

1 the relief sought in plaintiffs' Complaint, the entirety of this case is now moot. To the extent that
2 the Court finds that this case is not moot, Moving Defendants are not necessary parties to this
3 action, and therefore must be dropped as defendants, because plaintiffs can obtain the relief they
4 seek without Moving Defendants as parties. Moreover, all relief sought against the Moving
5 Defendants relies on their respective prior positions as Board Members. If the Court finds this case
6 is not moot, and that Moving Defendants are otherwise necessary parties, the claims against
7 Moving Defendants must be dismissed because they fail as a matter of law. For the reasons set
8 forth in more detail below, Moving Defendants request this Court for entry of an Order dismissing
9 the entire case as moot under CR 56. Alternatively, Moving Defendants move under CR 21 for
10 entry of an Order dropping them from this action. Alternatively, Moving Defendants seek
11 dismissal, *with prejudice*, under CR 56.

12 II. RELEVANT FACTS

13 Plaintiffs' Complaint seeks declaratory and injunctive relief as to the future of ACBC's
14 swimming pool. *See generally* Compl. The Complaint asserts that as Board Members, the Moving
15 Defendants took actions in an effort to decommission the pool. *Id. at* ¶¶ 3.12-3.17. Specifically,
16 plaintiffs assert that the Moving Defendants sent a ballot to the membership that included an option
17 to remove the pool and that such an option was a violation of the Bylaws, the Articles of
18 Incorporation, a motion passed by the membership, and the original granting deeds. *Id. at*
19 ¶¶ 3.3 3.16, 3.21. The Complaint seeks a declaration that the actions taken by Moving Defendants
20 as Board Members violated the governing documents and were contrary to a motion passed by the
21 membership at the October 2012 Annual Meeting. *Id. at* ¶ 5.1. Plaintiffs also seek a declaratory
22 judgment that the pool is an inherent and necessary element of ACBC's corporate purpose and
23 objective. *Id.* Plaintiffs further seek injunctive relief against the Moving Defendants to prevent
24 them from taking future action as Board Members to remove the pool and to prevent them from
25

1 keeping properly nominated ACBC members from running for the Board. *Id.* at ¶¶ 5.2-5.5.

2 Plaintiffs also seek special and general damages, attorney’s fees and costs, “and other relief as the
3 Court deems just and equitable.” *Id.* at ¶¶ 5.5-5.9.

4 Moving Defendants’ alleged actions were done solely in their capacities as Board
5 Members, and the relief sought in the Complaint is predicated on Moving Defendants still being
6 Board Members. *See generally* Compl. When Moving Defendants were on the Board, they were
7 faced with the requirement pursuant to WAC 246-260-141 that “if a pool facility is not in operation
8 for more than twelve months, the owner shall provide a safety cover over the pool meeting ASTM
9 standard F1346-91 or the owner shall back fill the pool.” WAC 246-260-141. (Decl. of Jean Salls
10 (“Salls Decl.”), ¶ 3.) The pool was last used in September 2012, before it was closed for the
11 season. (*Id.* at ¶ 4.) During the summer of 2012 when the pool was open sporadically, the Moving
12 Defendants’ Board began investigating the refurbishment of the pool. However, despite the
13 Board’s diligent work to resolve the pool issue, a quorum of members at the October 2012 Annual
14 Meeting passed a motion setting forth an alternative process to evaluate the pool’s future.¹ (*Id.* at
15 ¶ 5.) During the next several months the Board complied with this motion, but doing so pushed
16 any resolution of the pool issue closer to the one-year deadline set forth in WAC 246-260-141. (*Id.*
17 at ¶ 8.)

18 In an effort to have the pool issue resolved before the one-year, September 2013 deadline,
19 in May 2013 the Board took its findings in compliance with the October 2012 motion and put the
20 pool issue to a vote.² (*Id.* at ¶ 9.) Had the Board waited any longer to put the issue to a vote, the

21
22 ¹ As the Court can see upon comparing the membership motion included in **Exhibit A** to Salls Decl.
23 to those submitted by plaintiffs, there are several versions of the motion passed at the October 27, 2012
24 Annual Meeting. The meeting minutes attached as **Exh. A** to Salls Decl. contain the official record of the
25 motion that the membership passed. (Salls Decl. at ¶ 7.)

² Before including the removal option on the ballot, the Board sought a legal opinion as to whether
ACBC’s governing documents required the continued existence of the pool. (Salls Decl. at ¶ 10.) The
opinion, attached as **Exh. B** to Salls Decl., stated that the Bylaws and Articles of Incorporation do not

1 pool likely would have been in violation of the WAC because the one-year deadline was rapidly
2 approaching.³ (*Id.* at ¶ 13.) The ballot included the option to refurbish the pool at a cost of
3 \$650,000,⁴ with financing options to be determined following the vote, and the option to remove
4 the pool at a cost of \$200,000.⁵ (Salls Decl., **Exh. D.**) Included with each ballot was a set of
5 frequently asked questions and corresponding answers. (Salls Decl., **Exh. E.**) Moving Defendants
6 all voted to refurbish the pool and believed that the majority of the community would also vote to
7 refurbish the pool. However, a majority of ACBC members voted to remove the pool. The results
8 of the voting were announced at a June 29, 2013 membership meeting. (*Id.* at ¶ 19.) (**Exh. F** to
9 Salls Decl.) The special assessments to fund removal of the pool were mailed to the membership
10 on or about August 13, 2013. (*Id.* at ¶ 21.) Following this vote and subsequent special assessment
11 to remove the pool, plaintiffs filed this action seeking to enjoin ACBC and the individual
12 defendants from taking any further action to remove the pool and from influencing the ACBC
13 elections in a manner contrary to the Bylaws. (*Id.* at ¶ 22.)

14 While the Complaint seeks to prevent Moving Defendants from taking certain actions in the
15 future, these actions can only be taken by Board Members. (*See* Bylaws, **Exh. G** to Salls Decl.).

16
17 _____
18 require that the pool be maintained. Based on the Board's understanding of its obligations under
19 RCW 24.03.127, which permits the Board to rely on opinions of counsel, the Board included the removal
20 option on the ballot. (Salls Decl. at ¶ 12.)

21 ³ Covering the pool was not an option at that time. While the WAC does permit the Club to cover
22 the pool, because of the pool's odd shape and need for a cover with extra strength, the cost of a suitable
23 cover exceeded \$11,000. (*See* **Exh. C** to Salls Decl.) As the Board is only able to spend \$4,000 without
24 membership approval and because at the time it was unknown whether the membership was willing or able
25 to pay for the pool to ever be operable again, spending in excess of \$11,000 to cover a pool that may never
operate again was not a realistic option. Moreover, covering the pool would have required the Club to
continue annual maintenance, insurance, management, and utility costs on the pool with an annual
approximate cost of \$10,000. (Salls Decl. at ¶ 14.)

⁴ The total cost to refurbish the pool was reached after receiving an extensive study and estimate
regarding what was required to bring the pool into code compliance, how much such a refurbishment would
cost, and the size of the appropriate reserve/maintenance fund. (Salls Decl. at ¶ 18.)

⁵ The \$200,000 cost to completely remove the pool was a number presented by Ed Delahanty.
(Jones Decl. at ¶ 3.)

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1 However, Moving Defendants are no longer Board Members. (Salls Decl. at ¶ 24.) On January 11,
2 2014, ACBC held its Annual Meeting⁶ at which time the results of the election for the new Board
3 of Directors were announced. As a result of the election, Maria Chamberlain, Karen Shaak,
4 Robert Peetz, and Dan Jones were no longer on the Board. (*Id.* at ¶ 25.) On January 30, 2014,
5 Jean Salls resigned from the Board effective February 1, 2014. (**Exh. H** to Salls Decl.) The Board
6 is now comprised of the following individuals: plaintiff Dustin Frederick; defendants Suzy Palmer
7 and Ed Delahanty; and Kurt Blankenship, Fred Salmon, and Chris Hendrickson. (Salls Decl. at
8 ¶ 27.) Prior to the election, members of ACBC received a letter in their mailboxes stating that “Ed
9 [Delahanty] and Suzy [Palmer], the only Board members actively supporting the pool, need help.
10 Fred Salmon, Christine Hendrickson, Dustin Frederick and Kurt Blankenship all express an interest
11 in moving forward with the motion to restore and maintain the pool. They need our votes.”⁷
12 (**Exh. I** to Salls Decl.) (emphasis in original).

13 As Moving Defendants are no longer on the Board, they no longer have the ability to
14 proceed with the actions plaintiffs seek to enjoin. (Salls Decl. at ¶ 29.) In Moving Defendants’
15 individual capacities, they have no intention nor authority to remove the pool, control the ACBC
16 election, or conduct any ACBC business that would be in violation of the governing documents.
17 (Salls Decl. at ¶ 30; Shaak Decl. at ¶ 3; Chamberlain Decl. at ¶ 3; Peetz Decl. at ¶ 3; and Jones
18 Decl. at ¶ 4.) Moreover, there are no allegations, nor is there any evidence, that Moving
19 Defendants intend to remove the pool or adversely affect ACBC elections in their individual
20

21 ⁶ The meeting held on January 11, 2014 was the annual meeting for the year 2013.

22 ⁷ Much has been made in this litigation about supposed “pro-pool” and “anti-pool” Board
23 Members. In reality, all members of the past and present Board are “pro-pool.” The meaningful distinction
24 in this community is between those members and directors who are concerned that the community may be
25 unable and unwilling to pay for the expense associated with proper, Code-compliant pool refurbishment
and those whose views differ in that regard. The Moving Defendants want to be clear that they were in
favor of keeping the pool so long as the community was willing and able to pay for it. When the community
expressed its unwillingness to pay for the refurbishments, the prior Board, in conformance with their duty to
the Club, proceeded according to the wishes of the community.

1 capacities as regular ACBC members. Finally, as the new Board was properly elected and intends
2 to move forward with the restoration and maintenance of the pool, all claims in this case as set
3 forth in the Complaint are now moot.

4 III. ISSUES

5 1. If the properly elected new Board does not intend to follow through with the ballot
6 to remove the pool, is there a justiciable controversy in this case? **NO**

7 2. If Moving Defendants' involvement in this action was only necessary due to the
8 their respective positions as Board Members and the relief sought can be achieved without their
9 involvement because they are no longer Board Members, should plaintiffs' claims proceed against
10 the Moving Defendants? **NO**

11 3. If Moving Defendants have no authority to act for the Club or act on their
12 interpretations regarding the Club's governing documents, is there a sufficient justiciable dispute
13 for the Court to enter a declaratory judgment against the Moving Defendants? **NO**

14 4. If Moving Defendants have no authority to act for the Club and have no intention to
15 remove the pool, is there a sufficient fear that the Moving Defendants will invade plaintiffs' rights
16 and cause immediate irreparable harm such that an injunction must be entered against Moving
17 Defendants? **NO**

18 IV. EVIDENCE RELIED UPON

19 Moving Defendants rely on the prior pleadings, motions, and filings in this case and the
20 declarations of Jean Salls, Karen Shaak, Maria Chamberlain, Robert Peetz, Dan Jones, and
21 Vasudev N. Addanki, and the exhibits attached thereto.

1 **V. AUTHORITY AND ARGUMENT**

2 **A. The Entirety of this Case Is Now Moot because the Properly Elected New Board Does**
3 **Not Plan to Enforce the Ballot to Remove the Pool**

4 The entirety of this case focuses on the prior Board’s enforcement of the ballot to remove
5 the pool and on the recent Board elections which resulted in election of the new Board. Following
6 the recent election at issue, the Board is now comprised solely of individuals, including plaintiff
7 Frederick, who do not plan to enforce the results of the ballot to remove the pool. Because the
8 current Board does not plan to enforce the Club’s ballot vote to remove the pool, all claims as to
9 the pool are now moot. In addition, any claims as to the efficacy of the recent Board election are
10 now moot because it proceeded according to the Bylaws.⁸

11 “A case is considered moot if there is no longer a controversy between the parties, if the
12 question is merely academic, or if a substantial question no longer exists.” *Pentagram v. City of*
13 *Seattle*, 28 Wn. App. 219, 223, 622 P.2d 982 (1981) (internal citations omitted). Appellate courts,
14 in an effort to preserve judicial resources, may hear a moot case if it involves “matters of
15 continuing and substantial public interest.” *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692
16 P.2d 793 (1984). However, if a case for declaratory relief and injunctive relief becomes moot
17 before trial, “dismissal of [the] claims will not involve a waste of judicial resources and will avoid
18 danger of allowing petitioners to litigate a claim in which they no longer have an existing interest.”
19 *Id.* at 253-54.⁹

20 ⁸ Moving Defendants support this basis for dismissal with declarations and the exhibits attached
21 thereto. Therefore, they move for dismissal on the basis of mootness pursuant to CR 56.

22 ⁹In *Kuehn v. Renton School Dist.*, 103 Wn.2d 594, 596, 694 P.2d 1078, the Court stated that
23 “[a]lthough declaratory relief may be impossible to grant due to an intervening occurrence, the existence of
24 a monetary dispute arising out of a declaratory action will prevent the action from becoming moot.”
25 However, in *Kuehn* the Court addressed a case brought under 42 U.S.C. § 1983 which provides nominal
damages and attorney fees for civil rights violations even if no actual injuries are proven. *Kuehn* is
distinguishable from the case at bar because plaintiffs here must prove actual injury before recovering
damages and no injuries have been asserted in this case other than fear that the pool would be removed and
that the elections would be tampered with, both of which have not occurred.

1 The claims in this case arise from the prior Board’s action to issue a ballot and then remove
2 the pool according to the Club members’ vote on that ballot. However, as per the letter forwarded
3 to the members of ACBC, individual defendants Delahanty and Palmer “actively support[] the
4 pool” and “need help” regarding same. (**Exh. H** to Salls Decl.) Further, the new Board Members
5 have all “express[ed] an interest in moving forward with the motion to restore and maintain the
6 pool.” (*Id.*) Implicit in an intent to move forward with the motion to restore and maintain the pool
7 is an intent to reject the ballot to remove the pool. As the new Board does not intend to enforce the
8 ballot to remove the pool, the questions in this case are now purely academic as to the language of
9 the ballot, the timing of the ballot, the governing documents’ effect on the ballot, the procedure to
10 reach the contents of the ballot, and the enforcement of the ballot.

11 In addition, because the new Board intends to “restore and maintain” the pool, any claim
12 for relief regarding the maintenance of the pool pending the final refurbishment or removal of the
13 pool are similarly moot. Consequently, all claims for relief regarding the ballot to remove the pool,
14 the interpretation of the governing documents as they relate to the ballot and the pool, and the
15 actions of the Moving Defendants regarding the ballot or the pool, are now moot and must be
16 dismissed.

17 Further, since the pool is currently in no danger of being removed or decommissioned,
18 plaintiffs’ claim for declaratory relief as to whether the pool can ever be removed is likewise moot
19 and must be dismissed because plaintiffs and the current Board are aligned as to the pool’s future.
20 With such alignment between plaintiffs and those able to act for the Club and with no current plan
21 to remove the pool, there is no longer a present controversy between the parties as to this claim for
22 declaratory relief. Moreover, as the election referenced in the Complaint has already occurred,
23 any claims for relief arising from the recently-conducted election are likewise moot and must be
24 dismissed. Finally, as the unspecified and unsupported damages which plaintiffs seek are directly

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1 related to the claims regarding the pool, which is not being removed, and an election, which
2 plaintiffs' camp won, any claim for damages is likewise moot.

3 To the extent the parties wish to have the Court determine whether the ballot was proper,
4 whether the new Board must comply with the ballot, or whether the pool can ever be removed, the
5 burden is on plaintiffs to establish the existence of a justiciable dispute. As the Complaint is
6 currently constructed, no such dispute exists. Moreover, the Complaint as currently constructed
7 does not include any claims seeking the enforcement of the pool removal ballot. Therefore, the
8 new Board's failure to comply with the pool removal ballot is not a dispute currently at issue in the
9 Complaint. Consequently, until the new Board demonstrates an intent to comply with the ballot, or
10 a third-party intervenes to assert a claim against the new Board for failure to comply with the
11 ballot, there is no actual dispute between any plaintiff and any party with authority to act for the
12 Club. Until there exists an actual, present, or existing dispute between the new Board and
13 plaintiffs, this entire case is moot and must be dismissed.

14 **B. If the Court finds that the Entire Case is Not Moot, Civil Rule 21 Permits the Court to**
15 **Drop Moving Defendants because they are Not Necessary to Achieve the Relief Sought**

16 Civil Rule 21 provides:

17 Misjoinder of parties is not ground for dismissal of an action. Parties may be
18 dropped or added by order of the court on motion of any party or of its own
19 initiative at any stage of the action and on such terms as are just. Any claim against
20 a party may be severed and proceeded with separately.

21 CR 21. "The application of CR 21 is within the sound discretion of the trial court." *Shelby v.*
22 *Keck*, 85 Wn. 2d 911, 918, 541 P.2d 365 (1975) (noting that a trial court's decision regarding
23 CR 21 "will not be disturbed on appeal absent a manifest abuse of discretion.") "Since CR 21 is
24 identical to and patterned from the federal rule, it is appropriate that we apply the federal courts'
25 interpretation." *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 907, 670 P.2d 1086 (1983).

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1 “Pursuant to Rule 21, a court may exercise its discretion ‘to drop a party from a lawsuit [on
2 motion of any party or] *sua sponte* whose presence no longer affects the issues being litigated.”
3 *Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 267 (6th Cir. 2003) *overruled on other grounds by*
4 *Blackburn v. Oaktree Capital Mgmt, LLC.*, 511 F.3d 633 (6th Cir. 2008). Under Rule 21,
5 “[m]isjoinder has been declared where no relief is demanded from one or more of the parties
6 joined as defendants, where a particular defendant lacks authority to provide the requested relief,
7 where a defendant has no discernible legal obligations to provide the requested relief, or where a
8 defendant’s presence is not necessary to afford all the requested relief.” *See Benson v. RMJ*
9 *Securities Corp.*, 683 F. Supp. 359, 377 (S.D.N.Y. 1988) (citing collected cases in support)
10 (internal citations omitted).
11

12 **1. Moving Defendants are not Necessary Parties for Plaintiffs’ Claim for**
13 **Declaratory Relief**

14 The Moving Defendants should be dropped as parties to plaintiffs’ claims for declaratory
15 relief because, following Moving Defendants’ departure from the Board, such relief can be
16 achieved without their involvement in this case. Declaratory relief is appropriate when the
17 elements to invoke the court’s declaratory power are met:

- 18 (1) . . . an actual, present and existing dispute, or the mature seeds of one, as
19 distinguished from a possible, dormant, hypothetical, speculative, or moot
20 disagreement, (2) between parties having genuine and opposing interests, (3) which
21 involves interests that must be direct and substantial, rather than potential,
theoretical, abstract or academic, and (4) a judicial determination of which will be
final and conclusive.

22 *Ronken v. Board of County Comm’rs of Snohomish County*, 89 Wn.2d 304, 310 572 P.2d 1 (1977).

23 “Inherent in these four requirements are the traditional limiting doctrines of standing, mootness,
24 and ripeness, as well as the federal case-or-controversy requirement. *To-Ro Trade Shows v.*

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1 *Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). Pursuant to RCW 7.24.110, “[w]hen
2 declaratory relief is sought, all persons shall be made parties who have or claim any interest which
3 would be affected by the declaration, and no declaration shall prejudice the rights of persons not
4 parties to the proceeding.” However, where the interested parties have designated representatives
5 involved in the lawsuit, the individual interested parties need not be parties to the proceeding to be
6 bound by the holding. *See Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d
7 874, 888-89, 691 P.2d 524 (1984) (declining motion to intervene as untimely, but finding that
8 intervenors would be bound by declaratory judgment because their interests were represented by a
9 designated representative).

11 There is no basis for Moving Defendants to remain defendants to plaintiffs’ claim for
12 declaratory relief. Moving Defendants are no longer Board Members. They are now in the same
13 position as all other regular members of ACBC. In this community, the Board represents the Club
14 and its members. Because the Moving Defendants are no longer Board Members, their interests
15 are now represented by the Club and the Board, whether Moving Defendants agree with every
16 action the Board takes or not. As the Board represents the Club and its members, any declaratory
17 judgment against the Club would be binding on the members. *See Chemical Bank*, 102 Wn.2d at
18 888-89. Therefore, Moving Defendants are not necessary for the Court to grant the relief sought by
19 plaintiffs’ claim for declaratory relief.

20 If Moving Defendants are found to be necessary for the adjudication of this claim in their
21 capacities as regular members of ACBC, then all regular members of ACBC must be joined in this
22 claim in their individual capacities pursuant to RCW 7.24.110, which states: “[w]hen declaratory
23 relief is sought, all persons shall be made parties who have or claim any interest which would be
24 affected by the declaration, and no declaration shall prejudice the rights of persons not parties to

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1 the proceeding.” Under this rule, if Moving Defendants’ interests in their capacity as regular
2 members are sufficient to require they be joined, then all regular ACBC members must be joined.
3 Such a result would defeat the purpose of having the Club’s interests represented by its Board.
4 Such a result would also be impractical and is not the intent of RCW 7.24.110. Consequently,
5 Moving Defendants are not necessary or proper parties to plaintiffs’ claim for declaratory relief.
6 Because Moving Defendants are neither proper parties nor necessary parties, they should be
7 dropped from plaintiffs’ claim for declaratory relief.

8 **2. Moving Defendants are not Necessary Parties for Plaintiffs’ Claim for**
9 **Injunctive Relief**

10 As to injunctive relief, CR 65(d) states in relevant part that every order granting an
11 injunction is “binding only upon the parties to the action, their officers, agents, servants,
12 employees, and attorneys, and upon those persons in active concert or participation with them who
13 receive actual notice of the order by personal service or otherwise.” CR 65(d). When determining
14 if injunctive relief is appropriate:

15 It is an established rule in this jurisdiction that one who seeks relief by temporary or
16 permanent injunction must show (1) that he has a clear legal or equitable right,
17 (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that
the acts complained of are either resulting in or will result in actual and substantial
injury to him.

18 *Tyler Pipe Industries, Inc. v. State, Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

19 Here, any injunction against ACBC will be binding on the entire Club, including the
20 Moving Defendants. The Club only acts through its officers, agents, servants, employees, and
21 attorneys, all of whom will be bound by the injunction. There are no allegations that the Moving
22 Defendants or any other regular members plan to take action with regard to the pool that is not in
23 active concert or participation with the Club or the Board. Moreover, based on the size of this
24 community, all members will receive actual notice of any permanent injunction entered. Because
25 all members will receive notice of any injunction, all members of the Club will be enjoined if an

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1 injunction is entered against the Club. Permanently enjoining the Club and the Moving Defendants
2 would be redundant and unnecessary.¹⁰ Therefore, the Moving Defendants are not proper or
3 necessary parties to plaintiff's permanent injunction claim and should be dropped from this case.
4 *See Committee for Public Educ. & Religious Liberty v. Rockefeller*, 322 F. Supp. 678, 686
5 (S.D.N.Y. 1971) (dropping governor from case challenging the constitutionality of a statute when
6 the governor would not have been the one to carry out the statute and complete relief could be
7 afforded without governor even though governor was involved in passing challenged statute).
8 Because Moving Defendants are neither necessary nor proper parties to plaintiffs' claim for
9 injunctive relief, they should be dropped from this claim.

10 3. Other Relief Sought

11 The Complaint seeks relief in the form of unspecified and unsupported special and general
12 damages, attorney's fees, and costs. *See* Compl. ¶¶ 5.5, 5.6, 5.7, 5.9. These secondary requests for
13 relief are tied directly to the Moving Defendants' inclusion in the above claims. However, Moving
14 Defendants are neither proper nor necessary parties to the above claims. Consequently, any claims
15 against Moving Defendants for general damages, attorney's fees, costs, and other relief must be
16 dropped.

17 C. If the Court finds that the Entire Case is Not Moot, Any Claim from Which Moving 18 Defendants are Not Dropped Should be Dismissed under Rule 56.

19 Summary judgment is appropriate if the pleadings and evidence establish that there is no
20 genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
21 *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). The court considers the

22 ¹⁰ While an action by a rogue ACBC member acting without board authorization may not be
23 covered by an injunction against the club, there are no allegations regarding any such rogue members.
24 Moreover, any action by a rogue member to destroy the pool without Board authorization would be illegal
25 in its own right, absent any injunction otherwise prohibiting the destruction of the pool. There is no need to
enjoin each individual member of ACBC from doing that which would already be illegal. Injunctions were
not designed to prevent that which is already illegal.

1 facts and inferences from those facts in the light most favorable to the nonmoving party. *Id.* The
2 party moving for summary judgment bears the initial burden of showing the absence of an issue of
3 material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If
4 the moving party meets its initial burden, then the burden shifts to the nonmoving party. *Id.* If the
5 non-moving party, ““fails to make a showing sufficient to establish the existence of an element
6 essential to that party's case, and on which that party will bear the burden of proof at trial,’ then the
7 trial court should grant the motion.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
8 (1986)).

9 **1. Plaintiffs’ Declaratory Relief Claim Must be Dismissed**

10 As noted above, declaratory relief is appropriate when the elements to invoke the court’s
11 declaratory power are met:

12 (1) . . . an actual, present and existing dispute, or the mature seeds of one, as
13 distinguished from a possible, dormant, hypothetical, speculative, or moot
14 disagreement, (2) between parties having genuine and opposing interests, (3) which
15 involves interests that must be direct and substantial, rather than potential,
16 theoretical, abstract or academic, and (4) a judicial determination of which will be
17 final and conclusive.

18 *Ronken v. Board of County Comm’rs of Snohomish County*, 89 Wn.2d 304, 310 572 P.2d 1 (1977).

19 “Where the four justiciability factors are not met, ‘the court steps into the prohibited area of
20 advisory opinions.’” *To-Ro*, 144 Wn.2d at 416. In *To-Ro*, the dispute was deemed dormant,
21 hypothetical, or speculative when the initial basis for the dispute no longer existed and there was
22 no entity “waiting in the wings” to fulfill necessary elements for the original dispute. *Id.* at 415-16.

23 Here, the prior actual, present, and existing disputes asserted in the Complaint arose out of
24 Moving Defendants’ positions on ACBC’s Board and the ballot Moving Defendants issued to
25 avoid a violation of WAC 246-260-141. Had Moving Defendants not been on the Board, they
would not have had the authority to issue the ballot or take the actions for which plaintiffs seek

1 declaratory relief. While Moving Defendants still disagree with plaintiffs on many issues,
2 including whether the pool can ever be removed, Moving Defendants have no ability to act on
3 those beliefs as Board Members. Moving Defendants were either voted out of their positions on
4 the Board or voluntarily stepped away from those positions. Because they are no longer on the
5 Board, Moving Defendants' beliefs as to the pool are just that, beliefs. Without authority to act on
6 those beliefs, the disputes between plaintiffs and Moving Defendants asserted in the Complaint as
7 currently constructed are dormant and hypothetical, until such time as Moving Defendants have the
8 authority to act on those beliefs. Whether Moving Defendants will again have that authority
9 sometime in the future is entirely speculative.

10 Because the specific disputes asserted in the Complaint are now dormant, hypothetical, and
11 speculative as between plaintiffs and Moving Defendants, the disputes asserted in the Complaint
12 between plaintiffs and Moving Defendants are not actual, present, or existing disputes.
13 Consequently, plaintiffs cannot meet the first element necessary for declaratory relief against
14 Moving Defendants. As such, any judgment on the merits for plaintiffs' declaratory relief claim as
15 between plaintiffs and Moving Defendants would be an impermissible advisory opinion.¹¹
16 Therefore, to the extent the entire case is not moot and Moving Defendants are not dropped from
17 plaintiffs' claim for declaratory relief, this claim must be dismissed due to the lack of an existing
18 dispute between Moving Defendants and plaintiffs.

19 **2. Plaintiffs' Injunctive Relief Claim Must be Dismissed**

20 As noted above, the standard for whether a party is entitled to injunctive relief is as follows:

21 It is an established rule in this jurisdiction that one who seeks relief by temporary or
22 permanent injunction must show (1) that he has a clear legal or equitable right,

23 ¹¹ Moving Defendants note that on "rare occasions where the interest of the public in the resolution
24 of an issue is overwhelming and where the issue has been adequately briefed and argued," the Washington
25 Supreme Court has noted that advisory opinions are permissible. *To-Ro*, 144 Wn. 2d at 416. However, the
dispute here is not of such overwhelming public interest and it has not been fully briefed or argued.
Therefore, this action is in an improper posture for issuance of advisory opinion.

1 (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that
2 the acts complained of are either resulting in or will result in actual and substantial
3 injury to him.

4 *Tyler Pipe Industries, Inc.*, 96 Wn.2d at 792.

5 Now that Moving Defendants are no longer Board Members, they no longer have the ability
6 or authority to remove, decommission, or affect the pool in any way. Additionally, they no longer
7 have the ability or authority to affect who runs for ACBC elections. Most importantly, plaintiffs
8 have not alleged any actions that Moving Defendants plan to take in their capacities as regular
9 ACBC members that would negatively affect the pool or the elections. The Complaint as currently
10 constructed is limited in its relief sought against Moving Defendants, as provided in detail above.

11 The second element for a temporary or permanent injunction requires that plaintiffs have “a
12 well-grounded fear of immediate invasion” of plaintiffs’ rights. As Moving Defendants no longer
13 have the ability or authority to invade plaintiffs’ rights and as there are no allegations that Moving
14 Defendants plan to act against the pool in their individual capacities, plaintiffs cannot meet the
15 second element necessary for injunctive relief. In addition, the third element requires that “ the
16 acts complained of are either resulting in or will result in actual and substantial injury to”
17 plaintiffs. Because Moving Defendants cannot perform the acts complained of in their capacities
18 as regular ACBC members and because there are no allegations that Moving Defendants plan to
19 act in their capacities as regular members, plaintiffs cannot meet the third element for injunctive
20 relief. Consequently, plaintiffs’ claim for injunctive relief against Moving Defendants fails as a
21 matter of law and must be dismissed.
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25

1 DATED this 22nd day of February, 2014.

2 BETTS, PATTERSON & MINES, P.S.

3
4 By _____
5 Vasudev N. Addanki, WSBA #41055
6 David R. Greenberg, WSBA #46308
7 Attorneys for Moving Defendants
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DEFENDANTS' MSJ BASED ON MOOTNESS
AND MOTION TO DROP MOVING
DEFENDANTS PURSUANT TO CR 21 AND/OR
DISMISS PURSUANT TO CR 56
674826.8/022214 0558/77180073

- 18 -

Betts
Patterson
Mines
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Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

1 **CERTIFICATE OF SERVICE**

2 I, Valerie D. Marsh, declare as follows:

3 1) I am a citizen of the United States and a resident of the State of Washington. I am
4 over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm
5 of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike
6 Street, Seattle, Washington 98101-3927.

7 2) By the end of the business day on February 22, 2014, I caused to be served upon
8 counsel of record at the addresses and in the manner described below, the following documents:

- 9 • **Defendants Salls, Chamberlain, Shaak, Peetz, And Jones’ Motion For**
- 10 **Summary Judgment Based On Mootness And Motion To Drop Moving**
- 11 **Defendants Pursuant To Cr 21 And/Or Dismiss Pursuant To Cr 56; and**
- 12 • **Certificate of Service.**

13 *Counsel for Plaintiffs:*

14 Christon C. Skinner
15 Law Offices of Christon C. Skinner, P.S.
791 SE Barrington Drive
Oak Harbor, WA 98277-3278

- U.S. Mail
- Hand Delivery
- Telefax
- UPS
- E-mail

16 I declare under penalty of perjury under the laws of the State of Washington that the
17 foregoing is true and correct.

18 DATED this 22nd day of February, 2014.

19
20
21 _____
Valerie D. Marsh