

Appeals court upholds dismissal of anti-BDS lawsuit against Olympia Food Co-op

Phan Nguyen on April 8, 2014 30 Comments



Olympia Food Co-op members showing their support for the Co-op in the face of the anti-BDS lawsuit, August 2013. (Justin Mauger)

Yesterday the Washington State Court of Appeals upheld the dismissal of the anti-BDS lawsuit against the Olympia Food Co-op. The suit had been filed by five Co-op members in 2011 to force the Co-op to rescind its boycott of Israeli goods. Aside from determining additional attorney fees, the appellate court decision may conclude the legal track of anti-BDS efforts against the 15,000-member food cooperative.

The Olympia Food Co-op, based in Olympia, Washington, was the first US grocery store to publicly honor the Palestinian boycott call in 2010. A year later, the resultant legal attack became the first anti-BDS lawsuit. In Feb. 2012, the lawsuit was dismissed as a violation of Washington State's anti-SLAPP legislation, which prohibited lawsuits strategically designed to inhibit free speech—a ruling now affirmed in the court of appeals.

Although the five plaintiffs still have the right to appeal to the state supreme court, it is unlikely to produce a different result, as the supreme court had already refused to hear the case prior to the court of appeals decision.

For the duration of the court case—in which the plaintiffs claimed that the lawsuit was not a defense of Israel but a procedural challenge—several pro-Israel interests became involved, ranging from the multimillion-dollar Israel advocacy group StandWithUs, to the Israeli Ministry of Foreign Affairs, and most recently the Lawfare Project.

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[StandWithUs and Israeli government involvement finally acknowledged](#)

In the past, both StandWithUs and the plaintiffs have downplayed the involvement of the Israeli government and StandWithUs in the lawsuit. This no longer appears to be the case, as an “emergency response” page on the StandWithUs website is surprisingly candid:

In 2011, StandWithUs filed a lawsuit against the Olympia Food Co-op in Olympia, Washington, to nullify its boycott of Israeli-made products. The lawsuit was the byproduct of the partnership between StandWithUs and the Israeli Ministry of Foreign Affairs, spearheaded by Israeli Deputy Foreign Minister Danny Ayalon, and brought against the Olympia Food Co-op and its board for violating their own policies.

This statement contradicts prior assertions made by StandWithUs to the *Forward* and *Electronic Intifada*, as well as claims made in signed declarations filed by the plaintiffs in court. However, thanks to StandWithUs meeting notes accidentally posted online, activists learned about these connections before the lawsuit was even filed.

The Lawfare Project gets involved

A new addition to the Israel lobby's participation in the lawsuit, however, is the Lawfare Project, a relatively small anti-BDS outfit based in New York. On Jan. 27, 2014, the Lawfare Project submitted an *amicus curiae* brief to the appeals court that sided with the plaintiffs' claim that the anti-SLAPP statute had been incorrectly applied.

In order to make the case, the Lawfare Project presented itself to the court as an organization with a deep interest in SLAPP laws, while concealing its Israel-apologist agenda.

Yet a closer examination of the Lawfare Project's workings make this agenda clear:

The Lawfare Project was registered as a nonprofit in 2010, receiving startup money from the foundation of the Conference of Presidents of Major Jewish Organizations. In fact, the Lawfare Project is housed in the same building floor as the Conference of Presidents—a floor also shared with the World Zionist Organization and the American Zionist Federation.

The Lawfare Project also receives donations from the Jewish Communal Fund (a donor advised fund) and the MZ Foundation, headed by Myron Zimmerman, sugar daddy for several Israel advocacy organizations such as StandWithUs and the Zionist Organization of America.



Myron Zimmerman (left), who funds both the Lawfare Project and StandWithUs, is pictured here with StandWithUs founders Esther Renzer and Roz Rothstein (second and fourth from left), along with Elon Gold and Bret Stephens. (StandWithUs fundraising gala, 2013)

The Lawfare Project claims its interest in the Co-op lawsuit is due to

an egregious example of the misuse of [Washington's anti-SLAPP law] to bar the access to justice, which also constitutes an unconstitutional legislative infringement on the separation of powers.

However, the [only three references](#) to anti-SLAPP legislation on the Lawfare Project's website are all favorable. Furthermore, a Lawfare Project book, *Lawfare: The War Against Free Speech: A First Amendment Guide for Reporting in an Age of Islamist Lawfare*, has a chapter that praises the value of anti-SLAPP laws.

Yet when it comes to the Co-op lawsuit, the Lawfare Project sides with appellants who were arguing that the Washington State anti-SLAPP law was unconstitutional.

Outside of anti-SLAPP laws, the Lawfare Project's advocacy gets more interesting. Its website features an article suggesting that groups boycotting Israel [could be sued](#). It has also contributed to a complaint calling on the IRS to [revoke the tax-exempt status](#) of the American Studies Association for boycotting Israel and [takes credit](#) for the 2012 rejection of a Park Slope Food Coop BDS initiative.

As far back as June 2013, it was reported that Benjamin Ryberg, director of research at the Lawfare Project, was working on an amicus brief for the Olympia Food Co-op case. However, the brief that was eventually filed with the appeals court on behalf of the Lawfare Project was submitted not by Ryberg but by Seattle real estate attorney Rob Spitzer.



Rob Spitzer

Like the plaintiffs' lead attorney Bob Sulkin, Spitzer is a prominent figure in the Greater Seattle Jewish community. His father, Jack Spitzer, was the president of B'nai B'rith International. Rob Spitzer himself is a former president of the Jewish Federation of Greater Seattle and now ex officio board member. As president of the Spitzer Foundation, he has provided grants to Hope for Heroism, an organization that assists disabled Israeli soldiers and that was co-founded by Bob Sulkin.

And like Sulkin, Spitzer has ties to StandWithUs Northwest, the pro-Israel organization chapter that helped file the lawsuit. Previously I had reported that Bob Sulkin and his wife were at one point "row hosts" for a StandWithUs fundraiser, as indicated in a [since-deleted](#) StandWithUs web page. That same web page indicated that Rob Spitzer and his wife were also designated StandWithUs row hosts.

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<option value="Alayne and Bob Sulkin">Alayne and Bob Sulkin</option>
<option value="Andrew and James Cohen">Andrew and James Cohen</option>
<option value="Barb and Chuck Maduell">Barb and Chuck Maduell</option>
<option value="Rabbi Rob Toren">Rabbi Rob Toren</option>
<option value="Rabbis Jonathan and Beth Singer">Rabbis Jonathan and Beth Singer</option>
<option value="Rob and Kathleen Spitzer">Rob and Kathleen Spitzer</option>
<option value="Rob Jacobs">Rob Jacobs</option>
<option value="Robert and Polly Amkraut">Robert and Polly Amkraut</option>
<option value="Robert Wilkes and Nancy Tipton">Robert Wilkes and Nancy Tipton</option>
<option value="Ruth Etzioni">Ruth Etzioni</option>
<option value="Saul Gamoran">Saul Gamoran</option>
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Plaintiffs' lead attorney Bob Sulkin and amicus brief author Rob Spitzer both appear in a now-deleted web page as row hosts for a StandWithUs Northwest fundraiser.

In 2006, Sulkin and Spitzer traveled to Israel together as part of a five-man delegation expressing solidarity with Israel during its bombing of Lebanon.

Thus the Lawfare Project portrays itself as a third-party "friend of the court" with an interest in anti-SLAPP legislation in order to conceal an agenda that would compromise its argument. Indeed, with the amicus author's connections to StandWithUs and to the plaintiffs' lead attorney, such disclosures would have compromised the Lawfare Project's claim to be a third party interested in SLAPP laws and whatnot.

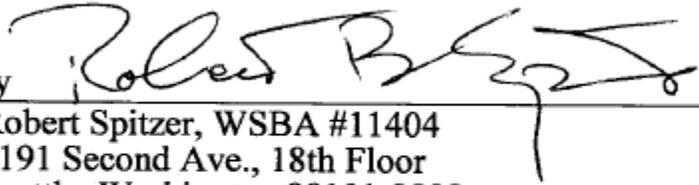
Oh, and in a peculiar typo, the Lawfare Project misidentified itself as the American Civil Liberties Union (ACLU):

IV. CONCLUSION

For the foregoing reasons, **ACLU** respectfully requests that the Court reverse the lower court's decision granting Respondents' anti-SLAPP motion and remand the case for further consideration.

Respectfully submitted this 27th day of January 2014.

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A peculiar typo in the appellants' brief.

Ultimately, the appeals court was not moved by the Lawfare Project's brief—the court opinion makes no reference to it at all.

False and contradictory statements made in sworn declarations

In its appeal brief, the plaintiffs contended that the trial court had inappropriately discounted their declarations as hearsay. In fact, I would contend that referring to the declarations as hearsay would be generous. Declarations submitted by or for the plaintiffs were replete with falsehoods and contradictions of other statements.

Prior to suing the Co-op, three of the five plaintiffs ran for board of directors in the 2010 Co-op election. All three lost by a landslide. In order to explain their lack of popularity, boycott opponents accused BDS activists of cheating. Such a claim was made by one of the plaintiffs' "expert" witnesses, Massachusetts blogger Jon Haber, who wrote on his "Divest This!" website, months before the lawsuit was filed:

pro-boycott forces decided to play it safe by simply changing the rules (again), making it possible for the first time for people (i.e., Evergreen students) to join the Co-op without physically visiting the store. With that rule change in place, it was a simple matter to recruit students to simultaneously become members then vote in a pro-boycott slate for an organization they will probably never visit.

Yet this claim never appeared anywhere in the lawsuit—not even in Haber's declaration in support of the plaintiffs. Instead an alternate claim was made by four of the five plaintiffs:

“Voter turnout” for the Co-op’s Board elections in November 2010 was greater for the five candidates endorsed by BDS because BDS activists at the Evergreen State College campus had recruited then carpooled students to the Co-op to become members for the express purpose of endorsing the Israel Boycott and Divestment resolution/policies.

Not only are these two claims baseless, they contradict each other. The latter claim was made by plaintiffs in sworn statements “declare[d] under penalty of perjury” as being “true and correct and based on personal knowledge”—that is, they claim to have witnessed events that had never happened.

In the end, the appeals court found that the declarations were not necessary to make a SLAPP determination in the case. However, had the lawsuit proceeded and the plaintiffs’ declarations been scrutinized, they may have been held liable for committing perjury.

Another declaration on behalf of the plaintiffs was filed by Co-op member Nancy Koppelman. Koppelman’s [declaration](#) alleged that the Co-op’s boycott was “improper and unlawful.” Yet a year earlier she had [criticized the Co-op board](#) for following the bylaws too closely in implementing the boycott, declaring that “the letter of the law was wrong” and comparing the board to “slave traders who followed the letter of [the] law [to] justify their actions.”

And though Koppelman’s declaration stated that she “no longer shop[ped] at the Co-op,” she nevertheless ran for the Co-op board in 2013, running on a platform that made gratuitous reference to Omar Barghouti. Unsurprisingly, she lost.

What’s next for Olympia

Although this might be the end of the lawsuit, it is not the end to the attacks against the Olympia Food Co-op. BDS opponents have waged a multi-track strategy against the Co-op. At the extreme has been the lawsuit, but opponents have also continued to write letters against the Co-op in local media and complain to the Co-op board that they are oppressed by the Co-op’s boycott.

The loss of the legal track only means a ramping up of other avenues of attack.

And absolutely no one will take responsibility for having supported the lawsuit. Even the most prominent and influential rabbi in Olympia expressed [support for the plaintiffs](#) and [accused the Co-op](#) defendants of “decid[ing] to use punitive action in making a SLAPP claim against its own members.” In other words, the rabbi criticized the defendants for defending themselves with the most obvious and sensible defense available, the state’s anti-SLAPP legislation—and he did so on the basis that such a defense would harm the plaintiffs—the very plaintiffs who had threatened the defendants with a “complicated, burdensome, and expensive” process.

Appendix: Chronology of developments in the Co-op lawsuit

July 15, 2010: The Olympia Food Co-op board of directors approves a request by a working member to honor the Palestinian civil society call for an Israeli boycott—becoming the first US grocery store to publicly do so. Opponents of the boycott will utilize every means possible to overturn the boycott except for a member-initiated ballot, which they fear would lose.

August 11, 2010: Future plaintiff Kent Davis joins the Olympia Food Co-op *after* the boycott is in place. Along with his fellow plaintiffs, he will eventually sue the Co-op for “irreparable injury” sustained by the Co-op’s refusal to stock Israeli products.

Fall 2010: Several boycott opponents run for the Co-op board of directors, every one of them losing by a landslide to pro-boycott candidates. Three of the losing candidates, will later become plaintiffs in the anti-BDS lawsuit.

March 11, 2011: The future plaintiffs of the lawsuit hold a private meeting in Olympia with Seattle attorney Avi Lipman (who will represent the plaintiffs in the lawsuit), Seattle representatives of StandWithUs, and Israeli Consul General Akiva Tor. According to StandWithUs meeting notes, a “[presentation of legal case](#)” is given. Subsequent notes will refer to the Olympia Food Co-op lawsuit as a StandWithUs “project.”

Later that day, Akiva Tor is confronted by an Olympia activist who accuses Tor of being in Olympia to help quash BDS. [Tor denies this](#), although the anti-BDS meeting is later confirmed by other attendees, who claim the content of the meeting is protected under [attorney-client privilege](#).

May 31, 2011: The future plaintiffs issue a letter to sixteen current and former Co-op board members and staff, threatening them with a “complicated, burdensome, and expensive” lawsuit unless the current board rescinds the Israel boycott. The board does not submit to the threat.

June 2011: StandWithUs releases an [overdramatic anti-BDS video](#) featuring four of the five future plaintiffs, who claim that BDS destroys communities and encourage anti-Semitism.

September 2, 2011: The plaintiffs, five members of the Olympia Food Co-op, file their lawsuit in Washington State Superior Court (*Davis et al. v. Cox et al.*).

Mid-September 2011: Following reports by [Electronic Intifada](#) and [Richard Silverstein](#) about the involvement of StandWithUs and the Israeli government in the Co-op lawsuit, Israeli Deputy Foreign Minister Danny Ayalon [responds to Israeli news queries](#) by stating that

It is very important to make use of every means at our disposal, mainly legal means ... And it's true, we are using this organization, StandWithUs, to amplify our power.

February 27, 2012: Judge Thomas McPhee [dismisses the Co-op lawsuit](#) as a violation of the state's anti-SLAPP law, with penalties levied against the plaintiffs to be determined later.

July 12, 2012: Judge McPhee rejects the plaintiffs' claim that since they had sued the Co-op on behalf of the Co-op membership, it was the Co-op that should pay the fines. Instead, he awards each of the sixteen defendants \$10,000, plus attorney's fees. The defense attorneys, who were working on behalf of the Center for Constitutional Rights and the law firm of Davis Wright Tremaine, had taken the case pro bono, to be compensated only upon prevailing. Altogether, fines and attorneys' fees add up to \$221,846.75, owed by the plaintiffs.

August 10, 2012: The plaintiffs file a notice of appeal to the Washington State Supreme Court.

August 6, 2013: The supreme court [refuses to hear the appeal](#) and transfers the case to the state court of appeals.

January 27, 2014: The Lawfare Project submits an [amicus curiae brief](#) to the court of appeals in order to support the appellants' claim that the anti-SLAPP statute did not apply.

April 7, 2014: Washington State Court of Appeals Division I [upholds the trial court's dismissal](#) and rejects the appellants' claims on all pertinent grounds. The opinion is authored by Judge Stephen J. Dwyer with judges Michael S. Spearman and Ann Schindler concurring. Additional attorneys' fees are to be determined later.

Further information on the Olympia Food Co-op lawsuit can also be found in my previous articles: “Who’s who behind the Olympia Food Co-op lawsuit” and “Excerpts from the Olympia Food Co-op lawsuit dismissal.”

- See more at: <http://mondoweiss.net/2014/04/appeals-dismissal-against#sthash.DL8fKA20.dpuf>