Hearing Date: October 30, 2023
Hearing Time: 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

BRAD CAREY, PAMELA ROGERS, and LIBERTY MANAGEMENT LLC, a Washington State limited liability company, Plaintiffs, v. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, a public agency, Defendant.	NO. 19-2-00737-23 **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION AND RELIEF REQUESTED

The agreed upon discovery deadline for this case has passed. The agreed upon mediation deadline for this case has passed. Plaintiffs have laid their cards on the table and shown that there are no genuine issues of material facts in dispute, and they are entitled to prevail in this case as a matter of law.

Faced with this proposition and realizing that it has entirely neglected to develop its case, DNR now beseeches the Court to allow it time to conduct additional undefined discovery under CR 56(f). What discovery it seeks to conduct is not identified. DNR does not name an expert or even the field in which this unnamed expert practices. What DNR proposes to "discover" is anyone's guess; especially since DNR has not found "it" since this case started almost four years ago (in December of 2019).

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(P): 360-298-0464

DNR has wholly failed to meaningfully participate in this litigation. DNR's request to continue this matter under CR 56(f) is improper under such a circumstance. DNR's request should be denied, and this Court should entertain Plaintiff's Motion for Summary Judgment and rule on the merits.

Discovery closed on September 1, 2023, pursuant to the parties' stipulated case scheduling order, which was approved by the Court. Power Decl., Ex. J. The trial setting conference is to occur in just two days, on November 1, 2023. *Id.* Plaintiffs are ready to proceed to trial – though for the rationales stated in their Motion for Summary Judgment -- believe no trial is necessary.

DNR has not done its homework and now asks the Court to grant DNR more time. Plaintiffs have diligently prosecuted their claims. Indeed, DNR has been derelict throughout the litigation. It has cancelled depositions within the hour that they were scheduled to begin (Power Decl., Ex. G), it has not shown up for scheduled conference calls (Power Decl., Ex. D), and it even has had the temerity to stiff court reporters and the mediator forcing Plaintiffs alone to cover the tab for these expenses (Power Decl. Exs. H & I). This is not how the State of Washington should treat its citizens, even when litigating against them.

Plaintiffs identified all of their experts and provided DNR with copies of their expert reports weeks **prior** to the close of the discovery period (September 1, 2023). Power Decl, Ex. N. Plaintiffs then tried their best to coordinate (and actually participated in mediation) before the mediation deadline of October 1, 2023, but DNR failed to communicate about, or participate in, mediation. Power Decl., Exs. B, C, D., L, M, N. DNR has done nothing to conduct discovery since it took the deposition of Plaintiffs in June of 2023, and this Court should not give DNR any reprieve to now do what it could have and should have done before.

Critically, time is of the essence in this case. The winter rains are soon to fall, and there is serious concern that because of DNR's unlawful unplugging of the Caldervin Creek culvert, it is very possible that a main arterial – N.E. Northshore Road – will be washed out. There is no time for delay in this case, and if the Court is contemplating granting DNR's request under CR 56(f), which it should not, then the Court should Order DNR to post a bond in the amount of Three Million Dollars, so that when the road

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(P): 360-298-0464

is washed out, there will be adequate funds to cover the damage.

Finally, this Court must not rely upon DNR's false representations of the case history. Depressingly, DNR submits blatant falsehoods and half-truths in support of its request, and the Court should not be persuaded by these unethical efforts. Given how egregious DNR's conduct has been and given the prejudice to Plaintiffs, the Court should grant Plaintiffs' Motion for Summary Judgment and award sanctions pursuant to CR 11 and CR 37[1] in an amount equal to the costs and fees incurred in this litigation since June 21, 2023, through resolution of the motions pertaining to CR 56. Plaintiffs incorporate their moving papers and supporting declarations filed in this matter by this reference.

II. ARGUMENT AND AUTHORITY

A. Defendant Has Been Completely Dilatory, and Such Behavior Will Not Support a Request for a Continuance and it Should Not Be Rewarded.

In light of Defendant's omissions, it is important for the Court to have some context to consider Defendant's request under CR 56(f). Defendant has been totally and completely dilatory regarding this matter.

- July 2022: DNR fails to show up at properly noted Deposition of DNR Employees. Power Decl., Ex. G.
- October 2022: DNR still has not paid (as promised) to cover the cancellation fee for Court reporter. Power Decl., Exs. G, H & I.
- December 2022: Plaintiffs identify biologist Grant Novak as a testifying expert and produce his CV. Power Decl., Ex. F.
- December 16, 2022: Plaintiffs depose Carla Fosberg (Forest Practice Program Coordinator at DNR), Nathan McReynolds (Hood Canal District Manager for DNR), Bruce Meyer (Forest Practice District Manager for the South Puget Sound Region for DNR), and Jason

[1] CR 56(f) by its terms allows a Court discretion in imposing terms stating, stating courts "may make such other order as is just."

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(P): 360-298-0464

Sharp (Forest Practice Regulator and Map/Road Specialist for South Puget Sound Region for DNR). September 26, 2023, Power Decl., Ex. A-D (Court File).

- April 2023: Parties Enter Into a 5th Agreed Upon Case Schedule Order. Power Decl., Ex J setting a discovery cut-off of September 1, 2023, and a mediation deadline of October 1, 2023).
- April 17, 2023: Plaintiffs identify Engineer Martin Fisher as a testifying expert and produce his CV to DNR. Power Decl., Ex. A.
- June 21, 2023: DNR takes the depositions of Plaintiffs (Brad Carey, Wade Anderson/Liberty Management LLC, and Pamela Rogers). Power Decl., Ex. C.
- August 17, 2023: Plaintiffs tender Expert Reports to DNR. Power Decl., Ex. N.
- September 13, 2023: Plaintiffs propose 5 possible mediators, ask DNR to select one of them, and remind DNR of the October 1, 2023, mediation deadline. Power Decl., Ex. M. Plaintiffs inform DNR that if no response is received, then Plaintiffs will proceed to select a mediator and proceed with arranging a mediation date. Id.
- DNR does not respond to Plaintiffs' correspondences regarding mediation. However, on September 20, 2023: DNR's counsel asks Plaintiffs' counsel if they can be available for a Zoom meeting on Monday, September 25, 2023. Power Decl. Ex. B.
- September 25, 2023: DNR's counsel does not provide a Zoom link and makes no effort to communicate with Plaintiffs' counsel. Power Decl. Ex. D After the Zoom conference was supposed to occur, Plaintiffs' counsel writes DNR's attorney if he would like to have a call "sometime before mediation."). Id. Counsel for DNR does not respond.
- September 28, 2023: Plaintiffs file their Motion for Summary Judgment. Court File.

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Friday Harbor, WA 98250
(P): 360-298-0464

- September 29, 2023: DNR fails to attend mediation and does not communicate with anyone until after the scheduled mediation had already begun. Power Decl., Ex. L.
- September 29, 2023: Mediator sends correspondence to the parties' counsel along with an invoice for services. Plaintiffs remit payment for their share of the costs. Vera Decl., Ex. B.
- October 2, 2023: **After** Plaintiffs file their Motion for Summary Judgment, DNR's counsel serves a Notice of Unavailability. Power Decl., Ex. K.
- October 18, 2023: DNR files its request pursuant to CR 56(f) to continue discovery. Court File.

B. The Court Should Deny DNR's Request to Continue This Matter Under CR 56(f), Since DNR Wholly Failed to Provide the Court with a Record Required for Such Relief.

Defendant has requested a continuance under CR 56(f), yet has made absolutely no attempt to demonstrate that each of the elements required to support such a request are satisfied in this case. *See* Defs. Response, at 3. CR 56(f) requires the party seeking a continuance to justify the request by affidavit, which must demonstrate good cause for the delay. The party seeking a continuance must (1) outline the evidence sought to be discovered if the continuance is granted, **and** (2) demonstrate how the new evidence would support the party's position in the case. *Thongchoom v. Graco Children's Products, Inc.,* 71 P.3d 214 (2003) (explanation that new evidence would go to the issue of defendant's knowledge was insufficient to justify continuance). A ruling on a motion for continuance under CR 56(f) is reviewed for "manifest abuse of discretion." *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 928 P.2d 1108 (1996). A court does not abuse its discretion if (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Id.* "A continuance is not

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Friday Harbor, WA 98250
(P): 360-298-0464

justified if the party fails to support the request with an explanation of the evidence to be obtained through additional discovery." *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986); *See also, Gross v. Sunding*, 139 Wn. App. 54, 161 P.3d 380 (2007) (in opposing alleged tortfeasor's motion for summary judgment, motorist was not entitled to continuance to conduct deposition of alleged tortfeasor in motorist's action arising out of automobile collision in parking lot; motorist did not demonstrate good reason for delay in obtaining evidence from alleged tortfeasor). "Only one of the qualifying grounds is needed for denial." *Id.* (citing *Pelton v. Tri-State Memorial Hospital*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

Appellate Courts have framed the inquiry under CR 56(f) as follows:

> CR 56(f) provides a remedy for parties who know of the existence of a material witness and show good reason why they cannot obtain the witness' affidavits in time for the summary judgment proceeding. In such a case, the trial court has a duty to give the party a reasonable opportunity to complete the record before ruling on the motion. *Lewis v. Bell,* 45 Wn. App. 192, 196, 724 P.2d 425 (1986); *Cofer v. County of Pierce,* 8 Wn. App. 258, 262-63, 505 P.2d 476 (1973).
>
> The trial court may, however, deny a motion for continuance where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Lewis,* 45 Wn. App. at 196; *Sternoff Metals Corp. v. Vertecs Corp.,* 39 Wn. App. 333, 341-42, 693 P.2d 175 (1984); *see also* 6 J. Moore, *Federal Practice* ¶ 56.24, at 56-817 to 56-821 (2d ed. 1988). The trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion. *Lewis,* 45 Wn. App. at 196; 6 J. Moore, *supra* at 56-800 to 56-804.
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> …
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> There are relatively few Washington cases addressing CR 56(f). However, it is essentially the same as Fed. R. Civ. P. 56(f). Therefore, we look to decisions and analysis of federal rules for guidance in interpreting the state rule. *Rinke v. Johns-Manville Corp.,* 47 Wn. App. 222, 225, 734 P.2d 533, *review denied,* 108 Wn.2d 1026 (1987).
>
> Most federal courts considering the issue agree that a party must comply with Fed. R. Civ. P. 56(f) to preserve his or her contention that summary judgment should be delayed. *See, e.g., Foster v. Arcata Assocs., Inc.,* 772 F.2d 1453, 1467 (9th Cir.1985) (failure to comply with the requirements of Fed. R. Civ. P. 56(f) is a proper ground for denying discovery and proceeding to summary judgment), *cert. denied,* 475 U.S. 1048, 89 L.Ed.2d 576, 106 S.Ct. 1267 (1986); 6 J. Moore, *supra* at 56-820 to 56-821 ("[g]enerally, a contention by the opposing party that he was

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Friday Harbor, WA 98250
(P): 360-298-0464

not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal"); *accord,* RAP 2.5.

In limited situations, the federal courts have shown leniency to parties who have not formally complied with Fed. R. Civ. P. 56(f). These include situations in which the party opposing the motion for summary judgment: (1) appeared pro se, *Garrett v. City & Cy. of San Francisco,* 818 F.2d 1515, 1518-19 (9th Cir.1987); (2) was incarcerated, *Murrell v. Bennett,* 615 F.2d 306 (5th Cir.1980); (3) honored the district court's order limiting discovery to one issue and moved to strike those portions of the other party's affidavits which addressed additional issues, *Program Eng'g, Inc. v. Triangle Publications, Inc.,* 634 F.2d 1188, 1193 (9th Cir.1980); (4) moved to compel production of certain documents before the motion for summary judgment was heard, *Garrett,* 818 F.2d at 1518-19; or (5) filed a letter stating that needed evidence was in the defendants' possession and the parties had previously agreed to complete the defendants' discovery before the plaintiff began his discovery, *Littlejohn v. Shell Oil Co.,* 483 F.2d 1140, 1146 (5th Cir.), *cert. denied,* 414 U.S. 1116, 38 L.Ed.2d 743, 94 S.Ct. 849 (1973). None of these exceptions applies.

Turner v. Kohler, et al, 54 Wn. App. 688, 775 P.2d 474 (1989) (internal footnotes omitted).

Likewise, none of these exceptions apply in this case. First, Defendant wholly fails to offer a good reason for the delay in obtaining evidence. Response, at 1, 3. Here, there can be no dispute that there is no good cause for DNR's delay in obtaining the desired evidence. The parties' stipulated to a case scheduling order and agreed that the discovery cut-off would be September 1, 2023. Power Decl., Ex. J. Until its request pursuant to CR 56(f) filed just last week, Defendant made no effort to depose Plaintiffs' experts. Power Decl. Defendant's counsel will argue that he was too busy to handle this case, to meet this case's deadlines, or (apparently) to even email or call opposing counsel to seek an extension or request additional time before the discovery cut-off ended or prior to filing DNR's Response in the middle of October. Since August of 2023, Defendant's counsel has only made contact with Plaintiffs' counsel on two occasions: (1) asking Plaintiffs' counsel to participate in a Zoom or call, which Plaintiff's counsel agreed to do, but then Defendant's counsel never participated in the Zoom call and did not follow up with Plaintiff's counsel when Plaintiff's counsel emailed him pointing out that the Zoom call had no occurred, (Power Decl., Ex. B (requesting Zoom call), Power Decl., Ex. D (no-show for Zoom call)) and (2) emailed Plaintiffs' counsel on the day of mediation, after mediation had already started, to say that an

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3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

upcoming trial would prevent Defendant's counsel from participating in mediation. Vera Decl. Exs. A & B.

Hopefully, this Court will agree that these kinds of dilatory tactics do not constitute a reasonable basis to grant the request for a continuance (see argument in Section F, below). This is even more true in a case such as this where Defendant is represented by the Office of the Attorney General, which is a Washington State agency consisting of "more than 1,800 employees, including nearly 800 attorneys providing legal services . . . ." Washington State Office of the Attorney General; Office Divisions.[2] While one particular Assistant Attorney General may be busy, there is absolutely no reason why another attorney at the office could not support his or her colleague, if necessary.

Moreover, Defendant's counsel has failed to identify with specificity the evidence that would be obtained during a continuance. The only basis offered by Defendant's counsel for the continuance is: "It is necessary for the Defendant to have the opportunity to conduct the deposition of Plaintiff's expert regarding his opinions, as well as obtaining a rebuttal opinion from Defendant's disclosed expert." Response, at 3. First, Defendant has **never** disclosed an expert witness in this case. Power Decl. Ex. E. So, even if this Court were to grant DNR's CR 56(f) request, then DNR should not be permitted to rely on its undisclosed expert at this late stage in the proceedings – especially since the discovery cut-off has long since passed.

DNR has not made a single attempt to specify the evidence that would be obtained from deposing Plaintiffs' experts or having DNR's as-of-yet undisclosed expert review and rebut Plaintiffs' experts. Would DNR's mysterious expert(s) refute the hydrological calculations performed by Plaintiffs' expert? Would Defendant's unnamed expert(s) opine on the salmon spawning habitat in Caldervin Creek?

[2] (https://www.atg.wa.gov/office-divisions#:~:text=Office%20Overview&text=The%20office%20consists%20of%20more,state%20agencies%2C%20boards%20and%20commissions.)

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

We don't know, and neither does DNR. Based upon the arguments offered by DNR it is quite possible that DNR's unnamed, undisclosed, expert(s) might even agree with the conclusions reached by Plaintiffs' experts. DNR has utterly failed to make any reasonable and meaningful attempt to provide this Court with sufficient grounds to justify a continuance in this case under these circumstances. Given that discovery has closed, and since DNR (unlike Plaintiffs) never disclosed any expert witnesses in this case, the Court should deny DNR's request under CR 56(f) and rule on the merits of Plaintiffs' summary judgment motion.

C. DNR's Response is Full of Half-Truths and Egregious Falsehoods.

DNR's Response consists of a handful of repeated misrepresentations, and in some instances outright lies. What little DNR offered in support of its request for a continuance under CR 56(f) not only failed to satisfy all required elements (see, Section A above), but the most compelling portions of Defendant's Response are untrue. For example:

FALSE: DNR asserts - "Plaintiffs have disclosed expert opinion for the first time in their Motion for Summary Judgment, though Defendant has pending on point discovery regarding expert opinions in this matter, as well as a number of follow-up emails requesting Plaintiffs' expert opinions." Response, at 1, 2. DNR likewise asserts[3] -- "Plaintiffs recently disclosed expert opinion in the context of their Motion for Summary Judgment, despite Defendant's on point discovery and subsequent requests for expert opinion disclosure."

TRUTH: Plaintiffs disclosed their two testifying experts in January of 2023 (Grant Novak), and in April of 2023 (Martin Fisher). Power Decl., Ex. F, Ex. A. Plaintiffs provided their expert witness reports to DNR on August 17, 2023. Power Decl. Ex. N. After providing DNR with these reports, DNR made absolutely zero attempt to request or coordinate depositions of Plaintiffs' experts or pursue any additional discovery with Plaintiffs. *Id.* Plaintiffs have no understanding of what DNR is referring

[3] AAG Hornbrook declared this statement under penalty of perjury under the laws of the State of Washington.

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

to with respect to "follow-up emails" and "subsequent requests for expert opinion disclosure" it has purportedly sent, none were offered by DNR in support of these assertion and based upon a review of email correspondence exchanged regarding this matter, such correspondence appear to be nonexistent.

HALF-TRUTH: DNR asserts - "Defendant has served a Notice of Unavailability in this matter due to a current trial and it is anticipated that defense counsel will remain in trial through the end of October."

TRUTH: Defendant served a Notice of Unavailability on October 2, 2023, **AFTER** Plaintiffs filed their Motion for Summary Judgment on September 28, 2023. Court File. It is unfathomable that DNR's counsel did not know he would possibly be in trial and unavailable in October until October. At no time prior, did DNR's counsel raise this scheduling issue with Plaintiffs' counsel (however, there was a suggestion on the day of mediation – September 29, 2023, that DNR's counsel would be heading to trial in another matter – but even this communication came **after** Plaintiffs had already filed their Motion for Summary Judgment on September 28, 2023). Moreover, Defendant's omission of the fact that said Notice of Unavailability was filed **after** Plaintiffs had filed and served their Motion for Summary Judgment may implicate Defendant's counsel's duty of candor under RPC 3.3.

FALSE: DNR asserts -- "Defense counsel has no availability to conduct Plaintiffs' expert deposition and requires time for the Defendant's expert to review and prepare a rebuttal report." Response at 3.

TRUTH: The parties Stipulated to the Fifth Case Scheduling Order on March 24, 2023. Power Decl., Ex. J. This Case Scheduling Order established an agreed upon discovery cut-off of September 1, 2023, and a mediation deadline of October 1, 2023. *Id.* Plaintiffs disclosed their testifying experts in January and April of 2023. Power Decl., Ex. F, Ex. A. Plaintiffs produced copies of their expert witness reports **prior to** the discovery cut-off in this case. Power Decl. Ex. N. Defendant made no attempt to coordinate a deposition of Plaintiffs' experts nor did DNR request additional information in that regard (until filing its Response on October 16, 2023). *Id.* The time for Defendant to "review and prepare a rebuttal report" has long since come and gone, and DNR should not be allowed to identify an expert

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

almost a full two months after the discovery cut-off has passed and after Plaintiffs have filed their Motion for Summary Judgment.

FALSE:[4] DNR asserts -- "It is necessary for the Defendant to have the opportunity to conduct the deposition of Plaintiff's expert regarding his opinions, as well as obtaining rebuttal opinion from Defendant's disclosed expert."

TRUTH: To date, Defendant still has not identified a single expert witness. Power Decl., Ex. E. And again, the discovery cut-off agreed upon by the parties has long-since passed. Power Decl., Ex. J.

Given DNR's flagrant misrepresentations and half-truths at this late stage in the proceedings, the Court is wholly within its right to deny DNR's request under CR 56(f) and rule on the merits of Plaintiffs' motion for summary judgment. Plaintiffs are entitled to have their case entertained by the Court at this time, and if the Court grants DNR's CR 56(f) request, then Plaintiffs will be prejudiced.

D. The Parties' Stipulated Case Scheduling Order is a Binding and Enforceable Contract, and this Court Should Not Re-Write the Parties' Contract.

The most recent Case Scheduling Order constitutes a binding contract between the parties. CR 2A requires this Court to enforce such contractual stipulations. There was an offer, an acceptance of that offer, and consideration (in the form of the mutual promises made). *Kenneth L. Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Contract law serves society's interest in the performance of promises. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 129, 325 P.3d 327 (2014). Washington Courts highly regard the principle of freedom to contract, as parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004). It is black letter law that parties to a contract shall

[4] AAG Hornbrook declared this statement under penalty of perjury under the laws of the State of Washington.

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

be bound by its terms. *Torgerson v. One Lincoln Towner*, 166 Wn.2d 510, 210 P.3d 318 (2009). Here, the parties entered into a contract when they signed the most recent Case Scheduling Order, and this Court should enforce the terms of the parties' contract.

The parties entered into five separate agreed upon case scheduling orders. Court File. The final stipulated case schedule was entered into on March 24, 2023, and it provided that discovery would close on September 1, 2023, and established the deadline for mediation as October 1, 2023. Power Decl., Ex. J. Plaintiffs worked diligently to comply with this agreed upon case schedule, disclosed all of their expert and lay witnesses in a timely fashion and provided DNR with their expert witness reports **before** discovery closed. Power Decl., Ex. N. Plaintiffs might have been amenable to coordinating the deposition of Plaintiffs' experts after the close of discovery, but DNR made no request to depose Plaintiffs' experts (until filing its Response to Plaintiffs' Motion for Summary Judgment on October 18, 2023 – more than 6 weeks after discovery closed!).

This Court should deny DNR's request under CR 56(f), since the request constitutes a breach of contract and violates the plain terms of the agreed upon Case Scheduling Order.

E. Defendant Has Been Utterly Dilatory with Regard to This Matter, and Such Behavior Should Not Be Rewarded.

It is well settled that "dilatory conduct" is not a basis to grant a continuance under CR 56(f). This case is remarkably similar to *Nguyen-Aluskar v. The Lasik Vision Institute, LLC*, No. 73018-5 (Nov. 30, 2015) (unpublished decision cited pursuant to GR 14.1):

> Nguyen-Aluskar argues that the trial court abused its discretion when it denied her request for a CR 56(f) continuance, because she demonstrated good cause for the continuance.
> ...
> Nguyen-Aluskar's consolidated response to LVI's and Dr. Jensen's motions for summary judgment stated that she had a good reason for the delay, because her expert witness withdrew on the eve of the due date of her opposition leaving her without an expert and without an

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

opinion to present. She stated that her "subsequent expert witness's opinion" would address the standard of care and informed consent issues present in the lawsuit.

The trial court denied Nguyen-Aluskar's CR 56(f) motion to continue the summary judgment hearing, reasoning that dilatory conduct is not a basis for a continuance. The trial court noted that in the three and a half weeks since Nguyen-Aluskar's summary judgment response was due, she submitted nothing supporting the fact that she made any efforts to find another expert after Dr. Bensinger withdrew. And, the trial court also noted that Nguyen-Aluskar had failed to respond to interrogatories five months earlier, when those interrogatories specifically asked her to identify her experts. The trial court ultimately concluded that to grant the continuance would support Nguyen-Aluskar's dilatory conduct.

Nguyen-Aluskar relies on Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990), for the assertion that when a party knows of the existence of a material witness and shows good reason why the witness's affidavit cannot be obtained in time for the summary judgment proceeding, the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case. In Coggle, the court concluded that the trial court abused its discretion by denying Coggle's motion for a continuance when he was unable to produce an expert declaration in time for a summary judgment hearing, because he had just hired a new attorney. Id. at 508.

In Coggle, the new attorney appeared for the plaintiff and filed a motion for continuance along with a declaration. Id. at 502. The new attorney's declaration stated that his client had already been seen by a physician, described what evidence the affidavit of the physician would rebut, and explained that it was too late to obtain the physician's affidavit within the time required by LR 56 because of his late substitution into the case. Id.

Unlike in Coggle, Nguyen-Aluskar did not initially attach supporting declarations to her CR 56(f) motion to continue containing reasons why she could not yet present facts essential to justify her opposition. And, after she filed untimely declarations, two days before the summary judgment hearing, LVI and Dr. Jensen moved to strike the declarations.[5] The trial court sustained their objections to the declarations. Even considering the untimely declarations, the substance of the attorney's declaration in Coggle makes that case distinguishable. The attorney in Coggle was diligent and made it clear that the plaintiff was nearly ready to submit the physician's affidavit and would have been able to, but for the shortened timeline resulting from the substitution of counsel. Id. at 502. This is distinguishable from the case here, in which Nguyen-Aluskar was effectively asking the court for time to conduct an entirely new expert search.

Here, Nguyen-Aluskar consulted with Dr. Bensinger in November 2012. Nothing in the record affirms further contact for nearly two years, until after the summary judgment motion had been filed. Had Nguyen-Aluskar not been dilatory in responding to discovery, she would have much earlier had reason to follow up with Dr. Bensinger to confirm his availability and his opinion. Nguyen-Aluskar had notice on October 22, 2014 that LVI noted the motion seeking dismissal on summary judgment. And, Nguyen-Aluskar had additional notice when LVI and Dr. Jensen filed their motions for summary judgment on November 14, 2014. But, Nguyen-Aluskar waited until November 21, 2014 to contact Dr. Bensinger. Nguyen-Aluskar set up a meeting with Dr. Bensinger on November 26, 2014 to "finalize [his] declaration." And, Nguyen-Aluskar learned of Dr. Bensinger's withdrawal on November 26, 2014. Nguyen-Aluskar does not provide a good reason for her delay— about a month—once she received notice that LVI was seeking dismissal.

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

> We conclude that the trial court did not abuse its discretion when it denied Nguyen-Aluskar's CR 56(f) motion for a continuance.

For the same reasons explained in *Nguyen-Aluskar,* this Court should not reward DNR's dilatory conduct and should deny DNR's request under CR 56(f). This case is much more similar to *Nyguyen-Aluskar* than *Coggle.* Had DNR not been dilatory in conducting discovery, including identifying its own experts in a timely fashion, then there would have been no need for DNR's CR 56(f) request. DNR has had years to identify one or more experts. DNR has had Plaintiffs' expert reports since before the expiration of the discovery cut-off. Instead of making any attempt to work with Plaintiffs' counsel to coordinate a reasonable accommodation to the discovery schedule, DNR elected to sit on its hands and do absolutely nothing until filing its response to Plaintiffs' Motion for Summary Judgment. This Court should not reward this absolutely dilatory conduct and denying DNR's request under CR 56(f) will not be overturned for "a manifest abuse of discretion."

F. Plaintiffs Would be Prejudiced by a Continuance, and Especially Since Dredging Needs to Occur Now Before the Rains Start Again in Earnest.

Plaintiffs would be prejudiced in a number of ways if the Court grants DNR's request to continue discovery at this late stage in the proceeding. With the winter rains fast approaching, Plaintiffs face another season of unmitigated flooding. As explained by Expert Fisher, the sudden release of the water by DNR dislodged sediment from the stream bank. This mass of sediment was flushed into the bed of the stream elevating the Creek's lowest level – the thalweg. That mass of gravel and sediment is migrating down the stream from the upper reaches to the lower reaches and is continuing to fill in the lower reaches of the Creek. So, with each passing winter, the danger to the Plaintiffs and their property continues to increase. Delay in this case is acutely prejudicial to Plaintiffs. It is also prejudicial to the people of Mason County who are at severe risk of losing the bridge that

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

crosses Caldervin Creek – a part of N.E. North Shore Road – which is a major arterial in the area, and which will foreseeably be lost if Caldervin Creek is not dredged in the immediate future.

Moreover, it would be tactically prejudicial to allow DNR -- with the benefit of having Plaintiff's Motion for Summary Judgment already in hand – to now conduct discovery in order to defeat that Motion and to manufacture a refutation to the evidence developed and relied upon by Plaintiffs and their experts. Plaintiffs are entitled to plan their motions practice and litigation strategy in reliance upon the discovery schedule in this case. This is especially true where the case schedule was the result of negotiation and agreement between the parties – as it was here.

Moreover, to avoid expense and duplication of effort, Plaintiffs should be able to rely upon the discovery cut-off so they are able to be satisfied that discovery is complete prior to incurring the time and expense of filing dispositive motions. It would be unfair, inequitable, prejudicial, and unjust to now allow Defendants yet another attempt to re-open discovery. At the very minimum, Plaintiffs will be required to both participate in additional discovery and overhaul their Motion for Summary Judgment to account for whatever evidence DNR might develop. In fact, if this Court grants DNR's CR 56(f) request, then DNR will likely do everything it can to manufacture a genuine issue of material fact, which could render dispositive motions useless. In that case, then this entire exercise would have been futile. If DNR had simply participated in this litigation in a timely fashion according to the agreed upon case schedule, then Plaintiffs could have elected to forgo dispositive motions altogether and instead focus on preparing for trial. There are rules for litigation and DNR should not be permitted to obtain a tactical advantage by ignoring them.

Importantly, expenses are not equally felt between these parties. In addition to having a stable of attorneys who might have been brought in to assist DNR's counsel of record (assuming he truly is overbooked), DNR is using public funds to defend itself. Plaintiffs are using their own funds. The

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

Court should not permit DNR to further exploit the disparate economic circumstances by allowing DNR to play these kinds of games and to engage in delayed discovery (presumably with the hope of bankrupting the Plaintiffs before they can litigate this case to its conclusion). Considering the unique facts and circumstances in this case, the Court should deny DNR's CR 56(f) request and grant the relief sought by Plaintiffs in their moving papers and as set forth herein.

G. DNR has Never Identified One or More Experts to Plaintiffs.

While it is clear that DNR's request under CR 56(f) is inappropriate under these circumstances, even if this Court were to grant DNR's request to depose Plaintiffs' experts, Defendant should not be allowed to identify one or more experts at this late-stage in the proceedings. Unlike Plaintiffs, who disclosed their experts in January and April of this year, DNR has never identified a single expert witness it plans to call in this case. In response to Plaintiffs' discovery requests, on August 12, 2021, Power Decl., Ex. E, DNR responded as follows:

> **INTERROGATORY NO. 11:** Please identify each and every person you or your representative expect to call as an expert witness at the time of trial and the subject matter upon which each such expert is expected to testify.
>
> **RESPONSE: Objection. Open-ended requests seeking "all," "every," "each," "each and every," or "any" piece of information or document are overly broad, unduly burdensome and can easily result in claims that Defendant did not completely respond to a request. Defendant DNR will provide this information in accordance with the rules for civil discovery as well as relevant court orders.**
>
> **Discovery is on-going in this matter and Defendant will supplement its response in a timely fashion pursuant to CR 26 if additional information becomes available.**

To date, this response has never been supplemented or updated (save for the statements set forth in

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

DNR's Response to Plaintiffs' Motion for Summary Judgment). DNR has literally had years to identify one or more expert witnesses, but has wholly failed to do so. Plaintiffs have proceeded with developing their case understanding that DNR would not be calling any expert witnesses.

In fact, had DNR disclosed even a single expert witness, then Plaintiffs would have had an opportunity to explore the opinions and understandings of said expert(s) and may not have elected to pursue a Motion for Summary Judgment. Relying upon the representation that DNR would not be calling any expert(s) in this case, and having deposed DNR's fact witnesses, Plaintiffs confidently concluded that there are no genuine issues of material fact and that judgment can be entered in Plaintiffs' favor as a matter of law. After Plaintiffs have spent a tremendous amount of time, energy, and money, DNR now asks this Court to give it yet another chance to find and identify an expert and have that expert prepare a rebuttal report. This Court should expect more from its litigants, and especially when DNR is represented by the Office of the Attorney General of the State of Washington.

H. The Court Should Award Plaintiffs Their Attorneys' Fees and Costs.

Given DNR's egregious conduct in this case, and especially if this Court grants DNR's request under CR 56(f), the Court should award Plaintiffs all of their fees and costs incurred from June 21, 2023, through a decision on these CR 56 matters. An award to Plaintiffs of their attorneys' fees and costs is warranted pursuant to CR 11 and CR 37.

Since DNR's CR 56(f) request is really a discovery motion concerning CR 26 through CR 37, DNR was first required to confer with counsel regarding its request. As this Court knows, the Court should not entertain any motion regarding CR 26 through CR 37 unless counsel have conferred with respect to the motion. CR 26(i). DNR is essentially asking this Court to extend the agreed upon discovery cut-off date, to allow DNR to finally identify an expert witness, and to allow DNR to compel the deposition of Plaintiffs' experts – all long after the discovery cut-off in this case has come and gone.

THE LAW OFFICE OF NICHOLAS POWER
3660 Beaverton Valley Road
Friday Harbor, WA 98250
(P): 360-298-0464

DNR made no attempt to confer with Plaintiffs' counsel regarding the possibility of extending the discovery cut-off, allowing DNR to amend its prior discovery responses to identify an expert witness, or to compel Plaintiffs' expert witnesses to testify at depositions after discovery has closed. As such, pursuant to CR 37 this Court should deny DNR's CR 56(f) request, and should award Plaintiffs their costs and attorneys' fees incurred for having had to respond to DNR's discovery motion clothed as a CR 56(f) request.

CR 11 also imposes requirements on attorneys who sign and file any "pleading, motion, or legal memorandum". The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters.*, Inc., 498 U.S. 533, 112 L. Ed. 2d 1140, 1160, 111 S. Ct. 922 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash. Prac., Rules Practice § 5141 (3d ed. Supp. 1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1014 (1988).

If a filing lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990).

Here all grounds are present. DNR has failed to participate at a number of junctures in this litigation. DNR's counsel certainly knew better, could have communicated with Plaintiffs' counsel, but now attempts to mislead the Court with a story spun from whole cloth about how DNR just needs to now conduct some as yet described discovery. Such depths should be well below where the Attorney

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Friday Harbor, WA 98250
(P): 360-298-0464

General's Office litigates, and attention should be called to this behavior. Accordingly, Plaintiffs should also be awarded appropriate sanctions pursuant to CR 11.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request the Court deny DNR's request under CR 56(f), consider the Motion for Summary Judgment as it is presently (and fully) briefed, grant Plaintiffs' Motion for Summary Judgment, and grant the following additional relief:

1. If the Court grants DNR's CR 56(f) request, then entry of an Order directing DNR to pay the sum of $3,000,000.00 into the Court registry for mitigation of the increased risk of damages;
2. An award in favor of Plaintiffs for their attorneys' fees and costs incurred from June 21, 2023 through the resolution of these CR 56 matters, in an amount to be determined in a subsequent proceeding, pursuant to CR 37, CR 11, and/or CR 56(f).
3. Make a finding that DNR acted negligently when it released the impounded waters of Wood Lake on December 1, 2016;
4. Make a finding that DNR tortiously injured Plaintiffs' real properties when it unplugged the Caldervin Creek culvert;
5. Make a finding that DNR unlawfully trespassed on the properties of the Plaintiffs;
6. Make a finding that DNR committed the tort of waste;
7. Make a finding that DNR inversely condemned the property of Plaintiffs;
8. Make a finding that DNR's actions (and inaction) caused damage to the Plaintiffs and their properties;
9. Make a finding that DNR violated the Public Trust Doctrine when it breached its fiduciary duty to maintain, manage, and preserve public trust assets;
10. Make a finding that Plaintiffs are entitled to treble damages pursuant to RCW 4.24.630.
11. Entry of a money judgment in favor of the Plaintiffs in the sum of $1,427,490.00.
12. Entry of a money judgment in favor of Plaintiffs for all reasonable attorneys' fees and costs

THE LAW OFFICE OF NICHOLAS POWER
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Friday Harbor, WA 98250
(P): 360-298-0464

associated with this litigation, including expert witness fees, in an amount to be determined at a later proceeding;

13. Entry of an Order commanding DNR or allowing Plaintiffs to undertake appropriate remediation to return the drainage from Wood Lake so as to restore the Wood Lake culvert, Caldervin Creek, and restore its functionality as a fish bearing creek.
14. Entry of an Order retaining jurisdiction over this matter to allow for further proceedings to determine the sufficiency and the completeness of ordered remediation, and to determine the costs of restoration.
15. Setting a trial date, which shall date shall be stricken if the Court rules in Plaintiffs' favor on Plaintiffs' Motion for Summary Judgment.
16. For any such further relief that is equitable and just.

DATED this 24th day of October 2023.

The Law Office of James P. Grifo, LLC

s/ James Grifo
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