

BEFORE THE HEARING EXAMINER  
CITY OF SEATTLE

In the matter the Appeal of:

**BAJA CONCRETE USA CORP.,  
ROBERTO CONTRERAS, NEWWAY  
FORMING INC., and ANTONIO  
MACHADO**

From a Final Order of the Decision issued by  
the Director, Seattle Office of Labor Standards

) Hearing Examiner File:

) **No:** LS-21-002  
) LS-21-003  
) LS-21-004

) APPELLANT ANTONIO MACHADO'S  
) RESPONSE TO THE CITY OF SEATTLE'S  
) MOTION FOR SUMMARY JUDGMENT

**I. RELIEF REQUESTED**

Appellant, Antonio Machado, responds to the City of Seattle's motion for summary judgment. The City of Seattle contends that as an economic reality Mr. Machado was an employer of 53 aggrieved workers. However, Mr. Machado worked for Newway, did not have ownership in or officer status in either Newway or Baja USA Corp. and did not have control over significant aspects of either companies' day-to-day functioning to cause the violations in this case. As Mr. Machado was not responsible for the violations alleged in this case, he should not be held jointly and severally liable for damages and penalties over \$2.2 million.

**II. STATEMENT OF GROUNDS**

Mr. Machado is a superintendent for Newway Forming, Inc, a concrete finishing company. He reported to Newway's project manager, Tom Grant. Kincaid Decl., Ex. 1, 23:5-16. Of the three worksites Newway worked at in Seattle from 2018 to 2020, Mr. Machado was only the superintendent for one of the three worksites, 1120 Denny Way, a large commercial project in downtown Seattle. *Id.* at 15:24-16:7, 33:9-15; Kincaid Decl., Ex. 2, 8:8-20.

1 Mr. Machado's position involves working in the field doing quality control and safety  
2 monitoring. Kincaid Decl., Ex. 1, 18:13-18:25; 21:19-24:9; 25:19-26:4. He also puts together a  
3 weekly schedule for his site in coordination with the other site contractors and would then  
4 communicate the schedule to his foremen. *Id.* at 21:19-24:9. Based on the schedule, his foremen  
5 would then oversee those on their teams. *Id.* at 21:19-24:9, 25:19-26:4, 43:25-44:22; Kincaid  
6 Decl., Ex. 2, 12:15-13:19, 25:1-12. Although Machado set the overall schedule for the 1120 Denny  
7 Way site, but he had little to no control over start or end times for the day. Kincaid Decl., Ex. 1,  
8 45:18-47:18, 54:3-24. If a project ran over eight hours in a day due to issues such as delays in  
9 concrete trucks arriving, he was not involved in deciding which workers would work overtime  
10 and which ones would go home or when workers would take breaks. *Id.* at 45:18-47:18, 54:3-24.  
11 Mr. Machado as a superintendent had no role in hiring workers, setting pay, firing, discipline,  
12 keeping or maintaining any employment records, processing payroll, or posting any employee  
13 rights posters.

14 Sometime around 2017 or 2018, Baja Concrete USA Corp, Baja Concrete Ltd. (Baja  
15 Canada), and Newway entered into a subcontracting agreement. Mr. Machado was not involved  
16 in making this agreement. Kincaid Decl., Ex. 1, 73:5-7, 163:6-14; Kincaid Decl., Ex. 2, 27:17-  
17 2:4. Mr. Machado was not a corporate officer of any of these entities, nor did he have any  
18 ownership of these entities. Kincaid Decl., Ex. 3, Requests for Admissions No. 1-5. As part of the  
19 agreement, Baja USA was to provide services at the three Newway worksites in Seattle, including  
20 1120 Denny Way, at certain rates per hour for concrete finishing, labor, and carpentry work.  
21 Kincaid Decl., Ex. 2, 8:8-20. There were thus Baja USA workers at the 1120 Denny Way worksite  
22 where Mr. Machado worked, in addition to Newway employees.

23 At some point, Carlos Ibarra of Baja Canada approached Mr. Machado for a small loan for  
24 various things as they knew each other. Kincaid Decl., Ex. 1, 110:119-111:16. Because Mr. Ibarra  
25 had issues sometimes obtaining American money, he asked his sister Claudia Penunuri, who is  
26 the owner of Baja USA, to issue Mr. Machado a repayment check for the loan in the amount owed

1 without interest. *Id.* at 110:119-111:16, 111:25-112:1; Kincaid Decl., Ex. 4, 99:3-100:21, 103:13-  
2 17. Mercedes De Armas, who processed all checks for Baja USA, including checks to Baja USA's  
3 workers, confirmed that Mr. Machado was never sent anything other than the loan repayments.  
4 Kincaid Decl., Ex. 5, 45:4-46:18; Kincaid Decl., Ex. 3, Requests for Admissions No. 3, 6, 7. Mr.  
5 Machado never received any monthly payment from Baja USA. Kincaid Decl., Ex. 5, 45:4-46:18.

6         Baja USA had Roberto Soto Contreras on site supervising the Baja USA workers. Mr.  
7 Contreras would coordinate with Tom Grant or Kwynne Forler-Grant of Newway regarding their  
8 subcontracting obligations. Kincaid Decl., Ex. 1, 32:10-19, 136:9-137:1; Kincaid Decl., Ex. 2,  
9 8:3-7, 18:5-15, 24:4-8. In addition to Mr. Contreras, there were lower-level supervisors from Baja  
10 USA who also assisted in supervising the other Baja USA workers, including when Mr. Contreras  
11 was at another project. Kincaid Decl., Ex. 4, 161:22-162:14. Mr. Contreras hired the Baja USA  
12 workers and set their pay. *Id.* at 38:3-6, 76:14-24, 150:5-152:2. Mr. Contreras kept track of the  
13 workers hours and supplied a summary to Baja USA's payroll; Baja USA then used this  
14 information to pay the Baja USA workers and invoice Newway for services. *Id.* at 17:21-5, 18:18-  
15 19:5, 27:18-28:11, 38:3-6, 38:19-39:7, 71:6-23, 76:14-24. Baja USA's payroll was processed and  
16 issued by Mercedes Accounting, owned by Mercedes De Armas. Kincaid Decl., Ex. 5, 33:18-  
17 34:16. Baja USA workers would report to Roberto if they were sick and needed time off work.  
18 Kincaid Decl., Ex. 4, 78:12-80:7. Mr. Contreras was also the individual disciplining and firing the  
19 Baja USA workers. *Id.* at 96:9-20. He was also involved in setting the sick leave policies and other  
20 policies for the Baja USA workers. *Id.* at 79:9-80:7. In other words, Roberto Soto Contreras was  
21 their supervisor.

22         Of the workers that Baja USA brought onto the 1120 Denny Way site, Mr. Machado had  
23 truly little information or involvement with them. He did not know the number of workers that  
24 Baja USA had at the 1120 Denny Way site. Kincaid Decl., Ex. 1, 31:3-8. He did not know how  
25 any of the Baja USA workers were hired nor did he take part in their hiring. *Id.* at 32:10-33:1. The  
26 Baja USA workers did not report to Mr. Machado if they were sick. *Id.* at 57:15-23, 58:6-18. Mr.

1 Machado had no role in disciplining or firing any workers. *Id.* at 58:19-20, 76:11-14, 77:7-24. He  
2 never threatened to fire any workers, report any workers to ICE, or direct anyone to do so. *Id.* at  
3 77:7-24. Mr. Machado did not know what any of the Baja USA workers were being paid or about  
4 any deductions being taken from their pay. Kincaid Decl., Ex. 1, 88:15-89:1, 96:7-19, 98:18-99:7,  
5 101:9-17, 125:6-8, 165:7-17. He was not involved in setting any policies for any of the workers  
6 for Baja USA. Mr. Machado has even less information about the Baja USA workers who worked  
7 at the Fairview and Terry Avenue worksites as he was not the superintendent for these sites and  
8 did not otherwise work or direct those sites. Overall, Mr. Machado did not direct or supervise any  
9 of the Baja USA workers' activities. Kincaid Decl., Ex. 2, 25:1-21.

10 Sometime in 2020, the City began investigating violations of Seattle Municipal Ordinances  
11 (SMC) 14.20 (Wage Theft), 14.19 (Minimum Wage), and 14.16 (Paid Sick and Safe Time)  
12 involving the Baja USA workers. Specifically, complaints were made by Baja USA workers on  
13 deductions Baja USA had taken from their paychecks, regarding meal and rest breaks, regarding  
14 pay for all hours worked and pay for overtime, and regarding their paid sick and safe time. As it  
15 appeared on some of the paystubs for the aggrieved workers, Baja USA was invoicing Newway  
16 at much higher rate per hour than what it was paying its workers. Kincaid Decl., Ex. 6.

17 After conducting an investigation, the City somehow made a determination that Mr.  
18 Machado was a joint employer of 53 of the aggrieved Baja USA workers and thus that he was in  
19 part responsible for a violation of these ordinances. Specifically, it claimed that Mr. Machado was  
20 a supervisor of the workers, although it lacked specifics on how Mr. Machado did so. It also  
21 claimed Mr. Machado was receiving eight percent of what the workers were paid based on  
22 speculative and hearsay evidence. It cited to the loan repayment check Mr. Machado received,  
23 although they admitted that they could not get the loan repayment check to amount to eight percent  
24 of what the workers were paid. They also alleged that Mr. Machado threatened to report the  
25 aggrieved workers to ICE, although again the facts and details to support their allegations again  
26 were murky or lacking altogether and seemed to point more to Roberto Soto Contreras making

1 these threats rather than Mr. Machado. The City issued a Final Determination of this on August  
2 25, 2021, and assessed over \$2.2 million dollars in damages and penalties against the named  
3 parties in this case, including Mr. Machado. The assessment amount is equivalent to fourteen  
4 years' worth of Mr. Machado's salary. Kincaid Decl., Ex. 1, 106:19-107:1. The Final  
5 Determination noted: paid sick and safe time back wages of \$22,152.01; wage theft back wages  
6 of \$603,537.35; minimum wage back wages for \$5,599.18; \$161,338.37 in interest, and  
7 \$1,262,577.19 in liquidated damages. The Determination also assessed civil penalties of  
8 \$170,786.20 to the City of Seattle for violations including failure to keep and provide employment  
9 records and provide notice of employees' rights.

10 Mr. Machado, along with the other Respondents, appealed this Final Determination. Now,  
11 on appeal before the hearing examiner, the City has filed a motion for summary judgment to be  
12 entered against Mr. Machado, among others. In its motion, the City relies on a declaration from  
13 Jonathan Parra Ponce. However, this declaration is full of conclusory statements that lack any  
14 detailed facts to support those conclusions against Mr. Machado.

### 15 III. STATEMENT OF ISSUES

16 1. Whether the City's motion for summary judgment should be **denied** because Mr.  
17 Machado is not responsible for the violations at issue when he had no power or control over the  
18 Baja USA workers' pay, breaks, deductions, and paid sick and safe time, when he had no role in  
19 the keeping or maintaining of employment records or providing notice to workers of their rights,  
20 and when he did not retaliate against any of the workers for exercising their rights?

### 21 IV. EVIDENCE RELIED UPON

22 The evidence relied on includes the Declaration of Sara Kincaid with exhibits and the  
23 pleadings and files of record.

### 24 V. OBJECTIONS TO THE CITY'S EVIDENCE

25 The City presents a declaration from Jose Parra Ponce in support of its motion. This  
26 declaration does not contain the minimum requirements for the declaration to be admissible

evidence. Specifically, his declaration primarily has mere allegations, conclusions, impressions, and opinions, without setting forth specific facts into evidence. These portions of the declaration should be struck as they are irrelevant, unreliable, and immaterial under the applicable rules.

Irrelevant, unreliable, immaterial, or unduly repetitive evidence shall be excluded. Hearing Examiner Discrimination Rules 2.28(a). On appeal, lay opinion evidence is discouraged. Hearing Examiner Rules of Practice and Procedure 2.17(c).

Generally, lay witnesses must supply facts, and not draw opinions, conclusions, or impressions. *State v. Smith*, 16 Wn. App. 300, 302, 555 P.2d 431 (1976); *Randanite Co. v. Smith*, 172 Wash. 390, 395, 20 P.2d 33 (1933). A lay witness may provide opinion testimony if it is rationally based on the perception of the witness, helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and not based on scientific, technical, or specialized knowledge. Evidence Rule 701. Even then, such testimony is not admissible unless the witness lays the specific foundational facts they observed supporting their opinion, conclusion, or impression. *State v. Jamison*, 93 Wn.2d 794, 798, 613 P.2d 776 (1980); *Ulve v. City of Raymond*, 51 Wn.2d 241, 253, 317 P.2d 908 (1957)). Without having specific facts, these conclusions, opinions, or impressions invade the province of the factfinder by preventing the factfinder from making their own determination on the matter. *Jamison* at 799.

Courts have held that declarations, like Mr. Ponce's, missing these crucial details are too conclusory to be considered specific facts to give the declarations evidentiary value. *See Dong Wan Kim v. O'Sullivan*, 133 Wn. App. 557, 566-567, 137 P.3d 61 (2006).

Mr. Machado moves for the Examiner to strike this declaration from evidence, particularly the substantive portions of the declaration ¶ 3-19, in considering summary judgment.

Also, the city obtained this declaration within the discovery period, but it did not disclose this statement to the parties in discovery and did not disclose this statement until its motion for summary judgment. Kincaid Decl., ¶ 8. This is significant as the City refused to disclose Mr. Ponce's identity until late in discovery on April 1, 2022, when discovery ended June 1, 2022, and

discovery had been ongoing since September 2021. *Id.*

## VI. LEGAL AUTHORITY

### 1. Standard for Summary Judgment

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The burden is on the party moving for summary judgment. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party meets this initial burden, the non-moving party “must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 225-26 (emphasis added). These specific facts must be shown by affidavits, depositions, interrogatory responses, or other evidence that would be admissible. CR 56(e). All evidence and reasonable inferences therefrom will be viewed in the light most favorable to the non-moving party. *Id.* at 226. Summary judgment should be granted “if reasonable minds could reach only one conclusion from the evidence presented.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

The City argues on summary judgment that as an economic reality Mr. Machado was an employer of the aggrieved workers at issue and that judgment should be entered against him in advance of the hearing. For the Examiner to grant its motion, the City would have to prove there is no genuine issue of material fact that Mr. Machado was responsible for causing the alleged violations.

### 2. **Mr. Machado is not a joint employer under the economic reality test.**

As noted by the City, the Ordinances are based on the Fair Labor Standards Act (FLSA), and thus we must look to FLSA precedent in interpreting the provisions of these Ordinances.

The FLSA is said to be interpreted broadly to effectuate its remedial purpose. *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (citation omitted), cert. denied, 528 U.S. 1116 (2000). However, the US Supreme Court has “rejected this principle as a useful guidepost” in

1 interpreting the act as it is a “flawed premise that the FLSA pursues its remedial purpose at all  
2 costs.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks  
3 and citations omitted). The Act is instead to be given a “fair” interpretation. *Id.*

4 In deciding whether a person or entity is an employer, the Court applies the economic  
5 reality test. *Becerra Becerra*, 181 Wn.2d at 196-97; *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th  
6 Cir. 1997); *Morgan v. MacDonald*, 41 F.3d 1291, 1292 (9th Cir. 1994), cert. denied, 515 U.S.  
7 1148 (1995). In considering whether an entity is an employer or joint employer under this flexible  
8 test, the Court considers non-exhaustive factors, such as the nature and degree of control of the  
9 workers; the degree of supervision, direct or indirect, of the work; the power to determine the pay  
10 rates or the methods of payment of the workers; the right, directly or indirectly, to hire, fire, or  
11 modify the employment conditions of the workers; and preparation of payroll and the payment of  
12 wages. *Becerra Becerra* at 196-97; *Torres-Lopez* at 639-40.

13 The economic reality test looks differently at the personal liability of an individual. A  
14 person acting directly or indirectly in the interest of an employer in relation to an employee, means  
15 someone who acts on behalf of the Employer in the ordinary sense by hiring, supervising, paying,  
16 and managing workers. *See Falk v. Brennan*, 414 U.S. 190, 192-93, 195 (1973).

17 **This test extends FLSA “employer” liability to individuals who are chief**  
18 **corporate officers of the business, have a significant ownership interest in the**  
19 **business, control significant aspects of the business's day-to-day functions, and**  
20 **determine employee salaries and make hiring decisions.**

21 *Diaz v. Longcore*, 751 Fed. Appx. 755, 758-59 (6<sup>th</sup> Cir. 2018) (citing *U.S. Dep't of Labor*  
22 *v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir. 1995) (emphasis added); *also see Donovan v.*  
23 *Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984); *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st  
24 Cir. 1983). Additionally, unexercised authority is not enough to show liability as a joint employer.  
25 *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008).

26 This differing test makes sense when trying to analyze who caused the violations to occur.  
The purpose of the economic reality test is to find the parties actually responsible for the violation,



1 “without obfuscation by legal fictions applicable in other contexts.” *Dole v. Simpson*, 784 F. Supp.  
2 538, 545 (S.D. Ind. 1991). Courts have cautioned that the using too broad a definition of  
3 “employer” could lead to individuals being liable who had some supervision over the aggrieved  
4 employees, but in reality were not the individuals responsible for the violations occurring. *See*  
5 *Agnew* at 1511-14; *Baystate Alternative Staffing v. Herman*, 163 F. 3d 668, 677-78 (1st Cir. 1998).  
6 The definition of Employer “[t]aken literally and applied in this context, it would make any  
7 supervisory employee, even though without any control over the corporation’s payroll, personally  
8 liable for the unpaid or deficient wages of other employees.” *Id.* Yet it is that precise overbroad  
9 definition that the City looks to apply here against Mr. Machado.

10  
11 We already know that Mr. Machado was not a chief corporate officer of any of the entities  
12 at issue and he does not have a significant ownership interest in any of the businesses at issue.  
13 Even though these factors are necessary under the personal liability analysis, we will also show  
14 how Mr. Machado did not control significant aspects of the businesses’ day-today functions in a  
15 way that caused the alleged violations. Without having this significant control, Mr. Machado  
16 cannot be held personally liable for any of the alleged Ordinance violations in this case.

17 **A. Wage Theft Ordinance (SMC 14.20)**

18 An employer violates this Ordinance by not paying all compensation owed to an employee  
19 by reason of employment. SMC 14.20.020. Employers are also to display a poster enumerating  
20 workers’ rights pertaining to this statute and give written notice of information pertaining to hours  
21 worked and wage calculations. SMC 14.20.025. An Employer is also to keep payroll records.  
22 SMC 14.20.030. Retaliation for the exercise of these rights by an employee is also prohibited.  
23 SMC 14.20.035.

24 To be liable for violations under this statute, an individual would need to have some role  
25 in determining whether a workers’ compensation was paid, whether deductions would be taken  
26 from pay, posting workers’ right posters, keeping or maintaining records, or in retaliating against

1 the aggrieved workers. Mr. Machado did not have a role in any of this.

2 1. Mr. Machado never received a cut of any aggrieved workers' pay.

3 The City alleges that Mr. Machado had an agreement to receive an eight percent cut of  
4 what the Baja USA workers were paid.

5 The only evidence the City submits with their motion is a declaration that claims Mr.  
6 Contreras told “us” that he and Machado had an arrangement in which Machado received a cut  
7 when workers were paid. Ponce Decl. ¶ 12. It is unclear who “us” encompasses or when this was  
8 allegedly said. It is also not specified whether the workers referenced were the aggrieved workers,  
9 or other unrelated individuals. Further, the declarant does not try to quote Mr. Contreras on this  
10 issue. He claimed that Machado “would frequently threaten to report workers to ICE” but he does  
11 not allege that Machado made these threats in reference to anything specific. Ponce Decl. ¶ 13.  
12 Nor does he specify the workers that these threats were made to, or if these workers were from  
13 Baja or Newway, or whether he himself overheard Machado say these things. He further alleges  
14 that Roberto “was taking orders” from Machado but does not explain why he says this. Ponce  
15 Decl. ¶ 16. He says that Machado “had the authority to hire and fire workers. He would tell  
16 Roberto if he needed more workers or wanted to let someone go. I heard the discussions between  
17 Tony and Roberto to this effect.” Ponce Decl. ¶ 17. However, the declarant does not try to quote  
18 Mr. Machado on this matter, nor does he state whether Mr. Contreras acted on these statements.  
19 Mr. Machado objects to any consideration of these inadmissible conclusory statements from Mr.  
20 Ponce; however, despite these objections to admissibility, all the other evidence, which is far less  
21 conclusory, contradicts these statements.  
22

23 Newway, Baja USA, and Mr. Machado have all stated that such an agreement never  
24 existed. Kincaid Decl, Ex. 2, 54:11-13; Kincaid Decl., Ex. 1, 116:11-117:23, 118:8-25; Kincaid  
25 Decl., Ex. 5, 45:4-46:18; Kincaid Decl., Ex. 3, Requests for Admissions 3, 6, 7, 8. In fact, the City  
26 sought all checks issued from Baja Concrete in their attempts to corroborate these allegations. The

1 only payments Machado ever received from anyone, other than his salary from Newway, were to  
2 repay a small loan he made to Carlos Ibarra. Kincaid Decl., Ex. 1, 108:11-14. Mr. Machado  
3 received only the amount that he was owed without interest. *Id.* at 112:5-13. Mercedes De Armas,  
4 whose company processed all checks for Baja USA including issuing checks to Baja USA's  
5 workers, testified that Mr. Machado was never sent any payments other than in repayment for a  
6 loan. Kincaid Decl., Ex. 5, 45:4-46:18; Kincaid Decl., Ex. 3, Requests for Admissions No. 3, 6,  
7 7. She also testified that Mr. Machado was not receiving any monthly payment from Baja USA.  
8 Kincaid Decl., Ex. 5, 45:4-46:18. There is no evidence that Mr. Machado was receiving a portion  
9 of what the Baja USA workers were paid either monthly or otherwise as the City contends.

10 2. Mr. Machado made no decisions regarding pay, deductions or breaks.

11 The evidence will show that Mr. Machado had no control over or role in the aggrieved  
12 workers' unpaid straight time, unpaid overtime, deductions, or lost meal and rest breaks.

13 The payroll and paychecks for the aggrieved workers were processed and issued by Baja  
14 USA, through Mercedes Accounting. Kincaid Decl., Ex. 5, 33:18-34:16. Payroll was done by  
15 taking the summary of hours given to payroll by Roberto Contreras. Kincaid Decl., Ex. 4, 17:21-  
16 5, 18:18-19:5, 27:18-28:11, 38:3-6, 38:19-39:7, 71:6-23, 76:14-24. Further deductions were taken  
17 from payroll based on information from Roberto Contreras and from Baja USA issued credit cards  
18 held by Baja USA supervisors. Kincaid Decl., Ex. 5, 53:3-22. Mr. Machado had no knowledge of  
19 or role in this process as he did not work for Baja USA. Kincaid Decl., Ex. 1, 98:18-99:7.

20 Mr. Machado is also not an officer of Baja USA or in control of its day-to-day operations  
21 and has no say in its policies, including any policies about pay or payroll. Kincaid Decl., Ex. 3,  
22 Requests for Admissions No. 1-5. He has not been alleged as having any involvement in these  
23 unauthorized deductions or having any control over them as Baja Concrete was the entity taking  
24 these deductions out of the workers' pay. He also has not been alleged as having any power to  
25 issue paychecks for Baja Concrete, make decisions on payroll practices at Baja Concrete, or  
26 otherwise make any decisions in whether workers were paid for all of their hours worked. He was

1 not even the individual involved in deciding which workers (Baja Concrete or Newway workers)  
2 would work overtime if a concrete project required more than eight hours of work a day to remain  
3 on the project schedule. Kincaid Decl., Ex. 1, 45:18-47:18, 54:3-24. He also did not tell workers  
4 when to take any meal or rest breaks. *Id.* at 54:3-24. There is simply no evidence of any sort that  
5 Mr. Machado had any involvement sufficient to make him responsible for unpaid straight time,  
6 overtime, unlawful deductions, and meal and rest breaks.

7 In fact, a look at the evidence will show that it was really Baja USA who was responsible  
8 for causing these violations to occur. It was not unusual that Baja USA made profits of over  
9 \$30,000 a month to over \$100,000 some months. Kincaid Decl., Ex. 6. Baja USA kept  
10 approximately half of what Newway paid it, rather than paying the workers what they were owed  
11 according to the timesheet summaries provided by Roberto Soto Contreras. If they had not kept  
12 such a substantial profit for themselves, none of the respondents would be here today. Either way,  
13 Mr. Machado had zero involvement in this.

14  
15 3. Mr. Machado did not retaliate against the aggrieved workers.

16 There is also no evidence that Mr. Machado retaliated against the aggrieved workers, either  
17 by retaliating himself or directing someone else to retaliate. Although Mr. Ponce claims in his  
18 conclusory declaration that Machado would threaten to report workers to ICE, he does not say  
19 that Mr. Machado did this because of an exercise of any rights workers held under this Ordinance.  
20 Ponce Decl., ¶ 13. Mr. Ponce also does not say the workers to whom these threats were made, or  
21 that he ever heard Mr. Machado make any of these threats, or when these threats allegedly were  
22 made. Ponce Decl., ¶ 13. Given this, we do not know if this even involved any of the aggrieved  
23 workers in this case. And as with all his other statements, he does not try to quote Mr. Machado  
24 so that the hearing examiner can make his own determination of what occurred here. Ponce Decl.,  
25 ¶ 13.

26 Further, given that Mr. Ponce does not state any information about how he knows Mr.

1 Machado in his declaration, he may be confusing Mr. Machado for someone else on the worksite.  
2 This was a large worksite with many individuals from different trades working there at one time.  
3 These workers reported to Roberto Soto Contreras and the other Baja USA supervisors, and  
4 Roberto Soto Contreras reported to Tom Grant at Newway; none of these individuals reported to  
5 Mr. Machado. Kincaid Decl., Ex. 1, 32:10-19, 136:9-137:1; Kincaid Decl., Ex. 2, 8:3-7, 18:5-15,  
6 24:4-8; Kincaid Decl., Ex. 4, 161:22-162:14. As a superintendent, Mr. Machado was not involved  
7 in directing the workers from Newway or Baja USA. Kincaid Decl., Ex. 2, 25:1-21; Kincaid Decl.,  
8 Ex. 1, 21:19-24:9, 25:19-26:4, 43:25-44:22. Additionally, Mr. Machado denies that he has ever  
9 threatened to report any workers to ICE or retaliated in any way against them. Kincaid Decl., Ex.  
10 1, 77:7-24. Based on the above, there is no evidence that Mr. Machado retaliated, directly or  
11 indirectly, against the aggrieved Baja USA workers for exercising any of their rights under this  
12 Ordinance.

13  
14 **B. Minimum Wage Ordinance, (SMC 14.19)**

15 An employer must pay its employees an hourly minimum wage. SMC 14.19.030-040.  
16 Employers are also supposed to display posters about employee rights under this Ordinance. SMC  
17 14.19.045. An employer must also keep records documenting information pertaining to wages and  
18 compensation. SMC 14.19.050. An employer also cannot retaliate against employees for  
19 exercising their rights under this Ordinance. SMC 14.19.055. (See Wage Theft section addressing  
20 the retaliation arguments against Mr. Machado).

21 To be liable for a violation of this Ordinance, an individual would need to have some role  
22 in setting the aggrieved workers' pay or processing their payroll in a way that denied them the  
23 hourly minimum wage. Or they would need to handle putting up the pertinent employees' rights  
24 posters or retaining records pertaining to wages or compensation. Or an individual could be liable  
25 by retaliating against any of the aggrieved workers for exercising their rights under this Ordinance.

26 1. Mr. Machado had no role regarding pay, retaining records, or putting up posters.

1 Again, Mr. Machado had no role in setting the aggrieved workers' pay or processing their  
2 payroll. He was not involved in hiring or setting the wages of the aggrieved workers, nor was he  
3 involved in any negotiations between Baja Concrete and Newway regarding the subcontracting  
4 arrangement. Kincaid Decl., Ex. 1, 73:5-7, 163:6-14; Kincaid Decl., Ex. 2, 27:17-2:4. He did not  
5 process paychecks or payroll for the aggrieved workers, nor did he have control or authority over  
6 any policies or decisions made with respect to paychecks or payroll issued. Nor was Tony  
7 responsible for maintaining any records of employment or posting employees' rights posters.

8 **C. Paid Sick and Safe Time Ordinance (SMC 14.16)**

9 An employer must provide its employees with paid sick and safe time and allow its  
10 employees to use any accrued paid sick and safe time. SMC 14.16.025-030. The employer must  
11 display a poster on employee rights under this ordinance and provide employees with its leave  
12 policies. SMC 14.16.045. An employer must keep records pertaining to paid sick and safe time.  
13 SMC 1416.050. Finally, an employer cannot retaliate against an employee for exercising their  
14 rights under this Ordinance. SMC 14.16.055.

15 Like the other statutes, an individual would need to have some role in providing and  
16 allowing the aggrieved workers to use accrued paid sick and safe time, in putting up pertinent  
17 employees' rights posters, retaining records of paid sick and safe time, or in retaliating against an  
18 employee for exercising their rights to paid sick and safe time. (See Wage Theft section addressing  
19 the retaliation arguments and Minimum Wage section regarding the keeping and maintaining of  
20 employment records and putting up employees' rights posters).

21 1. Mr. Machado was uninvolved in Baja USA workers paid sick and safe time (PSST).

22 Mr. Machado was not involved in the PSST of Baja USA workers. The City has also  
23 submitted no evidence with their motion that Mr. Machado had any role whatsoever in the  
24 aggrieved workers' PSST.

25 In Baja USA's deposition, their representative testified that the aggrieved workers reported  
26 to Roberto Soto Contreras on their sick leave and then that Mr. Contreras reported this information

1 on to Baja USA's payroll. Kincaid Decl., Ex. 4, 78:12-80:7. Mr. Machado is not mentioned in  
2 reference to sick leave in Mr. Ponce's declaration. *See* Ponce Decl., ¶ 7. Mr. Machado did not  
3 process payroll and set PSST policies for Baja USA, so he would have no role in deciding whether  
4 workers were paid for days sick leave was taken or whether deductions were taken from their pay  
5 pertaining to PSST.

## 6 VII. CONCLUSION

7 Based on the above arguments, Mr. Machado respectfully requests that the hearing  
8 examiner deny the City's motion for summary judgment.

9 Signed this 3<sup>rd</sup> day of August, 2022.

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**DECLARATION OF SERVICE**

I caused a copy of the foregoing Appellant Antonio Machado's Preliminary Witness and Exhibit List to be served to the following in the manner indicated:

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On today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

Signed and DATED this 3rd day of August 2022 in Seattle, Washington.

s/ Elena Maltos  
Elena Maltos, Legal Assistant