

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO</p> <p>Terry R. Harris Judicial Center 270 South Tejon Street Colorado Springs, CO 80903</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>Plaintiffs:</b> Robert Mitchel, James Lally and Gary Anderson, on behalf of USA SHOOTING, INC., a Colorado corporation.</p> <p>v.</p> <p><b>Defendants:</b> Walton Eller, Jason Turner, Brett Tecklenburg, Mary Weeks, Joshua Richmond, and Janet Raab, in their capacity as board members of USA Shooting, Inc.</p>	
<p>Janette L. Ferguson, #020164 Chad D. Williams, #030917 DAVIS GRAHAM &amp; STUBBS LLP 1550 17th Street, Suite 500 Denver, CO 80202 Telephone: 303.892.9400 Facsimile: 303.893.1379 E-mail: <a href="mailto:janette.ferguson@dgsllaw.com">janette.ferguson@dgsllaw.com</a> <a href="mailto:chad.williams@dgsllaw.com">chad.williams@dgsllaw.com</a></p> <p>Edward G. Williams, Esq. (<i>pro hac application pending</i>) Stewart Occhipinti, LLP One Exchange Plaza 55 Broadway, Suite 1501 New York, New York 10006 Telephone: (212) 239-5500 Ext. 28 Facsimile: (212) 239-7030 E-mail: <a href="mailto:egwilliams@somlaw.com">egwilliams@somlaw.com</a></p> <p>Attorneys for Defendant, Jason Turner</p>	<p>Case No. 2015CV32584</p> <p>Ctrm.</p>
<p><b>MOTION TO DISMISS, OR ALTERNATIVELY TO STAY</b></p>	

Defendant Jason Turner,<sup>1</sup> a three-time Olympic athlete presently training for the Rio Olympics, and sued in his capacity as a board member of USA Shooting, Inc., hereby moves to dismiss the Verified Complaint filed by Robert Mitchel, Dr. James Lally and Gary Anderson (“Plaintiffs”) allegedly on behalf of USA Shooting, Inc., a Colorado nonprofit (“USAS”).

C.R.C.P. Rule 121 § 1-15(8) Certification: Pursuant to C.R.C.P. 121 § 1-15(8), the undersigned counsel certifies that on October 19, 2015, she conferred with Brent Rychener, Esq. with the office of Bryan Cave, counsel for Plaintiffs, prior to filing this Motion. Mr. Smith opposes the relief requested herein.

### **INTRODUCTION**

This action is a purported derivative action filed by Plaintiffs who are all officers and/or directors of USAS. Defendants, likewise, are officers and/or directors of USAS. The action is brought against Defendants in their capacity as directors of USAS. Plaintiffs seek a declaration from this Court, pursuant to C.R.S. § 13-51-101, *et seq.* and C.R.C.P. 57, that two of the Plaintiffs, presently on the USAS Board of Directors, were, pursuant to the USAS bylaws, properly elected to and are properly serving on USAS’s Board of Directors. Plaintiffs’ Verified Complaint seeking a Declaratory Judgment must be dismissed, because:

- (1) Plaintiffs lack standing in that they have failed adequately to state a derivative claim pursuant to C.R.C.P. 23.1 and C.R.S. Section 7-126-401. In brief, Plaintiffs have not shown (or even alleged) that they have made a sufficient demand for specific action on either the directors or the members of USA Shooting, or that

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<sup>1</sup> As of the date of filing this Motion, Jason Turner is the only Defendant that has been served.

any such demands for action were denied or that such demands, if made, would have been futile.

- (2) The issues that are the subject of the Plaintiffs' Declaratory Judgment Complaint are the subject of a "Section 10 Complaint" previously filed with the US Olympic Committee pursuant to the statutorily-created dispute resolution processes established by the Ted Stevens Olympic and Amateur Sports Act ("the Ted Stevens Sports Act" or "the Act") and Section 10 of the USOC Bylaws (which USA Shooting, as a USOC-recognized National Governing Body must adhere to); and accordingly, Plaintiffs have failed to exhaust statutory-created remedies before seeking relief from this court;
- (3) Plaintiffs also fail adequately to state a claim for declaratory relief in that the alleged "controversy" Plaintiffs cite in their Complaint relates to actions which have already taken place (i.e. each of the Plaintiffs is currently seated on the USAS Board). A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act; and Plaintiffs do not allege any pending action to unseat them. Accordingly, the alleged "controversy" is not the proper subject of a declaratory judgment action; and
- (4) Plaintiffs have failed and neglected to make parties to the case all persons who have, or claim, an interest which would be affected by any declaration sought by Plaintiffs that may issue from the Court. For example, there are three director Plaintiffs, and six director Defendants. However, there are now, and at the time of

the board meeting in March 2015 that is the subject of the Complaint, a number of additional directors who have not been named and whose rights would (or could) be affected by any declaratory judgment ruling by the court. Nor have the Plaintiffs named as parties the members of USAS whose rights could be affected by an Order as sought by Plaintiffs. Accordingly, the Court, even if this matter were the proper subject of a declaratory judgment action, is unable to make a final determination regarding the underlying member-initiated “controversy” as requested by the Plaintiffs, unless Plaintiffs join these additional individuals as parties.

Alternatively, the Court should stay this action until such time as it is determined whether the issues referenced in this matter (and others) are resolved (or not) in the pending dispute resolution proceeding now before a Hearing Panel of the US Olympic Committee involving the same issues and all of the parties in this action.

### **FACTUAL BACKGROUND**

Background Regarding USA Shooting, Inc. USAS is a Colorado nonprofit. Its mission and purpose is to promote the shooting sports throughout the United States and prepare American athletes to compete at national and international events. (See Exhibit A, USAS Bylaws at Art. III.)<sup>2</sup> USAS is the amateur sports organization recognized by the United States Olympic Committee (“USOC”), a government chartered corporation, under the Ted Stevens Sport Act, 36 U.S.C. §§ 22501, *et seq.*, as the sole National Governing Body (“NGB”) for the sport of shooting in the United States. (Id. at Art. III & IV.) As the USOC-recognized NGB, USAS is subject to

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<sup>2</sup> USAS’s Bylaws also are attached to the Verified Complaint filed by Plaintiffs.

the regulations contained in the Ted Stevens Sports Act, including continued compliance with the NGB eligibility requirements of 36 U.S.C. § 220522 and other general duties of NGBs stated at 36 U.S.C. § 220524. (Id. at Art. V.) USAS also is a member NGB of the USOC. 36 U.S.C. § 220524(b)(1). As a member NGB, USAS is subject to their bylaws. (Exhibit A at Art. V.) The USOC bylaws and the Ted Stevens Sports Act require NGB compliance with certain management, operational and corporate governance standards. (*See Id.* at Art. V, 36 C.F.R. §§ 220522(a), *et. seq.* & United States Olympic Committee Bylaws (“USOC Bylaws”), Exhibit B, Section 8.)<sup>3</sup> The USAS bylaws presently provide for fifteen board members and set forth rules regarding board composition, the directors’ roles, the election or appointment of directors, voting rights, term limits, etc. (Exhibit A at Art. XI.)

In order to be eligible for, and to maintain its eligibility as an NGB under the Ted Stevens Sports Act, USAS is required to “provide procedures for the prompt and equitable resolution of grievances of its members”. 36 C.F.R. § 20522(a)(13). Consistent therewith, USAS’s bylaws provide that “any member of the USAS may file a written grievance in the form of a complaint with USAS’s Secretary pertaining to any matter within the cognizance of USA Shooting, and alleging a violation of any provision of these Bylaws, the [Ted Stevens] Sports Act, or the USOC Bylaws”. (Exhibit A at Art. XXV, ¶ L.) Further, a member of USAS may, pursuant to §220527 of the Ted Stevens Sports Act, file a complaint with the USOC seeking to compel USAS’s compliance with the relevant provisions of the Act, including the NGB corporate governance

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<sup>3</sup> Defendants ask the Court to take judicial notice of the Bylaws of the U.S. Olympic Committee. These Bylaws are public documents whose accuracy is easily verifiable and not subject to reasonable dispute. *See*, C.R.E. 201(b); *Championsworld LLC v. U.S. Soccer Federation, Inc.*, 726 F.Supp.2d 961, 965 (E.D. Ill. 2010).

requirements. In order to bring a complaint to the USOC, a USAS member must establish that the member exhausted the grievance procedures provided for in the USAS bylaws or that pursuing the grievance procedures under the USAS would be futile. 36 C.F.R. 220527(B). A member of USAS also may compel USAS's compliance with Section 8 of the USOC bylaws by filing a written complaint with the USOC. (Exhibit B at Section 10.) Once the USOC has made a determination under the procedures established by the Ted Stevens Sports Act and the USOC bylaws pertaining to that complaint, a party aggrieved by that determination may demand arbitration before the American Arbitration Association. 36 C.F.R. § 220529.

B. Prior Grievances by Defendants. As alleged in the Verified Complaint, in March 2015, USAS held an election for at-large seats on its Board of Directors. Compl. at ¶ 16. Shortly before the election meeting, it became apparent to a number of Board Members that Plaintiff, Gary Anderson, the USAS representative to the International Federation for Shooting, had been serving as a USAS board member for 20 years—well beyond the term allowed in the USAS bylaws—without the USAS bylaw-required (1) break in service or (2) a 2/3 majority vote of the Board to extend his term limits. Several board members questioned the continued validity of Anderson's seat and urged the board to correct the oversight. Compl. at ¶ 17. USAS leadership refused to permit the term limits extension vote to be held and on April 3, 2015. Defendants, in their capacity as members of USAS, and other members of USAS filed a grievance with USAS, in accordance with Article XXI, ¶L of the USAS bylaws, regarding the March election of Mr. Anderson. Compl. at ¶ 20. (*See also*, Grievance at Exhibit C.)<sup>4</sup> The grievance also alleged that

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<sup>4</sup> The grievance was referenced in the Complaint and is, therefore, incorporated therein and may be considered for this Motion to Dismiss.

Dr. Lally, another Plaintiff, had improperly participated in the vote to re-elect himself to the Board of Directors. Compl. at ¶ 21.

The USAS bylaws, as required by the Ted Stevens Sports Act and the USOC Bylaws, set forth specific procedures to be followed by USAS in response to a grievance filed by a member.

(See, Exhibit A at Art. XXV, ¶ L.) The bylaws provide:

At the time of filing, a copy of the complaint shall be sent to the CEO-ED. The Secretary shall confer with the Counselor of USA Shooting and, if appropriate, the Executive Committee concerning the matter. If the Secretary determines that there is no basis for such complaint, the Secretary shall advise the person filing the same, who may appeal the decision to the Executive Director under the same procedures established in Chapter XXII for the processing of grievances filed under that Chapter...

Chapter XXII of the bylaws provides that a member who has filed a grievance is entitled to a hearing (¶ C), an investigation by an uninvolved party (¶ D(2)), and mediation (¶ D(4)).

Plaintiffs do not, and cannot allege, that USAS followed the grievance procedures set forth in their own bylaws. Pursuant to the Ted Stevens Sports Act and the USOC bylaws, a member of USAS who has exhausted a NGB's grievance procedures, or who can establish that following those procedures would be futile, may file a complaint seeking review by the USOC. 36 C.F.R. § 220527 & Exhibit B at Section 10. Defendants have filed such a complaint with the USOC. (See, USOC Order dated September 25, 2015 at Exhibit D.)<sup>5</sup> The complaint review processes provided for in the Ted Stevens Sports Act and the USOC bylaws are presently ongoing. Id.

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<sup>5</sup> Defendants ask the Court to take judicial notice of the September 25, 2015 Order issued by the USOC, a Federal Government chartered corporation. The Court may take judicial notice of adjudicative facts, i.e. a fact that is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." C.R.E. 201(b). This Order is a document whose accuracy is easily verifiable and not subject to reasonable dispute. See, C.R.E. 201(b). The document was issued by the USOC based on the authority granted to it under federal regulations.

## ARGUMENT

### **I. Motion to Dismiss Standards**

Under C.R.C.P. 12(b)(1), a plaintiff has the burden of proving subject matter jurisdiction. *Capra v. Tucker*, 857 P.2d 1346, 1348 (Colo.App. 1993). The plaintiff bears the burden of demonstrating that subject matter jurisdiction exists, and the trial court need not treat the facts alleged in the complaint as true. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (en banc). The trial court may make appropriate factual findings based on evidence presented and need not draw all inferences in the plaintiff's favor. *Id.* In order to establish subject matter jurisdiction, the plaintiff must prove that there is an injury-in-fact and that the injury must be to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 856-7 (Colo. 2004).

Pursuant to C.R.C.P. 12(b)(5), this Court may dismiss any claim that fails to state a claim upon which relief can be granted. The purpose of a motion to dismiss under Rule 12(b)(5) is twofold. First, a motion to dismiss tests the formal sufficiency of the complaint or counterclaim. *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). Second, a motion to dismiss permits the early dismissal of meritless claims. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 915-916 (Colo. 1996). In considering a motion to dismiss for failure to state a claim, a court generally may consider only the matters stated in the complaint, and may not go beyond the confines of the pleading. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). However, where claims are based upon a writing attached to the pleadings or referred to therein, the written document may be considered as included or incorporated into the complaint. *City of Boulder v. Public Service Co.*, 996 P.2d 198 (Colo. App. 1999) (“Documents referred to in a pleading are, in effect, incorporated in that pleading, and may properly be considered by the



trial court in deciding whether to dismiss a claim on any grounds.”). And, certain matters of public record and matters which are properly the subject of judicial notice may be considered. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo.App. 2006).

## **II. The Plaintiffs Have Not Sufficiently Alleged Standing For A Derivative Action**

This suit should be dismissed for failure to follow the specific requirements outlined under Colorado law for bringing a derivative action on behalf of a non-profit corporation. *See* C.R.S.A. § 7-126-401; C.R.C.P. 23.1. In order to meet the requirements for filing a derivative action, the plaintiff must “allege with particularity the demand made, if any, to obtain action by the directors and either why the complaint could not obtain the action or why they did not make the demand.” C.R.S.A. § 7-126-401(3). Additionally, a plaintiff must demand redress from the members of USAS or show why doing so would be futile. C.R.C.P. 23.1. Compliance with these statutory requirements must be shown on the face of the complaint. *Van Schaack v. Phipps*, 558 P.2d 581, 585 (Colo.App. 1976). Plaintiffs have not shown that they made a sufficient demand for specific action on either the directors or the members of USAS or that any such demands for action would have been futile. Therefore, Plaintiffs have failed to state a claim pursuant to C.R.C.P. 12(b)(5) and do not have standing.

### **A. Plaintiffs Have Not Fulfilled The Demand Requirement With Respect to the Directors of USAS.**

In order to successfully bring a derivative action, Plaintiffs must allege in their Complaint the specific actions they took to seek redress from the directors of the corporation or explain why those actions would have been futile. As the Supreme Court of Colorado has explained, “[c]ourts will only hear the complaint of an individual stockholder when ‘all efforts to obtain redress from the directors have been exhausted or would have been futile.’” *Hirsch v. Jones Intercable, Inc.*,

984 P.2d 629 (Colo. 1999) citing *Bell v. Arnold*, 487 P.2d 545 (Colo. 1971). Indeed, derivative suits are recognized as “an extraordinary remedy” that are available “only when there is no other road to redress.” *Bell v. Arnold*, 487 P.2d at 547.

In this case, Plaintiffs have failed to provide sufficient (indeed, any) detail regarding the demand, if any, they made on the USAS Board to obtain their desired action, or the futility of any such demand, and as a result, their claims should be dismissed. First, it is unclear from the Complaint what “action” the Plaintiffs are trying to obtain from the USAS Board given that Mr. Anderson and Dr. Lally are currently seated as members on the Board and Plaintiffs have made no suggestion that USAS is planning to remove them. As such, it appears that the Plaintiffs have already obtained the relief sought from the Board.<sup>6</sup>

However, even if the Court finds that a desire to ensure that the status quo is maintained (i.e. a declaration that past action was valid) can be grounds for a derivative declaratory relief action, Plaintiffs have not sufficiently detailed the demands they have made to ensure that Dr. Lally and Mr. Anderson keep their Board seats. The only actions taken by Plaintiffs as explained in the Complaint are that they engaged in negotiations with the director Defendants to settle a controversy with USAS members, Compl. at ¶ 23, and that generally they “have attempted to resolve the issues with Defendants,” Compl. at ¶ 43. These do not meet the pleading standard for filing a derivative action. For example, in *Ireland v. Wynkoop*, 539 P.2d 1349 (Colo. Ct. App. 2005), the plaintiffs simply alleged that they “have diligently endeavored, over several years last past [sic], to have the Board of Managers of the defendant Association and the Association

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<sup>6</sup> This relates to the lack of any real controversy for the Court to rule on, discussed, *Infra*, at p. 15-16.

membership as a whole prosecute and resolve the claims involved in this action, but said efforts have been unavailing,” *id.* at 1360. The court rejected these allegations, finding that they “completely lack[ed] the particularity required by C.R.C.P. 23.1.” *Id.* Similarly here, Plaintiffs’ vague allegations that they have attempted to settle the member-initiated dispute do not provide sufficient detail to meet the standards of C.R.C.P. 23.1 and C.R.S.A. § 7-126-401(3) and thus merit dismissal.

In addition, Plaintiffs have utterly failed to show that any actions that they could undertake to resolve the dispute would be futile. The only allegation with respect to demand futility is Plaintiffs’ unsupported statement, lacking any details, that further demands would be futile. Plaintiffs, all of whom are officers and/or directors of USAS, provide no explanation as to why any of the multitude of options available to them would be futile, such as working with other directors to call a board meeting, putting forward a resolution, or requesting any other action, such as amending the bylaws, by the USAS Board to avoid future controversy. Moreover, Plaintiffs acknowledge in their Complaint that USAS has an internal grievance procedure for resolving disputes over the proper interpretation of the bylaws and that members of USAS, including Defendants in their capacity as such, filed a grievance covering issues relating to the present litigation. Compl. at ¶¶ 20-21. Plaintiffs, however, provide no further information about this process. They do not, and cannot, allege that the process has been followed and concluded unsuccessfully. And, they provide no information about the status of the grievance or why such a procedure could not adequately resolve Plaintiffs’ claims. Furthermore, as described above, there are additional internal grievance processes available to the Plaintiffs through the Ted Stevens Sports Act and the USOC bylaws that are designed to resolve disputes between USAS, as an

NGB, and its members. These mechanisms, however, are not even mentioned in the Complaint and Plaintiffs provide no indication of why these statutorily-created avenues of dispute resolution, which have been initiated by USAS members and are ongoing, could not provide them with their requested relief. Thus given that Plaintiffs have failed to allege that they made an adequate demand on the USAS Board or that any such demand would be futile, Plaintiffs have failed to satisfy the requirements for bringing a derivative action and their claims should be dismissed.

**B. The Plaintiffs Have Not Made Any Demand Of the Members.**

Plaintiffs have also failed to satisfy the demand requirement with respect to the members of USAS. C.R.C.P. 23.1 specifically states that in addition to making a demand on the directors of a corporation, a plaintiff must also make a demand on the shareholders or members. Failure to make a demand on the members, in addition to the directors, can be grounds for dismissal, such as in the case of *Bell v. Arnold*, 487 P.2d 545 (Colo. 1971). In that case, the Supreme Court of Colorado affirmed the dismissal of a derivative action brought on behalf of a nonprofit corporation for failure to make a demand on the members to redress the wrongdoing of the corporation. *Id.* The court explained that this is an important requirement in addition to making a demand on the directors because “[t]he purpose of making demand on the shareholders is to inform them of the alleged nonratifiable wrongs; to seek their participation in the available courses of action, such as, the removal of the involved directors and the election of new directors who will seek the redress required in the circumstances; or to secure shareholder approval of an action for damages to the corporation caused by the alleged wrongdoing directors.” *Id.* at 547. The Complaint contains no allegations that there was any demand made on the members of

USAS or that such a demand would have been futile or too burdensome. As a result, the suit should be dismissed for failure to comply with C.R.C.P. 23.1.

**III. This Court Should Exercise Its Discretion and Dismiss This Action Because Plaintiffs Have Failed To Allege That They Have Exhausted Statutorily-Created Remedies**

Because of its unique status as a NGB under the Ted Stevens Sports Act, USAS is subject to the regulations and bylaws of the USOC. The Act gives the USOC the right to “review all matters related to the continued recognition of an organization as a national governing body and take action it considers appropriate, including placing conditions on the continued recognition.” 36 U.S.C. § 220521. One of the eligibility requirements for an NGB is that it must have “the managerial and financial capability to plan and execute its obligations” under the Act. 36 U.S.C. § 220522(a)(2). Other eligibility requirements relate to the composition and operation of an NGB’s Board of Directors. 36 U.S.C. § 220522(a). Importantly, the Ted Stevens Sports Act contains a detailed statutory process for the resolution of disputes between an NGB and its members. The Act requires an NGB to provide “procedures for the prompt and equitable resolution of grievances of its members,” 36 U.S.C. § 220522(a)(13), and, provides for member complaints against an NGB to be decided by the USOC after the complaining members exhaust available remedies within the national governing body. 36 U.S.C. § 220527.

The trial court has discretion to determine whether to permit a declaratory judgment action. *Bereenergy Corp. v. Zab, Inc.*, 94 P.3d 1232, 1235 (Colo.App. 20014). Because USAS is subject to the Ted Stevens Sports Act and a review process is ongoing under those regulations, this Court should, in its discretion, decline to exercise jurisdiction of this declaratory action. When administrative, or in this case statutorily-created, procedures for review and remedies are

specifically set forth in applicable regulations those procedures should be exhausted before a party may seek judicial review. *City and County of Denver v. United Airlines*, 8 P.3d 1206, 1212 (Colo. 2000) (Our precedent does not permit United Airlines to circumvent the exhaustion requirement by seeking declaratory judgment without first having followed the required procedures at the administrative level.). *See also, Davison v. Board of County Com'rs of Park County*, 585 P.2d 315, 317 (Colo.App. 1978) (plaintiffs could not invoke declaratory judgment procedure to circumvent requirement that administrative remedies be exhausted). As noted in Plaintiffs' Complaint, USAS members initiated two grievances before the USAS, as required by USAS bylaws (and the Ted Stevens Sports Act). Plaintiffs have not pled that they followed the grievance procedures required by the USAS bylaws. Nor have Plaintiffs acknowledged and/or alleged compliance with the Ted Stevens Sports Act grievance and review processes. (*See* 36 C.F.R. § 220527.) In fact, a USOC Complaint filed by the USAS members has been filed with the USOC, and was so filed prior to this Declaratory Judgment Action. (Exhibit D at ¶1.) The grievance and complaint process between Plaintiffs, Defendants (as members of USAS) and other members of USAS are underway and deal, in part, with the Board of Directors activities that are the subject of Plaintiffs' Declaratory Judgment Complaint. Compl. at ¶¶ 20. Therefore, the Complaint should be dismissed because those Ted Stevens Sports Act-created dispute resolution processes have not been exhausted.

#### **IV. Plaintiffs Fail To State A Claim For Declaratory Relief**

The purpose of a declaratory judgment is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations”. C.R.S. 13-51-102. C.R.S. 13-51-106 provides:

Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”

To have standing to bring a declaratory judgment action, a plaintiff must assert a legal basis on which a claim for relief can be grounded. And, the plaintiff must allege an injury in fact to a legally protected or cognizable interest. *Farmers Ins. Exchange v. District Court*, 862 P.2d 944, 947 (Colo. 1983). “Indirect and incidental pecuniary injury... is insufficient to confer standing.” *Id.* When the questions presented by the complaint are not within the purview of the Declaratory Judgment Act, the complaint should be dismissed. *Champion v. City of Montrose*, 128 Colo. 474, 263 P.2d 434, 436 (Colo. 1953).

Here, Plaintiffs’ claim for declaratory relief should be dismissed because 1) a declaratory judgment action is not appropriate where the conduct which is the subject of the action has already occurred and therefore, does not create a justiciable dispute, and is properly being challenged through statutorily-created procedures, and 2) even if the Court determines that Plaintiffs’ claim against its own directors in their capacity as such gives rise to a justiciable dispute, Plaintiffs have failed to make parties to the case all persons who have or claim any interest which would be affected by the declaration.

**No Justiciable Controversy.** A court's jurisdiction in a declaratory judgment action exists only if the case contains a currently justiciable issue or an existing legal controversy between the parties. *Cacioppo v. Eagle County School Dist. Re-50J*, 92 P.3d 453, 467 (Colo. 2004). The primary purpose of a declaratory judgment is to enable the parties, in a proper case, to obtain a determination of their rights and duties *in advance* of the time when litigation might

possibly arise or *before* the repudiation of obligation, the invasion of rights, or the commission of wrongs. *Cann v. Board of Water Commissioners*, 534 P.2d 346, 347 (Colo.App. 1975).

Therefore, Plaintiffs here must allege a presently existing controversy that can be resolved by a declaratory judgment. *Villa Sierra Condominium Ass'n v. Field Corp.*, 878 P.2d 161, 165 (Colo.App. 1994). A declaratory judgment is meant to define the legal rights and obligations of the parties in *anticipation of some future conduct*, not simply to proclaim liability *for a past act*. *Smith v. Krieger*, 643 Fed.Supp.2d 1274, 1295 (Dist. Colo. 2009) (emphasis added).

Plaintiffs assert that the “controversy” which requires a declaration from this Court legally fixing the rights and obligations of the parties arises from the grievance filed with the USAS claiming that the election of the at-large directors was invalid.<sup>7</sup> Compl. at ¶¶ 20 & 21. However, here, a declaration from this Court would not establish rights or duties *before* the commission of the wrongful conduct, i.e. the board elections, or *in advance* of any proper review of the allegedly wrongful conduct. The action which is the subject of the declaratory relief has already occurred; a vote, proper or not, has already been taken and Mr. Anderson and Dr. Lally have been determined by USAS to be members of the board of directors and have been acting as such. Compl. at ¶¶ 16-19. Plaintiffs do not allege current action or efforts to remove these two Board Members. Instead, as Plaintiffs acknowledge, members of USAS that believe the vote of the at-large directors violated the USAS bylaws have sought review of this past action as part of their NGB non-compliance complaint filed with the USOC pursuant to the Ted Stevens Sports

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<sup>7</sup> Defendants are sued here in their capacity as directors of USAS. However, Defendants, along with others, filed the underlying grievance in their capacity as members of USAS. (Exhibit C.) Plaintiffs do not assert a current controversy that concerns the rights or obligations between the corporate entity and the Defendants as members of the Board of the Directors under USAS’s Bylaws.



Act-created review processes contained in the Ted Stevens Sports Act and the USOC bylaws. The exercise of jurisdiction over Plaintiffs' Declaratory Judgment Action is not warranted where the proper review process is already underway, the ongoing process is the more appropriate process, and the Court's consideration of this case would reward USAS for failing and refusing to follow the processes set forth in its own bylaws and regulations that are required of USAS as an NGB. *See, e.g. Apotex Inc. v. Sanofi-Synthelabo*, 386 F.Supp.2d 549, 552 (S.D.N.Y. 2005); 6A Moore's Federal Practice ¶ 57.08[5], p. 57–50 (courts have not sustained attempts to circumvent the purposes of the Federal Declaratory Judgment Act, and have sought “to prevent the use of the declaratory action as a method of procedural fencing, or as a means to provide another forum in a race for *res judicata*.”). Here, it is apparent that the purpose of the declaratory relief suit is to attempt to circumvent established statutory processes. The Court should therefore, dismiss Plaintiffs' Complaint.

**Failure to Include Interested Parties.** When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding. C.R.S. 13-51-115 & C.R.C.P. 57(j). Any entity or person with existing or potential interest in the outcome of a declaratory judgment action should be named as party in order to fully and finally resolve the controversy at issue, since a declaratory judgment action cannot bind nonparties. *Constitution Assoc. v. New Hampshire Ins. Co.*, 930 P.2d 556, 562 (Colo. 1996).

There are fifteen USAS Board Members. The three director Plaintiffs have named as Defendants six of the fifteen members. Plaintiffs have failed to name the remaining directors. These additional unnamed directors have rights that will (or could) be affected by any

declaratory judgment ruling by this Court regarding the validity of the March 2015 vote. More significantly, Plaintiffs have failed to name USAS members. The alleged “controversy” giving rise to the claim for declaratory relief is the grievance filed after the March 16, 2015, meeting and concerning the election of at-large members of the Board of Directors. Compl. at ¶¶ 16-20. The grievance, incorporated by reference in Plaintiffs’ Complaint, was filed by members of USAS and asserts that the Board of Directors of USAS did not properly follow the term limit provisions in the bylaws regarding the election of at-large members. (*See*, Grievance at Exhibit C.) Here, Plaintiffs seek a declaration that the provisions in USAS’s bylaws providing for term limits of Board Members were nullified and over-ridden by past practices of the Board and that the election of the at-large members was valid. Compl. at p. 8. It is indisputable that the USAS members that filed a grievance would be affected by the declaration. Yet, the interested members have been excluded from the declaratory relief action filed by Plaintiffs. Therefore, the Court should in its discretion decline to accept jurisdiction and dismiss this action.

V. **If The Litigation Continues, The Case Should Be Stayed And Plaintiffs Should Be Required To Post A Security.**

For the reasons outlined above, the Court should dismiss the suit. However, should the Court allow the suit to continue, this Court should stay the proceedings until the ongoing dispute resolution process concludes. *See* C.R.S.A. § 7-126-401(3) (“If a demand for action was made and the nonprofit corporation’s investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.”). As discussed above, there are internal review processes established by the USAS bylaws, the Ted Stevens Sports Act, and the USOC bylaws; and several members of USAS have already undertaken to utilize these

procedures to resolve any existing dispute. As such, the Court should stay any proceeding until the termination of that review process.

Additionally, should this case proceed at any time, Defendants request that the Plaintiffs post a security for the costs and expenses that will be incurred by USAS in defending this lawsuit, pursuant to C.R.S.A. § 7-126-401(4). Defendants also request that Plaintiffs post a security for the costs and expenses to be incurred by Defendants pursuant to C.R.S.A. § 7-126-401(4) given that USAS will likely be held legally liable for the expenses incurred by the Defendants under the indemnification provisions of USAS's bylaws. (*See Exhibit A* at Art. XXIV.)

### **CONCLUSION**

For the reasons stated above, Plaintiffs' Declaratory Judgment Action should be dismissed. Alternatively, the action should be stayed. If this matter proceeds at all—and it should not—Plaintiffs should be required to provide security for costs and expenses.

Dated: October 19, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of October, 2015, a true and correct copy of the foregoing was filed and served via ICCES on the following:

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