☐ EXPEDITE

☐ No hearing set

☒ Hearing is set

Date: March 30, 2012

Time: Motion Calendar

Judge/Calendar: Hon. Thomas McPhee

SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

KENT L. and LINDA DAVIS; JEFFREY and SUSAN TRININ; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE, Plaintiffs, v. GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; SUZANNE SHAFER; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM, Defendants.	Case No. 11-2-01925-7 DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR MANDATORY COSTS, ATTORNEYS' FEES, AND AWARD UNDER RCW 4.24.525

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

Plaintiffs provide no authority and no compelling argument to show that Defendants' request for costs, attorneys' fees, and statutory award pursuant to RCW 4.24.525 is unreasonable. They acknowledge no responsibility for causing the large expenditures of work that underlie the fee petition. They also do not deny succeeding in "making good" on their threat to subject these 16 Defendants to complicated, burdensome, and expensive litigation.

Plaintiffs' Opposition to Motion for Fees and Penalties ("Pl.'s Br.") attempts to sidestep responsibility for Plaintiffs' own actions, now that the "considerable sums of money" anticipated by the Court have been made clear. Def.'s Motion for Fees and Costs, Ex. B at 34:5 (Transcript of Court's Feb. 27, 2012 Oral Opinion). It ignores the fact that the work done to defeat this SLAPP was entirely of Plaintiffs' own making. Lawsuits have "something of the tennis game, something of war, to it; if one side hits the ball, or shoots heavy artillery, the other side necessarily spends time hitting the ball or shooting heavy artillery back." *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004). Indeed, Plaintiffs' instant brief—which includes exhaustive and meritless claims—is a prime example of the "heavy artillery" to which Defendants have been forced to respond throughout this needless litigation.

Washington's anti-SLAPP law's ***mandatory*** award of attorneys' fees, costs, and statutory awards of $10,000 per moving party is unequivocally clear. *See* RCW 4.24.525(6)(a). As shown below, Plaintiffs have offered no persuasive reason to justify dodging the Legislature's mandate.

A. Fees, Costs, and Statutory Awards are Proper against Plaintiffs.

Plaintiffs' claim that the mandatory fee award must be issued **against the Co-op**—instead of against the Plaintiffs themselves—borders on absurd. Plaintiffs cite absolutely no authority for their perverse argument that the attorneys' fees, costs, and statutory award mandated by the anti-SLAPP law should be assessed against the Co-op. This argument merely adds insult to injury. The anti-SLAPP law's function as a deterrent to such lawsuits would be wholly undermined by Plaintiffs' proposal to shift the fees, costs, and award to a separate entity that had no involvement in bringing this suit. Aside from the common-sense reasons to hold Plaintiffs responsible for an action of their own design, the law also favors liability for Plaintiffs

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

here. As noted in Defendants' special motion to strike, in derivative suits the award of fees is not a one-way street in favor of prevailing plaintiffs. "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); *see also Sletteland v. Roberts*, 314 Mont. 76, 81 (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 anti-SLAPP law itself notes that the award shall be made "***without regard to any limits under state law.***" RCW 4.24.525(6)(a) (emphasis added).

Plaintiffs, who brought an unsuccessful lawsuit to bully, intimidate, and chill the speech of sixteen volunteer Board members, cannot pass their liability off to an organization their very conduct offended.[1] Plaintiffs filed this lawsuit, not the Co-op. Plaintiffs, not the Co-op, pushed these claims, demanded "complicated, burdensome and expensive" discovery, and argued against the anti-SLAPP motion to strike. Plaintiffs cannot suddenly pretend that they are ***not*** the Plaintiffs here, and protest that they should be automatically relieved from all responsibility for their SLAPP. If accepted, Plaintiffs' argument would mean that corporations would need to subsidize even the most frivolous strike suits brought by their shareholders, as long as they purported to be brought in the corporation's name.

Furthermore, to maintain standing plaintiffs in derivative suits 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.*; *see also Stokes ex rel. Anesthesia Associates of Monroe, PLLC v. Rodda*, 144 Wn. App. 1043, 2008 WL 2174434 at *3 (2008) (unpublished) (dismissing "proposed derivative action"

[1] Derivative suits are suits of equity. At a minimum, the Court should exercise its equitable power to hold Plaintiffs responsible for attorneys' fees, costs, and other equitable relief in this meritless suit.

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

after finding plaintiff's motives to be "hostile" and "vexatious rather than meritorious"). Plaintiffs' instant attempt to transfer damages to the corporation surely puts the nail in the coffin regarding their inadequacy as derivative plaintiffs. Plaintiffs cannot be deemed to "fairly and adequately represent" the Co-op's interests, because they now attempt to shift their liability under the anti-SLAPP law to the Co-op. Their current position is directly hostile and contrary to the interests of the entity on whose behalf they claim to have brought this suit. They now seek to have the Co-op absorb the penalties of their own actions, and act as a shield against their own mandatory personal liability under the anti-SLAPP law. There is no basis in law for such flagrant abuse of derivative litigation. Plaintiffs' argument provides the Court with a fresh opportunity to rule that Plaintiffs do not fairly and adequately represent the Co-op, to find Plaintiffs' claims frivolous, and to dismiss the derivative nature of the suit.[2]

B. Each of the 16 Defendants is Entitled to a Mandatory Award of $10,000.

Plaintiffs argue that the statutory amount of $10,000 should apply only to a single entity, the Co-op Board, not each of the individually named defendants. This argument cannot survive and, in fact, is refuted by the very remedy sought by Plaintiffs in this lawsuit: ***individual liability*** for breach of fiduciary duties against ***each*** of the 16 Board members. In their Complaint, Plaintiffs alleged without limitation that "These ***Defendants*** are therefore ***personally liable*** to OFC for the damages proximately caused by the breaches of their fiduciary duties." Complaint at 11-12, ¶¶ 67 & 68 (emphasis added). Plaintiffs now reverse course and attempt to claim they sued "an entity" instead of 16 individuals. *See* Pl.'s Br. at 2. This about-face cannot be countenanced. In Plaintiffs' own words, this lawsuit was ***not*** brought against "an entity," but instead against 16 individual volunteers. Plaintiffs' sudden argument to the contrary does not stand up to the facts.

[2] In such a situation, Defendants respectfully submit that they also would be entitled to costs and fees pursuant to CR 11 or RCW 4.84.185 ("prevailing party to receive expenses for opposing frivolous action or defense").

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

Further, if Plaintiffs had prevailed on their claim for breach of fiduciary duties, each Defendant would have been individually liable for the damages that the complaint explicitly sought. Each Defendant's liability could have differed, had suit proceeded to judgment against Defendants. This is because all Defendants did not all share an identical relationship with the subject of the suit. Some Defendants were sued as members of the Board that actually adopted the boycott, and then left the Board. *See, e.g.,* Complaint ¶ 10 (Jackie Krzyzek), ¶ 11 (Jessica Laing), ¶ 18 (Suzanne Shafer), ¶ 20 (Joellen Reineck Wilhelm). Other Defendants were not members of the Board that adopted the boycott, but became members of the Board in the year following adoption of the boycott resolution. Defendant Harry Levine was a member of the Board that adopted the boycott resolution, but he stood aside, and did not vote on the boycott resolution because he was the staff's representative to the Board, rather than a Board member elected by the Co-op membership. Levine Decl. ¶ 24 and Ex. M. Defendant Grace Cox was a member of the Board only during the months of September, November, and December, 2010, as a stand-in for Defendant Harry Levine, and did not participate in the boycott decision. Cox Decl. ¶ 1(d).

The statutory award of $10,000 applies to each of the 16 named Defendants to this action.

C. The Anti-SLAPP Law Does Not Conflict with Other Statutes.

Plaintiffs fabricate a false conflict between the anti-SLAPP law and the Nonprofit Act, RCW 24.03.040, and assert that the Court must "choose" one or the other. Pl.'s Br. at 3-4. This argument fails on its face. The two statutes are cumulative and not mutually exclusive. The language of the Nonprofit Act does not interfere with the remedy sought by Defendants here. If a plaintiff brings a derivative suit attacking the exercise of free speech rights on matter of public concern—as here—the 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 only if there is no reasonable cause for the claim. That is a rational distinction for the Legislature to make. The Nonprofit Act clearly does not preclude an award of fees, and it is the anti-SLAPP law that mandates fees in this case.

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

But even if the statutes conflicted (which they do not), 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 (2010). In this case, the anti-SLAPP law is both (1) more specific *and* (2) enjoys legislative intent expressing its broad application and liberal construction. *See* S.B. 6395, 61st Leg., 2010 Reg. Sess. (Wash. 2010) (the anti-SLAPP statute "shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts"). Furthermore, the anti-SLAPP law itself notes that the award shall be made "*without regard to any limits under state law*." RCW 4.24.525(6)(a) (italics added).

D. Defendants' Counsel Accurately Recorded Billing Entries.

Plaintiffs assert that Defendants "have largely failed to distinguish between work performed in connection with their CR 12(b)(6) motion and their anti-SLAPP motion." Pl.'s Br. at 11. Essentially, this argument attempts to create a new 12(b)(6) motion out of whole cloth—a separate motion that Defendants never wrote. *See, e.g.,* Pl's Br. at 2, 11-12. Defendants' billing entries overwhelmingly do not reflect a "12(b)(6) motion" for the simple reason that Defendants' counsel spent exceedingly little time on 12(b)(6) issues. In reality, Defendants argument for 12(b)(6) dismissal was an integral aspect of their anti-SLAPP special motion to strike. It was not a separate brief, or a separate motion. Indeed, Defendants' special motion focused entirely on anti-SLAPP analysis under RCW 4.24.525—except for two footnotes and the statement of issue addressing 12(b)(6). *See* Def.'s Special Motion to Strike at 1 n.1; 17 n.12.

Reference to 12(b)(6) thus required a miniscule amount of research and even less time to draft into the motion. *See, e.g.,* Ex. C to Johnson Decl. at 10 (reflecting two entries, dated 10/28/11 and 10/30/11, addressing 12(b)(6) or "alternative grounds for dismissal"). Defendants' 12(b)(6) reference exists purely as a result of a strategic decision to allow another procedural

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

vehicle for dismissal. The time spent on it was negligible. Plaintiffs' attempt to make is something other than what it is should be rejected.[3]

E. Hourly Rates for Defendants' Counsel are Reasonable in Olympia.

Plaintiffs make scant effort to refute the reasonableness of the hourly rates charged by Defendants' counsel. They appear to claim only that Olympia should enjoy a separate customary rate than Seattle. This assertion is not borne out in practice. As the Court is aware, countless Seattle attorneys practice in Thurston County, and on countless occasions judges in Thurston County have awarded "Seattle" rates for "Olympia" cases. Plaintiffs—whose lawyers also hail from Seattle—have not met their burden to show that a deviation from the lodestar is warranted. *See, e.g., Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598 (1983).[4]

F. Washington's Anti-SLAPP Statute is Still Constitutional.

Plaintiffs now contend—without substantial discussion—that the anti-SLAPP law's $10,000 award is unconstitutional. *See* Pl.'s Br. at 13-14. This argument ignores that fact that this Court has already ruled on Plaintiffs' challenge to the constitutionality of RCW 4.24.525—and has found it to be constitutional. Plaintiffs' argument is especially ineffective because Plaintiffs "incorporate[] by reference herein" the very same arguments that failed previously. Pl.'s Br. at 14. In its February 27, 2012 oral opinion, the Court unequivocally stated that "I must ... address the constitutionality of the statute, because I am applying it here. *I conclude that it is constitutional.*" *See* Ex. B to Def.'s Motion for Fees and Costs, at 27:7-9 (italics added). The

---

[3] Further, it is worth pointing out that Plaintiffs' attempt to limit recovery to the special motion to strike alone cannot be reconciled with the plain language of the statute. *See* Pl.'s Br. at 11 n.10. The anti-SLAPP statute clearly provides an award of fees and costs for work "in connection with ***each motion*** on which the moving party prevailed." RCW 4.24.525(6)(a)(i) (emphasis added). Again, this goes to the broad and liberal construction of the statute, the intent of which is to curtail abusive SLAPP suits. Because plaintiffs control early litigation, the Legislature found it necessary to provide comprehensive relief for aggrieved defendants. Foreclosing fees for motions other than the special motion to strike would create a gaping loophole in the anti-SLAPP statute that would permit plaintiffs to bring frivolous motion after frivolous motion without fear of liability—the opposite of the anti-SLAPP law's intent.

[4] Since filing this motion, Defendants' counsel Maria LaHood received an order on a motion for attorneys' fees and costs in another anti-SLAPP case, granting all her requested fees at an hourly rate of $425—higher than that requested here. *See* Supplemental Declaration of Maria C. LaHood, attached as Ex. A.

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

constitutionality of the anti-SLAPP statute is accordingly "law of the case." *See, e.g., In re Estate of Campbell,* 87 Wn. App. 506, 512 n.1 (1997). It is a thing decided, and should not be overturned at this late hour.

In addition to the dispositive arguments above, RCW 4.24.525(6)(a)(ii)'s $10,000 award is constitutional. For the reasons explained in Defendants' Reply regarding the special motion to strike (which are incorporated by reference), RCW 4.24.525 does not violate separation of powers and does not conflict with the Civil Rules. To illustrate this point, many other Washington statutes contain similar provisions. For example, RCW 26.09.160 requires a civil penalty of not less than $100 for failure to provide residential provisions in child custody matters. Similarly, RCW 42.56.550(4) allows a statutory award of $100 per day for denial of review of public records. The Washington Consumer Protection Act, RCW 19.86.090, provides treble damages. *See, e.g., Banuelos v. TSA Washington, Inc.*, 134 Wn. App. 607, 615 (2006). Finally, RCW 49.52.070 allows double damages for wrongful withholding of wages (in addition to costs and attorneys' fees). All of these statutes—like the anti-SLAPP law—provide prevailing parties with more than mere damages, costs, and attorneys' fees. Like the above statutes, RCW 4.24.525 is not unconstitutional.

G. Plaintiffs' Failure to Reveal Their Own Fees is Conspicuous.

The Ninth Circuit has noted that "there is one particularly good indicator of how much time is necessary ... and that is how much time the other side's lawyers spent." *Dem. Party of Washington*, 388 F.3d at 1287. "If the time claimed by the prevailing party is of a substantially greater magnitude than what the other side spent, that often indicates that too much time is claimed." *Id*; *see also Joy Mfg. Corp. v. Pullman-Peabody Co.*, 742 F. Supp. 911, 923 (W.D. Pa. 1990) (noting with disapproval opposing counsel's failure to submit their own billing entries which "could have been helpful"). Yet, despite offering a declaration from their lawyer, Plaintiffs offer no evidence of the amount of time that they spent on the case. Indeed, Plaintiffs' brief opposing Defendants' instant motion is conspicuously lacking any discussion regarding Plaintiffs' own fees or hourly rates. As the case law makes clear, this is a method by which non-

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

prevailing parties may attempt to reduce fees. Plaintiffs' silence on this issue—as well as their silence regarding the identity of parties who are paying fees for Plaintiffs' counsel—speaks volumes.

II. CONCLUSION

As the Fifth Circuit has noted: "It is unbecoming for the plaintiffs to hail the defendant into court by means of false allegations and then to complain when the defendant hires skillful, experienced and expensive advocates to defend against those allegations." *Schwarz v. Folloder*, 767 F.2d 125, 134 (5th Cir. 1985) (internal quotations omitted). "Having wrongfully kicked the snow loose at the top, [the plaintiff] must bear the consequences of the avalanche at the bottom." *Id.*

For the foregoing reasons, Defendants respectfully request that the Court award their request for reasonable attorneys' fees incurred in connection with their successful motions, $178.75 in costs, and a statutory amount of $10,000 per defendant.

DATED this 29th day of March, 2012.

Davis Wright Tremaine LLP
Attorneys for Defendants

By _____

Bruce E.H. Johnson, WSBA #7667
Devin Smith, WSBA #42219
1201 Third Ave., Ste. 2200
Seattle, WA 98101
Phone: (206) 622-3150
BruceJohnson@dwt.com
DevinSmith@dwt.com

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served to the parties listed below, the DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR MANDATORY COSTS, ATTORNEYS' FEES, AND AWARD UNDER RCW 4.24.525 and PROPOSED ORDER in the manner noted below:

Robert Sulkin McNaul Ebel Nawrot & Helgren Class, 600 University St., Ste. 2700 Seattle, WA 98101	___ __X__ __X__	Via Hand-Delivery Via U.S. Mail, 1st Postage Prepaid Via Electronic Mail

DATED this 29th day of March, 2012.

Donna Alexander

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 · 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 · Fax: (206) 757-7700