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

STATE OF OREGON, by and through its
Department of Agriculture,

Plaintiff,

v.

APPLEBEE AVIATION, INC. and
MICHAEL APPLEBEE,

Defendants.

Case No.

EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER AND MOTION FOR
PRELIMINARY INJUNCTION

ORS 20.140 - State fees deferred at filing

The State of Oregon requested a hearing on its ex parte motion for a temporary restraining order, which is set for Monday, October 12 at 8:30am. The State anticipates that such hearing will take less than one hour. Official court reporting services are requested.

The State further requests an expedited hearing on its motion for preliminary injunction. The State anticipates that such hearing will take approximately one hour. Official Court reporting services are requested.

MOTIONS

Pursuant to ORCP 79, the State of Oregon, by and through its Department of Agriculture (“ODA”), moves this court for a temporary restraining order and a preliminary injunction to immediately restrain and enjoin Defendants’ illegal conduct of engaging in the application of pesticides without a pesticide operator’s license in violation of the State Pesticide Control Act.

The Court has jurisdiction to grant a temporary or permanent injunction pursuant to ORS 561.280. The State of Oregon will suffer irreparable harm if Defendants are not restrained. This

1 motion is supported by the following points and authorities, the complaint on file in this action
2 and the declaration of Dale Mitchell.

3 **POINTS AND AUTHORITIES**

4 **A. Introduction**

5 ODA is charged by statute with enforcing the State Pesticide Control Act. ORS 634.005.
6 The purpose of the State Pesticide Control Act is to regulate the formulation, distribution,
7 storage, transportation, application and use of pesticides. Regulation of pesticides is in the
8 public interest because pesticides may injure health, property, wildlife or environment by being
9 distributed, stored, transported, applied or used in an improper or careless manner. ORS 634.005.
10 The Oregon legislature has determined that that the citizens of this state benefit from a system of
11 safe, effective and scientifically sound pesticide regulation. ORS 634.055. Oregon law further
12 provides that a uniform, statewide system of pesticide regulation that is consistent, coordinated
13 and comports with both federal and state technical expertise is essential to the public health,
14 safety and welfare. ORS 634.055.

15 Defendant Applebee Aviation, Inc. (“Applebee Aviation”)—a business engaged in
16 application of pesticides upon the land or property of another—and its owner Defendant Michael
17 Applebee (“Applebee”) are pesticide operators subject to the State Pesticide Control Act and to
18 regulation by ODA. To protect the health and safety of all Oregonians, Pesticide operators are
19 prohibited from engaging in the business of applying pesticides upon the land or property of
20 another without a valid pesticide operator’s license. ORS 634.372(9).

21 In September of 2015, ODA issued an emergency suspension of Applebee Aviation’s
22 pesticide operator’s license. The basis for the emergency suspension was that Applebee Aviation
23 had engaged in pesticide application activities in a faulty, careless or negligent manner in
24 violation of the State Pesticide Control Act. This conduct included failure to follow label
25 requirements; failure to provide sufficient safety materials, equipment and training for workers;

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1 using workers without required personal protective equipment; and using defective equipment
2 which presented workers with additional potential exposure to pesticides. The emergency
3 suspension became effective immediately. ODA provided written notice to Defendants that they
4 were prohibited from performing pesticide application services until the license was reinstated.
5 Reinstatement was conditioned on implementation of a written plan designed to ensure that the
6 faulty, careless or negligent application of pesticides would not be repeated (“written plan”).
7 ODA expressly reiterated the prohibition on engaging in pesticide application activities during an
8 in-person meeting with Applebee on September 29. Applebee specifically asked ODA for an
9 exception to permit Applebee Aviation to perform work under a three million dollar contract
10 with the Bureau of Land Management (“BLM”) before Applebee had completed a written plan
11 and regained its license. ODA told Applebee that there were no exceptions to this rule. On or
12 about October 1 and 2, 2015, Applebee Aviation performed pesticide application activities under
13 the BLM contract even though its pesticide operator’s license was suspended. When confronted,
14 Applebee informed ODA that he directed Applebee Aviation to perform pesticide application
15 activities without a license because the BLM contract at issue was worth three million dollars
16 and he felt pressure to get the job done. Applebee Aviation also illegally engaged in pesticide
17 application activities without a pesticide operator’s license on September 26, 2015.

18 While its license was suspended, and being fully informed of the restrictions imposed by
19 the suspension, Applebee Aviation, subject to the direction and control of Applebee, made a
20 calculated and knowing decision to violate the State Pesticide Control Act. Applebee’s
21 expressed justification of lost profits indicates that he made a deliberate cost-benefit analysis and
22 decided that violating the law served his interests. This conduct threatens the public interest and
23 poses a serious risk to public health and safety. Without a temporary restraining order and
24 preliminary injunctive relief, there is no mechanism to prevent Defendants from repeating their
25 calculated cost-benefit analysis and again choosing to deliberately engage in illegal conduct that

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1 endangers the public welfare. Injunctive relief is necessary and warranted to compel Defendants'
2 compliance with the State Pesticide Control Act and protect the public.

3 **B. Facts**

4 **1. ODA Suspended Defendants' License and Provided Notice that Defendants Shall
5 Not Perform Pesticide Activities until the License is Reinstated.**

6 In April of 2015, in response to complaints about Applebee Aviation's pesticide handling
7 and application practices, ODA and the Occupational Safety and Health Division of the Oregon
8 Bureau of Labor and Industry ("OR-OSHA") conducted a joint investigation into Applebee
9 Aviation. The joint investigation found that Applebee Aviation violated the State Pesticide
10 Control Act by performing pesticide activities in a faulty, careless or negligent manner, thereby
11 seriously endangering worker health and safety and presenting a serious risk to the public.
12 Compl. Ex. 1 at 8. Applebee Aviation failed to provide safety training to workers, failed to
13 provide workers with personal protective equipment, failed to follow label requirements and
14 used a pesticide mixture tank with a defective tank, presenting workers with increased potential
15 for exposure to pesticides. Compl. Ex. 1 at 7. These violations warranted immediate suspension
16 of Applebee Aviation's pesticide operator's license. Compl. Ex. 1 at 1. As a result, On
17 September 25, 2015, ODA issued a Notice of Proposed Imposition of Civil Penalty and
18 Proposed/Final Order, and Order of Emergency License Suspension and Notice of Opportunity
19 for a Hearing" (hereafter, "License Suspension Order") to Defendant Applebee Aviation.
20 Compl. Ex. 1. The License Suspension Order—which also imposed a \$1,110.00 civil penalty—
21 was served on Defendants on September 25, 2015. See Compl. Ex. 2.

22 The License Suspension Order states unequivocally that "[e]ffective immediately,
23 [Applebee Aviation] must stop providing pesticide application services, or applying pesticides
24 onto the properties of others in Oregon until further order of [ODA]. Compl. Ex. 1 at 2; see also
25 *id.* at 9 (Applebee Aviation's pesticide operator's license "is immediately suspended"). The
26 License Suspension Order sets forth corrective actions that Applebee Aviation must take before

1 its license can be reinstated, including submitting to ODA “a written plan ... describing how it
2 will set in place policies, protocols and training to prevent recurrences” of the activities giving
3 rise to the suspension. *Id.* at 9.

4 **2. ODA Expressly Reiterated that Defendants Shall Not Perform Pesticide
Activities until its License is Reinstated by ODA**

5 After receiving service of the License Suspension Order, defendant Applebee and his
6 employee Warren Howe (“Howe”) appeared unannounced at ODA’s office on Tuesday,
7 September 29, 2015 to request a meeting with ODA Pesticide Enforcement Program Manager
8 Dale Mitchell (“Mitchell”). Mitchell Decl. ¶ 5. Mitchell met with Applebee and Howe and
9 reviewed and explained each clause of the License Suspension Order, including that no pesticide
10 application activity could be performed until the license was reinstated. *Id.* ¶ 6. Applebee
11 requested that ODA make an exception to allow Applebee Aviation to perform pesticide
12 application activities under a three million dollar contract with the Bureau of Land Management
13 (“BLM”). *Id.* Mitchell reiterated that there were no exceptions and under no circumstances was
14 Applebee Aviation permitted to engage in pesticide application activities until it had submitted a
15 written plan and ODA reinstated its pesticide operator’s license. *Id.*

16 **3. Applebee Aviation Performed Pesticide Application Activities while its License is
Suspended.**

17 Applebee Aviation provided a first draft of a written plan to ODA on September 29,
18 2015. Mitchell Decl. ¶ 7. ODA reviewed the written plan and informed Defendants of required
19 improvements. *Id.* On October 5, 2015, Applebee Aviation submitted to ODA a final written
20 plan. *Id.* ¶ 8. ODA employees visited Applebee Aviation’s place of business to examine
21 equipment and verify compliance with the written plan on October 8, 2015. *Id.* ¶ 11. During this
22 visit, Applebee informed ODA that Applebee Aviation had performed pesticide application
23 activities under the BLM contract even though it did not have a valid pesticide operator’s license
24 and ODA had not yet approved its written plan. *Id.* Applebee’s explanation was that he was
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1 under a lot of pressure to complete the BLM contract and the job was worth three million dollars.
2 Applebee further stated that Applebee was the only person authorized to halt operations. *Id.*

3 The BLM contract provides that Applebee Aviation is to treat 800 acres located
4 approximately five miles north of the town of Christmas Valley in Lake County with a chemical
5 called Plateau (Imazapic). *Id.* ¶ 12 and Ex. 1 to Mitchell Decl. Plateau (Imazapic) falls within
6 the definition of “pesticide” under ORS 634.006(8). Mitchell Decl. ¶ 12.

7 Applebee Aviation also engaged in pesticide application activities without a pesticide
8 operator’s license on September 26, 2015, after receiving notice of its license suspension. *Id.* ¶
9 14. Applebee Aviation applied the pesticides glyphosate, sulfometuron methyl, metsulfuron
10 methyl and impazapyr on a total of 71 acres in Astoria, Oregon pursuant to a contract with
11 Oregon Department of Forestry.

12 **4. Defendants’ Conduct Threatens Public Health and Safety**

13 The requirement that all pesticide operators have current, valid licensing is intended to
14 protect the public. *Id.* ¶ 14. A primary purpose of the State Pesticide Control Act is to prevent
15 adverse health impacts from pesticides. *Id.* The protection of Oregon’s health and environment
16 from adverse impacts of pesticides depends on pesticide operators being properly licensed. *Id.*
17 The requirement that all pesticide operators have a valid license allows ODA to assure the public
18 that pesticide operators use pesticides responsibly and without unacceptable risks. *Id.*
19 Defendants’ act of performing pesticide application activities without a pesticide operator’s
20 license poses a serious danger to the public health and safety and undermines public trust. *Id.*

21 ODA intends to issue a second Order of Emergency License Suspension to Defendants
22 on the basis of that Defendants engaged in pesticide application activities without a license when
23 they performed work on September 26 and October 1 and 2, 2015. *Id.* ¶ 16. However, given
24 Defendants’ history of noncompliance with the State Pesticide Control Act and ODA Orders,
25 ODA has a reasonable belief that Defendants will violate the subsequent Order of Emergency
26 License Suspension as well. *Id.* This subsequent violation will threaten public health and safety

1 for the reasons outlined above. *Id.* Defendants’ conduct also threatens public health and safety
2 because it sends a dangerous message to other pesticide operators that monetary gain is more
3 important than complying with the law. *Id.* ¶ 17. In order for ODA to achieve its mandate of
4 protecting public health and safety and to ensure a level playing field for all pesticide operators,
5 it is imperative that there are immediate and severe consequences for Defendants’ brazen
6 violations. *Id.* It is essential to public health and safety that pesticide operators understand that
7 violation of the State Pesticide Control Act and ODA Orders will not be tolerated and that
8 deliberate violations will be swiftly punished. *Id.*

9 **C. Legal Standard**

10 A preliminary injunction is available under the Oregon rules “[w]hen it appears that a
11 party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of
12 restraining the commission or continuance of some act, the commission or continuance of which
13 during the litigation would produce injury to the party seeking the relief,” ORCP 79 A(1)(a), or
14 “[w]hen it appears that the party against whom a judgment is sought is doing or threatens, or
15 is about to do, or is procuring or suffering to be done, some act in violation of the rights of a
16 party seeking judgment concerning the subject matter of the action, and tending to render the
17 judgment ineffectual.” ORCP 79 A(1)(b).

18 Because ORCP 79 is largely derived from FRCP 65, it is appropriate to examine federal
19 case law interpreting the analogous federal rule. *See, e.g., Von Ohlen v. German Shorthaired*
20 *Pointer Club*, 179 Or App 703, 710-711 (2002) (federal cases interpreting FRCP 65 are
21 persuasive authority concerning injunctive relief under ORCP 79). “A plaintiff seeking a
22 preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to
23 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his
24 favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*,
25 555 U.S. 7, 20 (2008).

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1 **1. The State of Oregon is likely to succeed on the merits.**

2 This Court has jurisdiction to grant a temporary or permanent injunction restraining any
3 person from violating any provision of a law under the jurisdiction of ODA. ORS 561.280.
4 Defendants have violated ORS 634.372(9), which is a law under the jurisdiction of the
5 department, and thus, the department is entitled to the relief sought.

6 The State of Oregon is likely to prevail on the merits of this case. The law is clear that a
7 pesticide operator shall not “engage in the business of ... applying pesticides upon the land or
8 property of another, without first obtaining and maintaining a pesticide operator’s license.” ORS
9 634.372(9). There can be no dispute that Applebee Aviation is a pesticide operator and, at the
10 direction of Applebee, it engaged in the business of applying pesticides when it applied Plateau
11 (Imazapic) on or about October 1 and 2, 2015, and various pesticides on September 26, 2015,
12 and that it did so without a pesticide operator’s license. Plateau (Imazapic) and the chemicals
13 used by Defendants on September 26, 2015, fall within the definition of “pesticide” under ORS
14 634.006(8). Mitchell Decl. ¶¶ 12, 14.

15 **2. Defendants’ activities will continue to harm ODA’s interests if the Court does**
16 **not take immediate action and an injunction is in the public interest.**

17 The remaining factors weigh heavily in favor of granting ODA’s motion. The State of
18 Oregon will suffer irreparable harm in the absence of preliminary relief. Defendants have
19 demonstrated a pattern of violating the Pesticide Control Act. First, Defendants performed
20 pesticide application activities in a faulty, careless or negligent manner by, among other things,
21 failing to provide essential training and safety equipment to workers and using defective
22 equipment. Compl. Ex. 1 at 1. Then, before taking all steps necessary to remediate their prior
23 hazardous conduct and restore their license, Defendants instead proceeded to illegally apply
24 pesticides without a pesticide operator’s license in knowing and willful violation of the law.
25 Pesticides are hazardous materials and, as such, are highly regulated to protect the health and
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1 safety of Oregonians. Defendants’ deliberate and knowing violation of the License Suspension
2 Order and the State Pesticide Control Act is inherently dangerous, as it reflects disregard for
3 essential regulatory protections. Defendants’ actions threaten to cause irreparable harm by
4 sending a message to the pesticide industry that pesticide operators may continue to operate even
5 when they intentionally and blatantly violate the law. Mitchell Decl. ¶ 15.

6 For these same reasons, the public interest is served by issuance of a temporary
7 restraining order. The requirement that all pesticide operators have a valid license allows ODA
8 to assure the public that pesticides are used responsibly in Oregon and maintain the ability to
9 effectively use pesticides without unacceptable risks. The public has a strong interest in knowing
10 that pesticide operators who fail to follow essential regulatory requirements are immediately
11 restrained for performing pesticide application activities. Defendants’ conduct allows them an
12 unfair economic advantage over other similarly situated pesticide operators who have lost
13 business because they chose to obey Oregon law and refrain from engaging in pesticide
14 application activities when their licenses were suspended. *Id.* ¶ 17. Defendants’ conduct
15 undermines the level playing field that is essential to fair and consistent regulation of pesticides.
16 *Id.* Moreover, the balance of the equities tips strongly in favor of ODA’s motion. Defendants’
17 stated justification for violating the State Pesticide Control Act is monetary gain. Protecting the
18 public and ensuring consistent application of the State Pesticide Control Act strongly outweighs
19 Defendants’ interests in making money.

20 ODA has already attempted to block defendants’ hazardous and illegal activities through
21 administrative processes, and defendant has willfully disregarded those attempts. ODA intends
22 to issue Defendants a second Order of Emergency License Suspension. *Id.* ¶ 16. ODA has
23 imposed civil penalties on Defendants and intend to impose more. However, the monetary
24 sanctions imposed by ODA are set by statute and have not been an adequate deterrent to restrain
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1 Defendants' illegal activity. Defendants' conduct demonstrates that their illegal pesticide
2 application activity will not stop short of a court order.

3 **D. This Court Should Require No Security under ORCP 82A**

4 The State requests that the court deem it proper that no security is required under ORCP
5 82A. This action and the request for restraining order is necessitated by Defendants' willful
6 refusal to comply with state law and willful refusal to comply with ODA's License Suspension
7 Order.

8 WHEREFORE, The State of Oregon prays for the following relief:

9 A. A temporary restraining order and preliminary injunction requiring that Defendant
10 Applebee Aviation immediately cease all pesticide application activities until such time as
11 Applebee Aviation's pesticide operator's license is reinstated by ODA;

12 B. A temporary restraining order and preliminary injunction requiring that Defendant
13 Applebee immediately cease directing and/or causing Applebee Aviation to engage in any
14 pesticide application activities until such time as Applebee Aviation pesticide operator's license
15 is reinstated by ODA.

16 DATED this ____ day of October, 2015.

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