

Opening Statement in

Forrester v. KBOO

The Legal Issues

This case involves legal issues that have not been addressed in Oregon. There is no question that a nonprofit corporation has to maintain list with names and addresses; no question that member can demand the list and it has to be provided in certain circumstances. However, this case presents a number of other questions that are not clearly answered, either in the statutes or in case law. These are:

1. What is a proper purpose?
2. What is good faith in this context?
3. How specific does a member have to be to meet the requirement of “reasonable particularity” in stating their purpose?
4. What is the interaction between 65.224 and 65.774?
5. Who has the burden of proving or disproving proper purpose and good faith?
6. Should the court balance the purposes expressed by the demander with the nonprofit’s proper purposes?
7. Should the court balance the good faith of the demanding member with the good faith of the nonprofit organization?
8. Should the court balance the purposes expressed by the demander with the potential harm to the nonprofit?

9. How does a nonprofit respond to a member's written demand that contains a clearly improper purpose when it also contains arguably proper purposes?

Whether we can or need to answer all of these questions, we intend to introduce evidence showing:

10. That plaintiffs did not have a proper purpose
11. That their stated purposes were not stated with reasonable particularity
12. That they were not acting in good faith because they had ulterior motives and because their stated purposes were not their real purposes
13. That both their stated purposes and their actual purposes created a foreseeable risk of significant harm to KBOO
14. That KBOO acted in good faith in its responses to plaintiffs' demands for KBOO's membership list
15. That KBOO had legitimate and proper purposes for refusing to provide the list on the 2 occasions alleged

The Story

This saga starts late summer 2008. Scott Forrester, a longtime radio show host, announced he was running for KBOO's Board. Apparently he was upset at the changes occurring at KBOO. He thought it was becoming too commercial. He particularly didn't like programming changes and thought that KBOO should cut expenses by cutting staff rather than raising revenue.

When Scott Forrester announced his candidacy, he started asking for every kind of corporate record he could think of, including many that a nonprofit is not required to maintain, such as the ballots from the previous years, ten years of audited financial statements, all of the working papers of KBOO's CPA and all the minutes of every KBOO committee. In many cases, although not all, Arthur Davis provided these documents to Scott Forrester even when not required by statute.

Scott Forrester also started asking for membership lists, which was his right since he was running for the Board. The problem was that he couldn't seem to hang on to the lists-or at least that's what he told Arthur Davis. Mr. Davis put the list in Mr. Forrester's cubby one time but Forrester somehow didn't get it. Then Mr. Davis gave him the list and Mr. Forrester's wife mistakenly recycled it. Then Mr. Davis gave him the list and Forrester couldn't find it. All in the space of a few days.

I don't believe Mr. Forrester's claims that he didn't get or somehow lost these lists. He was able to determine that Anthony Petchel wasn't a member of KBOO at some point before Mr. Petchel's election to the Board. Scott Forrester raised this matter over and over, regardless of how many times he was told that Mr. Petchel became a member prior to his election to the Board. Forrester had two 1-hour phone calls with Mr. Petchel to try to convince him to resign. Forrester brought this up at Board meetings and in communications to the Board. Forrester and Papadopoulos originally included this as a claim in the initial Complaint filed in this lawsuit.

Scott Forrester also somehow determined that an employee, John Mackey, was not on the membership list. Employees are automatically members under KBOO's Bylaws. Mr. Forrester called Mr. Mackey and asked him if he got a ballot for the election because he wasn't listed as a member.

There is one more fact that leads to the conclusion that Scott Forrester actually had the lists that he claims that he lost. Mr. Forrester told Arthur Davis that he was looking for “patterns” in the lists. He wouldn’t have been able to find “patterns” unless he had several versions of the list. The evidence indicates that Mr. Forrester was lying when he claimed that he didn’t have the lists he was previously provided. Instead, he was trying to get several versions of the list over time in order to look for “patterns”.

As soon as he was elected, Scott Forrester started abusing his directorship. He started making demands of staff, often requiring them to defer their station duties to deal with him. He tried give directions to staff as if he was their boss. He contacted KBOO’s consultants and professionals directly without any request or authority from the Board

The rest of the Board felt compelled to take action and they did so quickly. The Board voted to send Forrester a letter dated one month after the election describing his violations of proper director behavior and KBOO culture and recommending actions that he take to correct these issues, recommendations that Mr. Forrester complied with. Unfortunately this didn’t stop him.

About the same time, Michael Papadopoulos started asking for records. He asked for draft Board minutes in late September and didn’t accept the secretary’s explanation that, since the minutes hadn’t been approved by the Board yet, she had to discuss his request with the Board. In October, Mr. Papadopoulos started making repeated requests for the membership list for purposes of fundraising. There are a number of emails between Papadopoulos and KBOO staff regarding this matter. Michael Papadopoulos refused to accept any explanation about why he couldn’t use the list for fundraising or about KBOO’s right to protect its members’ privacy. He started citing his interpretation, a

misinterpretation, of Oregon statutes and KBOO Bylaws to support his claim that he was absolutely entitled to the list to conduct his own fundraising campaign.

When his less formal attempts to acquire the list failed, Michael Papadopoulos twice requested the list in formal certified letters. He continued to insist he had a right to fundraise. This was the only purpose stated in his November 12 and November 22 letters. He sent emails contemporaneously with the certified letters. Both emails contained other information. The November 24 email was a lengthy screed about his legal rights to the list, the legal risk to KBOO and the Board, the substantive reasons he thought it was a good idea, the reasons that KBOO's concerns about member privacy were irrelevant and the reasons that he couldn't work with staff on fundraising.

When this didn't work Mr. Papadopoulos sent his final written demand for the list in the form of a December 12 email. He started claiming that individual directors would be liable if they didn't comply with his request and implying that legal action would be filed against them—which of course occurred. He stated a primary purpose of fundraising, then he made three secondary (or as he called them, supplementary) requests. Despite the fact that the statutes don't provide any guidance and Mr. Papadopoulos had researched the statutes, he didn't say anything about how KBOO might provide the list for some but not all of stated purposes.

It's important to note that Mr. Papadopoulos wanted the email addresses of members—information to which he clearly wasn't entitled. Arthur Davis told him he wasn't entitled to email addresses. Papadopoulos rejected this statement. This is important because KBOO had no reason to believe that, if it provided the names and addresses only, this would satisfy Mr. Papadopoulos' demands.

Michael Papadopoulos and Scott Forrester were acting in concert, even then. Forrester told Mr. Petchel that Mr. Papadopoulos would be good replacement for Mr. Petchel. Mr. Forrester supported Papadopoulos' list request. Mr. Forrester asked that he and the other directors get copies of all of KBOO's legal counsel's emails about the member list issue, that the issue be discussed at the December Board meeting and that KBOO's attorney be present. Forrester also said he would be proposing a policy about director's and member's access to KBOO records modeled on Freedom of Information Act and Oregon open records laws by email that was directed "TO" Mr. Papadopoulos and Judy Fiestal and cc'ed to rest of the Board. Mr. Forrester never made such a proposal just like he never tried to accomplish his stated goals through the parliamentary procedures available to any director or through the cooperative methods that were offered by KBOO Board and staff.

Five days later, on November 30, Scott Forrester emailed Arthur Davis. He announced his candidacy for the Board election to be held in 2009. A few things are important about this announcement. First, this was just two months after the last election at which Forrester had been elected and 10 months before the 2009 election. Forrester had been provided with three copies of the list less than three months before this request. He said that said he wanted to communicate with members about "issues of interest" but he didn't provide any particularity as to what those issues of interest were. Perhaps most important, Forrester did not have anything in particular that he wanted to communicate to the members at that time. It looks like this was really an attempt to look for "patterns" in the list rather than a good faith desire to communicate with members.

After early December 2008, there were no more written communications between Forrester or Papadopoulos and KBOO regarding the membership list requests. It doesn't appear that there was much if

anything in the way of verbal communications. Forrester and Papadopoulos did not make any more requests for the list until the 2009 election campaign. Forrester and Papadopoulos did not follow up with KBOO to ask about the response to their requests. This was probably in part because that was the winter it started snowing in mid-Dec and snow was on the ground for a month. The December Board meeting was cancelled. Primarily, however, it was due to the fact that Forrester and Papadopoulos were causing other problems.

For instance, Mr. Forrester was claiming that the 2008 election, the election at which he was elected, was illegal because a quorum wasn't present. He was claiming that an amendment adopted at that meeting was invalid based on the quorum claim. He was claiming that the Board had illegally invaded the principal of KBOO's endowment and continued to make this claim publicly despite the fact that the Board had authorized use of income only and the principal was never invaded.

SCOTT FORRESTER's other interpersonal relations with staff, directors and members were hostile, confrontational and demanding. He called Tremaine Arkley at 8 in the morning and yelled at him because Mr. Arkley had sent an innocent, non-confrontational letter saying that Mr. Forrester had some good ideas and Mr. Arkley wanted to help. He tried to order Mr. Mackey to take programming to a generator during a power outage even though it was clear that the power would be restored promptly. He attended a Program Committee meeting and said he was appearing as a Board member and he was insisting that Committee halt its work—this despite the fact that the Committee had been charged by the Board to make recommendations about program changes. Mr. Forrester also said they shouldn't hold a retreat. He called them "cowards" when they wouldn't follow his requests despite the fact that

the Program Committee was charged by the Board and Mr. Forrester said he opposed the Board's goals.

By late January, it was clear that the Board again had to try to rein in Forrester's behavior. He was making it difficult for staff, especially Mr. Davis, to do their job of running the station. He was alienating members whose volunteer work is key to KBOO operations. The October 28, 2008 letter hadn't worked. Informal discussions didn't work. Mr. Forrester was out of control and he was interfering in KBOO's operations.

The Board finally determined that it had to take more official action. The Board set a special Board meeting for February 19, 2009 to review the Complaints against Forrester and to discuss options. Mr. Forrester was given a summary of the complaints and he was invited to attend and discuss the complaints and possible resolutions. A facilitator was hired to help with the meeting.

Scott Forrester came to the meeting but he wouldn't participate in discussion. After introductions, Forrester announced he wouldn't stay for the meeting and he wanted to make a statement. He then insisted that the meeting be cancelled and went into numerous reasons why the process was improper despite the fact that he had been given fair notice of the meeting and the complaints made against him and had been invited to defend himself and discuss not only the complaints but the actions that should be taken. Forrester refused to participate further and left.

Earlier that same day plaintiffs filed this lawsuit. The Complaint filed on February 19, 2009-particularly paragraphs 2 to 10-describes the real purpose of Forrester's and Papadopoulos' litigation. This lawsuit isn't about access to the list. That relief is essentially moot. The 2009 election

has come and gone. Forrester was provided a copy of the list-or at least many opportunities to pick it up at the station. He didn't use the list to communicate with the members about his campaign—thereby putting the veracity of his November 30 purpose in doubt. As to Mr. Papadopoulos' request, the derivative lawsuit was filed so he didn't need the list for that purpose. If he was given the list he is requesting-the version he would have received if KBOO had given him the list demanded on December 12, 2008-it isn't going to be much help getting Bylaws amendments or calling a special meeting. In fact, there apparently was no need for the list for these purposes because Michael Papadopoulos could have tried to accomplish whatever he intended to accomplish with a meeting or Bylaws amendments at the 2009 annual membership meeting. He didn't bother to propose any amendments or resolutions at that meeting. Clearly, his requests for the list to call a special meeting or to propose Bylaws were just a ruse.

NO—this lawsuit isn't about the list. Those claims were only included in the first place because they are the only claims that gave Forrester and Papadopoulos a chance to recover attorney fees.

NO—this lawsuit is just an extension of their political battle, a battle that only they wanted and a battle that they were losing badly. So they filed this lawsuit. And when their counsel figured out that most of their claims were not supported by the law, by the facts or by logic, they dismissed those claims and just kept the claims that might have some surface appeal and, more important, claims under which they could recover attorney fees. Because all Forrester and Papadopoulos really wanted was leverage to try to win a meaningless battle.

WINNING is all this lawsuit is about today. Forrester and Papadopoulos can't accept that they have lost. They can't accept that the great majority of the democratically elected Board disagrees with them.

They can't accept that the membership does not agree with them. They can't accept any of the changes that a majority of the Board and the active volunteers of KBOO believe are absolutely necessary for the future health and existence of KBOO. And, because plaintiffs can't accept that they lost, we are here today arguing about whether Forrester and Papadopoulos should be provided with outdated lists that won't accomplish any purpose. And when this is over, we have no doubt that the court will agree that Forrester and Papadopoulos did not and are not acting in good faith and that their purposes are not proper.