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Superior Court of Washington for Clark County

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

vs.

Columbia Community Credit Union, Karen Martel, Edwin C. Bell, Dale Magers, William F. Byrd III, Robert M. Byrd, Dennis McLachlan, Mark L. Ail, Connie Jones, and Bruce Davidson, Defendants.

No. 04-2-01341-4

Motion for Temporary Restraining Order and Memorandum in Support Thereof

I. Relief Requested and Introduction

Plaintiff Save Columbia CU Committee (“**Save CCU Committee**”) and the other above-named plaintiffs on March 16, 2004, filed a Complaint for Declaratory Judgment and for Injunction (“**Complaint**”) seeking the adjudication of several important issues concerning the internal affairs and membership governance of Columbia Community Credit Union (“**CCCU**”). Several of the issues, while important, require no immediate judicial intervention. But given that the orders of Clark County Superior Court Judge Roger A. Bennett (see Complaint ¶ 16) require CCCU to hold a vote on the removal from office of eight of its nine directors by ballots mailed-in before, or cast in-person at, a special membership meeting of CCCU’s members that has been scheduled for Sunday, March 28, 2004, the immediate intervention of the Court is necessary to restrain the above named Defendants from continuing to breach their fiduciary duties by campaigning with CCCU funds and resources so as to ensure they survive that recall vote.

By this motion, Plaintiffs seek a temporary restraining order (“TRO”) that enjoins the

1 Defendants from employing the funds, property, records, and employees that they control as
2 elected directors of CCCU to campaign against their removal by vote of the CCCU members or
3 using that control to prevent Save CCU Committee and its members from communicating with
4 other CCCU members concerning the director-removal vote.

5 **II. Statement of Facts**

6 As directed by orders of this Court entered March 2 and 8, 2004, Defendants set, and
7 notified CCCU's members of, a special membership meeting on Sunday, March 28, 2004, for the
8 purpose of, as stated in a petition signed by 3,593 members, holding a vote on whether to remove
9 eight of CCCU's nine current directors. In the mandamus action that led to those orders, *the*
10 *Court did not address the fiduciary responsibilities of any of the Defendants*, but merely directed
11 them to comply with provisions of RCW Chapter 31.12 and CCCU's bylaws concerning the
12 holding of a special meeting, which governing provisions the Court interpreted as requiring that
13 CCCU's members be permitted to vote by mail.

14 On or about March 16, 2004, CCCU members received from Defendants through the
15 mail a packet that included a notice of the special meeting and a vote-by-mail ballot, with
16 instructions. The packet included no information whatsoever to inform members why they were
17 being asked to vote on the retention or the removal of the CCCU board of directors members.

18 Beginning in January and continuing to this date, Defendants have been expending
19 CCCU funds in a costly and aggressive campaign to persuade CCCU members to vote to retain,
20 rather than vote to remove, the directors. That campaign has included many, many large or full-
21 page display advertisements in *The Columbian* newspaper, radio broadcast advertisements,
22 multiple direct mailings to CCCU members of campaign literature, direct electronic-mailing to
23 CCCU members of campaign literature, a telephone solicitation campaign to CCCU members by
24 representatives of Mellon Investor Services, campaign materials posted on CCCU's Internet
25 website, and temporary signs and banners.

26 **III. Statement of the Issue**

27 The issue is whether the Court should enter a Temporary Restraining Order to restrain
Defendants from breaching their fiduciary duties by using CCCU funds and resources to
campaign for its members to vote for the retention, rather than the removal, of its directors in the

1 impending special membership meeting.

2 3 **IV. Evidence Relied Upon**

4 This motion is based upon the Declaration of Doug Schafer and the exhibits to it, filed
5 concurrently with this motion.

6 **V. Legal Authority**

7 **1. Corporate Law Governs.** CCCU is a state chartered credit union, an entity defined
8 in RCW 31.12.015 as “a cooperative society organized under this chapter as a nonprofit
9 corporation for the purposes of promoting thrift among its members and creating a source of
10 credit for them at fair and reasonable rates of interest.” The Washington Credit Union Act,
11 RCW Chapter 31.12, requires the standard corporate structure, including a board of directors
12 elected by members of the entity. Under Washington law, other cooperative organizations also
13 are recognized as corporations. For cooperative associations, RCW 23.86.360 provides, “The
14 provisions of Title 23B RCW shall apply to the associations subject to this chapter, except where
15 such provisions are in conflict ...” For employee cooperative corporations, RCW 23.78.050
16 provides, “Members of an employee cooperative shall have all the rights and responsibilities of
17 stockholders of a corporation organized under Title 23B RCW, except as otherwise provided in
18 this chapter.”

19 **2. Corporate Directors are Fiduciaries.** RCW 31.12.267 expressly provides that credit
20 union directors and senior operating officers are fiduciaries in relation to the credit union.
21 Washington case law established long ago that corporate directors and officers stand in a
22 fiduciary relationship to their corporation and its shareholders. *E.g., Tefft v. Schaefer*, 148 Wn.
23 602, 269 P. 1048 (1928); *Hudson v. Alaska Airlines*, 43 Wn.2d 71, 260 P.2d 321 (1953); *State ex*
24 *rel. Hayes v. Keypoint Oyster*, 64 Wn.2d 375, 391 P.2d 979 (1964).

25 **3. Corporate Directors Have Duty to Disclose to their Principals.** Corporate
26 directors are recognized as agents of those shareholders or credit union members who elect them
27 to oversee their organization. Their duty to faithfully inform their principals, the shareholders or
members, of all material information relevant to decisions presented them was expressed
recently by the Delaware Supreme Court in *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del.Supr.
1996) as follows:

1 It is well-established that the duty of disclosure “represents nothing more than the
2 well-recognized proposition that directors of Delaware corporations are under a
3 fiduciary duty to disclose fully and fairly all material information within the
4 board’s control when it seeks shareholder action.” *Stroud v. Grace*, Del.Supr.,
5 606 A.2d 75, 84 (1992). This duty inheres any time a corporate board of directors
6 seeks stockholder action. *Id.*; *see also, Blasius Indus. v. Atlas Corp.*, Del. Ch. ,
564 A.2d 651, 659 n. 2 (1988) (citing *Smith v. Van Gorkom*, Del.Supr., 488 A.2d
858 (1985); *In re Anderson Clayton Shareholders’ Litig.*, Del. Ch. , 519 A.2d
669, 675 (1986)).

7 In *Turner v. Bernstein*, 776 A.2d 530 (Del.Ch. 2000), the trial court elaborated upon directors’
8 disclosure duties, and upon their liability for failing in that duty, saying:

9 Vice Chancellor Jacobs succinctly stated the pertinent principles of law relevant
10 to whether the defendant directors breached their fiduciary duties by providing
11 the GenDerm stockholders with deficient disclosures. Drawing on a large number
12 of decisions, he noted:

13 The fiduciary duty of disclosure flows from the broader fiduciary
14 duties of care and loyalty. That disclosure duty is triggered (inter
15 alia) where directors (as GenDerm’s former directors did here)
16 present to stockholders for their consideration a transaction that
17 requires them to cast a vote and/or make an investment decision,
18 such as whether or not to accept a merger or demand appraisal.
19 Stockholders confronted with that choice are entitled to disclosure
20 of the available material facts needed to make such an informed
21 decision. Specifically in the merger context, the directors of a
22 constituent corporation whose shareholders are to vote on a
23 proposed merger, have a fiduciary duty to disclose to the
24 shareholders the available material facts that would enable them to
25 make an informed decision, pre-merger, whether to accept the
26 merger consideration or demand appraisal.[footnote omitted]

27 In *Skeen v. Jo-Ann Stores, Inc.*, [Del. Supr., 750 A.2d 1170 (2000)] the Supreme
Court recently confirmed Vice Chancellor Jacobs’s view of the applicable
standard, stating:

In this appeal, we consider the adequacy of corporate disclosures
to minority stockholders who were “cashed out” in a merger
approved by the majority stockholder. The minority stockholders
complain that they were not given enough financial information to
decide whether to accept the merger consideration or seek
appraisal. They say, in essence, that the settled law governing
disclosure requirements for mergers does not apply, and that far
more valuation data must be disclosed where, as here, the merger
decision has been made and the only decision for the minority is
whether to seek appraisal. We hold that there is no different
standard for appraisal decisions. Directors must disclose all
material facts within their control that a reasonable stockholder

1 would consider important in deciding how to respond to the
2 pending transaction.[footnote omitted]

3 Without belaboring the obvious, the defendant directors did not discharge
4 their obligation to provide the GenDerm stockholders with “the available material
5 facts that would enable them to make an informed decision . . . whether to accept
6 the merger consideration or demand appraisal.”[footnote omitted] The record is
7 clear that the defendant directors defaulted on this obligation and did not even
8 attempt to put together a disclosure containing any cogent recitation of the
9 material facts pertinent to the stockholders’ choice. Furthermore, GenDerm did
10 not have a certificate of incorporation that included an exculpatory provision
11 immunizing the defendant directors from liability for the breach of the duty of
12 care.

13 Given the absence of evidence that the defendant directors made any
14 attempt to comply with their disclosure obligations, it is clear that a due care
15 violation has been demonstrated even under the exacting gross negligence
16 standard. Because such a violation will suffice to establish liability for monetary
17 liability, there is no need for the plaintiffs to produce evidence that the failure of
18 disclosure was purposeful or otherwise indicative of disloyalty.

19 **4. Corporate Directors’ Duty of Loyalty Requires Supporting Corporate**

20 **Democracy.** Many judicial decisions have recognized that corporate directors have a duty not to
21 use the power of their positions to interfere with the governance rights of their corporate
22 principals – the shareholders or members – to have fair elections and votes. That duty recently
23 was discussed by the Delaware Supreme Court in *MM Companies v. Liquid Audio*, 813 A.2d
24 1118 (Del. 2003), that concluded at 1132:

25 The record reflects that the primary purpose of the Director Defendants’
26 action was to interfere with and impede the effective exercise of the stockholder
27 franchise in a contested election for directors. The Court of Chancery concluded
that the Director Defendants amended the bylaws to provide for a board of seven
and appointed two additional members of the Board for the primary purpose of
diminishing the influence of MM’s two nominees on a five-member Board by
eliminating either the possibility of a deadlock on the board or of MM controlling
the Board, if one or two Director Defendants resigned from the Board. That
defensive action by the Director Defendants compromised the essential role of
corporate democracy in maintaining the proper allocation of power between the
shareholders and the Board, because that action was taken in the context of a
contested election for successor directors. Since the Director Defendants did not
demonstrate a compelling justification for that defensive action, the bylaw
amendment that expanded the size of the Liquid Audio board, and permitted the
appointment of two new members on the eve of a contested election, should have
been invalidated by the Court of Chancery.

One of the most venerable precepts of Delaware’s common law corporate
jurisprudence is the principle that “inequitable action does not become

1 permissible simply because it is legally possible.”[footnote to *Schnell v.*
2 *Chris-Craft, Indus., Inc.*, 285 A.2d 437, 439 (Del.1971)] At issue in this case is
3 not the validity generally of either a bylaw that permits a board of directors to
4 expand the size of its membership or a board’s power to appoint successor
5 members to fill board vacancies. In this case, however, the incumbent Board
6 timed its utilization of these otherwise valid powers to expand the size and
7 composition of the Liquid Audio board for the primary purpose of impeding and
8 interfering with the efforts of the stockholders’ power to effectively exercise their
9 voting rights in a contested election for directors. As this Court held more than
10 three decades ago, “these are inequitable purposes, contrary to established
11 principles of corporate democracy . . . and may not be permitted to stand.”[*Id.*]

12 In *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del.Ch. 1988), the Court
13 observed the inapplicability of the business judgment rule to conduct that impedes shareholder
14 governance rights, saying at 660:

15 [A] decision by the board to act for the primary purpose of preventing the
16 effectiveness of a shareholder vote inevitably involves the question who, as
17 between the principal and the agent, has authority with respect to a matter of
18 internal corporate governance. That, of course, is true in a very specific way in
19 this case which deals with the question who should constitute the board of
20 directors of the corporation, but it will be true in every instance in which an
21 incumbent board seeks to thwart a shareholder majority. A board’s decision to act
22 to prevent the shareholders from creating a majority of new board positions and
23 filling them does not involve the exercise of the corporation’s power over its
24 property, or with respect to its rights or obligations; rather, it involves allocation,
25 between shareholders as a class and the board, of effective power with respect to
26 governance of the corporation. This need not be the case with respect to other
27 forms of corporate action that may have an entrenchment effect — such as the
stock buybacks present in *Unocal*, *Cheff* or *Kors v. Carey*. Action designed
principally to interfere with the effectiveness of a vote inevitably involves a
conflict between the board and a shareholder majority. Judicial review of such
action involves a determination of the legal and equitable obligations of an agent
towards his principal. This is not, in my opinion, a question that a court may leave
to the agent finally to decide so long as he does so honestly and competently; that
is, it may not be left to the agent’s business judgment.

28 In *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115 (Del. Ch. 1990), the Court observed that it is the
29 duty of the courts to nullify or remedy inequitable conduct by corporate directors, saying:

30 It is an elementary proposition of corporation law that, where they exist,
31 fiduciary duties constitute a network of responsibilities that overlay the exercise
32 of even undoubted legal power. Thus it is well established, for example, that
33 where corporate directors exercise their legal powers for an inequitable purpose
34 their action may be rescinded or nullified by a court at the instance of an
35 aggrieved shareholder. The leading Delaware case of *Schnell v. Chris-Craft*

1 *Industries, Inc.*, Del.Supr., 285 A.2d 437 (1971) announced this principle and
2 applied it in a setting in which directors advanced the date of an annual meeting
in order to impede an announced proxy contest.

3 Under this test the court asks the question whether the directors' purpose
4 is "inequitable." An inequitable purpose is not necessarily synonymous with a
dishonest motive. Fiduciaries who are subjectively operating selflessly might be
5 pursuing a purpose that a court will rule is inequitable. Thus, for example, there
was no inquiry concerning the board's subjective good faith in *Condec*
6 *Corporation v. Lunkenheimer Company*, Del. Ch. , 230 A.2d 769 (1967) where
7 this court held that the issuance of stock for the principal purpose of eliminating
the ability of a large stockholder to determine the outcome of a vote was invalid
as a breach of loyalty. . . .

8 Each of these cases dealt with board action with a principal purpose of
9 impeding the exercise of stockholder power through the vote. They could be read
as approximating a per se rule that board action taken for the principal purpose of
10 impeding the effective exercise of the stockholder franchise is inequitable and
will be restrained or set aside in proper circumstances.

11 **4. Courts Do Enforce Corporate Democracy Principles.**

12 In recognition of the principles noted above, courts do have a role to perform in ensuring
13 that corporate governance rights are not defeated by entrenched or renegade boards. Recently,
14 the Alaska Supreme Court became involved in policing a board-removal vote by the members of
a rural electrical cooperative. That Court discussed its initial enforcement actions (apparently
15 unpublished) in its later published opinion in *Matanuska Elec. Assoc. v. Rewire the Board*, 36
16 P.3d 685 (Alaska 2001), saying at 700:

17 Our remand order of April 28, 1999, established ground rules governing
18 the period between MEA's annual meeting and the conclusion of mail balloting
for the recall election. The order included language that barred MEA from
19 attempting to influence the vote:

20 In order to maintain a fair election process, MEA, including its
board, management, and other persons, shall be prohibited, from
21 the date of the meeting until the votes have been counted, from
using or expending MEA funds, facilities, staff time, or other
22 resources to advertise, campaign, or otherwise attempt to
influence, directly or indirectly, the votes of the members in the
23 recall election. Individual board members are not prohibited from
acting to defend themselves against the recall but may not use
24 MEA funds, facilities, staff, or other resources in so doing. This
order does not impose any campaign prohibitions against any other
25 individuals or groups, including Rewire.

26 On April 29, 1999, the Anchorage Daily News printed an MEA
advertisement that violated this order. But after a hearing on the issue, we
27 concluded that the violation was not wilful and declined to hold MEA in

1 contempt.

2
3 A Pennsylvania trial court judge entered a similar order in *Lewis v. Philadelphia City*
4 *Employees' Federal Credit Union*, 46 Pa. D. & C.2d 751; 1969 Pa. D.& C. LEXIS 144, that
5 read:

6 (b) plaintiffs' request for a preliminary injunction restraining the defendants from
7 utilizing credit union funds, credit union posters and the credit union news letter
8 to promote and advance the interests of any one particular candidate or group of
9 candidates and from refusing to provide in the credit union news letter equal
10 space and pictures pertaining to all candidates who are running for office is
11 granted.

12 And in *Fitzgerald v. National Rifle Association of America*, 383 F. Supp. 162 (N.J., 1974),
13 the Court also acted to protect corporate democracy by ensuring the nonprofit organization's
14 primary member communications vehicle, a magazine, was accessible equally to all board
15 candidates. The Court stated at 165:

16 Like all corporate directors and officers, the management of the NRA owes a
17 fiduciary duty to its stockholders (in this case the association's membership) to
18 conduct the NRA's affairs in a good faith effort to promote the best interests of
19 the association. In the case of the NRA, this common law duty is augmented by
20 Section 717(a) of the N.P.C.L., which provides in part:

21 Directors and officers shall discharge the duties of their respective
22 positions in good faith

23 Because of the special relationship between the NRA and The American
24 Rifleman, it is this Court's view that the fiduciary obligations of the association's
25 directors and officers applies with equal vigor to the operation of *The American*
26 *Rifleman*.

27 As part of their overall fiduciary relationship with the stockholders, it is
well established that the directors and officers cannot manipulate the affairs of the
corporation primarily with the intent of securing control of the corporation to one
faction of stockholders or of excluding another. See 3W. Fletcher Cyc. Corp. §
850, at 206 (perm. ed. rev. 1965). Justice Douglas speaking for the Court in
Pepper v. Litton, 308 U.S. 295, 311, 60 S. Ct. 238, 247, 84 L. Ed. 281 (1939),
firmly restated this principle in the following language:

He who is in such a fiduciary position cannot serve himself first and his cestuis
second. He cannot manipulate the affairs of his corporation to their detriment and
in disregard of the standard of common decency and honesty . . . He cannot use
his power for his own personal advantage and to the detriment of the stockholders
and creditors no matter how absolute in terms that power may be and no matter
how meticulous he is to satisfy technical requirements. For that power is at all
times subject to the equitable limitations that it may not be exercised for the
aggrandizement, preference, or advantage of the fiduciary to the exclusion or

1 detriment of the cestuis.

2 The principles enunciated above make it clear that officers and directors
3 cannot utilize corporate instrumentalities such as *The American Rifleman* to
4 perpetuate themselves in office. If the concepts of fiduciary duty and corporate
5 democracy are to exist as something more than pious frauds, dissident
6 stockholders must have the opportunity to alert fellow stockholders to alternative
7 policies and programs. Corporate elections become hollow mockeries if
8 candidates are unable to bring their candidacies and platforms to the attention of
9 the stockholders at large.

10 **5. Washington Courts *Do* Have Inherent Equitable Powers to Police Corporations.**

11 The Washington Supreme Court and Courts of Appeals recognize that trial courts have
12 inherent equitable power to maintain proper the proper functioning of corporations. In *Scott v.*
13 *Trans-System, Inc.*, 148 Wn.2d 701, 64 P.3d 1 (2003), the Court recognized, at 716, in an
14 internal dissension case that “Dissolution suits under Washington's dissolution statute are
15 fundamentally equitable in nature,” so the trial court ought to have considered one of about a
16 half-dozen nonstatutory remedies as alternatives to a statutory dissolution of the subject
17 corporation. And in *DCHS. v. N.W. Defenders*, 118 Wn. App. 117, 75 P.3d 583 (2003), the
18 appellate court upheld the trial judge’s appointment, over objections, of an operating receiver for
19 an ill-managed nonprofit corporation, saying at 127 that “court acting in equity must act with
20 restraint, but in extreme cases must have wide latitude to respond to the particular circumstances
21 presented.”

22 **VI. Imminent Harm**

23 If the Defendants are not restrained, it appears that they will continue each day until the
24 special membership meeting to engage in the illegal and inequitable conduct described above,
25 which will further taint the legitimacy of the special membership meeting vote. It is hoped that
26 the widespread communication of an order restraining the Defendants’ campaigning with CCU
27 funds and resources will somewhat ameliorate the harm that has been caused by that conduct.

Under the circumstances of this request, Plaintiffs ask that the Court exercise its inherent
power to waive any bond, or in the alternative, to fix a bond or cash deposit at a nominal amount.

VII. Conclusion.

The Defendants are violating their fiduciary responsibilities and fundamental corporate

