

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:) Hearing Examiner File:
)
 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) RESPONDENT CITY OF SEATTLE'S
 the Director, Seattle Office of Labor Standards.) RESPONSE TO BAJA CONCRETE USA
) CORP.'S SUPPLEMENTAL BRIEF
)
 _____)

I. INTRODUCTION

Appellant Baja Concrete USA Corp. ("Baja") argues that Respondent Roberto Soto Contreras ("Contreras") is an independent contractor. This is not supported by the evidence or applicable caselaw. Contreras functioned as an employee of Appellant Baja, but even assuming *arguendo*, that he was not a Baja employee, he definitely acted as Baja's agent. Either way, City of Seattle respectfully requests that the Hearing Examiner find Baja liable for the violations of SMC 14.16, 14.19 and 14.20 as presented in this case.

**II. ISSUES RELATED TO THE HEARING EXAMINER'S REQUEST FOR
ADDITIONAL BRIEFING**

Is Respondent Roberto Soto Contreras an employee of Appellant Baja Concrete USA Corporation? Yes

1 Is Respondent Roberto Soto Contreras an independent contractor working with Appellant
2 Baja Concrete USA Corporation? No

3 Is Respondent Roberto Soto Contreras an agent of Appellant Baja Concrete USA
4 Corporation? Yes.

5 III. ARGUMENT

6 A. DIFFERENCE IN TESTS - ECONOMIC REALTIES VS. RIGHT TO CONTROL.

7 *Anfinson* explains when the economic realities test should be used versus the right to control
8 test.¹ The economic realities test (also known as economic dependence) is used to determine
9 whether a worker is an employee under the Minimum Wage Act (MWA).² The Washington
10 Supreme Court first adopted this test to determine whether a worker under the MWA was an
11 “employee” or an independent contractor.³ Under the MWA, the correct inquiry into whether a
12 worker is an employee covered by the act or an independent contractor not covered is “whether, as
13 a matter of economic reality, the worker is economically dependent upon the alleged employer or
14 is instead in business for himself.”⁴ Economic dependence was adopted from the Fair Labor
15 Standards Act (FLSA) and is used by a majority of the federal circuits.⁵ This is a six factor test and
16 should be used to determine whether Contreras was a worker/employee of Baja.⁶ In *Anfinson v.*
17 *FedEx Ground Package System, Inc.*, these six factors are:

- 18 (1) The permanence of the working relationship between the parties;
19 (2) The degree of skill the work entails;
20 (3) The extent of the worker’s investment in equipment or materials;

21 ¹ *Anfinson v. FedEx Ground Package System, Inc.* 159 Wash. App. 35, 51-53, 244 P.3d 32 (2010), aff’d, 174 Wash. 2d
851, 281 P.3d 289 (2012).

22 ² *Id.* 159 Wash. App. at 53 and *Karstetter v. King County Corrections Guild*, 23 Wash. App. 2d 361, 369, 516 P.3d 415,
2022

23 ³ *Nwauzor v. GEO Grp., Inc.*, 62 F.4th 509, 514 (9th Cir. 2023), *certified question answered sub nom. Nwauzor v. The
Geo Grp., Inc.*, No. 101786-3, 2023 WL 8817795 (Wash. Dec. 21, 2023) (citing *Anfinson* 174 Wash. 2d 851, 281 P.3d at
299).

⁴ *Id.* 174 Wash. 2d at 877 (citing *Hopkins v. Cornerstone Am.*, 545 F.3d, 338, 343 (5th Cir. 2008)).

⁵ *Id.* 159 Wash. App. at 53.

⁶ The City used the six-factor test in the City’s Supp. Br. 2-8; *Id.* 159 Wash. App. at 52.

- 1 (4) The worker’s opportunity for profit or loss;
2 (5) The degree of the alleged employer’s control over the worker;
3 (6) Whether the service rendered by the worker is an integral part of the alleged employer’s
4 business.⁷

5 The second test is the common law “right to control” test and it is used to distinguish
6 between agents and independent contractors and stated in the Washington Pattern Jury Instructions
7 (WPI) 50.11.01.⁸ The common law “right to control” test is derived from tort common law and is
8 also used to determine whether a worker is an employee or an independent contractor.⁹ The
9 distinction between employee and independent contractors “arose at common law to limit the
10 principal’s vicarious liability for the person’s misconduct rendering service(s) to the principal.”¹⁰
11 Although these tests overlap to some degree regarding the right to control being a factor in the
12 economic realities test and the common law test, the focus of each test is different.¹¹ The ultimate
13 inquiry under Washington’s common law test is whether the employer has the right to control the
14 worker’s performance.¹² The ultimate inquiry of the economic dependence test is whether the
15 worker is dependent on the alleged employer as a matter of economic reality.¹³

16 The 10 factors used in the right to control test are outlined in *Massey v. Tube Art Display,*
17 *Inc.*, 15 Wash. App. 782, 551 P.2d 1387 (1976):

- 18 (a) The extent of control which by the agreement, the master may exercise over the details
19 of the work;
20 (b) Whether or not the one employed is engaged in a distinct occupation or business;
21 (c) The kind of occupation, with reference to whether in the locality, the work is usually
22 done under the direction of the employer or by a specialist without supervision;
23 (d) The skill required in the particular occupation;
(e) Whether the employer or the workman 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;

⁷ *Id.* at 52.

⁸ *Id.* 159 Wash. App. at 53.

⁹ *Id.* 159 Wash. App. at 51.

¹⁰ *Id.*

¹¹ *Id.* 159 Wash. App. at 53.

¹² *Id.*

¹³ *Id.*

- 1 (g) The method of payment, whether by the time or by the job;
2 (h) Whether or not the work is a part of the regular business of the employer;
3 (i) Whether or not the parties believe they are creating the relation of master and servant;
4 and
5 (j) Whether the principal is or is not in business.¹⁴

6 *Massey* explained that all of the factors are of varying importance in determining the
7 relationship type and outside of the control element, not all of them need to be present.¹⁵ The right
8 to control another's physical conduct is essential in establishing vicarious liability in whether or
9 not the person was controlled as a servant or a nonservant agent.¹⁶ *Massey* also discussed that the
10 plaintiff did not need to show that the principal controlled or had the right to control every aspect
11 of the agent's operation in order to incur vicarious liability.¹⁷

12 **B. CONTRERAS SHOULD BE REGARDED AS A BAJA EMPLOYEE.**

13 The evidence and caselaw support a finding that Respondent Contreras is an employee of
14 Baja Concrete USA Corp. Baja argues that Contreras is an independent contractor and therefore
15 cannot be an employee. The six factors used in *Anfinson* were discussed in detail in the City's
16 Supplemental Closing Brief and only factor five will be discussed below which is "the degree of
17 the alleged employer's control over the worker."¹⁸

18 **1. Baja had Control Over and the Right to Control the Work of Contreras.**

19 Factor five is the degree of the alleged employer's control over the worker.¹⁹ Baja argues
20 that Contreras worked for Baja Concrete Limited in Canada. However, the business card that
21 Contreras circulated stated Baja Concrete USA Corp., not Baja Concrete Limited.²⁰ Baja gave
22 Contreras the authority to recruit, hire and negotiate wages for the Workers on Baja's behalf. In

23 ¹⁴ *Massey v. Tube Art Display, Inc.*, 15 Wash. App. 782, 786-87, 551 P.2d 1387 (1976).

¹⁵ *Id.* (citing *Hollingbery v. Dunn*, 68 Wash.2d 75, 81, 411 P.2d 431 (1966)).

¹⁶ *Id.* *McLean v. St. Regis Paper Co.*, *supra*; *Miles v. Pound Motor Co.*, *supra*.

¹⁷ *Id.* (citing *Jackson v. Standard Oil Co.*, 8 Wash. App. 83, 505 P.2d 139 (1972)).

¹⁸ *Id.* 159 Wash. App. at 52.

¹⁹ *Id.*

²⁰ HE Ex. 20 (Contreras's Baja Business Card).

1 the Request for Information provided on behalf of Baja, question three asked Baja to describe “the
2 process by which you publicize job openings, solicit job applicants, and hire new employees.”²¹
3 Baja responded that Roberto Soto (Independent Contractor) makes decisions with the President of
4 the Company.²² If Contreras is making the decisions with the Baja Concrete USA Corp. President
5 (Claudia Penunuri) about publicizing the job opening, soliciting the job applicants and hiring the
6 new employees, he is acting under the control of Baja.

7 In *Terry v. Sapphire Gentlemens Club*, the Supreme Court of Nevada held that the
8 performers were employees and guaranteed a minimum wage.²³ Sapphire Gentlemen’s Club
9 (“Sapphire”) contracted with performers to perform at their club.²⁴ Sapphire paid no wages to the
10 performers.²⁵ The performers were able to set their own hours, decide whether or not to dance on
11 stage or give private dances.²⁶ The court held that Sapphire’s lack of control reflected a “framework
12 of false autonomy.”²⁷ The Nevada Supreme Court adopted the economic realities of the Fair Labor
13 Standards Act which is used by other federal courts to determine employment for minimum wage.²⁸

14 Unlike in *Terry*, Contreras may have been able to control his own hours, but that evidence
15 was not before the Hearing Examiner. We are also uncertain of Contreras’s pay because of
16 conflicting Baja testimony. The Baja President was not sure of how Contreras was paid but
17 Mercedes De Armas of Mercedes Accounting testified that the Baja President made Zelle payments
18 to Contreras.²⁹ We are certain that Contreras hired the Workers and that the Workers were hired to
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21 ²¹ HE Ex. 32 (Baja’s Response to RFI) at TRIAL 01092.

22 ²² *Id.*

23 ²³ *Terry v. Sapphire Gentlemen’s Club*, 130 Nev. 879, 889-90, P.3d 951 (2014).

24 ²⁴ *Id.* at. 881.

25 ²⁵ *Id.*

26 ²⁶ *Id.* at 889-90.

27 ²⁷ *Id.*

28 ²⁸ *Id.* at 881.

29 ²⁹ HE Hr’g, Penunuri Test., Day 7, Part 4 at 46:02-46:51; HE Hr’g, De Armas Test., Day 14, Part 4 at 2:12:8-2:13:28.

1 work for Baja. All the responsibilities of Contreras were done on behalf of, and for, the benefit of
2 Baja. Therefore, Contreras was an employee of Baja.

3 **C. CONTRERAS WAS NOT AN INDEPENDENT CONTRACTOR.**

4 All 10 factors of the “right to control” test were analyzed in the City’s Supplemental Closing
5 Brief in regards to an agency relationship. The same factors are used to determine the existence of
6 an independent contractor relationship. To decrease redundancy, the following five of the ten
7 factors will be discussed to determine an independent contractor relationship:

- 8 • The extent of control which by the agreement, the master may exercise over the details of
9 the work;
- 10 • The kind of occupation, with reference to whether, in the locality, the work is usually done
11 under the direction of the employer or by a specialist without supervision;
- 12 • Whether the employer or the workman supplies the instrumentalities, tools, and the place
13 of work for the person doing the work;
- 14 • The length of time for which the person is employed; and
- 15 • Whether the parties believe they are creating the relationship of master and servant.³⁰

16 **1. Baja controlled the work of Contreras.**

17 The first factor is “the extent of control which by the agreement, the master may exercise
18 over the details of the work.”³¹ Baja compares its relationship with Contreras to the relationship of
19 Karstetter and King County Corrections Guild.³² But the *Karstetter* case is unique, and the facts
20 are distinguishable for these reasons. *Karstetter* admits that Guild did not have extensive control
21 over Karstetter’s work.³³ *Karstetter* had continuous five-year written contracts with Guild.³⁴
22 *Karstetter* had his own professional service corporation of which he was governor and sole
23 shareholder.³⁵ *Karstetter* had his own letterhead which affiliated him with his firm, not the Guild.³⁶

³⁰ *Id. Massey*, 15 Wash. App. at 786-87.

³¹ *Id.* at 786-87.

³² *Karstetter v. King County, Corr. Guild*, 23 Wn. App. 2d 361, 516 P.3d 415 (2022).

³³ *Id.* at 371.

³⁴ *Id.* at 364.

³⁵ *Id.* at 371.

³⁶ *Id.* at 372.

1 The Guild had no authority to terminate any of Karstetter's employees.³⁷ *Karstetter* also had more
2 than the Guild as a client.³⁸ Unlike the instant case, this factor supports *Karstetter* being an
3 independent contractor.

4 Baja argues that Contreras was in business for himself.³⁹ Baja then argues that Contreras
5 worked for Baja Concrete Ltd. in Canada, and that Baja had no control and no right to control the
6 work of Contreras.⁴⁰ The only testimony that Contreras worked for Baja in Canada or for himself
7 was self-serving testimony from Baja Concrete USA Corp.'s witnesses. There was no agreement
8 that any of the Baja witnesses could describe and no evidence provided that clearly shows Contreras
9 worked for Baja in Canada. Here, unlike the arrangement in *Karstetter*, there was no written
10 contract outlining Contreras's duties and there was no letterhead for Contreras. Instead, there was a
11 Baja Concrete USA Corp. business card with his email address holding himself out as a Baja
12 Concrete USA Corp. representative or employee.⁴¹

13 Baja had the right to control the hiring and firing of the Workers Contreras hired for Baja.
14 In Baja's Responses to OLS' Request for Information, Baja stated the hiring decisions were made
15 by Contreras and Ms. Penunuri (Baja President).⁴² The Guild could not make these terminations
16 decisions on behalf of Karstetter's employees. Contreras recruited Workers, arranged
17 transportation and housing, and negotiated starting pay, all on behalf of Baja. In *Massey*, the court
18 held that the backhoe operator (Redford) was an agent of the codefendant owner of signs (Tube Art
19 Display, Inc.).⁴³ Redford was found to be an agent even though he was self-employed for five
20 years, free to work with other contractors, paid his own income and taxes, and 90 percent of his

21 ³⁷ *Id.* at 371.

22 ³⁸ *Id.* at 372-73.

23 ³⁹ Appellant Baja Concrete USA's Supp. Br. filed Jan. 5, 2023 ("Baja. Supp. Br.") 5:1-2.

⁴⁰ *Id.* at 5:9-10.

⁴¹ HE Ex. 20 (Contreras's Baja Business Card).

⁴² HE Ex. 32 (Baja's Resp. to RFI) at TRIAL 01092.

⁴³ *Id. Massey*, 15 Wash. App. at 789-90.

1 time was working with Tube Art.⁴⁴ In *Karstetter*, he had his own company and worked for other
2 clients. Here, Contreras worked exclusively for Baja to hire the Workers.

3 In *Ebling v. Gove's Cove, Inc.*, the Washington Court of Appeals held that the plaintiff was
4 a former employee and not an independent contractor of Gove's Cove, Inc. (Gove's).⁴⁵ Ebling was
5 a salesman for Gove's and was hired to sell new sailboats for a commission.⁴⁶ Ebling agreed to
6 transfer to and manage Gove's office on Westlake Avenue for an additional agreed upon
7 commission.⁴⁷ After three months, Gove's was dissatisfied with Ebling's work and unilaterally
8 decreased his commission percentage.⁴⁸ Ebling terminated his employment 11 days after protesting
9 the change in commission. He was paid the lower commission anyway and he filed a suit requesting
10 damages for commissions withheld or for "reasonable value of services performed."

11 *Ebling* defined employee and independent contractor. An employee is "one whose physical
12 conduct in the performance of the service is subject to the other's right of control."⁴⁹ The definition
13 of an independent contractor is "one who contracts to perform services for another but is not subject
14 to the other's right to control his physical conduct in performing services."⁵⁰ Gove's and his general
15 manager (Butler) believed they had a right to control how Ebling effected the sales of boats.⁵¹
16 Ebling believed Gove's had that right to control.⁵² The court held that substantial evidence supports
17 that Ebling was an employee of Gove's.⁵³

20 ⁴⁴ *Id.* at 788.

21 ⁴⁵ *Ebling v. Gove's Cove, Inc.*, 34 Wash. App. 495, 498, 663 P.2d 132 (1983).

22 ⁴⁶ *Id.* at 496.

23 ⁴⁷ *Id.* at 497.

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Hollingbery*, at 79, 411 P.2d 431 (1966); *Massey* at 786, 551 P.2d 1387 (1976)).

⁵⁰ *Id.* (citing *Hollingbery* at 79-80, 411 P.2d 431 (1966); see also Restatement (Second) of Agency § 2(3) (1958)).

⁵¹ *Id.* at 498.

⁵² *Id.*

⁵³ *Id.*

1 Like in *Ebling*, the evidence supports Contreras being an employee. Contreras's
2 performance in recruiting and hiring the workers was under the control of the Baja President,
3 Claudia Penunuri. Contreras was even given authority to negotiate Newway's payments on Baja's
4 behalf.⁵⁴ This factor weighs in favor of Contreras not being an independent contractor.

5 **2. Contreras's work was done under the direction of Baja.**

6 The next factor is "the kind of occupation, with reference to whether, in the locality, the
7 work is usually done under the direction of the employer or by a specialist without supervision."⁵⁵
8 In *Karstetter*, he was engaged in work done by a specialist without supervision.⁵⁶ Karstetter was
9 an attorney that requires a certain level of education, professional licensing, and skill.⁵⁷ Karstetter
10 also had other clients besides the Guild. He even represented other unions while under the Guild
11 contract.⁵⁸ Karstetter received no direction on the types of arguments to make, authority to use or
12 how to prepare for presentations.⁵⁹ This factor, for Karstetter, supports an independent contractor
13 relationship. In *Massey*, the majority of Redford's business was with Tube Art although he was
14 self-employed for five years at the time of the trial.⁶⁰ Tube Art provided the exact size and location
15 for the excavation by marking it on the asphalt for the backhoe operator.⁶¹ In *Ochoa*, Martin Farms
16 exercised little control over Ramey's day-to-day recruitment and management of the Arizona
17 workers, but Martin Farms did use his power to provide instructions to Ramey about hiring.⁶²

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20 ⁵⁴ HE Hr'g, Penunuri Test., Day 8, Part 2 at 33:09-33:46.

21 ⁵⁵ *Id.* *Massey*, 15 Wash. App. at 786-87.

22 ⁵⁶ *Id.* *Karstetter*, 23 Wash. App. 2d at 371.

23 ⁵⁷ *Id.*

⁵⁸ *Id.* at 372-73.

⁵⁹ *Id.* at 371.

⁶⁰ *Id.* *Massey*, 15 Wash. App. at 788.

⁶¹ *Id.* at 783.

⁶² *Ochoa v. J.B. Martin and Sons Farms, Inc.*, 287 F.3d 1182, 1190 (9th Cir. 2002). **Ochoa* is discussed in detail in City's
Supp. Br. 8-10.

1 Contreras was Baja's recruiting manager. Like in *Ochoa*, Contreras hired the workers,
2 negotiated their hourly wage on behalf of Baja, arranged transportation and living arrangements if
3 needed and occasionally remained onsite to supervise. Contreras performed these responsibilities
4 on behalf of Baja. Like in *Ochoa*, The President of Baja was also involved in the hiring process to
5 some extent by selecting the Workers to be hired.⁶³ Unlike in *Ochoa*, the Workers recruited by
6 Contreras thought they worked for Baja, not Contreras.⁶⁴ This is evident from the safety sign-in
7 sheets in which the Workers did not state they worked for Contreras.⁶⁵ No evidence was provided
8 showing that Contreras maintained a separate entity outside of Baja. Unlike in *Karstetter*, no
9 specific education was required for Contreras to recruit the Workers. Like in *Ochoa*, there was no
10 special skill or education required for Ramey to hire and transport the workers from Arizona to
11 New York just like none was required for Contreras to do the same work. This factor does not
12 weigh in favor of Contreras being an independent contractor.

13 **3. Contreras supplied the place of work on Baja's behalf.**

14 The next factor is "whether the employer or workman supplies the instrumentalities, tools,
15 and the place of work for the person doing the work."⁶⁶ *Karstetter* supplied the instrumentalities,
16 the tools and the place of work.⁶⁷ *Karstetter* is listed as an officer under a PS Corp. He files the
17 taxes and pays unemployment.⁶⁸ *Karstetter* operated out of his home then later rented office space
18 from Triad Law Group.⁶⁹ Contreras supplied the place of work on behalf of Baja. The Workers
19 worked at Newway locations in Seattle, WA. From the evidence presented, Newway paid Baja,
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22 ⁶³ HE Ex. 32 (Baja Resp. to OLS RFI) at TRIAL 01092.

23 ⁶⁴ HE Hr'g, Jonathan Ivan Parra Ponce Test., Day 1, Part 3 at 05:33-06:47.

⁶⁵ HE Ex. 7 (Newway Safety Sign-In) at TRIAL 00350.

⁶⁶ *Id. Massey*, 15 Wash. App. at 786.

⁶⁷ *Id. Karstetter*, 23 Wash. App. at 371.

⁶⁸ *Id.*

⁶⁹ *Id.* at 372.

1 not Contreras, for the Workers provided. Baja's President gave Contreras authority to negotiate
2 payments from Newway on Baja's behalf.⁷⁰

3 In *Ochoa*, Martin Farms provided all the tools and equipment needed, but Contreras
4 purchased tools for the Workers and deducted the cost of the tools from their paychecks.⁷¹
5 Contreras performed this duty on Baja's behalf. It is not clear from the evidence or testimony as
6 to what instruments or tools Contreras needed to perform his recruitment duties. However, when
7 funds were given to Contreras to purchase items for the Workers, Baja reimbursed the lender, not
8 Contreras.⁷² Admittedly, this factor does not weigh strongly in favor of finding that Contreras is
9 an independent contractor. That said, not all factors are necessary to establish Contreras as an
10 independent contractor.

11 **4. Contreras worked for Baja during the entire life of the company.**

12 The next factor is "the length of time for which the person was employed."⁷³ In *Karstetter*,
13 there were five-year contracts that existed between Karstetter and the Guild outlining the terms of the
14 attorney relationship.⁷⁴ In *Ochoa*, the court considered the frequency of Ramey's services to
15 determine if an independent relationship existed although the duration of employment does not
16 control whether an agency relationship exists.⁷⁵ This factor weighed in favor of Ramsey being an
17 agent because he was hired more than once to provide hiring services for Martin Farms. In *Massey*,
18 Redford was self-employed for five years. He exclusively worked for sign companies the past three
19 years with 90 percent of his business with Tube Art.⁷⁶ This factor supported *Massey* being an agent.

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22 ⁷⁰ HE Hr'g, Penunuri Test., Day 8, Part 2 at 33:09-33:46.

⁷¹ City's Resp. 17:14-17; *Ochoa*, 287 F. 3d at 1191.

⁷² HE Ex. 48 (Machado paystub) at TRIAL 01635.

⁷³ *Id. Massey*, 15 Wash. App. at 786.

⁷⁴ *Id. Karstetter*, 23 Wash. App. 2d at 364.

⁷⁵ *Id. Ochoa*, 287 F.3d at 1191.

⁷⁶ *Id. Massey*, 15 Wash. App. at 788.

1 Baja argues that Contreras was not involved with Baja for a lengthy period of time. This is
2 not true. Baja was in business from 2018 through 2021.⁷⁷ Contreras was involved with Baja from
3 the beginning, hiring the Workers on Baja's behalf to work at the Newway locations. The Workers
4 testified Contreras hired them to work for Baja. Contreras hired Jonathan Parra Ponce and Hector
5 Cespedes Rivera to work for Baja in 2018.⁷⁸ By contrast, *Karstetter* had defined timeframes in his
6 contract with beginning and ending dates, but Contreras had no contract at all. In *Ochoa*, Ramey
7 was hired for specific hiring assignments for Martin Farms, but Contreras was working with Baja
8 with no end date in sight. This factor does not support Contreras being an independent contractor.

9 **5. Only Baja believes an independent contractor relationship existed.**

10 The last factor is "whether or not the parties believe they are creating the relationship of
11 master and servant."⁷⁹ In *Karstetter*, Karstetter believed he was an employee while the Guild
12 believed he was an independent contractor. The court ruled that Karstetter was an independent
13 contractor. In *Ochoa*, this factor was not helpful because not enough evidence to determine the
14 parties' beliefs.⁸⁰ The court ruled that Ramey was an agent of Martin Farms. In *Massey*, the belief
15 of the parties is unclear, but the court ruled Redford was not an independent contractor, but an agent
16 of codefendant, Tube Art.

17 Baja argues that "Baja USA and Contreras believed they were in the roles of service
18 provider and independent contractor."⁸¹ Contreras did not participate in the OLS investigation, nor
19 did he participate in the appeal with the other three appellants. Without Contreras's testimony, we
20 cannot confirm Contreras's thoughts on the matter and are left with Baja's self-serving testimony
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22 ⁷⁷ HE Hr'g, Penunuri Test., Day 7 Part 4 at 4:36-4:55, 53:23-53:55; Day 8, Part 4 at 1:37:04-1:37:45.

23 ⁷⁸ HE Ex. 2 (Ponce Declaration) at 3; HE Hr'g Jonathan Ivan Parra Ponce (Ponce) Test., Day 1, Part 3 at 05:33-06:07;
HE Hr'g, Hector Cespedes Riveria Test., Day 2, Part 5 at 18:54-19:30.

⁷⁹ *Id.* *Massey*, 15 Wash. App. at 787.

⁸⁰ *Id.* *Ochoa*, 287 F.3d at 1192.

⁸¹ *Id.* Baja Supp. Br. 6:14-16.

1 of a service provider and independent contractor relationship. From the evidence presented, the
2 remaining parties believe that Contreras worked for Baja Concrete USA Corp. This factor was
3 discussed in the City's Supplemental Closing Brief regarding agency relationship and should be
4 considered when reviewing this factor.⁸²

5 **D. CONTRERAS WAS BAJA'S AGENT.**

6 Baja argues that Contreras was not their agent. Even without Contreras's testimony, the
7 evidence supports Contreras was their agent. The factors used to determine the agency relationship
8 are the same ten factors used in *Massey* to determine whether an independent contractor relationship
9 exists.⁸³

10 The City incorporates the arguments of agency law from the City's Supplemental Closing
11 Brief. Supplemental arguments and responses to Baja's brief are made below.

12 **1. Apparent Authority exists between Contreras and Baja.**

13 Baja explains apparent authority using *D.L.S.*⁸⁴ In *D.L.S.*, the court held that "apparent
14 agency occurs, and vicarious liability for the principal follows, where a principal makes objective
15 manifestations leading a third person to believe the wrongdoer is an agent of the principal."⁸⁵ Baja
16 used the three requirements to determine apparent authority which include: (1) the actions of the
17 putative principal must lead a reasonable person to conclude the actors are employees or agents;
18 (2) the plaintiff must believe they are agents; and (3) the plaintiff must, as a result, rely upon their
19 care or skill to her detriment.⁸⁶ Baja argues that apparent authority does not exist.

20 Contrary to Baja's argument that nothing in the record supports a reasonable person
21 concluding Contreras was Baja's agent, the evidence presented shows Contreras was Baja's agent.

22 ⁸² *Id.* City's Supp. Br. 15-16.

23 ⁸³ *Id.* *Massey*, 15 Wash. App. at 786-87.

⁸⁴ *D.L.S. v. Maybin*, 130 Wash. App. 94, 121 P.3d 1210 (2005).

⁸⁵ *D.L.S. v. Maybin*, 130 Wash. App. 94, 121 P.3d 1210 (2005) citing Restatement, (Second) of Agency § 267 (1957).

⁸⁶ *Id.* at 98-99.

1 Baja's actions led the Workers and the Newway representatives to believe that Contreras was an
2 employee or agent of Baja. Contreras hired the Workers on behalf of Baja and the Workers testified
3 that they worked for Baja Concrete USA Corp. Baja President Claudia Penunuri was involved with
4 Contreras in hiring the Workers.⁸⁷ Newway representative Kwynne Forler-Grant testified that Baja
5 documents she requested from Mercedes Accounting were brought to her by Contreras.⁸⁸ Forler-
6 Grant understood Contreras to be a representative of Baja.⁸⁹ Contreras was involved in tracking
7 the time for the Workers. He worked directly with Newway to review the hours worked and with
8 Mercedes Accounting to pay the Workers.⁹⁰ Mercedes Accounting processed payroll on behalf of
9 Baja. Lastly, a reasonable person would believe a business card with a person's name and company
10 logo is an employee or agent of that company. Contreras had a Baja business card which indicated
11 he worked for Baja.⁹¹

12 The second factor is whether the plaintiffs believe the agency relationship exists.⁹² Baja
13 argues that nothing in the record supports this factor. The testimony and evidence show otherwise.
14 The Workers hired by Contreras believed they were hired to work for Baja and that Contreras
15 worked for Baja. OLS stated in their Findings of Fact that "Respondent Roberto Soto Contreras
16 acted as a hiring manager and representative of Baja Concrete."⁹³ Forler-Grant (Newway) testified
17 that Contreras was a Baja's Superintendent.⁹⁴ Newway's Adam Pilling testified that Contreras was
18 the general manager for Baja.⁹⁵

20 ⁸⁷ HE Ex. 32 (Baja's Resp. to RFI) at TRIAL 01092.

21 ⁸⁸ HE Hr'g, Kwynne Forler-Grant ("Forler-Grant") Test., Day 9, Part 1 at 48:39-52:56.

22 ⁸⁹ *Id.*

23 ⁹⁰ HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 1:08:56-1:09:25; HE Hr'g, De Armes Test., Day 14, Part 4 at 42:26-42:57, 44:09-45:01.

⁹¹ HE Ex. 20 (Contreras's Baja Business Card).

⁹² *Id. D.L.S.*, 130 Wash. App. at 98-99.

⁹³ HE Ex. 87 (OLS Findings, Det. and Order) TRIAL 000358.

⁹⁴ HE Hr'g, Forler-Grant Test., Day 9, Part 1 at 48:39-48:54, 49:35-49:45.

⁹⁵ HE Hr'g, Adam Pilling Test., Day 13, Part 6 at 32:50-35:37.

1 The third factor is that plaintiff must rely upon the agent's care or skill to his/her detriment.⁹⁶
2 Baja argues that they performed no acts to which the Workers could have relied on which does not
3 address this factor. The Workers were recruited by Contreras to work for Baja. They relocated to
4 the state of Washington to work for Baja. Contreras negotiated the Workers' hourly pay rates,
5 arranged their transportation to and from work, and made housing arrangements, all on behalf of
6 Baja. Baja's actions and the actions of Contreras show a principal/agent relationship. Baja would
7 benefit from Contreras being defined as an independent contractor and not as an agent or an
8 employee, but this is simply not supported by the evidence.

9 In *Young Tao v. Heng Bin Li*, 140 Wash.App.825, 931, 166 P.3d 1263 (2007), citing *Moss*
10 *v. Vadman*, 77 Wash.2d 396, 403, 463 P.2d 159 (1969), the two essential elements of an agency
11 relationship are control and consent.⁹⁷ Tao was a passenger in a caravan of three.⁹⁸ He brought a
12 suit when he sustained injuries from being ejected from the second van.⁹⁹ The trial court held that
13 the lead driver had no duty to the passenger in the second van and Tao appealed.¹⁰⁰ The court held
14 that an agent/principal relationship existed between the lead driver and second driver.¹⁰¹ The lead
15 driver set the schedule for the trip to Portland, the timing of trip, directed the order for the vans to
16 travel and instructed the second driver to follow at a certain distance.¹⁰²

17 In the instant case, Baja had control over whether or not Contreras recruited Workers to
18 work for Baja at the Newway locations. Contreras worked exclusively for Baja to provide labor to
19 Newway. No evidence was presented showing that Contreras recruited labor for any other
20

21 ⁹⁶ *Id.* D.L.S., 130 Wash. App. at 98-99.

22 ⁹⁷ *Young Tao v. Heng Bin Li*, 140 Wash.App.825, 931, 166 P.3d 1263 (2007) citing *Moss v. Vadman*, 77 Wash.2d 396,
403, 463 P.2d 159 (1969).

23 ⁹⁸ *Id.* 140 Wash. App. at 828.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 834.

1 companies other than Baja. It. can be implied that Baja gave consent for Contreras to act on its
2 behalf by recruiting the workers, negotiating the payments with Newway, and reviewing the
3 Workers' timesheets. The evidence and testimony support a finding that Contreras was the agent
4 of its principal, Baja.

5 **2. Agency and Independent Contractor Comparison Supports Agency Relationship.**

6 Baja uses *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wash. App. 227, 103
7 P.3d 1256 (2005) to distinguish between independent contractor and agency relationships.¹⁰³ The
8 court held that to determine whether an agency relationship exists, a court must look at the spirit of
9 the agreement between the two parties.¹⁰⁴ Baja argues that Contreras is an independent contractor
10 and has the burden to show the parties' true relationship.¹⁰⁵ The relevant distinction between an
11 agent and independent contractor is whether the owner has "the right to control the method or
12 manner in which the work was to be done[.]"¹⁰⁶

13 In *Kelsey*, the Homeowner Association argued that a genuine issue of material fact existed
14 about the declarant's actual knowledge of the defects and that a "should have known" standard was
15 not considered.¹⁰⁷ Kelsey Lane, Inc. (KLC) contracted with Sacotte Construction, Inc. ("Sacotte")
16 to build a complex.¹⁰⁸ KLC also hired Danali Management Corporation (DMC) as the independent
17 project manager and Allen Bayne from DMC was assigned to the project. Sometime after
18 completion, a routine inspection discovered defects in the complex and the Kelsey Lane
19 Homeowners Association sued KLC. The court held that neither Sacotte nor Bayne (of DMC) were
20 agents of KLC, therefore their knowledge was not imputed to KLC.¹⁰⁹

21 ¹⁰³ *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wash. App. 227, 103 P.3d 1256 (2005).

22 ¹⁰⁴ *Id.* at 235-236.

23 ¹⁰⁵ *Id.* at 236.

¹⁰⁶ *Id.* at 236-237.

¹⁰⁷ *Id.* at 230.

¹⁰⁸ *Id.* at 231.

¹⁰⁹ *Id.* at 237-238.

1 This case is factually distinguishable to the instant case. There were written agreements
2 between KLC and Sacotte and between Bayne and KLC. There were no written agreements that
3 could be verified between Baja and Contreras, other than the testimony and evidence presented by
4 the witnesses. Contreras was not available for the OLS investigation nor the trial. In *Kelsey*, KLC
5 did not actually know about the defects, but in Baja's case, Baja knew Contreras was hiring Workers
6 and handling logistics on Baja's behalf. The control Baja exercised over Contreras was more than
7 the control retained by KLC over Sacotte and without Contreras hiring the Workers on behalf of
8 Baja, there would have been no payroll for Baja to process.

9 Baja should be held vicariously liable for the actions of Contreras. In *Mohr*, the court stated
10 that under apparent authority an agent binds a principal when objective manifestations of the
11 principal "cause the one claiming apparent authority to actually, or subjectively, believe that the
12 agent has authority to act for the principal" and the belief is reasonable.¹¹⁰ The plaintiff had a
13 hypoglycemic event that caused a car accident resulting in her injuries.¹¹¹ The doctor (Grantham)
14 ran tests that were normal and indicated another neurological assessment would be run before
15 discharge that did not occur.¹¹² Due to her symptoms, plaintiff was back at the hospital the next
16 day. Plaintiff suffered permanent brain damage and filed suit against Grantham and the hospital
17 for negligent treatment. Superior Court entered summary judgment for defendant and plaintiff
18 appealed.

19 Like in *Mohr*, Baja allowed Contreras to act on its behalf when he negotiated payments with
20 Newway, recruited and hired the Workers and reviewed the timesheets with Newway. The Workers
21 believed Contreras represented Baja as well as Newway.

23 ¹¹⁰ *Mohr v. Grantham*, 172 Wash. 2d 844, 262 P.3d 490 (2011) (citing *King v. Riveland*, 125 Wash. 2d 500, 507, 886 P.2d 160 (1994)).

¹¹¹ *Id.* at 847.

¹¹² *Id.*

1 **CERTIFICATE OF SERVICE**

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

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18 the foregoing being the last known addresses and email addresses of the above-named party
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20 Dated this 12th day of January, 2024, at Seattle, Washington.

21
22 /s/Natasha Iquina
NATASHA IQUINA
23 Legal Assistant