☐ EXPEDITE
☐ No hearing is set
√ Hearing is set
Date: March 30, 2012
Time: 9 a.m.
Judge/Calendar: Hon. Thomas McPhee

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' OPPOSITION TO MOTION FOR FEES AND PENALTIES

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I. INTRODUCTION AND RELIEF REQUESTED

Defendants' request for more than $280,000 in attorneys' fees and $160,000 in statutory penalties is as excessive as it is unfounded. Here, where literally no discovery has taken place, Defendants are only entitled to fees in connection with the anti-SLAPP motion itself, and Defendants' rely largely on the same authority cited repeatedly in other cases by Davis Wright Tremaine ("DWT"), Defendants' fee request is so overreaching as to warrant outright denial. As discussed further below, fee petitions submitted by DWT in connection with other anti-SLAPP motions, which are smaller by orders of magnitude than the request here, make this point plain.

As if its disproportionate magnitude were not enough, Defendants' request fails in numerous other respects. Specifically: (1) given the derivative nature of this action, penalties and fees may not lawfully be assessed against the individual Plaintiffs;[1] (2) Defendants fail to establish entitlement to fees incurred by four separate law firms; (3) Defendants fail to establish that their billing rates are consistent with prevailing rates in the relevant locality (i.e., Olympia); (4) Defendants may not recover fees incurred in opposing Plaintiffs' motion for discovery or in prosecuting their CR 12(b)(6) motion, which was based on unrelated legal theories and left undecided; (5) where Plaintiffs sued OFC's Board of Directors collectively and on a derivative basis, only one $10,000 penalty may be imposed; and (6) because Plaintiffs sued to address the fact that ***their*** voices had been systematically ignored, it would be improper to punish Plaintiffs further (i.e., in addition to dismissal) by imposing such enormous penalties and fees.

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed this lawsuit against the Board of OFC as it was configured at and after the time the Israel Boycott was adopted. Plaintiffs' claims focused exclusively on the

[1] The Court did not reach Defendants' CR 12(b)(6) motion, and thus the lawfulness of Defendants' derivative action must be presumed for purposes of Defendants' motion.

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collective acts and omissions of the Defendants as members of the Board. In short, unlike other cases cited by Defendants in their motion for fees, Defendants here were sued as an entity—i.e., the Board of Directors—that acted singularly. *Compare, e.g., Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010).

On February 23, 2012, the Court denied Plaintiffs' motion for discovery; on February 27, 2012, the Court granted Defendants' anti-SLAPP motion, but did not reach and left undecided their CR 12(b)(6) motion to dismiss.

III. ARGUMENT

A. Penalties and Fees Cannot Be Imposed Against the Individual Plaintiffs

There is no question that this lawsuit remains a derivative action brought on behalf of OFC. As the Court recognized in its oral ruling on February 27, 2012, "The complaint brought by the plaintiffs is against the defendants in their role as a Board of Directors of Olympia Food Co-op, and the plaintiffs contend that they are acting as members of the Co-op bringing their claims against the directors in the name of and for the benefit of the corporation that is the Co-op." **Ex. A** at 9.[2] Having granted Defendants' anti-SLAPP motion, the Court is now presented with the question of whether and to what extent Defendants are entitled to penalties, fees, and costs. However the Court resolves these questions, such penalties and award must be issued—if at all—against OFC.

As a preliminary matter, given that the Court did not rule that this case is anything other than a derivative/representative lawsuit, the Court must consider principles governing fee awards in representative suits—not only the fee/penalty provision of RCW 4.24.525—in deciding whether and to what extent to award fees and statutory penalties. Those principles must also be considered in determining against whom those fees and penalties, if any, must be assessed. As the Honorable Ricardo Martinez ruled in a series of federal decisions, if

[2] Exhibits A-D are attached to the Declaration of Robert Sulkin in Support of Plaintiffs' Opposition to Motion for Fees and Penalties, filed herewith.

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this Court had decided that Plaintiffs' suit was not brought properly as a derivative action, it would have been dismissed under CR 12 and Defendants would not be entitled to any fees or penalties at all. *See Phillips v. Seattle Times Co.*, 2011 WL 4712196 (W.D.Wash. October 05, 2011); *Phillips v. KIRO-TV, Inc.*, 2011 WL 4826070 (W.D.Wash. October 05, 2011); *Phillips v. Newspaper Holdings*, Inc., 2011 WL 4829410 (W.D.Wash. October 05, 2011); *Phillips v. World Pub. Co.*, 2011 WL 4899973 (W.D.Wash. October 05, 2011).

The anti-SLAPP statute does not specify against whom the fee and penalty award should be entered. RCW 4.24.525. The Nonprofit Act's representative suit statute, however, does not authorize an award of fees against members who bring such an action. *See* RCW 23.04.040.[3] In fact, that statute does not authorize an award of fees at all. It provides only that corporate lack of capacity or power to perform a particular act may be asserted "[i]n a proceeding by the corporation, whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the officers or directors of the corporation for exceeding their authority." *Id.* By comparison, the corporate derivative suit statute (made applicable to cooperatives by RCW 23.86.360) only authorizes an award of fees against a plaintiff if the Court "finds that the proceeding was commenced without reasonable cause." RCW 23B.07.400(4).[4]

Under each of the foregoing statutory schemes, "the corporation is the real party in interest" in a derivative action. And the party who brings the action "is at best only a nominal plaintiff seeking to enforce a right of the corporation against a third party." *Walters v. Center Electric, Inc.*, 8 Wn. App. 322, 329, 506 P.2d 883 (1973). Given that the legislature clearly knows how to provide prevailing defendants in derivative actions an

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[3] The Court has ruled that OFC "remains a nonprofit under the law." **Ex. A** at 20.

[4] Plaintiffs' claims were clearly commenced with reasonable cause. *See, e.g., Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095, 1103 (2011); *Curhan v. Chelan County*, 156 Wn. App. 30, 37, 230 P.3d 1083, 1086 (2010); *Loc Thien Truong v. Allstate Property and Cas. Ins. Co.*, 151 Wn. App. 195, 207-08, 211 P.3d 430, 436 (2009).

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opportunity to recover their fees, *see* RCW 23B.07.400(4), its refusal to do so with respect to RCW 24.03.040 refutes Defendants' claim here. Moreover, in enacting the anti-SLAPP statute, the legislature did not override RCW 24.03.040 and provide for an award of fees against representatives who sue derivatively. Because RCW 24.03.040 and RCW 4.24.525 both apply to this matter, principles of statutory construction require an effort to harmonize them. *Walker v. Wenatchee Valley Truck and Auto Outlet, Inc.*, 155 Wn. App. 199, 208, 229 P.3d 871, 876 (2010). Significantly, neither statute authorizes an award against the individual who brings suit on behalf of a corporation.

To give effect to both RCW 24.03.040 and RCW 4.24.525, the Court must choose one of two results: either (1) Defendants are not entitled, due to the derivative nature of this action, to recover penalties and fees from Plaintiffs at all; or (2) any such penalties and fees must be assessed against the "real party in interest"; i.e., OFC.

B. Defendants Are Only Entitled to a Single Penalty of $10,000

The Court has acknowledged that "[t]he complaint brought by the plaintiffs is against the defendants ***in their role as a Board of Directors*** of Olympia Food Co-op." **Ex. A** at 9 (emphasis added). Defendants recognize this as well, when they cite to *Citizens United v. Federal Election Commission*, 558 U.S. 50, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) for the proposition that ***OFC's*** speech is protected by the First Amendment. Defs' Spec. Mot. to Strike at 6.[5] Where a lawsuit is aimed at a group of individuals whose collective action is at issue—as opposed to the distinct speech of different individuals (*see, e.g., Castello*)—only one $10,000 penalty should be assessed under the anti-SLAPP statute. Precedent is not to the contrary, given that none of the cases cited by Defendants involved an analogous situation. Mot. at 3-4.

[5] Plaintiffs have always maintained that this case is not about Defendants' individual speech at all, but rather the Board forcing OFC to speak for it.

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C. Defendants' Fee Request Should Be Denied In Its Entirety

"[T]he primary consideration in determining an appropriate award is reasonableness." *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wn.2d 145, 153, 768 P.2d 998, 1002 (1989). Defendants are not entitled to an award that so egregiously exceeds the reasonable expense of prosecuting an anti-SLAPP motion. "In enacting the attorneys' fees [provision of the anti-SLAPP law], the California legislature…did not intend recovery of fees and costs as a windfall…" *Pistoresi v. Madera Irrigation Dist.*, 2009 WL 910867, at *2 (E.D.Cal. 2009) (internal citations and quotation marks omitted).

This Court has looked to California law to help it interpret Washington's anti-SLAPP statute. The California Supreme Court has held "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether…If the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severer reaction is needful…" *Serrano v. Unruh*, 32 Cal. 3d 621, 635 (1982).

It is difficult to imagine a more unreasonable fee request than the one brought here. In this case, Defendants seek an unreasonable recovery that is grossly inflated by, among other things, (1) the needless and excessive use of multiple law firms, particularly given that lead defense counsel Bruce Johnson "assisted in drafting the Washington anti-SLAPP statute;" *see* Johnson Decl. ¶ 4, and multiple instances of partner-level attorney charging $400 or more per hour to perform clerical work; (2) the many hours expended by defense counsel reviewing and analyzing documents that Defendants argued were irrelevant to their motion and successfully convinced the Court to prevent becoming the subject of discovery; (3) the conflation with Defendants' fee application of work done in opposition to Plaintiffs'

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discovery motion and in support of Defendants' CR 12(b)(6), none of which is recoverable; and (4) block billing, which obscures the nature of some of the work claimed and exacerbates the vagueness of Defendants' fee request.

1. Multiple Law Firms

DWT, and Bruce Johnson specifically, regularly handles matters in which anti-SLAPP motions are filed. *See* **Ex. B**. Indeed, Mr. Johnson represents himself as a leading expert on such matters and "the author of the Washington…Anti-SLAPP Law." *Id.* Yet Defendants seek the recovery of dozens of hours of legal research at partner billing rates not only for Mr. Johnson, but also for Ms. LaHood ($400/hour) and Mr. Goldberg ($425/hour), in addition to the many hours of legal research conducted by DWT associate Mr. Smith. By way of example only, *see* LaHood Decl. Ex. A (billing entries for 10/20/11; 10/27/11; 12/5/11; 12/13/11; 12/14/11; 12/15/11; 2/22/12); Goldberg Decl. Ex. A (billing entries for 10/4/11; 10/11/11; 10/12/11; 10/18/11; 10/27/11). Ms. LaHood and Mr. Goldberg are not even members of the Washington State Bar. Rather, they are senior out-of-state attorneys whose legal research in this area was either superfluous or unrelated to Defendants' anti-SLAPP motion. Notably, DWT has apparently not sought out the help of Ms. LaHood, Mr. Goldberg, or Ms. Harvey in other anti-SLAPP cases it has handled.

Additionally, contrary to Defendants' representations, these multiple partner-level attorneys performed duplicative work. To cite but one example, on December 14, 2011, all ***four*** partner-level attorneys on the case billed multiple hours for editing Defendants' reply brief. *See* Johnson Decl. Ex. C ("Revise an[d] edit reply brief…"); LaHood Decl. Ex. A ("Review and Revise Draft Reply…"); Goldberg Decl. Ex. A ("…review of reply with Devin [Smith of DWT]"); Harvey Dec. Ex. A ("Revisions to reply brief"). Similarly, Defendants' billing records reflect repeated entries for editing other attorneys' edits. *See, e.g.,* Harvey Dec. Ex. A (billing entry 10/28/11). Recovery of fees for this and other duplicative work cannot be justified. Indeed, this is precisely the type of excess that a

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paying client would never tolerate and that would certainly result in either the reduction of the invoice or the departure of the client to more a more sensible law firm.

None of the non-DWT attorneys in this case claim expertise in litigating the Washington anti-SLAPP statute.[6] Work such as the foregoing was therefore clearly unwarranted in light of the fact that Mr. Johnson claims extensive expertise in this area. A key reason to retain a lawyer with such expertise is to save time and money. Here, Defendants repeatedly and heavily relied in their briefing on cases in which DWT was either counsel of record and/or which DWT had cited previously in anti-SLAPP motions in other cases. For example, DWT was counsel of record in both *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. Nov. 22, 2010) and *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104 (W.D. Wash. 2010), which feature prominently in Defendants' Special Motion to Strike. DWT has relied repeatedly before on *Nygard*, 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210 (2008), which was cited here to support Defendants' "public concern" argument.

In short, where one of four defense law firms has practiced so extensively in the relevant legal arena, and where lead defense counsel literally ***wrote the statute***, the Court should expect to find evidence of efficiency in the research and analysis underlying Defendants' motion. Instead, Defendants' fee request presents precisely the opposite: multiple partner-level attorneys at numerous different law firms billing $400 or more per hour to research, draft, and edit the very arguments with which DWT is so intimately familiar. No paying client would ever accept such a situation; nor could any Olympia-area law firm succeed while billing clients nearly $300,000 for one dispositive motion.[7]

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[6] Mr. Goldberg's practice, for example, is focused on medical malpractice cases.

[7] Defendants cite to a California case, *Metabolife v. Wornick*, in which the court awarded approximately this amount in fees under the anti-SLAPP statute ***after*** the case had been litigated, appealed to and decided by the Ninth Circuit, and then remanded to the trial court. 213 F. Supp. 2d 1220, 1222 (S.D.Cal. 2002). The court there also concluded that the defendant was entitled to retain

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In fact, when it comes to DWT's prior anti-SLAPP motions practice, it appears that paying clients have ***not*** been billed anywhere close to the number of hours expended by Defendants' four-firm legal team in this case. For instance:

- In November 2010, DWT and co-counsel Summit Law Group sought **$53,703** in fees on behalf of their clients in *Castello*, where the defendants prevailed on an anti-SLAPP motion. According to the defendants' motion for fees, *Castello* was a complex case that "required the review of events…spanning a period of approximately two years and a high volume of documents, including emails and public records involving multiple defendants throughout that time period…" **Ex. C** at 6. The fee claim for the two partners—John Chun of Summit and Mr. Johnson of DWT—totaled **55.9** and **20.5** hours respectively. *Id.* at 5. In that case, the two law firms represented two defendants who acted separately and whose respective statements regarding the plaintiff were separately at issue.

- In September 2010, DWT sought **$46,965** in fees in *Aronson*. The fee claim for Mr. Johnson, the lead partner on the case, totaled **32.1** hours. **Ex. D** at 6. To prepare the motion—apparently the first Mr. Johnson's office had ever filed—DWT "spent significant time and resources to research the newly-enacted statute, its legislative history, and comparable statutes in other jurisdictions with comparable legislation." *Id.* at 7. By the time the instant case was filed, of course, defense counsel had no need to conduct such comprehensive research.

By way of comparison to *Castello* and *Aronson*, Mr. Johnson's requested hours in the instant case total **109.8**; Ms. Harvey's **180.1**; Ms. LaHood's **167.8**, and Mr. Goldberg's **68**. Mot. Ex. C. All of these hours are in addition to associate Mr. Smith's **195** hours. *Id.* In short, Defendants seek fees for ***525.7 hours*** of partner-level time—almost ***seven times*** the number of such hours in *Castello* and ***more than sixteen times*** the number of hours in *Aronson.* Their request borders on the absurd.[8]

Moreover, these partner-level attorneys have billed extensive time for doing administrative/clerical work. For example, Ms. Harvey billed for work that clearly should

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two large law firms in Boston and San Diego because suit was filed thousands of miles from his city of residence. Here, Defendants' use of four separate law firms finds no analogous support.

[8] Defendants' suggestion that their representation of sixteen individuals justifies such exorbitant fees fails. Defendants' anti-SLAPP motion did not turn in any respect on differences among those individuals, who collectively represent (or previously represented) the true defendant in this case: the Board of Directors of OFC. Indeed, the legal theories asserted on their behalf are precisely the same across the group, and Defendants' briefing reflects as much. Moreover, Defendants told the Court that the Court had only to address a "simple question." *See* Defs' Br. Opp'g Pls' Cross-Mot. for Disco. at 9.

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have been done by a legal assistant at no cost to the clients. On October 31, 2011, for instance, Ms. Harvey billed 11.3 hours—or ***$4,802*** at $425/hour—to "assemble exhibits for HL & JK Decls." This simply cannot be justified, especially in light of the fact Ms. Harvey and the other non-DWT firms billed no time for paralegal work, which in Washington is expected of lawyers in their position. *See, e.g.*, *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 844, 917 P.2d 1086, 1088 (1995). Ms. Harvey also billed for 20 hours of work on one day—October 19, 2011—a claim unparalleled in the experience of undersigned counsel.

Ms. Harvey and others also billed numerous hours for group conference calls. On October 30, 2011, for example, Ms. Harvey billed 2.4 hours for a conference call with "lawyers"; Ms. LaHood billed 2.3 hours for the same; Mr. Goldberg billed for the call in a 3.5 hour block entry; and Mr. Johnson billed for this call in a 6.6 hour block entry. That conference call alone is therefore billed at an approximate total of $4,248—a figure unreasonable on its face.

2. Document Review and Analysis

In their motion for fees, Defendants request compensation for extensive investigation and document review. *See, e.g.*, Mot. at 7 (describing, among other things, Ms. Harvey's "all-nighters"). According to Mr. Johnson, this included "identifying, finding, and analyzing a very large factual record," Johnson Decl. ¶ 16, which apparently included "several thousand pages of documents, including years of [OFC] board minutes, staff meeting minutes, policies, board decisions, prior boycott decisions, and other corporate documents." Mot. at 8-9.

Defendants, however, represented to the Court that Plaintiffs were entitled to ***none*** of these documents because their anti-SLAPP motion could be resolved without discovery. And the Court, relying on this representation, denied Plaintiffs' discovery motion. Defendants' opposition to that motion states in relevant part as follows:

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> [T]he discovery sought by plaintiffs is not material to the claims stated in their complaint. Their case rests on the ***simple question*** of whether the board was authorized to adopt the boycott by consensus. That question is answered by the Co-op's Articles of Incorporation, Mission Statement, and Bylaws, all of which have been provided…***The other discovery sought by Defendants has no bearing on any of the legal issues here.***

Defs' Br. Opp'g Pls' Cross-Mot. for Disc. at 9 (emphasis added).

Defendants further argued that no "good cause" existed under RCW 4.24.525(5)(c) for discovery: "Defendants' ***legal position*** resolves the anti-SLAPP matter without the need for burdensome and expensive discovery." Defs' Br. Opp'g Pls' Cross-Mot. for Disc. at 9 (emphasis added). On February 23, 2012, the Court accepted Defendants' position and denied Plaintiffs' discovery request.

Defendants' position today—that extensive document review by partner-level attorneys billing in excess of $400/hour was a necessary part of briefing their anti-SLAPP motion—is totally inconsistent with its prior representations to this Court. It would be anomalous and improper for Defendants to be awarded fees for reviewing and analyzing massive numbers of documents at $400/hour that they and the Court concluded were irrelevant to resolution of Defendants' anti-SLAPP motion. Indeed, Defendants' position calls into serious question their claim, upon which the Court relied in denying Plaintiffs' discovery motion, that Plaintiffs' document review was unwarranted. Only two conclusions can be drawn: either Defendants are not entitled to recover fees for that work or the Court was misled by Defendants and its ruling on Plaintiffs' discovery motion should be revisited. Plaintiffs seek discovery now under CR 59(4) given Defendants' admissions, especially in light of the fact that the Court struck key declarations of non-moving parties in the absence of a motion by Defendants to do so.[9]

[9] Just the day before this filing, yet another food cooperative rejected an Israel boycott initiative. *See* http://www.nytimes.com/2012/03/28/nyregion/park-slope-food-co-op-to-decide-on-boycott-vote.html.

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3. Defendants Cannot Recover Fees for Other Work

Defendants are entitled to recover only those fees incurred in prosecuting their anti-SLAPP motion. RCW 4.24.525(6)(a)(i).[10] They are not entitled to recover for fees incurred either defending against Plaintiffs' motion for discovery or in prosecuting their CR 12(b)(6) motion. *Coulter v. Murrell*, 2010 WL 2775627, at *4 (S.D.Cal. 2010) ("The Court finds Defendant is not entitled to fees incurred in bringing the 12(b)(6) motion to dismiss the original Complaint, because these fees were not 'incurred in connection' with the anti-SLAPP motion.") (internal citation omitted); *Ravet v. Stern*, 2010 WL 3076290, at *3 (S.D.Cal. 2010) (no entitlement to fees incurred in connection with "separate and distinct defenses" raised in a motion to dismiss.); *Kearney v. Foley and Lardner*, 553 F. Supp. 2d 1178, 1184 (S.D.Cal. 2008) ("[M]ere common issues of fact are insufficient to award all fees when legal theories do not overlap or are not inextricably intertwined.").

Defendants, however, have largely failed to distinguish between work performed in connection with their CR 12(b)(6) motion and their anti-SLAPP motion. *See, e.g.*, Johnson Decl. Ex. C (billing entries 10/12/11-10/18/11).[11] Moreover, Defendants' inclusion of a CR 12(b)(6) with their anti-SLAPP motion was purely of their own choosing. This was not a situation in which Defendants risked waiving a defense. *Compare Metabolife Intern., Inc.*

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[10] Defendants invoke RCW 4.24.525(6)(a)(i) to support their position that they may recover fees for opposing Plaintiffs' discovery motion. But this is an incorrect reading of the statute. RCW 4.24.525(6)(a) states in part: "The court shall award to a moving party who prevails, in part or in whole, on ***a special motion to strike*** made under subsection…" (emphasis added). Subsection (6)(a)(i) provides for the recovery of "costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed." Given its inclusion in that subsection and common sense, the reference to "each motion" is clearly intended to mean "each special motion to strike." Reading the statute otherwise would lead to absurd results; for example, a defendant who prevailed on an anti-SLAPP motion with respect to one of several claims would be entitled to recover fees and costs for all motions on which he prevailed—even if unrelated to the dismissed claim.

[11] Defendants were capable of distinguishing between tasks performed on the two motions, and in fact did so from time to time. *See, e.g.*, Johnson Decl. Ex. C (billing entry 10/28/11). But almost without exception, they failed to do so with regard to time spent researching, drafting, and editing the motion itself.

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v. Wornick, 213 F. Supp. 2d 1220, 1223 (S.D.Cal. 2002) (awarding fees for CR 12 motion because "if [the defendant] had not raised the lack of personal jurisdiction and improper venue defenses in his motion to dismiss with the anti-SLAPP motion, he would have waived those defenses pursuant to Federal Rule of Civil Procedure 12(h).").

In the *Phillips* cases, which were dismissed on the pleadings, Judge Martinez denied the prevailing defendants fees and costs, despite the fact that the motion to dismiss was filed at the same time, and in the same document, as an anti-SLAPP motion. The court concluded that "Defendant could have avoided this result by filing the Rule 12(b)(6) motion first, to be followed by an anti-SLAPP motion only if the Rule 12(b)(6) motion did not fully dispose of the claims. Instead, the Court shall declare the anti-SLAPP motion moot, as there are no claims remaining to be stricken." *Phillips v. Seattle Times Co.*, 2011 WL 4712196, at *9 (W.D.Wash. 2011); *see also Phillips v. KIRO-TV, Inc.*, 2011 WL 4826070 (W.D.Wash. October 05, 2011); *Phillips v. Newspaper Holdings*, Inc., 2011 WL 4829410 (W.D.Wash. October 05, 2011); *Phillips v. World Pub. Co.*, 2011 WL 4899973 (W.D.Wash. October 05, 2011). Given that Defendants made the same procedural choice here, it follows that they are not entitled to fees/costs on their CR 12(b)(6) motion.

4. Block Billing

Defense counsel's billing records are riddled with block billed entries, which are improper and should not be compensated as part of any fee award. To cite but a few example, *see* Johnson Decl. Ex. C (among numerous others, billing entries for 9/19/11; 9/27/11; 9/29/11; 9/30/11; 10/3/11; 10/4/11; 10/5/11). In a California anti-SLAPP decision, block billed time entries were properly excluded entirely from the defendant's fee recovery. "Block billing consists of multiple tasks entered as a single entry…Block billing records are insufficiently detailed so that a Court is unable to determine 'with a high degree of certainty' that the hours billed were expended actually and reasonably….Accordingly, this Court utilizes its discretion to deny recovery of block billed entries." *Pistoresi v. Madera*

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Irrigation Dist., 2009 WL 910867, at *6 (E.D.Cal. 2009) (citing *Watkins v. Vance*, 328 F. Supp. 2d 27, 31 (D.D.C. 2004)); *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) (reducing requested hours because counsel's practice of block billing "lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness").

D. No Evidence That Proposed Rates Are Consistent With Olympia

It is Defendants' burden to establish that the billing rates they propose are consistent with the "the fee customarily charged in the locality for similar legal services." RPC 1.5(a)(3); *see also United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (the relevant community is where the court sits); *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wn. App 24, 40, 834 P.2d 638 (1992) (rejecting appellant's argument that fee awards must be cost related and upholding an attorney fee award on behalf of a state agency based on a reasonable market rate). The "locality" is Olympia, and Defendants have presented no evidence that their proposed billing rates are consistent with rates charged there.

E. The Penalty Provision of the Anti-SLAPP Provision Is Unconstitutional

CR 11 authorizes the imposition of sanctions against a party under certain specified conditions, not present here.[12] The penalty provision of the anti-SLAPP statute, RCW 4.24.525(6)(a)(ii), authorizes a $10,000 sanction under a lesser standard than CR 11 and thus conflicts with that rule. Specifically, the anti-SLAPP statute mandates the imposition of penalties and fees if a defendant meets her threshold burden and the court determines that a plaintiff has failed to establish by "clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b).

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[12] CR 11 requires in relevant part that a court filing be (1) "well grounded in fact"; (2) "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law"; (3) "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; and that (4) "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

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It is clear, in other words, that a lawsuit could—and this lawsuit does—satisfy the standards of CR 11 while still being found to violate the anti-SLAPP statute. For the reasons set forth in Plaintiffs' Brief Opposing Defendants' Special Motion (*see* pp. 8-10), which are incorporated by reference herein, that conflict with a Civil Rule renders RCW 4.24.525(6)(a)(ii) unconstitutional under Washington State's separation of powers doctrine. The requested penalties should be denied on that basis.

F. Equity Requires a Significant Reduction of the Penalty and Fee Request

Defendants' fee and penalty request in this case, which totals approximately ***$440,000***—or $88,000 per individual Plaintiff—amply demonstrates that Washington's statute is vulnerable to abuse. Indeed, ironically, an award of the size requested by Defendants would have a chilling effect on the free speech rights of the Plaintiffs, whose opposition to the process by which OFC adopted the Israel Boycott was voiced time and again without effect. For those reasons, the Court should exercise its equitable powers to either deny or significantly reduce the fees and penalties sought by Defendants.

IV. CONCLUSION

For the above foregoing reasons, Plaintiffs respectfully request that Defendants' motion for fees be denied or, in the alternative, that the fees requested be substantially reduced. Plaintiffs further request that Defendants' motion for penalties be denied or, in the alternative, that only one $10,000 penalty be imposed. Plaintiffs further request that if a fee and penalty award is issued, that it be issued against OFC and not the individual Plaintiffs.

DATED this 28th day of March, 2012.

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DECLARATION OF SERVICE

On March 28 2012, 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
Devin Smith
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Seattle, WA 98101-1688

☐ 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 28h day of March, 2012, at Seattle, Washington.

Lisa Nelson, *Legal Assistant*

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