

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY – SEATTLE DIVISION

KRYSTIL SMITH and TYLER LOBDELL,
derivatively on behalf of COSTCO
WHOLESALE CORPORATION,

Plaintiffs,

v.

ROLAND MICHAEL “RON” VACHRIS,
WALTER CRAIG JELINEK, HAMILTON
EVANS JAMES, SUSAN LYNNE DECKER,
KENNETH DARNELL DENMAN, RICHARD
ALAN GALANTI, SALLY M. JEWELL,
CHARLES THOMAS MUNGER, JEFFREY S.
RAIKES, JOHN WILLIAM STANTON, MARY
AGNES “MAGGIE” WILDEROTTER,
WALTER FREDRICK SHAFER III, JOHN
CHRISTOPHER SULLIVAN, ROBERT
CRAIG WILSON, TIMOTHY LEE ROSE,
SARAH CATHERINE GEORGE (FORMERLY
WEHLING), and JEFF COLE,

Defendants,

-and-

COSTCO WHOLESALE CORPORATION,

Nominal Defendant.

No. 22-2-08937-7 SEA

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION & RELIEF REQUESTED.....	1
STATEMENT OF FACTS.....	2
I. THE SALE OF CHEAP ROTISSERIE CHICKENS IS A MAJOR COMPONENT OF COSTCO’S CURRENT BUSINESS MODEL.....	3
II. COSTCO HAS COMPLETE CONTROL OVER ITS CHICKENS.	3
A. Costco Entered the Poultry-Production Business to Supply Itself with Cheap Meat.....	3
B. Costco has Complete Control Over its Growers.	4
C. Growers (Predictably) Cannot Adequately Care for Chickens While Following Costco’s Mandated Practices.....	5
III. COSTCO’S BIRDS ARE UNLAWFULLY ABANDONED AND NEGLECTED.....	6
IV. DEFENDANTS CAUSE, AND KNOW OF, COSTCO’S ILLEGAL PRACTICES.....	8
A. Defendants Have Control Over, and Knowledge of, Costco’s Neglect and Abandonment due to Their Respective Roles.	8
B. Defendants Were Made Further Aware of Costco’s Illegal Neglect and Abandonment Through Public Articles, Videos, Outcry, and Controversy.....	9
STATEMENT OF ISSUES.....	10
EVIDENCE RELIED UPON.....	11
ARGUMENT & AUTHORITY.....	11
I. STANDARD.....	11
II. SHAREHOLDER-PLAINTIFFS ADEQUATELY ALLEGED DEMAND FUTILITY.	12

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1	A.	Defendants Face a Substantial Likelihood of Liability for Breaching Their Duty to act Lawfully.....	13
2			
3	1.	The Duty to act Lawfully is Independent of the Duties of Care and Loyalty.....	13
4	2.	The FAC Adequately Alleges Defendants Breached Their Duty to act Lawfully.	15
5			
6	a.	Costco’s Poultry Production Practices Violate Nebraska and Iowa laws.....	16
7	b.	Defendants Were put on Notice of the Horror Involved in Costco’s Practices.....	21
8	B.	The Director Defendants Also Face a Substantial Likelihood of Liability for Breaching Their Fiduciary Duty of Loyalty.	25
9			
10	1.	The Director Defendants did not Institute a Well-Functioning Oversight Mechanism and did not Express a “Belief” Costco’s Neglect and Abandonment is “Legal.”	27
11			
12	2.	Costco has Suffered Significant Reputational Harm and is Exposed to Substantial Financial Penalties.	29
13	C.	Defendants Face a Substantial Likelihood of Liability for Making Costco Act <i>Ultra Vires</i>	31
14			
15		CONCLUSION	32

TABLE OF AUTHORITIES

CASES

Aronson v. Lewis,
473 A.2d 805 (Del. 1984).....26

Ashcroft v. Iqbal,
556 U.S. 662, 678 (2009)30

Barovic v. Ballmer,
72 F. Supp. 3d 1210 (W.D. Wash. 2014) 12

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014)32

In re Caremark Int’l Inc. Deriv. Litig.,
698 A.2d 959 (Del. Ch. 1996)*passim*

City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource, Inc. v. Hamrock,
2022 WL 2387653 (Del. Ch. June 30, 2022)26

Clingman & Hanger Mgmt. Assocs., LLC v. Knobel,
2018 WL 2006763 (S.D. Fla. Jan. 9, 2018)..... 14, 21, 27

In re Clovis Oncology, Inc. Derivative Litig.,
2019 WL 4850188 (Del. Ch. Oct. 1, 2019)30

Cort v. Ash,
422 U.S. 66 (1975) 13, 15

Cutler v. Phillips Petrol. Co.,
881 P.2d 216 (Wash. 1994) 11

Diimmel v. Morse,
218 P.2d 334 (1950)25

Enter. Timber, Inc. v. Washington Title Ins. Co.,
457 P.2d 600 (Wash. 1969)25

In re F5 Networks, Inc.,
166 Wn.2d 229 (2009).....12, 13

Frigidaire Sales Corp. v. Union Properties, Inc.,
562 P.2d 244 (Wash. 1977)24

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1 *Grassmueck v. Barnett*,
281 F. Supp. 2d 1227 (W.D. Wash. 2003) 25

2

3 *Hazout v. Tsang Mun Ting*,
134 A.3d 274 (Del. 2016)..... 16

4 *Horman v. Abney*,
2017 WL 242571 (Del. Ch. Jan. 19, 2017) 25, 26

5

6 *In re Infousa, Inc.*,
2007 WL 3325921 (Del. Ch. Aug. 13, 2007)..... 31

7 *In re Investors Bancorp. Inc. Stockholder Litigation*,
177 A.3d 1208 (Del. 2017)..... 15

8 *Jackson v. Quality Loan Serv. Corp.*,
347 P.3d 487, 490 (Wash. Ct. App. 2015) 30

9

10 *J.S. v. Vill. Voice Media Holdings, L.L.C.*,
359 P.3d 714 (Wash. 2015) 11

11 *Kandell on behalf of FXCM, Inc. v. Niv*,
2017 WL 4334149, at *18 (Del. Ch. Sept. 29, 2017) 25

12

13 *Louisiana Mun. Police Employees’ Ret. Sys. v. Pyott*,
46 A.3d 313 (Del. Ch. 2012), *rev’d on other grounds*, 74 A.3d 612 (Del.
14 2013)..... 15

15 *In re Massey Energy Co.*,
2011 WL 2176479 (Del. Ch. May 31, 2011) 15

16 *McCall v. Scott*,
239 F.3d 808 (6th Cir. 2001) 24

17 *Melbourne Mun. Firefighters’ Pension Tr. Fund on Behalf of Qualcomm, Inc. v. Jacobs*,
2016 WL 4076369 (Del. Ch. Aug. 1, 2016), *aff’d*, 158 A.3d 449 (Del. 2017) 26

18

19 *Miller v. AT&T*,
507 F.2d 759 (3d Cir. 1974) 13, 15

20 *Miller v. Yates*,
834 P.2d 36 (Wash. Ct. App. 1992) 7

21

22

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1 *Nevins v. Bryan*,
2 885 A.2d 233 (Del. Ch.), *aff'd*, 884 A.2d 512 (Del. 2005) 32

3 *In re Oracle Corp. Deriv. Litg.*,
4 2018 WL 1381331 (Del. Ch. Mar. 19, 2018) 12

5 *In re Parentage of C.M.F.*,
6 314 P.3d 1109 (Wash. 2013) 11

7 *South v. Baker*,
8 62 A.3d 1 (Del. Ch. 2012) 25, 26

9 *Stone ex rel. AmSouth Bancorporation v. Ritter*,
10 911 A.2d 362 (Del. 2006) 28

11 *Trujillo v. Nw. Tr. Servs.*,
12 183 Wn.2d 820 (2015) 11

13 *United Food & Com. Workers Union v. Zuckerberg*,
14 262 A.3d 1034 (Del. 2021) 11, 12, 13

15 *In re Walt Disney Co. Derivative Litig.*,
16 906 A.2d 27 (Del. 2006) 15

17 **STATUTES**

18 Iowa Livestock Neglect Law, Iowa Code § 717.2 *passim*

19 Nebraska Livestock Animal Welfare Act, Neb. Rev. Stat. § 54-901, *et seq.* *passim*

20 **OTHER AUTHORITIES**

21 Aleta G. Estreicher & Warren S. Green, *Heavy Duty II: Forming A Business*
22 *Entity in the United States*, 17 N.Y.L. SCH. J. INT’L & COMP. L. 307, 323
(1997) 14

The Duty To Act Lawfully, 20A Tex. Prac., Business Organizations § 36:11 (3d
ed.) 13

Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U.
PITT. L. REV. 945, 945 (1990) 14

Merriam-Webster, *accepted*, [https://www.merriam-
webster.com/dictionary/accepted](https://www.merriam-webster.com/dictionary/accepted) 20

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21
22

Merriam-Webster, *common*, <https://www.merriam-webster.com/dictionary/common>20

Richard S. Saver, *Medical Research Oversight from the Corporate Governance Perspective: Comparing Institutional Review Boards and Corporate Boards*, 46 WM. & MARY L. REV. 619, 672 (2004) 14

Tammy Real-McKeighan, *No Charges Filed After Chickens Die from Truck Fire at LPP*, https://fremonttribune.com/news/local/no-charges-filed-after-chickens-die-from-truck-fire-at-lpp/article_a505a0bf-7c5e-5f8e-a4dc-ab79bb9c50fc.html (last visited Sept. 1, 2022) 7

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1 **INTRODUCTION & RELIEF REQUESTED**

2 Defendants control Costco. This shareholder derivative action arises from Defendants’
3 disregard for the basic fiduciary duties that they, as Costco’s directors and officers, owe Costco—
4 and from Defendants’ decision to make Costco act *ultra vires*. The Shareholder-Plaintiffs bring
5 this case on Costco’s behalf, to protect Costco’s fundamental interest in following the law.

6 As Shareholder-Plaintiffs allege in the First Amended Complaint (“FAC”), Defendants
7 knowingly cause and permit Costco to neglect and abandon chickens, in violation of applicable
8 laws. Indeed, under Defendants’ leadership, Costco regularly lets its chickens die, slowly, from
9 thirst, hunger, illness, and injury. Defendants’ actions and inactions have thus harmed Costco’s
10 most fundamental interest: its interest in following the law. These actions and inactions have also
11 exposed Costco to financial harm and have negatively impacted, and will continue to diminish,
12 Costco’s reputation.

13 Each Defendant faces a substantial likelihood of liability for breaching their fiduciary
14 duties and making Costco act *ultra vires*. The Director Defendants thus cannot be trusted to
15 impartially decide whether Costco should sue Defendants (including *themselves*) for the claims
16 alleged in the FAC. Pe-suit demand on the Director Defendants (*i.e.*, asking them to sue
17 themselves) must therefore be excused as futile. Indeed, the FAC sufficiently alleges: (1)
18 Defendants face a substantial likelihood of liability for breaching their fiduciary duty to act
19 lawfully, by knowingly causing Costco to violate applicable animal-welfare laws (Count I); (2)
20 the Director Defendants face a substantial likelihood of liability for breaching their fiduciary duty
21 of loyalty by failing to take corrective measures or otherwise stop Costco from violating the law
22

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1 despite ample “red flags” that would have spurred a reasonable director to act (Count II); and (3)
2 Defendants face a substantial likelihood of liability for causing Costco to engage in illegal (and
3 thus *ultra vires*) acts (Count III). Defendants’ Motion to Dismiss, based solely on Shareholder-
4 Plaintiffs’ “failure” to make a demand on Costco’s Board of Directors must, therefore, be denied.

5 STATEMENT OF FACTS

6 Defendants¹ have wrongfully employed, and are causing Costco Wholesale Corporation to
7 continue to pursue, an illegal business strategy. See FAC ¶¶ 1–7. Pursuant to that business
8 strategy, Defendants cause Costco to: (1) breed chickens to grow so fast many become disabled
9 and cannot *stand under their own weight*, *id.* ¶ 3; (2) dump hundreds of thousands of genetically
10 vulnerable birds on Costco’s inexperienced contract growers, *id.* ¶¶ 86, 117, 119; (3) fail to
11 establish any realistic means for the numerous, *predictably disabled* birds to reach food and water,
12 *id.* ¶¶ 51, 127–29; and (4) fail to provide individualized veterinary care for injured, suffering birds,
13 *id.* ¶ 51. Indeed, Defendants knowingly permit a significant number of disabled birds to *die slowly*
14 *from hunger, thirst, injury, and illness*. See, e.g., *id.* ¶ 3. This is illegal.

18 ¹ “Defendants” are Roland Michael Vachris, Walter Craig Jelinek, Hamilton Evans James, Susan
19 Lynne Decker, Kenneth Darnell Denman, Richard Alan Galanti, Sally M. Jewell, Charles
20 Thomas Munger, Jeffrey S. Raikes, John William Stanton, Mary Agnes Wilderotter, Walter
21 Fredrick Shafer III, John Christopher Sullivan, Robert Craig Wilson, Timothy Lee Rose, Sarah
22 Catherine George, and Jeff Cole. The “Director Defendants” are Vachris, Jelinek, James,
Decker, Denman, Galanti, Jewell, Munger, Raikes, Stanton, and Wilderotter. The “Officer
Defendants” are Vachris, Jelinek, Galanti, Shafer, Sullivan, Wilson, Rose, George, and Cole.

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1 **I. THE SALE OF CHEAP ROTISSERIE CHICKENS IS A MAJOR COMPONENT**
2 **OF COSTCO’S CURRENT BUSINESS MODEL.**

3 Costco, a membership-based retailer, offers its members low prices on a wide range of
4 products. FAC ¶ 1. A well-known, key feature of Costco’s current business model is using cheap
5 rotisserie chickens to drive foot traffic and encourage membership renewals. *Id.* ¶¶ 1, 155. For
6 over a decade, despite inflation and sharply rising input costs, Costco has sold those iconic
7 chickens for just \$4.99 each. *Id.* ¶ 1. Last year, Costco sold over 100 million chickens. *Id.*

8 Given the significance of Costco’s rotisserie-chicken strategy to its current business model,
9 it is widely recognized that “Costco is willing to go to extreme lengths to keep its chickens at
10 \$4.99.” *Id.* Thus, to lower input costs by supplying itself with large quantities of cheap meat,
11 Costco established its owned-and-controlled subsidiary, Lincoln Premium Poultry, LLC (“LPP”).
12 *Id.* ¶¶ 48–49. Defendant Shafer, Costco’s Senior Vice President, leads LPP. *Id.* ¶ 49.

13 **II. COSTCO HAS COMPLETE CONTROL OVER ITS CHICKENS.**

14 Costco owns and controls the chickens referenced herein throughout their lives—either
15 directly or through LPP. FAC ¶¶ 50, 63. Costco controls the birds’ breeding, *environment, living*
16 *conditions*, and deaths. *Id.* ¶ 64.

17 **A. Costco Entered the Poultry-Production Business to Supply Itself with Cheap**
18 **Meat.**

19 Costco spent approximately half-a-billion dollars building a poultry production facility in
20 Nebraska, to supply itself with cheap rotisserie chickens. FAC ¶¶ 65–66, 156.

21 Costco controls its chickens’ genetics through selective breeding. *Id.* ¶ 68. Costco *chooses*
22 to breed birds that grow excessively fast. *Id.* ¶ 107. Costco chickens start their lives at Costco’s

1 hatchery and are then brought to Costco’s growers’ factory farms, in Nebraska and Iowa, to be
2 fattened for slaughter. *Id.* ¶¶ 69, 47. The birds are slaughtered at Costco’s slaughterhouse. *Id.* ¶
3 69.

4 Costco set up LPP to operate Costco’s poultry facility. *Id.* ¶ 70. LPP slaughters and
5 processes chickens exclusively for Costco. FAC ¶ 73.

6 **B. Costco has Complete Control Over its Growers.**

7 Costco, through LPP, recruited approximately 120 individuals to become contract growers.
8 FAC ¶ 80. These new recruits obtained land in line with Costco’s specifications for factory-farm
9 placement. *Id.* Costco encouraged each individual to build four-to-twelve barns on their land. *Id.*

10 Most of the individuals with whom Costco contracts have no prior poultry-raising
11 experience. *Id.* ¶ 82. Costco is responsible for training them on how to care for chickens, and for
12 setting the animal-welfare standards and practices they follow. *Id.* The growers rely solely on that
13 training. *Id.* ¶ 85.

14 Costco actually *prefers* inexperienced growers who are blank slates for Costco’s
15 instruction (including on the improper practices identified herein and in the FAC). FAC ¶ 83.
16 Indeed, in a Costco promotional video, an inexperienced Costco grower stated: “60,000 birds
17 showed up to our farm, and our lives have been changed forever...[I]t’s not been a learning curve—
18 it’s been a learning line straight up. *Sometimes backwards.*” *Id.* ¶ 84 (emphasis added). Costco
19 and LPP pressure new growers (without chicken-raising experience) to raise as many as 190,000
20 birds *every six-weeks*. *Id.* ¶ 86.

21 Costco encourages its growers to sign fifteen-year contracts. *Id.* ¶ 87. Growers’ factory
22

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1 farms and equipment are built according to Costco’s specifications. *Id.* ¶ 88. As a result, it is
2 nearly impossible for a grower to profitably repurpose the factory farm and equipment, should the
3 grower want to end their relationship with Costco. *Id.* Further, Costco’s growers are required to
4 take out large loans to finance building factory farms to Costco’s specifications. FAC ¶ 89.
5 Because of their burdensome debt, fifteen-year contracts, expensive and hard-to-repurpose factory
6 farms, and lack of prior chicken-raising experience, growers are beholden to Costco’s decision
7 making and under Costco’s control. *Id.* ¶ 90.

8 Costco not only controls the design of growers’ farms and equipment; it also dictates the
9 conditions under which growers keep Costco’s birds. *Id.* ¶ 92. Growers rely solely on Costco,
10 through LLP, for technical instructions for raising birds and follow a Costco-prescribed regimen
11 regarding, among other things, the birds’ food, light, and temperature. *Id.* ¶¶ 93–94. Growers also
12 rely on Costco for veterinary services. *Id.* ¶ 95.

13 Unsurprisingly given the above, growers are particularly susceptible to Costco’s influence.
14 *Id.* ¶ 102. Indeed, growers are so powerless that one agricultural economics expert referred to a
15 Costco grower’s role as like “an indentured servant” or “a chicken house janitor.” FAC ¶ 97. The
16 growers’ factory-farm facilities have similarly been called “Costco-sponsored chicken houses” and
17 “Costco’s grow farms.” *Id.* ¶ 98.

18 **C. Growers (Predictably) Cannot Adequately Care for Chickens While Following**
19 **Costco’s Mandated Practices.**

20 A single Costco grower’s barn may hold more than 45,000 chickens. FAC ¶ 115. Those
21 barns are over-crowded and, as a result, birds are forced to live amidst their own waste. *Id.* ¶ 114.
22 Each individual grower has multiple, crowded barns. *Id.* ¶ 116. A single grower may have as

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1 many as 360,000 birds at once. *Id.* ¶ 117.

2 Given the birds’ obvious, predictable health problems (discussed herein), the fact that
3 Costco selects inexperienced growers, the fact that the growers are entirely reliant on Costco
4 (through LPP) for training, and the immense financial pressure placed on growers, it is essentially
5 impossible for Costco growers to take proper care of 360,000 birds—many of which are injured
6 or disabled. *Id.* ¶ 118. Costco knows of that impossibility. *Id.*

7 **III. COSTCO’S BIRDS ARE UNLAWFULLY ABANDONED AND NEGLECTED.**

8 Costco’s treatment of its chickens from *birth to slaughter* violates applicable animal-
9 welfare laws.

10 Costco intentionally breeds its chickens to grow unnaturally fast. FAC ¶ 107. Birds bred
11 to grow unnaturally fast (like Costco’s) have unique health problems that require individualized
12 care and veterinary treatment. *Id.* ¶ 108. For example, due to their fast growth, Costco’s birds
13 often fall on their backs and cannot stand up. *Id.* ¶ 121. The birds, therefore, become completely
14 disabled and cannot access food or water without help. *Id.* If such help is not provided, the birds
15 predictably die from thirst or starvation. *Id.* ¶ 108.

16 Costco, however, fails to provide any means for its *many* disabled birds to access food and
17 water. *See, e.g., id.* ¶ 136 (citing footage of Costco chickens with severe, immobilizing limb
18 deformities and metabolic disease resulting in birds becoming disabled); *id.* ¶131 (citing Costco
19 factory-farm footage of decaying birds that died from thirst, hunger, illness, or injury); *id.* ¶ 163
20 (citing Defendant Sullivan’s admission that above-mentioned footage shows “normal and
21 uneventful activity” for a Costco contract grower); *id.* ¶ 164 (citing LPP’s admission that the
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1 grower in question was simply “following” the “process” LPP had “laid out for” growers).
2 Costco’s failure to provide basic care constitutes *neglect*² and *abandonment* and thus violates both
3 the Nebraska Livestock Animal Welfare Act, Neb. Rev. Stat. § 54-901, *et seq.* (“NLAWA”) and
4 the Iowa Livestock Neglect Law, Iowa Code § 717.2 (“ILNL”).

5 Further, excessively fast-growing birds, like Costco’s, have unique health problems
6 including, but not limited to, lung, bone, and heart defects that require individualized veterinary
7 care. FAC ¶ 125. Lacking such care, many of Costco’s chickens suffer and die prematurely. *Id.*
8 ¶ 108. Costco’s unnaturally fast-growing birds also frequently lose feathers on their underside,
9 exposing their skin to the dirty, excrement-laden³ factory-farm floor. *Id.* ¶ 109. That direct floor
10 contact causes injury and ammonia burns. *Id.* Ammonia burns also require specialized care,
11 including veterinary treatment. *Id.* ¶ 108. But Costco *declines* to provide such care to its birds, in
12 direct violation of applicable laws, leaving them to suffer and die from their injuries. *See e.g.*,
13 FAC ¶ 135 (citing footage showing Costco birds with open, untreated wounds); *id.* ¶ 136 (citing
14

15 ² In addition to neglecting birds at its growers’ factory farms, Costco also neglects birds at
16 Costco’s slaughterhouse. *See* FAC ¶ 141. For example, Costco denied food and water to
17 approximately 30,500 chickens for over twenty-four hours in January 2020, resulting in the death
18 of 1,622 birds. *Id.* ¶ 142. A government agent concluded “the prolonged time being
19 held...without access to food and water, in crowded conditions, led to the” chickens’ preventable
20 deaths. *Id.* Shockingly, less than a month after this action was filed, Costco *once again* caused
21 the preventable, pre-slaughter deaths of over 1,000 chickens. *See* Tammy Real-McKeighan, *No*
Charges Filed After Chickens Die from Truck Fire at LPP,
https://fremonttribune.com/news/local/no-charges-filed-after-chickens-die-from-truck-fire-at-lpp/article_a505a0bf-7c5e-5f8e-a4dc-ab79bb9c50fc.html (last visited Sept. 1, 2022); *see also*
Miller v. Yates, 834 P.2d 36, 38 (Wash. Ct. App. 1992) (acknowledging court took judicial notice
22 of information published in newspaper).

³ Costco removes excrement from factory farms *just once per year*. *See* FAC ¶ 138.

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1 footage showing diseased Costco chicks exacerbated by unclean conditions). Costco leaves yet
2 other birds to suffer and die from being trapped in feeders. *Id.* ¶ 137 (citing Costco factory-farm
3 footage showing a dead chick that apparently died from dehydration).

4 **IV. DEFENDANTS CAUSE, AND KNOW OF, COSTCO’S ILLEGAL PRACTICES.**

5 Defendants cause, know of, and consciously ignore red flags illuminating, Costco’s illegal
6 neglect and abandonment. FAC ¶ 52. This is clear—Costco’s illegal actions were exposed in,
7 amongst other places: (1) a 2021 *New York Times* piece entitled *The Ugly Secrets Behind the*
8 *Costco Chicken* (“*Ugly Secrets*”); (2) numerous targeted social media posts and an online petition;
9 (3) an online video specifically addressing Costco “executives;” and (4) videos created by Mercy
10 for Animals (“MFA”), including one on which Defendant Sullivan publicly commented. FAC ¶
11 52. Defendants also have knowledge of, and control over, Costco’s illegal practices due to their
12 roles with Costco.

13 **A. Defendants Have Control Over, and Knowledge of, Costco’s Neglect and** 14 **Abandonment due to Their Respective Roles.**

15 The Defendants have control over Costco’s major projects and decisions, including
16 Costco’s poultry production. FAC ¶ 150. In fact, as even the heavily redacted Costco Board
17 minutes—produced in response to Shareholder-Plaintiffs’ Request—make clear, the Director
18 Defendants frequently considered and discussed issues concerning Costco’s poultry production
19 practices (including those identified in *Ugly Secrets*). *See* Mot. at 20; Roberts Decl. Exs. 4, 5, 7,
20 8.

21 Defendants Vachris, Jelinek, Galanti, and Sullivan are high-level Costco officers who
22 oversee Costco’s operations and its major projects and decisions, including Costco’s poultry

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DEFENDANTS’ MOTION TO DISMISS**

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1 production. *See* FAC ¶ 151. Defendants Shafer, Wilson, Rose, George, and Cole are Costco
2 officers whose roles specifically cover Costco’s chicken breeding, raising, and slaughtering. *Id.* ¶
3 152. Each Officer Defendant knows of, and facilitates, Costco’s treatment of chickens. *Id.*
4 Indeed: Defendant Jelinek publicly gave Costco’s “rotisserie chicken” credit for encouraging
5 customers to renew their memberships during the COVID-19 pandemic; Defendant Galanti has
6 spoken publicly about how important it is for Costco to keep its chicken prices low; Costco’s
7 current strategy (implemented by Defendants) places great weight on decreasing Costco’s cost of
8 obtaining chickens; and Costco is involved (through Defendants) in a dispute with Tyson Foods,
9 Inc. regarding Costco’s concern over the price of buying chicken meat from third parties. *Id.* ¶
10 155–56.

11 **B. Defendants Were Made Further Aware of Costco’s Illegal Neglect and**
12 **Abandonment Through Public Articles, Videos, Outcry, and Controversy.**

13 Costco’s current chicken-raising method—with its inherent neglect and abandonment—
14 has been in the news, has been the subject of publicly available videos, including one targeting
15 Costco’s “executives,” and has caused public outcry. FAC ¶ 158. Indeed, Defendants were put
16 on notice of Costco’s illegal poultry production practices through (at least) the following:

17 *First, multiple* batches of footage were released publicly, showing routine, ongoing neglect
18 and abandonment of Costco’s chickens—and Defendant Sullivan admittedly watched one video
19 of such footage. *See, e.g., id.* ¶¶ 67, 161; *Ugly Secrets* at 2.

20 *Second*, the New York Times, a global publication with millions of readers, published *Ugly*
21 *Secrets*, and Defendant Sullivan provided comment. *Ugly Secrets* at 1–2. The Board *admits*
22 discussing *Ugly Secrets* at meetings. *See* Mot. at 20. Further, in direct response to *Ugly Secrets*

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1 Costco (through Defendants) released multiple public statements. *See* Roberts Decl., Ex. 3, 6.

2 *Third*, there was public outcry against Costco’s mistreatment of chickens, specifically
3 addressing Costco’s “executives.” The outcry included: (1) a repeatedly shared May 2021 social-
4 media video showing footage of Costco’s illegal mistreatment of birds, and specifically calling out
5 or mentioning Defendants Jelinek, Wilson, James, Decker, Denman, and Jewell; (2) “tags” of
6 Defendants Decker, Denman, and Jewell in February-through-May 2021 “tweets” alerting those
7 Defendants to Costco’s mistreatment of chickens and including footage; (3) the website, “richard-
8 galanti.com,” containing Defendant Galanti’s picture, discussing details of Costco’s mistreatment
9 of chickens, and concluding: “It’s time for Richard Galanti and Costco to put an end to this animal
10 abuse;” and (4) a popular “Change.org” petition directed to Defendants Jelinek, Galanti, Vachris,
11 Wilson, and George, detailing Costco’s mistreatment of chickens and linking to *Ugly Secrets*.
12 FAC ¶¶ 172–78.

13 Taken together, these sources leave no doubt that Defendants knew of, and ignored “red
14 flags” illuminating, Costco’s illegal mistreatment of its chickens. To date, by knowingly
15 *continuing* to leave Costco’s animals to die, slowly, from preventable things like thirst and
16 dehydration, Defendants *continue* to cause Costco to violate the law.

17 STATEMENT OF ISSUES

18 Whether the Court should deny Defendants’ Motion and permit this action to proceed to
19 discovery, where Shareholder-Plaintiffs adequately alleged that pre-suit demand is excused as
20 futile because Defendants face a substantial likelihood of liability for both: (1) breaching their
21 fiduciary duties; and (2) causing Costco to act *ultra vires*

22
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1 **EVIDENCE RELIED UPON**

2 Shareholder-Plaintiffs rely on the FAC’s allegations, Alene Anello’s Declaration submitted
3 herewith, and the Declaration’s exhibits, which consist solely of Shareholder-Plaintiffs’ Records
4 Request and documents the Board produced in response. At this early stage, courts presume the
5 truth of all facts alleged in the complaint, and draw all reasonable inferences in plaintiffs’ favor.
6 *See Trujillo v. Nw. Tr. Servs.*, 183 Wn.2d 820, 830 (2015); *United Food & Com. Workers Union*
7 *v. Zuckerberg*, 262 A.3d 1034, 1048 (Del. 2021).

8 **ARGUMENT & AUTHORITY**

9 **I. STANDARD**

10 Upon a motion to dismiss under CR 12(b)(6): (i) all well-pleaded factual allegations are
11 accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice
12 of plaintiffs’ claims; (iii) courts draw all reasonable inferences in favor of the non-moving party
13 (here, Shareholder-Plaintiffs); and (iv) dismissal is inappropriate unless plaintiffs would not be
14 entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.
15 *See J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 716 (Wash. 2015); *see also Cutler v.*
16 *Phillips Petrol. Co.*, 881 P.2d 216, 219–220 (Wash. 1994) (“CR 12(b)(6) motions should be
17 granted sparingly and with care and only in the unusual case in
18 which plaintiff includes allegations that show on the face of the complaint that there is some
19 insuperable bar to relief.”) (citations omitted); *In re Parentage of C.M.F.*, 314 P.3d 1109, 1112
20 (Wash. 2013) (“Dismissal under CR 12(b)(6) is appropriate only if it appears beyond
21 a reasonable doubt that no facts exist that would justify recovery.”)

22 **PLAINTIFFS’ OPPOSITION TO
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1 Similarly, under CR 23.1, while plaintiffs must plead particularized facts⁴ showing demand
2 futility, the pleading burden is intended to be “*generous to plaintiffs*” and “the court [is] bound to
3 draw all inferences from those particularized facts *in favor of the plaintiffs, not the defendants*,
4 when dismissal of a derivative complaint is sought.” *In re F5 Networks, Inc.*, 166 Wn.2d 229, 240
5 (2009) (emphasis added); *Zuckerberg*, 262 A.3d at 1061; *Barovic v. Ballmer*, 72 F. Supp. 3d 1210,
6 1218 (W.D. Wash. 2014) (stating that derivative-complaint allegations must be viewed in light
7 most favorable to plaintiffs and finding plaintiffs stated *Caremark* claim). Further, the Court need
8 only have a *reasonable doubt* Director Defendants could have fairly and objectively considered a
9 demand to find such demand is futile. *See In re Oracle Corp. Derivative Litg.*, 2018 WL 1381331,
10 at *18 (Del. Ch. Mar. 19, 2018); *F5 Networks*, 166 Wn.2d at 240. Shareholder-Plaintiffs’
11 allegations with respect to Costco’s illegal, *ultra vires* acts more than supply that doubt.

12 **II. SHAREHOLDER-PLAINTIFFS ADEQUATELY ALLEGED DEMAND** 13 **FUTILITY.**

14 Defendants argue the FAC should be dismissed for failure to adequately allege demand
15 futility under CR 23.1 and RCW § 23B.07.400. *See* Mot. at 9. Defendants are wrong.
16 Shareholder-Plaintiffs’ allegations are more than sufficient (and particularized) to show pre-suit
17 demand on the Board would have been futile.

18
19 ⁴ Defendants claim, to plead demand futility, a plaintiff “must satisfy stringent requirements of
20 factual particularity that differ substantially from notice pleading requirements,” but they
21 tellingly fail to cite a single *Washington* case adopting that standard. *See* Def. Mot. at 9
22 (citations omitted). That is because the demand-futility standard set forth in *F5 Networks* (which
also governs whether Defendants face a substantial likelihood of liability) applies. *See F5
Networks*, 166 Wn.2d at 240.

**PLAINTIFFS’ OPPOSITION TO
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1 Demand on a board is excused as futile where (like here) plaintiffs allege particularized
2 facts reasonably showing a majority of directors: (1) received a material personal benefit from the
3 misconduct alleged; (ii) face a substantial likelihood of liability from the conduct alleged; *or* (iii)
4 lack independence from someone who received such benefit or faces such liability. *See*
5 *Zuckerberg*, 262 A.3d at 1059; *F5 Networks*, 166 Wn.2d at 241. Because the Director Defendants
6 face a substantial likelihood of liability on Shareholder-Plaintiffs’ breach-of-fiduciary-duty and
7 *ultra-vires* claims, and therefore would not have fairly and objectively considered a demand, the
8 Motion must be denied.

9 **A. Defendants Face a Substantial Likelihood of Liability for Breaching Their**
10 **Duty to act Lawfully.**

11 The FAC adequately alleges Defendants face a substantial likelihood of liability for
12 knowingly causing and permitting (and continuing to cause and permit) Costco to violate
13 applicable Nebraska and Iowa animal-welfare laws. Demand is thus excused.

14 **1. The Duty to act Lawfully is Independent of the Duties of Care and**
15 **Loyalty.**

16 Defendants’ Motion treats Defendants’ duty to act lawfully as a subset of their duty of
17 loyalty. *See* Mot. at 10 (the “duty to act lawfully...is a duty of loyalty claim”). That is improper.
18 The duty to act lawfully is an independent duty all directors and officers owe their corporations.
19 *See Miller v. AT&T*, 507 F.2d 759, 762 (3d Cir. 1974) (“[E]ven though committed to benefit the
20 corporation, illegal acts may amount to a breach of fiduciary duty.”); *Cort v. Ash*, 422 U.S. 66, 84–
21 85 (1975) (“[T]he use of corporate funds in violation of” a “law may...give rise to a cause of action
22 for breach of fiduciary duty.”); *The Duty to Act Lawfully*, 20A TEX. PRAC., Business Organizations

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

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1 § 36:11 (3d ed.) (“*In addition to* exercising their duties of care and loyalty, directors have a duty
2 to observe the law...*This is an additional duty* because, under certain circumstances, directors may
3 decide after careful study that violating the law is in the best interests of the corporation and its
4 shareholders....”) (emphasis added); Melvin A. Eisenberg, *The Duty of Care of Corporate*
5 *Directors and Officers*, 51 U. PITT. L. REV. 945, 945 (1990) (“Corporate directors and officers are
6 under *three general legal duties*: the duty to act carefully, the duty to act loyally, *and* the duty to
7 act lawfully.”) (emphasis added); Aleta G. Estreicher & Warren S. Green, *Heavy Duty II: Forming*
8 *A Business Entity in the United States*, 17 N.Y.L. SCH. J. INT’L & COMP. L. 307, 323 (1997)
9 (“Directors and officers...are...liable for damages caused by breaches of their fiduciary duties of
10 care and loyalty, *and* the duty to act lawfully.”) (emphasis added); Richard S. Saver, *Medical*
11 *Research Oversight from the Corporate Governance Perspective: Comparing Institutional Review*
12 *Boards and Corporate Boards*, 46 WM. & MARY L. REV. 619, 672 (2004) (“The director’s major
13 fiduciary duties include the duty of care, duty of loyalty, duty of good faith, *and* duty to act
14 lawfully.”) (emphasis added). Thus, the standard set forth in *In re Caremark Int’l Inc. Derivative*
15 *Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996), which relates solely to duty-of-loyalty claims, does *not*
16 apply⁵ to Shareholder-Plaintiffs’ duty-to-act-lawfully claim, as Defendants incorrectly suggest.
17 See Mot. at 10–11; see also *Clingman & Hanger Mgmt. Assocs., LLC v. Knobel*, 2018 WL

19
20
21
22
⁵ Thus, Defendants’ assertion (which is incorrect even under *Caremark*) that Shareholder-
Plaintiffs must plead “knowing and intentional *participation* in illegal conduct,” see Mot. at 11,
misses the mark. The question is, instead, whether Defendants caused *Costco* to violate the law
(they did).

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DEFENDANTS’ MOTION TO DISMISS**

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1 2006763, at *9 (S.D. Fla. Jan. 9, 2018) (finding claim for breach of duty to act lawfully is distinct
2 from *Caremark* claim).

3 **2. The FAC Adequately Alleges Defendants Breached Their Duty to act**
4 **Lawfully.**

5 The FAC adequately alleges all Defendants face a substantial likelihood of liability on
6 Shareholder-Plaintiffs’ duty-to-act-lawfully claim.⁶ Demand is thus excused as futile. Indeed,
7 “[i]t strains reason to argue that a defendant-director could act independently to evaluate the merits
8 of bringing a legal action” if the director faces legal liability in connection with plaintiffs’ claims.
9 *In re Investors Bancorp. Inc. Stockholder Litigation*, 177 A.3d 1208, 1226 (Del. 2017).

10 The duty to act lawfully prohibits directors and officers from knowingly taking any actions
11 that would cause the corporation to violate applicable law. *See Miller*, 507 F.2d at 762; *Ash*, 422
12 U.S. at 84–85. This is true even if such actions could financially benefit, or are committed to
13 benefit, the corporation. *See Miller*, 507 F.2d at 762; *Louisiana Mun. Police Employees’ Ret. Sys.*
14 *v. Pyott*, 46 A.3d 313, 356 (Del. Ch. 2012), *rev’d on other grounds*, 74 A.3d 612 (Del. 2013)
15 (“[K]nowing use of illegal means to pursue profit” contravenes the common-sense principle that “a
16 fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly
17 causing it to seek profits by violating the law.”); *In re Massey Energy Co.*, 2011 WL 2176479, at
18 *20 (Del. Ch. May 31, 2011) (“Delaware law does not charter law breakers. Delaware law allows
19 corporations to pursue diverse means to make a profit, subject to *a critical statutory floor*, which

20
21 ⁶ Shareholder-Plaintiffs’ duty-to-act-lawfully claim is not (and cannot be) subject to the
22 exculpation provision in Costco’s Articles of Incorporation. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006).

**PLAINTIFFS’ OPPOSITION TO
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1 is the requirement that Delaware corporations only pursue ‘*lawful business*’ by ‘*lawful acts*.’ As
2 a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by
3 knowingly causing it to seek profit by violating the law.”) (emphasis added); *Hazout v. Tsang Mun*
4 *Ting*, 134 A.3d 274, 283 n.20 (Del. 2016) (“[I]t is utterly inconsistent with one’s duty of fidelity
5 to the corporation to consciously cause the corporation to act unlawfully.”).

6 Shareholder-Plaintiffs adequately alleged a duty-to-act-lawfully violation here. As
7 explained herein and in the FAC, Costco’s poultry production practices violate Nebraska and Iowa
8 laws, and Defendants, in addition to causing and allowing those practices, were put on notice (*i.e.*,
9 were “conscious”) of what they were causing and allowing. *See generally* FAC; *infra* 16–25; *see*
10 *also Hazout*, 134 A.3d at 283 n.20. Disregarding their fiduciary duties to Costco, Defendants
11 continue to cause and allow Costco’s illegal practices. They are thus subject to liability.

12 **a. Costco’s Poultry Production Practices Violate Nebraska and**
13 **Iowa laws.**

14 Despite Defendants’ protestation to the contrary, *see* Mot. at 13–14, Costco has violated,
15 and continues to violate, applicable animal-welfare laws. Costco, through its owned-and-
16 controlled subsidiary, LPP, controls factory farms in Nebraska and Iowa. FAC ¶¶ 60, 65. LPP-
17 controlled factory farms raise over 100 million chickens annually for sale in Costco stores. *Id.* ¶
18 52. Those chickens are regularly neglected and abandoned in violation of NLAWA and ILNL.

19 Under NLAWA, cruel neglect occurs when a defendant intentionally, knowingly, or
20 recklessly “fail[s] to provide a livestock animal [such as a chicken] in [the defendant’s] care,
21
22

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1 whether as owner⁷ or custodian, with feed, water, or other care as is reasonably necessary for the
2 livestock animal’s health.” NLAWA § 54-902(5).

3 Further, under NLAWA, livestock abandonment occurs when a defendant intentionally,
4 knowingly, or recklessly “leave[s] a livestock animal in [the defendant’s] care, whether as owner
5 or custodian, for any length of time without making effective provision for the livestock animal’s
6 feed, water, or other care as is reasonably necessary for the livestock animal’s health.” *Id.* § 54-
7 902(1).

8 Lastly, under ILNL, there are three different ways that livestock neglect may occur. *See*
9 ILNL § 717.2(1). Specifically, neglect occurs whenever a defendant,

10 impounds or confines livestock, in any place, and does *any of the*
11 *following*[:]...

12 a. Fails to provide livestock with care consistent with customary
13 animal husbandry practices[;]

14 ***b. Deprives livestock of necessary sustenance[; or]***

15 c. Injures or destroys livestock by any means which causes pain or
16 suffering in a manner inconsistent with customary animal husbandry
17 practices.

18 ILNL § 717.2(1) (emphasis added). Here, the FAC alleges a subsection (1)(b) violation, noting
19 that Costco deprives its chickens of necessary sustenance. *See* FAC ¶¶ 58, 60; ILNL § 717.2(1)(b).

20 Costco, through LLP (and Defendants), routinely violates each of the aforementioned
21 animal-welfare laws, including by: (1) breeding its chickens to grow so fast that they become

22 ⁷ Costco is the “owner” of the chickens at issue in this action. FAC ¶¶ 50, 56, 63, 120, 127, 134.
Costco is also often their “custodian.” *Id.* ¶¶ 56, 69, 78–79, 103, 139-140.

1 disabled, and then failing to provide its many disabled birds with “feed,” “water,” and “other care;”
2 (2) denying injured birds individualized veterinary care; (3) leaving disabled, immobile chickens
3 to suffer painfully and die slowly from hunger, thirst, or injury and then decay amongst other birds;
4 (4) failing to rescue birds that become stuck in feeders; and (5) warehousing chickens in factory
5 farms so crowded that it is impossible for the birds to receive the care necessary for their “health”
6 (especially considering the unique, predictable health problems facing Costco’s unnaturally fast-
7 growing birds). FAC ¶¶ 56, 109, 125, 130; NLAWA § 54-902(1, 5); ILNL §717.2(1)(b).

8 Defendants’ attempt to circumvent Costco’s clear NLAWA and ILNL violations by citing
9 inapplicable exceptions from *irrelevant provisions* of those statutes and claim those inapplicable
10 exceptions somehow absolve Costco (and therefore Defendants) of legal liability because Costco’s
11 poultry production practices are allegedly “common.” See Mot. at 13–14. They are wrong.

12 *First*, Defendants cite the exception to ILNL subsections 717.2(1)(a) and (c) for
13 “customary” practices. Mot. at 13. But that exception *is plainly irrelevant here*, because
14 Shareholder-Plaintiffs are not alleging violations of subsections (1)(a) or (1)(c). Rather, the FAC
15 alleges violation of ILNL subsection 717.2(1)(b): “Depriv[ing] livestock of necessary sustenance.”
16 See FAC ¶¶ 58, 60; ILNL § 717.2(1)(b). Subsection (1)(b) has *no exception*. See ILNL §
17 717.2(1)(b). Instead, it is *always* illegal to starve animals in Iowa.

18 Put differently, ILNL section 717.2 applies a disjunctive test whereby a defendant commits
19 neglect if the defendant takes *any* actions prohibited by section 717.2, including (*but, importantly,*
20 *not limited to*) “fail[ing] to provide livestock with care” and “[i]njur[ing] or destroy[ing] livestock
21 by any means which causes pain or suffering” in a manner “inconsistent with customary animal
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1 husbandry practices.” ILNL § 717.2(1)(a) and (c). Defendants conveniently ignore the fact that a
2 defendant also violates Section 717.2 any time the defendant deprives livestock of necessary
3 sustenance (which Costco regularly does), regardless of whether such deprivations are
4 “customary.” *See id.* § 717.2(1)(b).

5 *Second*, Defendants raise an exception within an irrelevant provision of NLAWA for
6 practices “common to the livestock animal industry.” Mot. at 13. But this “common to the
7 livestock animal industry” exception *doesn’t apply to neglect or abandonment*. The phrase
8 “common to the livestock animal industry” is absent from section 54-907, the part of NLAWA
9 which contains universal exemptions applicable to the whole Act. *See* NLAWA § 54-907. Rather,
10 the phrase “common to the livestock animal industry” comes from NLAWA’s definition of
11 “[a]nimal welfare practice.” NLAWA § 54-902(2). And “consistent with animal welfare
12 practices,” in turn, is an exception to the specific, irrelevant crime of cruelly *mistreating* an animal.
13 NLAWA § 54-902(4); *see also* NLAWA § 54-903(2). Cruel mistreatment is a *different* crime
14 from neglect or abandonment. And Nebraska *only* exempts actions “common to the livestock
15 animal industry” from the crime of cruelly *mistreating* an animal (perhaps to protect farmers’
16 ability to produce food by carrying out certain necessary, affirmative farming practices). Nebraska
17 *doesn’t* exempt all such “common” actions from the thoughtless, pointless crimes of *neglect and*
18 *abandonment*, which serve *no* valid purpose.

19 Rather, for exemption from the crimes of *neglect or abandonment* under NLAWA, an
20 action must be “commonly *accepted*.” *See* NLAWA § 54-907(4) (emphasis added). The relevant
21 question is, therefore, whether the public accepts Costco’s failure to care for its birds. *See*
22

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

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1 Merriam-Webster, *common*, <https://www.merriam-webster.com/dictionary/common> (“of or
2 relating to a community at large”); Merriam-Webster, *accepted*, [https://www.merriam-
4 webster.com/dictionary/accepted](https://www.merriam-
3 webster.com/dictionary/accepted) (“regarded favorably: given approval or acceptance...especially:
5 generally approved or used.”). The FAC adequately alleges that the public **does not** accept
6 Costco’s callousness toward its chickens. See FAC ¶¶ 186–99 (explaining that 119,000 people
7 signed a letter **objecting** to Costco’s behavior; that tens of thousands of people worked with MFA
8 to ask Costco to treat chickens better; that people who learn about Costco’s treatment of birds
9 become horrified, lose their appetite for Costco chickens, and say things like, “This is terrible,”
10 and “Shame on you, Costco;” that Costco’s mistreatment of chickens turned the Costco Rotisserie
11 Chicken Facebook fan page into an animal-welfare campaign; and more).

12 *Third*, to the extent Defendants assert any affirmative defense, Shareholder-Plaintiffs are
13 entitled to test it in discovery. Merely asserting an affirmative defense doesn’t call for dismissal.
14 Rather, at this stage, the Court looks to the FAC allegations, read in the light most favorable to
15 Shareholder-Plaintiffs. And the FAC demonstrates that Costco’s practices are **unaccepted** and
16 illegal. FAC ¶¶ 186–99. Defendants misleadingly suggest Shareholder-Plaintiffs’ claims are
17 based on Defendants’ mere failure to adopt “aspirational standards” for chicken **breeding**. See
18 Mot. at 13. Not so. It is the **neglect and abandonment**, between birth and slaughter, that
19 Shareholder-Plaintiffs (correctly) identify as illegal. Further, the “NCC standards” Costco
20 allegedly follows do not protect Costco’s practice of **denying birds food, water, and necessary**

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1 *care*.⁸ It is surely unacceptable *to deprive animals of food and water*. Indeed, *NCC has sought*
2 *to distance itself* from the description of Costco’s factory farms. FAC ¶ 197 (“The conditions
3 described in [*Ugly Secrets*] are not an accurate representation of the health and welfare of today’s
4 broiler chickens.”).

5 Costco’s poultry production practices therefore violate NLAWA and ILNL.

6 **b. Defendants Were put on Notice of the Horror Involved in**
7 **Costco’s Practices.**

8 The FAC adequately alleges that Defendants knew⁹ about Costco’s poultry production
9 practices.

10 *First*, although it is hard to discern precisely what was discussed during—concededly

14 ⁸ Defendants also reference vague speculation as to the practices of companies that “Walmart” and
15 “Safeway” buy their chicken meat from, in an attempt to defend Costco’s own practices. *See*
16 *Mot.* at 14. But that speculation lacks necessary specifics—Defendants fail to even identify
17 which companies Walmart and Safeway buy their chicken meat from, and do not claim that
Walmart and Safeway raise their own birds (like Costco does). Nor do Defendants clarify
whether, like Costco, those companies leave their birds to die slowly, without food or water.

18 ⁹ Defendants argue they were not “personally involved in poultry production at LPP.” *See Mot.*
19 at 15. *First*, “personal involvement” in the illegal act itself is not required to state a duty-to-act-
20 lawfully claim. Rather, Shareholder-Plaintiffs are only required to (and did) allege Defendants
21 caused *Costco* to violate applicable law. *See, e.g., Clingman*, 2018 WL 2006763, at *8 (by
22 “consciously causing *the corporation* to violate the law, a director would be disloyal to the
corporation”) (citations omitted). *Second*, neglect and abandonment are often crimes of
inaction—thus that Defendants may not have personally interacted with chickens is particularly
irrelevant to the allegation that they left Costco’s chickens to die without proper care.

1 relevant¹⁰—Board meetings from the heavily reacted minutes produced in connection with
2 Shareholder-Plaintiffs’ Records Request, the following is clear: (1) on April 14, 2021, the Board
3 discussed “animal welfare policies;”¹¹ (2) on July 13–14, the Board discussed “animal welfare
4 initiatives;”¹² (3) on October 12–13, 2021, in connection with “legal and compliance matters,” the
5 Board discussed “recent developments concerning broiler welfare;”¹³ (4) on October 17–18, 2019,
6 the Board discussed “operations at the poultry complex;”¹⁴ and (5) on January 23–24, 2020, the
7 Board discussed “factors pressuring margins (including the poultry complex).”¹⁵ While
8 Defendants claim that they “belie[ved] Costco’s practices were legal,” they have not *actually cited*
9

10
11 ¹⁰ Shareholder-Plaintiffs made a Request under RCW section 23B.16.020 for documents related to
12 the “mistreatment of chickens by Costco and its agents and affiliates,” including documents
13 related to chickens’ “suffering and dying, without proper care.” See Mar. 17, 2022 Records
14 Request Letter to Counsel for The Board of Directors of Costco Wholesale Corporation, attached
to Anello Decl. as Ex. 1. In response, presumably conceding such documents are relevant,
Defendants produced the redacted Board minutes attached to Roberts’s Declaration as Exhibits
4, 5, 7, and 8 and to Anello’s Declaration as Exhibits 2 and 3.

15 ¹¹ All Director Defendants were present, as was Officer-Defendant Sullivan. See Roberts Decl.,
Ex. 4.

16 ¹² All Director Defendants were present, as were Officer-Defendants Sullivan, Vachris, and
17 George. See Roberts Decl., Ex. 5.

18 ¹³ All Director Defendants except James and Munger were present, as were Officer-Defendants
Vachris, George, and Sullivan. See Roberts Decl., Ex. 7.

19 ¹⁴ All Director Defendants except Munger and Jewel were present, as were Officer-Defendants
20 Vachris and Sullivan. See Anello Decl., Ex. 2.

21 ¹⁵ All Director Defendants were present, as was Officer-Defendant Sullivan. See Anello Decl., Ex.
22 3.

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1 anything supporting their unfounded claim. *See* Mot. at 19; *see also* Exs. to Roberts Decl.; Exs.
2 to Anello Decl. Instead, from the information available at this early stage of litigation, it is just as
3 likely that Defendants discussed the fact that Costco’s current practices violate animal-welfare
4 laws; and, ignoring their duty to act lawfully, decided that it was in Costco’s short-term financial
5 interest to continue the unlawful practices. Drawing all inferences in favor of Shareholder-
6 Plaintiffs (as the Court must do at this stage), it is impossible to conclude, as Defendants suggest,
7 that Defendants believed Costco was following the law.

8 *Second*, Defendants received notice that Costco was engaging in illegal practices through
9 (at least¹⁶) *Ugly Secrets* and footage of neglect and abandonment at one or more¹⁷ Costco factory
10 farm. *Ugly Secrets* revealed that Costco: (1) abandons its immobile chickens without access to
11 food and water; and (2) leaves its chickens to suffer and die from untreated ammonia burns. *See*
12 *Ugly Secrets* at 1. Defendants were clearly aware of *Ugly Secrets*, a New York Times piece about
13
14

15
16 ¹⁶Defendants also received notice as a result of their roles, and the targeted social media posts,
public outcry, media attention, and targeted videos. *See supra* 8–10.

17 ¹⁷Defendants incorrectly claim that “[t]he Complaint points to *one* video from *one* contract
18 grower’s barn.” Mot. at 12. *This is false*. The FAC references *multiple* videos and at least *two*
19 batches of footage. *See, e.g.*, FAC ¶¶ 67, 161. The FAC never alleges that both batches were
20 shot in the same barn. If Defendants want to assert as much, Shareholder-Plaintiffs are entitled
21 to test that assertion in discovery. In any case, Defendants’ public response to the footage reveals
22 that the footage represents the norm for *all* Costco factory farms. *See id.* ¶¶ 163 (admission that
the initial footage showed “normal and uneventful activity” for a Costco grower); ¶ 164
(admission that factory farm exposed in initial footage was “following” the “process that” Costco
“laid out”).

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1 Costco. FAC ¶ 52. In fact: Defendant Sullivan *provided comment* in *Ugly Secrets*, Costco issued¹⁸
2 a “broiler welfare” statement less than one month after *Ugly Secrets* was published, and
3 Defendants admit (in their Motion) that *Ugly Secrets* was discussed *at multiple Board meetings*.
4 FAC ¶ 52; Roberts Decl., Ex. 3; Def. Mot. at 20; *see also McCall v. Scott*, 239 F.3d 808, 821 (6th
5 Cir. 2001) (finding plaintiffs alleged inference that executives knew of illegal activity, in part,
6 because officer gave other executives a news article condemning certain allegedly illegal company
7 practices).

8 Further, *Ugly Secrets confirms* Defendant Sullivan watched an MFA video showing
9 Costco’s chicken neglect and abandonment. FAC ¶¶ 163. The practices depicted¹⁹ in the footage
10 violate NLAWA and ILNL. Moreover, Defendants evidently knew that the conditions revealed in
11 the video were *the norm* within Costco’s poultry business. *Id.* ¶¶ 163–64 (repeating admissions
12 by Defendant Sullivan and LPP that they considered the conditions revealed “normal and
13 uneventful” and that the grower in question was “following” LPP’s instructions). Thus, there is a
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18 ¹⁸Costco can act, including to issue statements, only through its directors and officers. *See*
19 *Frigidaire Sales Corp. v. Union Properties, Inc.*, 562 P.2d 244, 247 (Wash. 1977). Thus, there
20 is no reasonable doubt that Defendants were aware of the information contained in Costco’s
21 public statements, *see* Roberts Decl., Exs. 3, 6, and, necessarily, the public outcry (including
22 *Ugly Secrets* and the MFA video) that spurred those statements.

¹⁹Any claim that Defendants thought the neglect and abandonment shown in the footage and
described in *Ugly Secrets* was somehow “legal” strains credulity.

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1 more-than-reasonable basis to infer that Defendants know²⁰ of Costco’s illegal poultry production
2 practices, and the Motion must be denied. *See Kandell on behalf of FXCM, Inc. v. Niv*, 2017 WL
3 4334149, at *18 (Del. Ch. Sept. 29, 2017) (denying motion to dismiss fiduciary-duty claim based
4 on corporation’s violation of law and finding that, while “[d]efendants may well be proved correct
5 that, on a developed record, the [p]laintiff cannot demonstrate that the directors willfully acted, or
6 refrained from a known duty to act, causing the [c]ompany to violate the law[,]” the law “on my
7 reading, clearly prohibits [the acts alleged in the complaint], and I find that the [c]ompany did
8 precisely that.”).

9 **B. The Director Defendants Also Face a Substantial Likelihood of Liability for**
10 **Breaching Their Fiduciary Duty of Loyalty.**

11 In addition to breaching the duty to act lawfully, the FAC also adequately alleges Director
12 Defendants face a substantial likelihood of liability for breaching their duty of loyalty.²¹ Corporate
13 directors owe a fiduciary duty of loyalty, which is breached where (like here) directors ignore “red
14 flags” indicating the corporation is breaking the law. *See South v. Baker*, 62 A.3d 1, 15 (Del. Ch.
15 2012); *Horman v. Abney*, 2017 WL 242571, at *10 (Del. Ch. Jan. 19, 2017) (“The relevant
16 inquiries under the second prong of *Caremark* are whether the Board was made aware
17

18 ²⁰Washington courts define “knowledge” to include what corporations (*i.e.*, their boards) “know”
19 or have “reason to know.” *See, e.g., Enter. Timber, Inc. v. Washington Title Ins. Co.*, 457 P.2d
20 600, 602 (Wash. 1969); *Diimmel v. Morse*, 218 P.2d 334, 337 (1950) (“One who has notice of
21 facts sufficient to prompt a person of average prudence to inquire is deemed to have notice of all
22 facts which reasonable inquiry would disclose.”).

²¹Duty-of-loyalty claims, like duty-to-act-lawfully claims, cannot be exculpated. *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003).

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1 of red flags and then whether the Board responded to address them.”); *Baker*, 62 A.3d at 15 (“A
2 claim that...a board had notice of serious misconduct and simply failed to investigate, for example,
3 would survive a motion to dismiss, even if the...board was well constituted and was otherwise
4 functioning.”). A director’s failure to act in the face of information suggesting illegal conduct is
5 bad faith and is just as culpable as affirmative misconduct. *See Aronson v. Lewis*, 473 A.2d 805,
6 813 (Del. 1984) (equating “a conscious decision to refrain from acting” with a decision to act);
7 *Horman*, 2017 WL 242571, at *10 (“[B]ad faith means the directors...ignored red flags indicating
8 misconduct in defiance of their [fiduciary] duties.”). Here, even assuming (*arguendo*) Director
9 Defendants did not have actual knowledge that Costco was violating NLAWA and ILNL (they
10 did), there were certainly “red flags” that should have spurred the Director Defendants to
11 investigate. *See Melbourne Mun. Firefighters’ Pension Tr. Fund on Behalf of Qualcomm, Inc. v.*
12 *Jacobs*, 2016 WL 4076369, at *8 (Del. Ch. Aug. 1, 2016), *aff’d*, 158 A.3d 449 (Del. 2017) (to state
13 *Caremark* claim, plaintiff must plead “that the directors knew or **should have known** that the
14 corporation was violating the law”) (emphasis added); *City of Detroit Police & Fire Ret. Sys. on*
15 *Behalf of NiSource, Inc. v. Hamrock*, 2022 WL 2387653, at *20 (Del. Ch. June 30, 2022) (“[T]his
16 is a pleading-stage [*Caremark*] decision. The question for present purposes is therefore whether
17 it is **reasonably conceivable** that the identified red flag would have placed a **reasonable observer**
18 on notice of the risk of [illegality].”). Indeed, the Director Defendants received notice (“red flags”
19 that: (1) Costco’s chickens are abandoned without access to life-sustaining sustenance; (2)
20 Costco’s chickens are left to suffer from untreated illness and injury; and (3) Costco’s chickens
21 are confined in dirty, crowded factory farms amongst dead and decaying birds. *See supra* 21–25.
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1 Based on this notice, reasonable directors would have investigated Costco’s poultry production
2 practices. *See Clingman*, 2018 WL 2006763, at *12 (S.D. Fla. Jan. 9, 2018) (plaintiffs stated
3 *Caremark* claim where officers and directors received reports of corporation’s financial condition
4 and, based on those reports, “should have known” corporation acted unlawfully). Because the
5 Director Defendants did not investigate—and because Costco’s poultry production practices are
6 illegal, *see supra* 16–21—the FAC adequately alleges Director Defendants face a substantial
7 likelihood of liability on Shareholder-Plaintiffs’ duty-of-loyalty claim.

8 **1. The Director Defendants did not Institute a Well-Functioning**
9 **Oversight Mechanism and did not Express a “Belief” Costco’s**
10 **Neglect and Abandonment is “Legal.”**

11 Defendants argue Shareholder-Plaintiffs failed to state a *Caremark* claim because Costco’s
12 “Board had an oversight mechanism in place” and because Costco’s “public statements expressed
13 a belief Costco’s poultry production practices *were* legal.” *See Mot.* at 17, 19. They are wrong.
14 Defendants cite to alleged “reports to the Board on poultry operations and presentations;” the fact
15 that the Board discussed the “treatment of chickens” at multiple meetings; and Costco’s public
16 statements attached to Roberts’s Declaration. But none of those (heavily redacted) sources
17 *confirm or even discuss* whether Costco’s treatment of chickens is legal. Nor do they otherwise
18 show Costco had a well-functioning “oversight” mechanism in place to identify violations *of*
19 *applicable animal-welfare laws*.²² Rather, Costco’s public statements merely claim Costco’s

20 ²²Defendants cite cases suggesting the duty of loyalty is not violated where a corporation responds
21 to red flags with corrective measures. *See Mot.* at 20. Those cases are inapplicable. There is
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1 *breeding practices*, in isolation (again, *not Costco’s neglect and abandonment* of birds between
2 birth and slaughter) are allegedly consistent with “NCC industry standards.” *See* Mot. at 19. That
3 is not, as Defendants misleadingly suggest, equivalent to investigating the practices exposed in
4 *Ugly Secrets* and the MFA video; determining whether those practices violate applicable animal-
5 welfare laws where Costco factory farms are located (they do), and taking corrective action to stop
6 future violations. Further, and tellingly, Defendants have *not cited a single source* where Costco
7 actually expressed a “belief” that its chicken neglect and abandonment is legal. Nor could they.
8 It is obvious from the FAC and the Roberts Declaration that the Director Defendants wholly failed
9 to take corrective action on (or even investigate) Costco’s illegal poultry production practices,
10 despite ample red flags (in the form of incontrovertible videos and reports) showing neglect and
11 abandonment. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006)
12 (“Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious
13 disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that
14 fiduciary obligation in good faith.”). Because the FAC sufficiently alleges the Director Defendants

15
16 *no evidence* of Costco taking any action to correct its chicken neglect and abandonment.
17 Defendants rely on Board minutes where chickens were merely discussed. Those redacted
18 minutes in no way show the type of targeted, fulsome corrective measures implemented in the
19 cited cases. As discussed herein, there is *no basis* upon which to conclude (particularly pre-
20 discovery) that Defendants discussed implementing corrective measures at Board meetings—as
21 opposed to simply choosing to *continue* violating the law in an effort to increase profits while
22 hoping to avoid sanctions. In fact, the minutes indicate that the Board decided to *continue to defend*
Costco’s current treatment of chickens. *See* FAC ¶¶ 180–81 (quoting minutes about
Board’s “detailed discussion of why the Better Chicken Commitment urged by certain third-
parties is not appropriate for the company” and “[d]iscussion...concerning communication
alternatives around broiler welfare,” which presumably refers to Costco’s defensive, pro-status-
quo public statements).

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1 ignored red flags and failed to implement any oversight mechanism to identify actual or potential
2 violations of applicable animal-welfare laws, demand would have been futile. The Motion must
3 be denied as to Shareholder-Plaintiffs’ duty-of-loyalty claim.

4 **2. Costco has Suffered Significant Reputational Harm and is Exposed to**
5 **Substantial Financial Penalties.**

6 Defendants argue Shareholder-Plaintiffs failed to state a *Caremark* claim because the FAC
7 does not allege “corporate trauma.” *See* Mot. at 12. Not so.

8 *First*, a corporate trauma ***need not have already occurred*** for directors to have breached
9 their fiduciary duty by failing to act when faced with red flags. Rather, all that is required is that
10 defendants’ conduct ***expose*** the corporation to corporate traumas (such as fines or liability). *See*
11 *Caremark*, 698 A.2d at 967 (“The claim is that the directors allowed a situation to develop and
12 continue which exposed the corporation to enormous legal liability and that in so doing they
13 violated a duty to be active monitors of corporate performance.”). The FAC adequately alleges
14 Director Defendants exposed Costco to such liability. Costco’s practices violate NLAWA and
15 ILNL. Each violation (every time Costco neglects or abandons a chicken) carries a penalty. *See*
16 *generally* NLAWA (no aggregation of penalties); ILNL (no aggregation of penalties for simple-
17 misdemeanor neglect). Further, Defendants admit Costco “grows” ***nearly 100-million birds a***
18 ***year***. *See* Mot. at 16. Thus, even if Costco neglected and abandoned just a small fraction of its
19 birds—which is implausible, based on the FAC—Costco’s exposure to financial and other harm
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1 remains enormous.²³ See NLAWA § 54-903(1) (abandonment or neglect is Class I misdemeanor;
2 or, if animal seriously injured, sickened, or killed, Class IV felony); Neb. Rev. Stat. §§ 28-106
3 (Class I misdemeanors carry up-to-\$1,000 fines); 28-105(1) (Class IV felonies carry up-to-\$10,000
4 fines); ILNL § 717.2(2) (neglect is a simple misdemeanor); Iowa Code § 903.1(1)(a) (simple
5 misdemeanors carry up-to-\$850 fines).²⁴

6 *Second*, Shareholder-Plaintiffs alleged a “corporate trauma” here. Costco’s chicken
7 neglect and abandonment, which has been made public by numerous sources including the New
8 York Times, see FAC ¶ 52, has resulted, and will continue to result, in significant reputational
9 harm to Costco. See generally FAC. Reputational harm is a “corporate trauma.” See *In re Clovis*
10 *Oncology, Inc. Derivative Litig.*, 2019 WL 4850188, at *15 (Del. Ch. Oct. 1, 2019) (“[A]t this
11

12
13 ²³Defendants fault Shareholder-Plaintiffs for failing to “quantify” the number of chickens Costco
14 neglects and abandons. See Mot. at 12. But this is the motion-to-dismiss stage and Shareholder-
15 Plaintiffs have not had the benefit of discovery. Thus, Shareholder-Plaintiffs’ more-than-
16 plausible allegations that Costco neglects and abandons “many” and “numerous” birds, see, e.g.,
17 FAC ¶¶ 3, 51, 127–29, based on the ample sources cited in the FAC, are more than sufficient to
18 show Costco routinely neglects and abandons animals. See *Jackson v. Quality Loan Serv. Corp.*,
19 347 P.3d 487, 490 (Wash. Ct. App. 2015) (“[A]ny hypothetical situation conceivably raised by
20 the complaint defeats a CR 12(b)(6) motion.”). Indeed, it is unreasonable to believe that the
21 sources identified in the FAC, including the New York Times, happened to “stumble” upon rare,
22 infrequent illegal activity at Costco’s factory farms. Instead, it is (more than) plausible those
sources uncovered routine, ongoing practices. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 678
(2009) (“[A] claim has facial plausibility when the plaintiff pleads factual content that allows the
court to draw the reasonable inference that the defendant is liable for the [illegal] misconduct
alleged.... The plausibility standard is not akin to a ‘probability requirement.’”). Again, Costco
even admitted the egregious conditions revealed by MFA’s investigation were “normal” to
Costco, and that the grower at issue was following its instructions. FAC ¶¶ 163–64.

²⁴For example, if Costco neglects or abandons just 5% of its chickens, it faces a maximum *annual*
penalty somewhere from *four-billion* to *50-billion dollars*.

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1 stage, [the p]laintiffs’ allegation that [directors’] failure of oversight caused...reputational harm to
2 the Company is sufficient to provide a causal nexus between the breach of fiduciary duty and
3 the corporate trauma.”). Indeed, while Shareholder-Plaintiffs cannot quantify (precisely) the
4 extent of reputational harm at this pre-discovery stage, given the importance of rotisserie chickens
5 to Costco’s brand, such harm is significant. FAC ¶¶ 1, 48, 52.

6 **C. Defendants Face a Substantial Likelihood of Liability for Making Costco Act**
7 ***Ultra Vires.***

8 Shareholder-Plaintiffs adequately allege demand is futile as to their *ultra-vires* claim
9 because Defendants face a substantial likelihood of liability for making Costco break the law. As
10 discussed herein, Costco’s practices violate NLAWA and ILNL, and Costco can only act
11 (including illegally) through its directors and officers. *See supra* 16–21. Illegal acts are *ultra vires*
12 as a matter of law. *See* RCW § 23B.03.010(1) (“Every corporation incorporated under this title
13 has the purpose of engaging in any *lawful* business unless a more limited purpose is set forth in
14 the articles of incorporation.”) (emphasis added). Thus, the FAC sufficiently alleges that
15 Defendants face a substantial likelihood of liability as to Shareholder-Plaintiffs’ *ultra-vires* claim,
16 and demand is excused. *See In re Infousa, Inc.*, 2007 WL 3325921, at *16 (Del. Ch. Aug. 13,
17 2007) (“[D]emand will be excused if a majority of the board that allegedly pursued the *ultra*
18 *vires* action remains on the defendant board at the time demand is [to be] made”).²⁵

19 Defendants’ contrary argument lacks merit. Defendants protest that, “operation of a

21 ²⁵ At the time of all relevant acts alleged in the FAC, the composition of the Board remained
22 meaningfully unchanged. *See* FAC ¶¶ 25–41.

1 poultry production business” is not “outside the purposes for which Costco was formed.” *See* Mot.
2 at 20. But Costco’s operation of *any* business *in an illegal manner, is* outside the purpose for
3 which Costco was formed. *See* RCW § 23B.03.010(1); *see also* *Burwell v. Hobby Lobby Stores,*
4 *Inc.*, 573 U.S. 682, 711 (2014) (“Each American jurisdiction today either expressly or by
5 implication authorizes corporations to be formed under its general corporation act for *any*
6 *lawful* purpose or business.”) (citations omitted) (emphasis added); *Nevins v. Bryan*, 885 A.2d
7 233, 245 (Del. Ch.), *aff’d*, 884 A.2d 512 (Del. 2005) (“[I]llegal acts” are “beyond the authority of
8 the corporation.”). Defendants’ Motion must thus be denied.

9 **CONCLUSION**

10 The FAC states multiple valid claims against Defendants. Demand on the Board is futile.
11 Shareholder-Plaintiffs thus respectfully ask that this Court **DENY** Defendants’ Motion and allow
12 this action to proceed.

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I certify that this memorandum contains 8,908 words, in compliance with this Court’s July 11, 2022 order.

Respectfully submitted this September 8, 2022,

ANIMAL LAW OFFICES, PLLC

By: 
ADAM P. KARN WSBA No. 28622

LEGAL IMPACT FOR CHICKENS

By: /s/ Alene Anello
ALENE ANELLO, *Pro Hac Vice*

Attorneys for Plaintiffs,
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derivatively on behalf of COSTCO
WHOLESALE CORPORATION

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

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