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7 BEFORE THE HEARING EXAMINER  
8 CITY OF SEATTLE  
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10 In the Matter of the Appeal of:

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

13 from a Final Order of the Decision issued  
14 by the Director, Seattle Office of Labor Standards  
15

Hearing Examiner File Nos.:

LS-21-002  
LS-21-003  
LS-21-004

**APPELLANT NEWWAY FORMING,  
INC.'S MOTION TO EXCLUDE  
EVIDENCE**

16  
17 **I. RELIEF REQUESTED**

18 COMES NOW, Appellant Newway Forming, Inc. ("Newway") pursuant to Hearing  
19 Examiner Rules of Practice and Procedure Section 2.17, by and through its undersigned  
20 counsel, and submits this Motion to Exclude Evidence from the hearing in this matter. The  
21 evidence Newway seeks to exclude is as follows: Respondent City of Seattle's exhibits nos.  
22 82, 91, 132, 135 and 136. These documents are clearly attorney-client privileged  
23 communications and should not be admissible.

24 **II. DISCUSSION AND AUTHORITY**  
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1 HER 3.18(a) states that the Hearing Examiner may admit evidence if the Examiner  
2 determines it is relevant, comes from a reliable source, and has probative value. HER 3.18(b)  
3 states that "*The Examiner may exclude evidence that is irrelevant, unreliable, immaterial,*  
4 *unduly repetitive, or privileged.*" Further, HER 3.18(g) provides that the Examiner may  
5 consider the Washington State Rules of Evidence when passing on the admissibility of  
6 evidence. Even more, HER 2.14(c) states that "*the rules of privilege apply to the extent*  
7 *recognized by law.*"  
8

9 Here, the City's exhibits nos. 82, 91, 132, 135, and 136 are attorney-client  
10 communications between Newway and its attorney and are therefore privileged and not  
11 admissible.  
12

#### 13 **A. Exhibit 82 is Privileged and Irrelevant**

14 Exhibit 82 is an internal email communication dated June 15, 2020 between Kwynne  
15 Grant, Tom Grant, and Sal Giantomaso, all employees of Newway. The second sentence of the  
16 email states "*I talked to the lawyer. We have two options as he sees it.*" The email then  
17 discusses the two options of advice provided by the lawyer in responding to the City's  
18 investigation. This is clearly an internal attorney-client privileged communication and should  
19 be excluded pursuant to HER 3.18(b). Further, the evidence is irrelevant in determining  
20 whether Newway is a joint employer – it is instead a discussion of options in responding to the  
21 OLS' investigation.

#### 22 **B. Exhibit 91 is Privileged**

23 Exhibit 91 is an email thread between Dan DeLue, Newway's previous attorney, and  
24 Kwynne Grant of Newway, where Kwynne Grant hand wrote notes in response to the City's  
25 Requests for Information. This is clearly an attorney-client privileged communication and  
26

1 should be excluded pursuant to the HER rules and Rules of Evidence.

2 **C. Exhibit 132 is Privileged and Irrelevant**

3  
4 Exhibit 132 is an email thread between Doug Oles, Newway's attorney, and Tom Grant  
5 of Newway, discussing legal advice related to a Covid-19 Safety Plan. This is clearly an  
6 attorney-client privileged email and is not admissible. Further, Newway's Covid-19 Safety  
7 Plan is not relevant to the investigation, wage claims, or whether Newway is a joint employer.

8 **D. Exhibits 135 and 136 are Privileged**

9 Exhibit 135 and Exhibit 136 are additional email threads between Dan DeLue,  
10 Newway's previous attorney, and Kwynne Grant of Newway, where Kwynne Grant hand  
11 wrote notes in response to the City's Requests for Information. These are clearly attorney-  
12 client privileged communications and should be excluded pursuant to the HER rules and Rules  
13 of Evidence.

14 **III. CONCLUSION**

15 For the foregoing reasons, Newway respectfully requests that the Hearing Examiner  
16 exclude Respondent City of Seattle's exhibits nos. 82, 91, 132, 135 and 136.

17  
18 DATED this 7th day of June, 2023.

19  
20 OLES MORRISON RINKER & BAKER LLP

21 By: /s/ Nicole E. Wolfe

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*Attorneys for Appellant Newway Forming Inc.*

**CERTIFICATE OF SERVICE**

The undersigned certified under penalty of perjury under the laws of the state of Washington that on this 7<sup>th</sup> day of June, 2023, I caused true and correct copies of the foregoing document to be delivered to the following parties and in the manner indicated below:

Office of the Hearing Examiner The Hon. Ryan Vancil, Hearing Examiner 700 Fifth Avenue, Suite 4000 Seattle, WA 98104	<input checked="" type="checkbox"/> E-File <input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Hand Delivery/Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Email: <a href="mailto:Hearing.Examiner@seattle.gov">Hearing.Examiner@seattle.gov</a>
Mark D. Kimball Alex T. Larkin MDK Law 777 108 <sup>th</sup> Ave. NE, Suite 2000 Bellevue, WA 98004  <i>Attorneys for Baja Concrete USA Corp.</i>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery/Legal Messenger <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email: <a href="mailto:mark@mdklaw.com">mark@mdklaw.com</a> <a href="mailto:alarkin@mdklaw.com">alarkin@mdklaw.com</a>
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SIGNED at Seattle, Washington this 7<sup>th</sup> day of June, 2022.

/s/ Christine J. Smith  
Christine J. Smith