BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of Baja Concrete USA Corp., Newway Forming Inc., and Antonio Machado, From a Final Order of the Director, City of Seattle Office of Labor Standards, Respondent.	Hearing Examiner Files: LS-21-002, LS-21-003, LS-21-004 (consolidated) **APPELLANT BAJA CONCRETE USA CORP.'S RESPONSE TO RESPONDENT CITY OF SEATTLE'S MOTION FOR SUMMARY JUDGMENT** **HER 2.16, CR 56** Department Reference: 2020-00186-LS

I. ORDER REQUESTED AND BASIS

COMES NOW Appellant Baja Concrete USA Corp. ("Baja Concrete"), pursuant to Hearing Examiner Rules of Practice and Procedure ("HER") Section 2.16 and Washington State Rule of Civil Procedure ("CR") 56, through the undersigned counsel, and submits this Response in opposition to Respondent City of Seattle's Motion for Summary Judgment. Respondent City of Seattle is asking the Hearing Examiner to convert the Determination issued by the Office of

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Labor Standards to a final order. Baja Concrete is seeking an Order denying the City of Seattle's Motion for Summary Judgment.

II. EVIDENCE RELIED UPON

The evidence that the Hearing Examiner of the City of Seattle ("Hearing Examiner") is asked to rely upon is set forth in the Declaration of Alex Larkin in Support of Baja Concrete's Motion for Partial Summary Judgment previously submitted in this matter and the Second Declaration of Alex Larkin submitted herewith.

III. BACKGROUND

In the City of Seattle Office of Labor Standards ("OLS") Findings of Fact, Determination and Final Order, dated August 25, 2021 (the "Determination"), issued against Appellants in the instant consolidated appeal before the Hearing Examiner, the Director of the OLS relies heavily on the legal doctrine of "joint employers" to support its finding that Baja Concrete, and the other Appellants, are joint employers of the workers identified in Attachment B to the Determination (the "Workers"). (*see discussion of joint employment at pages 16-19 of the Determination*). As discussed herein, Baja Concrete should not be regarded as an employer of the Workers. The caselaw on the doctrine of joint employers uses 13 factors to determine whether an entity or a person is a joint employer. In the instant case, Baja Concrete meets no more than three of the factors, and therefore should not be regarded as a joint employer.

IV. AUTHORITY AND ARGUMENT

A. SUMMARY JUDGMENT GENERALLY

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Case law construing Civil Rule 56 is extensive. The general proposition, however, is that summary judgment cannot be granted where there is an issue of material fact. *Gingrich v. Unigard Security Insurance Company,* 57 Wn. App. 424, 429, 788 P.2d 1096 (1990). Moreover, it is not simply the facts themselves which if controverted bar summary judgment. A central tenet of the body of authority relating to the application of Civil Rule 56 is that not only the facts, but any and all inferences therefrom, must be construed in favor of the non-moving party. *Hash Ex Rel Hash v. Children's Orthopedic Hospital & Medical Center,* 49 Wn. App. 211, 216-17, 741 P.2d 1039 (1987). Furthermore, in reviewing the evidence presented in support and opposition of a motion for summary judgment, the court may not weigh the credibility of testimony. *Hudesman v. Foley,* 73 Wn.2d 880, 887, 441 P.2d 532 (1968).

Here, there are genuine issues of material fact regarding whether Newway was an employer of the workers at issue in this matter, under the *Becerra Becerra* factor test used by the Courts in determining whether a person or an entity is a joint employer. The facts, and any and all inferences therefrom must be construed in favor of the non-moving party, in this case Baja Concrete.

B. The OLS' Authority Regarding the Legal Doctrine of Joint Employment

The OLS made its finding regarding joint employment based on caselaw and certain provisions of the Seattle Municipal Code ("SMC"). (*Determination at pg. 16*). The cited SMC provisions are SMC 14.16.010, SMC 14.19.010 and SMC 14.20.010, relating to paid sick time and paid leave time, minimum wage and minimum compensation rates for employees performing work in Seattle, and wage and tip compensation requirements, respectively. Each of those provisions includes the following definition of Employer:

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> "Employer means any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee. More than one entity may be the employer if employment by one employer is not completely disassociated from employment by the other employer."

Additionally, the OLS relies on Section 90-045(3) of the OLS Seattle Human Rights Rules ("SHRR") for the proposition that joint employment "depends on all the facts in the particular case." (*Determination at pg. 16*).

The OLS' reliance on SHRR 90-045(3) fails because none of the three criteria set out in the provision by which a joint employment relationship may be considered to exist are present in this case. SHRR 90-045(3) states, in relevant part:

> "[a] joint employment relationship generally will be considered to exist in situations such as:
>
> a. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
> b. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
> c. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

There is nothing in the record, and the OLS has produced no evidence, to support a finding that any of the three above criteria set out in SHRR 90-045(3) exist in this case.

The OLS relies primarily on *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014) for caselaw in support of its joint employment analysis, based on the

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economic realities test. (*Determination at pg. 16*). As discussed below, while *Becerra Becerra* is good law as to the question of joint employers, the OLS has misconstrued *Becerra Becerra* in this case.

C. The Correct Construction of the Legal Doctrine of Joint Employment

A close comparison of the facts in *Becerra Becerra* to the facts in the instant matter necessarily leads to a conclusion that Baja Concrete was not an employer of the Workers. A central issue in *Becerra Becerra* was whether Fred Meyer Stores Inc. ("Fred Meyer") and Expert Janitorial LLC ("Expert Janitorial") were joint employers of certain janitors who worked night shifts cleaning Fred Meyer stores. *Becerra Becerra at 189*. Expert Janitorial acquired a management contract to provide Fred Meyer with outsourced facility maintenance. *Id at 190*. Under that contract, Expert Janitorial subcontracted with independent janitorial companies who provided, managed and supervised workers who would clean Fred Meyer stores, while neither Expert Janitorial nor Fred Meyer directly employed the workers. *Id.* Expert Janitorial and Fred Meyer agreed on the specific work the janitors would do and the specific price Fred Meyer would pay Expert Janitorial for completing the work to Fred Meyer's reasonable satisfaction. *Id*. The workers could not leave the store until Fred Meyer supervision signed off on their daily Work Order sheet. *Id at 193*.

The Supreme Court in *Becerra Becerra* reversed the trial court's summary judgment finding that Fred Meyer was not a joint employer of the janitors and remanded the matter for further consideration based on a 13-factor analysis, known as the economic reality test, for determining whether joint employment existed. *Id at 196.*

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The 13-factor test mentioned above under *Becerra Becerra* consists of five regulatory factors and eight non-regulatory factors as follows, citing the U.S. Court of Appeals for the Ninth Circuit in *Torres-Lopez v. May, 111 F.3d 633, 639-640, 1997 U.S. App. LEXIS 6939, 1997*:

Regulatory factors:

1. The nature and degree of control of the workers;
2. The degree of supervision, direct or indirect, of the work;
3. The power to determine pay rates or the methods of payment of the workers;
4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
5. Preparation of payroll and the payment of wages.

Non-regulatory factors:

1. Whether the work was a specialty job on the production line;
2. Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;
3. Whether the premises and equipment of the employer are used for the work;
4. Whether the employees had a business organization that could or did shift as a unit from one worksite to another;
5. Whether the work was piecework and not work that required initiative, judgment and foresight (whether the service rendered requires a special skill);
6. Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill;
7. Whether there was permanence in the working relationship; and
8. Whether the service rendered is an integral part of the alleged employer's business.

Of the above 13 factors, at most, three of them apply in the context of the Workers and Baja Concrete. Notably, the above factors are not exclusive and are not to be applied mechanically. *Berry v. Transdev Servs., U.S. District Court for the Western District of Washington, 2017 U.S. Dist. LEXIS 58398, 12, 2017.* In *Berry*, the Court found that two of the regulatory factors and five of the non-regulatory (common law) factors applied, and thus found the existence of a joint employment relationship. This is in stark contrast to the instant case, in which no more than three of the 13 factors apply to Baja Concrete.

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Here, the roles of Appellant Newway Forming Inc. ("Newway") and Roberto Soto Contreras ("Contreras") are remarkably similar to those of Fred Meyer and Expert Janitorial respectively in *Becerra Becerra*. Contreras recruited and hired all workers and the workers worked at Newway project work sites. The Workers were expected to complete their work to the satisfaction of Newway. Baja Concrete had no role in these activities.

D. There are Genuine Issues of Material Fact Regarding Whether Baja Concrete is a Joint Employer

Ms. Mercedes De Armas, who operates Mercedes Accounting, which processed payroll for Baja Concrete, was deposed in this matter on May 11, 2022[1]. During that deposition, Ms. De Armas testified that Roberto Soto Contreras provided all information for payroll. (*Second Decl. of Larkin at ¶3, dep. transcript of De Armas, pg. 33, lines 2-7, lines 21-22*). Mr. Contreras, who was not an employee of Baja Concrete, would provide payroll summaries to Mercedes Accounting for processing payroll. (*Second Decl. of Larkin at ¶3, dep. transcript of De Armas, pg. 34-35*).

In a CR 30(b)(6) deposition of Baja Concrete in this matter, Ms. Mercedes De Armas, speaking for Baja Concrete, testified that Contreras is not, and never was, an employee of Baja Concrete. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 169, lines 17-21*). She further testified that Contreras was the boss of the Workers, in terms of management and hiring. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 170, lines 12-22*). Contreras determined the work hours of the Workers. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 77, lines 15-17*). Baja Concrete did not determine when

[1] Ms. Mercedes De Armas was deposed twice in this matter, once in a CR 30(b)(6) deposition of Baja Concrete and once in her individual capacity.

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Workers would work overtime, did not set the pace of work, and did not communicate with Workers about when they needed to report to work. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 77, line 21 to pg. 78, line 1*). Contreras, together with Newway, handled those matters. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 78, lines 2-3*). Additionally, if a Worker needed to go home sick, that was handled by Contreras and Newway, not by Baja. (*Decl. of Larkin at ¶4, Ex. 1, dep. transcript of Baja Concrete, pg. 78, lines 12-18*).

In a CR 30(b)(6) deposition of Newway in this matter, Ms. Kwynne Forler-Grant, speaking for Newway, testified that she has been with Newway for 22 years and has been a senior manager for the last ten years. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 7, lines 14-22*). Ms. Forler-Grant testified that Appellant Antonio Machado ("Machado") was general foreman for Newway for the 1120 Denny Way project. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 10, lines 11-24 (organizational chart attached as Ex. 2 to that dep.), and pg. 12, lines 15-20*). Machado oversaw everybody on the organizational chart for the 1120 Denny Way project. (*Id*). Machado delegated oversight of subcontractors to Newway leads who are listed on the organizational chart. (*Id at pg. 12, line 23 to pg. 13, line 5)*. The Newway leads would go to the office in the mornings and they would be instructed where their crews needed to go throughout the building during that day. (*Id at pg. 13, lines 9-12*).

Ms. Forler-Grant testified that Baja Concrete's superintendent, Contreras was onsite at 1120 Denny Way. (*Id at pg. 14, lines 5-13*). However, as discussed above, Ms. De Armas, testifying for Baja Concrete, stated that Contreras at no time was an employee of Baja Concrete. There is nothing in the record to show that Contreras was an employee of Baja Concrete.

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Regarding reporting of workers hours, and Baja Concrete's invoicing Newway for those hours, the process involved weekly meetings between Tom Grant[2] of Newway and Contreras at which the two of them would go through timecards, and Contreras would generate invoices. (*Id at pg. 18, line 12 to pg. 19, line 1, and g. 27, lines 6-16*). Tom Grant would decide how many laborers were needed, and would inform Contreras. (*Id at pg. 24, lines 4-16*).

Regarding directing work at the work site, Newway's leads would inform Contreras of where workers needed to be. (*Id at pg. 25, lines 1-12*).

Regarding workers' lunch break and other breaks, Contreras would make those decisions. (*Id at pg. 25, lines 22-25*).

Regarding working additional hours, Newway personnel were the decision makers. (*Id at pg. 71, lines 20-23*). Contreras would also make decisions regarding work hours based on directions from Newway. (*Id at pg. 72, lines 14-18*).

Notably, workers at the 1120 Denny Site who were apparently paid their wages by Baja Concrete indicated that they were employees of Newway. Attached as Exhibit 6 to the deposition transcript of Newway is a Site Safety Stand Down list which workers at the 1120 Denny Way site signed. (*Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway, pg. 28, lines 15-25, pg. 29, lines 1-4, pg. 30, lines 20-25, pg. 31, lines 1-5, Site Safety Stand Down attached as Ex. 6 to that dep.).* The Site Safety Stand Down sign-in list is 11 pages long, includes the signatures of numerous individuals who identified their employers, none of whom listed Baja Concrete as their employer. Ms. Forler-Grant testified that she did not know why Baja Concrete workers signed the list and indicated Newway as their employer. (*Id at pg. 33, lines 9-22, pg. 34, lines 8-10*).

[2] See Tom Grant on Newway organizational chart, Decl. of Larkin at ¶6, Ex. 2, dep. transcript of Newway.

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Regarding equipment on site, Ms. Forler-Grant testified that she believed Baja Concrete did not have any larger equipment at the work sites. (*Id at pg. 115, lines 3-6*). She further testified that Baja Concrete did not have an office, any facility at all or even a desk at the work sites. (*Id at pg. 115, lines 7-13*).

Finally, Ms. Forler-Grant testified that Newway is a Washington corporation, is a separate business entity from Newway Forming in Canada, that she understood that Baja Concrete is a Florida entity and that the Florida entity is a different business entity than Baja Concrete in Canada. (*Id at pg. 116, lines 4-11*).

We now apply above factual background to the joint employer factors set out in *Becerra Becerra.*

Regulatory factors:

1. **The nature and degree of control of the workers**. Baja Concrete did not have control of the workers. Newway's leads, Machado and Contreras did.

2. **The degree of supervision, direct or indirect, of the work**. Baja Concrete did not supervise, directly or indirectly, the work. These items were carried out by Newway personnel.

3. **The power to determine pay rates or the methods of payment of the workers**. Contreras set the wage rates of workers. Baja Concrete did have input into the methods of payment.

4. **The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers**. Contreras handled hiring and firing of workers. Employment conditions at the work sites was determined by Newway and its personnel. Baja Concrete had no input into these factors.

5. **Preparation of payroll and the payment of wages**. Relying on information about wage rates and work hours provided by Contreras, Baja Concrete did process payroll for the workers.

Non-regulatory factors:

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1. **Whether the work was a specialty job on the production line**. The workers at issue in this matter were laborers and cement finishers, requested by Newway and recruited and provided by Contreras. The record does not appear to indicate that the workers were specialists.

2. **Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes**. The record in the instant case indicates that there were no written employment contracts for the workers at issue. The record indicates that terms of employment were negotiated between each worker and Contreras, with no input from Baja Concrete.

3. **Whether the premises and equipment of the employer are used for the work**. The workers at issue in this matter did not work at the business address of Baja Concrete and did not use any Baja Concrete equipment. All work was performed at the work sites where Newway was a subcontractor to general contractors.

4. **Whether the employees had a business organization that could or did shift as a unit from one worksite to another**. The record does not indicate that there was any such business organization.

5. **Whether the work was piecework and not work that required initiative, judgment and foresight (whether the service rendered requires a special skill)**. The workers at issue were general laborers and cement finishers. The record does not indicate that they rendered services requiring a special skill.

6. **Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill**. The workers at issue were general laborers and cement finishers, and did not involve managerial skill. Supervision of the workers was carried out by Newway personnel and to a lesser extent by Contreras.

7. **Whether there was permanence in the working relationship**. The record indicates that the workers were hired for specific projects and there was no permanence in the working relationship.

8. **Whether the service rendered is an integral part of the alleged employer's business**. The services rendered by the workers were essential to the work Newway was engaged to perform at the work sites. To the extent that Baja Concrete's business involves processing of payroll and billing Newway for labor, such labor was important to Baja Concrete's business.

To a limited extent, factors 3 and 5 of the regulatory factors and factor 8 of the non-regulatory factors may apply to Baja Concrete. The other ten factors do not apply to Baja

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Concrete. In contrast, regulatory factors 1, 2, 4 and 5, and non-regulatory factors 1, 3, 6 and 8 appear to apply to Newway. Regulatory factors 1, 3, 4 and 5, and non-regulatory factors 2, 6 and 7 appear to apply to Contreras.

Recent caselaw is also informative on the issue of joint employment. In a case involving alleged violations of the Washington Industrial Safety and Health Act of 1973 ("WISHA"), although not in the context of wages, the Supreme Court of Washington focused on control of the workers and control of the physical work environment as primary considerations in determining employer liability under WISHA. *Dep't of Labor & Indus. v. Tradesmen Int'l, LLC*, 198 Wn.2d 524, 541, 497 P.3d 353 (2021)[3]. "Key factors include who has responsibility and power to control the workers and work site and whether the alleged employer has the power to hire, fire, or modify the employment conditions." *Id* at 542. "The inquiry is whether the staffing agencies retained substantial control over the workers and work environment such that they could abate the relevant safety hazards." *Id* at 543. The Supreme Court affirmed the Court of Appeals decision that staffing agency Tradesmen Int'l LLC ("Tradesmen") was not an employer of workers that it had provided to a separate entity. *Id* at 545. "Tradesmen was responsible for paying wages, determining compensation, and handling taxes, unemployment insurance and workers' compensation". *Id* at 544. "There was no evidence that Tradesmen actively supervised the workers, controlled the methods of work or work conditions, or provided on-site supervision." *Id*. In the instant case, Baja Concrete's sole role regarding the workers was processing payroll. As in the *Tradesmen* case, Baja Concrete did not supervise the workers, control the methods of work or work conditions, or provide on-site supervision. As such, Baja Concrete should not be regarded as a joint employer.

[3] The Tradesmen case was a King County Superior Court case, case no. 18-2-08751-7.

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E. The OLS Determination Itself Does Not Support its Own Finding that Baja Concrete was a Joint Employer

The Determination erroneously claims, without elaboration, that "*There is no dispute that Respondent Baja Concrete employed the employees listed on Attachment B).* (*Determination, pg. 4, Section II*). In fact, the role of Baja Concrete as to the workers in this matter was limited in essence to a payroll service provider. As explained in the Determination, Newway was responsible for keeping records of workers start times and end times, and provided timesheets to Baja Concrete. Baja Concrete processed payroll for the workers and submitted invoices to Newway for hourly rates charged by Baja Concrete to Newway. Contreras was exclusively responsible for recruiting, hiring, firing, disciplining and setting wages for the workers.

Quoting the Determination:

"Contreras exercised significant control over the workers and their pay; their Paid Sick and Safe Time; their hiring, firing, and discipline; and their housing, transportation to and from work…" (*Determination, Page 3*).

"Respondent Machado exercised significant control over the employees' hours, schedules and whether they worked overtime and he directly supervised both the Newway Forming foremen and the Baja Concrete representative who directed the employees' day-to-day work." (*Determination, page 4*).

"The [workers] testified that Roberto Soto Contreras recruited them, arranged for their travel to Seattle, managed their housing … drove one of the vans which brought them to work, and picked them up from work." (*Determination, page 4*).

"Newway [Forming] would tell us [workers] what hours we would work." (*Determination, page 4*).

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Work schedules and meal and rest breaks were set by Newway Forming. (*Determination, page 5*).

Quoting Machado, "Those guys [workers] would come to Newway foremen and the [Newway] foremen would guide them and give them directions, what to work on, when to go home." (*Determination, page 6*).

Quoting one of the workers, "Roberto [Soto Contreras] would mostly be in charge of paying us…" (*Determination, page 6*).

Newway exercised near-total control over the work of the cement finishers, laborers, and carpenters. (*Determination, page 17*).

The workers started their workdays by clocking in at the Newway office onsite, initially using timesheets and later using Newway's clock-in system to punch in and out. The workers used Newway's premises and equipment in completing their work. (*Determination, page 18*).

F. Additional Facts and Inferences Precluding Summary Judgment in Favor of the City of Seattle

In its Motion for Summary Judgment, the City of Seattle refers to a "dearth of employee records". *(Seattle Motion for Summary Judgment, pg. 17, line 16)*. In fact, records of payment of wages, taxes withheld, deductions, etc. have been produced in discovery in this matter. *(see sampling of paystubs attached as Exhibit 2 to the Second Declaration of Alex Larkin.)* These paystubs, and numerous more which have been produced in discovery in this matter indicate a factual issue of material fact to be determined at the hearing, and are certainly ample to survive the City of Seattle's Motion for Summary Judgment.

G. The Interest, Liquidated Damages and Civil Penalties Imposed by the OLS are Excessive, Arbitrary and Capricious

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The OLS imposed the maximum interest, liquidated damages and civil penalties against Baja Concrete and the other appellants, despite the fact that of the appellants have ever been the subject of a wage claim prior to this matter. An administrative agency's adoption of a rule is not arbitrary and capricious unless the agency acted willfully, unreasonably, and without regard for the facts and circumstances. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 456, 722 P.2d 808, 809 (1986). In reviewing administrative action, the court must examine the entire record in light of the public policy contained in the legislative act authorizing the decision. *Weyerhaeuser Co. v. Sw. Air Pollution Control Auth.*, 91 Wn.2d 77, 78, 586 P.2d 1163, 1164 (1978).

The tribunal should consider the entire record before it and reduce the interest, liquidated damages and civil penalties imposed by the OLS in light of the fact that none of the parties to the action have ever been the subject of a wage claim prior to this matter.

V. CONCLUSION

There are significant genuine issues of material fact before the tribunal as described herein and in the other motions currently pending in this matter, which can only be resolved by a trial/hearing. The tribunal should therefore deny the City of Seattle's Motion for Summary Judgment.

Respectfully Submitted this 3rd day of August, 2022.

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/s/ Alex T. Larkin

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