

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**

Hearing Examiner File:

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

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

REPLY ON APPELLANT ANTONIO
MACHADO'S MOTION FOR SUMMARY
JUDGMENT AND MOTION FOR
EXCLUSION OF EVIDENCE

I. RELIEF REQUESTED

Appellant Antonio Machado replies to the City's opposition to his motion for summary judgment as well as to the response filed by Baja Concrete USA Corp. The City wants to hold Machado personally liable for several alleged violations amounting to millions of dollars in back wages and penalties, that as an economic reality he was not responsible for causing and in the real world he would never be responsible for paying. Machado is not a corporation or business. He did not own any part of Newway or Baja Concrete (either in the US or Canada) nor was he a chief corporate officer of either. He had no power or authority over either entity in making compensation policies or decisions as to the obligations that were paid and those that were not, including payroll for the aggrieved workers. He did not supervise, hire, or fire them. He also did not threaten or retaliate against any of the aggrieved workers for exercising their rights under the ordinances at issue. Machado is just an individual worker for Newway. The \$2.2 million in back wages and penalties are equivalent to about fourteen years of his earnings, and he is unable to pay even a portion of these back wages and penalties. He should be dismissed from this case.

II. STATEMENT OF GROUNDS

To summarize the facts, this case involves a subcontracting agreement between Newway and Baja USA. Baja USA agreed to perform subcontracting work for Newway at three Seattle sites. Antonio Machado was Newway's superintendent at one of the three sites, 1120 Denny Way, and was not involved in the subcontracting agreement that was made. Kincaid Decl., Ex. 1, 15:24-16:7, 33:9-15; 73:5-7, 163:6-14; Kincaid Decl., Ex. 2, 8:8-20, 27:17-28:4. Baja USA had Roberto Soto Contreras, who was acting on their behalf as either an employee or independent contractor, working as a superintendent for the three Seattle sites. To perform their subcontracting work, Baja USA brought several workers to the three sites that were on Baja's payroll ("aggrieved workers").

A. Contreras managed the workers on Baja USA's payroll.

Baja USA had Roberto Soto Contreras on site supervising and in charge of the aggrieved workers. Kincaid Decl., Ex. 2, 14:4-11; Kincaid Decl., Ex. 4, 76:14-24. In addition to Contreras, there were lower-level supervisors from Baja USA who were in charge when Contreras was at another project. Kincaid Decl., Ex. 2, 73:7-24; Kincaid Decl., Ex. 4, 161:22-162:14. Baja USA supervisors would coordinate with Newway's schedule, based on the overarching Onni schedule, by attending a morning meeting with Newway and the other subcontractors and by coordinating with Newway's leads/foremen (i.e. not Machado). Kincaid Decl., Ex. 2, 13:6-14:3, 111:3-112:6. Contreras hired the aggrieved workers and set their pay. Kincaid Decl., Ex. 4, 38:3-6, 39:12-25, 76:14-24, 150:5-152:2. He directed them on their start and end times. Kincaid Decl., Ex. 2, 67:25-69:12; Ponce Decl., ¶ 19. He kept track of the aggrieved workers' hours and supplied a summary to Baja USA's payroll; Baja USA then used this information to pay the aggrieved workers and invoice Newway for Baja USA's services. Kincaid Decl., Ex. 4, 17:21-5, 18:18-19:5, 27:18-28:11, 38:3-6, 38:19-39:7, 71:6-23, 76:14-24. The aggrieved workers would report to Contreras if they were sick and needed time off work. *Id.* at 78:12-80:7. He was also involved in setting the sick leave policies and other policies for them. *Id.* at 79:9-80:7. Contreras was also the individual disciplining and firing the aggrieved workers. *Id.* at 96:9-20. In other words, Contreras was their

1 supervisor or manager.

2 **B. Machado was not a supervisor of the aggrieved workers.**

3 Machado as a superintendent had no role, including for any of Newway's subcontractors,
4 in hiring workers, setting pay, firing, discipline, keeping or maintaining any employment records,
5 processing payroll, or making any employment policies. Machado Decl., ¶ 5. Mr. Machado was
6 not a corporate officer of Newway, Baja USA, or Baja Canada, nor did he have any ownership of
7 these entities. Kincaid Decl., Ex. 3, Requests for Admissions No. 1-5.

8 Instead, Machado works in the field for Newway doing quality control and safety
9 oversight. Kincaid Decl., Ex. 1, 18:13-18:25, 21:19-24:9, 25:19-26:4. He also puts together a
10 construction schedule for Newway at his site in coordination with the other site contractors and
11 subs that is communicated to his foremen/leads. *Id.* at 21:19-24:9. Based on the schedule, his
12 foremen/leads would then coordinate with the workers and subcontractors to get the work done.
13 *Id.* at 21:19-24:9, 25:19-26:4, 43:25-44:22; Kincaid Decl., Ex. 2, 12:15-13:19, 25:1-12. Although
14 Machado set Newway's overall construction schedule for the 1120 Denny Way site, he had little
15 to no control over start or end times for the day. Kincaid Decl., Ex. 1, 45:18-47:18, 54:3-24. If a
16 project ran over eight hours in a day it was typically due to issues such as delays in concrete trucks
17 arriving. *Id.* Even then, he was not involved in deciding which workers would work overtime and
18 which ones would go home or when workers would take breaks. *Id.*

19 Of the workers that Baja USA brought onto the 1120 Denny Way site, Machado had truly
20 little information or involvement with them. He did not know the number of workers that Baja
21 USA had at the 1120 Denny Way site. Kincaid Decl., Ex. 1, 31:3-8. He did not know how any of
22 the Baja USA workers were hired nor did he take part in their hiring. *Id.* at 32:10-33:1. The Baja
23 USA workers did not report to Machado if they were sick. *Id.* at 57:15-23, 58:6-18. Machado had
24 no role in disciplining or firing any workers. *Id.* at 58:19-20, 76:11-14, 77:7-24. He never
25 threatened to fire any workers, or report any workers to ICE. *Id.* at 77:7-24; Machado Decl., ¶ 9.
26 Machado did not know what any of the Baja USA workers were being paid or about any

1 deductions being taken from their pay. Kincaid Decl., Ex. 1, 88:15-89:1, 96:7-19, 98:18-99:7,
2 101:9-17, 125:6-8, 165:7-17. He was not involved in setting any policies for any of the workers
3 for Baja USA and had no authority to make decisions on behalf of Baja USA. Machado Decl., ¶
4 6; Kincaid Ex. 3, Response to No. 5. Machado has even less information about the Baja USA
5 workers who worked at the Fairview and Terry Avenue worksites as he was not the superintendent
6 for these sites and did not otherwise work or direct those sites. Machado Decl., ¶ 3. Machado did
7 not supervise the aggrieved Baja USA workers. Kincaid Decl., Ex. 2, 25:1-21.

8 **C. Machado loaned a small amount to Carlos Ibarra.**

9 At some point after the subcontracting agreement started, Carlos Ibarra of Baja Canada
10 approached Machado for a small loan for various things. Kincaid Decl., Ex. 1, 110:119-111:16.
11 This amount was no more than \$12,000 or \$13,000 and was repaid in full without interest. *Id.* at
12 108:11-25, 111:25-112:13.

13 **D. The City argues that Machado should be personally liable for municipal**
14 **ordinances pertaining to unpaid wages of and retaliation.**

15 The City alleges that when Baja USA processed payroll for the aggrieved workers, that
16 Baja USA failed to pay them their straight time, overtime, and paid sick and safe time as required
17 by Seattle Municipal Ordinances (“SMC’s”), and that Baja USA improperly deducted amounts
18 from the workers pay without authorization. Finally, they allege that workers were retaliated
19 against by threatening to report them to ICE or by firing them or threatening to do so in response
20 to workers asserting their rights under the SMC’s.

21 The City argues that Machado should be personally liable as an employer because they
22 claim he supervised the aggrieved workers, set their start and end times, and because he made a
23 loan to Carlos Ibarra. They also claim he threatened to report workers to ICE.

24 As we will show, for personal liability an individual is not an employer because they were
25 a supervisor, and especially not when any alleged supervision was merely related to monitoring
26 safety or quality control/timeliness which are necessary to any subcontracting relationship. Rather,

1 to be an employer the individual must have played a role in causing the business not to compensate
2 the aggrieved workers.

3 There is no evidence that Machado supervised the aggrieved workers or set their start and
4 end times. Even then these factors do not show that he caused any entity to underpay these
5 workers, meaning he cannot be an employer under the pertinent legal tests for personal liability.

6 As to the retaliation claims, there is no admissible evidence that Machado retaliated against
7 any of the aggrieved workers for exercising any of their rights under the SMC.

8 For these reasons, there is no genuine issue of material fact as to whether Mr. Machado is
9 an employer or retaliated against the aggrieved workers. As such, summary judgment should be
10 granted for Machado and he should be dismissed from his claim.

11 Additionally, Mr. Machado moved for the exclusion of several witness statements taken
12 by the City and identified in his Motion. The City argues that such a ruling would be premature
13 and prevent it from laying the foundation at the hearing; however, the City will not lay the
14 foundation at the hearing, because it will not be calling any of these witnesses at the hearing. Thus,
15 these statements should be excluded.

16 **III. STATEMENT OF ISSUES**

17 1. Is Machado personally liable for the violations at issue when he did not cause any
18 of the entities to undercompensate the aggrieved workers for their straight time, overtime, or paid
19 sick and safe time or to take deductions without proper authorizations?

20 2. Is Machado personally liable for the violations when he did not retaliate, and there
21 is no admissible evidence that he retaliated, against the aggrieved workers for exercising or
22 asserting any of their rights under the SMC's.

23 **IV. EVIDENCE RELIED UPON**

24 Machado relies on the Declaration of Sara Kincaid with supporting exhibits, the
25 Declaration of Antonio Machado, and the pleadings and files of record.
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VI. LEGAL AUTHORITY

A. Standard for Summary Judgment

Summary judgment is appropriate 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).

A. Standard for Summary Judgment

The moving party bears the initial burden of proving that there is no genuine issue of material fact. *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 cannot rely on the allegations made in its pleadings” and “must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 225-26. These specific facts must be shown by affidavits, depositions, interrogatory responses or other evidence that would be admissible. CR 56(e).

B. An individual is not personally liable as an Employer unless they are responsible for causing the violations at issue.

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1 test is to identify the parties actually responsible for the violation, “without obfuscation by legal
2 fictions applicable in other contexts.” *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991).

3 Courts have cautioned that using too broad a definition of employer could lead to
4 individuals being liable who had some supervision over the aggrieved employees, but in reality
5 were not the individuals responsible for the violations occurring. “Taken literally and applied in
6 this context, it would make any supervisory employee, even though without any control over the
7 corporation’s payroll, personally liable for the unpaid or deficient wages of other employees.”
8 *Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983); also see *Baystate Alternative Staffing v.*
9 *Herman*, 163 F. 3d 668, 677 (1st Cir. 1998) (quoting *Agnew* to note the court found it “difficult to
10 accept...that Congress intended that any corporate officer or other employee with ultimate
11 operational control over payroll matters be personally liable for the corporation’s failure to pay
12 minimum and overtime wages as required by the FLSA.”). The courts have determined that such
13 an interpretation is not a fair or reasonable. *Id.*; also see *Encino Motorcars, LLC v. Navarro*, 138
14 S. Ct. 1134, 1142 (2018); *Diaz*, 751 Fed. Appx. at 758.

15 The “economic reality analysis focused on the role played by the corporate officers in
16 causing the corporation to undercompensate employees and to prefer the payment of other
17 obligations and/or the retention of profits.” *Baystate*, 163 F.3d at 678. Personal liability as an
18 employer has been extended to individuals “who are chief corporate officers of the business, have
19 a significant ownership interest in the business, control significant aspects of the business's day-
20 today functions, and determine employee salaries and make hiring decisions.” *Diaz v. Longcore*,
21 751 Fed. Appx. 755, 758-59 (6th Cir. 2018) (citing *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62
22 F.3d 775, 778 (6th Cir. 1995); *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994); *Dole v.*
23 *Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965-66 (6th Cir. 1991); also see *Donovan v. Grim*
24 *Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984); *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir.
25 1983); *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009). Operational control over significant
26 aspects of the business and ownership interest in the entity were relevant factors because they

1 indicate that the individual may control the businesses' financial affairs and can cause the
2 corporation to either pay or not pay the workers in compliance with the law. *Baystate* at 678.
3 *Baystate* rejected that a significant factor in the personal liability determination is simply the
4 exercise of control over the "work situation," and instead stated that more important was whether
5 the individual manager and the director had control over the "purse-strings or made corporate
6 policy about Baystate's compensation practices" and remanded the case back to the district court.
7 *Id.* at 678-79. Additionally, unexercised authority is not enough to show liability as an employer.
8 *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008).

9 Further, even in the entity context, monitoring of a subcontractor's compliance with safety
10 measures and quality control/timeliness requirements does not make an entity an Employer of the
11 subcontractor's workers. *Moreau v. Air Fr.*, 356 F. 3d 942, 951 (9th Cir. 2004).

12 **C. Machado as an economic reality is not an Employer of the aggrieved workers.**

13 The City alleges that Machado: (1) had an interest in the success of the subcontracting
14 arrangement because he loaned \$13,000 or less, not to Baja USA, but to Carlos Ibarra; (2) had
15 some oversight over the workers and set Newway's construction schedule for the 1120 Denny
16 Way worksite; and (3) had authority to select or terminate workers. On this basis, they argue he
17 should be personally liable as an Employer. However, there is no evidence Machado had the power
18 to select or terminate workers, and all the evidence indicates that Machado had no role in any of
19 the pertinent businesses' payroll or in making policies about compensation, overtime, or leave. As
20 such, there is no genuine issue of fact and Machado is not an Employer of the aggrieved workers.

21 The City hopes in making its arguments that the Examiner will ignore the long precedent
22 holding that it is not a fair or reasonable interpretation to "make any supervisory employee, even
23 though without any control over the corporation's payroll, personally liable for the unpaid or
24 deficient wages of other employees." *Agnew* 712 F.2d at 1513; see *Baystate*, 163 F. 3d at 678;
25 also see *Encino*, 138 S. Ct. at 1142.

1 1. Mr. Machado's loans to Carlos Ibarra did not cause the alleged violations.

2 The City argues, with no supportive legal authority, that Mr. Machado should be treated
3 differently than individuals assessed for personal liability in other cases because he lent a small
4 amount of \$12,000 or \$13,000 to Carlos Ibarra; instead, the City argues Mr. Machado should be
5 evaluated under the same factors used to evaluate whether an entity is an employer of a particular
6 set of workers. *City's Response to Machado MSJ*, 10:7-9. Specifically, the City argues he should
7 be considered under the entity test because the loan gave him a vested interest in the success of
8 the subcontracting agreement. *City's Response to Machado MSJ*, 9:19-20:2. However, the City's
9 arguments overlook the purpose of the economic reality test.

10 Regardless of the specific factors we consider for the economic reality test, the case law
11 makes clear that an individual is not personally liable unless they have power and authority over
12 the entity itself in a way that caused the alleged violations. *Baystate Alternative Staffing v.*
13 *Herman*, 163 F.3d 668, 678 (1st Cir. 1998). An individual having a financial interest in a business
14 does not mean the individual has any power or authority to make decisions for or direct the entity,
15 just like a typical bank lender or shareholder may have a financial interest in a business's success
16 yet have no authority or power to make any decisions on behalf of the business in a way to cause
17 or direct the entity to engage in these sorts of employment-related violations.

18 Machado's loans did not cause the alleged violations at issue, nor does the City argue this.
19 His loan was unrelated to the true cause of the alleged violations: Baja USA taking deductions
20 from workers' pay without the proper authorizations or Baja USA not paying their workers in
21 compliance with the SMCs at issue. Machado had no ownership, operational control, or authority
22 to make any decisions on Baja USA's behalf – to include making any decisions regarding whether
23 any obligations were to be paid over others. Kincaid Decl., Ex. 3, Response to Nos. 1, 4, and 5.
24 He had even less of a financial interest than a typical lender as he made the loans without interest,
25 and thus made no profit from the loans. Kincaid Decl., Ex. 1, 108:11-25, 111:25-112:13. Machado
26 very clearly did not cause or direct Baja USA to underpay these workers or take deductions

1 without the proper authorizations by providing Mr. Ibarra with loans equaling up to \$13,000.

- 2 2. Machado did not cause the violations by monitoring safety and quality control at the
3 Denny site or by setting Newway's construction schedule at the site.

4 The City alleges that Mr. Machado should be personally liable as an Employer because of
5 his role in setting the construction schedule for Newway at and monitoring safety and quality
6 control at the Denny Way site.

7 Baja USA and/or Roberto Soto Contreras were responsible for overseeing and managing
8 the aggrieved workers at all three Seattle worksites. Kincaid Decl., Ex. 1, 32:10-19, 136:9-137:1;
9 Kincaid Decl., Ex. 2, 8:3-20, 18:5-15, 24:4-8; Kincaid Decl., Ex. 4, 161:22-162:14, 78:12-80:7,
10 96:9-20, 79:9-80:7. Mr. Machado's only role was at the Denny Way worksite, and he was
11 uninvolved in the other two Seattle projects that some of the aggrieved workers also worked at –
12 yet the City is trying to hold him liable for amounts due for work at those other sites as well.
13 Kincaid Decl., Ex. 1, 15:24-16:7, 33:9-15. On the Denny Way site, he set Newway's construction
14 schedule. Kincaid Decl., Ex. 1, 21:19-24:9. Baja USA's supervisors would attend a morning
15 meeting with Newway and the other subcontractors to coordinate with the schedule and would
16 also coordinate with Newway leads/foremen (i.e. not Machado). Kincaid Decl., Ex. 2, 13:6-14:3,
17 111:3-112:6. The subcontractors had control over when their workers worked and whether their
18 workers worked overtime. *Id.* at 67:25-69:12; Ponce Decl., ¶ 19. Mr. Machado would also walk
19 the Denny Way site to monitor for potential safety issues or quality control issues that arose and
20 then report these issues to the site safety individual or to his leads/foreman. Kincaid Decl., Ex. 1,
21 18:13-18:25, 21:19-24:9, 25:19-26:4.

22 *a. Monitoring of safety and quality control compliance*

23 Even if we were to ignore the facts and assume Machado was the aggrieved workers'
24 supervisor, the City seeks to hold Machado liable under the exact standard courts have rejected
25 for personal liability. None of these factors identified by the City are relevant to whether Mr.
26 Machado played a role in causing an entity to undercompensate the aggrieved workers. The

1 economic reality test is less concerned about which individuals have control over the “work
2 situation” than which individuals had control over the company’s “purse-strings or made corporate
3 policy” about the company’s compensation practices. *Baystate*, 163 F.3d at 678-79.

4 Even under the broader entity version of the economic reality test, Machado would not be
5 an Employer based on monitoring safety and quality control. Mr. Machado’s work set forth above
6 all falls under what at most would be oversight from a safety, quality control, or timeliness
7 perspective, which does not create an Employer relationship. See *Moreau*, 356 F. 3d at 951.

8 *b. Setting Newway’s Construction Schedule*

9 Machado’s work on Newway’s construction schedule at the Denny Way worksite was not
10 the cause of the aggrieved workers not being compensated properly for their overtime.

11 While the City claims that Mr. Machado made decisions about the start and end times for
12 the workers dictating whether they would work overtime, there is no evidence to support that
13 Machado made decisions about the start time for any workers. City’s Response to Machado’s
14 Motion, 10:18-19. The general contractor decided the start time. Kincaid Decl., Ex. 1, 54:3-21.

15 As to end times for workers, Machado would tell his leads/foreman if the particular project
16 they were on would take more than the normal eight-hour day based on matters not within his
17 control such as a concrete truck arriving late. *Id.* at 22:3-13; 45:12-46:4. And even then, any
18 decisions about whether the aggrieved workers would stay onsite more than eight hours would be
19 up to the subcontractor and any overtime hours offered to the aggrieved workers were on a
20 volunteer basis. Kincaid Decl., Ex. 2, 67:25-69:12, 70:17-71:15, 72:10-18, 73:25-74:12, 78:19-
21 79:8. Neither Newway or Machado forced any workers or subcontractors to stay. Kincaid Decl.,
22 Ex. 1, 47:5-13. Although Mr. Ponce’s declaration shouldn’t be admissible, he supports this
23 explaining that Contreras told them when to start and end their day. Ponce Decl. ¶ 19.

24 And finally, the issue here is not whether Machado did anything that led to the aggrieved
25 workers working overtime – it is not a municipal violation to have a worker work overtime –
26

1 rather it is the nonpayment of the overtime worked that is the issue, something that Machado has
2 no role in.

3 Machado was also unaware the aggrieved workers were not receiving overtime pay, and
4 had no reason to know as he had no involvement in their payroll, nor did anyone ever report these
5 issues to him. Kincaid Decl., Ex. 1, 96:7-19, 125:6-8, 165:7-17. It cannot be said that he knowingly
6 had them work overtime knowing they would not be paid for it as the City seems to argue.

7 3. Machado had no authority to hire or fire workers on Baja USA's payroll.

8 Despite what the City alleges, they provide no evidence that Machado had authority or
9 power to hire or fire the aggrieved workers, and there is also no corresponding evidence of an
10 exercise of this authority needed to create personal liability. See *Alvarez*, 515 F.3d at 1161.

11 The only evidence the City cites to is the inadmissible declaration from Mr. Ponce claiming
12 that "Tony had the authority to hire and fire workers. He would tell Roberto if he needed more
13 workers or wanted to let someone go. I heard the discussions between Tony and Roberto to this
14 effect." Ponce Decl., ¶ 17. However, there are several issues with his allegations.

15 Mr. Ponce tries to support his statement that Machado had authority to hire workers by
16 claiming he overheard him telling Contreras that he needed more workers. However, an individual
17 stating they need more workers does not show they had authority or power to hire workers. Mr.
18 Machado, Newway, and Baja USA have all testified that Mr. Machado did not have authority to
19 hire, nor did he hire, any workers on Baja USA's payroll. Kincaid Decl., Ex. 1, 32:6-33:1; Kincaid
20 Decl., Ex. 2, 89:5-12; Kincaid Decl., Ex. 4, 38:3-6, 39:12-25, 76:14-24, 150:5-152:2; Kincaid
21 Decl, Ex. 3, Responses to Nos. 4, 5. In Mr. Ponce's declaration, as well as his prior statement to
22 the City, he states that Mr. Contreras hired him, not Mr. Machado. Ponce Decl., ¶ 3; Kincaid Decl.,
23 Ex. 5, 4:6-8. There is also a lack of any detail in Mr. Ponce's statement, such as when and where
24 these statements were made and exactly what was said, for any credibility determinations to be
25 made about his conclusory statements. Mr. Ponce also does not allege that after Mr. Machado
26 made these statements that any workers were hired. There, is thus no evidence in support of the

1 City's claims, and in fact all the evidence indicates that Mr. Machado did not have authority to
2 hire.

3 Mr. Ponce tries to support his statement that Mr. Machado had authority to fire workers
4 by claiming he overheard him telling Mr. Contreras that he wanted to let someone go. An
5 individual stating that they want to let someone go does not mean that individual has the authority
6 or power to let someone go. Again, Machado, Newway, and Baja USA have testified that Mr.
7 Machado did not have authority to, and that he did not, fire any workers on Baja USA's payroll.
8 Kincaid Decl., Ex. 1, 76:12-24; Kincaid Decl., Ex. 2:89:5-12, 90:10-18; Kincaid Decl., Ex. 4,
9 155:1-13; Kincaid Decl, Ex. 3, Responses to Nos. 4, 5. Mr. Ponce likewise did not provide any
10 detail as to when and where he alleges these comments were made and exactly what he alleges
11 was said, which prevents the factfinder from conducting a credibility determination on his
12 conclusory statement. Nor does Mr. Ponce allege that after these comments, the referenced worker
13 was terminated. Mr. Ponce does not even allege that the workers to which he refers to are the
14 workers on Baja USA's payroll. There, is thus no evidence in support of the City's claims, and in
15 fact all the evidence indicates that Mr. Machado did not have authority to fire.

16 There is also a credibility issue here regarding Mr. Ponce's allegations that he overheard
17 Mr. Machado make these comments. As is apparent from Mr. Ponce's declaration, he is Spanish
18 and not English speaking. See Declaration of Laura Hurley accompanying Mr. Ponce's
19 Declaration. Mr. Machado is not Spanish speaking. Kincaid Decl., Ex. 1, 63:4-8, 7:11-13.

20 The City has provided no evidence of this alleged authority to hire or fire workers on Baja
21 USA's payroll. Even then, none of this shows Mr. Machado played a role in causing the violations
22 because of an exercise of this authority.

23 **D. Machado did not retaliate against any of the aggrieved workers.**

24 The City alleges that Machado retaliated against the workers who alleged underpayment
25 of wages. An individual is liable if they retaliate against a worker because the worker exercised
26 any of their rights under City ordinances. SMC 14.16.055, 14.19.055, 14.20.035. However, the

City's allegations fail because they are not supported by any admissible evidence. As such there is no genuine issue of material fact, and Machado should be dismissed from this case.

The only evidence cited by the City on this point is the allegation from Mr. Ponce that "Workers were in no position to complain about underpayment. Both Roberto and Tony would frequently threaten to report workers to ICE, and when workers asked Roberto for more pay, Robert would make the same threat." Ponce Decl., ¶ 13.

Regarding Machado, Mr. Ponce fails to provide any detail to show he has personal knowledge of what he alleges. Mr. Ponce does not state when and where he alleges these comments were made and specifically what he alleges Machado said so that the Examiner can perform a credibility assessment on this statement. He also does not allege that Machado made these threats because of any exercise or assertion of the municipal rights at issue in this case by the aggrieved workers. He also does not clarify the workers he claims Machado threatened. Mr. Ponce's declaration is also inconsistent with his prior statement he made to the City, that Machado only made these threats through Roberto, indicating that he did not hear Machado make these threats himself. Kincaid Decl., Ex. 5, 4:14-17, 6:15-23

Machado has not ever threatened to report any workers to ICE or retaliated in any way against them. Kincaid Decl., Ex. 1, 77:7-24; Machado Decl., ¶ 9.

Based on the above, there is no admissible evidence that Mr. Machado retaliated, directly or indirectly, against the aggrieved Baja USA workers for exercising any of their rights under this Ordinance. As such there is no genuine issue of fact, and summary judgment should be granted.

E. Exclusion of Evidence

The City has also responded to Machado's and the other appellant's motions for the exclusion of witness statements. The City's only argument against the exclusion is that it is premature because they will lay the foundation for the statements' admission at the hearing.

The City's argument is not pertinent here because it will not be calling any of the witnesses that provided these statements at the hearing. The only way the City could lay the foundation for

1 these statements' admissibility would be to call these witnesses at trial. The City has already
2 indicated it does not intend to do so as it has refused throughout the discovery period to disclose
3 the identity of these witnesses. Thus, there is no harm, as the City claims, in ruling on the
4 admissibility of these statements now, rather than waiting until the hearing date.

5 Therefore, Machado respectfully requests that the Examiner rule these statements
6 inadmissible based on the arguments contained in our motion.

7 VII. CONCLUSION

8 Based on the foregoing arguments, the City has presented no evidence that Machado was
9 responsible for causing the violations alleged in this case or that the retaliated against any of the
10 aggrieved workers; therefore, Machado respectfully requests that the Examiner grant summary
11 judgment and dismiss him from this case. Additionally, Mr. Machado respectfully requests that
12 the Examiner grant his motion for the exclusion of the witness statements as a pre-hearing order.

13 Signed this 17th day of August, 2022.

14 ROCKE | LAW Group, PLLC

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17 Aaron V. Roche, WSBA No. 31525
18 Sara Kincaid, WSBA No. 55846
19 Roche Law Group, PLLC
20 500 Union Street, Suite 909
21 Seattle, WA 98101
22 Telephone: (206) 652-8670
23 Fax: (206) 452-5895
24 Email: aaron@rockelaw.com
25 Email: sara@rockelaw.com
26 Attorneys for Appellant Machado

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DECLARATION OF SERVICE

I caused a copy of the foregoing Reply on Appellant Antonio Machado's Motion for Summary Judgment and Exclusion of Evidence to be served to the following in the manner indicated:

Via Email to:

Mark D. Kimball
Alex Larkin
MDK Law
777 18th Avenue Northeast, Suite 2000
Bellevue, WA 98004
Telephone: (425) 455-9610
Email: mkimball@mdklaw.com
alarkin@mdklaw.com
Attorneys for Appellant Baja Concrete

Jason Wandler
Nicole E. Wolfe
Oles Morrison Rinker & Baker LLP
701 Pike Street, Suite 1700
Seattle, WA 98101
Email: wandler@oles.com
wolfe@oles.com
Attorneys for Appellant Newway Forming, Inc.

Lorna Sylvester
Cindi Williams
City of Seattle
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Email: Lorna.Sylvester@seattle.gov
cindi.williams@seattle.gov
Attorneys for Respondents

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 17th day of August 2022 in Seattle, Washington.

s/ Elena Maltos
Elena Maltos, Legal Assistant