☐ EXPEDITE
☐ No hearing is set
√ Hearing is set
Date: February 23, 2012
Time: 9:00 a.m.
Judge/Calendar: Hon. Thomas McPhee

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

KENT L. and LINDA DAVIS, *et al.*,

Plaintiffs,

v.

GRACE COX, *et al.*,

Defendants.

No. 11-2-01925-7

PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR DISCOVERY

In their motion for leave to conduct very limited and carefully targeted "specified discovery" brought pursuant to RCW 4.24.525(5)(c), plaintiffs made clear what discovery they seek and why. The requested discovery relates directly to the core issue raised by defendants' special motion: Do plaintiffs have a probability of prevailing on their claim that defendants' decision to have the Olympia Food Co-op ("OFC") boycott goods from Israel was procedurally invalid.[1] It begs the question, to say the least, why defendants should have full access to all of their documents and selectively choose which ones the Court sees, while claiming that plaintiffs do not need any discovery. Once defendants put

[1] As plaintiffs have argued repeatedly, this core issue is beyond the purview of RCW 4.24.525, as plaintiffs' suit does not seek to keep the defendants from speaking. The suit concerns defendants' compliance with OFC's procedural requirements, not their right to free speech. Defendants' resort to a special motion to try to derail this lawsuit reflects the "disturbing abuse" of anti-SLAPP laws (and the resultant chilling effect on potential plaintiffs), that prompted California to adopt legislation prohibiting anti-SLAPP motions in certain public interest lawsuits, class actions, and actions arising from commercial statements or conduct. Cal. Civ. Proc. Code § 425.17. It is telling that despite their heavy reliance on California law, defendants do not mention that statute.

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those documents at issue, they conceded discovery was necessary. Defendants try to avoid that inescapable conclusion with averments about plaintiffs' waiver of their right to discovery. Their averments are false. *Decl. of Robert M. Sulkin* ("*Sulkin Decl.*").

Defendants' admitted noncompliance with OFC's Boycott Policy is dispositive of this issue. That Policy unambiguously (1) requires that decisions to boycott be made by "*the staff* who will decide by consensus whether or not to honor a boycott;" and (2) allows OFC to "honor [only] *nationally recognized boycotts* that are called for reasons that are compatible with our goals and mission statement." **Ex. A** (emphasis added).[2] Defendant Levine admits there was no staff consensus on the Israeli boycott issue. *Harry Levine Decl.* (Dkt. 38) at ¶¶ 26-27. That is still the case. *See infra.* Mr. Levine also concedes that no *nationally recognized boycott* existed, as he admits "[t]he Board considered the ***international movement*** *to boycott Israel*" and that the Board "*approved the boycott proposal in solidarity with this* ***international boycott*** *movement.*" *Harry Levine Decl.* (Dkt. 38) at ¶ 25. An international movement is not necessarily one adhered to in the United States. That is certainly the case regarding boycotts aimed at Israel. Indeed, TIA-CREF recently rejected demands that it refuse to invest in companies that profit from "the Israeli occupation" of the West Bank. **Ex. B**; *see also Decl. of Jon Haber* (Dkt. 41.7).

Defendants' primary response to this core issue (a response that has nothing to do with the purposes of anti-SLAPP legislation and which confirms that this litigation in no way is an attempt to stop the individuals named as defendants from voicing their opinions) is that the OFC board can ignore a policy in place and respected for 19 years. But despite having burdened the Court with reams of paper, defendants proffer no relevant or admissible evidence supporting that response. They offer no evidence that the Board can ignore OFC policy, that the OFC Board ever previously ordered a boycott without staff consensus; that the OFC Board ever previously ordered joinder in a boycott that was not

[2] Exhibits A-Q referenced herein are attached to the accompanying Sulkin Decl.

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nationally recognized; or that the staff ever vested the OFC Board with the power to override the written Boycott Policy. In fact, so divisive was the Board-adopted boycott that for the last year and a half, OFC has been trying to rewrite the Boycott Policy to, among other things, clarify "the role of the board of directors." So far as plaintiffs are aware and based on documents obtained online, OFC has still not been able to achieve that goal and the original Boycott Policy is still in effect.[3] Discovery into this effort is necessary, as it is certain there are important documents in OFC's files that are not accessible online.

The fact is, since 1992 it has been OFC policy that: "If a boycott is to be called, it should be done by consensus of the staff." **Ex. O**. The intent is clear: absent staff consensus, there can be no boycott. The Board's post-Israeli boycott attempts to alter the Boycott Policy thus have prompted reminders to "use the resources in the MCAT [merchandising group], *as this specific group holds the 'Boycott policy' in their pervue* [sic] *and holds lots of knowledge in how the policy works within the organization.*" **Ex. I** (emphasis added). In short, other than the unsupported assertions made by defendant Levine in his declaration, and in plaintiffs' Court filings, there is no evidence that the Board has the ultimate power to order a boycott. The dearth of contemporaneous documentary evidence supporting defendants' claims makes it imperative that the Court

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[3] *See* Ex. **C** (July 2010 Board minutes requesting that the merchandising staff group "revisit the 'Boycott Policy'"); **Ex. D** (Aug. 2010 minutes noting member concerns about boycott); **Ex. E** (Sept. 2010 minutes stating Boycott Committee will be formed to "evaluate the current boycott policy, propose changes, and recommend them to the board"); **Ex. F** (Oct. 2010 minutes noting calls to reevaluate the boycott); **Ex. G** (Nov. 2010 minutes noting Boycott Committee's recommendations could lead to dramatic change); **Ex. H** (Dec. 2010 minutes noting member comments that the Israeli product boycott "did not follow historical Olympia food co-op boycott process" and that other OCF boycotts involved worker rights and politically motivated boycott decisions should involve entire co-op);); **Ex. I** (Mar. 2011 minutes noting Boycott Committee is in disarray); **Ex. J** (April 2011 minutes noting that Boycott Committee is looking at the current policy and highlighting areas of concern); **Ex. K** (June 2011 minutes noting Boycott Committee is in disarray); **Ex. L** (July 2011 minutes noting Boycott Committee's need for a facilitator); **Ex. M** (August 2011 minutes noting Boycott Committee needs a facilitator); **Ex. N** (Nov. 2011 minutes noting Boycott Committee is "close" to making a final recommendation).

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either deny defendants' special motion, or that it defer ruling upon it until plaintiffs complete the very limited specified discovery at issue.

As explained in their cross-motion for discovery, plaintiffs' specified discovery request is limited to "documents ... relating in any way to the Co-op's Boycott Policy and actions taken related thereto," *i.e.*, "documentary evidence regarding the Boycott Policy, its purposes, and its past and present application." Cross-Discovery Mot. at 2, 4. (Plaintiffs also seek documents relevant to other averments in Mr. Levine's declaration). These documents will show, among other things, how and why the Boycott Policy was adopted, how and when OFC has previously decided to participate in a boycott, documents relating to past Board actions described in the Levine Declaration, and other related materials. Significantly, defendants have access to such documents and have carefully selected which documents they want plaintiffs and the Court to see. Under selective waiver principles, defendants cannot keep additional related documents from plaintiffs and the Court. Further, the documentary evidence plaintiffs seek—evidence dating back to 1992—is not online and is under defendants' exclusive control. There is no way but through this specified discovery for plaintiffs to discover (and for the Court to ascertain) whether defendants' references to nonspecific OFC Board powers in the By-Laws reflect a newly-crafted litigation-prompted reading of the By-Laws, or reflect OFC's actual practice.

Plaintiffs also seek to depose three defendants: Harry Levine, Jayne Kaszynski, and Grace Cox. It is critical that plaintiffs depose Mr. Levine, as it is he who has alleged (without proffering documentary support) that the OFC Board has the power to ignore OFC's Boycott Policy and impose a boycott even if key Boycott Policy conditions (specifically, staff consensus and an ongoing nationally recognized boycott) are not met. Further, as someone who served as the OFC Board's Staff Representative for 15 years, Mr. Levine has extensive knowledge of OFC's past boycott-decision-making practices

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and procedures and whether (and if so, when) it has deviated from its policy of consensus. It is telling that although Mr. Levine cites several instances of the OFC Board stepping in when the staff could not reach consensus, he does not aver that any of those instances involved situations where an express written policy (here, the Boycott Policy) clearly and unambiguously requires staff consensus and makes no provision for OFC Board intervention. Nor does he support his assertions with documentary evidence.

Jayne Kaszynski is also a critical witness, as her averments to the Court reveal that the OFC Board's decision to order the Israeli boycott was based on something other than "reasons that are compatible with our goals and mission statement," as the Boycott Policy requires. Thus her declaration dwells on hearsay news reports and face-book postings that, among other things, indicate that OFC's Israeli boycott decision resulted from political pressure, not from an analysis of whether the boycott was compatible with OFC's goals and mission statement. *See* Dkt. 50. Notably, the OFC Board ordered the Israeli boycott without deciding what acts would warrant ending the boycott (a determination required by the Boycott Policy) and despite calls for a membership vote, and it did so on a night when the "board was surprised to find thirty or so community members gathered at the meeting in support of the boycott." **Ex. C**.

Lastly, plaintiffs seek to depose Grace Cox, a former Board Member who was directly involved in the boycott decision-making process. In support of defendants' reply, Ms. Cox submitted a declaration in which she avers the Boycott Policy's "nationally recognized boycott" language does not define a boycott prerequisite. *Grace Cox Decl.* (Dkt. 52). It is also inconsistent with the Levine Declaration which makes it clear that the issue was never even discussed. Moreover, that assertion is directly contrary to the plain language of the Boycott Policy and the understanding of others involved with OFC in the early 1990s and as such, warrants discovery.[4] *See* Decl. *of Tibor Breur* (Dkt. 41.4); *Decl.*

[4] Ms. Cox nevertheless claims the boycott Israel movement is widely supported in the United States. However, although she, too, has inundated the Court with documents, she has not

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of Michael Lowsky (Dkt. 41.8). Ms. Cox also describes other OFC boycotts. Tellingly, she makes no mention of the Board implementing a boycott after the staff failed to reach consensus that a boycott was warranted. Given Mr. Levine's assertions about the Board's powers, that omission warrants clarification by deposition.

Despite the very narrow and specific focus of plaintiffs' discovery requests, defendants ask the Court to deny plaintiffs any discovery at all because (defendants allege) plaintiffs have not met discovery standards and burdens established by the California courts under California's anti-SLAPP statute. That argument fails for two reasons. First, as is shown above, plaintiffs have more than met those requirements. Second (and more importantly), assuming *arguendo* that statutory limitations on plaintiffs' right to discovery are constitutionally valid, it is Washington's "good cause" law, not California's, that governs. Reliance on Washington good cause law is particularly necessary because there are fundamental differences between California's anti-SLAPP statutes and Washington's, and as a result, California plaintiffs have less need for discovery. As explained in footnote 1, *supra,* California has taken steps to limit abusive anti-SLAPP motions such as OFC's. California also imposes a lesser burden on plaintiffs subjected to such motions. *Compare* Cal. Civ. Proc. Code § 425.16(b)(1) (plaintiff must establish a probability it will prevail); *with* RCW 4.25.525(4)(b) (plaintiff must establish probability of prevailing with clear and convincing evidence). Given the greater burden imposed on Washington plaintiffs, it is far more important that Washington plaintiffs be afforded discovery (and more relaxed good cause burden be imposed), than it is in California. In Washington:

> "Good cause" for discovery is present if information sought is material to moving party's trial preparation. Such requirement for discovery and

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provided any relevant documentation. Specifically, Ms. Cox has provided third-party created documents largely setting forth the views of citizens of other countries, and a list of organizations (with unknown numbers of members) that supported the rights of Palestinians in December 2011. These materials do nothing to establish existence of an ongoing boycott in the United States now, let alone in the summer of 2010.

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> production of documents is ordinarily satisfied by a factual allegation showing that requested documents are necessary to establishment of the movant's claim or that denial of production would cause moving party hardship or injustice.

Hertog v. City of Seattle, 88 Wn. App. 41, 51, 943 P.2d 1153 (1997) (quoting BLACK'S LAW DICTIONARY 692 (6th ed.1990)). That is the operative standard.

The requirements imposed by Washington law are met here. To establish their claim that defendants violated established OFC policy and procedures, plaintiffs must be able to rebut the defense asserted by defendants, namely, that the OFC Board can ignore written policies. And were the Court to take defendants' averments at face value—without allowing plaintiffs the specified discovery at issue—plaintiffs could not only have their case dismissed for lack of evidence they can obtain only through discovery, but also be fined up to $10,000 and ordered to pay defendants' litigation and attorney fees. That would be patently unjust.

Defendants also try to turn the Court's attention from the actual matters in issue by equating the discovery requests that plaintiffs propounded before being advised of defendants' intent to file an anti-SLAPP motion, with plaintiffs' post-motion requests. That is misleading. The motion-related discovery plaintiffs now seek, while still not sufficient, is limited to documents directly relevant to defendants' overriding Board-power defense and depositions of three witnesses with knowledge pertinent to that defense. That discovery cannot fairly be equated with the far broader discovery requests plaintiffs served with their complaint. The same flaw makes defendants' invocation of plaintiffs' counsels' purported agreement not to pursue discovery untenable. Upon being told that defendants would file an RCW 4.25.525 motion, plaintiffs' counsel necessarily agreed the statute (if enforceable at all) did not allow plaintiffs to continue pursuing previously-served discovery. But counsel never agreed to forego plaintiffs' statutory right to seek motion-related "specified discovery." Indeed, plaintiffs could not know whether "specified discovery" would be needed until they knew what arguments defendants were

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making in support of their motion. *Sulkin Decl.* Once plaintiffs learned defendants had crafted a Board-power defense (as well as a defense premised on OFC being something other than a co-op),[5] there was no question that discovery was necessary. *Id.*

The Board failed to follow OFC's own Boycott Policy. The result is a highly charged, divisive dispute that is, by itself, proof of the wisdom of the OFC consensus requirements that defendants ignored. The instant lawsuit is premised on the theory that the OFC Board's action was made in violation of OFC procedural requirements. This is not an issue within the purview of RCW 4.25.525. But should the Court decide otherwise, plaintiffs respectfully ask the Court to allow them the limited "specified discovery" they seek. Without that discovery, plaintiffs' ability to rebut defendants' newly formulated Board-power defense will be sharply limited – a wholly unwarranted result given defendants' failure to proffer any documentary evidence in support of their defense.

DATED this 22nd day of February 2012.

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By: _____
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[5] OFC's minutes confirm that OFC presents itself to the public as a co-op. That portrayal warrants limited discovery into the propriety of OFC's not-a-co-op defense, as well. *See, e.g.*, **Ex. P** (March 2010 minutes noting comment on OFC's role "as a local justice-based cooperative" using democratic organization to meet common needs); **Ex. Q** (April 2010 Board member comment about OFC being "a beautiful collective" where staff members collectively reach consensus); **Ex. F** (Oct. 2010 minutes noting member group "It's Our Co-op" formed in response to Israeli boycott decision); **Ex. H** (Dec. 2010 minutes noting member references to the Co-op).

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