BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of Baja Concrete USA Corp., Newway Forming Inc., and Antonio Machado, From a Final Order of the Director, City of Seattle Office of Labor Standards, Respondent.	Hearing Examiner Files: LS-21-002, LS-21-003, LS-21-004 (consolidated) **APPELLANT BAJA CONCRETE USA CORP.'S PREHEARING MOTIONS TO EXCLUDE EVIDENCE** **HER 3.17, 3.18**

I. ORDER REQUESTED

COMES NOW Appellant Baja Concrete USA Corp. ("Baja Concrete"), pursuant to Hearing Examiner Rules of Practice and Procedure ("HER") Section 3.17, through the undersigned counsel, and submits these Motions to Exclude Evidence from the hearing in this matter, scheduled to begin on June 12, 2023. This motion is styled in a form similar to motions in limine for trial. The evidence sought to be excluded is as follows:

1. Respondent City of Seattle's exhibit nos. 43, 44, 45 – Pleadings in King County Superior Court case no. 22-2-04760-7.

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2. Appellant Newway Forming Inc.'s exhibit nos. 14, 15, 16, 17 - L&I Paperwork – Gomez Chavez, Parra Ponce, Gamboa Lopresti, Catalon Toro.
3. Respondent City of Seattle exhibit no. 81 – Email Forler-Grant 09172019 Baja Concrete.
4. Respondent City of Seattle's exhibit no. 92 – Claudia Penunuri contact information.
5. Appellant Antonio Machado's exhibit no. 22 – Email from Daron Williams to Alex Larkin and Mark Kimball dated 2/24/2021.
6. All unsigned witness statements for which the witness is not testifying at the hearing.

II. DISCUSSION AND AUTHORITY

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

HER 3.18(a) provides that the Hearing Examiner may admit evidence if the Examiner determines it is relevant, comes from a reliable source, and has probative value. HER 3.18(b) states that "The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive,

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or privileged. Further, HER 3.18(g) provides that the Examiner may consider the Washington State Rules of Evidence when passing on the admissibility of evidence.

Here, Baja Concrete's motions are reasonable and seek to exclude specific categories of evidence, and specific exhibits, that are irrelevant, immaterial, unreliable, repetitive or otherwise inadmissible and will not further the prosecution of this matter.

A. Respondent City of Seattle's exhibit nos. 43, 44, 45 – Pleadings in King County Superior Court case no. 22-2-04760-7

Baja Concrete and Appellant Newway Forming Inc., and others, were parties to King County Superior Court case no. 22-2-04760-7 (the "King County Case"). The King County Case, and the pleadings which are listed in Respondent's exhibits for hearing, are irrelevant and immaterial to the instant case, and potentially unduly prejudicial to Baja Concrete. The facts of King County Case related to a period of time in 2021 only. The instant appeal before the Hearing Examiner relates to the time period between February 2018 and August 2020. In addition, the King County Case involved other parties, which are not parties to the instant appeal. The claims and counterclaims in the King County Case were distinct from the issues in the instant appeal. The claims in the King County Case included, breach of contract, the Consumer Protection Act, and unjust enrichment, among others. The claims in the King County Case did not relate in any way to the issues before the Hearing Examiner in the instant appeal. Finally, the King County Case was resolved by the parties and was dismissed pursuant to an agreed Notice of Settlement of All Claims and Counterclaims under King County Local Civil Rule 41(e).

The above-referenced evidence should be excluded on grounds that it is irrelevant and lacks probative value (HER 3.18(a), (b)), and that it is immaterial to the instant appeal (HER 3.18(b)).

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B. Appellant Newway Forming Inc.'s exhibit nos. 14, 15, 16, 17 - L&I Paperwork – Gomez Chavez, Parra Ponce, Gamboa Lopresti, Catalon Toro

These offered exhibits purportedly related to worker rights complaints received by the State of Washington, Department of Labor and Industries (L&I). It appears that L&I made no conclusions or findings regarding any violations of workers rights in response to said complaints. These offered exhibits are immaterial, irrelevant and non-probative in relation to the instant appeal before the Hearing Examiner. Given the investigation conducted by the City of Seattle Office of Labor Standards ("OLS"), and the determination and final order issued by the OLS, from which this appeal is taken, at best, the L&I paperwork is redundant and unduly repetitive.

The L&I paperwork should excluded on grounds that it is irrelevant, it lacks probative value, and it is unduly repetitive (HER 3.18(a), (b)). Further, any communications included within the L&I paperwork, from L&I, is hearsay, and may therefore be excluded pursuant to HER 3.18(g).

C. Respondent City of Seattle exhibit no. 81 – Email Forler-Grant 09172019 Baja Concrete

Respondent City of Seattle exhibit no. 81 appears to be an internal communication of Newway Forming Inc. and makes reference to suspected fraud. This is no issue, claim or allegation of any suspected fraud before the Hearing Examiner in the instant appeal. This exhibit is potentially prejudicial, confuses the issues on appeal, is irrelevant, immaterial and lacks probative value, and should therefore be excluded pursuant to HER 3.18(a) and (b). Futher, given the potentially prejudicial nature of this exhibit, it should be excluded. Amend v. Bell, 89 Wn.2d 124, 130, 570 P.2d 138 (1977).

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D. Respondent City of Seattle's exhibit no. 92 – Claudia Penunuri contact information

Respondent City of Seattle's exhibit no. 92 purports to show contact information and real estate market value, related to Claudia Penunuri, the governor of Appellant Baja Concrete USA Corp. This information is irrelevant, non-probative, and immaterial to the instant appeal. Claudia Penunuri is not a party to this action. Further, she and her company, are represented by counsel in this action, such that any communications with her from any party in this matter, should be transmitted through counsel. Further, the source of the information included in this exhibit is unknown, is hearsay and is unreliable.

This exhibit should be excluded on grounds that it is irrelevant, does not come from a reliable source, is immaterial, and is and contains hearsay, pursuant to is HER 3.18(a), (b), and HER 3.18(g).

E. Appellant Antonio Machado's exhibit no. 22 – Email from Daron Williams to Alex Larkin and Mark Kimball dated 2/24/2021

Appellant Antonio Machado's exhibit no. 22 is correspondence between the OLS and counsel, constituting settlement negotiations. It is, therefore, inadmissible under ER 408. Further, this exhibit is irrelevant, immaterial and has no probative value. This exhibit should be excluded pursuant to ER 408 and HER 3.18(a), (b) and (g).

F. All unsigned witness statements for which the witness is not testifying at the hearing

Certain witnesses for which Respondent City of Seattle previously provided unsigned witness statements, are expected to testify during the upcoming hearing in this matter. However, in the event that any party introduces any unsigned witness statements where the witness does not testify at the hearing, Baja Concrete moves for the exclusion of such unsigned statements, on several grounds.

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First, HER 3.12(a) states:

> "All witnesses testifying at hearing must take an oath or affirmation to be truthful in their testimony. All witnesses are subject to cross-examination by the other party."

Witnesses, who did not sign their witness statements under penalty of perjury and who are no going to testify at the hearing, will not be available for cross examination. Therefore, any such unsigned witness statements should be excluded pursuant to HER 3.12(a).

Second, the hearing is in the context of a "contested case" as defined under SMC 3.02.020 which states:

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

In the instant proceedings, rights and duties of Baja Concrete, as well as other parties, are to be determined by the Hearing Examiner and, as such, the SMC provisions on contested cases are applicable. Specifically, SMC 3.02.090(M) states:

> "Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence."

Given that Baja Concrete will not have an opportunity to cross-examine the witnesses who were interviewed by the OLS, which gave rise to unsigned witness statements, and who do not testify at the hearing, those statements should be excluded pursuant to SMC 3.02.090(M).

Third, the unsigned witness statements are inadmissible hearsay, and may therefore be excluded pursuant to HER 3.18(g). ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If the OLS, or other party or witness, offers any of the unsigned witness statements into

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evidence during the hearing for the purpose of proving matters asserted in those statements, and the declarant does not testify at the hearing, those statements are hearsay under ER 801(c). ER 802 provides that hearsay is not admissible except as provided by the ERs, by other court rules, or by statute. In the instant case, none of the hearsay exceptions apply.

Finally, the OLS cannot testify as to the accuracy of such unsigned statements.

ER 602 states in part:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In the instant case, an investigator from the OLS, or other witness, cannot testify as to the accuracy of the unsigned witness statements given that they do not have personal knowledge of the contents of those statements. Washington courts have held that, even a governmental official, testifying in their official capacity, may only testify based on their actual personal knowledge. *Simmons v. City of Othello*, 199 Wn. App. 384, 399 P.3d 546 (2017). In *Simmons*, the City of Othello had moved to strike certain statements from a declaration of former Othello Mayor Shannon McKay. *Simmons* at 391. The court granted that motion (the Court of Appeals affirmed), striking the following statement, based on lack of personal knowledge:

> "During my term as mayor, a homeowner by the name of Mr. Crosier had a sewage backup into his basement. Upon investigation it was determined that his connection between his house line and the main sewer line had been broken in the alley." *Id*.

The Simmons court also struck the following statement of Ms. McKay (the Court of Appeals affirmed), as it included legal conclusions:

> "Based on the municipal code, we determined that the City of Othello was responsible for repairing the connection between the residence and the main line but we were not responsible for repairing the line from the house to that connection." *Id* at 391-392.

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Pursuant to the above, an OLS investigator, or other witness testifying in their official or unofficial capacity, may only testify on matters based on their own personal knowledge and, therefore, cannot testify as to the matters asserted in unsigned witness statements.

III. CONCLUSION

Appellant Baja Concrete hereby requests that the Hearing Examiner grant the requested prehearing motions to exclude evidence, in the form proposed.

Respectfully Submitted this 7th day of June, 2023.

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/s/ Alex T. Larkin

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