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<p>BEFORE THE COLORADO DEPUTY SECRETARY OF STATE 1700 Broadway, Suite 200 Denver, Colorado 80290</p> <hr/> <p>IN THE MATTER OF JONATHAN CLAPP, M.D. AND COLLEGIUM PHARMACEUTICAL COMPANY</p> <p>LOBBYIST COMPLAINT</p>	<p>CASE NUMBER: L2022-01</p>
<p style="text-align: center;">ORDER OF DISMISSAL</p>	

This matter comes before Christopher P. Beall, Colorado Deputy Secretary of State (“Deputy Secretary”), upon the Election Division’s (“Division”) Motion to Dismiss the Complaint. Having reviewed and considered the Motion and the contents of the file, the Deputy Secretary now grants the Motion and dismisses the Complaint.

LOBBYIST COMPLAINT PROCEDURES

Regulation of lobbyists is governed by Part 3 of the Colorado Sunshine Act, §§ 24-6-301, *et seq.*, C.R.S., and the Secretary of State’s Rules Concerning Lobbyist Regulation, 8 CCR § 1505-8. Under these provisions, Rule 5, 8 CCR § 1505-8, sets forth the complaint process for alleged violations of lobbying regulations. Pursuant to Rule 5.3, the Division conducts an initial review of filed complaints and determines whether to (1) dismiss the complaint if the complainant failed to identify a violation

of lobbying requirements or allege sufficient facts to support the alleged violations, or (2) conduct an investigation. *See* Rule 5.3.2. If the Division conducts an investigation and determines it has reasonable grounds to believe that a violation of the provisions of Part 3 of the Sunshine Law, sections 24-6-301 *et seq.*, or the Secretary's Lobbyist Rules has occurred, it may initiate a hearing with the Deputy Secretary. *See* Rule 5.6.1. If, on the other hand, the Division determines that it does not have reasonable grounds to believe that a violation has occurred, it must file a motion to dismiss the complaint with the Deputy Secretary. *See* Rule 5.5.3.

In the context of this proceeding, the Division conducted an investigation and now moves to dismiss the Complaint pursuant to Rule 5.5.3 on grounds that it has concluded there is insufficient evidence to support a finding that Respondents violated Colorado lobbying laws as alleged in the Complaint. The Secretary's lobbyist rules do not make the initial complainant a party to this administrative proceeding, and there is no provision for the complainant to participate at the administrative level by way of argument or motions practice beyond responding to information requests from the Division. *See* Rule 5. Rather, the record upon which the Deputy Secretary must make this determination is solely that which the Division presents, that is, the contents of the administrative file compiled by the Division. If the Deputy Secretary grants the motion and dismisses the Complaint, the dismissal order is the final agency decision of the Secretary of State's Office, and it may be appealed by any aggrieved party under the Colorado Administrative Procedure Act, § 24-4-105, C.R.S. *See* Rule 5.5.3.

PROCEDURAL HISTORY AND INVESTIGATION

I. The Complaint

G. Steven Jack Silvern and William Lee Blackburn filed a lobbyist complaint with the Division pursuant to section 24-6-308(2), C.R.S., and Rule 5.5.1 on May 11, 2022, alleging that Respondent Jonathan Clapp, M.D., and Collegium Pharmaceutical Company violated Colorado lobbying laws. As for the Complaint's allegations against Respondent Clapp (a medical doctor specializing in pain management, a member of the Colorado Medical Society, and President of the Colorado Pain Society), the Complainants assert that Respondent Clapp actively lobbied for Respondent Collegium (a pharmaceutical company focusing on pain management) from 2016 to 2021, and did not register as a professional lobbyist or file required disclosure reports. Ex. A to Mot. The Complaint further alleges that Respondent Clapp lobbied in support of legislation and encouraged the use of Respondent Collegium's medication without disclosing that he was paid by Respondent Collegium at the time of his testimony. Finally, Complainants also alleged that Respondent Clapp knowingly attempted to deceive a covered official regarding a material fact related to a matter within the scope of duties of the covered official.¹ *Id.* As for Respondent Collegium, Complainants allege that the company Collegium violated section 24-6-307 by employing and paying a person (Respondent

¹ Complainants included in their Complaint a contention that Respondent Clapp violated section 18-8-306, C.R.S., a criminal provision prohibiting the use of deceit in an attempt to affect public officials. Criminal violations are not within the enforcement authority of the Secretary of State and will not be addressed in this order.

Clapp) to engage in lobbying when that person is not registered as a lobbyist. *Id.* Complainants attached multiple documents to the Complaint, including a statement outlining the allegations labelled “crime report”; a June 2, 2021, *Colorado Politics* article regarding Respondent Clapp’s involvement with House Bill 21-1276; a January 11, 2022, *Colorado Politics* article including Respondent Clapp’s response to the original article; and a table reflecting “Colorado annual drug overdose deaths vs. opioid prescriptions 2014-2020.” *Id.*

II. The Division’s Investigation

The Division notified Respondents of the Complaint on May 12, 2022. *See* Ex. B to Mot. After determining on initial review that the Complaint specifically identified one or more violations of lobbyist laws and alleged sufficient facts to support a basis for the alleged violations, the Division sent Respondents a Notice of Initial Review and Investigation. *See* Ex. C to Mot. The Division subsequently sent requests for information to Complainants, Respondents, Representative Chris Kennedy, Senator Brittany Pettersen, and Senator Kevin Priola. *See* Exs. D, E, F, G, H, I. Both Complainants and both Respondents provided responses to the Requests for Information, as did Representative Kennedy. *See* Exs. J, K, M to Mot. Senators Pettersen and Priola did not respond.

In response to the Division’s information requests, Complainants state their belief that Respondent Clapp lobbied for Respondent Collegium between 2017 and 2021 and that Respondent Clapp had a financial relationship with Respondent Collegium in 2017 and 2018. *See* Ex. J. Complainant Silvern’s response is based on his own recollection, a news article from June 2021, Respondent Clapp’s published

response to that article, a conversation with a third party, and records received from a Colorado Open Records Request to Representative Kennedy. *Id.* Complainant Silvern maintains that, while Respondent Clapp stated that he was speaking on behalf of the Colorado Medical Society during his legislative testimony in 2021, he encouraged the prescribing of a Collegium product while failing to disclose his “then-contemporaneous financial relationship “ with the company. *Id.* Complainant Silvern also raised new facts and allegations, including that Respondent Clapp also lobbied for House Bill 20-1085 (“Prevention Of Substance Use Disorders”), Senate Bill 20-007 (“Treatment Opioid And Other Substance Use Disorders”), House Bill 18-022 (“Clinical Practice For Opioid Prescribing”), and Senate Bills 19-227 (“Harm Reduction Substance Use Disorders”), 19-228 (“Substance Use Disorders Prevention Measures”), and 19-219 (“Sunset Continue Licensing Of Controlled Substances”).

Respondent Clapp provided voluminous responses to the Division’s information requests. *See* Ex. K to Mot. He maintains that his only relationship with Respondent Collegium was as a “paid speaker for Collegium with Responsibilities to provide lectures on FDA-approved content for pain medications Nucynta (tapentadol) and Xtampa (abuse-deterrent extended-release oxycodone).” *Id.* at 1. Respondent Clapp produced his contract with Collegium and states that the last time did any work for Respondent Collegium under this contract was on September 4, 2018, at a large pain conference. *Id.* at 1. He received his last payment from Collegium one week after this final lecture. *Id.* Respondent Clapp contends that he has not discussed being a lobbyist with Collegium or any other company and has not profited from his

testimony at the Colorado General Assembly, which he does as a volunteer for the Colorado Medical Association. *Id.* at 1. He produced hundreds of pages of email communications between himself and Respondent Collegium and between himself and various legislators, including Representative Kennedy. Finally, Respondent Clapp addressed his testimony on House Bill 21-1276, stating that it was not focused on Collegium’s medications, included reference to many medications in direct competition with Collegium’s products, and was focused on broader issue of affordable patient access to safe pain treatments. *Id.*

Respondent Collegium states in its responses to the Division’s information requests that “at no point in time did Collegium pay Dr. Clapp to lobby on its behalf.” Ex. L. to Mot. It also confirms that it paid Respondent Clapp for speaking engagements in the amount of \$122,172.39. *Id.* Collegium notes that the written agreements between itself and Respondent Clapp explicitly stated that the payments made to Respondent Clapp “were not, in any way, a payment, offer or inducement to, or in return for, the past, present, future prescribing, purchasing, recommending, using, obtaining preferential formulary status, or dispensing of any Collegium product or in any way contingent or dependent upon such activity.” *Id.* at 2. Finally, Respondent Collegium states that it did not take any action to lobby for House Bill 21-1276, let alone pay Dr. Clapp to lobby for it. *Id.* at 4.

Representative Kennedy’s responses to the information request state that he “partnered closely” with Respondent Clapp in 2019 and through the 2020 session to “develop the policy and work with various stakeholders, including chronic pain

patients and insurance companies.” Ex. M to Mot., at 1. He maintains that most of his communications with Respondent Clapp related to the “policy ideas first proposed in 2018 and finally passed into law in 2021 as HB21-1276.” *Id.* Further, Representative Kennedy asserts that “[e]arly on in [their] relationship,” Respondent Clapp had disclosed that he had previously accepted compensation from certain pharmaceutical companies for speaking at events, but those relationships were no longer active and “were unrelated to his policy advocacy.” *Id.* He states that he has never been in contact with any Collegium representative, aside from being copied on an email in August 2017 sent by a member of the legislative council staff to certain stakeholder. *Id.*

The Division completed its investigation after extending its deadline pursuant to Rule 5.5.2. In addition to reviewing the responses to information requests, the investigation included a review of Respondent Collegium’s entries in the Centers for Medicare and Medicaid Services’ Open Payments Database showing the company’s payments to Respondent Clapp.² *See* Mot. at 11. The Division also reviewed Respondent Clapp’s recorded testimony at the legislature.³ *See id.* at 8-9. And the

² All payments made to Respondent Clapp by Respondent Collegium can be publicly viewed via <https://openpaymentsdata.cms.gov/physician/37074>. “Open Payments” is a federal government website managed and paid for by the U.S. Centers for Medicare and Medicaid Services that collects and publishes information about financial relationships between drug and medical device companies and certain health care providers.

³ Recordings of Respondent Clapp’s testimony can be found at <https://leg.colorado.gov/watch-listen>.

Division reviewed the hundreds of pages of emails submitted by Respondent Clapp in response to the Division's information request. *See id.* at 9.

III. Procedural Posture

Based on its review of the Complaint, the material received in response to information requests, and its own investigation, the Division concluded that there is insufficient evidence to support a finding that Respondents violated Colorado lobbying laws as alleged in the Complaint and filed this motion to dismiss.

Following the filing of the motion to dismiss, the Deputy Secretary received multiple submissions from Complainant Silvern and Respondent Clapp. These submissions appear to be attempts to respond and reply to the Division's motion, a process not contemplated by the Secretary's Lobbyist Rules. *See* Rule 5. While the Deputy Secretary did review the submissions, they do not inform the Deputy Secretary's determination of the motion.⁴

ANALYSIS

Under Colorado law, a professional lobbyist is a person who is "compensated by a client or another professional lobbyist for lobbying." § 24-6-301(6). Lobbying means communicating directly, or soliciting others to communicate, with a covered

⁴ After the Deputy Secretary directed Complainant Silvern and Respondent Clapp to cease and desist any further submissions related to the motion to dismiss, Complainant Silvern submitted a document entitled "Petition to the Secretary of State" asking the Secretary to conduct her own investigation of his allegations outside of the Rule 5 process. Complainant's "petition" is denied.

official⁵ for the purpose of aiding in or influencing certain legislative or rule-making activity. § 24-6-301(3.5). Professional lobbyists are required to register in Colorado and file periodic disclosure statements identifying their lobbying income and expenditures. § 24-6-303. It is undisputed that Respondent Clapp did not register as a lobbyist or file periodic disclosure statements. Thus, the question to be decided here is whether there is sufficient evidence to support the Complainants' allegation that Respondent Clapp was compensated by Respondent Collegium to communicate directly or indirectly with a covered official for the purpose of aiding in influencing legislation at the Colorado legislature or a rule-making official with jurisdiction over the subject matter of a rule. Alleged violations of criminal statutes or the criminal provisions of the Colorado Sunshine Law are outside the scope of this proceeding.⁶

The Deputy Secretary agrees with the Division's determination that there is no evidence to suggest that Respondent Clapp was ever compensated by Respondent Collegium for the purpose of lobbying, whether related to House Bill 21-1276 or any other piece of legislation. First, there is no evidence to contradict the statements from

⁵ A "covered official" includes, among others, a member of the general assembly, or in the context of a rule-making proceeding, a rule-making official with jurisdiction over the subject matter of the rule. §§ 24-6-301(1.7)(a) & (b).

⁶ The Deputy Secretary distinguishes between the potential criminal enforcement under section 24-6-309(1) versus a civil, administrative enforcement based on the list of "Prohibited Practices" in section 24-6-308(1). While, in certain circumstances, the prohibited conduct listed in subsection -308(1) may form the basis of a criminal prosecution, those practices also may form the basis of an administrative violation by a lobbyist. As a result, an allegation of non-criminal conduct in violation of one of Part 3's "Prohibited Practices" is properly within the scope of this proceeding. *See* § 24-6-308(2).

both Respondent Clapp and Respondent Collegium that Respondent Clapp was never asked to lobby on Collegium's behalf and was never paid to do so. While it is undisputed that Respondent Clapp did at one time have a financial relationship with Respondent Collegium and did receive some payments during the period in which he was involved in discussions related to proposed legislation, the compensation he received was not for the purpose of influencing or aiding a covered official in connection with legislation or rule-making.

Rather, Respondent Clapp's compensation from Collegium was for speaking engagement at conferences, not meetings with legislators or rule-making officials, and there is no evidence that any covered official was present at the conferences where Respondent Clapp was paid to make presentations, or that Respondent Clapp conveyed the content of those speaking engagements to any covered official. Moreover, Respondent Clapp received a majority of Collegium's payments during 2017 (prior to the start of his involvement in any legislative discussions in 2018), and the final payment occurred in January 2019. The bulk of Respondent Clapp's involvement with House Bill 21-1276 occurred after he received his last payment from Respondent Collegium, between summer 2019 and June 2021 when the bill was passed. Ultimately, the fact that Respondent Clapp received payment from Respondent Collegium during the time of Respondent Clapp's involvement with advocating on the legislation that became House Bill 21-1276, without more, does not establish that Respondent Clapp was compensated for lobbying on Respondent Collegium's behalf. That Respondent Clapp was compensated is insufficient here.

What matters is whether Respondent Collegium compensated Respondent Clapp *for purposes of lobbying*, and on that more particular question, there is no probative evidence that negates the Respondents' assertions that no such purpose applied to the compensation that occurred.

Second, the substance of Respondent Clapp's emails and legislative testimony corroborates the Division's determination that there is no evidence to suggest that Respondent Clapp was ever compensated by Respondent Collegium for the purpose of lobbying. *See Mot.* at 9. While Respondent Clapp did communicate with Respondent Collegium during the time of his involvement with the relevant legislation, it is evident that these communications related to seeking information from Collegium and urging the company to keep costs low for patients. *See id.* And the agreement between Respondents explicitly states that the payments made to Respondent Clapp "were not, in any way, a payment, offer or inducement to, or in return for, the past, present, future prescribing, purchasing, recommending, using, obtaining preferential formulary status, or dispensing of any Collegium product or in any way contingent or dependent upon such activity."

Respondent Clapp testified six times relating to what eventually became House Bill 21-1276 between August 2018 and May 2021: (1) August 14, 2018; (2) September 18, 2018; (3) July 9, 2019; (4) September 24, 2019; (5) October 29, 2019; and (6) May 5, 2021. *Mot.* at 8. Each time, Respondent Clapp disclosed his relationship with Colorado Pain Society and/or the Colorado Medical Society and focused his testimony on providing education on and access to safer pain medications

and alternative pain treatments, such as acupuncture and pain psychology. *Id.* at 8-9. While at one hearing Respondent Clapp did speak on the benefits of tapentadol specifically, this was only a small portion of his testimony, and there is no evidence that Respondent Clapp's comments were made for the purpose of benefiting Respondent Collegium. *Id.* at 9.

Complainant Silvern's argument that Respondent Clapp was engaged in undisclosed lobbying activity for Respondent Collegium is based on conclusions drawn from his own interpretation of emails and speculation regarding the Respondents' presumed contractual relationship. Speculative allegations without evidence are not sufficient to establish reasonable grounds for finding a violation. *See generally Walker v. Women's Professional Rodeo Ass'n, Inc.* 2021 COA 105M, at ¶ 37 (speculative allegations are not sufficient to state a valid cause of action in district court). The information received through the complaint process and discovered through the Division's investigation confirms that there is no evidence to suggest that Respondent Clapp was ever compensated by Respondent Collegium for the purpose of lobbying, whether related to House Bill 21-1276 or any other piece of legislation. Therefore, there is no evidence to suggest that Respondent Clapp met the definition of a professional lobbyist who was required to register and report as such or that Respondent Collegium employed and paid Respondent Clapp to engage in lobbying when that person was not registered as a lobbyist.

Additionally, with regard to the Complainants' contention that Respondent Clapp knowingly attempted to deceive a covered official regarding a material fact

relating to a matter within the scope of a covered official's duties, the record demonstrates that Representative Kennedy was aware of Respondent Clapp's prior public speaking work on behalf of pharmaceutical companies, *see* Ex. M to Mot., and there is no indication that Respondent Clapp knowingly made any false statements concerning a material fact related to the legislation that was being advocated.

Moreover, the Deputy Secretary finds no basis to support a conclusion that Respondent Clapp knowingly attempted to deceive a covered official on a material fact through his email correspondence on September 7, 2018, with Karen McGovern, Deputy Division Director, Legal Affairs, for the Division of Professions and Occupations at the Colorado Department of Regulatory Affairs ("DORA"). In that communication, Respondent Clapp requested on behalf of the Colorado Pain Society that DORA make a change in how the agency was treating the drug tapentadol in the state's Prescription Drug Monitoring Database. *See* Ex. K to Mot., at 180. There is no evidence to establish that Ms. McGovern meets the definition of a "covered official" with regard to a rule-making proceeding, let alone that the morphine-equivalent treatment of tapentadol is a matter within the scope of Ms. McGovern's duties or that she was a decision-maker on the issue. *See* § 24-6-308(1)(b). As such, there is no reasonable basis to conclude that Respondent Clapp engaged in a "prohibited practice" while lobbying.

CONCLUSION

Accordingly, the Deputy Secretary dismisses the Complaint against Respondents in its entirety. This order constitutes final agency action subject to judicial review under section 24-4-106.

DONE and **ORDERED** this 2nd day of September 2022.

CHRISTOPHER P. BEALL



Deputy Secretary of State

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this **ORDER OF DISMISSAL** was served on the following parties via electronic mail on September 2, 2022:

Complainants

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Respondents

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