

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO  Court Address: 1437 Bannock Denver, CO 80202	DATE FILED: July 18, 2013
<b>Plaintiffs:</b>  SCOTT E. GESSLER, <i>et al.</i>  vs.  <b>Defendants:</b>  DAN GROSSMAN, <i>et al.</i>	<hr/> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <hr/> Case Number: 13CV31590  Courtroom 409
<b>ORDER RE: DEFENDANTS' MOTION TO DISMISS          PLAINTIFFS' AMENDED COMPLAINT</b>	

**THIS MATTER** comes before me upon the Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, filed on May 9, 2013. In addition to reviewing the related pleadings and entire case file, I have considered applicable statutory and case law. Accordingly, I make the following findings of fact, conclusions of law and enter the following **ORDER**:

### I. Standard of Review

A motion to dismiss is viewed with disfavor, and should be granted only if it appears that the plaintiff would not be entitled to any relief under the facts pleaded. *National Sur. Corp. v. Citizens State Bank*, 593 P.2d 362, 364 (Colo. App. 1978). Courts must accept as true all material facts alleged by the plaintiff and draw all inferences in plaintiff's favor. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099-1100 (Colo. 1998). A motion to dismiss should be granted only when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Id.*

### II. Factual Background

Plaintiffs Scott E. Gessler and Suzanne Staiert submitted a request for an advisory opinion to Defendants Dan Grossman, Sally H. Hopper, Bill Pinkham, Matt Smith, Rosemary Marshall, and the Independent Ethics Commission (the "Commission") on January 2, 2013 regarding the propriety of establishing a legal defense fund. This request was listed on the Commission's agenda but the Commission had not issued an advisory opinion on the issue as of the date of

filing the Amended Complaint on April 19, 2013. The Commission subsequently issued an opinion on May 6, 2013.

Plaintiffs submitted an additional request for an advisory opinion to the Commission regarding the receipt of reimbursement from State funds, as well as payment by a third party, for travel and educational seminars on January 22, 2013. Upon request by the Commission, Plaintiffs submitted additional materials on February 26, 2013. The Commission issued an advisory opinion on this issue on April 8, 2013. This advisory opinion did not address all of the trips listed by Plaintiffs in the request for an advisory opinion. The Commission stated in the opinion that the omitted trips were not addressed due to "similarities between several of these trips and the issues in Complaint 12-07 currently pending before the Commission." The Commission subsequently issued an opinion with regard to the additional trips on June 19, 2013.

Plaintiffs also filed a request for an advisory opinion to the Commission regarding the receipt of reimbursement from State funds for travel and related expenses incurred by the Deputy Secretary Staiert on February 15, 2013. The Commission issued an advisory opinion regarding this request on April 8, 2013.

Plaintiffs filed their Amended Complaint seeking mandamus relief under C.R.C.P. 106(a)(2) to compel Defendants to give advisory opinions with regards to the Plaintiffs' requests on April 19, 2013.

### III. Legal Analysis

Mandamus relief is appropriate when the relief sought is to compel a party to perform a duty arising out of that party's office, trust, or station. C.R.C.P. 106(a)(2). In order to obtain mandamus relief the plaintiff must have a clear right to the relief sought, the defendant must have a clear duty to perform the act requested, and there must be no other available remedy. *Board of Cnty. Comm'rs Of Cnty. Of Archuleta v. Cnty. Road Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000).

The Commission has issued opinions with regards to the requests submitted by Plaintiffs. The request for mandamus relief is therefore moot, and Defendants' Motion to Dismiss is **GRANTED** and this case is **DISMISSED** with prejudice.

Done 18<sup>th</sup> day of July, 2013

BY THE COURT:



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Robert L. McGahey, Jr.  
District Judge

Cc: All Parties (by e-filing)