☐ EXPEDITE

☐ No hearing set

☒ Hearing is set

Date: February 2, 2012

Time: 9:00am

Judge/Calendar: Hon. Thomas McPhee

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE, Plaintiffs, v. GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM, Defendants.	Case No. 11-2-01925-7 DEFENDANTS' BRIEF OPPOSING PLAINTIFFS' CROSS-MOTION FOR DISCOVERY

I. INTRODUCTION

Plaintiffs' Cross-Motion for Discovery presents no compelling reason to permit the multiple depositions and burdensome document production sought by Plaintiffs here. To the contrary, this case spotlights the precise type of discovery abuse that the legislature sought to curtail when it enacted Washington's anti-SLAPP statute. In May 2011, Plaintiffs sent Olympia

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Food Co-op ("Co-op") board members a letter threatening a "***complicated, burdensome, and expensive***" legal action if the Co-op failed to bow to Plaintiffs' demands. Plaintiffs have proved true to their word. When the Board refused to rescind its boycott of Israeli products, Plaintiffs filed this lawsuit to chill Defendants' First Amendment conduct. Service of the summons and complaint included duplicative discovery requests for each of the 16 individually named defendants. These discovery requests alone totaled more than 200 pages. Plaintiffs followed up by noting videotaped depositions for each of the 16 defendants. These depositions were scheduled to run for five weeks, from October 31, 2011 through December 5, 2011.

Plaintiffs' instant motion is merely an extension of this "complicated, burdensome, and expensive" legal action. Courts have consistently rejected this type of discovery—which is available only for "good cause shown" in anti-SLAPP matters. "Indeed, '[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.'" *Varian Medical Systems, Inc. v. Delfino*, 35 Cal.4th 180, 193 (2005) (italics original). Here, Plaintiffs' request for three depositions and voluminous document production offends the spirit and the letter of the anti-SLAPP statute.

Defendants respectfully request that the Court deny Plaintiffs' attempt to lift the discovery stay automatically put in place by RCW 4.24.525(5)(c).[1]

II. STATEMENT OF FACTS

On May 31, 2011, Plaintiffs sent a demand letter to 15 past and present board members of the Co-op insisting that the Co-op rescind its boycott of Israeli products. Determining that the boycott furthered the Co-op's social and humanitarian mission, the Board had adopted the boycott by consensus after the Co-op staff could not reach the same. The letter closed by threatening to "bring legal action against you, and this process will become considerably more

[1] The statute provides: "All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under subsection (4) of this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted." RCW 4.24.525(5)(c).

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complicated, burdensome, and expensive than it has already." *See* Declaration of Bruce E.H. Johnson ("Johnson Decl."), ¶2, Ex. A; *see also* Decl. of Avi J. Lipman Opposing Def.'s Special Motion, Ex. AA. The Board declined to rescind the Israeli boycott.

On September 2, 2011, Plaintiffs filed a lawsuit against 16 individual members of the Co-op, alleging that their boycott decision as board members and refusal to rescind it were ultra vires and in breach of their fiduciary duties, and seeking injunctive relief to end the boycott.[2] The complaint and summons, when served upon ***each of the 16 defendants***, contained 13-page discovery requests for each. *See* Johnson Decl., ¶3, Ex. B.[3] On September 30, 2011, Plaintiffs escalated their discovery activity by noticing ***16 videotaped depositions***—again, one for every named defendant. *Id.*, ¶4, Ex. C. Plaintiffs scheduled these depositions over a five-week period.

Due to the large volume of discovery requested by Plaintiffs at the outset of the case, Defendants' counsel Bruce Johnson called Plaintiffs' counsel Robert Sulkin to request a discovery stay, pursuant to RCW 4.24.525(5)(c). On October 3, 2011, during a telephone conversation, the parties agreed to stay discovery until the Court decided the anti-SLAPP motion. The following day, Defendants' counsel sent Plaintiffs' counsel an email confirming the agreement to stay discovery until resolution of the anti-SLAPP motion. Mr. Sulkin responded: "We are on the same page." *Id.*, ¶¶ 5-8, Ex. D.

Nonetheless, on December 1, 2011, Plaintiffs filed their cross-motion seeking discovery, which attacked the automatic statutory stay and their own agreement not to seek discovery. This new request sought three depositions, in addition to all documents from all Defendants pertaining to the Co-op boycott policy.[4] Defendants now challenge Plaintiffs' cross-motion for discovery.

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[2] Jayne Kaszynski became the 16th defendant after she was named staff representative to the Co-op.

[3] Defendants have not been able to locate copies of the requests sent to defendants Harry Levine and Jessica Laing.

[4] This request for documents represents a single, consolidated request for the vast majority of the document discovery initially requested by Plaintiffs.

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III. ISSUE PRESENTED

Have Plaintiffs met their burden to lift the automatic discovery stay mandated by RCW 4.24.525(5)(c), which is intended to curb the "great expense, harassment, and interruption" caused by SLAPP suits such as Plaintiffs'?

IV. ARGUMENT AND AUTHORITY

A. Plaintiffs Have Waived Their Opportunity to Seek Discovery.

At the outset of this case and consistent with RCW 4.24.525(5)(c), Plaintiffs agreed with Defendants that they would not pursue any discovery until the anti-SLAPP motion is decided by this Court. Accordingly, Plaintiffs' cross-motion for discovery "rings hollow." *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal.App.4th 855, 867 (1995). "[D]iscovery is still a party-driven process, requiring the [non-moving party] to at least seek discovery." *Flores v. Emerich & Fike*, 385 Fed. Appx. 728, 2010 WL 2640625, at *2 (9th Cir. June 29, 2010). Because Plaintiffs have agreed not to seek discovery, they have waived their opportunity under the anti-SLAPP law to justify discovery while the special motion to strike remains pending. In fact, Plaintiffs' belated attempt to seek discovery—contrary to their agreement—belies the true motive for their cross-motion.

B. The Anti-SLAPP Statute's Discovery Stay Seeks to Halt "Complicated, Burdensome, and Expensive" Discovery.

Initially, it is worth noting that Plaintiffs' cross-motion for discovery is entirely bereft of legal authority for their demand to conduct discovery, which the law requires them to justify with "good cause." It is well settled that "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma,* 90 Wn. App. 533, 538 (1998) (citing *State v. Johnson,* 119 Wn.2d 167, 171 (1992)).

Despite the lack of support, Plaintiffs now seek (1) depositions from two Board members because they want to "test the veracity of Defendants' voluminous factual allegations," Cross-Mot. at 4; (2) additional deposition testimony, *id.*; and (3) "all documents in possession of each of the Defendants and the Co-op relating in any way to the Co-op's Boycott Policy and actions taken related thereto." *Id.* at 2. Plaintiffs, however, fail to provide any convincing reason to lift

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the discovery stay. Indeed, the reasons they have offered have been soundly rejected by courts interpreting California's anti-SLAPP statute, on which RCW 4.24.525 is based.[5]

In 2010, the Washington Legislature enacted RCW 4.24.525 to curb "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," (*i.e.*, so-called strategic lawsuits against public participation, or SLAPPs). S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010). According to the legislature, 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.* The legislature also found that 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.* (italics added).

To combat discovery abuse in SLAPP suits, the legislature included an *automatic* discovery stay upon filing an anti-SLAPP special motion to strike. *See* RCW 4.24.525(5)(c). The Court "may order that specified discovery or other hearings or motions be conducted" only "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:

> The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. *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."

[5] Plaintiffs also fail to make an evidentiary showing that complies with CR 56(f).

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Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (italics added).[6]

1. The "Good Cause" Standard Places a Heavy Burden on Plaintiffs.

California's anti-SLAPP statute—the model for Washington's law—contemplates a "good cause" exception nearly identical to RCW 4.24.525(5)(c). *See* CAL. CIV. PROC. CODE § 425.16(g).[7] California courts, as well as the Ninth Circuit, have construed the "good cause" requirement to place a high bar on a party seeking discovery.

Plaintiffs bear the burden to establish why discovery is *necessary* to address the pending anti-SLAPP motion. This requires a specific showing of need in order to establish a prima facie case. *See 1-800 Contacts v. Steinberg*, 107 Cal.App.4th 568, 593-94 (2003); *See also Sipple v. Foundation for Nat'l Progress*, 71 Cal.App.4th 226, 247 (1999). "The showing should include some explanation of what additional facts [plaintiff] expects to uncover ... ." *1-800 Contacts*, 107 Cal.App.4th at 593 (internal citations omitted). Absent such a showing, allowing discovery "would subvert the intent of the anti-SLAPP legislation." *Sipple*, 71 Cal.App.4th at 247.

The court should consider the discovery request in the context of the issues raised in the anti-SLAPP motion. *The Garment Workers Center v. Superior Court*, 117 Cal.App.4th 1156, 1162 (2004). "If, for example, the defendant contends the plaintiff cannot establish a probability of success on the merits because its complaint is legally deficient, no amount of discovery will cure that defect." *Id.* Courts should also consider a defendant's legal position before ruling on discovery. *Id.* Namely, if the issues raised in the anti-SLAPP special motion to strike can be resolved without discovery "the court should consider resolving those issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings." *Id.*

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[6] Plaintiffs' extensive discovery requests, including depositions for 16 individual corporate officers and voluminous business documents, counsels that this suit qualifies as a "similar type[] of litigation."

[7] California's anti-SLAPP discovery provision states: "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. *The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.*" CAL. CIV. PROC. CODE § 425.16(g) (italics added). The Washington version is substantively the same.

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Additionally, "[t]he trial court should consider whether the information the plaintiff seeks to obtain through formal discovery proceedings is readily available from other sources or can be obtained through informal discovery." *Id.* (citing *Schroeder v. Irvine City Council*, 97 Cal.App.4th 174, 191–92 (2002)).

Federal courts have analogized the "good cause" standard to that imposed by Federal Rule of Civil Procedure ("Rule") 56(d), which is the federal court equivalent to CR 56(f). For example, the Ninth Circuit has found that Rule 56(d) applies to anti-SLAPP motions, and no discovery will be allowed unless a plaintiff demonstrates that requested discovery is "essential" to opposing the anti-SLAPP motion. *Metabolife v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). In practice, no material difference exists between the "essential" standard of Rule 56(d) (or the "essential" language in CR 56(f)) and the California anti-SLAPP statute's "good cause" standard. *See New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1101 (C.D. Cal. 2004) ("at least on its face, [CAL. CIV. PROC. CODE § 425.16(g)] would seem to be entirely consistent with Rule 56(f)"[8] ... . This Court sees very little difference in the principles enunciated in the text of the two rules, or in their interpretation."). The court in *New.Net* explained that "[b]oth statutes confer discretion on the trial court to permit discovery in the face of a dispositive motion, in the appropriate case and upon a proper showing." *Id.* A Rule 56(d) motion may be granted only "where the nonmoving party has not had the opportunity to discover information that is *essential to its opposition.*" *Id.* (quoting *Metabolife*, 264 F.3d at 845) (emphasis original). This showing must be made with particularity. *New.Net*, 356 F. Supp. 2d at 1101. Defendants cannot, and have not, attempted to make the statutorily-required showing.

2. Plaintiffs Have Failed to Show "Good Cause" to Lift the Anti-SLAPP Statute's Automatic Discovery Stay.

Plaintiffs have not established good cause for any of the discovery requests found in their cross-motion. Each of their requests fail. First, Plaintiffs seek depositions from defendants Harry Levine and Jayne Kaszynski to "***test*** the veracity of Defendants' voluminous factual

[8] In 2010, Rule 56(f) was renumbered Rule 56(d).

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allegations," Cross-Mot. at 4 (emphasis added). However, it is well established that discovery may not be obtained merely to "test" an opponent's evidence. As a matter of law, challenging the statements made in Board members' declarations cannot provide good cause. *See 1-800 Contacts*, 107 Cal.App.4th at 593 ("Discovery may not be obtained merely to 'test' the opponent's declarations"); *see also Sipple*, 71 Cal.App.4th at 247. Federal courts agree that, under former Rule 56(f), good cause does not exist merely to test or impeach a witness. *See, e.g., Strang v. U.S. Arms Control and Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) ("Without some reason to question the veracity of affiants ... [plaintiff's] desire to 'test and elaborate' affiants' testimony falls short"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.,* 701 F.2d 95, 97 (9th Cir. 1983) ("[N]either a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment"); *Walker v. Kubicz,* 996 F. Supp. 336, 342 (S.D.N.Y. 1998) ("Although plaintiff no doubt would like additional discovery in the hope of impeaching the credibility of the defendants' affiants and to rebut the affiants' statements ... this is an insufficient basis for a Rule 56(f) continuance"). These holdings harmonize with the anti-SLAPP statute, which aims for early resolution of SLAPP suits based only on "pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." RCW 4.24.525(4)(c).

Second, Plaintiffs seek deposition testimony from defendant Grace Cox[9] and "documents in possession of each of the Defendants and the Co-op relating in any way to the Co-op's Boycott Policy and actions taken related thereto." Cross-Mot. at 2. However, Plaintiffs have failed to articulate with particularity any compelling reason to allow this unnecessary and burdensome discovery. Plaintiffs identify some general topics about which they would like to conduct discovery, but Plaintiffs offer absolutely no explanation—let alone a particularized explanation—why they cannot oppose Defendants' anti-SLAPP motion without this discovery,

[9] Ms. Cox submitted a declaration in support of Defendants' anti-SLAPP reply brief, which came after Plaintiffs' Cross Motion for Discovery. Presumably, Plaintiffs would also seek to "test" the veracity of Ms. Cox's declaration during her deposition as well, if the Court were to lift the discovery stay. Again, Plaintiffs' may not depose a declarant merely to "test" the veracity of their statements.

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what specific facts they intend to seek through discovery, or how any evidence Plaintiffs might obtain is "essential" to providing a probability of prevailing on their claims. In sum, Plaintiffs have merely stated that they would like to know more about the Board's decision-making process. That is not a sufficient showing, as a matter of law.

Third, Plaintiffs' vague and overbroad request for documents encompasses the vast majority the documents initially requested in Plaintiffs' 16 discovery requests served on Defendants. Plaintiffs' cross-motion essentially restates Plaintiffs' original requests in a different, consolidated format. If the Court were to entertain such a request—particularly one not supported by specifics or case law—it would undermine the very purpose of the anti-SLAPP law by "dragg[ing]" Defendants through the courts for exercising their constitutional rights. *See Varian Medical Systems*, 35 Cal.4th at 193.

Fourth, the discovery sought by plaintiffs is not material to the claims stated in their complaint. Their case rests on the simple question of whether the board was authorized to adopt the boycott by consensus. That question is answered by the Co-op's Articles of Incorporation, Mission Statement, and Bylaws, all of which have been provided in relevant detail in Defendants' special motion to strike and reply brief. In any event, all are readily available from the internet or public sources (and indeed are properly incorporated in Plaintiffs' own pleading, since their case rests on, and fails because of, those documents). The other discovery sought by Defendants has no bearing on any of the legal issues here.

Finally, Defendants' legal position resolves the anti-SLAPP matter without the need for burdensome and expensive discovery. Plaintiffs cannot overcome their myriad legal defects, including multiple standing problems, the business judgment rule, controlling corporate governance statutes, and failure to plead any proper ultra vires cause of action. Plaintiffs' legal claims cannot succeed as a matter of law. No amount of discovery will change that state of affairs.

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V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Cross-Motion for Discovery.

DATED this 11th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document on:

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DATED this 11 day of January, 2012.

DAVIS WRIGHT TREMAINE LLP

By Roni Grant
Roni Grant