

<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>MOTION TO DISMISS AND BRIEF IN SUPPORT OF MOTION TO DISMISS</p>	

Respondent, Husch Blackwell LLP (“Husch Blackwell”), pursuant to § 1-45-111.7, C.R.S. (2023), Rules 24.3.1 and 24.7.1 of the Secretary’s Rules on Campaign and Political Finance, 8 CCR 1505-6 and C.R.C.P. 12(b)(5), respectfully moves this Court for an Order dismissing Complainant Elections Division of the Secretary of State’s Complaint on the merits, with prejudice. The grounds for this motion are set forth herein.

INTRODUCTION

Husch Blackwell moves to dismiss this matter on the grounds that the Complaint fails to state a claim upon which relief can be granted. The Complaint contains nothing more than conclusory allegations contending it is “plausible” that Husch Blackwell “likely” used materials it

obtained from open records requests for the purpose of express advocacy, which constituted an expenditure that should have been reported under Colorado law. The Complaint fails to allege that Husch Blackwell actually engaged in express advocacy, fails to allege how Husch Blackwell engaged in express advocacy for or against a candidate, and fails to identify a single candidate that Husch Blackwell advocated for or against. As a result, the Complaint fails to state a claim for relief that can be granted against Husch Blackwell and should be dismissed pursuant to Rules 24.3.1 and 24.7.1 of the Secretary’s Rules on Campaign and Political Finance, 8 CCR 1505-6 and C.R.C.P. 12(b)(5).

STANDARD OF REVIEW

Pursuant to § 1-45-111.7, C.R.S. (2023) and Rule 24.3.1 of the Secretary’s Rules on Campaign and Political Finance, 8 CCR 1505-6, the Colorado Rules of Civil Procedure apply to this matter. Husch Blackwell brings this Motion to Dismiss pursuant to Rule 24.7.1 of the Secretary’s Rules on Campaign and Political Finance, 8 CCR 1505-6 and C.R.C.P. 12(b)(5). In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, the Hearing Officer must accept all factual allegations contained in the complaint as true and view them in the light most favorable to the plaintiff. *Scott v. Scott*, 2018 COA 25, ¶ 17, 428 P.3d 626. The Colorado Supreme Court has adopted the federal “plausibility” standard in determining whether a complaint states a claim upon which relief could be granted. *Warne v. Hall*, 2016 CO 50, ¶ 24, 373 P.3d 588.

Under the plausibility standard, “to survive a motion to dismiss for failure to state a claim, a plaintiff must allege a plausible claim for relief.” *N.M. v. Trujillo*, 2017 CO 79, ¶ 20, 379 P.3d 370 (citing *Warne v. Hall*, 2016 CO 50, ¶ 9, 373 P.3d 588. Facts pleaded as legal conclusions and

conclusory factual allegations are not entitled to the assumption that they are true, and Colorado courts have upheld dismissals because a complaint was conclusory in its allegations. *Scott*, ¶ 19. 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. “Further, a complaint may be dismissed if the substantive law does not support the claims asserted.” *Western Innovations, Inc. v. Sonitrol Corp.* 187 P.3d 1155, 1158 (Colo. App. 2008)(citing *Denver Parents Ass’n v. Denver Bd. Of Educ.*, 10 P.3d 662, 664 (Colo.App.2000); *Nelson v. Nelson*, 21 Colo.App. 63, 65-66, 497 P.2d 1284, 1286 (1972).

MATERIAL FACTS AS ALLEGED BY COMPLAINANT

Granby Ranch Metropolitan District (“GRMD”) is a special district located in Colorado. It was created in 2003, and services 362 residential lots spread across 232 acres of residential land, primarily located on the north side of the Granby Ranch Ski Resort. (Complaint at ¶ 10.) Charles Wolfersberger is GRMD’s District Manager and he served as GRMD’s designated election official for the GRMD 2023 Special District Election. (*Id.* ¶ 11.) On March 14, 2023, Wolfersberger filed a complaint against Husch Blackwell alleging that Husch Blackwell had submitted requests to GRMD under the Colorado Open Records Act (“CORA”), that these requests were election-related, and that Husch Blackwell was an unregistered Political Committee under Colorado law. (*Id.* ¶ 12.) After investigating the Wolfersberger complaint, the Elections Division filed a Motion to Dismiss the complaint with the Deputy Secretary of State. The Deputy Secretary denied the Motion to Dismiss to the extent that the Wolfersberger complaint alleged that Husch Blackwell may have made contributions to one or more candidates in the GRMD May 2023 election. (*Id.*

¶ 13.) As a result, the Deputy Secretary directed the Elections Division to conduct additional investigation into the Wolfersberger complaint. (*Id.* ¶ 14.)

Thereafter, a second campaign finance complaint was filed by Natascha O’Flaherty, a candidate in the May 2023 GRMD board election. In her complaint, O’Flaherty alleged that Husch Blackwell, Nick Raible, and two real estate developers, GR Terra LLC and GRCO LLC, had committed campaign finance law violations. (*Id.* ¶¶ 15-16.) In 2023, Husch Blackwell briefly represented two candidates, Matthew and Roxanne Hoover, for the May 2023 GRMD board election. The scope of Husch Blackwell’s representation was limited to advising on compliance with campaign finance laws and regulations. The Hoovers submitted self-nomination forms to GRMD on February 25, 2023, but GRMD rejected the self-nomination forms on the grounds that the Hoovers were not eligible for election. (*Id.* ¶¶ 19-20)

In 2022 and 2023, Husch Blackwell made several CORA requests to GRMD, including some requests that sought materials related to either the 2022 or 2023 GRMD board elections. (*Id.* ¶ 25.) In 2022, Husch Blackwell submitted five CORA requests to GRMD, including requests for copies of all self-nomination forms submitted for the GRMD May 2022 Special District Election and a request for eligible electors for the May 2022 Special District Election. (*Id.* ¶ 26.) In 2023, Husch Blackwell submitted 26 CORA requests to GRMD, including requests for all self-nomination forms submitted for the May 2023 GRMD board election and a request for GRMD’s mail ballot election plan, the lottery results for ordering the candidate names on the ballot, and a copy of the certified ballot. (*Id.* ¶ 27.) Husch Blackwell paid \$480 to obtain the materials sought in its CORA requests and billed its client approximately \$3,600 for the initial CORA requests and follow up correspondence. (*Id.* ¶ 28.) Husch Blackwell declined to identify the client who paid

for the requests.¹ (*Id.* ¶ 29.) Husch Blackwell confirmed that it was not paid to make the CORA requests by Headwaters Metropolitan District, Matthew Hoover, Roxanne Hoover, or any other prospective or actual candidates in the GRMD May 2023 board election. (*Id.* ¶ 30.)

On September 11, 2023, the Elections Division moved to dismiss both the Wolfersberger and O’Flaherty complaints. (*Id.* ¶ 31.) On October 16, 2023, the Deputy Secretary granted the motion to dismiss in part and denied the motion in part, concluding that there was insufficient evidence to support the claims against Nick Raible, GR Terra LLC, GRCO LLC, or Headwaters Metropolitan District. (*Id.* ¶¶ 32-33.) With respect to Husch Blackwell, the Deputy Secretary denied the Motion to Dismiss and directed the Elections Division to file a Complaint “on the issue of whether Husch Blackwell and/or its unidentified client violated the reporting requirements for independent expenditures.” (*Id.* ¶ 34.) “Specifically, the Deputy Secretary found it ‘plausible that the materials obtained through the CORA requests were likely used for the purpose of expressly advocating for or against a candidate for the GRMD board by the undisclosed client,’ and ‘[b]ecause the amount the client paid for the CORA work is more than \$1,000, Husch Blackwell’s work may constitute a contribution to an independent expenditure committee.’” (*Id.* ¶ 35.)

ARGUMENT

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

Based upon the factual allegations set forth above, the Complainant has asserted two claims for relief: (1) failure to register an independent expenditure committee under § 1-45-107.5(3)(a),

¹ Husch Blackwell was not authorized to reveal the identity of its client. Without such authorization, revealing the identity of Husch Blackwell’s client would violate Husch Blackwell’s obligations of confidentiality under Rule 1.6 of the Professional Rules of Conduct.

C.R.S.; and (2) failure to report an independent expenditure under § 1-45-107.5(4)(a), C.R.S. (*Id.* ¶¶ 40-51.) Both of these claims are dependent upon the same allegation: “The 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.” (*Id.* ¶¶ 43 and 49)(emphasis added).

A. The Deputy Secretary Already Dismissed the Claim that Husch Blackwell Committed an Expenditure.

In the Complaint, the Elections Division gives short shrift to the Deputy Secretary’s initial decision evaluating the Wolfersberger complaint. In his April 3, 2023 Order, the Deputy Secretary dismissed Wolfersberger’s complaint to the extent he alleged that Husch Blackwell made an expenditure that should have been reported. (Election Division Case No: 2023-03, Order Denying Motion to Dismiss at 5-6.) As properly recognized by the Deputy Secretary: “[a]s various judicial decisions have highlighted, [the constitutional definition of expenditure] depends on whether the spending is ‘for the purpose of expressly advocating’ in favor or against a candidate or ballot measure.” (*Id.*)(citing *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 26, 269 P.3d 1248, 1255; *Campaign Integrity Watchdog LLC v. Colo. Republican Party Indep. Expenditure Comm.*, 2017 COA 32, ¶ 25, 395 P.3d 1192, 1197).

The Deputy Secretary continued: “Moreover, the law is clear that ‘express advocacy’ is limited to speech that contains either the ‘magic words’ which explicitly exhort the audience to vote for or against a candidate in an upcoming election, or substantially similar synonyms of those ‘magic words.’” (*Id.* at ¶ 6)(citing *Colo. Ethics Watch*, 2012 CO ¶ 26 (citing *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976)); *Campaign Integrity Watchdog v. All. For a Safe & Indep. Woodmen Hills*, 2018 CO 7, ¶ 25, 409 P.3d 357, 362). Accordingly, the Deputy Secretary concluded: “[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.**” (*Id.*)(emphasis added). Because Wolfersberger’s complaint made no allegation and could not support any reasonable inferences based upon his allegations that Husch Blackwell had paid for express advocacy that explicitly exhorted voters in GRMD to vote in a particular way on the candidates seeking election to the board, the complaint failed to support a factual and legal basis for his claim that Husch Blackwell had made an expenditure that it failed to report. (*Id.*)

In his October 16, 2023 Decision denying the Elections Divisions’ second motion to dismiss the consolidated complaints filed by Wolfersberger and O’Flaherty, the Deputy Secretary does not overturn his previous Decision dismissing Wolfersberger’s claim that Husch Blackwell had made an expenditure that it failed to report. Moreover, the entire discussion regarding express advocacy is conspicuously absent from the October 16, 2023 Decision. The Deputy Secretary never vacated his prior order dismissing the claim that Husch Blackwell made an expenditure that should have been reported. The claim was disposed of on April 3, 2023. For the same reasons initially recognized by the Deputy Secretary, the Court must reach the same conclusion in dismissing the Complaint.

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

Assuming the filing of the O’Flaherty complaint and the Elections Division’s subsequent investigation into the Wolfersberger and O’Flaherty allegations somehow revived the claim that Husch Blackwell made an expenditure that it failed to report in violation of Colorado law, the

Complaint must still be dismissed. As set forth above, the statutory definition of “expenditure” requires that the spending be “‘for the purpose of expressly advocating’ in favor or against a candidate or ballot measure.” (*Id.*)(citing *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 26, 269 P.3d 1248, 1255; *Campaign Integrity Watchdog LLC v. Colo. Republican Party Indep. Expenditure Comm.*, 2017 COA 32, ¶ 25, 395 P.3d 1192, 1197).

The Complaint fails to allege: (1) that Husch Blackwell actually engaged in express advocacy; (2) any explanation of how Husch Blackwell (or its client) engaged in express advocacy for or against any candidate for the GRMD board; and (3) the identification of any candidate that Husch Blackwell advocated for or against. At best, the Complaint alleges that Husch Blackwell incurred nominal expenses in making CORA requests and billed its client for CORA requests, some of which were tangentially related to the 2023 GRMD board election and many others of which were totally unrelated to the GRMD May 2023 board election.² These allegations are insufficient to state a claim against Husch Blackwell.

Instead of providing the necessary factual allegations to support its claims, the Elections Division alleges as follows: “[s]pecifically, the Deputy Secretary found it ‘plausible that the materials obtained through the CORA requests were likely used ‘for the purpose’ of expressly advocating for or against a candidate for the GRMD board by the undisclosed client,’ and ‘[b]ecause the amount the client paid for the CORA work is more than \$1,000, Husch Blackwell’s work may constitute a contribution to an independent expenditure committee.’” (Compl. at ¶ 35.) At most, the Complaint contends that it was plausible that unidentified materials obtained through

² To the extent the claims asserted against Husch Blackwell relate to the GRMD May 2022 board election, such claims are time barred.

the CORA requests were potentially used for the purpose of expressly advocating for or against an unidentified candidate for the GRMD board. This conclusory allegation is nothing more than pure speculation. The Elections Division must allege facts sufficient to rise above a purely speculative level to avoid dismissal. *Defend Colorado v. Polis*, 2021 COA 8, ¶ 42, 482 P.3d 531.

The Complaint is devoid of facts identifying how Husch Blackwell or its client engaged in any express advocacy. In fact, the Complaint does not identify what materials obtained through the CORA requests were used for express advocacy or how they were used. 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. Indeed, the Complaint fails to even identify the specific candidate that Husch Blackwell allegedly advocated for or against, or how Husch Blackwell advocated for or against that candidate. The Elections Division summarily alleges that the Deputy Secretary concluded there was a plausible claim that Husch Blackwell made an expenditure, but does not explain how or why the Deputy Secretary reached this conclusion. 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 Elections Division's conclusory allegations cannot be accepted as true. There are no allegations connecting Husch Blackwell's CORA requests to any actual express advocacy for or against anyone. Without these critical allegations, the Complaint must be dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

For the reasons set forth herein, Husch Blackwell LLP respectfully requests that the Elections Division Complaint be dismissed with prejudice.

Respectfully submitted this 1st day of February, 2024.

HUSCH BLACKWELL LLP

/s/ Jamie H. Steiner

Jamie H. Steiner, #49304
1801 Wewatta Street, Suite 1000
Denver, Colorado 80202
Telephone: 303.749.7200
Fax: 303.749.7272
jamie.steiner@huschblackwell.com

CERTIFICATE OF SERVICE

This is to certify that I will cause the within filing to be served by electronic service the 1st day of February, 2024, addressed as follows:

Peter G. Baumann
Senior Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Peter.baumann@coag.gov

Charles Wolfersberger
12210 Brighton Rd., #8
Henderson, CO 80640
charles@wolfersbergerllc.com

Natascha O'Flaherty
PO Box 321
Granby, CO 80446
natascao@comcast.net

/s/ Ann Stolfa
Senior Paralegal