

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENT L. AND LINDA DAVIS, ET AL.,)	THURSTON COUNTY
)	CAUSE NO.
)	11-2-01925-7
Plaintiff,)	
)	
vs.)	MOTION FOR
)	SUMMARY
GRACE COX, ET AL.,)	JUDGMENT/MOTION
)	FOR PARTIAL
Defendant.)	SUMMARY JUDGMENT
)	
)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on March 9, 2018, the above-entitled matter came on for hearing before the Honorable CAROL MURPHY, Judge of Thurston County Superior Court.

Reported by: Sonya Wilcox, CCR # 2112
Registered Diplomate Reporter
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1 what was previously proposed?

2 MS. LAHOOD: No.

3 THE COURT: Very well. I reviewed this
4 request prior to the hearing today. I'm happy to
5 sign it. It also could have been submitted ex parte
6 and signed ex parte, just wanted to let you know
7 that.

8 MS. LAHOOD: Thank you.

9 THE COURT: There was no opposition to the
10 motion, and I have signed it.

11 MS. LAHOOD: Thank you.

12 THE COURT: Thank you very much.

13

14 * * * * *

15

16 THE COURT: Please be seated. Good morning.
17 The Court is now prepared to hear motions in the case
18 of Davis v. Cox, and we will begin with appearances
19 on the record, please.

20 MR. SULKIN: Your Honor, Bob Sulkin, for
21 plaintiffs. This is one of my clients, Kent Davis,
22 here in the courtroom.

23 MS. LAHOOD: Good morning, your Honor. I'm
24 Maria LaHood for the Center for Constitutional Rights
25 representing the defendants. I'm here with my

1 colleagues Bruce Johnson and Brooke Howlett with
2 Davis Wright Tremaine. We are also here with our
3 clients, Harry Levine, John Reagan (inaudible.)

4 THE COURT: Ms. LaHood, will you be arguing
5 today?

6 MS. LAHOOD: Yes, I will.

7 THE COURT: Anything we need to address
8 preliminarily before I hear argument?

9 MR. SULKIN: No, your Honor.

10 THE COURT: So we have two motions, well,
11 one motion for partial summary judgment and then
12 another motion for summary judgment. I would like to
13 hear them simultaneous, because, of course, there is
14 a great deal of overlap in these motions, and I don't
15 know if the parties have conferred regarding their
16 preference for order of the motions. I'm thinking of
17 hearing from Ms. LaHood first, if that's okay.

18 MR. SULKIN: No problem, your Honor.

19 MS. LAHOOD: That's fine, your Honor.

20 MR. SULKIN: May I stand up here?

21 THE COURT: Please, yes. The purpose of the
22 microphones at the lectern is more for the purpose of
23 the public. Of course I can hear you, and, with you
24 being so close to the court reporter, she should be
25 able to hear you, but I just mention that, because

1 there are members of the public here. So that's what
2 the microphones are for.

3 MS. LAHOOD: Thank you, your Honor.

4 MR. SULKIN: Thank you, your Honor.

5 MS. LAHOOD: Defendants are former volunteer
6 board members of the Olympia Food Co-op, a Washington
7 non-profit corporation. The Co-op's purpose is not
8 only to sell wholesome food but also to encourage
9 economic and social justice.

10 Pursuant to the Co-op's bylaws and the Washington
11 Non-Profit Corporation Act, the affairs of the Co-op
12 shall be managed by the Board of Directors. The
13 Board's duties under bylaws include adopting
14 policies, which promote the cause, mission, and
15 goals, adopting major policy changes, and resolving
16 organizational conflicts.

17 Nine years ago, in March 2009, a Co-op member
18 asked the Co-op to boycott Israel in accordance with
19 the Co-op's mission. The Co-op's boycott policy
20 states, "Whenever possible, the Co-op will honor
21 nationally-recognized boycotts, which are called for
22 reasons that are compatible with our goals and
23 mission statement," and it sets forth the procedures
24 for staff to adopt a boycott.

25 More than a year passed without resolution by

1 staff, who reported the impasse to the Board, which
2 discussed it at its May 20, 2010, Board meeting.
3 Given the long delay, members sought adoption of the
4 boycott at that meeting, but the Board decided that
5 staff should attempt to reach full staff consensus,
6 invited feedback from the full staff, and said that
7 it would consider the issue again at the July board
8 meeting, and if staff didn't consent, they invited
9 staff with blocking concerns to share them at the
10 July meeting.

11 The staff did not reach consensus. So the Board
12 addressed the issue at its July meeting. Prior to
13 the meeting, the Board received the boycott proposal,
14 a write-up of all staff feedback, and a lengthy
15 informational packet about the boycott. At the
16 meeting, the Board heard the views of members of the
17 staff, which was attended by 30 or so Co-op members
18 who had come to express support for the boycott
19 proposal.

20 The Board discussed various options of how to
21 proceed and ultimately consented to a boycott of
22 Israeli goods. The Board said, if members wanted to
23 reverse, they could initiate a membership vote
24 pursuant to the bylaws, and they later posted a
25 reminder of that on the website. No member initiated

1 the ballot process.

2 More than a year later, this case was brought by
3 five, now three, of the Co-op's 22,000 members to
4 permanently enjoin the boycott and seek damages from
5 the individual members of the Board who adopted the
6 boycott and those who were on the Board at the time
7 the suit was brought.

8 Six years ago, this case was dismissed by Judge
9 McPhee as meritless under Washington's
10 then-Anti-SLAPP statute, which was enacted to address
11 lawsuits brought primarily to chill the
12 constitutional right of freedom of speech. The Court
13 of Appeals affirmed finding that the Board was
14 authorized to adopt the boycott pursuant to the
15 Co-op's governing documents, the Articles of
16 Incorporation, and the bylaws, and the defendants
17 could avail themselves of the Business Judgment Rule.
18 The Washington state court, the Washington Supreme
19 Court --

20 THE COURT: I'm sorry to interrupt. I'm
21 very familiar with the history.

22 MS. LAHOOD: Okay. I will get to it.

23 THE COURT: I have a lot of legal issues
24 that have been fully briefed, and I would like to
25 hear regarding that. I'm very familiar with the

1 history.

2 MS. LAHOOD: So I brought up the Anti-SLAPP
3 statute just to say that we have now confirmed from
4 plaintiff's own documents that silencing protected
5 speech was, indeed, the purpose of the lawsuit and
6 that plaintiffs see this case as a success because
7 it's chilled other co-ops from boycotting Israeli
8 goods.

9 So their claims, the first claim they make is
10 that the act was ultra vires. "Ultra vires" means
11 beyond the powers. It describes a transaction that
12 is outside the purposes for which a corporation was
13 founded. In *South Tacoma Way*, the Washington Supreme
14 Court refused to void as ultra vires a sale of land
15 in violation of statutory notice requirements,
16 because the agency was generally authorized to sell
17 the property. The Court distinguished between acts
18 that were ultra vires and those that suffer some
19 procedural irregularity, a long-held distinction.
20 Plaintiffs acknowledge that the Co-op was authorized
21 to boycott, so the ultra vires claim must fail as a
22 matter of law.

23 For the fiduciary duty claim --

24 THE COURT: But the Board determined under
25 what circumstances a boycott could be imposed, and

1 those never occurred.

2 MS. LAHOOD: That was -- are you talking
3 about the boycott policy?

4 THE COURT: Yes.

5 MS. LAHOOD: The boycott policy was a staff
6 procedure. It did not mention the Board. The Board
7 did not and could not delegate its authority to adopt
8 policy to the staff. It couldn't do so under the
9 bylaws.

10 THE COURT: Didn't the Board adopt that
11 policy?

12 MS. LAHOOD: It did adopt the policy for the
13 staff as noted in the May 1992 board meeting minutes
14 when that policy was changed. The reason it was
15 changed was because, prior to that, individual staff
16 in certain departments could pass the boycott.

17 So they changed the policy to say, you know what,
18 all staff has to know about it, all staff has to
19 decide, it's going to have to be by staff consensus,
20 but the Board will -- I can get the exact language --
21 will look at it, if it takes issue with that
22 decision. So the Board never --

23 THE COURT: How does the policy word that?
24 What is the wording in the policy?

25 MS. LAHOOD: That is in the board meeting

1 minutes when they adopted the policy.

2 THE COURT: But it's not in the policy?

3 MS. LAHOOD: It's not in the policy.

4 There's no mention of the Board or, for that matter,
5 the membership in the policy. So, for example,
6 plaintiffs have never claimed -- you know, we had
7 briefing around the fact that they never brought a
8 membership vote. It was never -- you know, it was
9 decided that they didn't need to exhaust in that way.
10 It was never claimed that the membership didn't have
11 the right to either reverse or pass a boycott by a
12 vote. The membership's rights and the Board's rights
13 in that way are the same. The boycott policy does
14 not address what the Board can do. It doesn't
15 address what the membership can do. It addresses how
16 the staff passes boycotts.

17 THE COURT: Or not, isn't that correct, the
18 way the policy reads this staff consensus was to be
19 reached whether or not to impose a boycott?

20 MS. LAHOOD: I guess there are two issues,
21 your Honor. First of all, under ultra vires, it
22 doesn't matter what the boycott policy says. It
23 matters what the Co-op's authority is. It doesn't
24 even matter what the Board's authority was. It
25 matters if the Co-op is allowed to have a boycott.

1 The plaintiffs have not challenged that the Co-op
2 can have a boycott. In fact, plaintiffs say, if this
3 were done procedurally adequately, as far as they are
4 concerned, we will respect that decision. So they
5 have not challenged the Co-op's authority to have the
6 boycott.

7 Here, as the Court found, the Court of Appeals,
8 the boycott policy does not and cannot bind the
9 Board. Those documents are the governing documents,
10 the articles, and the bylaws.

11 THE COURT: And would you agree that the
12 decision of the Court of Appeals that was appealed to
13 the Supreme Court, and the Supreme Court issued a
14 decision that didn't contain that language, so that
15 holding on the Court of Appeals has limited
16 applicability to this Court?

17 MS. LAHOOD: I'm not arguing it's a finding
18 as a matter of law, your Honor, or law of the case.
19 I'm arguing it's persuasive that the Court of Appeals
20 looked at exactly the same evidence we have here --
21 no more evidence on this issue has been submitted --
22 and found, in fact, that the boycott policy did not
23 bind the Board.

24 THE COURT: But the Supreme Court held that
25 the trial court was considering an unconstitutional

1 standard.

2 MS. LAHOOD: You're right, your Honor, but
3 the appellate court employed a summary judgment
4 standard to uphold the constitutionality of the
5 Anti-SLAPP statute and the Court of Appeals found
6 under a summary judgment standard that defendants
7 correctly, that the motion -- that the case was
8 dismissed under that standard. There were no
9 disputed materials of fact, material issues of fact,
10 and the defendants were entitled to win as matter of
11 law, and nothing in the Supreme Court's decision
12 changed that. They struck down the Anti-SLAPP
13 statute. They did not discuss the analysis or
14 disturb the analysis of the Court of Appeals on that
15 issue.

16 THE COURT: But that is not binding on this
17 Court.

18 MS. LAHOOD: I'm not arguing it's binding;
19 I'm arguing it's persuasive. So, you know, there's
20 again -- well, should I -- do you want me to continue
21 on ultra vires, or can I move on to fiduciary duty?

22 THE COURT: That's your choice.

23 MS. LAHOOD: Let me just see if there is
24 anything else I have on that. So for fiduciary
25 duty -- so, again, just to close out on ultra vires,

1 there are other cases, too. I mean there is no case,
2 actually, that plaintiffs cite on ultra vires that
3 supports their argument.

4 The other case they are citing is *Twisp*, and in
5 the *Twisp* the thing happened. A transaction was made
6 by a resolution of the meeting with only three board
7 members when the Articles of Incorporation required
8 that there be seven members on the board, and the
9 courts did not strike the act down as ultra vires,
10 because the corporation was not prohibited from
11 passing such a resolution. It didn't matter even if
12 they even violated the bylaws. It was that the
13 corporation had the power to pass that resolution.
14 So I think the ultra vires issue is clear, regardless
15 of the boycott policy.

16 For the fiduciary duty issues, the Business
17 Judgment Rule applies. The Business Judgment Rule
18 immunizes directors where the decision to undertake
19 the transactions within the power of the corporation
20 and the authority of the management and there is a
21 reasonable basis to indicate that the transaction was
22 made in good faith.

23 So, as I have argued, the boycott was within the
24 Co-op's power and the Board's authority, and good
25 faith is about motivation. A breach requires an

1 intent to do harm, a decision so unreasonable there's
2 no other way to explain it. There is not one shred
3 of evidence here that defendants acted in bad faith.
4 So there's no justification to veer from, again, what
5 was persuasive authority in the Court of Appeals'
6 decision finding the defendants benefit from the
7 Business Judgment Rule.

8 But even without the Business Judgment Rule,
9 there's no breach here. There is no breach of
10 loyalty or due care. A breach of loyalty requires a
11 majority of directors materially or financially
12 interested in the transaction or an overriding
13 personal interest divergent from shareholder
14 interest.

15 Plaintiffs essentially concede that the Board had
16 no financial interest at stake but claim a sort of
17 nebulous non-financial personal interest, although
18 they provide no legal authority for what that might
19 be. Plaintiffs so-called evidence on this issue is
20 that Rochelle Gause, as a member of the Co-op before
21 she was even a board member, worked with other Co-op
22 members to encourage the Co-op to honor the boycott
23 of Israel. So that's not evidence of a loyalty
24 issue.

25 Even if some board members were already in favor

1 of boycotting Israel, which plaintiffs present no
2 evidence of, that's also not a breach of loyalty.
3 Just as if some members want to ban plastic bags or
4 not sell alcohol or meat or want to boycott Driscoll
5 Berries, people become volunteer non-profit board
6 members because they care about issues. That is in
7 no way a breach of loyalty under the law.

8 There is also no breach of due care. Courts have
9 refused to substitute their judgment for the judgment
10 of corporate directors absent evidence of fraud,
11 dishonesty, or incompetence, and that is even when
12 the duty of care is that of an ordinarily prudent
13 person. Plaintiffs provide no evidence that the
14 defendants acted unreasonable in any way. They acted
15 in the best interest of the Co-op honestly and
16 competently.

17 Plaintiffs' only evidence, so-called evidence, is
18 that a staff member and a board member thought the
19 process could have been better, and that's not the
20 standard of due care. If that were the standard of
21 due care, all non-profits and corporations, the work
22 of them, would come to a grinding halt. It is not an
23 issue about whether a process could have been better.
24 Moreover, the board member who said the process could
25 have been better also testified she believes it

1 was -- that they actually had a duty to make the
2 boycott decision.

3 Plaintiffs rely on *Riss* and *Shinn* in which courts
4 have found breaches of contract, as well as
5 unreasonable action. So neither case dealt with
6 corporations, first of all. The Courts didn't find
7 the Business Judgment Rule applied, and they said it
8 didn't matter if it did. But, most importantly, they
9 found a breach of contract to find a fiduciary duty
10 violation.

11 Here, plaintiffs don't allege a violation of a
12 specific provision of the bylaws. They instead argue
13 that the bylaws don't explicitly permit the Board to
14 adopt policy before changing policy, which they
15 acknowledge they could have done. That is not a
16 violation. That is the plenary power of the Board.

17 We have talked about the boycott policy, and for
18 the same reasons I have stated before, the Board did
19 not violate the boycott policy. The boycott policy
20 governed the staff.

21 So defendants are entitled to summary judgment on
22 plaintiff's fiduciary duty claims, as well, but also
23 fiduciary claims require not just a breach of duty
24 but a showing of injury and a proximate cause for
25 that injury, and plaintiffs have said they will save

1 their injury -- a showing of injury for trial,
2 because, frankly, they have no evidence of injury.

3 But it doesn't just impact damages, it impacts
4 liability both on fiduciary duty and also on standing
5 to bring derivative claims. If they have no injury,
6 they have no standing. If the Co-op has no injury,
7 they have no standing to bring a claim.

8 So plaintiffs so-called evidence of injury to the
9 Co-op is that the plaintiffs, Kent and Linda Davis,
10 stopped shopping there. Well, we have submitted
11 evidence that Kent wasn't even a member until after
12 the boycott, and we have also submitted evidence
13 produced by plaintiffs that Linda says she hopes
14 Co-op sales drop because of it, making her interests
15 seem divergent from the Co-op's interests in a
16 standing argument.

17 Plaintiffs the only other evidence is one
18 membership cancellation, and, frankly, if you compare
19 that -- so now we have Kent Davis joining and one
20 other person cancelling. But even if many people
21 cancel, they do not dispute that membership rates
22 went up after the boycott and so did sales, and they
23 have not disputed that evidence at all.

24 Moreover, evidence can't be based on speculation
25 and conjecture. This is a motion for summary

1 judgment. Plaintiffs can no longer throw around
2 assertions claiming them to be fact unsupported by
3 evidence.

4 They also raise the issue of expansion. There is
5 no credible evidence that expansion was halted due to
6 any other reason than financial risk. It was
7 certainly not because of the boycott, and then they
8 also talk about vague assertions of a divided
9 community.

10 The Co-op's boycott didn't harm the Co-op
11 community. It might have brought to the surface
12 political disagreement, but that is simply not a
13 cognizable injury. That is the freedom that makes
14 our democracy work. What has hurt, this lawsuit has
15 hurt the community. It is that they have threatened
16 and subjected their fellow community members to
17 litigation and, through that, harassing and
18 intimidating, silencing litigation, and that is
19 harmful not just to the defendants but to the
20 community, to free speech, and, frankly, to respect
21 to this judicial process.

22 We, also, another part of standing, which we
23 didn't raise, your Honor, in our motion for summary
24 judgment, is fair and adequate representation, but
25 last week in our reply we submitted evidence that I

1 mentioned, a recently-produced document by plaintiffs
2 which celebrated the lawsuit's success of
3 discouraging other co-ops from boycotting Israeli
4 goods.

5 So if it would please the Court, we could file
6 supplemental briefing on this issue. There is a host
7 of evidence to support that they do not fairly and
8 adequate represent the Co-op. We have not even
9 finished going through the 13,000 documents that
10 plaintiffs have produced simultaneous to this
11 briefing, even though we requested the documents
12 repeatedly since June of 2016. So if it's necessary,
13 we can brief that separately.

14 Finally, regarding declaratory and injunctive
15 relief and damage, there is no violation of law or
16 duty to grant relief. No current defendant is on the
17 Board --

18 THE COURT: Ms. LaHood, my apologies for the
19 interruption. It's always curious to me when
20 attorneys say, if necessary, I can give the Court
21 this or I can brief that. There's no request before
22 the Court to continue this hearing or to request
23 permission for the Court to consider something else
24 as part of that. So I'm not taking any action with
25 regard to that invitation.

1 MS. LAHOOD: Thank you, your Honor. And we,
2 you know, we kept -- we did not oppose consolidating
3 these motions, because this case has been going on
4 for eight years, and we want it to end. So we are
5 not asking for supplemental briefing on that issue,
6 although, again, we also don't want defendants to be
7 prejudiced by the fact that 13,000 documents came in
8 from plaintiffs during summary judgment briefing, and
9 even since Monday there are more documents that are
10 relevant to this issue. But we believe that the case
11 should be dismissed, you know, despite this standing
12 issue for the other reasons I have said.

13 So, as I was saying, no defendant is currently on
14 the Board. So the issue is moot as to declaratory
15 and injunctive relief, and there is no injury to be
16 compensated for damages. So we believe there are no
17 disputed material facts here and the defendants are
18 entitled to summary judgment as a matter of law.

19 THE COURT: Thank you.

20 MR. SULKIN: Thank you, your Honor. The
21 Supreme Court has addressed all of these issues. I
22 want to just kind of lay out analytically what has
23 happened and why we are here without going through
24 all the court rulings.

25 Here is what happened. The Board passed a

1 policy, the boycott policy, and this is it. The real
2 question before the Court from the very beginning:
3 Is the Board bound by the policy, yes or no? If the
4 answer is yes, we win. If the answer is no, they
5 win.

6 And they came up with a bunch of arguments as to
7 why the answer is no. Let me just lay them out for
8 you: One, ultra vires, that they had the power; two,
9 the Business Judgment Rule; three, improper motives.
10 Those were all their reasons, and the trial court
11 agreed with them. The Court of Appeals agreed with
12 them. The Supreme Court did not.

13 The Supreme Court reversed the decision of the
14 Court of Appeals and addressed these issues. These
15 issues were all briefed. Ultra vires was briefed. I
16 can hand you the briefs. I have copies of all of
17 them.

18 THE COURT: I don't want to see the briefs.

19 MR. SULKIN: That's fine.

20 THE COURT: But I would like to hear --

21 MR. SULKIN: Sure --

22 THE COURT: -- where in the Supreme Court's
23 holding you believe that the Supreme Court addressed
24 the merits of that issue.

25 MR. SULKIN: Here is where it goes, and let

1 me take it directly, your Honor. So the question
2 becomes whether the two-prong test -- we have a
3 boycott policy -- I'm going to answer your question.
4 Let me just set it up. Boycott policy is a two-prong
5 test: Is there a nation boycott, and, two, was there
6 unanimous consent? Those are the two prongs that
7 have to be met under the boycott policy.

8 The argument by the Co-op has been all along it's
9 immaterial those two things. It's immaterial because
10 the Board can do what it wants. It's immaterial
11 because of the Business Judgment Rule. We don't need
12 to address that, and, in fact, counsel is right. In
13 the trial court, Judge McPhee granted summary
14 judgment on those issues saying those were not
15 material facts. The Supreme Court found to the
16 opposite.

17 THE COURT: In a footnote? That's what
18 you're citing to?

19 MR. SULKIN: The Supreme Court says in a
20 footnote. Here is -- in the -- let's go here. I'm
21 at page 10. I have copies, if you want, if I can
22 hand up to you.

23 THE COURT: I don't need a copy.

24 MR. SULKIN: What? I'm sorry. I didn't
25 hear your answer, your Honor.

1 THE COURT: I don't need a copy.

2 MR. SULKIN: Page 10, Supreme Court says,
3 "By contrast, summary judgment is proper only if the
4 moving party shows there is no genuine issue as to
5 any material fact, the moving party is entitled to
6 judgment as matter of law." In other words, it's
7 taking on the question.

8 It goes on to say, "The trial court evaluated
9 disputed evidence, including supporting and opposing
10 affidavits. In this case, the trial judge did that.
11 Thus, the plain language required the trial judge to
12 make factual determinations." Then it goes on in a
13 footnote and describes the determinations.

14 "One disputed material fact in this case is
15 whether the boycott of Israel companies is a
16 nationally-recognized boycott."

17 THE COURT: And you believe that is a
18 holding of the Supreme Court?

19 MR. SULKIN: Without question. What's a
20 holding of the Supreme Court is a reversal of the
21 Court of Appeals, a reversal, and, in fact, to be
22 clear, your Honor, in their briefs to the Supreme
23 Court, they ask -- I'm now quoting from their
24 supplemental brief to the Supreme Court.

25 "The Court should affirm dismissal. It need not

1 reach the constitutional issues," meaning the
2 Anti-SLAPP statute, you can just go on summary
3 judgment, "but if it does, it should uphold RCW
4 4.24.525 so future SLAPPs may be dismissed promptly."

5 In other words, the Supreme Court didn't say, we
6 are striking the SLAPP statute but affirming on other
7 grounds. The Supreme Court reversed. The Supreme
8 Court reversed the summary judgment hearing decision,
9 and the Supreme Court found there's a disputed fact.
10 In fact, the Supreme Court went on to address the
11 ultra vires issue. It recognized it.

12 It said, "On this disputed material fact," on
13 this disputed material fact, "when the Superior Court
14 resolved the Anti-SLAPP motion, it weighed the
15 evidence and found the defendants' evidence clearly
16 shows that the Israel boycott and divestment movement
17 is a nation movement. The Court of Appeals reasoned
18 below that this is an immaterial fact on the theory
19 that the cooperative's board is not bound by its
20 adopted policy, because it's inherent authority to
21 manage the affairs of the corporation includes the
22 authority to disregard its adopted policies."

23 Said differently, your Honor, the canary in the
24 mine on all of this is are -- the two-prong test,
25 that two-prong test, are those material facts?

1 THE COURT: I would like to get to that
2 two-prong test.

3 MR. SULKIN: Sure.

4 THE COURT: The second prong with regard to
5 staff consensus?

6 MR. SULKIN: Yes.

7 THE COURT: Would you agree that the boycott
8 policy indicates that the staff, it indicates, "The
9 staff, who will decide by consensus whether or not to
10 honor a boycott"? So doesn't that mean that, by the
11 policy, the staff was required to reach consensus one
12 way or another, and that the policy doesn't address
13 the consequence of the staff not reaching consensus?
14 In other words, the policy doesn't say, in order to
15 issue a boycott, the staff has to reach consensus to
16 support a boycott. It says staff has to reach
17 consensus whether to boycott or not to boycott, and
18 the policy doesn't address the circumstance we have
19 here, which is staff didn't reach consensus one way
20 or the other.

21 MR. SULKIN: I'm going to answer your
22 question directly. It's a fair question and a good
23 question. The Supreme Court in its opinion page 6
24 answered that question. It said, "The Olympia Food
25 Co-op is a non-profit corporation grocery store. It

1 emphasizes an egalitarian philosophy that requires
2 consensus in decision making." The sentence goes on.

3 The last sentence of that paragraph says, "The
4 Board adopted this boycott without staff consensus on
5 whether it should be adopted." In other words, what
6 the Supreme Court is saying is that, in order to
7 adopt the policy, you need staff consensus. They
8 didn't have it. Now, if it's your interpretation
9 that it has to be one way or the other, in other
10 words, it has to be full consensus to adopt or full
11 consensus to not adopt --

12 THE COURT: I'm asking you.

13 MR. SULKIN: You're asking me. The answer
14 is -- the answer is what the Supreme Court says:
15 There has to be full consensus to adopt the policy.
16 There wasn't full consensus to adopt the policy;
17 therefore, it fails.

18 THE COURT: But look at the policy. I'm
19 asking about the language of the policy. How do you
20 get to that conclusion by looking at the language of
21 the policy?

22 MR. SULKIN: Because every witness who
23 testified on this has said you needed staff consent,
24 and they said, we didn't have it.

25 THE COURT: But I agree that that's what the

1 Supreme Court said, and I think I can say with some
2 confidence that both sides agree that consensus was
3 not reached.

4 MR. SULKIN: Fair enough.

5 THE COURT: So we know that.

6 MR. SULKIN: Yes.

7 THE COURT: So consensus was not reached to
8 issue a boycott or to not issue a boycott. That's my
9 question.

10 MR. SULKIN: Fair enough. If there is a
11 decision -- one, you need a national boycott. The
12 Supreme Court has said there is a disputed fact on
13 that at a minimum. That's a disputed fact.

14 THE COURT: Different prong.

15 MR. SULKIN: Different prong. So to the
16 extent the boycott policy applies and you get to the
17 Supreme Court analysis, this case gets kicked to
18 trial to determine whether there was a nation policy
19 to boycott Israel.

20 But the second prong has to be met, and that is,
21 in order to have a boycott, the Supreme Court says
22 you need full consensus; you can't act without full
23 consensus. They didn't act. The staff said, no, we
24 don't want a boycott.

25 THE COURT: No, they didn't.

1 MR. SULKIN: By blocking they did.

2 THE COURT: Would you agree, though, that
3 all of the parties in the case agree and the Supreme
4 Court agrees that no consensus was ever reached?

5 MR. SULKIN: You have to read -- yes, we
6 agree -- I mean I'm not arguing with you on the
7 facts, your Honor. I think everyone agrees on the
8 facts. If we read one of the sentences of the
9 boycott policy, I think it illuminates my point. I'm
10 at the bottom here.

11 It says, "The department manager will host a sign
12 informing customers of the staff's decision and
13 reasoning regarding the boycott." Here is what it
14 says, "If the staff decides to honor a boycott, the
15 MC," that is the head, "will notify the boycotted
16 company or body of our decision." In other words,
17 what it is a saying is the staff has to decide a
18 boycott. It didn't here. It just didn't.

19 And are there scenarios that are gray? I agree
20 with you, your Honor, this could have been worded
21 better, no question. But in order to have a boycott,
22 the staff has to have full consensus. It didn't
23 happen here. The Supreme Court recognizes it.

24 THE COURT: Couldn't you also read that to
25 say, in order to not have a boycott, the staff has to

1 reach a consensus to not have a boycott?

2 MR. SULKIN: I don't think that works, your
3 Honor, because if you think about it, that is the
4 default position. What do you then do? I mean in
5 the real -- because we live in the real world. We
6 are lawyers. We play with words, but in the real
7 world, what do you do?

8 You are sitting there right in the gray, and
9 you're right, okay? So do you say, well, if we don't
10 have staff consensus on whether to boycott, we do
11 boycott, and if we don't, we don't? It just doesn't
12 make any sense, and I think what the Court has to do
13 is recognize that human beings wrote this, and you
14 have to interpret it in a way that makes sense.

15 I mean at the end of the day, I'm not arguing
16 with you over the ambiguity here. I agree with you
17 in that sense. But in the real world with how
18 everyone has read it, including -- I'm just reading
19 Ms. Sokoloff's testimony, who was on the Board at the
20 time, and I want to read a couple other just
21 exhibits.

22 Your Honor, this is Ms. Sokoloff's testimony.
23 Question: "You understood that a previous Board
24 instituted a boycott policy?"

25 Answer: "Presumably."

1 Question: "Well, not just presumably. You
2 knew."

3 Answer: "Yeah, where ever it came from, I don't
4 actually know. Someone made a boycott policy, and it
5 was part of the policy of the Co-op."

6 "And that meant your Board, unless you amended
7 the policy, was bound by the boycott policy, bound to
8 follow it? In other words, you can't just ignore
9 it?"

10 Answer: "Or we could change it."

11 "Right, but you didn't change it; can we agree on
12 that?"

13 Answer: "Correct."

14 Question: "So you're bound by the boycott
15 policy?"

16 (Nodding head.)

17 Question: "Correct?"

18 Answer: "Okay."

19 "Am I right?"

20 "Yes."

21 This is Harry Levine after the vote. This is
22 Exhibit N to our briefing. They are looking what
23 they should do with the boycott policy, and they are
24 analyzing it.

25 Harry, "This is Harry, and you're free to contact

1 me." Here is what he writes, "Question: What I
2 would change," referring to the boycott policy, what
3 he would change.

4 "I think I would change the decision-making
5 process. I think the Board should make the final
6 decision." In other words, he is admitting that the
7 staff makes the decision, not the Board. He
8 understood that, and I'm going to go tie this back to
9 some of the issues of the case.

10 This is Exhibit M. Grace Cox is soliciting views
11 on the boycott policy. Again, this is dated
12 March 15th of '11 after the vote. Grace, "I am the
13 human being who drafted the first version of the
14 policy. I would change a few things at this point.
15 I would address the final decision making with the
16 Board and not the staff, in other words, recognizing
17 it was the staff that had the ability to boycott not
18 the Board." They couldn't go around the problem,
19 which is what the Supreme Court said. That's why the
20 prongs become material, and so all of these issues
21 have been decided previously by you in throwing out
22 the previous motion and the Supreme Court.

23 And so the question then becomes the one I
24 raised: Is the Board bound by the policy? The
25 answer is yes, because the Supreme Court has said so.

1 The answer is yes, because they have said so. And
2 then we get to the question you raised, your Honor,
3 which is, okay, were the tests met, and there was a
4 two-prong test. As to the first test, nation
5 boycott, we believe there clearly there was no nation
6 boycott of Israel at the time. In fact, the
7 contemporaneous documents said, and, in fact,
8 Levine's declaration at the time said we followed an
9 international movement. We think that's enough. The
10 Supreme Court disagrees with me. I will admit it.
11 They said those are disputed facts. Okay. So we
12 can't get summary judgment on that prong, which leads
13 us to the second prong.

14 If the second prong isn't met, and there is no
15 argument on it, we win. If it was met, then we go to
16 trial, because we have to decide whether the first
17 prong was met. As to the second prong, everyone
18 concedes there was no unanimity. There was no staff
19 consensus as to the second prong, and the only issue,
20 your Honor, is the one you articulated, the "whether
21 or not."

22 And what you then need to do, and I say this
23 respectfully, your Honor, is to decide what the
24 parties meant by that, and everyone has testified
25 they agree with me on it, as has the Supreme Court,

1 and that's how they acted. It doesn't make sense to
2 interpret it the other way.

3 Your Honor, we have to go back to fundamentals
4 here, and I want to be clear about this. There is a
5 right way and a wrong way to do things, and you can't
6 make an argument that the end justifies the means,
7 what everyone's politics are. It's dangerous when
8 that happens.

9 This Co-op was built on an egalitarian system to
10 protect the lone voice, the lone voice, the few
11 voices. That is the constitution of this group, and
12 I think it's great, and the courts exist in part to
13 protect those voices, the people that actually stand
14 up and say, you know, something, they didn't do it
15 right, and that's what my people have done. It
16 hasn't been easy. It is never easy. You're
17 ostracized. You walk into court, and the majority is
18 protesting against you, which is kind of odd. Their
19 right, absolute right to protest, but they had a
20 right to follow the rules. What the Board did is it
21 ran roughshod over the constitution of their Co-op
22 and the bylaws. They just ran roughshod over it.

23 THE COURT: Mr. Sulkin, assuming that your
24 points are correct, what evidence in the record shows
25 that the decision that you claim was improper caused

1 injury to the Co-op?

2 MR. SULKIN: They admit, your Honor. They
3 admit it. First, let's talk about injury versus
4 extensive injury. Okay? Let's pause there.

5 THE COURT: I'm hoping to hear an exhibit
6 number or a page number.

7 MR. SULKIN: I will get it to you, your
8 Honor. I pulled from my brief. I'm at my reply
9 brief, and I can go to my original brief. I will
10 pull it and get you some exhibit numbers there,
11 but -- and I may need to go back into my notes and
12 pull it.

13 They were quoted when they passed -- let me take
14 one step back. Let's start with the law, and then I
15 will answer your question. What I heard from counsel
16 was there was not a lot of harm, in other words, some
17 people stopped shopping there, including my clients.
18 That's enough, period. Even if it's \$5, that's
19 enough.

20 THE COURT: How is that enough if 200 more
21 people started shopping there?

22 MR. SULKIN: It doesn't matter, your Honor.
23 My people would have been shopping, too, right? They
24 have to show -- of course, it's going to grow. If my
25 people stop shopping there, and there have been many

1 others that have stopped shopping there, that's
2 enough. That's harm, number one.

3 THE COURT: Even if 500 more people shop
4 there?

5 MR. SULKIN: That doesn't mean they wouldn't
6 have shopped there anyways, your Honor. Let's be
7 clear. It wasn't like they said -- and I will get --
8 they were quoted in a magazine, the board member, and
9 I have got to find you the exhibit. I don't have it
10 on the tip of my tongue.

11 At the time the vote was made, they said, we
12 understand there will be financial impact on this.

13 THE COURT: I understand that, and there is
14 some documentation in the record indicating that the
15 Board anticipated there may be some financial
16 repercussions, but what if they are wrong? Doesn't
17 the law require an injury?

18 MR. SULKIN: Yes. Well, there are two types
19 of injuries, your Honor. Let me start.

20 THE COURT: Well, there's more than that,
21 but if you want to say there's two.

22 MR. SULKIN: Fair enough. First, they have
23 to show, even on their base argument, that those 500
24 people joined because they instituted this policy.
25 They haven't shown that. They may have had 1,000

1 people join without this policy, right? I mean they
2 can't just -- companies grow. If Amazon does
3 something bad, that doesn't mean because they are
4 growing there is no injury.

5 My people aren't shopping there anymore. That's
6 harmful. The fact that politically they are being
7 ostracized as members of the group, that's harm.
8 Those are all harms. The Supreme Court rejected all
9 of this. Even the Court of Appeals rejected. Even
10 McPhee rejected that argument. You don't need a lot
11 of harm. Anything will do. The extent of harm is
12 not the question.

13 THE COURT: Is there some authority for the
14 statement that anything will do?

15 MR. SULKIN: Yes. Pulling right quickly
16 from our brief is *Arden v. Forsberg & Umlauf*, 193
17 Wn. App. 731, and I can go back and perhaps in my
18 brief pull other cases for you, but there is one
19 right there.

20 THE COURT: And that case contains the
21 language, "anything will do"?

22 MR. SULKIN: That I can't say, your Honor.
23 I have been doing this for a long time, and it's my
24 understanding of the law, and the brief cites it.

25 THE COURT: So have I.

1 MR. SULKIN: There is a distinction, on
2 summary judgment, there is a distinction between the
3 extent of harm, no harm and little harm, is my point.
4 I think we can agree on that. What I'm saying is
5 that their argument is there is little harm here.
6 That doesn't get them across the finish line, and no
7 court has said it up to today, period. Our people
8 withdrawing from the Co-op and not shopping is harm,
9 period.

10 THE COURT: I have a question about that.

11 MR. SULKIN: Sure, yeah.

12 THE COURT: There was citation in your
13 briefing to declarations by your clients and I
14 believe at least one other person indicating that, as
15 of 2010, they no longer shop there. So it's now
16 2018.

17 MR. SULKIN: Yep.

18 THE COURT: So since 2010, your clients, who
19 are bringing a derivative action on behalf of Co-op
20 members, have not shopped there for at least eight
21 years; is that accurate?

22 MR. SULKIN: I don't know. I don't know the
23 answer to that question, your Honor. I'm happy to
24 ask him, but for the sake of this argument, I will
25 say yes, but I don't know. I haven't checked with

1 him.

2 THE COURT: Isn't that important?

3 MR. SULKIN: No, you can be a member without
4 shopping there. You know, think about this for a
5 moment, your Honor, just think about this. They want
6 to be part of this community. They want to be part
7 of this community. If this was a case where, let's
8 take this scenario, if I may use an analogy, your
9 Honor, Board policy, staff decides who to give
10 charity to, 10 percent of the charitable gifts, as
11 long as it's -- it's staff consensus to give
12 charitable gifts as long as the charitable agency is
13 nationally recognized. Let's suppose those two
14 prongs.

15 The proposal is to give money to the KKK. Staff
16 says no, but the Board unanimously votes to give to
17 the KKK. Would anyone argue that the Board didn't
18 have power to do that? And the members say, we are
19 not shopping at this place until that is rectified.
20 Would the Court say no harm? I don't think so, your
21 Honor. That's not the test. And I appreciate your
22 pushing me, because I think you need to do that, but
23 I need to push back hard. That's not the test,
24 whether we shop there or not, as far as our ability
25 to bring this lawsuit.

1 We are bringing the lawsuit because we believe in
2 the Co-op. We are bringing the lawsuit because, as
3 minorities, we need to be protected, and when they
4 say things like, well, you could have done this and
5 you could have done -- no, we have a right to rely on
6 the rules. That's what the rules are to protect the
7 minority. Courts are to protect the minority.

8 They may have views, political views, that are
9 abhorrent or disagreed with by the rest of the group.
10 That's okay. But the rules protect them, your Honor,
11 and you can't say, you lose your rights because you
12 are in silent protest against what has been done to
13 you in your views. That's what is happening, and I
14 can't say is it any better, your Honor. I think the
15 question is fair, but I think, respectfully, it
16 doesn't address the issue.

17 That is the harm to them that they can't go back
18 to their people. They can't shop there. They want
19 to be there. They want to be part of this community.
20 In fact, two of my people left because it was just
21 too much for them. You know, the easiest thing would
22 be for my people to do is just to quit, and I think
23 it says a lot that they didn't. They didn't. They
24 are sticking it out. They are here, and Mr. Davis is
25 sitting here at the table knowing that all of these

1 people are against him. It's not a fun place to be,
2 but he has his views on this, and so he has been
3 harmed, and they have all been harmed.

4 And this idea, I want to -- I don't want to short
5 circuit the subject matter, your Honor. If there are
6 other issues you want to question me on, I'm happy
7 to. I want to address a few of the others that were
8 dealt with by my colleague here.

9 She argues the Business Judgment Rule. Let me
10 start here. Fiduciary duty, breach of fiduciary
11 duty, they knew, the Board knew they weren't
12 following the policy when they did this. We know
13 this, because Sokoloff testified to it. You heard
14 Harry Levine's email from me where he said, I changed
15 the policy so the Board decides, not the staff. You
16 heard the statement to Grace, the person who wrote
17 the policy, said the same thing. They knew they were
18 violating the policy. That's a breach of fiduciary
19 duty, knowingly doing it.

20 They put their own political views ahead of what
21 the procedures were, and what I find interesting
22 about this, your Honor, if you think about it, and
23 it's always puzzled me, you have a Board that
24 unanimously voted to enact the boycott of Israel, yet
25 they couldn't unanimously agree to amend the policy.

1 What does that tell you? What that tells is how
2 embedded the idea of consensus is at the Co-op, that
3 the Board was unwilling and could not agree to amend
4 the policy -- they had the votes. They like it so
5 much -- to amend the boycott policy to say it's a
6 Board decision. They couldn't to get it done. It's
7 unbelievable. I mean I always thought that's the one
8 thing they would do. They can't, because it's the
9 whole basis of this organization is staff consensus;
10 every member's voice means something. That's what
11 the Board took away.

12 My colleague made two points about who the
13 defendants are in this case, and I would like to
14 address that --

15 THE COURT: Please.

16 MR. SULKIN: -- if you would. There are two
17 separate issues here, injunction and declaratory
18 relief, if I can address it. We can amend the
19 complaint and add these others, and I'm not using it
20 as an excuse but by way of explanation. You can
21 declare, and we are asking you to declare, based on
22 the law of the case, which the Supreme Court has
23 already found -- again, I think the Supreme Court has
24 already decided the issue -- you can declare that the
25 decision by the Board at the time of these defendants

1 was in violation of the boycott policy. That would
2 be a declaratory decision. We are asking you to do
3 that. Okay?

4 THE COURT: Isn't that moot?

5 MR. SULKIN: No, because the decision is
6 still there. We just want to say the decision,
7 itself, just the decision -- I will get to the
8 injunction part in a minute -- the decision, the
9 decision they made was wrong.

10 THE COURT: Right. But my question -- I
11 understand what you're saying. You're asking this
12 Court to declare invalid, essentially, the decision
13 of the defendants; isn't that correct?

14 MR. SULKIN: Well, it's a two-step process,
15 and, again, your Honor, you're right on, okay? There
16 are two reasons to do it this way. The first is it
17 then takes an issue away from trial on the damages
18 questions, if this goes to trial, but, secondly, it
19 then leads to the second.

20 If you say the decision to boycott was wrong and
21 it is still going on, then the question is: Can you
22 issue an injunction to order the Co-op to do -- to
23 take action consistent with the declaration you have
24 just made, okay? The case law in Washington is you
25 can do that. In other words, you can say boycott

1 policy wrong, Board, fix it, and the case is *LaHue v.*
2 *Keystone*, which we cited in our brief. But even if
3 you don't feel comfortable doing that, let's assume
4 you don't feel comfortable --

5 THE COURT: It's not my comfort level. I
6 want to make sure that --

7 MR. SULKIN: You disagree with me.

8 THE COURT: I'm not saying I do or I don't.
9 I'm asking you for authority that this Court could
10 order a current Board that is not a party to this
11 case to essentially reverse their decision, because
12 the reason I say that is a Board takes action, not
13 unlike what this Court might do. Anybody sitting in
14 this can chair makes a decision. If I left the bench
15 tomorrow, that decision is still the Court's
16 decision. There is an entity there. And the same
17 with the Board. So the former director's decision,
18 assuming that decision is still standing, becomes the
19 policy or the decision of the new directors. So
20 that's what I'm asking.

21 MR. SULKIN: Yeah, and I have -- I didn't
22 take it that way, and I apologize. There are two
23 ways to attack the issue, your Honor. One is to say
24 that the Co-op, we represent the Co-op derivatively,
25 and the case law basically says, in that situation,

1 the Co-op can be ordered to be enjoined.

2 But I just want to be clear, and I haven't, and
3 it's my fault. There are two separate concepts, your
4 Honor. One is the concept of declaratory judgment,
5 and the other is the injunction, that is enforcing
6 it, because there are two separate groups, and I want
7 to address it separately, if I may.

8 What I'm saying to you is, one, you can issue a
9 declaration, declaratory judgment, that the original
10 Board was wrong in its analysis. They were wrong,
11 okay? Then the question becomes, can you issue an
12 injunction against this Board who are not defendants
13 in the case? And there are two ways that I
14 understand under the law that can happen.

15 One is the case I cited allows you to do that
16 because it has been adopted by this Board, and we
17 represent the Board, and what the Court says, look,
18 every time a board member changes, we would have to
19 start amending our complaint.

20 The other way to do it is to get a declaration
21 from the Court to say the decision was wrong. We
22 will amend our complaint, add these people, get an
23 injunction. Either way works in a sense for us, but
24 what we didn't want to do is continually be amending
25 the complaint as each and every board member came on

1 and off the Board. So I hope that answers your
2 questions, your Honor. I'm happy to respond further,
3 if there's more.

4 THE COURT: I think we are going to run out
5 of time, if we take much more time. So just a minute
6 and then conclude, please.

7 MR. SULKIN: Your Honor, at the end of the
8 day, I'm going to end where I started. The Supreme
9 Court has stated the law of this case that binds this
10 Court. It has said to you that the two-prong test is
11 material. It says it in no uncertain terms. They
12 are only material if the Board is bound by the
13 policy. The Board can't avoid the policy it's bound
14 by.

15 And so the question becomes did that Board, the
16 defendants, follow the policy? The answer is no,
17 because there was no consensus. There just was not
18 staff consensus, and everyone agrees. For that
19 reason, summary judgment should be entered on at
20 least as to that issue, that is, the Board, itself,
21 at the time did not follow the board policy, boycott
22 policy. Thank you.

23 THE COURT: Thank you. Ms. LaHood?

24 MS. LAHOOD: Thank you, your Honor. First
25 of all, Mr. Sulkin referred twice to me as

1 representing the Co-op. I do not represent the
2 Co-op. We represent the 15 individual board members
3 who were sued. It is plaintiffs who purport to
4 represent the Co-op.

5 As to the footnote, I think we have pretty much
6 exhausted it. I would just like to point to footnote
7 ten of the Supreme Court's opinion in which the
8 Supreme Court said that basically that their
9 decision, their decision has nothing to do with the
10 particular claims.

11 It says, "Our decision does not turn on the
12 character of the particular claims here as there is
13 no question the statute broadly applies to all
14 claims." So the Supreme Court clearly did not make a
15 holding as to these issues currently before the
16 Court.

17 The issue of the boycott policy, I want to make
18 clear that the organizational conflict that the Board
19 could have been resolving, assuming that the boycott
20 policy does apply, that there is, contrary to what
21 Mr. Sulkin said, everyone did not testify that they
22 were bound by the boycott policy, and I will get to
23 that in a minute. There was membership who was
24 demanding that the boycott be honored. Staff had not
25 consented, and as you rightly point out, either to

1 honor it or not to honor it. So there was a conflict
2 that it was the Board's duty to resolve.

3 THE COURT: Is that covered in the policy
4 that, if there is no consensus, the Board resolves
5 that conflict?

6 MS. LAHOOD: It does not say that
7 explicitly, but it does say that or at least alludes
8 to that in the board meeting minutes that accompanied
9 the change in the boycott policy. There is also
10 other evidence of that. This was -- and I don't know
11 if you want to -- it was attached as an exhibit to
12 Mr. Levine's deposition transcript by the plaintiffs,
13 which was when feedback was received from all staff,
14 and it was from Grace Cox, defendant, who also
15 submitted an affidavit that she was the person who
16 drafted the policy, and consistent with what the
17 Board meeting minutes say, the reason the staff
18 consensus language, as I said before, was put in was
19 so it wasn't just up to a few staff members and that
20 the Board would retain authority.

21 Here, just when she was receiving feedback after
22 the boycott policy, she said staff does have consent
23 on boycotts, but members can take anything to the
24 Board, and they can make any decision they need to.
25 It's their duty to make those decisions, and they are

1 not restricted by the language of the boycott policy.

2 As to "nationally-recognized," your Honor, I
3 mean, you know, the plaintiffs's argument seems to
4 be, first of all, again, in the May 2010 board
5 meeting minutes, it said, "A nationally and
6 internationally-recognized boycott proposal was
7 presented to the Board." So it's false that there
8 was not evidence of a nationally-recognized boycott.

9 But to say at times when people say,
10 "internationally recognized," that that precludes it
11 from being nationally recognized, that makes no
12 sense. It's like saying soccer is an
13 internationally-recognized sport. That does not mean
14 it is not nationally recognized.

15 In fact, let me just grab -- but you know, again,
16 all the of this is somewhat besides the point for us,
17 because it's not -- we do not think the boycott
18 policy actually restricted the Board's authority to
19 act. I'm sorry I can't find my notes on that, but
20 let me continue to go through the rest of this.

21 I'm surprised that plaintiffs keep raising the
22 boycott subcommittee that was empanelled by the Board
23 after the boycott decision. First of all, there's
24 evidence in the record that it was something that the
25 staff had proposed prior to the boycott decision,

1 because there was so much confusion about how the
2 boycott policy worked and because there were already
3 things referenced in the boycott policy that no
4 longer even existed.

5 So after the boycott decision, the Board
6 appointed a boycott subcommittee to look at various
7 issues. It was not to retroactively legitimize some
8 conduct. In fact, they appointed an anti-boycott
9 person on that committee. The allegation of bad
10 faith is insulting and false.

11 Another issue raised, I think Mr. Sulkin has
12 said, everyone has testified, every witness to
13 testify said they were bound by the boycott policy.
14 That is false. He doesn't say that Ms. Sokoloff went
15 on to testify that she didn't think she was bound by
16 the boycott policy. In fact, she did think it was
17 her duty to make the boycott decision, as I said.

18 He references Mr. Levine's testimony about the
19 boycott -- about thinking that we should change, you
20 know, change the policy. As part of the boycott
21 subcommittee, they were taking about language to
22 change. Because of all of the issue that came out
23 after the boycott, of course maybe it should be
24 clarified to make clear that the Board retains final
25 authority and maybe it shouldn't be by staff

1 consensus at all. That's what they were talking
2 about. In their briefs they said this happened
3 before the boycott decision. It did not. It was
4 after as part of the boycott subcommittee's review.

5 The injury, you know, I think enough has been
6 said. There is no cite to any evidence of injury.
7 The piece that Mr. Sulkin couldn't pull up was an
8 article where five days after the boycott one of the
9 defendants said, you know, even if, basically that
10 the moral imperative to boycott would supercede any
11 potential financial impact. There was no financial
12 impact. The Board did not think there would be
13 financial impact.

14 THE COURT: Does impact have to be financial
15 in order show injury?

16 MS. LAHOOD: There has been no showing
17 of -- I think the only thing that they have said that
18 is not financial is the harm to plaintiffs. First of
19 all, it's the harm to the Co-op that is at issue
20 here, not the harm to the plaintiffs. Second of all,
21 from what it sounded like to me, the harm was not
22 brought on by the boycott, it was brought on by the
23 lawsuit. Third of all, he mentions that was the
24 reason the Trinins are no longer part of this
25 lawsuit. There is no evidence that's why they pulled

1 out of this lawsuit because it was too hard on them.
2 It seems just as likely, if not more likely, that
3 they did not want be to part of this lawsuit anymore.
4 So even if there is some injury that is not
5 financial, none has been shown to the Co-op.

6 THE COURT: If you could conclude, please.

7 MS. LAHOOD: In conclusion, the plaintiffs
8 just said, well, they could just amend and add other
9 people. They can't just amend. Civil Rule 15, they
10 have already amended once. It would take the
11 discretion of this Court to grant leave to amend, and
12 amendment would be futile. For all the reasons
13 stated, this case should be dismissed. Defendants
14 are entitled to summary judgment. There has been no
15 harm to the Co-op. There is no evidence of harm to
16 the Co-op. There is no evidence of bad faith in any
17 way here on behalf of defendants. So the case, they
18 are entitled to summary judgment.

19 THE COURT: Thank you.

20 MS. LAHOOD: Thank you, your Honor.

21 THE COURT: Mr. Sulkin, briefly, if you have
22 anything you want to point the Court's attention.

23 MR. SULKIN: I do, your Honor. First, the
24 citation to footnote ten was made by my colleague in
25 explaining footnote two. It has nothing to do with

1 footnote two, nothing.

2 There is no evidence for their position that the
3 Supreme Court has done anything other than find that
4 the Board was bound by the boycott policy, and the
5 only question, did they follow it? And they did not,
6 period.

7 Second, she did not say, because the rule is
8 clear, that you couldn't issue a declaratory judgment
9 against the present defendants, who are here and who
10 did not violate the policy.

11 Third, under Rule 15, we can amend. We don't
12 even have a trial date on this thing. Clearly, and,
13 in fact, if we couldn't, we would just file another
14 lawsuit against them to enforce the declaration.
15 It's always gamesmanship here, I mean technicalities
16 and the like. The core of this case is the core of
17 the case. The Supreme Court said so. It got rid of
18 every one of their defenses. Ultra vires was
19 addressed, thrown out; business judgment, thrown out,
20 every one of those things. The question is: Are
21 these prongs material? If the answer is yes, the
22 Board is bound. The Supreme Court said they are
23 material. The Board is bound by the policy. The
24 Supreme Court recognized it. Summary judgment should
25 issue for us, and a declaratory judgment should be

1 issued, your Honor. Appreciate it.

2 THE COURT: Thank you.

3 MS. LAHOOD: Thank you, your Honor.

4 THE COURT: The Court is going to take a
5 brief recess. I anticipate issuing a ruling today,
6 and I hope to do that within about 15 or 20 minutes.
7 I will be back on the bench. We are in recess.

8

9 (A recess was taken at 11:35 a.m.)

10

11 THE COURT: Please be seated. The Court is
12 prepared to issue a ruling at this time on the
13 motions before it. The motions before the Court are
14 the defendant's motion for summary judgment and the
15 plaintiff's motion for partial summary judgment. The
16 Court at this time grants the defendant's motion for
17 summary judgment and denies the plaintiff's motion
18 for partial summary judgment.

19

20 The defendants raised several issues: That the
21 boycott decision was not ultra vires; that the Board
22 did not breach a fiduciary duty; that the First
23 Amendment restricts tort liability here; that the
24 plaintiffs lacked standing; that the Court cannot
25 provide an injunctive remedy, because the defendants
are not current board members; that the plaintiffs

1 cannot maintain this suit, because the current Board
2 of Directors has rejected it; and that the plaintiffs
3 have failed to diligently prosecute this case.

4 The Court determines that as to many of these
5 arguments there are material issues of fact that
6 preclude the Court from ruling on them today.
7 Because of that, the Court is granting the motion for
8 on summary judgment only on specific bases.

9 The Court has determined that the plaintiffs lack
10 standing, because they fail to allege sufficiently
11 that the Co-op suffered any injury as a result of the
12 boycott. The defendants put into the record a
13 declaration indicating that there has been no
14 financial harm. The plaintiffs only point to
15 declarations in the record that were filed in 2010
16 that indicate that a few individuals, I believe
17 three, no longer shop there, but they do not in any
18 way contest the Levine declaration with regard to a
19 lack of injury. At summary judgment, the plaintiffs,
20 after the defendants moved for summary judgment, have
21 a burden to put evidence into the record with regard
22 to injury. They have not met that burden.

23 Additionally, the Court cannot provide an
24 injunctive remedy, because the defendants are not
25 current board members. This is true. The Court is

1 dealing with the current complaint. The Court does
2 not address this argument in the context of any
3 possible future amendment of the complaint.

4 With regard to the other arguments, the Court
5 finds that the Court either need not reach those
6 arguments or that there are factual issues that
7 preclude summary judgment.

8 With regard to the plaintiff's motion for partial
9 summary judgment, the plaintiffs argue that the
10 defendants breached their duty to the cooperative,
11 that the Court should declare the improper boycott
12 null and void, and the Court should permanently
13 enjoin the improper boycott.

14 This Court does not agree with the argument that
15 the Washington Supreme Court has addressed each of
16 the issues before this Court. With regard to the
17 plaintiff's first argument, the breach of the
18 director's duty requires harm or injury, and the
19 plaintiffs have not shown that.

20 Second, with regard to injunctive relief, the
21 defendants are not current board members, and the
22 Court finds that it cannot issue effective relief
23 even if the plaintiffs could prove their case.

24 Do the parties require clarification of the
25 Court's rulings today?

1 MR. SULKIN: No, your Honor.

2 MS. LAHOOD: No. Thank you, your Honor.

3 THE COURT: Thank you. The Court will sign
4 an order that is agreed as to form or it can be
5 presented at a future time. The Court has an ex
6 parte process for submitting an agreed order, or the
7 parties can note up a hearing at which time the Court
8 can approve an order, if the parties need to argue as
9 to the form of that order.

10 MR. SULKIN: I suggest we try and work
11 together to try to come to some agreement.

12 MS. LAHOOD: Thank you, your Honor.

13 THE COURT: Certainly, and I appreciate the
14 parties doing that. Thank you for excellent briefing
15 in this case, excellent argument, and I believe this
16 concludes this matter.

17 MR. SULKIN: Thank you.

18 MS. LAHOOD: Thank you, your Honor.

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20 (PROCEEDINGS ADJOURNED)

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, SONYA L. WILCOX, RDR, Official Reporter
of the Superior Court of the State of Washington in and
for the County of Thurston hereby certify:


1. I reported the proceedings stenographically;

2. This transcript is a true and correct record of
the proceedings to the best of my ability, except for any
changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any
party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this day, March 21, 2018.



SONYA L. WILCOX, RDR
Official Court Reporter
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