Electronically Filed
9/11/2023 2:53 PM
Fourth Judicial District, Ada County
Trent Tripple, Clerk of the Court
By: Gena Foley, Deputy Clerk

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 OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

COMES NOW Defendant, Idaho Water Resource Board ("IWRB"), by and through its

counsel of record, Kirton McConkie, and hereby submits this Opposition to Plaintiff's Motion for Protective Order. This Motion is further supported by the Declaration of Jennifer Reinhardt-Tessmer ("Reinhardt-Tessmer Dec."), filed concurrently herewith.

I. INTRODUCTION

Plaintiff, Strider Construction Co. ("Strider"), filed the instant motion on the grounds that Plaintiff and its principals should not be inconvenienced and burdened to travel to the forum location to sit for examination in a deposition. Essentially, Plaintiff and its President/CEO and Operations Manager (who would appear as 30(b)(6) representatives) seek relief from the general rule and practice of appearing at the forum location based on the argument that they are essentially victims of a forum selection clause (in a contract Plaintiff freely entered and in a lawsuit Plaintiff chose to initiate). Despite efforts by IWRB's counsel to reach a compromise, Plaintiff has opted to usurp the Court and parties' time and expense on this motion and has caused the subject depositions to be delayed.

IWRB complied with the applicable provisions of the Idaho Rules of Civil Procedure in setting the depositions for the forum location. Moreover, IWRB's 30(b)(6) deposition notice and Strider's principals' notices comply with the general principles of law applicable to deposition location, as described below, and Strider has failed to establish any good cause for an exception to the general rules. As such, Strider's Motion for Protective Order should be denied, with fees and costs awarded to IWRB.

II. STATEMENT OF RELEVANT FACTS

This lawsuit arises over a construction contract Plaintiff entered into with IWRB, wherein the parties agreed the designated forum for disputes would be Ada County. Over the course of the contract, Plaintiff provided defective workmanship it chose not to remedy, and ultimately, Plaintiff

preemptively and improperly terminated the contract. Thereafter, Plaintiff chose to initiate the instant litigation against IWRB in Ada County.

On August 21, 2023, IWRB issued a notice of deposition to Plaintiff, Strider, pursuant to Idaho Rule of Civil Procedure 30(b)(6), setting the deposition for September 20, 2023 at Kirton McConkie law office in Boise, Idaho. On the same day, IWRB issued notices of deposition to Plaintiff's principals, James (President and CEO) and Kyle Gebhardt (Operations Manager), for their individual depositions pursuant to Idaho Rule of Civil Procedure 30, to occur in the same time frame, given representations from Plaintiff's counsel that they would be representing Strider at the 30(b)(6) deposition. *See* Reinhardt-Tessmer Dec. at ¶ 6.

Back on August 9, 2023, prior to filing the notices, IWRB requested available dates from Strider for the 30(b)(6) deposition. *See* Reinhardt-Tessmer Dec., ¶ 2, Ex. 1. Counsel for IWRB requested to take the personal depositions of Plaintiff's principals, James and Kyle Gebhardt (the President/CEO and Operations Manager) during the same time frame given they would likely be the 30(b)(6) representatives. *Id.* at ¶¶ 2-3, Ex. 1. Counsel for IWRB also stated that she would try to combine both the personal and 30(b)(6) depositions for the convenience of the witnesses. *Id.* On August 16, 2023, Strider's counsel indicated she would oppose the 30(b)(6) deposition occurring at the forum location. *Id.* at Ex. 1. Counsel for both parties engaged in a meet and confer conference on August 22, 2023. *Id.* at ¶ 7. In that conference, Strider's counsel did not articulate any sort of financial or physical challenge or burden Strider faced in appearing at the forum location for the deposition. *Id.* at ¶ 8. Rather, to avoid the inconvenience of travel to Boise, Strider's counsel encouraged a remote deposition. *Id.* As explained to opposing counsel, this was not preferred given the large number of exhibits, the importance of the deposition. *Id.* As a compromise, given Plaintiff's reluctance to travel to the forum location for examination, IWRB

offered to take the deposition of Kyle Gebhardt in Seattle if he was not to be designated as a 30(b)(6) deponent and to travel to Seattle for the experts' depositions, meaning just the 30(b)(6) deposition and that of its CEO and President (who would be sitting as the 30(b)(6) representative anyway) would occur at the forum location. *Id.* at ¶ 8, Ex. 2. Strider did not accept these offers of compromise. *Id.* IWRB further urged Strider to weigh the cost of motion practice in the face of opposing authority against merely traveling to the forum location for the scheduled deposition. *Id.*

III. LEGAL AUTHORITY AND ARGUMENT

A. IWRB Properly Noticed the Plaintiff's Deposition for the Forum Location.

Idaho Rule of Civil Procedure 30(b)(1) only requires the party seeking to depose a person to provide that person with notice of the time and place of the deposition but is silent as to the location. I.R.C.P. 30(b)(1). The proper location for a deposition has not been greatly litigated in Idaho. As such, IWRB relies on persuasive federal authority.

i. As a General Rule, Plaintiffs Must Make Themselves Available for Examination in the District in Which They Initiate the Lawsuit.

"Ordinarily, [the] plaintiff will be required to make himself or herself available for examination in the district in which suit was brought." Wright & Miller, *Federal Practice and Procedure*, § 2112 (1994) (citing *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1343 (11th Cir. 2020) ("[T]he general rule is that plaintiffs are required to make themselves available for examination in the district in which they bring suit.")). In addition, the "plaintiff generally is required to bear any reasonable burden or inconvenience that the civil action presents." *Huddleston v. Bowling Green Inn of Pensacola*, 333 F.R.D. 581, 585 (N.D. Fla. 2019) (citing *Buzzeo v. Bd. of Educ., Hempstead*, 178 F.R.D. 390, 392 (E.D.N.Y. 1998)). While exceptions exist for plaintiffs demonstrating a physical or financial *inability* to travel, that has certainly not been demonstrated in this matter for Strider—a firm advertising a multitude of high-value and large-scale projects

across the northwest. *See* Strider's Website available at https://www.striderconstruction.com/project-gallery/. To be clear, physical or financial inability is distinct from the inconvenience and expense Strider asserts (which would conversely be incurred by Defendant for Defendant's counsel, the Deputy Attorney General and representative to travel to Plaintiff for the depositions with a large number of exhibits). "A plaintiff, therefore, cannot invoke the mere fact inconvenience or expense as a legitimate reason to refuse to appear and submit himself or herself to questioning by the defendant regarding the basis for the claim." *Huddleston*, 333 F.R.D. at 585 (citing *United States v. Rock Springs Vista Dev.*, 185 F.R.D. 603, 604 (D. Nev. 1999)).

Strider asserts it is somehow excluded from the general rule because it did not negotiate the forum selection clause, and consequently, Strider had no choice but to file in Ada County. This is difficult logic to follow. Strider chose to submit a bid for the contract in Idaho, knowing that, by doing so, it would profit off the the project. The bid for the contract provision states that "[t]he parties further agree that venue for any proceeding related to this Contract shall be in Boise, Ada County, Idaho, *unless otherwise mutually agreed by the parties*." Construction Contract at 26.1. (emphasis added). Strider is a sophisticated engineering firm which, according to its own website, conducts projects over $20 million dollars with qualifications up to $65 million of contract work for the Washington State Department of Transportation alone. *See* Strider's Website available at https://www.striderconstruction.com/about/. Strider does not even argue it ever attempted to negotiate for a different venue, but in any event, like any sophisticated business, it weighed the benefits of the contract against any provisions it may have found less favorable and found the contract overall worth entering. It entered the contract of its own free will, knowing it was agreeing to resolve litigation in Ada County, and it certainly initiated this lawsuit on its own accord. It

cannot now claim that it had "no choice or ability to negotiate the venue clause of the Contract" when the very terms of the Contract provide for possible negotiation of a different forum, and it it likewise cannot take the position that it should not incur the burden of associated expenses in the lawsuit it initiated – which should presumably entail – at a minimum – appearing at the venue for examination to account for the allegations made in the lawsuit filed. *See El Camino Res. Ltd. v. Huntington Nat. Bank*, 2008 WL 2557596, at *3 (W.D. Mich. June 20, 2008) ("[I]in every case, regardless of whether the lawsuit could have been filed in more than one forum, the plaintiff makes the primary choice of whether to bring suit or not, and thus makes a choice of forum.").

Moreover, Strider's assertion that its position as plaintiff is immaterial since IWRB brought counterclaims against Strider also fails. "If the Counterclaim is a compulsive counterclaim pursuant to Rule 13(a). . . . then [the] Defendant should not be considered to be in the same position as a party plaintiff which selected the forum." *Cont'l Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 700 (W.D. Okla. 1976). Here, IWRB's counterclaims all arise out of the same transaction or occurrence that is the subject matter of Strider's claim and, therefore, were compulsory counterclaims. Consequently, this Court should not consider IWRB to be in the same position as a party plaintiff.

ii. Generally, a Party Deposing Another May Unilaterally Choose the Location.

Another general rule is that the party deposing another party witness may unilaterally choose the location of the deposition. *See Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 628 (C.D. Cal. 2005) (citing 8 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2112 at 403 (1970)). The location selected by the deposing party—where Plaintiff filed the lawsuit—was entirely reasonable and done with substantial advance notice, and Plaintiff has failed to establish good cause for relief from appearing at Defendant's selected location.

iii. <u>When a Corporation is a Plaintiff, the General Rule is that the Corporation is Deposed at the Forum Location.</u>

Strider repeatedly contends that the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business. "While it is true that a corporation is indeed typically deposed at its place of business, such a 'rule of thumb' appropriately applies in circumstances where the corporation is a defendant." *Make-A-Friend, Inc. v. Bear Mill, Inc.*, 2008 WL 11472141, at *1 (D. Idaho 2008); *see also Sonitrol Distrib. Corp. v. Security Controls, Inc.*, 113 F.R.D. 160, 161 (E.D. Mich., 1986) ("While it is true that a corporate officer should ordinarily be deposed at the principal place of business, this is not a hard and fast rule."); *Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578, 580 (S.D.N.Y. 1960) ("The plaintiff has selected this forum to enforce its rights and necessarily must expect that its officers and managing agents will be subjected to its process."); *Soc'y of Indep. Motion Picture Producers v. United Detroit Theatres Corp.*, 8 F.R.D. 453, 455 (E.D. Mich. 1948) (requiring depositions of officers of plaintiff corporations to be taken in forum state, although providing that "the time. . . .suit the convenience of each individual proposed deponent"). As outlined in *Make-A-Friend, Inc.*, "it would seem improper for Defendants to have to travel to. . . .corporate Plaintiffs' place of business in order to defend against claims that may or may not have any merit – particularly when considering that these same Plaintiffs chose the District of Idaho to pursue their respective claims." *Make-A-Friend, Inc.*, 2008 WL at *1.

In *Sonitrol Distributing Corp. v. Security Controls, Inc*, the court denied a plaintiff's protective order citing the above authority that corporate defendants should be deposed in the forum state. *Sonitrol Distrib. Corp.*, 113 F.R.D. at 160. In that case, the plaintiff and its officers were located in Virigina and Florida. *Id.* In contrast, the defendant was located in Michigan. *Id.* The defendant noticed the depositions of the plaintiff to be taken in the office of the defendant's

attorney, in the forum state of Michigan. *Id.* Even though complying with the deposition notice would require the plaintiff to fly from Virigina or Florida to Michigan, the court denied plaintiff's motion in the interest of maintaining economy and minimizing expense and inconvenience to all parties in the litigation. *Id.* at 161. Like *Sonitrol*, this Court should deny Strider's protective order. Strider has not made a showing of good cause sufficient for this Court to alter the forum as the location of the deposition.

B. Strider Has Not Shown Good Cause Exists for an Exception to the General Rules.

The Court may issue a protective order describing a discovery method other than the one selected by the party seeking discovery only if the other party shows good cause. I.R.C.P. 26(c)(1). The Idaho Supreme Court has held that I.R.C.P. 26(c) "requires a party to use specific facts to show good cause." *Westby v. Schaefer*, 157 Idaho 616, 623 (2014). "The movant must show. . . . that the issuance of the protective order is necessary, which requires a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements. *Paul v. Winco Holdings, Inc.*, 249 F.R.D. 643, 648 (D. Idaho 2008) (internal citations omitted). The Idaho Supreme Court has adopted the Federal interpretation for Rule 26(c) that "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Westby*, 157 Idaho at 622 (citing *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). The courts in Idaho have found good cause in limited circumstances. *See Bailey v. Sanford*, 139 Idaho 744, 749 (2004) (finding good cause to grant a protective order where there was unreasonable delay and prejudice because the defendant gave the plaintiff only one week notice before requesting to take a deposition in a different state).

Here, Strider has not satisfied its burden of showing good cause for this court to issue a protective order. Strider concludes that conducting the deposition in Boise would be excessively

expensive and unduly burdensome. However, a deposition necessarily entails ordinary inconvenience of the parties. "Indigence. . . . normally will not relieve a plaintiff of the duty to submit to a deposition in the forum district. *Huddleston*, 333 F.R.D. at 585; s*ee also Newman v. Metro. Pier & Exposition Auth.*, 962 F.2d 589, 59192 (7th Cir. 1992) (holding that serious financial hardship was insufficient to overcome the presumption that a plaintiff's deposition may be taken within the forum district). As described in authority above, inconvenience of one party (that would merely be shifted to the other) is insufficient to modify the location. Moreover, it is difficult to understand how two witnesses would incur Kyle Gebhardt's estimate of $9,000 for "costs, lodging and meals" to travel from Washington to Idaho for what IWRB estimates to be 1.5 days of testimony, at most. *See* Declaration of Kyle Gebhardt at ¶ 5. The fact that Strider will incur certain inconveniences due to litigation (like flying from Seattle or Spokane to Boise to sit for examination regarding the allegations in a lawsuit Strider initiated) is to be expected and should be considered when contemplating whether to initiate litigation, which is why courts uniformly require plaintiffs to appear at the forum location for depositions. Such inconveniences do not support a finding of good cause for a court to move the location.

C. Remote Deposition Is Not Acceptable.

Finally, Strider asserts that this Court should limit the depositions requested by IWRB to be conducted remotely. The Defendant is seeking to conduct the key depositions in the case of the Plaintiff and its principals. The Idaho Rules of Civil Procedure instruct the court to consider whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Id.* IWRB's taking of these key depositions, which will necessarily involve a large number of exhibits, warrant

the comparative resources necessary to occur in person. Although Strider states that IWRB would not be prejudiced by taking the 30(b)(6) depositions remotely, Strider neglected to note that it already conducted IWRB's 30(b)(6) at the forum location *in person*. This fact stands in contrast to Strider's claim that "IWRB will be able to achieve the discovery goals outlined in the I.R.C.P. if the deposition is held virtually." If Strider is so prone to the idea of conducting depositions remotely to save costs, why did it choose not to in this case? As a matter of fairness, IWRB should be allowed to take Strider's 30(b)(6) deposition in person. *See Wellenstein v. Copocci*, 2010 WL 5093411, at *3 (D.S.D. 2010) (holding that fairness and equity required the plaintiff to be able to conduct an in-person deposition where the defendant had already completed an in-person deposition).

Further, "telephonic depositions are not recommended for obtaining controversial testimony. . . . because the inquirer cannot observe the impact of his or her questions, evaluate the witness' nonverbal responses, or be able to ascertain whether anyone is listening in or coaching the witness." *McArthur v. Rock Woodfired Pizza & Spirits*, 318 F.R.D. 136, 139 (W.D. Wash. 2016). "[A] deposition by remote means may be insufficient where. . . . the deponent is a key witness whose testimony and credibility are central to the case." *Gersh v. Anglin*, 2019 WL 4453062, at *2 (D. Mont. 2019); *see also United States v. Approximately $53,378 in U.S. Currency*, 2010 WL 4347889, at *1 (N.D. Cal. 2010); *Egan v. Resort*, 2018 WL 1528779, at *2 (D. Haw. 2018). Certainly, advances in video conferencing have improved these impediments but the same underlying obstacles to assessing the witness and interactions with counsel remain present. Here, the 30(b)(6) deposition and its principals' depositions at issue are critical to the case.

D. IWRB is Entitled to Its Expenses for Contesting This Motion

After Strider took the 30(b)(6) deposition of IWRB in person, it now takes the position, in

the face of clear authority, it should not be inconvenienced by the expense and time of appearing for examination in the forum location. For nearly a month now, IWRB's counsel has attempted to reach an agreement with Strider's counsel on dates and location for the Plaintiff and its principals' depositions. This should not be a matter of dispute, and in counsel's history of practice, it cannot recall a plaintiff ever resisting to appear in the forum for examination. The Motion has caused unnecessary delay in the previously scheduled depositions that cannot be recouped, but the expenses can and should be reimbursed by Strider for pursuing this frivolous Motion.

Idaho Rule of Civil Procedure 37(a)(5)(B) provides that if the movant's motion is denied, "the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." I.R.C.P 37(a)(5)(B). Pursuant to that rule, IWRB requests that the Court award IWRB its expenses in opposing Strider's Motion. Any legitimate financial inconvenience is outweighed by Strider's decision to incur unnecessary fees and waste judicial resources by filing this Motion in the face of known adverse authority, which counsel for Strider was made aware of, and which simple due diligence reveals. *Id*. Moreover, a reasonable compromise was offered, which was inexplicably and unreasonably rejected. *Id.*

IV. **CONCLUSION**

The standard for a plaintiff being deposed in the forum is supported by overwhelming authority. Moreover, Strider has not shown good cause exists for any deviation to the general rules. Accordingly, IWRB requests that this Court deny Plaintiff's Motion for a Protective Order and award IWRB its reasonable costs and fees in contesting the motion.

DATED this 11th day of September 2023.

KIRTON MCCONKIE

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

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September 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
Joe Meuleman **MEULEMAN LAW GROUP PLLC** 950 W. Bannock St., Ste. 490 Boise, ID 83702 Telephone: (208) 472-0066 *Attorneys for Plaintiff Strider Construction Co., Inc.*	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ iCourt E-File/Serve: jmeuleman@meulemanlaw.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