☐ EXPEDITE
☐ No hearing is set
☑ Hearing is set
Date: February 19, 2016
Time: 9:00 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' RENEWED MOTION TO DISMISS

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I. INTRODUCTION AND RELIEF REQUESTED

In a remarkable development, numerous documents previously withheld from Plaintiffs now reveal that Defendants—current and former members of the Board of Directors (the "Board") of the Olympia Food Cooperative (the "Co-op")—***knowingly and admittedly*** violated their duties as corporate directors, the Co-op's Bylaws, and other governing rules in the course of enacting a boycott of goods manufactured in Israel (the "Israel Boycott").

Among these documents, produced for the first time in response to this Court's recent order compelling production, are admissions by Defendants Grace Cox and Harry Levine that the Board acted without authority when it enacted the Israel Boycott in July 2010. Defendants thereby "put their own personal and/or political interests above the interests of [the Co-op], to the detriment of [the Co-op]," "put the interests of another organization above the interests of OFC, to the detriment of OFC," and acted in bad faith toward the corporation to which they owe fiduciary duties. *See* Am. Compl. ¶¶ 59-60; *see also Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 719, 189 P.3d 168, 172 (2008).

Under the plain language of the policy governing the Co-op's participation in boycotts (the "Boycott Policy"), the Co-op can honor a boycott only if two tests are met: (1) there is an existing nationally recognized boycott; and (2) Co-op Staff approve the boycott proposal by consensus (i.e., universal agreement). When the Board enacted the Israel Boycott in July 2010, it failed both tests. Evidence now shows that ***after*** enactment of the Israel Boycott, Ms. Cox and Mr. Levine each [redacted] (The change they recommended was never adopted.) Their statements read:

[redacted]

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[redacted]

These admissions of Ms. Cox and Mr. Levine are crucial—not to mention inconsistent with every brief Defendants have filed in this case—because they demonstrate not only that Defendants lacked authority to enact the Israel Boycott, but that they knowingly violated their duties as corporate directors in doing so. [redacted] Numerous other documents produced in response to this Court's discovery order show the same.

The Washington Supreme Court has already found that a genuine issue of material fact exists as to Defendants' misconduct, and recently obtained discovery demonstrates decisively that Plaintiffs' claims have merit. Not only must Defendants' Renewed Motion to Dismiss Under CR 12(b)(6) ("Renewed Motion") be denied, but any effort by Defendants to obtain summary judgment (which they have not yet sought) will fail.[2]

II. STATEMENT OF FACTS

A. Newly Discovered Evidence Defeats Defendants' Position

For years, Defendants have tried mightily to avoid their discovery obligations, most recently before this Court on Plaintiffs' Second Motion to Compel Discovery. In response to this Court's granting of Plaintiffs' motion on January 22, 2016, Defendants finally produced documents that explain why. Several of them contain dispositive

[1] Exhibits A-AA are attached to the Declaration of Avi J. Lipman In Support of Opposition to Defendants' Renewed Motion to Dismiss.

[2] At this point, given the documents Defendants have just produced, there appear to be no facts that support Defendants' position.

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admissions that clearly undermine the Renewed Motion.[3] To cite another example, a different Defendant wrote to other Board members in relevant part:

Ex. C (emphasis added). This document, written by one of the Defendants in November 2010, tracks precisely what Plaintiffs have been saying about Defendants' misconduct since before this lawsuit was filed. For example, in a letter dated March 31, 2011 to Defendants, Plaintiffs wrote: "OFC is a cooperative and its members have agreed to abide by certain rules. Yet you have refused to follow these rules or to cooperate. It is clear that members of the Board, by committing such ***procedural violations***, have failed collectively and as individuals to abide by their lawful obligations to OFC and its members." **Ex. D** (emphasis added).

The record is now clear that Defendants knew Plaintiffs' assertions in 2011 were accurate, yet Defendants tried to hide admissions to that effect under the guise of the "associational privilege"—until this Court properly struck Defendants' baseless objection on January 22, 2016. Not only has the extent of Defendants' discovery violations now been revealed, but the Court has hard evidence that Defendants (1) knowingly violated their duties, the Boycott Policy, ***and*** Bylaws of the Co-op; and (2) later tried to hide evidence of their liability under a privilege that does not even remotely apply.

Another email just produced by Defendants goes a step further and [redacted]

[3] Due to Defendants' refusal to comply with the rules governing discovery, Plaintiffs have only been able to review a portion of the recently-produced documents. Plaintiffs have moved separately for leave to file a supplemental brief on those documents they have not reviewed yet.

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[redacted]—which constitutes yet another, independent violation of the Bylaws. The email, addressed to Ms. Cox and dated September 30, 2010, states in relevant part: [redacted] **Ex. E**; *see also* **Ex. F** ¶ 6 ("Board decisions are made by consensus.").

Defendants' Renewed Motion fails in light of Plaintiffs' meritorious claims and the mounting evidence that supports them. Plaintiffs have standing as members of the Co-op to sue Defendants, as directors, on behalf of the Co-op. That right is inherent in membership and expressly acknowledged in applicable statutes. Plaintiffs have also stated valid claims for breaches of fiduciary duties and *ultra vires* action. Additionally, the Washington Supreme Court remanded the case to this Court to resolve disputed facts, and the Court of Appeals' overruled, non-controlling opinion is not the law of the case. Plaintiffs respectfully request that Defendants' Renewed Motion be denied.

B. Defendants' Pattern of Mischaracterizing the Claims and Hiding Evidence

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, and most recently by obstructing discovery by asserting the "associational privilege." Dkts. 41, 124, Defs' Opp. to Plfs' Second Mot. to Compel. At every turn, Defendants' efforts have been rejected. In May 2015, the Supreme Court reversed the Court of Appeals 9-0 and held that Plaintiffs' claims had been wrongly dismissed in 2012 under the Anti-SLAPP Act, which the Court ruled violates the constitutional right to a jury trial. *See Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). This Court recently rejected Defendants' assertion of an inapplicable privilege—which led directly to discovery of documents like those quoted above. These

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developments confirm that this case is about corporate misconduct—that is, the knowing violation by Defendants of the rules that govern the Co-op—and that Plaintiffs' claims have merit.

Defendants' efforts have failed because their portrayal of this case cannot be squared with either the record or the claims Plaintiffs have actually asserted. The 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. 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. As one Defendant admitted in November 2010, [redacted] **Ex. C**.

C. Background Regarding the Boycott Policy and Israel Boycott

The Co-op operates two retail grocery stores in Olympia, Washington. Am. Compl. ¶¶ 1, 20. The Bylaws define the Co-op as "collectively managed," relying "on consensus decision making." **Ex. F**. In May 1993, the Board adopted the Boycott Policy. **Ex. G**. 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 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. (emphasis added).

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In or around March 2009, a member of the Co-op proposed that the Co-op boycott products produced in Israel and divest from investment in Israel. Dkt. 38 ¶ 20. The proposal was discussed among Staff members, who failed to reach consensus regarding their position on the proposal. *Id*. Then, in an unprecedented step, Mr. Levine (at the time, Staff representative to the Board) submitted a Board-sponsored version of the proposal to the Staff. Dkt. 41.8 ¶ 4. The involvement of the Board in such a boycott proposal was inconsistent with prior boycotts, the plain language of the Boycott Policy, and the Staff's understanding of the Boycott Policy. *Id.*

The Staff was given three options with regard to the proposal: (a) "consent"; (b) "stand aside"; or (c) "take to meeting." Dkt. 41.8 ¶ 5. After at least one Staff member selected "take to meeting," the proposal was sent to Staff "work group meetings" (how and where the Staff collective makes decisions). *Id*. There were approximately 10–15 Staff members at each meeting, which took place in or around the beginning of July 2010. *Id.* Among the Staff who attended the work group meetings, there were a number of "firm blocks," meaning certain members were clearly against the proposal. *Id.* Because it only takes one Staff member to block consensus, it was clear that the Staff did not support the Israel boycott proposal. *Id.* By failing to reach consensus, the Staff rejected Israel Boycott. *Id*. No evidence was presented to Staff at the work group meetings, or at any other time, that a boycott of Israel was "nationally recognized." Dkt. 38 ¶ 5.

The Board was notified of the lack of consensus among the Staff regarding Mr. Levine's proposal. Dkt. 41.8 ¶ 6. It made no additional effort to revise the proposal in response to Staff objections. Instead, without due authority, in violation of the Bylaws, Boycott Policy, and other rules, the Board decided to adopt the Israel Boycott in July 2010.[4] *Id.* The Staff never consented to this action. *Id.* ¶ 7. As Mr. Levine admitted, "a few Staff members would not agree to the boycott and would not step aside to permit a

[4] Defendants argue the Board was empowered by the Staff's lack of consent to "resolve the conflict." This is incorrect for numerous reasons. Among them is that the Bylaws only allow the Board to "resolve organizational conflicts ***after all other avenues of resolution have been exhausted***"—which they were not. **Ex. F** at ¶ III(13)(16) (emphasis added).

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consensus." Dkt. 38 ¶ 24.

In attendance at the July 2010 Board meeting was a large group of activists from an anti-Israel group called Boycott, Divestment, and Sanctions ("BDS"). *Id.* BDS has been heavily involved in the Co-op community for years, and routinely engages in anti-Semitic activity, such as boycotting American Jewish musicians. **Ex. H**. The Amended Complaint alleges BDS was the primary driver behind the Board's unlawful enactment of the Israel Boycott. Am. Compl. ¶ 39. Email from a Defendant who co-founded "Olympia BDS" strongly supports this allegation. **Ex. I**.

D. There Was No Nationally Recognized Boycott of Israel in July 2010[5]

Defendants have admitted the Board, in enacting the Israel Boycott in 2010, did not consider the requirement that the Co-op honor only "nationally recognized" boycotts. As Defendant Mr. Levine stated: "The Board considered the ***international movement*** to boycott Israel … and approved the boycott proposal in solidarity with this ***international*** boycott movement." Dkt. 38 ¶ 25 (emphasis added). Of course, that is not the standard that must be applied under the Boycott Policy.[6] Michael Lowsky—a member of the Co-op for 23 years and a Staff member for 16 years—testified that no evidence was ever presented to the Staff that a boycott of and/or divestment from Israel were "nationally recognized." *See* Dkt. 41.8 ¶ 5. Rather, the proposal was presented to the Staff as an opportunity to be the "***first*** grocery store to publicly recognize a boycott and/or divestment from Israel." (Emphasis added). *Id.* This is consistent with a recently-obtained email from one of the Defendants who admits the Israel Boycott was [redacted] **Ex. I**.

Had it abided by its obligations, the Board would have readily determined that boycotting and divesting from Israel are nationally rejected—not nationally recognized—

[5] Nor is there a nationally recognized boycott of Israel now, but that is irrelevant.

[6] Additionally, the Co-op's own proposal to the Staff in support of the Israel Boycott and Divestment policies concedes that in 2005, organizations in ***Palestine*** called for a boycott of Israeli goods and investments—not organizations in the United States. *See* **Ex. J**.

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policies. *See* Dkt. 41.7 ¶ 5. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. *Id.* These include the Madison Market (Central Co-op) in Seattle; the Port Townsend (Washington) Food Co-op; the Davis (California) Food Co-op; and the Sacramento (California) Natural Foods Co-op. *Id.*

No matter where they have been pursued, efforts to organize boycotts of and divestment policies against Israel have failed in the United States. Dkt. 41.7 ¶ 6. Defendants provide no evidence to the contrary. Indeed, it is clear that boycotting Israel were not nationally recognized policies at the time the Board unlawfully adopted them in July 2010. The bottom line is that both the Staff and the Board have testified that the Board did not even consider the "nationally recognized" standard.

The Honorable Thomas McPhee (Ret.) previously acknowledged that there was no nationally recognized boycott of Israel at the time the Board acted. **Ex. K** at 24. On appeal, the Washington Supreme Court found that this very issue presents a genuine dispute of fact for trial. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015).

E. The Board Violated the Co-op's Consensus Rule

At the heart of the Co-op's system of governance and Bylaws is the principle of "consensus decision making." **Ex. F**. Indeed, the Co-op explicitly relies on "consensus decision making" at all levels of its operations. *See, e.g., id.* ¶¶ I(2), III(6), III(11), and III(12); **Ex. L** at 3 ("Staff Structure" and "Staff Decision Making"); **Ex. G**. By definition and in practice, "consensus" at the Co-op means that (1) all persons empowered to decide on a particular proposal must assent in order for the proposal to pass; and (2) any one such person may "block" the proposal from passing. In the words of a former Board Member:

> The Co-op staff collective uses a consensus-based decision-making process. No group decision is made until it has the support of all members of the collective. ***Any individual collective member may block consensus at any time. In fact, if an individual staff member cannot live with a decision that is about to be made, it is his/her responsibility to block consensus***…

Ex. M (emphasis added). In this case, multiple members of the Staff objected to the Israel Boycott and Divestment resolution/policies. *See* Dkt. 41.8 ¶ 5. Newly produced discovery

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confirms not only that Staff objected, but that [redacted] **Ex. N**. In response to a Staff survey, another employee wrote:

[redacted]

Ex. O (emphasis added). In another newly produced document, a Staff member asked the Board [redacted] **Ex. P**; **Ex. Q** (emphasis added). Judge McPhee previously found correctly that the Board enacted the Israel Boycott in July 2010 despite a lack of staff consensus. Dkt. 41 at 2; **Ex. K** at 20.

Defendants have argued previously that their violation of the Boycott Policy was authorized by a Bylaw provision providing that the Board may "resolve organization conflicts." **Ex. F**. This finds no support. Corporate directors cannot formulate a policy that requires Staff consensus, enact the policy unanimously, and then justify their violation of it by claiming a lack of Staff consensus constitutes a "conflict." That logic defies reality, and is flatly contradicted by Ms. Cox and Mr. Levine, who [redacted] **Exs. A**, **B**. If the Board was merely resolving a "conflict" when it acted, then why did [redacted] Defendants' argument makes no sense, and is also inconsistent with the Bylaws. *Id.* (the Co-op relies on "consensus decision making").

F. Defendants Put Their Interests and BDS Ahead of Their Duties to the Co-op

The proposal to boycott Israel in the first place was raised by in or around May 2010 by members of BDS. **Ex. R** (May 2010 Board minutes). In another email that was produced for the first time in response to this Court's ruling of January 22, 2016, one Defendant admitted that [redacted]

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[redacted]

[redacted]

Ex. I. Not only this, but this same Defendant later [redacted]

[redacted] **Ex. T**. This evidence alone demonstrates a breach of Defendants' duties to the Co-op, because it shows that allegiance to their own political views and an outside organization took precedence over Defendants' duties as directors of the Co-op.

Members of the Co-op recognized the improper and anti-Semitic influence of BDS on the Board. In another newly produced document, one wrote to the Board:

[redacted]

Ex. U. In yet another inculpatory admission that Defendants tried to hide from Plaintiffs, one Defendant wrote [redacted]

[redacted] **Ex. V**. This alone amounts to a brazen violation of the Bylaws' mandate to "support efforts to increase democratic process." **Ex. F**.[7]

[7] In virtually every brief they have filed in this case, including the Renewed Motion, Defendants cite to a May 2011 letter sent by Plaintiffs to Defendants asking them to comply with the Co-op's rules. **Ex. D**. Defendants' favorite quote is that if Defendants do not take prompt action to repair their procedural violations, "we will bring legal action against you, and this process will become considerably more complicated, burdensome, and expensive than it has been already." *Id.* Unfortunately for Defendants, the Court now has documented evidence that to the

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G. Fallout and Damage to the Co-op

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. D**. The Board refused. **Ex. W**. Instead, the Board attempted to amend the Boycott Policy to retroactively legitimize its misconduct. *E.g.*, **Ex. X**. Defendants have repeatedly admitted this fact, which is alleged in the Amended Complaint and strongly supports Plaintiffs' contention that the Board knowingly violated the Co-op's Boycott Policy and Bylaws. (Why else would they try to "fix" the Boycott Policy after the fact?)

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. Plaintiffs Linda and Kent Davis, who previously and routinely shopped at the Co-op have not done so since the summer of 2010. *Id.* Plaintiff Susan Mayer, who previously and routinely shopped at the Co-op, has not done so since the summer of 2010. Dkt. 41.9 ¶ 12. Others have followed suit or resigned. Dkt. 41.4 ¶ 3. Indeed, the Board expected losses and community discord when it voted to boycott. **Ex. Y**. But for the Board's misconduct, these membership cancellations, reduced sales, and community upheaval would not have occurred.

Additionally, the Co-op has lost revenue as a result of failing to offer Israeli-made products to customers who wish to purchase them. In 2010, the Co-op refrained from expanding to a new facility in part because of "the uncertain impact of the recently adopted boycott of Israeli products." **Ex. Z**. While it is impossible, without access to additional discovery, to quantify the resulting monetary losses to the Co-op, there is

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extent Plaintiffs have allegedly "succeeded," Defendants are entirely responsible for the consequences of their failure to accept Plaintiffs' invitation to take remedial action. Plaintiffs foresaw years ago that Defendants intransigence would not only harm the Co-op, but threatened to harm all of the parties involved. Contrary to Defendants' suggestion, there was nothing sinister about Plaintiffs' prediction; rather it was a prescient invitation to avoid protracted litigation. Defendants have no one to blame but themselves for having refused.

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ample evidence that business has been lost as a result of the Board's failure to follow the Co-op's governing rules and procedures.

H. Plaintiffs' Amended Complaint

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 a way that violated Co-op rules and procedures, it was void and unenforceable. Dkt. 20. The complaint also alleged that the Board members violated fiduciary duties owed to the entity. *Id.* Plaintiffs' complaint has since amended to clarify that Defendants violated those duties, among others, by, among other things, "put[ting] their own personal and/or political interests above the interests of [the Co-op], to the detriment of [the Co-Op]," and "put[ting] the interests of another organization above the interests of OFC, to the detriment of OFC." Am. Compl. ¶¶ 59-60. Plaintiffs seek declaratory and injunctive relief, as well as damages against Defendants. *See* Am. Compl.

Plaintiffs' Amended Complaint references a wide number of documents, all of which may properly be considered by this Court in resolving Defendants' Renewed Motion. *See, e.g.*, By way of example and not limitation, *see* Am. Compl. ¶¶ 32-36, 44, 46, 49, 54.

I. Defendants' Motion to Strike and Plaintiffs' Successful Appeal

On November 1, 2011, Defendants filed a Special Motion to Strike Under Washington's Anti-SLAPP Act, RCW 4.24.525, and Motion to Dismiss ("Motion to Strike"). Dkt. 41. Plaintiffs opposed the Motion to Strike, arguing, among other things, that Plaintiffs' Complaint was not covered by the Anti-SLAPP Act and that the Act was unconstitutional on its face and as applied to Plaintiffs. Dkt. 41.3. Plaintiffs also opposed Defendants arguments concerning dismissal of the Complaint under CR 12. *Id* at 17-25. At the same time, Plaintiffs cross-moved to allow discovery to proceed. Dkt. 42.2. On January 13, 2012, Judge McPhee granted Defendants' Motion to Strike based on the Anti-SLAPP Act, denied Plaintiffs' discovery cross-motion, and awarded fees and sanctions

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against Plaintiffs. In doing so, Judge McPhee did not consider Defendants' arguments for dismissal under CR 12. Plaintiffs appealed that ruling and the Court of Appeals affirmed. *See Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014).

On May 28, 2015, the Washington Supreme Court reversed and held that the Washington Anti-SLAPP Act is unconstitutional. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015). In so doing, it found disputed facts that must be resolved at trial:

> One ***disputed material fact*** in this case is whether a boycott of Israel-based companies is a "nationally recognized boycott[ ]," as the Cooperative's boycott policy requires for the board to adopt a boycott. The declarations on this fact conflict. . . ***On this disputed material fact, when the superior court resolved the anti-SLAPP motion, it weighed the evidence*** and found the defendants' "evidence clearly shows that the Israel boycott and divestment movement is a national movement."

Davis, 183 Wn.2d at 282 n.2 (emphases added) (internal citations omitted). Now, of course, the record shows not merely that Defendants might have violated the Boycott Policy, the Bylaws, and their duties—but that they did so knowingly. The Supreme Court struck down the Anti-SLAPP Act, reversed the dismissal of Plaintiffs' claims, and remanded the case for trial. *Id.* at 295-96. On June 19, 2015, the Supreme Court issued its mandate directing this Court to proceed consistent with its opinion. Dkt. 120.

III. ISSUES PRESENTED

1. Do members of the Co-op have standing to bring a derivative or representative lawsuit on behalf of the Co-op when the Board acted beyond its authority, violated its duties, acted in bad faith, and rejected all requests to remedy its improper conduct?

2. In light of Defendants' knowing and admitted violations of the Co-op's Bylaws and other governing rules, have Plaintiffs stated (a) a valid *ultra vires* claim and (b) a valid claim for a breach of Defendants' duties to the Co-op?

3. Does non-controlling analysis in a Court of Appeals decision that was reversed and vacated by the Washington Supreme Court constitute "law of the case" that is binding on Defendants' Renewed Motion?

IV. EVIDENCE RELIED UPON

Plaintiffs rely upon the Declaration of Avi J. Lipman and Exhibit A–AA attached

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thereto, and the records and files herein. For the convenience of the Court, courtesy copies of certain previously-filed documents upon which Plaintiffs rely have been provided.

V. ARGUMENT

A. CR 12(b)(6) Legal Standard

Under CR 12(b)(6), "[p]laintiff's allegations are presumed true and a court may consider hypothetical facts not included in the record." *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000). A plaintiff's allegations overcome a CR 12(b)(6) motion "if it is *possible* that facts could be established to support the allegations in the complaint." *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (emphasis in original). In other words, "[o]n a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). CR 12(b)(6) motions are granted only "sparingly and with care." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

B. Plaintiffs Have Standing to Sue Derivatively

Perhaps recognizing that Plaintiffs' claims will succeed on the merits, Defendants' Renewed Motion is devoted almost entirely to procedural requirements and statutory shell games. None of Defendants' arguments is supported by Washington law.

1. Plaintiffs' Claims Are Proper Under the Nonprofit Act

Plaintiffs may bring their claims under the Washington Nonprofit Corporation Act ("Nonprofit Act"), RCW 24.03 *et seq.*, 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." *See* RCW 24.03.040(2) (emphasis added). This statute specifically provides members such as Plaintiffs with the ability to

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combat *ultra vires* action by bringing a "representative suit" on behalf of the corporation against officers and directors for "exceeding their authority"—which is precisely what Plaintiffs have done here.

Defendants' facile reliance on canons of statutory interpretation demonstrates the weakness of their position. *See* Renewed Mot. at 8. 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, 207 P.3d 433, 437 (2009) (quoting *Williams v. Erie Mountain Consol. Min. Co.*, 47 Wash. 360, 361-62, 91 P. 1091, 1092 (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.

If the legislature wanted to eliminate the ability of members to bring a suit against corporate directors for exceeding their authority, it could have done so explicitly. Instead, it left intact a member's power to bring such a suit.

2. Lundberg v. Coleman Is Inapposite

Lundberg v. Coleman, 115 Wn. App. 172, 60 P.3d 595 (2002)—the case that forms the basis of Defendants' Renewed Motion—does nothing to support Defendants. The representative suit at issue in *Lundberg* was brought by a minority ***director*** of a

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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 specifically and unambiguously grants ***members***, such as Plaintiffs here, the right to bring representative suits against individual directors or officers; however, that provision was inapplicable to the *Lundberg* Court's analysis. 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.

The nature of the *Lundberg* plaintiff's claims therefore limited the scope of the Court's decision—a reality ignored by Defendants. Defendants cite *Lundberg* for the proposition that "the Legislature has determined that a proper remedy for mismanagement of nonprofit corporations is [*inter alia*] . . . a proceeding brought by the attorney general." *See* Renewed Mot. at 9. Yet they fail to quote the crucial introductory clause: "***In cases like this***." *Lundberg*, 115 Wn. App. at 178. "In cases like this" means cases brought under the Nonprofit Act where the individual seeking to bring a representative claim is merely a ***director*** of the corporation, but not a ***member*** of the corporation, or where the corporation does not have members. That is why *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 Court; subsection (2) was irrelevant to the case before it because subsection (2) deals with members, which the corporation in *Lundberg* did not have.

3. Plaintiffs Satisfy the Requirements of CR 23.1

Defendants propose a rule for derivative and representative actions which the courts of this State have repeatedly and flatly rejected. They also attack Plaintiffs'

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representative capacity (in a footnote) by woefully misapplying the CR 23.1's requirements. Defendants' procedural challenges are meritless.

Defendants assert that Plaintiffs' claims are barred because they "failed to exhaust the Co-op's internal remedies." Renewed Mot. at 9. Defendants' position is both factually inaccurate and legally flawed. Washington is a "demand futility" state. *F5 Networks*, 166 Wn.2d at 240. 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. Significantly, Defendants do not claim, nor could they, that Plaintiffs failed to ***plead*** futility with particularity. *Id.*; *see also* Am. Compl. Here, because were no disinterested directors and the Board refused to revisit the issue after numerous demands, any further effort by Plaintiffs to obtain remedial action by the Board would have been futile.

Defendants allege Plaintiffs failed to exercise their "right" to petition the Board. Not only is this incorrect, but the "right" to which they refer is not a "remedial remedy" that had to be exhausted. The Bylaw provision to which Defendants refer allows members to address proper Board action. **Ex. F**. It is not intended to remedy improper Board action, nor does it provide an avenue to such relief. Moreover, under Co-op policy, member petitions may only be submitted with approval of and active participants from the Board.[8] **Ex. AA**. Clearly, such action would be futile given the Board's unanimous enactment of the Israel Boycott. In fact, the Board received two petitions containing over 350 signatures asking it to, among other things, rescind the boycott. Dkt. 41.4 ¶ 6. The Board refused, evidencing its inability to "exercise its independent and disinterested business

[8] Defendants assert that Plaintiffs were ***required*** to put the issue to a vote of Co-op members as a prerequisite to suing the directors on behalf of the Co-op, but their suggestion ignores the plain language of the Boycott Policy and Bylaws, which required consensus (i.e., universal consent) of the Staff to "honor" a national boycott. Nothing in the Boycott Policy or Bylaws placed the onus on dissenting members to prove they outnumber those favoring the proposed boycott.

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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.

Defendants also argue unconvincingly that Plaintiffs do not adequately represent the Co-op's membership. Under the Civil Rules, the 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 the Plaintiffs themselves—are fairly and adequately represented in this action.

4. Defendants' Unlawful Conduct Injured the Co-op

As to Plaintiffs' claims for declaratory relief and *ultra vires*, there is no need to establish monetary damages. That said, the Co-op has been financially damaged. In light of the numerous membership cancellations that resulted from the Board's misconduct, the fact that certain members have stopped shopping at the Co-op in protest, the loss of revenue that has resulted from the Co-op's failure to offer Israeli-made products to customers who wish to purchase them, the Co-op has suffered monetary losses that can only be calculated through discovery. *See, e.g.*, Dkt. 41.4 ¶ 2; Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13; Dkt. 41.1 ¶ 13; Dkt. 42 ¶ 13. Similarly, the Co-op lost revenue and commercial opportunities when it delayed expanding to a new facility in part because of "the uncertain impact of the recently adopted boycott of Israeli products." **Ex. Z**.

But for the Board's misconduct, these membership cancellations, reduced sales, and expansion delays would not have occurred. Even the Board members recognized that

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the boycott would have negative financial effect in the Co-op. **Ex. Y**. Plaintiffs have adequately pled damages. *See Housing Works, Inc. v. Turner*, 2004 WL 2101900, 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 Co-op's injuries did not end with financial consequences. Defendants characterize Plaintiffs' allegations of a fractured community, division and mistrust among members, and alienation of members as "conjectural and hypothetical." Yet these are concrete and particularized examples of the negative impact Defendants' unlawful actions have had on the Co-op and its members. They are also symptoms of the underlying harm; i.e., Defendants' promotion of BDS and their own personal political agendas to the detriment 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").

C. The Amended Complaint States a Valid *Ultra Vires* Claim

Defendants, unable to establish that they actually followed the Boycott Policy and Bylaws, instead argue that because the Co-op has the power to enact boycotts, Plaintiffs cannot assert a claim based on the Board's failure to follow the governing rules. In support of this argument, Defendants rely on two Washington cases involving the doctrine of *ultra vires* action: *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 979 P.2d 854 (1999), and *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 133 P.2d 300 (1943). Neither case limits a member's ability to bring a claim of *ultra vires* against a corporation. Indeed, both specifically reject the tactics the Defendants are attempting to employ here. Corporate directors cannot disregard the corporation's own rules and bylaws that prescribe its policymaking procedures. *See Hartstene Pointe*, 95

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Wn. App. at 346.

Hartstene Pointe illustrates the Washington courts' refusal to allow corporate directors to hide behind the *ultra vires* doctrine while disregarding corporate rules. In *Hartstene Pointe*, the plaintiff sought to challenge the propriety of a corporate policy that was being imposed against him. The corporation argued that under the Nonprofit Act's *ultra vires* provision, RCW 24.03.040, the plaintiff could not challenge the propriety of the policy because he did not fit within the provisions of the Act. *See* 95 Wn. App. at 344. But *Hartstene Pointe* ***rejected*** the corporation's argument and permitted the plaintiff to challenge the policy: "If, as [the Association] suggests, RCW 24.03.040 prevents [the individual]'s challenge, the corporation would be free to disregarding its own bylaws that prescribe the make-up of committees. In short, the corporate articles and bylaws would be largely meaningless." *Id.* at 346. Accordingly, the court permitted the individual to challenge procedurally improper corporate action.

Hartstene Pointe cited to *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 133 P.2d 300 (1943), the other case relied on by Defendants. In *Twisp*, the corporation attempted to avoid a transaction with a third party by claiming it had acted without a quorum and that the transaction was therefore *ultra vires*. The Court rejected that argument, ruling the corporation could not shield itself from the legal effects of its own actions. Yet the Court made clear that acts violating corporate procedural rules are not beyond challenge by harmed individuals: "[A] corporate transaction . . . which is within the corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a certain class, is voidable only, and is valid until avoided, not void until validated." *Twisp*, 16 Wn.2d at 294. Thus *Twisp* does not limit Plaintiffs' ability to assert their *ultra vires* claim. To the contrary, it merely limits the ***Board's*** ability to use the *ultra vires* doctrine to avoid the consequences of its improper actions. *Id.* at 295.

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Indeed, *Twisp* supports Plaintiffs' claims in this case. Plaintiffs' Amended Complaint alleges that the Co-op Board failed to follow the Boycott Policy and Bylaws in enacting the Israel Boycott—rules that, among other things, protect Staff members who object to a particular boycott. Am. Compl. ¶¶ 66–67. Accordingly, the Israel Boycott is subject to being "avoided" through this litigation. *See Twisp*,16 Wn.2d at 294 (corporate transactions that fail to observe procedural requirements are valid until avoided).

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

D. The Amended Complaint States a Valid Breach of Duty Claim

Defendants inaccurately contend that their duties to Plaintiffs, the Co-op, and its members are limited to refraining from gross negligence.[9] Defendants rely on *Barry v. Johns*, which involved a dispute among city councilmembers over the propriety of their participation in a council vote concerning a nonprofit corporation of which the defendant councilmembers were directors. 82 Wn. App. 865, 867, 920 P.2d 222 (1996). Citing RCW 4.24.264, the *Barry* court found that the nonmember plaintiffs could only challenge the directors' conduct if it rose to the level of gross negligence. *Id.* at 867. But RCW 4.24.264(2) specifically carves out the very claims asserted by Plaintiffs here: "***Nothing in this section shall limit or modify in any manner the duties or liabilities of a director or officer of a corporation to the corporation or the corporation's members***." (Emphasis added.) Thus the statute confirms the right of members like Plaintiffs to sue nonprofit

[9] Even if the "gross negligence" standard applies here (it does not), Defendants were grossly negligent in knowingly violating the Boycott Policy and Bylaws.

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corporate directors for violating the duties they owe to the corporation. *Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85, 90, 332 P.3d 1133, 1135 (2014) (RCW 4.24.264 immunity "only applies against non-members of a nonprofit corporation.").

Waltz explained that "RCW 4.24.264(1) sets a gross negligence standard for liability of directors in the course of their official actions, while subsection (2) preserves any different statutory standard that might apply between directors and the corporation or its members." 183 Wn. App. at 90. A different standard applies with regard to directors' duties to nonprofit corporations organized under RCW 24.03, *et seq*., such as the Co-op, and the corporations' members. RCW 24.03.127 ("A director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."). This statute "sets forth a ***reasonableness standard for directors in their dealings with the corporation and its members***." *Waltz*, 183 Wn. App. at 90 (emphasis added).

Nonprofit directors are liable to nonmembers only for conduct rising to the level of gross negligence, but they are held to a ***higher*** standard—the obligation to act in good faith with the care of an ordinarily prudent person—with respect to duties owed the corporation and its members. *Waltz*, 183 Wn. App. at 92. Here, Defendants' owed Plaintiffs and the Co-op fiduciary duties to comply with the Co-op's Boycott Policy, Bylaws, and other rules in good faith with the care of an ordinarily prudent person. Instead, Defendants knowingly disregarded those rules to advance their own political agendas and the political agenda of BDS. This is plainly sufficient to state a claim for breach of fiduciary duty. *Id*.

Nor does the business judgment rule entitle Defendants to dismissal of the Amended Complaint. There is ample evidence in the record that Defendants acted with "dishonesty" and "incompetence" when they knowingly violated the Boycott Policy and

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Bylaws. Renewed Mot. at 16. Moreover, the Court obviously cannot weigh evidence under CR 12(b)(6). The Washington Supreme Court has held that business judgment rule cannot "serve as a bar to the proximate cause element of a legal claim," and that courts "must decide based on traditional principles of proximate causation whether or not a defendant was the cause of the injuries suffered." *City of Seattle v. Blume*, 134 Wn.2d 243, 260, 947 P.2d 223, 231 (1997). Proximate causation is generally inappropriate for resolution on summary judgment, not to mention CR 12(b)(6). 15A WASH. PRAC., HANDBOOK CIVIL PROCEDURE § 69.20 (2015-2016 ed.).

E. The Law of the Case Doctrine Does Not Apply Here

Defendants argue that this Court is bound by an opinion issued by the Court of Appeals that was subsequently reversed 9-0 by the Washington Supreme Court. Renewed Mot. at 16 (quoting *Davis v. Cox*, 180 Wn. App. 514, 534, 536, 325 P.3d 255, 267 (2014), *rev'd*, 183 Wn.2d 269, 351 P.3d 862 (2015)). Their argument fails for at least three reasons. ***First***, it is black letter law that the law of the case doctrine does not apply to the findings of an intermediate appellate court that is subsequently reversed by the ultimate appellate court. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975) ("[O]ur decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."); *see also State v. Wright*, 169 Wash. 668, 670, 14 P.2d 962 (1932) (holding that elements of lower court ruling not expressly reversed nonetheless "necessarily" overruled by reversal); *Matter of Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) ("A judgment which has been vacated is of no force or effect and the rights of the parties are left as though no such judgment had ever been entered."); *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 91 (Tenn. Ct. App. 1996) ("Obviously, [the law of the case doctrine] does not apply to intermediate appellate court opinions that have been reversed or vacated.").

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This rule derives from the core rule of appellate procedure that an appellate court "may reverse, affirm, or modify the decision being reviewed." RAP 12.2. When the appellate court "reverses," the decision below is a nullity. Defendants cite no law to the contrary.[10] Indeed, the case on which Defendants' principally rely, *Bailie Communic'ns, Ltd.*, 61 Wn. App. 151, 810 P.2d 12 (1991), addressed the impact of an earlier Court of Appeals decision that the Washington Supreme Court declined to review. *Bailie Communications, Ltd. v. Trend Business Sys.*, 53 Wn. App. 77, 765 P.2d 339 (1988), ***review denied***, 113 Wn.2d 1025, 782 P.2d 1069 (1989).

Here, of course, the Washington Supreme Court ***reversed*** the Court of Appeals. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015). The Supreme Court did not reach the factual disputes addressed by the appellate court below—because it determined that inquiry to be constitutionally improper. Yet, the Supreme Court's holding ***necessarily*** reversed the appellate court's factual inquiry under the Anti-SLAPP Act because it found the Act, as a whole, unconstitutional. The mandate directs this Court to conduct "further proceedings in accordance with the attached true copy of the [Washington Supreme Court's] opinion," without reference to the appellate opinion. Dkt. 120. Thus the Court of Appeals decision does not control.

Second, Defendants ignore that the Supreme Court not only reversed the Court of Appeals, but also identified a material dispute of fact necessitating a trial. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). If the law of the case applies at all in this lawsuit, it works in Plaintiffs' favor under CR 56, not to mention CR 12.

Third, even assuming that the Court of Appeals' findings survived reversal by the Washington Supreme Court, Defendants' argument is spurious. The law of the case doctrine applies only when an appellate court issues a ruling expressly controlling the

[10] Any other principle would lead to untenable consequences, whereby ancillary or supplemental issues that the ultimate appellate court did not need reach would nonetheless be preserved as law of the case if the intermediate appellate court's analysis touched on them. That cannot be the law.

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issue presented. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) ("[T]he doctrine applies only to issues actually decided."). In other words, the issue currently litigated must be "identical" the issue previously litigated. *MGIC Fin. Corp. v. H. A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573 (1979).

Here, the Court of Appeals evaluated evidence under the Anti-SLAPP Act, not pleadings under CR 12(b)(6). In other words, the Court of Appeals neither assumed the truth of Plaintiffs' allegations, nor considered hypothetical scenarios in Plaintiffs' favor. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000). Here, Plaintiffs have alleged that Defendants unlawfully "put their own personal and/or political interests above the interests of [the Co-op], to the detriment of [the Co-Op]," and "put the interests of another organization above the interests of OFC, to the detriment of OFC." Am. Compl. ¶¶ 59-60. These allegations alone defeat Defendants' Renewed Motion. Since the Court of Appeals did not "actually decide" the CR 12 issue presented here, its decision is not binding law of the case. *See Fluke Capital*, 106 Wn.2d at 620.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Renewed Motion to Dismiss be denied.

DATED this 29th day of January, 2016.

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DECLARATION OF SERVICE

On January 29, 2016, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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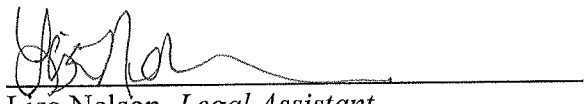
I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 29th day of January, 2016, at Seattle, Washington.



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