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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**

STRIDER CONSTRUCTION CO. INC.,

Plaintiff,

vs.

IDAHO WATER RESOURCE BOARD,

Defendant.

Case No. CV01-22-10932

PLAINTIFF'S REPLY IN SUPPORT OF
ITS MOTION TO STRIKE JURY TRIAL
AND OPPOSITION TO DEFENDANT'S
MOTION FOR JURY TRIAL

Plaintiff Strider Construction Co. Inc. ("Strider") filed its motion to strike the jury trial on March 9, 2023, in which Strider pointed out that neither party filed a jury demand under I.R.C.P. 38(b) or moved for a jury trial under I.R.C.P. 39(b) and appropriately sought to have the Court amend the Scheduling Order to reflect that this would be a bench trial. In its opposition brief filed March 15, 2023, Defendant Idaho Water Resource Board ("IWRB") moved to request that the Court exercise its discretion pursuant to I.R.C.P. 39(b) to order a jury trial despite the lack of

proper demand by either party. This Court should grant Strider's motion, order this case set for a bench trial, and deny IWRB's motion.

I. This Case Should Go to a Bench Trial: Defendant Waived Its Right to a Jury Trial by Failing to Make a Timely Demand.

IWRB does not dispute that no jury demand was filed. I.R.C.P. 38(d) states, "A party waives a jury trial unless its demand is properly served and filed." Therefore, it is undisputed that IWRB waived its right to a jury trial.

Where neither party files a timely demand for a jury trial, a bench trial is proper. *Eagle Springs Homeowners Ass'n, Inc. v. Rodina*, 165 Idaho 862, 873 n.1, 454 P.3d 504, 515 (2019); see also *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 71, 878 P.2d 762, 770 (1994) ("Because the Shireys' demand for a jury trial was untimely according to I.R.C.P. 38(b), the trial court did not abuse its discretion in denying a jury trial under either I.R.C.P. 38(b) or 39(b)."). Accordingly, Strider's motion seeking to correct the Scheduling Order to reflect that this case will go to a bench trial should be granted.

While a bench trial is warranted under the rules, it is also what Strider prefers for several other reasons. This is a commercial contract dispute. Strider does not desire a jury trial and deliberately did not file a demand for one. A jury trial is not required by the parties' contract. Further, this case involves a mixture of equitable claims, which are not decided by jury, and legal claims, which arise out of a construction contract and project that involves complex legal and technical issues. Collectively, the claims are better suited for a bench trial compared to a jury trial.

II. IWRB's Motion for Jury Trial Should Be Denied Because IWRB Provides No Justification for Its Failure to Timely File a Jury Demand.

Under I.R.C.P. 39(b), a party who failed to file a timely jury demand may, on motion, seek an order for a jury trial "on any issue for which a jury may have been demanded." I.R.C.P. 39(b). "Rule 39(b) provides a limited 'safety valve' against unduly harsh application of the waiver rule," vesting in the court a discretionary power to order a jury trial even though demand for a jury was not timely made. *Viehweg v. Thompson*, 103 Idaho 265, 269, 647 P.2d 311, 315 (Ct. App. 1982).

However, if the movant does not provide a compelling explanation for why it failed to make a timely jury demand under I.R.C.P. 38(b), enforcement of the waiver is not unduly harsh and is warranted. See *KDN Mgmt., Inc. v. WinCo Foods, LLC*, 164 Idaho 1, 6, 423 P.3d 422, 427 (2018) (citing *City of Pocatello v. Anderson*, 106 Idaho 370, 373, 679 P.2d 647, 650 (1984); *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 398, 111 P.3d 73, 83 (2005); *Viehweg v. Thompson*, 103 Idaho 265, 269, 647 P.2d 311, 315 (Ct. App. 1982)). Because a party waives its right to a jury trial by failing to make a timely demand under I.R.C.P. 38, even if the movant in an I.R.C.P. 39(b) motion provides an explanation for its failure to make a jury demand, the Court still has complete discretion to deny the motion. Here, IWRB's request for a jury trial under I.R.C.P. 39(b) does not give a compelling reason for the Court to exercise its discretion and allow a jury trial despite IWRB's failure to file a timely demand.

A. None of the Cases Cited by IWRB Resulted in the Court Ordering a Jury Trial.

IWRB relies primarily on *R.E.W. Const. Co. v. Dist. Court of Third Judicial Dist.*, 88 Idaho 426, 400 P.2d 390 (1965), but that case did not involve a motion for a jury trial and did not result in the Court ordering a jury trial. Rather, in *R.E.W.* the Court ruled that the requirement to file a jury demand under I.R.C.P. 38 did not infringe on the Constitutional right to a jury trial. *R.E.W.*, 88 Idaho at 442. Having ruled on the actual argument at issue, the Court in *R.E.W.* then gave a brief discussion of I.R.C.P. 39(b) and indicated that a trial court should exercise its discretion with the overall purpose and spirit of the Idaho Civil Rules of Procedure in mind - "to secure the just, speedy and inexpensive determination of every action and proceeding." *Id.* The opinion in *R.E.W.* does not indicate that this Court must grant IWRB's request for a jury trial. Here, the more just, speedy, and inexpensive choice is a bench trial. IWRB undisputedly waived its right to a jury trial by failing to file a timely demand.

IWRB also cites *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994), but the primary issue in that case was whether the jury demand was filed timely. Finding the demand was not filed timely in accordance with I.R.C.P. 38(b), the Supreme Court held that the trial court did not err in holding a bench trial because the right to a jury was waived and the trial court had no

obligation to grant the request for a jury under I.R.C.P. 39(b). *Id.* at 770-71. This case does not support IWRB’s position. *Shirey* reinforces that IWRB has waived its right to a jury trial and that this Court has no obligation to acquiesce to IWRB’s request for a jury over Strider’s objection.

B. IWRB Does Not Justify Its Failure to File a Jury Demand.

“Without a reasoned explanation as to why a proper demand was not made,” a trial court is undeniably within its discretion to deny the request for a jury under I.R.C.P. 39(b). *KDN Mgmt., Inc.*, 164 Idaho at 7.

IWRB attempts to excuse its failure to make a timely demand by noting that the deadline to file a demand had already passed by the time IWRB’s outside counsel had appeared in the case. But this is not a reasoned explanation justifying relief under I.R.C.P. 39. The reality is that before IWRB’s outside counsel appeared, IWRB relied on legal representation from Idaho attorneys general (effectively in-house counsel to IWRB). These deputy attorneys general prepared and filed IWRB’s Answer and Counterclaims on August 23, 2022—and could have filed a jury demand at any point until September 28, 2022 to comply with I.R.C.P. 38(b), but neglected to do so. IWRB’s motion gives no explanation for this. Nor does IWRB explain why its private outside counsel, who appeared after the deadline for jury demand had passed, nevertheless waited *more than five months* to move for a jury trial under I.R.C.P. 39(b) and did so only as part of its opposition to Strider’s motion.

KDN Mgmt., Inc. v. WinCo Foods, LLC is instructive in illustrating the inadequacy of IWRB’s excuse. In *KDN*, the party moving for a jury trial under I.R.C.P. 39(b) tried to explain the lack of filed jury demand by pointing out that all parties assumed a demand had been made because: (1) the case was scheduled as a jury trial approximately five times with no objection from the parties; (2) the parties executed a stipulation for a 12-person jury trial; (3) local counsel for opposing party stated that a jury trial was likely acceptable to its client; and (4) the moving party made a jury demand in their answer to the opposing party’s second amended complaint. *KDN Mgmt., Inc.*, 164 Idaho at 6-7. The Supreme Court stated “none of these reasons account for why

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2023, a true and correct copy of the within and foregoing instrument was served upon:

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*Attorney for Defendant Idaho Water
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- Via U.S. Mail
- Via Legal Messenger
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- Via iCourt E-File and Serve**

DATED: This 19th day of April, 2023.

/s/ John H. Guin