☐ EXPEDITE

☐ No hearing set

☒ Hearing is set

Date: January 13, 2012

Time: 11:00am

Judge/Calendar: Hon. Paula Casey

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE, Plaintiffs, v. GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM, Defendants.	Case No. 11-2-01925-7 DEFENDANTS' SPECIAL MOTION TO STRIKE UNDER WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525, AND MOTION TO DISMISS NOTE FOR MOTION CALENDAR: JANUARY 13, 2012

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I. INTRODUCTION

Defendants move to strike this action under RCW 4.24.525, Washington's anti-SLAPP statute, which provides for early termination of claims that target speech protected by the First Amendment. Plaintiffs, five members of the Olympia Food Co-op ("Co-op"), oppose the Co-op Board's approval of a boycott of Israeli goods, adopted in support of a nonviolent international campaign seeking compliance with international law and respect for human rights. This is a fatally flawed derivative suit that seeks to punish the Board members of a non-profit corporation for their political speech and petitioning, and to chill them from exercising their First Amendment rights in the future. Plaintiffs' lawsuit is precisely the type that the Washington legislature intended to deter in enacting the anti-SLAPP law in 2010. The statute applies to claims, such as this one, that target the constitutional rights of free speech and petition in connection with an issue of public concern, and lawful conduct in furtherance of such rights. It requires immediate dismissal unless Plaintiffs can prove a probability of prevailing on the merits by clear and convincing evidence. They must make this showing at the outset, generally without recourse to discovery.

Because Plaintiffs cannot meet this standard, the Court must strike and dismiss these claims and award the statutorily required relief.[1]

II. FACTUAL BACKGROUND

A. The Olympia Food Co-operative.

The Olympia Food Co-operative ("Co-op") is a nonprofit corporation that was formed in 1976 to bring fresh, healthy food to the community and "to make human effects on the earth and its inhabitants positive and renewing and to encourage economic and social justice." Levine decl. ¶ 3 and Exh. A. True to its mission, the Co-op has been active in social, human, and civil

[1] Defendants also move to dismiss this action pursuant to Civil Rule ("CR") 12(b)(6) for "failure to state a claim upon which relief can be granted." CR 12(b)(6). To the extent that dismissal is warranted under 12(b)(6), however, it means that Plaintiffs have no "probability" of success, and Defendants respectfully submit that they are primarily entitled to the additional relief mandated by the anti-SLAPP law. Further, this motion is supported by the provisions of CR 23.1, which for identical reasons also triggers the mandatory anti-SLAPP remedies.

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rights, ecology, community welfare, and peace and justice issues. It has closed its doors to protest war and in respect for International Women's Day. It currently maintains three active boycotts, including those against Coca-Cola and products made in China and Israel. It holds itself to its egalitarian goals by committing both Board and Staff to a consensus model for decision-making and empowering the Staff to manage operations and merchandising. *Id.* ¶¶ 3-8, 18, 25 and Exhs. A, B – Bylaws, art. III, § 6; Exh. H.

B. The Boycott Resolution.

On July 15, 2010, the Co-op Board approved a boycott of Israeli-made products and divestiture from any investments in Israeli companies. It was approved by the Board after the Staff committee responsible for reviewing boycott requests reported to the Board that it was unable to reach consensus on the request, made more than a year earlier. Levine decl. ¶¶ 20, 21. The Board remanded the matter for feedback from the full Staff in an effort to reach full Staff consensus. *Id.* ¶ 23. The Staff representative to the Board reported back to the Board in July 2010 that a few Staff members opposed the proposal and refused to stand aside to permit consensus. *Id.* At the Board's next meeting on July 20, 2010, after discussion of the humanitarian issues underlying the request and hearing support for the proposal from about 30 people who attended the meeting (including impassioned opposition to delaying the decision for a full membership vote four months later), the Board reached a consensus to approve the boycott. *Id.* ¶ 24 and Exh. M. It announced its decision to the membership, issued a press release, and scheduled a forum to educate and respond to questions about the issue from members and the community, for mid-August 2010. Views favoring and opposing the proposal were expressed at the forum, with opponents complaining about the resolution's substance and procedure. Kaszynski decl. ¶¶ 11-13 and Exhs. H – J.

The boycott decision received extensive local, national, and even international media coverage, including a feature on Amy Goodman's radio and television show, *Democracy Now!*, and at least two reports in the Israeli newspaper, *Ha'aretz*. Levine decl. ¶ 29 and Exhs. N – Q.

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Under the Co-op bylaws, any member may compel a Co-op vote and action by a petition for action that is within the Co-op's mission and budget. To pass, the petition must be signed by 300 persons identifiable as members, and approved by 60 percent of voting Co-op members. *Id.* ¶¶ 31, 32 and Exhs. B, art. II, §§ 8, 10; Kaszynski decl. ¶ 20 and Exh. O. At both the July and September 2010 Board meetings, the Board invited members to initiate a member ballot on the boycott, and posted information on its web site about the members' right to petition and initiate a vote, stating: "any member is welcome to propose a member initiated ballot process and should contact the Co-op board to begin this process." No members acted on the invitation. Kaszynski decl. ¶¶ 20, 21 and Exhs. G, P.

C. The November 2010 Board Election.

In the November 2010 annual Co-op board elections, the boycott resolution dominated the campaign. *Id.* ¶¶ 14, 16. Three of the Plaintiffs, Susan Trinin and Linda and Kent Davis, ran in opposition to the boycott. *Id.* ¶ 15. The community group Olympia BDS[2] endorsed five candidates and expressed concerns about five others. *Id.* ¶ 17 and Exh. L. With a record-breaking voter turnout, more than three times larger than in each of the preceding years, all five candidates endorsed by Olympia BDS were elected by large margins. *Id.* ¶¶ 18, 19 and Exhs. M, N. The boycott resolution was, for all practical purposes, a symbolic act. It affected 0.075 percent of the value of total inventory at wholesale and none of the Co-op's investments. There have been no discernable adverse business consequences, with total receipts and net membership enrollments steadily increasing since the Board enacted the boycott. Levine decl. ¶¶ 33-35.

III. STATEMENT OF THE ISSUE

Whether Plaintiffs' claims should be stricken and dismissed under RCW 4.24.525 and CR 12(b)(6)?

---

[2] "BDS" is an acronym for boycotts, divestment, and sanctions.

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IV. ARGUMENT AND AUTHORITY

A. The Anti-SLAPP Statute Applies to This Lawsuit, Requiring Plaintiffs to Prove Their Claims by Clear and Convincing Evidence.

Washington law protects from suit all individuals and other persons, including corporations, for exercising their constitutional free speech rights and lawful actions in furtherance of such speech. In 2010, the legislature enacted RCW 4.24.525 to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," (*i.e.*, so-called Strategic Lawsuits against Public Participation, or "SLAPPs"). *See* Exh. A (S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010)). Such lawsuits "are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities," deterring them from "fully exercising their constitutional rights." *Id.* To prevent this, the anti-SLAPP statute allows the target of a SLAPP suit to bring a special motion to strike at the outset of litigation, and imposes a high burden of proof on the responding party. *See generally* RCW 4.24.525; *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010) (dismissing claims under anti-SLAPP statute); *Phoenix Trading, Inc. v. Kayser*, 2011 WL 3158416 (W.D. Wash. July 25, 2011) (same); *Castello v. City of Seattle,* 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010) (same). Discovery is stayed pending a decision on the motion. RCW 4.24.525(5)(c). A responding party who cannot meet his or her burden is subject to dismissal of the claims, in addition to a mandatory award of attorneys' fees, costs, and a $10,000 penalty for each named defendant. RCW 4.24.525(6)(a). The legislature has directed that the anti-SLAPP statute "shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010).

Washington's anti-SLAPP statute outlines a two-step process. First, "[a] moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public

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participation and petition." RCW 4.24.525(4)(b); *see also Aronson*, 738 F. Supp. 2d at 1110; *Castello*, 2010 WL 4857022, at *6. The statute defines "public participation" as including: "Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e).

Second, "[i]f the moving party meets this burden, the burden shifts to the responding party to establish by ***clear and convincing evidence*** a probability of prevailing on the claim." RCW 4.24.525(4)(b) (emphasis added); *Aronson*, 738 F. Supp. 2d at 1110; *Castello*, 2010 WL 4857022, at *6. If the responding party fails to meet its burden, the special motion to strike should be granted. *Id.*

1. The Boycott Is Protected by the Anti-SLAPP Statute as Constitutionally Protected Free Speech and Petition, and Lawful Conduct in Furtherance of Such Rights.

A peaceful boycott called to protest perceived human rights violations is indisputably protected by the First Amendment. *National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982):

> [The] right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.

Id. at 914. Accordingly, "the nonviolent elements of petitioners' [boycotting] activities are entitled to the protection of the First Amendment." *Id.* at 915.

Boycotts are an American tradition, ranging from pre-Civil War protests against slavery to the Montgomery bus boycott devised by Dr. Martin Luther King, Jr. to, most recently, the opposition to apartheid, which helped foster modern, multiracial South Africa. Indeed, the United States itself is a product of a colonial boycott (the "Continental Association") against British, Irish, and West Indian goods, issued by the First Continental Congress on October 20, 1774, in an effort to avoid war, persuade British lawmakers, and influence British public opinion.

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See Exh. B (Thomas Jefferson's personal copy of the Continental Association, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page001.db&recNum=325; *see also* CONGRESSIONAL JOURNAL, 1st Continental Cong., 1st Sess. (October 20, 1774), *reprinted in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 75-81 (Worthington C. Ford et al. eds., 1903)); DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774, 84 (1974).

The Board's boycott also independently qualifies under the anti-SLAPP statute as protected petitioning activity. *See, e.g., North American Expositions Co. Ltd. P'ship. v. Corcoran*, 898 N.E.2d 831, 840-41 (Mass. 2009) (for purposes of the anti-SLAPP statute, "peaceful boycotts and demonstrations" constitute protected ***petitioning*** activity) (citing George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5 (1989) (right to petition may involve "reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations")); *see also Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 820-21 (1994) (overruled on other grounds).

Finally, as noted in the preceding section, the anti-SLAPP statute, by its clear terms, protects all lawful conduct in furtherance of protected free speech. RCW 4.24.525(2)(e); *see, e.g., Wilcox, supra.*[3] Because its purpose is indisputably humanitarian and its methods are indisputably nonviolent, this boycott (including all related publicity and educational programs) is fully protected by the First Amendment and the anti-SLAPP law.[4]

---

[3] Washington's anti-SLAPP statute is modeled after its California analog. The well-developed case law on California's anti-SLAPP statute, Cal. Civ. Pro. § 425.16, is instructive given the two statutes' similarity. Three decisions interpreting the Washington statute all relied on California cases to grant motions to strike. *See Aronson*, 738 F. Supp. 2d at 1110; *Phoenix Trading, Inc.*, 2011 WL 3158416, at *6; *Castello,* 2010 WL 4857022, at *4.

[4] First Amendment protection extends to corporations and decisions made by a corporate board of directors. *Citizens United v. Fed. Election Comm'n*, --- U.S. ---, 130 S. Ct. 876, 899-900 (2010).

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2. The Co-op's Boycott Involves an Issue of Public Concern.

The Board's action was made "in connection with an issue of public concern." RCW 4.24.525(2)(e). "[S]peech on matters of public concern ... is at the heart of the First Amendment's protection." *Snyder v. Phelps*, --- U.S. ---, 131 S.Ct. 1207, 1215 (2011) (internal quotes omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community ... or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 1216 (internal quotations and citations omitted). An issue of public concern is *"any issue in which the public is interested." Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (italics original). "[T]he issue need not be 'significant' to be protected by the anti-SLAPP statute—*it is enough that it is one in which the public takes an interest.*" *Id.* (italics added); *see, e.g., Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir. 2010) (birthday card poking fun at Paris Hilton fell within scope of California anti-SLAPP statute).

It is axiomatic that the Israeli-Palestinian conflict is a matter of public concern. The courts have found as much. *See Card v. Pipes*, 398 F. Supp. 2d 1126, 1136 (D. Or. 2004) (holding plaintiff's claims were subject to the defendant's anti-SLAPP motion to strike because defendant's anti-Israel comments were "in connection with an interest of public concern (alleged political activism and bias in the college classroom)"). The BDS movement itself is a matter of public concern, both nationally and internationally. For example, 52 national, state, and local organizations have endorsed the first Jewish-sponsored national BDS campaign in the U.S. *See* Exh. C.[5] The Co-op's boycott resolution received so much media attention that it was covered by Israel's newspaper *Ha'aretz* on July 20, 2010, Levine decl. Exh. N, before the *Olympian* covered the story the next day. Levine decl. Exh. O. It was featured by Amy Goodman on her national TV and radio news show, *Democracy Now!* and in two articles published by the Israeli newspaper *Ha'aretz*.[6] In a series of online news articles published this past spring and summer,

[5] http://wedivest.org/organizational-endorsers/; http://jewishvoiceforpeace.org/tiaa-cref.

[6] *See* http://www.democracynow.org/2010/7/20/headlines#13 (July 20, 2010).

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it was reported that a national group, StandWithUs, as discussed more below, had been organizing a lawsuit against the Co-op for months before this lawsuit was filed. *Id.* Exhs. Q – S, U. The Co-op's boycott indisputably involves an issue of public concern.

B. Plaintiffs Lack Standing to Bring a Derivative Suit on Behalf of the Co-op.

The law of this state is that derivative suits, which are strongly disfavored in Washington, cannot be brought by members of nonprofit organizations. Plaintiffs therefore lack standing to bring this derivative suit. Plaintiffs also lack standing on the independent grounds that, for several reasons, they do not "fairly and adequately represent" the interests of Co-op members; they failed to exhaust intra-corporate remedies; and the Co-op has suffered no injury.

1. Washington Law Strongly Disfavors Shareholder Derivative Lawsuits.

In Washington, "[d]erivative suits are *disfavored* and may be brought only in *exceptional circumstances*." *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 147 (1987) (italics added).[7] Washington shares the Supreme Court's concern that "derivative actions brought by minority stockholders could, if unconstrained, undermine the basic principle of corporate governance that the decisions of a corporation...should be made by the board of directors or the majority of shareholders." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530 (1984); *see also* 5 MOORE'S FEDERAL PRACTICE § 23.1.02(4) (3d ed. 2011). A minority group may not "impose their unbridled wills upon the officers or directors of a corporation by launching the corporation into litigation for the purpose of obtaining for it certain benefits which the complaining parties deem to belong or be due to the corporation." *Goodwin v. Castleton*, 19 Wn.2d 748, 762 (1944). A derivative action must be closely scrutinized because it risks that "the corporation, its officers, and directors, and the majority stockholders would at once be conclusively shorn of their power of management and discretion in the conduct of those affairs which are of vital concern to the corporation and all its stockholders." *Id.* at 763.

[7] While several dramatic differences exist between derivative actions involving non-profits and for-profit corporations, as shown below, the underlying disfavor for derivative suits remains constant across both genres.

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Derivative suits are creatures of equity. *Goodwin*, 19 Wn.2d at 761; *Haberman*, 109 Wn.2d at 149; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949). When sitting in equity, the trial court enjoys broad powers, and its ultimate goal is to accomplish "substantial justice." *Franklin County Sheriff's Office v. Parmelee*, 162 Wn. App. 289, 294-295 (2011). Equity provides courts wide discretion to weigh and consider evidence relevant to the rights involved, and its decisions applying such evidence will be overturned only for abuse of discretion. *Id.* at 294.

Plaintiffs lack standing to maintain their derivative suit on several independently sufficient grounds. While Washington law strongly disfavors shareholder derivative lawsuits against for-profit corporations, it also rejects members' efforts to use derivative lawsuits to interfere with the internal governance decisions of nonprofit corporations.

2. Under *Lundberg*, Members of Nonprofits May Not Bring Derivative Suits.

In Washington, members of nonprofit organizations lack standing to bring derivative suits. In *Lundberg ex rel. Orient Foundation v. Coleman*, the Court of Appeals closed the door on such actions. It held, "the Legislature did not intend to grant an individual director *or a private individual* standing to bring derivative lawsuits on behalf of nonprofit corporations." 115 Wn. App. 172, 177 (2002) (italics added). The court held that the plain language of Washington's Nonprofit Corporations Act ("NCA") unambiguously foreclosed derivative suits by certain individuals, including members of a nonprofit. *Id.* Under this State's law, the Attorney General has the authority to bring a derivative suit against a nonprofit corporation. "[T]he Legislature has determined that a proper remedy for mismanagement of nonprofit corporations is [*inter alia*]...a proceeding brought by the attorney general." *Id.* 178. This status quo may only be altered by legislative decree. *Id.*

The court further held that even if the statute were ambiguous, two canons of statutory interpretation suggest that the NCA does not permit member derivative suits. First, when a model act contains a certain provision, yet the legislature omits the provision, Washington courts

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conclude that the legislature intended to reject the provision. *Id.* As the Court of Appeals noted, "[t]he Revised Model Nonprofit Corporation Act expressly grants to ***members*** and directors the standing to bring derivative suits. Despite the opportunity to do so, the Legislature has not adopted this provision." *Id.* (citing American Law Institute, *Revised Nonprofit Corporation Act* § 6.30 (1987)) (emphasis added).

The second canon of interpretation attributes significance to the use of different language in similar statutes. Here, the "Washington Business Corporations Act, dealing with for-profit corporations, explicitly grants to shareholders the right to bring derivative actions on behalf of corporations. The same is not true for nonprofit corporations. There is no similar provision in the nonprofit corporation act." *Id.* at 177 (citing RCW 23B.07.400 and CR 23.1). *Lundberg* definitively bars member derivative suits on behalf of nonprofit corporations, such as the Co-op.

3. Plaintiffs Do Not "Fairly and Adequately Represent" the Interests of Co-op Members.

Even if a derivative suit were authorized on behalf of nonprofit corporations such as the Co-op, Plaintiffs cannot satisfy the requirements of CR 23.1, which they also must meet to "fairly and adequately" represent the interests of the 22,000 Co-op members. Rule 23.1 provides that "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation."

Courts look to an eight-prong analysis to determine whether shareholders fairly and adequately represent the interests of shareholders:

> (1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; ... (5) the lack of any personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants.

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Larson v. Dumke, 900 F.2d 1363, 1367 (9th Cir. 1990) (internal citations and quotations omitted). "These factors are 'intertwined or interrelated, and it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1.'" *Id.* (quoting *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir.1980)).

Here, at least three factors weigh heavily against Plaintiffs' derivative standing.

a. Plaintiffs Are Not Supported by the Co-op Membership, and, Indeed, Have Been Rejected by It.

The fourth factor, "the degree of support received by the plaintiff from other shareholders," strongly shows that Plaintiffs do not represent the Co-op membership. The Co-op's annual Board election, with five vacancies to be filled, took place in November 2010. The boycott resolution dominated the campaign, with 15 candidates vying for the five vacancies. Kaszynski decl. ¶ 15 and Exh. K. Olympia BDS, a community group, endorsed five candidates, including four non-incumbents, and expressed "concerns" about five others. *Id.*, Exh. L. Plaintiffs Susan Trinin, Kent Davis, and Linda Davis were all candidates—all of whom Olympia BDS expressed concerns about. *Id.*

In a record-breaking turnout, all five of the candidates endorsed by Olympia BDS were elected. They won by wide margins, with the two top vote-getters beating Susan Trinin, the top vote-getter who opposed the boycott resolution, by more than double the number of her votes. *Id.* ¶¶ 18, 19, and Exhs. M, N. Plaintiffs' decisive defeat by proponents of the boycott resolution, in a campaign dominated by that issue, in which Plaintiffs were identified as opponents of the resolution, disqualifies them as fair and adequate representatives of the Co-op in this derivative action demanding the very relief—rescission of the boycott resolution that they demanded as candidates—that the membership decisively rejected by electing Plaintiffs' opponents by wide margins.

b. Plaintiffs Do Not Appear to Be the Real Parties in Interest.

The first factor, "indications that the plaintiff is not the true party in interest," suggests that Plaintiffs do not adequately represent the Co-op members. The national organization

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StandWithUs actively dedicates itself to opposing BDS activism in the United States. *See* http://www.standwithus.com/bds/; http://www.standwithus.com/ABOUT/ ("SWU Responds to BDS (Boycott Divestment Sanctions)"). Together with the America-Israel Chamber of Commerce, it is the co-sponsor of the counter-BDS group, BuyIsraelGoods. *See* http://www.buyisraelgoods.org/.

A connection between StandWithUs and Plaintiffs was revealed in an online news article disclosing that a lawsuit against the Co-op appeared as a project of StandWithUs Northwest chapter on its May 2011 meeting agenda, four months before suit was actually filed and two weeks before Plaintiffs sent their threat to sue the Defendants if the boycott was not rescinded by June 30, 2011.[8] This lawsuit was actually filed on September 7, 2011, one day after this online article was published. Plaintiffs Kent and Linda Davis posted statements on their Facebook pages, using the BuyIsraelGoods logo, expressing support for a boycott campaign against the Co-op that was mounted by BuyIsraelGoods about a month after the Board approved the boycott resolution.[9] Kaszynski decl. ¶ 5 and Exhs. B,C. BuyIsraelGoods describes itself as a joint project of the America-Israel Chamber of Commerce and StandWithUs.[10] *Id.* ¶ 5 and Exh. D. On June 24, 2011, a few days before the Plaintiffs' June 30, 2011 ultimatum for Defendants' compliance with their demands to avoid suit, StandWithUs posted to YouTube a 15-minute video production featuring four of the five Co-op members who had sent the threat to sue to Defendants and who became Plaintiffs, three months later, in this case. *Id.* ¶ 10; *see* www.youtube.com/watch?v=S6vnPTr_iCw.

c. Plaintiffs Are Personally Adverse to the Co-op and Defendants.

The eighth factor barring a derivative suit imposed by CR 23.1 is Plaintiffs' vindictiveness toward Defendants and the Co-op that they manage. As supporters of a campaign *against* the Co-op, Kaszynski decl. ¶¶ 5,6 and Exhs. B – D, Plaintiffs Kent and Linda Davis each

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[8] *See* http://electronicintifada.net/node/10350#.Tq3YenJ1PYg.

[9] *See* www.facebook.com/pages/Boycott-Olympia.../136861573012073.

[10] *See* footnote 9, *supra.*

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has a personal interest directly adverse to the Co-op's interests. As supporters of a campaign against the Co-op, Plaintiffs Kent and Linda Davis cannot sue in the Co-op's name.

Four of the five Plaintiffs have collaborated in the attack upon the Co-op by the organization that is co-sponsoring the group, BuyIsraelGoods.org, that is identified by the boycott campaign against the Co-op as its photographic Facebook "profile" for the boycott campaign against the Co-op. *Id.* decl. ¶ 10. The StandWithUs video production posted to YouTube on June 24, 2011 featured Plaintiffs' opposition to the Co-op's boycott.

4. Plaintiffs Failed to Exhaust Intra-Corporate Remedies.

Plaintiffs also lack standing because they failed to exhaust their internal remedies. "[B]efore the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted ***all the means*** within his reach to obtain, ***within the corporation itself***, the redress of his grievances, or action in conformity to his wishes." *Hawes v. City of Oakland*, 104 U.S. 450, 460-61 (1881) (emphasis added); *Goodwin*, 19 Wn.2d at 761; *Galef v. Alexander,* 615 F.2d 51, 59 (2d Cir. 1980) (Rule 23.1 "is essentially a requirement that a stockholder exhaust his intracorporate remedies before bringing a derivative action"). Derivative actions are suits of "last resort" because they "impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit." 5 MOORE'S FEDERAL PRACTICE § 23.1.02(4) (3d ed. 2011).

Plaintiffs' lawsuit challenges the boycott resolution on the ground that the Board did not have the authority to resolve the Staff's deadlock and pass the boycott resolution. But this position ignores the fact that Plaintiffs had the right as Co-op members to call a membership vote, via member-initiated ballot, under the Co-op's bylaws. *See* Bylaws. art. II § 8. This intra-corporate remedy is available, at Co-op expense, to every Co-op member able to recruit 300 supporting members to a clearly stated petition for action within the Co-op's mission and budget, when 60 percent of the members vote in favor of it. Yet Plaintiffs failed to exercise their right as

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members to petition for an initiative vote on the boycott resolution. Had they made use of their membership right to initiate a membership vote, *as the Board itself had encouraged members to do*, this intra-corporate remedy would have fully remedied the Plaintiffs' procedural complaint in this case. Instead, Plaintiffs chose the contentious and divisive route of litigation. Their failure to exhaust the intra-corporate remedy that would have resolved their complaint, without litigation, compels dismissal of this lawsuit. Plaintiffs' failure to exhaust their intra-corporate remedies and seek a vote of the membership also exposes the pretextual character of this SLAPP suit.

5. Plaintiffs Lack Standing Because the Co-op Has Suffered No Injury.

"To establish standing, a party must ... allege [that] the challenged action has caused 'injury in fact,' economic or otherwise." *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 312, (2010) (internal quotations omitted). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *State v. Cook* 125 Wn. App. 709, 720-721 (2005) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

Plaintiffs allege that "[t]he OFC Board publicly represents that its decision to enact the Israel Boycott and Divestment policies was made based on OFC's 'mission statement' and in accordance with OFC's bylaws. This representation is false." Complaint ¶ 48. Assuming the sufficiency of these conclusory allegations for the purpose of argument, there is no foundation in fact for them: There is no basis in the bylaws, mission statement, or policy for the notion that the Co-op's commitment to staff consensus decision-making is a commitment to gridlock in the event of a failure to reach consensus. The Court may disregard Plaintiffs' conclusory and unsubstantiated allegations. *See Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 791 (2010) (dismissal is appropriate under CR 12(b)(6) "when it appears beyond a doubt that the claimant can prove no set of facts consistent with the complaint that justifies recovery"); *see also Berge v. Gorton,* 88 Wn.2d 756, 763 (1977) (in determining the sufficiency of a complaint to

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withstand a motion for dismissal under CR 12(b)(6), a court need not assume the truth of factual allegations shown to be incorrect). Here, the evidence strongly refutes Plaintiffs' claims.

To the contrary, longstanding past practice affirmatively shows the Board's authority to resolve—by consensus—questions on which the Staff had failed to reach unanimous agreement. *Id.* ¶ 9. The Board has the express authority and duty under the bylaws to manage the affairs of the organization, make all policy decisions, interpret the bylaws, and resolve organizational conflicts. Levine decl. ¶¶ 9-12, 16, and Exhs. B, F, G. The Board also has a longstanding practice, frequently expressed, of resolving Staff impasses by itself deciding the issue delegated by the Board to Staff decision-making. *Id.* ¶¶ 13, 15.

Beyond the absence of factual support for their allegation of an injury to the Co-op's governance documents, Plaintiffs refer vaguely to a "fractured" community, filled with "division and mistrust," where an unidentified number of members have resigned their membership or "ceas[ed] shopping at the Co-op." Complaint at 9 ¶ 51. These allegations, even if true, do not rise to the level of harm required to confer standing. To the contrary, our highest court has consistently enshrined First Amendment protections for speech on matters of public concern, even when the underlying conduct invites controversy. "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain .... As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*, 131 S. Ct. at 1220. Indeed:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that

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debate on public issues should be uninhibited, robust, and wide-open"). Plaintiffs' allegations of, *inter alia*, "division and mistrust" cannot create injury sufficient to confer standing.[11]

But Plaintiffs' claims of injury to the Co-op are also unsupported. They are contradicted by the results of the Board election, held when the alleged "division" was at its peak, and actual membership data. With the boycott resolution as the dominant campaign issue in the November 2010 election, members turned out to vote in record numbers and decisively rejected Plaintiffs' position by margins of more than 200 percent. This is just how democracy is supposed to work—candidates run for office against others with whom they disagree, with each side stating its position to the voters, causing the voters to become intensely engaged in the process and vote their preferences. Membership data show that 44 members left the Co-op following the Board's approval of the boycott, but that the number of new members greatly outnumbered those who left, resulting in an overall increase in membership for the period that exceeded the increase in the same period in the prior year. Levine decl., ¶ 33 and Exh. V. In sum, there was no governance violation and the Co-op suffered no adverse effects on either business volume or membership enrollments. Both figures, to the contrary, improved modestly in the wake of the boycott resolution.

6. Plaintiff Kent Davis Lacks Standing as a Member.

CR 23.1 requires a plaintiff asserting derivative status to be "a shareholder or member at the time of the transaction of which he complains." Having first become a Co-op member in

[11] Wholly aside from the important First Amendment principles that bar their damages claim, Plaintiffs' damages theory also fails to satisfy basic state law requirements. Plaintiffs' naked emotional distress allegations are insufficient as a matter of law. *See, e.g., Strong v. Terrell*, 147 Wn. App. 376, 387 (2008) ("A plaintiff may recover for negligent infliction of emotional distress if she proves negligence, that is, duty, breach of the standard of care, proximate cause, and damage, and proves the additional requirement of objective symptomatology"); *see also Corey v. Pierce County*, 154 Wn. App. 752, 763 (2010) (to make a prima facie case of intentional infliction of emotional distress (*i.e.*, outrage), the "conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community") (internal citations omitted). Furthermore, this is a derivative lawsuit and thus the alleged damages must have been suffered by the Co-op. It is a nonprofit corporation; as an "artificial being," *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819), it has no feelings.

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August 2010, a month ***after*** the Board's approval of the boycott resolution in July 2010, *see* Kaszynski decl. ¶ 4 and Exh. A, Plaintiff Kent Davis lacks standing to sue.

C. Plaintiffs Cannot Show By Clear and Convincing Evidence That They Are Likely To Prevail On The Merits.

Because Defendants' conduct falls within the ambit of RCW 4.24.525, the burden shifts to Plaintiffs to demonstrate by "clear and convincing evidence" a "probability" of prevailing on their claims. RCW 4.24.525(4)(b); *see also Aronson,* 738 F. Supp. 2d at 1112; *Castello*, 2010 WL 4857022, at *11. In making this determination, "the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c). Plaintiffs cannot satisfy this burden.[12]

1. The Board Acted Within the Scope of Its Authority Under the Bylaws by Deciding to Break the Staff Deadlock.

The essence of Plaintiffs' ultra vires claim is that Defendants' decision to engage in the boycott against Israeli products was not authorized by the Co-op's governing documents, and was therefore ultra vires. The difficulty addressing this argument is that Plaintiffs' complaint fails to specify ***how*** the bylaws or any other corporate documents were violated. Nonetheless, it is clear that this claim has no basis in either law or fact.

"The phrase 'ultra vires' describes corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature." *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 344-45 (1999) (citing *Twisp Mining & Smelting Co. v. Chelan Mining Co.,* 16 Wn.2d 264, 293-94 (1943)). "Ultra vires acts are those performed with ***no legal authority*** and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed."

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[12] Similarly, Defendants are entitled to relief under CR 12(b)(6). Under 12(b)(6), the court should dismiss a complaint when "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215 (2005) (internal quotation marks and citations omitted). Under the "incorporation by reference" doctrine, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726 (2008).

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South Tacoma Way, LLC v. State, 169 Wn.2d 118, 123 (2010). When a party argues that ***the way*** in which the Board exercised control "did not conform with the governing documents of the corporation…[such an argument] ***is not a challenge to the authority of the corporation, but only to the method of exercising it.***" *Hartstene Pointe,* 95 Wn. App. at 345 (emphasis added). Such an argument does not allege ultra vires acts. *Id.*

The Board's power to govern the affairs of the Co-op are granted by statute. Under Washington's Nonprofit Corporation Act, "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. The Co-op's bylaws, as well, expressly delegate authority to manage the Co-op's affairs to the Board: "The affairs of the cooperative shall be managed by a Board of Directors." Levine decl., Exh. B, art. III, § 1. The Co-op Bylaws also grant the Board authority to "adopt major policy changes;" "adopt, review, and revise Co-operative plans;" and "adopt policies which promote achievement of the mission statement and goals of the Co-operative." Bylaws, art. III, § 13. The Co-op's Bylaws and mission statement commit it to "support efforts to foster a socially and economically egalitarian society." Bylaws, art. I, § 2(4); Mission Statement at D.

Plainly, the authority to make the boycott decision was within the parameters of the Board's powers, defined in the Bylaws, given the perceived international legal and humanitarian violations by Israel which the boycott was intended to address. Plaintiffs may disagree with the Board's decision; but any argument that the purpose of the boycott is inconsistent with the mission of the Co-op or that the Board acted beyond its powers cannot survive.

Although the boycott policy adopted by the Board—allowing the Co-op to honor boycotts that are compatible with the Co-op's goals and mission statement—speaks in terms of the Staff deciding to engage in a boycott, the policy does not, and cannot, limit the Board's ultimate authority to act when the Staff cannot reach consensus. The Staff's powers, as enumerated in the bylaws, include "keep[ing] the store functioning and open regular hours;" "keep[ing] accounting records;" "maintain[ing] all facilities in good repair and in sanitary and

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safe condition," and other such operational functions. Bylaws, art. IV, §§ A, C, K. Indeed, Co-op Staff are ***obligated*** to "carry out Board decisions and/or membership decisions made in compliance with these bylaws." Bylaws, art. IV, § N.

Operational and merchandising decisions that can be resolved by Staff consensus have been delegated to the Staff for decision. Levine decl. ¶ 18 and Exh. H. But when decisions having operational or merchandising aspects raise important administrative or business issues, the Board has exercised its decision-making authority on the matter. In some cases, such matters have been referred to the Staff for research, analysis, feedback, or initial decision; in other cases, the Board has simply decided the matter without referring it to the Staff at all. *Id.* ¶¶ 16 and Exhs. F, G. And when the Staff has been unable to reach consensus, the Board has taken control of the matter and broken the deadlock. *Id.* ¶ 15 and Exhs. C – E.

The record of the Board's past practice of assuming authority over matters on which a Staff block has prevented decision is long and consistent, and necessary to its business. This very case demonstrates the point. The boycott request was first presented to the Front End/Member Services workgroup in March 2009. That staff group, in turn, referred it to the Merchandising Coordination Action Team ("MCAT"). After more than a year's work, without reaching consensus, on May 5, 2010 the MCAT reported the matter directly to the Board, rather than to the full staff, suggesting mediation and a membership vote. Levine decl. ¶¶ 20, 21 and Exh. J. This report was considered by the Board at its May 20, 2010 meeting. Several Co-op members attended the meeting, requesting immediate Board approval of the MCAT proposal. The Board noted that the matter had never been presented to the full Staff for consensus decision-making, referred it back to the Staff with instructions to attempt full Staff consensus and to seek and report back to the Board on the full Staff's feedback, and scheduled it for the July 2010 Board agenda. *Id.* ¶ ¶ 22, 23, and Exhs. K, L.

About 30 people attended the July 2010 Board meeting to express support for the boycott proposal. After discussion, including general agreement that Staff consensus was impossible and

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concerns about delaying resolution another four months beyond the year already expended, to hold the vote in conjunction with the annual November Board election, the Board approved the boycott proposal, by consensus. *Id.* ¶ 24 and Exh. M.

The Board's consensus approval of the boycott resolution following the Staff impasse was consistent with its past practice over the course of many years, as detailed by the then Staff's representative to the Board, Harry Levine. Indeed, the Board's action in resolving the deadlock honored the rationale for the 1993 revision to the boycott policy: to ensure that boycott decisions, as raising policy issues in addition to ordinary merchandising decisions, would never thereafter be made by a single Staff manager, but only by consensus of the full Staff. The 1992 record in the minutes that explained the rationale for the 1993 boycott policy revision explicitly noted the propriety of Board engagement in the decision-making process. Levine decl. ¶ 27 and Exh. Z.

The 1993 policy did nothing to compromise the Board's sole authority under the Bylaws to resolve organizational conflicts. The Board's action in exercising that authority to decide the request for the Israel boycott, after remanding for a Staff effort to reach full Staff consensus, without success, was the proper, rational, and appropriate exercise of Board authority under the law and the Co-op's own bylaws.

Moreover, because Plaintiffs appear merely to allege a procedural defect—*i.e.*, the method by which the boycott came about—Plaintiffs have not properly pleaded an ultra vires cause of action. *See Hartstene Pointe*, 95 Wn. App at 345. In *Hartstene Pointe*, a homeowner challenged the decision of an association's subcommittee to deny his application to cut down a tree. The homeowner did not challenge the association's corporate authority to regulate development, but instead challenged the manner of executing such authority through the subcommittee. The court held that the homeowner's procedural argument—indeed, the exact argument made by Plaintiffs here—cannot form the basis of an ultra vires suit. It noted that "the doctrine of ultra vires ***does not apply***" to the claim. *Id.* (emphasis added); *see also Twisp*, 16

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Wn.2d at 293-94 (holding that Board's transfer of property via a minority vote was not ultra vires because the corporation had authority to transfer the property, even if it did not garner the required number of votes). Here, to make even a prima facie case of ultra vires act(s), Plaintiffs would have to argue that Co-op did not have the power to engage in the Israeli boycott ***at all***. Plaintiffs have not alleged such, and in fact have asserted that they are prepared to respect the outcome of a process that they believe is procedurally sound. Complaint, ¶ 45.

Because the Board acted well within its powers, the ultra vires claim is utterly meritless.

2. The Board's Actions—Which Were Wholly Within its Powers—Did Not Breach Fiduciary Duties.

The question of whether Board members breached their fiduciary duties is controlled by the indisputable evidence that the Board's action did not exceed its authority under the mission statement and bylaws. More fundamentally, however, under the well-established business judgment rule, "[a] corporation's directors are its executive representatives charged with its management and the courts will not interfere with the reasonable and honest exercise of the directors' judgment." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 895 (2007). "[C]orporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) a reasonable basis exists to indicate the transaction was made in good faith. *Scott v. Trans–Sys., Inc.,* 148 Wn.2d 701, 709 (2003) (quoting *Nursing Home Bldg. Corp. v. DeHart,* 13 Wn. App. 489, 498 (1975)). Because the Board acted well within its powers to approve the boycott (as explained in the foregoing sections), the business judgment rule insulates it from liability.

Additionally, the Nonprofit Corporations Act shields the Board from liability for conduct that does not rise to the level of gross negligence. "[A] member of the board of directors or an officer of any nonprofit corporation ***is not individually liable for any discretionary decision*** or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence." RCW 4.24.264(1); *see also*

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Barry v. Johns, 82 Wn. App. 865, 869 (1996). Here, the Board's decision to approve the boycott cannot rise to the level of gross negligence.[13] The Co-op Board simply made a discretionary decision within its discretionary powers and duties under the mission statement, bylaws, and established past practice. Consequently, RCW 4.24.264 immunizes the individual directors from liability.[14]

D. The Anti-SLAPP Statute Mandates an Award of Attorneys' Fees, Costs, and a Statutory Penalty for Each Defendant.

Under the anti-SLAPP statute, a moving party who prevails "shall" be awarded its attorneys' fees and a $10,000 penalty. RCW 4.24.525(6). The fees, costs, and penalties are mandatory, and the penalty applies to each of the 16 named Defendants. *Castello*, 2010 WL 4857022, at *11 ("the language of the statute (which calls for the court to award 'a moving party' the statutory damages) requires the assessment of the penalty as to each defendant"); *see also Eklund v. City of Seattle*, 2009 WL 1884402, *3 (W.D. Wash. 2009) (awarding $30,000 under the anti-SLAPP statute to three named defendants). Thus, if the Court grants Defendants' motion, it is required to award attorneys' fees, costs, and $10,000 for each Defendant.[15]

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[13] "Gross negligence is failure to exercise slight care. But this means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence. It is negligence substantially and appreciably greater than ordinary negligence." *Kelley v. State*, 104 Wn. App. 328, 333 (2000) (internal quotations and citations omitted) (citing *Nist v. Tudor,* 67 Wn.2d 322, 330 (1965)).

[14] Washington's Nonprofit Corporations Act departs from the Washington Business Corporations Act, RCW 23B, et. seq., which explicitly provides a clause for individual liability when directors breach duties of care. *See, e.g.,* RCW 23B.08.310. The discrepancy between the acts further indicates that the legislature intended to limit the liability of nonprofit directors. *See Lundberg*, 115 Wn. App. at 177-78 (contrasting the aforementioned Acts to determine legislative intent).

[15] In the alternative, Defendants respectfully request attorneys' fees and costs pursuant to the Court's equitable power. "An award of attorney fees must be based upon a contract, statute, or recognized ground in equity." *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 521 (1986). Derivative suits represent one such recognized equitable ground. Derivative suits "depart from the general American rule that each party bears its own costs." 5 MOORE'S FEDERAL PRACTICE § 23.1.17(1) (3d ed. 2011). In derivative suits, the award of fees is not a one-way street in favor of prevailing plaintiffs. "A shareholder who loses on his or her derivative claims risks having to pay the reasonable expenses incurred by the corporation in its defense." *Id.* at § 23.1.17(2) (3d ed. 2011). Fees in favor of Defendants are warranted in this case, which is meritless.

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V. CONCLUSION

This lawsuit cannot survive First Amendment scrutiny. Plaintiffs seek to punish Co-op Board members for expressing views about Israel with which Plaintiffs vehemently disagree. "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Plaintiffs' proper course of action under the bylaws would have been to collect signatures on a ballot petition and offer their opinions about Israel in competition with opinions of the Board and other Co-op members. Instead, they have filed this SLAPP suit in an attempt to enlist the Court to enforce their own views and to punish Defendants for their opinions. Under Washington law, the complaint must be stricken and dismissed with prejudice.

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to strike, award them attorneys' fees and costs, and impose the statutory penalty prescribed by law.

DATED this 1st day of November, 2011.

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EXHIBIT A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6395

Chapter 118, Laws of 2010

61st Legislature
2010 Regular Session

PUBLIC PARTICIPATION LAWSUITS--SPECIAL MOTION TO STRIKE CLAIM

EFFECTIVE DATE: 06/10/10

Passed by the Senate February 16, 2010
YEAS 46 NAYS 0

BRAD OWEN

President of the Senate

Passed by the House February 28, 2010
YEAS 96 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved March 18, 2010, 2:51 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 6395** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

March 18, 2010

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 6395

Passed Legislature - 2010 Regular Session

State of Washington 61st Legislature 2010 Regular Session

By Senate Judiciary (originally sponsored by Senators Kline, Kauffman, and Kohl-Welles)

READ FIRST TIME 01/25/10.

AN ACT Relating to lawsuits aimed at chilling the valid exercise of the constitutional rights of speech and petition; adding a new section to chapter 4.24 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate.

NEW SECTION. **Sec. 2.** A new section is added to chapter 4.24 RCW to read as follows:

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

NEW SECTION. **Sec. 3.** This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.

NEW SECTION. **Sec. 4.** This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation.

NEW SECTION. **Sec. 5.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed by the Senate February 16, 2010.
Passed by the House February 28, 2010.
Approved by the Governor March 18, 2010.
Filed in Office of Secretary of State March 18, 2010.

EXHIBIT B

The ASSOCIATION *entered into by the* AMERICAN NENTAL CONGRESS *in Behalf of all the Colo*

1774 [illegible]

WHis Majesty's most dutiful and loyal Subjects, the Delegates of the [illegible] Several Colonies of New-Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the Three Lower Counties of Newcastle, Kent, and Sussex, on Delaware, Maryland, Virginia, North Carolina, and South Carolina, deputed to represent them in a Continental Congress, held in the City of Philadelphia on the 5th Day of September 1774, renewing our Allegiance to his Majesty, our Affection and Regard for our Fellow Subjects in Great Britain and elsewhere, affected with the deepest Anxiety, and most alarming Apprehensions at those Grievances and Distresses with which his Majesty's American Subjects are oppressed, and having taken under our most serious Deliberation the State of the whole Continent, find that the perilous unhappy Situation of our Affairs is occasioned by a ruinous System of Colony Administration, adopted by the British Ministry about the Year 1763; evidently calculated for enslaving these Colonies, and, with them, the British Empire: In Prosecution of which System, various Acts of Parliament have been passed for raising a Revenue in America, for depriving the American Subjects, in many Instances, of the constitutional Trial by Jury, exposing their Lives to Danger, by directing a new and illegal Trial beyond the Seas, for Crimes alledged to have been committed in America; and, in Profecution of the same System, several late, cruel, and oppressive Acts have been passed respecting the Town of Boston and the Massachusetts Bay, and also an Act for extending the Province of Quebeck, so as to border on the western Frontiers of these Colonies, establishing an arbitrary Government therein, and discouraging the Settlement of British Subjects in that wide-extended Country; thus, by the Influence of evil Principles, and ancient Prejudices, to difpose the Inhabitants to act with Hostility against the free Protestant Colonies, whenever a wicked Ministry shall chuse so to direct them.

To obtain Redress of those Grievances, which threaten Destruction to the Lives, Liberty, and Property, of his Majesty's Subjects in North America, we are of Opinion that a Non-importation, Non-consumption, and Non-exportation Agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable Measure; and therefore we do, for ourselves and the Inhabitants of the several Colonies whom we represent, firmly agree and associate, under the sacred Ties of Virtue, Honour, and Love of our Country, as follows:

First. That from and after the first Day of December next we will not import into British America, from Great Britain or Ireland, any Goods, Wares, or Merchandize whatsoever, or from any other Place, any such Goods, Wares, or Merchandize, as shall have been exported from Great Britain or Ireland; nor will we, after that Day, import any East India Tea from any Part of the World, nor any Molasses, Syrups, Paneles, Coffee, or Pimento, from the British Plantations, or from Dominica, nor Wines from Madeira, or the Western Islands, nor foreign Indigo.

Second. That we will neither import nor purchase any Slave imported after the first Day of December next, after which Time we will wholly discontinue the Slave Trade, and will neither be concerned in it ourselves, nor will we hire our Vessels, nor sell our Commodities or Manufactures, to those who are concerned in it.

Third. As a Non-consumption Agreement, strictly adhered to, will be an effectual Security for the Observation of the Non-importation, we, as above, solemnly agree and affociate, that, from this Day, we will not purchase or use any Tea imported on Account of the East India Company, or any on which a Duty hath been or shall be paid; and, from and after the first Day of March next, we will not purchase or use any East India Tea whatever; Nor will we, nor shall any Perfon for or under us, purchase or use any of those Goods, Wares, or Merchandize, we have agreed not to import, which we shall know, or have Cause to suspect, were imported after the first Day of December, except such as come under the Rules and Directions of the tenth Article, hereafter mentioned.

Fourth. The earnest Desire we have not to injure our Fellow Subjects in Great Britain, Ireland, or the West Indies, induces us to suspend a Non-exportation until the tenth Day of September 1775; at which Time, if the said Acts, and Parts of Acts of the British Parliament herein after mentioned, are not repealed, we will not, directly or indirectly, export any Merchandize, or Commodity whatsoever, to Great Britain, Ireland, or the West Indies, except Rice, to Europe.

Fifth. Such as are Merchants, and use the British and Irish Trade, will give Orders, as soon as possible, to their Factors, Agents, and Correspondents, in Great Britain and Ireland, not to ship any Goods to them, on any Pretence whatsoever, as they cannot be received in America: and if any Merchant residing in Great Britain or Ireland shall, directly or indirectly, ship any Goods, Wares, or Merchandize, for America, in Order to break the said Non-importation Agreement, or in any Manner contravene the same, on such unworthy Conduct being well attested, it ought to be made publick; and, on the Facts being so done, we will not, from thenceforth, have any commercial Connexion with such Merchant.

Sixth. That such as are Owners of Vessels will give positive Orders to their Captains, or Masters, not to receive on Board their Vessels any Goods prohibited by the said Non-importation Agreement, on Pain of immediate Dismission from their Service.

Seventh. We will use our utmost Endeavours to improve the Breed of Sheep, and increase their Number to the greatest Extent; and to that End we will kill them as sparingly as may be, especially those of the most profitable Kind: Nor will we export any to the West Indies, or elsewhere. And those of us who are or may become overstocked with, or can conveniently spare any Sheep, will dispose of them to our Neighbours, especially to the poorer Sort, on moderate Terms.

Eighth. That we will, in our several Stations, encourage Frugality Economy, and Industry; and promote Agriculture, Arts, and the Manufactures of this Country, especially that of Wool; and will discountenance and discourage every Species of Extravagance and Dissipation, especially all Horse-racing, and all Kinds of Gaming, Cock-fighting, Exhibitions of Shows, Plays, and other expensive Diversions and Entertainments; and on the Death of any Relation, or Friend, none of us, or any of our Families, will go into any further Mourning Dress than a black Crape or Ribband on the Arm or Hat for Gentlemen, and a black Ribband and Necklace for Ladies, and we will discontinue the giving of Gloves and Scarfs at Funerals.

Ninth. That such as are Venders of Goods or Merchandize will not take Advantage of the Scarcity of Goods that may be occasioned by this Association, but will sell the same at the Rates we have been respectively accustomed to do for twelve Months last past; and if any Venders of Goods or Merchandize shall sell any such Goods on higher Terms, or shall in any Manner, or by any Device whatsoever, violate or depart from this Agreement, no Person ought, nor will any of us deal with any such Person, or his or her Factor or Agent, at any Time thereafter, for any Commodity whatever.

Tenth. In Case any Merchant, Trader, or other Person, shall import any Goods or Merchandize after the first Day of December, and before the first Day of February next, the same ought forthwith, at the Election of the Owners, to be either reshipped or delivered up to the Committee of the County or Town wherein they shall be imported, to be stored at the Risk of the Importer, until the Non-importation Agreement shall cease, or be sold under the Direction of the Committee aforesaid: And, in the last mentioned Case, the Owner [illegible] (out of the Sales) the Cost to be applied towards relieving the Town of Boston as are in- and a particular Account of all Imported in the publick Papers.

Eleventh. That a Committee in Town, by those who are qualified Legislators, whose Business it shall of all Persons touching this Asso appear, to the Satisfaction of a Maj Person within the Limits of their Ju tion, that such Majority do forthwith published in the Gazette, to the End British America may be publickly known the Enemies of American Liberty; and th break off all Dealings with him, or her.

Twelfth. That the Committee of Corre Colonies do frequently inspect the Entries inform each other, from Time to Time, of all every other material Circumstance that may ation.

Thirteenth. That all Manufacturers of t able Prices, so that no undue Advantage Goods.

Fourteenth. And we do further agree no Trade, Commerce, Dealings, or Colony or Province in North Ame which shall hereafter violate, or unworthy of the Rights of Free their Country.

And we do solemnly bind Ties aforesaid, to adhere to in Acts of Parliament, passed for continue Duties on Tea, Wine, [illegible] Sugar, Pimento, Indigo, foreign Pa[illegible] and Painters Colours, imported into America, and extend the Powers of the Admiralty Courts beyond their ancient Limits, deprive the American Subject of Trial by Jury, authorize the Judge's Certificate to indemnify the Profecutor from Damages that he might otherwise be liable to from a Trial by his Peers, require oppressive Security from a Claimant of Ships or Goods seized before he shall be allowed to defend his Property, are repealed, and until that Part of the Act of the 13th of George [illegible] Chapter eight, intitled "An Act for the better securing his Majesty's Dockyards, Magazines, Ships, Ammunition, and Stores," by which any Persons charged with committing any of the Offences therein described in America may be tried in any Shire or County within the Realm, is repealed; and until the four Acts passed in the last Session of Parliament, viz. that for stopping the Port and blocking up the Harbour of Boston, that for altering the Charter and Government of Massachusetts Bay; and that which is entitled "An Act for the better Administration of Justice, &c." and that "For extending the Limits of Quebeck, &c." are repealed. And we recommend it to the Provincial Conventions, and to the Committees in the respective Colonies, to establish such further Regulations as they may think proper, for carrying into Execution this Association.

The foregoing Association being determined upon by the Congress, was ordered to be subscribed by the several Members thereof; and thereupon, we have hereunto set our respective Names accordingly.

In CONGRESS, PHILADELPHIA, *October* 20, 1774.

Resolved, PEYTON RANDOLPH, *President.*

JOHN SULLIVAN,	of New Hampshire.
NATHANIEL FOLSOM,	
THOMAS CUSHING,	of Massachusetts Bay.
SAMUEL ADAMS,	
JOHN ADAMS,	
ROBERT TREAT PAINE,	
STEPHEN HOPKINS,	of Rhode-Island.
SAMUEL WARD,	
ELIPHALET DYER,	of Connecticut.
ROGER SHERMAN,	
SILAS DEANE,	
ISAAC LOW,	of New York.
JOHN ALSOP,	
JOHN JAY,	
JAMES DUANE,	
WILLIAM FLOYD,	
HENRY WISNER,	
S. ROBERTS,	
JAMES KINSEY,	of New Jersey.
WILLIAM LIVINGSTON,	
STEPHEN CRANE,	
RICHARD SMITH,	
JOSEPH GALLOWAY,	of Pennsylvania.
JOHN DICKINSON,	
CHARLES HUMPHREYS,	
THOMAS MIFFLIN,	
EDWARD BIDDLE,	of Newcastle, &c.
JOHN MORTON,	
GEORGE ROSS,	
CAESAR RODNEY,	
THOMAS M'KEAN,	
GEORGE READ,	
MATTHEW TILGHMAN,	of Maryland.
THOMAS JOHNSON,	
WILLIAM PACA,	
SAMUEL CHASE,	
RICHARD HENRY LEE,	of Virginia.
GEORGE WASHINGTON,	
PATRICK HENRY, Junior,	
RICHARD BLAND,	
BENJAMIN HARRISON,	
EDMUND PENDLETON,	
WILLIAM HOOPER,	of North Carolina.
JOSEPH HEWES,	
R. CASWELL,	
HENRY MIDDLETON,	of South Carolina.
THOMAS LYNCH,	
CHRISTOPHER GADSDEN,	
JOHN RUTLEDGE,	
EDWARD RUTLEDGE,	

Thomas Jefferson
Randolph Gibbes
Richd Woods
Francis Lightfoot Lee
Carter Braxton
Francis Lightfoot

TO THE

PEOPLE OF *GREAT-BRITAIN*,

FROM THE

DELEGATES,

Appointed by the ſeveral ENGLISH COLONIES of NEW-HAMPSHIRE, MASSACHUSETT'S-BAY, RHODE-ISLAND and PROVIDENCE PLANTATIONS, CONNECTICUT, NEW-YORK, NEW-JERSEY, PENNSYLVANIA, The LOWER COUNTIES on DELAWARE, MARYLAND, VIRGINIA, NORTH-CAROLINA, and SOUTH-CAROLINA, to conſider of their Grievances in GENERAL CONGRESS, at PHILADELPHIA, September 5th, 1774.

Friends, and Fellow Subjects,

WHEN a Nation, led to greatneſs by the hand of Liberty, and poſſeſſed of all the glory that heroiſm, munificence, and humanity can beſtow, deſcends to the ungrateful taſk of forging chains for her Friends and Children, and inſtead of giving ſupport to Freedom, turns advocate for Slavery and Oppreſſion, there is reaſon to ſuſpect ſhe has either ceaſed to be virtuous, or been extremely negligent in the appointment of her rulers.

TUESDAY, OCTOBER 18, 1774.

The Congress resumed the consideration of the plan of association, &c. and after sundry amendments, the same was agreed to, and ordered to be transcribed, that it may be signed by the several members.

The Committee appointed to prepare an address to the people of Great-Britain, brought in a draught, which was read, and ordered to lie on the table, for the perusal of the members, & to be taken into consideration to-Morrow.

WEDNESDAY, OCTOBER 19, 1774.

The Congress met and resumed the consideration of the address to the people of Great-Britain, and the same being read and debated by paragraphs, and sundry amendments being made, the same was re-committed, in order that the amendments may be taken in.

The committee appointed to prepare a memorial to the Inhabitants of these colonies, reported a draught, which was read, & ordered to lie on the table.

Ordered, That this memorial be taken into consideration to-morrow.

THURSDAY, OCTOBER 20, 1774.

The Congress met.

The association being copied, was read and signed at the table, and is as follows:—

Here insert the Association.

WE, his majesty's most loyal subjects, the delegates of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the three lower

counties of New-Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, deputed to represent them in a continental Congress, held in the city of Philadelphia, on the 5th day of September, 1774, avowing our allegiance to his majesty, our affection and regard for our fellow-subjects in Great-Britain and elsewhere, affected with the deepest anxiety, and most alarming apprehensions, at those grievances and distresses, with which his Majesty's American subjects are oppressed; and having taken under our most serious deliberation, the state of the whole continent, find, that the present unhappy situation of our affairs is occasioned by a ruinous system of colony administration, adopted by the British ministry about the year 1763, evidently calculated for inslaving these colonies, and, with them, the British empire. In prosecution of which system, various acts of parliament have been passed, for raising a revenue in America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger, by directing a new and illegal trial beyond the seas, for crimes alleged to have been committed in America: and in prosecution of the same system, several late, cruel, and oppressive acts have been passed, respecting the town of Boston and the Massachusetts-Bay, and also an act for extending the province of Quebec, so as to border on the western frontiers of these colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protestant colonies, whenever a wicked ministry shall chuse so to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: and, therefore, we do, for ourselves, and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love of our country, as follows:

1. That from and after the first day of December next, we will not import, into British America, from Great-Britain or Ireland, any goods, wares, or merchandise whatsoever, or from any other place, any such goods, wares, or merchandise, as shall have been exported from Great-Britain or Ireland; nor will we, after that day, import

any East-India tea from any part of the world; nor any molasses, syrups, paneles,[1] coffee, or pimento, from the British plantations or from Dominica; nor wines from Madeira, or the Western Islands; nor foreign indigo.

2. We will neither import nor purchase, any slave imported after the first day of December next;[2] after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.

3. As a non-consumption agreement, strictly adhered to, will be an effectual security for the observation of the non-importation, we, as above, solemnly agree and associate, that, from this day, we will not purchase or use any tea, imported on account of the East-India company, or any on which a duty hath been or shall be paid; and from and after the first day of March next, we will not purchase or use any East-India tea whatever; nor will we, nor shall any person for or under us, purchase or use any of those goods, wares, or merchandise, we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and directions of the tenth article hereafter mentioned.

4. The earnest desire we have, not to injure our fellow-subjects in Great-Britain, Ireland, or the West-Indies, induces us to suspend a non-exportation, until the tenth day of September, 1775; at which time, if the said acts and parts of acts of the British parliament herein after mentioned are not repealed, we will not, directly or indirectly, export any merchandise or commodity whatsoever to Great-Britain, Ireland, or the West-Indies, except rice to Europe.[3]

5. Such as are merchants, and use the British and Irish trade, will give orders, as soon as possible, to their factors, agents and correspondents, in Great-Britain and Ireland, not to ship any goods to them, on any pretence whatsoever, as they cannot be received in America; and if any merchant, residing in Great-Britain or Ireland, shall directly or indirectly ship any goods, wares or merchandise, for America, in order to break the said non-importation agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made public; and, on the same being so

[1] Brown unpurified sugar.

[2] In the pamphlet edition this sentence reads: "That we will neither import, nor purchase any slave imported, after the first day of December next."

[3] See *Journals of Congress*, 1 August, 1775, *post*.

done, we will not, from thenceforth, have any commercial connexion with such merchant.

6. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their vessels any goods prohibited by the said non-importation agreement, on pain of immediate dismission from their service.

7. We will use our utmost endeavours to improve the breed of sheep, and increase their number to the greatest extent; and to that end, we will kill them as seldom[1] as may be, especially those of the most profitable kind; nor will we export any to the West-Indies or elsewhere; and those of us, who are or may become overstocked with, or can conveniently spare any sheep, will dispose of them to our neighbours, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, economy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing, and all kinds of gaming, cock-fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families, will go into any further mourning-dress, than a black crape or ribbon on the arm or hat, for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.

9. Such as are venders of goods or merchandise will not take advantage of the scarcity of goods, that may be occasioned by this association, but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past.—And if any vender of goods or merchandise shall sell any such goods on higher terms, or shall, in any manner, or by any device whatsoever violate or depart from this agreement, no person ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter, for any commodity whatever.

10. In case any merchant, trader, or other person,[2] shall import any goods or merchandise, after the first day of December, and before the first day of February next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the county or town, wherein they shall be imported, to be

[1] The pamphlet says *sparingly*.

[2] Persons is used in the pamphlet.

stored at the risque of the importer, until the non-importation agreement shall cease, or be sold under the direction of the committee aforesaid; and in the last-mentioned case, the owner or owners of such goods shall be reimbursed out of the sales, the first cost and charges, the profit, if any, to be applied towards relieving and employing such poor inhabitants of the town of Boston, as are immediate sufferers by the Boston port-bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the public papers; and if any goods or merchandises shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally contemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence, in the respective colonies, do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North-America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

And we do solemnly bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until such parts of the several acts of parliament passed since the close of the last war, as impose or continue duties on tea, wine, molasses, syrups, paneles, coffee, sugar, pimento, indigo, foreign paper, glass, and painters' colours, imported into America, and extend the powers of the admiralty

courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judge's certificate to indemnify the prosecutor from damages, that he might otherwise be liable to from a trial by his peers, require oppressive security from a claimant of ships or goods seized, before he shall be allowed to defend his property, are repealed.—And until that part of the act of the 12 G. 3. ch. 24, entitled "An act for the better securing his majesty's dock-yards, magazines, ships, ammunition, and stores," by which any persons charged with committing any of the offences therein described, in America, may be tried in any shire or county within the realm, is repealed—and until the four acts, passed the last session of parliament, viz. that for stopping the port and blocking up the harbour of Boston—that for altering the charter and government of the Massachusetts-Bay—and that which is entitled "An act for the better administration of justice, &c."—and that "for extending the limits of Quebec, &c." are repealed. And we recommend it to the provincial conventions, and to the committees in the respective colonies, to establish such farther regulations as they may think proper, for carrying into execution this association.

The foregoing association being determined upon by the Congress, was ordered to be subscribed by the several members thereof; and thereupon, we have hereunto set our respective names accordingly.

IN CONGRESS, PHILADELPHIA, *October 20, 1774.*

Signed,

PEYTON RANDOLPH, *President.*

New Hampshire	Jn^{o} Sullivan
	Nath^{l} Folsom
Massachusetts Bay	Thomas Cushing
	Sam^{l} Adams
	John Adams
	Rob^{t} Treat Paine
Rhode Island	Step. Hopkins
	Sam: Ward
Connecticut	Elipht Dyer
	Roger Sherman
	Silas Deane
New York	Isaac Low
	John Alsop
	John Jay
	Ja^{s} Duane
	Phil. Livingston
	W^{m} Floyd
	Henry Wisner
	S: Boerum
New Jersey	J. Kinsey
	Wil: Livingston
	Step^{n} Crane
	Rich^{d} Smith
	John De Hart
Pennsylvania	Jos. Galloway
	John Dickinson
	Cha Humphreys
	Thomas Mifflin
	E. Biddle
	John Morton
	Geo: Ross
The Lower Counties New Castle	Cæsar Rodney
	Tho. M: Kean
	Geo: Read
Maryland	Mat Tilghman
	Th^{s} Johnson Jun^{r}
	W^{m} Paca
	Samuel Chase

Virginia	Richard Henry Lee G° Washington P. Henry J^r^ Richard Bland Benj^a^ Harrison Edm^d^ Pendleton	South Carolina.	Henry Middleton Tho Lynch Christ Gadsden J Rutledge Edward Rutledge[1]
North Carolina	Will Hooper Joseph Hewes R^d^ Caswell		

Ordered, that this association be committed to the press, and that one hundred & twenty copies be struck off.

The Congress then resumed the consideration of the Address to the Inhabitants of these colonies, & after debate thereon, adjourned till to-morrow.

FRIDAY, OCTOBER 21, 1774.

The address to the people of Great-Britain being brought in, and the amendments directed being made, the same was approved, and is as follows:

Here insert the address to the people of Great-Britain.[2]

[1] In Force's Archives, First Series, vol. I. is reproduced in facsimile the last page of the original association, with the signatures. Only the last and formal paragraph "The foregoing association &c." and the names of the Colonies are in the writing of Charles Thomson. In the printed editions of the *Journals* the date of the association differs. In the first issue of the Association, printed probably on October 21, the date is correctly given; but in the first edition of the *Journals* October 24th is assigned, and this error has been followed in the subsequent editions.

Copies of the original were printed, and a few were signed by the members of the Congress. One such copy is in the Lenox Library, New York, and bears the name of the owner, Richard Smith, and the probable date on which the signatures were obtained "October 22^d^ 1774." A note in Smith's writing at the end reads:—"mem° Patrick Henry Jun^r^ & Edmund Pendleton Esq^r^ signed the Original Association but were absent at the signing of this—Mess^rs^ Philip Livingston, John Haring, John D'Hart, Samuel Rhoads, Geo. Ross and Rob: Goldsborough did not sign the original, being then absent—Cæsar Rodney Esq^r^ was absent at the Time of signing the Original, but his name was written by his Order." A second copy of the Association, signed, is in the Pennsylvania Historical Society.

[2] Drafted by John Jay.

EXHIBIT C

Organizational Endorsers

Would your organization like to endorse the TIAA-CREF Campaign?

Being an organizational endorser means adding your name to the list of organizations that support the TIAA-CREF campaign. Once you've added your name, we will provide you with a sample email and other resources for you to notify your constituency of your endorsement, encouraging them to sign the petition and to forward it on to their networks.

Some organizational endorsers will choose to engage heavily in organizing around the campaign, and we have myriad tools to support you in bringing the campaign to life in your organization or community. Click here to get started organizing locally.

To add your organization's name to the list of organizational endorsers, click here.

Here's a partial list of organizational endorsers:

Palestinian Boycott National Committee

Adalah-NY: the New York Campaign for the Boycott of Israel
American Friends Service Committee (AFSC)
American Jews For a Just Peace
Birthright Unplugged
Boston Coalition for Palestinian Rights
Boycott from Within, Israel
Build Bridges Not Walls
Christians for Palestinian Rights
Christian Peacemaker Teams – Palestine
Coalition to Stop $30 Billion to Israel
Coalition of Women for Peace, Israel
CodePINK Arizona
CodePINK NYC
Committee for Palestinian Rights
Committee for Peace in Israel and Palestine (CoPIP)
Denver BDS
Friends of Sabeel—North America (FOSNA)
Front Range Coalition

Global Exchange
Grassroots International
Hilton Head for Peace
Holy Cross Melkite-Greek Catholic Church
Ireland-Palestine Solidarity Campaign
Israeli Committee Against House Demolitions (ICAHD)-USA
Madison-Rafah Sister City Project
Michigan Peace Team
Middle East Research and Information Project (MERIP)
Minnesota Peace Project
No Mas Muertes
Northfielders for Justice in Palestine/Israel
Olympia Friends Meeting
Palestine Cultural Office, Michigan
Palestine Israel Action Group (PIAG) of Ann Arbor Friends Meeting
Peoria Area Peace Network
Popular Struggle Coordination Committee
Rachel Corrie Foundation for Peace & Justice
Radio Free Maine
Right to Education Campaign (Palestine)
St Louis Palestine Solidarity Committee
Students for Justice in Palestine (SJP), Columbia University
Students for Justice in Palestine (SJP), New York University (NYU)
Stop AIPAC
TESC Divest, the Evergreen State College
Tikkun Chicago
Unitarian Universalists for Justice in the Middle East (UUJME)
US Campaign to End the Israeli Occupation
US Palestinian Community Network (USPCN)
Vermonters for a Just Peace in Palestine/Israel
Virginians for Middle East Peace
Wisconsin Middle East Lobby Group
Women in Black, Union Square (NYC)

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document on:

Robert Sulkin
Avi J. Lipman
McNaul Ebel Nawrot & Helgren PLLC
600 University Street
Suite 2700
Seattle, WA 98101-3143

☒ by **mailing** a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Seattle, WA on the date set forth below;

☐ by causing a copy thereof to **be hand-delivered** to said attorney's address as shown above on the date set forth below;

☐ by sending a copy thereof via **overnight** courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

☐ by **faxing** a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or

☒ by **emailing** a copy thereof to said attorney at his/her last-known email address as set forth above.

DATED this 1 day of November, 2011.

DAVIS WRIGHT TREMAINE LLP

By Roni L Grant
Roni Grant