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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN HASTINGS, Jr.,
Plaintiff/Counterdefendant,

vs.

THE STATE OF IDAHO DEPARTMENT OF
WATER RESOURCES, a Political
Subdivision of the STATE OF IDAHO

Defendant/Counterclaimant.

Case No. CV01-21-17825

DECLARATION OF COUNSEL

COME NOW, J. Kahle Becker, being over the age of 18 and competent to make this Declaration, pursuant to Rules 2.7 and 56(d) of the Idaho Rules of Civil Procedure, I.C. § 9-1406, and upon his own personal knowledge and under penalty of perjury, states as follows:

1. That I am an attorney in good standing with the Idaho State Bar and counsel for the Plaintiff/Counterdefendant, John Hastings, Jr. herein.
2. That I make this Declaration in Support of Plaintiff's *Motion to Strike and Objection to Defendant's Request to Take Judicial Notice* as well as Plaintiff's *Motion to Continue – Filed in the Alternative*.

3. I have known Defendant's counsel Meghan Carter in a professional setting for many years. Nothing I state herein is intended to call into question her integrity or professionalism, which I continue to hold in high regard.

4. Along these lines, I have presented this Declaration to counsel for Defendant for review and discussion, on April 22, 2022, five days prior to its submission to the Court on April 26, 2022. However, Ms. Carter declined to engage in any additional discussions regarding why Defendant elected to violate the terms of the stipulations of the parties.

5. Attached hereto as Exhibit A are true and correct copies of email exchanges between myself and Ms. Carter, Garrick Baxter, and, on occasion, her office staff, regarding the numerous stipulations which have been filed in this case as well as the motion practice addressing the applicability of the statute of limitations found in Idaho Code § 42-3809.

6. When preparing this Declaration, I also reviewed my invoices to my client and compared them to the emails reflected in Exhibit A, to further corroborate my recollection of the substance of numerous phone calls and voicemails which took place between myself and Ms. Carter. Otherwise, I have no written or electronic record of these calls and I have long since deleted the voicemails. My invoices are not produced due to the attorney client privilege and work product protections associated with the information contained in them.

7. My perception of the overall purpose of the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* and the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* was to set the stage

for an efficient presentation of the primary issue in this case, the applicability of the statute of limitations found in Idaho Code § 42-3809, without the need for complex and expensive discovery efforts or a trial. From my perspective, that is why the parties agreed to have this issue decided based on a stipulated set of facts and the record as it existed as of the date these stipulations were filed. The parties agreed to have this novel legal issue submitted based on briefing alone, avoiding the need for a trial on this particular key issue, so that either party could appeal any decision of the district court on a narrow record, pursuant to an IRCP 54(b) certificate.

8. From my perspective, Defendant perceived this approach as a benefit due to its perception of the strength of its arguments on this issue, its desire to keep costs down, its desire to avoid a jury trial, and since this was a novel question of law which would likely impact its behavior on other unrelated enforcement actions which may exist, or which might take place against unrelated third parties in the future.

9. On January 12, 2022, Ms. Carter and I had a phone call in which I first suggested the possibility of bifurcating the case and preparing a stipulated set of facts. Ms. Carter seemed intrigued by the suggestion and, from what I recall, set out to discuss it with her client and superiors at the Office of the Attorney General

10. The next call with Ms. Carter took place on January 18, 2022 wherein we discussed procedural aspects of bifurcating the case.

11. Ms. Carter prepared the first draft of the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* and sent it to me *via* email on January 19, 2022. *See* Exhibit A.

12. I responded *via* email on January 20, 2022 that I had some minor edits to that stipulation and suggested:

Additionally, I think we should agree on a set of facts as to the SOL at this point. It seems we are about there, based on your Answer and Answers to our first set of discovery requests. However, I'd like to avoid a situation wherein we may find that we are not actually in agreement following the submission of a stipulation to bifurcate.

Thereafter, assuming the Court adopts our stipulation, we would file the stipulated facts we previously agreed upon, with any modifications that may arise due to the court's comments at the scheduling conference, in accordance with a briefing schedule prescribed by the court. *See* Exhibit A.

13. Ms. Carter responded via email on January 20, 2022 that she would take a crack at putting together a first draft of a stipulated set of facts. *See* Exhibit A.

14. Ms. Carter and I spoke again on January 23, 2022 regarding the contents of the stipulated set of facts. We also discussed that neither side would ambush the other with affidavits asserting facts, outside these stipulated facts or the record as it existed, during the briefing on the applicability of the statute of limitations in Idaho Code § 42-3809 which would follow.

15. On January 25, Ms. Carter emailed me her first draft of the *Stipulation on Facts for Motion Practice Re: Statute of Limitations*. *See* Exhibit A.

16. I emailed a revised version of the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* to Ms. Carter on January 26, 2022 and again reiterated that it seemed we were in agreement on the operative facts, leaving a purely legal dispute. *See* Exhibit A.

17. Ms. Carter and I spoke again on February 2, 2022. We discussed a few minor edits but again confirmed our respective positions that the submission of this stipulation

would avoid either side submitting affidavits to introduce additional factual assertions into the record in support of the impending briefing. Later that day Ms. Carter sent what would become the final version of the *Stipulation on Facts for Motion Practice Re: Statute of Limitations*. See Exhibit A.

18. Based on our agreement on the contents of the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* which reflected the parties' position to have the applicability of the statute of limitations in Idaho Code § 42-3809 decided based on a stipulated set of facts, I agreed to sign the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* and did so on February 3, 2022. Ms. Carter signed off the next day and filed the *Stipulation and Joint Motion to Bifurcate Issues and Request for a Briefing Schedule and Oral Argument* with the Court.

19. A scheduling hearing was held on February 8, 2022 wherein the Court agreed to bifurcate the case so that the applicability of the statute of limitations in Idaho Code § 42-3809 could be decided based on briefing alone.

20. The parties filed the *Stipulation on Facts for Motion Practice Re: Statute of Limitations* later that same day.

21. On February 9, 2022 Ms. Carter indicated for the first time that Defendant now desired to file its own motion for Summary Judgment. See Exhibit A.

22. Ms. Carter and I spoke again on February 10, 2022 over an extended Zoom call which first touched on some matters irrelevant to the dispute over the applicability of Idaho Code § 42-3809 and which included third parties who may become relevant to other aspects of this case at a later time. Ms. Carter and I then continued the Zoom call without these other parties. We discussed Defendant's desire to file its own Motion for

Summary Judgment. I specifically raised the concern that doing so should not include any additional factual evidence or affidavits and, per the parties' stipulation, the only issue ripe for adjudication was the applicability of the statute of limitations in Idaho Code § 42-3809.

23. One particular concern I had was my out-of-town travel over the Boise School District Spring Break over March 18-27, 2022 and the difficulty that would present if I needed to address the inclusion of additional facts into the record. On our call, Ms. Carter confirmed the Motion for Summary Judgment Defendant was contemplating was focused on the applicability of the statute of limitations in Idaho Code § 42-3809 and further confirmed no additional factual evidence would be introduced into the record in support of Defendant's impending Motion. This discussion was confirmed in an email exchange with Ms. Carter on February 10, 2022. *See Exhibit A.*

24. On February 23, 2022 Ms. Carter emailed me to indicate that Defendant had now elected to not file its own Motion for Summary Judgment. *See Exhibit A.*

25. Ms. Carter and I spoke again on March 28, 2022. Initially, Ms. Carter indicated that she needed an extension to prepare her response to Plaintiff's *Motion for Summary Judgment*. I informed her that I had no objection to extending deadlines and would do so as a matter of professional courtesy. Ms. Carter then indicated that Defendant desired to include additional documents into the record by submitting an affidavit. I indicated that I was not comfortable with that since I believed doing so would run afoul of our prior stipulations and since I had already filed Plaintiff's *Motion for Summary Judgment* based on the facts referenced in the *Stipulation on Facts for Motion*

Practice Re: Statute of Limitations, without including any affidavits supporting Plaintiff's Motion.

26. Ms. Carter indicated that she understood my frustration and stated that the direction to file an affidavit with this new documentation was being given by her superiors. I indicated I would not sign a stipulation which included any suggestion that Defendant was authorized to file an affidavit in support of its Response to Plaintiff's Motion for Summary Judgment. Ms. Carter and I had another phone call later that day wherein she indicated she would remove the word "affidavit" from her proposed stipulation to extend briefing deadlines.

27. These conversations were confirmed in an email exchange between myself and staff from Ms. Carter's office on March 28, 2022, which are included in Exhibit A.

28. On April 6, 2022 I received the *Department's Cross Motion for Summary Judgment, Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* along with *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment*, which included 32 pages of documents which Defendant sought to have this court take judicial notice of.

29. I immediately called Ms. Carter and expressed my concern that Defendant sought to deliberately violate the stipulations of the parties by including the 32 pages of documents, not by affidavit, but rather by a request to have the Court take judicial notice of them.

30. I informed Ms. Carter that I would require an extension of the briefing schedule and to continue the hearing, which had been set for April 19, 2022, in order to

file several motions to address the inclusion of these 32 pages of documents as well as a response to Defendant's *Cross Motion for Summary Judgment*. Ms. Carter agreed to my request for an extension and on April 7, 2022 the parties submitted the *Second Stipulation and Joint Motion for an Extension of Time to File Briefs and to Vacate and Reset Hearing*. That Stipulation further confirmed the original understanding of the parties to have the applicability of the statute of limitations in Idaho Code § 42-3809 decided based on a stipulated set of facts.

31. I have been precluded from conducting deposition and expert witness discovery on the documents attached to *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* due to what I believed, and what I had thought Defendant believed, was a desire to have the applicability of the statute of limitations found in Idaho Code § 42-3809 decided based on a stipulated set of facts – as confirmed by numerous stipulations of the parties.

32. In the event the Court takes judicial notice of and does not strike the 32 pages of documents attached to *Defendant's Statement of Facts in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* and any reference to the contents thereof, I request the opportunity for Defendant to conduct limited discovery on matters addressed in these 32 pages of documents as they relate to the issue of the applicability of the statute of limitations found in Idaho Code § 42-3809.

33. I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 26th day of April, 2022.
LAW OFFICES OF J. KAHLE BECKER

By: /s/ J. Kahle Becker
J. KAHLE BECKER
Attorney for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of April, 2022, I caused to be served the foregoing Declaration of Counsel to the following persons:

Meghan Carter and Garrick Baxter
Attorney for Defendant,
Idaho Department of Water Resources

via I-Court/Odyssey

/s/ J. Kahle Becker
J. KAHLE BECKER
Attorney for the Plaintiff/Counterdefendant