

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> <p>Case Number: 2009CV1650 Division/Courtroom: 19</p>
<p>Plaintiff:</p> <p>MICHAEL COFFMAN.</p> <p>v.</p> <p>Defendant:</p> <p>INDEPENDENT ETHICS COMMISSION.</p>	
<p>Attorneys for Plaintiff Michael Coffman: GREENBERG TRAUIG, LLP 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</p>	
<p>EMERGENCY MOTION FOR STAY OF PROCEEDINGS OF THE INDEPENDENT ETHICS COMMISSION</p>	

Plaintiff Michael Coffman, former Colorado Secretary of State (“Plaintiff” or “Mr. Coffman”), by and through his undersigned counsel, respectfully submits this Motion for Stay of the Independent Ethics Commission’s actions as it relates to Plaintiff, 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), pending this Court’s determination whether the State of Colorado Independent Ethics Commission, a newly created state entity (“Defendant”), has jurisdiction to pursue against Mr. Coffman a legally “frivolous” ethics complaint filed by Colorado Ethics Watch.

CERTIFICATION

In accordance with COLO. R. CIV. P. 121 (1-15(8)), undersigned counsel states that he has advised Jane Feldman, Executive Director of the Independent Ethics Commission, and Linda Siderius, counsel for the Independent Ethics Commission, regarding the filing of this motion with the Court. The Commission's position is unknown.

I. STATEMENT OF FACTS

A. LEGAL BACKGROUND OF AMENDMENT 41 AND THE INDEPENDENT ETHICS COMMISSION

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. COLO. CONST. art. XXIX.¹ 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. *Developmental Pathways v. Ritter*, 178 P.3d 524, 527 (Colo. 2008) (citing COLO. CONST. arts. XXIX(3) and (4)). Amendment 41 also prohibits 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).

Amendment 41 created a five-member independent ethics commission. COLO. CONST. art. XXIX(5)(2).² The Commission's mandate is to "hear complaints, issue findings, and assess

¹ See also COLO. REV. STAT. § 24-18.5-101(1)(a); *Developmental Pathways v. Ritter*, 178 P.3d 524, 526 (Colo. 2008) (sole Colorado Supreme Court case addressing Amendment 41). Amendment 41 provides that "[l]egislation may be enacted to facilitate the operation of this article, but in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted." COLO. CONST. art. XXIX(9). The Colorado legislature enacted legislation, pursuant to Amendment 41. COLO. REV. STAT. § 24-18.5-101; *Developmental Pathways*, 178 P.3d at 528. Additionally, pursuant to Amendment 41 and confined by Article 4 of the statute, the Colorado legislature delegated to the Commission the requirement to "adopt reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of Article XXIX and any other standards of conduct and reporting requirements as provided by law." COLO. REV. STAT. § 24-18.5-101(6); see also *Developmental Pathways*, 178 P.3d at 528. Pursuant to Amendment 41 and Colorado statute, the Commission promulgated its own rules of procedure. Indep. Ethics Comm'n R. P., available at <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> (last visited Feb. 11, 2009) [hereinafter "IEC Rules" or "IEC Rule"].

² See also COLO. REV. STAT. § 24-18.5-101(2)(a); see generally *Developmental Pathways*, 178 P.3d at 527.

other standards of conduct or reporting requirements as provided by law within the preceding twelve months.” COLO. CONST. art. XXIX(3)(a).⁶ The Commission must dismiss without a hearing any frivolous complaint. COLO. CONST. art. XXIX(3)(b).⁷

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*.

Developmental Pathways, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)) (alterations added; emphasis in original). “Private gain” or “personal financial gain” means:

any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an *official act* that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employees.

Id. (quoting COLO. REV. STAT. § 24-18.5-101(5)(b)(II)) (emphasis added). An “official act” is “any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” Indep. Ethics Comm’n R. P. 3(A)(11), *available at* <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> (last visited Feb. 11, 2009) [hereinafter “IEC Rules” or “IEC Rule”].

In addition to “frivolous” complaints, on September 1, 2008, the Commission adopted its rules of procedure that require that 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 IEC”; or (c) “the complaint fails to allege that the conduct complained of occurred within the preceding twelve months.” IEC Rule 7(D); *see also Developmental Pathways*, 178 P.3d at 534-35, n.8 (“This [12-month] provision essentially sets forth the statute of limitations period for violations under the Amendment.”).⁸

⁶ *See also* IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527.

⁷ *See also* IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528

⁸ In addition to this pending complaint, as of February 11, 2009, the Commission has considered five other complaints. Indep. Ethics Comm’n, *Complaints*, *available at* <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1225190784719> (last visited Feb. 11, 2009). The Commission dismissed all five of these complaints, because: (1) they were “frivolous”; (2)

The Commission's rules of procedure further provide that it *may dismiss a complaint*, if: (a) "[t]he complaint is groundless or brought for the purposes of harassment as determined by the IEC"; (b) "[a]nother body has already taken action on the subject of the complaint and the IEC believes the action of the other body was appropriate"; or (c) "the complaint fails to comply with IEC rules of procedure regarding complaints." IEC Rule 7(E). The Commission may stay a complaint if: (a) "[a]n action on the same subject of the complaint is pending before another body with concurrent jurisdiction"; or (b) "[t]he alleged violation is a criminal matter or a criminal investigation is pending." IEC Rule 7(F).⁹

The Commission shall, however, "conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules" it adopts. COLO. CONST. art. XXIX(3)(c).¹⁰ The Commission may delegate to an administrative law judge or hearing officer a particular hearing. IEC Rule 8(B). Amendment 41 grants the Commission the power to issue subpoenas for both documents and witnesses. COLO. CONST. art. XXIX(4). To issue a subpoena, Colorado statute requires a motion by a commissioner and the approval of "no fewer than four" commissioners. COLO. REV. STAT. § 24-18.5-101(8).¹¹ The Commission is

"the alleged misconduct occurred more than 12 months prior to the filing of the complaint, pursuant to Colorado Constitution Article XXIX, Section 5(2)(3)(a) and (b), and IEC Rule 7.D.2 and 4"; (3) of the "lack of jurisdiction pursuant to IEC Rule 7.D.1, because it alleges misconduct by a member of the judicial branch"; and/or (4) "pursuant to IEC Rule 7.D.3, the alleged violation, if true, would not constitute a violation of Colorado Constitution Article XXIX, or any other standard of conduct or reporting requirement under the jurisdiction of the IEC." *Id.*

⁹ The Commission denied Mr. Coffman's request to file a motion to stay, even though the Complaint is criminal in nature.

¹⁰ *See also* IEC Rule 8(A) ("The IEC shall hold a public hearing on all complaints within the jurisdiction of the IEC that have not been dismissed as frivolous or dismissed on other grounds."); *Developmental Pathways*, 178 P.3d at 527.

¹¹ The Commission, therefore, cannot issue subpoenas in Mr. Coffman's matter, because two of the five commissioners recused themselves. In other words, if this matter goes to a hearing before the Commission, Mr. Coffman has no means of subpoenaing witnesses or documents. An earlier Commission ruling deprived Mr. Coffman the ability to conduct discovery. This deprives Mr. Coffman his fundamental right to due process, including a fair hearing where he can confront witnesses. Moreover, even if COLO. CONST. art. XXIX, § 5(4) allows individual members to issue subpoenas and COLO. CONST. art. XXIX, § 9 prevents the legislature from limiting the Commission's subpoena power, COLO. REV. STAT. § 24-18.5-101(8) limits the Commission's subpoena power and agencies generally have no authority to decide constitutional issues that require the agency to question its own statutory authority or to disregard any statutory instructions. *See, e.g., Riffin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563

unable to issue subpoenas in this case; thereby depriving Mr. Coffman the ability to compel attendance of witnesses or the production of documents.

The Commission may also “assess penalties for violations as prescribed by this article *and provided by law*,” based upon findings by “a preponderance of evidence unless the commission determines that the circumstances warrant a heightened standard.” COLO. CONST. arts. XXIX(3)(d) and (e) (emphasis added).¹² Amendment 41 permits penalties for “breaches [of] the public trust for *private gain*.” COLO. CONST. art. XXIX(6) (emphasis added). Moreover, Amendment 41 provides that “any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions.” *Id.*; see also *Developmental Pathways*, 178 P.3d at 527. “The manner of recovery *and additional penalties may be provided by law*.” *Developmental Pathways*, 178 P.3d at 527-28 (emphasis added) (quoting COLO. CONST. art. XXIX(6)).

Colorado statute provides that “[a]ny final action of the commission concerning a complaint shall be subject to judicial review by the district court for the city and county of Denver.” COLO. REV. STAT. § 24-18.5-101(9); see general *Developmental Pathways*, 178 P.3d at 535.

B. COLORADO ETHICS WATCH’S COMPLAINT AGAINST FORMER COLORADO SECRETARY OF STATE MICHAEL COFFMAN

On February 13, 2008, Petitioner Colorado Ethics Watch (“CEW”) filed with the Commission its Complaint against then-Colorado Secretary of State Michael Coffman. Complaint, Feb. 13, 2008, Ex. 1 (including 29 exhibits to Complaint). The Commission did not yet exist and was not operational until it promulgated its rules on September 1, 2008. Hence, the Complaint was not ripe for review. *Developmental Pathways*, 178 P.3d at 535.

1. CEW’S COMPLAINT MAKES TWO SETS OF FACTUAL ALLEGATIONS RELATED TO MR. COFFMAN

Allegation 1: Mr. Coffman Allegedly Knew Of And Deliberately Misled The Public About His Employee’s Unlawful Outside Political Business

CEW’s factual allegations consist of the following: (1) in January 2007, Mr. Coffman hired Dan Kopelman, a political ally since 1996 who is a political consultant and an owner and operator of a political website called “Political Live Wires,” to serve as the elections technology manager within the Office of the Secretary of State; (2) in his previous position as the Colorado

(Fed. Cir. 1995) (“[T]he constitutional issue does not require the agency to question its own statutory authority or to disregard any instructions Congress has given it.”).

¹² See also IEC Rule 8(D)(5) (emphasis added) (“The IEC may impose penalties and sanctions *as provided by law*.”); see generally *Developmental Pathways*, 178 P.3d at 527-28.

state treasurer, Mr. Coffman also hired Mr. Kopelman to serve as his systems analyst; (3) Mr. Kopelman took two weeks of paid leave from his position in the Office of the State Treasurer to help Mr. Coffman's campaign for secretary of state; (4) Mr. Coffman's campaign paid Mr. Kopelman's company \$1,500 for consulting services during this paid leave; (5) Mr. Coffman's campaign also paid Mr. Kopelman and Mr. Kopelman's company for other expenditures; (6) Mr. Coffman claimed that he did not know of Mr. Kopelman's company until May 2007, after a newspaper reported the story; (7) the Office of the Colorado State Auditor released an audit, in which it stated that Mr. Kopelman violated Colorado law by owning and operating a partisan political business without prior authorization while serving in the Office of the Secretary of State; (8) the audit also stated that Mr. Coffman "shares responsibility for these violations," pursuant to the state personnel rules; (9) the audit further stated that four other employees of the Office of the Secretary of State held outside employment without prior authorization, and Mr. Coffman knew of two of these circumstances; (10) "[d]ocuments obtained by Ethics Watch through its [Colorado Open Records Act] request strongly suggest that Mr. Kopelman was one of the two employees"; (11) Mr. Coffman and his assistant received directly from Mr. Kopelman the outside company's emails between January and March 2007; (12) Mr. Kopelman utilized his outside company's email address, with Mr. Kopelman's official title included in the signature block, to correspond with Mr. Coffman and his staff; (13) if Mr. Coffman knew of Mr. Kopelman's company, Mr. Coffman "deliberately misled the public and should be held accountable for allowing his employees to engage in partisan conflicts of interest, failing to perform the duties of his office and violating the public trust."; and (14) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." Complaint, Feb. 13, 2008, Ex. 1, at 1-4, 5.

Allegation 2: Mr. Coffman Allegedly Certified One Company's Voting Machine, Against His Expert Panel's Recommendation, After The Company Hired Mr. Coffman's Campaign Consultant As Its Lobbyist

CEW next alleges that: (1) in April 2007, the Office of the Secretary of State accepted applications to retest the security standards on four electronic voting systems, one system of which was Premier; (2) Mr. Coffman appointed an expert advisory panel to advise him on the retesting; (3) in August 2007, Mr. Coffman "consulted with Phase Line Strategies LLC ("Phase Line") about hiring the company to run his" congressional campaign; (4) Mr. Coffman had a "working relationship" with Phase Line's president for more than ten years; (5) on September 17, 2007, Premier hired Phase Line as its lobbyist; (6) on October 30, 2007, Mr. Coffman's spokesman stated that Mr. Coffman "had every intention to run" for Congress; (7) Mr. Coffman knew of Phase Line's representation of Premier when Mr. Coffman hired Phase Line to run his congressional campaign; (8) Mr. Coffman's panel recommended that he recertify none of the four systems; (9) because Mr. Coffman stated that Premier's system substantially complied with legal requirements, he recertified Premier's system; (10) Mr. Coffman decertified some or all of the other three manufacturer's voting machines; (11) following a news report, Premier terminated its relationship with Phase Line; (12) Mr. Coffman continued his relationship with Phase Line; and (13) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." *Id.*, at 4-5.

2. BASED UPON THESE TWO SETS OF ALLEGATIONS, CEW STATES THREE CLAIMS AGAINST MR. COFFMAN

Claim 1: Violation of C.R.S. § 24-50-101(3)(d) and 4 CCR § 801, Rule 1-11
(Department of Personnel – Legislative Declaration – Terminology;
Personnel Board Rules and Personnel Director’s Administrative
Procedures)

CEW first claims, *inter alia*, that Mr. Coffman violated technical personnel rules and procedures. Indeed, it claims that

[o]n information and belief, Secretary Coffman knew *or should have known* that Mr. Kopelman was operating a partisan political business while employed as the state’s elections technology manager in violation of state personnel rules and state law.

Id., at 6 (emphasis added). Moreover,

[o]n information and belief, Secretary Coffman personally benefited from his transgressions. Allowing Mr. Kopelman to continue operating Political Live Wires while employed in the secretary of state’s office, and therefore, using state time and resources, *presumably* helped Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress.

Id. (emphasis added).

Claim 2: Violation of C.R.S. §§ 18-8-404 and/or 405
(Colorado Criminal Code – First Degree Official Misconduct and Second
Degree Official Misconduct)

CEW next brings a private right of action -- reserved solely for prosecutors -- claiming that, *inter alia*, Mr. Coffman violated the criminal code, punishable as a misdemeanor, as follows:

[T]here is reason to believe that Secretary Coffman committed first degree official misconduct. The attached documents and the audit suggest that: (1) Secretary Coffman was aware that Mr. Kopelman was engaged in a partisan side business and did nothing to stop it; and (2) Secretary Coffman and/or Dan Kopelman benefitted from Mr. Kopelman’s continued operation of Political Live Wires.

Id. (emphasis added). Moreover,

Additionally, Secretary Coffman violated state personnel rules and state law by failing to disclose his conflict with Premier by way of their mutual engagement of Phase Line. See C.R.S. § 24-50-117. On information and belief, Secretary Coffman's nondisclosure advantaged all parties involved -- Premier had its voting machine certified, Phase Line delivered on its contract with Premier and Secretary Coffman assisted his long-time political allies and current campaign consultants.

Id. at 7.

Claim 3: Violation of C.R.S. § 1-13-107
(Criminal Violation: Corrupt Conduct in the Discharge of a Duty Under the Election Code)

CEW finally claims that Mr. Coffman violated the criminal corrupt discharge statute, punishable as a misdemeanor, *inter alia*, that

[b]y authorizing the certification of Premier's voting system against the recommendations of the expert panel when a known conflict existed between Secretary Coffman and Premier's lobbying firm, Secretary Coffman *appears to have engaged* in "corrupt conduct in the discharge" of his duties under the Election Code.

Id., at 7 (emphasis added).¹³

C. PROCEDURAL HISTORY WITHIN THE INDEPENDENT ETHICS COMMISSION

On October 8, 2008, the Commission notified the parties of the hearing and hearing procedures. Notice of Hearing and Hearing Procedures, Oct. 13, 2008, Ex. 2. The Commission's staff and the parties' counsel held a general status conference on October 20, 2008. Transcript of Status Conf., Oct. 20, 2008, Ex. 3. On November 3, 2008, the Commission issued its procedural determination for the case. Procedural Determination, Nov. 3, 2008, Ex. 4. The Commission ruled, *inter alia*, that parties must obtain permission to file motions. *Id.* Additionally, the Commission stated that, *inter alia*,

¹³ Pursuant to the Election Code, only the district attorney or attorney general have the authority to prosecute criminal allegations. COLO. REV. STAT. § 1-13-101.

[t]he IEC wishes to emphasize that it contemplates that complaints and hearings before it will not be treated as formal litigation and it encourages the parties to work together to present the material each side feels is relevant for the IEC to consider in its deliberations.

Id., at 2. CEW objected to the Commission's procedural determinations, arguing, *inter alia*, that the Commission failed its constitutional duty to investigate. Objections, Nov. 13, 2008, Ex. 5.

Mr. Coffman responded to CEW's Complaint on November 13, 2008, denying the allegations and arguing that: (1) arguing that the Complaint is "frivolous and brought for the purposes of harassment"; (2) the Commission lacks jurisdiction; (3) the Complaint fails to state a claim for relief; (4) even if the allegations in the Complaint were true, it does not allege a violation under Article XXIX or other standards of conduct or reporting requirements under the Commission's jurisdiction; (5) the claims are 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. Response, Nov. 13, 2008, Ex. 6.

On November 13, 2008, Mr. Coffman requested leave from the Commission to file several motions. Request for Submission of Motions, Nov. 13, 2008, Ex. 7. 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. *Id.*

On November 17, 2008, the Commission met in executive session. Transcript of Gen. Bus. of the Indep. Ethics Comm'n, Nov. 17, 2008, Ex. 8. Thereafter, the Commission publicly denied Mr. Coffman's requests to file a: (a) motion to stay; (b) motion for jury trial; and, (c) motion to conduct discovery. *Id.* 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;¹⁴ (3) motion for determination of standard of review;¹⁵ and, (4) motion to continue and extend deadlines.¹⁶ *Id.*

¹⁴ On November 17, 2008, Mr. Coffman filed with the Commission this motion. Mot. To Transfer Matter To An Admin. Law J., Or In The Alternative, Mot. To Recuse, Nov. 17, 2008, Ex. 9. CEW responded on January 9, 2009. Response, Jan. 9, 2009, Ex. 10 (including exhibits). On January 28, 2009, the Commission denied the motion. O. Re. Mot. To Recuse or Transfer, Jan. 28, 2009, Ex. 11.

¹⁵ On November 17, 2008, Mr. Coffman filed with the Commission this motion. Mot. For Determination of Standard of Review, Nov. 17, 2008, Ex. 12. CEW responded on January 9, 2009. Resp. to Mot. To Transfer Matter To An Admin. Law J., Or In The Alternative, Mot. To Recuse, Jan. 9, 2009, Ex. 13. On February 5, 2009, the Commission granted this motion, in part,

On December 17, 2008, Mr. Coffman filed with Commission a motion to dismiss. Mot. To Dismiss, Dec. 17, 2008, Ex. 17.¹⁷ Mr. Coffman made numerous arguments, including that the Commission lacked jurisdiction to consider CEW's ethics complaint against Mr. Coffman. *Id.* This is so, according to Mr. Coffman, because, *inter alia*: (1) the Commission has no jurisdiction to consider alleged conduct before September 1, 2008; (2) even if it does, the Commission must dismiss claims based upon conduct prior to September 1, 2007; (3) the Commission must dismiss CEW's Complaint, as it is "frivolous" as a matter of law; and (4) CEW's Complaint fails to state a claim for relief for which relief may be granted. *Id.*

On January 12, 2009, CEW responded in opposition to Mr. Coffman's motion to dismiss. Response To Mot. To Dismiss, Jan. 12, 2009, Ex. 18; Exhibits To Response To Mot. To Dismiss, Jan. 12, 2009, Ex. 19. The Commission, on February 5, 2009, denied Mr. Coffman's motion to dismiss, finding that, *inter alia*, it had jurisdiction to consider CEW's ethics complaint, even though it had no authority over criminal allegations. O. Re. Mot. To Dismiss, Feb. 5, 2009, Ex. 20.

On February 11, 2009, Mr. Coffman filed his complaint with this court, seeking a legal review of the Commission's jurisdictional determination. Mr. Coffman files this present motion, seeking a stay of the Commission's actions pending this Court's determination of the Commission's threshold jurisdictional question.

II. LEGAL ANALYSIS

A. LEGAL STANDARD FOR ISSUANCE OF STAY

If this Court holds that the Commission is without jurisdiction to consider CEW's ethics complaint against Mr. Coffman, it must order the Commission to dismiss the complaint and restrain the Commission from taking any further action against Mr. Coffman. COLO. REV. STAT. § 24-4-106(7) ("If [the court] finds that the agency action is . . . in excess of statutory jurisdiction, authority, purposes, or limitations . . . then the court *shall* hold unlawful and set aside the agency action and *shall* restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed,

and held that it would utilize a clear-and-convincing evidence standard. O. Re. Mot. To Determine Evidentiary Standard, Feb. 5, 2009, Ex. 14.

¹⁶ On Dec. 1, 2008, Mr. Coffman requested in writing for an extension of the deadlines related to the hearing. Ex. 15. On Dec. 3, 2008, the Commission responded, in writing, extending the Hearing date and Prehearing Statement. Ex. 16.

¹⁷ This present motion makes many of the same arguments that Mr. Coffman made in his motion to dismiss before the Commission.

remand the case for further proceedings, and afford such other relief as may be appropriate.”) (emphasis added).

Moreover, if this Court finds Mr. Coffman’s irreparable injury from the Commission’s proceedings against him, despite the clear lack of jurisdiction, this Court may immediately review the Commission’s actions. COLO. REV. STAT. § 24-4-106(8) (“Upon a showing of irreparable injury, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency.”); *Envirotest Systems, Corp. v. Colo. Dept. of Rev.*, 109 P.3d 142, 144 (Colo. 2005) (“For a district court to intervene, the agency proceeding or action must clearly exceed the constitutional or statutory jurisdiction or authority of the agency and the party seeking to enjoin the proceedings must show that the agency action will cause irreparable injury.”).¹⁸

The Commission’s denial of Mr. Coffman’s motion to dismiss for lack of jurisdiction is “agency action subject to judicial review.” COLO. REV. STAT. § 24-4-105(11) (“Every agency shall provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders to terminate controversies or to remove uncertainties as to the applicability to the petitioners of any statutory provision or of any rule or order of the agency. The order disposing of the petition shall constitute agency action subject to judicial review.”).

Because the Commission is clearly without jurisdiction to consider CEW’s Complaint against Mr. Coffman and Mr. Coffman will suffer irreparable harm from the Commission’s continued proceedings against him, Mr. Coffman respectfully moves this Court to immediately order the Commission to dismiss the complaint and enjoin the Commission from taking any further action against Mr. Coffman. This fact is amplified by the procedural aspects of the case, which deny him the right to conduct discovery or compel the attendance of witnesses or production of documents.

B. THE COMMISSION IS WITHOUT JURISDICTION TO CONSIDER CEW’S ETHICS COMPLAINT AGAINST MR. COFFMAN, SO MR. COFFMAN RESPECTFULLY MOVES THIS COURT TO ORDER THE COMPLAINT’S DISMISSAL AND RESTRAIN THE COMMISSION FROM TAKING ANY FURTHER ACTION AGAINST MR. COFFMAN

¹⁸ See also COLO. REV. STAT. § 24-4-106(5) (“Upon a finding that irreparable injury would otherwise result, the agency, upon application therefor, *shall* postpone the effective date of the agency action pending judicial review, or the reviewing court, upon application therefor and regardless of whether such an application previously has been made to or denied by any agency, and upon such terms and upon such security, if any, as the court shall find necessary and order, *shall* issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceedings.”) (emphasis added).

1. THE COMMISSION IS DEVOID OF JURISDICTION TO HEAR COMPLAINTS BASED UPON CONDUCT THAT OCCURRED PRIOR TO SEPTEMBER 1, 2008

Because all of the Commission's members were not appointed and the rules were not finally promulgated until September 1, 2008, any allegation in CEW's Complaint prior to September 1, 2008 is not ripe for review. COLO. CONST. art. XXIX(3)(a) (emphasis added); *see also* IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527. Mr. Coffman, therefore, respectfully moves this Court to order that the Commission is without authority to consider complaints based upon alleged conduct that took place prior to September 1, 2008.

In *Developmental Pathways*, the Colorado Supreme Court specifically held:

[The twelve-month] provision essentially sets forth the statute of limitations period for violations under the Amendment. *It does not imply that any conduct following the Governor's proclamation of the Amendment on December 31, 2006 could automatically serve as the basis for an ethics complaint. The Commission must first act by, for example, adopting rules governing the complaint process, before there is any enforcement or threat of enforcement.*

178 P.3d at 535, n.8. (emphasis added). This language is dispositive of this matter. The Commission is devoid of jurisdiction to hear this case, because the Commission was not fully formed and did not adopt rules until September 1, 2008. There, therefore, could be no "enforcement," let alone the "threat of enforcement" prior to that date. *Id.* As a matter of law, therefore, Mr. Coffman respectfully moves this Court to order the Commission to dismiss CEW's Complaint and restrain the Commission from taking further action against Mr. Coffman.

2. ALTERNATIVELY, THE COMMISSION IS WITHOUT JURISDICTION TO HEAR CLAIMS BASED UPON CONDUCT PRIOR TO SEPTEMBER 1, 2007

Even if this Court does not dismiss CEW's Complaint for based upon the prior argument, Mr. Coffman respectfully moves this Court to order the Commission that it 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." COLO. CONST. art. XXIX(2)(6); IEC Rule 7(D); *Developmental Pathways*, 178 P.3d at 534-35, n.8 ("This [12-month] provision essentially sets forth the statute of limitations period for violations under the Amendment."). Hence, the Commission should only consider 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.

Mr. Coffman, therefore, respectfully moves this Court to order the Commission to dismiss the first two claims against Mr. Coffman, because all of the alleged wrongful conduct occurred prior to September 1, 2007. This precludes the Commission's consideration of the following allegations (strikethrough):

Allegation 1: Mr. Coffman Allegedly Knew Of And Deliberately Misled The Public About His Employee's Unlawful Outside Political Business

~~CEW first alleges that: (1) in January 2007, Mr. Coffman hired Dan Kopelman, a political ally since 1996 who is a political consultant and an owner and operator of a political website called "Political Live Wires," to serve as the elections technology manager within the Office of the Secretary of State; (2) in his previous position as the Colorado state treasurer, Mr. Coffman also hired Mr. Kopelman to serve as his systems analyst; (3) Mr. Kopelman took two weeks of paid leave from his position in the Office of the State Treasurer to help Mr. Coffman's campaign for secretary of state; (4) Mr. Coffman's campaign paid Mr. Kopelman's company \$1,500 for consulting services during this paid leave; (5) Mr. Coffman's campaign also paid Mr. Kopelman and Mr. Kopelman's company for other expenditures; (6) Mr. Coffman claimed that he did not know of Mr. Kopelman's company until May 2007, after a newspaper reported the story;~~

The remaining allegations are not based upon conduct that took place prior to September 1, 2007.

With regard to the second allegation, most of the relevant factual allegations are outside the 12-month constitutional period; therefore, CEW's Complaint does not state factual allegations to support the remaining claims. Mr. Coffman, therefore, respectfully moves this Court to order the Commission to dismiss these claims, along with all the factual allegations related to the same.

Allegation 2: Mr. Coffman Allegedly Certified One Company's Voting Machine, Against His Expert Panel's Recommendation, After The Company Hired Mr. Coffman's Campaign Consultant As Its Lobbyist

~~CEW next alleges that: (1) in April 2007, the Office of the Secretary of State accepted applications to retest the security standards on four electronic voting systems, one system of which was Premier; (2) Mr. Coffman appointed an expert advisory panel to advise him on the retesting; (3) in August 2007, Mr. Coffman "consulted with Phase Line Strategies LLC ("Phase Line") about hiring the company to run his" congressional campaign; (4) Mr. Coffman had a "working relationship" with Phase Line's president for more than ten years; (5) on September 17, 2007, Premier hired Phase Line as its lobbyist; (6) on October 30, 2007, Mr. Coffman's spokesman stated that Mr. Coffman "had every intention to run" for Congress; (7) Mr. Coffman knew of Phase Line's representation of Premier when Mr. Coffman hired Phase Line to run his congressional campaign; (8) Mr. Coffman's panel recommended that he recertify none of the four systems; (9) because Mr. Coffman stated that Premier's system substantially complied with~~

legal requirements, he recertified Premier's system; (10) Mr. Coffman decertified some or all of the other three manufacturer's voting machines; (11) following a news report, Premier terminated its relationship with Phase Line; (12) Mr. Coffman continued his relationship with Phase Line; and, (13) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." *Id.* at 5-7.

3. THE COMPLAINT IS "FRIVOLOUS" AS A MATTER OF LAW

Mr. Coffman respectfully moves this Court to dismiss CEW's Complaint and restrain the Commission from taking further action against him, because the Commission must dismiss without a hearing any "frivolous" complaint. COLO. CONST. art. XXIX(3)(b).¹⁹ CEW's Complaint is frivolous, as it fails to allege that Mr. Coffman "has accepted or received"

any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence [any vote, decision, recommendation, approval, disapproval, or other action, including action, which involves the use of discretionary authority] that is performed in the course and scope of the public duties of [Mr. Coffman].

Developmental Pathways, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(b)(II)); IEC Rule 3(A)(11).

Indeed, CEW's Complaint makes two general allegations against Mr. Coffman. First, CEW's Complaint generally alleges that Mr. Coffman knew, "or should have known," that Mr. Kopelman owned and operated a partisan website while he served in the Office of the Secretary of State; it also alleges that Mr. Coffman deliberately misled the public about such knowledge. Complaint, at 1-6. The Complaint alleges that Mr. Coffman "personally benefitted" from this, because

[a]llowing Mr. Kopelman to continue operating Political Live Wires while employed in the secretary of state's office, and therefore, using state time and resources, *presumably* helped Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress.

Id. at 6 (emphasis added). CEW's Complaint alleges that Mr. Coffman's conduct amounts to first degree official misconduct.

Second, CEW's Complaint generally alleges that Mr. Coffman certified Premier's voting machine -- against the recommendation of his expert panel -- after Premier hired Phase Line, Mr. Coffman's campaign consultant, as its lobbyist. *Id.*, at 5-7. CEW's Complaint further alleges

¹⁹ See also IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528.

that “Secretary Coffman *and/or* Dan Kopelman benefitted from Mr. Kopelman’s continued operation of Political Live Wires.” *Id.*, at 6 (emphasis added). This is apparently so, as CEW’s Complaint alleges that “Secretary Coffman assisted his long-time political allies and current campaign consultants.” *Id.*, at 7. In allegedly doing all of this, CEW argues that Mr. Coffman “*appears to have* engaged in ‘corrupt conduct in the discharge’ of his duties under the Election Code.” *Id.* (emphasis added). Moreover, CEW argues that Mr. Coffman “violated state personnel rules and state law.” *Id.*

Even if CEW’s allegations were true, they are still frivolous, because CEW fails to properly allege Mr. Coffman’s “private gain” or “personal financial gain” from his alleged conduct. *See Developmental Pathways*, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)). In other words, CEW fails to allege that Mr. Coffman personally received anything of value from Mr. Kopelman, Phase Line, Premier -- or anyone else -- in exchange for Mr. Coffman’s (1) hiring Mr. Kopelman and keeping him on his staff; or (2) certifying Premier’s voting machine. *See id.*; *see also* IEC Rule 3(A)(11). Even viewing CEW’s allegations in the most favorable light, CEW does not allege any *quid pro quo* -- presumably because there is not a scintilla of evidence that one existed.

The closest CEW comes to alleging Mr. Coffman benefitted in any way from these allegations is that: (1) these alleged actions “*presumably* helped Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress”; and, (2) “Secretary Coffman assisted his long-time political allies and current campaign consultants.” Complaint, at 6, 7 (emphasis added).

These allegations -- individually or even combined -- are wholly insufficient, as a matter of law, from the allegation of “*private gain*” or “*personal financial gain*” required to withstand dismissal for frivolousness. *See Developmental Pathways*, 178 P.3d at 528 (emphasis added) (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)). Even if, for argumentative sake, Mr. Coffman somehow enhanced his chances of winning his election to another *public* office by either (1) employing Mr. Kopelman in his current *public* office; or (2) “assist[ing] his long-time political allies and current campaign consultants” -- which Mr. Coffman did not -- this is not “private gain” or “personal financial gain” that is required under Amendment 41. The first allegation concerns an election to a *public* office; the second allegation addresses supposed benefits to people *other than Mr. Coffman*. It is telling that even the rigorous Amendment 41 specifically excepted from the fifty-dollar ban “campaign contributions.” COLO. CONST. art. XXIX(3)(3)(a); *see also Developmental Pathways*, 178 P.3d at 527. If Amendment 41 specifically excludes from its reach *direct* political gain, such as a campaign contribution, it no doubt would exclude *indirect* political gain, such as: (1) “*presumably* help[ing] Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress”; or (2) “assist[ing] his long-time political allies and current campaign consultants.” Complaint, at 6, 7 (emphasis added).

Presumably understanding that the private-gain or personal-financial-gain requirement subjects its complaint to mandatory dismissal, CEW nonetheless alleges that “personal gain is

not a necessary element in order for the Commission to initiate an investigation, impose penalties or issue a public censure.” Complaint, Feb. 13, 2008, Ex. 1, at 5. Indeed, CEW continues:

Pursuant to Colo. Const. art. XXIX, § 9, the Commission is authorized to hear complaints, issue findings and assess penalties on ethics issues arising under *any standards of conduct* as provided by law. The Commission’s constitutionally mandated authority may not be restricted by statute and, therefore, C.R.S. § 24-18.5-101, which purports to restrict the Commission’s authority to hear complaints that do not allege personal gain, cannot prevent the Commission from investigating and making findings regarding the allegations contained herein.

Id. (emphasis in original).

First, while the Colorado Supreme Court has not squarely addressed this issue, the Court did not pause to question it. *See Developmental Pathways*, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)). Second, if this Court takes this position, it raises other serious constitutional concerns; namely, it raises concerns about fair notice and the retroactive application of criminal and ethical statutes, implicating the Due Process and the *Ex Post Facto* Clauses of both the United States and Colorado Constitutions.

Because CEW’s Complaint fails to allege Mr. Coffman’s “private gain” or “personal financial” gain, it is “frivolous.” The Commission is required under Colorado statute, therefore, to grant Mr. Coffman’s motion to dismiss CEW’s Complaint. Mr. Coffman moves this Court to order such a dismissal and restrain the Commission from taking further action against Mr. Coffman.

4. THIS COURT MUST DISMISS CEW’S COMPLAINT, BECAUSE IT FAILS TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED OR PENALTIES COULD BE IMPOSED BY THE COMMISSION. THE COMMISSION LACKS SUBJECT-MATTER JURISDICTION OF THE CLAIMS, INCLUDING ITS ADMITTED LACK OF JURISDICTION OVER CRIMINAL ALLEGATIONS

Amendment 41 provides that “[a]ny person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article *or any other standards of conduct or reporting requirements as provided by law* within the preceding twelve months.” COLO. CONST. art. XXIX(3)(a) (emphasis added).²⁰ The Commission Rules mandate the dismissal of a complaint when the alleged violation, if true, would not constitute a

²⁰ See also IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527.

violation of Article XXIX, or any other standards of conduct or reporting requirements under the jurisdiction of the IEC. IEC Rule 7(D).

Mr. Coffman respectfully moves this Court to order the Commission to dismiss CEW's Complaint and restrain the Commission from taking further action against Mr. Coffman, because, even if CEW's allegations were true, there is no violation. This is so -- as this motion already discussed in detail -- because CEW fails to properly allege Mr. Coffman's "private gain" or "personal financial gain." This, therefore, makes CEW's Complaint "frivolous," and the Commission does not have the jurisdiction to hear frivolous complaints.²¹

Further, there is no "standard of conduct . . . as provided by law" at issue here. The Commission does not have jurisdiction over every law in Colorado, but arguably only over "standards of conduct" that they have not shown fall within the Commission's province. CEW's first claim for relief is predicated upon a violation of technical personnel rules, not ethics laws. *See* COLO. REV. STAT. § 24-50-101(3)(d) and 4 CCR § 801, Rule 1-11. COLO. REV. STAT. § 24-50-101 provides for the legislative declaration and terminology for the State Personnel System Act. Subsection (3)(d) merely explains the purpose and policy of the state personnel system. It does not provide a claim for relief or other statutory act, let alone a standard of conduct that would be actionable in this present action. Similarly, 4 CCR § 801 merely establishes the Personnel Board Rules and Personnel Director's Administrative Procedures. Rule 1-11 simply provides the appointing authority that all appointing authorities, managers, and supervisors are accountable for compliance with these rules and for reasonable business decisions, including implementation of other policy directives and executive orders. These create no substantive rights for relief or other standards of conduct that fall within the province of this Commission. CEW's attempt to combine these two provisions and create a claim for relief -- let alone one that would qualify as a standard of conduct provided by law and actionable in this case -- is untenable.

Additionally, CEW has not specified, nor can the Commission provide, a remedy for CEW's Complaint. Indeed, Colorado statute mandates the trial of criminal misdemeanor charges in county court. COLO. REV. STAT. § 16-5-101(3). No other entity has jurisdiction. Moreover, only the district attorney or the attorney general may prosecute criminal allegations under the Election Code. COLO. REV. STAT. § 1-13-101. The Commission concedes this. Indeed, it ruled that "[t]he Commission agrees that it does not have jurisdiction to enforce criminal statutes." O. Re. Mot. To Dismiss, Feb. 5, 2009, Ex. 20, at 2.²² In other words, the Commission's assessment of penalties for a criminal matter is not "provided by law," as required under Amendment 41.

²¹ *See supra* Part II(B)(3) (outlining in detail Mr. Coffman's frivolous legal argument); COLO. CONST. art. XXIX(3)(b); COLO. REV. STAT. § 24-18.5-101(5)(b)(II); IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528.

²² The Commission, nevertheless, rules that "[i]t does, however, have jurisdiction to determine if conduct is unethical pursuant to state ethics laws." O. Re. Mot. To Dismiss, Feb. 5, 2009, Ex. 20, at 2. Technical personnel rules or the Election Code are not "state ethics laws."

COLO. CONST. art. XXIX(3)(d) (emphasis added) (“The Commission may also ‘assess penalties for violations as prescribed by this article *and provided by law.*’”); *see also* IEC Rule 8(D)(5) (“The IEC may impose penalties and sanctions *as provided by law.*”) (emphasis added); *see generally* *Developmental Pathways*, 178 P.3d at 527-28 (quoting COLO. CONST. art. XXIX(6)) (“The manner of recovery *and additional penalties may be provided by law.*”) (emphasis added). The other violation is arguably over personnel rules.

Even if CEW were to prevail, it has not cited, nor can it cite, any legal authority for any remedy the Commission could provide. Indeed, there is no constitutional or statutory authority for the Commission to do anything as a result of a subsequent hearing. This includes, among other things, the ability to censure Mr. Coffman. Further, CEW cites no authority that holds that the Commission has any jurisdiction over Mr. Coffman, who is no longer a state elected official.

C. MR. COFFMAN WILL SUFFER IRREPARABLE INJURY FROM THE COMMISSION’S UNLAWFUL ASSERTION OF JURISDICTION

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 is exacerbated by the Commission’s failure to provide Mr. Coffman with a fair hearing. Mr. Coffman is unable to conduct discovery, and the three Commission members have no subpoena powers now. Meanwhile, they have denied his request to transfer this to an administrative law judge.

This danger is great, given CEW’s specious allegations and the Commission’s acknowledgment that they lack jurisdiction over the two criminal allegations -- yet the Commission’s ostensible belief that the technical-personnel-rules and criminal 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 admittedly 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. This type of proceeding unfairly subjects a public official to damages to his reputation.

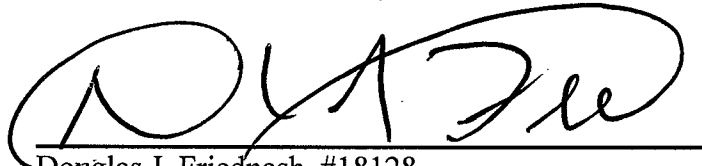
Mr. Coffman, therefore, faces “certain and imminent harm for which a monetary award does not adequately compensate” and “there is no legal remedy that provides full, complete, and adequate relief.” *Gitlitz v. Bellock*, 171 P.3d 1274, 1278-79 (Colo. App. 2007). Indeed, Mr. Coffman’s “[m]onetary damages are difficult to ascertain” and “there exists no certain pecuniary standard for the measurement of the damages.” *Id.* 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. *See*

Envirotest System, 109 P.3d at 145 (contemplating irreparable harm when an agency acts “outside of its statutory and constitutional framework”).

WHEREFORE, Plaintiff respectfully requests that this Court immediately restrain the Commission from continuing or instituting any action against Plaintiff, pending this Court’s determination of the jurisdictional issue in the Complaint.

Respectfully submitted this 12th day of February, 2009.

GREENBERG TRAURIG, LLP

A handwritten signature in black ink, appearing to read "DJA", is written over a horizontal line. The signature is stylized and cursive.

Douglas J. Friednash, #18128

Michael R. Davis, #39788

**ATTORNEYS FOR PLAINTIFF
MICHAEL COFFMAN**