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No. 37272-0-II

COURT OF APPEALS, DIV. II  
OF THE STATE OF WASHINGTON

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SAVE COLUMBIA CU COMMITTEE, CATHRYN CHUDY,  
KATHRYN EDGEComb, LLOYD MARBET, and ROBERT  
TICE, Appellants,

vs.

COLUMBIA COMMUNITY CREDIT UNION and STATE OF  
WASHINGTON DEPARTMENT OF FINANCIAL  
INSTITUTIONS, Respondents.

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APPELLANTS' OPENING BRIEF

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## **ASSIGNMENTS OF ERROR & ISSUES**

**Assignment of Error #1:** The court erred in dismissing claims by SaveCCU and Tice of wrongful expulsion from membership in Columbia.

**Issue #1:** Is there a cause of action for wrongful expulsion from membership in a WA credit union?

**Issue #2:** Did the SaveCCU and Tice state a claim for wrongful expulsion of membership in Columbia?

**Assignment of Error #2:** The court erred in dismissing claims by Chudy, Edgecomb, and Marbet of wrongful suspension and removal from elective office in Columbia.

**Issue #3:** Did Chudy, Edgecomb, and Marbet state a claim for wrongful suspension and removal from elective office in Columbia?

**Issue #4:** Did Chudy and Edgecomb fail to join necessary parties?

**Issue #5:** Was Marbet's claim for wrongful suspension and removal from elective office rendered moot by the expiration of his term of office during the pendency of the litigation?

**Assignment of Error #3:** The court erred in dismissing claims of Chudy, Edgecomb, and Marbet of wrongful expulsion from membership in Columbia.

**Issue #6:** Did Chudy, Edgecomb, and Marbet state a claim of wrongful expulsion from membership in Columbia?

**Assignment of Error #4:** The court erred in dismissing plaintiffs'

claim that Columbia's special membership meeting on July 22, 2006, was unlawfully conducted.

**Issue #7:** Did plaintiffs state a claim that Columbia's special membership meeting on July 22, 2006, was unlawfully conducted?

**Assignment of Error #5:** The court erred in dismissing plaintiffs' claim that Columbia's special membership meeting on November 15, 2006, was unlawfully conducted.

**Issue #8:** Did plaintiffs state a claim that Columbia's special membership meeting on November 15, 2006, was unlawfully conducted?

**Assignment of Error #6:** The court erred in dismissing plaintiffs' claim that DFI acted arbitrarily and capriciously in refusing to enforce applicable law when apprised of the actions of Columbia's board concerning the special membership meeting on July 22, 2006, and concerning the membership expulsions at the special board meeting on August 15, 2006.

**Issue #9:** Did DFI act arbitrarily and capriciously in refusing to enforce applicable law when apprised of the actions of Columbia's board concerning the special membership meeting on July 22, 2006, and concerning the membership expulsions at the special board meeting on August 15, 2006.

## INTRODUCTION

This case involves the rights of members, including members elected to corporate offices, of a member-owned cooperative corporation, Columbia Community Credit Union (Columbia). Beginning in late 2003, a group of members of Columbia, who in early 2004 formed Save Columbia CU Committee (SaveCCU), began publicly opposing certain governance practices of those members who had been elected to Columbia's board of directors. SaveCCU and its supporters sought more openness in the governance of Columbia. In 2004 and 2005, candidates endorsed by SaveCCU were elected to all open positions on Columbia's board and its supervisory committee. By mid-2005, Columbia's nine-member board consisted of four individuals (Minority Directors) who supported SaveCCU's open governance platform and five individuals (Majority Directors) who opposed SaveCCU's platform. During 2006, the Majority Directors amended Columbia's bylaws and took other actions to thwart the election to the board of any more members aligned with SaveCCU. And in mid-August, 2006, the Majority Directors summarily expelled, allegedly for cause, from membership in Columbia all the Minority Directors, three of the four elected members of its supervisory committee, SaveCCU and other members identified with it. Some of the expelled Minority Directors (Chudy and Edgecomb) and a supervisory committee member (Marbet), SaveCCU, and another member (Tice) commenced this action to challenge the lawfulness of their expulsions and

other actions by the Majority Directors. In September, 2006, the trial judge enjoined the expulsions of Chudy, Edgecomb, and Marbet, so the next month the Majority Directors suspended them from their elective offices. The Majority Directors, using Columbia staff and resources, then waged a malicious publicity campaign of false and misleading accusations against Chudy, Edgecomb, and Marbet to cause a majority of the members at a special membership meeting in November to vote for their removal from office and expulsion from membership in Columbia. The trial judge permitted the plaintiffs to amend their complaint to challenge the lawfulness of those suspensions, removals, and expulsions, but in late 2007 the trial judge dismissed all the plaintiffs' claims.

The trial judge earlier had dismissed the plaintiffs' claims that the Department of Financial Institutions (DFI), that regulates state credit unions, arbitrarily and capriciously refused to challenge unlawful actions of the Majority Directors due, in part, to the personal relationship between DCU's director and staff and its former director who in May 2005 became Columbia's chief executive officer.

### **STATEMENT OF THE CASE**

Columbia Community Credit Union (Columbia), headquartered in Clark County, was formed in 1952 as a federal credit union. Complaint (CP 4-16) ¶4. In late 1995 it converted to a Washington state credit

union, governed by the Washington Credit Union Act (WCUA, RCW Ch. 31.12) and regulated primarily by the Washington State Department of Financial Institutions (DFI) Division of Credit Unions (DCU). *Id.* ¶5 (CP 5). In 2003 and early 2004, Columbia's board of directors sought to convert it into bank. *Id.* ¶8. Many of Columbia's members opposed that conversion, and nearly 3,600 signed a petition calling for a special meeting to vote against the conversion and to remove from office all nine of Columbia's directors. *Id.* Those members formed a not-for-profit corporation, Save Columbia CU Committee (SaveCCU), which brought a mandamus action that resulted in the trial court ordering Columbia to hold the petitioned-for special meeting and to permit voting by mail. *Id.* ¶¶ 1, 13 (CP 4, 6). Columbia held the meeting and vote, and the directors retained their offices by a narrow voting margin with 13,153 ballots cast. *Id.* ¶15 (CP 7); Mot. for Injunction at 2 (CP 308).

Prior to the mandamus action, DFI/DCU on January 22, 2004, issued a formal opinion letter that the members' petition was valid and Columbia was required by law to hold the special membership meeting. Decl. of Jekel ¶9 and Ex. A (CP 406 and 411-16); Compl. App. Ex. 3 (CP 41-46). In that opinion letter (DCU Letter 04-01), DCU cautioned Columbia against adopting procedural rules for that meeting that could affect its outcome. DCU Letter 04-01 at 5 (CP 415). But after negotiations, DFI and Columbia on February 5, 2004, entered into a written agreement

(Settlement Agreement) in lieu of administrative action by DFI to enforce the members' petition whereby Columbia agreed to employ an open and impartial process in its 2004 annual election of members to its board of directors. Decl. of Jekel ¶¶9 and Ex. B (CP 406 and 418-23); Complaint ¶12 (CP 6); Complaint Appendix, Ex. 5 (CP 48-53). The Settlement Agreement required Columbia to allow candidates to submit, and for it to mail to all its members, candidate biographies and position statements, and to permit its members to vote by mail. *Id.* Columbia employed that same process in its 2005 election, the result being that candidates who supported SaveCCU's open governance platform and were endorsed by it were elected, by wide voting margins, to all open positions on Columbia's board and supervisory committee in 2004 and 2005. Complaint ¶¶ 17 & 21 (CP 7-8); Compl. App. Exs. 6-17 (CP 54-77).

In late 2004 Columbia's chief executive officer, David Doss, resigned and was succeeded, beginning in May 2005, by Parker Cann, who had been the director of DCU from 1995 to 2002, during which time he supervised its 17 or so employees including Linda Jekel, who was the DCU program manager for those seven years and succeeded him as its director. Decl. of Jekel ¶¶ 2, 4, & 10 (CP 404-07); Complaint ¶ 18 (CP 7).

By July 2005, seven of Columbia's nine directors had been elected based in part upon their support of and by SaveCCU, but three of them (Bequette, Straub, and Cheek) had withdrawn from SaveCCU and joined

with two pre-2004 directors (Ail and Byrd) to form a five-member majority (Majority Directors) that opposed, on issues relating to corporate governance, the four directors (Minority Directors; Chudy, Edgecomb, Erdmann, and Winterburn) who remained members of SaveCCU.

Complaint ¶ 22 (CP 8).

Columbia's board could unilaterally amend its bylaws (except to change its field of membership) at any board meeting without any approval by DFI or by Columbia's members. RCW 31.12.115 and Bylaws Art. XIII. (CP 37). In anticipation of the 2006 annual meeting and election, the Majority Directors amended the bylaws to eliminate (a) a requirement that elections be conducted by an impartial process and (b) a provision for candidates' policy position statements to be included in voters pamphlets mailed with ballots by Columbia to its members.

Complaint ¶¶ 24–25 (CP 9). The five Majority Directors decided that a nominating committee comprised of their three members who were not seeking re-election would endorse, and promote the election of, candidates chosen by it. *Id.* The Minority Directors perceived that those actions were intended to thwart the election of candidates who support the open corporate governance platform that SaveCCU had promoted since 2004.

*Id.*

In May, 2006, SaveCCU placed an ad in the local newspaper that read in part (Complaint ¶ 26):

“In an attempt to control the outcome of the upcoming election, Columbia’s majority Board of Directors has removed key Bylaw provisions within the last several months; namely, those provisions requiring impartial elections and voter’s pamphlet statements. These changes significantly alter Columbia’s election process. Unlike elections held in 2004 and 2005, candidate statements are not permitted in Columbia’s 2006 voter pamphlet. DENYING CREDIT UNION MEMBERS THE OPPORTUNITY TO USE CANDIDATE STATEMENTS IN MAKING INFORMED DECISIONS WHEN THEY VOTE IS AGAINST THE PRINCIPLES OF DEMOCRACY.

AN ELECTION IS MORE THAN JUST NAMES ON A BALLOT. IT SHOULD PROVIDE FOR CANDIDATES’ POSITIONS ON THE ISSUES AND THEIR VISION FOR THE FUTURE.

If you agree with SaveCCU, please make a difference and run for a Board or Supervisory Committee position at Columbia Credit Union. Application packets are available at any Columbia Credit Union branch and must be returned by May 22, 2006.”

A copy of the full ad is at Compl. App. Ex. 18 (CP 78).

In late June 2006, Columbia’s supervisory committee voted to call a special meeting of the membership to vote on three questions: (1) Should Columbia include candidates position statements in its voters pamphlet? (2) Should Columbia be prohibited from endorsing and campaigning for candidates for its elective offices? and (3) Should Columbia’s officials be prohibited from expending its funds to promote their preferred candidates for its elective offices? Complaint ¶ 27 (CP 9–10). That meeting was set for Saturday, July 22, 2006, and Columbia mailed a notice to its members that the meeting would be at 10:00 am on that date and only members attending it could vote. Complaint ¶ 32 (CP 11); Compl. App. Ex. 23 (CP

101). But at a special board meeting the evening of Thursday, July 20, 2006, the Majority Directors amended Columbia's bylaws to permit new board-adopted rules for membership meetings to supercede Roberts Rules of Order, and they then adopted rules for the impending membership meeting that allowed members to visit the meeting site anytime from 10:00 am until 3:00 pm to vote on the three questions. Complaint ¶ 33 (CP 11). The next day, Columbia notified its 250 employees (all of whom were voting members) that they and their family and friend members could visit the meeting site and cast ballots anytime before 3:00 pm. *Id.*; Letter of Cann (CP 519). Debate at the membership meeting ended by about noon, and after 3:00 pm the ballots were counted, there being about 500 cast, the "no" votes exceeding the "yes" votes on the three questions by margins of from 96 to 136 votes. Complaint ¶ 34 (CP 11).

SaveCCU notified DFI of the actions that Columbia's Majority Directors had taken to effect their desired outcome from the special membership meeting, but DFI took no administrative action. Complaint ¶ 35 (CP 11); Compl. App. Ex. 24 (CP 102-08); CP 514-19.

In early July 2006 three of the Minority Directors (including Chudy and Edgecomb) filed in Clark County Superior Court an action seeking a declaratory judgment that their positions as directors afforded them certain rights to information and to full participation in board of directors' discussions and decision-making in its management of the business and

affairs of Columbia. Complaint ¶ 29 (CP 10); CP 326–30.

At a special board meeting on August 15, 2006, Columbia’s Majority Directors amended its bylaws to define “for cause” so as to warrant a member’s immediate expulsion from Columbia to include “any other reason which in the opinion of the Board members voting for the expulsion agree is inimical to the best interests of the Credit Union.” Complaint ¶ 41 (CP 12); Bylaws Art. III § 6 (CP 23). Thereupon, the Majority Directors voted to expel immediately from membership Minority Directors Chudy and Edgecomb, the three supervisory committee members (including Marbet) who voted to call the special membership meeting, SaveCCU, Tice, and a foundation to which Marbet and Chudy were affiliated. *Id.* The principal “inimical-to-Columbia” reasons stated in the expulsion notices to Chudy, Edgecomb, Marbet, Tice, and SaveCCU were SaveCCU’s publication of the newspaper ad, the supervisory committee’s calling of the special membership meeting, and the Minority Directors’ declaratory judgment action. Compl. App. Exs. 26–30 (CP 120–38).

DCU Director Jekel was notified in advance of the planned expulsions from Columbia, but DFI took no administrative action to prevent or challenge them. Complaint ¶ 42 (CP 12–13); Decl. of Jekel ¶ 12 (CP 408).

In September 2006 the plaintiffs commenced this action in Thurston

County Superior Court against Columbia and DFI. Complaint (CP 4–16). On October 5, 2006, the court entered a preliminary injunction that restored Chudy, Edgecomb, and Marbet to their elective offices and to membership in Columbia, concluding that Columbia’s board had circumvented the process prescribed by RCW 31.12.285 for removing someone from a credit union’s board of directors or supervisory committee. Order Granting Prelim. Inj. (CP 280–88).

On October 16, 2006, Columbia’s Majority Directors then voted to suspend Chudy, Edgecomb, and Marbet from their elective offices in Columbia and called a special membership for November 15, 2006, for members to vote, in person only, on whether to remove them from office and expel them from membership. First Amended Complaint ¶¶ 43–44 (CP 596); Mot. for Injunction (CP 307-42). Columbia then undertook an extraordinary and costly publicity campaign directed at Columbia’s full membership to falsely denigrate and malign SaveCCU, along with Chudy, Edgecomb, Marbet, and other individuals identified with it. First Amend. Compl. ¶45 (CP 596); Dec. of Schafer re Columbia’s Website (CP 343–59).

Columbia permitted members at the site of the November 15, 2006, special membership meeting to cast ballots without attending the meeting. First Amend. Compl. ¶46 (CP 596). Of roughly 1,200 ballots cast, approximately 900 were marked to remove from elective office and expel

from membership Chudy, Edgecomb, and Marbet. *Id.* ¶¶ 46–47; Decl. of Jekel Ex. C (CP 425–26).

On November 15, 2006, the two other Minority Directors (Erdmann and Winterburn) resigned from Columbia’s board. Decl. of Cann ¶ 5 (CP 428). On December 28, 2006, Columbia finally held its 2006 annual membership meeting and announced the election, by mailed ballots, of six new members and one re-elected member to its board of directors. Decl. of Cann ¶ 6 (CP 429).

On May 15, 2007, the trial court granted DFI’s motion for summary judgment finding that allegations in the plaintiffs’ complaint were insufficient to constitute arbitrary and capricious action by the agency and that it had no duty to bring enforcement action. Order (CP 579).

On June 19, 2007, the trial court denied Columbia’s motion for summary judgment (CP 474–80) based on its arguments that SaveCCU and Tice had not stated a valid claim and that claims by Chudy, Edgecomb, and Marbet were moot because there were no longer members. Order (CP 600–01). The trial court permitted the plaintiffs to amend their complaint to allege the wrongfulness of Columbia’s actions taken against them in October and November of 2006. *Id.*

On July 20, 2007, Columbia filed a motion (CP 619–37) to dismiss all the plaintiffs’ claims pursuant to CR 12(b)(6) for failing to state a claim upon which relief may be granted and, alternatively, to dismiss the claims

of wrongful suspension and removal from office on the bases that Chudy and Edgecomb failed to join necessary parties and that Marbet's claim is moot by his term in office having expired with Columbia's 2006 annual membership meeting. The trial court granted Columbia's motion on December 20, 2007. Order (CP 678-84).

Plaintiffs appealed the trial court's orders dismissing its claims against DFI and against Columbia. Notice of Appeal.<sup>1</sup>

## ARGUMENT

### **1. There is a cause of action for wrongful expulsion from membership in a WA credit union.**

At a hearing on April 6, 2007, on Columbia's motion for summary judgment in which it asserted that SaveCCU and Tice had not stated a claim, the trial court questioned whether there was a cause of action for the egregiously unfair expulsions from membership. Verbatim Report of Proceeding, April 6, 2007 (VRP2) at 60-65. The Judge Casey directed the plaintiffs to file a one-page statement to define the cause of action arising from their expulsions. VRP2 64-65. Their resulting statement (CP 574) defined wrongful expulsion as follows:

“The Board of Columbia Community Credit Union  
wrongfully expelled Plaintiffs as members of the credit union.

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<sup>1</sup> Appellants' counsel overlooked listing their Notice of Appeal in the Designation of Clerk's Papers, and will now supplement it to do so. RAP 9.6(a). The orders attached to the Notice of Appeal are at CP 579 and 678.

RCW 31.12.255(1)(d) and Columbia's bylaws (Complaint App. Exh. 2, Art. II, §§ 2-6) [CP 23–24] permit expulsion only “for cause.” Columbia's expulsion reasons (Complaint App. Ex. 26-30) and process employed were insufficient, subterfuges, violative of public policy, in bad faith, fundamentally unfair, and otherwise unlawful.

“The cause of action for wrongful expulsion from a membership corporation and the judicial remedies therefore are well recognized in the common law. 18A Am. Jur .2d Corporations §§ 778-88 (2004); 12A Fletcher Cyclopedia of Corporations §§ 5696-5706.

“In *Galbraith v. Tapco Credit Union*, 88 Wn. App. 939, 954-55, 946 P.2d 1242 (1997), the court recognized a wrongful expulsion claim and found “cause” lacking where a primary reason a credit union board gave for expelling a member was his assistance to other members who asserted lawful claims against the credit union. The appellate court reversed the trial court's dismissal of the member's wrongful expulsion claim.

“The “for cause” requirement in RCW 31.12.255(1)(d) and Columbia's bylaws should be interpreted consistent with state law governing “for cause” employment terminations. Case law requires an employer's claim of “cause” to pass an “objective

reasonable belief standard.” *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989). And case law recognizes a cause of action for wrongful discharge in violation of public policy exists where an employee (whether terminable at will or only “for cause”) is fired for exercising a legal right or privilege. *Smith v. Bates Technical College*, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000).

“Courts sometimes apply public policy tests in voiding wrongful expulsions of members of nonprofit corporations and societies. *Zelenka v. Benevolent & Protective Order of Elks*, 129 N.J. Super. 379, 324 A.2d 35 (member’s public opposition to Elks Lodge’s racist policy is not grounds for expulsion), *cert. denied*, 66 N.J. 317 (1974); *Malibou Lake Mountain Club, Ltd. v. Robertson*, 219 Cal.App.2d 181, 33 Cal.Rptr. 74 (1963) (member’s good faith participation in legal proceedings against nonprofit corporation is not grounds for expulsion).

“Plaintiffs’ expulsions impair their economic and property rights. Complaint ¶¶ 44-45. [CP 13]”

In oral argument, plaintiffs’ counsel stressed that if Columbia’s directors could expel members for any reason whatsoever, they could expel all but their families and friends and then voluntarily liquidate Columbia under RCW 31.12.474, dividing its \$80 million of members’

equity among themselves. VRP2 60–61, 63–64.

After considering plaintiffs’ one-page submission, Judge Casey denied Columbia’s motion, writing in her June 1, 2007, letter ruling, “I am now satisfied that wrongful expulsion from a credit union board may be a cause of action.” (CP 586). At the next hearing, Judge Casey indicated that she may have intended to say in her June letter ruling that she recognized wrongful expulsion from “membership as well as the board” of a credit union. Verbatim Report of Proceedings, October 12, 2007 (VRP3) at 3.

Not cited in plaintiffs’ one-page statement was *Hendryx v. Peoples’ United Church*, 42 Wash. 336, 84 P. 1123 (1906), in which our state supreme court reversed a trial court ruling that *former* church members lacked standing to challenge actions of church officials due to the appellants’ expulsions (that they alleged were wrongful) saying at 344, “notwithstanding the fact that appellants joined an organization which provided that they might be summarily expelled upon entering the organization, there was an implied obligation or contract that the members would be fairly treated and that good faith would be maintained between them.”

Based on the cited authorities and precedents, this Court should recognize, as did the trial court, the claim of wrongful expulsion from membership of a Washington credit union.

**2. SaveCCU and Tice did not fail to state a claim for wrongful expulsion of membership in Columbia.**

A motion under CR 12(b)(6) seeks dismissal “for failure to state a claim upon which relief can be granted.” The standards in Washington state for deciding, and usually denying, such motions are clear. In *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 888 P.2d 147 (1995), the Washington State Supreme Court summarized the well-established law, at page 750:

“A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (quoting *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984))).”

CR 12(b)(6) motions should be granted only ‘sparingly and with care.’ *Haberman*, 109 Wn.2d at 120 (quoting *Orwick*, 103 Wn.2d at 254). ‘[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.’ *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). Hypothetical facts may be introduced to assist the court in establishing the ‘conceptual backdrop’ against which the challenge to the legal sufficiency of the claim is considered. *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 298 n. 2, 545 P.2d 13 (1975).”

We have held that in determining whether such facts exist, a court may consider a hypothetical situation asserted by the complaining party, not part of the formal record, including facts alleged for the first time on appellate review of a dismissal under the rule. *Halvorson*, 89 Wn.2d at 675. Neither prejudice nor unfairness is deemed to flow from this rule, because **the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.** See *Halvorson*, 89 Wn.2d at 674-75.” [Emphasis added.]

And in *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 962 P.2d 104 (1998), that Court restated that standard, at page 329:

“Under CR 12(b)(6), a complaint can be dismissed for ‘failure to state a claim upon which relief can be granted.’ A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. [fn23— *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff’d*, 113 Wn.2d 148, 776 P.2d 963 (1989); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).] In such a case, a plaintiff’s allegations are presumed to be true and a court may consider hypothetical facts not included in the record. [fn24— *Cutler v. Philips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995).] **CR 12(b)(6) motions should be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’** [fn25— *Hoffer*, 110 Wn.2d at 420 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 604 (1969)); *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984).” [Footnote citations inserted; emphasis added.]

*E.g.*, *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 122, 11 P.3d 726 (2000). And in *Hoffer*, 110 Wn.2d at 421, the Court reviewed CR 12(b)(6) motion rulings, saying first:

“[O]ur task is to determine only **if there is any possible set of facts for each claim under which recovery could be granted.** In many instances the bondholders have alleged multiple theories under which they could recover under a single claim. Once we have determined that recovery for a single claim is possible under one theory or set of facts, we will not address the sufficiency of the other theories. Accordingly, we have not addressed all the parties’ arguments concerning each claim.” [Emphasis added.]

So if “any possible set of facts”—even facts that “can be conceived”—might be found through pre-litigation discovery that would justify relief on a claim asserted, then a CR 12(b)(6) motion as to that claim must be denied.

In Columbia’s CR 12(b)(6) motion that the trial court granted it made essentially the same argument (CP 623–25) that it had made in its earlier CR 12(b)(6) motion (479–80) that the trial court had denied on June 19, 2007—that SaveCCU’s and Tice’s claims of wrongful expulsion from membership in Columbia should be dismissed because they “do not now allege *how or why* their expulsions from membership are unlawful.” (CP 623) But as our state supreme court ruled in *Bravo, supra*, “the inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived,” not whether specific facts are explained in detail in the complaint.

In *Galbraith, supra*, the TAPCO Credit Union board cited a long list of reasons, at 943–44, for expelling Galbraith from membership. But this Court held, at 955, that even though that board may have cited some legal reasons for expelling Galbraith from TAPCO, because their primary reason was his lawful assistance to former employees with discrimination claims against the credit union, the trial court improperly dismissed Galbraith’s claim of wrongful expulsion.

The primary reason for the Majority Directors’ expulsion of

SaveCCU and Tice from membership in Columbia appears from their expulsion notices (CP 136–39) to have been their participation in the publication of the newspaper ad inviting like-minded members to run against the incumbents for election to Columbia’s board of directors. (CP 78) That ad was factual, not defamatory, and consistent with democratic governance structure of Washington credit unions. RCW 31.12.105–.367. Thus, the expulsions of SaveCCU and Tice were not in good faith, fair, and consistent with public policy. Columbia’s motion to dismiss for failing to state a claim under CR 12(b)(6) should have been denied.

**3. Chudy, Edgecomb, and Marbet did not fail to state a claim for wrongful suspension and removal from elective office in Columbia.**

The WCUA does not permit a credit union’s board of directors to unilaterally to remove a duly elected director or member of its supervisory committee. Instead, removal requires a vote of the membership at a special meeting called for that purpose *after* the member has been suspended by the board for “cause,” as RCW 31.12.285 provides:

**Suspension of members of board or supervisory committee by board - For cause.** 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.

The “cause” necessary for suspension of an elected board or committee member is defined in that statute: (1) demonstrated financial irresponsibility, (2) breach of fiduciary duty, or (3) activities threatening the safety and soundness of the credit union. RCW 31.12.005(23) defines “unsafe and unsound condition” for purposes of the WCUA as a credit union’s insolvency or conditions likely to produce insolvency or an imminent danger of losing its share and deposit insurance.

The Majority Directors suspended Chudy, Edgecomb, and Marbet from office in October for the same reasons listed in their attempted expulsions of them from membership the prior August. Notice of Suspension (CP 317–22); Notices of Expulsion (CP 120–35). None of the reasons given by the Majority Directors for their purported expulsions and suspensions of Edgecomb, Chudy, and Marbet could reasonably be considered threats to Columbia’s safety and soundness or to be acts of “demonstrated financial irresponsibility.” The only colorable “cause” under RCW 31.12.285 that Columbia’s majority board might claim as applicable is that some act of Chudy, Edgecomb, or Marbet was a breach of their fiduciary duty to Columbia. The Notices of Expulsion for the those three elected officials assert that they breached their duty of loyalty to Columbia by (1) not preventing SaveCCU from publishing its “Help

Wanted” advertisement, but every factual assertion made in that ad was truthful, none of those three individuals participated in SaveCCU’s decision to publish that ad, and none of them had the power to prevent SaveCCU’s publication of that ad. Challenges to Expulsions by Chudy and Marbet. CP 202–230. Thus, neither Chudy, Edgecomb, nor Marbet breached their fiduciary duty to Columbia in relation to SaveCCU’s publication of its “Help Wanted” ad.

The Notices of Expulsion of Chudy and Edgecomb claim they breached their duty of loyalty to Columbia by filing, with director Emmy Winterburn, a declaratory judgment action against Columbia’s five majority directors and its CEO for denying them access to a various governance and operations records of Columbia and denying them the right to participate meaningfully in the governance of Columbia. (Their complaint is at CP 326–30.) They and their counsel, Peggy Hennessy, asserted in good faith that their action was necessary in order for them, as elected directors, to fulfill their fiduciary duties to Columbia. The Notice of Expulsion falsely asserts that those plaintiffs only sought certain records (*i.e.*, conversion records) as to which the defendants had a colorable — but never adjudicated — basis to withhold from them, but their claim was much broader than that. There is no reasonable basis to claim that Chudy and Edgecomb’s act, with their fellow director Emmy Winterburn, of bringing their lawsuit in good faith in order to fulfill their

fiduciary duties was itself an act in breach of their duty of loyalty to Columbia.

The Notice of Expulsion directed at Marbet asserts that he acted contrary to law by his voting with the majority of the Supervisory Committee members on June 30, 2006, to call the special membership meeting for the purpose of voting on three questions relating to Columbia's impending 2006 annual election. If his actions actually were contrary to law, then he would have been breaching his fiduciary duty to Columbia. But as his request for reinstatement points out (CP 215–230), the Supervisory Committee's calling of the special membership meeting was consistent with its power under RCW 31.12.195 and Columbia's bylaws, its role "as a check and balance to the Board of Directors" under Columbia's policies, and its role as asserted by DFI to "ensure board is in compliance with laws, bylaws, and policies." Marbet's actions, as one of the four members of the Supervisory Committee certainly were not contrary to law or in breach of any fiduciary duty to Columbia.

In conclusion, the Notices of Expulsion did not provide any "cause" within RCW 31.12.285 for the suspensions of Chudy, Edgecomb, or Marbet from their elective offices. Without a statutory "cause" for their suspension, there was no statutory basis for holding the special membership meeting on November 15, 2006, for Columbia's members to vote on their removal from their elective offices. Chudy, Edgecomb, or

Marbet did not fail to state a claim for wrongful suspension and removal from elective office in Columbia.

**4. Chudy and Edgecomb did not fail to join necessary parties.**

Columbia argued that Chudy and Edgecomb failed to join as necessary parties individuals who served as directors of Columbia subsequent to their removals. CP 632–34. The trial judge ruled orally that if she determined not to dismiss Chudy and Edgecomb’s claims based on Columbia’s CR 12(b)(6) argument, that she would allow them five days from her ruling to join Mr. Garey and Mr. Schwenk as necessary parties. VRP3 at 21. Columbia had identified Dexter Garey and Daniel Schwenk as having been appointed as interim directors following the November 15, 2006, special membership meeting at which Chudy and Edgecomb were removed (CP 632), but noted that they, in turn, were replaced by other individuals elected at Columbia’s December 28, 2006, annual meeting (*Id.*) Interestingly, the two other Minority Directors (Erdmann and Winterburn) resigned also on November 15, 2006 (CP 428), and Columbia announced shortly thereafter the appointment of *three* interim directors, Garey, Schwenk, and Dale Magers, each to serve only until the December 28, 2006, annual meeting. (CP 425).

In Columbia’s motion, it actually argued that the allegedly necessary parties were Garey and Charles McDonald, for they had received the

fewest votes in the election announced at the December 28, 2006, annual membership meeting. (CP 633 at n6.)

The necessary-party argument should be rejected. Members of Columbia's board are not elected or appointed to designated positions (*e.g.*, positions designated by a number or a constituent voting group). According to Columbia's bylaws, which can be amended unilaterally by its board at any meeting, its nine directors serve three-year terms, and at its annual elections those candidates receiving the most votes are assigned to the board vacancies with the longest remaining terms. Bylaws Art. IV sec. 5 and Art. V sec. 2. (CP 27–28.) Columbia admitted that the interim directors appointed by the board following the November 15, 2006, membership meeting were replaced when Columbia's membership elected seven directors at its December 28, 2006, annual meeting.

If the individuals serving on Columbia's board of directors are necessary parties, then plaintiffs would need to add new defendants and dismiss old defendants whenever an election is held or a vacancy occurs and is filled by an appointee. Perhaps plaintiffs should have named as a defendant "The Board of Directors of Columbia Community Credit Union," but the board is not an entity, and plaintiffs assert that the naming of the credit union itself is functionally the same because the board determines Columbia's acts in this litigation and the acts complained of in this litigation.

Columbia argued that the interests of individuals serving on its board of directors at the conclusion of this action would be impeded by a judgment declaring void the suspensions and removals of Chudy and Edgecomb. That assertion is unfounded because this trial court has broad equitable powers to correct Columbia's inequitable conduct. *E.g., King County Dep't of Cmty. & Human Servs. v. Nw. Defenders Ass'n*, 118 Wn. App. 117, 127, 75 P.3d 583 (2003) ("A court acting in equity must act with restraint, but in extreme cases must have wide latitude to respond to the particular circumstances presented.") The trial court could, for example, restore Chudy and Edgecomb to Columbia's board by increasing its number by two for the number of months remaining in their terms when they were wrongfully suspended and removed from their elective positions. Such an equitable remedy would not impair the interest of any of Columbia's then serving directors, but it would clearly communicate to Columbia's members the wrongfulness of their removals in 2006.

**5. Marbet's claim for wrongful suspension and removal from elective office was not rendered moot by the expiration of his term of office during the pendency of the litigation.**

Columbia moved the trial court to dismiss (CP 636), as it did, Marbet's claim of wrongful suspension and removal as moot. Its asserted basis was that Marbet's term of office on the supervisory committee to which he was elected had ended with Columbia's annual membership

meeting on December 28, 2006. The sole support Columbia cited for this argument was *Cotton v. City of Elma*, 100 Wn. App. 685, 693, 998 P.2d 339, *review denied*, 141 Wn.2d 1029 (2000), in which a former municipal judge filed a quo warranto action against a city and the judge who succeeded her for a term that had since expired. Given the expiration of that term, the defendants asserted that the quo warranto action was moot. Since the plaintiff was seeking damages and declaratory relief, the court found her claim not to be moot. Marbet did not bring a quo warranto action against any official of Columbia, but was seeking a declaratory judgment that his suspension and removal were unlawful.

If ultimately successful in this action, Marbet may well again seek election to Columbia's supervisory committee or its board of directors. However, unless declared unlawful by a court, his 2006 suspension and removal likely will stigmatize him to Columbia's voting members.

A case is considered moot if there is no longer a controversy between the parties, if the question is merely academic, or if a substantial question no longer exists. But it is not moot if a court still can provide some effective relief. Such relief might even take the form of the public cleansing of a party's reputation caused by the wrongful actions of another. In *Hough v. Stockridge*, 113 Wn. App. 532, 537, 54 P.3d 192 (2002), *rev'd on other grounds*, 150 Wn.2d 234 (2003), the court said, "The Houghs claim that the court can still provide the 'effective relief' by

cleansing their records and reputations ‘of the stigmatizing, erroneous and void orders.’ . . . . We hold this case is not moot; the Houghs seek to cleanse their record of the continuing stigma of the antiharassment order.” The Hough court was following precedent of the Washington State Supreme Court in *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983), which held a challenge to juvenile truants’ previously-served contempt incarcerations was not moot because the court could provide them effective relief by “cleansing their records.”

In this case, this Court can provide Marbet some similar effective relief by cleansing from his record of service to Columbia the stigma caused by his wrongful removal and suspension from its supervisory committee in 2006.

In addition, if a credit union elected official’s claim of wrongful removal becomes moot the moment her or his elective term ends, then wrongful removals are effectively beyond judicial review whenever the period of the remain term is less than the period to time necessary for adjudication and appeal of the claim. That effectively precludes judicial review of any such claims.

**6. Chudy, Edgecomb, and Marbet did not fail to state a claim of wrongful expulsion from membership in Columbia.**

Columbia moved (CP 625–28) for dismissal pursuant to CR 12(b)(6) of the wrongful expulsion claims by Chudy, Edgecomb, and Marbet because they “have not alleged that their expulsion proceedings were irregular, in bad faith, or in violation of Columbia’s bylaws and they have not identified any law that has been violated.” As noted above, the test under CR 12(b)(6) is whether any facts which would support a valid claim can be conceived, not whether specific facts are explained in detail in the complaint.

In Plaintiffs’ First Amended Complaint, at ¶¶ 45-45 (CP 596), they alleged that from October 16 to November 15, 2006, Columbia waged a costly publicity campaign to falsely denigrate and malign Chudy, Edgecomb, Marbet, and SaveCCU, and that Columbia allowed members to vote without actually attending the meeting, but did *not* allow members to vote by mail. At ¶¶ 52-54, they alleged that Columbia’s conduct of its costly and false publicity campaign to cause members to remove from office and expel from membership Chudy, Edgecomb, and Marbet violated principles of corporate governance and was unlawful. Columbia’s website maligned them as “radical, self-serving activists” and “offenders” who were “motivated by the possibility of personal gain,” and about whom a judge, referring to Judge Casey, said they “must be suspended.”

(CP 348, 350). Columbia published for its membership in a special meeting voters pamphlet its notices of expulsion of Chudy, Edgecomb, and Marbet in which it allegedly found these three officials acted “disloyally and unlawfully” and “contrary to law” with respect to the newspaper ad, that Chudy and Edgecomb “breached their fiduciary duty” with respect to their declaratory action, and that Marbet acted “contrary to law” with respect to calling the special membership meeting in June 2006. (CP 350, 663).

In Columbia’s motion, it cited case law in the context of elections for public office that recognizes a First Amendment right of private parties to conduct deceptive and false publicity campaigns against candidates for public office. That case law is simply inapplicable to the conduct of the directors and officers of Columbia when using Columbia’s funds and resources to present false information to Columbia’s members concerning issues to be voted on by them. It is well-recognized that directors and officers of a credit union, just like those of any corporation, have a fiduciary duty of candor to disclose accurately all germane and material information to the corporation’s members/shareholders when calling of those owners to vote on matters of corporate governance. The Washington State Department of Financial Institutions directed Columbia’s officials concerning that duty of candor toward their members in Interpretive Letter I-05-05 (CP 483), quoting the following from

Fletcher Cyclopedia of Corporations § 837.70:

A board's duty of complete candor to its shareholders to disclose all germane or material information applies to matters of corporate governance as well as to corporate transactions. Directors are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.

It is well established corporate common law that courts will set aside a vote by corporate shareholders/members when their board has breached its duty of candor to disclose to them all germane and material information on the issue voted upon. One of the leading cases in that regard is *Smith v. Van Gorkom*, 488 A.2d 858, 889-93 (Del. 1985), in which the court, at Part V of its opinion, nullified a shareholders' vote approving a merger where the board of directors had given the shareholders false and misleading information, and had omitted material information, concerning the transaction prior to their vote. Washington state courts commonly apply doctrines of corporate common law as established by the Delaware state courts. *E.g.*, *Wagner v. Foote*, 128 Wn.2d 408, 413-14, 908 P.2d 884 (1996) (Applying corporate opportunity doctrine established by Delaware case law.)

Chudy, Edgecomb, and Marbet did not fail to state a claim of wrongful expulsion from membership in Columbia.

**7. Plaintiffs did not fail to state a claim that Columbia’s special membership meeting on July 22, 2006, was unlawfully conducted.**

Columbia’s CR 12(b)(6) motion, it argues (CP 630–32) that even if the irregularities that Plaintiffs allege “unlawfully corrupted the democratic process” at the membership meeting held July 22, 2006, actually did occur, the Court should dismiss Plaintiffs’ claim. Columbia argued for such a dismissal because “plaintiffs have *not* alleged that any of the complained-of conduct affected the outcome.” But under CR 12(b)(6), if it can be conceived that the alleged irregularities affected the outcome of that meeting, Plaintiffs’ claim must not be dismissed. It is inconceivable that a reasonable person would not conceive that such irregularities may have affected the outcome. And considering the fiduciary duty that a credit union’s directors and officers owe to all the members when communicating to them information about membership meetings and voting, as discussed above, it appears plain that the alleged irregularities breached that fiduciary duty.

As Plaintiffs alleged at ¶¶32-34 of the First Amended Complaint (CP 594) the voting spread on the three issues presented at that membership meeting was from 96 to 140 votes, and that Columbia selectively notified only its 250 employees that they could cast votes until 3:00 pm at the site of the 10:00 am meeting.

**8. Plaintiffs did not fail to state a claim that Columbia's special membership meeting on November 15, 2006, was unlawfully conducted.**

In Columbia's CR 12(b)(6) motion at CP 629–30, it argued that the trial court should dismiss plaintiffs' claim that actions taken against them at the November 15, 2006, special membership meeting was unlawfully conducted and void. A declaration of invalidity of the actions at the subject membership meeting is an inherent element of the Chudy, Edgecomb, and Marbet claim that they were wrongfully expelled from membership, as discussed above.

Plaintiffs' First Amended Complaint, at ¶ 46, alleged procedural irregularities in the conduct of the November 15, 2006, special membership meeting in that members were allowed to vote without actually attending the meeting. (CP 596). And though for the 2004 special meeting to vote on the removal of directors the Clark County Superior Court had ordered, based upon Columbia's arguments (CP 332–42), that members must be permitted to vote by mail (Complaint ¶13, CP 6), in the 2006 special meeting Columbia did not permit mail-in voting. Columbia's claim of a bylaw provision barring voting by mail was disingenuous considering that its board could amend its bylaws at any meeting, and had done so at least thirteen times in the twelve months before calling the special membership meeting. Declaration of Chudy at 3 and Ex. B (CP 365, 369–379).

Columbia's argued at CP 630, that plaintiffs' claims about its false publicity campaign preceding that meeting was an allegation of fraud under CR 9(b) that should have been stated with particularity. Columbia cited no authority for that argument, which is unfounded. But even if that rule did apply, plaintiffs' 12-page First Amended Complaint and its 123-page Appendix to Complaint provide ample particularity.

**9. DFI acted arbitrarily and capriciously in refusing to enforce applicable law when apprised of the actions of Columbia's board concerning the special membership meeting on July 22, 2006, and concerning the membership expulsions at the special board meeting on August 15, 2006.**

An established line of Washington cases indicates that an agency's action or inaction must not be arbitrary or capricious. In DFI's motion for summary judgment, at 5-7, (CP 394-97), it suggests that its failure to enforce applicable law is not subject to review under RCW 34.05.570(4)(b), but in the sole Washington case it cites for that proposition the state supreme court measured the inactions of two agencies, Department of Corrections ("DOC") and Department of Labor and Industries ("DLI"), by the arbitrary or capricious standard. *Nat'l Elec. Contractors Assoc. v. Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999).

We note, however, that DOC's discretion is not absolute. Agency action is scrutinized under an arbitrary and capricious standard. RCW 34.05.570(4)(c)(iii). In general, agency action is deemed arbitrary and capricious if it is willful and unreasoning, and taken

without consideration and in disregard of the facts and circumstances. See *Heinmiller v. Department of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995). Under this standard, DOC’s decision to utilize inmate labor must be 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.]

*Nat’l Elec. Contractors* at 28-29.

DLI’s decision not to enforce the electrical licensing statute was not arbitrary and capricious.

*Nat’l Elec. Contractors* at 32.

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

The first issue concerns the failure-to-act claims brought by the conservation organizations under RCW 34.05.570(4)(b). In those claims, the organizations asserted that the agencies failed to perform a duty to adopt rules that they are required by statute to promulgate. As noted above, the trial court held that the conservation organizations could not maintain their failure-to-act claims under RCW 34.05.570(4)(b). A question before us, therefore, is whether the Court of Appeals correctly concluded that the conservation organizations may obtain judicial review of an agency’s alleged failure to adopt rules. We recently answered that question when we affirmed the decision of the Court of Appeals in *Rios*, 145 Wn.2d 483. There we indicated pursuant to RCW 34.05.570(4)(b) that plaintiffs, in that case agricultural pesticide handlers, can obtain judicial review of an agency’s failure to adopt rules. In such a challenge, the plaintiff bears the

burden of demonstrating that the agency's decision to forgo rule making was unconstitutional, outside the statutory authority of the agency, "arbitrary and capricious," or made by unauthorized persons. RCW 34.05.570(2)(c). We see no reason to depart from our decision in *Rios*.

More recently, in *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), the 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."

Plaintiffs assert that there is at least a question of fact as to whether DFI acted arbitrarily and capriciously in its inconsistent administrative actions concerning governance issues at Columbia from 2004 through 2006. It appears that DFI/DCU's close supervision and intervention into Columbia's governance ceased dramatically once DCU's former director, Parker Cann, became Columbia's CEO.

For example, DFI's dramatically opposite positions in 2004 and 2006 on the propriety of Columbia's board's adoption of strategic special membership meeting procedures illustrates the arbitrary or capricious nature of its inactions concerning Columbia's corporate governance. By an e-mail message dated July 30, 2006 (CP 102-08), plaintiffs' counsel objected to DFI's inaction over Columbia's board majority's last-minute adoption of special voting procedures (announced only to their

employees) for the special membership meeting on Saturday, July 22, 2006, observing that DFI had articulated its strong objection to such a strategy by Columbia's board in January 2004. At DFI's direction, Columbia CEO Parker Cann responded to Schafer and admitted that the meeting procedures adopted Thursday evening, July 20, 2006, were communicated only to Columbia's employees. (CP 519). Such diametrically opposite positions by DFI on substantially the same fact situation present a genuine issue of whether its actions were arbitrary or capricious.

DCU Director Jekel acknowledged having been contacted by Columbia CEO Cann in July 2006 about Columbia's plan to expel the plaintiffs from membership in Columbia, yet she took no action to challenge that. Decl. of Jekel ¶12 (CP 408). DFI/DCU claimed in its motion for summary judgment that it "rarely gets involved in issues relating to the governance of credit unions." In plaintiffs' response to that motion, it cited many, many examples of DCU having gotten involved in issues relating to the governance of Columbia. (CP 520–25).

One of the statutory primary responsibilities of the DCU director is to protect "the integrity of credit unions as cooperative institutions." RCW 31.12.015. To understand what the legislature intended by directing DFI to protect "the integrity of credit union as cooperative institutions," one should review the history of the WCUA since its first enactment in 1933.

That history was summarized under the issue “*What are credit unions, and what laws apply to them?*” as part of the appeal brief filed by plaintiffs Chudy and Edgecomb in the Court of Appeals in January 2007. Decl. of Schafer, Ex. 3 (CP 492–506). The history of the WCUA clearly indicates that members’ active participation in the democratic governance of their credit unions was always expected and intended by the legislature. The legislative directive to the state regulatory official to protect “the integrity of credit unions as cooperative institutions” was added in 1984 (Laws of 1984, Ch. 31 §3), at which time the legislature added a requirement that regular membership meetings “be conducted according to the customary rules of parliamentary procedure” (§20), and that after 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 bylaws and with customary rules of parliamentary procedure.” §21.

The history of the WCUA and of DFI’s official positions as summarized at CP 492-506 indicate that DFI has consistently applied general corporate common law to decide questions of corporate governance of credit unions.

Consistent with DFI’s application of general corporate common law to credit union governance issues, the SaveCCU and Tice in 2004 sought a declaratory judgment from Clark County Superior Court that Columbia’s

members had certain governance rights (*e.g.*, to enforce bylaw provisions, to access corporate records, to hold directors accountable for fiduciary breaches). On September 15, 2004, candidates identified as SaveCCU supporters were elected to Columbia's four open board positions and three open supervisory committee positions. Complaint ¶17 (CP 7). On September 22, 2004, DFI held compulsory meetings with Columbia's new supervisory committee and its new board. At those meetings DFI officials asserted that the newly elected directors and supervisory committee members had a conflict of interest because of SaveCCU's lawsuit, so DFI directed them not to gather any information or participate in any discussions pertaining to the lawsuit. DFI's agendas and directives are Exhibit 4 to Schafer Declaration. (CP 507–13).

Seven months later, when several members of SaveCCU, including Plaintiffs Chudy and Edgecomb, had filed as candidates for Columbia's board and supervisory committee, DFI exercised its regulatory authority to direct Columbia's board of directors to provide specific negative information about those candidates in the election materials sent to its members. Exhibit 1 to Schafer Declaration. (CP 483–88). In DCU Director Jekel's letter of April 27, 2005, to Columbia's board, she cited a leading corporate law treatise's statement of the "fundamental rule of corporate law" that directors have a fiduciary duty of candor to their shareholders to disclose fully and fairly to them all known material

information when seeking shareholder action on governance matters. *Id* at

4-5. Based upon that general principle of corporate governance, DCU

Director Jekel there directed Columbia's board as follows:

In order for a credit union's board of directors to properly exercise its fiduciary duty to all members, the board should ensure disclosure of a candidate's conflicts of interest arising from involvement in litigation pending against the credit union ... in election materials to the credit union's members.

....

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

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

The director of the Department of Financial Institutions, as delegated to the Division of Credit Unions, has the authority to require credit unions to conduct business in compliance with the Washington State Credit Union Act (Act). RCW 31.12.516(1). The director also has the authority to interpret the provisions of

the Act. RCW 31.12.516(3). Therefore, the Division may require a credit union board of directors to disclose a candidate's conflict of interest to members prior to the election of the board and supervisory committee.

[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. (CP 8)

Several other examples of DFI asserting regulatory authority in credit union governance matters can be shown. In January 2004, DFI discovered that Columbia's then CEO, David Doss, was serving on its board of directors notwithstanding its bylaws provision that barred employees from serving on its board. DCU Director Jekel then required that Doss immediately resign from the board or that the board amend its bylaws to remove its prohibition. She further required that Columbia's board ratify all its actions in which Doss had participated illegally as a director.

Exhibit 2 to Schafer Declaration. (CP 489-91)

In its letter of January 22, 2004 (Exhibit A to Jekel Declaration, CP 411-17) concerning the petition by SaveCCU supporters calling a special membership meeting to vote on the removal of Columbia's directors,

DCU asserted its authority to enforce common law principles of corporate governance. On page 5 of that letter, Director Jekel noted that Columbia's board had amended its bylaws to empower itself to adopt procedural rules for any membership meeting. She indicated that DCU would object to any bylaw amendments or meeting rules adopted by Columbia's board "which could materially affect the resulting outcome of a Special Membership Meeting in a manner different than would otherwise happen if the Board did not adopt the amendments or temporary rules." She applied general corporate common law, stating:

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

Consistent with the corporate common law doctrine that fairness to shareholders/members is required in governance matters, DFI/DCU caused Columbia to enter into with it, on February 5, 2004, a Settlement Agreement (Exhibit B to Jekel Declaration, CP 418-23) having specific and detailed procedural requirements for Columbia's impending election and annual meeting which agreement was expressly entered into "in order to promote fairness in corporate governance for the benefit of the Columbia Membership." *Id* at ¶3.0.

The last illustration of DFI asserting regulatory authority in credit union governance matter is DCU Director Jekel's 5-page letter of June 30,


2006, to Plaintiff Robert Tice responding to his e-mail messages questioning the lawfulness of certain amendments to Columbia's bylaws. Compl. App. Ex. 20 (CP 80–84). On page three of her letter, which she sent to Columbia's officials, Director Jekel asserted that certain bylaw amendment adopted by Columbia's board on June 5, 2006, were invalid and "should be rescinded." And she wrote on page four, "I am hereby directing Columbia's board of directors to rescind those portions of the April 25, 2006 bylaw amendments that pertain to a ratification vote."

It is apparent from these examples that DFI/DCU wields its regulatory authority as to credit union governance matters whenever its officials are inclined to do so. There is sufficient evidence to raise a question of fact as to arbitrary and capricious actions by its refusal to enforce applicable law when apprised of the actions of Columbia's board concerning the special membership meeting on July 22, 2006, and concerning the membership expulsions at the special board meeting on August 15, 2006.

### CONCLUSION

For the reasons argued above, the trial court dismissal of Plaintiffs' claims should be reversed.

Respectfully submitted this 23<sup>rd</sup> day of June, 2008.

  
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