DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St. Denver, CO 80202 **Plaintiff(s):** MICHAEL COFFMAN, **Defendant(s):** INDEPENDENT ETHICS COMMISSION Linda L. Siderius, #12931 McCONNELL, SIDERIUS, FLEISCHNER, HOUGHTALING & CRAIGMILE, LLC 4700 South Syracuse, Suite # 200 Denver, Colorado 80237 Phone: (303) 480-0400 Attorneys for Defendant Independent Ethics Commission	▲ **COURT USE ONLY** ▲ Case Number: 2009CV1650 Courtroom.: 19

INDEPENDENT ETHICS COMMISSION'S RESPONSE TO EMERGENCY MOTION FOR STAY OF PROCEEDINGS

The Colorado Independent Ethics Commission ("IEC"), through counsel, McConnell Siderius Fleischner Houghtaling & Craigmile, LLC files its Response to Plaintiff's Emergency Motion for Stay of Proceedings as follows:

BACKGROUND

In November 2006, the voters of Colorado passed Amendment 41 which was certified on December 31, 2006 by the Governor as Colo. Const. art. XXIX. This Article, among other issues, created the IEC. The purpose of the IEC "shall be to hear complaints...on ethics issues arising under this article and under any other standards of conduct..." *See, Colo. Const. art. XXIX, Section 5.* The legislature passed C.R.S. §24-18.5-101, et.seq. in 2007 which provided additional authority for the IEC. The members of the IEC were appointed in 2007 and 2008, and on September 1, 2008, Rules of Procedure for the IEC became effective.

On February 13, 2008, a Complaint (the "Complaint") was filed with the IEC by Colorado Ethics Watch ("CEW"). The Complaint alleges certain conduct by then Secretary of

State Michael Coffman ("Coffman") as being in violation of Colo. Const. art. XXIX and other state laws. The allegations contain conduct of Mr. Coffman that occurred after December 31, 2006 and within a year of the filing of the Complaint. The Complaint was held in abeyance until the IEC promulgated its Rules of Procedure. Thereafter, the IEC reviewed and investigated the Complaint. On October 6, 2008, it voted that the allegations as set forth in the Complaint were not frivolous as a matter of law. The IEC made a determination that, if proven, the alleged conduct may be found to be in violation of state ethics laws. The IEC did not make any findings relative to the allegations. The IEC voted to set the Complaint for a hearing. At the time of the vote, one Commissioner recused herself in participating in any proceeding regarding the Complaint.

The matter was initially scheduled for hearing to take place on December 2, 2008. Mr. Coffman and the CEW requested and were granted extensions of time for filing pleadings and for a continuance of the hearing date. The hearing was then set for January 14, 2009, and was subsequently rescheduled for March 6, 2008. This final date was cleared with counsel for both Coffman and CEW.

Generally, there are no prehearing motions permitted in hearings except with the prior written approval of the IEC. *See, IEC Rule of Procedure 8.D.1.* Nonetheless, Coffman filed a written request for the opportunity to file a number of prehearing motions. The IEC granted an Order permitting Coffman to file a Motion to Dismiss, a Motion to Determine Evidentiary Standard and a Motion for Extension of Times. Coffman then filed three Motions: a) Motion to Dismiss; b) Motion to Determine Evidentiary Standard; c) Motion to Transfer to an Administrative Law Judge or, in the Alternative, Motion to Recuse Commissioner Wood. CEW filed responses to all of the Motions. Orders for the Motions have been determined by the IEC and served on Coffman and CEW. An Amended Notice of Hearing was served on the parties on February 12, 2009 providing procedural information for the hearing. Prehearing statements, including proposed exhibits, were filed by IEC and CEW on February 13, 2009.

During the prehearing course, Commissioner Roy Wood determined that it was appropriate for him to recuse himself from further participation in the proceedings. This was done prior to a determination of the IEC on the Motion to Recuse and was noted in the Order. Three Commissioners, which constitutes a quorum, remain to hear the Complaint.

The Plaintiff filed this Emergency Motion for Stay on February 12, 2009 and a Supplement to his Motion on February 13, 2009. For the reasons set forth in the IEC's arguments below, this matter should be dismissed, and an award of costs and attorney's fees pursuant to C.R.S. §24-4-106(8) and must be awarded to the IEC.

ARGUMENT

1. **The Plaintiff has failed to exhaust the administrative remedies required before judicial review is permitted. Thus, the Court does not have jurisdiction to enter an Order staying the proceedings before the IEC.**

Generally, the Plaintiff complains that there are procedural due process issues which prevent him from having a fair hearing, for example, that the IEC no longer can issue subpoenas to compel the attendance of witnesses. He further complains that the IEC does not have jurisdiction to hear testimony on allegations of misconduct that occurred prior to September 1, 2008, or in the alternative, allegations of misconduct that occurred prior to September 1, 2007 based on the date when the IEC Rules of Procedure became effective. He further complains that the allegations do not provide a claim upon which the IEC can act, that the allegations are frivolous as a matter of law and that he will suffer irreparable harm.

It is a well settled axiom that a party must exhaust all mandated administrative remedies before seeking judicial review. *Envirotest Sys. v. Colo. Dept. of Rev.* 109 P.3d 142 (Colo. 2005); *State Pers. Bd. v. District Court* 637 P.2d 333 (Colo. 1981). In the case at bar, the hearing in the matter is pending and the Plaintiff has not exhausted his remedies before the agency. No final decision by the IEC has been rendered yet. The IEC has not heard the evidence to determine if, in fact, any of the alleged conduct of the Plaintiff is in violation of Colo. Const. art. XXIX or any other state codes of conduct. Thus, the Court is devoid of jurisdiction to stay the pending proceedings. *Envirotest, supra; State Pers. Bd., supra.*

The Plaintiff relies on C.R.S. §24-4-106(4) through (9) to argue that the Court has jurisdiction to stay the proceedings. The only section which gives the Court jurisdiction at this stage of the proceedings is C.R.S§ 24-4-106(8) which is discussed below. *Envirotest, supra.* The remaining sections of C.R.S. §24-4-106 relied upon by the Plaintiff provide for judicial review **only** after the agency has made a final determination. *Dept. of Rev. v. District Court,* 470 P.2d 864 (Colo. 1970); *Moore v. District Court,* 518 P. 2d 948 (1974); *State Pers. Bd, supra; Envirotest, supra; T & S Leasing v. District Court,* 728 P. 2d 729 (Colo. 1986); *Bd. Of Cosmetology v. District Court,* 530 P. 2d 1278 (Colo. 1974). In the case at bar, the sections of C.R.S. § 24-4-106 relied on by the Plaintiff to seek judicial review are not applicable at this stage of the proceedings because there has been no final agency action. Indeed, the Plaintiff does not identify what action taken by the IEC is deemed to be final action. There have only been decisions made by the IEC in the prehearing stage of the proceedings. His claims that the IEC prehearing decisions deny the Plaintiff due process cannot avoid the requirement to exhaust administrative remedies prior to seeking judicial review.

The Plaintiff alleges that there are jurisdictional issues which must be resolved prior to

the hearing before the IEC can proceed to hearing in the matter. These issues do not rise to the requirements of C.R.S.§24-4-106(8). Coffman has already attempted to have the IEC determine that it cannot hear testimony regarding conduct either prior to September 1, 2007 and September 8, 2008 in his Motion to Dismiss. The IEC reviewed Coffman's arguments and rejected them, concluding that it does have jurisdiction conferred on it by Colo. Const. art. XXIX, Section 5 (3) (a). The IEC has determined it can hear evidence relating to conduct that occurred after December 31, 2006 and within one year prior to the filing of the Complaint, that is February 13, 2008. If Coffman disagrees with the final decision of the IEC as to the dates of the conduct upon which the IEC makes any determination, he has an adequate remedy at law in judicial review. Whether or not the IEC has the jurisdiction as it has determined, is a matter of law that will be subject to judicial review after a complete record has been made at the hearing. There is no compelling reason to determine this jurisdictional issue prior to the hearing as it does not meet the exhaustion exception found in C.R.S.§ 24-4-106(8).

2. <u>There is only one exception to the statutory exhaustion of administrative remedies requirement which is found in C.R.S. § 24-4-106(8) and the Plaintiff does not meet the requirements for this exception.</u>

The only exception to the exhaustion of administrative remedies requirement is stated in C.R.S. §24-4-106(8) . A district court may intervene only if the agency proceeding or action clearly exceeds the constitutional or statutory jurisdiction or authority of the agency. Further, the party seeking to enjoin the proceedings must show that the agency action will cause irreparable harm. *Envirotest, supra.; T & S Leasing v. District Court, supra.* Plaintiff has not met his threshold requirement of showing irreparable harm or that the IEC is clearly exceeding its constitutional or statutory jurisdiction or authority as required by C.R.S. §24-4-106(8).

i. <u>The Plaintiff cannot show irreparable harm as required by C.R.S § 24-4-106(8);</u>

The Plaintiff alleges that he will suffer irreparable harm if the proceedings are not stayed. However, mere allegations, without further evidence, do not rise to the level of irreparable harm. The Plaintiff argues that the continued proceeding at the IEC gives rise to a stigma of a pending ethics complaint, distraction from public service, public suspicion, scorn to name a few of his claims. Arguably, the Plaintiff has suffered all of these claims since at least from the time the Complaint was filed. These claims are not new simply because the IEC is proceeding with a hearing.

Having the hearing does not give rise to any new facts that support these arguments. Delaying the proceeding as requested by Mr. Coffman will not cause the emotional distress, stigma, or scorn to go away. Indeed, delay only prolongs those claims. Further, these claims have an adequate remedy at law, which is appropriate

judicial review of the final action. The adequate remedies at law exist under C.R.S § 24-4-106 (2), (3), (4), (5) and (7).

ii. <u>The IEC is not acting clearly beyond its constitutional or statutory jurisdiction as required by C.R. S. §24-4-106(8).</u>

The Plaintiff argues that the IEC is without jurisdiction to hear the complaint. He first argues that the Supreme Court's findings in *Developmental Pathways,* 178 P.3d 527, deny the IEC jurisdiction over conduct that occurs prior to September 1, 2008 or in the alternative, conduct that occurs prior to September 1, 2007. He argues that in *Developmental Pathways,* the Supreme Court specifically held:

> [The twelve-month] provision essentially sets forth the statute of limitations period for violations under the Amendment. It does not imply that any conduct following the Governor's proclamation of the Amendment on December 31, 2006 could automatically serve as the basis for an ethics complaint. The Commission must first act by, for example, adopting rules governing the complaint process, before there is any enforcement or threat of enforcement.

178 P.3d at 535, n.8. The IEC respectfully disagrees with the Plaintiff's narrow interpretation of this statement by the Supreme Court.

Colo. Const. art. XXIX has been found to be self-executing, meaning that there does not need to be any statute required to implement the provisions of the article. The Supreme Court finds that the "Amendment's provisions contain substantial detail regarding the Commission's authority, as well as the ethical standards which covered individuals must meet." *Developmental Pathways, id. at 532.* Indeed, Colo. Const. art. XXIX and the subsequent statutory provisions of 24-18.5.-101, et. seq. set forth a clear jurisdictional statute of limitations. The plain language found in Colo. Const.art. XXIX that imposes a statute of limitations for the IEC is that the conduct alleged to violate state ethics laws must have occurred within the twelve months prior to the filing of any complaint. The Supreme Court's decision does not change or limit this jurisdictional limitation.

The statement relied upon by the Plaintiff does not suggest that the Supreme Court intended to limit the jurisdiction of the IEC by arbitrarily imposing a time line different than that specified in Colo. Const. art. XXIX, Section 5 (3)(a). The Supreme Court merely determined that the objections of the Plaintiff in the *Developmental Pathways* case were premature and not ripe for adjudication because the IEC had not had an opportunity to interpret Article XXIX or to engage in enforcement. The *Developmental Pathways* decision does not limit the statute of limitations but instead

indicates that before enforcement could commence for the purposes of ripeness of an action, the Commission needed to promulgate rules. The Plaintiff's reliance on *Developmental Pathways* is misplaced.

Generally, the Courts will give deference to an agency's interpretation of its own laws, rules and regulations. *Mile High Greyhound Park v. Racing Comm'n,* 12 P.3d 351 (Colo. App. 2000). *Developmental Pathways, supra.* In the case at bar, the Plaintiff asked the IEC to find it was without jurisdiction to review conduct that fell outside of certain periods of time. The IEC reviewed the arguments of the parties and determined it had jurisdiction conferred upon it by Colo. Const. art. XXIX to hear evidence about conduct that occurs after December 31, 2006 and occurring one year prior to the filing of a complaint. The Plaintiff's disagreement with this interpretation does not support his argument that the IEC is clearly acting outside of its constitutional or statutory authority. This is the very kind of issue that would be subject to review after a final agency action.

3. C.R.S. §24-4-106(8) requires that the Court shall assess attorneys fees and costs if a finding is made that the proceeding contesting the jurisdiction or authority is frivolous or brought for the purpose of delay.

A claim is frivolous if the Plaintiff can present no rational argument based on the evidence or law in support of the claim. *Collins v. Colo. Mountain College*, 56 P.3d 1132 (Colo. App. 2002). Here, the Plaintiff cannot and does not present any argument that overcomes the requirements of C.R.S. §24-4-106(8). The Plaintiff tries to rely on other sections of C.R.S.§24-4-106 that clearly afford judicial review only in instances of a final agency action, not in a case pending before an agency. The Plaintiff has completely ignored the doctrine of exhaustion of administrative remedies required in an agency proceeding before invoking the right to judicial review. He provides no legal support for why the prehearing decisions made by the IEC should not be subject to the exhaustion of administrative remedies.

The legal theories advanced by the Plaintiff are not new or an attempt to extend, modify or reverse existing law which would justify the denial. Indeed, the cases relied upon by the Plaintiff support the defenses to the claims, not the claims. It is well settled law that a party must exhaust administrative remedies available before seeking judicial review. *Envirotest, supra.* In fact, the case law and statutes relied on by the Plaintiff clearly support the arguments found in this Response. The Plaintiff cannot clearly identify what final action has been taken by the IEC upon which to initiate judicial review.

The Court can make a finding that a claim is frivolous if the constitution, statute and case law established the claims lacked "any legal foundation." *City of Littleton v. State*, 832 P.2d 985 (Colo. App. 1991). Here the constitution, statute, and case law support the arguments of the IEC.

It has the authority to hold hearings on ethics complaints which defeats the arguments that it is acting outside of it jurisdictional authority. A myriad of case law supports the exhaustion requirement and there is no credible evidence that the Plaintiff can show that there is irreparable harm that would permit the Court under C.R.S.§24-4-106 to stay the proceedings. *Envirotest, supra.* The Court must award attorneys fees and costs since the claims are frivolous.

The Complaint has been pending at the IEC since February 2008 and set for a hearing since October 8, 2008. The Plaintiff has been aware of the allegations since the filing of the Complaint. It is now, when the hearing is three weeks away, that the Plaintiff has chosen to engage in judicial proceedings in an attempt delay the proceedings. The misplaced reliance on C.R.S. §24-4-106(8) is a thinly veiled attempt at delay. There is no justification for the filing of the Emergency Motion for Stay when the Constitution, statute and case law are clear that this case falls squarely into the requirements for administrative exhaustion.

CONCLUSION

For the reasons set forth above, the Court shall deny the Emergency Motion to Stay the Proceedings and shall grant costs and fees to the IEC.

Dated this 18th day of February, 2009.

/s/ Linda L. Siderius
Linda L. Siderius

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **INDEPENDENT ETHICS COMMISSION'S RESPONSE TO EMERGENCY MOTION FOR STAY OF PROCEEDINGS** was transmitted via LexisNexis File & Serve this 18th day of February, 2009, to the following:

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and transmitted via email to the following:

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/s/ Terri Gonzales

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Court: CO Denver County District Court 2nd JD
Division/Courtroom: 19 - Division 19
Case Class: Civil
Case Type: Declaratory Judgment
Case Number: 2009CV1650
Case Name: COFFMAN, MICHAEL vs. INDEPENDENT ETHICS COM

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Note to Clerk: Linda Siderius is representating the IEC which is a State agency as a Special Assistant Attorney General. Therefore, no fees should be assessed.

Documents List
2 Document(s)

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Document Type:	Access:	Statutory Fee:	Linked:
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Attached Document, 8 Pages **Document ID: 19963035** PDF Format | Original Format

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Independent Ethics Commission's Response to Emergency Motion for Stay of Proceedings

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⊟ Service List (1)

Delivery Option	Party	Party Type	Attorney	Firm	Attorney Type	Method
Service	COFFMAN, MICHAEL	Plaintiff	Friednash, Doug	Greenberg Traurig LLP-Main Account	Privately Retained Attorney	E-Service

⊟ Additional Recipients (0)

⊞ **Case Parties**