

73426-1

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**Original**

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, J. NELSON HAPPY, KEN DEFRANG, ELLEN  
DEFRANG, OWEN RYAN,

Appellants.

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REPLY BRIEF OF APPELLANTS

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DIVISION I  
COURT OF APPEALS  
STATE OF WASHINGTON  
APR 14 4:57 PM '11

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## INTRODUCTION

The determinative issue in this case is whether the Kritzman Group<sup>1</sup> obtained membership status in Island Landmarks, over the Matthews Group's objection and in contravention of the Island Landmarks' Bylaws ("Bylaws"), by engaging in a secret hostile takeover attempt. The Kritzman Group seeks to excuse its noncompliance with the Bylaws by engaging in a misleading and legally irrelevant disparagement of the Matthews Group's leadership of Island Landmarks. Its Response Brief ("Resp.") simply distracts from the core issues in this case. It is also fraught with factual inaccuracies and legal theories that lack any supporting precedent.

When the law is properly applied to the facts here, it is clear that the trial court erred in numerous respects. Specifically, the trial court erred by (i) refusing deference to the Matthews Group's reasonable interpretation of the Bylaws' membership requirements, (ii) finding a contractual relationship between the Kritzman Group and Island Landmarks where none existed, (iii) interpreting the Bylaws in a way that leads to absurd results, and (iv) relying on inadmissible evidence while not even addressing the only admissible evidence, which was dispositive. The Court should remand with instructions to grant summary judgment in

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<sup>1</sup> As in the opening brief, the "Kritzman Group" refers to the group of persons who caused this lawsuit to be filed in the name of "Island Landmarks," the plaintiff below and appellee here. The "Matthews Group" consists of the defendants below and appellants here.

favor of the Matthews Group, the proper governing board of Island Landmarks, and dismiss this case once and for all.

### **COUNTERSTATEMENT OF FACTS**

The Kritzman Group's Response contains an introduction and statement of facts containing pages of irrelevancies and misrepresentations regarding the Matthews Group's stewardship of Island Landmarks from the mid-2000s onward. Resp. at 7-8. The Court's task is to interpret the 1995 Bylaws, with aid from evidence of "the corporation's intent regarding its membership requirements and procedures" "when the bylaws were approved." *Island Landmarks v. Matthews*, No. 69619-0-I, 2013 WL 6835306, \*7 - \*8 (Wash. Ct. App. Dec. 23, 2013) ("*Island Landmarks I*"). It is not to adjudicate which board would better govern Island Landmarks. Yet this is exactly what the Kritzman Group invites the Court to do. See Resp. at 22 (asking the Court to consider the Matthews Group's legal arguments in light of its "history of blithely ignoring [its] obligations to the corporation").

While irrelevant, the Matthews Group cannot allow these misrepresentations to stand. Matthews herself discovered the history of the Mukai Property and promoted the purchase of the Mukai Property and the formation of Island Landmarks. CP 1166, 1168-69, ¶¶ 5, 7-8. In 2000, Kritzman and others abandoned the organization and engaged in a smear campaign of Matthews' leadership, without participating in the organization's governance or contributing to its mission. See CP 1169-71, ¶¶ 9, 12; Opening Br. at 7, 11. During this so-called "leadership void," for

over 14 years Matthews and Happy have financially supported Island Landmarks and the Mukai Property (to the tune of upwards of \$400,000) because, with a few notable exceptions, no one was willing to assist them. CP 1168-69, ¶¶ 8-9; CP 1173-74, ¶ 16. If it were not for the Matthews Group, there would be no Mukai Farm and Garden for the Kritzman Group to seize. The very reason Matthews stepped in to rescue the organization in 2000 was because the “new board”—the group recruited to carry out the mission after the property was acquired— had abandoned it and refused to contribute one dollar or one minute of time to its mission for over a decade. CP 1169, ¶¶ 9-10. The Mukai Property is not “molder[ing] away,” but is in far better condition than it was when acquired, CP 2345, ¶ 4; CP 2350-2414; *see also* CP 2381-90 (recent photographs of the property, included as Appendix A). The Matthews Group remains committed to preserving the Mukai Property in a historically faithful manner.

Instead of working constructively with Island Landmarks to help restore the Mukai Property, in 2009 Kritzman and her followers—after eight years of occasional negative propaganda—plotted a secretive hostile takeover attempt, leading to this suit and three years of litigation.

## REPLY ARGUMENT

### A. THE TRIAL COURT ERRED IN FAILING TO DEFER TO THE MATTHEWS GROUP'S REASONABLE INTERPRETATION OF THE ISLAND LANDMARKS BYLAWS.

The Matthews Group rejected the Kritzman Group as members in Island Landmarks for failure to comply with Bylaws' membership requirements. CP 1500-01. The trial court erred in failing to defer to the Matthews Group's interpretation of the Bylaws' membership requirements.

As a general rule, courts will defer to the corporate officers' interpretation of a voluntary association's 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). The Matthews Group interpreted the Bylaws to require that corporate officers must handle membership dues and maintain records of membership in Island Landmarks. It is undisputed that the Kritzman Group's followers were never recorded in the membership records of Island Landmarks and that their "membership dues" were not handled by the Treasurer. Accordingly, they never became members of Island Landmarks. Cases like *Anderson* and *Couie* require the Court to defer to

the Matthews Group's reasonable interpretation of the Bylaws' membership requirements.

To avoid this binding precedent, the Kritzman Group fabricates a fanciful limitation that lacks any basis in law. According to the Kritzman Group, the rule applied in the cases above extends only to private "social" organizations and trade unions but not to "nonprofit corporations." Resp. at 23-24. This is flatly wrong: Washington courts decline to intervene in the "internal affairs of voluntary associations," *Anderson*, 80 Wn. App. at 46 (emphasis added), whether the organization has chosen to incorporate or not. *See Grand Aerie, Fraternal Order of Eagles v. Nat'l Bank of Wash., Kent Branch*, 13 Wn.2d 131, 135, 124 P.2d 203 (1942) (deferring to interpretation of governing constitution by Grand Lodge of Fraternal Order of Eagles, which was "incorporated under the laws of [Washington]"); *Schroeder v. Meridian Improvement Club*, 36 Wn.2d 925, 927, 221 P.2d 544 (1950) (holding that club, which "incorporated" for purposes of improving the Meridian District, was not required to accept as members persons who qualified for membership and tendered dues); *see also NAACP of Houston Metro. Council v. NAACP*, 460 F. Supp. 583, 589 (S.D. Tex. 1978) (deferring to national NAACP, "a private corporation organized under the laws of the State of New York"). The type of organization to which deference is owed is also not limited to "social organizations" or trade unions. *See NAACP*, 460 F. Supp. at 589; *Budwin v. American Psychological Ass'n*, 24 Cal. App. 4th 875 (1994) (professional association); *Cal. Trial Lawyers Ass'n v. Superior Court of*

*Sacramento*, 187 Cal. App. 3d 575 (1986) (professional association); *Oakland Raiders v. National Football League*, 131 Cal. App. 4th 621 (2005) (athletic organization).<sup>2</sup>

The Kritzman Group's assertion that federal 501(c)(3) tax exempt status permits a deviation from Washington precedent is also without authority. There is nothing in any case cited by the Kritzman Group that suggests 501(c)(3) status is relevant to the degree of deference courts accord to an organization's interpretation of its own rules. For example, while the Kritzman Group states that the Meridian Improvement Club at issue in *Schroeder* was "not a 501(c)(3) corporation," Resp. at 29, nothing in that opinion reveals Meridian's federal tax status, probably because that fact was completely irrelevant.<sup>3</sup> It is illogical to suggest that Washington courts should intervene in the affairs of a voluntary organization for the purpose of enforcing federal tax law. See Resp. at 24.

Because the Court should reject the Kritzman Group's unsupported and unworkable attempts to distinguish this binding authority, the case is governed by *Anderson*, 80 Wn. App. at 47 (reversible error for trial court to allow jury to decide meaning of organization's rules where

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<sup>2</sup> The Kritzman Group does not even substantiate its bald assertion that entities such as private clubs are not nonprofit corporations, as they often are both. See, e.g., *Grand Aerie, Fraternal Order of Eagles*, 13 Wn.2d at 135; *Golden Lodge No. 13, Indep. Order of Odd Fellows v. Grand Lodge of Indep. Order of Odd Fellows of Colorado*, 80 P.3d 857, 860 (Colo. App. 2003) (noting in caption that Colorado branch of Odd Fellows was a "Colorado nonprofit corporation").

<sup>3</sup> It was, at the very least and contrary to the Kritzman Group's assertion, a corporation organized under Washington's laws. See 36 Wn.2d at 927.

organization's interpretation is reasonable). *See* Opening Br. at 24-25 (discussing *Anderson*). The Kritzman Group makes no effort to meaningfully distinguish *Anderson*.<sup>4</sup>

Finally, the Kritzman Group argues that the Matthews Group's interpretation of the bylaws is unreasonable and arbitrary, and thus not deserving of any deference. Resp. at 24. But as explained in the Matthews Group's opening brief, and in section C of this reply brief, the Matthews Group's interpretation is the only reasonable one presented to the trial court and this Court. Contrary to the Kritzman Group's assertions, this interpretation was not "made up" after the fact, but fully comported with

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<sup>4</sup> The Kritzman Group, again citing no authority, argues that the Matthews Group waived this argument by failing to raise it in the prior appeal. Resp. at 23. The prior appeal involved the issue of who was entitled under the Bylaws to call a special membership meeting. *Island Landmarks I*, 2013 WL 6835306 at \*2 -\*5. This Court implicitly applied the rule stated in *Couie* and *Anderson*, because it rejected the Matthews Group's interpretation of the Bylaws' requirements on that issue as unreasonable. *See id.* at \*4 (holding that the Matthews Group's interpretation contravened the "only reasonable reading of this portion of § 2.7"). With respect to the organization's membership requirements, the Court seemed to suggest that the Matthews Group's interpretation was reasonable, but remanded because it found the record insufficient to resolve those issues. *See id.* at \*6-\*7. The trial court had not previously addressed these issues in its earlier ruling which was the subject of the prior appeal, as the Kritzman Group's amici acknowledged. *See* Br. of Amici Curiae in Support of Appellant, *Island Landmarks v. Matthews*, No. 69619-0-1 (Wn. Ct. App. Oct. 18, 2013), at 17 ("The trial court did not reach this [membership] issue."). In any event, judicial abstention arguments, like jurisdictional ones, may be raised at any time. *Cf. San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1105 (9th Cir. 1998) (party could assert judicial abstention doctrine there at issue even for the first time on appeal).

the membership practices of Island Landmarks from “when the bylaws were approved.” *Island Landmarks I*, 2013 WL 6835306 at \*7 -\*8; *see also* CP 1175, ¶ 20.

Under the Kritzman Group’s interpretation of the Bylaws, a group of outsiders could surreptitiously enlist “members” without the current board even knowing who those members were or that they even existed before the special meeting. It is absurd to suggest, as the Kritzman Group does, that an organization can have members that are completely unknown to any officer or director of that organization. The Kritzman Group’s own lawyers conceded that this Court implied that the Matthews Group’s interpretation of the Bylaws “may hold water.” CP 1741. The trial court erred in refusing to defer to the Matthews Group’s reasonable interpretation of the Bylaws’ membership requirements, and summary judgment should have been granted to the Matthews Group. *See Anderson*, 80 Wn. App. at 47.

**B. ISLAND LANDMARKS NEVER ACCEPTED THE KRITZMAN GROUP AS MEMBERS AND SO THEY NEVER BECAME MEMBERS.**

Because a member’s rights in an organization are governed by contract principles, mutual assent is necessary for an applicant to become a member in the first place. *See Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 933, 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 assent). Here, the Kritzman Group created its own membership

forms, deposited its own dues surreptitiously in the Island Landmarks bank account, and its followers were rejected from membership in Island Landmarks for failure to comply with the Bylaws. CP 1500-01. Any “assent” was unilateral.

Contrary to the Kritzman Group’s argument, *Schroeder v. Meridian Improvement Club*, 36 Wn.2d at 925, is materially indistinguishable from this case, and shows that the absence of mutual assent defeats the Kritzman Group’s claim of membership status. The plaintiffs in *Schroeder* “claimed the right to membership by offering to pay dues,” by pooling cash and tendering it as dues to the secretary of the club. *Id.* at 928. The secretary refused the tender of dues, and the prospective members then sued to enforce their purported rights under the corporation’s governing documents. *See id.* Although the governing documents referred to “eligibility” for membership, the Court reasoned that merely being “suitable, qualified, fit, worthy, [or] capable of being chosen,” was insufficient to achieve membership status. *Id.* at 932. For the same reasons, the Kritzman Group’s mere “eligibility” for membership in Island Landmarks did not automatically make them actual members.

The Kritzman Group attempts to distinguish *Schroeder* because “none of the plaintiffs who claimed the right to vote had paid their annual dues,” and the members “had not paid their dues by the time the critical vote was taken.” Resp. at 30. But the Kritzman Group’s members “paid” their dues in exactly the same manner as the plaintiffs alleged they had in *Schroeder*: they collected them in a protest effort, submitted them to the

corporation, and the corporation rejected them. The issue here is the exact issue the court resolved in *Schroeder*: “The courts cannot compel the admission of an individual into [a voluntary] association, and if his application is refused, he is entirely without legal remedy.” *Id.* at 934. *Schroeder* compels the same outcome here because the Kritzman Group’s followers, while “eligible,” nevertheless were rejected as members and their dues refused.

The Kritzman Group’s misleading characterization of *Schroeder* only shows that it cannot distinguish the case, because the case is not distinguishable. Because they were rejected from membership, the Kritzman Group lacked any capacity to call a special meeting of “members” to unseat the incumbent board members. Accordingly, their lawsuit in the name of “Island Landmarks” is a nullity. The Court should reverse on this point and instruct the trial court to enter summary judgment in the Matthews Group’s favor.

**C. THE MATTHEWS GROUP OFFERS THE ONLY REASONABLE READING OF ISLAND LANDMARKS’ MEMBERSHIP REQUIREMENTS.**

This Court previously determined that whether the Kritzman Group successfully became members of Island Landmarks prior to the June 4 special meeting must be determined based on “the corporation’s intent regarding its membership requirements and procedures,” measured “when the bylaws were approved,” *Island Landmarks I*, 2013 WL 6835306 at \*7 -\*8. The Bylaws were approved on December 11, 1995. CP 1497. The Matthews Group interpreted the Bylaws to require that (i)

membership applicants be recorded in the records of Island Landmarks, and (ii) membership dues be received and deposited by the Treasurer (or its designee). CP 1500-01. Only the Matthews Group offered admissible evidence from the time period “when the bylaws were approved” showing adherence to these two requirements. This extrinsic evidence was unrefuted, but the trial court ignored it (as does the Kritzman Group in its Response). Summary judgment should have been entered for the Matthews Group based on this evidence, which supported the Matthews Group’s interpretation of the Bylaws.

**1. The only admissible and relevant evidence shows that Island Landmarks’ Bylaws contain a treasury requirement and a recordation requirement.**

The only relevant evidence of “the corporation’s intent regarding its membership requirements and procedures,” “when the bylaws were approved,” *Island Landmarks I*, 2013 WL 6835306 at \*7 -\*8, was set forth by the Matthews Group. The uncontroverted evidence shows that the Bylaws required both payment of \$25 annual dues as required by Section 2.2 (“Qualification for Membership”) and in accordance with Section 4.9 (mandating Treasurer’s handling of all corporate funds), CP 1488-97; and the recordation of membership information in the corporation’s records as required by section 5.1. *Id.*; *see* Opening Br. at 26-35. The Kritzman Group asserts that bypassing the Treasurer by surreptitiously depositing dues into the organization’s bank account, and then unilaterally declaring oneself a member of Island Landmarks suffices to achieve that status. Not only does the Kritzman Group’s interpretation by the Bylaws contravene

the plain language and lead to absurd results, the Kritzman Group offered no extrinsic evidence from “when the bylaws were approved” that anyone had ever become of member of Island Landmarks in this fashion.

To show the corporation’s intent at the time the Bylaws were adopted with respect to its membership requirements, the Matthews Group set forth the following extrinsic evidence:

- membership forms from 1995 and 1996 (CP 1522-49, 1565-78, 1586-94);
- receipts for payment of initial dues for membership eligibility (CP 1550-61);
- examples of “thank you” letters for membership contributions (CP 1595, 1606-08,1611); and
- records of members from 1995 and 1996 (CP 1298 - 1311).

The Matthews Group also offered the un rebutted declaration of Mary Matthews, CP 1164-1181, who was Executive Director of Island Landmarks in 1995-1996 and had personal knowledge of the corporation’s membership procedures. *See* CP 1174-1175, ¶¶ 18-20.

All of this evidence showed that the actual practices of Island Landmarks in 1995-1996, when the bylaws were adopted, fully comported with the Matthews Group’s interpretation of the Bylaws’ membership requirements. Specifically, the Matthews Group interpreted the Bylaws to require that members be recorded in the membership records of the corporation. *See* Opening Br. at 9-10, 33-34. The extrinsic evidence offered by the Matthews Group from when the bylaws were approved

showed that members were in fact recorded in the membership records of Island Landmarks. *See* CP 1175 ¶ 20, CP 1522-1549 (rolodex cards with membership information); CP 1563-1594 (membership lists and applications).<sup>5</sup>

Next, the Matthews Group interpreted the Bylaws to require that membership dues be received and handled by the Treasurer (or its designee) and deposited into the organization's bank account with receipts provided to contributors. *See* Opening Br. at 9-10, 33. The extrinsic evidence offered by the Matthews Group from when the bylaws were approved showed that membership dues were in fact handled in this manner by the Treasurer or the Treasurer's designee. *See* CP 1175, ¶ 20; CP 1550-1561 (receipts for membership dues); CP 1606-1611 (examples of thank-you letters for membership contributions indicating "sent receipt"). The Kritzman Group simply fails to address any of this evidence. Instead, it relies solely on the inadmissible Kutscher Declaration, to the exclusion of any testimony from an actual director supporting its position. Matthews' testimony is unrefuted.

The Matthews Group's interpretation is not only reasonable, but also compelled by necessity. Quite simply, the recordation requirement

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<sup>5</sup> It is patently incorrect, as the Kritzman Group states, that "the only list of members that defendants produced was the list of nine members that Ms. Beard assembled in 2010, plus the five directors, which became the September 2010 list that Ms. Matthews put together after the 'vote' on September 16, 2010. CP 1007-08." Resp. at 26-27. The materials cited here include numerous records of membership from 1995-96. Note that address information has been redacted from these records for privacy.

and the treasury requirement exist so that the organization can know who its members are and how much money it has, and function accordingly. The Bylaws required members to be known to the officers of the corporation, with someone in charge of keeping track of such members through recording (the Secretary), so that notice of meetings can be given “to each member of record” as required by Section 2.7; 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 Section 2.5; and for many other reasons. *See* CP 1489, § 2.9 (determining whether a quorum exists), CP 1490, § 2.12 (allowing actions by members without a meeting), CP 1496-97, § 5.1 (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”).

**a. There is no merit to the Kritzman Group’s contention that an organization can have members that are unknown to the organization.**

The Kritzman Group downplays the absurdities that would result from their reading of the Bylaws by asserting that, in this particular instance, the incumbent officers could have discovered the identities of the purported new members when Ellen Kritzman offered their purported application forms to Island Landmarks secretary Ken DeFrang.<sup>6</sup> Resp. at 24-27. This argument fails for numerous reasons. First off, it is simply

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<sup>6</sup> As stated below, Kritzman’s offer is without probative value because she did so only nine days before the special meeting, thus precluding any use of these applications, and admittedly manipulated DeFrang into declining to demand the applications.

incorrect: Kritzman merely telephoned DeFrang to discuss the application forms; she never actually attempted to tender the forms to the organization.<sup>7</sup> See CP 1426. Instead, she manipulated DeFrang by suggesting that perhaps he did not want the forms so he could avoid informing Matthews about them. CP 1424-25.

Second, even if DeFrang's mere knowledge of the existence of these forms somehow imbued the applicants with membership status under some unexplained theory, it happened too late. Kritzman called DeFrang on May 26, nine days before the June 4 meeting. The meeting notice the Kritzman Group sent out two days earlier on May 24 was thus sent by non-members in violation of Sections 2.5 and 2.7 of the Bylaws and was therefore invalid. See *East Lake Water Ass'n v. Rogers*, 52 Wn. App. 425, 426, 761 P.2d 627 (1988) ("Where a meeting of a nonprofit corporation is not in accordance with its bylaws, its proceedings are void."). Moreover, May 26 was one day too late to notice a meeting for June 4 in any event. On this point the Kritzman Group's Response is materially wrong and misleading. See Resp. at 25 (asserting that Kritzman asked DeFrang "ten days before the June 4 meeting if he wanted the [forms]") (emphasis added). May 26 is nine days before June 4, not ten, and thus there is no possible way the Kritzman Group could have complied with Section 2.7.

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<sup>7</sup> DeFrang also lacked authority to unilaterally waive the Bylaw requirement that membership information be recorded in the records of the corporation. See CP 1484 (Bylaws can only be amended by the board).

Third, the *East Lake* case does not hold, as the Kritzman Group contends, that corporate officers are precluded “from relying on their own intransigence as a defense.” Resp. at 27 (citing *East Lake*, 52 Wn. App. at 430). Instead, that case applied the doctrine of equitable estoppel, which requires detrimental reliance upon an “admission, statement, or act inconsistent with the claim afterward asserted.” *East Lake*, 52 Wn. App. at 430. The Kritzman Group manipulated DeFrang; they did not rely to their detriment on any statement or act by him. *East Lake*’s only application to this case is to estop the Kritzman Group from complaining about any purported failure of DeFrang to demand their membership forms. DeFrang relied upon Kritzman’s manipulative assertions that he had no duty to accept the applications, so the Kritzman Group cannot now come into court asserting that DeFrang violated that very duty.

Finally, the Kritzman Group’s argument misses the fundamental point: an organization’s bylaws, like any contract, must be constructed in a reasonable manner that avoids absurd results. See *Grant County Port Dist. No. 9 v. Wash. Tire Corp.*, 187 Wn. App. 222, 236, 349 P.3d 889 (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 Kritzman Group’s interpretation of the membership requirements of the Bylaws—which permits members to exist without the organization’s knowledge—is absurd and unreasonable.

**b. The Kritzman Group misapprehends the purpose of the Bylaws' treasury requirements.**

The Kritzman Group contends that Section 4.9 of the Bylaws merely sets forth the Treasurer's duties and is unrelated to membership. Resp. at 28. This argument evades the issue. The Kritzman Group cannot be said to have "paid" membership dues in accordance with Section 2.2 unless the funds were handled in the manner set forth in Section 4.9. Surreptitious deposits, without corporate knowledge, do not count.

Again without citing any authority, the Kritzman Group asserts that the Matthews Group's rejection of these surreptitious deposits—once they came to light—violated the duties of loyalty and care. Resp. at 28 (citing RCW 24.03.217). There is simply no basis for the outlandish assertion that a corporation is obligated by statute to accept membership dues tendered by any person in any manner (even through fraudulent means; *see* Opening Br. at 13-14, 46-47), and the Court should reject it.

The trial court erred in reading the treasury and recordation requirements out of the Bylaws, and its holding should be reversed.

**2. Whether the June 4 special meeting was properly noticed presents, at minimum, a genuine issue of material fact.**

The Kritzman Group does not dispute that it failed to provide notice to Priscilla Beard (a member of Island Landmarks since 1995-96, CP 1309), but rather disputes whether Beard was a member at the time notice was required for the June 4 special meeting. Resp. at 21-22. The Kritzman Group argues that Beard was not an Island Landmarks member

(and thus was not entitled to notice of any meeting) because no evidence existed that Beard paid dues in 2011 or 2012. *Id.*

The Bylaws are silent, however, on whether members are ejected from the organization (or their membership otherwise lapses) for failure to pay dues on an ongoing basis. The Kritzman Group reads too much into Section 2.2 of the Bylaws, which contains no requirement that a member be expelled or stricken from membership for failure to pay dues. The bylaws at issue in *Schroeder*, by contrast, expressly provided that “[a]ny member who fails to pay his dues for the current year by April 1 will be considered in bad standing and his membership shall cease.” 36 Wn.2d at 934. Island Landmarks’ Bylaws were not so rigid, and the corporation did not always require annual payments of \$25 in cash by each person. At times the Board accepted contributions in kind or payments by one person covering the dues of several members. CP 2558-60 (Matthews Answer to Interrogatory No. 3); CP 2498-99. The salient point is that the corporation knew who these members were because there was a record of their membership, and they could be contacted at any time.

The Kritzman Group presumably could not have given notice to Beard as it had not requested a membership list in advance of the meeting (and could not have done so lest it bring its covert plan into the open). But this was a risk associated with the Kritzman Group’s covert plan. There exists at least a genuine issue of material fact as to whether, under the Bylaws, Ms. Beard’s membership terminated by failure to pay dues and

whether the Kritzman Group provided her notice of the June 4 special meeting.

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

In addressing the key question of “the intention of [Island Landmarks] at the time of its incorporation,” *Island Landmarks I*, 2013 WL 6835306 at \*7, the Kritzman Group relies entirely on the biased, purported recollections of an attorney who was not a director to prove what the actual founding directors intended. *See* Resp. at 6 (describing Kutscher’s testimony as to what “the incorporating directors chose,” and why); 18-19 (describing general “intent” behind Kutscher’s use of certain terms in bylaws, and purportedly confirming that “neither [Kutscher] nor the corporation’s founders intended to impose other grounds for membership”). Kutscher’s declaration should not have been relied upon by the trial court, as it was irrelevant and inadmissible hearsay.

The Kritzman Group contends that Kutscher does not “offer his recollection of statements made by others,” but “discusses his own recollections of how the Bylaws came to be drafted and his own understanding of the meaning of the provisions at issue.” Resp. at 31 (emphasis added). To the contrary, elsewhere in their Response (at 18), the Kritzman Group advances Kutscher’s testimony to prove what “the original directors intended.” This is hearsay. The Kritzman Group never explains how Kutscher came to know of these subjects other than through

out-of-court statements to him from the original directors. Moreover, to the extent that his declaration encompasses Kutscher's own understanding, it is irrelevant, as Kutscher was not a director and does not assert that the directors adopted his understanding. See *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 76, 265 P.3d 956 (2011) (corporation acts through officers, directors and agents); CP 1497 (Bylaws adopted by incorporating directors). The Kritzman Group cannot claim Kutscher's declaration to be both relevant and non-hearsay.

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. FOLLOWING KUTSCHER'S DEPOSITION, IN WHICH HE REVEALED HIS LACK OF PERSONAL KNOWLEDGE AND BIAS, THE COURT SHOULD HAVE RECONSIDERED ITS SUMMARY JUDGMENT.**

After Kutscher offered his declaration, the Matthews Group deposed him, and Kutscher admitted that 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. Kutscher's testimony proved he had no knowledge of any of the directors' intentions, and relied solely upon his own, irrelevant impressions of the corporation's intentions.

Moreover, Kutscher's testimony indicated (for the first time) his bias against the Matthews Group and Island Landmarks. Kutscher admitted to "disgust" with the Matthews Group's governance of Island Landmarks, CP 2169, confirmed that he had met with and actively assisted the Kritzman Group in its hostile takeover scheme, CP 2170, and admitted that he had attempted to essentially join the case as a party by encouraging an organization in which he was a director (the public development agency 4Culture) to intervene in the case below. CP 2172. While the Kritzman Group downplays Kutscher's testimony as merely the testimony of a witness "favorable to one of the parties," Resp. at 32, it ignores the animosity Kutscher admittedly harbored toward the Matthews Group. The trial court was unaware of this bias in considering Kutscher's original declaration, which portrayed him as disinterested, CP 1152-55, and the court would have been entitled to hold his testimony not to be dispositive. *See United States v. Real Prop. Located at 3234 Washington Ave. N., Minneapolis, Minn.*, 480 F.3d 841, 845 (8th Cir. 2007). Kutscher's opinion is further called into question by his lack of recollection of the drafting of the Bylaws, or any discussions related to the Bylaws, CP 2163-65, which tends to show that bias, not actual recollection, informed his opinion. The trial court abused its discretion in refusing to reconsider its summary judgment, which was solely supported by Kutscher's biased, irrelevant and hearsay testimony.

**F. THE KRITZMAN GROUP HAD UNCLEAN HANDS, AND WAS NOT ENTITLED TO A DECLARATION THAT IT WAS THE PROPER BOARD OF ISLAND LANDMARKS.**

Under the doctrine of unclean hands, a party is not entitled to equitable relief when its conduct was unjust or marked by a lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954). 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).

The Kritzman Group contends that Kritzman "did nothing wrongful in depositing checks into the Island Landmarks account," Resp. at 33, and that the Matthews Group "do[es] not identify any violation of law or policy." *Id.* To the contrary, the Matthews Group identified fraud and misrepresentation, as indicated by (1) Kritzman's return to Chase Bank despite being rejected from her previous attempts to access the account because (in Kritzman's words) the bank "understandably" would not give information because she "wasn't a signer on the account," CP 1738, (2) Kritzman's inducement of an ex-treasurer of Island Landmarks to disclose to her Island Landmarks' banking information, *id.*, (3) Kritzman's contravention of the banking agreement between Chase Bank and Island Landmarks, CP 1365 (listing "Depository and Withdrawal Authorization"); (4) Kritzman's personal alteration of checks for an account she had no authority to authorize, CP 1366-1421, and (5) Kritzman's continuing misrepresentations related to how she obtained the

current account number in 2012. CP 439-40, ¶ 23 (stating that she obtained account number from a 2009 statement provided by former Island Landmarks treasurer), *with* CP 1364 (showing that the account into which she deposited funds was not opened until September 2010).<sup>8</sup>

Apart from the banking issues, Kritzman engaged in self-described “manipulative” conduct to induce DeFrang into declining to demand the Kritzman Group’s purported membership forms. *See* part C.1.a, *supra*. The Kritzman Group deliberately concealed their activities, falsely represented their authority to bestow membership in and collect membership dues for Island Landmarks, and even convinced Island Landmarks’ former lawyer to divulge privileged information from his files about the organization without seeking the organization’s consent. *See* Opening Br. at 11-13, 21 n.5.

The unclean hands doctrine additionally precludes a party from asserting rights under a contract that it has violated. *See Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 815-16, 320 P.3d 130 (2014). The Kritzman Group seeks to enforce purported rights under the Bylaws, but admittedly circumvented the Bylaws’ requirements that corporate funds be provided to the treasurer, and membership information be recorded in the corporate records. Resp. at 34 (noting excuses for the Kritzman Group’s

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<sup>8</sup> *See also* RCW 9A.60.040(1) (“A person is guilty of criminal impersonation in the first degree if the person... (b) Pretends to be a representative of some...organization...does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose.”).

non-compliance with these requirements). Because the Kritzman Group violated the Bylaws, it has no right to ask the Court to enforce its purported rights of membership under the Bylaws. Summary judgment was therefore improperly granted to the Kritzman Group.

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

The Matthews Group was entitled to summary judgment because (1) the Court should have deferred to its interpretation of the Bylaws, *Anderson*, 80 Wn. App. at 47; (2) no contractual arrangement existed with the Kritzman Group under *Schroeder*, 36 Wn.2d at 932, due to the Matthews Group's rejection of the Kritzman Group as members; and (3) even without deference to the Matthews' Group's interpretation, the Bylaws did not permit the Kritzman Group to join Island Landmarks without fulfilling the treasury, recordation and notice requirements. Each is a sufficient independent basis to enter summary judgment for the Matthews Group, and the trial court erred in instead granting summary judgment for the Kritzman Group.

The Kritzman Group asserts that, because the Matthews Group challenges the Kutscher declaration and offers an unclean hands defense, the Matthews Group "effectively admitted to the existence of a factual dispute." Resp. at 35. This is incorrect. The Matthews Group is entitled to summary judgment because its construction of its own Bylaws are reasonable as a matter of law, it had no contractual relationship with the Kritzman Group's members because it never manifested assent for the

Kritzman Group to join Island Landmarks, and the Matthews Group's construction of the Bylaws is the only reasonable reading and is supported by the only admissible extrinsic evidence. *See supra* at A-D. Only if this Court were to reject these arguments would a genuine issue of material fact arise as to the secondary issues of notice and unclean hands that would defeat summary judgment in favor of the Kritzman Group.

### CONCLUSION

For the reasons stated in this reply brief and in the Matthews Group's opening brief, the Court should reverse the trial court and remand with instructions to enter summary judgment in the Matthews Group's favor.

Respectfully submitted this 24th day of August, 2015.

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## APPENDIX





















**DECLARATION OF SERVICE**

Lisa Werner declares as follows:

1. I am a legal assistant at the law firm of K&L Gates. At all times hereinafter mentioned I was a citizen of the United States, a resident of the State of Washington, over the age of 18 years, competent to be a witness in the above action, and not a party thereto.

2. On the date shown below, I served a true and correct copy of the foregoing on counsel of record for Plaintiffs as indicated below:

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CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

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

DATED this 24<sup>th</sup> day of August, 2015, at Seattle, Washington.

  
Lisa R. Werner