☐ EXPEDITE
☐ No hearing is set
√ Hearing is set
Date: January 13, 2011
Time: 11 a.m.
Judge/Calendar: Hon. Paula Casey/
Hon. Christopher Wickham

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,

Plaintiffs,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Defendants.

No. 11-2-01925-7

PLAINTIFFS' BRIEF OPPOSING DEFENDANTS' SPECIAL MOTION

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I. INTRODUCTION AND RELIEF REQUESTED

This case is not about the attempted suppression of speech or the right to petition. It is about the conduct of current and former members of the Board of Directors (the "Board") of the Olympia Food Cooperative (the "Co-op"), who ignored the Co-op's governing rules, procedures, and principles for the purpose of making a personal political statement. Defendants admit as much in the first paragraph of their opening brief by arguing that Plaintiffs' suit

> ...seeks to punish the Board members of a non-profit corporation for **their** political speech and petitioning, and to chill **them** from exercising **their** First Amendment rights in the future.

Mot. at 1 (emphasis added). The question presented, however, is not whether the individual Board members have a right to speak: Without question, they do. It is whether those Board members can force the Co-op to speak for them by ignoring the very rules and procedures that determine when the Co-op can speak and what it can say. The answer to that question is "no."

The Co-op is not an instrument of speech for individual Board members. Rather, the Co-op may only speak when the Board follows its established rules and procedures. In this instance, it failed to do so in at least two ways: First, the Board ignored the explicit requirement—set forth in the Co-op's "Boycott Policy"—that all boycotts honored by the Co-op be "nationally recognized." The Board concedes it did not consider this issue—perhaps because it recognizes that there is no "nationally recognized" boycott of Israel. Second, the Board instituted the Israel Boycott and Divestment resolution/policies over objections of the Co-op Staff. As its plain language demonstrates, the Boycott Policy at issue vested exclusive authority in the Staff, not the Board, to decide by consensus whether to boycott.

Beyond its faulty factual premises, Defendants' motion fails because, *inter alia*, (1) the anti-SLAPP statute itself is unconstitutional under the Washington State Constitution because it violates the separation of powers doctrine, contradicts the Civil Rules, and impermissibly restricts a plaintiff's right of access to the courts; and (2) even if

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the anti-SLAPP statute is constitutional, Plaintiffs have satisfied their burden of proof. In fact, Defendants all but concede they violated Boycott Policy and instead argue procedural issues unrelated to the anti-SLAPP statute. Their arguments misstate the applicable law and ignore key facts.

II. RESTATEMENT OF FACTS

A. The History of the Co-op's Boycott Policy

In May 1993, the Board adopted a policy to govern the process by which the Co-op recognizes boycotts of certain products (the "Boycott Policy"). The Co-op Staff was vested with authority to decide when and under what circumstances the Co-op would join nationally recognized boycotts. The Boycott Policy, which makes no mention of the Board whatsoever, reads in relevant part as follows:

> 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…
>
> A request to honor a boycott may come from anyone in the organization. The request will be referred to the Merchandising Coordinator (M.C.) to determine which products and departments are affected. The M.C. will delegate the boycott request to the manager(s) of the department which contains the largest number of boycotted products. ***The department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott…***
>
> The department manager will post a sign informing customers of the staff's decision and reasoning regarding the boycott. ***If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision …***

Ex. I (emphasis added).[1] In short, in order for the Co-op to honor a boycott, two tests must be met: (1) the boycott must be nationally recognized; and (2) the Co-op staff must approve the proposal to boycott by consensus (*i.e.*, universal agreement). Here, neither of these tests was satisfied.

[1] Exhibits A–X referenced herein are attached to the Declaration of Harry Levine ISO Defs.' Sp. Mot. ("Levine Decl.").

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B. There Has Never Been a Nationally Recognized Boycott of Israel

Defendants admit the Board did not consider the requirement that the Co-op honor only "nationally recognized" boycotts. As Defendant Mr. Levine states: "The Board considered the ***international movement*** to boycott Israel … and approved the boycott proposal in solidarity with this ***international boycott movement***." Levine Decl. ¶ 25 (emphasis added). Of course, that is not the standard that must be applied under the Boycott Policy.[2] *See* Declaration of Tibor Breuer ("Breuer Decl.") ¶ 4; Declaration Jeffrey Trinin ("J. Trinin Decl.") ¶ 3; Declaration of Susan Trinin ("S. Trinin Decl.") ¶ 3. Michael Lowsky—a member of the Co-op for 23 years and a Staff member for 16 years—states no evidence was ever presented to the Co-op Staff that a boycott of and/or divestment from Israel were "nationally recognized." *See* Declaration of Michael Lowsky ("Lowsky Decl.") ¶ 5. Rather, the proposal was presented to the Co-op Staff as an opportunity to be the "***first*** grocery store to publicly recognize a boycott and/or divestment from Israel." (Emphasis added). *Id.*

Had it abided by its obligations, the Board would have readily determined that boycotting and divesting from Israel are nationally rejected—not nationally recognized—policies. *See* Declaration of Jon Haber ("Haber Decl.") ¶ 5. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. *Id.* These include the Madison Market (Central Co-op) in Seattle; the Port Townsend (Washington) Food Co-op; the Davis (California) Food Co-op; and the Sacramento (California) Natural Foods Co-op. *Id.*

No matter where they have been pursued, efforts to organize boycotts of and divestment policies against Israel have failed in the United States. Haber Decl. ¶ 6. Defendants provide no evidence to the contrary. Indeed, it is clear that boycotting and divesting from Israel were not nationally recognized policies at the time the Board

[2] Additionally, the Co-op's own proposal to the Staff in support of the Israel Boycott and Divestment policies concedes that in 2005, organizations in ***Palestine*** called for a boycott of Israeli goods and investments—not organizations in the United States. See Ex. L.

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unlawfully adopted them in July 2010.[3] The bottom line is that both the Staff and the Board have testified that the Board did not even apply the "nationally recognized" standard.

C. Decisions by Consensus at the Co-op Require Universal Assent

At the heart of the Co-op's system of governance is the principle of "consensus decision making." Ex. A. Indeed, the organization explicitly relies on "consensus decision making" at all levels of its operations. *See, e.g., id.*; Ex. B at ¶¶ I(2), III(6), III(11), and III(12); Ex. H at 3 ("Staff Structure" and "Staff Decision Making"); Ex. I. By definition and in practice, "consensus" at the Co-op means that (1) all persons empowered to decide on a particular proposal must assent in order for the proposal to pass; and (2) any one such person may "block" the proposal from passing. In the words of a former Board Member:

> The Co-op staff collective uses a consensus-based decision-making process. No group decision is made until it has the support of all members of the collective. ***Any individual collective member may block consensus at any time. In fact, if an individual staff member cannot live with a decision that is about to be made, it is his/her responsibility to block consensus***...

Ex. BB (emphasis added). In this case, multiple members of the Co-op Staff objected to the Israel Boycott and Divestment resolution/policies. *See* Lowsky Decl. ¶ 5. Defendants concede this point. *See* Levine Decl. ¶ 24.

D. Procedural History of the Israel Boycott and Divestment Policies

1. The proposal is introduced to and rejected by Co-op staff

In or around March 2009, a member of the Co-op proposed that OFC boycott products produced in Israel and divest from investment in Israel. Levine Decl. ¶ 20. The

[3] While Defendants direct the Court's attention to the endorsement of Boycott, Divestment and Sanctions ("BDS")—an international alliance of anti-Israel political organizations—by certain nonprofit organizations (*see, e.g.*, Mot. at 7), such evidence is readily distinguishable from organizations, businesses, and/or institutions that actually boycott and/or have divested from Israel. For example, Defendants refer to the campaign to convince TIAA-CREF to divest from companies that do business in the West Bank and Gaza Strip—which has failed. Mot. at Ex. C. But the endorsement by BDS sympathizers of a campaign aimed at a major financial institution provides no evidence of any American entity actually boycotting and/or divesting from Israel. Further, divesting from companies that do business in the West Bank and Gaza Strip differs substantially from boycotting and/or divesting from Israel itself. *See* Haber Decl. ¶ 7. The fact remains that TIAA-CREF has not divested from Israel and has no plans to do so—despite the fact that it has divested from at least one country, Sudan, in response to political pressure. *Id.* ¶ 8.

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proposal was discussed among Co-op Staff members, who failed to reach consensus regarding their position on the proposal. *Id.* Then, in an unprecedented step, Mr. Levine (at the time, Staff representative to the Board) submitted a Board-sponsored version of the proposal to the Staff. Lowsky Decl. ¶ 4. The involvement of the Board in such a boycott proposal was inconsistent with prior boycotts, the plain language of the Boycott Policy, and the Staff's understanding of the Boycott Policy. *Id.*

Co-op Staff were given three options with regard to the proposal: (a) "consent"; (b) "stand aside"; or (c) "take to meeting." *Id.* ¶ 5. After at least one Co-op Staff member selected "take to meeting," the proposal was sent to Co-op Staff "work group meetings" (how and where the Staff collective makes decisions). *Id.* There were approximately 10–15 Co-op Staff members at each meeting, which took place in or around the beginning of July 2010. *Id.* Among the Staff members who attended the work group meetings, there were a number of "firm blocks," meaning certain members were clearly against the proposal. *Id.* Because it only takes one Co-op Staff member to block consensus, it was clear that the Co-op Staff did not support the Israel boycott proposal. *Id.* By failing to reach consensus, the Staff rejected the Board's attempt to boycott Israel. *Id.* No evidence was presented to Staff at the work group meetings, or at any other time, that a boycott of and/or divestment from Israel were "nationally recognized." Levine Decl. ¶ 5.

2. The Board ignores the Staff and imposes its views on the Co-op

After the "work meetings," the Board was notified of the lack of consensus among the Co-op Staff regarding Mr. Levine's proposal. Lowsky Decl. at ¶ 6. It made no additional effort to revise the proposal in response to Staff objections. Instead, without due authority, in violation of the Co-op's governing rules, procedures, and principles, the Board decided to adopt the Israel Boycott and Divestment resolution/policies in July 2010.[4] *Id.* The Co-op Staff never consented to this action. *Id.* ¶ 7. As Mr. Levine admits, "a few Staff members

[4] Defendants argue the Board was empowered by the Staff's lack of consent to "resolve the conflict." As discussed at greater length below, this is incorrect for numerous reasons. Among them is that the Co-op's Bylaws only allow the Board to "resolve organizational conflicts ***after all other avenues of resolution have been exhausted***"—which they were not. Ex. B at ¶ 16 (emphasis added).

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would not agree to the boycott and would not step aside to permit a consensus." Levine Decl. ¶ 24.

3. Community protest and requests for remedial action

The Co-op community quickly caught wind of the Board's improper action. J. Trinin Decl. ¶ 5; S. Trinin Decl. ¶ 5; Declaration of Kent Davis ("K. Davis Decl.") ¶ 5; Declaration of Linda Davis ("L. Davis Decl.") ¶ 5; Declaration of Susan Mayer ("Mayer Decl.") ¶ 4; Breuer Decl. ¶ 5. Prompt requests were made to rescind the policies, and the Board faced criticism for its procedural violations and petitions were presented to rescind the resolution/policies. *Id.* It soon became clear that the Board had no intention of taking appropriate remedial action. Breuer Decl. ¶ 6. In an effort to avoid litigation, Plaintiffs sent a letter, dated May 31, 2011, to each of the Defendants setting forth their position. *Id.* The letter reads in relevant part as follows:

> At this point, we are left no choice but to demand in no uncertain terms that OFC act in accordance with its rules and bylaws and rescind the Israel Boycott and Divestment policies. Should new proposals to enact such policies be pursued at a later date in accordance with OFC rules and regulations, ***we would be prepared to respect the outcome of that process***.

Ex. AA (emphasis added).[5] The Board rejected Plaintiffs' request (Ex. X) and Plaintiffs filed suit.

E. Losses as a Result of the Israel Boycott and Divestment Policies

In the wake of the Board's unlawful enactment of the Israel Boycott and Divestment Policies, a number of members either cancelled their memberships or otherwise stopped shopping at the Co-op in protest. *See, e.g.,* K. Davis Decl. ¶ 13; L. Davis Decl. ¶ 13. Plaintiffs Linda and Kent Davis, who previously and routinely shopped at the Co-op have not done so since the summer of 2010. *Id.* Plaintiff Susan Mayer, who previously and routinely shopped at the Co-op, has not done so since the summer of 2010. Mayer Decl. ¶ 12. Others have followed suit or resigned. Breuer Decl. ¶ 3. Indeed, the Board expected losses when it voted to boycott. Ex. N. But for the Board's misconduct, these membership cancellations and reduced sales would not have occurred.

[5] Exhibits AA–CC referenced herein are attached to the Declaration of Avi J. Lipman ("Lipman Decl.") filed herewith.

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Additionally, the Co-op has lost revenue as a result of failing to offer Israeli-made products to customers who wish to purchase them. While it is impossible, without access to discovery, to quantify the resulting monetary losses to the Co-op, there is ample evidence that business has been lost as a result of the Board's failure to follow the Co-op's governing rules and procedures.

III. RESTATEMENT OF ISSUES

1. Is the anti-SLAPP statute unconstitutional under the Washington Constitution and *Putman v. Wenatchee Valley Medical Center* because it conflicts with the Civil Rules, violates the separation of powers doctrine, and restricts access to the courts?

2. Notwithstanding constitutional questions, does the Defendants' failure to abide by the governing rules, procedures, and principles of the Co-op—specifically the "nationally recognized" and "Staff consensus" standards set forth in the Boycott Policy—establish that Plaintiffs have met their burden of proof under the anti-SLAPP statute?

3. Have Plaintiffs satisfied all relevant procedural and statutory requirements?

IV. ARGUMENT

A. The Anti-SLAPP Statute Does Not Apply Here Because This Case Deals with the Violation of Co-op Rules

The anti-SLAPP statute, enacted in its current form in 2010, does not apply to the case at hand. Indeed, Plaintiffs' motion is predicated on the incorrect assumption that the case seeks to punish the individual Defendants' speech. That is incorrect. Defendants are free to speak as they wish. What they cannot do, however, is violate the Co-op policies and procedures. Defendants admit that "the anti-SLAPP Statute, by its own clear terms, protects lawful conduct in furtherance of protected speech." *See* Mot. at 6. Here, the Board's conduct was not lawful. The anti-SLAPP statute was designed to stop meritless suits targeted to prevent speech, not suits designed to hold Board members accountable for failing to follow the rules.

B. The Anti-SLAPP Statute Is Unconstitutional

Recently, the Washington Supreme Court struck down a statute analogous to the one at issue here, as violative of the State Constitution. In *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009), the Court made it clear that: (1) "[r]equiring plaintiffs to submit evidence supporting their claims prior to the

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discovery process violates the plaintiffs' right of access to courts," *id.* at 979; and (2) "[i]f a statute appears to conflict with a court rule" and "cannot be harmonized" with it, "the court rule will prevail in procedural matters," *id.* at 980-81. For the reasons articulated in *Putman*, the recently-enacted Washington anti-SLAPP statute (RCW 4.24.525) violates the Washington Constitution by (1) violating the separation of powers doctrine; and (2) denying individuals the right of access to the courts. The recently-enacted anti-SLAPP statute is more violative of the State Constitution than the statute in *Putman*, because not only does it restrict discovery, it contains a heightened burden of proof standard to avoid dismissal.[6] Both the heightened burden of proof provision and the limits on discovery violate the State Constitution.

1. RCW 4.24.525 violates the separation of powers doctrine

a. Legislatively-created procedural rules may not conflict with court rules

The Washington Constitution places some "fundamental functions...within the inherent power of the judicial branch." *Putman*, 166 Wn.2d at 974. Pursuant to this doctrine of separation of powers, one such "fundamental function[]" of the Judicial Branch is the "power to promulgate rules" for operation of the civil courts. *Id.* Accordingly, "[i]f a statute appears to conflict with a court rule, [the Washington Supreme Court] will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Id.*

In *Putman*, a medical malpractice action, plaintiff appealed on constitutional grounds the dismissal of her case for failure to comply with RCW 7.70.150, which required that she file a signed certificate of merit from a health care provider in conjunction with her complaint—and therefore prior to the commencement of discovery. The Washington Supreme Court held, *inter alia*: (1) the certificate of merit requirement violated Putman's right of access to the courts; (2) the statute mandating the certificate of

[6] Washington anti-SLAPP Statute and the Court's interpretation of its Constitution are different than those in other states.

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merit conflicted with the Civil Rules regarding pleadings; and (3) the statute violated the separation of powers doctrine. 166 Wn.2d at 985. Thus the Court concluded it "must strike down [RCW 7.70.150] because it violates the right of access to courts and conflicts with the judiciary's inherent power to set court procedures." *Id.*

b. The anti-SLAPP statute conflicts with numerous Civil Rules

As in *Putman*, RCW 4.24.525 conflicts with a number of court rules that define restrictions and requirements regarding when a claim may proceed to discovery. These include the pleading, amendment, dismissal, and evidentiary burdens of CR 8, 11, 12(b), 15, and 56. In short, the anti-SLAPP statute conflicts fundamentally with the manner in which the Civil Rules determine whether a claim may proceed to discovery—just as the statute did in *Putman*. *See* 166 Wn.2d at 983 ("[t]he certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence. For that reason, [it] conflicts with the civil rules regarding notice pleading—one of the primary components of our justice system"). That language applies with equal vigor to the statute at hand. The judiciary has determined that a case may proceed to trial if there is even only one material fact in dispute, even if the plaintiff's case is weak. CR 56. Of course, the anti-SLAPP statute creates a much higher burden than the judicially-created burden. Additionally, the prohibition on discovery created by the legislature in the anti-SLAPP statute is in direct contravention of the right to full discovery contemplated by the judiciary. *See* CR 26–34. Under *Putman*, the legislature may not interfere with the process of judicial function.[7]

2. The offending provisions of RCW 4.24.525 are procedural

The judiciary has the right to determine its procedural rules. Because of these conflicts, the relevant question becomes whether the conflicts are procedural or substantive. If procedural, the Washington doctrine of separation of powers requires that the Judicial Branch (and the Civil Rules) prevail and the statute be struck down. *See Putman*, 166 Wn.2d at 980. The offending provisions of the anti-SLAPP statute involve

[7] Additionally, the provision requiring a litigant who may have a meritorious claim to pay attorney fees and a $10,000 penalty clearly has a chilling effect, further denying court access.

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procedural rules, conflict with the Civil Rules, and are therefore unconstitutional. As the Ninth Circuit Court of Appeals has observed in connection with California's similar (though not identical) anti-SLAPP statute, the statute's right to attorney fees is a substantive right, while the statute's discovery-limiting provisions are procedural and result in "a direct collision" with procedural rules regarding discovery and Fed. R. Civ. P. 56. *See Verizon Delaware, Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003).[8] Because Washington's heightened burden of persuasion conflicts with the notice pleading procedures of CR 8, the pleading rules of CR 11, the dismissal rules of CR 12, the amendment rules of CR 15, and the burden of proof standards of CR 56, the statute is unconstitutional.[9] Additionally, the statute directly conflicts with the right to full discovery under CR 26–34, 56(6).

3. RCW 4.24.525 violates the constitutional right of access to the courts

"The people have a right of access to courts; indeed, this single right is 'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman*, 166 Wn.2d at 979 (quoting *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). "Th[e] right of access to courts 'includes the right of discovery authorized by the civil rules.'" *Id.* The anti-SLAPP statute violates this right of access because it places a heightened evidentiary burden on a plaintiff before he or she becomes entitled to the general discovery contemplated by the Civil Rules and protected by the Washington

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[8] Moreover, as discussed above, the Washington anti-SLAPP statute conflicts with CR 8, CR 11, CR 12, CR 15, and CR 56 by requiring "clear and convincing evidence" of a probability of prevailing on a claim. The California statute at issue in *Verizon Delaware* did not raise these conflicts because the burden under the California statute is not nearly so high as the burden under the Washington statute; rather, it requires only that the plaintiff state and substantiate a legally sufficient claim of minimal merit. *See New York Studio v. Better Business Bureau*, No. 3:11-CV-05012, 2011 WL 2414452, at *3 (W.D. Wash. June 13, 2011) (noting that Washington burden is higher than California burden); *see also Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010) (noting California's "minimal merit" standard).

[9] The legislature is not without ability to protect substantive interests. For example, the legislature could create a substantive affirmative defense as a matter of law, that could then be asserted as a defense as a matter of law under CR 12(b)(6). In the context of consumer protection, the legislature has instituted fee shifting and treble damages—substantive rights that protect particular interests and do not conflict with the Civil Rules. *See* RCW 19.86 *et seq.*

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Constitution. Put differently, the anti-SLAPP statute permits the dismissal with prejudice of claims that have merit before any right to full discovery and trial.

In *Putman*, the Washington Supreme Court held that a statutory "certificate of merit" requirement violated the right of access because "[o]btaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when [witnesses] can be interviewed and [relevant documents] reviewed." 166 Wn.2d at 979. The Court therefore struck down the law. Here, without the right to complete discovery, the full merits of plaintiffs' claims cannot be presented. Indeed, Plaintiffs at this point have no idea what information Defendants or other witnesses have on issues related to this litigation. They cannot know until they obtain full discovery.

The requirement that a plaintiff establish by clear and convincing evidence the probability of prevailing on the merits is in direct conflict with burden of proof to be met to proceed to trial under CR 56(c). .Under *Putman*, this denies Plaintiffs full access to the courts. Under CR 56, even after full discovery, a plaintiff's burden is much lower than that imposed by the anti-SLAPP statute. Moreover, the Civil Rules permit a plaintiff to obtain additional discovery in response to a motion under CR 56 if the plaintiff cannot yet present facts essential to justify his claim. *See* CR 56(f). Once again, the anti-SLAPP statute conflicts with this provision.

4. The "good cause" provision does not cure conflicts with the Civil Rules

The court in *Putman* found that despite the "good cause" provision in the statute at issue there, the statute was still unconstitutional.[10] The anti-SLAPP Statute fairs no better. Washington's constitutional right of access is not preserved by the statute's "good cause" discovery provision. The Washington Constitution does not protect a plaintiff's right to minimal discovery or a plaintiff's right to attempt a good cause showing for limited specified discovery. Rather, the right of access includes a "***broad*** right of discovery" that

[10] The statute at issue in *Putman*, RCW 7.70.150, also contained a "good cause" exception that provided for a 90-day extension for filing the certificate of merit. That provision did not cure its constitutional defects, however, even though 90 days is clearly enough time within which to begin conducting discovery.

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is commensurate with the Civil Rules. *Puget Sound Blood Ctr.*, 117 Wn.2d at 782 (emphasis added). "It is common legal knowledge that ***extensive*** discovery is necessary to effectively pursue ... a plaintiff's claim." *Id.* (emphasis added). The constitutional right of access is therefore "implicated whenever a party seeks discovery" and allows only the "limited nature of the exceptions to broad discovery found in CR 26(c)." *Id.*

CR 26 through CR 37 allow for various forms of discovery at any time during the pendency of an action prior to the discovery cut-off. If a party wants to avoid discovery, the burden is on the party seeking to avoid discovery to move for a protective order under CR 26(c). The Court will deny the motion and permit discovery unless the moving party can (1) make a showing of good cause and (2) establish that the discovery sought presents "annoyance, embarrassment, oppression, or undue burden or expense." *See* CR 26(c). The anti-SLAPP statute flips this burden on its head. The statute's default rule is a stay of all discovery. *See* RCW 4.24.525(5)(c). To lift the stay, the party seeking discovery must make a showing of good cause. Moreover, the statute provides for only "specified discovery," *see* RCW 4.24.525(5)(c)—a quantum of discovery far less than the broad discovery permitted by CR 26(b)(1). A plaintiff rarely knows at the early stages of a lawsuit what information a defendant or other witnesses possess, making targeted discovery requests less than what is necessary to defend motions to dismiss. Even if one could interpret the statute's provision for "specified discovery" on a showing of "good cause" to be consistent with the full discovery required by the Civil Rules, such an interpretation would not save the statute from conflict with the Civil Rules. Under the statute, regardless of whether the plaintiff is permitted discovery, the claim is dismissed unless the plaintiff can show by "clear and convincing evidence" a probability of prevailing. Indeed, the "good cause" provision does not cure the heightened burden of proof problem inherent in the statute that is in direct conflict with CR 56.

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C. Defendants' Motion Must Also Be Denied on the Merits

Even if the Court determines that the anti-SLAPP statute is constitutional, Defendants' motion should be denied. The relevant burden on Plaintiffs—to establish by "clear and convincing evidence a probability of prevailing on the merits of their claim"—is less than "more probable than not" and clearly met by Plaintiffs. *C.f. State v. Riofta*, 166 Wn.2d 358, 378, 209 P.3d 467, 478 (2009) ("Reasonable probability" standard is less stringent a "preponderance of the evidence" standard). Indeed, Defendants essentially concede the foundation of Plaintiffs' Complaint: The Board's implementation of the Israel Boycott and Divestment resolution/policies failed to comply with the applicable rules.[11]

1. Defendants violated the Boycott Policy

a. The Staff consensus and "nationally recognized" standards

Without a doubt, Plaintiffs have established by clear and convincing evidence a probability that Defendants violated the rules and policies of the Co-op. In fact, Defendants admit this, which is why they must rely on procedural arguments to seek dismissal of the case. Defendants admit that the Israel Boycott and Divestment resolution/policies were not adopted by consensus, in violation of the first test of the Boycott Policy. *See, e.g.,* Levine Decl. ¶ 24 ("[A] few Staff members would not agree to the boycott and would not step aside to permit a consensus."); *see also* Lowsky Decl. ¶¶ 5–6. Likewise, Defendants admit they did not find a nationally recognized boycott of Israel. Rather, they only relied on the alleged existence of "an international movement." Levine Decl. ¶ 24. Of course, even Defendants must concede that is not the standard. Two members of the Board at the time the Boycott Policy was enacted have stated the need to meet both prongs. Breuer Decl. ¶ 4; S. Trinin ¶ 3. In sum, because the Board failed to comply with the Boycott Policy, Plaintiffs' claims meet the burden of proof standard test set forth in the statute.[12]

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[11] Because Plaintiffs have established a "probability of prevailing on the merits of their claim," Defendants' alternative motion under CR 12(b)(6) must also be denied.

[12] Plaintiffs reserve the right to bring a motion arguing that Defendants' motion on the anti-SLAPP Statute is bereft of evidence, and is "frivolous and meant to delay."

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2. The Board lacks authority to intervene in a boycott decision

In an effort to get around the fact that they ignored rules and policies, Defendants claim that the Board had authority to enact the boycott in order to resolve Staff gridlock under § 3 ¶ 13 of the Bylaws. That after-the-fact argument fails, because (1) the Boycott Policy does not give it that right (Ex. I); (2) even if the Board were permitted to resolve boycott-related conflicts among the staff, the Israel Boycott still failed the "nationally recognized" test (*id.*); and (3) the Board failed to exhaust "all other avenues of resolution" before enacting the resolution/policies (Ex. B).

a. Boycott policy requires consensus and none existed

Defendants claim that the Board maintains "ultimate authority to act when the Staff cannot reach consensus" is contrary to the plain language of the Boycott Policy, which confirms that the Staff's consensus action (or inability to reach consensus) is final. The Policy provides that the

> department manager will make a written recommendation to **the staff who will decide by consensus whether or not to honor a boycott.**

Ex. I (emphasis added). The Policy goes on to state the Co-op will "post a sign informing customers of the staff's decision" and that if "the staff decides to honor a boycott, the [Co-op] will notify the boycotted company or body of our decision." *Id.* Wholly absent from the Boycott Policy is any provision providing for Board reconsideration or intervention should the Staff fail to reach consensus.

If there is any doubt on this point, Board members who voted in 1993 on the Boycott Policy have stated in no uncertain terms that the intent of the policy is for the Staff to decide by consensus—not the Board. Tibor Breuer states as follows:

> **In the early 1990s, I was a member of the Board of Directors of the Co-op. I am familiar with the enactment in May 1993 of the Co-op's Boycott Policy. Underlying the adoption of the Boycott Policy were several intentions, among them that (1) the Co-op would be a follower with regard to boycotts that were already recognized—not a leader; (2) the prior recognition of such boycotts would be national in scope; and (3) authority to recognize boycotts would reside with the Co-op Staff—not the Board.**

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Breuer Decl. ¶ 4 (emphasis added). *See also* J. Trinin Decl. ¶ 3; S. Trinin Decl. ¶ 4.

Defendants' claim that the Board retained the power to impose a boycott over the protestations of a fractured Staff is an unsuccessful effort at post hoc justification. In fact, the Board's own report to the Staff states: "The Boycott Process calls for boycotts to be approved by Staff consent." Levine Decl. ¶ 23, Ex. L. Nothing in that report expresses the Board's later-adopted position—that absent consensus the Board can decide to impose its own will. The original policy adopted in 1992, and upon which Defendants rely, in categorical terms states: "If a boycott is to be called, it should be done by consensus of the staff." *See id.*, Ex. Z at 2. Again, there is no mention of the Board. Indeed, even Mr. Levine concedes that "the [boycott] policy establishes procedures for staff review and decision on boycott requests." Levine Decl. ¶ 19.

Defendants' citation to irrelevant prior situations offers them no support. *See id.* ¶¶ 15-16; *see also* Mot. at 19. Tellingly, none of these examples involved a boycott or a stated policy requiring Staff consensus. Nor did any of them involve a separate provision such as the "nationally recognized" standard or board members who voted on the policy claiming the Board acted improperly—as is the case here. Corporate rules and regulations are interpreted like contracts. *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wash. App. 175, 181, 139 P.3d 386 (2006). Accordingly, where corporate rules and regulations "provide[] a general and a specific term, ***the specific controls over the general.***" *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) (emphasis added). Here, the specific terms of the Boycott Policy do not provide for Board intervention.

b. Section 13 of the Bylaws does not help Defendants, because it fails to deal with the second prong of the boycott test

For a boycott to be implemented, both prongs of the Boycott Policy must be met. *See* Breuer Decl. ¶ 4; J. Trinin Decl. ¶ 3; S. Trinin Decl. ¶ 3. Thus, even if the Board has the authority to override the Staff's blocking of a boycott proposal, and it does not, Defendants' reliance on § 3 ¶ 13 of the Bylaws does not give it authority to ignore the

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second prong of the boycott test—*i.e.*, national recognition. In fact, the Board adopted the resolution/policies while knowingly not addressing this prong. Lowsky Decl. In short, even under Defendants' misguided usage of § 3 ¶ 13 of the Bylaws, their position fails.

c. Defendants failed to exhaust all remedies as required by the Bylaws on which they rely

In fact, even if somehow § 3 ¶ 13 of the Bylaws did apply to allow the Board to ignore the Staff block, and allow the Board to ignore the nationally-recognized requirement, Defendants still cannot prevail. Indeed, Defendants conveniently ignore the language of ¶ 13 of § 16 that states the Board may "resolve organizational conflicts **after all other avenues of resolution have been exhausted.**" (Emphasis added). In the instant case, Defendants fail to provide any evidence of taking such action. In a board meeting, Mr. Levine himself identified numerous alternatives to the Board stepping in, including holding educational forums for the membership. Ex. M. Moreover, the Board could have sent a revised proposal back to the Staff for consideration. Lowsky Decl. Yet, none of these avenues were explored. The reason given was that the Board did not want to delay the decision. Levine Decl. ¶ 24. Again, such an act is in violation of the very bylaws on which Defendants rely.

D. Plaintiffs Have Satisfied All Statutory and Procedural Requirements

1. Plaintiffs' claims are proper under the Co-op Act and the Nonprofit Act

Defendants' motion is based on the Nonprofit Act, which Defendants incorrectly claim limits Plaintiffs' ability to sue on behalf of the Co-op. Defendants' analysis of the Nonprofit Act (and relevant case law) is mistaken, but more importantly, it is beside the point. Plaintiffs are members of the Co-op, which is a cooperative organization. Therefore, under Washington law the Co-op is governed by the Cooperative Associations Act ("Co-op Act"), not the Nonprofit Act. *See* RCW 23.86 *et seq.*[13] The Nonprofit Act specifically states, and Defendants fail to mention, that "cooperative organizations . . . ***may not*** be organized under this chapter." RCW 24.03.015 (emphasis added). This is

[13] The Co-op's foundational documents claim it is organized under the Nonprofit Act, but since that is statutorily prohibited, the Co-op must be governed by the Co-op Act.

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because Washington provides a separate and specific statutory scheme for the governance of cooperative organizations: the Co-op Act.

Under the Co-op Act, Plaintiff's derivative claims are entirely proper. The Co-op Act provides that the "provisions of Title 23B RCW [that is, the Business Act] shall apply to the associations subject to this chapter [that is, cooperative associations]." RCW 23.86.360. One of the provisions of Title 23B, which applies by reference to the Co-op pursuant to the Co-op Act, is RCW 23B.07.400, which specifically provides for derivative suits. Accordingly, under the relevant and applicable statutory framework—a framework ignored by the Defendants—Plaintiffs' are procedurally valid.

If, as defendants seem to argue, the Co-op is incorrectly organized under the Model Nonprofit Act, it certainly cannot take advantage of laws that do not apply to it.[14]

2. Plaintiffs' claims are proper under the Nonprofit Act

Plaintiffs are also entitled to bring their claims under the Nonprofit Act, which provides that in "a proceeding by the corporation ... ***through members in a representative suit[]*** against the officers or directors of the corporation," the members may claim that the officers or directors "exceed[ed] their authority." *See* RCW 24.03.040(2) (emphasis added). The import of this provision for "ultra vires" claims is clear: General derivative claims make little sense in the nonprofit context. Where profit is not a corporation's purpose, claims for corporate waste, missed business opportunity, or other such run-of-the-mill derivative suits have no place. However, even nonprofit corporations must abide by their rules and regulations, and individual members are not be left legally powerless against boards of directors or majority shareholders who disregard the corporation's governing policies. Accordingly, while the legislature declined to provide general derivative suit protection to minority members of nonprofit corporations, it specifically provided minority members with the ability to combat ultra vires action by bringing a "representative suit" on behalf of the corporation against officers and directors for

[14] There is no question that Olympia Food Cooperative is a co-op. *See* website at http://www.-olympiafood.coop.

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"exceeding their authority" under the relevant corporate policies. Defendants' failure to mention this provision speaks volumes.

Defendants claim that the Model Nonprofit Act provides for full derivative procedures, while the Nonprofit Act adopted by Washington does not. *See* Mot. at 9. What Defendants fail to mention is that the legislature did not eliminate a member's ability to bring an ultra vires claim against rule-flouting officers and directors. Instead, it stated that such a claim could be brought "through members in ***a representative suit[]*** against the officers or directors of the corporation." *See* RCW 24.03.040(2) (emphasis added). If the legislature wanted to eliminate the ability of members to bring a suit against corporate directors for exceeding their authority, the legislature knew how to alter the Model Act's language. But the legislature left intact the power of the members of a nonprofit entity to bring such a suit.

3. *Lundberg v. Coleman* is inapposite

Lundberg v. Coleman, 115 Wn. App. 172, 60 P.3d 595 (2002)—the case that forms the basis of Defendants' motion—is not to the contrary. Indeed, *Lundberg* is entirely inapposite. First, *Lundberg* involves the Nonprofit Act; it therefore has no relevance to an analysis under the Co-op Act, which is the statutory framework that applies to this case. But even under the Nonprofit Act, *Lundberg* offers no support to Defendants' motion.

The representative suit at issue in *Lundberg* was brought by a director of a nonprofit corporation who was not a member of the corporation. Accordingly, neither the Court nor the parties addressed RCW 24.03.040(2), which specifically grants members—but not directors—the right to bring representative suits against individual directors or officers. The *Lundberg* Court therefore properly held that the Nonprofit Act "does not confer the right for a single or minority director/trustee to bring an action on behalf of the corporation." 115 Wn. App. at 177 (emphasis added). Wholly absent from the *Lundberg* decision is any mention of the rights granted to members under the Nonprofit Act because that issue was not before the Court.

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The nature of the *Lundberg* plaintiff's claims therefore limited the court's holding—a fact Defendants ignore. Defendants cite to *Lundberg* for the proposition that "[T]he Legislature has determined that a proper remedy for mismanagement of nonprofit corporations is [*inter alia*] ... a proceeding brought by the attorney general," *see* Mot. at 9. But Defendants fail to provide the crucial introductory clause: "***In cases like this***," *Lundberg*, 115 Wn. App. at 178; in other words, in cases brought under the Nonprofit Act where the individual seeking to bring a representative claim is merely a director of the corporation, but not a member of the corporation. In support of this proposition, the *Lundberg* court cited to RCW 24.03.040***(3)***, completely ignoring the language regarding representative suits in RCW 24.03.040***(2)*** (emphasis added). Subsection (2) was irrelevant to the case because subsection (2) deals with members, who were not at issue in *Lundberg*.

E. Plaintiffs' *Ultra Vires* Claim is Procedurally Valid

Defendants, unable to argue that they actually followed the Boycott Policy, instead argue that because the Co-op has the power to enact boycotts, Plaintiffs cannot assert a claim based on the Board's failure to follow Co-op rules, regulations, and procedures. In support of this argument, Defendants rely on two Washington cases involving the doctrine of ultra vires action: *Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 979 P.2d 854 (1999), and *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 133 P.2d 300 (1943). Neither case limits a member's ability to bring a claim of ultra vires against a corporation. Indeed, both cases reject Defendants' position and support the argument that a corporation cannot disregard its own rules and bylaws that prescribe the corporation's policymaking procedures. *See Hartstene Pointe*, 95 Wn. App. at 346.

In *Harstene Pointe*, a case cited under the Nonprofit Act, appellant challenged the propriety of a corporate policy that was being imposed against him. The corporation argued that under the Nonprofit Act's ultra vires provision, RCW 24.03.040, appellant was barred from asserting that position because he did not fit within the provisions of the statute. *See* 95 Wn. App. at 344. However, the court rejected the corporation's argument:

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"If, as [the Association] suggests, RCW 24.03.040 prevents [the individual]'s challenge, the corporation would be free to disregard its own bylaws that prescribe the make-up of committees. In short, the corporate articles and bylaws would be largely meaningless." *Id.* at 346.

In *Twisp*, a case not decided under either the Co-op Act or Nonprofit Act, a corporation attempting to avoid a transaction with a third party claimed it had acted without a quorum and that therefore the transaction was ultra vires. The Court rejected the argument. In so doing, however, it made clear that acts beyond corporate procedural rules were not beyond challenge by harmed individuals. To the contrary, the ruling in *Twisp* was predicated on the corporation's attempt to shield itself from the legal effects of the corporation's own actions. *Twisp* at 295.

Accordingly, *Twisp* does not serve to limit Plaintiffs' ability to bring its ultra vires claim against the Board. Rather, it limits a corporation's ability to use the ultra vires doctrine to excuse or justify improper corporate actions. *Twisp* supports Plaintiffs' claims in this case insofar as the Israel Boycott and Divestment resolution/policies are subject to being "avoided" through the instant litigation. *Twisp*, 16 Wn.2d at 294 (corporate transactions that fail to observe procedural requirements are valid until avoided).

Both *Twisp* and *Harstene Pointe* stand for the unremarkable proposition that a corporation cannot self-servingly protect its procedurally improper actions through offensive deployment of the ultra vires doctrine. But as *Harstene Pointe* made clear, the ultra vires doctrine does not prevent an individual from challenging a corporation's conduct in violation of its own rules and regulations. To do so would render the corporation's internal rules and regulations "largely meaningless." 95 Wn. App. at 346.

F. Plaintiffs Satisfy the CR 23.1 Standing Requirements

Defendants do not even attempt to argue Plaintiffs fail to "fairly and adequately" represent similarly situated members as to five of the eight factors set forth in *Larson v. Dumke*, 900 F2d. 1363, 1367 (9th Cir. 1990). *See* Mot. 10-13. Specifically, Plaintiffs:

- are familiar with the litigation and have been and remain willing to learn about the suit. *See* K. Davis and L. Davis Decls. ¶ 7; J. Trinin and S. Trinin Decls. ¶ 7;

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- have not surrendered their control of the litigation to their attorneys. *Id.*;
- maintain a personal commitment to the action on the part of the representative plaintiff. *Id.*;
- seek a remedy on behalf of the Co-op, not themselves personally. *Id.*; and
- maintain an interest in the derivative action that outweighs any personal interest they might have in the outcome. *Id.*

As to the other *Larson* factors ("true party in interest"; "degree of support" from other members; and "vindictiveness toward the defendants"), Defendants' arguments fail.

1. Plaintiffs fairly and adequately represent similarly-situated members

Regardless of whether the Court views this case as a member derivative claim under the Co-op Act or a member representative claim under the Nonprofit Act, the individual Plaintiffs satisfy the requirements of CR 23.1. Defendants' arguments to the contrary woefully misapply the Rule's requirements. Under CR 23.1, Plaintiffs may maintain a derivative action if they "fairly and adequately represent the interests of the shareholders or members ***similarly situated*** in enforcing the right of the corporation or association." CR 23.1 (emphasis added).

Contrary to Defendants' arguments, Plaintiffs are not disqualified from representing the Co-op because they lost an election or because the Israel Boycott and Divestment policies may have majority approval of the Staff. The fact they received votes demonstrates support for them. Under the clear language of CR 23.1, "a shareholder who is ***one among a small group of similarly situated persons*** may file a derivative action" under the Civil Rules. *See* 3A Karl B. Tegland, *Washington Practice, Rules Practice CR 23.1* cmt. 4 (5th ed. 2011) (emphasis added); *see also Schupack v. Covelli*, 512 F. Supp. 1310, 1312 (W.D.Pa. 1981) ("Rule 23.1 does not require that derivative action plaintiffs have the support of a majority of the shareholders or even that they be supported by all the minority shareholders .... The true measure of adequacy of representation under CR 23.1 is not how many shareholders does the plaintiff represent. Rather it is how well does this representative plaintiff advance the interest of other similarly situated shareholders.") (internal citations and quotation marks omitted). *See* Breuer Decl. ¶ 7.

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2. Plaintiffs are the real parties in interest

Defendants, who are strongly supported by BDS, make the specious argument that the organization StandWithUs—and/or the America/Israel Chamber of Commerce—is the "real party in interest" here. To the contrary, Plaintiffs are longstanding Olympia residents with a demonstrated commitment to the Co-op and the Co-op community.

a. Plaintiffs are not "personally adverse" to defendants

Defendants' argument that Linda and Kent Davis are "personally adverse" to them is without merit because (a) the Davises have done nothing to evidence "personal" adversity against individual Board members; and (b) any voice they have given to criticism of the Co-op—which is irrelevant because the Co-op is not a Defendant—derives solely from their objections to the Board's unlawful conduct in July 2010. *See* K. Davis and L. Davis Decls. ¶ 16. Indeed, Plaintiffs deny any such animosity. *Id.*

b. Kent Davis has standing as a plaintiff

Defendants' assertion that Kent Davis "first became" a member of the Co-op in August 2010 is incorrect. Mr. Davis and his wife Ms. Davis became members in 2004. K. Davis Decl. ¶ 2. Mr. Davis' individual membership was mistakenly cancelled for a period of time as the result of either computer or Staff error but was reinstated. Ms. Davis' membership has been consistently in effect since 2004. *Id.* ¶ 3. Mr. Davis therefore does not lack standing to sue. *See Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264, 111 S. Ct. 2298, 2306, 115 L.Ed.2d 236 (1991) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint.") (internal citation omitted). Moreover, Mr. Davis has standing regardless of how the Court analyzes the erroneous suspension of his membership by the Co-op. In Washington, all property acquired during marriage is presumptively community property. *Yesler v. Hochstettler*, 4 Wash. 349, 353-54, 30 P. 398 (1892); see RCW 26.16.030. "A community property interest may be a sufficiently 'real' interest to confer standing." *Dean v. Lehman*, 143 Wn.2d 12, 19-20, 18 P.3d 523, 528 (2001). Indeed, at least one Washington court has

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held that under CR 23.1, a one-half beneficial interest in corporate stock by reason of community property law is sufficient to confer standing for a derivative suit. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 776, 496 P.2d 343 (1972). Since Mr. Davis held a beneficial interest in Ms. Davis's membership in the Co-op in July 2010, he has standing on this basis as well.

G. The Co-op Has Suffered Damages

Relating to its claims for declaratory relief and *ultra vires*, there is no need to establish monetary damages. The members have been injured by the wrongful actions of the Board. The Co-op, however, has been damaged.

In light of the numerous membership cancellations that resulted from the Board's misconduct, the fact that certain members have stopped shopping at the Co-op in protest, and the loss of revenue that has resulted from the Co-op's failure to offer Israeli-made products to customers who wish to purchase them, the Co-op has suffered monetary losses that can only be calculated through discovery. *See, e.g.,* Breuer Decl. ¶ 2; K. Davis and L. Davis Decls. ¶ 13; J. Trinin and S. Trinin Decls. ¶ 13. But for the Board's misconduct, these membership cancellations and reduced sales would not have occurred. While it is impossible, without access to discovery, to estimate the resulting monetary losses to the Co-op, there is ample evidence that business has been lost. *Id.* Indeed, even the Board members recognized that the boycott would have negative financial effect in the Co-op. Ex. N. Plaintiffs met their burden on the element of damages. *See Housing Works, Inc. v. Turner*, 2004 WL 2101900, 34 (S.D.N.Y. 2004) ("[W]here nonprofits engage in activities intended to create profit, their measure of damages may be indistinguishable from those of for-profit entities.") (citing *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634 (8th Cir. 1975) (awarding lost profits to nonprofit agency); *Start, Inc. v. Baltimore County, Maryland*, 295 F. Supp. 2d 569, 581-82 (D.Md. 2003) (accord).

Defendants' allegations regarding the Co-op's financial performance since July 2010—which have obviously not yet been tested through discovery—do nothing to

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undermine Plaintiffs' evidence. Even if accurate, they fail to demonstrate that the Co-op has been more profitable that it would have been otherwise as a result of Defendants' unlawful enactment of the Israel Boycott and Divestment resolution/policies.

H. Plaintiffs Have Exhausted All Efforts

Defendants claim that Plaintiffs have failed to exhaust their remedies is both legally and factually flawed. As a legal matter, a shareholder need not exhaust all remedies where the board is "incapable of making an impartial decision regarding [the] litigation" and efforts to convince them would be futile. *In re Cray Inc.*, 431 F.2d 1114, 1119 (W.D. Wash. 2006). Moreover, Plaintiffs did take decisive action.

Plaintiffs made numerous demands on the Board which are set forth in their verified Complaint and declarations and were repeatedly rejected by the Board. Washington is a "demand/futility" jurisdiction and demands need not be made on the Board prior to suing derivatively if such demand would be futile. *See* RCW 23.07.400(2). *In re F5 Networks, Inc.*, 166 Wn.2d 229, 240 (2009). Moreover, under Washington law, no demand is required if futility is plead with particularity. *Id.* Significantly, Defendants do not claim, nor could they, that Plaintiffs failed to plead futility with particularity. *See In re F5 Networks.* Here, because there are no disinterested directors and the board refused to revisit the issue after numerous demands, any further action is excused.

The alleged "right" of the plaintiffs to petition the Board was met but is not a "remedial remedy." The bylaw provision to which Defendants refer allows members to address proper Board action. It is not intended to be a remedy for improper Board action nor is it clear that it can overturn Board action. Under Co-op policy, member petitions may only be submitted with approval of and active participants from the Board. **Ex. CC.** Clearly, such action would be futile given the Board's reluctance to move. In fact, the Board was presented with two petitions containing over 350 signatures asking it to, among other things, rescind the boycott. The Board refused. Breuer Decl. ¶ 2; J. Trinin and S. Trinin Decls. ¶ 6. Plaintiffs' only option was to sue. Any other efforts would be futile and Defendants do not question that point.

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I. The Board Breached its Fiduciary Duties

Defendants' claim that the Business Judgment Rule protects the Board from any claim that it breached its fiduciary duties is fatally flawed. The lawsuit is not predicated on the Board making an incorrect decision. Rather, the lawsuit is based on the uncontroverted evidence that the Board violated its own rules and procedures in reaching a decision. Even Defendants' case law supports Plaintiffs on this point. *See McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 895 (5007) (corporate management is immunized from liability if it acted with authority).

J. Defendants' CR 12(b)(6) Motion Must Be Denied

Because Plaintiffs have established a "probability of prevailing on the merits of their claim," Defendants' alternative motion to dismiss under CR 12(b)(6) must, like their motion under RCW 4.24.525, be denied.

V. CONCLUSION

For the above foregoing reasons, Plaintiffs respectfully request that Defendants' special motion be denied.

DATED this 1st day of December, 2011.

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