

1 pursuant to ORS 65.774 , as set forth in Plaintiffs’ Second Claim for Relief,

2 (2) whether Defendants unlawfully failed to provide Plaintiff Michael Papadopoulos with
3 the membership lists requested in his First Supplementary Request, Second Supplementary
4 Request, and Third Supplementary Request of December 12, 2008 to The KBOO Foundation,
5 pursuant to ORS 65.774 , as set forth in Plaintiffs’ Second Claim for Relief, and ,

6 (3) whether Plaintiffs have properly asserted a nonprofit corporation derivative action
7 pursuant to ORS 65.174, which was brought by Plaintiff Scott Forrester at a time that he was a
8 director of the KBOO Foundation, and in the right of the KBOO Foundation, to redress the
9 actions of the named Defendants, acting in their official capacity as members of the board of
10 directors of the KBOO Foundation, in failing to provide KBOO members with the membership
11 lists they requested from the nonprofit organization which have been described above, as set
12 forth in Plaintiffs’ First Claim for Relief in this action.

13 As Plaintiffs will demonstrate herein, based upon the facts as set forth in the Declarations
14 of Plaintiffs filed herewith, the supporting evidence, and the applicable law, Defendants are
15 clearly not entitled to Summary Judgment in this action as a matter of law..

16 II. PLAINTIFF FORRESTER’S MEMBERSHIP LIST REQUEST

17 The gravamen of Defendants arguments with respect to Plaintiffs’ Second Claim For
18 Relief, concerning Plaintiff Scott Forrester’s November 30, 2008 request for KBOO Foundation
19 membership list records, is Defendants’ mistaken premise that this nonprofit membership request
20 is not within the scope or otherwise authorized by ORS 65.774, and is instead controlled solely by
21 reference to ORS 65.224. *See* Defendants’ Summary Judgment at 4-6. However, Defendants fail
22 to understand that the legislature has clearly created two fully independent and non-exclusive
23 mechanisms for members to obtain access to membership records of a nonprofit organization.

24 While Defendants are correct that ORS 65.224 provides one specific mechanism for
25 members to obtaining a list of a nonprofit organization’s members, for the limited purpose of
26 communicating with other members concerning a membership meeting, and provides a specified

1 time period that a nonprofit organization must, as a matter of law, make its membership lists
2 immediately available to its members upon request, see ORS 65.224, it is also beyond dispute that
3 the Oregon legislature also created an additional and independent mechanism for members to
4 obtain access to a nonprofit corporation's records, including membership lists, **at any time**, for
5 proper purposes. *See* ORS 65.774(2)c - (3). There is certainly no indication in either of these
6 statutory provisions, ORS 65.224 or ORS 65.774, that suggest that either section was ever
7 intended to bar a member from using the other statutory mechanism to obtain membership records
8 from a non-profit organization as suggested by the Defendants in this action.

9 A close review of the two statutes discussed above (ORS 65.224 and ORS 65.774)
10 demonstrate that both expressly provide mechanisms for members to access and obtain copies of
11 membership lists, and that each contain some limitations as to membership access rights.

12 Under ORS 65.224, a member can obtain a copy of a nonprofit organization's membership
13 list, see ORS 65.774(2)c - (3), but only after giving the corporation written notice of a demand to
14 inspect and copy the records requested, *see* ORS 65.774(1), and only if the member's request is
15 made in good faith and for a proper purpose, if the request for records describes with reasonable
16 particularity the records sought and their purpose for seeking said records, and only if the records
17 are in fact connected with the stated purpose of the records request. *See* ORS 65.774.¹

18 In contrast, ORS 65.224 provides a separate mechanism for immediate access to a
19 nonprofit organization's membership list, without requiring a demand five days in advance, but
20 only within a specified time period (beginning two business days after notice of a membership
21 meeting and ending through the membership meeting), and only for the limited purpose of
22 "communication with other members concerning the meeting." *See* ORS 65.224(2). This section

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24 ¹ The legislature also expressly provided for an express mechanism for seeking judicial
25 review if a nonprofit organization fails to provide the records requested by member under ORS
26 65.774. *See* ORS 65.781.

1 does not contain any requirement that the requester identify a good faith purpose (since this
2 statutory provision already indicates the sole purpose for which membership lists can be provided
3 under this section). *Id.*

4 The plain language of these two statutes does not at all support Defendants argument that
5 one bars the other, *see PGE v. Bureau of Labor & Industries*, 317 OR 606, 610- 612 (1993), and
6 neither Defendants’ cases, nor their resort to general maxims of statutory construction are on point
7 to the issue of whether these provisions should be read to give meaning to both provisions as the
8 legislature clearly intended. The legislature has expressly indicated that, in construction of inter-
9 related statutory, a court should, wherever possible, interpret provisions in a manner that “will
10 give effect to all.” *See* ORS 174.010 (General rule for construction of statutes). The Oregon
11 Supreme Court has repeatedly emphasized this point, expressly holding that “when multiple
12 statutory provisions are at issue in a case, this court, if possible, must construe those statutes in a
13 manner that ‘will give effect to all’ of them.” *Powers v. Quigley*, 345 Or 432, 438 (2008). (citing
14 ORS 174.010 and *State v. Guzek*, 322 Or 245, 268 (1995)).

15 Plaintiff Forrester’s request was expressly made pursuant to ORS 65.774, *see* Declaration
16 of Forester (filed herewith),and asserted a proper purpose for requesting KBOO membership list
17 record therein. *Id.* To the extent that Defendants argue that this issue is resolved by reference to
18 ORS 65.224, Defendants are simply incorrect, as a matter of law, in asserting that separate statute
19 has any bearing or preclusive effect on the application of ORS 65 .774 in the case at hand. To the
20 extent that Defendants assert factual issues that are in dispute, as to the good faith purpose of
21 Plaintiff’s FOIA request, those issues are clearly material factual matters in dispute, and for which
22 Summary Judgment is clearly inappropriate in this action. *See* ORCP 47. Therefore, for the
23 reasons set forth above, Defendants Motion for Summary Judgment as to this claim (Plaintiffs’
24 Second Claim For Relief) must clearly be denied as a matter of law.

1 III. PLAINTIFF PAPADOPOULOS'S MEMBERSHIP LIST REQUEST

2 The issues presented in Defendants' Summary Judgment Motion as to Plaintiff's Third
3 Claim for Relief, concerning Plaintiff Michael Papadopoulos, appear to be largely concern issues
4 of fact, which are not appropriate for Summary Judgment per ORCP 47. *See* Defendants'
5 Summary Judgment Motion at 8-12.

6 Plaintiff Papadopoulos has squarely addressed those factual issues, challenging the "good
7 faith purpose" of his membership list records requests set forth in his First Supplementary
8 Request, Second Supplementary Request, and Third Supplementary Request of December 12,
9 2008 to The KBOO Foundation. *See* Declaration of Papadopoulos (filed herewith). As noted in
10 Defendants Summary Judgment briefing, Plaintiff Papadopoulos's specific requests of December
11 12, 2008 at issue in this action are alleged by Defendants not to be a "proper purpose" on the basis
12 that he had made other records requests for membership lists that have been denied by the KBOO
13 Foundation as not being proper purposes. *Id.*

14 Although Defendants argue at some length that they had no duty to provide Plaintiff
15 Papadopoulos with the membership lists that he had requested in an electronic form, **it is**
16 **undisputed that Defendants have expressly indicated that they will not provide the**
17 **membership lists requested by this Plaintiff for the purposes that he has requested in any**
18 **format** on the grounds that Defendants claim that they are not proper purposes. *See* Defendants'
19 Summary Judgment Motion at 10-12. Therefore, although Plaintiff Papadopoulos has indicated in
20 his declaration, he seeks the membership lists for these purposes in any form or format, the
21 Defendants are on record as taking the position that they will not provide even Plaintiff with paper
22 copies of these membership list records for the purposes set forth in his First Supplementary
23 Request, Second Supplementary Request, and Third Supplementary Request of December 12,
24 2008 to the KBOO Foundation, which they claim to be "improper purposes". *Id.*

25 Plaintiffs would also observe that Defendants' assertion that there is not a "good faith
26 purpose" in Mr. Papadopoulos's First Supplementary Request, Second Supplementary Request,
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1 and Third Supplementary Request of December 12, 2008, on the basis of these other requests is
2 not consistent with the fact that Plaintiff was provided with copies of the organization's
3 membership list for use in his 2009 KBOO board candidacy, and at no time ever used the KBOO
4 membership list for any unauthorized or improper purpose. *See* Declaration of Papadopoulos ¶ 8.

5 In sum, all of the issues raised by Defendants addressing Plaintiff Papadopoulos's
6 membership list request at issue in Plaintiffs' Third Claim for Relief center upon **factual issues**
7 and implications of that Plaintiff's *mens rea* / state of mind, to support the Defendants' arguments
8 as to the alleged "improper purpose" of these requests. It has been suggested by Defendants, that
9 if this Plaintiff made other requests that were denied by KBOO, then it follows (according to
10 Defendants) that all subsequent record requests to the organization must also be for an improper
11 purpose. These type of factual allegations and innuendos are not issues for which Summary
12 Judgment is appropriate as to this claim, particularly as all of the alleged "facts" presented by
13 Defendants as to these issues have been squarely addressed and rebutted by Plaintiffs in the
14 Declaration of Plaintiff Papadopoulos, filed herewith. *See* Declaration of Papadopoulos.

15 IV. PLAINTIFFS' NON-PROFIT CORPORATION DERIVATIVE ACTION

16 As set forth in Plaintiffs' pleadings as to Plaintiff's First Claim for Relief, and as further
17 supported by the Declaration of Scott Forrester filed herewith, Plaintiffs have met all of the
18 necessary elements for bring a nonprofit corporation derivative action under ORS 65.174.
19 Moreover, Defendants' Summary Judgment Motion as to this claim appears to express a
20 fundamental misunderstanding of the nature of ORS 65.174 derivative actions, which provides
21 jurisdiction to bring an action brought "in the right" of a corporation. Defendants appear to confuse
22 a derivative action, brought to redress the improper actions of the board of directors of a
23 corporation, with a third party claim brought to redress actions of unrelated parties. *See e.g.*
24 Defendants' Summary Judgment Motion at 13 (discussing *Hampton Tree Farms, Inc. v. Jewett*,
25 125 Or app 178 (1994), a case which has nothing whatsoever to do with the derivative action
26 issues at issue in the present action).

1 In the present action, Plaintiff Forrester, it is undisputed that was a director of the KBOO
2 Foundation at the time that this action was filed, see Declaration of Forrester ¶ 2, and Mr. Forrester
3 expressly avers in Plaintiffs' pleadings and in the Declaration filed herewith, that he has brought
4 this action in the right of the corporation, to redress the actions of the KBOO board members,
5 acting in their official capacity, who have failed to provide KBOO members with the nonprofit
6 organization's records in manner required by law. *See* Declaration of Forrester ¶ 3.

7 To the extent that Defendants seek to challenge these factual issues, those factual disputes
8 are clearly matters for trial, and Defendant is not entitled to Summary Judgment as a matter of law
9 by virtue of resting on their own factual assertions suggesting this action was not brought on behalf
10 of the KBOO Foundation, allegations which Plaintiff Forrester has squarely addressed in his
11 declaration, *see* Declaration of Forrester (filed herewith) Plaintiffs are certainly prepared to further
12 address each of the factual assertions made by Defendants at the trial in this matter, to the extent
13 that Defendants do not concede these issues in their reply..

14 Plaintiffs would observe that this is not in any respect a "third party claim" as suggested by
15 Defendants Summary Judgment Motion, and Defendants extensive discussion of those cases and
16 issues involving third party claims has no bearing or relevancy whatsoever with the claims
17 presented in the present action. Plaintiffs will not belabor that issue further, since it is clear that
18 Defendants are just entirely off point to the issues presented in the instant action with that
19 argument..

20 Plaintiffs would also observe that, contrary to the assertions of Defendants, the current
21 KBOO Board, in their official capacity, are clearly both necessary and appropriate parties to this
22 action, in order for Plaintiffs to obtain the relief which they are requesting pursuant to ORS 65.174
23 in this action. The existing KBOO Board's actions, in their official capacity, in refusing to provide
24 the membership lists requested by KBOO members as required by law, are central to the claims
25 presented in Plaintiffs' derivative action, *see e.g. Zidell v. Zidell, Inc.*, 277 Or 413, 418 (1977)
26 (discussing the legal responsibilities of individual board members to the members of a

1 corporation); *see also Chiles v. Robertson*, 94 Or App 604, 620-621 (1989) (same), and these board
2 members are also necessary parties for Plaintiffs to obtain the relief requested in this action in
3 obtaining the membership list records they seek, as set forth in the present derivative action.

4 V. CONCLUSION

5 Therefore, for all of the reasons set forth above, and within the supporting Affidavits and
6 evidence filed in this matter, the Court should deny Defendants' Motion for Summary Judgment.

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8 Respectfully submitted 15th day of March, 2010.

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1 **CERTIFICATE OF SERVICE**

2
3 I certify that on the 15th day of March, 2010, I served a true copy of the foregoing
4 PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on
5 the following as listed below by:

6
7 (____) BY FAX: Facsimile transmission (followed up by hand or
mail delivery):

8 (____) BY MAIL: Depositing in the United States mail a true copy
9 thereof, enclosed in a sealed envelope with postage paid and
addressed to the last known address of that party: or

10 (____) BY EMAIL: By sending a PDF file of this filing to the email address of
11 Defendants' counsel listed below.

12 Scott O. Pratt
13 Attorney At Law
14 The Jackson Tower, Ste. 1200
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Portland, OR 97205

15
16 DATED this March 15, 2010.

17
18 IRVING & STOTTER LLP

19
20

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