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Attorneys for Marion Ogle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

APPLICANT'S MOTIONS IN LIMINE

MOTION

COMES NOW, the Applicant, Marion Ogle ("Ogle" or "Applicant"), by and through her counsel of record, Hawley Troxell Ennis & Hawley LLP, and hereby respectfully seeks an order in limine instructing Salubria Holdings LLC ("Salubria" or "Protestant"), its counsel, and Protestant's witnesses to refrain from mentioning or using certain witnesses and evidence at hearing due to their late disclosure in this case. Even if such evidence were arguably relevant, any probative value is substantially outweighed by the danger of unfair prejudice to the Applicant due to its late disclosure. These Motions are supported by the Declaration of Dana L. Hofstetter, filed contemporaneously herewith.

I. BACKGROUND

The October 20, 2021, Hearing Notice/Scheduling Order in this case sets various case deadlines for disclosing case information, including an expert report deadline of November 19, 2021, a discovery deadline of January 7, 2022, and a January 18, 2022, exhibit and witness deadline. Case deadlines such as these are necessary to ensure that the parties exchange information in a timely and organized way so that they are able to adequately prepare for hearing. It is well understood that the failure to observe case disclosure deadlines can result in prejudice to the other party, including an inadequate opportunity to address the information through investigation, research or additional discovery.

On October 29, 2021, Marion Ogle's First [and Only] Set of Interrogatories and Requests for Production were served on Protestant's counsel ("Discovery Requests"). On December 15, 2021, the Applicant filed a Motion to Exclude Expert Witness on the basis that the Protestant's discovery responses and November 19, 2021, expert disclosure included no expert opinions or supporting facts. In the resulting January 4, 2022, Order on Motion to Exclude Expert Witness, the Hearing Officer found that Protestant's expert disclosure and discovery responses "do not fully respond to the interrogatory [4] and the requirements to disclose under Rule 26(b)(4)." Accordingly, to avoid additional prejudice to the Applicant, the Hearing Officer ordered disclosure of the Protestant's expert opinions and the information underlying those opinions a couple of days prior to January 13, 2022, the date scheduled for the expert's deposition:

On or before January 10, 2022, regarding Mr. King's testimony, Salubria must serve Ogle supplemental responses to Interrogatory 4, parts (c) and (d) consisting of specific, disclosure of the opinions to be expressed and the basis and reasons therefor,

as well as the data or other information considered by him in forming his opinions.

Order on Motion to Exclude Expert Witness at 2.

On January 11, 2022, (after 5 p.m. on January 10, 2022) almost two months past the original November 19, 2021, expert report deadline and technically just after the January 10, 2022, deadline in the Order on Motion to Exclude Expert Witness, Salubria served the expert report of Scott King in the form of a Memorandum.¹ *See* Declaration of Dana L. Hofstetter, Exhibit A.

On January 12, 2022, 5 days past the January 7, 2022, discovery deadline and over 2 months after being served the Applicant's Discovery Requests, Salubria for the first time produced documents in this case as part of its First Supplemental Discovery Disclosures. The pages of these documents were Bates numbered Salubria000001-000120. All 120 pages of these documents related to the Protestant's Motion to Dismiss that had been filed the day before.

On January 19, 2022 (after 5 p.m. on January 18, 2022), Salubria produced documents, Bates page numbered 000121-000229, as part of its second supplementation of discovery responses. The documents produced on January 19, 2022, almost a week after Scott King's January 13, 2022, deposition and after the deadline for identifying exhibits, included as Bates page numbers 000134-000146, a series of new aerial maps apparently prepared by Mr. King, not previously disclosed.

¹ The expert Memorandum provided on January 11, 2022, relates to the Hearing Officer's prior Order on Motion to Exclude Expert Witness and, therefore, is not addressed in this Motion except to the extent it was served after the deadline in that Order.

On January 21, 2022 (after 5 p.m. on January 20, 2022), Salubria produced documents Bates page numbered 000230-000233 as part of its third supplementation of discovery responses. These documents produced on January 21, 2022, more than a week after Scott King's deposition and after the deadline for identifying exhibits, included another series of new aerial maps apparently prepared by Mr. King.

On January 25, 2022, Salubria served its fourth supplementation of discovery responses, and while Applicant's counsel is in the early stages of reviewing these responses as of preparing this Motion, they appear to identify new witnesses, but they do not appear to produce additional documents. (A copy of these Fourth Supplemental Discovery Responses which also include Salubria's prior discovery responses are attached to the Declaration of Dana L. Hofstetter as Exhibit B.)

II. MOTION IN LIMINE #1 – UNTIMELY DISCLOSED EXPERT MATERIALS.

Motion: To preclude the Protestant from offering into evidence the materials prepared by its expert and first produced to Applicant on January 19 and 22, 2022, identified as Bates page nos. 000134-000146 (Exhibit 111) and 000230-000233 (not yet identified with a Salubria Exhibit number), and also the expert Memorandum produced just after the January 10, 2022, deadline in the Order on Motion to Excluded Expert witness.

Rule 26(e) of the Idaho Rules of Civil Procedure provides that when expert disclosures are required by court order, a party must supplement in a timely manner the identity of each testifying expert, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony. Idaho R. Civ. P. 26(e)(2). This is consistent with the general principle that parties should be barred from presenting evidence they should have included in their expert

disclosures. *See Salgado v. G.M. Corp.*, 150 F.3d 735, 741 n.6 (7th Cir. 1998) (“[T]he report must be complete such that opposing counsel is not forced to depose an expert in order to avoid ambush at trial.”). Salubria failed to provide its expert opinions and supporting information timely in the first place, and did so only after Ogle moved the Hearing Officer to cause Salubria to do so.

While the Hearing Officer’s deadline for Salubria to provide supplemental discovery responses related to its expert witness’s opinions was January 10, 2022, the new expert materials, served on January 19 and 22, 2022 (Bates 000134-000146 and 000230-000233), were received well past this deadline. Clearly, the use of these late disclosed documents at hearing would cause the Applicant great prejudice since they were disclosed after the deposition of Scott King and Applicant’s counsel had no opportunity to depose Mr. King about them.

Technically the expert supplemental discovery served shortly after the deadline of January 10, 2022, in the Order on the Motion to Exclude was late and should be excluded pursuant to Rule 26(e)(2) also. However, since Applicant’s counsel at least received these materials on January 11, 2022, prior to Mr. King’s deposition on January 13, 2022, not as much prejudice to Applicant would result as would occur if the expert documents produced on January 19 and 20, 2022, (Bates 000134-000146 and 000230-000233) were allowed into evidence at hearing.

III. MOTION IN LIMINE #2 – UNTIMELY DISCLOSED NON-EXPERT DOCUMENTS/WITNESSES.

Motion: To preclude any effort by Protestant to offer any non-expert witnesses and documents at hearing first disclosed after the January 7, 2022, Hearing Notice/Scheduling Order discovery deadline, when those witnesses and documents were available and in existence prior to the January 7, 2022, deadline.

Rule 26(e) of the Idaho Rules of Civil Procedure requires that a party who has made an initial disclosure or otherwise responded to discovery must supplement its responses in a timely manner upon obtaining new information. Much of the Protestant's "supplemental" discovery responses were not actually supplementing a prior response to Applicant's interrogatories or requests for production, but were actually providing information for the first time. Discovery responses provided for the first time after the January 7, 2022 deadline would be late and prejudicial to the other party. All late disclosed documents and witnesses should not be permitted to be used at the hearing because the Applicant has not had sufficient time to review and respond to those late identified witnesses and documents and the issues arising from them.

Protestant's (first) supplemental discovery responses served on January 12, 2022, all relate to the entirely new title issues raised by the Protestant in its Motion to Dismiss Application. There was no mention of these title issues in the original discovery responses. Further, there appears to be no reason why these witnesses and documents could not have been disclosed in the Protestant's original discovery responses served in November 2021, or at least in time before the January 7, 2022, discovery deadline for Applicant to be able to depose the witnesses or otherwise to conduct its own investigation to address the issues. Clearly, Protestant must have had this information available some time before filing its Motion to Dismiss Application on January 11, 2022. Protestant should not be rewarded at the Applicant's expense for dilatory case investigation and discovery disclosures.

IV. CONCLUSION

For the foregoing reasons, the documents and witnesses first disclosed after January 10, 2022, should not be used at hearing.

Dated: January 26, 2022

HAWLEY TROXELL ENNIS & HAWLEY LLP



By

Dana L. Hofstetter, ISB No. 3867
Attorneys for Marion Ogle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of January, 2022, I caused to be served the foregoing APPLICANT'S MOTIONS IN LIMINE by the pre-paid method (s) indicated below, and addressed to each of the following:

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- ☐ U.S. Mail, Postage Prepaid
- ☒ Hand Delivered
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