IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Craig B. Shaffer

Civil Action No. 1:16-cv-00138-RM-CBS

TAMMY HOLLAND,

Plaintiff,

v.

WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State,

Defendant.

REPORT & RECOMMENDATION

Magistrate Judge Shaffer

This matter comes before the court on Colorado Secretary of State Wayne W. William's ("the Secretary") "Motion to Dismiss" (Doc. 17), filed on March 3, 2016. The motion was referred to the Magistrate Judge by Order of Reference (Doc. 62) dated August 9, 2016. The court has considered the motion, the related briefing[1], the entire case file, and the applicable law. Being fully apprised in the premises, the court recommends that the Secretary's motion be denied.

Also before the court is Matthew Arnold's "Motion of Matthew Arnold to Intervene as Interested Party and/or Amicus" (Doc. 27), filed on March 31, 2016. This motion was also referred to the Magistrate Judge. Doc. 53. On May 19, 2016, this court convened a telephone status conference and discussed Mr. Arnold's motion. The court granted Mr. Arnold's request to

[1] The court has also considered the Amicus Curiae Briefs submitted, respectively, by the Center for Competitive Politics (Doc. 40) and Mr. Arnold (Doc. 61).

submit an Amicus Brief and took his request to intervene under consideration. *See* Doc. 54. After further consideration of the briefs and the relevant law, the court recommends that Mr. Arnold's request to intervene in this matter be denied.

BACKGROUND

Tammy Holland is a Colorado resident and a critic of some of her local school board's policies regarding school curriculum. To express her views on these issues, she purchased a series of advertisements in her local newspaper. Thereafter, Ms. Holland was accused of violating Colorado's campaign finance laws. Two local officials filed complaints against her pursuant to the private enforcement provision of the campaign finance laws.[2]

This private enforcement provision states:

> Any person who believes that a violation of either the secretary of state's rules concerning campaign and political finance or this article has occurred may file a written complaint with the secretary of state not later than one hundred eighty days after the date of the occurrence of the alleged violation. The complaint shall be subject to all applicable procedures specified in section 9(2) of article XXVIII of the state constitution.

Colo. Rev. Stat. § 1-45-111.5(1.5)(a); *see also* Colo. Const. art. XXVIII §9(2)(a). Under this scheme, the Secretary of State does not investigate or review these complaints. Rather the complaints are referred directly to an administrative law judge within three days of filing. Colo. Const. art. XXVIII §9(2)(a).

In her Complaint, Plaintiff contends that this private enforcement scheme is facially invalid because it impermissibly chills protected speech in contravention of the First Amendment. In her prayer for relief, she requests a declaratory judgment that Section 9(2) of Article XXVIII of the Colorado Constitution and Colorado Revised Statute § 1-45-111.5(1.5)(a)

[2] According to the Complaint, the first private enforcement action was voluntarily dismissed two days before the hearing. Doc. 1 at ¶ 45. At the time this action was commenced, the proceedings related to the second private enforcement action were still pending. *See Id*. at ¶¶ 50-56.

are facially unconstitutional. She also requests a permanent injunction against the Secretary prohibiting him from administering those same provisions. *See* Doc. 1 at 18. The Secretary filed a Motion to Dismiss (Doc. 17), arguing that this court should abstain from exercising jurisdiction under the *Younger* doctrine. *Id*. at 3-8. Alternatively, the Secretary argues that Ms. Holland's Complaint should be dismissed for failure to state a claim for relief.

Following the commencement of these proceedings, Mr. Arnold filed a Motion to Intervene on behalf of his organization, Campaign Integrity Watchdog LLC ("CIW"). Doc. 13. However, because Mr. Arnold is not an attorney and, therefore, not permitted to submit documents on his organization's behalf, the motion was denied without prejudice. Doc. 25. Thereafter, Mr. Arnold filed a Motion to Intervene (Doc. 27) in his individual capacity. Both Ms. Holland and the Secretary oppose Mr. Arnold's request to intervene.

ANALYSIS

I. *Younger* Abstention Doctrine

At the time this case was initiated, Plaintiff's state administrative proceedings were still pending. Based upon this, the Secretary argued that the *Younger* abstention doctrine[3] mandated dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(1). In his Motion to Dismiss, however, the Secretary also conceded that the future application of *Younger* to this case was dependent on the outcome of those administrative proceedings. To wit, if the administrative law judge ruled in Plaintiff's favor, and there was no subsequent appeal, there would be no ongoing state case from which to abstain. *See* Doc. 17 at 8.

[3] This doctrine is so named for *Younger v. Harris*, 401 U.S. 37 (1971), wherein the Supreme Court concluded that a federal court should abstain from exercising jurisdiction over a matter when (1) there is an ongoing state court proceeding, (2) the state court provides an adequate forum for determining the claims asserted in the federal action, and (3) the proceedings involve important state interests which traditionally look to state law for their resolution or implicate separately articulated state policies.

On June 1, 2016, Plaintiff notified (Doc. 58) this court that the administrative proceedings had been concluded in her favor, and that the administrative complainant had not filed a notice of appeal within the time frame for appeals. The Secretary has not filed anything to the contrary; consequently, the court concludes that the *Younger* abstention doctrine does not apply to this case. The court shall proceed to consider the whether Plaintiff has stated a claim for relief.

II. First Amendment Claim

In his Motion, the Secretary contends that Ms. Holland's facial constitutional challenge fails as a matter of law and, therefore, her claim should be dismissed at the pleading stage. The court disagrees.

A. Standard of Review

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). The court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, this court may consider exhibits attached to the Complaint without converting the motion into one for summary judgment pursuant to Rule 56. *See Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This standard requires more than the sheer possibility that a defendant has acted unlawfully. *Id*. Facts that are "merely consistent" with a defendant's liability are insufficient. *Id*. "[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's actions harmed him or her; and what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "Nevertheless, the standard remains a liberal one, and 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Morgan v. Clements*, No. 12-cv-00936-REB-KMT, 2013 WL 1130624, at *1 (D. Colo. Mar. 18, 2013) (quoting *Dias v. City & County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

Here, absent a factual record, the court focuses — as it must — on the allegations in the Complaint, accepting them as true and viewing all reasonable inferences from those facts in Ms. Holland's favor.

B. Discussion

The First Amendment, as applied to state and local governments through the Fourteenth Amendment, provides that state actors "shall make no law . . . abridging the freedom of speech."

U.S. Cont. amend. I. A Plaintiff may bring two types of First Amendment challenges against a law: facial and as applied. *Hawkins v. City of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999). "A facial challenge is a head-on attack on a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *United States v. Supreme Court of N.M.*, 839 F.3d 888, 907 (10th Cir. 2016) (internal citation and punctuation omitted). "In contrast, an as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the *particular circumstances* of the case." *Id.*; *see also N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010) ("[An] 'as-applied' challenge to a law acknowledges that the law may have some potential constitutionally permissible applications, but argues that the law is not constitutional as applied to [particular parties]."). Here, Plaintiff asserts that the enforcement provision is facially unconstitutional. *See* Doc. 1 at ¶¶ 86-94.

The Tenth Circuit has explained that "the approach to facial challenges . . . involves an examination of whether the terms of the statue itself measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contain a constitutional infirmity that invalidates the statute in its entirety." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (2012) (citations and internal punctuation omitted). "In other words, where a statute fails the relevant constitutional test (such as strict scrutiny, the Ward test, or reasonableness review), it can no longer be constitutionally applied to anyone—and thus there would be 'no set of circumstances' in which the statute would be valid." *Id*. (discussing the "test" laid out in *United States v. Salerno*, 481 U.S. 739 (1987)).

It is beyond dispute that the "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424

U.S. 1, 14 (1976). This type of speech "is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In her Complaint, Ms. Holland alleges that she purchased two ads in her local paper regarding the qualifications of various school board candidates. Doc. 1 at ¶ 17. These ads also urged voters to educate themselves about the entire field of candidates and the candidates' respective objectives. *Id*. at ¶ 18. In response to these ads, two local school officials brought enforcement actions pursuant to Colorado's private enforcement statute. *Id*. at ¶ 19. These actions were both referred to the Office of Administrative Courts, and Ms. Holland — at considerable personal cost — retained counsel to represent her. *Id*. at ¶¶ 38, 43, 55, 84. According to the allegations, both of these private enforcement actions were commenced in retaliation for the messages in Ms. Holland's advertisements. *See Id*. at ¶¶ 48, 49, 51. As a result of these actions, Ms. Holland — despite wishing to do so — has been chilled from purchasing any further political advertisements because she is afraid of being sued by individuals who disagree with her views. *Id*. at ¶ 85.

The Complaint also alleges that these experiences are not unique to Ms. Holland. She alleges that the private enforcement statute does not contain any screening mechanism to weed out frivolous complaints. *Id*. at ¶ 24. Rather, every complaint is referred to the Office of Administrative courts, which, in turn, triggers "full-blown enforcement litigation," which may include depositions, document requests, and a hearing. *Id*. at ¶¶ 26-28. Due to the nature of this scheme, public speakers are susceptible to retaliatory litigation. *See Id*. at ¶¶ 61-65.

Accepting these allegations as true, the court concludes that Ms. Holland has sufficiently alleged that the private enforcement scheme chills speech in violation of the First Amendment. *See Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (1992) (To establish Article III standing, a plaintiff must demonstrate standing to sue by establishing "(1) an injury in fact, (2) a

sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision."); *see also Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 794 (1988) (concluding that a regulatory scheme that invites "potential litigation" "necessarily chill[s] speech in direct contravention of the First Amendment's dictates"); *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964) ("The fear of damage awards . . . may be markedly more inhibiting that the fear of prosecution under a criminal statute"); *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1183 n.9 (D. Colo. 2014) ("The sheer expense and delay of unnecessary litigation chills, if not freezes entirely, prospective speakers' resolve to exercise their First Amendment rights").

In his Motion to Dismiss, the Secretary does not challenge the notion that Ms. Holland's political advertisements constitute speech that lies at the core of the First Amendment. Nor does he seemingly challenge her contention that — as a result of the private enforcement statute — she was chilled from engaging in further speech. Rather, he spends a great deal of his argument discussing law and facts that are not relevant to this court's analysis of a motion to dismiss pursuant to Rule 12(b)(6), an analysis that tests the legal sufficiency of the Complaint.

Specifically, the Secretary contends that Colorado has a substantial governmental interest in ensuring transparency in elections and compliance with campaign finance laws. Doc. 17 at 19. Among other things, he contends that private enforcement is effective, less expensive for the state, and incentivizes political speakers to strictly comply with Colorado's registration and recording requirements. *Id*. The Secretary also contends that Plaintiff's interests are protected by the procedural safeguards of civil litigation and the possibility of an award of attorney's fees.[4]

[4] The court notes that a recent Colorado Court of Appeals decision would seem to call into question the true availability of attorney's fees for a party who successfully defends an administrative action. *See McGihon v. Cave*, ___ P.3d ___, ___, No. 14CA2462, 2016 WL 2957205 (Colo. App. May 19, 2016). In *McGihon*, the panel concluded that even though respondents may be awarded attorney's

Doc. 17 at 13-14. All of these contentions may ultimately turn out to be true. At this stage of the proceedings, however, there is no factual record upon which this court could reach such conclusions. Therefore, this argument is, at the very least, premature.

To support dismissal, the Secretary also cites a number of cases from other jurisdictions in which similar laws were upheld. *See Cal. Teachers Ass's v. Davis*, 64 F. Supp.2d 945 (C.D. Cal. 1999) (construing the Defendants' motion to dismiss as a motion for summary judgment, and concluding that teachers do not have a First Amendment right in determining their curriculum such that the private enforcement provision did not affect protected speech), *aff'd by Cal. Teachers Ass'n v. State Bd. of Education*, 271 F.3d 1141 (9th Cir. 2001); *King Street Patriots v. Tex. Democratic Party*, 459 S.W.3d 631 (Tex. App. 2014) (affirming the trial court's order granting summary judgment and concluding that the state's private enforcement provision was facially constitutional); *Fritz v. Gorton*, 517 P.2d 911 (Wash. 1974) (concluding after a bench trial that the private enforcement suits did not pose a constitutional problem). Plaintiff is correct, however, that in none of these cases did the reviewing court address whether a First Amendment claim was subject to dismissal at the pleading stage. The fact that courts have upheld similar laws in other contexts — presumably with different factual records — does not compel the conclusion that Ms. Holland's challenge necessarily fails to state a claim for relief. Accordingly, the Secretary's reliance on these cases is unavailing.

The court is similarly unmoved by the Secretary's *qui tam* analogy. Doc. 17 at 16-17. The Secretary observes that *qui tam* actions have been authorized in a number of areas of law. Based on this, he argues that Ms. Holland "cannot realistically contend that each and every one of these regulatory schemes is subject to a potential facial invalidation under the First Amendment." *Id*. at

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fees in a private enforcement proceeding, Colorado law "does not make any provision allowing a respondent in a campaign finance action who is awarded attorney fees by an ALJ to file an action for enforcement of the ALJ's order in the district court." *Id*. at *3, ¶ 11.

17. This argument misconstrues the scope of Ms. Holland's claim. She does not challenge private enforcement actions as being generally violative of the First Amendment. Rather, she challenges a particular private enforcement regulation that — accepting her allegations as true — permits complainants to file baseless enforcement actions in retaliation for an individual's political speech. The Secretary has not identified any regulations or cited any case law allowing *qui tam* actions in the context of the First Amendment; thus his argument in this regard is not well taken.

For the foregoing reasons, the court concludes that Ms. Holland has stated a claim that Colorado's system of private enforcement impermissibly chills political speech in violation of the First Amendment. Her claim cannot be dismissed at this procedural juncture. Therefore, the court recommends that the Secretary's Motion to Dismiss be denied.

III. Mr. Arnold's Motion to Intervene

In his motion, Mr. Arnold contends that he has significant interests in the present litigation that would not be adequately represented by the Secretary. He argues that he has established the elements for intervention as a matter of right. Alternatively, he asks the court to exercise its discretion and permit him to intervene pursuant to Fed. R. Civ. P. 24(b). However, for the following reasons, the court recommends that Mr. Arnold's motion be denied.

A. Intervention as Matter of Right

Rule 24(a)(2)[5] provides for intervention as a right:

> (a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
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> ***

[5] Mr. Arnold does not contend that Fed. R. Civ. P. 24(a)(1) is applicable to his intervention request.

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The movant bears the burden of establishing his right to intervene. *See United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991).

To intervene as a matter of right under Rule 24(a)(2), the movant must show that: (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction which is the subject of the action; (3) the movant's interest relating to the property may be impaired or impeded; and (4) existing parties do not adequately represent the movant's interest. *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1391 (10th Cir. 2009) (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001)) (internal quotations omitted); *see also Wildearth Guardians v. United States Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009).

"Under Rule 24(a)(2), the [applicant] must claim an interest relating to the property or transaction which is the subject of the action." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d at 1250 (internal quotation marks omitted). "The Tenth Circuit requires that the interest be 'direct, substantial, and legally protectable.'" *Forest Guardians v. U.S. Dep't of Interior*, No. CIV 02–1003, 2004 WL 3426413, at *5 (D.N.M. Jan. 12, 2004) (Browning, J.) (quoting *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d at 1250). The Tenth Circuit has also noted that the inquiry is "highly fact-specific," and that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d at 1251–52.

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied."

WildEarth Guardians v. U.S. Forest Serv., 573 F.3d at 995 ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."). "Although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007). A third party's interest may be impaired "when the resolution of the legal questions in the case effectively foreclose[s] the rights of the intervenor in later proceedings, whether through res judicata, collateral estoppel, or stare decisis." *Ute Distrib. Corp. v. Norton,* 43 F. App'x 272, 279 (10th Cir. 2002).

An applicant for intervention also bears the burden of showing inadequate representation. *Forest Guardians v. U.S. Dep't of Interior,* 2004 WL 3426413, at *6. "[A] presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation," but the Tenth Circuit has "held this presumption [is] rebutted by the fact that the public interest the government is obligated to represent may differ from the would-be-intervenor's particular interest." *Utah Ass'n of Cntys. v. Clinton,* 255 F.3d at 1255. The Tenth Circuit stated:

> [T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.

Id. at 1255–56. Thus, when a prospective intervenor shows that the "public interest the government is obligated to represent may differ from the would-be intervenor's particular interest," the burden of demonstrating inadequate representation is met. *Id*.

Plaintiff and Defendant do not dispute the timeliness of Mr. Arnold's intervention motion. Rather, the question is whether Mr. Arnold has a legal interest in this case that is not adequately represented by the current parties. Mr. Arnold first contends that he has an interest in petitioning the government for the redress of grievances. Doc. 27 at 7, 10. He also argues that he has a direct financial interest in the outcome of these proceedings. *Id*. at 10-12. The court considers each of these interests in turn.

As to his first articulated interest, Mr. Arnold states that he is a "person who has historically exercised [the right to petition the government] and intends to exercise such rights in the future." *Id*. at 7, 10. Plaintiff correctly observes, however, that the constitutional right of access to the court "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Here, Mr. Arnold has not alleged what specific cases or claims would be in jeopardy if Plaintiff were to succeed on the merits; thus, his interest in accessing the court at this time seems tenuous at best.[6]

However, even assuming *arguendo* that Mr. Arnold has articulated a direct, substantial, and legally protectable interest, the court, nevertheless, concludes that this interest is adequately represented by the Secretary. Indeed, the Secretary and Mr. Arnold have the same ultimate objective with respect to this interest: to preserve the private enforcement provision against facial invalidation under the First Amendment.

Mr. Arnold contends that their interests diverge because he believes that the private enforcement provision — though facially valid — should be amended. Specifically, he argues

[6] In addition, as Defendant and Plaintiff both argue, the court entertains serious doubts as to whether the unavailability of a private cause of action to vindicate a public interest could be said to infringe on a constitutional interest. However, given this court's conclusion regarding sufficient representation, it need not address this question.

that the provision creates an unpaid public mandate and that the provision should be amended to allow for an award of penalties to those who successfully bring such actions. Doc. 27 at 14. The court disagrees that this is a legally protectable interest in the present litigation. The present action will determine whether the private enforcement provision unconstitutionally chills individuals from exercising their rights under the First Amendment. Mr. Arnold's arguments would necessitate an entirely separate analysis — and presumably separate evidence — regarding the private enforcement provision. Rule 24(a), however, "is not intended to allow for the creation of whole new suits by intervenors." *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (Intervenors must take the pleadings in a case as they find them"). Ms. Holland's complaint defines the general scope of this action and Mr. Arnold cannot now by intervention alter that scope to create a different suit. *See Ute Distrib. Corp. v. Norton*, 43 F. App'x at 279 ("Litigation impairs a third party's interests when the resolution of the legal questions in the case *effectively foreclose the rights of the proposed intervenor in later proceedings*") (emphasis added). Because Mr. Arnold could bring this entirely independent claim[7] in a different lawsuit, the court cannot conclude that it warrants intervention.

Turning to his alleged financial interest, Mr. Arnold argues that he and CIW have been awarded their costs following successful private enforcement actions. He also contends that CIW's small business revenues are "overwhelmingly from the campaign finance management services provided to organizations wishing to comply with the law." Doc. 27 at 11. If Plaintiff is successful in her facial invalidation, Mr. Arnold contends that other entities will have no incentive to pay CIW for its services. *Id*. at 11-12. For two reasons, the court is not persuaded that Mr. Arnold has articulated a direct, substantial, or legally protectable financial interest.

[7] The court's conclusion in this regard is not, and should not be considered, an evaluation of the merit — or lack thereof — of such a claim.

First, accepting for the purposes of argument that cost reimbursement constitutes a financial interest, the court nevertheless concludes that Mr. Arnold's interest is speculative. He has not alleged current involvement in any private enforcement actions. Rather, his interest is dependent on (1) the filing of a future private enforcement action; (2) ultimately prevailing in that action; and (3) and an ALJ's determination that he is entitled to an award of his costs. The mere possibility of these occurrences is entirely theoretical and too attenuated to justify intervention under Rule 24(a). *San Juan Cnty.*, 503 F.3d at 1202 ("the intervenor cannot rely on an interest that is wholly remote and speculative").

Second, Mr. Arnold's arguments regarding his small business revenues must fail for the same reason that his initial motion to intervene was denied. Here, the potential revenues[8] belong to CIW and Mr. Arnold may not assert claims that belong to his company. *See McDonald v. Coyle*, 175 F. App'x 947, 949 (10th Cir. 2006) ("Generally, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004)). If Mr. Arnold wishes to pursue claims on behalf of CIW, he must retain a licensed attorney to do so. *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 557 (10th Cir. 2001) ("As a general matter, a corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing *pro se*."). He will not be permitted to circumvent this court's previous conclusions by nominally bringing CIW's claims as his own. *See Motionless Keyboard Co. v. Microsoft Corp.*, 184 F. App'x 967, 968 (Fed. Cir. 2006) (concluding that allowing a company shareholder to intervene rather than hire replacement counsel for the corporation would constitute an end-run around the rule requiring corporate counsel); *Jacobs v. Patent Enforcement*

[8] Mr. Arnold's allegations with respect to these revenues are also speculative. He has not alleged any specific contracts that are currently in jeopardy. Rather, like his cost reimbursements, these revenues depend on being hired by some as-yet-unknown entity in the future.

Fund, Inc., 230 F.3d 565, 569 (2d Cir. 2000) (finding that the district court abused its discretion in allowing intervention by president and sole officer/director of company, where intervention was effectively an effort to enable company to appear without counsel); *United States v. High Country Broad. Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (refusing to allow sole shareholder with interests identical to corporation to intervene, rather than hiring corporate counsel, where plaintiff sought to accomplish indirectly through Rule 24 that which he could not do directly, namely, *pro se* representation of the company).

Based on the foregoing analysis, the court concludes that Mr. Arnold has failed to demonstrate that he is entitled to intervention as of right pursuant to Fed. R. Civ. P. 24(a). Accordingly, this court recommends that his motion to intervene be denied in this respect.

B. Permissive Intervention

In addition, the court recommends that Mr. Arnold be denied permissive intervention pursuant to Rule 24(b)(1)(B).

Rule 24(b) provides that, upon a timely motion, a court may permit anyone to intervene who has a claim or defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). When this threshold requirement is met, the decision to allow or deny permissive intervention lies within the discretion of the district court. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). In exercising this discretion, the court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3); *see also Wilderness Soc'y, Ctr. for Native Ecosystems v. Wisely*, 524 F. Supp. 2d 1285, 1294 (D. Colo. 2007). In addition, the court may consider such factors as: "(1) whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights; (2) whether the would-be intervenor's input adds

value to the existing litigation; (3) whether the petitioner's interests are adequately represented by the existing parties; and (4) the availability of an adequate remedy in another action." *United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 598 (D. Colo. 2008).

As previously discussed, the court concludes that Mr. Arnold has not set forth a sufficient financial interest in this case, and thus, his claims do not share a common question in this lawsuit. Mr. Arnold is not permitted to assert claims belonging to CIW, and his ability to recoup costs from future private enforcement actions is too speculative at this juncture. Furthermore, his stated interest in having a penalty provision added to the private enforcement statute would alter the scope of this action and could be brought in a separate lawsuit. Thus, Mr. Arnold should not be permitted to intervene based on these purported financial interests.

With respect to Mr. Arnold's general interest in pursuing future private enforcement actions, the court also concludes that permissive intervention is not warranted. Even setting aside the speculative nature of this interest, the court notes that it has already determined that the Secretary will adequately represent this interest, and adds that Mr. Arnold has indicated no "input" that would add value to this case.

Because Mr. Arnold has failed to show that he has a claim or defense that shares common questions of law or fact with this litigation, and because the factors weigh against it, the court recommends that the District Court deny the motion for permissive intervention.

CONCLUSION

For the foregoing reasons, the court RECOMMENDS that the Secretary's Motion to Dismiss (Doc. 17) be DENIED.

IT IS FURTHER RECOMMENDED that Mr. Arnold's Motion to Intervene (Doc. 27) be DENIED.

ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. Once Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar de novo review by the district court of the magistrate judge's proposed findings and recommendations and will result in waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (a district court's decision to review a magistrate judge's recommendation de novo despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059-60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve the issue for *de novo* review by the district court or appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate judge's ruling); *but see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

DATED at Denver, Colorado, this 29th day of December, 2016.

BY THE COURT:

s/Craig B. Shaffer
United States Magistrate Judge
District of Colorado