No. 87745-9

Thurston County Superior Court No. 11-2-01925-7

IN THE SUPREME COURT
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.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants, five members of the Olympia Food Cooperative (the "Co-op"), filed a derivative suit challenging the Co-op's Board of Directors' (the "Board" or "Respondents") failure to abide by the Co-op's procedures when it enacted a boycott of products from the State of Israel. Respondents filed a special motion to strike under RCW 4.24.525, the Washington Act Limiting Strategic Lawsuits Against Public Participation (the "anti-SLAPP Act").[1] Contrary to established law, the trial court rejected Appellants' evidence in favor of Respondents. It then granted Respondents' motion, denied Appellants' cross-motion for discovery, and ordered the Co-op's representative plaintiffs, i.e., Appellants, to pay Respondents $160,000 in penalties and $61,846.75 in fees and costs.

Respondents achieved this result by portraying their corporate malfeasance as "speech" subject to the anti-SLAPP Act. But a failure to abide by corporate rules is not constitutionally protected speech, and the anti-SLAPP Act is unconstitutional as applied and on its face. The conduct underlying Appellants' claims does not involve the "'heartland' of First Amendment activities" protected by the anti-SLAPP Act.[2] And, Washington's anti-SLAPP Act violates the separation of powers doctrine, imposes unconstitutional limits on the rights of access to the courts and

[1] The statute is reproduced in its entirety in the Appendix.

[2] *Jones v. City of Yakima Police Dept.*, 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012).

trial by jury, and is unconstitutionally vague. The misuse of anti-SLAPP provisions such as occurred here serves to chill free speech—not promote it. Appellants respectfully ask that the trial court's orders be reversed, the case be remanded with a direction that it proceed on the merits, and that Appellants be awarded their fees.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred in applying the anti-SLAPP Act to this action, granting Respondents' Special Motion to Strike, and in entering Special Motion Order Findings of Fact ("FOF") 4-8.[3]

Issues Pertaining to Assignment of Error

a. Is it error to grant a Special Motion to Strike absent a showing that the gravamen of a complaint alleging procedural violations by a board of directors is based on protected speech, and when there is substantial evidence the board members acted unlawfully?

b. Does a trial court granting a Special Motion to Strike commit reversible error when it weighs the evidence and draws inferences in the moving party's favor?

Assignment of Error 2: The trial court erred in concluding that Washington's anti-SLAPP statute is constitutional.

Issues Pertaining to Assignment of Error

a. Is Washington's uniquely onerous anti-SLAPP Act unconstitutional on its face because its procedural hurdles conflict with court rules in violation of the separation of powers doctrine and deprive litigants of their constitutional rights of access to the court and trial by jury, and because the statute is unconstitutionally vague?

b. As applied, is the anti-SLAPP Act unconstitutional because it deprived Appellants of their right of access to the courts?

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[3] The challenged FOFs are reproduced in the Appendix.

Assignment of Error 3: The trial court erred in denying Appellants' Cross-Motion for Discovery, entering Discovery Order FOF 1, and refusing to reconsider its discovery denial upon receipt of evidence that Respondents had substantial documents in their possession.

Issue Pertaining to Assignment of Error

Where a statute allows specified discovery upon a showing of good cause and the party seeking discovery meets that burden, and where the opponent later admits there are many thousands of pages of relevant documents in its exclusive possession, is it error for the trial court to deny any opportunity for discovery?

Assignment of Error 4: The trial court erred in striking as hearsay, certain statements made by Tibor Breüer and Susan Trinin.

Issue Pertaining to Assignment of Error

Where, based on personal knowledge, former board members testify about the purpose and intent of a policy they adopted, is it error to strike their testimony on hearsay grounds and to do so without any specific objection having been made?

Assignment of Error 5: The trial court erred in awarding $10,000 in statutory penalties for each Respondent board member, in awarding attorney fees without finding Appellants' suit lacked reasonable cause, and in making the representative plaintiffs individually liable for the awards.

Issue Pertaining to Assignment of Error

When representative plaintiffs make derivative claims based solely on collective action by a Board of Directors, is it error to give the fee and penalty provisions of the anti-SLAPP Act precedence over the derivative action statutes; and to award penalties for each board member defendant despite the action having been brought against the board as a whole?

III. STATEMENT OF THE CASE

A. Legal Framework

A SLAPP suit is a baseless lawsuit "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." CP 277. Anti-SLAPP statutes allow a defendant to file a special motion to dismiss a SLAPP suit.[4] 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." RCW 4.24.525(4)(b). 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.* In most circumstances, the responding party must meet this burden without the benefit of discovery. RCW 4.24.525(5)(c).

Courts apply anti-SLAPP laws cautiously because the extraordinary remedy they create deprives litigants of access to the judicial system and chills the constitutional right to petition. *E.g., Palazzo v. Alves,* 944 A.2d 144, 150 & nn.10-11. Courts ruling on anti-SLAPP motions therefore must accept as true all evidence favoring the non-moving party, and must not weigh credibility or compare the weight of the evidence. *Fielder v. Sterling Park Homeowners Ass'n,* 2012 WL 6114839, at *9 (W.D. Wash. Dec. 10, 2012); *Sycamore Ridge, Apts. LLC v. Naumann,* 157 Cal. App. 4th 1385, 69 Cal. Rptr. 3d 561, 571 (2007).

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[4] *E.g., Jones,* 2012 WL 1899228, at *2.

At issue in this appeal is the constitutionality of RCW 4.24.525 as applied and on its face, the trial court's treatment of the evidence, and its findings as to the parties' satisfaction of their evidentiary burdens. The evidence before the trial court is summarized below.

B. Background and Procedural Facts

The Co-op bills itself as a "collectively managed, not-for-profit cooperative organization that relies on consensus decision making." CP 56. In May 1993, the Co-op's Board adopted a policy establishing the procedure by which the Co-op would recognize product boycotts (the "Boycott Policy" or "Policy"). CP 106-07. The Policy provides:

> **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...
>
> ...
>
> In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott ... to allow our members to make the most educated decisions possible.
>
> ...
>
> 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 Policy's plain language, the Co-op

can honor 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.*

In July 2010, the Co-op's Board disregarded the Boycott Policy and adopted a resolution approving a boycott of Israeli-made products and divestment from Israeli companies (the "Boycott"). CP 121-23. As Respondents admit and the trial court found, the Board did so despite a lack of staff consensus. CP 252, 986. Moreover, and as the court also found, there was no nationally recognized boycott. CP 347-52, 990. The Boycott divided the Co-op community and caused members to cancel their memberships or shop elsewhere. CP 221, 298, 337, 355, 358, 372, 376, 833.

Appellants are long-time Co-op members and volunteers. CP 7, 296-97, 353-54, 356, 371-72, 374-75. One, Ms. Trinin, is a former Board President. CP 296-97. In September 2011, Appellants filed a verified derivative complaint asserting on behalf of the Co-op that because the Boycott was enacted in a way that violated Co-op rules and procedures, it was void and unenforceable. CP 6-18. The complaint also alleged that the Board members violated fiduciary duties owed to the entity. *Id.* Appellants primarily sought declaratory and injunctive relief. *Id.*

Respondents countered with a motion to dismiss under RCW 4.24.525 or Rule 12.[5] CP 245-74. Appellants responded and cross-moved

[5] Respondents' CR 12 motion argued that Appellants lacked standing to bring a derivative action. CP 258-67. The trial court rejected that argument. CP

for relief from the automatic discovery stay imposed by RCW 4.24.525(5)(c). CP 310-35, 362-66. The trial court granted Respondents' motion, denied Appellants', and ordered the individual members suing on the Co-op's behalf to pay a $10,000 penalty to each Respondent and pay Respondents' reasonable litigation expenses. CP 1238-42, 1246-61.

C. Respondents Failed to Establish That This Action Involves Protected Speech

To obtain relief under the anti-SLAPP Act, Respondents had to show that this suit "involve[s] public participation and petition," a phrase that refers primarily to matters presented to government entities, but also to "*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), (4)(b) (emphasis added). Respondents argued that because boycotts are a form of protected speech, so too is an entity's compliance with (or circumvention of) internal rules governing how to effectuate a boycott. CP 255-56, 407-08; 2/23 RP 24-25. Respondents cited no authority supporting that position, *id.*; and so far as Appellants are aware, none exists. As Appellants argued, and Respondents conceded, this matter concerns violation of corporate procedural requirements, not the carefully restricted right to boycott.[6] CP 270, 317.

1251; *see* CP 975. Respondents also made conclusory footnoted references to CR 12(b)(6), but offered no supporting argument for dismissal. CP 251, 267.

[6] Boycotts have a checkered history of improper and illegal uses such as, for example, anti-integration boycotts in the South during the 1960s. Consequently, the right to boycott is subject to many restrictions—including prohibitions against boycotts based on race, religion, or national origin, and

The trial court found that Respondents met their burden, but did so without addressing whether a dispute about the failure to comply with boycott approval *procedures* involves constitutionally protected speech. CP 982-84. Instead, the court relied on the fact that the *subject* of the boycott is a matter of public concern. *Id.* It noted that "[f]our decades of conflict in the Middle East...surround the purposes behind this proposed Boycott," and the Palestinian-Israeli conflict is "a matter of public concern in America and debate about America's role in resolving that conflict." CP 983. The court then found that "Defendants have shown by a preponderance of the evidence that [Appellants'] claim is based on 'an action involving public participation and petition'...specifically, '[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.'" CP 1239. In effect, the court ruled that an entity's board has unfettered power to disregard the entity's rules and procedures if the matter underlying the procedural violation involves constitutionally protected speech.

D. Respondents Failed to Establish the Lawfulness of Their Alleged "Speech"

Under RCW 4.25.425(2)(e) and (4)(b), it was also Respondents' burden to establish their alleged "speech" was "lawful," i.e., that their acts complied with all relevant Co-op policies and procedures.[7] If

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certain country-specific boycotts fostered by foreign nations. *E.g.*, 50 App. U.S.C. § 2407; Cal. Civ. Code § 51.5; RCW 49.60.030(1)(f).

[7] Because RCW 4.24.525(4)(b) requires a movant to show "by a preponderance of the evidence that the claim is based on an action involving

Respondents did so, the burden shifted to Appellants to counter that showing. *Id.* The trial court, however, relieved Respondents of their burden and instead required Appellants to establish that Respondents' "conduct in enacting the resolution was not lawful." CP 984. The court found that Appellants failed to meet that burden with "clear and convincing evidence [of] a probability of prevailing on their claims." CP 1239. It did so by improperly rewriting the Co-op's Boycott Policy, weighing the evidence before it, and drawing inferences in Respondents' favor. *See* CP 988 (court's statement about "weighing evidence").

1. The Boycott Was Unlawfully Adopted Without the Requisite Staff Consensus

The Boycott Policy says it is the "staff who will decide by consensus whether...to honor a boycott." CP 106. The trial court recognized that "[i]t is undisputed that there was no consensus among the staff in addressing this Boycott...Resolution." CP 986. Under the Boycott Policy, that should have been dispositive. But the trial court instead viewed the staff consensus element of the Boycott Policy to be irrelevant. It did so based on Respondents' claim that a Bylaw allowing the Board to "resolve organizational conflicts after all other avenues of resolution have been exhausted," empowered the Board to override the staff consensus requirement. CP 987-89; *see* CP 58 ¶ 13(16). Because

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public participation and petition"; and RCW 4.24.525(2)(e) defines an such an action 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," the initial burden of proving lawfulness is on the moving party.

Appellants did not provide "clear and convincing" evidence rebutting that claim, the court rejected Appellants' lack of consensus challenge. CP 989.

Respondents' claim the Board has an overriding power to resolve organizational conflicts lacked evidentiary support regarding the matters at issue here. The Board made no effort to demonstrate that it enacted the Boycott only after exhausting all other avenues of resolution. That, alone, rendered the Bylaw inapposite. Further, nothing in the Boycott Proposal or records from the meetings in which the Proposal was discussed indicates the Board was resorting to its so-called inherent powers. CP 109-24. To the contrary, those materials cite the need for staff consensus. *Id.* That indicates that even the Board did not believe the Bylaw applied. Moreover, while Respondents cited examples of the Board's prior use of its organizational conflict resolving power, those examples involved impasses over labor-related matters and operational issues; issues not subject to an express policy requiring staff consensus. *See* CP 41-43.

In short, nothing in the Policy or the Bylaws authorizes Board intervention if Staff cannot reach consensus on a proposed boycott. CP 58, 106. The only relevant Bylaw is one authorizing the Board to "adopt major policy changes," a provision that requires the Board to change existing policies it disagrees with, not simply ignore them. CP 58 ¶ 13(10); *see* 2/23 RP 37-38, 40. Recognizing this, Respondents spent over a year trying to amend the Boycott Policy after their controversial and divisive Boycott vote. CP 928 & n.3 (citing CP 837, 849, 862-63,

872, 884, 893-94, 902, 906). They were unable to do so. *Id.*

Respondents' overriding power claim is also belied by the fact that while there is no evidence of any prior Board enacting a boycott without staff consensus, there is substantial evidence demonstrating that the Board has in fact honored the Policy's requirements. A June 2010 report to Staff advised: "[t]he Boycott Process calls for boycotts to be approved by Staff consent." CP 116. Respondent Levine admits the Boycott Policy "establishes procedures for staff review and decision on boycott requests." CP 44 ¶ 19. Michael Lowsky, a 23-year Co-op member, 16-year employee, and participant in the staff discussions of and vote on the boycott proposal, testified that Co-op-honored boycotts are approved by staff consensus. CP 350-51. Even Respondents' documentary submissions confirm the staff consensus requirement. *See* CP 462 (1993 memo to staff re boycott and describing procedure "[i]f we all agree to this proposal"); CP 464 (1994 memo to staff re boycott states "proposal requires consensus of both staffs to be enacted at either store.")

Further, the evidence establishes that the principle of "consensus decision making" is at the heart of the Co-op's system of governance and applies at all levels of its operations. *E.g.*, CP 53, 56 ¶ 2, 87, 106. By definition and in practice, "consensus" at the Co-op means (1) all persons empowered to decide on a particular proposal must assent in order for the proposal to pass; and (2) any one such person may "block" the proposal from passing. As a Board Member explained in 1992:

> The Co-op staff collective uses a consensus-based decision-making process. No group decision is made until it has the support of all members of the collective. ***Any individual collective member may block consensus at any time. In fact, if an individual staff member cannot live with a decision that is about to be made, it is his/her responsibility to block consensus***...

CP 307 (emphasis added).

In addition to Mr. Lowsky's declaration and the documentary evidence cited above, the evidence on the staff consensus requirement included declarations from two members of the 1993 Co-op Board: Susan Trinin and Tibor Breuer. CP 296-99, 336-38. Both testified that the Board's intent in adopting the Policy was that "authority to recognize boycotts would reside with the Co-op Staff—not the Board." CP 297 ¶ 3, 337 ¶ 4. The trial court struck that testimony, calling it "inadmissible as expressions of their subjective intents at the time the policy was enacted. As statements of the intent of the Board, they are inadmissible as hearsay." CP 988. It did not strike the other evidence detailed above.

Whether or not the Trinin and Breuer statements were admissible (and Appellants contend they were), other evidence established that until July 2010, boycotts were entered into only by staff consensus. In other words, the Co-op had remained true to its consensus decision-making model. The Board's unprecedented Boycott vote ignored the Boycott Policy's clear language, contravened the consensus model, caused conflict among Co-op staff and members, and was unlawful.

2. The Vote to Boycott Unlawfully Violated the Nationally Recognized Boycott Requirement

The Boycott Policy allows the Co-op to "honor nationally recognized boycotts." CP 106. As such, the Policy's clear intent is that the Co-op will be a boycott follower, not a leader. The undisputed evidence established that proposals to boycott and divest from Israel are nationally rejected—not nationally recognized. Mr. Lowsky testified that the proposed boycott was presented to Co-op staff as an opportunity to be the "***first*** grocery store to publicly recognize a boycott and/or divestment from Israel."[8] CP 351-52 ¶ 5 (emphasis added). Jon Haber, an experienced observer of efforts to boycott Israeli products, testified: "[n]o matter where they have been pursued, efforts to organize boycotts of and divestment from Israel have failed in the United States [and] have never been 'nationally recognized' in this country." CP 348 ¶ 5. Indeed, every food cooperative in the United States where such boycotts have been proposed has rejected them. *Id.* The same is true in other sectors:

> [D]espite numerous campaigns...there is not one college or university in the country that has adopted such policies....Nor was any major religious organization in the United States taking such a position by July 2010, and none has done so since....Divest-from-Israel campaigns have found no more success in the private sector, where retailers, financial institutions, and other businesses have repeatedly refused to endorse a boycott of and/or divestment from Israel.

CP 348 ¶ 6.

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[8] The proposal explained that in 2005, organizations in *Palestine* called for a boycott of Israeli goods and investments. CP 116-17. A Palestinian boycott call is not a boycott (or movement) nationally recognized in the United States.

Faced with such evidence (and equally compelling evidence that the Co-op had never before honored a boycott without staff consensus[9]), Respondents again asked the court to ignore Boycott Policy's plain language. They argued that the mere existence of a *movement* advocating a boycott—whether or not successful—satisfies the Policy's "nationally recognized boycotts" requirement. *See* CP 45-46. To explain how the Co-op could "honor" a nonexistent boycott, Respondents argued that honoring, declaring, and imposing a boycott "all mean the same thing, that the board...or the co-op has decided in some form to abide by a particular boycott decision." 2/23 RP at 27-28. Of course that is not the case,[10] but the trial court evidently agreed. The court rejected Mr. Lowsky's and Mr. Haber's testimony and ruled that Appellants did not create even a question of fact as to Respondents' compliance with the "nationally recognized boycotts" requirement. CP 990. The court opined:

> The evidence clearly shows that the Israel boycott and divestment movement is a national movement....
>
> The question of its national scope is not determined by the degree of acceptance. There appears to be very limited acceptance, at least in the United States....

CP 990.[11] Being the first to sign onto an otherwise unsuccessful boycott

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[9] *E.g.*, CP 350-52, 452-64.

[10] To honor is to regard with respect or give special recognition; to declare is to make something known; and to impose is to establish or apply by authority. http://www.merriam-webster.com/dictionary. Appellants thus argued that the Policy's use of "honor" required that the Co-op be a boycott follower, not a leader. 2/23 RP 38.

[11] The trial court may have used evidence Respondents provided to show public interest, namely, evidence about Boycott, Divestment and Sanctions ("BDS")—an *international* alliance of anti-Israel organizations—and the

call is not the same as honoring a nationally recognized boycott. The evidence established that the Policy's "nationally recognized boycotts" requirement was not met and Respondents' enactment of the Boycott Policy thus was not "lawful."

3. Other Evidence of Unlawful Conduct

There is no evidence that Respondents made any attempt to comply with the Boycott Policy. Nothing in the record evidences consideration of whether the Board could override the Policy's staff consensus requirement, or whether a *nationally recognized boycott* was in place. The only evidence Respondents submitted showing any consideration whatsoever was Respondent Levine's self-serving claim that "[t]he Board considered the ***international movement*** to boycott Israel... and approved the boycott proposal in solidarity with this ***international boycott movement.***" CP 45-46 ¶ 25 (emphasis added). However, that testimony supported Appellants' position, not Respondents'.

Appellants, on the other hand, submitted evidence showing that the Board never considered the Boycott Policy's requirements. Mr. Lowsky testified that Respondents' boycott proposal acknowledged that the Co-op

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endorsement of BDS by certain nonprofit organizations, as evidence establishing a nationally recognized movement. CP 257; *see* CP 117-18, 477. Evidence of interest in an international movement does not establish the existence of a nationally recognized boycott, or that any organization, business, and/or institution in the United States has actually boycotted and/or actually divested from Israel. Indeed, the opposite is true. Although Respondents cited a campaign to convince TIAA-CREF to divest from companies that do business in the West Bank and Gaza Strip as support for their position, CP 257 (citing CP 293-94); in fact TIAA-CREF did not divest from Israel and has no plans to do so—even though it does divest from other nations when warranted, CP 349, 822-25.

would be the ***first*** grocery store to publicly recognize the boycott, and made no mention of national recognition. CP 351-52 ¶ 5. Moreover, the proposal described a call for a boycott, not a boycott already underway. CP 116-17. Nevertheless, the trial court accepted Respondents' claims and rejected Appellants' evidence. Indeed, the court independently determined that a directive to Respondent Levine that he "write a Boycott Proposal following the outlined process" established that he had in fact been directed to use "the process outlined in the Boycott Policy[.]" CP 991. Even Respondents had not made that claim.

The Board's conduct also violated other Co-op rules and procedures, in particular, the requirement that the Board delay resolving organizational conflicts until all other avenues of resolution are exhausted. CP 58 ¶ 13(16). Respondents provided no evidence of compliance with the exhaustion rule. Appellants, however, described several alternative ways the Boycott issue could have been resolved without effectively tossing the Boycott Policy aside.[12] The trial court rejected Appellants' evidence of this unlawful conduct. CP 992.

E. Consequences of the Unlawful Enactment of the Boycott

The trial court did not reach the issue of whether Appellants provided an evidentiary basis for their requested remedies. In fact,

[12] Appellants established that although the Board was authorized to provide membership education, seek a membership vote, or submit a revised proposal to the staff, it refused to pursue those options because it did not want to delay the Boycott decision. CP 45, 122-23, 351-52. The trial court dismissed this evidence by deeming it "not clear and convincing[.]" CP 992.

Appellants had met that burden by demonstrating that the Board's action adversely affected the Co-op. Briefly summarized, Appellants provided evidence that the Co-op community protested the Board's improper action and (as Respondents had expected), a number of members cancelled their memberships or stopped shopping at the Co-op in protest. CP 221, 298, 337, 355, 357-58, 368-69, 372-73, 375-76. But for the Board's misconduct, these adverse consequences would not have occurred.[13]

F. Facts Pertaining to the Trial Court's Additional Rulings

1. Appellant's Constitutional Challenge

In addition to their procedural and evidentiary arguments, Appellants argued that Washington's anti-SLAPP-Act is unconstitutional because it violates the separation of powers doctrine and impedes access to the courts by, among other things, depriving litigants of access to discovery. CP 317-22. Relying heavily on cases decided under California's similar (but different in very significant ways) anti-SLAPP legislation, the trial court concluded otherwise. CP 993-99.

2. Appellant's Cross-Motion for Discovery

Under RCW 4.24.525(5)(c), an anti-SLAPP motion such as Respondents filed effects an immediate stay of discovery. Upon motion by the non-moving party and good cause shown, the trial court can order that specified discovery be allowed. *Id.* Appellants filed their suit and

[13] Co-op members tried to persuade the Board to rescind the Boycott and consider reenactment pursuant to proper procedures, but the Board refused their requests. *E.g.*, CP 303-05, 337 ¶ 6, 849-52; *see* CP 170.

served Respondents with discovery in September 2011. CP 6-18, 573-812. Because Respondents invoked the anti-SLAPP Act, Appellants' initial discovery requests were never answered.[14]

In response to Respondents' anti-SLAPP motion, Appellants cross-moved for limited discovery pertaining to Respondents' arguments. CP 362-66. They asked to depose two Respondents who submitted declarations supporting the anti-SLAPP motion, and Respondent Cox (who has served on the Board since at least 1993). *Id.* Appellants also sought documents "relating in any way to the Co-op's Boycott Policy and actions taken related thereto." CP 363. The need for that limited discovery was particularly acute given Respondents' reliance on self-selected internal documents dating from 1992—documents unavailable to Appellants—to justify their disregard of the Boycott Policy's requirements. CP 175-76, 452-64; *see* CP 926-33.

The trial court denied Appellants' cross-motion. CP 958-64, 1241-42. It ruled that to establish "good cause" for discovery, Appellants had to make the same showing as a party seeking CR 56(f) relief. CP 962. And although Appellants sought discovery when they served their complaint and soon after Respondents filed their motion, the court determined that Appellants waited too long to "seek enforcement of a right to discovery."

[14] Soon after Appellants filed their complaint and served discovery, Respondents' counsel advised Appellants that Respondents intended to file an anti-SLAPP motion. CP 547. In light of that communication, Appellants did not demand answers to their pending discovery requests. CP 816-17.

CP 963. Further, given the legislature's intent that SLAPP suits be promptly resolved, Appellants had to have compiled all necessary evidence before filing suit. *Id.* According to the court, when a party files a suit "based upon speaking or petitioning by others on matters of public interest...they have a responsibility to have facts supporting their contentions that can meet the standards of the anti-SLAPP statute." CP 963.

But Appellants had sought discovery early on, CP 573-812, and were statutorily barred from demanding responses once Respondents signaled their intent to file an anti-SLAPP motion. Appellants could not seek anti-SLAPP-related discovery until Respondents filed their motion and revealed their bases for claiming this action to be a SLAPP suit. As for the duty to marshal evidence before filing a suit "based on speaking" about matters of public interest, Appellants believed their derivative action to be based on procedural matters, not free speech; and in any event, the relevant documentary evidence was in Respondents' exclusive control.

The trial court also ruled that the specific discovery sought was excessive, as Appellants wanted multiple depositions and "all of the records possessed or seen by any member of the board." CP 963-64. That was not the case. Appellants only sought documents relevant to the Boycott Policy and depositions on limited issues. CP 362-66, 926-33.

Given the trial court's analysis, it appears the court accepted as true Respondents' representations that discovery was unnecessary because any relevant materials were "readily available from the internet or public

sources." CP 562. Respondents' later-filed fee motion revealed otherwise. In that submission, Respondents admitted reviewing thousands of pages of documents, including years of Co-op minutes, policies, and decisions, that are not on-line or publicly available. *See* CP 948-50, 1045. Appellants accordingly asked the trial court to revisit its discovery ruling. CP 1162-63. The trial court denied their request. 7/12 RP 5, 37-38.

3. Evidentiary Rulings

As noted above, the trial court struck from the Trinin and Breuer declarations, paragraphs describing what the Board intended when it adopted the Boycott Policy in 1993. CP 297 ¶ 3, 377 ¶ 4, 988. The court did so on hearsay grounds, CP 988; and without Respondents having made any specific objection to that testimony, *see* CP 411 n.7. Trinin and Breuer were Board members in 1993, their testimony was based on personal knowledge, and they rebutted Respondent Levine's claim (not based on personal knowledge) that "the rationale for revising the boycott policy in 1993" was to allow staff consensus "without impinging upon the Board's sole retained authority under the Bylaws[.]" CP 46. The trial court did not strike Mr. Levine's testimony, similar allegations in the verified complaint, or intent-related testimony given in support of Respondents' reply by Respondent Cox. CP 6-18, 46-47, 466-71.

G. Penalty and Fee Awards Made to Respondents

If a party succeeds in having a complaint dismissed pursuant to RCW 4.24.525, the trial court must award "[c]osts of litigation and any

reasonable attorneys' fees incurred" in connection with the anti-SLAPP motion, and "[a]n amount of ten thousand dollars" to "a moving party[.]" RCW 4.24.525(6)(a). Respondents moved for an award of $10,000 for each of the 16 Board member defendants, $280,832 in attorney fees, and $178.75 in costs. CP 942-56. In all, Respondents sought over $440,000.

In opposition, Appellants argued that in derivative actions such as this, there is no basis for imposing liability on the individual representative plaintiffs for anti-SLAPP penalties and fees. Not only are the plaintiffs not the real party in interest, representative suit statues either do not authorize fee awards, or allow them only in limited circumstances. CP 1153-57. Moreover, since this lawsuit pertained to the Board's collective action, not to the acts of any individual defendant, only one $10,000 penalty could be assessed. CP 1157. Appellants also challenged the amount of Respondents' fee request as grossly unreasonable. CP 1158-67.

The trial court imposed a $10,000 penalty for each defendant, awarded attorney fees totaling $61,668, and made the representative plaintiffs individually liable for all of those sums. CP 1246-61.

IV. ARGUMENT

A. Standard of Review

The standard of review is de novo. A trial court's interpretation of a statute, and its rulings on constitutional challenges, are reviewed de novo. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). So, too, are determinations of whether particular statutory

language applies to a factual situation, as those are conclusions of law. *In re Meistrell,* 47 Wn. App. 100, 107, 733 P.2d 1004 (1987). De novo review is employed when, as here, a trial court's ruling is based entirely on declarations and documentary evidence. *Danielson v. City of Seattle,* 45 Wn. App. 235, 240, 724 P.2d 1115 (1986) (citing *In re Reilly's Estate,* 78 Wn.2d 623, 654, 479 P.2d 1 (1970)). In such cases, that standard applies to evidentiary rulings as well as legal ones. *Momah v. Bharti,* 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (de novo review applies to all summary judgment issues, including evidentiary rulings); *accord Rice v. Offshore Sys., Inc.,* 167 Wn. App. 77, 85, 272 P.3d 865 (2012).

B. The Trial Court Erred in Ruling the Anti-SLAPP Act Applies

The trial court's determination that Appellants' suit is a SLAPP is erroneous on multiple grounds. The court erred by: (1) weighing the evidence in Respondents' favor; (2) equating an action challenging corporate process with one based on constitutionally protected speech; (3) ruling as a matter of law that Appellants could not prevail on their challenge to the lawfulness of the procedure by which Respondents enacted the Boycott; and (4) effectively requiring Appellants to prove their claims by clear and convincing evidence. Each of these errors warrants reversal, but taken together they require that the trial court's ruling be reversed and this matter remanded for resolution on the merits.

1. The Trial Court Erroneously Weighed and Construed the Evidence in Respondents' Favor

Given the requirements of the Boycott Policy, the key fact issues

before the trial court were whether there existed a nationally recognized boycott of Israeli products, and whether there was staff consensus to honor that boycott. CP 106. Appellants submitted evidence establishing there was no nationally recognized boycott of Israeli products to "honor," and staff consensus was lacking. In fact, the trial court admitted that was the case. CP 986, 990. Respondents, on the other hand, relied on newly-crafted theories regarding the Boycott Policy, namely, that a boycott does not require staff consensus and "nationally recognized boycotts" include unsuccessful *international* boycott movements. Respondents proffered no evidence supporting these theories, and their documentary evidence was inconsistent with their claims. *See* CP 462, 464. Nevertheless, the trial court accepted Respondents' theories, rejected Appellants' evidence as irrelevant, and denied Appellants any opportunity to obtain discovery. That was error.

Because anti-SLAPP laws involve equally valid competing rights, courts must exercise extreme caution in their application.

> SLAPPs pit two sets of fundamental constitutional rights against each other: (1) defendants' rights of free speech and petition and (2) plaintiffs' rights of access to the judicial system....Solutions to the SLAPP problem must not compromise any of these rights. Plaintiffs must be able to bring suits with reasonable merit and defendants must be protected from entirely frivolous intimidation ...in public affairs.

Palazzo, 944 A.2d at 150 n.11 (quoting John C. Barker, *Common-Law & Statutory Solutions to the Problem of SLAPPs,* 26 LOY. L.A. REV. 395, 397-98 (1993)); *see also id.* at 150 n.11. In light of these competing

concerns (and so that anti-SLAPP acts survive constitutional challenges), courts ruling on anti-SLAPP motions accept as true, all evidence favoring the non-moving party. *Fielder v. Sterling Park Homeowners Ass'n,* 2012 WL 6114839, at *9 (W.D. Wash. Dec. 10, 2012).

> For purposes of an anti-SLAPP motion, "*[t]he court* considers the pleadings and evidence submitted by both sides, but *does not weigh credibility or compare the weight of the evidence. Rather, the court's responsibility is to accept as true the evidence favorable to the plaintiff....*"

Sycamore Ridge, 69 Cal. Rptr. 3d at 571 (citations omitted; emphasis added); *accord Nader v. Maine Democratic Party,* 41 A.3d 551, 562 (Me. 2012) (in ruling on anti-SLAPP motion, court must infer that statements in plaintiff's complaint and factual statements in affidavits are true); *Nexus v. Swift,* 785 N.W.2d 771, 781-82 (Minn. App. 2010) (in ruling on anti-SLAPP motion, all reasonable inferences must be drawn in favor of nonmoving party). The trial court did none of these things, an omission that by itself requires reversal.

Here, however, the trial court also committed reversible error by accepting Respondents' Bylaw and Policy interpretations as a matter of law. Words used in corporate documents must be given their ordinary, usual, and popular meaning; and extrinsic evidence cannot be used to show an intention independent of the instrument or to vary, contradict or modify the written word.[15] *Hearst Commc'ns, Inc. v. Seattle Times Co.,*

[15] Corporate rules and regulations are interpreted like contracts. *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 181, 139 P.3d 386 (2006).

154 Wn.2d 493, 503-04, 115 P.3d 362 (2005); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). When the meaning of a document depends on the credibility of extrinsic evidence or a choice among reasonable inferences, its interpretation is a question of fact for the jury. *Berg v. Hudesman,* 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990).

The trial court, however, weighed the evidence, rejected Appellants' evidence, and embraced Respondents' theories as to the Bylaw's effect and the Policy's meaning. The court adopted Respondents' theories even though they varied from the Policy's written words and the Board's prior practice. Had the trial court viewed the evidence in Appellants' favor (as it was required to do and as this Court will do in its de novo review); and had the court adhered to the rule of *Berg* and *Hearst,* it could not have determined as a matter of law that to "honor nationally recognized boycotts" means to inaugurate an otherwise unsuccessful boycott movement. Nor could it decide as a matter of law that the Board can ignore the Policy's staff consensus requirement. In short, the trial court violated fundamental rules governing judicial decision-making in cases such as this. As is shown below, that erroneous analytical process led the court to make erroneous findings, wrongly grant Respondents' motion, and commit reversible error.

2. The Trial Court Erred in Determining That This Case Pertains to Constitutionally Protected Speech

On appeal, as at trial, the Court first must determine whether as a matter of law, the defendant met its initial burden of establishing that the

action is a SLAPP. *Fielder,* 2012 WL 6114839, at *7. Identifying a SLAPP suit is not an easy task. *Duracraft Corp. v. Holmes Prods. Corp.,* 427 Mass. 156, 691 N.E.2d 935, 940. However, as a general rule a SLAPP action is premised on communications "to a government body, official, or the electorate...on an issue of some public interest or concern." *Id.* This is not such a case. This is a derivative action, brought by individual members of a cooperative organization, who allege that their Board violated its own rules and procedures and that by so doing, caused harm to the entity. The suit does not, and could not, thwart communications to a government body or representative, or the electorate. CP 6-18.

The trial court reasoned that because the subject matter of the challenged procedure—whether to boycott Israeli products and divest from the State of Israel—involved a matter of public interest and concern, this suit necessarily involves "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." CP 982-83, 1239. That was error.

The fact that "a broad and amorphous" public concern can be linked to a specific dispute is not enough to establish that an anti-SLAPP statute applies. *E.g., Weinberg v. Feisel,* 110 Cal. App. 4th 1122, 2 Cal. Rptr. 3d 385, 392 (2003). Instead, the gravamen of the dispute must be based on protected free speech. *E.g., Fielder,* 2012 WL 6114839, at *8. That protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a

suit into a SLAPP action. *In re Episcopal Church Cases,* 45 Cal. 4th 467, 87 Cal. Rptr. 3d 275, 284 (2009) (suit between congregations over church-owned property that will be resolved by documentary evidence, is not a SLAPP); *Donovan v. Dan Murphy Found.,* 204 Cal. App. 4th 1500, 140 Cal. Rptr. 3d 71, 75-78 (2012) (suit alleging illegal removal of nonprofit's board member not a SLAPP); *Santa Monica Rent Control Bd. v. Pearl St. LLC,* 109 Cal. App. 4th 1308, 135 Cal. Rptr. 2d 903, 909-10 (2003) (City's suit to compel compliance with rent control law not a SLAPP). The gravamen of this dispute is whether the Board failed to follow its own rules, not protected activity.

The trial court also erred because it failed to heed the rule requiring caution in determining whether an action is a SLAPP. *Duracraft,* 691 N.E.2d at 943; *Palazzo,* 944 A.2d at 150; *see also Fielder,* 2012 WL 6114839, at *9; *Jones v. City of Yakima Police Dept.,* 2012 WL 1899228, at *3 (E.D. Wash. May 24, 2012). Caution is particularly warranted under Washington's anti-SLAPP Act, because it places uniquely onerous burdens on plaintiffs. Unlike the anti-SLAPP laws of other states, Washington's act defines an "action involving public participation and petition" as including "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern," *and* requires responding parties to "establish by clear and convincing evidence a probability of prevailing on the claim." RCW

4.24.525(2)(e), (4)(b).[16] A responding party must somehow meet this burden without the benefit of discovery. RCW 4.24.525(5)(c). If the responding party fails to meet that burden, it is subject to mandatory penalties and liability for its opponent's attorney fees, as well as possible other sanctions. RCW 4.24.525(6)(a).

In recognition of these extraordinary burdens, a federal district court recently admonished that:

> [C]ourts evaluating a special motion to strike pursuant to RCW 4.24.525 must carefully consider whether the moving party's conduct falls within ***the "heartland" of First Amendment activities*** that the Washington Legislature envisioned when it enacted the anti-SLAPP statute.

Jones, 2012 WL 1899228, at *3 (emphasis added). Analysis of this case reveals that it does not involve conduct at the '"heartland' of First Amendment activities[.]" It is not about "conduct in furtherance of the exercise of the constitutional right of free speech," RCW 4.24.525(2)(e); it

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[16] So far as Appellants can discern, this combination is unique to Washington's anti-SLAPP law. For example, while the California act is like the Washington act in that it encompasses claims based on "the constitutional right of free speech in connection with a public issue," a party opposing an anti-SLAPP motion brought under California's act need only establish "there is a probability that [it] will prevail on the claim." Cal. Code Civ. Proc. §425.16(b)(1), (c)(2)(e)(4). This is a "minimal merit" showing. *Sycamore Ridge,* 69 Cal. Rtpr. 3d at 571. Moreover, in 2011 California adopted legislation limiting that state's anti-SLAPP statute in response to "a disturbing abuse" of and the chilling effects of that act. Cal. Code Civ. Proc. § 425.17. This being a derivative action, § 425.17 would bar Respondents' motion.

Minnesota appears to be the only other state that requires a party opposing an anti-SLAPP motion to "produce[ ] clear and convincing evidence" that the acts of the moving party are not immunized from liability. Minn. Stat § 554.02. But the Minnesota statute's scope is limited, as the immunity from liability applies only to "[l]awful conduct or speech that is genuinely aimed...at procuring favorable government action[.]" Minn. Stat. § 554.03.

is about the Board's violation of the Co-op's rules and procedures by initiating (i.e., leading) a boycott without staff consensus. Nothing suggests our legislature intended to protect the procedural machinations of corporate directors taken in the entity's name, particularly when the product of the procedural violation, a boycott, is not within the core of protected First Amendment rights and is subject to strict regulation. *See supra* n.6. The trial court erred in ruling otherwise.

3. Respondents' Conduct Was Not "Lawful"

Assuming *arguendo* that Respondents had satisfied their burden of demonstrating that this action involves conduct "in furtherance of" constitutionally protected free speech rights, it was still error to grant Respondents' motion. At a minimum, the evidence (particularly when viewed in Appellants' favor) established Respondents did not "lawfully" enact the Boycott. Respondents thus failed to meet their burden under RCW 4.24.525(2)(e) and (4)(b). That should have ended the inquiry.

The trial court, however, concluded that Respondents' conduct was lawful. It reached that conclusion by improperly weighing the evidence, failing to accept Appellants' evidence as true, and misconstruing the statutory burdens. Rather than treating lawfulness as part of Respondents' initial burden, the court required Appellants to disprove lawfulness. The court compounded that error by repeatedly substituting a straight "clear and convincing" standard for the statutory standard; i.e., "clear and convincing evidence [of] a probability of prevailing on the merits." RCW

4.24.525(4)(b).[17] Examples include:

- "One important difference [between the Washington and California anti-SLAPP acts] is the clear and convincing evidence standard in the Washington statute." CP 979.
- "Plaintiffs have offered no evidence that the Board exempted boycott matters from this power, certainly not evidence that could be considered clear and convincing." CP 989.
- "As regards the burden of proof argument, the clear and convincing evidence argument, our United States Supreme Court has spoken as recently as the year 2000..." CP 995.

See also CP 984-85, 990, 992.

But even under the trial court's erroneous approach, dismissal was error. Appellants did show by clear and convincing evidence a probability of prevailing on their claim that Respondents violated the Co-op's rules and policies and that Respondents' Bylaws defense was unfounded.

As is detailed above and the trial court conceded, it was undisputed there was no staff consensus. CP 986; *see* CP 45 ¶ 24 ("a few Staff members would not agree to the boycott and would not step aside to permit a consensus"); *see also* CP 351-52 ¶¶ 5–7. It was undisputed that the staff consensus requirement had been applied to all prior boycott proposals. CP 351, 462, 464. Likewise, it was undisputed that there is no nationally recognized boycott of Israeli products. CP 45-46 ¶ 25 (citing "international movement"). Two members of the 1993 Board testified that the staff consensus and nationally recognized boycotts requirements must both be met. CP 297 ¶ 3, 337 ¶ 4. A third, Respondent Cox, claimed only

[17] Respondents contributed to this error, informing the court that it was Appellants' burden to "prov[e] by clear and convincing evidence, that they will prevail in this lawsuit." CP 407.

that Appellants misapprehended the nationally recognized boycotts requirement, a narrow claim indicating Ms. Cox agrees with Appellants' staff consensus argument. CP 466-71.

In sum, the evidence establishes that the Boycott Policy means what it says. Because Respondents did not comply with the Policy, their conduct was not "lawful" and the trial court erred in finding otherwise.[18]

4. Appellants Established the Remaining Elements of Their Claims

A right to relief is an essential element of a claim. Although the trial court did not reach the issue, Appellants' evidence of lost membership and sales demonstrated that the Co-op suffered monetary losses and had a right to declaratory and injunctive relief. *Supra* at 16-17; *see Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc.*, 519 F.2d 634 (8th Cir. 1975); *Start, Inc. v. Baltimore County,* 295 F. Supp. 2d 569, 581-82 (D. Md. 2003).

Appellants also alleged that by violating the Co-op's rules and procedures, Respondents violated fiduciary duties owed to the Co-op. The evidence of misconduct described above is more than sufficient to allow this claim to go to a jury. Respondents tried to avoid that result by claiming immunity under the business judgment rule and *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 887, 895, 167 P.3d 610 (2007).

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[18] The trial court also erred in rejecting Appellants' evidence that Respondents acted unlawfully by failing to consider the Boycott Policy's requirements and/or by failing to exhaust all other avenues of resolution. *See supra* at 15-15.

CP 271. But *McCormick* holds that the business judgment rule protects corporate management from liability only for acts within management's authority. *Id.* This lawsuit is predicated on the Board making an unauthorized and unlawful decision—not one that is merely incorrect.

C. The Anti-SLAPP Act Is Unconstitutional

1. Introduction

The trial court erred in applying the anti-SLAPP Act to this case. Assuming arguendo that this case did fall within the Act's purview, the Court must still reverse the trial court on constitutional grounds. As many courts have recognized, anti-SLAPP Acts have a chilling effect on a potential plaintiff's constitutional right of access to the courts, fundamentally alter procedural and substantive law, and can impinge on the plaintiff's free speech and petition rights. *E.g., Palazzo,* 944 A.2d at 150 & nn.10-11. That is certainly the case with RCW 4.24.525.

Courts often avoid invalidating their state's anti-SLAPP laws by limiting their application. Thus, for example, a statutory requirement that a SLAPP suit be "based on" the protected action, is interpreted to require the moving party to establish that the non-movant's claims are based on the protected activities alone, have no substantial basis other than or in addition to the protected activities, and/or that protected activity is the principal thrust or gravamen of the claim. *Fielder,* 2012 WL 6114839, at *8; *see also Episcopal Church Cases,* 87 Cal. Rtpr. 3d at 283-84; *Duracraft,* 691 N.E.2d at 943-44; *Nader,* 41 A.3d at 559 n.9. Minnesota

courts have interpreted the requirement that a non-moving party proffer clear and convincing evidence as meaning clear and convincing evidence *in light of the Rule 12 or Rule 56 standards for granting judgment. Nexus,* 785 N.W.2d at 781-82. Federal courts interpreting RCW 4.24.525 have done the same. *AR Pillow Inc. v. Maxwell Payton, LLC,* 2012 WL 6024765, at *2 (W.D. Wash. Dec. 4, 2012).

Particularly as interpreted by the trial court and as is detailed more fully below, Washington's anti-SLAPP Act violates the separation of powers doctrine, imposes unconstitutional limits on the rights of access to the courts and to a trial by jury, and is unconstitutionally vague. Even if facially valid, it is unconstitutional as applied to Appellants. *See generally City of Redmond v. Moore,* 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) (a statute unconstitutional as applied cannot be applied in the future in a similar context, but is not rendered completely inoperative).

2. The Mandatory Discovery Stay Is Unconstitutional

a. Separation of Powers Doctrine

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 v. Wenatchee Med. Center,* 166 Wn.2d 974, 980, 216 P.3d 374 (2009) (internal citations and quotation marks omitted). Under that doctrine, the Washington Constitution places "[s]ome fundamental functions...within the inherent power of the judicial

branch." One such fundamental function is the "power to promulgate rules" for operating civil courts. *Id.* If a statute and court rule appear to conflict, the Court first attempts to harmonize them and give effect to both, but if it cannot, the court rule prevails in procedural matters. *Id.*

Anti-SLAPP laws are procedural. *Nguyen v. County of Clark,* 732 F. Supp. 2d 1190, 1193-94 (W.D. Wash. 2010) (RCW 4.24.525 is procedural); *see, e.g., Englert v. MacDonnell,* 551 F.3d 1099, 1101-02 (9th Cir. 2009) (same re Oregon); *Flatley v. Mauro,* 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606, 624 (2006) (same re California); *Lee v. Pennington,* 830 So. 2d 1037 (La. App. 2002) (same re Louisiana). Among other things, the procedures imposed by RCW 4.24.525(5)(c) conflict with rules defining what discovery is allowed. *See* CR 26-37.

Under CR 26(c), if requested discovery is onerous or burdensome, a party may seek relief from the court. The anti-SLAPP Act takes the opposite approach. The statute's default rule is a stay of all discovery. *See* RCW 4.24.525(5)(c). To lift the stay and obtain any discovery at all, the non-movant ordinarily must prevail on the anti-SLAPP motion *and* demonstrate good cause. *Id.* Thus, as the trial court opined, the anti-SLAPP Act's discovery stay effectively requires a plaintiff to acquire all facts supporting its contentions before filing suit. CP 960-63. That impossible task conflicts directly with the Civil Rules and renders the statute unconstitutional.

Putman confirms that statutes such as the anti-SLAPP Act are

unconstitutional. It held that a statute requiring a medical malpractice plaintiff to submit a certificate of merit with the complaint conflicted with Civil Rules regarding pleadings, and violated the separation of powers doctrine because it conflicted with the judiciary's inherent power to set procedures. 166 Wn.2d at 981-85. The anti-Slapp Act suffers from the same flaws. Indeed, a federal district court recently ruled that the statute's automatic discovery stay conflicts with the rules of civil procedure:

> In *Metabolife International, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001), the court addressed whether two provisions of California's anti-SLAPP statute conflicted with the Federal Rules of Civil Procedure or are contrary to *Erie's* purposes....[As is the case with Washington's statute, the] two subsections 'create a default rule that allows the defendant served with a complaint to immediately put the plaintiff to his or her proof before the plaintiff can conduct discovery.'" The court adopted a district court holding that ***when the expedited procedure is used in federal court to test a plaintiff's evidence before the plaintiff has completed discovery, it conflicts with Federal Rule of Civil Procedure 56.***
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> Here, the [Washington anti-SLAPP] Act has nearly identical provisions ... Accordingly, ***the Ninth Circuit's holding that the automatic stay of discovery in California's statute does not apply in federal court applies equally to the [Washington anti-SLAPP] Act.***

AR Pillow, 2012 WL 6024765, at *3 (emphasis added; citations omitted); *see also Verizon Del. Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (California's anti-SLAPP Act's discovery limitations result in "a direct collision" with discovery rules and Rule 56).[19]

[19] The California statute does not raise conflicts with certain other civil rules because the nonmovant's burden under that statute is lower than under the Washington statute. *Jones,* 2012 WL 1899228, at *3 (noting Washington's

The reasoning of *AR Pillow* applies to the conflict created by the discovery stay mandated by Washington's anti-SLAPP Act. The difference is that while a federal court may refrain from applying the discovery stay to a matter pending before it, state courts cannot. Because the discovery stay directly conflicts with court rules, it violates the separation of powers doctrine and is unconstitutional under *Putnam*.

b. Right of Access to the Courts

The very essence of civil liberty is the right to claim the protection of the laws upon the occurrence of an injury. *Putman*, 166 Wn.2d at 979. The constitutional right of access to the courts includes the right of discovery authorized by the civil rules.

> *The right of discovery and the rules of discovery are integral to the civil justice system. See John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991). Access to the civil justice system is founded upon our constitution, which mandates that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." WASH. CONST. art. I, § 1....
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> ... *The "right of access includes the right of discovery authorized by the civil rules, subject to the restrictions contained therein."* ...
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> ...Effective pretrial disclosure ... has narrowed and clarified the disputed issues and made early resolution possible....[E]arly open discovery exposed meritless and unsupported claims so they could be dismissed. *It is uncontroverted that early and broad disclosure promotes*

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higher burden); *see Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010) (noting California's "minimal merit" standard). *See supra* n.16.

> *the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims.*

Lowy v. PeaceHealth, 174 Wn.2d 769, 776-77, 280 P.3d 1078 (2012).

In *Putman*, this Court held a statutory "certificate of merit" requirement violated the right of access because "[o]btaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when [witnesses] can be interviewed and [documents] reviewed." 166 Wn.2d at 979. Here, without the right to full (or even limited) discovery, Appellants could not present the merits of their claims. Indeed, except for the materials Respondents unilaterally selected to support their motion, Appellants have no idea what documents exist regarding the adoption and application of the Co-op's Boycott Policy.

Citing California decisions, Respondents argued to the trial court that the "good cause" discovery stay exception in RCW 4.24.525(5)(c) renders the statute constitutional. CP 415 & n.13. But Washington law governs here and the rule in Washington is that a "good cause" provision will not save an unconstitutional statute. The provision at issue in *Putnam* had a good cause exception, but that did not prevent the *Putnam* court from holding it unconstitutional. *See* RCW 7.70.150(4).

As other courts have recognized, the right of access to the courts cannot be trumped by an anti-SLAPP statute. *E.g., Nader,* 41 A.3d at 559-60; *Duracraft,* 691 N.E.2d at 943; *Palazzo,* 944 A.2d at 150 & nn.10-11. Because the constitutional right of access is "implicated whenever a party

seeks discovery" and because under Washington law, the only allowable limitations on the right of discovery are those found in CR 26(c), the anti-SLAPP Act infringes on the right of access to the courts and is unconstitutional. *Doe,* 117 Wn.2d at 782; *accord Lowy,* 174 Wn.2d at 776-77.

c. The Discovery Stay Is Unconstitutional as Applied

An as-applied challenge to a statute's constitutional validity is characterized by an allegation that applying the statute in the specific context of the party's actions is unconstitutional. *City of Redmond,* 151 Wn.2d at 668-69. Even if this Court could interpret the anti-SLAPP Act so as to make it facially constitutional, the statute's 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, Appellants had to acquire all necessary information before filing suit. CP 963.

The burdens imposed by the trial court were unrealistic, particularly given that Respondents had exclusive access to the most critical documentary evidence. They also violated fundamental constitutional rights guaranteeing access to the courts and conflicted with the Civil Rules. The trial court's analysis is particularly problematic since Appellants filed a suit challenging their Co-op's Board with violating governing rules and procedures. Their claims were not within the

heartland of First Amendment activities protected by anti-SLAPP Act, and Appellants had no reason to anticipate their complaint would be met by a special motion to strike. *Fielder,* 2012 WL 6114839, at **7-10; *Jones*, 2012 WL 1899228, at **2-3. Moreover, in this case the moving party had exclusive access to several thousand pages of relevant documents—documents Appellants had no opportunity to review for inculpatory evidence, or to submit to the court in order to provide it with a more complete picture of Co-op policies, practices, and procedures. Depriving Appellants of the right to review those materials unconstitutionally limited their right of access to the courts.

3. The Heightened Burden of Proof Set Forth in RCW 4.24.525(4)(b) Is Unconstitutional

a. Separation of Powers Doctrine

As written, Washington's anti-SLAPP Act conflicts with CR 8, CR 11, CR 12, CR 15, and CR 56 because it requires a party to provide "clear and convincing evidence" of a probability of prevailing on a claim in order to pursue an action. In contrast, a CR 12(b)(6) motion will be denied unless there is no state of facts that plaintiff could prove consistent with the complaint, that would entitle plaintiff to relief. *McCurry v. Chevy Chase Bank, FSB,* 169 Wn.2d 96, 101, 233 P.3d 861 (2010). A CR 56 motion must be denied if, when construed in the non-movant's favor, the evidence and reasonable inferences therefrom create a genuine issue of material fact as to any essential element of a claim. *E.g., Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59,

70, 170 P.3d 10 (2007). The notice pleading principles of CR 8 require a plaintiff to provide only a "a short and plain statement of the claim;" Rule 11 applies only to legally or factually baseless allegations; and CR 15 allows amendments "when justice so requires." Clearly, conflicts exist. If the conflict is procedural, the separation of powers doctrine requires that the Judicial Branch (and the Civil Rules) prevail and the statute be struck down. *Putman*, 166 Wn.2d at 980.

Washington's act, like the anti-SLAPP acts in other states, has been held to be procedural. *Nguyen,* 732 F. Supp. 2d at 1193-94; *see supra* at 34. That is consistent with the *Putman* court's determination that enactments which act as a gateway for plaintiffs asserting certain types of claims and the right to proceed with discovery and trial, are procedural. 166 Wn.2d at 984-85. It is also consistent with the established rule that burdens of proof are substantive only when they are "an essential element of the claim itself[.]" *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000).

The "normal" burden associated with Appellants' claims is proof by a preponderance of the evidence. By requiring non-movants such as Appellants to provide "clear and convincing evidence" of a probability of prevailing on their claims, Washington's anti-SLAPP Act imposes procedural burdens that conflict with the Civil Rules and it is therefore unconstitutional under the separation of powers doctrine.

b. Right of Access to the Courts

The anti-SLAPP Act's heightened burden of proof violates the right of access to the courts 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.[20] Requiring a party to establish by clear and convincing evidence the probability of prevailing on the merits also directly conflicts with the quantum of proof needed to avoid dismissal under CR 12(b)(6) or CR 56(c).[21] Moreover, the Civil Rules permit a plaintiff to obtain additional discovery in response to a motion under CR 56 if the plaintiff cannot yet present facts essential to justify his claim. *See* CR 56(f). The anti-SLAPP Act eliminates that right.

It is to avoid such constitutional infirmities and impediments that courts limit application of anti-SLAPP laws to cases in which the litigation is *based on* protected speech, and hold that suits challenging conduct that is somehow related to protected speech are not SLAPP suits. *See, e.g., Episcopal Church Cases,* 87 Cal. Rptr. 3d at 284; *Duracraft,* 691 N.E.2d at 940-44; *Nader,* 41 A.3d at 559 & n.9; *Fielder,* 2012 WL 6114839, at *8. As interpreted by the trial court, Washington's statute is not so limited

[20] Additionally, the provision requiring a litigant who may have a meritorious claim to pay attorney fees and a $10,000 penalty clearly has a chilling effect, further denying court access. RCW 4.24.525(6)(a).

[21] The heightened burden of proof also conflicts with the notice pleading policy of CR 8; the baseless claims standard of CR 11; and the liberal amendment policy of CR 15.

and as such, is unconstitutional.

c. The Right to a Jury Trial

"The right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21.

> The term 'inviolate' connotes deserving of the highest protection...Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Sofie v. Fibreboard Corp. 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Because the anti-SLAPP Act imposes a heightened burden of proof before discovery is even commenced, and allows dismissal with prejudice if that burden is not met, it unconstitutionally denies claimants their right to a jury trial.

d. Unconstitutional Vagueness

> An [act] is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. Such an [act] violates the essential element of due process of law—fair warning.

Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986) (internal citations omitted); *see also Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739-40, 818 P.2d 1062 (1991) (the vagueness doctrine ensures that citizens receive fair notice as to what conduct is proscribed and prevents arbitrary enforcement of the law).

In this instance, the Washington anti-SLAPP statute imposes a burden that appears unique and unprecedented in Washington: "to establish by clear and convincing evidence a probability of prevailing on

the claim." RCW 4.24.525(4)(b). The "clear and convincing" standard is common, as is the standard of "probability." *E.g., State v. Thompson,* 169 Wn. App. 436, 494-95, 290 P.3d 996 (2012) (to establish ineffective assistance of counsel, defendant must prove there is a "reasonable probability" the outcome would have been different but for the deficient performance). But the standard in Washington's anti-SLAPP Act is neither common nor susceptible to understanding by "persons of common intelligence."

The vagueness of the standard is demonstrated by the trial court's repeated references to Appellants' failure to meet "the clear and convincing standard." *See, e.g.,* CP 979, 984-85, 989, 990, 992, 995. But Appellants were not charged with meeting "the clear and convincing standard"—they were charged with providing clear and convincing evidence ***of a probability*** of prevailing. The difficulty with that standard is that it mixes two standards of proof in such as way as to create a significant likelihood that "the clear and convincing evidence standard"—the highest standard other than "beyond a reasonable doubt"—will be applied to parties targeted by an anti-SLAPP motion. This confusion renders RCW 4.24.525(4)(b) unconstitutionally vague.

e. The Heightened Burden of Proof Is Unconstitutional as Applied

Even if this Court determines that Appellants' heightened burden of proof is constitutional on its face, applied here the burden effectively

required Appellants to prove their claims by clear and convincing evidence. CP 407, 979-95. That standard exceeds the burden of proof Appellants would bear at trial or in facing any other dispositive motion. Accordingly, as applied here, the anti-SLAPP Act was unconstitutional.

D. The Trial Court Erred by Striking the Declarations of Tibor Breuer and Susan Trinin and Denying Discovery

The trial court struck as hearsay, testimony by Mr. Breuer and Ms. Trinin explaining what the Board intended when it enacted the Boycott Policy in May 1993. CP 988. Those statements are not hearsay, however. Both witnesses were members of the Board when it adopted the Boycott Policy. CP 297, 337. Their statements are the Board's admissions, and as such, are not hearsay. ER 801(d)(2).

Moreover, these witnesses have personal knowledge of the Board's objectives in enacting the Policy. "Testimony based on personal knowledge is not hearsay." *State v. Benefiel*, 131 Wn. App. 651, 656-57, 128 P.3d 1251 (2006). *Snohomish County Fire District No. 1 v. Snohomish County*, is instructive. 128 Wn. App. 418, 115 P.3d 1057 (2005). There, the fire district sought a declaration that the board administering the county's retirement system had exceeded its authority. *Id.* at 422. Plaintiff argued the trial court erred by admitting a board member's affidavit, because "it contained inadmissible hearsay statements and legal conclusions." *Id.* at 422 n.1. The Court of Appeals disagreed: "As ***a member of the Board***, [the affiant] would have personal knowledge about the claims the Board was receiving ***and the Board's reasoning*** for

including preventative care." *Id.* (emphasis added). For the same reason, the trial court erred in striking the "Board intent" paragraphs from the declarations of Mr. Breuer and Ms. Trinin.

Even if the Court decides the Breuer and Susan Trinin statements were hearsay, however, the trial court's decision to strike them should be reversed. Appellants sought—without the benefit of discovery—to establish "by clear and convincing evidence a probability of prevailing" on their procedural misconduct claims. RCW 4.24.525(4)(b). Appellants did so with, among other things, declarations by individuals who had personal knowledge of critical background facts and who were rebutting Respondent Levine's testimony (not based on personal knowledge) about "[t]he rationale for revising the boycott policy in 1993[.]"[22] CP 46-47 ¶27. Respondents did not specifically object to those declarations and Appellants had no opportunity to address their admissibility. *See* CP 411 n.7. For the trial court to nevertheless single out Appellants' evidence for hearsay analysis at the same time it allowed Respondents' very similar evidence (*see* CP 46-47, 466-71), was error.

The trial court's denial of Appellants' cross-motion for limited discovery was also in error. Not only did the court's enforcement of the anti-SLAPP Act's mandatory stay deprive Appellants of their

[22] Hearsay offered for impeachment is often admissible. *See Fraser v. Beutel,* 56 Wn. App. 725, 738, 785 P.2d 470 (1990).

constitutional rights, the court's analysis was flawed. Rather than considering whether Appellants had demonstrated good cause under Washington law,[23] the court held Appellants to an unattainably higher standard that effectively deprived them of any right to discovery at all—even after Respondents conceded they had exclusive possession of thousands of pages of documentary evidence. *See supra* at 18-20.

E. The Trial Court's Award of Penalties, Fees, and Costs Against the Representative Plaintiffs Was Error

The trial court awarded Respondents $160,000 in penalties ($10,000 for each Respondent) and over $61,000 in fees and costs. CP 1246-48. The court ordered Appellants to pay those amounts. *Id.* In so doing, the court rejected Appellants' arguments that the fee provisions in the anti-SLAPP Act must be read in conjunction with derivative action statutes; this being an action brought against the "Board," only one $10,000 penalty could be imposed; and any amounts awarded should be paid by the real party in interest, i.e., the Co-op. CP 1153-68.

In a derivative action, the named plaintiffs bring suit on behalf of the entity, against defendants (often the entity's officers or directors) that those who control the entity have refused to pursue.[24] *See Goodwin v.*

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[23] Good cause for discovery is present if the information sought is material to the moving party's trial preparation. *Hertog v. City of Seattle,* 88 Wn. App. 41, 51, 943 P.2d 1153 (1997). A good cause requirement can ordinarily be met by an allegation the requested documents are needed to establish the movant's claim. *Id.*

[24] Although Respondents argued otherwise, the trial court determined that this suit is a proper derivative action. CP 1251 ("plaintiffs brought this action as a derivative action against a nonprofit corporation"); *see also* CP 975.

Castleton, 19 Wn.2d 748, 761-62, 144 P.2d 725 (1944). Derivative actions are governed by court rules (CR 23.1), and statutes (RCW 23B.07.400 for for-profit entities; RCW 24.03.040 for non-profit entities).

Under the for-profit statute, a court may award fees against an unsuccessful representative plaintiff only if the Court finds there was no "reasonable cause" for the proceeding. RCW 23B.07.400(4). The non-profit statute does not authorize any fee award whatsoever. RCW 24.03.040. Whichever representative suit statute applies here,[25] neither allows an award of fees against Appellants. Appellants had reasonable cause to bring this action;[26] a fact confirmed by Respondents' decision to seek dismissal under the anti-SLAPP Act and cite Rule 12(b)(6) only in passing. CP 251 n.1, 267 n.12. Indeed, had the trial court agreed with Respondents' Rule 12 arguments, it would have granted Respondents' CR 12 motion (as Judge Martinez has done in similar situations[27]) and Respondents would not recovered any fees or penalties.

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[25] It is unclear which provision applies. The trial court ruled that the Co-op "remains a nonprofit under the law." CP 986. However, RCW 23.86.360 makes statutes governing for-profit entities applicable to cooperatives.

[26] *See, e.g., Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011) (action brought without reasonable cause is subject to dismissal under frivolous action statute, RCW 4.84.185); *Curhan v. Chelan County*, 156 Wn. App. 30, 37, 230 P.3d 1083 (2010) (same).

[27] Judge Martinez elected to dismiss claims pursuant to Rule 12 rather than under the anti-SLAPP Act in part because by so doing, he did not have to address whether the statute is constitutional. *See Phillips v. World Pub. Co.*, 822 F. Supp. 2d 1114, 1124-25 (W.D. Wash. 2011); *Phillips v. Seattle Times Co.*, 818 F. Supp. 2d 1277, 1286-87 (W.D. Wash. 2011); *Phillips v. KIRO-TV, Inc.*, 817 F. Supp. 2d 1317, 1328 (W.D. Wash. 2011).

When different statutes apply to same matter, principles of statutory construction require an effort to harmonize them. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 208, 229 P.3d 871 (2010). Here, the trial court failed to attempt to harmonize the derivative action statutes with the anti-SLAPP Act and effectively read the derivative action provisions out of the statutory scheme. By so doing the trial court erred, and its fee award order must be set aside.

The derivative nature of this action also precluded the award of 16 separate $10,000 penalties. Appellants brought suit against the Co-op's Board of Directors; they named the individual members as defendants only because court rules and statutes required them to do so. Put differently, in order for the Co-op to hold its Board accountable collectively, the only procedural vehicle was to file suit against the individual Board members. As *Respondents* advised the trial court, "[c]orporations 'speak' through their... representatives." CP 407.

Several facts confirm that this matter is a suit against a collective Board, not a suit against 16 individuals. Appellants made no allegations against any particular defendant; their complaint focused entirely on the actions of the Board. CP 6-18. Respondents' attorneys did not differentiate among Respondents, and it was Respondents as a single unit, not Respondents as sixteen individuals, who sought and obtained an award

of fees. CP 1005, 1006-18, 1022-29, 1061-84, 1197-1234, 1246-61.[28] Moreover, Respondents never faced a serious threat of responsibility for expenses incurred in defending this action, as the Co-op's By-Laws require that Board members be indemnified for most legal expenses. CP 59 ¶ 18. Given this unique situation—one not addressed by any other court applying Washington's anti-SLAPP Act—the trial court erred in awarding multiple penalties to the collective Respondents.

Lastly, 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); *see Goodwin,* 19 Wn.2d at 762 (derivative action plaintiffs pursue claims not as own cause of action, but to put court's judicial machinery into motion). If such plaintiffs are subject to fee awards at all, it is only upon a determination their suit had no reasonable basis. RCW 23B.07.400(4). By ignoring this critical limitation and making the nominal plaintiffs personally liable for over $240,000 in fees and penalties, the trial court erred.

V. REQUEST FOR FEES

A court finding an anti-SLAPP motion frivolous or brought to cause unnecessary delay "shall award" the non-movant $10,000, and attorney fees and costs. RCW 4.24.525(6)(b). That same rule applies in

[28] Although Respondents were represented by multiple attorneys from many states (some of whom the trial court found contributed little value), all attorneys worked on behalf of all Respondents. *See* CP 1250-61

the appellate courts. RAP 18.1(a). Because this case never involved protected speech and Respondents' anti-SLAPP motion lacked a reasonable legal or evidentiary basis, Appellants request their fees.

VI. CONCLUSION

For the foregoing reasons, Appellants ask the Court to (1) vacate the order granting Respondents' anti-SLAPP motion; (2) hold as a matter of law that this is not a SLAPP action; (3) reverse the trial court's rejection of statements in the Trinin and Breuer declarations; (4) reverse the denial of Appellants' cross-motion for discovery and direct that full discovery be allowed; (5) remand this case to the trial court for further proceedings on the merits; and (6) award attorney fees to Appellants.

DATED this 22nd day of February, 2013.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____

Robert M. Sulkin, WSBA No. 15425
Barbara H. Schuknecht, WSBA 14106
Avi J. Lipman, WSBA No. 37661
Attorneys for Appellants

DECLARATION OF SERVICE

On February 22, 2013, 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:

Angela Galloway, WSBA No. 45330	☑	Via Messenger
Sarah Duran, WSBA No. 38954	☐	Via U.S. Mail
Bruce E. H. Johnson, WSBA No. 7667	☐	Via Overnight Delivery
Devin Smith, WSBA No. 42219	☐	Via Facsimile
DAVIS WRIGHT TREMAINE LLP	☑	Via E-mail
1201 Third Avenue, Suite 2200		
Seattle, WA 98101-3045		

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 22nd day of February, 2013, at Seattle, Washington.

_____

_____, LEGAL ASSISTANT

APPENDIX

C

Effective: June 10, 2010

West's Revised Code of Washington Annotated Currentness
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

→→ 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.

CREDIT(S)

[2010 c 118 § 2, eff. June 10, 2010.]

Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

END OF DOCUMENT

3

☐ 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 GRANTING DEFENDANTS' SPECIAL MOTION TO STRIKE THE COMPLAINT UNDER WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525

Amended

Clerk's Action Required

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

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tlc

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 Plaintiffs' 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; (6) Defendants' Brief Opposing Plaintiffs' Cross-Motion for Discovery; (7) Plaintiffs' Reply in support of Cross-Motion for Discovery; and (8) Defendant's Motion for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525; (9) Plaintiffs' Opposition to Motion for Fees and Penalties; and (10) Defendants' Reply to Plaintiffs' Opposition to Motion for Mandatory Costs, Attorneys' Fees, and Award under RCW 4.24.525.

Based upon the arguments, a review of the court file, and the briefing submitted by the parties, including the declarations and exhibits attached thereto, the Court hereby FINDS, ORDERS, and DECREES as follows:

1) In an oral opinion February 23, 2012, the Court DENIED Plaintiffs' Cross-Motion for Discovery;
2) In an oral opinion February 27, 2012, the Court GRANTED Defendants' Special Motion to Strike under Washington's Anti-SLAPP Statute, RCW 4.24.525, and Motion to Dismiss;
3) The Israeli-Palestinian conflict, which has persisted for more than four decades, is an "issue of public concern." *See* RCW 4.24.525(2)(e);
4) Defendants have shown by a preponderance of the evidence that the claim is based on "an action involving public participation and petition," RCW 4.24.525(4)(b); specifically, "[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." RCW 4.24.525(2)(e);
5) Pursuant to RCW 4.24.525(4)(b), Plaintiffs have failed to establish by clear and convincing evidence a probability of prevailing on their claims;

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

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.

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.

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.

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.

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.

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.

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7) Defendants are entitled to $178.75 for costs of litigation, pursuant to RCW 4.24.525(6)(a)(i) and RCW 4.84.010.

8) On July 12, 2012, the Court ruled that each of the 16 individual Defendants were entitled to a statutory amount of $10,000, and consequently entered an award of $160,000 pursuant to RCW 4.24.525(6)(a)(ii).

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that, pursuant to RCW 4.24.525(6)(a), Plaintiffs shall pay reasonable attorneys' fees to Defendants in the amount of $61,668.00; costs of litigation in the amount of $178.75; and a statutorily prescribed amount 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.

SO ORDERED this 16 day of Nov, 2012.

The Honorable Thomas McPhee

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: _____
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To: Robin Lindsey
Cc: angelagalloway@dwt.com; sarahduran@dwt.com; Bruce Johnston; devinsmith@dwt.com; Robert Sulkin; Avi Lipman; Lisa Nelson
Subject: RE: No. 87745-9--Kent L. and Linda Davis, et al. v. Grace Cox, et al.--Petitioners' Opening Brief

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Subject: No. 87745-9--Kent L. and Linda Davis, et al. v. Grace Cox, et al.--Petitioners' Opening Brief
Importance: High

Respectfully submitted in the above-referenced appeal is the **Brief of Appellant** with Appendix. The persons submitting this Opening Brief are Robert M. Sulkin (WSBA No. 15425), Avi J. Lipman (WSBA No. 37661), whose email addresses are: rsulkin@mcnaul.com and alipman@mcnaul.com.

We kindly ask the Court and counsel to acknowledge receipt of the attached documents.

Hard copies will follow to counsel via legal messenger.

The hard copy originals will follow by United States first class mail to the Clerk for filing.

Thank you.

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