The Honorable Carol Murphy

□ EXPEDITE
□ No hearing set
☒ Hearing is set
Date: January 22, 2016
Time: 9 a.m.
Judge/Calendar: Hon. Carol Murphy

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

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

Plaintiffs,

v.

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

Defendants.

No. 11-2-01925-7

DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND MOTION TO COMPEL DISCOVERY

NOTE FOR MOTION CALENDAR:

JANUARY 22, 2016, 9:00 a.m.

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I. INTRODUCTION

The Olympia Food Co-op is a not-for-profit organization that not only provides wholesome foods and other goods and services, but also advocates for economic and social justice. *See* Second Mot. to Compel, Lipman Decl. Ex. C. More than 4 years ago, Plaintiffs brought this lawsuit against sixteen[1] former and current volunteer members of the Board of Directors of the Olympia Food Co-op, alleging that the Board overstepped its authority when it approved a product boycott without unanimous staff approval. *See* Amended Complaint at ¶¶ 56–75. On their face, Plaintiffs' claims rise and fall on one thing and one thing only: the Co-op's Articles and Bylaws. Plaintiffs obtained those articles and bylaws—which explicitly grant the Board the authority to "manage[]" the "business and affairs of the Cooperative"—years ago. *See* Second Mot. to Compel, Lipman Decl. Ex. C. In short, Plaintiffs already have every document relevant to their claims.

Despite the remarkable simplicity of Plaintiffs' legal claims (which are deficient as a matter of law), Plaintiffs served broad-ranging discovery requests on all Defendants seeking, among other things "***all documents*** that relate ***in any way*** to boycotting and/or divesting from Israel," and "***all documents*** relating to ***any effort*** or consideration given by the Board of OFC to boycotting products ***of any country or geographic area*** other than Israel—***whether such boycott was enacted or not***." *See id*., Ex. A (emphasis added). These requests are incredibly overbroad and seek information that is at best loosely attenuated to Plaintiffs' claims.

Defendants spent hundreds of hours of more than a dozen attorneys' time collecting documents from each of the sixteen defendants and rigorously reviewing these documents to determine their responsiveness to Plaintiffs' unreasonable discovery requests and any applicable privileges. *See* Declaration of Brooke Howlett ¶¶ 2–5. Unsurprisingly, the broad strokes of Plaintiffs' discovery requests swept up thousands of documents containing Defendants' sensitive, private political speech and communications. These documents are the

1 Plaintiffs' Amended Complaint, filed January 8, 2016, eliminates as a defendant the Estate of Suzanne Shafer, leaving fifteen Defendants. *See* Amended Complaint. It also removes two of the original five plaintiffs from the case. *Id*.

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precise types of communications that Washington law protects from disclosure under the associational privilege. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 158, 786 P.2d 781 (1990) (recognizing privileged nature of documents whose disclosure has some probability of harming the custodian's First Amendment rights).

In their latest motion, Plaintiffs ask this court to order the production of "all documents being withheld under the associational privilege." Second Mot. to Compel at 2. However these documents are not only privileged, but are ***almost entirely irrelevant*** to Plaintiffs' claims. Importantly, Plaintiffs seek to force disclosure of these privileged and irrelevant documents immediately—apparently hoping to outrun the potential termination of the litigation, as Defendants' Motion to Dismiss is pending and scheduled to be heard on February 19, 2016. The Court should deny Plaintiffs' Second Motion to Compel for two reasons:

First, the documents Plaintiffs seek are privileged. Despite Plaintiffs' assertions to the contrary, Washington law recognizes a robust associational privilege. A party who shows even "***some*** probability that the requested disclosure will harm its First Amendment rights" can resist disclosure if the moving party cannot show that "the desired information is relevant and unavailable from other sources." *Snedigar*, 114 Wn.2d at 158, 166. This is precisely the situation before the Court.

Second, Plaintiffs' attempt at sweeping invasion into the privileged and irrelevant information is especially improper because, as discussed in Defendants' Motion to Dismiss, this case should be disposed of on several grounds. Plaintiffs' claims fail as a matter of law, and this Court should dismiss Plaintiffs' claims altogether when it hears Defendants' motion to dismiss on February 19, 2016. Though Plaintiffs attempt to argue otherwise, and request immediate disclosure of the documents, Plaintiffs' request requires that this Court undertake a rigorous analysis of thousands of documents on the eve of the dismissal hearing. This is unnecessary, and an utter waste of the Court's time and resources.

This lawsuit, originally dismissed nearly three years ago as a Strategic Lawsuit Against Public Participation ("SLAPP"), remains a suit "brought primarily to chill the valid exercise of

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the constitutional rights of freedom of speech." RCW 4.24.525 note of decision. Plaintiffs' motion to compel documents protected by the associational privilege is merely a continuation of their effort to chill protected First Amendment activity that cannot be countenanced by this Court, especially before a decision on Defendants' motion to dismiss.

II. FACTUAL BACKGROUND

Plaintiffs, three (originally five) of the Co-op's 22,000 members, filed a putative derivative lawsuit in September 2011, challenging the Board's 2010 decision to join a boycott of Israeli goods in the context of a humanitarian and political debate. Plaintiffs refused the Board's invitation to present the issue to the full membership for decision by securing 300 petition signatures, as provided by the Bylaws—choosing instead to file suit. Yet, Plaintiffs claim to favor participatory decision-making within the Co-op. *See* Amended Complaint, ¶¶ 23–39.

Significantly, this lawsuit was filed with the express threat and admitted goal, in the words of these Plaintiffs, of imposing "complicated, burdensome, and expensive" litigation on Board members who refused to rescind their boycott decision. Defendants' Renewed Motion to Dismiss, Dkt. 124 ("Mot. to Dismiss") at 3, Ex. D. Not coincidentally, Plaintiffs have repeatedly sought to burden Defendants with complicated and generally irrelevant discovery demands. Contemporaneously with service of the Summons and Complaint, for example, they served 13-page duplicative discovery requests on each of the 16 individually-named Defendants. *See* Motion to Compel Discovery ("Mot. to Compel") at 3–4; Declaration of Avi J. Lipman In Support of Plaintiffs' Motion to Compel Discovery ("Lipman Decl."), Ex. A. Plaintiffs followed up by demanding videotaped depositions from each of the 16 Defendants scheduled to run for five weeks. Lipman Decl., Ex. M.

In November 2011, because the claims were legally meritless, Defendants moved to dismiss the complaint under CR 12(b)(6) and, because the lawsuit was a "Strategic Lawsuit Against Public Participation," they also moved to strike the claims under the state's 2010 anti-SLAPP law, RCW 4.24.525. Under the anti-SLAPP law, Plaintiffs' threatened discovery

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was automatically stayed pending further order of the Court on a finding of good cause. Plaintiffs did not pursue their original discovery requests. Instead, Plaintiffs filed a cross-motion for discovery in response to Defendants' anti-SLAPP motion, with requests that were substantially more limited than their original requests, seeking three depositions instead of sixteen. Dkt. 42.2.

On February 23, 2012, Judge McPhee denied Plaintiffs' motion for "broad-ranging discovery," Defendants' Opp. to Plaintiffs' Mot. to Compel, Ex. A (Oral Opinion) at 6, finding that "in the good-cause exception of the anti-SLAPP statute, the test is at least as stringent and as narrow as the Civil Rule 56 test." *Id*. at 5. Judge McPhee next granted the anti-SLAPP motion (which at that time provided comprehensive relief for Washington citizens targeted by meritless lawsuits penalizing them for their exercise of First Amendment rights), and deferred ruling on the CR 12(b)(6) motion.

The anti-SLAPP dismissal was upheld by the Court of Appeals in April 2014. Additionally, the Court of Appeals affirmed the trial court's ruling that Plaintiffs had "failed to show 'good cause' for discovery," *Davis v. Cox*, 180 Wn. App. 514, 538, 325 P.3d 255 (2014), also reasoning that the standard was "similar" to CR 56(f), and held that the trial court had correctly denied Plaintiffs' "expansive [discovery] request." *Id*. at 540–41. The Court of Appeals also held that Plaintiffs had "failed to identify with any specificity what portion of their request for *all* documents in possession of the directors in connection with the Boycott Policy was needed to establish a prima facie case." *Id*. at 541. Further, the Court found that the Board had the authority to enact the boycott based on the Co-op's governing documents. *Id.* at 535–36.

In May 2015, the Washington Supreme Court reversed the dismissal and the related award of attorneys' fees and statutory damages, declaring the anti-SLAPP law unconstitutional because it violated the right to trial by jury.[2] The mandate issued on June 19, 2015, and a new

[2] As discussed at length in Defendants' Renewed Motion to Dismiss, the Washington Supreme Court did *not* reverse the Court of Appeals' finding that the Board had the authority to enact the boycott. Thus, that finding remains the law of the case.

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judge was assigned.

On August 13, 2015, Plaintiffs again demanded significant discovery from Defendants. Mot. to Compel Lipman Decl., Ex. B. Plaintiffs renewed their 2011 discovery requests, stating that they expected responses within 30 days (by September 14, 2015). *Id.*, Ex. B, Ex. D.

At the parties' August 28th meet and confer, Defendants explained their position that discovery should await resolution of the Motion to Dismiss; and Plaintiffs explained their position that discovery should not be delayed. The parties agreed that a single motion, whether to compel discovery or for a protective order, would be most efficient. *Id.*, Ex. D. On September 3rd, Plaintiffs stated their intent to move to compel discovery, and in an effort to avoid unnecessary motion practice, Defendants responded with authority supporting their position that discovery should be stayed pending the Motion to Dismiss, which was filed that day. *Id*. Defendants explained that "it is a complete waste of the parties' time and resources to launch into discovery before the legal sufficiency of the complaint has been determined" and reminded Plaintiffs that Judge McPhee had already denied discovery in the case: Defendants' counsel explained: "Judge McPhee's ruling on discovery was made when the parties were engaged in a complicated SLAPP motion involving mutual evidentiary submissions. Given that we are now dealing only with purely legal issues, your demand for discovery seems to me to be even less supportable." *Id.*

Meanwhile, Plaintiffs demanded at least 28 days for the briefing schedule on the renewed CR 12(b)(6) motion, and so the earliest available date for oral argument on the Motion to Dismiss was February 19, 2016 (giving Plaintiffs over five months to file their opposition). *Id*., Ex. D.

On October 2, 2015, the Honorable Erik Price ordered Defendants to answer and respond to Plaintiffs' Discovery Requests. Dkt. 132. Defendants provided answers, responses, and objections to those requests. *See* Second Mot. to Compel, Lipman Decl. Ex. A. Counsel for Defendants then underwent the rigorous process of collecting documents from each Defendant in order to produce documents in response to Plaintiffs' broad discovery requests.

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After collecting these documents, Counsel for Defendants then spent hundreds of hours of more than a dozen attorneys' time individually reviewing the documents to determine responsiveness and any applicable privileges. *See* Howlett Decl. ¶ 5. Defendants then produced 627 responsive, non-privileged documents. *Id.* ¶ 9. During the meet-and-confer conference between counsel, Defendants notified Plaintiffs' counsel that they were withholding a substantial number of documents that are responsive to Plaintiffs' broad requests, but consist of sensitive, private political speech and communications that fall under the associational privilege recognized under Washington law. *Id.* ¶ 10. Although not evidenced by Plaintiffs' current motion, Defendants' counsel informed Plaintiffs' counsel several times that the associational privilege was not limited to identities, but extended to communications as well. *Id.* Defendants' counsel declined to discuss privacy interests and the need for a protective order, as such a discussion would be premature given that the very same documents protected by the associational privilege may also be confidential for the purposes of a protective order.[3] *See* Second Mot. to Compel, Lipman Decl. Ex. M Plaintiffs' counsel and Defendants' counsel agreed to Defendants' production of a privilege log on a rolling basis, given the large volume of documents at issue. *See id.* Ex. L.

III. ARGUMENT

A. The Associational Privilege Applies to the Withheld Documents

There is a "vital relationship between freedom to associate and privacy in one's associations." *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). Accordingly, Washington stresses that the"[i]nviolability of privacy in group association may . . . be indispensable to [the] preservation of freedom of association, particularly where a group espouses dissident beliefs." *Eugster v. City of Spokane*, 121 Wash.

[3] Defendants maintain that a Protective Order would not alleviate the First Amendment concerns here. *See Eugster v. City of Spokane*, 121 Wn. App. 799, 809, 91 P.3d117, 122 (2004) (finding given the sensitive nature of the requested information that First Amendment harm would likely occur even if documents were produced confidentially). Similarly, some of the documents covered by the associational privilege are also covered by Washington's statutory mediation privilege. *See* RCW 7.07.030.

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App. 799, 807, 91 P.3d 117, 121 (2004). The associational privilege protects this privacy and the freedom of association in the discovery context. *Id*. When a party seeks to disclose the inner details of a political organization's activities, "the freedom of members to promote their views suffers." *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 825, 21 P.3d 1157 (2001). Indeed, the "threat to First Amendment Rights may be ***more severe*** in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage . . . ." *Britt v. Superior Court*, 20 Cal. 3d 844, 857 (1978) (emphasis added). Plaintiffs' attempt to gain access to Defendants' private political communications by asking this court to disregard the associational privilege that squarely applies to the documents at issue. The Court should reject that request.

Washington has established a three-part test for First Amendment challenges based on the associational privilege. *Eugster*, 121 Wn. App. at 807. "First, the party asserting the right is only required to show ***some probability*** that the requested disclosure will harm its First Amendment rights." *Id.* (emphasis added) (citing *Snedigar*, 114 Wn.2d at 158). "Once this threshold is met, the burden shifts to the party requesting discovery to establish (1) the relevance and materiality of the information sought, and (2) that reasonable efforts to obtain the information by other means has been unsuccessful." *Id.* "Finally, even if both of these required showings are made, the court must still balance the claim of privilege against the need for disclosure to determine which is the strongest." *Id.* To compel disclosure, the moving party's claimed "need" for information must "go[] to the heart of the matter or [be] crucial to the case of [the] litigant seeking discovery." *Snedigar*, 114 Wn.2d at 165 (internal citation omitted). Here, Plaintiffs cannot show more than minimal relevance—let alone that the information goes to the "heart of the matter." *Id.*

1. Defendants Can Demonstrate a Prima Facie Showing of Chill to First Amendment Rights

There is a substantial probability that Defendants' First Amendment rights will be harmed by disclosure of the material Plaintiffs seek. As a preliminary matter, Plaintiffs

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mistakenly focuses on the potential harm to Defendants as a result of the compelled disclosure of their ***names or identities***. Second Mot. to Compel at 10–12. That is simply incorrect. Washington's associational privilege extends far beyond that, covering not only parties' names or identities (which Defendants acknowledge are not unknown at this point), but also internal discussions, private meeting minutes, membership lists, details of activities, and correspondence regarding political activities. *See Snedigar*, 114 Wn.2d at 163–64; *Right-Price Recreation*, 105 Wn. App. at 825; *Eugster*, 121 Wn. App. at 808–09. Indeed, under Washington law, "[a]n ***assumed potential chilling effect*** arises when the discovery requests include membership lists, minutes of meetings, financial records, documents and correspondence regarding political activities." *Eugster*, 121 Wn. App. at 808 (emphasis added) (citing *Right-Price Recreation*, 105 Wn. App. at 824–25).

The significant majority of the withheld documents at issue are private communications between Defendants, other board members, staff members, and other Co-op members discussing internal organizational issues. Howlett Decl. ¶ 8. These communications include email correspondence regarding political activities, internal political and organizational discussions, and more. These are the precise types of communications protected under Washington's associational privilege. And, despite their irrelevance, all of these documents are swept up by Plaintiffs' incredibly overbroad requests asking for "all documents" relating to any boycott of Israel. *See* Second Mot. to Compel, Lipman Decl. Ex. A.

The potential harm to Defendants' First Amendment rights is far from speculative or theoretical. Indeed, Defendants have already been subjected to acts of harassment in the past as a result of their associations, including angry phone calls, verbal abuse, death threats, and hate mail. *See* Declaration of Rochelle Gause ¶¶ 3–5; Declaration of Jayne Rossman ¶¶ 2–5, 9. They have even sought advice from local police. Rossman Decl. ¶ 6. This has established a sense of fear and intimidation among Defendants, as well as a reticence to engage in political speech. *See id.* ¶ 6. Washington courts have found showings of similar types of harassment to establish a sufficient probability of harm. *See, e.g.*, *Snedigar*, 114 Wn.2d at 163 (finding prima

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facie showing of harm where members provided affidavits showing they had been "subjected to acts of reprisal and harassment in the past"); *accord Perry v. Schwarzenegger*, 591 F.3d 1147, 1162–63 (9th Cir. 2010) (finding chilling effect where several declarants attested to the impact that disclosure would have on their First Amendment rights).

Defendants' ability to engage freely in political and associational activities is significantly limited if their expectation of confidentiality is then betrayed. *See* Declaration of Grace Cox ¶¶ 6–11; Declaration of John Regan ¶¶ 5, 10. These members do have an expectation of confidentiality in their own internal discussions, and if they could not trust that confidentiality, they would perhaps either censor themselves or perhaps even decline to engage in these political discussions to begin with due to fear of further abuse. *See* Gause Decl. ¶¶ 6–11; *see* Cox Decl. ¶¶ 6–11; Rossman Decl. ¶¶ 9, 12; *see also Snedigar*, 114 Wn.2d at 163 (finding *prima facie* showing of harm where members had provided affidavits showing they had an "expectation of confidentiality in internal discussions"). This chilling effect extends to Defendants, current and former board members, staff members, Co-op members, and even non-members alike. *See* Cox Decl. ¶¶ 12, 13; *see* Declaration of Noah Sochet ¶¶ 3–5.

The substantial likelihood of harm to Defendants' First Amendment rights has already borne out in real-life situations. *See* Declaration of Maria LaHood. Defendants' Counsel, Maria LaHood, has seen the type of abuse and harassment that people have faced when expressing political views in support of Palestinian rights—targeting, smearing, threatening, investigating, disciplining, blacklisting, suing, and even arrest. LaHood Decl. ¶¶ 3–6. Particularly relevant here are the activities of StandWithUs, a group that has aligned itself with Plaintiffs. *Id.* ¶¶ 8–13. The disclosure of Defendants' internal communications cannot be viewed in a vacuum, but rather in the context of this well-documented pattern of abuse and intimidation. *Id.* ¶ 14.

2. Plaintiffs Show No Need For the Documents

Washington courts recognize that a party makes a prima facie showing of harm to one's First Amendment rights when they present the type of evidence that is before this Court now.

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See Snedigar, 114 Wn.2d at 164; *Eugster*, 121 Wn. App. at 809; *Right-Price Recreation*, 105 Wn. App. at 824–25. The burden now shifts to Plaintiffs, who must demonstrate a need for these documents. They cannot do so. Plaintiffs make the conclusory statement that "the information Plaintiffs seek is relevant to both Plaintiffs' claims and Defendants' raised defenses."[4] Second Mot. to Compel at 14; *see also id*. at 4, 8. However, mere conclusory statements are not enough. *See Right-Price Recreation*, 105 Wn. Ap. At 825 (holding that party failed to establish relevance by "generally contend[ing] that each request is likely to lead to information to substantiate its claims" but "giv[ing] no reasons specific enough to rise above mere speculation, as *Snedigar* requires.")

The fact that Plaintiffs provide little support for these claims is unsurprising—little support exists. This is clear for two reasons. ***First***, a significant number of the documents at issue were created after the boycott was put in place, and after the current lawsuit was filed. Howlett Decl. ¶ 8; *see also* Cox Decl. ¶¶ 7–8, 10. ***Second***, these documents contain private thoughts and opinions on many political issues, including boycotts, but have no bearing on the board's authority to enact such a boycott. Cox Decl. ¶¶ 7–8, 10. ***How, then, could these documents be relevant as to the purely legal question of whether the Board has the authority to institute a boycott?*** Indeed, even if internal discussions of a boycott were relevant to that question, surely discussions taking place ***after the boycott was enacted*** are of little use.

3. The Court's Balancing Test Tips Heavily in Favor of Defendants

On balance, the first two prongs of Washington's associational privilege weigh unmistakably in favor of Defendants. Here, Defendants can demonstrate clear, objective evidence of past harassment and threats as a result of their political beliefs. *See supra* Section III.A.1. The documents that Plaintiffs seek are at the core of the type of documents that Courts can "assume [have] a potential chilling effect on the group's First Amendment

[4] Plaintiffs also state that they "cannot obtain the information by other means." It is perhaps true that Plaintiffs may be unable to acquire these private political communications by other means. However, because these communications are irrelevant, Plaintiffs have no legitimate reason to acquire these documents.

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rights." *Right-Price Recreation*, 105 Wn. App. at 824–25. And, Plaintiffs cannot establish that these documents "go[] to the heart" of their straightforward corporate governance claims. *See Snedigar*, 114 Wn.2d at 165.

4. Plaintiffs' Request for Production of All Withheld Documents is Premature

Even if Plaintiffs could show that these documents are necessary—which they cannot—the remedy they seek is inappropriate. Rather than asking the Court to demand that Defendants produce "all documents being withheld under the associational privilege," Second Mot. to Compel at 14, Plaintiffs should have requested an *in camera* inspection of the requested information. *See Snedigar*, 114 Wn.2d at 167 ("Generally, Washington courts have similarly upheld in camera review as "a generally acknowledged device for determining whether a privilege is to be honored.") (quoting *State v. Allen*, 27 Wn. App. 41, 46, 615 P.2d 526 (1980)). The Court in *Snedigar* held that upon a showing that the desired information is "*clearly* necessary," the court should undertake an *in camera* inspection. *Id*. at 166 (emphasis in original).

To be clear, Defendants do not believe that such a review is warranted given the irrelevance of the documents at issue. *See Right-Price Recreation*, 105 Wn. App. at 826 ("Because [Plaintiffs] made no specific showing of the relevance and materiality of the information sought . . . in camera review was unnecessary."). However, if the Court should question the applicability of the associational privilege here, the appropriate course of action is for the Court to engage in *in camera* review of the documents, not simply order their disclosure as Plaintiffs have asked.

B. This Case Should Be Disposed of On Several Grounds

The inappropriateness of the compelled disclosure Plaintiff seeks is accentuated by the fact that this lawsuit should be disposed of in less than a month, when the Court hears Defendants' motion to dismiss. In this purportedly derivative lawsuit, Plaintiffs have pleaded two causes of action: (1) breach of fiduciary duties (attacking the Board's exercise of its

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authority under the Bylaws to decide to boycott Israeli products) and (2) *ultra vires* (alleging that the Board failed "to follow OFC's governing rules, procedures, and principles" when it endorsed the boycott). Under controlling Washington law, both claims fail as a matter of law and must be dismissed on the pleadings on at least three grounds.

1. Plaintiffs Do Not Have Standing to Bring a Derivative Claim

Washington nonprofit corporate law is clear: Plaintiffs have no standing to bring a derivative claim for breach of fiduciary duties. Washington does not allow derivative lawsuits involving internal governance disputes within nonprofits. *Lundberg ex rel. Orient Found. v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002); RCW 24.03.040 ("representative suit" allowed only for *ultra vires* cases, asserting that the nonprofit corporation is "without capacity or power" to undertake the challenged action); Mot. to Dismiss at 7–9. On their face, the Co-Op's Articles and Bylaws ***explicitly authorize*** Defendants' conduct. The Court of Appeals has already held in this case, the grant of authority in the Bylaws is unequivocal: "The affairs of the cooperative shall be managed by a Board of Directors." And: "Except as to matters reserved to membership by law or by these bylaws, the business and affairs of the Cooperative shall be directed by the Board of Directors." Mot. to Dismiss, Ex. A at 2–3. Thus, Plaintiffs' breach of fiduciary duty claim fails, as Defendants were acting under the clear authority of the Co-op's own governing documents.

2. Plaintiffs' Claim for *Ultra Vires* Liability Fails as a Matter of Law

Plaintiffs' claim for *ultra vires* liability asserting the Board allegedly "acted without authority and beyond the scope of the power allowed or granted them as OFC Board Members," Amended Complaint ¶ 66, likewise fails under controlling Washington law.

Quite simply, the mere fact that Plaintiffs use the words "*ultra vires*" does not make it so. *See Hartstene Pointe Maintenance Ass'n v. Diehl*, 95 Wn. App. 339, 344–45, 979 P.2d 854 (1999) (lawsuit attacking the exercise of board authority, by claiming it is inconsistent with Bylaws or other internal governance documents, does not state an *ultra vires* claim because it "is not a challenge to the authority of the corporation, but only the method of exercising it");

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Mot. to Dismiss at 14-16. Plaintiffs' conclusory *ultra vires* allegations[5] are negated by the express terms of the Co-op's Articles of Incorporation, which confirm that the Co-op in fact has been granted the corporate power to decide what products to buy and sell, and also to engage in a boycott supporting Palestinian rights. *See id*. at 14–15, Ex. B. Finally, the claim is also negated by their Amended Complaint, which concedes that the Co-op has the power and authority to support boycotts, when there is "universal agreement" among all Co-op employees. Amended Complaint ¶¶ 27–39. This lawsuit "is not a challenge to the authority of the corporation, but only the method of exercising it," and the *ultra vires* claim fails as a matter of law. *Hartstene Point*, 95 Wn. App. at 345.

3. Only Pure Questions of Law Remain

As discussed above, there can be no dispute as to the material facts in this case; only pure legal questions remain. Construction of these Articles and Bylaws is an issue of law for the Court. *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). The only question this Court need determine is whether the Co-op's articles and bylaws authorized the Board to enact its boycott. And that determination was already made by the Court of Appeals, which is the law of the case.

C. Defendants Request an Award of Fees

Plaintiffs claim that they are entitled to an award of attorney fees in the amount Plaintiffs have incurred in connection with their motion. They provide no argument as to why. However, if attorney fees should be awarded to anyone, it is to Defendants for having to respond to Plaintiffs' Motion to Compel. CR 37(a)(4) provides that fees should be awarded to Defendants if the motion to compel is denied, "unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses

[5]In evaluating the adequacy of the allegations under CR 12(b)(6), the trial court must accept as true only ***well-pled*** factual allegations, but not legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

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unjust." Here, Plaintiffs seek to denigrate Defendants' First Amendment rights for a purpose that is entirely unclear and even less justifiable. The information they seek is largely irrelevant to their case—which is insufficient as a matter of law. One can only conjecture what the true purpose is for seeking this information. Regardless of what that dubious purpose may be, Plaintiffs' motion to compel is entirely unjustified and an award of attorney fees to Defendants is warranted.

IV. CONCLUSION

For the reasons explained above, Defendants respectfully request this Court deny Plaintiffs' Motion to Compel and award attorney fees to Defendants. In the alternative, Defendants request that this Court engage in an *in camera* review of the documents at issue.

DATED this 20th day of January, 2016.

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DECLARATION OF SERVICE

On January 20, 2016, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

Robert M. Sulkin Avi J. Lipman McNaul Ebel Nawrot & Helgren PLLC 600 University Street, Suite 2700 Seattle, WA 98101-3143	☐ ☐ ☐ ☐ ☑	Via Messenger Via U.S. Mail Via Overnight Delivery Via Facsimile Via E-mail

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

DATED this 20th day of January, 2016, at Seattle, Washington.

s/ Brooke Howlett
Brooke Howlett, WSBA No. 47899

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