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7 **BEFORE THE HEARING EXAMINER**  
8 **CITY OF SEATTLE**

9 In the Matter of the Appeals of  
10 Baja Concrete USA Corp., Newway  
11 Forming Inc., and Antonio  
Machado,

12 From a Final Order of the Director,  
13 City of Seattle Office of Labor  
Standards, Respondent.  
14  
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Hearing Examiner Files:  
LS-21-002, LS-21-003, LS-21-004  
(consolidated)

**APPELLANT BAJA CONCRETE USA  
CORP.'S MOTION TO EXCLUDE EVIDENCE**

**HER 2.14, 2.16, 2.17, SMC 3.02.090(M), RCW 5.50  
et seq, Former RCW 9A.72.085, ER 602, 801, 802**

Department Reference: 2020-00186-LS

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17 **I. ORDER REQUESTED**

18 COMES NOW Appellant Baja Concrete USA Corp. ("Baja Concrete"), pursuant to  
19 Hearing Examiner Rules of Practice and Procedure ("HER") Sections 2.14, 2.16, 2.17, Seattle  
20 Municipal Code ("SMC") Section 3.02.090(M), Revised Code of Washington ("RCW") 5.50 *et*  
21 *seq*, former RCW 9A.72.085, and Washington State Rules of Evidence ("ER") 602, 801 and 802,  
22 through the undersigned counsel, and submits this Motion to Exclude Evidence from these  
23 proceedings. The evidence sought to be excluded is comprised of witness statements and notes  
24 of witness interviews which were prepared in relation to interviews conducted by investigators of  
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1 the City of Seattle Office of Labor Standards (“OLS”), which were not signed by the witnesses  
2 (collectively the “Unsigned Witness Statements”) and all evidence, findings of fact and  
3 conclusions of law which rely on the Unsigned Witness Statements, and all testimony,  
4 declarations and other evidence provided by any personnel of the OLS which are based on the  
5 interviews conducted which led to or are based on the Unsigned Witness Statements.

## 6 7 **II. EVIDENCE RELIED UPON**

8 The evidence that the Hearing Examiner is asked to rely upon is set forth in the  
9 Declaration of Alex T. Larkin in Support of Baja Concrete’s Motion to Exclude Evidence  
10 submitted herewith.

## 11 **III. BACKGROUND**

12 A significant part of the OLS investigation in this matter, and forming a significant basis  
13 upon which the OLS proceeded with its investigation, and which led to the OLS’ Findings of  
14 Fact, Determination and Final Order, dated August 25, 2021 (the “Determination”), against  
15 Appellants in the instant consolidated appeal before the Hearing Examiner of the City of Seattle  
16 (the “Hearing Examiner”) were the witness interviews conducted by OLS investigators and the  
17 Unsigned Witness Statements prepared during or following those interviews. (*see*  
18 *Determination*, page 1, and the Findings of Fact section of the Determination, pages 3-16 (the  
19 “OLS Findings”). The OLS conducted interviews of eight individuals it refers to as employees,  
20 one interview of a foreman of Appellant Newway Forming Inc., and one interview of Appellant  
21 Antonio Machado. (*see Determination*, page 1). Of the ten interviews conducted, only  
22 Appellant Antonio Machado signed his witness statement. (*see Decl. of Alex T. Larkin at ¶4,*  
23 *EXHIBIT 1*, which is comprised of excerpts from the nine Unsigned Witness Statements and  
24 excerpts from the witness statement of Appellant Antonio Machado, which were introduced as  
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1 exhibits during a CR 30(b)(6) deposition of the OLS in this matter). Exhibits 8 through 16 from  
2 the deposition of the OLS are the Unsigned Witness Statements and Exhibit 21 from that  
3 deposition is the witness statement of Appellant Antonio Machado. *Id.* For purposes of this  
4 motion, only the first page and last page, which would be the signature page, are being offered.  
5 This is because the witness statements are not being offered for their substantive content, but  
6 rather are being offered to show that they are unsigned (with the exception of Mr. Machado's  
7 statement), to show that is a common practice of the OLS to have witnesses review the  
8 statements for correctness and to sign under penalty of perjury, and to show that the OLS failed  
9 to follow its own common practice in this matter.

10       During the CR 30(b)(6) deposition of the OLS, Mr. Daron Williams ("Mr. Williams")  
11 was the designated individual to speak for the OLS for the portion of the deposition relevant to  
12 the instant Motion to Exclude Evidence. (*see Decl. of A. Larkin at ¶3.*) Mr. Williams testified  
13 that it is a common practice of the OLS to provide their interview notes to witnesses for the  
14 witnesses to review, confirm the accuracy thereof and then sign the statements under penalty of  
15 perjury. (*see Decl. of A. Larkin at ¶4, Ex. 1, excerpts of dep. transcript of OLS, pg. 80, lines 8-*  
16 *11*). Mr. Williams also confirmed that no further interviews, other than the ten mentioned above,  
17 were conducted during its investigation in this matter. (*see Decl. of Larkin at ¶4, Ex. 1, excerpts*  
18 *of dep. transcript of OLS, pg. 43, lines 10-14*). Additionally, Mr. Williams confirmed that there  
19 was no one present during the witness interviews with authority to swear in the witnesses (*see*  
20 *Decl. of A. Larkin at ¶4, Ex. 1, excerpts of dep. transcript of OLS, pg. 80, lines 16-22, pg. 84,*  
21 *lines 5-9, pg. 85, lines 16-19*). Mr. Williams stated that "No witness was sworn in for any  
22 interview." (*See Decl. of A. Larkin at ¶4, Ex. 1, excerpt of dep. transcript of OLS, pg. 85, lines*  
23 *18-25, pg. 86, line 1*). Appellant Antonio Machado was the only witnesses, in the OLS'

1 investigation in this matter, who signed their witness statement. (*see Decl. of A. Larkin at ¶4,*  
2 *Ex. 1, excerpt of dep. transcript of OLS, pg. 86, lines 7-12).*

3 Mr. Williams testified during the deposition several times that witnesses did not review  
4 the statements for correctness and did not sign them. (*see Decl. of A. Larkin at ¶4, Ex. 1,*  
5 *excerpts of dep. transcript of OLS, pg. 83, lines 21-23, pg. 85, lines 4-10, pg. 87, lines 16-22, pg.*  
6 *89, lines 14-20).*

7 Appellant Antonio Machado was given a chance to review his witness statement and  
8 signed it under penalty of perjury. (*see Decl. of A. Larkin at ¶4, Ex. 1, excerpt of dep. transcript*  
9 *of OLS, pg. 86, lines 7-12).*

10 Out of the ten witness statements produced during the OLS investigation, four of them  
11 included the following introductory wording from the OLS to the witness:  
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13 “Based on the answers to my questions, I will draft an interview  
14 statement. I will send it to you for your review. If anything is  
15 incorrect or inaccurate, please mark through and change it, then sign  
it and send it back to me. This statement is certified under penalty  
of perjury, so please ensure it is accurate and complete.”

16 (*see Decl. of A. Larkin at ¶4, Ex. 1, Exhibits 9, 12, 13, 15 to the dep. transcript of OLS).*

17 Out of those same ten witness statements, five included signature blocks (but no  
18 signatures, with the exception of the witness statement of Appellant Antonio Machado), with the  
19 following wording:

20 “By signing below, I acknowledge that I have been provided an  
21 opportunity to review and correct the accuracy of this statement  
based on my recollection of the interview.

22 I CERTIFY UNDER PENALTY OF PERJURY UNDER THE  
23 LAWS OF THE STATE OF WASHINGTON THAT THIS  
24 STATEMENT IS TRUE AND CORRECT.”  
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1 (See Decl. of A. Larkin at ¶4, Ex. 1, Exhibits 9, 12, 13, 15, 21 to the dep. transcript of  
2 OLS).

3 In sum, despite the OLS alleging that 53 workers are owed back wages and damages by  
4 the Appellants and Mr. Roberto Soto Contreras, it relies on only one signed witness statement,  
5 signed by Appellant Antonio Machado, who is not one of the said 53 workers (*see Attachment B*  
6 *to the Determination*). The OLS has failed to produce a single statement, signed under penalty  
7 of perjury, from a worker in this matter alleging that they are owed back wages or other  
8 compensation by Baja Concrete or by any party. Further, given that the OLS, and counsel for  
9 Respondent City of Seattle, Office of Labor Standards, assert that they cannot disclose the  
10 identities of the workers who were interviewed, Baja Concrete is unable to determine who was  
11 interviewed and therefore has no opportunity to cross-examine the witnesses<sup>1</sup>.  
12

#### 13 **IV. DISCUSSION AND AUTHORITY**

##### 14 **A. THE UNSIGNED WITNESS STATEMENTS MUST BE** 15 **EXCLUDED PURSUANT TO HER 2.14(a)**

16 HER 2.14(a) states:

17 “All witnesses testifying at hearing must take an oath or affirmation  
18 to be truthful in their testimony. All witnesses are subject to cross-  
19 examination by the other party.”

20 Based on witness disclosure lists provided in discovery in this matter, at most, one of the  
21 witnesses who was interviewed by the OLS in connection with the preparation of the Unsigned  
22 Witness Statements may testify at the hearing in this matter. If so, that witness will presumably  
23 be sworn in and Baja Concrete will have an opportunity to cross-examine the witness. As for the  
24 other Unsigned Witness Statements, it appears that none will testify at the hearing. As such, they

25 <sup>1</sup> Baja Concrete reserves the right to object to claims that they are not entitled to know the identities of the  
individuals who provided the Unsigned Witness Statements.

1 will not be sworn in and there will be no opportunity to cross-examine them. Pursuant to HER  
2 2.14 (a), their “testimony” in the form of the Unsigned Witness Statements must be excluded  
3 from these proceedings, given that the statements are unsigned, were not signed under penalty of  
4 perjury and there will be no opportunity to cross-examine them.

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6 B. THE UNSIGNED WITNESS STATEMENTS SHOULD BE  
7 EXCLUDED PURSUANT TO HER 2.17(b)

8 HER 2.17(b) states:

9 “The (Hearing) Examiner may exclude evidence that is irrelevant,  
10 unreliable, immaterial, unduly repetitive, or privileged.” (emphasis  
added).

11 The Unsigned Witness Statements should be excluded from these proceedings because they are  
12 unreliable. Based on the OLS’ own testimony, and based on the boilerplate wording on many of the  
13 Unsigned Witness Statements, it is a common practice of the OLS to have witnesses review their  
14 statements for accuracy, make corrections to the statements, and sign them under penalty of perjury.  
15 Such common practice is undoubtedly for the purpose of ensuring the “reliability” of the statements.  
16 Given that the OLS failed to have the witnesses review their statements for accuracy, make  
17 corrections, and sign them under penalty of perjury, the Unsigned Witness Statements should be  
18 excluded on the basis of unreliability pursuant to HER 2.17(b).

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20 C. THE UNSIGNED WITNESS STATEMENTS SHOULD BE  
EXCLUDED PURSUANT TO SMC 3.02.090(M)

21 The hearing to be conducted in the instant appeal before the Hearing Examiner is in the  
22 context of a “contested case” as defined under SMC 3.02.020 which states:

23 “Contested case means any proceeding before an agency in which  
24 the legal rights, duties, or privileges of specific parties are required  
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1 by ordinance to be determined after a hearing by a Hearing  
2 Examiner.”

3 In the instant proceedings, rights and duties of Baja Concrete, as well as other parties, are  
4 to be determined by the Hearing Examiner and, as such, the SMC provisions on contested cases  
5 are applicable. Specifically, SMC 3.02.090(M) states:

6 “Every party shall have the right of cross-examination of witnesses  
7 who testify, and shall have the right to submit rebuttal evidence.”

8 Given that Baja Concrete will not have an opportunity to cross-examine the witnesses  
9 who were interviewed by the OLS, which gave rise to the Unsigned Witness Statements, those  
10 statements should be excluded from the instant proceedings pursuant to SMC 3.02.090(M).

11 **D. THE UNSIGNED WITNESS STATEMENTS DO NOT COMPLY WITH THE**  
12 **UNIFORM UNSIGNED DECLARATIONS ACT RCW 5.50 OR WITH FORMER**  
13 **RCW 9A.72.085**

14 Eight of the nine Unsigned Witness Statements indicate that the interviews were  
15 conducted between March 1, 2019 and October 20, 2020, while one Unsigned Witness Statement  
16 is undated. RCW 9A.72.085, which was repealed effective July 1, 2021, was therefore in effect  
17 at the time of the witness interviews. RCW 9A.72.085 provided:

18 “Whenever, under any law of this state or under any rule, order, or  
19 requirement made under the law of this state, any matter in an  
20 official proceeding is required or permitted to be supported,  
21 evidenced, established, or proved by a person’s sworn written  
22 statement, declaration, verification, certificate, oath, or affidavit, the  
23 matter may with like force and effect be supported, evidenced,  
24 established, or proved in the official proceeding by an unsworn  
25 written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the State of Washington.

1 The certification or declaration may be in substantially the following  
2 form:

3 ‘I certify (or declare) under penalty of perjury under the laws of the  
4 State of Washington that the foregoing is true and correct:

5 \_\_\_\_\_  
6 (Date and Place)

7 \_\_\_\_\_  
8 (Signature)’

9 This section does not apply to writings requiring an  
10 acknowledgement, depositions, or oaths required to be taken before  
11 a special official other than a notary public.”

12 “That statute (RCW 9A.72.085) provides that an unsworn statement ‘certified or declared  
13 by the person to be true under penalty of perjury’ may be substituted for a sworn statement  
14 whenever a sworn statement is required or permitted by law to evidence or prove a matter in an  
15 official proceeding.” *Johnson v. Dep’t of Licensing*, 71 Wn. App. 326, 334, 858 P.2d 1112  
16 (1993). Here, since the Unsigned Witness Statements cannot be substituted for sworn statements  
17 or testimony in the Hearing Examiner proceedings.

18 In the instant case, the Unsigned Witness Statements do not comply with the above  
19 requirement that they be certified, as evidenced by signature, under penalty of perjury under the  
20 laws of the State of Washington to be true and correct. Given that the statements are unsworn,  
21 and noting that there was no one present during the interviews with authority to swear in the  
22 witnesses, the Unsigned Witness Statements must be excluded from these proceedings. It is  
23 telling that on some of the Unsigned Witness Statements, the required certification wording  
24 under RCW 9A.72.085 is present, showing that it is, in fact, common practice for such  
25 statements to be certified/signed by the witness, and showing that the OLS is aware of the  
requirement imposed by that statute.



1 Since the repeal of RCW 9A.72.085, effective July 1, 2021, that statute has been replaced  
2 by provisions of the Uniform Unsworn Declarations Act, RCW 5.50. RCW 5.50.010(4) defines  
3 sworn declaration to mean “a declaration in a signed record given under oath.” The Unsigned  
4 Witness Statements do not meet this definition as they were not given under oath. RCW  
5 5.50.010(5) defines unsworn declaration to mean “a declaration in a signed record not given  
6 under oath but given under penalty of perjury. The term includes an unsworn statement,  
7 verification, and certificate.” Given that the Unsigned Witness Statements are not signed, and  
8 therefore not indicated to be prepared under penalty of perjury, they do not meet the definition of  
9 unsworn declaration. RCW 5.50.050 provides the required form of an unsworn declaration,  
10 stating:

11 “An unsworn declaration under this chapter must be in substantially  
12 the following form:

13 I declare under penalty of perjury under the law of Washington  
14 that the foregoing is true and correct.

15 Signed on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_,

16 At (city or other location, state or country)

17 \_\_\_\_\_  
(printed name)

18 \_\_\_\_\_  
(signature)”

19  
20 Clearly, the Unsigned Witness Statements do not comply with the form requirements of  
21 RCW 5.50.050.

1           E.     UNSIGNED WITNESS STATEMENTS ARE INADMISSABLE HEARSAY IF  
2                 OFFERED INTO EVIDENCE BY A WITNESS OTHER THAN THE DECLARANT

3           While HER 2.17(a) permits the Hearing Examiner to admit hearsay evidence, a discussion of  
4 the relevant ERs here is appropriate given that, following the Hearing Examiner's decision after the  
5 conclusion of the hearing in this matter, the parties will have an opportunity to appeal to the Superior  
6 Court where the ERs will apply. ER 801(c) defines hearsay as "a statement, other than one made by  
7 the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter  
8 asserted." If the OLS, or other party or witness, offers any of the Unsigned Witness Statements into  
9 evidence during the hearing for the purpose of proving matters asserted in those statements, those  
10 statements are hearsay under ER 801(c). ER 802 provides that hearsay is not admissible except as  
11 provided by the ERs, by other court rules, or by statute.

12           In the instant case, none of the hearsay exceptions apply. The Unsigned Witness Statements  
13 are inadmissible hearsay.

14           It is important to note that, under ER 806, if a hearsay statement is admitted in evidence, the  
15 credibility of the declarant may be attacked. In the instant case, given that Baja Concrete has not been  
16 permitted to know the names of the declarants, it could not and cannot be afforded its right, under ER  
17 806, to attack the credibility of the hearsay declarants. This would be a very prejudicial miscarriage of  
18 justice and would run afoul of notions of fundamental fairness.

19  
20           F.     THE OLS CANNOT TESTIFY AS TO THE ACCURACY OF THE UNSIGNED  
21                 WITNESS STATEMENTS

22           ER 602 states in part:

23                 "A witness may not testify to a matter unless evidence is introduced  
24                 sufficient to support a finding that the witness has personal  
25                 knowledge of the matter."

1 In the instant, an investigator from the OLS, or other witness, cannot testify as to the accuracy  
2 of the Unsigned Witness Statements given that they do not have personal knowledge of the contents of  
3 those statements. Washington courts have held that, even a governmental official, testifying in their  
4 official capacity, may only testify based on their actual personal knowledge. *Simmons v. City of*  
5 *Othello*, 199 Wn. App. 384, 399 P.3d 546 (2017). In *Simmons*, the City of Othello had moved to strike  
6 certain statements from a declaration of former Othello Mayor Shannon McKay. *Simmons* at 391.  
7 The court granted that motion (the Court of Appeals affirmed), striking the following statement, based  
8 on lack of personal knowledge:

9 “During my term as mayor, a homeowner by the name of Mr.  
10 Crosier had a sewage backup into his basement. Upon investigation  
11 it was determined that his connection between his house line and the  
main sewer line had been broken in the alley.” *Id.*

12 The Simmons court also struck the following statement of Ms. McKay (the Court of  
13 Appeals affirmed), as it included legal conclusions:

14 “Based on the municipal code, we determined that the City of  
15 Othello was responsible for repairing the connection between the  
16 residence and the main line but we were not responsible for repairing  
the line from the house to that connection.” *Id.* at 391-392.

17 Pursuant to the above, an OLS investigator, or other witness testifying in their official or  
18 unofficial capacity, may only testify on matters based on their own personal knowledge and, therefore,  
19 cannot testify as to the matters asserted in the Unsigned Witness Statements.  
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**V. CONCLUSION**

Appellant Baja Concrete hereby requests that the Hearing Examiner grant the requested motion to exclude evidence, in the form proposed.

Respectfully Submitted this 30th day of June, 2022.

MDK LAW

*/s/ Mark D. Kimball*

*/s/ Alex T. Larkin*

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