

DISTRICT COURT, MESA COUNTY, STATE OF COLORADO 125 N. Spruce St. Grand Junction, CO 81501	
Petitioners: BARBARA CROSSMAN, et al. v. Respondents: CODY DAVIS, JANET ROWLAND, SCOTT MCINNIS in their official capacity as members of the BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY and BRANDI BANTZ, in her official capacity as the designated election official for Mesa County.	DATE FILED: September 23, 2022 11:01 AM CASE NUMBER: 2022CV30323 <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	Case Number: 2022 CV 30323 Div.: 9 Ctrm.: Barrett
<p style="text-align: center;">Order re: Respondents' Motion to Dismiss the Petition Pursuant to C.R.C.P. 12(b)(5)</p>	

This matter comes before me on Respondents Brandi Bantz and the Mesa County Board of Commissioners' (collectively "Respondents") Motion to Dismiss. After reviewing the motion, response, and reply, the Petition, and relevant legal authorities, I enter this Order.

I. Background

The Petition at issue was filed on August 19, 2022. Petitioners are residents of Mesa County (*Pet.* at ¶ 24-25) and are eligible electors. Respondent Bantz is the Designated Election Official ("DEO") for Mesa County, and Respondents McInnis, Rowland, and Davis are the county commissioners for Mesa County. (*Id.* at ¶ 26-29).

The Petition was filed pursuant to C.R.S. § 1-1-113. Among other requests for relief, Petitioners seek a hand count of voting ballots for the November 2022 general election. (*id.* at ¶ 68). In support of this request, they allege the voting equipment in Mesa County is not in compliance with federal and state law. (*id.* at ¶ 59-60). According to Petitioners, and upon their information and belief, a software upgrade was performed on Mesa County's voting equipment in May 2021. (*id.* at ¶ 54). Petitioners allege that "neither the Secretary [of State] nor Dominion backed up, copied, or imaged the hard drives of any Mesa County voting system components to preserve their contents before this upgrade was installed." (*id.*). The upgrade of the voting system software is referred to as a "trusted build." (*id.*).

Petitioners' expert, Mr. Douglas Gould, has reviewed images taken from "at least some" of Mesa County's voting system components. (*id.* at ¶ 55). These images were "caused to be made" in 2021 by Ms. Tina Peters. (*id.*). According to Mr. Gould, he performed a forensic analysis of the images. (*Exhibit 1*, pg. 1). He concluded, from the images he reviewed, the voting equipment is not in compliance with state and federal law. (*id.* at pgs. 8-9). The Petition does not allege who took the images or how Mr. Gould came in possession of the images. Mr. Gould concludes the overwriting of data, which allegedly occurred during the "trusted build", violates applicable law. (*Pet.* at ¶ 60).

In light of these allegations, Petitioners contend Respondents have breached their duties by failing to maintain certain voting records. Petitioners further contend that Respondents will continue to breach their duties during the November 2022 general election.

II. C.R.C.P. 12(b)(5) Standard

Respondents seek dismissal of the Petition on the grounds the Petition fails to state a claim upon which relief can be granted.

In order to survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5), a plaintiff must make factual allegations sufficient to “raise a right to relief ‘above the speculative level’ and provide ‘plausible grounds’” for relief. *Warne v. Hall*, 2016 CO 50, ¶9, 373 P.3d 588, 591 (Colo. 2016), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions” and “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.*, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do’, [n]or does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555, 557 (internal citation omitted).

III. Analysis

C.R.S. § 1-1-113(1) authorizes the filing of a petition when any eligible elector alleges “that a person charged with a duty” “has committed or is about to commit a breach or neglect of duty.” C.R.S. § 1-1-113 does not “impose any duty or function upon any election official, but rather provides a procedural vehicle or method. . .for the adjudication of controversies arising from a breach or neglect of duty or other wrongful

act that occurs prior to the day of an election.” *Carson v. Reiner*, 370 P.3d 1137, 1141 (Colo. 2016).

Pursuant to C.R.S. § 1-1-107(1)(a), the secretary of state (“SOS”) is required to “supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections.” The SOS is charged with enforcing provisions of the Uniform Elections Code and to serve as the chief election official for Colorado. C.R.S. § 1-1-107(1)(b and e).

A “governing body of any political subdivision” may only use voting machines that meet the requirements set forth in C.R.S. 1-5-601 *et seq.* C.R.S. § 1-5-603(1). The county clerk and recorder or the DEO is the custodian of the voting machines. C.R.S. § 1-5-605.5. The county clerk and recorder must “follow the rules and orders promulgated” by the SOS. C.R.S. § 1-1-110(1). The SOS is the only entity that can certify and decertify a voting machine. C.R.S. § 1-5-608.5 and C.R.S. § 1-5-621. In the event a voting machine malfunctions, the SOS “may” authorize a DEO to utilize a hand count of ballots. Additionally, if there is a concern that a voting machine is not functioning properly, a complaint can be lodged with the SOS at any time, including election day, “to determine whether the system complies with the applicable requirements[.]” C.R.S. § 1-5-621(1).

With this backdrop, I conclude the Petition must be dismissed. Petitioners have sued the wrong entities. They have also asked for relief that is not authorized by any rule, case, or statute. While it is true Respondents administer elections, the equipment they use is certified by, updated by, and approved for use by, the SOS. Put differently, Respondents are in no position to change the way ballots are counted (unless they engage in the public rule making process, just as Petitioners could), or how election results are

maintained, absent express approval from the SOS. Respondents do not create the software used in voting machines and they do not install the updates. They did not create the voting machines. They have no duty to certify or decertify a voting machine. All these matters are controlled by the SOS. There is also no allegation that Respondents may use a voting machine that has *not* been certified by the SOS.

Indeed, only the SOS can order, as requested by Petitioners, a hand count of ballots. Petitioners would have me 1) order a hand count of ballots without first following the procedures laid out in C.R.S. § 1-5-621(1) and 2) determine, on my own and without the involvement of the SOS, that the equipment the SOS certified fails to comply with applicable law. Neither of these matters implicate any duty of Respondents. Again, Respondents are in no position to certify or decertify the voting machines. Respondents cannot order a hand count without consulting the SOS. Without authority vested to them by the SOS, Respondents have very little control over the way ballots are counted, in the first instance, at a general election. Because of these facts, they are not failing to breach their duties, nor is there a threat they will breach their duties. I cannot simply step into the shoes of SOS when the SOS is not party to this case and has not been accused of breaching her duty. The SOS is a necessary party to this case. The allegations in the Petition do nothing more than create an illusion of responsibility on the part of Respondents. Consequently, the Petition must fail as a matter of law.

I also cannot grant the relief which requests third party access to the voting machines. There is no law to support this request, and none is offered.

Moreover, there is a specific procedure that I find first must be followed before a petition like the one at issue here can be filed. This procedure requires action, or inaction, from the SOS. That procedure is plainly laid out in C.R.S. § 1-5-621. If an individual has a concern with a voting machine, a complaint must be lodged with the SOS. Once a complaint is lodged, the SOS must respond to it. If the SOS responds in a way that is violative of applicable law, or the SOS fails to respond as required by law, then C.R.S. § 1-1-113 could be implicated. The specific statutory provision in C.R.S. § 1-5-621 controls over the broader provision in C.R.S. § 1-1-113. *Carson*, 370 P.3d at 1141–42. It’s also, as applicable to the allegations here, a condition precedent to C.R.S. § 1-1-113 being triggered. Petitioners, for whatever reason, seek to skip over the requirements C.R.S. § 1-5-621. This they cannot do, and it is fatal to their Petition.

Accordingly, for these reasons and for the additional reasons stated by Respondents, the Motion to Dismiss is **GRANTED** and all future court dates are **VACATED**.

Done this 23rd day of September, 2022.

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'M. Barrett', written over a horizontal line.

Matthew D. Barrett
District Court Judge