

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>DOLCEFINO COMMUNICATIONS, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>GERALD ROME, in his official capacity as Securities Commissioner for the State of Colorado,</p> <p>Defendant.</p>	<p style="text-align: center;">^ COURT USE ONLY ^</p>
<p>CYNTHIA H. COFFMAN, Attorney General ROBERT W. FINKE, 40756* First Assistant Attorney General SUEANNA P. JOHNSON, 34840* Senior Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8thFloor Denver, CO 80203 Telephone: (720) 508-6401 / 6155 FAX: (720) 508-6037 E-Mail: Robert.Finke@coag.gov; Sueanna.Johnson@coag.gov *Counsel of Record</p>	<p>Case No. 2018CV31668</p> <p>Div.: 424</p>
<p style="text-align: center;">MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)</p>	

Defendant Gerald Rome, in his official capacity as Securities Commissioner for the State of Colorado, by and through his counsel, the Colorado Attorney General and undersigned counsel, seeks to dismiss this action pursuant to C.R.C.P. 12(b)(5), and as grounds therefore, states the following:

Certificate of Conferral Pursuant to C.R.C.P. 121, 1-15(8). Undersigned counsel conferred with counsel for Plaintiff, who opposes the relief requested.

INTRODUCTION

This is an action under the Colorado Open Records Act (“CORA”) in which Plaintiff, Dolcefino Communications, LLC, requests an order requiring the Commissioner to produce documents that have already been provided, may be in the custody of another agency, or simply do not exist. Dolcefino has sought information about the amount of restitution or damages the Commissioner has obtained in connection with civil, criminal, or administrative proceedings under the Colorado Securities Act. Such documents – to the extent they exist in the Division’s custody – have been produced. To the extent Dolcefino wants documents about collection efforts, those documents – if they exist – would be with Colorado Central Collections within the Department of Personnel Administration. Because there are *no further documents* to be produced by the Commissioner, Dolcefino’s Complaint should be dismissed for failure to state a claim upon which relief can be granted.

BACKGROUND

Dolcefino has submitted at least ten CORA requests to the Commissioner beginning in 2017 to present. The Commissioner is the head of the Colorado Division of Securities, an agency housed within the Colorado Department of Regulatory Agencies. § 11-51-701, C.R.S.; *Compl.* at ¶¶ 8, 11, 26; *Affidavit of Gerald Rome*, ¶ 1. These CORA requests – using Dolcefino’s own word – seek to “verify” a statement made by the Commissioner as follows: that in “the fiscal year 2015-2016, the division brought 71 enforcement actions that resulted in criminal

and civil sanctions against bad actors, including over \$33 million ordered in damages and restitution back to harmed investors.” *Compl.* at ¶ 7. Dolcefino’s Complaint concerns four CORA requests submitted on March 10, 2017, August 22, 2017, February 26, 2017, and April 12, 2018. *Id.* at ¶¶ 8, 11, 20, 22. In short, these CORA requests have sought documents or information about the amount of restitution or damages that the Commissioner’s enforcement actions have totaled from 2014-2017, and records about the Division’s collection efforts. Dolcefino’s Complaint either acknowledges that documents were produced, *see id.* at ¶ 9, or references letters from the Division that documents do not exist. *Id.* at 23. Thus, based on the arguments below, this Complaint must be dismissed.

LEGAL STANDARD

The standard of review for Rule 12(b)(5) changed significantly as a result of the Colorado Supreme Court’s decision in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). In that case, Colorado has rejected the pleading standards established over 60 years ago by *Conley v. Gibson*, 355 U.S. 41 (1957). *Warne*, 373 P.3d at 595. Under the now outdated *Conley* standard, a motion to dismiss was viewed with disfavor, and a complaint was not subject to dismissal “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Id.* at 591-92 (quoting *Conley*, 355 U.S. at 45-46).

Now under the new standard, when evaluating a motion to dismiss under C.R.C.P. 12(b)(5), a claim must be dismissed if, accepting factual allegations in a

complaint as true, the complaint does not state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Warne*, 373 P.3d 588 at 595 (adopting the federal pleading standard). Under that standard, “plausibility” means that the plaintiff must plead *facts* which allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. Allegations that are legal conclusions, “bare assertions,” or merely conclusory statements are *not* entitled to the assumption of truth. *Id.* at 678–80.

Applying this standard, courts must first separate well-pleaded factual allegations from conclusory allegations or statements. *Iqbal*, 556 U.S. at 679. “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Id.* When a complaint contains well-pleaded *factual* allegations, a court should assume their accuracy and then determine whether they plausibly give rise to a claim for relief. *Id.*

ARGUMENT

I. There is no relief this Court may order under CORA, as there were no documents in which Dolcefino was “denied.”

This lawsuit is premised on Dolcefino’s belief that the Commissioner has withheld or denied documents in response to its CORA requests. That belief is incorrect.

Under § 24-72-203(5)(a), a requester may file a lawsuit under CORA if a “person is *denied* a right to inspect any document . . . or alleges a violation of section 24-72-203(3.5)[.]” (emphasis added). In other words, a CORA lawsuit is authorized only if: (1) the person has been denied records, or (2) the agency has not produced the document in digital format if stored in that manner. As a corollary, the only relief the Court may order under a CORA lawsuit is: (1) a determination that the denial of inspection of records was proper; or (2) a determination that the denial of inspection was improper with attorney fees awarded to the requester. § 24-72-204(5)(b), C.R.S. Because no documents have been denied, and Dolcefino pled no facts under the *Warne/Iqbal* standard to support a violation of § 24-72-203(3.5), C.R.S., the Complaint must be dismissed.

First, The Commissioner has not denied access to any records in its custody and control. The opposite is true. The Commissioner has produced documents responsive to Dolcefino’s requests. Specifically, the March 10, 2017 CORA request (“March Request”) sought documents as follows: (1) a record related to all restitutions, fines, or any other monetary collection levied for enforcement actions brought by the Division from January 1, 2014 to date of request; (2) a document detailing the amount actually received in restitution; and (3) a document detailing the budget of the Division from 2014 onward. *Compl.* at ¶ 8. Dolcefino admits that the Division provided documents, although they were not satisfied with the format and information included in the production. At the time, Dolcefino never

communicated dissatisfaction to the Division. The Division produced two spreadsheets that detailed the amount of restitution or penalties levied and the money recovered during the time period requested. *Compl.* at ¶ 9; *see also Affidavit of Gerald Rome*, ¶ 5, attached as EXHIBIT 1; *Affidavit Exs. A, B*. Dolcefino contends that the data is “unusable.” But a state agency has no obligation to create or manipulate data for a requester’s proffered needs or preference. § 24-72-203(3.5)(b), C.R.S.; *see also Office of the State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420 (Colo. 1999) (holding that there is no duty to manipulate computer-generated data). The data in Affidavit Exhibits A and B were produced in the format used internally by the Division within its custody and control. *Affidavit of Gerald Rome*, ¶ 5. The Division did not hear again from Dolcefino until receipt of the August 22, 2017 CORA request (“August Request”).

The August Request essentially requested updated restitution/damages information and collection efforts that had been produced from the March Request onward. Dolcefino did not communicate their purported dissatisfaction with the previous March 10, 2017 production. Because of pending litigation in a matter captioned *Rome v. HEI Resources, et al.*, Denver District Court case number 2009 CV 7181, the Commissioner requested the identity of Dolcefino’s client who sought the information for the August Request. This was done to avoid a situation where the Commissioner – the plaintiff in the *HEI* litigation – might violate any discovery rulings issued by the discovery master related to that case. *Compl.* at ¶ 14. The

Commissioner's response to the August Request would depend on whether the requester was an HEI litigant, as documents under CORA may not be produced if "[s]uch inspection is prohibited . . . by the order of any court." § 24-72-204(1)(c), C.R.S.; see also *Citizen Center v. Gessler et al.*, 2012 U.S. Dist. LEXIS 98066, Case No. 12-cv-00370 (July 16, 2012) (discovery order from federal magistrate prohibiting CORA requests during pendency of litigation). Seeking identity of the requester was not a "denial" of records, a position that even Dolcefino agrees. *Compl.* at ¶ 15.

As to the February 26, 2018 ("February Request") and April 12, 2018 ("April Request"), the Division responded that there were no responsive documents to those requests. In the February Request, Dolcefino requested documents related to collection efforts for the monetary judgments the Commissioner obtains. As discussed below in Section II, because the Division does not handle collection efforts but instead those tasks are handled by another agency, no responsive documents exist. *Compl.* at ¶ 21; *Compl. Ex. D.* While the response from the Division to Dolcefino in connection with the February Response should have included information about the other agency possibly having relevant documents in their custody and control, Dolcefino was not "denied" inspection since there were no documents in the Division's custody.

With respect to the April Request, Dolcefino requested: "documents that detail any efforts to identify and collect e-mails responsive to previous CORA requests by Dolcefino Consulting" which also included "any efforts or

communications involved in attempting to identify email communications” between the Commissioner and his staff or with the Division and State Collections. *Compl.* at ¶ 22; *Compl. Ex. E.* Although the Commissioner interpreted the CORA request to mean efforts to identify communications – which would not necessarily be written documents, so therefore not a “public record” as defined in CORA under § 24-72-202(6)(a)(1), C.R.S., *see Compl. Ex. F* – the Division has no physical documents either, and informed Dolcefino of this position on April 13, 2018. Again, because no responsive documents existed, there was no “denial” for inspection of public records. While Dolcefino may speculate such documents should exist, they have alleged no *facts* in their Complaint, beyond conclusory assertions, for that proposition. Thus, there is no relief that this Court can order under CORA for inspection of records that were not “denied.” *See* § 24-72-204(5)(b), C.R.S.

Second, while Dolcefino alleges that the Commissioner has violated § 24-72-203(3.5), C.R.S., it provides no *facts* upon which to support a claim. In their Complaint, Dolcefino alleges that “upon information and belief, [the] Defendant has otherwise violated section 24-72-203.” *Compl.* at ¶ 29. Dolcefino claims that because few documents have been produced or no documents exists that this is an “indicator that the Division of Securities is . . . failing to comply with CORA” by “failing to search for the requested documents.” *Compl.* at ¶ 25. But Dolcefino has pled no facts that allows “the court to draw the reasonable inference that the [Commissioner] is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

Indeed, Dolcefino raises no allegation that the Division has failed to produce documents in electronic format, as required by § 24-72-203(3.5), C.R.S. In actuality, Dolcefino’s allegations that the Commissioner has violated CORA are “bare assertions” or merely conclusory statements not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678–80. The company’s *belief* that such documents *should* exist is wholly distinct from whether they *do* exist, and have been withheld. As Affidavit Exhibits A, B, and C support, the Division produced documents in electronic format. Because, as discussed below, the Division uses the assistance of Colorado Central Collections to enforce its civil judgments, the *fact* that the Commissioner has limited documents responsive to Dolcefino’s requests is understandable, and hardly a violation of CORA.

II. The Commissioner has directed Dolcefino to the agency that may have custody of the documents requested.

When an agency does not have the requested documents in its custody or control, the agency must notify the requester of who may have custody and control. § 24-72-203(2)(a), C.R.S. Here, much of what Dolcefino seeks may be in the custody and control of Central Collections within the Department of Personnel Administration.

Under § 24-30-202.4(1), C.R.S., the “state controller shall advise and assist the various state agencies concerning the collection of debts due the state through such agencies[.]” The statute authorizes the State Controller to delegate the

collection task to Central Collection Services Section through the Division of Procurement and Finance, which is part of the Department of Personnel Administration. *Id.* Pursuant to that statute, the Commissioner through a designated representative electronically submits information about the restitution or damages it obtains in civil or administrative proceedings through a DPA-maintained website and database. *See Affidavit of Gerald Rome*, ¶ 4.

Once a debt is referred to DPA, “the controller shall institute procedures for collection thereof” pursuant to rules and procedures promulgated by DPA. § 24-30-202.4(3)(a), C.R.S.; *see also* 1 CCR 101-6, Rules for DPA/Division of Finance and Procurement “Accounts Receivable Collections.”¹ Such collection efforts may include, but not be limited to, referral of debts for offset against a tax refund or through private counsel or a private collection agency. §§ 24-30-202.4(3)(a)(II), (d), C.R.S. The State Controller, with consent of the State Treasurer, is authorized to “write off, release, or compromise any debt due to the state, but only in accordance with the rules applicable thereto.” § 24-30-202.4(3)(c), C.R.S.

Here, in the August, February, and April Requests, Dolcefino requests records related to: (1) “amounts actually received” related to the restitution or damages obtained during March 1, 2017 to date of request; (2) process and

¹ The DPA Rules are available at <http://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=5186> (last accessed June 7, 2018).

procedure employed by the Securities Division to collect monetary judgments; (3) documents showing the “use of those efforts” to collect judgments, including demand letters, emails, mailed notices, receipts for payment, or any other form of communication employed to collect on these judgments.” *Compl.* at ¶¶ 11, 20; *Compl. Exs. A, C, and E.* The Commissioner, through counsel, has notified Dolcefino that civil collection efforts for monetary judgments are handled with Central Collections. EXHIBIT 2.

Based on the statutory scheme, Central Collections through the State Controller and Treasurer have discretion and authority to collect on civil judgments referred by the Commissioner. The Commissioner has no documents referring its judgments to DPA, as the website does not provide any type of receipt or record for the Commissioner. *Affidavit of Gerald Rome*, ¶ 4. In short, another agency has authority and procedures to collect on monetary judgments that the Commissioner has obtained in his civil and administrative proceedings. Consequently, because there are no documents in the Commissioner’s custody and control for which this Court may order the Commissioner to produce under CORA, this Complaint must be dismissed.

III. Although not required under CORA, the Commissioner created a spreadsheet with all the requested information and provided it to Dolcefino.

Pursuant to another CORA request by Dolcefino dated April 2, 2018, where Dolcefino requested case numbers for records previously provided, the

Commissioner provided Dolcefino with a spreadsheet that included the case name, case number, court jurisdiction, amount ordered, and amount received from January 2014 to March 2017 and from March 3, 2017 to April 2, 2018. This is a document that a Division employee put together at the Commissioner's direction, and had to *create* by accessing public court records and the Division's website with the enforcement actions. *Affidavit of Gerald Rome*, ¶ 6-7; *Affidavit Ex. C*. The spreadsheet of all judgments includes the very information that Dolcefino seeks to verify: the amount of monies *ordered* in civil, criminal, or administrative enforcement actions and the amount recovered.²

This spreadsheet was created and produced pursuant to the April 2, 2018 CORA request. Even though the Division was neither required nor had a duty under CORA to create this document, it did so, and provided the information to Dolcefino. *Affidavit of Gerald Rome*, ¶ 7. Because no further documents exist – either because they would need to be created or they are within the custody and control of DPA Central Collections (to the extent they exist), this Court must dismiss this Complaint for failure to state a claim upon which relief may be granted.

² With respect to criminal cases referred by the Division to prosecutors, the Division has no statutory authority to collect restitution ordered by a criminal court. § 16-18.5-104, C.R.S.

CONCLUSION

This lawsuit is a wholly inappropriate forum for Dolcefino's intended efforts. Because the Commissioner has produced all documents in its possession responding to Dolcefino's requests, has not denied or withheld any document, and in fact created a document after Dolcefino's numerous CORA requests, this Court cannot provide any relief to Dolcefino under § 24-72-203(5)(b), C.R.S. Accordingly, this matter should be dismissed with prejudice under C.R.C.P. 12(b)(5).

Respectfully submitted this 8th day of June, 2018.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5) and EXHIBITS 1-2** upon all parties herein via the Colorado Courts E-Filing system, or by e-mail, at Denver, Colorado, this 8th day of June, 2018, addressed as follows:

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