BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the matter of the Appeal of:	)	Hearing Examiner File:
	)	**No.: LS-21-002**
BAJA CONCRETE USA CORP., ROBERTO CONTRERAS, NEWWAY FORMING INC., and ANTONIO MACHADO	)	**LS-21-003**
	)	**LS-21-004**
from a Final Order of the Decision issued by the Director, Seattle Office of Labor Standards	)	RESPONDENT CITY OF SEATTLE'S REPLY TO BAJA CONCRETE USA CORP.'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The material facts establishing Appellant Baja Concrete USA Corp. ("Baja") as an employer are undisputed in this case. Baja jointly employed the workers ("Workers") according to the definition of "employer" in Seattle Municipal Code Sections 14.16.010, 14.19.010, 14.20.010 and based on the factors outlined in *Becerra*.[1] In its response, Baja ignores several undisputed facts which clearly establish itself as an employer. Baja's attempt to shield itself from responsibility by pointing to Roberto Soto Contreras fails since Baja paid Soto Contreras for his services and he clearly acted as Baja's agent. The Hearing Examiner should grant the City's Motion for Summary Judgment and not allow Baja to use Soto Contreras as a means to avoid the consequences for failing to comply with applicable labor laws.

[1] *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 195, 332 P.3d 415 (2014) (using FLSA's "suffer or permit" standard in considering joint employment under Washington's Minimum Wage Act).

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II. THE MATERIAL FACTS ARE UNDISPUTED.

Baja suggests that there is a factual dispute sufficient to deny the City's Motion for Summary Judgment ("City's Motion"). However, no dispute involving any material facts exists. Although Baja contends that nothing shows Soto Contreras was an employee of Baja, these undisputed facts remain – Soto Contreras had a business card with his name and "Baja Concrete USA" on it and Baja paid Soto Contreras for his services. Baja claims items produced in discovery "indicate a factual issue of material fact" that require a hearing.[2] This bare assertion is not sufficient to find that material facts are in dispute. To the contrary, the material facts showing Baja was an employer cannot be disputed because they are based on information from Baja – paystubs provided by Baja, communication with Baja's representative during the investigation, and sworn testimony provided by Baja's 30(b)(6) witness.

III. BAJA OFFERS NO OPPOSITION TO OLS' DETERMINATION THAT THE VIOLATIONS OCCURRED.

Baja offers no opposition to the fact that the many wage theft, minimum wage, and Paid Sick and Safe Time ("PSST") violations occurred or to OLS' calculation of back wages. Instead, Baja raises a vague challenge to the Office of Labor Standards ("OLS") Director's sound exercise of discretion and, without any legal basis, invites the Hearing Examiner to reject the Director's assessment of remedies. The Director's assessment of remedies was reasonable in this case. In setting the amounts of liquidated damages and penalties, the Director considered the circumstances of this case, including information that these are the employers' first violations. The Director's decision complied with the terms of Seattle's Minimum Wage, Wage Theft, and PSST Ordinances ("Ordinances") and was not "manifestly unreasonable." The amount of liquidated damages and penalties were reasonably assessed as they were within the range prescribed by the Ordinances. The

[2] Baja's Response to City's Motion for Summary Judgment, page 14.

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remedies set by OLS must be upheld.

IV. OLS PROPERLY EXERCISED ITS DISCRETION IN SETTING LIQUIDATED DAMAGES AND PENALTIES IN THIS CASE.

In calculating the amounts of liquidated damages and penalties, the Director followed the explicit commands of the Ordinances. Baja contends that the Hearing Examiner should "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."[3] However, Baja offers nothing to support its position that the amounts should be reduced. As discussed in the City's Motion, discretion as to the remedies and penalties is delegated to the *Director*, not employers, and should be upheld unless it is shown that the Director abused discretion.[4]

The test for whether the Director abused their discretion is whether the exercise of discretion was "manifestly unreasonable" or, in other words, whether the discretion was "exercised on untenable grounds or for untenable reasons."[5] In this case, the Director's exercise of discretion was not "untenable" and since the City established that the Director's calculations were in accordance with the Ordinances, the Hearing Examiner must uphold the Director's calculations.

Here, Baja falls far short of showing that the Director's approach was "manifestly unreasonable" as would be required for this tribunal to displace the Director's calculations.[6] There is no dispute that the Workers are owed back wages due to multiple violations of the Seattle Municipal Code.[7] Based on those violations, the Director has discretion to set remedies, including back wages, liquidated damages, and penalties. Baja asks this tribunal to reduce the assessed remedies but never

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[3] Appellant Baja Concrete's Response to Seattle's Motion for Summary Judgment, page 15.
[4] *See* SMC 14.19.090.A; *see also* City's Motion for Summary Judgment, pp. 38-39.
[5] *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510 (1992), *aff'd,* 122 Wn.2d 801 (1993).
[6] *Id.*
[7] *See* City's Motion for Summary Judgment, pages 7-8 (listing the multiple Minimum Wage, Wage Theft, and Paid Sick and Safe Time violations).

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addresses the fact that, in setting remedies, agency discretion must be especially broad, because it is an area of particular agency competence.[8]

Baja's invitation for the Hearing Examiner to summarily reduce the remedies, without any supporting case law, must be rejected. Where an administrative agency sets penalties or other remedies within a range set by statute, that action is presumptively within the sound discretion of the agency.[9] Because the Director set liquidated damages and penalties at amounts within the range for first time violators set by the Ordinances, and was otherwise not manifestly unreasonable in the determinations, this tribunal must uphold the Director's assessment of liquidated damages and penalties.

V. BASED ON THE UNDISPUTED FACTS, BAJA EMPLOYED THE WORKERS.

Baja employed the Workers listed in the Findings of Fact, Determination and Final Order ("Determination") because Baja falls squarely within the Seattle Municipal Code ("SMC") definition of "employer." In claiming that the Determination lacked sufficient information to find that Baja is an employer, Baja focuses on the portions of the Determination in which OLS analyzed whether Newway Forming, Soto Contreras, and Antonio Machado were joint employers. OLS used the joint employment analysis to examine whether, *in addition to* Baja, any other entities could also be considered employers. As OLS noted in the Determination, there "is no dispute that Respondent Baja Concrete employed the employees listed in Attachment B."[10]

The term "Employer" is defined as "any individual, partnership, association, corporation, business trust, or any entity, person or group of persons, or a successor thereof, that employs another

[8] *State ex rel. Washington Fed'n of State Emp., AFL-CIO v. Bd. of Trustees of Cent. Washington Univ.*, 93 Wn.2d 60, 69 (1980).

[9] *Shanlian v. Faulk*, 68 Wn. App. 320, 328 (1992) (finding that an agency setting a fine at the maximum of the range was appropriate even though it may not have been consistent with other fines and cautioning that courts should not interfere with the allowable area of agency discretion).

[10] Findings of Fact, Determination and Final Order, page 4.

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person and includes any such entity or person acting directly or indirectly in the interest of an employer in relation to an employee."[11] The Ordinances broadly define the term "Employ" as "to suffer or permit to work."[12] Here, the undisputed facts demonstrate that Baja was an employer because it was an entity which permitted each Worker to work. As discussed in the City's Motion, each Worker was dependent on Baja for their pay and each Worker provided the service which allowed Baja to carry out its duties under Baja's agreement with Newway.

Notably, in its response, Baja does not dispute any of the following facts which were discussed in the City's Motion:

1. Baja was formed to provide labor to Newway;
2. Baja incorporated in Washington to provide labor to Newway;
3. Baja received compensation directly from Newway for providing labor to Newway;
4. Baja arranged the accounting services used to process the payroll to pay the Workers who provided labor to Newway;
5. Baja, through Soto Contreras, hired each of the Workers listed in the Determination to perform work at the 1120 Denny Way site;
6. Baja stayed involved in the hiring process (the president of the company needed to be informed of new hires);
7. Soto Contreras acted as Baja's representative (the business card with his name and "Baja Concrete USA" on it) and Baja paid for Soto Contreras' services;
8. Soto Contreras kept Baja informed as he carried out his duties;
9. Soto Contreras, on behalf of Baja, negotiated Workers' pay rates which were then paid *by Baja*;
10. Soto Contreras, on behalf of Baja, reviewed timesheet records with Newway, attached the timesheets to the invoices submitted to Newway, and then Newway paid the invoiced amount to Baja, not to Soto Contreras, each pay period;
11. Workers were on Baja's payroll and received their pay directly from Baja;
12. Baja paid Workers every two weeks through direct deposit but never paid in cash;
13. Baja paid Workers' payroll taxes;
14. Baja listed themselves as the "employer" on Workers' paystubs;
15. Baja arranged housing and transportation for Workers and paid other expenses using a Baja company credit card;
16. Baja's representative referred to Workers as "employees" during OLS's investigation;
17. Baja admitted they were obviously "in charge" in relation to their role compared to Soto Contreras' role;

[11] SMC 14.16.010. 14.19.010, 14.20.010.
[12] SMC 14.16.010. 14.19.010, 14.20.010; *see* 29 U.S.C. § 203(g) (FLSA).

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18. Soto Contreras *and* Baja communicated with Newway regarding invoices.[13] Newway compensated Baja at a higher rate than the rate that Baja paid its Workers, giving Baja a profit.

Baja's claim that they did not employ the Workers, after years of acting as the employer, is without merit and should be rejected. Substantial, undisputed evidence supports the conclusion that Baja employed the Workers by permitting each Worker to work to Baja's benefit. The undisputed facts clearly establish that Baja acted as an employer from its creation, throughout the relevant time period, and during OLS's investigation. Accordingly, on this basis, the City's Motion for Summary Judgment should be granted.

VI. BAJA IS A JOINT EMPLOYER BASED ON SEATTLE HUMAN RIGHTS RULES.

The Ordinances also contemplate joint employment. Under the Ordinances, "[m]ore than one entity may be the 'employer' if employment by one employer is not completely disassociated from employment by the other employer."[14] Based on the undisputed material facts of this case, Baja also is a joint employer.

The Seattle Human Rights Rules ("SHRR") govern the practices of OLS in administering requirements for minimum wage and minimum compensation under SMC section 14.19.[15] Specifically, SHRR 90-045(3) provides guidance to determine whether employment is joint employment, or separate and distinct employment in a given case.[16] Whether employment is joint employment or not "depends upon all the facts in the particular case."[17] Joint employment may be found where: the employee performs work that simultaneously benefits two or more employers, or one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee, or the employers are not completely disassociated with respect to the

[13] Declaration of Lorna S. Sylvester, Exhibit B, 30(b)(6) Deposition of Mercedes De Armas, page 165, line 24 to page 166, line 3 (Previously filed in support of City's Response to Baja's Motion for Partial Summary Judgment).
[14] SMC 14.16.010. 14.19.010, 14.20.010.
[15] SHRR 90-001.
[16] SHRR 90-045(3).
[17] *Id.*

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employment of a particular employee and they 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.[18]

Clearly, based on the undisputed facts, the Workers performed work that benefitted Baja since Baja was compensated at a higher rate than the rate they paid to Workers. Clearly, Soto Contreras acted directly in the interest of Baja in relation to the Workers. If Soto Contreras negotiated the rate that Baja subsequently would have to pay to the Workers, Baja benefited from Soto Contreras' negotiation because the funds to pay the Workers came from Baja, not Soto Contreras. And clearly, Baja and Soto Contreras were not completely disassociated with respect to the Workers because Soto Contreras had a "Baja Concrete USA" business card and was paid for the services he provided to Baja. Soto Contreras acted as Baja's agent. Everything Soto Contreras did also benefitted Baja because Baja was the entity providing labor to Newway, being compensated by Newway, and paying Workers.

Baja ignores but cannot dispute the fact that when comparing its role with the role of Soto Contreras, Baja's 30(b)(6) witness admitted "Well, obviously, Baja Concrete USA is the one in charge here, right?"[19] Based on all the undisputed material facts, Baja's actions demonstrate that they jointly employed the Workers pursuant to the SHRR.

VII. ACCORDING TO THE FACTORS OUTLINED IN *BECERRA*, THE UNDISPUTED FACTS ESTABLISH BAJA IS A JOINT EMPLOYER.

The City discussed *Becerra Becerra v. Expert Janitorial, LLC*[20] at length in the City's Motion. To summarize, *Becerra* involved an examination of joint employer liability under the Minimum Wage Act ("MWA"), Revised Code of Washington ("RCW") Ch. 49.46, for minimum wage and overtime

[18] *Id.* (emphasis added).
[19] 30(b)(6) Deposition of Mercedes De Armas, page 165, lines 6-15.
[20] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014).

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requirements.[21] Plaintiffs were janitorial workers *directly employed* by second-tier service providers and then subcontracted by another company, Expert, to provide janitorial services at Fred Meyer stores.[22] The Washington Supreme Court examined whether Expert and Fred Meyer were employers under the MWA.[23] The Washington Supreme Court reversed the lower court's summary judgment dismissal and remanded for further consideration of all relevant factors.[24]

The Washington Supreme Court ruled that the factors outlined in *Torres-Lopez*[25] should be used as an "economic reality" test to determine whether a joint employment relationship exists under minimum wage statutes.[26] The "economic reality" test involves an examination of 13 nonexclusive factors, including five formal or regulatory factors[27] and eight common law or functional factors.[28] However, these "factors are not exclusive and are not to be applied mechanically or in a particular order."[29] A court considering joint employment must examine the "circumstances of the whole activity."[30]

In addition to the 13 factors, a court can "consider any other factors it deems relevant to its assessment of the economic realities."[31] The economic reality test "offers a way to think about the

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[21] *Id.*
[22] *Id.* at 190-91 (emphasis added).
[23] *Id.* at 193 (the Washington Supreme Court did not examine whether the second-tier employer was a joint employer).
[24] *Id.* at 196-200.
[25] *Torres–Lopez v. May,* 111 F.3d 633 (9th Cir.1997).
[26] *Becerra*, 181 Wn.2d at 196-97.
[27] *Id.* (citing *Torres-Lopez*, 111 F.3d at 639-40) (the regulatory factors are (A) The nature and degree of control of the workers; (B) The degree of supervision, direct or indirect, of the work; (C) The power to determine the pay rates or the methods of payment of the workers; (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and (E) Preparation of payroll and the payment of wages).
[28] *Torres-Lopez*, 111 F.3d at 639-40 (internal quotation marks and citations omitted; alterations in original) (the non-regulatory factors are (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 or foresight, (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).
[29] *Becerra*, 181 Wn.2d at 198.
[30] *Id*. (quoting *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947)).
[31] *Becerra*, 181 Wn.2d at 198 (quoting *Ling Nan Zheng v. Liberty Apparel Co*., 355 F.3d 61, 71-72 (2d Cir. 2003))

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subject and not an algorithm. That's why *toting up a score is not enough.*"[32]

Baja first asserts that Soto Contreras and Newway were the employers and Baja's role in this case should be analyzed using the *Becerra* factors, or an economic reality test.[33] However, the joint employment analysis and factors articulated in *Becerra* are not central to the analysis of Baja's culpability because Baja's role is analogous to the second-tier service providers in *Becerra* and falls squarely within the SMC definition of "employer."[34] In *Becerra*, the existence of an employment relationship with the second-tier service providers was not in dispute.[35] As OLS noted in the Determination, there can be no dispute that Baja Concrete employed the Workers.

Still, Baja maintains that at most, three of the factors outlined in *Becerra* apply with respect to Baja and the Workers.[36] With this claim, Baja continues to ignore the undisputed facts demonstrating their obvious employer-employee relationship with the Workers. However, based on those three factors alone, the Hearing Examiner could find Baja is a joint employer since, as noted above, the economic reality factors are not an algorithm. One factor "can serve as the basis for finding that two or more persons or entities are 'not completely disassociated' with respect to a worker's employment if the facts supporting that factor demonstrate that the person or entity has a substantial role in determining the essential terms and conditions of a worker's employment."[37]

If the economic reality test factors are examined with respect to Baja, the undisputed material facts demonstrate that more than three factors are present in this case: Baja determined the methods of payment of the Workers, Baja was part of the hiring process since hiring decisions were made with

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[32] *Becerra*, 181 Wn.2d at 198 (quoting *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (emphasis added).
[33] Baja's Response to City's Motion for Summary Judgment at p. 10.
[34] SMC 14.16.010, 14.19.010, and 14.20.010 ("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.).
[35] *Becerra*, 181 Wn.2d at 192-93.
[36] Baja's Response to City's Motion for Summary Judgment, at p. 11.
[37] *Salinas v. Commercial Interiors, Inc*., 848 F.3d 125, 142 (4th Cir. 2017).

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the president of Baja, Baja prepared payroll and paid the wages, Baja's payroll provider reviewed Soto Contreras' payroll summaries and all the documents needed for the Workers' pay, Baja made sure payroll was done and taxes were paid.

Workers' tasks can be viewed as a specialty job on the production line. Baja's tasks were part of a broader effort to perform concrete work at the worksite similar to the way picking cucumbers "constituted one small step in the sequence of steps" to grow cucumbers and prepare them for processing in *Torres-Lopez*.[38]

There were no material changes between the labor Baja provided and the labor provided to Newway by a prior labor subcontractor.[39] Also, Workers were economically dependent on Baja because Baja's subcontractor duties were linked to the work Workers performed. If Baja did not get paid, Baja could not pay the Workers for their services.[40]

Workers did not function as a unit that shifted from one worksite to another. Although Baja sent Workers to different sites, they did not shift as an entire unit. Instead, a few Workers were sent to other sites for additional work.[41]

Baja did not require Workers to have any specialized skill set[42] and Workers had no opportunities for profit or loss based on their own managerial skill. Although paystubs often included a "bonus," the bonus amount was used to pay taxes and was never a real bonus based on a Worker's performance or managerial skills.[43] Workers did not have permanence in their working relationship with Baja. Workers did not sign any contracts at the time of hire.

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[38] *Torres-Lopez*, 111 F.3d at 643.
[39] Declaration of Cindi Williams, Exhibit A, 30(b)(6) Deposition of Kwynne Forler-Grant, page 50, line 20 to page 51, line 9; page 93, line 16-18 (Previously filed in support of City's Motion for Summary Judgment).
[40] 30(b)(6) Deposition of Mercedes De Armas at page 166, lines 1-10.
[41] *Id.* at page 92, lines 4-19; 30(b)(6) Deposition of Forler-Grant, page 23, lines 17-22, page 93, lines 3-8, page 93, line 24 to page 94, line 2.
[42] *See* 30(b)(6) Deposition of Forler-Grant, page 88, lines 13-22.
[43] 30(b)(6) Deposition of Mercedes De Armas, page 94, lines 6-17, page 125, line 20 to page 126, line 3.

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Lastly, it should be "beyond dispute that the collective effort of the workers" was an "integral part" of Baja's business;[44] the Workers' services were the *only* part of Baja's business. Baja was created for the purpose of providing labor to Newway and Baja contracted with no other businesses or entities for the Workers' services.[45] All of these factors indicate Baja employed the Workers.

Baja's reliance on *Tradesmen Int'l, LLC*[46] is misplaced. In *Tradesman*, the court examined whether under an economic realities test, a staffing company was an employer of a temporary worker for purposes of the Washington Industrial Safety and Health Act of 1973 ("WISHA").[47] The Washington Supreme Court ruled that courts should utilize a seven-factor economic realities test to determine joint employer liability *for WISHA violations*.[48] The Washington Supreme Court declined "to fully adopt the approach taken in *Becerra* … because not all the considerations are relevant."[49] *Tradesmen* is distinguishable from the instant case in all respects and the reasoning discussed in *Tradesmen* does not apply under these circumstances.

The *Becerra* factors illustrate Baja employed the Workers. The inquiry should focus on the reality of the relationship between the Workers and Baja.[50] Taken as a whole, the undisputed evidence demonstrates the economic reality that the Workers were employed by Baja. Accordingly, the City's Motion should be granted.

VIII. CONCLUSION

The undisputed facts conclusively establish that Baja employed the Workers, based on the plain definition of "employer" in the SMC, the SHRR, and the economic reality factors outlined in

[44] *Torres-Lopez*, 111 F.3d at 644 (quoting *Real v. Driscoll Strawberry Assocs., Inc.,* 603 F.2d 748, 754 (9th Cir. 1979)).
[45] 30(b)6) Deposition of Mercedes De Armas, page 88, line 9-17, page 89, lines 4-23.
[46] *Dept. of Labor and Industries v. Tradesman Int'l, LLC*, 198 Wn.2d 524, 497 P.3d 353 (2021).
[47] *Id.* at 534.
[48] *Id.* at 542 (citing *Potelco, Inc. v. Dep't of Labor & Indus.*, 191 Wn. App 9, 361 P.3d 767 (2015)) (emphasis added).
[49] *Tradesmen*, 198 Wn.2d at 548.
[50] *See Antenor,* 88 F.3d at 932 ("[T]he question in 'joint employment' cases is not whether the worker is more economically dependent on the independent contractor or the grower, with the winner avoiding responsibility as an employer.").

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Becerra. Baja is jointly and severally liable for the violations of Seattle's labor standards that occurred within the relevant time period. For the reasons stated above, the City respectfully requests that the Hearing Examiner grant the City's Motion for Summary Judgment.

DATED this 17th day of August, 2022.

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By: */s/ Lorna Staten Sylvester*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing document, **Respondent City Of Seattle's Reply to Baja Concrete USA Corp.'s Response to City's Motion for Summary Judgment** on the parties listed below and in the manner indicated:

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DATED this 17th day of August, 2022, at Seattle, Washington.

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