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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF CLACKAMAS
6

7 **TIM REEVES, ERIC SAUB, GREG**
8 **BURNETT, CARLA PEALER, as the**
9 **LIBERTARIAN PARTY OF**
10 **OREGON, and DAVID TERRY, M**
11 **CARLING, and RICHARD BURKE,**
12 **as Members of the LIBERTARIAN**
13 **PARTY OF OREGON,**

14 Plaintiffs,

15 vs.

16 **WES WAGNER, HARRY JOE**
17 **TABOR, MARK VETANEN,**
18 **BRUCE KNIGHT, JEFF WESTON,**
19 **JIM KARLOCK, RICHARD**
20 **SKYBA, individuals and**
21 **LIBERTARIAN PARTY OF**
22 **OREGON,**

23 Defendants.

Case No. CV 12010345

DEFENDANTS' REPLY IN
SUPPORT OF MOTION FOR
FINDINGS UNDER ORS
20.105(1)

24 **A. INTRODUCTION.**

25 The issue presented by Defendants' Motion for Findings Under ORS
26 20.105(1) is whether plaintiffs had an "objectively reasonable basis" for asserting
their claims against defendants when the relief plaintiffs sought from this Court
was constitutionally impermissible, as the Washington County Circuit Court held
in 2007. Plaintiffs responded with a number of assertions, none of which avoid
the conclusion that their claims lacked an objectively reasonable basis.
Defendants address each of plaintiffs' arguments in the paragraphs that follow.

1 **B. ARGUMENT IN REPLY.**

2 **1. Judge Redman's prior ruling does not shield plaintiffs.**

3 Plaintiffs argue that their claims must have had an objectively reasonable
4 basis because Judge Redman denied defendants' ORCP 21 motion to dismiss
5 plaintiffs' claims on the ground that the Court was constitutionally prohibited from
6 awarding the requested relief. Defendants respectfully disagree with the prior
7 ruling, but it also is beside the point. Judge Redman did not have the benefit of
8 the factual record that was presented in conjunction with defendants' summary
9 judgment motions. That factual record fleshed out the history and nature of the
10 dispute, establishing without a doubt that plaintiffs' claims involved an intraparty
11 political squabble. Plaintiffs were well aware of that history and therefore are
12 accountable for asserting claims for relief that could not be granted.¹ *Cf. Freitag*
13 *v. Dep't of Revenue*, 19 OTR 37, 41-45 (2006) (court may find that plaintiff's
14 claim lacked an objectively reasonable basis even though it previously survived a
15 motion to dismiss).

16 Judge Redman was not presented with defendants' argument on the
17 preclusive effect of the Washington County Circuit Court's decision in 2007, and
18 made no rulings on that matter. Plaintiffs cannot rely on a prior decision by Judge
19

20
21 ¹ As they did in the summary judgment proceedings, plaintiffs apparently try
22 to create the impression that this Court rejected defendants' constitutional
23 argument twice before, arguing that "Defendants twice previously briefed and
24 argued to this court their argument about jurisdiction under the First Amendment."
25 Response at 4:2-3. As plaintiffs' counsel was forced to admit under questioning
26 by the Court in the summary judgment hearing, Judge Redman ruled only once on
 defendants' motion. The Court deferred ruling on defendants' first motion raising
 the constitutional issue until plaintiffs joined necessary parties. *See* Order on Rule
 21 Motions signed April 27, 2012.

1 Redman to avoid accountability for filing a claim seeking relief that was precluded
2 by a prior judgment.

3 **2. Steve Trout's communications do not shield plaintiffs.**

4 Plaintiffs argue that their claims were objectively reasonable because Steve
5 Trout, an official with the Oregon Secretary of State's office, "told the parties that
6 they have to go to court to adjudicate this matter if there is to be any change
7 because they do not adjudicate this type of dispute." Response at 4:17-20. That
8 argument fails for at least two reasons. First, Mr. Trout expressed no opinion on
9 whether this court constitutionally could award the relief sought by plaintiffs or
10 whether issue preclusion would prevent a second adjudication of that issue. Mr.
11 Trout only stated that "if there is to be any change," it would need to come from a
12 court because the Secretary of State was not going to grant the relief requested by
13 plaintiffs. Smith Declaration Ex. 1 (Trout Declaration at page 2). Second, even if
14 Mr. Trout had opined on the First Amendment and preclusion issues, his opinion
15 is irrelevant to the question of whether there was an objectively reasonable basis
16 for plaintiffs' claims. The subjective views of Mr. Trout or anyone else have no
17 bearing on objective reasonableness.

18 In the section of plaintiffs' Response discussing Mr. Trout's statement,
19 plaintiffs also argue that Judge Hernandez validated their view in the 2006
20 Washington County case. This is another instance of plaintiffs mischaracterizing
21 the proceedings in the prior case. A reading of the transcript demonstrates that
22 Judge Hernandez refers to declaratory actions in his attempt to articulate the
23 Libertarian Party of Oregon's position, but offers no opinion on whether such an
24 action would be appropriate. Judge Hernandez explained that the court might
25 have concluded that the plaintiff needed to exhaust other remedies before pursuing
26 a writ of mandamus, but the constitutional prohibition trumped that inquiry. *See*

1 Defendant LPO's Reply in Support of Motions for Summary Judgment at 6-9, and
2 record cited therein.

3 **3. Decisions of the Libertarian National Committee have no**
4 **bearing on this motion.**

5 Plaintiffs argue that their position is supported by various decisions of the
6 Libertarian National Committee. Again, plaintiffs' argument is not responsive to
7 the question of whether they had an objectively reasonable basis for their claims.
8 As discussed in the summary judgment materials, there indeed were conflicting
9 rulings on the parties' dispute by various organs of the national party. But the fact
10 that they have been able to convince some people within an organization to
11 support their cause has no bearing on whether the U.S. Constitution bars this Court
12 from wading into the dispute or whether the answer to that question was
13 established through the doctrine of issue preclusion.

14 **4. Plaintiffs' arguments on standing are, again,**
15 **nonresponsive.**

16 In pages 10 through 17 of their Response, plaintiffs rehash arguments from
17 the summary judgment proceedings relating to standing. Defendants disagree with
18 those arguments, as set out in the summary judgment briefing, but those arguments
19 have nothing to do with the issue presented by this motion.

20 **5. Plaintiffs' First Amendment arguments were not**
21 **objectively reasonable.**

22 At page 18 of the Response, plaintiffs for the first time engage with the
23 question presented by defendants' motion for findings under ORS 20.105(1):
24 whether the plaintiffs' claims had an objectively reasonable basis. They fail,
25 however, to establish an objectively reasonable basis for their claims.
26

1 Plaintiffs simply misunderstand the U.S. Supreme Court's precedents on
2 this subject. They continue to argue that only statutory impairments of the internal
3 affairs of political parties are limited by the First Amendment. As this Court
4 concluded when deciding the summary judgment motions, courts are no less "the
5 state" than are the other branches of government. Letter Ruling dated May 21,
6 2013, at 2, citing *Ex Parte Virginia*, 100 US 339, 25 L Ed 676 (1879). *See also*
7 *O'Brien v. Brown*, 409 US 1, 4-5, 92 S Ct 2718 (1972) (reasoning that the party's
8 "convention itself is the proper forum for resolving intra-party disputes," and that
9 "the political processes" should "function free from judicial supervision");
10 *Cousins v. Wigoda*, 419 US 477, 95 S Ct 541 (1975) (ruling state court injunction
11 unconstitutional because it abridged the associational rights of delegates and
12 violated party's right to determine the composition of its national convention in
13 accordance with party standards). Thus, this Court could not interfere with the
14 internal affairs of the LPO in the absence of a compelling state interest, and the
15 state has no interest in protecting the party from itself. *Eu v. San Francisco*
16 *County Democratic Cent. Comm.*, 489 US 214, 229, 231-32, 109 S Ct 1013
17 (1989).

18 Plaintiffs also persist in their misunderstanding of decisions by other courts,
19 contending that they have settled intraparty disputes in circumstances that are
20 "almost directly on point." Plaintiffs start with two Reform Party cases, failing to
21 understand that the Reform Party had agreed to be bound to certain organizational
22 requirements in exchange for the receipt of federal money to hold its national
23 convention, under the Presidential Election Campaign act. *See Reform Party v.*
24 *Gargan*, 89 F Supp 2d 751, 753-54 (WD Va 2000).

25 The older cases cited by plaintiffs are no more helpful to them. In *Jackson*
26 *v. Riddell*, 476 F Supp 849, 857 (ND Miss 1979), the court refused to hear the

1 parties' dispute because plaintiff failed to use intra-party dispute resolution. In
2 *State ex rel Fosser v. Lavik*, 9 ND 461, 462, 83 NW 914 (1900), the court refused
3 to pass judgment on parliamentary tactics within a convention, but decided which
4 candidate a county auditor was required to place on a ballot. And in *Democratic-*
5 *Farmer-Labor State Central Committee v. Holm*, 227 Minn 52, 33 NW2d 831, 833
6 (1948), the court stated, contrary to what plaintiff would have the court believe:
7 "The rule with regard to judicial review of the actions of political conventions is
8 that in factional controversies within a political party, where there is involved no
9 controlling statute or clear right based on statute law, the courts will not assume
10 jurisdiction, but will leave the matter for determination within the party
11 organization." Not one of those cases held that a court may involve itself in a
12 purely intraparty dispute such as the one before this court.

13 Finally, plaintiffs for the first time argue that two decisions of the Oregon
14 Court of Appeals involving churches establish the objective reasonableness of
15 their claims. Response at 22-23. Neither of those decisions would trump the
16 doctrines established by the U.S. Supreme Court prohibiting judicial intervention
17 of courts in intraparty disputes in the absence of a compelling state interest. It also
18 bears noting that in neither case did a court declare how the church was to be
19 governed or who would be its leaders. *Hope Presbyterian Church of Rogue River*
20 *v. Presbyterian Church (USA)*, 242 Or App 485, 255 P3d 645 (2011), *aff'd* 352 Or
21 668 (2012) (deciding what entity held legal title to church property); *Decker v.*
22 *Berean Baptist Church*, 51 Or App 191 (1981) (affirming trial court's dismissal of
23 plaintiffs' claims).

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1 **6. Defendants agree that plaintiffs' good faith or bad faith is**
2 **immaterial to the inquiry under ORS 20.105(1).**

3 Plaintiffs cry foul over defendants' recitation of facts relating to plaintiffs'
4 conduct in this dispute. Response at 24-25. Defendants made clear in their
5 motion that plaintiffs' conduct was not relevant to the question of whether
6 plaintiffs' claims had an objectively reasonable basis. Motion at 5. There is no
7 dispute on that point. Rather, defendants observed that ORS 20.105(1) serves an
8 important purpose when a financially motivated litigant pursues objectively
9 unreasonable claims against a party perceived to lack the financial resources to
10 defend itself. No one is "slandering" the professions of Plaintiffs Burke or
11 Burnett, and no one "besmirch[ed] Plaintiffs' legal counsel" for pointing out that
12 plaintiffs' counsel also represents a different political party, as Mr. Smith
13 volunteered in the summary judgment hearing. (In fact, the latter point was made
14 in a different section of defendants' Points and Authorities and only intended to
15 refute in advance any suggestion that plaintiffs legitimately could be surprised to
16 learn that their claims are barred by a well-established constitutional doctrine.)
17 These issues might be revisited if the Court enters the findings requested by
18 defendants, but defendants agree that they should not be considered by the Court
19 when deciding whether there were objectively reasonable bases for plaintiffs'
20 claims.

21 **C. CONCLUSION.**

22 Plaintiffs asserted three claims against defendants, each founded on the idea
23 that this Court would resolve an intraparty dispute over the governing documents
24 and leadership of a political party. Well established constitutional principles
25 prohibit judicial involvement in such a dispute. At least one plaintiff knew that
26 was the case when they commenced this litigation; Plaintiff Burke controlled the

1 LPO's defense when it obtained a ruling to that effect from the Washington
2 County Circuit Court in 2007. That ruling created issue preclusion that
3 established a second, independently sufficient barrier to the relief plaintiffs sought.
4 Lacking any legal or factual support, plaintiffs' claims did not have an objectively
5 reasonable basis. Defendants therefore are entitled to findings pursuant to ORS
6 20.105(1) establishing their right to recover their reasonable attorney fees.

7 DATED this 24th day of June, 2013.
8

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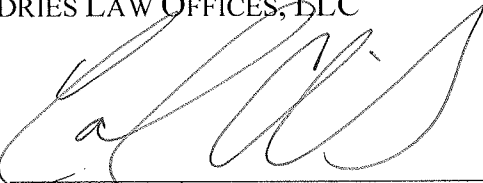
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CERTIFICATE OF SERVICE

I certify that on June 24, 2013, I served or caused to be served a true and complete copy of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR FINDINGS UNDER ORS 20.105(1)** on the party or parties listed below as follows:

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