☐ EXPEDITE
☐ No hearing is set
☑ Hearing is set
Date: January 22, 2016
Time: 9:00 a.m.
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

KENT L. and LINDA DAVIS; 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; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Defendants.

No. 11-2-01925-7

PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERY

LAW OFFICES OF
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

I. INTRODUCTION AND RELIEF REQUESTED

In an ongoing effort to avoid their obligation to respond fully to Plaintiffs' First Interrogatories and Requests for Production (the "Discovery Requests"), first served more than four years ago, Defendants are now withholding thousands of documents—and have redacted hundreds more—based on the "associational privilege." *See* **Ex. A.**[1] Their position is meritless. The associational privilege—a narrow doctrine that applies only to the disclosure of information that imperils a party's right to freedom of association—has no application here.

Washington public policy strongly favors early and broad discovery in civil litigation. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). Yet Defendants have resisted their discovery obligations at every turn. Plaintiffs have regrettably been forced to seek relief from this Court once already, and do so again now because Defendants—all current and former directors and officers of the Olympia Food Cooperative ("OFC")—are withholding responsive material that bears directly on whether Defendants breached their duties to OFC by putting "their own personal and/or political interests" and/or "the interests of another organization above the interests of OFC, to the detriment of OFC." Am. Compl. ¶¶ 59-60.

No Washington court has ever applied the associational privilege to a situation like the one presented here, and Defendants cannot demonstrate otherwise. Defendants have all previously taken a ***public*** stance on boycotting Israel. If, as Defendants contend, they are at risk of being targeted because of that stance (which Plaintiffs deny), such a risk arose long ago when Defendants repeatedly announced on-line and through the press their endorsement of OFC's participation in the Israel Boycott. It is absurd to argue that the

[1] Exhibits A-M are attached to the Declaration of Avi J. Lipman Re Plaintiffs' Second Motion to Compel Discovery ("Lipman Decl.") filed contemporaneously herewith.

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McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

disclosure of documents now—more than five years after the Israel Boycott was unlawfully enacted, and more than four years after the inception of this lawsuit—would create a new risk of reprisal that does not already exist.

To cite one example of Defendants' unreasonable position, Defendants produced an email exchange that appears to be between one of the Defendants and a third party regarding the OFC's boycott of Israel—yet the names of both the sender and the recipient(s) are redacted. *See* **Ex. B**. The entire text of the email reads: "The Food coop I'm on the board of decided to boycott Israeli products."

How can the identity of the sender of such a benign email, which contains nothing but purely public information, be insulated by the associational privilege, which requires Defendants to establish that their "First Amendment rights will be chilled by the requested disclosure"? *Snedigar v. Hoddersen*, 114 Wn.2d 153, 157, 786 P.2d 781, 782 (1990) (analyzing associational privilege as applied to a political party from whom information was requested about the "names of Party members and contributors"). In short, it cannot.

The Court should grant Plaintiffs' Second Motion to Compel, order the production of all documents being withheld under the associational privilege, order the production of clean versions of the presently redacted documents, and award Plaintiffs the legal expenses they are incurring in connection with the instant motion under CR 37(a)(4).

Counsel for the parties complied with CR 26(i) during a phone conference on December 16, 2015, but were unable to reach agreement. Lipman Decl. ¶ 2.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

A. The Co-Op's Boycott Policy and Boycott of Israel

The Olympia Food Co-op ("the Co-op") operates two retail grocery stores in Olympia, Washington. Dkt. 20 ¶¶ 1, 20. The Co-op bills itself as a "collectively

[2] Because the above-captioned case has recently been assigned to a new judge, the following overview and procedural history are offered by way of background.

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MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

managed," relying "on consensus decision making." **Ex. C**. In May 1993, the Co-op's Board adopted a policy establishing the procedure by which the Co-op would recognize product boycotts (the "Boycott Policy" or "Policy"). **Ex. D**. The Policy provides:

> **BOYCOTT POLICY**
>
> Whenever possible, the Olympia Food Co-op will ***honor nationally recognized boycotts*** which are called for reasons that are compatible with our goals and mission statement…
>
> …
>
> In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott … to allow our members to make the most educated decisions possible.
>
> …
>
> A request to honor a boycott … will be referred … to determine which products and departments are affected.... The [affected] ***department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott....***
>
> …
>
> The department manager will post a sign informing customers ***of the staff's decision*** … regarding the boycott. ***If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision …***

Id. (emphasis added). Under the Policy's plain language, the Co-op can honor a boycott only if two tests are met: (1) there is an existing nationally recognized boycott; and (2) Co-op staff approve the boycott proposal by consensus (i.e., universal agreement).

In or around May 2010, members of an anti-Israel group called Boycott, Divestment, and Sanctions ("BDS") proposed that the Co-op boycott Israel. **Ex. E** (May 2010 Board minutes). In July 2010, the Co-op's Board disregarded the Boycott Policy and adopted a resolution approving a boycott of Israeli-made products and divestment from Israeli companies (the "Israel Boycott"). *Id.* (July 2010 Board minutes). In attendance at this Board meeting was a large group of activists from BDS. *Id.* BDS has been heavily involved in the Co-op community for years, and Plaintiffs contend it was the primary driver behind the Board's unlawful enactment of the Israel Boycott.

The Honorable Thomas McPhee (Ret.) previously found—and, indeed, the Co-op has admitted—that the Board enacted the Israel Boycott in July 2010 despite a lack of

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Seattle, Washington 98101-3143
(206) 467-1816

staff consensus. Dkt. 41 at 2; **Ex. F** at 20. Moreover, Judge McPhee also acknowledged that there was no nationally recognized boycott of Israel at the time the Board acted. **Ex. F** at 24. On appeal, the Washington Supreme Court found that this very issue presents a genuine dispute of fact for trial. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). The Israel Boycott has divided the Co-op community and caused members to cancel their memberships or shop elsewhere. *See, e.g.*, **Ex. G** ¶ 12.

After the Board approved the Israel Boycott, several long-time Co-op members urged the Co-op Board to honor the Boycott Policy, as well as the Co-op's Bylaws and Mission Statement by reversing their decision and returning the issue to the staff. *E.g.*, **Ex. H**. The Board refused. **Ex. I**. Instead, the Board attempted to amend the Boycott Policy and thereby attempt to retroactively legitimize the Board's conduct. *E.g.*, **Ex. J**.

B. Plaintiffs' Complaint and Discovery Requests

Plaintiffs are long-time Co-op members and volunteers. *See, e.g.*, **Ex. G** ¶ 2. On September 2, 2011, Plaintiffs filed a verified derivative complaint asserting on behalf of the Co-op that because the Israel Boycott was enacted in a way that violated Co-op rules and procedures, it was void and unenforceable. Dkt. 20. The complaint also alleged that the Board members violated fiduciary duties owed to the entity. *Id.* Plaintiffs' complaint, since amended, primarily seeks declaratory and injunctive relief. *See* Am. Compl.

Relevant to Plaintiffs' claims are, among other things, the Boycott Policy itself, the Co-op's enactment of the Boycott Policy, the Co-op's application of the Boycott Policy since its enactment, the Co-op's actions adopting or rejecting previous proposed boycotts, the involvement of BDS in the Israel Boycott, and other issues related to the Boycott Policy. Accordingly, on September 7, 2011, Plaintiffs served Defendants with the Discovery Requests. *E.g.*, **Ex. A**. Among other things, these requests seek information concerning the membership of the Co-op's Board of Directors and the Co-op staff at the

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600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

time of the boycott, and seek documents and communications concerning the Israel Boycott and the Boycott Policy. *See id.* at 8-11. Plaintiffs also noted depositions of the named Defendants. *E.g.*, **Ex. K**.

C. The Co-op Special Motion to Strike and Subsequent Appeal

On November 1, 2011, Defendants filed a Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss ("Motion to Strike"). Dkt. 41. Under the Anti-SLAPP Statute, Plaintiffs' Motion to Strike triggered an automatic stay of discovery. *See* RCW 4.24.525(5)(c). Plaintiffs opposed the Motion to Strike, arguing, among other things, that Plaintiffs' Complaint was not covered by the Anti-SLAPP Statute and that the Statute was unconstitutional on its face and as applied to Plaintiffs. Dkt. 41.3. Plaintiffs also cross-moved to allow discovery to proceed. Dkt. 42.2.

After full briefing and oral argument on January 13, 2012, Judge McPhee granted the Defendants' Motion to Strike based on the Anti-SLAPP Statute, and accordingly denied Plaintiffs' discovery cross-motion. Dkts. 86, 87. The Court sanctioned Plaintiffs $10,000 for each of the sixteen Defendants—whom Plaintiffs had to name as defendants to properly sue the Co-op's Board—plus attorneys' fees and costs, for a total judgment of $232,325. Dkt. 110. Plaintiffs timely appealed this order and the Court of Appeals affirmed. *See Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014).

On October 9, 2014, the Washington Supreme Court accepted Plaintiffs' petition for review. Plaintiffs argued again on appeal that (1) the Anti-SLAPP Statute did not apply to Plaintiffs' claims, (2) Plaintiffs complaint should not have been dismissed even if the Anti-SLAPP Statute did apply because the undisputed record established that the Defendants breached their fiduciary duties, and (3) the Anti-SLAPP Statute was otherwise unconstitutional on its face and as applied to Plaintiffs.

On May 28, 2015, the Washington Supreme Court reversed and held that the Washington Anti-SLAPP Statute is unconstitutional. *Davis v. Cox*, 183 Wn.2d 269, 295-

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McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
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96, 351 P.3d 862 (2015). In so doing, it found that the record contained disputed facts that must be resolved at trial:

> One ***disputed material fact*** in this case is whether a boycott of Israel-based companies is a "nationally recognized boycott[ ]," as the Cooperative's boycott policy requires for the board to adopt a boycott. CP at 106. The declarations on this fact conflict. *Compare, e.g.*, CP at 348 (Decl. of Jon Haber) ("No matter where they have been pursued, efforts to organize boycotts of and divestment from Israel have failed in the United States. In short, policies boycotting and/or divesting from the State of Israel have never been 'nationally recognized' in this county. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. [Describes examples.]"), *with* CP at 470 (Decl. of Grace Cox) ("[T]he web site of the U.S. Campaign to End the Occupation ... name[s] hundreds of its own U.S. member organizations[ ] as supporters for its campaigns, including boycotts against Motorola, Caterpillar, and other companies in the U.S. and around the world that were profiting from Israel's occupation. The U.S. Campaign now reports about 380 state-level member *organizations* across the country, including five businesses in Olympia, WA."). ***On this disputed material fact, when the superior court resolved the anti-SLAPP motion, it weighed the evidence*** and found the defendants' "evidence clearly shows that the Israel boycott and divestment movement is a national movement." CP at 990.

Davis, 183 Wn. 2d at 282 n.2 (emphases added). Accordingly, the Court struck down the Anti-SLAPP Statute in its entirety, reversed the dismissal of Plaintiffs' claims, and remanded the case to this Court for trial. *Id.* at 295-96. On June 19, 2015, the Supreme Court issued its mandate directing this Court to engage in further proceedings consistent with its opinion. Dkt. 120.

D. Procedural History Following Remand

The Supreme Court's opinion and mandate returned the parties to their respective positions before Defendants filed their Motion to Strike on November 1, 2011. The unconstitutional Anti-SLAPP Statute no longer justifies dismissal of Plaintiffs' complaint; nor does it create an automatic stay of discovery. Accordingly, under the Civil Rules, Plaintiffs' outstanding discovery requests should have been answered no later than 30 days after the mandate issued—if not earlier. Yet, Defendants failed to do so.

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600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

After a protracted exchange between counsel failed to achieve resolution, Plaintiffs filed a motion to compel discovery on September 11, 2015. Dkt. 127. Shortly before that, on September 3, 2015 Defendants filed their second motion to dismiss. Dkt. 124. Defendants' motion lacks merit, and Defendants have previously briefed numerous reasons why Plaintiffs' arguments fail. *See, e.g.,* Dkt. 41.3 at 17-25; *see also* Dkt. 127.

After oral argument before the Honorable Erik Price, this Court granted in part Plaintiffs' first motion to compel on October 2, 2015. Dkt. 132. Defendants were ordered to answer and respond to the Discovery Requests within 30 days, and to produce responsive documents within 45 days. *Id.* Defendants timely provided answers, responses, and objections. **Ex. A**. They subsequently produced several tranches of documents, totaling 1811 pages. Lipman Decl. ¶ 3. To date, despite repeated requests, Defendants have not produced a privilege log. *See* **Ex. L**. (According to Defendants' counsel, a privilege log will soon be produced on a "rolling basis."). *Id.*

During the meet-and-confer conference between counsel, Defendants' counsel informed undersigned counsel that they were withholding between 4,000-5,500 documents based on the associational privilege, and between 3,000-4,500 documents based on the work product doctrine or attorney-client privilege. Lipman Decl. ¶ 4. More recently, however, counsel stated that Defendants are withholding "over 13,000" documents based on one privilege or another **Ex. L**. Undersigned counsel do not know whether the number of documents being withheld based on the associational privilege now exceeds 5,500. Additionally, hundreds of the documents Defendants have produced to date are redacted on the basis of the associational privilege. Lipman Decl. ¶ 4.

In response to a question from undersigned counsel, Defendants' counsel argued that all of the information and documents being withheld are protected from disclosure based on an associational privilege belonging to at least one of the Defendants. Lipman Decl. ¶ 5. While Defendants' counsel also suggested that an associational privilege

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600 University Street, Suite 2700
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belonging to a third party might apply to some or all of the documents/redactions (a proposition Plaintiffs reject), Defendants are apparently "not relying" on such a privilege to withhold any information or documents. *Id.*

During the meet-and-confer, in an effort to avoid further discovery litigation, undersigned counsel inquired as to whether Defendants would stipulate to a protective order to govern the handling of documents and information they claim are protected from disclosure by the associational privilege. Defendants' counsel declined. **Ex. M**. (To be clear, undersigned counsel made this offer in an effort to avoid burdening the Court and parties with motions practice, not because a protective order is warranted under the circumstances.)[3]

On January 8, 2016, Plaintiffs filed an Amended Complaint. Among other things, the Amended Complaint alleges that Defendants have unlawfully "put their own personal and/or political interests above the interests of OFC, to the detriment of OFC," and "put the interests of another organization above the interests of OFC, to the detriment of OFC." Am. Compl. ¶¶ 59-60. Plaintiffs have every reason to believe the materials being withheld by Defendants bear on those very issues. (Due to Defendants' failure to timely produce a privilege log, Plaintiffs do not know precisely what documents Defendants are withholding. This is a problem created solely by Defendants themselves, and the Court should draw inferences in Plaintiffs' favor on the issue.)

Defendants' counsel have confirmed that the information and documents in question are otherwise responsive to the Discovery Requests. Defendants now have the burden of establishing that the disclosure of these documents—which undersigned counsel expects consist mostly of email between Defendants and others regarding the Israel

[3] During the meet-and-confer, Defendants' counsel also denied that information or documents are being withheld based on the "Privacy Rights" referenced in their answers, responses, and objections. **Exs. A, M**. For that reason, Plaintiffs are not currently asking the Court to evaluate that objection, which they maintain lacks merit.

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600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Boycott—would chill Defendants' right to freedom of association. They cannot come close to meeting that burden.

III. STATEMENT OF ISSUES

1. Are Defendants entitled to withhold otherwise responsive information and documents under the associational privilege?
2. Should the Court award Plaintiffs attorneys' fees and costs incurred in bringing this Motion?

IV. EVIDENCE RELIED UPON

Plaintiffs' Motion to Compel relies upon the Declaration of Avi. J. Lipman Re Plaintiffs' Second Motion to Compel, filed herewith, and the record on file in this matter.

V. AUTHORITY AND ARGUMENT

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Putman*, 166 Wn. 2d at 979 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)). "The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman*, 166 Wn. 2d at 979. "This right of access to courts 'includes the right of discovery authorized by the civil rules.'" *Putman*, 166 Wn.2d at 979 (quoting *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 782, 819 P.2d 370 (1991)).

The Washington Supreme Court has already concluded that the statute under which Defendants previously sought dismissal of Plaintiffs' claims, RCW 4.24.525, "invades the jury's essential role of deciding debatable questions of fact [and therefore] violates the right of trial by jury under article I, section 21 of the Washington Constitution. *Davis v. Cox*, 183 Wn.2d 269, 294, 351 P.3d 862, 874 (2015). Yet Defendants are once again acting in derogation of Plaintiffs' constitutional right of access to the courts by withholding thousands of documents under the associational privilege, despite a complete

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McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

lack of evidence that (1) Defendants' right to freedom of association would actually be implicated by disclosure; and (2) the responsive documents and information are available from an alternative source.

A. The Associational Privilege Generally

The associational privilege is designed to guard against a risk that simply does not exist here; i.e., that the "compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *John Doe No. 1 v. Reed*, 561 U.S. 186, 201, 130 S. Ct. 2811, 2821, 177 L. Ed. 2d 493 (2010) (rejecting the associational privilege as invoked by Protect Marriage Washington with respect to the identity of supporters of Referendum 71). Here, of course, the Defendants' identities are already public information and, more importantly, Defendants' support of the Israel Boycott is already public information. Thus any risk that they will face "threats, harassment, or reprisals" as a result of the position they took on OFC's behalf arose years ago; i.e., when Defendants publicly supported OFC's participation in the Israel Boycott.[4] If Defendants ever had an associational right to assert, certainly they waived it long ago. *Desimone v. Shields*, 152 Wash. 353, 361, 277 P. 829, 832 (1929) ("There is nothing in the nature of such constitutional right as is here asserted to prevent its being waived, other right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right.").

The narrow circumstances under which the First Amendment insulates information from discovery were defined by the Unites States Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958). In that case, the NAACP objected to a discovery request by the State of Alabama for the identity of all of its members. The Court found that the NAACP had

[4] The identity of the members of the Co-op's Board, as well as the Israel Boycott itself, have been published on the Co-op's website for years. Other websites and media outlets have reported widely on these facts.

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MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

made an "uncontroverted showing that on past occasions revelation of the identity of its [ ] members had exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462-63. Therefore, the Court found that compelled disclosure would impair the ability of the NAACP to advocate for the beliefs of its members by potentially inducing members to withdraw or dissuading others from joining to avoid reprisal. *Id.*

Here, Plaintiffs have not sued an entity at all; to the contrary, Defendants are all individuals. Moreover, their identity is already known because they have publicly taken a political position—in their capacity as corporate directors and officers of the Co-op—in favor of boycotting Israel. This scenario bears no resemblance to the facts presented in *NAACP*, where the Court found the organization would be imperiled by the disclosure of the identity of members who would otherwise have remained anonymous.

Since *NAACP*, the vast majority of courts have recognized that a party invoking the associational privilege must demonstrate an "*objectively reasonable probability* that disclosure will chill associational rights, i.e. that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests." *In re Motor Fuel Temperature Sales Practices Litig.*, 707 F. Supp. 2d 1145, 1153 (D. Kan. 2010) (emphasis added); s*ee, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147, 1162-63 (9th Cir. 2010) (finding chilling effect only after defendants several declarations from members attesting to the impact that disclosure would have on their associational rights); *United States v. Comley*, 890 F.2d 539, 544 (1st Cir.1989) (finding that petitioner failed to make prima facie showing of associational privilege where he "made only general allegations concerning the harassment or harm that will result to his associates if their identities indeed are revealed by the tape recordings").

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MCNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
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Given that Defendants' identity and support for OFC's participation in the Israel Boycott have been public information for years, Defendants cannot show an "objectively reasonable probability" that their position will change in any way if the materials are disclosed.

B. The Associational Privilege in Washington State

In Washington State, courts analyze application of the associational privilege under a two-part framework. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 159 (1990). First, the party asserting the privilege must make a prima facie showing that ***his or her individual*** First Amendment rights would be chilled by the requested disclosure. *Id.* ("[T]o assert an associational privilege, a party must show that ***its*** First Amendment rights will be chilled…") (emphasis added). If such a showing is made, the Court must then balance this First Amendment claim against the opposing party's need for the information sought. *Id.* Here, Defendants' position fails at both stages of the analysis.

1. Defendants Cannot Show Their Rights Will Be Chilled

Defendants incorrectly assert that all "[c]ommunications involving the 'Boycott, Divestment, and Sanctions' ('BDS') movement to boycott Israeli products in support of Palestinian rights are protected by the associational privilege of the First Amendment." **Ex. A.** ***First***, Defendants' statement that the discovery requests were served by litigants who are opposed to the Israel Boycott or associate with organizations that are against BDS activism is completely irrelevant. The mere fact that the Plaintiffs might share different political views from Defendants in no way implies that Defendants have been or will be subjected to harm.

Second, Defendant's attempts to prove risk to BDS members based on the Lawfare Project's ("Lawfare") opposition to the Israel Boycott is ludicrous. Defendants do not claim (and certainly cannot demonstrate) that Lawfare has threatened or harassed anyone.

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600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

Ironically, Defendants appear to be suggesting they are at risk because Lawfare exercises the very constitutional rights that Defendants are invoking.

Third, Defendants' assertion that a professor lost his job because of his personal tweets criticizing the Israeli government is too attenuated of a connection to the BDS movement to show probability of a chilling effect. Defendants do not claim that the professor was a member of BDS or that his tweets were related to boycotting Israel boycott. Defendants cannot reasonably ask the Court to infer the risk of a chilling effect from these circumstances. More importantly, any such risk arose long ago, when Defendants publicly identified themselves as sympathizers of BDS and the Israel Boycott (apparently without reprisal over the course of more than five years). This strongly undercuts argument that any Defendant faces a risk of harm as the result of his participation in the BDS movement.

Defendants have further undermined their own position by rejecting Plaintiffs' reasonable offer of a stipulated protective order. Courts have recognized that limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement. *Perry*, 591 F.3d at 1160, n6; *see also Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 257, 654 P.2d 673, 690 (1982) aff'd, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (finding plaintiff failed to show some probability that requested disclosure would chill its first amendment rights in light of court's protective order that limited use of documents to the litigation). Yet Defendants have rejected that possibility, apparently due to concerns that such an order would "jeopardize the privileges we are asserting." **Ex. M**. Tellingly, Defendants have thus far offered no explanation as to why a protective order is insufficient to guard against the risk they inaccurately claim would arise as the result of disclosure.

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McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

2. *The Court Should Compel Production Even if the Privilege Applies*

Even if Defendants could establish that particular types of documents are prima facie privileged (they cannot), the Court should compel production because the balance of interests favors discovery. *See Snedigar*, 114 Wn.2d. at 164-65 (noting that "the trial court must balance the party's need for the information against the opposing party's claim of privilege"). Here, Plaintiffs can overcome any potential associational privilege of Defendants because (1) the information Plaintiffs seek is relevant to both Plaintiffs' claims and Defendants' raised defenses, and (2) Plaintiffs cannot obtain the information by other means. *Id.* at 164-65.

VI. CONCLUSION

For the reasons stated above, Plaintiffs hereby request that the Court grant Plaintiffs' Second Motion to Compel, order the production of all documents being withheld under the associational privilege, order the production of clean versions of the presently redacted documents, and award Plaintiffs the legal expenses they are incurring in connection with the instant motion under CR 37(a)(4).

DATED this 14th day of January, 2016.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____
Robert M. Sulkin, WSBA No. 15425
Avi J. Lipman, WSBA No. 37661

Attorneys for Plaintiffs

LAW OFFICES OF
McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816

DECLARATION OF SERVICE

On January 14, 2016, 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:

Bruce E. H. Johnson, WSBA No. 7667
Angela Galloway, WSBA No. 45330
Ambika Kumar Doran, WSBA No. 38237
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Email: brucejohnson@dwt.com
angelagalloway@dwt.com
ambikadoran@dwt.com
lesleysmith@dwt.com (Asst.)

- ☑ Via Messenger
- ☐ Via U.S. Mail
- ☐ Via Overnight Delivery
- ☐ Via Facsimile
- ☐ 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 14th day of January, 2016, at Seattle, Washington.

Lisa Nelson, *Legal Assistant*

LAW OFFICES OF
McNAUL EBEL NAWROT & HELGREN PLLC
600 University Street, Suite 2700
Seattle, Washington 98101-3143
(206) 467-1816