No. 35519-1-II

COURT OF APPEALS, DIV. II

OF THE STATE OF WASHINGTON

Cathryn Chudy, Emmy Winterburn, and Kathryn Edgecomb, on behalf of Columbia Credit Union, and Cathryn Chudy, Emmy Winterburn, and Kathryn Edgecomb, as individuals, Appellants,

vs.

Duane Bequette, Steve Straub, John Cheek, Mark Ail, Robert Byrd, and Parker Cann, Respondents.

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

Columbia Community Credit Union ("Columbia" or "CCCU") is a credit union chartered by the state of Washington under Chapter 31.12 of the Revised Code of Washington. CP 1. Cathryn Chudy, Kathryn Edgecomb, and Emmy Winterburn[1] ("Plaintiff Directors") were elected in

[1] Edgecomb declined to participate in this appeal. She resigned her director position at Columbia in November 2006.

June 2005 by the members of Columbia to its board of directors for three-year terms. CP 19. Defendants Duane Bequette, Steve Straub, John Cheek, Mark Ail, and Robert Byrd ("Defendant Directors") were also members of Columbia's board of directors from at least June 2005 through the filing of the Complaint on July 5, 2006. CP 2. During that period, Defendant Parker Cann ("CEO") was the chief executive officer of Columbia. CP 2.

In Paragraph 7 of the Complaint (CP 2), Plaintiff Directors alleged:

> "Defendants control the records of CCCU. They have engaged in a pattern and practice of denying Plaintiffs access to examine and copy corporate records to which Plaintiffs are entitled by law to examine and copy due to their positions as Directors."

In Paragraph 8 of the Complaint (CP 2), Plaintiff Directors alleged:

> "Defendant Directors have engaged in the practice of excluding Plaintiff Directors from Board of Directors (hereinafter "Board") meetings and Committee meetings despite their objections while Defendant Directors have been allowed to remain at the meetings. Defendant Directors discuss and decide significant corporate matters at meetings from which Plaintiff Directors are excluded."

In Paragraph 9 of the Complaint (CP 3), Plaintiff Directors alleged:

> "At the Board meetings that Plaintiff Directors have been allowed to attend, notwithstanding Plaintiff Directors' requests for accurate minutes, Defendant Directors have engaged in a pattern and practice of preparing and approving minutes that record the positions of the majority and omit the positions expressed by the minority on matters brought before the Board."

In Paragraph 13 of the Complaint (CP 4), Plaintiff Directors alleged:

> "Plaintiff Directors are entitled to indemnification, from CCCU, for their expenses, including attorney fees, relating to this action, which arise from the fact that they are directors, pursuant to CCCU's Articles of Incorporation."

Plaintiff Directors prayed for declaratory judgment and injunctions pursuant to Chapter 7.24, RCW, and an order directing Columbia to indemnify them for their expenses from the action. CP 4-5, 25-26.

On September 12, 2006, The Honorable Judge Diane M. Woolard issued a letter ruling (CP 38-39), followed by an Order filed on September 29, 2006 (CP 40-41), dismissing the Complaint under CR 12(b)(6) for failing to state a claim upon which relief may be granted.

ARGUMENT

1. What is the standard of review for a trial court's dismissal of claims under CR 12(b)(6)?

The standard of review for trial court dismissals of claims under CR 12(b)(6) was described recently as follows in *Holiday Resorts Community Assoc. v. Echo Lake Associates*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006):

> A complaint can be dismissed under CR 12(b)(6) for "failure to state a claim upon which relief can be granted." Whether a CR 12(b)(6) dismissal is appropriate is a question of law an appellate court reviews de novo. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to

> relief.'" *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985)). In undertaking such an analysis, "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record." *Tenore*, 136 Wn.2d at 330. A CR 12(b)(6) motion should be granted "'sparingly and with care" and "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Tenore*, 136 Wn.2d at 330 (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)). "'[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.'" *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (quoting *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)).

Thus, the trial court's dismissal was appropriate only if Plaintiff Directors had no basis for a declaratory judgment that they, as Columbia's elected directors, were entitled to examine *any* of its corporate records, to attend *any* meetings of its board of directors and committees, or to have *any* of their expressed views recorded in the minutes of board of directors' meetings, and had no basis under Columbia's articles of incorporation for indemnification of their expenses in the action.

2. What are credit unions, and what laws apply to them?

The trial court based its dismissal under CR 12(b)(6) on the analysis set forth in *Save Columbia CU Comm. v. Columbia Community Credit Union*, 134 Wn. App. 175, 139 P.3d 386 (2006). That case was wrongly decided and should be limited to its facts and issue—whether a credit union's *members* may inspect its records—if not simply overruled. In *Save Columbia*, the court applied to credit union members an analysis that our state supreme court in 1941 had applied to depositors seeking to inspect records of a savings and loan association in *State ex rel. Wicks v. Puget Sound Sav. & Loan Ass'n*, 8 Wn.2d 599, 113 P.2d 70 (1941). Regrettably, however, savings and loan associations ("S&Ls") have always been materially different, in terms of corporate governance and regulatory supervision, from credit unions.

The *Wicks* court observed that prior cases in Washington and other states had found that S&L members, though sometimes called "shareholders," were more like depositors or creditors than investors in corporate stock; and that the broad authority given by Laws of 1933, Ch. 183 ("1933 S&L Act") to a state official (the supervisor of S&Ls) charged with overseeing the affairs and business of S&Ls indicated the legislature intended the regulator's authority as the *exclusive* method of protecting the "meager savings" of an S&L's "large membership." The *Wicks* court quoted much of § 94 of the 1933 S&L Act which granted to the regulator "all powers necessary or convenient" to enforce the 1933 S&L Act.

Indeed, a reading of the 112 sections of the 1933 S&L Act reveals that members of an S&L were unlikely to take any significant governance oversight role in it. While they nominally elected, at annual meetings by voting the amount of their shares, a board of directors (§ 11), their votes normally were cast by incumbent holders of proxies of indeterminate duration (§ 13). It was customary for members, when opening an account at an S&L, to sign a printed account card which contained a proxy designating directors. *E.g.*, *Keough v. Kittleman*, 74 Wn.2d 814, 816, 447 P.2d 77 (1968). And because S&L members' voting power was based on the dollar amount of their shares or deposits (*e.g.*, §§ 33, 60, and 78), members with "meager savings" had little voting power.

Savings and loan associations (sometime previously called building and loan associations) had existed in Washington since before 1890. Laws of 1890, p. 56. So by 1933, and further by 1941, their pattern of being governed by a self-perpetuating board—with members having no active participation—was well established and understood, as the *Wicks* case indicates.

Credit unions were first established in Washington by the Laws of 1933, Ch. 173 ("1933 CU Act"). In stark contrast to the governance of S&Ls, the 1933 CU Act's 34 sections set out a governance design that expected very active participation by a credit union's members. Section 1 of the Act defined "credit union" as "a corporation" and specified that nothing in the Act affected the laws relating to S&Ls. Section 4 limited credit union membership to groups "having a common bond of occupation or association, or to groups within a well defined neighborhood, community or rural district." Credit union members could purchase from 1 to 200 shares of capital stock, all having a $5 par value, and could also make deposits of up to $1,000. Sections 3(4), 4, and 9. Section 12 provided that "[n]o member shall be entitled to vote by proxy or have more than one vote," and that ten or more members could call a special meeting of the membership. At annual meetings, members would elect a board of directors and also would "fix the maximum amount to be loaned to any one member." § 13. The board was to have "the general direction of the affairs of the corporation"(§ 15) and was to appoint a three-member auditing committee (§ 14) that was to report to the membership at each annual meeting. § 16. The board was also was to make "recommendations to the members of the credit union relative to the maximum amount to be loaned to any one member, the need of amendments to the by-laws and other matters upon which, in its opinion, the members should act at any regular or special meeting." § 15. The bylaws could only be amended by a three-fourths vote of the members present at a meeting called for that purpose. § 7. By a two-thirds vote of a credit union's members, they could liquidate the corporation and divide its net assets, after payment of all debts and deposits, among themselves in proportion to their shares of capital stock. §30.

In the 1933 CU Act, the supervision of a state official (the director of efficiency) was considerably less than that specified by the 1933 S&L Act for S&Ls. Under § 26 of the 1933 CU Act, the auditing committee was to make semiannual reports to that state official, and that official was to examine the credit union at least once a year or else accept a competent accountant's report in lieu of an examination. Section 31 permitted that state official to remove any credit union officer who that the official found to be unfit, but that removal authority was greatly curtailed ten years later.

The Washington statutes governing state credit unions ("SCUs") have been amended 34 times since 1933, but the core provisions ensuring active participation in their governance by their members have remained, most particularly that each member has *one vote* regardless of the amount of shares or deposits, and no member may vote by proxy. RCW 31.12.386 (2007).

In 1943 legislation, credit union auditing committees were empowered to suspend directors, officers, and committee members until their members, at a meeting held within 15 days, acted on the suspension. Laws of 1943, Ch. 131, §13. That legislation *eliminated* the power of the state official (by then, the supervisor of S&Ls) to remove credit union officers, replacing it with a power merely to suspend officers until the suspension is acted on, at a meeting within 15 days, by the credit union's own members "whose approval or disapproval shall be final." *Id.* § 23. But that legislation empowered the state official to suspend the operations of a credit union if its capital became impaired or if it was conducting business contrary to law. *Id.* § 20. That legislation lowered the required membership vote for amending the bylaws from three-fourths to two-thirds. *Id.*, § 6.

In 1953, new legislation required credit union boards to make a written report to their members at each annual meeting (Laws of 1953, Ch. 48, § 4), provided that the members at their annual meeting would elect their auditing committee members (*Id.* §5), and eliminated the power of a board to remove the audit committee members. *Id.*, §4. That legislation slightly changed the state supervisor's suspension power over credit union officers, providing that the regulator would notify a credit union's board, rather than its members, which then could act to remove the suspended officer "[i]f the board shall find the supervisor's objection to be well founded." *Id.*, § 10. That same section (§ 10) granted, *for the first time*, broadly-worded enforcement powers to the supervisor:

> "The supervisor shall be charged with the administration and enforcement of this chapter, shall require each credit union to conduct its business in compliance therewith, and shall have power to commence and prosecute action and proceedings to enforce the provisions of this chapter, to enjoin violations thereof, and to collect sums due the state of Washington from any credit

union."

In 1959, legislation replaced the power of a credit union's board to *remove* committee members with the power to *suspend* members of the credit or audit committee or the board until the membership, at a meeting held within 15 days, acted on the matter. Laws of 1959, Ch. 138, § 3.

In 1967, the number of members needed to call a special meeting of the members was increased from 10 to the lesser of 100 or ten percent of the voting members. Laws of 1967, Ch. 180, § 4. That legislation empowered the state's supervisor to file a civil action in superior court to remove an unfit director, officer, or employee if a credit union's board fails to remove such an individual after considering the supervisor's reasons for suspending him or her. *Id.*, § 15.

In 1969, legislation empowered, *for the first time*, a credit union's bylaws to be amended by its board of directors without a vote by the credit union members at a meeting. Laws of 1969, Ch. 65, § 2.

In 1973, legislation first empowered a credit union's members to vote by mail. Laws of 1973, 1st Ex. Sess., Ch. 8, § 2. That section (§ 2) also changed and set the number of members needed to call a special membership meeting at ten percent of the voting membership. That 1973 legislation, *for the first time*, enacted statutes expressly empowering the supervisor to revoke a credit union's charter and liquidate it. *Id.*, §§ 15-18.

In 1984, the legislature enacted a completely revised and recodified credit union act. Laws of 1984, Ch. 31. It included a declaration of policy stating that one of the purposes of the supervisor of S&Ls, as the credit union regulatory authority, was to protect "the integrity of credit unions as cooperative institutions." *Id.*, § 3. Consistent with that policy, it required that regular membership meetings "be conducted according to the customary rules of parliamentary procedure" (§ 20), and that after each special membership meeting the chair of the supervisory committee (formerly named the auditing committee) "shall report to the supervisor ... whether the special meeting was conducted in a fair manner in accordance with the bylaws of the credit and with customary rules of parliamentary procedure." § 21. The legislation changed the number of members needed to call a special meeting to the lesser of ten percent of the members or 2,000 members. *Id.*

In 1997, legislation revised a statute listing the duties of a credit union's board to expressly require that the board "Perform such other duties as the members may direct." Laws of 1997, Ch. 397, § 17 (Adding RCW 31.12.255(1)(i)). That legislation also replaced the language, added in 1984, that membership meetings follow "customary rules of parliamentary procedure" with language requiring only that they follow "rules of procedure approved by the board." *Id.*, §§ 12 and 13. The 1997 legislation also added a new section (*Id.*, § 19) stating that "Directors and board officers are deemed to stand in a fiduciary relationship to the credit union" and prescribing an "ordinary prudent person" standard of care for them identical to that of business corporation directors in RCW 23B.08.300(1) and of nonprofit corporation directors in RCW 24.03.127.

The foregoing overview of certain legislative changes to the statutes governing SCUs illustrates that their members have always taken a profoundly more active role in their corporate governance than did members of S&Ls at the time of the *Wicks* case was decided, and the state regulator has taken a much less active oversight role in the governance and affairs of of SCUs than did the regulator of S&Ls when *Wicks* was decided. In addition, it demonstrates that the corporate governance of SCUs has always resembled that of general business corporations.

Because Washington's SCU Act has never addressed every question that might arise in the governance of credit unions, the general body of law governing corporations and cooperatives has been recognized by state authorities as applicable to credit unions. For example, in the 1984 legislation, SCUs were directed to conduct their membership meetings in accordance with "customary rules of parliamentary procedure." And the current state regulator, the Washington State Department of Financial Institutions ("DFI"), Division of Credit Unions ("DCU"), has a long history of referring to the general corporate common law and to the state statutes governing business and nonprofit corporations for guidance when considering issues not directly addressed in the SCU Act. In DCU Opinion O-96-20 (http://www.dfi.wa.gov/cu/opinions1996.htm#20), DFI addressed whether mail ballots could count toward a quorum at credit union membership meetings by referring to general corporate law:

> "In reviewing this issue, I looked to the analogous situation with general business corporations to see how they count a quorum for stockholder meetings. Stock corporations are permitted by general corporate law to count those persons voting by proxy as well as those persons present in person at a stockholders meeting to determine whether a quorum has been reached.
>
> "As noted above, there is no statutory direction in the Washington State Credit Union Act (Chapter 31.12 RCW) on this point. However, I believe that the general corporate law position is a rational one and that the same position should be adopted for credit unions. Accordingly, I have concluded that for the purpose of establishing a quorum at a membership meeting, you should count each member attending the meeting personally, as well as each member voting by mail ballot on an issue presented at the meeting."

In DCU Opinion O-97-17 (http://www.dfi.wa.gov/cu/opinions1997.htm#17), the Director of DCU, Defendant Parker Cann[2], addressed the effective date of credit union mergers by referring to the business corporations statutes:

> "In analyzing this issue, I reviewed the analogous provisions under the Washington Business Corporation Act (Business Corporation Act). The Business Corporation Act provides that a merger becomes effective when articles of merger are filed with the Washington Secretary of State, or at a later date as specified

[2] Cann, an actively licensed lawyer, was Director of DCU from about 1995 until 2002.

in the articles. RCW 23B.11.050, 23B.01.230. Although these sections of the Business Corporation Act are not applicable to credit unions, they do establish legislative policy on this issue in the context of general business corporations.

"The Business Corporation Act policy is a reasonable one which would provide certainty if adopted in the credit union context. There do not appear to be any reasons why this policy should not be adopted by the Division for credit unions.

"In the absence of direction in the CU Act, the Division has determined to adopt the reasoning of the Business Corporation Act on the effective date of credit union mergers."

In DCU Opinion 98-10 (http://www.dfi.wa.gov/cu/opinions1998.htm#10), DCU Director Cann again addressed the effective date of credit union mergers, again adopting the business corporations act statute for credit unions:

"In analyzing this issue, we reviewed the parallel provisions under the Washington Business Corporation Act. The Business Corporation Act provides that a merger becomes effective when articles of merger are filed with the Washington Secretary of State, or at a later date as specified in the articles (not to exceed 90 days). RCW 23B.11.050, 23B.01.230. The rationale appears to be that the merger takes effect on the date provided in the public record maintained by the Secretary of State. In the credit union context, credit unions do not file articles of merger, but do file the signed merger agreement with the Secretary of State (through the Division).

"**Conclusion.** In the absence of direction in the Credit Union Act, the Division has determined to adopt the rationale of the Business Corporation Act—that mergers become effective as provided in the public record maintained by the Secretary of State. Accordingly, credit union mergers will become legally effective on the date the Division files the merger agreement with the Secretary of State, or a later date as specified in the agreement itself (not to exceed 90 days)."

In DCU Opinion 00-04 (http://www.dfi.wa.gov/cu/opinions2000.

htm#4), DCU Director Cann addressed the term of an interim director appointed to fill a new board seat, referring again to general corporate laws for guidance:

> "In the absence of clear direction in the Act, we looked to see how the legislature has dealt with this issue in parallel contexts. The Washington Business Corporation Act (WBCA), Title 23B RCW, provides that interim directors serve until the next annual meeting of shareholders. RCW 23B.08.050(4). The WBCA does not differentiate between the two types of interim directors we have distinguished above. Other state statutes governing financial institutions with elected directors have similar provisions. See RCW 33.16.010 [savings and loan associations]; RCW 32.32.495(4) [savings banks]; compare RCW 30.12.010 [commercial banks].
>
> "It appears that the legislature has generally concluded that interim new directors should serve only until the next regularly scheduled election of directors. We believe that the same conclusion is appropriate for credit unions."

In DCU Interpretive Letter I-04-05 (http://www.dfi.wa.gov/cu/opinions2004.htm#5), DCU Director Linda Jekel addressed whether minutes must be kept of credit union board meetings by referring to the statutes governing business and nonprofit corporations:

> "The Washington Credit Union Act and "C" Credit Union's bylaws are silent regarding minutes of a regular or special board meeting. In the absence of clear direction in the Act, we looked to see how the legislature has dealt with this issue in parallel contexts. The Washington Business Corporation Act, Title 23B RCW, and the Washington Corporation and Association (Non-profit) Act, Title 24 RCW, require board of directors to keep minutes of board meetings. See RCW 23B.16.010 and RCW 24.03.135. These statutes also do not specifically address executive sessions but we note that it is anticipated that actions taken by the board of directors will be entered into the minutes or

> filed with the corporate records. RCW 23B.08.210. Minutes should contain all motions exactly as moved and a very brief description of all major activities."

In DCU Interpretive Letter I-05-01 (http://www.dfi.wa.gov/cu/ I-05-01%20Board%20Member%20Proxy.pdf), a copy of which is in the appendix, DCU Director Jekel addressed whether credit union directors may vote by proxy at meetings. Once again, she considered both the state business corporations act and general corporate common law, referring to a national and a Washington state general corporate law treatise, and declared it to be DCU's position:

> "Generally, corporate law does not allow the directors of a corporation to vote by proxy at directors' meetings. They must be personally present and act themselves. 2 Fletcher Cyc. Corp. § 427 (perm. ed. rev. vol. 1990).
>
> "The Corporation Act, however, allows for board members to be present at a board meeting when participating by any means of communication that allows all members "present" to hear one another. RCW 23B.08.200. This is consistent with the Model Business Corporation Act and statutory law in a majority of states. 2 Fletcher Cyc. Corp. § 397.1 (perm. ed. rev. vol. 1990).
>
> . . . .
>
> "A credit union director may not give a proxy to another director to vote for him/her at a board meeting. A quorum of directors, as defined by statute and bylaws or articles of incorporation, must be present for the board to take action. Directors must be present, either physically or by electronic means, so long as all directors participating can hear one another."

In DCU Interpretive Letter I-05-05 (http://www.dfi.wa.gov/cu/ I-05-05r%20Conflict%20of%20Interest%20CCU%20Candidates%20IL% 20Corrected.pdf), a copy of which is in the appendix, DCU Director Jekel addressed questions about the responsibilities of credit union directors by applying general corporate common law, citing to a leading corporate law treatise and to both Delaware and federal case law, and emphasizing credit union directors' fiduciary duty to their members by quoting directly from that corporate law treatise:

> "A board's duty of complete candor to its shareholders to disclose all germane or material information applies to matters of corporate governance as well as to corporate transactions.
>
> "Directors are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."

It can be seen from the foregoing analysis that the general body of corporate statutory and common law will normally and naturally be applied to SCUs whenever governance questions arise that are not directly addressed by the SCU Act itself. Not surprisingly, the Washington act governing non-financial cooperative associations, societies, companies, and exchanges, Chapter 23.86, RCW, expressly provides that the Washington Business Corporations Act, RCW Title 23B, applies to them except where inconsistent with the cooperative associations' own act. RCW 23.86.360. Such an express legislative incorporation of the business corporation laws within the SCU Act had not been recognized as necessary, for DFI and credit union industry leaders and advisors had long ago recognized the applicability of general corporate law to credit unions. Similarly, the National Credit Union Administration long ago asserted that members of a federal credit union have the same governance rights as shareholders of business corporations under the statutory and common corporate law of the state where their credit union is located. NCUA OGC Legal Opinion 06-0127B (Feb. 6, 2006) (http://www.ncua.gov/RegulationsOpinionsLaws/opinion_letters/2005/06-0127B.pdf), citing NCUA OGC Legal Opinion 96-0541 (June 14, 1996).

The Plaintiff Directors reasonably expect that DFI and Washington courts will apply the statutory and common law of this state applicable to business corporations to the issues raised in their Complaint relating to their responsibilities and concomitant rights as credit union directors, since none of those issued is addressed in the SCU Act, Chapter 31.12, RCW.

3. What are the responsibilities and concomitant rights of credit union directors?

RCW 31.12.225(1) provides:

> "The business and affairs of a credit union shall be managed by a board of not less than five and not greater than fifteen directors."

RCW 31.12.255 repeats that mandate, without stating the number of directors, and enumerates certain duties of the board. That statutory mandate is comparable to that for boards of directors for Washington business corporations in RCW 23B.08.010(2):

> "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors ...."

The statutory standard of care, since 1998, for SCU directors is set forth in RCW 31.12.267 as follows:

> "Directors, board officers, and senior operating officers are deemed to stand in a fiduciary relationship to the credit union, and must discharge the duties of their respective positions:
> (1) In good faith;
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> (3) In a manner the director or officer reasonably believes to be in the best interests of the credit union."

That standard matches the standard of care for directors of Washington business corporations set forth in RCW 23B.08.300(1):

> "(1) A director shall discharge the duties of a director, including duties as member of a committee:
> (a) In good faith;
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> (c) In a manner the director reasonably believes to be in the best interests of the corporation."

In *Senn v. Northwest Underwriters*, 74 Wn. App. 408, 875 P.2d 637 (1994), the court considered a nearly identical statutory standard of care in the Washington insurance code, RCW 48.05.370, and held based on that standard that "directors have an affirmative duty to be aware of the affairs of the companies they serve and that they can be held liable for activities of other officers and directors which they reasonably should know about." The court found as persuasive, and adopted, the reasoning of *Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981), in which the New Jersey Supreme Court held that directors have a duty to acquire sufficient business knowledge to discharge their fiduciary duties and are under a continuing obligation to keep informed about the activities of the corporation that they direct.

Seasoned federal case law applicable to directors of financial institutions emphasizes their liability for failing to actively supervise their institutions, as illustrated by the passage in *F.D.I.C. v. Bierman*, 2 F.3d 1424 (7th Cir. 1993), at 1432-33:

> Directors are charged with keeping abreast of the bank's business and exercising reasonable supervision and control over the activities of the bank. *See, e.g.*, *Martin v. Webb*, 110 U.S. 7, 15, 3 S.Ct. 428, 433, 28 L.Ed. 49 (1884) ("Directors cannot in justice to those who deal with the bank shut their eyes to what is going on around them."); [Citation and footnote omitted.] A failure properly to supervise and attend Board meetings may become the basis for a charge of negligence. *Bowerman v. Hamner*, 250 U.S. 504, 39 S.Ct. 549, 63 L.Ed. 1113 (1919). The fact that an absentee director had no knowledge of the transaction and did not participate in it does not absolve him of liability. *See Hoye v. Meek*, 795 F.2d 893, 895 (10th Cir. 1986) (semi-retired director and chairman who failed to monitor and make necessary inquiries breached his statutory duty of care); *Preston-Thomas Constr., Inc. v. Central Leasing Corp.*, 518 P.2d 1125, 1127 (Okla. Ct. App. 1973) ("[W]here the duty to know exists, ignorance resulting from a neglected official duty creates the same liability as knowledge.").

Consistent with this established body of law that each director must actively participate in the fulfillment of their board's responsibilities, the DFI-DCU Interpretation Letter I-05-01 recognizes that SCU directors cannot participate in board meetings by proxy, but may participate by telephone or electronic means "so long as all directors participating can hear one another." That duty, and concomitant right, of each director to active participate in the decisions of their board has long been recognized in corporate case law, as illustrated by this passage from *Signal Oil and Gas. Co. v. Ashland Oil and Refining Co.*, 49 Cal.2d 764, 782, 322 P.2d 1 (1958):

> "Each member of a corporate body has the right of consultation with the others, and has the right to be heard upon all questions considered, and it is presumed that, if the absent members had been present, they might have dissented, and their arguments might have convinced the majority of the unwisdom of their proposed action, and thus have produced a different result." (*Holcombe v. Trenton White City Co.* (1912), 82 N.J. Eq. 122 [82 A. 618, 624].) "Every director is entitled to an opportunity to be present and participate in the deliberations of the board and to express his opinion with respect to any proposed action." (*Hill Dredging Corp. v. Risley* (1955), 18 N.J. 501 [114 A.2d 697, 714].)

To the extent that the Plaintiff Directors have been excluded from participation in the decisions of Columbia's board by the Defendant Directors their rights flowing from their fiduciary responsibilities, and Columbia's right to lawful corporate governance, certainly have been impaired.

Firmly established corporate common law also recognizes that directors, to fulfill their fiduciary responsibilities, must have unrestricted access to all the records of the corporation they direct. In *State ex rel. Anderson v. Frederickson*, 133 Wn. 28, 233 P. 291 (1925), the court upheld a trial court's order compelling the custodians of a corporation's records to allow the petitioning corporate directors "to examine all the books of account, minute book and stock book and all papers of every kind and nature," saying, at 29:

> "as trustees they must have such right of personal examination in order to perform their duties under § 3812, Rem. Comp. Stat. [P.C. § 4516], which provides that the corporate powers of a corporation shall be exercised by a board of trustees."

In *State ex rel. Paschall v. Scott*, 41 Wn.2d 71, 247 P.2d 543 (1952), the court recognized the general rule it applied in *Anderson*, but held it inapplicable to a director who was "driven by hostile and improper motives."

The New York supreme court recognized the rule of corporate common law that directors must have unlimited record inspection rights, declaring in *Matter of Cohen v. Cocoline Products*, 309 N.Y. 119, 123, 127 N.E.2d 906 (1955), followed by a long string of citations:

> "In order properly to perform his directing duties, a corporate director must, of course, keep himself informed as to the policies, business and affairs of the corporation, and as to the acts of its officers. He owes a stewardship obligation to the corporation and its stockholders, and he may be subjected to liability for improper management during his term of office. Because of these positive duties and potential liabilities, the courts of this State have accorded to corporate directors an absolute, unqualified right, having its roots in the common law, to inspect their corporate books and records."

The corporate law of Delaware is consistent, as illustrated by the following passage from *Henshaw v. American Cement Corporation*, 252 A.2d 125, 128-29 (Del.Ch. 1969):

> "A director of a Delaware corporation has the right to inspect corporate books and records; that right is correlative with his duty to protect and preserve the corporation. He is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he often has a duty to consult them. [Citations omitted.] Hence, he makes out a prima facie case when he shows that he is a director, he has demanded inspection and his demand has been refused."

The perhaps universal recognition of corporate directors', particularly financial institution directors', absolute and unqualified right to inspect corporate books and records was explained in *State ex rel. Moore v. State Bank of Hallsville*, 561 S.W.2d 722 (Mo. App. K.C. 1978) as follows:

> "Directors of a corporation are just what the title implies. They are the directors and managers of the corporation. Further, they act in their capacity as agents and trustees for the corporation and shareholders, and, in the case of a banking corporation, also for the depositors. *Bent v. Priest*, 86 Mo. 475, 483 (1885). Theirs is a fiduciary relationship. Charged with these responsibilities, they must perform them based upon informed judgment. It becomes therefore axiomatic that a director have access to information contained in the corporate books and records. A director, therefore, at common law, has been held to have an absolute and unqualified right to examine such records. *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647, 655[7] (Mo. App. 1956) and cases cited therein. Such rule has received wide acceptance in other jurisdictions. 19 C.J.S. Corporations § 780; 18 Am.Jur., Corporations, Section 183, pp. 712, 713; 5 Fletcher Cyc. Corp., Section 2235, p. 872."

To the extent that the Plaintiff Directors have been denied by Columbia's CEO and the Defendant Directors their right to inspect all books and records of Columbia to fulfill their fiduciary responsibilities to Columbia and its members, both their rights and Columbia's right to lawful corporate governance certainly have been impaired.

RCW 23B.08.240(4) provides, in relevant part:

> "A director who is present at a meeting of the board of directors when action is taken is deemed to have assented to the action taken unless: .... (b) the director's dissent or abstention from the action taken is entered in the minutes of the meeting ...."

Similarly, RCW 23.04.113 provides:

> "A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless the director's dissent or abstention shall be entered in the minutes of the meeting or unless the director shall deliver his or her dissent or abstention to such action to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver such dissent or abstention to the secretary of the corporation immediately after the adjournment of the meeting which dissent or abstention must be in the form of a record. Such right to dissent or abstain shall not apply to a director who voted in favor of such action."

The NCUA Examiners Manual (http://www.ncua.gov/GuidesManuals/examiners_guide/examguide.html) directs federal examiners, who may examine state chartered federally insured credit unions such as Columbia (Examiners Manual at Chapter 26), to closely examine the minutes of board and committee meetings, stating at Chapter 7, Page 7-7:

> "Minutes of board and committee meetings are a primary source of information by which examiners evaluate a board and its actions. The minutes should support conclusions reached by the officials in the meeting. Analysis of the minutes should enable

> the examiner to evaluate how the officials and management interact and perform their job responsibilities. This information can help determine the adequacy of management and the effectiveness of the policies."

Plainly, it is in the Plaintiff Directors best interest in shielding themselves against possibility liability for irresponsible board decisions, and in Columbia's best interest in accurately recording the quality of the discussions and decision-making by its board, that Columbia's minutes of its board and committee meetings accurately record the views expressed by the Plaintiff Directors on the matters considered. They are entitled to a declaratory judgment to require the keeping of such accurate minutes.

4. Does the judicial branch or the executive branch adjudicate rights and responsibilities of corporate directors?

The trial court appeared to believe, based upon the analysis in *Save Columbia*, that it was without power to adjudicate the Plaintiff Directors' declaratory judgment action—that only "DFI has oversight responsibility" as to the corporate law issues raised in the Complaint by the Plaintiff Directors. CP 39. That cannot be the case.

It is well-established that the judicial branch adjudicates questions of law arising from the interpretation and application of statutory and case law. In *Graham v. Northshore School District*, 99 Wn.2d 232, 662 P.2d 38 (1983), our state supreme court rejected assertions by the Public Employment Relations Commission ("PERC") that it had exclusive or primary jurisdiction to adjudicate unfair labor practice issues under the Educational Employment Relations Act, RCW Ch. 49.51, saying:

> "We do not agree with PERC's contention. Superior courts in Washington are courts of general jurisdiction "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court". Const. art. 4, § 6. The Educational Employment Relations Act contains no language directly removing the jurisdiction of the superior courts over cases involving unfair labor practices or involving interpretation of RCW 41.59. The chapter in question merely establishes a system of collective bargaining, grants and defines certain rights of the parties in the collective bargaining agreements, and confers certain regulating and enforcement powers on PERC. In order to enforce its orders, PERC petitions the court. RCW 41.59.150(3). Naturally, PERC must define and interpret the language in RCW 41.59 in order to carry out its functions. Every administrative agency must interpret the law in order to enforce or to follow it. It is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor practices to the conclusion that PERC is the exclusive decider of public labor law questions.
>
> "The declaration of legal rights and interpretation of legal questions is the province of the courts and not of administrative agencies. PERC's arguments amount to no less than a suggestion that the Legislature has by implication carved out an area of law and assigned a traditional judicial function to an administrative body."

Quite recently, this appellate court applied the analysis of *Graham* in finding error in a trial court's dismissal of unfair labor practice claims due to the claimants failing to pursue remedies through executive branch proceedings. *Wright v. Terrell*, ___ Wn. App. ___, (Docket No. 34492-1-II, filed 10-24-2006).

The same analysis and approach applied in *Graham* and in *Wright* should be applied in this case. This is particularly so because DFI has no established procedures to adjudicate such claims. The historical stroll, above, through past credit union legislation reveals the relatively limited powers of DFI and its predecessor agencies.

In 1997, the legislature adopted major revisions to the SCU Act (Chapter 31.12 RCW), specifically intending to "specify the [DFI] director's enforcement authority." RCW 31.12.003. That enforcement authority was specifically limited to removal or prohibition orders against individuals (RCW 31.12.575), cease and desist orders against credit unions (RCW 31.12.585), and interventions in the operations of a credit union (RCW 31.12.637). The power of DFI to remove or prohibit an individual from participating in the affairs of a credit union may be exercised only if the individual has committed a "material violation of law" or an "unsafe or unsound practice" (such phrases defined at RCW 31.12.005 (13) and (24), respectively) that "involves personal dishonesty, recklessness, or incompetence" established in an administrative hearing under Chapter 34.05 RCW. RCW 31.12.575 and –.625.

The power of DFI to order a credit union to cease and desist any practice arises only if the credit union has committed a "material violation of law" or an "unsafe or unsound practice" as determined in an administrative hearing under Chapter 34.05 RCW. RCW 31.12.585 and –.625. DFI may issue a temporary cease and desist order only if a credit union is about to commit or has committed such a violation or practice that is likely to cause an "unsafe and unsound condition" (defined at RCW 31.12.005(23) as insolvency, likely insolvency, or imminent loss of deposit insurance). RCW 31.12.647.

The power of DFI to intervene in the operations of a credit union by placing it under supervisory direction, or appointing a conservator or liquidating agent or receiver, may be exercised only if the credit union is in an "unsafe and unsound condition" or about to become so. RCW 31.12.637.

Consequently, DFI has no authority to adjudicate issues involving the responsibilities and rights of directors of a financially sound credit union, such as Columbia, arising under statutory or common law or their credit union's governing documents (articles of incorporation and bylaws) so long as the alleged wrongdoing credit union officials can present a nonfrivolous arguments to shield them from being deemed reckless or incompetent.

For these reasons, the trial court erred in apparently concluding that it was without power to adjudicate the Plaintiff Directors' declaratory judgment action.

5. Is there an insuperable bar to Plaintiff Directors' request for indemnification of their expenses relating to this action pursuant to Columbia's Articles of Incorporation?

In the Complaint, Plaintiff Directors claimed that they—

> "are entitled to indemnification, from CCCU, for their expenses, including attorney fees, relating to this action, which arise from the fact that they are directors, pursuant to CCCU's Articles of Incorporation."

The trial court dismissed the Complaint under CR 12(b)(6) without even considering the Plaintiff Directors' claim for indemnification. Columbia's Articles of Incorporation was not made a part of the record before the trial court. The issue of indemnification was not even argued to the trial court. The trial court erred in arbitrarily dismissing the Plaintiff Directors' claim for indemnification by Columbia of their expenses relating to the declaratory judgment action.

CONCLUSION

For the reasons discussed above, the Plaintiff Directors ask that this appellate court reverse the trial court's dismissal under CR 12(b)(6) of their claims and prayers for relief stated in their Complaint based on the trial court's finding that it failed to state a claim upon which relief may be granted.

Respectfully submitted this 16th day of January, 2007.

Doug Schafer

Douglas A. Schafer, Attorney for Appellants
WSBA No. 8652

APPENDIX

March 14, 2005

Subject: Use of Proxy by Members of Credit Union Board of Directors
Division of Credit Unions Interpretive Letter I-05-01

Issue

May a credit union director give a proxy to another director to vote for him/her at a board of directors meeting?

Analysis

The use of proxy by directors is not directly addressed in the Washington State Credit Union Act, Chapter 31.12 RCW (Credit Union Act). However, the Credit Union Act does require the board of directors to manage the business and affairs of the credit union. The duties and powers of the board of directors embodied in the Credit Union Act relate to the entire board, not to individual directors. See RCW 31.12.255. This is consistent with the Washington Business Corporation Act, Title 23B RCW (Corporation Act), and general principles of corporate law.

Under general corporate law principles, the authority to manage the affairs of a corporation is vested in the board of directors as a whole, not individually. 2 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 392 (perm. ed. rev. vol. 1990). Unless a corporation's charter or bylaws provide otherwise, there must be a majority of directors present at board meetings to transact business. 2 Fletcher Cyc. Corp. § 419 (perm. ed. rev. vol. 1990).

The Corporation Act also requires a majority of directors be present to form a quorum, unless the bylaws or articles of incorporation require a greater or lesser number of directors for a quorum. However, a quorum may never be less than one-third of the number of directors fixed in a corporation's bylaws or articles of incorporation. Once a quorum is present, the affirmative vote of the majority of the directors present constitutes an act of the board. RCW 23B.08.240.

Generally, corporate law does not allow the directors of a corporation to vote by proxy at directors' meetings. They must be personally present and act themselves. 2 Fletcher Cyc. Corp. § 427 (perm. ed. rev. vol. 1990).

The Corporation Act, however, allows for board members to be present at a board meeting when participating by any means of communication that allows all members "present" to hear one another. RCW 23B.08.200. This is consistent with the Model

Business Corporation Act and statutory law in a majority of states. 2 Fletcher Cyc. Corp. § 397.1 (perm. ed. rev. vol. 1990).

As stated in 1-8 Washington Corporate Law § 8.2:

> "This requirement of complete communication among directors is a key provision and consistent with the proposition that a director may not act by proxy, but must be present to hear and to engage in the give and take of discussion in order to carry out his or her duty of care and fiduciary responsibility."

Moreover, the reason why proxies are permitted for shareholder meetings and not for director meetings has been summed up, as follows:

> "While authority to vote at stockholders' meetings can be validly conferred under all modern statutes, authority to vote at directors' meetings cannot be so conferred and a proxy issued by a director authorizing attendance at a directors' meeting is valueless. The reason for the distinction is apparent. The stockholder, at the stockholders' meeting, represents only himself and there is no reason why he should not delegate to another that right of representation. A director, at a directors' meeting, on the other hand, represents not himself, but all stockholders. He is a fiduciary, with discretionary duties, entrusted to him alone that he may not delegate." 19 Fletcher Cyc. Corp. § 2:100 (perm. ed. 2004 cum. supp.).

Conclusion

A credit union director may not give a proxy to another director to vote for him/her at a board meeting. A quorum of directors, as defined by statute and bylaws or articles of incorporation, must be present for the board to take action. Directors must be present, either physically or by electronic means, so long as all directors participating can hear one another.

April 27, 2005

"A", Chair and
Board of Directors
"B" Credit Union

Corrected letter

Interpretive Letter I-05-05 redacted: Conflict of interest by candidates for board of directors or supervisory committee positions

Dear "A":

Thank you for your phone call. You have sought our guidance on how to handle possible conflicts of interest by candidates for board of directors or supervisory committee at "B" Credit Union, as described below:

- An outstanding payment dispute between "B" Credit Union and a former employee, and
- The involvement of a candidate for the board of directors or supervisory committee with ongoing litigation between "B" Credit Union and "C" Committee.

Your request raises the following issues:

1. Does a candidate's involvement in litigation pending against the credit union or a payment dispute with the credit union create a conflict of interest?
2. Must the "B" Credit Union board of directors disclose these conflicts of interest of the litigation pending against the credit union or a payment dispute with the credit union in materials sent to members for the election of board or supervisory committee members?

3. Does the Division of Credit Unions have the authority to regulate this issue of corporate governance?

Background

The board of directors and supervisory committee of "B" Credit Union have recently changed composition after a 2004 election. This change in board composition occurred following an attempt by the previously constituted "B" Credit Union board of directors to convert "B" Credit Union to a state-chartered savings bank. In 2004, the National Credit Union Administration (NCUA) concluded that "B" Credit Union had not complied with §708a of the NCUA Rules and Regulations, and that "B" Credit Union would have to undertake another membership vote if it intended to continue to pursue conversion.

During the controversy over the charter conversion, a group of members formed a non-profit corporation, the "C" Committee, which brought a lawsuit against "B" Credit Union related to the conversion. In the 2004 election of the board of directors and supervisory committee, several members of "C" Committee won election to office, resulting in slightly less than a majority on the board and a majority on the supervisory committee.

Some of the 2005 candidates for positions on the board and supervisory committee are members of "C" Committee, which is involved in ongoing litigation against "B" Credit Union.

Another candidate for a board position is a former employee of the credit union who is currently involved in a payment dispute with "B" Credit Union.

Issue 1: Does a candidate's involvement in ongoing litigation against "B" Credit Union or a payment dispute with "B" Credit Union constitute a conflict of interest?

Analysis

The law generally presumes that a board member will act in good faith and with prudent business judgment.[1] The common law "prudent business judgment" rule is essentially embodied in the Washington Credit Union Act, as follows:

> Directors, board officers, and senior operating officers are deemed to stand in a fiduciary relationship to the credit union, and must discharge the duties of their respective positions:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner the director or officer reasonably believes to be in the best interests of the credit union.

RCW 31.12.267.

This presumption may be rebutted upon a showing that a director:

- Has not actually deliberated;
- Is uninformed;
- Is otherwise not disinterested or independent; or
- Has acted in a "grossly negligent" manner.[2]

The presumption that a board or supervisory committee member will act in good faith is based in part on the concept that a director will exercise independence of judgment. Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences. The end result must be that each director has used his own informed business judgment to decide the merits of the issues without succumbing to influences that are not in the best interests of the corporation.[3]

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[1] *Fletcher Cyclopedia of the Law of Private Corporations*, § 1036; Aronson v. Lewis 473 A.2d 805, 812 (Del. 1984); FDIC v. Castetter 184 F.3d 1040 (CA 1999).

[2] *Fletcher Cyc. Corp.*, supra; Aronson v. Lewis, supra; FDIC v. Castetter, supra.

[3] *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1147 (Del. 1990).

Where a nominee for the board or supervisory committee is involved in litigation against the credit union or has a payment dispute with the credit union, they clearly have an interest contrary to that of the credit union with regard to those issues. They are not disinterested or independent as to those issues. As a result, there is clearly a conflict of interest between the nominee and the credit union. The nominee's conflict of interest remains as long as the current disputes are pending.

Conclusion

It is presumed that a future board or supervisory committee member will act in good faith and with prudent business judgment; unless it can be shown that the nominee has a conflict of interest, or will not act with disinterest or independence in a particular transaction. A board nominee who is involved in litigation against the credit union or has a payment dispute with the credit union has a conflict of interest.

Issue 2: Is the "B" Credit Union board of directors required to disclose these conflicts of interest of nominees, arising from involvement in the litigation pending against the credit union or a payment dispute with the credit union, in materials connected to the election of board members?

Analysis

In order for a credit union's board of directors to properly exercise its fiduciary duty to all members, the board should ensure disclosure of a candidate's conflicts of interest arising from involvement in litigation pending against the credit union or a payment dispute with the credit union in election materials to the credit union's members.

This principle is underscored by a fundamental rule of corporate law, stated as follows:

> A board's duty of complete candor to its shareholders to disclose all germane or material information applies to matters of corporate governance as well as to corporate transactions.
>
> Directors are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.[4]

[4] _Fletcher Cyc. Corp._ § 837.70.

The election of board and supervisory committee members requires action by the credit union's members, who are comparable to the shareholders of a for-profit corporation. The involvement of a board or supervisory committee nominee in pending litigation or a payment dispute with "B" Credit Union is information that is germane and material to the credit union's present and future corporate governance matters (such as litigation and settlement). Therefore, directors of the credit union are under a fiduciary duty to fully and fairly disclose the existence of such conflicts of interest.

This disclosure should be included in the voting materials disseminated to credit union members prior to the election. The requirement can be met either by the candidate including information about the conflict in his or her candidate statement, or by the credit union including the information in the election packet disseminated to members. If the candidate chooses to include the conflict information, he or she may state, for example, "I belong to an organization called "C" Committee. This organization is in ongoing litigation with "B" Credit Union" or "I am a former employee of "B" Credit Union, and I am in negotiations with the credit union regarding payments to me."

Conclusion

"B" Credit Union's board of directors owes its members a fiduciary duty of complete candor with respect to any germane and material information that may apply to corporate governance when it seeks shareholder action. A board or supervisory committee candidate's conflict of interest regarding pending litigation against "B" Credit Union or a payment dispute with the credit union are issues that are germane and material to questions of current and future corporate governance. Therefore, this information should be disclosed to credit union members in election materials disseminated before the annual meeting at which the board and supervisory committee will be elected. The conflict may be disclosed by the candidate in his or her statement, or by the credit union in the election information disseminated to members.

Issue 3: Does the Division of Credit Unions have the authority to regulate and enforce the principles of corporate governance set forth above?

Analysis

As discussed more thoroughly in Issue 2 above, directors of a credit union have a fiduciary relationship to the credit union and must act in good faith and with prudent business judgment. RCW 31.12.267. The director of the Department of Financial Institutions, as delegated to the Division of Credit Unions, has the authority to require credit unions to conduct business in compliance with the Washington State Credit Union Act (Act). RCW 31.12.516(1). The director also has the authority to interpret the provisions of the Act. RCW 31.12.516(3). Therefore, the Division may require a credit union board of directors to disclose a candidate's conflict of interest to members prior to the election of the board and supervisory committee.

Conclusion

The Division of Credit Unions has the authority to require a credit union to disclose a board or supervisory committee candidate's known conflicts of interest arising from involvement in litigation against the credit union or a payment dispute with the credit union in election materials sent to members prior to the election.

Sincerely,

Linda K. Jekel
Director of Credit Unions

In the Court of Appeals for the State of Washington
Division II

Cathryn Chudy, Emmy Winterburn, and Kathryn Edgecomb, on behalf of Columbia Credit Union, and Cathryn Chudy, Emmy Winterburn, and Kathryn Edgecomb, as individuals, Appellants, vs. **Duane Bequette, Steve Straub, John Cheek, Mark Ail, Robert Byrd, and Parker Cann,** Respondents.	**No. 35519-1-II** **Proof of Mailing of Appellant's Opening Brief.**

Douglas A. Schafer, attorney for Appellants, state that today I mailed by USPS Priority Mail a copy of Appellants' Opening Brief to opposing counsel of record, addressed as follows:

Heather Cavanaugh, Attorney
Miller Nash LLP
3400 US Bancorp Tower
111 SW 5th Ave
Portland, OR 97204

Date: January 16, 2007

Douglas A. Schafer

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