

1 In the alternative, Plaintiffs request that the court deny Defendants motion to dismiss for
2 failure to state a claim. Plaintiffs have standing, both individually and derivatively, to bring a
3 declaratory judgment claim against Defendant Directors and the CEO of CCCU because the claim
4 presents a justiciable controversy under the Uniform Declaratory Judgments Act. Additionally,
5 Plaintiffs properly pleaded a derivative action, and were not required to allege that Defendants'
6 conduct was wrongful or that Defendants breached a duty owed to Plaintiffs.

7 **II. BACKGROUND**

8 This case involves a declaratory judgment claim. Plaintiffs are bringing this claim as
9 directors of the CCCU Board of Directors (Board), both individually and on behalf of CCCU.
10 Plaintiffs are seeking a declaration that Plaintiff Directors have a right to examine all corporate
11 records, attend all Board and committee meetings, and register in the meeting minutes their
12 objections. Plaintiffs are also seeking a declaration that corporate minutes of meetings of the Board
13 and its committees must reasonably reflect the views of all directors expressed at the meetings.

14 **III. STANDARD OF REVIEW**

15 Courts should dismiss an action under court rule only when it appears beyond a reasonable
16 doubt that no facts justifying recovery exist. Kinney v. Cook, 130 Wash. App. 436, 440,123 P.3d
17 508 (2005) (citations omitted). A complaint survives a CR 12(b)(6) motion if any set of facts could
18 exist that would justify recovery. Id. A court may use hypothetical facts not part of the record in
19 arriving at its determination. Id. CR 12(b)(6) motions should be granted “sparingly and with care”
20 and “only in the unusual case in which [a] plaintiff includes allegations that show on the face of the
21 complaint that there is some insuperable bar to relief.” Id. at 440-41. Courts presume the truth of
22 allegations in the complaint for the purpose of the motion. Id. at 441.

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1 **IV. ANALYSIS**

2 A. **PRELIMINARY MATTER**

3 This motion is not properly before the court because the hearing was not scheduled in
4 accordance with the applicable court rules. Defendants were required to serve Plaintiffs with the
5 motion at least 5 full business days prior to the date set for hearing this motion. The clear purpose
6 of this rule is to provide the opposing party with an adequate opportunity to respond to the motion.

7 Civil Rule 6(d) provides, *in relevant part*:

8 A written motion * * * and notice of the hearing thereof ***shall*** be
9 served not later than 5 days before the time specified for the hearing
10 unless a different period is fixed by these rules or by order of the
11 court.[emphasis added].

12 Civil Rule 6(a) clarifies that weekend days are not included in the computation of a 5-day notice
13 requirement, stating:

14 When the period of time prescribed or allowed is less than 7 days,
15 intermediate Saturdays, Sundays and legal holidays shall be excluded
16 in the computation.

17 Here, Defendants served Plaintiffs with the Motion to Dismiss on Friday, August 25, 2006,
18 at approximately 4:15pm, noting a hearing for the following Friday, September 1, 2006, at 9:00 a.m.
19 Affidavit of Peggy Hennessy. ¶12. Because Saturday and Sunday are excluded under CR 6(d),
20 service for a 9:00am hearing on September 1, 2006, would have to have been completed at or before
21 9:00am on August 25, 2006.

22 ***The 5-day provision of CR 6(d) requires five full 24-hour days.*** See *Canterwood Place L.P.*
23 *v. Thande*, 106 Wn. App. 844, 25 P.3d 495 (2001) (eviction summons found invalid because the 6-
24 day response deadline was less than six ***full*** days when calculated in terms of hours.); *see also*,
25 *Troxell v. Rainier Public School District No. 307*, 154 Wash. 2d 345, 111 P.3d 1173 (2005) (60-day
26 waiting period on a tort claim requires sixty ***full*** days). Cf *Pederson v. Moser*, 99 Wn.2d 456, 462,
662 P.2d 866 (1983) (noting that fractional days are not part of the normal method of computing
time, but finding that a 20-day recall waiting period was satisfied notwithstanding that 20 full days
had not elapsed).

1 The issue in *Pederson* was whether a statutory 20-day waiting period between a recall
2 demand and the preparation of a ballot synopsis had been met where fewer than 20 full days had
3 passed. The *Troxell* decision clarifies and distinguishes the holding in *Pederson*, explaining that,

- 4 1. The court simply cited CR 6 (a), and there was no discussion of the rule’s
5 applicability to the statutory waiting period, but the Court purported to
6 rely on it;
- 7 2. The court’s holding that fractions of days were properly ignored in the
8 present case is at best confusing, since the court necessarily counted as an
9 entire day either the fractional day on which the recall demand was served
10 or the fractional day on which the ballot synopsis was formulated; and
- 11 3. Rather than requiring strict compliance with the waiting period, the
12 *Pederson* court applied a substantial compliance standard, observing that,
13 “[e]ven if the 20-day waiting period established by RCW 29.82.015 was
14 not complied with,” *Pederson*’s failure to show that the “technical
15 noncompliance” had harmed him precluded issuance of an injunction or
16 stay. 99 Wash.2d at 463, 662 P.2d 866 (emphasis added).

17 The *Troxell* Court concluded that “the *Pederson* court’s analysis of the waiting period prescribed in
18 former RCW 29.82.015 furnishes no clear precedent for our interpretation of RCW 4.96.020(4).”
19 Strict construction of the time periods was necessary to comply with the legislative intent of the
20 mandatory waiting period.

21 Similarly, in this case, strict construction of the 5-day period is necessary to meet the
22 legislative intent of the service requirement. The purpose of the mandatory service requirement is
23 to provide sufficient notice to allow opposing parties to prepare adequate responses to the motion.
24 If the CR 6 time calculations do not require full 24-hour days, the opposing affidavits or responses
25 could be served at 4:59pm on a Thursday for a 9:00am hearing on Friday. (CR 6 (d) provides that
26 opposing affidavits may be served not later than 1 day before the hearing . . .). This would appear
contrary to the legislative intent to provide a minimum time period for review prior to a motion
hearing.

Based upon the foregoing, Plaintiffs respectfully request that the court defer consideration
of Defendants’ motion pending full compliance with the service requirements of Civil Rule 6.

1 B. STANDING

2 Plaintiffs have standing, both individually and derivatively, to bring a declaratory judgment
3 claim against Defendant Directors and the CEO of CCCU because the claim presents a justiciable
4 controversy. Additionally, Plaintiffs properly pleaded this declaratory judgment action, and were
5 not required to allege that Defendants' conduct was wrongful, or that Defendants breached a duty
6 owed by the Defendants. For these reasons, the court should deny Plaintiffs' motion to dismiss for
7 failure to state a claim.

8 1. Plaintiffs have standing because this case presents a justiciable controversy.

9 Plaintiffs filed a declaratory judgment action under the Declaratory Judgment Act (DJA) set
10 forth in RCW Chapter 7.24. The DJA provides, in relevant part:

11 RCW 7.24.10.

12 **Authority of courts to render.**

13 Courts of record within their respective jurisdictions *shall have power to*
14 *declare rights, status and other legal relations whether or not further*
15 *relief is or could be claimed. An action or proceeding shall not be open*
16 *to objection on the ground that a declaratory judgment or decree is prayed*
17 *for. The declaration may be either affirmative or negative in form and*
18 *effect; and such declarations shall have the force and effect of a final*
19 *judgment or decree.*

20 RCW 7.24.050

21 **General powers not restricted by express enumeration.**

22 The enumeration in RCW 7.24.020 and 7.24.030 *does not limit or restrict*
23 *the exercise of the general powers conferred in RCW 7.24.010, in any*
24 *proceeding where declaratory relief is sought, in which a judgment or*
25 *decree will terminate the controversy or remove an uncertainty.*

26 [Emphasis added.] The DJA is liberally interpreted in order to facilitate its socially desirable
objective of providing remedies not previously countenanced by law. This principle has long been
tempered by the requirement that a "justiciable controversy" exist before a court may substantively
rule in such an action. Grandmaster Sheng-Yen Lu v. King County, 110 Wash. App. 92, 98, 38 P.3d
1040 (2002).

1 Inherent in justiciability requirements are the traditional limiting doctrines of *standing*,
2 mootness, and ripeness. Kightlinger v. Public Utility Dist. No. 1 of Clark County, 119 Wash. App.
3 501, 505-506, 81 P.3d 876 (2002), review granted 152 Wash.2d 1001, 101 P.3d 865. To present a
4 justiciable controversy, a plaintiff must establish: (1) an actual, present and existing dispute, or the
5 mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot
6 disagreement, (2) between parties having genuine and opposing interests, (3) which involves
7 interests that must be direct and substantial, rather than potential, theoretical, abstract or academic,
8 and (4) a judicial determination of which will be final and conclusive. Coppernoll v. Reed, 155
9 Wash. 2d 290, 300, 119 P.3d 318 (2005).

10 Here, Plaintiffs, both in their individual capacity, and on behalf of CCCU, have an actual
11 dispute with the Defendant Directors and Defendant CEO due to Defendants' actions of denying
12 Plaintiffs access to records, excluding Plaintiffs from meetings, and prohibiting Plaintiffs from
13 registering their objections to Board meeting minutes. Complaint, ¶10. Given Defendants' actions,
14 the parties have genuine and opposing interests, and these interests are direct and substantial.
15 Plaintiffs are requesting a judicial determination regarding whether they are entitled to access
16 records, attend Board and committee meetings, and register their objections in the meetings minutes.
17 This determination will be final and conclusive. Thus, a justiciable controversy exists, and Plaintiffs
18 have standing assert a declaratory judgment claim.

19 Defendants allege that Plaintiff Directors, in their individual capacities, lack standing to
20 assert a direct action against Defendants under Save Columbia CU Committee v. Columbia
21 Community Credit Union (SaveCCU), - P.3d - -, 2006 WL 2053479 (2006). However, SaveCCU
22 is clearly distinguishable from this case. SaveCCU involved a suit by *members* of CCCU against
23 individual directors and CCCU. The individual members brought a breach of fiduciary obligation
24 claim against the defendants. The court analyzed State ex rel. Wicks v. Puget Sound Sav. & Loan
25 Ass'n, 8 Wn.2d 599, 113 P.2d 70 (1941), to determine whether individual members lack standing
26 to bring a fiduciary duty claim.

1 Wicks involved a mandamus action brought by members of a savings and loan corporation
2 against the corporation and its directors and officers to compel the corporation to produce its records.
3 The Wicks court held that the members could not access the records of the corporation because “the
4 Legislature placed upon certain state officers the responsibility of protecting members in dealing
5 with such an association.” Wicks, 8 Wn. 2d at 603. The SaveCCU court, in applying Wicks, found
6 the regulatory oversight of savings and loan corporations comparable to the regulatory oversight of
7 Department of Financial Institutions (DFI) because the “legislature contemplated that the DFI
8 director would protect members’ interests.” 2006 WL 2053479, *8. The court concluded that the
9 “provision in the [Washington Business Corporation Act] allowing individual shareholders to bring
10 an action against a corporation’s directors, whereas the [Washington State Credit Union Act]
11 contains no such provision, evidences a legislative intent that credit union members have no such
12 right.” Id. at *9. Thus, the court held that members of CCCU lack standing to bring a fiduciary duty
13 claim against directors of a credit union. Id.

14 Here, Plaintiffs are bringing a claim against individual directors. It is not a breach of
15 fiduciary duty claim brought by *members* against directors, as in SaveCCU, but a declaratory
16 judgment claim brought by individual *directors*. Plaintiffs, as individual directors, are asserting that
17 Defendants have prevented them from fulfilling their own fiduciary obligations under RCW
18 31.12.267 and from exercising the duties and powers set forth in RCW 31.12.255. Complaint, ¶10,
19 11.

20 Neither Wicks, nor SaveCCU, addressed whether the regulatory oversight of an agency
21 prevents individual *directors* from asserting a claim. In fact, both opinions are clear that the
22 respective regulatory agencies are intended to protect the interests of *members*. While DFI may have
23 the authority to enforce the Credit Union Act, there is nothing in the statutes or regulations that gives
24 DFI exclusive jurisdiction over enforcement of the rights of members of the Board of Directors.
25 Moreover, the Business Corporation Act and the Credit Union Act are both silent as to whether
26 individual directors specifically have standing to bring an action against other directors. The

1 legislature’s use of language does not evidence any difference in intent, as is the case with individual
2 members. Thus, the SaveCCU holding that members of a credit union lack standing to bring a
3 fiduciary duty claim against the credit union’s board of directors is not on point.

4 Defendants also assert that Plaintiffs do not have standing to assert a derivative action on
5 behalf of CCCU pursuant to Lundberg v. Coleman, 115 Wn. App. 172, 60 P.3d 595 (2002). In
6 Lundberg, an individual minority director of a non-profit corporation sought to bring a derivative
7 action against other directors. The court observed that the Washington Nonprofit Corporation Act
8 includes no provision such as that provision in the Business Corporation Act—specifically, RCW
9 23B.07.400—“allowing individual shareholders to bring an action against a corporation’s directors.”
10 Id. at 176-77.

11 However, the Nonprofit Corporation Act does not apply to credit unions. RCW 24.03.015
12 provides, *in relevant part*, that:

13 * * * cooperative organizations, and organizations subject to any of
14 the provisions of the bank or insurance laws of this state may not be
organized under [the Nonprofit Corporation Act].

15 And RCW 23B.07.400, which prescribes the procedures for derivatively bringing a substantive
16 claims on behalf of an entity to remedy a harm suffered by the corporation, is inapplicable to a direct
17 shareholder action seeking to remedy a harm suffered by the shareholder. Moreover, RCW
18 23B.07.400 has been superceded by Civil Rule 23.1 which prescribes the procedure by which
19 shareholders or members may bring a derivative action on behalf of any corporation (including a
20 credit union) or unincorporated association. Gustafson v. Gustafson, 47 Wn. App. 272, 734 P.2d 949
21 (1987); LaHue v. Keystone Inv. Co., 6 Wn. App. 765, 496 P.2d 343 (1972). Accordingly, Lundberg
22 does not support a finding that Plaintiffs do not have standing to bring this action.

23 Additionally, in contrast to the Nonprofit Corporation Act, the Credit Union Act does not
24 carefully delineate when actions may be brought by a member or director on behalf of the
25 corporation. The Credit Union Act does not contain any regulatory prohibition against bringing an
26 action on behalf of the credit union against co-directors who are wrongfully interfering with Plaintiff

1 Directors' rights in governing the credit union. Moreover, the plaintiff in Lundberg filed the suit
2 solely as a derivative action on behalf of the corporation - no claims were raised on behalf of the
3 individual Plaintiff. Here, the Plaintiffs have sued on their own behalf, as well as on behalf of
4 CCCU. Plaintiffs, both in their individual capacities and derivatively, have presented a justiciable
5 controversy. Thus, Plaintiffs have standing to assert a claim.

6 2. Plaintiffs properly pleaded this declaratory judgment derivative action.

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8 Plaintiffs properly pleaded this derivative declaratory judgment action. Plaintiffs alleged that
9 they are presently directors of the CCCU Board of Directors, having been so elected by member-
10 owners, and that Defendants are presently directors of the CCCU Board of Directors, and have held
11 those positions during the conduct complained of herein. Complaint, ¶¶2, 3. Plaintiffs also alleged
12 specific conduct Defendant Directors engaged in that prevented Plaintiff Directors from exercising
13 fulfilling their fiduciary duties. Complaint, ¶¶7-11. Thus, Plaintiff properly alleged that they were
14 "shareholder[s] or member[s] at the time of the transaction of which [they] complain[]." See CR
15 23.1.

16 _____Additionally, Plaintiffs alleged the basis for jurisdiction. Complaint, ¶5. Plaintiffs also
17 alleged with particularity the efforts made by Plaintiffs to obtain the actions they desired from the
18 directors, and the reasons for failing to obtain the actions. Plaintiffs allege, "despite their objections"
19 Defendant Directors have engaged in the practice of excluding Plaintiff Directors from Board of
20 Directors meets. Complaint, ¶8. Plaintiffs further alleged that "[a]t Board meetings that Plaintiff
21 Directors have been allowed to attend, *notwithstanding Plaintiff Directors' requests for accurate*
22 *minutes*, Defendant Directors have engaged in a pattern and practice of preparing and approving
23 minutes that record the positions of the majority and omit the positions expressed by the majority"
24 [emphasis added]. Complaint, ¶9. Thus, Plaintiffs complied with the requirements of CR 23.1, and
25 Defendants' motion should be denied.
26

1 3. Plaintiffs are not required to allege that Defendants' conduct was wrongful or that
2 Defendants breached a fiduciary duty owed by the Defendants to present a
3 justiciable controversy.

4 Defendants assert that Plaintiffs failed to state a claim by failing to allege that Defendant
5 Directors' conduct was wrongful, that Defendant Directors breached a duty owed, or that the
6 Defendant Directors' decision exceeded the bounds of the business judgment rule. Defendants also
7 argue that Director Plaintiffs have no right to pursue this action against the CEO of CCCU because
8 they have not alleged that the CEO has acted wrongfully and in a manner independent from a
9 majority of the Board. However, Plaintiffs have not filed a breach of fiduciary duty claim. Rather,
10 Plaintiffs filed a declaratory judgment action under the DJA.

11 In order to state a declaratory judgment claim, there must be justiciable controversy. See
12 supra. The justiciable controversy requirements do not require allegations of wrongful conduct, bad
13 faith, or breach of some duty. Rather, all that is required is an actual, present and existing dispute
14 between parties having genuine and opposing, and direct and substantial interests. Id. It is clear
15 from the allegations in the Complaint that an actual and present dispute exists between Plaintiffs and
16 the Defendant Directors and CEO. Plaintiffs are seeking a final judicial determination to resolve this
17 dispute. Id. Thus, the court should deny Defendants' motion to dismiss for failure to state a claim.

18 CONCLUSION

19 For the foregoing reasons, Plaintiffs respectfully request that the court defer consideration
20 of Defendants' motion pending full compliance with the service requirements of Civil Rule 6. In
21 the alternative, Plaintiffs request the court to deny Defendants' Motion to Dismiss Plaintiffs'
22 Complaint Pursuant to CR 12(b)(6).

23 DATED this 30th day of August, 2006.

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25 _____
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