

Lindsay Watkins, *Pro Hac Vice*  
Lindsay.Watkins@acslawyers.com  
Nicholas Korst, *Pro Hac Vice*  
Nicholas.Korst@acslawyers.com  
**AHLERS CRESSMAN & SLEIGHT PLLC**  
1325 Fourth Avenue, Suite 1850  
Seattle, WA 98101  
Telephone: (206) 287-9900  
Facsimile: (206) 934-1139

Joe Meuleman, ISB #8029  
MEULEMAN LAW GROUP PLLC  
950 West Bannock Street Suite 490  
Boise, Idaho 83702  
Telephone: (208) 472-0066  
Facsimile: (208) 472-0067  
jmeuleman@meulemanlaw.com

*Attorneys for Strider Construction Co., Inc.*

**IN THE DISTRICT COURT OF 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

PLAINTIFF'S REPLY TO  
DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PROTECTIVE ORDER

**I. REPLY**

Strider Construction Co., Inc. ("Strider") maintains its request that the depositions the Counter-Plaintiff Idaho Water Resource Board ("IWRB") seeks to take of Strider and its employees (individuals who are not parties to this suit) be taken either (a) remotely utilizing industry standard remote video deposition practices, or, in the alternative, (b) near Strider's

PLAINTIFF'S REPLY TO  
DEFENDANT'S OPPOSITION  
TO PLAINTIFF'S MOTION  
FOR PROTECTIVE ORDER – 1

312876.1 / 101299.7

principal place of business (i.e., where the individuals live and work). In response, IWRB asserts that the fact Strider commenced this suit first is the sole consideration and summarily disregards Strider's repeated request for a virtual deposition, relying on only cases involving telephonic depositions, which Strider is **not** requesting. Ultimately, IWRB has not identified any prejudice to IWRB if Strider and its representatives are deposed by remote video deposition and, instead, completely ignores the significant burden IWRB seeks to impose on the individuals and Strider, which the Idaho Rules of Civil Procedure provide should be taken into consideration. *See* I.R.C.P 26(c)(1)(B) and (C) (providing that the Court may, for good cause, protect a party from undue burden or expense by specifying terms, including time and place, for discovery or prescribing a discovery method other than the one selected by the party seeking discovery).

Since Strider's Motion was filed, counsel for IWRB vacated the previously noted depositions, but as the Parties have conferred and IWRB continues to demand Strider and its employees (and presumably other witnesses) must travel to Boise at their sole burden and expense for in-person depositions, Strider requests the Court grant its request for a Protective Order and allow for remote depositions or, in the alternative, that they be taken near Strider's principal place of business or other mutually agreeable location.

## **II. LEGAL AUTHORITY AND ARGUMENT**

### **A. IWRB Presents No Prejudice By Proceeding Via Remote Deposition**

IWRB acknowledges that the place or manner of depositions has not been litigated in Idaho but that federal authority is persuasive. IWRB Response at 4. In discussing the federal equivalent of this rule, “[c]ourts have long held that leave to take remote depositions ... should be granted liberally.” *Sonrai Systems, LLC v. Romano*, No. 16-CV-3371, 2020 WL 3960441, at \*1 (N.D. Ill. 2020) (emphasis added and quoting *In re Broiler Chicken Antitrust Litig.*, No. 1:16-CV-08637, 2020 WL 3469166, at \*7 (N.D. Ill.

2020)); see also *Graham v. Ocwen Loan Servicing, LLC*, No. 16-80011-CIV, 2016 WL 7443288, at \*1 (S.D. Fla. 2016) (“[C]ourts enjoy broad discretion to control and place appropriate limits on discovery, **which includes authorizing depositions to be taken by remote means ...**” (emphasis added)). In objecting to remote depositions, IWRB relies only on cases opposing depositions by telephonic means, a process Strider is **not** proposing.

Rather, Strider is proposing the deposition occur via remote video deposition, which as IWRB acknowledges, is different. Largely prompted by the COVID-19 pandemic, numerous courts have recognized the needs and benefits of conducting remote electronic court proceedings, including depositions. See Supreme Court of Washington Order # No. 25700-B-697 (Oct. 27, 2022); *Grano v. Sodexo Management, Inc.*, No. 18cv1818-GPC(BLM), 2020 WL 1975057 (S.D. Cal. 2020) (ordering deposition to proceed by remote means); *Learning Resources, Inc. v. Playgo Toys Enterprises Ltd.*, No. 19-CV-00660, 2020 WL 3250723, at \*3 (N.D. Ill. 2020) (finding “good cause” to enter an order requiring a deposition by remote videoconferencing); *Wilkens v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 WL 2496001, at \*2 (D. Kan. 2020) (“Video or teleconference depositions and preparation are the ‘new normal.’”); *Joffe v. King & Spalding LLP*, No. 17-CV-3392(VEC), 2020 WL 3453452, at \*6 (S.D.N.Y. 2020) (finding that remote depositions are significantly safer than in-person depositions during the pandemic); see also *In re Terrorist Attacks on Sept. 11, 2001*, 337 F.R.D. 575, 579 (S.D.N.Y. 2020) (rejecting hypothetical arguments about what might occur during a remote deposition).

IWRB argues only that the deposition will involve a large number of exhibits and that Strider took a deposition in person, but both arguments are irrelevant. First, Strider took the deposition of the IWRB in Boise based on the same basis for this very Motion—the deposition should occur near the principal place of the business, which for the IWRB is

Boise. In Strider’s case, that is Bellingham and/or Wenatchee. For the large number of exhibits, IWRB provides no explanation of how that is prejudicial and numerous courts have held that the complexity of the deposition or volume of documents is **not** a bar to remote videoconference depositions. See *Rouviere v. DePuy Orthopedics, Inc.*, 471 F.Supp.3d 571, 575 (S.D.N.Y. 2020) (rejecting argument that “document intensive” nature of depositions would prejudice parties if conducted remotely); *see also United States for Use and Benefit of Chen v. K.O.O. Construction, Inc.*, 445 F.Supp.3d 1055, 1057 (S.D. Cal. 2020) (“Other courts have found that exhibits can be managed in remote depositions...by using modern videoconference technology to share documents and images ...”). There is no prejudice based on the fact that there are numerous exhibits and, in fact, none has actually been articulated by IWRB.

Finally, IWRB only partially explains the *Wellenstein v. Copocci* case it relies on for the proposition that because one party took an in person deposition, the other party should be entitled to an in person deposition, presumably because it shares no commonalities with the issue before this Court. In that case, the Court required the defendant travel to South Dakota rather than grant his request that he be deposed telephonically. *Wellenstein v. Copocci*, 2010 WL 5093411, at \*3 (D.S.D. 2011). The Court reasoned that “determining a deposition location entails a case-by-case inquiry” and that the particular case, involving sexual assault against a minor, “presents a unique factual background” because the defendant had already pled guilty to the underlying conduct in a South Dakota criminal case that continued to retain jurisdiction and it would present a hardship for the plaintiff, a then college student on a limited budget, to pay for her counsel to travel to Florida to depose him. *Wellenstein*, 2010 WL 5093411, at \*2-3. Again, there is no similarity to the issue here. The nature of the dispute could not be further removed and Strider is **not** proposing a telephone deposition. Finally, if anything, such a ruling further justifies that a party should be deposed

near the principal place of business, which is what occurred with respect to the IWRB deposition.

Ultimately, Strider has proposed a solution, proceeding via remote video deposition, that has been routinely accepted by Courts as a reasonable option to avoid undue burden and expense. IWRB has provided no actual prejudice or hardship it will suffer beyond its desire to force Strider to bear that burden and expense. Strider requests its Motion for Protective Order be granted.

**B. Strider And Its Employees Will Face Undue Burden and Expense if Forced To Be Deposed in Boise.**

The place to conduct the deposition of a corporate party depends upon an analysis of three factors: cost, convenience, and litigation efficiency. *See Mill–Run Tours v. Khashoggi*, 124 F.R.D. 547, 550–51 (S.D.N.Y.1989). Strider has demonstrated, with specific examples and details of expense and burden, good cause for a remote deposition or deposition near its principal place of business due to the harm (expense, inconvenience, and inefficiency) that will result if no protective order is granted. Contrary to IWRB’s assertions, the presumption regarding plaintiff vs. defendant is only a starting point subject to a case-by-case analysis and a balancing of burdens and benefits to determine the proper location for a deposition.

As described in *Packard v. City of New York*, the general rule the plaintiff be deposed in the forum “is not an absolute rule, and courts must strive to achieve a balance between claims of prejudice and those of hardship.” *Packard v. City of New York*, 100 Fed. R. Serv. 3d 1623, 326 F.R.D. 66, 68 (S.D.N.Y. 2018) (internal citation and quotation marks omitted). As part of this analysis, and contrary to IWRB’s description of the rule, Courts do not require a plaintiff to show travel is impossible. In *Packard v. City of New York*, the Court found it would be “*somewhat* of a burden for [the plaintiff] to travel to [the forum] to have his deposition taken” and the prejudice to the defendant of a video conference deposition would

be minimal. *Packard v. City of New York*, 326 F.R.D. 66, 68 (S.D.N.Y. 2018)(emphasis added). As a result, the court held the plaintiff could avoid the cost of travel to an in-person deposition and submit to a video deposition. *Id.*

Jim and Kyle Gebhardt and Tim Yedinak (who are **not** parties to this case), have demonstrated travel will be a burden on them personally and will burden the operations of Strider. Four individuals (Jim and Kyle Gebhardt, Mr. Yedinak, and counsel), three of which who live 2-3 hours from an airport with a direct flight to Boise would need to travel for the better part of four days to be deposed in Boise as previously scheduled. Gebhardt Decl. at ¶5. This is in addition to the unquantifiable impact on the personal obligations of those required to travel and the impact on Strider's business operations. In contrast, a remote deposition would avoid nearly all travel and expenses, and all but eliminate the impact on the deponents personal and business obligations. Simply because Strider performs large projects does not somehow mean these individuals will not be burdened.

The hardship of travel is a factor that can shift the balance of burdens and prejudices in favor of requiring a deposition in an alternative location or through an alternative means. In *Republic of Turkey v. Christie's, Inc.* the court found the plaintiff would face hardship because of the travel deponents would undertake to get to the forum. *Republic of Turkey v. Christie's, Inc.*, 101 Fed. R. Serv. 3d 1282, 326 F.R.D. 402, 406 (S.D.N.Y. 2018). The court found a deposition in an alternative forum "best balances Plaintiff's claims of hardship with Defendant's claims of prejudice." *Id.*

Other states, whose rules of civil procedure are also patterned off the Federal Rules have similarly balanced the burden on the parties, instead of blindly requiring the plaintiff to appear in the forum state. In *Insulation Unlimited, Inc. v. Two J's Properties, Ltd.* the court determined it "would be less expensive to hold the depositions [in Ohio] rather than Florida" and "the parties should incur less collective expense by conducting the depositions

in [Ohio].” *Insulation Unlimited, Inc. v. Two J’s Properties, Ltd*, 95 Ohio Misc.2d 18, 28, 705 N.E.2d 754 (1997). The court ordered that, should in person depositions be necessary, they would occur in Ohio, in part because the balance of burdens favored a deposition there. *Insulation Unlimited, Inc. v. Two J’s Properties, Ltd*, 95 Ohio Misc.2d 18, 29, 705 N.E.2d 754 (1997).

IWRB cites *Huddleston v. Bowling Green Inn*, to represent the presumption that a plaintiff be deposed in the forum as near iron-clad. IWRB Response at 4-5. However, the court in *Huddleston* did not approach their analysis under an absolute presumption the plaintiff must travel to the forum. *Huddleston v. Bowling Green Inn of Pensacola*, 105 Fed. R. Serv. 3d 360, 333 F.R.D. 581, 584. Instead, the *Huddleston* court “considered the competing interest of the parties and the factors discussed by the parties” to determine whether the plaintiff was required to travel to the forum for a deposition. *Id.* Here, Strider has proposed meeting closer to Seattle-Tacoma International airport, an airport where IWRB’s one counsel would travel to (as opposed to four individuals traveling for Strider) or, in the alternative, Strider has proposed video depositions, which would nearly eliminate the burden on both parties. On other hand, IWRB has not asserted any prejudice it would face under either proposal. Thus, under I.R.C.P 26(c)(1)(B) and (C), Strider’s Motion should be granted.

### **C. Strider Did Not Choose to File Suit in Ada County**

Though IWRB maintains that the only consideration that should be made is that Strider filed suit first, not one case cited by the IWRB involves a public works contract that could not be negotiated and only one involves a defendant with a counterclaim. Rather, the cases cited by IWRB involve cases where the Plaintiff chose to bring suit in a specific location. In contrast, this was a public works contract that could not be negotiated. *See* Gebhardt Decl. at ¶3 (“Strider did not have the opportunity to negotiate or modify IWRB’s

contract terms, including the location for resolving disputes”). Any attempt to negotiate the contract would have been in violation of the state procurement code. *See* Idaho Code §67-5711C. While IWRB asserts, without authority, that this is irrelevant because then Strider should have not bid the job, Strider could not and would not have assumed that a public entity would have administered a Project in the manner that has occurred, refused to issue payment, and/or breach the Contract. Moreover, neither Strider nor its representatives waived their right to seek protection from undue burden and expense as set forth in the Idaho Rules of Civil Procedure.

Federal Courts recognize the presumption in favor of requiring a plaintiff to travel when the plaintiff *selected* the forum, but notes “[T]his principal loses some weight where the plaintiff has no choice of forum, but...must bring his suit in one particular jurisdiction or not at all.” *Ellis Air Lines v. Bellanca Aircraft Corp.*, 17 F.R.D. 395, 398 (D. Del. 1955). For example, in *O’hara v. U.S. Lines Co.*, a plaintiff who lived in California brought suit in New York. *O’hara v. U.S. Lines Co.*, 164 F. Supp. 549, 550 (S.D.N.Y.). However, the plaintiff was not required to attend a deposition in New York because, based on the location of witnesses and parties, it was probable the case would have been transferred to New York even if the plaintiff had brought suit in California. *O’hara v. U.S. Lines Co.*, 164 F. Supp. 549, 552 (S.D.N.Y.). The court held “the hardships on the plaintiff which would arise were he compelled to appear in New York for deposition, are not of his own making. They arise because of the situs of the transaction in suit.” *O’hara v. U.S. Lines Co.*, 164 F. Supp. 549, 552 (S.D.N.Y.). Strider, like the plaintiff in *O’hara*, had no meaningful choice on location. Strider had to either give up any claim against IWRB or file suit in Ada County, thus, the Plaintiff designation is unavailing.



#### **D. Strider Should Be Awarded Its Expenses**

Finally, IWRB baldly argues that Strider has somehow delayed depositions. When IWRB counsel requested availability, Strider immediately indicated that the individual's availability provided was assuming it would be near Strider's principal place of business and noted an objection to proceeding in Boise due to the undue burden and expense the request would impose on the individuals who would be required to expend thousands of dollars and significant hours of a travel. Gebhardt Decl. at ¶5. Strider also proposed the alternative option of proceeding via remote means, which would avoid expenses and burden for both parties and all individuals. Counsel, only on the final attempt to confer, finally asserted that there were multiple exhibits as the sole reason for objecting to remote depositions.

IWRB's responses, mischaracterization of the record, and repeated insistence that Strider, its employees, and counsel comply with IWRB's demands no matter the expense or burden leads to the inescapable conclusion that IWRB is imposing its demands as a means to vex and harass. Strider has made numerous offers to schedule at mutually agreeable time and locations but the response has been only: concede with IWRB's demands or seek protection from the Court. I.R.C.P 26(c)(1)(B) and (C) provide that parties and witnesses should be protected from unnecessary burden and expense and IWRB provides no reasonable basis for its demands beyond the fact that a similar request has not been made in one of their previous cases. The ample caselaw cited by both parties in this briefing corroborates that is not a basis to impose that burden on Strider and as allowed by I.R.C.P 37, such expenses should be granted. Finally, IWRB, tellingly, only partially cites I.R.C.P 37(a)(5)(B), which confirms there is no basis to award IWRB its expenses. There is good cause for Strider's motion, and it should be granted to avoid unnecessary and undue burden and expense, especially when IWRB has asserted no prejudice it would face.

**III. CONCLUSION**

Strider has demonstrated that IWRB’s demands would result in undue burden and hardship not only on Strider but primarily on the employees of Strider, the individuals (individuals that are **not** parties to this case) whose individual depositions have been noted in addition to their requirement that they be present for the deposition of the entity and who would be forced to travel away from where they reside (locations that are not near a major airport) and their personal obligations. To avoid this unnecessary expense and hardship, Strider has proposed other options, including proceeding with accepted remote deposition practices and to which IWRB has not articulated any prejudice. Therefore, Strider requests its Motion be granted.

DATED this 15th day of September, 2023.

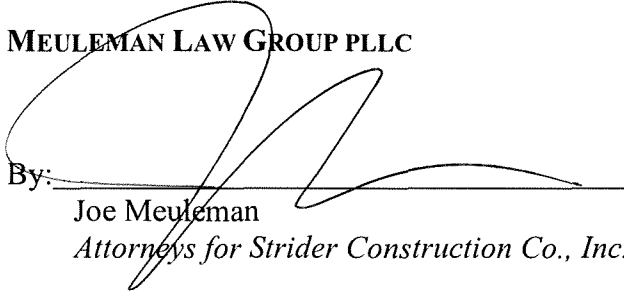
**AHLERS CRESSMAN & SLEIGHT PLLC**

By:           /s/ Lindsay Watkins          

Lindsay Watkins

*Attorneys for Strider Construction Co., Inc.*

**MEULEMAN LAW GROUP PLLC**

By: \_\_\_\_\_

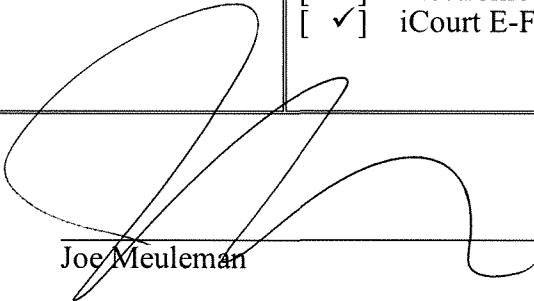
Joe Meuleman

*Attorneys for Strider Construction Co., Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15th day of September, 2023, a true and correct copy of the foregoing document was served by the method indicated below upon the following parties:

Garrick L. Baxter Meghan M. Carter Deputy Attorneys General Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098 <a href="mailto:garrick.baxter@idwr.idaho.gov">garrick.baxter@idwr.idaho.gov</a> <a href="mailto:meghan.carter@idwr.idaho.gov">meghan.carter@idwr.idaho.gov</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> iCourt E-File
Steven B. Andersen Jennifer Reinhardt-Tessmer KIRTON MCCONKIE 1100 W. Idaho St., Ste. 930 Boise, ID 83702-5662 <a href="mailto:sandersen@kmclaw.com">sandersen@kmclaw.com</a> <a href="mailto:jtessmer@kmclaw.com">jtessmer@kmclaw.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> iCourt E-File

  
\_\_\_\_\_  
Joe Meuleman