

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>SCOTT E. GESSLER, individually and in his capacity as the Secretary of State of the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>DAN GROSSMAN, SALLY H. HOPPER, BILL PINKHAM, MATT SMITH and ROSEMARY MARSHALL in their official capacity as members of the Independent Ethics Commission and the INDEPENDENT ETHICS COMMISSION, AND THE INDEPENDENT ETHICS COMMISSION, a tribunal of the State of Colorado,</p> <p>Defendants.</p>	<p>DATE FILED: March 11, 2013 3:47 PM FILING ID: 4032A4F3</p> <p style="text-align: center;"><b>^ COURT USE ONLY ^</b></p>
<p>JOHN W. SUTHERS, Attorney General LISA BRENNER FREIMANN * First Assistant Attorney General RUSSELL B. KLEIN* First Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, Floor Denver, CO 80203 Telephone: 720-508-6385 FAX: 720-508-6037 E-Mail: lisa.freimann@state.co.us Registration Numbers: 31175, 31965 *Counsel of Record</p>	<p>Case No. 13 CV 030421</p>
<p><b>MOTION TO DISMISS</b></p>	

Dan Grossman, Sally Hopper, Bill Pinkham, Matt Smith and  
Rosemary Marshall, in their official capacities as Commissioners, and

the Independent Ethics Commission (collectively the “Commission”), through its counsel, moves to dismiss this matter pursuant to C.R.C.P. 12(b)(1) and (5) for lack of jurisdiction and for failure to state a claim upon which relief may be granted. As grounds for this motion, the Commission states as follows.

### **I. Introduction**

The Secretary’s Complaint contains two claims for relief. The first claim for relief, brought pursuant to “C.R.C.P. 106 and/or C.R.S. § 24-4-106(2),” seeks judicial review to overturn the Commission’s decision denying the Secretary’s motion to dismiss, filed with the Commission as part of the administrative proceeding. The second claim for relief seeks injunctive relief, under “C.R.C.P. 106(a)(4)(V), C.R.C.P. 65 and/or C.R.S. § 24-4-106(8).”

There has been no final action by the Commission - the Commission has not yet completed its investigation and no hearing has been set in the matter. Therefore, the Secretary has not exhausted his administrative remedies. As a result, the Secretary is not entitled to judicial review at this time under either Colorado’s Administrative

Procedures Act (“APA”) or under C.R.C.P. 106(a)(4). Moreover, C.R.C.P. 106(a)(4) is not applicable to this matter because relief under that rule requires an absence of a plain, speedy, and adequate remedy otherwise provided by law and judicial review under the APA constitutes such a remedy.

The only relief the Secretary may have been entitled to in this case is injunctive relief provided for by section 24-4-106(8), C.R.S. This Court already has entered an order denying the Secretary’s request for injunctive relief under section 24-4-106(8). As a result, this case should be dismissed as there is no further relief to which the Secretary may be entitled.

## **II. Argument**

A motion to dismiss under C.R.C.P. 12(b)(1) for lack of jurisdiction should be granted when review is sought improperly in the district court. *Hansen v. Long*, 166 P.3d 248, 250-51 (Colo.App. 2007). A motion to dismiss under C.R.C.P. 12(b)(5) should be granted when accepting all facts pled in a complaint as true, the plaintiff has failed to

state a claim upon which relief can be granted. *Town of Alma v. AZCO Constr. Inc.*, 10 P.3d 1256, 1259 (Colo. 2000).

A. The Secretary's Claim for Judicial Review under C.R.S. section 24-4-106(2) and C.R.C.P. 106(a)(4) Should Be Denied Because There is no Final Action and the Secretary Failed to Exhaust His Administrative Remedies.

The Commission is charged by the Colorado Constitution to hear complaints, issue findings, and assess penalties on ethics issues arising under Article XXIX of the Colorado Constitution and under any other standards of conduct and reporting requirements as provided by law. Colo.Const. art. XXIX, § 5(1). The Constitution provides that the Commission must conduct an investigation, hold a public hearing and render findings on each non-frivolous complaint. Colo.Const. art. XXIX, § 5(3)(c). Any final action of the Commission concerning a complaint is subject to judicial review by the district court for the city and county of Denver. § 24-18.5-101(9), C.R.S.

Colorado Ethics Watch filed a complaint against the Secretary in October 2012. *See Verified Complaint*, para. 6. On November 5, 2012, the Commission determined that the complaint was not frivolous and

proceeded forward with its constitutional mandate to investigate the complaint, as required by article XXIX, section 5(3)(c). *See id.*

On December 20, 2012, the Secretary filed a motion to dismiss the complaint, which the Commission denied. Verified Complaint, para. 8 and 9. As of this date, the Commission neither has completed its investigation of the complaint nor set a hearing date for the matter.

Only “final action” is subject to judicial review. *See* C.R.S. § 24-4-106(2). *Cf. State Pers. Bd. v. Dist. Court*, 637 P.2d 333, 337 (Colo. 1981) (providing that even a claim of unconstitutionality does not give the judiciary the power to interfere with an administrative agency in advance of it taking final action.) In a similar vein, the doctrine of exhaustion of administrative remedies serves as a threshold to judicial review by requiring parties to pursue available administrative remedies before filing suit in district court. *State of Colo. v. Golden’s Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998). If the parties fail to satisfy the exhaustion requirement, the district court is without jurisdiction to hear the action. *Id. See e.g., City and County of Denver v. United Airlines, Inc.*, 8 P.3d 1206 (Colo. 2000) (holding that the district court

lacked jurisdiction over claims filed under C.R.C.P. 106(a)(4) when the plaintiff failed to exhaust its administrative remedies.)

The constitutionally mandated investigation of the complaint filed against the Secretary is ongoing. The Commission has not yet even scheduled a hearing. As a result, the Commission has not heard any evidence to determine whether any of the Secretary's conduct is in violation of Colorado Constitution article XXIX or any other standards of conduct or reporting requirements.

Based on these facts, the Secretary has not exhausted his administrative remedies and the Commission has not issued an order constituting final action. The denial of a motion to dismiss does not constitute final action from which judicial review may be had. *Cf. J.P. Meyer Trucking and Constr., Inc. v. Colo. School Dists. Self Ins. Pool*, 18 P.3d 198, 202 (Colo. 2001) (holding that the court of appeals erred in asserting jurisdiction because the trial court's order denying a motion to dismiss is not a final action). For these reasons, the Secretary's first claim for relief for judicial review under section 24-4-106(2) and/or C.R.C.P. 106(a)(4) should be dismissed.

B. In Addition to His Failure to Exhaust Administrative Remedies, the Secretary is Not Entitled to Relief Under C.R.C.P. 106(a)(4) Because Judicial Review Under the APA is a Plain, Speedy and Adequate Remedy.

In addition to the Secretary's failure to exhaust his administrative remedies, the Secretary is not entitled to relief under C.R.C.P. 106(a)(4), because he cannot prove that he lacks a "plain, speedy and adequate remedy otherwise provided by law." *See* C.R.C.P. 106(a)(4). The Secretary is afforded the right of judicial review of the Commission's final decision. § 24-18.5-101(9), C.R.S. The right of judicial review constitutes a plain speedy and adequate remedy. *See State of Colo. v. Dist. Court of Denver*, 802 P.2d 473, 476-77 (Colo. 1990) (finding that judicial review under section 42-2-122.1(9)(b) and the State Administrative Procedure Act provided a plain, speedy and adequate remedy to review the decision to revoke a driver's license and therefore the remedies of C.R.C.P. 106(a)(4) were unavailable); *People v. Dist. Court of Seventeenth Judicial Dist.* 612 P.2d 87, 89-90 (Colo. 1980) (holding that the State Administrative Procedure Act was the exclusive means through which to seek judicial review of a revocation of a driver's

license since there was no showing that it would not constitute a plain, speedy and adequate remedy); *Vigil v. Indus. Com. of State of Colo.*, 413 P.2d 904 (Colo. 1966) (finding that the failure to seek judicial review according to the statutory provisions for judicial review in the Worker's Compensation Act precluded review under C.R.C.P. 106(a)(2) and (4)). Accordingly, the Secretary is not entitled to relief under C.R.C.P. 106(a)(4).

C. The Secretary's Second Claim for Injunctive Relief Should Be Dismissed Because this Court Already Has Denied the Secretary Relief Under C.R.S. 24-4-106(8).

The only exception to the exhaustion of administrative remedies requirement relevant here is set forth in section 24-4-106(8), C.R.S. See *Colo. State Bd. of Medical Exam'rs v. Colo. Court of Appeals*, 920 P.2d 807, 810 (Colo. 1996); *Chittenden v. Colo. Bd. Of Social Work Exam'rs*, 2012 COA 150M, ¶¶ 16-18 (Colo. App. 2012). Pursuant to that section, a district court may intervene and enjoin agency conduct only upon a showing of irreparable injury and only if the agency proceeding or action clearly exceeds the constitutional or statutory jurisdiction or authority of the agency.

This Court held a hearing regarding whether the Secretary was entitled to relief under section 24-4-106(8), C.R.S. on February 7, 2013. Following arguments, this Court issued an order denying the Secretary injunctive relief because the Commission did not “clearly exceed” its constitutional or statutory jurisdiction or authority. As such, there is not further relief to which the Secretary is entitled until the Secretary exhausts his administrative remedies and there is a final Commission action. Once there is final action, the Secretary can seek relief under section 24-4-106, C.R.S., including injunctive relief. *See* § 24-4-106(7), C.R.S.

For these reasons, the Secretary’s second claim for relief should be dismissed.

### **III. Conclusion**

For the foregoing reasons, the Verified Complaint should be dismissed.

Respectfully Submitted this 11<sup>th</sup> day of March, 2013.

JOHN W. SUTHERS  
Attorney General

*Original signature of Lisa Brenner Freimann  
on file at the Office of the Attorney General*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **MOTION TO DISMISS** upon all parties herein via the ICCES E-filing service at Denver , Colorado this 11<sup>th</sup> day of March, 2013.

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