choice.”

C. Multiple Respondents Exercised Control Over Pay and Payroll

1 All the workers provided testimony stating they were informed of their pay verbally by Soto
2 Contreras. They understood that they worked for Baja and were paid by Baja or Soto Contreras.
3 Some stated their first payment was cash from Soto Contreras and then Soto Contreras helped them
4 set up direct deposit.

5 Baja paid Mercedes Accounting to process the payroll for the workers. Payroll was processed bi-
6 weekly. According to the testimony of Claudia Penunuri, Baja only processed payroll and did not
7 provide any labor to Newway. However, her testimony was inconsistent with the information alleged
8 by Baja in their complaint for King County Superior Court case #22-2-04760-7-SEA. **HE Ex.35 (pg.**
9 **3 at Ln. 7-9).** Baja filed this action claiming Newway did not pay Baja for the labor provided at 1120
10 Denny Way. Baja did not allege that it was only providing payroll services. Claudia's testimony is
11 also inconsistent with the workers who stated their employer was Baja and that Roberto Soto
12 Contreras worked for Baja.

13 The workers testified that they originally provided their timesheets to Soto Contreras. Other
14 workers stated that they recorded their time in a notebook or a timesheet and it was provided to
15 Newway through Roberto Soto Contreras. Timesheets were reviewed with some of the workers
16 during their testimony (**HE Exs.12-13**). Although the workers were not sure who had signed the
17 timesheets, Forler-Grant testified that someone from Newway had to approve the workers' time
18 before payment was issued to Baja.

19 Newway exercised direct control over timekeeping. Sometime in September 2019, Newway
20 requested that workers use a timeclock to record their time going forward. Workers testified that the
21 timeclock was kept in a Newway trailer. This testimony was consistent with Adam Pilling's testimony
22 about the location of the time clock. According to the testimony of Kwynne Forler-Grant, the
23 timeclock implementation was due to dishonesty, because Baja charged Newway for hours that
workers did not work. Forler-Grant also testified that at the end of the week, Tom Grant from

1 Newway would meet with Roberto Soto Contreras to review the timecards of workers. They met to
2 confirm the hours worked, then Newway would pay Baja. This shows an unusually close relationship
3 between Baja and Newway as it relates to payroll and workers' hours.

4 **D. Suspicious Payment Received from Baja to Antonio Machado**

5 Antonio Machado (Machado), who was a superintendent for Newway, had an unusually close
6 and intertwined relationship with Baja. He received a suspicious payment from Baja. In his
7 testimony, he stated the check was for reimbursement of personal money he loaned Carlos Penunuri
8 in Canada in the amount of \$4,878. **HE Ex.48.** The money was used for Baja in Washington state to
9 use for the workers' apartments or for Wal-Mart purchases for the workers. Machado did not think
10 it was strange for Carlos to request a personal loan, nor did he say it was strange that the personal
11 loan be reimbursed through Baja. Machado also testified that Carlos Penunuri had some authority
12 over Baja in the United States. This is contrary to the testimony of Claudia Penunuri, who stated
13 Baja Company Ltd, which is located in Canada, provided only consulting advice for Baja.

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16 **E. Newway's Control Over Supervision, Corrective Actions, and Meetings**

17 Soto Contreras received direction from Newway as to what the workers needed to do on site.
18 Adam Pilling testified that Soto Contreras received direction from him or Machado. Pilling testified
19 that Soto Contreras was like a General Manager for Baja.

20 Workers testified that Newway provided significant onsite direction through Antonio Machado.
21 Different Newway foremen provided job task direction depending on the type of work. For instance,
22 Pedro from Newway supervised the finishers and Victor Martinez from Newway supervised the
23 laborers. Jonathan Ivan Parra Ponce, Matias Catalan Toro, Hector Amin Cespedes Rivera, Angel
Gomez Chavez and Patricio Fernandez Borquez all stated that Pedro told them what to do next and

1 Pedro is who they would go to with questions. Raul Alejandro Fiol Martinez and John Edwards
2 Hinestroza Diaz provided testimony that Victor Martinez, from Newway, told them what to do next
3 when completing a job and they went to him with any questions. Jose Ascension Estrada Parra stated
4 Juan Cantos told him what to do next and answered his questions. Cantos also worked for Newway.

5 Workers testified that Soto Contreras was often not on site. This is consistent with testimony
6 provided by OLS Senior. Investigator Ashley Harrison, who stated Contreras started reporting to the
7 site in May of 2019. Soto Contreras went back and forth to Canada. Pilling testified that Soto
8 Contreras was rarely on site, and that the Newway foremen directed the workers paid by Baja. Pilling
9 testified that the work done by the Newway and Baja workers was the same. He also testified that he
10 was unable to distinguish between the Baja workers and the Newway workers when walking through
11 the worksite.

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14 Newway provided most of the corrective direction to the workers. Correction was provided by a
15 combination of Pedro, Victor, Cantos, and Machado. Fifty percent of the workers testified that
16 Machado was the “boss” of the Newway worksite.

17 The workers were required to attend Newway’s headcount and safety meetings. The workers
18 testified that Soto Contreras told them to list Newway as their employer on some of the sign-in sheets
19 and they did. **HE Ex.4, HE Ex.8.**

20 Meal and rest breaks were mostly determined by Newway foremen. A number of the workers
21 testified that they would receive a break in the morning and a 30-minute lunch break. They also
22 stated that some days when pouring concrete, no breaks were given. Some testified that Pedro
23 determined breaks, some stated Victor, others stated that Machado determined breaks. A few stated
Soto Contreras controlled when they could take breaks or lunch.

F. Employer/Employee Relationship Between Roberto Soto Contreras and Baja Concrete USA Corporation

Soto Contreras was hired by either Claudia or Carlos Penunuri to provide labor exclusively to Newway Forming, Inc. in Washington state. Baja and Soto Contreras had an employee/employer type of relationship. Soto Contreras had a Baja business card which listed his first name only (Roberto) and the first name of Carlos Penunuri. **HE Ex.20.** Carlos Penunuri is the brother of Claudia Penunuri. Claudia first testified that she did not know Carlos Ibarra, but when asked about Carlos Penunuri Ibarra, she stated he was her brother. Claudia also testified that Roberto would find employees and she would take care of the payroll. She later testified that Roberto had some kind of contract with her brother in Canada, but she was not privy to the details.

The Articles of Incorporation listed both Claudia Penunuri and Claudio Penunuri as officers and/or directors of Baja in 2017. **HE Ex.33.** Claudia testified that she was the sole owner of Baja as the President and the only employee was Claudia. The testimony from the former Baja workers indicated that Roberto worked for Baja. This testimony of Mercedes De Armas of Mercedes Accounting also contradicted Penunuri's testimony because De Armas testified that she told Labor & Industries that Baja employed between 21 and 30 employees.

Based upon the testimony provided and the exhibits admitted, Baja, Newway and Machado all had significant control over the economic and day-to-day aspect of the workers' employment and should be found to be joint employers.

III. APPELLANTS VIOLATED MULTIPLE SMC ORDINANCES

A. Wage Theft (SMC 14.20) Violations

Seattle’s Wage Theft Ordinance requires that employers pay workers regularly and accurately once they hired. Under SMC 14.20.020, an employer shall pay all compensation owed to a worker

1 by reason of employment on an established regular pay day at no longer than monthly payment
2 intervals.⁸

3 **a. Overtime Requested and Never Paid**

4 Employees must receive overtime pay when they work more than 40 hours in one work week.
5 Overtime pay is defined as receiving one and one-half times the regular rate of pay for each hour in
6 excess of 40 in one workweek⁹. Employees should not have to request overtime pay if they worked
7 over 40 hours in a week. Baja provided paystubs showing no overtime pay, but when a paystub was
8 compared to the timesheet with the same dates, it showed that the employee worked more than 80
9 hours in the two-week pay period. This is consistent with the testimony provided by all ten workers
10 who did not receive overtime pay.

11 One example of this is a comparison of the pay stubs and timesheets of Hector Amin Cespedes
12 Rivera (**HE Ex.12 at TRIAL 00932-3, HE Ex.14 at TRIAL 00492**). He worked 54.5 hours for the
13 week of January 14, 2019 – January 19, 2019. *Id.* **TRIAL 00932**. The hours worked for the second
14 week of the same pay period was 56.5 hours. **TRIAL 00933**. He worked 111 hours in that pay
15 period. However his pay stub said that he only worked 80 hours in that pay period. *Id.* **TRIAL**
16 **00492**. No overtime hours were noted anywhere on Cespedes' paystub. After the Respondents were
17 aware of OLS's investigation, overtime began to appear on some paystubs.

18 **b. Unauthorized Deductions from Baja Workers' Pay**

19 Deductions were made from the workers' pay without written consent. Deductions included
20 zapatos (shoes), advanced R (rent), tools, gas, loans and other items. RCW 49.52.060 requires
21 deductions 'to be authorized in writing in advance by the employee.' An employer cannot receive a
22 financial benefit from the deduction. All ten of the workers testified they never provided written
23 authorization for any of the deductions that were made for rent, gas, tools, shoes or loans. Many of

⁸ SMC 14.20.020

⁹ RCW 49.46.130(1)

1 the workers testified that they never saw their paystubs prior to the trial in this case. Most of the
2 workers did not know what Advanced R meant when they reviewed their deductions during their
3 testimony.

4 For example, Jose Ascension Estrada Parra had \$200 deducted for Advance R in the pay check
5 he received on February 15, 2019. **HE Ex.28 at TRIAL 00594.** He also had \$440 deducted for
6 Advance R from paycheck dated April 26, 2019 for \$440 and Gas deducted for \$10. **Id. TRIAL**
7 **00599.** He did not authorize any of these deductions in writing.

8 Another example is Patricio Antonio Fernandez Borquez, who had \$350 deducted for
9 Advance R and \$235 deducted for tools on February 1, 2019. **HE Ex.19 at TRIAL 00540.** He also
10 had a deduction of \$50 for gas on August 2, 2019. **Id. TRIAL 00553.** Again, he gave no advanced
11 written authorization for these deductions.

12 **c. Missing Meal Breaks and Rest Breaks**

13 A worker's compensation includes paid time for rest breaks.¹⁰ According to the Washington
14 Administrative Code ("WAC") sections 296-126-092(1) and 296-126-092(4), a ten-minute rest
15 period is required for every four hours of working time and a 30-minute meal period is required when
16 an employee works more than five hours in a shift.¹¹ OLS followed this guideline in its
17 determination.¹²

18 The workers provided consistent testimony regarding breaks. They testified that they received a
19 short break and one longer half hour break. They also testified that sometimes they did not have a
20 break because of the type of work being performed, so they would carry fruit in their pockets so they
21 would not go all day without eating. A number of workers testified that they worked six-day
22 workweeks, and this was consistent with their timesheets. Those six days consisted of up to 50 and
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¹⁰ SMC 14.20.010.

¹¹ WAC § 296-126-092(1), 296-126-092(4); Keppinger Dep. 23:9-24:7.

¹² Keppinger Dep. 23:15-24:7.

1 60 hours worked in one work week. Workers testified that when they worked more than ten hours
2 in one shift, they did not get additional rest or meal breaks. Raul Alejandro Fiol Martinez stated “they
3 worked us like slaves.”

4 There was testimony about workers taking small restroom breaks. OLS investigators testified that
5 a small restroom break does not take the place of the ten-minute break required by WAC 296-126-
6 092(1) and 296-126-092(4).

7 8 **d. Minimum Pay Because of Failure to Pay Overtime**

9 Seattle Municipal Code 14.19.030 requires Schedule 1 employers to pay an applicable hourly
10 minimum wage.¹³ Schedule 1 employers are defined as “all employers that employ more than 500
11 employees....”¹⁴ OLS concluded that Respondents were collectively Schedule 1 employers since
12 Newway employs more than 500 employees.¹⁵ The hourly minimum wage compensation
13 requirements for Schedule 1 employers are as follows: \$15.00 in 2018, \$16.00 in 2019, and \$16.39
14 in 2020.¹⁶ The minimum wage standard is applicable because Respondents failed to pay overtime
15 when workers had more than 40 hours in one work week.

16 **B. Paid Sick and Safe Time (SMC 14.16) Violations**

17 All employees of Tiers 1-3 employers have the right to paid sick time and paid safe time as
18 provided in Section 14.16.025.¹⁷

19 **a. Required Notice of Rights Posters Were Not Posted**

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23 ¹³ SMC 14.19.030.

¹⁴ SMC 14.19.010.

¹⁵ HE Ex.87 at TRIAL 00375 - Findings and Determination at p.20; Seattle Human Rights Rules 90-045(5): “The
Schedule of the joint employer with the most employees determines the hourly rate for the employee who is jointly
employed.”

¹⁶ SMC 14.19.030.B.

¹⁷ SMC 14.16.025.A

1 The Seattle Municipal Code 14.16.045 states “the agency shall create and distribute a poster
2 giving notice of the rights afforded by this Chapter 14.16.”¹⁸ Employers are required to display the
3 poster in a conspicuous and accessible location where any of their works can view it.¹⁹

4 The employees did not have access to paid sick and safe time posters at their work location.
5 All of the workers testified that there were no paid sick and safe time posters at their work location.
6 Neither Baja nor Newway posted notice at any location accessible to the workers. OLS Enforcement
7 Supervisor Katie Jo Keppinger testified that the paid sick and safe time notice posters were requested
8 of Respondents during the investigation but were not provided.

9 **b. Respondents Did Not Provide Required Paid Sick and Safe Time Notifications.**

10 The Seattle Municipal Code 14.16.045.C requires employers to provide to each employee written
11 notice of their paid sick and safe time policy.²⁰ All ten workers testified that they were not aware of
12 a paid sick and safe time policy. Some stated that they worked when sick because they would not get
13 paid. Others testified that they would contact Soto Contreras or Newway when sick. Those providing
14 testimony about not having sick pay were Matias Catalan Toro, John Edward Hineostroza Diaz, Jose
15 Ascension Estrada Parra, Patricio Fernandez Borquez, Jonathan Parra Ponce, Claudio Ivan Gamboa
16 Lopresti, Jose Alfredo Acosta Caballero and Hector Cespedes Rivera.

17 OLS determined that all of the Respondents were collectively a Tier 3 employer. Williams
18 testified about how OLS made this determination.. Employees of Tier 3 employers shall accrue at
19 least one hour of paid sick and paid safe time for every 30 hours worked according to SMC
20 14.16.025.B.2. Jonathan Parra Ponce, Hector Amin Cespedes River, Claudio Ivan Gamboa Lopresti
21 and Angel Martin Gomez Chavez testified that they did not receive any information about earned
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¹⁸ SMC 14.16.045.A

¹⁹ SMC 14.16.045.B

²⁰ SMC 14.16.045.C

1 paid sick and safe time. Williams also testified that during the investigation, the employees stated
2 they received nothing in writing about sick leave hours earned.

3 SMC 14.16.030.K requires employers to provide each employee with written notification of
4 available paid sick and safe time. This update must be provided each time wages are paid. The
5 majority of the workers' pay stubs included no sick time notation in this case. Others showed that
6 the time available and used sick hours were "0" for the that worker. There were some paystubs that
7 had "0" sick hours "used" with some hours listed in the "available" sick hours section. But the
8 "available" hours did not increase and appeared as the same number in multiple paychecks over a
9 four-week timeframe which is not in accordance with the Paid Sick and Safe Time ordinance .

10 For example, Mercedes DeArmes testified that upon review of the paystubs for Hector Amin
11 Cespedes Rivera, his sick time available and sick time used remained "0" on 35 paystubs reviewed
12 from 11/18/2018 – 03/21/2020. **HE Ex.14 at TRIAL 00488-522.** She stated that she did not provide
13 this information to the workers even though she processed their payroll. She testified that they
14 probably get this information from Soto Contreras.

15 While reviewing the paystubs of former worker Jonathan Ivan Parra Ponce, he testified that there
16 was no sick leave available or used on the information reviewed. **HE Ex.1 at TRIAL 00651, 00652**
17 **and 00653.** This was the same testimony of Jose Ascension Estrada Para. He testified to not
18 receiving any information on earned or available sick hours and he testified to seeing "0" hours on
19 some of his paystubs that was shared during his testimony. **HE Ex.28 TRIAL 00594, 00616.** Estrada
20 Para could also not explain why his sick leave hours available did not increase on his paystubs from
21 April 10, 2020 and June 5, 2020. They both had "0" hours used but "13.90" hours available with the
22 statements being over a month a part. **Id. at TRIAL 00624, 00628.** Raul Alejandro Fiol Martinez
23 testified that he never received anything in writing for his sick hours earned or used. Patricio Antonio
Fernandez Borquez testified to not having received any information on sick leave hours used or

1 available. His paystubs for January 18, 2019, February 15, 2019, and December 20, 2019 all had
2 “0” hours listed for available and used for the entire year. **HE Ex.26 at TRIAL 00539, 00541 and**
3 **00663.** However, when reviewing his sick time available and used on his April 10, 2020 and June 5,
4 2020 paychecks, he had “0” hours listed as sick used but “13.98” hours listed as available sick hours.
5 ***Id.* at TRIAL 00571, 00575.**

6 The Seattle Municipal Code 14.16.030(A)(1) outlines the requirements for employers to allow
7 employees to use their earned/accrued paid sick and safe time. The testimony as noted above was
8 consistent in that workers were not allowed to use sick time because they did not know it was an
9 available option. Angel Gomez Chavez testified to being off work sick for 15 days and was not paid
10 anything.

11 12 **C. OLS Workplace Posters**

13 During the investigation, OLS received no proof from the Respondents of required OLS
14 workplace posters that notify workers of their rights. This is consistent with the testimony provided
15 by . Williams. Each of the SMC’s applied by OLS in this case requires employers to display the OLS
16 posters in a conspicuous and accessible location where any of their employees work.²¹ A few of the
17 workers testified that they did not see these posters on the site, which supports the finding that
18 Respondents violated these SMCs.

19 **D. Record Retention Violation**

20 The three-year record retention is required according to SMC 14.16.050, SMC 14.19.050 and
21 SMC 14.20.030.²² This information was requested by OLS during the investigation and again
22 through a subpoena duces tecum and did not receive the requested information. Both OLS
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²¹ SMC 14.16.045.B, SMC 14.19.045.B and SMC 14.20.025.B

²² SMC 14.16.045.B, SMC 14.19.045.B and SMC 14.20.025.B

1 investigators testified to record retention being one of the findings and what they attempted to obtain
2 from the respondents.

3 **E. Notice of Employment Information Never Provided to Workers**

4 The Wage Theft Ordinance requires employers to provide employment specific information to
5 new workers regarding that include the rate of pay and the address of the worksite. OLS made
6 multiple attempts to obtain the proof that this notification from the Respondents, but it was never
7 provided. Both OLS investigators testified that they sent the Request for Information as well as a
8 subpoena duces tecum. They never heard from Soto Contreras and Claudia Penunuri would not return
9 their calls after a brief conversation to schedule a call. They did obtain some information from
10 Newway and Baja, but not a complete record of employment information.

11 **F. Wage Payment Notification Never Provided**

12 The wage theft ordinance requires employers to provide written notice each pay period.²³ The
13 hours worked, rate of pay, pay basis, gross wages and deductions for the pay period must be included
14 in each written notice for each pay period. Eighty percent of workers testified that they did not
15 receive pay stubs regularly. One worker, when shown paystubs during his testimony, said that he
16 had never seen them before.

17 All of the workers gave similar testimony regarding how they were paid. They each stated
18 they were paid by the hour and not by piece rate as indicated on their pay stubs. **See HE Ex.28 at**
19 **TRIAL 00599, HE Ex.19 at TRIAL 00553.**

20 **IV. CALCULATIONS FOR VIOLATIONS**

21 **A. Investigative Process and Background of OLS Investigators**

22 Investigations typically start with some kind of complaint from a worker. Harrison testified that
23 those complaints are investigated through a factfinding process to determine the merits. OLS

²³ SMC 14.20.025.E.

1 determines the penalties and amounts owed to workers based on information received during the
2 investigation. Violations permit the Director to “assess liquidated damages in an additional amount
3 of up to twice the unpaid wages.”²⁴

4 Both OLS investigators testified to the investigative process and their background in conducting
5 SMC ordinance violations. Harrison testified to being a current Sr. OLS Investigator for two years,
6 but an Investigator for a total of four years. Williams testified that his current role is a Senior OLS
7 Investigator, and that he has been in this role for five years. Both investigators participated in the
8 interviewing of witnesses and fact gathering, including evaluating many payroll documents provided
9 by Newway and Baja. Williams did most of the calculation of the back wages owed to workers. Ms.
10 Harrison calculated the deductions and the 2019 meal and rest breaks.

11 **B. Investigators Accurately Assessed Back Wages, Interest and Liquidated Damages**
12 **Payable to Workers**

13 The back wages owed to the workers were calculated for the period of February 2018 through
14 August 2020. Harrison provided testimony regarding how the damages were calculated for rest and
15 meal breaks for 2019 and the deductions. **HE Ex.52.** Williams testified about his calculations for
16 overtime, paid sick and safe time, and 2018/2020 meal and rest breaks. **Id, HE Ex.94.** A 12 percent
17 annual interest is calculated monthly. Keppinger also testified about the assessment of liquidated
18 damages, and how the timesheets and paystubs received from the respondents were used to help
19 calculate the damages.

20 There are a number of factors to consider in assessing violations. OLS considered the nature and
21 persistence of the violation, culpability of employers; violations whether they are technical or
22 substantive. Other factors include the size of the employer and whether or not the workers are
23 similarly situated to one another is also considered.

²⁴ SMC 14.16.080.B, SMC 14.19.080.B; *See* SMC 14.20.060.B (permitting the same recover of back wages, interest and liquidated damages “for full payment of unpaid compensation”).

1 When an employer is in violation, it “shall be liable for full amount of unpaid wages “accrue[ing]
2 from the date the unpaid wages were first due at 12 percent annum.²⁵ In this case, the respondents
3 have violated SMC 14.16, 14.19 and 14.20 and should be responsible for paying the damages as
4 determined by the OLS Director.

5 **C. Civil Penalties for First Violations**

6 The Director has the discretion to assess a civil penalty of \$556.30 per affected employee for a
7 first violation of the ordinances.²⁶ Under the Paid Sick and Safe Time, Minimum Wage and Wage
8 Theft Ordinances, the Director may “assess liquidated damages in an additional amount of up to twice
9 the unpaid wages for first violations.²⁷

10 **D. OLS’s Assessment of Back Wages and Penalties Is Not an Abuse of Discretion**

11 Under the Paid Sick and Safe Time, Minimum Wage and Wage Theft Ordinances, once liability
12 has been established “the remedies and penalties imposed by the Director shall be upheld unless it is
13 shown that the Director abused discretion.²⁸ An abuse of discretion occurs where a decision is
14 manifestly unreasonable, or made on untenable grounds or for untenable reasons.²⁹ The Director’s
15 assessment of wages and interest owed by Appellants is based on the clear requirements of the
16 Ordinances and long-standing methods for determining wages owed and entirely reasonable. The
17 methods used to calculate back wages are wholly consistent with the letter and the intent of the law
18 and were not undertaken for any untenable purpose.

19 **V. CONCLUSION**

20 The City has shown that Respondents Baja, Newway and Machado are joint employers and
21 that they violated SMC 14.20, SMC 14.19 and SMC 14.16 as found by the OLS Director. The City
22

23 ²⁵ SMC 14.16.080.B; SMC 14.19.080.B; SMC14.020.060.B

²⁶ SMC 14.16.080.F; SMC 14.19.080.F; SMC 14.20.060.F

²⁷ SMC 14.16.080.B; SMC 14.19.080.B; SMC 14.20.060.B

²⁸ SMC 14.16.090.A; SMC 14.19.080; SMC 14.20.060

²⁹ *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006).

1 has shown, by a preponderance of the evidence, that each Respondent is jointly liable for the total
2 amount of back wages, liquidated damages, civil penalties, and fines assessed by OLS in the amount
3 of \$2,055, 204.10 plus interest.

4 //
5 //
6 //
7 //

8 DATED this 25th day of October, 2023.

9 ANN DAVISON
10 Seattle City Attorney

11 By: /s/Trina Pridgeon -

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23

1
2 1. CERTIFICATE OF SERVICE

3 I hereby certify under penalty of perjury under the laws of the State of Washington that, on
4 this date, I caused to be served a true and correct copy of the foregoing document, **Respondent City of**
5 **Seattle's Closing Argument**, on the parties listed below and in the manner indicated:

6
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18 *Antonio Machado*

19
20 the foregoing being the last known addresses and email address of the above-named party
21 representatives.

22 Dated this 25th day of October, 2023, at Seattle, Washington.

23 /s/ Susannah Hanley
Susannah Hanley, paralegal