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' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs have long claimed before this Court that this lawsuit is about "abuse of process, not protected speech." *See* Pls.' Opp. to Defs.' Mot. for SJ at 15. Plaintiffs' true motives are now finally revealed. In a 2012 email (produced last month along with 13,000+ documents), Plaintiff Mayer celebrated that because of "the legal stand we took against the Israeli boycott by the Olympia Food Coop Board, a line has been drawn for such a boycott in other US food coops." Second Declaration of Brooke Howlett ("Second Howlett Decl."), Ex. B. It is now finally clear that it was not only the free expression of Defendants and the Olympia Food Co-op which Plaintiffs desired to chill, but the expression of other organizations throughout the country. This abuse of the judicial process to chill protected speech must not be tolerated by the Court.[1] Even setting aside Plaintiffs' improper purpose for bringing this case, and viewing the facts in the light most favorable to Plaintiffs, the evidence does not support their claims. Having been given the opportunity of discovery, Plaintiffs present no more evidence than they did when this case was originally dismissed. Thus, the Court of Appeals' analysis, in affirming dismissal as a matter of law, based on its conclusion that the Co-op's governing documents authorized the Board to adopt the Boycott, is unchanged. Defendants are entitled to summary judgment as a matter of law.

II. STATEMENT OF FACTS

The facts material to Plaintiffs' claims are undisputed. Defs.' Opp. to Pls.' Mot. for SJ at 2-3. The Board is obligated to manage the affairs of the Co-op under the Washington Nonprofit Corporation Act and the Co-op's Articles of Incorporation and Bylaws, which

[1] "[L]itigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression. Such conduct has always been, and always will be, sanctionable." *Davis v. Cox*, 183 Wn.2d 269, 292, 351 P.3d 862 (2015).

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specifically impose on the Board the duty to adopt and change Co-op policies. RCW 24.03.095; Levine Decl. Ex. B, Ex. C at § III.13.9. On July 15, 2010, the Board adopted the Boycott by consensus. Levine Decl. ¶ 14 & Ex. H. The Boycott Policy does not address or restrict the Board's authority to enact a boycott. *Davis v. Cox*, 180 Wn. App. 514, 534, 325 P.3d 255 (2014).[2]

Plaintiffs did not bring this case to ensure that the Co-op Board followed a particular process, but because they wanted to stop the Co-op's boycott of Israel and chill other such boycotts. Plaintiff Mayer continued her 2012 email by boasting that this lawsuit had "discouraged other coops from taking similar measures, and at this point, we have been successful in drawing a line!" Second Howlett Decl., Ex. B.[3] Mayer also expressed gratitude to StandWithUs for "providing the legal team and raising all the [appeal bond] money." *Id.* Plaintiff Linda Davis disapproved posting the message to a listserv because "it mentions some still-confidential and controversial issues involving our lawsuit," telling Mayer that while "others will want to know that our legal action has been successful in stopping other food co-ops from enacting similar boycotts against Israel, the information about the money from Stand With Us and other details should probably not be divulged to others right now, especially in writing." *Id.*

[2] While additional facts need not be reached in order to grant Defendants summary judgment, the following facts are also undisputed: 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; Declaration of Hutcheon Decl. ¶ 3. Recently the Co-op Board, on which no Defendant sat, 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," and that the case should be dismissed. Hutcheon Decl., Ex. A. Plaintiffs have not alleged much less provided any evidence that Defendants had a financial or material interest or otherwise personally benefited from the Boycott.

[3] Plaintiffs produced this document on February 5, 2018, four days before Plaintiffs' Motion for Summary Judgment was filed on February 9, 2018, and as part of a 13,000+ page production from January 25, 2018 to February 14, 2018. Second Howlett Decl. ¶ 1.

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III. ARGUMENT

A. Defendants' Actions Were Not *Ultra Vires*.

Defendants are entitled to summary judgment on Plaintiffs' *ultra vires* claim as a matter of law. *See* Defs.' Mot. for SJ at 8-12; Defs.' Opp. to Pls.' Mot. for SJ at 11-12. Plaintiffs do not dispute that Washington law defines *ultra vires* as a corporate transaction outside the purpose for which a corporation was formed, and they do not even argue that the Board's decision to enact the boycott would fall within that definition.[4] *See* Pls.' Opp. to Defs.' Mot. for SJ at 8-11.

Plaintiffs disregard this settled rule of Washington law and argue a new standard: that the Boycott Policy implicitly extinguished the Board's own policy duties under the Bylaws, causing its consensus approval of this boycott to be an *ultra vires* act. *See* Pls.' Opp. to Defs.' Mot. for SJ at 9-10. Defendants' interpretation would violate the WNCA by relinquishing Board governance duties to corporate staff, and the Bylaws by repudiating the Board's own policy oversight duties. Defendants did not and could not have relinquished their ultimate authority as a Board through the Boycott Policy. *See* Defs.' Mot. for SJ at 12. At all times, Defendants retained the authority to enact the Boycott.[5] *See id.* at 10-11. Regardless,

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[4] Moreover, "[i]n the corporate sphere, the *ultra vires* doctrine has come under increasing disfavor." *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982). In Washington, the doctrine applies almost exclusively to government entities, and, even then, is applied in very limited circumstances. *See* Defs.' Mot. for SJ at 10. Defendants are unaware of a single published case in the history of RCW 23B.03.040 or 24.03.127 that has invalidated a non-governmental act on *ultra vires* grounds.

[5] The Court of Appeals, considering the Co-op's Articles of Incorporation and Bylaws, affirmed dismissal, finding "the Boycott Policy does not bind the board" as a matter of law, *Davis*, 180 Wn. App. at 534, and explaining that "'[t]he charter of a corporation and its by-laws are the fundamental documents governing the conduct of corporate affairs.'" *Id.* (quoting *Liese v. Jupiter Corp.*, 241 A.2d 492, 497 (Del. Ch. 1968)). In so finding, the Court of Appeals applied a summary judgment analysis, as found by the Washington Supreme Court. *Davis*, 183 Wn.2d at 280 (citing *Davis*, 180 Wn. App. at 546-47). The Washington Supreme Court struck down the anti-SLAPP law as unconstitutional because of "its plain terms," acknowledging that its decision did "not turn on the character of the particular claims here," and remanding to this Court. *Id.* at 294 n.10.

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Plaintiffs' claim is not an *ultra vires* claim as a matter of Washington law, and Defendants are entitled to summary judgment. *See* Defs.' Mot. for SJ at 9-10.[6]

B. Plaintiffs Lack Standing to Bring This Lawsuit.

Injury to the Co-op is a required element of proving standing in a derivative claim. This Court did not close the door to that argument, but simply found that Plaintiffs' allegations of harm ***sufficed at the motion to dismiss stage***. Ruling at 7:20-25. Now, after a two-year window for discovery, Plaintiffs have provided no evidence of injury to the Co-op. *See* Defs.' Mot. for SJ at 21; Pls.' Opp. to Defs.' SJ at 8-9; 18-19; 21. Instead they point vaguely to "membership cancellations, reduced sales, and expansion delays." Pls.' Opp. to Defs.' Mot. for SJ at 18. But the evidence in the record is to the contrary: Both membership and sales increased post-Boycott. Levine Decl. ¶¶ 17-18. Plaintiffs' vague assertions that the "community was fractured . . . and membership engagement has been stunted" are unsupported by the record and "conjectural or hypothetical," and thus insufficient to support standing. *See* Defs.' Mot. for SJ at 21; *State v. Cook*, 125 Wn. App. 709, 720-21, 106 P.3d 251 (2005). Because the Co-op suffered no injury from the boycott, Plaintiffs' lack standing and Defendants are entitled to Summary Judgment.

Plaintiffs also do not "fairly and adequately represent" the interests of Co-op members as required by CR 23.1. Some of the interrelated factors used to determine fair and adequate representation include: "the degree of support received by the plaintiff from other

[6] Plaintiffs also incorrectly argue that this Court's Rule 12(b)(6) decision not to dismiss their *ultra vires* claim precludes summary judgment on this issue, and even if not, incorrectly argues that Defendants have presented no new evidence. Pls.' Opp. to Defs.' Mot. for SJ at 8-9. But this Court decided Defendants' Motion to Dismiss solely on the pleadings, declining to consider the Co-op's Articles of Incorporation and Bylaws, and did "not address[ ] whether the [C]o-op [B]oard acted within its authority." Feb. 25, 2016 Oral Ruling ("Ruling") at 9:6-7; *see also id.* at 4:8-14. The Court even explicitly clarified that "in denying this motion to dismiss, the Court is not precluding the parties from addressing motions, including summary judgment motions on some of these same issues and arguments." *Id.* at 11:4-7.

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shareholders," "indications that the plaintiff is not the true party in interest," "plaintiff's vindictiveness toward the defendants," and "the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself."[7] *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990).

Plaintiffs lack standing under each of these factors. Even if based solely on the email exchange between Plaintiffs Susan Mayer and Linda Davis, acknowledging that the purpose of the case was to suppress constitutionally protected speech, Second Howlett Decl., Ex. B, it is clear that Plaintiffs did not pursue this case on behalf of the Co-op or its membership, but to serve personal interests and the interests of StandWithUs, an unrelated organization. *See also* March 1, 2018 Declaration of Brooke Howlett ("March 1 Howlett Decl."), Ex. F (Plaintiff Linda Davis "hopes" Co-op sales are down); Defs.' Opp. to Pls.' Mot. for SJ at 7 n.9. The two other Plaintiffs who originally brought the case have abandoned it. Plaintiffs do not fairly and adequately represent the Co-op.

C. Plaintiffs Have Shown No Fiduciary Duty Violations and the Business Judgment Rule Protects Defendants' Actions.

Plaintiffs' fiduciary duty claim fails as a matter of law first because Defendants' actions are immunized from liability by the Business Judgment Rule 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). Adoption of the Boycott was within the Co-op's power and within the Board's authority. *See* Defs.' Opp. to Pls.' Mot. for SJ at 11-12; *see also* Part III.A. "[C]ourts generally refuse to substitute their

[7] Plaintiffs produced the dispositive evidence showing Plaintiffs' vindictive motives for this lawsuit ***after*** Defendants moved for summary judgment. *See* Part II n.2. Plaintiffs' dilatory tactics regarding discovery and this lawsuit should not be permitted to prejudice Defendants.

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judgment for that of the directors" where there is no evidence of "fraud, dishonesty, or incompetence." *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). There is no evidence that Defendants' actions were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 722, 189 P.3d 168 (2008). Plaintiffs provide no evidence of bad faith, or that Defendants' actions were anything but careful, informed, and rational, and deserve deference. See Defs.' Opp. to Pls.' Mot. for SJ at IV.C; II.B.2.

Regardless, even without the Business Judgment Rule, Plaintiffs provide no evidence that Defendants breached their fiduciary duty of care owed to the Co-op. This is so even if, as Plaintiffs argue, nonprofit directors are held to a duty (for liability purposes) in which they 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 person in a like position would use under similar circumstances." *Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85, 88, 332 P.3d 1133 (2014) (quoting RCW § 24.03.127).[8] Under this standard, Plaintiffs must also show that Defendants did not act in good faith, which Plaintiffs have failed to show. Moreover, Plaintiffs cite no evidence that Defendants did not act as an ordinarily prudent person in a like position would have in similar circumstances. Defs.' Opp. to Pls.' Mot. for SJ at IV.C.1; II.B.2;[9] *see, e.g.*, *Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982) (citing *Papalexiou v.*

[8] Although Defendants contest that it is the correct test, *see* Defs.' Opp. to Pls.' Mot. for SJ at 14 n.20, the distinction is immaterial here.

[9] Managerial and policymaking decisions are vested with the Board, a proposition that is long-held by the case law, academic literature, and the Co-op's own governing documents. The Boycott Policy did not remove the Board's own oversight duties under the law, Articles of Incorporation, and Bylaws. *Liese*, 241 A.2d at 497 (corporation's governing documents are its articles of incorporation and its bylaws); James D. Cox & Thomas L. Hazen, BUSINESS ORGANIZATIONS LAW § 10.5 (3d ed. 2011). (Questions of "value and policy" have long been said "to be part of the directors' business judgment, although their errors may be so gross as to show their unfitness to manage corporate affairs.").

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Tower W. Condo., 167 N.J. Super. 516, 401 A.2d 280, 286 (1979) (finding no breach of duty under ordinary care standard absent evidence of fraud, dishonesty, or incompetence).

Furthermore, there is no evidence of a breach of the duty of loyalty. See Defs.' Opp. to Pls.' Mot. for SJ at IV.C.2; II.B.2. Washington's duty of loyalty jurisprudence is exclusively concerned with a director's obligation to set aside personal pecuniary interests while representing a corporation. Plaintiffs cite no authority otherwise, and point to no facts showing that Defendants were "materially interested" in the Boycott decision to sustain their claim. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. at 722 (2008); *see Gilbert v. El Paso Co.*, 575 A.2d 1131, 1147 (Del. 1990) (summary judgment proper where plaintiffs unable to produce any evidence to suggest that "directors were motivated by improper or selfish interests . . . something more than innuendo is required to justify an inference of wrongful intent on the part of the defendants").

Finally, Plaintiffs fail to show that, even if a duty *were* violated, such a breach was the "proximate cause of the losses sustained." *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986). Not only do Plaintiffs fail to show how, if at all, the Board's decision proximately caused their injury, there simply *is no injury. See id.* at 510 ("plaintiff must prove the *damage* resulting from the breach) (emphasis added); *Hyde v. Wellpinit Sch. Dist.*, 32 Wn. App. 465, 470, 648 P.2d 892 (1982) (damages must be supported by "competent evidence in the record"). *See* Defs.' Opp. to Pls.' Mot. for SJ at II.B.4; IV.E.3. Plaintiffs' fiduciary duty claim fails as a matter of law.

D. Plaintiffs Are Not Entitled to Either Declaratory or Injunctive Relief.

Plaintiffs failed to make the showing required for either declaratory or injunctive relief. *See* Defs.' Opp. to Pls.' Mot. for SJ at 16-21. Their argument for declaratory judgment is moot under Washington law, as no Defendant remains on the Co-op Board. Plaintiffs misplace

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reliance on *LaHue*, arguing that "[j]oinder of the corporation is not always essential" and that "judgment in favor of [an] absent corporation . . . may be upheld." Pls.' Opp. to Defs.' Mot. for SJ at 20. But this is beside the point. This Court cannot—as a matter of Washington law—issue an award for declaratory relief without a "justiciable controversy." *Ames v. Pierce Cty.*, 194 Wn. App. 93, 113-14, 374 P.3d 228 (2016); *see also* Defs.' Opp. to Pls.' Mot. for SJ at 17. Because no Defendant remains on the Co-op Board, no such justiciable controversy exists. *See Davison-York v.Bd. of Managers of 680 Tower Residence Condo. Ass'n*, 2011 WL 10069517, at *5 (Ill. App. Ct. 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."). There is no declaratory relief against Defendants that could void the Boycott.

Nor can Plaintiffs make the showing required for a permanent injunction. *See* Defs.' Opp. to Pls.' Mot. for SJ 19-21. Plaintiffs have not demonstrated that the Co-op suffered irreparable injury from the boycott decision over the course of the seven years since its adoption, and have alleged no imminent future irreparable injury. *See id.*; *see also* Part III.B.

E. Plaintiffs—not Defendants—Have Been Obstructive.

Plaintiffs provide no excuse whatsoever for the undisputed fact that for ten months, Plaintiffs had abandoned this litigation. *See* Defs.' Mot. for SJ at 24-25; *see also* Howlett Decl. ¶¶ 7, 19, 20, 22. Instead, Plaintiffs brazenly attempt to shift responsibility to the Defendants for their own unwarranted failure to prosecute their lawsuit.[10] Defendants served Plaintiffs with their first set of interrogatories and requests for production in June 2016. February 14, 2018 Declaration of Brooke Howlett ("February 14 Howlett Decl."), ¶1. From October 2016 to

[10] "[T]he obligation of going forward to avoid the operation of the rule [dismissing a case for want of prosecution] always belongs to the plaintiff . . . and not to the defendant." *Story v. Shane*, 62 Wn.2d 640, 642-43, 384 P.2d 379 (1963); *see also Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969 (1961).

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November 2016, Plaintiffs produced 128 documents. *Id.* ¶ 3. Plaintiffs did not produce another document until January 2018—***over two years later***—when they dumped 13,700 documents on Defendants from January 25, 2018 to February 14, 2018, simultaneous with briefing on the parties' Motions for Summary Judgment. *Id.* ¶ 9.

Plaintiffs' suggestion that Defendants are resisting setting a trial date is absurd. On January 25, 2018 (after ten months of inaction) Plaintiffs unilaterally proposed May 29, 2018 as a trial date. Second Howlett Decl., Ex. A at 2. On February 1, 2018, undersigned counsel explained that they have another trial set to start that very same day, but invited Plaintiffs' counsel to "send us other dates that work for you and we can check them against our schedules as well as our clients' schedules." *Id.* Plaintiffs' counsel responded on February 2, 2018, stating "We will send you alternative trial dates." *Id.* at 1. They never did.

IV. CONCLUSION

Defendants respectfully submit that this Court should grant Defendants' Motion for Summary Judgment as a matter of law and must deny Plaintiffs' Partial Motion for Summary Judgment.[11]

[11] Respectfully, if the Court grants Defendants' Motion, an award of attorneys' fees and costs to Defendants may be warranted. It is within the Court's equitable power to award Defendants attorneys' fees and costs, as Plaintiffs brought this action derivatively. "[A]n award of attorney fees must be based upon a contract, statute, or recognized ground in equity." *Interlake Porsche & Audi*, 45 Wn. App. at 521. Derivative suits represent one such recognized equitable ground. Derivative suits "depart from the general American rule that each party bears its own costs." 5 MOORE'S FEDERAL PRACTICE § 23.1.17(1) (3d ed. 2011). "A shareholder who loses on his or her derivative claims risks having to pay the reasonable expenses incurred by the corporation in its defense." *Id*. at § 23.1.17(2) (3d ed. 2011). Fees and costs may also be awarded because Plaintiffs' claims are "frivolous and [were] advanced without reasonable cause." RCW 4.84.185. Finally, the award of sanctions is available to a party that defends against a claim that a reasonable inquiry would have shown is used "for any improper purpose, such as to harass . . . ." CR 11(a).

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DATED this 5th day of March, 2018.

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DECLARATION OF SERVICE

On March 5, 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
Avi J. Lipman	□	Via U.S. Mail
McNaul Ebel Nawrot & Helgren PLLC	□	Via Overnight Delivery
600 University Street, Suite 2700	□	Via Facsimile
Seattle, WA 98101-3143	□	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 March, 2018, at Seattle, Washington.

s/ Brooke Howlett
Brooke Howlett, WSBA No. 47899

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