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4 **IN THE CIRCUIT COURT OF THE STATE OF OREGON**
5 **FOR THE COUNTY OF CLACKAMAS**
6

7 TIM REEVES, DAVID TERRY, M
8 CARLING, GREG G BURNETT, and
9 RICHARD BURKE, as Members and
Officers of the LIBERTARIAN PARTY
OF OREGON,

10 Plaintiffs,

11 vs.

12 WES WAGNER and LIBERTARIAN
13 PARTY OF OREGON,

14 Defendants.
15

Case No. CV 12010345

WES WAGNER'S ORCP 21
MOTIONS

ORAL ARGUMENT REQUESTED

16 Time required for argument: 30 minutes

17 Telecommunications requested: No

18 Offices more than 25 miles from courthouse: No

19 Court reporting services requested: No

20 Defendant's First Appearance Fee \$240

21 Defendant, Wes Wagner ("Wagner") is represented by James E. Leuenberger of James E.
22 Leuenberger, P.C., 4500 SW Kruse Way, Suite 100, PO Box 1684, Lake Oswego, OR 97035.
23 Defendant, Libertarian Party of Oregon ("LPO") is represented by C. Robert Steringer of Harrang
24 Long Gary Rudnick PC, 1001 SW Fifth Avenue, 16th Floor, Portland, Oregon 97204. Plaintiffs
25 are represented by Tyler Smith and Nathan Goin of Tyler Smith & Associates, P.C., 181 N. Grant
26 Street, Suite 212, Canby, OR 97013.

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Certificate of Compliance

Pursuant to UTCR 5.010, Wagner hereby certifies that his counsel conferred with plaintiffs' counsel concerning the issues in dispute and a resolution was not reached.

Incorporation of Rule 21 Motions by Defendant Libertarian Party of Oregon

Wagner adopts and incorporates the Rule 21 Motions by Defendant Libertarian Party of Oregon.

Motions

1 – Strike ORCP 21E – Irrelevant Pleading

The words, “allegedly acting as Chairperson of the Libertarian Party of Oregon” as they appear in the caption of the Complaint (immediately after “Wes Wagner”) should be stricken as they are irrelevant. They are also argumentative.

Points and Authorities

ORCP 21E says, “the court may order stricken: (1) any ... irrelevant pleading....”

2 – Dismiss ORCP 21A(1) Lack of Jurisdiction Over the Subject Matter

This court is without jurisdiction to determine intraparty political disputes.

Points and Authorities

Wagner adopts and incorporates the arguments contained in LPO's Motion 1 – Plaintiffs seek relief that is not allowed under Oregon statutes governing political parties and which would constitute an unconstitutional foray into the inner workings of a political party.

3 – Dismiss ORCP 21A(4) Plaintiffs do not have the Legal Capacity to Sue

Plaintiffs do not have the legal capacity to sue.

Points and Authorities

Plaintiffs allege that ORS 65.084 provides them with a remedy. ORS 65.084 provides:

(1) Except as provided in subsection (2) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(2) A corporation's power to act may be challenged:

- 1 (a) In a proceeding by a member or members, a director or the Attorney General against
2 the corporation to enjoin the act;
3 (b) In a proceeding by the corporation, directly, derivatively or through a receiver, a
4 trustee or other legal representative, including the Attorney General in the case of a
public benefit corporation, against an incumbent or former director, officer, employee or
agent of the corporation; or
(c) In a proceeding under *ORS 65.664*.

5 (3) In a proceeding under subsection (2)(a) of this section to enjoin an unauthorized
6 corporate act, the court may enjoin or set aside the act, if equitable and if all affected
7 persons are parties to the proceeding, and may award damages for loss other than
anticipated profits suffered by the corporation or another party because of enjoining the
unauthorized act.

8 Pursuant to the Complaint, all plaintiffs are members of LPO and are suing in that capacity.

9 Pursuant to the Complaint, all plaintiffs allege and assert that the 2009 LPO Bylaws remain in
10 effect.

11 Pursuant to 2009 LPO Bylaws Article III, §2:

12 Full voting membership in the LPO shall be open to any individual who submits a
13 completed application to the LPO and pays such dues as may be in effect at the time of
14 application. Dues for membership in the LPO will be equivalent to the Oregon Political
Tax Credit as set for an individual. Only LPO members who pay dues and keep them
current may hold LPO office and/or participate as voting delegates at LP National
conventions and LPO Special or annual business conventions.

15 Pursuant to 2009 LPO Bylaws Article III, §4:

16 Membership remains in effect for one (1) year following the date of application or the
17 date of payment of dues, whichever comes later, unless terminated under the provisions
of this article.

18 None of the plaintiffs paid their LPO dues or filed LPO membership applications within 12
19 months of the filing of the Complaint on January 16, 2012. Declaration of Wes Wagner.

20 Pursuant to 2009 LPO Bylaws Article III, §2 and §4, no plaintiff was a member of the LPO
21 when the Complaint was filed.

22 According to the plaintiffs' allegations and the declaration of Wes Wagner, plaintiffs are not
23 members of the LPO and do not have the legal capacity to sue.

24 **4 – Dismiss ORCP 21A(7) Plaintiffs have failed to join necessary parties**

25 Plaintiffs are not all of the LPO officers they say were elected in May 2011. The missing
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1 alleged LPO officers are necessary parties.

2 Plaintiffs have not sued or joined all LPO officers and directors whom plaintiffs claim are
3 holding office in violation of the 2009 LPO Bylaws. Such persons are necessary parties.

4 **Points and Authorities**

5 This section is to supplement the points and authorities made by LPO in its Rule 21
6 Motions.

7 ORS 65.084(3), *supra*, a court is powerless to enjoin an act unless “all affected persons are
8 parties to the proceeding.”

9 ORCP 29 reads in part:

10 **A Persons to be joined if feasible.** A person who is subject to service of process shall be
11 joined as a party in the action if (1) in that person's absence complete relief cannot be
12 accorded among those already parties, or (2) that person claims an interest relating to the
13 subject of the action and is so situated that the disposition in that person's absence may
14 (a) as a practical matter impair or impede the person's ability to protect that interest or (b)
15 leave any of the persons already parties subject to a substantial risk of incurring double,
multiple, or otherwise inconsistent obligations by reason of their claimed interest. If such
person has not been so joined, the court shall order that such person be made a party. If a
person should join as a plaintiff but refuses to do so, such person shall be made a
defendant, the reason being stated in the complaint.

16 **B Determination by court whenever joinder not feasible.** If a person as described in
17 subsections A(1) and (2) of this rule cannot be made a party, the court shall determine
18 whether in equity and good conscience the action should proceed among the parties
19 before it, or should be dismissed, the absent person being thus regarded as indispensable.
20 The factors to be considered by the court include: first, to what extent a judgment
21 rendered in the person's absence might be prejudicial to the person or those already
parties; second, the extent to which, by protective provisions in the judgment, by the
shaping of relief, or other measures, the prejudice can be lessened or avoided; third,
whether a judgment rendered in the person's absence will be adequate; fourth, whether
the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

22 All claimants to LPO offices pursuant to the 2009 LPO Bylaws and all current officers and
23 directors are necessary parties to this suit. Until they are all parties to this suit, the suit should not
24 proceed. If they are not all made parties to this suit, the suit should be dismissed.

1 **5 – Dismiss ORCP 21A(8) Plaintiffs have Failed to State Ultimate Facts Sufficient to**
2 **Constitute a Claim – Incorporation**

3 Wes Wagner incorporates the arguments and authorities made in Rule 21 Motions by
4 Defendant Libertarian Party of Oregon.

5 **6 – Dismiss ORCP 21A(8) Plaintiffs have Failed to State Ultimate Facts Sufficient to**
6 **Constitute a Claim – Wes Wagner is the LPO Chairperson pursuant to the 2009 LPO**
7 **Bylaws**

8 Taking the facts as alleged by plaintiffs as true, Wagner is the LPO Chairperson until the
9 next LPO convention.

10 **Points and Authorities**

11 Complaint ¶14 alleged that Wagner was LPO Vice Chair when the March 12, 2011 annual
12 convention convened. The March 12, 2011 annual convention was continued to May 21, 2011.
13 Shortly after March 12, 2011, then LPO Chairperson Jeff Weston resigned. Upon Mr. Weston’s
14 resignation, Wagner became LPO Chairperson.

15 Pursuant to 2009 LPO Bylaws Article V, §2 B:

16 In the event of a vacancy in the office of state chairperson, the state vice chairperson shall
17 serve as State Chairperson until the close of the next annual convention.

18 Since the March 12, 2011 convention was, in plaintiffs’ word “continued” until May 21,
19 2011, the continued 2011 annual convention was not the “next annual convention.” Pursuant to
20 the 2009 LPO Bylaws, Wagner remains LPO “Chairperson” and “State Chairperson.”

21 **7 – Dismiss ORCP 21A(8) Plaintiffs have Failed to State Ultimate Facts Sufficient to**
22 **Constitute a Claim – 2009 LPO Bylaws Contained Only One Office’s Term**

23 Taking the facts as alleged by plaintiffs as true, LPO Offices do not have Designated Terms

24 **Points and Authorities**

25 Complaint ¶22 alleged that “[p]ursuant to Article V of the 2009 Bylaws the terms of office
26 of all elected officers begins immediately upon the close of the annual convention.”

1 2009 LPO Article V does say, in part, “Terms of office of all elected officers and directors
2 shall begin immediately upon the close of the annual convention.” What 2009 LPO Article V
3 does not say is – except for a Vice Chairperson who has become Chairperson due to the vacancy
4 of the office of Chairperson (*see* above) - when the term of office for any elected officer ends.

5 2009 LPO Article V does not say – as assumed by plaintiffs – that the terms of elected
6 officers end at the conclusion of the annual convention. Pursuant to 2009 LPO Article V, the LPO
7 officers at the beginning of an annual convention remain in office after the annual convention
8 unless and until an election has occurred during the annual convention or one or more officers
9 resigns his or her office during the annual convention.

10 Pursuant to LPO Article V, §2 (1st paragraph), “[n]ominations of all officers and directors
11 elected at the annual convention shall be from the floor, no nominating committees being
12 permitted.”

13 LPO Article V, §2 does not say, as assumed by plaintiffs¹, that there must be an election of
14 officers during an annual convention.

15 Pursuant to Complaint ¶21, “[o]nce again, the [continued to May 21, 2011] LPO convention
16 did not achieve quorum.”

17 Plaintiffs have not explained, nor can they, how an election for LPO officers could have
18 been conducted at the 2011 annual convention without there first being a quorum at that annual
19 convention.

20 Pursuant to 2009 LPO Bylaws Article V, §2 B, the State committee may select any LPO
21 member to fill a vacant office². Before the State committee can choose an officer for an office, the
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23 ¹ Plaintiffs allege, at Complaint ¶25, that the LPO office positions had become vacant. Plaintiffs
24 do not allege how the LPO office positions actually became vacant. As noted above, the LPO
25 office positions did not become vacant pursuant to 2009 LPO Bylaws Article V.

26 ² 2009 LPO Bylaws Article V, §2 B reads, in part: “In the event of a vacancy in any other office
[than State Chairperson] or in the position of any committee person at large, the State committee
may select any LPO member to fill any such vacancy until the next annual convention.”

1 office must be vacant. Plaintiffs have not alleged ultimate facts that show or even tend to show
2 that any LPO office, other than the office of Vice Chairperson, had become vacant before the
3 May 21, 2011 continued 2011 annual convention.

4 **8 – Dismiss ORCP 21A(8) Plaintiffs have Failed to State Ultimate Facts Sufficient to**
5 **Constitute a Claim – Breach of Duty of an Officer Director**

6 Plaintiffs have not given the court or Wagner any indication as to why this court has
7 jurisdiction to provide a remedy for any alleged breach of duty by an officer director. Wagner is
8 not aware of there being any authority for that proposition. In other words, Wagner is not aware
9 of there being any tort in Oregon called “breach of duty of an officer director.”

10 Wagner is well aware of Oregon’s pleading requirements and that plaintiffs are not required
11 to plead law. Nonetheless, plaintiffs are required to plead “ultimate facts sufficient to constitute a
12 claim.” A prerequisite to a valid pleading is there must be a legitimate claim to plead. Breach of
13 duty of an officer director is not such a legitimate claim.

14 **Request for Attorney Fees**

15 ORS 20.105(1) reads, in part:

16 In any civil action, suit or other proceeding in a circuit court ... the court shall award
17 reasonable attorney fees to a party against whom a claim... is asserted, if that party is a
18 prevailing party in the proceeding and to be paid by the party asserting the claim... upon
19 a finding by the court ... there was no objectively reasonable basis for asserting the
claim....

20 For the reasons stated above, plaintiffs had and have no objectively reasonable basis for
21 asserting their claims.

22 Dated this 7th day of March 2012.

JAMES E. LEUENBERGER PC

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24 James E. Leuenberger, OSB 891542
25 Attorney for Defendant Wagner
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Certificate of Service

On March 7, 2012 I mailed true copies of this document to:

Tyler Smith
Nathan Goin
Tyler Smith & Associates, P.C.
181 N. Grant Street, Suite 212
Canby, OR 97013

C. Robert Steringer
Harrang Long Gary Rudnick
P.C.
1001 SW 5th Ave 16th Flr
Portland OR 97204

James E. Leuenberger