IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 93607-2

(Court of Appeals Cause No. 73448-2-I)

KATHERINE GAISER, an individual; and CAROL GAISER, an individual,

Petitioners,

v.

JAY FRIET, an individual,

Respondent.

JAY FRIET'S ANSWER TO PETITIONERS' PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Petitioners Katherine Gaiser ("Katherine") and Carol Gaiser ("Carol") ask this Court to automatically deem ***every*** legal action concerning governance of limited liability companies by owners with contested membership as "derivative"—regardless of whether the action is actually derivative or instead direct—and deprive such owners of ***any*** legal recourse to protect their interests against malfeasance or to obtain judicial determination of their rights.[1] Petition for Review ("Pet'n") at 16. In doing so, Katherine misconstrues the Court of Appeals' decision (the "Opinion"), which held that a limited liability company owner has a ***direct*** (not derivative) interest in obtaining a judicial declaration of rights and statuses of all owners under a limited liability company's operating agreement, ***regardless*** of such owner's member status. Opinion ("Op'n") at 10–11. Citing with approval persuasive Delaware authority, the Court of Appeals determined that Respondent Jay Friet's ("Jay") declaratory judgment action belongs directly to him, not to nominal-defendant Landon Enterprises, LLC ("LLC").[2] *Id.* The Court of Appeals concluded that the trial court's summary judgment order, drafted and presented by Katherine, "***mischaracterized***" the nature of this action as derivative. *Id.* at 10.

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[1] Carol, Katherine's mother, suffers from dementia. She has not been heard from personally for over two years. Katherine is Carol's attorney-in-fact and purports to act on Carol's behalf. This Answer to Petition for Review refers to Katherine singularly.

[2] Katherine erroneously includes the LLC as a "Petitioner," but she cannot act on the LLC's behalf. The LLC is a nominal defendant. Indeed, Katherine's caption so acknowledges: this is Katherine's Petition, not the LLC's.

Katherine ignores the Court of Appeals' clear rulings and clings to her mistaken argument that Jay's claims are derivative. Pet'n at 16. They are not, and accordingly, there are no conflicts between the Opinion and prior decisions defining standing necessary to bring derivative actions. Nor does the Opinion create a conflict between Washington's Uniform Declaratory Judgment Act ("UDJA") and Washington's Limited Liability Companies Act ("LLC Act").

Katherine's misrepresentations of the Court of Appeals' findings and conclusions, and her serial efforts to keep this case mired in the appellate courts, support an inference that she filed her Petition to delay adjudication of Jay's ***direct*** claims on their merits. She earlier moved to publish the Opinion based on a surprising and misconceived argument that the Opinion "creates a hole in the LLC statute that the Legislature should either codify or otherwise address." Motion to Publish at 4. The Court of Appeals denied that motion. And, though petitioning for review is Katherine's right, she misuses that right by asking this Court to review a holding the Court of Appeals did not reach. Jay respectfully asks this Court to deny review, permit the Court of Appeals to issue its mandate, and allow him to try his claims.

II. STATEMENT OF THE CASE

A. Factual Background

1. Landon Enterprises, LLC

For a history of the LLC, the Wallingford properties it owns, and

Katherine's commitment to (in her own words) "destroying everything landon [sic]," Jay respectfully refers the Court to his brief on appeal. Appellant Brief ("App. Br.") at 8-9, 12-18. Jay owns 50 percent of the LLC. Jay's interest is comprised of 50 percent of the LLC's Governance and 50 percent of its Financial Units.[3] Op'n at 2, 7 ("It is undisputed that [Jay] owns 50 percent of the LLC based on his ownership of governance and financial units."). Carol, Jay's aunt, owns 27.5 percent of the LLC. The Verah Landon Testamentary Trust ("Trust"), for which Defendant Guardianship Services of Seattle ("GSS") served as successor trustee at times relevant to Jay's claims, owns the remaining 22.5 percent for Carol's benefit during her lifetime. Katherine has no ownership interest in the LLC. The LLC's operating agreement ("Agreement"), defines the rights and duties of the LLC's owners, members, and managers, and governs its operations. CP 192. CP 193–210.

a. Ownership rights

"Ownership rights in the [LLC] are reflected in Governance Units and Financial Units . . . ." CP 193. Governance Units and Financial Units are similar except that Financial Units are entitled to vote only in limited circumstances. *Id.* Any person owning ***at least*** one Governance Unit or one Financial Unit is a Unit Holder. *Id.* The Agreement expressly "binds all Unit Holders . . . claiming a right or benefit under or covered by [the] Agreement." CP 217.

[3] Katherine incorrectly claims that "Carol Gaiser and the Trust owned ***all*** of the Governance Units . . . ." Pet'n at 3 (emphasis added). In fact, Jay undisputedly owns half.

b. Members, Transferees, and Managers

Unit Holders fall into one of two categories: Members and Transferees. CP 188; CP 191. The LLC is Member managed, and the Members must abide the strictures of the Agreement. Transferees have rights to vote and participate under specified, limited circumstances. *E.g.*, CP 202–15. Both can own Governance and/or Financial Units, however, and both are equally entitled to share in profits and receive distributions and income.[4] CP 213.

Members can only act for the LLC in two ways: through a meeting, or through written action without a meeting. CP 208–10. To act at a meeting, Members must first have a "Quorum," which "consists of a majority [*i.e.*, ***more than*** 50 percent] of the Governance Units." CP 209. To act without a meeting by written consent, the consenting Members must "own the number of Governance and Financial Units equal to the number of Governance and Financial Units that would be required to take the same action of a meeting of the Members at which all Members were present." CP 210. In other words, Members cannot take any action by written consent unless (as a threshold matter) they could have satisfied the Quorum requirement at a meeting of the Members—unless the Members

[4] Katherine bases her Petition, in part, on the rejected assertions that "[Carol] and the [Trust] were the ***only members*** of the LLC" and that "[t]he LLC never admitted [Jay] as a member." Pet'n at 3, 5 (emphasis added). Katherine persists in ignoring the Opinion, which held that Jay's "status as a member . . . is a genuine issue of material fact for trial" independently precluding summary judgment, (Op'n at 9), and which notes "Katherine does not appear to have the rights of a member . . . , [and] [w]hile she contends she is acting solely on behalf of [Carol], it is unclear to this court whether that is true . . . ." Op'n at 9.

owned more than 50 percent of the LLC's ***total outstanding*** Governance Units. *E.g.*, CP 202.

Although the LLC is Member-managed, the Agreement authorizes the Members to unanimously appoint a Manager or Managers to assume management duties. CP 202–07. And, because such appointment constitutes an "action" by the Members, to validly make such appointment, the Members have to first satisfy the Quorum requirement, whether they act at or without a meeting. *See, e.g.*, CP 202 ("For certainty, at any time that no Person is serving as a Manager of the Company, any action that requires the consent or approval of the 'Managers' [which includes appointment of new Managers (CP 207)] may be undertaken only upon the consent and approval of the Members who own, in the aggregate, ***more than*** fifty percent (50%) of the ***total outstanding*** Governance Units," not merely those held by Members. CP 202 (emphasis added).

c. Limitations on transfers of Member rights

The Agreement authorizes only one situation in which a Member may transfer Member rights to a non-Member, voting by proxy, and strictly limits the manner in which a Member may do so. CP 209. The Agreement does not authorize any other transfer of rights inhering in Units; instead it renders such attempted transfer void. CP 211. Unauthorized transfers include a non-owner's misuse of a Member's power of attorney to purportedly exercise the Member's rights.

2. Current Dispute

On May 9, 2013, Katherine procured Carol's power of attorney for ***financial matters***.[5] CP 307–12. Katherine has since misused that document to exercise Carol's Member rights (which are a straightforward adjudication away from being extinguished). Katherine also persuaded GSS, the successor trustee of the Trust, to support her firing the LLC's long-serving Manager, Jeff Wilson, and then firing Jay as the LLC's property manager, for which service Jay received a salary and apartment. CP 726; CP 728; CP 730. After thus seizing control of the LLC, they largely cut off distributions to Jay, Carol, and the Trust.[6]

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[5] It remains unclear whether Carol had the capacity to execute such an instrument at that time, but it was clear at the time of the trial court's summary judgment that Carol's dementia rendered her incapable of managing her affairs, which, under the Agreement, warrants her dissociation. CP 187. An investigator with the Bellevue Police Department concluded in March 14, 2014, that Carol is "incapable of making financial decisions that have any consequences." CP 677. GSS testified on April 23, 2015, that "it is beyond dispute that Carol Gaiser is in fact not competent to be a witness. Her span of memory can be measured in minutes." CP 870. Carol's dissociation would preserve all her economic interests, but extinguish her Member rights. CP 187; CP 213. Carol's incapacity and the Agreement's definition of Dissociation make Katherine's misuse of the power of attorney trebly offensive. ***First***, contrary to the Katherine's assertions, Pet'n at 3, the power of attorney does not authorize her to exercise Carol's Member rights. It does not even mention them. CP 307-12. ***Second***, even if the power of attorney had purported to do so, the attempt would be void as an unauthorized transfer. *See supra* Part II.A.1.c. ***Third***, but for Katherine's gamesmanship, Carol's Member rights would have been extinguished as the Agreement contemplates, requiring in turn either prompt dissolution of the LLC or the owners' selection of new Members. CP 212; CP 214.

[6] This Court can take judicial notice of "ancillary" proceedings. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117, 1122 (2005). Katherine and GSS recently commenced a separate TEDRA action, without notice to Jay, in which they sought and obtained judicial approval of misconduct complained about here, including usurpation of ***$136,209.17 of the LLC's money*** to pay GSS's attorneys' fees incurred in unsuccessfully opposing Jay's UDJA claims in this matter. (The LLC was not even a party to the TEDRA action). *See generally, In re the Verah Landon Testamentary Trust*, Superior Court of Washington for King County, No. 16-4-02652-1 SEA. Jay is attempting to unwind the orders in that case. If this Court declines to take such judicial notice, the record that went to the Court of Appeals (in this TEDRA case) showed that as

B. Procedural Background

1. Superior Court

After Katherine commenced an earlier TEDRA action against Jay (whom she then unilaterally dismissed without notice) and Jeff Wilson, Jay brought this declaratory judgment action.[7] CP 376–90; Op'n at 2. Jay seeks a declaration of the Unit Holders' respective rights and duties under the Agreement that affects him, including a determination that Katherine cannot use Carol's power of attorney to exercise Carol's Member rights. *Id.* He also asks the court to enjoin the parties to conform their conduct to the court's declaration of the parties' rights and duties. CP 376–90; Op'n at 3.

Katherine moved for summary judgment[8] without providing overdue responses to pending discovery requests or sitting for her scheduled deposition. CP 548–61; CP 587–88; RP 14:14–15:9. GSS joined in Katherine's motion. Op'n at 3. The trial court adopted Katherine's and GSS's non sequitur that "[Jay]'s claims are derivative

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of the time that the appeal was briefed, Katherine and GSS had cut off ***all*** distributions to the LLC's owners, even though they had not yet disclosed how they were misusing them. App. Br. at 25.

[7] Katherine falsely states that Jay filed this action "on behalf of . . . the LLC." Pet'n at 2. Jay neither invoked CR 23.1 nor alleged any of its required showings. Rather, as the caption shows, Jay is the plaintiff and the LLC is a nominal defendant.

[8] Katherine also falsely claims that "[t]he LLC moved for summary judgment . . . . The trial court granted the LLC's motion and dismissed Mr. Friet's lawsuit." Pet'n at 2. The LLC did ***not*** move for summary judgment. CP 549 ("Carol and Katherine Gaiser . . . request this Court dismiss all of Jay's claims . . . ."); Op'n at 3 ("Katherine and Carol moved for summary judgment.").

inasmuch as [Jay] is not a member of Landon Enterprises, LLC . . . ."[9] CP 1005. Jay filed a timely appeal. CP 1006–09.

2. Court of Appeals

The Court of Appeals reversed the trial court's summary judgment. The Court of Appeals held that Jay's financial interests in the LLC, based on owning 50 percent of the LLC's Governance and Financial Units, fell within the "zone of interests" protected by the Agreement. Op'n at 7. The Court further found that "Katherine's continuous participation in the LLC's affairs may negatively affect [Jay]'s financial interests in the LLC." *Id.* Accordingly, the Court concluded that Jay has a "sufficient ***personal*** interest" to bring his claims for declaratory and injunctive relief, even if his claims affect Members of the LLC. *Id.* at 9.

The Court rejected Katherine's and GSS's arguments that Jay's claims are derivative. Op'n at 10. The Court relied on controlling Washington authority and cited with approval persuasive Delaware cases for assistance in distinguishing direct from derivative claims. Op'n at 10 (citing *Donlin v. Murphy*, 174 Wn. App. 288, 297, 300 P.3d 424 (2013); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004)). As the Court explained: "[I]f stockholders are directly

[9] Contrary to Katherine's assertions, the trial court made no determination that "[Jay]'s claims were the claims for the LLC." *Compare*, Pet'n at 5, *with* CP 1005.

injured and that injury is distinct from an injury to a corporation, the stockholders' claims are direct, and any recovery flows to the stockholders." Op'n at 10. Applying these tests, the Court concluded that the summary judgment order's conclusion that Jay's claims are derivative "***mischaracterizes*** the nature of this action." *Id.* (emphasis added). The Court held that Jay's injuries and claims are direct, not derivative.[10] *Id.* at 9 (finding Jay has a "personal" or "direct" interest in the LLC's governance).

III. ARGUMENT

The Court of Appeals decision does not conflict with precedent and does not create a conflict between the UDJA and LLC Act. Katherine refuses to acknowledge the Court of Appeals' holdings that Jay's interests and injuries are direct, and that he has standing to seek declaratory relief based on those interests. Instead, she blindly insists that, because she claims Jay is not a member—which itself is a genuine issue of fact for trial, Op'n at 9—he cannot bring a derivative claim on behalf of the LLC under the LLC Act ***and therefore*** cannot bring a declaratory judgment claim concerning the Agreement. Pet'n at 12–14, 16 ("It cannot be, however, that a party can bring a declaratory action concerning LLC

[10] Katherine misstates the Court's holding by seizing on the word "characterization." She mistakenly argues that the Court ruled Jay could bring a declaratory judgment action "even if [his] claims were wholly derivative." Pt'n at 2. The Court did not so hold; rather, the Court held that Jay's claims were ***direct***, and the trial court's ***mis***characterization of the claims as derivative did not bar Jay's claims for declaratory relief. Op'n at 10.

governance and rights of the LLC when that same party would be barred from bringing a lawsuit under the LLC Act."). But Katherine misstates the Court of Appeals' holdings and mischaracterizes Jay's claims. The Court of Appeals held that Jay brought ***direct*** claims on behalf of ***himself***. Worse, Katherine's (mis)reading would lead to the untenable and inequitable conclusion that all claims concerning corporate governance are necessarily derivative. Under Katherine's proposed interpretation, owners of limited liability companies whose member statuses were challenged would have no legal recourse to protect their economic interests. Such a "Catch 22" is not only wrong on the law, it would be grossly inequitable.[11]

A. The Opinion Does Not Conflict With Washington Precedent

Katherine asks this Court to determine whether the Court of Appeals' decision conflicts with Washington precedent "defining standing necessary to bring derivative actions." Pt'n at 1. But her request depends on the mistaken presumption that Jay's action is derivative. It is not, and precedent "defining standing necessary to bring derivative actions" is therefore inapplicable.

1. The Court of Appeals Correctly Determined that Jay's Claims are Direct

"A derivative suit permits a shareholder [or member] to sue a third party on behalf of a corporation [or limited liability company], even

[11] Katherine's Petition is notable for what it does not do. It does not address, nor does it expressly frame as an issue for review, the Court of Appeals' UDJA analysis, in which the Court determined Jay's interests are direct and Katherine's challenged actions threaten those interests.

though management is a function generally reserved to the corporation's officers and directors [or the limited liability company's members and managers]." *Donlin v. Murphy*, 174 Wn. App. at 297. One distinct characteristic of a derivative suit is that the shareholder or member is suing "for wrongs done to the [company]." *Id.* (quoting *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987)); *see also Goodwin v. Castleton*, 19 Wn.2d 748, 761, 144 P.2d 725, 731 (1944) (derivative suit is a claim by shareholders to "enforce a right of action ***belonging to the corporation***") (cited by Katherine). To determine whether a claim is direct or derivative, courts "look to the nature of the wrong and to whom the relief should go." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 877, 309 P.3d 555, 573 (2013), aff'd, 180 Wn.2d 954, 331 P.3d 29 (2014) (quoting *Tooley*, 845 A.2d at 1031.

Washington looks to Delaware for guidance on matters of corporate governance because Delaware has significant experience with the law of business entities. *FutureSelect*, 175 Wn. App. at 877; *see also In re F5Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 239–40, 207 P.3d 433 (2009). Delaware courts recognize that "[s]tockholders . . . can sue directly to enforce contractual constraints on a board's authority" under the corporation's charter, bylaws, and governing statutes. *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1050 (Del. Ch. 2015), *as revised* (May 21, 2015); *see also Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 407, 502 P.2d 1016, 1019 (1972)

(each shareholder has the right to enforce conformity with corporate regulations which is "just as valuable and real" as the right to vote shares or to share in dividends). This is because statutes, formation documents, and the company's governing documents "together constitute a multi-party contract among the directors, officers, and stockholders of the corporation. As parties to the contract, stockholders can enforce it." *Activision Blizzard*, 124 A.3d 1050 (citations omitted).

Here, Jay sought declaratory and injunctive relief to determine and enforce the Agreement's "contractual constraints" on the LLC's operation, ***including the number of Governance Units needed before Members can act on the LLC's behalf***, and prohibitions on non-owners' exercise of Member rights through powers of attorney. CP 376–90. The Agreement expressly "binds all Unit Holders . . . claiming a right or benefit under or covered by [the] Agreement." CP 217. The Agreement, together with the LLC Act, constitutes a "multi-party contract" among Members, Transferees, and Managers, and any claim by an owner—whether the owner is a Member or Transferee—to interpret or enforce provisions of the Agreement is direct, not derivative. *Activision Blizzard*, 124 A.3d 1025 at 1050; *Watson*, 81 Wn.2d at 407.

The Court of Appeals upheld Jay's "personal" and "direct" interests in the LLC's governance. Op'n at 9, 10. It held that "Jay's 50 percent ownership of the LLC," which entitles him to share in profits and receive income, "gives him a right to be heard in this action." Op'n at 7, 9. The Court's holding is consistent with Washington precedent and well-

reasoned Delaware authority. The Agreement's Quorum requirement prevents Katherine (exercising her mother's Member rights) and GSS, who collectively control at most 50 percent of the Governance Units, from acting on behalf of the LLC without accounting for Jay's Governance Units. The Agreement's constraints on unauthorized indirect transfers prevent non-owners (such as Katherine) and minority members (such as GSS as an acting trustee) from usurping the LLC's management to the detriment of other ***owners***.

Moreover, Jay's injuries are direct and distinct from those suffered by the LLC. Katherine and GSS circumvented the Agreement to cut off Jay's financial interests in 50 percent of the LLC's profits, income, and distributions. The LLC is not harmed when profits belonging to one owner are diverted to another (or to that other's attorneys); the harm hurts the owner whose profits and distributions were wrongly diverted. The Court of Appeals correctly found that Jay's claims are "personal" and "direct," and that the trial court mischaracterized the claims as derivative.[12]

2. Because Jay's Claims are Direct, Precedent Defining Standing Necessary to Bring Derivative Actions Is Inapplicable

Because the Court of Appeals determined that Jay brought direct claims to protect his own financial interests in the LLC, Katherine's first issue for review is moot. The Opinion cannot "conflict with this Court's

[12] Despite Katherine's mischaracterizations, the Court of Appeals did not hold, and this Court will not find in the Opinion the words "whether the claims were direct or derivative is irrelevant." Pt'n at 8.

and the Court of Appeals' prior decisions defining standing necessary to bring derivative actions," Pt'n at 1, because the Opinion does not discuss standing to bring derivative actions. There was no need for the Court of Appeals to broach the subject given that Jay's claims are not derivative.

Katherine's citation to *Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC*, is thus inapposite. 184 Wn.2d 176, 185, 357 P.3d 650, 655 (2015). There, the parties filed derivative cross-claims ***on behalf of*** a limited liability company. The *Nw. Wholesale* Court ruled that only members may bring derivative claims on behalf of limited liability companies. Nothing in the Opinion conflicts with that ruling. Katherine's first issue for review is thus a non-issue.

B. The Opinion Does Not Create a Conflict between the UDJA and the LLC Act

Katherine largely ignored the UDJA at the trial court and Court of Appeals, and she presents a flawed analysis of the UDJA in her Petition.[13] She unpersuasively attempts to manufacture a conflict between the UDJA and the LLC Act. Jay's claim for declaratory relief is not a *de facto* derivative claim—there is no such thing, nor does Katherine cite any authority mentioning such a notion—even if a Member of the LLC could

[13] For example, Katherine baldly cites, without explanation, *Hawk v. Mayer*, apparently for the proposition that some courts ***limit*** operation of the UDJA "to cases where there is no satisfactory remedy at law available." Pet'n at 8 (quoting *Hawk*, 36 Wn.2d 858, 866, 220 P.2d 885 (1950)). But Katherine would instead ***prevent*** UDJA actions where, by her definition, there would be no other remedy (*i.e.*, derivative relief) available.

also bring a derivative action on behalf of the LLC to request a similar declaration of rights. Rather, it is Katherine's proposed rule that conflicts with precedent, the UDJA, and the LLC Act. She untenably argues that any action concerning a limited liability company's governance is ***necessarily*** derivative, regardless of who suffers the injuries, who requests relief, or what relief is requested. Such a rule would establish a "Catch 22" whereby non-member owners of limited liability companies would be foreclosed from judicial determination and protection of their financial interests.

1. Jay Has Not Brought *De Facto* Derivative Claims

Katherine claims that the UDJA does not apply to limited liability company operating agreements because, she argues, "the Legislature has created a specific statutory scheme for those interested in a LLC to bring actions on behalf of the LLC."[14] Pt'n at 9. Katherine misses the point. Twice. ***First***, the UDJA expressly authorizes "[a] person . . . whose rights . . . are affected by a . . . contract . . . [to] have determined any question of construction or validity arising under the . . . contract . . ." in order to

[14] Katherine argues that the LLC Act "formed a framework for derivative actions, as well as actions on behalf of ***or against*** a limited liability company." Pt'n at 9. She misstates the LLC Act. The statute establishes procedures for bringing derivative actions, yes, but Katherine points to no provision within the LLC Act (and none exists) setting forth how one must assert claims "against" or "involving" a limited liability company. *See generally* RCW 25.15 *et seq.*

"settle and to afford relief from uncertainty and insecurity with respect to" those rights. RCW 7.24.020; RCW 7.24.120. The UDJA thus recognizes that a person affected by a contract, such as a limited liability company's operating agreement, may have a personal and direct interest in having the courts resolve questions of construction arising out of the contract to settle uncertainty as to rights under the contract.[15] Such claims belong to the persons whose rights are affected by the contract: in this case, the LLC's Unit Holders who are expressly bound by the Agreement. CP 217. The UDJA's established standing requirements protect against it being misused to prosecute theoretical actions or actions by plaintiffs with only remote interests. ***Second***, as Katherine would have it, there would be no "specific statutory scheme" for non-member owners with interests in limited liability companies to get into court to determine the rights and duties of themselves and their co-owners—not under the LLC Act and therefore not under the UDJA. *See, e.g.*, parenthetical at 9, *supra.*

To be sure, there are instances in which the UDJA overlaps with the LLC Act's derivative action procedures. For example, the LLC Act authorizes a non-managing member of a limited liability company to bring

[15] Consistent with Washington law, the Court of Appeals emphasized that "[t]he UDJA is 'remedial' and 'its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'" Op'n at 5 (citations omitted).

a ***derivative*** action under the UDJA to interpret or invalidate a contract ***between the company and a third party***, even though the member is not a party to the contract. *Carey v. Howard*, cited by Katherine, illustrates this concept. 950 So. 2d 1131 (Ala. 2006). In *Carey*, the Alabama Supreme Court held that members of a limited liability company who filed such an action ***directly*** could not meet the UDJA's standing requests when they sought to invalidate an agreement ***between two third-parties*** which affected property owned by the company. *Id.* at 1135. The court ruled that the plaintiffs' stated interest—ownership of the company that owned the property affected by the third-party agreement—was too attenuated to grant standing to sue directly under Alabama's declaratory judgment statute. *Id.* But this holding, even if issued by a Washington court, would have no bearing on the present case. Jay did not seek to invalidate an agreement between two third parties, or to determine rights and duties under a contract as to which his interests were remote; rather, he asked the trial court to interpret the Agreement that expressly binds him and the LLC's other Unit Holders. CP 217.

Weinstein v. Schwartz, another non-Washington case cited by Katherine, in fact supports the Court of Appeals' decision. 422 F.3d 476, 478 (7th Cir. 2005). There, the Seventh Circuit concluded that a shareholder of a Delaware corporation ***could*** bring a direct declaratory

judgment action challenging other shareholders' purported ownership of shares because he met his state's declaratory judgment act's standing requirements. *Id.* The other shareholders intended to use the disputed shares to sell the company-owned farm, which the plaintiff used for his personal business. The Court found that the declaratory judgment claim was direct because the alleged harm and intended remedy were personal to the plaintiff. As in *Weinstein*, Katherine's and GSS's conduct challenged by Jay injured and is continuing to injure him personally.

Katherine argues that the Court of Appeals' "decision allows non-LLC members to challenge the actions of the LLC and its managers regardless of the express provisions of RCW 25.15.375." Pet'n at 14. The Opinion does no such thing. Nothing in RCW 25.15.375 authorizes members to disregard and violate their limited liability company's operating agreement or inoculates them from claims by non-member owners injured by such acts. Likewise, the Opinion does not suggest that a non-member can use the UDJA to assert a claim that belongs ***exclusively*** to the limited liability company. The UDJA's standing requirements would not permit it.

Katherine ignores a basic principle: the same misconduct can harm multiple persons and give rise to similar, yet distinct and permissible causes of action for each. No one person is cut off from access to the

courts solely because the acts or omissions that directly hurt him may have also hurt others.[16] *De facto* derivative claims do not exist. Claims are either direct or not, even if the same wrongs might also give rise to a similar derivative claim on behalf of others. Here, the Court of Appeals correctly determined that Jay's claims are direct.

2. Katherine's Proposed Rule is a "Catch 22"

Katherine asks this Court to adopt a rule that would deem any claim concerning a limited liability company's governance as derivative. Such a rule would conflict with established tests to distinguish between direct and derivative claims: to wit, whether the wrongs alleged directly injured the ***person bringing the claims***. As Katherine would have it, there would be no need for such tests. Any claim against a member or manager of a limited liability company—or the board of a corporation—would

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[16] Katherine argues that UDJA claims are barred because "a breach of contract action, alone, is sufficient." Pt'n at 15 (citing *Jacobsen v. King Cty. Med. Serv. Corp.*, 23 Wn.2d 324, 327, 160 P.2d 1019, 1021 (1945)). Katherine's argument is misconceived for three reasons. ***First***, *Jacobsen* states that a plaintiff cannot invoke UDJA where a breach of contract had occurred "as the ***rights of the parties*** [are] then ***fixed***." *Id.* (emphasis added). When the claim involves continuing violations of a company's operating agreement, however, the rights of the parties are not fixed as the harm is ongoing. One goal of Jay's declaratory judgment action was to obtain an authoritative determination of the three owners' respective rights and duties, not as a ruler to measure past wrongs, but as a yardstick for proper conduct going forward. ***Second***, Jay's primary claims are against Katherine, who is ***neither*** an owner ***nor*** a party to the Agreement, which would at least complicate a (static) breach of contract claim. ***Third***, a properly plead declaratory judgment claim is not barred simply because an adversary can proffer fragments of other causes of action the proponent might have pled instead. In any event, Katherine did not raise her *Jacobsen* argument below or before the Court of Appeals.

(by her definition) be derivative, and injured individuals would be disenfranchised. That is not the law now, nor should it be.

The final sentence of the Petition reveals Katherine's goal and repeats her misconception that Jay's claims are derivative: she asks this Court to prevent Jay from "us[ing] the UDJA to challenge LLC governance when such claims would otherwise be dismissed as derivative." Pet'n at 16. She wants all challenges to limited liability companies' governance deemed derivative to strip non-member owners of any judicial recourse to protect their financial interests in their companies. Non-member owners would be unable to seek relief derivatively or directly. This would be as legally untenable as much as it would be inequitable.

IV. CONCLUSION

For the foregoing reasons, Jay respectfully requests that this Court decline review of the Opinion and permit Jay to proceed with his claims on the merits.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on October 17, 2016, a copy of the foregoing Answer to Petitioners' Petition for Review was served by electronic mail to:

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DATED this 17th day of October, 2016, at Seattle, Washington.

By: _____
Katie Walker, *Legal Assistant*