Clifford S. Davidson, OSB No. 125378
csdavidson@swlaw.com
Special Assistant Attorney General
Kelly H. Dove, OSB No. 082165
kdove@swlaw.com
SNELL & WILMER L.L.P.
One Centerpointe Drive, Suite 170
Lake Oswego, OR 97035
Telephone: (503) 624-6800
Facsimile: (503) 624-6888

Attorneys for Defendants State of Oregon, Oregon Department of Administrative Services, and Katy Coba, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services

Additional Counsel of Record Listed on Signature Page

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COCINA CULTURA LLC, an Oregon limited liability company,

Plaintiff,

vs.

STATE OF OREGON; OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES; KATY COBA, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services; THE CONTINGENT, an Oregon nonprofit corporation; THE BLACK UNITED FUND OF OREGON, INC., an Oregon nonprofit corporation,

Defendants.

Case No. 3:20-cv-02022-IM

Defendants'

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

[Pursuant to the Court's Order of November 30, 2020.]

I. INTRODUCTION.

Plaintiff Cocina Cultura, LLC ("Plaintiff") fails to distinguish successfully this Court's opinion in *Great Northern Resources, Inc. v. Coba*, No. 3:30-cv-1866-IM, 2020 WL 6820793 (D. Or. Nov. 20, 2020) ("*Great Northern*"), and the controlling authorities supporting it. There, this Court held that the plaintiff could not show irreparable injury where the plaintiff's application to the Oregon Cares Act Fund for Black Relief and Resilience (the "Fund") had been denied and it could not reapply. The same is true here. (Sand Decl., ¶¶ 5-7.) As in *Great Northern*, Plaintiff's injury, if there is one, is in the past and cannot be repeated. If Plaintiff proves at trial that the denial was wrongful, then Plaintiff will be entitled to damages. Plaintiff faces no imminent, future injury—the threshold for injunctive relief.

In its motion for preliminary injunction (Dkt. 16-1) (the "Motion"), Plaintiff tacitly admits that *Great Northern* correctly applied clear Supreme Court and Ninth Circuit precedents. Unable to challenge that opinion, Plaintiff proclaims that its case "is readily distinguishable from [*Great Northern*]." (Mot. at 13.) But all that Plaintiff points to is the notion that, after a trial on the merits, "the money may be less useful to research and development, and any damages caused by the loss of money now may be very difficult to ascertain for a newly developing business model." (Mot. at 12-13.)

There is no question that this is a challenging time for many businesses, especially for those, such as Plaintiff, owned by persons of color. Nevertheless, Plaintiff cannot generate irreparable harm from the desire, common to many litigants, to obtain and use moneys without awaiting a trial on the merits. The law compensates for the delay litigation may cause by making available lost profits damages and, where appropriate, prejudgment interest. Here, The Contingent goes above and beyond to secure Plaintiff's claimed entitlement to money by offering an unconditional deposit of $42,985.00 plus one year's prejudgment interest at the rate of 9% (Dkt. 23). The Contingent's offer to post interest at 9% exceeds the presumptive interest rate in federal court, and those funds are available to fully compensate Plaintiff for any delay if

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503.624.6800

Plaintiff ultimately is entitled to them. *Schneider v. Cty. of San Diego*, 285 F.3d 784, 789 (9th Cir. 2002) (citing *West Virginia v. United States*, 479 U.S. 305, 311 n.2 (1987)) (noting that the purpose of prejudgment interest is to compensate the plaintiff for having to wait until entry of judgment). An injunction is an "extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). There is nothing extraordinary about having to wait to recover money until after a case is fully litigated.

Further, Plaintiff's allegations of harm *pendent lite* are conclusory and unsupported by evidence beyond the testimony of Plaintiff's owner that such harm "may" occur. (Dkt. 16-4 ¶ 12.) This is not enough for a preliminary injunction. Indeed, when the Ninth Circuit considered a similar record—the plaintiff provided only conclusory statements regarding harm that plaintiff "*might* suffer"—the court vacated the preliminary injunction. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (original emphasis).

Finally, in addition to being unsupported by nonconclusory evidence, the several categories of harm Plaintiff alleges simply are not irreparable.

II. FACTUAL BACKGROUND

A. Oregon Receives CARES Act Funds from the Federal Government; the State Emergency Board Allocates Funds within the State and Creates the Oregon Cares Fund for Black Relief and Resiliency.

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The purpose of the CARES Act was to "provide[] fast and direct economic assistance for American workers, families, and small businesses, and preserve jobs for our American industries." (Davidson Ex. 2 (original emphasis).)

In April 2020, Oregon received approximately $1.39 billion through the Coronavirus Relief Fund ("CRF") created by Section 5001 of the CARES Act. (Davidson Ex. 3) Pursuant to Article III, Section 3 of the Oregon Constitution and ORS 291.326, the State Emergency Board was tasked with allocating a portion of these CRF funds.

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On July 14, 2020, the State Emergency Board allocated over $200 million of the CRF funds received by the State to assist vulnerable Oregonians and their businesses. This allocation included:

- $25.6 million in emergency assistance to small businesses with under 25 employees and which did not receive money under the Paycheck Protection Program or other provisions of the federal CARES Act;
- $50 million to support music, culture and community venues closed due to the pandemic;
- $30 million to the COVID-19 Leave Fund for workers not qualifying for traditional sick leave;
- $35 million to fund $500 Emergency Relief Checks for those waiting for unemployment benefits; and
- $62 million to the Oregon Cares Fund for Black Relief and Resiliency (the "Fund") "to provide economic relief to Black individuals and businesses. National and state data show that the Black community is one of the communities experiencing a disproportionate share of negative economic and health effects due to COVID-19."

(Davidson Ex. 4.) The State Emergency Board created the Fund after receiving evidence that, even though COVID-19 was causing disproportionate harm in Black communities and wiping out many of the gains that Black Oregonians and their businesses made after the Great Recession, ostensibly race-neutral government aid was not reaching Black Oregonians in proportion to their suffering. (*See, e.g.*, Dkt. 16-3 Exs. 1, 3, 5.)

B. DAS Grants Funds to Defendant The Contingent, Which Administers the Fund.

This lawsuit concerns the Emergency Board's allocation of the $62 million Fund (approximately 4.5% of the State's CRF funds) to defendant Oregon Department of Administrative Services ("DAS") for a grant to defendant The Contingent, an Oregon-based non-

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503.624.6800

profit with existing programs that serve Oregon's Black community. Pursuant to the Emergency Board's allocation, The Contingent is to use the granted CRF funds to establish and administer the Fund.

The Contingent has established a distribution process to grant relief through the Fund to Black-owned businesses in Oregon that have been adversely affected by COVID-19. To be eligible for relief, businesses must at least (1) be based in Oregon, (2) be 51% owned by a person or people who self-identify as Black, and (3) demonstrate business interruption due to COVID-19. (Sand Decl., ¶ 2.)

C. Plaintiff Applies to the Fund and Its Application is Permanently Denied.

On August 31, 2020, Plaintiff submitted an application to The Contingent for a distribution from the Fund. The application was processed to the point of assessing that Plaintiff would have been eligible for a total award recommendation of $42,985.00 if it met all eligibility requirements. The Contingent ultimately did not recommend this award because Plaintiff reported that its sole owner did not identify as Black. (Sand Decl., ¶¶ 3, 4.) The Contingent denied Plaintiff's application and communicated that denial by email, sent on November 27, 2020. (Sand Decl., ¶ 4, Ex. 1.) Plaintiff cannot reapply. (Sand Decl., ¶¶ 5, 6.) Applicants have only one opportunity to obtain a grant from the Oregon Cares Fund. Applicants are told this in the FAQ's on The Contingent's website and when they apply, applicants must attest that they have filed no other applications to the Fund. (*Id.*).

III. PLAINTIFF SEEKS A MANDATORY INJUNCTION AND A HEIGHTENED STANDARD OF PROOF APPLIES—THOUGH PLAINTIFF DOES NOT MEET THE STANDARD FOR ANY INJUNCTION.

To obtain a preliminary injunction, the moving party ordinarily must show that (1) the movant is likely to succeed on the merits, (2) the movant is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the movant's favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

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The movant "must demonstrate that there exists a significant threat of irreparable injury." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). If a movant does not so demonstrate, then the court "need not decide whether it is likely to succeed on the merits." *Id.*; *see generally Great Northern Resources,* 2020 WL 6820793 (denying preliminary injunction motion based solely on failure to demonstrate irreparable harm and without evaluating other *Winter* elements).

However, Plaintiff in this case seeks an extreme form of injunction: one that mandates consideration of a rejected application, but without regard to race. (Mot. at 17 [demanding consideration of Plaintiff's application]; Dkt. 20 at 2 (plaintiff's post-rejection letter to the Court demanding "an injunction precluding defendants from discriminating against it").)[1] A higher standard of proof therefore applies. As this Court noted in its opinion in *Great Northern*, mandatory injunctions are "particularly disfavored" and a movant must show that "extreme or very serious damage will result" in the absence of an injunction. *Great Northern*, 2020 WL 6820793 at *3 (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)). Moreover, a movant must demonstrate that such extreme or very serious damage will be "immediate." *Wood v. Washburn*, No. 2:20-cv-362-SB, 2020 WL 5517263, at *2 (D. Or. Sep. 14, 2020), *appeal filed* Oct. 14, 2020. And, the movant must "establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156-57 (D. Or. 2018) (original emphasis).

As described below, Plaintiff cannot make the required showing because (1) Plaintiff's

[1] Plaintiff mistakenly addresses race *and national origin*, demanding that its application be considered without reference to "the race or national origin of its owner." (Mot. at 17.) National origin is not a consideration in Fund distribution and played no role in the denial of Plaintiff's application. To the extent Plaintiff means to suggest that one who identifies as Mexican-American necessarily does not identify as Black, Plaintiff is mistaken. *See* "Afro-Latino: A deeply rooted identity among U.S. Hispanics." (Pew Research, Mar. 1, 2016), *available at* https://www.pewresearch.org/fact-tank/2016/03/01/afro-latino-a-deeply-rooted-identity-among-u-s-hispanics/ (accessed Nov. 30, 2020).

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Lake Oswego, Oregon 97035
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harm is compensable with money damages; (2) Plaintiff's vague allegation that Plaintiff "may" suffer loss while this lawsuit is pending does not adequately support the preliminary injunction that Plaintiff seeks; (3) Plaintiff's other cited categories of harm that "may" occur are insufficient; and (4) the deposit into court of principal and interest further removes the potential for irreparable injury.

IV. PLAINTIFF'S VAGUE ALLEGATIONS OF HARM IT "MAY" SUFFER WHILE THIS CASE IS PENDING DO NOT SUPPORT IRREPARABLE HARM.

A. Plaintiff's Alleged Harm Is Compensable with Money Damages.

Plaintiff tries to transform a claimed entitlement to money into a basis for injunctive relief through an inconsistent description of the relief it seeks. Plaintiff disclaims that it "seek[s] aid at all" and suggests that what it seeks is instead "an injunction precluding defendants from discriminating against it based on its owner's race and national origin." (Dkt. 20, Pl.'s Letter.)[2] But what Plaintiff ultimately claims entitlement to—as would any plaintiff alleging entitlement to money—is the benefits that might flow from the enforcement of its claimed rights. Indeed, Plaintiff even frames its claimed irreparable harm in relation to its access to money to reinvest in its business.

At the heart of this case is a request for a grant—that is, money. That request was denied, which Plaintiff alleges was improper and violated her rights. But Plaintiff cannot deny the simple truth that this case was and always has been about money—$42,985 that Plaintiff requested but

[2] As framed, Plaintiff's demand for injunctive relief is impermissibly vague. Rule 65(d) requires that any order granting injunctive relief state its terms specifically and describe in reasonable detail the acts or acts being restrained or required without reference to other documents. Therefore, an order demanding that a defendant follow the law and not discriminate is not available under Rule 65(d). *See Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263 (9th Cir. 1989) (holding a permanent injunction to be impermissibly vague when it enjoined a defendant from "future similar violations of" a federal statute); *Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 604 (10th Cir. 2008) ("injunctions simply requiring the defendant to obey the law are too vague to satisfy Rule 65" (quoting *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004)).

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Lake Oswego, Oregon 97035
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did not receive. The refusal to give a fixed sum of money is the *sine qua non* of a monetizeable injury. If this case is ripe for a preliminary injunction, then every case would be. Plaintiff cannot escape the simple truth that Plaintiff's ultimate injury was about failing to receive a quantifiable sum of money, which is, by definition, not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (Quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958))); *L.A. Mem'l Coliseum Comm. v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("It is well established . . . that such monetary injury is not normally considered irreparable").

B. Plaintiff's Sole Asserted "Irreparable" Harm—Having to Wait for Money—Is Not Concrete or Specific and Therefore Is Insufficient.

Plaintiff's assertion of irreparable harm is too vague and uncertain to support a preliminary injunction. Plaintiff's owner identifies the irreparable harm as follows: the grant "may" be less useful if awarded at the end of the litigation and "any damages caused by loss of the money now may be very difficult to ascertain for my newly developing business model." (Dkt. 16-4 ¶ 12 [emphasis added].) As Defendants discuss below in Section IV.C.1, having to wait for money is not irreparable; it is addressed through an award of prejudgment interest.

But even if it were irreparable harm, an assertion that harm "may" occur is not a showing that future the harm is "likely"—the required showing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 105 (1983). To support a preliminary injunction, evidence of future harm must not be speculative and must be concrete. *adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 756 (9th Cir. 2018) (so noting, and finding that plaintiff demonstrated immediate threatened injury through statistics and expert declarations); *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016); *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th

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Cir. 2013) (vacating preliminary injunction where district court relied on unsupported and conclusory statements regarding harm that plaintiff "*might* suffer"); *Precision Automation, Inc. v. Tech. Servs., Inc.*, 07-CV-707-AS, 2007 WL 4480739, at *4-*6 (D. Or. Dec. 14, 2007) (Brown, J.) (denying injunction in patent case where declarations stated that that defendant's acts "may have resulted in lost sales" and otherwise speculated as to future harm).

Moreover, the harm must be "immediate." *Boardman*, 822 F.3d at 1022. The fact that grant money "may" be less useful a year from now is not an immediate harm. Rather, it is a harm that may be accounted for in the ordinary course—whether through a judgment awarding lost profits, or through prejudgment interest.

C. Plaintiff's Claimed "Irreparable" Harms Are Substantively Insufficient.

Plaintiff cites several categories of alleged irreparable injuries in an attempt to justify a preliminary injunction. They are insufficient.

1. Waiting to Receive Money while Litigating Is Not Irreparable Harm.

As previously discussed, Plaintiff claims that having to wait until judgment is entered to receive payment is irreparable harm. Plaintiff does not cite any authority for the proposition that the burden of waiting until one's lawsuit concludes to receive money amounts to irreparable harm necessitating preliminary injunctive relief. Indeed, every plaintiff suing for money faces this situation. Under Plaintiff's theory, an injunction would transform from an "extraordinary remedy" available only to remedy irreparable harm, *Winter*, 555 U.S. at 22, into an ordinary one, available whenever a plaintiff says that there is a specific use to which it wishes to put the money it demands.

Furthermore, the law already has a mechanism for compensating litigants for having to wait until judgment to receive a monetary award: prejudgment interest. Prejudgment interest is

> a measure that 'serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those

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One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

damages are intended to redress.'

Schneider v. Cty. of San Diego, 285 F.3d 784, 789 (9th Cir. 2002) (quoting *West Virginia v. United States*, 479 U.S. 305, 311 n.2 (1987)). For example, where an insurance company fails to pay benefits, a prevailing plaintiff may receive prejudgment interest in an amount that compensates the plaintiff for losses incurred as a result of nonpayment. *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 988 (9th Cir. 2001).

Similarly, there is no irreparable harm even where a party faces years-long delay in obtaining judgment due to a litigation stay; "the difference between money now and money later, though real, is not the sort of irreparable harm that is effectively reviewable on appeal [as an order similar to an injunction]." *Moretrench American Corp. v. S.J. Groves and Sons Co.*, 839 F.2d 1284, 1289 (7th Cir. 1988).

Defendants have assured that full compensation to Plaintiff will be available should it prevail. As noted below in Section V, The Contingent has calculated the interest component of the Deposit using the Oregon statutory rate of 9%. *See* ORS 82.010(2). That rate far exceeds that which applies in this federal proceeding, in which the presumptive prejudgment interest is that specified by 28 U.S.C. § 1961. *Blankenship v. Liberty Life Assur. Co. of Bos.*, 486 F.3d 620, 628 (9th Cir. 2007) ("Generally, the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate." [Quotation marks and citation omitted.])."

2. <u>A Desire to Use Money to Invest in Research and Development Does Not Support Irreparable Harm.</u>

Plaintiff also asserts that it plans to use the grant money to conduct research and development. (Dkt. 16-4 ¶¶ 7-8.) That does not entitle Plaintiff to a preliminary injunction. *See Eli Lilly & Co. v. Am. Cyanamid Co.*, 82 F.3d 1568, 1578 (Fed. Cir. 1996) ("If a claim of lost opportunity to conduct research were sufficient to compel a finding of irreparable harm, it is hard

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One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

to imagine any manufacturer with a research and development program that could not make the same claim and thus be equally entitled to preliminary injunctive relief."); *Qualcomm Inc. v. Compal Elecs., Inc.*, 283 F. Supp. 3d 905, 920-21 (S.D. Cal. 2017) (conclusory allegations that non-payment of royalties would adversely affect Qualcomm's ability to invest in research and development insufficient to show irreparable harm).

3. Plaintiff Cannot Rest Irreparable Harm on Per Se Constitutional or Statutory Violations.

Plaintiff argues that (1) Plaintiff is suffering ongoing constitutional harm, and (2) a statutory or constitutional violation is per se irreparable harm. Neither is true.

There is no ongoing constitutional harm. Plaintiff does not allege that Defendants will discriminate against Plaintiff again. Nor can Plaintiff do so, as Plaintiff may not reapply to The Contingent after its application was denied. (Sand Decl., ¶¶ 4, 5.) Plaintiff thus cannot show that Defendants are likely to violate Plaintiff's constitutional rights again in the immediate future, as required by *Lyons*, 461 U.S. at 101, 105.

At most, Plaintiff alleges that it "may" suffer future economic consequences of an already completed constitutional harm: the denial of Plaintiff's application because it is not majority-owned by persons identifying as Black. Because this harm is purely monetary, it necessarily is not irreparable. *Sampson*, 415 U.S. at 90. If damages are not straightforward because Plaintiff's business model is novel, then an expert may offer an opinion at trial.

And the allegation of a constitutional violation does not comprise per se irreparable harm. In *Great Northern*, this Court "agree[d] with the other district courts in this Circuit that have rejected arguments of per se irreparable injury for constitutional claims and required something more." *Great Northern*, 2020 WL 6820793 at *2-*3. Plaintiff here does not overtly contest this Court's conclusion. Instead, plaintiff cites to *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), to imply some *per se* injury. But as this Court correctly observed in *Great Northern*, *Melendres* is not really a harm-per-se case because the plaintiffs unconstitutionally detained by

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One Centerpointe Drive Ste 170
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503.624.6800

police showed that they "faced a real possibility that they would again be stopped or detained and subject to unlawful detention on the basis of their unlawful presence alone." *Great Northern*, 2020 WL 6820793 at *2 (quoting *Melendres*, 695 F.3d at 1002). That is, the constitutional violations were likely to recur unless enjoined.

Plaintiff also cites several out-of-Circuit cases for the premise that a constitutional violation is per se irreparable harm. (Mot. at 13-14.) Each of those cases is distinguishable on its facts and none involved a case, such as the one before this Court, in which the alleged harm was *already completed* and would not recur. In *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009), the police chief announced that she would continue arresting in violation of the Constitution "until a judge stopped her." In *Christian Legal Society v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006), a student group continued to be "derecognized" for excluding LGBTQ students; the First Amendment harm therefore continued in the absence of de-derecognition. In *Planned Parenthood of Minnesota v. Citizens of Community Action*, 558 F.2d 861, 867 (8th Cir. 1977), a city ordinance would have continued intentionally preventing Planned Parenthood from constructing a medical clinic in violation of the Fourteenth Amendment.

In summary, to the extent Plaintiff suffers any harm during the pendency of this case, it will be the same harm every plaintiff or counterclaimant faces: having to wait until judgment on the merits. Neither that, nor a past alleged constitutional injury, comprises irreparable harm.

V. PLAINTIFF RISKS NO FUTURE INJURY BECAUSE THE CONTINGENT HAS OFFERED TO POST SECURITY IN AN AMOUNT EQUAL TO WHAT PLAINTIFF WOULD HAVE RECEIVED FROM THE FUND PLUS ONE YEAR OF INTEREST.

In conjunction with this Joint Response, The Contingent has filed a Motion to Deposit Funds (Dkt 23) in the amount of $46,853.65 (the "Deposit"). $42,958.00 of that amount comprises what Plaintiff would have received from the Fund if Plaintiff qualified under the State's mandate. (Sand Decl., ¶ 3.) At the November 30 scheduling conference, Plaintiff

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One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

indicated through counsel that Plaintiff is "not arguing about that" amount. (Nov. 30 Hearing Tr. at 11:4-10.)

The remaining $3,868.65 of the Deposit is one year of prejudgment interest that would compensate Plaintiff if it prevailed. The interest is calculated using the Oregon statutory rate of 9% per annum even though the lower federal rate presumptively applies. As discussed above in Section IV.C.1, Prejudgment interest is intended to fully compensate a plaintiff for having to wait until judgment to be paid money.

At the November 30 scheduling conference, the Court asked Defendants to affirm that the Court will have sole discretion over whether to disburse any of the Deposit. The Court further asked The Contingent to confirm that it will not assert sovereign immunity over the Deposit, and asked the State Defendants to affirm that they will not require The Contingent to make such an assertion. Defendants make that affirmation, as they did at the scheduling conference and in connection with *Great Northern*.[3]

For the foregoing reasons, the Court should find that the Deposit of principal plus interest will compensate Plaintiff for any harm stemming from delayed payment should Plaintiff ultimately prevail—a further reason that there is no irreparable harm.

VI. CONCLUSION

Defendants asked this Court to stage the briefing on Plaintiff's motion for preliminary

[3] The Court may rest assured that the December 30, 2020 deadline for return of CRF funds to the Federal Government (the "CRF Deadline") will not affect availability of the Deposit. The CRF Deadline is only the date by which costs eligible for reimbursement with CRF funds must be "incurred" and not the date by which they must be disbursed. *See* 42 U.S.C. § 801(d)(3) (CRF funds may be used for costs of the State that "were incurred during the period that begins on March 1, 2020 and ends on December 30, 2020."). The Department of the Treasury's September 2, 2020 guidance supports this interpretation. (*See* Davidson Ex. 5 at 2.) If Defendants are mistaken in their interpretation and Treasury believes the funds comprising the Deposit should have been returned to it after the CRF Deadline, then Treasury's remedy is to recoup the amount of the Deposit from the State of Oregon by booking it as a debt of the State owed to the Federal Government and not to claw back funds from the Court or any downstream entity. *See* 42 U.S.C. § 801(f)(2).

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

injunction so that the parties could isolate a single issue: whether Plaintiff's desire to use grant funds before a trial on the merits materially distinguishes its motion from the plaintiff's motion in *Great Northern*. As shown above, this Court should follow its opinion in *Great Northern*. Plaintiff has not shown irreparable harm supporting the injunction Plaintiff seeks, and accordingly should deny the Motion for Preliminary Injunction. *See Great Northern* 2020 WL 6820793 at *1 ("If a plaintiff does not make that 'minimum showing,' [of a significant threat of irreparable injury,] a court 'need not decide whether it is likely to succeed on the merits.'" (quoting *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985))).

Dated: December 2, 2020

ELLEN ROSENBLUM
ATTORNEY GENERAL
FOR THE STATE OF OREGON

SNELL & WILMER L.L.P

By /s/ Clifford S. Davidson
Clifford S. Davidson, OSB No. 125378
csdavidson@swlaw.com
Special Assistant Attorney General
Kelly H. Dove, OSB No. 082165
Alexix G. Terríquez (*pro hac vice to be filed*)
aterriquez@swlaw.com
Jenny Hua (*pro hac vice to be filed*)
jhua@swlaw.com
Alysha Green (*pro hac vice to be filed*)
agreen@swlaw.com

Fay Stetz-Waters, OSB No. 071789
Fay.stetz-waters@doj.state.or.us
Sheila H. Potter, OSB No. 993485
Sheila.potter@doj.state.or.us

Attorneys for Defendants State of Oregon, Oregon Department of Administrative Services, and Katy Coba, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800

SCHWABE, WILLIAMSON & WYATT, P.C.

By /s/ Amanda Gamblin

Amanda Gamblin, OSB #021361
agamblin@schwabe.com
Nika Aldrich, OSB #160306
naldrich@schwabe.com

Attorneys for Defendants The Contingent and The Black United Fund of Oregon

\4844-5605-5763

Snell & Wilmer
One Centerpointe Drive Ste 170
Lake Oswego, Oregon 97035
503.624.6800