

STATE OF WISCONSIN    CIRCUIT COURT    DANE COUNTY

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THE BOARD OF REGENTS OF THE  
UNIVERSITY OF WISCONSIN SYSTEM,

Plaintiff,

v.

THOMAS G. SONNLEITNER and  
RICHARD H. WELLS,

Defendants,

and

THOMAS G. SONNLEITNER,

Defendant and Third-Party Plaintiff,

v.

THE UNIVERSITY OF WISCONSIN OSHKOSH  
FOUNDATION,

Third-Party Defendant.

Case No. 2017 CV 106  
Case Code: 30301

Hon. Richard G. Niess  
Branch 9

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ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS, AND THIRD-PARTY  
COMPLAINT OF DEFENDANT THOMAS G. SONNLEITNER

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**INTRODUCTION**

Thomas G. Sonnleitner devoted the vast majority of his professional life to serving the University of Wisconsin Oshkosh (the "University"). All of the actions described in the Complaint were undertaken within the scope of his employment, in good faith, and for benefit of the University. Moreover, as set forth in detail below, Sonnleitner was acting with the knowledge and consent of his superiors and

representatives of Plaintiff Board of Regents. Accordingly, the Complaint lacks merit and should be dismissed in its entirety.

## ANSWER AND AFFIRMATIVE DEFENSES

### A. Answer

Defendant Thomas G. Sonnleitner, through his legal counsel, hereby answers the Complaint, utilizing the same paragraph numbers.

1. This paragraph sets forth a legal conclusion to which no factual response is required. To the extent a response is required, Defendant denies.

2. This paragraph sets forth a legal conclusion to which no factual response is required. To the extent a response is required, Defendant denies.

3. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

4. Admit.

5. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

6. Admit.

7. Deny. Wells served as Chancellor of the University from October 1, 2000, until August 31, 2014.

8. Admit.

9. Admit. Defendant adds that, after Wells retired, Defendant's immediate supervisor was Andrew Leavitt.

10. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

11. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-d and therefore denies.

12. Deny.

13. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

14. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

15. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

16. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

17. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

18. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-m, and therefore denies.

19. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

20. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

21. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-h, and therefore denies.

22. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

23. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

24. Deny.

25. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

26. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

27. This paragraph sets forth a legal conclusion to which no factual response is required. To the extent a response is required, Defendant denies.

28. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-c, and therefore denies.

29. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

30. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

31. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-e, and therefore denies.

32. Admit.

33. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-e, and therefore denies.

34. Admit that the Foundation has transferred the Sports Center to the University. As to the remaining allegations of this paragraph, Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations and therefore denies.

35. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations, including subparagraphs a-c, and therefore denies.

36. Deny.

37. Deny.

38. Deny.

39. Deny.

40. Deny.

41. Deny.

42. Deny.

43. Deny.

44. Deny.

45. Deny.

46. Deny.

47. Deny.

48. Admit that Wells (and others) authorized and approved all relevant actions of Defendant Sonnleitner. Deny the remaining allegations of this paragraph.

49. Deny.

Wherefore Clause. Deny.

**B. Affirmative Defenses**

1. The Complaint fails to state claims upon which relief may be granted.
2. Defendant Sonnleitner did not violate the Wisconsin Constitution, the Wisconsin Statutes, or Wisconsin common law.
3. Defendant Sonnleitner did not convert or conspire to convert any funds of the State of Wisconsin and/or of the University of Wisconsin System.
4. Defendant Sonnleitner's actions were taken in good faith.
5. Defendant Sonnleitner's actions were within the scope of his duties as Vice Chancellor at the University.
6. Defendant Sonnleitner's actions were authorized and approved by Sonnleitner's superiors, including but not limited to, Chancellor Wells, the Chancellor's cabinet, and representatives of Plaintiff Board of Regents.
7. Defendant Sonnleitner's actions were in the best interest of the University, and did not cause any financial harm to the University or to the State of Wisconsin.
8. Defendant Sonnleitner's actions resulted in a net financial gain for the University and the State of Wisconsin.

9. The “comfort” letters and other financial documents at issue in this action were not guarantees, as alleged in the Complaint, and did not create legally enforceable debt against the State of Wisconsin.

10. Defendant Sonnleitner is entitled to indemnification, including costs and reasonable attorney’s fees, from Plaintiff for any and all amounts determined to be owed by him.

11. Plaintiff is estopped from asserting its claims.

12. The Board of Regents is not a proper party to this action (lack of capacity).

13. The Board of Regents is not empowered to seek their requested relief (lack of capacity).

14. Plaintiff’s claims are barred by the statute of limitations.

## **COUNTERCLAIMS AND THIRD-PARTY COMPLAINT**

### **A. Parties, Jurisdiction, and Venue**

1. Plaintiff Board of Regents has filed a Complaint against Sonnleitner, which is incorporated by reference herein.

2. Defendant and Third-Party Plaintiff Sonnleitner has filed an Answer and Affirmative Defenses, which are incorporated by reference herein.

3. Third-Party Defendant University of Wisconsin Oshkosh Foundation, Inc. (the “Foundation”) is a non-profit organization operating at 625 Pearl Ave., Oshkosh, Wisconsin 54901.

4. To the extent jurisdiction and venue are appropriate for the Complaint, then jurisdiction and venue for these Counterclaims and Third-Party Complaint are appropriate pursuant to Wis. Stat. § 802.07.

**B. Sonnleitner's Employment at the University**

5. During all relevant times, Sonnleitner served as the Vice Chancellor of Administrative Services for the University.

6. According to a publicly available position description,<sup>1</sup> the duties of the Vice Chancellor of Administrative Services include: "providing leadership, vision and direction for the Administrative Services Division [of the University], including Facilities Management, Planning and Construction, Head Start, Human Resources, Budget and Financial Services, Postal and Document Services, Central Stores, Purchasing, . . . and Risk Management."

7. Sonnleitner also was specifically assigned the duty of acting as financial liaison on behalf of the University with the Foundation.

8. Sonnleitner also was specifically assigned, with others, the duty to oversee the University's Sustainability Project.

9. As Vice Chancellor, Sonnleitner oversaw an annual budget in excess of \$250 million.

10. As Vice Chancellor, Sonnleitner reported directly to the Chancellor and was part of the Chancellor's cabinet.

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<sup>1</sup> Available at <http://www.uwosh.edu/hr/employment/vice-chancellor-for-administrative-services-400a.1617/positiondescription> (last viewed on Jan. 24, 2017).

11. Sonnleitner's actions, as described in the Complaint, the Answer and Affirmative Defenses, and in these Counterclaims and Third-Party Complaint, were: (a) within the scope of his duties as Vice Chancellor, (b) authorized and approved by the Chancellor, the Chancellor's cabinet, and representatives of Plaintiff Board of Regents, (c) undertaken in good faith, and (d) for the benefit of the University.

**C. Interaction between the University and the Foundation**

12. All or the vast majority of universities in the UW System interact with related, non-profit foundations.

13. The UW System encourages these relationships because they benefit the universities.

14. The UW System encourages the universities to provide personnel and financial support to the foundations, with the expectation that the foundations would provide a net financial gain to the universities.

15. Publicly available financial records show that universities in the UW System indeed do routinely provide personnel and financial support to the foundations.

16. The Foundation is one of these related, non-profit organizations that regularly provided the University with millions of dollars.

17. The Foundation exists for the sole purpose of providing financial and other assistance to the University.

18. According to public IRS filings,<sup>2</sup> the Foundation has provided the University with the following amounts:

a. For the tax year 2010 (running from July 1, 2010 through June 30, 2011), in excess of \$2 million in cash grants and over \$400,000 in expense reimbursements.

b. For the tax year 2011 (running from July 1, 2011 through June 30, 2012), in excess of \$2.8 million in cash grants and almost \$480,000 in expense reimbursements.

c. For the tax year 2012 (running from July 1, 2012 through June 30, 2013), in excess of \$5.6 million in cash grants and almost \$500,000 in expense reimbursements.

d. For the tax year 2013 (running from July 1, 2013 through June 30, 2014), over \$8 million from the transfer of ownership of the Alumni Welcome Center, in excess of \$350,000 in cash grants, and over \$2.8 million in cash and expense reimbursements.

19. Also according to public IRS filings, the University has provided financial support to the Foundation—in the form of grants, advances, and loans—primarily related to building projects.

a. For the tax year 2010, the Foundation publicly disclosed that it received \$450,000 from the University. The Foundation also publicly disclosed that it owed the University a total of \$1.05 million.

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<sup>2</sup> All public IRS filings referenced in this document are available at <https://projects.propublica.org/nonprofits/> (last visited Jan. 24, 2017).

b. For the tax year 2011, the Foundation publicly disclosed that the University provided over \$1.5 million for building projects. The Foundation also publicly disclosed that it owed the University a total of \$750,000.

c. For the tax year 2013, the Foundation publicly disclosed that it borrowed \$31,311 from the University. The Foundation also publicly disclosed that it owed the University a total of \$841,709.

20. For each of the years at issue in the Complaint, the Foundation provided a net positive financial benefit to the University, usually involving millions of dollars. In other words, the University financially benefitted from the actions described in the Complaint.

#### **D. Interaction between the Board of Regents and the Foundation**

21. During all relevant times, the Vice President of Finance for the University of Wisconsin System served as both an Officer for the Board of Regents and as an *ex officio* Board Member of the Foundation.

22. This representative of the Board of Regents had contemporaneous knowledge of and access to the financial information set forth in the Complaint and in this Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint.

#### **E. Sonnleitner's Presentations to the Board of Regents**

##### **I. October 8, 2010 Presentation**

23. On or about October 8, 2010, Chancellor Richard Wells and Sonnleitner presented and caused to be presented information to the Board of Regents, as set forth in the following paragraphs.

24. The Board of Regents was told that the University's master plan was "investing for growth" through a "capital partnership" involving the Foundation.

25. The Board of Regents was told that, since 2000, the University, which is Wisconsin's third largest, "has been aggressively 'building capacity' to meet growing needs for the future," including with the "academic building," the "anaerobic biodigester," and the "Oshkosh Sports Complex."

26. The Board of Regents was told that, with respect to the Anaerobic Biodigester:

a. The project was "a unique collaboration between the UWO Foundation, the University of Wisconsin Oshkosh, and BIOFerm™ Energy Systems."

b. The parties had "entered into a \$3.8 million financing agreement in 2010 to purchase property and fund sustainability project startup."

c. The biodigester would convert waste products into energy.

d. The biodigester would benefit the University's educational mission and move the school "further along the path to energy independence."

27. The Board of Regents was told that, with respect to the Oshkosh Sports Complex:

a. The Foundation had "assumed 'ownership' of facility and land in 2004."

b. The University had "committed staff and resources over 6 years to raise funds to make improvements."

- c. "\$1.2 million from student fees" had been raised for the project.
- d. Additional funds were to be raised and spent on renovations and upgrades in excess of \$10 million.
- e. The Complex "created approx. 400 jobs" and "generates an economic impact to the area in excess of \$25 [million] annually."

28. The Board of Regents was told that University funds were being used for these projects.

29. Also on or about October 8, 2010, the Board of Regents President, in broadcasted and published remarks, congratulated Chancellor Wells on the biodigester program and acknowledged the benefit of the program to the University.

30. The Board of Regents President further acknowledged that the biodigester project "is a collaborative effort with the Foundation."

## **II. February 7, 2013 Presentation**

31. On or about February 7, 2013, Wells and Sonnleitner presented and caused to be presented information to the Board of Regents, as set forth in the following paragraphs.

32. The Board of Regents was told that the biodigester projects and the hotel development project were "public/private business development partnerships."

33. The Board of Regents was told that the Rosendale biodigester would provide the following benefits to the University:

- a. "become a leader in renewal energy production, research and development";

- b. “be a[n] educational facility for students in our proposed baccalaureate program in Environmental Engineering Technology”;
- c. “increase the research and testing work done at the [University’s] ERIC lab which will also create additional revenue to support students and education programs”;
- d. “increase the number of scholarships and paid internships available for students”;
- e. “develop new and grow existing programs for students in curricular programs such as pre-Veterinarian, Environmental Studies, Engineering Technology, Microbiology, Chemistry, and Geology”;
- f. “develop related graduate programs”;
- g. “increase scientific, social and environmental research opportunities”;
- h. “develop the new center on rural community development”; and
- i. “offer outreach/training programs for K-12, businesses and municipalities.”

34. The Board of Regents also was told that, with respect to the Rosendale biodigester, the Viessmann Group—a German owner of the private partner on the development—had committed to providing the following benefits to the University:

- a. “dozens of paid internships for [University] Students at Viessmann”;
- b. “seminars for [University] Students in Germany”;

- c. “lectures by Viessman experts at [the University]”;
- d. “fund 2 full scholarships per year for [University] students”;
- e. “exchange program—bring up to 50 German students (per year)

to [the University]”;

- f. “custom middle level management training program for hundreds of Viessmann employees at [the University] provided by the College of Letters and Science and College of Business”;

- g. “custom top-level executive training program for Viessman employees at [the University] provided by the College of Letters and Science and College of Business”; and

- h. “a fully-endowed \$100,000 per year salary for the chair of Sustainable Technology in support of the emerging NEW ERA engineering degree program in environmental, electrical and mechanical technology majors.”

35. The Board of Regents also was told that, with respect to the Rosendale biodigester, Milk Source—the owner of the Rosendale Dairy—had committed to providing the following benefits to the University:

- a. “giving [the University] ownership of fiber (post-digested substrate)”;

- b. “developing and investing in research and education center”;

and

- c. “allowing [University] faculty and student researchers access to dairy and surrounding land.”

36. The Board of Regents also was told that, with respect to the Rosendale biodigester, other partners had committed to providing the University with the following benefits:

- a. “support for research opportunities for faculty and students”;
- b. “providing Post-doctoral positions at [the University]”; and
- c. “involving [University] faculty in cutting-edge research on fiber use.”

37. Also on or about February 7, 2013, Art Rathjen of the Foundation offered to provide the Board of Regents with detailed information regarding the formation, construction plans, and financing of the Foundation, including the collaborative benefits of the Foundation’s “partnership” with the University.

38. The Board of Regents declined the offer, citing “time constraints” and suggesting that Rathjen would be invited back at another time.

**F. “Comfort” Letters and Memoranda of Understanding**

**I. “Comfort” Letters**

39. A “comfort” letter or instrument has been explained in case law as follows:

A comfort instrument is normally given by a “third party” to assure a party to a transaction regarding some element of value or credit. The third party intends to provide an incentive for one of the principals to enter into a transaction, while not becoming legally responsible itself. The comfort instrument can be found in numerous fields of business and finance. They are generally viewed as not creating any legally enforceable obligations.

*Bluebonnet Savings Bank, F.S.B. v. United States*, 43 Fed. Cl. 69, 77 (Fed. Cl. 1999) (emphasis added), *rev'd on other grounds* 266 F.3d 1348 (Fed. Cir. 2001) (quoting Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Laws of Satisfaction"*—*A Nonunified Theory*, 24 Hofstra L.R. 349, 429 (1995)).

40. During the time period in question, federal banking Regulation AA, Subpart B, provided that a third-party guarantee of a bank loan must be memorialized by specific bank documents conforming to the "model notice" provided by the Federal Reserve Board. The notice, which is normally in addition to a separately signed obligation (such as the promissory note) must contain explicit warnings on when and how the debt may be collected from the third party. *See also* Federal Reserve Board, *Regulation AA Unfair or Deceptive Acts or Practices: Credit Practice Rule*, Consumer Compliance Handbook (2006).

41. Any "comfort" letters signed by Sonnleitner in this action were signed in his capacity as Vice Chancellor, in good faith, with the approval of the Chancellor.

42. The "comfort" letters at issue in this action were drafted by banks whose officials acknowledged and agreed that the letters did not create legally enforceable obligations.

43. Upon information and belief, the "comfort" letters at issue in this action were reviewed and approved by the Foundation, including its legal counsel.

44. The "comfort" letters at issue in this action did not conform to the above requirements of federal law to create a binding obligation.

45. The "comfort" letters were not guarantees, as alleged in the Complaint, and did not violate the Wisconsin Constitution or other applicable law.

## II. Memoranda of Understanding

46. The memoranda of understanding at issue in this action were a memorialization that the University, within its proper legal authority, would support the Foundation in the relevant projects and continue to financially assist as previously described.

47. Any memoranda signed by Sonnleitner in this action were signed in his capacity as Vice Chancellor, in good faith, with the approval of the Chancellor.

48. The Foundation understood, acknowledged, and agreed that the memoranda did not obligate the State of Wisconsin to guarantee any debt.

49. The financial institutions involved in the relevant financing understood, acknowledged, and agreed that the memoranda did not obligate the State of Wisconsin to guarantee any debt.

50. The Foundation never reported the memoranda as legally enforceable debt guarantees in its public IRS filings.

51. At the time the Foundation received the memoranda, it held net assets of approximately \$20 million.

52. The memoranda were in the best interest of the University and did not cause any financial harm to the University or the State of Wisconsin.

53. The memoranda were not guarantees, as alleged in the Complaint, and did not violate the Wisconsin Constitution or other applicable law.

## **G. Legal Claims**

### **I. Statutory and Common Law Indemnification against Plaintiff**

54. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

55. If Sonnleitner is found liable for any actions arising from the Complaint, he is entitled to indemnification from Plaintiff, pursuant to Wis. Stat. § 895.46 and Wisconsin common law.

56. The indemnification also includes Sonnleitner's reasonable legal fees, costs, and other expenses in defending this action.

### **II. Unjust Enrichment against Plaintiff and the Foundation**

57. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

58. As a result of the actions described in the pleadings, Sonnleitner conferred a benefit upon Plaintiff and the Foundation.

59. Plaintiff and the Foundation had knowledge of and appreciation for the benefit.

60. To the extent Sonnleitner is found to owe money to Plaintiff, the Foundation, or any other party, allowing Plaintiff and the Foundation to retain the benefit without paying the value thereof would be inequitable and unjust.

### **III. Offset against Plaintiff and the Foundation**

61. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

62. As a result of the actions described in the pleadings, Sonnleitner conferred a benefit upon Plaintiff and the Foundation.

63. Plaintiff and the Foundation had knowledge of and appreciation for the benefit.

64. To the extent Sonnleitner is found to owe money to Plaintiff, the Foundation, or any other party, that amount must be offset by the financial benefit obtained and currently possessed by Plaintiff and the Foundation.

#### **IV. Contribution against Plaintiff and the Foundation**

65. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

66. To the extent Sonnleitner is found to owe money to Plaintiff, the Foundation, or any other party, there is common liability among Sonnleitner, Plaintiff, and the Foundation.

67. The Complaint therefore seeks to assign to Sonnleitner an unequal proportion of the common burden.

#### **V. Declaratory Judgment against Plaintiff and the Foundation**

68. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

69. Pursuant to Wis. Stat. § 806.04, this Court should declare that the financial documents at issue in this action do not create a legally enforceable debt against the State of Wisconsin.

70. Pursuant to Wis. Stat. § 806.04, this Court should declare that any debt in this action is not the personal responsibility of Sonnleitner.

**VI. Breach of Duty of Good Faith against Plaintiff and the Foundation**

71. The allegations of paragraphs 1-53 of these Counterclaims and Third-Party Complaint are incorporated herein.

72. Any attempt by Plaintiff or the Foundation to hold Sonnleitner personally responsible for actions at issue herein is a breach of the obligations of good faith found in: (a) the employment contract between the University and Sonnleitner, and (b) agreements between the University and the Foundation.

**WHEREFORE**, Defendant and Third-Party Plaintiff Thomas G. Sonnleitner respectfully requests that this Court enter an order:

1. Dismissing the Complaint against Sonnleitner, with prejudice;
2. Entering judgment, including declaratory judgment, for Sonnleitner against Plaintiff and the Foundation;
3. Awarding damages, indemnification, offsets, and contribution to Sonnleitner;
4. Awarding Sonnleitner costs and attorney's fees; and
5. Granting such other relief as the Court deems just and equitable.

**JURY DEMAND**

Defendant and Third-Party Plaintiff Thomas G. Sonnleitner demands a trial by a jury of twelve.

Dated this 30th day of January, 2017.

**BISKUPIC & JACOBS, S.C.**

By: /s/ Steven M. Biskupic

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