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 RESPONSE TO RESPONDENT CITY OF SEATTLE'S SUPPLEMENTAL BRIEF** Department Reference: 2020-00186-LS

I. INTRODUCTION

On January 5, 2023, at the request of the Hearing Examiner, Appellant Baja Concrete USA Corp. ("Baja USA") and Respondent City of Seattle (the "City") submitted supplemental briefings addressing the legal implications of Roberto Soto Contreras ("Contreras") acting as an independent contractor and/or agent. Baja USA now provides this brief in response to the City's supplemental brief.

In their supplemental brief, the City **incorrectly** argues that Contreras was an employee or agent of Baja USA, and that Baja USA is liable for the actions of Contreras. At all times relevant to this appeal, Contreras was an independent contractor, acting on his own volition, not at the direction or under the control of Baja USA. In fact, **the uncontroverted testimony**

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during the hearing is that Contreras was employed by a Canadian company, Baja Concrete, Ltd., which is not affiliated with Baja USA.

As explained in Baja USA's supplemental brief, Contreras was not an agent or an employee of Baja USA and, there is no legal basis to support holding Baja USA liable for the actions of Contreras.[1]

II. ARGUMENT

A. Contreras was an Independent Contractor

The City's reliance on *Anfinson v. FedEx Ground Package System, Inc.* is misplaced.[2] As the City concedes on page 3 of their supplemental brief, the court's analysis in *Anfinson*, regarding whether someone was an employee or an independent contractor, was in the context of the Minimum Wage Act. With respect to the relationship in this case between Baja USA and Contreras, minimum wage is not at issue and is not relevant. The six-factor economic realities test analyzed by the City is not the correct analysis to be applied here.

The relevant legal analysis for this issue is presented in *Karstetter v. King County Corr. Guild*, 23 Wn. App. 2d 361, 516 P.3d 415 (2022). *Karstetter* is discussed in detail in Baja USA's supplemental brief and, as such, is only briefly summarized here.[3]

In *Karstetter*, the plaintiff relied on *Anfinson v. FedEx Ground Package System Inc*., 174 Wn.2d 851, 281 P.3d 289 (2012) in support of his argument that the Court should use the 'economic dependence standard' and not the 'right to control' standard. *Karstetter* at 368-369. The Court disagreed, stating: "…***Anfinson* does not stand for the broad premise that Washington has adopted an economic dependence standard to distinguish employees from**

[1] See Baja USA Supp. Brief generally.
[2] See City Supp. Brief at pages 2-3.
[3] See Baja USA Supp. Brief at pages 2-7.

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independent contractors." *Id* at 369 (**emphasis added**). "Rather, *Anfinson* adopted the Fifth Circuit's economic dependence test strictly in the context of the Minimum Wage Act." *Id*. The relevant issue is whether "[T]he alleged worker is economically dependent upon the alleged employer or is instead in business for himself." *Id*, citing *Anfinson* at 877, quoting *Hopkins v. Cornerstone Am*., 545 F.3d 338, 343 (quoting *Anfinson* at 877, quoting *Hopkins v. Cornerstone Am*., 545 F.3d 338, 343 (5th Cir. 2008).

Karstetter filed suit against the King County Corrections 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*. Likewise, the 'right to control' test is the appropriate test to apply in determining whether Contreras was an employee of Baja USA or an independent contractor.

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.

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Bellevue, Washington 98004
(425) 455-9610

"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).

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 relevant caselaw 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).

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

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, 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 Contreras was an independent contractor, and not an employee of Baja USA.

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 the uncontroverted testimony of Mercedes de Armas and Claudia Penunuri, that Baja Concrete, Ltd. and Baja USA are not affiliated.

For completeness, despite the fact that the City applied the incorrect standard, we discuss briefly here the six factors pursuant to *Anfinson*, as follows:

(1) *The permanence of the working relationship between the parties.* There is no evidence in the record to indicate that the relationship between Baja USA and Contreras was of a permanent nature. If fact, testimony during the hearing in this matter clearly showed that Contreras was employed by a Canadian company, Baja Concrete, Ltd., and not by Baja USA. The City misconstrues the fact that Baja USA has not engaged in business other than the projects at issue in this case as evidence of permanence of the working relationship between Baja USA and Contreras. In fact, Claudia Penunuri testified that the reason the company has halted business is because

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of the instant case. She testified that she established the company with the intention of engaging in numerous business activities, including payroll processing, realty, real estate remodeling and construction.[4] With the exception of Contreras providing information necessary for Mercedes Accounting for use in processing payroll, there is nothing in the record to indicate that the intended business activities would even involve Contreras, let alone indicate permanence in the relationship between Baja USA Contreras.

(2) *The degree of skill the work entails*. The City's reliance on *Real v. Driscoll Strawberry Associates, Inc*., 603 F.2d 748 (1979) is misplaced. *Real* was a class action suit brought by 15 individuals who worked as strawberry growers for Driscoll. *Real* at 750. Driscoll granted the individuals a license to grow a strawberry crop. *Id*. That factual scenario is very different from the facts involving the relationship between Baja USA and Contreras. In the instant case, Baja USA did not grant any license to Contreras. The record is clear that Contreras, without any direction or control by Baja USA, recruited and hired workers, set their wages, determined their work locations, etc. In fact, contrary to the City's assertions, the services provided by Contreras did require skill in the sense of having knowledge and experience in the construction industry.

(3) *The extent of Contreras' investment in equipment and materials*. The testimony of workers during the Hearing shows that Contreras used his own vehicle for transporting workers to and from work sites, indicating his investment in the services he was providing as an independent contractor. Testimony further shows that most of

[4] Hearing days 7, 8, 9, August 16, 17, 22, 2023.

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the equipment at the work sites belonged to Newway Forming Inc. ("Newway") and other contractors, and not to Baja USA.

(4) *Opportunity for profit and loss*. The City correctly notes that there is an absence of evidence regarding whether Contreras had opportunities for profit and loss in the relationship between Baja USA and Contreras[5]. The City then asserts that Baja USA should not benefit from such absence of evidence. In doing so, the City has wrongly stated the burden of proof. The City claims that Contreras was an employee of Baja USA and, therefore bears the burden of proving the same. However, they can't. The testimony of Mercedes de Armas and Claudia Penunuri make it clear that Contreras was an independent contractor in relation to Baja USA, and was in fact employed by a Canadian company unrelated to Baja USA. The City should not be permitted to benefit from making assertions about Contreras' status as an employee, based on an absence of evidence to support such assertions.

(5) *Baja USA exercised no control over Contreras.* Again, with **no evidence**, the City asserts: "Baja controlled Contreras' work."[6] Baja USA did not control Contreras' work, and the City has failed to produce evidence to the contrary. The City should not be permitted to benefit from such baseless assertions.

(6) *Whether the services rendered by Contreras were an integral part of Baja USA's business*. The City correctly notes that Contreras recruited workers for Newway Forming.[7] This fact goes to the relationship between Newway Forming and Contreras, and not to the relationship between Baja USA and Contreras. The City

[5] City Supp. Brief at page 6, lines 13-15.
[6] City Supp. Brief at page 7, line 2.
[7] City Supp. Brief at page 7, lines 12-13.

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goes on to incorrectly state that Baja USA was only a payroll company.[8] Claudia Penunuri's unrefuted testimony was that she established the company with the intention of engaging in numerous business activities, including payroll processing, realty, real estate remodeling and constriction.[9] Arguably, Contreras' actions of recruiting, hiring and setting wages of workers, and transporting them to job sites was more integral to Newway Forming's business of cement finishing than it was to Baja USA's business involving payroll processing.

B. Contreras was Not an Agent of Baja USA

The City's relies heavily on *Ochoa v. J.B. Marin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002) for its discussion on agency.[10] Given that the *Ochoa* court was applying Arizona law, that case is informative only. *Ochoa* at 1190. Further, *Ochoa* is easily distinguishable from the instant case.

As with Washington law, the *Ochoa* court explained that "[T]he 'fundamental criterion for determining whether an actor is a purely independent contractor 'is the extent of control the principal exercises or may exercise over the agent.'" *Ochoa* at 1190, citing *Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 794 P.2d 138, 141 (Ariz. 1990). "A strong indication of control is … [the] power to give specific instructions with the expectation that they will be followed." *Id*.

J.B. Marin & Sons Farms, Inc. ("Martin Farms"), a New York company, engaged Ramey Farms, Inc., a Texas-based labor contractor ("Ramey"). *Ochoa* at 1186. "Martin Farms

[8] City Supp. Brief at page 8, line 1.
[9] Hearing days 7, 8, 9, August 16, 17, 22, 2023.
[10] City Supp. Brief at pages 8-9.

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requested Ramey's help in recruiting migrant labor for the Fall 1997 cabbage and squash harvest." *Id.*

In *Ochoa,* the court ultimately found that Martin Farms did exercise sufficient control over Ramey to give rise to a principal-agent relationship. *Id* at 1192. The facts underlying that holding are vastly different than the facts underlying the instant case, with regard to the working relationship between Baja USA and Contreras.

The *Ochoa* court summarized its finding, regarding agency, as follows:

> "To summarize, Martin Farms issued instructions to Ramey and expected those instructions to be followed; Martin Farms controlled the work to be done and provided the tools, equipment, and housing; Ramey lacked highly specialized skills; the relationship between Ramey and Martin Farms was ongoing; and Ramey's recruiting and management tasks were not ancillary to the central concerns of Martin Farms' business. In light of these factors, the *Santiago* analysis instructs that Ramey, as an independent contractor, acted as Martin Farms' agent when recruiting and managing Appellant farmworkers." *Id* at 1192.

In contrast to *Ochoa*, in the instant case:

- Baja USA did not issue instructions to Contreras, and had no right to do so;
- Baja USA did not communicate any instructions to Contreras to be followed. In fact, any instructions came from communications bertween Newway Forming and Contreras as to the number of workers needed, and for which job sites;
- Baja USA did not control the work to be done and did not provide tools and equipment;
- Contreras possessed specific knowledge and experience unique to the construction industry enabling to recruit and hire appropriate workers for the tasks needed;
- Contreras purchased tools for workers;

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- Contreras provided transportation to and from job sites for workers he recruited;
- Contreras located housing for workers, Baja USA did not; and
- There is no evidence that the relationship between Baja USA and Contreras is ongoing.

Clearly, there can be no finding or conclusion in the instant case, that Contreras was an agent of Baja USA.

The City cited *Massey v. Tube Art Display, Inc*., 15 Wash. App. 782, 786-787, 551 P.2d 1387, 1391 (1976), for its factor-test discussion regarding independent contractors.[11] The 10 factors are the same as those discussed in Baja USA's supplemental brief (not repeated in its entirety here), under *Dolan v. King County*, 172 Wn.2d 299, 314, 258 P.3d 20** (2011).[12]

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

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 directions, Baja USA maintained no supervisory role over Contreras, and Contreras supplied his own instrumentalities and tools. Contreras provided the place of work, Contreras did not provide services for Baja USA for a lengthy period of time, meaning the duration of their working relationship was limited, and Baja USA and Contreras believed that Contreras was an independent contractor, and not an employee of Baja USA.

[11] City Supp. Brief, page 9.
[12] Baja USA Supp. Brief, pages 4-7.

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The City did not address express versus implied agency, which is discussed in detail in Baja USA's supplemental brief, and briefly summarized here.[13]

"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.

"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. "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**). Baja USA engaged in no actions which could cause a third party to believe that Contreras was its agent. If Contreras engaged in any conduct that may have led a third party to believe he was Baja USA's agent, such action by the purported agent cannot give rise to the existence of a principal-agent relationship.

[13] Baja USA Supp. Brief, pages 10-12.

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C. Distinguishing Agency from Independent Contractor

See Baja USA's supplemental brief at pages 12-14 for a thorough discussion on distinguishing agency from independent contractor. In short, the Court of Appeals – Division One, undertook the relevant legal analysis 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).

In the instant case, 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.

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

The City briefly argues that Baja USA is vicariously liable for actions of Contreras.[14] Contrary to the City's assertions, Contreras was not an employee of Baja USA. He also was not an agent of Baja USA. As discussed above and in Baja USA's supplemental brief, actions by a purported agent cannot support a finding of an agent-principal relationship, based on implied

[14] City Supp. Brief at pages 17-18.

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agency. Only actions of a purported principal can give rise to a finding of an implied agent-principal relationship. There is no evidence in the record to show that actions of Baja USA could have led a third-party to reasonably believe that an agency relationship existed between Baja USA and Contreras.

The City asserts that, nowhere in the OLS Determination did the OLS Director concede that Baja USA was not an employer of the workers.[15] This appears to be a reference to Baja USA's discussion at page 12 of its closing arguments brief. That discussion provides numerous quotes from the OLS Determination in which the OLS Director explained in detail the OLS' assertions that Contreras, Antonio Machado and Newway Forming are employers, while barely mentioning Baja USA.

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 principal-agent relationship.[16] Baja USA did not, and had no right to, exercise control over Contreras.

[15] City Supp. Brief at page 18, lines 3-4.

[16] 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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III. CONCLUSION

As discussed in Baja USA's supplemental brief, the above response brief, and in closing arguments, and as the evidence clearly shows, Contreras was not an employee or agent of Baja USA, he was employed by Baja Concrete Ltd., a Candian company, and he was in fact an independent contractor over which Baja USA exercised no control and had no right to control.

There was no special relationship, such as an employer-employee relationship or an agency relationship, between Baja USA and Contreras, that could give rise to liability of Baja USA in this case, for the actions of Contreras.

For the reasons discussed herein, in Baja USA's supplemental brief, 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 this12th day of January, 2024.

/s/ Alex T. Larkin
MARK D. KIMBALL, WSBA No. 13146
ALEX T. LARKIN, WSBA No. 36613
MDK Law
777 108th Ave NE, Suite 2000
Bellevue, WA 98004
Attorneys for Appellant Baja Concrete USA Corp.