

The Honorable Carol Murphy

EXPEDITE
 No hearing set
 Hearing is set
Date: January 26, 2018
Time: 9:00 am
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
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

DECLARATION OF BROOKE
HOWLETT IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

NOTE FOR MOTION
CALENDAR: January 26, 2018

I, Brooke Howlett, am an attorney for Defendants, and I have personal knowledge of the matters set forth in this declaration. If called to testify to these matters, I could do so competently.

1 **Procedural History**

2 1. On February 27, 2012, the original trial court in this case heard oral argument on
3 Defendants' motion to strike the Amended Complaint under Washington's then-anti-SLAPP
4 statute. A true and correct copy of the trial court's February 27, 2012 oral opinion is attached
5 hereto as **Exhibit A**. The trial court granted Defendants' motion and dismissed the complaint.

6 2. After Plaintiffs unsuccessfully appealed the dismissal to the Court of appeals,
7 Plaintiffs appealed to the Washington Supreme Court. The Supreme Court struck down the
8 anti-SLAPP statute and remanded the case to this Court for further proceedings.

9 3. On February 25, 2016, this Court denied Defendants' motion to dismiss under
10 CR 12(b)(6). A true and correct copy of the trial court's February 25, 2016 oral opinion is
11 attached hereto as **Exhibit B**. In denying the motion to dismiss, this Court did "not address[]
12 whether the [C]o-op [B]oard acted within its authority."

13 **Plaintiffs' Document Production**

14 4. On June 23, 2016, Defendants served Plaintiffs with their first set of
15 interrogatories and requests for production of documents. On August 16, 2016, Plaintiffs
16 served Defendants with their written responses and objections to those discovery requests. A
17 true and correct copy of Plaintiffs' responses is attached hereto as **Exhibit C**.

18 5. On September 14, 2016 and October 6, 2016, I sent emails to Plaintiffs' counsel,
19 asking when Plaintiffs intended to begin producing documents. Plaintiff's counsel responded,
20 stating that they "plan to begin document production in less than a week, and will continue to
21 do so on a rolling basis." A true and correct copy of this email correspondence is attached
22 hereto as **Exhibit D**.

23 6. On October 14, 2016 and November 21, 2016, Plaintiffs produced two sets of
24 documents to Defendants in response to their discovery requests. In total, Plaintiffs produced
25 128 documents.

26 7. On April 18, 2017, I sent an email to Plaintiffs' counsel asking, among other
27 things, for an update on the status of Plaintiffs' document production, and requesting that

1 document production be completed by May 5, 2017. I did not receive a reply to this email. A
2 true and correct copy of my April 18, 2017 email is attached hereto as **Exhibit E**.

3 8. Plaintiffs have not produced any documents since November 21, 2016, nor have
4 they indicated in any way that document production is complete.

5 **Defendants' Depositions**

6 9. On October 3, 2016, Defendants received a Notice of Deposition for seven
7 Defendants: Harry Levine, Grace Cox, Rochelle Gause, John Regan, Erin Genia, Eric Makes,
8 and T.J. Johnson. A true and correct copy of the email serving these Notices is attached hereto
9 as **Exhibit F**.

10 10. Defendants proceeded to schedule the seven noted depositions on dates that
11 worked for Defendants and Plaintiffs, and I purchased a flight for one of the depositions to take
12 place out of town.

13 11. Plaintiffs deposed Harry Levine on November 21, 2016, and Grace Cox on
14 November 22, 2016.

15 12. On November 29, 2016, I received an email from Plaintiffs' counsel notifying
16 me that Plaintiffs were cancelling the remaining noted depositions, and intended instead to
17 proceed with depositions of Defendants Julia Sokoloff, John Nason, Eric Mapes, Jackie
18 Krzyzek, Rob Richards, Joellen Reineck Wilhelm, and Ron Lavigne. A true and correct copy
19 of the email is attached hereto as **Exhibit G**. My colleagues and I began contacting our clients
20 to arrange available dates for their depositions.

21 13. On December 8, 2016, Defendants received a Notice of Deposition for Julia
22 Sokoloff. A true and correct copy of the email serving this Notice is attached hereto as **Exhibit**
23 **H**.

24 14. Plaintiffs deposed Ms. Sokoloff on December 20, 2016.

25 15. On February 3, 2017, Defendants received a Notice of Deposition for Jayne
26 (Kaszynski) Rossman. A true and correct copy of the email serving this Notice is attached
27 hereto as **Exhibit I**.

1 16. Plaintiffs deposed Ms. Rossman on February 9, 2017.

2 17. To date, Plaintiffs have not noted any further depositions, and had not expressed
3 an intention to do so until a December 6, 2017 email from Plaintiffs' counsel mentioned
4 scheduling "whatever additional depositions may be needed by each side[.]" See ¶ 22, Ex. L.

5 **Plaintiffs' Inconsistent Communications**

6 18. Since this Court's February 25, 2016 ruling, I have had various conversations in
7 person and via email with Plaintiffs' counsel discussing the topic of a protective order to
8 govern confidentiality of discovery.

9 19. On April 4, 2016, I sent a proposed draft of a protective order to Plaintiffs'
10 counsel for their review. A true and correct copy of this email is attached hereto as **Exhibit J.**
11 Though Plaintiffs' counsel has since mentioned the topic in various emails and in-person
12 communications, they have never provided any substantive response to Defendants' draft
13 protective order. In the April 18, 2017, email referenced above in Paragraph 5, I again asked
14 Plaintiffs to provide a substantive response to Defendants' draft protective order. See **Ex. E.** I
15 did not receive a response to my email.

16 20. On January 20, 2017, Plaintiffs' counsel sent me an email asking about available
17 trial dates. I responded, in part, by asking when Plaintiffs intended to be done with depositions,
18 as Defendants would like to have a better idea of the timeline for remaining discovery before
19 deciding on a trial date. A true and correct copy of this email correspondence is attached hereto
20 as **Exhibit K.** I did not receive a response to my question. .

21 21. To the best of my recollection, I did not receive any further communications
22 (either via email or telephone) from Plaintiffs' counsel after attending the February 9, 2017
23 deposition of Jayne Rossman. As referenced above in Paragraphs 5 and 16, I sent Plaintiffs'
24 counsel an email in April 2017, but did not receive a response until December 2017.

25 22. On December 6, 2017, I received an email from Plaintiffs' counsel responding
26 to my request for a draft protective order, and asking about scheduling depositions and setting a
27 trial date. A true and correct copy of this email is attached hereto as **Exhibit L.**

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3
4 EXECUTED at Seattle, Washington this 19th day of December, 2017.

5
6 *s/ Brooke E. Howlett*
7 _____
8 Brooke E. Howlett, WSBA #47899
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1 **DECLARATION OF SERVICE**

2 On December 19, 2017, I caused to be served a true and correct copy of the foregoing
3 document upon counsel of record, at the address stated below, via the method of service
4 indicated:

5	Robert M. Sulkin	<input checked="" type="checkbox"/>	Via Messenger
6	Avi J. Lipman	<input type="checkbox"/>	Via U.S. Mail
7	McNaul Ebel Nawrot & Helgren PLLC	<input type="checkbox"/>	Via Overnight Delivery
8	600 University Street, Suite 2700	<input type="checkbox"/>	Via Facsimile
	Seattle, WA 98101-3143	<input type="checkbox"/>	Via E-mail

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

11 DATED this 19th day of December, 2017, at Seattle, Washington.

12
13 s/ Brooke Howlett
14 Brooke Howlett, WSBA No. 47899

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

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

Plaintiffs,

vs.

No. 11-2-01925-7

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.

ORAL OPINION OF THE COURT

BE IT REMEMBERED that on the 27th day of February, 2012,
the above-entitled and numbered cause came on for hearing
before the Honorable Thomas McPhee, Judge, Thurston County
Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448
Certified Realtime Reporter
Thurston County Superior Court
2000 Lakeridge Drive S.W.
Building 2, Room 109
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(360) 754-4370

A P P E A R A N C E S

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1 February 27, 2012

Olympia, Washington

2 MORNING SESSION

3 Department 2

Hon. Thomas McPhee, Presiding

4 Kathryn A. Beehler, Official Reporter

5 --o0o--

6 THE COURT: Please be seated. Good morning,
7 ladies and gentlemen. Welcome back to Superior
8 Court. I am disappointed that we could not be in the
9 larger courtroom to accommodate more people this
10 morning, but there was what appears to be a long and
11 contentious criminal case starting today. Hearings
12 began there at 8:30 this morning, and later in the
13 morning, and very probably before we are concluded
14 here, a large body of prospective jurors will come in
15 and occupy that room as they begin the process of
16 jury selection. So we are stuck here with a smaller
17 courtroom, which apparently does not accommodate
18 everyone. And for that our apologies.

19 Before I begin this morning with my opinion, I
20 have a couple of questions, one for each lawyer.
21 Mr. Sulkin, I'll begin with you. In your brief
22 arguing the issues raised on the constitutionality of
23 the statute, you refer to the evidence limitation
24 that's contained in the statute both as an issue of
25 burden of proof, measure of damages, and burden of

1 persuasion. I was not quite clear on what you
2 believe those differences are and how you would have
3 me apply them in this case.

4 Can you answer that question very quickly, just in
5 the differences in the terminology that you used?

6 MR. SULKIN: And if I may, Your Honor, you
7 said burden of proof, measure of damages, and a third
8 point?

9 THE COURT: Burden of proof, measure of
10 evidence, and burden of persuasion. Those are three
11 phrases that are different, but they are used,
12 apparently, in the same context, different parts.

13 MR. SULKIN: May I approach, Your Honor?

14 THE COURT: Well, either that or just answer
15 from counsel table, if you wish.

16 MR. SULKIN: Sure, Your Honor. Ultimately,
17 ultimately, we have two separate questions, I think,
18 not three. And I'm sure I was the one that's at
19 fault for creating this misimpression. I think on
20 the question of discovery, all right, the question of
21 discovery, obviously I believe there's a clear
22 separation of powers problem. If congress --

23 THE COURT: I understand that.

24 MR. SULKIN: All right. Now, the limitation
25 on evidence and discovery, what that did to me was

1 the following: They -- I have the burden, normally,
2 at the end of the case, as the plaintiff, to prove
3 all of the elements of my case. On this motion -- in
4 a normal case, under a Rule 56 motion, which is
5 really what this is, they would have the burden to
6 show there are no issues of fact as to each of the
7 elements.

8 THE COURT: Unless it is a *Key Pharmaceuticals*
9 motion.

10 MR. SULKIN: Yeah. Well, here, for instance,
11 the issues they raised in their motion were the
12 following: One, that in fact there is no board
13 policy; and two, there are no damages. And they had
14 some other legal issues that they raised about
15 standing and things of the like.

16 My argument to you on the issue of evidence was,
17 look. To the extent you think we haven't shown
18 enough evidence as to what happened at the board
19 meetings, who had power, what the agreements were, as
20 to the liability question, denying me discovery is a
21 problem.

22 THE COURT: I understand those arguments.
23 What I'm focusing on is, Why did you use the
24 different terms? I didn't understand the reason
25 for --

1 MR. SULKIN: Okay.

2 THE COURT: -- use of the different terms, and
3 I'm not even sure you intended a significant
4 difference.

5 MR. SULKIN: I think there's no difference
6 between "measure of damages" and "measure of
7 evidence." I think damages is one element of
8 evidence. So, you have liability of damages; they
9 raised the damages argument in their brief, saying
10 there are no damages.

11 THE COURT: I didn't ask about measure of
12 damages.

13 MR. SULKIN: Yeah. And so as to damages and
14 evidence, I think they fall in the same category,
15 that is, separation of powers; we don't have
16 discovery.

17 Burden of proof I think is a little different,
18 Your Honor, and that is -- and perhaps I'm just
19 repeating myself and you understand my point. It is
20 that on the burden of proof question, you have, the
21 Legislature can set the burden of proof on a statute;
22 that is, clear and convincing, preponderance of the
23 evidence. A place -- they can set that. The real
24 question, though, to you, is, what burden do they
25 have to show, do they have to get over, or what

1 burdens for me to get to a courtroom. And here,
2 normally, it's one material fact in dispute under
3 Civil Rule 56.

4 Here, the standard is much higher than that. So
5 what you have is a confluence --

6 THE COURT: What is the difference between
7 your use of "burden of persuasion" and "burden of
8 proof"? Let's just focus on that question --

9 MR. SULKIN: None.

10 THE COURT: -- because that's the only
11 question I have.

12 No difference?

13 MR. SULKIN: Well, let me say it this way:
14 They're the same in the sense that the statute does
15 two things. The burden of persuasion is putting it
16 on me when it should be on them; all right?

17 THE COURT: All right.

18 MR. SULKIN: That I have the obligation to
19 come forward. Normally it's them. They are the ones
20 making the motion. And the burden of proof is the
21 level of evidence I have to show to get over that.
22 And I think in both of those, that there's a problem.

23 THE COURT: All right.

24 MR. SULKIN: I hope that that answers your
25 question.

1 THE COURT: Thank you. I appreciate that.

2 Mr. Johnson, a question for you. In *Aronson* and
3 in *City of Seattle*, you were the lawyer in both of
4 those cases. In both cases, Judge Pechman and
5 Judge Strombom wrote that the Legislature has
6 directed that this statute be liberally construed and
7 applied. I couldn't find that anyplace. Where did
8 that come from? Do you know?

9 MR. JOHNSON: Yes, Your Honor. I'll hand up,
10 if I could -- this is just a printout from the RCWs
11 4.24.525. And you'll see, "Application, Construction
12 2010 c 118." It says,

13 "This Act shall be applied and construed liberally
14 to effectuate its general purpose of protecting
15 participants in public controversies from abusive use
16 of the courts."

17 That's an addendum to the statute.

18 THE COURT: That's why I didn't see it.

19 MR. JOHNSON: It's not something that forms
20 part of the statute, but it was part of the bill as
21 passed.

22 THE COURT: I'll take a look for it.

23 MR. JOHNSON: And I can hand this copy up.

24 THE COURT: Thank you.

25 Ladies and gentlemen, here is the decision that I

1 have reached in this case. We cover a lot of ground,
2 because there were a number of issues that were
3 raised here and must be decided.

4 The underlying question presented to me is, does
5 RCW 4.24.525, the Anti-SLAPP Act, apply to the
6 lawsuit brought by the plaintiffs against these
7 defendants. The complaint brought by the plaintiffs
8 is against the defendants in their role as a Board of
9 Directors of Olympia Food Co-op, and the plaintiffs
10 contend that they are acting as members of the Co-op
11 bringing their claims against the directors in the
12 name of and for the benefit of the corporation that
13 is the Co-op.

14 The plaintiffs contend that in adopting, by
15 consensus, the Boycott and Divestment Resolution of
16 July 15, 2010, the Board members acted beyond their
17 powers. And as a consequence of that, the plaintiffs
18 ask that the court do three things: First, declare
19 the Boycott and Divestment Resolution of July 15 null
20 and void; second, permanently enjoin its enforcement;
21 and third, award damages in favor of the Co-op
22 against each board member individually.

23 To determine whether § .525 applies, a court first
24 examines the language of the law itself and the act
25 creating it. And this is an interesting history and

1 guides, in some measure, at least, the resolution of
2 these issues. So I'll go through it in a little
3 detail.

4 This law was enacted in 2010. It begins with a
5 statement of findings and purpose by the Legislature.
6 In section 1 the Legislature finds and declares four
7 different principles, two of which I believe apply
8 here. In part (a), the Legislature finds and
9 declares that,

10 "It is concerned about lawsuits brought primarily
11 to chill the valid exercise of the constitutional
12 rights of freedom of speech and petition for the
13 redress of grievances."

14 And (d), the Legislature finds and declares that,

15 "It is in the public interest for citizens to
16 participate in matters of public concern . . . that
17 affect them without fear of reprisal through abuse of
18 the judicial process."

19 I edited that last slightly to eliminate some
20 language that does not apply to this case at all.

21 After a statement of findings and declarations,
22 then the Legislature identified the purposes it had
23 in enacting this legislation. They were, first,

24 "To strike a balance between the rights of persons
25 to file lawsuits and to trial by jury and the rights

1 of persons to participate in matters of public
2 concern."

3 Second, "To establish an efficient, uniform, and
4 comprehensive method for speedy adjudication of
5 strategic lawsuits against public participation;" and
6 then, third, "To provide for attorneys' fees, costs,
7 and additional relief where appropriate."

8 In its enactment, the Legislature followed a
9 nearly identical law enacted in California in 1992,
10 so that was some 18 years ago. In 1992 the
11 California Legislature declared its purpose. And we
12 find that it is remarkably similar to what the
13 Washington Legislature did in 2010. In 1992, the
14 California Legislature declared,

15 "The Legislature finds and declares that it is in
16 the public interest to encourage continued
17 participation in matters of public significance and
18 that this participation should not be chilled through
19 the abuse of the judicial process."

20 Interestingly, then, in 1997, some five years
21 later, the California Legislature further amended its
22 statement of purpose by declaring that, "To this end,
23 this section, the Anti-SLAPP law, shall be construed
24 broadly." As we all learned from the response by
25 Mr. Johnson this morning, the Washington Legislature

1 has enacted a similar direction about liberally
2 construing the law and liberally applying it to reach
3 its goals.

4 The law itself, our Washington law § .525,
5 declares, "This section applies to any claim, however
6 characterized, that is based on an action involving
7 public participation and petition. As used in this
8 section, an action involving public participation and
9 petition includes," and then we have a short laundry
10 list of things that are included within that
11 definition.

12 When we look at the California law, we see a very
13 similar pattern. The California Legislature declared
14 18 years earlier, "As used in this section, 'act in
15 furtherance of a person's right of petition or free
16 speech under the United States or California
17 Constitution in connection with a public issue"
18 includes, and then they have a laundry list. And
19 those laundry lists are remarkably similar. And in
20 this case, and in all of the other appellate
21 decisions that I am going to cite this morning, we
22 are dealing with what appears in Washington as the
23 fifth element and what appears in California as the
24 fourth element.

25 It says in the Washington law,

1 "As used in this section, an action involving
2 public participation and petition includes any other
3 lawful conduct in furtherance of the exercise of the
4 constitutional right of free speech in connection
5 with an issue of public concern or in furtherance of
6 the exercise of the constitutional right of
7 petition."

8 The California statute has exactly that same
9 language in its statute. In the Washington law,
10 there are two prongs for analysis of a claim for
11 dismissal such as this claim brought pursuant to the
12 Anti-SLAPP Act. And in California, the process is
13 similar but not exactly identical. One important
14 difference is the clear and convincing evidence
15 standard in the Washington statute. That standard
16 does not appear in the California statute.

17 Also relevant to the issues in this case, the
18 Washington law provides for a stay of discovery until
19 the motion can be heard. And it provides that the
20 motion must be heard on a very accelerated basis.
21 There are few areas of our law that require the
22 courts to act as quickly as the courts are required
23 to act in these cases. And you will find in
24 California that there are some changes in the
25 sentence structure, but the sections that deal with

1 limiting discovery and accelerated resolution are
2 otherwise identical.

3 Since this is a new law in Washington, enacted in
4 2010, there are very few appellate court decisions
5 interpreting, applying, and construing the law. Only
6 one Washington appellate decision has been issued so
7 far, and it did not decide anything relevant to this
8 controversy.

9 There are three federal court decisions applying
10 Washington law issued by the federal courts for
11 western Washington. In the course of decision-making
12 in those three cases, each federal judge considered
13 the large body of California appellate decisions
14 construing and applying the California law. Recall
15 that it is 18 years ahead of us, and recall that it
16 is a very similar law. This type of reference to
17 what other courts have done is often referred to in
18 our law as persuasive authority.

19 When a Court of Appeals or the Supreme Court in
20 the State of Washington issues a decision, I am
21 bound, as a trial judge here, to follow that
22 decision. I am not bound to follow the decision of
23 the California Supreme Court. But when the
24 California Supreme Court says something of interest
25 that is directly applicable to a case that I am

1 deciding, and where our courts of appeal have not
2 announced their decision, that decision by the
3 Supreme Court of another state or the Supreme Court
4 or a Court of Appeals from the federal system are all
5 persuasive authority that I should and often do
6 consider.

7 In the case of *Aronson v. Dog Eat Dog Films* - and
8 I'm not making this up. That is the title of the
9 case - *Dog Eat Dog Films* was a film company owned by
10 Michael Moore. And within which he made his
11 documentary film "Sicko." In that film is a very
12 short film clip of a fellow walking on his hands
13 across a street in London and resulting in his
14 injury, and then the idea was to compare the
15 treatment he got in England with the treatment that
16 would be available to him in the United States.

17 After the film was issued, the person walking on
18 his hands across the street sued the corporation
19 *Dog Eat Dog Films* contending that his privacy had
20 been invaded and that there had been a
21 misappropriation of a person's image, both laws that
22 permit recovery under the laws of the State of
23 Washington when that occurs. In that decision in
24 federal court, Judge Strombom there issued as part of
25 her opinion information or a statement that is

1 important to this case, and that is why I have
2 mentioned this in detail. I want to demonstrate how
3 far apart the act of walking on one's hands across a
4 street and then putting it in a film is from someone
5 standing on a soapbox or before an audience and
6 exercising his or her right of free speech. But they
7 are all connected. And Judge Strombom wrote,

8 "The focus is not on the enforcement of
9 plaintiff's cause of action but rather, the
10 defendant's activity that gives rise to defendant's
11 asserted liability and whether that activity
12 constitutes protected speech."

13 She further wrote,

14 "The Washington Legislature has directed that the
15 Act be applied and construed liberally to effectuate
16 its general purpose of protecting participants in
17 public controversies from an abusive use of the
18 courts. Any conduct in furtherance of the exercise
19 of the constitutional right of free speech in
20 connection with an issue of public concern is subject
21 to the protections of the statute."

22 With that background, then, we turn to the
23 evidence and the law in this case. As you know,
24 § .525 contains two prongs. First, the focus is on
25 the defendants, the persons bringing the motion

1 seeking dismissal of the lawsuit. Under the first
2 prong, the defendants must show that they are
3 protected by § .525 under (2)(e), the part that I
4 read to you earlier, defining an action involving
5 public participation and petition. And you recall
6 that that language is that "any other lawful conduct
7 in the furtherance of the exercise of a
8 constitutional right of free speech in connection
9 with an issue of public concern or in furtherance of
10 the exercise of the constitutional right of
11 petition."

12 Defendants here must show by a preponderance of
13 the evidence that their conduct fits this definition.
14 I find that they have done so. Four decades of
15 conflict in the Middle East have accompanied the
16 issues that surround the purposes behind this
17 proposed Boycott and Divestment Resolution. The
18 conflict in the Middle East between Israel and its
19 neighbors has certainly gone on longer than that, but
20 focusing on the conflict between the Palestinians and
21 the Israelis over the occupation of land is at least
22 four decades old. And for four decades, the matter
23 has been a matter of public concern in America and
24 debate about America's role in resolving that
25 conflict. I don't believe there can be any dispute

1 about that issue being a matter of public concern.

2 In their brief, plaintiffs contend that they don't
3 dispute defendants' right to speak on this important
4 subject. But they object to the improper way that
5 the defendants have used the corporation to voice
6 their speech. Recall the language from the *Dog Eat*
7 *Dog* case above, "any conduct in furtherance of the
8 exercise of the constitutional right of free speech
9 in connection with an issue of public concern" is
10 subject to the protections of the statute.

11 But also recall the language of the statute
12 itself. It begins, in that subpart (e), "any lawful
13 conduct." And it is here that the plaintiffs contend
14 that the conduct in enacting the resolution was not
15 lawful. Therefore, the analysis shifts to the second
16 prong of the statute, where plaintiffs must prove by
17 clear and convincing evidence a probability of
18 prevailing on the claim.

19 This is a new law, and it is also a new or unique
20 evidence standard. Clear and convincing evidence of
21 a fact is something that the courts are very used to
22 dealing with. Clear and convincing evidence of a
23 probability is certainly more unique than clear and
24 convincing evidence of a fact. Probability, I am
25 satisfied, relying upon the authorities provided me

1 by the plaintiff, means less than the preponderance
2 standard. But the evidence, to meet that threshold
3 standard, must be clear and convincing under the law.

4 Some writers have suggested that the proof
5 standard here is akin to the summary judgment
6 standard under Civil Rule 56. My application of the
7 evidence burden here is not dissimilar to that. But
8 even for summary judgments, the evidence standard is
9 not uniform. Motions for summary judgment may be
10 decided for cases requiring clear, cogent, and
11 convincing evidence when that is the underlying
12 burden, as well as evidence in the more traditional
13 case of a preponderance of the evidence.

14 So what evidence do the plaintiffs offer to meet
15 their burden on this second prong? First, the issue
16 of consensus. The governing documents of the
17 corporation, the Co-op here, is very clear.
18 Decisions of the Board must be by consensus. That is
19 not so for the membership nor is it so for the staff.
20 There is no requirement that either of those bodies
21 act by consensus that is contained in the bylaws of
22 the corporation.

23 This issue of consensus is a very important part
24 of the fabric of the Co-op, but it is not material to
25 this case. Consensus means many different things, but

1 it can, and does in this case, mean the unanimous
2 consent among decision-makers. Here, unanimity is
3 not the issue.

4 It is undisputed that there was no consensus among
5 the staff in addressing this Boycott and Divestment
6 Resolution. And we know that while the bylaws do not
7 require consensus for the staff to act, the Boycott
8 Policy certainly does. But we know that they didn't
9 reach consensus there. We know that the Board did
10 reach consensus. There is no dispute about that.

11 The issue is, Did the Board have authority to make
12 a decision, to pass, or to use the language of the
13 Co-op, to "consent to" the Boycott and Divestment
14 Resolution of July 15, 2010. In the words of the
15 statute, was the Board's conduct lawful. And whether
16 they acted with consensus or not is not material to
17 that issue, because there is no dispute they did act
18 with consensus towards that issue.

19 Next we deal with the key issue here, and that is
20 what is the authority of the Board to act in this
21 matter. As a matter of law, the Olympia Food Co-op
22 was organized as a nonprofit corporation and remains
23 a nonprofit corporation under the law. Under our
24 law, the governance documents of the Co-op are its
25 articles of incorporation and bylaws. Under our

1 law, "The affairs of a corporation shall be managed
2 by a board of directors."

3 The Co-op's governance documents, the bylaws,
4 repeat the statute, "The affairs of the cooperative
5 shall be managed by a Board of Directors."

6 It is equally clear that under our law a board of
7 directors of a nonprofit corporation may delegate
8 some of its powers. In this case the Co-op's Board
9 has done so with respect to the Boycott Policy. The
10 Boycott Policy, consented to by the Board in 1993,
11 has its operative language in paragraph 5 where the
12 policy declares, "The Department manager will make a
13 written recommendation to the staff who will decide
14 by census whether or not to honor a boycott."

15 The policy is silent about the consequences of
16 staff failing to reach consensus to either honor the
17 boycott or to not honor the boycott.

18 Plaintiffs contend that where the staff does not
19 reach consensus to honor a boycott, the matter simply
20 ends, and the boycott is not honored. Plaintiffs
21 contend that the delegation in the Boycott Policy is
22 a complete delegation of that power and that the
23 Board did not retain any power to decide boycott
24 requests, even where consensus was not reached by the
25 staff one way or the other.

1 The Boycott Policy does not explicitly support
2 these contentions. It speaks to consensus one way or
3 the other but not the failure to reach consensus.
4 For the plaintiffs, the Boycott Policy is at best
5 ambiguous about failing to reach consensus. To
6 explain the intent of the Board in 1993 regarding
7 this issue, plaintiffs offer the identical
8 declarations of two Board members at the time, to the
9 effect that "authority to recognize boycotts would
10 reside with the Co-op staff, not the Board."

11 Whatever the standard for weighing evidence in a
12 motion such as this, the evidence must be evidence
13 admissible under the rules of evidence in case law.
14 The statements of the two declarants are inadmissible
15 as expressions of their subjective intents at the
16 time the policy was enacted. As statements of intent
17 of the Board, they are inadmissible as hearsay.

18 The only objective evidence specifically relating
19 to this issue is in the Board minutes from July 28,
20 1992, almost a year before the policy was finally
21 adopted. The formal proposal there is stated as,
22 "If a boycott is to be called, it should be done by
23 consensus of the staff."

24 Consideration of the entire section of the minutes
25 relating to boycotts from this meeting shows that the

1 focus is on resolving, by policy, whether individual
2 managers or the staff would decide boycott requests.
3 And in the minutes, just above the formal proposal is
4 the statement, "BOD," or board of directors, "can
5 discuss if they take issue with a particular
6 decision."

7 The enumerated powers of the Board contained in
8 the bylaws includes, at No. 16, "Resolve
9 organizational conflicts after all other avenues of
10 resolution have been exhausted."

11 Plaintiffs have offered no evidence that the Board
12 exempted boycott matters from this power, certainly
13 not evidence that could be considered clear and
14 convincing.

15 The next argument that the plaintiffs make is on
16 the issue of nationally recognized boycott. The
17 plaintiffs make three contentions in this regard.
18 First, plaintiffs contend that if the Board did have
19 the power to resolve the deadlock on the boycott, the
20 Boycott and Divestment Resolution of July 15, 2010,
21 was unlawful because the Board failed to determine
22 that the matter was a nationally recognized boycott.

23 In the first of three arguments, they argue that
24 the Boycott and Divestment Resolution does not
25 reflect a national boycott. Their evidence is not

1 sufficient to meet the clear and convincing standard,
2 nor is it sufficient to even create a material issue
3 of fact. I will be more direct in this regard. The
4 evidence clearly shows that the Israel boycott and
5 divestment movement is a national movement. It is
6 clearly more than a boycott. It is a divestment
7 movement, as well.

8 The question of its national scope is not
9 determined by the degree of acceptance. There
10 appears to be very limited acceptance, at least in
11 the United States. Further, in arguing that the
12 movement has achieved little success, plaintiffs
13 offer examples that demonstrate the national scope of
14 the issue. Plaintiffs argue that the movement has
15 not penetrated the retail grocery business, but that
16 does not determine national scope. The assistance to
17 each side here from national organizations organized
18 to support or oppose the movement demonstrates its
19 national scope.

20 Next plaintiffs contend that even if the movement
21 is national in scope, the Board did not address that
22 issue in its resolution of June 15, 2010. The only
23 evidence offered is that the staff, in its
24 discussion, never reached that aspect of the
25 proposal. This contention is refuted by documentary

1 evidence that is clear contravention of the
2 plaintiffs' contention.

3 The minutes of the Board meeting of May 20, 2010,
4 show that a presentation was made to the Board
5 regarding the boycott proposal that included
6 presentation of, "The nationally and internationally
7 recognized boycott." I'm quoting there from the
8 minutes of the meeting.

9 At the meeting the Board decided to resubmit the
10 matter to staff with the direction to Harry Levine
11 to "write a Boycott Proposal following the outlined
12 process." I construe "outlined process" to mean the
13 process outlined in the Boycott Policy, because that
14 is the format that Mr. Levine followed. In his
15 lengthy paper dated June 7, 2010, Mr. Levine included
16 a section entitled "A growing movement for Boycott,
17 Divestment, Sanctions (BDS)," and following that
18 section a section entitled "Prominent Supporters."

19 The minutes of the Board meeting of July 15, 2010,
20 state that Harry shared with the group the summary of
21 staff feedback and the process therein arising out of
22 the submission to staff. This record clearly
23 reflects that the scope of the movement or boycott
24 was addressed; plaintiffs offer only vague rebuttal,
25 not clear and convincing evidence.

1 Finally, plaintiffs contend that the Board acted
2 in contravention of its powers granted it under the
3 bylaws to "Resolve organizational conflicts after all
4 other avenues of resolution have been exhausted."
5 Plaintiffs contend that the Board did not exhaust
6 other avenues before it acted. Plaintiffs offer two
7 avenues, first vote of the membership, or second,
8 education of the membership. This is not clear and
9 convincing evidence.

10 The avenues suggested by plaintiffs are not in the
11 Co-op's scheme for resolving boycott requests. The
12 scheme was for staff consideration first, as
13 authorized by the Boycott Policy, and if necessary,
14 followed by Board consideration in resolution of
15 organizational conflicts as authorized in the bylaws.
16 The record shows that the Board resubmitted the
17 matter to staff first and then acted when that avenue
18 proved a dead end. The record shows that the Board
19 considered further delay, reviewed the history of the
20 proposal, and balanced the need for completion
21 against further delay. That evidence is not
22 disputed.

23 In sum, I conclude that defendants have satisfied
24 their burden under the first prong of § .525 and now
25 conclude that plaintiffs have failed in their burden

1 under the section prong. In so doing, I have
2 addressed the substance of plaintiffs' complaint. I
3 have not addressed other contentions made by
4 defendants, because I did not have to in order to
5 decide this matter. I am sure appellate review will
6 be de novo under this statute.

7 I must, however, address the constitutionality of
8 the statute, because I am applying it here. I
9 conclude that it is constitutional. Plaintiffs argue
10 that they are relieved from making the showing
11 required under the second prong of §§ (4)(b) of
12 § .525 because the law is unconstitutional in two
13 respects.

14 In so doing, the law is clear that when a court is
15 considering the constitutionality of a statute
16 enacted by the Legislature, that statute is presumed
17 to be constitutional. And the party challenging the
18 constitutionality, the plaintiffs here, must overcome
19 that presumption by evidence beyond a reasonable
20 doubt our highest evidence standard.

21 This is recent law in Washington, so its
22 constitutionality has not been previously addressed.
23 Two attempts have been made in two of the three
24 federal court decisions that I alluded to earlier,
25 but in each case, the federal judge declined to

1 consider the matter because it was not timely made
2 before those courts.

3 In *Costello v. The City of Seattle*, Judge Pechman
4 made a comment that certainly occurred to me. She
5 stated, "Furthermore, the assertion that the Anti-
6 SLAPP Act is unconstitutional is questionable given
7 that California's Anti-SLAPP Act, which is
8 substantially similar to Washington's statute, has
9 been litigated multiple times and not held
10 unconstitutional." She cited as an example *Equilon*
11 *Enterprises v. Consumer Cause, Incorporated*, a 2002
12 decision from the California Supreme Court.

13 Plaintiffs here contend that § .525 is
14 unconstitutional for two reasons. First, the
15 Legislature imposed a heightened burden of proof,
16 clear and convincing evidence; and second, it
17 restricts full discovery until the Anti-SLAPP motion
18 is decided.

19 In this regard, it is important to note that the
20 law requires very speedy resolution of the motion. A
21 significant portion of that time is a time when
22 discovery is not permitted in any event. What the
23 discovery restriction here requires is that a party
24 initiating a lawsuit where the First Amendment rights
25 of the defendant are implicated must have evidence to

1 support the complaint before discovery is undertaken,
2 before the case is filed.

3 Plaintiff contends that RCW 4.24.525 violates the
4 constitutional provision for separation of powers
5 among the executive, the Legislature, and the courts.
6 Those are three separate but co-equal branches of
7 government. And here the focus is on the separation
8 between the Legislature and the courts in the control
9 of how cases proceed through the courts.

10 Second, they contend that the statute violates or
11 denies individuals the right of access to courts
12 guaranteed in our constitutions. Plaintiffs rely
13 upon *Putman v. Wenatchee Valley Medical Center*, a
14 2009 Supreme Court decision from our Washington
15 Supreme Court. I am bound to follow *Putman* if it
16 applies to this case. I find that it does not.

17 First, addressing the claim that § .525 violates
18 the separation of powers doctrine, the rule long
19 recognized and repeated in *Putman* is that the
20 Legislature can regulate substantive matters, but the
21 courts have exclusive power to regulate procedural
22 matters.

23 As regards the burden of proof argument, the clear
24 and convincing evidence argument, our United States
25 Supreme Court has spoken as recently as the year 2000

1 in *Raleigh v. The Illinois Department of Revenue*
2 where it stated, "Given its importance to the outcome
3 of cases, we have long held the burden of proof to be
4 a substantive aspect of the claim," in other words, a
5 part of the claim that the Legislature can regulate.

6 As regards limits on discovery, the plaintiffs
7 here contend that this is procedural. In assessing
8 that argument, I considered a statement from our
9 Supreme Court in *Sofie v. Fibreboard Corporation*
10 where the Washington Supreme Court wrote,

11 "The Legislature has the power to shape
12 litigation. Such power, however, has limits. It
13 must not encroach upon constitutional protections.
14 In this case, by denying litigants an essential
15 function of the jury, the Legislature has exceeded
16 those limits." *Sofie v. Fibreboard* dealt with an
17 issue of the right to trial by jury.

18 As I considered that statement, I reflected that
19 just as legislative powers are limited, court rules
20 may not encroach upon constitutional protections, as
21 well. Where the Legislature acts to provide rights
22 protecting constitutional guarantees, especially
23 fundamental First Amendment rights, does not the
24 separation powers of doctrine recognize a primacy of
25 purpose? Even if the act appears to implicate

1 procedures in court, if the purpose is to enforce
2 fundamental constitutional rights, is that not a
3 substantive act? I concluded "yes," and I find
4 support for that conclusion in the *Putman* case.

5 The *Putman* case involved a different statute, not
6 related to the types of rights of restrictions we're
7 dealing with, but it dealt with this separation of
8 powers issues, as well as access to courts issues.
9 And it was construing a statute identified as
10 RCW 7.70.150. And the Supreme Court wrote,

11 "We hold that RCW 7.70.150 is procedural,
12 because it addresses how to file a claim to
13 enforce a right provided by law. [Citation
14 omitted] The statute does not address the
15 primary rights of either party; it deals only
16 with the procedures to effectuate those rights.
17 Therefore, it is a procedural law and will not
18 prevail over conflicting court rules."

19 RCW 4.24.525 is different. It does address a
20 primary right of a party, the First Amendment right
21 of free speech and petition. I conclude that the act
22 of the Legislature in this regard is not
23 unconstitutional.

24 Second, addressing the claim that § .525 violates
25 the constitutional rights of access to courts, as

1 regarding the burden of proof argument, there is
2 little support in the law for that contention. As
3 late as 2004, the 6th Circuit Court of Appeals in
4 *Garcia v. Wyeth-Ayerst Laboratories* wrote,

5 "The argument that a state statute stiffens
6 the burden of proof of a common law claim does
7 not implicate this right to access of courts and
8 a jury trial."

9 As regards the limit on discovery, here I follow
10 the lead of the California Supreme Court in *Equilon*
11 *Enterprises*, a case I identified earlier. Although
12 dealing with a different aspect of the statute, the
13 court there concluded that the statute does not
14 restrict access; instead, it "provides an efficient
15 means of, dispatching early on in a lawsuit, a
16 plaintiff's meritless claims."

17 The same reasoning applies here. The Legislature
18 has not created a restriction on access. Rather, it
19 has determined that where the subject of the lawsuit
20 involves speech or acts protected by the First
21 Amendment, there must be clear and convincing
22 evidence of a meritorious claim at initial filing.
23 The statute provides for a mechanism for efficiently
24 dispatching those that don't. I find that the act is
25 not unconstitutional for those reasons.

1 That concludes my opinion here. The result is
2 that I am prepared to dismiss the lawsuit of the
3 plaintiffs. Concurrently with that, I will be
4 required to enter orders awarding to the defendants
5 attorneys' fees and a penalty of \$10,000 per
6 defendant against the plaintiffs. I don't decide at
7 this point that the statute requires a separate
8 \$10,000 award to each defendant. I will decide that
9 if there is an issue about it as we move forward.
10 But I do note that a federal court, Judge Pechman in
11 the *City of Seattle* case, issued such a ruling.

12 I am going to be gone now on a short vacation, and
13 so I do not contemplate that I will enter the orders
14 until I return. That will give us some time before
15 the entry of those orders and the case moves forward.
16 I am struck in this case by some aspects of this
17 lawsuit that I think it is appropriate for the
18 citizens of this community to consider.

19 The Olympia Food Co-op is an institution in this
20 community. It has existed for a long time and
21 presumably will continue to exist for a long time.
22 This case and this process that we've gone through
23 will move forward and will be resolved, ultimately,
24 in our Court of Appeals, I suspect.

25 What will be resolved is not the underlying

1 dispute which brings so many of the citizens here
2 today to observe, but rather, the dry and technical
3 application of the statute. However it is resolved,
4 it will be a long and expensive process. And as I
5 indicated, there are considerable sums of money now
6 at issue in this case that were not necessarily
7 present before and have nothing to do with the issue
8 of whether this is an appropriate boycott for the
9 Co-op to undertake or not.

10 I express absolutely no opinion in that regard.
11 But it does occur to me that whatever the final
12 decision in this case is, whether it is this decision
13 or whether it is determined that I have made a
14 mistake and the case should move forward to an
15 ultimate resolution either that the Board acted
16 correctly or not -- whatever that decision is down
17 the road, after a considerable period of time and
18 resources are invested in it, that decision can be
19 overturned very quickly and very simply, simply by a
20 vote of the membership of the cooperative.

21 Nothing here that is decided in terms of deciding
22 the course of the Co-op is cast in stone. And given
23 this state of the case, where we have a judicial
24 determination about the merits of the SLAPP motion,
25 but some time before that order is entered and

1 becomes appealable, I urge that the parties consider
2 resolution of this case something short of the type
3 of order that will be entered at the end of this
4 case. It would seem to me that it is in the best
5 interests of all parties, and I urge your
6 consideration of that view and that proposal.

7 That is not a process that I can order. It is not
8 a process that I will be involved in. But the
9 interests of the citizenry in this case, as evidenced
10 by the number of people who have appeared here, seems
11 to suggest that that is a matter for their concern;
12 and there is an avenue of resolution here short of
13 the type of order that I am required by law, now that
14 I have made my decision, to enter and which will be
15 reviewed.

16 That is all I have to say in that regard.
17 Counsel, I will be returning after next week. So I
18 will be back in the saddle on Monday, March 12th. I
19 start civil jury trials then. This would be an
20 appropriate case, I believe, for presentation of the
21 orders on the Friday motion calendar.

22 I will leave it to you to consult with Ms. Wendel
23 to arrange an appropriate date.

24 MR. SULKIN: Thank you, Your Honor.

25 THE COURT: Ladies and gentlemen, we'll stand

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in recess.

(Conclusion of the February 27, 2012 Proceedings.)

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

Department No. 2

Hon. Wm. Thomas McPhee, Judge

Kent and Linda Davis, et al.,)

Plaintiffs,)

vs.)

Grace Cox, et al.,)

Defendants.)

No. 11-2-01925-7
REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss

I, Kathryn A. Beehler, Official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do hereby certify:

That the foregoing pages, 1 through 36, inclusive, comprise a true and correct transcript of the proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, reported by me on the 27th day of February, 2012.

Kathryn A. Beehler, Reporter
C.C.R. No. 2248

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KENT L. And LINDA DAVIS, ET AL.,)	THURSTON COUNTY
)	CAUSE NO.
)	11-2-01925-7
Plaintiff,)	
)	12(b)(6) Motion
vs.)	
)	
GRACE COX, ET AL.,)	
)	
Defendant.)	

THE COURT'S RULING

BE IT REMEMBERED that on February 25, 2016, the above-entitled matter came on for hearing before the HONORABLE CAROL MURPHY, Judge of Thurston County Superior Court.

Reported by: Sonya Wilcox, RDR, Official Reporter,
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Olympia, WA 98502
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APPEARANCES

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For the Defendant:

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1 Before the Honorable CAROL MURPHY, Presiding
2 Representing the Plaintiff, ROBERT SULKIN
3 Representing the Defendant, BRUCE JOHNSON and
4 BROOKE HOWLETT
5 SONYA WILCOX, RDR, Official Court Reporter

6 --oo0oo--

7
8 THE COURT: We are in session in the case of
9 Davis v. Cox for the Court's oral ruling. Before the
10 Court provides its ruling, I would like to have the
11 attorneys put their appearances on the record,
12 please.

13 MR. SULKIN: Your Honor, Bob Sulkin for the
14 plaintiffs.

15 MR. JOHNSON: Bruce Johnson, your Honor.

16 MS. HOWLETT: And Brooke Howlett.

17 MR. JOHNSON: For defendants.

18 THE COURT: Thank you. The Court heard oral
19 argument on the motion to dismiss. At that time, I
20 had thoroughly reviewed the file, including the
21 briefing on the motion itself. I have since taken
22 the opportunity to review the record even closer and
23 look at all of the case law that was cited again, as
24 well as look into a little bit more deeply some of
25 the issues that arose at argument. I appreciate the

1 parties coming back to hear the Court's oral ruling.
2 I had been prepared to issue a ruling after hearing
3 argument, but I think the Court benefitted greatly
4 from the time that it took to review things a little
5 bit more closely.

6 I also want to indicate how much I appreciate the
7 parties' briefing in this case. It was very helpful.
8 As I indicated at the oral argument, the Court is
9 striking and not considering for the purposes of this
10 motion the affidavits and attachments for the
11 pleadings. Although I recognize that I have the
12 authority to properly consider documents referenced
13 in the complaint, as well as various attachments to
14 pleadings, I'm declining to do so.

15 Some of the reasons for the Court declining to do
16 so include the difficulty that the parties had in
17 bringing some documents to the Court's attention.
18 I'm not making any rulings or findings regarding
19 that, but I know that the parties had attempted to
20 have the court file certain documents under seal.
21 The parties had an agreement generally regarding
22 confidential documents, and that somewhat complicated
23 the attachments and the other documents that the
24 Court could have considered in this motion but is
25 declining to do so.

1 The Court is considering this as a motion to
2 dismiss under CR 12(b)(6) and is not converting it to
3 a motion for summary judgment under CR 56. The
4 parties agree that the operative complaint is the
5 amended complaint filed January 8, 2016. The Court
6 in this matter does not weigh the evidence but must
7 determine whether any evidence may be put forth to
8 support the claims by the plaintiffs. All
9 plaintiffs' allegations are presumed true.

10 The first argument that the defendants bring in
11 this motion to dismiss the plaintiffs' claims is that
12 the plaintiffs lack standing to bring a derivative
13 action against the co-op. The plaintiffs assert
14 their only claims are derivative on behalf of the
15 co-op, so this is a very important argument and I
16 will say probably the one that the Court spent the
17 most time on.

18 There are three subparts to this argument. The
19 first is that Washington law prohibits a derivative
20 suit by minority members of non-profit corporations.
21 That argument by the defendants would preclude this
22 action completely.

23 The argument relies on the case of *Lundberg v.*
24 *Coleman*, 115 Wn. App. 172 (2002). That case does not
25 specifically address the language in RCW

1 24.03.040(2), and that language is, starting with the
2 language in 040, "No act of a corporation and no
3 conveyance or transfer of real or personal property
4 to or by a corporation shall be invalid by reason of
5 the fact that the corporation was without capacity or
6 power to do such act or to make or receive such
7 conveyance or transfer, but such lack of capacity or
8 power may be asserted," and then I skip to (2) of
9 that statute, "In a proceeding by the corporation
10 whether acting directly or through a receiver,
11 trustee, or other legal representative or through
12 members in a representative suit against the officers
13 or directors of the corporation for exceeding their
14 authority."

15 Having reviewed the cases and the authorities, I
16 find that there really aren't authorities on point,
17 unfortunately, and so the Court, in considering
18 whether to apply the rule in *Lundberg* or to apply
19 statutory language or some other case law, which
20 again I have reviewed, I find that the Court cannot
21 be convinced that the law clearly requires that this
22 suit be dismissed for lack of standing, and because
23 of that, the Court is denying that particular motion,
24 the motion to dismiss based upon that subpart to the
25 argument that Washington law prohibits this

1 particular derivative suit.

2 I make that finding based upon the particulars of
3 this lawsuit. It is a co-op. It is a member
4 organization. It doesn't specifically fit the fact
5 situation in *Lundberg*.

6 The next subpart to the argument that the
7 plaintiffs lack standing is that the plaintiffs
8 failed to exhaust intracorporate remedies. The Court
9 rejects this subargument. The remedy sought by the
10 plaintiffs is not identical to that which might be
11 available by the identified remedy. It appears that
12 the plaintiffs may pursue a vote of the membership,
13 and that has been argued, but that is not what the
14 plaintiffs have sought in their complaint. They are
15 asking, as I understand it, that the co-op follow its
16 own policies, which it argues requires a consensus of
17 the staff before moving forward on a boycott. That
18 specific remedy isn't available by the remedies that
19 the plaintiffs were directed to when they complained.

20 The third subargument is that the co-op suffered
21 no injury. The Court finds that the complaint
22 alleges damages in the way of decreased membership,
23 less business at the co-op, and other injuries. They
24 do not have to quantify the damages or the injuries
25 at this stage.

1 Therefore, the Court has now addressed all three
2 subparts of the first argument that the plaintiffs
3 lack standing to bring a derivative action against
4 the co-op, and the Court has denied the motion as to
5 that first argument by rejecting each of those three
6 subarguments.

7 The second argument is that the plaintiffs' claims
8 lack merit. The defendants may bring this argument
9 under CR 12(b)(6) to challenge the allegations in the
10 complaint, and that requires that the Court look at
11 all of the allegations in the complaint and, assuming
12 that all of those allegations are true, determine
13 whether they state a claim.

14 The first subargument is that the board acted
15 within its authority. So the defendants argue that
16 the plaintiffs' claims lack merit because the board
17 acted within its authority. The defendants argue
18 this under the business judgment rule, which states
19 generally that, "Corporate management is immunized
20 from liability in a corporate transaction where (1)
21 the decision to undertake the transaction is within
22 the power of the corporation and the authority of
23 management and (2) a reasonable basis exists to
24 indicate the transaction was made in good faith."

25 The Court finds that any ruling on this argument

1 is not appropriate in a motion under CR 12(b)(6) as
2 it requires review of and potential interpretation of
3 the bylaws and other documents beyond the complaint
4 in this case. The Court cannot and will not decide
5 this argument in a 12 (b)(6) motion. The Court is
6 not addressing whether the co-op board acted within
7 its authority.

8 The second subargument that the plaintiffs' claims
9 lack merit addresses the claims of breach of
10 fiduciary duty and ultra vires acts. The claims of
11 breach of fiduciary duty requires that the plaintiffs
12 allege, "(1) that a shareholder breached his
13 fiduciary duty to the corporation and (2) that the
14 breach was a proximate cause of the losses
15 sustained."

16 Again, the Court finds that there are adequate
17 allegations in the complaint to address these
18 elements. At this stage, the plaintiffs are not
19 required to provide evidence of the specific duty,
20 nor are they required to quantify damages.

21 As to the allegation of ultra vires acts, it's a
22 different standard, and that is that the act must be
23 performed with no legal authority and, therefore,
24 void. Again, the Court finds that it must consider
25 documents beyond the complaint in order to determine

1 whether dismissal may be appropriate as a matter of
2 law. Based upon those findings, the Court is denying
3 the motion to dismiss plaintiffs' claims on the basis
4 that they lack merit.

5 Finally, the defendants argue that plaintiffs'
6 claims are barred under the law-of-the-case doctrine.
7 Both parties have asserted that they can rely on the
8 Court of Appeals findings in order to assist them in
9 this motion. I find that the findings of the Court
10 of Appeals are not helpful to this Court. The Court
11 of Appeals findings do not apply to bar the
12 plaintiffs from presenting facts to this Court. In
13 fact, that, I believe, is contrary to the holding of
14 the Washington Supreme Court. The Court of Appeals
15 and the Supreme Court addressed this Court's prior
16 ruling on a specific statutory scheme. The Supreme
17 Court struck down the anti-SLAPP statute, the
18 specific statutory scheme under which this Court had
19 previously made findings.

20 The defendants ask this Court now in ruling on
21 this motion to accept certain findings of the Court
22 of Appeals regarding the application of the business
23 judgment rule as law of the case. The Court denies
24 that request as inappropriate given the holding of
25 the Washington Supreme Court.

1 The Court believes now that it has addressed each
2 of the arguments and subarguments on the motion to
3 dismiss. That motion is denied. I want to be clear
4 that, in denying this motion to dismiss, the Court is
5 not precluding the parties from addressing motions,
6 including summary judgment motions on some of these
7 same issues and arguments. The ruling that the Court
8 issues today is based solely on a motion to dismiss.

9 Do the parties require any further clarification?

10 MR. SULKIN: No, your Honor.

11 MR. JOHNSON: No, your Honor.

12 THE COURT: I would appreciate it if the
13 parties presented an order that reflects the Court's
14 ruling. I'm not sure if it would be helpful to the
15 parties to have an order that addresses each of the
16 arguments or provides more information than simply
17 denial of the motion to dismiss. I will leave it to
18 the parties and sign an order that is agreed to as to
19 form, and if the parties have trouble agreeing as to
20 the form of an order, I can address that at a later
21 hearing.

22 MR. SULKIN: Thank you, your Honor.

23 THE COURT: Do the parties today have an order
24 that they agree as to the form?

25 MR. SULKIN: I have an order that just says

1 denied, and I will be happy to talk to Mr. Johnson if
2 he wants more than that, and if he wants to attach a
3 transcript, I'm happy with that, too.

4 THE COURT: I will give the attorneys a moment
5 to discuss.

6 MR. SULKIN: I think we can reach agreement,
7 your Honor.

8 THE COURT: I did initial where counsel has
9 initialled changes and I have signed the order.

10 MR. SULKIN: Thank you, your Honor.

11 THE COURT: Thank you very much. We are
12 completed.

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14 (Proceedings adjourned for the day at 1:51 p.m.)

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, SONYA L. WILCOX, RDR, Official Reporter
of the Superior Court of the State of Washington in and
for the County of Thurston hereby certify:

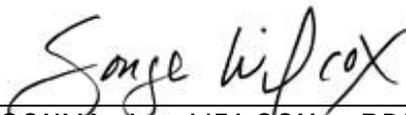
1. I reported the proceedings stenographically;

2. This transcript is a true and correct record of
the proceedings to the best of my ability, except for any
changes made by the trial judge reviewing the transcript;

3. I am in no way related to or employed by any
party in this matter, nor any counsel in the matter; and

4. I have no financial interest in the litigation.

Dated this day, March 3, 2016.



SONYA L. WILCOX, RDR
Official Court Reporter
Certificate No. 2112

EXHIBIT C

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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' RESPONSES AND
OBJECTIONS TO DEFENDANTS'
FIRST SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF
DOCUMENTS

Pursuant to CR 26, 33, and 34, Plaintiffs provide the following answers, responses,
and objections to Defendants' First Set of Interrogatories and Requests for Production of
Documents (the "Requests").

GENERAL OBJECTIONS

Plaintiffs make the following general objections to the Requests:

1. Plaintiffs object to the Requests to the extent they purport to impose any obligations exceeding those required by the Civil Rules.

1 2. Plaintiffs object to the Requests to the extent they seek information or
2 documents protected by the attorney-client privilege, work-product doctrine, or are
3 otherwise privileged or immune from discovery.

4 3. Plaintiffs object to the Requests to the extent they seek information,
5 documents, or things other than those in the actual possession, custody, or control of
6 Plaintiffs.

7 4. Plaintiffs object to the Requests to the extent they are vague, ambiguous,
8 overbroad, unduly burdensome, or seek information or documents either not relevant or
9 not reasonably calculated to lead to the discovery of admissible evidence.

10 5. Plaintiffs object to the Requests to the extent they seek information or
11 documents already in Defendants' possession, already known or disclosed to Defendants,
12 or information or documents equally available to Defendants.

13 6. Plaintiffs further reserve the right to alter or amend their objections set
14 forth herein, and to assert additional factual and/or legal contentions to the extent
15 additional facts are discovered and/or legal research is completed.

16 7. The foregoing general objections shall apply to all answers and responses
17 below, and are fully incorporated into them as if set forth separately.

18 Subject to and without waiving these objections, Plaintiffs answers and responds
19 as follows:

20 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

21 INTERROGATORY NO. 1: Identify each provision of the OFC's articles of
22 incorporation, bylaws, rules, goals and/or mission statement that you believe to have been
23 violated by the Board's decision to adopt the Israel Boycott and describe how each such
24 provision was violated.

25 ANSWER: Plaintiffs object to Interrogatory No. 1 as calling for legal conclusions;
26

1 and as inconsistent with the Washington State Supreme Court’s decision is *Weber v.*
2 *Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) (“...[I]t is improper to ask a party
3 to state evidence upon which he intends to rely to prove any fact or facts.”). Additionally,
4 discovery is ongoing, Defendants have not yet been deposed, and Plaintiffs reserve the
5 right to supplement this answer as warranted. Subject to and without waiving the
6 foregoing objections, Plaintiffs answer as follows: Plaintiffs incorporate by reference the
7 factual recitation and argument regarding these issues set forth in their Opposition to
8 Defendants’ Renewed Motion to Dismiss (previously filed). The Board’s decision to
9 adopt the Israel Boycott in the face of dissent, confusion, and/or abstention—by, at a
10 minimum, staff members and members of the Board itself—violated the principle of
11 consensus (i.e., unanimous decision-making), which is referenced throughout the Co-op’s
12 governing documents. For example, *see* the Co-op’s Mission Statement & Bylaws at ¶¶
13 I(2), III(6), III(11), and III(12); the Co-op’s Boycott Policy (1993); and the Co-op
14 Personnel Policy, dated September 2010, at 3 (“Staff Structure” and “Staff Decision
15 Making”). The Board also violated the “nationally recognized” standard set forth in the
16 Co-op’s Boycott Policy. Defendants further violated the governing documents, rules, and
17 goals of the Co-op by putting their own interests and the interests of an outside
18 organization (BDS) ahead of the interests of the Co-op. *See, e.g.*, the Co-op’s Mission
19 Statement & Bylaws at ¶ III(9). Defendants further violated the governing documents,
20 rules, and goals of the Co-op by arbitrarily discriminating against Israel, while
21 disregarding human rights abuses by numerous other countries that are far more severe
22 than the misconduct alleged against Israel. *See, e.g.*, the Co-op’s Mission Statement &
23 Bylaws at ¶¶ II(2), III(13). Defendants further violated the governing documents, rules,
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1 and goals of the Co-op by adopting the platform of BDS, which is widely recognized as an
2 anti-Semitic organization devoted to the dismantling of Israel as the Jewish homeland.
3 *See, e.g.,* the Co-op’s Mission Statement & Bylaws at ¶¶ II(2), III(13). Additionally, if, as
4 Defendants have contended, there was in fact an “organizational conflict” presented by the
5 Israel Boycott (which Plaintiffs deny), then the Board also violated the provision of the
6 Mission Statement & Bylaws that only allows the Board to “resolve organizational
7 conflicts after all other avenues of resolution have been exhausted”—which they were not.
8 *See* the Co-op’s Mission Statement & Bylaws at ¶ III(13)

9
10 REQUEST FOR PRODUCTION NO. 1: Produce all documents that refer or relate
11 to your answer to the preceding Interrogatory.

12
13 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
14 No. 1; Plaintiffs further object to RFP No. 1 as seeking documents protected by the
15 attorney-client privilege and attorney work product doctrine; and as seeking documents
16 already in the possession of Defendants. Subject to and without waiving the foregoing
17 objections, Plaintiffs respond as follows: Plaintiffs refer Defendants to the documents
18 cited in their Opposition to Defendants’ Renewed Motion to Dismiss (previously filed)
19 relating to the issues referenced in Interrogatory No. 1. Plaintiffs will provide copies of
20 responsive, non-privileged documents—with the exception of documents that were either
21 produced by Defendants to Plaintiffs or are otherwise available to Defendants (e.g., the
22 Co-op’s governing documents)—on a rolling basis at a mutually acceptable time and in a
23 mutually acceptable format.

24
25 INTERROGATORY NO. 2: Identify every fact that you believe supports or
26 contradicts your claim that Defendants acted “ultra vires” with respect to the Israel

1 Boycott.

2 ANSWER: Plaintiffs object to Interrogatory No. 2 as calling for legal conclusions;
3 and as inconsistent with the Washington State Supreme Court’s decision in *Weber v.*
4 *Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) (“...[I]t is improper to ask a party
5 to state evidence upon which he intends to rely to prove any fact or facts.”). Additionally,
6 discovery is ongoing, Defendants have not yet been deposed, and Plaintiffs reserve the
7 right to supplement this answer as warranted. Subject to and without waiving the
8 foregoing objections, Plaintiffs answer as follows: *see* Plaintiffs’ answer to Interrogatory
9 No. 1.

10 REQUEST FOR PRODUCTION NO. 2: Produce all documents that refer or relate
11 to your answer to the preceding Interrogatory.
12

13 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
14 No. 2; Plaintiffs further object to RFP No. 2 as seeking documents protected by the
15 attorney-client privilege and attorney work product doctrine; and as seeking documents
16 already in the possession of Defendants. Subject to and without waiving the foregoing
17 objections, Plaintiffs respond as follows: Plaintiffs refer Defendants to the documents
18 cited in their Opposition to Defendants’ Renewed Motion to Dismiss (previously filed)
19 relating to the issues referenced in Interrogatory No. 2. Plaintiffs will provide copies of
20 responsive, non-privileged documents—with the exception of documents that were either
21 produced by Defendants to Plaintiffs or are otherwise available to Defendants (e.g., the
22 Co-op’s governing documents)—on a rolling basis at a mutually acceptable time and in a
23 mutually acceptable format.
24

25 INTERROGATORY NO. 3: Identify every fact that you believe supports or
26

1 contradicts your claim that Defendants breached their fiduciary duties with respect to the
2 Israel Boycott.

3 ANSWER:

4 Plaintiffs object to Interrogatory No. 3 as calling for legal conclusions; and as
5 inconsistent with the Washington State Supreme Court's decision in *Weber v. Biddle*, 72
6 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) ("...[I]t is improper to ask a party to state
7 evidence upon which he intends to rely to prove any fact or facts."). Additionally,
8 discovery is ongoing, Defendants have not yet been deposed, and Plaintiffs reserve the
9 right to supplement this answer as warranted. Subject to and without waiving the
10 foregoing objections, Plaintiffs answer as follows: *see* Plaintiffs' answer to Interrogatory
11 No. 1.

12 REQUEST FOR PRODUCTION NO. 3: Produce all documents that refer or relate
13 to your answer to the preceding Interrogatory.

14 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
15 No. 3; Plaintiffs further object to RFP No. 3 as seeking documents protected by the
16 attorney-client privilege and attorney work product doctrine; and as seeking documents
17 already in the possession of Defendants. Subject to and without waiving the foregoing
18 objections, Plaintiffs respond as follows: Plaintiffs refer Defendants to the documents
19 cited in their Opposition to Defendants' Renewed Motion to Dismiss (previously filed)
20 relating to the issues referenced in Interrogatory No. 3. Plaintiffs will provide copies of
21 responsive, non-privileged documents—with the exception of documents that were either
22 produced by Defendants to Plaintiffs or are otherwise available to Defendants (e.g., the
23 Co-op's governing documents)—on a rolling basis at a mutually acceptable time and in a
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1 mutually acceptable format.

2 INTERROGATORY NO. 4: Identify any members of OFC who resigned their
3 Co-op memberships as a result of the Israel Boycott.

4 ANSWER:

5
6 Plaintiffs object to Interrogatory No. 4 as overbroad and unduly burdensome; and
7 as seeking information outside the possession, custody, or control of Plaintiffs.

8 Additionally, discovery is ongoing, Defendants have not yet been deposed, and Plaintiffs
9 reserve the right to supplement this answer as warranted. Subject to and without waiving
10 the foregoing objections, Plaintiffs answer as follows: Plaintiffs do not work at the Co-op,
11 have never been on the Board, and do not otherwise have access to the identities of all of
12 the members who resigned their Co-op memberships as a result of the Israel Boycott.

13 They reasonably expect, however, that additional discovery will provide information
14 relevant to this issue. For example, in or around August 2010, upon information and
15 belief, a petition was submitted to the Co-op requesting that the Israel Boycott be
16 rescinded. It was signed by a large number of Co-op members, some number of whom
17 subsequently resigned their memberships or stopped shopping at the Co-op. While other
18 members may also have resigned, this gives some indication of the impact of the Israel
19 Boycott.
20
21

22 REQUEST FOR PRODUCTION NO. 4: Produce all documents that refer or relate
23 to your answer to the preceding Interrogatory.

24 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
25 No. 4; Plaintiffs further object to RFP No. 4 as seeking documents protected by the
26 attorney-client privilege and attorney work product doctrine; as seeking documents

1 already in the possession of Defendants; and as seeking documents outside the possession,
2 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
3 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
4 documents—with the exception of documents that were either produced by Defendants to
5 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
6 acceptable time and in a mutually acceptable format.

8 INTERROGATORY NO. 5: Identify any members of OFC who ceased shopping
9 at OFC as a result of the Israel Boycott.

10 ANSWER:

11 Plaintiffs object to Interrogatory No. 5 as overbroad and unduly burdensome; and
12 as seeking information outside the possession, custody, or control of Plaintiffs.
13 Additionally, discovery is ongoing, Defendants have not yet been deposed, and Plaintiffs
14 reserve the right to supplement this answer as warranted. Subject to and without waiving
15 the foregoing objections, Plaintiffs answer as follows: Plaintiffs do not work at the Co-op,
16 have never been on the Board, and do not otherwise have access to the identities of all of
17 the members who ceased shopping at the Co-op memberships as a result of the Israel
18 Boycott. They reasonably expect, however, that additional discovery will provide
19 information relevant to this issue. For example, in or around August 2010, upon
20 information and belief, a petition was submitted to the Co-op requesting that the Israel
21 Boycott be rescinded. It was signed by a large number of Co-op members, some number
22 of whom subsequently resigned their memberships or stopped shopping at the Co-op.
23 While other members may also have stopped shopping at the Co-op, this gives some
24 indication of the impact of the Israel Boycott.
25
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1 REQUEST FOR PRODUCTION NO. 5: Produce all documents that refer or relate
2 to your answer to the preceding Interrogatory.

3 RESPONSE:

4 Plaintiffs incorporate by reference their objections to Interrogatory No. 5;
5 Plaintiffs further object to RFP No. 5 as seeking documents protected by the attorney-
6 client privilege and attorney work product doctrine; as seeking documents already in the
7 possession of Defendants; and as seeking documents outside the possession, custody, or
8 control of Plaintiffs. Subject to and without waiving the foregoing objections, Plaintiffs
9 respond as follows: Plaintiffs will provide copies of responsive, non-privileged
10 documents—with the exception of documents that were either produced by Defendants to
11 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
12 acceptable time and in a mutually acceptable format.

13 INTERROGATORY NO. 6: Identify every person who has personal knowledge
14 that supports or contradicts your allegations, and describe in full detail what that
15 knowledge is for each such person.

16 ANSWER:

17 Plaintiffs object to Interrogatory No. 6 as overbroad and unduly burdensome; and
18 as seeking information outside the possession, custody, or control of Plaintiffs. There are
19 likely dozens, if not hundreds, of people in the Co-op community and beyond who have
20 personal knowledge that supports Plaintiffs' allegations. Additionally, discovery is
21 ongoing, Defendants have not yet been deposed, and Plaintiffs reserve the right to
22 supplement this answer as warranted. Subject to and without waiving the foregoing
23 objections, Plaintiffs answer as follows:
24
25
26

- 1 1. Susan Mayer
2 c/o McNaul Ebel Nawrot & Helgren
3 600 University St. – Suit 2700
4 Seattle, WA 98101
5 (206) 467-1816
6 Ms. Mayer has knowledge regarding all aspects of this lawsuit.
- 7 2. Kent and Linda Davis
8 c/o McNaul Ebel Nawrot & Helgren
9 600 University St. – Suit 2700
10 Seattle, WA 98101
11 (206) 467-1816
12 Mr. and Ms. Davis have knowledge regarding all aspects of this lawsuit.
- 13 3. Susan and Jeff Trinin
14 1011 Wilson Street NE
15 Olympia, WA 98506
16 Mr. and Ms. Trinin had knowledge regarding all aspects of this lawsuit until
17 their withdrawal as Plaintiffs.
- 18 4. Defendants
19 c/o Davis Wright Tremaine
20 Defendants’ knowledge includes but is not limited to, the Co-op’s operations,
21 membership, governance, guiding rules and principles, practices, participation
22 in boycotts, financial condition, the process by which the Co-op adopted the
23 Israel Boycott, the reasons why the Board has not taken remedial action since
24 it adopted the Israel Boycott, and generally the allegations Plaintiffs have made
25 against Defendants in this lawsuit.
- 26 5. Tibor Breuer
Current contact information TBD
See Declaration of Tibor Breuer Opposing Defendants’ Special Motion
(previously filed)
6. Professor Nancy Koppelman
The Evergreen State College
2700 Evergreen Parkway NW
Olympia, Washington 98505
(360) 867-6000
See Declaration of Nancy Koppelman (previously filed)
7. Jon Haber
c/o McNaul Ebel Nawrot & Helgren
600 University St. – Suit 2700
Seattle, WA 98101

1 *See* Declaration of Jon Haber (previously filed)

2 8. Current and Former Members of the Board of Directors of the Olympia Food
3 Cooperative (other than Defendants)

4 c/o Olympia Food Cooperative
5 921 Rogers St. NW
6 Olympia, WA 98502
7 (360) 754-7666

8 Certain current and former Board members—not all of whom are known to
9 Plaintiffs—have knowledge regarding the Co-op’s operations, membership,
10 governance, guiding rules and principles, practices, financial condition,
11 participation in boycotts, the process by which the Co-op adopted the Israel
12 Boycott, the reasons why the Board has not taken remedial action since it
13 adopted the Israel Boycott, and generally the allegations Plaintiffs have made
14 against Defendants in this lawsuit.

15 9. Current and Former Staff Members of the Olympia Food Cooperative
16 (including but not limited to Michael Lowsky and Jim Shulruff)

17 c/o Olympia Food Cooperative
18 921 Rogers St. NW
19 Olympia, WA 98502
20 (360) 754-7666

21 Certain current and former staff members of the Co-op—not all of whom are
22 known to Plaintiffs—have knowledge regarding the Co-op’s operations,
23 membership, governance, guiding rules and principles, practices, financial
24 condition, participation in boycotts, the process by which the Co-op adopted
25 the Israel Boycott, and generally the allegations Plaintiffs have made against
26 Defendants in this lawsuit.

 10. Current and Former Members of the Palestinian BDS National Committee
 (BNC)

 Contact information TBD

 BNC identifies itself as “the coalition of Palestinian organizations that leads
 and supports the BDS [Boycott, Divestment and Sanctions] movement and by
 the Palestinian Campaign for Academic and Cultural Boycott of Israel
 (PACBI), a BNC member organization.” Members of the BNC have
 knowledge regarding BDS, the terms of the boycott BDS promotes against
 Israel, and the role BDS played in the Co-op’s decision to enact the Israel
 Boycott.

 11. Current and Former Members of “Olympia BDS”

 Contact information TBD

 Members of “Olympia BDS” have knowledge regarding that organization, the
 terms of the boycott “Olympia BDS” promotes against Israel, and the role
 “Olympia BDS” played in the Co-op’s decision to enact the Israel Boycott.

1
2 12. Individuals identified in documents produced by Defendants

Contact information TBD

3 Defendants have produced documents, including but not limited to email
4 correspondence, that reflect extensive communication with dozens, if not
5 hundreds, of individuals regarding the allegations contained in Plaintiffs'
6 complaint. These individuals have, at a minimum, the knowledge reflected in
7 the communications they sent and received.

8 REQUEST FOR PRODUCTION NO. 6: Produce all documents that refer or relate
9 to your answer to the preceding Interrogatory.

10 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
11 No. 6; Plaintiffs further object to RFP No. 6 as seeking documents protected by the
12 attorney-client privilege and attorney work product doctrine; as seeking documents
13 already in the possession of Defendants; and as seeking documents outside the possession,
14 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
15 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
16 documents—with the exception of documents that were either produced by Defendants to
17 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
18 acceptable time and in a mutually acceptable format.

19 INTERROGATORY NO. 7: Identify the following for each element of damages
20 that you seek to recover in connection with each Count in your complaint:

- 21 a) The amount of damages sought;
- 22 b) A fully detailed explanation for the claimed entitlement to damages;
- 23 c) The Defendant(s) against whom such damages are sought;
- 24 d) How you computed such damages, showing all underlying computations; and
- 25 e) Each person you believe has personal knowledge of such damages and their
- 26

1 computation.

2 ANSWER: Plaintiffs object to Interrogatory No. 7 as overbroad and unduly
3 burdensome; and as seeking information outside the possession, custody, or control of
4 Plaintiffs. Additionally, discovery is ongoing, Defendants have not yet been deposed, the
5 C-op has not yet been deposed, and the Co-op has not yet fulfilled its obligations under
6 the third party subpoena issued to it previously. Plaintiffs thus reserve the right to
7 supplement this answer as warranted. Subject to and without waiving the foregoing
8 objections, Plaintiffs answer as follows:
9

- 10 a. The amount of damages remains to be determined, and depends in part on
11 discovery that has not yet occurred.
- 12 b. Numerous membership cancellations that resulted from the Board’s misconduct;
13 the fact that certain members have stopped shopping at the Co-op in protest; the
14 loss of revenue that has resulted from the Co-op’s failure to offer Israeli-made
15 products to customers who wish to purchase them; the loss of revenue and
16 commercial opportunities resulting from delayed expansion of the Co-op to a new
17 facility in part because of “the uncertain impact of the recently adopted boycott of
18 Israeli products”; and the attorneys’ fees and litigation costs incurred by Plaintiffs
19 in bringing this lawsuit.
- 20 c. All Defendants who voted in favor of the Israel Boycott and/or failed to take
21 appropriate remedial action after the fact.
- 22 d. The amount of damages remains to be determined, and depends in part on
23 discovery that has not yet occurred.
- 24 e. The amount of damages remains to be determined, and depends in part on
25
26

1 discovery that has not yet occurred. Persons who have knowledge regarding
2 damages to the Co-op include those identified in subparts 1-5 and 8-9 of Plaintiffs'
3 answer to Interrogatory No. 6.

4 REQUEST FOR PRODUCTION NO. 7: Produce all documents that refer or relate
5 to your answer to the preceding Interrogatory.
6

7 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
8 No. 7; Plaintiffs further object to RFP No. 7 as seeking documents protected by the
9 attorney-client privilege and attorney work product doctrine; as seeking documents
10 already in the possession of Defendants; and as seeking documents outside the possession,
11 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
12 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
13 documents—with the exception of documents that were either produced by Defendants to
14 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
15 acceptable time and in a mutually acceptable format.
16

17 INTERROGATORY NO. 8: Identify every reason that Susan Trinin and Jeff
18 Trinin decided to request their dismissal as plaintiffs in this case. Include in your
19 response all explanatory statements and all statements by one or the other, or both of
20 them, of which you have knowledge, mentioning or bearing upon their decision to seek
21 their dismissal as plaintiffs.
22

23 ANSWER: Plaintiffs object to Interrogatory No. 8 based on the attorney-client
24 privilege and the ethical rules governing the practice of law in Washington State.

25 REQUEST FOR PRODUCTION NO. 8: Produce all documents that refer or relate
26 to your answer to the preceding Interrogatory.

1 RESPONSE: Plaintiffs object to RFP No. 8 based on the attorney-client privilege
2 and the ethical rules governing the practice of law in Washington State.

3 INTERROGATORY NO. 9: Describe the contents of every communication, both
4 oral and written, you have had with StandWithUs or StandWithUs Northwest or any of
5 their officers, representatives, or agents, including the name of the person, his or her
6 position, the date, the location, and the names of every party to the communication and
7 every person present, with identifying information for each such person, concerning:
8

- 9 a) How you learned about its or their existence;
10 b) All meetings you attended, with dates and your involvement with agenda items;
11 c) What positions of authority you have held or hold in the organization(s), if any;
12 d) Who suggested, initiated, and paid for the production of the video recording
13 explaining why each of you decided to become a plaintiff in this lawsuit;
14 e) The Co-op's Israel Boycott deliberations or decision; and/or
15 f) The involvement of the State of Israel or any of its agents or representatives in the
16 campaign against the Co-op's decision or in mounting, underwriting, or otherwise
17 providing support for such litigation.
18

19 ANSWER: Plaintiffs object to Interrogatory No. 9 as overbroad and unduly
20 burdensome; as seeking information protected by the attorney-client privilege and work
21 product doctrine; and as not reasonably calculated to lead to the discovery of admissible
22 evidence—particularly since it is not tailored to the subject matter of this lawsuit. Subject
23 to and without waiving the foregoing objections, Plaintiffs answer as follows: Pursuant to
24 CR 33(c) *see* Plaintiffs' forthcoming document production. With respect to the oral
25 communications referenced in Interrogatory No. 9, and limiting their answers to the
26

1 subject matter of this lawsuit, Plaintiffs further answer as follows:

2 a) Susan Mayer learned about StandWithUs after other organizations she contacted
3 (e.g., It's Our Co-op) were unable to convince the Co-op to rescind the Israel
4 Boycott. Ms. Mayer subsequently sought legal representation in connection with
5 the Israel Boycott. After deciding not to hire the first lawyer she contacted, Ms.
6 Mayer learned for the first time about StandWithUs and its northwest chapter. She
7 subsequently contacted it and obtained a referral to alternative counsel from Rob
8 Jacobs of StandWithUs Northwest.
9

10 Kent and Linda Davis learned about StandWithUs in 2010 in connection with a
11 story about Michael Oren being mistreated by anti-Israel activists at an event held
12 at the University of California (Irvine). When they first learned about the Israel
13 Boycott, the Davises sought legal representation in connection with it. After
14 deciding not to hire the first lawyer they contacted, Ms. Davis contacted
15 StandWithUs (Los Angeles), which referred her to StandWithUs Northwest, for
16 assistance. Rob Jacobs of StandWithUs Northwest subsequently referred the
17 Davises to alternative counsel.
18

19 b) Plaintiffs communicated with Rob Jacobs (of StandWithUs Northwest) in advance
20 of a community meeting they attended in November 2011 at the Chabad Jewish
21 Discovery Center in Olympia, where potential community responses to the Israel
22 Boycott were discussed. Ms. Mayer, among many others, also attended the
23 StandWithUs Northwest Community Reception, held on May 15, 2016 in Seattle.
24

25 c) Plaintiffs have held no positions of authority in StandWithUs or StandWithUs
26 Northwest.

- 1 d) Rob Jacobs contacted Kent and Linda Davis requesting their participation in the
2 video referenced above. Mr. and Ms. Davis are unaware of who paid for the
3 production of the video. Ms. Mayer had no involvement in or communications
4 regarding the production of the video.
5
- 6 e) Plaintiffs have had numerous conversations (dates unknown) with Rob Jacobs
7 regarding the Israel Boycott and other anti-Semitic and anti-Israel activity in the
8 Pacific Northwest. Plaintiffs also had several conversations with Rob Jacobs prior
9 to the filing of this lawsuit (dates unknown) regarding referrals to alternative
10 counsel. Ms. Mayer subsequently communicated with Mr. Jacobs on a number of
11 occasions (dates unknown) regarding the impact on her of the judgment issued by
12 Judge McPhee (later vacated). Additionally, Plaintiffs occasionally receive mass
13 email announcements from StandWithUs and StandWithUs Northwest.
14
- 15 f) Plaintiffs are unaware of any involvement by the State of Israel or any of its agents
16 or representatives in the campaign against the Co-op's decision or in mounting,
17 underwriting, or otherwise providing support for this litigation. Akiva Tor, a
18 representative (at the time) of the Consulate of Israel, attended a community
19 meeting in November 2011 at the Chabad Jewish Discovery Center in Olympia,
20 where potential community responses to the Israel Boycott were discussed.
21 Plaintiffs, among others, attended this community meeting. Plaintiffs cannot recall
22 if they spoke directly to Mr. Tor at that meeting. None of the Plaintiffs has had
23 contact with Mr. Tor or anyone connected with the State of Israel regarding the
24 subject matter of this lawsuit since then.
25
26

REQUEST FOR PRODUCTION NO. 9: Produce all documents that refer or relate

1 to your answer to the preceding Interrogatory.

2 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
3 No. 9; Plaintiffs further object to RFP No. 9 as seeking documents protected by the
4 attorney-client privilege and attorney work product doctrine; as seeking documents
5 already in the possession of Defendants; and as seeking documents outside the possession,
6 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
7 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
8 documents—with the exception of documents that were either produced by Defendants to
9 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
10 acceptable time and in a mutually acceptable format.

11 INTERROGATORY NO. 10: Describe the contents of every communication, both
12 oral and written, you have had with the government of Israel, or any of its officials,
13 representatives, employees or agents, and with Shurat HaDin or any person associated
14 with it, including for both the government of Israel and Shurat HaDin the name of each
15 such person, his or her position, the date, the location, and the names of every party to the
16 communication and every person present, with identifying information for each such
17 person.

18 ANSWER: Plaintiffs object to Interrogatory No. 10 as overbroad and unduly
19 burdensome; and as not reasonably calculated to lead to the discovery of admissible
20 evidence—particularly since it is not tailored to the subject matter of this lawsuit. (By way
21 of example only, read literally the Interrogatory would encompass communications
22 between Plaintiffs and a Customs official at Ben Gurion Airport during a tourist visit to
23 Israel.) Subject to and without waiving the foregoing objections, with respect to the oral
24
25
26

1 communications referenced in Interrogatory No. 10, and limiting their answers to the
2 subject matter of this lawsuit, Plaintiffs further answer as follows:

3 Plaintiffs have had no contact with the government of Israel, or any of its officials,
4 representatives, employees or agents, or with Shurat HaDin or any person associated with
5 it, regarding the subject matter of this lawsuit. Akiva Tor, a representative (at the time) of
6 the Consulate of Israel, attended a community meeting in November 2011 at the Chabad
7 Jewish Discovery Center in Olympia, where potential community responses to the Israel
8 Boycott were discussed. Plaintiffs, among others, attended this community meeting.
9 Plaintiffs cannot recall if they spoke directly to Mr. Tor at that meeting. None of the
10 Plaintiffs has had contact with Mr. Tor or anyone connected with the State of Israel
11 regarding the subject matter of this lawsuit since then.
12

13
14 REQUEST FOR PRODUCTION NO. 10: Produce all documents that refer or
15 relate to your answer to the preceding Interrogatory.

16 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
17 No. 10; Plaintiffs further object to RFP No. 10 as seeking documents protected by the
18 attorney-client privilege and attorney work product doctrine; as seeking documents
19 already in the possession of Defendants; and as seeking documents outside the possession,
20 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
21 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
22 documents—with the exception of documents that were either produced by Defendants to
23 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
24 acceptable time and in a mutually acceptable format.
25

26 INTERROGATORY NO. 11: Describe your relationship to and participation in

1 “It’s Our Co-op,” and your participation in advocacy for a boycott of the Olympia Food
2 Co-op, if any.

3 ANSWER: Plaintiffs object to Interrogatory No. 11 as not reasonably calculated to
4 lead to the discovery of admissible evidence. Subject to and without waiving the
5 foregoing objections, Plaintiffs answer as follows:
6

7 Susan Mayer: Attended one meeting of It’s Our Co-op regarding the Israel Boycott
8 in August 2010. Ms. Mayer hoped that “It’s Our Co-op” would convince the Board to
9 rescind the Israel Boycott. That did not occur.

10 Kent and Linda Davis: Attended several meetings in 2010 and the beginning of
11 2011 regarding the Israel Boycott. Both Mr. and Ms. Davis hoped that “It’s Our Co-op”
12 would convince the Board to rescind the Israel Boycott. That did not occur.
13

14 REQUEST FOR PRODUCTION NO. 11: Produce all documents that refer or relate
15 to your answer to the preceding Interrogatory.

16 RESPONSE: Plaintiffs incorporate by reference their objections to Interrogatory
17 No. 11; Plaintiffs further object to RFP No. 11 as seeking documents protected by the
18 attorney-client privilege and attorney work product doctrine. Subject to and without
19 waiving the foregoing objections, Plaintiffs respond as follows: Plaintiffs will provide
20 copies of responsive, non-privileged documents—with the exception of documents that
21 were either produced by Defendants to Plaintiffs or are otherwise available to
22 Defendants—on a rolling basis at a mutually acceptable time and in a mutually acceptable
23 format.
24

25 INTERROGATORY NO. 12: Please identify each person, organization, or entity
26 who is paying or contributing to payment of costs and/or attorneys’ fees incurred in this

1 case by you or any other plaintiff(s), or for your undertaking of this litigation as a plaintiff
2 in it, including his or her position, date(s) of payment, and amount of each payment
3 received, whether made in the past or anticipated to be made in the future.

4 ANSWER: Plaintiffs object to Interrogatory No. 12 as seeking information
5 protected by the attorney-client privilege and work product doctrine. Subject to and
6 without waiving the foregoing objections, Plaintiffs answer as follows: None.
7

8 REQUEST FOR PRODUCTION NO. 12: Produce all documents that refer or
9 relate to your answer to the preceding Interrogatory.

10 RESPONSE: Plaintiffs object to RFP No. 12 as seeking documents protected by
11 the attorney-client privilege and work product doctrine. Subject to and without waiving
12 the foregoing objections, Plaintiffs answer as follows: None.
13

14 INTERROGATORY NO. 13: Identify all expert witnesses you expect to call at
15 trial and, as to each such witness, provide:

- 16 a) The person's name, occupation, title, business address, area of specialization, if
17 any, and professional relationship to you;
- 18 b) The subject matter on which the person is expected to testify;
- 19 c) The substance of the facts and opinions to which the person is expected to testify,
20 the identity of the source for each fact, and a summary of the grounds for each
21 opinion;
- 22 d) All data or other information considered by the person in forming his or her
23 e) opinions, with identification of the sources;
- 24 f) A statement of the person's qualifications, including a list of all publications
25 authored by the person in the past 10 years;
26

- 1 g) The identity of any exhibits to be used as a summary of or support for the person's
2 opinions;
- 3 h) The compensation to be paid to the person in connection with his or her work as an
4 expert witness; and
- 5 i) A list of all other cases in which the person has testified by deposition or at trial
6 and the identity of the attorneys who questioned the person, including physical
7 addresses, telephone numbers, and email addresses.

8
9 ANSWER: Plaintiffs object to Interrogatory No. 13 as premature, since Plaintiffs
10 have not yet identified experts for trial. Plaintiffs will disclose their expert witnesses in
11 accordance with the applicable Civil Rules.

12 REQUEST FOR PRODUCTION NO. 13: Produce all documents regarding OFC
13 boycotting—and/or attempting to boycott—any product or products, other than Israeli
14 products, including but not limited to documents relating to the boycott policies and
15 procedures of OFC.

16
17 RESPONSE: Plaintiffs object to Interrogatory No. 13 as overbroad and unduly
18 burdensome; as seeking documents protected by the attorney-client privilege and attorney
19 work product doctrine; as seeking documents already in the possession of Defendants; and
20 as seeking documents outside the possession, custody, or control of Plaintiffs. Subject to
21 and without waiving the foregoing objections, Plaintiffs respond as follows: Plaintiffs will
22 provide copies of responsive, non-privileged documents—with the exception of
23 documents that were either produced by Defendants to Plaintiffs or are otherwise
24 available to Defendants—on a rolling basis at a mutually acceptable time and in a
25 mutually acceptable format.
26

1 REQUEST FOR PRODUCTION NO. 14: Produce all documents recording,
2 reflecting, or evidencing OFC governing rules, procedures, and principles.

3 RESPONSE: Plaintiffs object to Interrogatory No. 14 as seeking documents
4 protected by the attorney-client privilege and attorney work product doctrine; as seeking
5 documents already in the possession of Defendants; and as seeking documents outside the
6 possession, custody, or control of Plaintiffs. Subject to and without waiving the foregoing
7 objections, Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-
8 privileged documents—with the exception of documents that were either produced by
9 Defendants to Plaintiffs or are otherwise available to Defendants—on a rolling basis at a
10 mutually acceptable time and in a mutually acceptable format.

11 REQUEST FOR PRODUCTION NO. 15: Produce all documents reflecting the
12 existence, statements, and status of a group called Boycott, Divestment, and Sanctions.

13 RESPONSE: Plaintiffs object to RFP No. 15 as seeking documents protected by
14 the attorney-client privilege and attorney work product doctrine; as seeking documents
15 already in the possession of Defendants; and as seeking documents outside the possession,
16 custody, or control of Plaintiffs. Subject to and without waiving the foregoing objections,
17 Plaintiffs respond as follows: Plaintiffs will provide copies of responsive, non-privileged
18 documents—with the exception of documents that were either produced by Defendants to
19 Plaintiffs or are otherwise available to Defendants—on a rolling basis at a mutually
20 acceptable time and in a mutually acceptable format.

21 REQUEST FOR PRODUCTION NO. 16: Produce all documents that you may
22 offer into evidence as exhibits at trial.

23 RESPONSE: Plaintiffs object to Request for Production No. 16 as overbroad and
24

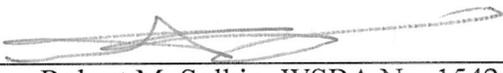
1 unduly burdensome; as seeking documents protected by the attorney-client privilege and
2 attorney work product doctrine; as exceeding the scope of discovery permissible under the
3 Civil Rules; and as inconsistent with the Washington State Supreme Court's decision is
4 *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) ("...[T]he opposing party
5 cannot be required to put on a dress rehearsal of the trial.") Subject to and without waiving
6 the foregoing objections, Plaintiffs respond as follows: Plaintiffs have not yet determined
7 their trial exhibits, and will disclose their trial exhibits in compliance with the case
8 schedule and applicable Civil Rules.

9
10 REQUEST FOR PRODUCTION NO. 17: Produce all documents identified or
11 relied upon in, or supporting or evidencing your answers to Defendants' First Set of
12 Interrogatories.
13

14 RESPONSE: Plaintiffs incorporate by reference their objections to the preceding
15 Interrogatories. Plaintiffs further object to RFP No. 17 as duplicative of Defendants'
16 preceding Requests for Production; as overbroad and unduly burdensome; as seeking
17 documents protected by the attorney-client privilege and attorney work product doctrine;
18 as inconsistent with the Washington State Supreme Court's decision is *Weber v. Biddle*,
19 72 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) and as exceeding the scope of discovery
20 permissible under the Civil Rules.

21 DATED this 16th day of August, 2016.

22 McNAUL EBEL NAWROT & HELGREN PLLC

23
24 By: 
25 Robert M. Sulkin, WSBA No. 15425
26 Avi J. Lipman, WSBA No. 37661
Attorneys for Plaintiffs

1 **DECLARATION OF SERVICE**

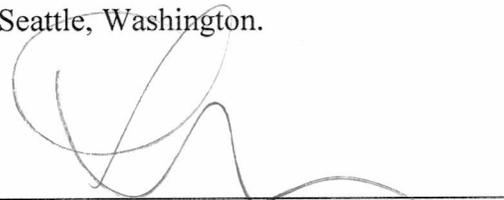
2 On August 16, 2016, I caused to be served a true and correct copy of the foregoing
3 document upon counsel of record, at the address stated below, via the method of service
4 indicated:

5 Bruce E. H. Johnson, WSBA No. 7667
6 Brooke E. Howlett, WSBA No. 47899
7 DAVIS WRIGHT TREMAINE LLP
8 1201 Third Avenue, Suite 2200
9 Seattle, WA 98101-3045
10 Phone: 206-622-3150
11 Fax: 206-757-7700
12 Email: brucejohnson@dwt.com
13 brookehowlett@dwt.com
14 mlahood@ccrjustice.org
15 blmharvey@sbcglobal.net
16 steven@stevengoldberglaw.com

- 17 Via Messenger
- 18 Via U.S. Mail
- 19 Via Overnight Delivery
- 20 Via Facsimile
- 21 Via E-mail (Per Agreement)

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

24 DATED this 16th day of August, 2016, at Seattle, Washington.



25 Thao Do, Legal Assistant

EXHIBIT D

Howlett, Brooke

From: Avi Lipman <ALipman@mcnaul.com>
Sent: Thursday, October 06, 2016 12:09 PM
To: Howlett, Brooke
Cc: Barbara Harvey (blmharvey@sbcglobal.net); Maria LaHood (Mlahood@ccrjustice.org); Steven Goldberg; Johnson, Bruce E.H.; Ruhan Nagra; Thao Do; Sara Redfield; Robert Sulkin
Subject: RE: Davis v. Cox

Brooke:

We're certainly willing to work with you on finding alternative dates, though tying them to our clients' document production doesn't make sense to me. I can appreciate your interest in obtaining our clients' documents before you depose them, but what do those documents have to do with your clients' preparation? Putting that question aside, we plan to begin document production in less than a week, and will continue to do so on a rolling basis.

As to alternative deposition dates, please send me proposals for the first two weeks of November. I trust at least one or more of the many lawyers on your team will be available to start defending depositions during that window. Plus, we can't wait until later in the month because of holidays and conflicts with other cases.

As for the Co-op's counsel, I intend to follow up with him regarding compliance with our subpoena. But since he hasn't appeared in the case and the Co-op is only a nominal party, I'm unaware of any obligation to include him on service. If you disagree, let me know your thoughts and I'll be happy to reconsider.

Regards,

Avi Lipman | Attorney
McNaul Ebel Nawrot & Helgren PLLC
600 University St., Suite 2700 | Seattle, WA 98101
T 206.467.1816 | F 206.624.5128 | D 206.389.9371
alipman@mcnaul.com | www.mcnaul.com/attorneys/avi_lipman

From: Howlett, Brooke [<mailto:BrookeHowlett@dwt.com>]
Sent: Thursday, October 06, 2016 11:18 AM
To: Avi Lipman
Cc: Barbara Harvey (blmharvey@sbcglobal.net); Maria LaHood (Mlahood@ccrjustice.org); Steven Goldberg; Johnson, Bruce E.H.; Ruhan Nagra
Subject: RE: Davis v. Cox

Avi,

I am following up on the below email, as we have heard nothing from you as to when you plan to begin producing documents. We expect you to start production as soon as possible, but no later than one week from today.

Also, we have received your notices of our clients' depositions scheduled October 26-November 4. For a few reasons, we would like to discuss rescheduling these depositions for mid-to-late November. I have a trial starting October 31 that will take up the majority of my time until then. Also, we need time to receive and review your document production before the depositions, in order to avoid the additional time and expense involved if some or all of the depositions need

to be reopened following production of documents not disclosed before the depositions. I'm available today and tomorrow if you would like to have a call to discuss rescheduling.

Finally, it does not appear that counsel for the Co-op was CC'd on the deposition notices. Has he been notified of these depositions?

Best regards,

Brooke

Brooke Howlett | Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200 | Seattle, WA 98101
Tel: (206) 757-8187 | Fax: (206) 757-7187
Email: brookehowlett@dwt.com | Website: www.dwt.com

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From: Howlett, Brooke
Sent: Wednesday, September 14, 2016 2:15 PM
To: 'Avi Lipman'
Cc: Barbara Harvey (blmharvey@sbcglobal.net); Maria LaHood (Mlahood@ccrjustice.org); 'Steven Goldberg'; Johnson, Bruce E.H.
Subject: Davis v. Cox

Avi,

Please let us know when you plan to begin producing documents as indicated in your August 16 responses to our discovery requests.

Best regards,

Brooke

Brooke Howlett | Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200 | Seattle, WA 98101
Tel: (206) 757-8187 | Fax: (206) 757-7187
Email: brookehowlett@dwt.com | Website: www.dwt.com

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EXHIBIT E

From: Howlett, Brooke
Sent: Tuesday, April 18, 2017 6:01 PM
To: Avi Lipman
Cc: Johnson, Bruce E.H.; Maria LaHood; 'Barbara Harvey'
Subject: Davis v. Cox

Avi,

It has been a while since we have discussed the status of discovery on this case, and I wanted to get an update on where things are on your end. First, please let me know where you stand on producing documents responsive to our discovery requests. We have not received any further productions from you in several months. We would like you to produce the remaining documents by **May 5**—if that is not feasible, please let me know as soon as possible so we can discuss a different production deadline.

Second, do you have a draft protective order for us to review? We sent you revisions on April 4, 2016, more than a year ago, and we have yet to get a substantive response from you on them.

On our end, we would like to begin scheduling depositions for Kent Davis, Linda Davis, and Susan Mayer. We would like to schedule these for as soon as possible, so please send the earliest dates in May that your clients are available. We would also like to depose the Trinins—will you accept service of a subpoena for them, and help schedule dates? We will need to have document production prior to these depositions, which we can discuss when scheduling.

Finally, we've learned that we inadvertently produced several privileged documents in our document production to you: COX006089-006092; COX006093-006097; COX006098-006102; COX006103-006107; COX006108-006113; COX006151; COX006156; COX006231-006232; COX011877-011878; COX011989-011991; COX014817; COX014178-014181; COX006021-006022; and COX011976-011977. Please destroy all copies of these privileged documents, including those in your firm's and your clients' possession, and please let us know once you have done so.

Best regards,
Brooke

Brooke Howlett | Davis Wright Tremain LLP
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Email: brookehowlett@dwt.com | Website: www.dwt.com

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EXHIBIT F

From: Thao Do <TDo@mcnaul.com>
Sent: Monday, October 03, 2016 1:19 PM
To: Johnson, Bruce E.H.; Howlett, Brooke; 'mlahood@ccrjustice.org';
'blmharvey@sbcglobal.net'; 'steven@stevengoldberglaw.com'
Cc: Robert Sulkin; Avi Lipman; Curtis Isacke; Robin Lindsey; Lisa Nelson; Sara Redfield; Thao Do
Subject: Davis, et al. v. Cox, et al.
Attachments: 16-1003 Notice of Videotaped Deposition of Harry Levine.pdf; 16-1003 Notice of Videotaped Deposition of Grace Cox.pdf; 16-1003 Notice of Videotaped Deposition of Rochelle Gause.pdf; 16-1003 Notice of Videotaped Deposition of John Regan.pdf; 16-1003 Notice of Videotaped Deposition of Erin Genia.pdf; 16-1003 Notice of Videotaped Deposition of Eric Mapes.pdf; 16-1003 Notice of Videotaped Deposition of T.J. Johnson.pdf

Attached please find the following documents:

1. Notice of Videotaped Deposition of Harry Levine;
2. Notice of Videotaped Deposition of Grace Cox;
3. Notice of Videotaped Deposition of Rochelle Gause;
4. Notice of Videotaped Deposition of John Regan;
5. Notice of Videotaped Deposition of Erin Genia;
6. Notice of Videotaped Deposition of Eric Mapes; and
7. Notice of Videotaped Deposition of T.J. Johnson.

Thank you,

THAO DO | LEGAL ASSISTANT
TO MATTHEW J. CAMPOS, THERESA DEMONTE, AND AVI LIPMAN
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University St., Suite 2700 | Seattle, WA 98101
Direct 206-389-9362
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EXHIBIT G

From: Avi Lipman <ALipman@mcnaul.com>
Sent: Tuesday, November 29, 2016 1:38 PM
To: Howlett, Brooke
Cc: Thao Do; Maria LaHood; Steven Goldberg; Johnson, Bruce E.H.; Barbara Harvey; Robert Sulkin
Subject: RE: Davis; add'l depositions

Brooke:

Following up on my earlier email, we have decided to put off next week's depositions until next year. Instead, we wish to proceed with the following depositions, starting with Ms. Sokoloff: Julia Sokoloff, John Nason, Eric Mapes, Jackie Krzyzek, Rob Richards, Joellen Reineck Wilhelm, and Ron Lavigne.

Please send me available dates for them. As mentioned, if any of them are available on the dates we have set aside next week, that works for us. Otherwise, let's look at the rest of December and January.

Thanks.

Avi Lipman | Attorney
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alipman@mcnaul.com | www.mcnaul.com/attorneys/avi_lipman

From: Avi Lipman
Sent: Tuesday, November 29, 2016 12:41 PM
To: Howlett, Brooke (BrookeHowlett@dwt.com)
Cc: Thao Do
Subject: Davis; add'l depositions

Brooke:

We'd like to get the remaining defendants scheduled, starting with Ms. Sokoloff. Would you please send us at least three dates (per witness) in January when they and you are available. Let's stick with two per day.

Also, can we talk on Thursday or Friday this week about the protective order?

Thanks.

Avi Lipman | Attorney
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alipman@mcnaul.com | www.mcnaul.com/attorneys/avi_lipman

EXHIBIT H

From: Thao Do <TDo@mcnaul.com>
Sent: Thursday, December 08, 2016 8:53 AM
To: Johnson, Bruce E.H.; Howlett, Brooke; 'mlahood@ccrjustice.org';
'blmharvey@sbcglobal.net'; 'steven@stevengoldberglaw.com'
Cc: Robert Sulkin; Avi Lipman; Robin Lindsey; Sara Redfield; Thao Do
Subject: Davis v. Cox—Notice of Videotaped Deposition of Julia Sokoloff
Attachments: 16-1208 Notice of Videotaped Deposition of Julia Sokoloff.pdf

Attached please find Notice of Videotaped Deposition of Julia Sokoloff.

Thank you,

THAO DO | LEGAL ASSISTANT
TO MATTHEW J. CAMPOS, THERESA DEMONTE, AND AVI LIPMAN
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EXHIBIT I

From: Thao Do <TDo@mcnaul.com>
Sent: Friday, February 03, 2017 3:43 PM
To: Johnson, Bruce E.H.; Howlett, Brooke; 'mlahood@ccrjustice.org';
'blmharvey@sbcglobal.net'; 'steven@stevengoldberglaw.com'
Cc: Robert Sulkin; Avi Lipman; Robin Lindsey; Sara Redfield; Thao Do
Subject: Davis, et al. v. Kent, et al.—Notice of Dep of Jayne Kaszynski
Attachments: 17-0203 Notice of Deposition of Jayne Kaszynski.pdf

Attached please find Notice of Deposition of Jayne Kaszynski.

Thank you,

THAO DO | LEGAL ASSISTANT
TO MATTHEW J. CAMPOS, THERESA DEMONTE, AND AVI LIPMAN
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EXHIBIT J

From: Howlett, Brooke
Sent: Monday, April 04, 2016 1:13 PM
To: Avi Lipman
Cc: Johnson, Bruce E.H.; Maria LaHood; Steven Goldberg; Barbara Harvey
Subject: Davis v. Cox
Attachments: [Proposed] Stipulated Protective Order.DOCX

Avi,

I'm attaching for your review a revised proposed stipulated protective order that we hope will address the Court's concerns. Please let me know if you are willing to agree to this proposed order, or would like to discuss.

Secondly, it's come to my attention that during the course of collecting documents from our clients, we inadvertently did not process a set of documents that, as a result, were not reviewed or produced. We are finalizing review of those documents and should be prepared to produce them this week. We will be designating documents as confidential in accordance with the attached protective order if appropriate, and will produce any so designated under our mutual understanding that they will be treated as confidential until the issue of the protective order is resolved. Please let us know that you agree.

Best,

Brooke

Brooke Howlett | Davis Wright Tremaine LLP
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Email: brookehowlett@dwt.com | Website: www.dwt.com

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EXHIBIT K

From: Howlett, Brooke
Sent: Tuesday, January 24, 2017 11:59 AM
To: Avi Lipman
Cc: Thao Do; Robin Lindsey; Johnson, Bruce E.H.; Steven Goldberg; Maria LaHood; Robert Sulkin
Subject: RE: Davis v. Cox

Avi,

Jayne is available on the afternoon of February 9. Regarding the trial date—when do you anticipate being done with depositions? We'd like to have a better idea of the timeline for remaining discovery.

Brooke

Brooke Howlett | Davis Wright Tremaine LLP

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Email: brookehowlett@dwt.com | Website: www.dwt.com

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From: Avi Lipman [<mailto:ALipman@mcnaul.com>]

Sent: Friday, January 20, 2017 9:56 AM

To: Howlett, Brooke

Cc: Thao Do; Robin Lindsey; Johnson, Bruce E.H.; Steven Goldberg; Maria LaHood; Robert Sulkin

Subject: RE: Davis v. Cox

Thanks. A half day will be sufficient. Possible dates in February include Feb 8-10.

Also, please relay your team's availability between October-December for trial.

Avi Lipman | Attorney

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From: Howlett, Brooke [<mailto:BrookeHowlett@dwt.com>]

Sent: Friday, January 20, 2017 9:54 AM

To: Avi Lipman

Cc: Thao Do; Robin Lindsey; Johnson, Bruce E.H.; Steven Goldberg; Maria LaHood; Robert Sulkin

Subject: RE: Davis v. Cox

Avi,

We are still working to determine Jayne's availability, but it does not appear that we will be able to get something scheduled by the end of the month given the late notice. We have been working with the other individuals you identified as the next batch of deponents (John Nason, Eric Mapes, Jackie Krzyzek, Rob Richards, Joellen Reineck Wilhelm, and Ron Lavigne), but had not anticipated your interest in deposing Jayne now. Please let me know your

availability in February and we will send you dates Jayne is available. Also, do you plan on Jayne's deposition being a half-day deposition?

Best regards,

Brooke

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From: Avi Lipman [<mailto:ALipman@mcnaul.com>]

Sent: Friday, January 20, 2017 9:14 AM

To: Howlett, Brooke

Cc: Thao Do; Robin Lindsey; Johnson, Bruce E.H.; Steven Goldberg; Robert Sulkin

Subject: RE: Davis v. Cox

Brooke: I'm following up on my email below. Thanks.

Avi Lipman | Attorney

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From: Avi Lipman

Sent: Wednesday, January 18, 2017 12:30 PM

To: Howlett, Brooke (BrookeHowlett@dwt.com)

Cc: Thao Do (TDo@mcnaul.com); Robin Lindsey

Subject: Davis v. Cox

Brooke:

We would like to depose Ms. Kaszynski before the end of the month. The timing is based on numerous arbitration/trial dates I have this winter and Bob Sulkin's upcoming absence for knee surgery. Is that workable at your end?

Also, I do need to finalize a revised SPO with you at some point so we can arrange for completion of the Co-op's document production.

Finally, we want to get this case scheduled for trial in the fall. Please let me know what your team's availability is between October-December.

Thanks.

Avi Lipman | Attorney

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EXHIBIT L

From: Avi Lipman <ALipman@mcnaul.com>
Sent: Wednesday, December 06, 2017 3:05 PM
To: Howlett, Brooke
Cc: Johnson, Bruce E.H.; Thao Do; Robert Sulkin
Subject: OFC
Attachments: Proposed Stipulated Protective Order AJL redline 12-6-17 ('ge10bc14qc').docx

Brooke:

It has been quite some time since we spoke about this case. Attached is a redline of what I believe was the revised SPO you generated last year. Let me know if it's acceptable.

Also, we would like to set this case for trial, schedule whatever additional depositions may be needed by each side, and generally get the parties collectively back on track.

Please give me your availability for a trial in April-June of next year. I don't know what the court's availability is during that window, but that is what we are aiming for.

Thanks.

Avi J. Lipman | Attorney



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