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 No hearing is set.
 Hearing is set.
Date: March 20, 2007
Time: 3:30 pm
Judge/Calendar: J. Casey

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Superior Court of Washington for Thurston County

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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' Response to DFI's Motion for Summary Judgment.

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Plaintiffs here respond to the Defendant Department of Financial Institutions' Motion for Summary Judgment ("DFI Motion"), supported by the Declaration of Linda Jekel ("Jekel Declaration"), both filed on or about February 15, 2007.

1. Standard for Decision. A summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The evidence in a motion for summary judgment shall be viewed in the light most favorable to the nonmoving party. Reynolds v. Hicks, 134 Wash.2d 491, 495, 951 P.2d 761 (1998) (citing Wilson, 98 Wash.2d at 437, 656 P.2d 1030). Summary judgment should only be granted when "reasonable persons could reach but one conclusion." *Id.*

2. DFI Responsibility to Protect Integrity of Credit Unions as Cooperative Institutions. In the Jekel Declaration at ¶3, she misstates her first responsibility by omitting the phrase "as cooperative institutions" when she paraphrased her primary responsibilities set forth

1 in RCW 31.12.015. The omitted phrase is added to her statement below in bold and within
2 brackets:

3 “As Division Director, I have three primary responsibilities. (See RCW
4 31.12.015.) One responsibility is to protect credit union members’ financial
5 interests and the integrity of credit unions [**as cooperative institutions**] by
6 supervising state chartered credit unions for safety and soundness, and
7 compliance with consumer laws.”

8 That statute defines a credit union as “a cooperative society organized under this chapter as a
9 nonprofit corporation.”

10 Division of Credit Unions (DCU) Director Jekel asserts in her declaration at ¶8 and at the
11 foot of page 3 of the DFI Motion that DFI rarely gets involved in issues relating to the
12 governance of credit unions, doing so only “if there is a material violation of law or an unsafe
13 and unsound practice exists.” But as will be shown below, DFI routinely gets involved in
14 governance issues when its officials wish to do so.

15 To understand what the legislature intended by directing DFI to protect “the integrity of
16 credit union as cooperative institutions,” one should review the history of the Washington Credit
17 Union Act (“WCUA”) since its first enactment in 1933. That history was summarized under the
18 issue “*What are credit unions, and what laws apply to them?*” as part of the appeal brief filed
19 by plaintiffs Chudy and Edgecomb in the Court of Appeals in January 2007, such part here
20 included as Exhibit 3 to the Declaration of Schafer re: Exhibits, filed with this response
21 (“Schafer Declaration”). The history of the WCUA clearly indicates that members’ active
22 participation in the democratic governance of their credit unions was always expected and
23 intended by the legislature. The legislative directive to the state regulatory official to protect
24 “the integrity of credit unions as cooperative institutions” was added in 1984 (Laws of 1984, Ch.
25 31 §3), at which time the legislature added a requirement that regular membership meetings “be
26 conducted according to the customary rules of parliamentary procedure” (§20), and that after
27 each special membership meeting the chair of the supervisory committee report to the state
official “whether the special meeting was conducted in a fair manner in accordance with the

1 bylaws and with customary rules of parliamentary procedure.” §21.

2 The history of the WCUA and of DFI’s official positions, as summarized in Exhibit 3 to
3 the Schafer Declaration, further indicate that DFI has consistently applied general corporate
4 common law to decide questions of corporate governance of credit unions.

5 **3. DFI’s Assertion of Regulatory Authority in CU Governance Matters.** Consistent
6 with DFI’s application of general corporate common law to credit union governance issues, the
7 Plaintiffs SaveCCU and Tice in 2004 sought a declaratory judgment from Clark County Superior
8 Court that Columbia’s members had certain governance rights (*e.g.*, to enforce bylaw provisions,
9 to access corporate records, to hold directors accountable for fiduciary breaches). On
10 September 15, 2004, candidates identified as SaveCCU supporters were elected to Columbia’s
11 four open board positions and three open supervisory committee positions. Complaint ¶17. On
12 September 22, 2004, DFI held compulsory meetings with Columbia’s new supervisory
13 committee and its new board. At those meetings DFI officials asserted that the newly elected
14 directors and supervisory committee members had a conflict of interest because of SaveCCU’s
15 lawsuit, so DFI directed them not to gather any information or participate in any discussions
16 pertaining to the lawsuit. DFI’s agendas and directives are Exhibit 4 to Schafer Declaration.

17 Seven months later, when several members of SaveCCU, including Plaintiffs Chudy and
18 Edgecomb, had filed as candidates for Columbia’s board and supervisory committee, DFI
19 exercised its regulatory authority to direct Columbia’s board of directors to provide specific
20 negative information about those candidates in the election materials sent to its members.
21 Exhibit 1 to Schafer Declaration. In DCU Director Jekel’s letter of April 27, 2005, to
22 Columbia’s board, she cited a leading corporate law treatise’s statement of the “fundamental rule
23 of corporate law” that directors have a fiduciary duty of candor to their shareholders to disclose
24 fully and fairly to them all known material information when seeking shareholder action on
25 governance matters. *Id* at 4-5. Based upon that general principle of corporate governance, DCU
26 Director Jekel there directed Columbia’s board as follows:
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1 In order for a credit union's board of directors to properly exercise its
2 fiduciary duty to all members, the board should ensure disclosure of a candidate's
3 conflicts of interest arising from involvement in litigation pending against the
4 credit union ... in election materials to the credit union's members.

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

14 In marked contrast to the claim of limited regulatory authority that DFI now makes in its
15 summary judgment motion, DCU Director Jekel in her letter of April 27, 2005, at page 6,
16 claimed broad regulatory authority to enforce common law principles of corporate governance.
17 She answered affirmatively the question that she framed herself-- "Does the Division of Credit
18 Unions have the authority to regulate and enforce the principles of corporate governance set
19 forth above?" asserting the following:

20 The director of the Department of Financial Institutions, as delegated to
21 the Division of Credit Unions, has the authority to require credit unions to
22 conduct business in compliance with the Washington State Credit Union Act
23 (Act). RCW 31.12.516(1). The director also has the authority to interpret the
24 provisions of the Act. RCW 31.12.516(3). Therefore, the Division may require a
25 credit union board of directors to disclose a candidate's conflict of interest to
26 members prior to the election of the board and supervisory committee.

27 [Heading omitted.] 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.

In the election-by-mail ended June 29, 2005, notwithstanding the DFI-required disclosures of
their alleged conflict of interest, three SaveCCU-endorsed board candidates, including Chudy
and Edgecomb, were elected, receiving from 2,990 to 3,610 votes. Complaint ¶21.

Several other examples of DFI asserting regulatory authority in credit union governance

1 matters can be shown. In January 2004, DFI discovered that Columbia's then CEO, David Doss,
2 was serving on its board of directors notwithstanding its bylaws provision that barred employees
3 from serving on its board. DCU Director Jekel then required that Doss immediately resign from
4 the board or that the board amend its bylaws to remove its prohibition. She further required that
5 Columbia's board ratify all its actions in which Doss had participated illegally as a director.
6 Exhibit 2 to Schafer Declaration.

7 In its letter of January 22, 2004 (Exhibit A to Jekel Declaration) concerning the petition
8 by SaveCCU supporters calling a special membership meeting to vote on the removal of
9 Columbia's directors, DCU asserted its authority to enforce common law principles of corporate
10 governance. On page 5 of that letter, Director Jekel noted that Columbia's board had amended its
11 bylaws to empower itself to adopt procedural rules for any membership meeting. She indicated
12 that DCU would object to any bylaw amendments or meeting rules adopted by Columbia's board
13 "which could materially affect the resulting outcome of a Special Membership Meeting in a
14 manner different than would otherwise happen if the Board did not adopt the amendments or
15 temporary rules." She applied general corporate common law,¹ stating:

16 [T]he Board may adopt written membership meeting procedures that (1) are
17 reasonably necessary, (2) are fair to the Membership, and (3) provide fair advance
18 notice to the Membership of how the Special Membership meeting may be
19 conducted, including the nomination and election of Interim Directors. [Emphasis
20 added.]

21 Consistent with the corporate common law doctrine that fairness to shareholders/
22 members is required in governance matters, DFI/DCU caused Columbia to enter into with it, on
23 February 5, 2004, a Settlement Agreement (Exhibit B to Jekel Declaration) having specific and
24 detailed procedural requirements for Columbia's impending election and annual meeting which

25 ¹ Many cases recognize that corporate directors may not purposefully interfere with
26 shareholders' exercise of their voting and other governance rights. *E.g.*, *MM Companies v.*
27 *Liquid Audio*, 813 A.2d 1118, 1132 (Del. 2003); *Schnell v. Chris-Craft, Indus., Inc.*, 285 A.2d
437 (Del.1971).

1 agreement was expressly entered into “in order to promote fairness in corporate governance for
2 the benefit of the Columbia Membership.” *Id* at ¶3.0.

3 The last illustration of DFI asserting regulatory authority in credit union governance
4 matter is DCU Director Jekel’s 5-page letter of June 30, 2006, to Plaintiff Robert Tice
5 responding to his e-mail messages questioning the lawfulness of certain amendments to
6 Columbia’s bylaws. It is Exhibit 20 to the Appendix to Complaint. On page three of her letter,
7 which she sent to Columbia’s officials, Director Jekel asserted that certain bylaw amendment
8 adopted by Columbia’s board on June 5, 2006, were invalid and “should be rescinded.” And she
9 wrote on page four, “I am hereby directing Columbia’s board of directors to rescind those
10 portions of the April 25, 2006 bylaw amendments that pertain to a ratification vote.”

11 It is apparent from these examples that DFI/DCU wields its regulatory authority as to
12 credit union governance matters whenever its officials are inclined to do so.

13 **4. An Agency’s Failure to Act Must Not be Arbitrary or Capricious.** An established
14 line of Washington case precedents indicates that an agency’s action or inaction must not be
15 arbitrary or capricious. In the DFI Motion, at 5 - 7, DFI suggests that its failure to enforce
16 applicable law is not subject to review under RCW 34.05.570(4)(b), but in the sole Washington
17 case it cites for that proposition the state supreme court measured the inactions of two agencies,
18 Department of Corrections (“DOC”) and Department of Labor and Industries (“DLI”), by the
19 arbitrary or capricious standard. *Nat’l Elec. Contractors Assoc. v. Riveland*, 138 Wn.2d 9, 978
20 P.2d 481 (1999).

21 We note, however, that DOC’s discretion is not absolute. Agency action is
22 scrutinized under an arbitrary and capricious standard. RCW 34.05.570(4)(c)(iii).
23 In general, agency action is deemed arbitrary and capricious if it is willful and
24 unreasoning, and taken without consideration and in disregard of the facts and
25 circumstances. *See Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d
26 433 (1995). Under this standard, DOC’s decision to utilize inmate labor must be
27 based on a reasonable determination that the improvements to prison facilities can
be accomplished “in as satisfactory a manner and at a less cost to the state. . . .”
[Emphasis added.]

1 *Nat'l Elec. Contractors* at 28-29.

2 DLI's decision not to enforce the electrical licensing statute was not arbitrary and
3 capricious.

4 *Nat'l Elec. Contractors* at 32.

5 Other cases establishing the arbitrary or capricious standard for judicial review of failure-
6 to-act claims are *N.W. Ecosystem Alliance v. Forest Bd.*, 149 Wn.2d 67, 66 P.3d 614 (2003), and
7 *Rios v. Washington Dept. of Labor & Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002). In *N.W.*
8 *Ecosystem Alliance*, at 73-73 under the heading "Judicial Review of Failure-to-Act Claims," the
9 state supreme court wrote:

10 The first issue concerns the failure-to-act claims brought by the conservation
11 organizations under RCW 34.05.570(4)(b). In those claims, the organizations
12 asserted that the agencies failed to perform a duty to adopt rules that they are
13 required by statute to promulgate. As noted above, the trial court held that the
14 conservation organizations could not maintain their failure-to-act claims under
15 RCW 34.05.570(4)(b). A question before us, therefore, is whether the Court of
16 Appeals correctly concluded that the conservation organizations may obtain
17 judicial review of an agency's alleged failure to adopt rules. We recently
18 answered that question when we affirmed the decision of the Court of Appeals in
19 *Rios*, 145 Wn.2d 483. There we indicated pursuant to RCW 34.05.570(4)(b) that
20 plaintiffs, in that case agricultural pesticide handlers, can obtain judicial review of
21 an agency's failure to adopt rules. In such a challenge, the plaintiff bears the
22 burden of demonstrating that the agency's decision to forgo rule making was
23 unconstitutional, outside the statutory authority of the agency, "arbitrary and
24 capricious," or made by unauthorized persons. RCW 34.05.570(2)(c). We see no
25 reason to depart from our decision in *Rios*.

26 More recently, in *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), the
27 state supreme court noted that improper motives are a basis for judicial invalidation of agency
action, stating at ¶85, "[A]n agency declaration will not be upheld where it is arbitrary or
capricious, or through abuse of discretion, violation of law, improper motives, or collusion."

28 **5. There Exists a Genuine Issue Whether DFI's Inaction Was Arbitrary or**
29 **Capricious.** DFI's dramatically opposite positions in 2004 and 2006 on the propriety of
30 Columbia's board's adoption of strategic special membership meeting procedures illustrates the

1 arbitrary or capricious nature of its inactions concerning Columbia's corporate governance. By
2 an e-mail message dated July 30, 2006, Plaintiffs' counsel objected to DFI's inaction over
3 Columbia's board majority's last-minute adoption of special voting procedures (announced only
4 to their employees) for the special membership meeting on Saturday, July 22, 2006, observing
5 that DFI had articulated its strong objection to such a strategy by Columbia's board in January
6 2004. Exhibit 5 of Schafer Declaration. At DFI's direction, Columbia CEO Parker Cann
7 responded to Schafer and admitted that the meeting procedures adopted Thursday evening, July
8 20, 2006, were communicated only to Columbia's employees. *Id.* Such diametrically opposite
9 positions by DFI on substantially the same fact situation present a genuine issue of whether its
10 actions were arbitrary or capricious.

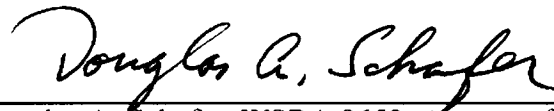
11 DCU Director Jekel acknowledges she was the Program Manager for DCU from 1995 to
12 2002 (Jekel Declaration ¶2), and DFI previously admitted that Columbia CEO Parker Cann was
13 the Director of DCU from 1995 to 2002. DFI's Answer to Plaintiff's Complaint ¶19. DCU
14 Director Jekel admits (Jekel Declaration ¶12) that on July 24, 2006, Cann informed her that
15 Columbia's board majority planned on August 15, 2006, to expel from membership the
16 Plaintiffs. Director Jekel asserts her agency then took the position that a credit union's board
17 majority could expel members, including its elected officials, for any reason whatsoever. The
18 absurdity of such a passive regulatory position is obvious in light of DFI's responsibility to
19 "protect the integrity of credit unions as cooperative institutions" for an unbounded expulsion
20 power enables an abusive board majority to expel summarily any dissenting board member, any
21 supervisory committee member who identifies problems, any member who brings lawlessness to
22 the attention of DFI or other officials, and any member who circulates or signs a petition for a
23 special membership meeting as RCW 31.12.195 plainly permits. In fact, Columbia's stated
24 grounds for expelling Plaintiff Marbet included his action with other supervisory committee
25 members to call a special membership meeting as RCW 31.12.195 plainly permits. Exhibit 28 to
26 Appendix to Complaint; Declaration of Schafer re: Expulsion Challenges, filed Sept. 15, 2006.
27 It's grounds for expelling Plaintiff Tice included his demands that Columbia's officials comply

1 with applicable law, as evidenced by DCU Director Jekel's letter of June 30, 2006. Exhibits 20
2 and 29 to Appendix to Complaint. Its grounds for expelling Plaintiffs Chudy and Edgecomb
3 included their dissenting from decisions of the board majority and their filing of a declaratory
4 judgment action seeking judicial clarification of their responsibilities and concomitant rights as
5 directors of Columbia. Exhibits 26 and 27 of Appendix to Complaint; Declaration of Schafer re:
6 Expulsion Challenges, filed Sept. 15, 2006.

7 Given the absurdity of DCU Director Jekel's position in light of its responsibility to
8 protect "the integrity of credit unions as cooperative institutions," a genuine issue is raised as to
9 whether or not it was arbitrary or capricious. Plaintiff should be permitted to conduct further
10 discovery into DCU's basis for its inaction.

11 DFI's motion for summary judgment should be denied.

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13 Respectfully submitted this 13th day of March, 2007

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Douglas A. Schafer, WSBA 8652, Attorney for
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