

<p>STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290</p> <hr/> <p>BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, <i>in re</i> ED 2023-03, 2023-11</p> <p>ELECTIONS DIVISION OF THE SECRETARY OF STATE,</p> <p>Complainant,</p> <p>vs.</p> <p>HUSCH BLACKWELL LLP, and JOHN DOE(S)</p> <p>Respondents.</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p> <hr/> <p>CASE NUMBER</p> <p>2023 AHO 0019</p>
<p align="center">REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS</p>	

It is now abundantly clear that Husch Blackwell LLP’s (“Husch Blackwell”) Motion to Dismiss must be granted. The Complaint fails to allege the necessary facts to state a claim against Husch Blackwell and the Division’s Response simply highlights the fatal deficiencies in the Complaint. This case should be dismissed.

ARGUMENT

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The Deputy Secretary's Prior Holding Reveals the Weakness of the Division's Complaint.

The Division contends the Deputy Secretary's April 3, 2023 Order is "outside the scope of the Court's consideration" and occurred at a very different procedural posture. (Resp. at 4.) Because there are ample grounds to dismiss the Complaint for failure to state a claim upon which relief may be granted, Husch Blackwell will not belabor the point in arguing whether the April 3, 2023 Order has preclusive effect upon the present Complaint – aside from one critical point that the Division fails to address. The April 3, 2023 Order contains a lengthy discussion defining express advocacy that is entirely missing from the October 16, 2023 Decision. Given that the Complaint depends entirely upon the Deputy Secretary's conclusion that it was plausible that the CORA requests were likely used for the purposes of expressly advocating for or against a candidate, the omission is glaring.

As the Deputy Secretary properly stated in his April 3, 2023 Order: "[t]hus, it is not sufficient to constitute a reportable 'expenditure' to show that a person has expended some amount of money in support of a candidate, but rather, such a payment constitutes an 'expenditure' that may have to be reported to the Secretary of State's office only when the payment is made for advocacy that contains express, explicit words exhorting the audience to vote in a particular way for or against a candidate or ballot measure." (Election Division Case No: 2023-03, Order Denying Motion to Dismiss at 6.) Neither the Complaint, nor the October 16, 2023 Decision upon which it

is based, identify any conduct undertaken by Husch Blackwell “that contains express, explicit words exhorting the audience to vote in a particular way for or against” any candidate for the GRMD board. The Division fails to offer any explanation for why the Deputy Secretary omitted this discussion from the October 16, 2023 Decision.

B. The Complaint Fails to State a Viable Claim that Husch Blackwell Made an Expenditure That Should Have Been Reported.

“Only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Warne v. Hall*, 2016 CO 50, ¶ 9. “That is, a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief.” *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 8 (citing *Warne*, ¶ 24). “A complaint is insufficient if it provides only bald assertions without further factual enhancement.” *Alderman v. Bd. Of Governors of Colo. State Univ.*, 2023 COA 61, ¶ 12. “Plausibility requires ‘more than a sheer possibility that a defendant has acted unlawfully.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

The Division failed to include the necessary “factual enhancement” to survive a motion to dismiss and failed to include sufficient facts to support a claim for relief. In its Response, the Division contends that Husch Blackwell admits that some of the CORA requests it served sought materials related to GRMD board elections, but faults Husch Blackwell for arguing “that it is not plausible that these requests were used for the purposes of express advocacy.” The Division misconstrues Husch Blackwell’s argument. First, the Division’s conclusory statement that “it was plausible that these CORA requests were likely used for the purpose of expressly advocating for or against a candidate for the GRMD board” is not entitled to the assumption that it is true. *Scott*

v. Scott, 2018 COA 25, ¶ 19 (facts pleaded as legal conclusions and conclusory factual allegations are not entitled to the assumption that they are true).

Moreover, Husch Blackwell’s Motion to Dismiss is based on the grounds that the Division has failed to allege that Husch Blackwell engaged in express advocacy. At best, the Complaint includes only a conclusory factual statement that “[t]he Deputy secretary concluded it was plausible that these CORA requests were likely used for the purpose of expressly advocating for or against a candidate for the GRMD board.” This allegation amounts to nothing more than a “sheer possibility” that Husch Blackwell acted unlawfully, and is not sufficient to withstand a motion to dismiss.

The Division bears the burden of proof in this proceeding. Rule 24.10 of the Secretary’s Rules on Campaign and Political Finance. How can Husch Blackwell possibly defend itself if the Division isn’t even required to allege that Husch Blackwell actually engaged in express advocacy? The Division has taken the position that it only need suggest that it is theoretically possible that Husch Blackwell engaged in express advocacy without identifying any explicit words exhorting the audience to vote in a particular way for or against any candidate for the GRMD board. The Court cannot possibly endorse this position. Remarkably, the Complaint fails to include any facts supporting the requested relief. Specifically, the Complaint does not:

1. Allege that Husch Blackwell obtained any information or materials in response to its CORA requests.
2. Identify what information or materials Husch Blackwell received in response to its CORA requests.
3. Allege how Husch Blackwell used the information or materials to engage in express advocacy.
4. Identify any express advocacy Husch Blackwell engaged or participated in with respect to the 2023 GRMD election.

5. Identify any candidate that Husch Blackwell expressly advocated for or against.

The Division contends that Husch Blackwell “does not reference the core of the Division’s Complaint. (Resp. at 6.) Yet, the “core” of the Division’s Complaint falls far short of providing the necessary factual basis to support a plausible claim against Husch Blackwell. The Division maintains the following facts are sufficient to state a claim:

1. Husch Blackwell submitted over two-dozen CORA requests in 2023 alone, and many of those requests were election related.
2. Husch requested self-nomination forms submitted by candidates for the election, lottery results of the ordering of candidate names on the ballot, and even a copy of the certified ballot.
3. Husch submitted these requests while representing two candidates for the election and two developers who were adverse to the GRMD Board in litigation.

(Resp. at 6.)

These allegations form the “core” of the Division’s Complaint.¹ Based solely on these three factual allegations, the Division argues: “From there, it is a reasonable inference to conclude that the information obtained by those requests was used for express advocacy.” As set forth above, however, the Complaint **does not even allege** that Husch Blackwell obtained any information in response to the CORA requests, let alone how that information was used for express advocacy. The Complaint only alleges that Husch Blackwell submitted requests – and fails to allege that Husch Blackwell obtained any information or documents in response to these requests. (See Compl. ¶¶ 25-27; 41-43; 47-49.) Accordingly, no reasonable inference can be drawn from the “core” allegations in the Division’s Complaint that would support an alleged violation of law by Husch Blackwell.

¹ In its Response, the Division argues that the two developers Husch Blackwell represented in litigation “would therefore plausibly benefit from a change in the Board’s membership,” but this allegation is not included in the Complaint.

Without alleging any of the necessary underlying facts, the Division’s self-serving statement that “[t]he Deputy Secretary already concluded as much on the record that existed after the Division’s investigation” is of no persuasive value. The absence of underlying factual allegations in the Complaint raises more questions than answers, key among them: was there actually any express advocacy? We do not know – and apparently neither does the Division, considering it concludes: “Because that information was worth over \$1,000 to whomever obtained it, **any such** express advocacy would constitute a reportable independent expenditure.” (Resp. at 7.)(emphasis added). The Division has yet to identify whether any express advocacy actually occurred. At best, the Division contends that Husch Blackwell could have used the information for express advocacy. But did it? We don’t know because the Complaint is silent on this critical fact.

A complainant must allege facts sufficient to rise above a purely speculative level. *Defend Colorado v. Polis*, 2021 COA 8, ¶ 42, 482 P.3d 531. The Complaint falls short of even alleging that Husch Blackwell engaged in any express advocacy. There isn’t a single allegation that Husch Blackwell used any of the magic words to exhort the audience to vote for or against any candidate in the GRMD board election. The Elections Division is required to explain *how* Husch Blackwell made an expenditure that it failed to report in violation of Colorado law. *See Defend Colorado*, 2021 COA 8, ¶ 42 (dismissing a complaint when “...none of its factual allegations explain *how* the Governor improperly influenced the Commission.”)(emphasis in original). The Complaint fails to include allegations to rise above the suggestion of “sheer possibility,” and the Complaint must be dismissed.

CONCLUSION

For the reasons set forth herein and for the reasons set forth in its principal Brief on file herein, Husch Blackwell respectfully requests that the Elections Division Complaint be dismissed with prejudice.

Respectfully submitted this 23rd day of February, 2024

HUSCH BLACKWELL LLP

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CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by electronic service the 23rd day of February, 2024, addressed as follows:

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