Steven B. Andersen (ISB 2618)
Jennifer Reinhardt-Tessmer (ISB 7432)
KIRTON MCCONKIE
11th & Idaho Building
1100 W. Idaho St., Ste. 930
Telephone: (208) 370-3325
Facsimile: (208) 370-3324
sandersen@kmclaw.com
jtessmer@kmclaw.com

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
MEGHAN M. CARTER, ISB No. 8863
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Defendant

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

I. INTRODUCTION

Idaho Water Resource Board ("IWRB") filed the instant motion to compel Strider to return property it wrongfully took from IWRB's worksite just 48 hours before filing the instant litigation. Strider now attempts to focus the Court's attention on Strider's possession of the property during an irrelevant time period, (months prior, during the project period) when the parties were working collaboratively and viewed the J-seal together. Of course, at that time, litigation was not reasonably anticipated, the viewed J-seal was not evidence, and it was of no concern that IWRB's contractor had possession of the same. The concerning event is Strider's decision to remove the J-seal from state property after terminating the contract, knowing it would be initiating litigation in the following days. Such conduct was a direct subversion of the discovery process. Rather than address the issue head on, Strider's Memorandum in Opposition to Defendant's Motion to Order Return of State Property ("Opposition") attempts to deflect attention from its own wrongdoing with inappropriate attacks and threats on IWRB and counsel of record. Using baseless allegations for a seemingly improper purpose not only disregards standards of civility in litigation, it constitutes sanctionable conduct and should not be entertained by this Court.

II. REPLY

I. The Purpose of Formal Discovery Rules

In its strained attempts to distinguish IWRB's authority, Strider ignores the importance of fair litigation practices and this Court's authority to foster such practices. "The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that the discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose." *Edmunds v. Kraner*, 142 Idaho 867, *873 (2006). A court's authority to control discovery extends beyond formal discovery. *Lahr v. Fulbright & Jaworski, L.L.P.*, 1996 WL

34393321, *3 (N.D. Texas 1996) (unreported). "The court's power to remedy unfair litigation practices and preserve judicial integrity is broader in scope." *Id.* "The exclusion of deceptively obtained evidence remains a matter within the sound discretion of the court." *Lahr*, 1996 WL 34393321 at *3 (citing *Park v. El Paso Bd. Of Realtors*, 764 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied,* 474 U.S. 1102, 106 S.Ct. 884 88 L.Ed.2d 919 (1986).

Courts have consistently declined to reward plaintiffs who subvert formal discovery, which is exactly what Strider did in this case. *See Ashman v. Solectron Corp.*, 2008 U.S. Dist. LEXIS 98934, *4 (N.D. Cal. 2008) ("discovery self-help is not a protected activity"); *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319 (S.D.N.Y. 1997); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp.2d 548 (S.D.N.Y. 2008); *In re Shell Refinery*, 143 F.R.D. 105 (E.D. La. 1992), amended at 144 F.R.D. 73 (E.D. La. 1992). In *In re Shell*, as in the foregoing cited cases, the court rejected efforts at self-help discovery, because they offended the purpose of formal discovery. Specifically, the court found that the plaintiffs in *Shell* went beyond mere investigation and "effectively circumvented the discovery process and prevented Shell from being able to argue against production." *In re Shell*, 143 F.R.D. at *108.

In *Lahr v. Fulbright & Jaworski*, the plaintiff had access to documents in her capacity as an employee, which she later tried to use in her litigation against her employer. *Lahr*, 1996 WL 34393321 at *3. Like Strider, she tried to distinguish herself from *Shell* because she obtained the documents while employed. *Id.* The court disagreed and upheld the reasoning of the magistrate: "The plaintiff's use of the notes poses a threat to the integrity of this judicial proceeding and the administration of justice. To permit the utilization of these notes for any purpose in this case would reward malfeasant conduct and encourage the use of subversive tactics employed to obtain the notes." *Id.* (quoting Mag. Op. at 5-6). The court went on to explain that "[i]n the context of civil

litigation, the interest served by suppressing evidence obtained by deception or other improper means is the integrity of the judicial process and the promotion of candor and honesty among members of the Bar." *Id.* at *4. Here, at this juncture, IWRB is not seeking sanctions or trying to suppress use of the evidence but is merely seeking its return.

II. When Property Becomes Evidence

The common law duty to preserve evidence arises at "the moment that litigation is reasonably anticipated." *Hynix Semiconductor Inc. v. Rambus*, 645 F.3d 1336 (Fed. Cir. 2011); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011); *Zubulake v. UBS Warburg*, LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that evidence may be relevant to future litigation."). Moreover, counsel must take affirmative steps to ensure their litigation clients comply with the duty to preserve evidence. *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999 ("once on notice, the obligation to preserve evidence runs first to counsel, who then had a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation."); *see also Day v. LSI Corp.*, 2012 U.S. Dist. LEXIS 180319 (2012); *Play Visions, Inc. v. Dollar Tree Stores, Inc.*, 2011 U.S. Dist. LEXIS, 61636 (W.D. Wash. 2011); *GFI Acquisition, LLC v. Am. Feder. Title Corp.*, 2010 Bankr. LEXIS 1217 (S.D.N.Y. 2010).

Laying the foundation to proper discovery, standard and formal preservation and collection practices ensure evidence is properly collected and not cherry-picked to favor one's own case. *See Bromley v. Garey*, 132 Idaho 807, 812, 979 P.2d 1165, 1170 (1999) *citing Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995) (noting that the "evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence."). The discovery rules, along with the

foundational preservation and collection standards, establish procedures and guidelines that ensure fairness and transparency in the exchange of information, evidence, and documents in a litigation. Ensuring proper storage and maintaining a chain of custody are crucial for preserving, securing, and retaining reliable evidence, without compromising admissibility or raising questions regarding authenticity. These are the very concerns that led to IWRB's request to return its property. Indeed, if Strider had properly left the J-seal sample on IWRB's property after terminating the contract, returned to Washington, and filed the lawsuit, IWRB would have had a duty to preserve the sample as evidence.

III. Strider Improperly Circumvented Discovery

Strider's Opposition recites a timeline that does nothing to support its position on this motion, because Strider fails to acknowledge the critical demarcation in the timeline of events when litigation was reasonably anticipated and the J-seal, which was simply a sample sitting in a trailer on IDWR's worksite, became evidence in the case. Strider cannot seem to decide in the Opposition whether the J-seal was "trash", could have been trash under the contract that it had terminated at the time the J-seal was removed from IWRB's site[1], or if it was a "sample that had been in the onsite trailer." In reality, at the critical point in time that Strider terminated the contract (when it clearly anticipated litigation), it was a sample from IDWR's Tainter gate, sitting on IDWR's site. Strider removed it, apparently took it to Washington, and just 48 hours later, filed the instant lawsuit. *See* Opposition at 5. It appears it was specifically taken for purposes of the instant lawsuit, as Strider asserts it has since been preserved and maintained. *Id.* at 8.

[1] IWRB acknowledges Strider was permitted, pursuant to the terms of the contract, to remove the J-seals from the Tainter gates and dispose of them in the dumpster on state property – but this J-seal had not been discarded at the critical point in time when preservation obligations arose.

Strider's Opposition acknowledges that when Strider viewed the sample with IWRB representatives, it was "well before there was any litigation." (Opposition at 2). In other words, during the course of the contract, the parties were collaborating on why the gates were leaking. At that time, the contract authorized Strider to have the J-seals. Moreover, it was of no import that the parties collaboratively viewed the J-seal months earlier as IWRB assisted Strider with the leaking Tainter gates. Strider's focus on this time period is wholly irrelevant and indicates a fundamental misunderstanding of when preservation obligations are triggered and why ownership over the property matters.[2] Indeed, counsel should have been guiding Strider through these obligations as soon as they anticipated filing the instant litigation – and yet, although the Complaint was filed in July of 2022, Strider's counsel seemingly made no effort to confirm with Strider what seals were preserved and where they were even being kept until requested to do so by IWRB's counsel (after inquiring if they were taken by Strider) in March of 2023. *See* Second Declaration of Jennifer Reinhardt-Tessmer ("Second Reinhardt-Tessmer Dec.") at ¶ 4-5; Declaration of Kristina Southwell in Support of Plaintiff's Opposition, Exhibit A, March 29, 2023 email at12:51 p.m..

There are many self-serving contradictions in Strider's Opposition. For example, Strider takes the position that the J-seal was "discarded trash", and yet, the J-seal was kept by Strider on-site and after Strider terminated the contract, taken off-site to Washington where it has apparently been preserved. Additionally, Strider took the alleged "trash" back to Washington without disclosing to IWRB that it had possession of the same and yet, the onus was allegedly on IWRB

[2] Footnote 38 of Strider's Opposition further highlights this misunderstanding. In fact, any "documents, emails or notes" created during the Project period, which were IWRB property and taken from the site, upon anticipation of litigation, would also be improperly obtained. *See Lahr*, 1996 WL 34393321. The contested behavior is subverting the discovery process to obtain materials by improper means. This is why courts reject former employees' use of employer's documents gathered as ammunition while employed in subsequent lawsuits. *Id.*

to know Strider had the property and seek access to it through a formal discovery process – a process wholly ignored by Strider.

IWRB notes that it attempted on multiple occasions to avoid court intervention in this dispute, as demonstrated by the email record attached to the parties' briefing. However, Strider's course of conduct, combined with what appeared like a lack of counsel control over the evidence has led to legitimate concern regarding the secure custody of the J-seal. As acknowledged by Strider, IWRB counsel emailed opposing counsel to inquire about the physical evidence in Strider's possession – including, specifically, whether Strider preserved samples of the original J-seal material. *See* Declaration of Kristina Southwell at ¶ 2; *see also* Second Reinhardt-Tessmer Dec. at ¶ 2. However, IWRB counsel's recollection of the subsequent meet-and-confer conference differs from the account relayed in Strider's Opposition. Specifically, when IWRB's counsel inquired if Strider had any J-seals, Strider's counsel responded that she had inquired with her client and was able to confirm he had an old J-seal. *See* Second Reinhardt-Tessmer Dec. at ¶ 4. IWRB's counsel inquired where the J-seal was being kept and was told by opposing counsel that she "assumed" it was somewhere in Strider's office, that she was unsure where the office was located (Idaho or Washington) but assumed it was in an "air-conditioned location." *Id.* at ¶ 5. When Strider's counsel said IWRB could travel to view it (wherever it was), IWRB's counsel stated that she believed it was IWRB's property so counsel would need to work that out. *Id.* at ¶ 5. In addition to the fact that Strider took the J-seal from the worksite, based on that call, IWRB became increasingly concerned about the evidence collection, chain of custody, and preservation of IWRB's J-seal and followed up with an email to opposing counsel inquiring about the same. *See* Declaration of Kristina Southwell, Exhibit A, page 1. Strider's counsel did not appease those concerns but, ironically, directed Plaintiff's counsel to formal discovery. *Id.*

Defendant chose not to seek sanctions or a more drastic remedy as a result of Strider's actions but simply sought the return of the property following Strider's continued refusal to return it. When Strider's counsel ultimately refused to send the J-seal, blaming "security" concerns with the U.S. mail (after it previously appeared counsel didn't even know Strider had the J-seal or where it was being stored for the past 10 months), IWRB was compelled to file the underlying motion. In addition to concerns over the safekeeping of evidence, the ongoing roadblocks and increased expenses being demanded to view one's own property after Strider circumvented formal discovery is not only inequitable, it offends the integrity of the discovery process.

Finally, although IWRB and its counsel do not wish to engage in unproductive and uncivil dialogue, it is forced to address the improper threat of sanctions for a seemingly improper purpose – as a tactic to detract from Strider's problematic behavior leading to the underlying motion and as a threat to compel IWRB to withdraw the pending motion.[3] Strider's own version of the facts in the Opposition only highlights IWRB's position. Strider either lacks a fundamental understanding regarding discovery and the triggering of preservation obligations or intentionally seeks to levy accusations in bad faith. Either way, IWRB will seek counter-sanctions against Strider should such improper tactics continue.

III. CONCLUSION

At the time Strider terminated the contract, just 48 hours before filing this lawsuit and commencing litigation against IWRB, Strider chose to remove a selected J-seal sample from IWRB property (which was not in the garbage but apparently in a trailer) and take it back to Washington to keep for use in this litigation. Despite requests for assurance from opposing counsel, there has been no indication that appropriate collection or preservation measures have

[3] On June 2, 2023, Strider's counsel sent a letter threatening Rule 11 sanctions if IWRB declined to withdraw the instant motion.

been taken, chain of custody records kept, or the evidence safely maintained. Further, IWRB should not have to incur any expenses or further delay to obtain access to its own property. Strider should be compelled to comply with formal discovery and respect the integrity of the judicial proceeding he initiated. As such, IWRB respectfully requests that the Court order the return of the State's property.

DATED this 7th day of June 2023.

KIRTON MCCONKIE

/s/ *Jennifer Reinhardt-Tessmer*
Jennifer Reinhardt-Tessmer
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June 2023, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

Lindsay (Taft) Watkins
Pro Hae Vice Admission Pending
Kristina Southwell
Pro Hae Vice Admission Pending
AHLERS CRESSMAN & SLEIGHT PLLC
1325 4th Ave., Suite 1850
Seattle, WA 98101
Telephone: (206) 287-9900

☐ U.S. Mail
☐ Facsimile: (208) 388-1300
☐ Hand Delivery
☐ Overnight Delivery
☒ iCourt E-File/Serve:
lindsay.watkins@acslawyers.com
kristina.southwell@acslawyers.com

John H. Guin
LAW OFFICE OF JOHN H. GUIN, PLLC
P.O. Box 31210
Spokane, WA 99223
Telephone: (509) 443-0709
Attorneys for Plaintiff Strider Construction Co., Inc.

☐ U.S. Mail
☐ Facsimile:
☐ Hand Delivery
☐ Overnight Delivery
☒ iCourt E-File/Serve:
john@guinlaw.com

Garrick L. Baxter
Meghan M. Carter
Deputy Attorneys General
Idaho Water Resource Board
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Attorneys for Defendant

☐ U.S. Mail
☐ Facsimile:
☐ Hand Delivery
☐ Overnight Delivery
☒ iCourt E-File/Serve:
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

/s/ *Jennifer Reinhardt-Tessmer*
Jennifer Reinhardt-Tessmer