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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SISTERS AIRPORT PROPERTY, LLC, an
Oregon limited liability company, and
SISTERS RUNWAY INC., an Oregon
nonprofit corporation

Plaintiffs,

v.

STATE OF OREGON, by and through the
Oregon Department of Transportation,

Defendant.

Case No. 18CV10187

**ANSWER AND COUNTERCLAIM OF
STATE OF OREGON, DEPARTMENT OF
TRANSPORTATION**

Principal Amount of Counterclaim: \$733,259

Counterclaim NOT Subject to Mandatory
Arbitration

State filing fees deferred – ORS 20.190

SUMMARY

Plaintiffs’ use of the ConnectOregon V grant funds at issue in this case was fraught with self-dealing, profiting from public funds, unreasonable expenses, accounting problems and multiple violations of the governing Grant Agreement. Sisters Airport Property LLC and Sisters Runway Inc. received or benefited from \$733,259 in tax-exempt funds for their airport property (on top of money received in a prior round of grant funding) yet did not comply with the conditions for use of the funds. As the agency charged with administering the grant program, Defendant Oregon Department of Transportation (“ODOT”) serves as a steward of the funds and is entitled to recover the misspent ConnectOregon V grant funds from Plaintiffs. Plaintiffs are not entitled to any of their requested declaratory relief, and ODOTs are entitled to judgment in the amount of the grant funds.

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8.

With respect to paragraph 14, ODOT admits that some or all of the improvements were installed on Plaintiffs' property but denies that all improvements were to specifications and denies the remaining allegations in the paragraph for lack of sufficient information.

9.

With respect to paragraph 15, ODOT admits that Plaintiffs received all \$733,259 of the grant funds and submitted invoices. ODOT denies the remaining allegations of Paragraph 15 to the extent Plaintiffs allege that the grant funds were properly received under the Grant Agreement and supported by back-up invoices.

10.

With respect to paragraph 16, ODOT admits that Plaintiffs received the retainage following an inspection of the project but denies the remaining allegations.

11.

With respect to paragraph 17, ODOT admits that certain grant-related documents referred the Bensons as owners of Energyneering Solutions Inc. (ESI) and indicated that Benny Benson was a principal. ODOT further admits on information and belief that ESI is an engineering and construction firm owned by the Bensons and that Plaintiff Sisters Airport Property, LLC does not have an engineering or construction contracting license with associated bonding and insurance. ODOT denies the remainder of paragraph 17.

12.

With respect to paragraph 18, ODOT admits that no contract existed between SAP and ESI. ODOT lacks information sufficient to form a belief about whether there has been a dispute between SAP and ESI and therefore denies the allegation. ODOT denies the remaining allegations in paragraph 18.

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13.

ODOT lacks information sufficient to form a belief as to the allegations in paragraph 19 and therefore denies them.

14.

ODOT lacks sufficient information to admit or deny the allegations in paragraph 20 regarding the unidentified “neighbor” and therefore denies the allegations in the paragraph.

15.

With respect to Paragraph 21, ODOT admits that it has alleged violations of the Grant Agreement, including the violations described. ODOT denies the remainder of paragraph 21.

16.

As to paragraph 22, ODOT admits that it demanded repayment of the grant amount by letter dated February 16, 2018 but denies the remainder of the paragraph.

17.

ODOT denies paragraphs 23 and 24.

18.

As to paragraph 25, ODOT admits that ODOT declared a breach of the Grant Agreement but denies the remainder of the paragraph.

19.

With respect to paragraph 26, ODOT incorporates its above responses to Plaintiffs’ re-alleged allegations.

20.

ODOT admits paragraphs 27 and 28.

21.

ODOT denies paragraphs 29 through 32 and the entirety of Plaintiffs’ complaint, except for as expressly admitted above.

///

1 ///

2 **II. ODOT'S COUNTERCLAIM AGAINST PLAINTIFF**

3 General Allegations

4 22.

5 ODOT is a State of Oregon agency charged with overseeing all forms of transportation in
6 the state. ODOT administers the ConnectOregon Fund established pursuant to ORS 367.080 *et*
7 *seq.* The fund provides grants for air, marine, rail, public transit, and bicycle and pedestrian
8 transportation projects.

9 23.

10 Plaintiff SAP is an Oregon limited liability company in good standing that owns fee
11 simple title to portions of the real property and improvements at 15820 Barclay Drive in Sisters,
12 Oregon, which is the location for the Sisters Eagle Airport, a privately owned and operated
13 airport facility.

14 24.

15 Non-party ESI is an Oregon domestic business corporation in good standing and a
16 licensed general contractor in good standing with the Oregon Construction Contractors Board.
17 ESI maintains its offices and principal business location at 15820 Barclay Drive in Sisters, at the
18 airport property.

19 25.

20 Plaintiff SRI is an Oregon public benefit corporation that owns fee simple title to the
21 portion of 15820 Barclay Drive that comprises the airport's runway.

22 26.

23 Non-party Benjamin "Benny" Benson is the president of ESI and a member of plaintiff
24 SAP. Non-party Juliene "Julie" Benson is the secretary of ESI and also a member of Plaintiff
25 SAP. The Bensons are married and jointly own ESI and Plaintiff SAP. Julie Benson is
26 additionally the president and secretary of Plaintiff SRI.

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27.

SAP and SRI jointly applied for funding from the ConnectOregon V round of grant funding in late 2013. The application said that grant funds would be used to complete improvements associated with the runway replacement completed with the ConnectOregon IV funding. Specifically, the application said that the grant would fund construction of a parallel taxiway along the length of the runway; paving of the aircraft parking area; installation of an automated weather observation system (AWOS); and installation of above-ground runway lighting.

28.

ODOT approved the application and agreed to provide grant funds for up to the full amount requested. The parties entered into the Grant Agreement attached as Exhibit A to Plaintiffs' Complaint and incorporated by reference. The Grant Agreement was executed between just ODOT and SAP and grant funds were distributed solely to SAP, but the agreement also incorporates application materials submitted by SRI. Plaintiffs submitted payment requests to ODOT with invoices to both SAP and SRI. Grant funds went to pay for improvements on airport property owned by both SAP and SRI. Plaintiffs relied on the runway property owned by SRI to meeting matching requirements for the grants. Both SAP and SRI are both parties to the Grant Agreement and ODOT is entitled to recover mis-expended grant funds from both of them. In the alternative, to the extent SRI is not deemed a party to the Grant Agreement, SAP breached representations that it owned the Property on which the grant project was constructed.

Airport Property Improvements and Grant Disbursement Requests

29.

Work on the grant project was performed by both ESI personnel and other subcontractors. ESI prepared invoices to "Sisters Airport," and Plaintiffs in turn submitted these to ODOT for reimbursement. In most cases, the ESI invoices that were passed through to ODOT for payment charged for both: a) time worked by ESI employees (at a marked-up or so-called

1 “loaded rate”), including a substantial amount of charges for hours spent by Benjamin Benson;
2 and b) other contractors and suppliers’ charges (also at a marked up rate), even though ESI had
3 not paid the contractors prior to the reimbursement request.

4 30.

5 SAP and SRI did not execute any agreement with ESI governing ESI’s work on the
6 project. Plaintiffs failed to meet the requirements for subagreements in Section 9 of the Grant
7 Agreement, including required provisions to incorporate the Grant Agreement into the
8 subcontract, name ODOT as a third-party beneficiary of the contract, and indemnify ODOT for
9 losses or claims caused by ESI or subcontractors. Further, Plaintiffs and ESI did not ensure that
10 other third-party contractors working on the project executed written agreements complying with
11 the Grant Agreement requirements.

12 31.

13 In total, Plaintiffs submitted five ESI invoices with a total of \$852,399.06 in charges.
14 Based on the invoices, ODOT disbursed the full grant amount – \$733,259 – to Plaintiff SAP.

15 ODOT Audit

16 32.

17 ODOT became concerned about use of the grant funds after learning that Plaintiffs or
18 their agents had caused improvements funded with the public ConnectOregon V funds to be
19 constructed on neighboring property not owned by Plaintiffs or part of the grant project. ODOT
20 decided to investigate the trespass, and pursuant to its audit rights and stewardship
21 responsibilities under the Grant Agreement, to review Plaintiffs’ overall use of the Grant Funds.

22 33.

23 ODOT’s review has revealed that Plaintiffs not only used public grant funds to construct
24 a trespassing improvement but also used the grant funds in multiple other ways that violated the
25 Grant Agreement and agency rules governing the ConnectOregon program. Plaintiffs double
26 dipped by not only receiving \$733,259 in tax-free public funds for their airport but also by

1 steering profits to their commonly owned entity, ESI, through the following (non-exclusive)
2 actions:

3 a) The ESI invoices included mark ups from what third-party contractors charged for
4 work on the project and what was ultimately billed to "Sisters Airport" and passed on to ODOT
5 for reimbursement with grant funds. The typical markup on most charges was 15%.

6 b) The ESI invoices included at least \$25,180.00 worth of charges for time spent by
7 Benny Benson, an officer of grant recipient SAP, for administering and overseeing work to
8 improve properties owned by his and his wife's companies.

9 c). The ESI invoices included two separate "mobilization" charges of \$10,000 each.
10 ESI did not have to mobilize because its office and operations were already located on the airport
11 property. Plaintiffs submitted the mobilization charge for reimbursement merely to claim
12 another \$20,000 in public funds for ESI.

13 d). The invoices included hourly rates for ESI employees that far exceeded ESI
14 payroll costs for these employees.

15 34.

16 The ESI invoices violated the prohibition in Section 7(c) of the Grant Agreement against
17 grantees' officers receiving gratuities, favors or any item of monetary value from contractors,
18 potential contractors, or parties to subagreements. Further, only reasonable and necessary costs
19 that are not otherwise ineligible could be reimbursed under the Grant Agreement. The grant
20 disbursements for the ESI invoices were not reasonable and necessary and were ineligible for
21 reimbursement under the Grant Agreement.

22 35.

23 Plaintiffs further violated the Grant Agreement and Oregon law by submitting and
24 requesting reimbursement of invoices from other contractors prior to when they or ESI had
25 actually made the payments. The Grant Agreement and agency rules require that grant funds be
26 disbursed on a reimbursement basis only, unless ODOT makes a determination in advance that

1 the grantee would have difficulty meeting this requirement. ODOT did not make such a
2 determination with respect to Plaintiffs and they did not request one. Almost all charges from
3 non-ESI contractors or suppliers were reimbursed to Plaintiffs before Plaintiffs or ESI had even
4 paid the relevant contractor or supplier. In some cases, payment was not made until several
5 months after Plaintiff SAP received the funds. Because of the mark-up on most non-ESI
6 charges, Plaintiffs or their related entity in many cases received not only the invoice amount but
7 also excess public funds in advance of paying the contractor or supplier. On information and
8 belief, Plaintiffs also failed to pay ESI for the \$20,000 in "mobilization" charges before seeking
9 and receiving disbursement of these amounts from ODOT. All grant funds received prior to
10 payment of a contractor or supplier violated the Grant Agreement and Oregon law and were
11 therefore ineligible and subject to recovery.

12 36.

13 Plaintiffs further violated the Grant Agreement by failing to comply with any of the
14 requirements in Section 9 for subagreements. On information and belief, no written agreement
15 between ESI and either Plaintiff existed for ESI's work on the project. Section 9 requires written
16 agreements that contain important protections for ODOT, including provisions to make ODOT a
17 third-party beneficiary of the agreement, to indemnify ODOT and to maintain insurance with
18 minimum coverage amounts naming ODOT as an additional insured. On information and belief,
19 work performed on the airport project by non-ESI contractors was also not done pursuant to a
20 written agreement in compliance with Section 9. Because Plaintiffs failed to comply with the
21 contract requirements, the grant funds they received were ineligible and ODOT is entitled to
22 recover the grant funds from Plaintiffs.

23 37.

24 Plaintiffs further violated the Grant Agreement or governing Oregon law in other ways,
25 including but not limited to:

26 • Plaintiffs failed to account for all grant funds received;

- 1 • Plaintiffs used or allowed the use of public grant funds to construct improvements
- 2 that trespassed onto a neighboring property;
- 3 • Plaintiffs double-billed ODOT for some charges;
- 4 • Plaintiffs sought and received full reimbursement for an automated weather observing
- 5 station (AWOS) when they committed to paying for the majority of this cost as part
- 6 of their grant matching requirement. Plaintiffs also overbilled and received
- 7 reimbursement for more than the actual AWOS charges;
- 8 • Plaintiffs sought and received reimbursement for work and charges incurred before
- 9 the effective date of the Grant Agreement; and
- 10 • Plaintiffs received reimbursement for several other items that were not reasonable and
- 11 necessary for administration of the grant.

12 For its **FIRST COUNTERCLAIM** against Plaintiffs (breach of contract; unjust
13 enrichment), ODOT alleges:

14 Count 1- Breach of Contract

15 38.

16 ODOT re-alleges paragraphs 1 through 37 above and incorporates them by reference.

17 39.

18 By their acts and omissions described above, Plaintiffs have violated the Grant
19 Agreement and received public grants funds that were not eligible for reimbursement.

20 40.

21 Pursuant to Section 6(d) of the Grant Agreement, funds disbursed and expended by
22 Plaintiffs in violation of the Grant Agreement are considered “mis-expended” and must be
23 returned to ODOT.

24 41.

25 Despite demand, Plaintiffs have failed to return the grant funds.


26

1 **PRAYER FOR RELIEF**

2 WHEREFORE, ODOT prays for a judgment affording Plaintiffs no relief and dismissing
3 their Complaint and for a judgment and money award against Plaintiffs, jointly and severally, in
4 the principal amount of \$733,259, plus its costs and disbursements incurred herein and such
5 other and further relief that the Court deems just and equitable.

6 Dated: March 17, 2018.

7 ELLEN F. ROSENBLUM
8 Attorney General

9 
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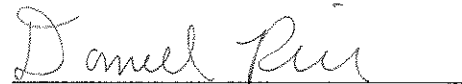
CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2018, I served the foregoing Oregon Department of Transportation's Answer and Counterclaim upon the parties hereto by email pursuant to ORCP 9

G:

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