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Special Assistant Attorney General on behalf of Defendants Katy Coba, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services; and Oregon Department of Administrative Services.

Additional Counsel of Record Listed on Signature Page.

**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**PORTLAND DIVISION**

GREAT NORTHERN RESOURCES, INC.,

Plaintiff,

vs.

KATY COBA, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services; OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES; THE CONTINGENT; and DOES 1-10,

Defendants.

Case No. 3:20-cv-01866-IM

Defendants'

**JOINT REPLY REGARDING WHETHER PLAINTIFF CAN SHOW IRREPARABLE INJURY NECESSARY FOR A PRELIMINARY INJUNCTION**

[Pursuant to the Court's Order of November 10, 2020.]

Consistent with its agenda, Great Northern Resources, Inc. misperceives the past and future. Oregon received roughly $1.39 billion from the federal government and allocated a small fraction to The Oregon Cares Fund for Black Relief and Resiliency. That fund exists because, although COVID-19 was causing disproportionate harm in Black communities, ostensibly race-neutral government aid was not reaching Black Oregonians in proportion to their suffering. (Dkt. 1-2.) Notwithstanding those needs of Black Oregonians, Great Northern's application to the Fund was denied without consideration of race. But even if Great Northern were to prove that the denial was pretextual, and this Court were either to award damages or mandate that The Contingent set aside its bar on repeat applications and consider a future application by Great Northern, the proposed deposit of $200,000 ensures that any alleged harm is fully redressed in the ordinary course. Great Northern faces no imminent, future injury.

## I. GREAT NORTHERN HAS NOT MET ITS BURDEN.

### A. Great Northern Must Make a Clear Showing of Future Harm.

Great Northern failed to make a "clear showing" of irreparable harm. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As Defendants explained, a party seeking a preliminary injunction must satisfy Article III standing and establish that it is "likely to suffer future injury." *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Great Northern's Response ignores *Lyons* and its progeny, instead relying on insufficient generalized assertions of unproven constitutional violations.

As Defendants told the Court, ongoing constitutional injury may be irreparable for purposes of injunctive relief. (Dkt. 18 at 11-12.) The authorities Great Northern recites primarily stand for this tenet. (*See* Dkt. 21 at 4-6.) These decisions do not assist Great Northern as they do not address the key issue: plaintiff can assert no cognizable claim of future harm. Indeed, Great Northern's own authorities do not stand for the overstated position it urges – that an assertion of past constitutional injury satisfies a showing of future irreparable harm. *See, e.g., Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) ("When violations of constitutional rights are alleged,

further showing of irreparable injury may not be required ***if what is at stake is not monetary damages***.") (emphasis added); *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 738 (S.D. Ind.), *aff'd*, 838 F.3d 902 (7th Cir. 2016) ("[F]or ***some*** kinds of constitutional violations, irreparable harm is presumed.") (emphasis added).

Great Northern misplaces its reliance on *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001), for the premise that an assertion of past harm suffices to show future irreparable harm. *Silver Sage Partners* involved the issuance of a permanent injunction after a jury trial and thus does not apply to preliminary relief. *See Arizona Recovery Hous. Ass'n v. Arizona Dep't of Health Servs.*, 462 F. Supp. 3d 990, 999 (D. Ariz. 2020) (recognizing that the *Silver Sage Partners* holding "cannot be squared with *Winter's* instruction that a preliminary injunction cannot issue on the mere possibility of harm").

The characterizations of constitutional injury as irreparable and the like derive from situations for which money damages are in fact inadequate. *See e.g.*, *Back*, 933 F. Supp. 738 (equal protection violation in context of judicial nominating commission). That is not this case.

**B. Great Northern Allegedly Has Suffered a Completed Harm, which Cannot Support Injunctive Relief.**

The Contingent produced evidence that Great Northern cannot reapply to the Fund after the denial of its application. Great Northern was on notice that if its application was rejected, then it would not have an opportunity to reapply. (Dkt. 19 [Sand Decl.] at Ex. A.) As Defendants explained, the inability to reapply means that no future injury justifying a preliminary injunction is possible. (Dkt. 18 at 9-11.) Great Northern's completed purported harm cannot support preliminary injunctive relief.

Great Northern argues that the federal government may sometime in the future provide new COVID-relief funds on the old terms to Oregon, that the specific Fund at issue in this case will be replenished and again granted to The Contingent, and that if those events come to pass, then reapplication might be permissible. But this sequence of events is speculative—unsupported

by any evidence that these events will occur—and not a cognizable, irreparable injury.

Moreover, notwithstanding Great Northern's insistence to the contrary, The Contingent's rejection of Great Northern's application for reasons other than race precludes a showing of irreparable injury. The Eleventh Circuit's decision in *Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1281–82 (11th Cir. 2001), is instructive. There, the Court held that a white applicant who was denied admission to the University of Georgia based on her academic credentials, and who would have been subject to race-conscious criteria had she advanced in the admissions process, lacked standing because she never made it past the initial stage at which race was not considered. The rejection of her application on race-neutral criteria precluded any "claim to have suffered any cognizable injury on account of race." *Id.* at 1282. The Court concluded that concluding otherwise "would virtually abolish the injury-in-fact requirement in this context, conferring a cognizable injury on every unsuccessful applicant for a government contract or admission to a public university where the process at some stage or for some purposes disfavors the applicant's racial group in favor of another, regardless of whether the plaintiff herself was actually treated unequally." *Id.* Although Great Northern insinuates that The Contingent's explanation for its rejection was pretext, Great Northern does not present any supporting evidence, and this Court should not find irreparable injury on this basis.

**C. This Is Not a Bid-Contest Case.**

Great Northern heavily relies on bid-contest cases to argue that its harm is irreparable and not merely monetary. But this is not a bid contest and the calculus of harm is different. Whereas this case involves a one-time disbursal of funds, a bid-contest case concerns a company's ability to bid, complete awarded projects, build a reputation, and other intangible benefits. For example, Great Northern cites *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 704 (9th Cir. 1997), to argue that money damages cannot remedy its harm. (Dkt. 21 at 4). But unlike the plaintiff in *Monterey Mechanical*, who in the ordinary course of business bid in construction projects subject to a statewide statute applicable to all public construction projects, Great Northern applied for a

one-time funding program for a specified amount of money – not an opportunity to compete with other businesses or the opportunity to work as a government contractor. The contractor competed not simply for money, but the right to complete a project. Even after finding the government's conditions unconstitutional, the Ninth Circuit ordered reconsideration in light of the Ninth Circuit's determination and not entry of a preliminary injunction. *Id.* at 715. The plain language of the decision belies Great Northern's insistence that the court intended otherwise.

Great Northern cites additional cases in which the plaintiffs competed for construction funds. (*See* Dkt. 21 at 5-6, citing *Cent. Alabama Paving, Inc. v. James*, 499 F. Supp. 629, 639 (M.D. Ala. 1980) (bid for state highway contract); *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 341 (M.D. Tenn. 1981) (same); *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1032 (W.D. Wis. 1989) (same).) But in these cases, where the plaintiffs bid to complete a contract, the calculation of damages would be "difficult or impossible." *Milwaukee Cty. Pavers Ass'n*, 707 F. Supp. at 1033. That is not the case here, where Great Northern's potential purported damages are known even at this early stage.

## II. THE CONTINGENT'S OFFER TO DEPOSIT FUNDS ELIMINATES ANY SPECTER OF IRREPARABLE HARM.

Great Northern labors to explain how its alleged injury cannot be remedied by money damages and is more than financial. For example, Great Northern argues that it is entitled to have its application "considered on equal footing," (Dkt. 21 at 7), or that it will suffer "competitive harm." (*Id*. at 6.) But on its best day, if Great Northern's application were reconsidered and granted, that simply means that it could receive a maximum of $200,000 in relief funds. However Great Northern struggles to define its harm, all roads lead to an award of relief funds. As such, the obvious remedy if Great Northern prevails is the relief money it applied for. *Arizona Recovery Hous. Ass'n*, 462 F. Supp. 3d at 1000 (holding that pointing to a law that may end up violating certain civil rights statutes does not convert asserted injury into more than a claim for monetary relief).

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