The Honorable Carol Murphy

□ EXPEDITE
□ No hearing set
☒ Hearing is set
Date: March 9, 2018
Time: 9:00 a.m.
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

KENT L. and LINDA DAVIS; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,

Plaintiffs,

v.

GRACE COX, ROCHELLE GAUSE, ERIN GENIA, T.J. JOHNSON, JAYNE KASZYNSKI, JACKIE KRZYZEK, JESSICA LAING, RON LAVIGNE, HARRY LEVINE, ERIC MAPES, JOHN NASON, JOHN REGAN, ROB RICHARDS, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Defendants.

No. 11-2-01925-7

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Board of Directors of the Olympia Food Co-op ("Co-op") was authorized to adopt the 2010 Boycott of Israeli goods ("Boycott") under the Co-op's Articles of Incorporation and Bylaws, as held by the Washington State Court of Appeals in affirming this Court's original disposition on the merits, based on the clear and unambiguous language of these governing documents. Despite seven years of litigation, a lengthy discovery period, and numerous distortions and misstatements in Plaintiffs' briefs, there are still no disputed material facts. Rather, the facts material to Plaintiffs' claims are clear and undisputed.

Plaintiffs acknowledge that the Co-op has the authority to adopt a boycott; their *ultra vires* claim thus fails on its face. Nor do Plaintiffs dispute that the Bylaws direct the Board to adopt and change policy, as well as resolve organizational conflicts. Plaintiffs' fiduciary duty claim also fails, as they have not, and cannot, provide one shred of evidence of fraud, dishonesty, or incompetence; financial or other material interest; or personal benefit to Defendants. Moreover, the business judgment rule immunizes Defendants, who acted in good faith and within the Co-op's authority. Plaintiffs do not even allege to the contrary, much less provide admissible evidence. Finally, because no Defendant is currently a Co-op Board member, there is no declaratory or equitable relief that can be enforced against Defendants. Nor have Plaintiffs produced evidence that the Co-op, represented derivatively, suffered any actual injury or loss that would be recoverable as damages.

None of Plaintiffs' proffered facts, many of them seriously misstated or misinterpreted, are material to the disposition of this meritless case—except to bring down the house of cards it was built on. Plaintiffs' entire case comes down to one objection—that by adopting the Boycott, the Board violated the Co-op's subordinate Boycott Policy (which Defendants dispute), and that the Board should have amended that policy (which they concede the Board

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was authorized to do) before assuming its responsibility for adopting a policy or resolving an organizational conflict. Defendants respectfully submit that this Court must deny Plaintiffs' Partial Motion for Summary Judgment.

II. FACTUAL BACKGROUND

A. Undisputed Material Facts

The following facts are undisputed and material, and dictate that Defendants' Motion for Summary Judgment be granted and that Plaintiffs' Motion for Partial Summary Judgment be denied.

The Co-op's purposes under its Articles of Incorporation include: "to educate members and the public in the wise" purchase of food and goods, and to promote "political self-determination." Dec. 19, 2017 Decl. of Harry Levine ("Levine Decl.") Ex. B, art. III, §§ 3, 6. Pursuant to the Co-op's bylaws, "the business and affairs of the Cooperative shall be directed by the Board of Directors." *Id.* Ex. C, § III.13.

The Co-op's bylaws impose upon the Board the duty to "adopt policies which promote achievement of the mission statement and goals of the [Co-op]," "adopt major policy changes," and "resolve organizational conflicts." *Id.* ¶ 4 & Ex. C, §§ III.13.15, 13.9, 13.16. The Co-op's Mission Statement, which is included in its Bylaws, expresses its goals of "encourage[ing] economic and social justice" and "support[ing] efforts to foster a socially and economically egalitarian society." *Id.* Ex. D; Ex. B § 2.

The Co-op has a Boycott Policy that is not part of its Articles of Incorporation or Bylaws, and which, as Plaintiffs admit, may be modified or repealed at any time by the Board. See Pls.' Mot. for SJ at 4-5 (citing Ex. A § III.13-9, -15); Pls.' Opp. to Defs.' Mot. for SJ at 4 (same). The Co-op has a long history of engaging in social justice and human rights issues,

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including by adopting boycotts. Levine Decl. ¶ 7. The Board adopted the Boycott by consensus. Levine Decl. ¶ 14 & Ex. H.

Other undisputed facts that provide alternative means of dismissing this case include:

The Co-op's total sales and total membership increased after the Boycott was adopted. Levine Decl. ¶¶ 17-18. No Defendant is currently a member of the Co-op Board. Levine Decl. ¶ 2 & Ex. A; Nov. 29, 2017 Decl. of James Hutcheon ("Hutcheon Decl.") ¶ 3. The Co-op Board, no member of which is a Defendant in this case, found that Plaintiffs are not acting "in a derivative capacity on behalf of the Co-op," nor are they "acting under any authority delegated by the Board, past or present," and that the case should be dismissed. Hutcheon Decl., Ex. A. Defendants had no financial or material interest or otherwise personally benefited from the Boycott.

B. Corrections of the Record Regarding Disputed Immaterial Facts

Plaintiffs make many inaccurate statements that are not only immaterial, but many of which are contradicted even by their own documents. Some of these facts are immaterial to Defendants' Motion for Summary Judgment, but would compel denial of Plaintiffs' Partial Motion for Summary Judgment, as creating disputed fact issues, if the Court determines to resolve it; others, though immaterial to the outcome of this litigation, must be addressed for the record as highly prejudicial, as well as erroneous.

1. The Boycott Policy Was Not Violated.

The Plaintiffs contend that the Boycott Policy "***removes*** boycotts from the purview of the Board." Pls.' Opp. to Defs.' Mot. for SJ at 10. Plaintiffs are wrong as a matter of law, addressed below, and also as a factual matter. The Boycott Policy sets forth the procedure for Co-op ***staff*** to follow when deciding whether to honor a boycott. Levine Decl. ¶ 6 & Ex. E (emphasis added). Its 1993 revision was intended to ensure that boycott decisions were no

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longer made by individual staff managers, but by staff consensus, without impinging on the Board's authority "if they take issue with a particular decision." Oct. 31, 2011 Decl. of Harry Levine ¶ 27; *id.* Ex. Z. In May 2010, the Board proposed that the staff representative draft a proposal for the Boycott to go to staff since it had not attempted to reach consensus, with an effort for staff consent by the July 2010 Board meeting. Lipman Decl., Ex. O at 1-2. The proposal to the Staff made clear that "If Staff does not consent, the Board will look at the issue again in the July Board meeting." Levine Decl. ¶ 12 & Ex. G at 1.[1]

Although the Co-op's Articles and Bylaws, the actual governing documents under the Washington Nonprofit Corporation Act, *see* RCW 24.03.025; RCW 24.03.070, did not restrict Defendants' authority to adopt the Boycott, the Board did in fact "consider the 'nationally recognized' standard," contrary to Plaintiffs' assertion. Pls.' Mot. for SJ at 9. As Judge McPhee found, "[t]he minutes of the Board meeting of May 20, 2010, show that a presentation was made to the Board regarding the boycott proposal that included presentation of, 'the nationally and internationally recognized boycott.'" Lipman Decl., Ex. G at 24-25; Ex. O at 1; *see also* Dec. 15, 2011 Declaration of Grace Cox ("Cox Decl.") ¶ 12, Ex. B.[2]

[1] Plaintiffs misrepresent Julia Sokoloff's testimony regarding the Board's authority. Pls.' Opp. to Defs' Mot. for SJ at 2 n. 2. *See* Howlett Decl., Ex. L (Sokoloff Tr.) 41:21-41:24) ("I believe that" the Board "was not bound by the boycott policy"); 48:24-49:2 ("I think the Board at that meeting believed that we had the authority and actually the obligation to resolve the staff conflict and to move on, and so that's what we did.").

[2] Plaintiffs also erroneously state that Judge McPhee "previously acknowledged that there was in fact no nationally recognized boycott of Israel at the time the Board originally acted." Pls.' Mot. for SJ at 9; *see also* Pls.' Opp. to Defs' Mot. for SJ at 5. To the contrary, Judge McPhee found that the "evidence clearly shows that the Israel boycott and divestment movement is a national movement. It is a divestment movement, as well. The question of its national scope is not determined by the degree of acceptance." Lipman Decl., Ex. G at 23-24. As explained by Defendant Grace Cox, who wrote the 1993 Boycott Policy, the term "nationally recognized boycotts" differentiates boycott decisions from regular product selection decisions, excluding from consideration boycott requests originating exclusively from within the Co-op. Cox Decl. ¶ 4. A boycott can be adopted "without regard to whether any other organization has already committed to honor the call for boycott." *Id.* ¶ 5.

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2. Defendants Have Acted Honestly, Competently, and in Good Faith.

Plaintiffs proffer no evidence that Defendants acted in bad faith, incompetently, or dishonestly. *See* Pls.' Opp. to Defs.' Mot. for SJ at 13. Plaintiffs rely entirely on documents that post-date the boycott decision, none of which show bad faith, incompetence or dishonesty, and therefore are immaterial, as a matter of law: Plaintiffs' own letter and the Board's response (Lipman Decl., Exs. T-U); a job application of Ms. Gause's (Exs. E, Q); an email from Ms. Gause to the Board before she was a Board member (Ex. P); an email from a third party to the Board (Ex. R), and an email from a Board member expressing concern that an anti-Boycott member, if elected to the Board, might obstruct all Co-op business (Ex. S).[3] While Defendants, as respondents, have no obligation to present affirmative evidence of their good behavior, the evidence is ample that the Board acted honestly, competently, and in good faith.[4] Furthermore, Defendants understood, correctly, that they had the authority to pass the Boycott. *See* Part IV.B.

Separately, Plaintiffs falsely claim that Rochelle Gause "wrote to the Board ***on behalf of*** Olympia BDS thanking the Board (of which she was a member) for its enactment of the Israel Boycott." Pls.' Mot. for SJ at 10 (referencing Lipman Decl., Ex. P, an email dated

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[3] Plaintiffs spuriously claim that Jayne Kaszynski wrote an "email documenting the Board's interest in actively destroying the possibility of a new member being elected who might object to the Board's unlawful actions." Ps' Mot. at 11 (citing Lipman Decl., Ex. S). As obvious on the face of the email cited by Plaintiffs, it is not from Jayne Kaszynski, but rather from Julia Sokoloff. But more significantly, as also clear from the email, Ms. Sokoloff's expressed concern is not as claimed by Plaintiffs, but instead is that someone opposed to the boycott, if elected to the Board, would be willing to obstruct all Co-op business until the boycott is overturned. Lipman Decl., Ex. S.

[4] More than a year after a working member had requested that the Co-op boycott Israeli goods, staff members informed the Board that they were at an impasse, which the Board discussed at its May 20, 2010 meeting. Levine Decl. ¶¶ 8-16 & Ex. F. The Board decided that there should be an attempt to reach full staff consensus, inviting feedback from the full staff, and that the Board would consider the issue again at the July Board meeting. *Id.* ¶ 11. Harry Levine, the Staff representative to the Board at the time, reported back to the Staff on June 7, 2010, that the Board would consider the issue again in the July Board meeting. *Id.* ¶ 12 & Ex. G. The matter was then reexamined at the Board's July 15, 2010 meeting. *Id.* Ex. H. The Board heard the views of members and staff at that meeting, discussed the issue, and unanimously approved a boycott of Israeli goods. *Id.* ¶¶ 13-14.

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November 17, 2010). Rochelle Gause was not a board member when the boycott was adopted, nor on November 17, 2010 when she wrote the Board; Ms. Gause joined the Board in January 2011.[5] Similarly, Plaintiffs cite ***no*** evidence to support their claim that several (or any) members of the Board who adopted the Boycott were BDS activists (which would not be improper, regardless). Pls.' Mot. for SJ at 2.[6]

Plaintiffs speciously claim that the Board "attempted to amend the Boycott Policy to retroactively legitimize its misconduct" (Pls.' Mot. for SJ at 11 (citing Lipman Decl., Ex. V); Pls.' Opp. to Defs.' Mot. for SJ at 6 (same); *see also* Pls.' Mot. for SJ at 1), citing only Board Meeting Minutes describing the Boycott Subcommittee, the purpose of which was "to evaluate the current boycott policy, propose changes and recommend them to the board." Lipman Decl., Ex. V. In fact, the idea to review how the boycott process worked was proposed by staff *before* adoption of the Boycott. *See*, *e.g.*, Howlett Decl., Ex. A. The subcommittee "was empowered with a wholesale review of the boycott policy," with "multiple recommendations that would have been presented."[7] *See* Howlett Decl., Ex. B (Rossman Tr.) 45:20-45:21; 47:23-47:24. Moreover, the Board appointed a member of It's Our Co-op, the group formed to oppose the

[5] Lipman Decl., Ex. O (July 15, 2010 Board Meeting Minutes at 1, naming Board members); Ex. X (December 2010/January 2011 Co-op News stating that Rochelle "will join the Board of Directors this January"); Gause Decl. ¶ 3.

[6] It is true that the five candidates endorsed by Olympia BDS all won by wide margins in a Board election that saw a record-high turnout *following* the adoption of the Israel Boycott; in fact, Plaintiffs themselves ran for the Board on an anti-Boycott platform, but none of them were elected. Nov. 2, 2011 Decl. of Jayne Kaszynski ("Kaszynski Decl.") ¶¶ 14-19; *see also* Howlett Decl., Ex. J.

[7] Contrary to Plaintiffs' false assertion that Harry Levine suggested changes to the Boycott Policy "before enacting the Israel Boycott," Pls.' Opp. to Defs.' Mot. for SJ at 2, his email referenced by Plaintiffs (which was his response to a Boycott Survey issued by the Boycott Subcommittee), is dated March 18, 2011, eight months *after* July 15, 2010 the date the boycott was passed. Lipman Decl.., Ex. N; Ex. O at 7.

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Boycott, and of which Plaintiffs had been members, to the Boycott subcommittee. *See* Howlett Decl., Ex. C.[8]

Plaintiffs also claim, without evidence, that Defendants put their own interests or the interests of a "third party"—BDS—above the Co-op's. Pls.' Mot. for SJ at 5; Pls.' Opp. to Defs.' Mot. for SJ at 12. BDS—Boycott, Divestment, and Sanctions—is not an organization, it is a tactic used by a growing movement for Palestinian rights; Olympia BDS was a grassroots effort by the Co-op's own members, not an "outside" organization or "third party." Pls.' Opp. to Defs.' Mot. for SJ at 12, 14. Gause Decl. ¶¶ 1-2; *see also* Howlett Decl., Ex. K. (Levine Tr.). 48:9-48:14 ("it was not a formalized group") ("it" referring to "co-op members who were supporters of the BDS movement"). Plaintiffs' dark insinuations against "outsiders" are unsupported by evidence.

3. Plaintiffs Do Not Represent the Co-op.

Plaintiffs do not represent the Co-op. They ran for the Board on an anti-Boycott agenda and lost by a landslide. *See* Part IV.C.2. No Co-op Board has repudiated the Boycott decision; in fact, the Board (with no Defendant as a member) has formally repudiated Plaintiffs' position and claim to derivative status. Hutcheon Decl., Ex. A. Tellingly, Plaintiffs refused to use their internal remedies by petitioning for a membership ballot on the Boycott, as provided in the Bylaws; evidence now confirms why they refused to do so: they knew they lacked sufficient votes to end the Boycott. Howlett Decl., Ex. D.[9]

[8] Plaintiffs also assert that the Board did not change the Boycott Policy because there was not Board Approval. Pls.' Opp. to Defs.' Mot. for SJ at 10 (citing Ex. A § III.13, the Bylaws, and Ex. BB at 33:13-15, testimony that the boycott policy has not been amended). But the "Board decided to table the recommendations from that committee until such a time as this lawsuit was completed." *See* Howlett Decl., Ex. B (Rossman Tr.) 46:14-46:16.

[9] Plaintiffs' assertion that their "claims are not based on the ***outcome*** of the Board's vote…but rather the ***process*** in which the Board engaged," Pls.' Mot. for SJ at 14, is belied by their own documents. Plaintiffs brought this case because the Co-op Board boycotted Israeli goods; they would not have brought it if another country's goods were boycotted, and they would not have brought it if the Co-op Board decided *against* boycotting Israeli goods.

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4. Adoption of the Boycott Caused No Injury.

There is no evidence that the Co-op has suffered any injury as a result of the Boycott, despite Plaintiffs' claims. Pls.' Opp. to Defs.' Mot. for SJ at 11; Pls.' Mot. for SJ at 11-12. Plaintiffs have provided no actual evidence beyond one membership cancellation and the fact that Plaintiffs themselves refuse to shop at the Co-op,[10] which if indeed an injury, ***Plaintiffs*** seem to have caused, and even intended, the harm themselves. As Plaintiff Linda Davis stated, she and her husband, also a Plaintiff, "have stopped shopping at both Co-op stores, so I hope the OFC's bottom line IS being affected by a drop in sales." Howlett Decl., Ex. F.[11] But even if ***many*** people quit the Co-op or stopped shopping, Plaintiffs do not dispute that total memberships and sales both increased following the Boycott.[12] Levine Decl. ¶¶ 17-18. In fact, Plaintiffs have produced documents stating that they think people joined the Co-op ***because*** of the Boycott. *See, e.g.*, Howlett Decl., Ex. G.

As "evidence" that the Co-op lost revenue from failing to offer Israeli products and by declining expansion opportunities, Plaintiffs rely on a newsletter article opining that the "uncertain impact of the boycott" was the fifth (and last) reason the Board decided to put

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It is Plaintiffs who put their personal interests and the interests of Israel and StandWithUs ahead of the Co-op's, whose interests they purport to represent in bringing this derivative suit. *See, e.g.,* Howlett Decl., Ex. E; *see also* Jan. 20, 2016 Decl. of Maria LaHood ¶¶ 8-14.

[10] The sum total of the evidence that Plaintiffs put forth to support their contention that the Co-op has suffered injury is: Plaintiffs' testimony that: "a ***number*** of Co-op members have either cancelled their memberships or otherwise stopped shopping at the Co-op" (emphasis added) (Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13); Plaintiffs' testimony that ***they themselves*** have stopped shopping at the Co-op (*Id.*; Dkt. 41.9 ¶ 12); and that one other person, Tibor Breuer, cancelled his membership (and he's aware of "numerous" other (unnamed) individuals who did the same). Dkt. 41.4 ¶ 3.

[11] In fact, Plaintiff Kent Davis was not a "long-time Co-op member." Ps' Mot. at 12. Mr. Davis was not even a member of the Co-op in July 2010 when the Boycott was adopted, but only became a member the next month. Kaszynski Decl. ¶ 4.

[12] A Defendant's statement to the media soon after the Boycott was adopted, that the "moral imperative" to boycott would supersede any potential minimal financial effect is ***not*** evidence that there was in fact a financial impact. Pls.' Opp. to Defs.' Mot. for SJ at 11, Lipman Decl. Ex. W.

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expansion on hold. Pls.' Mot. for SJ at 12; Lipman Decl., Ex. X. But the Board[13] itself did not consider the Boycott to be a factor in its decision to postpone expansion. Howlett Decl., Ex. H; *see also* Howlett Decl., Ex. I (Board Report explaining why expansion plans were put on hold, without mentioning the boycott). The financial risk of expansion was the main reason the Board did not expand. *Id*.

III. PROCEDURAL HISTORY

On February 27, 2012, Judge McPhee dismissed the complaint under Washington's anti-SLAPP law (Dec.18, 2017 Decl. of Brooke Howlett ("MSJ Howlett Decl."), Ex. A), which was affirmed on appeal. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014). The Court of Appeals found that "neither an applicable statute, the articles of incorporation, nor the bylaws compel the board to comply with adopted policies," as a matter of law, and "although adopting the Policy presented an opportunity for staff involvement, the board did not relinquish its ultimate authority to adopt boycotts pursuant to its general authority to manage the Co-op." *Id.* at 535. The Washington Supreme Court struck down the anti-SLAPP law as an unconstitutional intrusion upon the right to a jury trial, remanding to this Court. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). The Supreme Court did not address Board authority to adopt the Boycott.[14] *Id.* at 281.

On February 25, 2016, this Court denied Defendants' CR 12(b)(6) Motion, declining to consider the Bylaws or Articles of Incorporation, which had not been attached to the

[13] The author, TJ Johnson, was not a board member at the time. Lipman Decl., Ex. X (12/2010-1/2011 Co-op News; *see also* Howlett Decl., Ex. K (Levine Tr.) 28:7-28:10.

[14] Plaintiffs erroneously claim that the Supreme Court "concluded that the Board was legally bound to honor the boycott," Pls.' Mot. for SJ at 2, and "found that the Board must observe the Boycott Policy." Pls.' Opp. to Defs.' Mot. for SJ at 5. The footnote involved, however, described how this Court had erroneously weighed evidence, to illustrate how the Anti-SLAPP statute violated the right to a jury trial. 183 Wn.2d at 281 n.2. The Supreme Court also described how the Court of Appeals found that the meaning of the Boycott Policy was immaterial, as the Board was not bound by it. *Id.* This Court need not address the meaning of the Boycott Policy if it finds, as the Court of Appeals did, that the Boycott policy does not circumscribe the authority granted the Board by the WNCA and Co-op Bylaws.

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Complaint, and did "not address[ ] whether the [C]o-op Board acted within its authority." MSJ Howlett Decl., Ex. B at 4, 11, 9. Discovery ensued. Plaintiffs shamelessly contend, without supporting evidence, that ***Defendants'*** "obstruction has slowed discovery" (Pls.' Opp. to Defs' Mot. for SJ at 24), But Defendants completed their production in November 2016, and scheduled and rescheduled Defendants' depositions at the request of Plaintiffs, only to be cancelled by Plaintiffs, except for four Defendants. MSJ Howlett Decl. ¶¶ 9-16; Despite repeated requests over the course of a year and a half, Plaintiffs delayed their document production until the parties were in the midst of briefing these summary judgment motions, when Plaintiffs dumped more than 13,000 documents on Defendants. Feb. 14, 2018 Decl. of Brooke Howlett ¶¶ 1, 4, 6, 10.

Plaintiffs proposed a date for trial that conflicted with another trial. Defendants have requested more dates from Plaintiffs, to no avail. Lipman Decl., Ex. GG. That, Plaintiffs claim, "leaves the conclusion of this long-protracted litigation uncertain." Pls.' Opp. to Defs' Mot. for SJ at 8. Defendants most certainly welcome the conclusion of this lawsuit, which is as meritless today as it was when it was originally dismissed six years ago.

IV. ARGUMENT

A. Summary Judgment Standard.

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Save Our Scenic Area v. Skamania Cty.*, 183 Wn.2d 455, 463, 352 P.3d 177 (2015). "Evidence is construed in the light most favorable to the nonmoving party." *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008).

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B. The Undisputed Facts Establish Defendants Did Not Act *Ultra Vires*

Plaintiffs cannot establish that Defendants acted *ultra vires*. Defs.' Mot. for SJ at 10-13. The *ultra vires* doctrine applies to a specific subset of corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature. *Hartstene Pointe Maint. Ass'n v. Diehl*, 95 Wn. App. 339, 344-45, 979 P.2d 854 (1999). Where a party argues that the ***manner*** in which corporate officers exercised their authority "did not conform with the governing documents of the corporation . . . [such an argument] is not a challenge to the authority of the corporation, but only to the method of exercising it," *Hartstene Pointe*, 95 Wn. App. at 345, and therefore does not establish a violation. *See also Twisp Mining & Smelting Co. v. Chelan Mining Co.,* 16 Wn.2d 264, 293-94, 133 P.2d 300 (1943) (act not *ultra vires* where corporation had authority to act).[15]

Defendants cannot put it more simply than Plaintiffs put it themselves: Plaintiffs' claims are not "based on the ***outcome*** of the Board's vote" but rather "the ***process*** in which the Board engaged." Pls.' Mot. for SJ at 13 (emphasis in original). In other words, Plaintiffs' argument is not ***whether*** the Board had the duty to create new policies, change existing policies, and resolve organizational conflicts—they plainly did. *See* Bylaws, art. 3, §§ 13.9, 13.15, 16. Plaintiffs instead challenge the ***manner*** chosen by the Board to discharge these duties, focusing on the Boycott Policy and consensus decision-making to assert this claim. Pls.' Mot. for SJ at 13.

Defendants make clear in their Motion for Summary Judgment that this argument is frivolous: the subordinate Boycott Policy did nothing to alter the Board's ultimate authority to "direct" the "business and affairs of the [Co-op]" by adopting a policy decision by consensus, as it did. *See* Defs.' Mot. for SJ at 10-13; Levine Decl., Ex. C § III.13. Defendants had the

[15] Courts have found that Boards still have "the exclusive power to manage the affairs" of a corporation even where the bylaws grant "authority to the shareholders to disapprove of Board actions," and the shareholders do in fact vote to disapprove the Board action. *See, e.g., Horsch v. De Giulio*, 135 Idaho 149, 151, 15 P.3d 1157 (2000).

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plain authority to adopt the boycott. *See* Defs.' Mot. for SJ at 10-13.[16] But, in any case, Plaintiff's claim is not an *ultra vires* claim because it targets Defendants' "process," not their ultimate authority to act.

C. The Undisputed Facts Establish Defendants Did Not Breach Any Duty to the Co-op and are Immunized by the Business Judgment Rule.

Under Washington law, a claim for breach of fiduciary duty requires: (1) that a corporate officer or other official having a fiduciary duty to the corporation breached the fiduciary duty, and (2) that the breach was a proximate cause of the losses sustained. *Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 414, 875 P.2d 637 (1994); *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 894, 167 P.3d 610, 620 (2007) (shareholder claim). Generally, there are three fiduciary duties: good faith,[17] due care, and loyalty. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 860, 292 P.3d 779 (2013); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. at 718 (applying Delaware law).

1. Plaintiffs Cannot Show Defendants Breached a Duty of Care.

Courts are barred from substituting their judgment for that of corporate directors "[u]nless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence)." *Spokane Concrete Prods., Inc. v. U.S. Bank of Wash., N.A.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995) (applying Washington law). There is not even a scintilla of evidence suggesting a lack of due care in this case. *See* Part II. To the contrary, the Board

[16] In order to delegate its authority to manage a corporation, a Board would need to resolve to appoint a committee "which shall consist of two or more directors." RCW 24.03.115; *see also Hartstene,* 95 Wn. App. at 343. Here, the Board did not so delegate its authority.

[17] Plaintiffs make one passing allegation of bad faith in enacting the Boycott. Pls' Mot. for SJ at 15-16; *see* also Pls.' Opp. to Defs.' Mot. for SJ at 13. But there is no evidence on the record that could lead this Court to conclude that Defendants acted in bad faith under the applicable standard. *See Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 721-22, 189 P.3d 168 (2008) (Plaintiff must show "conduct [wa]s motivated by an actual intent to do harm," or that the defendant "consciously and intentionally disregard[ed] their responsibilities," and acted "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.") (quotations & citation omitted).

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was asked to intervene by staff after it had been unable to resolve a member's request to boycott Israeli goods for more than a year, which the Board discussed at its May 20, 2010, Board meeting. Levine Decl. ¶¶ 8-16 & Ex. F. Although asked to decide the issue then, the Board requested that staff consider a written proposal, with an "attempt to reach full staff consensus," inviting "feedback from the full staff," and said that the Board would consider the issue again at the July Board meeting. *Id.* ¶¶ 11-12 & Ex. G. The matter was then reexamined at the Board's July 15, 2010, meeting, at which the Board received the views of members and staff, discussed the issue, and unanimously approved a boycott of Israeli goods. *Id*. ¶¶ 13-14, Ex. H.

Relying upon *Waltz v. Tanager Estates Homeowner's Association*, 183 Wn. App. 85, 88, 332 P.3d 1133 (2014), Plaintiffs propose that some lesser standard applies to review Defendants' actions. Washington courts—including the only appellate court to have applied law to the facts in this case, *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014), have been clear that courts are barred from substituting their judgment for that of corporate directors absent "evidence of fraud, dishonesty, or incompetence." *Spokane Concrete Prods., Inc.,* 126 Wn.2d at 279.[18] Engrafting an ordinary care standard onto the applicable test would belie over a century of corporate governance jurisprudence[19] and a significant amount of academic literature.[20] The Board's decision was a valid and rational exercise of its business judgment, and this Court should not disturb it.

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[18] *See also Scott v. Trans–Sys. Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003); *McCormick*, 140 Wn. App. at 895; *Sho Shia Wang v. Ta Chi, Inc.*, 2011 Wash. App. LEXIS 1998 * (Wash. Ct. App. Aug. 25, 2011).

[19] *See, e.g., Northview Terrace Ass'n v. Mueller*, 111 Wn. App 1002, at *5 n.4 (2002) (Court can uphold Board's decision even where it finds "errors [to] be so gross that they . . . demonstrate the unfitness of the directors to manage the corporate affairs."); *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 396, 739 P.2d 717 (1987) ("In considering the actions of a corporate officer, however, the business judgment rule rather than the standard of ordinary care applies").

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However, under *any standard*, Plaintiffs are still unable to show a breach of the duty of care. Plaintiffs have cited no legal authority, in any jurisdiction, wherein similar conduct was held to be such a breach. Nor do Defendants know of such authority. To the contrary, there is no evidence that Defendants' decision was made without good faith or was inconsistent with its governance duties under the public law and bylaws, or that it was not an informed, rational, competent, and fair decision.

2. Plaintiffs Cannot Show Defendants Breached a Duty of Loyalty.

Likewise, the Board did not violate its duty of loyalty to the Co-op. The duty of loyalty demands that "'the best interest of the corporation and its shareholders take[] precedence over

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[20] Plaintiffs' urgings to apply an ordinary care standard is an error that lies in the failure to discern between two fundamental but divergent precepts: "standards of conduct" and "standards of review." Standards of conduct are normative, even "aspirational," standards that reflect how a legislature believes an individual should comport herself; in contrast, standards of liability reflect how a court is to review an individual's particular decision. *See generally* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 Fordham L. Rev. 437, 465 (1993) ("officers liable for a bad judgment only if the judgment was either interested or in bad faith, the decision maker did not appropriately inform himself, or the judgment was so bad as to be irrational."). "Corporate law is characterized by a pervasive divergence between standards of conduct and standards of review." Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 Wm. & Mary L. Rev. 519, 521 (2012).

Many state statutes—such as Washington's— codify *standards of conduct* which state that a director is to act "with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances." American Law Institute, Principles of Corporate Governance: Analysis and Recommendation 10, § 4.01 (2018); Revised Model Business Corporation Act § 8.30(a) (nearly identical); *see* RCW 23B.08.300; RCW 24.03.127. But this is not the standard of *review* a court is to apply when examining a director's conduct. The Divergence of Standards of Conduct and Standards of Review in Corporate Law, 62 Fordham L. Rev. at 440–41 ("the standards of *review* applied to the performance of these duties are less stringent . . . a much less demanding standard of review may apply, under the business-judgment rule."); *see also id.* at 443 ("a rationality standard of review . . is considerably less demanding than the relevant standard of *conduct,* which is based on reasonableness.").

This distinction is reflected in the Legislative history underlying RCW 23B.08.300, the functionally identical sister statute of RCW 24.03.127, which was revised in 1989 to incorporate provisions of the Revised Model Business Corporations Act. The legislative history makes clear that RCW 23B.08.300 was a "standard of conduct" for directors that should not be used to review the "correctness of the director's decisions." *See Senate Journal*, S. 51-2, Reg. Sess., at 3041-42 (Wash. 1989). The Legislature warned against "reexamining [director] decisions with the benefit of hindsight." *Id.* In further delineating a line between the standard of conduct and standard of liability—and acknowledging deference to the common law—the Legislature stated: "[t]he elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts," noting that the "standards of director conduct set forth in this section" were not meant to replace the elements of the rule. *Id.*

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any interest possessed by a director . . . and not shared by the stockholders generally.'" *Rodriguez v. Loudeye Corp.*, 144 Wn. App. at 722 (quoting *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. Ch. 1993). Plaintiffs' duty of loyalty claim fails for many reasons.

First, Defendants misapply *Rodriguez*'s "any interest" language to encompass non-pecuniary interests, an interpretation that is contrary to the actual legal standard stated in the well-established case law, including *Rodriguez* itself: "[A] director is materially interested in a transaction if the director's interest is 'of a sufficiently material importance, ***in the context of the director's economic circumstances***, as to have made it improbable that the director could perform her fiduciary duties.'" 144 Wn. App. at 722 (2008) (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999) (emphasis added); *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) ("'directors can[not] . . . expect to derive any personal financial benefit from it in the sense of self-dealing"') (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. Sup. 1984); *cf. In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369(Del. Ch. 2008) (personal loyalties cannot constitute a breach of loyalty where director is not "poised to receive a special benefit from the … deal."). "[S]omething more than innuendo is required to justify an inference of wrongful intent" to sustain a duty of loyalty claim against defendants. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1147 (Del. 1990)).

Further, the duty of loyalty will not be violated where "any interest possessed by a director . . . [is] shared by the stockholders generally." *Rodriguez*, 144 Wn. App. 722. Thus, where a director's interests are aligned with the general sentiments of the shareholders—here, the Co-op members—there is no injury to membership interests, and the duty of loyalty is not violated. *Id.* Plaintiff Linda Davis admitted on February 20, 2012 that, "if a [membership] vote were to be taken today [on the Boycott issue], we are far outnumbered." Howlett Decl., Ex. D. The membership's support for the Boycott was also demonstrated by the results of the

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November 2010 Board member election (following adoption of the Boycott), as the five candidates endorsed by Olympia BDS all won by wide margins in a record-high turnout, whereas those candidates opposing the Boycott, including Plaintiffs, were defeated by a margin greater than two-to-one. Kaszynski Decl. ¶¶ 14-19.

Plaintiffs produced no evidence of breach of any fiduciary duty. *See* Part II.B.2. Casting unsupported aspersions on Defendants cannot and do not entitle Plaintiffs to summary judgment.

3. The Business Judgment Rule Insulates Defendants' Decision from Liability.

Pursuant to the business judgment rule, this Court must defer to the Board's reasonable and honest exercise of judgment to adopt the Boycott, as the Court of Appeals in this case did. *Davis v. Cox*, 180 Wn. App. at 535 (finding that "the [B]oard may avail itself of the business judgment rule."). The business judgment rule immunizes directors where: (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith." *Scott v. Trans–Sys. Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). As discussed above, adopting the Boycott was clearly within the Co-op's power and the Board's authority, *see* Part IV.B, and there is absolutely no evidence Defendants acted in bad faith. *See* Part II.B.2. Therefore the business judgment rule insulates Defendants' actions from liability.

D. Plaintiffs Have Not Made the Showing Required for an Entry of a Declaratory Judgment.

Plaintiffs cannot justify a declaratory judgment under the Washington Uniform Declaratory Judgment Act ("UDJA"), RCW 7.24 *et seq.* because they lack standing to seek such relief and because they fail to meet the requirements of the UDJA.

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First, Plaintiffs lack standing to seek a declaratory judgment, which requires that the party must "(1) be within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise." *Nelson v. Appleway Chevrolet, Inc*., 160 Wn. 2d 173, 186, 157 P.3d 847, 853 (2007). Plaintiffs lack standing to bring a derivative lawsuit on behalf of the Co-op precisely because they are not "within the zone of interest" contemplated by the Washington Nonprofit Corporation Act ("NCA"), RCW 24.03 *et seq*. *See* Defs.' Mot. for SJ at 19-20 (per *Lundberg ex rel. Orient Found. v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002), the NCA delineates what types of derivative actions may be brought on behalf of a nonprofit corporation, and does not include actions brought by a minority of non-director members). Nor have Plaintiffs—or the Co-op for that matter—suffered any injury whatsoever. *See* Part II; *see also* Part IV.E.; *see also* Defs.' Mot. for SJ at 21-22; *see also* Levine Decl. ¶¶ 17-18 (Co-op financial strength and membership has improved).

Second, Plaintiffs failed to meet the four prerequisites to any award of declaratory relief under the UDJA. *See League of Educ. Voters v. State*, 176 Wn.2d 808, 816, 295 P.3d 743 (2013). Where any of the four elements is lacking "the court's opinion . . . would be merely advisory" and would lack a "justiciable controversy." *Ames v. Pierce Cty.*, 194 Wn. App. 93, 113-14, 374 P.3d 228 (2016). Without a judiciable controversy, the court will refuse to consider a declaratory judgment action. *See Lewis Cty. v. State*, 178 Wn. App. 431, 435-37, 315 P.3d 550 (2013) (affirming trial court's decision not to render a declaratory judgment where to do so would "step[] into the prohibited area of advisory opinions) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1974). Here, Plaintiffs cannot show ***any*** of the four requirements:

As to the first element, there is not an "'actual, present and existing dispute . . . as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement'" that

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is amenable to declaratory relief. *See Osborn v. Grant Cty. by & through Grant Cnty Cmm'rs*, 130 Wn.2d 615, 631, 926 P.2d 911 (1996) (quoting Ronken v. Bd. of Cty. Comm'rs, 89 Wn.2d 304, 310, 572 P.2d 1 (1977); *see also League of Educ. Voters*, 176 Wn.2d at 816. This first element concerns "ripeness and mootness." *Lee v. State*, 184 Wn.2d 608, 617, 374 P.3d 157 (2016). While there ***may have been*** a dispute between the Co-op Board and Plaintiffs, ***no current Co-op Board member is named as a Defendant***; and the Co-op itself is claimed to be represented by the ***Plaintiffs***, derivatively. None of the named Defendants is associated with the Board any longer. Levine Decl. ¶ 2 & Ex. A; Declaration of James Hutcheon ("Hutcheon Decl.") ¶ 3. With no named Defendant currently holding Board status, the relief sought by Plaintiffs is not within the current power of any Defendants to provide. *See Davison-York v. Bd. of Managers of 680 Tower Residence Condo. Ass'n*, 2011 WL 10069517, at *5 (App. Ct. Ill Sept 27, 2011) ("[A] declaration that former Board members breached a fiduciary duty . . . would serve merely as an advisory opinion and would have no other consequences."); *see also Underwood v. Alabama State Bd. of Educ*., 39 So.3d 120 (Sup. Ct. Al. 2009) (affirming trial court's decision not to enter declaratory judgment regarding lawfulness of Board's process for selecting Chancellor where Chancellor had since resigned). The claim for declaratory relief here rests on a dispute that is no longer "actual" or "present," and has been mooted.[21]

Plaintiffs also fail to satisfy the second requirement for declaratory relief, that the parties have "genuine and opposing interests." *League of Educ. Voters*, 176 Wn.2d at 816.

[21] Further, the dispute articulated by Plaintiffs is that "Defendants and Plaintiffs disagree on the Board's right to disregard its own governing documents in enacting the Boycott." Pls.' Mot. for SJ at 19. But Defendants have never asserted a right to disregard the Co-op's own governing documents, and Plaintiffs provide no evidence that Defendants ever did—the Co-op's governing documents are its Articles of Incorporation and Bylaws. *See* RCW 24.03.025; RCW 24.03.070. The policy decision that Plaintiffs dispute is just that: a ***policy decision*****,** which Plaintiffs argue contradicts the Boycott Policy, a policy decision approved by a prior Co-op board, that the named Defendants, as a later Co-op board, were empowered to change or abandon or resolve a dispute around, as deemed appropriate by the Board. *See* Defs.' Mot. for SJ at 10-13; Levine Decl., Ex. C § III.13. This was the holding of this Court in the earlier history of this case and was affirmed on appeal. *See* Defs.' Mot. for SJ at 11 n.4. Plaintiffs have shown no violation of the Co-op's actual governing documents.

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Because Defendants are no longer Co-op Board members, Plaintiffs' complaint that they disregarded and violated Co-op rules (which Defendants dispute) fails to state interests amenable to declaratory relief against the named Defendants. Defendants no longer have any legal interest in the Co-op rules as Board members of the Co-op—their service on the Co-op Board has ended.

Third, Plaintiffs cannot point to any interests that are "direct and substantial, rather than potential, theoretical, abstract or academic" that can be resolved by declaratory judgment. *Id.* Plaintiffs themselves may have an interest in "resolving Board authority" but they cannot resolve that question here, against parties having no authority to act on behalf of the Co-op.

Finally, for the same reasons as stated above, a judicial declaration of the parties' purported rights would not be "final and conclusive." *Id.* Because Defendants are not Board members, there is no declaratory relief against Defendants that would be capable of rescinding the prior Board's boycott decision. Moreover, the current Co-op Board has resoundingly rejected Plaintiffs' claim to be representing the Co-op in this lawsuit.[22] *See* Defs.' Mot for SJ at 23.

There is no live dispute left, and this Court should reject Plaintiffs' attempts to force an ineffectual declaratory judgment on Defendants having none of the required power or authority to effectuate the requested relief.

E. Plaintiffs Have Not Met Their Burden to Justify a Permanent Injunction.

To support a claim for permanent injunctive relief, a party must show (1) "a clear legal or equitable right," (2) "a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury." *See*

[22] In fact, this lawsuit should be dismissed because Plaintiffs cannot maintain a derivative suit where the current Co-op Board has rejected it. *See* Defs.' Mot. for SJ at 23; *Dreiling v. Jain*, 151 Wn.2d 900, 904-05, 93 P.3d 861 (2004) (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981); *Lewis v. Anderson*, 615 F.2d 778, 780 (9th Cir. 1979).

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Tyler Pipe Indus., Inc. v. Dept. of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). Plaintiffs cannot establish any of these three elements.

1. Plaintiffs Have Not Shown a Clear Right to Relief.

Plaintiffs cannot show a clear right to relief here. As stated above and in Defendants' Motion for Summary Judgment, Plaintiffs have not met their burden in establishing any breach by Defendants in their duties to the Co-op, and the business judgment rule plainly insulates Defendants' decision from liability. *See* Part IV.C; *see also* Defs.' Mot. for SJ at 13-15. Plaintiffs have also failed to show that Defendants committed an *ultra vires* act. *See* Defs.' Mot. for SJ at 10-13.

2. Plaintiffs Have Not Shown an Invasion of Their Rights.

Because Plaintiffs have pleaded no personal legal rights, but only derivative rights on behalf of the Co-op, they cannot show an invasion of their rights. Plaintiffs have entirely failed to assert any rights of their own as being at issue in this case. They rely solely on claims that there has been an invasion of "the rights of the Co-op." Pls.' Mot. for SJ at 24. But as detailed in Defendants' Summary Judgment motion and reiterated above, Plaintiffs' assertion of derivative status on behalf of the Co-op has no foundation in fact and has now been entirely vitiated by the formal position taken by the current Board in opposition to the Plaintiffs' position in this lawsuit. *See* Part IV.B-C; Defs.' Mot. for SJ at 23-24. The only violations of rights asserted by Plaintiffs have now been authoritatively debunked both in fact and in law, by the Non-Profit Corporations Act and the Co-op's actual governing documents; and the current Board has repudiated Plaintiffs' assertion that Plaintiffs represent the Co-op's position, leaving Plaintiffs without standing to assert claimed violations of the Co-op's rights.

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3. The Co-op Has Not Suffered Any Harm.

Plaintiffs have failed to show that the Co-op has suffered any injury. *See, infra,* FACTS, injury. Plaintiffs state—without ***any*** factual basis—that Defendants have "eviscerated the Co-op's community-building, consensus-driven mission." Pls.' Mot. for SJ at 24. This after-the-fact and subjective assertion of injury to the Co-op is contradicted by the longstanding evidentiary record, which shows exactly the opposite: that the Co-op Board made its decision by consensus, and acted in line with the views of the majority of its membership, ***resulting in a net increase in both the Co-op's membership rolls and sales***. The Co-op's financial strength continued to improve in the last several ensuing years. Levine Decl. ¶¶ 17-18. Indeed, what ***has*** caused harm to the Co-op is Plaintiffs' decision to subject the Co-op, the Defendants, and the community to this years-long litigation. *See* Hutcheon Decl., Ex. A.

Plaintiffs' claims that the Co-op's "membership, financial benefits, and community support" have been somehow harmed are false, and they are flatly contradicted by the actual evidentiary record. *See* Factual Background, *supra*.

F. Plaintiffs Seek Relief that Violates the First Amendment.

The Co-op Board's approval of a peaceful boycott of Israeli goods is protected First Amendment expressive activity. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *see also Koontz v. Watson,* 2018 WL 617894, at *9 (D. Kan. Jan. 30, 2018) (preliminarily enjoining Kansas law targeting boycotts of Israel, which are "protected for the same reason as the boycotters' conduct in *Claiborne* was protected."). Courts are required by the First Amendment to refrain from enjoining private political advocacy and related lawful expressive conduct, such as the Co-op's boycott decision. *See, e.g.*, *Shelley v. Kraemer,* 334 U.S. 1 (1948) (courts bound by the Fourteenth Amendment to refrain from enforcing a private contractual covenant that prohibits sale based on a protected class); *see also, Nebraska Press*

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Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (invalidating a prior restraint on speech, as it is "the most serious and the least tolerable infringement on First Amendment rights"). In the absence of unlawful action, issuance of an injunction would violate the First Amendment.

DATED this 1st day of March, 2018.

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DECLARATION OF SERVICE

On March 1, 2018, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Robert M. Sulkin	☒	Via Messenger
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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 1st day of March, 2018, at Seattle, Washington.

s/ Brooke Howlett
Brooke Howlett, WSBA No. 47899

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