COLORADO INDEPENDENT ETHICS COMMISSION
Complaint No. 13-11

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compass Colorado and Alexander Hornaday,

Complainants,

vs.

John W. Hickenlooper,

Respondent.

This matter comes before the Independent Ethics Commission (the "IEC" or "Commission") on a complaint filed by Compass Colorado ("Compass") alleging violations of the gift ban provisions of Article XXIX of the Colorado Constitution ("Gift Ban")and ethical violations of "other standards of conduct and reporting requirements as provided by law" ("other Standards of Conduct" provision). The essence of the complaint is that the Governor hosted and attended the 2013 conference of the Democratic Governors Association ("DGA") in Aspen Colorado, accepted gifts in the form of dinners, meals/snacks and lodging that exceeded the value of $53 allowed under the Gift Ban, and violated various standards of conduct by allowing his office staff, while on official duty, to prepare briefing notes for his use while speaking at the conference.

At the time Compass filed the complaint, it also provided the media with a copy of the complaint. The Governor filed a response and requested that the IEC

find the complaint frivolous and dismiss it. The IEC made an initial determination of non-frivolousness and proceeded to investigate the complaint. The investigation included a review of stipulated facts agreed to by the parties, written discovery conducted between the parties and interviews conducted by an investigator retained by the IEC.

The Governor filed a Motion: (1) to Reconsider Non-Frivolous Determination, (2) to Dismiss for Lack of Subject Matter Jurisdiction, (3) to Dismiss for Failure to State a Claim, and (4) for Summary Judgment. On April 14, 2014, the IEC heard argument on the Motion for Summary Judgment from counsel for both parties. The IEC reviewed all pleadings, discovery, exhibits and investigation. After deliberating, the IEC voted 4-1, with Commissioner Smith dissenting, to grant the Respondent's Motion for Summary Judgment.

For the reasons set forth below, the IEC has determined that based on the material facts at this point in the proceeding, the Complainants cannot prevail as a matter of law, and thus the IEC enters judgment in favor of Governor Hickenlooper and dismisses Complaint 13-11. The IEC denies the Governor's request to reconsider the IEC's non-frivolous determination and to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The Commission makes the following findings of facts and conclusions of law:

I. Findings of Fact

A. The Democratic Governors Association

1. The Democratic Governors Association ("DGA") is a not-for-profit entity organized as a political organization pursuant to 26 U.S.C. § 527. The DGA receives more than 5% of its funding from for-profit sources.

2. According to the DGA's website: "Founded in 1983, the Democratic Governors Association (DGA) is an independent voluntary political organization organized to support Democratic governors and candidates across the nation. As the only organization dedicated to electing Democratic governors and candidates, the DGA participates at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages. The DGA also provides expert advice in policy areas to Democratic governors and candidates, with several policy conferences a year on topics such as biotechnology and life sciences and the new energy economy. The DGA is proud to support the 22 Democratic governors who hold office now."

3. Each of the 22 Democratic Governors currently in office is a member of the DGA. No Republican governor is a member of the DGA.

4. During 2013, Governor Hickenlooper was the Vice-Chair of the DGA.

B. The DGA's 2013 Summer Policy Conference

5. The DGA's 2013 Summer Policy Conference was held in Aspen, Colorado. Its schedule began at 6:00pm on Friday, July 12, and ended on Saturday night, July 13.

6. The Governor was host of the DGA Summer Policy Conference.

7. The Governor's personal campaign staff working on campaign salaries conducted the advance planning of the DGA summer conference. No state resources were used to locate the venue, plan the conference, create the invitation lists, track attendance, or plan meals.

8. The Governor's scheduler is responsible for scheduling all of the Governor's activities. Compass concedes that the use of the scheduler's time is not an issue in this matter.

9. The Governor ate and drank at the opening reception, Saturday Breakfast, Saturday lunch, closing reception and Saturday dinner.

10. The value of the meals and lodging were over $53.

11. The Governor attended the following DGA Summer Policy Conference events:

- Opening Reception on Friday, July 12, 2013,
- Breakfast on Saturday, July 13, 2013,
- Roundtable Policy Discussion 1: Balancing Budgets: States Living Within their Means on Saturday, July 13, 2013,
- Roundtable Policy Discussion 2: Creating Jobs and Delivering Affordable Energy to Homes Across America on Saturday, July 13, 2013,
- Roundtable Policy Discussion 3: Expanding the Economy: Business and Government Working Together to Invest in our Community on Saturday, July 13, 2013,
- Lunch on Saturday, July 13, 2013,
- Closing Reception on Saturday, July 13, 2013, and
- Dinner on Saturday, July 13, 2013.

12. The Governor contends that he participated in the DGA Summer Policy Conference and addressed the following topics:

- First Roundtable Policy Discussion: the State can be business minded even though it is not a business; Colorado requires a balanced budget

and has strict debt limitations; for most tax policy changes in Colorado a vote is required; one of the most important things is to avoid building up permanent operating obligations;

- Second Roundtable Policy Discussion: the economy, security and climate are interrelated; Colorado has diverse energy resources, both traditional and renewable; innovation in energy; carbon emissions of natural gas; Colorado leads the nation in fracking rules; states, as opposed to the federal government, can take the lead in energy policy; global implications for energy development; states can listen to each other; reliance on the science;
- Third Roundtable Policy Discussion: as a brewery owner I learned the value of good government; there are no margins in making enemies; work with a diverse group of people; government should listen to the people as customers.

13. We disagree with the Governor's contention that the DGA summer conference is not primarily a partisan event. There is little dispute that the DGA and its policy conferences are partisan. They are organized by an overtly partisan sponsor; they are hosted by members of only one party; both the DGA and the policy conferences are used, in substantial part, to raise money for one party, to advance a partisan agenda, to enact policies favored primarily by one party and to create opportunities for the members of one party only for access to donors, constituents, supporters and industry.

14. We also disagree with Compass' contention that the conference serves no valid policy purpose. There is relatively little dispute that substantial policy discussions occur at these conferences. There is nothing inconsistent with holding a partisan affair and also working on, discussing or developing public policy. By its nature, our political system encourages the incumbent party and the loyal opposition to gather together, develop competing policy proposals and seek to convince themselves and others of the wisdom of their views. That is so even when the discussion involves the tactics of obtaining the power to enact these policies. To divorce the process of obtaining, from the ends of exercising, the levers of power in a democratic system is to create an artificial distinction. The agenda for the DGA spring conference, the allegations themselves, and the information obtained by the IEC support the view that there is a substantial policy component to the conference.

15. We further presume that there is a substantial partisan and political purpose to the DGA summer conference and a substantial policy purpose as we define it above.

16. The use of *de minimis* state resources to prepare briefing notes for an event with a substantial policy component does not violate any ethical standard, even if there is a substantial political or fund raising activity, and therefore, a private component as well.

II. Conclusions of Law

1. Summary judgment is proper when the pleadings, affidavits, depositions or admissions show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of establishing the absence of a genuine issue of material fact. *Cont'l Air Lines v. Keenan,* 731 P.2d 708, 712 (Colo. 1987). This can be accomplished by showing that there is no record evidence supporting the nonmoving party's case. *Schultz v. Wells,* 13 P.3d 846, 848 (Colo. App. 2000).

2. Factual disputes will not defeat an entry of summary judgment if the disputed facts are not material to the outcome of the case. *Svanidze v. Kirkendall,* 169 P.3d 262, 264 (Colo. App. 2007). A material fact is one that will affect the outcome of the case. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). A conclusory statement made without supporting documentation or testimony is insufficient to create an issue of material fact. *Suncor Energy (USA), Inc. v. Aspen Petroleum Prods., Inc.*, 178 P.3d 1263, 1269 (Colo. App. 2007). (Stating that "a genuine issue of fact cannot be raised simply by means of argument by counsel.") *People in Interest of J.M.A.*, 803 P.2d 187, 193 (Colo. 1990)); (providing that "Mere conclusory statements are not sufficient to raise genuine factual issues.") *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 858 (Colo. App. 2007).

3. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* Failure to meet this burden will result in summary judgment for the moving party. *Woodward v. Bd. of Dir. of Tamarron Ass'n of Condominium Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007). All facts must be viewed in the light most favorable to the nonmoving party and all favorable inferences must be drawn in its favor. *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269, 270 (Colo. App. 2008).

4. The Governor is a "public officer" as defined by Colorado Constitution Article XXIX section 2(6), and was subject to the Commission's jurisdiction at the time of the events in question.

5. Compass does not claim that the Governor violated Article XXIX by using state resources in the form of transportation to travel to and from the Conference. The Governor is exempted specifically from the normal restrictions on use of state

resources for travel. *See e.g.* § 1-45-117(2), C.R.S (permitting the Governor's use of state aircraft and motor vehicles and security officers paid by the State).

6. Compass asks to apply the Fair Campaign Practices Act ("FCPA") as an "other standard of conduct" regarding the use of staff for an event that has a substantial partisan purpose or which involves, at least indirectly, partisan fund raising activities. On its face, the Gift Ban specifically excludes campaign contributions from its prohibitions. Colo. Const. Art. XXIX, § 3(3)(a). We, therefore, decline to exercise jurisdiction in this instance.

7. With respect to meals and conference fees, Art. XXIX § 3(3)(e) exempts such items from the gift ban when the recipient appears as a speaker as part of a scheduled program. In this case, the Governor appeared as a conference speaker throughout the DGA Summer Policy Conference and is thus exempted from the gift ban.

8. Article XXIX, § 3(1) of the Colorado Constitution states, "No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who accepted or received the money, forbearance or forgiveness of indebtedness." It is undisputed that the Governor acted as the host for the event and in so doing, he helped plan the event, set the agenda, open the conference and close the conference. Such activities provided valuable consideration equal to or greater than the costs of the Governor's lodging. For this reason, the Commission finds the Governor did not violate the gift ban provision of the Colorado Constitution.

THEREFORE, the Commission grants the Motion for Summary Judgment in favor of the Respondent and dismisses Complaint 13-11.

The Independent Ethics Commission

Rosemary Marshall, *Chairperson*
Matt Smith, *Vice Chairperson,* dissenting
Bob Bacon, *Commissioner*
William J. Leone, *Commissioner*
Bill Pinkham, *Commissioner*
Dated: July 23, 2014

Commissioner Smith dissenting:

THIS MATTER comes before the Commission upon the Respondent's Motion to Reconsider Non-Frivolous Determination, to Dismiss for lack of Subject Matter Jurisdiction, to Dismiss for Failure to State a Claim and for Summary Judgment. The matter was first heard during the Prehearing Conference on Complaint 13-11 held on March 31, 2014. The matter subsequently was continued to the Prehearing Conference on Complaint 13-11 held by the Commission on April 14, 2014. Upon submission of documents generally identified as "staff documents" previously exchanged by the parties under a confidentiality agreement, the Commission deliberated on matters in the record, primarily as a Motion for Summary Judgment.

The issues before the Commission concern whether the Governor's attendance at the Democratic Governors' Association conference in Aspen, Colorado on July 12 and 13, 2013 violates the "gift ban," and secondly, whether the Governor's staff time to plan, travel and attend the conference is an ethical violation under the jurisdiction of the Commission by application of the "other standards of conduct" provision of Article XXIX of the Colorado Constitution, namely the Fair Campaign Practices Act.

1. GIFT BAN

A. Governmental Purpose.

The initial question for a gift ban analysis is whether a gift was made to a covered individual or whether a gift is to a governmental entity. The initial analysis was carved out and created by the Commission in Position Statement 08-02. Subsequently, the Commission modified the test for determining whether a governmental exemption should apply in Position Statement 12-01. Regardless of the approach, the governmental purpose test is a prerequisite to applying the governmental exception in Position Statement 12-01.

"Reimbursement of travel expenses to covered individuals is a prohibited gift unless it is established that such reimbursement does not inure to the benefit of the covered individual but rather to the governmental entity, department, agency, or institution that employs the covered individual. At the outset, the covered individual should consider whether a public benefit is conferred to a governmental entity as distinct from an individual benefit conferred to the covered individual. Position Statement 12-01, p. 5. (Emphasis added.)

The facts in the present case show that the invitation to attend the Aspen Conference came to John Hickenlooper, as the Governor of Colorado, because of his affiliation with the Democratic Party. This fact is undisputed. John Hickenlooper is one of 22 Governors currently holding office in the country, and as such, is a member of the Democratic Governors' Association ("DGA"). *See*, Stipulated Facts. Benefits, if any, to be derived from the event would not inure to the benefit of the State of Colorado, but rather to John Hickenlooper one of 22 Democratic governors. Events such as the Aspen Conference are typically held in the state of an incumbent Democratic Governor. *See*, DGA letter of March 28, 2014. A governmental purpose was not extended to the State of Colorado but rather to Democratic Governor John Hickenlooper to attend the DGA Aspen Conference. The governmental entity requirement of Position Statement 12-01 has not been established.

B. Gift to a Covered Individual.

If a grant for conference related expenses is not qualified for governmental purposes under Position Statement 12-01, the next issue to be analyzed under the gift ban provisions of Article XXIX is whether there has been a gift to a covered individual. It is not disputed that Governor Hickenlooper is a covered individual as defined under Article XXIX. The Governor is a "public officer" as defined by Section 2(6) of Article XXIX.

Section 3(2) of Article XXIX provides:

> **(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars ($50)** (Currently $53) **in any calendar year, including but not limited to, gifts, . . . without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.** (Emphasis added.)

Conference related expenses would be considered a "gift" under the gift ban. The fact that article XXIX contains express exemptions for travel and conferences make it all the more clear that conference related expenses were contemplated by the gift ban in Section 3. *See,* Colo. Const., Art. XXIX, sec. 3 (3)(e and f). Conference related expenses accepted or received by a covered individual are prohibited by Article XXIX unless they fall within a stated exception.

C. Conference Fees as Consideration.

Respondent contends that work provided by him before and after the Aspen Conference is at least equal to if not more than the benefit he received from the DGA. The letter from the DGA dated 3/28/14 would tend to factually bolster this argument.

This argument is not novel, and has previously been rejected by the Commission. *See,* Advisory Opinion 10-06 at pages 3-4. There is no doubt that there likely is some value involved in preparing for and attending a conference by covered individuals. However, the Commission has long recognized that such an expansive reading of the consideration provision in Section 3 of Article XXIX would swallow the gift ban and remove any need for the specifically stated travel exceptions that follow. If such an expansive reading of the consideration exception were applied, every covered individual would be exempted from the gift ban regardless of their role in the event to the full extent that the covered individual and the host might agree to the value of their participation. Additionally, the Commission has interpreted conference attendance in circumstances where the invited guest may serve as the "draw" for others to attend and pay conference fees. *See,* Advisory Opinion 10-14. Neither preparation for nor mere attendance at an event meets the consideration test for attendance at a conference.

Opening the door to include the 'consideration' provision of Article XXIX to an undefined standard of "more than mere attendance" is contrary to Advisory Opinions 10-06 and 10-14 and contrary to a reading of the travel exceptions contained within the four corners of Article XXIX. Ironically, the more "staff time" used to prepare for hosting the event, the more difficult it becomes to apply the rationale for the *de minimis* standard presented in the Fair Campaign Practice defense addressed in Section 2 which follows.

D. Exception 3(3)(e) to the Gift Ban.

Respondent contends that he was part of the scheduled program and is entitled to the exception set forth in exception 3(3)(e) of Article XXIX, which provides:

(e) Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the

recipient appears to speak or to answer questions as part of a scheduled program;.... (Emphasis added.)

On its face, exception 3(3)(e) of the gift ban provides that the cost of admission, food or beverages consumed at a reception, meal or meeting by an organization are exempt if the recipient appears to speak or answer questions as part of the scheduled program. Respondent is correct in his assertion that exception 3(3)(e) makes no distinction whether the reception, meal or meeting is part of a political program or not.

The scheduled program in this case shows Governor Hickenlooper scheduled to speak as part of the program. The agenda for the program is attached to the Complaint which has been stipulated by the parties. Based upon the program, Governor Hickenlooper's acceptance of the admission to the Aspen Conference and his consumption of food and beverages at the programs where he was scheduled to speak or answer questions would not be a violation of the Article XXIX gift ban.

However, what does appear to be in dispute between the parties is potentially the consumption of food and beverages which may have been consumed by Governor Hickenlooper when he was not part of the scheduled program. For its assertion on this matter, Complainants relies upon Letter Ruling 09-06 and Advisory Opinion 10-14, which set forth the proposition that an exception to the gift ban is not a complete waiver for all activities at the event. Complainants contend that Governor Hickenlooper was not part of the scheduled event for the Saturday luncheon and Sponsor Dinner. It has been stipulated that the Governor ate and drank at these activities. Respondent contends that he appeared and participated at every portion of the event. The DGA letter of March 28, 2014 notes that a total meal cost was calculated for the entire conference at $495. On its own, the published schedule does not provide sufficient detail to answer the factual dispute as to the extent of the Governor's participation at the event under exception 3(3)(e). At this juncture in the proceeding, a genuine issue of material fact remains regarding the extent that exception 3(3)(e) applies to portions of the event held on Saturday July 13, 2013. The balance of the meals and drinks for the event would appear to meet the prerequisites of the 3(3)(e) exception to the gift ban and should be dismissed.

The plain language of exception 3(3)(e) fails to include lodging as an exempted expense under the gift ban. By contrast, the language in exception 3(3)(f), applicable to expenses paid by non-profits who receive less than five percent of their funding from for-profit organizations, provides a reasonable expense standard which may

cover lodging that is not included in exception 3(3)(e). The parties have stipulated that the DGA fails to qualify for exception 3(3)(f). *See,* Stipulated Facts.

At present the amount of the lodging is in dispute. Complainants estimate the lodging at $425. *See,* Complaint. Respondent acknowledges that lodging was accepted. However, no amount is acknowledged in either of its responses of October 9, 2013 or December 20, 2013. The DGA letter of March 28, 2014 states that the lodging extended to Governor Hickenlooper for the Aspen Conference was in the amount $1,778.58. At this time, no grounds have been established to exempt the gift of lodging for the conference. However, the amount of such gift has not been factually established. Unless provided in another exception to the gift ban, the acceptance of lodging would appear at this point in the proceeding to be a violation of the gift ban.

E. There is no Statutory Gift Ban

Respondent contends that that the gift ban contained in Article XXIX was effectively narrowed by the adoption of C.R.S., sec. 24-18.5-101(5) first by constraining the Constitutional standard to "private or personal gain" and then by defining that term as an act of influence peddling within the course and scope of public duties. C.R.S., sec. 24-18.5-101(5) provided in pertinent part:

> **(5) (a) Subject to the provisions of paragraph (c) of this subsection (5), the commission shall dismiss as frivolous 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. . .**
>
> **(5)(b)(II) "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 employee.** (Emphasis added.)

This argument is not new to the Commission and the Commission understands the conflict between the statutory language and the Constitution. The Commission consistently has applied the constitutional gift ban test in all previous decisions since its inception and has rejected the conflicting gift ban under C.R.S., sec. 24-18.5-101(5). While the legislature may enact legislation to facilitate the operation of

the Commission, the legislature is prohibited from restricting the provisions of Article XXIX or the powers granted by it. *See,* Colo. Const., Art. XXIX, Sec. 9. *See also, Developmental Pathways v. Ritter*, 178 P.3d 524, 533 (Colo. 2008) determining that Article XXIX is self-executing to prevent the legislature from restraining the Commission from enforcing gift bans against general assembly members and other governmental employees. The gift ban under C.R.S., sec. 24-18.5-101(5) is in direct conflict with the Article XXIX, Section 3 and the prohibitions in Section 9. As a result, the statutory gift ban has never been applied or enforced.

Respondent's argument to restrict the gift ban to influence peddling under C.R.S., sec. 24-18.5-101(5) is rejected. The jurisdiction of the Commission to determine application of the gift ban is set forth in Section 3, and reinforced in Section 9 of Article XXIX. *See, Gessler v. Grossman,* at 13 CV-030421. (Currently on appeal).

F. Campaign Contribution Exception

Article XXIX 3(3)(a) provides that the gift ban does not apply if the gift or thing of value, is:

(a) A campaign contribution as defined by law; . . .

At this time there are no arguments by the parties before the Commission suggesting that Exception 3(3)(a) may apply to the gift ban portion of this case. A few relevant facts have emerged suggesting that $840,000 was raised at the Aspen Conference and that this money might, but probably would not be used by Governor Hickenlooper in connection with his race for Governor. *See,* DGA letter of March 28, 2014. The DGA is an entity organized under Section 527 of the Internal Revenue Service Code, but there is very little information provided as to the future use of these funds. Counsel appeared to agree during argument that the funds are not contributions for an issue based campaign.

There are no previous interpretations by the Commission on this exception to the gift ban. From the bluebook hearings it appears that the exception was discussed but without interpretation. A sole reference to the exception was made by the author of this opinion to fellow Commissioners requesting that the exception be included within the jurisdictional section of the Commission Rules of Procedure Adopted April 14, 2011. However, that request was denied and is not part of the recorded

rulemaking process. The Commission has not previously considered exception 3(3)(a) in any published opinions.

Exception 3(3)(a) has a purpose and should be given a plain language interpretation as all other exceptions to the Article XXIX gift ban. Based upon its plain language, the exception appears to extend to "covered individuals" to generate their own campaign funds. Campaigns for office may be conducted by persons that are covered individuals (incumbents) under Article XXIX and those that are not. Simply as a matter of fairness, it may be argued that the gift ban provision was not intended to deprive covered individuals from the ability to raise campaign funds on equal footing with non-covered individuals. Campaign contributions as defined by law may be made by lobbyists under Article XXIX, Section 4.

Application of the 3(3)(a) exception at this point in the proceedings would turn the parties' cases upside down. The Complainants have urged the Commission to find fault because campaign activities were conducted at the Aspen Conference. Respondent contends that no campaigning of any sort was under way, at least none for the benefit of the Respondent. The irony is that exception 3(3)(a) appears to grant covered individuals the right to raise funds for their own campaigns. Any donations or contributions received would need to comply with campaign finance recording requirements but would be eligible for exemption under the Article XXIX gift ban. Today, there are no facts before the Commission to apply the 3(3)(a) exception.

2. **Ethical use of State Staff Assistance**

A. Other Standards of Conduct

Complainants aver that Governor Hickenlooper used state staff time to plan, travel and attend the DGA Aspen conference. Article XXIX, Section 5(1), states:

The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law. (Emphasis added.)

The question is whether the facts before the Commission identify ethical issues arising under other standards of conduct or reporting requirements that are within

the jurisdiction of the Commission. The parties direct the Commission to the Colorado Fair Campaign Act ("FCPA") as the ethical standard for this review. Respondent denies that the Commission has jurisdiction to address claims under the FCPA.

B. Authority of the Commission under FCPA

The Respondent contends that the Commission is barred under Article XXVIII, Section 9, Clause 2(a) of the Colorado Constitution from hearing any matter under the FCPA involving the use of staff time for political activities because the exclusive jurisdiction for such claims is vested with the Colorado Secretary of State's office. However, a review of the Constitutional clause and C.R.S., sec. 1-45-111.5(1.5) suggests only a discretionary forum with the Secretary of State's office for such matters by use of the language that "any person may file" with that office for an FPCA violation. There is nothing within the FPCA that bars an ethical review of similar facts by the Commission. As a matter of Constitutional interpretation, the passage of Article XXIX as the subsequent measure controls over a conflicting provision of Article XXVIII, if such a conflict does exist. *People v. Heitzman,* 852 P.2d 443, 446 (Colo. 1993). The specific reference to campaign activities expressly contained in Article XXIX, as referenced above, further suggests that there was no intent by the electorate to deprive the Commission of jurisdiction for FPCA matters, but rather to apply them as enumerated in Article XXIX.

The most harmonious reading of the FCPA and Article XXIX is to acknowledge that FCPA violations may be filed with the Colorado Secretary of State's office, but that ethical matters arising under conduct or reporting requirements under the FCPA may also be filed with the Commission. *See, Rocky Mountain Animal Defense v. Div. of Wildlife,* 100 P.3d 508, 514 (Colo. App. 2004). However in order to do so, the Commission needs to be mindful of the express restrictions placed upon it for "campaign contributions defined by law" contained in 3(3)(a) and 3(4) as outlined above.

C. Ethical Standard under the FCPA

Having determined that the Commission has a role in determining ethical standards under the FCPA, the analysis shifts to the ethical standard that should be applied. C.R.S., sec. 1-45-117(1)(a)(I) provides:

No agency, department, board, division, bureau, commission, or council of the state or any political subdivision of the state shall make any

contribution in campaigns involving the nomination, retention, or election of any person to any public office.... (Emphasis added.)

The FCPA carefully sets forth interpretations of the act, distinguishing issue based activities from campaign based activities, and providing guidance to policy making responsibilities and minimal expenditures which may be made. The act even allows campaign expenses inadvertently entered to be corrected for a period of 10 days. See, C.R.S., sec. 1-45-117(3).

Cases interpreting the FCPA have been cited by the parties. The case which appears most illuminating to the Commission at this point in the proceeding is the *Matter of Dick Sargent v. Governor Romer*, OS 97-14. The case is relevant because it involved the scheduling and travel related services of staff for the former Governor's participation in his Democratic National Committee functions. The ALJ in that proceeding announced a *de minimis* standard for the scheduling activities of the Governor's staff of less than one hour per week. The case contains an ethical standard regarding the use of state staff time in coordinating activities with the Democratic National Committee. It may or may not be the only relevant FCPA standard applicable to the current case, but based upon the facts in the record, it tracks the ethical question in the current case closely.

D. Applying the *De Minimis* Staff Standard

The difficulty in applying the OS 97-14 standard to the present case is that there has been little effort to establish the activities, time spent and purpose of the staff in preparing for and participating at the event. At this point in the proceedings it appears that the staff participants have been identified either in the investigative interviews or by the parties disclosures, but it is unclear who did what and when to apply that activity to the ethical standard. The time estimates of 7 hours and 10 minutes, or 5 hours and 10 minutes (subtracting actual scheduling time) at this stage of the proceeding are strictly provided in the oral and written argument of counsel for the Respondent. These are statements of counsel not supported by the record. And, even if taken to be true, they do not answer the question of what happened the rest of the time and whether these activities fit within the FCPA and the FCPA cases cited by the parties.

At this point in the proceeding, application of facts to the *de minimis* standard of OS 97-14 remains in dispute. All favorable inferences must be drawn in favor of the Complainants. *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269, 270 (Colo. App.

2008). Without more facts, a ruling based upon the OS 97-14 *de minimis* standard may not support dismissal under a Motion for Summary Judgment at this time.

CONCLUSION

At this point in the proceedings, I would:

1. Grant in part the Respondent's Motion for Summary Judgment to dismiss the gift of meals and beverages for the Aspen event except for the Saturday luncheon and Sponsor Dinner under exception 3(3)(e) to Article XXIX;

2. Schedule a hearing to determine the facts concerning the Saturday luncheon and Sponsor Dinner under exception 3(3)(e) of Article XXIX, the amount of lodging received by Respondent and to determine the application of the *de minimis* standard and/or other FCPA standards ethically apply to the Governor's staff's planning, travel and attendance of the Aspen DGA Conference; and

3. Dismiss the balance of Respondent's claims to reconsider the non-frivolous determination, for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted for the reasons stated above.

CERTIFICATE OF MAILING

This is to certify that on the 18th day of July, 2014, I mailed and emailed true copies of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW as follows:

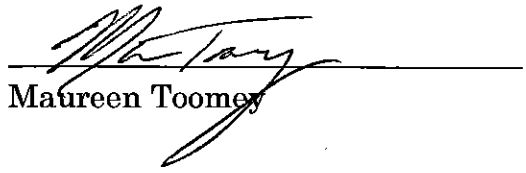
Alexander Hornaday, Esq.
The Law Office of Alexander Hornaday, LLC
1624 Market Street, Suite 202
Denver, CO 80202
ahornaday@hornadaylaw.com

Geoffrey Blue, Esq.
gblue@adroitadvocates.com

Steven A. Klenda, Esq.
sklenda@adroitadvocates.com

Jack Finlaw, Esq.
Office of the Governor
136 State Capitol
Denver, CO 80203-1792

David Spector, Esq.
david.spector@state.co.us



Maureen Toomey