The Honorable Erik Price

☐	EXPEDITE
☐	No hearing set
☒	Hearing is set
Date:	February 19, 2016
Time:	9:00 am
Judge/Calendar:	Hon. Erik Price

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, FOREST VAN SISER SHAFER as personal representative for the ESTATE OF SUZANNE SHAFER, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,

Defendants.

No. 11-2-01925-7

DEFENDANTS' RENEWED MOTION TO DISMISS UNDER CR 12(b)(6)

NOTE FOR MOTION CALENDAR:
FEBRUARY 19, 2016

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I. INTRODUCTION

This lawsuit attacks sixteen[1] citizens who are current and former Board members of the Olympia Food Cooperative (the "Co-op") because they voted to join a boycott of Israeli goods and expressed solidarity with Palestinians in the context of a humanitarian and political debate.

Plaintiffs, five of the Co-op's 22,000 members, disagreed with the Co-op's boycott decision. Rather than work internally to challenge the boycott, Plaintiffs threatened to bury Defendants with "complicated, burdensome, and expensive" litigation unless the Board rescinded its decision.

Plaintiffs later made good on that threat. On September 2, 2011, they filed a lawsuit alleging that Defendants' decision constituted a breach of fiduciary duties and *ultra vires* conduct. They demanded that the Court enjoin the boycott and hold Defendants personally liable for monetary damages. And they immediately served each Defendant with a 13-page discovery inquiry and demanded videotaped depositions of all 16 Defendants (for a total of five weeks of depositions).

On November 1, 2011, Defendants moved to dismiss these claims under CR 12(b)(6), and also filed a motion to strike under RCW 4.24.525, the anti-SLAPP ("Strategic Lawsuit Against Public Participation") law that Washington had enacted in 2010. On February 27, 2012, Judge McPhee granted the motion to strike. The parties then spent the next three-plus years in the Washington appellate courts arguing about SLAPP remedies and the construction and constitutionality of the state's anti-SLAPP law.

Now, the case has returned to the trial court, with the CR 12(b)(6) motion still pending. Four years after they filed this lawsuit, Plaintiffs' claims ***still fail*** as a matter of law. ***First***, under controlling Washington law, Plaintiffs lack standing to bring this action. ***Second***, Plaintiffs fail to state claims for which relief may be granted because, as a matter of law, the Board members acted within their legal authority when they voted to support the boycott.

[1] One Defendant, Suzanne Shafer, died on July 14, 2014. The personal representative of Ms. Shafer's estate, Forest Van Sise Shafer, was named as her substitute.

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Third, the Court of Appeals' holding that the Board acted lawfully is the law of the case on remand—precluding Plaintiffs from re-litigating that legal issue here. Therefore, the Court should dismiss Plaintiffs' claims with prejudice.

II. FACTUAL BACKGROUND

A. The Olympia Food Co-op

The nonprofit Olympia Food Co-op operates under certain governing documents, including the Co-op's Bylaws. Complaint, Dkt. 20, at ¶ 22. The Co-op was formed under the Washington Nonprofit Corporation Act, RCW 24.03, to "contribute to the health and well-being of people by providing wholesome foods and other goods and services" and to "strive to make human effects on the earth and its inhabitants positive and renewing and to encourage economic and social justice." Exhibit A (Bylaws) at § I.2.[2]

The Co-op's Articles of Incorporation direct that the corporation has full authority to make wholesale and retail product decisions, educate the public about wise buying options and promote political self-determination. Ex. B (Articles) at art. III.[3] The Co-op's Bylaws state that "[t]he affairs of the cooperative shall be managed by a Board of Directors," and grant the Board exclusive power to establish and amend Co-op policies. Ex. A at §§ III.1, III.13 (*e.g.*, the Bylaws direct the directors to "adopt policies which promote achievement of the mission statement and goals of the Cooperative"). The Bylaws obligate the Co-op staff to "carry out" Board decisions and comply with applicable laws, the Articles of Incorporation and the Bylaws. *Id*. at §§ IV.N, O. The Bylaws task the staff with operational obligations, such as to

---

[2] In ruling on a CR 12(b)(6) motion, courts may consider documents whose contents are alleged in a complaint but which are not physically attached to the pleading. *Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 726, 189 P.3d 168 (2008). In considering this renewed motion, the Court may consider the Co-op Bylaws because Plaintiffs reference the Bylaws in the Complaint at ¶¶ 42, 45 and 48.

[3] In considering CR 12(b)(6) motions, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and ***matters of which a court may take judicial notice***." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (emphasis added). Courts may take judicial notice of public documents if their authenticity cannot be reasonably disputed. ER 201(b) authorizes the court to take judicial notice of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rodriguez.*, 144 Wn. App. at 725-26.

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"keep the store functioning and open regular hours"; "keep accounting records"; and "maintain all facilities in good repair and in sanitary and safe condition." *Id.* at §§ IV, A, C, K. Under the Bylaws, any member may compel a vote of all the members by gathering enough petition signatures. *Id*. at § II.8.

The Bylaws remain unaffected by the Board's 1993 boycott policy (the "Boycott Policy"). Ex. C (Boycott Policy).[4] That Policy creates a procedure for member- and staff-initiated proposals to support nationally recognized boycotts. *Id*. It does not cede to the staff the Board's authority. *Id*. Nor does the Boycott Policy purport to amend or alter the Co-op's governing documents. *Id*. Although the Policy requires staff consensus for staff-initiated boycotts, it does not address the board's authority to adopt boycotts nor how the Board should respond to a lack of staff consensus. *Id.* It nowhere purports to be the sole method for approving Co-op boycotts. *Id.*

B. Plaintiffs threaten Defendants

On May 31, 2011, nearly a year after the Board made its boycott decision, Plaintiffs sent Defendants a letter demanding they immediately rescind the boycott, or else Plaintiffs would "hold each of you personally responsible." Ex. D at p. 2 (May 2011 letter).[5] The letter closed with a similar threat: "If you do what we demand, this situation may be resolved amicably and efficiently. If not, we will bring legal action against you, and this process will become considerably more ***complicated, burdensome, and expensive***." *Id* at p.3 (emphasis added).

The Board members responded with a June 13, 2011, letter that asked Plaintiffs to specify how the directors had violated the Co-op's governing documents. Ex. E (June 2011 letter).[6] The Board's letter also invited Plaintiffs to participate in the Co-op's Bylaw-provided

[4] The Court may consider the Boycott Policy because Plaintiffs reference the policy in their Complaint at ¶¶ 29, 30, 32, 33. *See* n. 2

[5] The Court may consider the letter because Plaintiffs reference the letter in their Complaint at ¶ 45. *See* n. 2.

[6] *See* n. 5.

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process for challenging such decisions: a membership vote. *Id.* The Board advised Plaintiffs: "[T]here is a democratic alternative to the litigation that you are threatening: the member-initiated ballot process that is laid out in our Bylaws. This process allows members who want to make a change at the Co-op to bring their proposal to a vote of the membership." Plaintiffs flatly rejected the Board's invitation they invoke the democratic process; Plaintiffs dismissed it as a "suggestion . . . not well taken" and said they "respectfully refuse to take up your proposal." Ex. F (July 2011 letter).[7]

C. Thurston County Superior Court dismisses the case

Less than two months later, Plaintiffs filed this suit alleging that the Co-op directors breached their fiduciary duty and acted *ultra vires* when they supported the boycott. Complaint at ¶¶ 52-54, 62-68. Plaintiffs alleged that the Board lacked legal authority to approve the boycott after the Co-op's staff deadlocked on the issue. *Id.* Plaintiffs sought a declaratory judgment that the boycott was null and void, permanent injunctive relief preventing its enforcement and damages from each of the 16 defendants. *Id.* at ¶¶ 55-62. The suit sought to hold each defendant personally liable. *Id.* at ¶ 68.

Defendants moved to strike the complaint under the state's now-defunct statute providing remedies for such strategic lawsuits against public participation, RCW 4.24.525, or to dismiss under CR 12(b)(6). Motion to Strike, Dkt. 41, at pp. 3, 17 n. 12. The motion asserted, among other arguments, that Plaintiffs' claims failed because (1) Plaintiffs lacked standing to bring the derivative action and (2) Plaintiffs' claims failed on the merits as a matter of law.

The Court held that the Board acted within its authority, as provided in the Bylaws, when approving the boycott:

> Next we deal with the key issue here, and that is what is the authority of the Board to act in this matter. As a matter of law, the Olympia Food Co-op was organized as a nonprofit corporation and remains a nonprofit corporation under the law.

[7] *See* n. 5.

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> Under our law, the governance documents of the Co-op are its articles of incorporation and bylaws. Under our law, "The affairs of a corporation shall be managed by a board of directors." The Co-op's governance documents, the bylaws, repeat the statute, "The affairs of the cooperative shall be managed by a Board of Directors."

Ex. G (Oral Opinion) at 20:21-25; 21:1-5, 23:7-10. The Court did not decide the standing question because it dismissed the case on other grounds. *Id.* at 27:2-5.

D. The Court of Appeals affirms dismissal

Plaintiffs appealed the dismissal to the Court of Appeals. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014); *rev'd*, 183 Wn.2d 269, 351 P.3d 862 (2015). The appellate court upheld the trial court's determination that Plaintiffs' claims failed and upheld dismissal of the complaint under RCW 4.24.525. The Court of Appeals affirmed that the Co-Op's Bylaws authorized the Board's decision:

> [T]he Boycott Policy does not bind the board. . . . [Neither an] applicable statute, the articles of incorporations, nor the bylaws compel the board to comply with adopted policies. . . . ***[T]he bylaws task the board with managing the Co-op. By virtue of being tasked with managing the corporation, the board may avail itself of the business judgment rule.*** The business judgment rule cautions against courts substituting their judgment for that of the board of directors, absent evidence of fraud, dishonesty, or incompetence ….
>
> [B]ecause we conclude that the board did have authority to adopt the boycott, and since no evidence of fraud, dishonesty, or incompetence were presented, ***there is no basis for us to question the board's decision to adopt the boycott***.

Id. at 534-35 (emphases added) (internal citation omitted).[8]

E. The Supreme Court strikes down the anti-SLAPP statute – but leaves intact the holding that the Board acted within its authority

Plaintiffs appealed the Court of Appeals holding to the Washington Supreme Court. *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). The Court held that the anti-SLAPP statute was unconstitutional on the ground that it violates the right of trial by jury under article I, section 21 of the Washington Constitution (although the Court acknowledged that its decision

[8] The Court also noted that the plaintiffs had rejected the Board's invitation that they challenge the boycott through a membership vote. *Davis*, 180 Wn. App. at 525.

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did not turn on the character of the claims here, which are exclusively equitable and would not go to a jury). *Id.* at 274-75. The Court remanded the matter to this court. *Id*. The Court did not consider the merits of Plaintiffs' claims. *Id.* at 294 n. 10 ("Our decision does not turn on the character of the particular claims here[.]")

III. ARGUMENT

This litigation, dragging into its fifth year, exemplifies the sort of judicial abuse that Washington's business judgment rule aims to guard against: attempts by minority interests to usurp Board authority and strip corporate directors of their lawful decision-making discretion.[9] Therefore, Defendants respectfully renew their request under CR 12(b)(6) that the Court dismiss this lawsuit with prejudice because Plaintiffs lack standing to bring the suit; Plaintiffs fail to state a claim upon which relief can be granted because, as a matter of law, the directors had legal authority to support the boycott; and Plaintiffs are precluded from re-litigating issues of law that the Court of Appeals already resolved.[10]

A. CR 12(b)(6) requires dismissal where the plaintiff fails to state proper claims.

Civil Rule 12(b)(6) "weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 102, 233 P.3d 861 (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." *Yeakey v. Hearst Communications, Inc*., 156 Wn. App. 787, 791, 234 P.3d 332

[9] 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, 744 P.2d 1032 (1987) (emphasis added). Thus, Washington shares the United States 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). 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." *Goodwin v. Castleton*, 19 Wn.2d 748, 762, 144 P.2d 725 (1944).[9]

[10] Defendants reserve the right to seek fees under CR 11 and/or RCW 4.84.185, particularly since the Court of Appeals already held that the Co-op Bylaws and state law authorized that the Board to make the boycott decision, and controlling Washington authority denies them any standing to sue.

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(2010). On a motion to dismiss under CR 12(b)(6), the court assumes the truth of the facts alleged in the complaint, but need not accept the complaint's legal conclusions. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. at 717-18. "While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

B. The Plaintiffs lack standing to bring a derivative action against the Co-op.

Plaintiffs lack standing to bring this derivative action for several independently sufficient reasons. ***First***, Washington prohibits such derivative suits by minority members of nonprofit corporations. ***Second***, even if such a cause of action were proper, which it is not, Plaintiffs lack standing because they failed to exhaust their intra-corporate remedies. ***Finally***, Plaintiffs also lack standing because they failed to allege that the Co-op suffered an injury.

1. Under *Lundberg*, nonprofit members generally lack standing to bring derivative suits.

Washington does not allow members of nonprofit corporations to routinely use derivative lawsuits in order to interfere with internal governance decisions: indeed, nonprofit members lack standing to bring such suits. *Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002). The *Lundberg* court held that the plain language of Washington's Nonprofit Corporation Act ("NCA"), RCW 24.03, severely limits the right to bring derivative suits and unambiguously forecloses derivative suits by certain individuals, including minority directors and members who are not "representative" of a nonprofit. *Id*. The NCA "carefully delineates" what type of action may be brought, and limits standing to lawsuits filed: (1) "on behalf of the corporation . . . by a ***majority*** of the board;" (2) by a member or director ***against*** the corporation; (3) by certain parties for liquidation; and (4) by the attorney general. *Id.* (emphases added). Those parameters nowhere allow for derivative suits purportedly brought on behalf of the corporation by an infinitesimally small minority of

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members dissatisfied with board or management. Plaintiffs' claims, therefore, fail as a matter of law because they lack standing to bring them.[11]

Even if the NCA were ambiguous on this point, which it is not, basic tenets of statutory construction make clear that the Legislature affirmatively decided against providing such standing. Washington's statutory scheme governing for-profit corporations expressly grants shareholders the right to bring derivative actions on behalf of corporations; yet the Legislature omitted such a provision from the NCA. *Lundberg*, 115 Wn. App. at 177 (citing the Washington Business Corporation Act (WBCA) at RCW 23B.07.400 and CR 23.1). "[I]t is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." *City of Kent v. Beigh*, 145 Wn.2d 33, 45-46, 32 P.3d 258 (2001). *See* also *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 191, 139 P.3d 386 (2006) (denying credit union members standing to sue its directors, and stating "that the legislature included a provision in the WBCA allowing individual shareholders to bring an action against a corporation's directors, whereas the [Act governing credit unions] contains no such provision, evidences a legislative intent that credit union members have no such right.")

Similarly, the NCA generally echoes the Revised Model Nonprofit Corporation Act—yet it omits a section of the Model Act that broadly grants members and directors standing to bring derivative suits. When a model act contains a certain provision, but the Legislature declines to adopt that provision, our courts conclude that the Legislature intentionally rejected the provision. *State v. Coria*, 105 Wn. App. 51, 59–60, 17 P.3d 1278 (2001), *rev'd on other*

[11] Indeed, RCW 24.03.040(2) allows a "representative suit" only when the claim is that the nonprofit corporation is "without capacity or power" to undertake the particular action, which plainly does not apply here. *See* discussion at §III.C, 2.b., *infra*. And, as *Lundberg* noted, only "a majority of the board" may validly bring such a "representative" claim on behalf of the corporation. *Lundberg*, at 177. Similar validation should be required before allowing member-initiated lawsuits. Here, other than a conclusory allegation that they fairly and adequately represent the Co-op membership, the five individual Plaintiffs offer no facts that would support "representative" standing; instead, the Complaint directly negates such a conclusion by admitting that they defiantly rejected the membership vote required by the Bylaws. *See* CR 23.1 ("derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent" the membership).

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grounds by 146 Wn.2d 631, 638, 48 P.3d 980, 983 (2002). For these reasons, courts must read the NCA to reflect legislators' deliberate decision to deny members standing to bring any derivative suits unless their complaint is premised on allegations that ***the nonprofit corporation*** itself is "without capacity or power" to make the decision that they seek to challenge through litigation.

2. Plaintiffs failed to exhaust their intra-corporate remedies.

Plaintiffs also lack standing because it is undisputed that they failed to exhaust the Co-op's internal remedies. A shareholder may bring a suit on behalf of the corporation ***only*** "where it is shown that the stockholder has exhausted all his available means to obtain within the corporation itself redress of his grievances" and "it appears that the corporation is incapable of enforcing a right of action accruing to it or that its officers or directors are acting fraudulently or collusively among themselves or with others, in such a manner as will result in serious injury to the corporation or to the interests of its stockholders. . ." *Goodwin*, 19 Wn.2d at 761. *See also 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).

Here, Plaintiffs allege that the Board lacked authority to approve the boycott. But Plaintiffs refused to internally challenge the Board's decision by calling a member-initiated vote, as permitted under the Co-op's Bylaws. *See* Ex. A at § II § 8.[12] *See* Ex. F ("refus[ing]" Defendants' invitation to invoke the member-driven vote). The intracorporate remedy is available, at Co-op expense, to any Co-op member able to collect a certain number of petition

[12] In ruling on a CR 12(b)(6) motion, courts may consider documents whose contents are alleged in a complaint but which are not physically attached to the pleading. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

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signatures. Had Plaintiffs made use of their right to initiate a membership vote, that intracorporate remedy would have fully remedied Plaintiff's purported procedural concerns.

Instead, Plaintiffs chose the contentious and divisive route of litigation—subjecting 16 individual Board members to "complicated, burdensome, and expensive" litigation. Ex. D. Plaintiffs' failure to exhaust the intracorporate remedy that would have resolved their complaint without litigation compels dismissal of this lawsuit.

3. Plaintiffs lack standing because the Co-op suffered no injury.

Finally, Plaintiffs also lack standing because they fail to sufficiently allege that the Co-op suffered any 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, 230 P.3d 190 (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, 106 P.3d 251 (2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Here, in purporting to assert injury, 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. They are neither "concrete and particularized" nor "actual or imminent" (rather than "conjectural or hypothetical.") *See Cook,* 125 Wn. App. at 720-721.

To the contrary, the First Amendment protects boycotts and other forms of 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 . . . . As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound

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national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982) (finding nonviolent political boycotts are protected by the First Amendment). Plaintiffs' allegations of, among other vagaries, "division and mistrust" fail to allege injury sufficient to confer standing.

C. Plaintiffs' claims lack merit – and are barred under the law of the case doctrine.

Even if Plaintiffs had standing to bring this action, and they do not, their complaint suffers two fatal flaws: (1) they fail to state claims for which relief may be granted and (2) the law of the case doctrine precludes the claims because the Court of Appeals already determined the directors acted lawfully.

1. The Board acted within its authority.

Washington statute requires the Board's directors to manage the Co-op's affairs. Under the NCA, "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. The NCA shields the Board from liability for conduct that does not rise to the level of gross negligence. "[M]embers of board of directors and officers of nonprofit corporations are not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity unless it constitutes gross negligence." *Barry v. Johns*, 82 Wn. App. 865, 869, 920 P.2d 222 (1996).

Moreover, 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, 167 P.3d 610 (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

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made in good faith." *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1(2003). As the Delaware Court of Chancery explained:

> The business judgment rule, as a general matter, protects directors from liability for their decisions so long as there exist "a business decision, disinterestedness and independence, due care, good faith and no abuse of discretion and a challenged decision does not constitute fraud, illegality, ultra vires conduct or waste." There is a presumption that directors have acted in accordance with each of these elements, and ***this presumption cannot be overcome unless the complaint pleads specific facts demonstrating otherwise***. Put another way, under the business judgment rule, the Court will not invalidate a board's decision or question its reasonableness, so long as its decision can be attributed to a rational business purpose.

Robotti & Co., LLC v. Liddell, 2010 WL 157474 at *11 (Del.Ch. 2010) (quoting footnote 1 Stephen A. Radin, et al., The Business Judgment Rule: Fiduciary Duties for Corporate Directors 110 (6th ed. 2009)) (emphasis added).

The Co-op's Bylaws, as well, expressly direct the Board to manage the Co-op's affairs: "The affairs of the cooperative shall be managed by a Board of Directors." Ex. A, § III, 1. The Co-op Bylaws 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." *Id.*, art. III,§ 13 (7,9,15). The Bylaws commit the Board to "support[ing] efforts to foster a socially and economically egalitarian society." *Id*., art. I,§ 2(4). Construction of the Bylaws, like other written contracts, is an issue of law for the Court. Interpretation of bylaws and other documents governing a corporation are questions of law. *See Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-74, 279 P.3d 943 (2012); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 859, 567 P.2d 218 (1977) (bylaws); *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956) (bylaws of a non-profit home-owners association).

The 1993 Boycott Policy did nothing to compromise the Board's authority under the Bylaws. Even assuming, as Plaintiffs allege, that the Policy sets forth the terms by which the Co-op may honor boycotts, the policy does not—and cannot—limit the Board's ultimate

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authority to act. The staff's role, as enumerated in the Bylaws, includes operational duties such as: "keep the store functioning and open regular hours" and "maintain all facilities in good repair and in sanitary and safe condition." Ex. A, §§ IV, A, C, K. Indeed, Co-op staff members are obligated to "carry out Board decisions and/or membership decisions made in compliance with these bylaws." *Id.* art. IV, § N.

2. Plaintiffs' claims fail as a matter of law.

The essence of Plaintiffs' claims is that Defendants' decision to engage in the boycott against Israeli products was not authorized by the Co-op's Boycott Policy and therefore constituted a breach of fiduciary duty and *ultra vires* conduct. Complaint at ¶¶ 52-54, 63-68. These claims have no basis in law or fact.

a. Plaintiffs' breach of fiduciary duty claim fails.

A derivative claim against a shareholder for breach of fiduciary duty requires the following elements: (1) that a shareholder breached his fiduciary duty to the corporation, and (2) that the breach was a proximate cause of the losses sustained. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986); *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 403, 357 P.2d 725 (1960).

Plaintiffs fail to state specific, factual allegations to support such a claim: they identify no duty breached and offer only vague, speculative damages. Certainly, the Board's decision to approve the boycott cannot rise to the level of gross negligence, as required under *Barry*. *See* 82 Wn. App. at 869. Nor does it suffice to override the business judgment rule, which immunizes directors' duly authorized decisions, such as the boycott decision. *Scott*, 148 Wn.2d at 709. The Board simply made a discretionary decision within its discretionary powers and duties under the Bylaws.[13]

[13] As discussed above, *supra* at §III.B.1, Plaintiffs lack standing to bring any derivative claims premised on allegations of breach of fiduciary duties by Board members, because RCW 24.03.040 allows a "representative suit" only with regard to *ultra vires* claims, where the Complaint alleges that the nonprofit corporation itself is "without capacity or power" – *i.e.*, to be maintained derivatively, the

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b. Plaintiffs' *ultra vires* claim also fails.

Corporate transactions are *ultra vires* when "outside the purposes for which the 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, 244-45, 979 P.2d 854 (1999) (citing *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 293-94, 133 P.2d 300 (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." *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). When a party argues that the way in which a board exercised control "did not conform with the governing documents of the corporations . . . [such an argument] is not a challenge to the authority of the corporation, but only the method of exercising it." *Harlstene Point*, 95 Wn. App. at 345. Such a claim does not allege *ultra vires* acts. *Id.*

Plainly, the capacity and power "to engage in the business of buying and selling food and other goods as a wholesaler and a retailer," to "educate . . . the public" in "wise and efficient" purchases of food and other goods, and to "promote . . . democratic, decentralized decision-making [and] . . . political self-determination," are expressly conferred on the Co-op by its own Articles. Ex. B, art. III. The 2010 boycott decision (deciding which retail products the Co-op would buy and sell, while also advancing fundamental rights of self-determination among Palestinians under Israeli occupation) were also well within the parameters of the Board's powers to "adopt policies which promote achievement of the mission statement and goals of the Co-operative" as defined in the Articles and Bylaws, especially given the perceived international legal and humanitarian violations by Israel that the boycott was intended to address. Plaintiffs, who support the Israeli government against the Palestinians, may disagree politically with the Board's 2010 decision, but any legal argument that the ***purpose*** of the boycott is ***inconsistent*** with the ***mission*** of the Co-op, or that the Board's decision was beyond

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lawsuit must allege in effect that the Articles that empower the nonprofit corporation do not permit the Co-op to make decisions about what food and products it will sell.

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its powers, cannot survive. Because the Co-op acted well within its corporate powers, the *ultra vires* claim is utterly meritless.[14]

Moreover, because Plaintiffs merely 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. Plaintiffs' Complaint makes clear that they are not challenging the authority to boycott, but merely whether proper procedural requirements were followed:

> Plaintiffs have repeatedly asked, in writing, that the OFC Board rescind the Israel Boycott and Divestment policies and apply the proper procedures to deciding the issue. For example, in letters dated May 31, 2011 and July 6, 2011, Plaintiffs demanded in no uncertain terms that the OFC Board act in accordance with its rules and bylaws and rescind the Israel Boycott and Divestment policies. Further, Plaintiffs have requested that the issues of boycotting and divesting from Israel be raised through a process that comports with OFC's governing rules, procedures, and principles. In their May 31, 2011 and July 6, 2011 letters, Plaintiffs made clear that they are prepared to respect the outcome of such a process.

Complaint at ¶ 45.

In *Hartstene Pointe*, a homeowner challenged the decision of an association's subcommittee to deny his application to remove 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—the exact argument Plaintiffs make here—cannot form the basis of an *ultra vires* suit. *Id*. *Se*e also *Twisp*, 16 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

[14] *See* RCW 24.03.035(4)-(5) (every Washington nonprofit corporation is granted the power to "purchase" and "deal in . . . personal property" and to sell "any part of its property and assets"). As a retailer, product decisions are not only permitted by the company's Articles but are the essence of the Co-op's business. And, as a retailer dedicated in its Articles to promoting "political self-determination," the Co-op clearly has authority to decide which products that it buys and sells appropriately promote these core goals.

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even a *prima facie* case of *ultra vires* act(s), Plaintiffs would have to allege that the Co-op lacked authority power to engage in the Israeli boycott at all; allegations of procedural defects do not suffice to state an *ultra vires* claim.[15]

3. The Law of the Case doctrine precludes Plaintiffs from re-litigating their claims.

Under the "law of the case" doctrine, the rulings of an "appellate court on appeal as to every question that was determined on appeal and as to every question which might have been determined becomes the law of the case and supersedes the trial court's findings." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 *amended sub nom*. *Bailie Commc'ns, Ltd v. Trend Bus. Sys., Inc.*, 814 P.2d 699 (Wash. Ct. App. 1991); *see also Columbia Steel Co. v. State*, 34 Wn.2d 700, 705, 209 P.2d 482 (1949) ("Upon the retrial the parties and the trial court were all bound by the law as made by the decision on the first appeal."). Also, once an appellate court makes a ruling "its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).[16]

The Court of Appeals ruled that Defendants were entitled to judgment as a matter of law on the issues of fiduciary duty and *ultra vires* action. *Davis*, 180 Wn. App. at 536 ("We affirm . . . on the basis that the Co-op's governing documents provided the Board with the authority to adopt the boycott."). The appellate court also held that the business judgment rule protected the Board's discretion to make the boycott decision because Plaintiffs did not allege fraud, dishonesty or incompetence. *Id*. at 535. ("[T]he bylaws task the board with managing

[15] As a consequence, Plaintiffs also lack standing to sue. *See* discussion at § III.B, *supra*.

[16] Indeed, the law of the case doctrine significantly constrains even the ability of appellate courts to revise prior determinations. *Folsom v. Cnty. of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) ("[T]he law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal."); *see also Greene v. Rothschild*, 68 Wn.2d 1, 6, 414 P.2d 1013 (1966); *Lian v. Stalick*,115 Wn. App. 590, 598, 62 P.3d 933 (2003).

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the Co-op. By virtue of being tasked with managing the corporation, the board may avail itself of the business judgment rule. . . . . [W]e conclude that the board did have the authority to adopt the boycott.") Moreover, the Court rejected Plaintiffs' contention that the Co-Op's Boycott Policy superseded the Bylaws in this regard. The court held "the Boycott Policy does not bind the board." *Id.* at 534. Indeed, "neither an applicable statute, the articles of incorporation, nor the bylaws compel the board to comply with adopted policies." *Id.* at 535. While the Board may aspire to decisions by consensus, "this aspiration does not imbue the Boycott Policy with authority equivalent or superior to that of the applicable statutes, the articles of incorporation, or the bylaws." *Id*. at 536. The decisions of the Court of Appeals are the law of this case, and must be followed on remand. *Bailie Commc'ns, Ltd.*, 61 Wn. App. at 160. That includes the Court's holding that Plaintiffs' fiduciary duties and *ultra vires* claims failed as a matter of law. *Davis,* 180 Wn. App. at 525.

Finally, the Supreme Court's reversal of the Court of Appeals does not invalidate the appellate court's determination that the directors did not breach their fiduciary duty or engage in *ultra vires* conduct. The Washington Supreme Court focused on the anti-SLAPP statute's constitutionality, and did not address the other legal holdings in the Court of Appeals decision. *Davis,* 183 Wn.2d at n.10. Therefore, this case is bound by the appellate court ruling and Plaintiffs cannot possibly state a claim upon which relief could be granted. Defendants are thus entitled to judgment as a matter of law.

IV. CONCLUSION

The interests of justice, as well as the letter of the law, warrant dismissal with prejudice because Plaintiffs lack standing as a matter of law to bring a derivative action; they fail to state cognizable claims as a matter of law; and they are precluded as a matter of law from re-

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litigating dispositive legal issues under the doctrine of law of the case. On the face of the Complaint, this lawsuit is meritless.

Pursuant to Civil Rule 12(b)(6), therefore, the Complaint must be dismissed.

DATED this 3rd day of September, 2015.

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DECLARATION OF SERVICE

On September 3, 2015, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Robert M. Sulkin	☑	Via Messenger
Avi J. Lipman	☐	Via U.S. Mail
McNaul Ebel Nawrot & Helgren PLLC	☐	Via Overnight Delivery
600 University Street, Suite 2700	☐	Via Facsimile
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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 3rd day of September, 2015, at Seattle, Washington.

s/ Angela Galloway
Angela Galloway, WSBA No. 45330

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EXHIBIT A

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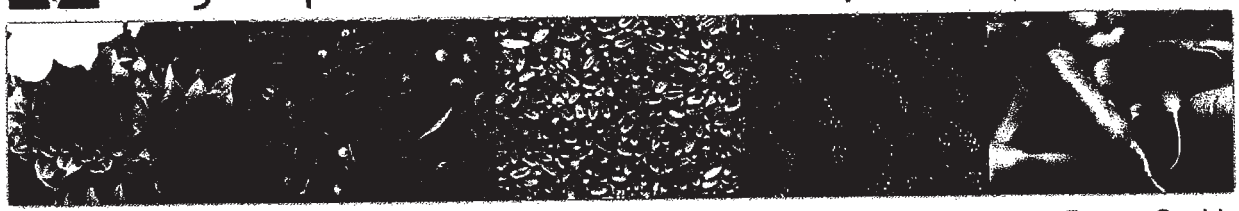

New Tabling Guidelines More info.

The Olympia Food Co-op Bylaws!

1. NAME The name of the corporation is The Olympia Food Cooperative (hereinafter the Cooperative).

2. PURPOSES The cooperative has been formed under the Washington Nonprofit Corporations Act, R.C.W. 24.03. The purpose of the Cooperative is to contribute to the health and well-being of people by providing wholesome foods and other goods and services, accessible to all, through a locally-oriented, collectively managed, not-for-profit cooperative organization that relies on consensus decision making. We strive to make human effects on the earth and its inhabitants positive and renewing and to encourage economic and social justice. Our goals are to:

1. Provide information about food;
2. Make good food accessible to more people;
3. Support efforts to increase democratic process;
4. Support efforts to foster a socially and economically egalitarian society;
5. Provide information about collective process and consensus decision making;
6. Support local production;
7. See to the long-term health of the business;
8. Assist in the development of local community resources.

II. Membership

1. ELIGIBILITY Membership in the Cooperative is open to any person who meets all qualifications set forth in these bylaws and who pays a non-refundable lifetime membership fee. The amount of such fee shall be set by the Board. The Board may designate different classes of membership. The amount of the membership fee may vary for different classes of members. Any financial obligation of membership may be waived in whole or in part by the Board of Directors (hereinafter the Board).

2. NON-DISCRIMINATION The Cooperative strives to be egalitarian in all aspects of its business operations. The Cooperative works to serve a diverse population by incorporating procedures and practices that remove barriers to classes of people who are oppressed or are denied power and privilege in society generally. These classes of people include people who are discriminated against based on race, sex, religious creed, age, disability, size, sexual orientation, gender orientation, marital status and economic status.

3. MEMBER STATUS An active member maintains a current address on file and keeps current in their dues. An active member becomes an inactive member if they;

1. fail to pay dues; or
2. fail to maintain a current address on file for one year; or
3. fail to renew a low income membership
4. request inactive status.

4. CAPITAL ACCOUNT Members shall pay dues into a capital account. The Board may set the amount of dues. Upon becoming an inactive member, members may have all money they have paid into the capital account refunded, unless the member's dues have been transferred from the capital account pursuant to paragraph II.5.

5. INACTIVE MEMBER DUES Inactive member dues may be transferred from the capital account to the Cooperative's accounts according to policies and procedures

capital account to the Cooperative's accounts according to policies and procedures established by the Staff and approved by the Board.

6. ANNUAL MEETING An annual meeting of the membership shall be held each year. The place, day, and hour of the meeting shall be mailed to all active members at least 10, but not more than 50 days, prior to the meeting. In addition, notice of the meeting shall be posted at the Cooperative at least 10 days prior to the annual meeting.

The purpose of the annual meeting is to provide an opportunity for the Board and members to discuss the activities of the Cooperative. The Board shall establish the agenda for the annual meeting in a manner that allows for members to propose agenda items.

7. MEMBER VOTING In all instances of member voting, ballots may be received at the Cooperative, by mail, or at a meeting of members. No proxies are allowed and each active member shall have one vote. Unless otherwise specified in these bylaws, or by law, a simple majority vote is required for elections and other membership actions. The Board may prescribe additional rules and procedures for elections as appropriate. The Board shall take steps to encourage maximum participation by the membership.

8. MEMBER-INITIATED BALLOT Any member may initiate a ballot for vote by the general membership by following the Member-Initiated Ballot Procedure and Petition Requirements that are prescribed by the Board. All petitions for initiating a ballot must be signed by 1/2 of the average number of voting members from the previous three annual elections, or 300, whichever is greater. Unless otherwise specified by State law, a 60% majority is required for a member-initiated ballot to pass.

9. QUORUM An election must meet a quorum of 100 active members to be considered valid.

10. SPECIAL MEETING 300 Active members or ½ of the average number of voting members from the previous three elections, whichever is greater, may petition for a special meeting of the membership to take place within 90 days from the filing of the petition with the Board. The petition shall state the business to be discussed at the special meeting and the meeting shall be limited to such business. The Board may also call special meetings. Notice of special meetings shall be mailed to all active members at least 10, but not more than 50 days prior to the time of the meeting. The notice shall contain the time, place, and agenda of the special meeting.

11. MARKUPS Members shall pay markups on goods purchased from the Cooperative which shall be less than those paid by non-members. Volunteer Working Members are eligible to pay markups on goods purchased from the Cooperative which shall be less than those paid by non-volunteers. The Board shall determine the procedure and amount of special membership category discounts and non-member mark-ups.

12. MEMBER INDEMNITY Members are not liable for the debts of the Cooperative.

13. COMMUNICATION Members shall maintain free-flowing communication with the Board, Staff, and other members.

III. Board of Directors

1. GENERAL RESPONSIBILITIES The affairs of the cooperative shall be managed by a Board of Directors.

2. NUMBER, AND TERM The Board shall consist of a minimum of six directors and a maximum of ten directors. The exact number of directors shall be fixed by resolution of the Board. No reduction in the membership of the Board shall serve to shorten the term of any director then elected and serving. At least one Director shall be a member of the staff. Directors elected by the membership shall serve two year terms. No Director elected by the membership shall serve more than four consecutive years.

3. ELIGIBILITY Any active member is eligible to serve as a Director of the Cooperative.

4. ELECTION OF BOARD MEMBERS Board members shall be elected by the membership, except for the Staff representative, who shall be appointed by the Staff. The Board may prescribe the manner and procedures for membership elections, except that elections shall be held annually.

5. VACANCIES In the event of a vacancy on the Board of Directors, the remaining Board members may appoint a new Director. The appointed Director shall serve until the next Board election. Any Board appointed Director is eligible to run for an elected term at the next election.

6. DECISION MAKING Board Decisions are made by consensus.

7. QUORUM For purposes of Board action, unless otherwise specified or required by law, a quorum shall be a majority of the Board.

8. CONTRACTS FOR PROFIT Except for fair compensation for services actually rendered, a director shall not during her/his term of office be a party to a contract for profit with the Cooperative differing in any way from the business relations accorded members generally or upon terms differing from those generally current among members.

9. CONFLICT OF INTEREST Directors shall be under an affirmative duty to disclose an actual or potential conflict of interest in any matter under consideration by the Board. Directors having such an interest may not participate in the discussion or decision of the matter unless otherwise determined by the Board.

10. REIMBURSEMENT The Cooperative may, if authorized by a general Board resolution, reimburse individual Directors for reasonable expenses required to attend Board and committee meetings. To be eligible for reimbursement the Director must be present for the entire Board meeting.

11. REMOVAL Any Director may be removed from the Board whenever the Board determines that such removal will be in the best interest of the Cooperative. Before a Director is removed, that Director shall be given reasonable prior notice and a reasonable opportunity to speak before the Board at a regular meeting. Removal shall require a consensus minus-one vote of the Board. The membership may also remove a director through the member-initiated ballot process.

12. RESIGNATION A director may resign by submitting a written resignation to the Board with thirty days notice. Absence from three (3) Board meetings in a Board members term without providing prior notification shall constitute resignation from the Board. Exceptions to this policy may be made by consensus of the Board.

13. BOARD DUTIES Except as to matters reserved to membership by law or by these bylaws, the business and affairs of the Cooperative shall be directed by the Board of Directors. The major duties of the Board are to:

1. employ Staff, approve the make-up of the hiring committee, approve job descriptions, and approve a hiring policy;
2. select officers, and fill Board vacancies as needed;
3. approve an operating budget annually;
4. monitor the financial health of the Cooperative;
5. appoint standing and special committees as needed;
6. authorize appropriate agents to sign contracts, leases, or other obligations on behalf of the Cooperative;
7. adopt, review, and revise Cooperative plans;
8. approve major capital projects;
9. adopt major policy changes;
10. adopt policies to foster member involvement;
11. authorize major debt obligations of the Cooperative;
12. ensure compliance with all corporate obligations, including the keeping of corporate records and filing all necessary documents;
13. ensure adequate audits of Cooperative finances;
14. maintain free-flowing communication between the Board, Staff, committees, and the membership;
15. adopt policies which promote achievement of the mission statement and goals of the Cooperative.
16. resolve organizational conflicts after all other avenues of resolution have been exhausted;
17. establish and review the Cooperative's goals and objectives.
18. provide an annual report to the members to include a financial report, committee reports, and a summary of other significant events held and actions taken by the Cooperative during the year.

14. DISPOSAL OF ASSETS The Board may not dispose of all or substantially all of the Cooperative's assets without prior approval of two-thirds of the active members.

15. SUPREMACY The Board shall not exercise any power under these bylaws which is in conflict with the articles of incorporation or applicable state or federal law.

16. MEETINGS The Board shall meet at least twelve times a year. Board meetings shall normally be open to the membership. The Board may close meetings at its discretion to discuss personnel matters, legal matters, or other items which require private discussion. Extra or special meetings may be called at the discretion of the Board or by petition of 25 active members, provided that the petition specifies the business to be conducted at the meeting.

17. ACTION WITHOUT MEETING The Board may act without meeting if all Directors consent. The action shall be recorded in writing at the time it is made and included in the minutes of the next Board meeting. Any action taken under this procedure shall be fully effective.

18. INDEMNIFICATION To the full extent permitted by the Washington Non-Profit

18. INDEMNIFICATION To the full extent permitted by the Washington Non-Profit Corporation Act the cooperative shall indemnify any person who was or is a party or is threatened to be a party to any civil, criminal, administrative, or investigative action, suit, or proceeding by reason of the fact that the person was or is a Director or officer of the cooperative against expenses (including attorney's fees), judgements, fines, and liabilities reasonably incurred or imposed upon them in connection with or resulting from any claim, action, suit, or proceeding, provided that they acted in good faith and in a manner they reasonably believed to be in or not opposed to the best interests of the cooperative. The termination of any action, suit, or proceeding by judgement, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent shall not create a presumption that the person did not act in good faith and in a manner which they reasonably believed to be in or not opposed to the best interests of the cooperative. The Board of Directors may obtain insurance on behalf of any person who is or was a Director, officer, employee, or agent against any liability arising out of their status as such, whether or not the cooperative would have power to indemnify her/him against such liability. The Board of Directors may, at any time, approve indemnification under the Washington Non-Profit Corporation Act of any person which the cooperative has the power to indemnify. The indemnification provided by this section shall not be deemed exclusive of any other rights to which a person may be entitled as a matter of law or contract.

IV. Staff

MAJOR RESPONSIBILITIES The major responsibilities of the Staff are to:

A. keep the store functioning and open regular hours.

B. present comprehensive financial statements to the Board quarterly or as requested;

C. keep accounting records in accord with generally accepted accounting principles;

D. maintain accurate and up-to-date corporate records, articles, Bylaws, Board meeting minutes, membership meeting minutes, staff meeting minutes, and required reports; and make these documents accessible to members.

E. maintain accurate and up-to-date membership records including names, addresses, fee records, and dues records;

F. maintain accurate and up-to-date records of the names and addresses of all creditors;

G. maintain adequate insurance and bonding;

H. regularly propose to the Board updated personnel policies and employee benefit programs;

I. maintain systems for control of all operations;

J. maintain adequate channels for taking and responding to member suggestions, commendations, and complaints;

K. maintain all facilities in good repair and in sanitary and safe condition;

L. provide effective and consistent programs for consumer and cooperative information;

M. maintain free-flowing communication between Staff, Board, committees, and the membership;

N. carry out Board decisions and/or membership decisions made in compliance with these bylaws;

O. carry out all activities and act in accordance with applicable law, the articles of incorporation, and the bylaws of the cooperative.

V. Financial Information

1. FISCAL YEAR The fiscal year ends December 31.

2. AUDIT COMMITTEE The Board shall name an audit committee or select an experienced accountant to conduct an audit every three (3) years. Members of the audit committee or the accountant may not be employees, or officers of the cooperative or their immediate families; Board members may be on the audit committee, but the committee may not be composed entirely of Board members. The audit committee or accountant shall report their findings to the Board in writing and in a timely fashion.

3. REPORTS The financial coordinator or a member of the Finance committee shall report to the members at the annual meeting and in the Cooperative's newsletter. The Finance committee will also report to the Board as required.

4. BONDING The Board may require bonding of employees.

VI. Dissolution

1. BOARD ACTION In order to voluntarily dissolve the Cooperative, the Board of Directors must adopt a resolution recommending dissolution and direct that the question of dissolution be submitted to a vote of the membership.

2. NOTICE Appropriate notice of the vote must be provided as required by R.C.W.24.03.220.

3. VOTE NEEDED The Cooperative may be dissolved by a 2/3 vote of the active membership. No other business may be transacted at a special meeting called for the purpose of dissolving the Cooperative or on a ballot issued for the purpose of dissolving the Cooperative.

4. PROCEDURE Upon dissolution of the Cooperative the Board shall supervise the winding up of business, the paying of debts, and the distribution of assets.

VII. Amendment

These bylaws may be amended through a board or member-initiated ballot that remains open at least 30 days. Copies of the proposed bylaws changes shall be available at all locations of the Cooperative at least 30 days prior to the beginning of any vote to amend these bylaws.

Approved by the membership November 2005

EXHIBIT B

D-262238
FILE NUMBER

DOMESTIC

STATE OF WASHINGTON | DEPARTMENT OF STATE

I, **BRUCE K. CHAPMAN**, Secretary of State of the State of Washington and custodian of its seal, hereby certify that

ARTICLES OF INCORPORATION

of THE FOURTEEN OUNCE OKIE DOKE COOPERATIVE CLUB

a domestic corporation of Olympia, Washington,

was filed for record in this office on this date, and I further certify that such Articles remain on file in this office.

Filed at request of The Fourteen Ounce
Okie Doke Cooperative Club
% Debra Lutz
2627 W. 9th St.
Olympia, WA 98502
NON-PROFIT

Filing and recording fee . . . $.....

License to June 30, 19..... $.....

.....Excess pages @ 25¢ $.....

Microfilmed, Roll No. 1369

Page 028 - 029

In witness whereof I have signed and have affixed the seal of the State of Washington to this certificate at Olympia, the State Capitol,

December 9, 1976

BRUCE K. CHAPMAN
SECRETARY OF STATE

SSF-57 B (6-69)

167269 DEC1076

ARTICLES OF INCORPORATION OF
THE FOURTEEN OUNCE OKIE DOKE COOPERATIVE CLUB

The undersigned, as incorporator of The Fourteen Ounce Okie Doke Cooperative Club, for the purpose of forming a corporation under the non profit laws 24.03 of the State of Washington, state:

I

The name of the corporation shall be The Fourteen Ounce Okie Doke Cooperative Club.

II

The term of existence shall be perpetual.

FILED
DEC 9 1976
SECRETARY OF STATE
STATE OF WASHINGTON

III

The purpose for which the corporation is organized is as follows: To educate people concerning food, nutrition, and cooperative enterprises by providing healthy low-cost food in a cooperatively run, managed, and owned storefront.

IV

The address of the initial registered office of the corporation shall be 2627 W. 9th. St., Olympia, Washington 98502

V

The name of the initial registered agent at the same address shall be Debra Lutz.

VI

The number of directors constituting the initial Board of Directors shall be three. The names and addresses of the persons who will serve as the initial directors are as follows:

John Adams 1333 Overhulse Rd. Olympia, Washington 98502
Carmela Courtney 1333 Overhulse Rd. Olympia, Washington 98502
Fred Zell 1333 Overhulse Rd. Olympia, Washington 98502

VII

In the event of dissolution, the net assets are to be distributed to other non-profit organizations with similar interests and purposes as the Fourteen Ounce Okie Doke Cooperative Club.

VIII

The name and address of the initial incorporator shall be Greg Reinemer 1333 Overhulse Rd. Olympia, Washington 98502.

Greg Reinemer

On this 9th day of December 1976 Greg Reinemer

appeared before me and signed this document

John H Ryan

Notary Public

residing in Olympia, Washington

2-262238-5
FILE NUMBER

DOMESTIC

STATE OF WASHINGTON | DEPARTMENT OF STATE

I, **RALPH MUNRO**, Secretary of State of the State of Washington and custodian of its seal, hereby certify that

ARTICLES OF AMENDMENT TO
ARTICLES OF INCORPORATION

of THE FOURTEEN OUNCE OKIE DOKIE COOPERATIVE CLUB

a domestic corporation of Olympia, Washington,

(Amending articles, changing registered agent and office to Beth Hartman, 921 N. Rogers Street, Olympia, WA 98502 and Changing name to OLYMPIA FOOD COOPERATIVE)

was filed for record in this office on this date, and I further certify that such Articles remain on file in this office.

Filed at request of
Beth Hartman
921 North Rogers Street
Olympia, WA 98502

NON PROFIT

Filing and recording fee $

License to June 30, 19 , $

Excess pages @ 25c $

In witness whereof I have signed and have affixed the seal of the State of Washington to this certificate at Olympia, the State Capitol,

April 29, 1981.

Microfilmed, Roll No. 1574

Page 048 - 050

RALPH MUNRO
SECRETARY OF STATE

SSF-57-B (6-69) -111-

00137MAY 881

FILED

APR 29 1981

SECRETARY OF STATE
STATE OF WASHINGTON

ARTICLES OF AMENDMENT

Pursuant to the provisions of RCW 24.03 of the Washington Nonprofit Corporation Act, the undersigned adopts the following articles of amendment to the articles of incorporation:

(1) The name of the corporation is the Fourteen Ounce Okie Doke Cooperative Club.

(2) The following amendments to the articles of incorporation were adopted by the voting members of the corporation on October 6, 1980.

Article I. The name of the corporation shall be the Olympia Food Cooperative.

Article III. The purpose for which the corporation is organized is as follows:

1. To engage in the business of buying and selling food and other goods as a wholesaler and a retailer, including the rendering of services according to consumer cooperative principles;

2. to provide fairly priced, nutritious food and quality goods;

3. to educate members and the public in the wise and efficient production, purchase, and use of food, goods, and services;

4. to educate members and others in cooperative practices and structures;

5. to cooperate with other cooperatives, collectives, small businesses, and farms on a local and regional basis;

6. to promote ecologically sound lifestyles and eating habits, democratic, decentralized decision making, political self-determination, and economic self-sufficiency;

7. to engage in all such activities as are incidentally conducive to the attainment of the purpose of this corporation or to any of them and to exercise all powers now or hereafter permitted by the laws of the State of Washington for corporations formed under the Nonprofit Corporations Act, Chapter 24.03, or any successor statute.

Article IV. The address of the registered office of the corporation shall be 921 North Rogers Street, Olympia, WA 98502.

Article V. The name of the registered agent at the same address shall be Beth Hartman.

Article VI. The current officers of the corporation are as follows:

President: Ellen Madsen,4044 11th Avenue NW; Olympia,WA 98502
Vice-president: James D. Sego Jackson, P.O. Box 7611; Olympia, WA 98501
Vice-president: Cara Stiles,4044 11th Avenue NW; Olympia, WA 98502
Secretary: Robin Ostfeld, 13136 201st SW Avenue; Rochester, WA 98579
Treasurer: Judy Lantor, 4124 11th Avenue NW; Olympia, WA 98502

Article VII. Upon dissolution or final liquidation of the corporation, the assets of the corporation shall be distributed in the following order of priority:

1. All debts shall be satisfied.
2. The Board of Directors shall be responsible for determining the non-profit organizations to which surplus funds shall be given.

(3) The ballot began September 8, 1980 andended October 6, 1980. The total number of votes cast by the voting members was 87. Of those votes, 85 were in favor of the amendment. A quorum was present at the ballot.

Robin Ostfeld, secretary

Ellen Madsen, president

State of Washington
County of Thurston

The undersigned, a notary public, in and for the state and county above set forth, hereby certifies that on April 16, 1981, personally appeared before me Robin Ostfeld/ELLEN MADSEN, who, being by me first duly sworn, declaved that she/he is the PRESIDENT secretary of the aforementioned corporation and that she/he signed the foregoing document, and that the statements therein contained are true.

Notary Gail L. Dalkoff
for the state of Washington
Thurston Cty

EXHIBIT C

BOYCOTT POLICY

Whenever possible, the Olympia Food Co-op will honor nationally recognized boycotts which are called for reasons that are compatible with our goals and mission statement.

Exceptions to this policy include:
A: Staple products that are being boycotted across the board or for which alternative brands or product lines or not available; or,
B: Dietary specialty products for which alternatives are not available.

In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott as well as why we are continuing to carry the product in question, to allow our members to make the most educated decisions possible.

When we become aware of a boycott of a product that we carry, we will gather as much of the following information as possible:
A: Who is calling the boycott;
B: How to contact them;
C: Basic outline of the issues involved;
D: Parameters of the boycott (what products are specifically involved); and,
E: What will end the boycott.
If a member informs us of a boycott, we will ask them to provide the above information.

A request to honor a boycott may come from anyone in the organization. The request will be referred to the Merchandising Coordinator (M.C.) to determine which products and departments are affected. The M.C. will delegate the boycott request to the manager(s) of the department which contains the largest number of boycotted products. The department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott.

The recommendation should include:
A: Who's calling the boycott and why
B: List of products we carry that would be affected
C: Information on availability of alternative products (including price)
D: Significant difficulties in honoring the boycott
E: Recommendations of other affected department managers
F: Exceptions to the recommendation (e.g. "I recommend we honor the boycott of Chinese products except for hemp twine, and here" why.'"

The department manager will post a sign informing customers of the staff's decision and reasoning regarding the boycott. If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision.

The Co-op will not accept bulk orders for items produced by the target of a Co-op honored boycott. Bulk orders for items produced by targets of boycotts which the Co-op has not yet formally chosen to honor will be accepted.
Approved May, 1993

EXHIBIT D

May 31, 2011

Via Certified Mail, Return Receipt Requested

Grace Cox
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Eric Mapes
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Harry Levine
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Julia Sokoloff
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

TJ Johnson
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Rochelle Gause
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Rob Richards
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Erin Genia
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

John Nason
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Ron Lavigne
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

John Regan
Olympia Food Co-op
Board of Directors
3111 Pacific Ave. SE
Olympia, WA 98501

Jackie Krzyzek
[redacted]

Joellen Reineck Wilhelm
[redacted]

Suzanne Shafer
[redacted]

Jessica Laing
[redacted]

To the Olympia Food Co-op Board of Directors (present and former):

We are members of the Olympia Food Co-op ("OFC") who oppose OFC's boycott of Israeli made products ("Israel Boycott") and divestment from Israeli companies ("Divestment"). More importantly, we strongly object to the numerous procedural violations committed by the OFC Board of Directors (the "Board") in adopting these policies. You are receiving this letter because either (a) you are currently a member of the Board or (b) you were a member of the Board at the time the Israel Boycott and Divestment policies were adopted.

To be clear, we have repeatedly asked the Board to act on these issues in accordance with the rules and bylaws of OFC. We agree, of course, that OFC would be bound by the result of such a process. After all, OFC is a *cooperative* and its members have agreed to abide by certain rules. Yet you have refused to follow these rules or to cooperate. It is clear that members of the Board, by committing such procedural violations, have failed collectively and as individuals to abide by their lawful obligations to OFC and its members. A number of us have made this position clear to the Board since it announced its decision to enact the Israel Boycott. Yet our efforts have apparently fallen on deaf ears, as the Board steadfastly refuses to revisit its position on the Israel Boycott and Divestment policies. (To be clear, we currently take no position on

soundness of OFC's "Boycott Policy" itself, which we understand may be under review by the Board, or OFC's boycott of products other than those made in Israel.)

At this point, we are left no choice but to demand in no uncertain terms that OFC act in accordance with its rules and bylaws and rescind the Israel Boycott and Divestment policies. Should new proposals to enact such policies be pursued at a later date in accordance with OFC rules and regulations, we would be prepared to respect the outcome of that process. Regrettably, should the Board reject our demand, we are prepared to pursue relief through the court system. We wish the situation had not come to this point, but frankly you have forced our hand by ignoring—again and again—our requests for due process and procedural compliance with OFC rules and regulations. As such, we expect to receive a response from the Board to our demand no later than ***30 days*** from the date of this letter. (Please arrange to have the Board's response mailed to us at the address below.) Should no response be received by that date, we will assume you have rejected our demand and will proceed accordingly.

Although the basis for our demand has previously been communicated to Board members collectively and, in certain instances, individually, we again explain in summary fashion our position. This is provided in the sincere hope that you will revisit the process by which the Boycott and Divestment policies were adopted. Nothing would please us more than to see this matter resolved without the need for adversarial action. That said, we are tired of being ignored and marginalized by a Board that refuses to abide by the rules and cooperative spirit of OFC's governance principles and procedures.

We remind the Board of the numerous occasions on which members of OFC have explained how and why the enactment of the Israel Boycott and Divestment policies violated OFC rules and regulations and why, as a result, the Board should rescind them. In short, you have repeatedly been put on notice of the Board's procedural violations, and you have repeatedly rejected requests for remedial action. While we are continuing to investigate and conduct additional analysis, it is clear that the Board, in deciding to boycott Israeli made products and divest from investments in Israeli companies, violated the terms of a number of OFC's governing documents—most obviously, the OFC "Boycott Policy." Other rules and regulations that were violated include OFC's Mission Statement and Bylaws. We intend to hold each of you personally responsible for these procedural violations and the breaches of your duties.

As members of OFC—some of us longstanding members—we submit this letter to you in the sincere hope that the Board will (1) recognize the mistakes it made in the course of adopting the Israel Boycott and Divestment policies and (2) rescind these policies without the need for further action by us. We are not interested in needlessly dragging ourselves or OFC, an institution to which we have collectively given significant time and energy, into an adversarial proceeding. That said, our informal efforts thus far—made in the spirit of cooperation that drew us to OFC in the first place—have failed to persuade you to do what is required under the circumstances. In short, you are entirely responsible for the position in which you now find yourselves. If you do what we demand, this situation may be resolved amicably and efficiently.

If not, we will bring legal action against you, and this process will become considerably more complicated, burdensome, and expensive than it has been already.

We look forward to receiving a response from you no later than *30 days* from the date of this letter. Please arrange to have the Board's response mailed to us at P.O. Box 6060, Olympia, WA 98507-6060.

Sincerely,

Kent L. Davis

Linda Davis

Susan Mayer

Susan G. Trimm

Jeffrey I. Trimm

EXHIBIT E

Kent L. Davis
Linda Davis
Susan Mayer
Susan G. Trinin
Jeffrey I. Trinin
P.O. Box 6060
Olympia, WA 98507-6060

June 30, 2011

Dear Kent L. Davis, Linda Davis, Susan Mayer, Susan G. Trinin and Jeffery I. Trinin,

Regarding your letter dated May 31, 2011, the Co-op would like to respond in a productive way. We are unable to do so, however, because your letter fails to explain *how* the Co-op's boycott decision supposedly violates the Co-op's Boycott Policy, Mission Statement, or Bylaws.

A great deal of careful and thoughtful time and discussion preceded the Co-op's Israeli-product boycott decision. Additionally, the Board revisited the boycott decision many times after the original decision was made. The Board continues to adhere to its decision, which was expressly founded in Co-op policies, as articulated in its mission statement and bylaws.

When you articulate to us the specific grounds for your view that the boycott decision violates the Co-op's boycott policy, mission statement, or bylaws, we will promptly respond.

We also remind you that there is a democratic alternative to the litigation that you are threatening: the member-initiated ballot process that is laid out in our bylaws. This process allows members who want to make a change at the Co-op to bring their proposal to a vote of the membership. To bring the proposal to rescind the Israeli-products boycott to a vote of the membership, all you need to do is gather the signatures of "1/2 of the average number of voting members in the previous three annual elections, or 300, whichever is greater." In this case, this would require you to gather 300 signatures of active members. Once on a ballot, your proposal would need to pass with 60% of total votes (as stated in the bylaws, "Member-initiated ballot.")

Sincerely,

Erin Genia,
(on behalf of all letter recipients)
President,
Olympia Food Co-op Board of Directors

EXHIBIT F

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN
A PROFESSIONAL LIMITED LIABILITY COMPANY

600 UNIVERSITY STREET, SUITE 2700
SEATTLE, WASHINGTON 98101-3143
TELEPHONE: (206) 467-1816
FACSIMILE: (206) 624-5128

ROBERT M. SULKIN

E-MAIL: RSULKIN@MCNAUL.COM

July 15, 2011

Via Certified Mail, Return Receipt Requested

Erin Genia, President
Olympia Food Co-op Board of Directors
3111 Pacific Ave SE
Olympia, WA 98501

Dear Ms. Genia:

Thank you for responding to our clients' letter of May 31, 2011.

Unfortunately, the Board's response is inadequate. You have failed to agree to rescind the Israel Boycott and Divestment policies and to follow the proper procedures to determine whether OFC should adopt these policies in accordance with its governing rules and principles. Instead, you have asked for a more detailed explanation regarding "*how* the Co-op's boycott decision supposedly violates the Co-op's Boycott Policy, Mission Statement, or Bylaws." With all due respect, this request is either disingenuous or strategic. In the year since the Board enacted the Israel Boycott and Divestment policies, without due authority and in violation of OFC's governing principles, the process by which they were enacted has been the subject of ongoing and vociferous debate in the OFC community. Through letters, emails, and discussion, numerous members have clearly expressed to the Board precisely "*how* the Co-op's boycott decision supposedly violates the Co-op's Boycott Policy, Mission Statement, or Bylaws." While you and your fellow Board members are free to disagree with those positions, you cannot seriously claim to be unaware of them.

Our clients have retained us because they are tired and frustrated by the Board's protracted refusal to abide by the basic tenets of a cooperative organization. Along with others, they have tried diligently and cooperatively to convince you and the Board to correct the procedural violations that led to enactment of the Israel Boycott and Divestment policies. Their efforts thus far have failed—but not from a lack of effort, reasonableness, or candor.

You propose as an alternative to litigation that our clients avail themselves of "the member-initiated ballot process." This suggestion is not well taken. It is the Board that failed to follow the procedural rules, and it is the Board's responsibility to take remedial action. It is neither fair nor justified to impose on our clients the burden of correcting errors that were not of

their making. Doing so would be tantamount to admitting the Israel Boycott and Divestment policies resulted from legitimate Board action, as opposed to procedural unfairness and disregard for the rules and principles of OFC. Our clients are responsible for neither the Board's original misconduct nor its ongoing refusal to take remedial action. They therefore respectfully refuse to take up your proposal.

In short, the Board has failed to satisfy our clients' demand. We will proceed accordingly.

Sincerely,

Robert M. Sulkin
Avi J. Lipman
Attorneys

RMS:ajl

EXHIBIT G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

KENT L. and LINDA DAVIS, JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE, Plaintiffs, vs. 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.	No. 11-2-01925-7 Supreme Ct. No. 87745-9

ORAL OPINION OF THE COURT

BE IT REMEMBERED that on the 27th day of February, 2012, the above-entitled and numbered cause came on for hearing before the Honorable Thomas McPhee, Judge, Thurston County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Certified Realtime Reporter
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Building 2, Room 109
Olympia, WA 98502
(360) 754-4370

A P P E A R A N C E S

For the Plaintiffs:

Robert M. Sulkin
Attorney at Law
McNaul Ebel Nawrot & Helgren
600 University Street
Suite 2700
Seattle, WA 98101-3143
206-467-1816
Rsulkin@mcnaul.com

For the Defendants:

Bruce Edward Humble Johnson
Attorney at Law
- and -
Devin M. Smith
Attorney at Law
Davis Wright Tremaine, LLP
1201 3rd Avenue
Suite 2200
Seattle, WA 98101-3045
206-757-8069
Brucejohnson@dwt.com

February 27, 2012 Olympia, Washington

MORNING SESSION

Department 2 Hon. Thomas McPhee, Presiding

Kathryn A. Beehler, Official Reporter

--o0o--

THE COURT: Please be seated. Good morning, ladies and gentlemen. Welcome back to Superior Court. I am disappointed that we could not be in the larger courtroom to accommodate more people this morning, but there was what appears to be a long and contentious criminal case starting today. Hearings began there at 8:30 this morning, and later in the morning, and very probably before we are concluded here, a large body of prospective jurors will come in and occupy that room as they begin the process of jury selection. So we are stuck here with a smaller courtroom, which apparently does not accommodate everyone. And for that our apologies.

Before I begin this morning with my opinion, I have a couple of questions, one for each lawyer. Mr. Sulkin, I'll begin with you. In your brief arguing the issues raised on the constitutionality of the statute, you refer to the evidence limitation that's contained in the statute both as an issue of burden of proof, measure of damages, and burden of

persuasion. I was not quite clear on what you believe those differences are and how you would have me apply them in this case.

Can you answer that question very quickly, just in the differences in the terminology that you used?

MR. SULKIN: And if I may, Your Honor, you said burden of proof, measure of damages, and a third point?

THE COURT: Burden of proof, measure of evidence, and burden of persuasion. Those are three phrases that are different, but they are used, apparently, in the same context, different parts.

MR. SULKIN: May I approach, Your Honor?

THE COURT: Well, either that or just answer from counsel table, if you wish.

MR. SULKIN: Sure, Your Honor. Ultimately, ultimately, we have two separate questions, I think, not three. And I'm sure I was the one that's at fault for creating this misimpression. I think on the question of discovery, all right, the question of discovery, obviously I believe there's a clear separation of powers problem. If congress --

THE COURT: I understand that.

MR. SULKIN: All right. Now, the limitation on evidence and discovery, what that did to me was

the following: They -- I have the burden, normally, at the end of the case, as the plaintiff, to prove all of the elements of my case. On this motion -- in a normal case, under a Rule 56 motion, which is really what this is, they would have the burden to show there are no issues of fact as to each of the elements.

THE COURT: Unless it is a *Key Pharmaceuticals* motion.

MR. SULKIN: Yeah. Well, here, for instance, the issues they raised in their motion were the following: One, that in fact there is no board policy; and two, there are no damages. And they had some other legal issues that they raised about standing and things of the like.

My argument to you on the issue of evidence was, look. To the extent you think we haven't shown enough evidence as to what happened at the board meetings, who had power, what the agreements were, as to the liability question, denying me discovery is a problem.

THE COURT: I understand those arguments. What I'm focusing on is, Why did you use the different terms? I didn't understand the reason for --

MR. SULKIN: Okay.

THE COURT: -- use of the different terms, and I'm not even sure you intended a significant difference.

MR. SULKIN: I think there's no difference between "measure of damages" and "measure of evidence." I think damages is one element of evidence. So, you have liability of damages; they raised the damages argument in their brief, saying there are no damages.

THE COURT: I didn't ask about measure of damages.

MR. SULKIN: Yeah. And so as to damages and evidence, I think they fall in the same category, that is, separation of powers; we don't have discovery.

Burden of proof I think is a little different, Your Honor, and that is -- and perhaps I'm just repeating myself and you understand my point. It is that on the burden of proof question, you have, the Legislature can set the burden of proof on a statute; that is, clear and convincing, preponderance of the evidence. A place -- they can set that. The real question, though, to you, is, what burden do they have to show, do they have to get over, or what

burdens for me to get to a courtroom. And here, normally, it's one material fact in dispute under Civil Rule 56.

Here, the standard is much higher than that. So what you have is a confluence --

THE COURT: What is the difference between your use of "burden of persuasion" and "burden of proof"? Let's just focus on that question --

MR. SULKIN: None.

THE COURT: -- because that's the only question I have.

No difference?

MR. SULKIN: Well, let me say it this way: They're the same in the sense that the statute does two things. The burden of persuasion is putting it on me when it should be on them; all right?

THE COURT: All right.

MR. SULKIN: That I have the obligation to come forward. Normally it's them. They are the ones making the motion. And the burden of proof is the level of evidence I have to show to get over that. And I think in both of those, that there's a problem.

THE COURT: All right.

MR. SULKIN: I hope that that answers your question.

THE COURT: Thank you. I appreciate that.

Mr. Johnson, a question for you. In *Aronson* and in *City of Seattle*, you were the lawyer in both of those cases. In both cases, Judge Pechman and Judge Strombom wrote that the Legislature has directed that this statute be liberally construed and applied. I couldn't find that anyplace. Where did that come from? Do you know?

MR. JOHNSON: Yes, Your Honor. I'll hand up, if I could -- this is just a printout from the RCWs 4.24.525. And you'll see, "Application, Construction 2010 c 118." It says,

"This Act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from abusive use of the courts."

That's an addendum to the statute.

THE COURT: That's why I didn't see it.

MR. JOHNSON: It's not something that forms part of the statute, but it was part of the bill as passed.

THE COURT: I'll take a look for it.

MR. JOHNSON: And I can hand this copy up.

THE COURT: Thank you.

Ladies and gentlemen, here is the decision that I

have reached in this case. We cover a lot of ground, because there were a number of issues that were raised here and must be decided.

The underlying question presented to me is, does RCW 4.24.525, the Anti-SLAPP Act, apply to the lawsuit brought by the plaintiffs against these defendants. The complaint brought by the plaintiffs is against the defendants in their role as a Board of Directors of Olympia Food Co-op, and the plaintiffs contend that they are acting as members of the Co-op bringing their claims against the directors in the name of and for the benefit of the corporation that is the Co-op.

The plaintiffs contend that in adopting, by consensus, the Boycott and Divestment Resolution of July 15, 2010, the Board members acted beyond their powers. And as a consequence of that, the plaintiffs ask that the court do three things: First, declare the Boycott and Divestment Resolution of July 15 null and void; second, permanently enjoin its enforcement; and third, award damages in favor of the Co-op against each board member individually.

To determine whether § .525 applies, a court first examines the language of the law itself and the act creating it. And this is an interesting history and

guides, in some measure, at least, the resolution of these issues. So I'll go through it in a little detail.

This law was enacted in 2010. It begins with a statement of findings and purpose by the Legislature. In section 1 the Legislature finds and declares four different principles, two of which I believe apply here. In part (a), the Legislature finds and declares that,

"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."

And (d), the Legislature finds and declares that,

"It is in the public interest for citizens to participate in matters of public concern . . . that affect them without fear of reprisal through abuse of the judicial process."

I edited that last slightly to eliminate some language that does not apply to this case at all.

After a statement of findings and declarations, then the Legislature identified the purposes it had in enacting this legislation. They were, first,

"To 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."

Second, "To establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation;" and then, third, "To provide for attorneys' fees, costs, and additional relief where appropriate."

In its enactment, the Legislature followed a nearly identical law enacted in California in 1992, so that was some 18 years ago. In 1992 the California Legislature declared its purpose. And we find that it is remarkably similar to what the Washington Legislature did in 2010. In 1992, the California Legislature declared,

"The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through the abuse of the judicial process."

Interestingly, then, in 1997, some five years later, the California Legislature further amended its statement of purpose by declaring that, "To this end, this section, the Anti-SLAPP law, shall be construed broadly." As we all learned from the response by Mr. Johnson this morning, the Washington Legislature

has enacted a similar direction about liberally construing the law and liberally applying it to reach its goals.

The law itself, our Washington law § .525, declares, "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," and then we have a short laundry list of things that are included within that definition.

When we look at the California law, we see a very similar pattern. The California Legislature declared 18 years earlier, "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes, and then they have a laundry list. And those laundry lists are remarkably similar. And in this case, and in all of the other appellate decisions that I am going to cite this morning, we are dealing with what appears in Washington as the fifth element and what appears in California as the fourth element.

It says in the Washington law,

"As used in this section, an action involving public participation and petition includes 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."

The California statute has exactly that same language in its statute. In the Washington law, there are two prongs for analysis of a claim for dismissal such as this claim brought pursuant to the Anti-SLAPP Act. And in California, the process is similar but not exactly identical. One important difference is the clear and convincing evidence standard in the Washington statute. That standard does not appear in the California statute.

Also relevant to the issues in this case, the Washington law provides for a stay of discovery until the motion can be heard. And it provides that the motion must be heard on a very accelerated basis. There are few areas of our law that require the courts to act as quickly as the courts are required to act in these cases. And you will find in California that there are some changes in the sentence structure, but the sections that deal with

limiting discovery and accelerated resolution are otherwise identical.

Since this is a new law in Washington, enacted in 2010, there are very few appellate court decisions interpreting, applying, and construing the law. Only one Washington appellate decision has been issued so far, and it did not decide anything relevant to this controversy.

There are three federal court decisions applying Washington law issued by the federal courts for western Washington. In the course of decision-making in those three cases, each federal judge considered the large body of California appellate decisions construing and applying the California law. Recall that it is 18 years ahead of us, and recall that it is a very similar law. This type of reference to what other courts have done is often referred to in our law as persuasive authority.

When a Court of Appeals or the Supreme Court in the State of Washington issues a decision, I am bound, as a trial judge here, to follow that decision. I am not bound to follow the decision of the California Supreme Court. But when the California Supreme Court says something of interest that is directly applicable to a case that I am

deciding, and where our courts of appeal have not announced their decision, that decision by the Supreme Court of another state or the Supreme Court or a Court of Appeals from the federal system are all persuasive authority that I should and often do consider.

In the case of *Aronson* v. *Dog Eat Dog Films* - and I'm not making this up. That is the title of the case - *Dog Eat Dog Films* was a film company owned by Michael Moore. And within which he made his documentary film "Sicko." In that film is a very short film clip of a fellow walking on his hands across a street in London and resulting in his injury, and then the idea was to compare the treatment he got in England with the treatment that would be available to him in the United States.

After the film was issued, the person walking on his hands across the street sued the corporation *Dog Eat Dog Films* contending that his privacy had been invaded and that there had been a misappropriation of a person's image, both laws that permit recovery under the laws of the State of Washington when that occurs. In that decision in federal court, Judge Strombom there issued as part of her opinion information or a statement that is

important to this case, and that is why I have mentioned this in detail. I want to demonstrate how far apart the act of walking on one's hands across a street and then putting it in a film is from someone standing on a soapbox or before an audience and exercising his or her right of free speech. But they are all connected. And Judge Strombom wrote,

"The focus is not on the enforcement of plaintiff's cause of action but rather, the defendant's activity that gives rise to defendant's asserted liability and whether that activity constitutes protected speech."

She further wrote,

"The Washington Legislature has directed that the Act be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts. Any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern is subject to the protections of the statute."

With that background, then, we turn to the evidence and the law in this case. As you know, § .525 contains two prongs. First, the focus is on the defendants, the persons bringing the motion

seeking dismissal of the lawsuit. Under the first prong, the defendants must show that they are protected by § .525 under (2)(e), the part that I read to you earlier, defining an action involving public participation and petition. And you recall that that language is that "any other lawful conduct in the furtherance of the exercise of a 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."

Defendants here must show by a preponderance of the evidence that their conduct fits this definition. I find that they have done so. Four decades of conflict in the Middle East have accompanied the issues that surround the purposes behind this proposed Boycott and Divestment Resolution. The conflict in the Middle East between Israel and its neighbors has certainly gone on longer than that, but focusing on the conflict between the Palestinians and the Israelis over the occupation of land is at least four decades old. And for four decades, the matter has been a matter of public concern in America and debate about America's role in resolving that conflict. I don't believe there can be any dispute

about that issue being a matter of public concern.

In their brief, plaintiffs contend that they don't dispute defendants' right to speak on this important subject. But they object to the improper way that the defendants have used the corporation to voice their speech. Recall the language from the *Dog Eat Dog* case above, "any conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern" is subject to the protections of the statute.

But also recall the language of the statute itself. It begins, in that subpart (e), "any lawful conduct." And it is here that the plaintiffs contend that the conduct in enacting the resolution was not lawful. Therefore, the analysis shifts to the second prong of the statute, where plaintiffs must prove by clear and convincing evidence a probability of prevailing on the claim.

This is a new law, and it is also a new or unique evidence standard. Clear and convincing evidence of a fact is something that the courts are very used to dealing with. Clear and convincing evidence of a probability is certainly more unique than clear and convincing evidence of a fact. Probability, I am satisfied, relying upon the authorities provided me

by the plaintiff, means less than the preponderance standard. But the evidence, to meet that threshold standard, must be clear and convincing under the law.

Some writers have suggested that the proof standard here is akin to the summary judgment standard under Civil Rule 56. My application of the evidence burden here is not dissimilar to that. But even for summary judgments, the evidence standard is not uniform. Motions for summary judgment may be decided for cases requiring clear, cogent, and convincing evidence when that is the underlying burden, as well as evidence in the more traditional case of a preponderance of the evidence.

So what evidence do the plaintiffs offer to meet their burden on this second prong? First, the issue of consensus. The governing documents of the corporation, the Co-op here, is very clear. Decisions of the Board must be by consensus. That is not so for the membership nor is it so for the staff. There is no requirement that either of those bodies act by consensus that is contained in the bylaws of the corporation.

This issue of consensus is a very important part of the fabric of the Co-op, but it is not material to this case. Census means many different things, but

it can, and does in this case, mean the unanimous consent among decision-makers. Here, unanimity is not the issue.

It is undisputed that there was no consensus among the staff in addressing this Boycott and Divestment Resolution. And we know that while the bylaws do not require consensus for the staff to act, the Boycott Policy certainly does. But we know that they didn't reach consensus there. We know that the Board did reach consensus. There is no dispute about that.

The issue is, Did the Board have authority to make a decision, to pass, or to use the language of the Co-op, to "consent to" the Boycott and Divestment Resolution of July 15, 2010. In the words of the statute, was the Board's conduct lawful. And whether they acted with consensus or not is not material to that issue, because there is no dispute they did act with consensus towards that issue.

Next we deal with the key issue here, and that is what is the authority of the Board to act in this matter. As a matter of law, the Olympia Food Co-op was organized as a nonprofit corporation and remains a nonprofit corporation under the law. Under our law, the governance documents of the Co-op are its articles of incorporation and bylaws. Under our

law, "The affairs of a corporation shall be managed by a board of directors."

The Co-op's governance documents, the bylaws, repeat the statute, "The affairs of the cooperative shall be managed by a Board of Directors."

It is equally clear that under our law a board of directors of a nonprofit corporation may delegate some of its powers. In this case the Co-op's Board has done so with respect to the Boycott Policy. The Boycott Policy, consented to by the Board in 1993, has its operative language in paragraph 5 where the policy declares, "The Department manager will make a written recommendation to the staff who will decide by census whether or not to honor a boycott."

The policy is silent about the consequences of staff failing to reach consensus to either honor the boycott or to not honor the boycott.

Plaintiffs contend that where the staff does not reach consensus to honor a boycott, the matter simply ends, and the boycott is not honored. Plaintiffs contend that the delegation in the Boycott Policy is a complete delegation of that power and that the Board did not retain any power to decide boycott requests, even where consensus was not reached by the staff one way or the other.

The Boycott Policy does not explicitly support these contentions. It speaks to consensus one way or the other but not the failure to reach consensus. For the plaintiffs, the Boycott Policy is at best ambiguous about failing to reach consensus. To explain the intent of the Board in 1993 regarding this issue, plaintiffs offer the identical declarations of two Board members at the time, to the effect that "authority to recognize boycotts would reside with the Co-op staff, not the Board."

Whatever the standard for weighing evidence in a motion such as this, the evidence must be evidence admissible under the rules of evidence in case law. The statements of the two declarants are inadmissible as expressions of their subjective intents at the time the policy was enacted. As statements of intent of the Board, they are inadmissible as hearsay.

The only objective evidence specifically relating to this issue is in the Board minutes from July 28, 1992, almost a year before the policy was finally adopted. The formal proposal there is stated as, "If a boycott is to be called, it should be done by consensus of the staff."

Consideration of the entire section of the minutes relating to boycotts from this meeting shows that the

focus is on resolving, by policy, whether individual managers or the staff would decide boycott requests. And in the minutes, just above the formal proposal is the statement, "BOD," or board of directors, "can discuss if they take issue with a particular decision."

The enumerated powers of the Board contained in the bylaws includes, at No. 16, "Resolve organizational conflicts after all other avenues of resolution have been exhausted."

Plaintiffs have offered no evidence that the Board exempted boycott matters from this power, certainly not evidence that could be considered clear and convincing.

The next argument that the plaintiffs make is on the issue of nationally recognized boycott. The plaintiffs make three contentions in this regard. First, plaintiffs contend that if the Board did have the power to resolve the deadlock on the boycott, the Boycott and Divestment Resolution of July 15, 2010, was unlawful because the Board failed to determine that the matter was a nationally recognized boycott.

In the first of three arguments, they argue that the Boycott and Divestment Resolution does not reflect a national boycott. Their evidence is not

sufficient to meet the clear and convincing standard, nor is it sufficient to even create a material issue of fact. I will be more direct in this regard. The evidence clearly shows that the Israel boycott and divestment movement is a national movement. It is clearly more than a boycott. It is a divestment movement, as well.

The question of its national scope is not determined by the degree of acceptance. There appears to be very limited acceptance, at least in the United States. Further, in arguing that the movement has achieved little success, plaintiffs offer examples that demonstrate the national scope of the issue. Plaintiffs argue that the movement has not penetrated the retail grocery business, but that does not determine national scope. The assistance to each side here from national organizations organized to support or oppose the movement demonstrates its national scope.

Next plaintiffs contend that even if the movement is national in scope, the Board did not address that issue in its resolution of June 15, 2010. The only evidence offered is that the staff, in its discussion, never reached that aspect of the proposal. This contention is refuted by documentary

evidence that is clear contravention of the plaintiffs' contention.

The minutes of the Board meeting of May 20, 2010, show that a presentation was made to the Board regarding the boycott proposal that included presentation of, "The nationally and internationally recognized boycott." I'm quoting there from the minutes of the meeting.

At the meeting the Board decided to resubmit the matter to staff with the direction to Harry Levine to "write a Boycott Proposal following the outlined process." I construe "outlined process" to mean the process outlined in the Boycott Policy, because that is the format that Mr. Levine followed. In his lengthy paper dated June 7, 2010, Mr. Levine included a section entitled "A growing movement for Boycott, Divestment, Sanctions (BDS)," and following that section a section entitled "Prominent Supporters."

The minutes of the Board meeting of July 15, 2010, state that Harry shared with the group the summary of staff feedback and the process therein arising out of the submission to staff. This record clearly reflects that the scope of the movement or boycott was addressed; plaintiffs offer only vague rebuttal, not clear and convincing evidence.

Finally, plaintiffs contend that the Board acted in contravention of its powers granted it under the bylaws to "Resolve organizational conflicts after all other avenues of resolution have been exhausted." Plaintiffs contend that the Board did not exhaust other avenues before it acted. Plaintiffs offer two avenues, first vote of the membership, or second, education of the membership. This is not clear and convincing evidence.

The avenues suggested by plaintiffs are not in the Co-op's scheme for resolving boycott requests. The scheme was for staff consideration first, as authorized by the Boycott Policy, and if necessary, followed by Board consideration in resolution of organizational conflicts as authorized in the bylaws. The record shows that the Board resubmitted the matter to staff first and then acted when that avenue proved a dead end. The record shows that the Board considered further delay, reviewed the history of the proposal, and balanced the need for completion against further delay. That evidence is not disputed.

In sum, I conclude that defendants have satisfied their burden under the first prong of § .525 and now conclude that plaintiffs have failed in their burden

under the section prong. In so doing, I have addressed the substance of plaintiffs' complaint. I have not addressed other contentions made by defendants, because I did not have to in order to decide this matter. I am sure appellate review will be de novo under this statute.

I must, however, address the constitutionality of the statute, because I am applying it here. I conclude that it is constitutional. Plaintiffs argue that they are relieved from making the showing required under the second prong of §§ (4)(b) of § .525 because the law is unconstitutional in two respects.

In so doing, the law is clear that when a court is considering the constitutionality of a statute enacted by the Legislature, that statute is presumed to be constitutional. And the party challenging the constitutionality, the plaintiffs here, must overcome that presumption by evidence beyond a reasonable doubt our highest evidence standard.

This is recent law in Washington, so its constitutionality has not been previously addressed. Two attempts have been made in two of the three federal court decisions that I alluded to earlier, but in each case, the federal judge declined to

consider the matter because it was not timely made before those courts.

In *Costello v. The City of Seattle*, Judge Pechman made a comment that certainly occurred to me. She stated, "Furthermore, the assertion that the Anti-SLAPP Act is unconstitutional is questionable given that California's Anti-SLAPP Act, which is substantially similar to Washington's statute, has been litigated multiple times and not held unconstitutional." She cited as an example *Equilon Enterprises v. Consumer Cause, Incorporated*, a 2002 decision from the California Supreme Court.

Plaintiffs here contend that § .525 is unconstitutional for two reasons. First, the Legislature imposed a heightened burden of proof, clear and convincing evidence; and second, it restricts full discovery until the Anti-SLAPP motion is decided.

In this regard, it is important to note that the law requires very speedy resolution of the motion. A significant portion of that time is a time when discovery is not permitted in any event. What the discovery restriction here requires is that a party initiating a lawsuit where the First Amendment rights of the defendant are implicated must have evidence to

support the complaint before discovery is undertaken, before the case is filed.

Plaintiff contends that RCW 4.24.525 violates the constitutional provision for separation of powers among the executive, the Legislature, and the courts. Those are three separate but co-equal branches of government. And here the focus is on the separation between the Legislature and the courts in the control of how cases proceed through the courts.

Second, they contend that the statute violates or denies individuals the right of access to courts guaranteed in our constitutions. Plaintiffs rely upon *Putman v. Wenatchee Valley Medical Center*, a 2009 Supreme Court decision from our Washington Supreme Court. I am bound to follow *Putman* if it applies to this case. I find that it does not.

First, addressing the claim that § .525 violates the separation of powers doctrine, the rule long recognized and repeated in *Putman* is that the Legislature can regulate substantive matters, but the courts have exclusive power to regulate procedural matters.

As regards the burden of proof argument, the clear and convincing evidence argument, our United States Supreme Court has spoken as recently as the year 2000

in *Raleigh v. The Illinois Department of Revenue* where it stated, "Given its importance to the outcome of cases, we have long held the burden of proof to be a substantive aspect of the claim," in other words, a part of the claim that the Legislature can regulate.

As regards limits on discovery, the plaintiffs here contend that this is procedural. In assessing that argument, I considered a statement from our Supreme Court in *Sofie v. Fibreboard Corporation* where the Washington Supreme Court wrote,

"The Legislature has the power to shape litigation. Such power, however, has limits. It must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury, the Legislature has exceeded those limits." *Sofie v. Fibreboard* dealt with an issue of the right to trial by jury.

As I considered that statement, I reflected that just as legislative powers are limited, court rules may not encroach upon constitutional protections, as well. Where the Legislature acts to provide rights protecting constitutional guarantees, especially fundamental First Amendment rights, does not the separation powers of doctrine recognize a primacy of purpose? Even if the act appears to implicate

procedures in court, if the purpose is to enforce fundamental constitutional rights, is that not a substantive act? I concluded "yes," and I find support for that conclusion in the *Putman* case.

The *Putman* case involved a different statute, not related to the types of rights of restrictions we're dealing with, but it dealt with this separation of powers issues, as well as access to courts issues. And it was construing a statute identified as RCW 7.70.150. And the Supreme Court wrote,

> "We hold that RCW 7.70.150 is procedural, because it addresses how to file a claim to enforce a right provided by law. [Citation omitted] The statute does not address the primary rights of either party; it deals only with the procedures to effectuate those rights. Therefore, it is a procedural law and will not prevail over conflicting court rules."

RCW 4.24.525 is different. It does address a primary right of a party, the First Amendment right of free speech and petition. I conclude that the act of the Legislature in this regard is not unconstitutional.

Second, addressing the claim that § .525 violates the constitutional rights of access to courts, as

regarding the burden of proof argument, there is little support in the law for that contention. As late as 2004, the 6th Circuit Court of Appeals in *Garcia v. Wyeth-Ayerst Laboratories* wrote,

"The argument that a state statute stiffens the burden of proof of a common law claim does not implicate this right to access of courts and a jury trial."

As regards the limit on discovery, here I follow the lead of the California Supreme Court in *Equilon Enterprises*, a case I identified earlier. Although dealing with a different aspect of the statute, the court there concluded that the statute does not restrict access; instead, it "provides an efficient means of, dispatching early on in a lawsuit, a plaintiff's meritless claims."

The same reasoning applies here. The Legislature has not created a restriction on access. Rather, it has determined that where the subject of the lawsuit involves speech or acts protected by the First Amendment, there must be clear and convincing evidence of a meritorious claim at initial filing. The statute provides for a mechanism for efficiently dispatching those that don't. I find that the act is not unconstitutional for those reasons.

That concludes my opinion here. The result is that I am prepared to dismiss the lawsuit of the plaintiffs. Concurrently with that, I will be required to enter orders awarding to the defendants attorneys' fees and a penalty of $10,000 per defendant against the plaintiffs. I don't decide at this point that the statute requires a separate $10,000 award to each defendant. I will decide that if there is an issue about it as we move forward. But I do note that a federal court, Judge Pechman in the *City of Seattle* case, issued such a ruling.

I am going to be gone now on a short vacation, and so I do not contemplate that I will enter the orders until I return. That will give us some time before the entry of those orders and the case moves forward. I am struck in this case by some aspects of this lawsuit that I think it is appropriate for the citizens of this community to consider.

The Olympia Food Co-op is an institution in this community. It has existed for a long time and presumably will continue to exist for a long time. This case and this process that we've gone through will move forward and will be resolved, ultimately, in our Court of Appeals, I suspect.

What will be resolved is not the underlying

dispute which brings so many of the citizens here today to observe, but rather, the dry and technical application of the statute. However it is resolved, it will be a long and expensive process. And as I indicated, there are considerable sums of money now at issue in this case that were not necessarily present before and have nothing to do with the issue of whether this is an appropriate boycott for the Co-op to undertake or not.

I express absolutely no opinion in that regard. But it does occur to me that whatever the final decision in this case is, whether it is this decision or whether it is determined that I have made a mistake and the case should move forward to an ultimate resolution either that the Board acted correctly or not -- whatever that decision is down the road, after a considerable period of time and resources are invested in it, that decision can be overturned very quickly and very simply, simply by a vote of the membership of the cooperative.

Nothing here that is decided in terms of deciding the course of the Co-op is cast in stone. And given this state of the case, where we have a judicial determination about the merits of the SLAPP motion, but some time before that order is entered and

becomes appealable, I urge that the parties consider resolution of this case something short of the type of order that will be entered at the end of this case. It would seem to me that it is in the best interests of all parties, and I urge your consideration of that view and that proposal.

That is not a process that I can order. It is not a process that I will be involved in. But the interests of the citizenry in this case, as evidenced by the number of people who have appeared here, seems to suggest that that is a matter for their concern; and there is an avenue of resolution here short of the type of order that I am required by law, now that I have made my decision, to enter and which will be reviewed.

That is all I have to say in that regard. Counsel, I will be returning after next week. So I will be back in the saddle on Monday, March 12th. I start civil jury trials then. This would be an appropriate case, I believe, for presentation of the orders on the Friday motion calendar.

I will leave it to you to consult with Ms. Wendel to arrange an appropriate date.

MR. SULKIN: Thank you, Your Honor.

THE COURT: Ladies and gentlemen, we'll stand

in recess.

(Conclusion of the February 27, 2012 Proceedings.)

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Department No. 2 Hon. Wm. Thomas McPhee, Judge

Kent and Linda Davis, et al., Plaintiffs, vs. Grace Cox, et al., Defendants.	No. 11-2-01925-7 REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Kathryn A. Beehler, Official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do hereby certify:

That the foregoing pages, 1 through 36, inclusive, comprise a true and correct transcript of the proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, reported by me on the 27th day of February, 2012.

Kathryn A. Beehler, Reporter
C.C.R. No. 2248