☐ EXPEDITE
☐ No hearing is set
☑ Hearing is set
Date: September 18, 2015
Time: 9:00 a.m.
Judge/Calendar: Hon. Erik D. Price

SUPERIOR COURT OF WASHINGTON FOR 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.

No. 11-2-01925-7

PLAINTIFFS' MOTION TO COMPEL DISCOVERY

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I. INTRODUCTION AND RELIEF REQUESTED

This motion to compel presents a flagrant, ongoing violation by Defendants of the rules governing discovery. Plaintiffs' First Interrogatories and Requests for Production (the "Discovery Requests") were served on Defendants nearly four years ago. *See, e.g.*, **Ex. A.**[1] The case was subsequently dismissed by the Honorable Thomas McPhee (Ret.) and appealed. The Washington Supreme Court ultimately reversed Judge McPhee's order of dismissal, and issued its mandate on June 19, 2015. Dkt. 120. To this day, however, Defendants have not provided a single responsive document or answered a single interrogatory. Defendants' responses are long overdue, and they have waived their right to object. Defendants cannot plausibly contend otherwise.

Further, it cannot be disputed that Plaintiffs have attempted to secure Defendants' cooperation in discovery. Most recently, Plaintiffs voluntarily offered to extend Defendants' deadline to respond to the Discovery Requests. **Ex. B**. Defendants rejected that offer, instead choosing to continue their strategy of stonewalling Plaintiffs. **Ex. C**. Their position violates the letter and spirit of the Civil Rules. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054, 1077 (1993) (a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials).

Accordingly, Plaintiffs hereby request that, first, the Court compel Defendants to respond to the Discovery Requests by a date certain. CR 37; *see* CR 33, 34. Second, Plaintiffs request that the Court issue an order finding that Defendants have waived any and all objections to the Discovery Requests and must therefore answer them fully and completely. *See Rivers v. Washington State Conf. of Mason Contractors,* 145 Wn.2d 674, 681, 41 P.3d 1175 (2002). Finally, Plaintiffs request the Court award Plaintiffs fees

[1] Exhibits A-M are attached to the Declaration of Avi J. Lipman ("Lipman Decl.") filed contemporaneously herewith.

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incurred in bringing this Motion to Compel Discovery in an amount to be determined. CR 37(a)(4).

II. STATEMENT OF FACTS

A. The Co-Op's Boycott Policy and Boycott of Israel

The Olympia Food Co-op ("the Co-op") is a non-profit cooperative association organized under the laws of Washington State that operates two retail grocery stores in Olympia, Washington. Dkt. 20 ¶¶ 1, 20. The Co-op bills itself as a "collectively managed," relying "on consensus decision making." **Ex. E.** In May 1993, the Co-op's Board adopted a policy establishing the procedure by which the Co-op would recognize product boycotts (the "Boycott Policy" or "Policy"). **Ex. F.** The Policy provides:

> **BOYCOTT POLICY**
>
> Whenever possible, the Olympia Food Co-op will ***honor nationally recognized boycotts*** which are called for reasons that are compatible with our goals and mission statement...
>
> ...
>
> In the event that we decide not to honor a boycott, we will make an effort to publicize the issues surrounding the boycott ... to allow our members to make the most educated decisions possible.
>
> ...
>
> A request to honor a boycott ... will be referred ... to determine which products and departments are affected.... The [affected] ***department manager will make a written recommendation to the staff who will decide by consensus whether or not to honor a boycott....***
>
> ...
>
> The department manager will post a sign informing customers ***of the staff's decision*** ... regarding the boycott. ***If the staff decides to honor a boycott, the M.C. will notify the boycotted company or body of our decision ...***

Id. (emphasis added). Under the Policy's plain language, the Co-op can honor a boycott only if two tests are met: (1) there is an existing nationally recognized boycott; and (2) Co-op staff approve the boycott proposal by consensus (i.e., universal agreement).

In July 2010, the Co-op's Board disregarded the Boycott Policy and adopted a resolution approving a boycott of Israeli-made products and divestment from Israeli companies (the "Israel Boycott"). *See* **Ex. G.** Judge McPhee previously found—and,

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indeed, the Co-op has admitted—that the Board did so despite a lack of staff consensus. Dkt. 41 at 2; **Ex. H** at 20. Moreover, Judge McPhee also acknowledged that there was no nationally recognized boycott of Israel at the time the Board acted. **Ex. H** at 24. On appeal, our Supreme Court found that this very issue presents a genuine dispute of fact for trial. *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). The Israel Boycott has divided the Co-op community and caused members to cancel their memberships or shop elsewhere. *See, e.g.*, **Ex. I** ¶ 12.

After the Board approved the Israel Boycott, several long-time Co-op members urged the Co-op Board to honor the Boycott Policy, as well as the Co-op's Bylaws and Mission Statement by reversing their decision and returning the issue to the staff. *E.g.*, **Ex. J**. The Board refused. **Ex. K**. Instead, the Board attempted to amend the Boycott Policy and thereby attempt to retroactively legitimize the Board's conduct. *E.g.*, **Ex. L**.

B. Plaintiffs' Complaint and Discovery Requests

Plaintiffs are long-time Co-op members and volunteers. *See, e.g.*, **Ex. I** ¶ 2. On September 2, 2011, Plaintiffs filed a verified derivative complaint asserting on behalf of the Co-op that because the Israel Boycott was enacted in a way that violated Co-op rules and procedures, it was void and unenforceable. Dkt. 20. The complaint also alleged that the Board members violated fiduciary duties owed to the entity. *Id.* Plaintiffs' complaint primarily seeks declaratory and injunctive relief. *Id.*

Relevant to Plaintiffs' claims are, among other things, the Boycott Policy itself, the Co-op's enactment of the Boycott Policy, the Co-op's application of the Boycott Policy since its enactment, the Co-op's actions adopting or rejecting previous proposed boycotts, and other issues related to the Boycott Policy. Accordingly, on September 7, 2011, Plaintiffs served Defendants with the Discovery Requests. *E.g.*, **Ex. A**. Among other things, these requests seek information concerning the membership of the Co-op's Board of Directors and the Co-op staff at the time of the boycott, and seek documents and

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communications concerning the Israel Boycott and the Boycott Policy. *See id.* at 8-11. Plaintiffs also noticed depositions of the named Defendants. *E.g.*, **Ex. M.** Defendants have not, to date, responded in any way to the Discovery Requests.

C. The Co-op Special Motion to Strike and Subsequent Appeal

On November 1, 2011, Defendants filed a Special Motion to Strike Under Washington's Anti-SLAPP Statute, RCW 4.24.525, And Motion To Dismiss ("Motion to Strike"). Dkt. 41. Under the Anti-SLAPP Statute, Plaintiffs' Motion to Strike triggered an automatic stay of discovery. *See* RCW 4.24.525(5)(c). Plaintiffs opposed the Motion to Strike, arguing, among other things, that Plaintiffs' Complaint was not covered by the Anti-SLAPP Statute and that the Statute was unconstitutional on its face and as applied to Plaintiffs. Dkt. 41.3. At the same time, Plaintiffs cross-moved to allow discovery to proceed. Dkt. 42.2.

After full briefing and oral argument on January 13, 2012, Judge McPhee granted the Defendants' Motion to Strike based on the Anti-SLAPP Statute, and accordingly denied Plaintiffs' discovery cross-motion. Dkts. 86, 87. The Court sanctioned Plaintiffs $10,000 for each of the sixteen Defendants—whom Plaintiffs had to name as defendants to properly sue the Co-op's Board—plus attorneys' fees and costs, for a total judgment of $232,325. Dkt. 110. Plaintiffs timely appealed this order and the Court of Appeals affirmed. *See Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014).

On October 9, 2014, the Washington Supreme Court accepted Plaintiffs' petition for review. Plaintiffs argued again on appeal that (1) the Anti-SLAPP Statute did not apply to Plaintiffs' claims, (2) Plaintiffs complaint should not have been dismissed even if the Statute did apply because the undisputed record established that the Defendants breached their fiduciary duties, and (3) the Statute was otherwise unconstitutional on its face and as applied to Plaintiffs. Oral argument was held on on January 20, 2015

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On May 28, 2015, the Washington Supreme Court reversed and held that the Washington Anti-SLAPP Statute is unconstitutional. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015). In so doing, it found that the record contained disputed facts that must be resolved at trial:

> One ***disputed material fact*** in this case is whether a boycott of Israel-based companies is a "nationally recognized boycott[ ]," as the Cooperative's boycott policy requires for the board to adopt a boycott. CP at 106. The declarations on this fact conflict. *Compare, e.g.*, CP at 348 (Decl. of Jon Haber) ("No matter where they have been pursued, efforts to organize boycotts of and divestment from Israel have failed in the United States. In short, policies boycotting and/or divesting from the State of Israel have never been 'nationally recognized' in this county. Among food cooperatives alone, the record is stark: every food cooperative in the United States where such policies have been proposed has rejected them. [Describes examples.]"), *with* CP at 470 (Decl. of Grace Cox) ("[T]he web site of the U.S. Campaign to End the Occupation ... name[s] hundreds of its own U.S. member organizations[ ] as supporters for its campaigns, including boycotts against Motorola, Caterpillar, and other companies in the U.S. and around the world that were profiting from Israel's occupation. The U.S. Campaign now reports about 380 state-level member *organizations* across the country, including five businesses in Olympia, WA."). ***On this disputed material fact, when the superior court resolved the anti-SLAPP motion, it weighed the evidence*** and found the defendants' "evidence clearly shows that the Israel boycott and divestment movement is a national movement." CP at 990.

Davis, 183 Wn. 2d at 282 n.2 (emphases added). Accordingly, the Court struck down the Anti-SLAPP Statute in its entirety, reversed the dismissal of Plaintiffs' claims, and remanded the case to this Court for trial. *Id.* at 295-96. On June 19, 2015, the Supreme Court issued its mandate directing this Court to engage in further proceedings consistent with its opinion. Dkt. 120.

D. Procedural Posture Following Remand

The Supreme Court's opinion and mandate returned the parties to their respective positions before Defendants filed their Motion to Strike on November 1, 2011. The unconstitutional Anti-SLAPP Statute no longer justifies dismissal of Plaintiffs' complaint; nor does it create an automatic stay of discovery. Accordingly, under the Civil Rules,

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Plaintiffs' outstanding discovery requests should have been answered no later than 30 days after the mandate issued—if not earlier.[2] Yet, Defendants failed to do so.

On August 13, 2015, undersigned counsel wrote to Defendants' counsel inquiring about the status of Defendants' responses. **Ex. B**. At that point, Defendants responses were already months overdue. Nonetheless, in the interest of cooperation, undersigned counsel indicated that Plaintiffs would be willing to allow Defendants an ***additional thirty days*** to respond to Plaintiff's discovery. **Ex. B**. After subsequent dialogue did not yield an agreement on how to proceed with discovery, undersigned counsel requested that counsel meet and confer under CR 26. **Ex. C**. Counsel engaged in further conference on August 28, 2015. *Id.* At that conference, Defendants' counsel rejected Plaintiffs' offer of an extended discovery deadline. *Id.* Instead, Defendants' counsel indicated that Defendants intended to file a "renewed motion to dismiss" and took the position that "discovery should await resolution of the renewed [motion]." *Id.*

Thereafter, Defendants' counsel determined that the earliest dates for a hearing on Defendants' second motion to dismiss are in February 2016. **Ex. D**. The parties agreed on a hearing date of February 19, 2016. Undersigned counsel asked if Defendants intended to stand on their position that discovery should be stayed until after the motion to dismiss hearing—an additional five months of delay. *Id.* On September 3, 2015, Defendants' counsel responded simply by reiterating his position that discovery would have to wait until after the motion to dismiss was resolved. *Id.*

That same day, September 3, Defendants filed their second motion to dismiss. Dkt. 124. The motion lacks merit; indeed, Defendants have previously briefed numerous reasons why Plaintiffs' arguments fail. *See* Dkt. 41.3 at 17-25. Defendants' second motion

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[2] Fifty-five days elapsed between Plaintiffs' service of discovery (**Ex. A**) on September 7, 2011, and Defendants service of their Motion to Strike on November 1, 2011, which stayed discovery (Dkt. 41). Another fifty-five days elapsed between the date the Supreme Court's mandate issued (Dkt. 120) and August 13, 2015 letter.

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relies principally upon arguments previously made (Dkt. 40), but not ruled on, by Judge McPhee in granting Defendants' first motion to dismiss (Dkt. 87). (Judge McPhee's dismissal order was based on Washington's Anti-SLAPP Act, which our Supreme Court declared unconstitutional in the appeal of the instant litigation.) In addition to these old arguments, Defendants' also take the position that certain comments by the Court of Appeals create "law of the case" that mandates dismissal. Dkt. 124 at 16-17. Of course, Defendants ignore that our Supreme Court ***reversed*** the Court of Appeals, and in so doing stated explicitly that this dispute presents a genuine dispute of fact for trial (and thus should withstand a CR 56 motion, not to mention a CR 12 motion). *Davis v. Cox*, 183 Wn.2d 269, 282 n.2, 351 P.3d 862 (2015). Defendants' motion is plainly futile under the "law of the case" doctrine.

Yet, the Court need not consider or resolve the merits of Defendants' second motion to dismiss here. CR 37. Washington law imposes no temporal limitation restricting a plaintiff's access to discovery until after a defendant completes years of motion practice. CR 33(a), 34(a). On the contrary, Washington public policy strongly favors early and broad discovery. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). In light of this Court's schedule, a stay of discovery would result in a delay of at least another ***five months***. **Ex. D**. This delay is facially prejudicial to Plaintiffs, whose day in Court has already been put off for years. The Court should compel Defendants to comply with the Civil Rules, and order Plaintiffs to promptly comply with the Discovery Requests.

Counsel for the parties complied with CR 26(i) during a phone conference on August 28, 2015, but were unable to reach agreement. **Ex. C**.

III. STATEMENT OF ISSUES

1. Should the Court compel Defendants to respond to the Discovery Requests, which are now at least three months overdue?

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2. Should the Court find that Defendants' failure to respond to the Discovery Requests constitutes a waiver of Defendants' objections to those requests?

3. Should the Court award Plaintiffs fees incurred in bringing this Motion?

IV. EVIDENCE RELIED UPON

Plaintiffs' Motion to Compel relies upon the September 10, 2015 Declaration of Avi. J. Lipman, filed herewith, and the record on file in this matter.

V. AUTHORITY AND ARGUMENT

A. The Court Should Compel Defendants to Respond to the Discovery Requests

Defendants' responses to the Discovery Requests are now more than three months overdue. Plaintiffs served their complaint and summons on the Defendants on September 2, 2011 (Dkts. 4-20), and subsequently served discovery requests on the Defendants on September 7, 2011. *E.g.*, **Ex. A**. Under CR 33 and 34, Defendants' responses were due within forty days after service of the complaint. Defendants did not respond to Plaintiffs' requests within that timeframe.

Instead, fifty-five days after service of Plaintiffs' requests, on November 1, 2011, Defendants filed a Motion to Strike under Washington's former Anti-SLAPP Statute, RCW 4.24.525. Dkt. 41. Under Washington law as it existed at the time, this Motion carried with it an automatic ***stay*** of discovery. RCW 4.24.525(5)(c). Plaintiffs moved to lift the discovery stay, but that motion was denied when, on July 12, 2012, Judge McPhee granted Plaintiffs' Motion to Strike and dismissed Plaintiffs' complaint. Dkts. 86, 87. Plaintiffs appealed the Court's ruling and for several years this litigation moved through the Court of Appeals and on to the Washington Supreme Court. On May 28, 2015, the Supreme Court held that the Washington Anti-SLAPP Statute was unconstitutional, reversed the trial court's dismissal of Plaintiffs' complaint, and remanded. *Davis v. Cox*, 183 Wn.2d 269, 295-96, 351 P.3d 862 (2015). The Supreme Court's mandate of June 19, 2015 returned the parties to their respective positions before the Motion to Strike was

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filed. Since that mandate issued, another seventy-seven days have elapsed. Defendants have still not responded to the Discovery Requests.

Under CR 37, if a party fails to answer an interrogatory submitted under Rule 33 or fails to respond to a request for production or inspection submitted under Rule 34, "any party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request." CR 37(a)(2). Here, it is undisputed that Defendants failed entirely to timely answer and respond to the Discovery Requests. Indeed, as described above, Defendants' responses are now at least ***three months*** overdue. Moreover, Defendants rejected Plaintiffs' offer to allow Plaintiffs additional time to respond and now imply that they will not produce any responses for at least another ***five months***. *See* **Exs. C, D**. Defendants have flouted the Civil Rules governing discovery and the "spirit of cooperation and forthrightness" that is supposed to govern discovery. *Fisons Corp.*, 122 Wn.2d at 342 (1993). The Court should order Defendants to perform by a date certain.

B. Defendants' Failure to Timely Respond to Plaintiffs' Discovery Requests Waived Defendants' Objections to the Discovery Requests

As described above, *supra* Section V.A, it is beyond dispute that Defendants have failed to timely answer and respond to the Discovery Requests. Nor did Defendants timely assert any objections. Accordingly, any possible objections have been waived. *See, e.g., Rivers v. Washington State Conf. of Mason Contractors,* 145 Wn.2d 674, 681, 41 P.3d 1175 (2002); *see also Rhinehart v. Seattle Times Co.,* 51 Wn. App. 561, 563 n. 1, 754 P.2d 1243 (1988) ("Absent a timely response or objection to a discovery request, the right to object may be waived.") (citations omitted). This Court should order that Defendants have waived their right to object to the Discovery Requests.

C. Plaintiffs Are Entitled to an Award of Attorneys' Fees and Costs Incurred in Bringing This Motion

Plaintiffs are entitled to recover their fees in costs in bringing this motion because Defendants have ignored Washington's rules on discovery. CR 37 provides that if a party

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fails to answer an interrogatory submitted under Rule 33 or fails to respond to a request for production or inspection submitted under Rule 34, "any party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request." CR 37(a)(2). CR 37(a)(4) in turn provides:

> If the motion is granted, the court ***shall***, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Defendants cannot show good cause that excuses their non-performance under the Civil Rules. Defendants have never asserted that they need additional time to respond to Plaintiffs' requests, nor have they asked Plaintiffs to consider an extension. On the contrary, when Plaintiffs willingly offered Defendants additional time to respond (**Ex. B**), Defendants rejected that offer and indicated that Defendants had no intention to provide discovery before taking filing a ***second*** motion to dismiss with this Court. **Ex. C**. As further described below, *infra* Section V.D, Defendants' position is not "substantially justified." Accordingly, Plaintiffs seek an award of fees incurred in bringing this motion in an amount to be determined after oral argument.

D. There Is No Legal Basis for a Five-Month Stay of Discovery Pending Resolution of an Unwarranted, Second Motion to Dismiss

Defendants may argue that—in light of their second motion to dismiss this lawsuit (**Ex. C**)—"good cause" exists to excuse their non-compliance with the Civil Rules and to further stay discovery until the Court resolves Defendants' motion. Defendants' position is both meritless under Washington law and unreasonable on the facts presented here.

1. Washington Law Favors Early, Broad Discovery

Washington public policy strongly favors early and broad discovery in civil litigation. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009). "The very

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essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Putman*, 166 Wn. 2d at 979 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)). "The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'" *Putman*, 166 Wn. 2d at 979. "This right of access to courts 'includes the right of discovery authorized by the civil rules.'" *Putman*, 166 Wn.2d at 979 (quoting *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 782, 819 P.2d 370 (1991)).

Indeed, the Washington Supreme Court has explained that "[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.'" *Putman*, 166 Wn.2d at 979 (quoting *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991) Other Washington courts have emphasized the need for "early open discovery" because "early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims." *Lowy*, 174 Wn.2d at 777. To that end, Washington's Civil Rules expressly allow discovery requests to be served "with or after service of the summons and complaint" in each case. CR 33(a), 34(a).

Accordingly, Washington courts have rejected efforts by parties to use CR 12(b) motions strategically to avoid all discovery obligations. *See, e.g., State v. LG Electronics, Inc.*, 185 Wn. App. 394, 408, 341 P.3d 346, 354 (2015) *review granted,* 183 Wn. 2d 1002, 349 P.3d 856 (2015) (rejecting effort to stay discovery pending a CR 12(b) motion because the requested stay would be "antithetical to the purpose of notice pleading and the structure of the Civil Rules").

2. Washington Law Favors Access to Discovery Here

Plaintiffs in Washington have the right to access the Court and the attendant right to early and broad discovery to test the merits of their claims. *Putman*, 166 Wn.2d at 979;

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Lowy, 174 Wn.2d at 777. This case is now approximately four years old (Dkt. 1), and Defendants' responses to the Discovery Request are long overdue. *Supra* Section V.A. Defendants' persistent refusal to provide even a single substantive response to any of Plaintiffs' requests undermines Plaintiffs' constitutional rights. *Lowy,* 174 Wn.2d at 777.

Moreover, Defendants' position is particularly disingenuous in light of their own extensive review and use of the Co-op documents in its control. Defendants have previously submitted bills to this Court indicating that Defendants' counsel spent scores of hours and tens of thousands of dollars reviewing Co-op documents—documents that remain in Defendants' exclusive control. Dkt. 68 at 7-9; Dkt. 76. Defendants have used these documents (and declarations from Defendants) in an effort to restrain the factual narrative in their favor. This is precisely the type of litigation strategy the Court of Appeals rejected in *State v. LG Electronics, Inc.*, 185 Wn. App. 394. The *LG Electronics, Inc.* court explained: "Were we to embrace the [Defendant's] position, we would create a false world—one existing solely as the result of litigation strategies." *Id.* at 408. It rejected the defense "litigation strategy designed to subvert, rather than advance, the purpose of our liberal notice pleading regime—to facilitate a proper decision on the merits." *Id.*

3. There Is No Legal Basis to Stay Discovery Pending Defendants' Second Motion To Dismiss

A discovery stay pending the Defendants' second motion to dismiss is unreasonable on the facts presented. On its merits, Defendants motion is futile. The Washington Supreme Court stated that Plaintiffs have established at least one factual dispute that will need to be resolved at trial. *Davis v. Cox*, 183 Wn. 2d 269, 282 n.2, 351 P.3d 862 (2015). In other words, the Supreme Court has already indicated that Defendants cannot prevail on a motion under CR 56, much less a motion under CR 12. There is no reason to further delay discovery in deference to meritless and wasteful motions practice.

In any event, in light of this Court's unavailability until February 2016 (*see* **Ex. D**), Defendants' requested stay of discovery would require another discovery delay

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lasting at least five months. Such a delay is unfair and prejudicial on its face. This is not a case of modest delay at the outset of a lawsuit. This litigation is now at it four year anniversary. The Court should compel Defendants to comply with their discovery obligations.

VI. CONCLUSION

For the reasons stated above, Plaintiffs hereby request that the Court (1) compel Defendants to respond to the Discovery Requests and produce documents by a date certain; (2) direct Defendants to respond to the Discovery Requests fully and completely; (3) noted that Defendants have waived their right to object to the Discovery Requests; and (4) award Plaintiffs their attorneys' fees and costs incurred in bringing this Motion to Compel Discovery.

DATED this 11th day of September, 2015.

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By: _____
Robert M. Sulkin, WSBA No. 15425
Avi J. Lipman, WSBA No. 37661
Attorneys for Plaintiffs

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DECLARATION OF SERVICE

On September 11, 2015, 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:

Bruce E. H. Johnson, WSBA No. 7667 Angela Galloway, WSBA No. 45330 Ambika Kumar Doran, WSBA No. 38237 DAVIS WRIGHT TREMAINE LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 Email: brucejohnson@dwt.com angelagalloway@dwt.com ambikadoran@dwt.com lesleysmith@dwt.com (Asst.)	☑ ☐ ☐ ☐ ☐	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 11th day of September, 2015, at Seattle, Washington.

Lisa Nelson, *Legal Assistant*

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