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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.  
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Hearing Examiner Files:  
LS-21-002, LS-21-003, LS-21-004  
(consolidated)

**APPELLANT BAJA CONCRETE USA  
CORP.'S REPLY TO RESPONDENT CITY OF  
SEATTLE'S RESPONSE TO BAJA CONCRETE  
USA CORP.'S MOTION TO EXCLUDE  
EVIDENCE**

15 Department Reference: 2020-00186-LS  
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17 **I. INTRODUCTION**  
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19 On July 1, 2022, Appellant Baja Concrete USA Corp. ("Baja Concrete") submitted a  
20 Motion to Exclude Evidence ("Baja Motion to Exclude") in this matter, specifically requesting  
21 that the Hearing Examiner exclude from these proceedings the Unsigned Witness Statements (as  
22 defined in the Baja Motion to Exclude) and all evidence, findings of fact and conclusions of law  
23 which rely on the Unsigned Witness Statements, and all testimony, declarations and other  
24 evidence provided by any personnel of the City of Seattle Office of Labor Standards ("OLS"),  
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1 which are based on the interviews conducted which led to or are based on the Unsigned Witness  
2 Statements.

3 Appellant Antonio Machado likewise submitted a Motion for Exclusion of Evidence on  
4 July 1, 2022, seeking to exclude the same Unsigned Witness Statements. Appellant Newway  
5 Forming, Inc. filed a Joinder in the Baja Motion to Exclude Evidence, dated July 11, 2022. The  
6 only opposition to the Baja Motion to Exclude was filed by Respondent City of Seattle August 3,  
7 2022, in which they opposed the motions to exclude evidence brought by Baja Concrete,  
8 Newway Forming Inc. and Antonio Machado.

9 Baja Concrete now submits this brief in strict reply to the City of Seattle's opposition to  
10 the Baja Motion to Exclude.

11 **II. THE HEARING EXAMINER SHOULD VIEW THE MOTION TO EXCLUDE AS A**  
12 **MOTION IN LIMINE**

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14 In its opposition, the City of Seattle argues that the Baja Motion to Exclude is an  
15 evidentiary motion for trial and is subject to the OLS laying a foundation via testimony to aid in  
16 a ruling under the Hearing Examiner Rules of Practice Procedure. *City of Seattle Response at*  
17 *pg. 1, lines 22-23*. Rather than an evidentiary motion for trial, the Hearing Examiner should  
18 view the Baja Motion to Exclude as a motion in limine.

19 A motion in limine is designed to assist the trial court in the presentation of admissible  
20 evidence and the exclusion of inadmissible evidence, thereby expediting trial and limiting trier of fact  
21 confusion based on numerous or duplicative objections. *Fenimore v. Donald M. Drake Constr. Co.*, 87  
22 Wn.2d 85, 89-90, 549 P.2d 483 (1976); *Gammon v. Clark Equip. Co.*, 38 Wn. App 274, 286, 686 P.2d.  
23 1102 (1984) affirmed, 104 Wn.2d 613, 707 P.2d 685 (1985). Trial courts have a wide degree of  
24 discretion in granting or denying a motion in limine. *Id.* A trial court should grant a motion in limine  
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1 if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial  
2 court to determine that it is clearly inadmissible under the issues as drawn or which may develop  
3 during the trial, and if the evidence is so prejudicial in its nature that the moving party should be  
4 spared the necessity of calling attention to it by objecting when it is offered during the trial. *Amend v.*  
5 *Bell*, 89 Wn.2d 124, 130, 570 P.2d 138 (1977).

6 As explained in the Baja Motion to Exclude, the Unsigned Witness Statements are clearly  
7 inadmissible on a number of grounds. The Unsigned Witness Statements should be excluded in  
8 order to expedite the hearing and to avoid numerous and duplicative objections during the  
9 hearing.

10 **II. THE HEARING EXAMINER RULES OF PRACTICE AND PROCEDURE (HER) AND**  
11 **THE SEATTLE MUNICIPAL CODE (SMC) REQUIRE THAT THE UNSIGNED WITNESS**  
12 **STATEMENTS BE EXCLUDED**

13 HER 2.14(a) states:

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

17 Based on witness disclosure lists provided in discovery in this matter, at most, one  
18 witness, Jonathan Ivan Parra Ponce, who was interviewed by the OLS in connection with the  
19 preparation of the Unsigned Witness Statements, may testify at the hearing in this matter. As  
20 such, the witnesses who are the subjects of the Unsigned Witness Statements, other than Mr.  
21 Ponce, will not be testifying under oath and will not be subject to cross-examination. HER  
22 2.14(a), therefore, requires exclusion of the Unsigned Witness Statements.

23 HER 2.17(b) states:

24 “The (Hearing) Examiner may exclude evidence that is irrelevant,  
25 unreliable, immaterial, unduly repetitive, or privileged.”

1 The Unsigned Witness Statements must be excluded pursuant to HER 2.17(b) because they are  
2 unreliable. As explained in the Baja Motion to Exclude, it is a common practice of the OLS to have  
3 witnesses review their statements for accuracy, make corrections to the statements, and sign them  
4 under penalty of perjury. Such common practice is undoubtedly for the purpose of ensuring the  
5 “reliability” of the statements.  
6

7 The Unsigned Witness Statements must also be excluded pursuant to the contested case  
8 provisions of the SMC. SMC 3.02.020 states:

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

13 Further, SMC 3.02.090(M) states:

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

16 With the possible exception of Mr. Ponce, none of the witnesses who are the subjects of  
17 the Unsigned Witness Statements will testify at the hearing in this matter. As such, Baja  
18 Concrete will have no opportunity to cross-examine the witnesses. Therefore, pursuant to SMC  
19 3.02.090(M), the Unsigned Witness Statements must be excluded.  
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### 21 **III. THE OLS CANNOT LAY A FOUNDATION AS TO UNSIGNED WITNESS** 22 **STATEMENTS**

23 In its opposition to the Baja Motion to Exclude, the City of Seattle argues that, since the  
24 SMC provides that every party shall have the right of cross examination of witnesses who testify,  
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1 the issue of exclusion of the Unsigned Witness Statements should essentially be reserved for the  
2 hearing. *City of Seattle Response at pg. 3, lines 3-6.* Given that the witnesses who are the  
3 subjects of the Unsigned Witness Statements will not be testifying at the hearing in this matter,  
4 the OLS will be unable to lay a foundation for the admissability of the Unsigned Witness  
5 Statements. Therefore, they must be excluded.

#### 6 **IV. CONCLUSION**

7 Appellant Baja Concrete hereby requests that the Hearing Examiner consider the Baja Motion  
8 to Exclude as a motion in limine and grant the requested motion in order to expedite the hearing and  
9 avoid numerous and duplicative objections .

10 Respectfully Submitted this 17th day of August, 2022.

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13 MDK LAW

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15 */s/ Mark D. Kimball*

16 */s/ Alex T. Larkin*

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