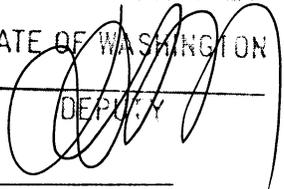


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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

SAVE COLUMBIA CU COMMITTEE, CATHRYN CHUDY,
KATHRYN EDGECOMB, LLOYD MARBET, and ROBERT TICE,

Appellants,

vs.

COLUMBIA COMMUNITY CREDIT UNION and STATE OF
WASHINGTON DEPARTMENT OF FINANCIAL INSTITUTIONS,

Respondents.

BRIEF OF RESPONDENT COLUMBIA
COMMUNITY CREDIT UNION

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I. INTRODUCTION AND OVERVIEW

This is the third, and hopefully last, case before this Court involving internal corporate governance disputes between certain members of Columbia Community Credit Union ("Columbia") and the board of directors of Columbia.

In the first case, Save Columbia CU Committee ("SaveCCU") and Robert Tice (also plaintiffs here) sought to establish that directors of state-chartered credit unions owed fiduciary duties under Washington law directly to members (as opposed to the credit union) and that such members had special rights to access records of the credit union. Recognizing the special statutory scheme surrounding state-chartered credit unions, the status of members as depositors and the role of the Washington Department of Financial Institutions ("DFI"), this Court ruled against SaveCCU and Tice. *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 139 P.3d 386 (2006).

In the second case, certain directors of Columbia who are members of SaveCCU (also plaintiffs here—former directors Cathryn Chudy and Kathryn Edgecomb) sought to establish that they had a right as directors to sue their fellow directors whenever they were dissatisfied with board

decisions. That case was dismissed as moot in an unpublished opinion.

Chudy v. Bequette, 139 Wn. App. 1078 (2007).

This case involves the expulsions from membership of each plaintiff based on a determination by the board of directors of Columbia that multiple grounds existed for expulsion for "cause" under Columbia's bylaws. Tice and SaveCCU challenge their expulsion by the board, whereas Chudy, Edgecomb and Lloyd Marbet, a former member of Columbia's supervisory committee, challenge both their expulsion by the board *and* their expulsion by the membership, which occurred at a special membership meeting conducted in November 2006 in which members voted by a nearly 3-to-1 margin to expel Chudy, Edgecomb and Marbet.

After giving all plaintiffs, including Tice and SaveCCU, two separate opportunities to clearly allege their claims for wrongful expulsion from membership by the board—other than baldly to assert that they were "egregiously unfair"—the court below dismissed those claims for failure to state a claim. As set forth below, under the standard applicable to assess grounds for expulsion from a voluntary membership organization like a credit union, in this instance, Tice and SaveCCU have failed to meet the standard. They simply have failed to allege that each of the

independent grounds for their expulsions was irregular, in bad faith, or in violation of the bylaws or specific Washington statutes or that the grounds for their expulsion were untrue.

The claims of Chudy, Edgecomb and Marbet that they were improperly expelled by the members by a 3-to-1 vote are premised on the November 2006 membership meeting's being irregular. Yet they, too, failed to allege facts to meet the standard for upsetting a membership vote, i.e., that the vote was irregular in a way that could have affected the outcome. And unless they are members of Columbia, they have no right to elective office. Furthermore, their claims to elective office were dismissed as to Chudy and Edgecomb because they failed to join their successors as necessary parties. Marbet's claim to elective office was dismissed as moot because his term of office had expired. These rulings by the court below were also proper.

The final claim, that actions taken by members at a July 2006 membership meeting (concerning how Columbia should run its elections for elective office) should be set aside, suffers from the same failure to allege any irregularities that could have affected the outcome of that meeting.

II. STATEMENT OF THE CASE

A. Plaintiffs' Expulsion from Membership by Columbia's Board of Directors.

While not directly germane to the issues before the Court, plaintiffs' statement of the case at pages 4 to 9 concerning events preceding plaintiffs' expulsion sufficiently establishes the context for those expulsions: in short, there was significant internal disagreement on corporate governance matters that resulted in substantial adverse publicity affecting Columbia. Possible public perception of instability at a credit union, especially one with more than 60,000 members, is never a positive situation.

Against this backdrop, on August 15, 2006, Columbia's board expelled each of the plaintiffs¹ from membership for "cause" as defined in Columbia's bylaws. CP 195 (Decl. of J. Parker Cann, ¶ 2). The notices of expulsion for each plaintiff contain a specific description of multiple grounds for expulsion, and although ignored in plaintiffs' description of the facts, the notices specifically state that each ground was determined to be sufficient in itself for expulsion. CP 120-39.

¹ Contrary to plaintiffs' contention (Opening Br. at 3), the board did not expel all (four) so-called Minority Directors—the board expelled only Chudy and Edgecomb.

In expelling Chudy, Edgecomb and Marbet, the board determined that they each acted contrary to their duty of loyalty to Columbia and contrary to law, engaged in conduct inimical to the best interests of Columbia and caused Columbia to suffer a loss. CP 120-35. The "inimical to Columbia" reason that appears to be the focus of plaintiffs' complaint detailed that the three elected officials ("volunteers" in credit union parlance) had engaged in "activity unreasonably disruptive to Columbia by fostering divisiveness as opposed to developing consensus between and among Columbia volunteers and members." *Id.* As to causing a loss, the notices stated that by engaging in the conduct specified in the notices of expulsion, the volunteers "caused or contributed to member withdrawals from the credit union." *Id.*

With respect to member Tice, Columbia's board determined that he should be expelled because, among other things, he failed to comply with his duty as a member as set forth in the bylaws "to act civilly in his dealings with corporate officers and employees of Columbia." CP 23 (Art. II, §5), 136. In addition, like the volunteers, the board concluded that Tice's conduct specified in the notice of expulsion caused a loss to Columbia by contributing to member withdrawals. *Id.* The board also

found that Tice had caused Columbia a loss by imposing "frequent frivolous or unreasonable demands upon Columbia." Finally, the board found that Tice had acted contrary to law. CP 136-37.

Finally, as to SaveCCU, Columbia's board determined that it acted contrary to law, that it caused Columbia to suffer a loss by contributing to member withdrawals and that the majority of its board was comprised of individuals who had been expelled for cause. CP 138-39.

On September 8, 2006, plaintiffs commenced this action against Columbia and DFI and sought an injunction to, among other things, restore Chudy, Edgecomb and Marbet to their volunteer positions. CP 4-16; CP 155-61. Both Columbia and DFI opposed the motion. CP 162-81. DFI argued, as did Columbia, that Columbia's actions in expelling the volunteers from membership did not violate the Washington State Credit Union Act ("WSCUA"). CP 163-65.

On October 5, 2006, the superior court entered an order granting preliminary injunction in which it restored Chudy, Edgecomb and Marbet to membership and to their former positions as either directors or supervisory committee member. CP 280-86. In granting the motion, the court determined that directors and supervisory committee members, such

as Chudy, Edgecomb and Marbet, must first be suspended and removed from office under RCW 31.12.285 before they can be expelled from membership. CP 280-86. In other words, under the court's view of the WSCUA, members in a credit union who become elected to positions may not be expelled for the same "cause" for which all other members may be expelled.

B. Chudy's, Edgecomb's and Marbet's Suspension from Elective Office by Columbia's Board of Directors and Subsequent Removal from Elective Office and Expulsion from Membership by Columbia's Members.

Pursuant to the court's October 5, 2006, order on preliminary injunction, Chudy, Edgecomb and Marbet resumed their former volunteer positions. On October 16, 2006, in response to the court's order on preliminary injunction, Columbia's board voted to suspend Chudy and Edgecomb from the board and Marbet from the supervisory committee. Decl. of J. Parker Cann in Supp. of Columbia's Mot. to Strike or, in the Alternative, for a Continuance,² ¶ 2. The board also scheduled a special membership meeting for November 15, 2006, to vote on a number of

² Concurrent with the filing of this brief, Columbia will supplement the record with the Declaration of J. Parker Cann in support of Columbia's motion to strike or, in the alternative, for a continuance, as well as with the motion itself and the Declaration of Kathleen Porter in support of the motion. All three documents are attached hereto as Appendix A.

matters, including whether the members should direct the board to expel Chudy, Edgecomb and Marbet from membership. *Id.*; CP 317-25.

At the November membership meeting, Columbia's members voted, by a near 3-to-1 margin, to remove Chudy, Edgecomb and Marbet from office and to expel them from membership. CP 596 (Am. Compl., ¶ 47).

On February 20, 2007, Columbia moved for summary judgment on the grounds, among others, that the claims of Chudy, Edgecomb and Marbet were moot because they had been expelled by Columbia's members and because SaveCCU and Tice had failed to state a claim for relief. CP 474-80. Plaintiffs opposed this motion and simultaneously sought to amend their complaint to add allegations pertaining to the suspension, removal and subsequent expulsions of Chudy, Edgecomb and Marbet. CP 520-22.

On April 6, 2007, the court heard oral argument on Columbia's motion for summary judgment, as well as a motion for summary judgment filed by DFI. During oral argument, the superior court repeatedly asked plaintiffs' counsel to articulate the legal principle upon which the wrongful-expulsion claims were based. Verbatim Report of Proceedings

("VRP"), Apr. 6, 2007, at 54:10-64:20. When plaintiffs' counsel was unable to articulate a legal principle, the superior court provided him with an opportunity to file a one-page statement stating his cause of action. VRP, Apr. 6, 2007, at 64:16-65:21. The court further provided that if plaintiffs could state their cause of action for wrongful expulsion, she would permit their proposed amendment to the complaint. VRP, Apr. 6, 2007, at 78:17-79:15.

Plaintiffs filed their one-page statement on April 16, 2007. CP 573-74. On June 1, 2007, the superior court determined that "wrongful expulsion from a credit union board may be a cause of action." CP 586. Plaintiffs filed their amended complaint on June 19, 2007. CP 587-99.

C. Superior Court's Dismissal of Plaintiffs' Complaint.

On July 20, 2007, Columbia filed its motion to dismiss in part on the ground that while a cause of action for wrongful expulsion may *exist*, plaintiffs still had not pleaded sufficient facts to state such a claim. CP 619-36. In the alternative, Columbia moved for partial summary judgment as to the wrongful suspension and removal claims of Chudy, Edgecomb and Marbet on necessary party and mootness grounds. CP 632-35. In its reply in support of the motion to dismiss, Columbia

indicated that it would not oppose an amendment to the complaint stating clearly the nature of plaintiffs' claims regarding their expulsions.

CP 651-53.

At oral argument on Columbia's motion to dismiss, the superior court again asked plaintiffs' counsel to articulate the basis behind the wrongful-expulsion claims. VRP, Oct. 12, 2007, at 16:9-19:13. This he was unable to do to the court's satisfaction. The superior court then again provided plaintiffs with additional time to identify the basis for their claims. VRP, Oct. 12, 2007, at 19:25-20:5. Specifically, the superior court instructed plaintiffs to provide the court a two-page statement identifying the allegations in the amended complaint that support their cause of action for wrongful expulsion. *Id.* Plaintiffs filed their two-page statement on October 22, 2007. CP 661-63.

After reviewing plaintiffs' two-page statement and supporting argument, as well as Columbia's response, the superior court dismissed plaintiffs' wrongful-expulsion claims. CP 682. This appeal followed.

III. ARGUMENT

A. Summary of Argument.

SaveCCU and Tice failed to state a claim of wrongful expulsion by Columbia's board. The court's scope of inquiry into an individual's

expulsion from membership in a voluntary association like Columbia is limited, and SaveCCU and Tice alleged no facts to meet the applicable standard. Accordingly, the superior court properly dismissed their claims. This argument pertains to plaintiffs' assignment of error No. 1.

Chudy, Edgecomb and Marbet failed to state a claim of wrongful expulsion by Columbia's membership. In support of their wrongful-expulsion claims, Chudy, Edgecomb and Marbet allege only that the November meeting at which the expulsions took place was unlawfully conducted in that Columbia waged a "false publicity campaign" and refused to allow a mail ballot. These plaintiffs do not allege that the meeting was improperly held, nor do they identify any alleged "false" statements by Columbia or allege that such statements affected the outcome. In light of this failure, and because Columbia's bylaws prohibited a mail ballot at special membership meetings, Chudy, Edgecomb and Marbet failed to state a claim of wrongful expulsion.

Because they were properly expelled by Columbia's membership, and nonmembers may not be volunteers, the membership's expulsion of Chudy, Edgecomb and Marbet disposes of their claims of wrongful suspension and removal from office. Even if it did not, the superior court

properly granted summary judgment dismissing the claims of wrongful suspension and removal on the grounds that Chudy and Edgecomb failed to join necessary parties and Marbet's claim was moot. This argument pertains to plaintiffs' assignment of error Nos. 2, 3 and 5.

Finally, plaintiffs failed to state a claim regarding the July membership meeting. This is again due to the fact that they have not alleged that any of the alleged "irregularities" affected the outcome. This argument pertains to plaintiffs' assignment of error No. 4.

B. The Superior Court Properly Granted Columbia's Motion to Dismiss the Wrongful-Expulsion Claims of SaveCCU and Tice for Failure to State a Claim.

For purposes of this appeal, Columbia does not contend that Washington law does not recognize a claim for wrongful expulsion from a state-chartered credit union. Rather, the focus below and on appeal is whether the allegations of Tice and SaveCCU give rise to a claim under the standard applicable to such a claim. As they did below, SaveCCU and Tice ignore both the applicable standard and the reasons stated by the board for their expulsion. Because of this dual failure, Tice and SaveCCU have failed to state a claim for wrongful expulsion, and the superior court properly dismissed this claim.

An order granting a motion under CR 12(b)(6) is reviewed de novo. *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). For purposes of such a motion, "the plaintiff's allegations are presumed to be true." *Id.* As the United States Supreme Court recently explained, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' [under Fed. R. Civ. P. 8(a)] requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (citations omitted). Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level."³ 127 S. Ct. at 1965.

³ The standard for measuring whether a plaintiff has stated a claim under the federal equivalent of CR 12(b)(6) has changed under *Twombly*. While Columbia recognizes that Division III of this Court recently refused to adopt the new federal standard, *McCurry v. Chevy Chase Bank, F.S.B.*, No. 60075-3-I, 2008 WL 2231460 (Wash. App. Div. I June 2, 2008), this Court should do so. But even if this Court declines to adopt *Twombly*, an action "may be dismissed under CR 12(b)(6) if 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" *Yurtis*, 143 Wn. App. at 689 (quoting *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986)) (internal quotation marks omitted).

1. The scope of a court's inquiry into a claim of wrongful expulsion is limited.

The Washington Supreme Court has explained that the scope of a court's inquiry into a claim of wrongful expulsion from a voluntary organization is limited to the process employed in such expulsion. *Grand Aerie, Fraternal Order of Eagles v. Nat'l Bank of Washington*, 13 Wn.2d 131, 135, 124 P.2d 203 (1942). In that case, the court explained that the expulsion of a member from a mutual benefit association "would not be inquired into by the courts, except to ascertain whether the proceedings were regular, in good faith, and not in violation of the laws of the order or the laws of the state." 13 Wn.2d at 135 (citing *Kelly v. Grand Circle Women of Woodcraft*, 40 Wash. 691, 82 P. 1007, 1008 (1905)). The court explained further that "[i]n cases of this kind "courts never interfere, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land." 13 Wn.2d at 135 (quoting *Kelly*, 40 Wash. 691, 82 P. 1007 (quoting *Connelly v. Masonic Mut. Benefit Ass'n*, 58 Conn. 552, 20 A. 671 (1890))).

This limited inquiry standard is particularly applicable to a Washington-chartered credit union—a financial institution—whose board is charged by statute with making decisions respecting expulsion of members. Under the WSCUA, the Legislature delegated to the board the authority both to determine the qualifications necessary for membership in the credit union and to establish the conditions under which a member may be expelled for cause. *See* RCW 31.12.065(1)(c) (board authorized to adopt bylaws which "shall include . . . [r]easonable qualifications for membership in the credit union . . . and the procedures for expelling a member"); RCW 31.12.255(1)(d) ("The board shall . . . [e]stablish the conditions under which a member may be expelled for cause"). Columbia's board has done that in Article II, Section 6, of its bylaws, which specify what constitutes "cause" for expulsion.⁴ CP 23. Nowhere do plaintiffs contend that those bylaws are improper.

⁴ Under the bylaws, "for cause" includes, but is not limited to:

- a. Any abusive or threatening conduct to a Credit Union official or employee;
- b. Any unlawful conduct or activity affecting the Credit Union;
- c. Failing to comply with the member's duties;
- d. Causing the Credit Union a loss;

Board members are not only empowered with statutory authority to establish the grounds for "cause" for expulsion—but they are required to exercise their expulsion authority in "a manner the director . . . reasonably believes to be in the best interests of the credit union." RCW 31.12.267(3). Furthermore, the directors serve at the pleasure of the membership. Under Washington law, credit union members may call a special membership meeting to recall directors by a petition signed by 10 percent of the membership or 2,000 members, whichever is less. RCW 31.12.195(1). And, as this Court knows, Columbia's members have exercised this right in the past when dissatisfied with board decisions. *Save Columbia CU Comm.*, 134 Wn. App. at 179. Accordingly, if the membership disagrees with a board decision to expel, mechanisms exist to elect new directors and even to remove an entire slate of directors.

Not only does the membership of a credit union possess a valuable tool in its ability to demand a special meeting to remove the board, board

e. Failing to maintain the member's share balance required for admission to membership, and failing to increase the balance to at least the par value of one share within thirty (30) days of the reduction; or

f. Without limitation on the foregoing, any other reason which in the opinion of the Board members voting in favor of expulsion agree is inimical to the best interests of the Credit Union.

CP 23 (Art. II, § 6).

action is further subject to regulatory oversight by DFI. RCW 31.12.516(1) provides that DFI "shall require each credit union to conduct business in compliance with this chapter." Additionally, DFI "has the power to commence and prosecute actions and proceedings, to enjoin violations . . ." *Id.* DFI has further authority under RCW 31.12.575 to remove a director or an officer from office under certain circumstances. Notably, DFI has *not* intervened in the expulsions at issue here, but rather determined that the plaintiffs' expulsions from membership were consistent with the WSCUA. CP 162-66, 398-401.

Plaintiffs do not address Washington's recognition of a rule of limited review of expulsion decisions from voluntary societies. Plaintiffs advert to an employment law standard of an "objectively reasonable belief," citing *Galbraith v. TAPCO Credit Union*, 88 Wn. App. 939, 954-55, 946 P.2d 1242 (1997). Opening Br. at 14-15. But *Galbraith* is not authority for adoption of such a test. In fact, in *Galbraith*, the court specifically declined to adopt an employment law test for "just cause" for expulsion of a credit union member, and that was at a time when the WSCUA did not delegate to the board the power to define "cause," for purposes of expulsion. 88 Wn. App. at 954-55.

In sum, credit unions—which are financial institutions—are unique creatures of statute, containing both a regulatory overlay and a system of democratic checks and balances in which the membership may, if dissatisfied with the governance of the credit union, effect change by either electing different directors at an annual meeting or demanding a special meeting to seek to remove existing directors. Columbia's board was empowered to expel Tice and SaveCCU for "cause," and that decision should not be disturbed absent allegations by plaintiffs that establish that the expulsion proceedings were other than "regular, in good faith, and not in violation of the laws of the order or the laws of the state." *Grand Aerie*, 13 Wn.2d at 135.

2. SaveCCU and Tice failed to allege facts giving rise to a claim of wrongful expulsion, and what they have alleged is insufficient.

In their amended complaint, SaveCCU and Tice alleged only that their expulsions were "unlawful and contrary to democratic, cooperative, corporate governance principles upon which Columbia and other credit unions were formed." CP 597 (¶ 51). SaveCCU and Tice do not identify the "law" allegedly violated by their expulsion, unlike Chudy, Edgecomb and Marbet, who alleged that their expulsions violated RCW 31.12.285.

CP 597 (¶ 50). Nor does Tice or SaveCCU allege that their expulsions from membership were irregular, in bad faith, or a violation of Columbia's bylaws. *See Grand Aerie*, 13 Wn.2d at 135.

The only *fact* SaveCCU and Tice allege in support of their claim of wrongful expulsion is that Columbia "amended its bylaws to define 'for cause' so as to warrant a member's immediate expulsion from Columbia to include 'any other reason which in the opinion of the Board members voting for the expulsion agree is inimical to the best interests of the Credit Union.'" CP 595 (¶ 41). If by this allegation SaveCCU and Tice mean to evince a procedural irregularity or violation of Columbia's bylaws or Washington law, their effort falls short. The board has the authority under the WSCUA to amend its bylaws. *See* RCW 31.12.115(2). And as set forth above, the Board also has the authority to establish the conditions under which a member may be expelled for cause. RCW 31.12.255. This allegation does nothing more than describe lawful conduct by Columbia's board consistent with its delegated authority from the Legislature to establish the grounds upon which a member may be expelled for cause; it does not state a claim.

But regardless of the adoption of the "inimical to Columbia" bylaw, that is not a specified ground for expulsion of either SaveCCU or Tice. CP 136-38. Thus adoption of the bylaw could not provide any basis for challenging their expulsion.

In their Opening Brief, Tice and SaveCCU suggest that a "primary" reason to expel them was what they contend is somehow "protected conduct" (publishing a factually accurate ad⁵ and inviting opposition to the board). Opening Br. at 20. But their notion of "primary" has no basis in the record. Plaintiffs themselves assert that the board "expelled from membership all the plaintiffs for cause(s) stated in their respective Notices of Expulsion." CP 663. As noted in each of the notices, *each* reason for expulsion was a sufficient basis for board action. This includes for both SaveCCU and Tice that they were contributing to losses being incurred by Columbia and, as to Tice, that he had breached the rules of civility that every member of Columbia agrees to abide by. As alleged by Tice and SaveCCU, the board had many different reasons to

⁵ Plaintiffs claim that the ad was not defamatory, but the notices of expulsion contain the Report of Special Committee Concerning Investigation of Columbia Volunteers, one of whose members was a lawyer, that concluded that the ad was disparaging. CP 122, 124. Plaintiffs do not allege that the board should not reasonably have relied on the report.

expel them, and Tice and SaveCCU, on this record, have not challenged, in any manner, at least two compelling reasons for a board to expel members of a voluntary organization that happens to be a financial institution—causing losses and acting uncivilly.

Even if the concept of a "primary" reason for expulsion had support in the record *and*, contrary to a special committee report, the ad was not disparaging, it is not a question of the correctness of Columbia's board's judgment or factual conclusions but whether the board lacked *any* credible basis for its conclusions. But as noted in footnote 5, *supra*, the board had before it a report of a special committee that concluded that the ad was disparaging of Columbia. There is no allegation that Columbia's board was not entitled to reasonably rely on the report in concluding to use the ad as one of multiple grounds for expulsion. *See* RCW 23B.08.300(2) ("In discharging the duties of a director, a director is entitled to rely on information, opinions, reports . . . if prepared or presented by: (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; [or] (b) Legal counsel . . . or other persons as to matters the director reasonably believes are within the person's professional or expert

competence[.]"). The court does not sit as a "super" fact-finder to second-guess the board's decision but gauges whether the process employed was regular. *Grand Aerie*, 13 Wn.2d at 135.

Nevertheless, SaveCCU and Tice argue that under *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 888 P.2d 147 (1995), their claim of wrongful expulsion should not have been dismissed under CR 12(b)(6) because the relevant inquiry "is whether any facts which would support a valid claim can be conceived,' not whether specific facts are explained in detail in the complaint." Opening Br. at 19. But the *Bravo* court explained that while a court may consider a "hypothetical situation" in conjunction with a motion to dismiss pursuant to CR 12(b)(6), such situation must be *raised by the complaint*: "[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim." 125 Wn.2d at 750 (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). Here, plaintiffs alleged that the board expelled them for many different causes, each of which was cause alone, but then failed to allege that all the cited reasons were knowingly untrue, in bad faith or somehow irregular.

Given this failure and the fact that their expulsion notices provide that "[e]ach of the foregoing reasons is sufficient in itself for expulsion" (CP 136-39), SaveCCU and Tice have alleged no claim of wrongful expulsion, and the superior court properly dismissed their claims.

C. The Superior Court Properly Granted Columbia's Motion for Summary Judgment on the Wrongful Suspension and Removal Claims of Chudy, Edgecomb and Marbet.

In seeking to lay claim to their volunteer positions, Chudy, Edgecomb and Marbet assert an issue not alleged below; namely, the board did not have "cause" within the meaning of RCW 31.12.285 to suspend them, and thus their expulsions, approved by a wide margin of the votes cast at the November 15, 2006, special membership meeting, should be disregarded. Opening Br. at 23. Plaintiffs did not claim that the November meeting was unlawfully *called*; rather, they complained that the meeting was "unlawfully conducted" in that mail balloting was not allowed and due to a false publicity campaign. Opening Br. at 33-34.

As set forth below, the fact that the members expelled the volunteers from membership at a duly called (and conducted) special membership meeting extinguishes Chudy's, Edgecomb's and Marbet's claim to office because only members may serve as volunteers. RCW

31.12.235(1) and RCW 31.12.326(3). Even if that were not true, the court properly dismissed Chudy's and Edgecomb's claim to office due to their failure to join necessary parties and Marbet's claim because it was moot—his term having expired. Finally, the court can affirm their claims to office on an alternative ground appearing in the record; i.e., they were properly expelled by the board for cause in August, and the court's contrary ruling was in error.

1. The membership's expulsion of Chudy, Edgecomb and Marbet was lawful.
 - a. The November membership meeting was lawfully called.

In their Opening Brief, Chudy, Edgecomb and Marbet argue that the board did not have "cause" to suspend them pursuant to RCW 31.12.285, and therefore, there was no "statutory basis" for holding the November meeting at which Columbia's members voted overwhelmingly to remove them from office and expel them from membership. Opening Br. at 20-23. Chudy, Edgecomb and Marbet raise this issue for the first time on appeal.⁶ Because plaintiffs did not raise this issue before the

⁶ On October 24, 2006, plaintiffs filed a second motion for injunction. In this motion, plaintiffs argued that the board did not have statutory "cause" to suspend Chudy, Edgecomb and Marbet from office and sought: (1) an injunction to restore the suspended plaintiffs to office, and (2) whether or

superior court, this Court should not consider it. *See* RAP 2.5 ("The appellate court may refuse to review any claim of error which was not raised in the trial court"); *see also Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) ("An issue, theory or argument not presented at trial will not be considered on appeal.").

Even if this issue were properly before the court, Chudy, Edgecomb and Marbet are wrong. Chudy, Edgecomb and Marbet were suspended for "cause" by the board on October 16, 2006. CP 317-22. The November membership meeting was called for the membership to *remove and expel* these plaintiffs, not suspend them. CP 323-25. Moreover, the membership did not need to have "cause" to remove and expel Chudy, Edgecomb and Marbet. The membership, in other words, did not ratify the board's stated grounds for cause for suspension of Chudy, Edgecomb and Marbet. Instead, the questions posed to the membership on that November evening were simply, among others:

not the court restored the suspended plaintiffs to office, to require that the membership meeting be conducted by mail ballot. CP 307, 313-16. Plaintiffs did not argue in this motion (or in their subsequent amended complaint or any subsequent briefing) that, absent statutory "cause" for suspension, Columbia lacked a statutory basis for the membership meeting.

Question #2 REMOVE DIRECTORS AND
SUPERVISORY COMMITTEE MEMBER

Should the following Directors and Supervisory Committee member be immediately REMOVED from Columbia Credit Union's Board of directors Supervisory Committee, respectively?

- 2A Cathryn Chudy (Director)
- 2B Kathryn Edgecomb (Director)
- 2C Lloyd Marbet
(Supervisory Comm Member)

* * *

Question #5 EXPEL FROM COLUMBIA CREDIT
UNION MEMBERSHIP

If removed as a Director or Supervisory Committee member by the membership at this Meeting, do you direct Columbia's Board of Directors to EXPEL from membership in Columbia Credit Union the following individuals?

- 5A Cathryn Chudy
- 5B Kathryn Edgecomb
- 5C Lloyd Marbet

CP 324-25 (emphasis in original).

RCW 31.12.195 and Columbia's bylaws (CP 25 (Art. III, § 4)) provide that "[a] special membership meeting of a credit union may be called by a majority of the board . . ." Plaintiffs have not challenged, and based on this authority reasonably cannot challenge, the *calling* of the November membership meeting. If plaintiffs believed they had a lawful basis to do so, they could have sought to enjoin the occurrence of the

meeting. Instead, they sought an injunction to restore the suspended plaintiffs to office and to require that the meeting be *conducted* to allow voting by mail ballot. CP 307, 313-16. Plaintiffs' motion for injunction thus impliedly recognized that Columbia's board had lawful power to call the membership meeting to remove these plaintiffs from office and expel them from membership, regardless of the stated grounds for suspension by the board. CP 307, 313-16.

In sum, the November membership meeting was lawfully called, and plaintiffs' argument, not properly before the Court, to the contrary should be rejected.

- b. The November membership meeting was lawfully conducted.

Chudy, Edgecomb and Marbet allege that their expulsions were "unlawful" and seek to have them declared "void." CP 597-98 (¶ 53, Prayer). Like SaveCCU and Tice, however, Chudy and Edgecomb failed to identify the "law" they believe has been violated. They also identified no violation of Columbia's bylaws. Instead, Chudy, Edgecomb and Marbet allege purported procedural irregularities—namely, that Columbia conducted a false "publicity campaign" and did not utilize a mail ballot at the meeting. CP 596 (¶¶ 45-46). But Chudy, Edgecomb and Marbet do

not allege that these purported procedural irregularities affected the outcome of the November meeting, nor do they acknowledge that Columbia's bylaws at the time prohibited a mail ballot at special membership meetings.

Under Washington law, "the judiciary must exercise restraint in interfering with the elective process which is reserved to the people in the state constitution." *McCormick v. Okanogan County*, 90 Wn.2d 71, 75, 578 P.2d 1303 (1978).⁷ "The purpose of an election, whether for men or for measures . . . is to give effect to the voice of the people; and, when the people have spoken, their verdict should not be disturbed by the courts, nor the election in which they have voiced it held void, unless it is clearly so." *Murphy v. City of Spokane*, 64 Wash. 681, 684, 117 P. 476 (1911). An election will not be set aside for an "informality or irregularity which cannot be said in any manner to have affected the result of the election." *McCormick*, 90 Wn.2d at 75.

Chudy, Edgecomb and Marbet argue that they stated a claim for relief because they alleged that "Columbia waged a costly publicity

⁷ The same is true here in the context of voluntary associations, given the principle that courts "refrain from interfering in the internal affairs of voluntary associations." *Anderson v. Enterprise Lodge No. 2*, 80 Wn. App. 41, 46, 906 P.2d 962 (1995), *rev. denied*, 129 Wn.2d 1015 (1996).

campaign to falsely denigrate and malign" them. Opening Br. at 29. But nowhere in their amended complaint, one-page statement or two-page statement do Chudy, Edgecomb and Marbet *identify* the allegedly false statements.⁸ CP 574, 587-99, 662-63. And importantly, they have not identified whether such allegedly false statement was "germane" or "material" to a credit union member voting at the membership meeting. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 383-85, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970) (In the corporate context, a shareholder challenging the outcome of a shareholder vote based on a false or misleading proxy statement must establish: (1) the existence of a false or misleading statement or omission; (2) that the statement or omission was material; and (3) that it caused injury to the plaintiff.). Given the absence of allegations of falsity or materiality, the purported false "publicity campaign" fails to state a claim.⁹

⁸ In their Opening Brief, Chudy, Edgecomb and Marbet state that "Columbia's website maligned them as 'radical, self-serving activists' and 'offenders' who were 'motivated by the possibility of personal gain.'" Opening Br. at 29. But *even in their brief*, these plaintiffs do not allege that such statements are false statements of fact.

⁹ *See* CR 8(a) (a pleading that sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); *Nw. Line Constructors Chapter of Nat'l Elec. Contractors Ass'n v. Snohomish County Pub. Util. Dist. No. 1*, 104 Wn. App. 842, 848-49, 17 P.3d 1251 (2001) (quoting *Lewis v. Bell*, 45 Wn. App. 192, 197,

Finally, Chudy, Edgecomb and Marbet argue that Columbia did not allow members to vote by mail at the November membership meeting at which they were expelled. Opening Br. at 29, CP 596 (¶ 46). But they do not allege—and they cannot reasonably allege—that such conduct was wrongful or constituted a violation of law or of Columbia's bylaws. At the time of the membership meeting, Columbia's bylaws expressly disallowed voting by mail at special membership meetings.¹⁰ CP 26 (Bylaws, Art. III, § 8).

Plaintiffs argue that "Columbia's claim of a bylaw provision barring voting by mail was disingenuous considering that its board could amend its bylaws at any meeting, and had done so at least thirteen times in

724 P.2d 425 (1986) (citing *Williams v. Western Sur. Co.*, 6 Wn. App. 300, 492 P.2d 596 (1972))) ("A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.").

¹⁰ Plaintiffs fail to inform the Court that the bylaw provision disallowing mail voting at special membership was the direct result of conduct of the plaintiffs themselves. Specifically, Columbia adopted a bylaw championed by Marbet in October 2004 which provided that only members in attendance at a special meeting would be permitted to vote but that action approved at such a meeting would be stayed pending a ratification vote by the membership conducted by mail. Decl. of Kathleen Porter, ¶ 2 (attached as Appendix A). Tice challenged the amendment in a complaint to DFI. Thereafter, DFI ordered Columbia to rescind the ratification provision, which Columbia promptly did. CP 80-83; Porter Decl., ¶ 3. This left in place the prohibition on mail balloting for special membership meetings.

the twelve months before calling the special membership meeting."

Opening Br. at 33. Plaintiffs are incorrect. The board could not amend this bylaw provision given that "[n]o changes to this Section . . . may be made . . . [p]rior to a Special Meeting after the Meeting has been requested." CP 26 (Bylaws, Art. III, § 8). The simple fact of the matter is that at the time of the November 2006 meeting, mail balloting was not permitted on the matters before the electorate.

In sum, the membership properly expelled Chudy, Edgecomb and Marbet from membership, and the superior court thus properly dismissed their wrongful-expulsion claims.¹¹ And because nonmembers may not serve as volunteers, their claims of wrongful suspension were properly dismissed.

¹¹ Not only was the November meeting properly called and conducted, plaintiffs' request to declare void certain aspects of the meeting have become moot. Specifically, one of the questions approved at the November meeting has since been incorporated into Columbia's bylaws, which now provide that in order to be eligible to serve on the board or supervisory committee, an individual shall "not be a plaintiff in a legal action pending against the Credit Union, a member of an organization that is a plaintiff in a legal action pending against the Credit Union, or an attorney representing a plaintiff in a legal action pending against the Credit Union." CP 654 (n.2).

2. The superior court properly ruled that Chudy and Edgecomb failed to join necessary parties.

RCW 7.24.110 provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Chudy and Edgecomb seek a declaration that their suspension and subsequent removal from office were unlawful and ask that both actions be declared void. CP 597-98 (¶¶ 52, 54, Prayer). By asking the court to declare void their suspensions and removal from office, Chudy and Edgecomb seek reinstatement to those offices, but they have failed to include necessary parties in this action, i.e., existing directors elected by Columbia's membership who currently occupy positions once held by Chudy and Edgecomb.

In *Treyz v. Pierce County*, 118 Wn. App. 458, 460-62, 76 P.3d 292 (2003), *rev. denied*, 151 Wn.2d 1022 (2004), a part-time district court judge whose position was eliminated by new Pierce County consolidation ordinances sued Pierce County, seeking a declaration that the ordinances were null and void. The plaintiff failed, however, to name the eight district court judges who would lose their positions if the court invalidated

the ordinances. 118 Wn. App. at 462. Ultimately, this Court held that the eight district judges were necessary parties to the action; as a result, the trial court lacked jurisdiction to decide the case. 118 Wn. App. at 462. Similarly, here, the superior court properly determined that Chudy and Edgecomb had failed to name their successors, H. Dexter Garey and Charles McDonald. CP 633 (n.6); CP 616-17 (Decl. of J. Parker Cann, ¶ 6).

Notwithstanding RCW 7.24.110 and this Court's decision in *Treyz*, plaintiffs argue that the "necessary-party argument should be rejected" because "plaintiffs would need to add new defendants and dismiss old defendants whenever an election is held or a vacancy occurs and is filled by an appointee." Opening Br. at 25. But that is precisely the point. As this Court explained in *Treyz*, "the decision on [plaintiff's] claim will affect the rights of the judges who were elected under the consolidation ordinances; it will determine whether they retain their positions." 118 Wn. App. at 464. Likewise, if Chudy and Edgecomb achieved reinstatement to office, that would have a direct impact on their successors' ability to retain their director positions because Columbia's bylaws fix the number

of directors at nine and the board is currently fully constituted. CP 616 (Decl. of J. Parker Cann, ¶ 4); CP 656 (n.3).

Finally, Chudy and Edgecomb argue that the interests of their replacement directors would not be impeded by a judgment ordering them reinstated to the board because the court could "restore Chudy and Edgecomb to Columbia's board by increasing its number by two for the number of months remaining in their terms when they were wrongfully suspended and removed from their elective positions." Opening Br. at 26. Columbia's bylaws, however, fix the number of directors at nine. CP 656 (n.3). Chudy and Edgecomb do not suggest that this bylaw provision is invalid. Further, an increase in the number of directors would dilute the votes of other directors. Were Chudy and Edgecomb to prevail on their claims of wrongful suspension and removal, their remedy, if any, is not to expand the Board but to resume their former positions for the remainder of their respective terms (now expired).¹²

¹² Chudy and Edgecomb cite no authority for their suggestion that this Court could restore them to office "for the number of months remaining in their terms" at the time they were removed. As noted in the motion to dismiss that Columbia is filing concurrently with this brief, the terms of Chudy and Edgecomb have expired and are now moot. They cannot suspend the passage of time by seeking reinstatement for the time remaining in their terms at the time of their suspension and removal.

For these reasons, the superior court properly granted Columbia's motion for partial summary judgment as to the wrongful suspension and removal claims of Chudy and Edgecomb.

3. The superior court properly ruled that Marbet's claims regarding his suspension and removal from office are moot.

Like Chudy and Edgecomb, Marbet seeks a declaration that his suspension and subsequent removal from office were unlawful and asks that both actions be declared void. CP 597-98 (Am. Compl. ¶¶ 52, 54, Prayer). However, Marbet's term of service on the supervisory committee expired long ago. CP 615 (Decl. of J. Parker Cann, ¶ 2). Under no circumstances can Marbet be reinstated to the supervisory committee. As this Court explained in the context of a quo warranto proceeding, "[W]here the sole purpose of the proceeding is to oust the respondent from office, it will usually be dismissed upon cessation of the respondent's office through resignation, expiration of his term, or otherwise." *Cotton v. City of Elma*, 100 Wn. App. 685, 693, 998 P.2d 339, *rev. denied*, 141 Wn.2d 1029 (2000) (quoting 65 Am. Jur. 2d *Quo Warranto*, § 102, at 304 (1972)). And while the plaintiff in *Cotton* was able to withstand a mootness challenge on this same ground because she had asserted a claim

for damages, the same is not true of Marbet. His term of service expired. He asserted no claim for damages. His claims with respect to his suspension and removal are moot, and the superior court properly granted Columbia's motion for partial summary judgment on this ground.

In an effort to distinguish *Cotton*, Marbet argues that his claim is for declaratory judgment, rather than a quo warranto action. Opening Br. at 27. This is a distinction without a difference. Marbet's term of office expired, and he did not assert a claim for damages. His claims in connection with his suspension and removal from office are indisputably moot.

Marbet also argues that his claims regarding his suspension and removal are not moot because, under the reasoning of *Hough v. Stockbridge*, 113 Wn. App. 532, 54 P.3d 192 (2002), *rev'd in part on other grounds*, 150 Wn.2d 234 (2003), and *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983), the court can still provide "effective relief" by "cleansing from his record of service to Columbia the stigma caused by his wrongful removal and suspension." Opening Br. at 28. Marbet is wrong. In the cases cited by Marbet, the "cleansing" was connected to *court orders*, which, because of their substance, gave rise to alleged

stigma. *See Hough*, 113 Wn. App. 532 (cleansing connected to an anti-harassment order); *Turner*, 98 Wn.2d 731 (cleansing of record connected to an invalid contempt order and subsequent incarceration in a juvenile-detention facility). Columbia is a voluntary association, not a court. Marbet's suspension and removal from Columbia pursuant to statute and Columbia's bylaws is a private matter between Columbia, Marbet and Columbia's members. It has not created a "stigma" that the court can "cleanse" and by which Marbet can avoid a mootness dismissal.

Finally, Marbet argues that his claim cannot be moot because if a claim of wrongful removal "becomes moot the moment [an] elective term ends, then wrongful removals are effectively beyond judicial review whenever the period of the remain [sic] term is less than the period to [sic] time necessary for adjudication and appeal of the claim." Opening Br. at 28. Not only does Marbet fail to cite any authority for this proposition, he failed to raise this argument below. *See* CP 638-46. Regardless, if by this argument Marbet means to assert the "capable of repetition, yet evading review" exception to the mootness doctrine, the argument fails. While Washington courts have discussed this exception, it does not appear that it has been expressly adopted in Washington. *See Hart v. Dept. of*

Social and Health Servs., 111 Wn.2d 445, 451, 759 P.2d 1206 (1988)

("We decline at this time" to adopt the "'capable of repetition, yet evading review' exception to mootness adopted by the United States Supreme Court.").

Even if the exception had been adopted in this State, it is not applicable on these facts. As the *Hart* court explained, the Supreme Court, in applying the exception, has "required a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." 111 Wn.2d at 452 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed 2d 353 (1982)). Marbet has been expelled from Columbia. Nonmembers cannot hold office. RCW 31.12.326(3). There is no "reasonable expectation" that this same controversy will recur with Marbet.

4. The superior court's dismissal of the wrongful-expulsion claims by Chudy, Edgecomb and Marbet may be affirmed on the ground that they were properly expelled by the board in August 2006.

The superior court's dismissal of the claims of Chudy, Edgecomb and Marbet that they were wrongfully expelled by Columbia's membership at the November 15, 2006, membership meeting may be

affirmed on another ground.¹³ RAP 2.5(a). And that is, Chudy, Edgecomb and Marbet were properly expelled by the board on August 15, 2006. In granting the preliminary injunction restoring these plaintiffs to office, the superior court determined that they must be suspended and removed from office *before* they can be expelled. CP 280-86. This ruling, however, is inconsistent with the statutory scheme.

As explained above, the Legislature has conferred the board with the power to define "cause" for expulsion and to act to expel members. RCW 31.12.255. The WSCUA contains a separate provision empowering the board to suspend a volunteer from the board or supervisory committee for specified statutory grounds that constitute "cause." RCW 31.12.285. These two statutory provisions are not only separate and stand-alone provisions, they are predicated on two completely different concepts underlying credit union law (*membership* in the credit union versus *governance* of the credit union). The statutes provide that if a director ceases to be a member, the "director shall no longer serve as a director."

¹³ See, e.g., *Yurtis*, 143 Wn. App. at 690 (because review under CR 12(b)(6) is de novo, "an appellate court may sustain the trial court's judgment upon any theory that is established by the pleadings and supported by the record"); *McGowan v. State*, 148 Wn.2d 278, 288, 60 P.3d 67 (2002) (prevailing party "entitled to argue any grounds in support of the superior court's order that are supported by the record.").

RCW 31.12.235(1). The same is true of a supervisory committee member.

RCW 31.12.326(3). Thus membership is the *sine qua non* of entitlement to a corporate governance position.

The suspension and removal statute, RCW 31.12.285, provides as follows:

The board may suspend for cause a member of the board or a member of the supervisory committee until a membership meeting is held. The membership meeting must be held within thirty days after the suspension. The members attending the meeting shall vote whether to remove a suspended party. For purposes of this section, "cause" includes demonstrated financial irresponsibility, a breach of fiduciary duty to the credit union, or activities which, in the judgment of the board, threaten the safety and soundness of the credit union.

The court below read the suspension and removal statute as somehow "trumping" the board's right to expel any member for cause. But a board's determination that an elected official is "unfit to govern" should not be confused with or interfere with the board's right to determine that a member is "unfit to belong." Columbia is a "cooperative society" in which membership is voluntary and in which the board, by bylaw, establishes the criteria for entry as a member and the "cause" for expulsion. *See* RCW 31.12.015 ("A credit union is a cooperative society organized under this chapter as a nonprofit corporation for the purposes of

promoting thrift among its members and creating a source of credit for them at fair and reasonable rates of interest."). It is the board's decision alone as to whether a member remains fit to continue to belong as a member.

The mere fact that a member happens to be a board or supervisory committee member does not immunize the member from expulsion for cause as defined by the board and accepted by the membership. A board member who defaults on his or her loan and causes a loss to the credit union is no more immune from expulsion than the board member who causes a loss by causing membership withdrawals. The court's ruling effectively shields board and supervisory committee members from expulsion by the board because the board must first invoke the suspension statute. Yet, if the board member has only caused a loss that does not threaten the safety and soundness of Columbia, the board may neither suspend nor expel under the court's reasoning. That result is untenable under the statutory scheme¹⁴ and antithetical to the concept of a

¹⁴ As the Washington Supreme Court has explained, the "construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency." *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). Further, "[s]tatutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the

"cooperative society" that is permitted to expel members, whoever they are, for "cause" as defined by the board. Under the court's ruling, instead of all members of a cooperative society being equal, the court has created a class of members that are "more equal" than others.

Moreover, the result of the superior court's ruling is that Columbia must utilize the suspension and removal process if a board or supervisory committee member causes a loss to Columbia by defaulting on a loan. The highly public suspension and removal process should not be required to expel a member who defaults on a loan. Membership expulsions are private—volunteer suspensions are not.

Finally, Chudy, Edgecomb and Marbet failed to state a claim of wrongful expulsion by the board for the same reasons that Tice and SaveCCU failed to state such a claim. Namely, the board had numerous different reasons to expel Chudy, Edgecomb and Marbet from membership, each of which was sufficient in itself for expulsion, and these plaintiffs failed to allege that *all* the stated reasons were untrue, unlawful or irregular. CP 120-35.

integrity of the respective statutes." 142 Wn.2d at 342 (internal quotation marks and citations omitted).

In sum, the board properly expelled Chudy, Edgecomb and Marbet from membership on August 15, 2006. It was unnecessary to first suspend and remove them from office pursuant to RCW 31.12.285. The superior court's dismissal of Chudy, Edgecomb and Marbet's claim of wrongful expulsion may be affirmed on this ground as well.

D. The Superior Court Properly Granted Columbia's Motion to Dismiss Plaintiffs' Claim Regarding the July 22, 2006, Membership Meeting for Failure to State a Claim.

Plaintiffs make a number of allegations regarding the board's conduct preceding the July 22, 2006, membership meeting, including that (1) the board amended its bylaws to provide that *Robert's Rules of Order* would be superseded by procedural rules adopted by the board at special membership meetings; (2) the board adopted rules shortly before the meeting permitting members to cast votes at the meeting between 10:00 a.m. and 3:00 p.m.; and (3) Columbia "selectively notified its employees . . . that they with their family and friend members could . . . cast ballots anytime until 3:00 p.m." CP 594 (¶ 33). Because none of these allegations state a claim, the superior court properly dismissed plaintiffs' claim for a declaration that this conduct be declared "unlawful"

and that the court declare "void" all action taken at the July 22, 2006, membership meeting. CP 597-98 (¶ 55, Prayer).

The board may properly amend Columbia's bylaws. *See* RCW 31.12.115(2). And the WSCUA expressly provides that "[s]pecial membership meetings shall be conducted according to the rules of procedure approved by the board." RCW 31.12.195(5) (emphasis added). Accordingly, the board's action in adopting rules of procedure for the membership meeting was expressly authorized by statute.

Plaintiffs' remaining allegation, that is, "selectively informing" employees that members could vote up until 3:00 p.m., similarly fails to state a claim. Even assuming Columbia did inform only its employees that the polls would be open until 3:00 p.m., plaintiffs did not allege that such conduct affected the outcome of the meeting. *See McCormick*, 90 Wn.2d at 75 (An election will not be set aside for an "informality or irregularity which cannot be said in any manner to have affected the result of the election").

Plaintiffs argue that they need not make such allegation under CR 12(b)(6) because "if it can be conceived that the alleged irregularities affected the outcome of that meeting, Plaintiffs' claim must not be

dismissed." Opening Br. at 32. But it cannot be "conceived"¹⁵ unless plaintiffs are prepared to show factually that (1) those who were "selectively notified" voted (a) during the extended hours and (b) in a given manner, and (2) had a fewer number of votes been cast, the result would have been different. Plaintiffs know that none of that can be shown because a member's vote is confidential. CP 27 (Bylaws, Art. IV, § 4) (Columbia utilizes independent third-party election tellers and "[t]he Tellers shall administer the distribution, collection and tabulation of . . . member vote[s] in accordance with the procedures approved by the Board, assuring confidentiality of the members' votes . . .").

Based on the foregoing, it is clear that *even if* there were irregularities at the July 22, 2006, membership meeting, the election may not be invalidated unless such irregularities affected the outcome. And plaintiffs did *not* allege that any of the complained-of conduct affected the outcome. All plaintiffs alleged is that the polls were open longer than they thought they would be and only Columbia's employees allegedly were aware of the longer hours. Ironically, plaintiffs' position seems to be that the fewer members able to vote on the particular issues before the

¹⁵ See *Twombly*, 127 S. Ct. at 1965 ("[f]actual allegations must be enough to raise a right to relief above the speculative level").

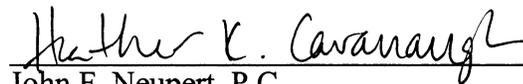
membership on that July day, the better. The superior court properly dismissed this claim.

IV. CONCLUSION

The superior court properly dismissed the plaintiffs' complaint. The wrongful-expulsion claims and claims respecting the July and November membership meetings fail because plaintiffs failed to state a legal claim for relief. The suspension and removal claims of Chudy, Edgecomb and Marbet fail because they were properly expelled by the membership and nonmembers cannot hold office. In addition, Chudy and Edgecomb failed to join necessary parties, and Marbet's claim to office is moot. The superior court's decision should be affirmed.

Respectfully submitted this 22nd day of August, 2008.

MILLER NASH LLP



John F. Neupert, P.C.

WSB No. 39883

Heather K. Cavanaugh

WSB No. 33234

Attorneys for Respondent Columbia
Community Credit Union

APPENDIX A

Honorable Paula Casey

<input checked="" type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input checked="" type="checkbox"/> Hearing is set Date: <u>October 26, 2006</u> Time: <u>3:30 p.m.</u> Judge/Calendar: <u>Paula Casey</u> _____

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

SAVE COLUMBIA CU COMMITTEE,
CATHRYN CHUDY, KATHRYN
EDGECOMB, LLOYD MARBET, and
ROBERT TICE,

Plaintiffs,

v.

COLUMBIA COMMUNITY CREDIT
UNION and STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL
INSTITUTIONS,

Defendants.

Case No. 06-2-01688-0

COLUMBIA COMMUNITY CREDIT
UNION'S MOTION TO STRIKE OR, IN
THE ALTERNATIVE, FOR A
CONTINUANCE OF THE HEARING ON
PLAINTIFFS' MOTION FOR
INJUNCTIONS

I. RELIEF REQUESTED

Defendant Columbia Community Credit Union ("Columbia") moves to strike the civil notice of issue ("Notice") setting the motion for injunctions filed October 24, 2006, ("Motion") and set for hearing on October 26, 2006 at 3:30 p.m. or in the alternative to continue the hearing on the motion to a later date and time convenient to the court and the parties.

II. EVIDENCE RELIED UPON

This motion relies upon the declarations of Colleen Boccia, J. Parker Cann, Heather K. Cavanaugh, and Kathleen Porter, and the pleadings and files herein.

1 4. Plaintiffs basis for an injunction asserts facts which allegedly occurred
2 only in Clark County. If plaintiffs sought to supplement their complaint, the supplemental claim,
3 if any, would not place venue in this Court. Columbia does not transact business in Thurston
4 County nor does it have an office in the County. See Declaration of J. Parker Cann in support of
5 Columbia's opposition to plaintiffs' first motion for injunction at ¶ 10; Trans-Northwest Gas v.
6 Northwest Natural Gas, 40 Wn.2d 35, 240 P.2d 261 (1952) (corporations transact business when
7 a substantial part of its usual and ordinary and not merely casual or incidental business is
8 conducted in the county).

9 5. Plaintiffs argued to this court in their first motion for injunction at 5:17-20
10 and reply in support of that motion at 1:15-3:17 that Columbia must utilize the suspension and
11 removal process in lieu of expulsion. The Court accepted plaintiffs' arguments and held that the
12 stated grounds for expulsion were the equivalent of grounds for suspension and removal² and
13 thus, Columbia must follow the suspension and removal process: "I would expect that by these
14 orders, the board will be suspending the membership of the plaintiffs on their respective boards
15 and supervisory committees." Transcript of September 18, 2006, hearing on plaintiffs' motion
16 for injunction at 75:4-6.³

17 Plaintiffs argued against reconsideration of the Court's ruling in a court
18 appearance October 19, 2006. At that hearing plaintiffs were aware of the suspension that had
19 occurred just 3 days earlier but plaintiffs did not complain and in fact resisted an increase in the
20 bond due to the membership meeting to be held. Having obtained injunctive relief on this basis
21 and having stood silent in front of this Court after the suspension occurred, it is unreasonable and
22 inequitable for plaintiffs to raise now, for the first time, an assertion that the grounds for
23

24 ² "Cause is not much different than expulsion from membership, really, or at least those relied
25 upon by the board in this instance." Transcript of September 18, 2006, hearing on plaintiffs'
26 motion for injunction at 73:6-8.

³ A copy of the portion of the transcript containing the Court's oral ruling is attached as Exhibit
A to the memorandum in support of Columbia's motion for reconsideration and partial summary
judgment.

1 expulsion *are not or could not be* grounds for suspension and removal. Columbia acted in
2 reliance on the Court's ruling in suspending the plaintiffs and in calling a membership meeting.
3 Declaration of J. Parker Cann in support of Columbia's motion to strike or, in the alternative, for
4 a continuance at ¶ 2 ("Cann Decl."); see also, notices of suspension attached as Exhibits A, B and
5 C to plaintiffs' Motion. If plaintiffs believed that Columbia could not suspend plaintiffs and call
6 a membership meeting on these facts plaintiffs should have so informed the Court and Columbia.
7 Plaintiffs did not because that would undercut their argument against expulsion. Plaintiffs
8 cannot play both sides of the street at once. That is inequitable and their conduct amounts to
9 grounds for judicial estoppel. See Save Columbia CU Committee v. Columbia Community
10 Credit Union, 134 Wn. App. 175, 186, 139 P.3d 386 (2006) ("The essence of judicial estoppel is
11 that the party to be estopped must be asserting a position that is inconsistent with an earlier
12 position; the party seeking estoppel must have relied on and been misled by the other party's first
13 position; and it must appear unjust to permit the estopped party to change positions.") (Citations
14 omitted).

15 6. Not only has this Court held that the stated grounds for expulsion are the
16 equivalent on this record of grounds for suspension, a position the Court knows Columbia
17 disagrees with, but assuming the process the Court has required Columbia to utilize is the proper
18 process, the statutory grounds for suspension are not limited to the three grounds asserted by
19 plaintiffs. RCW 31.12.285 provides a non-exclusive list of grounds for suspension.⁴ If the Court
20 is correct in its analysis, then the stated grounds for expulsion are within the non-exclusive
21 grounds for suspension. Furthermore, courts are instructed not to insert themselves into internal
22 disputes. Anderson v. Enterprise Lodge No. 2, 80 Wn. App. 41, 46, 906 P.2d 962 (1995), rev.
23 denied, 129 Wn.2d 1015 (1996) (courts "refrain from interfering in the internal affairs of
24 voluntary associations").

25 _____
26 ⁴ RCW 31.12.285 provides that, "[f]or purposes of this section, 'cause' includes demonstrated
financial irresponsibility, a breach of fiduciary duty to the credit union, or activities which, in the
judgment of the board, threaten the safety and soundness of the credit union."

1 7. Plaintiffs and their counsel are intimately familiar with the history of this
2 controversy yet plaintiffs omit to inform the Court of a critical and dispositive fact and that is
3 that Columbia's bylaws do not permit a mail ballot for the special membership meeting and that
4 is the direct result of acts, votes and conduct by these very same plaintiffs who wish to ignore
5 bylaws they caused to be adopted. By action of the board of directors of Columbia, on October
6 24, 2005, Columbia adopted a bylaw, championed by plaintiff Marbet, that provided that only
7 members in attendance at a special meeting would be permitted to vote, but that action approved
8 at such a meeting would be stayed pending a ratification vote by the membership conducted by
9 mail. Declaration of Kathleen Porter in support of Columbia's motion to strike or, in the
10 alternative, for a continuance at ¶ 2 ("Porter Decl."). Plaintiff Chudy voted in favor of this
11 bylaw.⁵ Porter Decl., ¶ 2. Plaintiff Robert Tice challenged that amendment in a complaint to
12 the Washington Department of Financial Institutions. In its June 30, 2006, letter, DFI ordered
13 Columbia to rescind the ratification provision. See Complaint, Exhibit 20. By Board action on
14 July 11, 2006, Columbia's Board voted to rescind the ratification provision. Plaintiff Chudy
15 voted *for* rescission. Porter Decl., ¶ 3. No Board member proposed changing the bylaw to
16 provide for a mail ballot at a special meeting. Porter Decl., ¶ 3. Thus, Columbia's bylaws, to
17 which plaintiffs are bound, legally and factually, provide that "With respect to Special Meetings,
18 *only those* eligible members as of the voting date of record for the Meeting *who attend* the
19 Meeting shall vote on the items under consideration." (Emphasis added).⁶ Article III, Section 8;
20 Complaint, Exhibit 2. That is in complete accord with the legal position Marbet, Tice and Save
21 CCU took in the mandamus action before Judge Roger Bennett. In that case, these plaintiffs
22 strenuously argued *against* a mail ballot for a Special Membership meeting: "**no statute gives**

23 ⁵ Plaintiff Edgecomb was not present at the time of the final vote on this bylaw, but at an earlier
24 board meeting where the bylaw was discussed Edgecomb was in favor of the bylaw. Porter
Decl., ¶ 2.

25 ⁶ And this section of the bylaws may not now be amended. Article III, Section 8 specifically
26 provides that "No changes to this Section or Article II, Section 2 may be made . . . [p]rior to a
Special Meeting after the Meeting has been requested." This provision was also championed by
plaintiff Marbet.

1 **credit union members the legal right to vote by mail."** (Emphasis in original). Plaintiffs'
2 Reply to Answer and to Memorandum in Opposition to Application for Writ of Mandamus at ¶
3 13, attached hereto as Exhibit A.⁷

4 8. While the foregoing grounds are more than sufficient to strike the Notice,
5 to reset the Motion to another time, or to deny the motion outright, in order to prepare a full
6 opposition to the Motion, Columbia would request discovery or, at a minimum, to call as
7 witnesses at an evidentiary hearing, these plaintiffs (or others) to establish, among other things,
8 the following:

9 8.1. Prior to the current situation, plaintiffs have always believed that a special
10 membership meeting like that at issue should not be conducted by mail ballot and they have
11 acted accordingly;

12 8.2. Plaintiffs only seek to have a mail ballot pursued at the membership
13 meeting at issue because they believe they will be removed from office or expelled;

14 8.3. The grounds for expulsion and the grounds for suspension are truly and
15 correctly stated or the Board believes them to be so;

16 8.4. Plaintiffs' assertion that the special membership meeting held July 22,
17 2006, was conducted unfairly is false and unfounded;

18 8.5. Plaintiffs' assertion that the "minority director's lawsuit" was pursued in
19 "good faith" is false and unfounded; and
20

21
22

23 ⁷ Another crucial and distinguishing fact omitted by plaintiffs is that when Columbia argued that
24 its members should not be deprived of a mail ballot on removal of directors, Columbia's bylaws
25 were different. Porter Decl., ¶ 4. At that time, Columbia's bylaws provided for mail balloting
26 but did not specify the circumstances in which it would be permitted. Porter Decl., ¶ 4. As
noted above, the bylaws have since changed and now specify when mail balloting is permitted
and when attendance is required to vote. This is in accord with the statutes. See RCW
31.12.386(2) (members may vote as prescribed in the bylaws).

1 8.6. Plaintiffs will not suffer any irreparable harm if Columbia conducts a
2 membership meeting on November 15, 2006 (3 weeks) in which the electorate will have an
3 opportunity to vote, by secret ballot, whether to remove the elected plaintiffs from office or to
4 expel plaintiffs. If the membership votes to not remove the elected plaintiffs from office, then
5 they will be restored to office if the membership does not vote to expel them. This is in complete
6 accord with the right of the Board to call a membership meeting to remove the elected plaintiffs
7 from office regardless of whether the elected plaintiffs were first suspended from office. See
8 RCW 31.12.195(1).
9

10 9. Columbia will suffer harm if the membership meeting is not held
11 November 15, 2006. Columbia must hold an annual meeting in 2006. Declaration of Colleen
12 Boccia in support of Columbia's motion to strike or, in the alternative, for a continuance at ¶ 2
13 ("Boccia Decl."). Columbia reasonably cannot hold an annual meeting without knowing whether
14 Chudy, Edgecomb, and Marbet are to be replaced. Boccia Decl., ¶ 3. The membership meeting
15 planned for November 15 is intended to occur in a timeframe that will permit Columbia to
16 conduct its annual meeting in 2006. Boccia Decl., ¶ 4. Even if Columbia's bylaws would
17 lawfully allow Columbia to do so, it will be extremely difficult as well as impracticable to
18 conduct the November 15 meeting with a mail ballot because those ballots must be prepared,
19 mailed to the membership, and then returned by the members all in advance of the meeting
20 which is a mere three weeks away. Boccia Decl., ¶ 5. Thus, if the Court were to require a mail
21 ballot notwithstanding Columbia's bylaws, that would necessitate preparing mail ballots at a cost
22 of \$80,000, mailing them to the membership and giving the members only a very short time
23 period in which to return the ballots, or postponing the November 15 meeting at a cost to exceed
24 \$25,000. Boccia Decl., ¶¶ 6, 7. If the November 15 meeting is postponed, then it is not possible
25 for Columbia to conduct its annual meeting in 2006. Boccia Decl., ¶ 8.
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IV. CONCLUSION

For the foregoing reasons, Columbia respectfully requests that the Court strike the Notice or, alternatively, continue the hearing on plaintiffs' motion for injunctions to a date convenient to the Court and the parties. To the extent this relief is not granted, Columbia requests that plaintiffs' motion be denied in its entirety.

If the Court grants plaintiffs' motion for injunctions, Columbia requests that plaintiffs' be required to post a bond in the amount of \$100,000 to cover "all damages and costs which may accrue by reason of the injunction." RCW 7.40.080.

DATED this 25th day of October, 2006.

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Columbia Community Credit Union

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Superior Court of Washington for Clark County

Save Columbia CU Committee, John Bucholtz, Steve Straub, and Robert Tice, Plaintiffs,

vs.

Columbia Community Credit Union, Karen Martel, Edwin C. Bell, Dale Magers, William F. Byrd III, Robert M. Byrd, Dennis McLachlan, Mark L. Ail, Connie Jones, Bruce Davidson, Clarence Dykman, DeeAnn Miller, Jan Stockton, David E. Doss, and Paul F. Hodge, each such individual in their capacity as a credit union official, Defendants.

No. 04-2-00675-2

Plaintiffs' Reply to Answer and to Memorandum in Opposition to Application for Writ of Mandamus

The above-named Plaintiffs reply as follows to the above-named Defendants' Answer to Application to Writ of Mandamus ("Answer") filed 2/20/2004 (served 2/23/2004) and Defendants' Memorandum in Opposition to Application for Writ of Mandamus ("Memo") filed 2/23/2004. Acronyms and shortened names as defined in Plaintiffs' Application for Writ of Mandamus ("Application") filed February 11, 2004, will be employed here.

No Material Facts in Dispute

- 1. Defendants' have not seriously disputed any of the material facts that support Plaintiffs' Application for a Writ of Mandamus. While Defendants have not forthrightly admitted

1—Plaintiffs' Reply to Answer and to Memorandum.

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P.O. Box 1134, Tacoma, WA 98401
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e-mail: schafen@pobox.com

1 (Answer ¶19) that CCCU's secretary received on January 14, 2004, Petitions bearing
2 signatures at least 2,000 of its members, Defendants have not seriously denied that at
3 least 2,000 of the alleged 3,593 Petition signatures by persons claiming to be CCCU
4 members were valid. The records needed to verify their validity are possessed only by the
5 Defendants. In the letter of January 26, 2004, by CCCU's Oregon counsel to DFI
6 (Answer, Ex. 2) several objections on legal issues are raised concerning the Petitions, but
7 counsel made no claim that the Petitions bore fewer than 2,000 valid CCCU-member
8 signatures. Defendants' counsel undoubtedly recognizes their obligation under CR 11 to
9 refrain from raising factual defenses that would be unsupportable by a reasonable inquiry.

- 10 2. DFI concluded, after inspection of copies of all the signed Petitions that were delivered to
11 CCCU, that "the Petition presumptively contains more than the requisite number of
12 signatures necessary to properly call a Special Membership Meeting." DCU Opinion
13 Letter 04-01, page 3 (Application, Ex. B)

14 Mandamus as Appropriate Remedy

- 15 3. Defendants, at Answer ¶16, "allege that mandamus is not appropriate in this action;" and
16 Defendants deny (Answer ¶29) Plaintiffs assertion at Application ¶29, that "the issuance
17 of a writ of mandate is appropriate to compel CCU and its officials to immediately give
18 notices of, and to hold, a special meeting."
19 4. In addition to the mandamus cases against corporate officials cited at ¶16 of the
20 Application, a more recent one is quite instructive. In *Hern v. Looney*, 90 Wn. App. 519,
21 959 P.2d 1116 (1998) the appellate court criticized both the corporate officers and the
22 trial court for addressing issues beyond simply performance of the ministerial duties of
23 the corporate officials, saying at 526-27:

24 Mr. Looney, Jr., and Mr. Klaue appeared in this mandamus
25 action as representatives of the corporation. As such, they had a
26 fiduciary relationship to those who presented conflicting claims to
27 the same share. 12 William Meade Fletcher, *et al.*, FLETCHER
CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5528, at
384 (perm. ed. rev. vol. 1996). They were neither obligated, nor
permitted, to look beyond the facial legality of the transfer: "The

1 law, however, does not require or permit the officers of the
2 corporation to assume the functions of a court of justice, and by
3 their decision forever conclude the rights of the contending
4 claimants." *Id.* at 385.

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[p. 528] For us, the conclusion is inescapable. In processing
a request for registration of a transfer, a corporation acts merely as
a record-keeper. It is not burdened with the responsibility of
determining the rights of adverse claimants to the shares. Nor can it
do so, if a claimant presents a prima facie valid transfer certificate.
Tobias [v. Wolverine Min. Co.] 17 P.2d [332 (1932)] at 342. *A*
proceeding that attempts to determine the rights of adverse
claimants would extend beyond the issues of a simple mandamus
action, which is aimed at requiring officers to perform
ministerial acts. See *Walker [v. Munro]*, 124 Wn.2d 402,] 410-11,
[879 P.2d 920 (1994)]. The limited action here was never intended
to adjudicate the validity of Jack Hern's purported gift to Alan
Hern. [Emphasis added.]

5. A credit union secretary's actions under RCW 31.12.195(3) upon receiving a petition for a special meeting are merely ministerial—"designating the time and place at which the special meeting will be held" and "giv[ing] notice of the meeting within ten days of receipt of the request." Neither the secretary, the board members, or others are directed by RCW 31.12.195 or any other provision to speculate on or to judge what will be the legal effect of the actions taken on the agenda items by the members who attend the special meeting.
6. At page 5 of the Memo, Defendants suggest that the holding of a special meeting based upon the Petition would be *illegal!* But the two *Vashon Island* cases there cited for that proposition are inapposite, and only stand for the commonsense proposition that courts need not order persons or bodies to perform *useless* actions. No one can responsibly assert that holding a special membership meeting to vote on the removal and replacement of all members of a credit union's board of directors is a useless act, much less an illegal act.
7. Defendants assert (Answer ¶34) that the Petition's agenda item #1—voting to rescind the adoption of the Plan of Conversion—is moot because of NCUA's "disapproval of the methods and procedures applicable to the membership vote." (Application, Ex. C) But

1 such a new membership vote is not a useless, illegal, or moot action, for it affords
2 members an opportunity to express their wishes and directions to their board, as expressly
3 permitted by RCW 31.12.255(1)(i)(board shall “perform such other duties as the
4 members may direct.”). RCW 31.12.195 only requires that a special meeting be called
5 for one or more specific purposes, so any legal purpose is enough. Recognize that the
6 Defendant board members’ reaction the day after receiving the NCUA letter ruling was to
7 publicly announce that they were considering holding a membership revote on the Plan of
8 Conversion. See Exhibit A to Declaration of Doug Schafer filed with this Reply. And
9 four days later, they broadcast another press release announcing they were “considering
10 an option to table” such a revote, but they never have publically abandoned their Plan of
11 Conversion to a bank charter. See Exhibit B to Declaration of Doug Schafer.

12 Bylaws Cannot Trump State Statutes

- 13 8. As previously noted (Application ¶22), RCW 31.12.065(1)(m) requires that a credit
14 union’s bylaws not be inconsistent with anything in RCW Chapter 31.12. Nonetheless,
15 Defendants argue that selected words and phrases of its bylaws trump contrary state
16 statutes.
- 17 9. For example, while RCW 31.12.195(3) requires a credit union’s *secretary* to designate
18 the time and place of a special membership meeting “Upon receipt of a request” for such
19 a meeting, the CCCU bylaws provides that “Upon receiving an *acceptable* request for a
20 special membership meeting, the Board shall designate the time and place” for it. Plainly,
21 these two schemes are inconsistent, and the bylaws must yield to the statute.
- 22 10. By statute, RCW 31.12.195(1), special membership meetings may be called by either the
23 board, the supervisory committee, or by 2,000 members.
- 24 11. Under RCW 31.12.285, if the board suspends a director or supervisory committee
25 member, then a “membership meeting must be held within thirty days after the
26 suspension. The members attending the meeting shall vote whether to remove a
27 suspended party.” The same language appears in RCW 31.12.345, empowering the
supervisory committee to suspend directors and other committee members. In adopting

1 those statutes, the Washington legislature apparently concluded that members who attend
2 such meetings would be fairly representative of the overall membership, and apparently
3 concluded that their actual meeting attendance—so as to see and hear accusations and
4 defenses—was a important to ensure members cast informed votes on any official’s
5 removal.

- 6 12. Considering RCW 31.12.195, -.285, and -.345 (addressed in the two preceding
7 paragraphs), the only logically consistent interpretation of RCW 31.12.246 (Removal of
8 directors—Interim directors) is that “members attending the meeting shall vote on
9 whether to remove” the directors named in the meeting notice. That statute reads:

10 The members of a credit union may remove a director of the credit
11 union at a special membership meeting held in accordance with
12 RCW 31.12.195 and called for that purpose. If the members
13 remove a director, the members may at the same special
14 membership meeting elect an interim director to complete the
15 remainder of the former director’s term of office or authorize the
16 board to appoint an interim director as provided in RCW
17 31.12.225.

- 18 13. None of the three statutes providing for special membership meetings at which in-person
19 members vote on the removal of their previously elected officials can be read consistent
20 with the concept of voting by mail. Perhaps that is why *no statute gives credit union*
21 *members the legal right to vote by mail*. RCW 31.12.286(2) permissively states,
22 “Members may vote, as prescribed in the credit union’s bylaws, by mail ballot, absentee
23 ballor, or other method.” So from among the universe of voting methods (apparently
24 including Internet voting), a credit union’s bylaws may prescribe the methods to be
25 available to its members—but as noted above, the bylaws cannot be inconsistent with any
26 provisions of RCW Chapter 31.12.

- 27 14. Defendants assert (Memo, page 4, line 8) that the Petition is defective for “not identifying
individuals to serve as interim directors” if the members attending the requested special
meeting vote to remove any named incumbent directors. But neither RCW 31.12.195 nor
-.246 calls for petitions or meeting notices to name the candidates who might get elected
to fill vacancies caused by the removal of named directors.

1 15. Defendants assert (Memo, page 4, line 12) that the special meeting notice period (10 to 20
2 days before the meeting) mandated by RCW 31.12.195(3) must be ignored in the case of
3 the Petition's first agenda item—voting to rescind the adoption of the Plan of
4 Conversion—in favor of giving 90-day, 60-day, and 30-day notices, but Defendants offer
5 no legal authority to support any claim of federal preemption or other basis for such
6 assertion.

7 **Credit Union Officials Have Fiduciary Duties**

8
9 16. Defendants deny that they have fiduciary duties toward CCCU's members and the
10 supervisory committee members even deny having fiduciary duties toward CCCU.
11 Answer ¶¶ 7, 9, and 11. But all such officials can be removed for cause, defined as
12 including "any breach of fiduciary duty" (RCW 31.12.385 and -.345), and the statute
13 limiting their personal liability includes exceptions for harm caused by breaching
14 fiduciary duties (RCW 31.12.269(1) and -.267).

15 17. The credit union members, as a group, are the ultimate beneficiaries of all fiduciary
16 relationships benefitting CCCU, for the member-owners not only have control of the
17 credit union through their voting rights, but in the event of voluntary liquidation the
18 members would divide its net assets among themselves in proportion to their account
19 balances. RCW 31.12.474(2). So CCCU's officials are essentially trustees managing for
20 its members its net assets of about \$60 million to \$90 million (financial institutions
21 commonly sell for roughly one-and-a-half times their book value) that would be divided
22 among the member-owners if they decided to sell the institution to a major savings bank
23 or commercial bank. Protecting that \$60 million to \$90 million in value that the members
24 have accumulated over CCCU's existence is one of the core fiduciary duties of its
25 officials.

26 18. As DFI noted at page 4 of its DCU Opinion Letter 04-01, the implementation of the Plan
27 of Conversion of CCU to a Washington savings bank would "fundamentally abrogate
[members'] equity ownership in the credit union." That is because, under Washington
state law (RCW Title 32, excluding Ch. 32.32 and Ch. 32.35), depositors of a mutual

1 savings bank not only have *no voting rights* whatsoever, but they have *no legal right to*
2 *share in the institution's net assets* upon a voluntary liquidation. RCW 32.24.010. The
3 complete absence of any equity ownership by state savings bank depositors has been
4 recognized for years as a source of some fundamentally abusive practices that recur when
5 such banks convert to stock ownership, for the un-owned equity most frequently produces
6 a great financial windfall to savvy investors and bank insiders. See the May 31, 1994
7 FDIC "White Paper" on Certain Fundamentals of the Conversion Process. 59 Federal
8 Register 30357 (June 13, 1994), appended as Exhibit C to the Declaration of Doug
9 Schafer.

10 19. It is not surprising that there presently is only one mutual savings bank chartered in the
11 state of Washington, Anchor Mutual Savings Bank. All the rest have converted to
12 stockholder-owned savings banks or to federally chartered banks.

13 20. As a result of widely recognized insider abuses and flagrant breaches of fiduciary duty
14 that were unchecked by state legislatures and state regulatory agencies, the FDIC in
15 late 1994 adopted rules that condition its approval of deposit insurance for state savings
16 banks converting from mutual to stock ownership upon an approving vote by at least a
17 majority of the bank's depositors. 12 CFR 333.4, 59 Fed. Reg. 61233 (Nov. 30, 1994).
18 But unfortunately, the FDIC now routinely waives or relaxes its majority-vote condition
19 when approving converting savings banks (*e.g.*, accepting wealth-weighted voting by
20 depositors—one vote per \$100 on deposit, up to \$100,000).

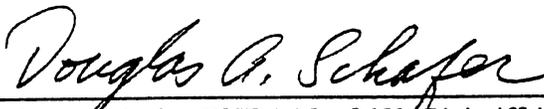
21 21. It goes without saying that if the fiduciaries managing a \$60 million to \$90 million asset
22 for the benefit of trusting credit union members persuade them through misinformation to
23 abandon their equity ownership of that asset, a profoundly serious breach of fiduciary
24 duty has occurred.

25 22. A recent example of such a circumstance, former Rainier Pacific Credit Union (now
26 Rainier Pacific Financial Group, Inc., NASD: RPFG) in Tacoma, Washington, is widely
27 discussed in the national credit union press. See Exhibit D to Declaration of Doug
Schafer.

1 **Relevance of WA Dept. of Financial Institutions' Positions**

- 2 23. Defendants assert (Answer ¶23) that DFI has retreated from its position reflected in DCU
3 Opinion Letter 04-01, and asserts that CCCU's Settlement Agreement with DFI (Answer,
4 Ex. 3) over the latter's threats of administrative enforcement somehow bars Plaintiffs
5 from obtaining a writ of mandamus in this proceeding. Plaintiffs shared those pleadings,
6 received late yesterday, with officials of DFI who were not pleased with them. Plaintiffs
7 are submitting as Exhibit E to the Declaration of Doug Schafer an Affidavit of Linda K.
8 Jekel, Director, Division of Credit Unions, Department of Financial Institutions, State of
9 Washington, that present's that agency's response to those pleadings.
- 10 24. Plaintiff's understanding is that DFI specifically intended to *not impair* the rights of
11 Plaintiffs to seek civil remedies for the clear violations of law by Defendants, and that
12 DFI exercised its prosecutorial discretion reflected in the Settlement Agreement because
13 it lacked statutory power to take speedy enforcement action unless the safety and
14 soundness of CCCU were threatened by its noncompliance with applicable law. RCW
15 31.12.575 to -.625 and RCW 31.12.005(23) (defining "unsafe and unsound condition").

16 February 24, 2004

17 
18 _____
19 Douglas A. Schafer, WSBA No. 8652, Plaintiffs' Counsel

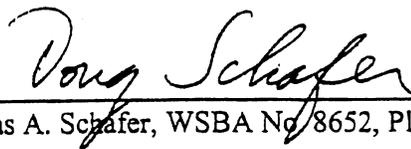
Proof of Service

I certify that today I served by e-mail to counsel of record named below, and telephonically confirmed their receipt of (and they relieved me from faxing to them), the foregoing pleading titled Plaintiff's Reply to Answer and to Memorandum in Opposition to Application for Writ of Mandamus , and I mailed that document along with this proof of service, to both counsel at their offices shown below. I also e-mailed a bench copy of that document to the attention of Judge Bennett today, and I am causing the original of that document with this proof of service appended to be filed with the Court Clerk tomorrow.

Steven E. Turner, Attorney
Miller Nash LLP
500 E. Broadway, Suite 400
Vancouver, WA 98660-3324
Fax: 360-694-6413

Peggy Hennessy, Attorney
Reeves, Kahn & Hennessy
4035 S.E. 52nd Avenue
P.O. Box 86100
Portland, OR 97286
Fax: 503-777-8566

February 24, 2004



Douglas A. Schafer, WSBA No. 8652, Plaintiffs' Counsel

Proof of Service

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Honorable Paula Casey

<input checked="" type="checkbox"/>	EXPEDITE
<input type="checkbox"/>	No hearing set
<input checked="" type="checkbox"/>	Hearing is set
	Date: <u>October 26, 2006</u>
	Time: <u>3:30 p.m.</u>
	Judge/Calendar: <u>Paula Casey</u>
<hr/>	

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

SAVE COLUMBIA CU COMMITTEE,
CATHRYN CHUDY, KATHRYN
EDGEComb, LLOYD MARBET, and
ROBERT TICE,

Plaintiffs,

v.

COLUMBIA COMMUNITY CREDIT
UNION and STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL
INSTITUTIONS,

Defendants.

Case No. 06-2-01688-0

DECLARATION OF KATHLEEN
PORTER IN SUPPORT OF
COLUMBIA'S MOTION TO STRIKE OR,
IN THE ALTERNATIVE, FOR A
CONTINUANCE OF THE HEARING ON
PLAINTIFFS' MOTION FOR
INJUNCTIONS

Kathleen Porter declares as follows:

- I am the assistant to J. Parker Cann, the chief executive officer of Columbia Community Credit Union ("Columbia"). I make this declaration based on my personal knowledge or from sources deemed reliable. If asked to testify, I would be competent to do so.
- At the August 30, 2005, meeting of the Board of Directors that I attended, the Board reached consensus on a bylaw, championed by plaintiff Marbet, that provided that only members in attendance at a special meeting would be permitted to vote, but that action approved at such a meeting would be stayed pending a ratification vote by the membership conducted by mail. Cathryn Chudy and Kathryn Edgecomb were in favor of this bylaw. A final

DECLARATION OF KATHLEEN PORTER IN SUPPORT OF
COLUMBIA'S MOTION TO STRIKE OR, IN THE
ALTERNATIVE, FOR A CONTINUANCE - 1
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MILLER NASH LLP
ATTORNEYS AT LAW
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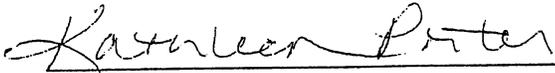
1 vote was deferred until a subsequent Board meeting. At the October 24, 2005, special board
2 meeting that I also attended, the Board formally approved a version of the bylaw containing the
3 provision that only members in attendance at a special meeting could vote, but allowing for
4 subsequent ratification by mail vote. Cathryn Chudy voted in favor of this final version of the
5 bylaw. Kathryn Edgecomb did not attend this meeting.

6
7 3. At a July 11, 2006, Board meeting, Columbia's Board voted to rescind the
8 ratification provision. Cathryn Chudy voted in favor of rescission. Kathryn Edgecomb was not
9 present at the time of the vote on this issue. No Board member proposed changing the bylaw to
10 provide for mail ballot at a special meeting.

11 4. In 2004, when Columbia argued that its members should not be deprived
12 of a mail ballot on the removal of directors, Columbia's bylaws were different than they are
13 today. Specifically, at that time, Columbia's bylaws provided for mail balloting but did not
14 specify the circumstances in which it would be permitted. A true and correct copy of the
15 relevant portion of the bylaws in effect in 2004 is attached as Exhibit A hereto.

16 I declare under penalty of perjury under the laws of the State of Washington that
17 the foregoing is true and correct and that this declaration was executed in Vancouver,
18 Washington.

19 DATED this 25 day of October, 2006.

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22 Kathleen Porter

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DECLARATION OF KATHLEEN PORTER IN SUPPORT OF
COLUMBIA'S MOTION TO STRIKE OR, IN THE
ALTERNATIVE, FOR A CONTINUANCE - 2
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Section 2. Place of Annual Membership Meeting. The Credit Union's annual membership meeting place shall be designated by the Credit Union's Board of Directors.

Section 3. Notice of Annual Membership Meeting. Notice of the Credit Union's annual membership meeting shall be published and mailed to the members at least thirty (30) days prior to the date of the meeting. The notice of the Credit Union's annual membership meeting shall include both the time and place of the meeting.

Section 4. Initiation of Special Membership Meeting. A special membership meeting may be called by the majority of the Credit Union's Board of Directors, a majority vote of the Credit Union's Supervisory Committee, or upon written application of the lesser of ten percent or two thousand members. The request for a special membership meeting must be submitted in writing to the Secretary of the Credit Union's Board of Directors. The request must specifically state the purpose or purposes for which the meeting has been called. If the special membership meeting is being called for the removal of one or more Directors, the request shall state the name of the Director or Directors whose removal is sought. No business other than that specified in the request shall be transacted at a special membership meeting.

Section 5. Time & Place of Special Membership Meeting. Upon receiving an acceptable request for a special membership meeting, the Board shall designate the time and place for the special membership meeting. Special membership meetings shall take place no sooner than twenty (20) and no later than thirty (30) days after receiving a request for a special membership meeting.

Section 6. Notice of Special Membership Meeting. The Secretary shall notify members of the special membership meeting. Notification of the meeting shall be published and mailed within ten (10) days of receiving the request for the special membership meeting. The notice of the special membership meeting shall include the purpose for which the special meeting is being called. If the special membership meeting is being called for the removal of one or more Directors, the notice shall also state the name of the Director or Directors whose removal is sought.

Section 7. Quorum. For the purpose of all membership meetings, fifteen (15) members shall constitute a quorum. Meetings adjourned for failure to reach a quorum shall be reconvened by following those timing and notification requirements adopted for special membership meetings in Section 5 and Section 6, except that the notice of the adjourned meeting shall state that the meeting could not be held as originally scheduled because of failure to obtain a quorum according to the Credit Union's Bylaws.

Section 8. Voting. Each member shall have one vote, regardless of shares held in the Credit Union. In order to be eligible to vote at a membership meeting, the member must have reached eighteen years of age. No votes may be cast by proxy. Membership held by entities other than natural persons shall have one vote, which shall be cast through an agent designated in writing by the entity. Members may vote through the use of mail ballots as permitted by the Credit Union's Board of Directors.

Honorable Paula Casey

<input checked="" type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input checked="" type="checkbox"/> Hearing is set Date: <u>October 26, 2006</u> Time: <u>3:30 p.m.</u> Judge/Calendar: <u>Paula Casey</u> _____

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

SAVE COLUMBIA CU COMMITTEE,
CATHRYN CHUDY, KATHRYN
EDGEComb, LLOYD MARBET, and
ROBERT TICE,

Plaintiffs,

v.

COLUMBIA COMMUNITY CREDIT
UNION and STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL
INSTITUTIONS,

Defendants.

Case No. 06-2-01688-0

DECLARATION OF J. PARKER CANN
IN SUPPORT OF COLUMBIA'S
MOTION TO STRIKE OR, IN THE
ALTERNATIVE, FOR A
CONTINUANCE OF THE HEARING ON
PLAINTIFFS' MOTION FOR
INJUNCTIONS

J. Parker Cann declares as follows:

1. I am the chief executive officer of Columbia Community Credit Union ("Columbia"). I make this declaration based on my personal knowledge or from sources deemed reliable. If asked to testify, I would be competent to do so.

2. On October 16, 2006, the Board voted to suspend Cathryn Chudy, Kathryn Edgecomb, and Lloyd Marbet from their volunteer positions to which they had been reinstated pursuant to this Court's order on preliminary injunction. A membership meeting has been scheduled for November 15, 2006, at which time the members may vote, among other things, upon the removal of Chudy, Edgecomb, and Marbet from office. Columbia acted in reliance on

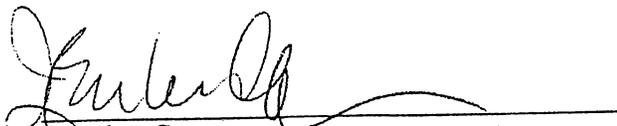
DECLARATION OF J. PARKER CANN IN SUPPORT OF
COLUMBIA'S MOTION TO STRIKE OR, IN THE
ALTERNATIVE, FOR A CONTINUANCE - 1
PDXDOCS:1524535.1

MILLER NASH LLP
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1 the Court's order on preliminary injunction in suspending these individuals and calling the
2 membership meeting.

3 I declare under penalty of perjury under the laws of the State of Washington that
4 the foregoing is true and correct and that this declaration was executed in Vancouver,
5 Washington.

6 DATED this 25th day of October, 2006.

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9 J. Parker Cann

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DECLARATION OF J. PARKER CANN IN SUPPORT OF
COLUMBIA'S MOTION TO STRIKE OR, IN THE
ALTERNATIVE, FOR A CONTINUANCE - 2
PDXDOCS:1524535.1

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I hereby certify that I served the foregoing Brief of Respondent Columbia Community

Credit Union on:

VIA E-MAIL AND FIRST-CLASS MAIL

Douglas A. Schafer
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Attorneys for Appellants

VIA E-MAIL AND FIRST-CLASS MAIL

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Assistant Attorney General
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of Washington
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Olympia, WA 98504-0100
E-mail: charlesc@atg.wa.gov

Attorney for Respondent Washington
Department of Financial Institutions

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STATE OF WASHINGTON
DEPT OF FINANCIAL INSTITUTIONS
FILED
COURT OF APPEALS
DIVISION II

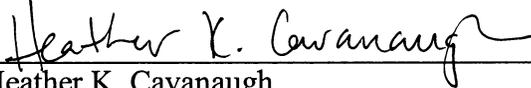
by the following indicated method or methods:



by **e-mailing** and **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Portland, Oregon, this 22nd day of August, 2008.


Heather K. Cavanaugh

Of Attorneys for Respondent
Columbia Community Credit Union

Certificate of Service