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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
(Portland Division)

JENNIFER RAE GUNTER, an Oregon
Elector; **CHRISTINA LYNN MILCAREK**,
an Oregon Elector; and **CHELSEA ANNE
WEBER**, an Oregon Elector

Plaintiffs,

v.

LISA GAMBEE, in her individual capacity
and as Wasco County Clerk; **KATHY
SCHWARTZ**, in her individual capacity and
as Wasco County Clerk; **STEVE KRAMER**,
in his individual capacity and as Wasco
County Clerk; and **SCOTT HEGE**, in his
individual capacity and as Wasco County
Clerk

Defendants.

Case No.: 3:22-cv-01675-MO

**DEFENDANTS' MOTION TO
CONSOLIDATE**

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LR 7-1 CERTIFICATION

Counsel for Defendants have conferred with the Plaintiffs through Plaintiff Jennifer Rae Gunter and the Court's involvement is necessary to resolve the issues contained in this motion.

MOTION

In accordance with Fed. R. Civ. P. 42 and LR 42-3, Defendants move to consolidate this case with *Gunter, et al. v. Fagan*, United States District Court Case No. 3:22-cv-01252-MO. Consolidation is appropriate because both cases involve similar allegations against elections officials arising out of the use of voting machines manufactured by Clear Ballot and certified by the Oregon Secretary of State Shemia Fagan. The cases raise common factual and legal issues, and consolidation is justified to conserve the resources of both the Court and the Parties and to avoid inconsistent results.

POINTS AND AUTHORITIES

I. LEGAL STANDARDS.

The Federal Rules of Civil Procedure provide that a court may consolidate cases which “involve a common question of law or fact.” Fed. R. Civ. P. 42(a). The court may consolidate for hearing or trial “any or all matters at issue,” including the entire case. *Id.* “In making this determination, the court must weigh ‘the interest in judicial convenience against the potential delay, confusion and prejudice caused by consolidation.’ ” *Evrax Inc., N.A. v. Travelers Indem. Co.*, Case No. 3:11-cv-00233-AC, 2013 WL 6241984, at *1 (quoting *Paxonet Commc'ns, Inc. v. TranSwitch Corp.*, 303 F. Supp. 2d 1027, 1028 (N.D. Cal. 2003)). “The purpose of Rule 42(a) is to improve trial court efficiency by avoiding unnecessary duplication of evidence and procedures and to avoid the risk of inconsistent adjudications.” *Wilson v. HGC, Inc.*, Case No. 3:16-cv-64-SI, 2016 WL 4432690, at *1 (D. Or. Aug. 18, 2016). The District Court enjoys “substantial

discretion in deciding whether and to what extent to consolidate cases.” *Hall v. Hall*, 584 U.S. ___, 138 S.Ct. 1118, 1131, 200 L.Ed.2d 399 (2018).

II. LR 42-3 INFORMATION.

As required by LR 42-3, Defendants provide the following information:

- The case number, case title, and assigned judge of every related case pending in the District of Oregon.
 - 3:22-cv-01252, *Gunter et al., v. Fagan*, assigned to Sr. District Judge Michael W. Mosman.
 - 3:22-cv-01675, *Gunter et al., v. Gambee, et al.*, was originally assigned to Magistrate Judge Jolie A. Russo and reassigned to Sr. District Judge Michael W. Mosman on November 7, 2022.
- The case number, case title, assigned judge, and court location of every other related case pending in any other state or federal court.
 - None Known
- The common question of law or fact at issue in each case.
 - Please see Discussion and Analysis section below.
- The status in each case of all pending motions, court-imposed deadlines, case management schedules, trial dates, etc.
 - 3:22-cv-01252, *Gunter et al., v. Fagan* – Defendant Shemia Fagan’s Motion to Dismiss is currently pending, with briefing completed. The Court previously denied the Plaintiffs’ Motion for Preliminary Injunction on August 29, 2022. Discovery is to be completed by 12/27/2022. Joint Alternate Dispute Resolution Report is due by 1/23/2023. Pretrial Order is due by 1/23/2023.
 - 3:22-cv-01675, *Gunter et al., v. Gambee, et al.* – This case was originally filed in the Wasco County Circuit Court and was removed by Defendants on October 31, 2022. Plaintiffs moved for a preliminary injunction on November 7, 2022. Defendants’ Response is due on November 21, 2022. Discovery is to be completed by 3/1/2023. Joint Alternate Dispute Resolution Report is due by 3/31/2023. Pretrial Order is due by 3/31/2023.

- The reason that the cases should be reassigned and managed by a single judicial officer.
 - Please see Discussion and Analysis section below.
- The position of the other parties, if known.
 - Plaintiffs object to consolidation of these cases. The State of Oregon and Defendant Shemia Fagan support consolidation.
- The scope of consolidation requested, e.g., for hearing on a motion; for pretrial and discovery; or for all further proceedings, including trial.
 - Defendants seek consolidation for all pretrial purposes as the factual and legal overlap of these cases is significant. Consolidation would promote efficient resolution by eliminating redundant proceedings and would avoid inconsistent results. Defendants do not, however, seek consolidation for purposes of trial.

III. DISCUSSION AND ANALYSIS.

All the factors supporting consolidation are present in these cases. Questions at issue in both cases include whether the Secretary of State's certification of voting machines manufactured by Clear Ballot was lawful; whether the continued use of those machines in Oregon elections violates the federal constitution; whether Plaintiffs have standing to assert those claims; and whether the Plaintiffs are entitled to preliminary injunctive relief. Resolution of those matters in a single proceeding will promote efficiency for the Court and the Parties, and consolidation will eliminate the potential for inconsistent decisions on pretrial motions and, if necessary, at trial. Conversely, there is no prejudice to Plaintiffs by consolidation. They will be able to advance all arguments available under the facts of both cases, there will be no delay as both cases are recently filed and in their earliest stages, and there is no risk of confusion of

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issues. *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, 720 F.Supp. 805, 806–807 (N.D.Cal.1989)(setting forth criteria). Accordingly, there is good cause to consolidate these cases.

DATED this 7th day of November, 2022.

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2022, I served the foregoing **DEFENDANTS' MOTION TO CONSOLIDATE PURSUANT TO FRCP 42**, on the following:

Jennifer Rae Gunter
1601 G St.
The Dalles, OR 97058

Christina Lynn Millcarek
1496 Foxglove Street
Woodburn, OR 97071

Chelsea Anne Weber
1900 S. Pear Rd.
Oregon City, OR 97045

Plaintiffs

by the following indicated method(s):

- by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorney at the last known office address of the attorney, and deposited with the United States Post Office at Portland, Oregon on the date set forth above.
- by causing a full, true and correct copy thereof to be **hand delivered** to the attorney at the last known address listed above on the date set forth above.
- by **faxing** a full, true and correct copy thereof to the attorney at the fax number shown above, which is the last-known fax number for the attorney's office on the date set forth above.
- by transmitting full, true and correct copies thereof to the attorneys through the court's Cm/ECF system on the date set forth above.

HAGLUND KELLEY LLP

By: /s/ Christopher Lundberg
Christopher Lundberg, OSB No. 941084
Attorney for Defendant