

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ARISE VIRTUAL SOLUTIONS, INC.**  
**Respondent**

**And**

**MATTHEW RICE, an Individual**  
**Charging Party**

**CASE NO. 12-CA-144223**

**RESPONDENT ARISE VIRTUAL SOLUTIONS INC.'S ANSWERING BRIEF TO THE  
GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Arise Virtual Solutions Inc. (“Arise”) hereby submits the following Answering Brief to the General Counsel’s (the “GC’s”) Cross-Exceptions and Brief in Support of Cross-Exceptions to the Administrative Law Judge’s Decision<sup>1</sup> (the “Decision”) in the above-captioned case.

## **I. INTRODUCTION**

Certified Client Solutions LLC (“CCS”) is a small business that purchases access to Arise’s software platform in order to provide call center services to large companies. Matthew Rice, a Client Support Professional (“CSP”) that worked for CCS,<sup>2</sup> filed a charge in the above-referenced matter alleging that Arise violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”). A hearing on the charge was held before the Honorable Charles L. Muhl, Administrative Law Judge (the “ALJ”) on May 2 and 3, 2016. On August 12, 2016, the ALJ issued his Decision finding in error that *all* CSPs, including Mr. Rice, are employees of Arise and that the class action waiver entered into between Mr. Rice and CCS violated the NLRA. On September 23, 2016, Arise filed Exceptions and a Brief in Support of Exceptions to the ALJ’s Decision (the “Exceptions Brief”). On October 20, 2016, the GC filed Cross-Exceptions and a Brief in Support of Cross-Exceptions to the ALJ’s Decision (the “Cross-Exceptions Brief”) and Arise now answers the GC’s Cross-Exceptions Brief.

In her Cross-Exceptions Brief, the GC challenges the ALJ’s findings with respect to four factors of the common law agency test. Each of the GC’s challenges to those findings fail. *First*, the GC argues that the ALJ should have found that the factor of whether Mr. Rice and

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<sup>1</sup> When citing to the GC’s Cross-Exceptions Brief, it will be identified as “GC Cross-Exceptions” and the page number.

<sup>2</sup> Arise refers to the businesses with which it contracts as call center companies, but has in the past referred to them as “independent businesses.” The ALJ referred to the call center companies as “IBs” in his Decision, so for the purposes of consistency, Arise will follow this convention.

CCS were engaged in a distinct occupation or business should have weighed in favor of employee status. This is without merit because the GC failed to consider (1) undisputed evidence that CCS in fact was engaged in a business distinct from Arise, and (2) evidence that Arise on the one hand, and CCS and Mr. Rice on the other hand, were not engaged in the same business or occupation because Arise is not a call center. **Second**, the ALJ properly concluded that the factor of whether Arise supplied instrumentalities, tools and a place of work favored independent contractor status and the GC's arguments to the contrary are unconvincing. Among other things, the GC fails to understand that Arise does not **supply** IBs access to its telephony infrastructure because charging an IB a fee to access its platform is not "supplying" any equipment, tools or place of work. **Third**, the ALJ properly concluded that the method of payment factor weighed in favor of independent contractor status. The GC's arguments to the contrary are unconvincing because the GC ignores undisputed evidence establishing that (1) Arise in no way controls CSPs' rate of pay, and (2) CCS, the company Mr. Rice worked for, did experience financial risk or gain as an independently operating business. **Fourth**, the GC argues that the ALJ should have found that the factor of whether the parties believe they are creating an independent contractor relationship should have weighed in favor of employee status. This is without merit because both the objective intent of the parties exhibited in the contracts and the subjective intent of the parties based on their conduct shows that the parties believed they were creating an independent contractor relationship.

The GC's Cross-Exceptions Brief also suffers from numerous other flaws throughout—analytical errors which are also present in the GC's other briefing as well as in ALJ's Decision, and are fully addressed in Arise's Exceptions Brief and Reply in Support of Exceptions Brief. **First**, for example, the GC fails to consider evidence relevant to CCS when analyzing many of

the common law agency factors. The ALJ was required to consider such evidence because the question of independent contractor status is fact-intensive analysis that demands a review of “all of the incidents of the relationship.” *FedEx Home Delivery*, 361 NLRB No. 55, at \*1 (2014). This error infected the analysis in both the ALJ’s Decision and the GC’s Cross-Exceptions Brief. ***Second***, both the ALJ and the GC seek to extrapolate findings about Mr. Rice’s employment status to all CSPs without citing any authority that would allow them to do so and without any evidence that CSPs are similar to each other or that Mr. Rice is similar to other CSPs with respect to the common law agency factors. In fact, both the ALJ and the GC ignore significant record evidence demonstrating the exact opposite given the significant differences between Mr. Rice and Patricia Rice (the owner of CCS). This pattern in the GC’s Cross-Exception Brief further supports Arise’s argument in its Exceptions Brief and Reply in Support of Exceptions Brief that the ALJ erred in extrapolating his findings about Mr. Rice to all CSPs.

## **II. ARGUMENT<sup>3</sup>**

### **A. The GC Continues to Improperly Rely on Evidence Specific to Mr. Rice and CCS to Establish the Employment Status of All CSPs.**

As established in Arise’s Exceptions Brief and Reply in Support of Exceptions Brief, the ALJ improperly relied upon evidence pertinent only to Mr. Rice and CCS to establish employment status for all other CSPs without any authority that would allow him to do so and without any evidence that all CSPs are similar to each other or that Mr. Rice is similar to all CSPs. This was in error. In her Cross-Exceptions Brief, the GC committed the same error by continuing to rely on the same kind of evidence specific to only Mr. Rice to try to establish the

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<sup>3</sup> The GC brief makes a significant number of statements that are either legally incorrect, factually unsupported, or both. The key errors and misstatements are addressed herein, but failure to address a particular error or misstatement should not be read as tacit agreement – rather, Arise is in disagreement with the entirety of the GC’s argument.

employment status of all CSPs. The specific and personalized evidence of Mr. Rice and CCS that the GC relied on in her Cross-Exceptions Brief includes: (1) Mr. Rice’s testimony that he considered himself an employee of Arise (GC Cross-Exceptions at 3); (2) the amount of money Mr. Rice paid for equipment and certification (*Id.* at 4-5); (3) evidence of the rate of pay provided to CCS for Mr. Rice’s servicing (*Id.* at 6); (4) Mr. Rice’s opinion that “he did not believe the wage rate was negotiable” (*Id.*); (5) Patricia Rice’s testimony that she did not retain a portion of the service revenue generated by her family members’ servicing (*Id.*); (6) Mr. Rice’s testimony that he did not consider CCS or his mother to be his employer (*Id.* at 8); (7) evidence that Mr. Rice has asserted claims in federal court under the Fair Labor Standards Act (*Id.*); and (8) Patricia Rice’s testimony that she “shepherded” Mr. Rice or that she was not running a big or successful business (*Id.*).

The GC must decide whether she is relying on evidence pertinent to Mr. Rice only to establish employment status as to Mr. Rice or as to all CSPs. If it is the latter, she cannot rely on unique factual circumstances specific to Mr. Rice or CCS like those listed above to establish employment status for a group of disparate CSPs without providing any evidence that Mr. Rice is similar to all CSPs or that all CSPs are similar to each other. The GC’s and the ALJ’s reliance on this type of evidence specific to Mr. Rice to establish the employment status of all CSPs was and still is improper.

**B. Mr. Rice and CCS Are Engaged in a Distinct Occupation or Business Relative to Arise and Accordingly the GC’s Cross-Exception 1 Should Be Denied.**

Arise has filed exceptions regarding the ALJ’s finding that the factor of whether Mr. Rice and CCS are engaged in a distinct occupation or business is a neutral factor. As argued in Arise’s Exceptions Brief, this factor should weigh in favor of independent contractor status and

the GC's arguments that it should weigh in favor of employee status should be rejected. (*See* Arise's Exceptions Brief at 15-19.)

The GC makes several arguments in support of her position that CSPs are not engaged in a distinct occupation or business, none of which have any basis in fact or law. First, the GC states that the ALJ "correctly concluded that without Respondent, CSPs could not perform their customer service work because Respondent supplies CSPs with the necessary infrastructure to provide customer service work." (GC Cross-Exceptions at 2-3). This is manifestly incorrect because the ALJ failed to consider substantial and undisputed evidence showing that CCS did, in fact, operate as a separate entity absent any affiliation from Arise. (Arise's Exceptions Brief at 15.) The record reflects that CCS operated as an independent call center business long before any partnership with Arise, marketed itself to businesses seeking call center services, and earned revenue from multiple sources by providing call center services. (*See* Resp. Ex.<sup>4</sup> 16, Resp. Ex. 11; Tr. 130:3-131:3.) CCS also sought to expand its client base by reaching out to other companies to obtain their business and by investing in marketing and advertising. (Tr. 128:21-23, 131:16-18, 146:6-20.) Overall, ample evidence establishes that CCS engaged in a distinct occupation or business separate from Arise. (*See id.*) Moreover, while it is true, as the GC states, that Arise provides IBs and their CSPs with access to its infrastructure to provide customer services, this is because the IB contracts specifically to *purchase* access to that infrastructure and to partner with Arise to provide customer services to clients through that system.<sup>5</sup> A business that contracts with Arise does not, however, need Arise's infrastructure to

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<sup>4</sup> Citations to Exhibits introduced by the parties are formatted as follows: (GC Ex. 1); (Resp. Ex. 1), where "GC" refers to General Counsel for the Board and "Resp." refers to Arise.

<sup>5</sup> In addition, the mere fact that Mr. Rice utilizes a product purchased from Arise (*i.e.*, the telephony infrastructure) to provide customer service does not mean that Arise employs Mr. Rice. Mr. Rice also

provide call center services to other clients—as noted above, CCS did provide services to other clients absent any affiliation with Arise. (Resp. Ex. 16, Resp. Ex. 11; Tr.<sup>6</sup> 130:3-131:3.) The GC also highlights that the ALJ found that “Respondent derives about 85 percent of its revenue from the work performed by CSPs.” (GC Cross-Exceptions at 3.) As established in Arise’s Exceptions Brief, this finding fails to acknowledge that IBs are also clients of Arise and pay to access the Arise platform. (Tr. 274:13-18.) Because Arise is a connector between IBs and other large corporations, both sides of the connection are necessary—the IBs and its CSPs, as well as the large companies in need of call center services.

The GC also relies on the fact that the “ALJ found that although Respondent does not preclude CSPs from working for other employers, the hours of work and sporadic nature of CSP work makes it difficult for CSPs to obtain other employment.” (GC Cross-Exceptions at 3.) To the extent any CSP does actually experience “sporadic” work hours, this does not preclude the CSP from obtaining other work and places no restrictions on his/her ability to seek another job. Moreover, the ALJ relied solely on evidence pertinent to Mr. Rice to come to this conclusion that CSPs in general experience sporadic hours. As explained in Arise’s Exceptions Brief, this was in error. No evidence in the record established that any other CSP – let alone all CSPs as a whole – had a schedule similar to Mr. Rice’s schedule. In fact, the nature of how an IB and its CSPs select their work hours when using the Arise platform – *i.e.*, without any input from Arise, and with tiered access based on company performance – means there is no common schedule or shift for CSPs that would allow the ALJ to determine if *all* CSPs have sporadic work hours.

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utilizes a computer and a headset to provide customer services, but that does not mean that the companies selling the computer or headset employ Mr. Rice.

<sup>6</sup> Citations to “Tr.” refers to the transcript of proceedings conducted on May 2, 2016 and May 3, 2016.

The GC also argues that CSPs and Arise are engaged in the same business. (GC Cross-Exceptions at 3.) Arise established in its Exceptions Brief, however, that it is engaged in a completely separate business than CCS and Mr. Rice; specifically, Arise is a technology company that provides access to its telephony platform, whereas CCS and Mr. Rice provide call center services. (Tr. 251:1-4.) Arise has never provided call center services. (Tr. 251:7-8.) The GC’s single statement to the contrary is insufficient to rebut Arise’s evidence showing that it is engaged in a separate business than CCS. Further, in an attempt to refute the ALJ’s conclusion that CSPs including Mr. Rice do not do business in the name of Arise, the GC argues that it is the nature of Arise’s business that compels the CSPs to identify themselves as working for the client, not for Arise. (GC Cross-Exceptions at 3.) The GC is correct: it *is* the nature of Arise’s business that no CSP would ever state he/she was providing call center services on behalf of Arise because Arise, as a business, *does not provide call center services*. There would, thus, be no occasion for any CSP to provide call center services on behalf of Arise or to identify him or herself as “working” for Arise when providing such services and the GC fails to explain *why* this factor should weigh in favor of employee status. In fact, that CSPs do not identify themselves as working for Arise shows the opposite, as it reinforces the fact that Arise’s business is *connecting* IBs and their CSPs with clients—not providing call center services. *Cf. FedEx Home Delivery*, 361 NLRB No. 55 (2014) (finding that drivers, even those that operate as incorporated businesses, are doing business in the name of FedEx “[b]y virtue of their uniforms and logos and colors on their vehicles”).

Lastly, the GC tries to use the fact that Mr. Rice allegedly considered himself an employee of Arise to support the conclusion that Arise, on the one hand, and CCS and Mr. Rice on the other, are not engaged in a distinct occupation or business. But Mr. Rice’s opinion as to

his employment status is not relevant to this factor and the GC provides no reason or explanation why it would be. This factor examines whether the IBs and their CSPs “operate as separate entities” —not whether Mr. Rice feels that he is employed by Arise. Mr. Rice’s opinion on the legal issue of whether he was an employee or independent contractor is entitled to no weight. The common law agency test articulates specific factors that bear on this legal question, and it does not examine the alleged employee’s analysis of those factors.<sup>7</sup>

As established in Arise’s Exceptions Brief, this factor should have weighed in favor of independent contractor status. The GC’s arguments that this factor should have weighed in favor of employee status and her Cross-Exception No. 1 should be denied.

**C. The ALJ Correctly Concluded that Arise Did Not Supply Instrumentalities, Tools or Place of Work and Accordingly the GC’s Cross-Exception 2 Should Be Denied.**

The ALJ correctly concluded that the factor of whether the purported employer or individual supplies the instrumentalities, tools or place of work weighed in favor of independent contractor status. (Decision at 15.) Arise never supplied Mr. Rice or CCS with any equipment, supplies, or reimbursement for any expenses. (Tr. 166:13-24, 209:23-210:7, 280:15-281:4.) Mr. Rice, through CCS, also utilized his own equipment and office space to access Arise’s platform and provide call center services. (*See, e.g.*, Tr. 31:8-20; GC Ex. 3 & 4 § 3.3 (“Vendor shall supply, at its sole expense, all equipment, tools, materials, and supplies to accomplish the work agreed to be performed herein.”); § 4.4 (“Each party shall pay all expenses whatsoever of its offices . . . .”); § 13.4 (“Vendor is in the business of providing Services and Deliverables for

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<sup>7</sup> What is relevant is the parties’ intent in setting up the relationship. And that intent, as expressed in the MSA between Arise and CCS, and the Waiver Agreement between CCS and Mr. Rice, is that the parties intended to create an independent contractor relationship.

profit, using its own facilities, equipment, employees and other assets owned, or contracted for, by Vendor.”)

The GC argues that the fact that Arise “provides” IBs and CSPs with the “infrastructure necessary to connect with [Arise’s] clients to perform CSP work” supports a finding of employee status. (GC Cross-Exceptions at 4.) This argument is meritless. Arise does not simply *provide* IBs access to its infrastructure; rather, IBs like CCS *pay fees* to leverage that technology.<sup>8</sup> (*See* Resp. Ex. 12; Tr. 274:13-18; *see Supershuttle DFW*, 2010 NLRB LEXIS 547, \*26-27 (2010) (paying for a device on a weekly basis is an investment on the part of the renter in which the renter has a proprietary interest, and does not indicate employee status); *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987) (“Paying lease or rental fees over a period of time results in a substantial investment on the part of a lessee.”)). The ALJ recognized this fact as well, highlighting that Arise “deducts that fee from the payment it makes to IBs for the work CSPs perform.” (Decision at 15.) The GC tried to refute this point by stating that IBs, instead of CSPs, pay for the platform access. (GC Cross-Exceptions at 4.) This is true, but it supports Arise’s position and undercuts the GC’s contention. The question under this factor is whether the alleged employer bears the cost/burden of providing equipment. The record evidence clearly demonstrates that Arise does not bear that burden – to the contrary, the cost associated with accessing the infrastructure is a revenue stream to Arise. The fact that the IB bears the cost of providing access might be relevant to whether the IB is an employer, but it does not demonstrate

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<sup>8</sup> The GC argues that the fact that Arise provides instructions on how to set up a work station or provides computer specifications shows that Arise provides equipment to CSPs, but that argument should be rejected. While Arise informs IBs of certain requirements for office equipment, such as minimum internet speed or minimum RAM, these guidelines are largely based on client requirements and are communicated to IBs so they know what tools they need to be successful. (Tr. 54:20-55:14.)

that Arise is an employer.<sup>9</sup> Indeed, evidence that CCS, rather than Mr. Rice, paid the fee to access the Arise platform further demonstrates why the ALJ should have considered all evidence of the tripartite relationship between Arise, CCS, and Mr. Rice to fully complete the fact-intensive analysis required. (*See* Arise’s Exceptions Brief at 15-26.)

The GC highlights the amount of money Mr. Rice spent on equipment and certification courses, but this only *supports* Arise’s argument that it did not provide any equipment or tools to Mr. Rice or CCS. Equipment costs is an issue left to the discretion of IBs like CCS. (Tr. 280:15-281:4 (“[I]ts not our business how [IBs] choose to provide equipment or pay for equipment. It’s up to them.”).) The GC tries to draw a comparison between the amount Mr. Rice spent on equipment and the amount Arise invested in its telephony platform, but the argument falls flat. As established above, the IBs *pay for* access to this platform, which refutes any argument that Arise “provides” or supplies the platform as equipment and weakens any attempt to compare the expenditures.<sup>10</sup> As noted above, the point of this factor is to determine who bears the cost of obtaining the equipment—in an employment relationship the employer does, while in an independent contractor relationship the contractor does. The undisputed fact here is that CCS incurred this cost, which is consistent with independent contractor status. The relative investment is irrelevant. *See Porter Drywall, Inc.*, 362 NLRB No. 6 (2015) (finding that this factor still weighed in favor of independent contractor status, even if the purported employer

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<sup>9</sup> Of course, it is the Independent Business Owner (“IBO”) – in this case, Patricia Rice – that determines exactly how this access fee is paid (whether it is paid directly by the IB, deducted from payments to the CSP, etc.). This type of disparity as to this common law agency factor between Patricia Rice, an IBO and a CSP (at one point), and Matthew Rice, a CSP, shows exactly why the ALJ erred in extrapolating his findings about Mr. Rice’s employment status to all CSPs without any findings that the CSPs were similar with respect to the common law agency factors. (*See* Arise’s Exceptions Brief at 9-13 and Reply in Support of Exceptions Brief at 4-9.)

<sup>10</sup> In fact, to the extent the relative investment of the parties is at all relevant (which it is not), the more useful comparison would be an IB’s expenditure on equipment as compared to Arise’s expenditures on the telephony infrastructure on a per-IB basis.

supplied drywall panels for the crew leaders to install, because the crew leaders were still responsible for their crew's tools and supplies, and crew leaders did not maintain offices at the purported employer's facility).

The ALJ correctly concluded that this factor should weigh in favor of independent contractor status. The GC's argument to the contrary and the GC's Cross-Exception No. 2 should be denied.

**D. The ALJ Correctly Concluded that the Method of Payment Factor Weighs in Favor of Independent Contractor Status and Accordingly the GC's Cross-Exception 3 Should Be Denied.**

The ALJ correctly concluded that the method of payment factor weighed in favor of independent contractor status. (Decision at 16.) The ALJ properly found that: IBs, not Arise, determine the wages paid to CSPs; Arise does not withhold taxes or report any payments on 1099s; Arise does not pay any benefits for or to CSPs; and Arise does not guarantee any minimum wage rate for CSPs. (*Id.*) Moreover, CCS (as all IBs do) warranted and represented to Arise in the Master Services Agreement ("MSA") entered into between Arise and CCS that it would be solely responsible for providing employment compensation and benefits that may be required by law to all of the persons working for CCS, and that it would at all times be in compliance with any applicable, federal, state, and local laws, rules, regulations and ordinances. (GC Ex. 2 § 1.6, 3.4, 3.5.7, 7.7.2, 11.8.)

The GC attempts to challenge the ALJ's finding that the method of payment factor weighed in favor of independent contractor status, but all her arguments are without merit. The GC first states that Arise "exercises significant control over CSPs' rate of pay." (GC Cross-Exceptions at 5.) This is utterly wrong and refuted by the evidence in the record. As clearly proven by the record, Arise *in no way* exercises any control over the rate of pay for any CSP,

including Mr. Rice—IBs are in complete control of the rate of pay for its CSPs. (GC Exs. 3 & 4 § 3.5; Resp. Ex. 11; Resp. Ex. 12; Tr. 141:25-143:10, 150:22-151:3, 184:15-185:4, 270:18-21.) Arise has also *never* paid any CSP directly, including Mr. Rice. (*Id.*) Pursuant to the Statements of Work (“SOWs”) between IBs and Arise, Arise makes single payments to IBs regardless of the number of clients serviced, or the number of CSPs servicing, and the IB exercises its discretion in managing how it compensates its CSPs. (*See* Resp. Ex. 12; 143:1-22, 150:22-151:3, 270:18-21, 273:21-275:2, 274:19-275:2.) The record shows that this is exactly how Mr. Rice received compensation for servicing: Arise would make a payment to CCS for any and all servicing performed by any of CCS’s CSPs, and CCS would allocate those funds to its CSPs, including to Mr. Rice, in whatever manner Patricia Rice chose. (*Id.*; *see also* Tr. 143:2-10 (“Q: Who made the decision about what [money] stayed with you and what went to [the CSPs?] A: I did.”).) The evidence is undisputed on this point. (*See id.*) Accordingly, the record clearly refutes the GC’s statement that Arise exercises control, let alone “significant control,” over CSPs’ rates of pay. (GC Cross-Exceptions at 5.)

The GC appears to contend that Arise exercises such control over CSPs’ wages by “restrict[ing] the amount that an IBO is able to pay CSPs” in the SOWs. (*Id.* at 6.) In making this statement, the GC equates Arise’s contractual obligation in the SOW to pay an *IB* an agreed-upon price for services with control over the compensation a *CSP* receives. This argument defies logic and must be rejected. No case law or Board decisions support this view, and it is not consistent with the way this factor is meant to be applied. *Cf. FedEx Home Delivery*, 361 NLRB No. 55 (2014) (analyzing for the method of payment factor whether FedEx established and controlled the drivers’ rate of compensation by examining how FedEx paid those drivers directly). Logically, when viewed in a vacuum, *any* contractual relationship that contemplates

services in exchange for payment will “restrict” the amount of money the service provider will receive, and in turn, can pay its workers—this does not create an employment relationship and the argument that it somehow should create an employment relationship is absurd. Here, Arise in no way controlled the compensation Mr. Rice received—not “technically” or otherwise. (GC Cross-Exceptions at 6.) CCS had complete control over Mr. Rice’s compensation, just as all IBs had complete control over the compensation of their CSPs, and complete control over what companies the CSPs provided call center services to. (Tr. 143:2-10.)

All of the GC’s other arguments are similarly unconvincing. The GC next states that Mr. Rice believed the wage rate was non-negotiable. (GC Cross-Exceptions at 6.) But, again, the compensation rate is set by negotiations between the IB and the CSPs with no input from or even knowledge by Arise. Arise pays IBs revenue for services rendered—this is completely disconnected from the CSP’s compensation rate agreed to between the IB and the CSP. Consistent with that, Mr. Rice’s compensation rate was decided between CCS and Mr. Rice; Arise played no part whatsoever in that discussion or decision. (Tr. 150:22-151:3.) The GC next argues that Arise “rewards higher achieving CSPs by paying IBs more per call depending on the star rating achieved by the CSP.” (GC Cross-Exceptions at 6.) This observation is irrelevant. It is true that under some – not all – SOWs, Arise will pay an IB more if the IB’s CSPs meet or exceed certain metrics set by the client. But this only affects the revenue Arise owes to the IB—Arise can in no way reward a high-achieving CSP with monetary compensation because *Arise does not ever pay CSPs*. (GC Exs. 3 & 4 § 3.5; Resp. Ex. 11; Resp. Ex. 12; Tr. 141:25-143:10, 150:22-151:3, 184:15-185:4, 270:18-21.) Arise only pays the IB, which then decides what funds to allocate to its CSP—an IB that receives higher revenue may choose to share some, all, or none

of these monies with its CSPs. This arrangement does not support employee status relative to Arise.

Attempting to refute the well-established fact that IBs have and exercise discretion to allocate service revenue to CSPs, the GC misleadingly cites Patricia Rice's testimony that she did not "deduct"<sup>11</sup> any money from the paychecks of people in her family before allocating the service revenue. While Patricia Rice may have chosen not to retain a portion of the service revenue generated by Mr. Rice's or other family members' servicing, she did in fact retain a portion of the service revenue generated by all other CSPs servicing. (Tr. 143:2-10, 150:22-151:3.) This proves Arise's position that IBs retain complete control over the compensation its CSPs receive and refutes the GC's argument that Arise in any way controls how CSPs are paid.

The GC also makes a series of arguments to the effect that Arise minimizes the possibility of genuine financial risk or gain and that CSPs "lack the infrastructure necessary to provide customer service on their own." (GC Cross-Exceptions at 6.) As established in Arise's Exceptions Brief, the GC's argument (and ALJ's conclusion as to the same) fails to consider significant and undisputed evidence showing that CCS not only had the possibility of financial risk or gain, but actually experienced such risk or gain. Indeed, CCS's financial success fluctuated over the years; in some years, it earned over \$100,000 in revenue from providing call center services and in other years, it earned less. (*See* Resp. Ex. 18 & 19.) The same evidence establishes that CCS and its personnel did provide customer service to clients with no affiliation with Arise or its infrastructure. (Resp. Ex. 11, 18, 19; Tr. 122:9-19, 127:4-14, 136:13-17.) The

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<sup>11</sup> The GC assumes that the amount Patricia Rice deducted from the single payment Arise provided her company were the fees charged by Arise for access to the platform. This is not supported in the record and is misleading. The amount Patricia Rice chose to deduct from the paychecks of her CSPs could have far surpassed the fee Arise charged for accessing the platform.

failure to consider evidence of CCS's financial risk or gain and its independently functioning business was in error and resulted in an incomplete analysis of the relationship between Arise and CCS, and between CCS and Mr. Rice.<sup>12</sup> The GC accordingly could not establish that Arise exercises "strict control over CSPs' wages, earnings and potential for gain or loss." (GC Cross-Exceptions at 7.)

As explained in its Exceptions Brief, while Arise disagrees with the ALJ's conclusions that "CSPs are not subjected to any genuine financial risk or gain," that CSPs "do not have any potential for entrepreneurial gain," and that "the only method CSPs have to increase compensation is to work more hours,"<sup>13</sup> the ALJ properly concluded that this factor weighs in favor of independent contractor status. The GC's Cross-Exception No. 3 should be denied.

**E. The Parties Believed They Were Creating an Independent Contractor Relationship and Accordingly the GC's Cross-Exception 4 Should Be Denied.**

Arise has filed exceptions regarding the ALJ's finding that the factor of whether the parties believe they are creating an independent contractor relationship is a neutral factor. As argued in Arise's Exceptions Brief, this factor should weigh in favor of independent contractor status – regardless, the GC's arguments that it should weigh in favor of employee status should be rejected. (*See* Arise's Exceptions Brief at 38.)

As Arise argued its Exceptions Brief, both the objective intent of the parties evidenced in the relevant contracts and the subjective intent of the parties based on their conduct showed that the parties believed they were creating an independent contractor relationship. As the ALJ acknowledged, Arise, CCS and Mr. Rice all communicated an intent to enter into an independent contractor relationship in (1) the MSA entered into between Arise and CCS, (2) the SOWs

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<sup>12</sup> This argument is developed more fully in Arise's Exceptions Brief on pages 15-26.

<sup>13</sup> This argument is developed more fully in Arise's Exceptions Brief in footnote 17.

entered into between Arise and CCS, and (3) the Waiver Agreement entered into between CCS and Mr. Rice. (*See* GC Exs. 2-5.) The ALJ did fail to consider, however, significant evidence showing that CCS operated as if it were an independent contractor. Specifically, CCS functioned as an independent business with multiple clients, holding itself out to the public as “a virtual call center with contractors working from home all over the United States.” (Resp. Ex. 17.) Moreover, CCS had an opportunity to reject work from Arise or to work for any other client, even those competitive with Arise. *See Porter Drywall, Inc.*, 362 NLRB No. 6 (2015) (finding that the factor of whether the parties believed they were creating an independent contractor relationship to weigh in favor of the purported employer when the crew leaders were free to reject work); (*see, e.g.*, GC Ex. 3 § 2.6.).

The GC’s arguments to the contrary must fail. First, after acknowledging that IBs like CCS sign an MSA in which they agree they are independent contractors, the GC again states that CSPs do not have an “opportunity to bargain over the terms of this agreement.” (GC Cross-Exceptions at 7.) This is yet more evidence that not all “CSPs” are similarly situated. As a threshold matter, a CSP in his capacity as CSP is not a party to any MSA or any SOW—only IBs are parties to those contracts. Accordingly, Mr. Rice could not try to negotiate a contract he was not a party to and the GC’s argument that this supports a finding that Mr. Rice was an employee of Arise is nonsensical. Other CSPs, like Patricia Rice, are also IBOs, and an IBO could negotiate the terms of an MSA (or SOW) with Arise in their capacity as IBO. This underlines how different Mr. Rice’s situation was as compared to Patricia Rice’s, and demonstrates the lack any relationship (let alone an employment relationship) between Arise and Mr. Rice. Regardless of whether a CSP can bargain over the terms of the agreements, that fact does not bear on the parties’ understanding of what the contract said and what they were agreeing to. Furthermore,

while the GC argues that written agreements are not dispositive of independent contractor status, they are certainly probative of a belief that the parties were creating an independent contractor relationship. *See Dial-A-Mattress Operating Corp.*, 326 NLRB No. 75 (1998) (finding as evidence of independent contractor status that “the contracts express an intention on the part of the contracting parties to create an independent contractor relationship”); *see also Porter Drywall, Inc.*, 362 NLRB No. 6 (2015) (finding that this factor weighed in favor of independent contractor status, even if crew leaders did not have opportunity to bargain over terms of the “independent contractor agreement”). This is particularly the case where – as here – there is no evidence whatsoever of any intent to establish anything but an independent contractor relationship.

The GC also relies on the fact that Mr. Rice considered Arise to be his employer and that Patricia Rice testified that she was a “go-between” between Arise and CSPs to argue that this factor should weigh in favor of employee status. (GC Cross-Exceptions at 8.) Initially, as explained in Arise’s Exceptions Brief, this evidence pertinent only to Mr. Rice and CCS cannot serve as evidence to show that all CSPs believed they were creating an employment relationship with Arise, that all IBOs felt they were “go-betweens,” or that all CSPs are otherwise employees of Arise. Furthermore, the GC argues that the fact that Mr. Rice and other CSPs have asserted claims in federal court against Arise under the Fair Labor Standards Act supports its argument that the parties believed that they were creating an independent contractor relationship. But Mr. Rice’s decision to bring a lawsuit years after he began servicing as a CSP does not speak to whether he believed he was creating an independent contractor relationship at the time he began using the Arise platform or during the time he was using the Arise platform.

Lastly, the GC referred to Patricia Rice’s testimony indicating that she was not running a big business without ever fully explaining what alleged import that fact had to whether Mr. Rice is an independent contractor. That portion of Patricia Rice’s testimony has no relevance to the questions at issue. To the extent the GC believes that Patricia Rice’s alleged failure to succeed as a business owner of CCS shows that she is not an independent contractor, the GC incorrectly presupposes that one must be successful to be an independent contractor. No such requirement exists. Patricia Rice’s alleged lack of success<sup>14</sup> does bear on one factor – namely, the *opportunity* for profit or loss. Ms. Rice’s experience with CCS is compelling evidence of independent contractor status because it shows there was real risk in her decision to run CCS—a hallmark of an independent contractor.

As established in Arise’s Exceptions Brief, this factor should have weighed in favor of independent contractor status. The GC’s arguments that this factor should have weighed in favor of employee status and the GC’s Cross-Exception No. 4 should be denied.

### **III. CONCLUSION**

For the foregoing reasons, the GC’s Cross-Exceptions 1-4 and Brief in Support of Cross-Exceptions should be denied. As explained in Arise’s Exceptions Brief, the ALJ’s overall finding that CSPs are employees should be reversed.

Dated: November 18, 2016

Respectfully submitted:

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<sup>14</sup> The GC’s statements notwithstanding, it is actually not at all clear that Ms. Rice failed to “succeed.” CCS may not have made Ms. Rice a millionaire, but on the other hand it survived for many years and generated a fairly substantial source of revenue for Ms. Rice. (See Resp. 18 & 19.)

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**CERTIFICATE OF SERVICE**

I hereby certify that RESPONDENT ARISE VIRTUAL SOLUTIONS INC.'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE in the matter of *Arise Virtual Solutions Inc.* and *Matthew Rice*, Case 12-CA-144223 was duly served electronically upon the following individuals on November 18, 2016:

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