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**Superior Court of Washington for Thurston County**

**Save Columbia CU Committee, Cathryn Chudy, Kathryn Edgecomb, Lloyd Marbet, and Robert Tice, Plaintiffs,**

vs.

**Columbia Community Credit Union and State of Washington Department of Financial Institutions, Defendants.**

**Case No. 06-2-01688-0**

**Plaintiffs' Reply to Oppositions to Motion for Injunction.**

**1. Removals From Elective Office Violate Applicable Law**

RCW 31.12.285 titled "Suspension of members of board or supervisory committee by board — For cause" provides:

"The board may suspend for cause a member of the board or a member of the supervisory committee until a membership meeting is held. The membership meeting must be held within thirty days after the suspension. The members attending the meeting shall vote whether to remove a suspended party. For purposes of this section, "cause" includes demonstrated financial irresponsibility, a breach of fiduciary duty to the credit union, or activities which, in the judgment of the board, threaten the safety and soundness of the credit union."

Defendants assert that the five-member Majority Board of Columbia can evade this specific statutory procedure by simply expelling from membership two duly elected board members and three duly elected supervisory committee members. They claim a credit union board's general power to expel members "for cause" (RCW 31.12.255(1)(d)), and the requirement that credit union elected officials be credit union members legitimizes such an evasion.

If their legal analysis is sound, then RCW 31.12.285 is rendered meaningless, for no

1 responsible board would follow its specific procedure for removing a board or supervisory  
2 committee member when the same can be accomplished so expeditiously by simply expelling  
3 him or her from membership. If fact, it arguably would be irresponsible for a board to take the  
4 relatively slow and costly (*e.g.*, membership meeting costs) statutory removal route when they  
5 could take the quick and no-cost summary expulsion route. But such an analysis is of  
6 Washington law unsound, for it renders RCW 31.12.285 statutory surplusage and meaningless.

7 Washington courts consistently apply recognized rules of statutory construction which  
8 seek to give meaning and effect to all legislative enactments. In *Miller v. Pasco*, 50 Wn.2d 229,  
9 310 P.2d 863 (1957), the court declared those rules, at 233-34:

10 Two rules of statutory construction, to which we have uniformly adhered,  
11 apply to the issue presented by this proceeding: (1) that each and every section of  
12 a legislative enactment must be given meaning, and (2) where general powers are  
13 granted with specific powers enumerated, the general powers are modified,  
14 limited, and restricted to the extent of the specific enumeration. *Groves v. Meyers*,  
15 35 Wn.2d 403, 213 P.2d 483 (1950); *State v. Thompson*, 38 Wn.2d 774, 232 P.2d  
16 87 (1951); *Public Hospital Dist. No. 2 of Okanogan County v. Taxpayers of*  
17 *Public Hospital Dist. No. 2 of Okanogan County*, 44 Wn.2d 623, 269 P.2d 594  
18 (1954); 50 Am.Jur. 244, § 249; 82 C.J.S. 658, § 332.

19 If, as appellant contends, cities of the third class, by RCW 35.24.300,  
20 *supra*, have *general power* to lease, sublease, convey or otherwise dispose of their  
21 real estate, then the remainder of the quoted portion of the section, which  
22 authorizes specific types of leases, is surplusage and meaningless.

23 Similarly, in *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004), the court stated at 164:

24 At the outset, we must determine which statutes apply to this case. ... Statutes  
25 relating to the same subject are construed together and, in “ascertaining  
26 legislative purpose . . . are to be read together as constituting a unified whole, to  
27 the end that a harmonious, total statutory scheme evolves.” *Hallauer v. Spectrum*  
*Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84  
Wn.2d 645, 650, 529 P.2d 453 (1974)). When more than one statute applies, the  
specific statute will supersede the general statute. *See Hallauer*, 143 Wn.2d at 146  
(stating that when statutes conflict, the specific statute supersedes the general  
statute); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d  
621, 630, 869 P.2d 1034 (1994).

And in determining when a more general statute is superceded by a more specific statute, the

1 court in *State v. Shriner*, 101 Wn.2d 576, 681 P.2d 237 (1984), stated the test at 580:

2 It is a well established rule of statutory construction that “where a special statute  
3 punishes the same conduct which is punished under a general statute, the special  
4 statute applies and the accused can be charged only under that statute.” *State v.*  
5 *Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). It is not relevant that the special  
6 statute may contain additional elements not contained in the general statute; *i.e.*,  
7 notice. The determining factor is that the statutes are concurrent in the sense that  
8 the general statute will be violated in each instance where the special statute has  
9 been violated.

10 As applied to the facts of this case, if every act of “cause” justifying board suspension and  
11 membership removal of an elected credit union official under RCW 31.12.285 is also an act of  
12 “cause” justifying immediate expulsion from credit union membership (and elective office)  
13 under RCW 31.12.255(1)(d), then the more specific statute’s procedure must be followed in any  
14 disciplinary proceeding for acts of alleged “cause” by a credit union’s elected officials.

15 The necessary employment of the board-suspension-membership-removal procedure of  
16 RCW 31.12.285 is further compelled in this case because the alleged “cause” for which the  
17 Columbia directors and supervisory committee members were removed was their allegedly  
18 violating a fiduciary duty of loyalty that only arose by virtue of their elective offices. Mere  
19 members of a credit union owe no fiduciary duty of loyalty. Compare expulsion notices of  
20 elected officials Chudy, Edgecomb, and Marbet with that of non-elected-official member Tice.  
21 Complaint Appendix Exhibits 26 - 29.

## 22 **2. Actions to Thwart Democracy Violate the Law.**

23 In Columbia’s 2004 and 2005 elections of board and supervisory members, candidates  
24 identifying themselves with and endorsed by SaveCCU were overwhelming elected by  
25 Columbia’s membership. Complaint ¶¶ 17 and 21. The Washington Credit Union Act  
26 (“WCUA”), Chapter 31.12 RCW, plainly envisions democratic governance of credit unions by  
27 requiring annual elections by the members of the board and supervisory committee members.  
RCW 31.12.225 and –.326.

1 In *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972), the court said, at 552:

2 A fundamental principle in our democracy is “the people should choose whom  
3 they please to govern them” and “this principle is undermined as much by  
4 limiting whom the people can select as by limiting the franchise itself.” *Powell v.*  
*McCormack*, 395 U.S. 486, 547, 23 L.Ed.2d 491, 89 S.Ct. 1944 (1969).

5 It is apparent to any objective observer that the actions taken in 2006 by the Majority Board of  
6 Columbia were intended to thwart the effective governance of it by the individuals chosen by its  
7 membership. In Columbia’s opposition brief, counsel makes references to the “business  
8 judgment rule” as covering their recent actions in removing Columbia’s democratically elected  
9 officials and preventing Marbet from becoming elected as a director. The business judgement  
10 rule was developed by courts to shield corporate directors from liability to their shareholders for  
11 their good faith decisions involving transactions of their corporations with third parties. It is  
12 consistently held inapplicable to actions taken by corporate directors to impede democratic  
13 governance by their shareholders, and such actions are consistently set aside by reviewing  
14 courts..

15 For example, the Delaware supreme court in *MM Companies v. Liquid Audio*, 813 A.2d  
16 1118 (Del. 2003), invalidated bylaw amendments enacted to thwart corporate democracy, saying  
17 at 1132:

18 The record reflects that the primary purpose of the Director Defendants’  
19 action was to interfere with and impede the effective exercise of the stockholder  
20 franchise in a contested election for directors. The Court of Chancery concluded  
21 that the Director Defendants amended the bylaws to provide for a board of seven  
22 and appointed two additional members of the Board for the primary purpose of  
23 diminishing the influence of MM’s two nominees on a five-member Board by  
24 eliminating either the possibility of a deadlock on the board or of MM controlling  
25 the Board, if one or two Director Defendants resigned from the Board. That  
26 defensive action by the Director Defendants compromised the essential role of  
27 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

1           been invalidated by the Court of Chancery.

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

15          In *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del.Ch. 1988) (which case has  
16          been cited in at least 55 published opinions and was endorsed by the Delaware supreme court in  
17          *Liquid Audio, supra*) the court observed the inapplicability of the business judgment rule to  
18          conduct that impedes shareholder governance rights, saying at 660:

19           [A] decision by the board to act for the primary purpose of preventing the  
20           effectiveness of a shareholder vote inevitably involves the question who, as  
21           between the principal and the agent, has authority with respect to a matter of  
22           internal corporate governance. That, of course, is true in a very specific way in  
23           this case which deals with the question who should constitute the board of  
24           directors of the corporation, but it will be true in every instance in which an  
25           incumbent board seeks to thwart a shareholder majority. A board’s decision to act  
26           to prevent the shareholders from creating a majority of new board positions and  
27           filling them does not involve the exercise of the corporation’s power over its  
          property, or with respect to its rights or obligations; rather, it involves allocation,  
          between shareholders as a class and the board, of effective power with respect to  
          governance of the corporation. This need not be the case with respect to other  
          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.

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

3 It is an elementary proposition of corporation law that, where they exist,  
4 fiduciary duties constitute a network of responsibilities that overlay the exercise  
5 of even undoubted legal power. Thus it is well established, for example, that  
6 where corporate directors exercise their legal powers for an inequitable purpose  
7 their action may be rescinded or nullified by a court at the instance of an  
8 aggrieved shareholder. The leading Delaware case of *Schnell v. Chris-Craft  
Industries, Inc.*, Del.Supr., 285 A.2d 437 (1971) announced this principle and  
9 applied it in a setting in which directors advanced the date of an annual meeting  
10 in order to impede an announced proxy contest.

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

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

### 24 **3. Washington Court Do Enforce Laws and Bylaws.**

25 In Columbia's opposition brief, at 11, it suggested that Washington courts abstain from  
26 interfering in the internal affairs of voluntary associations, like Columbia. But the exceptions  
27 such abstention are well recognized, as observed by our state supreme court in *Anderson v.  
Enterprise Lodge No. 2*, 80 Wn. App. 41, 906 P.2d 962 (1995), *rev. denied*, 129 Wn.2d 1015  
(1996), in which the court stated, at 46-47:

As a general rule, courts refrain from interfering in the internal affairs of  
voluntary associations. *Grand Aerie, Fraternal Order of Eagles v. National Bank*,  
13 Wn.2d 131, 135, 124 P.2d 203 (1942).

....

1 Both sides of this case agree there are circumstances in which these disputes are  
2 judicially cognizable. Among those circumstances are disputes (1) involving  
3 property rights of members, *Washington Local Lodge No. 104 of Int'l Bhd. of*  
4 *Boilermakers v. International Bhd. of Boilermakers*, 33 Wn.2d 1, 74, 203 P.2d  
5 1019 (1949); and (2) involving whether the organization's "proceedings were  
6 regular, in good faith, and not in violation of the laws of the order or the laws of  
7 the state," *Grand Aerie*, 13 Wn.2d at 135. [Emphasis added.]

8 In the dispute between these parties, the Clark County Superior Court in 2004 granted a  
9 writ of mandamus to compel Columbia's board to comply with its bylaws and the WCUA by  
10 holding the special membership meeting that was requested by its petitioning members.  
11 Complaint ¶ 13, noted in the Court of Appeals ruling entered July 25, 2006 (Complaint  
12 Appendix Exhibit 25, page 2, hereafter "COA 7/25/06 Ruling").

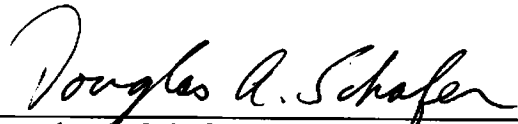
13 And in the COA 7/25/06 Ruling, the Court squarely addressed SaveCCU's claim that  
14 certain of Columbia's directors were holding office in violation of the term-limits provision in its  
15 bylaws, and the Court remanded that wrongly dismissed claim to be adjudicated by the trial  
16 court.

17 And in *Galbraith v. Tapco Credit Union*, 88 Wn. App. 939, 946 P.2d 1242 (1997), the  
18 appellate court reversed a trial court's dismissal of a credit union members' claim for wrongful  
19 expulsion from membership. The expulsion was allegedly based upon a litany of causes, much  
20 like those alleged against Plaintiffs in this case, when the primary reason was the member's  
21 exercise of plainly lawful actions (as in this case).

22 An exception to judicial abstention noted in *Anderson* concerns disputes involving  
23 property rights of members. Plaintiffs noted in their Complaint, at ¶ 44, the statutory rights  
24 (RCW 31.12.474) of Columbia's members to share proportionately in its net assets of \$78  
25 million in the event of its voluntary liquidation. Washington courts recognize that the right of  
26 members of a non-profit corporation to share proportionately in its assets in the event of its  
27 voluntary liquidation is a valuable property right. *In re the Monks Club, Inc.*, 64 Wn.2d 845,  
849-50, 394 P.2d 804 (1964).



1 Respectfully submitted this 15<sup>th</sup> day of September, 2006.

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4 Douglas A. Schafer, WSBA 8657, Attorney for  
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