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NO. 87745-9

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,

Appellants/Plaintiffs Below,

v.

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

Respondents/Defendants Below.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellants filed this lawsuit in Thurston County Superior Court in September 2011, seeking to penalize 16 current and former Board Members of the nonprofit Olympia Food Co-op ("Co-op") for supporting a boycott of Israeli goods.

A year earlier, the Co-op's Board of Directors voted to support a boycott of Israeli goods that was designed to promote humanitarian rights for the Palestinian people. Appellants, five of the Co-op's 22,000 members, disagreed with its decision. Rather than seek the boycott's repeal internally, they filed a lawsuit alleging misconduct and seeking damages from Respondents for a purported breach of fiduciary duties based on their support for the Co-op's boycott decision.

Appellants insist they filed suit merely to enforce Co-op bylaws and policies. But that claim is belied by the relief they seek (to enjoin the boycott), their attempt to hold Respondents personally liable, and their threat to bury Respondents with "complicated, burdensome, and expensive" discovery. Applying the unambiguous language of the Co-op's governing documents, the trial court correctly ruled as a matter of law that the Board acted within its authority when it voted to support the boycott, and the court properly dismissed the claims under Washington's anti-SLAPP statute, RCW 4.24.525.

Indeed, this Strategic Lawsuit Against Public Participation ("SLAPP") is precisely what the Washington Legislature intended to deter by enacting RCW 4.24.525 in 2010[1] – a vengeful lawsuit against ordinary citizens who lack resources to defend their free speech and petition rights through expensive litigation. The Washington anti-SLAPP law facilitates the early dismissal of lawsuits that target participation in matters of public concern, unless the plaintiff can show by clear and convincing evidence a probability of prevailing on the merits.[2] Because Appellants failed to meet that burden, the trial court properly dismissed the case and awarded Respondents their attorneys' fees, costs, and $10,000 each in statutory damages. It also correctly rejected Appellants' scattershot constitutional challenges to the law.

This Court should affirm the trial court's ruling in its entirety.

II. STATEMENT OF THE CASE

A. Exercising Their Duties Under the Co-op's Bylaws, Respondents Approved the Boycott.

The Co-op is a nonprofit corporation formed in 1976 to provide its

[1] Washington has two different anti-SLAPP statutes, RCW 4.24.525 and RCW 4.24.510. The Legislature passed the second statute, RCW 4.24.525, to broaden the types of speech and petition activities that are protected through early dismissal. *See* Bruce E.H. Johnson and Sarah K. Duran, *A View from the First Amendment Trenches: Washington's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495, 509 (2012).

[2] This legislative policy is fully consistent with Washington courts' finding that "[i]n the First Amendment area, summary procedures are ... essential. For the stake here, if harassment succeeds, is free debate...." *Mark v. Seattle Times Co.*, 96 Wn.2d 473, 48, 635 P.2d 1081 (1981) (citation omitted).

community with fresh, healthy food and "make human effects on the earth and its inhabitants positive and renewing and to encourage economic and social justice." CP 40. The Co-op has a long history of advocating for civil rights and social justice through measures such as written statements, posters, donations, symbolic store closures and boycotts. CP 40-46. Its Board of Directors approves such actions, and since 1989 has taken similar stands at least 20 times. CP 41. The Board is bound by the Co-op's governing documents, including its articles of incorporation, bylaws, and mission statement. CP 56-60.

In March 2009, a boycott of Israeli goods and financial investments was first proposed to the staff workgroup. CP 44. The workgroup referred the idea to a staff merchandise team, which deliberated for more than a year. CP 44. Deadlocked, the team sent the matter to the Board. At its May 20, 2010 meeting, the Board declined to act on the proposal, and sent it back to the staff with instructions to attempt unanimous consensus. CP 44-45, 111-19. But the staff remained deadlocked. CP 45, 121-24. At its next meeting, in July 2010, the Board agreed to support the boycott (the "Boycott"). CP 45.

The Board acted pursuant to provisions of the Co-op's Bylaws stating that "[t]he affairs of the cooperative shall be managed by a Board of Directors," CP 46, 58, and granting the Board exclusive power to

establish and amend policies and to "resolve organizational conflicts." CP 58. The Bylaws obligate staff to carry out Board decisions and comply with applicable laws and the Bylaws. CP 59.

The Bylaws remain unaffected by the Board's 1993 boycott policy (the "Boycott Policy"). CP 106-07. That Policy creates a procedure for member- and staff-initiated proposals to support nationally recognized boycotts. *Id.* It does ***not*** cede to the staff the Board's authority. CP 46. The Boycott Policy also does not purport to amend or alter the Co-op's governing documents. Although the Policy requires staff consensus for staff-initiated boycotts, it does not address how the Board should address a lack of consensus. CP 106. Nor does it purport to be the sole method for approving Co-op boycotts. *Id.*

Under the Bylaws, any member may compel a vote of all the members by gathering enough signatures (in this case, 300 signatures). CP 57. Pursuant to this provision, at its July 2010 meeting, the Board invited any dissenting members to put its decision to a vote. CP 181-82. The Board also posted to its website information about this option, including a message that "any member is welcome to propose a member initiated ballot process." CP 182, 239. Neither Appellants nor anyone else accepted this invitation. CP 182.

In the fall of 2010, several Appellants ran for election to the Co-op

Board, campaigning on their opposition to the Boycott. CP 181. Boycott supporters endorsed a slate of five candidates who had supported the Boycott. *Id.* The Boycott dominated the campaign season.[3] Co-op members voted in record numbers, and sent a clear mandate: Each candidate endorsed by the Boycott supporters won by a wide margin. Each Appellant candidate lost by a large margin. *Id.*

In May 2011, nearly a year after the Board made its Boycott decision, Appellants' lawyer sent its current and former members a letter demanding they immediately rescind the Boycott, or else he and his clients would "hold each of you personally liable." CP 303-05. The letter closed with a similar threat: "If you do what we demand, this situation may be resolved amicably and efficiently. If not, we will bring legal action against you, and this process will become considerably more ***complicated, burdensome, and expensive***." *Id.* (emphasis added).

B. The Trial Court Dismissed Appellants' Lawsuit for Targeting Free Expression.

On September 2, 2011, after Respondents refused to withdraw the Boycott, Appellants filed suit in Thurston County Superior Court. CP 6-17. They alleged that, by supporting the Boycott, the Co-op

[3] Primarily an expressive and symbolic gesture, the Boycott caused the Co-op no discernible adverse business consequences. The discontinued merchandise amounted to 0.075 percent of the wholesale value of Co-op inventory and none of the Co-op's investments. Indeed, Co-op receipts and membership enrollments have steadily increased since the Board approved the Boycott. CP 48.

directors acted *ultra vires* and breached their fiduciary duties; and they sought a declaratory judgment that the Boycott was null and void, permanent injunctive relief preventing its enforcement, and damages from all 16 defendants. The suit also sought to hold each defendant personally liable. *Id.* Along with serving the summons and complaint, Appellants served each defendant with a 13-page discovery demand and several weeks later demanded videotaped depositions for all 16 defendants, for a total of five weeks of depositions. CP 555, 565-67.

On November 1, 2011, Respondents filed their special motion to strike pursuant to RCW 4.24.525. CP 245-95. Appellants opposed the motion and sought discovery. CP 362-66, 378-403. Respondents opposed the request, citing the automatic stay in RCW 4.24.525. CP 554-64.

The trial court heard arguments on February 23, 2012. The court denied Appellants' request for discovery based on their tardiness in pressing for the requested discovery and because the request was "not focused" but instead was very "broad-ranging." CP 1192-93. The court orally granted the motion to strike on February 27, 2012. RP 26-27, 32.[4] The court ruled that Respondents had shown by a preponderance of the evidence that the Boycott was an act in furtherance of the exercise of the constitutional rights of speech and petition, and that Appellants had failed

[4] All Report of Proceedings citations in this brief refer to the hearing held February 27, 2012, except where indicated otherwise.

to show by clear and convincing evidence a probability of prevailing on their claims. *Id.* at 17, 26-27. The court rejected Appellants' primary legal argument that the Board lacked authority to break the staff deadlock because the Bylaws specifically allow the Board to "resolve organizational conflicts after all other avenues of resolution have been exhausted." *Id.* at 22-23.

The court further found that Appellants failed to show by clear and convincing evidence that there was no nationally recognized boycott, which Appellants claimed was another condition for supporting a boycott: "The evidence clearly shows that the Israel boycott and divestment movement is a national movement." *Id.* at 24. The court supported this conclusion with references to Board meeting minutes. *Id.* at 25.

Finally, the court held that the anti-SLAPP statute is constitutionally valid, RP 28-32, and excluded as inadmissible hearsay declarations of two former Board members speculating on the Board's intent when it passed the Boycott Policy, *id.* 22.

On November 16, 2012, the trial court ordered Appellants to pay $221,846.75, including attorneys' fees and $10,000 in statutory damages to each named Respondent. CP 1246-48. This appeal followed.

III. ARGUMENT

A. Standards of Review.

There are several issues presented in this appeal, with different standards of review.

First, the Court reviews the trial court's grant of the anti-SLAPP motion *de novo*. Where a trial court makes a decision of law based on documentary evidence only, this is the appropriate standard of review. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35- 36, 769 P.2d 283 (1989). Review is also *de novo* for summary judgment decisions. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Because the anti-SLAPP statute merely requires the plaintiff to meet his burden as if on summary judgment, *de novo* review applies. *See Lowe v. Rowe*, 173 Wn. App. 253, 258, 294 P.3d 6 (2012) (anti-SLAPP statute facilitates an early summary judgment motion); *Mindy's Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599 (9th Cir. 2010) (likening anti-SLAPP procedure to summary judgment, nonsuit or directed verdict); *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 278, 46 Cal. Rptr. 3d 638, 139 P.3d 30 (2006) (under California's statute, a trial court "evaluates the merits of the lawsuit using a summary-

judgment-like procedure at an early stage of the litigation."). [5]

Second, the Court also reviews decisions about the constitutionality of a law *de novo*. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004); *State v. Evans*, No. 74410-6, 2013 WL 1490589 at *1 (Wash. 2013).

Finally, the Court reviews evidentiary rulings and attorney fee and similar awards for an abuse of discretion. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (evidentiary rulings); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991) (evidentiary rulings); *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 123, 101 P.3d 409 (2004) (attorney fee award). Abuse of discretion also governs the challenge to the trial court's discovery rulings. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 234, 654 P.2d 673 (1982).

B. Washington's Anti-SLAPP Statute Broadly Protects Speech and Petitioning.

The Legislature enacted RCW 4.24.525 in 2010 to curtail "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition ...." S.B. 6395, 61st Leg., 2010 Reg. Sess.

[5] Washington's anti-SLAPP statute is modeled after the California anti-SLAPP law. The well-developed case law on the latter, Cal. Civ. Pro. § 425.16, is instructive and most decisions interpreting the Washington statute have looked to California cases for guidance. *See, e.g., Aronson*, 738 F. Supp. 2d at 1110; *Phoenix Trading, Inc. v. Kayser*, No. C10-0920 JLR, 2011 WL 3158416, at *6 (W.D. Wash. July 25, 2011); *Castello v. City of Seattle*, No. C10-14 57 MJP, 2010 WL 4857022, at *4 (W.D. Wash. Nov. 22, 2010).

(Wash. 2010). Such lawsuits "are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities," deterring them from "fully exercising their constitutional rights." *Id.*

To prevent this, the statute allows the target of a SLAPP to bring a special motion to strike at the outset and imposes a high burden of proof on the responding party. RCW 4.24.525; *see also Aronson v. Dog Eat Dog Films, Inc.*, 738 F.Supp.2d 1104, 1109-10 (W.D.Wash. 2010); *Davis v. Avvo*, No. C11-1571 RSM, 2012 WL 1067640, at *2-3 (W.D. Wash. Mar. 28, 2012); *Castello v. City of Seattle,* No. C10-14 57 MJP, 2010 WL 4857022, at *3 (W.D. Wash. Nov. 22, 2010). If the plaintiff fails to meet this burden, the court must dismiss the claims and impose an award of attorneys' fees, costs, and $10,000 for each moving party. RCW 4.24.525(5)(c), (6)(a).

Courts decide anti-SLAPP motions in two steps. First, the defendant 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); *see also Aronson*, 738 F. Supp. 2d at 1110; *Castello*, 2010 WL 4857022, at *6. "[P]ublic participation" includes any "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the

exercise of the constitutional right of petition." RCW 4.24.525(2)(e). Second, the plaintiff must "establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b); *Aronson*, 738 F. Supp. 2d at 1110; *Castello*, 2010 WL 4857022, at *6. If the plaintiff does not, the court must dismiss the case. *Id.* The Legislature further mandated that the statute "be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts."[6] S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010); *see also Aronson,* 738 F. Supp. 2d at 1110.

The trial court correctly applied RCW 4.24.525 to Appellants' claims and dismissed their suit as an impermissible attempt to punish Respondents' Boycott. The Boycott, it found, passed in the midst of the nearly century-old Israeli-Palestinian conflict, qualified as speech and lawful conduct in furtherance of a matter of public concern. CP 1107-08. Because Appellants failed to show by clear and convincing evidence a probability of prevailing on any of their claims, dismissal was proper.

[6] Appellants claim the trial court contravened a "rule" requiring judicial caution in determining whether a suit is a SLAPP. Appellants' Br. at 27. There is no such "rule." Indeed, if there were, it would contravene the Legislature's direction that courts construe the statute liberally. *See* S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010); *Aronson,* 738 F. Supp. 2d at 1110.

1. The Trial Court Correctly Ruled that Respondents' Boycott Qualified for Protection Under RCW 4.24.525.

The First Amendment unquestionably protects the Boycott. As the United States Supreme Court has recognized, the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). Thus, in *Claiborne Hardware,* the Court found "the nonviolent elements" of a boycott "are entitled to the protection of the First Amendment." *Id.* at 915.

This is no accident. The United States itself is a product of a colonial boycott against British, Irish, and West Indian goods, issued by the First Continental Congress on October 20, 1774, in an effort to avoid war, persuade British lawmakers, and influence British public opinion. Cong. Journal, 1st Cont'l Cong., 1st Sess. (Oct. 20, 1774), reprinted in 1 Journals of the Cont'l Congress 75-81 (Worthington C. Ford et al. eds., 1903)); *see also* David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (1974). Since then, the country has had a long tradition of boycotts, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr.,

to the opposition to South African apartheid.

In light of this history and *Claiborne Hardware*, the Co-op's participation in the Boycott of Israeli goods indisputably qualifies as "action involving public participation and petition." *See* RCW 4.24.525(2). Boycotts fall within the "heartland" of First Amendment activities, contrary to Plaintiffs' assertions. Appellants' Br. at 7, n. 6. Moreover, the Boycott independently qualifies for anti-SLAPP protection as an act of petitioning. *See, e.g., N. Am. Expositions Co. Ltd. P'ship v. Corcoran*, 898 N.E.2d 831, 840-41 (Mass. 2009) (peaceful boycotts and demonstrations are protected petitioning activity under anti-SLAPP statute); *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 820-21, 33 Cal. Rptr. 2d 446 (1994), *rev'd on other grounds by Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002) (anti-SLAPP statute protects expression including "peaceful economic boycott").

The Boycott unquestionably involves "an issue of public concern" – the protracted Israeli-Palestinian conflict. *See* RCW 4.24.525(2)(e); *see also Card v. Pipes*, 398 F. Supp. 2d 1126, 1136 (D. Or. 2004) (holding plaintiff's claims subject to an anti-SLAPP motion because defendant made anti-Israel comments "in connection with an interest of public concern"). Indeed, Appellants do not dispute that the Israeli-Palestinian

conflict is a matter of public concern. A matter is of public concern if it "relat[es] to any matter of political, social, or other concern to the community... or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[7] *Snyder v. Phelps*, 131 S. Ct. 1207, 1216, 179 L.Ed.2d 172 (2011) (internal quotation marks and citations omitted). As the trial court correctly ruled: "Four decades of conflict in the Middle East have accompanied the issues that surround the purposes behind this proposed Boycott and Divestment Resolution. ... And for four decades, the matter has been a matter of public concern in America and debate about America's role in resolving that conflict." RP 14-24.

Appellants claim (for the first time on appeal[8]) that RCW 4.24.525(2)(e) only applies to "lawful" conduct, and that because their lawsuit is based on the Board's failure to follow its own procedures, *not* protected conduct, RCW 4.24.525 is inapplicable. This argument reflects a fundamental misunderstanding of the anti-SLAPP law.

As an initial matter, Respondents' conduct is lawful, and

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[7] Interpreting California's anti-SLAPP statute, courts have found that an issue of public concern is "any issue *in which the public is interested.*" *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042, 72 Cal. Rptr. 3d 210 (2008) (italics in original). "[T]he issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." *Id.; see, e.g., Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir. 2010) (birthday card poking fun at Paris Hilton within scope of statute).

[8] Appellants failed to raise this argument in the trial court, and thus waived it. *See* RAP 2.5(a); *Brundridge*, 164 Wn.2d at 441.

Appellants cite no authority suggesting that a private board's alleged failure to follow its own policies can strip speech of its First Amendment protections. Instead, the term "lawful" in Section 2(e) merely excludes the types of conduct that receive limited or no First Amendment protection, such as speech that is threatening, incites a breach of the peace, or advocates vandalism or destruction of property.[9] To explain the difference succinctly with a pertinent example: peacefully demonstrating against the World Trade Organization (WTO) is protected; vandalizing Downtown Seattle storefronts to express opposition to the WTO is not.[10]

Appellants' argument, if accepted, would require judging the merits of a claim *before* applying the anti-SLAPP statute. But "a court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary." *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1089, 114 Cal. Rptr. 2d 825 (2001). "Otherwise, the second step would become superfluous in almost every

[9] The Supreme Court recently catalogued these categories and cautioned against adding new ones, including, in that case, depictions of animal cruelty. *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010).

[10] Interestingly, even if Appellants had offered evidence that Respondents violated a specific criminal law, the conduct is not unlawful if that law conflicts with Respondents' First Amendment rights. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (defendant's conviction for burning the flag in violation of Texas' flag desecration statute was properly reversed).

case, resulting in an improper shifting of the burdens."[11] *Id.* *See also* *Navellier v. Sletten*, 29 Cal. 4th 82, 94-95, 124 Cal. Rptr. 2d 530 (2002) (declining to interpret preamble of California statute, which suggests its purpose is to promote the "valid" exercise of free speech, to apply only to "valid" speech); *see Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356, 1366, 102 Cal. Rptr. 2d 864 (2001), *rev'd on other grounds by Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002).

Moreover, Appellants' insistence they brought the lawsuit because Respondents failed to follow policies separate and apart from the Boycott completely misunderstands the anti-SLAPP statute's scope.[12] A federal court rejected a similar argument in *Aronson v. Dog Eat Dog Films, Inc.* There, the plaintiff claimed the defendant's free speech rights were "merely incidental" to the defendant's alleged misconduct (unauthorized use of the plaintiff's video). Judge Strombom disagreed, stating that the relevant inquiry is whether "the act underlying the plaintiff's cause, or the act which forms the basis for the plaintiff's cause of action" is "an act in

[11] Appellants' reading also would violate the Legislature's mandate that the law be construed liberally, and lead to absurd results, in violation of the basic principle that courts must "avoid readings of statutes that result in unlikely, absurd, or strained consequences." *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833-34, 74 P.3d 115 (2003).

[12] Their protestations of good faith are also completely beside the point because under the anti-SLAPP law, "plaintiff's subjective motivations in bringing the suit are irrelevant." *Tuchscher Dev. Enters, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1234, 132 Cal. Rptr. 2d 57 (2003).

furtherance of the right of free speech." 738 F.Supp.2d at 1111. Here, that act is the Boycott – an act that is afforded the highest degree of protection for free speech as "expressive conduct" in support of human rights.

Nor are Appellants' assertions about the basis for their lawsuit credible. Appellants filed a lawsuit that sought to enjoin the Boycott, CP 16-17, and to hold ***personally liable*** 16 current and former Board Members, ordinary citizen-volunteers, many of whom by then had left the Board and were no longer in a position to make any corrections or follow different procedures, CP 7-8. They threatened these volunteers with a lawsuit that they promised would be "***complicated, burdensome and expensive***," CP 303-05 (emphasis added). And they chose litigation without even trying to resolve the matter through a Co-op membership vote. CP 170-73. The Respondents' First Amendment activity is not incidental to the parties' dispute— it is at the heart of the dispute.

2. Appellants Failed to Show by Clear and Convincing Evidence a Probability of Prevailing on their Claims.

Because the Boycott qualified as speech protected by RCW 4.24.525, Appellants had to show by "clear and convincing evidence" a "probability" of prevailing on their claims for *ultra vires* and breach of fiduciary duty. RCW 4.24.525(4)(b); *see also Aronson*, 738 F. Supp. 2d at

1112. The trial court correctly found Appellants failed to do so.

Appellants primarily argue that the Board lacked authority to support the Boycott without the staff's consensus. They base their claim on the Boycott Policy (which allows staff-initiated boycott proposals if the idea enjoys unanimous staff support) by arguing that breaking the deadlock among staff members was *ultra vires* and violated the Board's fiduciary duties.

These theories fail under fundamental tenets of corporate governance. First, the Boycott Policy does not (and could not) contravene the Board's authority under the Co-op's Bylaws and Washington law to direct the Co-op's affairs. Second, the Board's vote, which broke the deadlock, did not violate the plain language of the Boycott Policy.

a. The Board Was Authorized to Break the Staff Deadlock.

Appellants claim the Board lacks authority to resolve staff deadlocks on a proposed boycott. Appellants' Br. at 10. This argument conflicts with the Bylaws and, if accepted, would grant the staff powers superior to those of the Board — indeed, it would empower a single staff opponent to immobilize the Board, in violation of well-established law.

Interpretation of bylaws and other documents governing a corporation are questions of law. *See Roats v. Blakely Island Maint.*

Comm'n, Inc., 169 Wn.App. 263, 273-74, 279 P.3d 943 (2012); *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 859, 567 P.2d 218 (1977) (bylaws); *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956) (bylaws of a non-profit home-owners association).

Here, the Bylaws could not be clearer. They direct that "[t]he affairs of the cooperative shall be managed by a Board of Directors." CP 57. They broadly authorize the Board to "***adopt major policy changes***;" "***adopt, review, and revise Co-operative plans***;" and "***resolve organizational conflicts*** after all other avenues of resolution have been exhausted." CP 58 (emphasis added). By contrast, the Bylaws delegate to the staff various operational functions such as: "keep[ing] the store functioning and open during regular hours;" "keep[ing] accounting records;" and "maintain[ing] all facilities in good repair and in sanitary and safe condition." CP 57. Indeed, the staff must "carry out Board decisions...made in compliance with these bylaws." CP 59. The 1993 Boycott Policy, in contrast, governs the procedure for ***staff*** to make boycott decisions. CP 106-07. Nothing in the Policy denies the Board the ability to resolve an impasse or to support a boycott, or to do either, if desired, without ***any*** staff input. *Id.*

This result is also consistent with past Co-op practice and the Board's long history of acting on operational and merchandising matters.

CP 42-43. In some cases, the Board simply decided the matter without staff involvement; in others, it first referred the matter to the staff for research, analysis, feedback or initial decision. CP 78-83. Here, when a staff committee asked for Board intervention after more than a year of unsuccessful deliberation, the Board remanded the matter to the full staff. CP 44-45. When the staff again failed to reach consensus, it "resolved [an] organizational conflict[]," "adopted [a] ... Cooperative plan[]," "adopt[ed] major policy changes," and "managed ... [t]he affairs of the cooperative" to break the deadlock. *Id.*, CP 57-58. The Boycott Policy does not abdicate to the staff these Board powers. The trial court did not err by so finding. RP 20-23.

Moreover, state law precludes granting a corporate staff power superior to that of the board of directors. Pursuant to the Washington Nonprofit Corporation Act, "[t]he affairs of a corporation shall be managed by a board of directors." RCW 24.03.095. A failure to manage would be an abdication and a breach of fiduciary duties; by definition, managing is not.

In short, Appellants may disagree with the Board's decision to boycott Israeli goods, but their argument that it lacked authority wholly fails as a matter of law, as correctly held by the court below.

b. To the extent Appellants Argue *Ultra Vires* on Appeal, Their Claim Fails.

Appellants appear to have abandoned their *ultra vires* argument on appeal, and therefore have waived it. But even if the Court reaches this issue, this claim, too, is unfounded. "The phrase '*ultra vires*' describes corporate transactions that are outside the purposes for which a corporation was formed and, thus, beyond the power granted the corporation by the Legislature." *Hartstene Pointe Maint. Ass'n v. Diehl*, 95 Wn. App. 339, 344-45, 133 P.2d 300 (1999) (citation omitted). "*Ultra vires* acts are those performed with ***no legal authority*** and are...void on the basis that no power to act existed, even where proper procedural requirements are followed." *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010) (emphasis added). An argument that a board "did not conform with the governing documents of the corporation...is not a challenge to the authority of the corporation, but only to the method of exercising it." *Hartstene Pointe,* 95 Wn. App. at 345. Such an argument thus does not allege *ultra vires* acts. *Id.*

Further, the burden of proof to satisfy a *prima facie* case of *ultra vires* requires Appellants to show the Co-op lacked authority to engage in the Israeli Boycott ***at all***. *South Tacoma Way*, 169 Wn.2d at 123. It is uncontroverted that the Co-op had the power to boycott Israeli goods.

Appellants have never alleged it did not; in fact, they asserted they would respect a boycott of Israeli goods approved by other means. CP 13. Appellants' *ultra vires* claim, even if the Court considers it, is meritless.

c. The "Business Judgment Rule" Immunizes the Board Members.

Even if there were a valid question about the propriety of the Board's Boycott decision, the business judgment rule immunizes its members because they acted in good faith. "Unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence), courts generally refuse to substitute their judgment for that of the directors." *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). "A corporation's directors are its executive representatives charged with its management and the courts will not interfere with the reasonable and honest exercise of the directors' judgment." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 895, 167 P.2d 610 (2007). Because the Board acted well within its powers to support the Boycott, the business judgment rule insulates its members from liability.[13] Appellants did not allege, let alone provide any evidence, showing fraud, dishonesty or incompetence among Respondents.

[13] By definition, the business judgment rule grants the Co-op Board authority to interpret and apply its own Bylaws and other governance documents. If the Board has express authority to "resolve[] an organizational conflict," its decision resolving an organizational conflict is an obvious exercise of business judgment.

Additionally, under Washington law, "a member of the board of directors or an officer of any nonprofit corporation ***is not individually liable for any discretionary decision*** or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence." RCW 4.24.264(1); *see also Barry v. Johns*, 82 Wn. App. 865, 869, 928 P.2d 222 (1996). Appellants have not alleged any facts that would suggest such negligence, and here the Board's lengthy process and its eventual decision to approve the Boycott suggest just the opposite.[14] The Board simply made a discretionary decision within its powers and duties under the Bylaws, policies and established past practice.[15] Consequently, RCW 4.24.264 immunizes the individual directors from liability.[16]

d. The Trial Court Properly Ruled That Appellants Failed to Meet Their Burden of Proof.

Given this well-established authority, the trial court did not err

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[14] "Gross negligence is failure to exercise slight care. . . . It is negligence substantially and appreciably greater than ordinary negligence." *Kelley v. State*, 104 Wn. App. 328, 333, 17 P.3d 1189 (2000) (internal quotation marks and citations omitted).

[15] The Boycott Policy by its own terms required no more than review of the proposed boycott by the entire staff, rather than any single head of an affected department. The Board returned the matter to the staff, for full staff review, but that caused a recurrence of the deadlock. The Bylaws authorized the Board, and only the Board, to resolve such an organizational dispute. So the Board violated neither its Bylaws nor its Boycott Policy by resolving the deadlock.

[16] Washington's Nonprofit Corporations Act departs from the Washington Business Corporations Act, RCW 23B, *et. seq.*, which explicitly allows individual liability when directors breach duties of care. *See, e.g.*, RCW 23B.08.310. This difference further indicates the Legislature intended to limit the liability of nonprofit directors.

when it held that Appellants failed to show by clear and convincing evidence a probability of prevailing on their claims. The interpretation of the Co-op's Bylaws and the Boycott Policy required the court to engage in analysis similar to a dispute over contract interpretation. *See Roats*, 169 Wn.App. at 273-74; *Langan*, 88 Wn.2d at 859. Because it required looking at the parties' intent, based on the undisputed language in these documents, the court had no need to weigh any extrinsic evidence.[17] *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005) (stating, "when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used").[18] If the document's language is clear and unambiguous, there is no place for extrinsic evidence of intent. *Id.* In any event, Appellants failed to present any admissible evidence to support their interpretation, so there were no evidentiary conflicts. *See, e.g.*, RP 23, 26 (noting that Appellants "offered no evidence that the Board

[17] Appellants claim the statute requires the court to accept as true all evidence favoring the plaintiffs. Appellants' Br. at 24. They are only half-right, because in fact the statute directs the court to consider "opposing affidavits." RCW 4.24.525. Consequently, the evidence of both the moving and nonmoving parties merits consideration. And of course, to be considered, the evidence must be competent and relevant.

[18] Indeed, because the meaning of a written contract is a question of law, the declarations are incompetent. *See Wash. State Phy. Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (court improperly considered declarations of attorneys and others on a legal issue); *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 949-50, 37 P.3d 1269 (2002) (rejecting declaration of the party's understanding of an insurance contract as irrelevant); *Hearst*, 154 Wn.2d at 503-4 (courts interpret contracts based on what was written "rather than on the unexpressed subjective intent of the parties").

exempted boycott matters from [its] power[s] and that the undisputed evidence showed the Board followed the policy by resubmitting the issue to staff and acting when the staff failed to act).

Appellants claim without explanation that the court drew "inferences in the moving party's favor." Appellants' Br. at 2. In fact, the record shows that the court's ruling was made as a matter of law by interpreting the Bylaws and Boycott Policy. RP 20-27. Nevertheless, Appellants mischaracterize the court's oral ruling and the evidence to claim that factual questions existed. For example, they claim there was a question of fact as to whether there was a "nationally recognized boycott" and that the trial court resolved the issue by agreeing there was no nationally recognized boycott. Appellants' Br. at 23. To the contrary, although not crucial to its holding, the court ruled that there was such a movement, RP 23-24, CP 293-94, and that the Board had considered the substantial evidence of it presented at two Board meetings.[19] RP 25, CP 115-19, 469-70, 476-515. The evidence included a list of about 380 state-level member organizations of the U.S. Campaign to End the Israeli

[19] Appellants' arguments about whether the Boycott was national in scope (Appellants' Br. at13-15) are also unavailing because, as the trial court correctly found, how widely a boycott is accepted does not determine whether it is national in scope. RP 24. Furthermore, under the business judgment rule, this decision was the Board's.

Occupation, across the country, including five businesses in Olympia.[20] CP 470, 517-44, 478-516.

In sum, the trial court did not err by ruling the Respondents met their initial burden of proving their speech was "lawful conduct in furtherance of the constitutional right of free speech ... [or] petition,"[21] RCW 4.24.525(2)(e), and that Appellants failed to show by clear and convincing evidence a probability of prevailing on their claims.

C. The Court Should Reject Appellants' Constitutional Challenges to the Anti-SLAPP Statute.

Appellants seek to evade the anti-SLAPP statute by offering a kitchen sink of arguments that it is unconstitutional. Their burden of persuasion is great: "[I]t is well established that statutes are presumed constitutional and that a statute's challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional ***beyond a reasonable doubt***." *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010) (emphasis added). A court will not strike a statute unless it

[20] The Boycott proposal included detailed written evidence that the boycott was both national and international in scope, showing endorsements by hundreds of national organizations and hundreds of international organizations, including Israeli organizations; European governments, banks, and state pension funds; and world-famous U.S. and foreign citizens, ranging from Naomi Klein to Archbishop Desmond Tutu, from Gil Scott-Heron to Elvis Costello and Santana. CP 45-46, 469; 477-79, 483-84, 495-516.

[21] Appellants claim the court contravened a "rule" requiring judicial caution in deciding whether a suit is a SLAPP. Appellants' Br. at 27. There is no such "rule," which, if it existed, would violate the Legislature's direction that courts construe the statute liberally. S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010); *Aronson*, 738 F. Supp. 2d at 1110.

is "fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id.* at 606. Appellants did not meet this high bar.

Courts have unanimously upheld the constitutionality of anti-SLAPP statutes—including California courts, which interpret the law on which Washington's anti-SLAPP statute was modeled. *See, e.g., Castello,* 2010 WL 4857022, at *4; *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 507, 52 P.2d 685 (2002) (California statute does not violate constitutional right to petition); *Guam Greyhound v. Brizill*, No. CVA07-021, 2008 WL 4206682 (Guam Sept. 11, 2008) (Guam statute; same); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996) (Rhode Island statute does not violate right of access); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995) (California statute; same); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 338 (Utah 2005) (Utah statute not bill of attainder); *Sandholm v. Kuecker*, 962 N.E.2d 418, 434-435, (Ill. 2012) (Illinois statute; guarantee to a remedy); *Nexus v. Swift*, 785 N.W.2d 771 (Minn. Ct. App. 2010) (Minnesota statute does not violate due process and jury trial rights); *Lee v. Pennington*, 830 So. 2d 1037 (La. Ct. App. 2002) (Louisiana state does not violate equal protection and due process rights). *See also* Bruce E.H. Johnson and Sarah K. Duran, *A View from the First*

Amendment Trenches: Washington's New Protections for Public Discourse and Democracy, 87 Wash. L. Rev. 495, 523-24 (2012).

As the California Supreme Court has explained, an anti-SLAPP statute "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech" but merely "subjects to potential dismissal only those causes of action to which the plaintiff is unable to show a probability of prevailing on the merits." *Equilon Enters.*, 29 Cal. 4th at 63. Another California court stated that the legislature may "reasonably conclude [SLAPP] suits should be evaluated in an early and expeditious manner." *Lafayette Morehouse*, 37 Cal. App. 4th at 865-66.

Nevertheless, Appellants claim Washington's anti-SLAPP statute is unconstitutional because it violates separation of powers and infringes the right of access. Appellant's Br. at 32-44. Their objections center on the statute's presumptive discovery stay and its requirement that plaintiffs demonstrate a probability of prevailing by presenting clear and convincing evidence. [22] These arguments are flawed.

1. The Statute's Automatic Stay Provision Is Constitutional.

a. The Discovery Stay Does Not Violate Separation of Powers.

Courts are "vested with judicial power from article IV of our state

[22] Here, the clear and convincing standard is irrelevant because the issue was decided as a matter of law based on undisputed documents.

constitution and from the legislature under RCW 2.04.190." *City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776 (2006). Article IV's inherent powers include the power to govern court procedures and adopt rules of procedure. *Id.* When a court rule conflicts with a state statute, the court must attempt to harmonize them and give effect to both. *Id.*

In enacting RCW 4.24.525, the Legislature found it "is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them ***without fear of reprisal through abuse of the judicial process***." *Id.* (emphasis added). To combat such abuse, it included an automatic discovery stay upon the filing of a special motion to strike. *See* RCW 4.24.525(5)(c). However, the law allows courts to permit specified discovery "on motion and for good cause shown." *Id.* Suits of this nature, in particular, run the risk of abusive discovery. As Justice Rehnquist has noted in a similar case:

> The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. ... [T]o the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so

> representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975). *See also Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 193, 25 Cal. Rptr. 3d 298, 106 P.3d 958 (2005) (stating, "[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights"). California's courts, interpreting that state's anti-SLAPP statute, have held that the discovery stay does not violate the separation of powers doctrine. *See Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1129, 52 Cal. Rptr. 3d 185 (2006).

Appellants argue that RCW 4.24.525 and the Civil Rules conflict, but, in fact, as the trial court recognized here, they are fully consistent. The anti-SLAPP law requires a showing of good cause, which is the same standard as Washington's CR 56(f), which allows a plaintiff faced with a summary judgment motion to obtain discovery that is "essential to justify his opposition."[23] *See New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090,

[23] California courts have long applied the good-cause exception in California's anti-SLAPP statute which, similar to Washington's anti-SLAPP law, calls for a discovery stay except for "good cause shown." *See* Cal. Civ. Code § 425.16(g); *see also Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 183, 118 Cal. Rptr. 2d 330, (2002). The good cause standard is discussed in more detail *infra*.

1101 (C.D. Cal. 2004) (comparing California's "good cause" anti-SLAPP statute with the Federal Rule 56(d)).

In any event, the law cannot violate separation of powers because it does not require ***the court*** to do anything – rather it directs a ***party*** to ask permission before pursuing discovery after the dispositive anti-SLAPP motion is filed, a substantive protection that is especially important for ordinary citizens seeking to vindicate their constitutional rights without "complicated, burdensome and expensive" litigation.

For their argument, Appellants rely primarily on *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979-80, 216 P.3d 374 (2009). Appellants' Br. at 33-34. There, the court struck down a statute that required plaintiffs to submit a medical expert's certificate of merit ***before*** filing a malpractice lawsuit. The statute therefore conflicted with Washington's liberal pleading rules. The anti-SLAPP statute, by contrast, does not suffer this flaw – it imposes no preconditions to filing a lawsuit, and it allows any needed discovery "on motion and for good cause shown." RCW 4.24.525(5)(c). Thus, there is no merit to Appellants' claim that the statutory balance deprived them of all rights of discovery.[24]

[24] Appellants' claim (Appellants' Br. at 34) that the anti-SLAPP statute's stay of discovery requires them to prevail on the anti-SLAPP motion ***and*** demonstrate good cause to obtain discovery is simply inaccurate, as the statute provides for discovery for

Appellants' reliance on *AR Pillow Inc. v. Maxwell Payton, LLC*, No. C11-1962RAJ, 2012 WL 6024765 (W.D. Wash. Dec. 4, 2012), is similarly misplaced. In *AR Pillow*, the court was not asked to consider the issue here: Whether the automatic stay was constitutional because it violates the separation of powers doctrine. The court's holding that the automatic discovery stay conflicts with Federal Rule 56 was based on the *Erie* doctrine and the Supremacy Clause and thus is irrelevant here, where that Clause has no application. Here, the object is "to harmonize,"[25] a wholly different task than policing the *Erie* divide, especially given that the Legislature is on parallel footing with the state's courts.

b. The Discovery Stay Does Not Violate the Right of Access

Appellants also claim the discovery stay violates their right of access to the courts, relying again on *Putman*. Again, the statute there did not include a good cause requirement to obtain discovery and as a result, the court did not consider the issue here: Whether an automatic discovery stay, as balanced by a good cause exception, violates the right of access.

Indeed, in *In re Estate of Fitzgerald*, 172 Wn. App. 437, 449, 294 P.3d 720 (2012), the Court of Appeals rejected a nearly identical argument

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good cause, "notwithstanding" the discovery stay in place until the ruling on the anti-SLAPP motion. RCW 4.24.525(5)(c).

[25] It is obvious that the anti-SLAPP statutory language closely harmonizes with the Civil Rules, given that CR 26(c) applies the identical "good cause" language for the issuance of "any order which justice requires" affecting the scope and timing of civil discovery.

involving the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A. For reasons similar to the anti-SLAPP law, TEDRA limits discovery to:

> (1) A judicial proceeding that places one or more specific issues in controversy that has been commenced under RCW 11.96A.100, in which case discovery shall be conducted in accordance with the superior court civil rules and applicable local rules; or
>
> (2) A matter in which the court orders that discovery be permitted on a showing of good cause ...

RCW 11.96A.115. The appeals court soundly rejected the petitioner's argument: "The trial court retains the discretion to permit discovery—in appropriate circumstances—before determining whether the creditor's claims are time barred. Accordingly, unlike the certificate of merit requirement in a medical malpractice suit, the TEDRA discovery rules do not unconstitutionally limit a creditor's access to the courts." *Id.* at 449 & n. 8.

Similarly, the anti-SLAPP law does not deny discovery altogether. Appellants may pursue any appropriate discovery after the filing of a motion to strike simply by showing good cause.[26] *See* RCW

[26] Appellants are wrong when they say that CR 26(c) is the only allowable limit on discovery. In *Putman*, Chief Justice Madsen noted in her concurring opinion that there are many other limitations that do not violate the right of access to the courts, including privilege, cost, and pleading requirements. *Id.* at 986. Indeed, the stay here is akin to a

4.24.525(5)(c). This short and very permeable discovery stay does not violate Appellants' right of access to the courts.

c. The Discovery Stay Is Not Unconstitutional as Applied.

Appellants also claim the statute is unconstitutional because it required them to acquire all necessary evidence before filing a lawsuit.[27] Appellants' Br. at 38-39. On the contrary, Appellants needed only enough evidence to show a ***probability*** of prevailing – a *prima facie* case – or to explain what discovery would satisfy this requirement. As the trial court correctly explained: The plaintiffs "have a responsibility to have the facts supporting their contentions that can meet the standards of an anti-SLAPP statute. That's a determination before the lawsuit is filed when it involves these fundamental first amendment freedoms." CP 963. Even so, again, Appellants could have taken discovery if they had simply shown good

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privilege, which the Legislature has the power to create. *See, e.g.*, RCW 5.68.010 (identity of news media's confidential source is absolutely privileged and news media work product is conditionally privileged, and not subject to discovery unless opposing party offers certain proof with convincing clarity); RCW 4.24.250 (proceedings, reports, and records of quality review committee proceedings are privileged and not discoverable).

[27] Whatever the merits of this argument in a different SLAPP case, here, because of the Co-op's consistent dedication to complete transparency, its Bylaws (available on the internet, CP 53-60; 2/23 RP 11; http://www.olympiafood.coop/bylaws.html, last checked May 24, 2013) obligate the staff to "maintain accurate and up-to-date corporate records, articles, Bylaws, Board meeting minutes, membership meeting minutes, staff meeting minutes, and required reports; and make these documents accessible to members." Before they filed this SLAPP, Appellants and their lawyers had 14 months after the Boycott vote to obtain numerous Co-op documents, merely by requesting them. But they let that opportunity pass, and chose instead to pursue "complicated, burdensome, and expensive" litigation against the Board, including demands for formal discovery.

cause to do so, the same standard as under CR 56. This they failed to do. Finally, there was no harm in the denial of discovery because the powers and duties of the Board and Staff are clearly and unambiguously set forth in the Co-op's governing documents, specifically, its Bylaws. Under the rule, the discovery Appellants demanded could not be used to re-interpret the Co-op's Bylaws and Policies.

d. The Statute's Clear and Convincing Standard is Constitutional.

Appellants next argue that the burden the law places on nonmoving parties—to show by clear and convincing evidence a probability of prevailing—also violates separation of powers and right of access. Appellants' Br. at 39-44. But there is no question that Washington's Legislature has the power to modify the common law, *see Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Mktg. Ass'n*, 276 U.S. 71, 89, 48 S. Ct. 291, 72 L.Ed. 473 (1928) ("the present controversy concerns a statute, and a state may freely alter, amend, or abolish the common law within its jurisdiction") and statutory rights and causes of action, *see Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 666, 771 P.2d 711 (1989) ("It is entirely within the Legislature's power to define parameters of a cause of action and prescribe factors to take into consideration in

determining liability.").[28] "The argument that a state statute stiffens the standard of proof of a common law claim does not implicate" the right of access to the courts. *Garcia v. Wyeth-Ayerst Labs*, 385 F.3d 961, 967-68 (6th Cir. 2004) (upholding constitutionality of statute immunizing drug manufacturers from product liability if drug was approved by FDA).

There is also no dispute that Washington's lawmakers may create different burdens of proof for distinct claims. Indeed, the Legislature has established convincing clarity requirements in other settings, where (as here) that heightened burden of proof promotes important public policy.[29] *See, e.g.*, RCW 4.24.730(3) (presumption of good faith for employer's disclosure of employee information rebuttable only on showing of "clear and convincing evidence"); RCW 5.68.010 (2) (journalist work-product may be compelled only if "the party seeking such news or information" shows its relevance and unavailable alternatives "by clear and convincing evidence"); *In re Welfare of A.B.*, 168 Wn.2d 908, 911, 232 P.3d 1104 (2010) (termination of parental rights available when inadequacy proven

[28] Appellants' attack on the clear and convincing evidentiary standard is of no consequence in appeal because the court's dismissal was based completely on the Co-op's governing documents, which are construed as a matter of law.

[29] Indeed, the statutory standard is completely consistent with long-established common law requirements that a defamation plaintiff offer evidence of convincing clarity in opposing a defendant's motion for summary judgment in cases involving matters of public concern. *See, e.g, Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 237, 487, 580 P.2d 642 (1978). Extending the same standard to other lawsuits targeting First Amendment acts is an incremental change in the law well within the Legislature's authority.

by "clear, cogent, and convincing" evidence).

2. RCW 4.24.525 Does Not Violate the Right to a Jury Trial and Is Not Impermissibly Vague.

Lastly, Appellants assert that the anti-SLAPP statute violates their right to a jury trial[30] and is impermissibly vague. Appellants' Br. at 42-43. Appellants raised neither argument in the trial court, CP 317-23, and thus waived each one. *See* RAP 2.5(a); *Brundridge*, 164 Wn.2d at 441. Appellants also fail to adequately develop either argument: "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Request of Rosier,* 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). In any event, each is easily dismissed:

With respect to the jury trial right, "[t]he constitutional right to a jury trial does not prevent all pretrial determinations by a judge; it provides parties presenting claims at law with the right to have triable issues of material fact decided by the jury." *Nexus v. Swift*, 785 N.W.2d at 782 (Minn. App. 2010). "When there is no genuine issue of material fact...summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial." *LaMon v. Butler*, 112 Wn.2d 193, 199-200 n.5, 770 P.2d 1027 (1989) (citations omitted). The Ninth Circuit

[30] Appellants lack standing to make this hypothetical argument because they have no right to a jury trial at all. This is a derivative lawsuit alleging liability for breach of fiduciary duties, which is exclusively a creature of equity. *See Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 147, 744 P.2d 1032 (1987).

likened California's anti-SLAPP motion to a motion for nonsuit or directed verdict, which mandates dismissal when no reasonable jury could find for the plaintiff. *Mindy's Cosmetics*, 611 F.3d at 599 (quoting *Metabolife, Int'l., Inc. v. Warnick*, 264 F.3d 832, 840, 264 F.3d 832 (9th Cir. 2001)). It is well established that a directed verdict does not offend a right to trial by jury. *Galloway v. United States*, 319 U.S. 372, 389-90, 395, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943).

Appellants' vagueness arguments fare no better. This doctrine requires that a statute provide people of ordinary intelligence an opportunity to know what a statute prohibits and include standards clear enough to avoid arbitrary or discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Due process does not require "mathematical certainty." *Id.* at 110. Nothing about the anti-SLAPP law is vague. The statute, like California's, merely requires that the plaintiff offer enough evidence to establish a *prima facie* case, and over more than two decades, California courts have had no difficulty interpreting it. *See Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010) (plaintiff must show complaint is legally sufficient and present prima facie case showing facts that, if believed, would support judgment in favor of plaintiff); *Wilcox*, 33 Cal. Rptr. 2d at 454 (same). Nor should there be any confusion about the

meaning of "clear and convincing," which is also well-established.[31] Application of the convincing clarity test is very simple: "[T]he judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986) (discussing the clear-and-convincing standard of proof in a defamation case and saying "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence"); *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 41, 515 P.2d 154 (1973) (requiring proof of convincing clarity); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (evidence in a defamation case must be clear and convincing).

As noted by the trial court, the anti-SLAPP statute requires responding parties to establish a prima facie case with evidence that is "clear and convincing under the law." RP 13, 19. Of the nearly 20 published cases that have interpreted RCW 4.24.525, none has expressed any concern about vagueness.

[31] Washington's appellate courts, which have adjudicated cases involving the clear and convincing clarity requirement for four decades, have had no difficulty applying this burden of proof.

D. The Trial Court Properly Struck the Hearsay Paragraphs in Appellants' Declarations and Denied Their Request for Discovery.

Appellants challenge two of the trial court's evidentiary rulings: (1) denial of discovery and (2) the striking of inadmissible hearsay from two declarations proffered by Appellants. Appellate courts reverse evidentiary rulings only if there is a "manifest abuse of discretion." *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). This exists "only when no reasonable person would take the view adopted by the trial court." *Castellanos*, 132 Wn.2d at 97. Only errors that prejudice the outcome warrant remedy. *In re Ward's Estate*, 159 Wn. 252, 257, 292 P. 737 (1930). Appellants' attack fails to meet any of these standards.

1. Appellants Failed to Show Good Cause to Pursue Discovery.

The anti-SLAPP statute automatically stays discovery pending the outcome of a motion to strike, unless the SLAPP plaintiff shows good cause. RCW 4.24.525(c). This provision supports the statute's basic purpose: to protect defendants from the undue burden and expense of litigation based on their speech and petitioning activities. S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010); see also *Varian*, 35 Cal. 4th at 193 ("The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights").

Good cause requires Appellants to show the evidence they seek is necessary to evaluate the defendant's motion *and* that there is a specific need for the evidence to establish their *prima facie* case. *See 1-800 Contacts*, 107 Cal. App. 4th 568, 593-594, 132 Cal. Rptr. 2d 789 (2003); *Sipple v. Found. for Natl's Progress*, 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677 (1999). Allowing discovery absent such a showing "would subvert the intent of the anti-SLAPP legislation." *Sipple*, 71 Cal. App. 4th at 247. The law also requires the plaintiff to show the evidence is not readily available from other sources or through informal discovery. *Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156, 1162 (2004). Moreover, if the special motion raises legal and factual defenses, the trial court must rule on the legal defenses "before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings" relating to the other defenses. *Id.*

Again, this standard is basically the same as CR 56(f), which allows a party faced with a summary judgment motion to seek a continuance to take discovery "essential to justify his opposition." The nonmoving party must show "how additional discovery would preclude summary judgment and why a party cannot immediately provide specific facts demonstrating a genuine issue of material fact." *Hewitt v. Hewitt*, 78 Wn. App. 447, 455-56, 896 P.2d 1312 (1995) (internal quotation marks

omitted).

Appellants did not meet this standard. In the trial court, they sought to depose two individuals who had submitted declarations in support of defendants' special motion to strike and a third defendant who they claimed "has abundant evidence regarding the Board's process, thinking, purpose, and understandings regarding the Boycott Policy and the Israel Boycott and Divestment Policies at the time those policies were adopted." CP 364. They also sought access to "***all documents*** in possession of each of the [16] Defendants and the Co-op relating ***in any way*** to the Co-op's Boycott Policy and actions taken related thereto." CP 363 (emphasis added). They did not show the evidence was unavailable elsewhere. And they asserted generally that they needed this discovery to respond to the special motion to strike, but they failed to show what specific information or facts were needed and essential for their response. CP 365.

Instead, Appellants said they needed the depositions to "test the veracity of Defendants' voluminous factual allegations." CP 365. However, it is well-settled that parties may not demand discovery after the filing of a dispositive motion simply to "test" an opponent's evidence or to impeach a witness. *See, e.g., 1-800 Contacts*, 107 Cal. App. 4th at 593; *Sipple*, 71 Cal. App. 4th at 247.

Appellants merely identified broad topics for exploration, rather than specific needs. CP 365. In denying Appellants' discovery request, the trial court found the discovery sought was "broad-ranging" and "not focused." RP 20. Before this Court, Appellants merely complain that they were held "to an unattainably higher standard that effectively deprived them of any right to discovery at all." Appellants' Br. at 46. Putting aside their insistence that they were deprived of "any right to discovery," their argument falls far short of showing that the trial court's ruling was a "manifest abuse of discretion." *Luvene*, 127 Wn.2d at 706-07.

2. The Court Properly Struck the Hearsay Portions of Appellants' Declarations.

The trial court properly refused to consider the hearsay aspects of declarations of two former Board members purporting to divine the intentions behind the Board's decision to enact the 1993 Boycott Policy. CP 297 at ¶ 3, CP 337 at ¶ 4. The evidence is inadmissible because (1) extrinsic evidence cannot be used to alter the meaning of an unambiguous document, *Hearst*, 154 Wn.2d at 503-04; (2) the evidence was hearsay to the extent it opined on the intentions of *other* Board members; and (3) a party's unilateral and subjective intentions are irrelevant to the interpretation of a clear and unambiguous writing, *id.*; *see also Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Appellants' reliance on *Snohomish County Fire District No. 1 v. Snohomish County*, 128 Wn. App. 418, 115 P.3d 1057 (2005), is misplaced because there, the evidence was admitted for non-hearsay purposes. *Id.* at 422. Here, by contrast, Appellants offered the testimony to prove the truth of the matter asserted: the meaning of the Bylaws and Boycott Policy. The trial court did not abuse its discretion when it excluded the plainly incompetent testimony, relying instead on the Co-op's official documents.[32] *Luvene*, 127 Wn.2d at 706-07.

E. The Trial Court Properly Imposed the Anti-SLAPP Statute's Awards.

RCW 4.24.525(6)(a)(i) mandates an "award to a moving party who prevails, in part or in whole, ... [c]osts of litigation and any reasonable attorneys' fees incurred in connection with each motion on which the moving party prevailed." The statute also requires the Court to award to "a moving party who prevails an "amount of ten thousand dollars, not including the costs of litigation and attorney fees." *See* RCW 4.24.525(6)(a)(ii); *Castello*, 2010 WL 4857022, at *11 (awarding $10,000 to both named defendants); *Phoenix Trading,* 2011 WL 3158416 at *15 ($30,000 for three defendants); *AR Pillow*, 2012 WL 6024765 at *7 (same). Here, the court awarded Respondents their attorneys' fees, costs

[32] Appellants also claim the court erred because Respondents "did not specifically object to those declarations and Appellants had no opportunity to address their admissibility" but cite no authority as to why Respondents' objection (*see* CP 411 n.7) did not suffice.

and the statutory amount of $10,000 per prevailing party. CP 1196. Appellants argue (1) they cannot be personally liable for the award; and (2) only a single $10,000 penalty should be imposed. Appellants' Br. at 46. Both arguments lack merit.

1. Fees, Costs, and Statutory Damages Are Proper against Plaintiffs.

Appellants claim the Co-op, not they, should pay attorneys' fees on the theory that the Co-op must pay members' legal fees. The anti-SLAPP law's purpose in deterring lawsuits that chill speech and public participation would be wholly undermined by Appellants' proposal to shift the fees, costs, and statutory awards to a wholly innocent entity. Moreover, aside from the fact that rewarding Appellants for bringing a SLAPP would be absurd, basic corporate law actually favors liability for Appellants here. "A shareholder who loses on his or her derivative claims risks having to pay the reasonable expenses incurred by the corporation in its defense." 5 *Moore's Federal Practice* §23.1.17(2) (3d ed. 2011); *Sletteland v. Roberts*, 64 P.3d 979, 982 (Mont. 2003) (awarding fees against plaintiff who brought derivative suit without reasonable cause); *Callanan v. Sun Lakes Homeowners' Ass'n No. 1, Inc.*, 656 P.2d 621, 625-26 (Ariz. App. 1982) (same).

The record is clear that it was Appellants, not the Co-op, who

brought this unsuccessful lawsuit to retaliate against 16 volunteer former and then-current Board members. Appellants, not the Co-op, pursued these claims, demanded "complicated, burdensome and expensive" discovery, and opposed the motion to strike. Appellants cannot suddenly pretend they are ***not*** the plaintiffs in this action, and protest that they should be relieved from all responsibility for their SLAPP.

Furthermore, to maintain standing, plaintiffs in derivative suits[33] must not assert positions adverse to the corporation. "Perhaps the most important element to be considered [in determining fair and adequate representation] is whether plaintiff's interests are antagonistic to those he is seeking to represent." *Sweet v. Bermingham*, 65 F.R.D. 551, 554 (S.D.N.Y. 1975) (quoting 7A Wright & Miller, *Federal Practice and Procedure* § 1833). "If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed." *Id.* Appellants cannot shift to the Co-op their personal liability under the anti-SLAPP law.

RCW 23B.07.400 (for-profit entities) and RCW 24.03.040 (non-profit entities) do not prevent an award against Appellants individually. They do not conflict with RCW 4.24.525. Rather, the statutes are cumulative. If a plaintiff brings a derivative suit attacking the exercise of free speech rights on a matter of public concern as Appellants did here the

[33] Contrary to appellants' claim, the court did not rule on whether Appellants' lawsuit was a proper derivative suit. CP 1194-96.

anti-SLAPP law applies by its express terms. If that same plaintiff brings a derivative suit without a free speech element, fees may be awarded if there is no reasonable cause for the claim. Neither RCW 23B.07.400 nor 24.03.040 precludes an award of fees.

Even if the statutes did conflict, the anti-SLAPP law would prevail. "When statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls." *State v. Hirschfelder*, 170 Wn.2d 536, 546, 242 P.3d 876 (2010). In this case, the anti-SLAPP law is both (1) more specific *and* (2) mandated to be liberally construed. *See* S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010). Furthermore, the anti-SLAPP law itself notes that the mandatory statutory awards shall be made "***without regard to any limits under state law***." RCW 4.24.525(6)(a) (italics added).

2. Each Prevailing Respondent Is Due the Statutory Award.

Appellants also argue the statutory amount of $10,000 should be awarded to a single entity, the Co-op Board, not each individually named defendant. Appellants claim (without citation) that they were required to name all of the individual members as defendants because court rules and statutes required them to do so. Appellants' Br. at 48.

Appellants alleged a breach of fiduciary duties against and sought

damages from ***all*** 16 Respondents. CP 8, 16-17. If Appellants had prevailed, ***all*** would have been individually liable. And ***all*** would have been put to the expense and effort of defending against this lawsuit. In enacting RCW 4.24.525, the Legislature recognized that SLAPP suits are expensive, harassing and time-consuming. S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010). *See also Castello*, 2010 WL 4857022, at *11 (award for each defendant); *Phoenix Trading*, 2011 WL 3158416 at *15 (same); *AR Pillow*, 2012 WL 6024765 at *7 (same); Johnson & Duran, *supra,* at 517-18 (discussing legislative support for a statutory penalty per defendant). Respondents have learned this truth firsthand.[34]

Appellants' argument that the directors would have a right to be indemnified for their legal expenses is disingenuous. Under Co-op policy, indemnification is available where a director acts in good faith and in the interests of the Co-op. CP 59. Appellants' Complaint alleges the Respondents acted ***in bad faith*** and ***contrary*** to the Co-op's interests, and seeks to hold Appellants liable to the company. CP 14-17. Appellants' complicated tail-chasing scenarios do not negate Respondents' clear right to relief on the facts of this case, especially given the Legislature's instruction that these anti-SLAPP remedies are to be liberally construed.

[34] Appellants' calculated decision to sue so many people is further evidence that their motive was to punish Respondents for speech rather than to enforce Co-op policy, and to discourage others from taking the same position.

Because Appellants targeted all 16 Respondents with their SLAPP claims, the statute requires that each receive $10,000. Nothing in the statutory language or history warrants any other outcome.

F. Respondents Request Their Attorneys' Fees on Appeal.

The anti-SLAPP statute's award is mandatory for any fees and costs "incurred in connection with each [anti-SLAPP] motion on which the moving party prevailed," RCW 4.24.525(6). The Board members are therefore entitled to their attorneys' fees on appeal if the Court affirms the trial court's decision.[35] *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) ("[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal."); *see also* RAP 18.1(a). Accordingly, Respondents respectfully request fees, costs, and statutory awards for their protected free-speech activity on appeal.

IV. CONCLUSION

This lawsuit cannot survive First Amendment scrutiny. Appellants sought to punish Co-op Board members for promoting a different view-point about Americans' dealings with Israel. "Under the First Amend-ment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges

[35] The Court should deny Appellants their fees because no evidence suggests that Respondents' special motion to strike was frivolous or to delay proceedings.

and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2987, 41 L. Ed. 2d 789 (1974).

Appellants' proper remedy, provided in the Co-op's Bylaws and other governing documents, was to collect signatures on a ballot petition and offer their own opinions about the Israeli-Palestinian conflict. Instead, they threatened "complicated, burdensome, and expensive" litigation and then filed this SLAPP in a futile effort to enlist the courts in punishing Respondents for their exercise of Board judgment in adopting the Boycott. Under Washington law, the trial court properly dismissed their complaint with prejudice, and its decision should be affirmed on appeal, with an award of reasonable attorneys' fees.

RESPECTFULLY SUBMITTED this 24th day of May, 2013.

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PROOF OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing document, BRIEF OF RESPONDENTS, to be served in the manner indicated upon the following counsel of record:

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Evelyn Dacuag

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Cc: Duran, Sarah; Galloway, Angela; Johnson, Bruce
Subject: RE: Sent on Behalf of Sarah K. Duran RE: Davis et al v. Cox et al; No. 87745-9 - Brief of Respondents

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Subject: Sent on Behalf of Sarah K. Duran RE: Davis et al v. Cox et al; No. 87745-9 - Brief of Respondents

Attached for filing is the Brief of Respondents submitted by:

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