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**IN THE DISTRICT COURT FOR 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

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO ORDER
RETURN OF STATE PROPERTY**

Idaho Water Resource Board (“IWRB”), by and through its counsel of record, Kirton McConkie, hereby submits this Memorandum in support of Defendant’s Motion to Order the Return of State Property.

I. INTRODUCTION

This motion is before the Court because Strider, during the course of performing work for the State of Idaho - IWRB, circumvented discovery practices and removed select State property from the State worksite at the Priest Lake Dam, knowing it was key evidence in the instant matter. Strider never disclosed that it stole the property until IWRB discovered it was missing and specifically inquired with Strider’s counsel as to whether Strider had possession of it. The IWRB, through this motion, seeks the return of the property, in the interest of efficient and equitable judicial proceedings.

Pursuant to the contract that is the subject of this litigation, Plaintiff was charged with replacing J-seals¹ on the State dam Tainter gates. IWRB has maintained Plaintiff’s replacement of the J-seals failed to meet industry standards for quality workmanship and materials and resulted in ongoing leaks. At a time unknown, and without IWRB’s knowledge or consent, Plaintiff determined examining the J-seals would be valuable in the litigation. However, rather than follow the proper channels and seek an examination through formal discovery, Strider selected one of the J-seals, stole it from the worksite and apparently took it to his business – although the chain of custody has not been verified. Plaintiff did not provide IWRB with advance notice of the removal, nor did Plaintiff or Plaintiff’s counsel notify IWRB that such key evidence and State property was taken – until Defendant’s counsel specifically inquired after finding the evidence missing. Beyond the issue of taking State property, there is no indication that when Plaintiff took the J-seal, it followed any sort of

¹ A J-seal, as used in the Contract, is a side seal on Tainter gates of a dam. At issue in this matter is Strider’s deficient Tainter gate repairs and specifically, the failure to install J-seals with a proper seal, resulting in nearly all of the gates leaking water. *See* Plaintiff’s Complaint at 2, 9 and Defendant’s Answer to Complaint and Counter Claim at pp. 24-25.

objective collection practices (indeed, it is unknown where the balance of the remaining replaced J-seals are that Plaintiff did not select for removal) and there is also no assurance the evidence has been safely preserved in a secure location. Plaintiff's counsel has refused to answer questions regarding such evidence collection procedures, impeding Defendant's ability to inspect the evidence with the appropriate foundational understanding of its condition and further calling into question serious concerns regarding spoliation of key evidence. Plaintiff's removal of State property and physical evidence at the center of dispute in this case was improper, illegal, failed to follow proper evidence preservation obligations and chain of custody guidelines, and the property should be returned to the IWRB, with an explanation as to when and how it was collected and preserved.

II. STATEMENT OF RELEVANT FACTS

This is a case involving Plaintiff's breach of a construction contract for certain improvements to the Priest Lake Water Management Project Outlet Dam in Priest Lake, Idaho. On or about August 20, 2020, IWRB and Strider entered into a fixed-price construction contract for the dam improvements ("the Contract"), which included extending the height of the existing Tainter gates on the dam, replacing trunnion pins, and strengthening gate assemblies, repairing existing concrete, expansion joints and existing railing, as well as installing a new concrete and armor rock scour apron extension. This litigation involves Plaintiff's non-conforming work under the Contract in relation to two key areas: the Plaintiff's failure to design and implement an effective dewatering method to create a dry workspace per contract requirements (an essential element of successfully completing the work); and Plaintiff's non-conforming work with relation to the Tainter gates. For purposes of this motion, Defendant will focus on the Tainter gates and relevancy of the J-seals.

Pursuant to the Contract, Strider was required to "[i]ninstall radial gates in such a way that the rubber J-seals are not damaged and proper sealing will occur when upstream water levels are

restored.” Defendant’s Answer to Complaint and Counterclaim, Ex. 1 at ex. C, Tech. Specs. div. 5, § 05 12 00, pt. 3.03D. Further, Strider was required to adjust the J-seals “after installation so that they are slightly compressed in the closed, unwatered condition to prevent excessive depression and wear in the closed, watered condition.” Defendant’s Answer to Complaint and Counterclaim, Ex. 1 at ex. C, Contract Drawing no. GN-2 n.5. Post-installation inspections by the Owner’s Representative and Board staff revealed that the J-Seals do not seal properly, and that there are substantial gaps between the J-Seals and the sill plates. *Id.* at 25. When Strider completed its work on the Tainter gates, nearly all of them leaked water. *Id.*

Upon initiation of this litigation, IWRB was unable to locate the J-seals changed out by the Plaintiff. In a meet and confer conference between counsel on April 29, 2023, IDWR’s counsel inquired as to whether any J-seals were taken by Strider. *See* Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant’s Motion to Compel (“Reinhardt-Tessmer Dec.”), at ¶ 2. Strider’s counsel confirmed that Strider did in fact have a J-seal. *Id.* IWRB’s counsel requested the return of the State’s property along with documentation of the chain of custody, but Strider’s counsel has refused to return the property or account for when it was removed, or even provide assurances that appropriate measures were taken against tampering or spoliation. *Id.*, ¶¶ 2-6 and Exhibits A-D.

III. ARGUMENT

A. Plaintiff Should be Compelled to Return the State’s Property.

- i. The Court has the Authority to Order Strider to Return the J-Seal

“[T]rial courts have ‘inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.’” *Hall v. State*, 151 Idaho 42, 46 (2010) quoting *Townsel v. Superior Court*, 20 Cal.4th 1084, 86 Cal.Rptr.2d 602, 979 P.2d 963, 964 (1999); *see*

also I.C. § 1-1622. This inherent authority is widely recognized beyond Idaho, where courts have intervened to prevent parties like Strider from obtaining an advantage through circumventing formal discovery. See *Fayemi v. Hambrecht & Quist*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997) citing *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888) (“[C]ourts necessarily have the inherent equitable power over their own process ‘to prevent abuses, oppression and injustices.’”). “Pursuant to this inherent authority, a court must be able to sanction a party that seeks to introduce improperly obtained evidence; otherwise the court, by allowing the wrongdoer to utilize the information in litigation before it, becomes complicit in the misconduct.” *Id.* A motion seeking to “regulat[e] the use of information obtained by a party independent of the discovery process” is properly brought pursuant to the Court’s inherent equitable powers, rather than pursuant to Rule 26, because Rule 26 does not operate when evidence is gathered independent of the discovery process. *Id.*

Although it appears an Idaho court has not addressed these specific circumstances, other courts have and concluded that improperly-obtained evidence should be returned to its rightful owner. See *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992), amended at 144 F.R.D. 73 (E.D. La. 1992); *Lahr v. Fulbright & Jaworksi L.L.P.*, 1996 U.S. Dist. LEXIS 20133 (N.D. Tex. 1996).

In *Shell*, the court ruled in order to “preserv[e] the integrity of [the] judicial proceeding” and “balanc[e] the scales ... [t]he plaintiffs may not make any use of the documents obtained from the Shell-employee source or any use of the information contained therein, including keeping any copies or notes of the information contained in the documents, unless the documents are publicly available or were previously produced by Shell.” *Id.* at 109. The Court also amended its original order “to reflect that it was entered pursuant to the Court’s inherent authority to control and

preserve the integrity of its Judicial proceedings,” rather than pursuant to Rule 26, because the documents were obtained independent of the discovery process. *Id.*

Similarly, in *Lahr*, a sex discrimination case, the plaintiff had access to and made copies of documents in her capacity as an employee for the defendant. When the plaintiff tried to use the documents in the litigation, arguing that such documents were not privileged, the court explained that it may exercise its authority to exclude documents improperly obtained outside the context of formal discovery. *Lahr*, 1996 U.S. Dist. LEXIS 20133 at *5-6. *Lahr* also argued that her case was different from *Shell* because she copied the documents while employed. *Id.* at *8. The court rejected that argument, finding it didn’t change the wrongful acquisition of them for use in the litigation, concluding the “court's inherent authority is intended to preserve the integrity of the proceedings before it. This power is not to be constricted by formalistic distinctions like the one *Lahr* now attempts to draw.” *Id.* at *8-9. The district court judge also affirmed the conclusion reached by the magistrate judge that courts will not reward illicit conduct and encourage parties to use improper tactics to obtain information. Consequently, the court ordered the plaintiff to return the documents. *Id.*

In addition to its inherent authority over its docket, “[a]s a general principle, the trial court is granted broad discretion in fashioning equitable relief,” which includes recourse to principles of justice. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 867 (2018) *citing Rowe v. Burrup*, 95 Idaho 747, 750, 518 P.2d 1386, 1389 (1974). The Court should exercise its authority to prevent Strider from using methods of obtaining evidence that circumvent formal discovery and violate the legal rights of the State.

ii. Plaintiff Should Not Benefit from Improper Tactics.

Plaintiff's wrongful taking and retention of State property is concerning for a number of reasons. First and foremost, Strider is unlawfully holding the property. Although Strider has attempted to dance its way around this by referring to a provision in an exhibit to the Contract, which references disposal, the referenced provision lends no support to Strider's position that it owns the J-seal. Reinhardt-Tessmer Dec. at ¶ 5. Further, even if you refer to Strider's proffered language, it did not in fact dispose of the material - it stole it from State property for use in the instant litigation.

Second, the property is indisputably evidence at the very center of this case. By using surreptitious means to procure the J-seal as opposed to allowing the formal collection of the evidence and requesting to inspect the evidence through formal discovery, Strider removed important safeguards of equity afforded through formal discovery. Strider removed a single, selected J-seal, and to date, Strider and its counsel have refused to confirm whether any evidence collection procedures or chain of custody guidelines were followed. This gamesmanship and misconduct should not be rewarded. Strider should be ordered to return the property, which is key evidence in the case so that the State can properly assure it is retained by the State's counsel in a secure location for inspection by all parties moving forward.

IV. CONCLUSION

IWRB respectfully requests that the Court exercise its inherent authority to regulate these judicial proceedings and order Strider to return the J-seal to the State and to provide the State's counsel with information regarding when it was removed, whether anything else was removed, and the chain of custody for the J-seal since its removal.

DATED this 8th day of May 2023.

KIRTON MCCONKIE

/s/ Jennifer Reinhardt-Tessmer

Jennifer Reinhardt-Tessmer

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2023, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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