The Honorable Erik Price

□ EXPEDITE

□ No hearing set

☒ Hearing is set

Date: Sept 18, 2015

Time: 9 a.m.

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' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY; AND REQUEST FOR PROTECTIVE ORDER

NOTE FOR MOTION CALENDAR:

SEPTEMBER 18, 2015, 9:00 a.m.

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I. INTRODUCTION AND FACTUAL BACKGROUND

The Defendants in this case are fifteen former[1] and current volunteer members of the Board of Directors of the Olympia Food Co-op, and the estate of another former Board member, Suzanne Shafer, who died in 2014. Plaintiffs, five of the Co-op's 22,000 members, filed a putative derivative lawsuit in September 2011, challenging the Board's 2010 decision to join a boycott of Israeli goods in the context of a humanitarian and political debate. They refused the Board's invitation to present the issue to the full membership for decision by securing 300 petition signatures, as provided by the Bylaws—choosing instead to file suit.[2] Yet, Plaintiffs claim to favor participatory decision-making within the Co-op. *See* Complaint, ¶¶ 23-39.

Significantly, this lawsuit was filed with the express threat and admitted goal, in the words of these Plaintiffs, of imposing "complicated, burdensome, and expensive" litigation on Board members who refused to rescind their boycott decision. Defendants' Renewed Motion to Dismiss, Dkt. 124 ("Motion to Dismiss") at 3, Ex. D. Not coincidentally, Plaintiffs have repeatedly sought to burden Defendants with complicated and generally irrelevant discovery demands, thus far without success. Contemporaneously with service of the Summons and Complaint, for example, they served 13-page duplicative discovery requests on each of the 16 individually-named Defendants. *See* Plaintiffs' Motion to Compel Discovery ("Motion to Compel") at 3-4; Declaration of Avi J. Lipman In Support of Plaintiffs' Motion to Compel Discovery ("Lipman Dec."), Ex. A. Plaintiffs followed up by demanding videotaped depositions from each of the 16 Defendants. These depositions were scheduled to run for five weeks, from October 31, 2011, through December 5, 2011. *Id.*, Ex. M.

In November 2011, because the claims were legally meritless, Defendants moved to dismiss the complaint under CR 12(b)(6) and, because the lawsuit was a "Strategic Lawsuit Against Public Participation," they also moved to strike the claims under the state's 2010 anti-

[1] Only one of the Defendants, Eric Mapes, currently serves on the Board.
[2] *See* Motion to Dismiss at 3-4, 9-10, Exs. E, F.

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SLAPP law, RCW 4.24.525. Under the anti-SLAPP law, Plaintiffs' threatened discovery was automatically stayed pending further order of the Court on a finding of good cause. Plaintiffs did not pursue their original discovery requests. Instead, Plaintiffs filed a cross-motion for discovery, with requests that were substantially limited from their original—and current—requests, seeking three depositions instead of sixteen. Dkt. 42.2.

On February 23, 2012, Judge McPhee denied Plaintiffs' motion for "broad-ranging discovery" Exhibit A (Oral Opinion) at 6, finding that "in the good-cause exception of the anti-SLAPP statute, the test is at least as stringent and as narrow as the Civil Rule 56 test." *Id*. at 5. Judge McPhee next granted the anti-SLAPP motion (which at that time provided comprehensive relief for Washington citizens targeted by meritless lawsuits penalizing them for their exercise of First Amendment rights), and deferred ruling on the CR 12(b)(6) motion.

The anti-SLAPP dismissal was upheld by the Court of Appeals in April 2014. Additionally, the Court of Appeals affirmed the trial court's ruling that Plaintiffs had "failed to show 'good cause' for discovery," *Davis v. Cox*, 180 Wn. App. 514, 538, 325 P.3d 255 (2014), also reasoning that the standard was "similar" to CR 56(f), and held that the trial court had correctly denied Plaintiffs' "expansive [discovery] request." *Id.* at 540-41. The Court of Appeals further held that Plaintiffs had "failed to identify with any specificity what portion of their request for all documents in possession of the directors in connection with the Boycott Policy was needed to establish a prima facie case." *Id.* at 541.

In May 2015, the Washington Supreme Court reversed the dismissal and the related award of attorneys' fees and statutory damages, declaring the anti-SLAPP law unconstitutional because it violated the right to trial by jury.[3] The mandate issued on June 19, 2015, and a new judge has since been assigned.

[3] The Supreme Court acknowledged that this lawsuit did not implicate anyone's right to trial by jury, because Plaintiffs' claims are exclusively equitable, but nonetheless decided to grant their facial constitutional challenge to the law. "Our decision does not turn on the character of the particular claims here, as there is no question the statute broadly applies to all claims, with the only limitation being that they concern an action involving public participation and petition." *Davis v. Cox*, 183 Wn.2d 269, 294, 351 P.3d 862 (2015.)

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On August 13, 2015, Plaintiffs again demanded significant discovery from Defendants. Lipman Dec., Ex. B. Plaintiffs renewed their 2011 discovery requests, stating that they expected responses within 30 days (by September 14, 2015). Motion to Compel, Ex. B, Ex. D.4.

Plaintiffs claim that Defendants' responses to their discovery requests are "more than three months overdue," Motion to Compel at p. 8. Plaintiffs also claim "Defendants have not, to date, responded in any way to the Discovery Requests." Motion to Compel, at 4. Both claims are patently false. At the parties' August 28th meet and confer, Defendants explained their position that discovery should await resolution of the Motion to Dismiss; and Plaintiffs explained their position that discovery should not be delayed. The parties agreed that a single motion, whether to compel discovery or for a protective order, would be most efficient. Lipman Dec., Ex. D. On September 3rd, Plaintiffs stated their intent to move to compel discovery, and in an effort to avoid unnecessary motion practice, Defendants responded with authority supporting their position that discovery should be stayed pending the Motion to Dismiss, which was filed that day. *Id.* Defendants explained that "it is a complete waste of the parties' time and resources to launch into discovery before the legal sufficiency of the complaint has been determined" and reminded Plaintiffs that Judge McPhee had already denied discovery in the case: Defendants' counsel explained: "Judge McPhee's ruling on discovery was made when the parties were engaged in a complicated SLAPP motion involving mutual evidentiary submissions. Given that we are now dealing only with purely legal issues, your demand for discovery seems to me to be even less supportable." Lipman Dec., Ex. D.

Meanwhile, Plaintiffs demanded and got at least 28 days for the briefing schedule on the renewed CR 12(b)(6) motion, and so the earliest available date for oral argument on the Motion to Dismiss was February 19, 2016. *Id.*, Ex. D.

[4] On August 18, 2015, Defendants' counsel responded that due to August vacation schedules of the legal team and likely many of the sixteen Defendants (who needed to be consulted), Defendants would not be able to respond substantively before the following week. Lipman Dec., Ex. D. On August 19, 2015, the parties agreed to have a call at the end of the following week, which took place on August 28th.

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II. ARGUMENT

The Motion to Dismiss is simple and straightforward, and does not require any discovery by either side. Although purporting to defend the niceties of corporate governance, Plaintiffs' lawsuit asks the Court to ignore the plenary authority granted the Co-op, a nonprofit corporation, and its Board by the Articles and Bylaws, and instead focus on an entirely different issue—legally irrelevant to the pending dismissal motion, but apparently of significance to them—of whether the BDS ("Boycotts, Divestment and Sanctions") movement is "nationally recognized." *See* Complaint, ¶¶ 30, 31, 33, 41, 42.

Because the Articles and Bylaws are unambiguous in describing the authority of the Co-op and the Board, the discovery Plaintiffs seek is irrelevant, premature and a waste of resources.

A. This Lawsuit Must be Dismissed Under CR 12(b)(6)

In this derivative lawsuit, Plaintiffs have pleaded two causes of action: (1) breach of fiduciary duties (attacking the Board's exercise of its authority under the Bylaws to decide to boycott Israeli products) and (2) *ultra vires* (because, they claim, the Board failed "to follow OFC's governing rules, procedures, and principles" when it endorsed the boycott).[5] Under controlling Washington law, both claims fail as a matter of law and must be dismissed on the pleadings.

First, under Washington nonprofit corporation law, Plaintiffs have no standing to bring a derivative claim for breach of fiduciary duties. This is because Washington does not allow **any** derivative lawsuits involving internal governance disputes within nonprofits. *Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002); RCW 24.03.040 ("representative suit" allowed only for *ultra vires* cases, asserting that the nonprofit corporation is "without capacity or power" to undertake the challenged action); Motion to Dismiss at 7-9. In addition, as the Court of Appeals has already held in this case, the breach of

[5] *See* Complaint ¶¶ 52-54, 63-68. They have also alleged a "cause of action" for an injunction and for a declaratory judgment (*id.* at ¶¶ 55-62), but those are remedies, not claims.

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fiduciary duty claim also fails because the grant of authority in the Bylaws is unequivocal: "The affairs of the cooperative shall be managed by a Board of Directors." And: "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." Ex. A to Motion to Dismiss, at 2-3.

Second, Plaintiffs' claim for *ultra vires* liability asserting the Board allegedly "acted beyond the scope of the power allowed or granted them as OFC Board Members,"[6] likewise fails under controlling Washington law. *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 344-45, 979 P.2d 854 (1999) (lawsuit attacking the exercise of board authority, by claiming it is inconsistent with Bylaws or other internal governance documents, does not state an *ultra vires* claim because it "is not a challenge to the authority of the corporation, but only the method of exercising it"); Motion to Dismiss at 14-16. Furthermore, Plaintiffs' conclusory *ultra vires* allegations[7] are negated by the express terms of the Co-op's Articles of Incorporation, which confirm that the Co-op in fact has been granted the corporate power to decide what products to buy and sell, and also to engage in a boycott supporting Palestinian rights. *See Id.* at 14-15, Ex. B. Finally, the claim is also negated by their Complaint, which concedes that the Co-op has the power and authority to support boycotts, when there is "universal agreement" among all Co-op employees.[8] Thus, this lawsuit "is not a challenge to the authority of the corporation, but only the method of exercising it," and the *ultra vires* claim fails. *Hartstene Point*, 95 Wn. App. at 345.

Furthermore, it is clear that construction of these Articles and Bylaws is an issue of law for the Court.[9] *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)

[6] Complaint ¶ 53.
[7] In evaluating the adequacy of the allegations under CR 12(b)(6), the trial court must accept as true only well-pled factual allegations, but not legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).
[8] Complaint ¶¶ 27-39, 49.
[9] Both the Articles and the Bylaws are properly before this Court on a motion to dismiss under CR 12(b)(6). *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

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(bylaws of a non-profit home-owners association); Motion to Dismiss at 12. As a result, the factual discovery Plaintiffs demand is irrelevant and a waste of everyone's resources until the legal issues presented are first resolved.

Plaintiffs argue that the pending Motion to Dismiss is "futile," because they claim that the Washington Supreme Court in its opinion "stated that Plaintiffs have established at least one factual dispute that will need to be resolved at trial," and that the Supreme Court "has already indicated that Defendants cannot prevail on a motion under CR 56, much less a motion under CR 12." Motion to Compel at 12. Defendants would urge the Court to review the Motion to Dismiss, which requests dismissal based on controlling Washington legal authority untouched by the State Supreme Court's opinion, including rulings made in this very case, which also remained untouched by the Supreme Court's decision striking down the anti-SLAPP law.

Plaintiffs' argument also completely misconstrues what the Supreme Court held. What is clear is that the only thing the Supreme Court ruled on was the constitutionality of the anti-SLAPP statute,[10] and to the extent it noted the evidence in this case, it was in the context of analyzing the anti-SLAPP law's burden of proof.

Unlike the Court of Appeals, the Supreme Court never reached the merits of Defendants' legal arguments that their boycott decision was neither a breach of their fiduciary duty nor *ultra vires*. In footnote 2 of its opinion, the Supreme Court explained in *dicta* that the trial court had evaluated some "disputed evidence" as instructed by the anti-SLAPP statute—one of the fatal flaws of the statute as held by the Court—and described the allegedly disputed fact, which is not in any way relevant to the purely legal issues presented by the pending Motion to Dismiss. Plaintiffs also fail to mention that the Supreme Court ended the footnote by stating: "The Court of Appeals below reasoned that this is an immaterial fact, on the theory that the Cooperative's board is not bound by its adopted policies because its inherent authority

[10] Furthermore, because Judge McPhee ruled on the anti-SLAPP motion, and deferred ruling on the companion motion to dismiss, Plaintiffs' lack of standing was not presented to the appellate courts.

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to manage the affairs of the corporation includes the authority to disregard its adopted policies. *Davis*, 180 Wn. App. at 532-36." *Davis v. Cox*, 183 Wn. 2d 269, 282, 351 P.3d 862, 868 (2015). The Court never rejected or in any way ruled on the validity of the holding by the Court of Appeals that Defendants argue is the law of this case. *See* Motion to Dismiss, at 3.

B. Plaintiffs May Not Pursue Discovery in the Co-op's Name Because They Have Not Established Standing to Sue

Furthermore, unless and until they establish standing to sue in the Co-op's name, Plaintiffs' purported discovery requests are a nullity. CR 23.1 is clear on this point: "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the . . . members similarly situated in enforcing the right of the corporation." By definition, if Plaintiffs do not have standing to file a derivative lawsuit in the Co-op's name and their claims are a legal nullity, they have no authority and cannot claim they "fairly and adequately represent" the interests of the Co-op and its 22,000 members in enforcing the Co-op's Articles and Bylaws.[11]

Furthermore, the federal case law is instructive here. *See* Karl B. Tegland, 3A Wash. Prac., Rules Practice CR 23.1 at 559 (6th ed. 2013) ("CR 23.1 is virtually identical to the corresponding federal rule. Because of the similarity between the two rules, federal case law may be helpful in resolving issues that have not been addressed in the Washington case law."). The federal cases applying Fed. R. Civ. P 23.1 are unambiguous: discovery is not permitted at this stage of the proceeding. Absent a complaint that establishes the requisite standing to bring a derivative lawsuit, "and absent a specific argument from plaintiff as to what more discovery would yield, we decline to allow plaintiff to avail himself of a premature opening of the floodgates to discovery in an effort to cure the deficiencies in the complaint." *Halebian v. Berv*, 631 F. Supp.2d 284, 298 (S.D.N.Y. 2007) (applying Fed. R. Civ. P. 23.1), *aff'd in part, vacated in part*, by *Halebian v. Berv*, 644 F.3d 122 (2nd Cir 2011); *In re: Crown Castle International Corp.*, 247 S.W.3d 349, 355 (Tex. App. 2008) (trial court abused its discretion in

[11] Indeed, their refusal to seek a membership vote to overturn the Board's decision also precludes this lawsuit, again as a matter of law. *See* Motion to Dismiss at 9-10, Exs. E-F.

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allowing discovery by purported derivative plaintiffs, because "the shareholders may not seek discovery from Crown Castle for the purpose of satisfying Delaware's heightened pleading requirement in derivative proceedings").

Given that these claims legally belong to the Co-op, and not to Plaintiffs, this is a sensible requirement. Under Rule 23.1, a derivative plaintiff is not permitted to hijack the corporation's right to sue and usurp the Board's authority, and to demand discovery in its name, unless and until the plaintiff's complaint establishes the requisite standing to bring a lawsuit in the name of the corporation. *See, e.g., In re First Bancorp Derivative Litigation*, 407 F.Supp.2d 585, 586-87 (S.D.N.Y.2006) (Rule 23.1 mandates that discovery in a derivative suit be stayed until the plaintiffs survive the motion to dismiss); *In re Openwave Systems, Inc. Shareholder Derivative Litigation*, 503 F.Supp.2d 1341, 1353 (N. D. Cal. 2007) (Rule 23.1 requires "that derivative actions pass certain hurdles before being allowed to proceed with the normal course of litigation, including discovery.")

Indeed, this principle is a basic rule of corporate governance and equity jurisdiction, which govern efforts to demand discovery in purported derivative lawsuits such as this. *See, e.g., Jones v. Martinez*, 230 Cal. App. 4th 1248, 1254, 179 Cal. Rptr. 3d 35 (2014), *review denied* (2014) ("A plaintiff who seeks to overcome [the business judgment] presumption must do so at the pleading stage before the company or its officers and directors are asked to respond to discovery requests."); *Lerner v. Prince*, 119 A.D.3d 122, 127, 987 N.Y.S.2d 19 (N.Y. App. Div. 2014); *King v. Verifone Holdings, Inc.*, 994 A.2d 354, 359 (Del. Ch. 2010) (Rule 23.1 "generally bars discovery to improve a complaint's ability to survive a dismissal motion"); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004).

C. Discovery is a Waste of the Resources Until the Pending CR 12(b)(6) Motion is Resolved

Given that the case is subject to immediate dismissal on the pleadings, the requested discovery accomplishes nothing, and instead defeats the basic requirement of the Civil Rules,

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that they should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." CR 1. Indeed, the purpose of a Rule 12(b)(6) motion is to provide "a quick and convenient way for the defendant to avoid a claim when it is clear that the plaintiff will never prevail regardless of the facts proven at trial." Karl B. Tegland, 14 Wash. Prac., Civil Procedure § 12:24 (2d ed. 2014). In keeping with that purpose, it is only logical to stay discovery pending resolution of a motion to dismiss, especially when the legal defect is not merely a pleading deficiency but whether Washington law forbids these causes of action.

Recognizing that the burdens of unnecessary discovery should be avoided, courts in Washington and elsewhere regularly stay discovery while a dispositive motion is pending. *See, e.g., Nissen v. Pierce Cnty.*, 183 Wn. App. 581, 597, 333 P.3d 577, 585 (2014) ("CR 26(c)(1) gave the superior court discretion to stay discovery until after the CR 12(b)(6) hearing . . . ."); *Quinn Const. Co., LLC v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 33, 44 P.3d 865 (2002) ("The trial court clearly had the discretion to stay discovery until after the CR 12(b)(6) hearing.") (citing CR 23(c)(1)).

Federal cases are in accord. "A plaintiff's right to discovery before a ruling on a motion to dismiss may be stayed when the requested discovery is unlikely to produce facts necessary to defeat the motion." *Sprague v. Brook*, 149 F.R.D. 575, 577 (N.D. Ill. 1993); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should...be resolved before discovery begins. Such a dispute always presents a purely legal question..."). Other courts have similarly recognized that "[a] stay of discovery pending the determination of a dispositive motion 'is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.'" *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001).

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D. A Protective Order is Warranted to Prevent Wasteful and Unnecessary Discovery

This Court has broad discretion under CR 26(c) to structure and sequence discovery in a sensible, cost-effective manner. Upon "good cause shown" a court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See Rhinehart v. Seattle Times*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982); see also CR 26(c). The court's order may prevent any further discovery, allow the discovery on specified terms and conditions, or limit the scope of the discovery to certain matters. CR 26(c). This rule gives the Court broad discretion to structure and sequence discovery in a sensible, cost-effective manner. *See Penberthy Electromelt Int'l, Inc. v. United States Gypsum Co.*, 38 Wn. App. 514, 521, 686 P.2d 1138 (1984). A party establishes "good cause" by showing the threat of any of the harms listed in CR 26(c) exists, and a protective order could avoid those harms "without impeding the discovery process." *Rhinehart*, 98 Wn.2d at 256.

CR 26(b)(1)(C) thus empowers the Court to deny the motion to compel and to issue a protective order when "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Each of these factors counsels against permitting discovery at this point in this case. The proposed discovery has no application to the legal issues presented in the Motion to Dismiss which, if granted, will end the lawsuit without further expense and hassle. The parties do not have substantial resources, and under the circumstances Plaintiffs' demands are "unduly burdensome."

In fact, Plaintiffs' newest discovery demands are simply another attempt to make this lawsuit "complicated, burdensome, and expensive" for the Co-op and its former volunteer Board members. Defendants respectfully request that the Court adjudicate the legal issues that were first presented in November 2011, and were renewed two weeks ago, and which mandate dismissal as a matter of law.

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E. Discovery is Also Inappropriate Under the Law of the Case Doctrine

The Court of Appeals' affirmation of the trial court's denial of Plaintiffs' discovery request is the law of the case and thus binding on remand because it is a legal issue decided by an appellate court. "The law of the case doctrine provides that once there is an appellate court 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, 1154 (2008); *see also Lian v. Stalick*,115 Wn. App. 590, 598, 62 P.3d 933, 937 (2003) ("[T]he law of the case doctrine precludes this court from reconsidering the same legal issue already determined as part of a previous appeal."); *Miller v. Sisters of St. Francis*, 5 Wn.2d, 204, 210, 105 P.2d 32 (holding that, on remand, plaintiffs could rely on prior appellate decision that evidence they sought to use was admissible); *overruled on other grounds by Greene v. Rothschild*, 68 Wn.2d 1, 6, 414 P.2d 1013, 1016 (1966) ("Under the doctrine of 'law of the case,' . . . court[s] are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.").

The Court of Appeals ruled that Plaintiffs failed to show "good cause" for discovery, *Davis v. Cox*, 180 Wn. App. at 538, 325 P.3d at 268, a showing required by the Anti-SLAPP statute to overcome the automatic stay that is put in place once a special motion to strike is filed. RCW 4.24.525(5)(c). Reasoning that the "good cause" standard was "similar to" Civil Rule (CR) 56(f), the Court decided that Plaintiffs failed to show "'how additional discovery would preclude summary judgment and why a party cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact.'" *Id.* at 269, 539, *quoting Hewitt v. Hewitt*, 78 Wn. App. 447, 455, 896 P.2d 1312 (1995). The Court ruled that Plaintiffs did not satisfy this standard because their purported need to test the veracity of Defendants' factual allegations cannot serve as a basis for granting relief from the stay. *Id.* at 541. Additionally, the Court found that the Plaintiffs failed to identify with any specificity what portion of their request for all documents in possession of the directors in connection with the Boycott Policy was needed to establish a *prima facie* case. *Id.* These rationales for denying discovery, which were explicitly based on a CR 56 summary judgment standard, remain independently

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controlling on remand, being distinctly separate from the Supreme Court's ruling on the constitutionality of the anti-SLAPP statute. Because the Court of Appeals' denial of discovery was a legal question decided at the appellate level, it is binding on remand as the law of the case.

F. Defendants Did Not Waive Their Objections to Discovery

Next, Plaintiffs offer a type of "gotcha" argument to the Court. They falsely assert that Defendants' responses to their Discovery Requests are "more than three months overdue" and that they have waived any objections. Motion to Compel, p. 8-10.

In fact, Plaintiffs renewed these 2011 discovery requests in letter mailed and emailed on August 13, 2015, and **fifteen days later**, on August 28, 2015, Defendants responded objecting to discovery prior to a ruling on the Motion to Dismiss and the parties agreed they would pursue a combined motion to compel/motion for protective order. *See* Lipman Dec., Ex. D. This is hardly tardy. The deadline for objections or responses to interrogatories is 30 days from the date of service (CR 33(b)) and the deadline for objections or responses to document requests is also 30 days from the date of service (CR 34(b)(3)(A)).

Plaintiffs apparently take exception to the fifteen days that Defendants took. On August 18, 2015, Mr. Lipman expressed bewilderment that Defendants' counsel needed to confer with their sixteen clients about the sudden discovery demands. Lipman Dec., Ex. C. But, in fact, Defendants' counsel had an obligation under RPC 1.2 and RPC 1.4 to communicate with them about these renewed discovery demands, and to determine their position on this legal issue. It should be obvious that taking fifteen days does not waive objections to discovery.

G. An Earlier Hearing Date for Defendants' Renewed 12(b)(6) Motion May be Warranted

When they filed the Motion to Dismiss, Defendants selected the earliest available argument date for dispositive motions on the Court's calendar: February 19, 2016. *See* Lipman Dec., Ex. D. Defendants are willing, in fact eager, to have the Motion to Dismiss argument

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conducted sooner than that, in a special setting, at a mutually convenient date and time for the Court, counsel and the parties. Defendants also requested from Plaintiffs a stipulated briefing schedule, so that both parties have sufficient time to make their arguments. In the meantime, this meritless lawsuit has disrupted the Co-op for four years, with its promoters pretending that they are representing the Co-op's interests, and not other political and ideological goals.[12]

H. Defendants Request an Award of Fees

Plaintiffs' argument that Defendants' purported failure to timely respond to discovery requests warrants waiver of any objections to those requests, and justifies an award of attorney fees to Plaintiffs, is, once again, meritless. In 2011, discovery was stayed by the trial court. When this case was remanded by the Supreme Court, it took time for a trial court to be assigned. Defendants' original motion to dismiss was never ruled on, and they renewed that motion expeditiously. As argued *supra*, responding to Plaintiffs' discovery demands make no sense until the legal arguments presented by Defendants' renewed Motion to Dismiss are resolved.

If attorney fees should be awarded to anyone, it is to Defendants for having to respond to Plaintiffs' Motion to Compel.[13] Under CR 37(a)(4), if the motion to compel is denied, fees should be awarded to Defendants, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Furthermore, fees are also available because this motion also involves a request for protective order. According to CR 26(c)(8): "The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to" a motion for protective order."

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[12] See, e.g., "Breaking News!! BDS Defeat at Washington Supreme Court, May 28, 2015," StandWithUs, available at http://www.standwithus.com/news/article.asp?id=3981, and attached hereto as Exhibit B.

[13] In lawyer-to-lawyer discussions, Defendants' counsel explained our concerns about unnecessary discovery, offering significant case citations, in hopes that the detailed information would be "helpful in avoiding unnecessary motion practice. . . . But if you continue to disagree, let's discuss an appropriate motion and briefing schedule." Lipman Dec., Ex. D at pp. 1-2. No such discussions were forthcoming; the next morning, Defendants were served with a lengthy Motion to Compel, which argued that these good-faith negotiations amounted to a waiver of all objections to discovery.

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III. CONCLUSION

For the reasons explained above, Plaintiffs' Motion to Compel is, at best, premature. Defendants respectfully request this Court grant Defendants' request for a protective order staying discovery pending outcome of Defendants' Motion to Dismiss, and deny the Plaintiffs' Motion to Compel.

DATED this 16th day of September, 2015.

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DECLARATION OF SERVICE

On September 16, 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
Seattle, WA 98101-3143	☐	Via E-mail

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 16th day of September, 2015, at Seattle, Washington.

s/ Angela Galloway
Angela Galloway, WSBA No. 45330

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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENT L. and LINDA DAVIS, et al.,	)	
	)	SUPREME COURT NO.
Plaintiffs,	)	87745-9
	)	
vs.	)	THURSTON COUNTY
	)	NO. 11-2-01925-7
GRACE COX, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on February 23, 2012, the above-entitled matter came on for hearing before the HONORABLE Wm. THOMAS McPHEE, Judge of Thurston County Superior Court.

Reported by: Aurora Shackell, RMR CRR
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THE COURT: Good morning, ladies and gentlemen. I will first welcome members of the public to our hearing this morning. It is seldom that we see this many members of our community present in court. That's gratifying, and your presence here is welcome. I do have a couple of matters to address with you before we proceed on with this. These are comments addressed to the public.

As you know, one of the hallmarks of our country is the justice system that permits the respectful and orderly resolution of disputes among citizens. And we don't always meet that ideal of respectful and measured, but we try to do that. And so this morning, we've got a courtroom full of people, who, I suspect, are here motivated more by their interest in the underlying substance of the resolution passed by the co-op and its board members, rather than an abiding curiosity about how the standards of the statute that we're going to be discussing apply to that. I think that's to be expected, and I understand that.

And so I also understand that these are very strongly held opinions in many instances. I understand and respect that. I hope that you will agree that gathering here today in a room, it's

important to remember the principles of our justice system, and that is a measured and respectful resolution of the issues. Accordingly, I hope that we can maintain that decorum. I certainly expect that we will do so.

We have some rules here in the courtroom, and, at times, those rules are relaxed. We don't have a jury, and we're not finding facts this morning. No judge or jury is going to declare, based upon conflicting evidence, what the facts in the case are, and so some of the rules that we have will be relaxed.

I have no objection to members of the community taking photographs in such an instance, and I know that there has been some inquiry about that. However, there are some ground rules that apply to that as well. Number one, it should not interfere with the ability of the person seated next to you or around you to hear and understand the proceedings. There should be no flashbulbs that tend to distract the proceedings, and there should be no moving around in order to get the best location to shoot any photographs that you wish to shoot.

We don't allow the use of cell phones in a courtroom, and I think you can probably understand

the reason for that. I hope that you will all abide by that in every respect this morning. The issue of whether a proceeding can be recorded -- see, sir? That's exactly what I had in mind when I asked you to not use flashes. So if you're going to take photographs, please do not use your flash.

AUDIENCE MEMBER: I was unaware this even had a flash. My apologies.

THE COURT: I suspect that will be the case, but I want to point you out to make you an example of people forgetting. So if you're going to record these proceedings, I have no objection to that. And the reason I have no objection to that is because there's no evidence in this case that's going to be presented, in the sense of fact finding. It's oral argument that we're dealing with, and so it's a different matter than what we would normally undertake in courtrooms where trials are being held.

Before we proceed, I have a disclosure to make to the parties in this case. Having read the briefs, and I guess it was in one of the declarations reading about the membership of the co-op, it triggered in my memory the possibility that my spouse was a member of the co-op. I inquired of her, and she is a life member that she -- a membership that she took out

sometime in the 1980's. We don't know. She shops at the co-op, in her words, regularly once every three to five years. She has never attended a meeting. She has never volunteered or done any activity with the co-op, and she has never voted in any election. She does not receive regular mailings, to my knowledge, and, frankly, I didn't ask her about that.

She joined the co-op in order to get free-range turkeys at Thanksgiving before other places had free-range turkeys, and I accompanied her twice to the co-op sometime before I became a judge to pick up the turkey. That's the extent of my contact with the co-op. It's a broad-based community organization, and many people touch it. Our family has touched it briefly. I've considered whether this should disqualify me, and I have concluded that it does not.

You have the right of exercising an affidavit of prejudice, and the process calls for me to withdraw for a short period of time after making this disclosure to allow you to contemplate whether you'll do that or not, and I'm going to do that right now. We will stand in recess. Is three minutes sufficient?

MR. SULKIN: Yes, Your Honor.

THE COURT: We'll stand in recess for

15 minutes.

(Recess.)

THE COURT: Counsel, are you ready to proceed?

MR. JOHNSON: Yes, Your Honor. We appreciate the disclosure and, of course, waive any claim of prejudice.

MR. JOHNSON: We're prepared to go forward, Your Honor.

THE COURT: Thank you. Counsel, my process for proceeding this morning will be to address the motion for discovery. Seven minutes a side for that. And then we will address the substance of the motion if we proceed in that direction. And, as I indicated yesterday, I think it was conveyed to you, there will be 20 minutes a side for that. I'll hear the moving party's motion on discovery.

MR. SULKIN: Thank you, Your Honor. My name is Bob Sulkin. I represent the plaintiffs. I want to be very clear, there are two issues on discovery. One is the constitutional question, which we'll address later on.

THE COURT: Oh, yeah, that's the substance of the motion. Your request to conduct discovery is

what I'm addressing here.

MR. SULKIN: Your Honor, I'll start with this point: The defendants themselves have access to all the records of the co-op, their own records, and selectively chose which ones to put before you. And I don't diminish Mr. Johnson. I've known him for 20 years and hold him in high regard. But the whole process of justice and fairness is to allow each side to have a chance to see the underlying facts.

And I want to be very clear. I understand the purpose of this statute. I understand the legislature is trying to streamline things, but when they put discovery in, it should tell you two things. It should tell you that they have something perhaps more, and it should tell you this is not a frivolous action. And what the statute was intended to go after -- and I think what the legislature did is a good purpose it was designed around, was to go after cases in which someone was seeking a fishing expedition to delay.

We don't have that, and I'll tell you, I think, based on the facts as they are before you today, we should win. We should win. The policy is clear, and they violated it, and that's all you need to know for today.

But if you don't believe that, and you want to go beyond what the four corners of that document says, where they want to take you, which is kind of interesting, they're putting in evidence, "Oh, it didn't really mean this, it meant that. Oh, you've got to look at this." Well, once you open that door, which they did, then we get to walk through it, too. And when they tell you, "Boy, this was a policy that just applied to the staff, but not to the board, that there's a separate board policy. Oh, I'm entitled to discovery on that," is it really true? Or do you just believe what Mr. Levine says on that when they tell you, Your Honor, that we did consider these things, yet, there's no evidence of it --

THE COURT: Consider what things?

MR. SULKIN: For instance, Ms. Cox put in a declaration there was some consideration of whether or not there was a national boycott. For instance, she put in a statement -- one declarant has put in a statement saying it was raised once. Okay. What was said? Mr. Lowsky denied it was ever raised. They want to put in what the purpose of the board -- what the language means beyond what it says, put in declarations to that effect. Mr. Levine put in a statement that says consensus doesn't mean that

everyone has to agree. That's what he said in his declaration. Well, where are you getting that from?

THE COURT: Probably the dictionary. There are two definitions of consensus; one is, and one isn't.

MR. SULKIN: If you look at section "AA" of our submission to Your Honor, with due respect from the co-op, it defines consensus as full and complete agreement. No -- no one disagreed. In fact, the purpose of the co-op was a noble one, recognizing tolerance in the face of disparity of views. That was the purpose -- a purpose of the co-op. That's why consensus was necessary, because the co-op recognized, the founders, that when people have disparate views, the way you make things work is to try to reach full consensus. And when you ignore that principle, the very fabric of the institution unravels, which is what's happening here. You alluded to that in your opening remarks.

So we need discovery because they've opened the door by using discovery themselves, and we get the chance to test it. For instance, they have -- Mr. Levine puts in the idea they haven't been hurt financially. We put in declarations that say, wrong, we've got people that say they don't shop there

anymore. We have a right to test that.

Do you have any questions, Your Honor? I'd be happy to respond to them?

THE COURT: I have no questions now. Thank you.

MR. SULKIN: Thank you.

MR. JOHNSON: Your Honor, Bruce Johnson representing the defendants in this case. With me is Maria LaHood for the Center for Constitutional Rights in New York.

The discovery motion, I think, is very straightforward. And I'm going to hand up to the Court, if I may approach the bench, the one document which I believe answers this entire case, and when we get to the argument on the merits, we'll discuss the relevance of this document. These are the bylaws for the Olympia Food Co-op, Exhibit B to the Levine declaration. There's nothing secret about these bylaws. I got them off the internet. They're available to any member, and they establish that the board has full authority to undertake decision making on behalf of the food co-op. We'll discuss that when we get to oral argument.

But I think it's quite clear that you don't need to test the veracity of this piece of paper. This

was the basis for the plaintiff's lawsuit, claiming that, somehow, the food co-op had violated its own internal rules, and this is the binding document.

Mr. Sulkin says that he simply wants to test the veracity. When we get to the oral argument, we'll explain that this document, I think, answers every question the Court needs to answer. I will admit that both parties put in, told their story at great length, and I think that's valuable so the Court understands exactly the perspectives on both sides. But in terms of material facts and in terms of the issues presented, the bylaws establish the authority of the board. As a consequence, there's no need -- whether we call that a 56(f) motion, there's no good cause whether we denominate that the "good cause standard" in the anti-SLAPP law. The bylaws answer these questions. Yes, we've got a complete record, but we don't need to waste everybody's time with unnecessary discovery.

In addition, I would like to point out, at the start of this case, I approached Mr. Sulkin and said we would like to stay discovery until this motion is heard, and he agreed, and we believe that that stipulation is valid. And, quite frankly, complaining about a lack of discovery after having

agreed not to pursue discovery until this motion strikes me as basically putting the cart after the horse but not getting anywhere. So we believe there's no necessity for discovery, that this is essentially a motion to dismiss and/or a motion for summary judgment on a very limited evidentiary record of material facts, and we ask the Court to deny the motion.

THE COURT: Thank you.

MR. SULKIN: May I quickly respond, Your Honor?

THE COURT: You may, Mr. Sulkin, but I don't need to hear the argument that you did not agree -- or that you did not agree to stay discovery. I'm not going to base my decision on that contention.

MR. SULKIN: Thank you, Your Honor. The board of directors instituted a policy 19 years ago that's in effect today. They haven't changed it. They haven't amended it. They've done nothing. It is the governing procedure of the co-op on the question of boycotts. Now, had they amended it, had they changed it, had they overruled it, perhaps there would be a different argument today. But I find it interesting that, while Mr. Johnson claims that this is the only document necessary, they put in a ton of documents as

the movants, as the moving party on the motion, Your Honor. So we do need discovery both constitutionally and to address their concerns.

If you have any questions, Your Honor, I'd be happy to answer them.

THE COURT: Mr. Sulkin, it seems to me that many of the documents that you wish further discovery about are related to the contention that your clients lack standing. Is that a fair assessment?

MR. SULKIN: Well --

THE COURT: Damages -- damages, interest, those sorts of things? They relate to standing, do they not?

MR. SULKIN: Well, I don't think -- the short answer is no, because I don't think there's a real -- a real issue as to their standing, Your Honor. I think the real question is, what is the policy. As Mr. Johnson just stated, is there a policy or can they ignore it. Okay. Can they just ignore it?

Now, the problem with discovery is you never know what's there. What I'd like, for instance, is their comments on this very issue. Are there e-mails back and forth between the board members? Are there memos back and forth as to what their obligations are and how they see that board policy?

Now, let's assume -- I don't know, I haven't seen it -- there's a memo between Levine and Ms. Cox saying, "We haven't met the two prongs of this test, but we don't care, we're going to impose our views on the co-op." I think they'll be highly relevant to today's discussion, Your Honor. Highly relevant. Now, can I warrant to you that those documents are there? Of course not. That's the point of discovery, to allow a litigant like myself to find out.

And what we do know is that there are documents, and the problem -- the constitutional problem, which we'll get to later, is the statute puts the cart before -- flips discovery on its head. It puts the burden on me to justify discovery, not on them, to argue why it's not needed. And the reason the burden is never on the plaintiff is because the plaintiff is the person -- or the reason the burden is not on the party against whom discovery is asked, is because that party knows what's there. I don't.

So we've asked for the part of discovery on issues related to the claims made in the Levine declaration. I don't know what's there, but you can't have a fair process, Your Honor, when one side has all the evidence and the other side doesn't. I hope that

answers your questions.

THE COURT: It does. Thank you.

MR. SULKIN: Thank you.

THE COURT: I'm going to deny the motion for discovery. And in explaining my reason, I'll begin by first reviewing the process of this case so far. This case was filed on September 2, 2011. Fifty-nine days thereafter, this motion was filed, within the time limits permitted by the legislature, which is a 60-day time limit. The legislature, after declaring that these motions must be brought within 60 days of filing the case, then declared that the hearing must occur within 30 days of the filing of the motion. The parties determined not to follow that process and, instead, scheduled and rescheduled this hearing on a number of different occasions until we are here now on the 17th of February.

The statute goes on to say that, after the hearing, I have seven days in which to make my determination and announce what it is. That's a very short and unusual time limit for the legislature to impose upon courts to act, but it is not unheard of, and it is done in most instances, and I believe here as well, in order to make sure that there is a speedy resolution of this extraordinary process that the

legislature created in the anti-SLAPP statute.

The request for discovery was made at the time that the plaintiffs filed their brief responding to the defendant's motion, and it has never been scheduled for a time different than the date scheduled for this hearing. There have been three different dates when this hearing has been scheduled. The purpose of the motion as stated in the moving party's papers are, first, to decide the motion in their favor on the record before me, but if I find that I cannot do that, then discovery should be permitted. Under the statute that governs the law of discovery here, Section 525(5)(c), the legislature declares that, in these instances, in these cases, discovery shall be stayed. And then it goes on to say the stay shall remain in effect until the anti-SLAPP motion is decided, a strong statement of what the legislature intends as regards this process.

There follows, then, a good-cause exception to the rule that discovery should be stayed, providing that a court for good cause can permit specified discovery. In testing what good cause means here, what I have found is that there is a split of authority among the courts across the United States that have governed this issue. Washington courts

have not ruled on the issue, to my knowledge. Some courts apply simply a Civil Rule 56 test, which, in itself, is a specific and targeted exception to the right of a party to move forward with a motion for summary judgment, permitting in some instances additional time to gather declarations to contest the motion when it has been shown that that information could not have been obtained within the schedule for hearing the motion for summary judgment. That is a focused test. It requires an explanation of what the moving party, the party seeking additional discovery or time to prepare declarations, expects to discover and why it's important to the motion.

I conclude that in the good-cause exception of the anti-SLAPP statute, the test is at least as stringent and as narrow as the Civil Rule 56 test.

The anti-SLAPP statute is not a statute enacted by the Washington legislature from whole cloth. It is a statute that has been enacted in many states across the nation, most importantly California, because Washington adopted a very similar statute, and California has a much more developed set of appellate decisions than does Washington. They've had longer at these issues.

But if you look at the legislative declarations of

other legislatures, the appellate decisions of other courts, and the writings of authorities on the subject of these anti-SLAPP statutes and the issue of discovery, you will see that the intent underlying the statute is for quick resolution of cases that involve fundamental First Amendment rights, the right of free speech, the right of petition. The second governing principle is that it is a process that is to avoid the time and expense of litigation, including discovery. And the third and I think, in the context of this motion for discovery, the most important principle is that it puts persons on notice, persons who would file litigation based upon speaking or petitioning by others on matters of public interest, that they have a responsibility to have facts supporting their contentions that can meet the standards of the anti-SLAPP statute. That's a determination that is expected before the lawsuit is filed when it involves these fundamental First Amendment freedoms.

In this case, in my view, the discovery sought fails for two reasons: First, it comes at the end of the process. We are downstream by a long measure, and there's been no attempt to seek enforcement of a right to discovery until here we are at the hearing

where I am constrained by a very short time leash. Second, the discovery is not focused. It is broad-ranging discovery encompassing several -- I can't remember if it's two or three depositions and, most importantly, all of the records possessed or seen by any member of the board.

For all of those reasons, I am denying the motion. I want to make clear that I am not basing my decision upon the contention that the plaintiffs have weighed their right to make the motion.

I'm ready to proceed now to the merits of the case. And, here, the moving party appears to be the defendant, so they'll go first.

MR. JOHNSON: Thank you, Your Honor. Bruce Johnson representing the defendants. As I said, with me is Maria LaHood from the Center for Constitutional Rights in New York, and we do have almost a dozen of our 16 clients in the court today, as well as their friends and colleagues and co-workers. This is an extraordinary lawsuit. It's designed to punish these 16 individuals, who are all basically local citizens here in the Olympia area, who served as volunteers on this particular board. They receive no pay, and they have to make business decisions in accordance with the bylaws of the Olympia Food Co-op.

They made a decision that the co-op should honor a boycott of Israeli products. In our view, this decision was well in accord with the co-op's basic decision to encourage economic and social justice. It was made after more than a year of internal staff discussion and two membership meetings, a lengthy written staff report, and public comments. We're here today because their decision was an exercise of free speech rights on a matter of intense public concern.

The plaintiffs are five members of the co-op who oppose the boycott of Israeli goods. They file this derivative suit seeking to end the boycott and punish the board members for exercising this particular decision in support of the boycott and, we would contend, ultimately to chill the exercise of First Amendment rights.

Plaintiff's lawsuit is precisely the type the Washington legislature intended to stop when it passed the anti-SLAPP law in 2010. This law applies to all claims, however characterized, that turn on or depend on lawful conduct in furtherance of rights on issues of public concern. The law seeks immediate dismissal unless plaintiffs can prove a probability of prevailing on the merits by clear and convincing

evidence. That standard has been defined in Washington law going all the way back to *In Re Sego*, 82 Wn.2d 736 at page 739, as a requirement that the evidence show the required fact to be highly probable.

Because plaintiffs cannot meet their burden, the case should be stricken and dismissed under the anti-SLAPP law. First, we would contend -- and I think it's relevant, because this is a derivative suit, to note that this lawsuit was ultimately completely unnecessary. In its July and September 2010 board meetings, the board invited any members who were opposed to its decision to undertake a petition for a vote by all members in accordance with the bylaws, which we provided to the Court earlier. We received no response. A later invitation, which was made directly to the lawyer for the plaintiffs, was met with an express refusal to undertake that type of member vote.

Instead, some of these plaintiffs sought to take over the board. The evidence shows that, in the November 2010 annual board co-op election, three of these plaintiffs ran for the board. The sole election issue was the boycott resolution. All of the opponents to the resolution lost. In contrast,

all five candidates supporting the boycott were elected by large margins. A similar result happened most recently in November of 2011 with the pro-boycott candidates winning and those opposed losing.

After losing the 2010 board vote -- membership vote in May 2011, the plaintiffs sent a lawyer's letter basically promising complicated, burdensome and expensive litigation if the board did not back down. The board did not back down. The plaintiffs here then sought assistance from a pro-Israel group called Stand With Us, and this lawsuit followed on September 2, 2011.

On November 1, 2011, we filed this motion to strike pursuant to CR 12 and the new anti-SLAPP law. I'd like to make three basic legal points in the legal argument here in support of the dismissal request. Number one, does the anti-SLAPP law apply here? RCW 4.24.525 says that there's a substantive remedy available for defendants who are the targets of any claim, however characterized -- that's the term of the legislature -- any claim, however characterized, that is based on an action involving public participation and petition. The law explicitly includes all causes of action that are

based on any lawful conduct by the defendant in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern.

Washington's anti-SLAPP law provides for a two-prong process. First, the moving party, the defendants here, must show by a preponderance of the evidence that the activities for which they were sued involve lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern.

THE COURT: Mr. Johnson, I'm pretty aware of the facts that have been recited in the record and the law of the statute as it applies.

MR. JOHNSON: I will simply note, then, for the record the issues surrounding Israel and Palestine are matters of intense public concern and have been for some time. I would also note, I pointed out notice in our brief, the decisions to boycott go back to the very founding of the United States. Indeed, it, in some ways, may have led to the founding of the United States when Britain did not honor the boycott request initiated in 1774 by the First Continental Congress. History is replete with other types of boycotts. Dr. Martin Luther King

got his start in Montgomery, Alabama, in 1956 based on these decisions and based upon a boycott.

So we think it's basically an exercise of First Amendment rights at the heart of the free speech clause of the state and federal constitutions.

Because plaintiffs have met this burden, the second step is now triggered, and that is, they must establish by clear and convincing evidence a probability of prevailing on their claims. This standard was drawn from the California anti-SLAPP law, and it means they must offer evidence sufficient to establish a prima facie case. The California court of appeals held in the case of *Stewart vs. Rolling Stone*, 181 Cal.App 4th 664, the probability of prevailing requires a prima facie showing of facts admissible at trial sufficient to support a judgment in the plaintiff's favor as a matter of law on a motion for summary judgment.

So, in effect, what the anti-SLAPP law does is it promotes an early resolution on cases that can be disposed on a motion for summary judgment, and the standard is essentially identical.

The second legal issue here is corporate law. This is a nonprofit corporation. Ultimately, this turns upon governance decisions made by the board of

directors, and the issue underlying that is, does the board have the authority to make this boycott decision. As I mentioned in the discovery motion, there are very few documents we have to consult. First, RCW 24.03.095, the co-op is a nonprofit corporation organized in 1976 and remains a nonprofit corporation. Washington law states the affairs of a nonprofit corporation shall be managed by a board of directors.

Second, the bylaws -- and the bylaws were attached as Exhibit B to the Levine declaration -- basically, they grant the board the ultimate decision-making powers. It says, "The affairs of the cooperative shall be managed by a board of directors. Further, 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."

Plaintiffs will argue about a 1993 board policy dealing with staff consensus for boycotts, but the board's powers also include the duty and right to adopt major policy changes. That's in the bylaws as well. The board is further empowered to resolve organizational conflicts after other avenues of resolution have been exhausted, and, finally, the

board is granted general authority to adopt policies which promote achievement of the mission statement and the goals of the cooperative.

There's no evidence in the record that the board ever abandoned that authority. It never basically gave up the ultimate fiduciary decision making to anybody else in the cooperative. Yes, it promoted and encouraged staff consensus, staff decision making and employee -- basically empowering employees to make decisions, but it ultimately retained all authority as a board to determine whether these decisions were consistent with the oversight duties of the board of directors of a corporation.

THE COURT: Mr. Johnson, I'm intrigued by some of the verbs that we find in this case. In the statement of purpose in the policy document, the boycott policy, it uses the word "honor." You've used the word "honor," but the resolution by the board does not. It makes no mention of honoring a boycott. It simply declares a boycott. Is there a difference, in your view, in those verbs, declaring a boycott, honoring a boycott, imposing a boycott? If there is, I'd appreciate your views in that regard.

MR. JOHNSON: I'm not aware of any substantive difference there. Those words all mean the same

thing, that the board of directors or the co-op has decided in some form to abide by a particular boycott decision. Some boycotts have been organized for many, many years and are well recognized over a period of maybe a dozen years or something like that. Perhaps at that point, if the board is stepping in late in the game, it's honoring a very well established boycott tradition. If it's stepping in earlier in the game, perhaps declaring a boycott may be a more proper verb. But I don't think substantively those verbs have any particular distinction at all, or at least as a legal matter, because it's simply a recognition that they will not do something based upon certain products and where they come from.

Ultimately, there's no evidence that the board ever abandoned its oversight duties, and, as a matter of fact, when you look at Exhibit O to the reply in support of the cross-motion for discovery, this is attached to the Sulkin declaration, and this is the original boycott policy back in 1993. It says, "Let staff as a whole make decision; board of directors can discuss if they take issue with a particular decision." That's the document upon which this lawsuit is premised. Let the staff make the

decision; board of directors can discuss if they want to look at that decision themselves.

So ultimately even --

THE COURT: Let me stop you there, because that argument is a surprise to me. What document are you referring to? I am referring to Attachment I, or Exhibit I to the Levine declaration which you submitted, which contained the boycott policy. I didn't see that language there.

MR. JOHNSON: This is not the actual boycott policy. This is actually the first use of the boycott policy in 1993, which led to the -- which led to the ultimate -- 1992 use of the boycott -- let me start... This is in 1992 as they adopted for the first time a boycott policy by honoring a decision not to purchase Chinese products.

Later on, they then developed a 1993 policy, which the Court is referring to. So I'm simply --

THE COURT: What document did you read to me?

MR. JOHNSON: I'm reading from Exhibit O of the Robert Sulkin declaration, which was served and filed yesterday. And this is a 1992 document where the food co-op first decided or had to decide about making boycott-type decisions which led to the 1993 document, which is the policy that the Court is

talking about.

THE COURT: All right. Thank you.

MR. JOHNSON: In connection with this particular policy, Exhibit K to the Levine declaration states, and this is the May 2010 board minutes, "Boycott proposal, Rochelle, Andrew and others presented a member interest in boycotting products from Israel. The MCAT has sent this request to the board as after working on it for a year could not consent to it. The members presented the nationally and internationally recognized boycott and feel this is a humanitarian issue and needs to be addressed. They urge the board to participate in the boycott and in the nonviolent movement. Harry" -- Mr. Levine -- "offers a write a proposal to staff and try for consent. Jessica," another board member "requests that if the proposal does not make it through staff, that those with blocking concerns come to the board to present those concerns."

So we have the policy in place, and we also have the board ultimately able to exercise its own fiduciary duty of oversight dealing with the staff consensus on this these particular decisions.

In addition, we mention in our briefing the business judgment rule. And I just want to highlight

the business judgment rule. This is basically a recognition that courts are very reluctant to interfere in the internal management of a corporation and generally will refuse to substitute their judgment for that of the directors. As a consequence, when one tries to allege something, a breach of fiduciary duty or some other misconduct by a corporate board member, one must allege something more than the exercise of honest business judgment.

The court in the *Schwarzmann* case, 33 Wn.App 397 at page 402, said, "The business judgment rule immunizes management from liability in any corporate transaction undertaken within both the power of the corporation and the authority of management where there's a reasonable basis to indicate that the transaction was made in good faith." And we would submit that the business judgment rule attaches here as well, because the board is being asked to interpret its own bylaws and determine what the scope of its powers are in connection with this particular decision.

The third legal point are matters of equity, the court should pay attention to. This is a derivative suit. It's a creature of equity. And in the *Haberman vs. WPPSS* case, the court said, derivative

suits are disfavored and may only be brought in exceptional circumstances. Furthermore, in Washington, in the *Lundberg* case, which we cited in our motion, our anti-SLAPP motion, members of nonprofit corporations lack standing to bring derivative suits. Indeed, the court of appeals closed the doors on such actions because the legislature did not intend to grant an individual director or a private individual standing to bring derivative lawsuits on behalf of a nonprofit corporation. That's 115 Wn.App at page 177.

In addition, Civil Rule 23.1 governs this particular lawsuit, and the Court can basically conclude that the derivative suit cannot be maintained if the plaintiffs do not fairly and adequately represent the interests of the corporation. Here, we've had two board elections where the plaintiffs have lost and a deliberate refusal to undertake a member vote to second-guess what the board has decided. And we would submit that the plaintiffs here do not fairly and adequately represent the interests of the corporation.

Finally, and related to this under Civil Rule 23.1, the failure to exhaust. Washington law requires the derivative plaintiffs exhaust internal

corporate procedures before bringing a lawsuit. And here, all they had to do, if they opposed to this particular vote, was get 300 persons to sign a petition and then have a vote and have that petition be approved by 60 percent of voting co-op members. That, as well, is in the bylaws we handed to the Court.

At both the July and September 2010 meetings, the board invited members to initiate a member ballot on the boycott and posted information on the website about the right to petition and initiate a vote and said any member is welcome to propose a member-initiated ballot process and should contact the co-op board to begin this process. No members acted on that invitation.

In conclusion, we would request that the Court grant our motion pursuant to the anti-SLAPP law and award appropriate remedies consistent with that law: Number one, dismissal of the complaint with prejudice; number two, the statute says the court shall award reasonable attorneys' fees; and, number three, there's a statutory penalty of $10,000 per defendant. And we would request that the Court award appropriate sanctions consistent with that law.

What happened here was the plaintiffs disagreed

with the board decision, and, instead of pursuing the member vote, they decided they would undertake a lawsuit. I want to go back to the fact that these are basically 16 ordinary people who are serving without pay for a very idealistic operation. They went through a very elaborate process in support of the mission of the co-op using their business judgment, decided to honor the boycott of Israeli products. As a result of that decision, the 16 ordinary citizens became targets of a complicated, burdensome and expensive lawsuit. They were forced to hire their own lawyers, face an onslaught of significant and potentially expensive discovery demands, and also risk potential significant damages.

We believe that this is precisely what the anti-SLAPP law was designed to combat, to allow ordinary citizens to conduct their business without being subject to the massive expense and dangers of litigation where they are working on a matter of important public concern consistent with the rights to exercise free speech as citizens of this state.

We would request the Court grant the motion.

THE COURT: Thank you.

MR. JOHNSON: Thank you.

MR. SULKIN: Again, Your Honor, Bob Sulkin.

My clients, Jeff and Susan Trinin are at the table with me. As I said before, Your Honor, this co-op was built on the idea of consensus and tolerance. And what happened was the board 19 years ago instituted a policy procedure, which the same document Mr. Johnson referred you to, reading from paragraph 13 --

THE COURT: I'm not sure that I understand the importance of consensus in this claim, Mr. Sulkin. Because if the board didn't have the power, it didn't matter whether there was consensus on the board or not. If it had the power, independent from the policy, there clearly was consensus on the board.

MR. SULKIN: Fair enough, Your Honor. Let me go right to the point I'm trying to make. The point is that Mr. Johnson's position is that the board had the power to ignore this policy. That's his position. All right. Well, let's look at that. And he tells us look, let's look at the bylaws. Look at the bylaws, and the board has authority.

And I'm telling you look at the bylaws, and let me tell you what the bylaws say. The bylaws say that the board has the obligation to adopt policies. This is the policy the board adopted, the board adopted in 1993. Paragraph nine of the same provision he

refers to under paragraph 13, it says, "The board may adopt major policy changes." Said differently, if the board doesn't like this, it can vote to change it. It didn't. The board didn't change this policy. It is in effect as we sit here today under his analysis. In fact, the board can adopt policies which promote the achievement of the mission statement, which is consensus.

So there's no dispute that this is the policy in effect today. And there's no dispute that the board took no action to overturn this policy. They're bound by it. This is a board-adopted policy from 1993, period. Now, if the board tried to change it, amend it, as it could have, we'd have a different argument. So the question before you today, or at least one, is did the board follow this policy, or did they ignore it.

THE COURT: Mr. Sulkin, let me pose a question to you so I understand your argument better.

MR. SULKIN: Sure.

THE COURT: Assume here that a member of the co-op came to the co-op and said, "There's a major shellfish producer here in Puget Sound with operations all over the world, and they are growing shellfish incompatible with our goals and

aspirations. I would like the co-op to institute a boycott of their products. What would be the outcome of that request both in process and in final determination?

MR. SULKIN: Here's the process: The process is right here. There's the board. A properly acting board would say this is the process right here.

THE COURT: But doesn't that statement of purpose that you see in the first paragraph eliminate the proposal or the hypothetical I've posed to you? It's not a nationally recognized boycott. You're not honoring something. You're creating something.

MR. SULKIN: Exactly right, Your Honor.

THE COURT: Does it go away?

MR. SULKIN: Yes.

THE COURT: Does the board not have the power to adopt a boycott in those circumstances?

MR. SULKIN: What the board can do is what -- its right under paragraph nine of the paragraph 13 of their bylaws. They can adopt major policy changes. In other words, if the board wants to change this policy, it can do that. We're not saying the board can't change its policy. Perhaps it should have, Your Honor. But what the board has to do is follow a board-initiated policy. And what the board decided,

Your Honor -- here's what the board decided back in 1993, never been changed for 19 years: The board decided then that what we're going to do with a boycott policy is recognize two things: One, we're going to be a follower and not a leader. Number one.

THE COURT: Say that again, please.

MR. SULKIN: We're going to be a follower and not a leader. We're going to honor nationally recognized boycott policies. We're not going to be the first ones that start. Didn't have to do it that way. That's what they did. And the second thing they did was say the staff, through consensus, is going to decide that point. Why? Because we are an organization that is staff and consensus built. That's the purpose. Those are the two prongs.

And so the question isn't, Your Honor, could there be a different boycott policy that the board could vest itself the power to decide. Perhaps it can. But that's not the policy in effect.

So let's take the *Hartstene* case, which they cite. That's a case where someone was fined a thousand dollars for cutting trees at his property. And the court found you didn't have the power under your bylaws to fine the guy, basically. The board could have changed the bylaws and given itself that right.

It didn't.

THE COURT: I thought that was where the architecture control committee was improperly formed.

MR. SULKIN: Exactly, and one of the issues was the ability to fine. The point is -- the point is, once the policy is set, you've got to follow it. And it's a board policy. And that's why what they argue, Your Honor, is this isn't a policy. It is. It was voted on by the board. The board never changed it, which is why the question before you is: One, is this the policy? Yes. And two, did it follow it? Not whether there could be a different policy, not whether you agree with the policy or I agree with the policy. This is the policy, and they've never denied it.

THE COURT: You've explained that to me as being a statement of purpose or intention that the co-op is going to only follow nationally recognized boycotts.

MR. SULKIN: Yes.

THE COURT: Isn't it just as reasonable to look at that policy and say this policy pertains to honoring recognized national boycotts and is silent as to the other powers of the co-op acting through its board of directors to consider boycotts that are

different, that don't meet the criteria?

MR. SULKIN: There are two problems with that, Your Honor.

THE COURT: Okay.

MR. SULKIN: Problem number one is, you're reading language into the boycott that's not there. It's just not there. If the board wanted to do it, it would have. And let's go back to the document Mr. Johnson cited to you. It's their Exhibit C, my Exhibit O. This is board of directors minutes of July 28, 1992. This is from the board. And here's what it says. I think this is Exhibit Z. Okay. If we go through, what it says is -- this is what Mr. Johnson read to you, "Let staff as a whole make decision; board of directors can discuss if they take issue with a particular decision."

So the board had in their mind the idea that perhaps we should have some involvement in this. It's not in the final agreement. It's not in the final policy. They rejected it. In fact, the conclusion here is, formal proposal. If a boycott is to be called it should be done by consensus of the staff. And so the fact that they raised it and didn't include it tells you it's not part of the policy.

Moreover, I've got declarations from two of the board members who initiated the very policy at issue. You don't get better evidence than that. And what do they tell you? Mr. Breuer and Ms. Trinin, here's what they said: "The co-op would be a follower with regard to co-ops that are already recognized, not a leader. Prior recognitions of such boycotts would be national in scope, and the authority would reside in the co-op staff." That's two declarations under oath. I should say, Breuer is not even a plaintiff.

So coming full circle, yes, the board could have changed the policy. It didn't. It acted beyond the policy. This idea, the idea that Mr. Johnson raised for the first time that it's a business judgment rule, is ridiculous. With due respect to Mr. Johnson, who I said I hold in high regard, think about that for a minute.

Without question, the policy calls for staff consensus. Without question. Levine says that staff consensus is needed. He understood it. He also said he considered it an international movement, not the national. He's not saying I'm trying to figure out what this language means, I'm really struggling here. He's ignoring it. And I should say, and I want to be very clear on this, Mr. Johnson already pointed out,

the underlying politics of this is very divisive. I understand Mr. Levine is a caring person, as are the people that support the boycott. They've got their views. It's okay.

But that's not the question here, Your Honor. The question is: Who gets to speak for the co-op? Who gets to determine who speaks for the co-op, and on a boycott policy? Someone can't publish an article and sign my name to it and claim free speech protection. I get to choose what I get to say. And what the board said was, the staff gets to decide who gets to speak for the co-op on a boycott. And I agree with Mr. Johnson, boycotts are important. And we said from the beginning, if the co-op decides to boycott Israeli products through a proper process, we're okay. Because the foundations of this co-op require people to get along with disparate views, as long as the process is followed. That's not what happened here.

I believe what the board did was they felt the ends justified the means. And that's when institutions unravel, when decisions are made because you believe the ends justify the means. This is the policy.

So let me come back and try to address -- I hope I

answered your question.

THE COURT: You did. Thank you.

MR. SULKIN: All right. Let me come back and attack or at least address the concerns raised by Mr. Johnson. First, this is not a SLAPP suit. Let's start there.

THE COURT: Okay.

MR. SULKIN: And I concede, Your Honor, it's not so easy sometimes to tell what a SLAPP suit is and what isn't. But I can say two things on the point, and I'm referring to the *Equilon* case, and let me read what it says --

THE COURT: Which case?

MR. SULKIN: *Equilon* case, 52 P.3d 685. And here's what it says, Your Honor: It says -- it's discussed more fully in the companion case, *City of Cotati* -- "The mere fact that action was filed after protected activity took place does not mean it arose from that activity. Rather, quote, the act underlying the plaintiff's cause, end quote, or the act which forms the basis for the plaintiff's cause of action must itself have been an act in furtherance of the right of free speech."

We're not here saying the co-op can't boycott. It can. What we're attacking is the board authority

under this policy. The board just doesn't have the authority. We're not attacking the right of free speech. No one believes in free speech more than my clients. And that's an example of how things unravel when you don't follow procedures, Your Honor. That's precisely what's happening here. Procedures weren't followed.

Next point: Let's assume you believe that the anti-SLAPP statute applies. Then the question becomes, do we have sufficient evidence to get over the hump. That's sort of esoteric comment and the answer there is clearly yes. I mean, look, here it is. You follow a nationally recognized boycott. There isn't one. It wasn't looked at. The Haber declaration is very clear on that. There is no nationally recognized boycott of Israel products. There just isn't. It's been turned down everywhere, perhaps incorrectly, but it's been turned down.

Second, "A request to honor a boycott may come from anyone in the community organization." So they get the word "may". The request will be, however, referred to the merchandising coordinator staff to determine which products and departments are affected. She will delegate the boycott request to the managers of the department, to the staff who will

decide by consensus. By consensus.

Now, here's what's really interesting: The department manager will post a sign informing the customers of staff's decision and reason regarding the boycott. If the staff decides to honor a boycott -- - again, the word "honor," not a mistake, the MC will notify the boycotted company or body of our decision. Who is the "our" there, Your Honor? It's the co-op. The board. They didn't say the staff decision. It's our decision. This is the Olympia Food Co-op policy, period.

Now, we know these weren't met. Levine tells you they weren't met. He said internationally recognized, and he said we couldn't get staff consensus because people stood up. And, in fact, we had Mr. Lowsky, who was there at the time, not happy about providing a declaration because he loves this place. And I should say, my clients have been with this co-op for 31 years. And Mr. Lowsky says, "Since the enactment of the boycott policy, the staff of OFC has decided by consensus to honor certain nationally recognized boycotts." And he talks about the meeting, and he says here, "Because it takes only one co-op staff member to block consensus, it was clear at those meetings the co-op staff did not support the

Israel boycott and divestment. No evidence was presented to us at those meetings or at any other time that a boycott of and/or divestment from Israel were nationally recognized." It's done. The policy was never amended. That's the problem we have here. So we do meet the merit test.

If you look at the other anti-SLAPP cases, they're almost frivolous. There's just no evidence supporting. We have evidence. We have the board itself. We have the board minutes which show they did consider perhaps the board should have involvement, which was rejected. The only conclusion you can draw, because it's not in the policy.

And then what do they say on the merit side? They say first, the argument the board decides. It's not there. Then they say, well, gee, if there's staff -- if there's no staff consensus, we can break an organizational deadlock. Well, there's two problems with that. One, it doesn't address the nationally recognized standard. There's two standards, not one. And second, it says they have to, under that test, one, show it's an organizational dispute. This isn't. It's not over where we should put the store and whether we should buy this -- buy toilet paper for the bathroom or not. And they have to exhaust

all remedies, all other avenues. They didn't.

THE COURT: Mr. Sulkin, if I was looking at your argument skeptically there, I might raise an argument and say the language you're relying upon is a statement of purpose, which generally accompanies a policy or an enactment or a rule, and that the rule itself, the policy, is announced later on where we get to the enumerated parts of the process. And that is the policy or the rule, not the statement of purpose. And there, I don't see anything about national boycotts at all.

MR. SULKIN: Well, you see, I'm sure it's me, Your Honor, when you say national boycotts --

THE COURT: Nationally recognized boycotts. That's in the statement of purpose. But when you get down to what we're going to do to implement our policy, there's no issue there about finding that the proposal is a nationally recognized boycott, is there?

MR. SULKIN: Let me take you through that.

THE COURT: All right.

MR. SULKIN: We have here, "Whenever possible, honor a nationally recognized boycott." "A request to honor a boycott." This is the nuts and bolts.

THE COURT: Right.

MR. SULKIN: When they say honor, Mr. Johnson didn't have an answer for you. He said honor doesn't mean anything. "Honor a boycott," that means a pre-existing boycott. You can't honor something that doesn't exist, Your Honor. That's your answer. It's right here. And "decides to honor a boycott," right here. Three times, they say it.

THE COURT: You read into that honor, meaning honor a nationally recognized boycott? You're going to make that stretch, Mr. Sulkin, and I don't see it explicit in that policy.

MR. SULKIN: Well, Your Honor, with due respect --

THE COURT: All right.

MR. SULKIN: With due respect, do you really think that when they said "honor a boycott," they didn't -- this was irrelevant? I would argue against it, but we're on a summary judgment motion, Your Honor. I've got two declarations from the people that were sitting on the board, who were there. They were there, and they tell you what it meant.

THE COURT: I understand your argument there.

MR. SULKIN: Thank you. Secondly, even giving you credit, Your Honor -- and I mean that rhetorically -- it still doesn't address the

consensus question. It was not consensus; everyone concedes that. Even Levine concedes that. There was not staff consensus.

THE COURT: You have expended your 20 minutes. You haven't reached the constitutional claim. I'm inclined to extend to you both additional time to argue that point.

MR. SULKIN: Is it necessary -- my two quick points before that.

THE COURT: Finish up.

MR. SULKIN: One, with due respect to Mr. -- I think our brief sets out our position on *Lundberg*, they missed that point. *Lundberg* allows -- the statutes on nonprofit organizations actually permits --

THE COURT: All right.

MR. SULKIN: They just missed it. Let's go to the constitutional question, Your Honor.

THE COURT: Ten minutes, and you'll have 10 minutes for that as well.

MR. SULKIN: Thank you, Your Honor.

THE COURT: And you've also got some rebuttal time left.

MR. SULKIN: And I also want to say, there is no requirement in Washington under the *F5* case and

Cray to exhaust all remedies. Believe me, this is the last place we want to be. But we did our best. Let's go here.

I think this is a typo, this should be "Putman", not "Putnam". I think everything else is correct.

Your Honor, *Putman* is a case recently decided about the time the statute was written --

THE COURT: The statute was actually written a long time ago. It was only subpart (e) that was added, I think.

MR. SULKIN: Right. But look what it says. There are two problems with the statute, as I see it. One, *Putman* addresses no discovery, no discovery before finding the merits. And, second, this burden -- we'll call it the burden of proof issue. I want to talk about that. *Putman* goes back to *Marbury vs. Madison* and quotes the very essence of civil liberty. Certainly consists of the right of every individual to claim protection of laws whenever he receives an injury. And the court goes on to say, as we said before, it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. You cannot, as a free society, have cases decided in this courtroom unless someone has a right

to full discovery. That's what our constitution says.

And that's why those California cases are very different, Your Honor, because, one, we're in Washington, and the Washington courts have taken a very broad interpretation, constitutional interpretation, of someone's rights, and we have a full right of discovery, and we didn't get it. That's why the statute is unconstitutional. And what it does is it says it denies access to the courts.

And what is their response? Their response is, oh, no, under *Putman*, what really concerned the court was that you had to file a certificate of merit. And it's that certificate that was the problem, not the discovery. And the public access to the court was you couldn't file it without the certificate. This debunks it. It's the discovery issue.

Going on, requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiff's right of access to the courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. So that's the first prong. The statute is unconstitutional under *Putman,* because we have no

right to discovery.

THE COURT: What's your strongest argument, access to courts or separation of powers?

MR. SULKIN: I think on separate issues -- on the discovery issues, I think it's the access to the court question.

THE COURT: It's what?

MR. SULKIN: Access to the court question. I think on this burden of proof question, it's probably the separation of powers. Although the court in *Putman*, relied on both.

THE COURT: Burden of proof, though, is clearly substantive.

MR. SULKIN: Well, it's a different issue, Your Honor, if I may. I think burden of proof is substantive. No question about it, there's a different burden here. There's a different question here. You see, the courts decide the burden of proof necessary to get to a trial, on the substantive burden of proof. The courts decide that. And what the courts in Washington have said is that, what you need to get to trial is to prove one genuine fact in dispute.

Now, the legislature can set the burden in a case of preponderance of the evidence, clear, cogent and

convincing. It can set it where it wants, and it's done so in this case. Preponderance of the evidence is the burden under the anti-SLAPP statute. That's legislative. That is substantive. But the question becomes: How do you get to trial and what evidence do you need to show to get to trial? That's a separate issue.

And that's the problem I have, is this idea that we have to show by clear and convincing evidence that we can win by a preponderance. Because that's a court issue. That's a CR 56 issue. In fact --

THE COURT: So that's a separation of powers issue.

MR. SULKIN: It is. It's a separation of powers issue because the legislature is telling the court -- telling the court -- when you have to dismiss a case. But it's also, Your Honor, more than that. And here's why this is so important, both issues are so important: It's because cases are to be decided on the merits. And when the government and the institutional powers restrict someone's rights to get to a jury, restrict them unfairly, you don't have justice. You don't have fairness.

And that's what the court in *Putman* really is saying. Yes, discovery is messy. Yes, it can be

expensive. Yes, I understand what the legislature was saying and the court was saying. There's too many malpractice cases, just like there are too many speech cases. But we're not going to go so far here, is what the court has said.

THE COURT: But isn't there a difference, especially approaching it on the separation of powers doctrine, between a legislative determination about burdens and discovery and whatnot in a professional negligence case, and where the separation of powers issue is very clear? And then where you're dealing with a fundamental first amendment right, free speech, which trumps all other constitutional rights, where the legislature addresses those in a particular manner, isn't there less deference to the separation of powers argument?

MR. SULKIN: Oh, I don't think so at all. I think the separation of powers is embedded into the constitution itself, the federal constitution, by the first three articles. And *Putman* basically says the same thing, that it's embedded in the state constitution.

THE COURT: But it's not dealing with fundamental First Amendment rights?

MR. SULKIN: Well, let's be clear here on two

points. We have First Amendment rights. It's not just theirs that are at stake here; it's ours and it's the co-op's. Because this is a derivative case, we represent the co-op. And the question here is who gets to speak for the co-op, the board or the staff by consensus. And so to turn the argument on its head, Your Honor, it can be seen as our constitutional rights at issue.

But *Putman* -- there is no statement in *Putman* that the right to -- that the discovery issue and the constitutionality of the statute turned on whether there were free speech issues. What the court said is you have a fundamental right -- the very essence of civil liberty consists of the right of every individual to claim the protection of the laws -- of the laws -- whenever he receives an injury.

Now, think about that. Even in a case of just an injury, you get it. And so the Court is not saying sometimes you have these constitutional rights and sometimes you don't. You just get them. And the courts -- I think the courts are right on this. I understand why you need sometimes to limit discovery, and, you know, courts -- there is a test, likely to lead to admissible evidence. If a request is not likely to lead to admissible evidence, you don't get

it. But, basically, our liberty is based on this right, the right to discovery. Because if someone can hide the true facts, there isn't going to be justice.

And I'm not accusing the co-op of hiding anything, but we have no access to it. And the fact of the matter is, this statute is just unconstitutional as it sits. They've got to go back and rewrite it and take out two provisions, no discovery, turning it on its head and basically putting the burden on me, and even then getting focused discovery, as you pointed out, and raising the burden. Either is bad, but together, it's terrible.

So I think, in conclusion, the statute should be struck down by you. I know it would be a brave action to take, but I think it's the right one. If you have any questions, I'd be happy to answer them.

THE COURT: I do not. Thank you.

MR. JOHNSON: Very briefly, Your Honor, on the anti-SLAPP motion itself, the question is --

THE COURT: Mr. Johnson, don't be very brief. Be thorough. That's what I always tell lawyers who first begin by apologizing for the time they're going to take. You're not wasting my time, so long as you stay focused on what I need to know.

MR. JOHNSON: Okay. Let me see if I can try to focus it. The question really is whether and who gets to speak for the co-op. And, ultimately, Mr. Sulkin said we've introduced this business judgment rule late in the game. Those are in our initial anti-SLAPP motion. Who decides on behalf of the co-op? Who gets to interpret its own bylaws? The board gets that. That's the business judgment rule.

Now, they've offered declarations that say these people thought back in 1993 that this might be a rule saying we're going to be a follower, not a leader. Those unexpressed subjective intentions are ultimately irrelevant. And the question is what the board, when making the decision on this boycott in 2010, viewed as its authority.

THE COURT: Well, what if this policy is ambiguous? Because we don't know what it means. Does it mean this is the exclusive way of dealing with all boycotts, or this is the way we deal with boycotts that come to the staff, and we're reserving a reservoir under law of our decision-making authority to act in the manner you suggest they did and are entitled to do that? If the document, the policy, is silent as to that issue and, therefore,

ambiguous, don't you look basically to the intent of the framers and if there is an intention stated here? Isn't that significant evidence about what this document means?

MR. JOHNSON: You look at --

THE COURT: That's Mr. Sulkin's argument.

MR. JOHNSON: You look at objective evidence, not unexpressed intentions. That's very different. In interpreting a written contract, going all the way back to the *Hudesman* case, all cases dealing with written agreements require statements, objective evidence, not simply unexpressed views of somebody who might have voted something at one time.

In addition, I think you focus on a very important point. If a policy is ambiguous, the business judgment rule gives the board the ability to interpret that ambiguity. It's like the contra-insurer rule. If you buy an insurance policy and it says coverage for "X," and you basically view "X" as covered, you, the insured, get covered even if the insurance company says, well, that actually could mean "Y" as well.

Basically, the essence of running a nonprofit corporation is the ability on the part of the board to make those types of business decisions, even where

there's ambiguity. And this question has been in the case from the very beginning.

So the question is who gets to decide, and we believe that the board has full authority under the bylaws to make decisions such as change policies, adopt major policy changes, resolve organizational conflicts. If the board -- if the staff is unable to achieve consensus, the board is not required to sit idly by. It can make its own decision, and that's what the nonprofit corporation law basically mandates, and that's what the bylaws mandate.

Just a few points, Your Honor, on the constitutional issue. This is not *Putman.* This case was filed like any other case. There was no pre-filing certificate of authenticity or certificate of authority that was required here. It was a normal case filed with a lawyer signing it. It is governed by Civil Rule 23.1, which requires a notarization and an affidavit under oath by the plaintiffs, but it was filed like any other case. This was nothing like *Putman* at all.

Discovery is permitted. Obviously, you have to show a need for discovery, but there's no complete, absolute right for discovery in the abstract. There has to be some showing that discovery would be

relevant to the dismissal issues that are at stake, as opposed to, gee, we would like to have unlimited discovery, wouldn't it be neat. It's consistent with the civil rules. All this case does is bring to bear earlier than it might otherwise be the case a motion for summary judgment and establishes burdens of proof consistent with Civil Rule 56 to determine whether there has been a prima facie case and allow the case to go to trial.

Finally, as we pointed out, Mr. Sulkin -- and I think we're dealing with burdens of proof again. Mr. Sulkin must prove the statute unconstitutional beyond a reasonable doubt. We don't think he does. And we would ask that the Court grant our motion. Thank you.

THE COURT: Thank you. Counsel, I'm going to announce my decision next week. I anticipate 9:00 a.m. on Monday morning. Does that work for everybody?

MR. SULKIN: That should work.

THE COURT: Actually, 11:00 a.m.

MR. SULKIN: What?

THE COURT: 11:00 a.m. on Monday.

MR. SULKIN: I have a deposition that day. I can try and reschedule it, Your Honor.

THE COURT: What time is your deposition?

MR. SULKIN: It starts in the morning.

THE COURT: Okay. You'll have to reschedule that no matter what.

MR. SULKIN: Yeah.

MR. JOHNSON: I'm actually in New York for a closing on Tuesday, but I may be able to work my schedule to accommodate. I don't know.

THE COURT: You want it earlier, then? I was moving it back to kind of accommodate travel and everything.

MR. JOHNSON: Earlier would probably be better because, then, we would have -- there's a 3:00 o'clock flight I can catch probably, if I make arrangements.

THE COURT: 9:30 on Monday, then.

MR. SULKIN: Thank you, Your Honor.

THE COURT: We'll stand in recess until that time.

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, AURORA J. SHACKELL, CCR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

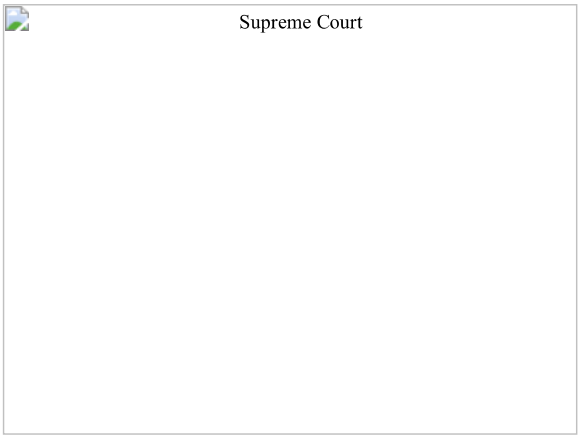
Dated this the 13th day of February, 2013.

_____

AURORA J. SHACKELL, RMR CRR
Official Court Reporter
CCR No. 2439

EXHIBIT B

Breaking News!! BDS Defeat at Washington Supreme Court, May 28, 2015



Breaking News!! BDS Defeat at Washington Supreme Court, May 28, 2015

May 28, 2015, StandWithUs is thrilled to share the news that, in a major setback to the anti-Israel boycott, divestment, sanctions (BDS) campaign, this morning the Washington State Supreme Court held, by a vote of 9-0 that a lawsuit can proceed against Olympia Food Co-op board members, challenging their 2011 decision to boycott Israeli products.

StandWithUs helped the plaintiffs, five long-term dedicated members of the Olympia Food Co-op, find counsel to take legal action after they'd exhausted all other opportunities to get the Olympia Food Co-op board to follow its own boycott policy and bylaws and to reconsider the boycott decision.

When the trial court ruled against the plaintiffs, it assessed $232,000 in fees and penalties, an amount that would have been an overwhelming burden to the plaintiffs.

To appeal the case, the plaintiffs would have had to post a bond for more than that amount - over $400,000 - exremely difficult for the five middle class Olympia plaintiffs.

StandWithUs saw the situation the plaintiffs were in - long-time co-op members, supporters of Israel - who now d devastating financial penalties simply because they stood up for fair treatment of Israel and demanded that their co-op board follow its own rules and bylaws.

StandWithUs stepped in and borrowed the money to post the bond for the full amount so that the plaintiffs could challenge the lower court decisions.

Now that the Washington State Supreme Court has completely rejected the Olympia Food Co-op board members' argument and sent the case back to the trial court, StandWithUs is looking forward to the plaintiffs having their day in court - a real trial on the issues they first presented: The Olympia Food Co-op board's violation of the co-op's own rules and boycott policy when, without any public notice or debate, the co-op board voted to boycott Israeli products.

StandWithUs congratulates the plaintiffs and their counsel, the Seattle law firm of McNaul Ebel Nawrot &

Helgren, on their important victory.

Background

The Olympia Food Co-op is the only commercial establishment in the U.S. to officially vote to boycott Israeli products. The anti-Israel BDS vote at the Olympia Food Co-op passed because the Olympia Food Co-op board gave its community no notice or opportunity to debate before voting. The co-op board decided to vote on the boycott resolution at a regularly scheduled co-op board meeting, with no mention of a possible vote on the agenda, in a room filled with organized BDS supporters, with no one in opposition present. And in violation of specific requirements of its own board-adopted boycott policy, the Olympia food co-op board voted on the BDS boycott proposal.

In every othercase, where co-ops have faced anti-Israel BDS boycott resolutions, the co-ops notified their members and allowed for open debate before voting. And in each case where the community debated, BDS lost.

After the plaintiffs filed their case, the co-op board members, the defendants, moved to dismiss the case claiming that it was groundless and was only filed to intimidate the co-op into cancelling the boycott. They argued that it was a “SLAPP” lawsuit - strategic litigation against public policy.

The trial court agreed, and under Washington State's anti-SLAPP statute, the court awarded the defendants attorneys fees and fined the pro-Israel plaintiffs penalties, leaving the plaintiffs facing nearly $232,000 in fees and penalties.

In Washington State, you cannot appeal the decision of a court unless you can post a bond in the amount of any fees and penalties assessed against you.

Without StandWithUs posting the required bond, the plaintiffs would have lost their case and been hurt financially. Instead, today the plaintiffs are celebrating this overwhelming victory.

Other stories

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StandWithUs is deeply disturbed that the Senate refused to allow a vote on the resolution ...

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Action Alert From AIPAC on September 10, 2015

Urge Senators and Representatives to allow a vote on the resolution of disapproval...

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New petition created by concerned citizens in Los Angeles affiliated with the creative com...

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Campus Activist Dreamin`

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With the vote on the Iran nuclear deal fast approaching, StandWithUs has launched its late...

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Alan Dershowitz on Iran Nuclear Deal: `I`m Furious With President Obama`

Long-time Democrat, Israel defender and famed law professor Alan Dershowitz told a synagog...

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