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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**

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| STRIDER CONSTRUCTION CO., INC.,<br><br>Plaintiff,<br><br>vs.<br><br>IDAHO WATER RESOURCE BOARD,<br><br>Defendant. | Case No. CV01-22-10932<br><br>**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL STRIDER TO PRODUCE PHYSICAL EVIDENCE IN RESPONSE TO DEFENDANT'S SECOND SET OF REQUESTS FOR PRODUCTION** |

Idaho Water Resource Board ("IWRB"), by and through its counsel of record, Kirton McConkie, hereby submits this Memorandum in support of its Motion to Compel Strider Construction to Produce Physical Evidence in Response to Defendant's Second Set of Requests for Production.

## I. INTRODUCTION

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 Construction Co. ("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. This motion is before the Court due to Plaintiff's persistent efforts to evade Defendant's Second Set of Requests for Production – specifically, a request to produce physical evidence in its possession.

## II. STATEMENT OF RELEVANT FACTS

Pursuant to the Contract, Strider was required to "[i]nstall 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.* 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.

In a meet and confer conference in April of 2023, IWRB's counsel learned that, upon improperly terminating the Contract and leaving the worksite, Strider took with it certain physical evidence – namely, old and new J-seals, which is relevant evidence in the litigation given the claims at issue. When IWRB asked for Strider to mail the J-seals to Boise for inspection, promising to return them, Strider's counsel refused, claiming, among other things, the U.S. mail was too risky. After much back and forth, and in the pursuit of expediting inspection of the evidence, IWRB sought to have the property returned directly on grounds that it was the State's property and improperly taken from the site after anticipation of litigation. At a hearing on June 9, 2023 (and captured in the Court's Order on August 3, 2023) the Court found Strider did not have a duty to voluntarily return the evidence and directed IWRB to either request an inspection of the evidence by way of formal discovery or deal with the matter informally.

On June 13, 2023, in compliance with the Court's direction, IWRB served Strider with its second discovery requests. *See* Exhibit A to the Affidavit of Jennifer Reinhardt Tessmer in Support of Motion to Compel Strider Construction to Produce Physical Evidence in Response to

Defendant's Second Set of Discovery Requests ("Reinhardt-Tessmer Aff."). Specifically, Request for Production No. 19 states as follows:

> **REQUEST FOR PRODUCTION NO. 19.** Please produce all physical evidence in your possession related to this lawsuit (including but not limited to, the J-seal material from the replaced J-seal and the new J-seal) for inspection pursuant to Rule 34(b)(1)(b) at the law offices of Kirton McConkie at 1100 W. Idaho St. #930 in Boise, Idaho.

*Id.* On July 13, 2023, Strider's counsel requested an extension from IWRB's counsel to respond to Request for Production No. 19 on the basis that "Strider is in the process of engaging counsel in Boise to substitute for John Guin and that is going to impact the response to the discovery requests…." *See* Reinhardt-Tessmer Aff., ¶ 3, Ex. B. IWRB's counsel granted her request for the extension. *Id.*

On July 18, 2023, Strider produced a written answer to Request for Production No. 19. Therein, Strider made no objection to relevancy but claimed the request was "vague" and objected to production at IWRB's counsel's office (without explanation for the objection to this specific location). Importantly, Strider did not object to production in Boise on grounds that such production would be an unreasonable place pursuant to Rule 34. If it had, the parties would have met and conferred on the issue and followed an orderly process for timely resolving the dispute. Instead, Strider's counsel answered in its formal response that it would make the evidence available for inspection at its newly retained Boise counsel's office instead of Plaintiff's counsel's office. Strider's full response is as follows:

> **RESPONSE:** Strider objects to Request for Production No. 19 on the basis that it is vague, overbroad, and fails to describe with reasonable particularity each item or category of items to be inspected other than the sample of old J-seal and new J-seal. Aside from the J-seal material, the request asks for "all physical evidence" which is overbroad and lacks sufficient detail for Strider to understand what is being requested. Strider further objects to the request to the extent that it demands the material be produced at the law offices of Kirton McConkie. Subject to the foregoing objections, Strider responds that it will make the old J-seal and new J-seal material samples available for inspection by IWRB under supervision of Strider at Strider's Wenatchee offices, or its representatives at a mutually agreeable time at Meuleman Law Group, PLLC in Boise, Idaho.

*Id.*at ¶ 4, Ex. C. On August 16, 2023, IWRB's counsel emailed Strider's counsel to advise that in light of upcoming depositions, IWRB would want to retrieve the evidence from their Boise counsel's office in mid-September and requested that the evidence be made available for inspection. *Id.* at Ex. D. Strider's counsel responded to the August 16th email objecting to requests for depositions and improperly insisting that they witness IWRB's expert's examination of evidence occurring at the dam; however, counsel's email voiced no objection to IWRB's request to make the physical evidence in its possession available with its local Boise counsel ahead of the September depositions. *Id.* at ¶ 6, Ex. E.

On August 21, 2023, the 30(b)(6) deposition of Strider and individual depositions of Strider's principals, Jim and Kyle Gebhardt, were noticed for Boise, Idaho for September 20th and 21st, 2023. *Id.* at ¶ 7. On August 24, 2023 (more than a week after IWRB's counsel originally notified Strider's counsel of its desire to inspect the evidence in September ahead of the depositions), IWRB reached out to Strider's local counsel directly to follow up on the previously requested physical evidence inspection in Boise. *Id.* at ¶ 8, Ex. F. Specifically, IWRB's counsel advised that its expert would be coming to town on September 13, 2023 to

inspect the evidence and requested to pick up the evidence for the day of the 13th from local counsel's office for the inspection. *Id.* Again, no objection was made by Strider's Washington counsel or its local Boise counsel to the August 24th request, just as no objection was made to the August 16, 2023 inspection request, despite counsel exchanging several emails in this time period contesting other discovery issues. *Id.* at ¶ 8. Thereafter, IWRB's expert booked his travel to fly into Boise to meet IWRB's representatives for the evidence inspection. *Id.* at ¶ 9.

Despite knowing depositions were approaching and the date for the evidence examination was imminent, no objection to Strider's previous requests to coordinate reviewing the evidence with Strider's Boise counsel (in accordance with Strider's own discovery request) was made until September 4, 2023 when IWRB counsel sent its *third* email regarding the evidence examination to Strider's counsel to confirm that Strider's Response to Request for Production No. 19 was still current. *See id.* at ¶ 10, Ex. H. Thereafter, and for the *first time* since IWRB's request for the Boise inspection three weeks prior and over two months since being served with IWRB's request for the production of physical evidence, Strider's counsel asserted that Strider would not produce the physical evidence in Boise because Strider (who is based in Washington) was simply unavailable to be in Boise but we could travel to Wenatchee before the depositions.[1] Of note, Strider didn't claim counsel was unavailable. Such a response was wholly inconsistent with Strider's original discovery response, stating the physical evidence would be produced at Boise counsel's office "under the supervision of its representatives", which IWRB had relied on in scheduling depositions and booking expert travel.

IWRB attempted to meet and confer with Strider on its failure to comply with IWRB's

[1] The late offer of production in Wenatchee so close to depositions was insincere as no specifics were provided, and Strider was aware we would have to arrange travel to this remote location for counsel, IWRB's expert and IWRB representative – all while preparing for the key depositions in the case.

discovery request to produce the physical evidence, and its reliance on Strider's previous discovery response, but such attempts were unfruitful. *Id.* at ¶¶ 11-12, Exs. H-J. Strider's counsel did not elaborate on its objections or otherwise claim an inability to produce the evidence in Boise on the requested date or explain why Strider needed to be present for the examination. *Id.*, Ex. I. Instead, Strider's counsel said the date did not work for Strider; that it was available in Wenatchee, Washington "as stated in the discovery responses" and suggested that rather than inspect the same evidence retained by the Plaintiff in the matter, Defendant should effort to locate Strider's old garbage to obtain its own evidence. *Id.*

Although Defendant's expert had already booked travel for the previous date and despite the ongoing gamesmanship, Defendant's counsel made yet another attempt to avoid a motion on this issue. When counsel for Strider finally responded three weeks later, she stated that the "single" proposed date was not agreeable for Strider, and so IWRB's counsel asked for any other dates that did work for Strider ahead of the September depositions. *Id.*, Ex. I. Strider finally provided alternative dates for inspection that would be "mutually agreeable" – which were not until sometime in November (unless, as counsel noted, her anticipated hearing date was modified….) *See id.* at Ex. I. The proposed dates are well after the scheduled depositions (in fact, well into the discovery period) and nearly five months after Strider was served with its subject discovery request, and still, Strider is avoiding a commitment to any specific date. Strider acknowledges the consequential impact to the schedule, noting that the scheduled depositions would presumably have to be delayed until after the inspection of the physical evidence takes place. *Id.*

For nearly four months, IWRB has been seeking to obtain a simple non-destructive examination of evidence, and for some reason, Strider has resisted this legitimate request at

every turn. It is not simply the fact that Plaintiff is refusing to put the relatively small pieces in the mail, or otherwise secure its delivery to its retained Boise counsel, or that it is now insisting the inspection take place in Wenatchee after previously inducing opposing counsel to rely on representations it would make it available in Boise. Rather, it is this strange game of creating a moving target, backtracking, failing to commit and imposing unreasonable stipulations, which have led to delay in the deposition schedule and costs for IWRB's expert booking travel and having to cancel. At this point, IWRB is simply attempting to move the case forward with deposition discovery, but it cannot do so because of Strider's refusal to produce physical evidence. Such tactics have made attempts to reach resolution without the Court's intervention impossible.

## III. ARGUMENT

### A. Standard

"The trial court has broad discretion in determining whether or not to grant a motion to compel." *Nightengale v. Timmel,* 151 Idaho 347, 351, 256 P.3d 755, 759 (2011); *see also Christiansen v. Potlatch #1 Fin. Credit Union*, 498 P.3d 713, 721 (2021) ("Control of discovery is within the discretion of the district court."). Idaho Rule of Civil Procedure 37(a)(2) provides that if a party fails to timely answer an interrogatory or respond to a request for production, that the "discovering party may move for an order compelling an answer..." Idaho Rule of Civil Procedure 37(a)(3) provides that "an evasive or incomplete answer is to be treated as a failure to answer." I.R.C.P. 37(a)(3). "While the moving party must make a threshold showing of relevance, ... the party resisting discovery carries the 'heavy burden' of showing specifically why the discovery request is irrelevant, unduly burdensome, disproportional to the needs of the case, or otherwise improper." *Davis v. E. Idaho Health Servs., Inc.,* No. 4:16-CV-00193-BLW, 2017

WL 1737723, at *2 (D. Idaho May 3, 2017) (citing *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 352 (1978); *see also Westby v. Schaefer*, 157 Idaho 616, 622 (Idaho 2014); I.R.C.P. 26(b)(1)(B) (on a motion to compel, the burden is on the party resisting discovery to show why it should not be had).

B. Plaintiff has failed to comply with its obligation to produce the requested evidence.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents or other tangible things ...." Idaho R. Civ. P. 26(b)(1)(A). Pursuant to I.R.C.P. 34(a)(1)(B), requests may be served on the plaintiff to produce and permit the inspection of tangible things in the plaintiff's possession. A party seeking discovery may move for an order compelling production or inspection if, like here, a party fails to permit inspection through evasive acts – despite verbally stating it will make the items available. *See* I.R.C.P. 37(a)(4). Requests to compel production have been granted in favor of parties who wish to view physical evidence in the other party's possession for the purpose of examining, inspecting, or testing the evidence. *See* persuasive federal authority interpreting the federal counterpart to I.R.C.P. 34[2]: *Merriam Display Supply Studio v. Harlambides*, 196 Misc. 352, 91 N.Y.S.2d 901 (Mun. Ct. 1949) (regarding production of sun shades); *Canter v. American Cyanimid Co*., 5 A.D.2d 513, 173 N.Y.S.2d 623 (3d Dep't 1958), order modified on other grounds, 6 A.D.2d 847, 174 N.Y.S.2d 983 (3d Dep't 1958) (bottle of vaccine); *Brady by Brady v. Wyeth Laboratories, Inc*., 106 A.D.2d 795, 484 N.Y.S.2d 191 (3d Dep't 1984) (serum vial); *Owens-Illinois Glass Co. v. Bresnahan*, 322 Mass. 629, 79 N.E.2d 195, 13 A.L.R.2d 653 (1948) (fragments of glass bottle

[2] Federal case law provides persuasive authority in the interpretation of Idaho rules where the language of the Idaho and federal rule are substantially similar. *See Black v. Ameritel Inns, Inc.,* 139 Idaho 511, 515, 81 P.3d 416, 420 (2003).

which exploded). *Quinn v. Christler Corp.*, 35 F.R.D. 34 (W.D.Pa. 1964) (handbrake assembly of automobile); *Gallo v. London Bus Co., Inc.*, 54 A.D.2d 957, 388 N.Y.S.2d 638 (2d Dep't 1976) (motor vehicle parts).

The at-issue discovery IWRB served requesting the production of the J-seals for inspection was compliant with the Idaho Rules of Procedure 26 and 34. The items were relevant; the request designated with particularity the items to be inspected (as reflected in a reading of the propounded request); the request designated a reasonable time and place for production (a single day in the forum location at counsel's office) and moreover, nearly a month of advance notice was provided of the Boise inspection (at Strider's selected location). Strider provided no explanation as to why it objected to producing the physical evidence requested at Defendant's counsel's office, let alone why it then failed to produce the evidence at its own local counsel's office as it proposed in its discovery responses, and it has certainly not met its burden to establish any such reasons are justified. Instead, Strider has engaged in avoidance by ignoring requests and then claiming it is unavailable to be there for the production and examination. If Plaintiff wishes to resist responding to discovery, or to limit the response (i.e. to a specific location) it needs to meet and confer on the stated grounds and then, if necessary, file a Motion for Protective Order. Plaintiff cannot simply hold evidence and state it will be available at a location, then change its mind or later state it will only be available at that location in two months – well into the discovery period. These evasive tactics are explicitly addressed in the Rules of Civil Procedure and constitute a failure to answer. *See* I.R.C.P. 37(a)(3).

Depositions were scheduled in Boise for Strider and its owners for the third week in September. In August, IWRB requested to retrieve the evidence from Strider's local Boise counsel in accordance with Strider's July discovery response – and only for the day – so its expert could

simply conduct a nondestructive examination. Strider's counsel let that request go unanswered for weeks, knowing the depositions were approaching, only now to refuse production at the previously offered location, necessarily requiring the postponement of depositions. If Strider had originally demanded in its original response that IWRB travel to Wenatchee on a date certain to view the evidence, the matter could have been resolved in July, well ahead of depositions; however, that is not the position Strider took in its discovery response. It induced reliance by IWRB and did so right until the eve of depositions, then withheld the evidence, insisting on an inspection location out of state, knowing the impact on the schedule. *See* Reinhardt-Tessmer Dec., Ex. I.

Strider's assertion is that IWRB must wait to inspect the J-seals on Strider's own terms (where and when it's convenient for Strider), but the rules of procedure provide parties with uniform rules of "fair play" to avoid the gamesmanship evidenced by the supporting Reinhardt-Tessmer Dec. and Exhibits attached thereto, which reflect ever-changing and unreasonable conditions on a non-destructive evidence inspection, which are intended only to provide a moving-target resulting in delay, costs, and frustration for IWRB. Strider initially contested production of the evidence based on security concerns for the U.S. mail; it then insisted IWRB obtain the evidence through formal discovery. Upon receiving a formal discovery request, it sought an extension on the basis it needed to retain local counsel. Strider then stated it would produce with local counsel but only when agreeable; however, Strider then refused to respond for weeks or identify an agreeable date between August when originally requested and sometime in November (unless, according to Strider's counsel, that date changes). It then shifted positions, stating the evidence would be available in Wenatchee[3] – with no explanation as to why it could not now make the evidence

[3] For a plaintiff to hold a piece of evidence 400 miles away and out of state —even if IWRB knows where it is located— does not satisfy Strider's burden of production of a relatively small tangible item. Even Strider acknowledges how remote and inaccessible Wenatchee is in its recently filed motion resisting to appear in Ada County for its 30(b)(6)

available in the forum location with its local counsel. As the Idaho Supreme Court has admonished:

> "…discovery should not be a game played by lawyers. Violations of discovery rules must be dealt with as they arise and as they are acknowledged by the trial court. If they are not, the party unreasonably avoiding legitimate discovery will be rewarded for its intransigence, to the detriment of the innocent party."

*Gem State Roofing, Inc. v. United Components, Inc.*, 160 Idaho 820, 829, 488 P.3d 488, 497 (2021).

A party is required to comply with the obligations imposed by the Idaho Rules of Civil Procedure whether it is "mutually agreeable" for that party to do so or not. Strider's insistence that it must look over the shoulder of IWRB's experts is yet another tactic to delay what should have been a straightforward discovery production. Further, given Strider's course of conduct, IWRB has little faith Strider would ever in fact produce the evidence at a specific time and under reasonable conditions – even in un unreasonable place like Wenatchee. Strider's pattern of delayed or no-response in combination with ever-changing positions have caused unacceptable delay. IWRB's attempts to bend in order to accommodate what it found to be unreasonable tactics in order to avoid a motion failed to yield results. Now, IWRB is compelled to seek court intervention to enforce the rules of procedure.

IWRB respectfully asks the Court to order Strider to comply with IWRB's second request for production of the physical evidence by a date certain, and at IWRB's counsel's office in Boise, and to clarify that IWRB's expert shall have an opportunity to confer with IWRB's counsel in privacy during the inspection.

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deposition. *See* Declaration of Kyle Gebhardt in Support of Strider's Motion for Protective Order, ¶ 4 ("Strider also has an office in Wenatchee, Washington, which is roughly three hours to either Seattle, Washington or Spokane, Washington."). Moreover, counsel has imposed, as a condition of examination, that Strider be available and then states Strider is not available for weeks – or months – at a time. Still, if Plaintiff believes this is a more reasonable time and place for inspection than the forum location where both parties have counsel, it must formally object on this basis and seek a protective order. It cannot unilaterally dictate the terms of its production at the cost of the schedule.

C. IWRB is entitled to reasonable fees and expenses.

Idaho Rule of Civil Procedure 37(a)(5) states that the court *must*, after giving an opportunity to be heard, require the party whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. I.R.C.P. 37(a)(5). IWRB is forced to petition this Court to compel Strider to produce evidence, which it was already under an obligation to do. Not only is Strider in violation of the rules of procedure, Strider is in violation of the Court's August 3, 2023 Order, in which it directed IWRB to request the evidence formally or for the parties to work it out informally. IWRB has attempted formal and informal efforts to achieve what should be a relatively simple non-destructive inspection of tangible items through discovery. In light of the above, IWRB requests that this Court order Strider to pay IWRB's reasonable fees and expenses incurred in having to bring this motion.

## IV. RULE 37(a)(1) CERTIFICATION

Pursuant to Idaho Rule of Civil Procedure 37(a)(1), counsel for IWRB hereby certifies that they met and conferred with counsel for Strider regarding the request at issue in this Motion by email. *See* Reinhardt-Tessmer Dec., Exs., H, I. Despite these attempts, Strider has neither complied with the discovery requests, nor the Court's August 3, 2023 Order, nor provided a sound reason why compliance should be ignored.

## V. CONCLUSION

IWRB respectfully requests that the Court order Strider to produce the J-seals in its possession for inspection at the law office of Kirton McConkie in Boise on a date specific, and to allow counsel and its expert to confer during the inspection in privacy.

DATED this 13th day of September 2023.

**KIRTON MCCONKIE**

/s/ *Jennifer Reinhardt-Tessmer*
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of September 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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