Court of Appeals 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.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Appellants' case, filed in 2011, is still as unmeritorious as it was when it was dismissed as a SLAPP (Strategic Lawsuit Against Public Participation) by Division I of this Court in 2014—even more so, now that Appellants have had the benefit of discovery yet still cannot state a claim, much less demonstrate a disputed issue of material fact as required on summary judgment.

Appellants' primary argument is that because of the Co-op's boycott of Israeli goods (the "Boycott"), two of the three of them stopped shopping at the Co-op (which they claim to represent in this derivative action), and one other member cancelled his membership, supposedly causing injury to the Co-op. Indeed, Appellant Linda Davis admitted that she and her husband, Appellant Kent Davis, stopped shopping, so she "hope[d]" the Co-op's sales had dropped. But sales did not drop—both total sales and total membership increased following the Boycott. Appellants do not dispute that evidence.

On summary judgment, the trial court therefore properly found that Appellants lacked derivative standing because they failed to show the Co-op suffered any injury. The court also correctly found that Appellants could not obtain injunctive relief because no Respondent was still a Co-op board member.

Appellants have subjected Respondents to seven years of litigation and counting, over a Boycott that caused no injury to the Co-op. But whether a SLAPP is ultimately victorious is often not the point—years of litigation itself does the job of chilling speech. Indeed, discovery revealed that Appellants celebrated their lawsuit's success in discouraging other co-ops from boycotting Israeli goods. A SLAPP is still a SLAPP even without an Anti-SLAPP statute to dismiss it promptly. Summary judgment in favor of Respondents must be affirmed.

II. STATEMENT OF THE CASE

The Co-op. The Co-op was founded under the Washington Nonprofit Corporation Act, RCW 24.03. The Co-op is governed by its Articles of Incorporation and Bylaws and is managed by its Board of Directors. CP 62-66 (Articles of Incorporation); CP 68-72 (Bylaws). No current director is a party to this lawsuit. CP 49, CP 57-60, CP 211.

The Co-op's main purpose is "[t]o engage in the business of buying and selling food and other goods as a wholesaler and a retailer." CP 65 at Art. III § 1. Another express purpose "for which the corporation is organized" is "to promote . . . political self-determination." *Id.* at Art. III, § 6. The Co-op's Mission Statement includes "encourage[ing] economic and social justice" and "[s]upport[ing] efforts to foster a socially and economically egalitarian society." CP 74. This ethos is also borne

out in the Bylaws: "We strive to make human effects on the earth and its inhabitants positive and renewing and to encourage economic and social justice." CP 68 § 2. Chief among the stated goals of the Co-op is to "[s]upport efforts to foster a social and economically egalitarian society." *Id*. § 2.4. Another purpose of the Co-op is "to educate members and the public in the wise and efficient production, purchase, and use of food, goods, and services." CP 65 at Art. III § 3.

The "business and affairs of the [Co-op] shall be directed by the Board of Directors." CP 70 § III.13. The "major duties" of "the business and affairs of the [Co-op]" include "adopt[ing] policies which promote achievement of the mission statement and goals of the [Co-op]." *Id.* § III.13.15. The Board also can "resolve organizational conflicts," such as between staff and members. *Id.* § III.13.16. Board decisions are "made by consensus." CP 69 § III.6.

In addition to establishing the roles and duties of Directors, the Co-op Bylaws also delineate the "Major Responsibilities" of its staff members. CP 71 § IV. The Bylaws require, among various responsibilities, that the staff "carry out Board decisions . . . made in compliance with these Bylaws." *Id.* CP 71 § IV.N. The Board's authority to act under the Co-op's Articles of Incorporation and Bylaws are not, and cannot be, limited by the 1993 "Boycott Policy," which sets

forth the procedure for Co-op staff to follow when deciding whether to honor a boycott. CP 77-78.

The Boycott. Beginning in March 2009, Co-op staff members debated inconclusively as to whether to adopt a boycott of Israeli goods, pursuant to a request from a working member. CP 50 ¶¶ 8-9. After considering the matter for more than a year with no resolution, staff members reported the impasse directly to the Board, which discussed it at its May 20, 2010 meeting. CP 50 ¶¶ 9-16, CP 79-83. Members attending that meeting urged the Board to participate in "the nationally and internationally recognized boycott" of Israeli products. CP 331. But since "there had been no attempt to reach full staff consensus," the Board decided that such an attempt should be made, that "feedback from the full staff should be invited," and that the Board would consider the issue again at the July Board meeting. CP 50 ¶ 11. Again, the staff was unable to reach consensus. Respondent Harry Levine, the Staff representative to the Board at the time, reported back to the Staff on June 7, 2010 that the Board would consider the issue again at the July Board meeting. CP 50 ¶ 12, CP 84-88. The matter was then reexamined at the Board's July 15, 2010 meeting. CP 51 ¶ 13, CP 89-93. The Board heard the views of members and staff at the meeting, which was attended by some thirty members who expressed support for the boycott proposal. CP 51 ¶ 13.

The Board had been informed that some staff members would not agree to the boycott and would not step aside. *Id.*

Following discussion, and acknowledging that a decision on the matter had been delayed since March 2009, the Board unanimously passed a resolution approving a Boycott of Israeli-made products and divestment from Israeli companies "in solidarity with [the] international boycott movement." CP 51 ¶ 14. On September 26, 2010, the Board posted a reminder on the Co-op's website that any member was welcome to propose a member-initiated ballot process. CP 52 ¶ 15, CP 95. A member could have initiated such a ballot process at that time by gathering the requisite number of signatures: 300 of the 22,000 members. CP 52 ¶ 16, CP 97. No such ballot process regarding the Boycott was initiated by any member. CP 52 ¶ 15. Plaintiff Linda Davis admitted on February 20, 2012 that, "if a [membership] vote were to be taken today [on the Boycott issue], we are far outnumbered." CP 472. The membership's support for the Boycott was also demonstrated by the results of the November 2010 Board member election (following adoption of the Boycott). Five candidates endorsed by Olympia BDS, an informal group of Co-op members who supported the Boycott (CP 532—not an outside "organization known as 'Boycott Divestment Sanctions,'" Appellants' Br. at 10) all won by wide margins in a record-high turnout, whereas those

candidates opposing the Boycott, including Appellants, were defeated by a margin greater than two-to-one. CP 508-509, CP 364. Contrary to Appellants' false assertion that Respondent Levine suggested changes to the Boycott Policy "before enactment" of the Boycott (Appellants' Br. at 13), his email is dated March 18, 2011 (CP 329), eight months *after* July 15, 2010, the date the Boycott was passed. CP 337. Appellants have previously made this false assertion (CP 228) and have already been corrected by Respondents. CP 545, n.7.

The Lawsuit. Almost a year after the Boycott, on May 31, 2011, five Co-op members (the three current Appellants and two former plaintiffs in this matter) sent to 16 former and then-Board members (Respondents) a demand letter voicing, among other things, their displeasure with the Board's Boycott resolution. CP 99-101. These members threatened that if the resolution were not rescinded, they would bring legal action, "and this process will become considerably more complicated, burdensome, and expensive than it has been already." CP 101. The Board responded on June 30, 2011, expressing the desire "to respond in a productive way" and inviting any dissenting members to put the Boycott decision to a vote via "Member-initiated ballot," per the Co-op's Bylaws. CP 103. Appellants' counsel then responded on July 15, 2011, stating that the proposal "that our clients avail themselves of 'the

member-initiated ballot process . . . is not well taken.'" CP 105. On September 2, 2011, Appellants, claiming derivative status, filed suit on behalf of the Co-op against Respondents in Thurston County Superior Court.

On November 16, 2017, after years of complicated, burdensome, and expensive litigation, the Co-op Board (none of whom were on the Board at the time of the Boycott vote in 2010, or are Respondents in this case) passed a resolution finding that Appellants' filing of this lawsuit was done without the approval of the Co-op or the Board, and that Appellants are not acting under any authority delegated by the Board, past or present. CP 213. The Board found that Appellants had imposed significant burdens on the Co-op to its detriment by filing this lawsuit, and that the lawsuit has had a "chilling effect" on the Co-op's ability to engage with related issues and move forward. *Id.* The Board resolved that it rejects Appellants' claim that they are acting in a derivative capacity on behalf of the Co-op and believes the lawsuit should be dismissed. *Id.*

Lack of Injury. The Co-op's total sales and total membership both increased following the Boycott, which Appellants do not dispute. CP 52-53 ¶¶ 17-18. There is no evidence that the Co-op suffered any injury as a result of the Boycott, despite Appellants' arguments. To support their baseless contention that the Board "expected losses and

community discord when it voted to enact the Israel Boycott" (Appellants Br. at 14), Appellants cite one Respondent's statement to the media soon after the Boycott was adopted, that the "moral imperative" to boycott would supersede any potential minimal financial effect—that is ***not*** evidence that there was in fact a financial impact. CP 361.

Appellants have provided no competent evidence beyond one membership cancellation and the fact that two Appellants themselves refuse to shop at the Co-op, which even if it could be considered harm, it is one which Appellants caused, and even intended, themselves. As Appellant Linda Davis stated, she and her husband, also an Appellant, "have stopped shopping at both Co-op stores, so I hope the 'OFC's bottom line IS being affected by a drop in sales." CP 486. In fact, Appellants have stated that they think people joined the Co-op ***because*** of the Boycott. *See, e.g.*, CP 494, App. 6, App. 10. Appellants' other "evidence" is vague affidavit testimony that: "a number of Co-op members have either cancelled their memberships or otherwise stopped shopping at the Co-op" (App. 6 ¶ 13, App. 10 ¶ 13, App. 17 ¶ 12); *see also* App. 2 ¶ 3 ("numerous" other individuals cancelled their memberships). Such "evidence" is not competent evidence, and even if it were, it does not refute that the Co-op's sales and membership increased.

As "evidence" that the Co-op lost revenue from failing to offer Israeli products and by declining expansion opportunities, Appellants rely on a newsletter article (also not competent evidence) opining that the "uncertain impact of the boycott" was the fifth (and last) reason the Board decided to put expansion on hold. CP 365. The author of the article, Respondent TJ Johnson, was not a board member at the time of the decision not to expand or at the time of the article. CP 365, CP 514:7-10. The Board itself did not consider the Boycott to be a factor in its decision to postpone expansion. CP 497-500, CP 506 (Board Report explaining why expansion plans were put on hold, without mentioning the Boycott). The financial risk of expansion was the main reason the Board did not expand. CP 506.

The motivation for bringing this case has never been to represent other Co-op members to redress some (nonexistent) injury on the Co-op's behalf. It has always been a SLAPP to squelch constitutionally-protected boycotts of Israel. In an email intended to be posted to a listserv, Appellant Mayer boasts that StandWithUs[1] told her that because of "the legal stand we took against the Israeli boycott by the Olympia Food Coop Board, a line has been drawn for such a boycott in other US food coops. It seems that this legal action has discouraged other coops from taking

[1] *See* StandWithUs: Supporting Israel Around the World, http://www.standwithus.com/ (last visited Oct. 2, 2018).

similar measures, and at this point, we have been successful in drawing a line!" CP 599.[2] Mayer also expressed gratitude to StandWithUs for "providing the legal team and raising all the [appeal bond] money." *Id.* Appellant Linda Davis did not approve posting the message to the listserv because "it mentions some still-confidential and controversial issues involving our lawsuit," telling Mayer that while "others will want to know that our legal action has been successful in stopping other food co-ops from enacting similar boycotts against Israel, the information about the money from Stand With Us and other details should probably not be divulged to others right now, especially in writing." *Id.*

III. PROCEDURAL HISTORY

Appellants filed suit in 2011 and amended their complaint in 2016 (dropping two of five plaintiffs), alleging that former and then-Co-op directors breached their fiduciary duty and acted *ultra vires* when they adopted the Boycott and refused to rescind it. CP 9-11 ¶¶ 52-54, 62-68. Appellants sought, purportedly on behalf of the Co-op: (1) a declaratory judgment that the boycott was null and void; (2) permanent injunctive relief preventing its enforcement; and (3) damages from each of the now

[2] Appellants produced this document on February 5, 2018, four days before their Partial Motion for Summary Judgment was filed on February 9, 2018, and as part of a 13,000+ page production from January 25, 2018 to February 14, 2018. CP 439, CP 244, CP 591 ¶ 1.

fifteen Respondents. CP 11-12 ¶¶ 68-70, 71-75. Respondents moved to strike the complaint under the state's then-anti-SLAPP statute, which the trial court granted in 2012, holding that Appellants did not demonstrate a sufficient likelihood of success on the merits of their claims. CP 114-149. The trial court found that the Board acted within its authority under the Co-op's governance documents, its articles of incorporation and bylaws, as well as by statute, which dictates that the "affairs of a corporation shall be managed by a board of directors." CP 133:19-134:5; RCW 24.03.095.

Appellants appealed the dismissal to the Court of Appeals (Division I), which upheld the trial court's dismissal, and held that the Co-op's Bylaws authorized the Board's resolution. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014), *rev'd*, 183 Wn.2d 269, 351 P.3d 862 (2015). The Court of Appeals ruled that,

> [N]either an applicable statute, the articles of incorporation, nor the bylaws compel the board to comply with adopted policies. Thus, although adopting the Policy presented an opportunity for staff involvement, the board did not relinquish its ultimate authority to adopt boycotts pursuant to its general authority to manage the Co-op.

180 Wn. App. at 535, 325 P.3d at 267.

Appellants appealed to the Washington Supreme Court, challenging the constitutionality of Washington's anti-SLAPP statute. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). The Supreme Court

struck down the anti-SLAPP statute as unconstitutional, holding that it violated the right to trial by jury, and remanded the case to the trial court for further proceedings. *Id.* The Supreme Court did not address the Board's authority to adopt the Boycott.[3]

Respondents subsequently moved to dismiss under CR 12(b)(6), which the lower court denied on February 25, 2016, declining to consider documents referenced in the complaint or attachments to the pleadings, including the Articles of Incorporation and the Bylaws. CP 155:11-14. In denying the motion to dismiss, the trial court did "not address[ ] whether the [C]o-op Board acted within its authority," CP 160:5-7, and explicitly did not preclude "summary judgment motions on some of these same issues and arguments." CP 162:4-7.

Discovery ensued. Respondents responded to Appellants' discovery requests, including broad requests for all documents relating in any way to boycotting and/or divesting from Israel, having nothing to do with the Co-op. *See, e.g.,* CP 205, CP 594, CP 596. Appellants deposed four Respondents and then did not attempt to depose the other eleven

[3] Appellants erroneously claim that the Supreme Court "necessarily rejected Division One's conclusion that the Board was not bound by the terms of the Boycott Policy while it remains in effect." Appellants' Br. at 17, citing *Davis,* 183 Wn.2d at 281 n.2. The Supreme Court's footnote described how the first trial court had erroneously weighed evidence to illustrate how the Anti-SLAPP statute violated the right to a jury trial. *Davis,* 183 Wn.2d at 281 n.2, 325 P.3d at 868 n.2. The Supreme Court also described how the Court of Appeals found that the meaning of the Boycott Policy was immaterial, as the Board was not bound by it. *Id.*

Respondents for ten months. CP 109-110 ¶¶ 11, 13, 16, 17. Appellants failed to respond to Respondents' April 2017 request for production of Appellants' outstanding documents, request to schedule Appellants' depositions, and request to finalize the protective order until December 2017, nearly eight months later. CP 110 ¶¶ 18-22, CP 195, CP 205, CP 210. That response came after the independent Co-op Board adopted a resolution on November 16, 2017, rejecting Appellants' derivative capacity to sue on behalf of the Co-op, and stating its belief that this lawsuit should be dismissed. CP 211-213.

In December 2017, Respondents moved for summary judgment, CP 15-47, and in February 2018, Appellants cross-moved for partial summary judgment. CP 214-45. From January 25, 2018 to February 14, 2018, Appellants produced over 13,000 documents. CP 590 ¶ 1. On March 9, 2018, after hearing oral argument, the trial court granted summary judgment in favor of Respondents, finding that Appellants lack standing "because they fail to allege sufficiently that the Co-op suffered any injury as a result of the boycott," CP 608:9-12, and that an injunctive remedy could not be provided because Respondents are not current board members. CP 608:23-25. The trial court denied Appellants' partial summary judgment motion, finding that breach of fiduciary duty claims require harm or injury, which Appellants had not shown, CP 609:17-19,

and that injunctive relief could not be issued because Respondents are not current board members. CP 609:20-23. Appellants appealed to this Court.

IV. ARGUMENT

A. Standards of Review.

"An order granting summary judgment is reviewed de novo." *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490, 497 (2011). "Summary judgment 'shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting CR 56(c)). However, "[a] trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion." *Kucera v. State, Dep't. of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000), citing *Wash. Fed'n of State Emps. v. State,* 99 Wn.2d 878, 887, 665 P.2d 1337, 1343 (1983). "For purposes of granting or denying injunctive relief, the standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary." *Wash. Fed''n of State Emps.*, 99 Wn.2d at 887, 665 P.2d at 1343. Appellate courts also "review a trial court's dismissal of a request for declaratory relief for abuse of discretion." *Hawkins v. Empres Healthcare Mgmt., LLC,* 193 Wn. App. 84, 92, 371 P.3d 84, 88 (2016), *as amended on denial of reconsideration* (June 8, 2016). Finally, an

appellate court "may affirm the superior court's decision on any ground supported by the record." *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696, 700 (2003).

B. The Trial Court Correctly Ruled that Appellants Lack Standing Because They Did Not Provide Evidence that the Co-op Suffered Any Injury.

As the trial court found, Appellants do not have standing to represent the Co-op in a derivative claim because they failed to show that the Co-op suffered any injury as a result of the boycott. CP 608:9-12. "To establish standing, a party must . . . allege [that] the challenged action has caused injury in fact, economic or otherwise." *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, 230 P.3d 190 (2010) (alteration in original, internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *State v. Cook*, 125 Wn. App. 709, 720-21, 106 P.3d 251, 256 (2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The trial court found that Respondents submitted evidence that there was no financial harm to the Co-op, CP 608:12-14, and that Appellants failed to meet their burden to put evidence into the record with regard to injury. CP 608:19-22. Both the Co-op's total sales volume and

total membership increased following the Boycott. CP 52-53 ¶¶ 17-18. Appellants did not contest Respondents' evidence that there was no financial harm to the Co-op. CP 608:17-19; Appellants' Br. at 18-30. There is no genuine issue as to any material fact regarding injury. A "'material fact' is a fact upon which the outcome of the litigation depends, in whole or in part." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346, 1349 (1979). The material facts regarding injury are undisputed.

Appellants merely submitted evidence that two of the three of them stopped shopping at the Co-op due to the Boycott, Appellants' Br. at 22, citing App. 6 ¶ 13 & App. 10 ¶ 13, and that one other individual cancelled his membership. App. 2 ¶ 3. Regardless of whether two people stopped shopping at the Co-op and one person cancelled his membership, total membership numbers, as well as sales, increased following the Boycott. That evidence is not disputed by Appellants. There simply was no injury to the Co-op. Appellants misplace reliance on *City of Burlington v. Washington State Liquor Control Board*, which did not address derivative standing, but "standing to seek judicial review of the [Washington State Liquor Control] Board's action under the Administrative Procedure Act [APA]." 187 Wn. App. 853, 858, 351 P.3d 875, 877 (2015), *as amended*

(June 17, 2015).[4] Under the APA, a "potential injury" is sufficient for standing. *Id.* at 869, 351 P.3d at 882. That is not the standard here, in a derivative case purportedly on behalf of a corporation, on summary judgment, eight years after the Boycott was adopted. Appellants must actually provide evidence that the Co-op suffered some injury.

Appellants claim that the trial court erroneously weighed evidence in finding that the Co-op suffered no financial harm following the boycott, relying on only one case, *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 359 P.3d 841 (2015). Appellants Br. at 29-30. In *Wuth*, plaintiffs filed a "wrongful birth" case seeking damages for expenses as well as damages for emotional injury. *Id.* at 681, 359 P.2d at 853. Where there was ample evidence showing the child's birth "brought both joy as well as significant anguish," *id.* at 686, 359 P.3d at 853 (internal quotation marks omitted), *Wuth* found the trial court did not err by sending the emotional damages claim to the jury, which was "entitled to consider the countervailing emotional benefits attributable to the birth." *Id.* at 681. Weighing joy and anguish to determine "net increase" or "net loss" is nothing like "weighing" a financial impact on a corporation. Appellants

[4] The court found that the City had standing to challenge the relocation of a liquor license to a minimart based on public safety and because it would impact its law enforcement resources and budget, as the minimart was close to a high school, minors regularly came into contact with it, and criminal activity was common in the area. *Id.* at 869-70, 351 P.3d at 882-83.

simply failed to provide any evidence to challenge Respondents' evidence that there was absolutely no financial injury to the Co-op. Appellants' evidence that two people stopped shopping and one person left the Co-op is simply immaterial, financially and otherwise, to whether the Co-op was injured. *Wuth's* analysis does not apply to the determination of whether there was injury to a corporation, which is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). "[C]orporations cannot recover emotional distress damages." *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 714 n.2, 315 P.3d 1143, 1149 n.2 (2013). And the Co-op's Articles and Bylaws confirm that its corporate purposes include encouraging "economic and social justice" (CP 68, CP 74) and promoting "political self-determination" (CP 65)—purposes requiring business judgment not readily measured by yearly sales figures.

Appellants' three declarations also stated, identically, that: "a number of Co-op members either cancelled their memberships or otherwise stopped shopping at the Co-op in protest," (App. 6 ¶ 13, App. 10 ¶ 13, App. 17 ¶ 12), and another declaration stated that "numerous" Co-op members cancelled their memberships. App. 2 ¶ 3. This vague, conclusory testimony is not competent evidence, and is inadmissible hearsay. Affidavits must be

made on personal knowledge, to "set forth such facts as would be admissible in evidence," and to "show affirmatively that the affiant is competent to testify to the matters stated therein." Civil Rule 56(e). Neither Appellants Kent and Linda Davis nor Mr. Breuer were Co-op Board members or staff members at the time, and their declarations do not state affirmatively how they might possibly have personal knowledge that anyone else stopped shopping at the Co-op or cancelled their Co-op memberships because of the Board's action. "To be competent, the evidence of proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture." *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228, 1233 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998). If anyone told the declarants that they stopped shopping or cancelled their membership, it would be hearsay. *See, e.g., Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 513–14, 84 P.3d 1241, 1249 (2004) (describing plaintiff's statement in affidavit regarding what people told him as "bald claim" and "self-serving hearsay and conclusory assertion," and rejecting it as "insufficient to raise a genuine issue of material fact").

But even had Appellants submitted competent evidence that many people stopped shopping or cancelled their memberships, they still did not dispute that total membership and sales both increased after the Boycott.

Appellants did not provide evidence that more people would have joined the Co-op but for the Boycott. Appellants did not provide evidence that sales would have been higher but for the Boycott. It is not sufficient for Appellants to merely speculate that perhaps the Co-op was injured even though its sales and membership increased. "[Plaintiff's] opinion, based on his hindsight, that he would have been able to make a greater margin of profit ... is pure guess work and without foundation in this record." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1222 (9th Cir. 1997) (alteration in original). Appellants simply did not submit evidence that the Co-op suffered any injury.

Appellants further argue that in their summary judgment opposition brief, they "noted the myriad reasons why an increase in sales and membership was not inconsistent with harm resulting from the Israel Boycott." Appellants' Br. at p. 28, citing CP 426. But argument in a brief is not evidence, and evidence is what is required to avoid summary judgment. It is well-established that at the summary judgment stage, "plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted); *see also, Price v. City of Seattle*, 106 Wn. App. 647, 657, 24 P.3d 1098, 1103-04 (2001) (on summary judgment, nonmoving party may not "rely on speculation, argumentative assertions

that unresolved factual issues remain, or in having its affidavits considered at face value; . . . [it] must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material facts exists") (internal quotation marks omitted); Civil Rule 56(e) (on summary judgment, a "party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party"). Appellants did not submit any evidence to support their argument that the Co-op was injured despite its increased sales and membership numbers.

Appellants similarly argue that the Co-op "lost revenue as a result of failing to offer Israeli-made products to customers who wish to purchase them," and in "refraining from expanding to a new facility in part because of 'the uncertain impact of the recently adopted boycott of Israeli products.'" Appellants' Br. at 14. The only "evidence" Appellants cite to support these broad contentions is a Co-op newsletter article written by a non-Board member (CP 514:7-10), opining that the "uncertain impact of the boycott" was the fifth (and last) reason the Board decided to put expansion on hold. CP 365. But the Board itself did not consider the Boycott to be a factor in its decision to postpone expansion. CP 497-500;

CP 506 (Board Report explaining why expansion plans were put on hold, without mentioning the boycott). The financial risk of expansion was the main reason the Board did not expand. CP 506. Moreover, the newsletter article is inadmissible hearsay, even more so given that it is an article by a non-Board member regarding the purported reasons that the Board made a decision. ER 801 *et seq*.; *see also Tortes v. King County*, 119 Wn. App. 1, 14, 84 P.3d 252, 258 (2003), *as amended* (Sept. 22, 2003) (Court found to the extent the news ”article is offered to prove the truth of the matters stated therein, it is properly excluded as hearsay”). Most significantly, Appellants never provided evidence that had the Co-op expanded, its profits would have increased. Appellants simply failed to provide evidence that the Co-op suffered any injury. Their arguments to the contrary are just that—arguments.

Appellants incorrectly claim that the trial court's decision would "effectively insulate boards of directors from their own misconduct so long as the profits of a corporation increase after the directors' misconduct." Appellants' Br. at 30. Appellants could have tried to provide evidence that the Co-op suffered harm despite increased sales and membership—but they failed to do so. The trial court's decision merely precludes a few members of a corporation from having standing to sue on behalf of the corporation when they fail to show any injury to the corporation—and that

is, indeed, the law. If Appellants' argument were accepted, any argument by the nonmoving party, or any evidence, regardless of how immaterial, could defeat summary judgment. That is not the standard on summary judgment.

Finally, Appellants' argument that the trial court erred in addressing standing on summary judgment because it had addressed it at the motion to dismiss stage is patently frivolous. Defenses are routinely asserted under both CR 12 and CR 56; the trial court's finding that Appellants sufficiently alleged damages to support standing in their complaint on a motion to dismiss (CP 158:20-25) is irrelevant to whether there was a genuine issue of material fact regarding standing on summary judgment. CP 162:4-7 ("in denying this motion to dismiss, the Court is not precluding the parties from addressing motions, including summary judgment motions on some of these same issues and arguments"). Appellants misplace reliance on *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 976 (2013), inaccurately and irrelevantly claiming it held that defendant had waived its standing defense "by failing to raise it before the trial court." Appellants' Br. at 23-24. First, the appellate court in *Trinity* did not find defendant waived its standing defense—it found that the plaintiff did *not* have standing, but refused to void (as opposed to reverse) the default judgment entered by the

court below for lack of subject matter jurisdiction, finding that lack of standing was not a matter of subject matter jurisdiction. 176 Wn. App. at 199, 212 P.3d at 984. Second, Respondents did raise standing below in this case, so waiver is inapposite.[5] Respondents' standing argument was appropriately addressed on summary judgment, and the trial court did not err in granting summary judgment in Respondents' favor.

C. The Trial Court Correctly Ruled that it Cannot Provide Injunctive Relief Because Respondents Are No Longer Co-op Board Members.

This Court should affirm the trial court's ruling that Appellant cannot obtain injunctive relief against Respondents because they are no longer Co-op board members. "A case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793, 796 (1984); *see also Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome") (internal quotation marks omitted); 43A C.J.S. Injunctions § 28 (1978, Sept. 2018 update) ("An injunction will not be issued restraining a person from taking a certain action unless the person is trying to take the action or is the

[5] Appellants' assertion that standing is waivable because it is not a matter of subject matter jurisdiction in Washington is not only irrelevant, it is also disputed. *See, e.g.*, *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973, 980 (2011) ("Standing is jurisdictional."); *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 885 & n.1, 194 P.3d 977, 981 & n.1 (2008) ("[S]tanding is a matter of our jurisdiction.").

person in control of it."). Because no Respondent is still on the Co-op Board, injunctive relief cannot be ordered against them.

Appellants further turn a court's authority to hear justiciable controversies on its head with its utterly unsupported argument that: "Defendants would be bound as well, both as members of the Co-op and as individuals who were, are, or may in the future be, directors of the Co-op." Appellants' Br. at 26. Such speculation regarding the possibility that Respondents might again become Board Members in the future cannot be the basis for a justiciable controversy or for granting injunctive relief, especially where no current Respondent can effectuate such relief. A court order for injunctive relief must be enforceable against whom it is ordered; a court cannot grant injunctive relief against Appellants who have no ability to comply with such an order because they are no long Co-op Board Members. *See Davison-York v. Bd. of Managers of 680 Tower Residence Condo. Ass'n*, 2011 WL 10069517, at *5 (Ill. App. Ct., Sept 27, 2011) (unpublished) ("[A] declaration that former Board members breached a fiduciary duty . . . would serve merely as an advisory opinion and would have no other consequences."). Because Respondents have no power to effectuate injunctive relief, it cannot be ordered against them.

Appellants acknowledge that no Respondent is currently a Co-op board member, but instead argue that because Appellants brought this case

derivatively (despite their lack of standing to do so), the Co-op itself—as the ostensible plaintiff—would be bound by an injunction voiding the Boycott. Appellants' purported authority for this absurd proposition is inapposite. Appellants' Br. at 31. *Walters v. Ctr. Elec., Inc.*, 8 Wn. App. 322, 329, 506 P.2d 883, 888 (1973) merely describes what a derivative action is, and that the corporation is the real party in interest whose rights are being enforced against a third party. Also inapposite is *In re Ezcorp Inc. Consulting Agreement Derivative Litigation,* 130 A.3d 934 (Del. Ch. 2016), in which plaintiff wanted to voluntarily dismiss his derivative complaint without prejudice, but defendants "sought a dismissal with prejudice that would bind all potential plaintiffs." *Id.* at 938. The court of chancery of Delaware applied Delaware Chancery Court Rule 15(aaa) to find that dismissal should be with prejudice, but only as to the named plaintiff. *Id.* at 945. *Ezcorp*'s discussion of whether a derivative action may bind other plaintiffs does not relate to whether injunctive relief can be ordered when defendants are not in positions to comply; it relates to whether subsequent litigation can be brought after dismissal of a derivative case. Nothing in *Ezcorp* supports Appellants' claim that injunctive relief can be granted against Respondents with no control over the corporation, or that a corporation that does not want a case brought can

be bound by injunctive relief because three shareholders or members purport to sue derivatively on its behalf.[6]

Appellants further claim that the Co-op itself is not prejudiced by nonjoinder, citing a case in which the corporation had shown no interest in the suit. Appellants' Br. at 32, citing *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 778, 496 P.2d 343 (1972). Here, however, the Co-op, through a completely independent board, has spoken regarding its interest, and has rejected Appellants' derivative capacity to sue on behalf of the Co-op, requesting dismissal. CP 211-213. There is no need for Appellants to impute a "clear interest" to the Co-op, Appellants' Br. p. 25, as the Co-op itself has made its interest perfectly clear. Moreover, Appellants' own authority explains that "joinder is excused in the case of corporations that have ceased to exist, or have liquidated or are virtually liquidated." *LaHue*, 6 Wn. App. at 778, 496 P.2d at 351. That is certainly not the case with the Co-op, which is fully intact.

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[6] Even if *Ezcorp.* were relevant, which it is not, it makes clear that "[a] judgment in a stockholder derivative action certainly binds the corporation and its stockholders when the plaintiff has authority to assert the corporation's claims," *id.* at 945, such as when the "corporation has brought the case … [or] the derivative plaintiff has … gained authority to sue, and obtained a decision on summary judgment or … a court has approved a derivative action settlement…. But the general rule does not apply before the stockholder plaintiff has gained authority to sue on behalf of the corporation." *Id.* at 946. Here, Appellants do not have standing to sue on behalf of the Co-op. Moreover, the Supreme Court of Delaware declined to follow *Ezcorp. See Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 840 (Del. 2018), *cert. denied*, 2018 WL 3093913 (U.S. Oct. 1, 2018) (dismissal against subsequent derivative plaintiffs based on issue preclusion is appropriate "when their interests were aligned with and were adequately represented by the prior plaintiffs").

Moreover, "[i]t is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show . . . hat the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 96 Wn.2d 785, 792, 638 P.2d 1213, 1217 (1982) (internal quotation marks omitted). Because Appellants have failed to show injury, Appellants cannot obtain injunctive relief either.

Appellants are also not entitled to a declaratory judgment under the Uniform Declaratory Judgment Act ("UDJA"), RCW 7.24 *et seq.*, because they lack standing to seek such relief and because they fail to meet the UDJA's requirements. Before a court's jurisdiction is invoked under the UDJA, there must be a justiciable controversy satisfying four elements:

> (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973).

Appellants have failed to meet these four prerequisites, which would render any opinion granting declaratory relief "merely advisory."

Ames v. Pierce Cty., 194 Wn. App. 93, 113-14, 374 P.3d 228, 238 (2016). Appellants do not satisfy the first element because their demand for a declaratory judgment against Respondents is a "moot disagreement." *Ripley*, 82 Wn.2d at 815, 514 P.2d at 139. As no Appellant is still on the Board (CP 49, CP 57-60, CP 211), the relief sought is not within Appellants' power to provide. *See, e.g., Davison-York*, 2011 WL 10069517, at *5. Declaratory relief is therefore mooted against Appellants. Although failing to satisfy even one element renders a controversy nonjusticiable, Appellants also fail to satisfy the other three requirements because Respondents are no longer Board members and therefore cannot effectuate declaratory (or injunctive) relief: the parties no longer have "genuine and opposing interests," the interests involved are "theoretical, abstract or academic," and a judicial determination would not be "final and conclusive." *Ripley*, 82 Wn.2d at 815, 514 P.2d at 139.

Moreover, "[t]o establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract." *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004); *see also To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 414, 27 P.3d 1149, 1154 (2001) (plaintiff failed to meet the third justiciability requirement because it failed to show any "demonstrably

direct or substantial financial harm"). Any harm alleged here is speculative, so any declaratory relief against Appellants would be merely advisory, and thus impermissible.

Finally, Appellants argue that the trial court erred by ignoring its equitable powers to order declaratory (and therefore injunctive) relief, Appellants' Br. at 32, even though Appellants don't have standing, there are no damages, and there is no possibility of injunctive relief against Respondents. Again, denial of injunctive and declaratory relief is reviewed for an abuse of discretion. *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337, 1343 (1983); *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 92, 371 P.3d 84, 88 (2016). Appellants have clearly failed to meet that high burden, so the Trial Court's judgment should be affirmed.

D. Respondents Are Entitled to Summary Judgment on Appellants' Fiduciary Duty Claim.

1. Appellants' Fiduciary Duty Cause of Action Fails Because They Did Not Show Injury to the Co-op.

As the trial court found in denying Appellants' partial summary judgment motion, Appellants' fiduciary duty claims fail because "the breach of the director's duty requires harm or injury, and the plaintiffs have not shown that." CP 609:17-19. "In a shareholder derivative action the plaintiff bears the burden of proving (1) a breach of fiduciary duty to

the corporation and (2) the breach was the proximate cause of the losses sustained." *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597, 603 (1986). "Even assuming that a breach of duty exists, summary judgment is appropriate where the plaintiff fails to present evidence that the plaintiff suffered legally recoverable damages." *Arden v. Forsberg & Umlauf, PS*, 189 Wn.2d 315, 329, 402 P.3d 245, 251–52 (2017). In *Arden*, the Washington State Supreme Court affirmed dismissal of fiduciary duty claims on summary judgment because the plaintiffs failed to establish damages, even though factual questions remained regarding whether defendant had met his duty of care. *Id*. at 328-31, 402 P.3d at 251-53. *See also Roil Energy, LLC. v. Edington*, 195 Wn. App. 1030, at *18 (Aug. 2, 2016) (unpublished) (finding that fiduciary duty cause of action should have been dismissed because plaintiff failed to prove that he suffered any damages, and that trial court erred when entering a declaratory judgment that he breached his fiduciary duty "since damages are integral to the causes of action"), *review denied*, 187 Wn.2d 1003, 386 P.3d 1085 (2017). Because Appellants failed to show an injury to the Co-op, much less that it would have been the proximate cause of any purported breach of fiduciary duty (especially given that Appellants' "evidence" of injury is primarily that they themselves stopped shopping at the Co-op), this Court should affirm

summary judgment on the grounds that Appellants' claim for breach of fiduciary duty fails as a matter of law.

2. Respondents Are Entitled to Summary Judgment under the Business Judgment Rule.

Division I of this Court previously ruled in this case that the "board may avail itself of the business judgment rule." *Davis v. Cox*, 180 Wn. App. 514, 535, 325 P.3d 255, 267 (2014). The business judgment rule immunizes directors where: "(1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith." *Scott v. Trans–Sys. Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1, 5 (2003). As clear from the Co-op's governing documents, as argued herein, and as previously found by this Court, the decision to adopt the Boycott was indisputably within the power of the Co-op, and also within the authority of the directors of the Co-op under its governing documents. *See infra*, sec. IV.E; *Davis*, 180 Wn. App. at 535, 325 P.3d at 267. In order to show bad faith, plaintiffs must show "conduct [wa]s motivated by an actual intent to do harm," or that the defendant "consciously and intentionally disregard[ed] their responsibilities," and acted "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *See*

Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 721-22, 189 P.3d 168, 174 (2008) (internal quotation marks omitted). There is not one shred of evidence in the record that Respondents acted in bad faith, so there is no justification to veer from the prior Court of Appeals' ruling that Respondents benefit from the business judgment rule. *Davis*, 180 Wn. App. at 535, 325 P.3d at 267.

E. Respondents Are Entitled to Summary Judgment on Appellants' *Ultra Vires* Claim.

Summary judgment against Appellants can also be affirmed on the grounds that their *ultra vires* claim fails as a matter of law. *Ultra vires* means "beyond the powers"—it describes a transaction that is "outside the purposes for which a corporation was formed." *Hartstene Pointe Maint. Ass'n v. Diehl*, 95 Wn. App. 339, 344-45, 979 P.2d 854, 856 (1999) (citing *Twisp Mining & Smelting Co.*, 16 Wn.2d 264, 293-94, 133 P.2d 300, 312 (1943)). Appellants have never alleged, argued, or provided evidence that adopting the Boycott was outside of the Co-op's power, and have even acknowledged that the Co-op itself does have the power to boycott. *See, e.g.*, CP 8 ("Plaintiffs made clear that they are prepared to respect the outcome" of a "process that comports with OFC's governing rules, procedures, and principles").

There is a "long-held distinction between *ultra vires* and procedurally irregular." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 126, 233 P.3d 871, 875 (2010). In *South Tacoma Way*, the Washington Supreme Court refused to void as *ultra vires* a sale of land in violation of statutory notice requirements because the agency was generally authorized to sell the property. *Id.* at 123, 233 P.3d at 874. Similarly, in *Twisp*, the Washington Supreme Court found that the board directors' passage of a resolution could not be *ultra vires* because the "corporation was not prohibited from passing such a resolution." *Twisp*, 16 Wn.2d at 293, 133 P.2d at 312. In other words, the directors' acts were not "beyond the power conferred on the corporation by the legislature." *Id.* at 294. *See also, Hartstene*, 95 Wn. App. at 345, 979 P.2d at 856 (*ultra vires* does not apply to claim that "is not a challenge to the authority of the corporation, but only to the method of exercising it").

Even if the Board members' authority, as opposed to the corporation's power, were relevant to an *ultra vires* claim, Division I of this Court previously found that "the Co-op's governing documents provided the Board with the authority to adopt the boycott," *Davis*, 180 Wn. App. at 536, 325 P.3d at 267, and that "the Boycott Policy does not

bind the Board" as a matter of law. *Id.* at 534, 325 P.3d at 266.[7] There are no genuine issues of material fact, and Appellants' *ultra vires* claims therefore fail as a matter of law.

F. Respondents Cannot Maintain this Derivative Suit, Which Has Been Rejected by an Independent Co-op Board.

Plaintiffs cannot maintain this purported derivative lawsuit because an independent and disinterested Board has determined that dismissal is in the best interests of the Co-op. CP 211-213. Numerous courts have recognized the authority of such disinterested and independent directors to terminate a shareholder derivative lawsuit after the directors evaluate the claims and determine that the action is not in the corporation's best interest. *See Dreiling v. Jain*, 151 Wn.2d 900, 904-05, 93 P.3d 861, 864-65 (2004) (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981)). "So long as the committee [of directors] exercises its best business judgment, the decision to dismiss the action will be honored by the courts." *Lewis v. Anderson*, 615 F.2d 778, 780 (9th Cir. 1979). In *Lewis*, the Ninth Circuit affirmed the dismissal of a shareholder derivative

[7] The prior Appellate Court ruling is the binding law of the case. *See Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12, 18 (1991) (under the "law of the case" doctrine, the rulings of an "appellate court on appeal as to every question that was determined on appeal and as to every question which might have been determined becomes the law of the case and supersedes the trial court's findings"), *amended by* 814 P.2d 699 (Wash. Ct. App. 1991); see also *Columbia Steel Co. v. State*, 34 Wn.2d 700, 705, 209 P.2d 482, 486 (1949) ("Upon the retrial the parties and the trial court were all bound by the law as made by the decision on the first appeal.") (internal quotation marks omitted).

lawsuit against Disney after a group of independent directors—each of whom were either appointed after the challenged conduct, or did not benefit from the conduct—determined that a lawsuit would not be in Disney's best interest. *Id.* "[T]he good faith exercise of business judgment" by these disinterested directors "is immune to attack by shareholders or the courts." *Id.* at 783.

Here, the Co-op Board that resolved that this "lawsuit should be dismissed" (CP 213) is disinterested and independent, as it consisted entirely of directors who were not on the Board at the time of the Boycott decision or at the time this lawsuit was brought. CP 211; *see Dreiling*, 151 Wn.2d at 905, 93 P.3d at 865 (noting that a committee of directors "who were not serving on the board at the time of the alleged misconduct . . . were therefore presumably independent"). After careful deliberation, the Board passed a unanimous and unequivocal resolution, finding that Appellants are not acting in a derivative capacity on behalf of the Co-op, nor are they "acting under any authority delegated by the Board, past or present." CP 213. The Board believes that Appellants "chose to litigate their concerns rather than pursuing redress through the channels outlined in [the] Co-op's bylaws, including the member-initiated ballet process," that this lawsuit "has imposed significant burdens upon the Co-op, to the Co-op's detriment," and that these burdens include a

"chilling effect on the Co-op's ability to engage with related issues and move forward in a spirit of reconciliation." *Id.* And ultimately, the Board resolved that this lawsuit should be dismissed. *Id.* This Court should honor the independent Board's exercise of its authority over its own affairs, and affirm summary judgment on these grounds as well.

G. The First Amendment Restricts Tort Liability for Protected Expression, Including Peaceful Political Boycotts.

The Co-op Board's approval of a peaceful boycott of Israeli goods is protected First Amendment expressive activity. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982), the United States Supreme Court recognized that peaceful political boycotts rely on "[t]he established elements of speech, assembly, association, and petition." *See also, Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018) (boycott of Israel is protected by the First Amendment). Political boycotts constitute "expression on public issues" and therefore "rest[] on the highest rung of the hierarchy of First Amendment values." *NAACP*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). "[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (alteration in original, internal quotation marks omitted). The issue of Israel and Palestine—the focus of the Boycott—is most certainly a matter

of public concern. *See Davis*, 180 Wn. App. at 531, 325 P.3d at 265 (Co-op's "boycott decision was in connection with an issue of public concern"); *see also Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083 (N.D. Ill. 2015) (finding that tweets regarding "Israeli-Palestinian relations" were a matter of public concern for plaintiff's First Amendment claim).

The First Amendment restricts the imposition of tort liability—such as liability for breach of fiduciary duty, *see Miller v. United States Bank of Wash., N.A.*, 72 Wn. App. 416, 426, 865 P.2d 536, 543 (1994), *as corrected* (Feb. 22, 1994)—for protected speech and expression, even as between private parties. In *Snyder v. Phelps*, the United States Supreme Court found that the First Amendment shielded the Westboro Baptist Church—which had conducted offensive picketing activities at a soldier's funeral—from liability for an intentional infliction of emotional distress claim brought by the soldier's father. The Court found that "even hurtful speech on public issues" is protected "to ensure that we do not stifle public debate." 562 U.S. at 461; *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (finding that the circuit court's judgment in favor of Jerry Falwell contravened the First Amendment rights of Hustler Magazine, whose "patently offensive" but non-defamatory parody about Falwell was protected speech); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (designating "conduct as an invasion of privacy. . . is not sufficient

to support an injunction against peaceful distribution of informational literature"). The First Amendment precludes finding Respondents liable for passing a resolution that the Co-op engage in a protected peaceful boycott on a matter of public concern.

H. Appellants Should Be Sanctioned for Bringing this Frivolous, Harassing, Chilling Lawsuit and Appeal.

As the Washington Supreme Court said in this very case, "litigants cannot be allowed to abuse the heavy machinery of the judicial process for improper purposes that cause serious harm to innocent victims, such as to harass, cause delay, or chill free expression. Such conduct has always been, and always will be, sanctionable." *Davis*, 183 Wn.2d 269, 292, 351 P.3d 862, 873 (2015). It is within the Court's equitable power to award Respondents attorneys' fees and costs in this case, as Appellants brought it as a derivative lawsuit, which "depart(s) from the general American rule that each party bears its own costs." 5 Moore's Federal Practice § 23.1.17(1) (3d ed. 2011). "A shareholder who loses on his or her derivative claims risks having to pay the reasonable expenses incurred by the corporation in its defense." *Id.* at § 23.1.17(2).

Division I of this Court dismissed this case as a meritless SLAPP four years ago. *Davis*, 180 Wn. App. 514, 325 P.3d at 255. Discovery subsequently revealed that Appellants celebrated this lawsuit's success in

discouraging other co-ops from boycotting Israeli goods. CP 599. One Appellant hoped the Co-op, who she claims to represent, was injured by her refusal to shop there anymore. CP 486. Such harassing, intimidating, and chilling lawsuits can only be discouraged through the imposition of sanctions.

An "appellate court…may order a party or counsel…[who] files a frivolous appeal" to pay costs and attorneys' fees or sanctions to the court. Wash. R. App. P. 18.9(a). An "appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, 191-92 (1980) (imposing sanctions under RAP 18.9(a) because the appeal was "essentially a factual appeal" that was "totally devoid of merit"); *see also Andrus v. State, Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152, 1155 (2005) (awarding fees and costs because appellant "asserted arguments that lack any support in the record or are precluded by well-established and binding precedent").

Again, this case was previously dismissed as meritless by Division I of this Court. *Davis*, 180 Wn. App. 514, 325 P.3d at 255. "This case presents essentially the same claims and issues on which [appellants] were defeated in two prior cases. Nevertheless, [appellants] have persisted in

appealing this case even though they present no debatable issues and their position is so devoid of merit that there is no possibility of reversal." *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 540, 762 P.2d 356, 361–62 (1988); *see also Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 581–82, 754 P.2d 1243, 1255 (1988) ("issues are devoid of merit with no reasonable possibility of reversal since most of the issues are governed by" prior decisions "and the other issues are not debatable issues upon which reasonable minds might differ"). Appellants should be sanctioned for bringing this meritless, frivolous, harassing, chilling lawsuit and appeal.

V. CONCLUSION

For the reasons stated above, Respondents respectfully request that this Court affirm the trial court's grant of summary judgment in their favor on the grounds stated herein, and award Respondents attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 3RD day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be electronically filed using the Washington State Appellate Courts' Portal Electronic Delivery System which will serve all counsel of record.

Executed this 3rd day of October, 2018 at Seattle, Washington.

s/ Bruce E. H. Johnson
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