BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of Baja Concrete USA Corp., Newway Forming Inc., and Antonio Machado, From a Final Order of the Director, City of Seattle Office of Labor Standards, Respondent.	Hearing Examiner Files: LS-21-002, LS-21-003, LS-21-004 (consolidated) **APPELLANT BAJA CONCRETE USA CORP.'S SUPPLEMENTAL BRIEF** Department Reference: 2020-00186-LS

I. INTRODUCTION AND ISSUES

On December 14, 2023, the Hearing Examiner re-opened the hearing in this matter (the "Hearing") and requested additional briefing, based on caselaw, from the parties addressing the following with respect to the relationship between Appellant Baja Concrete USA Corp. ("Baja USA") and Roberto Soto Contreras ("Contreras")[1]:

1. Under what circumstances is an independent contractor legally regarded as an employee of the party he is contracting with?

   Answer: It depends on the degree of control that the principal exercises, or has the right to exercise, over the methods and means by which the independent contractor completes work for the

[1] Contreras is named is a Respondent, along with Baja USA, Newway Forming Inc. and Antonio Machado, in the Findings of Fact, Determination and Final Order issued by the Director of the Office of Labor Standards, City of Seattle, dated August 25, 2021, under case no. CAS-2020-00186 (the "Order"), from which this appeal is taken. Contreras did not appeal the Order.

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principal. Baja USA did not, and could not, exercise control over Contreras, and therefore cannot be held liable for that actions of Contreras. The evidence admitted during the Hearing shows that Contreras was employed by a Canadian company, Baja Concrete, Ltd., and not by Baja USA, and that these two business entities are not affiliated.

2. Address the law of agency. Under what circumstances is the law of agency implicated?

   Answer: Contreras was not acting with actual or apparent agency authority for Baja USA. Therefore, the legal doctrine of agency is not applicable to this case.

3. How does the fact that Contreras was not an employee of Baja USA absolve Baja USA in this matter?

   Answer: Absent a special relationship, such as an employer-employee relationship of an agency relationship, a party is not liable to third parties for the conduct of another. There was no special relationship between Baja USA and Contreras.

The Hearing Examiner stated that the factual arguments are understood. As such, in the interest of brevity, references to the factual record in this brief are limited. Baja USA submits this supplemental brief addressing the above issues.

II. AUTHORITY AND DISCUSSION

1. Conteras, as an Independent Contractor, Could Not be Regarded as an Employee of Baja USA

Recent Caselaw

Relevant caselaw clearly and consistently stands for the proposition that an independent contractor is not an employee of the party contracted with. The appropriate judicial analysis to be applied in determining whether an individual is an employee or an independent contractor is the 'right to control' test. The Court of Appeals of Washington, Division One, recently did so in

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Karstetter v. King County Corr. Guild, 23 Wn. App. 2d 361, 516 P.3d 415 (2022). *Karstetter* is highly persuasive here, as a central issue in that case was whether Karstetter, as legal counsel, was an independent contractor or an employee of King County Corr. Guild (the "Guild"). In *Karstetter*, the plaintiff began his career in 1975 as a corrections officer for King County, where he was a member of Local 519 of the Public Safety Employees Labor Union ("Local 519"). *Karstetter* at 364. "From 1984 to 1987, Local 519 employed Karstetter as a business representative' and Karstetter attended law school at the same time." *Id.* Karstetter became a licensed Washington attorney in 1988. *Id.* "Between 1987 and 1996, Karstetter claims that he began representing Local 519 through consecutive five-year contracts." *Id.* "Local 519 was decertified." *Id.* "Karstetter was terminated." *Id.* "In 1996, after Local 519 was decertified by the corrections officers, the Guild was formed as the exclusive bargaining representative of corrections officers and sergeants employed by the King County Department of Adult and Juvenile Detention." *Id.* "Karstetter claims that he continued to represent the Guild in the same capacity as he did Local 519 – as in-house counsel attorney – through consecutive five-year contracts." *Id.* "On October 10, 2011, the Guild approved Karstetter's most recent contract, and the one subject to this action, spanning January 1, 2012, through December 31, 2016." *Id.* "The contract provided for just cause termination:

> "Consistent with the rights and expectations of the members that the GUILD represents, ATTORNEY may be terminated for just cause. The definition of Just Cause shall be the same definition that is currently contained in the Collective Bargaining Agreement for GUILD members …" *Id* at 364-365.

Clearly, based on the above, the Guild essentially treated Karstetter as an employee, governed by the collective bargaining agreement of other employees. However, as discussed

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further below, the Court, applying the 'right to control' test, held that Karstetter was an independent contractor and not an employee of the Guild.

"In April 2016, several Guild members filed complaints against Karstetter with the Washington State Bar Association." *Id.* "On April 27, 2016, the Guild's executive board voted to terminate Karstetter." *Id*.

Karstetter filed suit against the Guild alleging breach of contract and wrongful discharge. *Id*. The Court explained that "This case turns on whether Karstetter was an independent contractor or employee of the Guild." *Id* at 367. "The Guild contends that the court should apply the 'right to control' test.'" *Id* at 368. "Karstetter, on the other hand, asks the court to employ the 'economic dependence test.'" *Id*. "We (the Court) agree with the Guild that the right to control test applies." *Id.*

"The Washington Supreme Court expressed the right to control test in *Hollingberry v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966):

> A servant or employee may be defined as a person employed to perform services in the affairs of another under an express or implied agreement, and who with respect to his physical conduct in the performance of the service is subject to the other's control or right of control.
>
> An independent contractor, on the other hand, may be generally defined as one who contractually undertakes to perform services for another, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in performing the services." *Karstetter* at 368.

"The right to control test has since been upheld as "[t]he bedrock principle" on which such relationships are analyzed under the common law." *Id*, citing *Dolan v. King County*, 172 Wn.2d 299, 314, 258 P.3d 20 (2011).

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Here, in the context of the relationship between Baja USA and Contreras, the record is clear in that Contreras was in business for himself. The voluminous body of jurisprudence necessitates that the 'right to control' standard is the appropriate standard in this case.

> "In determining whether an individual performs services as an employee or independent contractor using the right to control test, several factors are considered:
>
> (a) the extent of control which, by the agreement, the employer may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of employer and employee; and
>
> (j) whether the principal is or is not in business." *Id* at 370, citing *Hollingberry,* 68 Wn.2d 75 at 80-81 (quoting *Restatement (Second) of Agency* § 220(2) (Am. L. Inst. 1958).

"Of the factors, the most important is the element of control." *Id* at 370-371. "The focus is on substance and not on corporate forms, titles, labels, or paperwork." *Id.*

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In applying the above factors, the *Karstetter* court explained: "[t]he Guild did not have a great extent of control over Karstetter's work." *Id.* "It did not provide Karstetter with direction on the types of arguments to make, identify relevant authority, advise him how to structure presentations, or advise him how to prepare for management hearings, nor did the Guild review Karstetter's briefing." *Id.* "The Guild also maintained no supervisory role over Karstetter's employees—his wife and an associate attorney—nor could the Guild terminate their employment." *Id.* "Karstetter supplied the instrumentalities, the tools, and his place of work." *Id.*

Likewise, in the instant case, the record shows that Baja USA did not have control of Contreras, had no right to such control, Baja USA did not provide Contreras with direction, Baja USA maintained no supervisory role over Contreras, and Contreras supplied his own instrumentalities and tools. Further applying the above factors, Contreras provided the place of work, Contreras did not provide services for Baja USA for a lengthy period of time, and Baja USA and Contreras believed they were in the roles of service provider and independent contractor.

The evidence admitted during the Hearing shows that Contreras was employed by a Canadian company, Baja Concrete, Ltd., and not by Baja USA. Further, the record is clear, based on testimony of Mercedes de Armas and Claudia Penunuri, that Baja Concrete, Ltd. and Baja USA are not affiliated.

Arguably, given the fact that there was a written contract between the Guild and Karstetter, given the long period of time that the Guild and Karstetter maintained a professional relationship, and given that the Guild did provide some direction to Karstetter, the relationship between the Guild and Karstetter was less distinctively an independent contractor relationship

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than was the relationship between Baja USA and Conteras. Therefore, given that the *Karstetter* court found that Karstetter was not an employee of the Guild and was an independent contractor, the Hearing Examiner must conclude that Contreras was an independent contractor and not an employee of Baja USA.

Long-Established Jurisprudence

"One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for is an independent contractor." *Wash. Recorder Pub. Co. v. Ernst*, 199 Wash. 176, 177, 91 P.2d 718 (1939). *Wash. Recorder* was a seminal case in Washington's jurisprudence distinguishing employees from independent contractors. In that case, a newspaper publisher, Wash. Recorder Pub. Co., published the Daily Olympian, and engaged the services of independent contractors (newspaper carriers) to deliver the paper to subscribers in Olympia. *Id* at 177. In the context of unemployment compensation, the superior court for Thurston County found that the newspaper carriers were independent contractors under contract with the plaintiff, and were not employees of the plaintiff. *Id* at 183-184. In affirming the superior court's findings, the Supreme Court of Washington stated that: "The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work and not as to the means whereby it is to be accomplished." *Id* at 190, citing *Amann v. Tacoma*, 170 Wash. 296, 16 P.2d 601 (1932). "An independent contractor is one who renders service to another in the course of an independent occupation, representing the will of the employer only as to the result of his work, and not as to the means by which it is accomplished." *Id*, citing *Leech v. Sultan R. & Timber Co*., 161 Wash. 426, 297 Pac. 203 (1931).

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Other Jurisdictions Are Consistent with Washington

Washington's 'right to control' test, with respect to determining whether a person is an independent contractor or an employee, is consistent with other jurisdictions. In the *Wash. Recorder* opinion, the court discussed at length a Supreme Court of Michigan case. *Id* at 184-185, citing *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N.W. 36 (1916). *Gall* is instructive in the instant matter as the facts of the relationship among the relevant parties in that case mirror, to a remarkable degree, the relationships among the parties at issue here. In *Gall*, the action was brought against the Detroit Journal Company and one Albert Rebtoy to recover damages for a personal injury to the plaintiff. See *Gall* generally. The Supreme Court of Michigan reversed the lower court's denial of a motion for directed verdict for the defendant, Detroit Journal. *Gall* at 411. Under an agreement between Detroit Journal and Rebtoy, "Rebtoy was to deliver the papers to such persons, at such places, and on such time as the company should from day to day designate." *Id* at 409. "Such delivery was the result to be obtained." *Id.* "And Rebtoy was to effect such delivery and obtain such result by any means and by any conveyance and in any way he saw fit." *Id.* "One whom the employer does not control, and has no right to control, as to the method, or means, by which he produces the result contracted for is an independent contractor." *Id*. "The right, on the part of the company, to designate the persons and places was but a right to designate the result to be obtained, and did not give the company any control over the method for obtaining that result." *Id* at 410. "Rebtoy was independent in all of the methods of doing the work." *Id*.

Just as the companies in *Wash. Recorder* and *Gall* had no control, and no right to control, the method, or means, by which the carriers produced the result contracted for, Baja USA had no control, or right to control, the method, or means, by which Contreras recruited workers, hired

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workers, set their wages, determined break times, provided laborers to Newway's job sites, etc. The right, on the part of Baja USA, was but a right to designate the result to be obtained, with that result being Contreras' provision of information regarding hours worked and wage rates for such hours to Mercedes Accounting as a service provider for Baja USA.

It is important to note that the plaintiff in *Gall* was not alleging that he was either an employee or independent contractor of Detroit Journal. Rather, he was alleging that Detroit Journal was liable for the actions of Rebtoy, an individual who delivered newspapers for Detroit Journal, which resulted in injury to the plaintiff, while Rebtoy or his designee was delivering newspapers. The Supreme Court of Michigan held that a directed verdict in favor of Detroit Journal was appropriate. Essentially, Detroit Journal was not liable for alleged harm resulting from actions of an independent contractor while working for Detroit Journal. Likewise, in the instant case, Baja USA cannot be held liable for acts or omissions of independent contractor Contreras while he was acting as such a contractor.

Arguably, the companies in *Wash. Recorder* and *Gall* had a greater degree of control over carriers than Baja USA had over Contreras, and the courts in those cases found the carriers to be independent contractors and not employees. In *Wash. Recorder* and *Gall*, the companies did exercise a degree of control over newspaper delivery times, delivery routes and newspaper pricing. Baja USA did not exercise control, and did not have the right to control, wages of workers, hiring and terminating of workers, or even work sites, for individuals recruited and hired by Contreras.

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2. Contreras was not an Agent of Baja USA

The Doctrine of Agency

"The burden of establishing an agency relationship typically rests upon the party asserting its existence." *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co*., 125 Wn. App. 227, 237-238, 103 P.3d 1256 (2005), citing *Hewson Constr. v. Reintree Corp*., 101 Wn.2d 819 (1984). It is important to note that, in the Office of Labor Standards determination in this matter, and in the instant appeal therefrom, no party has asserted the existence of an agency relationship between Baja USA and Contreras. Nevertheless, for completeness, the legal doctrine of agency is analyzed here.

"An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another." *Hewson Constr. v. Reintree Corp*., 101 Wn.2d 819, 823, 685 P.2d 1062 (1984), citing *Matsumura v. Eilert*, 74 Wn.2d 362, 444 P.2d 806 (1968). "Both the principal and agent must consent to the relationship." *Id.*

"Express authority is authority that a principal directly conveys to an agent in express terms." *Kachess Community Ass'n v. Hix*, 1997 Wash. App. LEXIS 386*, *8 (1997), citing Black's Law Dictionary 581 (6th ed. 1990). "The term 'express authority' often means the actual authority that the principal has stated in very specific or detailed language." *Lybyer v. Grays Harbor PUD*, 2002 Wash. App. LEXIS 242*, *5 (2002), citing *Restatement (Third) of Agency* §2.01, cmt. B (2001).

In the instant case, and as the record shows, there was no express authority granted by Baja USA to Contreras to recruit and hire workers. There is no evidence in the record showing specific or detailed language by Baja USA granting authority to Contreras to carry out any acts.

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Clearly, no express agency relationship existed between the two parties. In contrast, the record is clear that Contreras acted on his own behalf to locate, recruit and hire workers. He merely instructed Baja USA, through its service provider Mercedes Accounting, to run payroll and he provided the necessary information to Mercedes Accounting for Baja USA to do so.

Division One of the Court of Appeals has held that: "Apparent agency (implied agency) occurs … where a principal makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal." *D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 Wn. App. 1210 (2005), citing to *Restatement, (Second) of Agency* §267 (1957). The doctrine has three basic requirements: (1) the actions of the putative principal must lead a reasonable person to conclude the actors are employees or agents; (2) the plaintiff must believe they are agents; and (3) the plaintiff must, as a result, rely upon their care or skill, to her detriment. *D.L.S.* at 98.

Of critical importance here, "Apparent authority can be inferred **only from acts of the principal**, which cause the third party to actually, or subjectively, believe that the agent has authority to act for the principal." *Id* at 101, citing *Hansen v. Horn Rapids O.R.V. Park*, 85 Wn. App. 424, 430, 932 P.2d 724 (1997) (**emphasis added**).

Assuming, *arguendo*, that a party in the instant matter was asserting apparent authority, such an assertion would necessarily fail given that the purported principal, Baja USA, engaged in no acts that would cause a third party to believe that Contreras had authority to act for it. To the contrary, if any acts occurred that may have caused a third party to actually or subjectively believe that Contreras had agency authority to act for Baja USA, such acts were by Contreras, the purported agent, and not by Baja USA.

Here, we apply the three factors in *D.L.S.* to the instant case, regarding whether apparent authority existed. *First*, we address whether actions of the putative principal, Baja USA, would

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lead a reasonable person to conclude Contreras was its agent. There is nothing in the record to support any contention that Baja USA engaged in any actions that could lead a reasonable person to reach such a conclusion. The absence of evidence to support this first element is sufficient to defeat any assertion that apparent authority existed in this case. *Second*, we address whether any party relevant to the instant case actually believed Contreras was Baja USA's agent. There is nothing in the record to support such an assertion. *Third*, while workers may have relied on Contreras to their detriment, there were no acts by Baja USA on which the workers could have been relying.

Based on the above, apparent authority did not exist as to Baja USA and Contreras.

Distinguishing Agency from Independent Contractor

The Court of Appeals – Division One, undertook the legal analysis for distinguishing independent contractors from agents in *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co*., 125 Wn. App. 227, 103 P.3d 1256 (2005). "An independent contractor is generally not considered an agent because the contractor acts in his own right and is not subject to another's control." *Kelsey Lane Homeowners* at 235. "The relevant distinction between an agent and an independent contractor is whether the owner has the right to control the method or manner in which the work was to be done … if the construction company represented the will of the owner only as to the result of the work, and not as to the means by which it was to be accomplished, then the relation between the parties would be that of independent contractor." *Id* at 237-238. "The right to control another's conduct is often the most decisive factor in determining if an agency relationship exists." *City of Seattle v. KMS Fin. Servs., Inc*., 12 Wn. App. 2d 491, 508, 459 P.3d 359 (2020).

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In *Kelsey Lane*, the condominium declarant, defendant KLC contracted with Sacotte Construction, Inc., ("Sacotte Construction") to build the complex. *Id* at 231. "KLC also hired Danali Management Corporation ("DMC") as the independent project manager." *Id.* "DMC assigned its employee Allen Bayne to the project." *Id.* "The City of Bellevue issued certificates of occupancy in 1994." *Id.* "In May 2002, during a routine inspection of the buildings' vinyl siding, inspectors found rot under the building envelope systems." *Id.* "Later that year, engineering investigators … discovered that the required building paper was either missing or installed incorrectly in 75 percent of the exposed areas." *Id.* "[T]he water intrusion at Kelsey Lane was so bad that some walls were heavily decayed and in a state of imminent collapse." *Id.*

"In July 2002, the Kelsey Lane Homeowners Association (Association) sued KLC for fraudulent concealment, misrepresentations and in the public offering statement, breach of fiduciary duty …" *Id.* The Association relied on the legal doctrine of agency to support its claims, essentially asserting that that Sacotte Construction and Allen Bayne of DMC had knowledge of the defects and, through apparent agency authority, such knowledge was imputed to the principal, KLC. *Id* at 235. "Generally, an agent's knowledge is imputed to the principal if that knowledge is relevant to the agency relationship." *Id.* "An agency relationship exists … when one party acts under the direction and control of another." *Id.* In contrast, "An independent contractor is generally not considered an agent because the contractor acts on his own right and is not subject to another's control." *Id.*

KLC argued that Sacotte Construction and Allen Bayne were not its agents because they were independent contractors. *Id* at 236. The *Kelsey* court noted that:

> "The only exceptions to the contractor's (Sacotte Construction) total control over the project are: the contractor must obtain the owner's consent before awarding a subcontract for an amount that exceeds the budget; the owner may direct the date of commencement and

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> substantial completion; the owner may direct a change in the work; and the owner may terminate the contractor for cause." *Id.*

"[W]hile KLC retained the right to control some budget-related matters, the means by which the project was to be completed remained in Sacotte's control." *Id* at 237. Accordingly, the *Kelsey* court concluded that: "Sacotte was not KLC's agent and any knowledge of construction defects it may have had cannot be imputed to KLC." *Id*. "Similarly, Bayne was an independent contractor who was not subject to KLC's control, and thus he was not an agent. *Id*.

In the instant case, the amount of control exercised by Baja USA over Contreras, which was essentially none, was less than the amount of control retained by KLC over Sacotte Construction in *Kelsey*. Baja USA exercised, and had the right to exercise, no control over Contreras. As such, and in keeping with *Kelsey*, Contreras was an independent contractor for Baja USA, and not an agent.

3. Baja USA Cannot be Held Liable for the Acts of Contreras

Given that Contreras was not an employee of Baja USA and was not acting as an agent for Baja USA, and given that he controlled the methods and means by which he provided services, Baja USA cannot be held liable for his acts and omissions. The Washington courts have consistently held this view. The Court of Appeals, Division One, has stated: "In the absence of a special relationship, no duty exists to protect others from the criminal acts of others." *Ngo v. Hearst Corp*., 1999 Wash. App. LEXIS 1734, *3 (1999), citing *Craig v. Washington Trust Bank*, 94 Wash. App. 820, 826, 976 P.2d 126 (1999), citing *Folsom v. Burger King*, 135 Wash. 2d 658, 958 P.2d 301 (1999). In the instant case, no special relationship existed between Baja USA and Contreras. There was no employer-employee relationship and no

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principal-agent relationship.[2] Baja USA did not, and had no right to, exercise control over Contreras.

III. CONCLUSION

Neither the City of Seattle nor the other parties have met their burden of showing that Contreras was an employee of Baja USA. The record shows that he was not.

Neither the City of Seattle nor the other parties have met their burden of showing that Contreras was an agent acting with actual or apparent authority for Baja Contreras.

There was no special relationship, such as an employer-employee relationship or an agency relationship, between Baja USA and Contreras.

Contreras, at all times relevant hereto, was an independent contractor who controlled the methods and means by which he provided services. Baja USA exercised no control, and had no right to control, Contreras.

For the reasons discussed herein and in closing arguments, and based on the record of the Hearing, Appellant Baja Concrete USA Corp. should be dismissed with prejudice from this action.

Respectfully Submitted this 5th day of January, 2024.

/s/ Mark D. Kimball
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[2] The evidence admitted during the Hearing shows that Contreras was employed by a Canadian company, Baja Concrete, Ltd., and not by Baja USA. Further, the record is clear, based on testimony of Mercedes de Armas and Claudia Penunuri, that Baja Concrete, Ltd. and Baja USA are not affiliated.

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