

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-7800	<p style="text-align: center;"><u>▲ COURT USE ONLY ▲</u></p> Case Number: Division/Courtroom:
Plaintiff: MICHAEL COFFMAN v. Defendant: INDEPENDENT ETHICS COMMISSION	
<i>Attorneys for Plaintiff Michael Coffman:</i> Douglas J. Friednash, #18128 Michael R. Davis, #39788 1200 Seventeenth Street, Suite 2400 Denver, Colorado 80202 Phone Number: 303.572.6500 Fax Number: 303.572.6540 E-Mail: FriednashD@gtlaw.com DavisM@gtlaw.com	
COMPLAINT	

Plaintiff Michael Coffman, former Colorado Secretary of State (“Plaintiff” or “Mr. Coffman”), by and through his undersigned counsel, respectfully submits this Complaint against the State of Colorado Independent Ethics Commission, a newly created state entity (the “Defendant” or “Commission”). Mr. Coffman seeks a determination that the Commission has no jurisdiction to pursue against Mr. Coffman a legally “frivolous” ethics complaint filed by Colorado Ethics Watch, a private entity. Mr. Coffman also seeks an injunction against the Commission. In support thereof, Mr. Coffman alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter, pursuant to COLO. CONST. art. XXIX, § 5; COLO. REV. STAT. § 24-18.5-101(9); COLO. REV. STAT. §§ 24-4-106(4) through (9); COLO.

REV. STAT. § 24-4-105(11); COLO. R. CIV. P. 106(4); and *Envirotest Systems, Corp. v. Colo. Dept. of Rev.*, 109 P.3d 142 (Colo. 2005).

2. Venue is proper in this Court, pursuant to COLO. REV. STAT. ANN. § 24-18.5-101(9) and COLO. REV. STAT. ANN. § 24-4-106(4).

FACTUAL ALLEGATIONS

Brief Legal Background On Amendment 41 And The Independent Ethics Commission

3. In November 2006, the voters of Colorado enacted Amendment 41, which was entitled “Ethics in Government” and later codified as Article XXIX to the Colorado Constitution.

4. Amendment 41 generally provides for a (1) “fifty-dollar ban,” which generally limits to \$50 any gifts to public officers, members of the general assembly, local government officials, and government employees, along with their spouses or dependent children; and (2) “zero-dollar ban,” which bans any gifts from lobbyists to elected officeholders.

5. Amendment 41 also includes provisions that prohibit statewide elected officeholders and members of the general assembly from engaging in representation of other persons or entities before certain public bodies for a period of two years. COLO. CONST. art. XXIX(4).

6. Finally, Amendment 41 created and empowered a five-member Independent Ethics Commission (the “Commission”) to enforce the Amendment.

7. The Commission is independent of any branch of government.

8. The Commission’s mandate is to hear complaints, issue findings, and assess penalties; it also issues advisory opinions on ethics issues arising under Amendment 41 and any other standards of conduct and reporting requirements as provided by law.

9. Amendment 41 provides that any person may file a written complaint with the Commission, asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with Amendment 41 or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.

10. The Commission must investigate the complaint, hold a public hearing, and issue findings, unless the Commission finds the complaint is “frivolous.”

11. The Commission has no jurisdiction to consider, *inter alia*, a “frivolous” complaint, as defined by law. A “frivolous” complaint is defined as any complaint filed under Article XXIX that fails to allege that a public officer, member of the general assembly, local

government official, or government employee has accepted or received any gift or other thing of value for *private gain or personal financial gain*.

12. On September 1, 2008, the Commission adopted rules of procedure that also govern when the Commission must dismiss complaints, may dismiss complaints, or may stay a complaint.

13. In addition to “frivolous” complaints, the Commission *must dismiss a complaint* if: (a) the Commission has no jurisdiction; (b) the alleged violation, if true, would not constitute a violation of Article XXIX, or any other standards of conduct or reporting requirements under the jurisdiction of the Commission; or (c) the complaint fails to allege that the conduct complained of occurred within the preceding twelve months. Independent Ethics Commission (“IEC”) Rule 7(D); *see also Developmental Pathways v. Ritter*, 178 P.3d 524, 534-35, n.8 (Colo. 2008).

14. The Commission *may dismiss a complaint*, if: (a) the complaint is groundless or brought for the purposes of harassment, as determined by the Commission; (b) another body has already taken action on the subject of the complaint, and the Commission believes the action of the other body was appropriate; or (c) the complaint fails to comply with the Commission rules of procedure regarding complaints. IEC Rule 7(E).

15. The Commission may stay a complaint if: (a) an action on the same subject of the complaint is pending before another body with concurrent jurisdiction; or (b) the alleged violation is a criminal matter or a criminal investigation is pending. IEC Rule 7(F).

16. In April 2007, the Colorado legislature implemented and funded the Commission.

17. The statute provides that “any final action” of the Commission concerning a complaint shall be subject to judicial review in this Court.

Colorado Ethics Watch’s Complaint Against Mr. Coffman

18. On February 13, 2008, Colorado Ethics Watch (“CEW”), a private entity, filed with the Commission a complaint against then-Colorado Secretary of State Michael Coffman.

19. Even though CEW filed its Complaint on February 13, 2008, the Commission did not fully form and promulgate its rules of procedure until September 1, 2008.

20. On October 6, 2008, the Commission voted 3-to-1 to press forward with this matter. Commissioner Hopper recused.

21. CEW and Mr. Coffman both alleged that the Commission failed to conduct a preliminary investigation, as required by Amendment 41.

22. CEW's Complaint generally alleges that Mr. Coffman knew that, and deliberately misled the public concerning, one of his public employee's outside political business.

23. CEW's Complaint also generally alleges that Mr. Coffman certified a company's voting machine, against his expert panel's recommendation, after the company hired as a lobbyist Mr. Coffman's campaign consultant.

24. Based upon this, CEW's Complaint brought before the Commission criminal allegations against Mr. Coffman, apparently pursuant to the Commission's power to hear complaints based upon "other standards of conduct or reporting requirements" other than the gift bans established by Amendment 41.

Relevant Proceedings Before The Commission

25. Mr. Coffman responded to CEW's Complaint on November 13, 2008, denying the allegations and arguing that: (1) the Complaint is "frivolous and brought for the purposes of harassment"; (2) the Commission lacked jurisdiction; (3) arguing that the Complaint failed to state a claim for relief; (4) even if the allegations in the Complaint were true, they did not allege a violation under Article XXIX or other standards of conduct or reporting requirements under the Commission's jurisdiction; (5) the claims were barred in whole or in part by the statute of limitations; (6) the Denver District Attorney's Office already reviewed the allegations and found they lacked merit; and (7) CEW failed to comply with the rules of procedure.

26. On November 13, 2008, Mr. Coffman requested leave from the Commission to file several motions.

27. Specifically, Mr. Coffman requested to file a: (1) motion to dismiss; (2) motion to stay; (3) motion for jury trial; (4) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse; (5) motion for determination of standard of review; (6) motion to continue and extend deadlines; and (7) motion to conduct discovery.

28. The Commission denied Mr. Coffman's requests to file a: (1) motion to stay; (2) motion for jury trial; and (3) motion to conduct discovery.

29. The Commission, however, approved Mr. Coffman's request to file a: (1) motion to dismiss; (2) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse; (3) motion for determination of standard of review; and (4) motion to continue and extend deadlines.

30. Commissioner Wood recused himself prior to the Commission's ruling on Mr. Coffman's motion to transfer to an administrative law judge, or in the alternative, motion to recuse.

31. On December 17, 2008, Mr. Coffman filed with the Commission a motion to dismiss.

32. Mr. Coffman made numerous arguments, including that the Commission lacked jurisdiction to consider CEW's Complaint against him.

33. Mr. Coffman argued that, pursuant to the Colorado Supreme Court's decision in *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008), the Commission had no jurisdiction to consider alleged conduct based upon conduct that occurred prior to September 1, 2008.

34. Mr. Coffman argued that the Commission was devoid of jurisdiction, because the Commission must dismiss claims based upon conduct that occurred prior to September 1, 2007.

35. Mr. Coffman argued that the Commission must dismiss CEW's Complaint, as it was "frivolous" as a matter of law.

36. Mr. Coffman argued that CEW's Complaint failed to state a claim for relief for which relief may be granted

37. Mr. Coffman made numerous other arguments, including that: (a) CEW had no private right of action to bring criminal complaint against Mr. Coffman, and the Commission was devoid of jurisdiction to hear such matters; (b) Counts 1 and 2 should have been dismissed as the Colorado State Auditor had already investigated and taken action on the underlying allegations; (c) Counts 1 and 2 should have been dismissed because the Denver District Attorney's Office has already investigated Mr. Coffman and declined to prosecute; and (d) CEW brought the complaint for purposes of harassment.

38. On February 5, 2009, the Commission denied Mr. Coffman's motion to dismiss, finding that, *inter alia*, it had jurisdiction to consider CEW's ethics complaint.

39. The Commission's decision is a final action on the jurisdictional questions now presented before this Court.

40. The Commission set this matter for a hearing on March 6, 2008.

41. Mr. Coffman now files this present Complaint, seeking a legal review of the Commission's jurisdictional determination. The issues presented are cases of first impression for this Commission, which is independent from the other branches of government and provides for a direct challenge under its governing statute.

42. Mr. Coffman also moves this Court to stay the Commission's actions, pending this Court's determination of the threshold jurisdictional question.

CLAIM FOR RELIEF

Declaratory Relief:

The Independent Ethics Commission Is Without Jurisdiction To Consider Colorado Ethics Watch's Complaint Against Former Colorado Secretary of State Michael Coffman

43. Plaintiff incorporates by reference all other paragraphs of this Complaint as if fully set forth herein.
44. Because all of the Commission's members were not appointed and the Commission did not fully promulgate its rules until September 1, 2008, there is no jurisdiction to hear this Complaint under *Developmental Pathways v. Ritter*, 178 P.3d 524, 526 (Colo. 2008).
45. The Commission lacks jurisdiction to consider CEW's Complaint, because it is "frivolous" as a matter of law. Even if read as true, CEW's Complaint fails to allege Mr. Coffman's "private gain" or "personal financial gain" resulting from the allegations. The Commission erred by denying Mr. Coffman's motion to dismiss.
46. Because: (1) CEW's Complaint is frivolous; (2) there is no applicable standard of conduct to guide the Commission; (3) the Commission can provide no adequate remedy because there is no punishment for the allegations; (4) the allegations are not "*under any other standards of conduct and reporting requirements as provided by law*," COLO. CONST. art. XXIX(5)(1) (emphasis added), over which the Commission has jurisdiction; and (5) Mr. Coffman is no longer a statewide elected official, CEW's Complaint fails to state a claim for which relief may be granted or for which the Commission could impose penalties.
47. The Commission is without jurisdiction to consider any allegation in CEW's Complaint that fails to allege that the conduct complained of occurred within the preceding twelve months. Hence, the Commission should only consider the alleged conduct that took place on or after September 1, 2007, after the Commission promulgated its rules. Moreover, because it is CEW's burden to properly plead facts within the 12-month constitutional period, the Commission should also not consider any facts that, from the face of CEW's Complaint, are ambiguous as to whether they occurred within the 12-month constitutional period.
48. The irreparable injury from the Commission's continued *ultra vires* proceedings against Mr. Coffman is obvious and great. By way of example only, there is a great danger that the stigma of a pending ethics complaint and its subsequent investigation subjects a public official to the immediate distraction from public service; public suspicion, scorn, and humiliation; the loss of public support; and other emotional distress. This danger is great, given CEW's allegations and the Commission's ostensible belief that the allegations constitute "other standards of conduct and reporting requirements as provided by law" that fall within the Commission's jurisdictional reach. The Commission has no authority to hear this matter, but Mr. Coffman is forced to expend resources and subject himself to defending this action. Mr. Coffman's irreparable harm stems from the fact that he faces the time and expense of defending

himself in a proceeding for which the Commission has no jurisdiction; Mr. Coffman also faces the prospect of an adverse ruling by the Commission, a ruling the Commission has no power to issue. The equities favor immediately enjoining the Commission's proceedings until after the resolution of the jurisdictional issue. This will simply preserve the status quo and greatly reduce the Mr. Coffman's risk of irreparable injury.

* * *

WHEREFORE, Plaintiff respectfully requests from this Court the following relief and judgment, pursuant to COLO. REV. STAT. § 24-18.5-101(9); COLO. REV. STAT. § 24-4-106(5); COLO. REV. STAT. § 24-4-106(7); COLO. REV. STAT. § 24-4-106(8); *Envirotest Systems, Corp. v. Colo. Dept. of Rev.*, 109 P.3d 142 (Colo. 2005); and COLO. REV. STAT. § 24-4-105(11):

A. A declaration that Defendant Independent Ethics Commission is without jurisdiction to consider Colorado Ethics Watch's Complaint against former Colorado Secretary of State Michael Coffman.

B. An order that Defendant Independent Ethics Commission dismiss with prejudice, for lack of jurisdiction, Colorado Ethics Watch's Complaint against former Colorado Secretary of State Michael Coffman.

C. An order immediately enjoining Defendant Independent Ethics Commission from instituting or continuing any further action as it relates to Colorado Ethics Watch's Complaint against former Colorado Secretary of State Michael Coffman.

D. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 11th day of February, 2009.

GREENBERG TRAURIG, LLP

/s/ Douglas J. Friednash

Douglas J. Friednash
Michael R. Davis

(Original on file at offices of Greenberg Traurig,
LLP, pursuant to C.R.C.P. 121, § 1-26)

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