Superior Court of Washington for Clark County

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

vs.

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

No. 04-2-00675-2

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

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

No Material Facts in Dispute

1. Defendants' have not seriously disputed any of the material facts that support Plaintiffs' Application for a Writ of Mandamus. While Defendants have not forthrightly admitted (Answer ¶19) that CCCU's secretary received on January 14, 2004, Petitions bearing

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

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

Mandamus as Appropriate Remedy

3. Defendants, at Answer ¶16, "allege that mandamus is not appropriate in this action;" and Defendants deny (Answer ¶29) Plaintiffs assertion at Application ¶29, that "the issuance of a writ of mandate is appropriate to compel CCU and its officials to immediately give notices of, and to hold, a special meeting."

4. In addition to the mandamus cases against corporate officials cited at ¶16 of the Application, a more recent one is quite instructive. In *Hern v. Looney*, 90 Wn. App. 519, 959 P.2d 1116 (1998) the appellate court criticized both the corporate officers and the trial court for addressing issues beyond simply performance of the ministerial duties of the corporate officials, saying at 526-27:

> Mr. Looney, Jr., and Mr. Klaue appeared in this mandamus action as representatives of the corporation. As such, they had a fiduciary relationship to those who presented conflicting claims to the same share. 12 William Meade Fletcher, *et al*., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5528, at 384 (perm. ed. rev. vol. 1996). They were neither obligated, nor permitted, to look beyond the facial legality of the transfer: "The law, however, does not require or permit the officers of the

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corporation to assume the functions of a court of justice, and by their decision forever conclude the rights of the contending claimants." *Id.* at 385.

....

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

5. A credit union secretary's actions under RCW 31.12.195(3) upon receiving a petition for a special meeting are merely ministerial—"designating the time and place at which the special meeting will be held" and "giv[ing] notice of the meeting within ten days of receipt of the request." Neither the secretary, the board members, or others are directed by RCW 31.12.195 or any other provision to speculate on or to judge what will be the legal effect of the actions taken on the agenda items by the members who attend the special meeting.

6. At page 5 of the Memo, Defendants suggest that the holding of a special meeting based upon the Petition would be ***illegal!*** But the two *Vashon Island* cases there cited for that proposition are inapposite, and only stand for the commonsense proposition that courts need not order persons or bodies to perform ***useless*** actions. No one can responsibly assert that holding a special membership meeting to vote on the removal and replacement of all members of a credit union's board of directors is a useless act, much less an illegal act.

7. Defendants assert (Answer ¶34) that the Petition's agenda item #1—voting to rescind the adoption of the Plan of Conversion—is moot because of NCUA's "disapproval of the methods and procedures applicable to the membership vote." (Application, Ex. C) But such a new membership vote is not a useless, illegal, or moot action, for it affords

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members an opportunity to express their wishes and directions to their board, as expressly permitted by RCW 31.12.255(1)(i)(board shall "perform such other duties as the members may direct."). RCW 31.12.195 only requires that a special meeting be called for one or more specific purposes, so any legal purpose is enough. Recognize that the Defendant board members' reaction the day after receiving the NCUA letter ruling was to publicly announce that they were considering holding a membership revote on the Plan of Conversion. See Exhibit A to Declaration of Doug Schafer filed with this Reply. And four days later, they broadcast another press release announcing they were "considering an option to table" such a revote, but they never have publically abandoned their Plan of Conversion to a bank charter. See Exhibit B to Declaration of Doug Schafer.

Bylaws Cannot Trump State Statutes

8. As previously noted (Application ¶22), RCW 31.12.065(1)(m) requires that a credit union's bylaws not be inconsistent with anything in RCW Chapter 31.12. Nonetheless, Defendants argue that selected words and phrases of its bylaws trump contrary state statutes.

9. For example, while RCW 31.12.195(3) requires a credit union's *secretary* to designate the time and place of a special membership meeting "Upon receipt of a request" for such a meeting, the CCCU bylaws provides that "Upon receiving an *acceptable* request for a special membership meeting, the Board shall designate the time and place" for it. Plainly, these two schemes are inconsistent, and the bylaws must yield to the statute.

10. By statute, RCW 31.12.195(1), special membership meetings may be called by either the board, the supervisory committee, or by 2,000 members.

11. Under RCW 31.12.285, if the board suspends a director or supervisory committee member, then a "membership meeting must be held within thirty days after the suspension. The members attending the meeting shall vote whether to remove a suspended party." The same language appears in RCW 31.12.345, empowering the supervisory committee to suspend directors and other committee members. In adopting those statutes, the Washington legislature apparently concluded that members who attend

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such meetings would be fairly representative of the overall membership, and apparently concluded that their actual meeting attendance—so as to see and hear accusations and defenses—was a important to ensure members cast informed votes on any official's removal.

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

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

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

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

15. Defendants assert (Memo, page 4, line 12) that the special meeting notice period (10 to

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20 days before the meeting) mandated by RCW 31.12.195(3) must be ignored in the case of the Petition's first agenda item—voting to rescind the adoption of the Plan of Conversion—in favor of giving 90-day, 60-day, and 30-day notices, but Defendants offer no legal authority to support any claim of federal preemption or other basis for such assertion.

Credit Union Officials Have Fiduciary Duties

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

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

18. As DFI noted at page 4 of its DCU Opinion Letter 04-01, the implementation of the Plan of Conversion of CCU to a Washington savings bank would "fundamentally abrogate [members'] equity ownership in the credit union." That is because, under Washington state law (RCW Title 32, excluding Ch. 32.32 and Ch. 32.35), depositors of a mutual savings bank not only have ***no voting rights*** whatsoever, but they have ***no legal right to share in the institution's net assets*** upon a voluntary liquidation. RCW 32.24.010. The

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complete absence of any equity ownership by state savings bank depositors has been recognized for years as a source of some fundamentally abusive practices that recur when such banks convert to stock ownership, for the un-owned equity most frequently produces a great financial windfall to savvy investors and bank insiders. See the May 31, 1994 FDIC "White Paper" on Certain Fundamentals of the Conversion Process. 59 Federal Register 30357 (June 13, 1994), appended as Exhibit C to the Declaration of Doug Schafer.

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

20. As a result of widely recognized insider abuses and flagrant breaches of fiduciary duty that were unchecked by state legislatures and state regulatory agencies, the FDIC in late1994 adopted rules that condition its approval of deposit insurance for state savings banks converting from mutual to stock ownership upon an approving vote by at least a majority of the bank's depositors. 12 CFR 333.4, 59 Fed. Reg. 61233 (Nov. 30, 1994). But unfortunately, the FDIC now routinely waives or relaxes its majority-vote condition when approving converting savings banks (*e.g.*, accepting wealth-weighted voting by depositors—one vote per $100 on deposit, up to $100,000).

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

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

Relevance of WA Dept. of Financial Institutions' Positions

23. Defendants assert (Answer ¶23) that DFI has retreated from its position reflected in DCU

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Opinion Letter 04-01, and asserts that CCCU's Settlement Agreement with DFI (Answer, Ex. 3) over the latter's threats of administrative enforcement somehow bars Plaintiffs from obtaining a writ of mandamus in this proceeding. Plaintiffs shared those pleadings, received late yesterday, with officials of DFI who were not pleased with them. Plaintiffs are submitting as Exhibit E to the Declaration of Doug Schafer an Affidavit of Linda K. Jekel, Director, Division of Credit Unions, Department of Financial Institutions, State of Washington, that present's that agency's response to those pleadings.

24. Plaintiff's understanding is that DFI specifically intended to ***not impair*** the rights of Plaintiffs to seek civil remedies for the clear violations of law by Defendants, and that DFI exercised its prosecutorial discretion reflected in the Settlement Agreement because it lacked statutory power to take speedy enforcement action unless the safety and soundness of CCCU were threatened by its noncompliance with applicable law. RCW 31.12.575 to –.625 and RCW 31.12.005(23) (defining "unsafe and unsound condition").

February 24, 2004

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