IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

ROBERT A. WHITE, JR. and SHELLEY ANN WHITE,

Plaintiffs,

v.

JOSEPHINE COUNTY,

Defendant.

Case No. 15CV23592

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION OF SISKIYOU SEEDS, LLC AND OREGONIANS FOR SAFE FARMS AND FAMILIES TO INTERVENE AS DEFENDANTS

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Oregonians for Safe Farms and Families ("OSFF") and Siskiyou Seeds, LLC ("Siskiyou") seek to intervene in this matter even though neither intervenor applicant has a sufficient interest in this controversy to support intervention. Oregon law leaves no doubt that an organization like OSFF lacks standing to intervene to represent its members in a declaratory judgment action. Moreover, neither intervenor applicant is affected in any significant way by the validity or invalidity of the Josephine County Ordinance ("Ordinance") at issue. Thus, neither intervenor applicant has standing, and they therefore should not be allowed to intervene as parties in this matter. Plaintiffs have no objection to OSFF and/or Siskiyou appearing as *amicus* in this matter, however, which would allow the court to hear OSFF's and Siskiyou's arguments and to consider their proffered authority without running afoul of the statutory requirements for standing for declaratory judgment actions.

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II. ARGUMENT

A. To intervene here, OSFF and Siskiyou must show that their "rights, status or other legal relations" are "affected by" the Ordinance.

A non-party to litigation may not intervene and become a party in a declaratory judgment action unless it has standing "under the rule governing intervention, ORCP 33, and under the declaratory judgment law, ORS chapter 28[.]" *Rendler v. Lincoln Cnty.*, 302 Or 177, 180-81 (1986). Because Plaintiffs seek a declaratory judgment under ORS 28.020, that statute governs standing for purposes of intervention. *Id.*; *see also Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 194 (2013) (whether a person has standing "depends on the particular requirements of the statute under which he or she is seeking relief"). ORS 28.020 provides:

> Any person … whose *rights, status or other legal relations are affected* by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(Emphasis added.) Similarly, ORS 28.110 provides that "all persons shall be made parties *who have or claim any interest which would be affected* by the declaration[.]"[1] (Emphasis added.) Thus, to show that they have standing, OSFF and Siskiyou must show that their "rights, status or other legal relations" are "affected by" the Ordinance. *See League of Oregon Cities v. State of Oregon*, 334 Or 645, 658 (2002). Specifically, they "must show some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." *Id.* Finally, this required "showing of that injury or other impact must not be too speculative." *Id.* (internal quotation omitted).

[1] OSFF and Siskiyou cite a number of cases for the idea that their motion should be granted because ORS 28.110 requires that "all affected interests" must be joined. Mot., pp. 4-5. Those cases do not assist OSFF and Siskiyou because, in the first instance, OSFF and Siskiyou must, but cannot, show that they have a sufficient interest that is affected.

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B. OSFF lacks standing.

1. OSFF does not have "organizational standing" because Oregon law does not recognize any such standing in a declaratory judgment action.

OSFF is a "membership organization" that advocates on behalf of its members, "Josephine County farmers and gardeners who are growing traditional crops that will be protected from transgenic contamination by the implementation and enforcement of the Ordinance." Mot., p. 8. OSFF seeks "to intervene *to assert the interests of its members*." Mot., p. 5 (emphasis added). Indeed, the Declaration of Mary Middleton ("Middleton Decl." or "Middleton Declaration") on which OSFF relies makes clear that it has no interest independent of those of its members. *See, e.g.*, Middleton Decl., ¶¶ 34-40 (listing purported interests of "OSFF and its members"). OSFF takes none of the actions described in the Middleton Declaration except through or on behalf of its members.[2]

OSFF appears to concede the lack of any independent standing, as it must, and argues only that it "has organizational standing to intervene to assert the interests of its members." Mot., p. 5. OSFF cites *Rendler*, 302 Or at 181, in support, but that case does not address standing of an organization to represent its members in a declaratory judgment action. In that case, a committee was allowed to intervene as "organized 'members of the public' asserting" the existence of a public road by prescriptive use. *Id.* at 183. The court found the committee had standing because "the asserted interest by definition is not a private interest of separate individuals but a collective 'public' interest in an easement or road created by and belonging to 'the public.'" *Id.* at 184. The court in *Rendler* expressly stated, however, that it was "not deal[ing] with an organization's standing to represent the individual interests of some of its members[.]" OSFF overreaches by attempting to rely on *Rendler* for the very proposition the

[2] Ms. Middleton spends most of the five pages of "Background" in her declaration describing what *she* does and knows in her individual capacity, but she is not seeking to intervene in her individual capacity, and her interests as an individual member, founder, or even Chair of OSFF are not relevant to OSFF's lack of standing as an organization.

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court stated it was *not* addressing.

Oregon courts have squarely rejected the notion of "representational standing" in a declaratory judgment action under ORS 28.020. In *Oregon Taxpayers United PAC v. Keisling*, the Court of Appeals addressed whether a political committee had standing under ORS 28.020 to pursue a declaration regarding the constitutionality of a certain statutes that required disclosure of the identity of individuals who contribute to ballot measure campaigns. 143 Or App 537, 539 (1996). The court analyzed ORS 28.020 and the case law construing it, and concluded that "ORS 28.020 does not allow an organization to assert the rights of its members[.]" *Id.* at 544; *see also Ashland Drilling, Inc. v. Jackson Cnty.*, 168 Or App 624, 628 n1 (2000) (holding that trade association did not have standing under ORS 28.020 to assert the rights of its members); *Lone Oak Racing, Inc. v. State*, 162 Or App 111, 118 (1999) (holding that Horsemen's Benevolent & Protective Association did not have standing under ORS 28.020 to assert the rights of its members). There could not be a clearer statement of Oregon law: OSFF has no standing to assert the purported rights of its members.

2. OSFF does not have standing in its own right.

As noted, OSFF does not argue in its motion that it has standing in its own right. Nonetheless, the Middleton Declaration refers to harm to "OSFF's credibility and the public's trust," to "its ability to promote safe farms and families from the impacts of genetically engineered crops in Josephine County," and to its ability to raise funds. Middleton Decl., ¶¶ 32-33. To establish that its "rights, status, or other legal relations" are "affected by" the validity or invalidity of the Ordinance, however, OSFF's purported "injury must be real or probable, not hypothetical or speculative." *Morgan*, 353 Or at 195. It is difficult to conceive of a more speculative injury than supposed reputational harm and harm to fundraising, utterly unsupported by anything other than OSFF's self-serving proclamation that such harm "would definitely" occur. Middleton Decl., ¶ 32. Moreover, neither OSFF's reputation nor its fundraising ability are a right, status, or legal relation under ORS 28.020 at all. And even if they were, any

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purported connection between political credibility and fundraising and an Ordinance that regulates growing GMO crops is far too tenuous to support standing. *See, e.g.*, *League of Oregon Cities*, 334 Or at 659 (no standing where alleged adverse impact is not sufficiently adverse).

C. Siskiyou lacks standing because it has never been harmed by GMO crops in Josephine County and because it cannot base standing on a challenge to the *status quo*.

Siskiyou's standing to intervene is somewhat more complicated—since it does not rely on a legal doctrine Oregon court have squarely rejected—but is ultimately unavailing. It farms in Josephine County. Declaration of Don Tipping ("Tipping Decl." or "Tipping Declaration"), ¶ 3. Siskiyou suggests that it has been harmed by GMO seeds in the past. Tipping Decl., ¶¶ 25, 27. Siskiyou professes that the sky will fall on it if the Ordinance is not enforced and if GMO crops are allowed to be grown in Josephine County. *See generally* Tipping Declaration. But the court should not be fooled: (1) Despite its misleading presentation of evidence, Siskiyou *has never suffered harm* as a result of GMO farming in Josephine County (assuming such harm even exists); and (2) in any event, Siskiyou's opposition to the *status quo* cannot give rise to standing.

1. There is no evidence that Siskiyou has actually ever suffered harm from GMO farming in Josephine County.

a. Siskiyou's 2010 destruction of crops had nothing to do with GMO crops being grown in Josephine County.

Siskiyou claims that it "has suffered significant direct negative impacts and economic losses due to genetic contamination of its seed supplies and those suppliers from whom it purchases seeds for its sale[.]" Mot., pp. 2-3. First, Siskiyou claims that it in 2010, it "suffered direct losses from genetic contamination." Tipping Decl., ¶ 25. According to Mr. Tipping, Siskiyou planted corn with seeds it later learned "were contaminated with genetically engineered corn when I received them." Tipping Decl., ¶¶ 25-26. To be sure, if the Ordinance were valid and in place, under Siskiyou's construction of the Ordinance, Siskiyou itself would have violated it by planting genetically engineered corn. *See* Compl., Ex. 1, p. 2 (Ordinance prohibits growing

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GMOs in Josephine County). But Siskiyou does not argue that it is impacted by the Ordinance in that way; it does not want to grow GMOs. Its claim appears to be that it was harmed by unknowingly planting GMO seeds, and that it has a legally cognizable interest because somehow the Ordinance would have prevented the resulting alleged harm. Siskiyou does not and cannot articulate how a prohibition on the use of GMOs by *others* would have prevented *it* from planting GMOs.

Even more glaring, however, is Mr. Tipping's omission of any information regarding *the source* of the seeds. While the Tipping Declaration is silent on the point, OSFF's and Siskiyou's motion misleadingly insinuates that Siskiyou's seed supplier was from Josephine County. Mot., pp. 2-3 (referring to "economic losses due to genetic contamination of … those suppliers from whom it purchases seeds"). That insinuation is false.

Mr. Tipping's prior sworn testimony shows that in fact the seeds at issue were purchased from a supplier in *Maine*. On April 7, 2015, plaintiffs in *Schultz Family Farms LLC v. Jackson County*, US Federal District Court Case No. 1:14-cv-01975-CL took Mr. Tipping's deposition. Excerpts from that deposition, including the Certificate of the Court Reporter, are attached as Ex.1 to the Declaration of John DiLorenzo, Jr. ("DiLorenzo Decl.") which accompanies this memorandum.[3] During the deposition, Mr. Tipping was asked to elaborate about each of the instances he identifies in his Declaration in this case. He testified that he was aware of only "one known instance of GMO contamination," and that was when Siskiyou grew a certified organic corn crop that was for seed for another seed company, Uprising Seeds in Bellingham,

[3] To the extent that evidence submitted in opposition to a motion to intervene must be admissible, plaintiffs note that the statements are all admissible (not hearsay) because they are made by a party opponent. ORE 801(4)(b). Further, although intervenor applicants would have no plausible basis to challenge the authenticity of the transcript, the court reporter's certification is sufficient to meet any authentication requirement. *Cf. Orr v. Bank of Am., NT & SA*, 285 F3d 764, 774 (9th Cir 2002) ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent.").

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Washington. "They contracted with us to produce Oaxacan green dent corn. We didn't have planting stocks; so we obtained certified organic seed planting stock from Johnny's Selected Seed in Maine, and once again, it was certified organic seed." Tipping Depo. at 40, Ex. 1, DiLorenzo Decl. This seed purchased from a vendor in *Maine* was the cause of Siskiyou's claimed harm. Obviously, an Ordinance regulating GMO seeds and crops in Josephine County would not prevent claimed harm from seeds Siskiyou imported from out of state. In other words, that claimed harm does not relate a right, status or legal relation that would be affected by the relief sought in this case, and thus cannot support standing.

Mr. Tipping's prior sworn testimony contradicts the inferences that flow from the statements in his declaration, and also suggest that Mr. Tipping has not been forthcoming with all the facts. This court should not countenance OSFF's and Siskiyou's obfuscation. Siskiyou's 2010 seed planting is irrelevant to any issue relating to the Ordinance and does not support standing.

b. The 2012 voluntary destruction of crops was based on pure speculation.

Siskiyou's claimed harm from its apparent choice in 2012 to destroy its organic Swiss Chard crop because "Syngenta had planted genetically engineered sugar beets within less than 1 mile" of Siskiyou's crop similarly fails to confer standing. Tipping Decl., ¶ 27. Simply put, *there is no evidence of cross-pollination.* Siskiyou apparently decided that the "risks of contamination were too great," but there is not one scintilla of evidence before the court that Siskiyou was harmed by anything other than its own paranoia. Mr. Tipping's deposition again makes clear that he merely assumed his crop would cross-pollinate with GMO crops:

> [D]o we let it flower and let it get crossed and spend all the time weeding, harvesting, cleaning the seed, spending the hundreds of dollars on the test to find out it's hot when we knew it was within a half mile? And we figured out, we just didn't have the time. We're farmers. We mowed it under. So I lost about $20,000 in that deal because I was just – we were so certain – we talked to all the experts – that it was going to get crossed. That would have been a contamination issue, I'm almost certain of it.

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Tipping depo. at 42, Ex. 1, DiLorenzo Decl. Indeed, Mr. Tipping testified that he was unaware of *any* seed crop *ever* cross-pollinating a crop nearby (other than what he believed were the two instances above which never involved any cross-pollination in Jackson or Josephine County). Tipping Depo. at 51, Ex. 1, DiLorenzo Decl. In fact, Mr. Tipping specifically testified that he has no evidence of any cross pollination of GE crops ever happening in Jackson County. Tipping Depo. at 56, Ex. 1, DiLorenzo Decl. The notion that Siskiyou was harmed by self-proclaimed but unsupported "risks of contamination" is too speculative to support standing to intervene.

Moreover, Siskiyou does not say *where* Syngenta planted its crop. This exposes another flaw in Siskiyou's argument—nothing in the Ordinance prevents GMOs in neighboring counties. But if what Siskiyou says about the range of pollen drift is true, *see, e.g.*, Tipping Decl., ¶¶ 28, 37, 40, the Ordinance will not prevent *any* of the harm Siskiyou alleges. Siskiyou would still have to monitor who is growing GMOs in neighboring counties, would still have to test its crops (which Siskiyou complaints is prohibitively expensive, Tipping Decl., ¶ 36), and would still have all of the reputational concerns it asserts. Siskiyou's argument does not show that it has standing—it shows why the Legislature has preempted all local legislation in this area.

2. Siskiyou does not have standing because it will not be prohibited from doing anything it wants to do nor compelled to do anything it does not want to do, regardless of the outcome.

Regardless of the lack of evidence of any actual impact on Siskiyou, Siskiyou's fundamental problem is that opposing the *status quo* cannot give rise to standing. Simply put, there will be no effect on Siskiyou if the Ordinance is declared valid and enforceable. Siskiyou says it is not doing anything the Ordinance would prohibit, nor would validity of the Ordinance result in any change in how Siskiyou conducts its business. Similarly, if the Ordinance is declared invalid, then there would be no effect on what Siskiyou does or any change in how it operates its business. That is because, as a practical matter, invalidity of the Ordinance, which has never been enforced, results in maintenance of the *status quo*. *Siskiyou would have the exact*

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same "rights, status or other legal relations" as it had before the Ordinance was passed and as it has had during the time between when the Ordinance was passed and today. That fact shows that Siskiyou has no stake at all in the validity of an Ordinance that neither prohibits Siskiyou from doing anything it wants to do nor compels Siskiyou to do anything it does not want to do. At bottom, Siskiyou claims that it is adversely affected by the *status quo* under which *others* are allowed to engage in conduct in which those *others* will not be allowed to engage if the Ordinance is valid and enforced. That is not a legally cognizable effect on *Siskiyou*.

The Tipping Declaration further shows the fallacy of the argument that it has standing to challenge the *status quo*. The Tipping Declaration states that, without the Ordinance in place, Siskiyou's gross sales "have roughly doubled each year for the last five years[.]" Tipping Decl., ¶ 15. Even though the Tipping Declaration states the belief "that the potential for contamination from genetically engineered crops puts the future growth of Josephine and Jackson Counties' seed production at risk," Tipping Decl., ¶ 16, it nonetheless declares that Mr. Tipping "expects this trend [of doubling gross sales every year] to continue." Tipping Decl., ¶ 15. In other words, the evidence before the court is that, even with the "potential for contamination" that Siskiyou believes the Ordinance would prevent, Siskiyou will continue at *exactly the same growth in gross sales as it currently experiences without the Ordinance*. This action has no effect on Siskiyou's interests, and its motion to intervene should be denied.

D. OSFF's and Siskiyou's other arguments fail.

OSFF and Siskiyou make a number of other arguments in passing, none of which support standing to intervene. OSFF and Siskiyou refer to their investment in a "significant amount of time, expertise, reputation, and financial resources in the successful campaign that led to the approval of the Ordinance." Mot., p. 3. But those investments have already occurred, and the money and resources have already been expended. This action will not recover those expenditures, nor will it cause OSFF or Siskiyou to expend additional resources. Further, OSFF and Siskiyou do not have any financial interest in the *enforcement* (or non-enforcement) of the

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Ordinance. Their "investment" argument is a red herring. *Cf. Hollingsworth v. Perry*, 133 S Ct 2652, 2663 (2013) ("But once Proposition 8 was approved by the voters, the measure became a duly enacted constitutional amendment or statute. Petitioners have no role—special or otherwise—in the enforcement of Proposition 8." (citation and quotation marks omitted)).

OSFF and Siskiyou also assert that Siskiyou "has a direct interest in the matter that is so 'direct and immediate' that it will 'either gain or lose by the direct legal operation' and effect of the judgment." Mot., p. 5 (citing *Brune v. McDonald*, 158 Or 364, 370 (1938) and *Lambert v. Multnomah Cnty. Civil Serv. Comm'n*, 227 Or 432, 434 (1961)). The language OSFF and Siskiyou cite is outdated and in any event merely set forth the then-*general* rule. Moreover, in both *Brune* and *Lambert*, the Oregon Supreme Court *rejected* the intervenors' attempts to intervene. *See Brune*, 158 Or at 371 (it was "obvious that the direct legal operation of the judgment in the case at bar would not cause intervener either to gain or lose anything"); *Lambert*, 227 Or at 435 (intervenor "had no standing as a party in the proceeding … and it has no standing here to attack the judgment in favor of the plaintiff).[4] The correct standard for judging standing to intervene is set forth above, but even if OSFF's and Siskiyou's outdated case law represented the proper standard, for the reasons described above, Siskiyou and OSFF have not shown that they have anything that is legally cognizable to gain or lose by the validation or invalidation of the Ordinance.

[4] Notably, the intervenor in *Brune* also attempted to rely on what appears to be a predecessor in form to ORS 28.110:

> Intervener calls attention to section 1-314, Oregon Code 1930: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy can not [sic] be had without the presence of other parties, the court shall cause them to be brought in."

Brune, 158 Or at 373. The court again concluded it was "obvious" that the controversy could be determined without an impact on intervenor. *Id.*

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E. Plaintiffs do not object to allowing OSFF and Siskiyou to participate as *amici*.

The crux of OSFF's and Siskiyou's motion to intervene is that they are more motivated than the County to "resolve the matter as expeditiously as possible" and that they have "unique and integral factual and legal expertise regarding this Ordinance." Mot., p. 4. To the extent that OSFF and Siskiyou wish to have their viewpoints and arguments expeditiously considered by the court, plaintiffs have no objection to the court allowing OSFF and Siskiyou to participate as *amici*. *See Hawai'i Floriculture & Nursery Ass'n v. Cnty. of Hawai'i*, 2014 WL 4199342, at *1 (D Hawaii Aug 22, 2014) (denying intervention and granting amicus status). Plaintiffs would even stipulate to OSFF's and Siskiyou's participation in oral argument when the court holds hearings. This would allow the court to have the benefit of OSFF's and Siskiyou's "unique and integral factual and legal expertise" without compromising this court's jurisdiction over the proceeding by allowing intervention by parties that do not have standing.

III. CONCLUSION

For the foregoing reasons, the court should deny OSFF's and Siskiyou's Motion to Intervene.

DATED this 12th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION OF SISKIYOU SEEDS, LLC AND OREGONIANS FOR SAFE FARMS AND FAMILIES TO INTERVENE AS DEFENDANTS** on:

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☒ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below; and on

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☐ by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

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☒ by using the Court's efiling system; or

☐ by emailing a copy thereof to said attorney at his/her last-known email address as set forth above.

Dated this 12th day of October, 2015.

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