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

SCOTT FORRESTER AND MICHAEL)
PAPADOPOULOS,)
)
Plaintiffs,)
)
v.)
)
THE KBOO FOUNDATION)
)
Defendants.)

Case No. 0902-02464
DEFENDANT’S TRIAL
MEMORANDUM

BACKGROUND

Plaintiffs are members of The KBOO Foundation. Plaintiff Forrester was a director of KBOO from his election to a one-year term on September 28, 2008 to February 23, 2009 as alleged in paragraph 8 of plaintiffs’ Amended Complaint. His tenure as a director was tumultuous. One month after his election, the KBOO Board found it necessary to send Mr. Forrester a letter describing his harassment of another director and his improper use of his position as a director in contacts with staff and consultants.

As to Mr. Forrester’s problem with another director, he claimed that Anthony Petchel, a volunteer director, was improperly elected. Despite the fact that it was explained that Mr. Petchel followed KBOO policy and joined prior to the election, Mr. Forrester made repeated contacts with Mr. Petchel challenging his right to be a director. Plaintiffs raised this matter in their original Complaint. (Initial Complaint, para 48.) They have since voluntarily dismissed this claim.

Regarding his contact with staff and consultants, Mr. Forrester was claiming a power to give directives to staff in his capacity as a director. As to consultants, Mr. Forrester should not

1 have been contacting them directly except upon authority of the Board, an authority he did not
2 have.

3 The Board suggested that they start anew and made some recommendations to Mr.
4 Forrester as to steps he could take in this regard. Mr. Forrester complied with these
5 recommendations for a short time but he was soon engaging in the same behavior. DID HE
6 WRITE APOLOGY TO AP? WHEN DID HE START MAKING DIRECTIVES TO STAFF
7 AGAIN?

8 About the same time, Mr. Papadopoulos started requesting, and then demanding, a copy
9 of the membership list. In each written demand, Mr. Papadopoulos stated that he intended to
10 use the list to conduct his own fundraising campaign for KBOO. When the KBOO station
11 manager, Arthur Davis, explained that he could not use the list for that purpose and provided
12 Mr. Papadopoulos with a copy of KBOO's counsel's legal opinion to that effect, Mr.
13 Papadopoulos refused to accept these explanations. He challenged the legal opinions and made
14 claims about his legal rights and KBOO's legal responsibilities into his communications. He
15 insisted that he had an absolute right to the list to conduct his own fundraising campaign for
16 KBOO. When he made his final demand, he asserted that the KBOO directors were violating
17 their legal duties and would liable in civil litigation if the list wasn't provided to him and he
18 again requested the list for the purpose of his own fundraising campaign.

19 Curiously, Mr. Papadopoulos does not now claim that his statutory rights were violated
20 by KBOO's refusal to let him use the membership list for his own fundraising. Instead, he is
21 relying on alternate purposes included in his final demand in his Claim for Relief against
22 KBOO.

23 On November 30, two months after he was elected to the Board and ten months before
24 the next election, Mr. Forrester sent an email to Mr. Davis announcing his candidacy for re-
25 election to the KBOO Board of Directors. He stated that he was getting started on his re-
26

1 election campaign and wanted a copy of KBOO's membership list for that campaign. Mr.
2 Forrester alleges that KBOO did not provide him with the list.

3 **RELEVANT STATUTES**

4 Plaintiffs allege that KBOO violated ORS 65.774 because they made a written
5 demand for the membership list and KBOO did not provide it. Subsection 3 of that statute
6 imposes certain standards on plaintiffs' written demand. ORS 65.774(3) states:

7 (3) A member may inspect and copy the records identified in subsection (2) of this
8 section only if:

9 (a) The member's demand is made in good faith and for a proper purpose;

10 (b) The member describes with reasonable particularity the purpose and the records the
member desires to inspect; and

11 (c) The records are directly connected with this purpose.
12

13 KBOO will show that plaintiffs' demands were not made in good faith or for a proper
14 purpose. KBOO will also show that Mr. Forrester did not describe his purpose with
15 reasonable particularity and that the records were not directly connected with his purpose.

16 ORS 65.224 also provides a process for a member to obtain a nonprofit corporation's
17 membership list. ORS 65.224 states:

18 **65.224 Members' list for meeting; attorney fees.** (1) A corporation shall prepare an
19 alphabetical list of the names, addresses and membership dates of all its members. If there
20 are classes of members, the list must show the address and number of votes each member is
21 entitled to vote at the meeting. The corporation shall prepare on a current basis through the
time of the membership meeting a list of members, if any, who are entitled to vote at the
meeting, but are not part of the main list of members.

22 (2) The list of members must be available for inspection by any member for the purpose
23 of communication with other members concerning the meeting, beginning two business days
24 after notice of the meeting is given for which the list was prepared and continuing through
the meeting, at the corporation's principal office or at a reasonable place identified in the
25 meeting notice in the city or other location where the meeting will be held. A member, the
26 member's agent or the member's attorney is entitled, on written demand setting forth a
proper purpose, to inspect and, subject to the requirements of ORS 65.774 and 65.782, to
copy the list at a reasonable time and at the member's expense, during the period it is
available for inspection.

1 (3) The corporation shall make the list of members available at the meeting, and any
2 member, the member's agent or the member's attorney is entitled to inspect the list for any
proper purpose at any time during the meeting or any adjournment.

3 (4) If the corporation refuses to allow a member, the member's agent or the member's
4 attorney to inspect the list of members before or at the meeting or copy the list as permitted
5 by subsection (2) of this section, on application of the member, the circuit court of the county
6 where the corporation's principal office, or if the principal office is not in this state, where its
7 registered office is or was last located, may enter a temporary restraining order or
8 preliminary injunction pursuant to ORCP 79 ordering the inspection or copying at the
corporation's expense and may postpone the meeting for which the list was prepared until the
inspection or copying is complete. The court may award reasonable attorney fees to the
prevailing party in an action under this subsection. The party initiating such a proceeding
shall not be required to post an undertaking pursuant to ORCP 82 A.

9 (5) Refusal or failure to prepare or make available the membership list does not affect the
10 validity of action taken at the meeting.

11 (6) The articles or bylaws of a religious corporation may limit or abolish the rights of a
member under this section to inspect and copy any corporate record.

12 (7) The articles of a public benefit corporation organized primarily for political or social
13 action, including but not limited to political or social advocacy, education, litigation or a
14 combination thereof, may limit or abolish the right of a member or the member's agent or
15 attorney to inspect or copy the membership list if the corporation provides a reasonable
means to mail communications to the other members through the corporation at the expense
of the member making the request. [1989 c.1010 §60; 1995 c.618 §41; 2005 c.22 §45]

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17 KBOO contends that ORS 65.224 is the exclusive method for a member to obtain the
18 membership list for purposes of the election of directors. KBOO raised this matter in its
19 Summary Judgment Motion. The court denied that part of the Motion. KBOO reasserts its
20 argument on this issue based on the Points and Authorities in its Summary Judgment Motion.

21 **PROPER PURPOSE AND GOOD FAITH**

22 Proper purpose has not been defined in ORS 65.774, the legislative history, or case
23 law. Case law in other jurisdictions relating to for-profit corporations provides some
24 guidance.

25 *Retail Property Investors, Inc. v. Skeens*, 471 S.E.2d 181, 183 (Va. 1996) (copy
26 attached, relevant portions highlighted), provides some guidance. The applicable statute,

1 Code § 13.1-771(C), is substantially similar to ORS 65.774. The court held that it was the
2 stockholder's burden to prove both that the demand was made in good faith and for a proper
3 purpose and that requires, "that a shareholder seeking corporate records pursuant to Code §
4 13.1-771(C)(2) has the burden of satisfying a trial court that he seeks such records for a
5 proper purpose, meaning that he is acting in good faith to protect his rights as a shareholder
6 and that the relief he seeks will not adversely affect the corporation's interests." *Skeens*,
7 *supra*, at 183. Similarly, plaintiffs in this case should have the burden of proving that they
8 were acting in good faith and for a proper purpose, that their purposes were to protect their
9 rights as members of KBOO and that their use of the list would not adversely affect KBOO's
10 interest.

11 Two of Mr. Papadopoulos' stated purposes fail on their face. He clearly could not
12 use the list to conduct his own fundraising campaign and he appears to now recognize that
13 since he does not allege that as a proper purpose. Mr. Papadopoulos' purpose of using the
14 member list to contact other members regarding a possible lawsuit is also improper. *Skeens*,
15 *supra*, at 183.

16 *Northwest Industries Inc. v. BF Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969) (copy
17 attached, relevant portions highlighted), is a Delaware case that also provides some definition
18 to the term "proper purpose". In that case, a shareholder made a request for the shareholder
19 list. The relevant statute is similar to ORS 65.774, including a requirement that the list be
20 requested for a proper purpose and that the purpose reasonably relate to the demander's
21 interest as a shareholder. The court held that a stated purpose of general intent to
22 communicate with stockholders regarding an upcoming shareholder meeting is insufficient.
23 The demander must also state the substance of the intended communication so that the
24 corporation could determine whether there was a reasonable relationship between the
25 communication and the demander's interest as a shareholder.
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1 ORS 65.774(3)(b) essentially codifies the requirement that the demander must state
2 the substance of the communication. It provides that a member must describe the purpose
3 with “reasonable particularity”. Mr. Forrester did not describe the substance of his intended
4 communication. In fact, he has stated that he did not have anything in particular that he
5 wanted to communicate to other KBOO members.

6 Mr. Papadopoulos’ contends that, because his December 12 demand stated proper
7 purposes, KBOO had the burden of providing him with the list and somehow restricting him
8 from using the list for the improper purposes stated in that demand. The statutes do not
9 create such a procedure nor do the statutes place any such burden on a nonprofit corporation.
10 Under the principles of equity that Mr. Papadopoulos is proceeding and the authority of
11 *Skeens, supra*, KBOO contends that Mr. Papadopoulos had the burden to make a demand that
12 didn’t include clearly improper purpose.

13 KBOO also believes that the other two purposes stated by Mr. Papadopoulos should
14 be found to be improper. He wants the list to solicit members to call a special membership
15 meeting and to propose Bylaws amendments. Mr. Papadopoulos will not be able to prove
16 that these actions would not harm KBOO. In addition, these purposes were not stated with
17 reasonable particularity. Mr. Papadopoulos did not state the purpose of a special
18 membership meeting in anything other than general terms. He needed to state the specific
19 purpose for which such a meeting would be held. This is supported by *Northwest Industries,*
20 *supra*, and ORS 65.214(3)(c), which states that notice of a special membership meeting must
21 include a description of the purpose or purposes for which the meeting is called.

22 Mr. Papadopoulos’ stated purpose of contacting members about proposing Bylaw
23 amendments is also vague. He does not state the substance of the amendments that he
24 intends to propose. Had he done so, KBOO’s Board could have decided to submit those
25 proposals to a vote of the membership, thereby avoiding the need of contacting members for
26 this purpose and potentially harming KBOO with that contact.

