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No. 71360-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Petitioners/Plaintiffs Below,

v.

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

Respondents/Defendants Below.

ERRATA *Amended*
APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

Kent and Linda Davis, Jeffrey and Susan Trinin, and Susan Mayer, derivatively on behalf of Olympia Food Cooperative (the "Co-op") (collectively, "Petitioners"), Appellants below and Plaintiffs in the trial court, are the petitioning parties.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seek review of *Davis et al. v. Cox et al.,* Court of Appeals No. 71360-4-1 (April 7, 2014), a published decision affirming orders denying Petitioners' motion for discovery; striking Petitioners' complaint under the Washington Act Limiting Strategic Lawsuits Against Public Participation, RCW 4.24.525 (".525" or "Anti-SLAPP Act"); and awarding Respondents $232,325 in attorneys' fees, costs, and statutory sanctions under RCW 4.24.525(6)(a)(ii).[1]

III. ISSUES PRESENTED FOR REVIEW

1. Should the legislature be permitted to enact a statute that (a) conflicts with *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009) , by violating the separation of powers doctrine and constitutional guarantee of a right of access to the courts; and (b) imposes an unconstitutionally vague burden of proof?

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[1] Copies of the Court of Appeals' decision; the trial court's order striking Petitioners' complaint (CP 1194-96); the trial court's order denying Petitioners' cross-motion for discovery (CP 1192-93); the trial court's order granting Respondents' motion for attorneys' fees, costs, and statutory sanctions (CP 1246-61); the final order and judgment; and RCW 4.24.525 are attached hereto in the Appendix.

2. Given the presumption that a party opposing summary judgment has full discovery rights, did the appeals court err in relying on the standard for a continuance under CR 56(f) to conclude the discovery stay and good cause exception under .525(5)(c) are constitutional?

3. Did the legislature intend (a) for .525 to apply to meritorious claims alleging misconduct by corporate directors and (b) for the term "based on action involving public participation and petition" (.525(2)) to encompass conduct that is not directly, and at most tangentially, related to speech—where both results would chill the right to petition by threatening potential plaintiffs with crushing sanctions?

4. Does the Court of Appeals' decision conflict with *Dillon v. Seattle Deposition Reporters, LLC*, 316 P.3d 1119, 1143 (Wash. Ct. App. 2014), which holds that in determining whether claims are "based on an action involving public participation and petition" under .525(2), courts must "view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party"?

5. Where corporate directors deliberately violate governing policies, including bylaws, and later try (but fail) to amend a policy they violated to make it comport with their action, do factual disputes exist as to whether they breached fiduciary duties and acted unlawfully?

6. Does a trial court abuse its discretion by denying all discovery under .525(5)(c) if factual disputes exist regarding key issues?

7. In a valid derivative action under the Nonprofit Act, RCW 24.03.040(2), may fees and penalties be awarded against the representative plaintiffs?

IV. STATEMENT OF THE CASE

This case presents the question of whether corporate directors may violate their fiduciary duties and a corporation's governing rules, and then punish the members/shareholders who challenge their actions with crushing penalties under the Anti-SLAPP Act. RCW 4.24.525. The Court of Appeals' decision, which answered this question in the affirmative, will undoubtedly intimidate prospective plaintiffs, upon whom the mere threat of an anti-SLAPP motion will have a chilling effect.

Respondents are current and former members of the Board of Directors (the "Board") of the Co-op who, in derogation of their fiduciary duties and numerous internal policies, compelled the Co-op to join a boycott of Israeli-made products and divestment from Israeli companies (the "Boycott"). CP 121-23. Petitioners, all long-time Co-op members and volunteers, sought to hold the Board accountable for its unauthorized and unlawful action by filing a verified derivative complaint in September 2011. CP 6-18, 7, 296-97, 353-54, 356, 371-72, 374-75. Instead, the trial court dismissed their case under .525 and sanctioned them individually in the amount of $232,325 in legal expenses and statutory penalties. *See* App. The Court of Appeals upheld the dismissal and awarded fees.[2]

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[2] As of this filing, the Court of Appeals has not yet issued a fee award.

A. The Boycott Policy

The bylaws of the Co-op state that it is a "collectively managed, not-for-profit cooperative organization that relies on consensus decision making." CP 56. In 1993, the Board adopted strict procedures by which the Co-op would join product boycotts (the "Boycott Policy"):

> **BOYCOTT POLICY**
>
> Whenever possible, the Olympia Food Co-op will ***honor nationally recognized boycotts*** which are called for reasons that are compatible with our goals and mission statement...
>
> ...
>
> A request to honor a boycott ... will be referred ... to determine which products and departments are affected.... The [affected] department manager will make a written recommendation to ***the staff who will decide by consensus whether or not to honor a boycott....***
>
> ...
>
> The department manager will post a sign informing customers ***of the staff's decision*** ... regarding the boycott. ***If the staff decides to honor a boycott,*** the M.C. will notify the boycotted company or body of our decision ...

CP 106 (emphasis added). Under the Boycott Policy's plain language, the Co-op can join a boycott only if two tests are met: (1) there is an existing, nationally recognized boycott; and (2) Co-op staff approve the boycott proposal by consensus (i.e., universal agreement). *Id.*

The Co-op assiduously followed the Boycott Policy until July 2010, when the Board disregarded it and compelled the Co-op to join the Israel Boycott. CP 121-23. As courts below recognized, the Board did so despite a lack of staff consensus (CP 252, 986; Op. 3), and in the absence of a nationally recognized boycott. CP 347-52, 990; Op. 13. Having

ignored the Co-op's own rules and procedures, including the bylaws, and recognizing it had a ***duty*** "to adopt major policy changes," CP 41 ¶ 10, the Board then tried to modify the Boycott Policy to "clarify the role of the Board"—i.e., make the Boycott Policy retroactively consistent with actions the Board had already taken. It failed, which further demonstrates the Board breached its fiduciary obligations when it decided to consider the Boycott.

B. Procedural History

Petitioners claims on behalf of the Co-op were that the Board violated its fiduciary duties, CP 6-18, by enacting the Boycott in derogation of the Co-op's rules and policies. Petitioners sought declaratory and injunctive relief, and nominal damages. *Id.* Respondents countered with a motion to dismiss under .525 or CR 12, supported by declarations and exhibits.[3] CP 39-274, 419-551. Petitioners responded and cross-moved for relief from the automatic discovery stay (*see* .525(5)(c)). They sought only limited document production and two depositions. CP 310-35, 362-66. The trial court granted Respondents' motion, denied Petitioners' cross-motion, and ordered the representative plaintiffs to pay a $10,000 penalty and reasonable litigation expenses to each Respondent. CP 1238-42, 1246-61. The Court of Appeals affirmed these rulings.

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[3] Respondents' CR 12 motion argued that Petitioners lacked standing to bring a derivative action. CP 258-67. The trial court rejected that argument, Respondents did not appeal, and the Court of Appeals did not address it. CP 1251; *see* CP 975.

C. The Anti-SLAPP Act

A party filing an anti-SLAPP motion in Washington must show "by a preponderance of the evidence that the claim is based on an action involving public participation and petition." .525(4)(b) (referred to herein as "step one" of the Anti-SLAPP Act). If the movant meets its burden, "the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim." *Id.* (referred to herein as "step two" of the Anti-SLAPP Act). Upon the filing an anti-SLAPP motion, all discovery is stayed and cannot proceed "except on motion and for good cause shown." .525(5)(c).

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court may consider a decision by the Court of Appeals if it conflicts with a decision of the Supreme Court or another decision of the Court of Appeals, RAP 13.4(b)(1)-(2); involves a "significant question of law" under the Constitution of the State of Washington or of the United States, RAP 13.4(b)(3); or if the petition involves an "issue of substantial public interest" that should be determined by the Supreme Court, RAP 13.4(b)(4). This Petition meets each standard, particularly since the Court of Appeals' decision expands the Anti-SLAPP Act to threaten potential plaintiffs with crushing sanctions and fee-shifting for pursuing meritorious claims, including, but by no means limited to, members or shareholders considering recourse against corporate directors for unlawful conduct.

A. Constitutional Violations

1. Conflicts With *Putman* and Its Progeny

In 2009, this Court struck down a statute analogous to .525. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). *Putman* held that: (1) "[r]equiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts," *id.* at 979; and (2) "[i]f a statute appears to conflict with a court rule" and "cannot be harmonized" with it, "the court rule will prevail in procedural matters," *id.* at 980-81. For the same reasons, .525 is unconstitutional. Washington's unique Anti-SLAPP Act, however, is *more* constitutionally infirm than the statute in *Putman*, because it both restricts discovery and contains a heightened burden of proof to avoid dismissal.

a) Separation of Powers

Like the statute at issue in *Putman*, .525 conflicts with the pleading, amendment, dismissal, and evidentiary burdens of CR 8, 11, 12(b), 15, and 56, as well as the right to full discovery under CR 26–34 & 56(f). In short, it conflicts fundamentally with the manner in which the Civil Rules determine whether a claim may proceed to discovery and, eventually, to trial. 166 Wn.2d at 983.[4]

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[4] Petitioners also challenged the constitutionality of .525's heightened burden of proof and discovery stay as applied to this case. *See generally City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). The Court of Appeals erroneously rejected both arguments. Given the relatively recent enactment of .525 and the increasing frequency with which .525 is being asserted in Washington courts, these as-applied challenges present "significant question of law" under the Washington State Constitution.

Because the offending provisions of .525 are procedural, not substantive, the separation of powers requires that the Judicial Branch (and the Civil Rules) prevail and the statute be struck down. *See Putman*, 166 Wn.2d at 980; *see also Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (California's anti-SLAPP statute results in "a direct collision" with procedural rules regarding discovery and Fed. R. Civ. P. 56). As one federal court has held regarding .525:

> The Washington legislature could have granted immunity that could be invoked through [Fed. R. Civ. P. 12 or 56] motions, similar to the immunity the Act grants under [RCW 4.24.510] ... [It] has instead imposed upon plaintiffs a burden of proof heavier than prescribed by [Fed. R. Civ. P. 12 & 56] and imposed upon the courts an obligation to make preliminary determinations on the merits based on materials outside of the pleadings in a manner that runs in direct conflict with [Fed. R. Civ. P.] 12(d).

Intercon Solutions, Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1051-52 (N.D. Ill. 2013) (.525 may not be applied in diversity actions).[5]

Contrary to the Court of Appeals' decision, the availability under .525(5)(c) of a mechanism to request discovery "for good cause" does not save it from violating the constitutional right of access to the courts. Op. 23-24 ("[T]he anti-SLAPP statutory requirement that good cause be shown imposes no greater burden than does CR 56(f) ...").[6] A party

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[5] *See also Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119, 147 P.3d 1275, 1282 (2006) (CR 12(b) "mirrors" its federal counterpart).

[6] Also, the burdens are different under CR 56 and step two of .525 (a "genuine issue as to any material fact" as compared to "clear and convincing evidence [of] a probability" of prevailing.). Unlike a motion for summary judgment, "wherein the court does not resolve the merits of a disputed factual claim," the procedure in .525 requires the trial court "to

opposing summary judgment is presumed to have full discovery rights, and 56(f) merely provides a mechanism to seek a continuance if the non-moving party has been unable to obtain "facts essential to justify his opposition." The "primary consideration" in a trial court's decision under CR 56(f) is "justice," and a trial court abuses its discretion by applying "time limitations" in a "draconian" manner. *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554, 560 (1990). By comparison, .525(5)(c) imposes a presumption of ***no*** discovery—despite the fact that the court is essentially charged under .525(4)(b) with resolving the merits of a plaintiff's claims. *Opinion of the Justices*, 138 N.H. 445, 450-51, 641 A.2d 1012, 1015 (1994).

b) Access to the Courts

The Anti-SLAPP Act violates the right of access to the courts because it places a heightened evidentiary burden on a plaintiff before he becomes entitled to the broad discovery contemplated by the Civil Rules and protected by the Washington Constitution. As did the statute *Putman* struck down, it permits the dismissal with prejudice of meritorious claims. 166 Wn.2d at 979.

The Court of Appeals erroneously found .525 consistent with *Putman* based in part on its own decision in a TEDRA case, *In re Estate of Fitzgerald*, 172 Wn. App. 437, 294 P.3d 720 (2012), *review denied*, 177 Wn.2d 1014 (2013). *Fitzgerald* is not applicable and, in any event, not

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do exactly that." *Opinion of the Justices*, 138 N.H. 445, 450-51, 641 A.2d 1012, 1015 (1994) (proposed anti-SLAPP legislation in New Hampshire violates the right to a jury trial).

binding on this Court. TEDRA actions are "special proceedings" and thus only marginally subject to the Civil Rules. RCW 11.96A.090(1), (4); CR 81(a). Thus *Putman*—which held in part that the "right of access to courts includes the right of discovery authorized by the ***civil rules***," 166 Wn.2d at 974 (emphasis added), was irrelevant to the court's conclusion in *Fitzgerald.*

2. Vagueness

The Court of Appeals erroneously dismissed as a "non-sequitur" Petitioners' argument that the burden of proof in step two of .525 ("clear and convincing evidence of a probability")—which is unprecedented in Washington law and unique among anti-SLAPP statutes nationally[7]—is unconstitutionally vague. Simply put, even if a standard of proof is clear on its own does not mean, as the court concluded, that it is clear when ***combined*** with another such standard; e.g., "proof beyond a reasonable doubt of clear and convincing evidence of a probability."

B. The Anti-SLAPP Act Does Not Apply to This Case

1. Holding Corporate Misconduct Involves "Public Participation and Petition" Will Chill Petition Rights

Under step one of .525, the moving party bears the burden of establishing that the plaintiff's case "is based on an action involving public participation and petition"— a phrase that refers primarily to matters presented to government entities, but includes "lawful conduct in

[7] Minn. Stat. § 554.02 uses a "clear and convincing" standard, but limits the definition of "public participation" to "speech or lawful conduct ... genuinely aimed in whole or in part at procuring favorable [American] government action."

furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern[.]" .525(2)(e), (4)(b).

The gravamen of Petitioners' complaint was that Respondents breached their fiduciary duties to the Co-op by "failing to follow [the corporation's] governing rules, procedures, and principles." CP 14 ¶ 51. Specifically, Petitioners alleged not that the result of the Board's consideration of the Boycott was unlawful, but that the Board's decision to ignore governing rules was. Indeed, Petitioners' complaint expressly pled in part: "Plaintiffs have requested that the issues of boycotting and divesting from Israel be raised through a process that comports with OFC's governing rules, procedures, and principles ... ***Plaintiffs made clear that they are prepared to respect the outcome of such a process.***" CP 13 ¶ 45 (emphasis added). To analogize, if a corporate Board took action without a quorum, shareholders should be able to challenge such action as a breach of fiduciary duty. The *subject matter* of its decision does not cure the procedural defect.

The Court of Appeals mistakenly concluded that because the subject of the Board's action was a boycott, that "the principal thrust of [Petitioners'] suit is to make the Directors cease engaging in activity protected by the First Amendment." Op. 9-10. This significantly expands the application of .525, thereby threatening the right to petition under both the WASH. CONST. art. I, § 4 and U.S. CONST. amend. I. Also, in so ruling, the court disregarded key allegations in the complaint, mischaracterized the relief sought, drew inferences against Petitioners, and

mistakenly concluded that the Board's action was "in furtherance of the exercise of the constitutional right of free speech."[8] In effect, the court ruled that corporate directors have unfettered power to disregard an entity's rules and procedures if constitutionally protected speech is even tangentially related to that procedural violation. That was error, particularly since the only protected "speech" at issue here is that of the Co-op, which was only compelled to "speak" as a result of Respondents' misconduct. As the California Supreme Court has held:

> [T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. The anti-SLAPP statute cannot be read to mean that any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under [California's anti-SLAPP statute], whether or not the claim is *based on* conduct in exercise of those rights.

City of Cotati v. Cashman, 29 Cal. 4th 69, 76-77, 52 P.3d 695, 700 (2002) (citations and quotation marks omitted) (emphasis original); *see also Donovan v. Dan Murphy Found.*, 204 Cal. App. 4th 1500, 1506-07, 140 Cal. Rptr. 3d 71, 76-77 (2012) ("The mere act of voting ... is insufficient to demonstrate that conduct challenged ... arose from protected activity."). The Court of Appeals' decision incorrectly rejected this analysis.

2. Conflicts With *Dillon:* Shifting the Burden to Petitioners and Drawing Inferences Against Them

In *Dillon v. Seattle Deposition Reporters, LLC*, Division I held in part that, with respect to step one (not just step two), Washington courts

[8] The burden in step one of the .525 analysis should have fallen on Respondents, but the Court of Appeals, as discussed further below, erroneously imposed it on Petitioners.

must "view the facts and ***all*** reasonable inferences therefrom in the light most favorable to the nonmoving party." 316 P.3d at 1143 (emphasis added). In this case, the court acknowledged that the Board's failed effort to amend the Boycott Policy after its unlawful action was "open to any number of explanations." Op. 16; CP 928 & n.3 (collecting citations). One of the obvious "explanations" for this—and a reasonable inference the court should have drawn in Petitioners' favor—is that the Board knew its enactment of the Israel Boycott was unauthorized and unlawful, which is why it later tried to amend the Boycott Policy. To revisit the example above, if a corporate Board took action without a quorum, and then tried to amend the quorum rule to retroactively validate its action, an obvious inference would be that Board knew its original action was unauthorized and unlawful. Here, however, the appeals court refused to draw this inference.

Somewhat confusingly, the appeals court also rejected Petitioners' "invitation to consider whether the Directors improperly adopted the boycott," holding that because Respondents did not challenge the Board's action as "illegal as a matter of law," it was "lawful conduct" for purposes of step one of .525. Op. 11.[9] It is unclear what the court meant by "illegal as a matter of law," and its reliance on California law only adds to the confusion because that state's anti-SLAPP statute does not impose a

[9] In fact, Petitioners did challenge the Board's action as "illegal as a matter of law" by presenting ***undisputed*** evidence that Respondents exceeded their lawful authority and breached fiduciary obligations to the Co-op. *See, e.g.*, CP 347-52. (At a minimum, any related factual disputes should have been resolved in Petitioners' favor.)

burden on the moving party, as .525(2)(e) does, to establish that the moving party's conduct was "lawful." (The term "lawful" does not appear in Cal. Civ. Proc. Code § 425.16.)

Regardless, the court erred by (1) shifting the burden to Petitioners to meet the "lawfulness" standard; and (2) failing to draw all reasonable inferences in Petitioners' favor—particularly since the interpretation of bylaws generally presents questions of fact. *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 181-82, 139 P.3d 386, 389-90 (2006) ("In interpreting bylaws, we apply contract law [and] may look to the context surrounding an instrument's execution to interpret the parties' intent [and] may consider extrinsic evidence...."). [10]

With respect to the gravamen of Petitioners' claims, this case resembles *Henne v. City of Yakima*, Case No. 89674-7 (scheduled for oral argument before this Court on May 29, 2014), where the plaintiff voluntarily dismissed certain "offending" claims and successfully argued the defendant's anti-SLAPP motion was "moot." 177 Wn. App. 583, 586, 313 P.3d 1188, 1190 (2013) *review granted,* 179 Wn.2d 1022, 320 P.3d 718 (2014). However, the "heart" of Henne's amended complaint "was the City's negligent hiring and supervision of city employees and the breach of police department ***policies and procedures*** relating to internal

[10] Ample evidence showed that the Board violated the Co-op's bylaws (in addition to the Boycott Policy) by, for example, adopting a policy that failed to "promote achievement of the mission statement and goals of" the corporation and preventing the staff from "carry[ing] out Board decisions and/or membership decisions made in compliance with these bylaws." CP 58 ¶ 13(15); CP 59 § IV (N).

investigations...." *Id.* (emphasis added).[11] Similarly, the "heart" of Petitioners' complaint is Respondents' breach of internal "policies and procedures"—yet the appeals court incorrectly concluded it was based on "public participation and petition."

The Court of Appeals' decision erroneously shifted the burden in step one of its .525 analysis to Petitioners, and drew inferences in Respondents' favor. It therefore conflicts with *Dillon* and warrants review.

C. Petitioners Met Their Burden Under Step Two of .525

1. Weighing Evidence on Key Issues Was Not Harmless

Despite the trial court's refusal to grant them discovery, Petitioners nonetheless presented substantial evidence that Respondents violated the governing rules of the Co-op through their enactment of the Boycott. The trial court found it "undisputed that there was no consensus among the staff in addressing this Boycott...." CP 986. By declaration, longtime Co-op Staff member Michael Lowsky testified that no evidence was ever presented that a boycott of and/or divestment from Israel were "nationally recognized." CP 351-52 ¶ 5. Expert Jon Haber testified that "policies boycotting and/or divesting from the State of Israel have never been 'nationally recognized' in this country."[12] CP 348 ¶ 5.

Taken together with the express terms of the Boycott Policy, this

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[11] Notably, the City/appellant in *Henne* has apparently never taken the position that Henne's ***amended*** complaint offends the Anti-SLAPP Act. *See* Pet. for Rev. of Def. City of Yakima and Supp. Br. of Def./Pet'r City of Yakima (Case No. 89674-7). Nor did the Court of Appeals (Div. III) even suggest as much. 177 Wn. App. at 586.

[12] The appeals court erroneously struck other declarations filed by Petitioners.

unrebutted testimony should have been dispositive of the .525 analysis because, at a minimum, it creates genuine issues of fact as to whether Respondents breached their fiduciary duties by failing to exercise "proper care, skill, and diligence." *Riss v. Angel*, 131 Wn.2d 612, 632-33, 934 P.2d 669, 681 (1997). The Court of Appeals correctly concluded that the trial court erred by weighing evidence on both of these issues and drawing factual inferences in Respondents' favor. Op. 14. But it found the errors harmless and affirmed instead "on the basis that the Co-op's governing documents"—i.e., its articles of incorporation and bylaws—"provided the board with the authority to adopt the boycott." Op. 16. In so ruling, the Court of Appeals erred for several reasons.

First, the court ignored well-settled law that the interpretation of corporate bylaws generally presents questions of fact. *Save Columbia CU Comm.*, 134 Wn. App. at 181-82. Second, the record established that the Board did violate the bylaws. For instance, the bylaws: (1) include a duty to "adopt major policy changes," CP 41 ¶ 10 (that duty is meaningless if the Board can disregard its own policies on a whim); (2) required the Board to "promote achievement of the mission statement and goals of" the Co-op (violating the Boycott Policy breached this duty) CP 58 ¶ 13(15); and (3) required the staff to "carry out Board decisions ... made in compliance with these bylaws" (Respondents' conduct made this impossible). CP 59 § IV (N).

Third, as corporate directors, Respondents had a fiduciary duty of care to the Co-op and its members to adhere to the Boycott Policy—not

just the Co-op's articles and bylaws—by virtue of their obligations to:

> (a) discharge their duties with the care an ordinary prudent person in a like position would exercise under similar circumstances; (b) discharge their duties with a ***critical eye*** to assessing information, performing actions carefully, thoroughly, thoughtfully, and in an informed manner; (c) seek ***all relevant material information before making decisions*** on behalf of the corporation; and (d) avoid and prevent corporate waste and unnecessary expense.

Grassmueck v. Barnett, 2003 WL 22128263, at *1 (W.D. Wash. July 7, 2003) (emphasis added). The Board members' failed, after-the-fact attempt to amend the Boycott Policy—to make it consistent with their prior action—underscores their understanding that the fiduciary obligations described in *Grassmueck* required them to adhere to it. The appeals court, however, took a much narrower view of the fiduciary duties of corporate directors, which merits review as an "issue of substantial public interest." Whether its view is applied generally or just within the context of .525, the appeals court left unsaid. In either case it was error, as was the court's overlooking of genuine issues of fact as to the meaning of the Co-op's bylaws. *Save Columbia CU Comm.*, 134 Wn. App. at 181-82.

2. The Appeals Court's Misapplication of the Business Judgment Rule Merits Review

The Court of Appeals found that Respondents "may avail [themselves] of the business judgment rule" ("BJR"), which it applied erroneously to conclude that "there is no basis for us to question the board's decision to adopt the boycott." Op. 15. The BJR, however, does not protect against unauthorized action. Even a showing of good faith

"may not be enough to remain shielded by" it. *See Seafirst Corp. v. Jenkins,* 644 F. Supp. 1152, 1158-59 (W.D. Wash. 1986); *Riss v. Angel,* 131 Wn.2d 612, 632-33, 934 P.2d 669, 681 (1997) (accord). Moreover, contrary to the Court of Appeals' decision, Petitioners ***did*** present evidence of "dishonesty" and "incompetence by" the Board. *See* § C(1) *supra; In re Spokane Concrete Prods., Inc.,* 126 Wn.2d 269, 279, 892 P.2d 98 (1995). This should have defeated application of the BJR.

D. The Denial of Discovery Raises a "Significant Question of Law" Meriting Review

At a minimum, Petitioners raised numerous genuine issues of fact regarding their claims. Given *Dillon*'s admonition that Washington courts "should apply a summary judgment-like analysis to determine whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits," this entitled Petitioners to discovery under the "good cause" standard of .525 (5)(c). *See Dillon*, 316 P.3d at 1142.

Even if this Court could interpret .525 so as to make it facially constitutional, the discovery stay is unconstitutional as applied. The trial court effectively read the good cause requirement out of the statute by finding the anti-SLAPP Act's "governing principle ... [is] to avoid the time and expense of litigation, including discovery," and that, as a result, Petitioners had to acquire all necessary information before suing. CP 963.

The burdens imposed by the trial court, and sanctioned by the Court of Appeals, were unrealistic, particularly given that Respondents had exclusive access to the most critical documentary evidence. Op. 21-

22. Indeed, Respondents' counsel admitted having reviewed thousands of pages in support of their anti-SLAPP motion, to which Petitioners had no access. CP 947 (referencing the "very large factual record"), 949 ("voluminous documents" and "thousands of pages"). Respondents submitted numerous of these as exhibits in support of the motion. Yet the Court of Appeals decided that none of the undisclosed material even *could* create a genuine issue of fact. Op. 21. Its decision violated fundamental constitutional rights guaranteeing access to the courts and conflicted with the Civil Rules, which is particularly problematic since the Board's procedural violations were not within the "heartland" of activities protected by .525. *Jones v. City of Yakima Police Dept.,* 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012).

E. Award of Attorneys' Fees, Costs, and Penalties

1. The Judgment Against Petitioners Is a Windfall That Threatens to Chill Free Speech, Involves an Issue of Substantial Public Interest, and Merits Review

The Anti-SLAPP Act was enacted for the purpose of protecting "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010). Yet the application of it here threatens to exacerbate the very harm the legislature intended to ameliorate, as is amply demonstrated by the $232,325 in sanctions and fees awarded against five ordinary citizens, with the Court of Appeals expected to impose more, for taking the reasonable and substantiated position that the Board exceeded its authority and breached its fiduciary duties.

2. The Entity, Not the Representative Plaintiffs, Is Subject to a Statutory Award in a Derivative Action

As Petitioners' argued to the appeals court, the entity is the real party in interest in a derivative action and a representative plaintiff "is at best... a nominal plaintiff seeking to enforce a right of the corporation against a third party." *Walters v. Center Elec., Inc.*, 8 Wn. App. 322, 329, 506 P.2d 883 (1973). If such plaintiffs are subject to fee awards at all, it is only if their suit had no reasonable basis. RCW 23B.07.400(4). By ignoring this critical limitation, the Court of Appeals erred.

3. The Conflict Between the Fee-Shifting Provisions of .525 and the Washington Nonprofit Act Merits Review

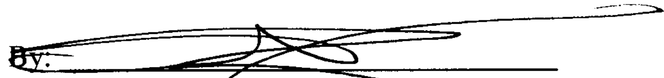
Petitioners properly brought this derivative action under the Washington Nonprofit Act. RCW 24.03.040(2). That statute, however, does not authorize an award of fees against members who bring such an action. In fact, it does not authorize an award of fees at all. Given that the legislature clearly knows how to provide prevailing defendants in derivative actions an opportunity to recover their fees, *compare* RCW 23B.07.400(4), its refusal to do so refutes the award here. RCW 24.03.040 is one of the only tools available to hold directors and officers of a nonprofit corporation accountable for improper conduct, and the court's decision threatens to chill reliance on it by prospective plaintiffs.

VI. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant discretionary review.

DATED this 8th day of May, 2014.

McNAUL EBEL NAWROT & HELGREN
PLLC



By: ______________________
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Attorneys for Appellants

DECLARATION OF SERVICE

On May 8, 2014, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 8th day of May, 2014, at Seattle, Washington.

Lisa Nelson, LEGAL ASSISTANT

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Appendix

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KENT L. and LINDA DAVIS, JEFFREY and SUSAN TRININ, and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE	DIVISION ONE
	No. 71360-4-I
Appellants,	PUBLISHED OPINION
v.	
GRACE COX, ROCHELLE GAUSE, ERIN GENIA, T.J. JOHNSON, JAYNE KASZYNSKI, JACKIE KRZYZEK, JESSICA LAING, RON LAVIGNE, HARRY LEVINE, ERIC MAPES, JOHN NASON, JOHN REGAN, ROB RICHARDS, SUZANNE SHAFER, JULIA SOKOLOFF, and JOELLEN REINECK WILHELM,	
Respondents.	FILED: April 7, 2014

DWYER, J. — To determine whether a pleaded cause of action falls within the ambit of Washington's anti-SLAPP[1] statutes, the trial court must decide whether the claim targets activity involving public participation and petition. To properly do so, the trial court must focus on the principal thrust or gravamen of the claim. A consideration of the relief sought by the party asserting the cause of action can be a determinative factor when resolving this question. Here, the

[1] Washington Act Limiting Strategic Lawsuits Against Public Participation.

plaintiffs' prayer for relief included a request that the court order the defendants to cease activity protected by the First Amendment. Accordingly, the trial court correctly ruled that the complaint was subject to an anti-SLAPP motion to strike.[2] Because the plaintiffs did not demonstrate a sufficient likelihood of success on the merits of their claim, as required by the relevant statute, the trial court also properly granted the defendants' motion to dismiss. Given that these two rulings were properly made, and because we find no error in the other rulings of the trial court, we affirm.

I

The Olympia Food Co-op (Co-op) is a nonprofit corporation with over 22,000 members. The Co-op was formed pursuant to the Washington Nonprofit Corporation Act[3] with the express purpose of "contribut[ing] to the health and well-being of people by providing wholesome foods and other goods and services, accessible to all, through a locally-oriented, collectively managed, not-for-profit cooperative organization that relies on consensus decision making." The Co-op has a long and active history of engagement in social, human rights, ecology, community welfare, and peace and justice issues. In 1993, the Co-op's board of directors "adopted" a Boycott Policy that prescribed a procedure by which the Co-op would recognize product boycotts. The Policy provides, in pertinent part, as follows:

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[2] RCW 4.24.525 provides that a party may successfully bring a motion to strike any claim so long as the moving party shows by a preponderance of the evidence that the claim is based on an action involving public participation and petition, and so long as the responding party fails to establish by clear and convincing evidence a probability of prevailing on the claim.

[3] Ch. 24.03 RCW.

> BOYCOTT POLICY
> Whenever possible, the Olympia Food Co-op will honor nationally recognized boycotts which are called for reasons that are compatible with our goals and mission statement.
> . . .
> A request to honor a boycott . . . will be referred . . . to determine which products and departments are affected. . . . The [affected] department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott.
> . . .
> The department manager will post a sign informing customers of the staff's decision . . . regarding the boycott. If the staff decides to honor a boycott, the [Merchandising Coordinator] will notify the boycotted company or body of our decision. . . .

In March 2009, a cashier proposed to the staff work group a boycott of Israeli goods and financial investments. The staff members comprising the Merchandising Coordination Action team (MCAT) considered the request and attempted to reach an internal consensus for more than a year. After failing to reach a consensus, the MCAT reported its failure to the board. In May 2010, the board instructed the staff to again attempt to achieve full staff consensus. After this renewed effort failed, the board—at its next meeting in July 2010—by consensus agreed to support the boycott and adopted a resolution approving a boycott of Israeli-made products and divestment from Israeli companies. At the same time, the board invited any dissenting members to put the board's decision to a vote as provided for by the Co-op's bylaws. The board also posted a reminder on the Co-op's website informing members that they could compel a member vote by gathering the requisite number of signatures. No member pursued this option.

On September 2, 2011, Kent Davis, Linda Davis, Jeffrey Trinin, Susan

Trinin, and Susan Mayer (collectively Members) filed a derivative suit on behalf of the Co-op against 16 current and former board members (collectively Directors) in Thurston County Superior Court. Their complaint was filed in the wake of a failed attempt by 3 Members to be elected to the board, and following a demand letter sent from the Members to the Directors, wherein the Members stated that if the boycott was not rescinded, "we will bring legal action against you, and this process will become considerably more complicated, burdensome, and expensive than it has been already." In their complaint, the Members alleged that the Directors acted ultra vires and breached their fiduciary duties. The Members sought a declaratory judgment that the boycott was void, permanent injunctive relief preventing its enforcement, and monetary damages from all 16 defendants. The Members also served each defendant with a 13-page discovery demand and, several weeks later, noticed videotaped depositions of each defendant.

On November 1, the Directors filed a special motion to strike the Members' complaint pursuant to RCW 4.24.525—Washington's anti-SLAPP statute. The anti-SLAPP statute contains a two step process that a trial court must utilize in ruling on such a motion.

> A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

RCW 4.24.525(4)(b). The statute defines an "action involving public participation

and petition," in pertinent part, as "[a]ny other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e).

The Members opposed the motion and, in response, brought a motion for discovery, arguing that they were entitled to discovery pursuant to the "good cause" exception to the automatic discovery stay provision of RCW 4.24.525(5)(c). The Directors opposed the Members' discovery motion. The trial court heard argument on February 23, 2012 and denied the Members' motion. The court's basis for denying the request for discovery was twofold: (1) the request was belated, and (2) it was "broad-ranging" and "not focused."

Subsequently, on February 27, the court granted the Directors' motion to strike the Members' claims. The court ruled that the Directors had shown by a preponderance of the evidence that their conduct fit within the statutory category of "any other lawful conduct in . . . furtherance of the exercise of a constitutional right of free speech in connection with an issue of public concern or in furtherance of the exercise of the constitutional right of petition," and that the Members had failed to establish by clear and convincing evidence a probability of prevailing on their claims.

In dismissing the Members' claims, the court rejected their argument that the board lacked authority to resolve the boycott issue, instead concluding that the board's authorization in the bylaws to "resolve organizational conflicts after all other avenues of resolution have been exhausted" gave the board authority to

adopt the boycott. In considering this issue, the court excluded as hearsay the declarations of two former board members, Tibor Bruer and Susan Trinin, who asserted that the board, by adopting the Boycott Policy, did not intend to retain the authority to enact a boycott if the staff failed to reach a consensus. However, the court did not exclude as hearsay the declaration of Harry Levine, another former board member, who stated that the board, by adopting the Boycott Policy, did not intend to relinquish its authority to resolve organizational conflict with respect to boycotts.

After rejecting the Members' various constitutional challenges to the anti-SLAPP statute, the trial court ordered the Members to pay a total of $221,846.75 to the various defendants, which included attorney fees and $10,000 in statutory damages payable to each named defendant, as mandated by the anti-SLAPP statute. RCW 4.24.525(6)(a)(ii).

The Members subsequently sought direct review in the Supreme Court. The Supreme Court denied direct review and transferred the case to Division Two, which then transferred the case to us.

II

The Members assign error to the trial court's grant of the Directors' anti-SLAPP motion. Specifically, the Members argue that the Directors failed to establish by a preponderance of the evidence that the lawsuit targeted activity involving public participation and petition and that, even if the Directors did meet their burden, the Members established by clear and convincing evidence a

probability of prevailing on their claims. We are not persuaded by these arguments.

"We review the grant or denial of an anti-SLAPP motion de novo." Dillon v. Seattle Deposition Reporters, LLC, __ Wn. App. __, 316 P.3d 1119, 1133 (2014). "Under the anti-SLAPP statute, a party may bring a special motion to strike 'any claim that is based on an action involving public participation and petition.'" Dillon, 316 P.3d at 1132 (quoting RCW 4.24.525(4)(a)). The two step process by which we decide an anti-SLAPP motion is as follows:

> In deciding an anti-SLAPP motion, a court must follow a two step process. A party moving to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim targets activity "involving public participation and petition," as defined in RCW 4.24.525(2). U.S. Mission Corp. v. KIRO TV, Inc., 172 Wn. App. 767, 782-83, 292 P.3d 137, review denied, 177 Wn.2d 1014, 302 P.3d 181 (2013). If the moving party meets this burden, the burden shifts to the responding party "to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b). If the responding party fails to meet its burden, the court must grant the motion, dismiss the offending claim, and award the moving party statutory damages of $10,000 in addition to attorney fees and costs. RCW 4.24.525(6)(a)(i), (ii).

Dillon, 316 P.3d at 1132. "[T]he procedure for deciding anti-SLAPP motions is similar to that used in deciding a motion for summary judgment." Dillon, 316 P.3d at 1132. Thus, a court ruling on an anti-SLAPP motion "shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c). However, "the trial court may not find facts, but rather must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." Dillon, 316 P.3d at 1143.

A

We first inquire whether the trial court erred by concluding that the Directors did, in fact, establish by a preponderance of the evidence that the Members' claims targeted activity "involving public participation and petition." The Members contend that the Directors failed to meet their burden. This is so, they assert, because their lawsuit was meant to correct corporate malfeasance, not to target constitutionally protected speech. We disagree.

The anti-SLAPP statute defines "an action involving public participation and petition" as follows:

> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
> (c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;
> (d) Any oral statements made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or
> (e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

RCW 4.24.525(2). Recently, we adopted a guiding principle for determining whether a lawsuit targets constitutionally protected speech.

> "[I]t is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected

> activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute."

Dillon, 316 P.3d at 1134 (quoting Martinez v. Metabolife Int'l, Inc., 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (Cal. App. 2003)). Moreover, if the plaintiffs' cause of action "targets conduct that advances and assists" the defendants' exercise of a protected right, then the cause of action targets the exercise of that protected right. Greater L.A. Agency on Deafness, Inc. v. Cable News Network, 742 F.3d 414, 423 (9th Cir. 2014) (applying California law).[4] Additionally, "[b]ecause the legislature's intent in adopting RCW 4.24.525 was to address 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,' this court looks to First Amendment cases to aid in its interpretation." City of Seattle v. Egan, __ Wn. App. __, 317 P.3d 568, 570 (2014) (quoting LAWS OF 2010, ch. 118, §1(a)).

In seeking to identify the principal thrust or gravamen of the Members' claim, it is instructive to look to the remedy sought. One remedy the Members sought was permanent injunctive relief. In essence, the Members sought to have the court permanently enjoin the Directors from continuing the boycott. Because the nonviolent elements of boycotts are protected by the First Amendment, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Members' desired remedy reveals that the principal thrust of their suit is to make the Directors cease engaging in activity protected by

[4] "Washington's anti-SLAPP statute mirrors California's anti-SLAPP statute. Therefore, in most circumstances, California cases may be considered as persuasive authority when interpreting RCW 4.24.525." Dillon, 316 P.3d at 1132 n.21.

the First Amendment. This is of great significance in resolving the question presented.

The Directors assert that the boycott is "an action involving public participation" because it is "*lawful* conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of *public concern.*" RCW 4.24.525(2)(e) (emphasis added). Therefore, we must next determine whether the boycott is in connection with an issue of public concern. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" Snyder v. Phelps, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011) (quoting Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). The trial court, as part of its ruling that the boycott was in connection with an issue of public concern, observed the following:

> Four decades of conflict in the Middle East have accompanied the issues that surround the purposes behind this proposed Boycott and Divestment Resolution. . . . And for four decades, the matter has been a matter of public concern in America and debate about America's role in resolving that conflict. I don't believe there can be any dispute about that issue being a matter of public concern.

The trial court correctly ruled that the boycott decision was in connection with an issue of public concern.

Rather than challenge this aspect of the ruling, the Members assert that the trial court erred because the Directors' conduct was not "lawful," as required by RCW 4.24.525(2)(e). In essence, the Members argue that adopting the boycott was not "lawful" because the board violated the Boycott Policy in doing so.

Although we consider whether the Directors' activity was "lawful" under the first step of the anti-SLAPP motion analysis, our review is limited to determining whether the activity was illegal as a matter of law. If, as part of our review under the first step, we accepted the Members' invitation to consider whether the Directors improperly adopted the boycott, the second step would be rendered superfluous and the burden of proof would be improperly shifted. Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1089, 114 Cal. Rptr. 2d 825 (Cal. Dist. Ct. App. 2001) ("[U]nder the statutory scheme, a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary. Otherwise, the second step would become superfluous in almost every case, resulting in an improper shifting of the burdens." (citation omitted)); see also Gerbosi v. Gaims, Weil, West & Epstein, LLP, 193 Cal. App. 4th 435, 446, 122 Cal. Rptr. 3d 73 (Cal. Dist. Ct. App. 2011) ("[W]hen a defendant's assertedly protected activity *may or may not be* criminal activity, the defendant may invoke the anti-SLAPP statute *unless the activity is criminal as a matter of law.*" (second emphasis added)). The Members do not assert that the decision to boycott Israeli goods was an activity that was illegal as a matter of law. Rather, they contend that it was a decision made in contravention of the governing rules of the Co-op. Thus, we conclude that the Directors' adoption of the boycott was "lawful" under the first step of the anti-SLAPP statute.[5]

The Directors demonstrated that the boycott was constitutionally

[5] The Directors also assert that the boycott is protected as an act of petition. However, because the boycott constitutes protected speech activity, we need not address whether it is also protected as an act of petitioning.

protected, lawful, and in connection with an issue of public concern. The Members sought a court order requiring the protected activity to stop. Accordingly, the trial court did not err by concluding that the Directors established that the Members' claims targeted activity involving public participation and petition.

B

We next inquire whether the trial court erred by concluding that the Members failed to establish by clear and convincing evidence a probability of prevailing on their claims. The Members contend that the trial court erred by improperly weighing the evidence and by ruling as a matter of law that they did not meet their burden. Although the trial court did err by improperly weighing the evidence, its error was harmless. Accordingly, the trial court did not err by ruling as a matter of law that the Members failed to meet their burden.

The Members assert that the trial court improperly weighed evidence. This is so, they aver, because the trial court—presented with competing theories as to whether a nationally recognized boycott existed and as to whether an organizational conflict existed—improperly weighed the evidence and accepted the Directors' theories. We agree.

"The role of the trial court in determining whether the plaintiff has met his or her burden under the second step of the anti-SLAPP motion to dismiss analysis is akin to the trial court's role in deciding a motion for summary judgment." Dillon, 316 P.3d at 1142. Thus, "[t]he trial court may not find facts or make determinations of credibility." Dillon, 316 P.3d at 1142. "Instead, 'the court

shall consider pleadings and supporting and opposing affidavits stating the facts.'" Dillon, 316 P.3d at 1142 (quoting RCW 4.24.525(4)(c)). "[I]n analyzing whether the plaintiff has shown, by clear and convincing evidence, a probability of prevailing on the merits" the trial court "must view the facts and all reasonable inferences therefrom in the light most favorable to the plaintiff." Dillon, 316 P.3d at 1143.

The Boycott Policy states that "[w]henever possible, the Olympia Food Co-op will honor nationally recognized boycotts." The Members argued that "nationally recognized" is synonymous with "nationally accepted," and offered evidence indicating that the movement to boycott Israeli products had failed to gain traction on a national scale. Nevertheless, the trial court accepted the Directors' theory and ruled that a nationally recognized boycott existed because "[t]he question of its national scope is not determined by the degree of acceptance."

Here, the meaning of the Boycott Policy depends on a choice among reasonable inferences. It is not clear from the Policy whether "nationally recognized" means that boycotts have been enacted across the nation as the Members contend, or whether it means that people and organizations are trying to enact boycotts across the nation, as the Directors contend. Both parties presented evidence in favor of their interpretations—the Members, evidence that Israeli boycotts had failed on a national level; the Directors, evidence that hundreds of member organizations of the U.S. Campaign to end the Israeli Occupation existed across the country—which required the trial court to choose

between reasonable inferences. When the trial court drew an inference in favor of the Directors, it erred.

The parties also offered different theories as to whether a lack of consensus among the staff created an organizational conflict that the board could resolve or whether it simply meant that consensus had not been achieved—constituting a decision in and of itself, given the requirement to reach a consensus for a decision to be made. Again, in ruling against the Members, the trial court weighed the evidence, selectively excluded declarations submitted by the Members (while relying on a declaration submitted by the Directors), and failed to credit reasonable inferences from the Members' evidence. This was also error. However, because the Boycott Policy does not bind the board, the trial court's errors were harmless.

Both parties agree that the board "adopted" the Boycott Policy in 1993, but neither party explained what effect adopting the Policy had on the board's authority to manage the corporation. Generally, "[t]he charter of a corporation and its by-laws are the fundamental documents governing the conduct of corporate affairs." Liese v. Jupiter Corp., 241 A.2d 492, 497 (Del. Ch. 1968). The Co-op's bylaws require the board to "adopt major policy changes," but do not further mandate that the board comply with adopted policy changes. Moreover, the Policy does not contain any language that obligates the board to adhere to it once adopted. Presumably, if the board failed to comply with an adopted policy, and a sufficient number of members were troubled by that fact, they could

exercise their right to vote the board members off of the board.[6] However, neither an applicable statute, the articles of incorporation, nor the bylaws compel the board to comply with adopted policies. Thus, although adopting the Policy presented an opportunity for staff involvement, the board did not relinquish its ultimate authority to adopt boycotts pursuant to its general authority to manage the Co-op.

Indeed, notwithstanding the Co-op's emphasis on consensus decision-making, the bylaws task the board with managing the Co-op.[7] By virtue of being tasked with managing the corporation, the board may avail itself of the business judgment rule. The business judgment rule cautions against courts substituting their judgment for that of the board of directors, absent evidence of fraud, dishonesty, or incompetence. In re Spokane Concrete Prods., Inc., 126 Wn.2d 269, 279, 892 P.2d 98 (1995). The Members did not present any evidence of fraud, dishonesty, or incompetence by the board. Instead, they argued that the board lacked the authority to adopt the boycott. However, because we conclude that the board did have the authority to adopt the boycott, and since no evidence of fraud, dishonesty, or incompetence was presented, there is no basis for us to question the board's decision to adopt the boycott.

Nonetheless, the Members point to the board's subsequent efforts to amend the Boycott Policy as evidence that the board could not simply disregard

[6] In fact, several of the appellants ran against several respondent board members in a subsequent election. However, they were unsuccessful in attempting to oust the respondent board members.

[7] Additionally, the Washington Nonprofit Corporation Act makes clear that "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095.

an adopted policy. However, the board's attempt to amend the Policy is open to any number of explanations, including a desire to avoid the perception that it was usurping the Co-op's goal of consensus decision-making. Although the Co-op as an organization—including, in all likelihood, the board members in this lawsuit—may aspire to consensus decision-making, this aspiration does not imbue the Boycott Policy with authority equivalent or superior to that of the applicable statutes, articles of incorporation, or the bylaws.

Ultimately, the Members failed to meet their burden. Although the trial court based its decision on the board's authority to resolve organizational conflict, we affirm, instead, on the basis that the Co-op's governing documents provided the board with the authority to adopt the boycott.[8]

III

In addition to their contention that the trial court committed reversible error by granting the Directors' anti-SLAPP motion, the Members assert that the trial

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[8] The Members also assert that the trial court erred by requiring them to meet the "clear and convincing evidence" standard, rather than the statutorily prescribed "clear and convincing evidence [of] a probability of prevailing on the claim" standard. The transcript from the February 27, 2012 hearing rebuts this assertion.

> Therefore, the analysis shifts to the second prong of the statute, where plaintiffs must prove by clear and convincing evidence a probability of prevailing on the claim.
>
> This is a new law, and it is also a new or unique evidence standard. Clear and convincing evidence of a fact is something that the courts are very used to dealing with. Clear and convincing evidence of a probability is certainly more unique than clear and convincing evidence of a fact. Probability, I am satisfied, relying upon the authorities provided me by the plaintiff, means less than the preponderance standard. But the evidence, to meet that threshold standard, must be clear and convincing under the law.
>
> Some writers have suggested that the proof standard here is akin to the summary judgment standard under Civil Rule 56. My application of the evidence burden here is not dissimilar to that.

The trial court clearly applied the correct standard.

court erred in its evidentiary rulings. Specifically, they argue that the trial court erred by refusing to consider declarations offered by the Members, in which two former board members—Trinin and Bruer—opined as to what the board intended when it adopted the Boycott Policy. We disagree.

"Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, '[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.'" Momah v. Bharti, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (alteration in original) (quoting Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Because "the procedure for deciding anti-SLAPP motions is similar to that used in deciding a motion for summary judgment," Dillon, 316 P.3d at 1132, we review de novo the trial court's evidentiary ruling made here in conjunction with the anti-SLAPP motion.

The Members first assert that because both declarants were members of the board when it adopted the Boycott Policy, their statements constitute an admission by the board. An admission by a party opponent does not constitute hearsay. ER 801(d)(2). However, the Members overlook the requirement that board members must have speaking authority for ER 801(d)(2) to apply.

> When applying ER 801(d)(2), Washington follows the Restatement (Second) of Agency, § 286 (1958), which requires that an agent have speaking authority. Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 404, 725 P.2d 1008 (1986), review denied, 107 Wn.2d 1020 (1987); Donald B. Murphy Contractors, Inc. v. State, 40 Wn. App. 98, 108-10, 696 P.2d 1270, review denied, 103 Wn.2d 1039 (1985). In order to fall under the rule, the declarant must be authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party. Lockwood v. A C & S, Inc., 109 Wn.2d 235, 262, 744 P.2d 605 (1987); Barrie v. Hosts of

> Am., Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980). When a person does not have specific express authority to make statements on behalf of a party, the overall nature of his authority to act for the party may determine if he is a speaking agent. Lockwood, [109 Wn.2d] at 262.

Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 169-70, 758 P.2d 524 (1988). The Members provide no evidence that either declarant was authorized to speak on behalf of the board. Accordingly, ER 801(d)(2) does not exempt their testimony from application of the hearsay rules.

The Members next assert that the declarants' testimony does not constitute hearsay because it was based on personal knowledge. In support of this assertion, the Members rely on Snohomish County Fire District No. 1 v. Snohomish County Disability Board, 128 Wn. App. 418, 115 P.3d 1057 (2005). There, we affirmed a trial court's decision to admit a board member's affidavit where the board member testified from personal knowledge. Snohomish County Fire Dist., 128 Wn. App. at 422-23 n.1. However, we based our decision on the fact that the board member's statements "were offered to show the research and procedure that the Board used in adopting the Rules, not to prove the truth of the substance of the statements." Snohomish County Fire Dist., 128 Wn. App. at 423 n.1. To the contrary, here, both declarants' testimony was offered to prove the truth of the matter asserted: namely, that the board intended to relinquish to the staff its authority to adopt a boycott. Accordingly, the trial court did not err in excluding the declaration testimony as hearsay.

IV

The Members next contend that the trial court erred by denying their

discovery motion. As the Members failed to show "good cause" for discovery, their contention is unavailing.

The automatic discovery stay provision in the anti-SLAPP statute reads thusly:

> All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

RCW 4.24.525(5)(c).

"Appellate courts ordinarily review discovery rulings for abuse of discretion." Fellows v. Moynihan, 175 Wn.2d 641, 649, 285 P.3d 864 (2012). California courts have applied this familiar standard when reviewing decisions made pursuant to its anti-SLAPP statute's "good cause" exception to the automatic discovery stay provision. 1-800 Contacts, Inc. v. Steinberg, 107 Cal. App. 4th 568, 593, 132 Cal. Rptr. 2d 789 (Cal. Dist. Ct. App. 2003); Sipple v. Foun. for Nat'l Progress, 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677 (Cal. Dist. Ct. App. 1999). Given this persuasive authority, we review the trial court's denial of the Members' discovery motion for abuse of discretion.

"A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds." In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). "[I]t is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Fiorito, 112 Wn. App. at 664.

California courts have provided guidance in interpreting the meaning of "good cause" for discovery in the context of their state's anti-SLAPP statute.[9]

> Decisions that have considered what constitutes such a showing of good cause have described it as a showing "that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case." (Lafayette Morehouse[, Inc. v. Chronicle Publ'g Co.], 37 Cal. App. 4th [855,] 868[, 44 Cal. Rptr. 2d 46 (Cal. Dist. Ct. App. 1995)].) The showing should include some explanation of "what additional facts [plaintiff] expects to uncover . . . . " (Sipple [v. Found. for Nat'l Progress], 71 Cal. App. 4th [226,] 247[, 83 Cal. Rptr. 2d 677 (Cal. Dist. Ct. App. 1999)]; see also Nicosia v. De Rooy, 72 F. Supp. 2d 1093, 1111 [N.D. Cal. 1999].) Only in these circumstances is the discretion under section 425.16, subdivision (g) to be "liberally exercise[d]." (Lafayette Morehouse, supra, 37 Cal. App. 4th at p. 868.) Discovery may not be obtained merely to "test" the opponent's declarations. (Sipple, supra, 71 Cal. App. 4th at p. 247.)

1-800 Contacts, 107 Cal. App. 4th at 593. Moreover, the "good cause" standard is similar to Civil Rule (CR) 56(f), which allows a party faced with a summary judgment motion to seek a continuance to engage in discovery "essential to justify his opposition." Pursuant to CR 56(f), the nonmoving party must show "how additional discovery would preclude summary judgment and why a party cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact." Hewitt v. Hewitt, 78 Wn. App. 447, 455, 896 P.2d 1312 (1995).

The Members sought to depose two individuals who had submitted declarations in support of the Directors' special motion to strike and a defendant who they claimed "has abundant evidence regarding the Board's process, thinking, purposes, and understandings regarding the Boycott Policy and the Israel Boycott and Divestment Policies at the time those policies were adopted."

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[9] Cal. Civ. Proc. Code § 425.16(g).

The Members also sought access to "all documents in possession of each of the Defendants and the Co-op relating in any way to the Co-op's Boycott Policy and actions taken related thereto." In explaining why it was necessary to depose witnesses, the Members stated that it was to "test the veracity of Defendants' voluminous factual allegations."

Explaining the standard that it was applying, the trial court stated, "I conclude that in the good-cause exception of the anti-SLAPP statute, the test is at least as stringent and as narrow as the Civil Rule 56 test." The trial court explained that the CR 56 test "requires an explanation of what the moving party, the party seeking additional discovery or time to prepare declarations, expects to discover and why it's important to the motion." In light of the fact that "the procedure for deciding anti-SLAPP motions is similar to that used in deciding a motion for summary judgment," Dillon, 316 P.3d at 1132, we conclude that the trial court applied the correct legal standard.

The Members did not satisfy this standard. The trial court, in declining to find "good cause," explained that it was denying the motion for discovery for two reasons: "First, it comes at the end of the process. . . . Second, the discovery is not focused." As the trial court correctly concluded, the discovery request was an expansive request with the stated goal of "test[ing] the veracity of Defendants' voluminous factual allegations." However, 1-800 Contacts and Sipple preclude this motivation as a basis for granting relief from the stay. 107 Cal. App. 4th at 593; 71 Cal. App. 4th at 247. Additionally, the Members failed to identify with any specificity what portion of their request for *all* documents in possession of the

directors in connection with the Boycott Policy was needed to establish a prima facie case. Therefore, the trial court did not err in denying the motion.

V

The Members next challenge the constitutionality of the anti-SLAPP statute, both on its face and as applied to them. They identify two offending provisions: (1) the automatic discovery stay, and (2) the requirement that they establish by clear and convincing evidence a probability of prevailing on their claims. None of their arguments persuade us that either provision is unconstitutional.

We review the constitutionality of a statute de novo. Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 978, 216 P.3d 374 (2009). "Statutes are presumed to be constitutional, and '[t]he challenger bears the burden of showing the statute is unconstitutional beyond a reasonable doubt.'" Ringhofer v. Ridge, 172 Wn. App. 318, 327, 290 P.3d 163 (2012) (alteration in original) (quoting City of Bothell v. Barnhart, 172 Wn.2d 223, 229, 257 P.3d 648 (2011)), review denied, 177 Wn.2d 1009 (2013). Indeed, we will strike down a statute only if we are "'fully convinced, after a searching legal analysis, that the statute violates the constitution.'" Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 606, 244 P.3d 1 (2010) (quoting Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)).

A

The Members argue that the mandatory discovery stay is unconstitutional. They first contend that the mandatory discovery stay violates our separation of

powers doctrine. This is so, they assert, because the discovery stay conflicts with CR 26(c) and, since the anti-SLAPP statute is procedural in nature, the court rule must prevail. Their contention is unavailing.

Washington's constitution "does not contain a formal separation of powers clause, but 'the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.'" Putman, 166 Wn.2d at 980 (internal quotation marks omitted) (quoting Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009)). Washington courts are "vested with judicial power from article IV of our state constitution and from the legislature under RCW 2.04.190. The inherent power of article IV includes the power to govern court procedures." City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006) (footnote omitted). "When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both." Jensen, 158 Wn.2d at 394. However, if a statute and a court rule "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Putman, 166 Wn.2d at 980.

The Members assert that this automatic discovery stay conflicts with CR 26(c). Specifically, they argue that while CR 26(c) allows a party to seek relief from the court if requested discovery is onerous or burdensome, RCW 4.24.525(5)(c) takes the opposite approach by staying all discovery unless good cause is shown. However, the anti-SLAPP statutory requirement that good cause be shown imposes no greater burden than does CR 56(f), which allows a party faced with a summary judgment motion to obtain discovery that is

"essential to justify his opposition." See Dillon, 316 P.3d at 1142; see also Britts v. Superior Court, 145 Cal. App. 4th 1112, 1129, 52 Cal. Rptr. 3d 185 (Cal. Dist. Ct. App. 2006) (holding that California's automatic discovery stay does not violate separation of powers principles). Given that the automatic discovery stay is no more burdensome than CR 56(f), a rule applied without constitutional controversy for many years, the Members have not established that it is unconstitutional.

The Members next argue that the automatic discovery stay violates their right of access to the courts. However, our recent decision in In re Estate of Fitzgerald, 172 Wn. App. 437, 294 P.3d 720 (2012), review denied, 177 Wn.2d 1014 (2013), militates against striking down the automatic discovery stay on this basis.

"The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" Putman, 166 Wn.2d at 979 (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). "This right of access to courts 'includes the right of discovery authorized by the civil rules'" and "'[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.'" Putman, 166 Wn.2d at 979 (alteration in original) (quoting John Doe, 117 Wn.2d at 782). Recently, we explained our Supreme Court's holding in Putman with regard to access to courts.

> In Putman, our Supreme Court considered the constitutionality of a law requiring a plaintiff in a medical malpractice suit to submit a "certificate of merit" with the pleadings. 166 Wn.2d at 982-83. The court explained that "[t]he certificate of merit requirement essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery

> and obtain such evidence." Putman, 166 Wn.2d at 983. Noting that the "right of access to courts 'includes the right of discovery authorized by the civil rules,'" Putman, 166 Wn.2d at 979 (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)), the court held that the certificate of merit requirement unconstitutionally limited a litigant's access to the courts. Putman, 166 Wn.2d at 985.

Fitzgerald, 172 Wn. App. at 449 n.8. However, we declined to interpret Putman so broadly as to render unconstitutional any statute that limits discovery.

> Unlike the situation in Putman, however, in the context of a TEDRA[10] proceeding, no decision disposing of the creditor's claim is mandated before any discovery can be had. The trial court retains the discretion to permit discovery—in appropriate circumstances—before determining whether the creditor's claims are time-barred. Accordingly, unlike the certificate of merit requirement in a medical malpractice suit, the TEDRA discovery rules do not unconstitutionally limit a creditor's access to the courts.

Fitzgerald, 172 Wn. App. at 449-50 n.8.

As in the context of a TEDRA proceeding, trial courts retain the discretion to permit discovery before ruling on an anti-SLAPP motion. Thus, the non-movant in an anti-SLAPP motion will not categorically be precluded from obtaining discovery before the trial court rules on the motion. So long as the non-movant can show good cause to obtain discovery, the trial court should allow such discovery. RCW 4.24.525(5)(c). Therefore, the discovery stay does not violate the Members' right of access to the courts.

The Members finally aver that the discovery stay is unconstitutional as applied here. This is so, they assert, because "[t]he trial court effectively read the good cause requirement out of the statute by finding the anti-SLAPP Act's 'governing principle . . . [is] to avoid the time and expense of litigation, including

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[10] Trust and Estate Dispute Resolution Act, ch. 11.96A RCW.

discovery,' and that, as a result, Appellants had to acquire all necessary information before filing suit." Appellant's Br. at 38. However, as explained above, the trial court applied the correct legal standard in ruling on the Members' discovery motion. Their assertion to the contrary, supported by selectively culling language from the trial court's examination of legislative intent, does not warrant a grant of appellate relief.

B

The Members also argue that the requirement that they establish by clear and convincing evidence a probability of prevailing on their claim is unconstitutional. They first contend that this heightened burden violates separation of powers principles. This is so, they assert, because the heightened burden of proof conflicts with CRs 8, 11, 12, 15, and 56. However, because burdens of proof are substantive, not procedural, the Members are incorrect.

"When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both." Jensen, 158 Wn.2d at 394. However, if a statute and a court rule "cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Putman, 166 Wn.2d at 980.

"Given its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim." Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20-21, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000).

Even were we to decide that a conflict between the statute and the cited court rules actually exists, a decision we need not make, the Members would not

prevail on their claim that the statute violates the separation of powers. If such conflicts do exist, the statute must prevail, as burdens of proof are substantive aspects of a claim. Thus, the heightened burden of proof does not violate separation of powers principles.

The Members next contend that the heightened burden of proof violates the right of access to the courts. This is so, they assert, because "it permits claims to be dismissed with prejudice based on a burden of proof greater than that the claimant would face at trial, and without the claimant having acquired the discovery needed to establish its case." Appellant's Br. at 41. This contention is unavailing.

"It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in determining liability." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 666, 771 P.2d 711, 780 P.2d 260 (1989). "The argument that a state statute stiffens the standard of proof of a common law claim does not implicate" the right of access to courts. Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 968 (6th Cir. 2004). The legislature has the prerogative to impose a heightened burden of proof.[11] Its choice to do so here does not violate the Members' right of access to the courts.

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[11] Indeed, our legislature has utilized a straightforward "clear and convincing evidence" burden of proof in other contexts. See RCW 4.24.730(3) (presumption of good faith for employer's disclosure of employee information rebuttable only on showing of "clear and convincing evidence"); RCW 5.68.010(2) (journalist work-product may be compelled only if "the party seeking such news or information" shows its relevance and unavailable alternatives "by clear and convincing evidence"); RCW 13.34.190(1)(a)(i) ("[T]he court may enter an order terminating all parental rights to a child only if the court finds . . . [t]he allegations contained in the petition . . . are established by clear, cogent, and convincing evidence."). Our courts have also approved of this heightened burden of proof in the defamation context. See Mark v. Seattle Times, 96 Wn.2d 473, 487, 635 P.2d 1081 (1981) (requiring "that a defamation plaintiff resisting a

The Members next contend that the requirement that they establish by clear and convincing evidence a probability of prevailing on their claims violates their right to a jury trial. We disagree.

Our recent decision in Dillon explained that the standard of clear and convincing evidence of a probability of prevailing on the claim is applied by viewing the evidence in a manner similar to how it is viewed in deciding a summary judgment motion. Dillon, 316 P.3d at 1142. We concluded that the summary judgment standard does not offend the constitutional right to a trial by jury and, therefore, the anti-SLAPP statute also does not offend this right.

> The summary judgment standard does not offend the constitutional right to trial by jury because "it was not the purpose of [article I, section 21] to render the intervention of a jury mandatory . . . where no issue of fact was left for submission to, or determination by, the jury." . . .
>
> Accordingly, the anti-SLAPP statute does not violate the right to trial by jury where the court utilizes a summary judgment-like standard in deciding the motion to strike.

Dillon, 316 P.3d at 1142 (quoting In re Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945); citing Nexus v. Swift, 785 N.W.2d 771, 782 (Minn. App. 2010)).

The Members next argue that the requirement that they establish by clear and convincing evidence a probability of prevailing on their claims is unconstitutionally vague. This is so, they assert, because the standard mixes two standards of proof, such that there is a significant likelihood that the more rigorous standard—clear and convincing evidence—will be applied without

defense motion for summary judgment must establish a prima facie case by evidence of convincing clarity").

reference to the more relaxed standard of probability of prevailing on the claim. We disagree.

"The party challenging a statute's constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). "A statute is void for vagueness if it is framed in terms so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" Haley, 117 Wn.2d at 739 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). Yet, "[c]ondemned to the use of words, we can never expect mathematical certainty." Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

The Members admit that both the "clear and convincing" standard[12] and the "probability" standard are common standards, but then conclude that the two together will confound persons of common understanding. This is a non sequitur. Since both standards are well known, there seems to be little risk that, when considered together, confusion will abound. The Members have failed to demonstrate beyond a reasonable doubt that this statutory standard is unconstitutionally vague.

The last of the Members' constitutional challenges is that the clear and convincing evidence of a probability of prevailing on the claim standard is unconstitutional as applied to them. This is so, they assert, because this

[12] The United States Supreme Court has provided guidance in applying the convincing clarity standard: "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

statutory standard exceeds the burden of proof that they would face at trial or any other dispositive motion. However, because—at the motion stage—the trial court must credit the evidence presented by the plaintiffs, it is not true that the same quantum of evidence that would prevail at trial might not prevail in opposing the motion, as feared by the Members. The heightened burden, therefore, was not unconstitutional as applied to them.

VI

The Members next contend that the trial court erred by awarding $10,000 in statutory damages to each defendant. This is so, they assert, because the suit was a derivative suit brought against the board, not 16 individuals. We disagree.

RCW 4.24.525(6)(a)(ii) mandates that a moving party who prevails on an anti-SLAPP motion be awarded ten thousand dollars.

> (6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:
>
> . . .
>
> (ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees.

RCW 4.24.525(6)(a)(ii).

Recently, we interpreted RCW 4.24.525(6)(a)(ii) and stated, in no uncertain terms, "all persons who prevail on an anti-SLAPP motion filed on their behalf are entitled to the statutory damage award." Akrie v. Grant, ___ Wn. App. ___, 315 P.3d 567, 571 (2013). In reaching this conclusion, we relied on the legislature's statement that "'[t]his act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies

from an abusive use of the courts.'" Akrie, 315 P.3d at 571 (quoting LAWS OF 2010, ch. 118, § 3).

In view of our pronouncement in Akrie, we must determine whether all 16 board members prevailed or whether it was only the board of directors as a single unit that prevailed. Put differently, did the Members sue each director individually or the board as a single entity? Without citation to authority, the Members aver that they named the individual members as defendants only because "court rules and statutes required them to do so." Appellant's Br. at 48. Additionally, the Members assert, they "made no allegations against any particular defendant; their complaint focused entirely on the actions of the Board." Appellant's Br. at 48. Their requested relief once again belies their position on appeal. Tellingly, the Members' complaint sought monetary damages from all 16 board members. This fact demonstrates that the Members sued the 16 board members individually, seeking monetary recompense from each. Thus, when the board members prevailed on the anti-SLAPP motion, they were each entitled to receive the statutorily-mandated $10,000 award.

The Members, nevertheless, argue that the Directors should not each receive the statutory damage award, reasoning that—even in the event that the Members had prevailed in the trial court—the Directors would have been indemnified by the Co-op as provided for by the bylaws, meaning that they never faced a serious threat of being held financially responsible. Although the Members are correct that the bylaws authorize indemnification for directors, they overlook the requirement that directors must act in good faith and in the interests

of the Co-op in order for indemnification to be available. Because the Members argue at length that the Directors failed, in fact, to act in good faith and in the interests of the Co-op, their indemnification argument is, at best, disingenuous. Akrie establishes that each defendant was entitled to the statutory damage award. There was no error.

VII

The Members next contend that the Co-op, as the real party in interest, should pay the attorney fees awarded to the Directors by the trial court. In support of this assertion, they cite to the statutes governing derivative actions for for-profit and for non-profit entities, RCW 23B.07.400[13] and RCW 24.03.040,[14] and argue that because neither statute authorizes fees against them as representative plaintiffs, they conflict with the anti-SLAPP statute.

"We review the legal basis for an award of attorney fees de novo and the reasonableness of the amount of an award for abuse of discretion." Hulbert v. Port of Everett, 159 Wn. App. 389, 407, 245 P.3d 779 (2011).

Without deciding whether the anti-SLAPP statute does, in fact, conflict with these derivative action statutes, we conclude that the legislature's intent in mandating an award of litigation costs and attorney fees to the prevailing party was clearly expressed by the plain language of the statute: "The court shall award to a moving party who prevails . . . *without regard to any limits under state law* . . . [c]osts of litigation and any reasonable attorneys' fees incurred in

[13] Under the for-profit statute, a court may award fees against an unsuccessful representative plaintiff only if the court finds that there was no "reasonable cause" for the proceeding. RCW 23B.07.400(4).

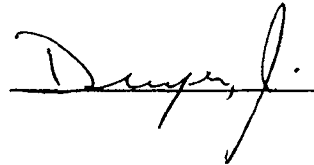
[14] The non-profit statute does not expressly authorize an award of fees. RCW 24.03.040.

connection with each motion on which the moving party prevailed." RCW 4.24.525(6)(a)(i) (emphasis added). Accordingly, even if a conflict existed, the anti-SLAPP statute would control. Therefore, the trial court did not err by assigning the liability for financial recompense to the Members.[15]

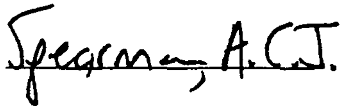
VIII

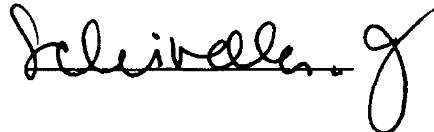
The Directors request their attorney fees on appeal. "The court shall award to a moving party who prevails, in part or in whole . . . [c]osts of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed." RCW 4.24.525(6)(a)(i). Additionally, "where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." Sharbono v. Universal Underwriters Ins. Co., 139 Wn. App. 383, 423, 161 P.3d 406 (2007). Thus, the Directors' request is well taken. Upon compliance with RAP 18.1, a commissioner of this court will enter an appropriate order.

Affirmed.



We concur:





[15] The Members, in passing, also assert that the representative nature of their presence in this lawsuit requires the Co-op, and not them, to be held liable for the statutory damages award. However, because the Members fail to support this assertion with citation to legal authority, we do not consider it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

3

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2012 JUL 12 PM 2:47

BETTY J. GOULD, CLERK

1 ☐ EXPEDITE
2 ☐ No hearing set
3 ☒ Hearing is set
4 Date: March 30, 2012
5 Time: Motion Calendar
6 Judge/Calendar: Hon. Thomas McPhee
7
8
9
10 SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY
11
12 KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD
13 COOPERATIVE,
14 Plaintiffs,
15 v.
16 GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI;
17 JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES;
18 JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA
19 SOKOLOFF; and JOELLEN REINECK WILHELM,
20
Defendants.
21

Case No. 11-2-01925-7

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' SPECIAL MOTION TO STRIKE THE COMPLAINT UNDER WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525

Amended

Clerk's Action Required

22 This matter came before the Court on Defendants' Special Motion to Strike Under
23 Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss. The Court heard
24 oral argument on Defendants' motion on February 23, 2012, and issued its oral ruling on
25 February 27, 2012. In connection with this Motion, the Court has also reviewed the following
26 documents submitted by the parties: (1) the Complaint and its attachments; (2) Defendants'
27 Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion

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tlc

1 to Dismiss, and all declarations and exhibits thereto; (3) Plaintiffs' Brief Opposing Defendants'
2 Special Motion, and all declarations and exhibits thereto; (4) Defendants' Reply to Plaintiffs'
3 Brief Opposing Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW
4 4.24.525, and Motion to Dismiss, and all declarations and exhibits thereto; (5) Plaintiffs' Cross-
5 Motion for Discovery; (6) Defendants' Brief Opposing Plaintiffs' Cross-Motion for Discovery;
6 (7) Plaintiffs' Reply in support of Cross-Motion for Discovery; and (8) Defendant's Motion for
7 Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525; (9) Plaintiffs' Opposition
8 to Motion for Fees and Penalties; and (10) Defendants' Reply to Plaintiffs' Opposition to Motion
9 for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525.
10 Based upon the arguments, a review of the court file, and the briefing submitted by the
11 parties, including the declarations and exhibits attached thereto, the Court hereby FINDS,
12 ORDERS, and DECREES as follows:
13 1) In an oral opinion February 23, 2012, the Court DENIED Plaintiffs' Cross-Motion for
14 Discovery;
15 2) In an oral opinion February 27, 2012, the Court GRANTED Defendants' Special
16 Motion to Strike under Washington's Anti-SLAPP Statute, RCW 4.24.525, and
17 Motion to Dismiss;
18 3) The Israeli-Palestinian conflict, which has persisted for more than four decades, is an
19 "issue of public concern." *See* RCW 4.24.525(2)(e);
20 4) Defendants have shown by a preponderance of the evidence that the claim is based on
21 "an action involving public participation and petition," RCW 4.24.525(4)(b);
22 specifically, "[a]ny other lawful conduct in furtherance of the exercise of the
23 constitutional right of free speech in connection with an issue of public concern."
24 RCW 4.24.525(2)(e);
25 5) Pursuant to RCW 4.24.525(4)(b), Plaintiffs have failed to establish by clear and
26 convincing evidence a probability of prevailing on their claims;
27

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6) Plaintiffs have failed to show, by evidence beyond a reasonable doubt, that Washington's Anti-SLAPP statute, RCW 4.24.525, is unconstitutional;

7) Defendants are the prevailing parties regarding (1) Defendants' Special Motion to Strike under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss, (2) Plaintiffs' Cross-Motion for Discovery, and (3) Defendant's Motion for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525;

8) Defendants are entitled to mandatory costs of litigation, reasonable attorneys' fees, and the statutory amount of ten thousand dollars ($10,000) per each Defendant. RCW 4.24.525(6)(a);

9) Therefore, Defendants' Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss is GRANTED;

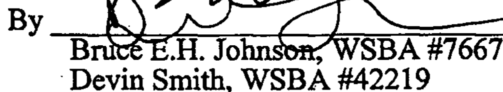
Accordingly, Plaintiffs' Complaint is hereby stricken and DISMISSED with prejudice.

It is so ORDERED.

DATED this 12 day of July, 2012.

Hon. Thomas McPhee

Presented by:
Davis Wright Tremaine LLP
Attorneys for Defendants



By ______
Bruce E.H. Johnson, WSBA #7667
Devin Smith, WSBA #42219

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2

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2012 JUL 12 PM 2:47

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: March 30, 2012
Time: Motion Calendar
Judge/Calendar: Hon. Thomas McPhee

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. 11-2-01925-7

~~[PROPOSED]~~ ORDER DENYING PLAINTIFFS' CROSS-MOTION FOR DISCOVERY

This matter came before the Court on Plaintiffs' Cross-Motion for Discovery. The Court heard oral argument on Plaintiffs' cross-motion on February 23, 2012, and denied the Cross-Motion in an oral ruling on that same date. In rendering its decision, the Court has reviewed the following documents submitted by the parties:

1. The Complaint and its attachments;

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2. Defendants' Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss, and all declarations and exhibits thereto;

3. Plaintiffs' Brief Opposing Defendants' Special Motion, and all declarations and exhibits thereto;

4. Defendants Reply to Plaintiff's Brief Opposing Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss, and all declarations and exhibits thereto;

5. Plaintiffs' Cross-Motion for Discovery, and all declarations and exhibits thereto;

6. Defendants' Brief Opposing Plaintiffs' Cross-Motion for Discovery, and all declarations and exhibits thereto; and

7. Plaintiffs' Reply Brief and the declaration and exhibits thereto.

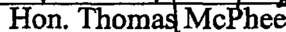
Based upon the arguments, a review of the court file, the court's oral ruling, and the briefing submitted by the parties, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiffs have failed to show good cause for discovery as required by RCW 4.24.525(5)(c);

2. Defendants are the prevailing parties regarding Plaintiffs' Cross-Motion for Discovery;

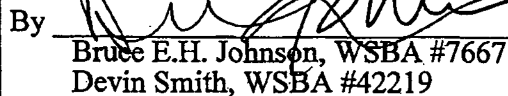
3. Plaintiffs' Cross-Motion for Discovery is DENIED.

DATED this 17 day of July, 2012.



Hon. Thomas McPhee

Presented by:
Davis Wright Tremaine LLP
Attorneys for Defendants

By 
Bruce E.H. Johnson, WSBA #7667
Devin Smith, WSBA #42219

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16

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2012 NOV 16 AM 11:20

BETTY J. GOULD, CLERK

☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: July 12, 2012
Time: Motion Calendar
Judge/Calendar: Hon. Thomas McPhee

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. 11-2-01925-7

~~[PROPOSED]~~ ORDER GRANTING DEFENDANTS' MOTION FOR MANDATORY COSTS AND ATTORNEYS' FEES UNDER RCW 4.24.525

This matter comes before the Court on Defendants' Motion for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525. The Court heard arguments of counsel regarding these issues on July 12, 2012, but left the amount of costs and fees to be determined after additional briefing. The Court subsequently issued the Court's Decision Re Attorney Fee Shifting on September 17, 2012 (the "Fee-Shifting Decision"), which identifies the amount of

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1 costs and fees awarded to Defendants. A copy of the Fee-Shifting Decision is attached hereto
2 as Attachment A, and is incorporated by reference herein. Based upon the arguments of
3 counsel, a review of the court file, and the briefing submitted by the parties, including the
4 declarations and exhibits attached thereto, the Court hereby FINDS, ORDERS, and DECREES
5 as follows:

6
7
1) RCW 4.24.525(6)(a) provides to each moving party mandatory awards of costs of litigation and reasonable attorney' fees incurred in connection with each motion on which the moving parties prevailed, and a statutory award in the amount of $10,000.

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2) Defendants are the prevailing parties regarding (1) Plaintiffs' Cross-Motion for Discovery, (2) Defendants' Special Motion to Strike under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss, and (3) Defendants' Motion for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525.

12
13
14
3) Pursuant to RCW 4.24.525(6)(a), Defendants are entitled to costs of litigation and reasonable attorneys' fees incurred in connection with the first two motions mentioned in the preceding paragraph, but for reasons set forth in the Fee-Shifting Decision, are not entitled to such costs and fees as to the third.

15
16
17
4) After engaging in the lodestar analysis contemplated by *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581 (1983) and its progeny, the Court issued the Fee-Shifting Decision on September 17, 2012.

18
19
5) The parties have agreed to accept the Fee-Shifting Decision as Findings of Fact and Conclusions of Law regarding the award of attorneys' fees and costs.

20
21
22
6) Based on the lodestar calculation, Defendants are entitled to an award of reasonable attorneys' fees in the amount of $61,668.00, as follows:

a. Bruce Johnson & Devin Smith (DWT) $52,443.00.

b. Barbara Harvey $9,225.00.

23

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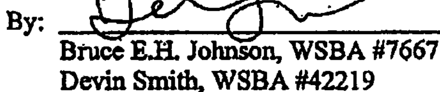
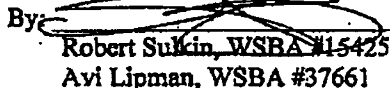
1 7) Defendants are entitled to $178.75 for costs of litigation, pursuant to RCW
2 4.24.525(6)(a)(i) and RCW 4.84.010.
3 8) On July 12, 2012, the Court ruled that each of the 16 individual Defendants were
4 entitled to a statutory amount of $10,000, and consequently entered an award of
5 $160,000 pursuant to RCW 4.24.525(6)(a)(ii).
6
7 Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that, pursuant to
8 RCW 4.24.525(6)(a), Plaintiffs shall pay reasonable attorneys' fees to Defendants in the amount
9 of $61,668.00; costs of litigation in the amount of $178.75; and a statutorily prescribed amount
10 of $160,000 ($10,000 for each moving party). The total amount of this judgment and award is
$221,846.75, which shall bear interest at the rate of 12% per annum.
11
12 SO ORDERED this 16 day of Nov, 2012.

13 The Honorable Thomas McPhee
14
15 Presented by:
DAVIS WRIGHT TREMAINE LLP
16 Attorneys for Defendants.



17 By:
18 Bruce E.H. Johnson, WSBA #7667
Devin Smith, WSBA #42219
19
20 Approved as to form:
MCNAUL EBEL NAWROT & HELGREN PLLC
21 Attorneys for Plaintiffs.



22 By:
23 Robert Sulkin, WSBA #15425
Avi Lipman, WSBA #37661

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Exhibit A

I certify to be true under penalty of perjury
Under the laws of the State of Washington that
I delivered/mailed a copy of this document to:
[handwritten] on [handwritten],
2012, at Olympia, WA
Signed [signature]

FILED
SEP 17 2012
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

KENT L. and LINDA DAVIS, et al.,
Plaintiffs,

vs.

GRACE COX et al.,
Defendants.

NO. 11-2-01925-7

COURT'S DECISION RE ATTORNEY FEE SHIFTING

Defendants moved for award of attorney fees of $280,832 pursuant to the fee shifting provisions of RCW 4.24.525(6)(a).[1] The fees sought to be shifted are less than incurred (defendant's motion identified at least $23,000 charged but not sought) and are not literally a shifted obligation, as defendants' counsel agreed to perform all work without charge to defendants and so limit their compensation to fees shifted pursuant to the statute, if any.

The issues presented in this motion are affected by two noteworthy considerations. First is the primacy of Mr. Johnson among all defendants' attorneys. Mr. Johnson was instrumental in drafting the anti-SLAPP statute in its current form and has been counsel or co-counsel for the parties seeking its protection in nearly all reported cases in Washington – most of these from federal court. He is an unquestioned expert on the subject. He was assisted in this case by his associate, Mr.

[1] Costs of $178.25 are approved without further discussion.

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1 Smith; none of defendants' other attorneys claimed any experience with Washington's anti-SLAPP
2 statute. The second noteworthy aspect of this case is that the protected speech was a corporate
3 resolution, and plaintiffs brought this action as a derivative action against a nonprofit corporation.
4 The amount of the fee awarded is calculated on the authority of *Bowers v. Transamerica*
5 *Title Ins. Co.*, 100 Wn.2d 581(1983), using a lodestar calculation. Lodestar is arrived at by
6 multiplying a reasonable hourly rate by the hours reasonably expended on the matters for which
7 fees are shifted.
8 Billing rates. At the hearing on July 10, I ruled that the "locality" considered to establish a
9 reasonable rate was "a regional rate encompassing the law firm where most of the work is currently
10 done, Davis, Wright, Tremaine." The rates charged by Mr. Johnson and Mr. Smith are judged
11 reasonable. The rates determined here for other counsel are explained as their hours charged are
12 considered below.
13 Reasonable hours. Of the many responsibilities imposed on counsel seeking fee shifting by
14 *Bowers* and its progeny, none is more important than the responsibility to exercise billing judgment.
15 It is particularly applicable here. Billing judgment was first explained by the U.S. Supreme Court in
16 *Hensley v. Eckerhart*, 461 U.S. 424, 434 - 437 (1983).

17 The district court also should exclude from this initial fee calculation hours that were not
18 "reasonably expended." S.Rep. No. 94-1011, p. 6 (1976). Cases may be overstaffed, and the skill
and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith
19 effort to exclude from a fee request hours that are **excessive, redundant, or otherwise
unnecessary**, just as a lawyer in private practice ethically is obligated to exclude such hours from
20 his fee submission. "In the private sector, 'billing judgment' is an important component in fee
setting. It is no less important here. Hours that are not properly billed to one's *client* also are not
21 properly billed to one's *adversary* pursuant to statutory authority." Copeland v. Marshall, 205
22 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980).
...
23 The applicant should exercise "billing judgment" with respect to hours worked ... and should
maintain billing time records in a manner that will enable a reviewing court to identify distinct
24 claims. [bolded emphasis added]

25 Washington has adopted the "billing judgment" duty for lawyers. *Scott Fetzer Co. v. Weeks*, 122
26 Wn. 2d 141, 156 (1993).
27
28

THURSTON COUNTY SUPERIOR COURT
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0-000001251

This case demonstrates the importance of billing judgment and the apparent lack of that judgment in the pending attorney fee request. Evident here are practices that would never be acceptable to a reasonable client if that client was expected to pay the bill. Here the plaintiffs agreed to associate Mr. Johnson and his firm with the plaintiffs first attorneys because of Johnson's expertise in anti-SLAPP litigation. Nevertheless, all of work by Mr. Johnson and his associate was thereafter subject to review and editing by the referring attorneys who do not profess to possess his expertise.

> We take this occasion to remind practitioners that such [business judgment] considerations apply whether one's fee is being paid by a client or the opposing party.

Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 156 (1993)

Counsel for plaintiffs brought to the court's attention the fees sought and awarded to defendants' lead counsel, Mr. Johnson, for his work in similar cases but where the award was a fraction of the amount sought here. Of particular importance to this court is the example of *Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp.2d 1104 (W.D. Wash. 2010). Mr. Johnson and his firm were awarded $46,965 in the first case brought under Washington's Anti-SLAPP statute. Important to my consideration here is the unique form of speech involved in both *Aronson* and this case – the two forms are considerably different from one another, but each presents a unique departure from the traditional concepts of speech. Nothing in this record suggests that the subject of corporate resolutions as speech was more complicated than film clips as speech. Nothing in this record suggests that preparation of legal or factual issues here was more complicated than in *Aronson*.[2]

I conclude that the billing judgment duty compels a substantial reduction of the fee sought here, applying the more specific factors developed by *Bowers* and it progeny. Under those cases, the court should not award lodestar fees for:

- Time spent on work not covered by the fee shifting provisions of RCW 4.24.525(6)(a).
- Time spent communicating with clients not directly related to covered work.
- Time spent on excessive, redundant, or otherwise unnecessary work, including duplicated work.
- Time spent on clerical work.

[2] In this case the evidence record spanned many years of corporate records, which may distinguish it from *Aronson*, but the declarations of the co-op board members make clear that they did the initial work of combing those records.

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Also under those cases, plaintiffs' counsel must sufficiently identify covered work and segregate it from other work performed for the clients.

A threshold issue for deciding fee shifting in this case is what fees are shifted. Many, perhaps most, fee shifting statutes provide for shifting fees without further condition other than the fees shifted be reasonable. The statute here is more limited. Section .525(6)(a)(i) provides that the court "shall award. . . . any reasonable attorney fees incurred in connection with each motion on which the moving party prevailed." Thus a court undertaking a lodestar analysis under §.525(6)(a) should identify the motions where defendants prevailed and the fees charged in connection with each motion before any fees are shifted to the plaintiffs. Fees charged that are not in connection with the identified motions may not be shifted even though the fee is reasonable and is reasonably documented. Such fees are governed by the American Rule, which does not shift fees except pursuant to contract, statute, or other recognized ground in equity.

In this case the defendants prevailed on their motion to strike. Work directly related to that motion began on September 26, 2011 (by Mr. Smith who prepared the motion), and ended with its filing on November 1. Plaintiffs' responding brief was filed December 1. Defendants' replied on December 15 with a ten page reply brief that largely addressed issues raised in defendants' opening brief, except for three pages addressing the constitutionality of the anti-SLAPP statute (mostly surveying California appellate decisions and distinguishing *Putman v. Wenatchee Valley Med Ctr.*). Assuming one week to prepare for oral argument[3] on February 23, 2012, defendants' counsel had about seven weeks of intense work on this motion.

Defendants also prevailed on their opposition to plaintiffs' cross-motion for discovery. Plaintiffs' cross-motion was filed December 1; defendants' counsel (Mr. Smith) began work on response on January 3; it was filed January 11. The response is a nine page brief thoroughly reviewing state and federal appellate decisions on this issue and a three page declaration from Mr. Johnson. Again assuming one week to prepare for oral argument on February 23, defendants' counsel had about two weeks of intense work on this unremarkable motion.

[3] Mr. Johnson opened with 17 minutes of argument and replied for 6 minutes.

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1 Reasonable fees charged in connection with the aforementioned motions must be shifted. In
2 addition defendants have prevailed on their motion for award of attorney fees and would be entitled
3 to fee shifting for that work under §.525(6)(a). However they have forborne that claim.[4]

4 Plaintiffs contend that defendants also sought dismissal pursuant to CR 12(b)(6), but were
5 unsuccessful on that ground and therefore are not entitled to fee shifting for that work. Plaintiffs
6 further contend that defendants have failed to segregate the CR 12 work from the §.525 work and so
7 should not be awarded fees for either. I conclude that plaintiffs misconstrue defendants' reliance on
8 CR 12; that work was merely part of the work in successfully obtaining dismissal pursuant to §.525.
9 The title *Defendants' Special Motion to Strike . . . and Motion to Dismiss* suggests a motion brought
10 pursuant to CR 12 as well as §.525. However, the introduction section makes clear that §.525 is the
11 sole ground for seeking dismissal. Conversely, the statement of issues in the motion identifies
12 dismissal under both §.525 and CR 12(b)(6).

13 The structure of RCW 4.24.525 shows how CR 12 fits comfortably within the framework of
14 a §.525 motion to strike. Under §.525(4)(a), a defendant seeking dismissal must first show that
15 plaintiff's claim involves public participation and petition, then the burden shifts to plaintiff to
16 show a probability of prevailing. Defendant may raise in the motion or in reply any defense that
17 defeats the probability of prevailing, including any defense recognized in CR 12. This is what
18 defendants have done in this case. A substantial part of defendants' motion, Section B, pages 8–16,
19 contends that plaintiffs cannot prevail because of defenses that could also be addressed by a CR 12
20 motion. The argument section of the motion only raises CR 12 in parenthetical material
21 accompanying two case citations and in footnote 12, at page 17. It is clear that defendants' motion
22 is exclusively a §.525 motion.

23 In the declarations supporting this fee shifting motion, defendants' counsel identify the
24 categories of work for which fee shifting is sought thusly:

25

26 [4] *Clearly the decision to forbear a claim for attorney fees related to this motion was premised on counsels' notion that they*
would be awarded the amount requested for other work. They have not been, so the question arises should counsel now be
awarded those forborne fees? The answer must be no. A significant portion of the work on this motion must surely have been
27 for work that was not successful – work justifying the $280,832 request. It may have been the case that had counsel initially
requested the amount awarded instead, the matter might not have been contested at all.

28

THURSTON COUNTY SUPERIOR COURT
2000 Lakeridge Dr. S.W.
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0-000001254

1. Preparing the motion to strike, including research and briefing on the application of §.525 and the scope of its protection.

2. Preparing the evidentiary record, focusing on the issue of the co-op's corporate governance as it relates to boycott proposals.

3. Communicating with and among the sixteen defendants and five lawyers, including client support, strategy, coordination of legal research and evidence development, and review and editing of work product.

4. Opposing plaintiffs' cross-motion for discovery.

I have shifted some of the fees requested for items 1, 2, and 4. I have not shifted fees for item 3.

Reasonable rates and reasonable hours to support fee shifting are considered below for each attorney retained as co-counsel for defendants. Before that is undertaken an overview of findings and conclusions will be helpful: Defendants' representation began with a solo practitioner in Detroit. It then passed to the Center for Constitutional Rights (CCR) in New York. A third attorney, in Portland, was added to the mix. He recommended Davis, Wright, Tremaine, in Seattle, where Mr. Johnson's expertise in Washington anti-SLAPP litigation made him lead counsel, assisted by Mr. Smith. At no point in the progression did any attorney withdraw from active participation, resulting in breathtaking inefficiencies and duplication.[5] A perusal of the time records shows the immense amount of time the attorneys spent communicating with one another. A random example is the number and time of communication about the hearing schedule, at which only Mr. Johnson would speak.

Defendants' counsel profess, accurately for some counsel, to have withdrawn some time for work not connected to the two motions at issue. However, they have not withdrawn the immense amount of time spent exchanging their work product with each other and their clients. These efforts probably added some value to the service received by the defendants, but RCW 4.24.525(6)(a) has a narrower standard that excludes this work from fee shifting. The standard requires that the work be incurred in connection with each motion. I conclude that communication with clients and over-all case administration is not encompassed within that standard. I conclude that simply receiving and reading the work product of co-counsel is not encompassed within that standard. I conclude that

[5] This court is no stranger to large, complex attorney fee shifting disputes, the most recent resulting in an award of ~$16 million involving common fund and fee shifting issues with multiple law firms. Nothing in this court's experience has approached the inefficiencies and duplication evident here.

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1 while editing work product of an associate level attorney may very well be encompassed within the
2 standard, the nature and extent of editing and comment here violates the billing judgment standard.
3 A reasonable approach would have been to assign Mr. Smith the task of preparing the briefs and
4 Mr. Johnson the task of directing, reviewing, and editing his work. The process evident here went
5 far beyond that.

6 The time records for each attorney have been examined separately and together. Discrete
7 tasks have been grouped by identifying the dates and deadlines established for the motions at issue.
8 Defendant's motion to strike began on October 27, 2011 and was filed on November 1, so that
9 effort ended on that date. Plaintiffs' response was filed December 1, initiating a reply effort that
10 culminated with filing the reply brief and declarations on December 15. Plaintiffs also filed their
11 cross-motion for discovery on December 1, but defendants work in opposing it did not begin in
12 earnest until January 3, 2012. That effort ended eight days later, with the filing of defendants'
13 response brief on January 11.

14 Barbara Harvey, initial counsel for defendants and CCR cooperating attorney. Ms. Harvey, a
15 solo practitioner in Detroit, is an experienced labor law attorney. Her declaration suggests broad
16 experience in union – management litigation and civil rights cases. She professes less expertise in
17 anti-SLAPP litigation. Ms. Harvey was initial counsel for defendants before plaintiffs filed this
18 lawsuit. When that occurred she passed the case to CCR, but remained as associated counsel. She
19 had primary responsibility for development of the evidence for the anti-SLAPP motion, which
20 consisted, in near entirety, of declarations from Olympia board members and corporate records kept
21 here. There is no doubt that Ms. Harvey contributed significantly to success on the anti-SLAPP
22 motion and that some portion of her fees should be shifted to plaintiffs. Nevertheless she is exhibit
23 A for the breathtaking inefficiencies and duplication built into co-counsels' representation of the
24 defendants.

25 For her work, Ms. Harvey requests payment at $425 per hour. She places herself in the first
26 quartile of attorneys in the Seattle market, but discounts her rate to less than that of primary counsel
27 in the case, Mr. Johnson. Ms. Harvey's experience justifies her inclusion in the first quartile, but it
28

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is inconceivable that a Seattle firm would assign to its first quartile attorneys the work performed here by Ms. Harvey. For the anti-SLAPP motion she prepared two declarations: Mr. Levine, 11 pages, 26 exhibits; and Ms. Kaszynski, 4 pages, 16 exhibits. For the reply brief Ms. Harvey prepared three declarations: Ms. Kaszinski, 5 pages, 7 exhibits; Mr. Nason, 2 pages, 4 exhibits; and Ms. Cox, 4 pages, 3 exhibits. A more reasonable assignment of this work would have been to an associate level attorney, in the manner of Mr. Johnson's assignment of brief writing to Mr. Smith. I find a reasonable rate for Ms. Harvey's work is $250 per hour in 2011.

I have limited fee shifting to Ms. Harvey's work preparing the evidence record. I have not included her messaging, review of co-counsel's work, or editing other than the evidence record. Her status as a sole practitioner and her time records suggest she is supported by minimal staff, if any. For example, on October 30 she reports 3.7 hours communicating with co-counsel and clients regarding signing and filing logistics, and on October 31 she reports 11.3 hours for assembling exhibits for the Levine and Kaszynski declarations – this after the declarations themselves were completed, with the exhibits gathered for and identified in the declarations. These examples of clerical work are not shifted, even if connected to the anti-SLAPP motion.

I find 18.1 hours are reasonable for the preparation of evidence supporting the motion to strike. This time encompasses entries made between October 12 and 19 (not all entries between those dates). I find an additional 3 hours for further editing the declarations is reasonable. I find 15.8 hours are reasonable for preparation of evidence supporting the reply brief. This time encompasses entries made between December 6 and 15. All of this time is in 2011, at the DWT 2011 rate of $250. Ms. Harvey's charges shifted here total $9,225.

Maria LaHood, CCR Senior Staff Attorney. Ms. LaHood reports 167.8 hours and a rate of $400 per hour. Ms LaHood describes her work: "I acted as overall coordinator and administrator of the case, and served as the primary point of contact with the clients. I provided big-picture strategy and organization to the litigations, communicated with clients and co-counsel, assisted with factual development, provided legal analysis and strategy, and edited the briefs and declarations."

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1 Ms. LaHood contends all hours were in connection with the two successful motions, but
2 most were clearly not. Her time records show most entries were for client and co-counsel
3 communication. She made no attempt at segregating any of her hours. For example, four entries on
4 October 12 indicate four hours ($1,600) receiving, reading, and communicating about the anti-
5 SLAPP motion without any indication of value added to that motion. There are several entries for
6 editing, but no showing that such editing was reasonably necessary. Mr. Johnson had primary
7 responsibility for editing Mr. Smith's work; on its face her editing work was duplication. Although
8 her work had undoubted value for the clients, I find little, if any, fits within the §.525(6)(a) standard
9 and I find she has failed to segregate any of her work. I conclude that none of Ms. LaHood's fees
10 should be shifted.

11 Steven Goldberg. Mr. Goldberg, an attorney in Portland, was contacted by Ms. LaHood at
12 CCR. He assisted her in finding Mr. Johnson to lead the effort, and then stayed in the case in a
13 limited role. He seeks fee shifting for all his hours, totaling 68. He has not segregated. Of his
14 reported time, 17.5 hours occurred in September and cannot be in connection with the motion to
15 strike. A block of 20 hours occurred between October 27 and 31, ending when the motion to strike
16 was completed and filed. He describes his work during this time as legal research and work on the
17 brief. This work occurred at the very end of a long period of writing, editing, and rewriting by
18 Smith and Johnson. It may have been work connected to the motion, but it does not pass the billing
19 judgment test. I conclude that none of Mr. Goldberg's fees should be shifted.

20 Davis, Wright, Tremaine. DWT was associated on the strength of Mr. Johnson's expertise in
21 anti-SLAPP motions. He assigned Mr. Smith to assist him and describes Smith's work as primary
22 responsibility for preparing the various motions, including: (1) the anti-SLAPP motion (the motion
23 and the brief); (2) Defendants' reply brief; (3) Defendants' brief opposing discovery; (4)
24 Defendants' motion for attorney fees; and (5) proposed orders and associated documents regarding
25 the above. "Mr. Smith performed a substantial amount of legal research regarding, *inter alia*, First
26 Amendment and anti-SLAPP jurisprudence, derivative suits, plaintiffs' standing, statutory
27
28

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construction, and defenses to ultra vires and breach of fiduciary duties causes of action."[6] DWT time records show this assignment. The time records also show that Mr. Johnson assumed the role of supervising attorney for Mr. Smith. Additionally Mr. Johnson also assumed the role at DWT for communicating and coordinating with co-counsel; time for which fee shifting should not occur under the billing judgment duty discussed above and the limitation in the statute. In considering reasonable fees that should be shifted, I have segregated DWT billings into five discrete blocks, (1) preparing the anti-SLAPP motion and brief, (2) editing and revising the anti-SLAPP motion and brief, (3) preparing, editing, and revising the reply brief, (4) preparing, editing, and revising the brief opposing discovery, and (5) oral argument.

1. Preparing the anti-SLAPP motion and brief, September 26 to October 14. Mr. Smith's billing entries suggest that he concluded the draft of the anti-SLAPP motion on October 14 (3.9 hours, "Draft anti-SLAPP special motion to strike"). Group editing seems to have begun in earnest after this date.[7] I have identified 41.2 hours of work performed by Mr. Smith in preparing the motion. I have not include all of Mr. Smith's work during this time in the fee shifting – for example, on September 30 he worked on discovery (it was not stayed at this time) and on October 4, 1.3 hours of the 6.6 charged was for a telephone conference with co-counsel.

During this first block, I have identified 5.9 hours of work by Mr. Johnson for directing, reviewing and editing Mr. Smith's work. He also performed research of his own. All of these tasks are appropriate for a supervising attorney. Mr. Johnson also performed substantial additional work during this time – work I conclude is not encompassed by the fee shifting limitation in the statute.

The total charges claimed by DWT during this block and approved by me as being eligible for fee shifting amount to $13,368. The charges are calculated at hourly rates of $520 and $250, which I find are reasonable rates.

[6] Johnson Declaration, page 3.
[7] This date is not entirely certain; others report reviewing and editing drafts before this time, but Mr. Smith's earlier entries uniformly include research and editing as well as drafting. The October 14 entry is unequivocally a draft, and is the culmination of three days of intense work. Several entries thereafter are only editing.

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2. Revising to the anti-SLAPP motion, October 16 to November 1. Beginning October 17 through October 28 Mr. Smith spent 22.5 hours editing and revising his brief.[8] Then in the four days just preceding filing on November 1, he spent an additional 28.6 hours revising the motion. For this block, I have identified 7.1 hours spent by Mr. Johnson; again, this is only a portion of his time, but includes entries specifically identified with the motion. The total charges claimed by DWT during this block and approved by me as being eligible for fee shifting amount to $16,467, and brings the total claimed for DWT work in preparing the anti-SLAPP motion to $29,835. I have calculated this amount after eliminating all hours I could identify that did not meet the statutory test of being "in connection" with the anti-SLAPP motion. Nevertheless, this total clearly reflects the very extensive editing and revision that occurred after each co-counsel had participated in the seemingly endless rounds of editing and revision. Nothing in this record or the nature of the issues in this case suggest that DWT, led by Mr. Johnson, could not have accomplished the same work product and result without the group editing and revising by co-counsel who admittedly did not possess Mr. Johnson's expertise. I conclude this practice violated the billing judgment duty, and so reduce the amount billed by $5,000. The amount for these two blocks approved for shifting is $24,835.

3. Preparing, editing, and revising defendants' reply brief, December 2 to December 15. From December 2 through December 9, Mr. Smith billed 16.7 hours to draft the reply. Then the serial editing began. In the four days before filing this ten page brief, Mr. Smith billed an additional 28.2 hours for editing and revising. As noted earlier, most of the reply brief repeated material submitted in the motion, except for three pages addressing the constitutionality of the statute (an issue not previously addressed in Washington, but decided in California). Mr. Johnson billed 10.1 hours that I identified as connected with the reply brief. The total charges claimed by DWT during this block and approved by me as being eligible for fee shifting amount to $16,477. For the same

[8] The 22.5 hours does not include all time billed by Mr. Smith in this period. Entries for October 18, 19, 25, and 27 were reduced to account for other work described in the narrative.

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reasons stated above, I reduce this amount by $5,000 based on billing judgment; the amount approved is $11,477.

4. Preparing, editing, and revising defendants' brief opposing discovery, January 3 to January 11. The DWT rates changed for this period, to $545 and $290. I find those rates reasonable. Mr. Smith billed 18.6 hours for work I identified as connected with opposing plaintiffs' motion to lift the discovery stay; for Mr. Johnson the time is 2.6 hours. The amount billed is $6,811. The time is reasonable; I approve it for shifting.

5. Oral argument. I find Mr. Johnson billed 7.1 hours for work connected with preparation of oral argument. That time is reasonable. He billed five hours for appearing in court on February 27 to hear this court's decision. He did not included any time billed for oral argument on February 23, an omission that must be inadvertent. I have added five hours for that time. The adjusted total billed is 17.1 hours, or $9,320. The time is reasonable; I approve it for shifting.

Total fees shifted. The total attorney fees shifted amount to $61,668 – $9,225 for Ms. Harvey, $52,443 for DWT.

Defendants sought and have been awarded attorney fees, so defendants are the prevailing party. Defendants should prepare findings of fact and conclusions of law, or the party's may agree to rely on this filed decision for findings and conclusions. Defendants should prepare an order or judgment to reflect this decision.

Date: September 15, 2012

Thomas McPhee, Judge

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FILED
JUL - 1 2013
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

Case No. 11-2-01925-7

[PROPOSED]

FINAL ORDER AND JUDGMENT AGAINST PLAINTIFFS

CLERK'S ACTION REQUIRED

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

SUMMARY OF JUDGMENT

Pursuant to RCW 4.64.030, the following information should be entered on the Clerk's Execution Docket:

1. Judgment Creditors: Defendants Grace Cox, Rochelle Gause, Erin Genia, T. J. Johnson, Jayne Kaszynksi, Jackie Krzyzek, Jessica Laing, Ron Lavigne, Harry Levine, Eric Mapes, John Nason, John Regan, Rob Richards, Suzanne Shafer, Julia Sokoloff and Joellen Reineck Wilhelm

2. Judgment Creditors' Attorney: Bruce E. H. Johnson
Devin Smith
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

3. Judgment Debtors: Kent L. and Linda Davis, Jeffrey and Susan Trinin, and Susan Mayer

4. Award Under RCW 4.24.525(6)(a)(ii): $160,000.00

5. Attorneys' fees and costs: $61,846.75

6. Interest accrued (through April 8, 2013): $10,478.46.

7. Total judgment amount (through April 8, 2013): $232,325.21.

8. Post-judgment interest rate: 12 percent per annum, beginning April 9, 2013.[1]

ORDER

This Court, having entered an order granting dismissal in favor of Defendants, finds that entry of final judgment is now appropriate. Based on the foregoing, pursuant to RCW 4.64.030, and incorporating by reference the Court's Order Granting Defendants' Motion for Mandatory

[1] Because the judgment set forth herein incorporates interest accrued on the Court's award through April 8, 2013, interest on this judgment shall be deemed to commence accruing on April 9, 2013.

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Costs and Attorneys' Fees Under RCW 4.24.525 (Dkt. 100), the Court hereby ORDERS as follows:

1. Defendants are awarded judgment against Plaintiffs in the amount of $232,325.21.

2. Interest on the judgment shall accrue at the rate of 12 percent per annum, beginning April 9, 2013.[2]

3. The Court shall retain jurisdiction where appropriate as to any issue or form of relief.

DATED this 1st day of July, 2013.

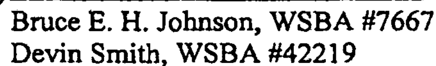
ERIK D. PRICE

ERIK D. PRICE

Judge / ~~Court Commissioner~~

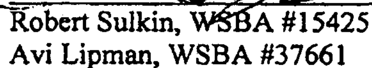
Presented by:

Davis Wright Tremaine LLP
Attorneys for Defendants

By 
Bruce E. H. Johnson, WSBA #7667
Devin Smith, WSBA #42219

Approved as to form:

McNAUL EBEL NAWROT & HELGREN PLLC
Attorneys for Plaintiffs.

By 
Robert Sulkin, WSBA #15425
Avi Lipman, WSBA #37661

[2] *See supra* note 1.

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RCW 4.24.525
Public participation lawsuits — Special motion to strike claim — Damages, costs, attorneys' fees, other relief — Definitions.

(1) As used in this section:

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in subsection (4) of this section is filed seeking dismissal of a claim;

(d) "Other governmental proceeding authorized by law" means a proceeding conducted by any board, commission, agency, or other entity created by state, county, or local statute or rule, including any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity;

(f) "Responding party" means a person against whom the motion described in subsection (4) of this section is filed.

(2) This section applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this section, an "action involving public participation and petition" includes:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(c) Any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage or to enlist public participation in an effort to effect consideration or review of an issue in a legislative, executive, or judicial proceeding or other governmental proceeding authorized by law;

(d) Any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(e) Any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(3) This section does not apply to any action brought by the attorney general, prosecuting attorney,

or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

(4)(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in subsection (2) of this section.

(b) A moving party bringing a special motion to strike a claim under this subsection has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under (b) of this subsection, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim:

(i) The fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(ii) The determination does not affect the burden of proof or standard of proof that is applied in the underlying proceeding.

(e) The attorney general's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

(5)(a) The special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not later than thirty days after the service of the motion unless the docket conditions of the court require a later hearing. Notwithstanding this subsection, the court is directed to hold a hearing with all due speed and such hearings should receive priority.

(b) The court shall render its decision as soon as possible but no later than seven days after the hearing is held.

(c) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(d) Every party has a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

(6)(a) The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike made under subsection (4) of this section, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorney fees; and

(iii) Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable

conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award to a responding party who prevails, in part or in whole, without regard to any limits under state law:

(i) Costs of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the responding party prevailed;

(ii) An amount of ten thousand dollars, not including the costs of litigation and attorneys' fees; and

(iii) Such additional relief, including sanctions upon the moving party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(7) Nothing in this section limits or precludes any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

[2010 c 118 § 2.]

Notes:

Findings -- Purpose -- 2010 c 118: "(1) The legislature finds and declares that:

(a) It is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(b) Such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities;

(c) The costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(d) It is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process; and

(e) An expedited judicial review would avoid the potential for abuse in these cases.

(2) The purposes of this act are to:

(a) Strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(b) Establish an efficient, uniform, and comprehensive method for speedy adjudication of strategic lawsuits against public participation; and

(c) Provide for attorneys' fees, costs, and additional relief where appropriate." [2010 c 118 § 1.]

Application -- Construction -- 2010 c 118: "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." [2010 c 118 § 3.]

Short title -- 2010 c 118: "This act may be cited as the Washington Act Limiting Strategic Lawsuits Against Public Participation." [2010 c 118 § 4.]