

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  
Olympia, WA 98502  
(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,  
CCR#2112  
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APPEARANCES

For the Plaintiff:

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For the Defendant:

BRUCE JOHNSON  
BROOKE HOWLETT  
Davis Wright Tremaine  
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Seattle, Washington 98101

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:

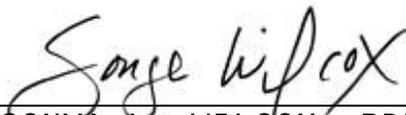
1. I reported the proceedings stenographically;

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,  
24  
25  
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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  
26

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

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

18           ANSWER:

19           Plaintiffs object to Interrogatory No. 6 as overbroad and unduly burdensome; and  
20 as seeking information outside the possession, custody, or control of Plaintiffs. There are  
21 likely dozens, if not hundreds, of people in the Co-op community and beyond who have  
22 personal knowledge that supports Plaintiffs' allegations. Additionally, discovery is  
23 ongoing, Defendants have not yet been deposed, and Plaintiffs reserve the right to  
24 supplement this answer as warranted. Subject to and without waiving the foregoing  
25 objections, Plaintiffs answer as follows:  
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  
13 b. Numerous membership cancellations that resulted from the Board’s misconduct;  
14 the fact that certain members have stopped shopping at the Co-op in protest; the  
15 loss of revenue that has resulted from the Co-op’s failure to offer Israeli-made  
16 products to customers who wish to purchase them; the loss of revenue and  
17 commercial opportunities resulting from delayed expansion of the Co-op to a new  
18 facility in part because of “the uncertain impact of the recently adopted boycott of  
19 Israeli products”; and the attorneys’ fees and litigation costs incurred by Plaintiffs  
20 in bringing this lawsuit.  
21  
22 c. All Defendants who voted in favor of the Israel Boycott and/or failed to take  
23 appropriate remedial action after the fact.  
24  
25 d. The amount of damages remains to be determined, and depends in part on  
26 discovery that has not yet occurred.  
e. The amount of damages remains to be determined, and depends in part on

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

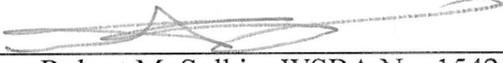
1 unduly burdensome; as seeking documents protected by the attorney-client privilege and  
2 attorney work product doctrine; as exceeding the scope of discovery permissible under the  
3 Civil Rules; and as inconsistent with the Washington State Supreme Court's decision is  
4 *Weber v. Biddle*, 72 Wn.2d 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**

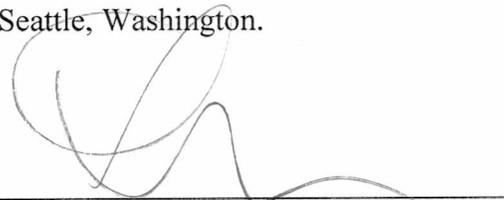
2 On August 16, 2016, I caused to be served a true and correct copy of the foregoing  
3 document upon counsel of record, at the address stated below, via the method of service  
4 indicated:

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](mailto:brucejohnson@dwt.com)  
13 [brookehowlett@dwt.com](mailto:brookehowlett@dwt.com)  
14 [mlahood@ccrjustice.org](mailto:mlahood@ccrjustice.org)  
15 [blmharvey@sbcglobal.net](mailto:blmharvey@sbcglobal.net)  
16 [steven@stevengoldberglaw.com](mailto: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

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**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](mailto:alipman@mcnaul.com) | [www.mcnaul.com/attorneys/avi\\_lipman](http://www.mcnaul.com/attorneys/avi_lipman)

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**From:** Howlett, Brooke [<mailto:BrookeHowlett@dwt.com>]  
**Sent:** Thursday, October 06, 2016 11:18 AM  
**To:** Avi Lipman  
**Cc:** Barbara Harvey ([blmharvey@sbcglobal.net](mailto:blmharvey@sbcglobal.net)); Maria LaHood ([Mlahood@ccrjustice.org](mailto: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](mailto:brookehowlett@dwt.com) | Website: [www.dwt.com](http://www.dwt.com)

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | [Seattle](#) | Shanghai | Washington, D.C.

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**From:** Howlett, Brooke  
**Sent:** Wednesday, September 14, 2016 2:15 PM  
**To:** 'Avi Lipman'  
**Cc:** Barbara Harvey ([blmharvey@sbcglobal.net](mailto:blmharvey@sbcglobal.net)); Maria LaHood ([Mlahood@ccrjustice.org](mailto: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](mailto:brookehowlett@dwt.com) | Website: [www.dwt.com](http://www.dwt.com)

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | [Seattle](#) | Shanghai | Washington, D.C.

# **EXHIBIT E**

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**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 Tremaine LLP  
1201 Third Avenue, Suite 2200 | Seattle, WA 98101  
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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**  
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# **EXHIBIT G**

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**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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---

**From:** Avi Lipman  
**Sent:** Tuesday, November 29, 2016 12:41 PM  
**To:** Howlett, Brooke ([BrookeHowlett@dwt.com](mailto: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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# **EXHIBIT H**

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**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**

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**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**

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**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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# **EXHIBIT K**

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**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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---

**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

**Brooke Howlett | Davis Wright Tremaine LLP**

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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](mailto:BrookeHowlett@dwt.com))

**Cc:** Thao Do ([TDo@mcnaul.com](mailto: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**

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**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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