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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CHARLES E. ORTEGO, <i>et al.</i> ,	)	No. C14-1840RSL
Plaintiff,	)	
v.	)	ORDER OF DISMISSAL
LUMMI ISLAND SCENIC ESTATES COMMUNITY CLUB, INC., <i>et al.</i> ,	)	
Defendant.	)	

This matter comes before the Court on “Defendants’ Motion for Partial Summary Judgment Regarding Remaining Claims.” Dkt. # 146. In their Second Amended Complaint, plaintiffs assert a number of causes of action arising out of an alleged scheme to defraud the general membership of the Lummi Island Scenic Estates Community Club (“LISECC”) into funding the operation and repair of a water system that benefits only a fraction of the membership. The two main avenues through which the alleged scheme was carried out were by continuing to charge dues and fees after LISECC’s authority to act on behalf of the homeowners had ended and by reducing dues and fees associated with bound lots. The Court has already found, *inter alia*, (1) that LISECC retains the authority to govern, make assessments, and/or impose dues, charges, or liens on parcels within Lummi Island Scenic Estates (“LISE”), (2) that the bound lots exemption is enforceable, and (3) that no reasonable jury could conclude that the named defendants were trying to hide or obfuscate their efforts to spread the costs of the water system to every member of the community. Plaintiffs’ primary RICO claim has therefore been dismissed. Dkt. # 199. Defendants seek summary judgment on the remaining claims.

ORDER OF DISMISSAL

1 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
2 the nonmoving party, there is no genuine dispute as to any material fact that would preclude the  
3 entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears  
4 the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp.  
5 v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record”  
6 that show the absence of a genuine dispute of material fact (Fed. R. Civ. P. 56(c)). Once the  
7 moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party  
8 fails to designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp.,  
9 477 U.S. at 324. The Court will “view the evidence in the light most favorable to the nonmoving  
10 party . . . and draw all reasonable inferences in that party’s favor.” Krechman v. County of  
11 Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury  
12 genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the  
13 “mere existence of a scintilla of evidence in support of the non-moving party’s position will be  
14 insufficient” to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049  
15 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Summary judgment  
16 should be granted where the nonmoving party fails to offer evidence from which a reasonable  
17 jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509,  
18 514 (9th Cir. 2010).

19 Having reviewed the memoranda, declarations, and exhibits submitted by the parties,<sup>1</sup> the  
20 Court finds as follows:

21 \_\_\_\_\_  
22 <sup>1</sup> The Court has not considered documents and photographs, most of which are of recent vintage,  
23 that were not properly disclosed during discovery. Nor will defendants be permitted to rely on advice of  
24 counsel that was withheld as privileged. Plaintiffs’ motion to strike (Dkt. # 191) is GRANTED.

25 Despite the obvious evidentiary and procedural problems with many of the documents attached  
26 to plaintiff Ortego’s declaration, the Court has assumed that the authenticity of and foundation for the  
documents could be established at trial. Defendants’ request to strike those documents (Dkt. # 186 at 19)  
is therefore DENIED. Statements in declarations that are offered without any indication of personal  
knowledge, however, have not been considered. To that extent, defendants’ motion to strike is  
GRANTED.

1 **A. Breach of Contract and Objections to Business Decisions**

2 In their response memorandum, plaintiffs spend an inordinate number of pages discussing  
3 leaks in and maintenance of LISECC's water system, LISECC's compliance with the terms of a  
4 Drinking Water State Revolving Fund ("DWSRF") Loan from the Washington State Department  
5 of Health, and the wisdom of various decisions regarding fundraising, allocation of resources,  
6 on-line records, and evaluating/responding to questions regarding LISECC's authority. Plaintiffs  
7 have not asserted – and do not have standing to assert – a breach of contract claim on behalf of  
8 the Department of Health. Nor does a simple disagreement regarding policy choices and  
9 maintenance priorities give rise to a cause of action. Absent actionable misconduct, plaintiffs'  
10 remedy lies in the election of board members who agree with them, not in a federal lawsuit. To  
11 the extent any of these decisions, acts, or failures to act are relevant to a claim that has been  
12 asserted in this litigation, they are considered below.

13 **B. Breach of Fiduciary Duty**

14 To establish a breach of fiduciary duty claim, plaintiffs must show: "(1) that a fiduciary  
15 relationship existed which gave rise to a duty of care on the part of the defendant to the plaintiff;  
16 (2) that there was an act or omission by the fiduciary in breach of the standard of care; (3) that  
17 plaintiff sustained damages; and (4) that the damages were proximately caused by the fiduciary's  
18 breach of the standard of care." Tomchak v. Greenberg, 2016 WL 4081194, at \*3 (Wn. App.  
19 Aug. 1, 2016). The existence of a fiduciary relationship between the director defendants and the  
20 LISECC is not in dispute. Directors of a homeowners' association such as LISECC are required  
21 to "act in all instances on behalf of the association" unless otherwise provided in the  
22 association's governing documents and must perform their duties "in good faith, in a manner  
23 such director believes to be in the best interests of the corporation, and with such care, including  
24 reasonable inquiry, as an ordinarily prudent person in a like position would use under similar  
25 circumstances." RCW 64.38.025 and RCW 24.03.127. Regardless of whether the business  
26 judgment rule applies, both good faith and reasonable care are required. Riss v. Angel, 131

1 Wn.3d 612, 632-33 (1997).

2 Plaintiffs argue that defendants acted unreasonably by violating the procedures set forth  
3 in LISECC's bylaws for assessing charges against members, violating Washington regulations  
4 regarding municipal water supplies, violating the terms of the DWSRF loan, forcing non-water  
5 users to subsidize the water service, and generally obfuscating facts and hiding documents to  
6 conceal their misdeeds. The Court has reviewed the documents plaintiffs submitted (many of  
7 which are the same documents that were presented in support of the general RICO claim) to  
8 determine whether there is any inference of bad faith or incompetence/unreasonableness. There  
9 is not.

10 For every allegation of wrongdoing, either the facts do not support the allegation or there  
11 is a reasoned explanation for the decision, action, or failure to act with no hint of bad faith. For  
12 example, there is no evidence from which one could draw the inference that defendants violated  
13 Bylaw Section 4.5. The dues and assessments levied to pay for capital improvements to the  
14 water system – assets that are owned by all LISECC members even if used by less than all  
15 members – were approved at meetings of the membership by a majority of the members present  
16 as specified in the bylaws. Similarly, charges for the water service itself were appropriately  
17 levied against individual lots. Plaintiffs' gloss on the bylaws – that dues and assessments can be  
18 levied only if they "benefit all the members in common" and that charges are fees for service  
19 that "must be charged at cost" – are not supported by the language of Section 4.5 and cannot  
20 support the claimed breach. With regards to the alleged violations of Washington regulations,  
21 plaintiffs' cite to the definitional section of the code that applies to Group A Public Water  
22 Supplies and to a non-existent provision, WAC 26-290-020 & (1)(b)(i)&(ii). Even if the Court  
23 assumes plaintiffs are relying on WAC 246-290-020, there are no subsections to section (1)(b)  
24 and there are no limitations regarding allowable leaking percentages in that regulation. To the  
25 extent LISECC is, in fact, required to keep unexplained water losses within certain bounds,  
26 plaintiffs make no attempt to show that, given LISECC's limited membership, the financing

1 options available, and the emergent repair needs of the water system, the board's decisions  
2 regarding repair and upgrade priorities were unreasonable. Nor have plaintiffs shown that the  
3 board violated the terms of the DWSRF loan, that LISECC is otherwise in danger of defaulting  
4 on the loan or incurring penalties, that charging all owners in LISE for upgrades and  
5 maintenance to the common water system was unauthorized or illegal, or that any of the alleged  
6 misstatements or lack of transparency denotes bad faith, incompetence, or unreasonableness.

7 In the context of this motion for summary judgment, it is plaintiffs' burden to come  
8 forward with admissible evidence in support of their claim that defendants breached their  
9 fiduciary duties to the membership. They cannot simply provide citations to random documents,  
10 strung together with dastardly-sounding words and their own firm conviction of wrongdoing.  
11 The documents actually have to support the chosen story line, not just form an innocent  
12 backdrop on which speculation and conspiracy theories are hung. That is all we have in this case,  
13 and it is not enough to create a triable issue of fact regarding a breach of fiduciary duty.<sup>2</sup>

#### 14 **C. Dissolution**

15 RCW 24.03.266 authorizes the court to dissolve a corporation upon a finding that the  
16 directors have acted illegally, oppressively, or fraudulently or that the corporate assets are being  
17 misapplied or wasted. Judicial dissolution is a remedy provided by the Court, not the jury. Scott  
18 v. Trans-Sys., Inc., 148 Wn.2d 701, 707 (2003). “[T]he remedy of liquidation is so drastic that it  
19 must be invoked with extreme caution” after considering “whether that solution will be  
20 beneficial or detrimental to all the shareholders or injurious to the public.” Id. at 708-09 (internal  
21 citations omitted). Plaintiffs bear the burden of proving, by a preponderance of the evidence, the  
22 equitable grounds for dissolution. They have not done so. As discussed above, there is no  
23 evidence that defendants acted in bad faith, unreasonably, illegally, or fraudulently. Plaintiffs  
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25 <sup>2</sup> In addition, plaintiffs do not articulate any harm, injury, or damage that they personally  
26 sustained as a result of the alleged violations of Washington regulations regarding municipal water  
supplies or the terms of the DWSRF loan.

1 argue that their conduct has been “oppressive,” meaning burdensome, harsh and wrongful,  
2 lacking in probity, prejudicing some members, and departing from standards of fair play. Dkt.  
3 # 185-1 at 25-26. Unfairness does not constitute “oppression,” however. The Washington  
4 Supreme Court cited an Oregon case with approval on this issue: “[A]n abuse of corporate  
5 position for private gain at the expense of the stockholders is ‘oppressive’ conduct. Or the  
6 plundering of a ‘close’ corporation by the siphoning off of profits by excessive salaries or bonus  
7 payments and the operation of the business for the sole benefit of the majority of the  
8 stockholders, to the detriment of the minority stockholders, would constitute such ‘oppressive’  
9 conduct as to authorize dissolution of the corporation.” Scott, 148 Wn.2d at 713-14 (quoting  
10 Baker v. Commercial Body Builders, 507 P.2d 387, 394 (Or. 1973)). Here, defendants have the  
11 backing and support of a majority of LISECC’s members in their efforts to spread the costs of  
12 maintaining and repairing the community water system to the entire community, and there is no  
13 evidence of secret profits or self-dealing. This case represents nothing more than a difference of  
14 opinion regarding the best interests of the community and falls far short of the standard for  
15 oppression for purposes of RCW 24.03.266. Where there are legitimate and reasonable  
16 explanations for the board’s decisions, acts, or failure to act, the evidence does not support the  
17 extreme remedy of dissolution under Washington law.<sup>3</sup>

#### 18 **D. Consumer Protection Act (“CPA”)**

19 Plaintiff’s CPA claim is based on “multiple false statements about the propriety of paying  
20 dues despite those claims being repeatedly debunked.” Dkt. # 185-1 at 27. The Court has now  
21 determined that LISECC’s authority to levy dues, assessments, and charges continues unabated  
22 by the passage of time. The fact that plaintiffs repeatedly claimed the opposite does not make  
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24 <sup>3</sup> Although plaintiffs mention the term “waste,” the only allegations of waste have to do with  
25 water losses resulting from the many leaks in LISECC’s antiquated water system or possibly the fact  
26 that the water system has deteriorated over time. These are hardly the types of one-sided business deals  
where corporate assets are squandered that give rise to a finding of waste for purposes of RCW  
24.03.266.

1 defendants' position "unfair or deceptive" for purposes of the CPA.

2 **E. Unjust Enrichment**

3 Plaintiffs have failed to show that their payment of dues, assessments, and charges to  
4 LISECC was unjust or that it unfairly benefitted the individual defendants. This claim fails as a  
5 matter of law.

6 **F. Conspiracy**

7 While LISECC's board of directors clearly acted in combination, the evidence does not  
8 raise a triable inference that the combination was pursuing an unlawful purpose or a lawful  
9 purpose by unlawful means.

10 **G. Racketeer Influenced and Corrupt Organizations ("RICO") Act**

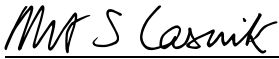
11 Plaintiffs' RICO claims of wire and mail fraud in furtherance of a scheme to defraud the  
12 general membership of LISECC by forcing them to pay more than their fair share of dues,  
13 assessments, and charges has been dismissed. The only remaining claims are those of plaintiffs  
14 Ortego and Ponomareva, who allege that their water was shut off in furtherance of an extortion  
15 scheme and that their homemade water system was sabotaged on four occasions in order to keep  
16 Ortego from pursuing this and a parallel state court action.

17 The extortion claim is based on conduct that the Court has found to be lawful: Ortego and  
18 Ponomareva intentionally and knowingly failed to make payments to LISECC, which cut off the  
19 water service to their property pursuant to policies that Ortego himself helped create when he  
20 was a member of the board. Plaintiffs have not offered any evidence that could support a finding  
21 of witness tampering. Plaintiff Ponomareva has not offered a declaration, and plaintiff Ortego  
22 states only that, at some undisclosed time, he found a sharpened 3" diameter branch that had  
23 been used to pierce his water collection system in two places. Dkt. # 180 at ¶ 16. There is no  
24 indication of who damaged the system, what the temporal relationship is between the damage  
25 and Ortego's participation in a judicial proceeding, or any information about the other three  
26 alleged incidents. Plaintiffs cannot rely on the allegations of their complaint at this stage of the

1 proceeding. Other evidence shows only that defendants suspected Ortego and his wife of  
2 creating an unauthorized hookup to the community water system and investigated that  
3 possibility: there is absolutely no evidence that defendants ever talked about, threatened,  
4 condoned, or conducted sabotage against plaintiffs.

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6 For all of the foregoing reasons, defendants' motion for summary judgment on the  
7 remaining claims (Dkt. # 146) is GRANTED. Plaintiffs' motion to strike (Dkt. # 191) is  
8 GRANTED. The Clerk of Court is directed to enter judgment in favor of defendants and against  
9 plaintiffs.

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11 Dated this 13th day of December, 2016.

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14 Robert S. Lasnik  
15 United States District Judge  
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