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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

**REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO AMEND SCHEDULING
ORDER**

Idaho Water Resource Board ("IWRB"), by and through its counsel of record, Kirton McConkie, hereby submits this Reply in support of Defendant's Motion to Amend Scheduling Order.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO AMEND SCHEDULING ORDER -

For the reasons set forth in further detail below, IWRB respectfully requests the Court enter an order amending the deadlines in the November 16, 2022 Scheduling Order.

I. INTRODUCTION

IWRB filed its Motion to Amend the Scheduling Order on June 5, 2023, requesting the Court to extend the trial date, pre-trial conference date, and all other associated upcoming case deadlines by approximately four months, based on the serious and unforeseen health condition of lead counsel. On June 8, 2023, Plaintiff filed its Opposition to Defendant’s Motion to Amend Scheduling Order. At a hearing before the Court on June 9, 2023, counsel for the parties was asked to meet and confer on a stipulation to IWRB’s motion. IWRB’s counsel made efforts to schedule time to confer with opposing counsel on the issues and to provide additional information on the good cause for IWRB’s request. *See* Second Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant’s Motion to Amend Scheduling Order (“Second Reinhardt-Tessmer Dec.”), filed currently herewith, at ¶ 2, and **Exhibit A** attached thereto. However, Strider would not stipulate to an extension of the trial date and so the parties will reappear before the Court on IWRB’s motion.¹ *Id.*

II. REPLY ARGUMENT

A. Good Cause Exists to Modify the Scheduling Order

i. Lead Counsel is Experiencing Unforeseen Medical Issues

Idaho Rule of Civil Procedure 16(b)(6) provides the Court with the discretion to modify a scheduling order upon a showing of good cause. Idaho R. Civ. Pr. 16(a)(3); *see also State v. Young*, 136 Idaho 113, 116, 29 P.3d 949, 952 (2001) (considering I.C. § 19-3501(2), noting that

¹ In light of expert witness and lay witness deadlines approaching, the parties did stipulate to an **interim** amendment to the Scheduling Order to permit time for the resolution of IWRB’s Motion to Amend the Scheduling Order, which Order was entered by the Court on June 23, 2023.

“[b]ecause there is no fixed rule for determining what constitutes good cause, the matter is initially left to the discretion of the district court.”).

As described in the previously-filed first Declaration of Jennifer Reinhardt-Tessmer in support of the underlying motion, the lead attorney IWRB retained to handle this matter has had a serious and unforeseeable medical issue arise in recent months that will pose a direct conflict with his ability to prepare for and participate in trial as currently scheduled. *See* also Second Reinhardt-Tessmer Dec. at ¶ 4. Specifically, this condition has resulted in counsel’s ongoing hospitalization for continued treatment over the majority of the past eight weeks. *Id.* This condition was not known at the time of the scheduling conference. *Id.* That attorney is anticipated to undergo a medical procedure for this condition sometime shortly after August of 2023 that would necessarily require a period of recovery estimated at 6 weeks before returning to work. *Id.* at ¶ 5.

The Deputy Attorneys General of record in this matter (hereinafter the “AG Office”) hired the lead attorney of record to handle all major responsibilities associated with the defense of this matter and prosecution of IWRB’s counterclaim. *Id.* at ¶ 3. Due to a heavy workload, the AG Office’s role in this matter is generally limited to monitoring and informing outside counsel and assisting with the coordination of internal witnesses. *Id.* Thus, while Strider argues there are technically four attorneys listed on the caption of the pleading on behalf of the State of Idaho, Idaho Water Resource Board, there are currently two outside attorneys – with the lead attorney who was initially retained, being on medical leave. The Kirton McConkie firm currently has two other shareholders in our Litigation section and one in the International section based in Boise, who are all covering cases while their partner is out on leave. *Id.* at ¶ 6. Given the unforeseen and unique circumstances, good cause exists to modify the Scheduling Order.

- ii. A Key Evidence Inspection Cannot be Conducted Until November

Apart from the lead attorney for IWRB being on medical leave, counsel for IWRB has recently been advised that water levels at the dam are too high to conduct a necessary inspection of a suspected void under the dam – a void that is key to several defective workmanship issues and payment disputes underlying claims in the Complaint and Counterclaim in this litigation. *Id.* at ¶¶ 7,8, *see also* Plaintiff’s Responses to Defendant’s First Set of Interrogatories, attached hereto as **Exhibit B** to the Second Reinhardt-Tessmer Dec. (responses to Interrogatories, 14, 17, 34); *see also* excerpts from the 30(b)(6) deposition of the Idaho Department of Water Resources, attached hereto as **Exhibit C** to the Second Reinhardt-Tessmer Dec., which demonstrate the materiality of the issue in the case. In fact, in the Idaho Department of Water Resource’s deposition, Plaintiff’s counsel specifically questioned the 30(b)(6) witness about what evidence it had that Strider caused the “hole” under the dam, specifically asking the witness if anybody has “actually see[n] a hole under the dam”. *See* Second Reinhardt-Tessmer Dec., Exhibit C at pg. 105 of transcript. As indicated by opposing counsel’s line of questioning, the inspection will help determine the potential mechanism of formation of voids, including Plaintiff’s cofferdam failures. *Id.* at ¶ 9.

Mike Morrison, Planning Engineer for IWRB, has worked to accommodate the access requests, but he reports that rainfall and melting snow have caused high water levels that have prevented testing. *See* Declaration of Mike Morrison in Support of Defendant’s Motion to Amend Scheduling Order (“Morrison Dec.”), filed herewith, at ¶¶ 1-7. By the end of March 2023, water levels had increased to the point where inspection of the anticipated void could not occur without dewatering the area. *Id.* at ¶ 7. Dewatering the relevant areas would require IWRB to obtain permits, spend months planning, and expend significant costs. *Id.* at ¶ 8. In September, the IWRB will begin drawing down Priest Lake for dewatering to accommodate in-water work on the Priest

Lake Outlet Dam repairs and improvements, which will include an inspection of the current damage and associated repairs to the void. *Id.* at ¶ 9.

Counsel has been diligent since its retention in October 2023 to identify appropriate experts to explore the issues in the case and specifically, to perform the surveys in appropriate field conditions, but due to requirements for physical access safety and optimal data quality combined with the water levels at the dam, our expert has not yet been able to conduct the appropriate surveys for IWRB's defense and counterclaim and will now not be able to do so until November 2023. *Id.* at ¶¶ 9-11.

The unique factors serving as the basis of IWRB's motion warrant the requested extension. Beyond the facts justifying the extension, IWRB has not unduly delayed seeking a modification to the scheduling order and could not have foreseen the events giving rise to the motion at the time of the initial scheduling conference. Moreover, there was no attorney negligence that led to the motion. *See Kushner v. Nationwide Credit, Inc.*, 256 F.R.D. 684, 687 (E.D. Cal. 2009), citing *Wright, Miller & Kane*.

B. Amending the Scheduling Order Will Not Prejudice Plaintiff but Failure to Amend Will Prejudice Defendant

Plaintiff's opposition to amendment of the scheduling order does not establish any prejudice that will be caused by pushing out the trial date and associated deadlines. "Prejudice must consist of more than general concerns of the passage of time." *Gerstner v. Washington Water Power Co.*, 837 P.2d 799, 803 (Idaho 1992). Beyond the passage of time, the only potential harm noted in Plaintiff's opposition to IWRB's motion is its own counsel's conflicts with the specific dates IWRB proposed. Through its motion, IWRB does not wish to interfere with opposing counsel's previously planned trips out of country or state and is flexible in identifying mutually agreeable dates. Unfortunately, Strider's refusal to engage in efforts to identify such dates stunted

meet and confer efforts, forcing us back before the Court. *See* Second Reinhardt-Tessmer Dec. at ¶ 2. Although amending the scheduling order will not prejudice the Plaintiff, failing to so amend will in fact prejudice IWRB. Not only will it be strapped to retain additional counsel whose schedule will accommodate the compressed timeline, but more importantly, it will be unable to inspect evidence that is necessary for its defense and counterclaim, as confirmed in the recent 30(b)(6) deposition of the Idaho Department of Water Resources. This alone is good cause to amend the scheduling order.

III. CONCLUSION

The rules provide the Court with discretion to amend the Scheduling Order for good cause based on exactly these types of circumstances. IWRB respectfully requests the Court grant its Motion.

DATED this 5th day of July 2023.

KIRTON McCONKIE

/s/ Jennifer Reinhardt-Tessmer

Jennifer Reinhardt-Tessmer

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 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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/s/ Jennifer Reinhardt-Tessmer
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