☐ EXPEDITE
☐ No hearing is set
☑ Hearing is set
Date: March 9, 2018
Time: 9:00 a.m.
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 11-2-01925-7

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants' position in this lawsuit can be reduced to single premise: The Board may exercise any authority it desires to manage the affairs of the Co-op, notwithstanding the express statement of powers in the Bylaws. Yet, the Washington Supreme Court has already rejected this view of the Board's authority. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). Indeed, Defendants position is flatly contrary to the law. RCW 24.03.070. The Co-op's Bylaws provide an exclusively-phrased list of powers, authorizing the Board to adopt or change Co-op policy, but not to ignore or circumvent existing, promulgated policy. *See* Ex. A § III.13.[1] Accordingly, if the Board has enacted a policy prescribing and delegating decision-making procedure, that policy is the operative standard until rescinded or changed. *Davis*, 183 Wn.2d at 282 n.2.

The material facts are undisputed here:

1. **The duly-enacted Boycott Policy was the complete and only procedure for the Co-op's entry of boycotts**. Ex. C. The Boycott Policy's language makes this clear. *Infra* § II.A.1. And, Defendants have admitted it. Ex. AA at 35:24-36:12 ("Q. So [the Board was] bound by the boycott policy? . . . A. Yes."); Ex. F at 1 (Mr. Levine stating on June 7, 2010, before the Board enactment, that "[t]he Boycott Process calls for boycotts to be approved by Staff consent."); Ex. CC at 28:2-29:1(Levine stating that the process would need to "change" to allow the Board to decide boycott issues).

2. **The Boycott Policy vested the Co-op's power to enter boycotts in Staff consensus**. Ex. C. The Boycott Policy is clear on this fact (*id.*) and Defendants have admitted it. Ex. AA at 35:24-36:12 ("Q. Does [the Boycott Policy] make clear to you that this policy is the Staff's decision to boycott? A. Yes.").

3. **The Staff did not reach consensus to approve the Israel Boycott, and therefore blocked it under the Boycott Policy**. Defendants expressly admit this too. Ex. CC at 28:17-29:1.

4. **Defendants knew or carelessly failed to investigate, all of the material facts described above when they enacted and failed to rescind the Boycott Policy**. Again, Defendants admissions are controlling. Ex. CC at 28:2-29:1, 35:2-14; Ex. AA 25:8-12, 35:24-26:12, 37:6-38:1; Ex. F; Ex. Y. As Defendants have said, the actions they took were "not right." Ex. Y.

The first three facts establish as a matter of law that Defendants acted *ultra vires*. The four

[1] Exhibits A-CC are attached to the Declaration of Avi J. Lipman in Support Plaintiffs' Motion, dated February 9, 2018.

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facts together establish that Defendants breached their fiduciary duties.[2] Partial summary judgment in Plaintiffs' favor is necessary and proper here.

II. ARGUMENT

A. This Lawsuit Is About Process, and, as the Defendants Have Admitted, the Process was "Not Right"

1. Defendants' Construction of the Bylaws and the Israel Boycott Is Belied By Their Own Actions and Admissions

Defendants argue that the Board did not violate the Bylaws because the Boycott Policy is not the exclusive mechanism for the Co-op to enter boycotts, but rather just ***a*** method for the Staff to honor nationally recognized boycotts. Defs. Opp. 3. Yet, Defendants argument is contrary to their contemporaneous statements and subsequent admissions. Defendant Levine contemporaneously admitted that "the decision making process" needs to "change" to allow the Board to enact boycotts on its own. *See* Ex. AA at 36:6-38; Ex. CC at 22:2-16. Shortly after the vote, Defendant Sokoloff wrote to the other Defendants and admitted that "[t]he process" was "not right." Ex. Y. During her deposition, Ms. Sokoloff admitted that the Board had only two options, follow the Boycott Policy or change it (Ex. AA at 35:24-36:5), but the Board did neither (*id.*).[3]

Defendants Levine and Sokoloff's admitted reading of the Boycott Policy I supported by the text, which is phrased exclusively. The first seven paragraphs of the Boycott Policy define how the procedure for honoring a boycott is to work. Ex. C at 1. The final paragraph then states: "The Co-op will not accept bulk order for items produced by the target of a Co-op honored boycott. ***Bulk order for items produced by targets of boycotts the Co-op has not yet formally chosen to honor will be accepted***." *Id.* at 2

[2] Further, the Boycott Policy allows the Co-op to honor only "nationally recognized" boycotts. Ex. C. The undisputed facts are (1) the Staff never received evidence that a boycott of Israel is nationally recognized (Dkt. 41.8 ¶ 5), (2) the Staff never so found (*see id.* ¶¶ 7), and (3) the Board failed to consider whether there was a nationally recognized boycott when it voted (*see* Ex. E; Dkt. 38 ¶ 25). Moreover, there is compelling expert testimony in the record that there has never been a nationally recognized boycott of Israel. Dkt. 41.8 ¶¶ 5-6. For this reason too the Israel Boycott is improper and void.

[3] Of course, Defendants argument is also inconsistent with a core position they have taken throughout this litigation—that a boycott of Israel ***is*** nationally recognized. *See* Defs. Opp. 4.

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(emphasis added). In other words, the Co-op will continue to make purchases in the ordinary course of business unless a boycott is enacted as described therein. The inclusion of the last sentence belies any interpretation of the policy as non-exclusive. Washington law disfavors any construction of a writing that would render express terms meaningless. *See Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003). Defendants' position is incorrect as a matter of law.

2. The Supreme Court Has Rejected Defendants' View of the Bylaws and that Holding is the Law of the Case

Ignoring their own admissions and contemporaneous statements, defendants also argue that the Israel Boycott was a valid exercise of the Board's power to manage the Co-op and resolve disputes, repeatedly referring to earlier decisions of Judge McPhee (Ret.) and the Washington Court of Appeals as support. Those decisions provide Defendants no support because the Washington Supreme Court overruled those analyses in *Davis*, 183 Wn.2d 269. *See* Pls. Mot. 13. The Washington Supreme Court's opinion necessarily resolved (1) that the plain language of the Bylaws does not allow the Board to sidestep a promulgated policy in the guise of setting new policy, and (2) the Boycott Policy is the exclusive mechanism by which the Co-op may join a boycott. Those legal conclusions are the law of the case. *See State v. Thompson*, 143 Wn. App. 861, 869, 181 P.3d 858 (2008).[4]

3. The Parties' Political Disagreements Are Not Material

In opposing Plaintiffs' Motion, Defendants filed with the Court a number of Plaintiffs' personal emails about the substance of the Israel Boycott. Of course Plaintiffs oppose the substance of the Israel Boycott. But Plaintiffs' views (and personal emails) are immaterial. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) ("material fact is one upon which the outcome of the litigation depends, in whole or in part."). As the Board was told by many Staff members that opposed the Israel Boycott at

[4] Contrary to Defendants' mischaracterizations, without the benefit of depositions and document discovery, Judge McPhee found key facts in Plaintiffs' favor. *See* Ex. G at 20:4-6 ("It is undisputed that there was no consensus among the staff in addressing this Boycott and Divestment Resolution.")

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the time, the issue was consensus decision making process, not the outcome. *See* Dkt. 41.8 ¶ 5.[5] Defendants have long known that, for a majority of the Staff and many Co-op members, procedure was the issue; their reliance on Plaintiffs' personal emails is telling.

4. Defendants' Implication that Winning an Election Is License to Disregard the Law is both Meritless and Revealing

Defendants argue that many in the Co-op community support the Israel Boycott and repeatedly emphasize that several of the Defendants won election to the Board of Directors running on a pro-Israel Boycott platform, while others opposing the Israel Boycott were not elected. Defs. Opp. 15-16. Defendants' implication is that prevailing in an election licenses continued disregard of the Bylaws and the Boycott Policy. That is not the law in Washington, or anywhere. To the contrary, the Civil Rules protect minority shareholders (or members, like the named Plaintiffs) where directors serve a majority group to the detriment of the corporation as a whole. CR 23.1; *see* Pls. Opp. at 24 & n.14. Here, again, Defendants' impulse to introduce irrelevant facts to excuse their conduct and obfuscate the issues is revealing. The fact is, the Board recognized it was bound to follow the Boycott Policy and did not; it tried to amend the Boycott Policy but failed. Ex. V.

5. Defendants' Conduct Violated the Bylaws under Any Facts

Defendants claim that, if one were to look past the Boycott Policy, there is no dispute that the Israel Boycott was consistent with the Bylaws. Defs. Opp. 2. This is incorrect. Defendants simply ignore Bylaws (and the incorporated Mission Statement) provisions that do not fit their argument. *See* Pls. Opp. 11-12.[6] And, here again, Defendants ignore the Supreme Court ruling and their admissions.

B. Defendants Breached Their Fiduciary Duties to the Co-op

The facts are clear and unrebutted: Defendants knew (or carelessly failed to inform

[5] Plaintiffs have made clear that they would abide a procedurally proper boycott. Dkt. 136.

[6] The Bylaws charge the Board to "adopt policies to foster member involvement," and "adopt policies which promote achievement of the mission statement and goals of the Cooperative" (Ex. A § III.13), which include community engagement and growth of the Co-op's business (*id.* at 1). The Israel Boycott has undermined, not supported, all of those goals. *See* Pls. Opp. 11-12.

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themselves) that the Bylaws—and, by extension, Boycott Policy—bound and divested the Board of the power to enact a boycott over Staff objections when they sat to vote in 2010. *Supra* § I. In deciding to vote on the Israel Boycott anyway, the Board breached their fiduciary duties. *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 402, 357 P.2d 725 (1960); *see, e.g.*, *Riss v. Angel*, 131 Wn.2d 612, 629–30, 934 P.2d 669 (1997); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 835, 786 P.2d 285 (1990).

1. The Business Judgment Rule Does Not Shield Defendants' Procedurally Improper Israel Boycott

Defendants rely almost exclusively on the cloak of the business judgment rule to answer Plaintiffs' breach of duties arguments. Defs. Opp. 12-14.[7] Yet, the business judgment rule does not shield a fiduciary's procedural failure to exercise care in understanding or enforcing the governing rules of the corporation. *Riss*, 131 Wn.2d at 632–33.[8] Put another way, if otherwise proper, the business judgment rule requires the court to provide deference to the ***substance*** of decisions of a board of directors. *Riss*, 131 Wn.2d at 629 (if rule applies, "the court should not substitute its judgment for that of the Board"). If the rule applied here, it would protect the decisions of the enacting board to vote yes or no on the Israel Boycott. That said, the business judgment rule does not protect clear ***procedural*** errors. *Id.* at 629–30 (antecedent to application of the rule, "the court is obliged to determine whether that decision was properly made").

A reasonably prudent person would act with knowledge of and consistent with the governing rules of the corporation. *See id.* at 633 (no application of the rule where there is failure to "adequately investigate"). Yet, as Defendants have admitted, that did not happen here. Some of the Defendants knowingly acted contrary to the Boycott Policy and Bylaws.

[7] Defendants obscure that the business judgment rule is the near exclusive basis for their argument, but rely only on *In re Spokane Concrete Products, Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995) in arguing that "Plaintiffs cannot show Defendants breached a duty of care." Defs. Opp. 12. *In re Spokane Concrete Product* does not concern the duty of care, but instead addresses only the business judgment rule.

[8] Before the rule applies, a showing by the fiduciary of "[r]easonable care is required." *Riss*, 131 Wn.2d at 632–33. This includes the duty to "adequately investigate." *Id.* at 633; *see Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1164 n.13 (Del. 1995) (directors have "duty" to "act on an informed basis" before the business judgment rule applies).

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Ex. F; Ex. CC at 28:2-29:1, 35:2-14. Others did not review or understand the implications of the Boycott Policy when they voted to enact the Israel Boycott. Ex. AA at 32:11-20.[9] Moreover, even setting those admissions aside, a plain language reading of the Bylaws and the Boycott Policy reveals that the Board was without authority to enact the Israel Boycott without changing the Boycott Policy. Supra § II.A.1. Indeed, the Washington Supreme Court has concluded as much already. *Davis*, 183 Wn.2d at 282 n.2.

Defendants claim that the business judgment rule applies to shield fiduciary actions based only on a showing of good faith. This is incorrect. "[G]ood faith is insufficient because a director must also act with such care as a reasonably prudent person in a like position would use under similar circumstances." *Riss*, 131 Wn.2d at 632–33; *see Shinn*, 56 Wn. App. at 834–35 (rule does not appear to protect a defendant's conduct in Washington if the defendant did not exercise proper care, skill, and diligence").[10]

Separately, it is black letter corporate law that where there is a prima facie showing that directors stand to gain from their actions (or inaction), the business judgment rule does not apply. *See Leppaluoto*, 57 Wn.2d at 402 (no application of business judgment rule where showing of "personal profit or advantage").[11] Here, there is undisputed evidence that at least some Defendants were members of BDS, supported its goals, and sought election to the Board to protect the Israel Boycott to the exclusion of other views. *See* Pls. Opp. n.6, 15-16; Exs. E, P, Q, S. This shifts the burden to

[9] And, when those Defendants later learned about the Boycott Policy, they admitted that the process was "not right" (Ex. Y) and the only options open to the Board at the time were to comply with the Boycott Policy or change it (Ex. AA at 35:24-36:12).

[10] Defendants rely on a description of the rule contained in *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). That formulation of the rule is dicta. *See id.* at 714 (resolving dispute on antecedent shareholder oppression issue). In *Riss*, the Supreme Court analyzed at length and rejected a party's position that only "good faith" is required to prove application of the business judgment rule. In comparison, the *Scott* Court included its statement in passing, without any suggestion that it was changing the law. That said, even as it discussed in *Scott*, the rule requires good faith in addition to, rather than instead of, reasonableness in making business decisions. *See Scott*, 148 Wn.2d at 714 (the party asserting the business judgment rule as a defense must show that it "acted in good faith and that the decisions were reasonable business judgments"). In any event, even if held to the standard that the business judgment rule applies absent "bad faith," there is ample evidence in the record of such bad faith. *See* Pls. Opp. 13.

[11] *See Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983); *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 260 (Del. Ch. 2006).

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Defendants to show that the action was fair to the Co-op. Defendants do not and cannot make such a showing; to the contrary, Defendants recognized at the time that the Israel Boycott would harm the Co-op's business. Ex. W.

2. Washington Law Supports Plaintiffs' Duty of Care Claim

As explained in Plaintiffs' Motion, the undisputed facts prove Defendants' breach of the fiduciary duty of care. Pls. Mot. 15-18. Setting aside Defendants' mistaken reliance on the business judgment rule, Defendants do not squarely respond, except to argue that there is no controlling precedent for this finding on similar facts. Defs. Opp. 14. Defendants are incorrect: Washington courts have vindicated duty of care claims in analogous circumstances. *See, e.g.*, *Riss*, 131 Wn.2d at 629–30 (described above); *Shinn*, 56 Wn. App. at 835 (declining to apply business judgment rule and finding breach of duty of care where partner failed to follow requirements of governing document).

3. Personal "Financial" Benefit Is Not Required to Establish Breach of the Duty of Loyalty

As further explained in Plaintiffs' Motion, the undisputed facts prove Defendants' breach of the fiduciary duty of loyalty. Pls. Mot. 15-18; *see Leppaluoto*, 57 Wn.2d at 402 ("If a corporate officer willfully performs an act which he knows, or ought to know, is unauthorized . . . such person is clearly liable to the corporation for resulting damages."). Defendants do not dispute the facts, but offer two legal arguments. Both lack merit.

First, Defendants contend that a fiduciary breaches its duty of loyalty only if the fiduciary serves personal ***financial*** interests over the interests of the corporation. Def. Opp. 15. In support of this position, Defendants only cite cases where the conflict of interest was financial in nature. *Id.* Admittedly, financial conflicts are the most common scenario addressed by the courts, but no case anywhere stands for the proposition that non-pecuniary interests cannot form the basis of a duty of loyalty claim. Washington law states that if the fiduciary advances "***any*** interest" of its own before the corporation's interests, the fiduciary has acted disloyally. *Rodriguez v. Loudeye Corp.*, 144 Wn. App.

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709, 722, 189 P.3d 168 (2008) (emphasis added). And, leading Delaware corporate law expressly rejects Defendants' view. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. ").[12]

Second, Defendants argue that they were not disloyal because their support for the Israel Boycott was "shared by the [members] generally." Def. Opp. 15 (citing *Rodriguez*, 144 Wn. App. 722). Here, Defendants misconstrue the term "generally" to mean "many" or "most." That is not the law. A fiduciary is not disloyal in serving his personal interest if the interest shared by ***all*** members (e.g. stock price). *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 751 (Del. Ch. 2005), *aff'd,* 906 A.2d 27 (Del. 2006); *see also Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 697, 871 P.2d 146 (1994) ("[D]irestors ha[ve] a fiduciary duty to *all* the shareholders" (emphasis in original)).[13] Here, the record is that the Israel Boycott fractured the community. *E.g.*, Ex. R; *see* Ex. Y. Defendants admit it. *Id*. And, they knew it would happen when they voted. Ex. W.

C. The Uncontroverted Record Establishes that the Co-op Has Been Harmed by Defendants' Actions

Defendants claim the Co-op has not suffered any injury because it has continued to grow since the Israel Boycott was enacted. Defs. Opp. 21. Similar to the electoral argument, Defendants appear to argue there can be no liability for misconduct if revenues always increase by a single dollar over the previous year. Yet, this is not the law. A company may be injured by illegal conduct even if it continues to grow and be profitable. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1222 (9th Cir. 1997). The relevant measure of harm is the loss caused by the unlawful conduct;

[12] *See also* Principles of the Law of Nonprofit Organizations § 310 TD No 1 (2007) ("The law is fairly well developed regarding financial conflicts of interest, but a board member may also violate the duty of loyalty when a nonfinancial conflict prevents him or her from acting in the best interests of the organization.").

[13] The Washington duty of loyalty rule is patterned on the Delaware rule and Delaware courts, including the *In re Walt Disney* Court, have clarified that "shared generally" means "shared by all." Any other construction of the term "generally" would undermine the duty of loyalty entirely.

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any other principle of law would engender absurd, unintended consequences. *See* Pls. Opp. 19-20. [14]

D. The Defendants Acted *Ultra Vires* Under the Bylaws

As Plaintiffs have explained, the very authority Defendants have cited in seeking to dismiss Plaintiffs' *ultra vires* claim actually undermines Defendants' position. *See* Pls. Mot. 21-24. Tellingly, Defendants do not provide any responsive analysis of the law.

Instead, Defendants insist that they did not act *ultra vires* because they could have, in theory, acted to amend the Boycott Policy to allow for Board control of boycotts (even though they did not). In Defendants' view, this means the Board had the "authority" to enact the Israel Boycott. This sleight of hand is unavailing. The Bylaws empower the Board to enact policies. Ex. A § III.13. The Bylaws do not afford the Board plenary power to avoid policies. *See id.* Defendants have admitted the Boycott Policy transferred to the Staff the authority to enter into boycotts. Ex. AA at 35:17-38:1, 45:21-23; Ex. CC at 28:17-29:1, 35:2-14. When the Board voted to adopt the Israel Boycott over the Staff's rejection thereof, it acted outside the authority allowed to it by the Bylaws and *ultra vires*.

E. Defendants Mischaracterize Plaintiffs' Request for Declaratory Judgment

Defendants urge the Court to deny Plaintiffs' request for a declaratory judgment by attacking a strawman.[15] The Israel Boycott remains in force; the validity thereof, and

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[14] Confusingly, Defendants do broadly urge that there is "no evidence that the Co-op has suffered any injury as a result of the Boycott." Defs. Opp. 8. Yet, mere sentences later Defendants admit Plaintiffs have presented numerous examples of harms suffered by the Co-op arising from the Boycott, including but not limited to loss of customers and membership. *Id.* 8-9. And, Defendants do not refute that evidence. Perhaps Defendants intend to imply that Plaintiffs have not shown "enough" harm to the Co-op or the amount of "damages." If so, that argument is irrelevant here. To prove a liability for breach of fiduciary duties, plaintiffs must prove only that there was "injury." *Arden v. Forsberg & Umlauf, P.S.*, 193 Wn. App. 731, 743 (2016). The undisputed record reflects injury to the Co-op. *See* Pls. Mot. 11-12. And, Plaintiffs' motion does not bring the issue of "damages" before the Court; that issue remains for trial. *See id.* at 2. Perhaps Defendants mean to suggest that these harms are not the "result of" of the Israel Boycott. If so, Defendants argue contrary to the undisputed testimonial evidence in the record expressly linking loss of customers and membership to the Israel Boycott. *See* Dkt. 41.5 ¶ 13; Dkt. 41.4 ¶ 3; Dkt. 41.6 ¶ 13; Dkt. 41.9 ¶ 12. Indeed, Defendants have admitted this causal connection: As one Defendant wrote, just months after the Israel Boycott was enacted, the "[t]he consequence" of the process of enacting the Israel Boycott "has been a divisive decision which has been hurtful to many members and staff." Ex. Y.

[15] Plaintiffs have asked the Court to "issue a declaratory judgment that the Board failed to comply with the governing rules in enacting the Israel Boycott" and "declare the Boycott null and void." Pls. Mot. 20. Defendants ignore Plaintiffs request, and instead reframe the declaratory judgment issue as concerning

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process used to enact it, is a live, ripe controversy. All of the justiciability factors are present. *See* Pls. Mot. 20-22; Pls. Opp. 18-20. Defendants' suggestion that they no longer have any interest in the legality of their actions as Board members is belied by their own writings (Exs. E, P, Q, S) and the zeal with which they continue to dispute this lawsuit.[16]

F. An Injunction Enjoining Enforcement of the Improper Israel Boycott Is Just

For many of the same reasons previously stated, this Court should enjoin enforcement of the improper Israel Boycott.[17] The current Board's stated frustration with this lawsuit does not cure Defendants' invasion of the Co-op's rights; to the contrary, it underscores the urgency and necessity of judicial intervention. *See* Pls. Opp. 22-24. An injunction restricting enforcement of the Israel Boycott is equitable and proper here.

DATED this 5th day of March, 2018.

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Defendants' personal liability for breaches of fiduciary duties. Defs. Opp. 18.

[16] Even if it were otherwise, this Court should issue a declaratory judgment because this is case that "presents issues of continuing and substantial public interest" and may otherwise evade relief. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004).

[17] Plaintiffs have a clear right to relief based on Defendants' breaches of duty and *ultra vires* conduct, unhampered by the business judgment rule. *See* Pls. Mot. 15-20, 21-23. As noted by the Supreme Court, the unrebutted record is that Defendants failed to abide the Co-op's governing rules in enacting the Israel Boycott, and this invades the rights of the real plaintiff in interest, the Co-op. *See* Pls. Mot. 24. Defendants argue that the Court should not enjoin the Israel Boycott because Plaintiffs have not asserted "any rights of their own as being at issue in this case." Defs. Opp. 20. The named Plaintiffs sue derivatively here, so it is harm to the Co-op that is relevant. Plaintiffs share in equal portion that harm. Finally, clearly and admittedly, the Co-op has been injured. *Supra* § II.C; Pls. Mot. 24-25.

DECLARATION OF SERVICE

On March 5, 2018, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 5th day of March, 2018, at Seattle, Washington.

Katie Rogers, *Legal Assistant*

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