

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:
BAJA CONCRETE USA CORP.,
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

) MACHADO'S RESPONSE TO BAJA
) CONCRETE USA CORP'S PREHEARING
) MOTION TO EXCLUDE MACHADO'S
) EXHIBIT 22
)

Antonio Machado hereby exercises his prerogative to respond to Baja Concrete USA Corp's prehearing motion in writing, pursuant to the agreement the parties reached at the May 26, 2023, conference call involving all counsel. By doing so, Mr. Machado does not waive his right to engage in oral argument.

Baja seeks to exclude Machado's Exhibit 22, an email from Daron Williams to attorneys Jason Wandler, Alex Larkin and Mark Kimball dated 2/24/2021. Baja argues that this email is correspondence constituting settlement negotiations, therefore it is inadmissible under ER 408; further, Baja argues, this exhibit is irrelevant, immaterial and has no probative value. Baja is incorrect on both counts.

ER 408 does not exclude evidence offered for another purpose.

ER 408 renders statements made in compromise negotiations inadmissible generally, however, the Rule "does not require exclusion when the evidence is offered for another purpose." Mr. Machado does not intend to use Exhibit 22 to demonstrate that the parties were willing to engage in settlement discussions. Nor does he intend to ask any witness about what

MACHADO'S RESPONSE TO BAJA'S
MOTION TO EXCLUDE EX 22

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1 happened in those discussions, if discussions did in fact occur. Rather, Mr. Machado intends to
2 use this exhibit to demonstrate that, as of February 24, 2021, “OLS’ position [was] that Baja
3 Concrete USA Corp and Newway Forming, Inc. share joint and several liability for the
4 violations...” By omission, then, OLS’s position was that Mr. Machado did not share joint and
5 several liability.

6 **HER 5.10.05 does not apply either.**

7 Although Baja did not raise the issue, it should be noted that mediation communications
8 are privileged under HER 5.10.05. But mediation communications are communications made for
9 purposes of considering, conducting, etc., a mediation. *Id.* OLS was not suggesting mediation
10 here. Rather, it was trying to negotiate a resolution without the help of a mediator.

11 **Machado’s Exhibit 22 is relevant, material and probative.**

12 Mr. Williams’ failure to mention Mr. Machado in this email speaks volumes. This exhibit
13 is not just relevant and material, it is tantamount to an admission of a party-opponent. It is
14 probative of the fact that OLS had not developed sufficient evidence as of February 24, 2021, to
15 determine that Mr. Machado was a joint employer. Mr. Machado must be permitted to ask Mr.
16 Williams what changed between that date and the date the Determination was issued.

17 If OLS believed that Mr. Machado was a joint employer within the meaning of the Seattle
18 Municipal Code upon the completion of its investigation, Mr. Williams would have written that
19 the goal was “to negotiate and execute a formal settlement agreement between Baja Concrete
20 USA Corp, Newway Forming, and OLS” *and Antonio Machado*. He did not.

21
22 RESPECTFULLY SUBMITTED this 9th day of June, 2023.

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26 Allen McKenzie, WSBA No. 48703

DECLARATION OF SERVICE

I caused a copy of the foregoing Appellant Antonio Machado's Response to Baja's Motion to Exclude Exhibit 22 to be served to the following in the manner indicated:

Via Email to:

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On today's date.

1 I declare under penalty of perjury under the laws of the state of Washington that the
2 foregoing is true and correct to the best of my belief.

3 Signed and DATED this 9th day of June 2023 in Seattle, Washington.

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5 s/ Elena Maltos

6 Elena Maltos, Paralegal
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