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

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 11-2-01925-7

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

TABLE OF CONTENTS

Page

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

TABLE OF AUTHORITIES

Page

Cases

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Statutes

Rules

Other Authorities

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

I. INTRODUCTION

Plaintiffs Kent Davis, Linda Davis, and Susan Mayer, derivatively on behalf of the Olympia Food Cooperative (the "Co-op") (collectively, the "Plaintiffs"), respectfully move for partial summary judgment on their claims against Defendants. This lawsuit, which has been pending since 2011 and has already been reviewed once by the Washington State Supreme Court, is ultimately straightforward: In July 2010, the Co-op's board of directors (the "Board") voted to compel the Co-op to boycott goods made in Israel ("Israel Boycott"). In so doing, Defendants violated unambiguous provisions of the Co-op's governing documents and their fiduciary duties to the Co-op.

Put simply, the Board had two choices when confronted by a proposal to boycott Israel. First it could have followed the Boycott Policy, including its two core requirements; i.e., that boycotts be approved by universal agreement of the Co-op staff members—which gives minority views robust protection—and that any boycott be "nationally recognized" before the Co-op agrees to participate. Second, the Board could have tried to modify the Boycott Policy to eliminate those two core requirements. Indeed, undisputed evidence shows the Board tried (unsuccessfully) to do just that, but not until ***after*** it had unlawfully enacted the Israel Boycott. What the Board could not do was simply ignore the Boycott Policy. Yet, this is precisely what happened.

In reviewing the prior dismissal of this case by the Honorable Thomas McPhee (Ret.), the Court of Appeals concluded that whether the Board abided by the Boycott Policy was not a material fact, "on the theory that the Cooperative's board is not bound by its adopted policies." *Davis v. Cox*, 183 Wn.2d 269, 282 n.2 (2015). The Washington Supreme Court reversed that decision 9-0. In so doing, it held that, to the contrary, whether the Board abided by the Boycott Policy ***is*** a material issue. *Id.*[1] ***Thus, the***

[1] The Court also concluded that this issue was disputed—but, as discussed further below, undisputed evidence produced by Defendants since the case was remanded demonstrates that they violated the Boycott Policy, and thus the issue is now ripe for summary judgment.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Supreme Court has already concluded that the Board was legally bound to honor the Boycott Policy. This is the law of the case. Given that conclusion, this Court need only consider whether there is any dispute that the Board violated the Boycott Policy. The answer to that question is clearly "no."

Regrettably, in taking their unlawful actions, Defendants—who were Board members at or after the enactment of the Israel Boycott—embraced an international political movement called Boycott, Divestment, and Sanctions ("BDS"). BDS is notorious for, among other things, fracturing local communities with its misleading anti-Israel rhetoric and anti-Semitic platform. Its toxic methods have been condemned by leaders across the political spectrum—from President Trump to Senator Bernie Sanders.[2] Succumbing to pressure from BDS activists, several of whom were also Board members, the Board brazenly disregarded clear Co-op policies and principles. The Co-op and its community have suffered as a result.

Plaintiffs, who are longstanding members of the Co-op, now ask this Court to rule as a matter of law that Defendants' enactment of the Israel Boycott was unlawful, that Defendants violated their duties to the Co-op, and that Plaintiffs are entitled to (i) summary judgment on their claim for declaratory judgment, and (ii) partial summary judgment on liability with respect to their claims for ultra vires conduct and breach of fiduciary duties. Based on the undisputed record, the only issue remaining for trial is the amount of damages to which the Co-op is derivatively entitled.

II. FACTUAL BACKGROUND

A. The Structure and Composition of the Co-Op

The Co-op operates two retail grocery stores in Olympia, Washington. Dkt. 136

[2] *See, e.g.*, https://www.nytimes.com/2018/01/18/us/politics/kenneth-marcus-civil-rights-israel-bds.html (presidential appointee critical of BDS); http://www.jpost.com/Arab-Israeli-Conflict/Bernie-Sanders-rejects-anti-Israel-agenda-in-interview-with-Al-Jazeera-489835 (Senator Sanders rejects BDS).

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

¶¶ 1, 20. The Co-op defines itself as "collectively managed," relying "on consensus decision making." **Ex. A** at 1.[3] "The Cooperative works to serve a ***diverse*** population by incorporating procedures and practices that ***remove barriers*** . . . ." *Id.* § II.2 (emphases added). The Co-op maintains an "open membership" policy. *Id.* II.3 To become an "active member" of the Co-op, an applicant must pay a membership fee and membership "dues," and maintain a current address on file with OFC. *Id.*

Co-op members are entitled to vote on certain issues, and in such instances each member has one vote. **Ex. A** § II.7. Some members of the Co-op volunteer by working at one or both OFC locations without monetary compensation.

The Co-Op operates according to certain governing rules, procedures, and principles in publicly available documents. Among these documents are the Co-Op's "Mission Statement" and "Bylaws." As relevant here, the Bylaws empower the Board to:

> 7. adopt, review, and revise Cooperative plans; . . .
>
> 9. adopt major policy changes;
>
> 10. adopt policies to foster member involvement; . . .
>
> 12. ensure compliance with all corporate obligations, including the keeping of corporate records and filing all necessary documents; . . .
>
> 14. maintain free-flowing communication between the Board, Staff, committees, and the membership;
>
> 15. adopt policies which promote achievement of the mission statement and goals of the Cooperative.
>
> 16. resolve organizational conflicts after all other avenues of resolution have been exhausted; and
>
> 17. establish and review the Cooperative's goals and objectives.

Id. § III.13.

Separately, the Co-op employs certain professional staff members, who are paid

[3] Exhibits A-CC are attached to contemporaneous Declaration of Avi J. Lipman in Support of Plaintiffs' Motion for Summary Judgment.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

for the time they spend working at the Co-op. **Ex. B** at 3. These individuals are known collectively as the "Staff." The Staff publicly describes itself as a non-hierarchical collective that makes decisions through a consensus process. *Id.* "Consensus," according to the Board's governing rules, means unanimous agreement. *Id*. The Bylaws vest the Staff with, among other things, the responsibilities to "carry out Board decisions and/or membership decisions made in compliance with these bylaws" and "carry out all activities and act in accordance with applicable law, the articles of incorporation, and the bylaws of the cooperative." **Ex. A** § IV. In other words, to the extent the Board vests the Staff with duties, the Bylaws allocate to the Staff the responsibility to effectuate those duties. *Id.*

B. The Co-Op Board Enacts the Boycott Policy

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

> **BOYCOTT POLICY**
>
> Whenever possible, the Olympia Food Co-op will ***honor nationally recognized boycotts*** which are called for reasons that are compatible with our goals and mission statement . . .
>
> . . . .
>
> In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott . . . to allow our members to make the most educated decisions possible.
>
> . . .
>
> A request to honor a boycott . . . will be referred … to determine which products and departments are affected. . . The [affected] ***department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott….***
>
> . . .
>
> The department manager will post a sign informing customers ***of the staff's decision*** … regarding the boycott. ***If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision …***

Id. (emphases added). The Boycott Policy has remained in effect at all relevant times.

C. The Board Ignores the Bylaws and Boycott Policy and Enacts the Boycott

Under the Bylaws, following due procedure, the Board retained authority to repeal

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

the Boycott Policy any time after it was enacted. **Ex. A** § III.13-9, -15. Yet, the Board has not done so: Since May 1993, the Boycott Policy has not been amended or repealed. **Ex. BB** at 33:13-15. Accordingly, if the Board wished to enact a proposed boycott, the requirements of the Boycott Policy were effective—including the requirements of Staff consensus and an existing "nationally recognized" boycott of Israel. **Ex. C**; *see* **Ex. AA** 35:17-36:12. Yet, there is no evidence in the record that the Board, prior to or in conjunction with enacting the Israel Boycott, made any changes to the Boycott Policy or followed the procedures laid out therein. *See id.* Rather, the Board pursued the only option unavailable to it: It simply disregarded the Boycott Policy and enacted the Israel Boycott. In failing to follow Co-Op rules, Defendants failed to exercise ordinary care. Through these actions, Defendants were also less than loyal: They placed their own interests (and the interests of a third party) above those of the Co-Op.

1. The Board Enacts the Israel Boycott

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.*

After the Staff initially failed to reach consensus, Defendant Levine (at the time, Staff representative to the Board) took an unprecedented step: He submitted a Board-sponsored version of the proposal to the Staff. Dkt. 41.8 ¶ 4. The Board's involvement in such a boycott proposal was inconsistent with prior boycotts, the text of the Boycott Policy, and the Staff's understanding thereof. *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" (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

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

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.*; *see* **Ex. CC** at 28:17-29:1, 35:2-14.

Under the plain language of the Boycott Policy, by its failure to reach consensus, the Staff rejected the Israel Boycott. **Ex. C.** The Board was notified of the lack of consensus among the Staff. Dkt. 41.8 ¶ 6. In response, the Board made no additional effort to revise the proposal in response to Staff objections. They did not even consider the Staff's resolution. *See* **Ex. AA** at 24:12-25:15; *see also id.* at 32:11-33:3.

Instead, at a Board meeting in July 2010 attended by a large group of activists from BDS, without due authority, in violation of the Bylaws, Boycott Policy, and other rules, the Board decided to adopt the Israel Boycott. Dkt. 41.8 ¶ 6.[4] The Staff never consented to this action. *Id.* ¶ 7. As Defendant Levine admitted at the time, "a few Staff members would not agree to the boycott and would not step aside to permit a consensus." Dkt. 38 ¶ 24. Still further, contemporaneous communications indication that the Board was "***not unanimous in their support of the process around the boycott***…." **Ex. Z**. This represents a separate and independent breach of the Co-Op's documents. *See* **Ex. A** ¶ 6 ("Board decisions are made by consensus.").

2. The Board Violated the Boycott Policy's Staff Consensus Rule

At the heart of the Co-op's system of governance and Bylaws is the principle of "consensus decision making." **Ex. A**. 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. B** at 3 ("Staff Structure" and "Staff Decision Making"); **Ex. C**. By definition

[4] Defendants have argued 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 plainly were not. **Ex. A** ¶ III(13)(16) (emphasis added).

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

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. H (emphasis added). In this case, multiple members of the Staff objected to the Israel Boycott and other divestment resolution/policies. *See* Dkt. 41.8 ¶ 5.

Discovery here confirmed not only that Staff objected, but that at least one of their objections was "removed from our [Staff] journal," presumably in effort to hide it. **Ex. I**. In response to a Staff survey, another employee wrote:

> [A] lot of trust in the BOD was lost when it decided to force it's [sic] personal political beliefs onto the co-op staff, and ***strong-armed the staff into participating in a boycott that it did not consent to*** … No matter the rationalization used, the action of the BOD strongly resembled that of the BOD of any large corporation … ***the BOD decided to use the Co-op for their own strongly held personal political agendas and to ignore the precepts of cooperation and collectivity***.

Ex. J (emphasis added). Another Staff member asked the Board to "suspend" the Israel Boycott "in acknowledgment of the ***mistake in process*** which occurred." **Ex. K**; **Ex. L** (emphasis added). Yet, despite these requests, the Board enacted the Israel Boycott.

Judge McPhee previously found correctly that the Board maintained the Boycott in July 2010 despite a lack of staff consensus. Dkt. 41 at 2; **Ex. G** at 20.

3. The Board Did Not Find a Nationally Recognized Boycott of Israel When It Enacted the Boycott[5]

Defendants have admitted that 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 Levine stated: "The Board considered the ***international***

[5] Nor is there a nationally recognized boycott of Israel now, but the Court need not consider that issue.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

movement to boycott Israel … and approved the boycott proposal in solidarity with this ***international*** boycott movement." Dkt. 38 ¶ 25 (emphases added). Of course, that is not the standard that must be applied under the Boycott Policy. *See* **Ex. C**.[6]

Likewise, 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." *Id.* (emphasis added). This is consistent with an email obtained from one of the Defendants who admits the Israel Boycott was "the first boycott of Israeli goods by a US grocery store." **Ex. E**.

Had it abided by its obligations, the Board would have readily determined that boycotting and divesting from Israel are nationally rejected—not nationally recognized—policies. *See* Dkt. 41.7 ¶ 5.[7] No matter where they were pursued, prior to July 2010 every effort to organize a boycott of Israel had failed in the United States. Dkt. 41.7 ¶ 6.

Defendants provide ***no*** evidence indicating that ***anyone*** on the Board at the time the Israel Boycott was enacted believed there was a nationally recognized Israel boycott. When the Washington Supreme Court looked at this issue and found a genuine issue of fact as to whether a nationally recognized boycott ever existed, it cited in favor of Defendants a declaration from Defendant Cox. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2 (2015). Yet, that evidence is irrelevant to whether the enacting Board believed or considered whether there was a nationally recognized boycott: Cox was ***not*** on the Board when it enacted the Israel Boycott. Whatever her belief was at enactment does not create

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

[7] Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. Dkt. 41.7 ¶ 5. 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.*

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

an issue of fact for trial.[8]

Based on testimony from both the Staff and the Board, it is undisputed that the Board did not even consider the "nationally recognized" standard. *See* Dkt. 38 ¶ 25; **Ex. E**; *see also* **Ex. BB** at 32:11-20. Moreover, the Honorable Thomas McPhee (Ret.) previously acknowledged that there was in fact no nationally recognized boycott of Israel at the time the Board originally acted. **Ex. G** at 24. There is no countervailing evidence. The issue is now ripe for resolution on summary judgment.

4. Defendants Did Not Have the Authority to Ignore Co-op Rules and Policies

The Bylaws vest the Board with a list of "major duties," including the authority to adopt and review policies. *Id.* § III.13. Nothing in the Bylaws authorize the Board to ignore duly enacted policies. Indeed, the plain text of the Bylaws requires the contrary conclusion: The list of Board powers is phrased ***exclusively***, meaning anything unlisted is ***not*** a major power of the Board in managing the affairs of the Co-Op.

Defendants have argued that their violation of the Boycott Policy was authorized by a Bylaw provision providing that the Board may "resolve organization conflicts." **Ex. A** §III.13-16. 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." The position defies logic.

It is also flatly contradicted by the fact that Defendant Levine admitted, ***before enactment***, "the decision making process" would need to "change" to allow the Board to enact the Israel Boycott on its own. *See* **Ex. AA** at 36:6-38:; **Ex. CC** at 22:2-16. Moreover, Defendants Cox and Levine recommended ***after*** the Israel Boycott was enacted that Staff consensus be abandoned with respect to boycotts. **Exs. M, N**. If the Board was

[8] Moreover, Defendant Cox is not an expert on the issue and simply wrong: Boycotting Israel were not nationally recognized policies at the time the Board unlawfully adopted them in July 2010. Dkt. 41.8 ¶¶ 5-6.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

merely resolving a "conflict" when it enacted the Israel Boycott, then why would the Boycott Policy need revising? No remedial action would be required—and Cox and Levine would not have recommended revising the Boycott Policy—if the Board had acted lawfully when it first enacted the Israel Boycott.

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

In attendance at the July 2010 Board meeting was a large group of activists from BDS. Dkt. 38 ¶ 24. 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 by virtue of their Judaism. **Ex. D**. Evidence indicates that BDS exerted both internal and external pressure on the Board to enact the Boycott. **Ex. E**. Indeed, some Board members appear to have joined the Board for the very purpose of placing BDS's interests ahead of the Co-op's interests. *See* **Exs. P, Q**.

The proposal to boycott Israel was raised in or around May 2010 by members of BDS. **Ex. O**. Defendant Gause has admitted that she was one of the co-founders of Olympia BDS two years before the Board took its action:

> In 2008 I co-founded Olympia BDS, the grassroots effort that led to the first boycott of Israeli goods by a US grocery store, the Olympia Food Co-op. In the process of that campaign, the aftermath of which is still ongoing, I was elected board member of the Co-op and gained an amazing amount of in-the-trenches experience in both BDS campaign strategy and realization….

Ex. E. Defendant Gause later wrote to the Board ***on behalf of*** Olympia BDS thanking the Board (of which she was a member) for its enactment of the Israel Boycott. **Ex. P**. Records further show that Defendant Gause's desire to promote BDS's agenda was the reason she ran for the Co-op Board in the first place. **Ex. Q**. This alone demonstrates a breach of Defendants' duties to the Co-op because it shows that allegiance to their own political views and the agenda of an outside organization (BDS) took precedence over their duty to act in the best interest of the Co-op. By contravening the Boycott Policy and

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Bylaws for the express purpose of promoting the interests of an outside organization, Defendants breached their duties as directors and officers of the Co-op.

These actions were particularly troubling given the incendiary impact BDS had on the Co-op community. Numerous Co-op members recognized the improper and anti-Semitic influence BDS was having on the Board. One member wrote to the Board:

> [I]t is clear that your interest was in serving the needs of the BDS organizers and not the membership …. It is clear to me from my days spent protesting at the coop over the past week (which included enduring ***anti-Semitic remarks*** and having the police called on me) that the Board has allowed BDS far too much influence and control and has ***violated both the mission and bylaws of the organization by serving the needs of BDS rather than the membership*** … The best thing that could happen now if [sic] for the Board to rescind its vote and start over….

Ex. R. Defendant Kaszynski wrote a group email documenting the Board's interest in actively destroying the possibility of a new member being elected who might object to the Board's unlawful actions. **Ex. S**. This too constitutes a violation of the Bylaws' mandate to "support efforts to increase democratic process." **Ex. A** at 3; *see id.* III.13-15 (charging board to promote the mission of the Co-op).

D. 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. T**. The Board refused. **Ex. U**. Instead, the Board (unsuccessfully) attempted to amend the Boycott Policy to retroactively legitimize its misconduct. *E.g.*, **Ex. V**. Defendants have repeatedly admitted this fact, suggesting 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

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

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. W**. 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. X**. There is ample, undisputed evidence that business has been lost as a result of the Board's failure to follow the Co-op's governing rules and procedures. Of the issues presented in this case, only the amount of that loss must be decided at trial.

III. PROCEDURAL HISTORY

A. Plaintiffs Sue to Vindicate the Co-Op Rules

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 Defendants violated the fiduciary duties they owed to the Co-op. *Id.*

Plaintiffs' complaint has since been amended to clarify that Defendants violated those duties 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." Dkt. 136 ¶¶ 59-60. Plaintiffs seek declaratory and injunctive relief, as well as damages against Defendants. *See id.*

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

B. Defendants Move to Strike the Complaint; Plaintiffs Prevail on Appeal and the Case Was Remanded for Discovery

On November 1, 2011, Defendants filed a Special Motion to Strike Under Washington's Anti-SLAPP Act and Motion to Dismiss ("Motion to Strike"). Dkt. 41. Plaintiffs opposed the Motion to Strike, arguing, among other things, that the Complaint was not covered by the Anti-SLAPP Act and that the Act was unconstitutional on its face and as applied to the 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 against Plaintiffs. Plaintiffs appealed that ruling and the Court of Appeals affirmed (*Davis v. Cox*, 180 Wn. App. 514 (2014)), "on the theory that the Cooperative's board is not bound by its adopted policies." *Davis v. Cox*, 183 Wn.2d 269, 282 n.2 (2015).

On May 28, 2015, the Washington Supreme Court reversed and held that the Washington Anti-SLAPP Act is unconstitutional. *Id.* at 295-96. In doing so, the Court also found that "[o]ne ***disputed material fact*** in this case is whether a boycott of Israel-based companies is a 'nationally recognized boycott[ ],' as the Cooperative's boycott policy requires for the board to adopt a boycott." *Id.* at 282 n.2. In finding this fact "material," the Washington Supreme Court necessarily rejected the court of appeals' conclusion that the Board was not bound by the terms of the Boycott Policy while it remains in effect. On June 19, 2015, the Supreme Court issued its mandate directing this Court to proceed consistent with its opinion. Dkt. 120.

Since the Supreme Court's Order, significant, undisputed evidence has emerged that shows: (a) the Israel Boycott was not based on a "nationally recognized" boycott of Israel (*see* **Ex. E)** and (b) that the Defendants ***knowingly*** violated the Boycott Policy, Bylaws, and their duties by, among other things, failing to honor the Staff's resolution.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

See **Exs. M, N, Y, Z, AA** at 45:21-23, 52:25-53:4. For these reasons, and others, this Court properly denied a renewed CR 12 motion (Dkt. 124)—arguments Defendants now essentially recycle in their Motion for Summary Judgment (Dkt. 192).

C. Defendants Have Repeatedly Mischaracterized the Claims in this Case in an Effort to Avoid the Inescapable Fact of the Board's Misconduct

Defendants have long mischaracterized this lawsuit as one directed at their constitutional rights—first by invoking the Anti-SLAPP Act, then in their "Renewed" CR 12 Motion, later by obstructing discovery by asserting the "associational privilege," and most recently through their Motion for Summary Judgment. Dkts. 41, 124, 140, 192. At every turn, Defendants' efforts have been rejected.

Their efforts have failed because their portrayal of this case cannot be squared with either the record or the claims Plaintiffs have ***actually*** asserted. Those 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, "[t]he process" was "not right." **Ex. Y**.

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." CR 56(c). "The purpose of summary judgment is to avoid useless trials on formal issues which . . . , if factually supported, could not as a matter of law lead to a result favorable to the nonmoving party." *Mostrom v. Pettibon*, 25 Wn. App. 158, 167 (1980).

"A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861 (2004). Summary

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

judgment should be granted "if reasonable persons could reach only one conclusion." *CPL, LLC v. Conley*, 110 Wn. App. 786, 791 (2002).

In opposing summary judgment, the non-moving party must come forward with more than a mere scintilla of evidence. *See, White v. State,* 131 Wn.2d 1, 17 (1997). Instead, the opposing party must come forward with "specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact." *Heath v. Uraga,* 106 Wn. App. 506, 513 (2001).

B. Defendants Breached Their Duties to the Co-Op

The elements of breach of fiduciary duty are "(1) the existence of a fiduciary duty, (2) a breach of that fiduciary duty, (3) resulting injury, and (4) that the breach of duty proximately caused the injury." *Arden v. Forsberg & Umlauf, P.S.,* 193 Wn. App. 731, 743 (2016). First, contrary to Defendants' repeated misstatements, nonprofit board members owe duties to the corporation and membership, and members of nonprofits may sue corporate directors for violating duties they owe. *See Waltz v. Tanager Estates Homeowner's Ass'n*, 183 Wn. App. 85, 90 (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 to the nonprofit's 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***

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

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. *Id.* at 92. Here, Defendants owed the Co-op (and Plaintiffs) fiduciary duties to comply with the Co-op's Boycott Policy, Bylaws, to act in the best interests of the Co-Op, and other rules in good faith with the care of an ordinarily prudent person. RCW 24.03.127; *Barnett v. Hicks*, 114 Wn.2d 879, 890 (1990); *Waltz*, 183 Wn. App. at 92.

The Defendants also owe the Co-Op a duty of loyalty: "The duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over ***any interest*** possessed by a director and not shared by the stockholders generally." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 722 (2008) (emphasis added). "To plead a breach of the duty of loyalty, the shareholder must allege facts sufficient to show that a majority of the directors who approved the conduct or transaction were ***materially interested*** in the transaction." *Id.* (emphasis added).

Second, the undisputed and binding record makes clear that the Defendants breached their duty of care. Defendants contend that they have no duty to observe the Boycott Policy. The law of the case is to the contrary. *See Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 113 (1992) ("determinations made by the appellate court" have "binding effect" "on further proceedings in the trial court on remand"). Here, the Washington Supreme Court has found that predicates to enact a Boycott described in the Boycott Policy are material issues that must be resolved by this Court. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2 (2015). In other words, the Supreme Court expressly rejected Defendants' position. Since remand, the undisputed record developed through discovery is that Defendants did not enact the Israel Boycott consistent with the Boycott Policy—a fact Defendants effectively concede. **Exs. M, N, Y, Z, AA** at 32:11-20; Dkt. 38 ¶¶ 19, 23-24.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Defendants breached their duty of care.

The undisputed record also reveals the Defendants breached their duty of loyalty by advancing their own political agendas and the political agenda of BDS—to the detriment of the Co-op's financial and organizational well-being. **Exs. E, P, Q**. The record also shows that Defendants' decision to place their interests first came at the expense of the Co-Op. *Supra* II.D. Defendants breached their duty of loyalty. *See Rodriguez*, 144 Wn. App. at 722.

Third, Defendants cannot dispute that the Co-op has suffered injuries. The record establishes that the Co-Op has lost membership (Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3), experienced discord among the remaining Staff and membership (**Ex. W**), and as a result, forgone new opportunities to advance the mission of the Co-op due to the uncertainty of the Israel Boycott. **Ex. X**; *supra* § II.D.

Fourth, there can be no argument that Defendants are the proximate cause of such injuries. "A proximate cause of an injury is defined as a cause which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred." *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 683 (2008). Here, under Boycott Policy, the Staff rejected the proposed Israel Boycott (**Ex. C**); the opinions of the Co-op membership were (at least) deeply divided (*see, e.g.*, Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3; **Ex. W**), and even the opinions on the Board were ***not*** unanimous. **Ex. Z.** Defendants alone are solely responsible for the divisive Israel Boycott. They voted to enact it and/or failed to take remedial action. Dkt. 38 ¶ 20. They ignored requests to rescind the Boycott under Co-op rules. **Exs. R, S**. Summary judgment is proper.

The business judgment rule does not alter the foregoing analysis. There is ample evidence that Defendants' disregard for Co-op process was animated by their own personal political desires and the political desires of an antagonistic third party (BDS).

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Exs. E, P, Q. Where directors stand to gain from their directorship actions, the business judgment rule does not apply. *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509 (1986) (no application of business judgment rule where evidence implicates breach of the duty of loyalty); *see also Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402 (1960) (corporate representatives "are not permitted to retain any personal profit or advantage gleaned" at the expense of the company and "good motives or good intentions of the corporate officer in no way relieve him from liability").[9] In any event, there is ample evidence in the record that the Board did not proceed with fairness, but instead with "dishonesty" and "incompetence" when it knowingly violated the Boycott Policy and Bylaws. *See* **Exs. M, N, CC** at 22:3-13, 28:17-29:1, 35:2-14; Dkt. 38 ¶¶ 19, 23-24.

C. The Court Should Declare the Improper Boycott Null and Void

The purpose of the Washington Uniform Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. Accordingly, the law "is to be liberally construed and administered." *Id.* Under the Act, a person "interested" or "affected" by writings may have "any question of construction or validity" decreed and "obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. Furthermore, the Legislature explained that "a declaratory judgment or decree may be granted whenever necessary or proper." RCW 7.24.080.[10] Here, declaratory relief is necessary and proper to correct Defendants' plain disregard for the Co-op's governing documents.

"Declaratory judgment is appropriate when the four elements of a justiciable

---

[9] *See In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 260 (Del. Ch. 2006); *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 642 (Del. 2014) ("[W]here a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is 'entire fairness,' with the defendants having the burden of persuasion.").

[10] *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 187 (2007) (explaining no "private right of action is necessary for parties to seek a declaratory judgment"); *see also* CR 57 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

controversy are present." *Osborn v. Grant Cty. By & Through Grant Cty. Comm'rs*, 130 Wn.2d 615, 631 (1996). First, there must be "an actual, present and existing dispute." *Id.* Here, it is plain that Defendants and Plaintiffs disagree on the Board's right to disregard its own governing documents in enacting the Boycott. *See* Dkt. 192.

Second, the dispute must be between "parties having genuine and opposing interests." *Osborn*, 130 Wn.2d at 631. Here, the Co-op has an interest in not only protecting its own rules but also in maximizing membership consistent with its consensus-based, community building mission. **Ex. A**. Defendants, on the other hand, were animated by political motivations in disregarding and violating Co-op rules. *See* **Exs. E, P, Q**.

Third, there must be "interests" that are "direct and substantial, rather than potential, theoretical, abstract or academic." *Osborn*, 130 Wn.2d at 631. Evidence discovered in this litigation has made plain that the Co-op's interests in resolving Board authority is anything but "potential, theoretical, abstract or academic": The Co-op has lost existing and potential membership (Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3; **Ex. W**) and development opportunities (**Ex. X**) as a result of the Israel Boycott.

Fourth, "a judicial determination" of the parties' respective rights must "be final and conclusive." *Osborn*, 130 Wn.2d at 631. Here, declaratory relief would be final and conclusive, and instruct Co-op operations moving forward. Judgment would be binding not only on those Defendants, if any, still serving on the Board, but also on the Co-op as the derivative plaintiff. *See LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 778 (1972); *see also* 46 Am. Jur. 2d Judgments § 598 ("[A] judgment for or against a shareholder in [derivative] actions is generally considered to bind the corporation and its officers, as well as other shareholders, including those not made parties to the action . . . ."); *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 130 A.3d 934, 946–47 (Del. Ch. 2016) (a judgment in a derivative action may have binding effect on the corporation and other stockholders if the derivative action survives a motion to dismiss).

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Defendants likely will argue that since the Co-op is not a named party or because some or all of the Defendants are no longer Board members, no relief can be final and conclusive. This is incorrect. The *LaHue* Court explained "[j]oinder of the corporation is not always essential" to render judgment but rather "[t]he necessity of joinder is determined by 'pragmatic considerations.'" 6 Wn. App. at 778. "If nonjoinder does not prejudice the rights of the absent corporation sought to be benefited, or the rights of the defendants against whom the corporate cause of action is asserted, judgment in favor of the absent corporation in the stockholder's derivative suit may be upheld." Here, the Co-op has been on notice of this dispute since before this litigation (*e.g.*, **Ex. T**), and been active during it as a subject of discovery (*see* Dkt. 194). There can be no dispute the Co-op has been on notice that it is the real plaintiff in interest in this litigation. And, there can be no argument that a judgment construing the Co-op's governing rules would prejudice the Co-op. As such, there is no principle of law preventing a final judgment not only against Defendants but in favor of the Co-op. *LaHue*, 6 Wn. App. at 778.

This Court should issue a declaratory judgment that the Board failed to comply with the governing rules in enacting the Israel Boycott. *Supra* § II.C. The Court's order should declare the Boycott null and void. *See Hous. Auth. of City of Pasco & Franklin Cty. v. City of Pasco*, 120 Wn. App. 839, 846 (2004) (affirming injunction and declaratory judgment where action taken without authority).

D. The Court Should Permanently Enjoin the Improper Boycott

In Washington, a party seeking a permanent injunction must show "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him." *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 792 (1982). Injunctive relief may be ordered on a motion for summary judgment. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827 (1993).

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

"A court in equity has broad discretion to fashion a remedy to do substantial justice and end litigation." *Cogdell v. 1999 O'Ravez Family, LLC*, 153 Wn. App. 384, 390 (2009) (citing *Hough v. Stockbridge*, 150 Wn.2d 234, 236 (2003)). "Equity will not suffer a wrong to be without a remedy." *Crafts v. Pitts*, 161 Wn.2d 16, 23 (2007). "When a court's legal powers cannot adequately compensate a party's loss with money damages, then a court may use its broad equitable powers to compel [performance]." *Id.*

1. Plaintiffs Have a Clear Right to Relief

As explained above, the Co-Op has a clear right to relief because Defendants breached their duties of care and loyalty in enacting, and refusing to reconsider, the Israel Boycott. *Supra* § IV.B. The Defendants breached their duty of care by failing to enact the Israel Boycott consistent with the procedures in the Boycott Policy or their powers in the Bylaws to modify or repeal the Boycott Policy. *Id.* Defendants also breached their duty of loyalty by advancing their own political agendas and the political agenda of BDS to the detriment of the Co-op's financial and organizational well-being. *Id.*

Separately, the Co-Op has a clear right to relief from Defendants' *ultra vires* actions. Defendants' actions were *ultra vires* if "performed with no legal authority." *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123 (2010). In Washington, corporate directors cannot simply disregard the corporation's own rules and bylaws that prescribe its policymaking procedures. *See Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 346 (1999). 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

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

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 plaintiff to challenge procedurally improper corporate action.

Hartstene Pointe cited to *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264 (1943). 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.

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.

Defendants' actions in disregarding for the Boycott Policy lacked legal authority. *Supra* § II.C; *see* **Exs. M, N, Y, Z, CC** at 22:3-13, 28:17-29:1, 35:2-14; Dkt. 38 ¶¶ 19, 23-24. As the Supreme Court has implicitly recognized (*supra* § IV.B), the Board had two choices when confronted by a proposal to boycott Israel. The Board did neither.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

First, the Board could have followed the procedure laid out in Boycott Policy, which requires (a) that boycotts be approved by universal agreement of the Staff (giving minority views robust protection) and (b) that any boycott be "nationally recognized" before the Co-op agrees to participate. *See also* **Ex. AA** at 35:17-36:12. The undisputed record is that there was no Staff consensus (*supra* § II.C.2) and no evidence of a "nationally recognized" boycott of Israel (*supra* § II.C.3).

Second, the Board could have tried to modify or repeal the Boycott Policy. The Bylaws describe the Board's powers by reference to a list of "major" duties. **Ex. A** § III.13. As relevant here, the listed authorities of the Board are to "adopt major policy changes," "adopt policies which promote achievement of the mission statement and goals of the Cooperative," and "establish and review the Cooperative's goals and objectives." **Ex. A** § III.13. Accordingly, after enacting the Boycott Policy, the Board retained the authority to rescind it at any time under the above-stated powers. If the Board wished to enact the Boycott despite the absence of Staff approval, all it had to do was rescind the Boycott Policy first. It did not. Even after the fact—in the face of objections from Staff and Co-Op Membership—the Board failed to rescind the Boycott Policy and enact the Boycott. *See* **Exs. T, U**. Defendants' enactment of the Israel Boycott was *ultra vires.*[11]

Twisp demonstrates the merits of Plaintiffs' claims in this case. The undisputed record shows the Board failed to follow the Boycott Policy and Bylaws in enacting the Israel Boycott—rules that, among other things, honor the Co-op's entrenched commitment to consensus-based governance and protect Staff members who object to a particular boycott. *See* **Exs. A, C**. Accordingly, the Israel Boycott is subject to being "avoided" through this litigation. *See Twisp,* 16 Wn.2d at 294 (corporate transactions that fail to

[11] Defendants have argued that the Board's authority to "resolve organizational conflicts after all other avenues of resolution have been exhausted" justifies their actions. 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" for which there is no alternative "avenue" of resolution. The position defies logic.

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

observe procedural requirements are valid until avoided).

2. The Board's Wrongful Actions Have Invaded the Rights of the Co-Op and Its Membership, including the Named Plaintiffs

This prong of the test for an injunction is regularly presumed where a clear legal right is established. *See, e.g., Nw. Gas Ass'n,* 141 Wn. App. at 121. Here, Defendants' permanent disregard for the Co-Op rules and policies has not merely threatened, but actually realized, an invasion of the rights of the Co-op. The Bylaws require governance by and through duly enacted policies. **Ex. A** § III.13. Defendants' disregard for this imperative has eviscerated the Co-op's community-building, consensus-driven mission. *Supra* § II.D. In return for membership dues, the Co-op promised its membership consensus decision-making. **Ex. A**. By enacting and sustaining the Boycott *ultra vires*, in breach of their fiduciary duties, Defendants invaded the rights that belong to the Co-op, including the named Plaintiffs. *See id.* § III.13 (defining bounds of Board authority).

3. The Co-Op Has Suffered Substantial Harm as a Result of the Board's Improper Conduct, as Have the Named Plaintiffs

The Co-op, the real party in interest, has suffered substantial harm. Here, there is no dispute that Defendants' abuse of process has deprived the Co-op of membership, financial benefits, and community support. Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3; **Ex. W**. This is substantial harm warranting a permanent injunction. *See Isthmian S. S. Co. v. Nat'l Marine Engineers' Beneficial Ass'n*, 41 Wn.2d 106, 117 (1952) (conduct injurious to commercial and reputational interests found to be substantial harm).

Furthermore, Washington courts have held that loss of a bargained for or legal right constitutes substantial harm. *See King v. Riveland*, 125 Wn.2d 500, 517–18 (1994); *see also King Cty. v. Port of Seattle*, 37 Wn.2d 338, 345 (1950) ("The basis for injunctive relief must be interference with a legal right of the plaintiff."). In *King v. Riveland*, the Washington Supreme Court affirmed an injunction to prevent disclosure of confidential personal information reasoning that the plaintiffs would be substantially harmed if denied

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

the equitable right to enforce the defendants' duties not to wrongly disclose the information. *King*, 125 Wn.2d at 517–18. The same reasoning applies here. The Co-op's membership, including the named Plaintiffs, have a valid equitable interest in enforcing the duties owed by the Board, and damages cannot remedy the harm the Co-Op has suffered and are suffering as a result of Defendants' disregard of their duties.

The extent of the Co-op's financial injury will be developed through discovery and may be resolved at trial. For present purposes, there can be no genuine dispute that the Co-op lost revenue from depressed membership (Dkt. 41.5 ¶ 13; Dkt. 41.6 ¶ 13, Dkt. 41.9 ¶ 12, Dkt. 41.4 ¶ 3; **Ex. W**), and lost 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. X**). An injunction should issue as a matter of law.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court enter judgment finding Defendants breached their duties, declaring the Boycott null and void, and permanently enjoining enforcement of the Boycott.

DATED this 9th day of February, 2018.

McNAUL EBEL NAWROT & HELGREN PLLC

By: s/ Avi J. Lipman
Robert M. Sulkin, WSBA No. 15425
Avi J. Lipman, WSBA No. 37661

600 University Street, Suite 2700
Seattle, WA 98101
P: (206) 467-1816 / F: (206) 624-5128
Email: rsulkin@mcnaul.com
alipman@mcnaul.com

Attorneys for Plaintiffs

DECLARATION OF SERVICE

On February 9, 2018, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Bruce E. H. Johnson, WSBA No. 7667
Brooke E. Howlett, WSBA No. 47899
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Phone: 206-622-3150
Fax: 206-757-7700
Email: brucejohnson@dwt.com
brookehowlett@dwt.com
mlahood@ccrjustice.org
blmharvey@sbcglobal.net
steven@stevengoldberglaw.com
Attorneys for Defendants

- ☐ Via Messenger
- ☐ Via U.S. Mail
- ☐ Via Overnight Delivery
- ☐ Via Facsimile
- ☑ Via E-mail (Per Agreement)

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

DATED this 9th day of February, 2018, at Seattle, Washington.

Thao Do, *Legal Assistant*

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816