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Division I  
State of Washington

NO. 73426-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ISLAND LANDMARKS,

Respondent,

v.

MARY MATTHEWS, KEN DEFRANG, and ELLEN DEFRANG,

Appellants.

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BRIEF OF APPELLANTS

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION.....	1
ASSIGNMENTS OF ERROR .....	3
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	4
STATEMENT OF THE CASE.....	6
A.    Statement of Facts.....	6
1.    Matthews founded Island Landmarks and facilitated the purchase of the Mukai Property.....	6
2.    Island Landmarks’ membership requirements included payment of dues to the treasurer, and recordation of membership information by the secretary.....	9
3.    The Kritzman Group attempted a “hostile takeover” of Island Landmarks. ....	10
B.    Procedural History .....	15
1.    The Kritzman Group sued for a declaration that it controls Island Landmarks and the trial court initially entered summary judgment for the Matthews Group.....	15
2.    The Court of Appeals reversed in <i>Island Landmarks I</i> , holding that a question of fact remained as to whether the Kritzman Group were “members” of Island Landmarks.....	16
3.    On remand, the trial court entered summary judgment for the Kritzman Group.....	18
4.    The trial court denied the Matthews Group’s motion for reconsideration. ....	20
ARGUMENT .....	21
A.    STANDARDS OF REVIEW .....	21

B.	THE TRIAL COURT ERRED IN REFUSING TO DEFER TO THE ORGANIZATION’S REASONABLE INTERPRETATION OF ITS OWN BYLAWS. ....	23
C.	THE TRIAL COURT ERRED IN HOLDING THAT THE BYLAWS PERMITTED THE KRITZMAN GROUP TO BECOME MEMBERS BY SECRETLY CREATING THEIR OWN MEMBERSHIP ATTESTATIONS AND DEPOSITING CHECKS. ....	26
1.	The Matthews Group had no legal obligation to accept the Kritzman Group as members, and did not accept them. ....	29
2.	Island Landmarks’ Bylaws contain a treasury requirement and a recordation requirement, and have always been understood as such. ....	32
a.	The treasury and recordation requirements for membership are plainly set forth in the Bylaws.....	32
b.	Extrinsic evidence from when the Bylaws were approved supports the Matthews Group’s interpretation of the Bylaws.....	36
3.	The Matthews Group presented evidence that created a genuine issue of material fact as to whether the Kritzman Group properly notified each member of record about the special meeting. ....	36
4.	The Kritzman Group is equitably estopped from complaining about DeFrang’s purported refusal of its membership applications, and this issue is legally irrelevant in any event.....	37
D.	THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON THE KUTSCHER DECLARATION IN GRANTING SUMMARY JUDGMENT TO THE KRITZMAN GROUP. ....	40
E.	THE TRIAL COURT ERRED IN DENYING THE MATTHEWS GROUP’S MOTION TO RECONSIDER, AFTER KUTSCHER’S DEPOSITION CONFIRMED HIS DECLARATION WAS INADMISSIBLE AND SHOWED HIS BIAS.....	43

F.	THE KRITZMAN GROUP’S UNCLEAN HANDS BARRED IT FROM SEEKING DECLARATORY RELIEF .....	45
G.	THE MATTHEWS GROUP, NOT THE KRITZMAN GROUP, WAS ENTITLED TO SUMMARY JUDGMENT.....	49
	CONCLUSION .....	50

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Anderson v. Enterprise Lodge No. 2</i> , 80 Wn. App. 41, 906 P.2d 962 (1995) .....	24, 25, 26
<i>Belenski v. Jefferson County</i> , __ Wn. App. __, __ P.3d __, 2015 WL 2394974 (May 19, 2015) .....	22
<i>Blomster v. Nordstrom, Inc.</i> , 103 Wn. App. 252, 11 P.3d 883 (2000) .....	23, 40
<i>Cal. Trial Lawyers Ass’n v. Superior Court</i> , 187 Cal. App. 3d 575 (1986) .....	24, 32
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) .....	22
<i>City of Tacoma v. City of Bonney Lake</i> , 173 Wn.2d 584, 269 P.3d 1017 (2012) .....	35
<i>Couie v. Local Union No. 1849 United Bhd. of Carpenters &amp; Joiners of Am.</i> , 51 Wn.2d 108, 316 P.2d 473 (1957) .....	23, 24
<i>Diaz v. Wash. State Migrant Council</i> , 165 Wn. App. 59, 265 P.3d 956 (2011) .....	41
<i>East Lake Water Ass’n v. Rogers</i> , 52 Wn. App. 425, 761 P.2d 627 (1988) .....	37, 38, 39
<i>Garvey v. Seattle Tennis Club</i> , 60 Wn. App. 930, 808 P.2d 1155 (1991) .....	29, 31

<i>Go2Net, Inc. v. C I Host, Inc.</i> , 115 Wn. App. 73, 60 P.3d 1245 (2003) .....	28
<i>Grand Aerie, Fraternal Order of Eagles v. Nat'l Bank of Washington</i> , 13 Wn.2d 131, 124 P.2d 203 (1942) .....	25
<i>Grant County Port Dist. No. 9 v. Wash. Tire Corp.</i> , __ Wn. App. __, __ P.3d __, 2015 WL 1825962 (Apr. 21, 2015).....	35
<i>Income Investor, Inc. v. Shelton</i> , 3 Wn.2d 599, 101 P.2d 973 (1940) .....	45, 48
<i>Island Landmarks v. Matthews</i> , 178 Wn. App. 1030, 2013 WL 6835306 (Dec. 23, 2013).....	<i>passim</i>
<i>Jones v. State</i> , 140 Wn. App. 476, 166 P.3d 1219 (2007), <i>rev'd</i> <i>on other grounds</i> , 170 Wn.2d 338, 242 P.3d 825 (2010) .....	40
<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306, <i>review</i> <i>granted</i> , 181 Wn.2d 1007, 335 P.3d 941 (2014) .....	23, 43
<i>Keystone Land &amp; Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 p.3D 945 (2004) .....	29
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975) .....	22
<i>Martini v. Post</i> , 178 Wn. App. 153, 313 P.3d 473 (Wash. Ct. App. 2013).....	23

<i>Mayer v. Pierce County Med. Bureau, Inc.</i> , 80 Wn. App. 416, 909 P.2d 1323 (1995) .....	27
<i>McGary v. Westlake Investors</i> , 99 Wn.2d 280, 661 P.2d 971 (1983) .....	28
<i>McKelvie v. Hackney</i> , 58 Wn.2d 23, 360 P.2d 746 (1961) .....	45
<i>NAACP of Houston Metro. Council v. NAACP</i> , 460 F. Supp. 563 (S.D. Tex. 1978) .....	24
<i>Portion Pack, Inc. v. Bond</i> , 44 Wn.2d 161, 265 P.2d 1045 (1954) .....	45
<i>Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.</i> , 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381 (1945) .....	46
<i>Ralph Martin &amp; Co. v. McCue</i> , 304 Ill. App. 358 (1940) .....	29
<i>Realm, Inc. v. City of Olympia</i> , 168 Wn. App. 1, 277 P.3d 679 (2012) .....	27
<i>Retail Clerks Health &amp; Welfare Trust Fund v. Shopland Supermarket, Inc.</i> , 96 Wn.2d 939, 640 P.2d 1051 (1982) .....	48
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002) .....	23
<i>Roats v. Blakely Island Maint. Comm'n, Inc.</i> , 169 Wn. App. 263, 279 P.3d 943 (2012) .....	27

<i>Schroeder v. Meridian Improvement Club</i> , 36 Wn.2d 925, 221 P.2d 544 (1950) .....	29,30,31,32
<i>Seattle-First Nat'l Bank v. Westlake Parks Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985) .....	27, 32
<i>Shields v. Morgan Fin., Inc.</i> , 130 Wn. App. 750, 125 P.3d 164 (2005) .....	22
<i>T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n</i> , 809 F.2d 626 (9th Cir. 1987).....	22
<i>Tanner Elec. Coop. v. Puget Sound Power &amp; Light Co.</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996).....	28
<i>Top Line Builders, Inc. v. Bovenkamp</i> , 179 Wn. App. 794, 320 P.3d 130 (2014) .....	38, 40, 47, 48
<i>United States v. Real Property Located at 3234 Wash. Ave N., Minneapolis, Minn.</i> , 480 F.3d 841 (8th Cir. 2007).....	44
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	22, 23
<b>Statutes</b>	
RCW 24.03.080(1) .....	35
<b>Other Authorities</b>	
4 Am. Jur. 462, Associations and Clubs, § 11 .....	29
ER 801(a) .....	41, 42

## INTRODUCTION

This appeal pertains to a hostile takeover attempt of a private nonprofit corporation (“Island Landmarks” or the “corporation”) by a group of non-members led by Ellen Kritzman (the “Kritzman Group”).<sup>1</sup> In May and June 2012, the Kritzman Group purported to conduct its own covert membership campaign in Island Landmarks. This campaign was carried out through secrecy, misrepresentation, and manipulation. The Kritzman Group generated its own Island Landmarks “membership forms” and collected “membership dues” despite being composed of outsiders to the corporation, induced Chase Bank to divulge Island Landmark’s bank account number, and then made unauthorized deposits of the collected dues into that account. No officer of Island Landmarks had any knowledge of these activities. With its purported new members, the Kritzman Group called a special “membership” meeting of Island Landmarks and purported to unseat the incumbent board (referred to as the “Matthews Group”)<sup>2</sup> and elect its own board.

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<sup>1</sup> The Kritzman Group filed this lawsuit as “Island Landmarks” based on the presumption that its hostile takeover attempt succeeded. The Matthews Group (defined in the next footnote) has nevertheless remained in control of Island Landmarks and is still recognized by the Washington Secretary of State as the lawful governing board. CP 1183.

<sup>2</sup> The Matthews Group is comprised of the defendants in the case below, who were the directors of Island Landmarks when this suit was filed.

As a matter of law, the Kritzman Group’s takeover attempt failed because it plainly violated the bylaws of Island Landmarks (“Bylaws”). The Matthews Group rejected the Kritzman Group’s membership applications for noncompliance with the Bylaws, and so no legal relationship with the corporation was formed. And the Matthews Group was correct to do so. Rather than permitting unilateral assertions of membership, the Bylaws have from their inception contained a “treasury requirement” in which the treasurer must deposit membership dues in Island Landmarks’ bank account, and a “recordation requirement” in which new membership applicants must be added to the corporation’s membership roles. The Kritzman Group deliberately violated these two requirements to conceal their scheme from the Matthews Group. Without the prospective members’ dues being paid to the treasurer, and without the prospective members’ names and addresses being recorded in the membership records, as required by the Bylaws, the Kritzman Group and its cohorts could not have become members of record, and never did.

This Court, in reversing an earlier summary judgment in the Matthews Group’s favor, held that extrinsic evidence of both the treasury requirement and the recordation requirement was necessary to determine

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They are Mary Matthews (“Matthews”), J. Nelson Happy (“Happy”), Ken DeFrang (“DeFrang”), Ellen DeFrang, and Owen Ryan. Happy and Ryan were never served and so are not parties to this litigation. CP 2029, 2039.

whether the Bylaws permitted the Kritzman Group to become members by creating their own membership forms and secretly depositing money into Island Landmarks' bank account. The only admissible extrinsic evidence considered by the trial court on remand confirmed the plain meaning of the Bylaws, and showed that Island Landmarks adhered to both a treasury requirement and a recordation requirement from its inception when the Bylaws were approved. The only evidence to the contrary was an inadmissible hearsay declaration from the attorney-drafter of the Bylaws, Ted Kutscher, who purported to testify about the corporation's intent in adopting the Bylaws even though he was never an officer or director of the organization, admitted in his deposition that he had no actual knowledge of the original directors' intent, and who harbored extreme bias against the Matthews Group. The trial court erred in granting summary judgment to the Kritzman Group, and should have instead granted summary judgment to the Matthews Group.

#### **ASSIGNMENTS OF ERROR**

1. The trial court erred in granting the Kritzman Group's Motion for Partial Summary Judgment, and in denying the Matthews Group's Motion for Summary Judgment.

2. The trial court erred in implicitly denying the Matthews Group's Motion to Strike Portions of the Declaration of Frederick T. Kutscher.
3. The trial court erred in entering final judgment for the Kritzman Group.
4. The trial court erred in denying the Matthews Group's Motion for Reconsideration.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

The trial court granted summary judgment to the Kritzman Group, holding as a matter of law that it, and not the Matthews Group, controlled Island Landmarks. The issues here are whether the trial court erred in granting summary judgment for the Kritzman Group, and in denying summary judgment for the Matthews Group, because:

1. A non-justiciable question was presented as to whether the Kritzman Group achieved membership status, and the Court should have deferred to the Matthews Group's decision not to recognize the Kritzman Group as members;
2. The Bylaws do not permit persons to become members in the manner attempted by the Kritzman Group, which included secretly filling out membership attestations of their own creation, and then surreptitiously depositing their purported membership dues into

Island Landmarks' bank account, without any knowledge by or authorization from Island Landmarks;

3. The trial court abused its discretion in disregarding the only admissible, extrinsic evidence as to the corporation's intent in enacting its bylaws, which supported the Matthews Group's interpretation of the Bylaws' membership requirements;
4. The sole extrinsic evidence produced by the Kritzman Group as to the corporation's intent in enacting its Bylaws was the Kutscher declaration, which was inadmissible as a matter of law, and the trial court thereby abused its discretion in relying on that declaration in entering summary judgment for the Kritzman Group;
5. The trial court abused its discretion in declining to reconsider its summary judgment ruling after the Kutscher deposition, which revealed his personal bias against the Matthews Group and lack of personal knowledge about the events described in his earlier declaration upon which the trial court relied;
6. The Kritzman Group failed to provide notice of its "special meeting" to all members of record of Island Landmarks; and
7. The Kritzman Group's unclean hands barred the declaratory relief it requested from the trial court.

## STATEMENT OF THE CASE

### A. Statement of Facts

#### 1. Matthews founded Island Landmarks and facilitated the purchase of the Mukai Property.

Island Landmarks was incorporated in 1995 to “promote historic preservation of architecture, landscape, and heritage of Vashon and Maury Islands.” CP 1481. An early focus of Island Landmarks’ preservation efforts was the Mukai Farm and Garden (“Mukai Farm”), a historic strawberry farm on Vashon Island started by Japanese immigrants. CP 1165-66 at ¶ 4. The property contains a Japanese garden planted in the 1920s by Kuni Mukai, which is significant because historically it was uncommon for Japanese women to design and plant such gardens. *Id.*

Island Landmarks’ interest in the Mukai Farm arose out of the efforts of Matthews, who began studying the property in the early 1990s. CP 1166-67 at ¶ 5. Through her role with the King County Historic Preservation Program, in 1993 Matthews drafted the designation of the property as a King County Landmark. *Id.* She also succeeded in listing the property on the National Register of Historic Places in 1994. *Id.* Without Matthews’ research and preservation efforts, the Mukai Farm and its historic garden would largely be unknown today and possibly lost to property development. *Id.*

Matthews became Executive Director of Island Landmarks in 1995 and continued her efforts to preserve the Mukai Farm through the organization. CP 1167-68 at ¶ 6. Island Landmarks and Matthews shared the vision of revitalizing the Mukai Farm, restoring the garden, and operating the property as a museum with full-time staff. *Id.*

By 2000, Island Landmarks secured sufficient grant funds to purchase the Mukai Farm. CP 1168-69 at ¶¶ 7-8. Matthews successfully convinced the previous owner to sell the property to Island Landmarks instead of another private party for more money. CP 1168 at ¶ 7. After this initial purchase, however, the Island Landmarks Board failed to secure additional funds to maintain and revitalize the property and realize the organization's vision. No member of the Matthews Group, at that time, was a board member. CP 1168-69 at ¶¶ 8-9.

The failure to obtain additional funding left the corporation in a bind; having acquired the property, it lacked funds even for basics like property taxes and general maintenance, let alone restoration and operation as a museum. CP 1169-70 at ¶¶ 10-11. Many Board members resigned in 2000, including Ellen Kritzman ("Kritzman"), the eventual ringleader of efforts to oust the incumbent Board. CP 1169 at ¶ 9. Matthews then reconstituted the Board with herself as a Board member, became President, and sought outside funding. CP 1169-70 at ¶ 10.

In the early 2000s, the Board began considering the transfer of the property to another person or entity that possessed the resources to achieve the organization's original vision for the property. CP 1170-71 at ¶¶ 11-12. Thus, the objective of Island Landmarks changed from undertaking the restoration of the property itself, to finding an organization or individual with the resources and commitment to do so properly, consistent with the organization's vision and with historic preservation principles. *Id.*

Membership in the organization declined in this period, which reflected the organization's shifting goals. Having a large membership base of mostly Vashon residents had not succeeded in raising sufficient capital, and so the focus shifted to maintaining the condition of property so that a new owner could realize the organization's longstanding vision. CP 1176-77 at ¶¶ 22-23.

From 2004 to 2012, Island Landmarks negotiated with numerous potential buyers. CP 1170-73 at ¶¶ 11-12, 14-15. None of these negotiations worked out, however, mostly because each buyer's planned use for the site was inconsistent with property restrictions or Island Landmark's vision. *Id.* Throughout this time, Matthews and Happy advanced over \$400,000 of their own personal funds to cover taxes, security and other expenses to keep the property maintained. CP 1173-74

at ¶ 16. No other person or entity stepped forward with financial resources to assist with these preservation efforts. *Id.*

**2. Island Landmarks' membership requirements included payment of dues to the treasurer, and recordation of membership information.**

The Bylaws (CP 1488-1497) contain the following provisions related to membership:

- Section 2.2: “Qualification of Members. Membership shall be open and unlimited to all persons who have an interest in promoting historic preservation of architecture, landscape, and heritage of Vashon and Maury Islands. In order to qualify for membership, a member shall pay annual membership dues which shall initially be \$25.00.”
- Section 5.1: requiring the corporation to “keep at its principal or registered office copies of...records of the name and address and class, if applicable, of each member”;
- Section 4.8: requiring the Secretary to “keep records of the post office address and class, if applicable, of each member”; and
- Section 4.9: requiring the treasurer to “have charge and custody of and be responsible for all funds...of the corporation,” to “receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of corporation in banks....”

From its inception, Island Landmarks maintained membership records, and all membership dues were paid to the corporation and deposited into the Island Landmarks bank account by the treasurer or its designee. Extrinsic evidence showing adherence to these steps from when the Bylaws were adopted in 1995 include membership forms from 1995-

1996 (CP 1579-85); membership roles showing recordation of members in those years (CP 1522-49, 1565-78, 1586-94); receipts for payment of initial dues for membership eligibility (CP 1550-61); and examples of “thank you” letters for membership contributions (CP 1595, 1606-08, 1611). In addition, the unrebutted declaration of Mary Matthews details the practices of Island Landmarks in depositing membership dues and recording members’ information in the corporate records. *See* CP 1174-77 at ¶¶ 18-24.

**3. The Kritzman Group attempted a “hostile takeover” of Island Landmarks.**

After Kritzman terminated her involvement with Island Landmarks in 2000, she ceased communications with Matthews and offered no assistance to help preserve or operate the Mukai Farm. CP 1177-78 at ¶ 25. Instead, she embarked upon a decade-long private campaign to disparage Matthews and her stewardship of the Mukai Farm, and recruited the help of others who had never even met Matthews and similarly refused to provide constructive assistance in preserving the property. *Id.* ¶¶ 25-26. This campaign included vilifying Matthews in the press, *see* CP 1333-62, conspiring with agencies like King County 4Culture to seize the property, *see* CP 1460, 1469-70, and initiating letter writing campaigns urging the State Attorney General to dissolve Island Landmarks, *see* CP 1461-62.

These efforts culminated in a covert and self-described “hostile takeover” scheme to “[wrest] control from Matthews and Happy.” CP 1434-35, 1458-59. While the plan ostensibly was to utilize procedures in the Bylaws whereby members of the organization may call a special meeting to replace the Board, the Kritzman Group attempted this change in control by creating a secret parallel association in which they recruited their own “members,” and then had these purported “members” vote out the incumbents and vote themselves in as the new directors. As demonstrated below, their secret scheme, while calculating, was fundamentally flawed.

**Covert Membership Drive.** First, the Kritzman Group manufactured its own “Island Landmarks Membership Form.” CP 1463. Without any authorization of Island Landmarks, their form declared that its submission with a \$25 check would assure “full membership rights and privileges as described in the Bylaws of Island Landmarks.” *Id.* No member of the Kritzman Group had any affiliation with Island Landmarks when they went about distributing their forms promising membership in Island Landmarks, much less any authority to solicit members, collect funds, or bind the corporation in the manner represented. CP 1178 at ¶ 26.

These purported Island Landmarks membership forms were intentionally hidden from Island Landmarks. Instead of listing Island

Landmarks' address, the Kritzman Group's form listed its own post office box. *See* CP 1427 ("I suggest we use the post office box for our mailing address rather than the house. Is that okay? We want to have sole access to the mail and the PO box guarantees that..."); *see also* CP 1463; 1464-66, 1442. The Kritzman Group covertly collected membership forms and checks throughout April and May 2012, with the goal of doing so without Island Landmarks' knowledge. *See* CP 1436-38 ("let's wait to deposit all the money we get until May 24th, not before").

**Deliberate Secrecy and Concealment of their Activities.** For the Kritzman Group, secrecy was paramount to avoid early detection of their scheme. It is undisputed that the Kritzman Group sought to conceal their membership drive and takeover attempt from the Matthews Group. CP 1439-40 ("I'm wondering if there's a way we could let folks know about this effort and solicit memberships--all without tipping off Mary Matthews"); CP 1445-46 ("I hope [the membership application] is sent on with the caution of silence until the initial membership fees have been deposited, and notification actually sent out."); CP 1447-49 ("Ellen was worried about keeping a lid on this"); CP 1450-52 ("just so long as everyone who attend [sic] knows it's essential to 'keep clam' at this point"); CP 1773 ("We all agree to keep quiet about this whole plan, and

as we recruit new members to caution them to keep silent as well.”); CP 1432-33.

The Kritzman Group deliberately timed sending notice of their meeting to give the minimum notice allowed under the Bylaws (ten days). Having set June 4, 2012, as the date for their “special meeting,” they calculated the last day on which notice could be given under § 2.7 of the Bylaws (May 25) and strategized about how best to deliver the “membership” forms to Island Landmarks (which they never did). *See* CP 1464-66.

**Unauthorized Use of Island Landmarks’ Bank Account.** Ellen Kritzman collected all the checks from purported new “members” and, on May 23, 2012—having absolutely no legal authority to do so—went to Chase Bank to deposit them into Island Landmarks’ account. *See* CP 1473-74; *see also* CP 439-40 at ¶ 23. Kritzman knew she had no authority to access Island Landmarks’ account because she had tried once before and was rebuffed by the bank. CP 1738. Yet somehow, on her second attempt, Kritzman induced Chase Bank to divulge to her Island Landmarks’ new account number, which she then hand-wrote onto some of the checks and deposit slips before depositing them into that account.

CP 1367-81; *see also* CP 1800.<sup>3</sup> The Kritzman Group admits that none of its members had any authority to transact business in Island Landmarks' Chase Bank account. CP 1656; 1507.

Matthews did not obtain copies of these checks until June 6, 2012 (two days after the Kritzman Group's meeting) when she called Chase Bank immediately after learning that Kritzman may have made unauthorized deposits. CP 1179 at ¶ 27.

**Notice and Conduct of Purported Special Meeting.** After secretly depositing the checks, Kritzman mailed a notice on May 24, 2012 of the "special meeting" scheduled for June 4. *See* CP 440 at ¶ 24. Then, on Saturday, May 26, 2012—nine days before the "special meeting" scheduled for June 4—Kritzman telephoned Island Landmarks' corporate Secretary, DeFrang, to ask if he had received the notice and to notify him of the new "members" she had recruited. CP 440 at ¶ 25. Kritzman told DeFrang that she had an envelope of "new membership forms" that the Secretary was entitled to get, but "maybe he would rather not have [Matthews] know he received it." CP 1424-25. Boasting to her cohorts by email, Kritzman characterized her discussion with DeFrang as

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<sup>3</sup> In a prior declaration, Kritzman testified that she merely used an old account number given to her in 2009 by a former treasurer of Island Landmarks. CP 439-40 at ¶23; *see also* CP 1507. In fact, contrary to her declaration, Kritzman deposited the funds into a new account opened in 2010 and used that new account number. *See* CP 1799-1800, 1507.

“manipulative.” *Id.* The purported membership records were *never* given to Island Landmarks officers and directors, and the first time they were viewed by the Matthews Group was in discovery more than two years after this suit was filed. CP 1178 at ¶ 26.

At the June 4 meeting, the Kritzman Group purported to vote out the incumbent Board and vote themselves in as the new directors of Island Landmarks. *See* CP 1467-68. Two weeks later they filed this lawsuit in the name of “Island Landmarks.” *See* CP 1-14.

The Matthews Group, meanwhile, rejected the Kritzman Group as members for failure to comply with the Bylaws, and refunded their “membership” checks. CP 1500-01 (explaining that the Kritzman Group failed to comply with Bylaws and were not members, and monies were refunded). It is undisputed that the Matthews Group rejected the Kritzman Group’s membership attestations and checks. *See* CP 1644. The Washington Secretary of State has never recognized the Kritzman Group as the lawful governing board of Island Landmarks. CP 1183.

## **B. Procedural History**

### **1. The Kritzman Group sued for a declaration that it controls Island Landmarks and the trial court initially entered summary judgment for the Matthews Group.**

The Kritzman Group filed a complaint in King County Superior Court on June 18, 2012—two weeks after the purported hostile takeover—

seeking a declaratory judgment that certain leaders of its group were the lawful governing board and officers of Island Landmarks. CP 1-14. In other words, the Kritzman Group asserted that its hostile takeover attempt was successful, and the Matthews Group was no longer the duly constituted board of the organization. *Id.* ¶¶ 28-29. The trial court granted summary judgment in the Matthews Group’s favor on November 11, 2012 because it determined that notice of the June 4 meeting was not given in accordance with the Bylaws. CP 757-58.

**2. The Court of Appeals reversed in *Island Landmarks I*, holding that a question of fact remained as to whether the Kritzman Group were “members” of Island Landmarks.**

On review, this Court affirmed in part, reversed in part, and remanded. *Island Landmarks v. Matthews*, 178 Wn. App. 1030, 2013 WL 6835306, \*1 (Dec. 23, 2013) (“*Island Landmarks I*”). The Court reasoned, first, that the trial court had erred when it concluded that a special meeting could only be called by the secretary of Island Landmarks. *Id.* at \*3. The Court concluded instead that “three separate entities are authorized to call a special meeting: (1) the President, (2) any two board members, or (3) ‘not less than ten percent (10%) of the members entitled to vote at such meeting.’” *Id.* Because the Kritzman Group had submitted evidence that at least ten percent of the purported “members entitled to vote” had called

for the meeting, it was possible that a special meeting was properly noticed by the Kritzman Group. *Id.* at \*4.

This Court could not, however, resolve the entire case on the record before it. Questions remained as to whether (1) the Kritzman Group and others who had purported to become members through the Kritzman Group's applications had properly become members of Island Landmarks, *id.* at \*5-7, and (2) whether notice of the special meeting at which the Kritzman Group purported to seize control of Island Landmarks was properly provided to each "member of record." *Id.* at \*7-8.

The Court found that the record was unclear as to whether the Kritzman Group could become members under the Bylaws by completing their own membership attestations and secretly depositing funds in the Chase bank account. *Id.* at \*7. The Court noted the Bylaw provision stating that the treasurer "shall 'have charge and custody of and be responsible for *all funds*' and 'received and give receipts for moneys due and payable . . . from *any source whatsoever.*'" *Id.* (emphasis in original). The Court also questioned whether the secretary of Island Landmarks had a role in recognizing members; namely, whether such members needed to be added to membership records of the corporation. *See id.* The Court concluded that "because the bylaws are unclear and this record is incomplete, extrinsic evidence is required to ascertain the corporation's

intent regarding its membership requirements and procedures.” *Id.* Thus, the touchstone of this inquiry is the corporation’s intent “when the bylaws were approved.” *Id.* at \*8.

**3. On remand, the trial court entered summary judgment for the Kritzman Group.**

After remand, the parties cross-moved for summary judgment. The Kritzman Group’s only extrinsic evidence from the time “when the bylaws were approved,” *id.*, was a declaration submitted by Kutscher, the attorney for Island Landmarks who had drafted the Bylaws, testifying both as to Kutscher’s own intent and the original directors’ intent in drafting the Bylaws. *E.g.*, CP 1124-25. Kutscher was neither an officer, director, nor a member of Island Landmarks. Significantly, the Kritzman Group produced no declaration from Kritzman or any of the other original directors.

The trial court entered partial summary judgment for the Kritzman Group and denied summary judgment for the Matthews Group. CP 1906. The trial court held that “there is no material dispute concerning who is a member of record and a member entitled to vote.” According to the trial court, “both[] the bylaws definition and the Chase bank records[] conclusively determine which persons were entitled to vote on June 4, 2012 at the special meeting.” *Id.* The court reasoned that “[c]ompletion of

the attestation required under the bylaws, at section 2.2, and actual deposit of dues into Chase bank aptly resolve any issues of fact.” *Id.* In other words, the court reasoned that, as a matter of law, any person could become a member of Island Landmarks by (1) depositing money into Island Landmarks’ account (without Island Landmarks’ awareness or authorization of the deposit), and (2) completing a self-created attestation of membership (without Island Landmarks’ awareness of the existence of the attestee or her attestation).

Because the trial court held that the Kritzman Group were “members of record” and “members entitled to vote,” and notice of the June Special Meeting was proper, the court concluded that “the persons duly elected as directors at the special meeting of members on June 4, 2012, are lawfully empowered to act as the ongoing governing body of Island Landmarks: Glenda Pearson, Helen Meeker, Bob Horsley, Rayna Holtz, Ellen Kritzman, Bruce Haulman, Sally Fox, Anita Halstead, Lynn Greiner, Kelly Robinson, and Yvonne Kuperberg.” *See* CP 1906-07.

The trial court implicitly denied the Matthews’ Group motion to strike the Kutscher declaration on hearsay grounds. *See* CP 1905 (stating that the trial court relied on the Kutscher declaration in ruling on summary judgment).

**4. The trial court denied the Matthews Group’s motion for reconsideration.**

The Matthews Group moved for reconsideration after they deposed Kutscher in response to his declaration filed in support of the Kritzman Group. Contrary to his declaration, Kutscher in his deposition testified that he had no specific recollection of “meeting with [Matthews] in connection with . . . the nonprofit corporate formation of Island Landmarks,” “speaking with anyone else affiliated with Island Landmarks during the period in which [he] represented Island Landmarks,” or “meeting . . . with any officer or director of Island Landmarks in their official capacity during the time [he] represented the entity from the time it was incorporated.” CP 2163 at 31:13-23; 32:16-33:5; CP 2165 at 62:6-12.<sup>4</sup> The Matthews Group argued that Kutscher thus had no personal knowledge of the intent of the corporation at the time the bylaws were adopted, and urged the trial court to revisit its ruling in light of this new information that flatly contradicted Kutscher’s earlier declaration upon which the trial court relied. CP 2439-41.

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<sup>4</sup> Testimony elicited at Kutscher’s deposition also revealed that, in 2000, at the request of Ellen Kritzman in her capacity as a then-board member, Kutscher had drafted proposed amendments to the Bylaws that would have eliminated members’ voting rights. *See* CP 2164 at 51:18-22; *see also* CP 2181-82. This further called into question Kutscher’s “perceptions” about the importance of membership voting rights to Island Landmarks as set forth in his earlier declaration. *See* CP 1153 at ¶5.

Kutscher's deposition also revealed his deep bias against the Matthews Group. He had worked behind the scenes for years in support of the Kritzman Group's takeover attempt, and even urged an organization he served as a board member to engage as a co-plaintiff with the Kritzman Group in this very lawsuit. CP 2162 at 20:16-20; CP 2166 at 67:13-68:1; CP 2169 at 82:2; CP 2170 at 88:3-10.<sup>5</sup> The Matthews Group argued that Kutscher's bias and affiliation with the Kritzman Group – not previously disclosed to the trial court – created a genuine dispute of material fact that precluded summary judgment for the Kritzman Group based on Kutcher's declaration.

The trial court denied the Matthews Group's motion for reconsideration. This appeal followed. CP 2447-55.

## **ARGUMENT**

### **A. STANDARDS OF REVIEW**

A trial court's order granting or denying a motion for summary judgment is reviewed de novo. *Belenski v. Jefferson County*, \_\_\_ Wn. App.

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<sup>5</sup> Without seeking or obtaining prior consent of Island Landmarks, Kutscher disclosed, as an exhibit to his declaration in support of the Kritzman Group's summary judgment motion, a privileged document of Island Landmarks that Kutscher had in his own files from when he represented Island Landmarks as its attorney. *See* CP 1157-63. This document actually helped the Matthews' Group because it showed that Matthews was Kutscher's point of contact with Island Landmarks. *See* CP 1163. Nevertheless, its disclosure was improper and not authorized by Island Landmarks, his former client.

\_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 2394974, \*2 (May 19, 2015). Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that (1) no genuine issue exists as to any material fact, and (2) the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). “If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-32 (9th Cir. 1987)). This result follows because “[w]here proof of an essential element of a claim is lacking, all other facts are rendered immaterial.” *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 758, 125 P.3d 164 (2005) (citing *Young*, 112 Wn.2d at 225).

A trial court's evidentiary ruling on a motion for summary judgment is reviewed for abuse of discretion. *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 259, 11 P.3d 883 (2000).

A trial court's denial of a motion for reconsideration is also reviewed for an abuse of discretion. *Keck v. Collins*, 181 Wn. App. 67, 94, 325 P.3d 306, *review granted*, 181 Wn.2d 1007, 335 P.3d 941 (2014) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002)); *Martini v. Post*, 178 Wn. App. 153, 166, 313 P.3d 473 (2013) (granting motion for reconsideration because new evidence created genuine issue of material fact).

**B. THE TRIAL COURT ERRED IN REFUSING TO DEFER TO THE ORGANIZATION'S REASONABLE INTERPRETATION OF ITS OWN BYLAWS.**

The Court should reverse the trial court's summary judgment because it failed to defer to the Matthews Group's interpretation of Island Landmarks' own membership requirements. With respect to voluntary membership organizations like Island Landmarks, courts will defer to the officers' interpretation of the organization's own rules unless that interpretation is arbitrary or unreasonable. *See Couie v. Local Union No. 1849 United Bhd. of Carpenters & Joiners of Am.*, 51 Wn.2d 108, 115, 316 P.2d 473 (1957); *Anderson v. Enterprise Lodge No. 2*, 80 Wn. App. 41, 47, 906 P.2d 962 (1995) (reversible error for trial court to allow jury to

decide meaning of organization's rules where organization's interpretation is reasonable). This rule is firmly established in other jurisdictions as well. *See, e.g., Cal. Trial Lawyers Ass'n v. Superior Court*, 187 Cal. App. 3d 575, 580 (1986) (noting that "the judiciary should generally accede to any interpretation by an independent voluntary association of its own rules which is not unreasonable or arbitrary"); *NAACP of Houston Metro. Council v. NAACP*, 460 F. Supp. 563, 589 (S.D. Tex. 1978) (noting that court had very limited authority to intervene in internal affairs of voluntary association, namely to ensure basic due process).

The maxim that "it is not for the jury to interpret the constitution of the union, nor will the courts interfere with the interpretation placed upon such a constitution by its officers and agents unless such interpretation is arbitrary and unreasonable," is fully applicable here. *See Anderson*, 80 Wn. App. at 47 (citing *Couie*, 51 Wn.2d at 115). In *Anderson*, a statewide leader of a social organization decided to revoke the charter of a lodge, the effect of which was to rescind lifetime memberships, and switch to an annual dues model when the lodge reopened. *Id.* at 45-46. A group of members sought to rescind the closure of the lodge as inconsistent with the organization's governing rules. *Id.* at 45. The trial court denied motions to dismiss and held a jury trial, after which damages were awarded to the plaintiffs for loss of lifetime member benefits. *Id.* at 46.

This Court reversed, holding that the jury should not have been asked to interpret the organization's governing rules, because the defendants' interpretation was neither arbitrary nor unreasonable and thus controlling. *Id.* at 47. Generally, the Court reasoned, "courts refrain from interfering in the internal affairs of voluntary associations," and may only do so in disputes involving property rights of members and whether the organization's proceedings "were regular, in good faith, and not in violation of the laws of the order or the laws of the state." *Id.* (citing *Grand Aerie, Fraternal Order of Eagles v. Nat'l Bank of Washington*, 13 Wn.2d 131, \_\_\_, 124 P.2d 203 (1942)). In the record below, members of the organization had expressed confusion as to whether the relevant rules expressly permitted the leader to revoke the charter without notice, and the effect of such revocation. *Id.* at 44-45. The court reasoned that, while the record showed "conflicting and confusing rules," the defendants' interpretation was neither arbitrary nor unreasonable. The court thus deferred to the organization's interpretation, and reversed the jury's determination. *Id.* at 47.

This binding legal authority should have disposed of the Kritzman Group's lawsuit, but the trial court did not even address it. The Matthews Group declined to recognize the Kritzman Group as members. *See* CP 1500-01 (explaining that the Kritzman Group failed to comply with

Bylaws and were not members); *see also* CP 1644. The Matthews Group reasonably interpreted the Bylaws as requiring dues to be received through the corporation, and members to be added to corporate records to become “members of record.” *See infra* at section C (showing that the Matthews Group’s interpretation is supported by the plain language of the bylaws and extrinsic evidence from the time the bylaws were adopted); *see also* CP 1741 (lawyer for the Kritzman Group conceding that this Court implied that the Matthews Group’s interpretation of the Bylaws “may hold water”).

Because they were not members, the Kritzman Group lacked standing to oust the board or to file this lawsuit in the name of “Island Landmarks.” To the extent that the trial court should have intervened at all in this case, it should have granted summary judgment for the Matthews Group based upon its reasonable interpretation of Island Landmarks’ own bylaws. *See Anderson*, 80 Wn. App. at 49 (these claims “are not cognizable at law”).

**C. THE TRIAL COURT ERRED IN HOLDING THAT THE BYLAWS PERMITTED THE KRITZMAN GROUP TO BECOME MEMBERS BY SECRETLY CREATING THEIR OWN MEMBERSHIP ATTESTATIONS AND DEPOSITING CHECKS.**

Even if the trial court were permitted to review the Bylaws in a *de novo* fashion—and it was not—the Kritzman Group’s interpretation still

fails as a matter of law. First, the Kritzman Group’s recruits were never accepted as members of Island Landmarks. There existed no legal relationship between the parties, and therefore no rights to enforce. Second, the Bylaws contain membership requirements that undisputedly were not followed, and so the Kritzman Group’s hostile takeover attempt failed.

A corporation’s bylaws “are interpreted in accordance with accepted rules of contract interpretation.” *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 273–74, 279 P.3d 943 (2012). The “touchstone of contract interpretation is the parties’ intent.” *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4, 277 P.3d 679 (2012) (citation omitted). “Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.” *Id.* at 5. Interpretations giving effect to all words are favored over interpretations rendering some language “meaningless or ineffective.” *Seattle-First Nat’l Bank v. Westlake Parks Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985). The court will not read ambiguity into a contract “where it can reasonably be avoided.” *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995) (quoting *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983)). Interpretation of a contract is a question of law where (1) the

contract does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 86, 60 P.3d 1245 (2003) (citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)).

The trial court erroneously held as a matter of law that membership status in Island Landmarks could be achieved solely by self-attestation and unauthorized, surreptitious deposit checks into the organization's bank account. Under the trial court's reasoning, in other words, a person could become a full-fledged member of Island Landmarks even though not a single officer, director or member was aware of that person's existence. This holding is wrong for two reasons. First, the organization needed to actually accept a person as a member, as any organization does. Second, the Bylaws required (and the only admissible extrinsic evidence showed) that, to be accepted as a member, an eligible applicant's dues needed to be handled by the treasurer, and his or her name and contact information needed to be recorded in the corporate records. The Kritzman Group never became members because none of these requirements were met.

**1. The Matthews Group had no legal obligation to accept the Kritzman Group as members, and did not accept them.**

As a member's right in an organization is governed by principles of contract, any rights in the first instance must be established by mutual assent. *See, e.g., Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 808 P.2d 1155 (1991) (relationship between members and organization governed by contract); *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P3d 945 (2004) (contract established by mutual consent). Here, only unilateral assent, by the Kritzman Group, occurred. The Matthews Group rejected the Kritzman Group's applications for failure to comply with the Bylaws, and no membership relationship was formed.

“Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion.” *Schroeder v. Meridian Improvement Club*, 36 Wn.2d 925, 932, 221 P.2d 544 (1950) (emphasis added) (quoting 4 Am. Jur. 462, Associations and Clubs, § 11)); *Ralph Martin & Co. v. McCue*, 304 Ill. App. 358, 362 (1940) (“The relationship [between an organization and its

member] arises out of the application of the member, its acceptance by the club and the provisions of the by-laws by which both are to be governed in their relationship to each other.”).<sup>6</sup>

In *Schroeder*, a group of plaintiffs who “claimed the right to membership by offering to pay dues” sued the Meridian Improvement Club (“Meridian”) to enjoin the sale of Meridian’s clubhouse. *Id.* at 927-28. At a protest meeting, the members pooled cash and appointed a committee to offer the dues of those present to the secretary of the club. *Id.* at 928. The secretary of the club refused the tender of dues. *Id.* The trial court enjoined Meridian from refusing membership applications from all bona fide residents of the neighborhood. *Id.* at 929.

The Supreme Court reversed. It began with the premise that regardless of the actions of Meridian, it could not grant the plaintiffs any relief “unless they themselves are entitled to maintain the action.” *Id.* The Court reasoned that none of the plaintiff group had become members of Meridian, although the constitution provided that “any property owner or resident within the confines of the district shall be eligible for membership.” *Id.* at 932. While “eligible” meant “suitable, *qualified*, fit, worthy, capable of being chosen,” mere eligibility was not sufficient. *Id.*

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<sup>6</sup> *Schroeder* involved an incorporated membership organization like Island Landmarks. 36 Wn.2d at 927.

(emphasis added). This was because membership in a voluntary organization “may be accorded and withheld,” and was not “a right which can be gained independently and then enforced.” *Id.* A person who is rejected from membership is “entirely without remedy,” regardless of the reason for the person’s exclusion. *Id.*<sup>7</sup>

So it is here. Like the plaintiffs in *Schroeder*, the Kritzman Group presented checks, and those checks were rejected by Island Landmarks. 36 Wn.2d at 932; CP 1500-01. Like the plaintiffs in *Schroeder*, the Kritzman Group claimed entitlement to membership based on a provision of the Bylaws (§ 2.2) that merely sets forth the eligibility requirements or “Qualification[s]” of membership. *See* 36 Wn.2d at 932. But *Schroeder* makes clear that mere qualification or eligibility is insufficient; membership status requires acceptance by the organization. The Kritzman Group “were not and never had been members,” because “merely being eligible for membership” did not make them members, and “courts cannot compel the admission of an individual into [a voluntary organization].” *Id.* The Kritzman Group is thus “entirely without remedy,” *id.*, and its complaint should have been dismissed in its entirety.

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<sup>7</sup> As in *Garvey*, here there “is no allegation of unlawful discrimination against the [Kritzman Group] based on, for example, race, sex or religion, which might raise a different issue.” 60 Wn. App. at 934 n.1.

**2. Island Landmarks' Bylaws contain a treasury requirement and a recordation requirement, and have always been understood as such.**

The trial court's holding that membership can be obtained unilaterally under § 2.2 of the Bylaws was erroneous, as it reads out the treasury requirement of § 4.9 and the recordation requirement of §§ 5.1 and 4.8. *See Seattle-First Nat'l Bank*, 42 Wn. App. at 274 (interpretation of document giving meaning to every provision favored over interpretation rendering language "meaningless or ineffective"); *Cal. Trial Lawyers Ass'n v. Superior Court*, 187 Cal. App. 3d 575, 580, 231 Cal. Rptr. 725 (1986) (noting that provision regarding a candidate's eligibility to serve as president-elect of organization, contained in one section, was qualified by separate sections; "[W]e cannot close our eyes to other articles of the bylaws which tend to roil that apparently limpid language").

**a. The treasury and recordation requirements for membership are plainly set forth in the Bylaws.**

Section 2.2 provides that membership shall be "open and unlimited to all persons who have an interest in promoting historic preservation of architecture, landscape, and heritage of Vashon and Maury Islands." *See* CP 1488. This language, however, contains no promise of membership. *See Schroeder*, 32 Wn.2d at 932. "Open and unlimited" merely refers to the ability of a person to be eligible to join the organization, and there

being no limit on the number of members the organization may have. A person can “qualify for membership” by tendering membership dues of \$25.00. *Id.* In order to become a member, however, two additional requirements must be satisfied.

First, Island Landmarks must receive and handle membership dues in accordance with the Bylaws. Only the treasurer “shall have charge and custody of and be responsible for all funds...of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of the corporation in banks...” § 4.9. *See* CP 1495-96. Membership dues are undoubtedly funds “of the corporation” which must be under the “charge and custody” of and “receive[d]” by the Treasurer and deposited by the Treasurer “in banks.” *See id.* The Kritzman Group’s surreptitious, unauthorized deposits of funds intentionally bypassed the treasurer, and thus cannot constitute membership dues that were actually paid and received by the corporation in accordance with the Bylaws.

Second, a person cannot be a “member of record” without a record of her membership. The Bylaws expressly require the recording of the name and contact information of members in the records of the corporation. Section 5.1 requires the corporation to keep “records of the name and address and class, if applicable, of each member...” *See* CP

1496; *see also* § 4.8 (CP 1495) (Secretary must “keep records of the post office address and class, if applicable, of each member”). Thus, a person cannot be a member unless her name and address are recorded in the records of the corporation. *Applicants* cannot unilaterally take on this role themselves in contravention of the Bylaws, as the Kritzman Group purported to do. None of the Kritzman Group’s recruits were ever recorded in the membership records of Island Landmarks.

It is fundamental that a member-based and member-governed organization like Island Landmarks must know who its members are. That is why the Bylaws required the organization to have members on record, and charged the Secretary with maintaining such records. *See* §§ 5.1; 4.8 (CP 1495-96). Membership recordation is necessary so that notice of meetings can be given “to each member of record” as required by § 2.7 (CP 1489). Membership recordation is also necessary to determine whether a Special Meeting is duly called by “not less than 10 percent (10%) of the members entitled to vote at such a meeting” under § 2.5. *Id.* Numerous other provisions in the Bylaws reflect the organization’s need to know who its members are for the orderly conduct of its business. *See, e.g.,* § 2.9 (*id.*) (determining whether a quorum exists), § 2.12 (CP 1490) (allowing actions by members without a meeting), § 5.1 (CP 1496-97) (organization’s records may be viewed upon request by “any member of

three months standing or to a representative of more than five percent of the membership”).

Any contrary reading of the Bylaws would create absurd results and could not stand. *See Grant County Port Dist. No. 9 v. Wash. Tire Corp.*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2015 WL 1825962, at \*7 (Apr. 21, 2015) (citing *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012) (noting that courts “avoid construing contracts in a way that leads to absurd results”). The Bylaws would be utterly meaningless if, as the Kritzman Group suggests, they freely allowed any persons—unaffiliated with the organization, and without any authority or knowledge by the organization—to create their own membership application forms, solicit memberships and dues and then deposit funds into the organization’s bank account. Under such a construction it would have been impossible, for example, for Matthews as President to call a special meeting on May 25, 2012, because there were allegedly “members” she did not know about on that date, but which the Bylaws would have required her to notify. *See also* RCW 24.03.080(1) (requiring at least ten days’ notice to each “member entitled to vote”). This absurd interpretation is precisely the one the Kritzman Group countenances.

**b. Extrinsic evidence from when the Bylaws were approved supports the Matthews Group's interpretation of the Bylaws.**

To the extent that extrinsic evidence is required to interpret the Bylaws' membership requirements, the *only* admissible extrinsic evidence from the time when the Bylaws were approved supports the Matthews Group's interpretation. This un rebutted evidence showed that a person interested in becoming a member would submit an application form along with a check or cash to the corporation, the treasurer or the treasurer's designee would deposit the funds into Island Landmarks' account and provide the person with a receipt, and the person's name and contact information would be recorded in the organization's membership records, at which point the person was considered a member. *See* CP 1174-76. The trial court's ruling in favor of the Kritzman Group made no mention of this un rebutted extrinsic evidence. To the extent the trial court disregarded this evidence, the trial court abused its discretion. No extrinsic evidence was offered to show that a person had ever become a member in the manner attempted by the Kritzman Group.

**3. The Matthews Group presented evidence that created a genuine issue of material fact as to whether the Kritzman Group properly notified each member of record about the special meeting.**

The Matthews Group presented evidence that the Kritzman Group

failed to notify all members of record about its “special meeting” on June 4, thus invalidating any actions taken at that meeting. Specifically, the Matthews Group offered the declaration of Priscilla Beard, a longstanding member of Island Landmarks, who testified that she received no notice of the June 4 meeting. CP 1838 at ¶ 6. Indeed, in keeping with its covert scheme, the Kritzman Group never requested a membership list from Island Landmarks before sending out notice of the June 4 meeting; they merely notified their own purported members and the existing officers of Island Landmarks, and no one else. CP 44 at ¶ 24.

The trial court seemed to suggest that the Matthews Group was somehow estopped from disputing adequate notice to all members. *See* CP 1906 (stating that because the Matthews Group “failed to properly send notice to the membership, including the new dues paid members, [they are thus] estopped from asserting any challenge as to notice”) (citing *East Lake Water Ass’n v. Rogers*, 52 Wn. App. 425, 761 P.2d 627 (1988)). This Court already held that the Matthews Group was not required to send notice because the Bylaws authorized a group of not less than 10 percent of the members to send notice. *Island Landmarks I*, 2013 WL 6835306 at \*8. Indeed, the Matthews Group could not have sent notice because it did not have a list of the purported new members. The issue therefore was not whether the Matthews Group provided adequate notice, but whether the

Kritzman Group did, and the Matthews Group presented evidence that the Kritzman Group failed to do so. *Eastlake* thus has no application to the Matthews Group, because the duty to provide adequate notice rested with the Kritzman Group. The trial court erred in disregarding the Matthews Group's proffered evidence as to the Kritzman Group's failure to provide notice to all members.<sup>8</sup>

**4. The Kritzman Group is equitably estopped from complaining about DeFrang's purported refusal of its membership applications, and this issue is legally irrelevant in any event.**

If *Eastlake* has any application in this case, it is to estop *the Kritzman Group* from complaining about any purported failure of Ken DeFrang, the Secretary, to agree to accept their packet of membership applications. Equitable estoppel requires an "(1) admission, statement, or act inconsistent with the claim afterward asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to the other party resulting from allowing the first party to contradict or repudiate the admission, statement, or act." *Eastlake*, 52 Wn. App. at 430.

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<sup>8</sup> Even if equitable estoppel had any application, the Kritzman Group was not permitted to rely on it due to its unclean hands. See *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 815-16, 320 P.3d 130 (2014) (holding that equitable estoppel may not be asserted by a party with unclean hands), and section F, *infra*.

Kritzman’s manipulation of DeFrang meets all elements. By Kritzman’s own admission, she informed DeFrang that she had a packet of membership applications but represented to him that he had no duty to accept the applications. CP 1426. Kritzman further admitted that she successfully manipulated him into declining acceptance of the applications. *Id.* Under *Eastlake*, the Kritzman Group cannot later contend that DeFrang’s purported failure to accept the applications – an act they induced by manipulating him – somehow excuses their failure to comply with the Bylaws’ membership recordation requirements.<sup>9</sup>

This question is academic in any event because the relevant events all occurred one day too late. Kritzman offered the applications to DeFrang on May 26, nine days before the special meeting on June 4, so even if *offering* to provide the applications of the Kritzman Group members somehow made these individuals “members of record,” it occurred *after* the meeting had already been noticed. Under this theory, the meeting notice was therefore improperly sent by non-members, and the Kritzman Group became members one day too late to send notice for a June 4 meeting. *See* CP 1489, § 2.7 (Notice of Meetings must be given by “persons authorized to call the meeting” not less than ten days prior to the

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<sup>9</sup> DeFrang had no authority to unilaterally waive the Bylaw requirements as to membership recordation in any event. Bylaws can only be amended by the Board of Directors. CP 1484.

date of the meeting). *See* CP 1489. Therefore the purported election results were void.

**D. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RELYING ON THE KUTSCHER DECLARATION IN GRANTING SUMMARY JUDGMENT TO THE KRITZMAN GROUP.**

The Kritzman Group attempted to prove the intent of the corporation at the time the bylaws were adopted through the testimony of the drafter of the bylaws, Ted Kutscher. CP 1653. Kutscher was not a director or officer of the corporation, and *his* intent is irrelevant to establishing the *corporation's* intent. To the extent that Kutscher purported to testify about the intent of the original directors of Island Landmarks, that testimony lacks foundation and is inadmissible hearsay. The trial court's implicit denial of the Matthews' Group's motion to strike, and subsequent denial of the Matthews' Group motion for reconsideration on this point, was error.<sup>10</sup>

On summary judgment, supporting affidavits must “be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e); *see also Blomster*, 103 Wn.

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<sup>10</sup> The trial court did not expressly rule on the Matthews Group's motion to strike, CP 1905-07, but it implicitly rejected that motion by considering the Kutscher declaration as noted in its summary judgment order. *Id.*

App. at 259-60. Affidavits submitted on summary judgment “must conform to what the affiant would be permitted to testify to at trial.” *Blomster*, 103 Wn. App. at 260; *see also Jones v. State*, 140 Wn. App. 476, 487, 494-95, 166 P.3d 1219 (2007) (reversing trial court’s consideration of declaration that contained “rendition of out of court statements by [third parties]” and conversations between the declarant’s attorney and members of a health board; hearsay statements could not be considered on summary judgment, even as background), *rev’d on other grounds*, 170 Wn.2d 338, 242 P.3d 825 (2010).

Kutscher’s declaration was inadmissible and should not have been considered by the trial court. First, Kutscher’s subjective impressions of his own goals in drafting the Bylaws are irrelevant to “the corporation’s intention . . . when the bylaws were approved.” *Island Landmarks I*, 2013 WL 6835306 at \*7. A corporation may only act through its officers, directors, and agents. *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 76, 265 P.3d 956 (2011). The relevant “act” at issue was the ratification of the Bylaws by the incorporating directors of Island Landmarks. CP 1497 (“The foregoing Bylaws were adopted by the Board of Directors on this 11th day of Dec., 1995.”). The intentions of Kutscher, a non-director, are irrelevant. Kutscher makes no allegation that he shared

his own intentions with the incorporating directors of Island Landmarks, or that his intentions informed *their* understanding in any way.

Second, even if Kutscher's declaration articulates the intentions of the original directors of Island Landmarks, they are hearsay. *See* ER 801(a) (hearsay "statement" can be an "oral or written assertion"). Kutcher's testimony about the directors' alleged out of court assertions is an attempt to prove that the Bylaws mean what the Kritzman Group says they mean. The statements are plainly based on *someone's* expressions, and the Kritzman Group cannot conceal the statements' objectionable nature by drafting them in a vague manner. *See, e.g.*, CP 1154 at ¶ 6 ("I infer . . . that [the original directors] intended to use membership to create a broad constituency for the new nonprofit and to encourage wide participation," and he "believes" he wrote the membership rules to signify this); *id.* ("no other qualification to be a member was intended . . .").

Because Kutscher's declaration was inadmissible, the Kritzman Group produced *no evidence* of "the corporation's intention . . . when the bylaws were approved," as mandated by *Island Landmarks I*, 2013 WL 6835306, \*7. The trial court thus erred in granting summary judgment to the Kritzman Group.

**E. THE TRIAL COURT ERRED IN DENYING THE MATTHEWS GROUP’S MOTION TO RECONSIDER, AFTER KUTSCHER’S DEPOSITION CONFIRMED HIS DECLARATION WAS INADMISSIBLE AND SHOWED HIS BIAS.**

The trial court abused its discretion in denying the Matthews Group’s motion to reconsider following the Kutscher deposition. While the inadmissibility of the Kutscher declaration should have been apparent on its face, his deposition (occurring by necessity after summary judgment briefing) established his lack of personal knowledge. Moreover, the Kutscher deposition revealed Kutscher’s bias against the Matthews Group, showing that his declaration alone was insufficient to entitle the Kritzman Group to judgment as a matter of law.

New material evidence may justify reconsideration. *See* CR 59(a)(4) (permitting reconsideration upon “[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial”); *see also* CR 59(a)(9) (allowing trial court to grant reconsideration where “substantial justice has not been done”); *Keck v. Collins*, 181 Wn. App. 67, 94, 325 P.3d 306 (trial court abused discretion in denying reconsideration where it had erred in not considering evidence that showed genuine issue of material fact), *review granted*, 181 Wn.2d 1007, 335 P.3d 941 (2014).

The trial court erred in not granting reconsideration. Kutscher's deposition showed that, contrary to his declaration, he had no recollection of any discussions with Island Landmarks directors or agents regarding their intent for membership requirements of the organization. CP 2163 at 31:13-23; 32:16-33:5; CP 2165 at 62:6-12. This is critical because the Kutscher Declaration was the basis for the trial court's ruling. The trial court referenced the Kutscher Declaration during the summary judgment hearing, *see* RP 43:24-25 to 44:1) (CP 2175-76) ("is that your argument or response to the lawyer's [Kutscher's] declaration that said it [membership] was intended to be open?"), and then adopted his proffered interpretation of the Bylaws in ruling on summary judgment. *See* CP 757-58.

Moreover, Kutscher's deposition indicated a deep-seeded bias against the Matthews Group, and an alignment of interest with the Kritzman Group. Kutscher admitted to "disgust" with the manner in which the Matthews Group was running Island Landmarks, CP 2169 at 82:2, helped the Kritzman Group concoct its hostile takeover scheme, CP 1779; and even encouraged an organization of which he was a board member to intervene in this very lawsuit as a co-plaintiff. CP 2172 at 108:3-4, 15-16. Kutscher's declaration omits these facts. The trial court, at a minimum, should have determined that a jury could have disbelieved his testimony because of his bias. *See United States v. Real Property*

*Located at 3234 Wash. Ave N., Minneapolis, Minn.*, 480 F.3d 841, 845 (8th Cir. 2007) (“[W]here specific facts are alleged that if proven would call the credibility of the moving party’s witness into doubt, summary judgment is improper, especially when the challenged testimony is an essential element of the Plaintiff’s case.”).

Based on the significance of the Kutscher declaration in the order on summary judgment, and the manner in which it was impeached by his later deposition testimony, the trial court abused its discretion in declining to reconsider its summary judgment order.

**F. THE KRITZMAN GROUP’S UNCLEAN HANDS BARRED IT FROM SEEKING DECLARATORY RELIEF.**

The trial court erred in granting any relief to the Kritzman Group because its hands were sullied by its misrepresentations and manipulation in attempting its hostile takeover. The doctrine of unclean hands precludes a party from attaining an equitable remedy when the party’s conduct has been unjust or marked by a lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954). “Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.” *Income Investor, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). A claim is barred

based on the doctrine of unclean hands if the Court finds that the litigant's conduct was inequitable and the conduct relates to the subject matter of the claims. *McKelvie v. Hackney*, 58 Wn.2d 23, 32, 360 P.2d 746 (1961). Fraud and misrepresentation are types of inequitable conduct that warrant application of the doctrine of unclean hands to bar a litigant's claims. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815, 65 S. Ct. 993, 89 L. Ed. 1381 (1945) (unclean hands doctrine requires litigant to "have acted fairly and without fraud or deceit as to the controversy in issue. . . Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation" of the doctrine).

Misrepresentation, manipulation, conspiracy and concealment were the pillars upon which the Kritzman Group erected their scheme to oust the Board of Island Landmarks. Kritzman misrepresented her authority to deposit funds into Island Landmarks' bank account. Kritzman knew it was wrong for her to access the account, because she had tried once before and was rebuffed because she "wasn't a signer on the account." CP 1738. Undeterred, she went back years later, armed with an old account number she solicited from a prior treasurer with no current Board authority. CP 439-40 at ¶ 23. She then without legal authority apparently convinced someone at the bank that she had authority to

transact business for Island Landmarks, convinced that person to disclose the new account number, and deposited funds into the organization's account after endorsing and altering checks herself—all without any corporate authority. *See id.*; CP 439-40 at ¶ 23; 1473-74; 1179 at ¶ 27, 1366-1421. This was fraudulent.

The Kritzman Group also created its own counterfeit “Island Landmarks Membership Form,” which purported to bestow “full membership rights and privileges as described in the Bylaws of Island Landmarks.” CP 1463. Of course, no one associated with the Kritzman Group had any corporate authority to bestow such rights and privileges, and their unauthorized “membership form” itself was a misrepresentation to all of their own purported “members.” Kritzman then engaged in self-described “manipulative” conduct in her effort to convince DeFrang to decline acceptance of the Kritzman Group's “membership forms.” *See* CP 1426; see also section C *supra* (arguing that the Kritzman Group should be equitably estopped from complaining about any alleged procedural deficiency caused by their own manipulative conduct). Throughout this time, the Kritzman Group deliberately concealed their activities for the express purpose of keeping the officers of Island Landmarks in the dark. *See, e.g.*, CP 1432, 1439, 1445-46, 1450, 1773.

The doctrine of unclean hands is particularly appropriate because the Kritzman Group asserts rights under the very contract it violated—the Bylaws. *See Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 815-16, 320 P.3d 130 (2014). To the extent the Kritzman Group relies on equitable estoppel to enforce its purported right to membership under the Bylaws, “a party with unclean hands may not assert equitable estoppel.” *Id.* at 815 (citing *Retail Clerks Health & Welfare Trust Fund v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982)). In *Top Line Builders*, this court denied an estoppel argument because the defendant had unclean hands: it had failed to follow some procedures in the contract, but “seeks to enforce other provisions of the contract to its benefit.” *Id.* The same is true here. The Kritzman Group seeks to enforce a purported promise of membership, but it violated the requirement that funds go to the corporation through its officers and it manipulated a corporate officer into declining to accept membership applications. Its unclean hands bar any enforcement of rights under the Bylaws.

Because a “person who comes into an equity court must come with clean hands,” *Income Investors*, 3 Wn.2d at 602, the Kritzman Group’s unclean hands bar any declaratory relief.

**G. THE MATTHEWS GROUP, NOT THE KRITZMAN GROUP, WAS ENTITLED TO SUMMARY JUDGMENT.**

The Matthews' Group's interpretation of the Bylaws' membership requirements was reasonable, and the trial court should not have intervened to overturn that interpretation. Moreover, even if no deference were accorded to Island Landmarks' own interpretation of the Bylaws, its interpretation was correct. Longstanding authority prohibits unilateral assertions of membership in a private organization, and the Kritzman Group violated the Bylaws by deliberately circumventing both the treasury requirement (by depositing its funds in the Island Landmarks bank account without authority) and the recordation requirement (by generating its own membership attestations that were never provided to Island Landmarks). While ample, *undisputed* evidence showed that this interpretation comports with the intent of the corporation when the Bylaws were adopted, the only evidence in support of the Kritzman Group was the inadmissible Kutscher declaration. The trial court erred in granting summary judgment for the Kritzman Group and denying summary judgment for the Matthews Group.

**CONCLUSION**

For the reasons stated in this brief, the Court should reverse and remand with instructions to enter summary judgment in the Matthews Group's favor and dismiss the complaint with prejudice.

Respectfully submitted this 15th day of June, 2015.

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***CERTIFICATE OF SERVICE***

I hereby certify under penalty of perjury under the laws of the State of Washington, that on the date set forth below I caused to be served a copy of the foregoing:

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