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NO. 758918

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

EVERGREEN FREEDOM FOUNDATION
d/b/a FREEDOM FOUNDATION,

Appellant,

v.

SEIU 775,

Respondent.

OPENING BRIEF OF APPELLANT FREEDOM FOUNDATION

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I. INTRODUCTION

The U.S. Supreme Court held in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), that certain individual home health care providers have a constitutional right to opt out of compelled union dues payments. Since then the Freedom Foundation has worked to inform those providers of their constitutional rights. It has worked toward this end by, among other things, using information obtained from confidential sources to contact individual providers and to write and publish articles.

In response to these efforts, SEIU 775, the union that serves as the exclusive collective bargaining representative for these individual providers, filed several suits intended to stop the Foundation from informing individual providers of their constitutional rights and from engaging in protected political speech. In one of those suits, this one filed in June 2016, SEIU claimed tortious interference with contractual relations, arguing the names and contact information of individual providers used by the Foundation was confidential and proprietary, and sought a preliminary injunction. That same month, the trial court denied SEIU's motion for a preliminary injunction, holding protected speech cannot supply the basis for a tortious interference claim, and the Commissioner of this Court denied SEIU's request for discretionary review.

In other litigation, Division II of this Court has now made clear the names and contact information of individual providers are not confidential but public records subject to mandatory disclosure. *SEIU 925 v. Freedom Found.*, No. 48522-2-II, __ P.3d __, 2016 WL 7374228, at *1 (Dec. 20, 2016) (names and contact information); *SEIU Healthcare 775NW v. State Dep't of Soc. & Health Servs.*, 193 Wn. App. 377 (2016) (names).

Thus, SEIU rests its tortious interference claim in this case on the Foundation's use of information that is, as a legal matter, public information, and seeks damages for the loss of union dues from members who decide to exercise their constitutional rights as an alleged result of the Foundation's protected speech. Despite the shaky premise on which it bases its claim, SEIU continues to demand in discovery disclosure of the identities of the Foundation's confidential sources—over the Foundation's objections under the First Amendment associational privilege, the Shield Law (Washington's journalist's privilege statute, RCW 5.68.010), and the common-law journalist's privilege.

The Foundation originally sought a protective order asking the court to bar all discovery under these privileges. The trial court summarily denied that motion, without engaging in the analyses required when a party asserts these privileges and without indicating whether the Court was rejecting the privilege objections or rejecting the Foundation's

request to prevent all discovery. As a result, while the Foundation understood discovery would proceed, it believed the court had not foreclosed its ability to raise its privilege objections in the context of particular questions, which it did in a subsequent CR 30(b)(6) deposition, refusing to disclose its confidential sources. Nevertheless, the trial court held the Foundation in contempt for violating its prior order denying the Foundation's motion for a protective order, in a ruling that also revised that prior order. The court's revisions to the prior order provided, for the first time, analyses of the privileges the Foundation had long asserted.

This Court should reverse both orders and should direct the trial court to enter an order barring compelled disclosure of the Foundation's confidential sources for several reasons:

First, SEIU cannot meet its burden to overcome the Foundation's First Amendment associational privilege objection because SEIU has not demonstrated (a) that the identities of these sources go "to the heart of the matter" and are "crucial" to its claim (particularly given the core information the confidential sources provided consists of public records); and (b) that it has exhausted efforts to obtain the identities of the confidential sources from other means; and because (c) the risk of a chilling effect on the Foundation's First Amendment right to free association outweighs SEIU's weak interest in exposing these confidential

sources. This Court has long recognized that "[p]rivacy and anonymity are often essential to the free exercise of First Amendment rights," and should do so again, here. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 825 (2001), *remanded*, 146 Wn.2d 370 (2002).

Second, the Foundation qualifies as "news media" under Washington's Shield Law, RCW 5.68.010(5), because it is in the regular business of gathering and disseminating news and information to the public through its monthly news magazine, weekly radio show, and numerous other journalistic activities. Further, even though the Shield Law does not require the Foundation to show it obtained the information from the confidential sources to publish news stories and commentaries, the record shows it did. And the Foundation showed its sources have a reasonable expectation of confidentiality. The Shield Law therefore protects against compelled disclosure of the Foundation's confidential sources and of information tending to reveal those sources. RCW 5.68.010(1)(a).

Third, the common-law journalist's privilege bars compelled disclosure of these confidential sources because the Foundation used the information from the confidential sources to contact individual providers and gather information for publication and broadcast, and SEIU failed to

meet its burden to overcome that privilege. The journalist's privilege protects against compelled disclosure in "all but the most exceptional cases," and the Court should hold the privilege applies here. *Shoen v. Shoen* (*Shoen II*), 48 F.3d 412, 416 (9th Cir. 1995).

Fourth, the trial court abused its discretion when it held the Foundation in contempt based on the Foundation's "violation" of a prior order that (a) did not engage in the analyses required when a party invokes these privileges and (b) did not clearly and unambiguously forbid the Foundation from asserting its privilege objections in the context of specific questions.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in rejecting the Foundation's First Amendment associational privilege.

2. The trial court erred in rejecting the Foundation's assertion of an absolute privilege under the Shield Law, RCW 5.68.010.

3. The trial court erred in rejecting the Foundation's common-law journalist's privilege.

4. The trial court abused its discretion in holding the Foundation in contempt ("Contempt Order") for violating the order denying the motion for a protective order ("September 8 Order").

B. Issues Pertaining to Assignments of Error.

1. Did the trial court err when it found SEIU overcame the Foundation's First Amendment associational privilege where SEIU (a) failed to show the identities of the confidential sources go to the "heart of the matter" and are "crucial" to SEIU's claim; (b) failed to show it had exhausted efforts to obtain the identities of those confidential sources through other means; and (c) failed to show its interest in the identities of these confidential sources outweighs the harm of compelled disclosure to the Foundation's First Amendment right to free association?

2. Did the trial court err when it found Washington's Shield Law, RCW 5.68.010, does not apply to the Foundation where (a) the Foundation is in the regular business of news gathering and dissemination; (b) though not required to under the Shield Law, the Foundation showed it used the information from the confidential sources to investigate and publish news stories and commentaries; and (c) the Foundation showed its sources had a reasonable expectation of confidentiality?

3. Did the trial court err when it found the common-law journalist's privilege does not apply where (a) the Foundation used the information it obtained from the confidential sources in articles and reports it published about SEIU, and (b) SEIU failed to meet its burden to overcome the privilege?

4. Did the trial court abuse its discretion when it held the Foundation in contempt for violating the September 8 Order, where neither the Contempt Order nor the September 8 Order engaged in the required analyses of the privileges or clearly and unambiguously forbade the Foundation from asserting its privilege objections in the context of specific questions?

III. STATEMENT OF THE CASE

A. The Freedom Foundation.

The Foundation is a Washington-based 501(c)(3) non-profit organization that promotes government accountability, individual liberty, and free enterprise. CP 665-66. The Foundation employs staff policymakers, journalists, researchers, attorneys, and fundraisers. CP 494. It furthers its mission through, among other things, a variety of journalistic activities designed to inform the public on issues important to the Foundation's principles. For instance, for 25 years it has published a monthly news magazine, *Living Liberty*, in which it includes news stories and commentary authored by Foundation journalists. CP 258-60 (the Foundation's managing editor spent 31 years as a newspaper reporter and editor). The Foundation also produces a weekly radio show and maintains an active journalistic presence online, publishing news articles, commentaries, blog posts, and videos. CP 187, 215-22, 227-30, 259-60,

263-67. In recent years, the Foundation has focused its advocacy on public-sector labor reform. CP 665.

B. SEIU 775 and Individual Providers.

SEIU is a labor union and the exclusive bargaining representative for approximately 34,000 individual providers, who provide "personal care or respite care services to functionally disabled persons" under a contract with the Department of Social and Health Services ("DSHS"), or who are employed by private home care agencies or nursing homes. CP 2-3, 27; RCW 74.39A.240(3) (defining "individual provider"). The average individual provider who has not opted out of SEIU pays approximately $570 per year in dues (3.2% of her salary) to the union. CP 187, 206, 210. SEIU collects nearly $20 million annually from individual providers and spends some 40% of its annual budget on political activities, including activities outside of Washington. CP 210.

C. Individual Providers Have a Constitutional Right to Opt Out of Compelled Union Dues Payments.

In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the U.S. Supreme Court held the First Amendment prohibits compelling personal care providers (i.e., individual providers) to pay dues or fees to a union they do not wish to support. *Id.* at 2638-40. As a result, the Foundation has worked to inform individual providers of their constitutional rights to opt

out of compelled union dues payments. CP 186-87. The Foundation's educational campaign has included writing and publishing stories about SEIU and SEIU's efforts to dissuade union members from exercising this constitutional right, and reporting on SEIU's attempts to undermine the Foundation's advocacy. CP 280-82, 690-91, 703-04, 706. In writing and publishing these articles and stories, the Foundation relied on the information the confidential sources provided. *Id.*

Since the Foundation began working to inform individual providers of their constitutional rights, individual providers have increasingly exercised their right to opt out of compelled dues payments: According to state payroll records, the number of SEIU members who no longer pay dues has risen from 23 in June 2014 to 2,132 in June 2016, which is 6.1% of the SEIU membership. CP 221-22, 698. Once made aware of their rights, many SEIU members choose to opt out. Through its attacks on the Foundation, SEIU seeks to prevent SEIU members from learning of their constitutional rights.

D. SEIU Has Retaliated Against and Harassed the Foundation's Supporters and Officials.

SEIU and its affiliates have repeatedly harassed and retaliated against Foundation supporters and officials. CP 142, 146, 205, 576, 578, 594, 665-67. SEIU 925 is an SEIU 775 affiliate that represents child care

providers, which Washington law treats similarly for purposes of collective bargaining. *See* RCW 41.56.113. In January 2015, SEIU 995 declined to renew its contract with a small business owner because she posted a link to a Foundation article on her Facebook page. CP 575-76. It also filed two lawsuits against a family child care provider for her association with the Foundation. CP 594-97. SEIU members and affiliates have also picketed the corporate offices of the president of the Foundation's board of directors, CP 648-49, 653, and distributed flyers on cars in the parking lots of the president's company's clients, CP 650. And SEIU has sent multiple mailers attacking the Foundation's CEO to his neighbors, church members, Washington legislators, and the Foundation's staffers. CP 666-67, 676-79, 683-84.

E. Sources Provided Lists Containing Individual Providers to the Foundation on the Condition of Confidentiality.

Between December 1, 2015, and April 30, 2016, two sources approached the Foundation and provided it with lists containing names and contact information of the individual providers. CP 422, 427, 430-31, 464-65, 521. The sources requested confidentiality in providing these lists to the Foundation. CP 469. The Foundation asked the confidential sources whether providing this information would violate any legal obligation they might have and was informed it would not. CP 480-83.

The Foundation holds itself out as an outlet for whistleblowers and confidential sources. CP 686. Whistleblowers frequently approach Foundation journalists and staff and in doing so, require that the Foundation promise to keep them confidential. CP 188, 259. The Foundation has used information received from confidential sources to expose past failings at the Department of Corrections and Washington Education Association. CP 686-87. If the Foundation cannot guarantee confidentiality to its sources, those sources will likely be less willing, or entirely unwilling, to come forward with information that exposes corruption, negligence, and government abuses. CP 687.

The Foundation used the lists the confidential sources provided in this case for direct mail, email, and door-to-door campaign efforts to inform individual providers about their rights regarding union membership and support. CP 437, 483, 491. The Foundation also published several news stories and commentaries about SEIU's treatment of individual providers and SEIU's refusal to allow opt-outs based on the Foundation's contacts and communications with individual providers, which contacts and communications the lists enabled. CP 188, 202, 204, 215-22, 469-70, 690-92. An article in the September 2016 edition of *Living Liberty*, for example, relied on dozens of phone calls and emails with individual

providers the Foundation identified through the lists the confidential sources provided. CP 691, 706.

F. SEIU's Lawsuit Against the Foundation to Expose the Identities of the Confidential Sources.

Attempting to silence the Foundation's efforts to communicate with individual providers about their constitutional rights, SEIU filed this suit against the Foundation on June 1, 2016, alleging tortious interference with contractual relations and seeking damages and injunctive relief. CP 1, 6. SEIU claimed the Foundation, "for both an improper purpose and through improper means," intentionally interfered with SEIU's contractual relations with individual provider members. CP 2, 6.

SEIU moved for a preliminary injunction to prohibit the Foundation from using the lists to contact individual providers. CP 17. On June 30, 2016, the trial court denied the motion, correctly finding SEIU had not met its burden of showing it will likely prevail on the merits of its claim because "[p]olitical speech protected under the First Amendment cannot constitute an improper purpose" in support of a tortious interference claim. CP 17-19. The court also noted that Division II of this Court has held the names of individual providers are subject to a public records request to DSHS. *Id.* (citing *SEIU Healthcare 775NW*, 193 Wn. App. 377). And the court concluded the Foundation's conduct was

justified or privileged "because the Defendant contacts individual providers to inform them of their constitutional rights." CP 20.

On July 22, the Commissioner of this Court denied SEIU's request for discretionary review, reasoning "the asserted purpose" for obtaining the lists "appears political," and agreeing the Foundation cannot be held liable under a tortious interference theory based on the fact it provided "truthful information" to individual providers. CP 33-34. *See also* CP 36 (explaining the *Pentagon Papers* "line of cases 'holds that the First Amendment gives people a near absolute right to publish truthful information about matters of public concern that they lawfully acquire, even if they know the information was stolen by someone else'") (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971)). The Commissioner also recognized: "[I]t is questionable that the providers' decisions to opt out of union membership and fee payments based on accurate information about their rights to do so (information they should know) would constitute damages or harm" to SEIU. CP 36.

Subsequently, on August 8 and 11, SEIU served the Foundation with a CR 30(b)(6) deposition notice and discovery requests aimed directly at exposing the Foundation's confidential sources. CP 48-49, 61, 64, 133-35. In particular, SEIU sought information about "how and when" the Foundation obtained the lists, and "[t]he name of all specific

individuals who provided the list[s] to the Freedom Foundation," CP 48-49, 61, 64.

On August 11, the Foundation filed a motion to stay discovery, and on August 24 and 25, SEIU served an amended CR 30(b)(6) deposition notice, seeking the identities of the confidential sources, and filed a motion to compel the Foundation to produce a CR 30(b)(6) representative for a September 9 deposition. CP 75-83, 133-36. Within days, the Foundation moved for a protective order, asking the court to bar the deposition and SEIU's discovery requests in their entirety because, among other things, the First Amendment associational privilege, Shield Law, and journalist's privilege protect the identities of the Foundation's confidential sources from compelled disclosure. CP 186-97, 202.

G. The Foundation's Substantial Journalistic and Associational Activities.

In its motion for a protective order, the Foundation showed it engages in journalistic and associational activities and that these activities are central to its mission. CP 187-88, 255-56, 258-61. For the past 25 years, the Foundation has published its monthly *Living Liberty* news magazine, which includes news stories and commentaries written by staff journalists. CP 187, 258-60, 276-84, 703-06. The Foundation also broadcasts a weekly radio show and maintains an active online presence,

including publishing blogs, videos, and investigative reports. CP 187, 215-22, 227-30, 259, 263-67. Some of the Foundation's videos have been viewed 10,000 times or more on YouTube. *Id.* Foundation staffers have submitted op-ed commentaries in Washington newspapers, including in the Everett Herald, CP 208-11, and conducted radio and television interviews on broadcast stations, including on KVI 570 AM and Q13 FOX TV. CP 213, 224-25.

The Foundation employs a Managing Editor, who majored in journalism and worked for 31 years as a newspaper reporter and editor before joining the Foundation in 2011. CP 258, 260. The Managing Editor edits *Living Liberty* and hosts the weekly radio show, writes news stories and commentaries, conducts interviews, reports on meetings and court hearings, edits stories, and designs pages—all traditional journalistic activities. CP 259-60 ("Simply put, everything I do here is journalism. ... I am, was and always will be a journalist.").

The Foundation also presented evidence that many of its supporters associate with it secretly, out of concern that their association with the Foundation will subject them to hostile treatment by employers or government agencies. CP 188, 202, 205. Indeed, given the history of retaliation by SEIU and organizations like it, such as SEIU 925, the

Foundation believes these supporters will not associate with it if "their identities and that association became known." CP 206.

H. The Trial Court Granted SEIU's Motion to Compel and Denied the Foundation's Motion for a Protective Order.

On September 2, the trial court granted SEIU's motion to compel the Foundation to produce a CR 30(b)(6) representative to appear for deposition on September 9. CP 382-83. On September 8, the trial court summarily denied the Foundation's motion for a protective order ("September 8 Order"). CP at 384-87.[1] The court's September 8 Order included no findings, conclusions, or analyses of the Foundation's asserted privileges. *Id.* Nor did the ruling indicate whether it was intended to foreclose privilege objections in the context of specific questions during a deposition. *Id.*[2] The order merely denied the Foundation's motion, in which the Foundation sought to foreclose all discovery.

On September 9, the Foundation produced a CR 30(b)(6) representative for deposition. CP 407, 410. The representative, Maxford Nelsen, answered numerous questions about the lists the confidential sources provided, including the number of confidential sources (two), CP 420; the date ranges in which the confidential sources provided the lists,

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[1] The court also denied the Foundation's motion to stay discovery. CP 384-87.

[2] The court's order granting SEIU's motion to compel also contained no analysis. CP 382-83.

CP 422, 521-22; how they provided the lists (on thumb drives), CP 424, 430, 465; the number of lists, their format, the approximate number of individual providers on them, and the categories of information contained in them (such as names, addresses, phone numbers, and email addresses), CP 427-28, 430-36, 465-68; the Foundation staff present at meetings with the confidential sources, CP 424-25, 455, 464; the payments the Foundation made to the confidential sources, CP 453-59; and the existence of a contract with one of the confidential sources, which included confidentiality restrictions, CP 506.

Mr. Nelsen also confirmed that both sources approached the Foundation and requested confidentiality in providing the lists. CP 422-23, 464, 469. He testified the Foundation asked whether the confidential sources were under any legal restrictions prohibiting disclosure of the lists and whether the confidential sources understood the Foundation intended to use the lists to contact individual providers to inform them of their constitutional rights. CP 429-30, 468-69, 480-83.

Mr. Nelsen only refused to answer questions seeking information that would either directly identify the confidential sources, CP 425, 474; or would lead to their identification, such as questions asking if the confidential sources were current or former employees of DSHS or the SEIU Northwest Training Partnership (the sole entity qualified under

SEIU's collective bargaining agreement with the State to provide the statutorily mandated training to individual providers), CP 219, 426-27, 463, 478-79, 485-88, 499-500. In response to such questions, Mr. Nelsen asserted the Foundation's First Amendment associational privilege, Washington's Shield Law, RCW 5.68.010, and the journalist's privilege, and refused to answer those particular questions. CP 418.

As a result, during the deposition, SEIU's counsel emailed the trial court, requesting a ruling on the propriety of the Foundation's representative asserting a Shield Law objection. CP 797. SEIU's email to the trial court referenced Mr. Nelsen's refusal to answer "certain questions" but did not specify which ones, or the fact that Mr. Nelsen only objected to questions that would identify the sources, and referred only to the Shield Law objection, not the First Amendment associational and common-law journalist's privileges that Mr. Nelsen had also asserted. *Id.* The trial court responded by email:

> To the extent the Foundation's CR 30(b)(6) representative is objecting to questions and refusing to respond by asserting RCW 5.68.010 [the Shield Law], he has no basis to do so. This court has already denied the Foundation's Motion for Protection based on RCW 5.68.010. See the attached copy of my order that was previously sent to counsel . . . . A refusal to answer questions based on RCW 5.68.010, would be tantamount to contempt of my prior order.

CP 796.

The Foundation's counsel explained the witness was only objecting to questions seeking the identities of confidential sources and was doing so on the basis of the First Amendment associational and common-law journalist's privileges, as well as the Shield Law. *Id.* The Foundation asked the court to stay the order and permit an emergency appeal. CP 795-96.

The trial court responded by email, stating: "Judge Oishi refers the parties to his previous email. The emailed request for a stay is denied." CP 795. Neither of the court's emails acknowledged that Mr. Nelsen had asserted the First Amendment associational and common-law journalist's privileges, in addition to the Shield Law, or that he was refusing to answer only those questions that sought disclosure of the confidential sources. CP 795-96.

Mr. Nelsen continued to answer questions that did not seek the identities of the Foundation's confidential sources, but at the direction of his employer, he maintained his objections to the narrow scope of inquiry into the identities of those sources, citing the First Amendment associational privilege, the Shield Law, and the common-law journalist's privilege. CP 484, 522-23.

I. The Trial Court's Contempt Order.

On September 14, SEIU brought a motion for contempt and sanctions against the Foundation based on Mr. Nelsen's refusal to answer questions seeking to identify the Foundation's confidential sources. CP 388. In opposition, the Foundation showed it not only engages in journalistic activities as part of its normal course of business and to further its mission, but also that it used the lists from the confidential sources to generate news and advocacy. CP 685-88, 689-92, 713-18. The Foundation also demonstrated that SEIU 775 and SEIU 925 have retaliated against or harassed individuals they believed had associated with the Foundation. CP 575-77, 578-80, 594-97, 648-51, 665-68.

In addition, the Foundation explained the court should not hold it in contempt because the September 8 Order denying the motion for protective order and the court's emails during the deposition did not clearly and unambiguously compel responses to specific questions over objections based on the First Amendment associational privilege, Shield Law, and journalist's privilege. CP 711-18.[3] Indeed, the court had not conducted the analyses required by those privileges in the September 8

[3] *See State Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 771-72 (2012) (an ambiguous order does not provide a sufficient basis for holding a party in contempt); *see also In re Marriage of Davisson*, 131 Wn. App. 220, 226 (2006) (same).

Order or in its emails. CP 384-87, 795-97.[4] The Foundation asked the court to stay enforcing any sanction until it could seek appellate review. CP 719-20.

On October 3, the court issued an order finding the Foundation in contempt for "violating" the September 8 Order denying the Foundation's motion for a protective order, and "clarifying" that September 8 Order. CP 743-48. In its "clarification," the court, for the first time, discussed the privileges the Foundation had long asserted and issued findings of fact and conclusions of law. *Id.*

In those findings of fact and conclusions of law, the court held the First Amendment associational privilege applies to the Foundation and that disclosing its confidential sources would harm the Foundation, but that the sources' identities are "relevant and material" and "not reasonably available to Plaintiff by other means." CP 745. The court concluded SEIU's stated need for compelling disclosure of those sources outweighed the harm to the Foundation's First Amendment rights. CP 745.

The trial court also concluded the Foundation does not qualify as "news media" under the Shield Law, RCW 5.68.010(5), or the journalist's privilege because, according to the court, the Foundation "gathered information about individual providers for use in contacting individual

[4] The court also had not engaged in these analyses in the order granting SEIU's motion to compel the deposition. CP 382-83.

providers to notify them of their constitutional rights, not to disseminate information to the public," and therefore did not qualify for journalistic protections under either privilege. CP 746-47.[5]

The trial court ordered the Foundation to appear for another CR 30(b)(6) deposition, barred it from refusing to answer questions on the basis of these privileges, and imposed a $500 fine for every day the Foundation failed to "appear for the re-scheduled deposition and answer all questions" in the deposition notice. CP 748.

J. The Emergency Temporary Stay.

The same day the trial court issued its Contempt Order, the Foundation filed a notice of discretionary review of the Contempt Order and the September 8 Order on which the court based the Contempt Order. CP 739. Three days later, on October 6, the Foundation filed an emergency motion to temporarily stay these two orders pending appellate review because compelled disclosure of the confidential sources would render any appellate review meaningless, and the threat of a $500 daily fine or compelled disclosure would cause immediate injury to the Foundation's First Amendment rights. CP 1012-37. On October 7, the Commissioner granted the Foundation's emergency temporary stay,

[5] The trial court also concluded the Foundation's "activities in gathering information are not substantially related to the news gathering and dissemination that the Legislature intended to protect in the Shield Law," and that the names of the sources are not "confidential news media sources as contemplated by the Shield Law." CP 747.

converted the request for discretionary review into a notice of appeal from appealable final orders, and directed the clerk of the court to issue a perfection schedule. CP 1066-69.[6]

K. Division II of This Court Has Rejected the Basic Premises Underlying SEIU's Claim.

In *SEIU Healthcare 775NW v. State Dep't of Soc. & Health Servs.*, 193 Wn. App. 377 (2016), Division II of this Court agreed with the Foundation that (1) its communications with individual providers about their constitutional rights is "political rather than commercial" speech; and (2) lists of the names of in-home individual care providers maintained by DSHS are subject to disclosure under the Public Records Act ("PRA"). *Id.* at 385, 406. On September 28, 2016, the Washington Supreme Court denied review. 186 Wn.2d 1016 (2016).

On December 20, 2016, Division II reaffirmed its decision in *SEIU Healthcare 775NW*, holding in *SEIU 925 v. Freedom Foundation*, No. 48522-2-II, __ P.3d __, 2016 WL 7374228 (Wash. Ct. App. Dec. 20, 2016), that the names and "state contact" information for childcare providers in Washington's "Family Friends and Neighbors" program are likewise subject to disclosure under the PRA. *Id.* at *1 (also holding the

[6] The Commissioner deemed the September 8 Order appealable because it prejudicially affects the Contempt Order under RAP 2.4(b). CP 1066-69. On November 3, SEIU filed a motion to modify the order granting the emergency temporary stay, asking the Court to lift the stay. That motion remains pending.

Foundation did not request this information for commercial purposes but to notify providers of their constitutional rights).

Division II's decisions in these cases cast doubt on the central premises of SEIU's tortious interference claim here—i.e., that the lists of names and state contact information for individual providers are confidential and the Foundation's use of them to engage in protected speech and to inform individual providers of their constitutional rights is improper.

IV. ARGUMENT

A. Standards of Review.

This Court reviews a trial court's orders finding a party in contempt and denying a motion for a protective order for abuse of discretion. *See Moreman v. Butcher*, 126 Wn.2d 36, 40 (1995) (contempt order); *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 694 (2013) (discovery order). A trial court's ruling based on an erroneous view of the law or an incorrect legal analysis is necessarily an abuse of discretion. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833 (2007); *In re Estates of Smaldino*, 151 Wn. App. 356, 364 (2009) (same, involving contempt order).

The interpretation and application of statutory and constitutional privileges are legal questions, which this Court reviews de novo. *Norton v. U.S. Bank Nat'l Ass'n*, 179 Wn. App. 450, 454 (2014) (statutory

privilege under Bank Secrecy Act). *See also Republic of Kaz. v. Does 1-100*, 192 Wn. App. 773, 781-82 (2016) (finding trial court abused its discretion in denying a motion to quash subpoena under the Shield Law, but reviewing interpretation of the Shield Law de novo, applying "general principles of statutory construction" and deciding first impression legal questions); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 n.3 (9th Cir. 2009) (de novo review applies to determination of First Amendment associational privilege). Similarly, whether SEIU made a sufficient showing to overcome the Foundation's assertion of the journalist's privilege "is a mixed question of law and fact," requiring de novo review. *Shoen II*, 48 F.3d at 414.

B. The Trial Court Erred in Rejecting the Foundation's First Amendment Associational Privilege.

The Court should reverse the Contempt Order and September 8 Order because while the trial court correctly found the First Amendment associational privilege applies to the Foundation and the Foundation would be harmed if forced to disclose its confidential sources, the trial court erred in concluding SEIU had met its burden to overcome that privilege.

"The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First

Amendment." *Perry*, 591 F.3d at 1152. This Court has long understood that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Eugster v. City of Spokane*, 121 Wn. App. 799, 807 (2004) (applying associational privilege and affirming decision quashing subpoenas to corporation for campaign contribution information) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958)). *See also Right-Price*, 105 Wn. App. at 825 ("Privacy and anonymity are often essential to the free exercise of First Amendment rights.") (citing *Talley v. California*, 362 U.S. 60, 64-65 (1960)).

It is therefore well settled that compelled disclosure of "protected First Amendment political associations [can] have a profound chilling effect on the exercise of political rights." *Perry*, 591 F.3d at 1156. *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (any "loss of First Amendment freedoms ... unquestionably constitutes irreparable injury"). For this reason, "[d]isclosures of political affiliations and activities" that could have a chilling effect receive "exacting scrutiny." *Perry*, 591 F.3d at 1160 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976)).[7]

[7] The First Amendment associational privilege applies not only to the identities of an organization's members and their communications, but also to disclosure of any information that potentially interferes with an organization's protected advocacy. *Perry*,

In reviewing a First Amendment associational privilege claim, Washington courts must apply a three-step analysis. *See Snedigar v. Hoddersen*, 114 Wn.2d 153, 158-59 (1990). The party asserting the privilege "need only show some probability that the requested disclosure will infringe upon its First Amendment rights." *Right-Price*, 105 Wn. App. at 822 (applying associational privilege and reversing order compelling production for in camera review of defendant citizen groups' member lists, meeting minutes, financial information, and correspondence) (citing *Snedigar*, 114 Wn.2d at 162-63). "The burden then shifts to the party seeking discovery to show (1) the relevance and materiality of the information sought and (2) that reasonable efforts to obtain the information by other means have been unsuccessful." *Id.* "If both parties make the required showings, the court then balances the need for disclosure against the claim of privilege to determine which is more compelling." *Id.*

Here, the trial court erred when it found that although the Foundation's First Amendment associational rights would be harmed if the Foundation were compelled to disclose its confidential sources, SEIU had shown the names of those sources are "relevant and material,"

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591 F.3d at 1162 (the associational privilege "has never been limited to the disclosure of identities of rank-and-file members"; "The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.").

"reasonable efforts to obtain the information by other means have been unsuccessful," and the balance of interests favored compelled disclosure. CP 745.

1. The Foundation Showed that Compelled Disclosure of the Confidential Sources Would Have a Chilling Effect.

The trial court found "disclosure of information sought from Defendant's CR 30(b)(6) representative may have some probability of harming the Defendant's First Amendment Rights and those of individuals who support its work." *Id.* Indeed, the Foundation more than satisfied this low, threshold requirement.

The Foundation submitted declarations of five witnesses describing retaliation and harassment by SEIU and its affiliates for their association with the Foundation. CP 575-77, 578-80, 594-97, 648-51, 665-68. In particular, these declarations explained that because of this history of retaliation and harassment, if the Foundation cannot keep its sources confidential, they will stop working with and assisting the Foundation. CP 202-06, 685-88. That the Foundation frequently comes under attack by political opponents for its insistence on investigating and speaking publicly about issues involving public policy and government underscores the need to maintain the confidentiality of its sources—sources who have come forward on the condition of confidentiality. CP

205, 686-87.

The discovery at issue here, however, seeks to expose the names of those who have chosen to associate with and contribute to the Foundation for the ultimate purpose of stopping these and other sources from providing information to it. CP 205, 686-87. *See Right-Price*, 105 Wn. App. at 824 (court may assume chilling effect where requested information seeks disclosure of "the names of [the organization's] contributors"). Under settled law, the Court can and must assume that compelled disclosure of these confidential sources would have a chilling effect on the Foundation's fundamental right to associate freely with those who support it and wish to assist or contribute to it. *See, e.g.*, *Snedigar*, 114 Wn.2d at 163-64 (declarations from organization's national secretary expressing concern about ability to ensure privacy to "members, contributors, and business associates" sufficed); *Right-Price*, 105 Wn. App. at 823-25 (court assumed compelled disclosure of membership lists, meeting minutes, and financial records would have a chilling effect on associational rights of citizen groups based on "affidavits stating that members had experienced acts of reprisal and harassment and emphasizing the importance of confidentiality of members' names").

2. The Court Erred in Finding SEIU Met Its Burden of Showing the Names of the Sources Are "Crucial" to the Claims.

Without providing any discussion or rationale, the trial court concluded "[t]he information Plaintiff seeks is relevant and material." CP 745. The court erred in reaching this conclusion because the names of the confidential sources have little to no bearing on the elements of SEIU's tortious interference claim.

The requesting party's "interest in disclosure [of the requested information] will be regarded as relatively weak unless the information goes to the 'heart of the matter', or is crucial to the case of [the] litigant seeking discovery." *Snedigar*, 114 Wn.2d at 165 (citing *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981)). To satisfy this burden, SEIU must provide "reasons specific enough to rise above mere speculation" that information might be useful. *Right-Price*, 105 Wn. App. at 825. Because of the First Amendment issues at stake, this relevance standard is "more demanding" than is the standard for relevance under Rule 26. *Perry*, 591 F.3d at 1161 (addressing Federal Rule of Civil Procedure 26(b)(1)).

Here, the names of the confidential sources are not "crucial" to SEIU's claim for tortious interference. To prove that claim, SEIU must establish (1) the existence of a valid contractual relationship with the

individual providers, of which the Foundation has knowledge; (2) intentional interference, by improper purpose or improper means, by the Foundation that causes breach or termination of the contractual relationship, and (3) resultant damage. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 168 (2012). SEIU argued it "seeks to discover how the Foundation acquired the names and contact information of the union's members in order to obtain evidence necessary to establish that it did so through improper means such as by knowingly receiving the list from an individual who was under a legal obligation not to disclose it." CP 331-32.

This Court has rejected similar general contentions that the requested information will "likely … lead to information to substantiate its claims," and it should do so here, too. *Right-Price*, 105 Wn. App. at 825. This is particularly the case here because the Foundation's alleged intentional interference turns not on ***how*** the Foundation obtained the contact information for individual providers, but on ***why and how*** it disseminated information to those individual providers about their constitutional rights, because it is the information it disseminated to those providers that allegedly caused them to cease their dues payments and union memberships. CP 1-2, 4-5, 7, 437, 483, 491. This is so because, for tortious interference, "improper purpose focuses on the *motive* for the

defendant's interference with the contract," while "improper means" focuses on the "*method* by which a defendant interferes with the contractual relationship, such as taking arbitrary and capricious action or using the threat of a lawsuit to harass." *Wash. Trucking Ass'ns v. State, Emp't Sec. Dep't*, 192 Wn. App. 621, 651 (2016), *review granted*, 186 Wn.2d 1016 (2016). Thus, the relevant questions are why (motive) and how (method) the Foundation communicated with the individual providers.

SEIU does not appear to argue that the names of the confidential sources are crucial to its burden to prove "improper purpose." CP 331-32. Nor could it, for "[t]he opportunity to persuade others to action is clearly protected" and therefore, cannot form the basis for a tortious interference claim. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 348 (1983) (union's efforts to persuade others to boycott business owner was "speech in its purest form," entitled to protection "against imposition of damages for business interference"). As the trial court correctly found, the Foundation's political speech is "protected under the First Amendment [and therefore] cannot constitute an improper purpose" for purposes of tortious interference. CP 19.[8] The names of the

[8] The confidential sources understood the Foundation intended to use the lists containing individual providers to communicate with those providers about their constitutional rights. CP at 429, 468-69.

confidential sources have no bearing on the "improper purpose" element (i.e., motive).

Nor are the sources' identities "crucial" to the element of "improper means." As a threshold matter, even if the "improper means" element turned on the identities of the confidential sources—and it does not—the identities of those sources still would not matter. The Foundation's CR 30(b)(6) representative testified the confidential sources represented that providing the lists to the Foundation would not violate any legal obligation of the sources. CP 480-83. And importantly, Division II of this Court has held the names and "state contact" information of individual providers—the core information the sources provided—are subject to public records requests anyway. *SEIU Healthcare 775NW*, 193 Wn. App. at 385-86 (names of in-home individual providers); *SEIU 925*, No. 48522-2-II, at 2 (names and "state contact" information of child care providers). Therefore, even if it were relevant (and it is not), SEIU cannot show the Foundation wrongfully obtained the lists, regardless the identities of the confidential sources.

But more importantly, the names of the confidential sources are not relevant—let alone "crucial"—to the "improper means" element of the claim. The contractual relations at issue are SEIU's contractual relations with its individual provider members, ***not*** any theoretical contractual

relation with the confidential sources. CP 1, 6, 35 n.27. The alleged tortious interference in this case is the Foundation's communication with individual providers about their constitutional rights, which communications SEIU claims caused individual providers to drop their dues payments. CP 1, 6, 35 n.27. Thus, for the "improper means" element, the "*method*" by which the Foundation allegedly interfered with SEIU's contractual relations with individual providers turns ***not*** on the identities of the sources of the confidential lists, but on ***the form and content of the Foundation's communications*** to the individual providers about their constitutional rights—i.e., the emails, mailers, and phone calls, and their content. *See Wash. Trucking*, 192 Wn. App. at 651; *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 337-38 (2015) ("improper means" turns on the form and content of the communication that caused the interference; defendant used "improper means" by registering a domain name similar to plaintiff's and posting on that website disparaging content, thereby interfering with plaintiff's business expectancies).

The names of the confidential sources also have no bearing on the question of damages, which SEIU bases on the fact individual providers have appreciated the Foundation's efforts to inform them of their constitutional rights and have increasingly chosen to opt out of compelled dues payments. CP 1, 6, 221-22, 698.

The names of the confidential sources of the lists do not go to the heart of the claim for yet another reason. As the Commissioner correctly found, regardless of how the Foundation obtained the lists, truthful, "accurate, non-confidential information" cannot constitute tortious interference with contractual relations. CP 34; *see also Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 506-07 (2001) (citing Restatement (Second) of Torts § 772).

The names of the confidential sources have no bearing on the improper purpose, improper means, or damages elements of SEIU's tortious interference claim and therefore cannot justify infringing on the Foundation's fundamental First Amendment right to associate freely. The trial court erred in concluding otherwise, requiring reversal.

3. The Court Erred in Finding SEIU Had Met Its Burden of Showing Exhaustion.

The trial court also erred in concluding SEIU established "that reasonable efforts to obtain the information by other means have been unsuccessful." CP 745. To satisfy this burden, SEIU must show it "has exhausted ***every reasonable alternative*** source of [the] information." *Snedigar*, 114 Wn.2d at 165 (emphasis added) (quoting *Black Panther Party*, 661 F.2d at 1268). This showing "must be reasonably explicit." *Id.*

SEIU asserted it conducted an internal investigation, exhausted its internal sources and records, and concluded "there are no alternative sources for this information other than the Foundation and the individual who provided the list to it." CP 332. But SEIU has not shown whether it has asked other individual providers, former employees, or even the defendants in other litigation it has filed in King County based on the same issues. *See SEIU 775 v. Elbandagji*, No. 16-2-13095-0 SEA (King Cnty. Super. Ct. June 2, 2016); CP 1018, 1027. This Court has found a requesting party made insufficient attempts to obtain the information through other reasonable sources in similar circumstances. *See, e.g.*, *Eugster*, 121 Wn. App. at 810 (developers seeking campaign contribution information from third-party mortgage company for tortious interference claim against public officials failed to meet this burden because, among other things, they had "not formally deposed" the public officials). The trial court erred in finding SEIU had exhausted all reasonable alternative sources, and this Court should reverse.

4. The Court Erred in Finding SEIU's Weak Interest Outweighed the Substantial Harm to the Foundation's First Amendment Rights.

Because SEIU did not meet its burden of showing the names of the confidential sources are "crucial" to its claims and cannot be obtained from any other reasonable alternative source, the trial court erred in

concluding SEIU's stated interest in discovering the identities of the confidential sources outweighed the harm to the Foundation's First Amendment associational rights. *Eugster*, 121 Wn App. at 810 ("Without a sufficient showing [of exhaustion of alternative sources] ... we do not reach the third prong and balance the need for disclosure against the claim of privilege.").

But even if that were otherwise, the court erred in simply concluding that "Plaintiff's need for the disclosure of the information it seeks has more weight than Defendant's claim of privilege." CP 745. A court can compel disclosure of information over a First Amendment associational privilege claim only after "balanc[ing] plaintiff's need for the information against the Party's claim of privilege" and "determin[ing] which is the strongest." *Snedigar*, 114 Wn.2d at 166.

For instance, in *Beinin v. Center for Study of Popular Culture*, 2007 WL 1795693 (N.D. Cal. June 20, 2007), in which the district court applied essentially the same analysis as Washington courts, *id.* at *3-4, the court held the threat to the plaintiff-professor's First Amendment associational rights posed by compelled disclosure of the names and contact information of supporters of his lawsuit against defendant, a conservative organization that had used a photograph of the professor for an article about faculty terrorist sympathizers, outweighed the

organization's need for that information to support its copyright misuse and unclean hands defenses. *Id.* at *3-4. The court explained: "the First Amendment privacy interest is overridden only when the party seeking the information asserts a compelling interest"—i.e., one that is "crucial" to the party's case. *Id.* at *3. "This is because the First Amendment occupies a 'preferred position ... in the pantheon of freedoms,' and its interests are not easily overridden." *Id.* (citation and internal quotation marks omitted).

The court found the harm to the First Amendment rights of the plaintiff and his supporters posed by compelled disclosure of their names and contact information—even if those supporters did not provide financial support—outweighed defendant's need for the information because "[o]ne of the purposes inherent in the right of association is to encourage like-minded individuals to discuss issues of common importance," and compelled disclosure would cause a chilling effect. *Id.* at *4.

Here, the confidential sources provided even more support to the Foundation than did the supporters in *Beinin*—the confidential sources here provided information to the Foundation, and they did so with the explicit expectation of confidentiality to protect against retaliation and harassment by SEIU. CP 469. The Foundation presented substantial evidence showing those who have associated with it have suffered

retaliation and harassment, including from SEIU and SEIU's affiliate, SEIU 925. CP 575-77, 578-80, 594-97, 648-51, 665-68. As a result, the Foundation fears that sources of information important to the Foundation's mission will not associate with or support the Foundation, for fear of reprisals. CP 205-06, 686-87. The First Amendment associational privilege exists to protect against this very chilling effect, for a "vital relationship [exists] between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 462. Indeed, "[p]rivacy is particularly important where the group's cause is unpopular; once the participants lose their anonymity, intimidation and suppression may follow." *Sexual Minorities of Uganda v. Lively*, 2015 WL 4750931, at *4 (D. Mass. Aug. 10, 2015) (associational privilege protected from disclosure personal information of supporters of LGBT advocacy group in Uganda) (quoting *Black Panther Party*, 661 F.2d at 1265).

In contrast, because the names of the confidential sources are not "crucial" to the tortious interference claim, SEIU has at best a "relatively weak" interest in compelling disclosure of the confidential sources. *See Snedigar*, 114 Wn.2d at 165. The gravity of the harm that compelled disclosure of the identities of the confidential sources would cause the Foundation's First Amendment associational rights more than outweighs the "relatively weak" interest SEIU has in compelling exposure of

information that will not further its tortious interference claim. The trial court erred in overriding the Foundation's constitutional privilege, and this Court should reverse.

C. The Trial Court Erred in Rejecting the Foundation's Shield Law Privilege.

The trial court also erred in rejecting the Foundation's Shield Law privilege because (a) the Foundation qualifies as "news media" under that statute; (b) even though not required, it used the information it obtained from the confidential sources to investigate and publish articles and reports regarding SEIU; and (c) its sources had a reasonable expectation of confidentiality.

1. The Court Erred in Concluding the Foundation Is Not "News Media" Under the Shield Law.

The Shield Law broadly defines "news media" as encompassing organizations that, like the Foundation, are in "the regular business of news gathering and disseminating news or information to the public" in any form. RCW 5.68.010(5)(a). The Shield Law absolutely "protects against disclosure of the identity of a source of ***any*** news or information," and "of any information that would tend to identify a source." *Republic of Kaz.*, 192 Wn. App. at 786 (emphasis added); *see also* RCW 5.68.010(1)(a).

The trial court found the Foundation is "not an entity that is in the

regular business of news gathering and dissemination of news or information to the public" because, according to it, the Foundation "gathered information about individual providers for use in contacting individual providers to notify them of their constitutional rights, not to disseminate information to the public." CP 746-47. But in fact, the Shield Law's definition of "news media" extends beyond traditional news sources to include "any entity" in the "regular business" of "disseminating ... information to the public by any means." RCW 5.68.010(5)(a).[9] Further, the Shield Law does not require that the "entity" engage exclusively in "news gathering and dissemination"; rather, the Law requires only that it be in the "regular business" of doing so. *Id.*

The broad definition of "news media" in the Shield Law makes good sense, for courts have long recognized the difficulty of attempting to determine "what constitutes 'legitimate journalis[m].'" *O'Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 97 (Cal. Ct. App. 2006) ("We can think of no workable test or principle that would distinguish 'legitimate' from 'illegitimate' news."). This difficulty exists because the "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who

[9] Unlike New York's shield law, which only protects "professional journalists and newscasters." N.Y. Civ. Rights Law § 79-h. *See also Too Much Media, LLC v. Hale*, 20 A.3d 364, 382 (N.J. 2011) (New York shield law applies only to professional journalists).

utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

Here, the Foundation showed it is in the regular business of disseminating information to the public: it has published a monthly news magazine for 25 years, CP 187, 258-60, 276-84, 703-06; and it broadcasts a weekly radio show and regularly posts blogs, videos, and investigative reports online, CP 187, 215-22, 227-30, 259, 263-67. It employs a career journalist as its managing editor, who performs traditional journalism functions. CP 258-60 (describing activities such as publishing news stories, hosting radio shows, and reporting on meetings and court hearings). Foundation staffers also contribute op-ed commentary to Washington newspapers and appear as guests on broadcast stations. CP 208-13.

It makes no difference that the Foundation is an advocacy organization with a publication arm. *See, e.g.*, *Schiller v. City of N.Y.*, 245 F.R.D. 112, 119 (S.D.N.Y. 2007) (New York ACLU chapter qualified as journalistic enterprise entitled to assert privilege for its journalistic efforts; noting "the touchstone is not ... whether the journalistic enterprise was 'unbiased'; by that standard, few, if any, daily newspapers could assert the privilege"); *O'Grady*, 44 Cal. Rptr. 3d at 98 ("*raison d'etre*" of any news entity or publisher is "dissemination of a particular kind of information to

an interested readership"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (definition of press encompasses "every sort of publication which affords a vehicle of information and opinion").

2. The Court Erred in Finding the Foundation Did Not Gather the Lists to Disseminate Information and the Sources Were Not Confidential.

The trial court also erred in finding the Shield Law does not apply because, in its view, the Foundation did not gather the lists to disseminate information to the public and the sources were "not confidential news media sources as contemplated by the Shield Law." CP 746.

First, the Shield Law does not require a nexus between the information obtained from the confidential source and the information disseminated for purposes of the absolute privilege under RCW 5.68.010(1)(a). CP 746. Rather, the Law requires only that the entity satisfy the statutory definition of "news media." RCW 5.68.010(1)(a). *See also* Final Bill Report on H.B. 1366, at 2, 60th Leg., Reg. Sess. (Wash. 2007) ("The news media has an absolute privilege from being compelled to testify, produce, or disclose the identity of a source of news or information[.]").

Regardless, the Foundation showed it used the lists from the confidential sources not only to contact individual providers but also to investigate and generate news stories and commentaries based on those

contacts and communications with individual providers. CP 202-04, 690-91. For instance, a September 2016 article in the Foundation's news magazine resulted from "dozens of phone calls and emails" with individual providers identified through the lists. CP 691, 706. If a nexus requirement exists, the Foundation satisfies that requirement. *Cf. Schiller*, 245 F.R.D. at 114, 119 (common-law journalist's privilege, which has a nexus requirement, applied to New York ACLU to protect from disclosure hundreds of questionnaires from recipients regarding police treatment during 2004 Republican National Convention protest because ACLU showed it had "at least in part" intended to produce a published report).

Second, the Foundation showed the sources approached it and provided information with the expectation and on the condition of confidentiality. CP 422, 464-65, 469. The court's apparent finding otherwise contradicts the only evidence in the record, requiring reversal.

D. The Trial Court Erred in Rejecting the Foundation's Journalist's Privilege.

The trial court committed further error when it found the common-law journalist's privilege does not apply. Although the journalist's privilege shares some similarities with the Shield Law, it exists independent of that Law and stems from the First Amendment principle that "society's interest in protecting the integrity of the newsgathering

process and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Shoen v. Shoen* (*Shoen I*), 5 F.3d 1289, 1292 (9th Cir. 1993).

In determining whether the privilege applies, "the critical question ... is whether [the entity] is gathering news for dissemination to the public." *Id.* at 1293 ("[w]hat makes journalism journalism is not its form but its content"). "The test ... is whether the person seeking to invoke the privilege had 'the intent to use material—sought, gathered or received—to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process.'" *Shoen I*, 5 F.3d at 1293 (alteration in original) (quoting *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987)); *Jimenez v. City of Chi.*, 733 F. Supp. 2d 1268, 1271 (W.D. Wash. 2010) (same).

To overcome the privilege, SEIU must show the information is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. *Shoen II*, 48 F.3d at 416, 418; *Jimenez*, 733 F. Supp. 2d at 1272. If SEIU meets this burden, the court must weigh "the opposing need for disclosure" against the need for confidentiality to determine "where lies the paramount interest." *Shoen II*, 48 F.3d at 415, 417.

Compelled disclosure, however, "is the exception, not the rule." *Id.* at 416. "Indeed, if the privilege does not prevail in ***all but the most exceptional cases***, its value will be substantially diminished." *Id.* (emphasis added).

The trial court erred in its application of this test, for four reasons.

First, the trial court erred in finding the Foundation could not invoke the journalist's privilege because, according to the court, the Foundation "gathered information about individual providers for use in contacting individual providers to notify them of their constitutional rights, not to disseminate information to the public." CP 746. As discussed, however, the Foundation showed it used the lists the confidential sources provided not only to communicate with individual providers but also to investigate news stories and reports through those communications, and based on those investigations and communications, to publish information to the public. CP 690-91, 694-98, 703-04, 706.

Other courts have agreed that where, as here, the entity "at least in part" intended to use the information obtained from the confidential sources to publish information to the public, the journalist's privilege may apply. *See Schiller*, 245 F.R.D. at 114, 119 (New York ACLU).

Second, as discussed, substantial evidence in the record confirms the Foundation has continuously engaged in journalistic activities and

therefore, is in the regular business of news gathering and dissemination. CP 258-61, 689-92. This record of journalistic activities suffices, and the court erred in finding otherwise. CP 746. *See, e.g.*, *Shoen I*, 5 F.3d at 1293 (privilege extends to book authors; "critical question" in invoking privilege is whether entity "is gathering news for dissemination to the public"); *Jimenez*, 733 F. Supp. 2d at 1272 (privilege extends to student journalist who obtained documents in writing article for graduate school magazine).[10]

Third, the trial court again failed to hold SEIU to its burden of showing that it had exhausted "all reasonable alternative sources" of the names of the confidential sources, and that those names are "clearly relevant to an important issue in the case." *Shoen II*, 48 F.3d at 416. As discussed, SEIU cannot meet this burden because it has not shown it asked for this information from other individual providers, former employees, or even the defendants in its other litigation on these issues. *See Shoen I*, 5 F.3d at 1296-98 (reversing contempt order and holding plaintiffs failed to demonstrate a sufficiently compelling need for the information because, among other things, plaintiffs had not even deposed defendant before subpoenaing the author). And as discussed above, the names of the

[10] Indeed, the journalist's privilege extends to "unpublished resource material," as well as to information intended for publication. *In re Pan Am Corp.*, 161 B.R. 577, 582 (S.D.N.Y. 1993) (citing *von Bulow*, 811 F.2d at 142).

confidential sources of the lists are not "clearly relevant" to any element of SEIU's tortious interference claim. *See supra* Part IV.B.2; *Shoen II*, 48 F.3d at 416 (requiring "a showing of ***actual*** relevance"; "a showing of potential relevance will not suffice") (emphasis added)); *Harbert v. Priebe*, 466 F. Supp. 2d 1214, 1216 (N.D. Cal. 2006) (requested discovery from newspaper not "clearly relevant" when claims focused on information available in public records).

Fourth, because SEIU did not and cannot meet this burden, the trial court erred in concluding SEIU's stated need for the names of the sources outweighs the Foundation's privilege and justifies risking "the free flow of information to the public." *Shoen I*, 5 F.3d at 1292; *J.J.C. v. Fridell*, 165 F.R.D. 513, 516 (D. Minn. 1995) (applying *Shoen II* balancing test and finding that plaintiff's failure to "clearly and specifically demonstrate[] materiality" of reporter's notes to claim at issue weighed against requiring production).

E. The Trial Court Abused Its Discretion in Holding the Foundation in Contempt.

The trial court not only abused its discretion in holding the Foundation in contempt based on its erroneous interpretation and application of the Foundation's privileges, but also in holding the Foundation in contempt for violating an order that did not engage in the

analyses required when a party invokes these privileges, and that did not clearly and unambiguously forbid the Foundation from raising the privileges in the context of specific questions.

A court may hold a party in contempt only where the party "intentional[ly] ... disobe[ys] any lawful ... order ... of the court." RCW 7.21.010(1)(b). When deciding whether a party has intentionally disobeyed an order, "strict construction [of the order] is required." *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713 (1982). This requirement exists "to protect persons from contempt proceedings based on violation of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done." *Graves v. Duerden*, 51 Wn. App. 642, 647-48 (1988).

Here, the court's September 8 Order denying the Foundation's motion for a protective order did not engage in the analyses required when a party invokes the First Amendment associational privilege, Shield Law, and journalist's privilege. *See Snedigar*, 114 Wn.2d at 168; RCW 5.68.010; *Shoen I*, 5 F.3d at 1292-93. The September 8 Order also denied a motion that asked the court to bar all discovery, and the court did so without specifying any rationale. CP 386-87. The Foundation therefore understood the September 8 Order to mean discovery would proceed, but reasonably believed it could assert privilege objections in the context of

specific questions.[11] Thus, the September 8 Order on which the court premised the Contempt Order did not clearly and unambiguously forbid the Foundation from raising these privileges in response to questions seeking to expose the confidential sources, and the court abused its discretion in holding the Foundation in contempt for "violating" it.

V. CONCLUSION

For the foregoing reasons, the Foundation respectfully requests the Court reverse the September 8 Order and the Contempt Order, and remand with directions to order that SEIU cannot compel disclosure of the Foundation's confidential sources because of the First Amendment associational privilege, Shield Law, and/or common-law journalist's privilege.

[11] In addition, the court's emails during the deposition did not acknowledge all the Foundation's privileges, or the narrow scope of questions to which the Foundation was objecting. CP 795-97.

RESPECTFULLY SUBMITTED this 22nd day of December, 2016.

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DECLARATION OF SERVICE

I, Anita A. Miller, hereby declare under penalty of perjury under the laws of the State of Washington that on December 22, 2016, I caused the foregoing Opening Brief of Appellant Freedom Foundation to be filed with the court of Appeals, Division I, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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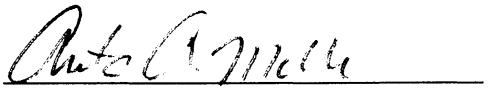
SIGNED this 22nd day of December, 2016 at Seattle, WA.



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