The Honorable Carol Murphy

□ EXPEDITE
□ No hearing set
☒ Hearing is set
Date: January 26, 2018
Time: 9:00 am
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Plaintiffs,

v.

GRACE COX, ROCHELLE GAUSE, ERIN GENIA, T.J. JOHNSON, JAYNE KASZYNSKI, JACKIE KRZYZEK, JESSICA LAING, RON LAVIGNE, HARRY LEVINE, ERIC MAPES, JOHN NASON, JOHN REGAN, ROB RICHARDS, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Defendants.

No. 11-2-01925-7

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOTE FOR MOTION CALENDAR: January 26, 2018

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I. INTRODUCTION

Over seven years ago, the volunteer Board of the Olympia Food Cooperative (the "Co-op")—an organization dedicated to promoting "economic and social justice"—unanimously resolved to join a boycott of Israeli goods (the "Boycott") in support of a broad campaign seeking compliance with international law and respect for human rights. The Co-op's Bylaws authorize the Board to adopt such policies in furtherance of its mission and goals. This is not simply Defendants' position—in 2012, the trial court in this case found that the Bylaws authorized the Board's Boycott resolution, and the appellate court agreed in 2015. On February 25, 2016, this Court denied Defendants' CR 12(b)(6) motion to dismiss, permitting Plaintiffs to pursue discovery into the merits of their claims. Almost two years later, this baseless lawsuit which was brought to suppress First Amendment protected expression—a peaceful boycott on an issue of public concern—lingers, with little or no attention from Plaintiffs and their lawyers. At this point, Defendants submit, the case has dragged on long enough.

In 2011, nearly a year after the Boycott resolution passed, Plaintiffs wrote to Defendants (16 individuals,[1] all either Board members at the time of the boycott vote or when suit was filed) and threatened to bring "complicated, burdensome, and expensive" litigation against them because Plaintiffs were unhappy about the Boycott. Despite the Board's plain authority to govern the Co-op and enact the Boycott, Plaintiffs demanded that Defendants immediately rescind the Boycott, or else Plaintiffs would hold each of them "personally responsible." Declaration of Harry Levine ("Levine Decl."), Ex. K. Defendants invited Plaintiffs to initiate a member ballot on the Boycott per the Bylaws, but Plaintiffs refused. *Id.* Ex. L.

[1] There are now 15 Defendants; former Co-op director Suzanne Shafer died in July 2014.

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Plaintiffs continue to make good on their threat: they have engaged Defendants in years of burdensome discovery and motions practice. They abandoned litigation of this case this year, but have not sought dismissal, though not a single Defendant remains a Co-op Board member. This Court should grant Defendants' motion for summary judgment and end this litigation for six reasons:

First, the Board had the plain authority to adopt the Boycott under the Co-op's Articles of Incorporation and Bylaws;

Second, the Board's decision to adopt the Boycott did not violate its fiduciary duty to the Co-op and was protected by the business judgment rule;

Third, the First Amendment restricts tort liability for protected expression, including peaceful boycotts like the one at issue in this case;

Fourth, Plaintiffs lack standing to challenge the Board's actions;

Fifth, Plaintiffs' request for injunctive relief is moot, as none of the Defendants are current Board members of the Co-op; and

Sixth, Plaintiffs have no derivative status and the current Board has rejected this lawsuit.

II. FACTUAL BACKGROUND

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 the Board of Directors. Levine Decl., Exs. B (Articles of Incorporation and Amendment), C (Bylaws). No current director is a party to this lawsuit. Levine Decl. ¶ 2 & Ex. A; Declaration of James Hutcheon ("Hutcheon Decl.") ¶ 3.

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." Levine Decl., Ex. B art. III, § 1. Another express purpose "for which the corporation is organized" is "to promote . . . political

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self-determination." *Id.* 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." *Id.* Ex. D. 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." *Id.* Ex. C § I.2. Chief among the stated goals of the Co-op is to "[s]upport efforts to foster a social and economically egalitarian society." *Id*. § I.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." *Id.* Ex. B art. III, § 3.

The "business and affairs of the [Co-op] shall be directed by the Board of Directors." *Id.* Ex. C § 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." *Id.* § III.13.16. Board decisions are "made by consensus." *Id*. § 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. *Id.* § IV. The Bylaws require, among various responsibilities, that the staff "carry out Board decisions . . . made in compliance with these Bylaws." *Id*. § 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. Levine Decl., Ex. E.

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. Levine Decl. ¶ 8. After considering the matter for over one year with no resolution, staff members reported the impasse directly to the Board, which the Board discussed at its May 20,

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2010 Board meeting. *Id.* ¶¶ 9-16 & Ex. F. Members attending that meeting sought immediate adoption of a resolution to boycott Israeli products, 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. *Id.* ¶ 11. 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 in the July Board meeting. *Id.* ¶ 12 & Ex. G. The matter was then reexamined at the Board's July 15, 2010 meeting. *Id.* Ex. H. The Board heard the views of members and staff at the meeting, which was attended by some 30 people who expressed support for the Boycott proposal. *Id.* ¶ 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." *Id.* ¶ 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. *Id.* Ex. I. 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. *Id.* Ex. J. No such ballot process regarding the Boycott was initiated by any member. *Id.* ¶ 15.

The Lawsuit. Almost a year later, on May 31, 2011, five Co-op members (the three current Plaintiffs and two former Plaintiffs in this matter) sent to 16 former and then-Board members a demand letter voicing, among other things, their displeasure with the Board's Boycott resolution. Levine Decl., Ex. K. These members threatened that, if the resolution were not rescinded, these members would "bring legal action against you, and this process will

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become considerably more complicated, burdensome, and expensive than it has been already." *Id.* 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 Bylaws. *Id.* Ex. L. Plaintiffs' 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.'" *Id.* Ex. M. On September 2, 2011, Plaintiffs, claiming derivative status, filed suit on behalf of the Co-op against 16 former and then-current Board members in Thurston County Superior Court.

On November 16, 2017, after several years of complicated, burdensome, and expensive litigation, the current Board (none of whom was on the Board at the time of the Boycott vote in 2010, or are defendants in this case) passed a resolution finding that Plaintiffs' filing of this lawsuit was done without the approval of the Co-op or the Board, and that Plaintiffs are not acting under any authority delegated by the Board, past or present. Hutcheon Decl., Attachment. The Board found that Plaintiffs 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 Plaintiffs' claim that they are acting in a derivative capacity on behalf of the Co-op and believes the lawsuit should be dismissed. *Id.*

III. PROCEDURAL HISTORY

Plaintiffs allege that the Co-op directors breached their fiduciary duty and acted *ultra vires* when they adopted the Boycott. Amended Complaint ("AC") at ¶¶ 52-54, 62-68. Plaintiffs 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 fifteen defendants. *Id*. ¶¶ 68-70, 71-75. Defendants moved to

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strike the complaint under the state's then-anti-SLAPP statute. The trial court held that the Board acted within its authority, as provided in the Bylaws, when approving the Boycott:

> Next we deal with the key issue here, and that is what is the authority of the Board to act in this matter. As a matter of law the Olympia Food Co-op was organized as a nonprofit corporation and remains a nonprofit corporation under the law. Under our law, the governance documents of the Co-op are its articles of incorporation and bylaws. Under our law, "The affairs of a corporation shall be managed by a board of directors." The Co-op's governance documents, the bylaws, repeat the statute, "The affairs of the cooperative shall be managed by a Board of Directors."

Declaration of Brooke Howlett ("Howlett Decl."), Ex. A at 20:19-21:5. Accordingly, the trial court held that Plaintiffs did not demonstrate a sufficient likelihood of success on the merits of their claim, granted Defendants' motion, and dismissed the complaint.

Plaintiffs appealed the dismissal to the Court of Appeals, 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.

Plaintiffs 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 this Court for further proceedings. *Id.* Defendants subsequently moved to dismiss under CR 12(b)(6), which this court denied on February 25, 2016, declining to consider documents referenced in the Amended Complaint or

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attachments to the pleadings. Howlett Decl., Ex. B at 4, 11. In denying the motion to dismiss, this Court did "not address[] whether the [C]o-op Board acted within its authority." *Id.* at 9.

Since the resolution of the motion to dismiss on February 25, 2016, Plaintiffs have deposed only four Defendants. Howlett Decl. ¶¶ 11, 13, 16. The first deposition was conducted on November 21, 2016, and the most recent was conducted on February 9, 2017. *Id.* ¶¶ 11, 16. Plaintiffs had originally noticed all Defendants in two sets. *Id.* ¶¶ 9, 12. After noticing seven depositions on October 3, 2016, Plaintiffs conducted two and cancelled the other five. *Id.* ¶¶ 9-12. Plaintiffs then sought depositions for eight remaining Defendants on November 29, 2016, but only deposed one Defendant from this second set. *Id.* ¶¶ 12, 14. A fourth Defendant was deposed on February 9, 2017. *Id.* ¶ 16. Until less than two weeks ago, Plaintiffs had not attempted to take depositions of the other eleven defendants in the ten months since the last deposition. *Id.* ¶ 17.

Furthermore, Plaintiffs have yet to complete document production in response to Defendants' discovery requests. *Id.* ¶¶ 4-8. Defendants last contacted Plaintiffs on April 18, 2017, requesting production of their remaining documents by May 5, 2017, and requesting to schedule Plaintiffs' depositions. *Id.* ¶ 7. Defendants have yet to receive a reply from Plaintiffs regarding their discovery requests as of the date of filing this motion. *Id.*

Lastly, Plaintiffs have failed to maintain consistent communication with Defendants. As the parties wish to keep a number of documents confidential, Defendants sent Plaintiffs a revised draft of a protective order on April 4, 2016, and sent a follow-up e-mail on April 18, 2017. *Id.* ¶¶ 18-22 & Exs. E, J. Defendants only received a substantive response from Plaintiffs regarding the April 4, 2016, draft protective order less than two weeks ago. *Id.* ¶ 22 & Ex. L. On January 20, 2017, Plaintiffs asked about a trial date, and on January 24, 2017, Defendants responded by asking when Plaintiffs anticipated being done with depositions, explaining that

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Defendants sought a more defined timeline for remaining discovery before choosing a trial date. *Id.* ¶ 20. Plaintiffs did not respond until ***December 6, 2017***—less than three weeks after the current Co-op Board enacted its resolution rejecting Plaintiffs' derivative authority to sue. *Id.* Ex. L. Prior to this single communication, Plaintiffs had not taken any known action in this lawsuit since the last Defendant's deposition on February 9, 2017.

IV. ARGUMENT

Summary judgment is proper where, as here, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Save Our Scenic Area v. Skamania County*, 183 Wn.2d 455, 463, 352 P.3d 177 (2015). Though "[e]vidence is construed in the light most favorable to the nonmoving party," *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008), Defendants plainly acted within their authority and with due care when they passed the Boycott. Plaintiffs cannot subvert the authority granted to the Board of Directors to manage the business and affairs of the Co-op because they disagree with its decision, and cannot point to any authority, legal or factual, that would indicate otherwise.

A. The Boycott decision was within the Board's scope of authority and was not *ultra vires.*

Plaintiffs allege that Defendants failed to follow the Co-op's "governing rules, procedures, and principles in enacting the Israel Boycott and Divestment policies," and that the enactment was therefore rendered void and unenforceable as an *ultra vires* act. AC ¶ 66; *see* RCW 24.03.040(2). Plaintiffs point vaguely to the Boycott Policy and consensus decision-making to assert this claim. But the subordinate Boycott Policy ***did nothing to alter the Board's ultimate authority*** to "direct" the "business and affairs of the [Co-op]" by adopting a policy decision by consensus, as it did. Levine Decl., Ex. C § III.13. This fundamental attribute of board power is commanded by the State's non-profit corporations law.

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RCW 24.03.095. Accordingly, the uncontroverted facts establish that Plaintiffs cannot sustain an *ultra vires* claim as a matter of law.

1. Plaintiffs' *ultra vires* claim is facially improper.

"The phrase '*ultra vires*' describes corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature." *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 344-45, 979 P.2d 854 (1999) (emphasis added) (citing *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 293-94, 133 P.2d 300 (1943)). Under Washington law, "*Ultra vires* acts are those performed with no legal authority and are characterized as void on the basis that ***no power to act existed, even where proper procedural requirements are followed***." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (emphasis added).

Where, as here, a party argues that ***the way*** in which the Board exercised control "did not conform with the governing documents of the corporation . . . [such an argument] is not a challenge to the authority of the corporation, but only to the method of exercising it." *Hartstene Pointe*, 95 Wn. App. at 345 (emphasis added). Such an argument does not allege *ultra vires* acts. *Id.* In *Hartstene Pointe*, a homeowner challenged the decision of an association's subcommittee to deny his application to remove a tree. The homeowner did not challenge the association's corporate authority to regulate development at all, but instead challenged the manner of ***executing*** such authority through the subcommittee. The court held that the homeowner's procedural argument—indeed, the exact type of argument made by Plaintiffs here—cannot form the basis of an *ultra vires* suit. It noted that "the doctrine of ultra vires does not apply" to the claim. *Id*. (emphasis added); *see also Twisp*, 16 Wn.2d at 293-94 (holding that Board's transfer of property via minority vote was not *ultra vires* because the corporation had authority to transfer property, even if it did not garner required votes).

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In invoking the *ultra vires* doctrine, Plaintiffs have completely ignored both the purpose behind the doctrine and the limitations on its application. The *ultra vires* doctrine itself is extraordinarily narrow, particularly when it is applied to actions taken by private entities. "In the corporate sphere, the *ultra vires* doctrine has come under increasing disfavor." *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982). Indeed, the application of the traditional ultra vires doctrine has been severely limited in many jurisdictions.[2] In Washington, the doctrine applies almost exclusively to government entities,[3] and, even then, is applied in very limited circumstances. Again, *ultra vires* acts are those where "***no power to act existed***." *S. Tacoma Way, LLC*, 169 Wn.2d 118 (emphasis added). Defendants are unaware of a single published case in the history of RCW 23B.03.040 or 24.03.127 that has invalidated a non-governmental act on *ultra vires* grounds. Nevertheless, even presuming that the *ultra vires* doctrine can be invoked in this case, it must be rejected because, as described below, the Board had the authority to adopt the Boycott.

2. The Board had the authority to adopt the Boycott.

The essence of Plaintiffs' *ultra vires* claim is that the decision to enact the Boycott was inconsistent with the Co-op's Boycott Policy and was therefore *ultra vires*. However, Plaintiffs

[2] *See* 1 James D. Cox et al., *Corporations* § 2.4, at 2.10, § 4.4, at 4.9-4.10 (1995); 1 William W. Cook, *A Treatise on the Law of Corporations Having a Capital Stock* § 3 (7th ed. 1913) (proclaiming the doctrine of ultra vires invalid, except as against the state); Robert W. Hamilton, *Cases and Materials on Corporations* 213-21 (6th ed. 1998) (naming a section of corporate law casebook "The Decline of the Doctrine of Ultra Vires"); Harry G. Henn & John R. Alexander, *Laws of Corporations and Other Business Enterprises* 477 (3d ed. 1983) ("The approach to ultra vires acts has undergone a drastic change . . . and is no longer as important as it once was." (citation omitted)); Charles R.T. O'Kelley & Robert B. Thompson, *Corporations and Other Business Associations* 671 (3d ed. 1999) (discussing the "demise of the strict ultra vires doctrine").

[3] The few cases that have held that a transaction was voidable as *ultra vires* involved government entities. *See, e.g.*, *Adamson v. Port of Bellingham*, 192 Wn. App. 921, 929, 374 P.3d 170 (2016); *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 772, 863 P.2d 535 (1993) (Madsen, J., dissenting); *Red Letter Ministries v. City of North Bend*, No. 71867-3-I, 2015 WL 4531288, at **2-3 (Wash. Ct. App. July 27, 2015) (unpublished opinion cited herein as nonbinding authority). Such a result is reconciled with the fact that—unlike in this case—many public entities have clearly limited powers to engage in a certain set of transactions proscribed by law. *See Noel*, 98 Wn. 2d at 381 (act was *ultra vires* because state law required the Department of Natural Resources to prepare an environmental impact statement before taking action). Conversely, under current application of the *ultra vires* doctrine, private corporations have been afforded wide latitude to engage in transactions and adopt policies under plenary powers adopted in their respective charters.

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cite no limitation to the Board's ultimate authority to adopt a boycott, nor does one conceivably exist. *See S. Tacoma Way*, 169 Wn.2d at 122-26 (*ultra vires* acts are those where "no power to act existed"). This is because, simply, it was within the Board's authority to adopt the Boycott.[4] The Board is empowered through the Bylaws to "adopt policies which promote achievement of the mission statement and goals of the [Co-op]," Levine Decl., Ex. C § III.13.15, "adopt major policy changes," *id.* § III.13.9, and to "resolve organizational conflicts" *id.* § III.13.16, "by consensus," *id*. § III.6. These are some of the "major duties of the board" attendant to directing "the business and affairs" of the Co-op as proscribed by the Bylaws. *Id*. § III.13. It is hornbook law that a board of directors is tasked with managing the business and affairs of an entity, *see* James D. Cox & Thomas L. Hazen, Business Organizations Law § 3.11 (3d ed. 2011). This governing rule is enshrined both in the Co-op's Bylaws and in statute. *See* Levine Decl., Ex. C § III.13; RCW 24.03.095.

The stated goals of the Co-op include "[s]upport[ing] efforts to foster a socially and economically egalitarian society," and "striv[ing] to make human effects on the earth and its inhabitant's positive and renewing and to encourage economic and social justice." Levine Decl. Ex. D. The Board's consensus decision to adopt the Boycott was aimed at facilitating such goals, and was an action within the enumerated parameters of the Board's powers. Thus,

[4] The appellate court agreed with Defendants on this point, see *Davis*, 180 Wn. App. at 536 ("We affirm . . . on the basis that the Co-op's governing documents provided the Board with the authority to adopt the boycott."), and its holding remains 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 *amended by* 814 P.2d 699 (Wash. Ct. App. 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."); *see also Columbia Steel Co. v. State*, 34 Wn.2d 700, 705, 209 P.2d 482 (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."). The Washington Supreme Court's subsequent decision focused on the anti-SLAPP statute's constitutionality, and did not address the other legal holdings in the Court of Appeals Decision. *Davis*, 183 Wn.2d at 294 n.10.

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the appellate court correctly held that "the Co-op's governing documents provided the Board with the authority to adopt the boycott."[5] *Davis*, 180 Wn. App. at 536.

3. The Board's authority is not limited by the Boycott Policy or Plaintiffs' disagreement with the Board's decision.

The 1993 Boycott Policy does not and cannot limit the Board's authority to manage the business and affairs of the Co-op under the Articles of Incorporation and the Bylaws. The Boycott Policy is plainly a subordinate corporate document; it is well-settled that only "[t]he charter of a corporation and its by-laws are the fundamental documents governing the conduct of corporate affairs." *Liese v. Jupiter Corp.*, 241 A.2d 492, 497 (Del. Ch. 1968). An internal policy cannot override this hallmark principle. As the appellate court in this case held, "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."[6] *Davis*, 180 Wn. App. at 535. Indeed, no evidence can imbue the "Boycott Policy with authority equivalent or superior to that of the applicable statutes, articles of incorporation, or the bylaws." *Id.* at 536. The Boycott Policy plainly does not—and as a matter of law, cannot—legally bind the Board or usurp its powers to manage the Co-op. *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 239 (Del. 2008) (shareholders cannot impose upon directors restriction of managerial powers).

Despite Plaintiffs' urgings to the contrary, they cannot erode away the broad scope of the Board's authority. The Board has always retained the right under the Bylaws to adopt policy and to resolve inter-organizational disputes. Plaintiffs cannot undermine this right, nor can they proscribe the manner in which the Board goes about exercising it. Indeed, "[d]irectors

[5] The appellate court's ruling on this point remains the binding law of the case. *See supra* n.4.
[6] The appellate court's ruling on this point also remains the binding law of the case. *See supra* n.4.

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are not the servants of a majority of the shareholders," let alone a minority of three Co-op members. James D. Cox & Thomas L. Hazen, Business Organizations Law § 9.11 (3d ed. 2011). "The directors control and supervise the conduct of the business . . . and [i]ndividual shareholders generally have little direct voice in determining the corporation's business practice." *Id.* Plaintiffs cannot invalidate Board action because they disagree with the substance of the action or the manner in which it was taken, no matter how strenuously they object. *See Pub. Hosp. Dist. No. 1 v. Univ. of Wash.*, 182 Wn. App. 34, 49, 327 P.3d 1281 (2014) (disagreement about the validity of a contract does not render contract *ultra vires*). A contrary result would turn a century of corporate governance law on its head.

Although Plaintiffs may quarrel with the Board's 2010 decision to enact the Boycott, the Board's decision was plainly within its powers and in accordance with the Co-op's governing documents. The Boycott Policy did nothing to compromise the Board's sole authority under the Bylaws to resolve organizational conflicts. The Board's action in exercising that authority to decide the request for the Boycott, after remanding for a staff effort to reach full staff consensus, without success, was a proper, rational, and appropriate exercise of Board authority under the law and the Co-op's own Bylaws. Accordingly, Plaintiffs' *ultra vires* claim must be rejected, as it was rejected by this Court in the earlier history of this case and affirmed on appeal.

B. The Board did not breach its fiduciary duty when it adopted the Boycott or when it declined to rescind it.

The Board had the power to adopt the Boycott and doing so was a decision that accorded with the Board's fiduciary duty to the Co-op. The decision, made in good faith and with requisite care and attention, was made in a manner that the Board reasonably believed to be in the best interests of the Co-op and consistent with its mission. On these bases, this Court

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should refuse to substitute its judgment for that of the Board's under the business judgment rule. There is no genuine issue of material fact precluding this Court's judgment that Plaintiffs' breach of fiduciary duty claim must fail as a matter of law.

1. Plaintiffs' fiduciary duty claims must be dismissed under the business judgment rule.

Pursuant to the business judgment rule, this Court must defer to the Board's reasonable and honest exercise of judgment to adopt the Boycott. *See Davis v. Cox*, 180 Wn. App. at 535 (affirming dismissal, finding that "the [B]oard may avail itself of the business judgment rule")[7]. The business judgment rule, simply put, "requires only that managers have a reasonable basis for their decisions, despite the availability of more compelling alternative choices available to them." James D. Cox & Thomas L. Hazen, Business Organizations Law § 10.4 (3d ed. 2011); *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975). The business judgment rule, long applied under Washington law, provides that officers and directors will be "immunized from liability" where: "(1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith." *Scott v. Trans–Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Both elements are met here.

First, as explained above, the Board's decision[8] was not *ultra vires*, but rather plainly "within the power of the corporation," *see* Section IV.B. Second, the Board's decision was made in good faith. As a preliminary matter, Plaintiffs do not even allege that the Boycott was

[7] Again, the appellate court's ruling on this point remains the binding law of the case. *See supra* n.4.

[8] The Boycott decision—adopting a policy regarding the Co-op's purchase of Israeli products, while advancing fundamental rights of self-determination of Palestinians—plainly qualifies as the type of "business decision" that merits deference. *See Scott*, 148 Wn.2d at 709. Questions of "value and policy," such as the Board's decision here, have long been said "to be part of the directors' business judgment, although their errors may be so gross as to show their unfitness to manage corporate affairs." James D. Cox & Thomas L. Hazen, Business Organizations Law § 10.1 (3d ed. 2011).

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enacted in bad faith, and the inquiry should end there. But even if Plaintiffs ***had*** alleged bad faith, they would need to offer evidence that the Board's "conduct [wa]s motivated by an actual intent to do harm," or that the Board "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." *Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 721-22, 189 P.3d 168, 174 (2008) (quotation marks omitted); *see also In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (director acts in bad faith "where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties"). Plaintiffs cannot point to a single piece of evidence that Defendants intended to do harm or intentionally disregarded their duties, or that their conduct was unreasonable. Defendants made a good faith decision consistent with the Co-op's mission.

2. The Board did not breach its fiduciary duties.

The business judgment rule creates a strong presumption that the Board "acted independently, with due care, in good faith and in honest belief that its actions" were in the Co-op's best interests. *Rodriguez*, 144 Wn. App. at 718. And Plaintiffs cannot present any evidence to rebut that presumption. As previously stated, Plaintiffs have not even alleged that Defendants acted in bad faith, and thus the duty to act in good faith is not discussed at length here.

a. **The Board acted with due care.**

The duty of care has both procedural and substantive requirements: "the requirements that the directors be attentive and reasonably informed are procedural . . . the substantive requirement is that their decisions have a 'rational basis' or, as it is sometimes expressed, be reasonable." James D. Cox & Thomas L. Hazen, Business Organizations Law § 10.5 (3d ed.

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2011). And "[u]nless there is evidence of fraud, dishonesty, or incompetence (*i.e.*, failure to exercise proper care, skill, and diligence)," Washington courts "generally refuse to substitute their judgment for that of the directors." *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995).

There is simply no evidence of "fraud, dishonesty, or incompetence" here, and Plaintiffs cannot establish any facts that would cause this Court to second-guess Defendants' decision. *See id.* The Board was both attentive and reasonably informed when it decided to adopt the 2010 Boycott. Having been unable to reach consensus for over one year, staff members brought the proposed Boycott to the Board's attention. Levine Decl. ¶ 9. The Board did not act hastily or capriciously, but rather redirected the staff members to "attempt to reach full staff consensus," noting that an attempt should be made to secure "feedback from the full staff." *Id.* ¶ 11. After a discussion of the Boycott proposal at the July 2010 meeting, the Board passed a resolution adopting the Boycott. *Id*. ¶ 15. The Board did so after "consider[ing] the international movement to boycott Israel until it ends its occupation," noting that the action "was consistent with its practice in past boycotts." *Id.* Defendants were attentive and their decision—made within their authority to adopt policy and to resolve organizational conflicts—was rational. *See id.* Ex. C §§ III.13.9, 13.15, 13.16. The Board possessed the power—indeed it had a duty—to adopt a policy that promoted its mission and resolved an organizational conflict. *See id.* §§ III.13.15, 13.16. Plaintiffs cannot point to a single piece of evidence to suggest that the Board breached its duty of care to the Co-op in enacting the Boycott.

b. **The Board acted with loyalty.**

Nor, as detailed below, does Plaintiffs' evidence support an allegation that the Board breached the duty of loyalty (which is not even clearly alleged), by implausibly claiming that Defendants put their own interests or the interests of another organization above the interests of

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the Co-op. *See* AC ¶¶ 59, 60. Plaintiffs' claim fails for at least two reasons: (1) the evidence does not show, as is required, that Defendants possessed a financial or "material" interest in adopting or failing to rescind the Boycott, and (2) the Board, empowered to adopt policy and settle organizational conflicts, did not stand to gain any personal benefit from the Boycott, but rather acted to further the goals and best interests of the Co-op as a whole, as called for by the Bylaws.

A breach of the duty of loyalty requires that "a majority of the directors who approved the conduct or transaction were materially interested in the transaction." *Rodriguez*, 144 Wn. App. at 722 (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 495 (Del. Ch. 2000); *see also RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 319, 358 P3d 483 (2015) (directors may not self-deal or take secret profits). "A director is materially interested in a transaction if the director's interest is of a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest." *Rodriguez*, 144 Wn. App. at 722 (internal quotation marks omitted); *see also Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (directors cannot "expect to derive any personal financial benefit from [the transaction] in the sense of self-dealing"); *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) ("[i]t is an act of disloyalty for a fiduciary to profit personally"); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 Colum. L. Rev. 1253, 1271 (1999) ("[t]he duty of loyalty is a shorthand expression for the duty of fair dealing by, and the trustworthiness of, directors, officers, and controlling shareholders when they are *financially interested* in a matter affecting the corporation") (emphasis added). Plaintiffs do not even assert, nor could they plausibly allege, that Defendants possessed any financial interest in the Boycott. The Boycott was a

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decision made consistent with the Co-op's stated goal to "promote . . . political self-determination," a course of action that rests quintessentially on ethical principle and not financial motivation. Levine Decl., Ex. B, art. III, § 6.

Even if a duty of loyalty claim could be premised on non-financial benefits, any such non-financial benefit Defendants may have received from the decision would have also benefitted the Co-op. The duty of loyalty demands that "the best interest of the corporation and its shareholders take[] precedence over any interest possessed by a director . . . and not shared by the stockholders generally." *Rodriguez*, 144 Wn. App. at 722. Indeed, a corporate fiduciary receiving a "personal benefit from a transaction not received by the shareholders generally" is a "classic" example of a breach of the duty of loyalty. *Cede & Co.*, 634 A.2d at 362. To the extent there are tangible benefits of boycotting certain Israeli-made products, those benefits very clearly imbue to the Co-op itself. The only plausible conclusion is that the benefits of adopting the Boycott are to further the mission to "[s]upport efforts to foster [an] . . . egalitarian society," Levine Decl., Ex. C § I.2.4, a mission and ethos that applies Co-op-wide.

C. The First Amendment restricts tort liability for protected expression, including peaceful 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." Political boycotts constitute "expression on public issues" and therefore "rest[] on the highest rung of the hierarchy of First Amendment values." *Id*. 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) (internal quotation

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marks omitted). The issue of relations between Israel and Palestine—the focus of the Boycott—is most certainly a matter of public concern. *See Davis v. Cox*, 180 Wn. App. at 531; *see also Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1083 (N.D. Ill. 2015) (First Amendment case finding that tweets regarding "Israeli-Palestinian relations" were a matter of public concern, noting that the topic "often brings passionate emotions to the surface").

The First Amendment restricts the imposition of tort liability—such as liability for breach of fiduciary duty, *see Miller v. United States Bank, N.A.*, 72 Wn. App. 416, 426, 865 P.2d 536, 543 (1994)—for protected speech and expression, even as between private parties. In *Snyder v. Phelps*, the 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 Defendants liable for passing a resolution that the Co-op engage in a protected peaceful boycott on a matter of public concern.

D. Plaintiffs lack standing to bring a derivative action.

Plaintiffs' claims also fail due to lack of standing for at least three reasons. First, it is unclear whether Washington nonprofit members have standing to bring derivative lawsuits at all. *See Lundberg ex rel. Orient Found. v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595

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(2002); *cf. Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 191, 139 P.3d 386 (2006) (denying credit union members standing to sue directors, stating "that the legislature included a provision in the WBCA allowing individual shareholders to bring an action against a corporation's directors, whereas the [Act governing credit unions] contains no such provision, evidences a legislative intent that credit union members have no such right").

Even assuming that nonprofit members may lawfully bring a derivative action, the plain language of Washington's Nonprofit Corporation Act ("NCA"), RCW 24.03 unambiguously forecloses derivative suits by certain individuals. The Court of Appeals has noted that the NCA "carefully delineates" what type of action may be brought, and limits standing to lawsuits filed: (1) "on behalf of the corporation . . . by a ***majority*** of the board;" (2) by a member or director ***against*** the corporation; (3) by certain parties for liquidation; and (4) by the attorney general. *Lundberg*, 115 Wn. App. at 177 (emphases added). Plaintiffs, a few dissenting non-director members, cannot plausibly comprise the representative faction intended by the Legislature.[9]

Second, Plaintiffs also lack standing because they failed to exhaust the Co-op's internal remedies. A shareholder may bring suit on behalf of the corporation only "where it is shown that the stockholder has exhausted all his available means to obtain within the corporation itself redress of his grievances" and "it appears that the corporation is incapable of enforcing a right of action accruing to it or that its officers or directors are acting fraudulently or collusively among themselves or with others, in such a manner as will result in serious injury to the corporation or to the interests of its stockholders." *Goodwin v. Castleton*, 19 Wn.2d 748, 761,

[9] Basic tenets of statutory construction support that the Legislature affirmatively decided against providing such standing. Washington's statutory scheme governing for-profit corporations expressly grants shareholders the right to bring derivative actions on behalf of corporations; yet the Legislature omitted such a provision from the NCA. *Lundberg*, 115 Wn. App. at 177 & n.6 (citing the Washington Business Corporation Act (WBCA) at RCW 23B.07.400 and CR 23.1); *see City of Kent v. Beigh*, 145 Wn.2d 33, 45-46, 32 P.3d 258 (2001) ("[I]t is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.").

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144 P.2d 725 (1944). Derivative actions are suits of "last resort" because they "impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit." 5 Moore's Federal Practice § 23.1.02(4) (3d ed. 2011). Here, Plaintiffs disagreed with the Board's decision, but refused to internally challenge it by calling a member-initiated vote, as permitted under the Co-op's Bylaws. *See* Levine Decl., Ex. C § II.8. This intracorporate remedy is available, at Co-op expense, to any Co-op member able to collect signatures from a small percentage of members: here, 300 of 22,000. Had Plaintiffs used their right to seek a membership vote, it could have remedied their concerns.

Finally, Plaintiffs also lack standing because they fail to allege sufficiently that the Co-op suffered any injury as a result of the Boycott. "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) (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 (2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, in purporting to assert injury, Plaintiffs refer vaguely to a "fractur[ed]" community, filled with "division and mistrust," where an unidentified number of members have resigned their membership or "ceas[ed] shopping at the Co-op." AC ¶ 73. These allegations, even if true, do not rise to the level of harm required to confer standing, as they are neither "concrete and particularized" nor "actual or imminent" (rather than "conjectural or hypothetical"). *See Cook*, 125 Wn. App. at 720-21.

In fact, not only have Plaintiffs failed to show actual injury, the undisputed evidence shows that the Co-op's financial strength has only continued to improve in the many years after

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the boycott was put into place. Levine Decl. ¶¶ 17-18. Membership rose after the Boycott, as did sales across the board. *Id.* Quite simply, neither Plaintiffs nor the Co-op were harmed by Defendants' actions, and Plaintiffs lack standing to bring this lawsuit. The only thing that has caused harm to the Co-op is ***Plaintiffs'*** decision to subject the Co-op and Defendants to this years-long litigation. *See* Hutcheon Decl., Attachment.

E. This Court cannot provide an injunctive remedy because Defendants are not currently board members.

One of the many flaws with Plaintiffs' decision to engage in a years-long, baseless lawsuit against Defendants is that, as of today, not a single Defendant is a Board member. Levine Decl. ¶ 2. Plaintiffs ask this Court to "permanently enjoin the Board from enforcing or otherwise abiding by the Israel Boycott and Divestment policies and order the Board to follow OFC's governing rules, procedures, and principles in the future." AC ¶ 75. But because Defendants have no power over the current Board whatsoever, this Court must reject this claim for relief as moot. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1389 (9th Cir. 1985) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *accord Norman v. Chelan Cty. Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 635, 673 P.2d 189 (1983).

Courts have declined to provide equitable relief where, as here, the defendants no longer served in the capacity in which they took the challenge action. *See Schmidt-Wenzel*, 766 F.2d at 1389-90 (request for declaratory and injunctive relief regarding Board of Directors mooted by election of new Board); *Bromfield v. McBurney*, No. C07-5226RBL-KLS, 2008 U.S. Dist. LEXIS 116880, at *11 (W.D. Wash. Sep. 2, 2008). Defendants have no ability to alter the Boycott, *Schmidt-Wenzel*, 766 F.2d at 1389, and this Court cannot provide effective

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relief where the person authorized to act is not a party to the litigation. *See In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

F. Plaintiffs cannot maintain this derivative suit because the current Co-op Board has rejected it.

Plaintiffs cannot maintain this purported derivative lawsuit because the current Board—consisting entirely of disinterested and independent directors—has determined that dismissal is in the best interests of the Co-op. *See* Hutcheon Decl., Attachment.

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 (2004) (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 (Del. 1981)). "So long as the committee [of directors] exercise[s] 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 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 current Board consists entirely of directors who were not on the Board at the time of the Boycott decision ***or*** at the time this lawsuit commenced. They are thus sufficiently disinterested and independent. *See Dreiling*, 151 Wn.2d at 905 (noting that a committee of directors "who were not serving on the board at the time of the alleged misconduct . . . were therefore presumably independent). And, after careful deliberation, the current Board has

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passed a unanimous and unequivocal resolution, finding that Plaintiffs are not acting in a derivative capacity on behalf of the Co-op, nor are they "acting under any authority delegated by the Board, past or present." Hutcheon Decl., Attachment. The current Board believes that plaintiffs "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 current Board resolved that the lawsuit should be dismissed. *Id.* This Court should honor the current Board's exercise of its authority over its own affairs, and dismiss this lawsuit.

G. Plaintiffs have failed to diligently prosecute this case, and no further discovery is warranted or necessary.

For ten months, Plaintiffs abandoned litigation of this case. Now, soon after the Co-op Board passed its resolution rejecting this lawsuit, Plaintiffs are attempting to reinvigorate the harassing litigation they brought and are now seeking further discovery and a trial date. Howlett Decl. ¶ 22. Not only is no further discovery necessary to hear Defendants' Motion for Summary Judgment because it relies on the Co-op's governing documents and a decision can be made as a matter of law, but no further discovery is also warranted because Plaintiffs abandoned litigation of this case for ten months. *See, e.g.*, *Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969 (1961) (Courts are empowered to dismiss cases for want of prosecution in order "to protect litigants from dilatory counsel[] and . . . to prevent the cluttering of court records with unresolved and inactive litigation.").

For ten months, Plaintiffs abandoned discovery and failed to respond to Defendants' queries. Howlett Decl. ¶ 31. Defendants sent Plaintiffs a revised draft protective order for

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review on April 4, 2016, nearly a year and a half ago, but despite follow-up emails, only received a substantive response on the draft less than two weeks ago, just weeks after the Co-op's resolution was passed. *Id.* ¶¶ 19, 22. Plaintiffs also ignored Defendants' effort to set a discovery schedule, necessitated by their failure to complete document production and most of their depositions of Defendants since their last deposition conducted on February 9, 2017. *Id.* ¶ 20. Plaintiffs also failed to respond to Defendants' April 18, 2017, communication to Plaintiffs until ***December 6, 2017***, and then did not even respond to much of it. *Id.* ¶ 7, 22.

Plaintiffs have failed to meet their duty to diligently pursue this litigation. *See Storey v. Shane*, 62 Wn.2d 640, 642-43, 384 P.2d 379 (1963) (quoting *Bishop v. Hamlet*, 58 Wn.2d 911, 913, 365 P.2d 600 (1961) ("[T]he obligation of going forward to avoid the operation of the rule always belongs to the plaintiff . . . and not to the defendant.")). The Plaintiffs' dilatory conduct—even despite Defendants' effort to make progress in the pretrial process—contradicts their duty to diligently pursue litigation, and as such, demonstrates a lack of good faith effort. No further discovery is warranted or necessary before Defendants' Motion for Summary Judgment is heard.

V. CONCLUSION

As matters of law, Plaintiffs cannot show that the Board did not have the authority to adopt the Boycott, or that doing so was a breach of any duty. Because Plaintiffs have not created any genuine material issues of fact, Defendants are entitled to summary judgment.

DATED this 19th day of December, 2017.

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DECLARATION OF SERVICE

On December 19, 2017, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Robert M. Sulkin	☑	Via Messenger
Avi J. Lipman	☐	Via U.S. Mail
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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 19th day of December, 2017, at Seattle, Washington.

s/ Brooke Howlett
Brooke Howlett, WSBA No. 47899

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