

1 EXPEDITE
2 No hearing is set
3 Hearing is set
4 Date: October 2, 2015
5 Time: 9:00 a.m.
6 Judge/Calendar: Hon. Erik D. Price

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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

12 Plaintiffs,

13 v.

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

23 Defendants.

No. 11-2-01925-7

PLAINTIFFS' REPLY IN SUPPORT
OF MOTION TO COMPEL
DISCOVERY

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26
PLS.' REPLY IN SUPPORT OF MOT. TO COMPEL DISC.

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

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I. INTRODUCTION

The procedural history underlying Plaintiffs' Motion to Compel Discovery ("Mot.") is not complicated: (1) Plaintiffs served discovery requests in 2011; (2) Defendants never responded to them, and instead moved successfully to dismiss the case under RCW 4.24.525 (the "Anti-SLAPP Act"); (3) starting when Defendants filed their 2011 motion, discovery was stayed under RCW 4.24.525(5)(c); (4) the Washington State Supreme Court subsequently declared the Anti-SLAPP Act unconstitutional, and issued its mandate in June 2015. Thus, Defendants' responses to the discovery requests were due, at the latest, thirty days after the mandate issued, minus the number of days that elapsed between the date when the discovery requests were originally served and the service of Defendant' 2011 motion to dismiss. Defendants do not meaningfully dispute this history, nor could they. *Infra* Section II.D. Yet, Defendants have never responded to the discovery requests, steadfastly refuse to consent to depositions, and insist they are entitled to another five months of inaction on four-year old discovery requests. Their position is simply untenable, and flagrantly violates the letter and spirit of the rules governing discovery.

Instead of addressing the merits of Plaintiffs' straightforward motion to compel, Defendants demand a premature assessment of the merits of Defendants' pending motion to dismiss (Dkt. 124). *See* Opp. 4-8, 11-12. This is a red herring designed to distract attention from Defendants' inexcusable neglect. Washington precedent demonstrates a clear preference for early, broad access to discovery. *Infra* Section II.A. Additionally, the weight of authority shows a "general disfavor" for discovery stays pending a motion to dismiss, absent (1) "particularized facts that demonstrate there will be a clearly defined and serious harm associated with moving forward with discovery" and (2) a showing that the stay would not "substantially lengthen the duration of this case." *Kaufman v. Univ. of Colorado*, 2015 WL 4748987, at *2 (D. Colo. Aug. 12, 2015); *see also Old Republic Title, Ltd. v. Kelley*, 2010 WL 4053371, at *4 (W.D. Wash. Oct. 13, 2010).

1 Thus it is unsurprising that Defendants’ Opposition conspicuously fails to identify
2 *any* Washington authority linking denial of a motion to compel discovery to the substance
3 of a pending motion to dismiss. (And, indeed, Plaintiffs are aware of no such authority.)
4 While the Court plainly has discretion to manage discovery (Opp. 9), Defendants fail to
5 articulate any valid reason to stay discovery here—i.e., particularized harm that warrants
6 the parties sitting idly for *five months* until the hearing on Defendants’ motion to dismiss.

7 In any event, Defendants’ motion to dismiss does not raise any arguments
8 warranting dismissal, much less a discovery stay. Plaintiffs have standing to sue (*infra*
9 Section II.B) and the Court of Appeals’ reversed decision is of no consequence for this
10 motion or Defendants’ motion to dismiss (*infra* Section II.C). The Court should order
11 Defendants to follow the Civil Rules and provide discovery responses by a date certain.

12 II. ARGUMENT IN REPLY

13 A. Washington Law Favors Early and Broad Discovery Notwithstanding a 14 Pending Motion to Dismiss; Federal Law Is in Accord

15 Washington constitutional law favors open access to the courts, including access to
16 civil discovery. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012);
17 Const. art. I, § 10. Indeed, the Washington Supreme Court has declared that the right to
18 discovery is presumptively “broad” and subject only to “relatively narrow restrictions,” in
19 recognition that “the party seeking discovery . . . has a significant interest in receiving it.”
20 *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). Thus,
21 whenever “the respective interests of the parties in litigation” conflict, the “right of access
22 to the courts and . . . discovery must be accorded a high priority in weighing” those
23 interests. *Id.* at 783. This constitutional preference for discovery guides the courts in
24 ruling on discovery disputes, even while a motion to dismiss is pending. *See, e.g., State v.*
25 *LG Electronics, Inc.*, 185 Wn. App. 394, 408-09, 341 P.3d 346 (2015).

26 The majority of federal courts similarly resolve discovery disputes pending a
motion to dismiss in favor of access. “A motion to dismiss is not grounds for staying

1 discovery. . . . ‘Had the Federal Rules contemplated that a motion to dismiss under Fed. R.
2 Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that
3 effect.’” *Old Republic Title, Ltd.*, 2010 WL 4053371, at *4 (W.D. Wash.) (quoting *Gray v.*
4 *First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990). *See also, e.g., Kaufman*, 2015
5 WL 4748987, at *2; *Reinerio v. Bank of N.Y. Mellon*, 2015 WL 4425856, at *6 (W.O. Mo.
6 July 20, 25 2015); *Timothy v. Oneida County*, 2015 WL 4170140, at *2 (D. Idaho July 9,
7 2015); *Boden v. Hmshost Corp.*, 2015 WL 3826725, at *1-3 (D. Colo. June 19, 2015);
8 *Cloverleaf Golf Course v. FMC Corp.*, 2011 WL 2838178, at *2 (S.D. Ill. July 15, 2011).

9 To overcome the “high priority” accorded to discovery in Washington, a party
10 seeking to restrict discovery must show “good cause” to obtain a protective order under
11 CR 26(c). (To be clear, Defendants have not moved for a protective order.) That party
12 “bears the burden . . . of showing that specific prejudice or harm will result if no
13 protective order is granted.” *Dreiling v. Jain*, 151 Wn.2d 900, 916, 93 P.3d 861 (2004). It
14 also means the moving party “must support, where possible, its request by affidavits and
15 concrete examples,” as “[u]nsubstantiated allegations will not satisfy the rule.” *Id.* at 916-
16 17. Defendants fail to present any concrete example of hardship, burden, or prejudice
17 imposed by Plaintiffs’ discovery requests.¹ In the absence of such evidence, Defendants’
18 attempt to restrict Plaintiffs’ discovery fails. On the other hand, the record plainly
19 demonstrates the harm to Plaintiffs and the Co-op occasioned by an additional five months
20 of delay—in a case already four-years-old.² A stay of discovery would defer judicial

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22 ¹ Defendants point to Judge McPhee’s comment that Plaintiffs sought “brought-ranging discovery.”
23 Opp. 2. Yet this comment was made solely in the context of considering whether to lift the presumptive stay
24 imposed by the (unconstitutional) Anti-SLAPP Act. Judge McPhee in no way suggested that Plaintiffs’
requests were improper under normal circumstances. Today, the opposite presumption applies—i.e., one
favoring discovery—and Judge McPhee’s comment from 2011 is utterly beside the point.

25 ² Defendants imply that Plaintiffs are to blame for the delay in scheduling the hearing on
26 Defendants’ motion to dismiss because Plaintiffs “demanded” a 28 day briefing schedule. Opp. 3. As the
Court is well aware, a 28 day briefing schedule applies in cases where a CR 12(b) motion presents “matters
outside the pleadings.” LCR 5(d)(1)(D); CR 56(c). Defendants’ motion appends sixty-two pages of exhibits.
Opp. 26-87. Moreover, the Court must pre-approve any hearing date for a CR 12 motion. LCR 7(b)(6)(B).
This Court’s burdened docket (now further burdened by Defendants’ refusal to abide their discovery
obligations) necessitated the later hearing date, not any “demand” by Plaintiffs.

1 correction of Defendants' abuse of authority for yet another half-year, and further burden
2 Plaintiffs' rights under the Washington Constitution.³

3 **B. Arguments About Standing Do Not Warrant a Stay of Discovery**

4 Defendants argue that federal and foreign courts favor staying discovery served by
5 a derivate plaintiff when a pending motion to dismiss challenges the plaintiffs' standing to
6 sue. Opp. 7. The authority cited by Defendants does not support this. Rather, it stands for
7 the proposition that courts should stay discovery sought by derivative plaintiffs if the
8 complaint fails to *allege* the requirements set forth in Fed. R. Civ. P. 23.1 itself—i.e., (1)
9 that the plaintiff was a member at the time of the transaction, (2) that the action is not
10 collusive, (3) that the plaintiff sought to obtain action from the board of directors, or is
11 excused from doing so, and (4) that the plaintiffs fairly and adequately represent the
12 members. *See In re First Bancorp Derivative Litig.*, 407 F. Supp. 2d 585, 587 (S.D.N.Y.
13 2006). Where such allegations are made, as they were in Plaintiffs' complaint, the
14 question of whether discovery should be stayed is committed to the court's discretion. *See*
15 *Brody v. Chemical Bank*, 482 F.2d 1111, 1114 (2d Cir. 1973).

16 Defendants do not argue that Plaintiffs failed to plead the elements required by
17 Washington CR 23.1 (which parallels the federal rule). Nor could they. Dkt. 20 ¶¶ 2-4, 47-
18 50. Instead, Defendants argue that the same rationale limiting discovery should apply to
19 other theories attacking a derivative plaintiff's standing under state law. This view is not
20 supported by federal case law, the federal rules, or Washington law.⁴

21 Even if the Court is inclined to consider the substance of Defendants' standing
22 argument, Defendants' position is meritless. The Nonprofit Act (which, for reasons

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24 ³ Defendants' Opposition requests an earlier hearing date for Defendants' Motion to Dismiss,
25 should one become available. Opp. 12-13. Plaintiffs do not oppose that request. An earlier hearing date
26 would not, however, alleviate the burden on Plaintiffs' constitutional right to discovery, or the obvious
prejudice to Plaintiffs' capacity to litigate the merits of this lawsuit.

⁴ Defendants cite to *Halebian v. Berv*, 631 F. Supp. 2d 284, 296-97 (S.D.N.Y. 2007), but fail to
mention that the *Halebian* court was reversed on the crux issue on appeal by the Second Circuit. *See*
Halebian v. Berv, 644 F.3d 122, 133 (2d Cir. 2011) (indicating that it would be "advisable" on remand to
"reevaluat[e] . . . any such application by the plaintiff for more discovery").

1 explained below, does not apply here) provides that members may claim an entity’s
2 officers or directors “exceed[ed] their authority” in “a proceeding by the corporation ...
3 *through members in a representative suit*” against the officers or directors.” See RCW
4 24.03.040(2) (emphasis added). Accordingly, while the legislature declined to provide
5 general derivative suit protection to minority members of nonprofit corporations, it
6 specifically provided minority members with the ability to combat ultra vires action by
7 bringing a “representative suit” on behalf of the corporation against officers and directors
8 for “exceeding their authority” under the relevant corporate policies. Defendants’ failure
9 to mention this provision speaks volumes.⁵

10 Moreover, Defendants’ argument is wholly predicated on the Nonprofit Act, which
11 Defendants incorrectly claim limits Plaintiffs’ ability to sue on behalf of the Co-op. Dkt.
12 124 at 7-11. But the Co-op is a cooperative organization. Dkt. 20 ¶¶ 1, 20; see OLYMPIA
13 FOOD CO-OP (Sept. 16, 2015), available at <http://www.olympiafood.coop>. Thus, it is
14 governed by the Cooperative Associations Act (“Co-op Act”), not the Nonprofit Act. See
15 RCW 23.86 *et seq.* Under the Co-op Act, Plaintiffs’ derivative claims are entirely proper.
16 The Co-op Act provides that the “provisions of Title 23B RCW [the Business Corporation
17 Act] shall apply to the associations subject to this chapter [i.e., cooperative associations].”
18 RCW 23.86.360. One of these provisions is RCW 23B.07.400, which specifically
19 provides for derivative suits. Accordingly, under the relevant and applicable statutory
20 framework—ignored by Defendants—Plaintiffs’ complaint is procedurally valid.

21 C. The Law of the Case Doctrine Does Not Apply

22 Defendants argue that Court of Appeals’ affirmation of the trial court’s denial of
23 discovery to Plaintiffs under the Anti-SLAPP Act is binding “law of the case” concerning
24 this discovery dispute under CR 26(c). Opp. at 11-12. This spurious argument fails for at
25 least two reasons. *First*, it is black letter law that a party is not bound under the law of the

26 ⁵ For further discussion of this issue. See Dkt. 41.3 at 17-19. As explained there, Defendants’
reliance on *Lundberg v. Coleman*, 115 Wn. App. 172, 60 P.3d 595 (2002) is misplaced. 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 the right to bring representative suits against individual directors or officers.

1 case doctrine by the findings of an intermediate appellate court subsequently reversed by
2 the ultimate appellate court. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12, 95 S.
3 Ct. 2486, 45 L. Ed. 2d 396 (1975) (“[O]ur decision vacating the judgment of the Court of
4 Appeals deprives that court’s opinion of precedential effect, leaving this Court’s opinion
5 and judgment as the sole law of the case.”); *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939
6 S.W.2d 83, 91 (Tenn. Ct. App. 1996) (“Obviously, [the law of the case doctrine] does not
7 apply to intermediate appellate court opinions that have been reversed or vacated.”); *see*
8 *also State v. Wright*, 169 Wash. 668, 670, 14 P.2d 962 (1932) (holding that elements of
9 lower court ruling not expressly reversed nonetheless “necessarily” overruled by reversal);
10 *Matter of Estate of Couch*, 45 Wn. App. 631, 634, 726 P.2d 1007 (1986) (“A judgment
11 which has been vacated is of no force or effect and the rights of the parties are left as
12 though no such judgment had ever been entered.”). This black letter rule derives from the
13 core rule of appellate procedure that an appellate court “may reverse, affirm, or modify
14 the decision being reviewed.” RAP 12.2. Where the appellate court “reverses,” the
15 decision below is a nullity as controlling law for that case.⁶

16 Here, the Washington Supreme Court reversed the Court of Appeals in a 9-0
17 decision, holding that the Anti-SLAPP Act is unconstitutional because it violates a
18 plaintiff’s right to a jury trial. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015).
19 In doing so, the Court did not reach the discovery issues addressed by the appellate court
20 below. Yet its holding “necessarily” reversed the appellate court’s analysis of Plaintiffs’
21 discovery requests under the Anti-SLAPP Act because it found the statute, as a whole,
22 unconstitutional. *See Wright*, 169 Wash. at 670. Moreover, the mandate effective in this
23 case directs the trial court to conduct “further proceedings in accordance with the attached
24 true copy of the [Washington Supreme Court’s] opinion,” without reference to the Court

25 _____
26 ⁶ Any other principle would risk unintended or paradoxical consequences through the “law of the case” doctrine whereby ancillary or supplemental issues that the ultimate appellate court did not need reach in its analysis are nonetheless preserved as law of the case if the intermediate appellate court’s analysis touched on them. That cannot be the law.

1 of Appeals’ opinion. Dkt. 120. Accordingly, the Court of Appeals decision is simply not
2 controlling law. *See United States v. Bartsh*, 69 F.3d 864, 866 (8th Cir. 1995) (“Under the
3 law of the case doctrine, a district court must follow [the] mandate . . .”).

4 **Second**—even assuming that the Court of Appeals findings survived reversal by
5 the Washington Supreme Court—Defendants’ argument is spurious. The law of the case
6 doctrine applies only when an appellate court issues a ruling expressly controlling the
7 issue presented. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724
8 P.2d 356 (1986) (“[T]he doctrine applies only to issues actually decided.”). In other
9 words, the issue currently being litigated must be “identical” the issue previously litigated.
10 *MGIC Fin. Corp. v. H. A. Briggs Co.*, 24 Wn. App. 1, 8, 600 P.2d 573 (1979).

11 The issue presented here differs starkly from any issue earlier decided by the Court
12 of Appeals. That court found that Plaintiffs had failed to meet their burden under the Anti-
13 SLAPP Act to demonstrate “good cause” to lift the automatic discovery stay under RCW
14 4.24.525(5)(c). *Davis*, 180 Wn. App. at 538. In reaching that conclusion, it equated the
15 standard for additional discovery to the “good cause” standard under CR 56(f). *Davis*, 180
16 Wn. App. at 539. But the question presented here is whether *Defendants* have established
17 “good cause” to overcome the constitutional presumption favoring discovery under *CR*
18 *26(c)*. The governing rules and respective burdens are completely different, and the Court
19 of Appeals did not “actually decide,” or even consider, the issues presented here. Thus the
20 opinion is not binding law of the case. *See Fluke Capital*, 106 Wn.2d at 620.

21 **D. Defendants’ Discovery Responses Are Overdue; Defendants Have Waived**
22 **Objections**

23 Defendants do not dispute that their discovery responses to Plaintiffs’ First
24 Discovery Requests are overdue. Opp. 12. Defendants argue only that they have not
25 waived their objections because they communicated with undersigned counsel after
26 Plaintiffs allegedly “renewed” their discovery requests. *Id.* On August 13, 2015, Plaintiffs’
counsel sent a letter to Defendants’ counsel stating, in relevant part: “As a courtesy to you,

1 your firm, and your clients, we are prepared to agree to a deadline of thirty days from
2 now; i.e., September 13, 2015.” **Ex. B.** Fifteen days later, Defendants’ counsel responded
3 to this unsolicited courtesy by stating “that discovery should await resolution of the
4 renewed [motion to dismiss].” **Ex. C.** In Defendants’ view this was a “timely” “objection”
5 that preserves all unstated objections. It was not. *All* objections to discovery must be
6 served within thirty days after service of the discovery, or the objections are waived. *See*
7 *Rivers v. Washington State Conf. of Mason Contractors*, 145 Wn.2d 674, 681, 41 P.3d
8 1175 (2002).

9 Moreover, Defendants’ view that their obligation to provide discovery responses
10 only commenced when Defendants “renewed” their discovery on August 13, 2015 is
11 incorrect. The Anti-SLAPP Act imposed a presumptive discovery stay when Defendants
12 moved to strike Plaintiffs’ complaint on November 1, 2011. This discovery stay remained
13 in place until the Washington Supreme Court declared the Anti-SLAPP Act
14 unconstitutional. By no later than June 23, 2015, when the Supreme Court’s mandate was
15 entered on this Court’s docket, the discovery stay was a nullity (along with the rest of the
16 Anti-SLAPP Act). At that point, Plaintiffs’ discovery requests were again active. *See*
17 *BLACK’S LAW DICTIONARY* at 1548 (9th Ed. 2009) (defining a “stay” as “[t]he
18 postponement or halting of a proceeding, judgment, or the like”). Accordingly,
19 Defendants’ responses and objections were already long overdue when Plaintiffs’ counsel
20 wrote to Defendants’ counsel on August 13 and offered “as a courtesy” to extend the
21 deadline. Plaintiffs rejected that request and have waived all discovery objections.

22 **III. CONCLUSION**

23 For the reasons stated above, and in Plaintiffs’ Motion to Compel Discovery,
24 Plaintiffs request that the Court compel Defendants to respond to the discovery requests
25 and produce documents by a date certain, order that Defendants’ right to object has been
26 waived, and award Plaintiffs’ attorneys’ fees in litigating this motion under CR 37.

1 DATED this 17th day of September, 2015.

2 McNAUL EBEL NAWROT & HELGREN PLLC

3
4 By: 

5 Robert M. Sulkin, WSBA No. 15425

6 Avi J. Lipman, WSBA No. 37661

7 *Attorneys for Plaintiffs*

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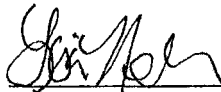
1 **DECLARATION OF SERVICE**

2 On September 17, 2015, I caused to be served a true and correct copy of the
3 foregoing document upon counsel of record, at the address stated below, via the method of
4 service indicated:

5 Bruce E. H. Johnson, WSBA No. 7667 Via Messenger
6 Angela Galloway, WSBA No. 45330 Via U.S. Mail
7 Ambika Kumar Doran, WSBA No. 38237 Via Overnight Delivery
8 DAVIS WRIGHT TREMAINE LLP Via Facsimile
1201 Third Avenue, Suite 2200 Via E-mail
Seattle, WA 98101-3045
9 Email: brucejohnson@dwt.com
angelagalloway@dwt.com
ambikadoran@dwt.com
10 lesleysmith@dwt.com (Asst.)

11 I declare under penalty of perjury under the laws of the United States of America
12 and the State of Washington that the foregoing is true and correct.

13 DATED this 17th day of September, 2015, at Seattle, Washington.

14 

15 _____
16 Lisa Nelson, *Legal Assistant*