

Tyler Smith & Associates, P.C.
Rural Business Attorneys

September 30, 2013

Via First Class U.S. mail,
Clackamas County Circuit Court
Civil Clerk
807 Main Street, Room 104
Oregon City, Oregon 97045

CC:
Judge Breithaupt
1163 State Street
Salem, OR 97301

RE: Case# 12010345, *Reeves et al v. Wagner et al.*, Proposed General Judgment of Dismissal.

Dear Clerk,

Enclosed is Plaintiffs' proposed General Judgment of Dismissal. The originals have been filed through Clackamas County Court and a copy has been sent to Judge Breithaupt in case he is still assigned to this matter. Opposing counsel was served with a copy of this proposed judgment more than three days before filing pursuant to UTCR 5.100. Defendants' counsel will be submitting an alternative proposed judgment. Please contact my office if you have any questions.

Defendants' proposed judgment should be rejected and Plaintiffs' form of judgment should be used because Defendants attempt to label themselves as prevailing parties on this case as a whole. Defendants did not prevail on the merits of their counterclaims and were not adjudged to be the legitimate leadership of the Libertarian Party of Oregon, yet they seek to have this court sign a Judgment claiming that they be the prevailing party. Defendants' position is not

accurate based upon the circumstances of the case and should not be reflected in the final Judgment.

Defendants' claims were dismissed under ORCP 54. The rule of law from ORCP 54(A)(3) is that, when there is a dismissal under ORCP 54, "Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party. ORCP 54 (A)(3). There are no circumstance that could be interpreted as indicating that Defendants won on either of their two counterclaims. In this case, Plaintiff brought three legal claims, Defendant LPO brought two legal claims via their counterclaims, one of those being identical to Plaintiffs, the other being a totally independent claim for "money had and received". Further it was Defendant Wagner and Defendant LPO that insisted that additional parties be pulled into the suit. Both (all) of Defendants' counterclaims have been dismissed under ORCP 54. Plaintiffs twice prevailed on the ORCP 21 motions to dismiss based upon various jurisdictional grounds, Defendants then prevailed on their summary judgment motion. Over Plaintiff's objections Judge Breithaupt agreed with Defendants on that particular argument and ruled that "either plaintiffs' claims are nonjusticiable or that it is within the court's discretion to abstain from deciding plaintiff's claims". Thus, the victor on the merits of the claims was not decided. Defendant prevailed on one of their affirmative defenses, yet that prevented adjudication on the merits.

Important for how the final judgment should read it is important to note that at that time the motion for summary judgment was decided, there were claims (Defendants' counterclaims) still pending, one being declaratory judgment and one being a claim for "monies had and received". The circumstances of this case and the claims themselves show that based upon this

court's ruling on the summary judgment motions, Defendants could not move forward with either of their two counterclaims and were thereby forced to dismiss their counterclaims. Plaintiff could simply have filed a few sentence motion for summary judgment forcing them to dismiss their claims so based on this court's prior ruling so they had no choice.

Under ORCP 54 (A)(3) dismissal of Defendants' two counterclaims means that with respect to Defendants' counterclaims, Plaintiff is to be deemed the prevailing party, unless circumstances indicate otherwise. Here there are no other circumstances to indicate that Defendant prevailed on either of its two counterclaims, because they did not. They did not recover money on their second counterclaim. It is straightforward that because Defendants could no longer legitimately forward their counterclaims in this case, they had to dismiss both of them. Plaintiff prevailed under ORCP 54 and Defendants prevailed on their motion, so there were technically two prevailing parties and neither should be labeled as prevailing party or awarded costs.

Under the rules of civil procedure both parties "prevailed", and yet neither prevailed on the merits of their arguments to prove that they were the legitimate leadership of the organization. Accordingly, this court did not rule on the substantive merits of Plaintiffs' claims, nor Defendants' counterclaims, rather in reality the more accurate way to state it is that this court ruled prior to adjudication on the merits that neither party, in this case, on these claims, in this court, could prevail against the other. If neither party can prevail against the other on the claims themselves, then neither party should be listed as prevailing party or this court would be doing what it has said it would not. The general rule is that when neither party prevails on its claims

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such that they have a judgment in their favor, the trial court may allow or deny costs in its discretion. See *Ruth v. Von Hickman*, 214 Or. 490, 499 (1958). In *Ruth*, the Supreme Court held that ORCP 68 B gives trial courts the discretion to award costs to a prevailing party or to award neither party costs. *Selective Servs., Inc. v. AAA Liquidating & Auction Serv., Inc.*, 126 Or. App. 74, 78-79 (1994).

If this court should decide to label one party as prevailing party for purposes of costs the judgment should be written to clearly reflect that neither party was adjudicated to be the victor on the merits. Plaintiffs' form of proposed judgment treats the circumstances of the case most accurately with respect to all of the claims and counterclaims in total and should be used.

Best wishes,


Tyler Smith

CC: Colin Andries, James Leuenberger, Robert Steringer

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

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

12 Plaintiffs,

13 v.

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

19 Defendants.

Case No. CV 12010345

**GENERAL JUDGMENT OF
DISMISSAL**

20 THIS MATTER having come before the Court on cross Motions for Summary Judgment,
21 the Court having found in its opinion letter dated May 21, 2013, either that plaintiffs' claims are
22 nonjusticiable or that it is within the Court's discretion to abstain from deciding plaintiffs'
23 claims, and the parties having stipulated to the dismissal of Defendant Libertarian Party of
Oregon's counterclaims against plaintiffs without prejudice, and neither party prevailed on its
substantive claims or counterclaims and all claims were dismissed therefore it is hereby:

ADJUDGED that plaintiffs' claims are dismissed with prejudice.

It is further ADJUDGED that Defendant Libertarian Party of Oregon's counterclaims against
plaintiffs are dismissed without prejudice pursuant to ORCP 54A.

1 It is further ADJUDGED that there are no prevailing parties and no party shall be
2 awarded costs or disbursements.

3 DATED this ____ day of September, 2013.

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Clackamas County Circuit Court Judge

Submitted By:

Tyler Smith
Tyler Smith & Associates P.C.
181 N Grant St. STE 212
Canby, OR 97013
503-266-5590(p) 503-877-6652(f)
Tyler@RuralBusinessAttorneys.com

1 **UTCR 5.100 CERTIFICATION**

2 I HERBY CERTIFY that on the 24 day of September, 2013, I caused a true copy of this
3 proposed General Judgment of Dismissal on Defendants to be served upon the following named
4 parties or their attorney as indicated below and addressed to the following via e-mail, all
5 objected:

6 Colin Andries (attorney for Defendants Tabor, Vetanen, Knight, Skyba, Weston, and Karlock)
1001 SW Fifth Ave STE 1100
7 Portland, OR 97204

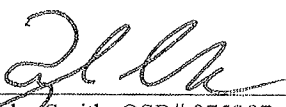
8 James E. Leuenberger (attorney for Defendant Wagner)
James E. Leuenberger PC
9 4500 SW Kruse Way, Suite 100
Lake Oswego, OR 97035

10 C. Robert Steringer (attorney for Defendant Libertarian Party of Oregon)
11 Harrang Long Gary Rudnick
1001 SW Fifth Ave. 16th Floor
12 Portland, OR 97204

13 Delivery was done by ____ hand, ____ first class mail, ____ certified or ____ registered
14 mail, return receipt requested with restricted delivery, ____ express mail, X e-mail, ____
15 facsimile.

16 DATED this 30 day of September, 2013.

17 Tyler Smith & Associates, P.C.

18
19 By 
20 Tyler Smith, OSB# 075287
Nathan Goin, OSB# 114011
21 Attorneys for Plaintiffs
181 N. Grant St. STE 212, Canby, OR 97013
22 Phone: 503-266-5590; Fax: 503-877-6652