DISTRICT COURT ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Englewood, CO 80112	
Plaintiff: STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL **v.** **Defendants:** COLORADO HUMANE SOCIETY & S.P.C.A, INC.; MARY C. WARREN, an individual; ROBERT WARREN, an individual; and STEPHANIE L. GARDNER, an individual	▲ **COURT USE ONLY** ▲ Case No. 08 CV 2659 Courtroom.: 404

ORDER DENYING IN PART AND GRANTING IN PART INDIVIDUAL DEFENDANTS' AMENDED JOINT MOTION TO DISMISS OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

This MATTER comes before the Court on Individual Defendants' Amended Joint Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5), or in the alternative, Motion for More Definite Statement. The Court having reviewed the Complaint, Briefs submitted by the parties, and being sufficiently advised, FINDS AND ORDERS:

I. PROCEDURAL POSTURE

Plaintiff, the State of Colorado, upon relation of John W. Suthers, Attorney General for the State of Colorado filed a Complaint and Petition for Appointment of Custodian or for Dissolution (hereinafter "Complaint") on December 10, 2008. On January 20, 2009, Defendant Mary C. Warren filed a Motion to Dismiss. Defendant's Robert Warren and Stephanie Gardner filed motions to Join Defendant Mary C. Warren's Motion to Dismiss on January 20 and 21, 2009, respectively. Defendant Mary C. Warren filed an Amended Motion to Dismiss, or in the alternative, Motion for More Definite Statement (hereinafter "Motion to Dismiss") on January 28, 2009. Defendants Robert Warren and Stephanie Gardner

again joined in the Motion to Dismiss the following day. Plaintiff filed his Response on February 26, 2009, followed by Defendants' joint Reply on March 12, 2009.

II. STANDARD OF REVIEW

C.R.C.P. 12(b)(5) mandates that the court analyze the merits of the plaintiff's claim when it rules on a motion to dismiss, as the purpose of a 12(b)(5) motion to dismiss is to test the legal sufficiency of the complaint to determine whether the plaintiff has asserted a claim or claims upon which relief can be granted. *Hemmann Management Services v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007). In determining whether to grant a motion to dismiss, the trial court must accept as true and in the light most favorable to the plaintiff, the material allegations in the complaint. *Macurdy v. Faure*, 176 P.3d 880, 882 (Colo. App. 2007); *see also*, *Hemmann*, 176 P.3d at 858. Furthermore, motions to dismiss are viewed with disfavor and should not be granted unless it appears to the court beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* at 859 (quoting *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992)).

III. FINDINGS AND ORDER

Individual Defendants' Motion to Dismiss raises the following issues: (1) that Plaintiff lacks standing to bring claims One through Six; (2) to the extent that Plaintiff may bring claims One through Six as violations of the Colorado Consumer Protection Act (hereinafter "CCPA") claim Seven is duplicative and ought to be dismissed; (3) Plaintiff fails to allege CCPA claims of fraud with particularity in contravention of C.R.C.P. 9(b); (4) Plaintiff has pled insufficient grounds for Dissolution under claim Eight; (5) claim Nine is not a claim for relief and ought to be dismissed.

A. Whether the Attorney General Has Standing to Assert Claims One through Six

Defendants first argue in their Motion to Dismiss that the Plaintiff Attorney General lacks standing to assert claims One through Six. As a threshold matter in a C.R.C.P. 12(b)(5) motion to dismiss, a plaintiff must have standing to bring suit. *Keft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. App. 2007). A two prong test is used to determine if a plaintiff has standing: (1) the plaintiff must show injury in fact; and (2) the injury must be to a legally protected interest. *Id.* Defendants

argue that the Attorney General fails to meet the second prong. The Court disagrees. "A legally protected interest must emanate 'from a constitutional, statutory, or judicially created rule that entitles the plaintiff some form of judicial relief.'" *Id.* Section 103 of the CCPA specifically grants the Attorney General with the responsibility for the enforcement for violations of the CCPA. C.R.S. § 6-1-103 2002.

Claims One through Six of Plaintiff's Complaint are predicated upon acts which, if proven, would provide for violations of the Colorado Charitable Solicitations Act (hereinafter "CCSA") and the Pet Animal Care and Facilities Act (hereinafter "PACFA"). Defendants argue that neither the CCSA nor PACFA grant the Attorney General the statutory authority to enforce claims brought for violations of those statutes. Defendants further argue that Plaintiff's Complaint is "styled" such that claims One through Six appear to be stand-alone claims, that is, that it appears that the Attorney General is attempting to bring independent claims derived directly from violations of the CCSA and PACFA, something the Attorney General is without power to do. The Court disagrees with Defendants' interpretation of how Plaintiff's claims for relief are pled.

C.R.S. § 6-16-111(5) provides that any violation of the CCSA "also shall constitute a deceptive trade practice in violation of the 'Colorado Consumer Protection Act', article 1 of this title, and shall be subject to the remedies, penalties, or both, pursuant thereto." C.R.S. § 6-16-111(5) 2002. Similarly, C.R.S. § 35-80-108(4) provides failure to comply with specific provisions of the PACFA "is a deceptive trade practice and is subject to the provisions of the 'Colorado Consumer Protection Act.'" C.R.S. § 35-80-108(4) 2007. Violations of the CCSA and certain parts of the PACFA are likewise enumerated as deceptive trade practices within the CCPA itself. *See* C.R.S. § 6-1-105(hh) and (oo). Indeed, Defendants even concede that violations of the CCSA and PACFA constitute deceptive trade practices and are lawfully enforced by the Attorney General under the CCPA. Neither in Plaintiff's Complaint nor in Plaintiff's brief does Plaintiff claim authority to seek redress for violations of the CCSA or PACFA under the remedies provided from those statutes themselves. All relief sought by the Plaintiffs for claims One through Six are for remedies provided for under the CCPA. The Court therefore finds that Plaintiff has standing to bring claims One through Six for violations of various provisions of the CCSA and PACFA under its authority to enforce those violations as deceptive trade practices under the CCPA and to seek the appropriate remedies thereof.

B. Whether Claim Seven of Plaintiff's Complaint is Duplicative of Claims One Through Six and Ought to Therefore be Dismissed as Such

Claim Seven of the Plaintiff's Complaint states in relevant part that "the conduct described in counts One through Six above constitute deceptive trade practices" and seeks relief as such under the CCPA. Defendants argue that to the extent Plaintiff is merely pleading six different CCPA claims in claims One through Six, then claim Seven is therefore duplicative and ought to be dismissed. Plaintiff argues, however, that claim Seven rather than being duplicative serves to put Defendants on notice that the Attorney General is seeking remedies pursuant to the CCPA for each violation of the CCSA and PACFA.

Notwithstanding Plaintiff's genuine attempt to utilize claim Seven as a mechanism to put Defendants on notice of the specific remedies for which it seeks for each deceptive trade act in claims One through Six, the Court agrees that it does not serve as a model of clarity. The Court finds that it is plain enough that the Plaintiff is asserting six different violations of the CCPA predicated upon specific violations of either the CCSA or PACFA. The section of Plaintiff's Complaint entitled "Relief Requested" is also sufficiently clear that the remedies sought for claims One through Six are those provided for under the CCPA. Therefore, to the extent that claim Seven does not present a factual basis, separate and apart, from claims One through Six, for a violation of the CCPA, no error would result in its dismissal. *Barham v. Scalia*, 928 P.2d 1381, 1387 (Colo. App. 1996)(no error when trial court dismisses duplicative claim).

C. Whether Plaintiff Has Pled CCPA Claims of Fraud With Sufficient Particularity to Comply With C.R.C.P.

As a threshold matter, the Court must first address the issue of whether the C.R.C.P. 9(b) heightened requirements to plead claims of fraud with particularity apply to suits brought under the CCPA.

1. Applicability of C.R.C.P. 9(b) Pleading Requirements to Claims Brought Pursuant to the CCPA

Defendants argue that, as there can be no question that claims One through Seven are premised upon allegations of fraud, claims One through Seven are thus subject to the heightened pleading requirements of C.R.C.P. 9(b). Defendants cite to several cases for support of their assertion. *Brooks v. Bank of Boulder*, 891

F.Supp. 1469 (D.Colo. 1995)(holding that since CCPA claim sounded in fraud, subject to F.R.C.P. 9(b) requirement of particularity); *Duran v. Clover Club Foods Co.*, 616 F.Supp. 790 (D.Colo. 1985)(Holding that as Colorado Courts have stated that CCPA is intended to protect against consumer fraud, Rule 9(b) requirement of particularity applies); *State Farm Mut. Auto Ins. Co. v. Parrish*, 899 P.2d 285 (Colo. App. 1994)("C.R.C.P. 9(b) requires that, in all averments of fraud, the circumstances constituting fraud shall be stated with particularity").

Plaintiff, on the other hand, contends that civil law enforcement actions brought by the Attorney General do not have to be pled with Rule 9(b) particularity. Specifically, Plaintiff argues that Defendants provide "scant authority under Colorado law in support of the application of Rule 9(b) to civil law enforcement actions brought by the Attorney General Pursuant to the CCPA." Plaintiff's Response p.6. The Court however, likewise finds that the Plaintiff has provided scant authority which specifically holds that Rule 9(b) particularity requirements *do not apply* to civil law enforcement actions brought by the Attorney General pursuant to the CCPA.

Plaintiff draws the Court's attention to *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660 (Colo. 1972) which states that "the right to regulate in the name of the police power is especially clear when the legislative intent is to regulate commercial activities and practices which, because of their nature may prove injurious, offensive, or dangerous to the public." *Id.* at 667. Plaintiff implies that this statement by the Colorado Supreme Court necessarily implies that "as such imposing strict pleading requirements on consumer protection enforcement cases brought by the Attorney General in contrary to law and inconsistent with the remedial and deterrence objectives of the CCPA." *See Plaintiff's Response*, p.6. Plaintiff also cites to *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998)(noting that courts construe the CCPA liberally to effectuate its broad purpose and scope) and *May Dept. Stores Co. v. State ex rel. Woodward*, 863 P.2d 967, 973 (Colo. 1993)(noting that the scope of the CCPA includes broad remedial deterrence purposes) to support its claim that civil law enforcement actions brought by the Attorney General under the CCPA are not subject to Rule 9(b) requirements of particularity. The Court, however, is not convinced that Plaintiff's claim is supported by the case law presented.

Indeed, the Court finds that the only case cited by the Plaintiff which comes close to supporting the argument that Rule 9(b) does not apply to the Attorney General's present claim is *Heller v. Lexton-Ancira Real Estate Fund*, 809 P.2d

1016, 1022 (Colo. App. 1990)(rev'd on other grounds). The relevant portion of the decision in *Heller* reads:

> Defendants also argue that plaintiffs did not plead the claim under the Act, raising it, rather, for the first time in the trial data certificate. Additionally, defendants assert that an action under this Act requires that the allegation be pleaded specifically pursuant to C.R.C.P. 9(b). We disagree.
>
> To the contrary, we agree with the plaintiff that, even under C.R.C.P. 9(b), it is sufficient to state the main facts constituting fraud.

809 P.2d at 1022. The Court finds the *Heller* ruling to be unclear. It does not seem apparent whether the Court was specifically refusing to apply Rule 9(b) to CCPA claims, or whether it was simply interpreting that the burden of pleading in accordance with Rule 9(b) is satisfied by stating the "main facts constituting fraud". This is further supported by the fact that four years later the Colorado Court of Appeals in *Parrish* held that all cases which sound in fraud are subject to the Rule 9(b) requirements. *Parrish*, 899 P.2d at 289. The Court in *Brooks* reiterated this idea when specifically looking at Rule 9(b) in the context of the CCPA.

2. Whether Plaintiff Pled Fraud With Sufficient Particularity

Notwithstanding the murkiness of Colorado jurisprudence regarding the applicability of Rule 9(b) to CCPA claims brought by the Attorney General, the Court nonetheless finds that the Plaintiff has sufficiently pled fact with particularity to overcome the heightened requirements of 9(b).

Rule 9(b) "only requires identification of the circumstances constituting fraud." *Duran*, 616 F.Supp. at 793. The court in *Heller* similarly held that it was "sufficient to state the main facts constituting fraud." *Heller*, 809 P.2d at 1022. The Court in *Parrish* also stated that:

> courts must be sensitive to the risk that application of the requirement of particularity, prior to discovery, may permit sophisticated defrauders successfully to conceal the details for their fraud. Furthermore, in applying the

> rule, courts must not focus so narrowly as to fail to take account of the general simplicity and flexibility contemplated by the rules. . .
>
> . . . While a plaintiff need not plead all of the evidence that may be presented to prove the claim of fraud . . . the complaint must at least state the main facts or incidents which constitute the fraud so that the defendant is provided with sufficient information to frame a responsive pleading and defend against the claim.

899 P.2d at 289. Under this standard, the Court is confident that the Plaintiff has pled more than sufficiently the main facts or incidents which constitute fraud such that the Individual Defendants are provided with sufficient information to frame a responsive pleading.

Plaintiffs chronicle, throughout the course of 113 paragraphs, a laundry list of the alleged misrepresentations, the basis for which they are believed to be misrepresentations, and a time frame for which they believe the misrepresentations occurred. That the Plaintiff did not aver every last possible fact which may be presented to prove their claims does not prove fatal to his Complaint. To hold otherwise would fly in the face of the purpose of notice pleading and the process of discovery. The Court does not find insufficiencies in the Plaintiff's Complaint that would run afoul of the requirement that "a complaint alleging fraud should be filed only after a specific wrong is reasonably believed to have occurred: it should serve to seek redress for a wrong, not to find one." *Parrish*, 899 P.2d at 289. The Court is confident that the "main facts or incidents which constitute the fraud" have been pled.

D. Whether Plaintiff has Pled Sufficient Grounds for Dissolution Under Claim Eight

Moving past the CCPA claims, Defendants next argue that Plaintiff's Eighth claim for relief seeking judicial dissolution of CHS pursuant to the Colorado Revised Nonprofit Corporation Act (hereinafter "CRNCA") fails to state a claim that could justify dissolving the CHS. Defendants correctly point out that C.R.S. § 7-134-301(1)(a)-(b) provide for the circumstances under which the attorney general may initiate a proceeding for dissolution of a nonprofit corporation; the circumstances being either that the nonprofit corporation obtained its articles of incorporation through fraud, or that the nonprofit corporation has "continued to

exceed or abuse the authority conferred upon it by law. C.R.S. § 7-134-301(1)(b) 2006.

In short, Defendants argue that Plaintiff's claim for dissolution rests on either "technical" violations which may be remedied short of dissolution, or on claims of misappropriation, wasting assets, or for alleged misconduct which are causes of action for which only directors or members may initiate dissolution proceedings. The Court disagrees.

By filing with the Colorado Secretary of State, CHS is permitted, or granted, the authority to operate as a nonprofit organization to serve its state purpose and operate according to its governing documents. The Court does not find that the Plaintiff has beyond a doubt failed to allege facts which would prove his claim fro relief. To the contrary, the Court finds that the Plaintiff has sufficiently alleged that CHS has been soliciting charitable donations notwithstanding its suspension by the Secretary of State for failure to re-register in contravention of Colorado law since 2004. This alone at a minimum would seem to rise to the level of "continuing to exceed or abuse authority conferred by law" as required under the CRNCA. Additionally, CHS's alleged failure to submit annual financial reports and its alleged failure to operate in accordance with its stated, required Board Structure, thereby causing it to operate ultra vires, again rises to the level of exceeding or abusing its authority.

These operating and reporting mechanisms are put in place so that the State can have oversight of charitable organization to ensure they continue to operate for the public good. While it is entirely possible that the Plaintiff will be unable to prove certain facts at trial to sustain his Eighth claim for relief, the Court does not agree that at this stage the Plaintiff has pled no facts which could support the claim, and thus dismissal is inappropriate at this time.

E. Whether Claim Nine States a Claim for Relief

C.R.S. § 7-134-303(1) provides that a "court in a judicial proceeding to dissolve a nonprofit corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the affairs of the nonprofit corporation." C.R.S. § 7-134-303(1) 2006. Defendants argue that this claim Nine is not an independent and separate substantive claim, but rather reiterates Plaintiff's prayer for equitable relief in the form of seeking the appointment of a custodian or receiver. The Court agrees.

C.R.S. § 7-134-303(1) does not enumerate grounds for dissolution of a nonprofit corporation, but merely establishes a type of relief which may be sought from the Court in the event that a dissolution proceeding occurs. Plaintiff can therefore not be prejudiced by dismissal of this claim as Plaintiff specifically requests this remedy in its complaint under the section entitled "relief requested". Furthermore, the Court has already entered a stipulated order appointing a custodian and issuing preliminary injunctive relief on this matter.

IV. RULING

THEREFORE, the Court hereby DENIES Defendants' Motion to Dismiss Claims One through Six Pursuant to C.R.C.P. 12(b)(5).

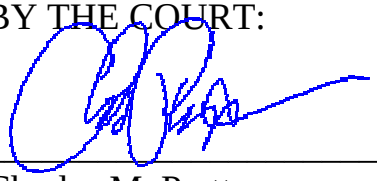
THEREFORE, the Court hereby further GRANTS Defendants' Motion to Dismiss Claim Seven Pursuant to C.R.C.P. 12(b)(5).

THEREFORE, the Court hereby further DENIES Defendants' Motion to Dismiss Claim Eight Pursuant to C.R.C.P. 12(b)(5).

THEREFORE, the Court hereby further GRANTS Defendants' Motion to Dismiss Claim Nine Pursuant to C.R.C.P. 12(b)(5).

SO ORDERED this 20TH day of May, 2009

BY THE COURT:



Charles M. Pratt
District Court Judge