The Honorable Carol Murphy

☐	EXPEDITE
☐	No hearing set
☒	Hearing is set
Date:	February 19, 2016
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' REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS

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I. INTRODUCTION

Volunteer board members of the Olympia Food Co-op made a decision in 2010 to boycott Israeli goods—a decision made in accordance with the Co-op's governing documents and social justice mission, and following a long tradition of other boycotts. Nearly a year after the boycott was passed, five members of the Co-p who opposed the boycott demanded that the then-Board rescind it, and if not, promised to bring legal action against those Board members and the Board members who had passed it. The Board invited the members to bring the issue to a member vote as provided for in the Bylaws, but they refused. Instead, the five members brought this case against sixteen Board members and former Board members. Plaintiffs' complaint boils down to one grievance—that the Board did not follow the Boycott Policy governing staff decisions to honor a boycott. Defendants contend, and both courts to consider the issue have found, that the Board had the authority to boycott Israeli goods, irrespective of the Boycott Policy. Even if what Plaintiffs allege is true, their claims must still be dismissed as a matter of law.

In their Opposition, Plaintiffs use extraneous communications to unfairly attack the intentions of ordinary citizens in their roles as volunteer Co-op board members. This attack is particularly pernicious because these communications have no bearing on the legal issues at stake; the attack is gratuitous.[1] Despite Plaintiffs' best efforts to muddle the record with immaterial communications, none of this clutter changes the legal issues before the Court on Defendants' Renewed Motion to Dismiss.

This Motion to Dismiss, resting solely on the pleadings and referenced attachments to them, is premised upon six issues of law: ***First,*** Plaintiffs have no standing because RCW 24.03.040 allows members of nonprofits to bring derivative suits only where the ***entity itself*** *(here, the Co-op)* is "without capacity" to act (*ultra vires*). ***Second,*** Plaintiffs refused to comply with the Co-op's internal procedures for overturning board decisions. In this case in equity, they should be estopped from going directly to the Court for relief, without first honoring their own Co-op's non-litigation dispute resolution procedure: a membership vote upon presentation of a clear question and a petition signed by a nominal percentage of the Co-op membership. ***Third,*** Plaintiffs remain unable to articulate an injury. ***Fourth,*** RCW 24.03.095 and the Co-op Bylaws grant the Board plenary

[1] As is Plaintiff's other attack on Defendants' attempt to protect internal Co-op communications under the First Amendment associational privilege, out of fear of further intimidation and chilling of protected activities.

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authority to make Co-op management decisions. ***Fifth*****,** Plaintiffs can state no claim for breach of fiduciary duty, and the business judgment rule applies here to protect the Board's conduct. ***Sixth*****,** the Court of Appeals affirmed this Court's ruling for Defendants on the merits, as a matter of law, on the Board's inherent management authority, now the law of the case.

II. STATEMENT OF FACTS

The nonprofit Olympia Food Co-op operates according to certain governing documents, including the Co-op's Bylaws. Amended Complaint ("AC") ¶¶1,21. The Bylaws specify that the Co-op was formed to provide wholesome foods and to "encourage economic and social justice." Dfs.' Renewed Motion to Dismiss ("MTD") Ex. A.[2] The Co-op's affairs are "managed by a Board of Directors," and it is the Board's duty to adopt Co-op policies. *Id.* It is the staff's reasonability to "carry out Board and/or membership decisions made in compliance with [the] bylaws." *Id.* The Co-op was not only incorporated to buy and sell food, but also to educate the public to wisely purchase food, and to promote political self-determination. Ex. B. The Co-op's 1993 Boycott Policy states that the Co-op will, whenever possible, honor nationally recognized boycotts.[3] AC ¶¶28-29; Ex. C. The Co-op has joined various boycotts over the years. AC ¶32.

In March 2009, a Co-op member proposed that the Co-op boycott products produced in Israel. *Id.* ¶33. For more than a year, the staff was unable to reach consensus on whether to join the boycott. *Id.* ¶¶33-34. Around May 2010, the Board urged that staff consensus on a boycott proposal be pursued. *Id.* ¶36. In July 2010, when staff consensus had still not been reached, the Board voted to boycott Israeli products. *Id.* ¶¶38-40.

On May 31, 2011, Plaintiffs sent Defendants a letter identifying themselves as Co-op members "who oppose [the Co-op's] boycott of Israeli made products." Ex. D. Plaintiffs' letter threatened Defendants that if they did not immediately rescind the boycott, each of them would be held personally liable, and the process would become "considerably more complicated, burdensome, and expensive."[4] *Id.* The Board responded to Plaintiffs' threat to sue by asking how the directors had violated the Co-op's governing documents and by

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[2] All citations to exhibits in this brief are to the Exhibits filed with Defendants' Renewed Motion to Dismiss.

[3] The Boycott Policy requires staff consensus if "the staff decides to honor a boycott…." Ex. C. It does not, nor could it, cede the Board's authority to the staff to determine Co-op policy, nor does it address the Board's authority to adopt boycotts or how the Board should respond to a lack of staff consensus. *Id.* It nowhere purports to be the sole method for approving Co-op boycotts. *Id.*

[4] Plaintiffs' Amended Complaint confirms the impetus behind this lawsuit is, simply, their disagreement with the boycott of Israel: "In committing the actions and omissions described above, Defendants have targeted Israel—a Jewish state—while at the same time not causing [the Co-op] to boycott countries such as Turkey, Iran, and Russia." AC ¶55.

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inviting Plaintiffs to participate in the member-initiated process under the Bylaws for bringing proposals to a membership vote.[5] Ex. E. Plaintiffs refused to do so. Ex. F. Plaintiffs filed this lawsuit on September 2, 2011, alleging that the 16 individual defendants breached their fiduciary duties and acted *ultra vires*.[6] AC ¶¶9-10.

III. ARGUMENT

A. Plaintiffs' Introduction of Outside Evidence In their Opposition to This 12(b)(6) Motion is Improper and Such Evidence Should Be Disregarded

It is well-settled under Washington law that a Court considering a motion to dismiss under CR 12(b)(6) may consider only the pleadings, and not outside evidence. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725 (2008) ("[I]n ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings."); *see also Brown v. MacPherson's Inc*, 86 Wn. 2d 293, 297 (same). This Court should consider only the pleadings and those documents that are effectively taken as part of Plaintiffs' complaint, such as documents incorporated by reference in the complaint, and public documents subject to judicial notice. *See Rodriguez,* 144 Wn. App. at 725-26; *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 866 (2013). The documents properly considered here are: (1) the Co-op Bylaws,[7] (2) the Boycott Policy,[8] (3) letters exchanged between Plaintiffs and Defendants on May 31, 2011, June 30, 2011, and July 15, 2011,[9] and (4) the Co-Op's Articles of Incorporation.[10]

The Court need not look past the pleadings to find Plaintiffs' claims deficient as a matter of law. However, if this Court is inclined to treat Defendants' motion as a summary judgment motion under CR 56, CR 12(b)(7) requires the Court to give "reasonable opportunity to present all material made pertinent to such a motion by rule 56." CR 12(b)(7); *see also Bly v. Pilchuck Tribe No. 42*, 5 Wn. App. 606, 607 (1971).

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[5] Under the Bylaws, a member who gathers enough signatures may compel a vote of all the members. Ex. A.

[6] Notably, Plaintiffs never alleged that the Co-op lacks the authority or power to enact a boycott, but have claimed only "procedural violations…in adopting these policies." Ex. D. "Plaintiffs have repeatedly asked . . . that the Board rescind the Israel Boycott and Divestment policies and *apply the proper procedures* to deciding the issue." AC ¶47 (emphasis added).

[7] Incorporated by reference at Amended Compl. at ¶¶ 21, 47, 50.

[8] Incorporated by reference at Amended Compl. at ¶¶ 28, 29, 31, 32, 54.

[9] Incorporated by reference at Amended Compl. at ¶ 47.

[10] The Articles are a public document properly subject to judicial notice. *See Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015).

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B. Plaintiffs Have No Standing to Bring this Lawsuit

1. RCW 24.03.040 Forecloses Plaintiffs' Claims

Under Washington's Nonprofit Corporation Act ("NCA"), RCW 24.03 *et seq*., members may bring a "representative suit" stating *ultra vires* claims only where the complaint alleges that the ***nonprofit corporation itself*** is "without capacity or power." In order for Plaintiffs' claim to be maintained derivatively, the lawsuit must allege that the ***Articles that empower the Co-op*** do not permit the Co-op to make decisions about what food and products it will sell, or will not sell, including by engaging in boycotts.[11] Plaintiffs cannot and do not state such a claim. They do not challenge ***the Co-op's power*** to enact boycotts, but rather focus exclusively on the Board's decision on how to exercise that authority, and the ***process*** through which the boycott was enacted. *See* AC ¶66; *see also supra* n.6. This is simply not an *ultra vires* claim.

Even those derivative lawsuits that ***are*** permitted under the NCA are disfavored under Washington law, and recognized as disruptive of corporate governance. *See Haberman v. Wash. Public Power Supply System*, 109 Wn. 2d 107, 147 (1987) ("Derivative suits are disfavored and may be brought only in exceptional circumstances."); *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530 (1984) ("[D]erivative actions brought by minority stockholders could, if unconstrained, undermine the basic principle of corporate governance that the decisions of a corporation . . . should be made by the board of directors or the majority of shareholders."). Washington courts recognize the inherent risk derivative actions pose that "the corporation, its officers, and directors, and the majority stockholders would at once be conclusively shorn of their power of management and discretion in the conduct of those affairs which are of vital concern to the corporation and all its stockholders." *Goodwin*, 19 Wn.2d at 763.[12]

Plaintiffs rely on their misnamed "ultra vires" claim in an attempt to manufacture a case. *See* Pls.' Opp. to MTD ("Opp.") at 19-20. It is, of course, true that RCW 24.03.040 permits proceedings "by the corporation . . . through members in a representative suit, against the officers or directors of the corporation for exceeding their

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[11] The Co-op's Articles unambiguously empower the Co-op to "engage in the business of buying and selling food and other goods[.]" Ex. B.

[12] Accordingly, Washington's Nonprofit Corporation Act ("NCA"), RCW 24.03 *et seq.,* has unambiguously limited the right to bring derivative suits challenging an act of a corporation. RCW 24.03.040; *see also Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 177 (2002). The NCA limits standing to lawsuits filed: (1) "on behalf of the corporation . . . by a majority of the board;" (2) by a member or director against the corporation; (3) by certain parties for liquidation; and (4) by the attorney general. *Lundberg*, 115 Wn. App. at 177.

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authority." RCW 24.03.040. Such corporate transactions are *ultra vires* when they are "outside the purposes for which the 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, 244-45, (1999) (emphasis added) (citing *Twisp Mining & Smelting Co. v. Chelan Mining Co.,* 16 Wn.2d 264, 293-94 (1943)).[13] Again, Plaintiffs do not argue that the boycott decision was beyond the Co-op's power, and point to no authority which suggests that the Washington State legislature has not granted corporations the power to enact boycotts. Instead, they simply seized on the words "ultra vires" and attempted to shoehorn the phrase into a claim that passes muster.

Plaintiffs cannot distinguish *Hartstene* and *Twisp*. Plaintiffs claim that "[n]either case limits a member's ability to bring a claim of *ultra vires* against a corporation." That is true. A nonprofit member is permitted to bring an *ultra vires* claim against a corporation under the plain language of RCW 24.03.040. ***But that is not what Plaintiffs have done.*** The cases hold that challenges—just like Plaintiffs' in this case—that are not "to the authority of the corporation, but only to the method of exercising it" are simply "not *ultra vires*." *Hartstene*, 95 Wn. App. at 345; *Twisp*, 16 Wn. 2d at 293-94 (not *ultra vires* where corporation had authority to act).

2. Plaintiffs Failed to Exhaust Intra-Corporate Remedies

Derivative actions are suits of "last resort" because they "impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit." 5 Moore's Federal Practice § 23.1.019(4) (3d ed. 2011). Thus, a shareholder seeking to bring a suit on behalf of a corporation must first "exhaust[] all his available means to obtain within the corporation itself redress of his grievances." *Goodwin v. Castleton*, 19 Wn. 2d 748, 761 (1944); *see also* CR 23.1.

Plaintiffs attempt to escape this requirement by claiming that "any further effort by Plaintiffs to obtain remedial action by the Board would have been futile." Opp. at 17. Plaintiffs pleaded no facts to support their allegation that further requests would be futile, AC ¶51, much less plead it "with particularity." *F5 Networks, Inc., Deriv. Litig*., 166 Wn.2d 229, 239 (2009). In fact, their complaint references the Board's June 30, 2011

[13] The Model Nonprofit Corporations Act's Comment to 3.04 emphasizes this definition of *ultra vires* and "without capacity." Model Bus Corp Act § 3.04, Official Comment; *see also, e.g., Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn. 2d 603, 623, 146 P.3d 914, 924 (2006) (Where text of Washington's Code and a Model Code are the same, comments to the latter are "persuasive authority."). Thus, even corporate actions that are criminally illegal are nonetheless not proper subjects of *ultra vires* claims. *Id.* More specific to this case, *ultra vires* claims do not include "the validity of essentially intra vires conduct that is not approved by appropriate corporate action." *Id.* (citing as an example that corporate action to sell off all a corporations assets without any consultation of members, while manifestly impermissible, is not *ultra vires*).

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letter in which ***the Board itself*** suggested Plaintiffs take remedial action by participating in the Co-op's process for challenging decisions via a membership vote. MTD at 3-4 & Ex. E. Plaintiffs argue that this action would be "futile" because member petitions may only be submitted with the approval of the Board, and "[c]learly, such action would be futile given the Board's unanimous enactment of the Israel Boycott." Opp. at 17. However, it was the Board itself that invited Plaintiffs to seek this avenue of relief by participating in the process dictated by the Bylaws. MTD at 3-4 & Ex. E.[14]

3. The Co-op Suffered No Injury

Plaintiffs remain unable to put forth allegations that, even if true, rise to the level of harm required to confer standing. They are neither "concrete and particularized" nor "actual or imminent," but rather "conjectural or hypothetical." *State v. Cook*, 125 Wn. App. 709, 720-21 (2005). In lieu of alleging actual financial damages, Plaintiffs refer vaguely to "numerous membership cancellations" and the fact that "certain members have stopped shopping at the Co-op." Opp. at 18-19. And, ironically, Plaintiffs continue to assert that the community's reaction to the boycott constitutes a particularized injury. *Id.* at 19. In the only case cited by Plaintiffs, a city was found to have suffered a sufficient injury in fact where it was entitled to comment on an environmental impact statement, and a federal agency failed to prepare one as required by federal statute. Opp. at 19; *City of Davis v. Coleman*, 521 F.2d 661, 671-72 (9th Cir. 1975). The negative response of others, however, is not a sufficient "injury" to confer standing.

Indeed, Plaintiffs do not address the fact that the United States Supreme Court has specifically recognized that "[a]s a nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011); s*ee also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). To argue that the discourse and debate that followed the boycott somehow constitutes an "injury" would be to denigrate the very thing that the First Amendment is designed to protect: political speech and expression. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982) (finding nonviolent political boycotts are protected by the First Amendment).

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[14] It must also be noted that Plaintiffs cannot now obtain the relief they seek—injunctive relief enjoining enforcement of the boycott—by suing 14 former board members. AC ¶¶ 5,3-17.

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C. Defendants Acted Under the Plenary Authority Granted to the Board by RCW 24.03.095 and the Co-op's Articles and Bylaws

Plaintiffs cannot dispute that "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. Nor can they dispute that the Co-op's Bylaws expressly state: "The affairs of the cooperative shall be managed by a Board of Directors." Ex. A. Plaintiffs cannot dispute that those Bylaws grant the Board authority to "adopt major policy changes;" "adopt, review, and revise Co-operative plans;" and "adopt policies which promote achievement of the mission statement and goals of the Co-operative." *Id.* Finally, they cannot dispute that the Co-op's express aim is to "encourage economic and social justice." *Id.*

And yet, despite their repeated acknowledgment of the Board's plenary authority to Act, Plaintiffs nonetheless allege that the Boycott Policy somehow lessens the Board's ultimate authority to "manage . . . [t]he affairs of the cooperative." Plaintiffs rest this assertion on two false premises: first, that the "plain language" of the Boycott Policy sets forth a two-part "test" that must be followed before enacting a boycott;[15] and second, that the existence of the Boycott Policy in and of itself somehow meant that "Defendants lacked authority to enact the Israel Boycott[.]" Opp. at 2. The Boycott Policy cannot usurp the Board's ultimate authority to act under the Bylaws and Articles. Plaintiffs do not provide any authority for the proposition that a policy created ***pursuant*** to a Board's ultimate authority to "adopt policies" governing a Co-op somehow lessens that Board's authority to "manage[] . . . the affairs" of that Co-op. RCW 24.03.095; Ex. A.

D. Plaintiffs Cannot State a Claim of Breach of Fiduciary Duty And The Business Judgment Rule Protects Defendants' Actions

A derivative claim against a shareholder for breach of fiduciary duty requires that: (1) that a shareholder breached his fiduciary duty to the corporation, and (2) that the breach was a proximate cause of the losses sustained.[16] Nonprofit directors must act "in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent

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[15] By its terms, the 1993 Boycott Policy does not exclude or limit the Board's inherent management authority, which obviously includes Co-op boycott decisions. Nor does it prevent the Board from approving boycotts that are not "nationally recognized." Indeed, the language is one of authorization, not prohibition ("Whenever possible, The Olympia Food Co-op will honor nationally recognized boycotts which are called for reasons that are compatible with our goals and mission statement."). The Policy does not and cannot bar the Board's inherent management authority to adopt other boycotts, whether they happen to be recognized locally, regionally, nationally, or (as here) internationally.

[16] *See, e.g., McCormick*, 140 Wn. App. at 873 (2007); *Interlake Porsche & Audi, Inc. v. Bucholz,* 45 Wn. App. 502, 509 (1986); *Leppaluoto v. Eggleston*, 57 Wn. 2d 393, 403 (1960).

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person in a like position would use under similar circumstances." RCW § 24.03.127.

Plaintiffs vaguely allege that Defendants breached a fiduciary duty to the Co-op membership by placing their "personal and/or political interests," as well as the interests of "another organization," ahead of the Co-op's interests. AC ¶¶59-60. These allegations are abstract and conclusory; and there are no factual allegations to support them. *See, e.g.*, *Rodriguez,* 144 Wn. App. at 720 ("To the extent the complaint in this case alleges breach of the duty of care, it must be dismissed unless it alleges facts sufficient to state a claim for breach of the duties of loyalty or good faith."). Furthermore, Plaintiffs fall far short of pleading bad faith. They "do[] not even come close to alleging any conduct so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith" under Washington law. *Id.* at 721-24 (2008) (internal quotations omitted).

Though it is unclear, Plaintiffs appear to be alleging a breach of the duty of loyalty. Washington's duty of loyalty jurisprudence is exclusively concerned with a director's obligation to set aside personal pecuniary interests while representing a corporation.[17] Plaintiffs allege no pecuniary interest here; to the contrary, Plaintiffs expressly allege that Defendants' decision was motivated by their personal and/or political values. AC ¶59. Absent a pecuniary gain to the clear detriment of the corporation, Plaintiffs have not adequately alleged that Defendants breached a fiduciary duty of loyalty.

Plaintiffs' breach of fiduciary claims are further undermined by the business judgment rule, under which "courts will not interfere with the reasonable and honest exercise of the directors' judgment." *McCormick v. Dunn & Black*, P.S., 140 Wn. App. 873, 895, 167 P.3d 610 (2007). "Unless there is evidence of fraud, dishonesty, or incompetence (*i.e.*, failure to exercise proper care, skill, and diligence), courts generally refuse to substitute their judgment for that of the directors." *Spokane Concrete v. U.S. Bank*, 126 Wn.2d 269, 279, 892 P.2d 98, 104 (1995). Plaintiffs' Amended Complaint does not even allege fraud, dishonesty, or incompetence. Under the business judgment rule, Plaintiffs have therefore failed to state a claim as a matter of law. *See, e.g.*, *McCormick*, 140 Wn. App. at 895; *Spokane Concrete*, 126 Wn.2d at 279. Indeed, the Court of Appeals in this case held that there was no basis to question the Board's decision to boycott under the business

[17] *See, e.g., Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691 (1970); *Kieburtz & Associates, Inc. v. Rehn*, 68 Wn. App. 260 (1992); *J & J Celcom v. AT & T Wireless Servs. Inc.*, 162 Wn. 2d 102 (2007); *RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305 (2015) (all associating duty of loyalty to a monetary conflict of interest).

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judgment rule, absent the presence of fraud, dishonesty or incompetence. *Davis v. Cox*, 180 Wn. App. 514, 535 (2014), *rev'd on other grounds*, 183 Wn. 3d 269 (2015). That finding remains the law of the case.[18]

E. The Court of Appeals Affirmances of Dismissal of the Fiduciary Duty and *Ultra Vires* Claims Are the Law of the Case

The law of the case doctrine recognizes that issues previously decided by a court of competent jurisdiction need not be revisited in later proceedings in the same case. It promotes finality, consistency, and efficiency in the sometimes long course of a lawsuit through the courts. 5 Am.Jur.2d Appellate Review Section 605 (1995). Under this doctrine, "this court [is] bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled." *Greene v. Rothschild,* 68 Wn.2d 1, 10 (Wn. 1966).

The questions now facing this Court have already been resolved by the Court of Appeals. Its rulings were made expressly under the CR 12(b)(6) standard, rather than the anti-SLAPP standard. It held that Defendants were entitled to judgment, *as a matter of law*,[19] on the issues of fiduciary duty and *ultra vires* action. *Davis*, 180 Wn. App. at 536. It also held that the business judgment rule protected the Board's discretion to make the boycott decision because Plaintiffs did not allege fraud, dishonesty or incompetence. *Id.* at 535. Further, the Court rejected Plaintiffs' contention that the Co-op's Boycott Policy superseded the Bylaws, limiting the Board's authority to act. *Id.* at 534.

The Washington Supreme Court's reversal of the Court of Appeals was based solely on its determination that the anti-SLAPP statute was unconstitutional. *Davis*, 183 Wn. 2d at 294 n. 10 ("Our decision does not turn on the character of the particular claims here . . ."). The Supreme Court did not address the other legal issues resolved by the Court of Appeals, and it specifically did not vacate the Court of Appeals' decision. *Id.* Accordingly, these appellate court holdings on corporate decision-making as a matter of law—that the Board's boycott was not a breach of fiduciary duty or *ultra vires* action, holdings which were never addressed,

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[18] Although Plaintiffs did not allege fraud, dishonesty, or incompetence, they now claim in their Opposition that there is "evidence in the record that Defendants acted with 'dishonesty' and 'incompetence.'" Opp. at 22-23. But Plaintiffs' so-called "evidence" is not properly before the Court, or pertinent to this motion to dismiss on the pleadings. *See supra* Part IIIA. Plaintiffs do not argue that the business judgment rule is inapplicable at the motion to dismiss stage, nor can they. *See, e.g., Rodriguez,* 144 Wn. App. at 720) (upholding trial court's dismissal under Civ. R. 12(b)(6) of claims against corporate directors under the business judgment rule and its denial of leave to amend the complaint). And Plaintiffs even acknowledge that "the Court obviously cannot weigh evidence under CR 12(b)(6)." Opp. at 23.

[19] "Although we consider whether the Directors' activity was lawful under the first step of the anti-SLAPP motion analysis, our review is limited to determining whether the activity was illegal as a matter of law." *Davis*, 180 Wn. App. at 531.

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let alone "authoritatively overruled" by the Supreme Court--are binding. Plaintiffs misread the effect of the Supreme Court's opinion and the cases on which they rely.

The cases cited by Plaintiffs are inapposite. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court overturned ***and vacated*** a Court of Appeals decision which allowed confinement of a non-dangerous mentally ill individual, remanding the case with instructions to consider the qualified immunity defense. Under *O' Connor,* a ***vacated*** decision "of necessity" has no precedential effect. *Id.* at 577 n.12. It is silent on the precedential effect of an appellate decision reversed on grounds other than the merits.[20]

Plaintiffs further contend that the Supreme Court's footnote 2 demonstrates its intent to reverse all aspects of the Court of Appeals' decision. Footnote 2 noted a disputed material fact: whether a boycott of Israeli goods is "nationally recognized." *Davis*, 183 Wn. 2d at n.2. That factual question was material to the Supreme Court's constitutional analysis of the anti-SLAPP law's evidentiary standard.[21] The issue before this Court is not the constitutionality of the evidentiary standard under the anti-SLAPP law, but the merits of Plaintiffs' claims under CR 12(b)(6) standards—whether the pleadings and referenced documents require dismissal as a matter of law. Defendants do not ask this Court to decide whether the boycott was nationally recognized—that is irrelevant here. The Court of Appeals' ruling, ***as a matter of law***, that Plaintiffs failed to state viable claims (based on the Coop's governing documents), should be binding on this Court.

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[20] Similarly, *State v. Wright*, 169 Wn. 668 (1932) simply ruled that a trial court decision, ordering a note and chattel mortgage held by the plaintiff to be considered paid and cancelled, had no effect when an appellate court held that certain charges owed by the plaintiff to the defendant were valid and should have been paid before the note was cancelled. In other words, the trial court's holding was of no effect because it was incompatible with enforcement of the appellate court's decision. Likewise, *In re of Estate of Couch*, 45 Wn. App. 631 (1986), is relied on by Plaintiffs for the proposition that a judgment which has been vacated "is of no force or effect." *Id.* at 634. In *Couch*, an adopted daughter sued to vacate the adoption order in order to get a share of her biological father's estate. The sole issue in *Couch* was whether the validity of the vacated decree should be considered by the probate court in the context of a motion to dismiss. The case had nothing to do with a decision of an intermediate appellate court being vacated by a higher appellate court.

[21] In rejecting Defendants' argument that the anti-SLAPP standard was equivalent to a summary judgment standard, the Supreme Court pointed out that the trial judge weighed evidence to evaluate a disputed fact, which illustrated why the determination was not akin to one made at summary judgment, and why the anti-SLAPP statute violated the right to a jury trial. *Davis*, 183 Wn.2d 269, 281. The decision's footnote merely states what the trial court and the Court of Appeals did, detailing the trial court's determination because that's where the constitutional problem was. Defendants are not asking this Court to determine whether the boycott was nationally recognized—it is not necessary to resolve this Motion to Dismiss.

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DATED this 5th day of February, 2016.

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DECLARATION OF SERVICE

On February 5, 2016, 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 Avi J. Lipman McNaul Ebel Nawrot & Helgren PLLC 600 University Street, Suite 2700 Seattle, WA 98101-3143	☐ ☐ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via Overnight Delivery Via Facsimile Via E-mail

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 5th day of February, 2016, at Seattle, Washington.

s/ Brooke Howlett
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