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

SUPERIOR COURT OF WASHINGTON FOR 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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

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TABLE OF AUTHORITIES

Cases

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Statutes

Rules

Other Authorities

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I. INTRODUCTION

Plaintiffs Kent Davis, Linda Davis, and Susan Mayer, derivatively on behalf of the Olympia Food Cooperative (the "Co-op") (collectively, "Plaintiffs"), respectfully oppose Defendants' motion for summary judgment ("Defendants' Motion") and request that the Court instead grant the relief Plaintiffs seek in their motion for partial summary judgment ("Plaintiffs' Motion") (previously filed). The arguments set forth in Defendants' Motion largely repeat the arguments that this Court has already rejected in denying Defendants' renewed motion to dismiss under CR 12. *See* Dkts. 124, 189. Additionally, Defendants' position contravenes the decision issued by the Washington State Supreme Court in *Davis v. Cox*, 183 Wn.2d 269 (2015).

In reviewing the prior dismissal of this case by the Honorable Thomas McPhee (Ret.), the Court of Appeals concluded that whether the Board abided by the Co-op's Boycott Policy (enacted in 1993 by the Co-op's Board) was not a material fact, "on the theory that the Cooperative's board is not bound by its adopted policies." *Id.* at 282 n.2. The Supreme Court reversed the Court of Appeals 9-0. In so doing, it held that, to the contrary, whether the Board abided by the Boycott Policy ***is*** a material issue. *Id*. ***Thus, the Supreme Court has already concluded that the Board was legally bound to honor the Boycott Policy.*** This is the law of the case.

The Supreme Court also concluded that the issue of whether there was a "nationally recognized" boycott of Israel as required under the Boycott Policy was disputed. *Id.* But that ruling came before Plaintiffs received discovery that ***the Board knew, before the boycott vote, that it did not have the power to enact a boycott***. **Ex. AA** at 36:6-38:1; **Ex. CC** at 22:2-16.[1] In light of the Supreme Court's decision and ensuing discovery, it is Plaintiffs who are entitled to summary judgment—not Defendants.

[1] Exhibits A-CC are attached to the Declaration of Avi J. Lipman in Support Plaintiffs' Motion, filed on February 9, 2018. Exhibits DD-GG are attached to the Declaration of Avi J. Lipman in Support of Plaintiffs' Opposition to Defendants' Motion, filed contemporaneously herewith.

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To rule in Plaintiffs' favor, the only issue this Court need consider is whether there is any dispute the Board violated the Boycott Policy when it enacted the Israel Boycott. The answer to that question is clearly "no." Defendants have repeatedly admitted as much. For example, Defendant Levine wrote, before enacting the Israel Boycott, that "the decision making process" under the Boycott Policy would need to "change" to allow the Board to enact the Israel Boycott on its own. **Ex. CC** at 22:2-16; **Ex. AA** at 37:6-38:1.[2] The Board did not "change" the Boycott Policy. The Board just ignored it. The undisputed facts demonstrate that the Board, in enacting the Israel Boycott, violated (i) the Co-op Bylaws; (ii) the Boycott Policy; and (iii) its fiduciary duties to the Co-op. *Infra* §§ II.B, IV.B-C; *see* Pls.' Mot. The only issue on which a material dispute remains is the amount of damages to which the Co-op is derivatively entitled.

The few arguments Defendants assert that have not already been rejected by this Court or the Supreme Court are legally unsupportable. For example, the current Co-op Board's alleged "displeasure" with the lawsuit has no significance under Washington law, nor does Plaintiffs' alleged "failure to prosecute," which is also factually baseless. (Ironically, undersigned counsel recently spent weeks trying, without success, to cooperate with defense counsel regarding Plaintiffs desire to schedule trial in the spring of 2018.) Similarly, there is no legal support whatsoever for Defendants' demand that discovery suddenly terminate. (This request is particularly improper where the Supreme Court has already held that Plaintiffs' right to a jury trial was invaded by an unconstitutional statute.) In short, Defendants' core arguments fail for the same reasons they failed before, and their new arguments are baseless.

[2] Likewise, Defendant Sokoloff has admitted that, at the time the Board enacted the Israel Boycott, the Boycott Policy was binding on the Board (**Ex. AA** at 35:7-36:2, 36:6-12) and the requirements of the Boycott Policy had not been met (*id.* at 24:12-25:15, 45:21-23), so the Board's only other option to enact the Israel Boycott was to modify the Boycott Policy (*id.* at 35:7-36:2). The Board has never done so. *Id.* at 36:3-4.

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II. FACTUAL BACKGROUND

Plaintiffs respectfully refer the Court to the factual background and procedural history set forth in Plaintiffs' Motion for Partial Summary Judgment.[3] This factual background is only a brief summary of the pertinent facts.

A. The Co-op's Governing Bylaws and Boycott Policy

The Co-op operates two retail grocery stores in Olympia, Washington. Dkt. 20 ¶¶ 1, 20. The Co-op bills itself as "collectively managed," relying "on consensus decision making." **Ex. A** at 1. The Co-op operates according to certain governing rules, procedures, and principles, which are set forth in publicly available documents. Among these documents are the Co-op's "Mission Statement" and "Bylaws." As relevant here, the Bylaws empower the Board to enact and review policies. *Id.* § III.13. The Bylaws do not afford the Board plenary power to avoid policies without repealing them. *See id.*

Separately, the Co-op employs certain paid professional staff members (the "Staff"). **Ex. B** at 3. The Bylaws vest the Staff with, among other things, responsibilities allocated to them by the Board. **Ex. A** § IV.

In May 1993, consistent with its role in the Bylaws, the Board adopted the Boycott Policy. **Ex. C**. It provides:

> **BOYCOTT POLICY**
>
> 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 . . .
>
> . . . .
>
> In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott . . . to allow our members to make the most educated decisions possible.
>
> . . .
>
> A request to honor a boycott . . . will be referred … to determine which products and departments are affected. . . The [affected] ***department manager will make a***

[3] To economize briefing before this Court, Plaintiffs repeatedly requested that Defendants stipulate to consolidated briefing and argument of Defendants' Motion (Dkt. 192) and Plaintiffs' Motion. *See* **Exs. FF-GG**. Defendants rejected Plaintiffs' requests. *See id.* Accordingly, Plaintiffs submit this opposition brief separately from their Motion. That said, since the facts underlying both parties' motions overlap, Plaintiffs will not fully restate them here.

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> ***written recommendation to the staff who will decide by consensus whether or not to honor a boycott….***
>
> . . .
>
> The department manager will post a sign informing customers ***of the staff's decision*** … regarding the boycott. ***If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision …***

Id. (emphases added). Under the Bylaws, provided it followed proper procedure, the Board retained authority to repeal or modify the Boycott Policy any time after it was enacted. **Ex. A** § III.13-9, -15. The Board has never done so. **Ex. BB** at 33:13-15.

B. The Board Enacts the Israel Boycott without Authority

In or around March 2009, a Co-op member proposed the Israel Boycott. Dkt. 38 ¶ 20. The Staff considered the proposal and failed to reach consensus to approve it. Dkt. 41.8 ¶ 5. Among other hurdles, no evidence was presented that a boycott of Israel was "nationally recognized." Dkt. 38 ¶ 5. Under the Boycott Policy, and the Co-op's governing documents, by failing to reach consensus, the Staff rejected the proposal. **Ex. C**.

At the time, the Board knew the Staff opposed the proposal. As Defendant Levine recognized: "[A] few Staff members would not agree to the boycott and would not step aside to permit a consensus." Dkt. 38 ¶ 24. Defendant Sokoloff testified:

> Q. So it's fair to say that prior to the July 15th meeting, the Board knew that there was some blocks to the boycott and lots of concern at the staff level?
>
> A. Yes.

Ex. AA at 25:8-12. The Board also knew the Staff's decision was binding:

> Q. All right. So you were bound by the boycott policy? . . .
>
> A. Yes.

Id. at 36:6-12.

> Q. Does it make clear to you that this policy is the Staff's decision to boycott?
>
> A. Yes.

Id. at 36:6-12. Accordingly, the Board knew that its only options were to honor the Staff's decision or modify or rescind the Boycott Policy:

> Q. Okay. And that meant your Board, unless you amended the policy, was bound by the boycott policy, bound to follow it?

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A. Or we could change it.

Q. Right. But you didn't change it. We can agree on that?

A. Correct.

Id. at 35:24-36:5. At the time, Defendant Levine wrote that "the decision making process" under the Boycott Policy would need to "change" to allow the Board to enact the Israel Boycott on its own. *See* **Ex. CC** at 22:2-16; **Ex. AA** at 37:6-38:1.

Nonetheless, without modifying the Boycott Policy, the Board decided to act on the proposed boycott. At a Board meeting in July 2010, without due authority, and in violation of the Bylaws, Boycott Policy, and other rules, the Board voted to enact the Israel Boycott. Dkt. 41.8 ¶ 6. The Staff has never consented to this action. Dkt. 41.8 ¶ 7.

In the words of one Defendant, the process followed by the Board in enacting the Israel Boycott was "not right." **Ex. Y**. Judge McPhee (Ret.) previously found—and the Co-op has admitted—that the Board enacted the Israel Boycott despite a lack of Staff consensus. Dkt. 41 at 2; **Ex. G** at 20. Moreover, Judge McPhee also acknowledged that there was no nationally recognized Israel boycott at the time the Board acted. **Ex. G** at 24.

Nevertheless, Defendants have repeatedly argued that it does not matter whether there was Staff consensus or a nationally recognized boycott of Israel as required by the Boycott Policy because the Boycott Policy is not binding on the Board and the Board retains the authority to resolve "organizational conflicts." The Washington Supreme Court rejected that view of the Co-op's governing documents in this case, finding whether or not the Board followed requirements in the Boycott Policy was a material issue to be resolved by this Court. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2 (2015); *infra* § III.C. In so deciding, the Supreme Court necessarily found that the Board must observe the Boycott Policy. *Id.*

C. The Co-op Suffers Harms from the Improperly Enacted Israel Boycott

After the Board approved the Israel Boycott, several long-time Co-op members urged the Board to honor the Boycott Policy, as well as the Bylaws and Mission Statement, by reversing their decision and returning the issue to the Staff. *E.g.*, **Ex. T**. The

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Board refused. **Ex. U**. Instead, the Board attempted to amend the Boycott Policy retroactively to legitimize its misconduct. *E.g.*, **Ex. V**. This effort failed.

In the wake of the Board's unlawful enactment of the Israel Boycott, a number of members either cancelled their memberships or otherwise stopped shopping at the Co-op in protest. *See, e.g.*, Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13; Dkt. 41.4 ¶ 3. Additionally, the Co-op has lost revenue from failing to offer Israeli-made products and forgone expansion opportunities due to "the uncertain impact of the recently adopted boycott of Israeli products." **Ex. X**. These repercussions were not unexpected to Defendants: They knew the Co-op would experience losses and community discord even as they forced it to follow the Israel Boycott. **Ex. W**. But for Defendants' misconduct, these membership losses, lost revenues, and community upheaval would not have occurred.

III. PROCEDURAL HISTORY

A. Plaintiffs Initiate this Derivative Lawsuit

On September 2, 2011, Plaintiffs—all long-time Co-op members and volunteers—filed a verified derivative complaint asserting on behalf of the Co-op that because the Israel Boycott was enacted in violation of Co-op rules and procedures, it was void and unenforceable. Dkt. 20. The complaint also alleged that Defendants violated the fiduciary duties they owed to the Co-op. *Id.* Plaintiffs' complaint has since been amended to clarify certain allegations. Dkt. 136 ¶¶ 59-60. Plaintiffs seek declaratory and injunctive relief, as well as damages against Defendants.

B. The Special Motion to Strike and Subsequent Appeal

On November 1, 2011, Defendants filed a Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss ("Motion to Strike"). Dkt. 41. Plaintiffs opposed that motion. Dkt. 41.3.

On January 13, 2012, Judge McPhee granted Defendants' Motion to Strike based on the Anti-SLAPP Statute. Plaintiffs appealed that ruling and the Court of Appeals

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affirmed (*Davis v. Cox*, 180 Wn. App. 514 (2014)) "on the theory that the Cooperative's board is not bound by its adopted policies." *Davis*, 183 Wn.2d at 282 n.2.

On May 28, 2015, the Washington Supreme Court reversed the Court of Appeals and held that the Washington Anti-SLAPP Act is unconstitutional. *Id.* at 295-96. In doing so, the Court also found that "[o]ne 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." *Id.* at 282 n.2. In finding this fact "material," the Washington Supreme Court necessarily rejected the Court of Appeals' conclusion that the Board was not bound by the terms of the Boycott Policy while it remains in effect. On June 19, 2015, the Supreme Court issued its mandate directing this Court to proceed consistent with its opinion. Dkt. 120.

C. Procedural History Following Remand

The Supreme Court's opinion and mandate returned the parties to their respective positions before Defendants filed their Motion to Strike in November 2011. Nonetheless, Defendants withheld long overdue discovery responses. After a protracted exchange between counsel failed to achieve resolution, Plaintiffs filed a motion to compel discovery on September 11, 2015. Dkt. 127. After oral argument, before the Honorable Erik Price, this Court granted in part Plaintiffs' first motion to compel on October 2, 2015. Dkt. 132. Thereafter, Defendants continued to refuse production of relevant documents. As a result, on January 14, 2016, Plaintiffs again moved to compel Defendants to participate in open and fair discovery. Dkt. 138.

In early 2016, the parties argued Defendants' Renewed Motion to Dismiss. Defendants argued—as they do again here—that (1) Plaintiffs lacked standing to sue Defendants, (2) Plaintiffs' ultra vires claim fails as a matter of law, and (3) Plaintiffs' breach of duties claim fails as a matter of law. Dkt. 124. On February 25, 2016, this Court denied Defendants' Renewed Motion to Dismiss. Dkt. 189.

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Since that time, Plaintiffs have worked through the long-belated discovery process. Plaintiffs obtained and reviewed nearly 20,000 pages of document discovery from Defendants and produced more than 13,000 pages of document discovery in response to Defendants' requests. *See, e.g.,* **Exs. DD-GG**. Following receipt of documents from Defendants, in late 2016 through 2017, Plaintiffs deposed numerous key witnesses. *See, e.g.*, **Exs. AA** at 1, **BB** at 1, **CC** at 1. Defendants have not deposed anyone.

Plaintiffs have also sought to bring a fixed end date to these proceedings, by seeking Defendants' agreement to a spring 2018 trial date. **Exs. FF-GG**. Defendants refused, citing a conflict, which leaves the conclusion of this long-protracted litigation uncertain. *See* **Ex. GG**.

IV. ARGUMENT

A. Legal Standard

"In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989). Only if this initial burden is met does the burden shift to the opposing party to show that there exists a dispute of fact such that a trial is required to resolve the dispute. If the moving party meets its initial burden, then the Court, in evaluating the motion and response, must view "the evidence and all reasonable inferences therefrom … in the light most favorable to the nonmoving party. *Id*. at 226.

B. Defendants' Actions Were *Ultra Vires*

1. The Court Has Already Rejected Defendants' Purely Legal Argument

Without citing any facts outside the scope of the complaint—as if this were another CR 12(b)(6) motion—Defendants argue "[t]he Boycott decision was within the Board's scope of authority and was not *ultra vires*." Dkt. 192 at 8-13.

Defendants have already made precisely this legal argument in their Renewed Motion to Dismiss (*compare id. with* Dkt. 124 at 14-16), and the Court denied it. Dkt.

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189. If Defendants had a basis to revisit that ruling, the proper procedure would have been to move for reconsideration. CR 59. Obviously, such a motion now would be untimely. *Id.* And even if it were not, Defendants present no evidence or law as a basis for reconsideration here. There is no reason for this Court to even consider reversing itself.

2. Defendants Violated the Bylaws in Enacting and Maintaining the Israel Boycott

"[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." *See Davis v. Harrison*, 25 Wn.2d 1, 10 (1946); *see also* Pls.' Mot. at 21-24.

In arguing otherwise, Defendants repeat their prior contention that 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. As they did previously before this Court, they cite to *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 346 (1999) and *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264 (1943).

Yet, as Plaintiffs established in successfully opposing Defendants' CR 12 Motion, and have again explained in Plaintiffs' Motion, *Hartstene Pointe* and *Twisp* undermine, rather than support, Defendants' position. *See* Pls. Mot. at 22-24.

Defendants also repeat their contention that they followed the Bylaws in enacting the Israel Boycott, citing the general statement that the Board manages the "affairs" of the Co-op and has the power to "resolve organizational conflicts." Dkt. 192 at 13. Defendants are incorrect, just as they were when the Court denied their CR 12 Motion. Dks. 189.

The Bylaws describe the Board's powers by reference to a list of "major" duties. **Ex. A** § III.13. Contrary to Defendants' misleading suggestion, the list is phrased ***exclusively***. *Id.* ("The major duties of the Board are to: . . . ."); *see Gorre v. City of Tacoma*, 184 Wn.2d 30, 47 (2015) (affirmative list lacking non-exclusive qualifier is

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construed exclusively). Thus, any unlisted authority concerning the "affairs" of the Co-op—if such authority exists—is not a "major" power comparable to those listed. Here, the relevant listed 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." **Ex. A** § III.13.

The Board exercised these very powers when it enacted the Boycott Policy in May 1993. **Ex. C**. The Boycott Policy expressly 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 (1970) ("The expression of one thing is the exclusion of another."). Indeed, Defendants have recognized as much. **Ex. AA** at 45:21-23; *see* Dkt. 38 ¶ 24; **Ex. CC** 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. **Ex. A** § III.13. But it never did so. *See* **Ex. BB** 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. **Exs. R-U**. 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* **Ex. A** § III.6; **Ex. BB** 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. **Ex. A** § III.13. In nearly seven years of litigation, Defendants have never cited any principle of Washington law that allows the Board to have done so. To the contrary, the authority cited by Defendants undermines their position. *See, e.g.*, *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.")

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(emphasis added). Defendants acted *ultra vires*, and are not entitled to summary judgment.

The Board's authority to "resolve organizational conflicts after all other avenues of resolution have been exhausted" does not change the foregoing analysis. **Ex. A** § III.13. 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 it. **Ex. AA** at 35:17-38:1, 45:21-23; **Ex. CC** at 28:17-29:1, 35:2-14.[4]

Defendants also argue that, if the Court were to set aside the Boycott Policy, there can be no dispute that the Board would have the authority to enact the Israel Boycott. Yet, the undisputed evidence shows that this too is incorrect. The Bylaws charge the Board is charged to "adopt policies to foster member involvement," "maintain free-flowing communication between the Board, Staff, committees, and the membership," and "adopt policies which promote achievement of the mission statement and goals of the Cooperative" (**Ex. A** § III.13), which include community engagement and growth of the Co-op's business (*id.* at 1). Here, the Staff refused to enact the Israel Boycott, which indicates internal division among the Staff. The same is true of the Co-op community: At the time of enactment, and since, Plaintiffs and others have repeatedly implored the Board to reconsider the Israel Boycott. *See, e.g.*, **Exs. T-U**. The Co-op has lost members and customers as a result. Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3. And, as Defendants admit, community engagement with the Co-op and the Board is down since the Israel Boycott. Dkt. 192 at 24. None of this was a surprise to Defendants who voted to enact the Boycott. They knew at the time that the Co-op would suffer. **Ex. W**. Accordingly, even setting aside the Boycott Policy, the Board's improper Israel Boycott

[4] Defendants' argument is also flatly contradicted by Defendants Cox and Levine, who recommended ***after*** the Israel Boycott was enacted that the Staff consensus be abandoned. **Exs. M-N**; *see* Pls. Mot. at 9-10.

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abuses the authority described in the Bylaws.[5]

C. Defendants Breached Their Fiduciary Duties in Enacting, and Failing to Rescind, the Israel Boycott

1. The Court Previously Rejected Defendants' Legal Analysis and No Facts Presented Here Warrant Revisiting that Decision

Defendants previously argued to this Court (1) Plaintiffs failed to state claim for breach of fiduciary duties and (2) even if Plaintiffs had, the business judgment rule immunized Defendants' conduct. Dkt.124 at 13. This Court has already rejected those arguments. Dkt. 189. Now, citing ***only*** the purported ***absence*** of facts in the record, Defendants renew their same legal arguments. Defendants are simply incorrect in their claims about the record. Accordingly, for the same reasons the Court previously rejected Defendants' mistaken legal arguments under CR 12(b)(6), the Court should deny Defendants' arguments under CR 56.

2. The Business Judgment Rule Does Not Protect Conflicted Actions

Contrary to Defendants' argument, the business judgment rule does not apply in Washington to shield misconduct associated with 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. *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509 (1986) (no application of business judgment rule where evidence implicates breach of the duty of loyalty); *see also Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402 (1960). There is ample evidence that Defendants' disregard for Co-op process was motivated by their own personal political objectives and the political agenda of an adverse third party known as Boycott, Divestment, and Sanctions ("BDS"). *Infra* § IV.C.4; *see* **Exs. E, P, Q**.

Even if it were otherwise, the business judgment rule is simply inapplicable here

[5] Defendants also cite foreign authority for the proposition that the shareholders cannot limit the managerial authority of a Board. Even if this law were persuasive, it is beside the point: The Bylaws—not Plaintiffs—limit the authority of Defendants. And, under the Bylaws, the Board is not free to disregard duly enacted policies. *See Davis*, 183 Wn.2d at 282 n.2.

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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 (2003). The record is clear that the Board lacked authority to enact the Israel Boycott. *Supra* § IV.B. 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. **Ex. A** § III.13. The only permissible solution for the Board is to propound a new policy. It has consistently failed to do that. **Ex BB** at 33:13-15.[6]

Finally, even under the business judgment rule, judgment in favor of Defendants is improper. There is ample, undisputed documentary evidence of bad faith, incompetence, and dishonesty by Defendants in enacting (and refusing to reconsider) the Israel Boycott. *See, e.g.*, **Exs. E, P, Q-U**. Indeed, Defendants have directly testified that the decision to boycott belonged to the Staff (**Ex. AA** at 45:21-23), but they recklessly and knowingly ignored the Staff's decision on the Israel Boycott anyway. *See* **Ex. AA** at 24:12-25:15, 32:11-33:3, 35:17-38:1, 45:21-23, 52:25-53:4, **Ex. CC** at 22:5-16, 28:17-29:1, 35:2-14.

3. Defendants Breached Their Duty of Care

Defendants repeat their argument—made and rejected by this Court already—that they did not breach their duty of care to the Co-op because they did not act with "fraud, dishonesty, or incompetence." Dkt. 192 at 15-16. This is an irrelevant standard. In Washington, "[w]ith respect to claims brought by the members of the nonprofit corporation . . . the officers and directors owe a fiduciary duty, and thus are liable for ***ordinary*** negligence." 16 Wash. Prac., Tort Law And Practice § 2:38 (4th ed.); *see Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85 (2014). As Defendants correctly recognize, however, this "ordinary negligence" can be proven by evidence of procedural

[6] Additionally, the Israel Boycott itself violated the Bylaws and mission statement of the Co-Op. *Supra* § IV.B.2. For this reason too, the business judgment rule does not apply.

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or substantive failures. Both types of breach occurred here. As explained above, Defendants disregarded the procedural requirements in the Bylaws that require them to "adopt" a new policy if the Board desired to change an existing policy. *Supra* §§ II.B, IV.B.2. This is significant because the existing Boycott Policy divested the Board of any authority to enact boycotts and instead vested that responsibility with the Staff. *Id.* Defendants also substantively disregarded their duty of ordinary care by ignoring the Bylaws' requirements and by refusing to withdraw the Israel Boycott when those procedural deficiencies were identified. *Id.*

Even if a higher standard applied (it does not), there is ample evidence in the record that Defendants were, for example, "dishonest" in their actions. For example, they allowed outside political pressure from BDS and their own political objectives to cloud their judgment in discarding the Bylaws and enacting the Boycott Policy. *Infra* § IV.C.4. In so doing, they did not deal honestly with either Staff or Co-op members who either questioned or opposed the Board's effort to convert a local grocery store into a mouthpiece for an incendiary, international political campaign. Instead, they simply circumvented the governing rules that stood in their way (*see* **Ex. CC** at 35:17-38:1), conspired to keep contrary viewpoints from being presented to the Board, and undermined those who sought to enforce Co-op rules (**Ex. S**).

4. Defendants Breached Their Duty of Loyalty

Defendants argue that they did not breach their duty of loyalty to the Co-op because they did not receive any "material" benefit from the Israel Boycott, and under Washington law, "material" benefit means "financial" benefit. Dkt. 192 at 16-18. This is incorrect. Certainly, personal financial benefit is one avenue by which a director may breach his or her duty of loyalty to a corporation, but it is not the only way a director may breach loyalty. Indeed, the very case cited by Defendants makes this clear: "The duty of loyalty mandates that the best interest of the corporation and its shareholders takes

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precedence over ***any*** interest possessed by a director and not shared by the stockholders generally." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 722 (2008) (emphasis added).[7] Here, the record is replete with evidence that Defendants placed their own interests above those of the Board. *See* Pls. Mot. at 10-11; **Exs. E, P, Q**.

The undisputed record also shows that Defendants' decision to advance their personal political agendas came at the expense of the Co-op. *Supra* § II.C. Defendants breached their duty of loyalty.

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

Defendants have long mischaracterized this lawsuit as one directed at their constitutional rights—first by invoking Washington's (now unconstitutional) Anti-SLAPP Act, RCW 4.24.525, later in their Renewed Motion to Dismiss, again in attempting to obstruct discovery through the assertion of the "associational privilege," and, most recently in their motion for summary judgment. Dkts. 41, 124, 140, 192. At every turn, Defendants' efforts have been rejected.

In May 2015, the Supreme Court reversed the lower court's dismissal of this action and affirmed the right of Plaintiffs to a jury trial on their corporate law claims. *See 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 have merit. *Id.* At 282 n.2; *see also* **Ex. G** at 20, 24; Pls.' Mot. No case cited by Defendants directs or even suggests that this Court find otherwise.

Defendants' efforts to dismiss this case as an assault on free speech have failed because their portrayal of this case cannot be squared with either the record or the claims

[7] "To plead a breach of the duty of loyalty, the shareholder must allege facts sufficient to show that a majority of the directors who approved the conduct or transaction were ***materially interested*** in the transaction." *Rodriguez*, 144 Wn. App. at 722 (emphasis added). The *Rodriguez* Court went on to explain that financial benefit is one way that a director may be "materially interested" in a Board action. *Id.* Washington law is clear, however, that a director acts wrongly by placing "any" interest of its own above the interest of the Co-op. *Rodriguez*, 144 Wn. App. at 722.

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Plaintiffs have actually asserted. 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* Dkt. 136 ¶¶ 40-41, 63-64, 66, 69, 72. That process brazenly violated the Co-op's policy regarding when and how the Co-op joins boycotts, as well as the Co-op's Bylaws. *Supra* §§ II.B, IV.B.2. Indeed, as one Defendant admitted in November 2010, "***[t]he process***" was "not right." **Ex. Y** (emphasis added).

E. As this Court Has Previously Held, Plaintiffs have Standing and this Lawsuit Is Procedurally Valid

This Court has previously rejected Defendants' procedural arguments. On September 3, 2015, Defendants filed their Renewed Motion to Dismiss, in which they argued Plaintiffs could not proceed with this lawsuit because (1) nonprofit members lack standing to sue under the Nonprofit Corporation Act ("Nonprofit Act"), (2) Plaintiffs failed to exhaust intra-corporate remedies as required under CR 23.1, and (3) the Co-op has suffered no harm. Dkt. 124. This Court rejected all of those arguments. Dkt. 189.

Now, Defendants simply repeat the same three legal arguments and ask this Court to reach a different result. Dkt. 192 at 19-22. They provide no reason for the Court to do so.[8] Defendants present only one alleged "fact"—concerning harm to the "Co-op"—and that "fact" is not determinative in evaluating whether the Co-op has suffered "harm."

As previously observed by this Court (*see* Dkt. 189), Plaintiffs may bring their claims under the Nonprofit Act because the legislature has specifically provided that in "a proceeding by the corporation . . . ***through members in a representative suit***[] against the officers or directors of the corporation," such members may claim that the officers or directors "exceed[ed] their authority." RCW 24.03.040(2) (emphasis added). This statute specifically provides members with the ability to combat *ultra vires* action by bringing a

[8] Defendants' cut-and-paste approach is so extensive that they repeat statements from their earlier CR 12 motion (rejected by this Court) that the Plaintiffs "fail to allege" certain issues. Dkt. 192 at 21. These arguments are no more cognizable under CR 56 than they were under CR 12.

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"representative suit" on behalf of the corporation against officers and directors for "exceeding their authority." That is precisely what Plaintiffs have done here.[9]

Lundberg v. Coleman, 115 Wn. App. 172 (2002) does nothing to support Defendants. The representative suit at issue in *Lundberg* was brought by a minority ***director*** of a ***nonmember*** nonprofit corporation. The *Lundberg* Court only addressed that portion of RCW 24.03.040(2) applicable to a nonmember nonprofit corporation. The Nonprofit Act separately grants ***members***, such as Plaintiffs here, the right to bring representative suits against individual directors or officers—and that provision was not addressed or considered in *Lundberg*. The corporation in *Lundberg* did not have members, and the plaintiff was a minority director. Accordingly, the *Lundberg* Court properly held that the Nonprofit Act "does not confer the right for a single or minority ***director/trustee*** to bring an action on behalf of the corporation." 115 Wn. App. at 177 (emphasis added). Wholly absent from *Lundberg* is any mention of the rights granted to ***members*** under the Nonprofit Act, because that issue was not before the Court. *Lundberg* cites RCW 24.03.040***(3)***, but completely ignores the language regarding member-initiated representative suits in RCW 24.03.040***(2)***. This was not an oversight by the *Lundberg* Court; subsection (2) was irrelevant to the case before it because subsection (2) deals with members, which the corporation in *Lundberg* did not have.

[9] Defendants' reliance on canons of statutory interpretation demonstrates the weakness of their position. Dkt. 192 n.9. Defendants observe that the ***Model*** Nonprofit Act and Washington Business Corporation Act provides for full derivative procedures, while the Nonprofit Act Washington adopted does not. However, those statutes merely codified a long-recognized common law right of shareholders and members to "assert a corporation's rights on its behalf when its officers and directors have failed to do so or have done so improperly." *In re F5 Networks, Inc.*, 166 Wn.2d 229, 236, 238 (2009) (quoting *Williams v. Erie Mountain Consol. Min. Co.*, 47 Wash. 360, 361-62 (1907)). In enacting the Nonprofit Act, the legislature ***did not*** eliminate a member's ability to bring an *ultra vires* claim against rule-flouting corporate directors. Instead, it expressly permits a nonprofit corporation to bring such claims "through members in ***a representative suit***[] against the officers or directors of the corporation." *See* RCW 24.03.040(2) (emphasis added). In light of this express authorization, the absence of a derivative action provision mirroring the Model Nonprofit Act or Corporation Act does not strip nonprofit corporation members of their inherent right to sue derivatively.

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Second, as previously resolved by this Court (Dkt. 189), Plaintiffs' lawsuit is not barred by failure "to exhaust the Co-op's internal remedies" under CR 23.1. Defendants' position is both factually inaccurate and legally flawed. Washington is a "demand futility" state. *In re F5 Networks, Inc.*, 166 Wn.2d 229, 240 (2009). Washington has also "long recognized that demand is not required if the plaintiffs can clearly show that a demand for corporate action would have been useless." *Id.* at 236-37 (internal citations omitted); CR 23.1. Stated differently, no demand is required if futility is pled with particularity. *F5 Networks*, 166 Wn.2d at 240. Here, Plaintiffs' complaint pled futility (Dkt. 136 ¶ 51) and all evidence is that the Board refused to revisit the issue after numerous demands. **Exs. R-U**; *see* Dkt. 41.4 ¶ 6 (the Co-op Board received over 350 signatures asking it to, among other things, rescind the Israel Boycott). The Board's refusal evidences its inability to "exercise its independent and disinterested business judgment…." *F5 Networks*, 166 Wn.2d at 240. Dkt. 41.4 ¶ 2; Dkt. 41.1 ¶ 6; Dkt. 42 ¶ 6. Plaintiffs' only option was to sue.

Third, Defendants argue again that Plaintiffs "fail to allege" harm to the Co-op. Dkt. 192 at 21. This Court correctly rejected this precise argument that the Amended Complaint is somehow deficient with respect to "alleging" harm to the Co-op. Dkt. 189.

Moreover, in light of discovery, it cannot be disputed that the Co-op has been injured. *Supra* § II.C. But for Defendants' misconduct, membership cancellations, reduced sales, and expansion delays would not have occurred. *Id.* This is cognizable harm. *See Housing Works, Inc. v. Turner*, 2004 WL 2101900, at *34 (S.D.N.Y. 2004) ("[W]here nonprofits engage in activities intended to create profit, their measure of damages may be indistinguishable from those of for-profit entities.") (citation omitted); *Start, Inc. v. Baltimore County, Maryland*, 295 F. Supp. 2d 569, 581-82 (D.Md. 2003) (accord).

The record also demonstrates significant non-financial consequences as a result of Defendants' abuse of process. The Co-op community was fractured by Defendants' actions and membership engagement has been stunted. *E.g.*, **Ex. R**. Even Defendants

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concede that participation in the Co-op is diminished since the Israel Boycott. Dkt. 192 at 24. This undermines the mission of the Co-op (**Ex. A** at 1) and represents a failing of the Co-op's Board. *See id.* at III.13 (responsibility of Board to promote community engagement). These harms are just some of the manifestations of the underlying misconduct—Defendants' abuse of process to promote political agendas at the expense of the Co-op, its members, and Staff. *See City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975) (injury-in-fact exists where defendant "deprives [plaintiff] of its opportunity to participate in the administrative decision making process").

Defendants cite only one purported "fact" to claim "the undisputed evidence" favors summary judgment for Defendants on this issue: "[T]he Co-op's financial strength has only continued to improve in the many years after the boycott was put into place. Membership rose after the Boycott, as did sales." Dkt. 192 at 22 (citing Dkt. 193 ¶¶ 17-18). Of course, Defendants' argument does not dispute the non-financial harms evidenced in the record (including non-financial harms they concede). And, the law is clear: As to Plaintiffs' claims for declaratory relief and *ultra vires*, there is no need to establish financial damages. *See S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 125 (2010) (voidness and damages under *ultra vires* doctrine are district inquiries); *Inland Empire Rural Electrification v. Dep't of Pub. Serv. of Washington*, 199 Wash. 527, 533 (1939) (declaratory relief resolved without argument or evidence of financial injury).

Additionally, the "fact" cited by Defendants is not determinative of whether the Co-op has suffered financial harm. There are many market-based reasons why sales and membership may have increased since 2011 (if indeed they have). For example, the economy is stronger than it was then and the Olympia community is growing. This does not rebut the undisputed evidence that "but for" Defendants' disregard of the Co-op rules and policies in enacting the Israel Boycott, the Co-op would have ***greater*** membership and sales, not to mention other expansion opportunities. Dkt. 41.4 ¶ 2; Dkt. 41.5 ¶ 13; Dkt.

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41.6 ¶ 13; Dkt. 41.1 ¶ 13; Dkt. 42 ¶ 13; **Ex. X**. Defendants' argument finds no basis in the law. *Cf. McCurdy v. Union Pac. R. Co.*, 68 Wn.2d 457, 467 (1966) (measure harm by difference in value caused by the injury). If it were otherwise, members or shareholders would have no recourse to hold corporate fiduciaries accountable for wide-ranging misconduct as long as the corporation grew even a fractional amount over the previous year. That is not and cannot be the law. The asserted "undisputed fact" does not make summary judgment proper.[10]

This Court correctly denied Defendants' earlier efforts to evade accountability under CR 12. Dkt. 189. Presented with the same arguments here, it should do so again.

F. The Court Can Issue a Binding Injunction or Declaratory Relief Here

Defendants also claim that the injunctive relief remedy is improper here because Defendants have rotated off the current Co-op Board and no longer can effectuate an injunctive remedy.[11] This is incorrect for at least two reasons.

First, Defendants ignore Washington law providing that a derivative action may be binding on a corporate entity even where that entity is not joined as a party. In *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 778 (1972), this Court explained that "[j]oinder of the corporation is not always essential" to render judgment but rather "[t]he necessity of joinder is determined by 'pragmatic considerations.'" 6 Wn. App. at 778. "If nonjoinder does not prejudice the rights of the absent corporation sought to be benefited, or the rights of the defendants against whom the corporate cause of action is asserted, judgment in favor of the absent corporation in the stockholder's derivative suit may be upheld." *Id.* Here, the Co-op has been on notice of this dispute since before this litigation (*e.g.*, **Ex. T**), and been active during it as a subject of discovery. Dkt. 194. There can be no dispute the

[10] Moreover, given the absence of documentary evidence for a readily demonstrable contention, Plaintiffs doubt the fair presentation of this alleged "fact."

[11] Defendants do not argue that the declaratory relief action is mooted by this factual circumstance. Nor could they. As explained in Plaintiffs' Motion, declaratory relief is proper here. *See* Pls.' Mot. at 18-20.

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Co-op has known it is the real plaintiff in interest in this litigation. An order of injunctive relief here would bind the Co-op and its current agents on the board of directors.

Second, Defendants ignore that, under Washington law, Plaintiffs had no option but sue Defendants individually for their *ultra vires* conduct and breaches of fiduciary duties in enacting and failing to rescind the boycotts; suing the Board as an entity is not possible under Washington law. It would be improper for this Court to allow Defendants to escape responsibility, simply because they advanced legal arguments that required appellate court intervention and reversal after years of delay. *See State v. Oreiro*, 73 Wn. App. 868, 873 (1994) ("it would be fundamentally unfair" to allow party to evade accountability due to delays "caused, at least in part, by [its] own actions"). Even if the situation were otherwise, Plaintiffs retain the right to amend the complaint to seek injunctive relief against the current Board. CR 15(a) (leave to amend "shall be freely given when justice so requires").

The authority cited by Defendants is not controlling or persuasive. The primary case Defendants cite—*Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985)—held that a challenge to the election of directors was "moot" where, after the case was filed, a special election was called and new directors voted onto the board. *Lee* would be persuasive by analogy here only if the current Board had repealed the improperly enacted Israel Boycott and then re-enacted a new boycott of Israeli products consistent with the Boycott Policy (or after repealing or modifying the Boycott Policy). Of course, that has not happened. This case is not "moot"; Defendants do not even claim it is.[12]

The cited Washington cases are similar. In *In re Marriage of Horner*, 151 Wn.2d 884, 892 (2004), the Court found a lawsuit was "moot" because the ***substance*** of the claim

[12] *Bromfield v. McBurney*, C07-5226RBL-KLS, 2008 WL 4426827, at *4 (W.D. Wash. Sept. 26, 2008) is a similarly unpersuasive federal case outside the corporate context. Here, the Co-op is the real plaintiff in interest and can properly be bound to enforce an injunction. *LaHue*, 6 Wn. App. at 778. And, even if Co-op could not be bound as the real plaintiff in interest, any "mootness" of the injunctive relief remedy is cured by simple amendment of the complaint.

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had resolved: While the superior court restrained movement of a child with a parent and that parent appealed, the case was "moot" on appeal because, in the intervening time, the parent decided not to move. Likewise, *Norman v. Chelan Cty. Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 634 (1983) provides Defendants no support: In that case, the court found a case was "moot" on appeal because the parties had settled their lawsuit.[13]

G. The Current Board's Inaction Simply Underscores the Validity of this Lawsuit

Defendants renew their procedural arguments by claiming that the current Co-op Board's "displeasure" with this lawsuit provides grounds to dismiss Plaintiffs' complaint. Dkt. 192 at 23-24. This position, like the others advanced by Defendants (*supra* § IV.E), contravenes established law and precedent in Washington.

Defendants rely on *Dreiling v. Jain*, 151 Wn.2d 900, 905 (2004), but that case is inapposite. In *Dreiling*, the subject company was incorporated in Delaware and Delaware law applied. *Id.* Under Delaware law, 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. Of course, Washington law governs here because the Co-op was organized and operates in Washington. Dkt. 136 ¶ 1. In Washington, there is no authority for the use or involvement of an SLC (or the Board) after the derivative complaint is filed. *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.").

Moreover, none of the antecedent conditions present in *Dreiling* are present here.

[13] Even if it could be argued that this case were for some reason "moot" (and it is not), Washington courts have held that resolution is still proper if the case "presents issues of continuing and substantial public interest." *In re Marriage of Horner*, 151 Wn.2d 884, 891 (2004) (citing *Westerman v. Cary*, 125 Wn.2d 277, 286 (1994)). The Israel Boycott, which remains in effect today, has fractured the Olympia community—as even Defendants admit. *See* Dkt. 192 at 24. There is a continuing and substantial public interest in a judicial determination of its validity.

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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. Indeed, the Board's resolution focuses only on the supposed burden caused by the litigation. *See id.* Second, the SLC then intervened and moved to dismiss the litigation. *Dreiling*, 151 Wn.2d at 905. Of course, that has not happened here either. And, third, the Court must be presented with evidence justifying termination with the opportunity for the derivative plaintiffs to respond. *Dreiling*, 151 Wn.2d at 905. That has not happened here.

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.

Finally, neither *Drieling*, 151 Wn.2d at 905, nor *Lewis*, 615 F.2d at 780, is instructive here where ***this Court itself*** has already determined Plaintiffs' complaint should not be dismissed.

> 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 934, 947 (Del. Ch. 2016). Here, this Court has previously denied Defendants' motion to dismiss under CR 23.1. Dkt. 189. This ruling conferred on Plaintiffs the authority to pursue this claim and bind the Co-op to the result. *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 130 A.3d at 947. 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. Plaintiffs have standing to sue, and

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this Court should resolve this long-delayed case on summary judgment or at trial.[14]

The current Board's stated "displeasure" with the lawsuit does not support Defendants' position. If anything, the current Board's continued refusal to take action in the face of transparent breaches of fiduciary duty and *ultra vires* conduct by Defendants simply underscores the necessity of this action to protect the Co-op's interests.[15]

H. Defendants' Obstruction Has Slowed Discovery Here

Defendants finally argue that no further discovery is warranted before hearing Defendants' Motion because Plaintiffs have engaged in "dilatory" conduct by "abandoning" this litigation. Dkt. 192 at 24-25. Most obviously, Defendants mischaracterize the record. *Supra* § III.C.

As a threshold matter, Defendants do not present any legal authority for their position. Defendants cite language from Washington cases applying CR 41(b)(1), yet, Defendants have not brought a motion under CR 41(b)(1), described the legal standard for such a motion, or even cited that rule. It is obvious why. CR 41(b)(1) allows a court dismiss a case without prejudice for want of prosecution if a plaintiff "neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined." Defendants cannot make this showing here. Plaintiffs have produced significant discovery

[14] Implicit within Defendants' argument is the contention that Plaintiffs do not adequately represent the Co-op membership. Defendants have previously raised this argument (Dkt. 124 at 7-8 & n.11) and the Court rejected it. Dkt. 189. Under the Civil Rules, Plaintiffs may maintain a derivative action if they "fairly and adequately represent the interests of the shareholders or members ***similarly situated*** in enforcing the right of the corporation or association." CR 23.1 (emphasis added). Plaintiffs need not represent the interests of ***all*** members or even the ***majority*** of the members. Plaintiffs need only represent the interests of those members—even a minority of the membership—who oppose the Israel Boycott and the Board's decision to violate its duties, the Bylaws, and the Boycott Policy. While it is not Plaintiffs' burden under CR 23.1 to establish what percentage of the overall membership these individuals represent, it is clear that their interests—in addition to those of Plaintiffs themselves—are fairly and adequately represented in this action. *See, e.g.*, **Ex. J**; *see also* **Ex. AA** at 24:12-25:15 (Defendant acknowledging that a portion of the membership opposed the Israel Boycott).

[15] Plaintiffs contend, but provide no supporting evidence, that the current Board is "disinterested" in the previous Board's enactment and refusal to rescind the Boycott. For this reason too, summary judgment on this claim is improper. *See Young*, 112 Wn.2d at 225. Indeed, the only available evidence suggests a concerted effort to keep like-minded individuals supportive of the Israel Boycott on the Board. *See* **Ex. S**.

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within the last year. *See* **Ex. EE**. And, Defendants' Motion is predicated in part on a fact developed on November 16, 2017; i.e., the current Co-op Board's vote of "displeasure" with this lawsuit. *See* Dkt. 194 ¶ 2. Still further, a CR 41(b)(1) motion must be denied if the plaintiff comes forward to set a trial date or the defendant itself is the cause of delays. Here, Plaintiffs have attempted to set a trial date and bring a fixed conclusion to these proceedings, but Defendants' scheduling conflicts have stood in the way. *See* **Ex. GG**.

Even setting aside the facts and the law, Defendants simply invent a remedy for themselves—the sudden termination of discovery—without ***any*** support under the Civil Rules or other Washington law. Defendants likely brought this strained argument to shield more inculpatory material (*see* Dkt. 194) from discovery, which would obviously be improper. A limited amount of additional discovery remains essential as the parties move toward trial, and there is no authority whatsoever that precludes Plaintiffs from obtaining it.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

DATED this 12th day of February, 2018.

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DECLARATION OF SERVICE

On February 12, 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:

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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 12th day of February, 2018, at Seattle, Washington.

Thao Do, *Legal Assistant*

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