

**IN THE CIRCUIT COURT OF THE STATE OF OREGON**  
**FOR THE COUNTY OF DESCHUTES**

AVION WATER COMPANY, INC.,  
an Oregon corporation,

Plaintiff,

vs.

SOURCE WEEKLY, assumed business name  
of LAY IT OUT, INC., an Oregon corporation

Defendant.

Case No.: 22CV18513

ANSWER, AFFIRMATIVE DEFENSES,  
AND COUNTERCLAIMS OF DEFENDANT  
SOURCE WEEKLY

Filing Fee: \$281.00

(Not Subject to Mandatory Arbitration)

**PRELIMINARY STATEMENT**

1.

Oregon’s water is public property the use of which must benefit the public, and the distribution of water to Oregonians has traditionally been a governmental activity. Most water utilities that provide customers with potable water, including Plaintiff, are closely regulated by state and federal laws designed to ensure the health, safety, affordability, and stewardship of this finite communal resource. Oregon’s Public Records Law, ORS 192.311 *et seq.* (hereinafter “OPRL”), mandates transparency and openness in government activities, including activities undertaken by private companies acting as the functional equivalent of a government. Plaintiff manages public property (water), using public infrastructure (public rights-of-way), while receiving significant government support (an exclusive franchise agreement), and is subject to

1 extensive government regulation. Nevertheless, Plaintiff asks this Court to declare that because  
2 it is a private company, it is entitled to keep secret from the public the amount of water it  
3 distributes to its customers. Such a declaration must be denied because it would allow Plaintiff  
4 to act as the functional equivalent of a government without the transparency mandated by OPRL,  
5 would be contrary to Oregon’s Water Rights Act., and would prevent Oregonians from  
6 understanding their state’s water usage during the worst drought in 1,200 years.

8 **ANSWER**

9 2.

10 Pursuant to ORCP 19, Defendant hereby files this Answer to Plaintiff’s Complaint. To  
11 the extent any allegation in the Complaint is not specifically admitted, the allegation is denied.

12 Defendant Source Weekly admits, denies, and alleges as follows:

13 3.

14 Defendant admits the allegations in Paragraph 1.

15 4.

16 Defendant lacks sufficient information to form a belief about the truth of the allegation in  
17 paragraph 2 and therefore denies the allegations in Paragraph 2.

18 5.

19 Defendant denies the allegations in Paragraph 3 to the extent that Lay It Out, Inc. is a  
20 “media company” rather than a “newspaper publishing organization”. Defendant admits the  
21 remaining allegations in Paragraph 3.

22 6.

23 Defendant admits the allegations in Paragraph 4.

24 7.

1 Defendant lacks sufficient information to form a belief about the truth of the allegation in  
2 Paragraph 5 and therefore denies the allegations in Paragraph 5.

3  
4 8.

5 Defendant lacks sufficient information to form a belief about the truth of the allegation in  
6 Paragraph 6 and therefore denies the allegations in Paragraph 6.

7  
8 9.

9 Defendant lacks sufficient information to form a belief about the truth of the allegation in  
10 Paragraph 7 and therefore denies the allegations in Paragraph 7.

11  
12 10.

13 Defendant lacks sufficient information to form a belief about the truth of the allegation in  
14 Paragraph 8 and therefore denies the allegations in Paragraph 8.

15  
16 11.

17 Defendant admits the allegation in Paragraph 9 that Merzbach submitted to Plaintiff the  
18 writing contained in Exhibit 1, the contents of which speaks for itself. Defendant admits Exhibit  
19 1 is a true and correct copy of Merzbach's submission. Defendant denies the remaining  
20 allegations in Paragraph 9.

21  
22 12.

23 Defendant admits the allegation in Paragraph 10 that Exhibit 2, the contents of which  
24 speaks for itself, is a true and correct copy of Plaintiff's response to Exhibit 1. Defendant denies  
25 the remaining allegations in Paragraph 10.

26  
27 13.

28 Defendant admits the allegations in Paragraphs 11.

14.

1 Defendant admits the allegation in Paragraph 12 that Exhibit 4 is a true and correct copy  
2 of Merzbach's May 20, 2022 email, the contents of which speaks for itself. Defendant denies the  
3 remaining allegations in Paragraph 12.

4  
5 15.

6 Defendant admits the allegation in Paragraph 13 that Exhibit 5 is a true and correct copy  
7 of District Attorney Hummel's May 26, 2022 order, the contents of which speaks for itself.  
8 Defendant denies the remaining allegations in Paragraph 13.

9  
10 16.

11 In answer to Paragraph 14, Defendant incorporates by reference the responses to  
12 Paragraphs 1 through 13 of the Complaint as set forth hereinabove.

13  
14 17.

15 Paragraph 15 contains allegations of law, not fact, to which no response is required. To  
16 the extent the allegations require a response, Defendant denies the allegations in Paragraph 15.

17  
18 18.

19 Paragraph 16 contains allegations of law, not fact, to which no response is required. To  
20 the extent the allegations require a response, Defendant denies the allegations in Paragraph 16.

21  
22 19.

23 In answer to Paragraph 17, Defendant denies that Plaintiff is entitled to any type of  
24 declaration, injunction, remedy, relief, or damages, including the relief demanded in Plaintiff's  
25 Complaint.

26  
27 20.

28 In answer to Paragraph 18, Defendant incorporates by reference the responses to  
Paragraphs 1 through 17 of the Complaint as set forth hereinabove.

1 21.

2 Paragraph 19 contains allegations of law, not fact, to which no response is required. To  
3 the extent the allegations require a response, Defendant admits the allegations in Paragraph 19.  
4

5 22.

6 In answer to Paragraph 20, Defendant denies that Plaintiff is entitled to any type of  
7 declaration, injunction, remedy, relief, or damages, including the relief demanded in Plaintiff's  
8 Complaint.

9 **DEFENSES**

10 23.

11 By pleading the defenses set forth below, Defendant does not admit that it bears the  
12 burden of proof on all or any of the aforesaid defenses and reserves all rights with respect to  
13 allocation of the burden of proof under law. Defendant reserves the right to amend its Answer  
14 and Defenses to assert such additional defenses as may later become available or apparent.  
15

16 **FIRST AFFIRMATIVE DEFENSE**

17 **(Pre-emption)**

18 24.

19 Plaintiff's claims are pre-empted in whole or in part by Oregon's Water Rights Act, ORS  
20 537.010 *et seq.*, which provides that all water is publicly owned.<sup>1</sup>  
21

22 **SECOND AFFIRMATIVE DEFENSE**

23 **(Failure to State a Claim)**

24  
25  
26 <sup>1</sup> ORS 537.110, 537.153(2) and 537.170(8) (2019); *see also In re Hood River*, 114 Or. 112, 213 (1924)  
27 (Coshow, J., concurring) ("The Water Code declares the waters of the state to be public property."); Mark Squillace,  
28 *Restoring the Public Interest in Western Water Law*, 2020 Utah L. Rev. 627, 628 (2020), available at  
<https://scholar.law.colorado.edu/articles/1286/> ("[P]ublic interest considerations limit the private right to use water  
in virtually every Western state.").

1 25.

2 Plaintiff fails to state a claim upon which relief can be granted because Plaintiff is the  
3 functional equivalent of a public body and must comply with OPRL.  
4

5 **COUNTERCLAIMS**

6 26.

7 Defendant Source Weekly, by its attorneys, counterclaims against Plaintiff Avion Water  
8 Company, Inc. and alleges as follows:

9 **JURISDICTION AND VENUE**

10 27.

11 The Circuit Court for Deschutes has subject matter jurisdiction pursuant to ORS 192.427,  
12 ORS 192.431, and ORS 28.010. Venue is appropriate in Deschutes County because ORS  
13 192.415 requires a case of this nature to be filed in the circuit court in which Plaintiff is located,  
14 and Plaintiff is located in Deschutes County. Venue is also appropriate because Plaintiff  
15 conducts its regular sustained business in Deschutes County, and its improper actions occurred  
16 there.  
17  
18

19 28.

20 Defendant Source Weekly is a wholly owned subsidiary of Lay It Out, Inc., and operates  
21 a newspaper called The Source Weekly which has been in operation since 1997.  
22

23 **FIRST COUNTERCLAIM**

24 **(Injunctive Relief, ORS 192.411, ORS 192.415, ORS 192.431)**

25 29.

26 Defendant incorporates by reference those matters alleged in Paragraphs 1 through 28  
27 above as though fully stated herein.  
28

1 30.

2 The records sought by Defendant are subject to disclosure by Plaintiff under OPRL.

3 31.

4 Oregon's water is public property the use of which must benefit the public.<sup>2</sup>

5 32.

6 The distribution of water to Oregonians has traditionally been a governmental activity.<sup>3</sup>

7 33.

8 The Western United States, including Oregon, is experiencing the worst drought in 1,200  
9 years.<sup>4</sup>

10 34.

11 Plaintiff manages public property (water), using public infrastructure (public rights-of-  
12 way), while receiving significant government support (an exclusive franchise agreement), and is  
13 subject to extensive government regulation. *See* Compl. Ex. 5.

14 35.

15 Plaintiff has refused to allow Defendant to inspect or copy the public records requested,  
16 despite the DA's order to Plaintiff to disclose the records.

17 36.

18  
19  
20  
21  
22 <sup>2</sup> ORS 537.110, 537.153(2) and 537.170(8) (2019); *see also In re Hood River*, 114 Or. 112, 213 (1924)  
23 (Coshow, J., concurring) ("The Water Code declares the waters of the state to be public property."); Mark Squillace,  
24 *Restoring the Public Interest in Western Water Law*, 2020 Utah L. Rev. 627, 628 (2020), available at  
<https://scholar.law.colorado.edu/articles/1286/> ("[P]ublic interest considerations limit the private right to use water  
in virtually every Western state[.]")

25 <sup>3</sup> *See e.g. M.N. Baker, The Manual of American Water-Works 1888*, Engineering News 507-511 (1889)  
26 (listing Oregon towns of Ashland, Astoria, Baker City, Medford, Milton, Oregon City, Pendleton, Portland, and The  
27 Dalles as owning or building waterworks systems by 1889) <https://perma.cc/7QTQ-XUFC>; *see also Navigating*  
*Legal Pathways to Rate-Funded Customer Assistance Programs: A Guide for Water and Wastewater Utilities*, 92-  
93 (2016) available at <https://efc.web.unc.edu/2016/10/19/public-vs-private-a-national-overview-of-water-systems/>  
(In 2016, approximately 92% of Oregon's population was served by government-owned community water systems).

28 <sup>4</sup> Nathan Rott, *Study Finds Western Megadrought is the Worst In 1200 Years*, National Public Radio (February 14,  
2022) <https://perma.cc/NU4U-45PM>.

1 Plaintiff's refusal to allow Defendant to inspect or copy the public records requested is a  
2 violation of the OPRL entitling Defendant to injunctive relief, pursuant to ORS 192.411, ORS  
3 192.415, and ORS 192.431.

4  
5 37.

6 WHEREFORE, having fully answered Plaintiff's Complaint, and having pled its  
7 Counterclaim, Defendant prays for judgment as follows:

- 8 1. That judgment be entered in favor of Defendant and against Plaintiff;
- 9 2. That Plaintiff be enjoined from withholding the requested records and ordered to disclose  
10 the requested records to Defendant;
- 11 3. That Defendant recover its costs, disbursements, and reasonable attorney fees incurred in  
12 this action pursuant to ORS 192.431(3).
- 13 4. That pursuant to ORS 192.431(2), except as to causes the Court considers of greater  
14 importance, this Court afford this proceeding precedence on the docket over all other  
15 causes and assign it for hearing and trial at the earliest practicable date and expedite it in  
16 every way; and  
17  
18 5. For such further and additional relief the Court considers just and equitable.

19 DATED this 5th day of August, 2022.  
20  
21

22  
23 By s/ Ellen Osoinach  
24 Ellen Osoinach, OSB# 024985  
25 REPORTERS COMMITTEE  
26 FOR FREEDOM OF THE PRESS  
27 Telephone: 503-213-3949  
28 E-mail: [eosoinach@rcfp.org](mailto:eosoinach@rcfp.org)

*Attorney for Defendant*



1  
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on the 5<sup>th</sup> day of August, 2022, I caused to be served the foregoing  
4 ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS on the following parties at  
5 the following address:

6  
7 C. Robert Steringer  
8 bob.steringer@harrang.com  
9 Erica Tatoian  
10 erica.tatoian@harrang.com  
11 *Of Attorneys for Plaintiff*

12 By:

- 13  U.S. Postal Service, First Class Mail  
14  U.S. Postal Service, Certified Mail, Return Receipt Requested  
15  Hand Delivery  
16  Facsimile  
17  Electronic Service (via prior agreement)  
18  Other (specify) \_\_\_\_\_

19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
*s/ Ellen Osoinach*  
Ellen Osoinach, OSB# 024985