

FILED
SUPREME COURT
STATE OF WASHINGTON
11/6/2019 1:50 PM
BY SUSAN L. CARLSON
CLERK

CONSOLIDATED CASE NO. 97109-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION,
Petitioner,

v.

TEAMSTERS LOCAL 117 SEGREGATED FUND, et al.,
Respondent/Cross-Appellant.

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION POLITICAL
EDUCATION AND ACTION FUND,
Respondent/Defendant.

FREEDOM FOUNDATION,
Petitioner/Plaintiff,

v.

JAY INSLEE, et al.,
Respondents/Defendants

SERVICE EMPLOYEES INTERNATIONAL UNION 775,
Respondent/Necessary Party.

**TEAMSTERS LOCAL UNION NO. 117'S ANSWERING BRIEF
AND OPENING BRIEF ON CROSS APPEAL**

Darin M. Dalmat, WSBA No. 51384
Ben Berger, WSBA No. 52909
BARNARD IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Attorneys for Teamsters Local Union No. 117

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 4

STATEMENT OF THE CASE..... 5

 I. The parties..... 5

 II. The Foundation notified public officials of its FCPA claims against Local 117, and the Attorney General rejected them as meritless. .. 9

 III. The trial court’s first (partial) dismissal..... 11

 IV. The Foundation sought wide-ranging, invasive discovery, which Local 117 largely responded to, and the trial court then stayed pending Local 117’s motion for judgment on the pleadings. 12

 V. The trial court rendered judgment for Local 117 because the Foundation failed to satisfy Section 765(4)(a)(ii)’s prerequisites for maintaining a citizen’s action. 14

 VI. The trial court denied Local 117 attorneys’ fees on the ground that its procedural dismissal precluded an evaluation of the merits of the Foundation’s claims..... 15

 VII. The trial court dismissed Local 117’s selective enforcement counterclaim..... 17

ARGUMENT 17

 I. The trial court correctly dismissed this action because the Foundation failed to file suit within the window period required by Section 765..... 17

 A. The trial court correctly considered Local 117’s Section 765 argument..... 18

 II. Alternative grounds support the dismissal of this action..... 24

 A. The Foundations own allegations show that Local 117 is not a political committee subject to FCPA registration. 25

B. Local 117’s SSF is not a person under the FCPA subject to suit in its own right.....	28
III. The trial court erroneously denied Local 117’s fee petition.	30
IV. The trial court erroneously dismissed Local 117’s counterclaim.	35
V. The trial court acted well within its discretion in staying discovery.	43
VI. The Foundation is not entitled to fees.....	47
CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Banowsky v. Guy Backstrom, DC</i> , 193 Wn.2d 724, 445 P.3d 543 (2019).....	17
<i>Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n</i> , 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).....	38, 39
<i>Brown v. Transurban USA, Inc.</i> , 144 F. Supp. 3d 809 (E.D. Va. 2015)	40
<i>Brunette v. Humane Soc. of Ventura Cty.</i> , 294 F.3d 1205 (9th Cir. 2002)	40
<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).....	13, 15, 17, 27
<i>Buecking v. Buecking</i> , 179 Wn.2d 438, 316 P.3d 999 (2013).....	21
<i>Burke v. Town Of Walpole</i> , 405 F.3d 66 (1st Cir. 2005).....	42
<i>Cnty. Treasures v. San Juan Cty.</i> , 192 Wn.2d 47, 427 P.3d 647 (2018).....	21
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	39
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2 370 (1991).....	45
<i>Dyson v. King Cty.</i> , 61 Wn. App. 243, 809 P.2d 769 (1991)	22
<i>Edmonson v. Leesville Concrete Co., Inc.</i> , 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).....	36, 39

<i>In re Estate of Jepsen</i> , 184 Wn.2d 376, 358 P.3d 403 (2015).....	21, 22
<i>State ex rel. Evergreen Freedom Found. v. National Educ. Ass’n</i> , 119 Wn. App. 44, 81 P.3d 911 (2003).....	8
<i>State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass’n</i> , 140 Wn.2d 615, 999 P.2d 602.....	8, 26
<i>Evergreen Freedom Found. v. Washington Educ. Ass’n</i> , 111 Wn. App. 586, 49 P.3d 894 (2002)	<i>passim</i>
<i>Fritz v. Gorton</i> , 83 Wn.2d 275, 517 P.2d 911 (1974).....	20, 21, 34
<i>Georgia v. McCollum</i> , 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).....	36, 43
<i>Hoye v. City of Oakland</i> , 653 F.3d 835 (9th Cir. 2011)	35
<i>James v. Cty. of Kitsap</i> , 154 Wn.2d 574, 115 P.3d 286 (2005).....	21, 22, 47
<i>King v. Snohomish Cty.</i> , 146 Wn.2d 420, 47 P.3d 563 (2002).....	22
<i>Lacey v. Maricopa Cty.</i> , 693 F.3d 896 (9th Cir. 2012)	35
<i>Lewis Cty. v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 113 Wn. App. 142, 53 P.3d 44 (2002)	21, 22
<i>LK Operating, LLC v. Collection Group, LLC</i> , 181 Wn.2d 48, 331 P.3d 1147 (2014).....	24
<i>Long v. Snoqualmie Gaming Comm’n</i> , 7 Wn. App. 2d 672, 435 P.3d 339 (2019).....	45
<i>Lugar v. Edmondson Oil Co., Inc.</i> , 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).....	36, 38, 42

<i>In re Marriage of Wallace</i> , 111 Wn. App. 697, 45 P.3d 1131 (2002)	34
<i>Nichols v. Village of Pelham Manor</i> , 974 Supp. 243 (S.D.N.Y. 1997).....	35
<i>Nickum v. Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009)	21, 22
<i>Nissen v. Pierce Cty.</i> , 183 Wn. App. 581, 333 P.3d 577 (2014) , <i>aff'd in part</i> , <i>rev'd in part</i> , 183 Wn.2d 863, 357 P.3d 45 (2015).....	45
<i>No On I-502 v. Washington NORML</i> , 193 Wn. App. 368, 372 P.3d 160 (2016)	42
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 692 P.2d 793 (1984).....	36
<i>Progressive Animal Welfare Soc. v. Univ. of Washington</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	32
<i>State ex rel. Pub. Disclosure Comm'n v. Rains</i> , 87 Wn.2d 626, 555 P.2d 1368 (1976).....	30
<i>Putman v. Wenatchee Valley Med. Ctr., P.S.</i> , 166 Wn.2d 974, 216 P.3d 374 (2009).....	44
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	31
<i>Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC</i> , 199 Wn. App. 534, 400 P.3d 347 (2017)	24
<i>In re Recall of Pearsall-Stipek</i> , 136 Wn.2d 255, 961 P.2d 343 (1998).....	34
<i>In re Recall of Piper</i> , 184 Wn.2d 780, 364 P.3d 113 (2015).....	31
<i>San Juan Cty. v. No New Gas Tax</i> , 160 Wn.2d 141, 157 P.3d 831 (2007).....	30

<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	48
<i>Shinn Irr. Equip., Inc. v. Marchand</i> , 1 Wn. App. 428, 462 P.2d 571 (1969).....	23
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	24
<i>Sprague v. Sumitomo Forestry Co., Ltd.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985).....	23
<i>State v. Clausen</i> , 146 Wash. 588, 264 P. 403 (1928).....	39
<i>State v. Dan J. Evans Campaign Committee</i> , 86 Wn.2d 503, 546 P.2d 75 (1976).....	25
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	31
<i>State v. W.R., Jr.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	23
<i>Stern v. Marshall</i> , 564 U.S. 131, 489 S.Ct. 2594, 180 L.Ed 475 (2011).....	41
<i>Storey v. City of Seattle</i> , 124 Wash. 598, 215 P. 514 (1923).....	39
<i>Swank v. Valley Christian Sch.</i> , 188 Wn.2d 663, 398 P.3d 1108 (2017).....	24
<i>Taylor v. Stevens Cty.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	40
<i>Tenore v. AT&T Wireless Svcs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998).....	35
<i>Trujillo v. Northwest Trustee Serv., Inc.</i> , 183 Wn.2d 820, 355 P.3d 1100 (2015).....	6

<i>United States v. Kidder</i> , 869 F.2d 1328 (9th Cir. 1989)	35
<i>Utter v. Building Indus. Ass’n of Washington</i> , 182 Wn.2d 389, 341 P.3d 953 (2015).....	<i>passim</i>
<i>Voters Educ. Comm. v. Washington State Pub. Disclosure Comm’n</i> , 161 Wn.2d 470, 166 P.3d 1174 (2007).....	8, 27
<i>Voytko v. Ramada Inn of Atlantic City</i> , 445 F. Supp. 315 (D.N.J. 1978)	40
<i>Washington Trucking Associations v. State Employment Sec. Dep’t</i> , 188 Wn.2d 198, 393 P.3d 761 (2017).....	17
<i>West v. Atkins</i> , 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).....	37
<i>West v. Wash. State Ass’n of Dist. & Mun. Court Judges</i> , 190 Wn. App. 931, 361 P.3d 210 (2015).....	22
<i>Wixom v. Wixom</i> , 190 Wn. App. 719, 360 P.3d 960 (2015)	34
<i>Young v. U.S. ex rel. Vuitton et Fils S.A.</i> , 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987).....	41
Statutes	
26 U.S.C. § 527(e)(1)–(2)	6
26 U.S.C. § 527(f)(3)	10
42 U.S.C. § 1983.....	4, 17
RCW 42.17A, Fair Campaign Practices Act	<i>passim</i>
RCW 42.17A.001.....	41
RCW 42.17A.005(13)(b)(v).....	27
RCW 42.17A.005(38).....	29

RCW 42.17A.005(40).....	25, 28
RCW 42.17A.140(1).....	20, 47
RCW 42.17A.765 (2012).....	<i>passim</i>
RCW 42.17A.765(1).....	38
RCW 42.17A.765(4).....	<i>passim</i>
RCW 42.17A.765(4)(a)(ii).....	<i>passim</i>
RCW 42.17A.765(4)(a)(iii)	9
RCW 42.17A.765(4)(a)(iv).....	15
RCW 42.17A.765(4)(b)	<i>passim</i>

Other Authority

1973 Letter Op. Att’y Gen. No. 114, 1973 WL 154063 (1973).....	26
WAC 390-16-313.....	26

INTRODUCTION

Teamsters Local Union No. 117 (Local 117 or Union) agrees with the analysis of the Fair Campaign Practices Act's (FCPA) citizen's action provision, RCW 42.17A.765(4) (2012), submitted in the Service Employees International Union Political Education and Action Fund's (PEAF) separate brief.¹ Applying that analysis here, the Freedom Foundation (Foundation) did not file its citizen's action in this case until more than two months after the filing window closed. The trial court thus properly dismissed the Foundation's claims.

In addition to contesting the proper interpretation of Section 765, the Foundation also raises a number of issues particular to Local 117. Namely, it contends that (1) Local 117 waived its Section 765 argument by failing to assert it in its answer; (2) the trial court abused its discretion by staying discovery while the Union's dispositive motion was pending; (3) the trial court should not have dismissed this case while the Foundation's discovery requests were outstanding; (4) the trial court improperly dismissed the Foundation's claim that Local 117 is a political committee based on its receipt of contributions; and (5) the Foundation is entitled to appellate fees. None of these points have merit.

¹ Unless otherwise noted, all references are to the version of the statute in effect in 2012.

First, Local 117 did assert lack of jurisdiction in its answer and, in any event, this Court has consistently treated procedural prerequisites to statutory rights, like the filing window for the citizen's action here, as jurisdictional requirements that cannot be waived. Second, the trial court acted well within its discretion by staying discovery while Local 117's dispositive motion was pending, which was only two weeks out of an 18-month discovery period. Third, because the Foundation's discovery requests had no bearing on the interpretation or application of Section 765's prerequisites, the trial court properly dismissed the suit without awaiting immaterial discovery. Fourth, under longstanding state law, union dues are considered political contributions only where they are specifically earmarked for use by the union as political contributions. Because the Foundation alleged only that Local 117 used general funds for electoral spending, not that its dues were specifically earmarked for such spending, it failed to state a contributions-based claim. Finally, even if it were to prevail in this appeal, the Foundation would not be entitled to fees because it would still not have obtained a judgment in its favor.

Although the Foundation's assignments of error have no merit, the trial court did err on two points. First, it abused its discretion by failing to determine whether the Foundation brought its claims against Local 117 without reasonable cause. Section 765(4)(b) required the court to make

that determination once it had dismissed the complainant's claims. Local 117 presented extensive evidence that the Foundation's primary purpose is to bankrupt and defund unions and that, by its own admission, it uses campaign finance litigation to further those private purposes rather than public objectives. That improper motive, combined with the lack of procedural or substantive merit supporting its claims, showed the Foundation's lack of reasonable cause for its suit. The trial court's refusal to even address the question because of the pre-trial dismissal constitutes abuse of discretion.

Additionally, the trial court erroneously dismissed Local 117's counterclaim. Local 117 alleged that the Foundation selectively enforced the FCPA against its ideological adversaries in violation of the First Amendment. The trial court held that the Foundation did not engage in state action, as required to commit a constitutional violation. However, as discussed below, enforcement of public rights enacted through a statutory scheme, like the FCPA, traditionally is an exclusive governmental function. Further, features of the FCPA's citizen's action enforcement mechanism make its use a particularly clear example of state action. The citizen actor brings an action in the name of the State and, if successful, obtains a judgment that escheats to the State, leaving the complainant no private bounty. The State also provides extensive support for citizen's

actions because it is statutorily required to reimburse prevailing plaintiffs. Finally, it is the State and not a complainant that enforces any FCPA judgment, making FCPA enforcement a joint activity between the complainant, who litigates the citizen's action, and the State, which enforces the judgment.

Local 117 thus respectfully asks this Court to affirm the dismissal of the Foundation's claims, reverse the dismissal of Local 117's counterclaim as well as the denial of its fee request, and remand for a determination of reasonable fees to be awarded Local 117.

ASSIGNMENTS OF ERROR

The trial court did not err with respect to any of the five issues to which the Foundation would assign error.

Local 117 assigns error to the following issues:

- 1) The trial court denied Local 117's post-dismissal request for attorneys' fees under RCW 42.17A.765(4)(b) without determining whether the Foundation brought this suit without reasonable cause. Was that failure to exercise discretion an abuse of discretion?
- 2) The trial court dismissed Local 117's 42 U.S.C. § 1983 counterclaim, which alleges that the Foundation has selectively enforced the FCPA to punish its ideological adversaries, finding no state action. Does the Foundation's prosecution of the public rights enacted by the FCPA, undertaken in the name of the State and seeking a judgment that escheats to the State without any private bounty for itself, constitute state action subject to constitutional regulation?

STATEMENT OF THE CASE

I. The parties

Local 117 is a labor union that represents over 16,000 workers at 200 employers throughout Washington. CP 54, 98. Its mission is to build “unity and power for all working people to improve lives and lift up our communities.” CP 55–56 (quoting www.teamsters117.org/about). Its bylaws flush out that mission in more detail by identifying as its objectives to (1) unite “all workers eligible for membership” into one union; (2) organize workers “to provide the benefit of unionism to all workers” and “protect and preserve the benefits obtained for members of this organization” while providing “services to those who are organized”; (3) “secure improved wages, hours, working conditions and other economic advantages through organization, negotiations and collective bargaining, through legal and economic means, and other lawful methods”; (4) “provide education advancement and training for employees, members and officers”; (5) “safeguard, advance, and promote the principle of free collective bargaining ... and the security and welfare of all the people by political, education and other community activity”; (6) “engage in cultural, civil, legislative, political, fraternal, educational, charitable, welfare, social, and other activities which further the interest of this organization and its membership, directly or indirectly”; (7) assist other labor

organizations; (8) “engage in community activities which will advance the interests of this organization and its members ...”; (9) “protect and preserve the Union as an institution and to perform its legal and contractual obligations”; (10) “carry out the objectives of the International Union as an affiliate thereof and its duties as such an affiliate; and (11) “use the funds and property” of the organization “to carry out the duties and to achieve the objectives set forth in these Bylaws and the International Constitution” CP 94–95.²

In 2011, Local 117 established a separate segregated fund (the Teamsters Local 117 SSF or SSF), pursuant to 26 U.S.C. § 527(e)(1)–(2). CP 98–99. That SSF is “in essence a bank account controlled by Teamsters Local 117.” CP 99. Consistent with the Internal Revenue Code, the SSF’s purpose is: “[t]o make contributions to candidates and campaigns that support the mission of improving the lives of working families in our state.” CP 56.

The Foundation is a registered nonprofit organization that seeks to bankrupt unions because it believes they are “the largest contributors to the Democratic party and to the left.” CP 549, 609–11. It boasts its “proven plan for bankrupting and defeating [public sector] unions through

² The Foundation’s complaint quotes these bylaws in part. CP 14. The entire bylaws are thus incorporated by reference into the complaint. *Trujillo v. Northwest Trustee Serv., Inc.*, 183 Wn.2d 820, 827 n.2, 355 P.3d 1100 (2015).

education, *litigation*, legislation and by rallying patriotic men and women of goodwill.” CP 620 (emphasis added). *Accord* CP 594. As one of its officers explained, to further this goal of bankrupting public sector unions, the Foundation “mak[es] the unions spend money on something they would rather not spend money on” since “[e]very dollar [unions] spend defending their idea is every dollar they don’t have to spend against our good candidates.” CP 549, 609–11. Doing so, it believes, will ultimately “defund the political left.” CP 549, 609–11. Indeed, by its own admission, “essentially everything the Foundation has done for the past four years” has been to undermine unions’ funding streams. CP 635.

The Foundation has explicitly identified campaign finance lawsuits as a component of its plan to bankrupt and defund public sector unions: a major focus of its efforts is to “enforce campaign finance laws against unions through investigations, complaints and lawsuits.” CP 623. It asks donors for contributions so that it can “set in motion new investigations—new lawsuits—and new victories” for its agenda. CP 625. *Accord* CP 596.

Consistent with this declared strategy to bankrupt and defund unions, since 1997 the Foundation has initiated at least eight citizen actions or APA appeals against or involving labor unions, seven of which

have been initiated within the last two years.³ It prevailed in none of these actions. The Foundation and its agents have also filed dozens of FCPA complaints against Washington-based unions with the AGO and Public Disclosure Commission in the last several years.⁴

At least one former member of this Court has questioned whether the Foundation “chooses to utilize the courts for what may be a political agenda.” *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass’n*, 140 Wn.2d 615, 642, 999 P.2d 602, 617 (2000), as amended (June 8, 2000) (Talmadge, J., concurring).

³ For the Foundation’s pre-2017 FCPA activity, see *State ex rel. State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass’n (EFF I)*, 140 Wn.2d 615, 999 P.2d 602; *Evergreen Freedom Found. v. Washington Educ. Ass’n (EFF II)*, 111 Wn. App. 586, 49 P.3d 894 (2002); *State ex rel. State ex rel. Evergreen Freedom Found. v. National Educ. Ass’n (EFF III)*, 119 Wn. App. 44, 81 P.3d 911 (2003). For the Foundation’s recent citizen actions and APA appeals against labor unions and their affiliated entities, other than the instant case, see *Freedom Found. v. Inslee, et al.*, Case No. 17-2-00417-34 (Thurston Cty., filed Feb. 8, 2017) (Skinder, J.) (including SEIU 775 as defendant); *Freedom Foundation v. Service Emp. Int’l Union Political Education & Action Fund*, No. 18-2-01731-34 (Thurston Cty., filed April 3, 2018) (Price, J.); *Freedom Found. v. SEIU 775*, Case No. 18-2-00454-34 (Thurston Cty., filed Jan. 19, 2018) (Dixon, J.); *Freedom Found. v. Inslee*, Case No. 18-2-02904-34 (Thurston Cty., filed Jun. 6, 2018) (Murphy, J.) (joining SEIU 775 as necessary party); *Freedom Found. v. Bethel Sch. Dist., et al.*, Case No. 18-2-05084-34 (Thurston Cty., filed Oct. 10, 2018) (Murphy, J.) (joining Washington Education Association as potentially interested party), *on appeal* No. 53415-1 (Div. II 2019); *Freedom Found. v. Wash. State Pub. Disclosure Comm’n, et al.*, Case No. 19-2-02843-34 (Thurston Ct., filed Jun. 5, 2019) (Skinder, J.) (naming SEIU PEAF as co-defendant), *on appeal* No. 53889-0-II (Div. II 2019).

⁴ For a list of Foundation-related allegations that have been referred to the PDC, see https://www.pdc.wa.gov/search?search_api_views_fulltext=%22freedom%20foundation%22&f%5B0%5D=type%3Aenforcement_case (searching “Freedom Foundation” on PDC website and filtering for enforcement cases) (last visited October 31, 2019).

II. The Foundation notified public officials of its FCPA claims against Local 117, and the Attorney General rejected them as meritless.

On August 3, 2017, the Foundation notified the Attorney General and the prosecuting attorneys of King and Thurston Counties (collectively, public officials) of its belief that Local 117 and its SSF had violated the FCPA. CP 51–95. The Foundation’s August 2017 notice alleged that the SSF is an unregistered political committee in violation of the FCPA. CP 53–57. It also alleged that Local 117 itself is an unregistered political committee. CP 58–89.

The public officials did not respond within 45 days of that notice. CP 1. On September 21, 2017—49 days after its first notice—the Foundation issued its second notice, pursuant to RCW 42.17A.765(4)(a)(ii). CP 1. That letter triggered a 10-day period—i.e., until October 2, 2017 (October 1 was a Sunday)—for the officials to commence an action if they wanted to foreclose the Foundation from doing so. RCW 42.17A.765(4)(a)(iii). If the officials failed to do so within that period, the Foundation then had 10 days from that failure—i.e., until October 12, 2017—to commence a citizen’s action under Section 765. RCW 42.17A.765(4)(a)(ii) (second notice must say that the complainant “will file commence a citizen’s action within ten days upon [the officials’] failure to do so”).

By letter dated October 19, 2017, the Attorney General's Office (AGO) responded that it had investigated the Foundation's allegations and found them meritless. CP 97–101. As for the SSF, the AGO concluded that the Local 117 SSF is a bank account, which federal law expressly permits tax-exempt organizations to use for receiving electoral contributions or making electoral expenditures without jeopardizing the organizations' tax-exempt status. CP 98–99 (discussing 26 U.S.C. § 527(f)(3); 26 C.F.R. §§ 1.527-2(b)(1), 1.527-6(f)). Noting the federal definition of a “political committee” sweeps more broadly than the state-law definition, the AGO concluded that the Local 117 SSF was not a distinct “person” and thus not a “political committee” under state law. CP 98–100. It noted, however, that the SSF was part of Local 117 and spending from that account could be attributed under state law to Local 117. CP 100. This view, it explained, comports with the Public Disclosure Commission's (PDC) view. *Id.*

The AGO also rejected the claim that Local 117 is an unregistered political committee under either the contributions or expenditures prong of the test. CP 100. It reviewed Local 117's spending on electoral and non-electoral activities “and concluded that less than 1% of total spending went to electoral activities,” thus defeating the contention that its primary

purpose is to make electoral expenditures. *Id.* It likewise rejected the contention that Local 117 was a receiver of contributions. *Id.*

The Foundation commenced this action on December 14, 2017. CP 1, 21–22. It accordingly filed the action more than two months after the deadline for doing so.

III. The trial court’s first (partial) dismissal.

On January 8, 2018, Local 117 moved under CR 12(b)(6) to dismiss the Foundation’s claims, contending Local 117 was not, as a matter of law, a “political committee” because the Foundation’s own allegations showed its primary purposes were not electoral political activity; the SSF is not a person that can qualify as a “political committee” under the FCPA; and should the Foundation prevail, it would be entitled to an award of attorneys’ fees only from the State, not Local 117. CP 23–46.

The trial court granted Local 117’s motion in part and denied it in part. CP 333–34. Specifically, it dismissed the claims that the SSF is a political committee; that Local 117 is political committee under the contributions prong; and that the Foundation is entitled to attorney’s fees from the Defendants. CP 334. It denied the motion with respect to the claim that Local 117 is a political committee based on the expenditures prong. *Id.* See also RP 34–37 (2/16/18). The Foundation moved for reconsideration, which the trial court denied. CP 399–400.

IV. The Foundation sought wide-ranging, invasive discovery, which Local 117 largely responded to, and the trial court then stayed pending Local 117's motion for judgment on the pleadings.

After the rulings on the motion to dismiss, on May 4, 2018, the Court issued an amended case schedule and set the discovery cutoff for July 9, 2019. CP 417.

More than a year after filing the case, on December 21, 2018, the Foundation served its first document requests and interrogatories. CP 1050, 1057–82.⁵ It did not sign those requests as required by CR 26(g). CP 1050, 1082–83. The Foundation's requests essentially sought documentation of every financial transaction Local 117 had undertaken for the prior six years. CP 1057–84.⁶

To accommodate Local 117's and its counsel's schedule and to provide sufficient time to respond to the Foundation's voluminous requests, the parties agreed to a 40-day extension, until March 1, 2019. CP 1050–52, 1089, 1092. Local 117 then produced 3,761 pages of responsive documents, which it further supplemented on March 6, 2019, bringing the total production to 4,199 pages. CP 1052, 1109, 1201. Local 117 produced

⁵ The Foundation had previously served requests for admission on July 18, 2018, which Local 117 timely answered on August 17, 2018. CP 1049.

⁶ In addition, 36 of the Foundation's 41 requests to Local 117 were exactly or substantially identical to the requests the Foundation propounded on SEIU 775 in Case No. 97394-6 (which has been consolidated for review with this appeal), despite the vastly different nature of the claims involved in the two cases. *Compare* CP 1057–84 *with* 97394-6 CP 489–525. Altogether, only 5 of the 41 requests to Local 117 were unique to this case and only 17 of the 53 requests to SEIU 775 were unique to Case No. 97394-6.

meeting minutes, bank statements, and other documents showing line-item transactions related to spending that expressly advocated for an electoral candidate or ballot initiative—as defined by *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *Utter v. Building Indus. Ass’n of Washington*, 182 Wn.2d 389, 341 P.3d 953 (2015)—but did not produce line-item transactions unrelated to electoral spending because such financial information invaded its associational privilege. CP 1111–1199, 1212–14. The parties conferred over these responses and objections on March 18, 19, and 22, 2019. CP 1053, 1205–15.

Meanwhile, on February 26, 2019, Local 117 had moved for judgment on the pleadings,⁷ based on grounds the trial court had recently adopted in the related *PEAF* case. CP 486–532.

On March 11, 2019—two weeks after Local 117 filed its motion for judgment on the pleadings—the Foundation asked Local 117 to schedule five depositions in the remaining two weeks of March. CP 1208. The next day, it served a second set of discovery requests seeking similar information as sought by its first requests. CP 547, 750–764.

Local 117 moved to stay further discovery until resolution of the pending dispositive motion. CP 533–45. It argued that it had already produced substantial discovery; the remaining discovery sought by the

⁷ The motion was set to be heard for April 12, 2019—the earliest date available on the court’s dispositive motion calendar. CP 547.

Foundation was burdensome, invasive of its associational privilege, and irrelevant; the Foundation made its requests 15 months into the litigation and insisted it be accomplished within two weeks, even though four months remained before discovery closed; the discovery would likely prove unnecessary in light of the pending motion; and the effort to cram such intrusive discovery in the few weeks before the dispositive motion could be heard demonstrated the Foundation's true motivation to drain the union of its resources. *Id.* The trial court granted the stay, CP 801–02, explaining that it was familiar with the issues on the pending dispositive motion and the stay would only cause a “stand down for two weeks” before that motion would be heard. RP 21 (3/29/19).

V. The trial court rendered judgment for Local 117 because the Foundation failed to satisfy Section 765(4)(a)(ii)'s prerequisites for maintaining a citizen's action.

Local 117 moved for judgment on the pleadings because the Foundation failed to satisfy the prerequisites under Section 765(4)(a)(ii) for maintaining a citizen's action. CP 486–532. After reviewing the parties' briefs and hearing argument, the trial court granted judgment for Local 117. CP 1247–48. It adopted its reasoning in the *PEAF* case and also indicated that, because the prerequisites under Section 765 were jurisdictional, it did not matter whether Local 117 asserted them for the first time by motion. RP 26:25–30:23 (4/12/19).

In the *PEAF* case, the trial court ruled that Section 765(4)(a)(ii)—which says that the complainant’s second notice must inform the officials that “the person will commence a citizen’s action within ten days upon their failure to do so”—means that the notice “must include an assertion that the citizen’s action will be commenced within ten days upon [the officials’] failure.” *PEAF* RP 72:18–23 (2/8/19). The court then held that, by requiring a citizen to make that specific assertion as a precondition to suit, the Legislature intended the citizen to act in accordance with its assertion: “it is unreasonable to assume that the Legislature would require such a specific notice if it did not also mean what it says, which is the suit much be actually commenced within the ten days.” *Id.* at 73:23–74:2. The court explained, it “would be odd and utterly unsupportable at the end of the day, in my view, to have the Legislature have this specific notice be an empty gesture and not mean what it says.” *Id.* at 74:3–6. It concluded that this reading of Section 765(4)(a)(ii) is not inconsistent with the existence of a separate statute of limitations under Section 765(4)(a)(iv). *Id.* at 74:7–18.

VI. The trial court denied Local 117 attorneys’ fees on the ground that its procedural dismissal precluded an evaluation of the merits of the Foundation’s claims.

After obtaining judgment, Local 117 moved under RCW 42.17A.765(4)(b) for an award of its reasonable attorneys’ fees because

the Foundation had brought its action “without reasonable cause.” CP1321–36. Local 117 contended the Foundation’s suit lacked reasonable cause because it was procedurally barred, pursued meritless theories previously rejected by the Attorney General without any showing that the AGO had erred, and used litigation tactics aimed to further its extra-judicial goals of bankrupting the union. *Id.*

Local 117 emphasized that even on the Foundation’s own allegations, Local 117 spent less than 0.3% of its 2015–17 expenditures on electoral political activities, even while arguing that Local 117 somehow had a primary purpose of electoral political expenditures. CP 1326 (referring to Complaint ¶¶ 17–57 (2017 expenditures), ¶¶ 58–90 (2016 expenditures), ¶¶ 91–92 (2015 expenditures)).

The trial court denied Local 117’s fee request. CP 1672–74. Although it expressed concern that the Foundation may have “misuse[d] ... the legal process” and recognized that using “the legal system for the purpose of bankrupting” is improper, it ultimately did not render a finding on whether the Foundation had in fact brought this suit for the improper purpose of bankrupting its political adversary. RP 23:12, 24:11–15 (5/3/19). Instead, it concluded that because it dismissed the case on procedural grounds, it did not have sufficient opportunity to assess whether the Foundation’s claims lacked reasonable cause. RP 24:24–26:7

(5/3/19). *Accord id.* 26:2–7 (“I’m not saying these claims had zero merit. I’m not saying that they had a lot of merit. I can’t make that decision based on the record before me sufficient to find it was brought without reasonable cause. So I’m going to deny the request.”). In its view, such a determination would have been “more appropriate” or easier “following trial.” RP 24:25–26:2 (5/3/19).

VII. The trial court dismissed Local 117’s selective enforcement counterclaim.

Local 117 counterclaimed that the Foundation violated 42 U.S.C. § 1983 by selectively enforcing FCPA citizen suits against its ideological adversaries. CP 470–72. The trial court dismissed the counterclaim on the ground that the Foundation had not engaged in state action when it sought to enforce the public rights of the FCPA in the name of the State. CP 1318–20; RP 24:17–27:25 (2/15/19). Notwithstanding that dismissal, the trial court recognized that “both sides have a lot of merit to their positions.” RP 25:25–26:2 (2/15/19).

ARGUMENT

I. The trial court correctly dismissed this action because the Foundation failed to file suit within the window period required by Section 765.

Local 117 agrees with PEAFF’s analysis of Section 765.⁸ In

⁸ This Court reviews the trial court’s judgment on the pleadings and its statutory interpretation *de novo*. *Washington Trucking Associations v. State Employment Sec. Dep’t*, 188 Wn.2d 198, 207, 393 P.3d 761, 766 (2017) (CR 12(c) dismissals); *Banowsky*

particular, Local 117 agrees that the plain language of Section 765(4)(a)(ii) specifically requires complainants to notify public officials in their second FCPA notice that the complainant will file a citizen's action within 10 days of the officials' failure to file an FCPA action, and to gain entitlement to bring a citizen's action a complainant must actually do what he or she is required to say—otherwise, as a matter of statutory interpretation, waiver, and forfeiture, the complainant loses the statutory privilege of bringing the citizen's action.

Applying that analysis here, the Foundation had until October 12, 2017, to file this action but did not do so until December 14, 2017. *Supra* at 9–11. The Foundation thus did not satisfy the statutory prerequisites and the trial court correctly dismissed the Foundation's action.

A. The trial court correctly considered Local 117's Section 765 argument.

The Foundation argues that the trial court should not have considered Local 117's Section 765 argument because, in its view, Local 117 was required to identify the deficiency in its answer but failed to do so. FF Op. Br. 3, 55–56 n. 49.⁹ This argument misses the mark factually, legally, and procedurally.

v. *Guy Backstrom, DC*, 193 Wn.2d 724, 731, 445 P.3d 543 (2019) (statutory interpretation).

⁹ This brief cites the Foundation's Initial Brief in Consolidated Appeals as "FF Op. Br."

As a factual matter, Local 117’s initial and amended answers both asserted lack of subject-matter jurisdiction as its first affirmative defense. CP 415 (initial answer), 469 (amended answer).¹⁰ Those pleadings sufficiently notified the Foundation that its citizen’s action was jurisdictionally deficient, particularly in light of the Foundation’s own allegation that the trial court had jurisdiction only because of Section 765(4). CP 3. The very premise of the Foundation’s default argument is thus inaccurate.¹¹

Were there any doubt on that score, Local 117 moved for judgment on the pleadings in February 2019, less than three months after filing its amended answer. That motion fully apprised the Foundation of the legal basis for Local 117’s position. And the Foundation had a full and fair opportunity to oppose the motion. *Supra* at 12–15. Its opposition did not even contend that Local 117’s dispositive motion improperly delayed trial—a ground for denying a CR 12(c) motion—much less that Local 117 had waived the Foundation’s failure to comply with the Section 765 prerequisites. Instead, the Foundation raised the point for the first time at

¹⁰ These jurisdictional defects did not need to be asserted as affirmative defenses because the trial court must “dismiss the action” whenever “it appears ... that the court lacks jurisdiction of the subject matter” CR 12(h)(3).

¹¹ To the extent the Foundation wanted more particularized notice of the defect, it could have moved for a more definite statement or propounded discovery seeking explanation of Local 117’s position. Having filed no such motion and served no such discovery, the Foundation should not now be heard to complain that it did not understand the defense.

oral argument—without citing a single authority—claiming that as a matter of “due process” it needed discovery before the Court ruled on the motion. RP 8:9–14:17 (4/12/19). The trial court queried what discovery might aid the Foundation’s opposition, and the Foundation answered that it sought discovery into the date the officials’ received its second notice or other “equitable bases” for what it described as a “waiver laches defense.” RP 11:23–14:17 (4/12/19). The court found that requested discovery immaterial in light of the Foundation’s pleadings and oral argument concessions, which both specifically alleged the dates of the Foundation’s second notice and this action. RP 27:25–28:10 (4/12/19); *supra* at 9–11.¹² The Foundation’s own allegations, then, demonstrated it had not satisfied Section 765’s requirements and was not entitled to bring this action. No discovery could change that inevitable conclusion.

As a legal matter, Section 765 establishes a series of “prerequisite[s]” that bar adjudication of a citizen’s action where complainants have not fulfilled them. *Utter v. Building Indus. Ass’n of Washington*, 182 Wn.2d 398, 341 P.3d 953 (2015) (characterizing Section 765’s requirements as prerequisites to suit because Section 765(4)(a) authorizes such suit “only if” they are met). *Accord Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974) (characterizing the prerequisites to a

¹² By operation of statute, the officials’ date of receipt is deemed equivalent to the date of the notice was postmarked as mailed. RCW 42.17A.140(1).

citizen's action as "specified safeguards" needed to provide "protection against frivolous and abusive lawsuits.").¹³

Because citizen's actions are creatures of statute, the statutory prerequisites to those actions operate as jurisdictional bars. This Court has strictly enforced similar statutory procedures that require, as a prerequisite to courts' exercise of jurisdiction, the filing of an action within prescribed timelines. *James v. Cty. of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005); *In re Estate of Jepsen*, 184 Wn.2d 376, 358 P.3d 403 (2015).

This principle has been applied specifically to a party's failure to timely complete pre-filing requirements. *See Cmty. Treasures v. San Juan Cty.*, 192 Wn.2d 47, 51, 427 P.3d 647 (2018); *Buecking v. Buecking*, 179 Wn.2d 438, 449, 316 P.3d 999 (2013); *Nickum v. Bainbridge Island*, 153 Wn. App. 366, 382, 223 P.3d 1172 (2009); *Lewis Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 113 Wn. App. 142, 153–54, 53 P.3d 44 (2002).¹⁴

Like the statutes at issue in these cases, the FCPA provides the exclusive means for enforcement of the FCPA. Enforcement via the FCPA's citizen's action provision is particularly circumscribed because judicial

¹³ As explained in PEAFF's brief, *Fritz* considered a predecessor to the statutory provision at issue here. Its particular characterizations of the 1972 citizen suit provision do not govern its 2012 amendments at issue here. But *Fritz*'s more general description of the statutory scheme as enacting safeguards against abusive litigation remains applicable.

¹⁴ *See also Jepsen*, 184 Wn.2d at 381 n. 5 (there is "no functional difference between a court lacking power to hear the issue based on a jurisdictional statute and a court lacking the opportunity to wield that power based on a litigation precondition: either way, it is unable to adjudicate the issue.") (internal quotations, alterations omitted).

review may occur “only if” the four prerequisites are satisfied. Section 765(4)(a), *Utter, supra*. Indeed, Washington courts treat a complainant’s failure to comply with the FCPA’s prerequisites for citizen suits as a jurisdictional bar. *See West v. Wash. State Ass’n of Dist. & Mun. Court Judges*, 190 Wn. App. 931, 941, 361 P.3d 210 (2015) (affirming dismissal where complainant failed to give timely notices and thus “lacked authority to sue” via FCPA citizen’s action) (emphasis added).

This Court should strictly enforce Section 765’s procedural prerequisites. *See also James*, 154 Wn.2d at 580–90 (dismissing for lack of compliance with 21-day filing requirement). *Accord Jepsen*, 184 Wn.2d at 382 n.7 (“automatic waiver under CR 12(h)(1) is inconsistent with the plain language of [the relevant statute] and so would not apply in any event. CR 81(a)”); *Nickum*, 153 Wn. App. at 382; *Lewis Cty.*, 113 Wn. App. at 153–54.

Without analyzing the jurisdictional nature of statutory prerequisites, the Foundation relies on decisions involving non-statutory claims and affirmative defenses. *See King v. Snohomish Cty.*, 146 Wn.2d 420, 422–26, 47 P.3d 563 (2002) (in negligence action, claim-filing defense waived through 45 months of litigation and discovery); *Dyson v. King Cty.*, 61 Wn. App. 243, 809 P.2d 769 (1991) (in damages action,

claim-filing defense waived through two years of litigation).¹⁵ Unlike affirmative defense cases, the very cause of action the Foundation wishes to bring—an FCPA citizen’s action—is a creature of statute, which the Foundation has the right to bring only upon satisfying the FCPA’s procedural prerequisites. *Supra* at 17–18. Those statutory prerequisites limit judicial authority to entertain citizen’s actions.

Statutorily prescribed procedural prerequisites are part of the plaintiff’s prima facie case and must be pleaded by the plaintiff to state a claim. *See Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 756–58, 709 P.2d 1200 (1985) (statutorily required notice was part of plaintiff’s prima facie case and did not “have to be affirmatively denied”); *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) (“when a defense necessarily negates an element of an offense, it is *not* a true affirmative defense”); *Shinn Irr. Equip., Inc. v. Marchand*, 1 Wn. App. 428, 430–31, 462 P.2d 571 (1969) (a matter that controverts “the opposing party’s prima facie case” is not an affirmative defense). In this case, the Foundation’s own pleadings negated its right under the FCPA to bring suit. *Supra* at 9–11, 14–15. Judgment on the pleadings was appropriate.

¹⁵ Notwithstanding GR 14.1(a), the Foundation also inappropriately relies on three unpublished Court of Appeals decisions issued before 2013, each of which is completely distinguishable. FF Op. Br. 55–56 n. 49.

Procedurally, if there is any default here, it is the Foundation's, not Local 117's. That is because the Foundation did not raise in its opposition brief its contention that Local 117 waived its Section 765 argument. Instead, the Foundation raised this objection for the first time at oral argument on the motion, without any cited authority. RP 8:9–14 (4/12/19). The Foundation did not move for reconsideration of the dismissal. The Foundation thus failed to preserve this purported error for appeal. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.”); *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675, n.6, 398 P.3d 1108 (2017) (declining to address argument raised for the first time at oral argument without citation to authority); *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 199 Wn. App. 534, 539, n.1, 400 P.3d 347 (2017) (similar).

The trial court properly considered and granted Local 117's Section 765 argument.

II. Alternative grounds support the dismissal of this action.

This Court may affirm the judgment for Local 117 on the Foundation's FCPA claims “on any ground supported by the record.” *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014). Such alternative grounds exist here.

A. The Foundations own allegations show that Local 117 is not a political committee subject to FCPA registration.

The FCPA regulates political committees. RCW 42.17A.005(40), .025, .235. To be a political committee, an organization must either have a primary purpose of seeking to “affect, directly or indirectly, governmental decision-making by supporting or opposing candidates or ballot propositions,” along with the expectation of making such expenditures; or expect to receive contributions to electoral candidates or for ballot initiatives. *State v. Dan J. Evans Campaign Committee*, 86 Wn.2d 503, 509, 546 P.2d 75 (1976). *See also Utter*, 182 Wn.2d at 412–27. Although an organization may have more than one primary purpose, the First Amendment permits expenditure-based regulation of political speech only of organizations with a primary purpose of spending on electoral candidates or ballot initiative. *Utter*, 182 Wn.2d at 424–27.

An organization’s purposes can be discerned either from its stated purposes or its actual expenditures. *Evans*, 86 Wn.2d at 508–09 (assessing purpose based on actual spending); *Utter*, 182 Wn.2d at 424, 427–28 (assessing purpose based on stated goals). In this case, the Foundation’s own allegations establish that Local 117 is not a political committee under either approach.¹⁶

¹⁶ It also does not qualify as a political committee under the contributions prong because it is well established that labor organizations in Washington State may properly use dues

Local 117's bylaws, alleged in the Foundation's complaint, state the union's purposes as to unite workers into one union, organize workers, secure improved wages, educate workers, advance collective bargaining, engage in activities that support the membership, assist other labor organizations, engage in members' communities, protect the union as an institution, carry out the objectives of its parent organization, and use union funds to achieve these objectives. *Supra* at 5–6. Those are non-electoral purposes. The Foundation focuses on the portions of Local 117's mission statement indicating that it advances collective bargaining and furthers its members' interests, in part, through political activity. CP 14. Those portions of Local 117's mission statement fall far short of the political-committee trigger: they confuse means and ends and conflate political activity with express electoral advocacy.

Where “electoral political activity is merely one means [an] organization uses to achieve its legitimate broad nonpolitical goals, electoral political activity cannot be said to be one of the organization's primary purposes.” *Evergreen Freedom Foundation v. Washington*

money “as a source for political contributions” without triggering political-committee regulation. *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 140 Wn.2d 615, 631, 999 P.2d 602 (2000). *Accord* 1973 Letter Op. Att'y Gen. No. 114, 1973 WL 154063, 4 (1973) (union dues not specifically earmarked for political contributions do not qualify as such, even if union later makes discretionary decisions to make political contributions from general revenues based on those dues). *Cf.*, Complaint ¶ 154, CP 18 (failing to allege that the dues themselves have specified portions earmarked for political contributions and alleging instead that the “segregation” occurs at the time when dues are moved from general funds to the SSF).

Education Association, 111 Wn. App. 586, 600, 49 P.3d 894 (2002), *rev. denied* 148 Wn.2d 1020 (2003). That is precisely the case here: Local 117 uses political engagement solely as one means to achieve its non-electoral ends of organizing workers, improving wages and working conditions, and advancing collective bargaining. *Supra* at 5–6.

Stray references to “political activity” do not demonstrate that Local 117 has the sort of purpose sufficient to qualify for political-committee regulation. On the contrary, only spending on electoral candidates or ballot initiatives, and not political activity unconnected to express advocacy for electoral candidates or ballot initiatives, qualifies under the expenditure prong for political committee regulation *Utter*, 182 Wn.2d at 423–27; *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm’n*, 161 Wn.2d 470, 484–92, 166 P.3d 1174 (2007); *Buckley*, 424 at 76–82. *Accord* RCW 42.17A.005(13)(b)(v) (excluding from the definition of contributions “internal political communication[s] primarily limited to ... the members of a labor organization”); WAC 390-16-313 (excluding such communications from the definition of “independent expenditures”).

The Foundation’s own allegations indicate that Local 117 spent less than 0.3% of its 2015–17 expenditures on electoral political activities—i.e., contributions to electoral candidates or to support or

oppose ballot initiatives. *Supra* at 16. While this Court has not yet identified a minimum spending level needed to support the conclusion that one of an organization's primary purposes is spending money on electoral activity, whatever the minimum may be, surely 0.3% of an organization's expenditures is so *de minimus* as to fall below it. The Foundation's allegations, then, confirm that Local 117's electoral spending is insufficient to qualify the union as a political committee.

Below, the Foundation resisted these conclusions on the ground that political committee status is a mixed question of law and fact. *WEA*, 111 Wn. App. at 596. True enough. But here the Foundation has pleaded all the facts needed for a full evaluation of the question and those pleaded allegations establish that Local 117 is not a political committee under either prong of the definition. *Supra* at 5–6, 16. Dismissal is warranted on this ground and should be affirmed regardless of the Court's ruling on the Section 765 issue.

B. Local 117's SSF is not a person under the FCPA subject to suit in its own right.

The trial court rightly dismissed the Foundation's claims against the SSF. *Supra* at 11–12. Only a "person" is subject to regulation as a political committee. RCW 42.17A.005(40). The FCPA defines a "person" as including "an individual, partnership, joint venture, public or private

corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized.” RCW 42.17A.005(38). That definition does not include bank accounts registered with the Internal Revenue Service under Section 527 of the Internal Revenue Code. The PDC reached that conclusion more than two decades ago and has followed it ever since, as has the Attorney General. CP 162–66 (citing *Voters Educ. Comm. v. Washington State Public Education Disclosure Comm’n*, 161 Wn.2d 470 491 n.14, 166 P.3d 1174 (2007) for the proposition that section 527 sweeps more broadly than the state definition of a political committee).

The SSF is therefore not an independent person subject to FCPA regulation and suit in its own right. Dismissal of the Foundation’s claim against the SSF is warranted on this ground and should also be affirmed regardless of the Court’s Section 765 analysis.¹⁷

¹⁷ The Foundation did not assign error to the portion of the trial court’s order dismissing its claim for fees from the defendants. FF Op. Br. 2–4. And for good reason: Section 765(4)(b) makes clear a complainant who prevails in a citizen’s action is entitled only to “be reimbursed by the state of Washington for costs and attorneys’ fees he or she has incurred.” Such prevailing citizen complainants are not entitled to fee recovery directly from the defendants.

III. The trial court erroneously denied Local 117's fee petition.

The trial court denied Local 117's request for fees under Section 765(4)(b) without deciding whether the Foundation brought this action "without reasonable cause." *Supra* at 15–17. It believed no such assessment could occur until after trial. *Id.* That abdication abused the trial court's discretion.

Section 765(4)(b) states:

In the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant.

RCW 42.17A.765(4)(b). By its terms, this provision identifies dismissal—not post-trial judgment—as the event that triggers the reasonable-cause determination. *Id.* And while the trial court generally has discretion to determine the amount of a fee award, *see San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 165, 157 P.3d 831 (2007) (fee award under similar Section 765(5) is discretionary); *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) (same), it does not have discretion to avoid determining, upon a timely motion for fees, whether the action was brought without reasonable cause.

An inspection of the statutory language makes this clear. The relevant sentence of Section 765(4)(b) contains two clauses. The first

clause identifies the circumstances in which courts may award fees to a citizen's action defendant: the action must be dismissed and the court must have found the action was brought without reasonable cause. RCW 42.17A.765(4)(b). The second clause, which grants trial courts discretion to order fees, presupposes that the dismissal and reasonable-cause determination have already occurred. *Id.* In this case, the trial court never determined whether the Foundation reasonably brought its claims, the precondition for exercising its discretion to award fees. It simply declined to engage in that statutorily required analysis.

“This failure to exercise discretion is itself an abuse of discretion subject to reversal.” *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). It is particularly egregious here because the court’s rationale—deferring a ruling until after trial—would lead to the perverse result that courts could not award fees in cases so frivolous to warrant dismissal on the pleadings but could do so in cases with enough merit to survive dismissal on the pleadings and summary judgment on the discovery record. This Court’s precedents provide no support for that inverted frivolity metric. *See In re Recall of Piper*, 184 Wn.2d 780, 788, 364 P.3d 113 (2015) (affirming CR 11 fee award imposed on plaintiff who voluntarily dismissed case); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903–05, 969 P.2d 64 (1998) (affirming fee award based on dismissal for “lack of standing and

premature filing,” even though motions presenting the merits had not yet been decided).

Often, when appellate courts find an abuse of discretion for failure to exercise discretion, they remand for the trial court to exercise discretion in the first instance. Even then, they properly provide guidance so that the trial court can assess the reasonable cause question based on appropriate factors. *See, e.g., Progressive Animal Welfare Soc. v. Univ. of Washington*, 114 Wn.2d 677, 688–89, 790 P.2d 604 (1990). In this case, the record is sufficiently developed that this Court could fairly reach the issue without remand, RAP 2.5(a), because the Foundation’s own statements, legal theories, and litigation tactics together establish that its action lacked reasonable cause here.

The Foundation’s own statements establish that its overarching goal is to bankrupt public sector unions and use litigation—particularly campaign finance litigation—to drain union resources. *Supra* at 6–8. This harassing objective is by itself a sufficient basis to award attorneys’ fees under Section 765.

As for the merits of its legal theories, the Foundation specifically knew—through the AGO’s response to its pre-filing complaint—that Local 117 could not be a political committee under either prong and the SSF was not a person capable independently of being a committee. *Supra*

at 10. While citizens may certainly disagree with official determinations where they have viable legal theories, the Foundation has never offered such a theory here. Instead, its pleaded allegations confirm the AGO's conclusion: Local 117 spent less than 1% of its annual outlays each year on electoral candidates or ballot initiatives and its dues receipts were not earmarked for such contributions. *Supra* at 16. Similarly, the Foundation has never offered any meaningful theory of why the SSF qualifies as a "person" under the FCPA.

Unfortunately, the Foundation's litigation tactics are consistent with its stated purpose of using campaign finance lawsuits to drain union resources. Its discovery sought every financial transaction Local 117 had undertaken for six years, even after Local 117 provided authority spanning 40 years showing that only spending that expressly advocates for an electoral candidate or ballot initiative—not vague references to "political" activity—is relevant to an organization's political committee status. *Supra* at 13. Moreover, the majority of the Foundation's discovery requests simply duplicated requests it propounded in other FCPA litigation involving totally different types of claims (including in Case No. 97394-6). *Supra* at 12 n.6. As soon as it realized its case would likely be dismissed for its failure to comply with Section 765's prerequisites, the Foundation tried to cram as much discovery as it could before dismissal,

seeking five or six depositions in a two-week period. *Supra* at 13. These tactics are untethered to any meritorious FCPA theory of liability. By advancing its private purpose to harass Local 117 and drain its resources, the Foundation's litigation tactics show a lack of reasonable cause warranting fees. *Fritz*, 83 Wn.2d at 314 (imposition of fees is an appropriate "deterrent against frivolous and harassing" citizen actions); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998) (courts may impose fees to sanction "intentionally frivolous [actions] brought for the purpose of harassment."); *Wixom v. Wixom*, 190 Wn. App. 719, 724, 360 P.3d 960 (2015) (sustaining fee award where a party's conduct made the "proceeding unduly difficult or costly"); *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002) (discovery abuses can support fee award).

The Foundation's harassing conduct reveals the unreasonableness of its suit as a whole. Even if the Court were to examine the reasonableness of its claims separately, however, a fee award would still be appropriate because the FCPA authorizes fee awards whenever even a "single claim" is frivolous or harassing. *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 615, 49 P.3d 894 (2002), *as amended on denial of reconsideration* (June 14, 2002). That is so because the FCPA's "policy of discouraging frivolous citizen actions is

furthered more by awarding attorney fees to individual claims brought without reasonable cause than by allowing frivolous claims to enjoy the safe haven of meritorious ones.” *Id.*

IV. The trial court erroneously dismissed Local 117’s counterclaim.

The trial court dismissed Local 117’s counterclaim on the ground that the Foundation had not engaged in state action. *Supra* at 17. Because the trial court dismissed this counterclaim under CR 12(b)(6), Local 117’s allegations must be accepted as true. *Tenore v. AT&T Wireless Svcs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). It is thus a verity on this appeal that the Foundation has used citizen’s actions to selectively enforce the FCPA against its ideological adversaries for its private gain. *Supra* at 17.¹⁸ Dismissal is appropriate only if no set of facts consistent with the claim

¹⁸ The trial court did not reach the issue of whether Local 117 had adequately alleged a constitutional deprivation. However, there is no doubt that it did. A selective enforcement claim is a well-recognized species of equal protection. *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011). A claimant must allege both discrimination on the basis of some impermissible basis such as race, religion, political affiliation, or the exercise of constitutionally-protected rights, *United States v. Kidder*, 869 F.2d 1328, 1336 (9th Cir. 1989), and the existence of a similarly situated person or entity that could have been, but was not, prosecuted. *Lacey v. Maricopa Cty.*, 693 F.3d 896, 920 (9th Cir. 2012) (internal citations omitted). Here, Local 117 did both. It clearly alleged that the Foundation violated the First and Fourteenth Amendments through selective FCPA enforcement, specifically by seeking to enforce the statute selectively based on perceived ideology. CP 470. Local 117 also alleged that the Foundation declined to enforce the law against its ideological fellow-travelers, who were similarly situated to its targets. CP 471. Enforcing a statute based on perceived ideology and a First-Amendment protected right to donate to one political party and its politically-aligned entities constitutes impermissible discrimination based on exercise of First Amendment rights. *See Nichols v. Village of Pelham Manor*, 974 Supp. 243, 255–56 (S.D.N.Y. 1997).

would entitle Local 117 to relief. *See, e.g., Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984).

As a general rule, the constitution binds only the government, not private parties. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619, 111 S.Ct. 2077, 2082, 114 L.Ed.2d 660 (1991). Private parties, however, have been deemed state actors subject to constitutional regulation when “the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority” and “the private party charged with the deprivation [can] be described in all fairness as a state actor.” *Id.* at 620 (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939–42, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982)).

Applying those standards, private litigants have been held to have engaged in state action in a variety of circumstances. *See, e.g., Edmonson*, 500 U.S. at 620–28 (private civil litigant engages in state action in using peremptory challenges and therefore may not exclude jurors based on race); *Lugar*, 457 U.S. at 924–26, 936–42 (private litigant that sought prejudgment attachment of defendant’s property engaged in state action and was subject to due process); *Georgia v. McCollum*, 505 U.S. 42, 50–55, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (private criminal defendants engage in state action in using peremptory challenges and therefore may

not exclude jurors based on race). Similarly, private parties have been held to engage in state action when the state has delegated to them the authority to carry out functions the law ordinarily imposes on the State itself. *West v. Atkins*, 487 U.S. 42, 48–57, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (private doctor contracted by the state to provide medical care to prisoners engaged in state action).

The trial court erroneously failed to analyze whether the State delegated to a private party the authority to carry out a function ordinarily imposed on the State itself. Instead, the court focused on what it believed to be a “unique” feature of the FCPA: that the citizen has the right to bring a citizen’s action under Section 765 only if the “State is disinterested in pursuing the claim” RP 27:10–12 (2/15/19). In light of that feature, the trial court described the citizen’s action as a “nongovernmental claim.” *Id.* at 27:17.

Instead of characterizing a citizen’s action as a “nongovernmental claim” due to the state officers’ conclusion, at the pre-filing stage, that the FCPA complaints lacked merit, the court should have asked whether, having chosen to file suit in the face of this decision, the Foundation’s selective enforcement of citizen’s actions to punish ideological adversaries resulted from the exercise of a right or privilege whose source is state authority and whether the Foundation’s litigation can fairly be described

as state action. The dismissal should be reversed because both questions must be answered affirmatively.

First, the Foundation's pursuit of citizen's actions is clearly grounded in state authority provided by Section 765. Complainants are authorized to enforce the State's electoral laws only by virtue of authority granted them by state statute. RCW 42.17A.765(4). Absent such extraordinary authority, the enforcement of Washington's electoral law—like the enforcement of all of its public-rights laws—is left to the Governor, Attorney General, and other executive department officials. RCW 42.17A.765(1) (“The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy... .”); Wa. Const. art. III, § 5 (the Governor “shall see that the laws are faithfully executed.”). Just as the attachment procedures for seizing property in *Lugar* were made possible only by authority provided by state statute, 457 U.S. at 936–41, here, the Foundation's selective pursuit of FCPA citizen's actions was made possible only by authority provided by the FCPA.

The Foundation's selective FCPA enforcement through citizen's actions is also fairly attributable to the State. “What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S.

288, 295, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807 (2001). Certain patterns suffice to fairly impute private action to the State, including “the extent to which the actor relies on government assistance and benefits”; “whether the actor is performing a traditional governmental function”; and “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.” *Edmonson*, 500 U.S. at 621–22. While none of these is necessary because a “range of circumstances” can “point toward the State behind an individual face,” *Brentwood*, 531 U.S. at 295, each factor supports state action here.

The prosecution of a citizen’s action enforcing the FCPA is most clearly seen as state action because enforcement of public rights established by statute is traditionally an exclusive governmental function. *See* Wa. Const. art. III, § 5 (the Governor “shall see that the laws are faithfully executed.”); *State v. Clausen*, 146 Wash. 588, 592, 264 P. 403 (1928) (“As the final right to determine the true intent and purpose of all laws is lodged in the Supreme Court of this state, so is the final determination as to their enforcement and execution lodged in the Governor.”). Just as enforcement of state criminal law is unequivocally state action, *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), so too is enforcement of regulatory statutes enacting public rights. *Storey v. City of Seattle*, 124 Wash. 598, 602, 215 P. 514

(1923) (Humane Society cloaked with state action where empowered to “appear in court and prosecute cases in the name of the state ... relating to the regulation of cats and dogs”); *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 165, 759 P.2d 447, 450 (1988) (administration of regulatory code involved “duties that are owed to the public at large,” not to any specific individual).

As a result, statutory schemes that delegate law enforcement to private actors cloak that activity in state action. *Brunette v. Humane Soc. of Ventura Cty.*, 294 F.3d 1205, 1208 (9th Cir. 2002) (Humane Society was “state actor” because it has been delegated law enforcement authority including the ability “to investigate reports of animal cruelty, impound animals, place liens on property, and bring criminal charges against citizens”); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 834–36 (E.D. Va. 2015) (private toll collector engaged in state action through delegated authority to collect tolls and fees, issue summons, and prosecute traffic infractions in court to enforce highway laws); *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315, 321-22 (D.N.J. 1978) (hotel owners were “state actors” where statute empowered them to institute criminal prosecutions of individuals who did not pay hotel bill). Any contrary rule would invite serious abuse of the prosecutorial function by allowing private attorneys to use “the expansive prosecutorial powers to gather

information [and achieve other goals] for private purposes.” *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987).

The rights protected here by the FCPA are public, not private. Public rights are those that arise “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,” whereas private rights involve “the liability of one individual to another under the law as defined.” *Stern v. Marshall*, 564 U.S. 131, 489 S.Ct. 2594, 180 L.Ed 475 (2011). The FCPA governs the relationship between elected representatives and the people of Washington as a whole. RCW 42.17A.001. Complainants who step into the shoes of the State to enforce these public rights need allege no particularized private harm to themselves and, even if they prevail in the action, receive no private bounty. RCW 42.17A.765(4). Instead, any “judgment awarded shall escheat to the state.” Section 765(4)(b).

The Foundation’s citizen’s suits also rely heavily on government assistance and benefits. Principally, the State funds successful citizen’s actions. That is so because prevailing citizen litigants are “entitled to be reimbursed by the state of Washington for costs and attorneys’ fees” they incur in prosecuting citizen’s actions. RCW 42.17A.765(4)(b). This right

to fee reimbursement is mandatory upon success. *Id.* (“shall be entitled”). It thus confers a substantial governmental benefit on private litigants like the Foundation. Moreover, judgments in successful citizen’s actions “escheat to the state,” RCW 42.17A.765(4)(b), leaving the citizen litigant no private interest whatever in the fruits of the litigation; all penalties, fines, and injunctive relief belongs to the State, with no bounty for the citizen litigant. As a result, state officials, not private citizens, are positioned to collect and enforce those judgments. Citizen litigants like the Foundation gain the benefit of governmental enforcement of judgments obtained by private litigants without cost to the litigants themselves.¹⁹

Third, Local 117’s selective enforcement injuries result from and are aggravated by the Foundation’s invocation of governmental authority. Like official actions, the Foundation brings citizen’s actions “in the name of the state.” RCW 42.17A.765(4). By so doing, the Foundation “is necessarily acting on behalf of the State, implicating rights that belong to the State.” *No On I-502 v. Washington NORML*, 193 Wn. App. 368, 373–74, 372 P.3d 160 (2016) (citizen litigants cannot appear pro se because, by suing in the name of the state, they are appearing appear “before the court

¹⁹ The FCPA’s citizen’s action provisions thus also fit comfortably in the “joint action” line of state action jurisprudence. *See Lugar*, 457 U.S. at 939 (either “joint action” or delegation of a “public function” can “convert [a] private party into a state actor”); *Burke v. Town Of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005).

on behalf of another party or entity”). They exercise fundamentally governmental authority.

Instead of conducting this analysis, the trial court concluded that the adversity between citizen litigants and the Attorney General precluded any finding of state action by citizen litigants. *Supra* at 17. That conclusion cannot be squared with *Georgia v. McCollum*, which found the use of peremptory challenges by criminal defendants to be state action even though such defendants are adverse to the state in criminal prosecutions. 505 U.S. at 53–54 (rejecting contention that the “adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge.”) Here, even though the Attorney General and the Foundation disagree about the proper enforcement of the FCPA, the Foundation wields quintessentially governmental power by enforcing the FCPA in the name of the State to vindicate rights that belong to the State and not to it individually. *See id.* at 54 (focusing on function of peremptory challenge, not relationship between defendant and prosecutor).

V. The trial court acted well within its discretion in staying discovery.

The Foundation rightly acknowledges that the trial court’s stay of discovery may be overturned only for an abuse of discretion. FF Op. Br.

47. However, it fails entirely to place that stay in its appropriate procedural context.

The Foundation had 15 months—from the filing of this case on December 14, 2017, through the issuance of the discovery stay on March 29, 2019—to conduct discovery. *Supra* at 12–14. At no point in this period did the Foundation issue discovery seeking to flesh out Local 117’s affirmative defenses, such as the lack of jurisdiction Local 117 pleaded. The stay paused discovery for only two weeks, from March 29, 2019, through April 12, 2019. *Supra* at 14. Had the trial court not entered that judgment, the Foundation would have been entitled under the scheduling order to conduct discovery for an additional two and a half months, until the July 9, 2019, discovery cutoff. *Supra* at 12. In short, the Foundation charges the trial court with an abuse of discretion because it paused discovery for a mere two weeks among an 18-month discovery period.

Yet, the Foundation offers no authority supporting its radical notion that such a brief stay abuses the trial court’s discretion—likely because no such authority exists. Instead, the Foundation offers platitudes about the importance of discovery in protecting a litigant’s right of access to the courts. FF Op. Br. at 47–48. Neither of its lead authorities involved a discovery stay. *See Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (invalidating statute requiring

certification of medical merit in a malpractice action prior to discovery); *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777–89, 819 P.2d 370 (1991) (affirming discovery order compelling identity of witness).

Washington courts have repeatedly approved the issuance of stays of discovery pending dispositive motions. *See, e.g., Nissen v. Pierce Cty.*, 183 Wn. App. 581, 597, 333 P.3d 577 (2014) (“CR 26(c)(1) gave the superior court discretion to stay discovery until after the CR 12(b)(6) hearing”), *aff’d in part, rev’d in part*, 183 Wn.2d 863, 357 P.3d 45 (2015); *Long v. Snoqualmie Gaming Comm’n*, 7 Wn. App. 2d 672, 435 P.3d 339 (2019) (“The issue of immunity here can be determined on the basis of the law. So the superior court did not abuse its discretion by staying discovery.”). The trial court’s brief stay, pending resolution of the dispositive motion, was an entirely appropriate exercise of discretion.

The Foundation’s true complaint is not with the two-week stay of discovery but with its own decision to waste most of the discovery period by waiting a full year before serving interrogatories and document requests—none of which sought the factual basis for Local 117’s defenses—and, then, wasting yet more time by serving incredibly overbroad pattern requests not calculated to obtain anything relevant to its claims. *Supra* at 12 n.6, 13. Those decisions cannot be laid at the trial court’s feet.

The Foundation nonetheless contends—almost as an aside—that it was prejudiced by the stay because its discovery was relevant to issues “bound up with Teamsters 117’s request for judgment on the pleadings” FF Op. Br. 49. And it suggests that the trial court should have converted Local 117’s motion to a summary judgment motion and continued it so that it could have completed discovery needed to oppose the motion. *Id.* at 50. To get such a continuance, CR 56(f) required the Foundation to submit an affidavit identifying the discovery that it deemed “essential to justify the [Foundation’s] opposition” to the motion. The Foundation’s affidavit in support of its opposition to the motion for judgment on the pleadings identified no such facts. *Cf.* CP 841–44. It failed to preserve this point.

In response to questioning from the trial court at oral argument, however, the Foundation indicated that it sought discovery into the date the officials received the second notice and other equitable factors to respond to what it erroneously characterized as Local 117’s laches defense. *Supra* at 20. Were the Court to treat these last-ditch efforts to identify discovery needed to oppose the motion as preserved for appeal, they would nonetheless be wholly immaterial to its resolution.

The actual date the officials received the Foundation’s second notice has no bearing on how Section 765 should be interpreted because

RCW 42.17A.140(1) deems the date of receipt equivalent to the date a mailing is postmarked. Because the Foundation specifically alleged the mailing date in its complaint, *supra* at 9, by operation of statute it also effectively alleged the date the officials received notice within the meaning of the FCPA. No discovery was needed on that point.

As for the Foundation's request to conduct discovery into unspecified equitable factors, it does not explain how any such factors would affect this Court's interpretation of Section 765. To the extent it is suggesting that it may have some unspecified equitable excuse for missing the deadline imposed by Section 765(4)(a)(ii), that suggestion cannot be squared with this Court's jurisdictional treatment of procedural prerequisites to statutory rights. *Supra* at 21 (discussing *James* and its progeny). Neither does it explain what facts it would like to discover to buttress its unspecified equitable excuse.

Ultimately, the Foundation has shown no prejudice from the stay. The trial court did not abuse its discretion in issuing it.

VI. The Foundation is not entitled to fees.

The Foundation's final request is for an award of fees under RAP 18.1 and Section 765. FF Op. Br. at 64. That request suffers two problems. First, and most fatally, the request is premature: even if the Foundation succeeds in this appeal, it will not have prevailed in its FCPA actions but

only reversed dismissals. To be a prevailing party, the Foundation must win an affirmative judgment. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). Reversing a dismissal falls several steps short of an affirmative judgment in the underlying action. Any fee award for the Foundation must therefore await a final judgment in its favor.

Second, even if the Foundation eventually were to prevail on its FCPA claims, it would not be entitled to an award of fees from Local 117. *Supra* at 11. Instead, it would be entitled only to fee reimbursement from the State. *Supra* at 11 (discussing Section 765(4)(b)).²⁰ To the extent the Foundation seeks a fee award payable by Local 117, that request must be denied in its entirety.

CONCLUSION

For the reasons explained above and in the accompanying PEAFF brief, Local 117 respectfully asks the Court to (1) affirm the judgment on the pleadings dismissing the Foundation's citizen's action for failure to comply with Section 765's prerequisites; (2) reverse the order denying Local 117 fees and remand for an award of the reasonable attorneys' fees Local 117 incurred in defending this action; (3) reverse the dismissal of

²⁰ RAP 18.1 allows fees only as provided by "applicable law."

Local 117's selective enforcement counterclaim; and (4) deny the Foundation's request for fees.

Respectfully submitted this 6th day of November, 2019.



Darin M. Dalmat, WSBA No. 51384
Ben Berger, WSBA No. 52909
BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Ste. 400
Seattle, WA 98119
(206) 257-6028
dalmat@workerlaw.com
berger@workerlaw.com

DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding document with the Washington State Supreme Court using the appellate efileing system, which will provide notice of such filing to all required parties.

Executed this 6th day of November, 2019, at Seattle, Washington.


Jennifer Woodward, Paralegal

BARNARD IGLITZIN & LAVITT

November 06, 2019 - 1:50 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97109-9
Appellate Court Case Title: Freedom Foundation v. Teamsters Local 117, et al
Superior Court Case Number: 17-2-06578-9

The following documents have been uploaded:

- 971099_Briefs_20191106134628SC703715_5368.pdf
This File Contains:
Briefs - Respondents/Cross Appellants
The Original File Name was 2019 11 06_T117 Answering Brief_Final.pdf

A copy of the uploaded files will be sent to:

- EStahlfeld@freedomfoundation.com
- LPDArbitration@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- alicia.young@atg.wa.gov
- berger@workerlaw.com
- comcec@atg.wa.gov
- ewan@workerlaw.com
- franco@workerlaw.com
- greenberg@workerlaw.com
- iglitzin@workerlaw.com
- jmatheson@freedomfoundation.com
- knelsen@freedomfoundation.com
- lawyer@stahlfeld.us
- legal@freedomfoundation.com
- margaretm@atg.wa.gov
- nicole.beck-thorne@atg.wa.gov
- rbouvatte@freedomfoundation.com
- susand1@atg.wa.gov
- tkia.morgan@atg.wa.gov
- valenzuela@workerlaw.com

Comments:

Sender Name: Jennifer Woodward - Email: woodward@workerlaw.com

Filing on Behalf of: Darin M Dalmat - Email: dalmat@workerlaw.com (Alternate Email: woodward@workerlaw.com)

Address:
18 W. Mercer St., Ste. 400
Seattle, WA, 98119
Phone: (206) 257-6016

Note: The Filing Id is 20191106134628SC703715