No. 93079-1

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WASHINGTON TRUCKING ASSOCIATIONS, a Washington nonprofit corporation; EAGLE SYSTEMS, INC., a Washington corporation, GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; PSFL LEASING, INC., a Washington corporation, and SYSTEM-TWT TRANSPORTATION d/b/a SYSTEM-TWT, a Washington limited liability company,

Appellants,

v.

THE STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; PAUL TRAUSE, individually and in his official capacity as the former Commissioner of the Employment Security Department, and JANE DOE TRAUSE, husband and wife and the marital community composed thereof; BILL WARD, individually and in his official capacity, and JANE DOE WARD, husband and wife and the marital community composed thereof; LAEL BYINGTON, individually and in his official capacity, and JANE DOE BYINGTON, husband and wife and the marital community composed thereof; JOY STEWART, a single individual, individually and in her official capacity; and MELISSA HARTUNG, a single individual, individually and in her official capacity; ALICIA SWANGWAN, a single individual, individually and in her official capacity,

Respondents.

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# REPLY BRIEF OF APPELLANTS

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## A. INTRODUCTION

This claim is premised on the bad faith tactics employed by respondent Employment Security Department ("ESD") in its blatant effort to restructure the trucking industry. ESD sends "auditors" into the field, *not* with instructions to audit trucking companies, including the appellants herein (the "Carriers"), but with a *mandate* to reclassify all owner/operators as employees, regardless of the actual circumstances of the trucking company's relationship to its owner/operators. It then deliberately assesses overinflated taxes, penalties, and interest against the trucking companies, forcing them to undertake litigation to correct ESD's errors and then engaging in obstreperous tactics in an effort to make the litigation cost-prohibitive to an individual carrier.

The administrative process provides no remedy for the harms caused by these bad faith tactics. Indeed, despite representing to this Court that the Carriers must exhaust administrative remedies, ESD has simultaneously argued in the administrative process to Administrative Law Judges ("ALJ") that its motives and means of arriving at the assessment are irrelevant and that the only issue the ALJ has jurisdiction to decide is whether the assessment *amount* was correct. Because the administrative process cannot provide any redress for the harms caused by

ESD's misuse of power, the Carriers properly sought recourse in the trial court.

The trial court incorrectly dismissed these claims, and ESD's arguments fail to justify that erroneous decision. The so-called "comity doctrine" does not bar a § 1983 claim where there is no adequate remedy under state law. And the Carriers stated a claim for tortious interference where ESD, through improper means and for an improper purpose, damaged the Carriers' valid contractual relationships with owner/operators.

Moreover, appellant Washington Trucking Associations ("WTA") has standing to pursue this claim, both in its individual capacity and in its associational capacity. WTA alleges an injury in its own right and acts as the representative of its members. Forcing WTA's individual members to litigate this claim would be unduly burdensome both to the individual members and to the judicial system. As such, this Court should reverse the trial court's precipitous dismissal of these valid claims and remand for a trial on the merits.

## B. ARGUMENT

Review of this CR 12(b)(6) dismissal is de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005) (citing *Tenore v. AT*

*& T Wireless Servs.*, 136 Wn.2d 322, 329–30, 962 P.2d 104 (1998)). The Court must reverse unless "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." *Id.* (quoting *Tenore*, 136 Wn.2d at 329–30). "In undertaking such an analysis, 'a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record.'" *Id.* (quoting *Tenore*, 136 Wn.2d at 329–30). Under this heavy burden, the trial court's dismissal order cannot stand.

1. ESD's bad faith audit and litigation tactics have caused harm to the Carriers.

The essence of the allegations in the Carriers' Complaint is this: During the economic downturn, ESD strategically targeted the trucking industry as a source of revenue. CP 205. After decades of interpreting the Employment Security Act such that owner/operators could be treated as independent contractors for unemployment-tax purposes, ESD arbitrarily changed its interpretation. CP 206. ESD then sent its auditors after the trucking industry, with instructions not to objectively audit individual companies and evaluate whether the requisite independence existed, but instead with orders to invariably and mandatorily reclassify all owner/operators as employees. *Id.*

In their haste to generate revenue and restructure the industry, ESD not only failed to apply its own standards for analyzing independent-contractor relationships, it also ignored statutory limits on its jurisdiction. CP 220–23. For example, its auditors failed to make any effort to identify owner/operators who resided out of state and drove no miles in Washington, thus depriving ESD of *situs* jurisdiction. CP 222. Likewise, its auditors failed to identify owner/operators with corporate form who, as a matter of law, cannot be employees. *Id.* In addition, ESD ignored the fact that the compensation paid to owner/operators, on the face of the contract, necessarily included payments for the rental of equipment, which cannot be "wages" subject to unemployment taxation. CP 223.

ESD contends that the burden was on the Carriers to prove these points.[1] But this is legally wrong. The equipment, situs, and corporate-entity issues go to ESD's jurisdiction to impose a tax and are thus ESD's burden to prove. *See* RCW 50.04.010 (only wages subject to tax), RCW 50.04.110 (ESD's initial burden of showing "employment" not met where situs requirements not met); RCW 50.04.320 (defining "wages" as remuneration paid to an individual).

Moreover, ESD omits that its auditors were in a far better position than the Carriers to know the limits of ESD's jurisdiction and to know

[1] Brief of Respondents at 26–27.

what documentation ESD would need in order to define these issues. ESD's auditors never asked for any such documentation. CP 493. ESD's tactic of not asking for the information it needed for a proper audit, and then blaming the Carriers for the overinflated assessments because they did not provide information that its auditors never requested, is just more evidence of ESD's bad faith.

That bad faith continued into the administrative process, where ESD's strategy has been to cajole the Carriers into capitulation by making the litigation more expensive than the assessment. The Carriers were forced to obtain an order from ALJ Gay just to require ESD to comply with its statutory obligation to eliminate out-of-state owner/operators, owner/operators with corporate form, and payments for equipment rental from the assessments. CP 497. But even after ALJ Gay remanded the assessments to address these issues, ESD refused to make the required reductions. CP 497–98.

Once again, ESD blames the victim. ESD points to language in ALJ Gay's order requiring the Carriers to provide the documentation to support the required adjustments.[2] ESD ignores that the Carriers provided this information, and ESD simply refused to acknowledge it. CP 497–501.

[2] Brief of Respondents at 4.

Eventually, the parties reached a settlement agreement, which ESD promptly breached, forcing the Carriers to obtain an order enforcing the agreement from the Pierce County Superior Court. CP 500–01. ESD makes much of the fact that the enforcement order was reversed on appeal and—again blaming the victim—attributes the excessively long administrative process to this appeal. This argument elevates form over substance.

The trial court order and subsequent appeal were caused by ESD's breach of the settlement agreement. No court has disagreed with the Pierce County Superior Court's finding that such a breach occurred. Rather than honor its contractual obligation, ESD chose to lengthen the process by appealing the order and obtaining a reversal based on a technicality relating to service of process. *See Eagle Systems, Inc. v. State Employment Sec. Dep't*, 181 Wn. App 455, 326 P.3d 764 (2014).

In short, ESD's audit and litigation strategies are designed to maximize revenue and minimize any challenge to the merits of its decisions. ESD instructs its auditors not to audit trucking companies, but to simply find owner/operators and assess taxes on the amounts paid, regardless of the facts and regardless of the statutory limits on ESD's jurisdiction. CP 492–93. If the trucking companies want a fair

assessment, they are forced to litigate the matter in an administrative process that is skewed in ESD's favor, and ESD conducts the litigation throughout that process in a manner that is calculated to make any legal challenge as expensive as possible for the trucking companies. CP 493-502.

ESD expends much of its brief arguing about the facts discussed above. But ESD's factual disputes are inapposite on review of a CR 12(b)(6) dismissal. This Court is required to assume the truth of the Carriers' allegations. And those allegations are that ESD has repeatedly taken an abusive, corrupt approach to the audits and litigation in this case, valuing revenue generation over fairness and heavy-handed litigation tactics over a reasoned consideration of the merits.

2. The administrative process provides no remedy to the Carriers for this harm.

The administrative process, which state law obligates the Carriers to endure, provides no remedy for the harm caused by ESD's abuses. Indeed, while arguing that the Carriers must exhaust administrative remedies, ESD simultaneously argues that, in the administrative process, the manner in which the audit was conducted cannot be considered because the agency's officers' "mental processes" are irrelevant. According to ESD, the *only* issue the ALJ has authority to adjudicate is the

correct amount of the assessment. "Only if the 'rigged audits' affected correctness of the ultimate decision would facts relating to the investigation even be relevant."[3]

Thus, no matter how outrageous ESD's abuse of the Carriers' rights might be, if the final audit amount is correct, the Carriers are without a remedy. Of course, here, ESD's assessments were plainly erroneous, and yet ESD continues to argue that evidence of impropriety in the audit is irrelevant.

Indeed, ESD made just this argument in briefing submitted in appellant System-TWT's administrative appeal, *after* the filing of ESD's brief in this case:

> In essence, System-TWT attempts to attack the investigation rather than the assessment, but the purpose of this de novo review is to determine the correctness of the assessment. . . . Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his or her function of decision. . . . Under RCW 50.32.050, in an appeal from a tax assessment, the appeal tribunal "shall affirm, modify or set aside the notice of assessment." It is the assessment, and not the audit, that is on review here.

[3] Brief of Respondents at 38 (citing *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001)).

Department's Response to Appellant's Hearing Brief upon Stipulated Facts, filed in *In the Matter of System TWT Transport dba System-TWT*, OAH Dkt. No. 122014-00336 ("ESD's System-TWT Response"), at 6.[4]

ALJs have agreed with ESD that the administrative process does not provide a remedy for abusive audit tactics. ALJ Gay ruled that he could provide no relief for the rigged audits because he knew "of no legal authority for dismissing an Order and Notice of Assessment based on a kind of exclusionary rule, even if there were a finding that the audit was improper or inadequate." CP 295. In related appeals, ALJ Terry Shuh ruled that evidence of ESD's bad faith audit tactics was "not apt" and excluded all such evidence, including a declaration from former State Auditor Brian Sonntag that ESD's audits failed to meet the minimum standards required by law. *See* 629–36.

ESD attempts to sanitize the record by arguing that evidence of ALJs' rulings in other matters is improper.[5] But ESD's approach in other cases, along with other ALJs' endorsement of that approach, is certainly relevant to show what likely awaits the Carriers in this case as they continue the administrative process. Certainly, the fact that ALJ Shuh excluded all evidence of impropriety in the audits—*on ESD's motion*—is

[4] ESD's System-TWT Response is attached to Appellants' Motion to Expand the Appellate Court Record under RAP 9.11, filed in this Court on April 14, 2015.
[5] Brief of Respondents at 10.

evidence that the administrative process cannot provide redress for the Carriers' complaints about abusive audit tactics.

Indeed, ESD should be judicially estopped from arguing that the administrative process provides an adequate remedy for the claims raised here. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position") (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). Because there is no adequate administrative remedy, the trial court erred in dismissing the Carriers' claims.

3. Neither the Tax Injunction Act nor the comity doctrine bars the Carriers' § 1983 claims.

Contrary to ESD's assertions, the Tax Injunction Act and the comity doctrine are not a license to routinely violate taxpayer rights with impunity. These doctrines do not bar the suit here for two reasons. First, and fundamentally, there is no adequate remedy under state law. Second, the Carriers do not challenge the validity of a tax.

a. There is no adequate remedy under state law.

As discussed above, the administrative remedy provided under state law here is inadequate. As ESD repeatedly acknowledges,[6] it bears the burden of proving that state law provides an adequate remedy before it can invoke the Tax Injunction Act or the comity doctrine to bar the claim asserted. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 592, 115 S. Ct. 2351, 132 L.Ed.2d 509 (1995). An adequate remedy is one that is plain, speedy, and efficient. *Hibbs v. Winn*, 542 U.S. 88, 107–08, 124 S. Ct. 2276, 159 L.Ed.2d 172 (2004).

Again, ESD is precluded from arguing that the administrative remedy is adequate when it has steadfastly insisted that the administrative process cannot address the Carriers' claims. Curiously, while arguing that the administrative process is adequate, ESD insists that there is no remedy. ESD argues at one point that the Carriers must direct their complaints about ESD's abusive tactics, designed to inflate the cost of challenging its decision, "to the Legislature."[7] On the following page, ESD writes that there "is not always a legal remedy for every perceived wrong."[8] It goes on to argue that evidence of impropriety in the audits is irrelevant in the administrative proceedings and that resolution of the those proceedings

[6] Brief of Respondent at 11-31, *passim*.
[7] Brief of Respondents at 28.
[8] Brief of Respondents at 29.

will bar any future suit.[9] It is unclear how ESD can argue on one hand that the state law remedy is adequate, and on the other that the remedy does not exist.

ESD argues that "there is no cause of action for an assertion that one must be satisfied with the way in which an audit is conduct," citing *Janaszak v. State*, 173 Wn. App. 703, 724-26, 297 P.3d 723 (2013).[10] There the Court of Appeals affirmed the summary dismissal of a dentist's claim against the Department of Health for the temporary restriction of his dental license. *Id.* at 709. *Janaszak* does not help ESD, for two reasons.

First, *Janaszak* involved claims of *negligent* investigation. *Id.* at 724–25. The Carriers' claims here do not sound in negligence, but rather allege a deliberate misuse of government power. CP 224–26. Second, the cited portion addressed claims under state tort law. *See Janaszak*, 173 Wn. App. at 724–26. Although the dentist also raised § 1983 claims, these were dismissed under the doctrine of qualified immunity, a defense that ESD has not argued here. *See id.* at 719–23. To the extent the discussion of negligent investigation can be read as barring a claim under state tort law here, it merely confirms that there is no adequate state law remedy for the Carriers' claims.

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[9] Brief of Respondents at 38, 40.
[10] Brief of Respondents at 29 (incorrectly citing to *Janaszak*, 173 Wn. App. at 735).

Also unavailing is ESD's attempt to distinguish this case from *McCarthy Fin., Inc. v. Premera*, 328 P.3d 940, 943 (Wn. App.) rev'd, No. 90533-9, 2015 WL 1510543 (Wash. Apr. 2, 2015), *reversed on other grounds*, No. 90533-9, 2015 WL 1510543 (Wash. Apr. 2, 2015). There, the agency head's declaration that the agency lacked jurisdiction to address a claim was sufficient to show that administrative exhaustion was not required. *See id.* In a footnote, ESD argues that this is somehow different from the present case, where ALJs have ruled that they lack jurisdiction to address the Carriers' claims.[11] ESD apparently overlooks the fact that the ALJs issued these rulings *on ESD's motion* and that ESD speaks for its Commissioner when it repeatedly argues that the Carriers' complaints cannot be addressed in the administrative process.

As well, ESD tries in vain to distinguish *Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010); *Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014); and *Johnson v. City of Seattle*, 184 Wn. App. 8, 335 P.3d 1027 (2014). The fact that these cases were not tax cases is inapposite. The point is that these cases show there is a § 1983 remedy for deliberate misuse of government power. Thus, while ESD cannot reasonably argue that there is an adequate state law remedy for the Carriers' claims, there is

[11] Brief of Respondents at 29 n. 17.

in fact an adequate remedy under federal law. The trial court erred in denying the Carriers the opportunity to pursue this remedy.

b. In this lawsuit, the Carriers do not challenge the validity of the tax, but rather ESD's abuse of the audit power.

While the lack of an adequate remedy is dispositive, the Tax Injunction Act and comity do not apply for the additional reason that they bar only challenges to the "the validity of state tax systems." *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 116, 115 S. Ct. 2351, 132 L. Ed.2d 509 (1981). The Carriers do not dispute the validity of the Employment Security Act or unemployment taxes. What they challenge in this action are ESD's bad faith abuses of its audit power.

Without analysis, ESD cites a Tenth Circuit case which held that the Tax Injunction Act "cannot be avoided by an attack on the administration of a tax as opposed to the validity of the tax itself." *Brooks v. Nance*, 801 F.2d 1237, 1239 (10th Cir. 1986). *Brooks* offers little guidance because it is extremely vague as to the underlying facts, saying only that the State of Oklahoma seized for forfeiture cigarettes on which the plaintiffs had not paid taxes. *Id.* It appears that the claim was cast as a challenge to the state's power to use seizure and forfeiture as an enforcement mechanism. *See id.* The decision gives no indication that

there was any allegation of corruption or abuse of power or other impropriety by the state in utilizing those powers. *Brooks* thus has no application to this case, where the Carriers do not dispute ESD's authority to conduct audits and assess taxes, but rather seek redress for ESD's abuse of that authority.

The United States Supreme Court holds that the Tax Injunction Act does not prohibit a claim in which the plaintiffs "do not contest their own tax liability" and do not seek to impede the state's "receipt of tax revenues." *Hibbs v. Winn*, 542 U.S. 88, 93, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004). The Ninth Circuit permitted a § 1983 claim to go forward, notwithstanding the Tax Injunction Act, to redress unlawful practices in the enforcement of a tax, in *Patel v. City of San Bernardino*, 310 F.3d 1138, 1142 (9th Cir. 2002). The court held that the Tax Injunction Act barred most of the plaintiffs' challenges to the tax at issue, but not its claim for damages caused by the City of San Bernardino's continued enforcement of the tax after it was declared unlawful. *Id.* *Hibbs* and *Patel* thus show that the Tax Injunction Act and comity are not absolute bars to any and all actions related in any way to a taxation system. The Tax Injunction Act and comity doctrine do not apply here, and the Carriers' § 1983 claims must be allowed to go forward.

4. ESD can be liable for tortious interference where it damaged the Carriers' valid contractual relationships through improper means and with an improper objective.

The Carriers also state a valid claim for tortious interference. The elements of this claim are (1) the existence of a valid contractual relationship known to the defendant; (2) intentional interference with an improper motive or by improper means that causes a breach of contract or termination of the contractual relationship; and (3) resultant damage. *Elcon Const., Inc. v. Wash. Univ.*, 174 Wn.2d 157, 168, 273 P.3d 965 (2012). The Department raises two basic arguments: (a) that the Carriers cannot prove the second element and (b) that the Carriers must exhaust their administrative remedies.[12] Neither argument has merit.

a. The Carriers stated a valid claim for tortious interference.

With respect to the substantive merits of the Carriers' interference claim, the only element ESD challenged below was the second element (CP 272–74), which is established where the defendant intentionally interferes either with "an improper motive" or "by improper means." *Elcon*, 174 Wn.2d at 168. This element can be met in a claim against a governmental entity with evidence that the entity arbitrarily or capriciously failed to follow appropriate procedures or delayed resolution

[12] Brief of Respondents at 31–46.

of the matter. *Pleas v. City of Seattle*, 112 Wn.2d 794, 799, 774 P.2d 1158 (1989). It can also be met with evidence that the entity improperly used its taxing power. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 28, 829 P.2d 765 (1992). This fact-intensive issue simply cannot be disposed of on a CR 12 dismissal.

ESD's improper means has been detailed extensively above and in the Carriers' opening brief. The audits and ESD's subsequent litigation tactics are indefensible. CP 221–24. ESD disputes these assertions, but its disagreement on the facts is irrelevant under the present posture of this case.

Although only a showing of improper means is necessary, the Carriers also allege an improper motive. This arises from ESD's intent to restructure the trucking industry by eliminating owner/operators. 226–27. There can be no question that this is an improper motive, given that the federal government has expressly preempted any state regulation of the trucking industry. *See* 49 U.S.C. § 14501(c)(1). To the extent ESD denies that this is its motive, the Carriers' allegations and ESD's denials are for the trier of fact to resolve.

b. Exhaustion of a nonexistent remedy is not required.

Once again, the fundamental flaw in ESD's argument is that it claims the Carriers are limited to the administrative remedy, while simultaneously arguing that the administrative process cannot provide any remedy for the asserted claims. According to ESD, the only question the ALJ can answer is whether the audit amount was correct, and the Carriers' complaints about abusive and corrupt audit practices are inadmissible and irrelevant in the administrative process.[13] ESD's arguments that the Carriers must pursue these claims in the administrative process are not well taken.

Under the futility doctrine, exhaustion is not required where "the available administrative remedies are inadequate, or if they are vain and useless." *Orion Corp. v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985) (quoting 4 R. ANDERSON, ZONING § 26.10 (2d ed. 1977)). Here, ESD's administrative process is inadequate, vain, and useless in addressing the Carriers' claims about impropriety and corruption in ESD's audit process.

Relying on the word "exclusive" in RCW 50.32.180, ESD contends that the futility doctrine is somehow inapplicable where the Employment Security Act is involved. But ESD offers no authority for

[13] Brief of Respondents at 38; ESD's System-TWT Response, *supra*, at 6.

the proposition that the designation of an exclusive remedy somehow trumps the well-settled principle "that courts will not require vain and useless acts." *Orion*, 103 Wn.2d at 458. Indeed, this Court has subjected exhaustion arguments to the futility analysis even when they were based on a statute designated as an exclusive remedy. *See, e.g.*, *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn.2d 761, 771, 776-78, 837 P.2d 1007 (1992) (observing that appeal to the Pollution Control Hearings Board is the "exclusive means" of challenging pollutant discharge permits, and then analyzing merits of futility argument).

Further, ESD acknowledges that judicial review may be had "'in accordance with the procedural requirements of' the APA."[14] But ESD overlooks that the Administrative Procedures Act, RCW 34.05 ("APA") explicitly recognizes exceptions to the exhaustion requirement where a remedy would be "patently inadequate" or "futile." RCW 34.05.534(3). As such, RCW 50.32.180 does not relieve ESD from the inevitable conclusion that the administrative process is futile insofar as the Carriers seek relief for ESD's failure to exercise its audit power in good faith.

In addition, the exclusivity provision relied upon by ESD applies only to remedies "for determining the justness or correctness of assessments, refunds, adjustments, or claims." RCW 50.32.180. When it

[14] Brief of Respondents at 32 (quoting RCW 50.32.120).

behooves ESD, ESD draws a distinction between adjudication of the correct assessment amount and adjudication of the Carriers' allegations that ESD has abused its audit power. *See* ESD's System-TWT Response, *supra*, at 6. But ESD improperly conflates the two concepts in the present action in a bad faith effort to erect procedural barriers to the Carriers' claims.

Finally, ESD's argument that it has "special competence to determine whether an owner-operator is in employment of a motor carrier under the Employment Security Act"[15] is inapposite. ESD has no "special competence" with respect to the trucking industry, constitutional law, or federal regulations. It is far less suited to address the Carriers' claims of federal preemption than is this Court.

Indeed, given that the result of a preemption finding would be to reduce ESD's influence and revenue, it is an inadequate remedy to force the Carriers to seek ESD's ruling on this issue before they can bring it before a court.[16] Notably, *ESD's Commissioner*—not the ALJ—is the last line of administrative review. *See* RCW 50.32.080, .090. Thus, to the extent the present action involves consideration of the preemption issue, the policy behind requiring an initial ruling by an agency with "special

[15] Brief of Respondents at 39.
[16] A similar analysis applies to the Carriers' claims that ESD's audit tactics were improper.

competence" is not implicated. Judicial efficiency would be furthered greatly by allowing the Carriers' claims to proceed in the trial court, which is a superior venue for adjudication of these issues.

5. WTA has both associational and individual standing.

WTA has standing to pursue this claim along with the Carriers. WTA sues the respondents both in its personal capacity and as its members' associational representative. ESD fails to justify the trial court's dismissal of either aspect of WTA's claim.

ESD acknowledges that a plaintiff has standing where it shows "a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief," and where the claim "falls within the zone of interests protected by the statute or constitutional provision at issue."[17] ESD does not dispute that WTA has incurred substantial legal fees and costs in the underlying process. CP 224. Without citation to authority, however, ESD argues that "WTA's incurrence of attorney fees and costs was traceable to the Plaintiffs' decision, not to the Defendants' conduct."[18] It is unclear what this statement even means, but the traceable cause of WTA's injury is yet another issue for the trier of fact.

[17] Brief of Respondents at 47 (quoting *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014)).
[18] Brief of Respondents at 47.

In any event, ESD utterly fails to show that WTA lacks associational standing. ESD's sole challenge to this standing is based on the fact that money damages are sought.[19] ESD simply ignores this Court's *express holding* that that an association is not precluded from bringing a lawsuit on behalf of its members solely because it seeks monetary relief. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186, *amended on denial of reconsideration*, 50 P.3d 618 (2002). Relying on an earlier case decided by a lower court,[20] ESD further ignores WTA's arguments demonstrating that its claim meets the standing requirements established by this Court in *Int'l Ass'n of Firefighters*.[21] ESD does not dispute that it would be burdensome, both for the individual carriers and for the courts, to require resolution of every trucking company's claim in an individual suit. *See Int'l Ass'n of Firefighters*, 146 Wn.2d at 214–16.

While alleging that evidence from individual members will be necessary to establish damages amounts, ESD does not even mention *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 312 P.3d 665 (2013), *review denied* 180 Wn.2d 1007, 320 P.3d 718 (2014). There, the

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[19] *See* Brief of Respondents at 48–49.
[20] Brief of Respondents at 48 (quoting *Nat'l Elec. Contractors Ass'n v. Emp't Sec. Dep't*, 109 Wn. App. 213, 221, 34 P.3d 860 (2001)).
[21] *See* Brief of Appellants at 46–49.

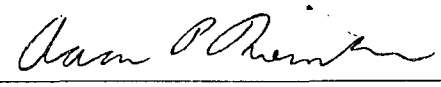
Court of Appeals rejected the notion that associational standing should be denied simply because it may be necessary to call individual members as witnesses. *See id.* Just as the dismissal of the associational plaintiff was reversible error in *Pugh*, so it requires reversal here.

## C. CONCLUSION

Because there is no remedy in the administrative process for the harms inflicted upon the Carriers and WTA by ESD, the Court should reverse the trial court's premature dismissal of the tortious interference and § 1983 claims, and remand this matter for a trial on the merits.

DATED this 17th day of April, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I e-mailed a copy and deposited in the U.S. mail for service a true and accurate copy of the Reply Brief of Appellants in Supreme Court Cause No. 90584-3 to the following parties:

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

DATED: April 17, 2015 at Seattle, Washington

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