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

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 11-2-01925-7

PLAINTIFFS' REPLY IN SUPPORT OF SECOND MOTION TO COMPEL DISCOVERY

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I. INTRODUCTION

As current and former directors of the Olympia Food Co-op ("OFC"), Defendants were bound to act "in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." RCW 24.03.127. Yet the Washington Supreme Court has already found there is a question of fact as to whether Defendants violated one of the Board-enacted policies that Defendants were bound to uphold. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). In committing these acts and omissions, Defendants knowingly violated OFC's governing rules, including the Bylaws and Boycott Policy, and knowingly put their personal agendas and loyalty to an outside organization ahead of the best interests of OFC. To make matters worse, Defendants are now trying to hide evidence of their misconduct and conflicts of interest behind a weak claim of privilege. Their arguments lack merit and Plaintiffs' motion should be granted.

Defendants' strident opposition begs a number of crucial questions. For example, why are a group of corporate directors, who publicly announced their support for boycotting Israel and publicly affiliated themselves with anti-Israel political activists in the course of violating the governing rules of the Olympia Food Co-op ("OFC"), now trying to hide thousands of documents behind an inapplicable privilege? What exactly is the new risk they allegedly face from disclosing documents and information that reflect their voluntary, public activity; i.e., the risk that did not already exist as a result of actions and omissions Defendants took long ago in their capacity as Board members? And how can Defendants' refusal to participate in discovery be reconciled to Plaintiffs' constitutional right of access to the courts, which "includes the right of discovery authorized by the civil rules"? *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374, 376 (2009). Defendants have no answers to these questions.

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Instead, they repeatedly point to incidents that have already occurred in connection with their actions and omissions. But this only undermines their position by defeating the argument that a separate risk to their freedom of association would arise if the withheld documents are disclosed. Defendants voluntarily sought election to the Board, voluntarily assumed various legal duties to OFC, voluntarily acted in derogation of those duties, and voluntarily announced their support for the Israel Boycott and affiliation with an anti-Israel group called Boycott, Divestment, and Sanctions ("BDS"). The fallout from their actions and omissions, even if some of it has been irrational or unfair, does not entitle Defendants to hide evidence of their wrongdoing. If the situation were otherwise, then a plaintiff's right of access to the courts in high-profile cases would depend on how the public reacts to a particular defendant's circumstances. That is not the law.

No Washington court has ever applied the associational privilege in the manner requested by Defendants. This Court should decline Defendants' invitation to be the first.

II. ARGUMENT IN REPLY

A. The Associational Privilege Does Not Apply Here

According to the Washington State Supreme Court, the associational privilege "protects a particular type of relationship—the relationship ***between a political party and its membership***—and the communications 'at the core of' that relationship." *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 429, 138 P.3d 1053, 1059 (2006) (citing *Wilkinson v. F.B.I.*, 111 F.R.D. 432, 434 (C.D. Cal. 1986)) (emphasis added). This case, of course, involves sixteen corporate directors and the public position they took long ago on boycotting Israel—not the "relationship between a political party and its membership."

Wilkinson, upon which our Supreme Court relied in *T.S.*, the court rejected an assertion of the associational privilege by "a long-time civil rights activist in Kentucky" who objected to a subpoena seeking "all documents pertaining to" a certain political party. 111 F.R.D. at 434. The court concluded that the subpoenaed activist sought "to apply the

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privilege not to specific membership documents, but instead to prevent any discovery of her files." *Id.* at 436. This was insufficient, the court conclude because "***the privilege is not available to circumvent general discovery.***" *Id.* (emphasis added). Defendants, who are asserting the associational privilege here with respect to 7,000 documents, are plainly trying to achieve precisely what *Wilkinson* held is improper. Our Supreme Court would find their effort unavailing.

Defendants argue that the associational privilege has been applied to more than just the names and identities of those whose rights are allegedly at risk of being chilled. Opp. at 8. Plaintiffs agree. What Defendants fundamentally ignore, however, is that the associational privilege has only been applied in Washington to entities seeking to insulate information about and communications among their otherwise anonymous members—not corporate directors trying to avoid discovery relating to public positions they have already taken voluntarily on behalf of the corporation they purport to represent.

Snedigar, the case on which Defendants principally rely, provides an excellent example. There, the entity resisting discovery was a political party (the Freedom Socialist Party) that asserted the associational privilege on behalf of its membership. In so doing, it submitted testimony to the court that "it has long been an established practice of the FSP to staunchly defend against all unconstitutional attempts by government agencies, employers or private parties to compel disclosure of the ***names of persons*** who associate with the FSP...." *Snedigar v. Hoddersen*, 114 Wn.2d 153, 163, 786 P.2d 781, 785 (1990) (emphasis added).

The *Snedigar* court cited to four cases in taking what it described as a "common sense" approach to the associational privilege. 114 Wn.2d at 162-63. One case dealt with the disclosure of the ***names*** of contributors to a political action committee. *Local 814, Int'l Longshoremen's Ass'n v. Waterfront Comm'n,* 667 F.2d 267, 272 (2d Cir.1981). The second case dealt with the disclosure of the ***identities*** of contributors to a state Republican

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Party. *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D.Ark.), *aff'd*, 393 U.S. 14, 89 S. Ct. 47, 21 L. Ed. 2d 14 (1968). The third case dealt with the disclosure of ***identity*** of organizations to which certain school teachers belonged. *Shelton v. Tucker,* 364 U.S. 479, 485–86, 81 S. Ct. 247, 5 L. Ed. 2d 231, (1960). The fourth case dealt with the disclosure of ***names and addresses*** on handbills. *Talley v. California,* 362 U.S. 60, 64, 80 S. Ct. 536, 4 L.Ed.2d 559, (1960).

Neither *Snedigar* itself, nor any of the cases on which it relied, nor any of the cases that have since relied upon it, has ever held that individuals such as Defendants—who are obviously not anonymous and who have voluntarily made their political position on boycotting Israel widely known—may avoid discovery under the associational privilege.

B. Plaintiff's Claim of Associational Privilege Fails the *Snedigar* Test

As an initial matter, Defendants have waived their right to assert associational privilege by publicly disclosing their identities and their political support of the Israel Boycott. *United States v. Salerno*, 505 U.S. 317, 323 (1992) (finding that in general, a party forfeits a privilege when he exposes the privileged evidence); *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960, 961 (1954) (finding waiver applies to all rights or privileges to which a person is legally entitled, and is a "voluntary act which implies a choice, by the party, to dispense with something of value"); *Kisser v. Coal. for Religious Freedom*, No. 95-MC-0174, 1995 WL 422786, at *2 (E.D. Pa. July 13, 1995) (finding that party waives right to assert associational privilege by publicly disclosing information asserted as privileged).

As to Defendants' initial burden under *Snediger*. Defendants have failed to make a *prima facie* that their associational rights will be chilled by disclosure. Defendants are not an organization seeking to protect itself by insulating the identity of previously unknown members or financial contributors. *See generally*, *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *Perry v. Schwarzenegger*,

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591 F.3d 1147, 1162-63 (9th Cir. 2010); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 159 (1990). Here, Defendants have all asserted an individual associational privilege that should not apply in light of their decision to voluntarily disclose their support for the Israel Boycott and BDS.

As Defendant John Regan stated in his declaration, the "decisions of the Board" and "meeting minutes reflecting those decisions as well as the underlying discussion at Board meetings are posted on our website." Defendants' assertions that a "presumed potential chilling effect arises when the discovery requests include membership lists, minutes of meetings, financial records, documents and correspondence regarding political activities," or that "the freedom of members to promote their views suffers" when a party seeks disclosure of details of an organization's activities, are irrelevant given that Defendants have already knowingly disclosed details of their activities regarding the Israel Boycott. *Id*.

Even if the Court found that Defendants have demonstrated a *prima facie* showing of privilege, the balance of interests between Defendants' claim of privilege and Plaintiffs' need for disclosure favors discovery. *See Snedigar*, 114 Wn.2d. at 164-65. Plaintiffs can overcome any potential associational privilege of Defendants because (1) the documents Plaintiffs seek are relevant to both Plaintiffs' claims and Defendants' raised defenses, and (2) Plaintiffs cannot obtain the information by other means. *Id*. at 164-65. Contrary to Defendants' assertions, the documents that Plaintiffs seek are highly relevant to whether Defendants breached their duties and engaged in *ultra vires* conduct by putting "their own personal and/or political interests" and the "interests of other organizations above the interests of OFC, to to the detriment of OFC." Am. Compl. at ¶¶ 59-60. In this context, Plaintiffs' need for discovery is not limited, as Defendants contend, to the narrow question of whether the Board had authority to enact the Israel Boycott. Opp. at 10. Plaintiffs' request for documents relating to the Board's consideration of the

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Israel and other boycotts is reasonably tailored to lead to the discovery of evidence regarding Defendants' consideration of OFC's interests and is not overly broad.

C. Plaintiffs Are Entitled to the Discovery They Seek

Defendants contend the only documents Plaintiffs require to prosecute their claims are OFC's Bylaws and Articles of Incorporation. Opp. at 1, 9. Tellingly, Defendants exclude from that list the Boycott Policy—which the Board enacted in 1993 and then brazenly violated in 2010—as well as documents memorializing the Board's unlawful actions. Their position rests on two untenable principles: first, that the Board acted in conformance with OFC's Bylaws when it enacted the Israel Boycott; and second, that corporate officers and directors cannot violate their duties to the corporation unless they act in derogation of the entity's bylaws and articles of incorporation. Both of these propositions are false.

As Defendants have already established, and will establish again at trial, the Board violated not merely the Boycott Policy when it enacted the Israel Boycott, but also OFC's Bylaws. The Bylaws state that the Co-op is a "collectively managed, not-for-profit cooperative organization that ***relies on consensus decision making***." **Ex. C** (emphasis added). "Consensus" at the Co-op indisputably means "unanimous." Lipman Supp. Decl., **Ex. N**. Against this backdrop, the Bylaws empower the Board to "adopt major policy changes," **Ex. C** ¶ 10, and "resolve organizational conflicts after all other avenues of resolution have been exhausted," *id.* ¶ 13(16). Yet, nothing in the Bylaws (or Washington law) gives the Board unfettered power to contravene one of its own policies without an authorized decision to first amend that policy.

As Judge McPhee previously found, it is undisputed that there was no staff consensus. Lipman Supp. Decl., **Ex. O**; *see also* **Ex. P** ¶¶ 5–7 (previously filed). It is also undisputed that the staff consensus requirement had been applied to all prior boycott proposals. **Exs. N, P**. Likewise, it is undisputed that there is no nationally recognized

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boycott of Israeli products. The record also reflects that Defendants attempted unsuccessfully to modify the Boycott Policy after the fact, meaning there is at least a factual dispute as to whether the Board believed it had violated the Boycott Policy by enacting the Israel Boycott. *See, e.g.,* Cox Decl. ¶ 9.

Moreover, Defendants have provided no authority, because none exists, for the proposition that a nonprofit director's duties, including the duty to act "in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances," is limited to complying with the corporation's bylaws and articles of incorporation. RCW 24.03.127. Their assertion that "[t]he only question this Court need determine is whether the Co-op's articles and bylaws authorized the Board to enact its boycott" is flatly incorrect.

D. No *In Camera* Review Is Necessary

Defendants accuse Plaintiffs of burdening the Court with having to "undertake a rigorous analysis of thousands of documents on the eve of the dismissal hearing." Opp. at 2. This through-the-looking-glass reasoning is difficult to take seriously. Defendants, not Plaintiffs, are the parties who have resisted discovery at every turn, who forced Plaintiffs to seek relief (successfully) from this Court once already, who are still withholding from production approximately ***7,000*** admittedly responsive documents (Howlett Decl. ¶ 8), who repeatedly sought the courtesy of extensions from undersigned counsel, who have failed to produce a privilege log that has been repeatedly requested (and which Defendants most recently promised to deliver on January 12, **Ex. L**), and who continue to avoid their obligations by asserting spurious arguments about an inapplicable privilege.

In short, Defendants' inexcusable intransigence is the ***only*** reason the Court is burdened with yet another round of discovery litigation. Fortunately, however, Defendants are wrong when they insist the Court must now "undertake a rigorous analysis of

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thousands of documents." To the contrary, the Court can easily dispose of this dispute by finding that the associational privilege does not apply to this situation at all. Why? Because Defendants voluntarily took a public position on Israel years ago, and simply cannot satisfy their burden to establish that their right to freedom of association would be chilled by disclosing communications consistent with that publicly taken position. Under these circumstances, the Court need not review any of the documents in question. Rather, the Court should grant Plaintiffs' Second Motion to Compel and order Defendants to comply with the Civil Rules governing discovery.

E. Plaintiffs' Arguments for Dismissal Should Be Ignored

Defendants' motion to dismiss will be argued next month, and the Court should ignore Defendants' invitation to consider it now. Plaintiffs have wasted the time and resources of the Court by briefing at length issues relating to their dispositive motion, and not to the question presented here; i.e., are Defendants entitled to withhold thousands of documents responsive Plaintiffs' Discovery Requests under the associational privilege? The answer to that question is no.

DATED this 21st day of January, 2016.

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DECLARATION OF SERVICE

On January 21, 2016, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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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 21st day of January, 2016, at Seattle, Washington.

Lisa Nelson, *Legal Assistant*

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