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Division II
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Court of Appeal No. 51770-1-II

Thurston County Superior Court No. 11-2-01925-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

Appellants,

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,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The central question for this Court is whether the decision by customers to no longer patronize a business constitutes an injury in fact sufficient to grant standing. In light of the minimal standing requirement imposed by law, to ask the question is to answer it. When a customer no longer shops at a store, it is self-evident that the store has suffered lost profits. The business has suffered an actual injury, and its owners may seek derivative relief on its behalf.

Defendants' Brief ("Resp. Br.") does not contest this basic principle. Resp. Br. at 1. Instead, Defendants rely upon the novel, uncited theory that because sales allegedly increased *overall* the Co-op *cannot* have suffered an injury.[1] This turns the standing inquiry on its head. Instead of merely determining whether an injury occurred, Defendants effectively argue that courts must instead weigh the actual injury suffered against any countervailing (or merely contemporaneous) economic gains. Defendants would have this Court conclude that standing is decided by the same process as damages are measured. That is not the law.[2]

Apparently sensing the weakness in their position as to the central issue on appeal, Defendants attempt to make this case about anything and

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[1] Capitalized words have the meaning provided to them in Plaintiffs' opening brief, unless otherwise defined herein.

[2] Of course, Defendants also ignore that the *overall* gains could (and almost certainly would) have been greater *but for* the actual injury suffered by the Co-op. Plaintiffs, as the non-moving party under CR 56, are entitled to receive this self-evident inference.

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everything else. Defendants claim that Plaintiffs filed a SLAPP. But the Washington State Supreme Court has already rejected that misguided position—and went significantly further by striking the Anti-SLAPP Act as unconstitutional in its entirety. *Davis v. Cox*, 183 Wn.2d 269, 295–96, 351 P.3d 862 (2015). Why Defendants continue to invoke a non-existent statute is unclear. Moreover, the Washington Supreme Court has already held that Plaintiffs' claims raise a material issue of fact justifying a trial. *Id.* at 282 n.2 ("One disputed material fact in this case is whether a boycott of Israel-based companies is a 'nationally recognized boycott[ ],' as the Cooperative's boycott policy requires for the board to adopt a boycott."). As it stands, Defendants' abuse of process has caused both economic and non-economic injuries to the Co-op. App. 6 ¶ 13; App. 10 ¶ 13; App. 17 ¶ 12; App. 2 ¶ 3. Plaintiffs' claims should proceed to trial.

Defendants also claim that injunctive relief would be ineffective. Resp. Br. at 24. This position ignores that the Co-op is a party to this lawsuit and disregards the inherent equitable power of the courts to do justice. Instead, Defendants double down on their claim that because sales and membership in the Co-op have risen over the years, no equitable relief can be granted. While Defendants' arguments in this regard are flawed on multiple levels, most crucially they ignore the essential difference between an action at law and one lying in equity—*i.e.*, equitable relief exists to

provide a remedy where monetary relief cannot. Equitable relief is tailored precisely to address Defendants' plea to enforce the Co-op's boycott process. Further, Defendants ignore that Plaintiffs can and should be allowed to amend their complaint to add the current Co-op board members—as the trial court has recognized, CP 609.

For all of Defendants' claims that the Co-op opposes Plaintiffs' lawsuit, the Co-op has failed for more than eight years to do the one thing that would resolve this case immediately—properly conduct the process for approving the Israel Boycott. This is revealing, not only on the subject of "demand futility," but also on the necessity of equitable relief here.

The alternative bases invoked by Defendants to affirm the order are equally without merit. As the trial court recognized, those arguments fail as a matter of law or because disputed material issues require a trial.

II. ARGUMENT

A. Plaintiffs Established Standing Exists Because the Co-Op Suffered an Injury In Fact

As has been explained, standing exists because, due to the Israel Boycott, customers stopped shopping at the Co-op. Under the liberal standing rules, this is sufficient. Defendants' Brief does not engage or dispute this black letter principle.[3] *Compare* Resp. Br. at 17 ("[Plaintiffs]

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[3] Indeed, Defendants concede that the Co-op's corporate purposes, which include advancing economic and social justice, "requir[e] business judgment not readily measured by yearly sales figures." Resp. Br. at 18. This effectively concedes that the

must actually provide evidence that the Co-op suffered some injury.") *with* Resp. Br. at 16 ("[Plaintiffs] . . . submitted evidence that two of the three of them stopped shopping at the Co-op due to the [Israel] Boycott and that one other individual cancelled his membership." (internal citations omitted)); *see also* CP 608 (trial court acknowledged that three individuals stopped shopping at the Co-op). This admission alone disposes of the standing question. *Accord* Plaintiffs' Brief ("Ap. Br.") at 23; *City of Burlington v. Washington State Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015) ("The injury in fact test is not meant to be a demanding requirement. Typically, if a litigant can show that a potential injury is real, that injury is sufficient for standing.").

Defendants incorrectly claim that *City of Burlington* is irrelevant. Resp. Br. at 16-17. While *City of Burlington* applied the standing analysis under the Administrative Procedures Act ("APA"), the relevant analysis cited by Plaintiffs in support—whether an injury in fact was suffered—is the same under the APA or any other standing analysis. *Compare City of Burlington*, 187 Wn. App. at 868 ("To show *injury in fact*, the City must demonstrate that it will be specifically and perceptibly harmed by the Board's action.") (emphasis added) *with* Resp. Br. at 15 ("To establish standing, a party must . . . allege [that] the challenged action has caused

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discord raised the flawed implementation of the Israel Boycott is itself an injury to the Co-op due to its special corporate mission.

injury in fact, economic or otherwise." (quoting *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, 230 P.3d 190 (2010)). Indeed, if anything, Plaintiffs' standing argument is stronger here than in *City of Burlington*, because Plaintiffs have demonstrated an actual existing injury, while in *City of Burlington*, standing turned on whether "threatened injury" was sufficient. 187 Wn. App. at 869.

Defendants cite no authority to support their argument that customers no longer patronizing a business is not an injury in fact. Moreover, Defendants cite no case law supporting their argument that if a corporation's *overall* profits increase, then a derivative plaintiff has no standing. Indeed, the only case they appear to cite in this regard, *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1222 (9th Cir. 1997), is entirely irrelevant. *Image Technology* did not hold anything with respect to standing. The opinion analyzed an appeal of a *jury verdict*. Obviously, it is entirely appropriate for a jury to weigh evidence. But this is not an appeal of a jury verdict—it is one from summary judgment, where all inferences must be drawn in the Plaintiffs' favor. Ap. Br. at 28.

This question of drawing inferences crystallizes another error made by the trial court: Improperly weighing evidence on summary judgment. Ap. Br. at 29-30. Defendants claim that *Wuth ex rel. Kessler v. Laboratory Corp. of Am.,* 189 Wn. App. 660, 359 P.3d 841 (2015) is inapposite

because "[Plaintiffs] simply failed to provide any evidence to challenge [Defendants'] evidence that there was absolutely no financial injury to the Co-op." Resp. Br. at 17-18.[4] But that claim itself is not supported by Defendants' evidence, which only shows that *overall* profits increased, not that (for example) profits increased *because of* the Israel Boycott. Neither does that claim account for the contrary evidence advanced by Plaintiffs. In such a situation *Wuth* makes clear that balancing of evidence is improper on summary judgment.[5]

Defendants also incorrectly claim that Plaintiffs' declarations demonstrating injury are somehow deficient. Tellingly, to make this argument, Defendants simply omit relevant portions of the declarations. *Compare* Resp. Br. at 18 *with* CP 618 (Tibor Breuer declaration stating "[a]s a direct result of the Board's action . . . I cancelled my Co-op membership"); CP 622 (Kent Davis declaration stating "my wife and I previously shopped at the Co-op one or two times per week, but have not done so since the summer of 2010"); CP 626 (Linda Davis declaration stating same); CP 633 (Susan Mayer declaration stating that "I previously shopped at the Co-op twice per week, but have not done so since the

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[4] Not only is this an incorrect statement, as customers did stop shopping at the Co-op (*see* App. 6 ¶ 13; App. 10 ¶ 13; App. 17 ¶ 12), but Defendants, *in the very next sentence*, then argue that Plaintiffs' evidence of financial is "immaterial." *Id.* at 18. The materiality of evidence goes to weight, which should be considered by a fact finder and not resolved on summary judgment.

[5] Defendants' discussion of *Wuth* and whether corporations can suffer emotional damages is entirely beside the point.

summer of 2010"). None of these statements are vague, and each demonstrates that due to the improper imposition of the Israel Boycott, customers stopped shopping at the Co-op, causing it harm. Nor are the statements hearsay, as each speak to what the declarant *did*, not what anyone else told them.[6]

Moreover, Defendants again attempt to twist summary judgment standard to their advantage by shifting the burden of proof onto Plaintiffs. Resp. Br. at 21 ("[Plaintiffs] did not submit any evidence to support their argument that the Co-op was injured despite its increased sales and membership numbers."). This argument simply misstates the law (and ignores Plaintiffs' evidence of injury in fact).

The court must "construe all evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Keck v. Collins*, 181 Wn. App. 67, 79, 325 P.3d 306 (2014). As the Plaintiffs' opening brief made clear, "[t]he trial court, . . . improperly drew inferences in favor of Defendants—the moving parties." Ap. Br. at 27. Again, Defendants only put forward evidence that *overall* Co-op revenues had increased. To prevail, that evidence requires the trial court to draw an

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[6] The cases cited by Defendants in this regard (Resp. Br. at 19-20) are irrelevant because both considered whether particular damage awards *rendered at trial* were appropriate, not standing to bring suit. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 630, 939 P.2d 1228 (1997), *aff'd,* 135 Wn.2d 820, 959 P.2d 651 (1998) (granting in part appeal from jury verdict); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) (appeal from jury verdict).

inference—i.e., the Co-op gained customers and revenue (in the aggregate) *because of* the Israel Boycott. Yet, under CR 56, Plaintiffs were not obligated to introduce evidence defeating that inference, only to identify the reasonable inferences that should be construed in their favor. Here, Defendants evidence does not show that the increase was *because of* the Israel Boycott. There is nothing in the record to support that counterintuitive conclusion. The more obvious explanation for increased sales is that the economy has improved in the Puget Sound region since this case was filed. Since "different inferences may be drawn [from facts not in dispute] as to ultimate facts . . . a summary judgment would not be warranted." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d (1960).

In other words, Defendants' argument confuses *when* the burden to produce evidence shifts from the moving party to the nonmoving party under CR 56. The moving party must present evidence that "show[s] there is no genuine issue as to any material fact." CR 56(c). Defendants' evidence only shows that profits *overall* increased, not that profits increased because of the Israel Boycott, or because of any other factor.

Finally, Defendants' attempted rebuttal of *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 976 (2013) is predicated on the puzzling contention that Plaintiffs rely on Defendants having "waived" standing. Resp. Br. at 23. What Plaintiffs

actually argued was that standing has already been decided by the trial court's order denying the Defendants' motion to dismiss. Ap. Br. at 23. As standing is not jurisdictional in Washington, courts are not free to revisit the issue again and again (unlike federal courts). *See Trinity Universal*, 176 Wn. App.at 199 ("Accordingly, if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits."). The issue here is not one of waiver (as it was in *Trinity Universal*), but rather the fact that Defendants already litigated this issue—and lost.

B. Plaintiffs Have the Right to an Injunctive Relief Remedy, as the Trial Court Has Conceded

1. Injunctive Relief May Be Ordered Against Any Party to a Litigation

Defendants' central argument regarding injunctive relief appears to be that a plaintiff (here, the Co-op) seeking injunctive relief cannot be bound by such relief. Resp. Br. at 26 ("[Plaintiffs]' purported authority for this absurd proposition [that "the Co-op itself—as the ostensible plaintiff—would be bound by an injunction voiding the Boycott"] is inapposite."). The plain language of CR 65(d), however, demonstrates that this is anything but an "absurd proposition": "Every order granting an injunction . . . *is binding only upon the parties to the action*, their officers, agents, servants, employees, and attorneys . . ." CR 65(d) (emphasis

added); *see Walters v. Ctr. Elec., Inc.*, 8 Wn. App. 322, 329, 506 P.2d 883 (1973) (in derivative action "the corporation is the real party in interest").[7]

The Co-op is a party to this action. *See* CP 1, ¶ 1. Plaintiffs act derivatively on its behalf. Defendants already moved to dismiss on the grounds that the Plaintiffs lacked derivative standing. *See* CP 430. The trial court denied that motion. *See id*. On summary judgment Defendants again moved on derivative standing. CP 39-41. Again, the trial court denied the motion. App. 22-23; CP 608-9. These findings were correct.[8]

2. A Court May Order Injunctive Relief to Enforce Its Declaratory Judgments

That injunctive relief was well within the trial court's power is also demonstrated by Defendants' arguments regarding Plaintiffs' request for declaratory judgment. Resp. Br. at 28.

First, the Israel Boycott is still in effect, after being implemented through an improper process. This is not a moot disagreement. It is a fact. The only way to "moot" this litigation would be for the Board to rescind

[7] *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 130 A.3d 934 (Del. Ch. 2016) supports Plaintiffs' argument. Defendants attempt to undermine the reasoning of that case by noting that the Delaware Supreme Court declined to follow it. But this is misleadingly reductive. The court "declined to follow" whether dismissal could be used offensively against other derivative plaintiffs, *not* whether a corporation would ultimately be bound by any declaratory or injunctive relief, which is the relevant proposition here.

[8] As explained below, while Defendants claim that the current Board (which it claims, without evidence in the record, is independent) "disapproves" of this litigation, that merely shows any demand would still be futile. *Infra* § II.C.3.

the Israel Boycott and follow the Boycott Policy. It has not done so.[9]

Second, injunctive relief would both bind the Co-op[10] and preclude Defendants (who appear to be still involved in the Co-op) from interfering or preventing the Co-op from "following [its] governing rules, procedures, and principles." CP 12 (request for injunction directed at Co-op's Board defined as the board of directors of the Co-op).

Third, as argued in detail above, the Co-op suffered an actual injury in fact. *See supra* § II.A. Loss of *any* revenue (even if *overall* revenues contemporaneously increase) is not speculative, and Defendants cite no case to the contrary.

Fourth, as the Co-op would be bound by any injunction—and its agents (i.e. the current Board) would be equally bound—a judicial determination would conclusively resolve this dispute.

Of course, all of this is within the equitable power of the trial court. Defendants do not contest this basic principle, instead claiming that injunctive relief *against them* would be impossible. But that is not the issue. The question is whether a trial court has the power to fashion

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[9] Defendants rely upon *Davison-York v. Bd. of Managers of 680 Tower Residence Condo. Ass'n*, 2011 WL 10069517 (Ill. App. Ct., Sept 27, 2011) (unpublished) to support their argument that they would have no ability to comply with injunctive relief. Yet, in *Davison-York* the court had denied derivative standing. Thus, the association at issue was not a party and could not be bound by any judgment. That is not the case here.

[10] This would include, of course, the Board. *Kitsap Cty. v. Kev, Inc.*, 106 Wn.2d 135, 142, 720 P.2d 818 (1986) (quoting 10 W. Fletcher, *Private Corporations,* § 4875, at 339 (rev. perm. ed. 1978)) ("[w]henever an injunction, whatever its nature may be, is directed to a corporation, it also runs against the corporation's officers, agents, employees and servants.").

effective injunctive relief to do justice. As the Co-op is within the trial court's jurisdiction, the answer to that question is "yes."

3. Amendment of the Complaint Resolves any Issues

Finally, as the trial court recognized, any deficiency in the complaint could easily be resolved by amendment. CP 608-9 ("The Court is dealing with the current complaint. The Court does not address this argument in the context of any possible future amendment of the complaint."). The parties have litigated this issue for many years. The Israel Boycott is still in place. Cause exists for amendment. Even if Defendants' arguments regarding injunctive relief were correct (they are not), Plaintiffs should be permitted to amend the complaint.

C. The Trial Court Correctly Rejected the Alternative Bases Presented by Defendants to Affirm the Order

The trial court found that "material issues of fact" existed as to the alternative bases for summary judgment asserted by Defendants below, and therefore properly denied summary judgment on those theories. App. 22; CP 608. In some instances, the trial court has rejected these theories *multiple* times. *See* CP 415-16, 419. Undeterred, Defendants present those arguments again here. The Rules of Appellate Procedure allow, but do not require, this Court to entertain these arguments. RAP 2.5(a); 2A Wash. Prac., Rules Practice RAP 2.5 (8th ed.).

If considered, Defendants face the same burden as they did below, meaning "[a]ll facts and reasonable inferences are considered in a light most favorable to the nonmoving party" and this Court will only "affirm summary judgment if there is no genuine issue of any material fact." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Defendants' arguments do not justify summary judgment on appeal.

1. Plaintiffs' Breach of Fiduciary Duties Claim Should Not Be Dismissed

Defendants offer two reasons why Plaintiffs' breach of fiduciary duties claims should be dismissed. First, they argue that a breach of fiduciary duties claim requires proof of injury to the Co-op and that no such injury occurred. Resp. Br. at 30-32. In other words, Defendants repeat their argument that there is no evidence in the record of harm to the Co-op. This is plainly incorrect. The record contains uncontested evidence that the Co-op lost customers and business it otherwise would have had but for the Israel Boycott. App. 6 ¶ 13; App. 10 ¶ 13; App. 17 ¶ 12. This is harm. The lost profits are damages.[11] Defendants' argument fails for the same reason the Defendants' standing argument fails. *Supra* § II.A.

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[11] *Arden v. Forsberg & Umlauf, PS*, 189 Wn.2d 315, 402 P.3d 245, (2017) is not to the contrary. In *Arden*, summary judgment was granted because plaintiffs had requested disgorgement of fees they had not paid. *Id.* at 329 ("[Plaintiffs] cite no authority that permits them to collect fees that they never paid."). Here, the Co-op has suffered actual economic damages.

Second, Defendants argue that the business judgment rule should be applied to bar Plaintiffs' breach of fiduciary duties claims. Resp. Br. at 32-33. It should not. The law in Washington (and elsewhere) does not shield a corporate director's breach of the duty of loyalty. Where directors stand to gain from their own actions, the business judgment rule does not apply. *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 260 (Del. Ch. 2006); *see Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986); *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402, 357 P.2d 725 (1960).[12] There is ample evidence that Defendants' disregard for Co-op process was motivated by their own political objectives and the political agenda of an adverse third party. CP 289, 340-43.[13]

Defendants rely on the earlier decision of Division One in arguing that the business judgment applies to the facts here. Yet, the Washington Supreme Court overruled that analysis in *Davis*, 183 Wn.2d 269. It is black letter law that, as a reversed intermediate appellate court order, that

[12] *See also Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 642 (Del. 2014) (business judgment rule applies to duty of care but not duty of loyalty); *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (same).

[13] Even if it were otherwise, the business judgment rule is simply inapplicable here because the disputed actions fall outside the authority of the Board or the Co-op. *See Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). The record is clear that the Board lacked authority to enact the Israel Boycott. *See* CP 415-19. The Bylaws afford the Board with certain express powers, including the power to propound policies. The Bylaws do not permit the Board to formulate a policy that vests authority in the Staff and then simply disregard that policy when the Staff makes a decision it does not like. CP 255 § III.13. The only permissible solution for the Board is to propound a new policy. It has consistently failed to do that. CP 385 at 33:13-15.

Division One's prior opinion not law of the case. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("[O]ur decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.").[14]

Even assuming that the Court of Appeals' findings survived reversal by the Washington Supreme Court, Defendants' argument is spurious because the earlier opinion evaluated pre-discovery facts under the now-unconstitutional Anti-SLAPP Act. The law of the case doctrine applies only when an appellate court issues a ruling expressly controlling the issue presented. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) ("[T]he doctrine applies only to issues actually decided.").

Nonetheless, even under the business judgment rule, summary judgment in favor of Defendants is improper following discovery. There is ample, undisputed documentary evidence of bad faith, incompetence, and dishonesty by Defendants in enacting (and refusing to reconsider) the

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[14] *See also State v. Wright*, 169 Wash. 668, 670, 14 P.2d 962 (1932) (holding that elements of lower court ruling not expressly reversed nonetheless "necessarily" overruled by reversal); *Matter of Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) ("A judgment which has been vacated is of no force or effect and the rights of the parties are left as though no such judgment had ever been entered."); *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 91 (Tenn. Ct. App. 1996) ("Obviously, [the law of the case doctrine] does not apply to intermediate appellate court opinions that have been reversed or vacated.").

Israel Boycott. *See, e.g.*, CP 289, 340-41, 343-54. Indeed, Defendants have directly testified that the decision to boycott belonged to the Staff (CP 378 at 45:21-23), but they recklessly and knowingly ignored the Staff's decision on the Israel Boycott anyway (*see* CP 374 at 24:12-25:15, 375 at 32:11-33:3, 376-77 at 35:17-38:1, 378 at 45:21-23, 379 at 52:25-53:4, 391 at 22:5-16, 392 at 28:17-29:1, 393 at 35:2-14). The trial court, closely familiar with these facts, agreed. *See* App. 22; CP 608.

2. Plaintiffs' Ultra Vires Claim Should Not Be Dismissed

"[W]here the directors of corporations breached their trust . . . by . . . ultra vires acts . . . and the corporation was unwilling, or unable to institute suit to remedy the wrong, a stockholder [may] bring action on his behalf and that of other shareholders." *Davis v. Harrison*, 25 Wn.2d 1, 10, 167 P.2d 1015 (1946). Defendants argue Plaintiffs' *ultra vires* claim is facially improper under Washington law because an act is *ultra vires* only where "no power existed" to take the action in question, pointing to *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 979 P.2d 854 (1999) and *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 133 P.2d 300 (1943). Those cases do not support Defendants' argument. Indeed, the trial court rejected this argument twice, once under CR 12 and again under CR 56. App. 22; CP 608; *see* CP 416.

The Co-op has a clear right to relief from Defendants' actions

under the *ultra vires* doctrine. Defendants' actions were *ultra vires* if "performed with no legal authority." *South Tacoma Way, LLC v. State,* 169 Wn.2d 118, 123, 233 P.3d 871 (2010). In Washington, corporate directors cannot simply disregard the corporation's own rules and bylaws that prescribe its policymaking procedures.

In *Hartstene Pointe*, 95 Wn. App. 339, the plaintiff sought to challenge the propriety of a procedurally improper corporate policy that had been imposed. The corporation argued that under the Nonprofit Act's *ultra vires* provision, RCW 24.03.040, the plaintiff could not challenge the propriety of the policy because he did not fit within the provisions of the Act. 95 Wn. App. at 344. But the court *rejected* the corporation's argument and permitted the plaintiff to challenge the policy. *Id.* at 346.

In *Twisp*, 16 Wn.2d 264, the corporation attempted to avoid a transaction with a third party by claiming it had acted without a quorum and that the transaction was therefore *ultra vires*. The Court rejected that argument, ruling the corporation could not shield itself from the legal effects of its own actions. Yet, the Court made clear that acts violating corporate procedural rules are not beyond challenge by harmed individuals. 16 Wn.2d at 294.

Both *Hartstene Pointe* and *Twisp* stand for the unremarkable proposition that a corporation cannot self-servingly protect its

procedurally improper actions by asserting the *ultra vires* doctrine. Yet, as *Hartstene Pointe* made clear, that doctrine does not prevent an individual from challenging a corporation's conduct in violation of its own rules and regulations. To do so would render the corporation's internal rules and regulations "largely meaningless." 95 Wn. App. at 346.

Here, the Bylaws describe the Board's powers by reference to a list of "major" duties, which are phrased exclusively. CP 255 § III.13 ("The major duties of the Board are to: . . . ."); *see Gorre v. City of Tacoma*, 184 Wn.2d 30, 47, 357 P.3d 625 (2015) (affirmative list lacking non-exclusive qualifier is construed exclusively). Any unlisted authority concerning "affairs" of the Co-op—if such authority exists—is not a "major" power comparable to those listed. Thus, the relevant Board powers are to "adopt major policy changes," "adopt policies which promote achievement of the mission statement and goals of the Cooperative," and "establish and review the Cooperative's goals and objectives." CP 255 § III.13.

The Board exercised these very powers when it enacted the Boycott Policy. CP 280-81. The Boycott Policy confers upon the Staff the power to adopt or reject proposed boycotts. *Id.* The plain language of this policy *removes* boycotts from the purview of the Board. *Id.*; *see City of Seattle v. Parker*, 2 Wn. App. 331, 335, 467 P.2d 858 (1970)

("The expression of one thing is the exclusion of another."). Defendants have *admitted* as much. CP 378 at 45:21-23; *see* CP 392 at 28:17-29:1.

Of course, the Board retained the authority to rescind or modify the Boycott Policy at any time under the above-stated powers. CP 255 § III.13. But it never did so. *See* CP 385 at 33:13-15. Even after the fact—in the face of objections from Staff and Co-op Membership concerning the improper procedure used to enact the Israel Boycott—the Board did not rescind or modify the Boycott Policy. CP 345-54. Why did the Board not employ its authority to "review" and rescind or "change" the Boycott Policy? The answer is obvious. Such a step would require unanimous Board approval, which did not exist at the time—and, apparently, has never existed. *See* CP 255 § III.6, 385 at 33:13-15.

This left Defendants with only one option: Disregard the Bylaws and claim the Board has plenary power to ignore the Boycott Policy at its whim. Yet, the Bylaws do not confer this power. CP 255 § III.13. And, in nearly decade of litigation, Defendants have not cited any Washington law conferring this power. To the contrary, authority cited by Defendants undermines their position. *See Liese v. Jupiter Corp.*, 241 A.2d 492, 497 (Del. Ch. 1968) ("The charter of a corporation and its by-laws are the fundamental documents governing the conduct of corporate affairs.").[15]

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[15] The Board's authority to "resolve organizational conflicts after all other avenues of resolution have been exhausted" does not change the foregoing analysis. CP 254 § III.6.

3. The Board's Inaction Underscores the Validity and Necessity of This Lawsuit

Defendants contend that this lawsuit should not continue because the current Co-op Board has expressed "displeasure" with it. Resp. Br. at 35. Defendants rely on *Dreiling v. Jain*, 151 Wn.2d 900, 905, 93 P.3d 861 (2004), but that case is of no assistance. In *Dreiling*, the company was incorporated under Delaware law. *Id.* in Delaware, a corporation may delegate to a special litigation committee ("SLC") the power and authority to review and derivative action and make a determination about whether the action should be dismissed. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981); Del. Code tit. 8, § 141. Washington law governs here because the Co-op was organized and operates in Washington. CP 1 ¶ 1. In Washington, there is no authority for the use or involvement of an SLC (or the Board) after the derivative complaint is filed.[16]

Moreover, none of the antecedent conditions present in *Dreiling* are present here. First, in *Dreiling*, an SLC was formed to review all discovery in the litigation to determine the merit of the claims. 151 Wn.2d at 905. No such thing happened here; the Board's resolution focuses only

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Corporate directors cannot formulate a policy that requires Staff consensus, enact the policy, and then justify their violation of it by claiming a lack of consensus constitutes a "conflict" for which there is no alternative "avenue" of resolution. The position defies logic. The boycott issue *was* resolved by the Staff: It was rejected. Indeed, Defendants have admitted as much. CP 376-77 at 35:17-38:1, 378 at 45:21-23, 392 at 28:17-29:1, 393 at 35:2-14.

[16] *See Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979) ("[W]hether a special committee of disinterested directors may dismiss a derivative action brought against other Defendants, depends on the relevant state law.").

on the supposed burden caused by the litigation. *See* CP 213. Second, in *Dreiling*, the SLC then intervened and moved to dismiss the litigation. 151 Wn.2d at 905. That has not happened here. Third, in *Dreiling*, the court was presented with evidence justifying termination and the derivative plaintiff must have the opportunity to respond. *Dreiling*, 151 Wn.2d at 905. This did not happened here either. There is no basis in the record to affirm on this ground. *See Wilson Court Ltd. P'ship*, 134 Wn.2d at 698.[17]

Finally, neither *Drieling*, 151 Wn.2d at 905, nor *Lewis*, 615 F.2d at 780, is instructive here where the trial court already determined Plaintiffs' complaint should not be dismissed under CR 23.1.

> When a stockholder representative pursues claims in a derivative action, authority can be conferred in two ways. First, the board of directors or a duly empowered committee can approve the litigation expressly or by failing to oppose it. Second, and more commonly, a court can determine that the stockholder plaintiff has authority to proceed by denying a Rule 23.1 motion because the complaint adequately pleads either that demand should be excused as futile or that demand was made and wrongfully refused.

In re Ezcorp Inc. Consulting Agreement Derivative Litig., 130 A.3d at 947. Here, the trial court has previously denied Defendants' motion to dismiss under CR 23.1. *See* CP 430. That ruling (not appealed here)

[17] Moreover, even under Delaware law, *Dreiling* is not persuasive precedent for the subsequent intervention of an SLC (or Board). *Dreiling* did not address the merits of SLC intervention. That case concerned whether the trial court had applied the appropriate standard for sealing the records that had been presented in support of the motion to dismiss. *Drieling*, 151 Wn.2d at 907.

conferred on Plaintiffs the authority to pursue this claim and bind the Co-op to the result.[18]

The current Board's stated "displeasure" with the lawsuit does not support Defendants' position. If anything, the Board's continued refusal to take action in the face of manifest duty breaches and *ultra vires* conduct underscores the necessity of this action to protect the Co-op's interests.

4. This Lawsuit Addresses Defendants' Abuse of Process, Not Speech

Defendants have long mischaracterized this lawsuit as one directed at their constitutional rights—first by invoking Washington's (now unconstitutional) Anti-SLAPP Act, and later in recurring efforts to dismiss this case under CR 12 and CR 56. *See* CP 422 (collecting instances). At every turn, Defendants' misconceived arguments have been rejected.

This is because Plaintiffs' claims are not based on the *outcome* of the Board's vote in July 2010 to boycott Israel, but rather the *process* in which the Board engaged. *See* CP 6-7 ¶¶ 40-41, 10-11 ¶¶ 63-64, 11 ¶¶ 66, 69, 12 ¶ 72). That process brazenly violated the Co-op's Bylaws and policy regarding when and how the Co-op joins boycotts. *See* CP 411-12, 416-19. As one Defendant admitted in November 2010, "[t]he process" was "not right." CP 367. Plaintiffs filed suit for that very reason.

[18] Accordingly, even if the Co-op had reviewed discovery and determined this litigation was meritless (it has not), and intervened to dismiss the complaint (it has not), that motion would be improper at this late stage of the litigation.

In May 2015, the Washington Supreme Court reversed the lower court's dismissal of this action and affirmed Plaintiffs' right to a jury trial on their corporate claims. *Davis*, 183 Wn.2d 269. The Court reasoned that this case is about corporate misconduct—that is, Defendants' knowing violation of the Co-op's governing rules—and that the claims themselves should be resolved at trial. *Id.* at 282 n.2; *see also* CP 299, 303. Under the law of the case doctrine, Defendants' arguments are without merit. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("[O]nce there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.").

Even setting aside the Supreme Court's ruling, Defendants have not cited any authority whatsoever to support their view that the First Amendment shields corporate directors from abuse of process or breaches of fiduciary duties. Defendants cite *Miller v. U.S. Bank of Washington, N.A.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994) as holding "[t]he First Amendment restricts the imposition of tort liability" "for breach of fiduciary duty." Resp. Br. at 38. This is wholly incorrect. *Miller* does not even discuss that issue. It found there is "no authority for imposing a fiduciary relationship between a lender and a guarantor." *Id.* at 427.

The other cases cited by Defendants are inapplicable on their face, concerning actions to impose tort liability for the content of speech.

See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011) (analyzing whether offensive picketing qualified as speech as a defense against a claim that the content of the offensive picketing caused emotional distress). These cases have nothing whatsoever to say about a lawsuit filed to compel a Board to follow the organization's governing documents. Defendants' speech (and the content thereof) is simply not an issue in this case.[19]

D. Plaintiffs Are Entitled to a Trial on Their Corporate Governance Claims

Remarkably, Defendants also ask this Court to sanction Plaintiffs for bringing this lawsuit and appeal. Resp. Br. at 39-41. Yet, there is no basis to dismiss this lawsuit under the Washington Constitution (*Davis*, 183 Wn.2d at 295–96), and the trial court's order dismissing the complaint for lack of standing was plainly incorrect (*supra* § II.A). Defendants have long deferred a merits-based resolution of this case by misstating legal principles and thereby inviting analytical errors by the court below. It is time to end these obstructions and remand this case for long-overdue trial.

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[19] If the Israel Boycott is speech at all, it is the *Co-op's* speech. Arguably, the First Amendment could be implicated if a third party sued the *Co-op* because it disagreed with the *content* of the *Co-op's speech*. Similarly, if the Plaintiffs sued the Defendants for Defendants' *personal* decision to not to buy Israeli products, the First Amendment may provide a defense. Those examples are not this case.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the trial court's order.

RESPECTFULLY SUBMITTED this 2nd day of November, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 2, 2018, I caused a copy of the foregoing **APPELLANTS' REPLY BRIEF** to be served on the following in the manner indicated below:

Office of Clerk Court of Appeals – Division II Tacoma, WA 98402	☑	E-Filing
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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 2nd day of November, 2018, at Seattle, Washington.

Katie Rogers, *Legal Assistant*